

FLORENCE, ATWATER, AND THE EROSION OF FOURTH AMENDMENT PROTECTIONS FOR ARRESTEES

Julian Simcock*

INTRODUCTION.....	600
A. <i>Analytical Template and Existing Literature</i>	601
B. <i>A Tale of Two Arrests</i>	602
I. THE STATE OF EXISTING FOURTH AMENDMENT LAW.....	606
A. <i>Terminology</i>	606
B. <i>Historical Doctrine</i>	607
C. <i>Bell v. Wolfish</i>	608
D. <i>Florence v. Board of Chosen Freeholders</i>	611
II. RESURRECTING <i>BELL</i> : WHY A FAITHFUL APPLICATION OF EXISTING LAW MILITATES AGAINST BLANKET STRIP-SEARCH POLICIES.....	615
A. <i>The Missing Deterrence-Based Rationale in Florence</i>	615
1. <i>Invoking deterrence-based precedent</i>	615
2. <i>Grappling with hypotheticals</i>	617
B. <i>An Exception, Rather than a New Norm</i>	619
III. RISKS OF ABUSE—WHY THE INTERSECTION OF <i>FLORENCE</i> AND <i>ATWATER</i> PRESENTS NEW PRACTICAL CONCERNS THAT MILITATE AGAINST BLANKET STRIP-SEARCH POLICIES.....	621
A. <i>Introducing Atwater v. City of Lago Vista</i>	621
B. <i>The Florence Concurrences</i>	623
C. <i>The Risk of Abuse by Police Officials</i>	626
1. <i>Instances of abuse</i>	627
2. <i>Application in contemporary context</i>	630
D. <i>The Rising Spectre of Justice Stevens’s Dissent in Bell</i>	630
CONCLUSION.....	632

* J.D. Candidate, Stanford Law School, 2013; M.P.A. Candidate, Harvard Kennedy School of Government, 2013. I am grateful to the members of the *Stanford Law Review*, who approached this effort with great care; to Bob Weisberg, who provided guidance and humor; and to Larry Kramer, who has long served as a source of encouragement. I hope their hard work is reflected in these pages.

INTRODUCTION

If there is an animating imperative behind the Supreme Court's decision in *Bell v. Wolfish*, it is this: when confronted with a question regarding strip-searching arrestees, courts must seek a careful balance.¹ The Fourth Amendment, the Court held, cannot be confined to a "mechanical application."² Instead, it "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails."³ In essence, while authorities may be justifiably concerned about the presence of contraband in prisons, there are limits to the policies they may pursue. These limits are especially important in the context of strip searches, which, given the degree of invasion involved, the Supreme Court has placed within a "category of [their] own demanding [their] own specific suspicions."⁴

Decades later, the Court appears to have deviated from *Bell's* moorings. Last Term, in *Florence v. Board of Chosen Freeholders*, the Court examined the constitutionality of blanket search policies that require that all arrestees be strip-searched regardless of individualized suspicion or the nature of the offense.⁵ In a five-to-four ruling, the Court upheld such searches as constitutional.⁶ The opinion is more fragmented than the initial vote count suggests—Justice Thomas refused to join one section of the majority opinion, and Chief Justice Roberts and Justice Alito wrote separate concurrences to explain limitations to the ruling.⁷

Nevertheless, a new line had been drawn. For the first time, the Court held that prisons seeking to implement blanket strip-search policies were free to dispense with any level of reasonable suspicion or tailored justification.⁸ I argue in the following analysis that *Florence* constitutes an unnecessary erosion of Fourth Amendment protections for arrestees. The Court's opinion entails a

1. 441 U.S. 520, 559-60 (1979) (upholding strip searches of pretrial arrestees after contact visits).

2. *Id.* at 559.

3. *Id.*

4. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009).

5. 132 S. Ct. 1510, 1513-15 (2012).

6. *Id.* at 1513-14.

7. Justice Kennedy, writing for the Court, secured a majority for sections I, II, III, and V. *Id.* at 1513, 1523-24. The unusually long delay in producing a final decision may further reflect the degree of unease on the bench. As Lyle Denniston notes, it was "unclear . . . why it had taken almost six months to decide," and "[t]he case was among the earliest argued in the Term that had not yet been decided." Lyle Denniston, *Opinion Analysis: Routine Jail Strip Searches OK*, SCOTUSBLOG (Apr. 2, 2012), <http://www.scotusblog.com/?p=142415>; see also Nina Totenberg, *Supreme Court OKs Strip Searches for Minor Offenses*, NPR (Apr. 2, 2012), <http://www.npr.org/2012/04/02/149866209/high-court-supports-strip-searches-for-minor-offenders> (discussing the majority opinion, concurrences, and dissent).

8. As discussed in Part I.D below, the opinion leaves unresolved the constitutionality of strip searches for a certain class of detainees.

departure from *Bell* and also from the Court's broader jurisprudence on the Fourth Amendment. In addition, some of the most unsettling issues posed by *Florence*—those which hint at the potential for future abuse—remain unresolved.

A. Analytical Template and Existing Literature

Among both judges and academics, the topic of arrestee strip searches is contentious. One group of scholars says that the degree of invasiveness is the crucial factor determining whether or not a strip search is permissible.⁹ Another argues that the arrestee's status in the adjudicatory process should be more closely considered,¹⁰ while a third asserts that courts should look only at when (or if) the arrestee is introduced to the general prison population.¹¹ A final group of scholars maintains that the decision should be contingent upon the type of offense with which the arrestee has been charged.¹²

Although many of these arguments represent important contributions to the field, this Note is premised on the idea that the debate cannot be quite so easily siloed. In fact, *all* of these arguments are featured at least once in the range of opinions issued in *Florence*. I argue that the state of the current law is the product of two things: a departure from prior Supreme Court precedent, and an insufficient focus on future risks. With these aims in mind, Part I of this Note takes up the work of historical analysis and situates the current debate in a broader legal and historical framework. Part II highlights why the Court's decision in *Florence* represents a departure from traditional jurisprudence.

9. The degree of invasiveness in strip searches has been heavily litigated. *See, e.g., Redding*, 557 U.S. at 378. It was also the subject of questioning by several Justices during the *Florence* oral arguments. *See* Transcript of Oral Argument at 10, 29, *Florence*, 132 S. Ct. 1510 (No. 10-945), 2011 WL 4836171, at *9-10, *29.

10. *See* Howard Friedman, Strip Searches and the Fourth Amendment Rights of Detainees and Prisoners, Address at the 27th Annual Georgetown University Law Center Continuing Legal Education, Section 1983: Civil Rights Litigation (Apr. 16, 2009), *available at* 2009 WL 2436800, at *8; *cf. Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (“The . . . presumption of innocence in favor of the accused is the undoubted law. . . . But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.” (internal quotation marks omitted)).

11. *See, e.g., Masters v. Crouch*, 872 F.2d 1248, 1254 (6th Cir. 1989) (“[I]ntermingling alone has never been found to justify such a search without consideration of the nature of the offense and the question of whether there is any reasonable basis for concern that the particular detainee will attempt to introduce weapons or other contraband into the institution.”).

12. *See* Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 4, 6 (2011); David M. Shapiro, *Does the Fourth Amendment Permit Indiscriminate Strip Searches of Misdemeanor Arrestees?*: *Florence v. Board of Chosen Freeholders*, 6 CHARLESTON L. REV. 131, 133 (2011); Gabriel M. Helmer, Note, *Strip Search and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U. L. REV. 239, 242, 285-87 (2001) (arguing that the distinction between felonies and misdemeanors should influence the decision to conduct a strip search).

Although it has been the subject of little attention by scholars, *Florence* relies heavily on holdings that emphasize the role of deterrence in strip-search policies. For a variety of reasons, these holdings are inapposite to the debate over postarrest strip-search policies. After arriving at a clearer understanding of how such precedent should be applied, I conclude that, contrary to the Court's assessment, existing precedent militates against blanket strip-search policies. In Part III, I set aside the doctrine, and look to the ground-level ramifications that an endorsement of blanket strip-search policies would create. Perhaps most importantly, I take a closer look at an unsettling aspect of the *Florence* decision—the unresolved intersection with *Atwater v. City of Lago Vista*. The Court's now decade-old holding in *Atwater* substantially expanded the range of minor offenses that allow an officer to make an arrest. While officers must continue to find probable cause, the gravity of the offense no longer weighs in the calculus.¹³ If that discretionary power is now coupled with the uniform application of suspicionless strip searches—a practice which now bears “constitutional imprimatur”¹⁴—the risk of abuse by prison officials may increase. While this issue received little of the Court's attention in *Florence*,¹⁵ and is almost entirely unexamined in the secondary literature, it deserves attention equal to, if not greater than, any other issue of jurisprudence on arrestee strip searches.

B. *A Tale of Two Arrests*

On an afternoon in March, a man in his late twenties, Albert, is driving with his family on a state highway.¹⁶ He is on his way to his in-laws' to celebrate the recent purchase of a new home.¹⁷ But before arrival, he and his family are stopped by the police for reasons that are unclear.¹⁸ Upon request, Albert

13. See *Florence*, 132 S. Ct. at 1520.

14. As Carol Steiker noted of the decision, “What the court did was to take a practice that was not universal and give it its constitutional imprimatur.” Totenberg, *supra* note 7 (internal quotation marks omitted). The unresolved question is “whether states that have forbidden this practice will now move to permit blanket strip searches of those arrested for minor charges.” *Id.*

15. In the ten-page opinion, the Court allocated only a few sentences to the potential for abuse:

Petitioner's *amici* raise concerns about instances of officers engaging in intentional humiliation and other abusive practices. There also may be legitimate concerns about the invasiveness of searches that involve the touching of detainees. These issues are not implicated on the facts of this case, however, and it is unnecessary to consider them here.

132 S. Ct. at 1523 (plurality opinion) (citations omitted).

16. See Brief for the Petitioner at 2, *Florence*, 132 S. Ct. 1510 (No. 10-945), 2011 WL 2508902; Totenberg, *supra* note 7.

17. See Brief for the Petitioner, *supra* note 16, at 2.

18. Neither of the respondent parties makes clear exactly what the motivation for the stop may have been. The Essex County Correctional Facility referred only to a “traffic stop” without further clarification in its brief. Brief for Respondents Essex County Correctional Facility and Essex County Sheriff's Department at 6, *Florence*, 132 S. Ct. 1510 (No. 10-945), 2011 WL 3739474. The Board of Chosen Freeholders' brief is less clear still:

identifies himself, and is then immediately arrested in front of his family.¹⁹ The officers cite an outstanding warrant for Albert's arrest based on his failure to pay a contempt violation.²⁰ Despite Albert's protestations, the arrest continues. The officers transport him to a nearby jail facility and order him to do something that strikes Albert as unnecessary—to take off his clothes and undergo a strip search.²¹ Neither the circumstances of his arrest nor his purported offense create any suspicion that he may be carrying contraband. But the jail's policy dictates that all arrestees must be strip-searched.²² While an officer looks on, Albert is forced to remove all of his clothing and then to open his mouth, lift his arms, rotate, and lift his genitals for closer inspection.²³ After six days in jail, he is escorted to another facility and put through a second, more invasive strip search.²⁴ This time, Albert is searched along with four other detainees, who are forced to strip in the presence of one another.²⁵ They are told to lift their genitals, turn around, and squat and cough.²⁶ Albert is afraid and humiliated throughout the process.²⁷ The next day, following what is now a week of confinement, he is finally able to see a magistrate.²⁸ Upon learning that the fine has been paid, the magistrate orders Albert's immediate release.²⁹

On another afternoon in March, a woman named Gail is driving her children home from soccer practice.³⁰ She is traveling at approximately fifteen miles per hour through a residential neighborhood just north of Austin, Texas, when she, too, is stopped by the police.³¹ Upon inquiry, she is informed that the

On March 3, 2005, April Florence was driving down I-295 in Burlington County, New Jersey, when she and her husband noticed that a state trooper was right behind them. Mrs. Florence pulled off the highway and the police car followed. A mile later, when the state trooper put on his lights, Mrs. Florence pulled over, handed the officer her license, registration, and insurance card, and presumably expected to be given either a warning or citation of some sort. Instead, the officer returned and asked who owned the car.

