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Nina Gleiberman

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**FLORENCE v. BOARD OF CHOSEN FREEHOLDERS:  
MAINTAINING JAIL SECURITY WHILE STRIPPING DETAINEES  
OF THEIR CONSTITUTIONAL RIGHTS**

NINA GLEIBERMAN\*

In *Florence v. Board of Chosen Freeholders*,<sup>1</sup> the Supreme Court of the United States considered whether a strip search policy conducted on a pretrial detainee—before entering the general jail population for a minor traffic-related offense—violated his Fourth<sup>2</sup> and Fourteenth<sup>3</sup> Amendment rights. The Court deferred to the judgment of correctional officials who devised the search policies<sup>4</sup> and held that the strip search was constitutional, striking a balance between inmate privacy and the security needs of correctional institutions.<sup>5</sup>

Although maintaining safety at detention centers requires the expertise of correctional officials, the Supreme Court, in *Florence*, gave too much discretion to detention center administrators to develop search policies, and the Court improperly balanced the need for the strip searches against detainees' privacy interests.<sup>6</sup> As a result of its unlimited deference to the judgment of correctional institution administrators, the Court disregarded the importance of a reasonable suspicion standard for conducting such intrusive searches.<sup>7</sup> The Supreme Court should have limited institutional discretion in determin-

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\*J.D. Candidate, 2014, University of Maryland Francis King Carey School of Law. The author wishes to thank Professors Michael Millemann and Lee Kovarsky for their invaluable feedback throughout the development of this Note. She also thanks her editors, Thomas Kolkin, Shari Silver, and Christine White, for their insightful comments and advice. Finally, the author is grateful to her friends and family, especially her mother Haleh Gleiberman, for their support and encouragement throughout law school.

1. 132 S. Ct. 1510 (2012) [hereinafter *Florence III*].

2. U.S. CONST. amend. IV. The Fourth Amendment protects people from “unreasonable searches and seizures.” *Id.*

3. U.S. CONST. amend. XIV. The Fourteenth Amendment incorporates the Fourth Amendment into the Due Process Clause, rendering the Fourth Amendment enforceable against states. *See, e.g.*, Silas J. Wasserstrom, *The Incredible Shrinking Amendment*, 21 AM. CRIM. L. REV. 257, 257 (1984) (noting that in *Ker v. California*, 374 U.S. 23 (1963), the Supreme Court “ruled that substantive [F]ourth [A]mendment law, by ‘incorporation’ into the [F]ourteenth [A]mendment, applied with full force to state law enforcement authorities”).

4. *Florence III*, 132 S. Ct. at 1513–14.

5. *Id.* at 1523.

6. *See infra* Part IV.A.

7. *See infra* Part IV.B.

ing intake procedures, specifically strip searches performed on individuals arrested for minor offenses prior to their admittance to the jail's general population.<sup>8</sup> These limitations should reflect recommended policies of the American Bar Association ("ABA"), which incorporate a reasonable suspicion standard for conducting strip searches on people who have committed minor crimes, such as the detainee in *Florence*.<sup>9</sup>

## I. THE CASE

On March 3, 2005, Albert Florence, his wife, and his son were traveling on Interstate Highway 295 in Burlington County, New Jersey, when a state trooper stopped their vehicle for a traffic infraction.<sup>10</sup> Florence's wife was driving, but Florence identified himself as the owner of the vehicle.<sup>11</sup> After the trooper conducted a records search, he discovered that Florence was the subject of an outstanding bench warrant in Essex County, New Jersey.<sup>12</sup> The warrant was issued on April 25, 2003, and charged Florence with a form of civil contempt (a non-indictable offense) for failure to pay a fine.<sup>13</sup> Florence informed the trooper that the warrant was invalid because he had already paid the fine.<sup>14</sup> Additionally, Florence presented the trooper with a copy of a letter confirming that the fine had been paid.<sup>15</sup> Nonetheless the

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8. See *infra* Part IV.C.

9. See *infra* Part IV.C.

10. *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 595 F. Supp. 2d 492, 496 (D.N.J. 2009) [hereinafter *Florence I*], *rev'd*, 621 F.3d 296 (3d Cir. 2010).

11. Petition for Writ of Certiorari at 3, *Florence III*, 132 S. Ct. 1510 (2012) (No. 10-945), 2011 WL 220710.

12. *Id.* Seven years prior to this incident, Florence was arrested after fleeing from police, and he was charged with obstruction of justice and use of a deadly weapon. He entered a guilty plea to a lesser offense and was sentenced to pay a fine on a monthly basis. *Invasive Strip Search Does Not Violate Fourth Amendment*, MCQUILLIN MUN. LAW REP. May 2012, at 1.

13. *Florence I*, 595 F. Supp. 2d at 496. Florence fell behind on the sentence payments and failed to appear at an enforcement hearing. *Invasive Strip Search Does Not Violate Fourth Amendment*, *supra* note 12. As a result, the bench warrant was issued in Essex County for his arrest. *Florence I*, 595 F. Supp. 2d at 496.

14. *Florence I*, 595 F. Supp. 2d at 496.

15. After he was stopped, Florence offered the police officer proof of a certified letter from the State of New Jersey, dated October 2004, demonstrating that all judgments were satisfied and no warrant existed against him. Complaint at ¶ 17, *Florence I*, 595 F. Supp. 2d 492 (D.N.J. 2009) (No. 05CV3619(JHR)), 2005 WL 2099622. Petition for Writ of Certiorari, *supra* note 11, at 3. Florence kept the letter accessible because he had been pulled over in the past. *Id.*

state trooper arrested Florence and took him to the Burlington County Detention Center (“Burlington jail”).<sup>16</sup>

At the Burlington jail, Florence alleged that he was subjected to a full-body strip search.<sup>17</sup> While Florence was nude, the officer conducted a body cavity search by “directing [Florence] to . . . open his mouth, lift his tongue, hold his arms fully out, and lift his genitals.”<sup>18</sup> After the observation, Florence was instructed to shower.<sup>19</sup> He was then detained at the Burlington jail for six days.<sup>20</sup>

After the sixth day, Florence was transported to the Essex County jail (“Essex jail”).<sup>21</sup> Upon arrival and pursuant to facility policy, Florence was again subjected to a full body and cavity strip search.<sup>22</sup> The Essex jail officers required Florence and four other detainees to enter separate shower stalls, disrobe, and shower.<sup>23</sup> The officers ordered the detainees to open their mouths and lift their genitals.<sup>24</sup> Then the officers directed the detainees to turn around, squat, and cough.<sup>25</sup> Afterwards, “Florence was placed with the general jail population.”<sup>26</sup> The next day, the officers transported Florence to the Essex County courthouse to appear before a judge.<sup>27</sup> The judge dismissed all

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16. Petition for Writ of Certiorari, *supra* note 11, at 3–4. The county had failed to remove the warrant from the relevant computer system, so the officer continued with the arrest. *Invasive Strip Search Does Not Violate Fourth Amendment*, *supra* note 12.

17. *Florence I*, 595 F. Supp. 2d at 496. 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 might be hiding.” BLACK’S LAW DICTIONARY 1469 (9th ed. 2009).

18. *Florence I*, 595 F. Supp. 2d at 496–97. The officer, sitting at arms-length in front of Florence, did not physically touch him during the strip search. *Id.* at 497.

19. *Id.* According to officers at the Burlington Jail, visual observations of non-indictable arrestees involve the nude arrestee taking a shower with a delousing agent. *See id.* at 498–99 (explaining the intake procedures based on the testimony of several Burlington Jail officers).

20. *Id.* at 497. During his imprisonment at the Burlington jail, Florence repeatedly told jail personnel that the warrant against him was invalid; however, the jail made no effort to inquire into the warrant’s validity. *See Complaint*, *supra* note 15, at ¶¶ 20–24, 55.

21. *Florence I*, 595 F. Supp. 2d at 497.

22. *Id.* The policy of the Essex County jail was that all arriving arrestees, regardless of the basis of their arrests, be strip searched while the officers observed and performed a full body examination “including body openings.” *Id.* at 499. Based on the Essex jail intake procedures, the strip search consisted of a visual observation, but not physical touching, by the officers. *Id.*

23. *Id.* at 497.

