DOES THE FOURTH AMENDMENT PERMIT INDISCRIMINATE STRIP SEARCHES OF MISDEMEANOR ARRESTEES? *FLORENCE V. BOARD OF CHOSEN FREEHOLDERS*

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I. INTRODUCTION

According to FBI statistics, over thirteen million people are arrested in the United States each year.[1] Depending on the Supreme Court's decision in *Florence v. Board of Chosen Freeholders*,[2] jails across the nation may soon attain the power to order all arrestees to remove their clothing and submit to a visual inspection of their naked bodies and genitals. Specifically, the question presented in *Florence* is: "Whether the Fourth Amendment permits a jail to conduct a suspicionless strip search of every individual arrested for any minor offense no matter what the circumstances."[3] Thus, depending on the holding, strip searches may be permitted without exception, even when an individual is arrested on minor charges, such as traffic violations, and when there is no reason to suspect hidden contraband.

Bell v. Wolfish,[4] the only prior Supreme Court decision to address the constitutionality of strip searches in correctional

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1. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORT, 2009 (2010) (reporting 13,687,241 arrests nationwide in 2009, excluding arrests for traffic violations), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010; FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2008 (2009) (reporting 14,005,615 arrests nationwide in 2008, excluding arrests for traffic violations), *available at* http://www2.fbi.gov/ucr/cius2009/index.html.

2. 563 U.S. ___, 131 S. Ct. 1816 (Apr. 4, 2011) (No. 10-945).

3. Petition for Writ of Certiorari at i, *Florence*, 563 U.S. ___, 131 S. Ct. 1816 (Apr. 4, 2011) (No. 10-495).

4. 441 U.S. 520 (1979).

institutions, sets the backdrop for *Florence*. In *Bell*, the Court held that correctional officers may strip search inmates following contact visits, even where probable cause to suspect hidden contraband does not exist.[5] The issue in *Bell*, however, differed in several respects from the question now before the Court in *Florence*, and in the years after *Bell*, a consensus developed among numerous federal courts of appeals that strip searches of arrestees charged with minor offenses could not be performed in the absence of reasonable suspicion.[6] This once-uniform view came into question when the Ninth and Eleventh Circuits—and recently the Third Circuit in the decision below in *Florence*—adopted the opposite position.[7]

This Article argues that, in the absence of reasonable suspicion, jail officials do not have the constitutional power to strip search individuals arrested for minor offenses when such arrestees arrive at a jail.[8] As the Supreme Court stated in *Bell*, the Fourth Amendment requires courts to balance the "need for the particular search against the invasion of personal rights that the search entails."[9] The invasion of privacy caused by a strip search is enormous.[10] Meanwhile, the security interest in indiscriminate strip searches of misdemeanor arrestees in the absence of reasonable suspicion is minimal because such arrestees are *least likely* to possess concealed contraband, and jail officials already have the authority to perform strip searches where there is a more realistic chance of discovering

5. *Id*. at 560.

6. *See infra* Part II.B.1

7. 621 F.3d 296 (3d. Cir. 2010), *cert. granted*, 563 U.S. ___, 131 S. Ct. 1816 (Apr. 4, 2011) (No. 10-495); *see also infra* Part II.B.2.

8. The *Florence* litigation and this Article focus on strip searches designed to prevent contraband from entering jails and purportedly justified by the need to maintain security in a correctional environment. *See, e.g.*, *Florence*, 621 F.3d at 298, 302. A separate issue, not before the Court in *Florence* and beyond the scope of this Article, is when strip searches may be performed as a means of uncovering evidence of crime. *See* Eugene L. Shapiro, *Strip Searches Incident to Arrest: Cabining the Authority to Humiliate*, 83 N.D. L. REV. 67, 99–104 (2007) (differentiating between strip searches designed to uncover evidence of crime and those justified as a means of preventing contraband from entering jails).

9. *Bell*, 441 U.S. at 559.

10. *See infra* Part IV.A.

contraband.[11] The constitutional balance therefore tips in favor of requiring reasonable suspicion to strip search an individual arrested for a minor offense.[12]

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11. *See infra* Part IV.B.

12. *See infra* Part IV. For previous discussions of strip searches in correctional institutions, see Robin Lee Fenton, *The Constitutionality of Policies Requiring Strip Searches of All Misdemeanants and Minor Traffic Offenders*, 54 U. CIN. L. REV. 175, 183–89 (1985) (arguing that blanket policies of strip searching all misdemeanor arrestees are unconstitutional); David C. James, *Constitutional Limitations on Body Searches in Prisons*, 82 COLUM. L. REV. 1033, 1051–55 (1982) (arguing that different considerations and standards should apply to strip searches designed to uncover evidence of crime and strip searches designed to prevent contraband from entering a correctional facility); Deborah L. MacGregor, *Stripped of All Reason?: The Appropriate Standard for Evaluating Strip Searches of Arrestees and Pretrial Detainees in Correctional Facilities*, 36 COLUM. J.L. & SOC. PROBS. 163, 191–200 (2003) (discussing the appropriate standard of review for strip searches of detainees and arrestees); Tracy McMath, *Do Prison Inmates Retain Any Fourth Amendment Protection from Body Cavity Searches?*, 56 U. CIN. L. REV. 739, 742–47, 755 (1987) (arguing that some courts have not given due weight to the privacy implications of strip searches and that "[*Bell*] has been stretched to fit so many challenges to body cavity searches that the case's rationale has become distorted"); Margo Schlanger, *Jail Strip-Search Cases: Patterns and Participants*, 71 LAW & CONTEMP. PROBS. 65 (2008) (examining the participants in jail strip search cases—plaintiffs and attorneys—as a lens for understanding such cases); Shapiro, *supra* note 8, at 104–08 (arguing that a warrant requirement would be appropriate for "evidentiary" strip searches performed after arrest—i.e., strip searches conducted in order to uncover evidence of a crime); Paul Shuldiner, *Visual Rape: A Look at the Dubious Legality of Strip Searches*, 13 J. MARSHALL L. REV. 273, 296 (1979) (arguing that the Fourth Amendment requires officers to obtain a warrant prior to conducting a strip search); William J. Simonitsch, *Visual Body Cavity Searches Incident to Arrest: Validity Under the Fourth Amendment*, 54 U. MIAMI L. REV. 665, 678–82, 687–88 (2000) (arguing that strip searches incident to arrest must be performed only where reasonable suspicion exists); Michael Beler, Comment, *Constitutional Law—Permitting Blanket Strip-Search Policies for All Arrestees Entering General Jail Population—* Florence v. Board of Chosen Freeholders, 621 F.3d 296 (3d Cir. 2010), 16 SUFFOLK J. TRIAL & APP. ADVOC. 284 (2011) (discussing the *Florence* litigation); 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, 898 (2009) (arguing that "reasonable suspicion is required to conduct strip searches of arrestees during the booking process"); Daphne Ha, Note, *Blanket Policies for Strip Searching Pretrial Detainees: An Interdisciplinary Argument for Reasonableness*, 79 FORDHAM L. REV. 2721, 2740–44, 2759–60 (2011) (arguing that, based on social science evidence showing that strip searches cause psychological harm, individualized suspicion should be required prior to a strip search of any detainee); Gabriel M. Helmer, Note, *Strip Search and the Felony Detainee: A Case for Reasonable*

Part II of this Article traces the evolution of Fourth Amendment jurisprudence regarding strip searches in jails and prisons. Part III reviews the *Florence* litigation. Part IV examines the competing security and privacy interests implicated by strip searches of misdemeanor arrestees and concludes that the Fourth Amendment permits such searches only where reasonable suspicion exists that a detainee is in possession of concealed contraband.

II. JUDICIAL PRECEDENT REGARDING STRIP SEARCHES IN PRISONS AND JAILS

A. The Supreme Court's Decision in *Bell v. Wolfish*

The United States Supreme Court considered the constitutionality of strip searches in correctional settings for the first time—and thus far, the only time—in 1979.[13] Although *Bell* addressed several constitutional questions regarding pretrial detention conditions,[14] only one is relevant here: the Court considered a Fourth Amendment challenge to a Federal Bureau of Prisons policy, applied at a facility that primarily housed pretrial detainees, of strip searching inmates after every contact visit.[15] Detainees were "required to expose their body cavities for visual inspection."[16] More specifically: "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."[17]

The Supreme Court, in an opinion by Justice Rehnquist, began its consideration of the strip search policy by noting that Fourth Amendment reasonableness "is not capable of precise

Suspicion, 81 B.U. L. REV. 239, 284–87 (2001) (arguing that strip searches even of felony arrestees should require reasonable suspicion).