Brief for Respondents Board of Chosen Freeholders et al. at 1-2, *Florence*, 132 S. Ct. 1510 (No. 10-945) (citations and footnote omitted), 2011 WL 3706116.

19. See *Florence v. Bd. of Chosen Freeholders*, 621 F.3d 296, 299 (3d Cir. 2010), *aff'd*, 132 S. Ct. 1510.

20. See *Florence*, 132 S. Ct. at 1514.

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

22. *Id.* at 299-300.

23. *Id.* at 299.

24. *Id.*

25. *Id.*

26. *Id.*

27. See Nina Totenberg, *Supreme Court Weighs Legality of Strip Searches*, NPR (Oct. 12, 2011), <http://www.npr.org/2011/10/12/141286747/supreme-court-weighs-legality-of-strip-searches>.

28. See Brief for the Petitioner, *supra* note 16, at 6-7.

29. *Id.*

30. See Brief Amicus Curiae of the American Civil Liberties Union et al. in Support of Petitioners, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (No. 99-1408), 2000 WL 1341276, at *1.

31. *Id.*

officer stopped her because he noticed that neither Gail nor her children were wearing seat belts.³² Before Gail can proceed very far with an explanation, the officer does something that strikes her as unnecessary—he announces that he is going to arrest her for her seat belt transgression.³³ When she realizes the officer is serious about his intentions, she asks if she might first take her children to a friend's house nearby.³⁴ The officer rejects the request and continues with the arrest (fortunately, a friend is able to come and retrieve Gail's children).³⁵ Gail is then handcuffed and placed in the squad car. She is taken to the local police station and processed, which involves having her "mug shots" taken, and being placed alone in a jail cell.³⁶ When she is able to see a magistrate, she quickly pleads no contest to the misdemeanor seat belt offense, pays money for a fine and bail bond, and is released.³⁷

The facts contained in the first story have now been widely publicized.³⁸ It is a summarized account of Albert Florence's arrest in 2005.³⁹ Following his ordeal, Florence commenced a lawsuit pursuant to 42 U.S.C. § 1983, alleging that the suspicionless strip searches to which he was exposed constituted violations of his Fourth Amendment rights.⁴⁰ His case was eventually heard by the Supreme Court. The second story, though less current and perhaps less widely known, is also salient. It is the story of Gail Atwater's arrest in 1997 in Lago Vista, Texas. Following her ordeal, Gail, too, commenced a lawsuit pursuant to 42 U.S.C. § 1983, and her case also made it as far as the Supreme Court.⁴¹ Ultimately, however, both sets of claims were rebuffed—the Court found that the authorities had acted within the purview of the Constitution.

I provide these stories for two reasons. First, they convey the reality of living through an arrest and a strip search. Much of the literature on this topic is filled with references to Supreme Court precedent and legalese (and, to be fair, so are portions of this Note). But given that personal privacy rights lie at the heart of this debate, it is appropriate to pause and consider the details of what such personal invasion entails. It is not necessary to sensationalize such

32. See *Atwater*, 532 U.S. at 323-24.

33. See *id.* at 324.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. See, e.g., Warren Richey, *Supreme Court Approves Strip Searches for Minor Offenses*, CHRISTIAN SCI. MONITOR (Apr. 2, 2012), <http://www.csmonitor.com/USA/Justice/2012/0402/Supreme-Court-approves-strip-searches-for-minor-offenses>; Totenberg, *supra* note 27.

39. See Totenberg, *supra* note 27.

40. See *Florence v. Bd. of Chosen Freeholders*, 621 F.3d 296, 299 (3d Cir. 2010), *aff'd*, 132 S. Ct. 1510 (2012).

41. See *Atwater*, 532 U.S. at 325.

accounts in order to recognize how invasive and humiliating they can be.⁴² Second, these stories anchor my research goals in human terms. They contain elements that nonlegal readers might consider “unfair.” What started as a normal afternoon for each of these two people quickly became the stuff of confusion, arbitrariness, and humiliation. And yet, from a legal perspective, the counterarguments offered in support of these searches do have some logical purchase. Albert Florence did, after all, have an outstanding warrant for his arrest; and so while the strip search may appear to have been unnecessary, his arrest appears somewhat more justifiable.⁴³ And while Gail was put through a very difficult experience, she *was* guilty of the minor seat belt infraction. Even more importantly, her troubles stopped short of removing any clothing.

What is striking in their comparison—and what I aim in part to explore—is what happens when the factual circumstances behind these stories are combined. That is, what if there had been no arrest warrant for Albert Florence, as was the case with Gail? What if, based on some level of minor seat belt infraction, officials could conduct an arrest and a full-body strip search—all without having encroached on any constitutional rights? These are not questions of narrow applicability. Each year, approximately 700,000 people are arrested on minor charges,⁴⁴ and vastly more than that are guilty of the sort of traffic infractions committed by Gail Atwater.⁴⁵

While the Supreme Court may find ways to prevent abuses in the future, for now, *Florence* has narrowed existing legal protections. Without some kind of recalibration, officer discretion—a potentially fallible and inconsistent standard—may be all that remains between minor offenders and substantial encroachments on privacy.

42. A range of important work has been done on the disproportionately severe impact that such searches have on women, in particular. See ANTI-DISCRIMINATION COMMISSION QUEENSLAND, *WOMEN IN PRISON 72-73* (2006); Margo Schlanger, *Jail Strip-Search Cases: Patterns and Participants*, LAW. & CONTEMP. PROBS., Spring 2008, at 65, 75-76.

43. In actuality, Florence’s arrest was a mistake. The contempt citation had been paid, but the payment had not been properly recorded in the county’s computer system. See *Florence v. Bd. of Chosen Freeholders*, 595 F. Supp. 2d 492, 496 (D.N.J.), *amended by* 657 F. Supp. 2d 504 (D.N.J. 2009), *rev’d*, 621 F.3d 296 (3d Cir. 2010), *aff’d*, 132 S. Ct. 1510. Yet, while this fact certainly exacerbated the sense of unfairness Florence felt, the legal inquiry remains. That is, we are still left to question whether or not the search would have been constitutional in an instance of a “proper” arrest.

44. See Totenberg, *supra* note 27.

45. In 2011, for example, in Florida alone, the total number of criminal and noncriminal moving traffic citations exceeded 2.5 million. *Florida Uniform Traffic Citation Statistics: Violations and Dispositions Made During Period 01/2011-12/2011*, FLA. DEP’T OF HIGHWAY SAFETY & MOTOR VEHICLES, <http://services.flhsmv.gov/SpecialtyPlates/UniformTrafficCitationReport> (last visited Feb. 24, 2013). To access this particular dataset, select year “2011” and then click “Generate Report” in either PDF or Excel format.

I. THE STATE OF EXISTING FOURTH AMENDMENT LAW

The history of Fourth Amendment law provides important context for the way in which we should evaluate contemporary strip-search policies. In this Part, I illustrate several themes that have emerged in the Court's jurisprudence to date. In particular, the Court has been reluctant to depart from standards of individualized suspicion, and, prior to *Florence*, it had put forth no holdings that endorsed entirely indiscriminate strip-search policies. In addition, where the Court *has* allowed for a more categorical approach, it has done so largely based on deterrence rationales, and, even then, only with express reservations.

A. Terminology

Some of the upcoming complexities merit a brief clarification about terminology.

A *strip search* refers to the “search of a person conducted after that person’s clothes have been removed . . . to find any contraband the person might be hiding.”⁴⁶ More specifically, I mean to refer to a search that is conducted in close proximity to the arrestee (i.e., a close inspection conducted by an official only a few feet away), which may include “visual body cavity searches.”⁴⁷ This terminology is in keeping with the definitions in *Florence*, which emphasize both that the search at issue involves “close observation of the private areas of a person’s body”⁴⁸ but also that it “does not include any touching of unclothed areas.”⁴⁹

By *prison*, or *prison facility*, I mean to include a range of penal institutions—including jails. In *Florence*, the Court uses a different approach, employing the term “jail” in a “broad sense to include prisons and other detention facilities.”⁵⁰ But while this assertion is technically accurate, it is somewhat

46. BLACK’S LAW DICTIONARY 1469 (9th ed. 2009).

47. Friedman, *supra* note 10, 2009 WL 2436800, at *3. Many authorities suggest that visual body-cavity searches routinely fall within the realm of strip searches conducted by prison facilities. *See id.* at *4. Because such searches were a component of Albert Florence’s experience, they are directly implicated in the Fourth Amendment analysis that was before the Court in his appeal.

48. *Florence*, 132 S. Ct. at 1525 (Breyer, J., dissenting).

49. *Id.* at 1515 (majority opinion). In the majority opinion, Justice Kennedy pushed generally for greater specificity:

The term [strip search] is imprecise. It may refer simply to the instruction to remove clothing while an officer observes from a distance of, say, five feet or more; it may mean a visual inspection from a closer, more uncomfortable distance; it may include directing detainees to shake their heads or to run their hands through their hair to dislodge what might be hidden there; or it may involve instructions to raise arms, to display foot insteps, to expose the back of the ears, to move or spread the buttocks or genital areas, or to cough in a squatting position.

Id.

50. *Id.* at 1513.

misleading. The distinction between jails and prisons often sheds light on the length of time that arrestees will be detained—a distinction which is important to the intersection of *Atwater* and *Florence*. As such, I use *prisons* or *prison facilities* to refer to institutions that house a general prison population. But I use *holding facilities* to refer to institutions that house individuals for a shorter period of time, and which do not contain a general population of prisoners.⁵¹

Finally, I use the following definitions for different types of strip-search policies: (1) the *reasonable suspicion standard* requires that officers have a reasonable suspicion that a specific individual is carrying contraband; (2) the *categorical suspicion standard* allows officers to conduct searches based on whether the category of offense creates some suspicion of contraband; and (3) the *suspicionless standard* or *blanket search standard* allows searches to be applied indiscriminately to all arrestees.

