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Judges as Jailers: The Dangerous Disconnect Between Courts and Corrections

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JUDGES AS JAILERS: THE DANGEROUS DISCONNECT BETWEEN COURTS AND CORRECTIONS

By: Christopher P. Keleher¹

I. INTRODUCTION

Picture a town inhabited only by convicts. The town’s police force is unarmed, patrols on foot, and is outnumbered 50 to 1. This is not the backdrop of a post-apocalyptic dystopian film. Rather, it is a correctional officer’s daily reality. Correctional facilities house throngs of criminally prone, gang-affiliated individuals in close quarters. This setting has thus been described as “a world of violence,”² “a walled battlefield,”³ and “Hobbesian.”⁴ And it is this environment correctional officers must pacify. If they fail, their lives, and those of fellow officers, inmates, and correctional staff are imperiled.

The already arduous task facing correctional officers is exacerbated by contraband. Contraband includes transparently troublesome things like drugs and weapons but also inherently innocuous items like paper clips and currency. Uncovering contraband during the correctional intake process is a task of Sisyphean proportions because officers must be omniscient, whereas a smuggler need only be successful once. Additionally, the rewards for getting contraband into a jail are immediate and personal while the benefits of uncovering it are long term and abstract. Finally, smugglers defy profiling. Some are forced—weaker individuals used as pawns. Some are ordered—gang members following instructions. Some are hooked—drug addicts. These

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² MATTHEW SILBERMAN, A WORLD OF VIOLENCE 2 (1995) (describing the prison as a “world of violence in which weakness is shunned and strength is worshipped”).
dynamics, the deadly consequences of contraband, and the fact that the anal cavity is often used to
smuggle, necessitate strip searches when arrestees enter a correctional facility.

If the realities of the correctional intake process are not problematic enough, legal challenges to
strip searches have made it even harder to stop contraband. Lawsuits alleging constitutional
violations have forced correctional officials to reduce the scope of intake searches or scrap
them altogether. Such suits have revolved around the poles of privacy and security, and privacy
has been winning thoroughly. While privacy is a worthwhile goal, three points must be
remembered. First, the traditional notion of privacy is inapplicable in the correctional context.
Second, correctional officials have a legal duty to protect inmates. Third, the unintended but
certainly foreseeable consequence of elevating privacy is increased contraband. Courts have not
recognized the realities of contraband—who carries it, how they carry it, why they carry it. Also
evaded are the murders, rape, and drug abuse contraband spawns. Thus, the irony that elevating
inmate privacy endangers inmate lives goes unnoticed.

Increased contraband is not the only consequence of finding strip searches unconstitutional. The
financial impact of such suits is staggering. Payouts stemming from jury verdicts and settlements
include:

- Cook County, IL: $55 million
- New York, NY: $50 million
- Seminole County, FL: $34.8 million
- Los Angeles County, CA: $27 million
- San Bernardino County, CA: $25.5 million
- Sacramento County, CA: $15 million
- District of Columbia: $14 million
- Suffolk County, MA: $10 million
- Orleans Parish, LA: $9.375 million
- Santa Fe County, NM: $8.5 million
- Camden County, NJ: $7.5 million
- St. Croix, WI: $6.9 million
- Cook County, IL: $6.8 million
- Miami-Dade County, FL: $6.25 million
In a time of contracting municipal coffers, these sums are troubling. They dilute funding for education, healthcare, and law enforcement. And the economically disenfranchised who depend on social services suffer as lawyers pocket millions. If correctional search practices were barbaric, these multi-million dollar figures might be justified. But they are not. Instead, these awards have been secured thanks to a number of misconceptions, the most notable being that reasonable suspicion is needed to search. Since the 1980s, federal courts have repeatedly held that the Fourth Amendment forbids strip searching misdemeanant arrestees absent reasonable suspicion.\(^5\) Yet in the 1979 decision of *Bell v. Wolfish*, the Supreme Court held the exact opposite.\(^6\) Deviating from Supreme Court precedent is troubling. More so when it is the basis for bankruptcy-flirting municipalities to dispense millions.

The premise of this Article is simple. Judges have invalidated strip searches without understanding the underlying law or the consequences of their rulings. Worse, they have ignored or distorted Supreme Court precedent in the process. These are strong charges, but they can be demonstrated. Part II outlines the neglected law, specifically, the Supreme Court’s treatment of the Fourth Amendment in the correctional context.\(^7\) Part II then examines circuit court and

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\(^5\) See *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) (misdemeanors); *Stewart v. County of Lubbock*, 767 F.2d 153, 156-57 (5th Cir. 1985) (misdemeanors); *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984) (traffic violations and other minor offenses); *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984) (traffic violations); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1984) (misdemeanors); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981) (DWI).


\(^7\) See infra notes ____.
district court handling of correctional search policies.\footnote{See infra notes \_\_._} Lower courts have misconstrued Supreme Court precedent, most notably \textit{Bell v. Wolfish}, by mandating reasonable suspicion or a history of contraband for correctional strip searches.\footnote{\textit{Weber v. Dell}, 804 F.2d 796, 802 (2d Cir. 1986); \textit{Stewart v. County of Lubbock}, 767 F.2d 153, 156-57 (5th Cir. 1985); \textit{Giles v. Ackerman}, 746 F.2d 614, 617 (9th Cir. 1984); \textit{Mary Beth G. v. City of Chicago}, 723 F.2d 1263, 1272 (7th Cir. 1983).} However, three recent cases have debunked the myth that \textit{Bell} mandated reasonable suspicion, also finding this requirement estranged from correctional realities.\footnote{\textit{Powell v. Barrett}, 541 F.3d 1298 (11th Cir. 2008) \textit{(en banc)}, \textit{Bull v. San Francisco}, 595 F.3d 964 (9th Cir. 2010) \textit{(en banc)}, \textit{Florence v. Board of Chosen}, 621 F.3d 296 (3rd Cir. 2010).}

Correctional strip searching is a contentious issue given the equally worthy goals of privacy and security. As such, the state of the circuits is not a split but a chasm. Should the Supreme Court address this divergence, Part III suggests that the Court confirm the propriety of correctional strip searches.\footnote{See infra notes \_\_._} The Court should further reaffirm that while intrusive, such searches save lives and correctional deference necessitates them.

