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Girls, Assaulted

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Articles

GIRLS, ASSAULTED

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ABSTRACT—Girls who are incarcerated share a common trait: They have often experienced multiple forms of sexual assault, at the hands of those close to them and at the hands of the state. The #MeToo movement has exposed how powerful people and institutions have facilitated pervasive sexual violence. However, there has been little attention paid to the ways that incarceration perpetuates sexual exploitation. This Article focuses on incarcerated girls and argues that the state routinely sexually assaults girls by mandating invasive, nonconsensual searches. Unwanted touching and display of private parts are common features of life before and after incarceration—from the sexual abuse many incarcerated girls experienced at home to the nonconsensual touching of their bodies they all experience when they enter detention facilities. Mandating invasive searches is a particularly gendered form of traumatization that is especially troubling given Black and Indigenous girls' disproportionate representation in juvenile detention facilities. So, like their ancestors, their bodies have become sites for conquest, dominion, and discipline. This Article examines the severity and normality of state violence and provides a constitutional basis for eliminating blanket and routine searches by arguing that these invasive searches violate the Fourth Amendment, Thirteenth Amendment, and Eighth Amendment rights of incarcerated girls. Despite a purported concern for these girls' rehabilitation, incarcerated girls must endure humiliating searches that require that they expose their bodies to the parental state. The routine touching that marks the everyday lives of incarcerated girls illustrates the ordinariness of the violence of incarceration in the United States.

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"You'd get a pat search after eating and a pat in certain classes. They'd pat search when something was missing. They'd strip you when you went across the yard even to the dentist at the boys' side. You get strip searched any time you have shackles and handcuffs on. It feels like a violation."

—Devon A.[†]

"When they are stripping us out, just derogatory comments, or just being rude. They grab your boobs, and it was just not OK to me."

—Suki[‡]

INTRODUCTION

Girls who are incarcerated share a common trait: They have often experienced multiple forms of sexual assault, at the hands of those close to

[†] HUM. RTS. WATCH & ACLU, CUSTODY AND CONTROL: CONDITIONS OF CONFINEMENT IN NEW YORK'S JUVENILE PRISONS FOR GIRLS 60 (2006), https://www.hrw.org/report/2006/09/24/custody-and-control/conditions-confinement-new-yorks-juvenile-prisons-girls [https://perma.cc/U8JF-MUGX] (highlighting Human Rights Watch & ACLU's interview with Devon A., in Albany, New York on February 28, 2006).

[‡] BARBARA OWEN, JAMES WELLS & JOYCELYN POLLOCK, IN SEARCH OF SAFETY: CONFRONTING INEQUALITY IN WOMEN'S IMPRISONMENT 146 (2017).

them and at the hands of the state.[1] The #MeToo movement has exposed the pervasiveness of sexual violence and sexual exploitation by powerful actors. We have learned of Hollywood producers, famous actors, and corporate executives who abused their power to sexually exploit people. However, one of the critiques of the movement is that it has focused on spaces occupied by upper- and middle-class women while ignoring the sexual exploitation of working-class and poor women and girls.[2] This oversight is pronounced in the failure to mobilize around sexual violence perpetuated by the criminal and juvenile legal systems. These systems exercise total dominion over the bodies of those they subordinate and have managed to normalize pervasive sexual violence and exploitation. There is a growing awareness that mass criminalization and mass incarceration are harmful, and this Article provides a visceral account of the nature of state violence against girls in particular. It focuses on incarcerated girls and argues that the state has routinely sexually assaulted girls by mandating regular, nonconsensual touching and searches of the most intimate parts of girls' bodies. This Article provides a constitutional basis for challenging these searches.

Unwanted touching and display of private parts tend to be common features of life before and after incarceration—from the sexual abuse many girls experienced at home to the nonconsensual touching of their bodies they experience when they enter detention facilities.[3] These practices are especially troubling when you consider that Black and Indigenous girls are disproportionately represented in juvenile detention facilities.[4] Mandating invasive searches is a particularly gendered form of traumatization that enacts (for all incarcerated girls) and reenacts (for many incarcerated girls) sexual trauma. "The routine use of strip searches against prisoners,

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[1] This Article refers to nonconsensual touching of intimate body parts, such as nonconsensual pat-down frisk searches, as sexual assault. Sexual abuse refers to nonconsensual sexual conduct that does not involve touching, which may include the forced exposure of sexual body parts.

[2] *See, e.g.*, Gillian B. White, *The Glaring Blind Spot of the 'Me Too' Movement*, ATLANTIC (Nov. 22, 2017), https://www.theatlantic.com/entertainment/archive/2017/11/the-glaring-blind-spot-of-the-me-too-movement/546458 [https://perma.cc/ESZ5-WU2H] ("Though the #MeToo movement has made clear the insidiousness and prevalence of sexual harassment and assault, it has also been centered mostly on the experiences of white, affluent, and educated women.").

[3] *See* MALIKA SAADA SAAR, REBECCA EPSTEIN, LINDSAY ROSENTHAL & YASMIN VAFA, THE SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS' STORY 7–10 (2019), https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2019/02/the-sexual-abuse-to-prison-pipeline-the-girls%e2%80%99-story.pdf [https://perma.cc/BK4M-ZFMP] ("[G]irls who are sent into the juvenile justice system have typically experienced overwhelmingly high rates of sexual violence."); *infra* Part II.

[4] The racial disparities in incarceration rates among Indigenous, Black, and white girls (123, 94, and 29 per 100,000, respectively) demonstrate that the state disproportionately incarcerates and then sexually assaults Black and Indigenous girls. *See* SENT'G PROJECT, INCARCERATED WOMEN AND GIRLS 5 (2020), https://www.sentencingproject.org/publications/incarcerated-women-and-girls [https://perma.cc/X3MD-FZXH]; *infra* Part II.

particularly female prisoners, means that '[s]exual abuse is surreptitiously incorporated into the most habitual aspects of women's imprisonment.'"[5] The repeated touching that marks their everyday lives raises the question whether incarceration is the appropriate response for girls, because touching and frisking are a routine part of life in detention.[6]

After all, the state is supposed to be acting in the "best interests"[7] of these girls, and rehabilitation is the primary goal of the juvenile system, unlike the adult system, which focuses on deterrence and retribution.[8] Courts recognize that children cannot be reduced to their worst decisions, so there is a deliberate focus on rehabilitating rather than punishing children who make mistakes.[9] Children are impressionable, and their experiences within the system will likely impact them for the rest of their lives.[10] Ideally,

[5] Jude McCulloch & Amanda George, *Naked Power: Strip Searching in Women's Prisons*, *in* THE VIOLENCE OF INCARCERATION 107, 108 (2009) (alteration in original) (quoting ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 81 (2003)) (discussing how tactics U.S. forces used on female prisoners at the Abu Ghraib detention facility during the War on Terror reflect the already-routine treatment of domestic prisoners in Western countries).

[6] *See id.* at 110; *see also* Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1500 (2018) (arguing children "have interests in maintaining their bodily and emotional integrity and in shielding certain aspects of their bodies and lives from others").

[7] *See* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 350 (2008) ("[Since] the eighteenth and nineteenth centuries the . . . juvenile justice criminal system in America . . . essentially rested on the tradition of best interests standard, and [that standard] is applied to the extent that the child is not transferred to adult criminal courts.").

[8] *See* Megan Pollastro, *Where Are You, Congress?: Silence Rings in Congress as Juvenile Offenders Remain in Prison for Life*, 85 BROOK. L. REV. 287, 293, 295 (2019) ("[The Supreme Court] put forth five unique factors to consider when sentencing youth: '(1) age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks; (2) family and home environment; (3) circumstances of the offense; (4) legal competency, i.e. ability to deal with police and lawyers; and (5) possibility of rehabilitation.' The idea of empathy for children came to the forefront of the conversation for juvenile sentencing." (quoting Alice Reichman Hoesterey, *Confusion in* Montgomery*'s Wake: State Responses, the Mandates of* Montgomery*, and Why a Complete Categorical Ban on Life Without Parole for Juveniles Is the Only Constitutional Option*, 45 FORDHAM URB. L.J. 149, 157 (2017)).

[9] *See id.*

[10] *See* Clare Ryan, *The Law of Emerging Adults*, 97 WASH. U. L. REV. 1131, 1135 (2020) ("New laws of emerging adulthood should be responsive to this age group's economic vulnerability, need for autonomy, and capacity to learn from mistakes."); *cf.* Sandy de Sauvage & Kelly Head, *Correctional Facilities*, 17 GEO. J. GENDER & L. 175, 186 (2016) ("In a 2011–12 survey, 2.3% of female inmates reported experiencing staff sexual misconduct. Although international law and treaties prohibit cross-gender supervision in prison, currently all federal and state prisons in the United States permit male guards to work in female facilities. . . . In federal women's correctional facilities, for example, seventy percent of guards are male. . . . The 2009–2011 statistical report for prison rape revealed that in state and federal prisons, where women constitute seven percent of sentenced inmates, thirty-three percent of victims of staff-on-inmate sexual victimization were women, while forty-six percent of the staff perpetrators were male guards. In local jails, where women constitute thirteen percent of inmates, sixty-seven percent of victims of staff-on-inmate sexual victimization were women while eighty percent of the staff perpetrators

governmental intervention should rehabilitate them from the trauma that led them into the system, not exacerbate it.[11]

However, routine practices within the system often ignore the age and characteristics of children, particularly young girls.[12] Girls are often incarcerated for survival offenses, such as prostitution and petty theft, after fleeing abusive home lives.[13] Yet detention facilities subject adjudicated girls to routine and invasive searches that are traumatizing and anything but restorative.[14] These searches include blanket strip-search policies for all girls when they are admitted into facilities, frisk searches at the discretion of correctional officials while they are in the facilities, and strip searches when they have visits with their families and attorneys.[15] These searches are insensitive to the sexual exploitation and re-traumatization that many girls experience during these searches.[16] "The frequency of strip searching combined with its sexually coercive nature has profoundly negative

were male guards. Female prisoners who become pregnant without having had contact with outside parties are often sent to solitary confinement as punishment for having had sexual contact." (citations and footnotes omitted)).

[11] *Cf.* Marty Beyer, Gillian Blair, Sarah Katz, Sandra Simkins & Annie Steinberg, *A Better Way to Spend $500,000: How the Juvenile Justice System Fails Girls*, 18 WIS. WOMEN'S L.J. 51, 54 (2003) ("Not only is the justice system failing to account for girls' specific needs in the processing of their cases, it is failing to provide appropriate rehabilitation and treatment—the stated goals of the juvenile justice system.").

[12] *See id.* at 53–54 ("A growing body of literature suggests that the juvenile justice system is ill-equipped to address the specific needs of girls . . . ." (footnote omitted)).

[13] *See* Danielle Tepper, Note, *Penalties for Miss Behaving: The Juvenile Justice System's Mistreatment of Female Status Offenders*, 15 GEO. J. GENDER & L. 667, 675 (2014) ("In many instances, female behavior that appears self-destructive may, in fact, be self-preservation, a response to traumatizing home environments. The families of delinquent girls have exhibited more dysfunction and experienced higher rates of intra-family conflict than the families of delinquent boys." (citations and footnotes omitted)).

[14] *See* Erica L. Green, *Juveniles in Maryland's Justice System Are Routinely Strip-Searched and Shackled*, BALT. SUN (Mar. 13, 2016, 12:17 PM), https://www.baltimoresun.com/news/investigations/bs-md-strip-and-shackle-20160129-story.html [https://perma.cc/5765-8U6X] (describing the "humiliating" strip searches that incarcerated girls experience in Maryland juvenile detention facilities); Caitlin E. Borgmann, *The Constitutionality of Government-Imposed Bodily Intrusions*, 2014 U. ILL. L. REV. 1059, 1092–94 ("In particular, the Court has been highly deferential to the judgments of prison officials regarding their need to conduct invasive searches even on pretrial detainees, in order to maintain order and safety.").

[15] *See, e.g.*, Green, *supra* note 14 (describing the strip searches that incarcerated girls experience including "after every visit with the public—including with lawyers and supervised family visits" and upon admission into the facilities).

[16] *See* Liz Watson & Peter Edelman, *Improving the Juvenile Justice System for Girls: Lessons from the States*, 20 GEO. J. ON POVERTY L. & POL'Y 215, 220 (2013) ("In some cases, girls who have suffered trauma are re-traumatized by their experiences in the juvenile justice system. Helping these girls heal from trauma and abuse is critically important, but many juvenile justice agencies lack the knowledge and training about what services are useful to assist these girls in their recovery." (footnote omitted)); Borgmann, *supra* note 14, at 1092–94.

consequences for . . . [those who] have suffered extensive histories of physical and sexual abuse outside prison."[17] Some girls describe invasive searches as triggering memories of past sexual abuse.[18]

Under any other circumstance, forcefully stripping children to nudity and requiring that they submit themselves to routine physical touching against their will would be sexual assault or rape.[19] However, when perpetuated by the state, courts examine whether the searches advance "penological interests."[20] Government officials claim that the unwanted touching is necessary to maintain the safety of juvenile detention facilities.[21] As a result of these practices, girls—a low-risk population based on offenses[22]—experience routine touching and bodily exposure, despite being high-risk for sexual exploitation.[23] This outcome is perverse. One girl who was routinely strip searched at a Sacramento facility after running away from home described the experience: "I'd have to bend over and squat, and cough . . . . It was humiliating. That's my body I'm showing to other human beings."[24]

There are compelling reasons to conclude that these invasive searches violate the Fourth, Thirteenth, and Eighth Amendment rights of incarcerated girls. Supreme Court decisions balancing criminal defendants' and prisoners' rights against penological interests offer guidance for courts that have considered the constitutionality of invasive searches.[25] And the Court

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[17] McCulloch & George, *supra* note 5, at 111–12.

[18] *See* HUM. RTS. WATCH & ACLU, *supra* note †, at 51, 58–61, 69, 96 (highlighting Human Rights Watch & ACLU's interview with Devon A.).

[19] *See, e.g.*, United States v. Russell, 662 F.3d 831, 832–35 (7th Cir. 2011) (upholding the defendant's conviction for producing and possessing photographs of minor girls nude and in their underwear).

[20] *See* de Sauvage & Head, *supra* note 10, at 177 ("In 1987, the Supreme Court held in *Turner v. Safley* that prison regulations infringing on inmates' constitutional rights are valid if 'reasonably related to legitimate penological interests.'" (quoting Turner v. Safley, 482 U.S. 78, 89 (1987))).

[21] *See* Borgmann, *supra* note 14, at 1092 ("In particular, the Court has been highly deferential to the judgments of prison officials regarding their need to conduct invasive searches even on pretrial detainees, in order to maintain order and safety.").

[22] Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 35 CARDOZO L. REV. 1091, 1105 (2014) (noting "girls not only pose a very low risk to others, but also are very vulnerable, often presenting with a high level of specialized needs").

[23] *See* Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313, 1313–14, 1334 (2015) ("Girls are more likely than boys to be abused or mistreated by staff while confined, and such abuse is often gendered, with girls being sexually assaulted or called 'hos.'").

[24] Mareva Brown, *Teens' Suit Cites Strip-Search Shame*, CYC-NET (Sept. 8, 2004), https://www.cyc-net.org/features/ft-strip-search.html [https://perma.cc/W7RV-ZR3H].

[25] *See, e.g.*, Winston v. Lee, 470 U.S. 753, 758, 760–63 (1985) (summarizing factors to help courts assess the reasonableness of a bodily intrusion for the purposes of the Fourth Amendment, considering whether a surgical search to retrieve a bullet is reasonable); *Turner*, 482 U.S. at 81, 99 (holding

has generally upheld strip searches as constitutional in light of the penological interests in preserving safety in detention centers.[26] However, these cases fail to consider the unique backgrounds of adjudicated girls that make blanket and routine invasive touching different and unreasonable as compared to strip searches of incarcerated adults.[27] Strangely, courts justify search practices that trigger in children posttraumatic stress disorder (PTSD) and memories of sexual abuse in the name of these children's own safety, although the state has a duty to act in the best interests of these children.[28] Is it not child abuse when a parent routinely peers at their teenager's nude body and rubs it to search for contraband?[29] But when the state is the parent, courts have ignored the perverse nature of peering at children's naked bodies on a regular schedule; the current Fourth Amendment jurisprudence on strip searches of incarcerated children would suggest that such actions are perfectly reasonable.[30] But this case law is deficient and would benefit from serious consideration of the unique circumstances of incarcerated girls. This Article attempts to fill that gap.

