PROTECTING PERSONHOOD: LEGAL STRATEGIES TO COMBAT THE USE OF STRIP SEARCHES ON YOUTH IN DETENTION

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The impact of *In re Gault* extends far beyond the case's immediate holding that children are entitled to due process protections during delinquency adjudications.[1] In fact, both the underlying holding that "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"[2] and the implicit admonition that children should not be harmed in the name of child protection have been relied upon by courts to protect children's rights to due process in a broad array of criminal justice procedures.[3] Courts have also relied on *Gault*'s broad

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1. *In re* Gault, 387 U.S. 1, 57 (1967).

2. *Id.* at 13.

3. *See generally* 43 C.J.S. *Infants* § 296 (2007) (explaining that juvenile prosecution statutes "are invalid to the extent that they infringe on constitutional guarantees").

> [R]ecognizing . . . a gap between the originally benign conception of the juvenile court system and its realities, . . . [*In re*] *Gault* established that certain constitutional guaranties [sic] (including notice of charges, right to counsel, right to confrontation and cross-examination, and the privilege against self-incrimination) . . . were applicable in juvenile delinquency proceedings . . . . As to the applicability of double jeopardy principles to juvenile court proceedings, . . . it has now been settled . . . in *Breed v. Jones*, 421 U.S. 519 (1975), that jeopardy does attach . . . in an adjudicatory delinquency proceeding in juvenile court.

Joel E. Smith, Annotation, *Applicability of Double Jeopardy to Juvenile Court Proceedings*, 5 A.L.R. 4TH 234 § 2 (2007) (citations and footnotes omitted). "However, the rights of juveniles are not coextensive with those of adults. . . . Therefore, not all rules of criminal procedure are applicable to juvenile courts." George L. Blum, Annotation, *Validity and Efficacy of Minor's Waiver of Right to Counsel—Cases Decided Since Application of* Gault, *387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)*,

notion of personhood—that children, like adults, are entitled to constitutional protections, to extend abortion rights to minors,[4] permit defenses to curfew laws,[5] assert the right to religious expression,[6] confer privacy,[7] require due process for voluntary departure procedures for unaccompanied alien children,[8] and to extend to incarcerated children the right of access to the courts.[9]

Such constitutional protections are particularly vital to children who are confined. Confinement to a detention center or other juvenile institution places children outside the view of their families, friends, and the public, and subjects them to what Kenneth Wooden has called a deliberate "politics of secrecy," hiding the conditions in juvenile institutions from the public eye.[10] Because detention centers are hidden from view, poor conditions and abuse persist.[11] As one incarcerated child wrote:

> There is a crack in the Earth
>
> And I'll have fallen in.
>
> Down in the darkness where I have never been.[12]

Juvenile defenders can play a crucial role in bringing abusive conditions to light. As points of contact with confined children, public defenders can learn about the conditions in which children are held and bring that information to the public. Defenders can also assist individual children in confronting violations either by pursuing

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101 A.L.R. 5TH 351 § 2(a) (2002). The recognized guarantees include the right to confront witnesses, *see* 43 C.J.S. *Infants* § 67, the right to protection from self-incrimination, *see* 47 AM. JUR. 2D *Juvenile Courts* § 89 (2007), the right to counsel, *see id.* § 86, and the right to appeal, *see id.* § 126.

4. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 692-93 (1977) (citing Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976)).

5. *See, e.g.,* Hutchins v. District of Columbia, 188 F.3d 531, 569-70 (D.C. Cir. 1999) (Rogers, J., concurring in part) (using *Gault* to support proposition that sweeping curfew laws should be invalid if they unduly burden fundamental rights).

6. *See* Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972) (holding that Amish parents, in exercising their religious freedom, were free to take their children out of school after completing grade school). However, note Justice Douglas's dissent, relying on *Gault* in considering the interests of the children themselves. *See id.* at 241-42 (Douglas, J., dissenting).

7. *See* C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 179 (3d Cir. 2005).

8. *See* Perez-Funez v. Dist. Dir., INS, 619 F. Supp. 656, 669 (C.D. Cal. 1985).

9. *See* John L. v. Adams, 969 F.2d 228, 230 (6th Cir. 1992).

10. KENNETH WOODEN, WEEPING IN THE PLAYTIME OF OTHERS: AMERICA'S INCARCERATED CHILDREN 21 (1976).

11. *See id.* at 21-22.

12. Amy E. Webbink, Note, *Access Denied: Incarcerated Juveniles and Their Right of Access to Courts*, 7 WM. & MARY BILL RTS. J. 613, 629 (1999) (citing Wooden, *supra* note 10, at 113-16).

litigation on the children's behalf, or by helping children locate other sources of legal assistance.

This Article focuses on one issue affecting detained and confined children: blanket strip-search policies requiring all children to be searched at intake to a detention facility.[13] Such policies are unconstitutional as applied to adults.[14] Nonetheless, both the Eighth and Second Circuit have recently upheld them as applied to children.[15] The clear tension between the courts' language of child protection and the risk that the searches will harm children brings to light important questions regarding the legal definition of personhood and dignity for children.[16]

This Article explores a variety of legal responses to these searches, relying on domestic constitutional law and human rights law. It also considers psychological research on the particular vulnerabilities of detained children, and the interplay between social science research and legal standards. By considering a variety of frameworks for understanding the situation of detained children who are strip searched, we hope to achieve a number of goals. Most concretely, we hope to provide litigation strategies for defenders and other juvenile justice advocates who litigate these issues. By bringing

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13. Case law is clear that male correctional officers cannot strip search female detainees, and that strip searches or other searches in which officers touch women for any nonpenological purpose violate the law. *See* Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993); Everson v. Mich. Dep't of Corrs., 391 F.3d 737 (6th Cir. 2004). Thus, while serious implementation issues arise regarding laws prohibiting strip searches by members of the opposite sex, the legal questions have largely been answered. In contrast, the question recently raised by the Second and Eighth Circuits regarding the constitutionality of blanket strip-search policies for children detained on minor offenses remains open, even though case law is clear that such a strip search on an adult would be unconstitutional. *See* Masters v. Crouch, 872 F.2d 1248, 1255 (6th Cir. 1989); Chapman v. Nichols, 989 F.2d 393, 395-97 (10th Cir. 1993); Weber v. Dell, 804 F.2d 796, 802 (2d Cir. 1986); Stewart v. Lubbock County, 767 F.2d 153, 156-57 (5th Cir. 1985); Jones v. Edwards, 770 F.2d 739, 741-42 (8th Cir. 1985); Giles v. Ackerman, 746 F.2d 614, 615 (9th Cir. 1984), *overruled on other grounds by* Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999); Hill v. Bogans, 735 F.2d 391, 394-95 (10th Cir. 1984); Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1273 (7th Cir. 1983); Logan v. Shealy, 660 F.2d 1007, 1013 (4th Cir. 1981). As a result, we will focus on blanket strip-search policies in this article.

14. *Jordan*, 986 F.2d at 1524.

15. N.G. *ex rel.* S.C. v. Connecticut, 382 F.3d 225, 237-38 (2d Cir. 2004); Smook v. Minnehaha County, 457 F.3d 806, 811-12 (8th Cir. 2006), *cert. denied*, 127 S. Ct. 1885 (2007) (mem.).

16. For other research on juvenile strip searches, see Christopher Smith, Note, 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 (2006); Scott A. Gartner, Note, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S. CAL. L. REV. 921 (1997); Katherine A. James, Comment, *Standard Operating Procedure: Take it All Off [*N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225 (2d Cir. 2004)]*, 44 WASHBURN L.J. 665 (2005).

concepts of international law and trauma research into the analysis, we strive to deepen the understanding of the experience of strip searches on children. Finally, we hope that this analysis can serve as an example of how and when to apply *Gault* beyond issues of due process. *Gault* clarified that the Constitution can protect children,[17] but did not resolve *which* constitutional protections extend to children, nor did it set forth a standard for assessing harm to children or balancing child protection against individual rights. As *Roper v. Simmons*[18] makes clear, both scientific research and international law standards can help resolve these open questions about the legal treatment of juvenile offenders.[19] Thus, while we focus here exclusively on strip searches, a similar analysis integrating domestic constitutional law, international law, and psychological research can also provide insight into other juvenile conditions of confinement issues, such as the use of restraints and seclusion.

Part I of this article describes the tension between children's constitutional rights and the paternalistic authority of the government to protect children. In Part II, we describe two important federal cases, *Smook v. Minnehaha County* in the Eighth Circuit[20] and *N.G. ex rel. S.C. v. Connecticut* in the Second Circuit,[21] which upheld the use of blanket strip-search policies on children in detention. This part concentrates on the courts' reasoning and the concerns raised when children's constitutional rights are denied in the name of child protection. Part III looks forward, using the holding of *Gault*, along with research on adolescent trauma and international human rights, to develop new legal strategies for addressing the harm strip searches impose on adolescents.

I. CHILDREN'S RIGHTS—THE COURTS' CONFLICTING INTERESTS

At the heart of legal decisions and academic research on children's constitutional rights is the tension between the state's child protection role and the child's individual constitutional rights:

> Since the middle 1950s, there have been a number of Supreme Court cases which have examined the child's right to protection by the United States Constitution. Unfortunately, however, even those cases upholding such protection have avoided the issue of how the child's constitutional rights would be affected

17. *In re* Gault, 387 U.S. 1, 33 (1967).
18. 543 U.S. 551 (2005).
19. *See id.* at 575-78.
20. 457 F.3d at 811-12.
21. 382 F.3d at 237-38.

> by competing constitutional claims of the child's parents or others having a similar relationship.[22]

As Claudia Worrell explains, because children have interests independent of those of the state, courts attempting to act in the best interest of the child:

> [M]ust profess the impossible: that the Juvenile Court can, in each case, make a decision that protects *both* the accused juvenile and the State. In many cases, however, the parties' interests are mutually exclusive, and the Juvenile Court must therefore choose which interest to protect. When it chooses to protect the State's interest and infringe upon that of the minor, the Juvenile Court glosses over its choice by emphasizing the "parental" nature of the State's actions and the intrinsic incompetence of minors.[23]

The conflict between constitutional rights and child protection leaves the courts with a problem difficult to resolve. Thus, Worrell suggests that the state separate its caretaking functions from its due process protections.[24] Other scholars suggest empowering youth through value education in the schools,[25] emphasizing parental engagement as a means of minimizing the state's parental role,[26] and focusing on the child's future—rather than current—interests.[27] Still others have suggested that advocates sidestep the issue by focusing their

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22. Roger J.R. Levesque, *The Internationalization of Children's Human Rights: Too Radical for American Adolescents?*, 9 CONN. J. INT'L L. 237, 259 (1994).

23. Claudia Worrell, Note, *Pretrial Detention of Juveniles: Denial of Equal Protection Masked by the* Parens Patriae *Doctrine*, 95 YALE L.J. 174, 190-91 (1985). *See also* Frank E. Vandervort & William E. Ladd, *The Worst of All Possible Worlds: Michigan's Juvenile Justice System and International Standards for the Treatment of Children*, 78 U. DET. MERCY L. REV. 203 (2001) (discussing how children are denied procedural protections *and* fail to receive adequate rehabilitative care).

