

Standard Operating Procedure: Take It All Off [*N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225 (2d Cir. 2004)]

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“The lady told me I had to take off my clothes so they could look for scars so that I can’t go home and say they did it and my parents can sue.”¹

I. INTRODUCTION

The Fourth Amendment to the United States Constitution protects citizens from unreasonable searches and seizures.² It, however, did not protect the teenage girls whose parents brought suit in *N.G. ex rel. S.C. v. Connecticut*³ and still does not apply to other juveniles detained in Connecticut.⁴ The United States Court of Appeals for the Second Circuit upheld the State of Connecticut’s standard procedure of strip searching all juveniles entering state custody at a detention center without reasonable suspicion that they were concealing weapons or other contraband.⁵ It chose not to apply the Fourth Amendment safeguards.

Few courts have considered the constitutionality of strip searches of juveniles in state custody.⁶ In *N.G. ex rel. S.C.*, the United States Court of Appeals for the Second Circuit held that it was constitutional to strip search juveniles entering the state’s custody at juvenile detention facilities, without reasonable suspicion.⁷ The court effectively held that juvenile detainees are subject to fewer privacy rights than other citizens and fewer rights than some foreign detainees.⁸

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1. Women’s eNews, *Connecticut Strip-Searches Truants, Runaways* (July 21, 2001), at <http://www.womensenews.org/article.cfm/dyn/aid/619/context/archive>. This quote is that of a fourteen-year-old girl describing her strip search in a Connecticut detention facility. *Id.* Although the article used no name, from the facts given it appears that the girl is T.W., one of the defendants in *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225 (2d Cir. 2004). *Id.*

2. U.S. CONST. amend. IV.

3. *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225, 228-29 (2d Cir. 2004).

4. *See id.* at 237.

5. *Id.* at 226.

6. *See Justice v. City of Peachtree City*, 961 F.2d 188 (11th Cir. 1992); *Smook v. Minnehaha County*, 353 F. Supp. 2d 1059, 1065 (D.S.D. 2005).

7. *N.G. ex rel. S.C.*, 382 F.3d at 226.

8. *See id.* at 237. Strip searches conducted without reasonable suspicion that contraband was concealed are unconstitutional for persons arrested for minor offenses. *See Shain v. Ellison*, 273 F.3d 56, 66 (2d Cir. 2001); *Chapman v. Nichols*, 989 F.2d 393, 394, 397 (10th Cir. 1993); *Jones v. Edwards*, 770 F.2d 739, 741-42 (8th Cir. 1985); *Giles v. Ackerman*, 746 F.2d 614, 615 (9th Cir. 1984); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983). Such searches are also unconstitutional for alien youths apprehended crossing this nation’s borders. *Flores v.*

In its ruling, the Second Circuit managed to carve out another exception to the Fourth Amendment's requirement that searches and seizures be reasonable.⁹ Instead, it should have protected the constitutional rights of juveniles by following United States Supreme Court guidelines and its own precedent.¹⁰ Prior decisions have traditionally granted adults more constitutional protections than children;¹¹ however, in the context of searches, children generally have protections equal to adults.¹²

The Second Circuit had the opportunity to protect vulnerable and impressionable citizens in need of positive reinforcement. Strip searches are an invasion of privacy and psychologically detrimental to children.¹³ Despite the fact that states traditionally strive to act in a child's best interest,¹⁴ and routine strip searches may lead to psychological damage in contradiction of that goal.¹⁵ By allowing the State to continue to violate juveniles' Fourth Amendment rights, the Second Circuit left open the door for greater damage to their well-being.

II. CASE DESCRIPTION

T.W. and S.C. were teenage girls from "families with service needs" when they entered the custody of state-run detention facilities in Connecticut.¹⁶ S.C.'s family was classified as a "family with service needs" after she violated court orders to stay at home and additional orders to stay in residential facilities in which she was placed.¹⁷ T.W.'s family received the designation as a result of her truancy.¹⁸

S.C. was detained on multiple occasions and strip searched eight times.¹⁹ A female staff member first strip searched her when S.C. was

Meese, 681 F. Supp. 665, 669 (C.D. Cal. 1988), *rev'd on other grounds sub nom. Reno v. Flores*, 507 U.S. 292 (1993).

9. U.S. CONST. amend. IV.

10. See *Bell v. Wolfish*, 441 U.S. 520, 559 (1979); *Shain*, 273 F.3d at 66.

11. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 654 (1995).

12. SAMUEL M. DAVIS, *RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM* §§ 3:6 to 3:12 (2d ed. 2005).

13. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985); Gary B. Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?*, 62 NEB. L. REV. 455, 475, 477 (1983) (asserting that invasions of privacy can lead to psychological harm in adolescents).

14. Mary Kay Lanthier, *Children's Right to Be Heard*, 2 NU FORUM 1, 3-4 (1997).

15. *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225, 239 (2d Cir. 2004) (Sotomayor, J., concurring in part and dissenting in part).

16. *Id.* at 228-29. The State of Connecticut classified "families with service needs" as those with a child who has acted in one of five ways: (1) run away from home without just cause; (2) become beyond the control of parents; (3) acted in an indecent or immoral manner; (4) been a truant or overtly defied school rules; or (5) if thirteen years of age or older, had sex with a person of similar age. CONN. GEN. STAT. § 46b-120(8) (2004).

17. *N.G. ex rel. S.C.*, 382 F.3d at 228.

18. *Id.* at 229.

19. *Id.* at 228-29. A juvenile may be detained in Connecticut's detention facilities for various reasons, including when there is probable cause to believe that he is from a "family with service needs" and committed a delinquent act. *Id.* at 227; see also CONN. GEN. STAT. § 46b-148 (2004). A child may also be held in detention if her parents will not take her home after an arrest for a non-serious offense, and there is no space in an alternate facility. *N.G. ex rel. S.C.*,

admitted into detention after she was arrested for running away from home in violation of a court order.²⁰ Upon her transfer to another detention facility, staff at that facility strip searched her for the second time.²¹ S.C. was strip searched a third time when she returned to a detention facility after being transported to and from a court appearance.²²

After her release, S.C. again violated a court order by running away from home.²³ Following her arrest and admission into detention, she was strip searched a fourth time.²⁴ S.C. was strip searched for the fifth time after a court-ordered transfer to another facility.²⁵ Detention officials performed the sixth and seventh strip searches while attempting to locate a missing pencil.²⁶ The court eventually released S.C. to her parents, but she again ran away.²⁷ She was then placed in a hospital, but also ran away from there.²⁸ S.C. turned herself in to the police, and staff searched her again upon her admission into detention.²⁹ None of the eight strip searches uncovered contraband.³⁰

382 F.3d at 227. Most commonly, children may be held while anticipating trial after being arrested for serious offenses. *Id.*; see also CONN. GEN. STAT. § 46b-133(d) (2004).

20. *Id.* at 228-29. At the time S.C. and T.W. were searched, the detention center's policy allowed for visual inspection of body cavities, including the vagina and the anus. *Id.* The girls were strip searched in 2000 and 2001. *Id.* The State amended its policy on September 1, 2002. *Id.* at 228. The new policy requires staff to:

- a. Inform the detainee of the strip search and the purpose of the search.
- b. Check the detainee's ears, nose and mouth, including under the tongue.
Have the detainee remove and step away from clothing and shoes and put on a
- c. JDC-issued robe.
- d. Have the detainee run his/her own hands through his/her hair.
- e. Check the bottom of detainee's feet.
Have the detainee raise one arm of the robe to mid-biceps and examine top and bottom of arm and hand with fingers spread. Repeat the procedure with second
- f. arm and hand.
Have the detainee raise the bottom of the robe to below the crotch to expose
- g. and inspect the front of the legs and feet.
- h. Have the detainee turn 180 degrees and drop the robe off the shoulders in order to inspect the upper back and shoulders.
- i. Have the detainee raise the bottom of the robe to above the waist in order to inspect the buttocks and legs.
Have the detainee turn 180 degrees (facing staff), and drop the robe off the shoulders and open the front of the robe, exposing the entire front of the body,
- j. shoulders, and upper arms.
- k. Instruct the detainee to shower and dress immediately in a clean uniform.
- l. Search all clothing and personal items, and label and store them appropriately.

Id. (citing State of Connecticut Judicial Branch, Division of Juvenile Detention Services, Operational Policy 311). The majority analyzed the revised policy when it addressed the strip searches. *Id.* at 226 n.4.