Courts should consider the empirical data about incarcerated girls in evaluating the constitutionality of invasive practices that occur while girls are incarcerated.[31] Studies have shown that incarcerated girls have often experienced sexual and physical trauma prior to their incarceration.[32] Many

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restrictions on prisoners' constitutional rights are permissible so long as they are "reasonably related to legitimate penological objectives").

[26] Borgmann, *supra* note 14, at 1091–95.

[27] *See* Watson & Edelman, *supra* note 16, at 215–20.

[28] N.G. *ex rel.* S.C. v. Connecticut, 382 F.3d 225, 232 (2d Cir. 2004) ("Where the state is exercising some legitimate custodial authority over children, its responsibility to act in the place of parents (*in loco parentis*) obliges it to take special care to protect those in its charge, and that protection must be concerned with dangers from others and self-inflicted harm.").

[29] *See* Ortiz v. Martinez, 789 F.3d 722, 725–26, 729–30 (7th Cir. 2015) (holding that claims that a father touched his daughter in the genital area—constituting sexual abuse—justified that his children not be returned to him under the Hague Convention on the Civil Aspects of International Child Abduction).

[30] *But see* Marjory Anne Henderson Marquardt, *Fallacious Reasoning: Revisiting the* Roper *Trilogy in Light of the Sexual-Abuse-to-Prison Pipeline*, 72 STAN. L. REV. 749, 760 (2020) ("The Court's *Roper* trilogy—*Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*—used the latest research on adolescents' cognitive development to decide the constitutionality of penal sentences. These cases are noteworthy for their striking break from precedent in which the Court had previously stated it would only rely on 'objective' evidence, which primarily consisted of federal and state laws or Eighth Amendment analyses of demonstrated behavior of prosecutors and juries."). By contrast, strip-search cases that involve children rarely consider "cognitive development" in examining the reasonableness of strip searches in the Fourth Amendment context. *See infra* Part III.

[31] *See* Marquardt, *supra* note 30, at 773 ("Just as the *J.D.B.* Court warned that courts cannot 'simply ignore' a child's age, neither should courts simply ignore a girl's experience with childhood sexual abuse." (quoting J.D.B. v. North Carolina, 564 U.S. 261, 277 (2011)).

[32] *See* Watson & Edelman, *supra* note 16, at 215 (recognizing that "[m]any girls in the system have experienced traumatic events—including sexual and physical abuse and neglect"—and are "disproportionately 'high-need' and 'low-risk'").

are incarcerated for status offenses and survival offenses[33] to flee abuse at home by running away or engaging in truancy.[34] Girls experience many bodily changes as they go through adolescence, which may prompt insecurity and feelings of inadequacy. Requiring them to reveal their developing bodies to strangers and to allow these strangers to pat down their bodies is abusive. Forcing them to expose their naked bodies to strangers on a regular basis, after fleeing from sexual abuse at home, and endure what amounts to sexual abuse while incarcerated, is an unreasonable practice.[35] In other contexts, forcing children to touch themselves and expose themselves would be sexual abuse.[36]

This Article adopts the novel approach of framing state action as sexual assault. This critique about the experience of girls within the system may extend to the experience of incarcerated women as well.[37] Incarcerated women often have prior histories of sexual assault.[38] They have often been arrested for low-level offenses, including prostitution, curfew violations, and truancy.[39] Incarcerated women are subject to routine strip and body-cavity searches that one Supreme Court Justice has described as humiliating and degrading.[40] They are also subject to high rates of sexual assault by correctional staff while incarcerated.[41] In her groundbreaking book *Are*

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[33] Marquardt, *supra* note 30, at 784–85 (Girls are often incarcerated for committing status offenses and "'survival crimes' and 'maladaptive' coping behaviors to deal with sexual abuse. Girls may engage in status offenses as a way to escape abuse . . . . Running away . . . is a common response to sexual abuse for which one may praise adult women but instead punish underage girls." (footnote omitted)).

[34] *Id.* at 770 ("The status crimes girls are most often arrested for—running away, substance abuse, and truancy—are all associated with reactions to abuse.").

[35] *See infra* Part III (explaining that young people are less culpable than adults and more impressionable).

[36] *See* United States v. Davis, 583 F. Supp. 2d 1015, 1019–20 (N.D. Iowa 2008) (noting that abuse does "not necessarily involve the use of force or even physical contact[, and] . . . the mere act of soliciting a child to fondle or touch one's genitals or pubes is abusive because of the psychological harm that may result").

[37] *See* McCulloch & George, *supra* note 5, at 111–12.

[38] *See* Caroline Wolf Harlow, *Prior Abuse Reported by Inmates and Probationers*, BUREAU OF JUST. STAT., https://www.bjs.gov/content/pub/pdf/parip.pdf [https://perma.cc/677Q-747E] (1999) (stating that 39% of women who were incarcerated in state facilities reported being sexually abused before incarceration).

[39] *See* Marquardt, *supra* note 30, at 770 ("The status crimes girls are most often arrested for—running away, substance abuse, and truancy—are all associated with reactions to abuse.").

[40] *See* Borgmann, *supra* note 14, at 1095 ("Justice Alito allowed that requiring detainees to disrobe and in some cases 'to manipulate their bodies' in an inspection 'is undoubtedly humiliating and deeply offensive to many,' and he suggested that it might be unreasonable to admit those arrested for minor offenses to the general population, thus subjecting them to such a humiliating search." (quoting Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington, 566 U.S. 318, 341 (2012)).

[41] *See* ALLEN J. BECK & TIMOTHY A. HUGHES, BUREAU OF JUST. STAT., SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004, at 5–8 (2005), https://www.bjs.gov/content/pub/pdf/svrca04.pdf [https://perma.cc/DU5P-54JA].

Prisons Obsolete?, Professor Angela Davis wrote about Assata Shakur's experience with strip searches. Davis states that Shakur described her strip searches while incarcerated as "humiliating" and "disgusting."[42] Reflecting on her own incarceration and that of Shakur, Davis notes that the "everyday routine in women's prisons . . . verges on sexual assault."[43] Although many of the claims in this Article apply to incarcerated women, this Article focuses on girls because the juvenile system is explicitly concerned with the well-being and rehabilitation of incarcerated girls.[44] The purpose is to repair and rehabilitate. Arguably, the high levels of sexual assault within adult detention facilities make the incarceration of women questionable, even under a retributivist model of punishment.[45] But the logics of the systems are sufficiently different to warrant separate treatment of girls . . . for now.

More fundamentally, the unique circumstances of incarcerated girls suggest that the very use of detention for them violates the Thirteenth Amendment's bar on involuntary servitude[46] and it subjects girls to cruel and unusual punishment under the Eighth Amendment.[47] Repeatedly forcing children to experience practices that feel like sexual assaults effectively means that they *are* sexual assaults. This is cruel and should not be usual. It

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[42] *See* DAVIS, *supra* note 5, at 62–63.

[43] *Id.* at 63.

[44] *See* Beyer et al., *supra* note 11, at 54 ("[T]he stated goals of the juvenile justice system" are to "provide rehabilitation and treatment . . . ."). The juvenile system is intended to be restorative, not punitive. *Id.* at 56. The primary goal of the juvenile system is rehabilitation. *Id.* at 59. The adult criminal system, on the other hand, has had conflicting and often muddy penological goals. Over the past three decades, the retributivist approach to punishment has focused on punishment for punishment's sake and ensuring that "offenders" are punished in accordance with their desert, or the extent to which they deserved to be punished. *See* Graham v. Florida, 560 U.S. 48, 71 (2010). The adult system also focuses on incapacitation. *See id.* at 72. The Supreme Court has acknowledged that retribution and incapacitation are not legitimate aims in the juvenile context. *See id.* ("But while incapacitation may be a legitimate penological goal sufficient to justify life without parole in other contexts, it is inadequate to justify that punishment for juveniles who did not commit homicide.").

[45] *See* Teresa A. Miller, *Keeping the Government's Hands off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches*, 4 BUFF. CRIM. L. REV. 861, 867–68 (2001) ("Power is sexualized in prison. Because prison guards exercise near total authority over prisoners, the potential for male guards to abuse their legitimate access to women's bodies to conduct bodily searches of women and to visually monitor them nude or only partially dressed in ways that are overtly sexual is great. Indeed, in a major report on the sexual abuse of women prisoners, Human Rights Watch found that male correctional officers misused their search authority to have inappropriate sexual contact with female prisoners. This finding led to a recommendation that all states limit cross-gender strip searches, pat-frisks and inappropriate cross-gender visual surveillance of female prisoners. The link between cross-gender searches and custodial sexual misconduct uniquely burdens women prisoners because women are more likely than men to be subjected to cross-gender searches and more likely than men to be the objects of custodial sexual misconduct.").

[46] *See infra* Section IV.B.

[47] *See infra* Section IV.C.

is an act of domination over their bodies[48] and subjects them to routine humiliation. Girls' interactions with the juvenile system should center their best interests and future development.[49] Instead, the incarceration of girls is a barrier to ensuring that they are able to land on their feet and lead productive lives, the presumed goal of the juvenile justice system.

Part I of this Article outlines the empirical research on incarcerated girls and argues that they are especially vulnerable to the violence of invasive searches. Part II argues that sexual assault is an appropriate lens for examining the invasive-search policies at girls' detention facilities. Part III embraces the vision for a new abolition constitutionalism and argues that blanket and routine invasive searches violate the Fourth Amendment, Thirteenth Amendment, and Eighth Amendment constitutional rights of incarcerated girls. While focused on intrusive search practices, this Part also casts doubt on the use of incarceration for any girls, provides a pathway for making similar arguments for all children, and provides an abolitionist argument against girls' incarceration that is rooted in the Constitution.[50] This Article contemplates a world where the routine denuding and sexual assault of children, particularly young girls, receives the shock that it deserves.

I. THE EVIDENCE ON GIRLS' VULNERABILITY TO INVASIVE SEARCHES

Before addressing the constitutional issues relating to the incarceration of girls, it is important to consider the empirical evidence regarding this population and why invasive searches are particularly egregious for them. Although girls comprise a smaller portion of the incarcerated population than boys,[51] they are more likely to be incarcerated for minor offenses.[52] Incarcerated girls are more likely to have been sexually assaulted before they

[48] The Thirteenth Amendment states: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. The incarceration of girls does not constitute "punishment for crime," and juvenile incarceration is not criminal punishment. *See infra* Section IV.B.

[49] *See* Beyer et al., *supra* note 11, at 54 ("Not only is the justice system failing to account for girls' specific needs in the processing of their cases, it is failing to provide appropriate rehabilitation and treatment—the stated goals of the juvenile justice system.").

[50] Professor Dorothy Roberts has argued that a "new abolition constitutionalism could seek to abolish historical forms of oppression beyond slavery . . . and strive to dismantle systems beyond police and prisons . . . . The purpose of a new abolition constitutionalism would not be to improve the U.S. state but to guide and govern a future society where prisons are unimaginable." *See* Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 120–21 (2019) (discussing the need for abolition constitutionalism).

[51] Girls comprise 15% of 43,580 youth in residential placement. SENT'G PROJECT, *supra* note 4, at 5.

[52] *See* Godsoe, *supra* note 22, at 1103 (examining how girls are a low-risk and high-needs population).

are imprisoned, they are imprisoned for minor offenses that are often connected to their need to escape chaotic homes, and they are more likely to be sexually assaulted by correctional staff.[53] There are racial disparities in the incarceration of girls, with Black and Indigenous girls much more likely to be incarcerated than white girls.[54] For example, they comprise more than half of children who are incarcerated for running away from home.[55]

A. Why Girls?

This Article focuses on girls because of the extensive empirical research demonstrating that girls are disproportionately criminalized for sexual precocity. Additionally, girls are more likely to have been sexually assaulted before their detention and to be incarcerated for minor offenses resulting from their failure to live up to expectations of what it means to be a "good girl."[56] These experiences make the state's enforcement of the touching, invasion, and exposure of their sexual body parts more insidious.

This empirical evidence suggests a difference in experience that deserves special attention. Yet such a focus on the experiences of one particular gender identity might raise concerns that this Article essentializes girls, or that it suggests that all girls can be reduced to a set list of attributes because of their social identity as girls. Nevertheless, as Professors Devon Carbado and Cheryl Harris recently noted, the relevant question is whether the "deployment of essentialism is justified empirically and normatively in a particular context."[57] Sometimes, essentialism is "necessary to describe, organize against, or disrupt the group-based hierarchies on which racism has historically rested."[58] And so also is the case when examining the conditions of incarcerated girls. They face conditions, conditions that are empirically and normatively distinct from those facing incarcerated boys, that can only

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[53] *Id.* at 1105, 1108 n.100.

[54] SENT'G PROJECT, *supra* note 4, at 5 ("African American and Native girls are much more likely to be incarcerated than Asian, white, and Hispanic girls. The placement rate for all girls is 43 per 100,000 girls (those between ages 10 and 17), but the placement rate for Asian girls 3 per 100,000; for white girls is 29 per 100,000; and Hispanic girls is 31 per 100,000. African American girls are more than three times as likely as their white peers to be incarcerated (94 per 100,000), and Native girls are more than four times as likely (123 per 100,000)." (footnote omitted)).

[55] *See id.*; Godsoe, *supra* note 22, at 1109 & n.105.

[56] *See* Fanna Gamal, *Good Girls: Gender-Specific Interventions in Juvenile Court*, 35 COLUM. J. GENDER & L. 228, 240 (2018) (examining how girls are punished for not complying with "ideals of hegemonic femininity," including "that 'good girls' should not be like boys in appearance and behavior[, and] . . . should not adopt the male characteristic of willfulness" (citing PATRICIA HILL COLLINS, BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM 196 (2d ed. 2005))).

[57] *See* Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2204 (2019).

[58] *Id.*

be addressed by specially considering the conditions particular to their incarceration. This Article also attempts to address a shortcoming in the empirical research in that it often refers to *cisgender* girls or does not clearly define girls.[59] The recommendations of this Article extend to every child who identifies as a girl or who is most comfortable in girls' facilities. While the boundaries of whom should be considered a girl are not rigid, I have drawn them at self-identification as a girl for the purposes of this Article to allow for an inclusive definition of girls.

Furthermore, there is an active debate about whether sex segregation is the best approach to incarceration in the adult context that may be relevant to juvenile incarceration.[60] There is some evidence that sex segregation reinforces binary sex classification and exposes LGBTQ people to greater harms while detained.[61] While facilities remain segregated, children should be allowed to enter facilities that most align with their gender in a binary system.[62]

This Article focuses on the incarceration of girls. But the focus on girls is not intended to suggest that the arguments in this Article are exclusive to girls. Other LGBTQ children, transgender children, and gender-nonconforming children often are subject to many of the harms in juvenile systems that this Article discusses.[63] The pathways into the juvenile system

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[59] For a criminology study that adopts a feminist perspective in identifying risk factors for juvenile criminogenic behaviors but fails to clearly define what it means by the term "girls," see generally Joanne Belknap & Kristi Holsinger, *The Gendered Nature of Risk Factors for Delinquency*, 1 FEMINIST CRIMINOLOGY 48 (2006).

[60] *But see* Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 5–6 (2011) (noting the complexities of identity-based segregation in carceral settings); *id.* ("L.A. County is engaged in a process of state-sponsored, identity-based segregation. Although this program would most likely survive a constitutional challenge, it nonetheless puts government officials in the business of intruding into the most private and intimate details of detainees' lives in order to determine whether they meet the Department's definition of 'homosexual.' Worse still, it engages state officers in a process of openly labeling certain individuals as sexual minorities—with color-coded uniforms, no less." (citations omitted)).

[61] *But see* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 901 (2019) ("Nonbinary people pose a direct challenge to all modes of sex segregation, unlike transgender people seeking recognition as men or women."); *id.* at 983–84 ("Sometimes correctional facilities may have space to house nonbinary people in individual sleeping quarters, but there is a danger that they will end up isolated for too long, which can be psychologically damaging.").

