

Juveniles are Different: The Case for Reasonable Suspicion in Juvenile Detention Centers

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I. INTRODUCTION

The American juvenile justice system was first established in 1825 when the Society for the Prevention of Juvenile Delinquency created the New York House of Refuge to house and rehabilitate troubled youth.¹ Juvenile offenders stayed at “reform schools,” like the New York House of Refuge.² These reform schools sought to rehabilitate juvenile offenders, as well as protect them from adult criminal offenders.³ Cook County, Illinois established the first juvenile court in 1899, and by 1924, most states had established juvenile court systems.⁴ These early juvenile court systems were premised on the *parens patriae* doctrine, emphasizing “an informal, nonadversarial, and flexible approach to cases[.]” and the paramount goal of the juvenile courts was to rehabilitate the juvenile offenders.⁵ This was accomplished in part by housing juvenile offenders in reform schools, separated from adult criminal offenders.⁶

In the late 1960s, the Supreme Court recognized that juvenile offenders have the same constitutional rights under the Fourteenth Amendment’s Due Process Clause as their adult counterparts.⁷ Beginning

¹ See ABA Div. for Pub. Educ., *The History of Juvenile Justice*, at 5 (Apr. 9, 2007), <http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf>; 18 U.S.C. § 5031 (2016) (defining “juvenile” as a person who is under eighteen years old). This Author will use “juvenile” and “adolescent” interchangeably throughout this Comment.

² ABA Div. for Pub. Educ., *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ See *id.* (defining *parens patriae* as the state’s “power to serve as a guardian (or parent) for those with legal disabilities, including juveniles”).

⁶ See *id.*

⁷ See ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 8 (Harvard Univ. Press) (paperback ed. 2010); see also *In re Gault*, 387 U.S. 1, 33, 41, 55–

in the 1970s and continuing through the early 1990s, juvenile crime, specifically violent crime, increased, as did a desire for a more punitive juvenile system.⁸ Critics of the rehabilitative juvenile justice model demanded reform; as a result, more juveniles, considered by some criminologists to be “super-predators,”⁹ were transferred to the adult criminal system.¹⁰ Juvenile arrest rates began to decline in 1996 and have been steadily declining since 2006.¹¹ In addition, the notion that juvenile offenders are “super-predators” has faded.¹² Moreover, recent legislative and policy reforms in numerous states as well as Supreme Court decisions such as *Roper v. Simmons*, which abolished the juvenile death penalty, indicate a movement away from such harsh treatment of juvenile offenders.¹³

While the juvenile justice system has evolved and fluctuated in significant ways since its inception, one principle remains constant: “children are different.”¹⁴ In 2015, the Third Circuit ignored this fundamental truth when it held in *J.B. v. Fassnacht* that juvenile detention centers may impose a blanket strip search policy upon all juvenile detainees entering the general population.¹⁵ The Third Circuit referred extensively to the Supreme Court’s decision in *Florence v. Board of*

57 (1967) (holding that juvenile offenders have a constitutional right to sufficient notice of charges, notification of right to counsel, adequate safeguards against self-incrimination, and confrontation and cross-examination of witnesses).

⁸ See SCOTT & STEINBERG, *supra* note 7, at 6–9, 84 (noting a period of “‘moral panic’ in which politicians, the public, and the media respond[ed] on the basis of exaggerated perceptions of threat” even during the mid-1990s when juvenile crime began to decline); see also Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18:2 THE FUTURE OF CHILDREN 17–18 (2008) (noting states enacted “automatic transfer statutes, under which many youths [were] categorically treated as adults when they [were] charged with crimes—either generally . . . or for specific crimes . . .”) (internal citation omitted).

⁹ See SCOTT & STEINBERG, *supra* note 7, at 6 n.12.

¹⁰ See *id.* at 5–9, 94–96.

¹¹ OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, STATISTICAL BRIEFING BOOK: JUVENILE ARREST RATE TRENDS, https://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05200 (noting that juvenile arrest rates for all offenses have declined by seventy percent since 1996).

¹² See SCOTT & STEINBERG, *supra* note 7, at 11.

¹³ *Id.* at 11–13. See also 543 U.S. 551, 568 (2005).

¹⁴ *Miller v. Alabama*, 567 U.S. 460, 480–81 (2012) (referring to juveniles). See also SCOTT & STEINBERG, *supra* note 7, at 29 (arguing that “scientific knowledge about cognitive, psychosocial, and neurobiological development in adolescents supports the conclusion that juveniles are different from adults in fundamental ways that bear on decisions about their *appropriate treatment* within the justice system—and that this scientific knowledge should be the foundation of the legal regulation of juvenile crime”) (emphasis added).

¹⁵ 801 F.3d 336, 337, 341 (3d Cir. 2015) (Fuentes, Nygaard & Roth, JJ.), *cert. denied*, 2016 U.S. LEXIS 2036 (Mar. 21, 2016) (No. 15-903).

Chosen Freeholders, which held that a correctional facility may enforce a universal strip search policy on all detainees entering the general population.¹⁶ “Using *Florence* as a guidepost,” the Third Circuit noted that the *Florence* Court did not carve out an exception for juvenile detainees, and the institutional security risks at an adult jail are the same as those at juvenile detention center.¹⁷ Thus, the Third Circuit determined that the Supreme Court’s decision in *Florence* governed strip searches of juvenile detainees at juvenile detention centers.¹⁸ By doing so, the Third Circuit treated juveniles as “miniature adults.”¹⁹

The Third Circuit incorrectly decided *J.B. v. Fassnacht* in three significant ways. First, the Third Circuit failed to meaningfully consider the psychological and developmental factors that distinguish juveniles from adults, as well as Supreme Court precedent which found age a determinative factor in assessing culpability. Second, the Third Circuit incorrectly found that the risks and dangers presented at adult jails are the same as those presented at juvenile facilities, implying that juveniles are miniature adults. Finally, the Third Circuit improperly held that the Supreme Court’s decision in *Florence* governed the issue. The Supreme Court’s decision in *Safford United School District #1 v. Redding* sets forth the applicable precedent for searches of juveniles, requiring an individualized determination standard, instead of *Florence*’s categorical rule.²⁰ As provided in *Safford*, there must be an individualized, reasonable suspicion that a juvenile detainee is dangerous or hiding contraband before a correctional officer may conduct a strip search.

Part II of this Comment will discuss the Third Circuit’s decision and reasoning in *J.B. v. Fassnacht*. Part III of this Comment will address the relevant Supreme Court precedent. Part IV will argue that the Third Circuit incorrectly decided *J.B. v. Fassnacht*. Part V will contend that an individualized, reasonable suspicion standard, as set forth in *Safford*, in the context of juvenile detention center strip searches, is more aligned with traditional Fourth Amendment principles, and more appropriate, than the administrative search policy provided in *Florence*. Part VI briefly concludes.

¹⁶ *Id.* at 339–47. See also 566 U.S. 318, 322–23 (2012).

¹⁷ See *Fassnacht*, 801 F.3d at 342–43, 346–47.

¹⁸ *Id.* at 337, 341.

¹⁹ *Miller*, 567 U.S. at 481 (noting that historically, laws and the judiciary have recognized that children cannot be viewed simply as miniature adults) (internal citation omitted).

²⁰ See 557 U.S. 364, 370, 377 (2009).