B. *Historical Doctrine*

The Fourth Amendment states, in relevant part: “The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated”⁵² Although the Court’s early jurisprudence viewed this guarantee as one that pertained predominantly to property rights, since 1967 the Court has held that the Fourth Amendment also protects the right to an *individual’s* privacy.⁵³ This holding gave way to extensive litigation, culminating in Justice Harlan’s now famous two-part test: in order to be protected under the Fourth Amendment, an individual must have both a subjective expectation of privacy (i.e., the individual must personally feel an expectation of privacy), and also an objective expectation of privacy (i.e., society must deem that person’s expectation reasonable given the circumstances).⁵⁴

A somewhat more difficult inquiry arises when examining Fourth Amendment privacy rights in the context of penal institutions. The Supreme Court has long held that inmates must forgo many of the constitutional rights enjoyed by nonincarcerated individuals—a retraction which the Court has deemed “justified by the considerations underlying our penal system.”⁵⁵ In many respects, this is a logical accommodation of rights and institutional needs (the act of forced incarceration itself might otherwise be considered an inappropriate infringement on constitutional rights). But by the Court’s own decree, this circumscription of rights should be carefully monitored: “Prison walls,” after all, “do not form a barrier separating prison inmates from the protections of the

51. As a functional matter, these categories are also slightly clumsy. See *infra* Part III.

52. U.S. CONST. amend. IV.

53. *Warden v. Hayden*, 387 U.S. 294, 304 (1967) (“We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.”).

54. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

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

Constitution.”⁵⁶ To that end, the Court has upheld a range of constitutional protections for inmates: the right to marry,⁵⁷ the right to religious worship,⁵⁸ some First Amendment protections, limited by the prison context,⁵⁹ as well as a range of safeguards under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.⁶⁰

Further complication is introduced when considering the Fourth Amendment rights of *pretrial* arrestees. Because pretrial arrestees have yet to benefit from any type of adjudicatory process, they have not yet received any formal assessment of culpability. These concerns stem largely from a fundamental tenet of the American justice system: individuals have the right to remain free of punishment until they have been proven guilty. As a result, some have argued that the line-drawing exercise for pretrial arrestees should be different⁶¹—have these individuals, by mere function of having been arrested, given up the same level of constitutional protection as those that are adjudicated guilty? The following case, *Bell v. Wolfish*, has become a seminal holding, in part because it takes up some of these difficult issues.

C. *Bell v. Wolfish*

The Supreme Court’s 1979 decision in *Bell v. Wolfish* explicitly addressed the constitutional rights of pretrial arrestees held at a federally operated detention facility.⁶² The facility, known as the Metropolitan Correctional Center (MCC), primarily housed persons “being detained in custody prior to trial for federal criminal offenses.”⁶³ As part of the facility’s policy, prisoners were forced to undergo a strip search—including a visual body-cavity inspection—following every contact visit with an individual from outside the prison.⁶⁴ The

56. *Turner v. Safley*, 482 U.S. 78, 84 (1987).

57. *See id.* at 81.

58. *Cooper v. Pate*, 378 U.S. 546, 546 (1964) (per curiam).

59. *See Pell v. Procunier*, 417 U.S. 817, 819-22 (1974) (“[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.”). It is worth noting, however, that despite first providing this basic assurance regarding First Amendment rights, the Court in *Pell* rejected inmates’ challenge to a California prison policy restricting media access to prisoners. *See id.* at 835.

60. *See Lee v. Washington*, 390 U.S. 333 (1968) (holding prison segregation impermissible); *see also Meachum v. Fano*, 427 U.S. 215, 225 (1976) (stating that felons retain “a variety of important rights”); *Wolff v. McDonnell*, 418 U.S. 539, 555-57 (1974) (stating that any position implying that prisoners are “wholly” unprotected by the Constitution is untenable and outlining supporting cases).

61. *See Friedman, supra* note 10, 2009 WL 2436800, at *8 (discussing the changing balance of interests to be considered under *Bell v. Wolfish* as an arrestee’s status in the adjudicatory process changes).

62. 441 U.S. 520 (1979).

63. *Id.* at 524.

64. *Id.* at 558.

search policy was applied in a uniform manner to all inmates that engaged in contact visits, without regard for individualized suspicion or probable cause.

Of the range of constitutional violations the prisoners alleged, the Court admitted that the suspicionless strip-search policy gave it the “most pause.”⁶⁵ Close inspection of the record revealed that the blanket policy had resulted in the discovery of only one additional item of contraband.⁶⁶ Nevertheless, the Court held that the strip searches at issue were not unreasonable and therefore were not prohibited under the Fourth Amendment.⁶⁷ In addressing the relative lack of empirical evidence, the Court placed emphasis on the deterrence-based rationale behind the policy. “That there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person,” the Court noted, “may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises.”⁶⁸

In order to parse such problems going forward, the Court created a balancing approach that has featured in decades of litigation on the issue: “[E]ach case . . . requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.”⁶⁹ According to the Court, this balancing requires a four-part assessment. Courts must examine “[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.”⁷⁰ Although all four pieces have been the subject of litigation, the first and third bear most directly on the analysis at hand. That is, assuming that a strip search is conducted appropriately and in a permissible location, courts are still left to grapple with what constitutes a sufficient justification for such an invasive search in the first place. As addressed in Part II, this issue—and, in particular, the role that deterrence-based policies play in the justification prong of the test—has been the subject of misinterpretation.

The *Bell* Court also touched upon the issue of whether or not pretrial arrestees, by virtue of not yet having been to trial, may have greater Fourth Amendment protections than those who have been adjudicated guilty. The answer, at least as it pertained to the constitutional violations alleged in *Bell*, was no.⁷¹ Writing for the majority, then-Justice Rehnquist explained: “Without

65. *Id.*

66. *Id.*

67. *Id.* (“The Fourth Amendment prohibits only unreasonable searches, and under the circumstances, we do not believe that these searches are unreasonable.” (citation omitted)).

68. *Id.* at 559.

69. *Id.*

70. *Id.*

71. *See id.* at 531-35. In other aspects of the opinion, however, the Court portrayed the difference as more relevant. Logic suggests that pretrial detainees should possess *more* rights than convicted prisoners, and the Court echoed similar logic: “*A fortiori*, pretrial detainees,

question, the presumption of innocence plays an important role in our justice system. . . . But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.”⁷²

Finally, two of the dissenting opinions are relevant to the contemporary debate over *Bell* (because they are explored in greater detail to come, I mention them only briefly here). First, Justice Powell argued for a reasonable suspicion standard, stating that “[i]n 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.”⁷³ In a separate dissent, Justice Stevens raised the possibility that strip searches could be considered a form of punishment: “I think it is unquestionably a form of punishment to . . . compel [a detainee awaiting trial] to exhibit his private body cavities to the visual inspection of a guard.”⁷⁴ The majority balked at this suggestion, holding that, “[a]bsent a showing of an expressed intent to punish on the part of detention facility officials,” the Court was unlikely to uphold a finding of punitive behavior.⁷⁵ Instead “if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to ‘punishment.’”⁷⁶ This holding has played an important, albeit largely unrecognized, part in shaping the legal landscape on prison searches. Without some form of “expressed intent” on the part of prison authorities or police officials, it is difficult to prove that an individual is being put through such procedures for punitive (and perhaps unconstitutional) purposes.

Several applicable themes emerge as we look back over this brief history of Fourth Amendment law. First, with respect to arrestees (including those who have been convicted, and also those who are awaiting trial), the Court has, *at times*, been willing to depart from the individualized standards that inform the majority of its Fourth Amendment jurisprudence.⁷⁷ The Court has not, however, endorsed policies that lack any form of tailoring whatsoever. In *Bell*, which provided the most substantial departure prior to *Florence*, the Court found that a blanket strip-search policy was constitutional as applied to a specific category

who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.” *Id.* at 545. But the Court quickly tempered whatever distance might have been created between such gaps: “There must be a mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application. This principle applies equally to pretrial detainees and convicted prisoners. A detainee simply does not possess the full range of freedoms of an unincarcerated individual.” *Id.* at 546 (citation and internal quotation marks omitted).

72. *Id.* at 533 (citation omitted).

73. *Id.* at 563 (Powell, J., concurring in part and dissenting in part) (calling specifically for a heightened level of cause for body-cavity searches).

74. *Id.* at 595 (Stevens, J., dissenting).

75. *Id.* at 538 (majority opinion).

76. *Id.* at 539.

77. In addition, the fact that a detainee is still awaiting trial does not appear to weigh decisively in his or her favor.

of inmates—those who had engaged in contact visits.⁷⁸ The Court was specifically focused, however, on the deterrence-based rationale of the *Bell* policy.⁷⁹ As a function of their ability to conduct contact visits, the prisoners at the MCC may have been inclined to take advantage of the opportunity to smuggle contraband into the prison. The Court's basic contention was that prisoners who knew that a full strip search was coming would be deterred. Equally important, the Court issued its *Bell* holding with the express directive that future policies be based upon a "balance."⁸⁰ With these themes in mind, it would be reasonable to question how the law has since gravitated towards such a divergent outcome. With that, we turn to a more detailed analysis of the *Florence* decision itself.

D. *Florence v. Board of Chosen Freeholders*

In the aftermath of *Bell*, case law regarding strip-searching arrestees splintered. Prior to *Florence*, courts endorsed three policy approaches: (1) the reasonable (or individualized) suspicion standard;⁸¹ (2) the categorical (or categorized) suspicion standard;⁸² and (3) the suspicionless (or blanket) standard, which was the subject of the Court's attention in *Florence*.⁸³ While all three standards were, and are, employed in varying iterations throughout the United States, the fault lines of the debate largely set the first and second standards against the third. This is partly a function of practical realities.⁸⁴ The reasonable suspicion standard and the categorical suspicion standard have much in common, and they are often employed in unison.⁸⁵ A prison official may be responsible for searching all arrestees who have committed a certain category of offense, but may also have the flexibility to search someone for other reasons—

78. See *supra* note 64 and accompanying text.

79. See *supra* note 68 and accompanying text.

80. See *supra* note 69 and accompanying text.

81. See, e.g., *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984), *overruled by* *Bull v. City & Cnty. of S.F.*, 595 F.3d 964 (9th Cir. 2010) (en banc); *Mary Beth G. v. City of Chi.*, 723 F.2d 1263, 1273 (7th Cir. 1983).

82. See *Roberts v. Rhode Island*, 239 F.3d 107, 111-12 (1st Cir. 2001).

83. See *Florence v. Bd. of Chosen Freeholders*, 621 F.3d 296, 310-11 (3d Cir. 2010), *aff'd*, 132 S. Ct. 1510 (2012); *Bull*, 595 F.3d 964 (overruling *Giles*, 746 F.2d 614); *Powell v. Barrett*, 541 F.3d 1298, 1314 (11th Cir. 2008) (en banc) (overruling *Wilson v. Jones*, 251 F.3d 1340, 1343 (11th Cir. 2001)).

84. It is also partly a function of the role of absolutes. Those that advocate for a suspicionless standard often believe that arrestees have no Fourth Amendment right to any kind of mitigating standard in the search process.