21. *Id.* at 229.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

T.W. was subjected to two strip searches.³¹ Officials initially strip searched her when she was admitted into a detention facility after violating a court order to attend school.³² T.W. was strip searched again the next day when she was transferred, in handcuffs and shackles, to a second facility.³³ Neither search revealed contraband.³⁴ After one week in detention, T.W. was returned to her mother's custody.³⁵

The parents of S.C. and T.W. sued the State of Connecticut and officials connected with the juvenile detention system on behalf of their daughters under 42 U.S.C. § 1983.³⁶ The suit centered on the policy requiring strip searches of all juveniles admitted into the detention facilities, without consideration of the reason for their admission.³⁷ The plaintiffs alleged that the strip searches violated their daughters' Fourth Amendment right to be free from unreasonable searches, and sought damages for a class of juveniles from "families with service needs."³⁸

The district court denied the class certification.³⁹ Although it stated that the standard policy of strip searching all juveniles violated the Fourth Amendment, the district court ruled that "the strip searches of S.C. and T.W. were reasonable" and dismissed the families' complaint.⁴⁰ The judge found that both girls had characteristics that made them likely to bring contraband into detention facilities.⁴¹ The families appealed the decision.⁴²

The United States Court of Appeals for the Second Circuit held that the strip searches conducted while the girls were in custody and without reasonable, individualized suspicion that either possessed contraband violated their Fourth Amendment rights.⁴³ It concluded, however, that the strip searches of the girls upon their initial admissions into detention custody were lawful.⁴⁴ The court vacated the judgment and remanded the case to the district court to determine whether there was reasonable suspicion to conduct the sixth and seventh strip searches of S.C. to locate the missing pencil.⁴⁵ It also directed the district court to determine whether relief should be

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* This statute allows citizens to circumvent government immunity and attach liability to government officials who violate their constitutional rights. 42 U.S.C. § 1983 (2000).

37. *N.G. ex rel. S.C.*, 382 F.3d at 229.

38. *Id.* at 229-30.

39. *Id.* at 230.

40. *Id.*

41. *Id.*

42. *Id.* at 226.

43. *Id.* at 237-38.

44. *Id.* at 237.

45. *Id.* at 238.

awarded for the unconstitutional searches.⁴⁶ The Second Circuit upheld the denial of class action certification.⁴⁷

III. BACKGROUND

The Fourth Amendment to the United States Constitution requires that persons be free from unreasonable searches and seizures, but allows a warrant to be issued for searches with a showing of probable cause.⁴⁸ The United States Supreme Court, however, has developed exceptions to this principle. In law enforcement situations, an officer's individualized suspicion that a crime has been committed may substitute for a warrant.⁴⁹ Additionally, law enforcement may conduct searches without a warrant if there are exigent circumstances or if the subject of the search gives consent.⁵⁰ The Court has also allowed frisks without a warrant upon a finding of individualized suspicion.⁵¹ Despite these exceptions, the general principle remains that a search by law enforcement requires a search warrant.⁵²

The United States Supreme Court has held that the Fourth Amendment applies not only to law enforcement, but to other state actors as well.⁵³ The Court has upheld searches without warrants and without probable cause in certain safety and administrative circumstances.⁵⁴ This special needs exception does require "a fact-specific balancing of the intrusion . . . against the promotion of legitimate governmental interests."⁵⁵ Therefore, for a search to be reasonable, the need for it must outweigh the invasion of the person's rights.⁵⁶ To

46. *Id.*

47. *Id.*

48. U.S. CONST. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

49. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989) ("Our cases indicate that even a search that may be performed without a warrant must be based, as a general matter, on probable cause to believe that the person to be searched has violated the law."); *see also Doe v. Calumet City*, 754 F. Supp. 1211, 1220 (N.D. Ill. 1990) ("Police officers must have some level of particularized justification to strip search an individual arrestee.").

50. *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

51. *Terry*, 392 U.S. at 30-31; *see also People v. Rivera*, 201 N.E.2d 32, 35 (N.Y. 1964) ("The frisk . . . as it is generally understood in police usage, is a contact or patting of the outer clothing of a person to detect by the sense of touch if a concealed weapon is being carried.").

52. *E.g., Skinner*, 489 U.S. at 619.

53. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985).

54. *See Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002); *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment).

55. *Earls*, 536 U.S. at 830.

56. *Bell v. Wolfish*, 441 U.S. 520, 559-60 (1979).

In each case [the test of reasonableness under the Fourth Amendment] requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the man-

justify the search, the government must prove that the suspicionless search “bear[s] a close and substantial relationship to the government’s special needs.”⁵⁷ The Court has used the special needs doctrine to justify warrantless searches in hospitals, schools, and government agencies.⁵⁸ It has never addressed the “reasonableness of strip searches of juveniles in lawful state custody, in the absence of individualized suspicion of possession of contraband.”⁵⁹

Although the United States Supreme Court has not extended to children all the rights granted to adults, it has held that children are afforded some rights under the Constitution.⁶⁰ The Court has stated that the Fourth Amendment’s protection from unreasonable searches is a right available to minors.⁶¹

A. *The Fourth Amendment Applied to Juveniles*

1. Searches in Schools

The United States Supreme Court has considered the application of the Fourth Amendment to searches of students by school officials.⁶² In *New Jersey v. T.L.O.*, school officials caught two students smoking in a school restroom.⁶³ After one student, T.L.O., denied that she had been smoking, her principal searched her purse for cigarettes.⁶⁴ As he searched, he found marijuana and other evidence that suggested that T.L.O. was dealing the drug.⁶⁵ The principal gave the evidence to the

ner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Id.

57. *United States v. Lifshitz*, 369 F.3d 173, 186 (2d Cir. 2004) (internal quotations omitted).

58. *See Earls*, 536 U.S. at 838 (holding that student drug testing was not a violation of the Fourth Amendment); *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989) (holding that the United States Customs Service did not violate the Fourth Amendment by requiring a drug test from employees requesting a change of position to a position that required them to carry a weapon or that involved drug interdiction); *O’Connor v. Ortega*, 480 U.S. 709, 720-21 (1987) (allowing a search of a physician’s office by hospital administrators to secure state property); *Roe v. Marcotte*, 193 F.3d 72, 78 (2d Cir. 1999) (stating that the special needs doctrine attaches to prisons).

59. *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225, 233 (2d Cir. 2004).

60. *See In re Winship*, 397 U.S. 358, 368 (1970) (holding that “proof beyond a reasonable doubt” is a constitutional due process right granted to children); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (discussing that children are entitled to freedom of expression as a fundamental right); *In re Gault*, 387 U.S. 1, 27-28, 30-31 (1967) (holding that juvenile proceedings shall include some of the same due process rights as adult court proceedings).

61. *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985) (holding that the Fourth Amendment protects students from unreasonable searches by school officials); *Gault*, 387 U.S. at 14 (noting that almost all jurisdictions grant rights to adults that are not granted to juveniles).

62. *T.L.O.*, 469 U.S. at 332-33.

63. *Id.* at 328.

64. *Id.*

65. *Id.*

police, and T.L.O. was charged in juvenile court.⁶⁶ T.L.O. claimed that the search violated her Fourth Amendment rights.⁶⁷

The United States Supreme Court held that the Fourth Amendment governed public school officials conducting searches.⁶⁸ It reasoned that “school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents’ immunity from the strictures of the Fourth Amendment.”⁶⁹ The Court next emphasized the need to determine whether the search was reasonable.⁷⁰

To determine reasonableness, the Court utilized a balancing test that weighed the individual’s privacy expectations against the government’s need to enforce order.⁷¹ The Court recognized that while school children have an expectation of privacy, school officials have a “substantial interest” in the discipline of pupils.⁷² In declining to hold school officials to the standard of probable cause for conducting a search, the Court concluded that a school search is reasonable if the method of the search is “reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”⁷³ Thus, the Court held that the search of T.L.O.’s purse was reasonable.⁷⁴

The United States Supreme Court again considered whether the Fourth Amendment applied in a school setting in *Vernonia School District v. Acton*.⁷⁵ In *Vernonia*, a student and his parents sued the school district, claiming the district’s policy of drug testing athletes violated his Fourth Amendment rights.⁷⁶ To determine the reasonableness and therefore the constitutionality of the school district’s policy, the Court balanced the intrusion on the students’ privacy against the government’s interest.⁷⁷ It noted that the Constitution does not afford children all the fundamental rights of adults, and that schools exercise some supervisory powers over students akin to those of parents.⁷⁸ The government’s interest in deterring drug use was important, and schools have a special responsibility to care for students.⁷⁹

66. *Id.* at 328-29.

67. *Id.* at 329.

68. *Id.* at 333.

69. *Id.* at 336-37.

70. *Id.* at 337-47.

71. *Id.* at 337.

72. *Id.* at 338-39.

73. *Id.* at 342-43.

74. *Id.* at 347.

75. 515 U.S. 646, 648 (1995).

76. *Id.* at 651. The family also claimed violations of the Fourteenth Amendment and the Oregon Constitution. *Id.* at 651-52.

77. *Id.* at 652-63, 654, 658, 660.