13. *Bell*, 441 U.S. 520.

14. *Id.*

15. *Id.* at 558.

16. *Id.*

17. *Id.* at 558 n.39 (citations omitted).

definition or mechanical application," and turns on "a balancing of the need for the particular search against the invasion of personal rights that the search entails."[18] Striking the proper balance implicates various considerations, including "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."[19]

The "place" where the searches challenged in *Bell* occurred—i.e., a correctional facility—figured prominently in the Court's resolution of the Fourth Amendment balancing test.[20] The Court underscored the importance of preventing drugs, weapons, and other contraband from being smuggled into prisons and jails and the need to conduct searches in order to uncover such contraband: "A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence."[21] At the same time, the Court acknowledged the substantial invasion of personal privacy caused by strip searches, stating, "this practice [of performing body cavity searches] instinctively gives us the most pause,"[22] and "[w]e do not underestimate the degree to which these searches may invade the personal privacy of inmates."[23]

Ultimately, the Court framed the relevant issue, and its resolution of the competing privacy and security interests, as follows: "[W]e deal here with the question whether visual body-cavity inspections as contemplated by the [Metropolitan Correctional Center (MCC)] rules can *ever* be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can."[24] Thus, while the Court rejected a probable cause requirement, Justice Rehnquist's

18. *Id*. at 559.
19. *Id*.
20. *Id*.
21. *Id*.
22. *Id*. at 558.
23. *Id*. at 560.
24. *Id*. (citation omitted).

narrow framing of the holding suggested that the Fourth Amendment might well require some lesser level of suspicion than probable cause—such as reasonable suspicion—to justify a strip search in a correctional facility.[25]

Justice Powell issued a one-paragraph opinion concurring in part and dissenting in part.[26] Justice Powell stated that he concurred with the majority on certain other issues but dissented as to the holding on visual inspections of body cavities.[27] In full, Justice Powell's opinion read as follows:

> I join the opinion of the Court except the discussion and holding with respect to body-cavity searches. In view of the serious intrusion on one's privacy occasioned by such a search, I think at least some level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches described in this case. I therefore dissent on this issue.[28]

Justice Powell's dissent has engendered debate as to the meaning of the majority opinion. Since Justice Powell characterized his opinion as a dissent as to the strip search issue, he apparently viewed his belief that the Fourth Amendment requires some level of suspicion to justify a strip search as inconsistent with the Court's holding. However, because reasonable suspicion is a lesser standard than probable cause, Justice Powell's assertion that "some level of cause, such as a reasonable suspicion, should be required,"[29] in fact appears to be *consistent* with Justice Rehnquist's conclusion that strip searches in correctional settings can sometimes "be conducted on less than probable cause."[30] The lower courts have since debated whether Justice Powell's dissent supports a more sweeping interpretation of the majority opinion as a rejection of both a probable cause requirement *and* a reasonable suspicion requirement.[31]

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25. *See id*. at 560.
26. *Id*. at 563 (Powell, J., concurring in part and dissenting in part).
27. *Id*.
28. *Id*.
29. *Id*.
30. *Id*. at 560 (majority opinion).
31. *See* Crampton, *supra* note 12, at 903–04 (discussing the debate

Justice Marshall authored a dissent in which he underscored the humiliation caused by strip searches, stating, "[i]n my view, the body-cavity searches of . . . inmates represent one of the most grievous offenses against personal dignity and common decency."[32] Similarly, Justice Stevens, in a dissent joined by Justice Marshall, stressed that strip searches constitute a form of punishment, which cannot be inflicted upon pretrial detainees subject to the presumption of innocence: "I think it is unquestionably a form of punishment to . . . compel [an individual presumed innocent] to exhibit his private body cavities to the visual inspection of a guard."[33]

B. Courts of Appeals Decisions Regarding Strip Searches of Misdemeanor Arrestees

In the wake of *Bell*, numerous federal appellate courts considered the issue presently before the Supreme Court in *Florence:* whether strip searches of misdemeanor arrestees require reasonable suspicion that a detainee is in possession of concealed contraband. For decades, federal appellate courts answered this question monolithically, and ten courts of appeals stated that misdemeanor arrestees cannot, in the absence of individualized suspicion, be subjected to strip searches upon

engendered by Justice Powell's opinion in *Bell*); Bull v. City of San Francisco, 595 F.3d 964, 978 (9th Cir. 2010) (en banc) ("[T]he [*Bell*] Court declined to impose an individualized suspicion requirement, notwithstanding criticism from Justices Powell and Marshall."); Powell v. Barrett, 541 F.3d 1298, 1307–08 (11th Cir. 2008) (en banc) ("Justice Powell dissented for one and only one reason, which was that the Court did not require reasonable suspicion for conducting the strip searches in that case."). *But see Powell*, 541 F.3d at 1314 (Edmondson, J., concurring) ("I think it is jurisprudentially unsound to look at a Justice's dissenting opinion to determine what the Supreme Court has decided in a case."); *id*. at 1317 (Barkett, J., dissenting) ("The majority also reads too much into the dissents of Justice Powell and Justice Marshall to support its argument that the Supreme Court implicitly sanctioned strip searches without reasonable suspicion. The reading more consistent with judicial rules of construction is that Justice Powell wanted the Supreme Court to decide more than it was willing to decide, namely, to explicitly articulate a level of cause necessary to justify the searches.").

32. *Bell*, 541 U.S. at 576–77 (Marshall, J., dissenting).

33. *Id*. at 595 (Stevens, J., dissenting) (citations omitted).

arrival at a jail.[34] Beginning in 2008, however, some courts began to reevaluate this settled precedent and conclude that even misdemeanor arrestees can be strip searched without reasonable suspicion—indeed, without any level of suspicion.[35] This section outlines the major cases that produced the circuit split presently before the Supreme Court in *Florence*.

1. Cases Holding That Strip Searches of Misdemeanor Arrestees Require Reasonable Suspicion

In the years after *Bell*, appellate courts focused on three elements that differentiate the Supreme Court's holding in that case from the constitutionality of suspicionless strip searches of misdemeanor arrestees—the issue now before the Court in *Florence*. First, whereas the question in *Florence* exclusively involves misdemeanor arrestees,[36] at least some of the inmates in *Bell* were charged with more serious crimes, or had already been convicted.[37] Second, the circumstances of the strip searches differ in *Bell* and *Florence*. The strip searches in *Bell* occurred after contact visits between inmates and visitors, whereas the strip

34. Florence v. Bd. of Chosen Freeholders, 621 F.3d 296, 299 (3d Cir. 2010) ("Since *Bell* was decided, ten circuit courts of appeals applied its balancing test and uniformly concluded that an arrestee charged with minor offenses may not be strip searched consistent with the Fourth Amendment unless the prison has reasonable suspicion that the arrestee is concealing a weapon or other contraband."), *cert. granted*, 563 U.S. ___, 131 S. Ct. 1816 (Apr. 4, 2011) (No. 10-495); *see also* Wilson v. Jones, 251 F.3d 1340, 1342–43 (11th Cir. 2001), *overruled by Powell*, 541 F.3d at 1314; Swain v. Spinney, 117 F.3d 1, 7 (1st Cir. 1997); Chapman v. Nichols, 989 F.2d 393, 395 (10th Cir. 1993); Masters v. Crouch, 872 F.2d 1248, 1255 (6th Cir. 1989); Weber v. Dell, 804 F.2d 796, 797 (2d Cir. 1986); Jones v. Edwards, 770 F.2d 739, 802 (8th Cir. 1985); Stewart v. Lubbock Cnty., Tex., 767 F.2d 153, 156–57 (5th Cir. 1985); Giles v. Ackerman, 746 F.2d 614, 616–17 (9th Cir. 1984), *overruled by Bull*, 595 F.3d at 977; Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983); Logan v. Shealy, 660 F.2d 1007, 1013 (4th Cir. 1981).

