

Rights Stripped Down: A Fourth Amendment Challenge to Cross-Gender Strip Searches of Transgender Inmates

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One in six transgender individuals have been incarcerated, yet prisons have been slow to implement policies that address the issues transgender people face while imprisoned. The lack of federal and state laws, coupled with the inadequacies of prison policies, negatively impact incarcerated transgender peoples' housing assignments, access to healthcare, and, as this Note addresses, their rights regarding strip searches. Currently, there are no nationwide laws governing cross-gender strip searches that directly pertain to transgender individuals. Using precedent addressing cross-gender strip searches of cisgender prisoners as its guide, this Note argues that it is unconstitutional to subject incarcerated transgender people to cross-gender strip searches. The Note will explore strip search caselaw and argue that precedential notions of reasonableness and bodily autonomy have created a legal standard which requires that, outside of exigent circumstances, cross-gender strip searches are unconstitutional for both cisgender and transgender prisoners.

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INTRODUCTION

“[D]uring strip searches I would break down and cry and shake, and when I would get back to my cell I would do the same.”

Sora Kuykendall, a transgender woman, describes being strip searched by male guards.¹

In United States prisons, strip searches² are a routine practice.³ Prison guards perform these searches in a variety of situations, including after a prisoner goes to visitation,⁴ during a prisoner’s intake into a new facility, and during cell searches.⁵ Because strip searches are so commonplace in prison life, incarcerated people have brought many lawsuits debating the constitutionality of the invasiveness and frequency of these searches.⁶ In some cir-

¹ *In Historic Victory, Federal Judge Orders Changes to Provision of Health Care and Housing for Transgender People in Custody of IDOC*, ACLU (August 10, 2021), <https://www.aclu-il.org/en/press-releases/historic-victory-federal-judge-federal-judge-orders-changes-provision-health-care-and> [<https://perma.cc/8YXY-6URM>].

² Legally, a strip search is “[a] search of a person conducted after that person’s clothes have been removed, the purpose usu[ally] being to find any contraband the person may be hiding.” Strip Search Definition, *Black’s Law Dictionary* (9th ed. 2009), available at Westlaw.

³ Joseph Ax, *In U.S. Justice System, the Strip-Search is Common Practice*, REUTERS (Dec. 19, 2013), <https://www.reuters.com/article/us-india-usa-stripsearches/in-u-s-justice-system-the-strip-search-is-common-practice-idUSBRE9BJ04M20131220> [<https://perma.cc/6YFR-6HMH>].

⁴ Visitation is when friends or family members are permitted to visit incarcerated people. See *General Visiting Information*, FEDERAL BUREAU OF PRISONS, <https://www.bop.gov/inmates/visiting.jsp> [<https://perma.cc/PYH6-ZXCM>].

⁵ See, e.g., N.J. Admin. Code § 10A:3-5.; How to Justice, *Are You Required to Consent to a Cavity Body Search in Prison?*, HOW TO JUSTICE, <https://howtojustice.org/going-to-prison/cavity-body-search/> [<https://perma.cc/8VHQ-KJYD>].

⁶ See, e.g., Dereck Giln, *Illinois Sheriff Settles Federal Class-Action Suit Over Strip Searches*, PRISON LEGAL NEWS (Mar. 6, 2018), <https://www.prisonlegalnews.org/news/2018/mar/6/illinois-sheriff-settles-federal-class-action-suit-over-strip-searches/> [<https://perma.cc/7BP8-KQQ6>] (lawsuit challenging the sheriff’s policy that required strip searches of arrestees

cumstances, these searches are cross-gender⁷—meaning they involve inmates and guards of different genders—and many prisoners have claimed that the cross-gender strip searches they experienced violated their Fourth Amendment protection against unreasonable searches and seizures.⁸ A federal law outlaws cross-gender strip searches,⁹ but given the law’s limited enforcement capabilities,¹⁰ it fails to protect many prisoners from “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive” searches that signify degradation and submission.¹¹

Courts have created a “robust body”¹² of case law outlining the constitutional limits of cross-gender strip searches of cisgender¹³ prisoners, but unfortunately, precedent is scarce regarding the constitutionality of cross-

before they could appear in court); Anjana Samant and Sarah Andrea Esteban, *Stripped of Their Rights*, ACLU (Aug. 27, 2019), <https://www.aclu.org/news/prisoners-rights/stripped-their-rights> [https://perma.cc/VHQ3-NTLD] (lawsuit where prisoners claim that a mass strip search within the view of other prisoners and guards was unconstitutional); Billy Kobin, *Louisville Woman Sues Metro Corrections Officers She Says ‘Paraded’ Her Naked Through Jail*, LOUISVILLE COURIER JOURNAL (Nov. 9, 2021), <https://www.courier-journal.com/story/news/local/2021/11/09/louisville-woman-sues-metro-corrections-officers-over-strip-search/6351330001/> [https://perma.cc/4PT2-F67T] (prisoner sued a Kentucky prison over a search in which she was “paraded” while naked in front of officers, employees, and other detainees).

⁷ See, e.g., *Timm v. Gunter*, 917 F.2d 1093, 1096 (8th Cir. 1990); *Naisha v. Metzger*, 490 F.Supp.3d 796, 804 (D. Del. 2020); *Bull v. City & Cnty. of San Francisco*, 595 F.3d 964, 971 (9th Cir. 2010).

⁸ See, e.g., *Gunter*, 917 F.2d at 1096; *Naisha*, 490 F.3d at 804; *Bull*, 595 F. 3d at 971–72.

⁹ 28 CFR § 115.15(a) (“The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.”).

¹⁰ *Frequently Asked Questions: Do the Standards Apply to Locally Operated Facilities?*, NAT’L PREA RESOURCE CENTER (Feb. 7, 2013), <https://www.prearesourcecenter.org/frequently-asked-questions/do-standards-apply-locally-operated-facilities#:~:text=yes,not%20comply%20with%20the%20standards> [https://perma.cc/3VUL-YNBQ] (“PREA standards apply equally to locally operated facilities, such as lockups, jails, juvenile detention centers, and locally operated residential community confinement facilities. The statute imposes certain financial consequences on states that do not comply with the standards. However, for local facilities or facilities not operated by the state, PREA provides no direct federal financial penalty for not complying.”). See also James Markham, *The Prison Rape Elimination Act and Its Impact on County Jails*, Coates’ Canons NC Local Government Law, <https://canons.sog.unc.edu/2013/06/the-prison-rape-elimination-act-and-its-impact-on-county-jails/> [https://perma.cc/YUT8-752L] (“But applicability is not the same as enforceability. As discussed above PREA is enforced on the states through the threat of grant reductions, and those grant reductions are triggered by the governor’s certification. The standards explicitly say that the governor’s certification applies only to ‘facilities under the operational control of the State’s executive branch.’ 28 C.F.R. § 115.501(b). The certification must include ‘facilities operated by private entities on behalf of the State’s executive branch,’ *id.*, but it does not include *local government* entities that house state inmates.”) (emphasis in original).

¹¹ *Henry v. Hulett*, 969 F.3d 769, 778 (7th Cir. 2020) (citing *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983)).

¹² *Carter-el v. Boyer*, No. 1:19-cv-243, 2020 WL 939289, at *4 (E.D. Va. Feb. 25, 2020).

¹³ According to Merriam-Webster Dictionary, “cisgender” means “of, relating to, or being a person whose gender identity corresponds with the sex the person had or was identified as having at birth.” *Cisgender*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/cisgender> [https://perma.cc/AF48-EQ8E].

gender searches of incarcerated transgender¹⁴ individuals.¹⁵ The sheer number of incarcerated transgender people suggests that law enforcement and courts should have consistent policies regarding strip searches involving transgender prisoners, as they regularly have for cisgender prisoners. In 2020, 5,000 transgender people were incarcerated in state prisons, and in 2022, there were approximately 1,300 transgender people in custody in federal prisons.¹⁶ Alarming, one out of six transgender people has reported that they have been incarcerated.¹⁷ Over-policing and profiling contribute to the mass incarceration of transgender individuals.¹⁸ The lack of consistent regulations of strip searches of incarcerated transgender people creates dangerous consequences—transgender prisoners are frequently being subjected to cross-gender strip searches in violation of their Fourth Amendment rights.

This Note will explore the constitutionality of same-sex and cross-gender strip searches.¹⁹ Following that discussion, this Note will demonstrate how, under well-established legal principles, transgender prisoners have a right to be strip searched by guards of their same gender, and how, thus far, the law has failed to recognize that right.

To begin, Part I will provide a background on strip searches in prisons and will discuss how strip searches contribute to the sexual assault of prisoners. Part II will detail how the Fourth Amendment applies to incarcerated people and will detail the Supreme Court’s tests for assessing strip searches under the Fourth Amendment. Part III will explore Fourth Amendment rights as they apply to transgender prisoners and note the barriers that incarcerated transgender people face in pleading constitutional violations. Specifically, this Note will argue that courts have abandoned precedent around strip searches when deciding cases involving transgender prisoners. After detail-

¹⁴ Transgender is defined as “[a]n umbrella term for people whose gender identity differs from the sex they were assigned at birth.” *GLAAD Media Reference Guide – Transgender, GAY AND LESBIAN ALLIANCE AGAINST DEFAMATION*, <https://www.glaad.org/reference/transgender> [<https://perma.cc/Q8KH-FM4R>].

¹⁵ This Note cites all of the available federal case law in which incarcerated transgender people alleged Fourth Amendment violations regarding their cross-gender strip search(es) in prison. The majority of that case law is at the district court level, so the decisions are not binding nationally, but they provide examples of how courts evaluated Fourth Amendment claims related to strip searches of transgender individuals in prisons.

¹⁶ Kate Sosin, *Biden Administration Releases New Transgender Federal Policy*, 19TH NEWS, <https://19thnews.org/2022/01/biden-administration-releases-new-transgender-federal-policy/> [<https://perma.cc/3QA4-5EWF>].

¹⁷ See *Transgender Incarcerated People in Crisis*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/trans-incarcerated-people> [<https://perma.cc/QN4M-UD4Y>].

¹⁸ *Id.* (“Over-policing and profiling of low-income people and of trans and gender-non-conforming people intersect, producing a far higher risk than average of imprisonment, police harassment and violence for low-income trans people.”).

¹⁹ This Note acknowledges that sex and gender are not interchangeable words. Currently, courts, carceral facilities, and legislatures use the terms “same-sex” and “cross-gender” to describe strip searches that either involve two members of the same gender, or that involve two members of different genders, respectively. This Note stays consistent with these guidelines, with the hope that the language of our courts and institutions will continue to change with our society.

ing the pitfalls within courts' current holdings regarding cross-gender strip searches in prison, this Note will argue that the Fourth Amendment bars cross-gender strip searches of incarcerated transgender people.

