

**THE PENDULUM CONTINUES TO SWING IN THE WRONG
DIRECTION AND THE FOURTH AMENDMENT MOVES
CLOSER TO THE EDGE OF THE PIT:
THE RAMIFICATIONS OF *FLORENCE V. BOARD OF CHOSEN
FREEHOLDERS***

*Amanda Laufer**

I. INTRODUCTION

The following excerpt comes from a short story written by Edgar Allan Poe called “The Pit and the Pendulum”:

Very suddenly there came back to my soul motion and sound—the tumultuous motion of the heart, and in my ears the sound of its beating. Then a pause in which all is blank. Then again sound, and motion, and touch, a tingling sensation pervading my frame. Then the mere consciousness of existence, without thought, a condition which lasted long. Then, very suddenly, THOUGHT, and shuddering terror, and earnest endeavour to comprehend my true state. Then a strong desire to lapse into insensibility So far I had not opened my eyes Perspiration burst from every pore, and stood in cold big beads upon my forehead. The agony of suspense grew at length intolerable

Although this passage is about the torments endured by a prisoner awaiting a death sentence during the Spanish Inquisition, Poe’s description effectively can be likened to the experience that an individual arrested on a minor offense endures when subjected to a strip search at a detention facility.

On March 3, 2005, Albert Florence and his wife were driving on Route 295 in Burlington County, New Jersey when a state trooper pulled them over for speeding.² The state trooper ran Florence’s

* J.D. Candidate, 2012, Seton Hall University School of Law; B.A., 2009, Cornell University. The Author would like to thank Professor John Wefing and her fellow Law Review editors for their help and guidance throughout the composition of this Comment. A very special thanks to my wonderful family and friends for their constant encouragement and for always believing in me.

¹ EDGAR ALLAN POE, *THE PIT AND THE PENDULUM: THE ESSENTIAL POE* 56 (2009).

² *Florence v. Bd. of Chosen Freeholders*, 621 F.3d 296, 299 (3d Cir. 2010), *cert. granted*, 131 S. Ct. 1816 (2011); Guy Sterling, *A Mistaken Warrant, Six Days in Jail and*

identification and found an outstanding bench warrant from April 25, 2003, which charged Florence with a non-indictable variety of civil contempt.³ Florence challenged the validity of the warrant and produced documentation showing that he had paid the fine two years earlier,⁴ but to no avail. The state trooper arrested Florence and took him to the Burlington County Jail (BCJ).⁵ Upon his arrival, corrections officers subjected Florence to a strip search and visual body cavity search. Florence “was directed to remove all of his clothing, then open his mouth and lift his tongue, hold out his arms and turn around, and lift his genitals” while an officer sat at an arm’s-length distance in front of him.⁶ Following the search, officers directed Florence to shower and held him at BCJ for six days until the Essex County Sheriff’s Department took custody and transported him to the Essex County Correctional Facility (ECCF).⁷ Upon his arrival at the correctional facility, the officers subjected Florence to another strip search and visual body cavity search.⁸ Two corrections officers directed him to strip naked and observed him while he showered.⁹ Next, he was “directed to open his mouth and lift his genitals,” and then “ordered to turn around so he faced away from the officers and to squat and cough.”¹⁰ After the searches, Florence entered the general population of the jail.¹¹ The following day, the state dismissed the charges against him and he was released.¹²

For the past thirty years, the constitutionality of strip searches in custodial facilities has been subject to ongoing debate. Although the majority of circuit courts have ruled on the issue, the Third Circuit did not address it until the case of *Florence v. Board of Chosen Freeholders*, which was decided on September 21, 2010, in an opinion by Judge Hardiman.¹³ Since the case was one of first impression, this ruling has major implications for both individuals and jails throughout the Third Circuit. Moreover, because the Supreme Court granted

Two Strip Searches, THE STAR LEDGER (Mar. 28, 2008), <http://www.appellate-brief.com/ClassActs/Florence/Starldgp1.htm>.

³ *Florence*, 621 F.3d at 299.

⁴ *Id.*; Sterling, *supra* note 2.

⁵ *Florence*, 621 F.3d at 299.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Florence*, 621 F.3d at 299.

¹² *Id.*

¹³ *Id.* at 296.

certiorari in the case,¹⁴ the implications will likely extend even further, including the setting of a national policy regarding strip searches.

Decades before the Third Circuit's decision, the Supreme Court examined the blanket strip-search policy at the Metropolitan Correctional Center (MCC), a federal short-term custodial facility designed to house pretrial detainees, in the 1979 case *Bell v. Wolfish*.¹⁵ This policy required inmates "to expose their body cavities for visual inspection as part of a strip search conducted after every *contact visit* with a person from outside the institution."¹⁶ In evaluating the constitutionality of the searches, the Court articulated a test of reasonableness, namely, a balancing test¹⁷ that became "the touchstone of Fourth Amendment analysis in the strip search context."¹⁸ In applying this balancing test, the Court found that MCC's policy was constitutional¹⁹ and concluded that visual body cavity searches of inmates after contact visits could be "conducted on less than probable cause" because the security interests involved outweighed the inmates' privacy interests.²⁰

The ambiguity of the Supreme Court's decision in *Bell* has left the lower courts without much guidance regarding the appropriate application of the *Bell* holding to strip-search policies in contexts other than post-contact visits.²¹ Notwithstanding this lack of guidance, nearly every federal circuit court has since held that blanket strip-search policies utilized by jails during booking procedures and applicable to all arrestees, even to those charged with minor offenses, violate the Fourth Amendment absent reasonable suspicion that an individual arrestee was concealing a weapon or other contraband.²²

¹⁴ *Id.* at 299.

¹⁵ 441 U.S. 520, 558 (1979).

¹⁶ *Id.* at 558 (emphasis added).

¹⁷ *Id.* at 559. For a discussion of the *Bell* balancing test, see *infra* Part II.B.

¹⁸ Gabriel M. Helmer, *Strip Search and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U. L. REV. 239, 249 (2001).

¹⁹ *Bell*, 441 U.S. at 558.

²⁰ *Id.* at 560.

²¹ Andrew A. Crampton, Note, *Stripped of Justification: The Eleventh Circuit's Abolition of the Reasonable Suspicion Requirement for Booking Strip Searches in Prisons*, 57 CLEV. ST. L. REV. 893, 904–05 (2009) ("Because of the ambiguity of the [*Bell*] decision, subsequent courts that had to determine the validity of prison facility strip searches that took place outside the particular context of contact visit had the difficult task of deciding how to apply and interpret the Supreme Court's holding in *Bell*").

²² See, e.g., *Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001); *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001), *overruled by* *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc); *Chapman v. Nichols*, 989 F.2d 393 (10th Cir. 1993); *Masters v.*

Starting in 2008, however, the Eleventh and Ninth Circuits disrupted this uniformity when they overturned their prior precedents. These courts upheld blanket strip-search policies that applied to all arrestees during booking as constitutional, regardless of whether there was reasonable suspicion.²³

In the wake of this recent trend, in *Florence*, a ruling of first impression, the Third Circuit joined the Eleventh and Ninth Circuits in upholding the blanket strip-search policies of two custodial facilities in New Jersey, BCJ and ECCF.²⁴ This Comment argues that the Third Circuit's decision in *Florence* was wrong. The court not only ignored the overwhelming majority of contrary jurisprudence in other circuits, but the court also overlooked many persuasive district court decisions within the Third Circuit itself. Moreover, the Third Circuit failed to recognize the factual differences between *Florence* and the Supreme Court's decision in *Bell*. The holding in *Bell* is not controlling outside of the context of post-contact visit strip searches. Finally, the Third Circuit failed to give adequate weight to the significant intrusion of bodily privacy that individuals endure during strip searches.

Part II of this Comment will examine the evolution of the Fourth Amendment jurisprudence in the context of unreasonable searches

Crouch, 872 F.2d 1248 (6th Cir. 1989); Weber v. Dell, 804 F.2d 796 (2d Cir. 1986); Stewart v. Lubbock Cnty., 767 F.2d 153 (5th Cir. 1985); Jones v. Edwards, 770 F.2d 739 (8th Cir. 1985); Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1985), *overruled by* Bull v. City & Cnty. of San Francisco, 595 F.3d 964 (9th Cir. 2010) (en banc); Hill v. Bogan, 735 F.2d 391 (10th Cir. 1984); Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983); Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981); *see also* Powell v. Barrett, 541 F.3d 1298, 1315 (11th Cir. 2008) (Barkett, J., dissenting) ("For almost thirty years, circuit courts have followed the *Bell* Court's instructions and, until today, universally held that reasonable suspicion is necessary to constitutionally justify the types of searches before us.").

²³ *See* Powell, 541 F.3d at 1314; Bull, 595 F.3d at 975; *see also* Florence v. Bd. of Chosen Freeholders, 621 F.3d 296, 304–05 (3d Cir. 2010), *cert. granted*, 131 S. Ct. 1816 (2011) (noting that the Eleventh and Ninth Circuits reversed prior precedent and upheld blanket strip-search policies).

²⁴ *Florence*, 621 F.3d at 311 ("In sum, balancing the Jails' security interests at the time of intake before arrestees enter the general population against the privacy interests of the inmates, we hold that the strip search procedures described by the District Court at BCJ and ECCF are reasonable."); *see also* Shannon P. Duffy, *Joining Trend, 3rd Circuit Upholds Jails' Blanket Strip Search Policy*, LEGAL INTELLIGENCER (Sept. 22, 2010), <http://www.law.com/jsp/article.jsp?id=1202472378843&slreturn=1> ("The pendulum is now swinging in the other direction and the law is very much in flux as illustrated by Tuesday's decision from the 3rd U.S. Circuit Court of Appeals that upheld blanket strip search policies in two New Jersey counties. Voting 2-1, the 3rd Circuit decided to follow recent rulings by two of its sister circuits in holding that jails must be given broad powers to use a mandatory strip search for every new detainee in order to prevent the influx of weapons, drugs, and other contraband.").

of an arrestee and provide an overview of the history of strip searches under the Fourth Amendment, including an in-depth analysis of the Supreme Court's decision of *Bell v. Wolfish*. Part III will examine the circuit split that developed post-*Bell* regarding the constitutionality of blanket strip-search policies applicable to arrestees charged with minor offenses. Then, Part IV of this Comment will analyze the Third Circuit's recent decision in *Florence*. Part V will argue that the Third Circuit's decision was wrong because the court, in upholding a blanket strip-search policy applicable to all arrestees, misinterpreted the Supreme Court's holding in *Bell* and failed to give adequate weight to the severe intrusion of an arrestee's bodily privacy during strip searches. Finally, Part VI will argue that the Supreme Court should reverse the Third Circuit and adopt the approach that the majority of circuit courts take: it is unreasonable and unconstitutional for a correctional facility to strip search a person arrested for a minor offense unless authorities have a "reasonable suspicion" that the individual is concealing a weapon or other contraband. This part will also examine the current composition of the Supreme Court and argue that it may not have been the right time for the plaintiffs to petition for certiorari considering the conservative leanings of the Roberts Court.

II. THE BACKGROUND OF FOURTH AMENDMENT STRIP SEARCHES

A. *The Evolution of the Fourth Amendment*

The United States places high value on protecting constitutional liberties, pursuant to which individuals have a right to be free from government intrusion in certain aspects of their lives.²⁵ Specifically, the Fourth Amendment provides the following protections:

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

²⁵ The text of the Constitution never explicitly uses the term "privacy," but various constitutional limits exist on governmental intrusion of an individual's right to privacy. See, e.g., U.S. CONST. amend. IV. (right to be free of unwarranted search or seizure); U.S. CONST. amend. I. (right to free assembly); U.S. CONST. amend. XIV (providing a substantive due process right to privacy); see also David C. James, *Constitutional Limitations on Body Searches in Prisons*, 82 COLUM. L. REV. 1033, 1042 (1982) ("One commentator has argued that prisoners retain a general constitutional right to privacy such as was recognized in *Griswold v. Connecticut* and *Roe v. Wade*." (internal citations omitted)); *Griswold v. Connecticut*, 381 U.S. 479 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.").

ing the place to be searched, and the persons or things to be seized.²⁶

The Fourth Amendment affords individuals the right to be free from unreasonable searches.²⁷ The essential purpose of the Fourth Amendment is to protect an individual's expectation of privacy by limiting the discretion of government officials in conducting searches and seizures.²⁸ Two such limitations are the warrant and probable cause requirements, which provide that an officer must obtain a warrant issued on probable cause before a search and/or seizure can occur.²⁹ Over time, however, as the jurisprudence of the Fourth Amendment evolved, the United States Supreme Court developed several exceptions to the warrant requirement.³⁰ Among these, the search-incident-to-arrest exception is one of the most important.³¹ In 1973, the Supreme Court held in *United States v. Robinson* that, when an arrest is lawful, a full-body search of a person is reasonable under the Fourth Amendment despite the absence of a warrant.³² One

²⁶ U.S. CONST. amend. IV.