24. *Id.*

25. *Id.*

26. *Id.*

27. Petition for Writ of Certiorari, *supra* note 11, at 7. New Jersey law generally requires the county to present an arrestee to a magistrate judge for a probable cause hearing, but Burlington County never provided Florence with such a hearing. *Id.* at 5–6.

charges against Florence and ordered his immediate release from custody on grounds that the warrant was invalid.<sup>28</sup>

Florence later filed a complaint pursuant to 42 U.S.C. § 1983<sup>29</sup> against the Burlington and Essex jails, as well as against several other people involved in the arrest and subsequent strip searches.<sup>30</sup> Specifically, Florence alleged that the defendants violated his Fourth Amendment rights because the strip searches were unreasonable given the nature of Florence's offense and the circumstances of his arrest.<sup>31</sup> Soon after the filing of the complaint, the United States District Court for the District of New Jersey certified the lawsuit as a class action.<sup>32</sup>

After three years of discovery, the parties filed cross-motions for summary judgment on the issue of the constitutionality of strip searches conducted without reasonable suspicion on non-indictable detainees.<sup>33</sup> The federal district court adopted the majority view of the U.S. Circuit Courts of Appeals,<sup>34</sup> and held that the blanket policy of strip searching non-indictable arrestees violated the Fourth

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28. *Id.* at 7. Florence had paid the fine less than a week after his failure to appear at the enforcement hearing. *Id.* at 3.

29. Section 1983 provides relief to individuals who have been deprived of their constitutional rights by state actors. *See* 42 U.S.C. § 1983 (2006) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .").

30. Complaint, *supra* note 15, at ¶¶ 4–12.

31. *Id.* at ¶¶ 39–45. In Count Three of the Complaint, Florence alleged that he "was falsely arrested and subjected to the humiliation and degradation of a strip/body cavity search procedure prior to any determination . . . that the . . . detention was supported by probable cause." *Id.* at ¶ 40. As such, Florence alleged that the searches were unconstitutional because there was no reasonable suspicion that he was concealing a weapon or contraband at the time of the searches. *Id.* at ¶¶ 43–44.

32. *Florence v. Bd. of Chosen Freeholders*, No. 05-3619, 2008 WL 800970, at \*1 (D.N.J. Mar. 20, 2008). On Florence's motion, the district court certified a class of individuals who had been charged with non-indictable offenses under New Jersey law and who were directed to undergo a strip search in the absence of reasonable suspicion while being processed at either the Burlington or Essex jails. *Id.* at \*17.

33. *Florence I*, 595 F. Supp. 2d 492, 495–96 (D.N.J. 2009). Additionally, the plaintiffs sought injunctive relief on behalf of the class. *Id.* at 496. The defendants, in turn, also sought Eleventh Amendment immunity and qualified immunity for certain defendants in their individual capacities, as well as the dismissal of plaintiffs' § 1983 Municipality Custom Violations Claim. *Id.*

34. *Id.* at 505–11. The district court recognized that an eight-to-three circuit split had developed since the *Bell* decision. *Id.* at 505–07. Three circuits—the Seventh, Ninth, and Eleventh Circuits—split from the majority view that reasonable suspicion must be present before a strip search is conducted in the context of admitting new inmates. *See infra* Part II.B.2.

Amendment.<sup>35</sup> First, the district court reasoned that the intake procedures at the Burlington and Essex jails were intrusive enough to rise to the level of a “strip search.”<sup>36</sup> Second, the court found that the search procedures were unconstitutional under the *Bell v. Wolfish*<sup>37</sup> balancing test.<sup>38</sup> Thus, the district court granted plaintiffs’ motion for summary judgment, concluding that the Fourth Amendment forbids a suspicionless strip search of an individual arrested for a minor offense if neither the nature nor the circumstances of the offense create a reasonable suspicion of the presence of contraband.<sup>39</sup>

The defendants filed an interlocutory appeal of the district court decision with the U.S. Court of Appeals for the Third Circuit.<sup>40</sup> The Third Circuit only reviewed “whether a blanket policy of strip searching *all* non-indictable arrestees admitted to a jail facility without first articulating reasonable suspicion violate[d] the Fourth Amendment.”<sup>41</sup> In its analysis, the court recognized the existence of a circuit split as to whether non-indictable arrestees pose a security risk at the time of intake.<sup>42</sup>

In applying the four-prong balancing test from *Bell*, the Third Circuit determined that “the scope, manner, and place of the [strip] searches” conducted by defendants “[w]ere similar to or *less* intrusive than those in *Bell*.”<sup>43</sup> Furthermore, the court concluded that preven-

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35. *Florence I*, 595 F. Supp. 2d at 492.

36. *Id.* at 502–03. The Burlington County policy made a distinction between “visual observation” and “strip search,” whereas the Essex County policy did not. *Id.*

37. 441 U.S. 520 (1979). In *Bell*, the Supreme Court applied a four-prong balancing test to determine whether the need for visual body-cavity inspections on detainees after contact visits with outsiders outweighed the invasion of detainee’s personal rights. *See infra* note 61 and accompanying text.

38. *Florence I*, 595 F. Supp. 2d at 511. The district court in *Florence* looked at the scope, manner, place, and justification for the particular intrusions. *Id.* at 511–12. The court reasoned that the strip procedures at both the Burlington and Essex jails invaded the personal privacy of the detainees. *Id.* Further, the searches took place in a shower room where privacy was minimal. *Id.* Third, the manner in which the searches were conducted was humiliating and degrading because they were conducted in the presence of other inmates. *Id.* Lastly, the district court found that the general security concerns justifying the strip search policies were not enough to outweigh the invasion of privacy interests. *Id.* at 512–13. This Note refers interchangeably to the *Bell* test, the *Bell* balancing test, and the *Bell* factors.

39. *Id.*

40. *Florence v. Bd. of Chosen Freeholders*, 621 F.3d 296, 301 (3d Cir. 2010) [hereinafter *Florence II*]. Following the district court decision, the defendants moved the district court to certify its summary judgment decision into an appealable order pursuant to 28 U.S.C. § 1292(b). *Id.*

41. *Id.* (emphasis added) (citation omitted).

42. *Id.* at 303–06; *see also supra* note 34.

43. *Florence II*, 621 F.3d at 307 (emphasis added); *see also supra* note 37 and accompanying text.

tion of smuggling dangerous weapons and contraband into the correctional facility was a sufficient justification for a blanket strip search policy.<sup>44</sup> A divided panel of the Third Circuit ultimately reversed the decision of the district court, holding that the search procedures conducted by defendants struck a reasonable balance between inmate privacy and the security needs of the Burlington and Essex jails.<sup>45</sup>

Writing in dissent, Judge Pollak concluded that it is unreasonable for correctional officers to conduct intrusive strip searches of citizens “‘arrested for minor offenses, such as violating a leash law or a traffic code, [when the citizens] pose no credible risk for smuggling contraband into [a] jail’” and when there is no evidence demonstrating that non-indictable arrestees tend to possess contraband.<sup>46</sup> Judge Pollak noted that jail administrators should be afforded deference in their attempts to ensure security in jails, but he also emphasized that convicted prisoners still receive constitutional protections, such as the “protection against forced nakedness during strip searches in front of others.”<sup>47</sup>

The Supreme Court granted certiorari to resolve the circuit split regarding “whether the Fourth Amendment requires correctional officials to exempt some detainees,” such as those arrested for minor, non-indictable crimes, from suspicionless strip search procedures before the detainees are placed in the general jail population.<sup>48</sup>

## II. LEGAL BACKGROUND

As a result of the Supreme Court’s emphasis on the need to defer to the judgment of the administrators of correctional institutions in developing jail policies since the late 1970s, there has been a reduction in the Fourth Amendment protections afforded to inmates. Part II.A of this Note examines the evolution of the constitutional rights of detainees and the balancing test the Supreme Court developed to determine the reasonableness of search procedures. Part II.B illustrates

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44. *Florence II*, 621 F.3d at 307–08.

45. *Id.* Although the majority recognized that the defendants had not presented any evidence regarding the discovery of contraband on indictable and non-indictable offenders at the time of intake, the majority was still compelled by the decision in *Bell*. The court noted that it is “plausible that incarcerated persons will induce or recruit others to subject themselves to arrest on non-indictable offenses to smuggle weapons or other contraband into the facility.” *Id.* at 308.

46. *Florence II*, 621 F.3d at 311–12 (Pollak, J., dissenting) (quoting *Bull v. City and Cnty. of S.F.*, 595 F.3d 964, 990 (9th Cir. 2010) (Thomas, J., dissenting)).

47. *Id.* at 312 (quoting *Powell v. Barrett*, 541 F.3d 1298, 1315 (11th Cir. 2008) (Barkett, J., dissenting)).

48. *Florence III*, 132 S. Ct. 1510, 1515 (2012).

how federal circuit courts have developed varying interpretations of what satisfies the reasonableness test for detainee search procedures and how these variations have resulted in a circuit split.