I. STRIP SEARCHES BEHIND BARS

“[I]t’s humiliating and they are disrespectful. You know, you have me surrounded by men, I have to go to yard with men . . . , go to eat with men, I have to go to counseling with men. I am being subject to be around them 24/7, even if I am in a cell by myself . . . I’m not male . . . [N]o woman should be forced to be around a man in prison.”

Marilyn Melendez²⁰

A. *Strip Searches as a Means to Promote Prison Security*

Strip searches occur frequently in prisons.²¹ Despite their prevalence, however, there is no federal statutory definition of “strip search.” A simple dictionary definition of a strip search is “a search for something concealed on a person made after removal of the person’s clothing.”²² Prisons create their own procedures for executing strip searches within their walls. For example, in Miami-Dade County Corrections’ facilities, a strip search involves “having an arrested person remove or arrange some or all of his or her clothing so as to permit a visual and/or manual inspection of the genitals; buttocks; anus; breasts, in the case of a female; or undergarments of such a person.”²³ Conversely, the South Carolina Department of Corrections’ policy on strip searches states that it is only a visual inspection of a person’s breasts, buttocks, or genitalia.²⁴

Even though facilities have different definitions of what constitutes a strip search, the United States Supreme Court has upheld the necessity of

²⁰ *In Historic Victory, Federal Judge Orders Changes to Provision of Health Care and Housing for Transgender People in Custody of IDOC*, ACLU (Aug. 10, 2021), <https://www.aclu-il.org/en/press-releases/historic-victory-federal-judge-federal-judge-orders-changes-provision-health-care-and> [<https://perma.cc/7ZYA-6Y37>].

²¹ *Ax*, *supra* note 3.

²² *Strip Search*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/strip%20search> [<https://perma.cc/XYZ7-3TA5>].

²³ Miami-Dade County Corrections and Rehabilitation Department, *Frisk and Strip Search Procedures*, MIAMI-DADE CORRECTIONS, [HTTPS://WWW.CLEARINGHOUSE.NET/CHDOCS/PUBLIC/JC-FL-0012-0012.PDF](https://www.clearinghouse.net/chDOCS/PUBLIC/JC-FL-0012-0012.PDF) [[HTTPS://PERMA.CC/6YCP-AKYA](https://perma.cc/6YCP-AKYA)].

²⁴ South Carolina Department of Corrections, *SDCS Policy GA.06-11B, Applying the Prison Rape Elimination Act (PREA)*, SCDC, <https://www.doc.sc.gov/policy/GA-06-11B.htm.pdf> [<https://perma.cc/3XBT-4NQB>] (“Strip Search means a search requires a person to remove or arrange some or all clothing so as to permit a visual inspection of the person’s breasts, buttocks, or genitalia.”).

these searches in prison settings.²⁵ This is because, almost as a guiding principle, the Supreme Court often defers to the policies prisons put in place to promote security and keep contraband out of jails.²⁶ In its strip search cases such as *Florence v. Board of Chosen Freeholders of County of Burlington*²⁷ and *Bell v. Wolfish*,²⁸ the Court has repeatedly touted the necessity of strip searches in prisons because it believes that “maintaining institutional security and preserving internal order and discipline are essential goals” of carceral institutions.²⁹ By acknowledging that the alleged central goal of prisons is to protect internal security, the Court has given prisons a green light to institute whatever policies they deem necessary in order to protect security interests.³⁰

The Supreme Court’s assurance that strip searches in prisons are integral to promote safety has not stopped incarcerated litigants from challenging the constitutionality of these searches under the Fourth Amendment. When plaintiffs push back against the constitutionality of strip searches, they often argue that strip searches violate their Fourth Amendment right against unreasonable searches and seizures.³¹ The Fourth Amendment protects “[t]he right of the people to be secure in their persons . . . against unreasonable searches” by the government.³² Plaintiffs allege that having to be strip searched by guards in varying situations, such as in front of other prisoners, makes the searches unreasonable under the Fourth Amendment.³³

²⁵ *Bell v. Wolfish*, 441 U.S. 520, 560 (1979) (“But we deal here with the question whether visual body-cavity inspections as contemplated by the MCC rules can ever be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can.”) (emphasis in original).

²⁶ *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 566 U.S. 318, 327 (2012) (“Policies designed to keep contraband out of jails and prisons have been upheld in cases decided since *Bell*”). See also Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. FORUM 302, <https://harvardlawreview.org/2022/04/the-coherence-of-prison-law/> [<https://perma.cc/6NGW-L3CZ>] (“For all the factual switchbacks Driver and Kaufman identify, there is an unmistakable consistency in the overall orientation of the field: it is consistently and predictably pro-state, highly deferential to prison officials’ decisionmaking, and largely insensitive to the harms people experience while incarcerated. These features represent the practical manifestation of the divergent normative inclinations the Supreme Court routinely displays toward the parties in prison law cases.”).

²⁷ 566 U.S. 318 (2012).

²⁸ 441 U.S. 520 (1979).

²⁹ *Id.* at 546.

³⁰ *Id.* at 547 (“Prison officials must be free to take appropriate action to ensure the safety of inmates and correction personnel”).

³¹ Anjana Samant and Sarah Andrea Esteban, *Stripped of Their Rights*, ACLU (Aug. 27, 2019), <https://www.aclu.org/news/prisoners-rights/stripped-their-rights> [<https://perma.cc/VHQ3-NTLD>].

³² U.S. CONST. amend. IV.

³³ See e.g., *Lopez v. Youngblood*, 609 F. Supp. 2s 1125, 1129 (E.D. Cal. 2009) (Plaintiffs alleged that the prison’s group strip search policy was unreasonable under the Fourth Amendment); *Lewis v. Sec’y of Pub. Safety & Corr.*, 870 F.3d 365, 368 (5th Cir. 2017) (Plaintiffs argued that strip searching ten prisoners at once was unreasonable under the Fourth Amendment).

The Fourth Amendment not only states that people have a right to be free from unreasonable searches, but also states that searches should only be conducted with probable cause.³⁴ Typically, the Supreme Court has bolstered that portion of the Amendment, holding that, for a search to be permissible, it must be based on evidence establishing probable cause of some legal violation.³⁵ But the Court has also created a gray zone where searches do not need probable cause to be considered reasonable.³⁶ *Bell* established that prison strip searches fall within that zone.³⁷ In *Bell*, when addressing whether a prison could conduct visual body inspections as a part of its strip searches of prisoners, the Court held that those inspections could be conducted on less than probable cause.³⁸ The Court stated that “the significant and legitimate security interests of the institution” justified the lack of probable cause for prison strip searches.³⁹ Similarly, in *Florence*, the Court stated that “in addressing this type of constitutional claim, courts must defer to the judgment of correctional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of jail [or prison] security.”⁴⁰ Incarcerated individuals argue that strip searches in prisons go far beyond what is necessary to promote jail security.⁴¹ Instead, strip searches dehumanize and humiliate detainees.⁴²

³⁴ U.S. CONST. amend. IV (“[N]o 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.”).

³⁵ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (“Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon ‘probable cause’ to believe that a violation of the law has occurred. However, ‘probable cause’ is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although ‘both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required.’”) (citations omitted).

³⁶ *Id.* (“However, “probable cause” is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although “both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required”).

³⁷ *Bell*, 441 U.S. at 560.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Florence*, 566 U.S. at 322-323.

⁴¹ Corey Devon Arthur, *I’ve Been Strip-Frisked Over 1,000 Times in Prison. I Consider it Sexual Assault*, MARSHALL PROJECT (Feb. 4, 2021), <https://www.themarshallproject.org/2021/02/04/i-ve-been-strip-frisked-over-1-000-times-in-prison-i-consider-it-sexual-assault> [https://perma.cc/QM8R-5EJ8].

⁴² Alan Mills, *Appeals Court Condemns Humiliating Mass Strip Search of Women Prisoners*, INJUSTICE WATCH (Sept. 10, 2020), <https://www.injusticewatch.org/commentary/2020/appeals-court-condemns-humiliating-mass-strip-search-of-women-prisoners/#:~:text=strip%20searches%20of%20prisoners%20are%20humiliating%2C%20degrading%2C%20and%20dehumanizing.&text=but%20strip%20searches%20are%20often,than%20for%20legitimate%20security%20purposes> [https://perma.cc/HHG7-57QU]. See also *Crawford v. Cuomo*, 796 F.3d 252, 258 (2d Cir. 2015) (in which a prison guard repeatedly sexually assaulted plaintiffs during strip searches by fondling and squeezing their penises).

B. Strip Searches Contribute to Sexual Assault in Prison

The prevalence of invasive and cross-gender strip searches have a clear link to sexual assault within prisons.⁴³ It is imperative to establish regulations regarding cross-gender strip searches for both cisgender and transgender prisoners because, according to formerly incarcerated people and civil rights organizations, strip searches can amount to sexual violence.⁴⁴ The National Prison Rape Elimination Commission acknowledged that “searches carried out by staff of the opposite gender heighten the potential for abuse.”⁴⁵ The Commission notes that when guards pat down prisoners of the opposite gender, they often exploit security protocol, inappropriately violating prisoners’ bodies.⁴⁶

Many proponents of strip search reform in prisons argue that strip searches are used not to keep prisons safe, but instead to exercise power over prisoners and to sexually abuse them.⁴⁷ Organizations such as The Marshall Project have published op-eds written by prisoners that detail their traumatic experiences and assert that the searches amount to sexual assault.⁴⁸ Corey Devon Arthur, who was incarcerated in several New York facilities, wrote that when he was strip searched in prison, he felt that he was assaulted and raped.⁴⁹ He explained that he often felt motionless and helpless when he was ordered to strip naked in front of guards.⁵⁰ Arthur stated that because saying “no” meant that he would be subjected to blows from the guards, he felt that he was commanded to expose his body to guards without any personal autonomy.⁵¹ Arthur’s experiences have been echoed by many others who have spent time in prisons. Women who participated in a study about strip searches in prisons also spoke about their inability to say “no” to being strip searched.⁵² They believed that they were at the mercy of the guards who performed the strip searches.⁵³ Professor Jessica Hutchinson stated that the power dynamic in prison coupled with the women’s inability to say “no”

⁴³ Arthur, *supra* note 41. See also *Byrd v. Maricopa Cnty. Sheriff’s Dep’t*, 629 F.3d 1135, 1141 (9th Cir. 2011) (“cross gender [assignments] in prison foster abuse of inmates by male and female officers”).

