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# Custodial Strip Searches of Juveniles: How Safford Informs a New Two-Tiered Standard of Review

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# CUSTODIAL STRIP SEARCHES OF JUVENILES: HOW *SAFFORD* INFORMS A NEW TWO-TIERED STANDARD OF REVIEW

**Abstract:** In its 2009 decision in *Safford Unified School District No. 1 v. Redding*, the U.S. Supreme Court first ruled on the constitutionality of strip searches in public schools. The Court held that the strip search of a middle school girl who had allegedly brought painkillers to school violated the Fourth Amendment's protection against unreasonable searches and seizures. The Court, however, has never addressed the constitutionality of strip searches in juvenile detention centers ("JDCs"). Strip searches in JDCs are particularly troubling because they may exacerbate the already damaging psychological and emotional impact of detention on youth. Although lower courts appear to agree that the standard for such searches should fall between the standards for school searches and prison searches, courts are still confused about the proper standard, leading to broad discretion by JDC officials who conduct searches. This Note applies the reasoning in *Safford* to urge courts to consider the age and sex of the offender as well as the nature of the offense committed when considering the constitutionality of strip searches of juveniles who have committed minor offenses. The Note proposes a two-tiered standard of review, based on the level of offense, for determining whether the strip search of a juvenile in a JDC is unconstitutional.

## INTRODUCTION

In August 1999, sixteen-year-old Jodi Smook was arrested and brought to a juvenile detention facility (a "JDC") for violating local curfew laws.<sup>1</sup> A JDC official asked Smook to strip down to her undergarments in order to search her for drugs and weapons.<sup>2</sup> In 2006, in *Smook v. Minnehaha County*, the U.S. Court of Appeals for the Eighth Circuit upheld this strip search as reasonable under the Fourth Amendment.<sup>3</sup> The court reasoned that the search of Smook was less intrusive than a full strip search—analagizing her nudity to wearing a bathing suit at

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<sup>1</sup> *Smook v. Minnehaha County*, 457 F.3d 806, 808 (8th Cir. 2006).

<sup>2</sup> *Id.* at 808, 811.

<sup>3</sup> *Id.* at 812.

the beach—and was necessary in light of the state’s responsibility to act as a guardian of juveniles in state custody.<sup>4</sup>

In October 2003, four years after Smook’s strip search, a middle school assistant principal called thirteen-year-old Savana Redding into his office due to a report that she had distributed common painkiller pills to other students.<sup>5</sup> School officials asked Redding to strip down to her undergarments in order to search her for pills.<sup>6</sup> In 2009, in *Safford Unified School District No. 1 v. Redding*, the U.S. Supreme Court held this strip search to be impermissible.<sup>7</sup> Justice Souter, writing his final opinion for the Court, emphasized the humiliating nature of the search and refused to equate Redding’s nudity with the exposure involved in changing for gym class.<sup>8</sup>

Schools and JDCs, as represented by *Safford* and *Smook*, are two significant contexts in which courts have applied the Fourth Amendment to juveniles.<sup>9</sup> Yet it is difficult to reconcile the opinions in *Safford* and *Smook* because both cases involved intrusive strip searches of juveniles accused of minor offenses.<sup>10</sup> On one hand, *Smook* is a disappointment to civil liberties advocates because it exposed a wide gap between the Fourth Amendment protections afforded to adults as compared with children.<sup>11</sup> On the other hand, *Safford* is a victory for civil liberties advocates, and for schoolchildren and parents.<sup>12</sup> In the last several dec-

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<sup>4</sup> *Id.* at 811–12.

<sup>5</sup> *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2638, 2642 (2009).

<sup>6</sup> *Id.* at 2638.

<sup>7</sup> *Id.* at 2644.

<sup>8</sup> *Id.* at 2641–42; Press Release, ACLU, Justice Souter Ends a Distinguished Career As U.S. Supreme Court Concludes a Relatively Quiet Term, (June 29, 2009), available at <http://www.aclu.org/organization-news-and-highlights/justice-souter-ends-distinguished-career-us-supreme-court-concludes> (“Justice Souter’s final opinion for the Court was a memorable one.”).

<sup>9</sup> See *Safford*, 129 S. Ct. at 2639–43; *Smook*, 457 F.3d at 812.

<sup>10</sup> See *Safford*, 129 S. Ct. at 2642 (asserting that pills the assistant principal showed to Redding were ibuprofen and naproxen—“common pain relievers equivalent to two Advil, or one Aleve”—and that he must have known these pills posed only a limited threat); *Smook*, 457 F.3d at 808 (noting that the district court included curfew violations in its definition of “minor offenses”).

<sup>11</sup> See Alliance for Justice, *Stripping Justice Bare*, FULL COURT PRESS (Aug. 16, 2006, 10:06 EST), [http://fullcourtpressblog.blogspot.com/2006\\_08\\_01\\_archive.html](http://fullcourtpressblog.blogspot.com/2006_08_01_archive.html) (questioning why the Eighth Circuit allowed officials to conduct suspicionless searches of juveniles like Smook, while adults arrested for low-level offenses are afforded greater Fourth Amendment protection).

<sup>12</sup> See Adam Liptak, *Strip Search of Girl by School Officials Seeking Drugs Was Illegal, Justices Rule*, N.Y. TIMES, June 26, 2009, at A16 (writing that *Safford* attracted national attention from parents who were angry about the intrusiveness of the search, although some parents were also concerned about limiting school officials’ ability to keep their children safe);

ades, juveniles' constitutional rights have been curtailed, with youths held to adult standards of accountability yet denied the constitutional protections received by adults.<sup>13</sup> Thus, the Court's decision in *Safford* may suggest signs of renewed compassion and empathy for juveniles.<sup>14</sup>

The difficulty of reconciling *Safford* with *Smook* results, in part, from the fact that the U.S. Supreme Court has never considered the constitutionality of strip searches of juveniles in JDCs.<sup>15</sup> By contrast, the Court has ruled on two major school search cases—including *Safford*—in the last twenty-five years, establishing a balancing test that weighs a student's privacy rights against the school's security interests.<sup>16</sup> Although this balancing test will not always present a clear-cut resolution to school search cases, the Court has established at least modest Fourth Amendment boundaries for school officials.<sup>17</sup>

Given that the Supreme Court has never established a framework for considering strip searches of juveniles in JDCs,<sup>18</sup> lower courts appear uncertain about what standard and precedent to apply when considering such searches.<sup>19</sup> Moreover, state officials are given substantial

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Press Release, Alliance for Justice, Court Ruling in *Safford v. Redding* Victory for Constitution (June 25, 2009), <http://www.afj.org/press/court-ruling-in-safford.html>; Press Release, ACLU, *supra* note 8 ("The 8–1 ruling in *Redding* was a rare and important victory for students' rights in the Supreme Court."); Frank D. LoMonte, *Safford v. Redding Analysis: High Court Surprises with Some Support for Students' Constitutional Rights*, ACSBLOG, <http://www.acslaw.org/node/13649> (June 25, 2009, 5:32 PM) ("Up to now, however, the Court has treated the Bill of Rights like the good Scotch that gets pulled down off the tippy-top shelf only after the kids have gone to bed.")

<sup>13</sup> See Christopher Smith, Casenote, N.G. ex rel. S.C. v. Connecticut: *The Strip Searches of Two Juveniles and the Need for Individualized Suspicion*, 24 QUINNIPIAC L. REV. 467, 520 (2006); see also Irene Merker Rosenberg, *The Rights of Delinquents in Juvenile Court: Why Not Equal Protection?*, 45 CRIM. L. BULL. 723, 724–25, 738–43 (2009). For example, alleged juvenile delinquents have been denied the right to a jury trial in the juvenile court's adjudicative stage. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971). The Supreme Court also upheld a state statute, under the Due Process Clause, authorizing pretrial detention of accused delinquents based on a finding of "serious risk" that the juvenile may commit an adult crime before the return date. *Schall v. Martin*, 467 U.S. 253, 263, 281 (1984). One year later, the Court held that school officials need not obtain a warrant to search a student, but could search based on a less stringent reasonableness standard. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

<sup>14</sup> See *The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 153, 170 (2009) (positing that, since Justice Ginsberg was the only female justice on the Court and had thus experienced life as a thirteen-year-old female, she empathized with the humiliation Savana Redding felt when she was searched).

<sup>15</sup> See *Smook*, 457 F.3d 806, *cert. denied*, 549 U.S. 1317 (2007).

<sup>16</sup> See *Safford*, 129 S. Ct. at 2639, 2642; *T.L.O.*, 469 U.S. at 341–42.

<sup>17</sup> See *T.L.O.*, 469 U.S. at 341–42.

<sup>18</sup> See *Smook*, 457 F.3d 806, *cert. denied*, 549 U.S. 1317 (2007).

<sup>19</sup> Compare *Justice v. City of Peachtree*, 961 F.2d 188, 190–93 (11th Cir. 1992), with N.G. ex rel. S.C. v. Connecticut, 382 F.3d 225, 236–37 (2d Cir. 2004). In considering the strip searches of youths detained for truancy and loitering in *Justice v. City of Peachtree*, the U.S.

deference to determine when to conduct a juvenile search, and such deference can lead to unbridled discretion and serious privacy invasions.<sup>20</sup> The need for a clear standard is further illuminated by the disparity in the way some courts address strip searches of juveniles as opposed to adults.<sup>21</sup> Some courts will find the search of an adult detained for a minor offense to be impermissible without reasonable suspicion that he or she possessed contraband, but will uphold the strip search of a juvenile detained for a minor offense as constitutional, even in the absence of individualized suspicion.<sup>22</sup> Although youth strip searches are a serious issue in any context, strip searches in JDCs can be particularly damaging because of their potential to exacerbate the already detrimental impact of detention and incarceration on vulnerable youth: even absent the trauma of a strip search, incarceration in crowded juvenile facilities can lead to psychiatric problems, suicidal tendencies, aggressive adult behavior, and poor development of social skills.<sup>23</sup>

This Note proposes that lower courts adopt a two-tiered standard of review for determining the constitutionality of strip searches of juveniles in JDCs that is based upon the level of offense committed by the juvenile.<sup>24</sup> This standard aims to diminish confusion by lower courts, heighten juveniles' privacy rights, and curb discretion by officials who

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Court of Appeals for the Eleventh Circuit applied the balancing test set out by the Supreme Court in *Bell v. Wolfish*, and held detained juveniles to the same "reasonableness" standard as adults—which requires reasonable suspicion that a juvenile lawfully in custody is concealing contraband or weapons in order to conduct a strip search. *Peachtree*, 961 F.2d at 190–93. See generally *Bell v. Wolfish* 441 U.S. 520 (1979). By contrast, in *N.G. ex rel. S.C. v. Connecticut*, the Second Circuit relied on the "special needs" standard set forth in *Board of Education v. Earls*, and upheld strip searches of juveniles upon intake to a juvenile facility. *N.G.*, 382 F.3d at 236–37; see *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002). The Second Circuit, however, noted the "pertinent but not precisely governing case law . . ." *N.G.*, 382 F.3d at 233.

<sup>20</sup> See *N.G.*, 382 F.3d at 238, 244–45 (Sotomayor, J., dissenting) (asserting that strip searches of detained juveniles were conducted without individualized suspicion, by the prison officials, that they possessed contraband).

<sup>21</sup> Compare *id.* at 244–45 (asserting that majority should not have justified the juvenile strip searches at issue without individualized suspicion), with *Miller v. Kennebec County*, 219 F.3d 8, 12–13 (1st Cir. 2000) (requiring reasonable suspicion for a search after the defendant failed to pay a fine), and *Masters v. Crouch*, 872 F.2d 1248, 1249–50, 1253–55 (6th Cir. 1989) (requiring reasonable suspicion for a strip search after the defendant failed to appear in court for motor vehicle violations).

<sup>22</sup> Compare *N.G.*, 382 F.3d at 244–45 (Sotomayor, J., dissenting), with *Miller*, 219 F.3d at 12–13 (requiring reasonable suspicion for a search after the defendant failed to pay a fine), and *Masters*, 872 F.2d at 1249–50, 1253 (requiring reasonable suspicion for a strip search after the defendant failed to appear in court for motor vehicle violations).

<sup>23</sup> See *infra* notes 185–189.