78. *Id.* at 654-55.

79. *Id.* at 654, 661-62.

The Court observed that the procedures for giving the urine sample made the intrusion minor, that the student athletes voluntarily submitted themselves to higher controls when they joined a team, and that physical harm from drug use is a particular risk to athletes, the students at whom the policy was aimed.⁸⁰ Considering the government's need, the risk of harm to the students, and minimalness of the intrusion, the Court held that the search was reasonable and did not violate the Fourth Amendment.⁸¹

In another case applying the Fourth Amendment to school searches, the Court upheld a policy of drug testing students who participate in extracurricular activities.⁸² In *Board of Education v. Earls*,⁸³ the school district implemented a policy that mandated drug testing before students participated in specific extracurricular activities and authorized random tests for students continuing to participate in those activities.⁸⁴ To take part in the extracurriculars, students had to also consent to testing upon reasonable suspicion.⁸⁵ Again, the Court weighed the intrusiveness of the search against the school's need for the search and held that the searches were reasonable.⁸⁶ Through the continued application of this balancing test, the United States Supreme Court has consistently held that students do have Fourth Amendment protections in the school environment.

2. Standards for Strip Searches

Courts have treated strip searches of children differently from less intrusive searches. The Second Circuit held that some searches of children in a school setting may be conducted on a standard not as high as probable cause, but that strip searches require probable cause.⁸⁷ The court stated, "[A]s the intrusiveness of the search intensifies, the standard of Fourth Amendment 'reasonableness' approaches probable cause, even in the school context."⁸⁸

In the Seventh Circuit, the court of appeals upheld the trial court's ruling that it was unreasonable for school officials to strip search a student without reasonable suspicion that she possessed contraband.⁸⁹ The court stated that "a nude search of a thirteen-year-old

80. *Id.* at 657-60, 662.

81. *Id.* at 664-65.

82. *Bd. of Educ. v. Earls*, 536 U.S. 822, 825 (2002).

83. *Id.* at 822.

84. *Id.* at 826.

85. *Id.*

86. *Id.* at 830.

87. *M.M. v. Anker*, 607 F.2d 588, 589 (2d Cir. 1979).

88. *Id.*

89. *Doe v. Renfrow*, 631 F.2d 91, 92 (7th Cir. 1980); *see also* *Cornfield v. Consol. High Sch. Dist.*, 991 F.2d 1316, 1320 (7th Cir. 1993) (stating that "a search is warranted only if the student's conduct creates a reasonable suspicion that a particular regulation or law has been violated, with the search serving to produce evidence of that violation").

child is an invasion of constitutional rights of some magnitude. . . . [I]t is a violation of any known principle of human decency.”⁹⁰ Emphasizing that children have Fourth Amendment rights even when a strip search is part of a child abuse investigation, the Tenth Circuit held that a police officer was obliged to respect a child’s rights in such an investigation.⁹¹ Other circuits have allowed strip searches of juveniles when the officers conducting the searches had reasonable suspicion that the juveniles were hiding contraband.⁹²

In the context of detention facilities, a district court in South Dakota held that a county juvenile detention center’s policy of strip searching all detainees without reasonable suspicion to believe they carried contraband or consideration of the charges against them violated the Fourth Amendment.⁹³ The Immigration and Naturalization Service, according to a California district court, must have reasonable suspicion to search juvenile detainees held as aliens in the agency’s detention centers.⁹⁴

The United States Supreme Court has clearly established that the Fourth Amendment applies to children. To determine whether a particular search of a student is reasonable now requires an inquiry into the particular search, weighing the governmental need for it against the intrusion into the student’s privacy. Although the United States Supreme Court has not considered strip searches of children, other courts have increased the level of suspicion needed as the intensity of the search increases to a strip search.

B. *Rights of Those Confined*

Various courts have held that adults in confinement still have some level of constitutional rights. The United States Supreme Court

90. *Renfrow*, 631 F.2d at 92-93.

91. *Franz v. Lytle*, 997 F.2d 784, 793 (10th Cir. 1993).

92. *See Reynolds v. City of Anchorage*, 379 F.3d 358, 360 (6th Cir. 2004); *Justice v. City of Peachtree City*, 961 F.2d 188, 189 (11th Cir. 1992). In *Justice*, the court noted uneasiness in making this ruling, but felt compelled to do so since it could not find a way to distinguish the case from precedent cases in the adult system. *Justice*, 961 F.2d at 193. *But see Jenkins v. Taladega*, 115 F.3d 821 (11th Cir. 1997). In *Jenkins*, the court held that school officials could not be liable for the strip search of second graders while trying to locate seven dollars. *Id.* at 822. The court reasoned that the law was not developed enough in the area of school searches for the staff to know that they were violating the students’ constitutional rights. *Id.* at 828. The court did state that the school officials “likely exercised questionable judgment given the circumstances,” but noted that in *New Jersey v. T.L.O.*, the United States Supreme Court did not give detailed guidance to school officials for conducting searches. *Id.* at 825, 828.

93. *Smook v. Minnehaha County*, 353 F. Supp. 2d 1059, 1065 (D.S.D. 2005).

94. *Flores v. Meese*, 681 F. Supp. 665, 669 (C.D. Cal. 1988), *rev’d on other grounds sub nom. Reno v. Flores*, 507 U.S. 202 (1993). The Immigration and Naturalization Service (INS) was disbanded and its functions were divided up among bureaus of the Department of Homeland Security on March 1, 2003. DEP’T HOMELAND SEC., IMMIGRATION & BORDERS: SERVING OUR VISITORS, SECURING OUR BORDERS (2005), at http://www.dhs.gov/dhspublic/theme_home4.jsp. U.S. Citizenship and Immigration Services (USCIS) is now responsible for services and benefits to immigrants. *Id.* The U.S. Immigration and Customs Enforcement (ICE) oversees immigration, customs, and air security laws. *Id.*

has ruled that although imprisonment limits many constitutional rights and privileges, incarceration does not eliminate all of a prisoner's rights.⁹⁵ While considering what rights prisoners do have, the Supreme Court stated, "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."⁹⁶

In *Bell v. Wolfish*,⁹⁷ the Court allowed the strip searches of pre-trial detainees after they had contact with non-incarcerated persons.⁹⁸ It acknowledged the essential goals in prisons of "maintaining institutional security and preserving internal order and discipline."⁹⁹ Prison administrators, the Court conceded, knew the best methods of adopting and executing prison disciplinary policies.¹⁰⁰ Furthermore, overseeing prison operations was a function of the legislative and executive branches.¹⁰¹

In concluding that the strip searches of pretrial detainees did not violate the Fourth Amendment, the Court in *Bell* again applied a balancing test.¹⁰² It weighed the intrusion on the prisoners' rights against the necessity for the searches.¹⁰³ Explaining that it appreciated the extent that the searches potentially invaded the inmates' privacy, the Court analyzed whether a standard lower than probable cause could be used to administer strip searches in a prison setting.¹⁰⁴ After considering the significant security needs of the prison, the Court held that incarcerated persons could be strip searched after contact with non-incarcerated visitors.¹⁰⁵

The Second Circuit has held that random strip searches of prison inmates are constitutional.¹⁰⁶ However, without reasonable suspicion that they possess contraband, strip searches cannot be performed on

95. See *Turner v. Safley*, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."); *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

96. *Turner*, 482 U.S. at 89.

97. 441 U.S. 520 (1979).

98. *Id.* at 558, 561-62.

99. *Id.* at 546.

100. *Id.* at 547.

101. *Id.* at 548.

102. *Id.* at 560.