⁴⁴ See Mills, *supra* note 42; Arthur, *supra* note 41.

⁴⁵ NATIONAL PRISON RAPE ELIMINATION COMMISSION, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT, 62 (2009).

⁴⁶ *Id.*

⁴⁷ *Id.* See also Daphne Ha, *Blanket Policies for Strip Searching Pretrial Detainees: An Interdisciplinary Argument for Reasonableness*, 79 *FORDHAM L. REV.* 2721, 2721 (2010-2011).

⁴⁸ See Mills, *supra* note 42.

⁴⁹ Arthur, *supra* note 41.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Jessica Hutchinson, “*It’s Sexual Assault. It’s Barbaric*”: *Strip Searching in Women’s Prisons as State-Inflicted Sexual Assault*, 35(2) *AFFILIA* 160, 167 (2020) (speaking on strip searches, one incarcerated woman stated “[Y]ou have these authority figures telling you to do all this and it’s like you don’t know what to do. Well, you gotta do it.”).

⁵³ *Id.*

classified the searches as sexual assault.⁵⁴ For some, the searches brought up trauma from being sexually violated before going to prison.⁵⁵ Still, despite these views held by people directly impacted by strip search policies, the Supreme Court has held that, in the name of prison security, strip searches are often appropriate, even during booking for a minor crime.⁵⁶

In an attempt to reduce the frequency of sexual assault in prisons, Congress passed the Prison Rape Elimination Act (PREA) in 2003.⁵⁷ The Act created the National Prison Rape Elimination Commission, which is responsible for drafting standards to eliminate prison rape.⁵⁸ The Commission increased the amount of reporting and compiled statistics surrounding prison rape through the Bureau of Justice Statistics.⁵⁹ Additionally, PREA authorized the Department of Justice to adopt rules and standards to respond to prison rape.⁶⁰ PREA Standards were published in the Federal Register and became effective in 2012 as 28 CFR § 115.15.⁶¹ PREA outlaws cross-gender strip searches in prisons and jails except in urgent circumstances, acknowledging that cross-gender strip searches contribute to the scourge of sexual assaults in prisons.⁶² The Act's supporting documents note that limiting bodily contact between prisoners and staff is necessary to prevent abuse and trauma that could arise from the interactions.⁶³ Specifically, PREA states that facilities "shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners."⁶⁴

PREA applies to federal prisons as well as locally operated facilities such as jails and juvenile detention centers, but despite this broad application, the Act's enforcement capabilities are somewhat limited.⁶⁵ To encourage compliance, the government can withhold federal funds if a facility

⁵⁴ *Id.* at 168 ("These findings provide evidence that the forced removal of clothing via strip searches is a form of sexual assault.")

⁵⁵ Hutchinson, *supra* note 52 at 166 ("[B]eing strip searched can be particularly traumatic for women who have experienced sexual violence prior to becoming incarcerated"). See also Ha, *supra* note 47, 2742 ("Strip searches of women have been labeled as sexual assault and compared to rape.")

⁵⁶ *Florence*, 566 U.S. at 353.

⁵⁷ 34 U.S.C.S. § 30302(2)-(3).

⁵⁸ *Prison Rape Elimination Act*, NAT'L PREA RESOURCE CTR., <https://www.prearesourcecenter.org/about/prison-rape-elimination-act> [<https://perma.cc/DUZZ-MDNE>].

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² 28 C.F.R. § 115.15.

⁶³ *PREA Standards in Focus*, NAT'L PREA RESOURCE CTR. 1, <https://www.prearesourcecenter.org/sites/default/files/library/115.15.pdf> [<https://perma.cc/JM3S-UFAG>].

⁶⁴ *Id.*

⁶⁵ *Frequently Asked Questions: Do the Standards Apply to Locally Operated Facilities?*, NAT'L PREA RESOURCE CTR. (Feb. 7, 2013), <https://www.prearesourcecenter.org/frequently-asked-questions/do-standards-apply-locally-operated-facilities#:~:text=yes,.not%20comply%20with%20the%20standards> [<https://perma.cc/3VUL-YNBQ>].

violates PREA.⁶⁶ In practice, however, this enforcement mechanism rarely pushes facilities to change their policies to align with PREA's goals. For example, in 2020, the state of Virginia received \$41.1 million in federal funds to run its jails.⁶⁷ That figure only accounted for 3.9 percent of all funding provided to Virginia's jails for 2020.⁶⁸ The loss of federal funding would not be negligible, but it would not force Virginia to shut down its jails. Further, if a local facility is not operated by a state, PREA provides no federal financial penalty for non-compliance.⁶⁹ The local facility may face consequences only if it has a contract to hold state or federal inmates.⁷⁰ PREA's funds-based enforcement mechanism fails to effectively protect all incarcerated people in the United States from prison rape or sexual abuse.

What's more, prisons' inconsistent housing policies for incarcerated transgender people contribute to cross-gender strip searches despite PREA's command. Under PREA, prison staff are told to make housing determinations for transgender prisoners on a case-by-case basis.⁷¹ The Act specifies that in making assignments, staff should consider the transgender inmate's health, safety, and gender identity.⁷² However, in practice, there are many cases in which transgender prisoners are housed in facilities with members of the opposite gender.⁷³ Because they are only recognized as the gender of those the prison staff houses them with, transgender prisoners are subjected to cross-gender strip searches.⁷⁴

⁶⁶ *Id.*

⁶⁷ COMMW. OF VA. COMPENSATION BD., *FY 2020 Jail Cost Report: Annual Jail Revenues and Expenditures Report 1* (2021), <https://www.scb.virginia.gov/docs/fy20jailcostreport.pdf> [<https://perma.cc/Z9GN-ABSP>] (“The report shows \$41.1 million in Federal funding. Federal funding accounted for 3.9% of all funding provided to Virginia’s jails in FY 2020, compared to 3.5% in FY 2019.”).

⁶⁸ *Id.*

⁶⁹ PREA, *supra* note 63.

⁷⁰ *Id.*

⁷¹ *Frequently Asked Questions: Does a policy that houses transgender or intersex inmates based exclusively on . . .*, NAT'L PREA RESOURCE CENTER (Mar. 24, 2016), <https://www.prearesourcecenter.org/frequently-asked-questions/does-policy-houses-transgender-or-intersex-inmates-based-exclusively> [<https://perma.cc/PN4T-UBB3>].

⁷² *Id.*

⁷³ *See, e.g.,* Jaclyn Diaz, *Minnesota Recognizes She's a Woman. She's Locked in a Men's Prison Anyway*, NPR (Oct. 13, 2022), <https://www.npr.org/2022/10/04/1126801351/trans-rights-transgender-inmates> [<https://perma.cc/X9KV-Z47P>] (“Lusk’s situation is one shared by many transgender people behind bars in the U.S. prison system. Because, in practice, they are often forced to stay in prisons according to their assigned sex at birth or genitalia at the time they were arrested, transgender inmates face greater risk of assault, discrimination, abuse and humiliation, according to attorneys, advocates and incarcerated individuals.”); Kate Sosin, *Trans, Imprisoned—and Trapped*, NBC NEWS (Feb. 26, 2020), <https://www.nbcnews.com/feature/nbc-out/transgender-women-are-nearly-always-incarcerated-men-s-putting-many-n1142436> [<https://perma.cc/ADM3-LY46>] (“But an NBC News investigation, based on dozens of documents received through public records requests and interviews with 18 current and former transgender prisoners, as well as researchers and advocates, found that nearly all transgender prisoners across the U.S. are housed, like Calvin, according to their sex at birth, not their gender identity.”).

⁷⁴ *See* Nora Neus, *Trans Women are Still Incarcerated with Men and it's Putting Their Lives at Risk*, CNN (June 23, 2021), <https://www.cnn.com/2021/06/23/us/trans-women-incar>

C. *The Litigation Gap in Strip Search Cases*

1. *Little precedent exists for those seeking to litigate cross-gender strip searches*

Currently, there is insufficient precedent to demonstrate to courts how they should apply the Fourth Amendment to strip search cases involving transgender individuals. There are no appellate court decisions that discuss the constitutionality of cross-gender strip searches of transgender prisoners. Furthermore, fewer than a dozen lower court cases on the topic exist around the country,⁷⁵ and because those cases are only binding in their own jurisdictions, they do not provide a general framework for handling these issues around the country. With so little precedent to which to refer, transgender litigants and those who advocate for them face challenges when arguing their cases.

Without clear legal precedent establishing that transgender inmates should be protected under the Fourth Amendment against cross-gender strip searches, transgender inmates will continue to be subjected to abuse via such searches. Due to the prevalence of strip searches in jails and the frequency with which transgender individuals interact with the carceral system,⁷⁶ there is a high risk of transgender inmates being searched by corrections officers who do not share their gender identity.

2. *PREA does not grant a private right of action to those who are incarcerated in federal prisons*

PREA does not create a private right of action for incarcerated people.⁷⁷ A incarcerated individual could not bring a lawsuit against a prison exclusively claiming that its strip search procedures violate PREA.⁷⁸ Therefore, fewer cases challenging the reasonableness of strip searches can survive the

ceration/index.html [https://perma.cc/G97H-JR4B] (“‘Since I’ve been out, I’ve been hearing stories of trans people being assaulted . . . being stripped out,’ or strip searched, by male correctional officers says [Jasmine Rose] Jones, alleging that is happening because the trans women are still being housed in men’s facilities with officers who are men.”).

⁷⁵ See, e.g., *Naisha*, 490 F.3d at 804; *Shaw v. District of Columbia*, 944 F. Supp. 2d 43 (D.D.C. 2013); *Carter-el*, 2020 WL 939289, at *4; *Diamond v. Owens*, 131 F.3d. 1346, 1355 (M.D. Ga. 2015); *Jackson v. Valdez*, 852 F. App’x 129, 131 (5th Cir. 2021); *I.Z. v. City of Phila.*, No. CV 17-1517, 2017 WL 4883156, at *1 (E.D. Pa. Oct. 30, 2017). There are other cases that involve incarcerated transgender people and their allegations of improper housing, harassment, and mistreatment, among other things, in prison, but few cases specifically address the question of whether it is a Fourth Amendment violation to subject a transgender prisoner to a cross-gender strip search.

⁷⁶ Ax, *supra* note 3.

⁷⁷ See, e.g., Brenda V. Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues*, 3 CRIM. L. BRIEF 10, 11 (2008); Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 801, 812 (2014).