85. In many states and counties, for example, the category of the offense that the arrestee has been charged with—for example, some form of drug possession or a violent crime committed with a weapon—informs whether or not an officer has an individualized reason for searching an arrestee. See *Friedman*, *supra* note 10, 2009 WL 2436800, at *13-14; *cf. Giles*, 746 F.2d at 617-18 (citing several cases that depict the way in which courts identify "reasonable suspicion," including evaluating the "nature of the offense" committed).

such as her behavior upon arrest.⁸⁶ This gives officers fuller discretion to exercise their own (reasonable) judgment during the arrest process.

Following the Third Circuit's decision in *Florence*,⁸⁷ the Supreme Court recognized that circuit courts had arrived at "differing conclusions" and granted certiorari to resolve the split.⁸⁸ *Florence* concerned the application of blanket strip-search policies as practiced by two facilities: the Burlington County Detention Center and the Essex County Correctional Facility.⁸⁹ Albert Florence was forced to undergo strip searches pursuant to mandatory practices at both facilities.⁹⁰ The question before the Court was whether blanket strip-search policies for arrestees at jails⁹¹ were constitutional, or whether the Fourth Amendment requires a more tailored search approach—such as the categorical suspicion or reasonable suspicion standard.

86. See, e.g., *Bull*, 595 F.3d at 986 (Kozinski, C.J., concurring) ("[P]laintiffs classify an arrestee who was 'nodding off,' and another who was 'nervous,' as inmates as to whom there was individualized suspicion. If 'nodding off' and 'nervous' are sufficient for individualized suspicion, can 'gave me a dirty look,' 'was hyperactive' or 'had poor posture' be far behind?").

87. Just as the doctrine on strip searches differed between circuits, the lower courts' decisions in *Florence* were similarly varied. Initially, the District Court for the District of New Jersey found the searches impermissible, holding that "blanket strip searches of non-indictable offenders, performed without reasonable suspicion for drugs, weapons, or other contraband, [are] unconstitutional." *Florence v. Bd. of Chosen Freeholders*, 595 F. Supp. 2d 492, 513 (D.N.J.), amended by 657 F. Supp. 2d 504 (D.N.J. 2009), rev'd, 621 F.3d 296 (3d Cir. 2010), aff'd, 132 S. Ct. 1510. In arriving at its conclusion, the district court, like many circuit courts, read a reasonable suspicion requirement into the *Bell* holding: "[J]ust because the searches in *Bell* were conducted pursuant to a blanket policy does not mean that reasonable suspicion was lacking [Contact] visits, by their very nature, may . . . provide the requisite reasonable suspicion for jail officers to justify the blanket search policy." *Id.* at 509. The Third Circuit reversed, largely based on a different interpretation of *Bell*. As the Third Circuit noted:

Like the Ninth and Eleventh Circuit Courts of Appeals, we conclude 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*. We reject Plaintiffs' argument that blanket searches are unreasonable because jails have little interest in strip searching arrestees charged with non-indictable offenses. This argument cannot be squared with the facts and law of *Bell*.

Florence, 621 F.3d at 308.

88. 132 S. Ct. at 1515.

89. *Id.* at 1514.

90. There was some debate about the extent to which all aspects of Albert Florence's strip search at the Burlington County Detention Center were expressly part of institutional protocol. The Court described the process as follows:

Burlington County jail procedures required every arrestee to shower with a delousing agent. Officers would check arrestees for scars, marks, gang tattoos, and contraband as they disrobed. Petitioner claims he was also instructed to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. (It is not clear whether this last step was part of the normal practice.)

Id. (citations omitted).

91. As mentioned above, the *Florence* Court noted that the "term 'jail' is used here in a broad sense to include prisons and other detention facilities." *Id.* at 1513.

The Court recognized *Bell v. Wolfish* as “the starting point for understanding how th[e] framework applies to Fourth Amendment challenges.”⁹² It also acknowledged, briefly, that “[t]he need for a particular search must be balanced against the resulting invasion of personal rights.”⁹³ Beyond that, however, overtures to *Bell*’s balancing test were sparse. Instead, the *Florence* Court placed a premium on deference to correctional facilities⁹⁴ and the need for an easily administrable standard. “[C]ourts,” the majority wrote, “must defer to the judgment of correctional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of jail security.”⁹⁵ The Court’s ultimate judgment was that the “necessary showing has not been made in this case.”⁹⁶

In fashioning its opinion, the majority relied on several Supreme Court precedents. First, the Court’s holding in *Turner v. Safley* provided a foothold for deference to prison officials. The *Florence* Court argued that *Turner* had “confirmed the importance of deference to correctional officials” and “explained that a regulation impinging on an inmate’s constitutional rights must be upheld ‘if it is reasonably related to legitimate penological interests.’”⁹⁷ For instances in which the Supreme Court had upheld prison policies that lacked reasonable suspicion, *Florence* cited three holdings⁹⁸: *Bell v. Wolfish*, *Block v. Rutherford*⁹⁹ (which concerned a county jail’s decision to ban all contact visits), and *Hudson v. Palmer*¹⁰⁰ (which addressed the question of whether prison officials could search inmate lockers without particularized suspicion). Finally, the *Florence* Court rejected the petitioner’s argument that detainees involved in nonserious or nondrug crimes should be exempt from strip searches absent a particular reason to suspect the presence of contraband.¹⁰¹ The Court called in-

92. *Id.* at 1516.

93. *Id.*

94. The dangers of excess deference in this field have been well documented. See Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 864-67, 885-86, 899-900, 904-05 (1990). But see Christopher P. Keleher, *Judges as Jailers: The Dangerous Disconnect Between Courts and Corrections*, 45 CREIGHTON L. REV. 87, 90 (2011) (“Judges invalidate strip searches without understanding the underlying law or the consequences of their rulings.”).

95. *Florence*, 132 S. Ct. at 1513-14.

96. *Id.* at 1514.

97. *Id.* at 1515 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). This is not the first instance in which *Turner*—a case which upheld the right to marriage among inmates—has actually been used to circumscribe the rights of prisoners. See, e.g., Kyrsten Sinema, Note, *Overton v. Bazzetta: How the Supreme Court Used Turner to Sound the Death Knell for Prisoner Rehabilitation*, 36 ARIZ. ST. L.J. 471 (2004).

98. *Florence*, 132 S. Ct. at 1516.

99. 468 U.S. 576 (1984).

100. 468 U.S. 517 (1984).

101. *Florence*, 132 S. Ct. at 1520.

stead for administrative ease. “It is reasonable,” the Court argued, “for correctional officials to conclude this standard would be unworkable.”¹⁰²

The *Florence* opinion was even more fragmented than the five-to-four vote suggests. In section IV of the opinion, Justice Kennedy attempted to draw some limitations on the Court’s ruling: “This case does not require the Court to rule on the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees.”¹⁰³ He argued instead that “[t]he accommodations provided in these situations may diminish the need to conduct some aspects of the searches at issue.”¹⁰⁴ But Justice Thomas refused to join this section, apparently reluctant to draw such an explicit exemption.¹⁰⁵ Finally, the majority opinion was accompanied by several concurrences. In the first concurrence, Chief Justice Roberts argued that the Court “does not foreclose the possibility of an exception to the rule it announces.”¹⁰⁶ Writing separately, Justice Alito was also quick to “emphasize the limits of [the] holding.”¹⁰⁷ As he explained, “[t]he Court holds that jail administrators may require all arrestees *who are committed to the general population of a jail* to undergo visual strip searches not involving physical contact by corrections officers.”¹⁰⁸

In total, therefore, the opinion contains several important considerations—some definitive, some less so. First, as a general matter, the Court clearly held that for any type of arrestees entering prison, prison officials were free to dispense with tailored justifications for strip searches. The narrower ruling in *Bell* that once pertained only to arrestees engaged in contact visits was expanded to all arrestees. Second, *Florence* governs “arrested persons who are to be held in jail while their cases are being processed.”¹⁰⁹ As such, according to the majority, an arrestee’s status in the adjudicatory process is of no moment. Third, for now, the holding may pertain only to individuals who enter prisons with *general populations*. But given the somewhat convoluted makeup of the majority and concurring opinions (remember that Justice Thomas refused to join section IV of the opinion, in which Justice Kennedy placed limits on the ruling), this final caveat rests on uncertain grounds.

102. *Id.*

103. *Id.* at 1522 (plurality opinion).

104. *Id.* at 1523.

105. *See id.* at 1513 & n.1 (majority opinion). It is interesting to note, however, that this distinction was already made partially clear in the opening salvo of the majority opinion. In section I of the opinion, which Justice Thomas joined, the majority wrote, “[t]he case proceeds on the understanding that the officers searched detainees prior to their admission to the general population, as the Court of Appeals seems to have assumed.” *Id.* at 1515; *see also* Denniston, *supra* note 7 (noting in reference to the exception alluded to in section IV that “Justice Thomas apparently did not want to leave that option open for a future challenge”).

106. *Florence*, 132 S. Ct. at 1523 (Roberts, C.J., concurring).

107. *Id.* at 1524 (Alito, J., concurring).

108. *Id.*

109. *Id.* at 1513 (majority opinion).

II. RESURRECTING *BELL*: WHY A FAITHFUL APPLICATION OF EXISTING LAW MILITATES AGAINST BLANKET STRIP-SEARCH POLICIES

Despite the proliferation of blanket search policies, and contrary to the opinion in *Florence*, a faithful application of existing law makes clear that suspicionless strip searches cannot be justified. In this Part, I explore some of the rationales that formed the Court's contrary assessment in *Florence*. In earlier instances where the Court has allowed blanket search policies—and in virtually all of the operative cases cited by the majority in *Florence*—the prison policies at issue were based in part on deterrence. But that rationale was decidedly absent in *Florence*. The result is that the Court was left to reach for footholds where few were available. Second, and again contrary to the Court's original intentions, because *Bell*'s ultimate conclusion was to uphold a form of suspicionless search policy (as applied to inmates who engaged in contact visits), the *Bell* decision has often been invoked as a full-throated endorsement of blanket strip-search policies of all kinds. We see evidence of this trend in *Florence*. A more faithful reading, however, suggests that the Court intended *Bell* as a departure from the norm, rather than as the new standard.

A. *The Missing Deterrence-Based Rationale in Florence*

In support of its decision to uphold a blanket strip-search policy, the *Florence* Court employed a variety of precedents. In virtually all instances, however, the precedents cited concerned deterrence-based prison policies, and, as such, were inapposite to the circumstances in *Florence*.

1. *Invoking deterrence-based precedent*

The first invocation of precedent came in the form of *Bell* itself. Following a brief overview of *Bell*'s framework, the *Florence* Court explained that *Bell*, like the present case, concerned a form of blanket strip-search policy. Specifically, *Bell* “addressed a rule requiring pretrial detainees in any correctional facility run by the Federal Bureau of Prisons ‘to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution.’”¹¹⁰ As the *Florence* Court recalled, despite the *Bell* petitioners' appeal for a more narrow approach, the “Court nonetheless upheld the search policy.”¹¹¹ But as the majority admitted, the policy in *Bell* was partially premised on deterrence: “[The Supreme Court] deferred to the judgment of correctional officials that the inspections served not only to discover but also to deter the smuggling of weapons, drugs, and other

110. *Id.* at 1516 (quoting *Bell v. Wolfish*, 441 U.S. 520, 558 (1979)).