A. *The Evolution of Inmates' Constitutional Rights Has Limited the Scope of Fourth and Fourteenth Amendments Protections by Expanding the Scope of Constitutional Searches and Other Prison Regulations*

The Fourth Amendment protects people against unreasonable searches.<sup>49</sup> The importance of maintaining safety in correctional institutions, however, restricts the extent to which constitutional rights are afforded to detainees.<sup>50</sup> Courts defer to the judgment of correctional officials when determining whether a policy satisfies constitutional requirements.<sup>51</sup>

1. *The Limited Scope of Fourth Amendment Protections*

Although the Fourth Amendment protects people from unreasonable searches, the scope of the constitutional protection is not unlimited. Generally, probable cause must exist before a search warrant is issued, and police must secure a warrant before conducting a search.<sup>52</sup> The Supreme Court has, however, established exceptions to this rule. For instance, in *Terry v. Ohio*,<sup>53</sup> the Court upheld warrantless “stop and frisk” procedures as reasonable when based on “specific and articulable facts which, taken together with rational inferences from these facts reasonably warrant th[e] intrusion.”<sup>54</sup> The *Terry* decision divided the reasonableness determination into two parts. The Court balanced the interests of the government in conducting the stop and frisk against “the nature and quality of the intrusion on individual rights.”<sup>55</sup> In addition, the Court required individualized suspicion, in the form of specific and articulable facts, to justify the procedure.<sup>56</sup>

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49. U.S. CONST. amend. IV.

50. See *infra* Part II.A.1.

51. See *infra* Part II.A.2.

52. See U.S. CONST. amend. IV (“No Warrants shall issue, but upon probable cause . . .”); *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (“[T]he police must whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . .”).

53. 392 U.S. 1 (1968).

54. *Id.* at 12, 20–21.

55. See *id.* at 22–25 (discussing whether officers are justified in performing a limited search of an individual’s outer clothing for weapons when there is no probable cause for arrest).

56. *Id.* at 21. The specific and articulable facts requirement is also referred to as “reasonable suspicion.” See *Sibron v. New York*, 392 U.S. 40, 71 n.20 (1968) (Harlan, J., con-



The *Terry* court implied that without an articulable, individualized suspicion that justifies the intrusion and is subject to review, the Fourth Amendment protection is meaningless.<sup>57</sup> The Supreme Court has since extended the reach of exceptions to the warrant requirement to arrestees, justifying the constitutionality of warrantless searches based on the need to protect officers from the risks of harm they face while performing their duties.<sup>58</sup>

The need to maintain safety and order at correctional institutions has limited the Fourth Amendment protections afforded to pretrial detainees. In *Bell*, the Supreme Court examined the scope of the rights of pretrial detainees when they are subjected to strip searches during the period of confinement prior to trial.<sup>59</sup> In *Bell*, inmates challenged the correctional center's policy requiring them "to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution."<sup>60</sup> To determine the reasonableness of the cavity searches, the Supreme Court balanced "the need for the particular search against the invasion of personal rights that the search entail[ed] in a four-factor balancing test."<sup>61</sup> The Court concluded that the need to prevent weapons, drugs, and other prohibited items from being smuggled into the correctional center outweighed the resulting invasion of the inmates' personal rights.<sup>62</sup> Although the *Bell* Court acknowledged that convicted prisoners retain constitutional rights,<sup>63</sup> the Court also pointed out that legitimate governmental interests can sub-

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curing in the result) (explaining that the *Terry* decision permits stop and frisks "premised on reasonable suspicion and does not require probable cause").

57. *Cf. Terry*, 392 U.S. at 21 ("The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.").

58. *See, e.g., United States v. Robinson*, 414 U.S. 218, 235 (1973) (holding that in the case of a lawful custodial arrest, a warrantless search of the arrestee is reasonable to detect weapons on the suspect's person); *Chimel v. California*, 395 U.S. 752, 763 (1969) (noting that incident to a lawful arrest, a warrantless search of the area within the immediate reach of the arrestee is reasonable to prevent the arrestee from obtaining or concealing a weapon).

59. 441 U.S. 520, 523 (1979).

60. *Id.* at 558.

61. *Id.* at 559. The Court considered four factors to determine reasonableness under the Fourth Amendment: (1) the scope of the particular intrusion, (2) the manner in which the intrusion is conducted, (3) the justification for initiating the intrusion, and (4) the place of the intrusion. *Id.*

62. *Id.* at 558-60.

63. *Bell*, 441 U.S. at 545 ("[C]onvicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison.").

ject “these rights . . . to restrictions and limitations.”<sup>64</sup> Thus, the Court in *Bell* held that the blanket cavity strip search policy was constitutional, even when the searches were conducted on less than probable cause, because they were reasonably related to legitimate governmental interests.<sup>65</sup>

2. *The Post-Bell Progeny—Expanding the Definition of “Reasonable” for Other Prison Regulations and Policies*

The Supreme Court applied the four-factor balancing test from *Bell* in subsequent cases challenging the constitutionality of strip searches on detainees. Because of the challenges administrators face in operating detention centers, the Court has determined that a similar, less exacting standard is appropriate for determining the constitutionality of other regulations and policies. For example, in *Block v. Rutherford*,<sup>66</sup> pretrial detainees at the Los Angeles County Central Jail challenged two of the jail’s policies—denying contact visits with outsiders and conducting random searches of cells in the absence of the cell’s occupants.<sup>67</sup> Applying the *Bell* factors, the Court was “unwilling to substitute [its own] judgment on these difficult and sensitive matters of institutional administration.”<sup>68</sup> The Court held that the blanket search policy and prohibition on contact visits were reasonable responses by jail officials to “legitimate security concerns.”<sup>69</sup>

Similarly, in *Turner v. Safley*,<sup>70</sup> the Supreme Court used a reasonable relationship standard for prison regulations “to determine the constitutionality of regulations promulgated by the Missouri Division of Corrections relating to inmate marriages and inmate-to-inmate mail correspondence.”<sup>71</sup> The *Turner* Court sought “to formulate a standard of review for prisoners’ constitutional claims that is respon-

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64. *Id.*

65. *Id.* at 560.

66. 468 U.S. 576 (1984).

67. *Id.* at 578–79. The pretrial detainees filed a class action lawsuit against the county jail officials, and the district court held that the policies violated the detainees’ rights under the Due Process Clause of the Fourteenth Amendment. *Id.* at 578–79, 590.

68. *Id.* at 585, 588, 591.

69. *Id.* at 588–89, 591. Although the lower courts concluded that the blanket prohibition on contact visits was excessive in relation to the jail’s security interests, the Supreme Court noted the difficulties involved in “selectively allowing contact visits to some.” *Id.* at 587–88.

70. 482 U.S. 78 (1987).

71. *See id.* at 89 (“[S]everal factors are relevant in determining the reasonableness of the regulation at issue[, including that] there must be a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it.” (quoting *Block*, 468 U.S. at 586)).

sive both to the ‘policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.’”<sup>72</sup> Analyzing case precedent,<sup>73</sup> the Court observed that “[i]n none of these [recent] ‘prisoners’ rights’ cases did the Court apply a standard of heightened scrutiny.”<sup>74</sup> The Court then noted that the proper inquiry was instead “whether a prison regulation that burdens fundamental rights is ‘reasonably related’ to legitimate penological objectives, or whether it represents an ‘exaggerated response’ to those concerns.”<sup>75</sup> Applying the lesser “reasonably related” standard, the Court concluded that “[t]he prohibition on correspondence between institutions” was constitutional because it “[w]as logically connected to . . . legitimate security concerns.”<sup>76</sup>

In *Bell* and subsequent cases challenging the constitutionality of search policies and other prison regulations, the Supreme Court emphasized that courts should defer to the judgment of correctional officials when deciding whether a policy is reasonably related to legiti-

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72. *Id.* at 85 (alteration in original) (quoting *Procunier v. Martinez*, 416 U.S. 396, 406 (1974), *overruled by Thornburgh v. Abbott*, 490 U.S. 401 (1989)). In *Turner*, the lower courts applied a “strict scrutiny standard” to evaluate the constitutionality of the correspondence and marriage regulations. *Id.* at 83. The U.S. Court of Appeals for the Eighth Circuit concluded that the regulations failed to satisfy the strict scrutiny standard because they “w[ere] not the least restrictive means of achieving the asserted goals of rehabilitation and security.” *Id.* (quoting *Safley v. Turner*, 777 F.2d 1307, 1315, (8th Cir. 1985), *aff’d in part, rev’d in part sub nom. Turner v. Safley*, 482 U.S. 788 (1987)).

73. The *Turner* Court analyzed four cases involving prisoners’ rights: *Bell v. Wolfish*, 441 U.S. 520 (1979) (constitutional challenges to several prison policies, including the prohibition on receiving food and personal care packages from outside sources, mandating body-cavity searches of detainees after contact visits, and the requirement that detainees remain outside their cells during routine inspections); *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119 (1977) (constitutional challenges to regulations prohibiting prisoner union meetings and bulk union mailing from outside sources); *Pell v. Procunier*, 417 U.S. 817 (1974) (constitutional challenge to a prison regulation prohibiting face-to-face media interviews with individual inmates); *Procunier v. Martinez*, 416 U.S. 396 (1974) (constitutional challenge to prisoner mail censorship regulations), *overruled by Thornburgh v. Abbott*, 490 U.S. 401 (1989).