II. *J.B. v. FASSNACHT* AND UNIVERSAL STRIP SEARCHES IN JUVENILE DETENTION CENTERS

J.B. was twelve years old when he created a homemade flame thrower with a “PVC pipe, a lighter, and some spray paint.”²¹ The one to two-foot flames attracted some neighborhood girls, whose babysitter told J.B. to stop playing with the object.²² The girls later approached J.B. and teased him.²³ A fight ensued, and J.B. held a homemade knife over a girl’s head and said he could kill her.²⁴ A parent called a police officer to the incident, and a juvenile allegation of “terroristic threats and summary harassment” was filed three weeks later.²⁵ J.B. was subsequently detained at the Lancaster County Youth Intervention Center (“LCYIC”) because the charges were serious.²⁶ When he arrived at LCYIC, J.B. was processed and strip searched under facility policy.²⁷ An officer led J.B. to the shower area, closed a privacy curtain and told J.B. to “drop his pants and underwear, bend over, spread his buttocks, and cough.”²⁸ J.B. was exposed to the officer for approximately ninety seconds.²⁹ LCYIC detained J.B. for approximately four days before releasing him to his parents.³⁰ At his juvenile hearing, J.B. did not contest the charges against him, and he agreed to write an apology letter to the victims and to abide by his probation conditions.³¹ In exchange, his record would be expunged.³²

²¹ *Fassnacht*, 801 F.3d at 337.

²² *Id.* See also Brief for Appellees at 5, *J.B. v. Fassnacht*, 801 F.3d 336 (3d Cir. 2015) (No. 14-3905), 2015 WL 1606873, at *5 (noting “[t]he girls started teasing J.B., and there was some name calling among the children.”); Brief and Appendix for Appellants at 11, *J.B. v. Fassnacht*, 801 F.3d 336 (3d Cir. 2015) (No. 14-3905), 2015 WL 502836, at *11 (noting “[l]ater that day, the same girls came to the J.B.’s front yard and began teasing J.B. which led to a hand-to-hand fighting between him and at least two of the girls . . .”).

²³ *Fassnacht*, 801 F.3d at 337.

²⁴ *Id.* at 337–38 (noting that J.B. told the girl “he was stronger than her, ‘so [he could] kill [her] and over power [her].’”) (alteration in original). See also Brief for Appellees, *supra* note 22, at 5 (noting that J.B. held the knife “over the head of another playmate . . . in a joking manner.”).

²⁵ *Fassnacht*, 801 F.3d at 338. See also Brief for Appellees, *supra* note 22, at 6 (noting that the responding police officer informed J.B.’s father that a father of one of the girls wished to file charges, and after his [the officer’s] vacation, “he would look into it”).

²⁶ *Fassnacht*, 801 F.3d at 338.

²⁷ *Id.* (“This policy states that such searches are conducted to look for signs of ‘injuries, markings, skin conditions, signs of abuse, or further contraband.’”) (internal citation omitted).

²⁸ *Id.*

²⁹ *Id.*

³⁰ See *id.*

³¹ *Id.*

³² *Fassnacht*, 801 F.3d at 338.

J.B.'s parents sued the police officers, Lancaster County Office of Juvenile Probation officials, and LCYIC officials on his behalf, alleging, among other things, unreasonable search and seizure.³³ The defendants argued that this allegation failed under *Florence v. Bd. of Chosen Freeholders*.³⁴ The District Court rejected the defendants' argument and held that *Florence* did not apply to juvenile detainees, as it only addressed strip searches of adult inmates.³⁵ Concerned by the three-week gap between the incident and J.B.'s detention, the District Court reasoned that there was a "genuine issue of material fact" whether the correctional officers had "reasonable suspicion to strip search J.B[.]"³⁶ The District Court certified to the Third Circuit the question of "whether *Florence* applies to all juveniles being committed to a juvenile detention facility."³⁷

On appeal, J.B.'s parents argued that *Florence* is limited to adult detainees.³⁸ J.B.'s parents argued that *Safford United School District #1 v. Redding* governs searches of juveniles; therefore, a correctional officer must have an individualized, reasonable suspicion to believe a juvenile detainee is concealing contraband, before conducting a strip search.³⁹ Finding that *Safford* only governed strip searches of juveniles in schools, the Third Circuit rejected J.B.'s argument, holding that *Florence* applies to all juvenile detainees entering a juvenile detention center's general population.⁴⁰ The Third Circuit reasoned that the three institutional security risks the Supreme Court identified in *Florence* applied to juvenile detention centers.⁴¹ A universal strip search policy "make[s] good sense" because (1) new detainees could introduce lice or contagious infections to the general population; (2) an increased number of gang members going through the intake process increases the likelihood of violence in the facility; and (3) new detainees may conceal contraband.⁴² The Third Circuit believed "[t]here [was] no easy way to distinguish between juvenile and adult detainees in terms of the security risks cited by the Supreme Court in *Florence*."⁴³ While it acknowledged in passing that

³³ *Id.* (Specifically, J.B.'s parents asserted "various civil rights violations under 42 U.S.C. § 1983 for false arrest, unreasonable search and seizure, false imprisonment, and violations of due process against various prison officials.").

³⁴ *See id.*

³⁵ *Id.* at 338–39.

³⁶ *Id.* at 339.

³⁷ *Id.*

³⁸ *Fassnacht*, 801 F.3d at 342.

³⁹ *See id.* at 344.

⁴⁰ *See id.* at 337, 341, 344.

⁴¹ *Id.* at 342. *See infra* Part III, Section B.

⁴² *Fassnacht*, 801 F.3d. at 342, 346. *See Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 330–33 (2012).

⁴³ *Fassnacht*, 801 F.3d at 343.

“youth . . . is a . . . condition of life when a person may be most susceptible . . . to psychological damage . . . [c]hildren are especially susceptible to possible traumas from strip searches[.]”⁴⁴ the Third Circuit found that the state’s legitimate interest in ensuring the facility is secure outweighs a juvenile detainee’s privacy interests.⁴⁵ Juvenile detainees pose the same risks as those noted in *Florence*, which means that juvenile detainees may pose significant dangers to other detainees, detention center staff, and themselves.⁴⁶ The Third Circuit held that a universal strip search of juvenile detainees before admission to the general population of a juvenile detention center serves legitimate penological interests.⁴⁷

The Third Circuit also reasoned that, unlike adult detainees, the state acts *in loco parentis* during a juvenile’s detention period;⁴⁸ the individualized, reasonable suspicion inquiry is problematic;⁴⁹ and *Florence* did not carve out an exception for juvenile detainees.⁵⁰ The court first noted that juveniles are presumptively under the control of their parents; however, if that control falters, such as when juveniles are detained, the state assumes control over the juvenile, acting *in loco parentis*.⁵¹ In this situation, the state’s “enhanced responsibility to screen for signs of disease, self-mutilation, or abuse in the home” may outweigh the juvenile’s privacy interests.⁵²

Second, an individualized, reasonable suspicion standard is impractical because, as the *Florence* Court noted, correctional officers know little about the detainee during intake, and new detainees might lie about their identity.⁵³ Because correctional officers have limited information, it is unreasonable for them to assume that the new detainee standing in front of them has not smuggled something into the facility.⁵⁴ Moreover, the Supreme Court has consistently acknowledged that “blanket policies in prison administration” are useful.⁵⁵ During the intake

⁴⁴ *Id.* at 342 (alteration in original) (emphasis added) (also acknowledging that strip searches are “a serious intrusion upon personal rights[,] an offense to the dignity of the individual[,] and demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, and repulsive[.]”) (internal quotations and citations omitted).

⁴⁵ *Id.* at 344.

⁴⁶ *Id.* at 342.

⁴⁷ *Id.* at 340.