[62] *See* 28 C.F.R. §§ 115.342(c)–(d), (f); JUV. DET. ALTS. INITIATIVE, JUVENILE DETENTION FACILITY ASSESSMENT: STANDARDS INSTRUMENT 2014 UPDATE 20 (2014), http://www.cclp.org/wp-content/uploads/2016/06/JDAI-Detention-Facility-Assessment-Standards.pdf [https://perma.cc/UV7L-MRVY].

[63] *See* Belknap & Holsinger, *supra* note 59, at 66 (noting that risk factors for juvenile incarceration such as low self-esteem correspond more strongly to sexuality than gender).

are often the same as those for cisgender girls.[64] Likewise, cisgender boys are also often victims of the punitive apparatus of the juvenile system.[65] The punitive nature of the juvenile system—despite its intended goal of rehabilitation—suggests that juvenile incarceration is likely inappropriate for *all children*.[66] Girls appear to be punished for deviating from sexual norms. Notably, 40% of incarcerated girls across seven detention and correction facilities identify as LGBTQ or gender nonconforming.[67]

B. The Evidence on Girls

In 2017, girls accounted for 15% of young people in juvenile custody and 30% of young people arrested.[68] A study by the National Child Traumatic Stress Network notes, "Studies of girls in juvenile justice have found a high incidence of unaddressed physical, sexual, and emotional abuse, and deficits in gender-specific treatment."[69] Girls in the criminal legal system have survived sexual abuse, homelessness, family trauma, and physical assault.[70] Nearly 10% of girls incarcerated in youth facilities have been confined for committing status offenses, such as running away from home and truancy.[71] Black girls comprise 35% of all incarcerated girls; Latina girls comprise 19%, and white girls 38%.[72] A significant number of

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[64] *See* Bianca D.M. Wilson, Sid P. Jordan, Ilan H. Meyer, Andrew R. Flores, Lara Stemple & Jody L. Herman, *Disproportionality and Disparities Among Sexual Minority Youth in Custody*, 46 J. YOUTH ADOLESCENCE 1547, 1549–50 (2017).

[65] *See* Nelson v. Heyne, 491 F.2d 352, 357 (7th Cir. 1974) (holding that the treatment of juvenile boys in detention, which included beatings with a fraternity paddle, constituted cruel and unusual punishment); Inmates of Boys' Training Sch. v. Affleck, 346 F. Supp. 1354, 1367 (D.R.I. 1972) (holding the placement of boys in a juvenile facility with dark rooms that only contained a bed and toilet was cruel and unusual punishment).

[66] *See* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 386 (2013) ("[There is an] overreliance on law enforcement officials and juvenile courts when responding to typical adolescent behaviors, particularly among youth of color. Whereas school officials were once willing to address normal adolescent misconduct through counseling and other in-school interventions, school officials now routinely rely on police officers to manage student discipline.").

[67] CTR. FOR AM. PROGRESS, MOVEMENT ADVANCEMENT PROJECT & YOUTH FIRST, UNJUST: LGBTQ YOUTH INCARCERATED IN THE JUVENILE JUSTICE SYSTEM 3 (2017), https://www.lgbtmap.org/file/lgbtq-incarcerated-youth.pdf [https://perma.cc/J327-7KV6].

[68] SENT'G PROJECT, *supra* note 4, at 5–6.

[69] SUE BURRELL, NAT'L CHILD TRAUMATIC STRESS NETWORK, TRAUMA AND THE ENVIRONMENT OF CARE IN JUVENILE INSTITUTIONS (2013), https://www.nctsn.org/sites/default/files/resources/trauma_and_environment_of_care_in_juvenile_institutions.pdf [https://perma.cc/948B-NFAN].

[70] *See* Carrie Griffin Basas & Lisa Peters, *Deprivation and "Deviance": The Disability and Health Experiences of Women in North Carolina's Prisons*, 93 N.C. L. REV. 1223, 1255 (2015).

[71] Press Release, Aleks Kajstura, Prison Pol'y Initiative, Women's Mass Incarceration: The Whole Pie 2019 (Oct. 29, 2019), https://www.prisonpolicy.org/reports/pie2019women.html [https://perma.cc/5SXV-LDV5].

[72] *Id.*

incarcerated girls are LGBTQ, with 40% identifying as "lesbian, bisexual, or questioning and gender non-conforming."[73] The juvenile incarceration system fails to address the unique needs of girls.

Girls, in contrast to boys, have unique vulnerabilities that create distinct pathways to incarceration. One study found that 35% of incarcerated females reported being survivors of childhood sexual abuse,[74] and girls are five times more likely to experience sexual abuse.[75] Fifty-four percent of incarcerated girls report experiencing physical or sexual abuse prior to their confinement.[76] This abuse often happens at the hands of an authority figure long before the state's involvement: 57% of victims of abuse report the father or stepfather as the abuser, while 35% report the mother or stepmother as the abuser.[77] "[F]emales reveal nearly twice the rate of past physical abuse (42% vs. 22%), more than twice the rate of past suicide attempts (44% vs. 19%), and more than 4 times the rate of prior sex abuse (35% vs. 8%)" than boys.[78] Incarcerated girls also have a high prevalence of mental health issues and disabilities. Approximately 75% of incarcerated girls have one or more psychiatric disorders.[79] Certain regions with higher rates of abuse are illustrative:

> Study after study reveals alarmingly high percentages of girls reporting having experienced physical or sexual abuse. In the NCCD girls study in California, eighty-one percent had experienced physical or sexual abuse. Fifty-six percent of the girls reported having been abused sexually, with more than one third of these girls reporting that they had been fondled or molested. Forty percent of the girls reported that they had been raped or sodomized at least once.[80]

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[73] *Id.*

[74] Anita Raj, Jennifer Rose, Michele R. Decker, Cynthia Rosengard, Megan R. Hebert, Michael Stein & Jennifer G. Clarke, *Prevalence and Patterns of Sexual Assault Across the Life Span Among Incarcerated Women*, 14 VIOLENCE AGAINST WOMEN 528, 533 tbl.1 (2008).

[75] *See* SHARI MILLER, LESLIE D. LEVE & PATRICIA K. KERIG, DELINQUENT GIRLS: CONTEXT, RELATIONSHIPS, AND ADAPTATION 44 (2012); *see also* Basas & Peters, *supra* note 70, at 1255 ("In a 2006 study, researchers examining the family and risk issues of incarcerated girls in California and Florida, for example, found that more than 40% of them had been taken from their homes by social services, 77% were chronic runaways, and 48% to 88% had experienced sexual, physical, or emotional abuse.").

[76] *See* ANDREA J. SEDLAK & KARLA MCPHERSON, SURVEY OF YOUTH IN RESIDENTIAL PLACEMENT: YOUTH'S NEEDS AND SERVICES 10–11 & fig.3 (2010).

[77] *Id.* at 10 tbl.3.

[78] *Id.* at 45.

[79] Michael A. Russell & Emily G. Marston, *Profiles of Mental Disorder Among Incarcerated Adolescent Females*, 46 CT. REV. 16, 16 (2009) ("[P]sychiatric disorder[s] appear even higher among detained female youth than detained male youth, suggesting that incarcerated adolescent females may be the most psychiatrically impaired population in today's juvenile justice system." (footnote omitted)).

[80] *See* Kim Taylor-Thompson, *Girl Talk—Examining Racial and Gender Lines in Juvenile Justice*, 6 NEV. L.J. 1137, 1144 (2006).

The offenses for which girls are incarcerated tend to be less serious and less violent than for other populations, making strip searches' necessity in the name of safety more dubious and subject to gendered expectations that girls must comply and submit. Girls enter into the system for less serious offenses that punish them for failing to comport with ideals about what it means to be a "good girl."[81] Girls are more likely than boys to be incarcerated for status offenses.[82] Within status crimes, girls are also most frequently incarcerated for running away from home and truancy.[83] They represent 38% of juvenile cases for ungovernability, or persistent disobedience; 35% for truancy; and 52% of offenses for running away from home.[84] Of the total status offenses petitioned in 2015, girls accounted for 38%.[85] There are also some racial differences: Black girls are more often detained and committed for violent offenses than white girls, and Indigenous girls are detained and committed at a higher rate than all other races.[86] "While society and the justice systems subject all girls to stricter codes of conduct than is expected of their male peers, Black girls in particular shoulder an added burden of adultification—being perceived as older, more culpable, and more responsible than their peers—which leads to greater contact with and harsher consequences within the juvenile justice system."[87]

Finally, not only are girls more likely to be incarcerated for status offenses than boys, they are also more likely to receive a longer term of incarceration for status offenses than boys.[88] These differences are glaring because girls appear to be more severely punished for being defiant than boys. The social expectation that girls should act more maturely and obediently than boys may explain why they are treated more harshly when

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[81] *See* Gamal, *supra* note 56, at 233–34, 240 (arguing that stereotypes about female disobedience result in harsher responses to girls who exhibit nonnormative behavior that is often overlooked when exhibited by boys).

[82] *See* Marquardt, *supra* note 30, at 769 ("Girls disproportionately comprise status offenders and are incarcerated more often than boys with more severe sanctions for these charges.").

[83] *See id.* at 770 ("The status crimes girls are most often arrested for—running away, substance abuse, and truancy—are all associated with reactions to abuse.").

[84] SAMANTHA EHRMANN, NINA HYLAND & CHARLES PUZZANCHERA, GIRLS IN THE JUVENILE JUSTICE SYSTEM 18 (2019), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/251486.pdf [https://perma.cc/B53C-X6BV].

[85] *Id.*

[86] *See* NCCD CTR. FOR GIRLS & YOUNG WOMEN, GETTING THE FACTS STRAIGHT ABOUT GIRLS IN THE JUVENILE JUSTICE SYSTEM 7 (2009), https://www.nccdglobal.org/sites/default/files/publication_pdf/fact-sheet-girls-in-juvenile-justice.pdf [https://perma.cc/3CS7-APYV].

[87] Press Release, *supra* note 71.

[88] *Id.*; *see* Erin M. Espinosa & Jon R. Sorensen, *The Influence of Gender and Traumatic Experiences on Length of Time Served in Juvenile Justice Settings*, 43 CRIM. JUST. & BEHAV. 187, 198 (2016).

they fail to comply with the expectation.[89] "Girls, unlike boys, were charged with 'immorality' or 'waywardness.' The purpose, was to control female sexuality, resulting in punishment that was more severe than for the boys. Today, non-conforming girls are still entering the juvenile justice system because of their status offenses, more than are their male counterparts."[90] Girls are also punished for their coping strategies for managing their emotional and sexual vulnerabilities. These behaviors include survival tactics for managing difficult family lives, such as engaging in prostitution, petty theft, and embezzlement.[91]

The sexualized nature of forcefully invasive searches is a natural extension of the government's persistent focus on regulating women's and girls' sexual behavior over the centuries. Disciplining girls for sexual precocity and social disobedience was a consistent feature of the origins of juvenile systems across the country. For example:

> In the early operations of the juvenile court in Chicago, girls were less likely to be placed on probation and more likely to face institutional confinement . . . than their male counterparts. Large numbers of girls came under the control of the justice system for engaging in sexual relationships with young men whom they would eventually marry. But because of rigid constraints on girls, even eighteen-year-old girls in relationships could expect the justice system to intervene.[92]

Professor Cheryl D. Hicks has detailed how the regulation of sexuality through wayward laws in New York was "designed to control . . . [women and] girls . . . charged with . . . prostit[ution] . . . by committing them to reformatory institutions."[93] "In 1886, the New York State legislature amended the law to include incorrigible female behavior more generally."[94]

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[89] *See* DeAnna Baumle, *Creating the Trauma-to-Prison Pipeline: How the U.S. Justice System Criminalizes Structural and Interpersonal Trauma Experienced by Girls of Color*, 56 FAM. CT. REV. 695, 702 (2018) ("[G]irls are penalized more harshly than boys once they are in the system, likely because of implicit gender bias.").

[90] Cynthia M. Conward, Essay, *Where Have All the Children Gone?: A Look at Incarcerated Youth in America*, 27 WM. MITCHELL L. REV. 2435, 2451 (2001).

[91] *See* Marquardt, *supra* note 30, at 785.

[92] Taylor-Thompson, *supra* note 80, at 1158.

[93] Cheryl D. Hicks, *"In Danger of Becoming Morally Depraved": Single Black Women, Working-Class Black Families, and New York State's Wayward Minor Laws, 1917–1928*, 151 U. PA. L. REV. 2077, 2082 (2003).

[94] *Id.*

The juvenile court system also subjected Black girls to heightened surveillance from its inception.[95] Professor Cheryl Nelson Butler has discussed how racial bias was infused into the system:

> The juvenile court's embrace of these race-based stereotypes about black womanhood and sexuality had disastrous consequences for black girls sent to reform institutions. At the State Industrial School for Girls at Geneva, black female residents and the white residents who befriended them endured the most atrocious emotional, physical, and sexual abuses. Black girls were disproportionately represented . . . . As girls were considered delinquent primarily for "sexual immorality," this standard arguably made black girls especially vulnerable due to stereotypes about black sexuality.[96]

Professor Priscilla Ocen has further noted that "[i]n many ways, the denigration of Black female sexuality during slavery, the criminalization of Black women for moral offenses in the post-Civil War Era and the discriminatory operation of the early juvenile reform institutions established the framework for the discriminatory treatment of Black girls."[97]

Sociologist James Nolan has tracked how problem-solving courts have adopted a corrective approach to girls aimed at providing resources and services to girls through intervention, arrest, and incarceration.[98] For instance, some system actors believe that they are "helping" girls by criminalizing them.[99] Law enforcement officers and judges express concerns that girls would be pushed into human trafficking rings or face other dangers

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[95] *See* Cheryl Nelson Butler, *Blackness as Delinquency*, 90 WASH. U. L. REV. 1335, 1386 (2013) ("The influence of the eugenic movement upon juvenile court judges and administrators furthered and entrenched the notion of dark-skinned women and girls as Jezebels.").

[96] *Id.* at 1386–87.

[97] Priscilla A. Ocen, *(E)racing Childhood: Examining the Racialized Construction of Childhood and Innocence in the Treatment of Sexually Exploited Minors*, 62 UCLA L. REV. 1586, 1614 (2015).

[98] *See* JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 178–80 (2001).

[99] *See* Amy Farrell, Meredith Dank, Ieke de Vries, Matthew Kafafian, Andrea Hughes & Sarah Lockwood, *Failing Victims? Challenges of the Police Response to Human Trafficking*, 18 CRIMINOLOGY & PUB. POL'Y 649, 662 (2019) ("Even though some police officers acknowledged the challenges of victims not disclosing human trafficking and refusing to provide information upon initial identification, potential sex trafficking victims are sometimes arrested on prostitution charges in the hope that they would receive the help needed to disclose their victimization. In the South, arrest was the primary mechanism local law enforcement used to convince sex trafficking victims to provide information."); *see also* Gamal, *supra* note 56, at 245 ("Even if the girl must be found guilty of a crime before she gains access to services, proponents believe that bringing the girl under court control will ultimately help her. Yet criminalization strategies, like those championed in Girls Court, have been widely criticized by feminist scholars who point to an underlying tension between the aims of a punitive system and broader feminist goals of 'ending women's subordination, dismantling hierarchy, and seeking distributive fairness.'").

if left on the streets.[100] Such officers also choose to engage in "benevolent" arrests, intended to protect the girls from themselves.[101] Rather than allow the girls to be released or treat them as independent agents, officers use arrests as a tool to ensure that the girls benefit from social services that are provided upon arrest and incarceration.[102] This approach is belied, however, by the harmful effects of incarcerating girls for minor offenses.[103] While there are few studies on status offenders, research on juvenile offenders in general shows that incarceration is generally criminogenic and promotes recidivism.[104] People are more likely to reoffend after incarceration, especially after being exposed to youth who have committed more serious crimes.[105] "[J]uveniles who were processed through the juvenile justice system were more likely to recidivate than those who were processed through alternative government agencies."[106] Detaining children does not foster rehabilitation that empowers young people. Detention should not be necessary to obtain needed resources.

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[100] *See* Godsoe, *supra* note 22, at 1108–09 & n.99; *see also* Marquardt, *supra* note 30, at 788 ("In the case of . . . net-widening, some may invoke a 'protectionist rationale' that incarceration incapacitates a girl and so prevents her from committing further crimes that put her at risk." (quoting Godsoe, *supra* note 22, at 1107)).