\section*{II. BACKGROUND}

The Fourth Amendment protects against unreasonable searches and seizures.\footnote{U.S. CONS. AMEND. IV.} This right encompasses, to varying degrees, one’s person, home, and vehicle.\footnote{\textit{See United States v. Martinez-Fuerte}, 428 U.S. 543, 554 (1976) (“The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.”).} But the dynamics change when one is admitted to a correctional facility.\footnote{This article will use the terms “corrections” or “institutional” to encompass jails and prisons, as the distinctions between jails and prisons are not relevant to this piece. Additionally, for a discussion pointing out that ‘jail’ and ‘prison’ are “all-but interchangeable,” \textit{see Shain}, 273 F.3d at 72 n.3 (Cabranees, J., dissenting).} Traditional Fourth Amendment protections are anathema in the correctional context because “privacy is the thing most surely extinguished by a judgment committing someone to prison.”\footnote{\textit{Johnson v. Phelan}, 69 F.3d 144, 146 (7th Cir. 1995).} As the Supreme Court explained, “the prisoner’s
expectation of privacy always [must] yield to what must be considered the paramount interest in institutional security.”

A. The Supreme Court Disavows the Notion of Institutional Privacy.


The starting point of any correctional privacy discussion is Bell v. Wolfish.17 A class action suit challenged numerous conditions of confinement at the Metropolitan Correctional Center (MCC) in New York City.18 The class averred deprivations of their statutory and constitutional rights based on overcrowding, length of confinement, improper searches, inadequate recreational opportunities, and restrictions on personal items.19 The district court agreed, enjoining over 20 MCC practices on constitutional and statutory grounds.20 The Second Circuit Court of Appeals largely affirmed, holding that under the Due Process Clause of the Fifth Amendment, arrestees may “be subjected to only those restrictions and privations which inhere in their confinement itself or which are justified by compelling necessities of jail administration.”21

At the heart of Bell was the MCC’s strip search policy.22 Everyone had 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.”23 It was a blanket policy encompassing felons,
misdemeanants, persons held in contempt, and even witness protection participants.\textsuperscript{24} The district court prohibited the searches unless there was probable cause to believe the person had contraband.\textsuperscript{25} The searches were “calculated to trigger, in the officer and inmate respectively, feelings of sadism, terror, and incipient masochism that no one alive could have failed to predict.”\textsuperscript{26} Because contraband was found only once as a result of the policy, “[t]hese affronts, repulsive in the most evident respects,” could not be justified.\textsuperscript{27} Highlighting the dearth of contraband, the Second Circuit affirmed.\textsuperscript{28} In its view, the “gross violation of personal privacy inherent in such a search cannot be outweighed by the government’s security interest in maintaining a practice of so little actual utility.”\textsuperscript{29}

The Supreme Court reversed, holding that correctional officers could strip search without probable cause if done reasonably.\textsuperscript{30} The reasonableness of a search was assessed by balancing “the need for the particular search against the invasion of personal rights that the search entails.”\textsuperscript{31} The Court considered four factors: the scope of the search, the manner in which it is conducted, the justification for searching, and the location.\textsuperscript{32} The “where” and “why” of the searches motivated \textit{Bell}. First, the MCC was a “unique place fraught with serious security dangers.”\textsuperscript{33} Second, the searches were designed to stop the smuggling of contraband which “is all too common an occurrence.”\textsuperscript{34} The Court recognized the lure of contraband and “inmate efforts

\begin{footnotesize}
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\item \textsuperscript{24} \textit{Id.} at 524.
\item \textsuperscript{25} 439 F. Supp. at 147-148.
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} \textit{Id.} at 148.
\item \textsuperscript{28} 573 F.2d at 131.
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} \textit{Bell}, 441 U.S. at 559-560.
\item \textsuperscript{31} \textit{Id.} at 559.
\item \textsuperscript{32} \textit{Id.}
\item \textsuperscript{33} \textit{Id.}
\item \textsuperscript{34} \textit{Id.}
\end{itemize}
\end{footnotesize}
to secrete these items into the facility by concealing them in body cavities . . . .”35 The paucity of contraband found during searches at the MCC was of no import. It was instead “a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates . . . .”36 This contrasted with the district court and Second Circuit, which made no mention of deterrence. And as post-Bell cases demonstrate, this omission would be repeated.

The Bell Court was also motivated by the “wide-ranging deference” afforded correctional administrators on security matters.37 Such deference has a structural basis in that “the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.”38 Deference precluded the class from carrying their “heavy burden” to show an exaggerated response to legitimate security considerations.39 The Court recognized less intrusive alternatives to strip searches existed.40 But it refused to consider whether metal detectors were less intrusive than strip searches.41 Such a query would “raise insuperable barriers to the exercise of virtually all search-and-seizure powers.”42 Regardless, in a footnote, the Court rejected metal detectors since strip searches were more effective.43

The issue was restated in closing: “whether visual body-cavity inspections as contemplated by the MCC rules can ever be conducted on less than probable cause.”44 The Court found they could, saying nothing about a level of cause required. The lack of reasonable suspicion was highlighted by Justice Powell’s three-sentence dissent which concluded, “some

35 Id.
36 Bell, 441 U.S. at 559.
38 Bell, 441 U.S. at 547.
39 Id. at 561-62.
40 Id. at 559-60.
41 Id. at 559, n. 40.
43 Bell, 441 U.S. at 559, n. 40. “Money, drugs, and other nonmetallic contraband still could easily be smuggled into the institution.” Id.
level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches described in this case.” 45 Thus, due to contraband, deterrence, and deference, strip searches conducted regardless of offense or reasonable suspicion were reasonable under the Fourth Amendment. 46

2. The Supreme Court Builds on Bell.

The Supreme Court has not addressed correctional search policies since Bell. However, it built on Bell in Hudson v. Palmer. 47 And once again, contraband was the focus. The plaintiff sued after an officer searched his cell, raising the question of whether an inmate had a reasonable expectation of privacy in his cell. 48 The Court held that the Fourth Amendment proscription against unreasonable searches did not apply in a cell. 49 Weighing institutional security against inmate privacy, the Court favored the former because privacy rights “cannot be reconciled with the concept of incarceration . . . .” 50 Underlying this determination was the incessant violence in correctional facilities, including suicides. 51 The dangers of contraband were also relevant. Correctional officials must be “ever alert to attempts to introduce drugs and other contraband into the premises which, we can judicially notice, is one of the most perplexing problems of prisons today.” 52 Echoing Bell, Hudson concluded that “loss of freedom of choice and privacy are inherent incidents of confinement.” 53