<sup>24</sup> See *infra* notes 164–307 and accompanying text.

conduct such searches.<sup>25</sup> The Note argues that courts should more strongly weigh the intrusiveness of juvenile strip searches when considering their constitutionality and should apply critical reasoning from school search cases to establish a clear standard of review for JDC searches.<sup>26</sup> Part I examines the development of the juvenile justice system in order to highlight important policy considerations concerning the treatment of incarcerated juveniles.<sup>27</sup> Part II presents the relevant Fourth Amendment doctrine, including the central cases governing juvenile searches in the school and JDC contexts.<sup>28</sup> Part III highlights the core similarities between schools and JDCs, which permit the application of reasoning from school search cases to the custodial context.<sup>29</sup> Part III then shows how two Supreme Court school search cases inform a two-tiered standard of review for determining the constitutionality of strip searches of juveniles in JDCs.<sup>30</sup>

### I. JUVENILE JUSTICE: FROM REHABILITATION TO PUNISHMENT

With the creation of the first juvenile<sup>31</sup> court in the United States in 1899, the juvenile justice system formally emerged as a separate institution from the adult justice system.<sup>32</sup> Juvenile courts were grounded in the idea that misbehaving children were psychologically troubled—as a consequence of a pathological environment rather than intrinsic evil—and that the state should act as a surrogate parent to foster growth in such children.<sup>33</sup> Initially guided by the common law doctrine of *parens*

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<sup>25</sup> See *infra* notes 164–307 and accompanying text.

<sup>26</sup> See *infra* notes 220–307 and accompanying text.

<sup>27</sup> See *infra* notes 31–64 and accompanying text.

<sup>28</sup> See *infra* notes 65–163 and accompanying text.

<sup>29</sup> See *infra* notes 164–215 and accompanying text.

<sup>30</sup> See *infra* notes 220–307 and accompanying text.

<sup>31</sup> A “juvenile,” also known as a minor, is defined as a person who has not reached the age at which one should be treated as an adult by the criminal-justice system. BLACK’S LAW DICTIONARY 945 (9th ed. 2009). This age is usually eighteen. *Id.*

<sup>32</sup> Office of Juvenile Justice & Delinquency Prevention, *Statistical Briefing Book: Juvenile Justice System Structure & Process*, U.S. DEP’T OF JUSTICE, [http://ojjdp.ncjrs.gov/ojstatbb/structure\\_process/overview.html](http://ojjdp.ncjrs.gov/ojstatbb/structure_process/overview.html) (last visited Jan. 25, 2011). There are actually fifty-one different juvenile justice systems in the United States, as each state (and the District of Columbia) has its own set of juvenile laws and policies. MELANIE KING, NAT’L CTR. FOR JUVENILE JUSTICE, *GUIDE TO THE STATE JUVENILE JUSTICE PROFILES 1* (2006), available at <http://www.ncjrservhttp.org/NCJJWebsite/pdf/taspecialbulletinstateprofiles.pdf>. Only ten states place control of juvenile correctional services within the adult corrections agency; the others, recognizing the separate missions of the two systems, place authority in either a separate juvenile justice agency or a human or social services agency. *Id.*

<sup>33</sup> AARON KUPCHIK, *JUDGING JUVENILES: PROSECUTING ADOLESCENTS IN ADULT AND JUVENILE COURTS* 1, 1, 11 (2006); Elizabeth Scott & Thomas Grisso, *The Evolution of Adoles-*

*patriae*,<sup>34</sup> the state's aim was to protect society and rehabilitate juveniles, not to impose criminal guilt and punishment.<sup>35</sup>

Despite the benevolent intentions that inspired the juvenile system, its rehabilitative model has crumbled in the last several decades and has been replaced by an adult-like system of prosecution and punishment.<sup>36</sup> In the 1970s and 1980s, skepticism about the potential for juvenile rehabilitation grew rapidly, along with heightened enthusiasm for holding children to adult standards of accountability.<sup>37</sup> A sharp increase in juvenile homicides in the late 1980s and early 1990s also aroused fear of the delinquent "juvenile superpredator," leading state legislatures to pass tougher juvenile laws.<sup>38</sup> As a consequence of a revolution in "transfer laws" in the 1990s, younger children were often tried as adults for a broader spectrum of offenses.<sup>39</sup> Moreover, transfer decisions were often placed in the hands of prosecutors and the legislature, not just the courts.<sup>40</sup> Today, transfer statutes have expanded beyond judicial waiver laws to include two other types of laws: statutory exclusion laws, which automatically transfer particular classes of juvenile cases to criminal court, and concurrent jurisdiction laws, which allow prosecutors to file certain cases directly in criminal court.<sup>41</sup> In addition

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*cence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 138 (1997).

<sup>34</sup> "*Parens patriae*" literally means "parent of his or her country" in Latin, and has been defined as "the state in its capacity as provider of protection to those unable to care for themselves." BLACK'S LAW DICTIONARY, *supra* note 31, at 1221. "This doctrine originated in the ancient duty of the English sovereign to protect all children within his or her realm" and, in the late 1800s, it was the driving factor behind the establishment of juvenile courts in the United States. Claudia Worrell, Note, *Pretrial Detention of Juveniles: Denial of Equal Protection Masked by the Parens Patriae Doctrine*, 95 YALE L.J. 174, 176 n.8 (1985).

<sup>35</sup> *Kent v. United States*, 383 U.S. 541, 554-55 (1966).

<sup>36</sup> KUPCHIK, *supra* note 33, at 1.

<sup>37</sup> Scott & Grisso, *supra* note 33, at 138.

<sup>38</sup> David S. Tanenhaus & Steven A. Drizen, "Owing to the Extreme Youth of the Accused": *The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 642 (2002). "Criminologist John Laub has argued that over the course of the twentieth century criminologists have invented new labels to describe basically the same population of serious and violent juvenile offenders, and the term 'superpredators' was only the latest such label." *Id.* at 643 n.9 (citing John Laub, *A Century of Delinquency Research and Delinquency Theory*, in *A CENTURY OF JUVENILE JUSTICE* 179, 186 (Margaret K. Rosenheim et al. eds., 2002)).

<sup>39</sup> *See id.* at 664-66. For further background information on the changing nature of the juvenile justice system, see Hillary J. Massey, Note, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After Roper*, 47 B.C. L. REV. 1083, 1086-89 (2006).

<sup>40</sup> *See* Tanenhaus & Drizen, *supra* note 38, at 667.

<sup>41</sup> *See, e.g.*, FLA. STAT. ANN. § 985.556 (West 2007); MASS. GEN. LAWS ch. 119, § 74 (2008); MINN. STAT. ANN. § 260B.101 (West 2007); *see also* BENJAMIN ADAMS & SEAN ADDIE, U.S. DEP'T OF JUSTICE, OJJDP FACT SHEET: DELINQUENCY CASES WAIVED TO CRIMINAL COURT,

to transfer laws, many new policies make juvenile records more widely accessible, open juvenile proceedings to the public,<sup>42</sup> impose mandatory minimum sentences on youth, and “require juveniles to register in sex-offender databases.”<sup>43</sup>

Despite this trend, however, juveniles have been denied the constitutional rights that should go hand-in-hand with increased accountability.<sup>44</sup> Since the origins of the juvenile system, minors have been denied many procedural rights that were afforded to adults.<sup>45</sup> For example, some states have denied juveniles the rights to bail, indictment by a grand jury, public trial, and trial by jury.<sup>46</sup> Reformers who supported the creation of a separate juvenile system felt that juveniles should be shielded from the rigidities and harshness of both substantive and procedural law in order to keep youths out of jails with hardened criminals.<sup>47</sup>

In 1966, in *Kent v. United States*, the U.S. Supreme Court first stressed the importance of procedural protections for juveniles.<sup>48</sup> In *Kent*, the Court held that a juvenile court could not transfer a juvenile to an adult criminal court without following certain procedures, including holding a hearing and providing effective assistance of counsel and

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2005, at 1 (2009), available at <http://www.ncjrs.gov/pdffiles1/ojdp/224539.pdf>. The term “certified juvenile” refers to a juvenile who has been certified to be tried as an adult. BLACK’S LAW DICTIONARY, *supra* note 31, at 945. As of 2007, fifteen states also had “juvenile blended sentencing” laws which permit a court to combine, for certain offenses, a juvenile disposition with a suspended criminal sentence; if the juvenile cooperates, he will remain in the juvenile system, but if not, he may be sent to the adult system. *National Overview: Which States Try Juveniles as Adults and Use Blended Sentencing?*, NAT’L CTR. FOR JUVENILE JUSTICE, [http://70.89.227.250:8080/stateprofiles/overviews/transfer\\_state\\_overview.asp](http://70.89.227.250:8080/stateprofiles/overviews/transfer_state_overview.asp) (last visited Jan. 25, 2011). On the other hand, many states also have “reverse transfer” statutes that allow criminal court judges to send juveniles who were transferred to their court back to juvenile court. Tanenhaus & Drizen, *supra* note 38, at 693. These statutes are “especially important in jurisdictions that rely extensively on automatic transfer and direct-file.” *Id.*

<sup>42</sup> Tanenhaus & Drizen, *supra* note 38, at 642.

<sup>43</sup> Kristin Henning, *What’s Wrong with Victims’ Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1113 (2009).

<sup>44</sup> See Rosenberg, *supra* note 13, at 724–25. Rosenberg also argues that juveniles could be afforded more constitutional rights under the Equal Protection Clause, rather than under the Due Process Clause. *Id.* at 727–28.

<sup>45</sup> *In re Gault*, 387 U.S. 1, 14 (1967).

<sup>46</sup> *Id.* In 1967, in *In re Gault*, the Supreme Court considered the constitutionality of the Juvenile Code of Arizona, which denied juveniles several rights: “notice of the charges; right to counsel; right to confrontation and cross-examination; privilege against self-incrimination; right to a transcript of the proceedings; and right to appellate review.” *Id.* at 10 (numbering omitted).

<sup>47</sup> See *id.* at 15–16.

<sup>48</sup> See 383 U.S. 541, 554 (1966).



a statement of reasons.<sup>49</sup> The Court emphasized that, although the statute in question gave the juvenile court “a substantial degree of discretion” it did not confer “a license for arbitrary procedure.”<sup>50</sup>

In 1967, in *In re Gault*, the Supreme Court further highlighted the importance of procedural protections for youth.<sup>51</sup> When considering the detention of a fifteen-year-old boy as a juvenile delinquent in a state industrial school,<sup>52</sup> the Court held that certain due process rights apply equally to both juveniles and adults.<sup>53</sup> Such rights include the right to counsel,<sup>54</sup> adequate notice of the charges (comparable to the notice given in criminal or civil proceedings),<sup>55</sup> the privilege against self-incrimination,<sup>56</sup> and the right to confrontation and sworn testimony by witnesses available for cross-examination.<sup>57</sup> The Court hoped to introduce procedural regularity, fairness, and orderliness into the juvenile system,<sup>58</sup> emphasizing that “unbridled discretion [was] a poor substitute for principle and procedure.”<sup>59</sup>

Yet the early promises of procedural rights for youth articulated in *Kent* and *Gault* are still unfulfilled, such that juveniles are held to adult accountability standards but denied similar constitutional rights.<sup>60</sup> For example, state agents have great discretion to determine when to detain juveniles because statutes governing when to detain accused individuals before trial are less precise for minors than for adults.<sup>61</sup> Moreover, in *McKeiver v. Pennsylvania*, decided by the Supreme Court in 1976, the plurality opinion held that juveniles have no constitutional right to a trial by jury in the juvenile court’s adjudicative stage.<sup>62</sup> A recent constitu-

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<sup>49</sup> *Id.* at 553–54.

<sup>50</sup> *See id.* at 553.

<sup>51</sup> *See* 387 U.S. at 26–28.

<sup>52</sup> *Id.* at 4.

<sup>53</sup> *See id.* at 26–28.

<sup>54</sup> *Id.* at 41.

<sup>55</sup> *Id.* at 33–34.

<sup>56</sup> *Id.* at 55.

<sup>57</sup> *Gault*, 387 U.S. at 56.

<sup>58</sup> *Id.* at 27–28.

<sup>59</sup> *Id.* at 18.

<sup>60</sup> *See* KUPCHIK, *supra* note 33, at 1.

<sup>61</sup> *See* Worrell, *supra* note 34, at 176–77. Worrell argues that a state may use the *parens patriae* doctrine to mask a motive that does not protect a juvenile or the community, such as subjecting juveniles to harsh pretrial detention strategies to create the appearance of being tough on crime. *Id.* at 181–82.