35. *See Powell*, 541 F.3d at 1300, 1306; *Bull*, 595 F.3d at 973.

36. *See Florence*, 621 F.3d at 299.

37. *Bell*, 441 U.S. at 524 ("In addition to pretrial detainees, the MCC also houses some convicted inmates . . . ."); *Mary Beth G.*, 723 F.2d at 1272 ("Although the majority in [*Bell*] did uphold the strip searches conducted there on less than probable cause, the detainees were awaiting trial on serious federal charges after having failed to make bond and were being searched after contact visits.").

searches in *Florence* occurred when individuals were taken to jail immediately after arrest. Third, whereas *Bell*, as interpreted above,[38] held only that the strip searches in question did not require probable cause, the question in *Florence* involves reasonable suspicion, a lesser standard than probable cause. Relying on some or all of these three distinctions, numerous federal appellate courts held in the years after *Bell* that strip searches of misdemeanor arrestees require reasonable suspicion. Each of these distinctions between *Bell* and *Florence* is discussed below in greater detail.

Felonies Versus Misdemeanors: In 1983, four years after *Bell*, the Seventh Circuit held in *Mary Beth G. v. City of Chicago* that a policy of strip searching all female arrestees (including misdemeanor arrestees) without reasonable suspicion violated the Fourth Amendment.[39] Female arrestees, including women arrested for outstanding parking tickets,[40] were forced to comply with the following instructions:

> 1) lift her blouse or sweater and to unhook and lift her brassiere to allow a visual inspection of the breast area, to replace these articles of clothing and then
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> 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.[41]

The Seventh Circuit distinguished *Bell* by focusing on the nature of the offenses with which the arrestees in *Mary Beth G.* were charged. Whereas "the detainees [in *Bell*] were awaiting trial on serious federal charges after having failed to make bond and were being searched after contact visits,"[42] the arrestees in *Mary Beth G.* were charged with much less serious offenses.[43] The court rejected the view that security "dangers are created by

38. *See supra* Part II.A.
39. 723 F.2d 1263, 1267 (7th Cir. 1983).
40. *Id*. at 1267 n.2.
41. *Id*. at 1267.
42. *Id*. at 1272.
43. *Id*.

women minor offenders entering the lockups for short periods while awaiting bail."[44] In subsequent cases, numerous other courts have relied on the felony/misdemeanor distinction in holding that a strip search of a misdemeanor arrestee requires reasonable suspicion.[45]

Reasonable Suspicion Versus Probable Cause: In 1986, the Second Circuit held in *Weber v. Dell* that a blanket policy of strip searching virtually all arrestees violated the Fourth Amendment.[46] Whereas the Seventh Circuit in *Mary Beth G.* focused on the distinction between misdemeanors and other crimes, the Second Circuit emphasized the difference between reasonable suspicion and probable cause.[47] Specifically, *Weber* rejected the view that *Bell*'s holding that strip searches could be performed based on a standard "short of probable cause" dictated the conclusion that such searches do not require reasonable suspicion.[48] The Second Circuit reasoned that *Bell* did not "read out of the Constitution the provision of general application that a search be justified as reasonable under the circumstances. The imposition of a standard short of probable cause in determining the balance of interests at stake in [*Bell*] in no way dispensed with that requirement."[49] Other federal courts have also distinguished *Bell* by differentiating between a reasonable suspicion requirement and a probable cause requirement.[50]

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44. *Id*. at 1273.

45. *See, e.g*., Roberts v. Rhode Island, 239 F.3d 107, 112 (1st Cir. 2001) (stating that reasonable suspicion is required when an individual is arrested for a misdemeanor); Wachtler v. Cnty. of Herkimer, 35 F.3d 77, 81–82 (2d Cir. 1994) (stating that the Fourth Amendment prohibits strip searches of misdemeanor arrestees without reasonable suspicion); Stewart v. Cnty. of Lubbock, Tex. 767 F.2d 153, 156–57 (5th Cir. 1985) (holding that strip searches of individuals charged with misdemeanor offenses require reasonable suspicion); Hill v. Bogans, 735 F.2d 391, 394 (10th Cir. 1984) (holding strip search of traffic offender unconstitutional where no reasonable suspicion existed that offender might have been concealing contraband).

46. 804 F.2d 796, 800 (2d Cir. 1986).

47. *Id*.

48. *Id*.

49. *Id*.

50. *See, e.g*., Wilson v. Jones, 251 F.3d 1340, 1343 (11th Cir. 2001) (holding that a blanket policy of conducting strip searches upon intake to jail is unreasonable when applied to DUI arrestee absent reasonable suspicion),

Arrest Versus Contact Visits: In 1984, the Ninth Circuit held in *Giles v. Ackerman* that "arrestees for minor offenses may be subjected to a strip search only if jail officials have a reasonable suspicion that the particular arrestee is carrying or concealing contraband or suffering from a communicable disease."[51] Like the Second Circuit in *Weber*, the Ninth Circuit in *Giles* noted that *Bell*'s holding that strip searches do not require probable cause in no way compels the conclusion that such searches can be performed without reasonable suspicion.[52] However, the Ninth Circuit also underscored the different circumstances in play during contact visits and shortly after arrest: "Visitors to the detention facility in *Bell* could plan their visits and organize their smuggling activities. In contrast, arrest and confinement in the Bonneville County Jail are unplanned events, so the policy could not possibly deter arrestees from carrying contraband."[53]

Several other federal appellate courts have relied on similar logic, reasoning that the surprise usually attendant to arrest greatly limits opportunities to plan smuggling operations.[54] The

overruled en banc by Powell v. Barrett, 541 F.3d 1298 (11th Cir. 2008); Kelly v. Foti, 77 F.3d 819, 821 (5th Cir. 1996) (finding a reasonable suspicion requirement); Giles v. Ackerman, 746 F.2d 614, 616 (9th Cir. 1984) ("Applying those factors, the Court in *Bell* concluded that a standard less stringent than probable cause could justify strip searches or body cavity searches of inmates at a pretrial detention facility. We reject the County's contention that *Bell* signifies that all strip searches are constitutionally acceptable." (citations omitted)), *overruled en banc by* Bull v. City of San Francisco, 595 F.3d 964 (9th Cir. 2010).

51. 746 F.2d at 615.

52. *Id*. at 616.

53. *Id*. at 617.

54. *See, e.g.*, *Bull*, 595 F.3d at 998 (Thomas, J., dissenting) ("[C]ontact visits are planned. As a matter of common sense, contact visits are far more likely to lead to smuggling than initial arrests."); *Powell*, 541 F.3d at 1318 (Barkett, J., dissenting) ("These appellees differ significantly from those in *Bell,* where the strip-searched plaintiffs had advance knowledge of their return to the general jail population after their planned interactions with outsiders. Again, as other circuit courts have recognized, the reasonable need for inspection in the *Bell* scenario is simply not present after the unplanned arrest of individuals for petty misdemeanors unrelated to contraband." (citations omitted)); Shain v. Ellison, 273 F.3d 56, 64 (2d Cir. 2001) ("*Bell* authorized strip searches after contact visits, where contraband often is passed. It is far less obvious that misdemeanor arrestees frequently or even occasionally hide contraband in their bodily orifices. Unlike persons already in jail who receive contact visits, arrestees do not ordinarily have notice that they are about to be

First Circuit, for example, stated in *Roberts v. Rhode Island* that "it is far less likely that smuggling of contraband will occur subsequent to an arrest—when the detainee is normally in handcuffed custody—than during a contact visit that may have been arranged solely for the purpose of introducing contraband to the prison population."[55]

2. Cases Holding That Strip Searches of Misdemeanor Arrestees Do Not Require Reasonable Suspicion

Although numerous courts held in the decades after *Bell* that strip searches of misdemeanor arrestees require reasonable suspicion, a countervailing position began to gain ground in 2008 when the Eleventh Circuit, sitting en banc, issued its decision in *Powell v. Barrett*.[56] The majority in *Powell*, over a dissent by Judge Barkett, held that the Fourth Amendment permits jail officials to perform strip searches of misdemeanor arrestees without any level of suspicion.[57] Less than two years later, the Ninth Circuit, also sitting en banc, reached the same conclusion in *Bull v. City of San Francisco*.[58] The Ninth Circuit en banc panel was split 7–4, with Judge Thomas writing a dissent joined by Judges Wardlaw, Berzon, and Rawlinson.[59]

The *Powell* and *Bull* courts rejected the distinctions made in prior lower court cases between the issue addressed by the

arrested and thus an opportunity to hide something." (citation omitted)); Justice v. City of Peachtree City, 961 F.2d 188, 192 (11th Cir. 1992) (noting that arrests for minor offenses are "quite likely to take that person by surprise" (quotation omitted)); *Giles,* 746 F.2d at 617 (stating that, in contrast to the visitation at issue in *Bell*, arrest and confinement are unplanned events); Allison v. GEO Group, Inc., 611 F. Supp. 2d 433, 454 (E.D. Pa. 2009) (noting that because arrest and detention are generally "unplanned events," most arrestees have little opportunity to plan or carry out smuggling activities); Thompson v. Cnty. of Cook, 412 F. Supp. 2d 881, 890 (N.D. Ill. 2005) ("[I]t is a relatively safe assumption—at least in the absence of evidence to the contrary—that only a negligible portion of arrestees have concealed contraband in body cavities *prior to* their encounter with law enforcement.").