⁴⁸ *Id.* at 343 (stating that “juveniles pose risks unique from those of adults[.]” thus implying that that the state’s *in loco parentis* role over the juvenile is the only thing distinguishing juvenile from adult detainees).

⁴⁹ *Fassnacht*, 801 F.3d at 344–45.

⁵⁰ *Id.* at 346.

⁵¹ *See id.* at 343 n.41.

⁵² *See id.* at 343–44 (internal citation omitted).

⁵³ *Id.* at 344–45.

⁵⁴ *Id.* at 345.

⁵⁵ *Fassnacht*, 801 F.3d at 345.

process, it is almost impossible for a correctional officer to identify a detainee who has a propensity for “violence, escape, or drug smuggling.”⁵⁶ In addition, classifications based upon individualized assessment risk discriminatory application, for a correctional officer might strip search a detainee based on characteristics such as race, sex, age, or accent.⁵⁷ Alternatively, a correctional officer, in an effort to avoid liability, may decide not to conduct a strip search “in [a] close case” and expose the entire detention center population to unnecessary risk.⁵⁸

Finally, the Third Circuit determined that the *Florence* Court did not carve out “an exception for juvenile detainees.”⁵⁹ When the Court stated it would not rule on whether other kinds of searches would be reasonable if a detainee is not admitted to the general population, it did not mean to imply that strip searches of juvenile detainees would provide an example of when other kinds of searches would be reasonable (i.e. strip searches would be unreasonable).⁶⁰ Under the Third Circuit’s interpretation of *Florence*, any potential exceptions the Supreme Court may have carved out do not include exceptions based on age classifications.⁶¹ Correctional officers in any detention facility have an “essential interest in readily administrable rules[:]”⁶² as a result, “blanket strip search policies upon admission to the general population of a jail, regardless of whether the detainee is a juvenile or adult, make good sense.”⁶³

III. SUPREME COURT PRECEDENT

A. School Searches and Individualized Suspicion

In *Safford United School District #1 v. Redding*, the Supreme Court held that the strip search of a student violated the Fourth Amendment because it was unreasonable in its scope.⁶⁴ Following a report from another student, the assistant principal asked thirteen-year-old Savana Redding if she knew anything about prescription and over-the-counter

⁵⁶ *Id.* at 345 (citing *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 327 (2012)).

⁵⁷ *Id.* at 345.

⁵⁸ *Id.* at 346 (citing *Florence*, 566 U.S. at 337).

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ *Fassnacht*, 801 F.3d at 346–47 (noting the Supreme Court used broad, sweeping language like “jail” to include “prisons and other detention facilities” and “every” and “all” when depicting who will be strip searched and therefore meant to include juveniles).

⁶² *Id.* at 346 (quoting *Atwater v. Lago Vista*, 532 U.S. 318, 347 (2001)).

⁶³ *Id.* (citing *Florence*, 566 U.S. at 338).

⁶⁴ 557 U.S. 364, 368, 376–77 (2009).

pills, deemed contraband pursuant to school rules.⁶⁵ Savana allowed the assistant principal and an administrative assistant to search her backpack, but they did not find any pills.⁶⁶ The assistant then took Savana to the school nurse's office to search her clothes for the alleged pills.⁶⁷ After Savana removed her outer clothing and shoes, the assistant and nurse ("school officials") told Savana to remove her pants and T-shirt.⁶⁸ The school officials told Savana, who was standing in front of them in her bra and underpants, to "pull her bra out and to the side and shake it, and to pull out the elastic on her underpants . . . exposing her breasts and pelvic area[.]"⁶⁹ The school officials did not find any pills.⁷⁰

The Supreme Court held that the strip search of Savana was unconstitutional because the "content of the suspicion," that Savana was providing contraband pills to fellow students, "failed to match the degree of intrusion," the strip search.⁷¹ Savana exposing "her breasts and pelvic area to some degree" to two school officials coupled with "subjective and reasonable societal expectations of personal privacy" warranted the conclusion that this kind of search was categorically distinct from "a search of outer clothing and belongings."⁷² This kind of intrusive search, therefore, demanded that distinct elements be met before school authorities search a student in this manner.⁷³ The Court reasoned that the test for searches of children by school officials was set forth in *New Jersey v. T.L.O.*⁷⁴ The Supreme Court in *T.L.O.* held that a school official must have reasonable suspicion to search a student.⁷⁵ When the "measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction," a school official's search of a student is permissible.⁷⁶

Applying *T.L.O.*, the *Safford* Court held that the assistant principal had a reasonable suspicion to search Savana's backpack and outer

⁶⁵ See *id.* at 368 (The pills in question were "four white prescription-strength ibuprofen 400-mg pills, and one over-the counter blue naproxen 200-mg pill, all used for pain and inflammation but banned under school rules without advance permission.").

⁶⁶ *Id.*

⁶⁷ *Id.* at 369. Both the administrative assistant and school nurse were women.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Safford*, 557 U.S. at 369.

⁷¹ See *id.* at 375–77.

⁷² *Id.* at 374.

⁷³ *Id.*

⁷⁴ See *id.* at 370.

⁷⁵ *New Jersey v. T.L.O.* 469 U.S. 325, 341–42 (1985).

⁷⁶ *Safford*, 557 U.S. at 370. A "school search" is another way of referring to a school official's search of a student.

clothing.⁷⁷ The Court reasoned that based on the assistant principal's prior conversations with two other students, the assistant principal could have reasonably suspected Savana of providing contraband pills to her fellow students, and it was reasonable for the assistant principal to suspect that Savana was carrying the pills on her person or in her backpack.⁷⁸ The Court held that the search of Savana's bag in the privacy of the assistant principal's office, and the school nurse's subsequent search of Savana's outer clothing were not excessively intrusive.⁷⁹ Nevertheless, the Court found that there was no indication of danger, and no reason to suppose that Savana was carrying pills in her underwear.⁸⁰ In other words, for a school search to reasonably make the jump from a student's outer clothes to intimate parts, there must be a reasonable suspicion of danger or that the student has resorted to hiding contraband in his or her underwear.⁸¹ The Court explained that reasonable suspicion is required before a strip search is performed because "[t]he meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions."⁸²

The Court noted its concerns about the potential psychological effects that an invasive search may have on adolescents.⁸³ Savana clearly had a subjective expectation of privacy, for she described the strip search as "embarrassing, frightening, and humiliating."⁸⁴ Indeed, such a search is an affront to any adolescent's sense of bodily integrity and dignity. Noting that adolescents feel this kind of invasion particularly acutely, the Court reasoned that Savana's expectation of privacy was reasonable and consistent with experiences of other adolescents similarly searched "whose adolescent vulnerability intensifies the patent intrusiveness of the exposure."⁸⁵ The Court held that the strip search was unreasonable, and that it violated Savana's Fourth Amendment rights to privacy.⁸⁶

⁷⁷ *Id.* at 373–74.

⁷⁸ *Id.* at 371–74.

⁷⁹ *Id.* at 374.

⁸⁰ *See id.* at 376–77.

⁸¹ *Id.* at 377.

⁸² *See Safford*, 557 U.S. at 377.

⁸³ *See id.* 375.

⁸⁴ *Id.* at 374–75.

⁸⁵ *Id.* at 375 (noting the important distinction between the bodily exposure Savana experienced during the search and the bodily exposure school students experience when, for example, changing for gym, and reasoning that changing "for play" has an entirely different meaning than a search "exposing the body" in response to an accusation of wrongdoing) (internal citations omitted).