⁷⁸ Erica Gammill, *PREA Legal Landscape: Prisoner Litigation*, NAT’L PREA RESOURCE CENTER (Feb. 24, 2021), <https://www.prearesourcecenter.org/sites/default/files/library/>

pleading stage of litigation. Fewer cases lead to less precedent for plaintiffs to reference when seeking to change strip search policies. In fact, courts have repeatedly dismissed complaints that only assert a civil PREA claim.⁷⁹

Instead of using PREA to invoke a private right of action, plaintiffs can use a facility's noncompliance with PREA to support an independent constitutional or tort claim. For example, if an incarcerated person was strip searched by a guard of the opposite gender and wanted to file a lawsuit against the prison, the lawsuit would have to allege an independent constitutional or statutory harm or tort claim. The incarcerated person could then claim that the prison violated PREA by allowing the strip search to happen. Despite this workaround, however, the inability to bring a PREA violation as a private right of action and the Act's limited enforcement mechanisms render the Act's ban on cross-gender strip searches largely ineffective.

II. PRISONERS' FOURTH AMENDMENT RIGHTS AND THE CONSTITUTIONALITY OF STRIP SEARCHES

"They forced me to bend over and open up my legs to make sure I didn't have a hidden penis."

Tahj Graham⁸⁰

Prisoners retain some of their constitutional protections while incarcerated.⁸¹ The Supreme Court has held that incarceration "brings about the necessary withdrawal or limitation of many privileges and rights,"⁸² but some of

PREA%20Legal%20Landscape%20Series%20-%20Part%201%20Prisoner%20Litigation.pdf [https://perma.cc/GM4M-NJWU].

⁷⁹ See *Maddux v. Metzger*, No. CV 20-414 (MN), 20 WL 6742966, at *5 (D. Del. Nov. 16, 2020); *Adger v. Carney*, No. 18-2048-LPS, 2020 WL 1475422, at *5 (D. Del. Mar. 26, 2020); *Bowens v. Emps. of the Dep't of Corr.*, No. 14-2689, 2015 WL 803101, at *1 n.1 (E.D. Pa. Feb. 26, 2015); *Washington v. Folino*, No. 11-1046, 2013 WL 998013, at *4 (W.D. Pa. Feb. 28, 2013) (holding that violations of PREA do not create a private cause of action). Courts also dismiss lawsuits based on PREA violations if they do not believe that a plaintiff has exhausted all of the administrative remedies at their correctional facilities before filing a lawsuit. See *Naisha*, 2021 WL 5632063, at *3 (considering whether Plaintiff exhausted the remedies through the PREA complaint process); *Porter v. Nussle*, 534 U.S. 516, 524 (2002) (holding that state prisoners must exhaust administrative remedies before filing a complaint).

⁸⁰ Aviva Stahl, *Strip Searches, Trauma, Isolation: Trans Men Describe Life Behind Bars*, NBSC News (Dec. 3, 2021), <https://www.nbcnews.com/nbc-out/out-news/strip-searches-trauma-isolation-trans-men-describe-life-bars-rcna6490> [https://perma.cc/5EB6-TMY3]. Tajn Graham is a transgender man. He explained that while he was incarcerated, he had female genitalia. During his first day at a women's prison, he was told to expose himself in front of a large group of incarcerated women. He stated that the guards said, "You were born a f—— girl, you're at a woman unit." *Id.*

⁸¹ *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."); see also *Shaw v. Murphy*, 532 U.S. 223, 229 (2001) ("We nonetheless have maintained that the constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large.").

⁸² *Price v. Johnston*, 334 U.S. 266, 285 (1948).

prisoners' rights remain during their incarceration.⁸³ For example, prisoners retain their First Amendment right to access the courts⁸⁴ and their Eighth Amendment right to be free from cruel and unusual punishment.⁸⁵

The Fourth Amendment's application to carceral spaces is a bit more complicated, as its protections with regards to prisoners are subject to layers of tests and assessments.⁸⁶ In particular, the Fourth Amendment does not protect prisoners from having guards search their bodies or their cells.⁸⁷ As the Court established in *Katz v. United States*⁸⁸, the Fourth Amendment does not prescribe a general right to privacy, but it does protect an individual's privacy against certain governmental intrusions.⁸⁹ In his concurrence, Justice Harlan further clarified that "a person has a constitutionally protected reasonable expectation of privacy."⁹⁰

In the context of prisons, the Court determined in *Hudson v. Palmer* that the permissibility of a search of a prison cell depends on "whether a prisoner's expectation of privacy in his prison cell is the kind of expectation that 'society is prepared to recognize as "reasonable"'."⁹¹ Ultimately, the Court decided that no reasonable expectation of privacy exists in a prison cell due to the "needs and objectives of penal institutes."⁹²

Although courts have found that the Fourth Amendment provides virtually no protection against searches of a prisoner's cell, the Amendment's reasonableness requirement can restrict searches of an incarcerated person's

⁸³ See *Turner*, 482 U.S. at 84 ("The first of these principles is that federal courts must take cognizance of the valid constitutional claims of prison inmates. Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.").

⁸⁴ See *McGehee v. Hutchinson*, 463 F. Supp. 3d 870, 924 (E.D. Ark. 2020).

⁸⁵ See *Foster v. Runnels*, 554 F.3d 807, 812 (9th Cir. 2009).

⁸⁶ See *Turner*, 482 U.S. at 85 ("Our task, then, as we stated in *Martinez*, is to formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.');" *Bell*, 441 U.S. at 535 ("In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee.").

⁸⁷ See *Bell*, 441 U.S. at 560 ("But we deal here with the question whether visual body-cavity inspections as contemplated by the MCC rules can ever be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can."); *Hudson v. Palmer*, 468 U.S. 517, 525–26 (1984) ("[W]e hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.").

⁸⁸ 389 U.S. 347 (1967).

⁸⁹ *Id.* at 350.

⁹⁰ *Id.* at 360 (Harlan, J., concurring).

⁹¹ *Hudson*, 468 U.S. at 525 (quoting *Katz*, 389 U.S. at 361).

⁹² *Id.* at 526 ("Notwithstanding our caution in approaching claims that the Fourth Amendment is inapplicable in a given context, we hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of a prison cell.").

body.⁹³ *Turner v. Safley* and *Bell v. Wolfish* provide the applicable legal framework for determining the constitutionality of strip searches in prisons.⁹⁴ In this section, this Note will analyze the tests established in both cases, their progeny, and their implications for cross-gender strip searches.

A. *Turner v. Safley: Balancing Prisoners' Rights with Penological Goals*

To determine whether a prison regulation infringes on inmates' constitutional rights, courts turn to the test the Supreme Court established in *Turner v. Safley*.⁹⁵ In *Turner*, the Court held that a regulation that would otherwise violate an inmate's constitutional rights can still survive if it is "reasonably related to legitimate penological interests."⁹⁶ For a regulation to pass muster, there must be a credible nexus between the regulation's restriction on inmates' rights and the governmental interest justifying the restriction.⁹⁷ In addition, *Turner* directs courts to consider whether there are other ways for the prisoner to exercise the restricted right.⁹⁸ If there are alternative avenues for the prisoner to practice the right, courts may give judicial deference to the prison administration's decision to keep the regulation in place.⁹⁹ If the prisoner has no other outlet to exercise the constitutional right, the regulation may be unreasonable.¹⁰⁰ *Turner's* final requirement is that courts must consider the "impact [an] accommodation of the asserted constitutional right will have on guards and other inmates, and the allocation of prison resources generally."¹⁰¹

Given the relative deference that the test set forth in *Turner* gives to prisons to restrict prisoners' rights, strip searches are not *per se* unconstitutional under *Turner* or its progeny.¹⁰² Subsequent caselaw expanded upon the *Turner* test in the specific context of strip searches.

⁹³ *Bell*, 441 U.S. at 558.

⁹⁴ *Turner*, 482 U.S. at 89; *Bell*, 441 U.S. at 559.

⁹⁵ See e.g., *Bull*, 595 F.3d at 971 ("Because the purpose of the search policy at issue was to further institutional security goals within a detention facility, the principles articulated in *Bell v. Wolfish* and *Turner v. Safley*, . . . govern our analysis.") (citations omitted); *Land v. Cnty. of Maricopa*, No. CV-08-1558-PHX-ROS, 2011 WL 13185716, at *3 (D. Ariz. Aug. 30, 2011) ("First, the Court could apply the test set forth by the Supreme Court in *Bell v. Wolfish* . . . Second, the Court could apply the general test for prison regulations contained in *Turner v. Safley*." (citations omitted)).

⁹⁶ *Turner*, 482 U.S. at 89.

⁹⁷ *Id.*

⁹⁸ *Id.* at 89–90.

⁹⁹ *Id.* at 90.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See, e.g., *Whyte v. Rockey*, No. 1:21-CV-00124, 2021 WL 2986367, at *8 (M.D. Pa. July 15, 2021).

B. Bell v. Wolfish: The Fourth Amendment, Strip Searches, and Bodily Privacy

The *Bell* court took the *Turner* standard and applied it to prison strip searches.¹⁰³ In *Bell*,¹⁰⁴ the plaintiffs alleged that routine “shakedown” inspections by prison guards violated their Fourth Amendment rights.¹⁰⁵ The Court acknowledged that prisoners retain some of their constitutional rights while incarcerated, but conducted an inquiry to determine if the inspections were nevertheless justified in relation to legitimate penological goals. The Court held that, when analyzing a detention facility’s search policy, judges should “balance[] the need for the particular search against the invasion of personal rights that the search entails.”¹⁰⁶ The Court ultimately identified four factors for evaluating the constitutionality of strip searches: (1) the scope of the particular intrusion; (2) the manner in which the search was conducted; (3) the justification for initiating the search; and (4) the place where the search was executed.¹⁰⁷ These factors, and the *Bell* balancing test, set forth the criteria that prisons may use to craft their search policies in a way that passes constitutional muster.¹⁰⁸ In setting forth this test, *Bell* added more color to *Turner* and an additional a layer of analysis for courts to consider when deciding prison strip search cases that allege Fourth Amendment violations.

Importantly, the Court’s opinion in *Bell* recognized that policymakers must consider prisoners’ privacy interests.¹⁰⁹ *Bell*’s reference to prisoners’ privacy interests opens the door to discussions about strip searches’ physical intrusion on incarcerated people’s bodies and the emotional and mental impact strip searches have on prisoners.