<sup>62</sup> 403 U.S. 528, 545 (1971) (plurality opinion). The Court in *McKeiver* stated that juveniles need not be given all constitutional rights given to adults in a criminal proceeding, noting that a jury trial could transform the ideally intimate and informal juvenile proceeding into a fully adversarial process. *Id.* Moreover, the Court determined that abuses in the

tional debate over juveniles' constitutional rights and needs for protection concerns strip searches of juveniles—the subject of this Note.<sup>63</sup> Invasive strip searches present some of the most serious constitutional issues because they infringe both on due process rights and on personal privacy rights.<sup>64</sup>

## II. APPLICATION OF THE FOURTH AMENDMENT TO JUVENILES IN PUBLIC SCHOOLS AND JUVENILE DETENTION CENTERS

The Fourth Amendment provides protection against unreasonable searches and seizures and states that “no warrants shall issue, but upon probable cause.”<sup>65</sup> The Supreme Court, however, has carved out exceptions to the probable cause requirement, especially in situations that require swift police action such that obtaining a warrant would be impracticable.<sup>66</sup> One exception recognized by the Supreme Court is the “special needs” doctrine.<sup>67</sup> In the context of safety and administrative regulations, the Court has held that a search may be reasonable “where ‘special needs,’ beyond the normal need for law enforcement, make

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juvenile system relate to a lack of resources and dedication, rather than unfairness. *Id.* at 547–48. In doing so, the Court was reluctant to acknowledge that the juvenile system had failed in its rehabilitative goals and hoped that states would experiment in seeking new ways of handling youthful offenders. *Id.* at 547. *Contra In re L.M.*, 186 P.3d 164, 170 (Kan. 2008) (reasoning that the juvenile justice system is now patterned after the adult criminal system, such that *McKeiver* is no longer binding precedent, and thus determining that juveniles have a constitutional right to a jury trial under the Sixth and Fourteenth Amendments).

<sup>63</sup> See generally *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009); *Smook v. Minnehaha County*, 457 F.3d 806 (8th Cir. 2006).

<sup>64</sup> See *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225, 232 (2d Cir. 2004) (writing that the adverse psychological effect of a strip search may be more serious for a child than an adult); see also *John Does 1–100 v. Boyd*, 613 F. Supp. 1514, 1522 (D. Minn. 1985) (“The experience of disrobing and exposing one’s self for visual inspection by a stranger clothed with the uniform and authority of the state, in an enclosed room inside a jail, can only be seen as thoroughly degrading and frightening.”).

<sup>65</sup> U.S. CONST. amend. IV. The Fourth Amendment is made applicable to the states by the Fourteenth Amendment. U.S. CONST. amend. XIV; *Michigan v. Summers*, 452 U.S. 692, 694 n.2 (1981).

<sup>66</sup> *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

<sup>67</sup> *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 829 (2002); *Nat’l Treasury Empls. Union v. Von Rabb*, 489 U.S. 656, 668 (1989). A special need arises when the government has a compelling need to discover or prevent “latent or hidden conditions.” *Von Rabb*, 489 U.S. at 668. Traditionally, the “special needs” exception requires a “fact-specific balancing of the intrusion . . . against the promotion of legitimate governmental interests.” *Smook v. Minnehaha County*, 457 F.3d 806, 810 (8th Cir. 2006) (ellipsis in original) (quoting *Earls*, 536 U.S. at 830).

the warrant and probable cause requirement impracticable.”<sup>68</sup> The Court has used this “special needs” reasoning to uphold warrantless searches in a variety of safety and administrative contexts,<sup>69</sup> including employee drug testing,<sup>70</sup> border checkpoints,<sup>71</sup> automobile junkyards,<sup>72</sup> and searches in hospitals<sup>73</sup> and schools.<sup>74</sup> Schools, however, present “special needs” examples that are particularly important to the juvenile context because they implicate the delicate balance between a child’s privacy rights and the government’s custodial interests in protecting the school environment.<sup>75</sup>

Two landmark Supreme Court decisions concern searches of public school students and help to inform jurisprudence concerning juvenile searches in a custodial setting.<sup>76</sup> In 1985, in *New Jersey v. T.L.O.*, the U.S. Supreme Court held the search of a student’s purse for cigarettes to be constitutional under a reasonableness test.<sup>77</sup> In 2009, in *Safford Unified School District No. 1 v. Redding*, the Court applied the *T.L.O.* standard and held that the strip search of a female student, aimed at discovering drugs, was impermissible.<sup>78</sup> The Court’s reasoning in *Safford* may have important consequences for juveniles’ rights in a JDC context, especially since the Court has never directly addressed the application of the Fourth Amendment to strip searches of juveniles in state custody.<sup>79</sup> In 2004 and 2006, two federal circuit courts of appeals con-

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<sup>68</sup> *Earls*, 536 U.S. at 829; *Griffin v. Wisconsin*, 483 U.S. 868, 872–74 (1987); see also Antoine McNamara, Note, *The “Special Needs” of Prison, Probation, and Parole*, 82 N.Y.U. L. REV. 209, 210–11 (2007) (arguing that, although the Court has held the warrant requirement to be impractical when a “special need” arises, it has generally required “special needs” searches to be based on reasonable, individualized suspicion or conducted as part of a neutral, nondiscretionary plan). Commentators note the confusing nature of the “special needs” exception. See, e.g., McNamara, *supra*, at 215–16 (noting that “special needs are awkwardly defined” and the “scope of the exception is not perfectly defined”); Smith, *supra* note 13, at 482–86 (discussing the confusion surrounding the “special needs” doctrine and arguing that this “special needs” exception was never intended to uphold strip searches in prisons in the absence of individualized suspicion).

<sup>69</sup> McNamara, *supra* note 68, at 212–13.

<sup>70</sup> *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 623 (1989).

<sup>71</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 560–62, 562 n.15 (1976).

<sup>72</sup> *New York v. Burger*, 482 U.S. 691, 693, 703 (1987).

<sup>73</sup> *O’Connor v. Ortega*, 480 U.S. 709, 725 (1987).

<sup>74</sup> *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

<sup>75</sup> See *Earls*, 536 U.S. at 829–30.

<sup>76</sup> *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2641–42 (2009); *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985).

<sup>77</sup> 469 U.S. at 343, 347.

<sup>78</sup> 129 S. Ct. at 2642–43.

<sup>79</sup> See *Safford*, 129 S. Ct. at 2641–43; *Smook*, 457 F.3d at 2642–44, *cert. denied*, 549 U.S. 1317 (2007).

sidered the constitutionality of custodial strip searches, with largely unfavorable results for juveniles' privacy rights.<sup>80</sup>

Section A of this Part discusses the two landmark school search cases in which the Supreme Court established the standard governing the constitutionality of school officials' search of a student.<sup>81</sup> Section B then examines recent decisions by U.S. courts of appeals that considered, and upheld as constitutional, strip searches of juveniles in state custody.<sup>82</sup> Finally, Section C of this Part discusses the myriad of standards created by the Supreme Court to govern prison regulations, a variety which amplifies the difficulty of lower courts in applying a clear test to the constitutionality of custodial searches of juveniles.<sup>83</sup>

### A. *Supreme Court Jurisprudence on the Constitutionality of Public School Searches*

#### 1. *New Jersey v. T.L.O.*: The Supreme Court Sets the School Search Standard

In 1985, in *New Jersey v. T.L.O.*, the U.S. Supreme Court set forth the standard for determining whether a strip search of a student by a school official violates the Fourth Amendment.<sup>84</sup> The plaintiff in *T.L.O.* was a female student whose purse was searched after school officials found her smoking in a school restroom.<sup>85</sup> When school officials searched the purse for cigarettes, they uncovered marijuana and other evidence suggesting that she had been dealing marijuana.<sup>86</sup> Considering the constitutionality of the search, the Court held that public school officials are governed by the Fourth Amendment because they act as "representatives of the State, not merely as surrogates of the parents."<sup>87</sup> The Court, however, declined to hold school officials to the probable cause standard and instead balanced the student's privacy interests against the government's need to enforce order.<sup>88</sup> The Court determined that the search of the purse was reasonable because it was "justified at its incep-

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<sup>80</sup> *Smook*, 457 F.3d at 812; *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225, 237 (2d Cir. 2004).

<sup>81</sup> See *infra* notes 84–109 and accompanying text.

<sup>82</sup> See *infra* notes 110–145 and accompanying text.

<sup>83</sup> See *infra* notes 146–163 and accompanying text.

<sup>84</sup> 469 U.S. at 341.

<sup>85</sup> *Id.* at 328.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* 336–37.

<sup>88</sup> *Id.* at 340–41.

tion” and the method was “reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and nature of the infraction.”<sup>89</sup>

The Court in *T.L.O.* justified its decision, in part, by distinguishing the school from the prison setting.<sup>90</sup> Emphasizing that the prisoner and the schoolchild are “separated by the harsh facts of criminal conviction and incarceration,”<sup>91</sup> the Court held that schoolchildren do maintain a legitimate expectation of privacy that must be weighed against the government’s need for the search.<sup>92</sup> Thus, the Court considered actual criminal conviction—not necessarily merely incarceration or detainment—to be a key distinguishing factor between the rights of individuals in schools and prisons.<sup>93</sup>

## 2. *Safford Unified School District No. 1 v. Redding*: The Supreme Court Continues to Define the School Search Standard

In 2009, in *Safford*, the U.S. Supreme Court continued to define the constitutional standards for school searches by holding that the strip search of a middle school female for prescription drugs was highly intrusive and unjustified.<sup>94</sup> Unlike the plaintiff in *T.L.O.*, the plaintiff in *Safford* did not merely have her belongings or outer clothing searched; instead, she was strip searched following reports that she was distributing painkiller pills to fellow students.<sup>95</sup> In October 2003, assistant middle school principal Kerry Wilson called thirteen-year-old Savana Red-

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<sup>89</sup> *Id.* at 341–42, 347. The Court has applied this standard to uphold drug testing, by a urine sample, of student athletes as well as random drug tests for students involved in extracurricular activities, emphasizing the minimal intrusion imposed upon students and schools’ need for the searches. See *Earls*, 536 U.S. at 830–34; *Vernonia*, 515 U.S. at 646, 664–65.

<sup>90</sup> *T.L.O.*, 469 U.S. 338–39.

<sup>91</sup> *Id.* at 338 (quoting *Ingraham v. Wright*, 430 U.S. 651, 669 (1977)). In *Ingraham v. Wright*, the Supreme Court held that the Cruel and Unusual Punishment Clause of the Eighth Amendment was intended to protect individuals convicted of a crime and does not apply to disciplinary corporal punishment in public schools, because community supervision of public schools sufficiently protects students against abuses. 430 U.S. at 669–70. The Court emphasized that labeling a convicted prisoner as a “criminal” deprives him of associational freedoms and that the Eighth Amendment only protects him from “unnecessary and wanton,” but not all, prison brutality. *Id.*

<sup>92</sup> See *T.L.O.*, 469 U.S. at 337, 338.

<sup>93</sup> See *id.* at 338–39. “Incarceration” is defined as the “act or process of confining someone.” BLACK’S LAW DICTIONARY, *supra* note 31, at 828. By contrast, “conviction” means that an individual has been proven guilty of a crime. *Id.* at 384.

<sup>94</sup> 129 S. Ct. at 2642–43.

<sup>95</sup> *Id.* at 2638.

ding into his office.<sup>96</sup> Wilson showed her painkiller pills, which were banned under school rules, and said he had received a report that she had distributed pills to other students.<sup>97</sup> When Redding denied knowing about the pills, Wilson searched her backpack.<sup>98</sup> This search uncovered no contraband, so he sent her to the nurse's office, where the nurse and an administrative assistant—both female—asked her to strip down to her bra and underwear.<sup>99</sup> They then asked her to pull out her underwear and pull her bra to the side and shake it, partially revealing her breasts and pelvic area.<sup>100</sup> This search uncovered no contraband.<sup>101</sup>

In considering the constitutionality of the search, the Court emphasized the “quantum leap” from a search of the “outer clothes and backpacks to exposure of intimate parts.”<sup>102</sup> Thus, the Court held the search of Redding's backpack was constitutional but the strip search was not.<sup>103</sup> In holding the strip search to be unlawful, the Court applied the standard it set out in *T.L.O.* and determined that, although the indignity of the search did not make it unlawful, the intrusiveness of the search outweighed the degree of suspicion about drug possession.<sup>104</sup>

Most importantly, however, the Court in *Safford* recognized a child's subjective expectations of privacy and refused to quibble over the precise details of the strip search.<sup>105</sup> The two female officials who conducted the search, a school nurse and an administrative assistant, stated that they did not see anything when Redding pulled out her bra and underwear.<sup>106</sup> Yet the Court refused to define a strip search and Fourth Amendment rights in a way that would “guarantee litigation about who was looking and how much was seen.”<sup>107</sup> In doing so, the Court held that any search which moves beyond the outer clothing and belongings is categorically distinct

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<sup>96</sup> *Id.* Assistant principal Kerry Wilson first questioned Redding by showing her a day planner containing knives, lighters, and a cigarette. *Id.* Redding told him that the planner—but none of the items inside—belonged to her, and that she had let her friend borrow the planner a few days ago. *Id.* Wilson then proceeded to question her about the pills. *Id.*

<sup>97</sup> *Id.* The pills were four 400-mg prescription-strength ibuprofen pills and one over-the-counter 200-mg naproxen pill. *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Safford*, 129 S. Ct. at 2638.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 2643.