74. *Turner*, 482 U.S. at 87.

75. *Id.* The Court determined that a less exacting standard of review applied in the context of the constitutionality of prison regulations because of the deference afforded to prison administrators in creating and implementing operational policies. *See id.* at 89 (“[W]hen a prison regulation impinges on inmates’ constitutional rights, regulation is valid if it is reasonably related to legitimate penological interests: such a standard is necessary if ‘prison administrators . . . and not the courts, [are] to make the difficult judgments concerning institutional operations.’” (alteration in original) (quoting *Jones*, 433 U.S. at 128)).

76. *Id.* at 91. In addition, the *Turner* Court “[f]ound that the marriage restriction, however, d[id] not satisfy the reasonable relationship standard, but rather constitute[d] an exaggerated response to petitioners’ rehabilitation and security concerns.” *Id.*

mate security interests.<sup>77</sup> For example, the Supreme Court has observed that the practice of conducting random searches is an effective tool that correctional facilities use to deter the possession of contraband. In *Hudson v. Palmer*,<sup>78</sup> the Court upheld a policy of random searches of inmate lockers and cells without reasonable suspicion based on the argument that a general search protocol would undermine the security of the institution.<sup>79</sup> As a result, when it comes to searches of inmates and arrestees, courts often defer to prison administrators.<sup>80</sup>

*B. Circuit Courts Disagree on Whether Reasonable Suspicion Is Required for Strip Searches to be Constitutional Under the Fourth Amendment*

*Bell* was one of the first Supreme Court cases to address the constitutional rights of pretrial detainees.<sup>81</sup> Despite the four-factor reasonableness test that the Court announced in *Bell*, federal circuit courts have varied in their interpretations of *Bell* and in their applications of the balancing test.<sup>82</sup>

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77. See *Bell*, 441 U.S. at 547 (“Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”); see also *Block v. Rutherford*, 468 U.S., 576, 583–91 (1984) (relying on *Bell* and deferring to the judgment of prison authorities); *Turner*, 482 U.S. at 90 (“[C]ourts should be particularly conscious of the ‘measure of judicial deference owed to corrections officials . . . .’” (quoting *Pell*, 417 U.S. at 827)).

78. 468 U.S. 517 (1984). The inmate in *Hudson* claimed that a prison guard deprived him of his right to due process of the law under the Fourteenth Amendment when the guard destroyed his property during a “shakedown search” of the prison locker. *Id.* at 530. The inmate brought a separate claim alleging that the shakedown search was an unreasonable search in violation of the Fourth Amendment, but the Court “conclude[d] that prisoners have no legitimate expectation of privacy and that the Fourth Amendment’s prohibition on unreasonable searches does not apply in prison cells.” *Id.* at 30.

79. *Id.* at 529 (“For one to advocate that prison searches must be conducted only pursuant to an enunciated general policy or when suspicion is directed at a particular inmate is to ignore the realities of prison operation.” (quoting *Marreo v. Commonwealth*, 284 S.E.2d 809, 811 (Va. 1981))).

80. See, e.g., *Bull v. City and Cnty. of S.F.*, 595 F.3d 964, 982 (9th Cir. 2010) (“[W]e conclude that San Francisco’s policy requiring strip searches of all arrestees classified for custodial housing in the general population was facially reasonable under the Fourth Amendment, notwithstanding the lack of individualized reasonable suspicion as to the individuals searched.”); see also *infra* Part II.B.1.

81. *Cf. Bell*, 441 U.S. at 523 (“Over the past five terms, this Court has in several decisions considered constitutional challenges to prison conditions or practices by convicted prisoners. This case requires us to examine the constitutional rights of pretrial detainees . . . .” (footnote omitted)).

82. See *infra* Parts II.B.1–2.

1. *Several Circuit Courts Have Upheld the Constitutionality of Blanket Strip Search Policies Under the Bell Test*

The U.S. Courts of Appeals for the Third, Ninth, Eleventh, and D.C. Circuits have held that strip searches conducted on pretrial detainees, even in the absence of reasonable suspicion, are constitutional under the Fourth Amendment based on an application of the *Bell* test. In *Powell v. Barrett*,<sup>83</sup> the Eleventh Circuit held that a blanket visual strip search policy, which mandated searches on all detainees placed into the general jail population for the first time, did not violate the Fourth Amendment.<sup>84</sup> There, the five plaintiffs had been charged with minor offenses.<sup>85</sup> The plaintiffs argued that “there was no reasonable suspicion to believe that any of them had hidden contraband.”<sup>86</sup> Applying the *Bell* factors, the Eleventh Circuit noted that the security concerns used to justify strip searches of inmates after contact visits in *Bell* were no greater than those needed to justify visual strip searches of new detainees in *Powell*.<sup>87</sup> The Eleventh Circuit concluded that the blanket strip search policies did not violate the Fourth Amendment, “provided that the searches are no more intrusive on privacy interests than those upheld in the *Bell* case.”<sup>88</sup>

The Ninth and Third Circuits soon followed the Eleventh Circuit decision. In *Bull v. City and County of San Francisco*,<sup>89</sup> the Ninth Circuit upheld the constitutionality of the San Francisco Sheriff’s Department’s policy of strip searching all arrestees introduced into the general jail population,<sup>90</sup> overruling its own case precedent.<sup>91</sup> Further-

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83. 541 F.3d 1298 (11th Cir. 2008).

84. *Id.* at 1300.

85. *Id.* at 1301. The charges against the plaintiffs included the following minor offenses: “a bail revocation on a disorderly conduct charge, a traffic ticket warrant, a DUI charge, . . . a contempt charge for failure to pay child support,” and a non-violent burglary charge. *Id.*

86. *Id.*

87. *See id.* at 1314 (“[T]here are plenty of situations where arrestees have had at least as much opportunity to conceal contraband as would inmates on contact visits, which is the situation in *Bell*.”).

88. *Id.*

89. 595 F.3d 964 (9th Cir. 2010).

90. *Id.* at 982. The Ninth Circuit determined that the scope, manner, and justification for the San Francisco policy was analogous to *Bell*, in which the balancing test favored the correctional institutions safety concerns. *Id.* at 975. Additionally, the Ninth Circuit noted that the Supreme Court’s decision in *Turner v. Safley* required it to give greater deference to the jail officials’ determinations of what constituted reasonable search policies. *Id.* at 976–77.

91. *See, e.g.,* *Thompson v. City of L.A.*, 885 F.2d 1439, 1445–48 (9th Cir. 1989) (holding that a blanket strip search policy of arrestees was per se unconstitutional), *overruled by* *Bull v. City and Cnty. of S.F.*, 595 F.3d 964 (9th Cir. 2010); *Giles v. Ackerman*, 746 F.2d 614, 615 (9th Cir. 1984) (same), *overruled by* *Bull*, 595 F.3d 964. The Ninth Circuit, in *Bull*,

more, in the appellate decision in *Florence*, the Third Circuit held that the blanket strip search policies implemented by the Burlington and Essex jails were reasonable under the Fourth Amendment.<sup>92</sup> Even more recently, the D.C. Circuit applied the *Bell* test in a decision that reversed the court's denial of summary judgment to a former U.S. Marshal who strip searched arrested protestors upon processing them into holding cells.<sup>93</sup> The D.C. Circuit upheld the constitutionality of searches on the grounds that in 2002, when the arrests and strip searches occurred, there "was no clearly established constitutional prohibition of strip searching arrestees without individualized, reasonable suspicion."<sup>94</sup>

2. *Other Circuits Have Concluded That Blanket Strip Search Policies Are Unconstitutional When Conducted in the Absence of Reasonable Suspicion*

Other circuits have held that blanket strip search policies violate the Fourth Amendment when conducted in the absence of individualized suspicion. Under the *Bell* balancing test, the First and Seventh Circuits, for example, have found that the humiliating and dehumanizing invasiveness of strip searches outweighs correctional institutions' needs for the search, especially when the alleged offense was minor.<sup>95</sup>

In *Mary Beth G. v. City of Chicago*,<sup>96</sup> the Seventh Circuit held that Chicago's policy of strip searching female misdemeanor offenders who were not inherently dangerous and who were detained only for a brief time was an unreasonable search in violation of the Fourth Amendment.<sup>97</sup> The court noted that *Bell* was inapplicable because the searches in *Mary Beth G.* were conducted under significantly different circumstances: The detainees in *Bell* "were awaiting trial on serious federal charges," whereas the detainees in *Mary Beth G.* were arrested

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concluded that previous case law failed to give appropriate weight to the *Bell* and *Turner* factors. *Bull*, 595 F.3d at 977.