55. 239 F.3d at 111.

56. 541 F.3d 1298.

57. *Id*. at 1300.

58. 595 F.3d 964.

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

Supreme Court in *Bell* and strip searches of misdemeanor arrestees performed without reasonable suspicion. First, both courts dismissed the distinction, drawn by other courts, between the level of danger posed by misdemeanor and felony arrestees.[60] The Eleventh Circuit, for example, noted that "gang members commit misdemeanors as well as felonies."[61]

Second, both courts interpreted *Bell* as rejecting not only a probable cause standard but also a reasonable suspicion standard.[62] In particular, although the holding in *Bell* was limited to the rejection of a probable cause requirement,[63] the Eleventh Circuit noted that the Bureau of Prisons procedure upheld by the Supreme Court in *Bell* was actually a blanket policy of strip searching *all* inmates after contact visits, without any particularized suspicion.[64] Both courts also asserted that Justice Powell's dissent suggested that the majority had rejected both a probable cause and a reasonable suspicion requirement.[65]

Finally, both the Eleventh Circuit and the Ninth Circuit rejected the view that the surprise that ordinarily accompanies an arrest differentiates an arrest from a contact visit.[66] Both courts asserted that individuals may be in possession of hidden contraband even at the time of arrest.[67]

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60. Both courts noted that not all of the detainees in *Bell* had been charged with felonies. *Bull*, 595 F.3d at 978 ("[T]he detention facility in *Bell* housed witnesses in protective custody and persons detained pursuant to contempt orders . . . ."); *Powell*, 541 F.3d at 1310.

61. *Powell*, 541 F.3d at 1311.

62. *Bull*, 595 F.3d at 978 (stating that the *Bell* Court "declined to impose an individualized suspicion requirement, notwithstanding criticism from Justices Powell and Marshall"); *Powell*, 541 F.3d at 1307–08.

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

64. *Powell*, 541 F.3d at 1306 (stating that the policy upheld in *Bell* "required that searches be conducted on every inmate after each contact visit, even without the slightest cause to suspect that the inmate was concealing contraband").

65. *Bull*, 595 F.3d at 978; *Powell*, 541 F.3d at 1307–08. For a discussion of Justice Powell's opinion in *Bell*, see *supra* Part II.A.

66. *Bull*, 595 F.3d at 979 ("In both scenarios [i.e., during arrests and contact visits], the individuals have access to contraband and can conceal dangerous items on their person."); *Powell*, 541 F.3d at 1313 ("[A]n inmate's initial entry into a detention facility might be viewed as coming after one big and prolonged contact visit with the outside world.").

67. *Bull*, 595 F.3d at 979; *Powell*, 541 F.3d at 1313.

III. THE *FLORENCE* LITIGATION

The events that would ultimately bring the *Florence* case to the Supreme Court began on March 3, 2005, when Albert W. Florence was sitting in a car being driven by his wife.[68] A New Jersey State Trooper pulled over the vehicle, and Florence was arrested due to a bench warrant, although the warrant resulted from a fine that Florence had already paid.[69] Over the next week, Florence would be subjected to two strip searches in two different jails.[70] During the first search, which occurred at the Burlington Jail, "an officer directed [Florence] to remove all his clothing and, while nude, open his mouth, lift his tongue, hold his arms out, turn fully around, and lift his genitals. Florence complied with these requests while the officer sat approximately one arm's length in front of him."[71] Six days later, Florence was transferred to the Essex County Jail, where he was strip searched yet again.[72] On the following day, all charges against Florence were dropped.[73]

Florence then brought suit against Burlington County and Essex County defendants in the United States District Court for the District of New Jersey.[74] The district court granted Florence's motion for class certification, with Florence serving as the representative of a class of misdemeanor arrestees strip searched in the Burlington County and Essex County Jails.[75]

The parties filed cross motions for partial summary judgment as to the constitutionality of the challenged strip searches,[76] presenting District Judge Joseph H. Rodriguez with the question whether a strip search of a misdemeanor arrestee "is

68. Florence v. Bd. of Chosen Freeholders, 595 F. Supp. 2d 492, 496 (D.N.J. 2009), *amended by* 657 F. Supp. 2d 504 (D.N.J. 2009), *rev'd*, 621 F.3d 296 (3d Cir. 2010), *cert. granted*, 563 U.S. ___, 131 S. Ct. 1816 (Apr. 4, 2011) (No. 10-495).

69. *Id.* at 496.

70. *Id.* at 496–97.

71. *Id.*

72. *Id.* at 497.

73. *Id.*

74. *Id.* at 492.

75. *Id.* at 495.

76. *Id.* at 495–96.

unreasonable when it is performed pursuant to a blanket policy without reasonable suspicion."[77] After reviewing the circuit split as to this issue, the district court adopted the majority view that such searches require reasonable suspicion.[78] The court noted that without a reasonable suspicion requirement, "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."[79] The district court therefore granted the plaintiff's motion for partial summary judgment.[80] In a subsequent order, the district court certified an interlocutory appeal of that decision.[81]

The Third Circuit, in an opinion by Judge Hardiman, reversed the district court's ruling.[82] Like the Ninth and Eleventh Circuit en banc majorities in *Powell* and *Bull*, the Third Circuit panel rejected the distinctions drawn in earlier appellate decisions between the Supreme Court's holding in *Bell* and suspicionless strip searches of misdemeanor arrestees.[83] The court 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*."[84] District Judge Louis Pollock, sitting by designation, authored a dissenting opinion.[85] On April 4, 2011, the Supreme Court granted certiorari.[86]

77. *Id*. at 504.

78. *Id*. at 511–12.

79. *Id*. at 512.

80. *Id*. at 519.

81. *Florence*, 657 F. Supp. 2d 504, 506 (D.N.J. 2009), *rev'd*, 621 F.3d 296 (3d Cir. 2010), *cert. granted*, 563 U.S. ___, 131 S. Ct. 1816 (Apr. 4, 2011) (No. 10-495).

82. *Florence*, 621 F.3d 296, 311 (3d Cir. 2010), *cert. granted*, 563 U.S. ___, 131 S. Ct. 1816 (Apr. 4, 2011) (No. 10-495).

83. *Id*. at 308–09.

84. *Id*. at 308.

85. *Id*. at 311–12 (Pollak, J., dissenting).

86. *Florence*, 563 U.S. ___, 131 S. Ct. 1816 (Apr. 4, 2011) (No. 10-945).

IV. STRIKING THE PROPER BALANCE BETWEEN COMPETING PRIVACY AND SECURITY INTERESTS

Consistent with the majority rule and the district court's decision in *Florence,* but contrary to the Third Circuit's ruling, the Fourth Amendment requires reasonable suspicion to perform a strip search of a misdemeanor arrestee. *Bell* demands "a balancing of the need for the particular search against the invasion of personal rights that the search entails."[87] This section evaluates the competing privacy and security interests presented by strip searches of misdemeanor arrestees and concludes that the balance tips in favor of a reasonable suspicion requirement.