<sup>103</sup> *Id.* at 2641, 2642.

<sup>104</sup> *Id.* at 2642. The Court also granted qualified immunity to the school officials who performed the search. *Id.* at 2644.

<sup>105</sup> *Id.* at 2641.

<sup>106</sup> *Safford*, 129 S. Ct. at 2641.

<sup>107</sup> *Id.*

and requires special justification.<sup>108</sup> Adolescents are uniquely vulnerable to embarrassment from an intrusive strip search, the Court continued, and thus should be protected by a “subjective expectation of privacy” prohibiting uncomfortable and frightening searches, even when the breasts and pelvic area are not fully exposed.<sup>109</sup>

B. *A Mixed Bag: Cases Determining the Constitutionality of Strip Searches of Juveniles in State Custody*

Courts have not shown the same sympathy for juveniles subjected to strip searches in the custodial setting.<sup>110</sup> State officials have been afforded substantial discretion in conducting such searches, justified by the unique, heightened security risks that exist in prisons and detention centers.<sup>111</sup> Moreover, some federal circuit courts require reasonable suspicion of contraband possession to justify a strip search of an adult detained for a minor offense, but require a less stringent standard to justify strip searches of juveniles.<sup>112</sup>

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<sup>108</sup> See *id.* This conception of a “strip search” is consistent with how the phrase has been defined by state statutes and circuit courts. See, e.g., CONN. GEN. STAT. ANN. § 54-33K (West 2009) (defining a strip search to include removal of some or all clothing); N.J. STAT. ANN. § 2A:161A-3 (West 2009) (defining a “strip search” as the removal of clothing to visually inspect an individual’s underwear, buttocks, anus, genitals, or breasts); *Wood v. Hancock Cnty. Sheriff’s Dep’t*, 354 F.3d 57, 63 n.10 (1st Cir. 2003) (“[A] strip search may occur even when an inmate is not fully disrobed.”). The Supreme Court’s definition of the term in *Safford* is also consistent with the definition in *Black’s Law Dictionary*, as a “search of a person conducted after that person’s clothes have been removed, the purpose usu. being to find any contraband the person might be hiding.” BLACK’S LAW DICTIONARY, *supra* note 31, at 1469.

<sup>109</sup> See *Safford*, 129 S. Ct. at 2641.

<sup>110</sup> See *Smook*, 457 F.3d at 811–12; *N.G.*, 382 F.3d at 237.

<sup>111</sup> See *N.G.*, 382 F.3d at 244–45 (Sotomayor, J., dissenting) (decriing the fact that the searches of young girls were conducted without individualized suspicion by the prison officials); cf. *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (stating in the adult context that “[i]nmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society . . . . Within this volatile ‘community,’ prison administrators are to take all necessary steps to ensure the safety of not only the prison staffs and administrative personnel, but also visitors.”).

<sup>112</sup> Compare *N.G.*, 382 F.3d at 245 (Sotomayor, J., dissenting) (arguing that the majority should have required prison officials to have individualized suspicion that juveniles possessed contraband before strip searching them), with *Miller v. Kennebec County*, 219 F.3d 8, 12–13 (1st Cir. 2000) (requiring reasonable suspicion for a search after the defendant failed to pay a fine), and *Masters v. Crouch*, 872 F.2d 1248, 1253–55 (6th Cir. 1989) (requiring reasonable suspicion for a search after the defendant failed to appear for a motor vehicle violation).

1. *N.G. ex rel. S.C. v. Connecticut*: The Second Circuit Applies the “Special Needs” Test to JDC Strip Searches

The Supreme Court has never ruled on the constitutionality of strip searches of juveniles in state custody.<sup>113</sup> Accordingly, lower courts currently apply different standards when considering such searches.<sup>114</sup> Two recent decisions by U.S. courts of appeals, for example, have used the “special needs” test to permit strip searches in the absence of individualized suspicion.<sup>115</sup> In 2004, in *N.G. ex rel. S.C. v. Connecticut*, the U.S. Court of Appeals for the Second Circuit considered the custodial strip searches of two juveniles.<sup>116</sup> S.C., who had a history of mental illness, was confined for failing to obey court orders requiring her to stay at home or at institutions in which she was placed.<sup>117</sup> T.W., who had a history of truancy, was confined for violating court orders requiring her to attend seventh grade.<sup>118</sup> Thus, the plaintiffs had not been convicted of any crime and were not awaiting trial.<sup>119</sup> The court separately considered the constitutionality of the initial searches of the juveniles (upon intake to the facility) and the subsequent searches conducted after the youths were transferred to different facilities.<sup>120</sup>

The Second Circuit reached its decision by applying the “special needs” test and by distinguishing the JDC and school settings.<sup>121</sup> In applying the “special needs” test, the court upheld the initial intake searches—conducted when the juvenile-plaintiffs were admitted to the juvenile facility—but held the subsequent searches (conducted after transfer from one facility to another) to be unconstitutional.<sup>122</sup> Although the court recognized the serious psychological impact of strip searches on juveniles,<sup>123</sup> it supported its holding by distinguishing the JDC setting from the school context.<sup>124</sup> In making this distinction, the court reasoned that “[t]he State has a more pervasive responsibility for

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<sup>113</sup> See *Smook*, 457 F.3d 806, *cert. denied*, 549 U.S. at 1317.

<sup>114</sup> Compare *N.G.*, 382 F.3d at 236 (relying on the “special needs” standard set forth in *Earls*, 536 U.S. at 829), with *Justice v. City of Peachtree*, 961 F.2d 188, 191–93 (11th Cir. 1992) (applying a balancing test to hold detained juveniles to the same “reasonableness” standard as adults).

<sup>115</sup> See *Smook*, 457 F.3d at 810; *N.G.*, 382 F.3d at 236–37.

<sup>116</sup> 382 F.3d at 226.

<sup>117</sup> *Id.* at 228.

<sup>118</sup> *Id.* at 229.

<sup>119</sup> *Id.* at 235.

<sup>120</sup> *Id.* at 233.

<sup>121</sup> See *id.* at 236–38.

<sup>122</sup> *N.G.*, 382 F.3d at 237, 238.

<sup>123</sup> *Id.* at 232.

<sup>124</sup> *Id.* at 236.



children in detention centers,” where children spend twenty-four hours each day, than it does in schools, where the state only has custody for a few hours.<sup>125</sup> Thus, the court held that the government’s legitimate need to discover contraband, both to protect other inmates and to prevent self-mutilation, outweighed the juveniles’ privacy interests.<sup>126</sup>

Then-Judge Sotomayor’s<sup>127</sup> dissenting opinion in *N.G.*, however, revealed greater sympathy for the young girls’ privacy interests.<sup>128</sup> Judge Sotomayor agreed that the court had applied the correct standard but would have held both the intake searches and the subsequent searches to be unlawful.<sup>129</sup> She stated that because there was no individualized suspicion that these particular adolescents possessed contraband, the state had failed to show that the government interests of deterring contraband and detecting child abuse outweighed the juveniles’ privacy interests.<sup>130</sup> Importantly, Judge Sotomayor emphasized that no court has ever upheld a strip search, outside the prison context, in the absence of particularized suspicion.<sup>131</sup>

## 2. *Smook v. Minnehaha County*: The Eighth Circuit Applies the “Special Needs” Test to JDC Strip Searches

The Eighth Circuit has also curtailed the Fourth Amendment rights of detained juveniles in the last decade.<sup>132</sup> In 2006, in *Smook v. Minnehaha County*, the U.S. Court of Appeals for the Eighth Circuit upheld the strip search of a juvenile who was arrested and brought to a detention facility for violating local curfew laws.<sup>133</sup> There, when admitted to the juvenile facility, the juvenile plaintiff, Jodi Smook, was required to remove all clothing except her underwear in the presence of a staff member.<sup>134</sup> As did the Second Circuit in *N.G.*, the Eighth Circuit applied the

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 236, 237.

<sup>127</sup> Justice Sonia Sotomayor served as a judge on the U.S. Court of Appeals for the Second Circuit from 1998 to 2009. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Jan. 25, 2011).

<sup>128</sup> *N.G.*, 382 F.3d at 239, 244–45 (Sotomayor, J., dissenting).

<sup>129</sup> *Id.* at 238.

<sup>130</sup> *Id.* at 242–45. Moreover, Sotomayor argued that the majority did not rely enough on the Eleventh Circuit’s opinion in *Peachtree*, 961 F.3d at 193, which she felt was “the most closely analogous case” that the majority had cited. *Id.* at 241.

<sup>131</sup> *Id.* at 241.

<sup>132</sup> See *Smook*, 457 F.3d at 812.

<sup>133</sup> *Id.* at 808, 812.

<sup>134</sup> *Id.* at 808–09.

“special needs” balancing test and upheld the strip search.<sup>135</sup> Using *N.G.* as a barometer of reasonableness, the Eighth Circuit reasoned that Smook’s constitutional claim was weaker than the juveniles’ claims in *N.G.* because Smook was not required to fully strip.<sup>136</sup> A key factor in the court’s decision was that she was allowed to remain in her underwear—the court likened this to her being “at the beach in a swimsuit.”<sup>137</sup>

### 3. *Justice v. City of Peachtree*. The Eleventh Circuit Applies a Balancing Test to Custodial Strip Searches

Prior to *N.G.* and *Smook*, in the 1992 case of *Justice v. City of Peachtree*, the U.S. Court of Appeals for the Eleventh Circuit also decided a custodial strip search case by adopting a balancing test, established by the Supreme Court, which requires particularized suspicion of contraband possession before conducting a strip search.<sup>138</sup> Although the search at issue had occurred in a police station, not a JDC, it was closely analogous to a JDC search because the plaintiff was in state custody and was searched by state law enforcement officials.<sup>139</sup> The Eleventh Circuit used this Supreme Court balancing test to uphold the strip searches of two juveniles.<sup>140</sup> The juveniles in *Peachtree* were a male and female teenager, James Justice and Lazena Simon, whom the police found sitting inside a parked car in a church parking lot during school hours.<sup>141</sup> The officers arrested the teenagers for loitering and truancy and subjected Simon to a strip search at the police station, but the search uncovered no contraband.<sup>142</sup>

In considering the constitutionality of the search, the Eleventh Circuit cited the balancing test that the U.S. Supreme Court had applied in *Bell v. Wolfish* when it considered the strip searches of individuals awaiting trial, sentencing, or transportation to federal prisons.<sup>143</sup> In *Bell*, the Court balanced the state’s compelling need for the searches against the invasion of personal rights, considering the scope and manner of the intrusion, the place where the search is conducted, and

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<sup>135</sup> *Id.* at 810–12.

<sup>136</sup> *Id.* at 811. Smook was taken to a private restroom and was directed by a female staff member to remove all clothing except her undergarments. *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Peachtree*, 961 F.2d at 191–92, 194.

<sup>139</sup> *See id.* at 189–90.

<sup>140</sup> *Id.* at 194.

<sup>141</sup> *Id.* at 189.

<sup>142</sup> *Id.* at 190.

<sup>143</sup> *Id.* at 191.

the justification for conducting it.<sup>144</sup> Applying this test, the court in *Peachtree* held the strip search of the juvenile to be reasonable because the officers had a “particularized and objective basis,” given the totality of circumstances, to believe Simon was hiding contraband.<sup>145</sup>

C. *The Myriad of Supreme Court Standards Concerning the  
Constitutionality of Prison Regulations*

A major concern underscored by cases like *Smook* and *N.G.* is the lack of a clear standard governing strip searches of juveniles in JDCs.<sup>146</sup> Although *T.L.O.* and *Safford* provide some guidance to courts deciding school search cases, the lack of Supreme Court precedent on juvenile searches in state custody has resulted in confusion among circuit courts in determining the relevant standard.<sup>147</sup> Similarly, this Section demonstrates that the Supreme Court has used a variety of frameworks to consider searches of adults in custody, providing limited guidance to lower courts in considering both adult prison searches and JDC searches.<sup>148</sup>

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<sup>144</sup> See *Peachtree*, 961 F.2d at 192 (citing *Bell v. Wolfish*, 441 U.S. 520, 559(1979)).