²⁷ See *id.*; *Carroll v. United States*, 267 U.S. 132, 147 (1925).

²⁸ See *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) ("The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."); *Schmerber v. California*, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."); *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967); see also *Helmer*, *supra* note 18, at 242–43 ("The essential purpose of the Fourth Amendment is to impose a standard of 'reasonableness' upon government searches and seizures and to limit the exercise of discretion by government officials.").

²⁹ See, e.g., *Katz v. United States*, 389 U.S. 347, 357 (1967); Paul Shuldiner, *Visual Rape: A Look at the Dubious Legality of Strip Searches*, 13 J. MARSH. L. REV. 273, 277 (1979) (citing *Brinegar v. United States*, 338 U.S. 160, 179 (1949)).

³⁰ *Helmer*, *supra* note 18, at 251 n.67 (citing *Chimel v. California*, 395 U.S. 752, 755–68 (1968); *Carroll*, 267 U.S. at 149); see also *United States v. Robinson*, 414 U.S. 218 (1973).

³¹ See *Robinson*, 414 U.S. 218; Shuldiner, *supra* note 29, at 277 (stating that the search incident to arrest exception is the most important and widespread exception to the warrant requirement).

³² *Robinson*, 414 U.S. at 235.

A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.

scholar, Gabriel Helmer, explains that, in *Robinson*, the Court seemed to “suggest that the strip search of pretrial detainees may be analyzed under the search-incident-to-arrest exception.”³³ One year after *Robinson*, the Court further extended the search-incident-to-arrest exception to the detention context in *United States v. Edwards*.³⁴ Nonetheless, the Supreme Court commented in a later case that *Edwards* was not addressing the circumstances in which a strip search of an arrestee is reasonable.³⁵ According to Helmer, the search-incident-to-arrest exception serves as an improper vehicle to analyze the constitutionality of a strip search.³⁶ Essentially, the “scope and intensity of strip and visual body cavity searches [is] more intrusive and not clearly included by the catch-all ‘full search’ in *Robinson*.”³⁷

In order to truly understand the scope and intensity of a strip search, one should consider the following account of a woman describing her arrest for failure to obey a police officer at a protest and her subsequent experience of being strip-searched:

After I removed all my clothes, the guard told me to turn around, bend all the way over, and spread my cheeks. I’m not sure that I can really convey the emotional and physical complexity of the situation. Bending over and ‘spreading my cheeks’ exposed my genitalia and anus to a complete stranger, who had physical authority over me, so that she could visually inspect my body cavities. . . .

The guard’s next set of instructions were to squat—and then—to hop like a bunny. Remember, I’m still ‘spreading my cheeks,’ so I can’t use my arms to balance or assist me in the hopping process. . . . I didn’t do it to the guards liking, so I had to do it over several times

I stood, bent over, and hopped naked under orders and in view of at least two guards in a small room with a door open to a

Id.; see also *id.* at 222–23 (“[T]he officer completely search[es] the individual and inspect[s] areas such as behind the collar, underneath the collar, the waistband of the trousers, the cuffs, the socks and shoes.”).

³³ Helmer, *supra* note 18, at 252.

³⁴ 415 U.S. 800, 803 (1974) (“[S]earches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention.”).

³⁵ *Illinois v. Lafayette*, 462 U.S. 640, 646 n.2 (1983).

³⁶ Helmer, *supra* note 18, at 253 (“The difference in scope, intensity, and justifications between the search incident to arrest exception and the strip search in confinement require courts to consider these strip searches outside of the search incident to arrest exception.”); Schuldiner, *supra* note 29, at 279–80; see also *Robinson*, 414 U.S. at 223 n.2 (explaining the full “field type search” that is permitted following an arrest based on probable cause).

³⁷ Helmer, *supra* note 18, at 253.

hallway that passersby could see in for about 10 to 15 minutes. My genitalia and anus were exposed and viewable to anyone passing through the hallway for over 5 minutes.³⁸

Strip-search policies at custodial facilities can include strip searches, visual body cavity searches, or manual body cavity searches.³⁹ In a strip search, “a prisoner is required to disrobe completely before a corrections official. In addition, the inmate may be asked to open his mouth, display the soles of his feet, and present open hands and arms.”⁴⁰ In a visual body cavity search, “[i]f the inmate is a male, he must lift his genitals and bend over to spread his buttocks for visual inspection. The vaginal and anal cavities of female inmates are also visually inspected. The inmate is not touched by security personnel at any time”⁴¹ A manual body cavity search “includes the physical probing of the rectum or vagina.”⁴² Regardless of what label one puts on the type of search, there is no question that these searches are more intrusive than the searches that the Supreme Court allowed in *Robinson*.⁴³

Most pertinent to *Florence*, the Fourth Amendment protects against governmental intrusions into areas where a person has a “reasonable expectation of privacy.”⁴⁴ To determine a person’s reasonable expectation of privacy, one must consider both the nature of the search and the stage of the investigative process (i.e., pre-arrest, incident to arrest, pre-trial detention, or post-conviction).⁴⁵ It is important to understand that from the beginning of this nation’s history,

³⁸ JUDY HANEY, STATEMENT TO THE COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS 3–4 (2005), available at http://www.prisoncommission.org/statements/haney_judith.pdf (statement to the Commission on Safety and Abuse in America’s Prisons regarding her personal experience of being strip searched in Miami-Dade County). Judy Haney was lead plaintiff in a federal class action suit filed against Miami-Dade County in March 2004 challenging the policies of strip searches and visual inspections of body cavities of women arrested for non-violent, non-drug- or non-weapons-related misdemeanors in Miami. See *Haney v. Miami-Dade Cnty.*, No. 04-20516, 2005 U.S. Dist. LEXIS 27739 (S.D. Fla. Oct. 6, 2005) (explaining that the court approved the settlement agreement for all arrestees who did not opt-out).

³⁹ See generally William J. Simonitsch, Comment, *Visual Body Cavity Search*, 54 U. MIAMI L. REV. 665 (2000) (discussing the various types of strip searches and their characteristics).

⁴⁰ James, *supra* note 25, at 1033 n.2.

⁴¹ *Bell v. Wolfish*, 441 U.S. 520, 558 n.39 (1979); see also James, *supra* note 25, at 1033 n.2.

⁴² James, *supra* note 25, at 1033 n.2.

⁴³ See *supra* note 36 and accompanying text.

⁴⁴ *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

⁴⁵ See Simonitsch, *supra* note 39, at 669–70 (explaining the reasonable expectation of privacy present for an individual at each stage of the investigative process).

the Constitution did not afford protections to prisoners.⁴⁶ However, throughout the 1950s and 1960s, prisoners' rights emerged as a result of the Civil Rights Movement.⁴⁷ In 1974, the Supreme Court explained that "a prisoner is not wholly stripped of constitutional protections" as "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."⁴⁸ Pretrial detainees subsequently gained the same constitutional protections as prisoners.⁴⁹ Nevertheless, prisoners' and detainees' rights are sometimes limited because of the unique nature of custodial facilities and the need to maintain security at the facilities.⁵⁰ For instance, in *Hudson v. Palmer*, the Supreme Court explained that "[t]he curtailment of certain rights is necessary, as a practical matter, to accommodate a my-

⁴⁶ See SCOTT CHRISTIANSON, 500 YEARS OF IMPRISONMENT IN AMERICA: WITH LIBERTY FOR SOME 252 (1998) ("For the first 160 years or so of the nation's history, the courts almost without exception had maintained a 'hands-off' or 'out-of-sight, out-of-mind' posture towards prisoners."); Helmer, *supra* note 18, at 249 ("One early American court remarked: A convicted felon . . . has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being a slave of the State." (internal citation omitted)); Deborah L. MacGregor, *Stripped of All Reason? The Appropriate Standard for Evaluating Strip Searches of Arrestees and Detainees in Correctional Facilities*, 36 COLUM. J.L. & SOC. PROBS. 163, 165 (2003) ("Courts did not immediately interpret the Constitution and Fourth Amendment as providing many rights to arrestees to be free of strip searches. Over time, this view began to evolve and some protections were extended.").

⁴⁷ Helmer, *supra* note 18, at 249. "[The Supreme Court] extended constitutional rights to prisoners pursuant to the Civil Rights Act of 1964." *Id.* at 250; see also *Cooper v. Pate*, 378 U.S. 546 (1964) (holding that a state prisoner had a right to sue a prison official under § 1983 of the Civil Rights Act of 1871); CHRISTIANSON, *supra* note 46, at 254 (explaining that *Cooper* confirmed that prisoners were protected under the Civil Rights Act).

⁴⁸ *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974). The Supreme Court has reiterated this notion over and over again. See, e.g., *Turner v. Safley*, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."); *Bell v. Wolfish*, 441 U.S. 520, 545 (1979) ("[W]e have held that convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison.").

⁴⁹ See *Bell*, 441 U.S. at 545 ("[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.").

⁵⁰ See *Hudson v. Palmer*, 468 U.S. 517, 524 (1984); see also *Bell*, 441 U.S. at 545, 557 ("The fact of confinement as well as the legitimate goals and policies of the penal institution limits these retained constitutional rights, [and thus,] any reasonable expectation of privacy that a detainee retained necessarily would be of a diminished scope."); *Allison v. GEO Grp., Inc.*, 611 F. Supp. 2d 433, 455–56 (E.D. Pa. 2009) ("[B]ecause custodial facilities necessarily provide little in the way of personal privacy, Fourth Amendment rights, which only exist where a person has a reasonable expectation of privacy that society is willing to recognize, are significantly diminished in custodial settings.").

riad of ‘institutional needs and objectives’ of prison facilities chief among which is internal security.”⁵¹ In *Hudson*, the Court held that “the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell” because the prison inmate does not have a reasonable expectation of privacy there.⁵² It is important to note that the Court in *Hudson* was dealing with prisoners’ privacy rights in their cells, rather than with prisoners’/detainees’ expectation of bodily privacy.

While there has been an exceptional amount of litigation regarding prisoners’ rights, there remains uncertainty as to body searches of arrestees and whether—and to what extent—the Constitution protects their expectations of bodily privacy.⁵³ This Comment focuses on the rights of detainees and arrestees to be free from unreasonable strip searches. On several occasions, the Supreme Court has explained that “the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’”⁵⁴ The Supreme Court has provided relatively little guidance with respect to analyzing the reasonableness of Fourth Amendment challenges to strip searches of detainees and arrestees in custodial facilities.⁵⁵ In fact, the Court’s “lone pronouncement” on the reasonableness of strip searches of pretrial detainees in custodial facilities came in 1979 in *Bell v. Wolfish*.⁵⁶

B. *Bell and the Balancing Test*

In *Bell*, the Supreme Court addressed the nature of constitutional rights afforded to pretrial detainees⁵⁷ by establishing a balancing test, which “became the touchstone for Fourth Amendment analysis in the strip search context.”⁵⁸ In this class action, pretrial detainees challenged numerous conditions of confinement at MCC, a federal short-term custodial facility in New York City designed to primarily

⁵¹ *Hudson*, 468 U.S. at 524 (internal citation omitted).

⁵² *Id.* at 526.

⁵³ James, *supra* note 25, at 1033.

⁵⁴ *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *Samson v. California*, 547 U.S. 843, 855 n.4 (2006); *United States v. Knights*, 534 U.S. 112, 118 (2001); *see also* *Pennsylvania v. Mimms*, 434 U.S. 106, 108–09 (1977) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

⁵⁵ THOMAS N. MCINNIS, *THE EVOLUTION OF THE FOURTH AMENDMENT* 153 (2009).

⁵⁶ *Id.*; James, *supra* note 25, at 1038 n. 34 (explaining that since *Bell*, the Supreme Court has demonstrated its reluctance to review cases involving the legality of body searches of prisoners by denying certiorari in all such cases).

⁵⁷ *Bell v. Wolfish*, 441 U.S. 520, 521 (1979) (explaining that a pretrial detainee is an individual who is charged with a crime but has not been tried on that charge).