There is no question that strip searches can be incredibly violating for prisoners.¹¹⁰ Courts have repeatedly indicated that the “privacy interest in one’s body is more acute than the interest in one’s property.”¹¹¹ In *Henry v.*

¹⁰³ *Bell*, 441 U.S. at 539.

¹⁰⁴ *Id.* at 555.

¹⁰⁵ *Id.* at 555–56.

¹⁰⁶ *Id.*

¹⁰⁷ See *Land*, 2011 WL 13185716, at *3 (quoting *Bell*, 441 U.S. at 559).

¹⁰⁸ See Law Enforcement Policy Center, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, *Strip and Body Cavity Searches* 5 (2019), <https://www.theiacp.org/sites/default/files/2019-09/Strip%20Searches%20-%20202019.pdf> [<https://perma.cc/AP9D-HJ5P>].

¹⁰⁹ *Bell*, 441 U.S. at 522.

¹¹⁰ See *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004) (“highly intrusive searches of the person” implicate “dignity and privacy interests” that “simply do not carry over to vehicles”).

¹¹¹ *Hulett*, 969 F.3d at 778 (7th Cir. 2020); see also *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) (recognizing that searches of a person’s body receive “significantly heightened protection” under the Fourth Amendment as compared with property searches); *Ybarra v. Illinois*, 444 U.S. 85, 91–92 (1979) (holding that a search warrant for a tavern and its bartender did not permit body searches of all the bar’s patrons); *United States v. Di Re*, 332 U.S. 581, 587 (1948) (holding that probable cause to search a car did not justify a body search of a passenger).

Hulett, for example, the Seventh Circuit stated that strip searches are “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission”¹¹² and held that the “Fourth Amendment protects (in a severely limited way) an inmate’s right to bodily privacy during visual inspections.”¹¹³ The case was brought as a class action against the Illinois Department of Corrections after hundreds of female inmates were forced to be strip searched as part of cadet training and ended up standing naked for hours while being berated with insults by prison guards.¹¹⁴

For cisgender inmates, courts have reiterated findings that inmates who experience cross-gender strip searches experience intense emotional anguish. In *Nelson v. City of Stamford*, for example, a female plaintiff recounted being strip searched by two male officers who placed their hands on her buttocks.¹¹⁵ The plaintiff claimed that the experience was humiliating, and the Connecticut district court held that a jury could potentially find the incident unreasonable.¹¹⁶ In its review of another case involving female inmates subjected to repeated strip searches by male guards, the Ninth Circuit upheld a district court’s finding that “[t]here is a high probability of great harm, including severe psychological injury and emotional pain and suffering, to some inmates from these searches, even if properly conducted.”¹¹⁷ In yet another Ninth Circuit case, in which it was alleged that a female cadet intentionally squeezed a male inmate’s scrotum, penis, and anus during a strip search, the court acknowledged that cross-gendered strip searches were a “frightening and humiliating invasion, that represented indignity in the prison system.”¹¹⁸ In each case, after engaging in *Bell*’s balancing test, the courts held that prisoners’ privacy interests and the humiliation to which they were subjected outweighed penological interests.¹¹⁹

¹¹² *Hulett*, 969 F.3d at 778 (citing *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983)).

¹¹³ *Id.* at 779.

¹¹⁴ *Id.* at 773–75.

¹¹⁵ No. 3:09-cv-1690, 2012 WL 233994, at *25 (D. Conn. Jan. 25, 2012).

¹¹⁶ *Id.* at *27.

¹¹⁷ *Jordan v. Gardner*, 986 F.2d 1521, 1525–26 (9th Cir. 1993)

¹¹⁸ *Byrd*, 629 F.3d at 1143, 1147.

¹¹⁹ *See, e.g., Henry*, 969 F.3d at 778 (“We hold that the Fourth Amendment right to bodily privacy is one of those that the Constitution guarantees, even though in a significantly diminished way, within the walls of a prison.”); *Byrd*, 629 F.3d at 1142 (“Applying the *Bell* factors in the context of our precedent recognizing the privacy interest of inmates in their personal dignity, giving credence to the compelling findings made by the Commission, and acknowledging the applicable accrediting standards, we conclude that the cross-gender strip search of *Byrd* was unreasonable as a matter of law.”); *Nelson*, 2012 WL 233994, at *27 (“A reasonable jury could conceivably find that the removal of Mrs. Nelson’s shirt and brassiere by a female and a male officer and the touching of Mrs. Nelson’s buttocks underneath her pants by a male officer, despite the Defendants’ interest in removing dangerous items from Mrs. Nelson to ensure her safety, constituted an unreasonable search in violation of the Fourth Amendment. Accordingly, summary judgment is denied as to Mrs. Nelson’s claim of an unconstitutional strip search in violation of the Fourth Amendment.”).

C. *Turner and Bell in Practice: Fourth Amendment Challenges to Strip Searches in Lower Courts*

A few cases provide litigants with guidance with regards to how lower courts use *Turner* and *Bell* in practice.¹²⁰ When litigants question the constitutionality of a prison's strip search policy, courts look to *Turner*, when a case deals with the particularities of a specific search, courts analyze the search against the *Bell* factors. In *Bull v. City and County of San Francisco*, the Ninth Circuit reversed a lower court's holding that strip searching people upon booking was a violation of their Fourth Amendment rights.¹²¹ The appellate court pointed to *Bell* and noted that prisons and jails are fraught with security threats such that, at times, strip searches are necessary.¹²² Further, the court referred to the case-by-case determination process established in *Turner*, and emphasized that "the reasonableness of a search is determined by reference to its context."¹²³ Ultimately, the court found that the prison was justified in conducting the search simply because the facility found contraband during the strip search in question.¹²⁴ Relying on that evidence alone, the court held that searches at the San Francisco jail were in line with the principles established in *Turner* and *Bell*.¹²⁵

The District Court of Arizona followed the Ninth Circuit's lead in *Land v. County of Maricopa*. The court held in *Land* that same-gender strip searches of female inmates who were being transferred into Estrella jail did not violate the Fourth Amendment.¹²⁶ The court relied on both the *Turner* test and the *Bell* factors to come to its decision.¹²⁷ Starting with *Bell*, the court held that the method in which the searches were conducted was appropriate.¹²⁸ Then, to address the constitutionality of the policy in general, the court factored in the *Turner* test.¹²⁹ The court stated that the creation of an alternative policy would redistribute the allocation of prison resources and place an unnecessary burden on the facility, and that there was an absence of ready

¹²⁰ See *Bull*, 595 F.3d at 967; *Land*, 2011 WL 13185716, at *3.

¹²¹ 595 F.3d at 982. An interesting component of *Bull* is that even though the complaint stated that a cross-gender strip search occurred, the court does not factor this into the analysis. That fact does not appear anywhere in the appellees' brief, and it is not referred to by the court. The court only mentions cross-gender strip searches when it states that, according to the prison's policies, they are not allowed. See *id.*; see also Appellee's Opening Brief, *Bull*, 595 F.3d 964; Class Action Complaint, *Bull v. City and Cnty. of S.F.*, No. C-03-1840, 2003 WL 23794307 (N.D. Cal.) (Oct. 27, 2003).

¹²² *Id.* at 966–67.

¹²³ *Id.* at 971–72.

¹²⁴ *Id.* at 969.

¹²⁵ *Id.* at 971–72.

¹²⁶ *Land*, 2011 WL 13185716, at *5.

¹²⁷ *Id.* at *3 ("[I]t is unclear whether the Court should apply the *Bell* test, the *Turner* test, or both. If the correct answer is 'both,' it is unclear what that means. That is, it is unclear how a search reasonable under the *Bell* test would ever fail to satisfy the *Turner* test. In an abundance of caution, the Court will address both the *Bell* and *Turner* tests.").

¹²⁸ *Id.* at *3–4.

¹²⁹ *Id.* at *5.

alternatives that would keep the prison free from contraband.¹³⁰ Additionally, the court determined that, because there was a legitimate nexus between the correctional facilities' strip search policy and the goal of keeping contraband out of the jail, the searches that were incident to facility transfers were reasonable.¹³¹ Therefore, the strip searches were held to be constitutionally valid.¹³²

By contrast, a prisoner seeking to challenge the constitutionality of strip searches under the Fourth Amendment was met with success in *Amador v. Baca*. In that case, during a same-sex strip search, female guards instructed a female prisoner to disrobe, lift her arms, lift her breasts, stretch her belly button for display, and manually spread her vagina for inspection in the view of other female inmates.¹³³ Because the guards did not provide adequate reasoning as to why they did not seek out alternative procedures for conducting the search, such as installing privacy shields between the inmates, the court held that the search failed the *Turner* test.¹³⁴ Regarding the *Bell* factors, the court found that the prison failed to provide any sound reasoning to defend the scope, manner, justification, and place of the search.¹³⁵ The court concluded that the plaintiff's Fourth Amendment rights were violated "based on the invasiveness of the search (i.e., the use of the 'labia lift' despite less intrusive alternatives), which used one of the most invasive procedures conducted in penological institutions, the group setting of the search, in which inmates could not avoid viewing each other, the lack of privacy within that group setting, and—most importantly—the lack of a penological purpose or informed justification for not providing individualized privacy."¹³⁶

While *Bull, Land*, and *Amador* show that, depending on the circumstances, same-sex strip searches may or may not be constitutional, courts appear to share the opinion that cross-gender strip searches are "frowned upon."¹³⁷ The analyses that courts engage in when deciding cross-gender strip search cases strongly suggests that, absent exigent circumstances, cross-gender strip searches of cisgender prisoners are unconstitutional.¹³⁸ In *Byrd v. Maricopa County Sheriff's Department*, Byrd, an incarcerated man,

¹³⁰ *Id.*

¹³¹ *Id.* ("Applying these factors here is straightforward. First, there is an obvious 'valid, rational connection' between the strip search policy and the goal of keeping contraband out of Estrella Jail.")

¹³² *Id.*

¹³³ *Amador v. Baca*, No. CV 10-01649-SVW-JEM, 2017 WL 9472901, at *1–2 (C.D. Cal. June 7, 2017).

¹³⁴ *Id.* at *8.

¹³⁵ *Id.*

¹³⁶ *Id.* at *10.

¹³⁷ *Harris v. Miller*, 818 F.3d 49, 63 (2d Cir. 2016) ("[C]ross-gender strip searches of inmates conducted in the absence of an emergency or other exigent circumstances are usually frowned upon.")