⁸⁶ *Id.* at 379.

B. Blanket Strip Search Policies in Adult Jails

In *Florence v. Board of Chosen Freeholders*, the Supreme Court held that a correctional facility may constitutionally impose a universal strip search policy on all detainees admitted to the general population.⁸⁷ Albert Florence was arrested and subsequently detained at Burlington County Detention Center and Essex County Correctional Facility, both in New Jersey.⁸⁸ Florence's arrest stemmed from a traffic stop in which a state trooper observed that he had an outstanding bench warrant in the statewide computer database.⁸⁹ The bench warrant was issued in 2003 when Florence fell behind on a fine's monthly payments.⁹⁰ While Florence paid the outstanding balance approximately one week after the warrant was issued, the warrant remained in the statewide computer database in error.⁹¹ Prison officials at both facilities strip searched Florence during the intake process.⁹²

Florence challenged the strip searches at both facilities.⁹³ Florence argued that if a new detainee was not arrested for a weapons or drugs offense, or a serious crime, correctional officers should not strip search that detainee.⁹⁴ Non-violent detainees should be exempt from strip searches unless a correctional officer has "a particular reason to suspect" they are hiding contraband.⁹⁵ Noting that the seriousness of an offense does not accurately predict which inmate has contraband, the Court rejected Florence's argument.⁹⁶

The Court deferred to correctional officers' expertise regarding necessary safety measures and reasoned that a universal strip search policy is reasonable unless there is "substantial evidence" suggesting the policy is an exaggerated response to the situation.⁹⁷ The Court reasoned that three main risks justify a universal strip search policy in correctional facilities: (1) the "danger of introducing lice or contagious infections[;]" (2) "the increasing number of gang members who go through the intake process[;]" and (3) "contraband concealed by new detainees[.]"⁹⁸ Contraband is anything "possessed in violation of prison rules," and includes weapons,

⁸⁷ See 566 U.S. 318, 322–23 (2012).

⁸⁸ *Id.* at 323.

⁸⁹ See *id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 323–24.

⁹³ See *Florence*, 566 U.S. at 323–24.

⁹⁴ *Id.* at 334.

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ *Id.* at 330 (internal quotations and citation omitted). The Court did not explicitly define "substantial evidence".

⁹⁸ See *id.* at 330–33.

drugs, alcohol, knives, razor blades, scissors, glass shards, crack, heroin, marijuana, lighters, matches, and even “an overlooked pen.”⁹⁹ Correctional officers’ professional expertise allows them to create and implement reasonable search policies to detect and prevent the possession of these items in their facilities, and determine whether a universal strip search policy is “reasonably related to legitimate security interests.”¹⁰⁰

The Court noted that because those arrested for minor offenses may still smuggle contraband, or those not subject to strip searches may be coerced into smuggling contraband into the jail, it is impractical to require correctional officers to make an individualized assessment during the intake process, as they usually know very little about the new detainee’s history.¹⁰¹ In addition, “during the pressures of the intake process[,]” most correctional officers are ill suited to make quick determinations that an inmate’s underlying offenses warrant a strip search.¹⁰² Because jails are dangerous places, where admitting new inmates creates various risks for existing inmates, facility staff, and the new inmate, correctional officers have a legitimate security interest in conducting a thorough search of the new inmate “as a standard part of the intake process.”¹⁰³ As a result, the Fourth and Fourteenth Amendments do not require correctional officers to have reasonable suspicion that a detainee is smuggling contraband, before conducting a strip search.¹⁰⁴ While the Court left open the possibility for an exception to a universal strip search policy, such as when a detainee is not admitted to the general population and does not have significant contact with other detainees, it never addressed whether its holding would apply to juvenile detainees held in juvenile detention centers.¹⁰⁵

IV. THE THIRD CIRCUIT INCORRECTLY DECIDED *J.B. v. FASSNACHT*

Despite acknowledging that juveniles are especially susceptible to psychological damage from the trauma of a strip search, the Third Circuit nevertheless found that the state’s legitimate interest in ensuring that the facility is secure outweighs a juvenile detainee’s privacy interests.¹⁰⁶

⁹⁹ *Florence*, 566 U.S. at 332–33 (internal citations omitted).

¹⁰⁰ *Id.* at 328.

¹⁰¹ *See id.* at 335–37 (noting that “[o]ther possible classifications based on characteristics of individual detainees also might prove to be unworkable or even give rise to charges of discriminatory application”).

¹⁰² *Id.* at 337.

¹⁰³ *Id.* at 330–33 (citing authorities that state new inmates can bring disease, gang violence, and contraband).

¹⁰⁴ *See id.* at 339 (The procedures in place at the New Jersey detention centers “struck a reasonable balance between inmate privacy and the needs of the institutions.”).

¹⁰⁵ *Florence*, 566 U.S. at 338–39.

¹⁰⁶ *J.B. v. Fassnacht*, 801 F.3d 336, 342, 344 (3d Cir. 2015).

While this may be true for adult facilities, a juvenile correctional facility needs a more specific reason for conducting a full body-cavity inspection of a juvenile detainee. Juvenile privacy rights outweigh a facility's legitimate interests in prison management because juveniles are more psychologically and developmentally fragile, and because they do not present the same institutional security risks as adult inmates. As such, the standard provided in *Safford v. Redding* should govern. Before conducting a strip search, a correctional official must have individualized, reasonable suspicion that a juvenile detainee is dangerous or hiding contraband.

A. The Third Circuit did not Meaningfully Consider Psychological and Developmental Factors that Distinguish Juveniles from Adults

i. Adolescent Psychological Development

“[Y]outh is more than a chronological fact.”¹⁰⁷ Research of brain development and function proves that juveniles are different from adults.¹⁰⁸ For example, the “Dual Systems Model” of adolescent brain development suggests that adolescents might experience a temporal gap in brain development.¹⁰⁹ Specifically, portions of the brain linked to puberty and reward seeking behavior mature early, causing risky behavior to peak during “middle adolescence,” whereas areas of the brain responsible for restraint, judgment, and planning are not fully mature until the mid-twenties.¹¹⁰ This explains why adolescents are immature, impulsive, and often reckless.¹¹¹ Adolescents are also more vulnerable to peer influence than adults.¹¹² Desire for peer approval and fear of rejection often cause adolescents to engage in antisocial behavior, especially around age fourteen or fifteen, to “impress their friends or to conform to peer

¹⁰⁷ *Miller v. Alabama*, 567 U.S. 460, 476 (2012) (internal quotations and citation omitted).

¹⁰⁸ See, e.g., Teena Willoughby et al., *Examining the link between adolescent brain development and risk taking from a social-development perspective*, reprinted in *Brain and Cognition* 89 (2014).

¹⁰⁹ *Id.* at 70.

¹¹⁰ See *id.* at 70–72; see also Elizabeth S. Scott “Children are Different”: Constitutional Values and Justice Policy, 11 *OHIO ST. J. CRIM. LAW* 71, 87 (2013) (commenting that “[a] growing body of developmental neuroscience research indicates that the areas of the brain that govern impulse control, planning, and foresight of consequences mature slowly over the course of adolescence and into early adulthood, while the arousal of the limbic system around puberty increases sensation seeking in early adolescence”) (internal citation omitted).

¹¹¹ See Jesse-Justin Cuevas & Tonja Jacobi, *The Hidden Psychology of Constitutional Criminal Procedure*, 37 *CARDOZO L. REV.* 2161, 2184 (2016); see also *Miller*, 567 U.S. at 476 (noting that adolescence is a period of “immaturity, irresponsibility, impetuousness, and recklessness”) (internal quotations, alteration and citation omitted).