⁵⁸ Helmer, *supra* note 18, at 242.

hold pretrial detainees.⁵⁹ One of the issues before the Court was a challenge to the strip-search policy at MCC, which subjected all inmates, regardless of the reason for their detention, to a visual body cavity inspection following every contact visit with a person from outside the facility.⁶⁰ Specifically, the search required the following:

If the inmate is a male, he must lift his genitals and bend over to spread his buttocks for visual inspection. The vaginal and anal cavities of female inmates also are visually inspected. The inmate is not touched by security personnel at any time during the visual search procedure.⁶¹

The district court held that the blanket visual body cavity searches were unreasonable and in violation of the Fourth Amendment because they were conducted without probable cause.⁶² The Second Circuit affirmed, finding such a search to be a “gross violation of personal privacy.”⁶³ The Supreme Court, in an opinion by Justice Rehnquist joined by Justices Burger, Stewart, White, and Blackmun, reversed the lower court decisions and held that the visual body cavity inspections at MCC were reasonable under the Fourth Amendment.⁶⁴ Justice Powell joined the majority in another part of the opinion, but dissented from the majority with respect to the body cavity searches because he viewed them as serious intrusions on a person’s privacy, which thereby required at least reasonable suspicion.⁶⁵ Justice Marshall dissented, expressing the view that the body cavity searches constitute “one of the most grievous offenses against personal dignity and common decency.”⁶⁶ Finally, Justice Stevens, joined by Justice Brennan, opined in his dissent that there must be probable cause in order to justify such searches of pretrial detainees.⁶⁷

The Supreme Court began its analysis of the strip-search policy at MCC by explaining that a strip search “instinctively gives us the most pause.”⁶⁸ In discussing the appropriate test for evaluating constitutional claims of detainees, the Court noted that both convicted

⁵⁹ *Bell*, 441 U.S. at 523.

⁶⁰ *Id.* at 558.

⁶¹ *Id.* at 558 n.39.

⁶² *United States ex. rel. Wolfish v. Levi*, 439 F. Supp. 114, 148 (S.D.N.Y. 1977), *aff’d in part and rev’d in part*, *Wolfish v. Levi*, 573 F.2d 118, 131 (2d. Cir. 1978), *rev’d sub nom.*, *Bell v. Wolfish*, 441 U.S. 520 (1979).

⁶³ *Wolfish*, 573 F.2d at 131.

⁶⁴ *Bell*, 441 U.S. at 558.

⁶⁵ *Id.* at 563 (Powell, J., concurring in part and dissenting in part).

⁶⁶ *Id.* at 576–77 (Marshall, J., dissenting).

⁶⁷ *Id.* at 590 (Stevens, J., dissenting).

⁶⁸ *Id.* at 558 (majority opinion).

prisoners and pretrial detainees retain some Fourth Amendment rights upon admittance to a correctional facility.⁶⁹ Yet, the Court explained that these rights are subject to restrictions due to the institution's goals of maintaining security and preserving order.⁷⁰ The problems that arise in the daily operation of custodial facilities can be challenging, and 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."⁷¹ The Court deferred to the judgment of prison administrators because (1) "such considerations [regarding institutional security] are peculiarly within the province and professional expertise of corrections officials," and (2) the operation of correctional facilities should be left to the authority of the legislative and executive branches, not the judiciary.⁷²

In evaluating the searches at MCC, the Court explained that the test of reasonableness is "not capable of precise definition or mechanical application," and therefore requires "a balancing of the need for the particular search against the invasion of personal rights that the search entails."⁷³ In balancing these dual interests, courts must consider the following four factors: (1) the scope of the particular intrusion, (2) the manner in which it is conducted, (3) the justification for initiating it, and (4) the place in which it is conducted.⁷⁴ In applying the balancing test, the Court noted that with regard to the scope of the intrusion, it did not "underestimate the degree to which these searches may invade the personal privacy of inmates."⁷⁵ With regard to the manner in which prison officials conduct the searches, the Court noted that there is potential for abuse, but the Court emphasized that it did not condone such conduct.⁷⁶ Nonetheless, the Court accorded great deference to the security needs and prison administrators' justifications, explaining that "[a] detention facility is a unique place fraught with serious security dangers."⁷⁷ The Court found that MCC had legitimate security concerns, which consisted of

⁶⁹ *Id.* at 545, 558.

⁷⁰ *Bell*, 441 U.S. at 545–46.

⁷¹ *Id.* at 547.

⁷² *Id.* at 558 (internal quotation marks and citation omitted).

⁷³ *Id.*

⁷⁴ *Id.* at 559.

⁷⁵ *Id.* at 560.

⁷⁶ *Bell*, 441 U.S. at 560.

⁷⁷ *Id.* at 559.

preventing and deterring the smuggling of weapons, drugs, and other contraband into the facility.⁷⁸ This concern persuaded the Court because smuggling was both common and documented at MCC and in other cases.⁷⁹ Although MCC officials detected only one instance of smuggling contraband, the Court found that this served as proof that the policy was effective.⁸⁰

In the end, the Court found that the institution's security interests outweighed the intrusion of an inmate's privacy interest, and held the searches conducted *after* planned visits from outsiders at MCC were not unreasonable under the Fourth Amendment.⁸¹ The Court failed to specify the level of cause required to uphold these policies, but limited its ruling by acknowledging that its holding was only "deal[ing] here with the question of 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, [the Court concluded] that they can."⁸²

III. THE *BELL*-PROGENY AND BLANKET STRIP-SEARCH POLICIES DURING BOOKING PROCEDURES

The Supreme Court's decision in *Bell* was limited to a blanket strip-search policy of all detainees on less than probable cause after contact visits with individuals from outside the institution.⁸³ Therefore, the *Bell* decision provided little guidance to lower courts on how to apply the holding to strip-search policies in other contexts (i.e., searches that take place during booking procedures) and what level of cause was required for such searches to be reasonable and to comport with the Fourth Amendment.⁸⁴ Notwithstanding the lack of clar-

⁷⁸ *Id.*

⁷⁹ *Id.* (citing *Ferraro v. United States*, 590 F.2d 335 (6th Cir. 1978); *United States v. Park*, 521 F.2d 1381 (9th Cir. 1975)). When discussing the problem of smuggling, however, both cases "document" the problem of smuggling contraband during a *planned contact visit*.

⁸⁰ *Id.* at 559 (noting that it serves as "a testament to the effectiveness of this search technique as a deterrent").

⁸¹ *Id.* at 558, 560.

⁸² *Bell*, 441 U.S. at 560.

⁸³ *Id.*

⁸⁴ See Crampton, *supra* note 21, at 904–05 ("Because of the ambiguity of the [*Bell*] decision, subsequent courts that had to determine the validity of prison facility strip searches that took place outside the particular context of contact visit had the difficult task of deciding how to apply and interpret the Supreme Court's holding in *Bell*.").

ity, the vast majority of circuit courts used the *Bell* balancing test to assess the constitutionality of blanket strip-search policies as applied to arrestees charged with minor offenses upon admission to a custodial facility.⁸⁵ For decades, these circuit courts have uniformly held that jails could not employ blanket strip searches of all arrestees absent reasonable suspicion that the individual was concealing a weapon, drugs, or other contraband.⁸⁶

A. *The Majority View and the Requirement of Reasonable Suspicion*

For the past thirty years, the majority of federal courts have prohibited blanket strip-searches of arrestees employed during booking procedures without an articulation of reasonable suspicion that the individual was harboring drugs or other contraband.⁸⁷ The Seventh Circuit's decision in *Mary Beth G. v. City of Chicago*⁸⁸ provided "the catalyst for this movement."⁸⁹ In 1983, the Seventh Circuit addressed a challenge to the City of Chicago's blanket strip-search policy when officers arrested three women for misdemeanor offenses involving minor traffic violations and strip searched them in accordance with the city's policy.⁹⁰ The policy required a strip search and visual body cavity inspection of all arrested and detained women regardless of whether the prison officials had reasonable belief that the arrestees were hiding weapons or contraband.⁹¹ This policy did not apply to male arrestees; in fact, male arrestees were only subject to a strip search if officers reasonably believed that the arrestees were concealing weapons or contraband.⁹² Specifically, the policy required that

⁸⁵ See cases cited *supra* note 22.

⁸⁶ See cases cited *supra* note 22; see also Helmer, *supra* note 18, at 279 ("It is well settled that blanket policies allowing strip searches of misdemeanor detainees are invalid because they require no level of cause to strip search the detainee.").

⁸⁷ See cases cited *supra* note 22; see also Crampton, *supra* note 21, at 905 ("[N]early all the federal courts faced with booking strip searches post-*Bell* chose the latter route, quickly selecting reasonable suspicion as the appropriate level of cause required.").

⁸⁸ 723 F.2d 1263 (7th Cir. 1983).

⁸⁹ Simonitsch, *supra* note 39, at 683; see also, Crampton, *supra* note 21, at 905 ("The first court to apply a specific standard of cause required for booking strip searches was the Seventh Circuit . . .").

⁹⁰ *Mary Beth G.*, 723 F.2d at 1267 n.2 (explaining that the arrests and detentions were not identical, but that all involved women were arrested for misdemeanor offenses: two women were stopped for traffic violations and arrested for outstanding parking tickets, and another was arrested for failure to produce her driver's license after making an improper left turn).

⁹¹ *Id.* at 1266.

⁹² *Id.* at 1268.

female police personnel search every woman in detention in the following manner:

(1) [to] lift her blouse or sweater and to unhook and lift her bra-siere to allow a visual inspection of the breast area, to replace these articles of clothing and then (2) to pull up her skirt or dress or to lower her pants and pull down any undergarments, to squat two or three times facing the detention aide and to bend over at the waist to permit visual inspection of the vaginal and anal area.⁹³

The Seventh Circuit began its analysis by setting forth the evolution of the Fourth Amendment jurisprudence through *Bell*.⁹⁴ The court explained that because the Fourth Amendment prohibits “unreasonable” searches, its task was to determine if the city’s strip-search policy was unreasonable under the Fourth Amendment.⁹⁵ The court noted that, generally, searches cannot be conducted without a warrant, but exceptions exist where a warrantless search may be considered reasonable.⁹⁶ The city argued that its policy was valid under two exceptions to the warrant requirement: (1) a search incident to arrest⁹⁷ and (2) a search incident to detention of a person lawfully arrested.⁹⁸ Nonetheless, the court examined the cases setting forth these exceptions to the warrant requirement and rejected the applicability of these holdings.⁹⁹ Rather, the court found that strip searches are more intrusive than searches incident to arrest.¹⁰⁰ Specifically, the court noted that, while the Supreme Court in *Bell* evaluated the scope of permissible searches incident to incarceration, *Bell* was not controlling “because the particularized searches in that case were initiated under different circumstances.”¹⁰¹ The court distinguished

⁹³ *Id.* at 1267.

⁹⁴ *Id.* at 1268.

⁹⁵ *Id.*

⁹⁶ *Mary Beth G.*, 723 F.2d at 1268.

⁹⁷ *Id.* (citing *New York v. Belton*, 453 U.S. 454 (1981); *United States v. Edwards*, 415 U.S. 800 (1974); *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 752 (1969)).

⁹⁸ *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520 (1979); *Edwards*, 415 U.S. at 804–05 n.6).

⁹⁹ *Id.* at 1271–73.

¹⁰⁰ *Id.* (“We cannot say that the breadths of the exceptions relied on by the City clearly extend to the circumstances that exist in these cases.”). The court explained that “the Robinson Court simply did not contemplate the significantly greater intrusions that occurred here. Similarly, the searches in the cases before [the court] are qualitatively different from the delayed custodial searches upheld in *Edwards*.” *Id.* Further, the court explained that *Bell* “is also not controlling because the particularized searches in that case were initiated under different circumstances.” *Id.*

¹⁰¹ *Id.* at 1271–72.

Bell by explaining that (1) in *Bell*, “the detainees were awaiting trial on serious federal charges,”¹⁰² while in *Mary Beth G.*, the detainees were minor offenders waiting to post bond and that (2) in *Bell*, detainees were searched after contact visits, whereas the searches were conducted during booking in *Mary Beth G.*¹⁰³

The Seventh Circuit engaged in its own inquiry as to whether the strip-search policy was “reasonable” and began its analysis by using the *Bell* balancing test.¹⁰⁴ Starting with the scope of the invasion, the court found that the strip searches were a severe intrusion on the privacy and dignity of the individual.¹⁰⁵ The Seventh Circuit explained that visual body cavity searches that inspect the anal and genital areas are “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.”¹⁰⁶ The court noted that the city sought to justify these searches claiming they were necessary to maintain security in the facilities in order to prevent the influx of weapons or contraband by female minor offenders;¹⁰⁷ yet, the record did not support this justification.¹⁰⁸ The court acknowledged the difficulty in balancing these interests and explained that jail security is a legitimate concern, but found that “the strip searches bore an insubstantial relationship to security needs.”¹⁰⁹ Thus, the Seventh Circuit held that the city’s policy

¹⁰² *Mary Beth G.*, 723 F.2d at 1272.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1271–72 (“Absent precedent that is clearly controlling, it is incumbent on us to examine independently the searches conducted here in light of the requirement of the [F]ourth [A]mendment that they not be unreasonable.”(internal quotation marks omitted)).