24. Worrell, *supra* note 23, at 191.

25. Suzanne Milne Alexander, Comment, *Too Much Protection and, at the Same Time, Not Enough: Inconsistent Treatment of Adolescents by the Supreme Court*, 53 DEPAUL L. REV. 1739, 1773-74 (2004).

26. David A. Geller, Note, *Putting the "*Parens*" Back into* Parens Patriae*: Parental Custody of Juveniles as an Alternative to Pretrial Juvenile Detention*, 21 NEW ENG. J. CRIM. & CIV. CONFINEMENT 509, 542 (1995).

27. Lawrence D. Houlgate, *Three Concepts of Children's Constitutional Rights: Reflections on the Enjoyment Theory*, 2 U. PA. J. CONST. L. 77, 88 (1999). Houlgate argues that a child's right is a future interest that can be justifiably postponed in "(1) situations in which a child is clearly incapable of exercising a constitutional right; and (2) situations in which a child, though capable of exercising the right, might damage his future ability to exercise his rights if presently allowed complete enjoyment of his rights." *Id.* at 86. "Restrictions on an older child's enjoyment of his rights for any other reason (e.g., because the exercise of his rights might offend or disrupt the peace and quiet of others) are unjustifiable." *Id.* at 88.

arguments on adolescent competence and decision-making abilities.[28] While these suggestions are valuable, they do not establish a methodology by which courts can assess the harm or benefit to children of a particular policy.

Recent Supreme Court jurisprudence recognizes the importance of both international law and social science research in defining appropriate treatment of juveniles.[29] By exploring how these analyses can work together, advocates can encourage standards that better link children's rights to their well being. Many scholars have noted that a basis in scientific research can give clearer answers to the questions of what helps—and what actually harms—children.[30] Elizabeth Scott and Laurence Steinberg have emphasized the importance of adolescent development research to assessments of criminal culpability.[31] Researchers have similarly applied adolescent development research to the question of youths' competence to stand trial.[32] Indeed, *Gault* itself found it essential that "the claimed benefits" to children "be candidly appraised" before a legal determination can be made regarding children's constitutional rights.[33]

Additionally, considering both domestic and international legal standards through the lens of social science helps temper some of the risks of a rights-based analysis. In both international and domestic law, a broad legal category, divorced from social, economic, and cultural context, can be used to curtail the rights of the historically disadvantaged, and to reflect the status quo and nothing more. Tying these legal standards to social science research helps to ground the analysis in something beyond political consensus.

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28. *See* Gary B. Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?*, 62 NEB. L. REV. 455, 488-89 (1983).

29. *See* Roper v. Simmons, 543 U.S. 551, 577-78 (2005).

30. *See, e.g.,* Craig Hemmens & Katherine Bennett, *Out in the Street: Juvenile Curfews, and the Constitution*, 34 GONZ. L. REV. 267, 326 (1999) (recognizing the need for "empirical evidence" before policies are put in place to limit juvenile rights). This approach is hardly new. *See generally* Gilbert T. Venable, Note, *The* Parens Patriae *Theory and its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT. L. REV. 894 (1966).

31. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (DEC. 2003).

32. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 357 (2003).

33. *In re* Gault, 387 U.S. 1, 21 (1967). The decision relied in large part on a president's commission assessing the effectiveness of the juvenile justice system. *See id*. at 13 n.11.

II. *SMOOK* AND *N.G.*: DENYING FOURTH AMENDMENT RIGHTS IN THE NAME OF CHILD PROTECTION

In the past decade, two cases have arisen in federal courts to challenge the constitutionality of strip-search policies for youth in detention. *N.G. ex rel. S.C. v. Connecticut*,[34] the first of the two cases, involved a Connecticut detention center that housed children detained after arrest and status offenders—primarily children who had run away or who had been truant from school.[35] Under Connecticut law, status offenders are considered "members of 'families with service needs.'"[36] The Connecticut detention center policy required a strip search upon a detainee's "initial intake" to the detention center, regardless of the charge for which the child was brought into detention.[37]

Plaintiff S.C. was fourteen years old at the time of her admission into detention.[38] She had "a history of mental illness, suicide attempts, self-mutilation, sexual activity with older men, drug and alcohol abuse, and drug peddling."[39] She "was adjudicated a member of a 'family with service needs,'" when she refused to stay either at home or at institutions in which she had been placed.[40] Plaintiff T.W. was thirteen years old at the time of her initial admission into detention.[41] She had a history of "truancy, and possibly mental health issues."[42] She was adjudicated a "member of a 'family with service needs'" as a result of her truancy.[43] Upon admission, each girl was subjected to a strip search.[44] During the searches, the girls were made to "remove all of their clothes and underwear . . . lift their breasts and spread out folds of fat." The girls described the process as embarrassing and humiliating.[45]

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34. 382 F.3d 225 (2d Cir. 2004).

35. *Id.* at 227.

36. *Id.*

37. *Id.* The court also addressed the policy's requirement for strip searches when children were transferred between facilities or to and from court, despite the fact that the children had already been searched and had remained in custody since the previous search. *Id.* at 237-38. It held such repetitive searches to be unlawful where there was no reasonable basis to think the children could have acquired contraband while in custody. *Id.*

38. *Id.* at 228.

39. *Id.*

40. *Id.*

41. *Id.* at 229.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 239. "T.W. cried throughout one of her searches. During one of S.C.'s searches, two other detainees were present." *Id.*

The district court concluded that both searches were reasonable because the girls' histories suggested that they might be predisposed to bring contraband into the detention facility.[46] Although the judge characterized T.W.'s truancy as "a quieter rejection of authority," he concluded that "her bouts of depression and regret at having been born created a risk of self-injury" that made the search reasonable.[47]

The Second Circuit began its analysis with reference to the "special needs" doctrine, which allows a search absent a warrant and probable cause when those requirements would be impracticable. The court cited a broad array of cases applying the special needs doctrine, including those relating to searches in hospitals, highly regulated industries, high schools, and prisons.[48] The court did not, however, distinguish between special needs cases that require *some* quantum of individualized suspicion[49] and those that require none.[50] By grouping all special needs cases together, the court implied that the doctrine itself could eliminate the requirement of individualized suspicion—a conclusion unsupported by case law.

In special needs search cases, the court must balance "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."[51] A determination of special needs is a threshold finding that allows a court to bypass the warrant and probable cause requirement—nothing more. Thus, a search may continue in the absence of a warrant and probable cause "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable . . . ."[52] Before turning to the full special needs analysis, the *N.G.* court explicitly acknowledged that strip searches of adults detained for minor offenses are unconstitutional.[53] It then asserted that, for juveniles, the analysis of strip searches places more weight on both sides of the reasonableness balancing equation.[54] According to the court, the in loco parentis power of the state ultimately justified the search because it would protect children from the harm they could inflict on themselves or others by smuggling

46. *Id.* at 230.

47. *Id.*

48. *Id.* at 231.

49. *Id.* at 230-32. *See also* Griffin v. Wisconsin, 483 U.S. 868, 875 (1987).

50. *N.G.*, 382 F.3d at 230 (citing Bd. of Educ. of Ind. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002)).

51. Bell v. Wolfish, 441 U.S. 520, 559 (1979).

52. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

53. *N.G.*, 382 F.3d at 232.

54. *Id.*

contraband,[55] and would allow the detention center to detect child abuse.[56] In weighing the child's liberty interest, the court acknowledged that "the adverse psychological effect of a strip search is likely to be more severe upon a child than an adult, especially a child who has been the victim of sexual abuse."[57] The court then asserted that the state, acting as a guardian, was entitled to conduct a search that a reasonable guardian might undertake.[58] It provided no specific evidence that a reasonable guardian would undertake such a search.[59]

The majority then engaged in a closer inquiry into the evidence introduced to support the search policy, looking first to the goal of discovering contraband.[60] Although the court recognized that strip searches locate and remove potentially harmful contraband only "infrequently," it concluded that for those "juveniles often brought to detention facilities on multiple occasions, many would become familiar with the searches, and the few instances of finding dangerous items may well indicate how effective the State's policy is as a deterrent."[61] As the dissenting opinion pointed out, only two of over 2500 strip searches uncovered contraband.[62] The dissent further observed that the deterrence argument is unconvincing, as children do not expect in advance to be arrested, detained, and searched.[63] Nonetheless, the court used the deterrence theory to support its conclusion that the goal of detecting contraband justified the strip searches.

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55. *See id.* at 233.

56. *See id.* at 236.

57. *Id.* In her dissenting opinion, Judge Sotomayor remarked on the potential trauma to children from strip searches, warning that youth "is a time and condition of life when a person may be most susceptible to influence and to psychological damage," and that the concern is even greater where there is the possibility that the child to be searched may have been a victim of sexual abuse. *Id.* at 239 (Sotomayor, J., dissenting in part) (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)). Judge Sotomayor further explained that youth in the juvenile justice system have often already suffered abuse and developed mental health problems, and that subjecting them to "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive" strip searches would harm them further rather than protect them, as the majority had contended. *See id.* (quoting Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983)).

58. *Id.*

59. The majority also determined that the searches could not be upheld under the *Turner* test balancing a prisoner's interest against penological interests. *See id.* at 236 (majority opinion).

60. *Id.*

61. *Id.* at 236 n.15.

62. *Id.* at 242-43 (Sotomayor, J., dissenting in part). Even the two searches that uncovered contraband did not require full nudity to discover the items. *Id.*

63. *See id.* at 243.

The majority then turned to the detention center's goal of detecting child abuse.[64] The court acknowledged that the center's written policy statement did not mention this objective, and that the assistant supervisor at the detention center had testified that detection of abuse was not the goal of the strip search policy.[65] Nevertheless, the court observed that law enforcement officers' subjective purposes are relevant to the determination of whether a search policy is valid.[66] It then concluded, with no explanation, that because the state had other valid purposes in detecting contraband, the additional purpose of detecting abuse could weigh in.[67] Detection of abuse and contraband were the only special needs the court articulated. The evidence supported neither. Nonetheless, the Second Circuit relied on these reasons to carve out an exclusion for children to the constitutional protections guaranteed to adults arrested on minor offenses.[68]

The next federal appellate case to address the issue of strip searches of youth in detention was *Smook v. Minnehaha County*.[69] On March 26, 2007, the Supreme Court denied certiorari.[70] The underlying Eighth Circuit case was the second (after *N.G.*) federal appellate decision in the past three years to deny children the constitutional protections afforded to similarly situated adults facing the possibility of strip searches.[71]

Jodi Smook was sixteen years old when she and three friends were arrested for violating local curfew laws when her car broke down.[72] The Minnehaha County Juvenile Detention Center (JDC) policy required full strip searches on all detainees, regardless of the level of offense or the length of time they were expected to stay.[73] While awaiting her parents' arrival at the JDC, Smook was stripped down to her underwear and bra, and a staff person touched her to look under her arms, between her toes, and through her hair and scalp.[74] A short time after Smook's search, her parents came to drive

64. *Id.*

65. *Id.* at 236 & n.16 (majority opinion).