92. See *supra* text accompanying notes 40–45.

93. *Bame v. Dillard*, 637 F.3d 380, 382 (D.C. Cir. 2011).

94. *Id.* at 388; see also *id.* at 386 ("The governing precedent was then [in 2002], as it is now, *Bell v. Wolfish*, and nothing in *Bell* requires individualized, reasonable suspicion before strip searching a person entering a detention facility.").

95. See generally *Roberts v. Rhode Island*, 239 F.3d 107, 108–13 (1st Cir. 2001) (holding that it was unconstitutional to strip search all pre-arraigned detainees charged with misdemeanors not associated with weapons or contraband, even though the detainees were held in a maximum security facility with documented history of contraband, and they also freely intermingled with the general prison population).

96. 723 F.2d 1263 (7th Cir. 1984).

97. *Id.* at 1273.

for misdemeanor offenses.<sup>98</sup> As such, the “need for the particular search” of the misdemeanants, especially in the absence of reasonable suspicion of smuggled contraband, was not “substantial enough . . . to justify the severity of the governmental intrusion.”<sup>99</sup>

In addition, the First Circuit has questioned correctional institutions’ justifications for conducting strip searches. For instance, in *Roberts v. Rhode Island*,<sup>100</sup> the court noted that the security concerns of the intake facility did not justify its strip search procedures.<sup>101</sup> Thus, the court determined that the search policies were unconstitutional.<sup>102</sup> At issue in *Roberts* were “[t]wo Rhode Island Department of Corrections . . . policies provid[ing] that all males committed to the state prison be subject[ed] to a strip search and a visual body cavity search.”<sup>103</sup> With the federal circuit courts clearly split on the constitutionality of blanket strip searches, the Supreme Court granted certiorari in *Florence*.

### III. THE COURT’S REASONING

In *Florence*, the Supreme Court held that the strip search procedures at the Burlington and Essex Jails “struck a reasonable balance between inmate privacy and the needs of the institutions” and therefore comported with the Fourth Amendment.<sup>104</sup> The Court found that *Florence* failed to provide substantial evidence that the strip search policies enforced by the Burlington and Essex jails “[w]ere an unnecessary or unjustified response to problems of jail security.”<sup>105</sup>

Writing for the majority, Justice Kennedy examined the “rules or limitations the Constitution imposes on searches of arrested persons” entering the jail population.<sup>106</sup> The Court explained the reasons why “deference must be given to [correctional] officials in charge of”

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98. *Id.* at 1272.

99. *Id.* at 1272–73 (citation omitted).

100. 239 F.3d 107 (1st Cir. 2001).

101. *Roberts*, 239 F.3d at 110–13. The “justification for initiating” the strip search was the concern for maintaining institutional security. *Id.* at 110–11. The institutional security concerns, however, were insufficient to support the invasive strip search that forced the detainee to display his genitals and spread his legs so officials could observe his body cavity. *Id.* at 110. Unlike the facility in *Bell*, the Rhode Island facility did not limit its searches to prisoners who had contact with outside visitors. *Id.* at 111. Further, prison officials had no reason to believe the detainee was highly dangerous or carrying weapons or contraband. *Id.* at 112.

102. *Id.* at 113.

103. *Id.* at 108.

104. 132 S. Ct. 1510, 1523 (2012).

105. *Id.* at 1513–14.

106. *Id.* at 1513.

conducting searches as a part of the jail intake process.<sup>107</sup> In particular, the Court noted that “[t]he admission of inmates creates numerous risks for facility staff,” such as the introduction of contagious infections<sup>108</sup> and “grave threats posed by the increasing number of gang members who go through the intake process.”<sup>109</sup> The Court also acknowledged the serious risks involved in the ability of new detainees to smuggle “[w]eapons, drugs, and alcohol” into jail.<sup>110</sup> As such, the Supreme Court concluded that “there [is] a substantial interest” in performing strip searches at intake to “prevent[] any new inmate . . . from putting all who live or work at these institutions at even greater risk.”<sup>111</sup>

The Supreme Court next explained that creating an exemption from strip searching certain detainees who had been arrested for minor offenses “would be unworkable.”<sup>112</sup> The Court rejected Florence’s argument that “there is little benefit to conducting [such] invasive [searches] on a new detainee who has not been arrested for a *serious* crime or for any offense involving a weapon or drugs.”<sup>113</sup> First, the Court emphasized that “[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals.”<sup>114</sup> As a result of such uncertainties, the Court observed, it is reasonable for correctional officials to “conduct the same thorough search of everyone who will be admitted to their facilities.”<sup>115</sup> The Court also noted that some “people arrested for minor offenses have tried to smuggle prohibited items into jail,” by using their body cavities as concealment.<sup>116</sup>

Second, the Supreme Court discussed the issues involved in classifying and exempting certain detainees from standard strip search

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107. *Id.* at 1518.

108. *Id.* (discussing “[t]he danger of introducing lice or contagious infections” during the admission of inmates).

109. *Id.* at 1518–19. The Court observed that during the intake process, gang members may “recruit new inmates by force,” and that feuding gangs can engage in deadly fights, putting the officers at risk. *Id.* at 1518–19. The Court determined that “[t]hese considerations . . . justify a visual inspection for certain tattoos and other signs of gang affiliation as part of the intake process.” *Id.* at 1519.

110. *Id.*

111. *Id.* at 1520.

112. *Id.*

113. *Id.* (emphasis added).

114. *Id.* As an example, the Court noted that Timothy McVeigh, the man responsible for the Oklahoma City bombings, “was stopped by a state trooper [for] driving without a license plate” a short time after the bombing. *Id.* Similarly, one of the terrorists involved in the 9/11 terrorist attack “was stopped and ticketed for speeding just two days” prior to the terrorist attacks. *Id.*

115. *Id.*

116. *Id.*



procedures based on the degree of their offenses.<sup>117</sup> The Court explained that “[t]he officers who conduct an initial search often do not have access to criminal history records” of arrestees, and that the “records can be inaccurate or incomplete.”<sup>118</sup> Additionally, the Court noted that it would be hard to implement exceptions for non-indictable detainees because officers would be required to quickly determine “whether any of the [arrestees’] underlying offenses were serious enough to authorize invasive search protocol.”<sup>119</sup> The Court predicted that officers may be less inclined to conduct a strip search when it is difficult to determine the severity of the underlying offense, which could result in unnecessary risks to the jail population.<sup>120</sup> Thus, the Court concluded that exempting certain detainees from strip searches during intake, solely based on their having committed minor offenses, would increase the danger already present in detention facilities.<sup>121</sup>

Writing in separate concurring opinions, Chief Justice Roberts and Justice Alito agreed with the majority.<sup>122</sup> However, they stressed that the Court “d[id] not foreclose the possibility of an exception to the rule” in the future; in other words, the Court should “not hold that it is *always* reasonable to conduct a full strip search of an arrestee.”<sup>123</sup>

In a dissenting opinion, Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, wrote that the Fourth Amendment forbids an officer from conducting a strip “search of an individual arrested for a minor offense that does not involve drugs or violence,” when the officer does not “have reasonable suspicion to believe that the individual possesses drugs or contraband.”<sup>124</sup> Justice Breyer explained that “the place, scope and manner” of the strip searches in *Florence* were “a serious invasion of privacy” because they “involve[d] close observation of the private areas of a person’s body.”<sup>125</sup> The dis-

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117. *Id.* at 1521–22.

118. *Id.* at 1521. The Court pointed out that Florence’s criminal record did not include his previous arrest for possession of a deadly weapon. *Id.*

119. *Id.* at 1521–22.

120. *Id.* at 1522.

121. *Id.*

122. *Id.* at 1523 (Roberts, C.J., concurring); *id.* at 1524–25 (Alito, J., concurring).

123. *Id.* at 1523 (Roberts, C.J., concurring); *id.* at 1524 (Alito, J., concurring).

124. *Id.* at 1525 (Breyer, J., dissenting).