111. *Id.*

prohibited items inside.”¹¹² The logic is understandable. As a function of their exposure to outside visitors, and given their advanced knowledge of such visits, prisoners might use the opportunity to smuggle contraband.

As the facts of *Florence* make clear, however, deterrence is a far less appropriate rationale for the policies featured in that case. Albert Florence had no knowledge that he would be arrested.¹¹³ Nor did he have any reason to believe that he would be entering a prison that afternoon.¹¹⁴ In fact, it is difficult to argue that any arrestee anticipates an arrest in the way presumed by the majority. Remember that the strip searches at issue in *Florence* are highly invasive. They entail a close visual inspection of body cavities. While offenders may conceal weapons or drugs during the commission of crimes, the notion that an offender would conceal such items in body cavities—in anticipation of an unforeseen arrest—is harder to entertain. In this respect, while the policy in *Bell* may have had some appeal from a deterrence perspective, the same cannot be said for a policy that applies to arrestees upon initial processing.

The other major precedents cited by the majority in *Florence* founder upon a similar analysis. The Court cited *Block v. Rutherford* to support its contention that “[p]olicies designed to keep contraband out of jails and prisons have been upheld in cases decided since *Bell*.”¹¹⁵ But the policies at issue in *Block* were also based on contact visits, and therefore were promulgated with an eye toward deterrence. As the *Block* Court explained, “[v]isitors can easily conceal guns, knives, drugs, or other contraband . . . [a]nd these items can readily be slipped from the clothing of an innocent child, or transferred by other visitors permitted close contact with inmates.”¹¹⁶ Finally, while the *Florence* Court’s final invocation of precedent—*Hudson v. Palmer*—does not pertain to contact visits, a deterrence-based rationale was nevertheless present. *Hudson* “addressed the question of whether prison officials could perform random searches of inmate lockers and cells even without reason to suspect a particular individual of concealing a prohibited item.”¹¹⁷ In upholding the constitutionality of the search policy, the *Hudson* Court argued that “[f]or one to advocate that prison searches must be conducted only pursuant to an enunciated general policy or when suspicion is directed at a particular inmate is to ignore the realities of prison operation.”¹¹⁸ But once again, these policies concerned individuals who were already detained. The presence of random and indiscriminate searches,

112. *Id.*

113. See Brief for the Petitioner, *supra* note 16, at 3.

114. See *id.*

115. *Florence*, 132 S. Ct. at 1516 (citing *Block v. Rutherford*, 468 U.S. 576, 586-87 (1984)).

116. *Block*, 468 U.S. at 586.

117. *Florence*, 132 S. Ct. at 1516 (citing *Hudson v. Palmer*, 468 U.S. 517, 522-23 (1984)).

118. *Hudson*, 468 U.S. at 529 (quoting *Marrero v. Commonwealth*, 284 S.E.2d 809, 811 (Va. 1981)) (internal quotation marks omitted).

therefore, had appeal as a deterrent. Otherwise, as the *Florence* Court reiterated, “[i]nmates would adapt to any pattern or loopholes they discovered in the search protocol and then undermine the security of the institution.”¹¹⁹

2. *Grappling with hypotheticals*

Lacking a clearly controlling legal precedent, the *Florence* majority employed empirical evidence in order to bridge the divide. The majority cited instances from three amicus briefs where individuals arrested for misdemeanor violations attempted to smuggle contraband into jails or prisons.¹²⁰ But in at least one of the instances cited in these briefs, the arrestee knew he would be going to jail in advance (because he self-reported to serve his sentence).¹²¹ For the other instances cited, the amicus briefs provide little indication of whether a reasonable suspicion standard may have sufficed rather than the blanket standard—the very crux of what’s at issue in *Florence*.

In light of the relatively sparse empirical evidence regarding arrestee smuggling, many commentators have questioned the source of contraband in prisons. The problem, after all, is well documented—the majority speaks compellingly of the inherent “difficulties of operating a detention center”¹²² and of the gravity of the problem contraband presents in contemporary prison facilities.¹²³ While a full empirical assessment lies beyond the scope of this Note, it bears noting that the issue involves a complex array of participants. In some instances, correctional staff themselves constitute a part of the smuggling problem.¹²⁴ Between 2001 and 2009, there were 16,717 substantiated instances of

119. *Florence*, 132 S. Ct. at 1517.

120. *See id.* at 1521.

121. *See* Brief for the United States as Amicus Curiae Supporting Respondents at 25 n.15, *Florence*, 132 S. Ct. 1510 (No. 10-945), 2011 WL 3821404 (citing an incident in Bangor, Maine, in which an “inmate who *self-reported* to serve sentence for refusing to submit to arrest smuggled a marijuana cigarette into jail in his rectum” (emphasis added)). Given the problem of advanced knowledge in instances of self-reporting, such arrests could simply be placed within a category that merits strip-searching under the reasonable suspicion standard.

122. *Florence*, 132 S. Ct. at 1515.

123. *See id.* at 1515, 1519-20.

124. *See, e.g.*, Robert Faturechi & Jack Leonard, *Jail Bars Are No Barrier to Drug Traffic; L.A. County Inmates Have Found Guards Willing to Aid in Their Smuggling Efforts*, L.A. TIMES, Oct. 2, 2011, at A1, available at <http://articles.latimes.com/2011/oct/02/local/la-me-jail-contraband-smuggle-20111002>; Jessica Hopper, *Texas Jail Guard Guilty of Sneaking Hacksaw Blade in Taco*, ABC NEWS (July 27, 2011), <http://abcnews.go.com/US/texas-jail-guard-found-guilty-sneaking-hacksaw-taco/story?id=14171253>; Samuel Rubinfeld, *2 Prison Guards Indicted on Bribery, Smuggling Charges*, WALL ST. J. CORRUPTION CURRENTS (June 26, 2012), <http://blogs.wsj.com/corruption-currents/2012/06/26/2-prison-guards-indicted-on-bribery-smuggling-charges>; Amber Stegall, *Prison Guard Takes Money from Inmate to Smuggle in Contraband*, WAFB 9 NEWS (June 27, 2012), <http://www.wafb.com/story/18857788/prison-guard-takes-money-from-inmate-to-smuggle-in-contraband>; Jason Trahan, *Federal Prison Guard Admits Smuggling Contraband to*

misconduct by correctional officers in the Federal Bureau of Prisons, a substantial portion of which involved contraband.¹²⁵ Secondary literature also reveals that, according to “convicted drug traffickers,” the “best candidates to safely smuggle drugs into prison are staff workers.”¹²⁶ This fact discounts neither the utility of empirics nor the general need for an inmate search policy. But it provides context for the way in which isolated instances of empirics should be evaluated in light of broader underlying causes. The presence of a substantial contraband problem should not, by itself, justify a more expansive policy on arrestee strip searches.

Given the absence of clear legal or empirical support, the *Florence* majority employed the use of hypotheticals.¹²⁷ For example, the majority posited that concealing contraband “might be done as an officer approaches a suspect’s car or during a brief commotion in a group holding cell.”¹²⁸ Similarly, “[s]omething small might be tucked or taped under an armpit, behind an ear, between the buttocks, in the instep of a foot, or inside the mouth or some other body cavity.”¹²⁹ Further, “[e]ven if people arrested for a minor offense do not themselves wish to introduce contraband into a jail, they may be coerced into doing so by others.”¹³⁰ Such an occurrence “could happen any time detainees are held in the same area, including in a van on the way to the station or in the holding cell of the jail.”¹³¹ But the Court cited no evidence from the record for the first two of these propositions. For the others, the evidence cited once again

Inmates at Seagoville, DALL. MORNING NEWS CRIME BLOG (Sept. 3, 2011), <http://crimeblog.dallasnews.com/2011/09/federal-prison-guard-admits-sm.html>.

125. The manner in which these figures are compiled makes it difficult to identify exactly what proportion of the transgressions involved contraband, but the report cites changes in contraband rules as one of the leading factors in the escalation in officer arrests. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, ENHANCED SCREENING OF BOP CORRECTIONAL OFFICER CANDIDATES COULD REDUCE LIKELIHOOD OF MISCONDUCT 14-15 (2011), *available at* <http://www.justice.gov/oig/reports/2011/e1102.pdf>.

126. Dennis J. Stevens, *Prison Regime and Drugs*, 36 HOW. J. CRIM. JUST. 14, 25 (1997).

127. Most courts have placed too much weight on empirical comparisons. While the *Bell* decision did feature an analysis of empirics, the analysis was cursory, lasting only long enough to dispel the lower court’s assessment and to offer a brief supposition about why the record might have contained so few instances of smuggling. This is not to say that the *Bell* Court was excusing itself from the matter entirely. It reiterated past precedent stating that the Court may have a role to play where “[prison] officials have exaggerated their response to [security] considerations.” *Bell v. Wolfish*, 441 U.S. 520, 548 (1979) (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)) (internal quotation marks omitted). But it is clear that, in determining what constitutes an exaggerated response, the Court was focused mostly on the qualitative aspects of the search policy.

128. *Florence*, 132 S. Ct. at 1520. A brief reflection on this argument also suggests it is implausible. The overwhelming impulse prior to arrest is surely to get *rid* of contraband as an officer approaches. In addition, the notion that many people would be capable of hiding contraband in a body cavity *while an officer approaches* is possible, but again unlikely.

129. *Id.*

130. *Id.* at 1521.

131. *Id.*

pertained to cases involving contact visits, not to individuals arrested without warning.¹³²

Ultimately, unlike the Court's earlier opinions concerning arrestee strip searches, the circumstances in *Florence* had little to do with deterrence. As such, analogies to precedent regarding deterrence-based search policies are inapt, and the Court's efforts to buttress its holding with empirical evidence are similarly unavailing.

B. *An Exception, Rather than a New Norm*

Closer scrutiny of *Bell* also provides important insights into the relatively narrow scope of the Court's intervention. In particular, several aspects of the opinion indicate that, contrary to the outcome in *Florence*, the *Bell* Court's endorsement of a blanket strip-search standard was intended as an exception, rather than a new norm. This is particularly true when interpreted in the context of existing legal standards at the time *Bell* was decided.

"[W]e deal here," the *Bell* Court explained, "with the question whether visual body-cavity inspections as contemplated by the MCC rules can ever be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can."¹³³ This language suggests that the Court saw its intervention as a deviation from the norm (the italicized emphasis on the word "ever" is not aesthetic—it features in the Court's original opinion). So while the Court ultimately held that a full-body strip search could be conducted without more individualized suspicion, it was staking out a small area of exception to the general requirement of individualized suspicion. That is, in a narrow class of detainees—those in transition back from contact visits—prison authorities could dispense with the usual requirements of individualized suspicion. But the *category* of these arrestees continued to play a clear role in informing the need for a strip search. The record in *Bell* provided no evidence that the correctional facility had been applying such policies to all arrestees.¹³⁴ Nor does the Court's opinion suggest such an expansive application.