As argued below in Part IV.A, strip searches humiliate and degrade those forced to endure them—indeed, such searches can even inflict psychological damage. Thus, the privacy interest in freedom from unnecessary strip searches is enormous. Meanwhile, as shown in Part IV.B, the law enforcement interest in strip searching misdemeanor arrestees without reasonable suspicion is minimal. Authority to conduct such searches would permit automatic strip searches in the very circumstances where an arrestee is *least likely* to have concealed contraband—circumstances in which an arrestee is not charged with a serious crime and in which there is no reason to suspect concealed contraband, not even the minimal indications necessary for reasonable suspicion. Correctional officials have sufficient power under current law to combat the smuggling of contraband into jails, and in light of such existing tools, any incremental security benefit associated with strip searching misdemeanor arrestees would be quite minimal.[88]

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

88. *See infra* Part IV.B.

A. The Privacy Interest in Preventing Unnecessary Strip Searches

It is difficult to overstate the invasion of privacy inherent in being ordered to remove one's clothes and expose one's body for inspection by state officials. The Supreme Court recently discussed the humiliation caused by a strip search in *Safford Unified School District No. 1 v. Redding*, a case which involved a student (Savana Redding) who was forced to expose portions of her body to school officials:

> The very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.
>
> Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating.[89]

Even the majority opinion in *Bell* stated, "[w]e do not underestimate the degree to which these searches may invade the personal privacy of inmates," and underscored that among the various policies before the Court in that case, "this practice [of performing body cavity searches] instinctively gives us the most pause."[90] In his dissent, Justice Marshall described body cavity searches as "one of the most grievous offenses against personal dignity and common decency."[91]

Likewise, numerous courts of appeals have recognized the "feelings of humiliation and degradation associated with forcibly exposing one's nude body to strangers."[92] They have described

89. 557 U.S. ___, ___, 129 S. Ct. 2633, 2641 (2009).

90. *Bell*, 441 U.S. at 558, 560.

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

92. Byrd v. Maricopa Cnty. Sheriff's Dep't., 629 F.3d 1135, 1136 n.1 (9th Cir. 2009) (en banc) (citing Way v. Cnty. of Ventura, 445 F.3d 1157, 1160 (9th Cir. 2006)) (internal quotation marks omitted) ("[W]e have consistently

strip searches in terms such as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission."[93] Strip searches have been said to constitute a "severe if not gross interference with a person's privacy,"[94] an "extreme intrusion," "an offense to the dignity of the individual,"[95] and "[o]ne of the clearest forms of degradation in Western Society."[96]

The accounts of those subjected to strip searches make clear the extraordinary humiliation and invasion of privacy this practice entails.[97] Judith Haney, arrested at a political demonstration in Miami in 2003, described her experience as follows:

> After I removed all my clothes, the guard told me to turn around, bend all the way over, and spread my cheeks [which] 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

recognized the frightening and humiliating invasion occasioned by a strip search, even when conducted with all due courtesy.").

93. Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983) (citation omitted) (internal quotation marks omitted).

94. Arruda v. Fair, 710 F.2d 886, 887 (1st Cir. 1983).

95. Wood v. Clemons, 89 F.3d 922, 928 (1st Cir. 1996) (citation omitted).

96. Canedy v. Boardman, 16 F.3d 183, 185 (7th Cir. 1994) (alteration in original) (citation omitted); *see also* Chapman v. Nichols, 989 F.2d 393, 396 (10th Cir. 1993) ("The experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state . . . can only be seen as thoroughly degrading and frightening." (quoting John Does 1–100 v. Boyd, 613 F. Supp. 1514, 1522 (D. Minn. 1985))); Justice v. City of Peachtree City, 961 F.2d 188, 192 (11th Cir. 1992) (noting that strip searches are degrading and frightening) (citing *Mary Beth G.*, 710 F.2d at 1272); Hunter v. Auger, 672 F.2d 668, 674 (8th Cir. 1982) ("[A] strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience."); York v. Story, 324 F.2d 450, 455 (9th Cir. 1963) ("The desire to shield one's unclothed figure from [the] view of strangers . . . is impelled by elementary self-respect and personal dignity.").

97. *See, e.g.*, *Way*, 445 F.3d at 1159 (regarding a jail detainee forced to "spread her labia . . . to allow a check of the vaginal area"); *Mary Beth G.*, 723 F.2d at 1267 (regarding a detainee forced 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").

to squat—and then—to hop like a bunny.[98]

Haney was eventually cleared of all charges.[99] Similarly, in *Bull v. City of San Francisco*, Judge Thomas wrote in his dissenting opinion:

> Mary Bull was arrested at a political protest for pouring red dye mixed with corn syrup on the ground. At the police station, according to her testimony, she was pushed to the floor and her clothes forcibly removed. Her face was smashed against the concrete cell floor while jailors performed a body cavity search. She was left naked in the cell for eleven hours, then subjected to a second body cavity search. After another twelve hours in the jail, she was released on her own recognizance. She was never charged with a crime.[100]

Detainees subjected to strip searches, as noted in federal cases, have described the experience as "humiliating" and "shameful,"[101] and have been left "weeping[] on the floor" after such searches.[102] The effects are sometimes severe and long-lasting. One district court described the consequences suffered by a young woman after being strip searched in order to visit her brother in prison:

> During the strip searches, Blackburn . . . panicked, perspired heavily and shook uncontrollably to the extent that she was barely able to stand. . . .
>
> Following the strip searches, Blackburn developed symptoms of post-traumatic stress syndrome. She regressed, becoming guilt ridden and depressed. She gained approximately forty pounds, had nightmares about the strip searches and had trouble sleeping. She also became phobic about sex. Shortly after the strip searches, Blackburn ended her sexual relationship. She stopped working, attempted suicide, and eventually dropped out of college, which she was within months of finishing. She never returned to school.

98. Schlanger, *supra* note 12, at 67 (alteration in original).

99. *Id.*

100. 595 F.3d 964, 989 (9th Cir. 2010) (en banc) (Thomas, J., dissenting).

101. Kelsey v. Cnty. of Schoharie, 567 F.3d 54, 66 (2d Cir. 2009) (Sotomayor, J., dissenting).

102. Lucero v. Donovan, 354 F.2d 16, 19 (9th Cir. 1965).

> When she attempted to have sexual relations with [her husband] she experienced muscle spasms, rigidity and physical pain. The symptoms of sexual dysfunction continued throughout her marriage. She had never experienced these physical reactions prior to the strip searches.[103]

Traumatic experiences such as this are not outliers; federal decisions are replete with testimonial examples of the psychological trauma caused by strip searches.[104]

A strip search "is a demeaning and humiliating experience for any human being, male or female."[105] But there is reason to believe the practice may have a disproportionately harmful effect on women: One commentator has noted that many challenges to strip-search policies "allege that women are singled out for more invasive search procedures than men, perhaps because jail authorities believe that vaginal smuggling is easier (or more common) than anal smuggling, and therefore that there is a greater need for highly intrusive searches of women."[106] In addition,

> [W]omen may well feel more harmed than men by a visual body-cavity search. After all, given the gender distribution of jail workforces, women arrestees may be more likely than men to have the search done or observed by someone of the opposite sex; they may be menstruating or pregnant, both conditions that may render searches particularly objectionable; and they

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103. Cole v. Snow, 586 F. Supp. 655, 666 (D. Mass. 1984), *aff'd in part sub nom*. Blackburn v. Snow, 771 F.2d 556 (1st Cir. 1985).

104. *See, e.g.*, Lee v. Ferraro, 284 F.3d 1188, 1192 (11th Cir. 2002) (describing a plaintiff plagued by pervasive fear following a strip search which caused depression and marital problems); Simpson v. City of Maple Heights, 720 F. Supp. 1306, 1310 (N.D. Ohio 1989) (finding the plaintiff suffered vomiting; diarrhea; inability to sleep, eat, or swallow; and loss of self-esteem, self-worth, and self-dignity as a result of being strip searched).

105. WOMEN IN PRISON: A REPORT BY THE ANTI-DISCRIMINATION COMMISSION QUEENSLAND 72 (2006) [hereinafter WOMEN IN PRISON]; s*ee also* Michael S. Schmidt, *City Reaches $33 Million Settlement Over Strip Searches*, N.Y. TIMES, Mar. 23, 2010, at A22, *available at* http://www.nytimes.com /2010/03/23/nyregion/23strip.html (describing a thirty-nine year old man being "horrif[ied]" and "humiliated" when required to "squat and spread his buttocks" during a strip search).