103. *Id.*

104. *Id.*

105. *Id.*

106. See *Convino v. Patrissi*, 967 F.2d 73, 80 (2d Cir. 1992).

adults arrested for misdemeanors.¹⁰⁷ In *Weber v. Dell*,¹⁰⁸ the court considered the legality of a strip search of a woman arrested for making a false report.¹⁰⁹ After a police dispatcher informed Ann Weber that the police would respond to her earlier report of assault only if she reported that a shooting had occurred, she told the dispatcher that there had been a shooting.¹¹⁰ After being arrested, Weber was strip searched pursuant to a policy of strip searching all arrestees.¹¹¹ The court held that such searches of arrestees charged with misdemeanors or minor offenses, absent reasonable suspicion that the arrestee concealed weapons or other contraband, violated the Fourth Amendment.¹¹² It noted that reasonable suspicion that a person was hiding contraband could be founded “on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest.”¹¹³ The court acknowledged the deference normally given to prison officials relating to the security of their facilities, but stated, “Deference . . . is not a dispensation from the requirement under the Fourth Amendment that searches be reasonable.”¹¹⁴

All other circuit courts of appeals to consider whether adults confined for minor offenses may be strip searched have ruled that strip searches are unconstitutional unless there was reasonable suspicion that the individual possessed contraband.¹¹⁵ The Ninth Circuit has gone so far as to rule that adults arrested for felonies cannot be strip searched without reasonable suspicion.¹¹⁶

107. *See* *Shain v. Ellison*, 273 F.3d 56, 66 (2d Cir. 2001) (upholding the lower court’s determination that it was well-known that persons held in local correctional facilities on misdemeanor charges could not be strip searched without reasonable suspicion that they were hiding contraband); *Wachtler v. County of Herkimer*, 35 F.3d 77, 82 (2d Cir. 1994) (holding that if the county’s policy was to routinely strip search all persons arrested for misdemeanors without reasonable suspicion that they carried contraband and that if there was no reasonable suspicion that the plaintiff carried contraband, he would prevail in a suit against the county); *Walsh v. Franco*, 849 F.2d 66, 67-69 (2d Cir. 1988) (citing its holding from *Weber v. Dell* in denying defendants’ claim that they should have been granted summary judgment on plaintiff’s claim that a strip search after an arrest for unpaid parking tickets violated his Fourth Amendment rights); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) (holding that strip searching arrestees charged with misdemeanors and minor offenses absent reasonable suspicion the arrestee concealed contraband is impermissible under the Fourth Amendment).

108. 804 F.2d 796 (2d Cir. 1986).

109. *Id.* at 799.

110. *Id.* at 798-99.

111. *Id.* at 799.

112. *Id.* at 802.

113. *Id.*

114. *Id.* at 804.

115. *See, e.g.*, *Miller v. Kennebec County*, 219 F.3d 8, 13 (1st Cir. 2000); *Kelly v. Foti*, 77 F.3d 819, 821 (5th Cir. 1996); *Chapman v. Nichols*, 989 F.2d 393, 395-97 (10th Cir. 1993); *Masters v. Crouch*, 872 F.2d 1248, 1257 (6th Cir. 1989); *Jones v. Edwards*, 770 F.2d 739, 741-42 (8th Cir. 1985); *Giles v. Ackerman*, 746 F.2d 614, 615 (9th 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).

116. *Kennedy v. L.A. Police Dep’t*, 901 F.2d 702, 710, 714 (9th Cir. 1989); *see also* *Murica v. County of Orange*, 226 F. Supp. 2d 489, 494 (S.D.N.Y. 2002) (stating that the reasonable suspicion standard should apply for both felon and misdemeanor arrestees).

In a context other than the Fourth Amendment, the United States Supreme Court has concluded that a prison regulation that “is reasonably related to legitimate penological interests” would be valid even if it infringed on the constitutional rights of inmates.¹¹⁷ To determine whether a regulation was reasonable, the Court in *Turner v. Safley*¹¹⁸ considered various factors.¹¹⁹ These included the connection between the regulation and the government interest; the other means, if any, for the inmates to exercise the regulated right; and the impact asserting the right would have on others and on prison resources.¹²⁰ Additionally, the Court considered the possibility of any alternatives to the regulation.¹²¹ The Court again pointed out that prisoners do retain some constitutional rights and recognized the deference granted to prison officials in running prisons.¹²²

Officials must have some basis to infringe on the constitutional rights of adult detainees. In the context of searches of prisoners, the United States Supreme Court instituted a balancing test, which considers the need for the search and weighs it against the invasion of the prisoner’s rights.¹²³ For adults held for minor offenses, there must be some level of individualized suspicion before a constitutionally permissible search can be conducted.¹²⁴ Regardless of the level of confinement, adults held by the state do not lose all constitutional protections.

C. *The Role of Juvenile Detention Centers*

Throughout history, courts have considered the “best interests of the child” when presented with juvenile issues.¹²⁵ The concept is even codified in many state statutes.¹²⁶ Until the creation of juvenile deten-

117. *Turner v. Safley*, 482 U.S. 78, 89 (1987) (applying the Constitution to regulations of inmate marriages and correspondence between inmates).

118. 482 U.S. 78 (1987).

119. *Id.* at 89.

120. *Id.* at 89-90.

121. *Id.* at 90-91.

122. *Id.* at 84-85. “Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.” *Id.* at 84.

123. *Bell v. Wolfish*, 441 U.S. 520, 560 (1979).

124. *See, e.g., Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986).

125. *E.g., Bretherton v. Bretherton*, 805 A.2d 766, 771 (Conn. App. Ct. 2002) (addressing a parent’s relocation in light of a custody dispute with the other parent).

126. *E.g.,* CONN. GEN. STAT. § 46b-141 (2004); KAN. STAT. ANN. § 38-1563(d) (2000); LA. REV. STAT. ANN. § 9:344 (2000).

The Commissioner of Children and Families may file a motion for an extension of the commitment as provided in subdivision (1) of subsection (a) beyond the eighteen-month period on the grounds that such extension is for the best interest of the child or the community. The court shall give notice to the parent or guardian and to the child at least fourteen days prior to the hearing upon such motion. The court may, after hearing and upon finding that such extension is in the best interest of the child or the community, continue the commitment for an additional period of not more than eighteen months.

CONN. GEN. STAT. § 46b-141(b).

tion centers, arrested juveniles were confined with adults and treated the same as adults regarding punishment for their crimes.¹²⁷ Detention centers were originally established with the goal of separating juveniles from adults.¹²⁸ The purpose of the separation was to focus on rehabilitation for the children, rather than punishment.¹²⁹

An additional benefit of a separate system for juveniles was the opportunity to foster *parens patriae*. Under the doctrine of *parens patriae*, the state has the authority to act in the parent's place for matters relating to children.¹³⁰ Society traditionally viewed children as unable to care for themselves.¹³¹ If no parent was available to look after the child, the doctrine imposed on the state the duty to step in.¹³² Closely related to this doctrine is the concept of *in loco parentis*. Under *in loco parentis*, school officials in particular are granted the right to make decisions for a student that would otherwise be left to parents.¹³³ The United States Supreme Court, however, has held that any relief parents have from complying with the Fourth Amendment does not carry over to school officials.¹³⁴ Under both *parens patriae* and *in loco parentis*, the state actor does not have more power than a parent would in the situation.¹³⁵ Although parents have wide discretion in raising their children, they are still accountable for injuries they cause to them.¹³⁶

IV. ANALYSIS

In *N.G. ex rel. S.C.*, the United States Court of Appeals for the Second Circuit considered the constitutionality of strip searching juvenile delinquents.¹³⁷ The parents of the juveniles argued that the searches violated the girls' Fourth Amendment rights.¹³⁸ The State countered that it had a special need for the searches.¹³⁹ The court

127. Gilbert T. Venable, *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT. L. REV. 894, 898 (1965).

128. See generally Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F. L. REV. 675, 678 (1998) (comparing the original purpose of a separate juvenile justice system with efforts to strengthening the stance on juvenile crime); Steven Friedland, *The Rhetoric of Juvenile Rights: Any Reconfigured Juvenile Justice System . . . Will Be Significantly Shaped and Influenced by the Rhetoric Used to Describe Juveniles*, 6 STAN. L. & POL'Y REV. 137, 138 (1995); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109 (1909).

129. Friedland, *supra* note 128, at 138; Venable, *supra* note 127, at 898.

130. Richard Jenkins, *An Historical Approach to Search and Seizure in Public Education*, 30 W. ST. U. L. REV. 105, 107 (2003).

131. Friedland, *supra* note 128, at 140.

132. *Id.* at 139.

133. DAVIS, *supra* note 12, § 3:9; Jenkins, *supra* note 130, at 114.

134. *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985). As early as 1967, the Court began to question the doctrine of *parens patriae*. *In re Gault*, 387 U.S. 1, 16 (1967).

135. Venable, *supra* note 127, at 899.

136. *Id.* at 899.

137. *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225, 225-26 (2d Cir. 2004).

138. *Id.* at 229.

139. *Id.* at 236.

upheld the constitutionality of the strip searches upon entry into detention custody without reasonable suspicion.¹⁴⁰ It also ruled that searches occurring while the girls remained in custody and without reasonable suspicion violated the Fourth Amendment.¹⁴¹

A. *Parties' Arguments*

1. N.G. *ex rel.* S.C.

S.C.'s and T.W.'s parents argued that every strip search of their children was illegal because there was never any suspicion or reason to believe that either girl possessed weapons or other contraband or had committed a serious crime.¹⁴² According to the parents, the standard strip search policy was facially invalid because it required detention personnel to ignore the Fourth Amendment standard of reasonableness.¹⁴³ They recognized that strip searches could have been acceptable for children who were suspected of serious offenses or if there was reasonable suspicion that contraband was being concealed.¹⁴⁴ The offenses the girls were brought to detention for, however, were minor, and there was no articulated reasonable suspicion that the girls had concealed any contraband.¹⁴⁵ The parents maintained that the policy of blanket strip searching all detention admittees violated the protection against unreasonable searches provided by the Fourth Amendment.¹⁴⁶

The girls' parents reasoned that Second Circuit precedent required reasonable suspicion before officials could strip search adult arrestees charged with minor offenses, and that children receive constitutional protections similar to adults.¹⁴⁷ They noted that most of the juveniles were being held for self-protection reasons, not for criminal conduct.¹⁴⁸ The plaintiffs observed that there was no evidence that the girls were carrying any contraband and no evidence to warrant a strip search.¹⁴⁹ They asserted that even if the personal histories of the girls might predispose them to carry contraband, these histories were not taken into consideration before detention staff performed the searches.¹⁵⁰ Since the staff did not know the histories of the girls, they could not have formed any suspicion based on those histories.¹⁵¹

140. *Id.* at 226.