44 Id. at 560.
45 Id. at 563, (Powell, J., dissenting). Justice Powell’s dissent has been viewed only as a critique of the majority’s silence in failing to articulate a level of cause. See Deborah L. MacGregor, Stripped of All Reason? The Appropriate Standard for Evaluating Strip Searches of Arrestees and Pretrial Detainees in Correctional Facilities, 36 COLUM. J.L. & SOC. PROBS. 163, 172 (2003).
46 Id.
48 Id. at 522.
49 Id. at 526.
50 Id.
51 Id.
52 Id. at 527.
53 468 U.S. at 528, quoting Bell, 441 U.S. at 537.
The Supreme Court next invoked *Bell* in *Block v. Rutherford*. Pretrial detainees housed at the Los Angeles County Jail claimed a prohibition on contact visits was unconstitutional. The Court rejected this claim, citing contraband and correctional deference. Because *Bell* upheld strip searches after contact visits, the prohibition of contact visits “cannot be considered a more excessive response to the same security objectives . . . .” *Block* declined to apply the less intrusive alternative test. Given the “wide-ranging deference” to correctional officials in formulating security policies, the judiciary should not second-guess officials by considering less restrictive alternatives. Forbidding contact visits fostered security because correctional officials must ensure “no weapons or illicit drugs reach the detainees.” Finally, the detainees argued they did not merit the jails’ security concerns because they had not yet been convicted. The Court disagreed. It found the detainee—inmate distinction one without a difference because detainees did not pose a lesser security risk than convicted inmates. Furthermore, divining which detainees had propensities for drug smuggling would be impossible.

*Bell’s* holding was reiterated in *Turner v. Safley*. *Turner* involved the constitutionality of a regulation prohibiting inmate mail correspondence and a regulation prohibiting inmates from marrying. The Court upheld the former but struck the later. Citing *Bell*, *Turner* articulated a standard of review for prisoner constitutional claims deferential to correctional officials. “When a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it

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56 Id. at 585, n. 8, quoting *Bell*, 441 U.S. at 540.
57 468 U.S. at 588-89.
58 Id. at 587.
59 Id.
60 482 U.S. 78 (1987).
61 Id. at 89.
is reasonably related to legitimate penological interests.” The Court’s rationale was simple. Subjecting officials “to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.” Thus, a correctional regulation is reasonable if (1) there is a rational connection between it and a governmental interest; (2) accommodating inmates’ constitutional rights will infringe on the rights of officers or other inmates; and (3) there are no other methods to accommodate inmates’ rights at a minimal cost to penological interests. Applying this deferential standard, the Court upheld the correspondence regulation but struck the marriage restriction. The Court upheld the regulation of inmate mail because it prevented communications between gang members and communications about escape plans.

Finally, in O’Lone v. Estate of Shabazz, inmates argued prison regulations violated their First Amendment rights. Specifically, they asserted that policies prevented them from attending a congregational service in contravention of the Free Exercise Clause of the First Amendment. The Supreme Court disagreed. It cited Bell for the proposition that administrators are best situated to evaluate penological objectives since they “are actually charged with and trained in the running of the particular institution under examination.” Thus, although a First Amendment claim, the Court deferred to correctional officials.

Four points can be gleaned from Bell and its progeny. First, the emphasis on contraband. The Court recognizes that contraband leads to murder, rape, and drug abuse and must be kept

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65 Id.
66 Id. at 89-91.
67 Id. at 91.
68 Id. at 89-90
69 482 U.S. at 95.
70 Id. at 91-92.
72 Id.
73 Id. at 349 (quoting Bell, 441 U.S. at 562).
out. Second, correctional facilities are dangerous places demanding vigilance. Third, correctional security trumps inmate privacy because security is “perhaps the most legitimate of penological goals.” Fourth, the willingness to defer. As one court explained, *Bell* “emphasized what is the animating theme of the Court’s prison jurisprudence for the last 20 years: the requirement that judges respect hard choices made by prison administrators.” But many courts have shunned these positions by reading *Bell* narrowly or misreading it completely.

**B. The Erosion of Bell and Its Progeny.**

Lower courts have misread *Bell* in numerous ways. Requiring reasonable suspicion and consideration of an arrestee’s charges for a strip search when *Bell* required neither. Asserting the persons searched in *Bell* were serious offenders when the policy encompassed persons arrested for contempt and witness protection participants. Downplaying the “wide-ranging deference” to correctional officials emphasized in *Bell* and its progeny. Concocting criteria for the contraband found by defendant officials. Finally, ignoring the deterrence element of strip searches. The source of these flaws is simple: an interpretation of what judges want *Bell* to say, not what it does.

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75 *Johnson*, 69 F.3d at 145 (emphasis in original).

76 *Bell*, 441 U.S. at 524. But see *Wilson*, 251 F.3d at 1343 (“This court recognizes that “reasonable suspicion” is sufficient to justify the strip search of a pretrial detainee.”); *Swain*, 117 F.3d at 7 (. . . courts have concluded that, to be reasonable under *Wolfish*, strip and visual body cavity searches must be justified by at least a reasonable suspicion that the arrestee is concealing contraband or weapons . . . . This court has held that the reasonable suspicion standard is the appropriate one for justifying strip searches in other contexts.”); *Masters*, 872 F.2d at 1255 (“The decisions of all the federal courts of appeals that have considered the issue reached the same conclusion: a strip search of a person arrested for a traffic violation or other minor offense not normally associated with violence and concerning whom there is no individualized reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband, is unreasonable.”).

77 *Bell*, 441 U.S. at 524.

78 *Id.* at 547; *Block*, 468 U.S. at 585.
1. Circuit Court Decisions Misconstruing Bell.

Virtually every circuit court considering correctional strip searches has mandated reasonable suspicion, consideration of the detainee’s underlying charges, or a history of contraband. Examining every such decision would belabor the point. For that reason, the seminal Seventh Circuit case of Mary Beth G. v. Chicago is analyzed, along with three circuits adopting the logic of Mary Beth G.

a. Mary Beth G. v. Chicago.

The origin of Bell’s distortion is Mary Beth G. v. Chicago. A City of Chicago policy mandated the strip searching of female misdemeanants in police lockups. A group of women arrested for traffic offenses sued and the Seventh Circuit declared the policy unconstitutional. The court distinguished Bell because the particularized searches in that case were initiated under different circumstances, “namely, for those facing serious federal charges.” The Seventh Circuit further noted that “the detainees [in Bell] were awaiting trial on serious federal charges after having failed to make bond.” In contrast, the Mary Beth G. plaintiffs were “not inherently dangerous and . . . were being detained only briefly while awaiting bond.” Bell’s contraband concerns were inapplicable because “those dangers are [not] created by women minor offenders entering the lockups for short periods while awaiting bail.” This was bolstered by the paucity of