66. *Id.* at 237.

67. *See id.* The court distinguished rulings requiring parental consent or judicial authorization for x-rays and medical examinations of children for evidence of abuse. The court asserted that such searches were more intrusive than strip searches. *Id.* The court did not explain *why* an x-ray is more intrusive than a strip search.

68. *See id.* at 232, 237.

69. 457 F.3d 806 (8th Cir. 2006), *cert. denied*, 127 S. Ct. 1885 (2007).

70. 127 S. Ct. 1885 (2007) (mem.).

71. *Smook*, 457 F.3d at 812.

72. Petition for Writ of Certiorari at 3, *Smook*, 127 S. Ct. 1885 (2007) (No. 06-1034).

73. *See id.* at 2.

74. *See id.* at 2-3.

her home.[75] She was never placed in a holding area with other juveniles.[76] Smook filed a suit challenging the strip-search policy on behalf of herself and other juveniles searched when detained for minor offenses.[77] Evidence indicated that some children were subjected to full strip searches while others, like Smook, were allowed to wear underwear while searched.[78] Nonetheless, Smook described the search as humiliating, feeling embarrassed and exposed:

> Every time I think about it, I just—I felt very exposed. I felt as if the JDC was taking advantage of the situation. Very, very humiliated, embarrassed. Very embarrassed. It's so hard to describe when you are 16 years old taking your clothes off in front of somebody you don't know. It's hard to talk about it. I don't even like to think about it. It just scared me so much, and to know that they do this to people.[79]

The Eighth Circuit relied heavily on *N.G.*, with no thorough analysis of the case, nor any explanation of why it found *N.G.* persuasive.[80] The court simply asserted that Smook's case was weaker than that of the *N.G.* plaintiffs, because Smook had been allowed to leave her underwear on.[81] The court concluded that "there are obvious practical difficulties in conducting a thorough search of a detainee's clothing while the detainee is wearing them."[82] It then observed that "[i]n light of the State's legitimate responsibility to act *in loco parentis* with respect to juveniles in lawful state custody" the reasonableness test tipped in favor of the search.[83] The court did not address the fact that Smook never intermingled with other detainees, that her parents soon picked her up, or that she was present on a curfew violation because her car had broken down—a situation without obvious connections to the possession of contraband, the detection of abuse, or the likelihood of harm to self or others.[84]

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75. *Id.* at 3.

76. *See id.*

77. *Smook*, 457 F.3d at 808.

78. *See id.* at 809*;* Petition for Writ of Certiorari, *supra* note 72, at 3.

79. *See* Plaintiffs-Appellees' Petition for Rehearing en Banc at 5, *Smook*, No. 05-1363 (8th Cir. Aug. 22, 2006) (on file with authors).

80. *See Smook*, 457 F.3d at 811.

81. *Id.* at 811-12.

82. *Id*. at 812.

83. *Id.*

84. *See generally* Petition for Writ of Certiorari, *supra* note 72, at 2-3. The Eighth Circuit also distinguished its own prior holdings in "special needs" cases because, although law enforcement officers could press charges if they found illegal items, the goal of the search was not to investigate crime but to protect students' welfare. *See Smook*, 457 F.3d at 812-13. The court concluded in the alternative that the officers were entitled to qualified immunity. *Id.* at 815.

A. The Fourth Amendment

Under a simple Fourth Amendment analysis, the strip searches in both *N.G.* and *Smook* should have been found unconstitutional. According to the Supreme Court, the category of constitutionally permissible suspicionless searches is "closely guarded"[85] and "[e]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"[86] Indeed, the majority of suspicionless searches upheld by the Supreme Court involve drug tests in which the Court has characterized the intrusion of privacy as minimal or even "negligible."[87] The only Supreme Court case to uphold a suspicionless strip search involved the exceptional security concerns created by contact visits in an adult penal institution that had a documented problem of prisoners smuggling contraband.[88] The Court characterized the facility as "a unique place fraught with serious security dangers."[89] It recognized that "[s]muggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record . . . and in other cases."[90]

Strip searches of juveniles cannot be characterized as minimal or negligible intrusions. Courts recognize that a strip search is a severe intrusion into personal privacy,[91] and that being forced to strip in

85. *See* Chandler v. Miller, 520 U.S. 305, 309 (1997).

86. New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985) (quoting Delaware v. Prouse, 440 U.S. 648, 654-55 (1979)).

87. *See, e.g.,* Bd. of Educ. of Ind. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 823 (2002); Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 658 (1995); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 626 (1989). The only other suspicionless special-needs searches the Supreme Court has upheld beyond the drug tests mentioned above involve lesser intrusions (such as apartment or pat-down searches) of those with diminished expectations of privacy resulting from their status as convicted criminals under state supervision. *See* United States v. Knights, 534 U.S. 112 (2001); Samson v. California, 126 S. Ct. 2193 (2006).

88. *See* Bell v. Wolfish, 441 U.S. 520, 558-62 (1979).

89. *Id.* at 559.

90. *Id.*

91. *See, e.g.,* Wood v. Clemons, 89 F.3d 922, 928 (1st Cir. 1996). *See generally* John H. Derrick, Annotation, *Fourth Amendment as Prohibiting Strip Searches of Arrestees or Pretrial Detainees*, 78 A.L.R. FED. 201 §3 (Supp. 2007) (citing Giles v. Ackerman, 746 F.2d 614, 615 (9th Cir. 1984), *overruled on other grounds by* Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999)).

front of a stranger can be frightening, demeaning, and degrading.[92] Case law also recognizes that children and teenagers perceive strip searches as particularly intrusive.[93] The Supreme Court has observed that youth "is a . . . condition of life when a person may be most susceptible . . . to psychological damage."[94] Lower courts have specifically recognized that strip searches can traumatize children.[95]

Despite the evidence of psychological trauma during strip searches, both the Eighth and Second Circuits suggested that their strip-search policies were justified—even as applied to status offenders and juveniles brought in on minor offenses—because they could lead to the discovery of weapons that a child could use to harm herself or others.[96] In doing so, these courts departed from accepted law that individuals arrested for minor, nonviolent offenses provide "little reason to believe that" they "will conceal weapons or contraband," and, therefore, that such searches are unreasonable.[97]

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92. *See* Chapman v. Nichols, 989 F.2d 393, 396 (10th Cir. 1993) (strip searches are "terrifying"); Justice v. City of Peachtree City, 961 F.2d 188, 192 (11th Cir. 1992) ("The experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state . . . can only be seen as thoroughly degrading and frightening. . . . [S]uch a search upon an individual detained for a lesser offense is quite likely to take that person by surprise, thereby exacerbating the terrifying quality of the event."); *see also* Thompson v. City of Los Angeles, 885 F.2d 1439, 1446 (9th Cir. 1989) (strip searches produce "feelings of humiliation and degradation"); Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983) (strip searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission"); Hunter v. Auger, 672 F.2d 668, 674 (8th Cir. 1982) ("[A] strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience.").

93. *See, e.g.*, Thomas *ex rel.* Thomas v. Roberts, 261 F.3d 1160, 1168 (11th Cir. 2001) (children expect that "we should be able to avoid the unwanted exposure of one's body, especially one's 'private parts'"); Jenkins v. Talladega City Bd. of Educ., 95 F.3d 1036, 1044 (11th Cir. 1996) ("[T]he perceived invasiveness and physical intimidation intrinsic to strip searches may be exacerbated for children."); Cornfield v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1323 (7th Cir. 1993) (strip search was particularly intrusive on sixteen year old, because at that age "children are extremely self-conscious about their bodies"); Doe v. Renfrow, 631 F.2d 91, 93 (7th Cir. 1980) (strip search of thirteen year old was a "violation of any known principle of human decency").

94. Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).

95. Flores v. Meese, 681 F. Supp. 665, 667 (C.D. Cal. 1988) ("Children are especially susceptible to possible trauma from strip searches.").

96. *See* Smook v. Minnehaha County, 457 F.3d 806, 812 (8th Cir. 2006); N.G. *ex rel.* S.C. v. Connecticut, 382 F.3d 225, 232 (2d Cir. 2004).

97. Masters v. Crouch, 872 F.2d 1248, 1254 (6th Cir. 1989). *See also Chapman*, 989 F.2d at 396 (stating that security interests cannot justify strip searching women brought in for driving with suspended licenses); Hill v. Bogan, 735 F.2d 391, 394 (10th Cir. 1984) (explaining that a strip search is not reasonable when an offense is not "associated with the concealment of weapons or contraband in a body cavity"); *Mary Beth G.*, 723 F.2d at 1273 (stating that searching a woman arrested on misdemeanor charges, who had been patted down "bore no relationship to security needs so that,

Both courts justified the departure from the rule on the basis of the state's duty to protect children in its care.[98]

B. The Duty to Protect

Generally, the duty to protect incarcerated individuals extends to adults as well as to children.[99] As a result, the simple notion of protecting children should not outweigh the child's right to privacy. Both adults and children need to be protected from harm when they are detained or incarcerated. Case law has established that individuals arrested on minor offenses can be adequately protected without being strip searched.[100] As described above, the factual basis for the arguments on both contraband and detection of abuse in *Smook and N.G.* were tenuous at best, further underscoring that the general reasoning is equally applicable to youth.

The Second and Eighth Circuit decisions reasoned that the in loco parentis doctrine justified searching children for their protection even though adults in a similar situation could not be searched. The Second Circuit explained that "[w]here the State is exercising some legitimate custodial authority over children, its responsibility to act in the place of parents (*in loco parentis*) obliges it to take special care to protect those in its charge, and that protection must be concerned

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when balanced against [her] privacy interests, the searches cannot be considered 'reasonable'"); Logan v. Shealy, 660 F.2d 1007, 1013 (4th Cir. 1981) (holding strip search of woman arrested for driving while intoxicated bore no discernable relationship to security concerns and "cannot be constitutionally justified simply on the basis of administrative ease").

98. For those like Smook, who committed only status offenses that would not be illegal if committed by an adult, the reasons for conducting the search are even more tenuous. For more on the effect of status offense laws on girls, see generally Alecia Humphrey*, The Criminalization of Survival Attempts: Locking Up Female Runaways and Other Status Offenders*, 15 HASTINGS WOMEN'S L.J. 165 (2004); Cheryl Dalby, *Gender Bias Toward Status Offenders: A Paternalistic Agenda Carried Out Through the JJDPA*, 12 LAW & INEQ. 429 (1994); Howard T. Matthews, Jr., Comment, *Status Offenders: Our Children's Constitutional Rights Versus What's Right for Them*, 27 S.U. L. REV. 201 (2000).

99. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 833 (1994) ("[P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.") (quoting Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558 (1st Cir. 1988); Wilson v. Seiter, 501 U.S. 294, 303 (1991); *see also* Jones v. Edwards, 770 F.2d 739, 742 (8th Cir. 1985) (recognizing that adult correction officials are in part responsible for the safety of their charges); A.M. v. Luzerne County Juvenile Det. Ctr., 372 F.3d 572, 585 n.3 (3d Cir. 2004) (observing that "a juvenile detention center is comparable to a prison, which . . . has a duty to care for and protect its inmates").