[101] *Cf.* Forrest Stuart, *Becoming "Copwise": Policing, Culture, and the Collateral Consequences of Street-Level Criminalization*, 50 LAW & SOC'Y REV. 279, 298–99 (2016) (giving the example of arresting unhoused people for their welfare); KATE MANNE, DOWN GIRL: THE LOGIC OF MISOGYNY 79 (2018) ("[S]exism often works by *naturalizing* sex differences, in order to justify patriarchal social arrangements, by making them seem inevitable, or portraying people trying to resist them as fighting a losing battle.").

[102] *See* Randy Frances Kandel & Anne Griffiths, *Reconfiguring Personhood: From Ungovernability to Parent Adolescent Autonomy Conflict Actions*, 53 SYRACUSE L. REV. 995, 1021 ("The discourses of discipline and therapy depend upon each other for their co-legitimation, and for the legitimation of Heather's institutionalization, which cannot otherwise be sustained, as she is neither criminal nor incompetent.").

[103] *See* Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 718 (2017) (discussing "a finding consistent with other research suggesting that even short-term detention has criminogenic effects").

[104] *See* Tepper, *supra* note 13, at 676 ("Labeling a child an 'offender' or 'delinquent' stigmatizes that individual.").

[105] *See id.*; Ian Lambie & Isabel Randell, *The Impact of Incarceration on Juvenile Offenders*, 33 CLINICAL PSYCH. REV. 448, 451 (2013) (examining the criminogenic effect of incarceration of young people and observing that "youth offenders incarcerated in out-of-home placements (adult or juvenile facilities) exhibited a much faster rate of exposure to antisocial peers than non-incarcerated youth offenders regardless of baseline exposure to antisocial peers"); Jasmine C. Dunn, Social Antecedents of Juvenile Delinquency 14 (2016) (Ph.D. dissertation, The Chicago School of Professional Psychology) (ProQuest).

[106] *See* Dunn, *supra* note 105, at 14.

As a result of these factors, the population of girls in juvenile detention facilities are there for less serious social offenses.[107] They have a high likelihood of having experienced sexual abuse,[108] are more likely to have mental health disorders, are more prone to committing suicide,[109] and are often engaged in the conduct that led to their detention to survive past trauma and abuse.[110] Despite the previously mentioned general studies on juvenile recidivism, girls are also less likely to recidivate than boys.[111] These factors provide ample reasons for courts to be suspicious of blanket policies that ignore the unique characteristics of girls who are detained.[112]

C. The Searches

Many juvenile facilities have blanket policies that require the strip search of girls prior to admission.[113] Girls report having to "remove their clothes and submit to a visual body-cavity inspection (during which they must cough) on entry to the facility, after visits from outsiders, and whenever there is a suspected infraction of facility rules."[114] Between 53% and 60% of young people incarcerated in detention, corrections, or camp report that they

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[107] *See* Gamal, *supra* note 56, at 233 ("Courts and other actors tend to respond harsher to girls who exhibit non-compliance. In 2007, approximately 65,000 girls were delinquent for status offenses, offenses that would not be criminalized if committed by an adult, such as running away, truancy, curfew violations, and liquor violations.").

[108] *See* Harlow, *supra* note 38, at 2 tbl.1 (reporting that 39% of women who are incarcerated in state facilities report being sexually abused before incarceration and that 36.7% of incarcerated women who previously suffered sexual or physical abuse were abused as minors); Jana Allen, Layne Dowdall, Haillie Parker & Chloe Johnson, *'It's Never OK': Sexual Abuse Persists in Juvenile Facilities Despite Years of Reform*, NEWS21 (Aug. 21, 2020), https://kidsimprisoned.news21.com/sexual-assault-juvenile-detention-facilities [https://perma.cc/K6VS-JDEH] ("[N]early a third of girls in the juvenile justice system report experiencing sexual abuse in the past, compared to 7% of boys . . . ." (citing SAAR ET AL., *supra* note 3, at 7–10)).

[109] *See* Kristi Holsinger & Alexander M. Holsinger, *Differential Pathways to Violence and Self-Injurious Behavior: African American and White Girls in the Juvenile Justice System*, 42 J. RSCH. CRIME & DELINQ. 211, 215 (2005).

[110] *See* Marquardt, *supra* note 30, at 758 ("A shattering 2015 report establishes that sexual abuse is one of the primary predictors of the subsequent rate of crime commission for young women. And yet these subsequent crimes—often in the form of 'survival crimes,' technical violations, status offenses, and mutually combative intra-familial disputes—are disproportionately low risk and better dealt with outside of the criminal justice system." (footnotes omitted)).

[111] *See* Anne Bowen Poulin, *Female Delinquents: Defining Their Place in the Justice System*, 1996 WIS. L. REV. 541, 553 ("[T]he [Office of Juvenile Justice and Delinquency Prevention] reports that girls were less likely than boys to become recidivist juvenile offenders.").

[112] *See* Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 375 (2009) (holding that the reasonableness of a search should be evaluated based on the nature of the intrusion and the age and characteristics of the child).

[113] *See* HUM. RTS. WATCH & ACLU, *supra* note †, at 60.

[114] Leslie Acoca, *Outside/Inside: The Violation of American Girls at Home, on the Streets, and in the Juvenile Justice System*, 44 CRIME & DELINQ. 561, 578 (1998).

experienced a strip search.[115] While many of these strip searches occur during routine intake procedures upon admission into juvenile detention facilities, many facilities also administer routine strip searches on an ongoing basis.[116] Some girls report that they experienced strip searches on a monthly basis while incarcerated.[117]

Strip searches require children to remove their clothing and expose their naked bodies to detention officials. Children must expose their genitalia, buttocks, and breasts during a strip search. Detention officials visually inspect the body, and there may be manual inspection of the body depending upon the facility. A body-cavity search requires the examination of the interior orifices of the body that are not visible during a strip search. Body-cavity searches require physical intrusion and manual manipulation of private orifices, including the manipulation of the anus and vagina for examination. Several states permit body-cavity searches of incarcerated children. Montana allows body-cavity searches for juveniles where there is "probable cause that weapons or contraband will be found."[118] Michigan permits body-cavity searches of children following court adjudication, where the facility director provides written permission for the search.[119] The Association for the Prevention of Torture in Geneva, a nongovernmental organization concerned with preventing torture, recommends that correctional officials do not conduct body-cavity searches, especially on children.[120]

Strip-search policies in different states vary, but many states require strip searches when children enter secure facilities and frisk searches even after the children have already been strip searched. For example, the Utah Department of Human Services Division of Juvenile Services Policy and Procedures Manual states staff "*shall* conduct a strip search on every juvenile upon admission and/or entry" and frisk search when "returning from any non-professional visit or vocational program . . . [and] prior to a secure

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[115] *See* ANDREA J. SEDLAK, SURVEY OF YOUTH IN RESIDENTIAL PLACEMENT: CONDITIONS OF CONFINEMENT 51 (2017), https://www.ojp.gov/pdffiles1/ojjdp/grants/250754.pdf [https://perma.cc/W55N-QRND].

[116] HUM. RTS. WATCH & ACLU, *supra* note †, at 60.

[117] *Id*.

[118] ADMIN. R. MONT. § 20.9.618(7).

[119] STATE OF MICH. DEP'T OF HEALTH & HUM. SERVS., JRM 511, BODY SEARCHES OF YOUTH, JUVENILE JUSTICE RESIDENTIAL MANUAL 5–6 (2021).

[120] *Body Searches*, ASS'N FOR THE PREVENTION OF TORTURE, https://www.apt.ch/en/knowledge-hub/detention-focus-database/safety-order-and-discipline/body-searches [https://perma.cc/2AYD-3LLL].

transport."[121] The Florida Department of Juvenile Justice requires that all admitted children be electronically searched, strip searched, and frisk searched upon admission into facilities.[122] The National Institute of Corrections Desktop Guide for correctional staff notes that "[s]ome juvenile facilities conduct strip searches on all youth immediately upon admission; others have more limited criteria, such as the seriousness of the admitting offense. Limitations are often the result of court rulings or legal advice mandating or recommending the 'reasonable suspicion' criteria."[123] The guide provides little instruction about when strip searches are appropriate and further recommends that a "frisk search should be conducted anytime that a strip search is not allowed."[124] These policies illustrate the frequency of strip and body-pat-down searches.

One seventeen-year-old girl who suffered a miscarriage at a juvenile detention facility recounted the challenges of being naked in front of correctional staff: "Staff in here threaten us. If we grieve them . . . they dog you. They take your apple or your cookie. The men staff are perverts. They look at you in the shower. They say, 'It's not like you never took your clothes off before.'"[125]

While courts consider whether searches are conducted by someone of the same gender,[126] gender matching does not eliminate the risk of exploitation. One girl recounted her experiences with same-sex searches in detention, stating that

> one of the guards said, "I feel like I'm going to strip someone. I ain't seen no such and such [genitals] lately." Then there's this one lady. Lord help me! Please don't let this lady pat me down. This lady goes up in your crotch and goes up and grips your stuff [demonstrates grabbing the genital area]. And then

[121] UTAH DEP'T OF HUM. SERVS., DEPARTMENT OF HUMAN SERVICES DIVISION OF JUVENILE JUSTICE SERVICES POLICY AND PROCEDURES (2018), https://www.powerdms.com/public/UTAHDHS/documents/148448#:~:text=Staff%20may%20conduct%20a%20strip,search%20or%20hand%2D%20held%20metal [https://perma.cc/3D9N-5GGB].

[122] FLA. DEP'T OF JUV. JUST., REG'L JUV. DET. CTR., FACILITY OPERATING PROCEDURES § 5.11 (2021), http://www.djj.state.fl.us/services/detention/facility-operating-procedure [https://perma.cc/2DJL-UZDF].

[123] *See* U.S. DEP'T OF JUST., NAT'L INST. OF CORRS., DESKTOP GUIDE TO QUALITY PRACTICE FOR WORKING WITH YOUTH IN CONFINEMENT ACCESSION NUMBER 028418, https://info.nicic.gov/dtg/sites/info.nicic.gov.dtg/files/DesktopGuide.pdf [https://perma.cc/96VK-GWWE].

[124] *Id.*

[125] Acoca, *supra* note 114, at 578.

[126] *See, e.g.*, Justice v. City of Peachtree City, 961 F.2d 188, 193 (11th Cir. 1992) (considering that a search of a detainee was conducted by officers of the same sex in evaluating its reasonableness).

> [she] goes up and lifts up your breasts [demonstrates by squeezing breasts]. And you can't say anything to them. Then you'll get in trouble.[127]

These invasive searches are intended to improve the safety of detention facilities, but they may make facilities less safe by triggering trauma and fostering negative interactions between the children and staff. "[C]orrectional practices (i.e., strip searches, pat downs) may trigger previous trauma and increase trauma-related symptoms and behaviors such as impulsive acts and aggression that may be difficult to manage within the prison or jail."[128] By triggering trauma, the searches may lead to more disruptive behaviors within the facility, undermining the goal of safety. There are less aggressive means of achieving safety.[129] At the very least, juvenile detention should limit the scope of searches and not require blanket strip searches each time a child goes to different areas of the facility or meets with an attorney. And if the only way to achieve a safe facility is routinely engaging in these searches, perhaps it's time to reconsider the use of these facilities altogether.

II. SEXUAL ASSAULT AS A LENS

Incarcerated girls must comply with routine touching and bodily exposure that under other circumstances would be sexual assault.[130] Sexual assault is nonconsensual sexual contact.[131] This definition of sexual assault is helpful to concretize the nature of the harm that the state inflicts when it forces children to expose themselves against their will. Every time a young girl must submit herself to the unwanted touching of corrections officers, she has been forced to endure sexual assault. Many states require that

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[127] BARBARA OWEN, JAMES WELLS & JOYCELYN POLLOCK, IN SEARCH OF SAFETY: CONFRONTING INEQUALITY IN WOMEN'S IMPRISONMENT 159 (2017) (alterations in original).

[128] Sheryl P. Kubiak, Stephanie S. Covington & Carmen Hillier, *Trauma-Informed Corrections*, *in* SOCIAL WORK IN JUVENILE AND CRIMINAL JUSTICE SYSTEMS 92, 92–93 (David W. Springer ed., 4th ed. 2017).

[129] *See id.*

[130] *See* Bearchild v. Cobban, 947 F.3d 1130, 1135 (9th Cir. 2020) (reversing a jury verdict in favor of an incarcerated person, who alleged that a prison pat down was converted into a sexual assault, where the "pat-down lasted about five minutes and involved rubbing, stroking, squeezing, and groping in intimate areas"); DeJesus v. Lewis, No. 18-11649, 2021 WL 4269920, at *1 (11th Cir. Sept. 21, 2021) ("[W]hen a prisoner proves that a prison official, acting under color of law and without legitimate penological justification, engages in a sexual act with the prisoner, and that act was for the official's own sexual gratification, *or for the purpose of humiliating, degrading, or demeaning the prisoner*, the prison official's conduct amounts to a sexual assault in violation of the Eighth Amendment." (emphasis added)); *cf.* Borgmann, *supra* note 14, at 1061, 1069 (examining the Supreme Court's inconsistent application of the right to bodily integrity).

[131] *See* United States v. Edwards, 272 F. Supp. 3d 1270, 1283 (D.N.M. 2017) (noting that the Federal Rules of Evidence define sexual assault "as including nonconsensual contact between any part of the defendant's body and another person's genitals" (citing FED. R. EVID. 413(d))).

incarcerated girls expose their naked bodies to strangers.[132] The nature of these searches is routine, and they are a part of the everyday procedures of many of these facilities.[133] These policies force girls to allow corrections officers to stare at their naked bodies as the girls manipulate their anal and vaginal regions for closer inspection.[134] The officers instruct the girls to manipulate the exterior of their developing bodies, searching for miscellaneous items that they might have brought with them into the correctional facilities. These searches are supposedly for the girls' safety. But the repeated and routine touching and exposing of their bodies—during repeated pat-down searches and strip searches—is in all but name a sexual assault.

The subjective experience of individual girls is relevant to assessing the harms of these searches, but the social meaning of conducting these searches is also relevant. The girls are forced to comply with these searches, which are humiliating. In another context, Professor Kaaryn Gustafson has discussed the "degradation ceremonies" that low-income Black women endure as rituals "'whereby the public identity of an actor is transformed into something looked on as lower in the local scheme of social types' . . . . [as] 'moral indignation may reinforce group solidarity' and . . . 'bring about the ritual destruction of the person being denounced.'"[135] By "marginalizing a few[, they promote] solidarity among the majority."[136] Similarly, the routine stripping and patting of the mostly Black and brown girls who are incarcerated is a degradation ceremony that relies on sexual violence to communicate that these girls are disposable.[137] The social significance of these searches is that these girls are devalued and degraded.

The sexual assault of children is generally afforded strict criminal liability.[138] Even so, there may be some questions about whether the *mens*

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[132] For examples of states that require girls to comply with strip searches, see UTAH DEP'T OF HUM. SERVS., DEPARTMENT OF HUMAN SERVICES DIVISION OF JUVENILE JUSTICE SERVICES POLICY AND PROCEDURES 5 (2018), https://www.powerdms.com/public/UTAHDHS/documents/148448#:~:text=Staff%20may%20conduct%20a%20strip,search%20or%20hand%2D%20held%20metal [https://perma.cc/3D9N-5GGB], and FLA. DEP'T OF JUV. JUST. REG'L JUV. DET. CTR., FACILITY OPERATING PROCEDURES § 5.11 (2021), http://www.djj.state.fl.us/services/detention/facility-operating-procedure [https://perma.cc/2DJL-UZDF].

[133] *See supra* Section I.C.

[134] HUM. RTS. WATCH & ACLU, *supra* note †, at 59–60.

[135] *See* Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 301 (2013) (alteration omitted) (quoting Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOCIO. 420, 420–21 (1956)).

[136] *Id.*

[137] *See id.*; Press Release, *supra* note 71.