This contention also finds support in secondary literature written not long after the *Bell* decision. As one commentator noted, "[t]he common denominator in [the cases leading up to *Bell*] was that the body cavity search policy was used only when prisoners came into contact or reasonably could come into

132. *See id.* ("It is not unreasonable to assume, for instance, that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied *contact visits*." (emphasis added) (quoting *Block v. Rutherford*, 468 U.S. 576, 587 (1984)) (internal quotation marks omitted)).

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

134. This was the subject of some dispute during the oral argument in *Florence*. *See* Transcript of Oral Argument, *supra* note 9, at 14, 2011 WL 4836171, at *14.

contact with persons from outside the prison facility.”¹³⁵ Of the decisions that reached further afield, the commentator noted that they “fail to take into account prior case law and tend to ignore Justice Rehnquist’s very particular limitation of the issue decided.”¹³⁶

In keeping with this more cabined reading, Justice Powell’s dissent in *Bell* lends additional guidance. Powell’s dissent states, in full:

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.¹³⁷

Because Justice Powell styled this argument as a dissent, some lower courts have taken this to mean that the controlling opinion in *Bell* rejects the need for any form of suspicion.¹³⁸ But such an interpretation neglects the specific language employed in the majority opinion. Then-Justice Rehnquist concluded that these searches could, at times, be conducted on “less than probable cause.”¹³⁹ But holding that prison authorities may sometimes be justified in departing from a probable cause standard is by no means a necessary rejection of the claim that *some* level of cause should accompany strip searches. Moreover, the fact that a specific standard was not expressly adopted by the majority may speak more to the judicial minimalism of the Court than to any implicit effort to reject a reasonable suspicion standard. Judge Barkett of the Eleventh Circuit Court of Appeals made a similar point in arguing against the blanket strip-search policy:

Nor does the fact that *Bell* upheld a blanket policy, *after a trial*, mean that the Supreme Court implicitly rejected a finding that reasonable suspicion is ever necessary to justify strip searches or strip search policies. This is too broad a constitutional principle to derive from an allegedly implicit holding of the Supreme Court. A more reasonable interpretation would be that the Supreme Court did not need to address the issue because reasonable suspicion was present in the evidentiary record based on the detainees’ planned contact with outsiders knowing they would be returning to the general population of the detention center after the visit.¹⁴⁰

Given the facts at issue in *Bell*, the majority may simply have felt that an explication of a new, defining standard was unnecessary, whereas Justice Powell may have felt that greater specificity was needed.

135. Tracy McMath, Comment, *Do Prison Inmates Retain Any Fourth Amendment Protection from Body Cavity Searches?*, 56 U. CIN. L. REV. 739, 746 (1987).

136. *Id.* at 745.

137. *Bell*, 441 U.S. at 563 (Powell, J., concurring in part and dissenting in part).

138. See Shapiro, *supra* note 12, at 137; see also *Bull v. City & Cnty. of S.F.*, 595 F.3d 964, 978 (9th Cir. 2010) (en banc); *Powell v. Barrett*, 541 F.3d 1298, 1307-09 (11th Cir. 2008) (en banc).

139. *Bell*, 441 U.S. at 560 (majority opinion).

140. *Powell*, 541 F.3d at 1316-17 (Barkett, J., dissenting).

In any case, interpretive acrobatics are unnecessary. In *Bell*, the fairest reading of the opinion is simply that the Court intended to uphold a discrete deviation from the probable cause standard. Despite the new trend at work in *Florence*, there is little evidence to indicate that the Court was considering a more expansive application to all arrestees.

III. RISKS OF ABUSE—WHY THE INTERSECTION OF *FLORENCE* AND *ATWATER* PRESENTS NEW PRACTICAL CONCERNS THAT MILITATE AGAINST BLANKET STRIP-SEARCH POLICIES

As the above Parts describe, a sound understanding of the Court's past jurisprudence and a fair reading of *Bell* should provide sufficient grounds to renounce blanket strip-search policies. But perhaps the most compelling case against suspicionless searches lies in the realm of practical considerations. In this Part, I leave the historical and doctrinal analysis behind and focus on several changes in contemporary case law that have led to a new set of ground-level ramifications. In particular, the Court's 2001 holding in *Atwater v. City of Lago Vista* expanded the range of offenses that may merit arrest.¹⁴¹ Now that *Atwater* has been augmented by the Court's endorsement of blanket strip-search policies, the combination allows for an elevated degree of police power and, in turn, increases the risk of abuse by police officers.¹⁴² While the intersection with *Atwater* does surface in the *Florence* opinions, the holding provides no additional protections from police abuse. Past and ongoing litigation make clear, moreover, that such risks are not mere speculation—they have already been borne out in cases before the Court. In light of these concerns, Justice Stevens's dissent in *Bell* reemerges as a prescient analysis of how strip searches might be used as a punitive tool.

A. *Introducing Atwater v. City of Lago Vista*

Although there has been a variety of litigation concerning strip-search policies in the aftermath of *Bell*, the most substantial change to the legal landscape, perhaps surprisingly, had little to do with strip searches. In 2001, the Supreme Court decided *Atwater v. City of Lago Vista*.¹⁴³ The case featured a Fourth Amendment challenge brought by petitioner Gail Atwater, who had been ar-

141. *See* 532 U.S. 318, 354 (2001).

142. To date, there has been no serious scholarly attempt to address these issues. Further, because these factors emerged entirely in the post-*Bell* environment, they necessarily fell beyond the purview of the Court's consideration when it was first evaluating the constitutionality of strip searches following contact visits.

143. 532 U.S. 318.

rested and detained for a seat belt violation (her children were sitting in the front seat without seat belts).¹⁴⁴

Following her release, Atwater filed a 42 U.S.C. § 1983 claim alleging that the local police official had violated her Fourth Amendment “right to be free from unreasonable seizure.”¹⁴⁵ Her chief legal argument was grounded in common law. “[F]ounding-era common-law rules,” she argued, “forbade peace officers to make warrantless misdemeanor arrests except in cases of ‘breach of the peace’”—an exception which historically included only nonfelony offenses that “involv[ed] or tend[ed] toward violence.”¹⁴⁶

The Court admitted that Atwater’s claims in this regard were “by no means insubstantial.”¹⁴⁷ But it refused to endorse her challenge. Writing for the majority, Justice Souter took issue with what he perceived to be Atwater’s overly simplistic assertions about the common law: in the Court’s opinion, there was “disagreement, not unanimity, among both the common-law jurists and the text writers.”¹⁴⁸ The Court also balked at the suggestion that it should create a new—or at least, more explicit—constitutional rule to protect individuals alleged to have committed only nonviolent minor offenses. In the Court’s assessment, the political process and the requirement of probable cause were sufficient protective barriers to prevent a parade of abuse.¹⁴⁹ The Court also introduced a heightened standard for Fourth Amendment claims for unconstitutional arrest. In order to warrant Fourth Amendment protection, the arrest had to be “conducted in an extraordinary manner, unusually harmful to [a defendant’s] privacy or even physical interests.”¹⁵⁰ Going forward, therefore, the implications of *Atwater* were clear but expansive: “If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”¹⁵¹

144. To reiterate briefly, following what might normally have been a routine traffic stop and citation, the officer took the unusual step of arresting Atwater. After a brief period of detainment at a local jail, Atwater ultimately pleaded no contest to the seat belt violation, and was released after posting a bail bond of \$310. In total, Atwater was charged with “driving without her seatbelt fastened, failing to secure her children in seatbelts, driving without a license, and failing to provide proof of insurance.” *Id.* at 324. All charges were dismissed with the exception of the seat belt violations. *Id.*

145. *Id.* at 325 (internal quotation marks omitted).

146. *Id.* at 327 (internal quotation marks omitted).

147. *Id.*

148. *Id.* at 332.

149. *Id.* at 353-54 (“The upshot of all these influences, combined with the good sense (and, failing that, the political accountability) of most local lawmakers and law-enforcement officials, is a dearth of horrors demanding redress.”).

150. *Id.* at 353 (quoting *Whren v. United States*, 517 U.S. 806, 818 (1996)) (internal quotation marks omitted).

151. *Id.* at 354.

When *Atwater* is coupled with the application of suspicionless strip searches, the ramifications become quickly apparent. Traditionally, a court could take comfort in the knowledge that the arrest itself provided some form of buffer against widespread Fourth Amendment abuse. While an individual alleged to have committed a violent offense could almost certainly be arrested, it was a far less likely occurrence for an individual who had participated in no serious wrongdoing. Following *Atwater*, this buffer was weakened. Now, while officers must continue to obtain the requisite probable cause in order to make an arrest, the gravity of the offense no longer weighs in the calculus. The functional result is that a broad array of individual offenses that had previously been beyond the scope of warrantless arrest are now within its purview.¹⁵² Following the chain of events only a few steps further leads to an important conclusion. An individual could begin her afternoon as Gail Atwater did, and end up in circumstances similar to those of Albert Florence. The Supreme Court may, of course, choose to provide further protections. But for now, the hypothetical merits exploration. Based on the holding in *Florence* alone, such an experience would entail no clear deprivation of constitutional rights and no cognizable legal claim or remedy.

B. *The Florence Concurrences*

Atwater received almost no attention from either party during briefing in *Florence*.¹⁵³ But it troubled the Justices. The case was cited prominently by the majority and the dissent, and it served as the unarticulated backdrop for both concurrences.¹⁵⁴ Ultimately, however, the Court only intimated the possibility of one day providing protection for individuals in Gail Atwater's circumstanc-

152. Over the course of the Fourth Amendment's evolution in the lower courts, individuals have been arrested and strip-searched for a wide array of offenses. The chief difference, of course, is that, barring the few exceptions at issue in this Note, courts ultimately found the strip searches unconstitutional because prison officials failed to provide any form of reasonable or categorical suspicion. See *Chapman v. Nichols*, 989 F.2d 393, 394-95, 397 (10th Cir. 1993) (holding unconstitutional a strip search following an arrest for driving with a suspended license); *Watt v. City of Richardson Police Dep't*, 849 F.2d 195, 196, 199 (5th Cir. 1988) (same following an arrest for failing to license a dog); *Walsh v. Franco*, 849 F.2d 66, 67-70 (2d Cir. 1988) (same following an arrest for failing to appear in court); *Jones v. Edwards*, 770 F.2d 739, 740-42 (8th Cir. 1985) (same following an arrest for refusing to sign a summons).

153. It features only once in Essex County's brief, and, even then, appears as support for a proposition entirely different from the issue raised in this Note. Brief for Respondents Essex County Correctional Facility and Essex County Sheriff's Department, *supra* note 18, at 18 ("Even if historical practices do not 'clear[ly] answer' whether the Fourth Amendment applies here, *Atwater v. City of Lago Vista*, 532 U.S. 318, 345 (2001), this Court's modern cases foreclose any claim that inmates have a reasonable expectation of privacy against intake searches conducted to serve institutional, not law enforcement, purposes.").

154. See *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1522-23 (2012); *id.* at 1526-27 (Breyer, J., dissenting); see also *id.* at 1523 (Roberts, C.J., concurring); *id.* at 1524-25 (Alito, J., concurring).

es. Further, if the concurrences are an accurate depiction of how these protections may eventually materialize, the final framework may remain prone to abuse.