106. Schlanger, *supra* note 12, at 75 (footnotes omitted).

may care more about bodily privacy than men.[107]

Moreover, women—particularly incarcerated women—have far higher rates of previous physical and sexual abuse than men.[108] More than fifty percent of women detained in jails report a history of physical or sexual abuse—a rate four times that of male jail detainees.[109] For a woman who has been sexually abused, "strip searching can be more than a humiliating and undignified experience. In some instances, it can re-traumatize women who have already been greatly traumatized by childhood or adult sexual abuse."[110] In 2010, for example, the Colorado Department of Corrections instituted a new (and subsequently abandoned) strip search policy at Denver Women's Correctional Facility.[111] The policy required women to hold open their labia for inspection by guards (a procedure sometimes referred to as a "labia lift").[112] In a letter to the author of this Article, one woman subjected to such a search described her experience, and the psychological trauma the search caused, as follows:

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107. *Id*. at 75–76 (footnotes omitted).

108. DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PROFILE OF JAIL INMATES, 2002 10 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf.

109. *Id*.; *see also* TERRY KUPERS, PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT 114 (1999) ("Approximately 80 percent of women behind bars have been the victims of domestic violence and physical or sexual abuse at some time prior to their conviction."); Jordan v. Gardner, 986 F.2d 1521, 1525 (9th Cir. 1993) (en banc) (noting the "shocking histories of verbal, physical, and, in particular, sexual abuse endured by many of the [female] inmates prior to their incarceration . . . [e]ighty-five percent of inmates report a history of serious abuse . . . including rapes, molestations, beatings, and slavery[]").

110. WOMEN IN PRISON, *supra* note 105, at 72; *see also* Louise Bill, *The Victimization . . . and . . . Revictimization of Female Offenders*, 1998 CORRECTIONS TODAY 106, 109 ("The powerlessness that most of these women already feel as the result of their previous abuse and exploitation is further exacerbated by the necessity to comply with [strip searches]."); KUPERS, *supra* note 109, at 135 (finding that humiliating treatment of incarcerated women can cause emotional disturbances and make post-release adjustment difficult).

111. *See* Letter from Mark Silverstein, Legal Dir., ACLU of Colo., to Ari Zavaras, Exec. Dir., Colo. Dep't of Corr. (Aug. 23, 2010) *available at* www.aclu.org/prisoners-rights/letter-colorado-department-corrections-challenging-degrading-body-cavity-search-pol.

112. *Id*.

> The lift is treated differently by officers, but generally involves spreading your legs and parting your outer labia so an officer can do a visual inspection of your genitals. I have had to perform this procedure simply standing; from a sitting position with my legs spread eagle and having a flashlight shined at my genitals; from a standing position with a foot perched on a toilet and an officer's face inches from my genitals; in front of multiple officers and once in front of an officer and two Life Safety trainees. . . .
>
> Being a survivor of sexual trauma the new labia-lift procedure encouraged my post-traumatic stress disorder. I had periodic flashbacks . . . I have also witnessed women literally crying when they were subjected to the labia lift . . . .[113]

The extreme invasion of personal privacy caused by a strip search may be necessary to maintain jail security when there is reasonable suspicion that an arrestee is in possession of hidden contraband. As demonstrated in the following section, however, any security benefit produced by strip searching misdemeanor arrestees in the absence of reasonable suspicion is likely to be minimal.

B. The Limited Security Interest in Strip Searching Misdemeanor Arrestees Without Reasonable Suspicion

A policy of strip searching every detainee including, as the district court put it in the *Florence* case, a "hypothetical priest or minister arrested for allegedly skimming the Sunday collection,"[114] contributes little to jail security and creates an intolerable risk of subjecting arrestees to needless humiliation. Indeed, situations in which an arrestee is charged with a misdemeanor, and in which there is no basis to suspect hidden contraband, are precisely the circumstances where an arrestee is *least likely* to have concealed contraband.

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113. *Id.*

114. Florence v. Bd. of Chosen Freeholders, 595 F. Supp. 2d 492, 512 (D.N.J. 2009), *amended by* 657 F. Supp. 2d 504 (D.N.J. 2009), *rev'd*, 621 F.3d 296 (3d Cir. 2010), *cert. granted*, 563 U.S. ___, 131 S. Ct. 1816 (Apr. 4, 2011) (No. 10-495).

In such situations, indiscriminate strip searches are unlikely to provide a substantial benefit to jail security. As explained by a leading authority on jail security in a United States Department of Justice publication:

> [I]t is easy to exaggerate a possible security threat. Several years ago, the standard practice in jails was to strip search every arrestee at the time of booking, regardless of who the arrestee was, what the arrest was for, or the behavior of the arrestee. The ostensible reason for this practice was to prevent the introduction into the jail of drugs or weapons that had not been discovered through routine pat searches.
>
> In a series of lawsuits around the country, no jail was able to convince a court that persons arrested for minor offenses, such as unpaid traffic tickets or other minor misdemeanors were likely enough to be carrying contraband around in a body cavity to constitutionally justify this type of search. Officials passionately believed that not being able to strip search all arrestees entering the jail would result in major security problems because of dramatic increases in contraband entering the jail.
>
> *However, these problems did not develop. The legal rulings did not cause the catastrophe many predicted.*[115]

115. WILLIAM C. COLLINS, JAILS AND THE CONSTITUTION: AN OVERVIEW 28–29 (2d ed. 2007) (emphasis added), *available at* http://www.nicic.org/Downloads/PDF/Library/022570.pdf. It also bears mention that state legislatures across the country have enacted laws that prohibit suspicionless strip searches of jail detainees accused of minor offenses. The existence of such statutes does not, of course, create constitutional law, but such statutes suggest that many state legislatures do not view suspicionless strip searches of misdemeanor arrestees as necessary to jail security. In New Jersey (the state in which the *Florence* litigation originated), persons who have "been detained or arrested for commission of an offense other than a crime [i.e., a non-indictable offense, which is commonly referred to as a misdemeanor] shall not be subjected to a strip search" unless (1) authorized by a warrant or consent, (2) a recognized exception to the warrant requirement exists and there exists probable cause that a weapon, drug, or evidence of a crime will be found, or (3) the person is confined in a municipal detention facility or an adult county correctional facility and there exists reasonable suspicion that a weapon, drug, or contraband will be found. N.J. STAT. ANN. § 2A:161A-1 (West 1985 & Supp. 2011).

Numerous other states have also enacted laws that limit strip searches of jail detainees accused of minor offenses. *See, e.g.*, CONN. GEN. STAT. § 54-33*l*

Judicial decisions requiring reasonable suspicion did not cause the sky to fall for at least four reasons. As discussed in greater detail below, all of these reasons reflect the wide latitude to perform appropriate searches that correctional officers already

(a) (2011) ("No person arrested for a motor vehicle violation or a misdemeanor shall be strip searched unless there is reasonable belief that the individual is concealing a weapon, a controlled substance or contraband."); 725 ILL. COMP. STAT. ANN. 5/103-1(c) (West 1992) ("No person arrested for a traffic, regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched unless there is reasonable belief that the individual is concealing a weapon or controlled substance."); IOWA CODE ANN. § 804.30 (West 2003) ("A person arrested for a scheduled violation or a simple misdemeanor shall not be subjected to a strip search unless there is probable cause to believe the person is concealing a weapon or contraband."); MO. ANN. STAT. § 544.193(2) (West 2002) ("No person arrested or detained for a traffic offense or an offense which does not constitute a felony may be subject to a strip search or a body cavity search by any law enforcement officer or employee unless there is probable cause to believe that such person is concealing a weapon, evidence of the commission of a crime or contraband."); OHIO REV. CODE ANN. § 2933.32 (B)(2) (LexisNexis 2010) ("A body cavity search or strip search may be conducted if a law enforcement officer or employee of a law enforcement agency has probable cause to believe that the person is concealing evidence of the commission of a criminal offense, including fruits or tools of a crime, contraband, or a deadly weapon . . . that could not otherwise be discovered."); TENN. CODE ANN. § 40-7-119(b) (2006) ("No person arrested for a traffic, regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched unless there is reasonable belief that the individual is concealing a weapon, a controlled substance or other contraband."); *see also* CAL. PENAL CODE § 4030(f) (West 2000); COLO. REV. STAT. § 16-3-405(1) (2006); FLA. STAT. ANN. § 901.211(2) (West 2001); MICH. COMP. LAWS ANN. § 764.25a(2) (West 2000); VA. CODE ANN. § 19.2-59.1 (West 2007); WASH. REV. CODE ANN. § 10.79.130 (West 2002).