[138] *See* Eric A. Johnson, *Mens Rea for Sexual Abuse: The Case for Defining the Acceptable Risk*, 99 J. CRIM. L. & CRIMINOLOGY 1, 1–2 (2008).

rea element of sexual assault is satisfied here. After all, some correctional officers may not have the individual, specific intent to abuse and humiliate incarcerated girls through the unwanted touching of their bodies. While this may be true in some cases, the state's intent to exercise power and dominion over these girls persists. The systemic sexual assault of this group of girls transcends the actions of the individual officers. Rather, the routine and systemic humiliation that these girls experience by state actors who deliberately engage in these activities indicates that these searches are sexual violence against reluctant participants. These policies have been established and normalized by the state, such that the absence of *mens rea* in many individual cases is not only unsurprising but logically expected.

The aim of the sexual assault lens is not to create a new crime to place detention officers in cages. It is to expose the everyday nature of state sexual violence and to expose how the state engages in conduct that is criminalized for its citizens. Moreover, sexual assault is a powerful lens for evaluating the unwanted touching that incarcerated girls experience. The searches are often reduced to mere bureaucratic functions that are inherent in the everyday nature of the juvenile system.[139] The searches could appear harmless, even necessary.[140] But viewing these searches through the lens of sexual assault undermines the everyday violence and invasiveness of the system. It elicits the visceral response that should always be there when discussing state violence. The domination of girls' bodies through routine sexual assaults elicits the repulsion that is currently missing from the discourse about these practices. It also provides a tangible understanding of how the state literally enacts violence through the criminal and juvenile systems. The violence is so pervasive that judges, government attorneys, and even defense attorneys continue to work in the system, and these searches appear ordinary. Furthermore, the sexual assault lens is helpful even if not all incarcerated girls are entitled to a legal remedy under sexual assault statutes.[141] From the girls' perspective, the nature of the bodily invasion remains the same, whether or not the correctional officer visibly expressed the necessary *mens rea* of enjoying the humiliation. Every girl who is touched experiences an unsolicited touching regardless of the intent of the perpetrators. The act of

[139] *See* Smook v. Minnehaha County, 457 F.3d 806, 811 (8th Cir. 2006).

[140] *See, e.g.*, J.B. *ex rel.* Benjamin v. Fassnacht, 801 F.3d 336, 344 (3d Cir. 2015) (discussing Supreme Court precedent deeming invasive searches necessary to detect contraband and signs of self-harm or abuse).

[141] It may well be that all incarcerated girls are entitled to a legal remedy under sexual assault statutes. However, even if the individual elements of sexual assault statutes are not met, sexual assault is a helpful framework for understanding how searches are experienced.

stripping girls down and exposing their genitals to strangers is an act of dominion over their bodies.[142]

The persistence of these assaults is particularly disturbing because the state is supposed to be acting in the best interests of these children as *parens patriae*.[143] *Parens patriae* refers to the state's duty to act in the best interests of vulnerable persons. The doctrine has evolved such that "the state has plenary power to legislate on behalf of the child. The interest of the state in its children is so broad 'as to almost defy limitations.'"[144] "Under the doctrine of parens patriae, the states felt they had both a right and a duty to intervene" to protect the physical and emotional well-being of a child.[145] The "purpose of parens patriae is to protect society as a whole," operating "under the hope that 'the child would save the state as well as the state the child.'"[146] As *parens patriae*, the state may act *in loco parentis* for children.

The history of *loco parentis* is rooted in a paternalistic[147] view of how the state should treat children within its custody. *Loco parentis* is Latin for "the place of a parent."[148] The state is adopting the posture of replacing the parent to contribute to the upbringing of the child who is in its care.[149] This posture is about care and respect for the child, much like one might expect a parent to care for and respect their child. There is a deliberate concern for

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[142] Debbie Kilroy, *Strip-Searching: Stop the State's Sexual Assault of Women in Prison*, 12 J. PRISONERS ON PRISON 30, 33 (2003) ("Prisoners are strip-searched because it is a highly effective way to control women, not because it keeps the drugs out of prison.").

[143] *See* Kristin Henning, *The Fourth Amendment Rights of Children at Home: When Parental Authority Goes Too Far*, 53 WM. & MARY L. REV. 55, 72 (2011) (noting that few courts have considered "a minor's expectation of privacy at home without the involvement or consent of parents" but that "[t]he courts that have addressed the question have recognized the minor's right to Fourth Amendment protections"). So even in the parental context, minors do have Fourth Amendment rights independent of their parents. *Id.*; *see also* Lisa V. Martin, *Litigation as Parenting*, 95 N.Y.U. L. REV. 442, 492, 494 (2020) (discussing parental rights to manage litigation involving their children and noting that children's rights generally are prioritized in the context of abortion).

[144] JEFFREY SHULMAN, THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD 56 (2014) (quoting *In re* Lippincott, 124 A. 532, 533 (N.J. Ch. 1924)).

[145] Michael J. Higdon, *Parens Patriae and the Disinherited Child*, 95 WASH. L. REV. 619, 648 (2020).

[146] *Id*. at 649 (quoting George B. Curtis, *The Checkered Career of* Parens Patriae*: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895, 902 (1976)).

[147] *Recent Cases*, 11 HARV. L. REV. 413, 416 (1898) (explaining that "a father is the only person who is *prima facie in loco parentis*").

[148] *In Loco Parentis*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/in%20loco%20parentis [https://perma.cc/45B5-DACN].

[149] *See* 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, 82 (2007) ("[T]he state's power under the *parens patriae* doctrine to protect children may be used to 'advance only the best interests of the incompetent individual and not attempt to further other objectives, deriving from its police power, that may conflict with the individual's welfare.'" (quoting *Developments in the Law—the Constitution and the Family*, 93 HARV. L. REV. 1156, 1199 (1980)).

the child's well-being. In fact, the standard for evaluating judicial proceedings that involve children is the best-interests-of-the-child standard that prioritizes the children's needs.[150] This form of state custody is not primarily concerned with punishment or discipline; it recognizes the importance of supporting the moral and social upbringing of children. In fact, when girls are incarcerated, they have not been punished for a crime that they committed.[151] They have been adjudicated as delinquents, and the state is adopting the parental role of providing guidance to the children. The incarcerated child is the child of the state, under the watchful care of the state. This is a fundamentally different role than that of the state in adult facilities, where it is concerned with meting out punishment.

The nature of these searches is especially troubling when you consider that Black and Indigenous girls are disproportionately represented in juvenile detention facilities. "Black girls are three-and-a-half times more likely to be imprisoned than White girls . . . ."[152] The placement rate for Black girls is 94 per 100,000.[153] The placement rate for Indigenous girls is 123 per 100,000.[154] The placement rate for white girls is 29 per 100,000.[155] Girls comprise a growing number of teens arrested.[156] While the legal arguments pertain to all girls, these disparities mean that Black and Indigenous girls are disproportionately subject to incarceration and then subjected to state-inflicted sexual assault. As they go through the humiliating process of exposing their bodies to strangers, the echoes of their ancestors' humiliation at the hands of government actors reverberate through the hallways of juvenile detention facilities.

Dominion over Black and Indigenous people is the legacy of slavery and settler colonialism that undergirds the U.S. legal system.[157] Acting with dominion over these girls' bodies extends the surveillance that their foremothers suffered at the hands of colonists and slave owners. Enslaved girls and Indigenous girls bore the children of predatory white men who

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[150] *See* Bridgette A. Carr, *Incorporating a "Best Interests of the Child" Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 127 (2009) ("[T]he 'best interests' approach prioritizes the child's safety, permanency, and well-being.").

[151] *See, e.g.*, United States v. Huggins, 467 F.3d 359, 361 (3d Cir. 2006) (holding that a juvenile court adjudication for delinquency was not the same as a prior conviction in the adult legal system while assessing whether a mandatory minimum sentence was appropriate).

[152] Joella Adia Jones, *The Failure to Protect Pregnant Pretrial Detainees: The Possibility of Constitutional Relief in the Second Circuit Under a Fourteenth Amendment Analysis*, 10 COLUM. J. RACE & L. 139, 164 (2020).

[153] SENT'G PROJECT, *supra* note 4, at 5.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *See* K-Sue Park, *Self-Deportation Nation*, 132 HARV. L. REV. 1878, 1910 (2019).

raped them and dispossessed them of any meaningful control over their children.[158] There is an entire race of people who bear the semblance of rape and conquest over Black and Indigenous bodies through their caramel complexions and wavy hair. If a parent were to engage in conduct that would otherwise be sexual assault, that parent would likely be charged with child abuse. If the parent were Black, they might be separated from the child and suffer through the procedures of the child surveillance system.[159] But the state is systematically and routinely engaging in what would be treated as sexual assault in any other context. The comfort, or rather complacency and complicity, with a system that routinely sexually assaults these children reflects the impervious nature of white supremacy in this country.

This framework provides a lens for evaluating the relevant constitutional issues and provides a mechanism for implementing "[a] new abolition constitutionalism."[160] The crime of sexual assault properly captures the severity of the invasion for the invaded child and places it within the context of a parental relationship. From the perspective of the frisked child, the experience of invasive searches does not rely upon the specific intent of the official conducting the search. A formerly incarcerated woman encapsulated the violation of rights inherent in searches:

> How can they walk in there, rip my clothes and say "Its [sic] okay, I was doing my job; it was professional." Maybe if the tables were turned they wouldn't think so, but the tables aren't. I don't know how any man can do that to any woman and say it was their job. As far as I know, its [sic] a crime. A crime was committed there. And if something like that happened down the street, that's a crime. If you go in an apartment and rip girl's clothes off, that's a crime. That's sexual assault.[161]

And when you do it to a child, it is the sexual assault of a child.

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[158] *See* Neal Kumar Katyal, Note, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 799–801 (1993); Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 123 (2004) ("Significantly, research shows a similar high rate of sexual assault in indigenous populations around the world, which lends credence to the theory that there may be a strong correlation between colonization and sexual violence.").

[159] *See* Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1476 (2012) (describing how incarceration and foster care work in tandem to excessively punish Black mothers).

[160] Roberts, *supra* note 50, at 120 (examining how the Constitution may provide a basis for the abolition of the American criminal legal system).

[161] McCulloch & George, *supra* note 5, at 109 (quoting LOUISE ARBOR, COMMISSION OF INQUIRY INTO CERTAIN EVENTS AT THE PRISON FOR WOMEN IN KINGSTON 75 (1996)).

III. "CHILDREN ARE DIFFERENT" JURISPRUDENCE

"[Y]outh . . . is a time and condition of life when a person may be most susceptible to influence and to psychological damage."

—Justice Lewis F. Powell Jr.[162]

Courts should consider empirical evidence on incarcerated girls in evaluating their constitutional claims, much like the Supreme Court has done in other contexts.[163] The Supreme Court's Eighth Amendment jurisprudence provides support for the use of empirical research in evaluating the incarceration and punishment of children.[164] While this jurisprudence pertains to all children, not just girls, it provides an opening for introducing additional empirical research in cases that must examine the incarceration of girls in the Eighth Amendment, Fourth Amendment, and other contexts.[165] This jurisprudence reflects a developmental approach in evaluating the treatment of children in the legal system.[166] The developmental approach to children recognizes two basic facts about them: (1) young people are less mentally culpable than adults because their brains are not fully developed, and (2) young people are impressionable and able to reform their lives to improve future outcomes.[167] The acknowledgement that children are different merely recognizes what is apparent from decades of neuroscience research and the everyday experiences of parents. Children are more impulsive, more likely to make bad decisions, and more impressionable than adults.[168] The neuroscience literature suggests that brains do not fully

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[162] Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).

[163] *See* Borgmann, *supra* note 14, at 1094–95 & n.319 (discussing the Court's interest in "substantial evidence" and "empirical example[s]").

[164] Marquardt, *supra* note 30, at 760.

[165] Borgmann, *supra* note 14, at 1067–68 (explaining that constitutional arguments against bodily intrusions may implicate the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments).

[166] *See* Marquardt, *supra* note 30, at 760 ("The Court's *Roper* trilogy—*Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*—used the latest research on adolescents' cognitive development to decide the constitutionality of penal sentences. These cases are noteworthy for their striking break from precedent in which the Court had previously stated it would only rely on 'objective' evidence, which primarily consisted of federal and state laws or Eighth Amendment analyses of demonstrated behavior of prosecutors and juries.").

[167] *See* Pollastro, *supra* note 8, at 293 ("The Court [in *Roper v. Simmons*] used these findings to identify three characteristics that differentiated juveniles from adults: (1) immaturity and underdeveloped awareness of responsibility, manifesting itself in propensities to engage in reckless behavior and impetuous and ill-considered actions and decisions; (2) a vulnerability and susceptibility to negative influences and outside pressures, including peer pressure; and (3) less character development than adults with more transitory, and fewer fixed, personality traits which enhance a minor's amenability to rehabilitation." (citing *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005)).

[168] *See id.*

develop until young people reach the age of twenty-five.[169] "Of particular importance for juvenile justice, research demonstrated that some level of delinquent behavior is normal, particularly for boys, and that the vast majority of teens 'age out' of such offending."[170] Children are uniquely capable of change.[171]

Recognizing this empirical evidence, the Supreme Court acknowledged in *Eddings v. Oklahoma* the sensitivity of youth in holding that children should not be subjected to the most severe forms of punishment:

> [Y]outh 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. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults.[172]

The Supreme Court discussed these facts in the context of the Eighth Amendment, but they are relevant in other contexts.

In *Roper v. Simmons*, Christopher Simmons was convicted of murder and sentenced to death for a crime that occurred when he was seventeen years old.[173] The Supreme Court considered the role of Simmons's youth in assessing the appropriateness of the death penalty for children.[174] The majority opinion acknowledged that

> general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."[175]

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[169] *See Understanding the Teen Brain*, UNIV. OF ROCHESTER MED. CTR., https://www.urmc.rochester.edu/encyclopedia/content.aspx?ContentTypeID=1&ContentID=3051 [https://perma.cc/Z9XH-U6J2] ("The rational part of a teen's brain isn't fully developed and won't be until age 25 or so.").

[170] Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 97 (2009).

[171] *See id.*

[172] 455 U.S. 104, 115–16 (1982) (quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979)).

[173] 543 U.S. 551, 556 (2005).

[174] *See id.* at 569–70.

[175] *Id.* at 569 (internal alteration omitted) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

The Court cited several empirical studies in reaching these conclusions.[176] While the case was concerned with youth as a mitigating factor in sentencing, the evidence about the malleability and vulnerability of youth is relevant in other contexts.

In 2010, the Supreme Court reiterated its position on youth, stating that "[n]o recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles."[177] In *Graham v. Florida*, the Court held that the sentence of life imprisonment without the possibility of parole was unconstitutional for a child because the "penalty forswears altogether the rehabilitative ideal. By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society."[178] In other words, the practice was at odds with the purpose of juvenile incarceration, which should be primarily concerned with providing rehabilitation.[179] The Court emphasized the importance of rehabilitation for young people who commit crimes: "For juvenile offenders, who are most in need of and receptive to rehabilitation, . . . the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence [of mandatory life without parole] all the more evident."[180]

Likewise, the Supreme Court recognized that "children are constitutionally different than adults" and have a "heightened capacity for change" in *Miller v. Alabama*.[181] In that case, fourteen-year-old Evan Miller was convicted of murder and sentenced to a mandatory term of life

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[176] *See id.* at 569–70 ("It has been noted that 'adolescents are overrepresented statistically in virtually every category of reckless behavior.' . . . In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. . . . The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . . This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. . . . The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." (first citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1014 (2003); then citing ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS 128 (1968); and then citing Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 339 (1992))).

[177] Graham v. Florida, 560 U.S. 48, 68 (2010).

[178] *Id.* at 74.

[179] *See id.*

[180] *Id.* (internal citation omitted).