125. *Id.* at 1525–26 (“[T]he kind of strip search in question involves more than undressing and taking a shower (even if guards monitor the shower area for threatened disorder). Rather, the searches here involve close observation of the private areas of a person’s body and for that reason constitute a far more serious invasion of that person’s privacy.”).

sent noted other instances in which individuals arrested for minor offenses were subjected to a visual strip search to emphasize the degradation and humiliation that can result from such an invasion of privacy.<sup>126</sup>

Although Justice Breyer acknowledged “that prison regulations that interfere with important constitutional interests are generally valid as long as they are ‘reasonably related to legitimate penological interests,’” he concluded that the strip searches in *Florence* lacked such justification.<sup>127</sup> Justice Breyer noted that the “first two penological interests advanced” in favor of strip searches—“(1) to detect injuries or diseases [and] (2) to identify gang tattoos”—could be satisfied through other intake procedures.<sup>128</sup> Further, the dissent noted that there was no justification for the third penological interest—“to detect contraband”—due to “the small number of ‘incidents’” in which inmates have been discovered to have concealed contraband at the time of admission.<sup>129</sup> Moreover, the dissent highlighted the laws in various states that prohibit suspicionless strip searches to demonstrate that the application of a reasonable suspicion standard does not “interfer[e] with the legitimate penal interest in preventing the smuggling of contraband.”<sup>130</sup> Overall, Justice Breyer found that case precedent cited by the majority did not adequately justify the exercise of strip searches of detainees arrested for minor offenses in the *absence* of reasonable suspicion.<sup>131</sup>

#### IV. ANALYSIS

In *Florence*, the Supreme Court held that correctional institutions may conduct suspicionless strip searches of every arrestee introduced into the general jail population, even when the arrestee allegedly committed a minor offense.<sup>132</sup> The Court reasoned that the strip searches performed on Florence struck a reasonable balance between respecting his privacy rights and maintaining the security needs of the

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126. *Id.* at 1526–27. The dissent cited to instances involving the strip search of women who were lactating, menstruating, or had been sexually assaulted. *Id.* at 1527.

127. *Id.* at 1527 (citation omitted).

128. *Id.*

129. *Id.* at 1528.

130. *Id.* at 1529–31.

131. *Id.* at 1530–31. The dissent noted that the majority did not “set forth any example of an instance in which contraband was smuggled into the general jail population during intake that could not have been discovered if the jail was employing a reasonable suspicion standard.” *Id.* at 1530.

132. *Id.* at 1523 (majority opinion).

Burlington and Essex jails.<sup>133</sup> In so holding, however, the Court improperly analogized Florence's case to *Bell*.<sup>134</sup> The *Florence* Court also afforded too much discretion to jail officials in determining the reasonableness of search procedures.<sup>135</sup> Rather than provide nearly unlimited discretion to correctional institutions, the Court should have applied the ABA standards, which adopt a reasonable suspicion standard for conducting strip searches.<sup>136</sup>

A. *The Florence Court Improperly Interpreted the Bell Balancing Test in Determining the Reasonableness of Strip Searches of Detainees*

The Supreme Court improperly applied the *Bell* balancing test to the facts of *Florence*. The Court's reliance on *Bell* was misplaced because the circumstances in *Florence* were highly distinguishable from those in *Bell*.<sup>137</sup> Proper application of the *Bell* balancing test to the facts of *Florence* demonstrates that the particular needs for the strip searches of Florence were heavily outweighed by the severe intrusion on his privacy rights.<sup>138</sup>

1. *The Unique Facts of Florence Did Not Warrant Heavy Reliance on Bell as a Basis for the Supreme Court's Decision*

The circumstances surrounding the strip searches in *Florence* were distinct from those in *Bell* and should have resulted in a different outcome before the Supreme Court. First, Florence, unlike the detainees in *Bell*, was a new detainee to the facility when he was strip searched.<sup>139</sup> In *Bell*, "the detainees were already confined" and were

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133. See *supra* Part III.

134. See *infra* Part IV.A.

135. See *infra* Part IV.B.

136. See *infra* Part IV.C. Most states have adopted the ABA standards to determine the reasonableness of invasive strip searches. There are other organizations that set out similar, if not identical, standards. For example, the American Correctional Association has promulgated a standard that forbids strip searches of arrestees during intake in the absence of "reasonable belief or suspicion" of the possession of contraband. CORE JAIL STANDARDS 1-CORE-2C-02, (Am. Corr. Ass'n 2010), available at [www.bia.gov/cs/groups/public/documents/text/idc012203.pdf](http://www.bia.gov/cs/groups/public/documents/text/idc012203.pdf). Similarly, the U.S. Department of Justice has published standards, which include a section on detainee searches, that are designed for use in reviewing non-federal facilities that have federal detainees to ensure "these facilities . . . protect . . . constitutional rights." FEDERAL PERFORMANCE-BASED DETENTION STANDARDS 1, 37 (Office of the Fed. Det. Tr., U.S. Dep't of Justice 2011), available at <http://www.justice.gov/ofdt/fpbds02232011.pdf>.

137. See *infra* Part IV.A.1.

138. See *infra* Part IV.A.2.

139. Brief of the American Bar Ass'n as Amicus Curiae in Support of Petitioner at 16, *Florence II*, 132 S. Ct. 1510 (2012) (No 10-945), 2011 WL2578557.

“strip searched after contact visits” with outside visitors.<sup>140</sup> The *Bell* Court noted that the strip searches were reasonable, in part, because the inmates posed “a greater risk to jail security and order.”<sup>141</sup> In contrast, Florence had merely been arrested for a minor infraction and was strip searched upon being processed for entry into both the Burlington and Essex jails.<sup>142</sup> Florence was arrested shortly after his vehicle was stopped; he had neither the opportunity nor the motive to smuggle contraband into the Burlington and Essex jails.<sup>143</sup>

Second, the nature of Florence’s offense did not justify the invasive strip searches implemented. As Justice Breyer noted in dissent, “[p]rison regulations that interfere with important constitutional interests are generally valid as long as they are ‘reasonably related to legitimate penological interests,’” such as detecting contraband.<sup>144</sup> In *Bell*, the Supreme Court noted that post-contact visit strip searches were reasonably related to “maintaining institutional security,” which justified searching “both convicted prisoners and pretrial detainees.”<sup>145</sup> The Court recognized that pretrial detainees were often “charged with serious crimes” or had prior criminal records, and thus posed security risks as great as those posed by convicted inmates.<sup>146</sup>

The strip searches of Florence, however, were not reasonably related to legitimate penological interests because Florence’s offense did not involve violence or drugs.<sup>147</sup> The dissenting opinion in *Florence*

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140. *Id.*

141. *Bell v. Wolfish*, 441 U.S. 520, 546 & n.28 (1979). In *Bell*, there was a concern that inmates would try to smuggle contraband received from outside visitors. *Id.* at 558–59. In addition, the Court suggested that it was reasonable to conduct strip searches on all detainees, including “those who are detained prior to trial,” because they are often “charged with serious crimes or . . . have prior records” and therefore “may pose a greater risk of escape than convicted inmates.” *Id.* at 546 n.28.

142. *See supra* Part I.

143. Brief of the American Bar Ass’n as Amicus Curiae in Support of Petitioner, *supra* note 139, at 16 (“[D]etainees like Mr. Florence, who are accused of minor offenses, are unlikely to have the motive or opportunity to plan to be arrested with contraband hidden on their persons for the purpose of smuggling it into a prison.”).

144. *Florence III*, 132 S. Ct. 1510, 1527–28 (2012) (Breyer, J., dissenting) (citation omitted).

145. *See Bell*, 441 U.S. at 546 & n.28 (noting that there “[w]as no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates”); *see also supra* note 141 and accompanying text.

146. *Bell*, 441 U.S. at 546 & n.28; *see also supra* note 141 and accompanying text.

147. *See Florence III*, 132 S. Ct. at 1530–32 (discussing state laws and federal appellate court decisions that forbid strip searches in the absence of reasonable suspicion that the arrestee is concealing weapons or contraband). In this instance, Florence was arrested for a minor traffic offense, which did not give the state trooper any reason to believe he was violent or carrying a concealed weapon or drugs. *See supra* note 143 and accompanying text.

correctly noted that the *Bell* Court, in implementing a post-contact-visit blanket strip search policy, “had no occasion to focus upon those arrested for minor crimes, prior to a judicial officer’s determination that [the detainee] should be committed to prison.”<sup>148</sup> Florence, however, was not presented to a magistrate judge, even though one was available, until a week after his detainment.<sup>149</sup> Florence was unfairly detained without having received determination from a judicial officer that was required to commit Florence to prison. Overall, the circumstances of Florence’s case were very different from those in *Bell* and did not warrant the strip searches. Thus, *Bell* did not provide sufficient justification for the *Florence* majority’s proposition that the judgment of correctional officers is enough to implement an invasive strip search policy without reasonable suspicion.<sup>150</sup>

2. *The Asserted Needs for the Strip Searches in Florence Did Not Outweigh the Invasion of Personal Privacy Rights*

In its application of the *Bell* balancing test, the *Florence* majority incorrectly concluded that the asserted need for the two strip searches outweighed the invasion of Florence’s personal rights.<sup>151</sup> To comply with the Fourth Amendment, searches must be reasonable in scope and in intrusiveness.<sup>152</sup> In past cases, the Supreme Court has recognized the humiliating and dehumanizing nature of strip searches similar to those performed on Florence.<sup>153</sup> In addition, federal appellate courts have described strip search practices as “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive, signifying degradation and submission.”<sup>154</sup> The invasive and degrading nature of these strip searches must be bal-

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148. *Florence III*, 132 S. Ct. at 1531.