141. *Id.*

142. Appellants' Brief at 28, *N.G. ex rel. S.C.* (No. 02-9274).

143. *Id.* at 4.

144. *Id.* at 5.

145. *Id.* at 9, 12, 18.

146. *Id.* at 4.

147. *Id.* at 19, 22.

148. *Id.* at 23.

149. *Id.* at 22.

150. *Id.* at 26.

151. *Id.*

The parents contended that alternative methods such as a pat-down or frisk would have achieved the State's goals.¹⁵² The parents raised the issue that staff sometimes ignored the formal policy and exercised discretion over the thoroughness of the searches.¹⁵³ They also addressed the fact that many of the State's witnesses had little knowledge regarding the effectiveness of the strip searches.¹⁵⁴ The searches, claimed the parents, predominantly turned up items that could be discovered from alternative methods, if they turned up anything.¹⁵⁵

2. State of Connecticut

The State argued that its strip search policy fell within the special needs exception to the Fourth Amendment.¹⁵⁶ Because of the security concerns at juvenile detention facilities, the State equated them to prisons.¹⁵⁷ It emphasized, however, that the searches were aimed more at safety concerns than at law enforcement, and argued that the searches were similar to school searches, in which courts have recognized the custodial responsibility of schools for students.¹⁵⁸ Additionally, the State asserted that the blanket strip search procedure conformed to the standards of a "nationally recognized professional organization" and was similar to that of other states.¹⁵⁹

Arguing that *Board of Education v. Earls* applied and that the intrusion upon the juveniles should be balanced with the interest of the government, the State maintained that the girls had a lowered expectation of privacy because they were confined.¹⁶⁰ It acknowledged that the searches were intrusive, but contended that no one else had complained about the searches, and that there was no evidence that the searches contributed to "significant psychiatric or psychological trauma."¹⁶¹ The State further stated that the searches were conducted in the least intrusive manner.¹⁶² According to the State, the interest of protecting the safety of the juveniles being searched, other residents, and staff was compelling.¹⁶³ Staff, the state argued, intended for the strip searches to deter juveniles from sneaking contraband into deten-

152. *Id.* at 26.

153. *Id.* at 15-16.

154. *Id.* at 16-17.

155. *Id.* at 17.

156. Appellees' Brief at 21, *N.G. ex rel. S.C.* (No. 02-9274).

157. *Id.* at 21-22.

158. *Id.* at 23 (quoting *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 656 (1995)).

159. *Id.* at 13 & n.23. The professional organization is the American Correctional Association. *Id.* Other proposed standards, however, promulgate the rule that searches should occur inside facilities only when there is reasonable suspicion that the juvenile is violating the law. JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH 49-50 (Robert E. Shepherd, Jr. ed., 1996).

160. Appellants' Brief at 24, *N.G. ex rel. S.C.* (No. 02-9274).

161. *Id.* at 28.

162. *Id.* at 30.

163. *Id.* at 30-31.

tion facilities.¹⁶⁴ No other type of search would be as effective.¹⁶⁵ Finally, it proposed that establishing a reasonable suspicion standard for conducting strip searches would be “difficult to administer” and strain the staff.¹⁶⁶

B. Majority Opinion

The United States Court of Appeals for the Second Circuit held that strip searches of juveniles entering state custody were lawful, but that the subsequent searches of the girls while still in state custody violated their Fourth Amendment rights.¹⁶⁷ The court considered the searches under the standards of both *Board of Education v. Earls* and *Turner v. Safley*.¹⁶⁸ Writing for the majority, Judge Jon Newman began the analysis by weighing the intrusiveness of the strip searches against the interests they served.¹⁶⁹ First, the opinion briefly addressed the intrusiveness of the strip searches, citing cases from the United States Supreme Court and other circuits that described strip searches as demeaning, terrifying, and humiliating.¹⁷⁰ The majority also noted that other courts have determined that strip searches are particularly traumatic for children.¹⁷¹ Next, it turned to the state interest served and analyzed the justification for each search.¹⁷²

First, the court addressed the four strip searches that occurred upon the girls’ transfers from one detention facility to another.¹⁷³ The girls were strip searched when they first entered custody and again when they transferred between facilities.¹⁷⁴ The majority concluded that facility transfers alone were not a sufficient basis for the searches.¹⁷⁵ It recognized that although it was more convenient for the second facility to conduct its own search, there were less intrusive alternatives available.¹⁷⁶ Instead of conducting another search, the

164. *Id.* at 31-32.

165. *Id.* at 29.

166. *Id.* at 32-33.

167. *N.G. ex rel. S.C.*, 382 F.3d at 226.

168. *Id.* at 233 (citing *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Turner v. Safley*, 482 U.S. 78 (1987)).

169. *N.G. ex rel. S.C.*, 382 F.3d at 226, 233.

170. *Id.* (citing *Chapman v. Nichols*, 989 F.2d 393, 394, 396 (10th Cir. 1993) (discussing the terrifying quality of strip searches); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (addressing the extent to which strip searches invade rights); *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982) (describing strip searches as a humiliating event)).

171. *Id.* (discussing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). “[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.” *Eddings*, 455 U.S. at 115.

172. *N.G. ex rel. S.C.*, 382 F.3d at 233.

173. *Id.* at 233-34.

174. *Id.* at 233.

175. *Id.* at 233-34. The court found the transfers did not provide an opportunity for either S.C. or T.W. to obtain contraband, but conceded that it might not be so in all cases. *Id.* at 234.

176. *Id.*

new facility could verify that the juvenile had already been searched for contraband at the previous facility.¹⁷⁷

The court next addressed the searches of S.C. that occurred on separate occasions after a pencil disappeared.¹⁷⁸ Detention officials needed reasonable suspicion that S.C. took each pencil before strip searching her.¹⁷⁹ The court suggested that a less intrusive method was available.¹⁸⁰ It proposed that if a lesser search failed to locate the missing item, a more intrusive search might then have been warranted.¹⁸¹

The remaining searches occurred when the girls were taken into the custody of the detention centers.¹⁸² The majority refused to apply the *Turner* standard to these searches, because S.C. and T.W. were not in prison.¹⁸³ The girls had not been convicted of any crime and were not confined pending trial for a criminal offense.¹⁸⁴ The court noted that contraband brought into detention centers could pose the same risks as contraband brought into prisons, but stated that the United States Supreme Court intended for *Turner* to apply to adult prisoners, not truants.¹⁸⁵ The court acknowledged that the *Turner* standard may be applicable in situations in which juveniles were confined for committing an act that would have been a crime if committed by an adult, but not in cases where running away and truancy were the reasons for confinement.¹⁸⁶ Additionally, the court stated that *Turner* was not exactly on point because it dealt with regulations that infringed on prisoners' affirmative rights, not on claims of unconstitutional searches.¹⁸⁷

The court did apply the United States Supreme Court's concept of special needs from *Earls*.¹⁸⁸ Through its role in detaining juveniles, the State had become a de facto guardian.¹⁸⁹ "Where the state is exercising some legitimate custodial authority over children, its responsibility to act in the place of parents (in loco parentis) obliges it to take special care to protect those in its charge"¹⁹⁰ The majority de-

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 234-35.

183. *Id.* at 235.

184. *Id.* The *Turner* standard allows prison regulations that infringe on prisoners' rights if the regulation relates to legitimate security interests and meets other criteria. *Turner v. Safley*, 482 U.S. 78, 89-91 (1987).

185. *N.G. ex rel. S.C.*, 382 F.3d at 235.

186. *Id.*

187. *Id.* at 235-36.

188. *Id.* at 236.