<sup>145</sup> *Id.* The court held that the officers had a “particularized and objective basis” for the search for the following reasons:

- (1) the officers suspected that drinking and drug activity regularly occurred in the area in which they arrested the juveniles; (2) [an officer] saw Justice hand something to Simon; (3) Simon appeared extremely nervous; (4) [one of the officers] thought that females were more likely than males to conceal contraband on their persons; (5) Simon had a friend whose mother suspected her daughter of using drugs; and (6) [one officer] suspected that Simon might have contraband on her person.

*Id.* at 194.

<sup>146</sup> See McNamara, *supra* note 68, at 211 (asserting that courts have “created a patchwork of modified balancing tests and categorical rules” when considering prison cases).

<sup>147</sup> Compare *Peachtree*, 961 F.2d at 193 (holding that law enforcement officers may “strip search a juvenile in custody, even for a minor offense, based upon reasonable suspicion that the juvenile is concealing weapons or contraband”), and *N.G.*, 382 F.3d at 241 (Sotomayor, J., dissenting) (asserting that strip searches should not be conducted in the absence of reasonable suspicion), with *N.G.*, 382 F.3d at 230–38 (majority opinion) (upholding the strip search of a juvenile even in the absence of reasonable suspicion); see also McNamara, *supra* note 68, at 211 (asserting that courts have created a “patchwork of modified balancing tests and categorical rules,” rather than analyzing penal cases under a consistent framework, and arguing that courts should be consistent by analyzing all prison cases under a “special needs” standard); *supra* notes 84–109 and accompanying text.

<sup>148</sup> See *infra* notes 149–163 and accompanying text.

1. *Bell v. Wolfish*: The Supreme Court Establishes a Balancing Test to Evaluate Prison Searches

In 1979, the U.S. Supreme Court set forth a balancing test in *Bell v. Wolfish*, where it considered the constitutionality of visual body cavity searches of adults at a pretrial detention center after contact visits.<sup>149</sup> In determining the reasonableness of the search, the Court balanced the state's compelling need for the searches against the invasion of personal rights, considering the scope and manner of the intrusion, the place where the search was conducted, and the justification for conducting it.<sup>150</sup> The Court concluded that, in some instances, strip searches could be conducted on a finding of less than probable cause without violating the Fourth Amendment.<sup>151</sup>

2. *Hudson v. Palmer*: The Supreme Court Establishes a Categorical Search Rule to Evaluate Prison Searches

In 1984, in *Hudson v. Palmer*, the Court established a new categorical rule allowing random searches of prison cells.<sup>152</sup> The Court determined that such searches are so imperative to institutional security that the government's need for such searches outweighs a prisoner's privacy rights.<sup>153</sup> The Court reasoned that the government must manage extremely serious hazards in prisons, and that random searches are essential to mitigating the threat of drugs, weapons, and other contraband.<sup>154</sup>

3. *Turner v. Safley*: The Supreme Court Establishes a Four-Factor Test to Evaluate for Prison Searches

Finally, in 1987, in *Turner v. Safley*, the U.S. Supreme Court established another new, four-factor test to determine the constitutionality of prison regulations.<sup>155</sup> Under the *Turner* test, a prison regulation that limits a prisoner's constitutional rights is valid if it is "reasonably related to legitimate penological interests."<sup>156</sup> The Court established four factors

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<sup>149</sup> 441 U.S. at 559. Contact visits are "visits that permit inmates to touch their visitors." *Miller v. Carson*, 563 F.2d 741, 748 (1977). Such visits "occur in a glass-enclosed room and are continuously monitored by corrections officers." *Bell*, 441 U.S. at 578.

<sup>150</sup> *Bell*, 441 U.S. at 559.

<sup>151</sup> *Id.* at 560.

<sup>152</sup> See *Hudson*, 468 U.S. at 529–30; McNamara, *supra* note 68, at 211.

<sup>153</sup> *Hudson*, 468 U.S. at 528–30.

<sup>154</sup> See *id.* at 527.

<sup>155</sup> 482 U.S. 78, 89–90 (1987).

<sup>156</sup> *Id.* at 89.

relevant to judging reasonableness: (1) whether there is a “valid, rational connection” between the regulation and a legitimate, neutral governmental interest; (2) whether alternative means of exercising the asserted right remain open to inmates; (3) whether accommodation of the asserted right will have an impact on prison staff, inmates’ liberty, and the allocation of limited prison resources; and (4) whether the regulation represents an “‘exaggerated response’ to prison concerns.”<sup>157</sup> Despite their differences, both *Bell* and *Turner* are very deferential to prison officials’ judgment.<sup>158</sup>

Lower courts are apparently unclear about the role *Turner* plays in prison cases, including whether *Turner* now replaces *Bell*, and thus have applied highly varied tests.<sup>159</sup> Although the Supreme Court suggested that *Turner* applies to all constitutional challenges in prison, it has never applied *Turner*’s factors to a Fourth Amendment case.<sup>160</sup> Lower courts’ uncertainty about what standard applies to searches of adult inmates—particularly whether and how the *Turner* standard affects the analysis in *Bell*—makes it more difficult for these courts to decide what standard to apply when considering custodial strip searches of juveniles.<sup>161</sup> Indeed, the court in *N.G.* questioned whether it should apply the *Turner* standard, although ultimately it relied on the “special needs” test instead.<sup>162</sup> Thus, these prison search cases do not clearly inform the standard which should govern searches of juveniles in state custody, although—as described below—it is questionable whether any type of prison standard should be applied to the unique context of a JDC.<sup>163</sup>

### III. APPLYING *SAFFORD* TO THE CUSTODIAL SETTING: THE CASE FOR HEIGHTENED CONSTITUTIONAL PROTECTIONS FOR YOUTHS IN JDCs

Courts clearly need an articulated constitutional standard of what Fourth Amendment protections apply to juveniles in state custody.<sup>164</sup> The U.S. Supreme Court’s decisions in school search cases inform a

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<sup>157</sup> *Id.* at 89–90.

<sup>158</sup> *See id.* at 89; *Bell*, 441 U.S. at 560.

<sup>159</sup> *See* McNamara, *supra* note 68, at 229. McNamara argues that the *Turner* factors do not fit well within Fourth Amendment doctrine because they do not provide any means to consider the costs of a search—namely, its intrusiveness—and because they devalue the humanity of prison inmates. *See id.* at 230, 232.

<sup>160</sup> *See id.* at 229.

<sup>161</sup> *See N.G.*, 382 F.3d at 235–36; McNamara, *supra* note 68, at 211, 229–32.

<sup>162</sup> *N.G.*, 382 F.3d at 235, 236.

<sup>163</sup> *See infra* notes 194–215 and accompanying text.

<sup>164</sup> *See* Smook v. Minnehaha County, 457 F.3d 808, 812 (8th Cir. 2006); *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225, 236–37 (2d Cir. 2004); McNamara, *supra* note 68, at 229.

new analysis of this constitutional issue and should motivate lower courts to protect the delicate privacy interests of adolescents.<sup>165</sup> Indeed, a recent federal district court case adopts reasoning from *Safford* and suggests courts' willingness to heighten the constitutional standard for JDC strip searches.<sup>166</sup> Section A of this Part addresses why schools and JDCs are sufficiently similar environments, such that the reasoning from the major school search cases is relevant to custodial searches in JDCs.<sup>167</sup> Section B considers how the U.S. Supreme Court's 2009 opinion in *Safford Unified School District v. Redding* informs the analysis of cases concerning strip searches in JDCs.<sup>168</sup> Finally, Section C of this Part proposes a two-tiered system of review for JDC strip searches, based on *Safford*, under which juveniles detained for minor offenses would be afforded greater Fourth Amendment protection than many lower courts have provided.<sup>169</sup>

A. *Key Similarities Between Schools and Juvenile Detention Centers for the Purposes of a Strip Search Analysis*

The search standard established by the U.S. Supreme Court in 1985 in *New Jersey v. T.L.O.*—recently applied in *Safford*—did not explicitly contemplate the JDC context.<sup>170</sup> The Court in *Safford*, however, opened the door to the idea that *T.L.O.* can be applied more broadly to JDC strip search cases like *N.G. ex rel. v. Connecticut*—decided in 2004 by the U.S. Court of Appeals for the Second Circuit—and *Smook v. Minnehaha County*, decided in 2006 by the U.S. Court of Appeals for the Eighth Circuit.<sup>171</sup> Because the Court in *Safford* limited its discussion to the school context, it is necessary to delineate the common characteristics of schools and JDCs that allow a similar standard to be applied to strip searches in both settings.<sup>172</sup>

The Second Circuit in *N.G.* reasoned that the legality of searches in schools cannot be compared to searches in JDCs because these settings are too dissimilar.<sup>173</sup> One reason to distinguish these settings,

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<sup>165</sup> See *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2641–42 (2009); *New Jersey v. T.L.O.*, 469 U.S. 325, 341–46 (1985).

<sup>166</sup> See *Mashburn v. Yamhill County*, 698 F. Supp. 2d 1233, 1237–38, 1244 (D. Or. 2010).

<sup>167</sup> See *infra* notes 170–219 and accompanying text.

<sup>168</sup> See *infra* notes 220–286 and accompanying text.

<sup>169</sup> See *infra* notes 287–307 and accompanying text.

<sup>170</sup> See *Safford*, 129 S. Ct. at 2641–43; *T.L.O.*, 469 U.S. at 341–42.

<sup>171</sup> See *Safford*, 129 S. Ct. at 2641–43; *T.L.O.*, 469 U.S. at 341–42. See generally *Smook*, 457 F.3d 806; *N.G.*, 382 F.3d 225.

<sup>172</sup> See *Safford*, 129 S. Ct. at 2641–42; *infra* notes 173–219 and accompanying text.

<sup>173</sup> See *N.G.*, 382 F.3d at 235.

which aligns with the concept of *parens patriae*, is that the state has a more pervasive responsibility for youths in JDCs because children are housed there twenty-four hours a day.<sup>174</sup> By contrast, the state only has custody of schoolchildren for part of the day.<sup>175</sup> A second ground for distinguishing these two settings is the higher security concerns that exist in JDCs compared with schools.<sup>176</sup> The Second Circuit in *N.G.* equated the risks in prisons and JDCs, stating that “contraband such as a knife or drugs can pose a hazard to the security of an institution and the safety of inmates whether the institution houses adults convicted of crimes or juveniles in detention centers.”<sup>177</sup>

These differences, although not wholly inaccurate, do not merit a categorical distinction between schools and JDCs when considering strip searches.<sup>178</sup> First, the fact that the state has more responsibility for supervising juveniles in JDCs than it does in schools does not justify searching juveniles absent suspicion that they possess drugs and contraband.<sup>179</sup> One flaw of the *parens patriae* doctrine is its assumption that minors’ incompetence diminishes their interest in freedom from state restraint.<sup>180</sup> This assumption is erroneous because juveniles maintain due process rights despite their status as minors, and because such an assumption can result in serious breaches of basic human privacy interests that may offset the positive benefits of the state’s *parens patriae* caretaking role.<sup>181</sup> Secondly, although contraband poses a similar hazard to JDCs and prisons, this does not imply that each individual who enters or resides in a JDC poses an equivalent risk, or that juveniles arrested for minor crimes pose an equivalent risk to prisoners with criminal convictions.<sup>182</sup>

JDCs, however, are more comparable to schools—and more distinguishable from prisons—than appears at first blush for the purposes of examining the constitutionality of strip searches.<sup>183</sup> First, the individuals

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<sup>174</sup> See *id.* at 236.

<sup>175</sup> See *id.*

<sup>176</sup> See *id.* at 235.

<sup>177</sup> See *id.*

<sup>178</sup> See *infra* notes 179–219 and accompanying text.

<sup>179</sup> See *N.G.*, 382 F.3d at 236.