149. *See supra* note 27 and accompanying text.

150. *Florence III*, 132 S. Ct. at 1531–32.

151. *See supra* Part III.

152. *See Bell*, 441 U.S. at 559 (“The test of reasonableness under the Fourth Amendment is not capable of precise definition . . . it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.”); *see also* *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (“[T]he central inquiry under the Fourth Amendment [is] the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.”).

153. *See, e.g., Safford United Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) (“The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.”); *Bell*, 441 U.S. at 560 (“We do not underestimate the degree to which these searches may invade the personal privacy of inmates.”).

154. *Mary Beth G. v. Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1984) (citation omitted).

anced *carefully* with the actual security risks used to justify each search to uphold the constitutionality of the procedures.<sup>155</sup>

In the absence of a reasonable suspicion standard, the strip search of Florence did not outweigh the severe invasion of his privacy rights. First, the purported need for a strip search—especially on two different occasions—was unreasonable when weighed against the actual security risks Florence posed. The *Bell* Court noted that it was reasonable for jail officials to be suspicious of detainees who had contact with outside visitors;<sup>156</sup> thus, there was a substantial basis for the decision to strip search all detainees who *voluntarily* chose to meet with visitors.<sup>157</sup> Neither the *Florence* majority nor the dissent dismissed the difficulties in managing a correctional institution and the need to minimize the spread of disease and violence.<sup>158</sup> Yet, the dissent correctly determined that there was a lack of evidence to support strip searches of those arrested for minor offenses based on the need to preserve and maintain prison security.<sup>159</sup> For example, alternative methods were available to search Florence and assure that he would

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155. Brief of the American Bar Ass'n as Amicus Curiae in Support of Petitioner, *supra* note 139, at 7–8 (emphasis added).

156. *See supra* Part II.A.1. Referring to the Supreme Court's decision in *Bell*, the dissent in *Bull v. City of San Francisco* noted that “[a]s a matter of common sense, contact visits are far more likely to lead to smuggling than initial arrests.” 595 F.3d 964, 998 (9th Cir. 2010) (Thomas, J., dissenting).

157. In contrast, individuals like Florence typically do not know that they are about to be arrested and, thus, have even less of an opportunity to hide contraband. *See Shain v. Ellison*, 273 F.3d 56, 64 (2d Cir. 2001) (“Unlike persons already in jail who receive contact visits, arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something.”). As the dissenting judge in the Third Circuit opinion in *Florence* noted, “[o]ne might doubt that individuals would deliberately commit minor offenses such as civil contempt . . . and then secrete contraband on their person, all in the hope that they will, at some future moment, be arrested and taken to jail to make their illicit deliveries.” *Florence II*, 621 F.3d, 296, 312 n.1 (3d Cir. 2010) (Pollack, J., dissenting).

158. *Florence III*, 132 S. Ct. 1510, 1527–28 (2012) (Breyer, J., dissenting); *see also id.* at 1520 (majority opinion).

159. *Id.* at 1528 (Breyer, J., dissenting). The dissent focused on the lack of a justification for strip searches with respect to detecting contraband. The dissent cited to “a study of 23,000 persons admitted to the Orange County correctional facility [in New York] between 1999 and 2003.” *Id.* According to the study, of the “23,000 persons [who] underwent a strip search of the kind described” in *Florence*, “the County encountered three incidents of drugs recovered from an inmate’s anal cavity and two incidents of drugs falling from an inmate’s underwear.” *Id.* (citation omitted). Justice Breyer noted that the results of the study revealed “that in four of these five instances there may have been reasonable suspicion to search, leaving only one instance in 23,000 in which the strip search policy ‘arguably’ detected additional contraband” in the absence of reasonable suspicion. *Id.* (citing *Dodge v. Cnty. of Orange*, 282 F. Supp. 2d 41, 69–70 (S.D.N.Y. 2003)).

pose no security risks prior to admission into the general jail population.<sup>160</sup>

Furthermore, the invasion of Florence's privacy happened on *two* separate occasions—at the Burlington jail and then again upon transfer to the Essex jail.<sup>161</sup> Florence was strip searched upon entering the Burlington jail to ensure that he would not pose a threat to the general jail population and then was detained there for six days. There was very little evidence provided as to why it was necessary for him to undergo a second strip search upon transfer to the Essex jail. If reasonable suspicion was the standard implemented at the time Florence arrived at the Essex jail, it is unlikely that correctional officials would have performed a second strip search.<sup>162</sup> Thus, the invasive and degrading nature of the two strip searches clearly outweighed the minimal security risks offered to justify the search of Florence on either occasion.

*B. By Not Implementing a Reasonable Suspicion Standard, the Florence Court Afforded Almost Unlimited Discretion to Correctional Facilities at the Expense of Detainees' Constitutional Rights*

In *Florence*, the Supreme Court granted correctional facilities nearly unlimited power to create and implement regulations. Although the Court's decision resolved a significant circuit split, the decision will likely lead to abuse in the correctional system. In the past, "[t]he Supreme Court has repeatedly granted considerable deference to corrections officials in reviewing of jail administration policies."<sup>163</sup> In the absence of a reasonable suspicion standard for strip searches, however, such searches are conducted in an indiscriminate manner, not only in the context of detainees searched during intake procedures at correctional institutions, but also in the context of school searches and gender-based searches.<sup>164</sup> In addition, the Supreme

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160. As Justice Breyer noted in his dissent, "searches already employed at Essex and Burlington include[d]: (a) pat-frisking all inmates; (b) making inmates go through metal detectors . . . ; (c) making inmates shower and use particular delousing agents or bathing supplies; and (d) searching inmates' clothing." *Florence III*, 132 S. Ct. at 1528.

161. See *supra* text accompanying notes 17–28.

162. See *supra* text accompanying notes 159–160; see also *Florence III*, 132 S. Ct. at 1528–32 (discussing the lack of justification for the strip searches of Florence pointing to the reasonable suspicion standard recommended by professional bodies and implemented in many states).

163. See generally *The Supreme Court, 2011 Term—Leading Cases*, 126 HARV. L. REV. 206, 211–12 (2012) (citing *Turner v. Safley*, 482 U.S. 78 (1987); *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977); and *Procunier v. Martinez*, 416 U.S. 396 (1975)).

164. See generally *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009) (considering the constitutionality of a strip search performed by school officials on an eighth

Court's practice of deferring to correctional officials has been overly broad and poorly defined, causing confusion among lower courts and resulting in a circuit split.<sup>165</sup>

Even though the Court's decision may increase the effectiveness of safety procedures at correctional facilities, the *Florence* decision will ultimately result in the erosion of constitutional protections afforded to detainees. One of "[t]he most remarkable aspect[s] of the [*Florence*] ruling was the Court's [heavy] reliance on the expertise of corrections officials, without *any* scrutiny of their [judgment] in developing a prison's strip search policy."<sup>166</sup> With unlimited deference, correctional facilities are likely to implement "more invasive policies, which will decrease the incentive for prisoners to bring . . . constitutional challenges" to their treatment.<sup>167</sup> The post-*Bell* cases focused on whether detainees have *any* privacy rights under the Fourth Amendment, and the Supreme Court has strictly limited the scope of the Fourth Amendment as it applies in correctional facilities.<sup>168</sup> In *Hudson*, Justice Stevens in a concurring and a dissenting opinion, argued that the Court's policy of deference encouraged it to "overlook[] the purpose of a written Constitution."<sup>169</sup> The Court's decision in *Florence* abrogated the reasonable suspicion standard for conducting strip searches, thus turning a blind eye to the Fourth Amendment rights of detainees.

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grader suspected of selling painkillers); *Mary Beth G. v. Chicago*, 723 F.2d 1263 (7th Cir. 1984) (detailing the Chicago policy of strip searching female arrestees while only hand frisking male arrestees).

165. *The Supreme Court, 2011 Term—Leading Cases*, *supra* note 163, at 212–13. Giving unlimited deference to jail officials fails to provide lower federal courts with guidance in cases similar to *Florence*. Such an "'open-ended' standard allows courts to decide cases based only on their policy preferences and also result[s] in circuit splits on policies and doctrine." *Id.* at 213.

166. *Id.* at 206 (emphasis added).

167. *Id.* at 213.

168. See Loui Itoh, Note, "*Hands-off*" the Solicitor General: *Florence v. Board of Chosen Freeholders and the Supreme Court's Deference in Prison Cases*, 17 TEX. J. C.L. & C.R. 251, 263 & n.82 (2012) (citing Deborah L. MacGregor, Note, *Stripped of All Reasons? The Appropriate Standard for Evaluating Strip Searches of Arrestees and Pretrial Detainees in Correctional Facilities*, 36 COLUM. J.L. & SOC. PROBS. 163, 174 (2003)).