¹¹² SCOTT & STEINBERG, *supra* note 7, at 38.

expectations.”¹¹³ The importance of peer approval in adolescence is especially prominent in group situations and a major reason why adolescents, more so than adults, commit crimes in groups.¹¹⁴ During this phase of immaturity, adolescents are “in the process of separating from their parents and forming their adult personal identities, a process that involves exploration and . . . experimentation in risky activities”; as a result, adolescent criminal activity is often a result of experimentation, or testing limits, in contrast to adult criminal activity, which reflects “*individual* preferences and values.”¹¹⁵ This suggests that juvenile crime is psychologically different than adult crime.

Due to their developmental immaturity, adolescents are also more vulnerable to coercive circumstances and are less able to respond appropriately to external pressures adults could resist.¹¹⁶ For example, juveniles are developmentally disadvantaged in police-citizen encounters.¹¹⁷ As decision makers, juveniles are less able to advocate for themselves when confronted by “older and much more socially and politically dominating authority, such as a police officer.”¹¹⁸ Adolescents have little “real-world” experience, and due to their “present-oriented thinking, egocentrism, [and] greater conformity to authority figures,” they are more vulnerable to stress and fear, which means that what an adult perceives as a benign street encounter with a police officer, an adolescent is more likely to feel that his or her freedom is limited.¹¹⁹ In addition, since adolescents are impulsive, they may respond to perceived threats more aggressively or emotionally than adults.¹²⁰

During adolescence, privacy becomes increasingly important.¹²¹ As puberty begins, adolescents begin to make “thorough assessment[s]” of themselves.¹²² During this time of “critical self-appraisal[,]” adolescents are more self-conscious and more vulnerable to embarrassment than their

¹¹³ *Id.* at 38–39.

¹¹⁴ *Id.* at 39.

¹¹⁵ *See id.* at 35 (emphasis in original).

¹¹⁶ Elizabeth S. Scott & Laurence Steinberg, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AMERICAN PSYCHOLOGIST 1009, 1014 (2003), available at <https://pdfs.semanticscholar.org/d8c2/85bc13a00babb93928f72f551f04d741f72.pdf>.

¹¹⁷ Cuevas & Jacobi, *supra* note 111, at 2184.

¹¹⁸ *Id.* at 2185.

¹¹⁹ *See id.*

¹²⁰ *See* Scott & Steinberg, *supra* note 116.

¹²¹ Brief for American Academy of Child and Adolescent Psychiatry as Amicus Curiae Supporting Petitioner, *J.B. v. Fassnacht*, 2016 U.S. LEXIS 2036 (No. 15-903), 2016 U.S. S. Ct. Briefs LEXIS 729, *18.

¹²² F. PHILIP RICE & KIM G. DOLGIN, *THE ADOLESCENT: DEVELOPMENT, RELATIONSHIPS, AND CULTURE* 168 (Pearson) (11th ed. 2005). *See also* Elizabeth S. Scott, *Blaming Youth*, 81 TEX. L. REV. 799, 819 (2003) (referring to adolescence as a period of “identity crisis”).

adult counterparts.¹²³ The vulnerability and sensitivity juveniles have regarding their bodies and interactions with authority figures suggest that a strip search upon intake to a detention facility will be very traumatic. Indeed, juveniles may feel like they are being sexually assaulted during a strip search and may be “retraumatize[d]” if they are already suffering from a psychiatric disorder or PTSD.¹²⁴

ii. The Third Circuit Ignored Supreme Court Precedent Finding Age to be a Determinative Factor in Accessing Culpability

In three significant cases, *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*, the Supreme Court relied on psychological and developmental data and found that age was a determinative factor in assessing juvenile culpability at sentencing.¹²⁵ While these cases address juvenile *culpability*, the evidence the Court relies on in each decision is equally applicable to juvenile *vulnerability*.¹²⁶ A juvenile offender’s developmental immaturity, impulsivity, susceptibility to peer pressure, and insecurity is the same whether the juvenile is being housed at a detention center pre-trial, or standing before a judge at sentencing.

In 2005, the Supreme Court held that the Eighth Amendment protection against cruel and unusual punishment forbids imposing the death penalty upon juvenile offenders under eighteen years old.¹²⁷ Significantly, the Court provided three reasons why—psychologically and developmentally—juvenile offenders are less culpable than adult offenders.¹²⁸ First, juveniles tend to lack maturity and have an underdeveloped sense of responsibility, as compared to adults.¹²⁹

¹²³ RICE & DOLGIN, *supra* note 122.

¹²⁴ See Brief for American Academy of Child and Adolescent Psychiatry, *supra* note 121, at *29; see also OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, PTSD, TRAUMA, AND COMORBID PSYCHIATRIC DISORDERS IN DETAINED YOUTH 5, 9 (June 2013), <https://www.ojjdp.gov/pubs/239603.pdf> (finding PTSD common among juvenile detainees and that “conditions of confinement often exacerbate symptoms of mental disorder, including PTSD Juvenile justice providers must reduce the likelihood that routine processing will retraumatize youth.”) (internal citations omitted).

¹²⁵ See 543 U.S. 551, 568, 569–71 (2005); 560 U.S. 48, 68–69, 74–75 (2010); 567 U.S. 460, 465, 471–73 (2012).

¹²⁶ See *id.*

¹²⁷ See *Roper*, 543 U.S. at 568, 578 (noting that “[c]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution[.]”) (internal quotations and citation omitted).

¹²⁸ *Id.* at 569–70 (noting that these “differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders”).

¹²⁹ *Id.* at 569.

Statistically, adolescents are the most reckless out of any age group.¹³⁰ Second, “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”¹³¹ The Court noted that youth is not simply a chronological fact, but “a time and condition of life when a person may be most susceptible to influence and to psychological damage[.]”¹³² Finally, juvenile character traits are considered temporary, and not fully formed.¹³³

The Court also noted that the two social purposes of the death penalty—retribution and deterrence—do not provide a sufficient justification for imposing it upon juvenile offenders.¹³⁴ Because a juvenile’s culpability or blameworthiness, due to youth and immaturity is diminished, the argument for retribution is not as strong as with an adult offender.¹³⁵ As for deterrence, juveniles are less likely than adults to make a “cost-benefit analysis” before engaging in criminal conduct; as a result, the possibility of execution does not factor into their decision making.¹³⁶

Five years after *Roper*, the Supreme Court held that a sentence of life without parole violates the Eighth Amendment’s protection against cruel and unusual punishment when imposed on juveniles who commit a non-homicide offense.¹³⁷ Similar to *Roper*, the Court in *Graham v. Florida* reasoned that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”¹³⁸ Indeed, research indicated that sections of the brain that regulate behavior control are still developing in late adolescence.¹³⁹ The Court reemphasized *Roper*’s holding that because juvenile offenders are less culpable, they are also less deserving of the most serious kinds of punishment.¹⁴⁰ The Court continued, “[f]rom a moral standpoint *it would be misguided to equate the failings of a minor with those of an adult*[.]”¹⁴¹

¹³⁰ *See id.*

¹³¹ *Id.* (internal citation omitted)

¹³² *Id.* (noting that juveniles have less control over their environment, as they do not have the same freedom as adults to remove themselves from a “criminogenic setting”) (internal quotations and citations omitted).

¹³³ *Roper*, 543 U.S. at 570.

¹³⁴ *Id.* at 572.