<sup>180</sup> Worrell, *supra* note 34, at 175, 191 (“In order to prevent the ingenuous use of the ‘best interests of the child’ rationale, the Juvenile Court should abandon the *parens patriae* justifications for pretrial detention and adopt an approach that keeps due process and caretaking concerns separate.”).

<sup>181</sup> See *id.*

<sup>182</sup> *Contra N.G.*, 382 F.3d at 235.

<sup>183</sup> See *infra* notes 184–197 and accompanying text.

in both schools and JDCs are youths.<sup>184</sup> Scientific and psychological research indicates that a traumatic strip search can have a lifelong impact on an adolescent's developing mind.<sup>185</sup> Even without the added trauma of a strip search, the incarceration of youth in crowded juvenile facilities can lead to psychiatric problems, increased suicidal tendencies, aggressive adult behavior, and poor development of social skills, compared with youth who remain in the community.<sup>186</sup> The trauma of a strip search would likely exacerbate the negative effects of youth incarceration.<sup>187</sup> Research has shown that the part of the brain responsible for rational decision making does not develop fully until an individual reaches his or her mid-twenties.<sup>188</sup> Moreover, childhood trauma increases the likelihood of lifelong personality disorders, conduct disorders, depression, anxiety, learning disabilities, and school-related problems.<sup>189</sup>

Many courts, bolstered by such psychological research, have recognized that adolescents are distinctly vulnerable to the humiliation and threat posed by a strip search.<sup>190</sup> In *Safford*, the Supreme Court emphasized the “adolescent vulnerability” that intensifies the intrusiveness of a strip search.<sup>191</sup> Similarly, in *N.G.*, the Second Circuit noted that a strip search would likely have a more severe adverse effect on a child than an adult, and that youth are particularly susceptible to psychological trauma.<sup>192</sup> Moreover, in 1985, in *John Does 1–100 v. Boyd*, the U.S. District Court for the District of Minnesota wrote that a strip search of one detained for a minor offense—as opposed to a serious offense—is more frightening because it likely will take the individual by surprise.<sup>193</sup>

Secondly, JDCs are more similar to schools, and more distinct from prisons, in terms of the reasons for which juveniles in JDCs are searched.<sup>194</sup> Many of these reasons are quite different from the offenses

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<sup>184</sup> See *Safford*, 129 S. Ct. at 2641–42; *N.G.*, 382 F.3d at 232.

<sup>185</sup> See ERICA J. ADAMS, JUSTICE POLICY INST., HEALING INVISIBLE WOUNDS: WHY INVESTING IN TRAUMA-INFORMED CARE FOR CHILDREN MAKES SENSE 2 (2010), available at [http://www.justicepolicy.org/images/upload/10-07\\_REP\\_HealingInvisibleWounds\\_JJ-PS.pdf](http://www.justicepolicy.org/images/upload/10-07_REP_HealingInvisibleWounds_JJ-PS.pdf).

<sup>186</sup> See *id.*

<sup>187</sup> See *id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> See *Safford*, 129 S. Ct. at 2641–42; *N.G.*, 382 F.3d at 232.

<sup>191</sup> 129 S. Ct. at 2641.

<sup>192</sup> 382 F.3d at 232.

<sup>193</sup> See 613 F. Supp. 1514, 1522 (D. Minn. 1985).

<sup>194</sup> See *Safford*, 129 S. Ct. at 2638 (searching a student based on an accusation that she brought painkiller drugs to school); *Smook*, 457 F.3d at 808 (searching a student because she violated local curfew laws).



that result in criminal conviction in an adult court, and more similar to the “minor” offenses committed by juveniles in schools.<sup>195</sup> As the Court noted in *T.L.O.*, the prisoner and the schoolchild are “separated by the harsh facts of criminal conviction and incarceration,”<sup>196</sup> suggesting that the strip search standard for juveniles in JDCs should fall somewhere in between the standards applied to prisoners and schoolchildren.<sup>197</sup>

In contrast to prison inmates, many juveniles who enter detention centers have not been criminally convicted.<sup>198</sup> There are two distinct kinds of juvenile cases that may lead to detention.<sup>199</sup> First, status offense cases involve offenses which, if committed by an adult, would not be considered a crime—such as curfew violations, running away, underage drinking, and truancy.<sup>200</sup> Second, juvenile delinquency cases are those which would be tried in criminal court had the underlying offense been committed by an adult.<sup>201</sup> Most juveniles, however, are not detained in JDCs for violent, serious offenses like rape and murder.<sup>202</sup> Statistics show, for example, that “[i]n 2005, only about 3% of cases heard in juvenile court involved violent offenses like robbery, rape, murder, and aggravated assault.”<sup>203</sup> By contrast, approximately half of all juvenile arrests are the result of theft, simple assault, drug abuse, disorderly conduct, and curfew violations.<sup>204</sup>

The courts in *N.G.* and *Smook* reiterated the reasons for which juveniles are detained, many of which can be considered “minor” offenses.<sup>205</sup> The Second Circuit in *N.G.* acknowledged that, although juveniles are detained while awaiting trial for serious offenses, they are also detained for less serious offenses and status offenses.<sup>206</sup> More explicitly, the Eighth Circuit in *Smook* understood “minor offenses” to include petty theft, liquor violations, being a runaway, and curfew viola-

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<sup>195</sup> See *T.L.O.*, 469 U.S. at 338–39; *supra* notes 39–41 and accompanying text (juveniles who commit serious crimes may be automatically transferred to adult court).

<sup>196</sup> See 469 U.S. at 338 (quoting *Ingraham v. Wright*, 430 U.S. 651, 669 (1977)).

<sup>197</sup> See *id.*

<sup>198</sup> See, e.g., *N.G.*, 382 F.3d at 235.

<sup>199</sup> Kathleen Michon, *Juvenile Court: An Overview*, NOLO, <http://www.nolo.com/legal-encyclopedia/article-32222.html> (last visited Jan. 25, 2011).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> See *id.*

<sup>203</sup> *Id.* It should be noted, however, that juveniles who commit such violent offenses may have been waived to criminal court and are not included in this statistic. See *supra* notes 39–41 and accompanying text.

<sup>204</sup> Michon, *supra* note 199.

<sup>205</sup> See *Smook*, 457 F.3d at 808–09; *N.G.*, 382 F.3d at 227.

<sup>206</sup> See *id.*; Michon, *supra* note 199.

tions, and understood “non-felony offenses” to include other non-violent offenses, such as truancy, contempt of court, disturbance of school, and damage to property.<sup>207</sup> For example, in *Smook*, the plaintiff had been temporarily detained for violating local curfew laws.<sup>208</sup> Similarly, in *N.G.*, the plaintiffs had been detained for disobeying court orders to attend seventh grade and to not run away from home.<sup>209</sup> Such “minor” and “non-felony” offenses are strikingly different in nature from the types of crimes that result in criminal conviction in adult court, and are more similar to the types of violations—like Savana Redding’s alleged offense—that would occur in a school setting.<sup>210</sup>

This reasoning is consistent with then-Judge Sotomayor’s discussion in her dissenting opinion in *N.G.* of Fourth Amendment rights in prisons, JDCs, and schools.<sup>211</sup> Like the Court in *T.L.O.*, Judge Sotomayor recognized that juveniles cannot so easily be compared to prison inmates—whom she believes are the only individuals who may be strip searched without reasonable, individualized suspicion.<sup>212</sup> Reasoning that the strip searches of both juveniles in *N.G.* were unconstitutional, Judge Sotomayor stated:

[T]o hold that the strip searches of the two girls in the instant appeal were reasonable is equivalent to saying that these girls are entitled to the same level of Fourth Amendment protection as prison inmates held on felony charges, and to decidedly *less protection* than people crossing the border, *jail inmates detained on misdemeanor charges*, prison corrections officers, or *students in public school*.<sup>213</sup>

Although the majority in *N.G.* also suggested that prisons and JDCs are distinct, it gave less weight to this distinction and upheld the searches under the “special needs” test.<sup>214</sup> By contrast, Judge Sotomayor’s dissent

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<sup>207</sup> 457 F.3d at 808–09.

<sup>208</sup> *Id.* at 808.

<sup>209</sup> 382 F.3d at 228–29.

<sup>210</sup> See *Safford*, 129 S. Ct. at 2638; *T.L.O.*, 469 U.S. at 338–39.

<sup>211</sup> 382 F.3d at 241 (Sotomayor, J., dissenting).

<sup>212</sup> See *id.*

<sup>213</sup> *Id.* (emphasis added).

<sup>214</sup> *Id.* at 235–37 (majority opinion). The majority in *N.G.* only used the distinction between prisons and JDCs to rule out the application of the *Turner* “penological interests” standard to the juvenile custodial context. *Id.* at 235–36. As the Court stated:

No doubt a state has a legitimate interest in confining such juveniles in some circumstances, but it does not follow that by placing them in an institution where the state might be entitled, under *Turner*, to conduct strip searches of

suggested that juveniles detained on minor charges deserve more Fourth Amendment protection than prison inmates and possibly as much protection as public school children.<sup>215</sup>

A recent district court case properly placed the JDC strip search standard in relation to the standards applied in public schools and in adult prisons.<sup>216</sup> In its 2010 opinion in *Mashburn v. Yamhill County*, the U.S. District Court for the District of Oregon wrote that, “On the constitutional spectrum, the standard for analyzing strip searches of children at the [detention facility] falls somewhere between the standards that govern searches of adult prison inmates and searches of school children.”<sup>217</sup> The district court recognized the importance of compromising between the need to protect children (a concern present in the school) and the need for institutional security (a concern present in a prison), and thus used “the unique concerns of children and of the government, which have analogies in both prisons and schools,” to frame the analysis.<sup>218</sup> The district court thus suggested the importance of the school-prison compromise that this Note aims to illuminate.<sup>219</sup>

### B. *Applying Safford to the JDC Context*

The standard for determining the constitutionality of the search of a student by school officials, set forth in *T.L.O.* and applied in *Safford*, informs the standard that can be applied to JDC strip searches.<sup>220</sup> The reasonableness standard in *T.L.O.* provides that the search must be “reasonably related in scope to the circumstances which justified the interference in the first place.”<sup>221</sup> The scope is constitutional where it is “not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”<sup>222</sup> This type of reasonableness test is dif-

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those convicted of adult-type crimes, a state may invoke *Turner* to justify strip searches of runaways and truants.

*Id.* at 235. The Court then, however, proceeded to examine and uphold the searches using the “special needs” justification. *Id.* at 236–37.

<sup>215</sup> *See id.* at 241 (Sotomayor, J., dissenting).

<sup>216</sup> *See Mashburn*, 698 F. Supp. 2d at 1238–39.

<sup>217</sup> *Id.* at 1238.

<sup>218</sup> *Id.* at 1238–39.

<sup>219</sup> *See id.*

<sup>220</sup> *See Safford*, 129 S. Ct. at 2641–42; *T.L.O.*, 469 U.S. at 341–42.

<sup>221</sup> *T.L.O.*, 469 U.S. at 341.

<sup>222</sup> *Id.* at 342.

ferent from the standards applied by lower courts to custodial strip searches of juveniles.<sup>223</sup>

When considering the strip searches of juveniles in custody, lower courts have often applied some form of balancing test.<sup>224</sup> In *N.G.*, for example, the Second Circuit applied the “special needs” test, which requires a fact-specific balancing of the intrusion of the search against the legitimate government interest at stake.<sup>225</sup> There, the court upheld the intake searches because it determined that the government’s legitimate need to discover contraband, both to protect other inmates and to prevent self-mutilation, outweighed the juveniles’ privacy rights.<sup>226</sup> Similarly, in *Smook*, the Eighth Circuit applied the “special needs” balancing test and upheld the intake strip search of the juvenile plaintiff.<sup>227</sup> The Eighth Circuit held that the state’s *in loco parentis* need to protect juveniles outweighed the invasiveness of the search.<sup>228</sup> Finally, in 1992, in *Justice v. City of Peachtree*, the U.S. Court of Appeals for the Eleventh Circuit applied the balancing test that the Supreme Court had applied in *Bell v. Wolfish*, which balances the government’s need for a search against the invasion of personal rights.<sup>229</sup> The approach in *Peachtree* comes close to the *T.L.O.* and *Safford* standard because it considers whether, given the totality of the circumstances, there is a “particularized and objective basis”—i.e., individualized suspicion—that the particular juvenile is hiding contraband.<sup>230</sup>

These types of balancing tests, which weigh a state’s interests against a juvenile’s privacy rights, present several concerns.<sup>231</sup> The primary concern lies with how courts have weighed a juvenile’s privacy rights—although the government interests which courts have proffered are also questionable.<sup>232</sup> First, such a balancing test does not explicitly force courts to consider any of the following: (1) the juvenile’s age; (2) his or her gender; or (3) the offense for which he or she was detained.<sup>233</sup> Second, in applying this balancing test, courts have too nar-

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<sup>223</sup> Compare *Safford*, 129 S. Ct. at 2641–42, and *T.L.O.*, 469 U.S. at 341–42, with *Smook*, 457 F.3d at 811–12, and *N.G.* 382 F.3d at 236–37.