169. See 468 U.S. 517, 556–57 (1984) (Stevens, J., concurring in part and dissenting in part) ("The Court's conclusive presumption that all conduct by prison guards is reasonable is . . . a decision to sacrifice constitutional principle to the Court's own assessment of administrative expediency."); see also *Block v. Rutherford*, 468 U.S. 576, 593 (1984) (Blackmun, J., concurring in the judgment) ("I am concerned about the Court's apparent willingness to substitute the rhetoric of judicial deference for meaningful scrutiny of constitutional claims in the prison setting.").



C. *The ABA's Reasonable Suspicion Standard Provides Better Fourth Amendment Protection for Pretrial Detainees*

The ABA's reasonable suspicion standard provides more protection of pretrial detainees' constitutional rights than does the Supreme Court's decision in *Florence* regarding blanket strip search policies.<sup>170</sup> Every year approximately 13,000,000 Americans are arrested—roughly 700,000 for minor offenses.<sup>171</sup> A blanket strip search policy assumes that all arrestees, regardless of the basis for arrest, may possess and smuggle contraband.<sup>172</sup> This policy defeats the purpose of having legitimate penological needs for policies implemented by correctional institutions.

Rather than approve a blanket strip search policy, the Supreme Court should have implemented a reasonable, individualized suspicion standard to strike an effective balance between a detainee's privacy rights and prison security concerns.<sup>173</sup> Reasonable suspicion is a relatively low standard, so it is highly unlikely that such a standard would hinder the security efforts of correctional facilities.<sup>174</sup> At the same time, the standard would provide at least some protection for the privacy interests at stake for individuals arrested for minor offenses.

The Supreme Court should have incorporated ABA Standard 23-7.9<sup>175</sup> concerning “searches of prisoners’ bodies,” which carefully balances detainee privacy rights with the security needs of correctional

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170. See Brief of the American Bar Ass'n as Amicus Curiae in Support of Petitioner, *supra* note 139, at 15–17 (explaining that the reasonable suspicion standard preserves the constitutional requirement that searches under the Fourth Amendment be reasonable).

171. *PBS NewsHour: Supreme Court Upholds Inmate Strip Searches Regardless of Charges* (PBS television broadcast Apr. 2, 2012), transcript available at [http://www.pbs.org/newshour/bb/law/jan-june12/scotus\\_04-02.html](http://www.pbs.org/newshour/bb/law/jan-june12/scotus_04-02.html).

172. See *supra* note 141 and accompanying text.

173. See Brief of the American Bar Ass'n as Amicus Curiae in Support of Petitioner, *supra* note 139, at 4–11 (discussing how “[t]he ABA standard on strip searches strikes the proper balance between personal rights and prison security”).

174. Reasonable suspicion requires only “a minimal level of objective justification” and that an “officer . . . be able to articulate more than an ‘inchoate and unparticularized suspicion or hunch’” that the detainee has contraband. *Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000) (citations omitted).

175. STANDARDS ON TREATMENT OF PRISONERS § 23-7.9 (2011). ABA Standard 23-7.9(d) specifically addresses strip searches of prisoners. The term “‘prisoner’ means any person incarcerated in a correctional facility,” including jails and prisons. STANDARDS ON TREATMENT OF PRISONERS § 23-1.0(i)–(k). A “‘jail’ means a correctional facility holding primarily pretrial detainees and . . . prisoners sentenced to a term of one year or less.” *Id.* § 23-1.0(i).

facilities.<sup>176</sup> The American Bar Association Standard 23-7.9(d) provides that individuals arrested and detained for minor, nonviolent, non-drug-related offenses should be strip searched only when there is “individualized reasonable suspicion” that the prisoner is carrying contraband.<sup>177</sup> Several jurisdictions have implemented statutes that mimic the ABA strip search policy.<sup>178</sup> The Federal Bureau of Prisons and numerous states impose an individualized suspicion standard whenever a *minor offense* is involved.<sup>179</sup> In addition, some jurisdictions require the individualized suspicion standard for strip searches conducted on individuals arrested for *any* crime, regardless of whether the crime was considered “minor.”<sup>180</sup> Ultimately, “ABA Standard 23-7.9(d) sets out a practical, workable alternative to permitting a strip search of anyone placed in a detention facility, regardless of the infraction alleged.”<sup>181</sup>

In *Florence*, Justice Breyer’s dissent made an even more convincing and logical case for applying a reasonable suspicion standard to strip searches performed on detainees who have committed minor crimes.<sup>182</sup> The act of being strip searched is humiliating,<sup>183</sup> especially

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176. Brief of the American Bar Ass’n as Amicus Curiae in Support of Petitioner, *supra* note 139, at 4.

177. The relevant text of ABA Standard 23-7.9(d) reads as follows:

Visual searches of prisoner’s bodily areas . . . should . . . be permitted only upon individualized suspicion that the prisoner is carrying contraband, unless the prisoner has recently had an opportunity to obtain contraband, as upon admission to the facility . . . upon return from outside the facility, after a contact visit, or when the prisoner has otherwise had contact with a member of the general public; provided that a strip search should not be permitted without individualized reasonable suspicion when the prisoner is an arrestee charged with a minor offense not involving drugs or violence and the proposed strip search is upon the prisoner’s admission to a correctional facility or before the prisoners placement in a housing unit.

*Id.* § 23-7.9(d) (ii).

178. See Brief of the American Bar Ass’n as Amicus Curiae in Support of Petitioner, *supra* note 139, at 12–14. For example, under the California Penal Code:

No person arrested and held in custody on a misdemeanor or infraction offense, except those involving weapons, controlled substances or violence . . . shall be subjected to a strip search or visual body cavity search prior to placement in the general jail population, unless a peace officer has determined there is reasonable suspicion based on specific and articulable facts to believe such person is concealing a weapon or contraband, and a strip search will result in the discovery of the weapon or contraband.

CAL. PENAL CODE § 4030(f) (West 2012).

179. Brief of the American Bar Ass’n as Amicus Curiae in Support of Petitioner, *supra* note 139, at 13.

180. *Id.* at 14.

181. *Id.*

182. See *supra* text accompanying notes 124–131.

183. See *supra* Part IV.A.2.

when the offense that led to the strip search was minor, such as driving with a noisy muffler or failing to wear a seatbelt.<sup>184</sup> The *Florence* Court was more focused on appeasing the interests of the government<sup>185</sup> than on maintaining a balance between security in correctional facilities and the privacy rights of individuals.

## V. CONCLUSION

The Supreme Court's decision in *Florence v. Board of Freeholders* approved a blanket policy that allows strip searches to be conducted on all arrestees, even on those arrested for the most mundane offenses.<sup>186</sup> At least seven federal appellate courts agreed with Florence's argument that the U.S. Constitution prohibits strip searches of people arrested for minor offense charges in the *absence* of reasonable suspicion.<sup>187</sup> Yet, the Supreme Court focused more on the difficulties of maintaining safety at correctional institutions and granted nearly unlimited deference to the judgment of correctional officials in determining strip search policies.<sup>188</sup> The Court's decision in *Florence* implies that the final word of correctional officials will receive more weight than the words of the Fourth Amendment, potentially opening a gateway to transforming correctional facilities into Fourth Amendment-free zones.<sup>189</sup> Rather than approving a blanket policy, the Supreme Court should have implemented a reasonable, individualized suspicion standard in order to strike an effective balance between a detainee's privacy rights and prison security concerns; this action would have preserved the limited constitutional rights afforded to detainees.<sup>190</sup>

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184. See *supra* text accompanying note 46; see also Adam Cohen, *Strip Searches: The Supreme Court's Disturbing Decision*, TIME.COM (Apr. 6, 2012), <http://ideas.time.com/2012/04/06/strip-searches-the-supreme-courts-disturbing-decision/> (“[W]hen the government can strip-search people who do not wear a seat belt, it can strip-search any of us.”).

185. Cohen, *supra* note 184 (“[W]hen there is a case in which the freedom at stake is crystal clear—the right to not be forced to needlessly lift one’s genitals or squat while coughing for a law-enforcement official—the court is firmly focused on the government’s important interests in taking it away.”).

186. *Id.* (“It might seem that in the United States, being pulled over for driving without a seat belt should not end with the government ordering you to take off your clothes and ‘lift your genitals.’ But there is no guarantee that this is the case . . .”).

187. *Florence III*, 132 S. Ct. 1510, 1530 (2012) (Breyer, J., dissenting).

188. See *supra* Part IV.A.

189. See *supra* Part IV.B.

190. See *supra* Part IV.C.