79 See Weber v. Dell, 804 F.2d 796, 802 (2d Cir. 1986) (misdemeanors); Stewart v. County of Lubbock, 767 F.2d 153, 156-57 (5th Cir. 1985) (misdemeanors); Giles v. Ackerman, 746 F.2d 614, 617 (9th Cir. 1984) (traffic violations and other minor offenses); Hill v. Bogans, 735 F.2d 391, 394 (10th Cir. 1984) (traffic violations); Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983) (misdemeanors); Logan v. Shealy, 660 F.2d 1007, 1013 (4th Cir. 1981) (DWI).
80 723 F.2d 1263 (7th Cir. 1983).
81 See infra notes and accompanying text.
82 723 F.2d 1263 (7th Cir. 1983).
83 Id. at 1264.
84 Id. at 1272.
85 Id.
86 Id.
87 Mary Beth G., 723 F.2d at 1273.
contraband recovered from female misdemeanants.\textsuperscript{88} As for Bell’s balancing test, the Seventh Circuit referenced it, but did not embrace it. Instead, the court cited Terry v. Ohio and Delaware v. Prouse.\textsuperscript{89} Relying on Terry v. Ohio, the Seventh Circuit articulated its own approach: “the more intrusive the search, the closer governmental authorities must come to demonstrating probable cause for believing that the search will uncover the objects for which the search is being conducted.”\textsuperscript{90} The court found the strip searches bore an insubstantial relationship to security needs.\textsuperscript{91} As such, strip searching misdemeanants required “reasonable suspicion by the authorities that either of the twin dangers of concealing weapons or contraband existed.”\textsuperscript{92}

The flaws of Mary Beth G. are pronounced. Its determination that those searched in Bell had “serious federal charges” is wrong.\textsuperscript{93} The blanket search policy in Bell included misdemeanants and witnesses in protective custody.\textsuperscript{94} Ignoring this fact enabled the Seventh Circuit to evade Bell and plot its own course. The court was concerned that some searches occurred in front of other arrestees and male officers.\textsuperscript{95} These troubling facts aside, Mary Beth G.’s selective reading of Bell is unfathomable. Worse, the Seventh Circuit questioned the search’s utility based on the minimal contraband found.\textsuperscript{96} This defied Bell, which had one instance of contraband.\textsuperscript{97} Finally, the court abandoned Bell’s reasonableness test, opting for standards annunciated in Terry v. Ohio and Delaware v. Prouse.\textsuperscript{98} Terry considered whether police could stop and search a suspect on the street if there was reasonable suspicion to believe

\begin{itemize}
\item \textsuperscript{88} Id.
\item \textsuperscript{89} Id., citing Terry v. Ohio, 392 U.S. 1, 18 n. 15 (1968) and Delaware v. Prouse, 440 U.S. 648, 654 (1979).
\item \textsuperscript{90} Mary Beth G., 723 F.2d at 1273, citing Terry v. Ohio, 392 U.S. 1, 18 n. 15 (1968).
\item \textsuperscript{91} Mary Beth G., 723 F.2d at 1273.
\item \textsuperscript{92} Id.
\item \textsuperscript{93} Id. at 1272.
\item \textsuperscript{94} Bell, 441 U.S. at 524.
\item \textsuperscript{95} Mary Beth G., 723 F.2d at 1275.
\item \textsuperscript{96} Id. at 1273.
\item \textsuperscript{97} Bell, 441 U.S. at 558.
\item \textsuperscript{98} Mary Beth G., 723 F.2d at 1273.
\end{itemize}
the person engaged in criminal activity.\textsuperscript{99} While less than an arrest, a Terry stop involves police compulsion to the extent that a reasonable person would not feel free to ignore the police request.\textsuperscript{100} Prouse involved an officer stopping vehicles to check drivers’ license and registration.\textsuperscript{101} Thus, Mary Beth G. disregarded the unique nature of correctional facilities—thousands of inmates in close quarters—by transplanting the tests of Terry and Prouse. Moreover, detainees entering correctional facilities are not searched for the possibility of wrongdoing. They already have been found to have engaged in criminal activity. This point is embodied by Bell, which did not rely on Terry or Prouse and required no level of suspicion to search.\textsuperscript{102} The Seventh Circuit thus had no basis to supplant the Bell correctional test with the street test of Terry and Prouse.

If Mary Beth G. was an aberration, its holding could be downplayed. But its effect has been far-reaching. As one commentator explains, Mary Beth G. “merely opened the floodgates for other courts to adopt the reasonable suspicion standard without first discussing whether the holding in Bell directly controls.”\textsuperscript{103} Relying on Mary Beth G. to invalidate strip searches, later courts overlooked the Seventh Circuit’s misreading of Bell and perpetuated its myth that reasonable suspicion and consideration of an arrestee’s charges are necessary. Furthermore, Mary Beth G. is factually distinguishable from the typical correctional search case. The search in Mary Beth G. applied to female traffic offenders at city lockups, not detainees booked into the general population of a large, gang-infested jail. And unlike the smattering of contraband in Mary Beth G.’s city lockup, contraband is endemic in most jails. Finally, the correctional

\textsuperscript{99} Terry v. Ohio, 392 U.S. at 18.
\textsuperscript{100} Id.
\textsuperscript{101} Delaware v. Prouse, 440 U.S. at 654.
\textsuperscript{102} Bell, 441 U.S. at 560.
\textsuperscript{103} Andrew A. Crampton, Stripped of Justification: The Eleventh Circuit’s Abolition of the Reasonable Suspicion Requirement For Booking Strip Searches in Prisons, 57 CLEV. ST. L. REV. 893 (2010).
violence fostered by contraband distinguishes *Mary Beth G*. Because the Seventh Circuit’s analysis of *Bell* is mistaken, *Mary Beth G.* rests on a frail foundation, and any reliance on *Mary Beth G.* renders those decisions suspect.

b. The Legacy of *Mary Beth G.*

*Mary Beth G.* was only three years old when the Second Circuit invoked it in *Weber v. Dell*. *Weber* considered the constitutionality of strip searching all persons booked into a jail. The district court found reasonable suspicion was not needed, citing *Bell* and *Block v. Rutherford*. Per *Bell* and *Block*, “a district court should not substitute its view on the proper administration of a jail” for that of the correctional officials. The Second Circuit rejected the district court’s reading, citing *Mary Beth G.* “An examination of cases from other circuits supports our view that *Block* and *Wolfish* do not suggest, much less require, the result reached here.” Thus, the Fourth Amendment precluded correctional officials from strip searching arrestees charged with minor offenses unless they have reasonable suspicion.