<sup>224</sup> See *Smook*, 457 F.3d at 812; *N.G.*, 382 F.3d at 237.

<sup>225</sup> 382 F.3d at 236–37.

<sup>226</sup> *Id.*

<sup>227</sup> 457 F.3d at 810–12.

<sup>228</sup> *Id.* at 812.

<sup>229</sup> *Peachtree*, 961 F.2d at 191 (citing *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

<sup>230</sup> *Id.* at 194.

<sup>231</sup> See *infra* notes 232–235 and accompanying text.

<sup>232</sup> See *Smook*, 457 F.3d at 810–12; *Peachtree*, 961 F.2d at 191.

<sup>233</sup> See *Safford*, 129 S. Ct. at 2642 (citing *T.L.O.*, 469 U.S. at 342).

rowly defined an “intrusive” strip search and have thus given too little weight to the seriousness of such a search.<sup>234</sup> The *T.L.O.* standard—and particularly its application to the strip search in *Safford*—not only suggests the importance of age, gender, and offense in considering the constitutionality of a strip search, but also gives a new meaning to the word “intrusive.”<sup>235</sup>

As opposed to a balancing test, this Note proposes a more clear-cut, two-tiered standard of review based on the level of the alleged juvenile offense.<sup>236</sup> Although such a two-tiered test has not been applied in the JDC setting, *Mashburn* suggests the appropriateness of a standard “based solely on categories of charged conduct” due to the difficulty of ascertaining reliable facts about each juvenile’s background that might otherwise inform the need to search him or her upon admission to the facility.<sup>237</sup>

### 1. Age, Gender, and Level of Offense

The search standards applied in the school context by the Supreme Court in *T.L.O.* and *Safford* explicitly force courts to consider “the age and sex of the student and the nature of the infraction.”<sup>238</sup> In considering the constitutionality of strip searches of juveniles in state custody, lower courts should more strongly weigh these three factors.<sup>239</sup> Lower courts have acknowledged that the age and gender of an individual affects the psychological and emotional impact of a strip search.<sup>240</sup> The *T.L.O.* standard, however, forces courts explicitly to consider these two factors, and *Safford* reinforces their importance.<sup>241</sup>

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<sup>234</sup> See *N.G.*, 382 F.3d at 244–45 (Sotomayor, J., dissenting).

<sup>235</sup> See *Safford*, 129 S. Ct. at 2641 (“[W]e would not define strip search and its Fourth Amendment consequences in a way that would guarantee litigation about who was looking and how much was seen.”); *N.G.*, 382 F.3d at 239 (Sotomayor, J., dissenting) (discussing the “uniquely invasive and upsetting nature of strip searches,” particularly for young girls who “have been victims of abuse or neglect, and may be more vulnerable mentally and emotionally than other youths their age.”).

<sup>236</sup> See *infra* notes 287–305 and accompanying text.

<sup>237</sup> See 698 F. Supp. at 1240.

<sup>238</sup> *T.L.O.*, 469 U.S. at 342; accord *Safford*, 129 S. Ct. at 2642.

<sup>239</sup> See *Safford*, 129 S. Ct. at 2642; *T.L.O.*, 469 U.S. at 342.

<sup>240</sup> See *N.G.*, 382 F.3d at 232.

<sup>241</sup> See *Safford*, 129 S. Ct. at 2641, 2642 (asserting that “adolescent vulnerability intensifies the patent intrusiveness of the exposure” and that “a search down to the body of an adolescent requires some justification in suspected facts”); *T.L.O.*, 469 U.S. at 342. A comment from Justice Ginsburg captured the Court’s concern about age and gender:

I think it makes people stop and think, [m]aybe a 13-year-old girl is different from a 13-year-old boy in terms of how humiliating it is to be seen undressed.

The “nature of the infraction”—how serious of an offense a juvenile has committed or has been accused of committing—should also play a significant role in the Fourth Amendment protection he or she receives.<sup>242</sup> The Court in *Safford* stated that Savana Redding was subjected to a full strip search because the assistant principal believed she possessed prescription strength ibuprofen and over-the-counter naproxen—the equivalent of two Advil or one Aleve.<sup>243</sup> Although possessing these painkillers violated school policy, the Court stated that the principal “must have been aware of the nature and limited threat of the specific drugs he was searching for” and “had no reason to suspect that large amounts of drugs were being passed around.”<sup>244</sup>

As discussed in Section A, juveniles are often detained in JDCs for low-level offenses, and have not been convicted of high-level criminal offenses that more reasonably warrant reduced Fourth Amendment protection.<sup>245</sup> For example, Jodi Smook was fully strip searched after being detained in a JDC for violating local curfew laws.<sup>246</sup> The juvenile plaintiffs in *N.G.* had been detained for disobeying court orders to attend seventh grade and to not run away from home.<sup>247</sup> Consistent with the Court’s reasoning in *Safford*, the courts in *N.G.* and *Smook* should have afforded more importance to the relatively nonthreatening nature of the offenses for which the juveniles were detained before deciding that the highly invasive strip searches were warranted.<sup>248</sup>

The opinion in *Mashburn* by the federal district court in Oregon provides one example of how the standard set forth in *T.L.O.* and *Safford* could be applied to the JDC setting.<sup>249</sup> The plaintiffs in *Mashburn*

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I think many of [the male justices] first thought of their own reaction. It came out in various questions. You change your clothes in the gym, what’s the big deal?

*The Supreme Court 2008—Leading Cases*, *supra* note 14, at 172 (citing Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES, July 12, 2009, § 6 (Magazine), at 22) The new presence on the Court of Justice Sonia Sotomayor, the second female and the only dissenter in *N.G.*, may heighten the Court’s interest in protecting vulnerable adolescent girls. *See N.G.*, 382 F.3d at 238–45 (Sotomayor, J., dissenting).

<sup>242</sup> *See Safford*, 129 S. Ct. at 2642.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *See Smook*, 457 F.3d at 808; *N.G.*, 382 F.3d at 227–29; *supra* notes 194–204 and accompanying text.

<sup>246</sup> *Smook*, 457 F.3d at 808.

<sup>247</sup> 382 F.3d at 228, 229.

<sup>248</sup> *Compare Safford*, 129 S. Ct. at 2641–42, and *T.L.O.*, 469 U.S. at 341–42, with *Smook*, 457 F.3d at 811–12, and *N.G.* 382 F.3d at 236–37.

<sup>249</sup> *See* 698 F. Supp. 2d at 1237–38.

were minors who were strip searched upon entry into a JDC, which had a policy permitting strip searches of all juveniles upon admission to the center.<sup>250</sup> In determining the constitutionality of this policy, the *Mashburn* court cited the test applied by the U.S. Supreme Court in *T.L.O.* and *Safford*, which states that the scope of the search must not be “excessively intrusive in light of the age and sex of the student and the nature of the infraction.”<sup>251</sup> The court held that the defendants presented no “evidence to suggest that the scope of the . . . strip search policy is ‘not excessively intrusive in light of the age and sex of the [juvenile detainee] and the nature of the infraction,’ or, in our case, the nature of the interest justifying the search.”<sup>252</sup> The court reasoned that the JDC’s search policy was unreasonable in permitting the same full strip search—including inspection of the breasts or scrotum—of juveniles who had been admitted for very different offenses, from committing a felony to failing to obey a court order.<sup>253</sup> *Mashburn* thus lends support to the more particularized strip search standard suggested in this Note as a means of “bridging the gap” between the standards applied in schools and JDCs.<sup>254</sup>

## 2. A Broader Definition of “Intrusive”

The Supreme Court’s opinion in *Safford* demonstrates a stronger recognition of juveniles’ privacy interests than many lower courts have recognized.<sup>255</sup> The Court’s emphasis on a juvenile’s subjective experience of privacy is extremely important to how it characterized the intrusiveness of a strip search.<sup>256</sup> The Court reasoned that a strip search is “categorically distinct” and refused to split hairs over the precise nature of the search.<sup>257</sup> Acknowledging adolescent vulnerability, the Court distinguished the exposure involved in a strip search from the nudity involved in changing for gym.<sup>258</sup> Moreover, the Court declined to equivocate over “who was looking and how much was seen.”<sup>259</sup> Thus, the Court determined that the strip search of Redding was highly intrusive

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<sup>250</sup> *Id.* at 1235–36, 1240.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 1244.

<sup>253</sup> *See id.* at 1235–36, 1239.

<sup>254</sup> *See id.* at 1244.

<sup>255</sup> *See* 129 S. Ct. at 2641–42.

<sup>256</sup> *Id.* at 2641.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 2642.

<sup>259</sup> *Id.* at 2641.

even though the search was conducted by two females in the privacy of a school nurse's office, Redding remained in her underwear, and the school officials allegedly did not see her private parts.<sup>260</sup>

The Court's strong recognition of adolescent vulnerability in *Safford* contrasts sharply with how lower courts have characterized the intrusiveness of a strip search.<sup>261</sup> In *Peachtree*, the Eleventh Circuit characterized the search of a juvenile by "who was looking and how much was seen,"<sup>262</sup> holding that the manner in which the search was conducted mitigated its intrusiveness and supported its constitutionality.<sup>263</sup> The Eleventh Circuit judged the nature of the search by the same elements as the Supreme Court did in *Safford*: where the search was conducted, who conducted the search, and what body parts were revealed.<sup>264</sup> The Eleventh Circuit determined that the search was conducted in the least intrusive manner possible: (1) the search was conducted in the privacy of a separate room in which only the plaintiff and the officers were present; (2) the search was conducted by two females, the same gender as the plaintiff; and (3) the plaintiff remained in her panties and did not have her body cavities searched.<sup>265</sup> Yet unlike the Court in *Safford*, which determined that the strip search was highly invasive and "categorically distinct" despite these same limitations,<sup>266</sup> the Eleventh Circuit suggested that these limitations mitigated the intrusiveness of the search and weighed in favor of its constitutionality.<sup>267</sup>

Like the Eleventh Circuit in *Peachtree*, the Eighth Circuit in *Smook* also showed less concern for adolescent vulnerability than did the Supreme Court in *Safford* when it considered the intrusiveness of a strip search by "who was looking and how much was seen."<sup>268</sup> Using the full strip search deemed permissible by the Second Circuit in *N.G.* as a baseline, the Eighth Circuit reasoned that the search of *Smook* was more justified because she was not required to fully undress.<sup>269</sup> The Eighth Circuit decided that the search was more constitutional than the search in *N.G.* based on the same factors that the Supreme Court refused to

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<sup>260</sup> *Id.* at 2638–41.

<sup>261</sup> Compare *Safford*, 129 S. Ct. at 2641, with *Smook*, 457 F.3d at 811, and *Peachtree*, 961 F.2d at 193–94.

<sup>262</sup> See *Safford*, 129 S. Ct. at 2641.

<sup>263</sup> See *Peachtree*, 961 F.2d at 193.

<sup>264</sup> See *Peachtree*, 961 F.2d at 193; see also *Safford*, 129 S. Ct. at 2641.

<sup>265</sup> See *Peachtree*, 961 F.2d at 193; see also *Safford*, 129 S. Ct. at 2641.

<sup>266</sup> *Safford*, 129 S. Ct. at 2641.

<sup>267</sup> *Peachtree*, 961 F.2d at 193.

<sup>268</sup> See *Smook*, 457 F.3d at 81; see also *Safford*, 129 S. Ct. at 2641.