189. *Id.* At the same time, the court recognized that, while it was age that made the children more in need of protection, it also made them particularly susceptible to the negative effects of a strip search. *Id.*

190. *Id.* at 232. Although the Second Circuit referred to the state's power as in loco parentis, this concept is typically reserved for school officials exercising authority over students. DAVIS,

cided that because the State supervised the detainees twenty-four hours a day, it had even greater responsibility for the juveniles in detention than the students in schools.¹⁹¹

The majority opinion recognized that a low number of items had been recovered in strip searches upon admissions, but reasoned that this low occurrence of actual discovery could be indicative of the deterrence factor of such searches.¹⁹² Finally, it stated that strip searches might lead to the detection of abuse, which could assist in developing a long-term care plan for the juvenile.¹⁹³ Although state officials did not include detection of abuse as a purpose of the searches, the court noted that, in light of the other purposes of the special needs doctrine, this could be an added factor in allowing such searches.¹⁹⁴

Using the special needs analysis, the court determined that the risks to T.W.'s and S.C.'s well-being and to the safety of the detention centers outweighed the risks to their psychological health.¹⁹⁵ It therefore found the strip searches upon each entry into the detention centers to be within the standards of the Fourth Amendment.¹⁹⁶

C. *Dissenting Opinion*

Judge Sonia Sotomayor agreed with the majority that the searches for a missing pencil and the searches upon transfers to other facilities violated the Fourth Amendment.¹⁹⁷ She noted that precedent had identified strip searches as highly intrusive and had strictly limited their use.¹⁹⁸ While agreeing that the special needs doctrine was the correct standard, the dissent disagreed with the majority's finding that the government had shown an interest that outweighed the intrusiveness of the strip searches.¹⁹⁹

Judge Sotomayor highlighted the fact that strip searches may have a particularly negative impact on youth.²⁰⁰ She noted that the facilities searched all admittees without considering that most have been subject to abuse or neglect.²⁰¹ Prior abuse makes juveniles susceptible to greater trauma from strip searches.²⁰² The dissent also

supra note 12, § 3:9; Jenkins, *supra* note 130, at 114. When the state acts on behalf of the parents, the concept is referred to as *parens patriae*. *Id.* at 107; *see also* Mack, *supra* note 128, at 109.

191. *N.G. ex rel. S.C.*, 382 F.3d at 236.

192. *Id.* at 236 n.15.

193. *Id.* at 236.

194. *Id.* at 236-37.

195. *Id.*

196. *Id.*

197. *Id.* at 238 (Sotomayor, J., concurring in part and dissenting in part).

198. *Id.* (Sotomayor, J., concurring in part and dissenting in part).

199. *Id.* (Sotomayor, J., concurring in part and dissenting in part).

200. *Id.* at 239 (Sotomayor, J., concurring in part and dissenting in part).

201. *Id.* (Sotomayor, J., concurring in part and dissenting in part).

202. *Id.* (Sotomayor, J., concurring in part and dissenting in part).

stated that the Second Circuit had never held that a strip search was reasonable without individualized suspicion, except in the prison setting, and that the girls were not akin to prison inmates.²⁰³

Distinguishing *N.G. ex rel. S.C.* from the cases that the majority cited, Judge Sotomayor observed that the majority did not rely on any non-prison cases that allow strip searches without individualized suspicion because there are none.²⁰⁴ Even though *N.G. ex rel S.C.* was not in a law enforcement setting, she stated that the court should have followed the Eleventh Circuit's rationale in *Justice v. City of Peachtree City*, which was the most analogous case.²⁰⁵

The dissent agreed that the government had a strong special need in the detention setting, but stated that simply having a special need was not sufficient.²⁰⁶ Special needs, according to Judge Sotomayor, require minimum intrusion with maximum "effectiveness so that the search[] bear[s] a close and substantial relationship to the government's special needs."²⁰⁷ The burden of showing the nexus between the intrusion and the need rested with the government, and the government had not sufficiently established a need in this case.²⁰⁸ She argued that in almost every instance the State cited in which contraband had been discovered during a strip search at a detention facility, the contraband could have been found through a less intrusive search, was found during a lesser search, or was found during a strip search that could have been justified by reasonable suspicion.²⁰⁹

The dissent responded to the majority's deterrence argument by admitting that deterrence can sometimes be a special need, but insisting that it was not in this case.²¹⁰ Juveniles do not usually expect to be brought to a detention facility; therefore, the possibility of a strip

203. *Id.* at 241 (Sotomayor, J., concurring in part and dissenting in part) (citing *Covino v. Patrissi*, 967 F.2d 73, 76-80 (2d Cir. 1992)). In *M.M. v. Anker*, 607 F.2d 588 (2d Cir. 1979), the court stated that schools were entitled to greater flexibility with regard to Fourth Amendment concerns because of the "unique relationship [teachers have with] their students, both in administering discipline as part of their educational function, and in protecting the well-being of all children in their care and custody." *Id.* at 589. The court, however, found that probable cause was still required when a teacher conducted an intrusive strip search, even though it may not have been a requirement for other searches. *Id.* In *Security & Law Enforcement Employees v. Carey*, 737 F.2d 187 (2d Cir. 1984), the court required individualized suspicion to strip search prison guards even though the government had a special need to keep the prison secure and to preserve internal order. *Id.* at 203, 209-10. In *United States v. Asbury*, 586 F.2d 973 (2d Cir. 1978), the court required reasonable suspicion "substantial enough to make the search a reasonable exercise of authority" before strip searches could be performed at the nation's borders. *Id.* at 975-76.

204. *N.G. ex rel. S.C.*, 382 F.3d at 241 (Sotomayor, J., concurring in part and dissenting in part).

205. *Id.* at 241-42 (Sotomayor, J., concurring in part and dissenting in part).

206. *Id.* at 242 (Sotomayor, J., concurring in part and dissenting in part).

207. *Id.* (Sotomayor, J., concurring in part and dissenting in part) (quoting *United States v. Lifshitz*, 369 F.3d 173, 186 (2d Cir. 2004)).

208. *Id.* at 242 (Sotomayor, J., concurring in part and dissenting in part).

209. *Id.* (Sotomayor, J., concurring in part and dissenting in part).

210. *Id.* at 243 (Sotomayor, J., concurring in part and dissenting in part).

search is unlikely to cause them to alter their behavior.²¹¹ Also, if deterrence were a credible special need, less intrusive searches could serve that function.²¹² The dissent noted that there was no evidence that strip searches expose child abuse or uncover self-mutilation that could not have been discovered some other way.²¹³

The dissent acknowledged that the reasonable suspicion standard in juvenile detention centers might be lower than in other settings.²¹⁴ In *N.G. ex rel S.C.*, there was likely reasonable suspicion to warrant the searches of the juveniles.²¹⁵ Judge Sotomayor concluded, however, that allowing strip searches without reasonable, individualized suspicion expanded the special needs doctrine too far.²¹⁶

D. Commentary

Juvenile detainees should not be subject to strip searches without reasonable suspicion that they possess contraband. The Second Circuit's ruling in *N.G. ex rel. S.C.* that strip searches of juvenile detainees are exempt from the Fourth Amendment's reasonableness requirement is inconsistent with its own precedent and the precedent of other circuits. The court did not adequately consider the best interest of the child or the potential consequences for the children searched. The Second Circuit's ruling could lead to a reduction in other rights for juveniles and possibly for adult detainees also.

1. Distinction from Searches in Schools

The strip searches of S.C. and T.W. violated the Fourth Amendment because of their extreme invasiveness. The majority misapplied the *T.L.O.* test for analyzing school searches. It did not properly account for the strip searches of S.C. and T.W. being more intrusive than the searches in the school cases upon which the majority relied to justify them. The search in *T.L.O.* was not an observation of a student's naked body, only a rifling through a student's purse.²¹⁷ "[A]s the intrusiveness of [a] search increases, so too does the standard of Fourth Amendment reasonableness."²¹⁸ The majority ignored the balancing test established in *T.L.O.* and focused more on the needs of the State than on the intrusion; it did not increase the standard for the justification of the search when it increased the intrusiveness allowed.

211. *Id.* (Sotomayor, J., concurring in part and dissenting in part).

212. *Id.* at 243-44 (Sotomayor, J., concurring in part and dissenting in part).

213. *Id.* at 244 (Sotomayor, J., concurring in part and dissenting in part).

214. *Id.* (Sotomayor, J., concurring in part and dissenting in part).

215. *Id.* (Sotomayor, J., concurring in part and dissenting in part).

216. *Id.* at 245 (Sotomayor, J., concurring in part and dissenting in part).

217. *New Jersey v. T.L.O.*, 469 U.S. 325, 328 (1985).

218. *Cornfield v. Lewis*, 991 F.2d 1316, 1321 (7th Cir. 1993).

Although the *T.L.O.* search implicated the Fourth Amendment, it did not approach the invasiveness of a strip search.