100. *See Chapman*, 989 F.2d at 395-97; *Masters*, 872 F.2d at 1255; Weber v. Dell, 804 F.2d 796, 802 (2d Cir. 1986); Stewart v. Lubbock County, 767 F.2d 153, 156-67 (5th Cir. 1985); *Jones*, 770 F.2d at 742; Giles v. Ackerman, 746 F.2d 614, 615 (9th Cir. 1984), *overruled on other grounds by* Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999); *Hill*, 735 F.2d at 394-95; *Mary Beth G.*, 723 F.2d at 1273; *Logan*, 660 F.2d at 1013.

with dangers from others and self-inflicted harm."[101] This rationale fundamentally misunderstands the in loco parentis doctrine. The term "in loco parentis" refers to someone who is "charged, factitiously, with a parent's rights, duties, and responsibilities."[102] The doctrine is reserved for individuals acting in the legal place of parents, and in a custodial role, and is not "designed for teachers, coaches, scout leaders, or any other persons who might temporarily have some disciplinary control over a child."[103] At the heart of the in loco parentis doctrine is the notion of a personal parental relationship, not the interaction between a governmental body and a child. As Betsy Levin describes in the context of the school-child relationship, in loco parentis no longer applies because it "is not a parental relationship between school official and student but a law enforcement relationship, where school authorities are acting to protect the safety and welfare of the general student population."[104] She continues:

> It is no longer the institution pictured by Justice Powell. In that changed institution, where students and teachers do not know each other, where teachers are often of a different race than their students, where a single high school can have the same population as a small town, where *in loco parentis* no longer is relevant, then constitutional protections become more important. The school is not the extension of the parent, but of the government. And among our most important democratic values are the disabling of government from acting arbitrarily and from suppressing dissenting viewpoints and ideas.[105]

This reasoning extends to staff in juvenile detention centers. Because staff members at a juvenile detention center are agents of the state, carrying out law enforcement obligations, and exercising temporary disciplinary control, they are not acting in loco parentis.

Both the Second and Eighth Circuits appear to have confused the parental authority conferred by the *in loco parentis* doctrine with the narrow power of the state to act as *parens patriae*.[106] Historically, the state's *parens patriae* power was only invoked upon the death of

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101. N.G. *ex rel.* S.C. v. Connecticut, 382 F.3d 225, 232 (2d Cir. 2004).

102. BLACK'S LAW DICTIONARY 787 (6th ed. 1990).

103. State v. Noggle, 615 N.E.2d 1040, 1042 (Ohio 1993). *Accord* Powledge v. United States, 193 F.2d 438, 441-42 n.5 (5th Cir. 1951) (analogizing persons *in loco parentis* to natural parents); United States v. Floyd, 81 F.3d 1517, 1524 (10th Cir. 1996).

104. Betsy Levin, *Education Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1672 (1986).

105. *Id.* at 1680.

106. *Cf.* Schall v. Martin, 467 U.S. 253, 265 (1982) ("[I]f parental control falters, the State must play its part as *parens patriae* . . . . In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's *parens patriae* interest in preserving and promoting the welfare of the child.").

the child's natural parent, or upon a showing that the parent was unfit or unable to care for his or her child.[107] This concept—that the state cannot overstep the rights of parents—still infuses the Supreme Court's jurisprudence on *parens patriae*. Children "are assumed to be subject to the control of their parents, and *if parental control falters*, the state must play its part as *parens patriae*."[108]

More importantly, the state's power under the *parens patriae* doctrine to protect children may be used to "advance only the best interests of the incompetent individual and not attempt to further other objectives, deriving from its police power, that may conflict with the individual's welfare."[109] The use of the doctrine in the criminal or juvenile justice context is therefore highly suspect. As the Supreme Court explained in *Gault*, the term *parens patriae* historically:

> [P]roved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was . . . used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence.[110]

Thus, while the state has a legitimate interest in "protecting both the juvenile and society from the hazards of pretrial crime," due process requires that before detaining a juvenile, the state must put in place procedures that "provide sufficient protection against erroneous and unnecessary deprivations of liberty."[111] Numerous courts have concluded that, absent prior judicial approval, the state may not conduct warrantless strip searches of children to investigate claims of child abuse.[112]

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107. DeBacker v. Brainard, 396 U.S. 28, 36 (1969) (the state may act if the child's parents or guardian "be unable or unwilling to do so"). *See also* Prince v. Massachusetts, 321 U.S. 158 (1944); Vidal v. Girard's Ex'rs, 43 U.S. 126, 168 (1844) (*parens patriae* allowed the state to take care of the "sick, the widow, and the orphan"); *Ex parte* Crouse, 4 Whart. 9, 11 (Pa. 1839) (state may act *parens patriae* where parents are "unequal to the task of education, or unworthy of it," or "where they are incompetent or corrupt").

108. *Schall*, 467 U.S. at 265 (emphasis added). *See also* Santosky v. Kramer, 455 U.S. 745, 767 n.17 (1982) ("Any *parens patriae* interest in terminating the natural parents' rights arises only at the dispositional phase, after the parents have been found unfit.").

109. *Developments in the Law—The Constitution and the Family,* 93 HARV. L. REV. 1156, 1199 (1980).

110. *In re* Gault, 387 U.S. 1, 16 (1967).

111. *Schall*, 467 U.S. at 274.

112. *See, e.g.*, Good v. Dauphin County Soc. Servs. for Children & Youth, 891 F.2d 1087, 1092 (3d Cir. 1989); Roe v. Texas Dep't of Protective & Regulatory Servs., 299

III. LOOKING FORWARD: *GAULT,* INTERNATIONAL LAW, AND TRAUMA RESEARCH

The Supreme Court's admonitions in *Gault* that children cannot be denied constitutional safeguards in the name of child protection, the standards set forth by international human rights law, and the vital information provided by research into adolescent trauma all underscore the importance of protecting children from strip searches in the absence of reasonable suspicion, and provide persuasive arguments for litigation. As the Supreme Court's recent decision in *Roper v. Simmons* makes clear, the Court will consider all of these sources in its decisions on juvenile rights.[113]

International law plays two important roles in domestic legal analysis. When the United States has ratified international covenants mandating the treatment of youth with respect and humanity, those covenants act as binding authority in federal courts.[114] When international law does not place binding authority on federal law—for example, because the United States has refused to ratify a covenant or convention—it still remains influential on constitutional and human rights questions.[115]

The Supreme Court has a long history of reliance on international law. In the past decade, international law has played a larger role in constitutional analysis, with an increasing number of Supreme Court Justices acknowledging its import.[116] Although some

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F.3d 395, 407-08 (5th Cir. 2002); Calabretta v. Floyd, 189 F.3d 808, 817-18 (9th Cir. 1999); Franz v. Lytle, 997 F.2d 784, 791 (10th Cir. 1993).

113. 543 U.S. 551, 569 (2005).

114. *See, e.g.*, International Covenant on Civil and Political Rights (ICCPR), *infra* note 155. For the United States' status of ratification of major human rights treaties, see generally Status of Ratifications of the Principal International Human Rights Treaties, *infra* note 156.

115. *See infra* notes 116-118.

116. In a 2006 address given to the Constitutional Court of South Africa, Justice Ruth Bader Ginsburg spoke of the influential force of international law:

> We refer to decisions rendered abroad, it bears repetition, not as controlling authorities, but for their indication, in Judge Wald's words, of "common denominators of basic fairness governing relationships between the governors and the governed." . . . National, multinational, and international human rights charters and courts today play a prominent part in our world. The U.S. judicial system will be the poorer, I have urged, if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own.

Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication, Address Before the Constitutional Court of South Africa (Feb. 7, 2006), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html. Similarly, at a gathering of the American Society of

legal scholars and theorists have argued that international law has no authority over the interpretation of domestic law,[117] the Supreme Court has explained that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights

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International Law, Justice Stephen Breyer quoted Justices Ginsburg and O'Connor, respectively, as follows:

> [C]omparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights. We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. . . . [C]onclusions reached by other countries and by the international community should at times constitute persuasive authority.

Stephen Breyer, Associate Justice, Supreme Court of the United States, The Supreme Court and the New International Law, Address Before the American Society of International Law 97th Annual Meeting (Apr. 4, 2003) (quoting Associate Justices Ruth Bader Ginsburg and Sandra Day O'Connor, respectively), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html. Also, while dissenting in *Thompson v. Oklahoma*, Justice Scalia stated that:

> The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so "implicit in the concept of ordered liberty" that it occupies a place not merely in our mores but, text permitting, in our Constitution as well.

487 U.S. 815, 870 n.4 (1982) (Scalia, J., dissenting) (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

117. *See* David J. Pfeffer, Comment, *Depriving America of Evolving its Own Standards of Decency?: An Analysis of the Use of Foreign Law in Eighth Amendment Jurisprudence and its Effect on Democracy*, 51 ST. LOUIS U. L.J. 855, 856 (2007). Pfeffer points to the "firestorm of debate and criticism about the role of these sources [of foreign law] in constitutional law" and supports that proposition by reference to the following authorities:

> Ann Althouse, Op-Ed., *Innocence Abroad*, N.Y. TIMES, Sep. 19, 2005, at A25 (discussing the controversy over the use of foreign law and opposing Chief Justice Roberts's criticism of its use on the Court); Hadar Harris, *"We Are the World"—Or Are We? The United States' Conflicting Views on the Use of International Law and Foreign Legal Decisions*, HUM. RTS. BRIEF, Spring 2005, at 5 (arguing that the Supreme Court's use of foreign law is highly beneficial to furthering human rights in U.S. policy); Frank James, *Gonzales Raps Justices for Citing Foreign Laws*, CHI. TRIB., Nov. 9, 2005, at 13 (discussing a speech by Attorney General Alberto Gonzales explaining his opposition to the Supreme Court's reliance on foreign law in recent cases); Felix G. Rohatyn, Op-Ed., *Dead to the World*, N.Y. TIMES, Jan. 26, 2006, at A23 (criticizing Justice Alito's opposition to incorporating foreign law into the Court's decisions); Jeffrey Toobin, *Swing Shift*, NEW YORKER, Sep. 12, 2005, at 42 (exploring Justice Kennedy's rationale for invoking foreign sources).

Id. at 856 & n.5.

within our own heritage of freedom."[118] The Court further stated that foreign authority and laws are "instructive"[119] as to the "opinion of the world community," and therefore serve as a source of "respected and significant confirmation for [the Court's] own conclusions."[120] Many legal scholars have subscribed to this view, increasingly using international law in interpretation of the Constitution.[121]

Roper v. Simmons demonstrates the Court's receptivity to international law analysis as persuasive in Eighth Amendment cases.[122] A similar analysis should apply to search and seizure cases. In the Eighth Amendment context, reliance on foreign law rests on a notion that when dealing with fundamental rights, international law is persuasive regarding the "evolving standards of decency" in the world community.[123] Eighth Amendment jurisprudence lends itself to the integrated use of foreign precedent because it concerns "the place of the United States within the international community in matters

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118. Roper v. Simmons, 543 U.S. 551, 578 (2005). Justice Kennedy, writing for the majority, referred to the Court's long history of relying on international law for Eighth Amendment determinations. *Id.* at 575-76. The majority opinion then clarified that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Id.* at 578. Although Justice O'Connor dissented from the ultimate holding of the case, she wrote separately to clarify that she also supported this confirmatory role for international law. *See id.* at 604-05 (O'Connor, J., dissenting). Only Justices Scalia and Thomas, along with Chief Justice Rehnquist, rejected the Court's use of international law. *Id.* at 628 (Scalia, J., dissenting).