The Second Circuit again considered misdemeanor strip searches in *Walsh v. Franco*. The defendants argued that searching all arrestees was constitutional because misdemeanants lived with the jail’s general population. The Second Circuit, like the district court, rejected this argument because the risk of a misdemeanor introducing contraband into the general population

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104 See *Holly v. Woolfold*, 415 F.3d 678, 679 (7th Cir. 2005) (describing “the dangerous general-population area” of the Cook County Jail and citing reports of stabbings and murders in the Cook County Jail).
106 Id.
108 Id. at 258.
109 *Weber*, 804 F.2d at 800.
110 Id. at 801.
111 Id.
112 849 F.2d 66, 67 (2d Cir. 1988).
113 Id. at 68.
did not warrant strip searching all detainees.\textsuperscript{114} Finally, the Second Circuit reiterated its position in \textit{Shain v. Ellison}.\textsuperscript{115} At issue was the Nassau County Correctional Center’s policy of strip searching all detainees at intake.\textsuperscript{116} The policy fell because reasonable suspicion, derived from the crime charged, the characteristics of the detainee, and the circumstances of the arrest, was needed.\textsuperscript{117}

In addition to the Second Circuit, \textit{Mary Beth G.} also featured prominently in the First Circuit. In \textit{Swain v. Spinney}, the plaintiff was strip searched at a police station.\textsuperscript{118} The district court held the search was compatible with the Fourth Amendment.\textsuperscript{119} The First Circuit reversed, citing \textit{Bell}’s “explicit recognition of the invasiveness of strip and visual body cavity searches.”\textsuperscript{120} Pointing to \textit{Mary Beth G.}, it also noted that “to be reasonable under \textit{Bell}, strip searches must be justified by at least a reasonable suspicion.”\textsuperscript{121} \textit{Swain} would be invoked in another First Circuit decision, \textit{Roberts v. Rhode Island}, along with \textit{Mary Beth G.}, cited four times.\textsuperscript{122} In \textit{Roberts}, the district court held that correctional officers must have reasonable suspicion before strip searching.\textsuperscript{123} The First Circuit affirmed, its reasoning fourfold.\textsuperscript{124} First, reasonable suspicion was required, per \textit{Mary Beth G.}.\textsuperscript{125} Second, the searches violated personal privacy.\textsuperscript{126} Third, the

\begin{itemize}
\item \textsuperscript{114} Id. at 69-70.
\item \textsuperscript{116} 273 F.3d at 61.
\item \textsuperscript{117} Id. at 63 (citing \textit{Weber v. Dell}, 804 F.2d 796, 802 (2d Cir. 1986). \textit{See also Walsh v. Franco}, 849 F.2d 66 (2d Cir.1986). \textit{Walsh} reaffirmed the \textit{Weber} holding, \textit{see Walsh}, 849 F.2d at 68-69, and \textit{Wachtler v. County of Herkimer}, 35 F.3d 77 (2d Cir.1994), assumed \textit{Weber}’s applicability to the post-arraignment strip search of a person charged only with a misdemeanor. \textit{Wachtler}, 35 F.3d at 81-82.
\item \textsuperscript{118} Id. at 112.
\item \textsuperscript{119} Id. at 2.
\item \textsuperscript{120} Id. at 7, quoting \textit{Bell}, 441 U.S. at 558.
\item \textsuperscript{121} Id. at 112.
\item \textsuperscript{122} \textit{Roberts v. Rhode Island}, 239 F.3d 107 (1st Cir. 2001).
\item \textsuperscript{123} \textit{Roberts v. Rhode Island}, No. 99-259ML, slip op. at 13-17 (D.R.I. March 16, 2000).
\item \textsuperscript{124} Id. at 111-112.
\item \textsuperscript{125} Id. at 111.
\item \textsuperscript{126} Id. at 111.
\end{itemize}
searches uncovered little contraband, again citing *Mary Beth G.* 127 Fourth, searching a person’s clothes for contraband was less intrusive than strip searching. 128

The First and Second Circuit decisions underscore the impact of *Mary Beth G.*; it was the faulty foundation on which over twenty years of precedent would be built. The First and Second Circuits effectively replaced *Bell* with *Mary Beth G.* as the authority on correctional searches. 129 In doing so, they abdicated their duty to analyze whether *Bell* controlled. Without *Mary Beth G.*, these courts might have recognized that *Bell* did not mandate reasonable suspicion. Indeed, if witness protection participants could be strip searched, so could misdemeanants. But the First and Second Circuits evaded this reality. They also found contraband less likely to be smuggled during the intake process and that deterrence was diminished at intake because arrests often occur without notice. 130 But such rhetoric does not reflect reality. Correctional officials do not know where arrestees came from, whether they had access to contraband, or how long they were detained. These unknowns eviscerate the notion that arrestees are immediately entering the facility fresh from an unanticipated arrest.

A final example of *Mary Beth G.*’s impact is the Ninth Circuit. In *Giles v. Ackerman*, the Ninth Circuit examined a jail policy requiring the strip searching of all persons booked into the jail on minor traffic offenses. 131 Like the Seventh Circuit, the Ninth Circuit misread *Bell*: “[t]he inmates in *Bell* were charged with offenses more serious than minor traffic violations, and they were therefore detained for substantial pretrial periods.” 132 This error enabled the Ninth Circuit to elude the reasoning of *Bell* and rely on *Mary Beth G.* *Giles* further found, in direct

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127 *Id.* at 112.
128 *Id.*
129 *See Roberts*, 239 F.3d at 111-112; *Shain*, 273 F.3d at 64.
130 *See Roberts*, 239 F.3d at 111; *Shain*, 273 F.3d at 64.
131 746 F.2d 614, 615 (9th Cir. 1984).
132 *Id.* at 617.
contravention of Bell, that the correctional officials did not establish their security interests because “only eleven persons had concealed anything that warranted a report ….” Relying on Mary Beth G, Giles required reasonable suspicion.

The Ninth Circuit would reaffirm its reliance on Mary Beth G. in Thompson v. City of Los Angeles. While Thompson ultimately upheld the challenged search, the Ninth Circuit determined the reasonableness of a search “hinges upon the nature of the grand theft auto offense” with which the plaintiff was charged. Thompson would be undercut by Kennedy v. Los Angeles Police Dep’t. Although the Ninth Circuit did not cite Mary Beth G., Kennedy departed even further from Bell. A City of Los Angeles policy required all felony arrestees to be strip searched at intake. Plaintiffs sued because those charged with misdemeanors were searched only upon reasonable suspicion. The Ninth Circuit concluded that a felony arrest did not alter the level of cause required. The felony-misdemeanor dichotomy did not preserve security because it indicated little about the likelihood of an arrestee concealing contraband. While a felony charge “might inform the presence of suspicion … it does not inform the level of suspicion required.” Finding no evidence that felons smuggled contraband more often than misdemeanants, the Ninth Circuit chastised the search process as “a ham-handed approach to policy making” resting on assumptions and societal judgments.