The Second Circuit misapplied *T.L.O.* in another way as well. It failed to apply an important aspect of the United States Supreme Court's decision. In *T.L.O.*, the Court expressed concern about requiring school officials to educate themselves on the standard of probable cause in light of their other duties.²¹⁹ Their primary duty is to oversee the education of children. Considering this responsibility, the Court required that school officials have a reasonable suspicion that a student was in possession of contraband, rather than the higher standard of probable cause.²²⁰

In contrast, detention officials are closely related to law enforcement and judicial systems; their job is to oversee juveniles taken into state custody. They can reasonably be expected to learn, if they do not already know, the standard of probable cause as a part of their job function. The Second Circuit did not require the detention officials to have either reasonable suspicion or probable cause before infringing on the protections of the Fourth Amendment, when the United States Supreme Court precedent it relied on required at least one of these. It simply did not appropriately apply the Court's reasoning from school search cases.

2. Psychological Effects of Strip Searches

In addition to its misapplication of the balancing test from *T.L.O.*, the majority also inappropriately applied the balancing test from *Bell v. Wolfish*. The court did not adequately weigh the intrusiveness or the impact of the searches on S.C. and T.W. against the need of the State. Strip searches contribute not only to psychological damage in children, but also to embarrassment and humiliation.²²¹ Strip searches paralyze and traumatize some children, and can lead to psychological difficulties equivalent to those suffered by rape victims.²²² The sexual abuse elements of force and authority are also present in strip searches.²²³ Typically, an adult in a position of power

219. *T.L.O.*, 469 U.S. at 342-43.

220. *Id.*

221. See Melton, *supra* note 13; *supra* text accompanying note 13.

222. See Scott A. Gartner, *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, 928-29 (1997); Paul R. Shuldiner, *Visual Rape: A Look at the Dubious Legality of Strip Searches*, 13 J. MARSHALL L. REV. 273, 303 (1979); Pamela Ellis Simons, *Strip-Search: The Abuse of Women in Police Stations*, 6 BARRISTER 8, 56 (1979) (discussing the comparison drawn between the consequences of rape and strip searches).

223. Steven F. Shatz, *The Strip Search of Children and The Fourth Amendment*, 26 U.S.F. L. REV. 1, 13 (1991).

forces the child to be strip searched.²²⁴ The searches of S.C. and T.W. contained both elements.

The United States Supreme Court has recognized that strip searches are a substantial invasion of privacy and the greatest personal indignity.²²⁵ The effects of strip searches may be greater on children than on adults because of the self-consciousness that accompanies adolescence and children's differing privacy expectations.²²⁶ Threats to privacy are viewed as a threat to a child's self-esteem.²²⁷ Acts that lead to this type of psychological damage cannot also logically promote the welfare of juveniles. The majority stated a need to balance the State's interest in the strip search against the impact of the searches on the children.²²⁸ It proceeded to spend very little time addressing the detrimental effects of the searches, and seemingly disregarded the established requirement of fair balance.²²⁹ Ignoring this impact does not lead to a proper application of the balancing tests used in both *Bell* and *T.L.O.*²³⁰ The court could have more appropriately applied the test if it had adequately considered the great negative effects of strip searches on children.

3. *Parens Patriae*

In reasoning that strip searches protect children, the Second Circuit again failed to appropriately consider United States Supreme Court precedent and its own prior holdings. *Parens patriae* and the guise of protection do not justify the highly intrusive searches.²³¹ The United States Supreme Court has ruled that good intentions cannot justify denying juveniles their constitutional rights.²³² The Second Circuit has held that there must be reasonable suspicion or an exigent circumstance to search a child during a child abuse investigation.²³³ In those investigations, in which promoting child welfare is the sole purpose, the Second Circuit has required at least the lower standard of

224. *Id.*

225. *T.L.O.*, 469 U.S. at 337 (citing *Terry v. Ohio*, 392 U.S. 1, 24-25 (1967); *Bell v. Wolfish*, 441 U.S. 520, 594 (1979)).

226. Jillian Grossman, *The Fourth Amendment: Relaxing the Rule In Child Abuse Investigations*, 27 *FORDHAM URB. L.J.* 1303, 1311-12 (2000).

227. Melton, *supra* note 13, at 488. Privacy is important for the developing child, but allowing her privacy may allow her to cover up delinquent acts. *Id.* at 488-89.

228. *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225, 236-37 (2d Cir. 2004).

229. *See, e.g., T.L.O.*, 469 U.S. at 337 (describing the balance between an individual's privacy expectations and the state's interest in maintaining order).

230. *Id.* at 325; *Bell*, 441 U.S. at 559.

231. *See Venable, supra* note 127, at 899.

232. *In re Winship*, 397 U.S. 358, 365-66 (1970) (“[C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts . . .”).

233. *Tenenbaum v. Williams*, 193 F.3d 581, 606 (2d Cir. 1999). *But see Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986) (holding that the Fourth Amendment was implicated in a strip search during a child abuse investigation, but that the State's interest outweighed the child's right to privacy).

reasonable suspicion before a child's Fourth Amendment rights are infringed.²³⁴ However, in *N.G. ex rel. S.C.*, when the court announced that promoting child welfare was a side benefit of the strip searches, it relied heavily on the rationale that a child's constitutional protections could be limited by adults designated to promote their welfare.²³⁵ This divergence from its prior rulings and those of the United States Supreme Court can only provide confusion for trial courts looking to the Second Circuit for guidance.

4. Deterrence

The Second Circuit erred not only when it considered the child abuse detection benefit of the strip searches, but also when it considered the deterrence benefit. Strip searches of juveniles do not serve the great deterrence benefit proposed by the court. Many juveniles do not expect to enter detention, and therefore would not have thought ahead to store contraband on their bodies.²³⁶ Since an arrest for even a minor offense is usually a surprise, it is unlikely that an arrestee would be smuggling weapons into a detention facility.²³⁷ It is unlikely that either S.C. or T.W. had planned to enter detention on the days of their admissions, with the probable exception of when S.C. turned herself in.²³⁸ Additionally, most juveniles are not educated on juvenile detention center policies.²³⁹ If they do not know of the strip search policy, it cannot deter them from bringing in contraband.²⁴⁰ The deterrence benefit of the strip search policy is minimal.²⁴¹

5. Procedural Effects

In addition to providing minimal deterrence benefits, strip searches can adversely affect the criminal procedure process.²⁴² Conducted upon admission into a detention center, the searches often occur prior to conviction for a crime, effectively subjecting juveniles to

234. *Tenenbaum*, 193 F.3d at 606.

235. *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225, 236 (2d Cir. 2004) (stating that age "provides the State with an enhanced responsibility to take reasonable action to protect them from hazards resulting from the presence of contraband where the children are confined").

236. See *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984) (discussing the inapplicability of the deterrence theory to adults arrested for minor offenses).

237. See *Does v. Boyd*, 613 F. Supp. 1514, 1523 (D. Minn. 1985) (distinguishing between prisoners' visits with non-confined persons and entering confinement at a local detention facility).

238. *N.G. ex rel. S.C.*, 382 F.3d at 229.

239. See *Boyd*, 613 F. Supp. at 1523.

240. See *id.*

241. See *N.G. ex rel. S.C.*, 382 F.3d at 243-44 (Sotomayor, J., concurring in part and dissenting in part).

242. Martin R. Gardner, *Sniffing for Drugs in the Classroom—Perspectives on Fourth Amendment Scope*, 74 Nw. U. L. REV. 803, 825 (1979).

punishment without conviction.²⁴³ Juveniles are entitled to procedural due process rights.²⁴⁴ Because these juveniles have not yet been convicted of a crime, they should be afforded more rights than prisoners who have been convicted.²⁴⁵ If the State maintains that the strip searches are not punishment, then the court must analyze whether there is an alternative purpose for them, and whether the searches are an excessive reaction to that alternative purpose.²⁴⁶ A blanket policy will not suffice; each case must be looked at individually.²⁴⁷

Furthermore, detention officials are likely to report incidents of finding contraband to the police or probation officers.²⁴⁸ This reporting could result in criminal prosecution and added punishment for the child. Although the Second Circuit relied on the State's duty under *parens patriae* to protect the juveniles, parents have no duty to report their children's violations of the law.²⁴⁹ Parents may be reluctant to do so because of the bond they share with their children and their affectionate feelings towards them.²⁵⁰ Detention workers are unlikely to have these same feelings towards the children.²⁵¹ As state agents, they have the objective of protecting the community, which may conflict with promoting the best interests of the child and result in greater punishment, not rehabilitation.²⁵²

The result of the Second Circuit's ruling is that children are having their equal protection rights violated through strip searches.²⁵³ Some children remain in detention after being arrested simply be-

243. See, e.g., Shuldiner, *supra* note 222, at 285. "Deprivation of a person's fourth amendment right to be free from unreasonable searches and seizures constitutes imposition of a penalty of the highest magnitude, especially since the pretrial detainee may not have committed any crime." *Id.*

244. *In re Gault*, 387 U.S. 1, 27-28 (1967). The Court reasoned that compliance with basic due process rights will not interfere with the special purpose of the juvenile justice system. *Id.* at 21.