Justice Kennedy, writing for the majority in *Florence*, was the first to broach the issue of *Atwater*. He noted that for individuals in *Atwater*'s circumstances, "[t]he accommodations provided in [such] situations may diminish the need to conduct some aspects of the searches at issue."¹⁵⁵ For the time being, however, because Albert Florence was housed in an institution that contained a general prison population, "[t]he circumstances before the Court . . . d[id] not present the opportunity to consider a narrow exception."¹⁵⁶

The concurring opinions, written by Chief Justice Roberts and Justice Alito, built upon Justice Kennedy's initial foray. In total, they spanned almost the full gamut of issues that have come to shape the Court's Fourth Amendment jurisprudence. Chief Justice Roberts, for example, raised the issue of warrants as a delineating factor. He noted that Albert Florence's "circumstances include the facts that Florence was detained not for a minor traffic offense but instead pursuant to a warrant for his arrest, and that there was apparently no alternative, if Florence were to be detained, to holding him in the general jail population."¹⁵⁷ As such, "[t]he Court is . . . wise to leave open the possibility of exceptions, to ensure that we 'not embarrass the future.'"¹⁵⁸ The first part of this delineation—dividing detainees arrested pursuant to a warrant from those who are not—is mostly temporal. It shifts the buffer from one point in the process (the arrest phase) to a later point (the strip-search phase). But it alone does little to fulfill the majority's desire for a workable bright-line rule. That is, the presence or absence of a warrant alone is unlikely to say much about the presence of contraband. Justice Alito, writing separately, sought clarity in a different type of temporal delineation. As he explained, most arrestees "are released from custody prior to or at the time of their initial appearance before a magistrate."¹⁵⁹ This contention, however, is in some conflict with then-Justice Rehnquist's holding in *Bell*, which made clear that an arrestee's status in the adjudicatory process should not play a decisive role in the nature of an arrestee's Fourth Amendment rights.¹⁶⁰

The most common thread among the opinions—and the issue upon which future protections are most likely to hinge—pertains to a prison's general population. The logic underlying this distinction is that inmates housed in a temporary holding facility have no access to a prison's general population and therefore pose a reduced risk of smuggling contraband. As Justice Alito noted in

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

156. *Id.*

157. *Id.* (Roberts, C.J., concurring).

158. *Id.* (quoting *Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 300 (1944)).

159. *Id.* at 1524 (Alito, J., concurring).

160. *See supra* Part I.C.

reference to Justice Kennedy's position, "admission to the general jail population, with the concomitant humiliation of a strip search, may not be reasonable, particularly if an alternative procedure is feasible."¹⁶¹ Here it is helpful to parse the language carefully. Justice Kennedy wrote that for arrestees in Atwater's circumstances, the *accommodations* provided may create an outlet by which to avoid the strip search.¹⁶² The difficulty with this type of categorization, however, is that it is inherently arbitrary. An arrestee's rights would be dictated not by the nature of the crime or by any action of the arrestee's own, but instead by whether or not the jurisdiction in which he or she is arrested happens to contain facilities with general prison populations.

As an initial matter, the proliferation of long-term holding facilities and other forms of hybrid transition facilities has made this classification murky. In many parts of the United States, contemporary holding "facilities" have replaced traditional jails for the purposes of housing pretrial detainees.¹⁶³ In *Bell*, for example, the Court examined the policies of an institution called the "Metropolitan Correctional Center," that, while designed "primarily to house pretrial detainees," also contained a number of "convicted inmates."¹⁶⁴

A quick glance at the policies of the Federal Bureau of Prisons also makes clear why the concurrences' proposed delineation may be problematic. The Federal Bureau of Prisons operates a wide array of facilities. The term "[a]dministrative facilities" alone, for example, encompasses "institutions with special missions, such as the detention of pretrial offenders; the treatment of inmates with serious or chronic medical problems; or the containment of extremely dangerous, violent, or escape-prone inmates."¹⁶⁵ Administrative facilities, therefore, include all of the following: "Metropolitan Correctional Centers (MCCs), Metropolitan Detention Centers (MDCs), Federal Detention Centers (FDCs), and Federal Medical Centers (FMCs), as well as the Federal Transfer Center (FTC), the Medical Center for Federal Prisoners (MCFP), and the Ad-

161. *Florence*, 132 S. Ct. at 1524 (Alito, J., concurring).

162. *Id.* at 1523 (plurality opinion).

163. Consider, for example, Rhode Island's "unified prison system," in which detainees awaiting a first court appearance were held at an "[i]ntake facility" which held the classification of a maximum-security prison. *Roberts v. Rhode Island*, 239 F.3d 107, 109 (1st Cir. 2001).

164. *Bell v. Wolfish*, 441 U.S. 520, 523-24 (1979). Albert Florence's own experience also blurs this line: he was first strip-searched in the "Burlington County jail," and then again upon his arrival at the "Essex County Correctional Facility"—the latter of which houses pretrial detainees as well as longer-term convicted inmates. *Florence*, 132 S. Ct. at 1514 (majority opinion). As such, the arguments presented during *Florence* oral arguments drew no distinction between jails and prisons for the purposes of applying the Fourth Amendment analysis. See generally Transcript of Oral Argument, *supra* note 9.

165. *Prison Types & General Information*, FED. BUREAU OF PRISONS, <http://www.bop.gov/locations/institutions/index.jsp> (last visited Feb. 24, 2013).

ministrative-Maximum (ADX) U.S. Penitentiary.”¹⁶⁶ All of these facilities, “except the ADX, are capable of holding inmates in all security categories.”¹⁶⁷

The arbitrary nature of the general population distinction also stands to affect a large number of arrestees. A recent study from the Department of Justice reports that, at the end of 2010, about 2,266,800 inmates were incarcerated “in local jails or in the custody of state or federal prisons.”¹⁶⁸ Of that total, approximately one in three was housed in a local jail.¹⁶⁹ That number includes, among others, “inmates under the age of 18 who were tried or awaiting trial as an adult.”¹⁷⁰ As such, while the concurrences offer some promise that protections may one day be afforded to individuals in *Atwater*’s circumstances, untangling the maze of institutions may be difficult. If one-third of all incarcerated individuals are doing time in local jails, that suggests that a huge number of arrestees in *Atwater*’s circumstances (who would be processed at these facilities) may still be subject to strip searches.

Finally, it is worth recalling that the concurrences are not law. Nor, given Justice Thomas’s abstention, is section IV of Justice Kennedy’s opinion, where the intersection with *Atwater* is first addressed. The result is that while the Court has intimated the possibility of future protections, none have yet been provided. If this wasn’t clear from the language of the opinions, it becomes so in the Court’s final prescription. As the majority noted, “[i]ndividual jurisdictions can of course choose ‘to impose more restrictive safeguards through statutes limiting warrantless arrests for minor offenders.’”¹⁷¹ That is, while the states are still free to provide further protections, the Court has not interpreted the Constitution to do so. Ironically, the Court’s citation for this final proposition is *Atwater* itself.¹⁷²

C. *The Risk of Abuse by Police Officials*

When combined with the expansive implications of *Atwater*, the blanket strip-search policies that were sanctioned in *Florence* could lead to real risks of abuse. In a functional respect, these holdings essentially create a new method of enforcing “street justice.” Police, armed with the knowledge that any arrest for any minor infraction would lead to a strip search, could put that leverage to use in a variety of manners. This argument is not intended as a sweeping indictment

166. *Id.* (emphases omitted).

167. *Id.*

168. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010, at 2 (2011), available at <http://www.bjs.gov/content/pub/pdf/cpus10.pdf>.

169. *Id.* at 3 tbl.1.

170. *Id.* at 3 tbl.1 n.d.

171. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1522 (2012) (quoting *Atwater v. City of Lago Vista*, 532 U.S. 318, 352 (2001)).

172. *See id.*

of police behavior; common sense suggests that the vast majority of officers making road stops have little interest in arresting traffic offenders. But the risks merit consideration. In function, the legal changes at issue have the potential to produce systemic results. Individuals are fallible, and if strip searches are allowed in instances where only a minor infraction has taken place, and where there is no suspicion of contraband, the discretion of the officer may be the only remaining protection that a traffic offender has at her disposal. What if Gail Atwater had been a member of an unpopular political group or an activist organization that routinely challenged local police? Or what if she had been a member of a community that was wary of police abuse, and therefore reticent to engage at all? Under the legal scheme envisioned, an officer could wait until some minor infraction has occurred, and then proceed with a chain of legal enforcements entirely within his or her discretion.

1. *Instances of abuse*

This analysis need not be speculative. The Supreme Court in *Atwater* noted concerns about the behavior of the very officer that was at issue before the Court. While “common sense says [Atwater] would almost certainly have buckled up as a condition of driving off with a citation,” the officer proceeded with the arrest regardless.¹⁷³ In the Court’s view, in fact, “the physical incidents of [Atwater’s] arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment. Atwater’s claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case.”¹⁷⁴ Further, the Court’s rendition of the facts attests to a degree of personal animosity between the officer and Atwater. In the opening salvo of Gail Atwater’s exchange with the officer, he purportedly “yell[ed] something to the effect of ‘[w]e’ve met before’ and ‘[y]ou’re going to jail.’”¹⁷⁵

173. *Atwater*, 532 U.S. at 346.

174. *Id.* at 346-47.

175. *Id.* at 324 (alterations in original). The backstory, as recounted in the petitioner’s brief, is that “several months previously Turek had stopped Atwater, apparently suspecting that her son was riding in the car without a seat belt, which turned out not to be the case.” Brief Amicus Curiae of the American Civil Liberties Union et al. in Support of Petitioners, *supra* note 30, 2000 WL 1341276, at *2. Moreover, Atwater does not appear to have been hostile during the encounter:

There is no evidence in this summary judgment record indicating in any way that Gail Atwater was sarcastic or belligerent, or that she challenged Officer Turek’s authority. Ms. Atwater was not under the influence of drugs or alcohol. She was not acting suspicious in any way, she did not pose any threat to Officer Turek, and she was not engaged in any illegal conduct in the officer’s view, other than her violation of the seat belt law, when he announced his intention to arrest her.

Brief of Petitioners, *Atwater*, 532 U.S. 318 (No. 99-1408), 2000 WL 1299527, at *3 (citation omitted).