119. *See id.* at 575 (majority opinion).

120. *See id.* at 578. A number of United Nations General Assembly Resolutions, representing the overall consensus of the global community, set forth advisory rules on conditions of confinement, delinquency prevention, and the administration of justice, and therefore are persuasive regarding the nature of the balance between penological interests and children's interests. *See generally* U.N. Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33, U.N. Doc. A/RES/40/33 (Nov. 29, 1985) [hereinafter Beijing Rules]; U.N. Guidelines for the Prevention of Juvenile Delinquency, G.A. Res. 45/112, U.N. Doc. A/RES/45/112 (Dec. 14, 1990) [hereinafter Riyadh Guidelines]; U.N. Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, U.N. Doc. A/RES/45/113 (Dec. 14, 1990) [hereinafter U.N. Rules].

121. *See generally* Bernardine Dohrn, *Something's Happening Here: Children and Human Rights Jurisprudence in Two International Courts*, 6 NEV. L.J. 749 (2006); Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628 (2007); Daniel J. Frank, Note, *Constitutional Interpretation Revisited: The Effects of a Delicate Supreme Court Balance on the Inclusion of Foreign Law in American Jurisprudence*, 92 IOWA L. REV. 1037 (2007). *See also* Jacob J. Zehnder, Note, *Constitutional Comparativism: The Emerging Risk of Comparative Law as a Constitutional Tiebreaker*, 41 VAL. U. L. REV. 1739 (2007).

122. *See Roper*, 543 U.S. at 575-78.

123. Diane Marie Amann, *"Raise the Flag and Let It Talk:" On the Use of External Norms in Constitutional Decision Making*, 2 INT'L J. CONST. L. 597, 602 (2004) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

pertaining to the human condition."[124] Scholars have argued that Fourteenth Amendment jurisprudence is equally receptive to foreign law, because the doctrine of substantive due process "urges an inquiry into practices that are 'implicit in the concept of ordered liberty,' a concept that transcends borders."[125] The Fourteenth Amendment protects certain fundamental rights of the individual—life, liberty, and property—and through the Fourteenth Amendment, certain freedoms and rights are extended to youth in the juvenile justice system.[126] "Because both the Eighth and Fourteenth Amendments safeguard basic civil liberties, these areas of jurisprudence offer an ideal context for the use of foreign law as persuasive authority."[127] In wrongful search and seizure cases, basic fundamental freedoms are challenged, and matters pertaining to human condition and dignity are paramount. Thus, "[t]he incorporation of a right to human dignity into the Fourth Amendment's 'privacy' provisions is consistent not only with U.S. constitutional law, but also with the international law obligations of the U.S., which require it to respect and ensure the rights of prisoners (and others) to human dignity."[128] International law and human rights instruments can therefore provide a comprehensive outlook on the world community's understanding and opinion regarding searches of youth in detention. International law echoes the themes of *Gault*: the state cannot intervene arbitrarily, simply because the subjects are children and it cannot harm children by depriving them of rights under the guise of child protection. International law, supported by psychological research, also helps to resolve questions of what actually protects children's best interests, and what causes them harm.

A. Child Protection

An important lesson of *Gault*, underscored by international authority, is that the language of child protection should not be used to undermine children's rights. In *Gault*, the Court squarely addressed the question of whether children's constitutional rights should be set aside in the interest of a *parens patriae* duty to protect children.[129] As described above, the Court in *Gault* asserted that *parens patriae* must only be used to promote the welfare of the

124. Rex D. Glensy, *Which Countries Count?:* Lawrence v. Texas *and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 381 (2005).

125. *Id.* at 382 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

126. *See generally In re* Gault, 387 U.S. 1 (1967).

127. *See* Frank, *supra* note 121, at 1051.

128. Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751, 797 (2005).

129. *Id.* at 16-17.

child.[130] It also underscored that the doctrine had no historical basis in criminal procedure.[131] Thus, the Court rejected the notion that the *parens patriae* doctrine should prevent a child from receiving procedural protections.[132] Rather, the Court conluded that such "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[133] Considering the wealth of evidence in front of it that the juvenile justice system was failing children, the Court remarked that "[t]he absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures."[134] Instead, according to the Court, the abandonment of due process has "resulted not in enlightened procedure, but in arbitrariness."[135]

Subjecting youth to strip searches from which adults would be constitutionally protected sends them a mixed message.[136] "Juveniles are taught that they will be held accountable for their offenses, that they will be subjected to the same punishment as adults rather than rehabilitated, and that they will be confined in similar institutions as adult criminals."[137] But, by the same token, they are "taught that they are not entitled to the constitutional protections to which adults are entitled."[138] As one scholar wrote, "[t]he system claims that lower constitutional standards are applied to juveniles because the system wants to protect them. The fact is that juveniles are actually harmed, not protected, by the juvenile justice system."[139] In fact, the ultimate effects of strip searches on juveniles may be "much more debilitating and traumatizing" than the possible effects of bringing contraband into detention centers.[140] As *Gault* warned, the urge to protect children by denying them rights afforded adults should not be supported in the absence of evidence that the system *does* actually help children.[141]

The focus on child protection—and the importance of ensuring that child protective language isn't used to harm children—is not unique to the American judicial system. A government's duty to protect children and act in their best interests is broadly recognized

130. *Id.* at 16.
131. *Id.*
132. *Id.* at 26.
133. *Id.* at 18.
134. *Id.*
135. *Id.* at 19.
136. Smith, *supra* note 16, at 521.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 524.
141. *In re* Gault, 387 U.S. 1, 22 n.30 (1967).

in the international community. It is emphasized not only in internationally recognized legal standards, but also in individual courtrooms around the globe. For example, the United Nations Declaration of the Rights of the Child[142] sets forth specific language:

> [T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection . . . .
>
> . . . .
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> The child shall enjoy special protection . . . [and in] the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.[143]

Children are considered to be the most vulnerable members of society, and, therefore, the government's paramount duty is to protect them from harm.[144] These protections apply with special force to children in confinement. Thus, states and national governments have the obligation to take "immediate actions to guarantee the psychic and moral integrity of inmates as well as their right to life and to the minimum conditions of dignified life, especially in the case of children, who require special attention on the part of the State."[145] Simlarly, in response to a petition by Brazilian youth in detention, the Inter-American Court of Human Rights (IACHR) held that the state must immediately adopt whatever measures necessary to safeguard the lives and personal integrity of children and adolescents who are institutionalized.[146] In order to assure that the children in confinement were being adequately protected, the court required the state to carry out periodic supervision of the detention conditions,

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142. U.N. Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. DOC. A/1386 (Nov. 20, 1959). This declaration is a customary international law resolution that is binding on all parties, not just signatories, because these resolutions represent the general practice of nations, which is generally accepted as law. *See, e.g.*, INT'L JUST. PROJECT, SUMMARY OF CUSTOMARY INTERNATIONAL LAW AND JUS COGENS AS PERTAINS TO JUVENILE OFFENDERS (2003/2004), http://www.internationaljusticeproject.org/juvJusCogens.cfm.

143. U.N. Declaration of the Rights of the Child, *supra* note 142, pmbl. & princ. 2.

144. *See* State v. Mutch, [1999] FJHC 149, Hac0008.1998 (Fiji) (Sentence and Sentencing Remarks of Pathik, J., in the High Court of Fiji, citing the Convention on the Rights of the Child), *available at* http://www.paclii.org/fj/cases/FJHC/1999/149.html.

145. *See* Matter of Children and Adolescents Deprived of Liberty in the "Complexo do Tatuape" of FEBEM, 2006 Inter-Am. Ct. H.R. No. 12.328, Considering ¶ 12 (July 4, 2006) (Order of the Inter-Am. Ct. H.R., Provisional Measures and Request for Extension of Provisional Measures Regarding the Federative Republic of Brazil) [hereinafter Brazil Tatuape FEBEM Case].

146. *See id; see also* Adolescents in the Custody of the FEBEM, Brazil, Admissibility Petition 12.328, Inter-Am. Ct. H.R., Report No. 39/02, ¶¶ 6-21 (2002), *available at* http://www.cidh.org/annualrep/2002eng/Brazil.12328.htm.

including both the physical and emotional state of the detained children.[147]

International law explicitly recognizes that the language of child protection cannot justify harm to children's well-being. In another IACHR case,[148] a group of Honduran children brought a human rights suit against their detention center for poor conditions of confinement.[149] The IACHR held that even children who are at risk may not be deprived of their liberty in an attempt to protect them.[150] The court explained:

> To incarcerate juveniles for being orphans or for their own protection is a violation of the most elementary rules of due process, presumption of innocence, the principle of legality and personal liberty, all guaranteed under the American Convention.[151]
>
> . . . .
>
> Depriving a minor of his liberty unlawfully, even if it be for a criminalized offense, is a serious violation of human rights. The State cannot argue the need to protect the child as grounds for depriving him of his liberty or of any other rights inherent in his person. Minors cannot be punished because they are at risk, that is to say, that because they need to work to earn a living, or because they have no home and thus have to live on the streets. Far from punishing minors for their supposed vagrancy, the State has a duty to prevent and rehabilitate and an obligation to provide them with adequate means for growth and self-fulfillment.[152]
>
> . . . .
>
> The Commission considers that the practice of incarcerating a minor, not because he committed a criminalized offense but simply because he was abandoned by society or was at risk, or is an orphan or a vagrant, poses a grave threat to Honduran children. The State cannot deprive of their freedom children who have committed no crime, without incurring international

147. Brazil Tatuape FEBEM Case, *supra* note 145, Decides ¶¶ 2-3 & Having Seen ¶ 2 (citing Nov. 30, 2005 Court Order).

148. The Inter-American Court of Human Rights, located in San Jose, Costa Rica, hears cases of human rights violations for the Organization of American States.

149. Minors in Detention v. Honduras, Case 11.491, Inter-Am. C.H.R., Report No. 41/99, ¶¶ 1-9 (1999), *available at* http://www.cidh.oas.org/annualrep/98eng/Merits/Honduras%2011491.htm.

150. *Id.* ¶ 110.

151. *Id.* ¶ 18.

152. *Id.* ¶ 110.

> responsibility for the violation of their right to personal liberty.[153]

Like the Court in *Gault*, the IACHR rejected harm in the name of child protection.