245. Shuldiner, *supra* note 222, at 283-84.

246. *Schall v. Martin*, 467 U.S. 253, 269 (1984) (stating "the mere invocation of a legitimate purpose will not justify particular restrictions . . . amounting to punishment").

247. See *id.* at 273-74.

248. See Irene Rosenberg, *New Jersey v. T.L.O.: Of Children and Smokescreens*, 19 FAM. L.Q. 311, 319 (1985). "[T]he evidence seized from the child is in fact used against her at a quasi-criminal juvenile delinquency proceeding to establish that she committed an act that if committed by an adult would be a crime." *Id.*

249. See Gardner, *supra* note 242, at 825; Claudia Worell, *Pretrial Detention*, 95 YALE L.J. 174, 180-82 (1985). Additionally, in a school search case in which it upheld drug testing by the school, the United States Supreme Court specifically noted that the results would not be given to law enforcement. *Vernonia School District v. Acton*, 515 U.S. 646 (1995).

250. Worell, *supra* note 249, at 179-82.

251. *Id.* at 181-82; Venable, *supra* note 127, at 903-04 (proposing that under *parens patriae* the government's authority to exercise authority over children should be more limited than the actual parents', as the government has no natural emotions toward the child).

252. Worell, *supra* note 249, at 181-82.

253. See Shuldiner, *supra* note 222, at 284. Cf. *Mary Beth G. v. Chicago*, 723 F.3d 1263, 1273-74 (7th Cir. 1983) (finding that a policy of strip searching women detainees but not men detainees violated Equal Protection). The Fourteenth Amendment states that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

cause their parents refuse to accept custody.²⁵⁴ These children will be subjected to the detrimental effects of strip searches while other children suspected of the same crimes whose parents accept them back into the family home will not be searched. The whims of parents in deciding whether to take their child home are not an adequate basis for violating the child's constitutional rights.

6. Equivalent Adult Standards

Given the minimal benefits of the strip searches of juveniles and the risk of negative psychological and procedural effects, it is not logical for the Second Circuit to apply a lesser standard for strip searches to juveniles than to adults. Government officials are required to have reasonable suspicion before strip searching adult detainees.²⁵⁵ Courts require that each adult and the individual circumstances be investigated to determine the need for a search.²⁵⁶ Officials overseeing the adult detainees should have the same duty to protect adults from other detainees as detention officials have in protecting juveniles in custody. Depending on the adult and the offense, there is no reason to suspect that the adult would be any less tempted to commit suicide or bring in contraband than a juvenile. Courts, however, have consistently ruled that officials need reasonable suspicion to conduct strip searches of adults who commit minor offenses.²⁵⁷

Additionally, other rights granted to adults in searches also apply to juveniles, and there is no reason for deviation in strip searches.²⁵⁸ The same standards apply to juveniles for searches incident to arrests, stop and frisks, automobile searches, and the taking of blood samples.²⁵⁹ Altering the standard for strip searches may lead to the reversal of these other protections already in place for juveniles. Alternatively, courts could manipulate the holding of *N.G. ex rel. S.C.* to limit rights granted to adults. New analogies could be drawn between adults involved in minor offenses and juvenile offenders.

254. *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225, 227 (2d Cir. 2004).

255. *See, e.g., Shain v. Ellison*, 273 F.3d 56, 66 (2d Cir. 2001) (upholding the lower court's determination that it was clearly established that persons held in local correctional facilities on misdemeanor charges could not be strip searched without reasonable suspicion that they were hiding contraband); *Wachtler v. County of Herkimer*, 35 F.3d 77, 82 (2d Cir. 1994) (holding that if the county's policy was to routinely strip search all misdemeanor arrestees entering jail without reasonable suspicion they carried contraband and that if there was no reasonable suspicion that the plaintiff carried contraband, he would prevail in a suit against the county).

256. *See, e.g., Hunter v. Auger*, 672 F.2d 668, 675 (8th Cir. 1982). "[T]he reasonable suspicion standard we have adopted requires individualized suspicion, specifically directed to the person who is targeted for the strip search." *Id.*

257. *See, e.g., Shain*, 273 F.3d at 66.

258. *DAVIS, supra* note 12, §§ 3:6 to 3:12.

259. *Id.*

7. Alternative Methods

The court did not credit alternative methods available to assist the State in achieving its stated goals. The State could use less intrusive searches such as a pat-down or a frisk.²⁶⁰ A metal detector could also be an effective tool to discover contraband.²⁶¹ The detention centers could establish a simple inquiry procedure for all admittees that would determine whether there was reasonable suspicion to search.²⁶² A danger of this practice is that it could become standard to strip search juveniles by claiming a cause for reasonable suspicion. However, suspicion would be determined prior to the search. If the State were required to articulate reasonable suspicion beforehand, it may help the children understand that the search is a necessity, not just an infringement. Additionally, the State can always seek a warrant if it fears it does not have reasonable suspicion. The highly intrusive nature of a strip search and the close relationship with a judicial officer in the specialized juvenile court system makes this a feasible alternative.²⁶³

The juvenile detention facilities could house detainees by classifications such as age, background, offense, court history, or present demeanor.²⁶⁴ A classification system would protect the children from each other by segregating those who pose a higher risk to others.²⁶⁵ It would involve an evaluation at intake and recurring assessments of the children.²⁶⁶ Additionally, if detention officials are being placed in the role of children's guardians, they should be charged with caring for them in all regards. Detention admission could turn into an important lesson in respect and in the United States Constitution.

V. CONCLUSION

The United States Court of Appeals for the Second Circuit erred when it ruled that strip searches of juveniles entering state custody at a detention center, absent any reasonable suspicion that the juvenile

260. In one study, researchers found that detention centers on average reported approximately "40 frisk searches, 30 room searches, and 9 strip searches on any given day for every 100 juveniles." READINGS IN JUVENILE JUSTICE ADMINISTRATION 98 (Barry C. Feld ed., 1999).

261. Although apparently never considered by the United States Supreme Court, the use of metal detectors without individualized suspicion has been upheld by lower courts. See, e.g., *Thompson v. Carthage Sch. Dist.*, 87 F.3d 979, 983 (8th Cir. 1996).

262. Kirk Heilbrun et al., *Risk Assessment for Adolescents* (2000), at http://www.ilppp.Virginia.edu/Juvenile_Forensic_Fact_Sheets/Fact_Sheets/Risk.html (describing tools to assess the risk a juvenile presents).

263. See Shuldiner, *supra* note 222, at 284 (discussing the possibility of requiring police officers to obtain a warrant before conducting a strip search).

264. It is reported that many detention centers already use classification systems for security reasons. READINGS IN JUVENILE JUSTICE ADMINISTRATION, *supra* note 260, at 97. "Nearly 8 in 10 juveniles in detention in 1991 were in facilities that used classification and separation procedures." *Id.*; Dale, *supra* note 128, at 717.

265. See Dale, *supra* note 128, at 717-18.

266. *Id.* at 717.

carried contraband, did not violate the Fourth Amendment. It inappropriately applied the precedent balancing tests by not adequately considering the harmful impact of the searches on the children. One more exception has been created for the Fourth Amendment requirement of “reasonableness.” The continuous creation of exceptions will eventually make the amendment meaningless, as everyone will fall into an exception.

By allowing detention workers to unreasonably strip search juveniles and violate their constitutional rights, the Second Circuit missed an opportunity to foster respect in a population that is in need of direction and positive reinforcement.²⁶⁷ Detention workers conducting strip searches of children are government workers. The children they interact with are likely to view them as authority figures. In abusing their position through strip searches, they are opening the door for the children to be hostile towards authority figures.²⁶⁸ The juveniles they interact with are already experiencing some difficulties in life and are in a vulnerable position. When the State violates their rights, it reinforces the juveniles’ low self-esteem and furthers any disrespect for society they may have.²⁶⁹ Rather than continuing to violate the children, the State should have demonstrated the reasonableness implicit in the Fourth Amendment.

The Second Circuit has approved a reduction in the rights of juveniles. Instead of protecting children’s interests, it now allows an intrusion into their privacy that could contribute to psychological damage and infringe on their other rights of due process and equal protection. It should have found the strip searches unconstitutional and advocated for the protection of the rights of a vulnerable population.

267. See Rosenberg, *supra* note 248, at 329. “Permitting the state to invade privacy rights of juveniles without adequate cause is to invite youthful hostility to authority that may result in an increase in crime and disobedience.” *Id.*

268. See generally Gartner, *supra* note 222, at 942-43 (discussing that educators should respect students constitutional rights to foster societal values).

269. *Id.*; Melton, *supra* note 13, at 488.