Kennedy never discussed the individuals searched in Bell. This is not surprising, for the fact that minor offenders and witness protection participants in Bell could be strip searched

133 Id.
134 Id., citing Mary Beth G., 723 F.2d at 1273.
135 885 F.2d 1439 (9th Cir. 1989).
136 Id. at 1447.
138 901 F.2d at 716.
139 Id. at 716.
140 Id. at 714.
141 Id. at 716 (emphasis in original).
eviscerates Kennedy’s logic. Moreover, Bell’s holding was misconstrued. The Ninth Circuit concluded that Bell did not specify “a level of cause against which the constitutionality of the particular searches were to be tested.”\(^{143}\) This logic is difficult to comprehend. Bell specified no “level of cause” because it required none, as evinced by Justice Powell’s dissent.\(^{144}\) The blanket search policy in Bell mandated everyone be searched regardless of reasonable suspicion.\(^{145}\) Thus, the felon-misdemeanant distinction was irrelevant to the Supreme Court. Additionally, Bell demanded that “wide-ranging deference” be the central consideration.\(^{146}\) Kennedy addressed deference before evaluating reasonableness, merely recognizing that deference is a threshold consideration preventing “delicate balancing.”\(^{147}\) But excising deference from the balancing of interests irreparably altered the test.

2. District Court Decisions Misreading Bell.

Many district courts have mandated reasonable suspicion or consideration of an arrestee’s charges for strip searching. In lieu of discussing every district court decision invalidating correctional search policies, one district court’s handling of the issue, the Northern District of Illinois, is examined. This jurisdiction is not selected at random; it has the largest strip search class action in the country—a class of over 200,000 people and a settlement of $55 million in Young v. Cook County.\(^{148}\) And bound by Mary Beth G., Northern District of Illinois decisions are the direct progeny of the Seventh Circuit’s ill-conceived decision.

\(^{142}\) Id. at 713.
\(^{143}\) Id. at 715.
\(^{144}\) Bell, 441 U.S. at 560 (Powell, J., dissenting).
\(^{145}\) Id.
\(^{146}\) Id. at 547.
\(^{147}\) 901 F.2d at 712.
\(^{148}\) Young v. Cook County, 616 F.Supp. 2d 834 (N.D. Ill. 2009).
a. The Road to Young.

Young warrants particular scrutiny because the summary judgment decision engendering the $55 million settlement defies Bell. But before delving into Young, a brief background is necessary. Young was not the first strip search case emanating from the Cook County Jail (CCJ). The CCJ has been a fertile and lucrative source of strip search litigation. But the CCJ is also a dangerous place, amplifying the dangers of contraband. Brawls, stabbings, and rape are routine.149 Even the Seventh Circuit has decried the dangers of the CCJ’s general population.150

In Thompson v. Cook County, the plaintiff alleged CCJ officials violated his Fourth and Fourteenth Amendment rights by strip searching him.151 A jury found for the officials, but the district court ordered a new trial.152 In arguing against a new trial, the officials claimed there was reasonable suspicion that the plaintiff was carrying contraband because detainees had been squatting near each other and conversing.153 The district court disagreed, noting that per Mary Beth G., “non-specific testimony, even in combination with the specific testimony, did not create a reasonable suspicion that minor offenders were concealing contraband.”154 Citing Terry v. Ohio, the district court demanded “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant an intrusion.”155 Finally, the officials’ decision to intermingle misdemeanants and felons was of no import because it would provide “a basis for blanket strip searches of detainees irrespective of the presence of individualized

149 11 guards, 7 inmates injured in jail fight Chicago Tribune May 14, 2008 Wednesday. Metro; Zone N; Pg. 3; 6 Cook jail inmates injured in brawl Chicago Tribune December 30, 2007 Sunday. Metro; Zone C; Pg. 3; 3 inmates stabbed in County Jail fight Chicago Tribune May 29, 2008 Thursday. Metro; Zone C; Pg. 3.
150 See Holly v. Woolfold, 415 F.3d 678, 679 (7th Cir. 2005) (describing “the dangerous general-population area” of the Cook County Jail and citing reports of stabbings and murders in the Cook County Jail).
152 Id.
153 Id.
reasonable suspicion."156 Ironically, that was the exact scenario of *Bell.*157 *Thompson* was not retried as the matter was settled.

Following *Thompson* was *Gary v. Sheahan.*158 A class action challenged the CCJ’s policy of strip searching every female inmate returning from court, including those for whom a court had ordered released.159 The district court found an Equal Protection Clause violation because male inmates were not always strip searched upon returning from court.160 *Mary Beth G.* was relied on to conclude that such a policy violates “constitutional standards, where no substantial relation between the disparity of treatment and an important state purpose is shown.”161 The policy also violated the Fourth Amendment. Applying *Bell’s* balancing test, the district court determined that since there was no basis for the plaintiffs’ detentions, their privacy interests were greater than those of pretrial detainees.162 Additionally, officials must have “a reasonable suspicion that the class member is carrying a weapon or contraband.”163 *Gary* was not appealed as the matter was later settled.

The policy litigated in *Gary,* but as applied to males, was the focus of *Bullock v. Sheahan.*164 The *Bullock* class alleged its constitutional rights were violated when detainees were strip searched upon returning to the CCJ after a court ordered their discharge.165 In denying the defendants’ motion for summary judgment, the district court cited *Mary Beth G.* in finding a Fourth Amendment violation. “The more intrusive the search, the closer the governmental

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156 428 F. Supp. 2d at 815.
157 *Bell,* 441 U.S. at 524.
159 Id.
160 Id.
163 Id.
165 Id.
authorities must come to demonstrating probable cause for believing that the search will uncover the objects for which the search is being conducted.”  

Quoting Mary Beth G., the court also found the intrusion “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, and signify degradation and submission.”  

Finally, the defendants’ argument that contraband justified the strip search was insufficient since only one class member had contraband.  

* Bullock* would later be settled as part of the Young settlement.

**b. Young: An Anatomy in Precedent Evasion.**

Young was the culmination of Gary, Bullock, and Thompson. These three decisions featured prominently as Bell was pushed to the periphery. The Young plaintiffs, a class of over 200,000 persons, challenged the CCJ’s intake process, whereby strip searches were conducted without regard to an individual’s charges or reasonable suspicion.  

However, unlike most correctional facilities, any detainee entering the CCJ had to undergo a probable cause hearing pursuant to *Gerstein v. Pugh* before the CCJ would accept them.  

Both parties moved for summary judgment.  

While the district court denied both motions, its denial of the defendants’ motion is the focus.

To prove the intake searches secured the CCJ, defendants submitted over 2,000 pages of contraband reports detailing the contraband found at the CCJ.  