¹³⁵ *Id.* at 571 (noting retribution can be attempting “to express the community’s moral outrage” or “to right the balance for the wrong to the victim”).

¹³⁶ *See id.* at 572.

¹³⁷ *Graham v. Florida*, 560 U.S. 48, 74–75 (2010).

¹³⁸ *Id.* at 68 (internal citations omitted).

¹³⁹ *Id.* (internal citations omitted).

¹⁴⁰ *Id.* (citing *Roper*, 543 U.S. at 569).

¹⁴¹ *Id.* (first alteration in original) (emphasis added) (citing *Roper*, 543 U.S. at 570).

In 2012, the Supreme Court held that mandatory life without parole sentences for juveniles violate the Eighth Amendment.¹⁴² Pointing to its prior decisions in *Roper* and *Graham*, the Court in *Miller v. Alabama* reiterated that “children are different” from adults.¹⁴³ Moreover, because juveniles are less culpable and more amenable to rehabilitation than adults, they are “less deserving of the most severe punishments.”¹⁴⁴ In that regard, criminal procedure laws that ignore defendants’ youthfulness are flawed.¹⁴⁵ The Court even opined that “it is the odd legal rule that does not have some form of exception for children.”¹⁴⁶

B. The Third Circuit Failed to Treat Juveniles Differently when it Found that Risks and Dangers at Juvenile Detention Facilities were the Same as Adult Jails

The Third Circuit found that the three institutional security risks that the *Florence* Court identified with respect to adult facilities also applied to juvenile detention facilities.¹⁴⁷ A juvenile detention facility can implement a universal strip search policy because (1) new detainees could introduce lice or contagious infections to the general population; (2) an increased number of gang members going through the intake process increases the likelihood of violence in the facility; and (3) new detainees may conceal contraband.¹⁴⁸ The Third Circuit stated,

There is no easy way to distinguish between juvenile and adult detainees in terms of the security risks cited by the Supreme Court in *Florence*. Indeed, [a] detention center, police station, or jail holding cell is a place fraught with serious security dangers. These security dangers to the institution are the same whether the detainee is a juvenile or an adult.¹⁴⁹

¹⁴² *Miller v. Alabama*, 567 U.S. 460, 465 (2012).

¹⁴³ *Id.* at 481.

¹⁴⁴ *Id.* at 471–73 (citing *Graham*, 560 U.S. at 68). The Court noted that “transient rashness, proclivity for risk, and inability to assess consequences—both lessened a [juvenile]’s ‘moral culpability’ and enhanced the prospect that, as the years go by and neurological development occurs, [the juvenile]’s ‘deficiencies will be reformed.’” (citing *Graham*, 560 U.S. at 68 (quoting *Roper*, 543 U.S. at 570)).

¹⁴⁵ *Id.* at 473–74 (citing *Graham*, 560 U.S. at 76).

¹⁴⁶ *Id.* at 481 (pointing out that the *Roper* and *Graham* sentencing decisions are not at odds with the law because “[o]ur history is replete with laws and judicial recognition’ that children cannot be viewed simply as miniature adults” (emphasis in original) (citing *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011)). See also SCOTT & STEINBERG, *supra* note 7, at 11 (pointing out that “[i]n virtually every other area of legal regulation, adolescents (and especially younger teenagers) are not treated like adults”) (internal citation omitted) (emphasis in original).

¹⁴⁷ *J.B. v. Fassnacht*, 801 F.3d 336, 342 (3d Cir. 2015).

¹⁴⁸ See *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 330–33 (2012).

¹⁴⁹ *Fassnacht*, 801 F.3d at 343 (alteration in original) (internal quotations and citation omitted).

If “[juveniles] are different,”¹⁵⁰ then juvenile and adult detainee security risks are also different. This is consistent with American laws and judicial precedent and demonstrates that juveniles “cannot be viewed simply as miniature adults.”¹⁵¹ It is therefore incorrect to conclude security dangers at correctional facilities are the same whether the detainee is a juvenile or adult.

Adult jails house significantly more detainees than juvenile facilities. The security risks at adult jails are ordinarily much greater.¹⁵² For example, the Essex County Jail, where Florence was detained, is the largest county jail in New Jersey.¹⁵³ Essex County Jail admits more than 25,000 inmates annually and houses approximately “1,000 gang members at any given time.”¹⁵⁴ In 2014, when J.B.’s case was pending before the District Court, 56% of juvenile facilities in the United States housed twenty or fewer residents.¹⁵⁵ Only twenty-two of 1,852 (or 1%) juvenile facilities in the United States house 200 or more residents.¹⁵⁶ This means that at any given time, an adult facility like Essex County Jail is housing five times as many detainees as one of the largest juvenile facilities, not including the non-gang member detainees.

In 2015, LCYIC, where J.B. was detained, has a Detention program, a Shelter program, and a “P.U.L.S.E. Weekend Program,” with a 60-bed capacity, 24-bed capacity, and 12-bed capacity, respectively.¹⁵⁷ Forty-five

¹⁵⁰ *Miller*, 567 U.S. at 481.

¹⁵¹ *J.D.B.*, 564 U.S. at 274 (internal citation omitted).

¹⁵² See Elizabeth S. Scott, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 LA. L. REV. 35, 66–67 (2010) (noting that “more than 40% of [adult] prisons house more than 500 prisoners; and many have an inmate population of more than 1,000,” compared to some of the largest training schools that house approximately 125 juveniles) (internal citations omitted).

¹⁵³ *Florence*, 566 U.S. at 324 (internal citation omitted).

¹⁵⁴ *Id.*

¹⁵⁵ OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, STATISTICAL BRIEFING BOOK: JUVENILES IN RESIDENTIAL PLACEMENT BY FACILITY SIZE AND FACILITY TYPE (2014), <https://www.ojjdp.gov/ojstatbb/corrections/qa08501.asp?qaDate=2014> (but noting that 54% of juvenile offenders were held in facilities holding 21–100 (residents)).

¹⁵⁶ *Id.* In 2016, new data was released, however, the statistics remain largely the same. For example, 56% of juvenile facilities in the United States still house twenty or fewer residents and less than one percent of juvenile facilities house 200 or more residents. See OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, STATISTICAL BRIEFING BOOK: JUVENILES IN RESIDENTIAL PLACEMENT BY FACILITY SIZE AND FACILITY TYPE (2016), <https://www.ojjdp.gov/ojstatbb/corrections/qa08501.asp?qaDate=2016&text=yes&maplink=link1>.

¹⁵⁷ 2015 Prison Rape Elimination Act (PREA) Annual Report Lancaster County Youth Intervention Center, http://www.lcyic.com/index_htm_files/YIC%20PREA%20Annual%20Report%202015.pdf. In 2017, the Detention program had a 48-bed capacity, the Shelter program had a 32-

juveniles were held in the facility on December 31, 2015.¹⁵⁸ In total, 532 juveniles were admitted to the facility in 2015.¹⁵⁹ This *yearly* total is less than half the population of Essex County Jail on any given day. A categorical rule requiring universal strip searches at a facility like Essex County Jail makes sense; however, a juvenile facility like LCYIC or even a facility housing 200 juveniles cannot take the administratively easy way out. Common sense dictates that a facility housing more than 1,000 adults is going to have a greater security risk than a facility housing forty-five juveniles ages ten through eighteen.¹⁶⁰ A facility like Essex County jail is undoubtedly going to have greater security risks than a juvenile facility like LCYIC, because in larger facilities, “violence levels are higher, staff-inmate relationships are more impersonal, and the organizational structure is more rigid.”¹⁶¹ If a strip search of a juvenile detainee is going to occur, it must be based on individualized, reasonable suspicion that the juvenile is dangerous or smuggling contraband.