¹⁰⁵ *Id.* at 1272.

¹⁰⁶ *Id.* (internal quotation marks and citation omitted).

¹⁰⁷ *Id.*

¹⁰⁸ *Mary Beth G.*, 723 F.2d at 1272–73.

¹⁰⁹ *Id.* at 1273 (citing *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981)). In *Logan*, a woman was arrested for a DWI and subjected to a visual strip search at a detention center. *Logan*, 660 F.2d at 1009–10. Under the policy, all persons regardless of their offense were subject to a strip search. *Id.* The Fourth Circuit, applying the standards of *Bell*, described the search as “the ultimate invasion of personal rights” and held that the policy was unconstitutional. *Id.* at 1013. The court explained that “[a]n indiscriminate strip search policy routinely applied to detainees . . . cannot be constitutionally justified simply on the basis of administrative ease in attending to security considerations.” *Id.* The Fourth Circuit found that the “strip search [of *Logan*] bore no such discernible relationship to security needs at the Detention Center that, when balanced against the ultimate invasion of personal rights involved, it could reasonably be thought justified.” *Id.*; see also *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984). In *Hill*, the Tenth Circuit, similarly to the Seventh Circuit’s reliance on *Logan* in *Mary Beth G.*, held that the strip search of a traffic offender was unconstitutional when there was no reasonable suspicion that he was concealing contraband. *Id.* at 394.

was unreasonable because the need for the search was not substantial enough to justify the strip search of a female arrestee charged with a minor offense without reasonable suspicion that the individual was concealing weapons or contraband.¹¹⁰

Since *Mary Beth G.*, other circuits have applied *Bell* in a similar fashion when analyzing the constitutionality of strip-search policies applied to arrestees.¹¹¹ Two years after *Mary Beth G.*, the Fifth Circuit looked to the Seventh Circuit for guidance in analyzing a similar case.¹¹² In *Stewart v. Lubbock County*, the county jail's policy permitted strip searches of all arrestees, regardless of the severity of the offense or the degree of suspicion regarding the possession of weapons or other contraband, prior to both arraignment and the opportunity to post bail.¹¹³ The plaintiffs, who were subjected to strip searches based on arrests for minor misdemeanors, including public intoxication and traffic violations, challenged the policy's constitutionality.¹¹⁴ The Fifth Circuit began its analysis by noting that the Seventh Circuit relied on *Bell* for the standard of reasonableness and distinguished the

The court noted that "intermingling is only one factor to consider in judging the constitutionality of a strip search." *Id.* Subsequently, the Tenth Circuit extended its earlier ruling in *Hill* in *Chapman v. Nichols*, 989 F.2d 393 (10th Cir. 1993) (holding the blanket strip-search policy of detainees was unconstitutional). The Tenth Circuit explained that "jails can meet the minimal security concerns they may have with minor offenders by means of a less intrusive pat-down search." *Id.* at 397 (internal quotation marks and citations omitted).

¹¹⁰ *Mary Beth G.*, 723 F.2d. at 1272–73.

¹¹¹ See *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989) ("The decisions of all the federal courts of appeals that have considered the issue reached the same conclusion: a strip search of a person arrested for a traffic violation or other minor offense not normally associated with violence and concerning whom there is no individualized reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband, is unreasonable."); *Jones v. Edwards*, 770 F.2d 739, 742 (8th Cir. 1985) (reviewing several other circuit cases, including *Mary Beth G.*, and holding that a visual body cavity search of a misdemeanor detainee arrested for violation of a lease law, where police had no reason to suspect an arrestee was concealing a weapon or contraband, before entry into a holding cell was unreasonable under *Bell*); *Crampton*, *supra* note 21, at 906 ("[The Seventh Circuit] merely opened the floodgates for other courts to adopt the reasonable suspicion standard without first discussing whether the holding in *Bell* directly controls."). For discussion of the *Stewart* case, see *infra* notes 112–16 and accompanying text.

The Sixth Circuit explained that "authorities may not strip search persons arrested for traffic violations and nonviolent minor offenses solely because such persons will ultimately intermingle with the general population at a jail when there were no circumstances to support a reasonable belief that the detainee will carry weapons or other contraband into the jail." *Masters*, 872 F.2d at 1255.

¹¹² See *Stewart v. Lubbock Cnty.*, 767 F.2d 153 (5th Cir. 1985).

¹¹³ *Id.* at 154.

¹¹⁴ *Id.*

Bell holding by explaining the difference between the types of detainees in each case.¹¹⁵ In the end, the Fifth Circuit held that, under the *Bell* balancing test, the searches were unreasonable and violated the Fourth Amendment because the policy applied to minor offenders “when no reasonable suspicion existed that they as a category of offenders or individually might possess weapons or contraband.”¹¹⁶

Similarly, in the 1986 case *Weber v. Dell*, the Second Circuit, addressed the constitutionality of the strip-search policy at the Monroe County Jail, which authorized the search of all arrestees booked into jail, regardless of whether there was reasonable suspicion that the arrestees were concealing contraband.¹¹⁷ Police arrested the plaintiff for a misdemeanor offense of falsely reporting an incident and resisting arrest.¹¹⁸ Once the plaintiff was taken into custody, officials strip searched her.¹¹⁹ The court explained that *Bell* “did not . . . read out of the Constitution the provision of general application that a search be justified as reasonable under the circumstances.”¹²⁰ The Second Circuit held that

the Fourth Amendment precludes prison officials from performing strip/body cavity searches of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrested is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrested, and/or the circumstances of the arrest.¹²¹

In *Roberts v. Rhode Island*, the First Circuit held that, based on its previous ruling,¹²² the Rhode Island Department of Corrections’

¹¹⁵ *Id.* at 156.

¹¹⁶ *Id.* at 156–57.

¹¹⁷ 804 F.2d 796, 797–98 (2d Cir. 1986).

¹¹⁸ *Id.* at 799.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 800.

¹²¹ *Id.* at 802; *see also* *Shain v. Ellison*, 273 F.3d 56, 66 (2d Cir. 2001) (“[The court rejected the defense of qualified immunity because] it was clearly established in 1995 that persons charged with a misdemeanor and remanded to a local correctional facility like NCCC have a right to be free of a strip search absent reasonable suspicion that they are carrying contraband or weapons . . .”). The Second Circuit distinguished *Bell* because “*Bell* authorized strip searches after contact visits where contraband is often passed. It is far less obvious that misdemeanor arrestees frequently or even occasionally hide contraband in their bodily orifices.” *Id.* at 64 (internal citation omitted).

¹²² *See* *Swain v. Spinney*, 117 F.3d 1, 5 (1st Cir. 1997) (“A strip and visual body cavity search of an arrestee must be justified, at the least, by reasonable suspicion.”). The First Circuit employed the *Bell* balancing test and explained that the searches at issue “impinge seriously upon the values that the Fourth Amendment was meant to pro-

blanket strip-search policies were unconstitutional, and the court required that officers have reasonable suspicion that an arrestee is harboring weapons or other contraband in order for a search to be reasonable.¹²³ In *Roberts*, officers stopped a car, in which the plaintiff was a passenger, for an expired registration sticker.¹²⁴ The officers determined that Roberts was the subject of an “outstanding body attachment,”¹²⁵ frisked him, placed him into custody, and subsequently conducted a strip and visual body cavity search.¹²⁶

The court applied the *Bell* balancing test and explained that the search was an extreme intrusion on an individual’s personal privacy.¹²⁷ Next, the court looked at the government’s justification for the search, which was to maintain institutional security.¹²⁸ In evaluating this justification, the First Circuit noted that the smuggling of contraband is less likely to occur subsequent to an arrest than during a contact visit.¹²⁹ Additionally, in the arrestee context, the deterrent justification for strip searches that *Bell* provided is “simply less relevant given the essentially unplanned nature of an arrest and subsequent incarceration.”¹³⁰ In the end, the court found that “*Bell* has not been read as holding that the security interests of a detention facility will always outweigh the privacy interests of the detainees” and held that the blanket strip searches of individuals arrested for minor offenses violate the Fourth Amendment.¹³¹

Overall, the majority of circuits have applied the *Bell* balancing test in cases involving individuals arrested for minor offenses and subjected to blanket strip searches absent reasonable suspicion and upon admission to a custodial facility; these courts have held that such

tect.” *Id.* at 6. Further, the court explained that the search constitutes a “severe if not gross interference with a person’s privacy.” *Id.*

¹²³ 239 F.3d 107 (1st Cir. 2001).

¹²⁴ *Id.* at 108.

¹²⁵ *Id.* (“[Under Rhode Island law] a magistrate has the power to issue a ‘body attachment’ upon the failure of a party to appear for a judicial proceeding.”).

¹²⁶ *Id.* at 108–09. The search entailed corrections officers inspecting the inside of Roberts’ mouth and nose and soles of his feet. *Id.* He was ordered to spread his buttocks, during which time an officer inspected his body cavity. *Id.* No contraband was found during this process. *Id.* Later that day, Roberts was subject to a similar search. *Id.*

¹²⁷ *Id.* at 110 (explaining that these searches constitute a “severe if not gross interference with a person’s privacy” (internal quotation marks and citation omitted)).

¹²⁸ *Id.* at 110–11.

¹²⁹ *Roberts*, 239 F.3d at 111.

¹³⁰ *Id.*

¹³¹ *Id.* at 113 (citation omitted).

searches are unreasonable and violate the Fourth Amendment. The Eleventh Circuit summarized this line of cases as follows:

While those decisions vary in detail around the edges, the picture they paint is essentially the same. The arrestee is charged with committing a misdemeanor or some other lesser violation and, while being booked into the detention facility, she is subjected to a strip search pursuant to the facility's policy. She later sues the officials asserting that the search was unconstitutional because the guards did not have any reasonable basis for believing that she was hiding contraband on her person. In each cited case, the court of appeals concludes that because the plaintiffs were minor offenders who were not inherently dangerous, detention officials could conduct a strip search only where there was a reasonable suspicion that the individual arrestee is carrying or concealing contraband. In each of the cases where reasonable suspicion was lacking, the search is held to violate the Fourth Amendment.¹³²

Notwithstanding the uniformity among the circuits, everything came to a screeching halt in 2008.

B. A Split Emerges Among the Circuits

In 2008, the Eleventh Circuit in *Powell v. Barrett* overruled its own precedent¹³³ and departed from the majority view by upholding a suspicionless, blanket strip-search policy of all arrestees upon admission to a custodial facility.¹³⁴ In *Powell*, eleven former detainees at Fulton County Jail in Georgia brought a class action suit after prison officials subjected them to strip searches upon entering or re-entering the

¹³² *Powell v. Barrett*, 541 F.3d 1298, 1309–10 (11th Cir. 2008) (en banc) (internal quotation marks and citations omitted).

¹³³ *Powell*, 541 F.3d 1298 (overruling *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001) (holding that the blanket policy of strip searches upon intake to jail was unreasonable when applied to DUI arrestee absent reasonable suspicion)). Prior to *Powell*, the Eleventh Circuit recognized that “‘reasonable suspicion’ [wa]s sufficient to justify the strip search of a pretrial detainee.” *Wilson*, 251 F.3d at 1343.

¹³⁴ *Powell*, 541 F.3d at 1300.

Every person booked into the Fulton County Jail general population is subjected to a strip search conducted without an individual determination of reasonable suspicion to justify the search, and regardless of the crime with which the person is charged. The booking process includes having the arrested person go into a large room with a group of up to thirty to forty other inmates, remove all of his clothing, and place the clothing in boxes. The entire group of arrestees then takes a shower in a single large room. After the group shower each arrestee either singly, or standing in a line with others, is visually inspected front and back by deputies.