These reports should have been the basis for a finding of reasonableness. But the district court dismissed the reports on multiple grounds. First, most reports “appear to deal with contraband that is not inherently dangerous,

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166 Id. (citing Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1273 (7th Cir. 1983)).
167 Bullock v. Cook County, 568 F. Supp. 2d 965, 975 (N.D. Ill. 2008) (citing Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983)).
168 568 F. Supp. 2d at 975.
169 Young v. Sheriff of Cook County, 616 F.Supp. 2d 834, 837 (N.D. Ill. 2009).
170 Id. at 849. See Gerstein v. Pugh, 420 U.S. 103 (1975) (probable cause determination may be made by a judicial officer without an adversary hearing).
171 616 F.Supp. 2d at 837.
172 Id. at 838.
such as money.” Second, the reports provided no “basis to support [defendants’] contention that these events occur ‘routinely.’” Third, the reports did not specify if class members were involved. Fourth, the reports did not indicate whether the contraband was discovered because of a strip search or found in a detainee’s clothing or surrendered. For these reasons, the contraband reports were insufficient “as a matter of law” to justify the strip searches.

With the search’s raison d’être gutted, defendants’ downfall was inevitable. Using Mary Beth G. as cover, Young distinguished Bell because unlike planned contact visits, the plaintiffs did not know they would be arrested. “The unexpected nature of the detainees’ arrest also undermines any deterrence argument, contrary to the situation with the plaintiffs in Bell, who could have used scheduled contact visits as an opportunity to attempt to smuggle contraband.” Intermingling with the general population was also not enough to justify strip searches. With correctional deference in abeyance, the court questioned why the CCJ searched “all detainees charged only with misdemeanors without giving those detainees the option to remain outside of the jail’s general population.” Putting the onus on defendants, the court was unimpressed with their rationale for “why a finding of probable cause that an individual has committed a misdemeanor unrelated to drugs or weapons provides any basis for conducting a highly intrusive strip or body cavity search of that detainee.” Young thus concluded that a detainee held on a non-weapon or drug misdemeanor charge may not be strip searched without reasonable

173 Id.
174 Id.
175 Id. at 847.
176 Id.
177 Young, 616 F. Supp. 2d at 848, citing Roberts, 239 F.3d at 112 (“The lack of specific instances where a body cavity search was necessary to discover contraband supports a finding that the policy of searching all inmates is an unreasonable one.”); Calvin, 405 F. Supp. 2d at 944.
178 Young, 616 F. Supp. 2d at 848.
179 Id.
180 Id.
181 Id. at 849.
suspicion. Pointing to *Mary Beth G.*, “courts have generally required jail officials to have either individualized suspicion or suspicion arising from the nature of the charged offense before conducting a strip search of a detainee charged with a misdemeanor that does not involve drugs or weapons.”\(^{182}\) After the plaintiffs prevailed in liability and damages trials, *Young* would settle for $55 million.

While *Young’s* settlement award was unprecedented, it would not have been possible without *Mary Beth G.* In evading *Bell*, *Young* took the path forged by *Mary Beth G.*, legitimized by courts such as the First, Second, and Ninth Circuits, and traveled by *Gary, Bullock*, and *Thompson*. Nevertheless, *Young’s* disregard for *Bell* was unparalleled as deference, deterrence, and contraband were either ignored or treated as an afterthought. Thus, *Young* and *Bell* are not merely irreconcilable, they are unrecognizable. For while *Bell* found one instance of contraband supported strip searches, *Young* found 2,000 pages of contraband reports did not. While witness protection participants in *Bell* could be searched, misdemeanor detainees who had undergone a probable cause hearing in *Young* could not. And while “wide-ranging deference” in *Bell* supported the search policy, the CCJ officials’ inability to prove the need for intake searches was their downfall. The juxtaposition of *Young* and *Bell* is not merely academic: taxpayers footed the $55 million bill. And if *Young’s* script was followed in every correctional search suit, taxpayer-funded windfalls would be a *fait accompli*.

3. **Summation.**

Reasonable minds will differ about strip searches. But the selective reading of *Bell* is difficult to defend. The circumvention of *Bell* was a sharp blow to the principle of precedent. The issue is whether a policy that combats contraband by strip searching every arrestee is reasonable.

\(^{182}\) *Id.* at 847, citing *Shain*, 273 F.3d at 63; *Roberts*, 239 F.3d at 112 (requiring “a reasonable suspicion that the
The Supreme Court says yes. The above cases thus ignore *Bell* and the consequences of contraband.

C. **Restoring *Bell v. Wolfish*.**

By 2008, *Bell* was gutted. Municipalities relying on *Bell* to defend blanket strip searches paid heavily—over $300 million. The futility of defending such policies was conceded by the American Jail Association. It published *Jail and Prison Legal Issues: An Administrator’s Guide*, which summarized the harsh reality:

> Despite the huge weight of authority regarding arrestee strip searches, one continues to hear of jail administrators searching for loopholes to the reasonable suspicion rule. In weighing whether to try to find a loophole in the traditional “reasonable suspicion” rule, a jail policy-setter needs to recognize several things. Legal research fails to reveal any loopholes. . . . So, pushing the limits of the traditional rule can be costly for the individual policy setter, for the city or county, and perhaps even for officers carrying out the policy.¹⁸³

But things changed suddenly. *Bell* was resuscitated in late 2008 when the Eleventh Circuit *en banc* upheld a strip search policy.¹⁸⁴ Then in 2010, the Ninth Circuit *en banc* did the same.¹⁸⁵ These *en banc* decisions persuaded the Third Circuit to renounce *Bell’s* misapplication and uphold an intake strip search policy.¹⁸⁶ Rejecting almost thirty years of precedent, these three decisions marked a paradigm shift away from inmate privacy.

1. **The Eleventh Circuit’s Watershed Decision of *Powell v. Barrett*.**

A class of detainees challenged a Fulton County Jail’s search policy where “neither the charge itself nor any other circumstance supplied reasonable suspicion to believe that the arrestee...
might be concealing contraband.”187 Detainees were thus searched because they were entering the jail.188 Detainees stood naked in a group of 40, with each person inspected by officers.189 Defendants moved to dismiss, arguing they were entitled to immunity.190 The district court granted qualified immunity, assuming that the policy was unconstitutional, yet finding that the unconstitutionality was not clearly established.191