[181] 567 U.S. 460, 461, 479 (2012).

imprisonment without the possibility of parole.[182] The Court referenced its prior findings regarding the nature of children. These findings

> rested not only on common sense—on what "any parent knows"—but on science and social science as well. . . . "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"—for example, in "parts of the brain involved in behavior control." We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development occurs, his "deficiencies will be reformed."[183]

The Court's commonsense findings in *Eddings*, *Roper*, *Graham*, and *Miller* that children are different from adults are instructive outside the Eighth Amendment context, and the Supreme Court has already cited these cases in evaluating whether the interrogation of a child violates the Fifth Amendment.[184] In *J.D.B. v. North Carolina*, the Supreme Court examined whether a child's age is relevant in assessing whether the child was in police custody.[185] J.D.B. was a thirteen-year-old who police interrogated for one hour about a burglary without administering the warnings required by *Miranda v. Arizona*.[186] In this case, the Court reiterated the relevance of age in evaluating constitutional claims involving children:

> A child's age is far "more than a chronological fact." It is a fact that "generates commonsense conclusions about behavior and perception." Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.
>
> Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children "generally are less mature and responsible than adults"; that they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them"; [and] that they "are more vulnerable or susceptible to . . . outside pressures"

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[182] *Id.* at 465; *see also* Montgomery v. Louisiana, 577 U.S. 190, 208, 212–13 (2016) (holding that "*Miller* announced a substantive rule of constitutional law" retroactively prohibiting life sentences without parole for "juvenile offenders whose crimes reflect the transient immaturity of youth").

[183] *Miller*, 567 U.S. at 471–72 (citations omitted) (first quoting Roper v. Simmons, 543 U.S. 551, 569 (2005); and then quoting *Graham*, 560 U.S. at 68–69).

[184] J.D.B. v. North Carolina, 564 U.S. 261, 272–74 (2011); *see also* Megan Annitto, *Consent Searches of Minors*, 38 N.Y.U. REV. L. & SOC. CHANGE 1, 18 (2014) ("The [Supreme] Court's view of age outside of the Fourth Amendment context and its recent cases discussing the importance of age, therefore, are informative.").

[185] 564 U.S. at 264.

[186] *Id.* at 265.

> than adults. . . . [*Graham* found] no reason to "reconsider" these observations about the common "nature of juveniles."[187]

The Supreme Court held that the lower courts should have considered J.D.B.'s age when evaluating whether he was in police custody in violation of *Miranda*.[188] The Court noted that "[our] history [is] 'replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults."[189] These cases highlight the developmental differences between adults and children as reflected in the empirical research. Courts should build upon the insights in this jurisprudence and consider the empirical research that is specific to girls' pathways to incarceration.

IV. THE UNCONSTITUTIONALITY OF UNWARRANTED SEARCHES OF CHILDREN

This Part examines the constitutional problems that occur from repeatedly stripping girls naked and touching them for their own "protection." The policy of engaging in blanket and routine sexual assaults of girls raises Fourth Amendment concerns about the reasonableness of these searches, Thirteenth Amendment concerns about exercising involuntary dominion over these girls' bodies, and Eighth Amendment concerns about the punitive nature of the practice. The existing constitutional doctrine fails to recognize the full extent of the harms of searches, especially as applied to survivors of sexual assault.

A. Fourth Amendment: Unreasonable Searches

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[190] It prohibits government actors from engaging in unreasonable searches and seizures.[191] Law enforcement officers generally require probable cause before conducting a full search, or reasonable suspicion to conduct a frisk or search of a suspect's outer clothing and body.[192] Fourth Amendment doctrine aims to protect everyone's reasonable expectation of

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[187] *Id.* at 272 (citations omitted) (first quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982); then quoting Yarborough v. Alvarado, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting); then quoting *Eddings*, 455 U.S. at 115–16; then quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979); then quoting *Roper*, 543 U.S. at 569; and then quoting *Graham*, 560 U.S. at 68).

[188] *J.D.B.*, 564 U.S. at 277.

[189] *Id.* at 262 (quoting *Eddings*, 455 U.S. at 115).

[190] U.S. CONST. amend. IV.

[191] *Id.*

[192] *See* Terry v. Ohio, 392 U.S. 1, 19–20, 27, 30 (1968).

privacy and physical dominion over their persons and property.[193] However, the Supreme Court has created notable exceptions. For example, the Court has applied the "special needs" doctrine to the school setting, allowing officers and administrators to search schoolchildren where there are "reasonable grounds" to suspect that the child has violated the law or school code.[194] These school searches cannot be excessive in light of the characteristics of the student. For example, the Supreme Court has held that the strip search of a girl for a minor violation is unconstitutional.[195] There must be individualized suspicion that the child is violating school rules or the law.[196]

By contrast, in the penological context of adult jails and prisons, the Court has permitted the strip search of arrestees, even for minor offenses.[197] The Court has deferred to the interests of jail officials under the penological interests doctrine and only requires that prison and jail officials articulate a penological interest for the search procedure.[198] Courts must uphold the search procedure unless there is "substantial evidence showing their policies are . . . unnecessary."[199] The courts that have considered the constitutionality of various search policies in the juvenile detention context have tended to analyze the constitutionality of the searches under the penological interests doctrine that focuses on incarcerated adults.[200] However, these cases do not fully consider whether cases in the juvenile detention context are more analogous to school searches because of the goals and purposes of juvenile detention, rather than searches in adult prisons and jails. This Section examines this jurisprudence.

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193 *See* Katz v. United States, 389 U.S. 347, 357 (1967) (establishing the reasonable-expectation-of-privacy test); United States v. Jones, 565 U.S. 400, 406–07 (2012) (holding that the trespass remained viable post-*Katz*).

194 *See* New Jersey v. T.L.O., 469 U.S. 325, 347, 351 (1985).

195 *See* Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 375, 379 (2009) (holding unconstitutional the strip search of a girl suspected of bringing ibuprofen into school).

196 *Id.* at 370.

197 *See* Bell v. Wolfish, 441 U.S. 520, 559–60 (1979).

198 *Id.*; *see also* Turner v. Safley, 482 U.S. 78, 91 (1987) (articulating the "penological interests" doctrine).

199 *See* Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 323 (2012).

200 *See Bell*, 441 U.S. at 559–60; J.B. *ex rel*. Benjamin v. Fassnacht, 801 F.3d 336, 340–44 (3d Cir. 2015).

1. Fourth Amendment: When Can a Father Strip His Child?

In general, searches and seizures of children within the government's supervision are held to a different standard than those of adults.[201] In the context of schools, the Supreme Court held the search of schoolchildren fits within the special needs exception to the Fourth Amendment.[202] In *New Jersey v. T.L.O.*, the Court held that school administrators need reasonable grounds that a child is guilty of breaking the law or violating school rules to justify the search of schoolchildren under the special needs exception to the Fourth Amendment.[203] Applying the special needs test, the Supreme Court reviewed the constitutionality of a strip search that occurred in a school in *Safford United School District No. 1 v. Redding*.[204] School administrators accused Savana Redding of bringing prescription-strength ibuprofen onto school grounds in violation of school policies.[205] Redding denied that she possessed contraband, and school officials instructed her to strip to her underwear in order for them to locate the drug, but they found nothing.[206] Redding challenged the constitutionality of this strip search under the Fourth Amendment, and the Supreme Court held that the search was unconstitutional.[207] The Court held that a search of a student can only be reasonable under the Fourth Amendment "when it is 'not excessively intrusive in light of the age and sex of the student and the nature of the infraction.'"[208] While government officials may search students under a standard that is lesser than the probable cause that is ordinarily required for searches, those searches cannot be excessively intrusive.[209]

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[201] *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) ("[T]he accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in school does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law."); Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 370–71, 374–75 (2009).

[202] *T.L.O.*, 469 U.S. at 332 n.2, 341–42 ("[T]he special needs of the school environment require assessment of the legality of such searches against a standard less exacting than that of probable cause.").

[203] *Id.* at 341–42 ("Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its 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 the nature of the infraction.").

[204] *See* 557 U.S. at 370–71, 374.

[205] *Id.* at 368.

[206] *Id.* at 369.

[207] *Id.* at 379.

[208] *Id.* at 375 (quoting *T.L.O.*, 469 U.S. at 342).

[209] *Id.* at 370.

Gender played an important role in the Court's decision in *Redding*. Justice Ruth Bader Ginsburg discussed the deliberations for the case during a presentation at Amherst College:

> In the argument before the court, the other justices compared the girl's situation to boys undressing in the locker room before gym classes, which was, according to one of my colleagues, "no big deal" . . . . That's when I stopped that line of questioning. I said a 13-year-old girl is not the same as a 13-year-old boy. She is very vulnerable at that time in her life, very conscious of changes in her body, humiliated by being forced to undress and be strip-searched. My effort was to get my colleagues to think about people they knew and cared for. Instead of joking about the boys in the locker room, think of how they would like their daughters and granddaughters to be treated.[210]

Justice Ginsburg's remarks highlight how the vulnerability and developing bodies of young girls make exposure to strangers or school officials especially invasive. Moreover, they highlight the insensitivity of government actors to these vulnerabilities at the highest levels of government and jurisprudence.

Nevertheless, searches within juvenile detention facilities are different than school searches in that they take place within a correctional facility. These searches often occur without individualized suspicion and under blanket policies that apply to all young people who enter the facilities.[211]

The Supreme Court explored the validity of body-cavity searches, albeit in the adult context, in its decision in *Bell v. Wolfish*.[212] In that case, the Court provided guidance for evaluating searches within adult correctional facilities, which are presumably focused on retribution, incapacitation, deterrence, and rehabilitation.[213] The Court balanced safety concerns against bodily integrity, noting that while "[a] detention facility is a unique place fraught with serious security dangers,"[214] there remain limits to body-cavity searches in adult jails given their potential for abuse.

> We do not underestimate the degree to which these searches may invade the personal privacy of inmates. Nor do we doubt, as the District Court noted, that on occasion a security guard may conduct the search in an abusive fashion. Such

[210] Katharine Whittemore, *Justice Ginsburg, Up Close*, AMHERST COLL. (Oct. 7, 2019), https://www.amherst.edu/news/news_releases/2019/10-2019/justice-ginsburg-up-close [https://perma.cc/4JLP-4BJ6].

[211] *See* HUM. RTS. WATCH & ACLU, *supra* note †, at 60.

[212] 441 U.S. 520, 523, 528 (1979).

[213] *See id.* at 559–60.

[214] *Id.* at 559.

> abuse cannot be condoned. The searches must be conducted in a reasonable manner.[215]

The Court has since interpreted this case as providing correctional officials with wide discretion in executing searches of people who are incarcerated as long there is a penological justification for the search.[216]

The Supreme Court examined the constitutionality of blanket strip-search policies in adult jails in *Florence v. Board of Chosen Freeholders*.[217] Albert Florence was arrested after a New Jersey state trooper stopped him for a traffic offense.[218] He was arrested for having an outstanding warrant for failing to pay a ticket, despite having paid the ticket.[219] Following his arrest, he was strip searched upon entry into jail for this less serious offense.[220] Florence challenged the constitutionality of the strip search under the Fourth Amendment.[221] In holding the policy constitutional, the Court emphasized the safety concerns that underlined the jail's policy and the reduced expectation of privacy that incarcerated people have.[222] The Court indicated "that deference must be given to the officials in charge of the jail."[223] The Court stated that courts "must defer to the judgment of correctional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of jail security."[224] The Court did recognize that there may be legitimate concerns about the invasiveness of searches that involve the physical touching of detainees.[225]

Only four circuit courts have considered the constitutionality of strip searches within juvenile detention facilities. The Second Circuit upheld a blanket strip-search policy that allowed for the strip search of all children upon entry into a Connecticut juvenile detention facility in *N.G. v. Connecticut*.[226] The parents of two girls who were thirteen and fourteen years old when they were strip searched upon their entry to a juvenile detention facility challenged the constitutionality of the strip searches.[227] The court considered the invasiveness of strip searches, the penological interests in

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[215] *Id.* at 560.

[216] *See* Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 326–27 (2012).

[217] *Id.* at 325–26.

[218] *Id.* at 323.

[219] *Id.*

[220] *Id.* at 324.

[221] *Id.*

[222] *See id.* at 330, 334, 339–40.

[223] *Id.* at 330.

[224] *Id.* at 322–23.

[225] *Id.* at 339.

[226] *See* 382 F.3d 225, 237 (2d Cir. 2004).

[227] *Id.* at 228–30.

conducting the searches to maintain safety, and the youth of the girls involved in the case.[228] The court upheld the blanket strip search of girls admitted into the juvenile detention facility but held that subsequent searches that occurred after they were under the continuous care and monitoring of the facility were unconstitutional absent "unavoidable circumstances."[229] The court recognized that "the adverse psychological effect of a strip search is likely to be more severe upon a child than an adult, especially a child who has been the victim of sexual abuse."[230]

In *J.B. ex rel. Benjamin v. Fassnacht*, the Third Circuit examined the constitutionality of blanket strip-search policies in juvenile detention facilities in Pennsylvania.[231] J.B. was charged with threatening another child and ordered to report for detention.[232] The juvenile detention facility had a strip-search policy that required J.B. to physically expose his naked body to correctional officers prior to entering the detention center.[233] J.B. and his parents challenged the constitutionality of this strip-search policy.[234] The court relied heavily on the Supreme Court's decision in *Florence* in holding the strip-search policy constitutional.[235] While the court noted that young people are especially vulnerable, the court did not cite any of the Eighth Amendment cases that discuss how the differences between adults and children may warrant different approaches when considering the reasonableness of searches that involve children. Instead, the court referred to children in detention as "prisoners," and stated, "'the prisoner and the schoolchild stand in wholly different circumstances.' This is so because 'the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells.'"[236] However, children in detention are not prisoners.[237] They are children who have been adjudicated as delinquents, and there is an explicit concern for rehabilitation where children are concerned.[238]

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[228] *Id.* at 236–37.

[229] *Id.* at 233–34, 237.

[230] *Id.* at 232.

[231] *See* 801 F.3d 336, 344 (3d Cir. 2015).

[232] *Id.* at 338.

[233] *Id.*

[234] *See id.*

[235] *Id.* at 347 ("*Florence* guides our decision to uphold LYIC's strip search policy of all juvenile detainees admitted to general population at LYIC."); *see also* Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 326–27, 330 (2012) (upholding a blanket strip-search policy).

[236] *See J.B.*, 801 F.3d at 344 (quoting New Jersey v. T.L.O., 469 U.S. 325, 338 (1985)).

[237] *See* Beyer et al., *supra* note 11, at 54–56 (distinguishing juvenile detainees from adult prisoners).

[238] *See id.* at 54 (explaining that "the stated goals of the juvenile justice system" are "to provide appropriate rehabilitation and treatment").

In *Smook v. Minnehaha County*, sixteen-year-old Jodie Smook challenged the strip-search policy of the Minnehaha, South Dakota County Juvenile Detention Center that required her to strip down to her underwear for a visual inspection upon entry into the facility.[239] The Eighth Circuit upheld the strip-search policy, reasoning that it was for the searched girls' security: "Where the state is exercising some legitimate custodial authority over children, its responsibility to act in the place of parents (*in loco parentis*) obliges it to take special care to protect those in its charge, and that protection must be concerned with dangers from others and self-inflicted harm."[240] The court further noted that strip searches can expose evidence of sexual abuse and neglect.[241] Curiously, the court spent little time considering that the strip search itself was a form of sexual abuse or child neglect.

The most recent federal circuit court case that examines the constitutionality of blanket strip-search policies in juvenile facilities is *Mabry v. Lee County*.[242] In that case, the Fifth Circuit upheld a blanket strip-search policy that subjected a twelve-year-old to a full body-cavity search and a strip search.[243] The court relied on *Florence* and *J.B.* in holding that the petitioner had an obligation "to enter evidence into the record below making a substantial showing that the Center's search policy is an exaggerated or otherwise irrational response to the problem of Center security."[244] While the petitioner did not present evidence that the policy was exaggerated, the Court noted:

> [T]he County has given no explanation for the Center's blanket policy of placing all incoming juvenile pretrial detainees into its general population as a default matter, absent some special indication from the Youth Court to the contrary. Indeed, at no point in its brief does the County point to *any evidence whatsoever* legitimating *any* components of the Center's intake procedures, including the search policy.[245]

The court nevertheless upheld the blanket strip-search policy as reasonable.

These cases demonstrate that courts have been unwilling to adopt many of the insights about children from the Fourth Amendment context when

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[239] *See* 457 F.3d 806, 811 (8th Cir. 2006).

[240] *Id.* (quoting N.G. v. Connecticut, 382 F.3d 225, 232 (2d Cir. 2004)).

[241] *Id.* ("[A] strip search may 'disclose evidence of abuse that occurred in the home, and awareness of such abuse can assist juvenile authorities in structuring an appropriate plan of care.'" (quoting *N.G.*, 382 F.3d at 236)).