<sup>269</sup> *Smook*, 457 F.3d at 811.



weigh in *Safford*: (1) the search of Smook was conducted in a private restroom; (2) the search was conducted by a female staff member; and (3) Smook was allowed to remain in her undergarments, concealing her private parts as if she were in a swimsuit at the beach.<sup>270</sup> In weighing the intrusiveness of the strip search by these factors, the Eleventh Circuit's reasoning stands in contrast to the Supreme Court's reasoning in *Safford*.<sup>271</sup> Although the Eleventh Circuit analogized such a search to being in a swimsuit on the beach, the Court in *Safford* refused to equate a strip search with changing for gym class.<sup>272</sup> The Court in *Safford* recognized that having one's intimate body parts inspected in detail, by a stranger in a position of authority, while standing in an unfamiliar place can be much more traumatizing than briefly standing in one's undergarments, among classmates one's age, in the girls' locker room.<sup>273</sup> The Eleventh Circuit in *Smook*, by contrast, obstinately failed to recognize a difference between undergoing a full body inspection by a stranger and casually relaxing on the beach in a bikini with one's friends.<sup>274</sup>

Finally, as in both *Peachtree* and *Smook*, the Second Circuit in *N.G.* did not consider the invasiveness of a strip search as strongly as did the Court in *Safford*.<sup>275</sup> The Second Circuit did acknowledge that some courts have considered strip searches to be humiliating and terrifying experiences.<sup>276</sup> The court itself, however, did not give significant weight to the invasiveness of strip searches when considering the constitutionality of the searches in question.<sup>277</sup> In fact, the majority opinion in *N.G.* did not once use the words "invasive" or "intrusive," both of which only appear in then-Judge Sotomayor's dissent.<sup>278</sup> Instead, the majority in *N.G.* merely focused on the government's interest in protecting children from self-mutilation and detecting child abuse, without adequately considering the intrusiveness of the searches in question.<sup>279</sup>

Although the Court in *Safford* did not explicitly extend its reasoning beyond the school context, it suggested that the intrusiveness of a

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<sup>270</sup> *Id.*

<sup>271</sup> Compare *Smook*, 457 F.3d at 811, with *Safford*, 129 S. Ct. at 2641.

<sup>272</sup> Compare *Smook*, 457 F.3d at 811, with *Safford*, 129 S. Ct. at 2641.

<sup>273</sup> See *Safford*, 129 S. Ct. at 2641.

<sup>274</sup> See *Smook*, 457 F.3d at 811.

<sup>275</sup> See *Safford*, 129 S. Ct. at 2641; *Smook*, 457 F.3d at 811; *N.G.*, 382 F.3d at 230–38; *Peachtree*, 961 F.2d at 193–94.

<sup>276</sup> See *N.G.*, 382 F.3d at 233.

<sup>277</sup> See *id.* at 235–37.

<sup>278</sup> Compare *N.G.*, 382 F.3d at 230–38 (majority opinion), with *N.G.*, 382 F.3d at 242, 244 (Sotomayor, J., dissenting).

<sup>279</sup> See *N.G.*, 382 F.3d at 236–37 (majority opinion).

strip search is context-neutral.<sup>280</sup> That is, a strip search is not considered more or less intrusive based on where it is conducted or what state official conducted it (or what he or she saw).<sup>281</sup> Moreover, the Court's statement that the strip search of Redding was "categorically distinct" further suggests that its reasoning about a strip search's intrusiveness extends beyond the school context—for example, to JDCs—and always requires special consideration.<sup>282</sup> A blanket policy, defended merely by asserting the high security risks in a prison, should not take the place of such specialized consideration.<sup>283</sup>

A recent district court case decided after *Safford* suggests that courts are willing to apply the *Safford* Court's broader definition of intrusive beyond the public school context.<sup>284</sup> In 2010, in *Jones v. City of Brunswick*, the U.S. District Court for the Northern District of Ohio considered the search of a plaintiff who—after being arrested for misdemeanors related to traffic violations and being brought to the police station—was asked to remove her hooded sweatshirt and stand for a photograph in her lace-trimmed camisole and bra.<sup>285</sup> In considering the defendants' motion for summary judgment on this search issue, the court—citing *Safford*—held that a jury could find that this camisole constituted "underwear" and, if so, that the search could be considered "highly intrusive in scope, even if not as intrusive as removing all of the Plaintiff's clothing."<sup>286</sup>

### C. A Two-Tiered Standard of Review

Following *Safford*, lower courts should adopt a two-tiered standard of review for custodial strip searches of juveniles based upon the level

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<sup>280</sup> See 129 S. Ct. at 2641.

<sup>281</sup> See *id.* As the Court stated, "we would not define strip search and its Fourth Amendment consequences in a way that would guarantee litigation about who was looking and how much was seen." *Id.* The Court did not appear to find the strip search of Redding to be more or less reasonable despite the fact that it was conducted in a private nurse's office by two females who professed that they did not see anything when Redding pulled out her bra and underwear. See *id.*

<sup>282</sup> See *id.*

<sup>283</sup> See *N.G.*, 382 F.3d at 238–45 (Sotomayor, J., dissenting). A Connecticut policy specifies that a strip search shall be conducted upon each detainee's "initial intake" at a JDC and upon each detainee's "readmission," or after any detainee "has left the supervision of Detention Center or Judicial Branch staff." *Id.* (internal quotations omitted). This type of policy, applied to all situations, is often referred to as a "blanket policy." See *id.* at 226.

<sup>284</sup> See *Jones v. City of Brunswick*, 704 F. Supp. 2d 721, 732–35 (N.D. Ohio 2010).

<sup>285</sup> *Id.* at 728.

<sup>286</sup> *Id.* at 733–34 (citing *Safford*, 129 S. Ct. at 2641).

of offense committed by the juvenile.<sup>287</sup> Level 1 review follows the *T.L.O.* and *Safford* reasonableness standard and should be applied to status offenses and juvenile crimes defined as “minor” by state law or state courts.<sup>288</sup> Thus, for a search of a juvenile committing a “minor” offense to be reasonable, courts must consider the intrusiveness of the search—as redefined by *Safford*—in light of the age and sex of the student and the nature of the offense.<sup>289</sup> Level 2 review, by contrast, affords greater discretion to state officials and should be applied to serious juvenile crimes, also as defined by state law or the state courts.<sup>290</sup> The increasing prevalence of transfer laws, however, suggests that many juvenile offenders falling into this category may be waived to the adult system.<sup>291</sup> Under Level 2 review, courts can continue to apply the balancing test that weighs the juvenile’s privacy interests against the government needs, giving more deference and flexibility to officials without requiring the deliberation necessitated by Level 1 and without placing such strong emphasis on the intrusiveness of the search.<sup>292</sup>

Again, as discussed in Section A, juveniles can be detained in JDCs for several different reasons, which can be summarized and categorized by degree of seriousness.<sup>293</sup> Juveniles may be detained for the following reasons: (1) as a result of abuse or neglect; (2) for low-level offenses like petty theft, simple assault, and drug abuse; (3) for status offenses such as curfew violations, running away from home, underage drinking, and truancy; and (4) for serious offenses like rape or murder.<sup>294</sup> Category A detainment—for abuse and neglect—cannot be considered an “offense” and should be considered under the Level 1 standard of review. Categories B and C, which together can be considered “minor offenses” should also be reviewed under Level 1.<sup>295</sup> Category D offenses, however, are “serious offenses” and can be reviewed under Level 2.<sup>296</sup>

This two-tiered standard of review recognizes the similarities between schools and JDCs for the purposes of a strip search analysis and

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<sup>287</sup> See *Safford*, 129 S. Ct. at 2642; *T.L.O.*, 469 U.S. at 342; *supra* notes 242–248 and accompanying text.

<sup>288</sup> See *Safford*, 129 S. Ct. at 2642; *T.L.O.*, 469 U.S. at 342; *supra* notes 242–248 and accompanying text.

<sup>289</sup> See *Safford*, 129 S. Ct. at 2642; *T.L.O.*, 469 U.S. at 342.

<sup>290</sup> See *N.G.*, 382 F.3d at 227.

<sup>291</sup> See *supra* notes 38–41 and accompanying text.

<sup>292</sup> See *Smook*, 457 F.3d at 811; *supra* notes 194–204 and accompanying text.

<sup>293</sup> See *supra* notes 199–210 and accompanying text.

<sup>294</sup> See *supra* notes 199–210 and accompanying text.

<sup>295</sup> See *supra* notes 199–210 and accompanying text.

<sup>296</sup> See *supra* notes 199–210 and accompanying text.

the important distinctions between prisons and JDCs that the federal district court in Oregon likewise identified in *Mashburn*.<sup>297</sup> This standard also offers courts a more uniform constitutional standard by which to evaluate juvenile strip searches in schools and detention centers, thus freeing courts from having to apply divergent tests to searches based on context.<sup>298</sup> It should be noted, however, that not all strip searches falling under Level 1 are categorically unreasonable.<sup>299</sup> It only forces courts to consider more carefully a juvenile's privacy interests, thus requiring stronger justification by the state for conducting the search (i.e., strong reasonable suspicion that the juvenile possesses contraband).<sup>300</sup> Finally, this standard recognizes that juveniles can be serious offenders who present a high risk of contraband or weapon possession.<sup>301</sup> In such cases, courts would be justified in affording a juvenile less Fourth Amendment protection.<sup>302</sup>

This proposed standard is consistent with both the policy concerns that initiated the juvenile justice system and with its more recent trends.<sup>303</sup> It ensures that juveniles in state custody are protected from the risks of contraband and weapons by permitting the government to perform a strip searches when justified by adequate suspicion that the juvenile possesses contraband, and it defers to state officials when dealing with high-level offenders.<sup>304</sup> Also consistent with the origins of the juvenile system, the proposed standard protects juveniles in a different sense of the word "protect": rather than protecting them from the criminal process and harsh punishment, it protects them from the psychologically damaging effects of a humiliating strip search.<sup>305</sup> Thus, this standard retains the ideological justification for the juvenile system that youth are unique and vulnerable—here, more vulnerable than adults

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<sup>297</sup> See *Mashburn*, 698 F. Supp. 2d at 1238–39; *supra* notes 170–215 and accompanying text.

<sup>298</sup> See *Safford*, 129 S. Ct. at 2638; *Smook*, 457 F.3d at 808.

<sup>299</sup> See *Safford*, 129 S. Ct. at 2642; *T.L.O.*, 469 U.S. at 342.

<sup>300</sup> See *Safford*, 129 S. Ct. at 2642; *T.L.O.*, 469 U.S. at 342.

<sup>301</sup> *N.G.*, 382 F.3d at 227 (noting that some juveniles commit serious offenses).

<sup>302</sup> See *id.*

<sup>303</sup> See Scott & Grisso, *supra* note 33, at 138 (discussing the rehabilitative origins of the juvenile system, which was aimed at protecting youth who were "childlike, psychologically troubled, and malleable"); Tanenhaus & Drizen, *supra* note 38, at 642 (discussing the scare of juvenile "superpredators" and the move, in the 1980s and 1990s towards tougher juvenile laws).

<sup>304</sup> See *N.G.*, 382 F.3d at 236–37; KUPCHIK, *supra* note 33, at 1 (discussing the origins of the separate juvenile system, which was aimed at protecting children who were incompetent, dependent, and in need of care).

<sup>305</sup> See *Safford*, 129 S. Ct. at 2641–42; *Kent v. United States*, 383 U.S. 541, 554–55 (1966); KUPCHIK, *supra* note 33, at 1.

to psychological damage from a search.<sup>306</sup> At the same time, this standard contemplates moving away from the strict *parens patriae* or *in loco parentis* doctrine by affording juveniles greater constitutional rights while still holding them accountable for their offenses—the proposed two-tiered standard does not alter the punishment, community service, or detention that a juvenile might receive for his or her offense.<sup>307</sup>

#### CONCLUSION

The delicate privacy rights at stake during invasive strip searches make the proper application of the Fourth Amendment to juveniles an important issue. Although courts have addressed this issue, they have applied different precedent and, thus, different standards. The Supreme Court has never directly addressed the constitutionality of strip searches of juveniles in state custody. The Court's recent opinion in *Safford Unified School District No. 1 v. Redding*, however, suggests that the Court seeks to broaden the Fourth Amendment protections given to juveniles and that its reasoning cannot be strictly limited to the school setting.<sup>308</sup> The Court in *Safford* refused to equate the nudity of a juvenile in her underwear with the exposure involved in wearing a bathing suit, a lesson that has broader applicability to the custodial context.<sup>309</sup> Thus, this Note suggests that courts adopt a two-tiered standard of review when confronting juvenile offenders; adopt a broader definition of "intrusive"; and more strongly weigh a juvenile's age, gender, and level of offense.

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<sup>306</sup> See *Safford*, 129 S. Ct. at 2641–42.

<sup>307</sup> See *id.*

<sup>308</sup> See 129 S. Ct. 2633, 2641–43 (2009).

<sup>309</sup> See *id.* at 2641–42.