Human rights instruments and case law also establish that the unreasonable use of strip searches is degrading and inhumane. The Unaccompanied Alien Child Protection Act prohibits the "unreasonable use" of shackling, handcuffing, solitary confinement, and pat or strip searches, which may violate a child's sense of dignity and respect.[154] More broadly, the International Convention on Civil and Political Rights (ICCPR)[155] states that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."[156] In Turkey, the European Court of Human Rights held that strip searches without medical necessity were unlawful and inhumane.[157] In this case, a young woman was forced to submit to a gynecological exam upon detention to prove that she was not sexually assaulted by her guards.[158] The court, citing the country's constitution, accordingly held that physical interference with a person's body is only permitted in the case of medical necessity or if allowed by law.[159] The court reasoned that a person's body concerns the most intimate aspect of one's private life, and thus medical intervention, even if of minor importance, constitutes an interference with the right to privacy.[160] For similar reasons—and recognizing the unique dangers to children when their privacy is breached by a strip search—the British government passed protective legislation to decrease the use of strip searches on juveniles.[161] As a result, youth in Britain are strip searched at much

153. *Id.* ¶ 109.

154. *See* Joyce Koo Dalrymple, Note, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L.J. 131 (2006); *see also* Unaccompanied Alien Child Protection Act of 2005, S. 119, 109th Cong. (2005).

155. International Covenant on Civil and Political Rights (ICCPR), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

156. *Id.* art. 17. The United States has been a party to the ICCPR since 1992. *See* OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 1, 11 (June 9, 2004), *available at* http://www.unhchr.ch/pdf/report.pdf [hereinafter STATUS OF RATIFICATIONS].

157. *See* Y.F. v. Turkey, No. 24209/94, 2003-IX Eur. Ct. H.R. ¶ 43, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=9&portal=hbkm&action=html&highlight=Y.F.&sessionid=3321244&skin=hudoc-en.

158. *Id.* ¶ 12.

159. *Id.* ¶ 23.

160. *Id.* ¶ 33.

161. *See* Tim Newburn et al., *Race, Crime and Injustice? Strip Search and the Treatment of Suspects in Custody*, 44 BRIT. J. CRIMINOLOGY 677, 683-84 (2004).

lower rates than adults.[162]

B. Treatment Appropriate to Child's Age and Development

The United States Supreme Court consistently recognizes that children are different from adults, and that they must therefore be treated differently. The Court's analysis relies on adolescent development research and international authority. In *Roper v. Simmons*,[163] for example, the Court observed that:

> [A]s any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."[164]

The Court then reasoned that once juveniles' diminished culpability is recognized, the death penalty could no longer be applied to them.[165] Similarly, in juvenile confession cases, the Court has recognized that teenagers do not behave like adults. For instance, in *Haley v. Ohio*,[166] the Court asserted that a teenager:

> [C]annot be judged by the more exacting standards of maturity . . . . [W]e cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him.[167]

Gault itself asserted concerns about youth's special vulnerability, noting that "the greatest care must be taken to assure that [a minor's] admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair."[168] In references to the purpose of the juvenile justice system, the Court has recognized the malleability of youth and their consequent amenability to rehabilitative interventions.[169]

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162. *See id.*

163. 543 U.S. 551 (2005).

164. *Id.* at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

165. *Id.* at 570-74 (explaining why justifications for the death penalty apply with less force to juveniles and why a bright-line rule is appropriate at age eighteen).

166. 332 U.S. 596 (1948).

167. *Id.* at 599-600. *See also* Gallegos v. Colorado, 370 U.S. 49, 54 (observing that minors lack critical knowledge and experience, and have a lesser capacity to understand—much less to exercise—their rights during police interrogations).

168. *In re* Gault, 387 U. S. 1, 55 (1967).

169. *See id.* at 15-16.

A growing jurisprudence in international law articulates the special obligation of the state to protect the young and to take age into account in juvenile justice issues. This is echoed throughout international human rights instruments that provide special protections for children based upon their potential for rehabilitation and development. The vision of a "child" reflected in various human rights instruments demonstrates that legal responses to children's rights must be appropriate to their development and age.[170] Therefore, procedures that deal with children in conflict with the law must be designed to "take account of [children's] age and the desirability of promoting their rehabilitation."[171] For example, the South Africa Constitutional Court[172] held that the state had no compelling interest in instituting a whipping policy on a child in the juvenile justice system.[173] The Court held that juveniles, being of a more "impressionable and sensitive nature" than adults, should be protected from treatment that might harden them, and diminish "their regard for a culture of decency" and their "respect for the rights of others."[174]

Research in adolescent development supports the conclusion that strip searches impact young people even more severely than adults.[175] Because adapting to physical maturation is central to the psychological task of adolescence, teenagers tend to be more self-conscious about their bodies than those in other age groups.[176] With the onset of puberty, normal teenagers begin to view their bodies

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170. *See* Convention on the Rights of the Child pmbl., *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 43.

171. ICCPR, *supra* note 155, art. 14, ¶ 4. However, the United States reserved the right to treat juveniles as adults in extraordinary cases:

> [T]he policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, in exceptional circumstances, to treat juveniles as adults . . . [and] with respect to individuals who volunteer for military service prior to age 18.

ICCPR, United States of America Reservations ¶ 5, *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp [hereinafter United States ICCPR Reservations].

172. The nation's highest appellate court.

173. *See S v Williams & Others* 1995 (3) SA 632 (CC) ¶ 91 (S. Afr.), *available at* http://www.constitutionalcourt.org.za/site/judgments/judgments.htm (under "Library quick search" Search in: "Cases" and Year: "1995" and select case CCT20-94).

174. *Id.* ¶ 47.

175. *See generally* ANNE C. PETERSON & BRANDON TAYLOR, THE BIOLOGICAL APPROACH TO ADOLESCENCE: BIOLOGICAL CHANGE AND PSYCHOLOGICAL ADAPTATION, HANDBOOK OF ADOLESCENT PSYCHOLOGY (Joseph Adelson ed., 1980).

176. *See id.* at 144; *see also* Edward Clifford, *Body Satisfaction in Adolescence*, *in* ADOLESCENT BEHAVIOR AND SOCIETY: A BOOK OF READINGS 53 (Rolf E. Muuss ed., 3d ed. 1980).

critically, and compare them to those of their peers and their ideals, making adolescents particularly vulnerable to embarrassment.[177] Surveys confirm a high degree of anxious body preoccupation and dissatisfaction among adolescents.[178] This body criticism is not happenstance; rather, it is part and parcel of the job of obtaining autonomy from the family and "assum[ing] the role of an adult in society."[179] Accordingly, teenagers have a heightened need for personal privacy.[180] Thus, for an adolescent, privacy is a "marker of independence and self-differentiation."[181] If the child's privacy is threatened, the resulting stress can seriously undermine the child's self-esteem.[182]

As a result of these developmental issues, strip searches have a more serious impact on children than on adults; in fact, "a child may well experience a strip search as a form of sexual abuse."[183] Researchers have concluded that strip searches can seriously traumatize children, leading them to experience years of anxiety, depression, loss of concentration, sleep disturbances, difficulty performing in school, phobic reactions, and lasting emotional scars.[184]

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177. *See* F. PHILIP RICE & KIM GALE DOLGIN, THE ADOLESCENT: DEVELOPMENT, RELATIONSHIPS AND CULTURE 173 (10th ed. 2002).

178. *See* PETERSON & TAYLOR, *supra* note 175, at 144-45.

179. William A. Rae, *Common Adolescent-Parent Problems, in* HANDBOOK OF CLINICAL CHILD PSYCHOLOGY 555 (C. Eugene Walker & Michael C. Roberts eds., 2d ed. 1992).

180. Melton, *supra* note 28, at 488. *See generally* Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509 (1998).

181. Melton, *supra* note 28, at 488.

182. *See* Rae, *supra* note 179, at 561 (noting the importance of confidentiality when working with adolescents); RICE & DOLGIN, *supra* note 177, at 180 (noting the negative impact of stress upon self-esteem and adolescent development).

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

> Children, even at very early ages, understand the concept that certain parts of their body are "private." Child abuse education programs underscore this understanding, telling children: "[N]o one who is bigger or older than you should look at or touch your private parts, nor should you look at or touch their private parts." . . . Thus, the strip search—being compelled to expose one's private parts to an adult stranger who is obviously not a medical practitioner—is offensive to the child's natural instincts and training.

Id. at 12-13.

184. *See* Gartner, *supra* note 16, at 929 (describing lasting and debilitating psychological effects of school's strip search of a student); *see also* Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 520-21 (2005) (noting that searches that would violate the Fourth Amendment for adults cause children to suffer "trauma, anxiety, fear, shame, guilt, stigmatization, powerlessness, self-doubt, depression and isolation"). Coleman further notes that "children who are

In the school context, researchers have found that strip-search policies can actually *lead* to behavior problems rather than preventing them.[185]

Strip searches can be particularly damaging for children in the juvenile justice system that have high rates of childhood trauma. The vast majority of youth in the juvenile justice system have histories of exposure to traumatic events.[186] Three out of four children in the juvenile justice system have suffered from childhood trauma.[187] "In one study of juvenile detainees, 93.2% of males and 84% of females reported having a traumatic experience" in their histories.[188] Even children detained because of status offenses may have disproportionately high trauma rates. Researchers have found high rates of physical and sexual abuse among children who run away from home.[189]

As a consequence of significant exposure to traumatic events, large numbers of children in the juvenile justice system suffer from posttraumatic stress disorder (PTSD) and other stress-related disorders.[190] These youth often suffer from behavioral-emotional

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subject to genital examinations appear to experience the investigatory examinations as sexual abuse." *Id.* at 521.

185. Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices That May Contribute to Student Misbehavior*, 36 J. SCH. PSYCHOL. 7, 12-13 (1998). "When students perceive that school personnel, especially the principal, are fair and caring, students feel that have a stake in making the school safe. . . . [But] unfair, punitive educators may contribute to student alienation, disruption and violence." *Id.* at 12. Indeed, strip searches "may lead to distrust for school staff and alienation from law enforcement authorities. These are often threshold factors for students' motivation to increasingly break the rules." *Id.* at 13.

186. *See* Julian D. Ford et al., *Pathways from Traumatic Child Victimization to Delinquency: Implications for Juvenile and Permanency Court Proceedings and Decisions*, 57 JUV. & FAM. CT. J. 13, 13 (2006).

187. *See id.*

188. GORDON R. HODAS, PA. OFF. OF MENTAL HEALTH & SUBSTANCE ABUSE SERVS., RESPONDING TO CHILDHOOD TRAUMA: THE PROMISE AND PRACTICE OF TRAUMA INFORMED CARE 17 (2006).