Id. at 1301.

general population at the detention facility.¹³⁵ The plaintiff class was divided into three groups.¹³⁶ Only the action for one group was before the en banc panel of the Eleventh Circuit.¹³⁷ This group consisted of arrestees who were strip searched during the booking process before being placed in the general population.¹³⁸ The defendants filed a motion to dismiss, claiming they were entitled to qualified immunity.¹³⁹ The district court granted the motion, explaining that the unconstitutionality of the strip-search policy was not clearly established.¹⁴⁰ On interlocutory appeal, the Eleventh Circuit panel reversed the district court's ruling and held that the policy was unconstitutional under stare decisis.¹⁴¹ The court, however, noted the "uncertainty about [the Eleventh Circuit] precedent."¹⁴² In 2008, the Eleventh Circuit granted a rehearing en banc sua sponte to resolve the constitutionality of strip searches of arrestees.¹⁴³

The Eleventh Circuit, in an opinion by Judge Carnes, overruled its precedent¹⁴⁴ and held that blanket strip searches of arrestees during the booking process are constitutional "provided that the searches are no more intrusive on privacy than those upheld in the *Bell* case."¹⁴⁵ Out of the twelve judges to hear the case, Judge Barkett was the sole dissenter.¹⁴⁶ This decision departed from nearly thirty years of contrary decisions by the majority of circuit courts.¹⁴⁷ The

¹³⁵ *Id.* at 1300.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Powell v. Barrett*, 376 F. Supp. 2d 1340, 1346 (N.D. Ga. 2005) ("[Q]ualified immunity offers complete protection for government officials sued in their individual capacities if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (citation omitted)).

¹⁴⁰ *Id.* at 1346 n.3, 1349–50.

¹⁴¹ *Powell*, 496 F.3d at 1310. The court explained that "[u]nder the law of this Circuit, an arrestee to be detained in the general jail population has a constitutional right under the Fourth Amendment to be free from strip searches conducted without reasonable suspicion that the detainee is concealing weapons, drugs, or other contraband." *Id.* (citing *Wilson v. Jones*, 251 F.3d 1340, 1341–43 (11th Cir. 2001) (plaintiff arrested for driving under the influence)); *Skurstenis v. Jones*, 236 F.3d 678, 680–82 (11th Cir. 2000) (same)).

¹⁴² *Id.* at 1312 (citing *Evans v. Stephens*, 407 F.3d 1272, 1278 (11th Cir. 2005) (en banc)).

¹⁴³ *Powell v. Barrett*, No. 05-16734, 2008 U.S. App. LEXIS 11705 (11th Cir. Feb. 1, 2008).

¹⁴⁴ For a discussion of the *Wilson* case, see *supra* note 133.

¹⁴⁵ *Powell v. Barrett*, 541 F.3d 1298, 1314 (11th Cir. 2008).

¹⁴⁶ *Id.* (Barkett, J., dissenting).

¹⁴⁷ See *supra* Part III.A.

Eleventh Circuit criticized the majority approach as misinterpreting that the *Bell* Court required reasonable suspicion in order to conduct a strip search and explained that

[t]he *Bell* decision, correctly read, is inconsistent with the conclusion that the Fourth Amendment requires reasonable suspicion before an inmate entering or re-entering a detention facility may be subjected to a strip search that includes a body cavity inspection. And the decision certainly is inconsistent with the conclusion that reasonable suspicion is required for detention facility strip searches that do not involve body cavity inspections.¹⁴⁸

The Eleventh Circuit initially noted that *Bell* approved a blanket strip-search policy that did not require individualized suspicion.¹⁴⁹ The court, pointing to Justice Powell's dissent in *Bell*, emphasized that *Bell* approved strip searches without any level of suspicion, and noted that Justice Powell would not have dissented if the majority required reasonable suspicion for strip searches of detainees.¹⁵⁰ One commentator noted, however, that the Eleventh Circuit ignored the fact that other courts post-*Bell* did not find *Bell* controlling because of the factual differences between the post-contact searches in *Bell* and searches conducted during booking procedures.¹⁵¹ Also, the Eleventh Circuit ultimately rejected the misdemeanor-felony distinction that some circuits have made in the context of strip searches in detention facilities.¹⁵²

The Eleventh Circuit relied on the need for institutional safety and security to justify the blanket strip-search policy.¹⁵³ The court dis-

¹⁴⁸ *Powell*, 541 F.3d at 1307.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1308 ("If the majority had required reasonable suspicion for body cavity inspection strip searches of pretrial detainees, Justice Powell would not have dissented at all.").

¹⁵¹ Crampton, *supra* note 21, at 912; *see also* Allison v. GEO Grp., Inc., 611 F. Supp. 2d 433, 459 (E.D. Pa. 2009) ("[The majority of circuits] did not hold that *Bell* 'requires' reasonable suspicion; they held that *Bell* requires reasonableness and that reasonableness, in certain circumstances, requires that searches be based on individualized suspicion of wrongdoing measured against some objective standard such as reasonable suspicion.").

¹⁵² *Powell*, 541 F.3d at 1310 ("Those decisions are wrong. The difference between felonies and misdemeanors or other lesser offenses is without constitutional significance when it comes to detention facility strip searches. . . . The Supreme Court made no distinction in *Bell* between detainees based on whether they had been charged with misdemeanors or felonies or even with no crime at all. . . . It was a blanket policy applicable to all."). *But see, e.g.*, *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989); *Stewart v. Lubbock Cnty.*, 767 F.2d 153, 156-57 (5th Cir. 1985); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983).

¹⁵³ *Powell*, 541 F.3d at 1310.

cussed the problems of smuggling contraband into the facility and the threat it poses to employees.¹⁵⁴ In the end, the court afforded great deference to the jail officials in implementing policies, namely the strip-search policy, to maintain security.¹⁵⁵ The court acknowledged that the plaintiffs' "best hope for distinguishing *Bell* lies in the fact that they were strip searched as part of the booking process instead of after contact visits."¹⁵⁶ The court rejected this distinction, however, explaining that arrestees would have just as much opportunity to conceal contraband as the inmates in *Bell* because they had been in contact with the outside world for a long period of time and some were on notice of a pending arrest.¹⁵⁷ The Eleventh Circuit explained that the security needs in *Bell* were "no greater than those" in this case and that the searches in *Bell* were actually "more intrusive" on the privacy interests of inmates.¹⁵⁸ Accordingly, the court held that the less intrusive searches in *Powell* did not violate the Fourth Amendment.¹⁵⁹

In *Bull v. City and County of San Francisco*, the Ninth Circuit, sitting en banc, departed from its precedent in a seven-to-four split¹⁶⁰ and upheld a policy that authorized strip searches of all arrestees before the arrestees entered the general prison population.¹⁶¹ In *Bull*, three judges joined Judge Thomas's dissent.¹⁶² Writing for the majority, Judge Ikuta explained that "the scope, manner, and justification for San Francisco's strip-search policy was not meaningfully different from the scope, manner, and justification for the strip-search policy in *Bell*."¹⁶³ The Ninth Circuit noted that, based on the record, which showed a "pervasive and serious problem with contraband inside San Francisco's jails," the justification for searches of arrestees during intake was even stronger than the justification in *Bell*.¹⁶⁴ In addition, the Ninth Circuit held that the policies were reasonable because the circumstances in *Bull* were "not meaningfully distinguishable from those presented in *Bell*," and therefore the jail's justifications for the

¹⁵⁴ *Id.* at 1310–11.

¹⁵⁵ *Id.* at 1311.

¹⁵⁶ *Id.* at 1313.

¹⁵⁷ *Id.* at 1314.

¹⁵⁸ *Id.* at 1302.

¹⁵⁹ *Powell*, 541 F.3d at 1302.

¹⁶⁰ 595 F.3d 964, 981 (9th Cir. 2010) (en banc).

¹⁶¹ *Id.* at 966.

¹⁶² *Id.* at 989 (Thomas, J., dissenting).

¹⁶³ *Id.* at 975 (majority opinion).

¹⁶⁴ *Id.*

searches outweighed the invasion of personal rights that the searches caused.¹⁶⁵

IV. THE THIRD CIRCUIT JOINS THE RECENT TREND TO UPHOLD BLANKET STRIP-SEARCH POLICIES

As previously described, jail officials conducted a strip and visual body cavity search of Albert Florence upon admittance to both BCJ and ECCF.¹⁶⁶ The policy at BCJ provided the following:

A physical search of an inmate by the same sex officer while unclothed consisting of routine and systematic visual observation of the inmate's physical body to look for distinguished identifying marks, scars or deformities, signs of illness, injury or disease and/or the concealment of contraband on the inmate's body.¹⁶⁷

The policy at ECCF provided that

all arrestees were to be strip searched and required to shower
A strip search . . . is to consist of an officer observ[ing] carefully while the inmate undresses and examining the arrestee's ears, nose, hair and scalp, the interior of the mouth, fingers, hands, arms and armpits, and all body openings and the inner thighs.¹⁶⁸

After being released, Florence filed a federal class-action suit against BCJ, ECCF, and various individuals and municipal entities under 42 U.S.C. § 1983.¹⁶⁹ In his suit, Florence asserted various constitutional violations, including a Fourth Amendment challenge to the strip-search procedures at both jails.¹⁷⁰ On March 20, 2008, the district court granted Florence's motion for class certification on his

¹⁶⁵ *Id.* at 975.

¹⁶⁶ For a discussion of the facts of *Florence*, see *supra* notes 1–12 and accompanying text.

¹⁶⁷ *Florence v. Bd. of Chosen Freeholders*, 621 F.3d 296, 300 n.2 (3d Cir. 2010), *cert. granted*, 131 S. Ct. 1816 (2011) (quoting BURLINGTON CNTY. DET. CTR./CORRS. & WORK RELEASE CTR., POLICIES AND PROCEDURES: SEARCH OF INMATES § 1186).

¹⁶⁸ *Id.* (internal quotation marks omitted) (quoting DEPT. OF PUB. SAFETY GEN. ORDER NO. 89-17 (2002)).

¹⁶⁹ *Id.* at 299. Under 42 U.S.C. § 1983, a plaintiff may have a cause of action for certain violations of his constitutional rights. Section 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983 (2006).

¹⁷⁰ *Florence*, 621 F.3d at 299.

strip-search claims.¹⁷¹ After evaluating the strip-search policies, the district court held that the procedures failed to survive the *Bell* balancing test and “that blanket strip searches of non-indictable offenders, performed without reasonable suspicion for drugs, weapons, or other contraband, is [sic] unconstitutional.”¹⁷² The Third Circuit granted permission to appeal and the district court certified the following issue: “[W]hether a blanket policy of strip searching all non-indictable arrestees admitted to a jail facility without first articulating reasonable suspicion violates the Fourth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment.”¹⁷³

While the issue was one of first impression for the Third Circuit, the Supreme Court’s decision in *Bell* and many other post-*Bell* cases guided the court’s analysis.¹⁷⁴ Since the court faced a circuit split, its task was to “determine which line of cases is more faithful to the Supreme Court’s decision in *Bell*.”¹⁷⁵ Before examining prior case law, the Third Circuit set forth various general standards concerning Fourth Amendment challenges by arrestees.¹⁷⁶ The court noted that there is a “circumscription or loss of many significant rights” that comes with detention in a correctional facility.¹⁷⁷ Based on the nature of prisons and the need to accommodate the various institutional objectives, prison officials must curtail certain rights—including a detainee’s Fourth Amendment right to privacy.¹⁷⁸ The Third Circuit

¹⁷¹ *Id.* at 299. The plaintiff class was defined as follows:

All arrestees charged with non-indictable offenses who were processed, housed or held over at Defendant Burlington County Jail and/or Defendant Essex County Correctional Facility from March 3, 2003 to the present date who were directed by Defendants’ officers to strip naked before those officers, no matter if the officers term that procedure a ‘visual observation’ or otherwise, without the officers first articulating a reasonable belief that those arrestees were concealing contraband, drugs or weapons

Id. at 300 (citation omitted).

¹⁷² *Florence v. Bd. of Chosen Freeholders*, 595 F. Supp. 2d 492, 513 (D.N.J. 2009), *rev’d*, 621 F.3d 296 (3d Cir. 2010), *cert. granted*, 131 S. Ct. 1816 (2011).

¹⁷³ *Florence*, 621 F.3d at 301 (citation omitted).

¹⁷⁴ *Id.* at 298–99.

¹⁷⁵ *Id.* at 299.

¹⁷⁶ *See id.* at 301–02.

¹⁷⁷ *Id.* at 301 (quoting *Hudson v. Palmer*, 468 U.S. 517, 524 (1984)); *see Hudson*, 468 U.S. at 526 (holding that prisoners do not have a reasonable expectation of privacy in their prison cells). It is important to note, however, that the Court in *Hudson* addressed prisoners’ privacy rights in their cells, while the Third Circuit in *Florence* addressed *bodily* privacy rights.