¹³⁸ See *Byrd*, 629 F.3d at 1141; 28 C.F.R. § 115.15(a) ("The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.")

was strip searched by a female guard.¹³⁹ Byrd sued the prison, stating that he felt violated because, even though there were several other male guards around, a woman conducted his search.¹⁴⁰ He claimed that the female guard touched his lower back, hip, penis, buttocks, and that she “grabbed his balls and his scrotum.”¹⁴¹ In its opinion, the Ninth Circuit stressed that “the desire to shield one’s unclothed figure from the view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and dignity.”¹⁴² The court also stated that “it is not surprising that a connection has been made between cross-gender [strip] searches and the level of sexual impropriety between inmates and corrections [officers].”¹⁴³ Applying *Bell*, the court found that the strip search “far exceeds searches we have previously sanctioned and weighs in favor of a finding of unreasonableness.”¹⁴⁴ The fact that the search was cross-gender was a crucial factor for the court because, although it found that the place of the search was reasonable and that the security reasons behind the search were justified, “there was no justification given for conducting a cross-gender strip search.”¹⁴⁵ Indeed, the Court found that the effect of the cross-gender strip search was “so extreme that a conclusion of unreasonableness [was] compelled.”¹⁴⁶

Other courts have agreed with *Byrd*’s conclusion. For example, in *Nelson*, the United States District Court for the District of Connecticut held that “[a] reasonable jury could conceivably find that the removal of Mrs. Nelson’s shirt and brassiere by a female and a male officer and the touching of Mrs. Nelson’s buttocks underneath her pants by a male officer, despite the Defendants’ interest in removing dangerous items from Mrs. Nelson . . . constituted an unreasonable search in violation of the Fourth Amendment.”¹⁴⁷ The court found that, despite the few factors that passed the *Bell* test, the cross-gender component of the search suggested that it was an unreasonable constitutional violation.¹⁴⁸ This precedent, coupled with PREA’s prohibition on cross-gender strip searches except in exigent circumstances,¹⁴⁹ suggests that cisgender prisoners have a Fourth Amendment protection against cross-gender strip searches.

¹³⁹ *Byrd*, 629 F.3d at 1137.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 1141.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1143.

¹⁴⁶ *Id.*

¹⁴⁷ *Nelson*, 2012 WL 233994, at *27.

¹⁴⁸ *Id.*

¹⁴⁹ 28 C.F.R. § 115.15.

III. TRANSGENDER INMATES' FOURTH AMENDMENT RIGHTS AND BARRIERS TO PLEADING CONSTITUTIONAL VIOLATIONS

“I was humiliated by Broome County jail staff because I am a transgender woman. I was harassed, mocked, misgendered and worse: jail staff strip-searched me, beat me up, placed me in the male section of the jail, and withheld my hormones for a period of time, forcing me to go into agonizing withdrawal . . . The abuses that police and jail staff across New York state commit against transgender New Yorkers must end.”

Makyyla Holland¹⁵⁰

Transgender prisoners should be protected against cross-gender strip searches under the Fourth Amendment. Federal courts have not been faced with a case that directly challenges a prison's policy concerning cross-gender strip searches of transgender people. Despite this, precedent in federal courts shows that, in deciding cross-gender strip search cases, courts should apply the *Turner* test along with the *Bell* factors.¹⁵¹ This section will argue that, under *Turner*, any strip search policy that allows for the cross-gender search of an incarcerated transgender person would be unconstitutional. Further, it will argue that, under *Bell*, courts should find that transgender prisoners should only be strip searched by a member of the opposite gender in exigent situations, as is the case for cisgender prisoners. Unfortunately, not only do courts disregard the principles established by *Bell* when deciding cases involving transgender prisoners, they have also imposed an unjustified requirement upon incarcerated transgender people: they must medically transition to be treated as the gender with which they identify.¹⁵² Lastly, this section will explain that cross-gender strip searches of transgender inmates violate their privacy interests, leaving them susceptible to trauma and suicidal tendencies.

¹⁵⁰ *Protect Trans New Yorkers in Jails and Prisons*, NEW YORK CIVIL LIBERTIES UNION, <https://www.nyclu.org/en/campaigns/protect-trans-new-yorkers-jails-and-prisons> [https://perma.cc/8BVE-2WMV].

¹⁵¹ See, e.g., *Harris*, 818 F.3d at 57–58 (“If the inmate’s Fourth Amendment claim challenges a prison regulation or policy, courts typically analyze the claim under *Turner v. Safley*. . . But if the inmate’s Fourth Amendment claim challenges an isolated search, courts typically apply the standard set forth in *Bell v. Wolfish*”); *Bull*, 595 F.3d at 971 (“Because the purpose of the search policy at issue was to further institutional security goals within a detention facility, the principles articulated in *Bell v. Wolfish* and *Turner v. Safley* govern our analysis.”).

¹⁵² Cf. *Shaw*, 944 F. Supp. 2d at 48 (acknowledging that Plaintiff was transgender because she medically transitioned), with *Carter-el*, 2020 WL 939289, at *3 (refusing to acknowledge that the Plaintiff was a woman because she did not medically transition and was legally a male).

A. *Cross-Gender Strip Searches of Transgender Prisoners Fail the Turner Test*

Prison policies that permit cross-gender strip searches of transgender individuals would fail the *Turner* test and be held unconstitutional. If an inmate challenges a strip search policy, a court must determine if there is: (1) a valid connection between the prison regulation and the legitimate governmental interest implemented to justify it; (2) an alternative way for the prisoner to practice their constitutional right; and (3) a likelihood that an accommodation of the asserted constitutional right will negatively impact the prison's staff, the facility's resources, and the other prisoners.¹⁵³

As to the first prong of the *Turner* test, precedent suggests that, in some circumstances, a court may condone the cross-gender strip search of a transgender inmate. Courts have stated that a cross-gender strip search could be justifiable in exigent situations due to a prison's security interests.¹⁵⁴ However, outside of emergencies, a court could feasibly say that a cross-gender search of an incarcerated transgender person has no penological interest, thus failing to satisfy this first prong.

Cross-gender strip searches of transgender prisoners may also fail under the second and third prongs of the *Turner* test. Part two of the test states that, if there is no other way for a person to assert their Fourth Amendment right to be free from unreasonable searches, the policy is more likely to be unreasonable.¹⁵⁵ If an incarcerated transgender person is subjected to a cross-gender strip search, they have no other way to assert their Fourth Amendment right against an unreasonable search.¹⁵⁶ Because they are incarcerated, their access to Fourth Amendment claims against seizure and unwanted searches of their cells are severely limited.¹⁵⁷ Their bodies are the only domain protected by the Fourth Amendment during their incarceration.¹⁵⁸ Therefore, if a

¹⁵³ *Turner*, 483 U.S. at 89–90.

¹⁵⁴ See, e.g., *Harris*, 818 F.3d at 63 (“[C]ross-gender strip searches of inmates conducted in the absence of an emergency or other exigent circumstances are usually frowned upon.”); 28 C.F.R. § 115.15(a) (“The facility shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.”).

¹⁵⁵ *Turner*, 482 U.S. at 89–90.

¹⁵⁶ *Hudson*, 468 U.S. at 25–26 (1984) (“[W]e hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.”).

¹⁵⁷ *Id.* at 518 (“There is no merit to respondent’s contention that the destruction of his personal property constituted an unreasonable seizure of that property violative of the Fourth Amendment. Assuming that the Fourth Amendment protects against the destruction of property, in addition to its mere seizure, the same reasons that lead to the conclusion that the Amendment’s proscription against unreasonable searches is inapplicable in a prison cell, apply with controlling force to seizures. Prison officials must be free to seize from cells any articles which, in their view, disserve legitimate institutional interests.”).

¹⁵⁸ See e.g., *Amador*, 2017 WL 9472901, at *10 (holding that a strip search violated a plaintiff’s Fourth Amendment rights based on the totality of the circumstances); *Byrd*, 629 F.3d

policy subjects transgender individuals to cross-gender strip searches, the policy should be considered unreasonable.

Part three of *Turner*'s test asserts that courts must consider how accommodating the litigant's constitutional right will impact guards, prison resources, and other incarcerated people.¹⁵⁹ Striking down a policy that permits cross-gender strip searches of transgender prisoners would not have a negative impact on guards, resources, or prisoners. Prisons in the United States staff both men and women to serve as guards in their facilities.¹⁶⁰ Because of this, they should be able to accommodate a transgender prisoner's request to be searched by someone who shares their gender identity. Additionally, accommodating a transgender prisoner's desire to only be subjected to same-gender strip searches would not negatively impact the rights of any other prisoners. Considering that prisons are currently obligated to conduct searches with privacy screens and out of view of other prisoners,¹⁶¹ the accommodation should be able to benefit transgender prisoners while having no impact on other incarcerated people. Using the *Turner* test, a court should hold that a policy allowing cross-gender strip searches of transgender prisoners is unconstitutional under the Fourth Amendment.

B. Courts' Treatment of Transgender Individuals Does Not Adhere to the Bell Balancing Test

In cases involving cisgender prisoners challenging the constitutionality of a specific search, courts apply the factors set forth in *Bell*; by contrast, courts do not consistently use *Bell* in cases involving transgender litigants.¹⁶² As previously discussed, the Court established in *Bell* that, when determining the constitutionality of a strip search, courts must consider (1) the scope of the particular intrusion, (2) the manner in which it is conducted, (3) the

at 1142 (determining that Plaintiff's bodily privacy interests were compromised during a strip search and therefore, the search violated the Fourth Amendment).

¹⁵⁹ *Turner*, 482 U.S. at 90.

¹⁶⁰ *See, e.g.*, Alysia Santo, *Peeping Toms: Do Prison Inmates Have a Right to Privacy?*, THE MARSHALL PROJECT (Dec. 17, 2014), <https://www.themarshallproject.org/2014/12/17/peeping-toms> [<https://perma.cc/TWD8-RJA6>] ("Cross-gender supervision in U.S. prisons has only become the norm since the 1970's."); Laura E. Bedard, *Cross-gender Supervision: The Inmate Perspective*, CORRECTIONS 1 (Sep. 7, 2019), <https://www.corrections1.com/corrections/articles/cross-gender-supervision-the-inmate-perspective-FxVRQP4JwsuNcS4b/> [<https://perma.cc/YQQ7-D9FZ>] ("These days, most states allow male correctional staff to supervise female inmates and vice versa.").

¹⁶¹ *Young v. Cnty. of Cook*, 616 F. Supp. 2d 834, 852 (N.D. Ill. 2009) (finding in 2009 that the failure to use privacy screens during strip searches without justification was a Fourth Amendment violation; *Byrd*, 629 F.3d at 1141 (finding that a search's reasonableness was in question because it was conducted in front of other prisoners).