Moreover, juvenile facilities generally provide more programs and offer a more rehabilitative setting than adult facilities.¹⁶² Many juvenile facilities have a ratio of about one teacher per fifteen juveniles, and juveniles at a facility in Florida, for example, have “academic classes, skills training, counseling, and recreational activities” on a daily basis.¹⁶³ In addition, self-report studies discovered that juveniles in juvenile facilities have higher positive attitudes than juveniles housed in adult facilities.¹⁶⁴ This too may indicate that security threats at juvenile facilities are not as high as the Third Circuit suggests.

bed capacity, and the “P.U.L.S.E. Weekend Program” capacity remained the same. 2017 Prison Rape Elimination Act (PREA) Annual Report Lancaster County Youth Intervention Center, http://www.lcyic.com/index_htm_files/YIC%20PREA%20Annual%20Report%202017.pdf.

¹⁵⁸ 2015 PREA Annual Report, *supra* note 157.

¹⁵⁹ *Id.* The population at LCYIC has decreased since 2015. In 2016, 499 juveniles were admitted, and in 2017, 419 juveniles were admitted. 2017 PREA Annual Report, *supra* note 157.

¹⁶⁰ 2015 PREA Annual Report, *supra* note 157 (housing “males and females from the ages of 10 to 18”).

¹⁶¹ Elizabeth S. Scott, *supra* note 152, at 67 (noting “[i]nstitutional size affects the experience of inmates in several ways”) (internal citation omitted).

¹⁶² *See id.* at 70–71.

¹⁶³ *Id.* (internal citations omitted).

¹⁶⁴ *Id.* at 71.

V. AN INDIVIDUALIZED, REASONABLE SUSPICION STANDARD
COMPORTS WITH TRADITIONAL FOURTH AMENDMENT PRINCIPLES

*A. The Fourth Amendment and the Requirement of Individualized,
Reasonable Suspicion*

The Fourth Amendment protects against unreasonable searches and seizures of “persons, houses, papers, and effects[.]”¹⁶⁵ The Supreme Court often begins with the presumption that a government official must have a warrant supported by probable cause to conduct a search.¹⁶⁶ Probable cause exists when “there is a fair probability that contraband or evidence of a crime will be found” in the area searched.¹⁶⁷ The requirement of a warrant supported by probable cause, however, is at a best a default rule, for the Supreme Court has enumerated several exceptions to the probable cause and warrant requirement. These exceptions include exigent circumstances,¹⁶⁸ searches incident to arrest,¹⁶⁹ consent searches,¹⁷⁰ automobile and container searches,¹⁷¹ plain view searches,¹⁷² stop and frisk searches,¹⁷³ and administrative searches.¹⁷⁴ In practice, these exceptions outnumber searches pursuant to a warrant supported by probable cause. In some situations, such as the strip search of a juvenile detainee, though the search lacks a warrant, the requirement of individualized, reasonable suspicion is the proper default rule.

In *Terry v. Ohio*, the Supreme Court held that when a police officer has reasonable suspicion “that criminal activity may be afoot and that the person[] with whom he is dealing may be armed and presently dangerous,” he may conduct a limited search of that person’s outer clothing, also known as a “frisk,” in order to find any weapons which might jeopardize his safety.¹⁷⁵ The purpose of the *Terry* stop and frisk exception is police officer and community safety.¹⁷⁶ The Supreme Court reasoned that an

¹⁶⁵ U.S. CONST. AMEND. IV.

¹⁶⁶ *Katz v. United States*, 389 U.S. 347, 356–57 (1967).

¹⁶⁷ *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983).

¹⁶⁸ *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967); *Michigan v. Fisher*, 558 U.S. 45 (2009).

¹⁶⁹ *Chimel v. California*, 395 U.S. 752 (1969); *New York v. Belton*, 453 U.S. 454 (1981).

¹⁷⁰ *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

¹⁷¹ *Chambers v. Maroney*, 399 U.S. 42 (1970); *California v. Acevedo*, 500 U.S. 565 (1991).

¹⁷² *Arizona v. Hicks*, 480 U.S. 321 (1987); *Horton v. California*, 496 U.S. 128 (1990).

¹⁷³ *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁷⁴ *United States v. Flores-Montano*, 541 U.S. 149 (2004); *Maryland v. King*, 569 U.S. 435 (2013); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

¹⁷⁵ 392 U.S. at 8, 30–31 (1968).

¹⁷⁶ *See id.* at 23–24, 26.

officer must be able to search a potentially armed and dangerous individual to protect himself and other potential victims of violence, even if that officer lacks probable cause to arrest that individual.¹⁷⁷ The Court noted that “[t]he scope of the search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.”¹⁷⁸ Therefore, the officer must limit his search of the individual to areas where a weapon may be hidden.¹⁷⁹

The Supreme Court echoed its reasoning in *Terry* when it required school officials to possess some individualized, reasonable suspicion prior to searching a student.¹⁸⁰ In *Safford*, for example, the Supreme Court found that the “content of the suspicion” must match “the degree of intrusion.”¹⁸¹ Furthermore, the school official must possess a reasonable suspicion that the hidden contraband poses a danger to other students, or in the words of the *Terry* Court, “other prospective victims of violence.”¹⁸²

These cases demonstrate that implicit in the Fourth Amendment’s protection against unreasonable searches and seizures is the principle that a government official must have probable cause or reasonable suspicion prior to searching an individual. At the very least, a government official must have some reason to suspect an individual of wrongdoing before searching that individual’s person or effects.

B. Administrative Searches

Another string of cases in which the Supreme Court carved out an exception to the probable cause and warrant requirement are administrative searches. Rather than look to whether a government official possesses probable cause or reasonable suspicion, the Supreme Court conducts a balancing test in which it weighs “[an] individual’s legitimate expectations of privacy and personal security” against “the government’s need for effective methods to deal with breaches of public

¹⁷⁷ *Id.* at 24, 29 (noting “[t]he sole justification of the search in the present situation is the protection of the police officer and others nearby[.]”).

¹⁷⁸ *Id.* at 19 (citing *Warden v. Hayden*, 387 U.S. 294, 310 (1967)).

¹⁷⁹ *Id.* at 26, 29 (noting the search “must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer”).

¹⁸⁰ *New Jersey v. T.L.O.* 469 U.S. 325, 340 (1985) (noting that “[t]he school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search”); *Safford United School District #1 v. Redding*, 557 U.S. 364, 370 (2009) (noting that a school official can base his or her decision to search a student based on a “standard of reasonableness that stops short of probable cause”).

¹⁸¹ *See Safford*, 557 U.S. at 375.