Standards issued by the American Bar Association and the American Correctional Association similarly forbid strip searching misdemeanor arrestees without articulable suspicion. *Standards of Treatment of Prisoners: Searches of Prisoners' Bodies*, A.B.A. 23-7.9 (2010), www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html# ("[A] strip search should not be permitted without individualized reasonable suspicion when the prisoner is an arrestee charged with a minor offense not involving drugs or violence and the proposed strip search is upon the prisoner's admission to a correctional facility or before the prisoner's placement in a housing unit."); AM. CORR. ASSOC., CORE JAIL STANDARDS 23 (2010) ("A strip search of an arrestee at intake is only conducted when there is reasonable belief or suspicion that he/she may be in possession of an item of contraband."); AM. CORR. ASSOC., PERFORMANCE BASED STANDARDS FOR ADULT LOCAL DETENTION FACILITIES 36 (4th ed. 2004) ("A strip search of general population inmates is only conducted when there is reasonable suspicion that an inmate may be in possession of contraband.").

possess under existing law—and would retain, even if the Supreme Court holds in *Florence* that strip searches of misdemeanor arrestees require reasonable suspicion. First, correctional officers are permitted to strip search misdemeanor arrestees where reasonable suspicion exists.[116] The reasonable suspicion standard places stock in the training and experience of law enforcement officers and their ability to assess whether there is cause to believe that a given arrestee is in possession of contraband.[117] Second, in some cases, the nature of even misdemeanor charges (especially charges related to narcotics or other contraband) is sufficient to create reasonable suspicion that a detainee is in possession of concealed contraband, and thereby to justify a strip search.[118] Third, correctional officers have the authority to conduct strip searches after contact visits, which may create an opportunity to plan for the exchange of contraband.[119] Arrest, however, generally comes as a surprise, and therefore presents a lesser risk of concealed contraband.[120] Finally, where reasonable suspicion does not exist, non-strip searches suffice to maintain jail security.[121] Each of these forms of authority to conduct appropriate searches under existing law is discussed below in greater detail.

1. Latitude Given to Law Enforcement Officers Under the Reasonable Suspicion Standard

The reasonable suspicion standard allows law enforcement officers, drawing on their training and experience, to assess whether a strip search is necessary in a given case.[122] Thus, even if the Supreme Court were to hold in *Florence* that strip searches of misdemeanor arrestees require reasonable suspicion, law enforcement officers would retain substantial latitude to conduct

116. *See infra* Part IV.B.1.
117. *See infra* Part IV.B.1.
118. *See infra* Part IV.B.2.
119. *See infra* Part IV.B.3.
120. *See infra* Part IV.B.3.
121. *See infra* Part IV.B.4.
122. United States v. Arvizu, 534 U.S. 266, 273 (2002) (citing United States v. Cortez, 449 U.S. 411, 418 (1981)).

strip searches in appropriate circumstances.

Courts assessing reasonable suspicion allow law enforcement officers to "make inferences from and deductions about the cumulative information available" and to "draw on their own experience and specialized training" to analyze factors that "might well elude an untrained person."[123] When assessing whether reasonable suspicion exists to strip search a jail detainee, courts consider a range of factors such as "the nature of the charge or specific circumstances relating to the arrestee and/or the arrest."[124] The extensive set of factors that may inform a finding of reasonable suspicion in a correctional context includes "the effect of intermingling the detainee with the larger prison population, the nature of the crime charged, characteristics of the detainee, lack of information about the detainee, criminal record, and period of time before a search where officials did not find any security concerns presented by the detainee, as well as whether officials could have performed less intrusive alternatives."[125]

Indeed, a reasonable suspicion standard is a very low burden, especially compared to other Fourth Amendment safeguards, such as the warrant requirement or a showing of probable cause. As one court noted in a strip search case:

> Reasonable suspicion does not mean evidence beyond a reasonable doubt, or by clear and convincing evidence, or even by a preponderance of the evidence. Reasonable suspicion is not even equal to a finding of probable cause. Rather, reasonable suspicion requires only specific objective facts upon which a prudent official, in light of his experience, would conclude that illicit activity might be in progress.[126]

Courts have found that jail officials satisfied reasonable suspicion and properly conducted strip searches in a range of cases. For example, in *Kraushaar v. Flanigan*, the plaintiff was strip searched after committing a traffic offense, and the Seventh Circuit found reasonable suspicion existed because an officer

123. *Id*. (quoting *Cortez*, 449 U.S. at 418).
124. Weber v. Dell, 804 F.2d 796, 802 (2d Cir. 1986).
125. Helmer, *supra* note 12, at 283.
126. Spear v. Sowders, 71 F.3d 626, 631 (6th Cir. 1995).

thought he saw the plaintiff conceal something.[127] Similarly, in *Doe v. Balaam*, a district court held that the authorities had reasonable suspicion to strip search a man arrested for misdemeanor destruction of property because he had a rolled up sock in his clothing.[128] Federal courts have found reasonable suspicion for strip searches in numerous other circumstances.[129]

2. Reasonable Suspicion Predicated on the Nature of the Charges

The nature of some charges may create reasonable suspicion per se that a detainee is in possession of contraband, regardless of any other particularized facts. Indeed, the district court's decision in *Florence* did not limit the authority of jail officials to conduct strip searches when an arrestee is charged with a misdemeanor that involves weapons, drugs, or violence, or with any felony whatsoever—even when particularized suspicion does not exist. Specifically, the district court noted that a prior decision from the same judicial district "reasoned that a policy that mandates strip searches for all individuals charged with felonies or drug-related/weapons-related misdemeanor offenses may be upheld because such policy contains an implicit recognition of reasonable suspicion."[130]

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127. 45 F.3d 1040, 1045–46 (7th Cir. 1995).

128. 524 F. Supp. 2d 1238, 1243–44 (D. Nev. 2007).

129. *See, e.g.*, Campbell v. Miller, 499 F.3d 711, 718 (7th Cir. 2007) (holding that law enforcement officers had reasonable suspicion to conduct a strip search because the defendant fit the description of a person just involved in a drug deal and the police officer observed the defendant drop a bag of marijuana); Cea v. O'Brien, 161 F. App'x 112, 113 (2d Cir. 2005) (finding reasonable suspicion to strip search a woman who was in an agitated state after refusing to surrender a handgun); Justice v. City of Peachtree City, 961 F.2d 188, 194 (11th Cir. 1992) (finding reasonable suspicion to strip search detainees because, among other reasons, an arrest occurred in an area where drinking and drug activity regularly took place and an officer saw one arrestee hand an object to another arrestee); Bradley v. Vill. of Greenwood Lake, 376 F. Supp. 2d 528, 536 (S.D.N.Y. 2005) (finding reasonable suspicion to strip search arrestee where, among other factors, an informant said that the arrestee possessed heroin).

130. Florence v. Bd. of Chosen Freeholders, 595 F. Supp. 2d 492, 505 (D.N.J. 2009) (citing Davis v. City of Camden, 657 F. Supp. 396, 400–01 (D.N.J. 1987)), *amended by* 657 F. Supp. 2d 504 (D.N.J. 2009), *rev'd*, 621 F.3d 296 (3d Cir. 2010), *cert. granted*, 563 U.S. ___, 131 S. Ct. 1816 (Apr. 4, 2011) (No. 10-495).

Like the district court, other courts generally have held that there is no need for further factual analysis when the nature of the charges provides a categorical basis for suspicion and makes the search reasonable. Numerous courts have held that misdemeanor charges involving drugs, guns, weapons, or other contraband—as well as any felony charge—create reasonable suspicion per se.[131] For example, in *Masters v. Crouch,* the Sixth Circuit stated: "It is objectively reasonable to conduct a strip search of one charged with a crime of violence before that person comes into contact with other inmates."[132] In *Dufrin v. Spreen*, the same court held the strip search of a female detainee was justified where the detainee was arrested and formally charged with felonious assault.[133]

3. Power to Perform Strip Searches After Contact Visits

Regardless of the Supreme Court's ultimate holding in *Florence*, jail and prison officials will retain the power, under *Bell*, to conduct strip searches after contact visits.[134] Requiring reasonable suspicion to conduct strip searches during booking does not undermine jail security because arrestees generally have more limited opportunities to hide contraband on their person than inmates who engage in contact visits.