[242] *See* 849 F.3d 232 (5th Cir. 2017).

[243] *Id.* at 233–34.

[244] *See id.* at 238–39 (citing Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 328 (2012), and J.B. *ex rel*. Benjamin v. Fassnacht, 801 F.3d 336, 343 (3d Cir. 2015)).

[245] *Id.* at 238–39.

evaluating strip searches of detained children. These courts have afforded juvenile detention facilities substantial deference, which is problematic because there should be special considerations when evaluating the search of children.[246] There are obvious differences between children and adults, between juvenile and adult incarceration, and between juvenile and adult adjudication, including the vulnerability of the populations, the goals of the incarceration, and the reasonableness of correctional policies in light of the harm that may result from excessive searches.[247] The courts did not examine the differences between juvenile detention facilities, which have a primary goal of rehabilitation, and adult detention facilities, which further the criminal legal system's stated goals of deterrence, retributivism, incapacitation, and rehabilitation.[248] None of the cases cited any of the cases from the *Miller* trilogy. One case referred to the children as prisoners and conducted no analysis of how children who are incarcerated are different from adults.[249] Moreover, while courts do not appear to distinguish between searches based on gender identity, gender identity is a relevant factor in assessing the reasonableness of the search.

2. Reasonableness Under the Fourth Amendment

A history of trauma is a relevant consideration in evaluating the reasonableness of searching a group. One study explains, "Youth with prior trauma exposure may be 'triggered' and suffer psychological distress in response to several invasive or coercive practices commonly used in the

[246] *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 332 n.2, 341–42 (1985) (outlining the "special needs" test: "Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its 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 the nature of the infraction.").

[247] *See* Martin R. Gardner, *Youthful Offenders and the Eighth Amendment Right to Rehabilitation: Limitations on the Punishment of Juveniles*, 83 TENN. L. REV. 455, 482 (2016) (stating that *Roper* distinguished juveniles from adults in the following ways: "(1) immaturity and underdeveloped awareness of responsibility, manifesting itself in propensities to engage in reckless behavior and impetuous and ill-considered actions and decisions; (2) a vulnerability and susceptibility to negative influences and outside pressures, including peer pressure; and (3) less character development than adults with more transitory, and fewer fixed, personality traits which enhance a minor's amenability to rehabilitation" (citing Roper v. Simmons, 543 U.S. 551, 569–70 (2005)).

[248] *See* I. India Thusi, *Harm, Sex, and Consequences*, 2019 UTAH L. REV. 159, 170 ("[A] utilitarian approach to [adult] criminal punishment considers the goals of deterrence, incapacitation, and rehabilitation. However, rehabilitation has become a distant third in the utilitarian equation." (footnote omitted)); Beyer et al., *supra* note 11, at 54 (explaining that the "stated goals of the juvenile justice system" are "rehabilitation and treatment").

[249] *See J.B.*, 801 F.3d at 344 ("We reiterate, however, that 'the prisoner and the schoolchild stand in wholly different circumstances.' This is so because 'the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells.'" (quoting *T.L.O.*, 469 U.S. at 338)).

justice system, including strip-searches or pat downs . . . ."[250] Another study found that there was a direct connection between young people's experience while incarcerated and their postrelease outcomes.[251] "[A]buse during incarceration is related to poor postrelease social and emotional functioning. Specifically, more frequent reports of abuse exposure during incarceration are positively associated with posttraumatic stress reactions, depression symptoms, and continued criminal involvement postrelease."[252]

The connection between trauma prior to incarceration and trauma while incarcerated is particularly troubling when evaluating the impact of strip searches. An Australian[253] review of strip searches of women in prison notes:

> In initiating the review the Commission was mindful of the extensive body of research documentation confirming that the majority of female prisoners have themselves been victims of sexual abuse and violence in their childhood years and/or adult relationships. It was considered for such women the prison experience of strip-searching could prove particularly traumatic and be seen as an institutional perpetration of abuse.[254]

One small study of formerly incarcerated women suggested that "strip searching mirrors the abusive nature of women's lives prior to becoming incarcerated and functions to (re)traumatize women. The women's unique life histories and circumstances, particularly of sexual victimization, were rendered unimportant and were not prioritized . . . ."[255] Another study on strip searches states, "Strip searches are 'a serious intrusion upon personal rights' and are 'demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive . . . .' 'Children are especially susceptible to possible traumas from strip searches,' even more so when they are already victims of sexual abuse."[256] After completing a

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[250] *See* Christopher Edward Branson, Carly Lyn Baetz, Sarah McCue Horwitz & Kimberly Eaton Hoagwood, *Trauma-Informed Juvenile Justice Systems: A Systematic Review of Definitions and Core Components*, 9 PSYCH. TRAUMA: THEORY, RSCH., PRAC., & POL'Y 635, 636 (2017).

[251] *See* Carly B. Dierkhising, Andrea Lane & Misaki N. Natsuaki, *Victims Behind Bars: A Preliminary Study of Abuse During Juvenile Incarceration and Post-Release Social and Emotional Functioning*, 20 PSYCH., PUB. POL'Y & L. 181, 181 (2014).

[252] *Id.* at 186.

[253] There are limited studies that specifically examine strip searches in the United States. Thus, studies from other countries may provide persuasive sources for understanding how women and girls experience strip searches in the United States.

[254] *See* McCulloch & George, *supra* note 5, at 112–13.

[255] *See* Jessica Hutchison, *"Bend Over and Spread Your Butt Cheeks": Access to Justice for Women Strip Searched in Prison*, 8 ANN. REV. INTERDISC. JUST. RSCH. 65, 83 (2019).

[256] Autumn R. Ascano & Joseph A. Meader, *Juridogenic Harm and Adverse Childhood Experiences*, 62 S.D. L. REV. 797, 801 (2017) (first quoting Justice v. City of Peachtree City, 961 F.2d 188, 192 (11th Cir. 1992); then quoting Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983); and then

comprehensive review of strip-search policies in Australian women's prison, the Anti-Discrimination Commission in Queensland, Australia found:

> [S]trip-searching diminished their self-esteem as human beings and greatly emphasized feelings of vulnerability and worthlessness. Strip-searching can greatly undermine best attempts being made by prison authorities to rehabilitate women prisoners, through programs and counselling to rebuild self-esteem, cognitive and assertive skills.[257]

The Court should consider the evidence and potential of trauma when examining the reasonableness of a search under the Fourth Amendment. The practice of engaging in routine strip searches of girls is contrary to treating them with dignity. "The sexual coercion implicit in prison strip searches is experienced in the context of the violence and sexual coercion that women prisoners experience in the community."[258] The experience of strip searches is heightened when dealing with children because their brains are still developing and they remain vulnerable to outside influences.[259] The goal should be to use this susceptibility to change to the children's benefit, not their detriment.

While circuit courts have generally upheld strip-search policies in the juvenile detention facilities,[260] several courts have held strip searches in women detention facilities unconstitutional because they were unreasonable under the Fourth Amendment. In *Gary v. Sheahan*, women challenged the policy of conducting group strip searches of women as they were returning to jail.[261] A woman was forced to strip naked in a group with "menstrual blood dribbling down her legs [as she] performed a series of humiliating tasks. . . . [T]he women opened their mouths, lifted their breasts, and ran their hands through their hair."[262] Chicago officials claimed that the group

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quoting N.G. *ex rel* S.C. v. Connecticut, 382 F.3d 225, 239 (2d Cir. 2004) (Sotomayor, J., dissenting)); *see also* OFF. OF JUV. JUST. & DELINQ. PREVENTION, GUIDING PRINCIPLES FOR PROMISING FEMALE PROGRAMMING: AN INVENTORY OF BEST PRACTICES (1998), https://ojjdp.ojp.gov/library/publications/guiding-principles-promising-female-programming-inventory-best-practices [https://perma.cc/6EB5-2HK7] ("Because a history of sexual and physical abuse is widespread among girl offenders, . . . girls in secure residential facilities may feel revictimized if asked to submit to strip searches . . . .").

[257] QUEENSLAND OMBUDSMAN, THE STRIP SEARCHING OF FEMALE PRISONERS REPORT: AN INVESTIGATION INTO THE STRIP SEARCH PRACTICES AT TOWNSVILLE WOMEN'S CORRECTIONAL CENTRE 6 (2014), https://www.ombudsman.qld.gov.au/ArticleDocuments/239/The_strip_searching_of_female_prisioners_report.pdf.aspx?Embed=Y [https://perma.cc/GB7J-G6EK].

[258] *See* McCulloch & George, *supra* note 5, at 113.

[259] *See supra* Part III.

[260] *See supra* Section IV.A.1.

[261] No. 96 C 7294, 1998 WL 547116, at *1–2 (N.D. Ill. Aug. 20, 1998).

[262] Tori Marlan, *Couldn't We Do This in Private?*, CHI. READER (Mar. 22, 2001), https://www.chicagoreader.com/chicago/couldnt-we-do-this-in-private/content?oid=904923 [https://perma.cc/B7DB-W6HL].

strip searches were necessary given the volume of women being processed.[263] The trial court granted the plaintiffs' motion for summary judgment.[264] The court held that officials must "have a reasonable suspicion that the plaintiff class member is carrying or concealing a weapon or contraband" before conducting a strip search.[265]

In *Amador v. Baca*, women challenged the strip-search practices of the Los Angeles County Sheriff's Office.[266] Officers from the sheriff's office forced women to strip naked and in large groups.[267] Women were instructed to remove tampons and menstrual pads and forced to stand in uncomfortable positions with blood dripping down their legs.[268] This case settled in 2020.[269] These cases illustrate the gender implications of invasive searches. Women were frequently forced to expose their menstruation as law enforcement officers inspected their naked bodies for their safety.

International cases provide additional support for finding invasive searches unreasonable. The Canadian Supreme Court has considered the appropriateness of state-sanctioned strip searches. In *R. v. Golden*, the Canadian Supreme Court held a strip search of an arrestee unconstitutional. The court stated:

> [I]n our view it is unquestionable that [strip searches] represent a significant invasion of privacy and are often a humiliating, degrading and traumatic experience for individuals subject to them. . . . Strip searches are thus inherently humiliating and degrading for detainees regardless of the manner in which they are carried out and for this reason they cannot be carried out simply as a matter of routine policy . . . . Women and minorities in particular may have a real fear of strip searches and may experience such a search as equivalent to a sexual assault. The psychological effects of strip searches may also be particularly traumatic for individuals who have previously been subject to abuse.[270]

The Canadian Supreme Court recognized the severity of the intrusion involved in all strip searches. But as Professor Anne Bowen Poulin has observed, "If rehabilitation remains a goal of the juvenile justice system, programs for adjudicated delinquents should adjust to prepare girls . . . ."[271]

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263 *See id.*

264 *Gary*, 1998 WL 547116, at *1.

265 *Id.* at *13.

266 No. CV 10–01649–SVW–JEM, 2017 WL 9472901, at *1 (C.D. Cal. June 7, 2017).

267 *Id.*

268 *Id.* at *2; Second Amended Class Action Complaint at 6, Amador v. Baca, No. 10-cv-01649, 2011 WL 994938 (Jan. 28, 2011).

269 Amador v. Baca, 2020 WL 5628938, at *1 (C.D. Cal. Aug. 11, 2020).

270 [2001] 3 S.C.R. 679, 724, 728–29 (Can.).

271 *See* Poulin, *supra* note 111, at 566.

The purpose of strip searches is less about actual safety and more about exercising dominion and control of unruly girls. A Canadian emergency response team conducted an inquiry into strip searches of women in prisons in Canada and noted:

> The process was intended to terrorize and therefore subdue. There is no doubt that it had the intended effect in this case. It also, unfortunately, had the effect of re-victimizing women who had had traumatic experiences in the past at the hands of men.[272]

In light of how incarcerated girls are likely to experience routine and regular invasive searches as sexual assaults, and the fact that they actually are sexual assaults, these searches are not reasonable under the Fourth Amendment. These searches can easily be limited to instances where there is individualized suspicion or a particularized basis for conducting invasive searches. Moreover, girls are a low-risk population,[273] and some facilities do not conduct invasive searches, suggesting that they are not necessary.[274] Public health researchers Ruta Mazelis and Nina Kammerer recognize that strip searches "tangibly evoke previous violation of person and control."[275] Courts should hold that invasive searches of incarcerated girls are unconstitutional, and policymakers should eliminate blanket, routine, suspicion-less searches of all girls.

Although the Supreme Court has recognized the importance of rehabilitation as a goal for juvenile justice matters, the circuit courts that have considered the constitutionality of blanket strip-search policies have relied upon *Florence*, which was specific to the conditions of admission to adult jails.[276] This reasoning mirrors the racialized policing of children. Black children are treated as adults and viewed as older than their actual age.[277]

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[272] McCulloch & George, *supra* note 5, at 114 (quoting ARBOUR, *supra* note 147, at 88).

[273] *See* Watson & Edelman, *supra* note 16, at 215.

[274] For example, pursuant to a settlement agreement, the Lincoln Hills juvenile detention facility in Wisconsin has eliminated the practice of blanket strip searches. *See* Eighth Report of the Monitor at 1, 46, J.J. v. Litscher, No. 3:17-cv-00047 (W.D. Wis. Jan. 25, 2021).

[275] Nina Kammerer & Ruta Mazelis, Resource Paper: Trauma and Retraumatization 11 (2006) (on file with journal).

[276] *See, e.g.*, Mabry v. Lee County, 849 F.3d 232, 238–39 (5th Cir. 2017) (citing Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 326 (2012)); *see also* Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001, 1028 (2005) (detailing the various challenges to ensuring that children obtain rehabilitative services while incarcerated).

[277] *See* Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCH. 526, 532 (2014) (noting that participants in a study overestimated the age of Black children, particularly when those children were accused of serious crimes).

Yet, the focus on rehabilitation in the juvenile context is clear in the text of the Juvenile Justice and Delinquency Prevention Act.[278] The purpose statement of that law, which is the most comprehensive federal legislation that regulates juvenile delinquency, states the law is intended "to support . . . programs . . . that are trauma informed, reflect the science of adolescent development, and are designed to meet the needs of at-risk youth and youth who come into contact with the justice system."[279] This statement reflects a focus on providing needed resources to children in the system and being responsive to past trauma. The penological goals of adult and juvenile detention are fundamentally different.

B. Thirteenth Amendment: Involuntary Servitude

The Thirteenth Amendment is often forgotten and rarely incorporated into contemporary analyses of civil rights claims.[280] Most civil rights scholarship and activism has focused on the Equal Protection Clause of the Fourteenth Amendment.[281] But the Thirteenth Amendment aims to address the "badges and incidents of slavery,"[282] and the continued acts of dominion over incarcerated girls' bodies implicate its prohibitions. This Section argues that the strip search of the overrepresented BIPOC and queer girls in juvenile detention facilities is an unconstitutional form of involuntary servitude.

1. Involuntary Servitude

Section One of the Thirteenth Amendment states, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[283] In the *Civil Rights Cases*, the Supreme Court recognized that this provision is "self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances," and the Amendment has the effect of "decreeing universal civil and political freedom throughout the United States."[284] While Section Two of the Thirteenth Amendment provides Congress with broad authority

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[278] Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. 93-415 (codified as amended at 34 U.S.C. §§ 11101–11313).

[279] 34 U.S.C. § 11102.

[280] *See* Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 975 (2019) ("[T]he Thirteenth Amendment . . . [is] seemingly invisible to legal scholars who invest in civil rights or social justice scholarship . . . .").

[281] *Id.*; Leah M. Litman, *New Textualism and the Thirteenth Amendment*, 104 CORNELL L. REV. ONLINE 138, 147 (2019).

[282] The Civil Rights Cases, 109 U.S. 3, 20 (1883).

[283] U.S. CONST. amend. XIII, § 1.