¹⁸² *See id.* at 368, 376–77; *Terry*, 392 U.S. at 24.

order.”¹⁸³ Administrative searches depart from traditional Fourth Amendment principles, because the primary concern in these situations is whether the government is “reasonably pursuing a legitimate government interest.”¹⁸⁴ If the government is pursuing a legitimate interest, the requirement of probable cause, and possibly reasonable suspicion, requirements vanishes.¹⁸⁵

Border searches are a form of administrative search.¹⁸⁶ In *United States v. Flores-Montano*, the Supreme Court found that the government’s legitimate interest “in preventing the entry of unwanted persons and effects is at its zenith at the international border.”¹⁸⁷ A sovereign’s longstanding right to protect itself gives government officials authority to conduct suspicionless searches at its borders, which can include disassembling and reassembling a car’s fuel tank to search for contraband.¹⁸⁸ In this context, the government’s interest in protecting international borders outweighs the individual’s possessory interest.¹⁸⁹

The Supreme Court has also used the balancing test to hold that DNA buccal swabs of every individual arrested for burglary or a crime of violence serves a legitimate government interest of identifying dangerous individuals, individuals who might flee, or individuals who were wrongfully convicted.¹⁹⁰ The Supreme Court in *Maryland v. King* noted that the government interest must outweigh the invasiveness of the search.¹⁹¹ In this case, that balancing test was satisfied because the government interest in identifying arrestees was great while the intrusion was minimal.¹⁹² In addition, the DNA data collected from the buccal swab merely provided identification, as it did not reveal the arrestee’s genetic traits.¹⁹³

Sobriety checkpoints offer another example of an administrative search in which no reasonable suspicion is required.¹⁹⁴ Instead, police

¹⁸³ *T.L.O.*, 469 U.S. at 337. Arguably, *T.L.O.* and *Safford* could fall into the administrative exception; however, given the centrality of the reasonable suspicion standard in these cases, they are much more aligned with *Terry v. Ohio*, and the traditional Fourth Amendment principles that a government official possess some justification for searching an individual.

¹⁸⁴ Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 255 (2011).

¹⁸⁵ *See id.* at 255–57.

¹⁸⁶ *Id.* at 255.

¹⁸⁷ 541 U.S. 149, 152 (2004).

¹⁸⁸ *See id.* at 152–53, 155–56.

¹⁸⁹ *See id.* at 155.

¹⁹⁰ *Maryland v. King*, 569 U.S. 435, 451–56 (2013).

¹⁹¹ *See id.* at 461.

¹⁹² *Id.* at 460–63.

¹⁹³ *See id.* at 464–65.

¹⁹⁴ *See Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 447 (1990)

officers stop all vehicles, then examine the driver for signs of intoxication.¹⁹⁵ If the officer observes signs of intoxication, he or she may conduct additional sobriety tests.¹⁹⁶ In this context, the Supreme Court has found that the state's interest in eradicating drunk driving outweighs the minimal intrusion imposed on motorists during the brief stop.¹⁹⁷

In a similar fashion, the government may impose a uniform drug testing policy on customs officials who carry firearms and are involved in drug interdiction.¹⁹⁸ The Supreme Court has noted that “[t]he Customs Service is our Nation’s first line of defense” against illicit drug smuggling which affects “the health and welfare of our population.”¹⁹⁹ In this context, the national interest of protecting international borders outweighs the interference with individual liberty, caused by submitting to a urinalysis test.²⁰⁰

These cases demonstrate that administrative searches implicitly seek to protect against a danger that would have widespread consequences. The government interest in protecting public roads and international borders justifies a search of personal belongings such as a car fuel tank, or a search of an individual, such as swabbing the inside of his or her mouth to obtain a DNA sample, asking him or her to submit to a sobriety test, or requiring him to submit a urine sample. Though inconvenient, the physical intrusion caused by administrative searches is minimal, certainly much less invasive than a strip search, which exposes “intimate parts.”²⁰¹

C. The Individualized Suspicion Standard Provided in Safford United School District #1 v. Redding Should Govern Strip Searches of Juvenile Detainees

When determining whether an invasive search of the body is appropriate, the most important factor to consider is *who* is being searched and *why*, not *where* they are being searched. In other words, while it may be easier to find that *Florence* governs juvenile detention center strip searches because *Florence* addresses detainee treatment, the line should not be drawn at “detention center,” rather, it should be drawn at “juvenile.” Juveniles have been, and should continue to be treated differently than

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* See also *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2176–77 (2016) (noting that like a DNA buccal swab, the physical intrusion of a breath test is “almost negligible,” and the experience is unlikely to cause embarrassment).

¹⁹⁷ *Mich. Dep’t of State Police*, 496 U.S. at 451–52.

¹⁹⁸ *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 661–62, 664, 667 (1989).

¹⁹⁹ *Id.* at 668.

²⁰⁰ See *id.* at 670–71.

²⁰¹ *Safford United School District #1 v. Redding*, 557 U.S. 364, 377 (2009)

adults. In *Safford*, the Supreme Court found that a school official must have reasonable suspicion of danger or that a student is hiding contraband in his or her underwear, before strip searching that student.²⁰² Without such reasonable suspicion, an invasive search is unconstitutional.²⁰³ A strip search is categorically distinct from a search of a student's backpack or outer clothing because it invades "subjective and reasonable societal expectations of personal privacy" by exposing intimate parts and causing embarrassment, fright, and humiliation.²⁰⁴ Under the *Safford* Court's reasoning, a strip search "require[es] distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings."²⁰⁵ Those distinct elements are a reasonable belief under the circumstances that there is danger or that student has resorted to hiding contraband in his or her underwear.²⁰⁶ This is the proper standard that should be applied in the juvenile detention center context.

Applying *Safford*'s standard, the concerns articulated by the Third Circuit in *J.B. v. Fassnacht*, that correctional officials must be able to check for lice or contagious infections, gang symbols or tattoos, and signs of "self-mutilation or abuse in the home," do not necessitate the degree of intrusion that a strip search entails.²⁰⁷ Certainly, correctional officials can detect lice and gang tattoos through a less invasive search, and if the juvenile detention center is concerned with self-mutilation or abuse in the home, surely a medical or psychological exam would better reveal those issues than a strip search upon intake.

VI. CONCLUSION

The Third Circuit agreed that because a strip search creates a "substantial risk of psychological damage for juvenile detainees . . . juvenile[s] maintain[] an enhanced right to privacy."²⁰⁸ Still, the Third Circuit found, paradoxically, that in a detention center setting, juveniles present the same risks and dangers as adults; therefore, a blanket strip search policy at a juvenile detention center is constitutionally permissible.²⁰⁹ Moreover, the Third Circuit failed to meaningfully consider the psychological and developmental differences between juveniles and adults. Those differences do not disappear simply because

²⁰² *See id.* at 377.

²⁰³ *See id.*

²⁰⁴ *See id.* at 374–75, 377.

²⁰⁵ *Id.* at 374.

²⁰⁶ *See id.* at 374, 377.

²⁰⁷ 801 F.3d at 342–43, 346.

²⁰⁸ *Id.* at 342.

²⁰⁹ *Id.* at 342, 347.

a juvenile is detained or has committed a crime, and it is morally misguided “to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”²¹⁰ Juveniles are different, and if a detention center is going to strip search a juvenile, there must be an individualized, reasonable suspicion that the juvenile is dangerous or smuggling contraband. Not only does a requirement of individualized, reasonable suspicion take into account that juveniles are psychologically and developmentally different than adults, but it comports with traditional Fourth Amendment principles that require a government official to have some level of suspicion of wrongdoing prior to searching an individual.

The mere fact of a juvenile’s admission to a juvenile detention center is not enough to justify a blanket strip search policy because the safety risks are not the same as those in an adult facility, and the concerns expressed by the Third Circuit, or the “content of suspicion” simply do not match the intrusiveness of a strip search. As the Supreme Court noted, “it is the odd legal rule that does *not* have some form of exception for children.”²¹¹ Whether it is at sentencing, or during pretrial detention, legal rules, including strip search policies, must take into account that juveniles are different.

²¹⁰ *Graham v. Florida*, 560 U.S. 48, 68 (2010) (citing *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

²¹¹ *Miller v. Alabama*, 567 U.S. 460, 481 (2012) (emphasis in original).