131. *See, e.g.*, Masters v. Crouch, 872 F.2d 1248, 1255 (6th Cir. 1989).

132. *Id.*

133. 712 F.2d 1084, 1089 (6th Cir. 1983); *see also Campbell*, 499 F.3d at 718 (finding reasonable suspicion based on possession of narcotics); Hicks v. Moore, 422 F.3d 1246, 1252 (11th Cir. 2005) (finding reasonable suspicion based on battery charges); Dobrowolskyj v. Jefferson Cnty., 823 F.2d 955, 958 (6th Cir. 1987) (finding strip search of detainee arrested for menacing constitutional because the offense, although a misdemeanor, was associated with weapons); *Davis*, 657 F. Supp. at 400 (suggesting that jails may adopt a "policy that permits only those persons arrested on felonies or on charges involving weapons or contraband to be searched without individualized suspicion"); Fenton, *supra* note 12, at 185–86 ("The reasonable scope of a search of a misdemeanant who has been brought into the station house should be more limited because one who is arrested for an outstanding parking ticket is much less likely to be carrying a dangerous weapon than is one who is arrested for an armed robbery."). *But see* Way v. County of Ventura, 445 F.3d 1157, 1162 (9th Cir. 2006) (finding a strip search unreasonable where an arrestee was booked on misdemeanor charges for being under the influence of a controlled substance).

134. Bell v. Wolfish, 441 U.S. 520, 558 (1979).

As the district court stated in *Florence*, "most arrests are a surprise to the arrestee. Such a surprise does not give the arrestee an opportunity to plan a smuggling enterprise."[135] The district court noted that strip searches following "planned contact visits" are "quite different from the instant matter" because such visits may not be a surprise, creating opportunities for advance planning.[136] The distinction drawn by the district court is fully consistent with the weight of authority, which differentiates between arrests and contact visits and holds that because arrest generally comes as a surprise, *Bell* does not countenance a blanket strip search policy during booking.[137]

While the Eleventh Circuit in *Powell* departed from the other courts of appeals in questioning the distinction between arrest and visitation, asserting that detainees may anticipate arrests,[138] it bears repeating that the issue before the court in *Powell*, and now before the Supreme Court in *Florence*, involves misdemeanor infractions, such as speeding, disorderly conduct, trespass, simple assault, and driving without insurance. Especially considering the low-level offenses that are generally categorized as misdemeanors, Judge Barkett, dissenting in *Powell*, was correct to note that the assertion "that pretrial detainees booked on petty misdemeanor charges might anticipate their arrests"—and therefore plan to conceal contraband in bodily orifices—"is unwarranted speculation."[139]

Moreover, the limited instances when an individual expects to be arrested are no reason to jettison reasonable suspicion in all cases. After all, an anticipated or voluntary arrest itself may help create reasonable suspicion in a given case, even when a detainee is charged with a misdemeanor unrelated to contraband or violence.[140]

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135. *Florence*, 595 F. Supp. 2d at 509.

136. *Id*. at 511.

137. *See Bell*, 441 U.S. at 560; *see also supra* Part II.B.1.

138. *See* Powell v. Barrett, 541 F.3d 1298, 1313–14 (11th Cir. 2008) (en banc).

139. *Id*. at 1318 (Barkett, J., dissenting); *see also* Bull v. City of San Francisco, 595 F.3d 964, 998 (9th Cir. 2009) (en banc) (Thomas, J., dissenting).

140. *See, e.g*., Miller v. Yamhill Cnty., 620 F. Supp. 2d 1241, 1246 (D. Or. 2009) (finding reasonable suspicion existed to strip search an individual who

4. Authority to Conduct Less Intrusive Searches Without Any Level of Suspicion

All told, correctional officials have the power to conduct strip searches where the nature of the crime, the occurrence of a contact visit, or the existence of reasonable suspicion provides the basis for such a search.[141] But even in a case where all of the following conditions apply—(1) the arrestee is charged only with a misdemeanor, (2) the misdemeanor does not relate to contraband, (3) no contact visit has occurred, and (4) there is no reasonable suspicion that the arrestee is in possession of contraband—correctional officers *still* have the power to employ less intrusive means of detecting contraband.

First, officers may conduct a pat-down search upon arrest. As the Supreme Court has stated, "[i]t 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."[142] Second, metal detectors may provide a less intrusive means of identifying contraband than a strip search.[143] Third, jail officials may conduct random searches of pretrial detainees' cells in order to preserve institutional security and uncover contraband.[144]

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self-reported to jail where, among other factors, he anticipated being taken into custody and had been incarcerated at the same jail before).

141. *See supra* Part IV.B.2–4.

142. United States v. Robinson, 414 U.S. 218, 235 (1973); *see also* Gustafson v. Florida, 414 U.S. 260, 266 (1973) (stating that upon lawful arrest, police officers may make a "full search of petitioner's person").

143. *See* Kelsey v. City of Schoharie, 567 F.3d 54, 70 (2d Cir. 2009) (Sotomayor, J., dissenting) (stating that the jail's "clothing exchange" procedure violates the Fourth Amendment because other jail policies "allow[ ] pat searches and searches with a hand-held metal detector upon intake"); *Powell*, 541 F.3d at 1319 (Barkett, J., dissenting) ("Metal detectors would be effective in discovering metallic weapons, discounting—at least, to some degree—the safety rationale.").

144. *See* Block v. Rutherford, 468 U.S. 576, 589 (1984) (upholding jail's policy of conducting "irregular or random 'shakedown' searches of the cells of detainees while the detainees are away at meals, recreation, or other activities"); Bell v. Wolfish, 441 U.S. 520, 557 (1978) ("No one can rationally doubt that room searches represent an appropriate security measure . . . [and

Pat-down searches, cell searches, and metal detectors may not always equal strip searches in thoroughness, but searches of this nature do, of course, help in uncovering hidden contraband. When neither the alleged crime, the circumstances of arrest, nor the conduct of the arrestee suggests the presence of hidden contraband, the more limited scope of such searches is proportionate with the correctional institution's limited justification for conducting the search.

V. CONCLUSION

Indiscriminate strip searches of misdemeanor arrestees add little to jail security, given the substantial power to ferret out contraband that jail officials already possess. Such searches inevitably produce a high volume of fruitless but humiliating searches, as in the *Florence* case itself, where jail policies required officials to subject Mr. Florence to two strip searches in less than a week, forcing him to squat and cough while naked, and to open his mouth and lift his genitals in front of an officer sitting an arm's length away—all because Mr. Florence had been arrested, in error, for a fine he already had paid.[145] *Bell* requires a balance between security and privacy, and the Fourth Amendment, at bottom, demands reasonableness.[146] There is nothing reasonable or balanced about the indiscriminate use of humiliating searches.

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that] [d]etainees' drawers, beds, and personal items may be searched . . . ."); Fenton, *supra* note 12, at 188 ("[T]here are valid alternatives to blanket strip search policies. First, an adequate patdown search would reveal weapons that might be concealed, satisfying the primary safety concern of the government. Second, law enforcement officials could employ the use of metal detectors, which would reveal any concealed weapons that the patdown did not reveal. Third, policies or statutes should, at the very least, delineate when and how a strip search may be conducted on a misdemeanant." (citing Giles v. Ackerman, 746 F.2d 614, 618 (9th Cir. 1984), *overruled by Bull*, 595 F.3d at 981)).

145. Florence v. Bd. of Chosen Freeholders, 595 F. Supp. 2d 492, 496–98 (D.N.J. 2009), *amended by* 657 F. Supp. 2d 504 (D.N.J. 2009), *rev'd*, 621 F.3d 296 (3d Cir. 2010), *cert. granted*, 563 U.S. ___, 131 S. Ct. 1816 (Apr. 4, 2011) (No. 10-495).

146. *Bell*, 441 U.S. at 520.