¹⁶² *See, e.g.*, *Carter-el*, 2020 WL 939289, at *2 ("Specifically, plaintiff cites to *Bell v. Wolfish*, and *Byrd v. Maricopa County Sheriff's Dep't*, and appears to argue that she considers the search that occurred to have been an impermissible cross-gender strip search. But the evidentiary record at summary judgment does not support such a characterization. Instead, the record demonstrates that plaintiff self-identifies as female, but is repeatedly identified as male on each of the legal documents related to her arrest and incarceration.") (citations omitted).

justification for initiating it, and (4) the place in which it is conducted.¹⁶³ Courts have typically found that cross-gender strip searches are unreasonable under the second prong of *Bell*'s test. For example, in *Nelson*, within its analysis of the manner in which Nelson was searched, the court stated that it "must also consider the fact that the search was cross-gendered."¹⁶⁴ The court then explained that having a male officer touch a woman underneath her pants could be seen as unreasonable and unconstitutional under the Fourth Amendment.¹⁶⁵

I. Courts' self-imposed transition requirement

However, courts have stymied the Fourth Amendment claims of transgender prisoners by imposing a transition requirement upon litigants. In several cases, a transgender litigant's success has depended on whether they have changed their genitals and physical appearance, suggesting that court shave read in a stringent transition requirement to these Fourth Amendment cases.¹⁶⁶

The only case in which a court employs the *Bell* factors to determine the constitutionality of a cross-gender search of a transgender person is *Shaw v. District of Columbia*. In *Shaw*, the plaintiff successfully argued that the cross-gender strip search she endured was unconstitutional.¹⁶⁷ The plaintiff had undergone gender confirmation surgery before she was incarcerated, yet was housed with male prisoners.¹⁶⁸ The District Court for the District of Columbia explained that the defendants' qualified immunity argument failed because "a reasonable officer would have known that a cross-gender search of a female detainee by male [] employees that included intimate physical contact, exposure of private body parts, and verbal harassment, all in front of male detainees and male [] employees in the absence of emergency, was unreasonable."¹⁶⁹ The court immediately accepted that Shaw is a transgender woman¹⁷⁰ and noted that Shaw "has undergone sex reassignment surgery"¹⁷¹ and "had her sex legally changed [from male] to female."¹⁷² In its analysis of the alleged Fourth Amendment violation, the court asserted that, because Shaw was claiming that the strip search was unreasonable, the balancing test set forth in *Bell* applied.¹⁷³

¹⁶³ *Bell*, 441 U.S. at 559.

¹⁶⁴ *Nelson*, 2012 WL 233994, at *26.

¹⁶⁵ *Id.* at *27.

¹⁶⁶ See *Carter-el*, 2020 WL 939289, at *2 and *Shaw*, 944 F. Supp. 2d at 55–56.

¹⁶⁷ *Id.* at 57.

¹⁶⁸ *Id.* at 49.

¹⁶⁹ *Id.* at 57.

¹⁷⁰ *Id.* at 47.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 55.

By contrast, the District Court for the Eastern District of Virginia refused to apply *Bell* to a case involving a transgender prisoner in *Carter-el*.¹⁷⁴ In *Carter-el*, the court immediately declined to identify Carter-el as a woman, even though she identified as one.¹⁷⁵ The court stated, “despite plaintiff’s self-identification as female, plaintiff’s booking papers, as well as the commitment order and custodial order issued in her criminal case, denote plaintiff’s sex as male” and therefore “plaintiff was housed in the general population.”¹⁷⁶ The court stated *Bell* was not determinative because Carter-el was legally a man, which would make the incident a reasonable same-sex strip search.¹⁷⁷ It quickly rushed through the *Bell* factors and did not spend any time focusing on the manner of the intrusion.¹⁷⁸ The court even referenced *Shaw* and stated that Carter-el’s case did not have the same Fourth Amendment questions because, in *Shaw*, the litigant had undergone a sex change, while in *Carter-el* the litigant had not.¹⁷⁹ While the circumstances surrounding the searches in *Shaw* and *Carter-el* were different—in *Shaw*, the guards physically touched Shaw and the search took place in front of other male prisoners,¹⁸⁰ and in *Carter-el*, the strip search was a private visual inspection¹⁸¹—it is nevertheless telling that the *Carter-el* court refused to apply all of *Bell*’s factors because Carter-el had not transitioned.¹⁸²

Given the lack of precedent regarding cross-gender searches of transgender prisoners, *Carter-el*’s misguided logic and its suggested requirement that transgender prisoners must medically transition to be granted constitutional protections serve as some of the only legal precedent available to transgender litigants. Potential litigants are limited to case law that effectively requires them to obtain gender confirmation surgery, which is out-of-touch with what constitutes a transition. While gender transition involves both social and sometimes medical processes, it is only in some cases that people pursue medical treatments or gender confirmation surgery.”¹⁸³

¹⁷⁴ *Carter-el*, 2020 WL 939289, at *3.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at *2.

¹⁷⁸ *Id.* at *3.

¹⁷⁹ *Id.* at *4.

¹⁸⁰ *Shaw*, 944 F. Supp. 2d at 52.

¹⁸¹ *Carter-el*, 2020 WL 939289 at *2.

¹⁸² *Id.* at *3.

¹⁸³ See Lesbian Gay Bisexual Transgender & HIV Project, *Transgender People and the Law*, ACLU, https://www.aclu.org/sites/default/files/field_pdf_file/lgbttransbrochure-law2015electronic.pdf [<https://perma.cc/MF6G-A3X4>]; *Frequently Asked Questions*, ACLU (Mar. 2015), https://www.aclu.org/sites/default/files/field_pdf_file/lgbttransbrochure-law2015electronic.pdf [<https://perma.cc/JX4G-V6EK>]. See also GLAAD Media Reference Guide – Transgender, GAY AND LESBIAN ALLIANCE AGAINST DEFAMATION, <https://www.glaad.org/reference/trans-terms> [<https://perma.cc/Q8KH-FM4R>] (“[N]ot all transgender people can or will take those steps, and a transgender identity is not dependent upon physical appearance or medical procedures.”); *Vuz v. DCSS III, Inc.*, No. 320CV00246GPCAGS, 2020 WL 7240369, at *2 (S.D. Cal. Dec. 9, 2020) (“This section provides, *inter alia*, that an individual’s lower anatomy or surgical status determines which jail facility the individual is booked into; no other changes or surgeries apply. Plaintiff alleges that

2. *Socio-economic barriers surrounding courts' and prisons' transition requirement*

By defining “transition” as whether an inmate has undergone gender confirmation surgery, courts have contributed to dangerous and stigmatic notions regarding transgender people, affecting the way that transgender inmates are treated in prisons, even beyond the context of strip searches.¹⁸⁴ For example, the implied transition requirement poses a significant problem when transgender individuals are assigned to units at a facility.¹⁸⁵ Some prisons, such as the Dallas County jail, have explicitly stated that is it their policy that an individual *must* have a sex change that aligns with their gender identity to be treated as that identity.¹⁸⁶ Considering that gender confirmation surgery is not ultimately determinative of a transition, the implementation of a transition requirement serves as an unjustified hurdle in transgender inmates' fight for a Fourth Amendment protection against cross-gender strip searches.

This hurdle is made especially insurmountable by the fact that medical transitioning is not readily accessible to everyone. Many transgender people who decide that they would like to medically transition are hit with medical costs that are not covered by insurance.¹⁸⁷ A National Center for Transgender Equality survey revealed that a quarter of the respondents “who tried to have insurance pay for their hormone replacement therapy were denied coverage, as were over half who sought coverage for transition-related surgery.”¹⁸⁸ To undergo a medical transition, the Philadelphia Center for Transgender Surgery estimates that surgery to change a person's genitals costs about “\$25,600 for male-to-female patients and about \$24,900 for female-to-

this policy establishes a test for womanhood that the overwhelming majority of transgender women will fail, as many transgender individuals do not undergo surgery to change their primary sex characteristics for a variety of reasons unrelated to the sincerity or legitimacy of their gender identity.”) (quoting the Second Am. Compl. ¶ 45).

¹⁸⁴ See Neus, *supra* note 74 (finding that prisons do not house transgender individuals based on their gender identity); Sosin, *supra* note 73 (studies show that transgender women are constantly housed with men because of their genitalia).

¹⁸⁵ See *Diamond v. Owens*, 131 F. Supp. 3d. 1346, 1355 (M.D. Ga. 2015) (in which a plaintiff who identified as female but did not undergo genital confirmation surgery was placed in a closed-security facility for adult male felons); *Jackson v. Valdez*, 852 F. App'x 129, 131 (5th Cir. 2021) (in which the plaintiff alleged that when she was being booked an officer said “[w]e need to know if you've had a sex change or not. We need to see if you have a penis or vagina . . . You are coming up in the system as male. It doesn't matter what you do, it can never be changed.”).

¹⁸⁶ *Valdez*, 852 F. App'x 129 at 131.

¹⁸⁷ Lisa Gill, *Transgender People Face Huge Barriers to Healthcare*, CONSUMER REPORTS, <https://www.consumerreports.org/healthcare/transgender-people-face-huge-barriers-to-healthcare-a9738689971/> [https://perma.cc/T58Y-LS7H].

¹⁸⁸ National Center for Transgender Equality, *The Report of the 2015 Transgender Survey*, NAT'L CNTR FOR TRANSGENDER EQUALITY 193, <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [https://perma.cc/NV25-G6RQ]; see also Gill, *supra* note 188.

male.”¹⁸⁹ Other gendering affirming surgeries, such as facial feminization, can cost up to \$70,100.¹⁹⁰ In 2013, a study of 364 transgender residents of Massachusetts found that 23.6 percent of the participants were unable to access transition-related healthcare within the past twelve months.¹⁹¹ Participants cited barriers including financial insecurity, low educational attainment, and healthcare discrimination.¹⁹² Given these barriers, transition requirements imposed by courts and prisons create an extreme burden for transgender inmates.