189. *See* Wan-Ning Bao et al., *Abuse, Support, and Depression Among Homeless and Runaway Adolescents*, 41 J. HEALTH & SOC. BEHAV. 408, 408 (2000). Researchers concluded that "70 percent of adolescents in shelters have been physically and/or sexually abused by family members." *Id.* In one study of male runaways, researchers found that "71.5 percent of the [interviewees] reported physical abuse and 38.2 percent reported sexual abuse in their families." *Id.* In another study, researchers found that 37 percent of girl runaways "had been forced to have sexual activity with an adult caretaker." *Id.*

190. JUV. JUST. WORKING GROUP, NAT'L CHILD TRAUMATIC STRESS NETWORK, TRAUMA AMONG GIRLS IN THE JUVENILE JUSTICE SYSTEM 3 (2004), http://www.nctsnet.org/nctsn_assets/pdfs/edu_materials/trauma_among_girls_in_jjsys.pdf [hereinafter NCTSN TRAUMA REPORT]. "Rates of PTSD among youth in juvenile justice settings range from 3 percent in some [studies] to over 50 percent in others.

problems, interpersonal problems, academic failure, suicidal behavior, and health problems.[191] PTSD symptoms include the persistence, for a month, of one or more of three symptoms: (1) hyperarousal (being "chronically attuned to any sign of threat and tend[ing] to interpret objectively innocuous situations as dangerous"); (2) reexperiencing (being "flooded with intrusive thoughts, flashbacks or nightmares"); and (3) avoidance (avoiding traumatic reminders or emotions associated with the initial traumatic event, often to the extent of seeming "spacy" or inattentive to others).[192] Children with hyperarousal may experience an inability to modulate their emotions or even process information.[193]

Adolescents who have experienced trauma need, first and foremost, to be provided with physical and emotional safety.[194] "In the absence of safety, the child will be unable and often unwilling to alter behavior, consider new ideas, or accept help. Children concerned about their survival cannot broaden their focus, engage in self-reflection, or allow themselves to be emotionally vulnerable."[195] As a result, for a traumatized youth, maintaining child safety is paramount for effective treatment.[196] Because strip searches can trigger flashbacks and exacerbate a traumatized child's stress and mental-health problems, the use of strip searches undermines, rather than helps, the child's well being.[197] Thus, the "profound irony" of protecting children by allowing them to be searched when adults may

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These rates are up to eight times as high as [those] in community samples of similar-age peers." *Id.* In one study of incarcerated boys, over thirty percent presented symptoms of PTSD. *See* Elizabeth Cauffman et al., *Posttraumatic Stress Disorder Among Female Juvenile Offenders*, 37 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1209, 1213 tbl.1 (1998). Rates of PTSD are even higher for girls in the juvenile justice system, as one study of incarcerated girls found that over sixty-five percent had experienced PTSD at some time in their lives. *See id.* at 1212.

191. Hans Steiner et al., *Posstraumatic Stress Disorder in Incarcerated Juvenile Delinquents*, 36 J. AM. ACAD. CHILD. & ADOLESCENT PSYCHIATRY 357, 357 (1997) (citing Rose M. Giaconia et al., *Traumas and Posttraumatic Stress Disorder in a Community Population of Older Adolescents*, 34 J. AM. ACAD. CHILD. & ADOLESCENT PSYCHIATRY 1369, 1370 (1995)).

192. SUSAN F. COLE ET AL., MASS. ADVOCS. FOR CHILD., HELPING TRAUMATIZED CHILDREN LEARN: SUPPORTIVE SCHOOL ENVIRONMENTS FOR CHILDREN TRAUMATIZED BY FAMILY VIOLENCE 93-96 (2005), *available at* http://www.massadvocates.org/uploads/Gf/UQ/GfUQpE26bVAtZ54Hz3hSnQ/Help_Tram_Child-Med.pdf.

193. *See id.*

194. *See* HODAS, *supra* note 188, at 32; Ford, *supra* note 186, at 16.

195. HODAS, *supra* note 188, at 32.

196. *See id.*

197. *See* Coleman, *supra* note 184, at 417. *See also* Michele R. Pistone, *Justice Delayed Is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197, 205-10 (1999) (explaining that the physical and mental health of asylum seekers in detention centers deteriorates with strip searches, pat downs, and prolonged isolation).

not be searched is that, in many instances, the search itself *inflicts* trauma, but fails to detect abuse or help the child in any way.[198] As Doriane Lambelet Coleman explains:

> [I]n the name of saving children from the harm that their parents and guardians are thought to pose, states ultimately cause more harm to many more children than they ever help. In 2002, for example, the states conducted approximately 1.8 million investigations concerning the welfare of nearly 3.2 million children. Only about 896,000, or twenty-eight percent, of these children were ultimately found to be victims of abuse or neglect. Seventy-one percent, or roughly 2.3 million children were thus subjected to state mandated "thorough" investigations involving at a minimum interviews, examinations, and/or home visits, in circumstances where the state in the end could not show that the children were unsafe and in need of rescue.[199]

Children subjected to these searches suffer "trauma, anxiety, fear, shame, guilt, stigmatization, powerlessness, self-doubt, depression, and isolation," and may experience the searches as sexual violence.[200] When no abuse is found as a result of the search, the harm comes with no benefit at all:

> The violence that these official investigations do to the children can be just as destructive as the private violence they seek to avert. And where no private violence exists—for example in the hundreds of thousands of cases each year involving intentionally fraudulent or simply erroneous reports—the state ends up being the (only) one, to cause the children harm.[201]

Similarly, in the vast majority of cases where no contraband is found on the person of a child detained for a status offense or other minor offense, the search inflicts significant psychological trauma with no real benefit.

C. Unique Treatment for Girls

Domestic law, international law, and psychological research also underscore the importance of gender-appropriate treatment for youth and suggest that strip searches without reasonable suspicion should be prohibited. The Fourteenth Amendment[202] establishes that no person may be discriminated against on the basis of gender.[203] All

198. *See* Coleman, *supra* note 184, at 417.

199. *Id.*

200. *Id.* at 520-21.

201. *Id.* at 540.

202. U.S. CONST. amend. XIV.

203. *See generally* Ann K. Wooster, Annotation, *Equal Protection and Due Process Clause Challenges Based on Sex Discrimination—Supreme Court Cases*, 178 A.L.R.

individuals, including youth, are entitled to equal protection under the law,[204] and therefore any classification system that distinguishes treatment facilities and programs on the basis of *gender alone* must be evaluated under heightened scrutiny.[205] Children who are detained are no exception.

There is also a movement beyond nondiscrimination, and toward assuring that a child's individual needs are met within the juvenile justice system. Programs specifically designed to treat the unique needs of girls in the juvenile justice system are consistent with the purpose of the juvenile court system and *not* in violation of the Fourteenth Amendment.[206]

The global legal community has articulated the importance of services that meet the needs of girls in the juvenile justice system. [207] For example, girl offenders in confinement deserve special attention, shall be treated fairly, and shall not receive less treatment or programming than boys.[208] Furthermore, when restrictions are placed upon girls' human rights, due to their gender or not, they must be founded on considerations related to security.[209] As discussed above, the security interests at issue in *Smook* and *N.G.* are not significant—the plaintiffs were arrested on minor offenses, and the evidence demonstrated that the searches rarely, if ever, detected contraband.[210]

Girls in the juvenile justice system are particularly likely to have histories of sexual and physical abuse, with studies placing the

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FED. 25 (2002). "Since *Reed* [*v. Reed*, 404 U.S. 71 (1971)], the Court has repeatedly recognized that . . . [no] government acts compatibly with the equal protection principle when denying to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, and participate . . . ." *Id.* § 2(a).

204. *See generally* Plyler v. Doe, 457 U.S. 202, 230 (1982) (holding that undocumented alien *children* are entitled, under the Equal Protection Clause, to the same free public education the state provides to other resident children).

205. *See* Wooster*, supra* note 203, § 3.

206. *See* Barney v. City of Greenville, 898 F. Supp 372, 377 (N.D. Miss. 1995). "[T]he Supreme Court has consistently upheld gender classifications where the distinction was not invidious, 'but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.'" *Id.* at 377 (quoting Michael M. v. Super. Ct. of Sonoma County, 450 U.S. 464, 469 (1981)). In examining a policy, courts must determine whether the policy substantially relates to a sufficiently important government interest. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

207. Beijing Rules, *supra* note 120, Rule 26.4.

208. *Id.*

209. *See generally* HUM. RTS. WATCH, THE RIGHTS OF INCARCERATED GIRLS UNDER INTERNATIONAL LAW (2006), *available at* http://www.hrw.org/reports/2006/us0906/5.htm; *see also* Beijing Rules, *supra* note 120.

210. *See supra* text accompanying notes 69-84 (discussing Smook v. Minnehaha County, 458 F.3d 806 (8th Cir. 2006)).

prevalence rate well over fifty percent.[211] Additionally, girls are more likely than boys to develop PTSD.[212] A 1998 National Council on Crime and Delinquency (NCCD) study found that of the girls interviewed in one juvenile justice system, ninety-two percent had "experienced one or more forms of physical, sexual, or emotional abuse."[213] Generally, for girls:

> [M]any characteristics of the detention environment (seclusion, staff insensitivity, loss of privacy) can exacerbate negative feelings and feelings of loss of control . . . resulting in suicide attempts and self-mutilation. The traditional methods of preserving order and asserting authority in these centers . . . may backfire with female detainees who suffer from [posttraumatic stress disorder].[214]

Girls react differently to searches than male inmates.[215] Girls who have suffered sexual abuse may demonstrate "great sensitivity to boundary violations."[216] In fact, for females with PTSD the detention experience may result in retraumatization or revictimization.[217] Thus, particular care must be taken to ensure that

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211. An estimated seventy percent of girls in the juvenile justice system have histories of sexual abuse. George Calhoun & Jannelle Jurgens, *The Neophyte Female Delinquent: A Review of the Literature*, 28 ADOLESCENCE 461, 463 (1993).

212. Catherine A. Simmons & Donald K. Granvold, *A Cognitive Model to Explain Gender Differences in Rate of PTSD Diagnosis,* 5 BRIEF TREATMENT & CRISIS INTERVENTION 290, 291 (2005). Detained boys also have high rates of mood and anxiety disorders. *See* Gail A. Wasserman et al., *The Voice DISC-IV with Incarcerated Male Youths: Prevalence of Disorder*, 41 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 314, 314-17 (2002). Many report thinking about death or suicide, and a significant number make suicide attempts. *Id.* at 317.

213. Leslie Acoca, *Outside/Inside: The Violation of American Girls at Home, on the Streets, and in the Juvenile Justice System*, 44 CRIME & DELINQ. 561, 565 (1998). Eighty-one percent of the girls had experienced physical or sexual abuse or both; over forty-five percent had been beaten or burned at least once; twenty-five percent had been shot or stabbed at least once; and forty percent "reported that they had been forced to have sex[,] were raped, or were sodomized at least once." *Id.* at 566-67. *See also* Cauffman et al., *supra* note 190, at 1209 (discussing the frequency of posttraumatic stress syndrome in delinquent females).

214. NCTSN TRAUMA REPORT, *supra* note 190, at 5.

215. *See* Jordan v. Gardner, 986 F.2d 1521, 1525 (9th Cir. 1993).