[284] 109 U.S. at 20.

to enforce Section One, this Article is primarily concerned with the self-executing portion of the Amendment in Section One.[285]

The Thirteenth Amendment prohibits both slavery and "involuntary servitude."[286] The Oxford English Dictionary defines servitude as "absence of personal freedom."[287] In *United States v. Kozminski*, the Supreme Court expounded on the definition of involuntary servitude and noted that the Thirteenth Amendment "prohibit[s] compulsion through physical coercion."[288] The Court rejected the argument that psychological coercion constituted involuntary servitude in the context of a criminal action that was brought against employers charged with engaging in involuntary servitude.[289] But the Court noted that the Thirteenth Amendment prohibits both physical and legal coercion.[290] Routine and blanket strip searches allow the state to exercise complete dominion over incarcerated girls' bodies. These practices require physical coercion, especially in detention facilities with routine and blanket strip-search policies. They also involve legal coercion in that the girls may be penalized with longer stays if they fail to comply with the searches.[291] They are forced to engage in unwanted conduct and surrender their bodies to the will of the state.

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[285] *See id.* at 10; *see also* Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1113 (2020) ("Legislation established under the Thirteenth Amendment includes prohibitions against racially motivated violence, conspiracies to interfere with civil rights, and discrimination in the sale of property, education, employment, and contracts." (footnotes omitted)); William M. Carter Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1366 (2007) ("[T]here is currently no consistent approach to determining the Thirteenth Amendment's self-executing scope that would comport both with the Amendment's original purposes as well as a vision of the Amendment as having continuing vitality."); Lauren Kares, Note, *The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, 80 CORNELL L. REV. 372, 380 (1995) (challenging the "construction of the Thirteenth Amendment as merely an enumerated power rather than a source of individual freedoms. It is true that *Jones v. Alfred H. Mayer Co.* breathed life into Thirteenth Amendment doctrine by construing liberally Congress' power under the Thirteenth Amendment . . . . However, *Jones*' use of congressional intent as the measure of the Thirteenth Amendment's scope delegated the determination of constitutional rights to the shifting political process. Moreover, *Jones* places so much emphasis on the role of the Amendment's second section in delegating power to Congress that it essentially deprives the first section of any affirmative power.").

[286] U.S. CONST. amend. XIII, § 1. *But see* Robertson v. Baldwin, 165 U.S. 275, 282 (1897) (recognizing "exceptional" cases well-established in the common law at the time of the Thirteenth Amendment, including "the right of parents and guardians to the custody of their minor children or wards").

[287] *Servitude*, OXFORD ENGLISH DICTIONARY (2d. ed. 1989).

[288] 487 U.S. 931, 942 (1988).

[289] *Id.*

[290] *Id.* at 944.

[291] *See* Acoca, *supra* note 114, at 577 (describing threats by male correctional staff to "mess with court dates" if female juvenile detainees want to report strip searches).

The primary exception to the Thirteenth Amendment is for "punishment for crime whereof the party shall have been duly convicted."[292] Girls who have been adjudicated delinquent participate in civil proceedings and often do not receive the same due process protections available at a criminal proceeding.[293] Consequently, they have not been "duly convicted" of crimes within the meaning of the Amendment. The juvenile system serves a different purpose and is not concerned with punishment. Yet, incarcerated girls are completely lacking personal freedom where someone more powerful can visually examine and inspect their naked bodies on a regular basis, without individualized suspicion that they have engaged in any wrongdoing. This is involuntary servitude.

2. The History of Racialized Sexual Subordination

The dominance over girls' bodies is troubling given the history of the Thirteenth Amendment.[294] The Thirteenth Amendment was intended to address the "badges and incidents" of slavery.[295] Sexualized dominion over Black girls' bodies was a core feature of slavery. "Rape and sexual violence were used as weapons of colonization"[296] and slavery. They have been powerful tools for exercising power and dominance over Black and Indigenous female bodies. Enslaved Black women were raped throughout slavery, and their children were their rapists' property.[297] This rape continued after slavery ended. As Professor Teri A. McMurtry-Chubb states, "In the post-Emancipation period and well into the era of Jim Crow, Black women were brutally raped by male members of the Ku Klux Klan as punishment for resisting White authority and as a way for these males to assert White

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[292] U.S. CONST. amend. XIII, § 1.

[293] *See, e.g.*, United States v. Huggins, 467 F.3d 359, 361 (3d Cir. 2006) ("Given the procedures and penalties under the Pennsylvania Juvenile Act, it is clear that an adjudication of delinquency is not the same as an adult conviction. For example, under the Act a child is not given the right to a trial by jury, and he or she does not face the same punishment associated with conviction in an adult court. Such distinctions are constitutionally permissible.").

[294] *See* Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1253 (2012) ("The sexualized violence directed at female prisoners has been well documented. Premised on notions of sexual deviance and violability of prisoners, female prisoners have been subjected to a range of sexual abuses, including vaginal, anal, and oral rape; sexual assault; inappropriate touching during searches; and surveillance by male guards while in various states of undress. Male guards often use their positions of authority or outright physical force to coerce female prisoners into sex." (footnotes omitted)).

[295] U.S. CONST. amend. XIII, § 1; The Civil Rights Cases, 109 U.S. 3, 20 (1883).

[296] *Cf.* McCulloch & George, *supra* note 5, at 107, 114–15 (discussing the colonization of Indigenous people in Australia).

[297] *See* Katyal, *supra* note 158, at 800–01 ("Every man who resides on his plantation may have his harem, and has every inducement of custom, and of pecuniary gain, to tempt him to the common practice." (quoting 2 HARRIET MARTINEAU, SOCIETY IN AMERICA 320 (London, Saunders & Otley 1837)).

patriarchal control."[298] Black girls were forced into reformatories, the predecessors of contemporary juvenile detention facilities, to be corrected when they deviated from the dominant norms.[299] Today, Black and Indigenous girls are disproportionately represented in the juvenile system[300] and subjected to state-sanctioned sexual violence. Many of the girls in the facilities are LGBTQ and gender nonconforming, and they may be engaging self-coping mechanisms that are unfairly prosecuted or may be targeted because they are not heterosexual.[301] There is evidence that corrections officers sexually abuse many incarcerated girls, which is reminiscent of the sexual slavery enslaved girls experienced at the hands of their masters.[302] The unwanted displays of nudity and exposure during strip searches or bodycavity searches, sexual abuse by corrections officials, and inability to refuse without physical or legal consequences exert domination over these girls' bodies.

One study found that there was a connection between the exercise of physical control of incarcerated children and violent victimization:

> Youth's reports of violent victimization varied with their reports that staff physically controlled them by holding them down or using handcuffs or wristlets, a security belt or chains, strip search, pepper spray, or a restraint chair. The more control methods that youth experienced, the greater the likelihood that youth reported being victims of violence.[303]

Consequently, facilities that exercise greater levels of dominion over girls' bodies appear to be more violent. Considering this evidence, repeatedly subjecting BIPOC girls to state domination through their submission to sexual assault by the "father state," and the consequent violent victimization this submission brings, violates these girls' Thirteenth Amendment rights and is a vestige of colonial and slavery practices that dominated the bodies of their ancestors.

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[298] Teri A. McMurtry-Chubb, *#SayHerName #BlackWomensLivesMatter: State Violence in Policing the Black Female Body*, 67 MERCER L. REV. 651, 670 (2016).

[299] *See* Butler, *supra* note 95, at 1386 (discussing the juvenile court and reform institutions' role in sterilizing and committing sexual violence against Black girls).

[300] SENT'G PROJECT, *supra* note 4, at 5.

[301] *See* Belknap & Holsinger, *supra* note 58, at 55 ("Girls (22.4%) were 6 times as likely as boys (3.6%) to identify as bisexual and 3 times (4.6%) as likely as boys (1.6%) to identify as lesbian/gay . . . . With these data, it is difficult to determine whether boys are less likely to report gay or bisexual identities or if it is an identity that places girls, but not boys, at increased risk of marginalization and delinquency. Perhaps lesbian and bisexual girls are more stigmatized as 'masculine' and, thus, 'delinquent' relative to their gay and bisexual male counterparts and heterosexual female counterparts.").

[302] *See* BECK & HUGHES, *supra* note 41, at 8.

[303] NAT'L CTR. FOR JUV. JUST., JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 216 (Melissa Sickmund & Charles Puzzanchera eds., 2014), https://www.ojjdp.gov/ojstatbb/nr2014/downloads/chapter7.pdf [https://perma.cc/X5LE-J5MB].

C. Eighth Amendment: Cruel and Unusual Punishment

Finally, the use of routinized sexual assault to "protect" incarcerated girls from themselves is also cruel and unusual punishment under the Eighth Amendment. The Eighth Amendment prohibits "cruel and unusual punishments" and "the imposition of inherently barbaric punishments."[304] The Supreme Court has indicated that the Eighth Amendment "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ,' against which we must evaluate penal measures."[305] In assessing whether a punishment is cruel and unusual, courts "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[306] "The concept of proportionality is central to the Eighth Amendment," so punishments that are not proportionate to the crime may violate the Eighth Amendment.[307] In evaluating proportionality, the Court has taken two approaches: (1) comparing the individual punishment to the offense and (2) categorically holding that certain classes of punishments are unconstitutional as applied to a class of offenders.[308]

The Court's jurisprudence on juvenile offenders adopts the second analysis in holding certain punishments unconstitutional.[309] The Court also considers the national consensus on the punishment in question as well as international standards and norms pertaining to the punishment.[310] The primary obstacle concerns whether courts would consider confinement to juvenile facilities punishment. While the intent to punish is supposedly absent for juvenile incarceration,[311] placing girls in facilities where they are repeatedly forced to be touched against their will, forced to expose their bodies, and disciplined because they were not good girls seems like punishment. Admittedly, the doctrine has some road to travel before there will likely be strong claims under the Eighth Amendment. Nevertheless, the blanket and routine use of strip searches illustrates a deprivation of bodily autonomy through the regular sexual assault of girls, which is heightened for all children, especially survivors of sexual assault.[312] Courts have recognized

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[304] U.S. CONST. amend. VIII; Graham v. Florida, 560 U.S. 48, 59 (2010).

[305] Estelle v. Gamble, 429 U.S. 97, 102 (1976) (citation omitted) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).

[306] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[307] *Graham*, 560 U.S. at 59.

[308] *See id.* at 59–60.

[309] *Id.* at 61, 74.

[310] *See id.* at 61, 80.

[311] *See supra* Part III.

[312] There are a number of cases that examine when violations of an incarcerated person's bodily integrity amounts to cruel and unusual punishment under the Eighth Amendment. *Cf., e.g.*, Cotts v. Osafo,

that there is sexual assault that violates the Eighth Amendment where detention officials engage in the "unwanted touching" of an incarcerated person.[313]

Courts have already recognized the rights of incarcerated children to be free from abuse. In *Poore v. Glanz*, there was an informal custom in the David L. Moss Criminal Justice Center in Tulsa, Oklahoma in which male officers would enter incarcerated girls' cells alone, and there was an incident in which a male nurse observed an incarcerated girl as she showered.[314] The court affirmed the district court's denial of the sheriff's motion for judgment as a matter of law against the incarcerated girl's claim.[315] In *Vazquez v. County of Kern*, the Ninth Circuit reversed a trial court's grant of summary judgment against the plaintiff, where she alleged that a juvenile detention correctional officer "made sexual comments to her, groomed her for sexual abuse, and looked at her inappropriately while she was showering" in violation of her constitutional rights.[316] The court noted that she had a right to bodily integrity and privacy although she was incarcerated.[317] While not directly involving invasive searches, these cases illustrate that courts have held conditions of confinement that facilitate sexual exploitation unconstitutional. Likewise, practices that subject incarcerated girls to multiple sexual assaults are unconstitutional. And to the extent that these practices are necessary for the administration of juvenile facilities in the United States, the very incarceration of girls is unconstitutional as well.

The international standards on the incarceration of children are relevant in evaluating the Eighth Amendment claim and human rights implications of these practices. The United Nations Convention on the Rights of the Child (CRC) states "[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."[318] It discourages the incarceration of

692 F.3d 564, 565–66 (7th Cir. 2012) (reversing the trial court and remanding the case for further trial proceedings where an incarcerated person asserted that he suffered cruel and unusual punishment when prison staff failed to provide him with medical treatment for his hernia); Large v. Washington Cnty. Det. Ctr., 915 F.2d 1564 (4th Cir. 1990) (reversing the trial court and remanding the case for further trial proceedings where an incarcerated person claimed that prison officials acted with deliberate indifference when they failed to protect him from a prison fight that resulted in his loss of hearing); Melanie Kalmanson, *Innocent Until Born: Why Prisons Should Stop Shackling Pregnant Women to Protect the Child*, 44 FLA. ST. U. L. REV. 851, 870 (2017) (arguing that shackling pregnant women is cruel and unusual punishment).

313 *See* Crawford v. Cuomo, 796 F.3d 252, 258 (2d Cir. 2015) (quoting Washington v. Hively, 695 F.3d 641, 643 (7th Cir. 2012)).

314 724 F. App'x 635, 638, 641 (10th Cir. 2018).

315 *Id.*

316 949 F.3d 1153, 1157–58 (9th Cir. 2020).

317 *Id.* at 1160.

318 G.A. Res. 44/25, Convention on the Rights of the Child, at 171 (Nov. 20, 1989).

children and states that it should only be used "as a measure of last resort and for the shortest appropriate period of time."[319] The CRC further states "[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age."[320] The CRC specifically instructs countries to protect children from sexual exploitation, stating:

> States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.[321]

While the United States is not a signatory to this treaty, this treaty provides standards about the dignity of children that are relevant under the Eighth Amendment.[322]

Considering these international standards and the harmful practices within juvenile detention facilities in the United States, the incarceration of girls should be completely avoided. Girls are stripped as the state routinely sexually assaults them by peering at their naked bodies.[323] This act of domination over private parts of their bodies mimics the power that their past abusers exercised over their bodies. A report from Physicians for Human Rights notes:

> Staff members at [the Centre for Victims of Torture] say that sexual humiliation often leads to symptoms of PTSD and major depression, and that victims often relive the session of humiliation in the form of flashbacks and nightmares long after their detention. . . . Clinicians at the Berlin Center similarly have found that victims of sexual torture often suffer from severe depression, anxiety, depersonalization, dissociative states, complex PTSD, and multiple physical complaints such as chronic headaches, eating disorders, and digestive problems. They also have found that suicides may occur unless a strong religious conviction forbids otherwise.[324]

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[319] *Id.*

[320] *Id.*

[321] *Id.* at 169.

[322] *See* Roper v. Simmons, 543 U.S. 551, 575 (2005) ("[T]he Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'").

[323] *See supra* Section I.C.

[324] PHYSICIANS FOR HUM. RTS., BREAK THEM DOWN: SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE BY US FORCES 60 (2005), https://www.pegc.us/archive/Authorities/PHR_psych_torture_20050501.pdf [https://perma.cc/445F-P5R2] (footnotes omitted).

Incarcerated girls experience routinized humiliation.[325] The fact that the acts have been normalized and are a routine part of entry to detention facilities does not eliminate the sheer barbarity of requiring girls to be sexually assaulted each time they go for a doctor's appointment while incarcerated, or each time they speak to their attorneys while they are detained.[326]

CONCLUSION

Blanket strip-search and invasive-search policies are fundamentally at odds with the state's role in acting in the best interests of children. Given the trauma that often leads to girls' incarceration, practices that are obviously re-traumatizing should be eliminated.[327] The empirical research on girls demonstrates that they are especially vulnerable to government excesses because they are more likely to have a history of sexual abuse, are more likely to attempt suicide, and more likely to be incarcerated for minor offenses because they deviate from social norms to be a "good girl." Girls must endure regular body-cavity searches, strip searches, and invasive pat downs while incarcerated when they go to the doctor, go to the library, visit their attorneys, or go to the dentist. These unwanted searches are sexual assaults that are unreasonable under the Fourth Amendment, involuntary servitude under the Thirteenth Amendment, and cruel and unusual punishment under the Eighth Amendment. It is time to abolish a system that enacts such violence on children.

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[325] *See* Gustafson, *supra* note 135, at 301 (discussing the sociological concept of ceremonial degradation of nondominant group members, whereby "marginalizing a few promotes solidarity among the majority").

[326] *See* DAVIS, *supra* note 5, at 66, 81.

[327] *But see* Amy J. Cohen, *Trauma and the Welfare State: A Genealogy of Prostitution Courts in New York City*, 95 TEX. L. REV. 915, 916–17 (2017) (discussing the role of the criminal justice system in administering social services to vulnerable populations).