Additionally, once in prison, it can be very challenging for transgender people to get access to the medications and healthcare services that they would need to transition, including puberty suppression, hormone therapy, and gender-affirming surgeries.¹⁹³ While in prison, it is a constant battle for many transgender prisoners to receive this care.¹⁹⁴ In a 2015 survey conducted by the National Center for Transgender Equality, thirty-seven percent of transgender people who were incarcerated stated that, even though they were taking hormones before their incarceration, they were denied access to their medication while they were detained.¹⁹⁵ Moreover, it is nearly impossible for transgender prisoners to undergo gender confirmation surgery while incarcerated.¹⁹⁶ The few who are able to receive any sort of gender-affirming care are only successful after years-long legal fights.¹⁹⁷ For example, in 2022, a court ordered the Federal Bureau of Prisons to secure gender-affirming surgery for a transgender prisoner.¹⁹⁸ This was the first time BOP had ever been ordered to assist in a prisoner’s medical transition.¹⁹⁹ Cristina Nichole Iglesias, the incarcerated transgender person who sought the sur-

¹⁸⁹ Benij Jones, *The Staggering Cost of Being Transgender in the US, Where Even Patients with Health Insurance can Face Six-figure Bills*, BUSINESS INSIDER (July 10, 2019), <https://www.businessinsider.com/transgender-medical-care-surgery-expensive-2019-6> [https://perma.cc/5CVB-3KRZ].

¹⁹⁰ *Id.*

¹⁹¹ Jaclyn M. White Hughto, Adam J. Rose, John E. Pachankis, & Sari L. Reisner, *Barriers to Gender Transition-Related Healthcare: Identifying Underserved Transgender Adults in Massachusetts*, 2 TRANSGENDER HEALTH 107, 107 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5627670/pdf/trgh.2017.0014.pdf> [https://perma.cc/EB39-F3WJ].

¹⁹² *Id.*

¹⁹³ See Jaclyn Diaz, *Trans Inmates Need Access to Gender-Affirming Care. Often They Have to Sue to Get It*, NPR (Oct. 25, 2022), <https://www.npr.org/2022/10/25/1130146647/transgender-inmates-gender-affirming-health-care-lawsuits-prison#:~:text=A%20major%20survey%20highlights%20the,had%20a%20prescription%20for%20hormones> [https://perma.cc/5ADK-Q523]; see also National Center for Transgender Equality, *supra* note 189, at 193; Erin Murphy Fete, *In Need of Transition: Transgender Inmate Access to Gender Affirming Healthcare in Prison*, 55 UIC L. REV. 772, 782-83 (2002).

¹⁹⁴ See Diaz, *supra* note 194.

¹⁹⁵ National Center for Transgender Equality, *supra* note 189, at 193.

¹⁹⁶ Diaz, *supra* note 194.

¹⁹⁷ *Id.*

¹⁹⁸ Mat Lavietes, *Court Orders First Gender-Affirming Surgery for a Transgender Federal Prisoner*, NBS NEWS (Apr. 21, 2022), <https://www.nbcnews.com/nbc-out/out-news/federal-court-orders-first-gender-affirming-surgery-trans-prisoner-rcna25377> [https://perma.cc/3RAW-Q3MV].

¹⁹⁹ *Id.*

gery, has been imprisoned by almost 30 years and fought for years to undergo surgery and to be housed with women.²⁰⁰ It is unclear if Iglesias has received the surgery as of the writing of this Note, but her story is a clear example of how challenging it is for transgender individuals to get the healthcare they desire while incarcerated. The challenges—both in and outside of prison—for transgender people seeking to medically transition demonstrates that the implied transition requirement in *Shaw* and *Carter-el* unjustly disqualifies many transgender litigants from adjudicating their Fourth Amendment claims.

C. Cross-Gender Strip Searches Unconstitutionally Interfere with Transgender Prisoners' Privacy and Psychological Interests

If courts were to properly apply *Bell's* balancing test to cross-gender strip search cases involving transgender plaintiffs, they would find that, given *Bell's* consideration of prisoners' bodily privacy and previous courts' assessment of the emotional implication that cross-gender strip searches have on prisoners, the searches are unconstitutional. *Byrd* and *Nelson* detail two cross-gendered strip searches of cisgender prisoners.²⁰¹ When assessing the manner in which the searches were conducted, both the *Byrd* and *Nelson* courts emphasized the importance of the fact that the searches were cross-gender and the impact of the cross-gender searches on the mental wellbeing of the plaintiffs.²⁰² As referenced in Part I, incarcerated people's privacy interests and psychological well-being were also an important consideration for the government when lawmakers created PREA.

There is no reason why the same considerations should not be given to transgender prisoners when considering the reasonability of their searches under *Bell*. Courts' current failure to give appropriate weight to the bodily privacy considerations discussed in *Bell* places transgender inmates at a disadvantage when they argue for Fourth Amendment protections; however, if courts accounted for the privacy and psychological considerations referenced in *Bell*, it would be clear that, under the manner prong of the *Bell* test, transgender inmates should be free from cross-gender strip searches under the Fourth Amendment.

For the safety and well-being of transgender prisoners, it is critical that courts incorporate *Bell's* recognition of bodily privacy and emotional well-being into their analysis of cross-gender strip searches involving transgender prisoners.²⁰³ As previously discussed, courts have occasionally acknowl-

²⁰⁰ *Id.*

²⁰¹ *Byrd*, 629 F.3d at 1137; *Nelson*, 2012 WL 233994, at *3.

²⁰² *Byrd*, 629 F.3d at 1141; *Nelson*, 2012 WL 233994, at *26.

²⁰³ Courts are readily capable of discussing the emotional and psychological injuries that transgender prisoners face when they are subject to cross-gender strip searches. See *Monroe v. Jeffreys*, No. 3:18-CV-00156-NJR, 2021 WL 391229 (S.D. Ill. Feb. 4, 2021); *I.Z. v. City of Philadelphia*, No. CV 17-1517, 2017 WL 4883156 (E.D. Pa. Oct. 30, 2017).

edged that cross-gender strip searches may encroach upon an individual's privacy interests and cause emotional duress.²⁰⁴ Transgender litigants have explained to courts that they often experience trauma when they undergo cross-gender strip searches. In *Monroe v. Jeffreys*, for example, after a female-identifying transgender person was repeatedly strip searched by male officers in the presence of male inmates, she was "placed on crisis watch for suicidal ideation."²⁰⁵ An expert witness to the case stated that misgendering transgender inmates "increases their risk of abuse/assault by other prisoners, as well as the risk of self-harm and suicide."²⁰⁶ Similarly, in *I.Z. v. City of Philadelphia*, a male-identifying transgender person was subject to a penetrative genital evaluation conducted by a female nurse to determine if his genitals matched his perceived gender identity.²⁰⁷ The plaintiff was told that, because he had not undergone surgery, he would be labeled as a female in the prison's system.²⁰⁸ Due to the experience, the plaintiff stated that he "suffered physical and mental anguish, including post-traumatic stress disorder, and a loss of dignity."²⁰⁹

Courts should consider a transgender individual's emotional turmoil when they are presented with strip search cases. Prong two of the *Bell* factors permits courts to assess the manner in which a strip search was conducted.²¹⁰ In analyzing the manner of a search, a court should explore how it psychologically impacted an incarcerated transgender individual, just as the courts in *Nelson* and *Byrd* did when evaluating the constitutionality of those cisgender litigants' strip searches.²¹¹ Not only this psychological analysis encourage prisons to be mindful of the mental state and bodily autonomy of incarcerated people before they conduct a search, but it also stays true to the Supreme Court's decision in *Bell* by "balancing the need for the particular search against the invasion of personal rights that the search entails."²¹² The privacy interests that *Bell* protects should be viewed in conjunction with evidence provided by litigants that a strip search impacted them emotionally, as courts have done for cisgender strip search cases.

In deciding cases involving cross-gender strip searches of transgender individuals, courts have an obligation under *Bell* to consider transgender prisoners' specific privacy needs. Transgender individuals' privacy interests are essential to consider in cross-gender strip search cases because "transgender people face the highest rates of pre-incarceration trauma as well as

²⁰⁴ See *Byrd*, 629 F.3d at 1141; *Nelson*, 2012 WL 233994, at *26.

²⁰⁵ *Monroe*, 2021 WL 391229, at *2.

²⁰⁶ *Id.* at *8.

²⁰⁷ 2017 WL 4883156, at *1.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Bell*, 441 U.S. at 559.

²¹¹ See *Byrd*, 629 F.3d at 1137; *Nelson*, 2012 WL 233994, at *3.

²¹² *Bell*, 441 U.S. at 559.

the highest rates of in-prison abuse compared with cisgender people.”²¹³ Decisionmakers and judges should acknowledge that transgender identity is correlated with sexual victimization in prison²¹⁴ and, therefore, that strip search policies should protect transgender inmates against invasions of privacy that would create opportunities for abuse during incarceration. In light of *Bell*'s provisions which advocate for the protection incarcerated people's privacy interests and the severe consequences cross-gender strip searches have on transgender prisoners' bodily autonomy, cross-gender strip searches of incarcerated transgender people should be unconstitutional.

CONCLUSION

Nearly one in six transgender people has been incarcerated,²¹⁵ yet there are no nation-wide regulations that protect transgender prisoners from being subjected to degrading and humiliating cross-gender strip searches. Although there is precedent strongly suggesting that there is Fourth Amendment protection against cross-gender strip searches of cisgender prisoners, courts fail to apply the legal principles established in those cases to cases involving transgender individuals. Courts must recognize that policies permitting cross-gender strip searches of transgender prisoners fail the Supreme Court's tests of reasonableness found in both *Turner* and *Bell*. Given that prisons have adequate means to refrain from cross-gender strip searches of transgender prisoners, and that the searches emotionally traumatize transgender prisoners, the cross-gender strip searches of transgender individual do not pass constitutional muster under the Fourth Amendment. By protecting transgender prisoners' right to be free from cross-gender strip searches under the Fourth Amendment, courts would be following already-established constitutional tests while preventing emotional hardship and humiliation for a vulnerable population.

²¹³ Evelyn F. McCoy, Melanie Langness, Jahnvi Jagannath, Janeen Buck Willison, Janine Zweig, Becki Ney, & Wayne Choinski, *Adapting Custodial Practices to Reduce Trauma for Incarcerated Women*, URBAN INSTITUTE 26 (Oct. 2020), https://www.urban.org/sites/default/files/publication/102997/adapting-custodial-practices-to-reduce-trauma-for-incarcerated-women_0.pdf [https://perma.cc/492G-YYXT].

²¹⁴ *Policies to Increase Safety and Respect for Transgender Prisoners: A Guide for Agencies and Advocates*, NAT'L CNTR FOR TRANSGENDER EQUALITY 8, <https://transequality.org/sites/default/files/docs/resources/PoliciestoIncreaseSafetyandRespectforTransgenderPrisoners.pdf> [https://perma.cc/TL3Z-V2ZT].

²¹⁵ *Transgender Incarcerated People in Crisis*, *supra* note 17.