216. HODAS, *supra* note 188, at 26.

217. *See* OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST., GUIDING PRINCIPLES FOR PROMISING FEMALE PROGRAMMING: AN INVENTORY OF BEST PRACTICES ch. 3 (1998), *available at* http://ojjdp.ncjrs.org/pubs/principles/contents.html [hereinafter OJJDP GUIDING PRINCIPLES]. "Because a history of sexual and physical abuse is widespread among girl offenders . . . girls in secure residential facilities may feel revictimized if asked to submit to strip searches . . . ." *Id.* Importantly, an essential element of effective programming for girls includes "[s]pace that is physically and emotionally safe." *Id.* ch. 2. *See also* NCTSN TRAUMA REPORT, *supra* note 190, at 5; Everson v. Mich. Dep't of Corrs., 391 F.3d 737, 752 (6th Cir. 2004) (noting expert

girls are protected from unnecessary strip searches. Because such searches are particularly damaging to girls and do not serve a compelling security interest, they violate girls' rights under the International Covenant on Civil and Political Rights[218] and the Convention on the Rights of the Child.[219]

D. Fair Treatment Consistent with Child's Dignity and Worth

Domestic and international law, in the context of trauma research, create an argument that strip searches also violate a child's dignity and worth. Discussions of dignity pervade the Supreme Court's constitutional jurisprudence. The Court refers to human dignity in decisions under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.[220] The Court has specifically recognized that in "highly intrusive searches of the person," the "dignity and privacy interests of the person being searched" are at issue.[221] Moreover, the concept of human dignity lies at the heart of the Eighth Amendment prohibition against cruel and unusual punishment. The Court has held that "the task of the courts in cases challenging prison conditions is to 'determine whether a challenged punishment comports with human dignity,'"[222] and that "[b]y protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."[223] In further understanding this concept of

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reports that offenders who had prior histories of abuse were likely to feel revictimized by the intimate contact of their breasts and genitals by male guards).

218. *See* ICCPR, *supra* note 155, art. 17.

219. *See* Convention on the Rights of the Child, *supra* note 170, pmbl.

220. *See* Bush v. Gore, 531 U.S. 98, 104 (2000) (voting rights); Rice v. Cayetano, 528 U.S. 495, 496 (2000) (voting rights); United States v. Flores-Montano, 541 U.S. 149, 152 (2004) (Fourth Amendment); Lawrence v. Texas, 539 U.S. 558, 574 (2003) (substantive due process); Chavez v. Martinez, 538 U.S. 760, 774 (2003) (procedural due process); Portuondo v. Agard, 529 U.S. 61, 76 (2000) (Stevens, J., concurring) (Sixth Amendment); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 419 (2000) (Thomas, J., dissenting) (First Amendment and voting rights); Rhodes v. Chapman, 452 U.S. 337, 372 (1981) (Marshall, J., dissenting) (Eighth Amendment).

221. United States v. Flores-Montano, 541 U.S. 149, 152 (2004).

222. *Rhodes*, 452 U.S. at 361 (Brennan, J., concurring) (quoting Furman v. Georgia, 408 U.S. 238, 282 (1972) (Brennan, J., concurring)).

223. Roper v. Simmons, 543 U.S. 551, 560 (2005) (holding that the Eighth and Fourteenth Amendments prohibit the execution of individuals who were under eighteen years of age at the time of their capital crimes). *See also* Overton v. Bazzetta, 539 U.S. 126, 138 (2003) (Stevens, J., concurring in decision to uphold prison regulations on visitation) ("[I]t remains true that the 'restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual.'") (citation omitted); Hope v. Pelzer, 536 U.S. 730, 745 (2002) (noting that plaintiff was treated in a way "antithetical to human dignity" when he was handcuffed to a hitching post); Farmer v. Brennan, 511 U.S. 825, 852 (1994) (Blackmun, J., concurring) (stating that

dignity, the Court has recognized that the standards for constitutionality under the Eighth Amendment are not static, but rather depend on "the evolving standards of decency that mark the progress of a maturing society."[224] While the ultimate determination of constitutionality for a particular punishment is left to the courts, the Supreme Court has noted that "[i]n determining when prison conditions pass beyond legitimate punishment and become cruel and unusual, the 'touchstone is the effect upon the imprisoned,'"[225] and may include the prisoner's "physical, mental, and emotional health and well-being."[226]

International law standards further promote the notion that children must be treated with dignity and respect. This is especially important when children are confined or in conflict with the law. The Convention on the Rights of the Child, for instance, mandates treatment of children:

> [C]onsistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.[227]

The convention also requires treatment with humanity and "respect for the inherent dignity" of the child, taking into account the particular needs of the child.[228] Similarly, the United Nations rules for the protection of children who are deprived of their liberty establishes children's rights to facilities and services that meet all the requirements of health and human dignity.[229] The institution is

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brutality without penological justification is "offensive to any modern standard of human dignity") (citation omitted). The Court in *Farmer* held that guards were deliberately indifferent to plaintiff by placing her in jeopardy of inmate-on-inmate assault. *Id.* at 828-29 (majority opinion).

224. Trop v. Dulles, 356 U.S. 86, 100-01 (1958).

225. *Rhodes*, 452 U.S. at 364 (quoting Laaman v. Helgemoe, 437 F. Supp. 269, 323 (D.N.H. 1977)).

226. *Id.*

227. Convention on the Rights of the Child, *supra* note 170, art. 40, ¶ 1. The United States has not yet ratified the Convention on the Rights of the Child, but is a signatory. *See* STATUS OF RATIFICATIONS, *supra* note 156, at 11, 12. Aside from Somalia, the United States is the only country that has not ratified the Convention. *See* UNICEF, Convention on the Rights of the Child Frequently Asked Questions, http://www.unicef.org/crc/index_30229.html (last visited Nov. 30, 2007).

228. Convention on the Rights of the Child, *supra* note 170, art. 37(c).

229. U.N. Rules, *supra* note 122, at Part IV.D, ¶ 31. *See also* U.N. Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF/ 611, Annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

required to minimize any differences between prison life and life at liberty that tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.[230] For example, in the juvenile whipping case in South Africa, the Court held that whipping is to be regarded as cruel, inhuman, and degrading punishment, and a breach of youths' right to dignity.[231] The prohibition of any form of cruel, inhuman, or degrading treatment is especially paramount in the protection of the rights of incarcerated children.[232] More specifically, the ICCPR, ratified by the United States, declares that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."[233]

Research on trauma-sensitive care helps define what it means to treat a child in a manner consistent with her dignity and worth.[234] Traumatized children need to learn alternative approaches to confronting stressful situations. A calm and respectful response from staff can shift the child's perspective on appropriate interactions.[235] Similarly, a child's attachment to an individual mentor or caregiver, who can teach a child to regulate his or her emotional states and learn to process information better, can be vital to a child's successful recovery.[236] For girls, the focus on positive relationships with staff members may be particularly helpful. Because girls are taught from a young age to listen to others and value emotional exchanges, "interactions between girl offenders and juvenile justice staff provide a context for girls to participate in healthy relationships. These interactions need to be fostered in a positive, ongoing, therapeutic

230. *See* U.N. Standard Minimum Rules for the Treatment of Prisoners, *supra* note 229, which became applicable to juveniles in Beijing Rules, *supra* note 120.

231. *See S v Williams & Others* 1995 (3) SA 632 (CC) ¶ 89 (S. Afr.), *available at* http://www.constitutionalcourt.org.za/site/judgments/judgments.htm (under "Library quick search," Search in: "Cases" and Year: "1995" and select case CCT20-94).

232. *See* ICCPR, *supra* note 155, art. 7. The "United States considers itself bound by [ICCPR] article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments." United States ICCPR Reservations, *supra* note 171, ¶ 3. Note that the United States ratified human rights instruments prohibiting cruel and inhuman treatment only to the extent defined by the Eighth Amendment to the United States Constitution. *See* STATUS OF RATIFICATIONS, *supra* note 156, at 1, 11.

233. ICCPR, *supra* note 155, art. 17.

234. *See generally* HODAS, *supra* note 188, at 49-56.

235. *See id.* at 52. Thus, researchers have emphasized the importance of "respectful interactions between staff and residents" in appropriate care for girls in the juvenile justice system. OJJDP GUIDING PRINCIPLES, *supra* note 217, ch. 2 § 3 (citing LESLIE ACOCA, BOISE & NAT'L COUNCIL ON CRIME AND DELINQ., UNDERSTANDING AND WORKING EFFECTIVELY WITH WOMEN OFFENDERS (1998)).

236. Ford, *supra* note 186, at 17-18.

manner."[237] Additionally, by promoting an environment in which children have a voice in decision making, staff members can help children to develop the coping skills they need. By contrast, a system in which staff members make all decisions autocratically can further alienate and disempower a child struggling to overcome a traumatic background.[238] As discussed above, children are likely to experience strip searches as degrading, disrespectful, and victimizing.[239] Such searches undermine, rather than enhance, the relationship between youth and facility staff, and work against the child's rehabilitation. As a result, strip searches for minor offenses—when there is no substantial evidence to suggest that the searches can protect the child from abuse or harm—are inconsistent with children's dignity and humanity.

IV. CONCLUSION

Forty years after the United States Supreme Court extended constitutional protections to youth in *In re Gault*,[240] juvenile detention centers continue to flout children's rights by engaging in inappropriate strip-search practices without any individualized suspicion. *Gault* mandated that children, like adults, deserve constitutional protections. Search practices designed to "protect" children from the harm they may cause themselves or others contravene not only *Gault*'s holding, but also the best interests of children.

The holdings in *Smook*[241] and *N.G.*[242] demonstrate courts' reluctance to guard the fundamental principles of personhood set forth in *Gault* and underscored by international law and social science research. For forty years, courts have been touting the state's responsibility to protect children as the primary function of the juvenile justice system. Case law on juvenile strip searches echoes this rhetoric, claiming to protect children in detention centers from themselves and others. Social science research shows, however, that behind the rhetoric of protection, children are suffering harm.

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237. OJJDP GUIDING PRINCIPLES, *supra* note 217, ch. 2

238. *See* HODAS, *supra* note 188, at 24; *see also* Ford, *supra* note 186, at 18 (explaining that a particular situation may trigger memories of exploitation or harm). Yet, even in the absence of such triggers, those who have been traumatized in the past may be hypervigilant to threats. In a punitive environment, or in any program that assumes a child has the capacity to regulate his or her emotions, the cycle of rigid thinking will likely be perpetuated. *See id.* at 18. Thus, a child punished for refusing to comply with a program may become further closed off from rehabilitation.

239. *See supra* text accompanying notes 91-95.

240. 387 U.S. 1 (1967).

241. Smook v. Minnehaha County, 457 F.3d 806 (8th Cir. 2006).

242. N.G. *ex rel.* S.C. v. Connecticut, 382 F.3d 225 (2d Cir. 2004).

Juvenile defenders are one of the few points of contact between incarcerated juvenile clients and the outside world. These youth, isolated from their peers, their families, and the outside world, depend on defenders to be their voice in challenging improper practices. While courts have begun to recognize the importance of social science research and international law standards, juvenile defenders do not always use these tools to their advantage. This article identifies legal strategies that draw on laws of the global community and research on adolescent trauma to give emphasis to Gault's mandate to protect the children's personhood. By implementing these strategies in their practice, defenders can advocate for a juvenile justice system that appropriately responds to children's needs and evolving standards of dignity and decency.