¹⁷⁸ *Florence*, 621 F.3d at 301.

explained that the Supreme Court “has repeatedly held that prisons are not beyond the reach of the Constitution,” but also recognized that detention facilities should be afforded a great deal of deference with respect to implementing management policies and procedures.¹⁷⁹

Following this brief background, the Third Circuit provided a detailed review of the Supreme Court’s decision in *Bell v. Wolfish*.¹⁸⁰ The court then explained that post-*Bell*, “ten circuit courts of appeals applied the Supreme Court’s balancing test to strip searches of individuals arrested for minor offenses and found the searches unconstitutional where not supported by reasonable suspicion that the arrestee was hiding a weapon or contraband.”¹⁸¹ Generally, the majority of circuits found that the extreme invasion of the arrestee’s privacy outweighed the prison’s interest in conducting the search.¹⁸² These courts found that the “critical factor” in these cases was that individuals arrested for minor offenses posed only a slight security risk based on the unexpected nature of the arrests, in comparison to the planned contact visits in *Bell*.¹⁸³

The court then discussed the recent trend of courts overturning precedent to uphold blanket strip-search policies in the Eleventh and Ninth Circuits and analyzed both *Powell* and *Bull*.¹⁸⁴ The court explained that “the *Bull* court relied on much of the same reasoning as the Eleventh Circuit in *Powell*, including its view that decisions interpreting *Bell v. Wolfish* to require reasonable suspicion to strip search minor offenders were analytically flawed.”¹⁸⁵ The Third Circuit noted that, in the case at hand, both jails relied on *Powell* to argue that their strip-search policies satisfied the reasonableness standard of *Bell* because the jails’ interests in prison security applied to all offenders.¹⁸⁶ On the other hand, Florence argued that the district court properly

¹⁷⁹ *Id.* at 302 (citing *Hudson*, 468 U.S. at 523; *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

¹⁸⁰ *See id.* at 302. For a discussion of the *Bell* case, see *supra* Part II.B.

¹⁸¹ *Florence*, 621 F.3d at 303–04 (citing ten circuit court decisions); see also discussion *supra* Part III.A.

¹⁸² *Florence*, 621 F.3d at 304.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 305–06 (citing *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc); *Bull v. City and Cnty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc)). For a discussion of both *Powell* and *Bull*, see also *supra* Part III.C.

¹⁸⁵ *Florence*, 621 F.3d. at 305–06 (internal citations omitted).

¹⁸⁶ *Id.* at 306.

applied *Bell* and urged the court to adopt the reasonable suspicion test that the majority of circuit courts apply.¹⁸⁷

After discussing the circuit split, the Third Circuit applied the *Bell* balancing test.¹⁸⁸ First, the court considered the scope of the searches at issue. The court explained that, in one of its previous decisions, the court had recognized that strip searches constitute a “significant intrusion on an individual’s privacy.”¹⁸⁹ In that case, the strip-search policies at issue “require[d] the arrestees to undress completely and submit to a visual observation of their naked bodies before taking a supervised shower.”¹⁹⁰ Although the court acknowledged the invasion of privacy caused by a strip search, it concluded that the searches in the case at hand were less intrusive than the searches in *Bell*.¹⁹¹ Next, the court noted that the manner and place of the searches at issue were similar to the manner and place of the searches in *Bell*; correctional officers conducted the searches at detention facilities, in private, under sanitary conditions, in a professional manner, and the searches were brief in duration.¹⁹² Overall, the court found that “because the scope, manner, and place of the searches [were] similar to or less intrusive than those in *Bell*, the only factor on which Plaintiffs could distinguish this case [was] the Jails’ justification for the searches.”¹⁹³

The court next examined the jails’ justifications for the searches. In this regard, the court observed that New Jersey jails face serious gang problems.¹⁹⁴ The jails set forth three specific security interests as justification for their strip-search policies: (1) detecting and deterring smuggling of weapons or contraband, (2) identifying gang members based on tattoos, and (3) preventing disease.¹⁹⁵ The Third Circuit found that the smuggling of contraband into the jails created a major threat to security and constituted a legitimate concern to prison administrators.¹⁹⁶

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 307 (quoting *United States v. Whitted*, 541 F.3d 480, 486 (3d Cir. 2008)).

¹⁹⁰ *Id.*

¹⁹¹ *Florence*, 621 F.3d at 307.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* (citing *Fraise v. Terhune*, 283 F.3d 506, 521–22 (3d Cir. 2002)).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* (“Prevention of the entry of illegal weapons and drugs is vital to the protection of inmates and prison personnel alike.”).

Ultimately, the Third Circuit joined the Ninth and Eleventh Circuits. Writing for the majority, Judge Hardiman concluded that “the security interest in preventing smuggling at the time of intake is as strong as the interest in preventing smuggling after the contact visits at issue in *Bell*.”¹⁹⁷ Thus, in a two-to-one decision, the Third Circuit held that the strip-search procedures at BCJ and ECCF were *reasonable* under the Fourth Amendment.¹⁹⁸ First, the court explained that *Bell* “explicitly rejected any distinction in security risk based on the reason for detention.”¹⁹⁹ Next, the court discussed how *Bell* addressed an overall policy applied to every inmate; thus the court rejected the need for individualized suspicion.²⁰⁰ The Third Circuit rejected plaintiffs’ claim that the security risk of smuggling contraband is low for minor offenders because of the surprising nature of the arrests.²⁰¹ The court explained that arrests are not always unanticipated and that excluding minor offenders from strip searches would only induce gang members to exploit the system.²⁰² The court also noted that, in *Bell*, the opportunity to smuggle contraband into the facility was low, but the court still found the search reasonable.²⁰³ The Third Circuit also rejected plaintiffs’ argument that the jails could not claim that they were preventing smuggling in the absence of evidence of a smuggling problem.²⁰⁴ In fact, in *Bell*, the Supreme Court viewed the absence of a record showing a problem as an indication that the policy served a deterrent function.²⁰⁵ Thus, the Third Circuit interpreted *Bell* not to require jails to produce a record of smuggling problems.²⁰⁶

Finally like *Bell*, the court in *Florence* found that courts must accord substantial deference to the judgments of the prison administrators, especially when the record does not indicate a smuggling problem because “[a] detention facility need not suffer a pattern of security breaches before it takes [reasonable] steps to prevent them.”²⁰⁷ The Third Circuit also rejected the plaintiffs’ argument that jails could prevent smuggling through less intrusive searches, such as

¹⁹⁷ *Florence*, 621 F.3d at 308.

¹⁹⁸ *Id.* at 311.

¹⁹⁹ *Id.* at 308 (citing *Bell v. Wolfish*, 441 U.S. 520, 546 n.28 (1979)).

²⁰⁰ *Id.* (citing *Bell*, 441 U.S. at 560).

²⁰¹ *Id.* at 308.

²⁰² *Id.* at 308–09 (citing *Powell v. Barrett*, 541 F.3d 1298, 1311 (11th Cir. 2008)).

²⁰³ *Florence*, 621 F.3d at 309.

²⁰⁴ *Id.*

²⁰⁵ *Id.* (citing *Bell*, 441 U.S. at 559).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 310.

searches through the use of a Body Orifice Scanning System (“BOSS Chair”).²⁰⁸ The court explained that, in *Bell*, the Supreme Court rejected the use of less intrusive means for evaluating searches because these means were ineffective.²⁰⁹ Similarly, the Third Circuit rejected the use of the BOSS Chair as an alternative to strip searches because the device would not be able to detect drugs and non-metallic contraband.²¹⁰ Finally, the Third Circuit concluded that a blanket strip-search policy promotes the equal treatment of all arrestees and removes the potential for abuse, especially when compared to the potential for abuse present under a “reasonable suspicion” standard, under which various subjective characteristics are taken into consideration.²¹¹

It is important to note that, unlike the en banc decisions of the Eleventh and Ninth Circuits in *Powell* and *Bull* respectively, a panel of three Third Circuit judges decided *Florence* by a two-to-one margin. Judge Pollak dissented from the majority opinion and stated that he would reaffirm the district court’s decision.²¹² While the majority found the *Powell* and *Bull* decisions persuasive, Judge Pollak found “greater wisdom in Judge Barkett’s dissent in *Powell* and Judge Thomas’s dissent in *Bull*.”²¹³

In pointing to Judge Thomas’s dissent, Judge Pollak agreed that, like the majority in *Bull*, the majority ignored “‘twenty-five years of jurisprudence’” and essentially “‘discard[ed] *Bell*’s requirement of balance.”²¹⁴ The majority gave jailers “the unfettered right” to conduct strip searches of any individual arrested for minor offenses.²¹⁵ Judge Pollak found Judge Thomas’s observation that “[t]he rationale for [the majority’s] abrupt departure is founded on quicksand” persuasive.²¹⁶ In *Bull*, the government argued that, because jail officials found contraband, arrestees must have smuggled it in the facility.²¹⁷

²⁰⁸ *Id.* (“[T]he Body Orifice Scanning System (BOSS Chair) [is] ‘[a] non-intrusive scanning system designed to detect small weapons or contraband metal objects concealed in oral, anal, or vaginal cavities.’” (third alteration in original)).

²⁰⁹ *Florence*, 621 F.3d at 310.

²¹⁰ *Id.*

²¹¹ *Id.* at 310–11.

²¹² *Id.* at 311 (Pollak, J., dissenting).

²¹³ *Id.*

²¹⁴ *Id.* (quoting *Bull v. City and Cnty. of San Francisco*, 595 F.3d 964, 990 (9th Cir. 2010) (Thomas, J., dissenting)).

²¹⁵ *Florence*, 621 F.3d at 311 (Pollak, J., dissenting).

²¹⁶ *Id.*

²¹⁷ *Id.* at 312 (Pollak, J., dissenting) (quoting *Bull*, 595 F.3d at 990 (Thomas, J., dissenting)).

Judge Thomas rejected this argument, finding no support in the record that arrestees were smuggling contraband.²¹⁸ Similarly, Judge Pollak noted that, in the case at hand, “neither county submit[ed] supporting affidavits that detail[ed] evidence of a smuggling problem specific to their respective facilities.”²¹⁹ Judge Pollak also relied on Judge Barkett’s dissent in *Powell*. More specifically, Judge Pollak observed that Judge Barkett’s dissent powerfully recognized the need to afford deference to jail administrators but did not underestimate the fact that individuals do not forfeit all of their constitutional protections upon admittance to a custodial facility.²²⁰ Quoting Judge Barkett, Judge Pollak explained that “[t]hese protections, such as the right to be free from degrading, humiliating, and dehumanizing treatment and the right to bodily integrity, include protection against forced nakedness during strip searches in front of others.”²²¹

V. THE THIRD CIRCUIT ERRED

Although the Third Circuit joined the recent trend of courts upholding blanket strip-search policies, this decision was wrong. The Third Circuit should have affirmed the district court’s holding that the blanket strip-search policies of BCJ and ECCF, which allow strip searches of all arrestees charged with minor offenses during booking, are unreasonable and violate the Fourth Amendment.²²² The Third Circuit should have adopted the reasonable suspicion standard that the majority of circuit courts support because it strikes the proper balance between the government’s legitimate interests in jail security and arrestees’ significant privacy interests.

Essentially, the Third Circuit’s decision in *Florence* upholds a policy that not only disregards decisions from district courts within the Third Circuit,²²³ but also ignores the overwhelming majority of deci-

²¹⁸ *Id.*

²¹⁹ *Id.* at 312 (quoting *Florence v. Bd. of Chosen Freeholders*, 595 F. Supp. 2d 492, 513 (D.N.J. 2009), *rev’d*, 621 F.3d 296 (3d Cir. 2010), *cert. granted*, 131 S. Ct. 1816 (2011)).

²²⁰ *Id.* at 312 (citing *Powell v. Barrett*, 541 F.3d 1298, 1315 (11th Cir. 2008) (Barkett, J., dissenting)).

²²¹ *Florence*, 621 F.3d at 312 (Pollak, J., dissenting) (quoting *Powell*, 541 F.3d at 1315) (Barkett, J., dissenting)).

²²² See *Florence v. Bd. of Chosen Freeholders*, 595 F. Supp. 2d 492, 511–12 (D.N.J. 2009), *rev’d*, 621 F.3d 296 (3d Cir. 2010), *cert. granted*, 131 S. Ct. 1816 (2011).