The irony, of course, is that the Court's actions have done little to aid Atwater or similarly situated individuals in their endeavor to live "free of pointless indignity." A wide array of cases regarding strip searches feature similar instances of personal animosity between suspects and police officers. Judith Haney, for example, was arrested following a political protest in Miami in 2003.¹⁷⁶ Although she was arrested along with several hundred protestors, only the women arrestees were forced to undergo a strip search upon arrival at the jail.¹⁷⁷ As Haney later reported, her perception was that the strip search was about "humiliation and control, not about safety."¹⁷⁸ Haney's experience also hints at the potential for misuse: "The guard's next set of instructions were to squat and then to hop like a bunny. . . . I didn't do it to the guard's liking, so I had to do it over several times."¹⁷⁹

Although less explicit, we see a similar set of issues at play in *Florence*. As the majority noted, Florence was exposed to two different strip searches. During the second search, Florence recalled that he was "instructed to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals."¹⁸⁰ The Court admitted that it was "not clear whether this last step was part of the normal practice."¹⁸¹ One inference here is that the police may have exercised discretion to expose Florence to a more invasive strip search than was called for by protocol.¹⁸²

In some respects, implicit issues of abuse have long been a component of strip-search litigation. In an early case before the Eighth Circuit, *Jones v. Edwards*, the court explored whether Marlin Jones, having been arrested for refusing to sign a court summons, could be subjected to a strip search.¹⁸³ The offender, Jones, had repeatedly violated a local leash law (that is, he often failed to leash his dog appropriately). What might normally have warranted only a warning prompted the animal control official—and the police officer he called

176. *Haney v. Miami-Dade Cnty.*, Nos. 04-20516-CIV-JORDAN, 04-20516-CIV-BROWN, 2004 WL 2203481, at *2 (S.D. Fla. Aug. 24, 2004); *see also* Schlanger, *supra* note 42, at 67 (examining the participants in jail strip-search cases, including Judith Haney's case).

177. *See* Maria Sprow, *Strip Search Under Seizure: Class-Action Lawsuits Challenge Blanket Search Policies in Jails*, COUNTY MAG., Mar.-Apr. 2009, at 31, 31.

178. *Id.* (internal quotation mark omitted).

179. *Id.* (alteration in original) (internal quotation mark omitted).

180. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct 1510, 1514 (2012).

181. *Id.*

182. Florence also voiced concerns that his race was a factor in why he was initially stopped by the police. Denniston, *supra* note 7. This is a distinct matter from the issue of the strip searches (he does not claim that he was *searched* as a function of his race). But it provides further context for the arbitrary way in which such procedures can be carried out—and the potential for animus.

183. 770 F.2d 739, 740-42 (8th Cir. 1985).

in for support—to pursue more assertive methods.¹⁸⁴ The additional steps required to resolve the issue were no doubt frustrating for the police officer. The process involved numerous procedural hurdles: “The officers [a] consulted their superiors, [b] filled out their reports, and [c] presented the matter to the county attorney. The county attorney [d] reviewed the information, and . . . [e] presented an affidavit for an arrest warrant to the county judge, who [f] issued the warrant.”¹⁸⁵ Making matters worse, upon arrival at the jail, Jones displayed behavior that surely incited frustration: “On the way to and inside the jail, Jones became loud and abusive and, as his booking procedure progressed, he grew increasingly profane and waved his arms about.”¹⁸⁶ The officers at the jail facility ultimately ordered a strip search—a decision the court noted as highly unusual given the facts of the case.¹⁸⁷

Although the court’s decision in *Jones* focused largely on the Fourth Amendment balancing test, the case also illustrates the degree of discretion that may be involved in strip searches. The record in *Jones* makes clear that the arrestee was difficult and offensive. The officers had every right to be frustrated with his behavior. But they did not have the right to order a strip search, as the court made clear in its final ruling.¹⁸⁸ “[S]ecurity,” the court held, “cannot justify the blanket deprivation of rights of the kind incurred here.”¹⁸⁹

This is the critical issue at stake in *Florence*. Regardless of what the actual motives of the officers in *Jones* may have been, it is not difficult to imagine a scenario in which an officer orders a strip search in retributive fashion. In *Jones*, the court—and the Constitution—provided the final protective barrier. Now that the Supreme Court has removed that barrier in *Florence*, officer discretion appears to be the only thing remaining to take its place.

184. It is important to keep in mind, however, that this instance is distinct from Atwater’s. Jones was arrested based on his refusal to sign a court summons, not based on the more minor dog-leash transgression. *Id.* at 741.

185. *Id.* at 740.

186. *Id.*

187. *See id.* at 741-42 (“Moreover, although the record suggests that Jones was uncooperative with officers, he was not charged with resisting arrest or with any sort of public misconduct which might justify a more intrusive search. We also note that neither the officers nor the jailers attempted a less intrusive pat-down search, which would have detected the proscribed items they sought without infringing Jones’s constitutional protections.”).

188. *Id.* at 742 (“Although we recognize that the security of detention facilities is an important concern of correction officials who are, in part, responsible for the safety of their charges, we also recognize that security cannot justify the blanket deprivation of rights of the kind incurred here. Accordingly, we find that the district court erred in failing to grant Jones’s motion for judgment notwithstanding the verdict, and we remand for determination of the proper damages to remedy this constitutional deprivation.” (footnote omitted)).

189. *Id.*

2. *Application in contemporary context*

These new police powers have surfaced at a time of increasing tension. Protests on either side of the political aisle are often rife with the kind of minor infractions that may warrant arrest under *Atwater*. In the case of Judith Haney, mentioned earlier, hundreds of protestors were arrested on misdemeanor charges for simply “fail[ing] to follow police orders to disperse.”¹⁹⁰ Because citizens almost always have a statutory responsibility to obey police directives,¹⁹¹ the line between legal activity and minor illegal infractions is especially thin in such instances. Recent events have made clear how quickly an otherwise peaceful sit-in on a university campus can result in pepper spray.¹⁹² Moreover, while protestors who purposefully “risk arrest” may have a greater tolerance for the invasions of personal privacy that follow, many others are likely to be unaware of the risks. Would a protestor be less likely to attend a rally if it included not only the risk of arrest, but also the possibility that he or she may finish the day standing naked before police officers? Although they lie beyond the scope of this Note, such considerations also highlight implications for further First Amendment analysis.

D. *The Rising Spectre of Justice Stevens’s Dissent in Bell*

With the emergence of practical concerns regarding police abuse also comes a renewed doctrinal concern. Recall that in *Bell* Justice Stevens anchored his dissent on the notion that suspicionless strip searches constitute a form of unjustifiable punishment. Not punishment that strayed beyond the confines of the Eighth Amendment, but punishment that nevertheless violated an individual’s due process right to “not be punished prior to an adjudication of guilt in accordance with due process of law.”¹⁹³ In defense of that argument, Justice Stevens admitted that “[i]t is not always easy to determine whether a particular restraint serves the legitimate, regulatory goal of ensuring a detainee’s presence at trial and his safety and security in the meantime, or the unlaw-

190. Sprow, *supra* note 177, at 31; *see also* Haney v. Miami-Dade Cnty., Nos. 04-20516-CIV-JORDAN, 04-20516-CIV-BROWN, 2004 WL 2203481, at *2 (S.D. Fla. Aug. 24, 2004).

191. Most of these regulations are promulgated at the state level. They usually proscribe some variation of obstructing a police officer by refusing to obey a lawful order. *See, e.g.*, MD. CODE ANN., CRIM. LAW § 10-201 (LexisNexis 2012) (making it a crime to “willfully fail to obey a reasonable and lawful order that a law enforcement officer makes to prevent a disturbance to the public peace”); N.C. GEN. STAT. § 14-288.5 (2012) (making it a crime to “fail[] to comply with a lawful command to disperse”); OR. REV. STAT. § 162.247 (2011) (making it a crime to “interfer[e] with a peace officer” by “refus[ing] to obey a lawful order”).

192. *See* Kevin Fagan, *UC Davis Protesters Confront Chancellor*, S.F. CHRON. (Nov. 22, 2011), <http://www.sfgate.com/bayarea/article/UC-Davis-protesters-confront-chancellor-2290069.php>.

193. *Bell v. Wolfish*, 441 U.S. 520, 580 (1979) (Stevens, J., dissenting).

ful end of punishment.”¹⁹⁴ But he nevertheless declared that “courts have performed that task in the past, and can and should continue to perform it in the future.”¹⁹⁵ The majority in *Bell* disagreed, noting simply that there had been no credible suggestion that the “restrictions and practices were employed by [prison] officials with an *intent* to punish the pretrial detainees housed there.”¹⁹⁶

In light of *Atwater*, Justice Stevens’s dissent has renewed salience. In circumstances where an individual is alleged to have committed a crime of some severity—and one that bears some relation to contraband—it may be possible to perceive of a strip search as a largely procedural tool. But in the context of individuals that have committed only minor infractions, the punitive aspects loom much larger. For most, the prospect of receiving a fine after a traffic offense is trivial in comparison to being strip-searched, and yet the current legal regime reverses these classifications. The fine is punishment; the strip search is procedure. In this respect, Justice Stevens’s conceptualization of what a strip search entails is far closer to the ground-level reality than that depicted by the majority in *Bell*. As Justice Stevens noted of the correctional facility’s policies in *Bell*:

The challenged practices . . . deprive detainees of fundamental rights and privileges of citizenship beyond simply the right to leave. . . . The withdrawal of rights is itself among the most basic punishments that society can exact, for such a withdrawal qualifies the subject’s citizenship and violates his dignity. Without question that kind of harm is an “affirmative disability” that “has historically been regarded as a punishment.”¹⁹⁷

In light of the concerns raised in *Atwater*, and given the expansion in suspicionless strip-search policies, it is useful to consider what the *Bell* Court’s analysis might look like in a contemporary context. The above concerns regarding police encroachment and the risk of abuse suggest that Stevens’s dissent may have garnered greater traction. In many instances, the only utility to be gained by subjecting an individual to a strip search is humiliation and retributive satisfaction—both of which clearly constitute punishments. A police officer may know that the arrest has no likelihood of increasing safety through either deterrence or incapacitation, and likewise, he or she may also know that the chance of finding contraband is essentially zero. Nevertheless, the officer may proceed legally, provided that he or she is careful not to display objective indicia of an intent to punish.

The vast majority of police officers are unlikely to proceed in this manner, opting instead to act as responsible stewards in exercising their powers. But for some, we need look no further than the cases featured herein. If, after subjecting Gail Atwater to a strip search, the officer in *Atwater* was still found to have

194. *Id.* at 584.

195. *Id.*

196. *Id.* at 561 (majority opinion) (emphasis added).

197. *Id.* at 589-90 (Stevens, J., dissenting) (footnote omitted).

behaved legally (as he almost certainly would be), proving some form of culpable intent would be an onerous hurdle.

CONCLUSION

The Supreme Court's ruling in *Florence* changes the balance that was once an explicit part of Fourth Amendment doctrine. It also leaves arrestees with a circumscribed set of constitutional protections. While deterrence once featured as a fundamental consideration in the Court's jurisprudence on blanket search policies, that consideration is largely absent in *Florence*. This, coupled with an expansive interpretation of the majority opinion in *Bell*, has produced an unnecessary departure from *Bell*'s originally narrow holding.

The Court also leaves unresolved a troubling set of issues. The concurrences hint at the possibility of additional protections for arrestees fortunate enough to avoid facilities with a general jail population. But the concurrences are not law. Even if they were, they provide only the possibility of future assistance—nothing yet concrete.

Like many issues of Fourth Amendment law, these developments pose real day-to-day risks. The Court's rulings in *Atwater* and *Florence* have left the public with fewer protective buffers. Moreover, given the punitive functions they may serve, strip searches may become an unwieldy tool. As the likelihood of arrest for a minor infraction has increased, so too has the range of disciplinary leverage at an officer's disposal. Given the risks, the Court has more reason than ever to revert back to safer territory.