²²³ See *id.* at 505–06 (citing *DiLoreto v. Borough of Oaklyn*, 744 F. Supp. 610, 622 (D.N.J. 1990); *Ernst v. Borough of Fort Lee*, 739 F. Supp. 220, 225 (D.N.J. 1990); *O’Brien v. Borough of Woodbury Heights*, 679 F. Supp. 429, 434 (D.N.J. 1988)); *Davis v. City of Camden*, 657 F. Supp. 396, 401 (D.N.J. 1987) (holding that plaintiff’s rights were violated when plaintiff was strip searched without reasonable suspicion as

sions from other circuits.²²⁴ Although district court decisions and decisions from other circuits are not binding on the Third Circuit, they undeniably serve as persuasive precedent and useful guideposts for analyzing strip-search claims.²²⁵ Rather than following this overwhelming majority of decisions, the Third Circuit relied on the Eleventh and Ninth Circuits' erroneous interpretations of the Supreme Court's decision in *Bell v. Wolfish*. The Third Circuit in *Florence*, like the majority in *Powell v. Barrett*, erred by "read[ing] the balancing test out of *Bell* and effectively establish[ing] a per se rule permitting automatic strip searches of all detainees, regardless of their status, in the name of security and administrative convenience."²²⁶

The major flaw in the Third Circuit's analysis is its failure to recognize the difference between arrestees strip searched at intake and an inmate strip searched after a contact visit.²²⁷ Although the Supreme Court in *Bell* upheld a blanket strip-search policy after contact visits with outsiders, such a policy is not always permissible in other contexts. One district court within the Third Circuit explained that the *Bell* Court "did not have occasion to rule on the reasonableness of custodial strip searches in other circumstances or under what circumstances reasonable suspicion might be required."²²⁸ Application of the *Bell* balancing test to a blanket strip-search policy of arrestees charged with minor offenses necessitates a different balance than that applied in the context of post-contact visits. Thus, as the majority of circuits have held, the *Bell* holding should not directly control cases dealing with blanket strip searches of arrestees charged with minor offenses.²²⁹ The Third Circuit, nonetheless, found that the searches were similar or less intrusive than those in *Bell* and noted that the on-

part of a blanket policy applied by jail)); see also *Allison v. GEO Grp., Inc.*, 611 F. Supp. 2d 433 (E.D. Pa. 2009); *Delandro v. Cnty. of Allegheny*, No. 06-927, 2009 U.S. Dist. LEXIS 111979 (W.D. Pa. Sept. 1, 2009); *Martinez v. Warner*, No. 07-3213, 2008 U.S. Dist. LEXIS 44395 (E.D. Pa. June 5, 2008); *Owens v. Cnty. of Delaware*, No. 95-4282, 1996 U.S. Dist. LEXIS 12098 (E.D. Pa. Aug. 15, 1996).

²²⁴ See *Florence*, 595 F. Supp. 2d at 505–07.

²²⁵ See *id.* at 509 ("[The Eleventh Circuit] not only overruled its own precedent, it also rejected the persuasive precedent of several circuits that distinguish misdemeanor-bookings procedure from that of felony.").

²²⁶ *Powell v. Barrett*, 541 F.3d 1298, 1316 (11th Cir. 2008) (Barkett, J., dissenting); see also *Bull v. City & Cnty. of San Francisco*, 595 F.3d 964, 990 (9th Cir. 2010) (Powell, J., dissenting) ("[T]he majority discards *Bell*'s requirement to balance the need for a search against individual privacy . . .").

²²⁷ See *supra* notes 103–04 and accompanying text.

²²⁸ *Allison v. GEO Grp., Inc.*, 611 F. Supp. 2d 433, 459 (E.D. Pa. 2009).

²²⁹ See *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1271–72 (7th Cir. 1983) (explaining that *Bell* was not controlling because the searches in *Bell* were "initiated under different circumstances").

ly way in which plaintiffs could distinguish *Bell* would be based on the jails' justification for the searches.²³⁰ The justifications for initiating the searches in *Bell*, namely to prevent and deter the smuggling of contraband, are not equivalent to the justifications for strip searches in the booking context.²³¹ The Third Circuit improperly relied on both jails' justifications for the searches, which were to detect and deter the smuggling of weapons, drugs, and other contraband, to support its decision.²³² Unlike contact visits, however, arrests for minor offenses are typically unplanned events; it is unlikely that an individual arrested for a minor offense would have the opportunity to plan to smuggle contraband into the detention facility.²³³ Less intrusive searches, such as pat-downs, would be effective in discovering any contraband that an arrestee may be concealing.²³⁴ Furthermore, even if an arrestee had an opportunity to conceal contraband, imposing a standard of reasonable suspicion permits officials to strip search an arrestee in a constitutionally permissible manner when such concerns arise. Based on the unexpected nature of an arrest, simply no deterrence effect is likely.²³⁵

The Third Circuit failed to strike the proper balance between the privacy interests of arrestees and a jail's security needs. On the one hand, the court was correct in recognizing that jails are inherently dangerous places with legitimate security concerns. The court correctly noted that jails in New Jersey, like most correctional facilities,

²³⁰ *Florence v. Bd. of Chosen Freeholders*, 621 F.3d 296, 307 (3d Cir. 2010), *cert. granted*, 131 S. Ct. 1816 (2011).

²³¹ See Crampton, *supra* note 21, at 916 ("[T]he majority, [in *Powell*] unfairly, and without much thought, deems the justifications behind a post-contact visit search as equal to that of a booking policy search. As discussed earlier in *Roberts* and *Shain*, such comparison should not be made because there exist two fundamental factual distinctions between the two types of searches: (1) the frequency of contraband being smuggled into the institutions for each type of search; and (2) the effectiveness as a deterrent for each type of search.").

²³² See *Florence*, 621 F.3d at 307.

²³³ See *Shain v. Ellison*, 273 F.3d 56, 65 (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."); see also *Powell v. Barrett*, 541 F.3d 1298, 1318 (Barkett, J., dissenting) ("The majority's assertion that pretrial detainees . . . might anticipate their arrests or that gang members might deliberately get arrested in order to smuggle weapons and drugs into jail is unwarranted speculation in this case.").

²³⁴ *Roberts v. Rhode Island*, 239 F.3d 107, 112 (1st Cir. 2001) ("[L]ess invasive (and less constitutionally problematic) searches would have been equally effective in revealing contraband [possessed by detained arrestees].").

²³⁵ *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1985), *overruled by* *Bull v. City & Cnty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc).

face serious gang problems.²³⁶ In fact, there may be a legitimate justification for strip searching many arrestees upon arrival, and the reasonable suspicion standard would allow jails to search such arrestees. Nonetheless, the Third Circuit overlooked the severe privacy intrusion that arrestees suffer.²³⁷ Under the current strip-search policies at BCJ and ECCF, anyone can be strip searched. In the *Florence* district court opinion, Judge Rodriguez opined that such a policy creates an unreasonable result because “a hypothetical priest or minister arrested for allegedly skimming the Sunday collection would be subjected to the same degrading procedure as a gang-member arrested on an allegation of drug charges.”²³⁸

Under the Third Circuit’s ruling, individuals who have committed minor offenses, such as unpaid traffic tickets or failure to pay child support, can be subjected to strip searches upon arrival to a detention facility. Absent some level of particularized suspicion, these individuals do not deserve to have their rights violated or to be subjected to such unreasonable searches. Another district court in the Third Circuit found that “[f]or offenses that are relatively minor, a strip search represents a grossly disproportionate consequence of arrest.”²³⁹ Florence’s attorney, Susan Chana Lask, explained “that what happened to her client could ‘happen to anyone’ and that those accused of being nonviolent offenders should be thought about and treated differently than murder suspects and criminals.”²⁴⁰ Nearly every circuit court, with the exception of the Eleventh, Ninth, and

²³⁶ *Florence*, 621 F.3d at 307.

²³⁷ See Jason Grant, *His Public Stand on Private Shame over Strip-Search*, THE STAR LEDGER (Newark, N.J.), Apr. 24, 2011, at 1. Florence explained the fear and degradation that came with the strip search at Burlington County:

It was horrible . . . I can even remember looking at a couple of the officers and one of them had a grin on his face. And then you look to your left or the right of you, and you know, it seems like another guy is looking at you, and it’s—it’s disgusting, very disgusting.

Id. Florence went on to explain that the strip search at Essex County was even worse than the one at Burlington: “You’re in there with convicted felons, murderers, carjackers, every walk of life . . . and everybody’s laughing . . . and here I am sitting wondering if my life is over: financially, emotionally, and my personal life, if that’s over.” *Id.*

²³⁸ *Florence v. Bd. of Chosen Freeholders*, 595 F. Supp. 2d 492, 512. (D.N.J. 2009), *rev’d*, 621 F.3d 296 (3d Cir. 2010), *cert. granted*, 131 S. Ct. 1816 (2011).

²³⁹ *Allison v. GEO Grp., Inc.*, 611 F. Supp. 2d 433, 453 (E.D. Pa. 2009).

²⁴⁰ Grant, *supra* note 237. Lask went on to explain that “there’s a practical fix, which is to physically separate the noncriminal offenders (in the correctional facilities) from the murderers and rapists.” *Id.*

now the Third Circuit, find these strip-search policies to be extremely offensive and humiliating.²⁴¹

Finally, the Third Circuit's decision is also inconsistent with the requirements of New Jersey's strip-search statute, N.J.S.A. 2A:161A-1(a),²⁴² the American Bar Association's (ABA) strip-search standard,²⁴³ and laws regarding strip searches for arrestees of minor offenses in many other states,²⁴⁴ which all require at least reasonable suspicion for strip searches.²⁴⁵ Although the plaintiffs in *Florence* did not attack the legality of BCJ and ECCF's policies under these provisions, they serve as useful indicators of the appropriate standard in the context of arrestee strip searches. In 1993, pursuant to N.J.S.A 2A:161A-8,²⁴⁶ the

²⁴¹ See *supra* Part III.A.

²⁴² N.J. STAT. ANN. § 2A:161A-1 (West 2010) ("A person who has been detained or arrested for commission of an offense other than a crime shall not be subject to a strip search unless . . . (c) The person is lawfully confined in a municipal detention facility or an adult county correctional facility and the search is based on a *reasonable suspicion* that a weapon, controlled dangerous substance" (emphasis added)).

²⁴³ STANDARDS FOR CRIMINAL JUSTICE: LEGAL STATUS OF PRISONERS, Standard 23-6.10(f), ("[A] search requiring a prisoner to disrobe, including visual inspection of body cavities, should be conducted only when *based upon an articulable suspicion* that the prisoner is carrying contraband or other prohibited material." (emphasis added)).

²⁴⁴ See Helmer, *supra* note 18, at 264 n.141 ("Several current state statutes also expressly limit their application of the Fourth Amendment protections to misdemeanants and minor offenders."); see, e.g., CAL. PENAL CODE § 4030(f) (LEXIS through 2011 urgency Ch. 745 & Extra. Sess. Ch. 16) (reasonable suspicion); COLO. REV. STAT. § 16-3-405(1) (LEXIS through 1st Reg. Sess. 2011) (reasonable belief); CONN. GEN. STAT. § 54-331(a) (LEXIS through 2011 Supp.) (reasonable belief); FLA. STAT. § 901.211(2)(a) (LEXIS through 2011 Act 269) (probable cause); 725 ILL. COMP. STAT. ANN. 5/103-1(c) (LEXIS through 2011 Acts 97-598, and 97-602) (reasonable belief); IOWA CODE ANN. § 804.30 (LEXIS through 2011 Supp.) (probable cause); KAN. STAT. ANN. § 22-2521(a) (LEXIS through 2010 Supp.) (probable cause); 501 KY. ADMIN. REGS. 3:120 § 3(1)(B) (LEXIS through Oct. 2011) (reasonable suspicion); ME. REV. STAT. ANN. tit. 5, § 200-G(2)(A) (LEXIS through Ch. 447 2011 1st Reg. Sess.) (reasonable cause); MICH. COMP. LAWS ANN. § 764.25a (LEXIS through 2011 P.A. 130) (reasonable cause); MO. REV. STAT. § 544.193(4) (LEXIS through 2d Reg. Sess. 2010) (probable cause); OHIO REV. CODE ANN. § 2933.32 (LEXIS through legislation passed by 129th Gen. Assembly 2011) (probable cause); TENN. CODE ANN. § 40-7-119(b) (LEXIS through 2011 Reg. Sess.) (reasonable belief); VA. CODE ANN. § 19.2-59.1(A) (LEXIS through 2011 Reg. Sess. cc. 1-890 & Special Sess.) (reasonable cause); WASH. REV. CODE § 10.79.130 (2011) (reasonable suspicion or probable cause); WIS. STAT. § 968.255 (LEXIS through Act 8 2011) (probable cause).

²⁴⁵ See Brief for Former Attorneys General of New Jersey et. al. as Amici Curiae Supporting Plaintiff-Appellee at *3-8, *Florence v. Bd. of Chosen Freeholders*, No. 10-945, (June 24, 2011).

²⁴⁶ N.J. STAT. ANN. § 2A:161A-8(b) (West 2010) ("[T]he Attorney General shall issue guidelines . . . for police officers governing the release and confinement of persons who have been arrested for commission of an offense other than a crime and such guidelines governing the performance of strip and body cavity searches . . .").

Attorney General of New Jersey promulgated *The Attorney General's Strip Search and Body Cavity Search Requirements and Procedures for Police Officers*, which permit strip searches in municipal detention facilities based on a search warrant, consent, or reasonable suspicion that an individual is concealing a weapon or other contraband.²⁴⁷ These guidelines are similar to the ABA's strip-search standard, which requires an "articulable suspicion" that an arrestee is concealing contraband.²⁴⁸ Additionally, like the New Jersey Legislature, many other state legislatures have provided statutory protection to their citizens by requiring at least reasonable suspicion for strip searches of arrestees for minor offenses.²⁴⁹ Accordingly, the blanket strip-search policies at BCJ and ECCF would violate the New Jersey strip-search statute, the ABA's standard, and the statutes of other states, all of which require at least reasonable suspicion.

Generally, states are allowed, through their constitutions, to provide greater protection to their citizens than is afforded to those citizens by the U.S. Constitution.²⁵⁰ After examining the New Jersey Constitution and the New Jersey strip search statute, it appears that the plaintiffs may have been better off bringing this claim in state court rather than in federal court.²⁵¹ For example, in *State v. Sheppard*, the

²⁴⁷ N.J. DIV. OF CRIMINAL JUSTICE, THE ATTORNEY GENERAL'S STRIP SEARCH AND BODY CAVITY SEARCH REQUIREMENTS AND PROCEDURES FOR POLICE OFFICERS II.A.1. (1993), available at <http://www.state.nj.us/lps/dcj/agguide/stripout.htm>.

²⁴⁸ See *supra* note 243.

²⁴⁹ See *supra* note 244.

²⁵⁰ See *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982). The Supreme Court of New Jersey explained that "the United States Supreme Court has long proclaimed that state Constitutions may provide more expansive protection of individual liberties than the United States Constitution." *Id.* at 300 (internal citations omitted). Moreover, the court noted that it had previously "recognized that [the New Jersey] state Constitution may provide greater protection than the federal Constitution." *Id.* (internal citations omitted); see also *State v. Hunt*, 450 A.2d 952, 959–60 (N.J. 1982) (citing *Prune Yard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980)); *Oregon v. Hass*, 420 U.S. 714, 718 (1975) (explaining that the U.S. Constitution establishes the minimum amount of protection that a state must afford to constitutional rights and that states may provide further protections to its citizens by further limiting state powers).

²⁵¹ See *State v. Hayes*, 743 A.2d 378 (N.J. Super. Ct. App. Div. 2000). The court explained that in addition to constitutional limitations on searches, strip searches are regulated by statute. *Id.* at 380–81 (citing N.J. STAT. ANN. § 2A:161A-1 (West 2010)). Moreover, "[s]ection 1c permits a strip search of a person lawfully confined in a municipal detention facility based on *reasonable suspicion*, provided the search is authorized under regulations promulgated by the Commissioner of the Department of Corrections." *Id.* at 382 (emphasis added) (internal quotation marks and citation omitted).

Superior Court of New Jersey looked to the New Jersey Constitution²⁵² and held that an individual's right to be free from unreasonable searches was violated when, prior to incarceration, the arrestee was strip searched absent probable cause that he was concealing weapons or contraband.²⁵³ The individual was arrested for motor vehicle violations and incarcerated solely due to his inability to post bail.²⁵⁴ The court chastised the blanket strip-search policy that the police implemented and explained that it could not approve such a policy "in a free society that passionately embraces the tenets of its constitution."²⁵⁵ Whether it was an oversight, a case of bad lawyering, or a strategic decision, Florence may have been better off filing suit in state court based on violations of the New Jersey Constitution and the New Jersey strip-search statute.

VI. THE RIGHT CASE AT THE WRONG TIME: IMPLICATIONS OF THE ROBERTS COURT DECIDING *FLORENCE*

Based on the various lower courts' approaches, it is evident that there is a significant level of confusion over the constitutionality of strip searches of individuals arrested for minor offenses. The circuit courts are irreconcilably divided over whether the Fourth Amendment permits suspicion-less strip searches of individuals arrested for minor offenses. Recognizing the constitutional import of Florence's suit, the Supreme Court granted certiorari in *Florence v. Board of Chosen Freeholders* on April 4, 2011.²⁵⁶ The Court heard oral arguments on October 12, 2011.²⁵⁷ Thereafter, the Court will likely set a uniform standard to evaluate Fourth Amendment challenges to strip-search policies of arrestees of minor offenses in detention facilities outside of the post-contact visit context.²⁵⁸ In ruling on this issue, the Court

²⁵² See N.J. CONST., art. I, para. 7 ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.").

²⁵³ 483 A.2d 235 (N.J. Super. Ct. Law. Div. 1984).

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 239.

²⁵⁶ 131 S. Ct. 1816 (2011).

²⁵⁷ See Transcript of Oral Argument, *Florence v. Bd. of Chosen Freeholders*, No. 10-945 (Oct. 12, 2011), available at http://www.oyez.org/cases/2010-2019/2011/2011_10_945%23argument.

²⁵⁸ Although the Supreme Court has not addressed the issue of strip-search policies in detention facilities since *Bell*, the Court has addressed strip-search policies in contexts outside of the arrestee/detainee context. In 2009, in *Safford Unified School Dist. #1 v. Redding*, 129 S. Ct. 2633 (2009), the Supreme Court, in a six-to-three rul-

should reverse the Third Circuit and adopt the approach that the majority of circuit courts take: it is unreasonable and unconstitutional for a correctional facility to strip search a person arrested for a minor offense unless authorities have “reasonable suspicion” that the individual is concealing a weapon or other contraband. The Supreme Court should adopt the “reasonable suspicion” approach because it strikes the proper balance between a jail’s legitimate justifications for strip searches and the severe intrusion into the privacy interests of individuals arrested for minor offenses.

Since the Supreme Court has been silent on the issue for over thirty years, and the record is well developed in this case, it appears that *Florence* is an ideal vehicle to resolve this conflict among the circuits. The problem for the plaintiffs, however, is the current composition of the Supreme Court. The jurisprudence of the Fourth Amendment varies depending on who is on the bench.²⁵⁹ The current Supreme Court, under Chief Justice John G. Roberts’s leadership, is the most conservative Court in decades.²⁶⁰ In his book, *The Evolution of the Fourth Amendment*, Thomas McInnis explains that the Roberts Court has ruled on ten cases involving the Fourth Amendment in the past three terms.²⁶¹ McInnis found several commonalities in these cases, namely the use of the reasonableness approach and victories for the government.²⁶² Accordingly, individuals who challenge the government’s action in Fourth Amendment cases “will have a high hurdle to overcome, because the presumption exists among at least five members of the Court that the governmental interest in law enforcement . . . will usually trump the individual’s interest in privacy.”²⁶³ Arguably, four of the six most conservative justices out of the

ing, decided a case dealing with a strip search in the school context. The Court held that a strip search of a student by school officials violated the student’s Fourth Amendment rights “[b]ecause there was no reason to suspect the drugs presented a danger or were concealed in her underwear.” *Id.* at 2637. The Court reiterated that such searches must be based on reasonable suspicion. *Id.* at 2643. Although this was a recent decision by the Court, it is not relevant or applicable to this case because *Florence* deals with an entirely different context—namely strip searches of pretrial detainees in detention facilities.

²⁵⁹ MCINNIS, *supra* note 55, at 271 (“The Burger and Rehnquist Courts’ interpretation of the Fourth Amendment allowed government to engage in a broader array of searches and seizures than had the Warren Court. This demonstrates that the meaning of the Fourth Amendment can change depending on who is on the Court.”).

²⁶⁰ Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES, at A1, July 24, 2010.

²⁶¹ MCINNIS, *supra* note 55, at 271.

²⁶² *Id.*

²⁶³ *Id.* at 283.

forty-four who have been on the bench since 1937 are currently serving, including Chief Justice Roberts, Justice Alito, Justice Scalia, and Justice Thomas.²⁶⁴ McInnis further explained that

Chief Justice Roberts and Justices Alito and Thomas are all consistent conservative voices who are not likely to use the Fourth Amendment to narrow the government's power to search and seize. Their votes, along with Justice Scalia's, provide a solid bloc of four votes which will usually support the government's power to search and seize.²⁶⁵

In addition to this conservative force, Justice Kennedy, the swing Justice sitting on the Roberts Court, is considered to be one of the ten most conservative justices on the bench since 1937.²⁶⁶ McInnis notes that "[t]he direction of the Court's Fourth Amendment jurisprudence when there are close cases will temporarily hinge on the votes of Justice Kennedy."²⁶⁷ In the cases in which the Court split last term, Justice Kennedy sided with the conservatives in nine out twelve cases.²⁶⁸ Furthermore, the additions of neither Justice Kagan nor Justice Sotomayor are likely to affect the ideological balance of the Court, as both Justices replaced other liberals, namely Justice Stevens and Justice Souter.²⁶⁹

Although the plaintiff class in *Florence* could not have waited to petition the Court until the ideology shifted towards a more liberal approach, based on the strong conservative leanings of the Roberts Court it is unlikely that the Court will rule in plaintiffs' favor. As previously noted, the plaintiffs may have been better off bringing their claims in state court.²⁷⁰ Nonetheless, since the Supreme Court has already granted certiorari on the case, only time will tell whether the ideologies of the Roberts Court hold true.

VII. CONCLUSION

In *Florence*, The Third Circuit erred in upholding a blanket strip-search policy of all arrestees charged with minor offenses upon their admission to both BJC and ECCF. In 1979, the Supreme Court, in

²⁶⁴ Liptak, *supra* note 260.

²⁶⁵ MCINNIS, *supra* note 55, at 283–84.

²⁶⁶ Liptak, *supra* note 260.

²⁶⁷ MCINNIS, *supra* note 55, at 283–84.

²⁶⁸ Erwin Chemerinsky, Editorial, *Supreme Court's Conservative Majority is Making Its Mark*, L.A. TIMES, Oct. 4, 2010, at 17. This article discusses the ideology of the Court prior to the replacement of Justice Stevens by Justice Kagan.

²⁶⁹ Liptak, *supra* note 260.

²⁷⁰ See *supra* text accompanying notes 251–55.

Bell v. Wolfish, examined a policy at MCC mandating strip searches of all inmates after contact visits. The Court articulated a balancing test that became the central inquiry in analyzing the constitutionality of strip searches. In *Bell*, the Court held that the strip-search policy could be conducted on less than probable cause because the security interests of the facility outweighed the privacy interests of the inmates. Due to the ambiguity of the Court's decision in *Bell*, lower courts did not have much guidance on how to apply the holding to strip-search policies in contexts outside of post-contact visits. Nonetheless, over the past thirty years, the overwhelming majority of circuit and district court decisions used *Bell* as a guidepost and adopted the reasonable suspicion standard in evaluating the constitutionality of strip-search policies in the booking context.

The Third Circuit, like both the Eleventh and Ninth Circuits, overlooked these cases, and in doing so misinterpreted the holding in *Bell* by failing to recognize the factual differences between *Florence* and *Bell*. While courts should use the *Bell* balancing test as a starting point in analyzing Fourth Amendment challenges, the *Bell* decision should be limited to the context of post-contact searches. The proper standard for evaluating the constitutionality of strip searches of arrestees for minor offenses is to require that jail officials have reasonable suspicion that individuals are concealing weapons or other contraband in order to conduct a strip search that passes constitutional muster. The Third Circuit's decision does not strike the proper balance between a jail's security interest and an individual's privacy interest. The court failed to give credence to the degrading nature of and severe privacy intrusion that arrestees suffer during a strip search. Thus, despite decades of well-settled law regarding blanket strip-search policies of arrestees for minor offenses, the Third Circuit's decision in *Florence v. Board of Chosen Freeholders* has caused further uncertainty concerning the proper standard to evaluate strip searches. The law is now in flux as the pendulum continues to swing in the wrong direction, and the Fourth Amendment rights of individuals arrested for minor offenses edges closer to the bottom of the pit. The Supreme Court will ultimately bring that pendulum to a halt when it decides *Florence*'s appeal.