On appeal, the Eleventh Circuit considered whether reasonable suspicion was needed for an intake strip search. It first addressed cases requiring reasonable suspicion. Those decisions emanated not only from other circuits, but also the Eleventh.192 For example, Skurstenis v. Jones held a strip search policy violated the Fourth Amendment because it did not require reasonable suspicion.193 And again in Wilson v. Jones, the Eleventh Circuit found a Fourth Amendment violation because an intake search did not require reasonable suspicion.194 Powell rebuked these decisions because they “misread Bell as requiring reasonable suspicion.”195 Bell instead upheld searches conducted “regardless of whether there was any reasonable suspicion to believe that the inmate was concealing contraband.”196 After discarding Skurstenis and Wilson, the Eleventh Circuit considered other circuits. Singling out Mary Beth G., the Eleventh Circuit noted “[t]he MCC was hardly a facility where all of the detainees were ‘awaiting trial on serious federal charges,’ as some of the opinions incorrectly state.”197 Powell also rejected the argument that

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187 Powell v. Barrett, 541 F.3d at 1300.
188 Id.
189 Id. at 1301.
190 Powell v. Barrett, 496 F.3d 1288, 1296-97 (11th Cir. 2007), vacated, Powell v. Barrett, 541 F.3d 1298 (en banc).
192 Powell, 541 F.3d at 1301, citing Wilson v. Jones, 251 F.3d 1340 (11th Cir. 2001); Cuesta v. Sch. Bd., 285 F.3d 962, 969 (11th Cir. 2002).
193 Skurstenis v. Jones, 236 F.3d 678, 682 (11th Cir. 2000).
194 Wilson v. Jones, 251 F.3d 1340.
195 Powell, 541 F.3d at 1307.
196 Id.
197 Id. at 1310, quoting Mary Beth G., 723 F.2d at 1272.
Bell was distinguishable because it addressed searches after contact visits, not searches at intake.\textsuperscript{198} If anything, searches were more pressing at intake. Detainees might hide contraband before intake because gang members “have all the time they need to plan their arrests and conceal items on their persons.”\textsuperscript{199} This was a rare instance in which a court acknowledged the reality of intake.

Powell is a seminal case. The Eleventh Circuit undid years of courts (including its own) misreading Bell. Those courts should have held that reasonable suspicion was not required. Instead, they did the exact opposite. Powell recognized that Bell said nothing about reasonable suspicion. Additionally, the facts of Bell suffered years of distortion. The Eleventh Circuit was the first circuit court to accurately portray Bell. Powell recognized that Bell not only did not involve “serious offenders,” it included non-offenders.\textsuperscript{200} Thus, because the blanket search was upheld in Bell, it was permissible in Powell. And by a vote of 11-1, the Eleventh Circuit reversed its prior decisions and split with eleven circuits.


Powell was the precursor to Bull v. San Francisco.\textsuperscript{201} Bull involved a Fourth and Fourteenth Amendment class action challenge to the San Francisco Jail’s strip search policy. That policy mandated strip searches of all arrestees entering the Jail’s general population.\textsuperscript{202} The district court found the policy violated the Fourth Amendment.\textsuperscript{203} The Ninth Circuit \textit{en banc} reversed.\textsuperscript{204} The court was swayed by “evidence of the ongoing, dangerous and perplexing

\begin{footnotesize}
\begin{enumerate}
\item \textit{Powell}, 541 F.3d at 1310.
\item \textit{Id.} at 1314.
\item \textit{Id.} at 1310, citing \textit{Bell}, 441 U.S. at 558.
\item \textit{Bell}, 595 F.3d 964 (9th Cir. 2010) (\textit{en banc}).
\item \textit{Id.} at 966.
\item \textit{Id.} at 970.
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
contraband-smuggling problem . . .”205 It took judicial notice “that the unauthorized use of narcotics is a problem that plagues virtually every penal and detention center in the country.”206 The record in Bull exemplified that problem. Contraband in the San Francisco Jail enabled an inmate to overdose, another to set her clothes on fire, and still another to commit suicide.207 Contraband uncovered included: handcuff keys, syringes, crack pipes, heroin, cocaine, and marijuana.208 Weapons were de rigueur: a seven-inch folding knife, a double-bladed folding knife, scissors, a jackknife, a double-edged dagger, a nail, and glass shards.209 For these reasons, the need for security outweighed the invasion of privacy.210

Bull disavowed prior Ninth Circuit cases that “failed to give due weight to the principles emphasized in Bell.”211 Those decisions included Thompson v. City of Los Angeles212 and Giles v. Ackerman.213 Bull found Giles flawed for three reasons. First, it required reasonable suspicion for strip searches.214 Second, arrestees charged with minor offenses “pose[d] no security threat to the facility.”215 Third, it determined eleven instances of smuggling did not constitute a smuggling problem.216 Like the Eleventh Circuit, the Ninth Circuit also criticized other courts. Those decisions distinguished “Bell on several grounds: that persons arrested on certain minor offenses do not represent a security concern ... that persons who are arrested are less likely to smuggle contraband than detainees already in the general jail population who engage in contact visits . . .

205 Id. at 977.
206 Id. at 966.
207 Bull, 595 F.3d at 967.
208 Id. at 969.
209 Id.
210 Id. at 976-77.
211 Id. at 977.
212 885 F.2d 1439 (9th Cir. 1989).
213 746 F.2d 614 (9th Cir. 1984).
214 Bull, 595 F.3d at 978.
215 Id. (citing Giles, 746 F.2d at 618).
216 Bull, 595 F.3d at 979 (citing Giles, 746 F.2d at 617-18).
The Ninth Circuit rejected such reasoning because it was inconsistent with Bell’s general principles and the application of those principles to the search in Bell. Bull relied on much of Powell’s logic, including its view that decisions interpreting Bell to require reasonable suspicion were flawed. The Ninth Circuit concluded, “the scope, manner, and justification for San Francisco’s strip search policy was not meaningfully different from the scope, manner, and justification for the strip search policy in Bell.”

The final vote was 6-5. The dissent recycled the themes of its (now discredited) precedent. It contended that strip searches required reasonable suspicion. It also argued Bell was inapplicable because it had a “record of smuggling,” unlike Bull which had no “evidence at all of any attempts by anyone to smuggle contraband via arrest.” The majority brushed these contentions aside, noting the facility in Bell had “only one instance … where contraband was found during a body-cavity search.” The majority also pointed out the irrelevance of whether anyone from the class was caught with contraband during the search. In sum, the Ninth Circuit’s en banc decision, like the Eleventh Circuit en banc before it, halted the erosion of Bell and gave correctional search policies a new life.

### 3. The Third Circuit Endorses Powell and Bull in Florence v. Board of Chosen.

The dichotomy between Powell and Bull and the rest of the circuits was examined by the Third Circuit. In Florence, an arrestee charged with civil contempt was subjected to a strip search at intake. The district court granted his motion for summary judgment on the unlawful

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217 Bull, 595 F.3d at 980.
218 Id.
219 Id. at 977-78.
220 Id. at 975.
221 Id. at 994-95 (Thomas, dissenting).
222 Id. (Thomas, dissenting).
223 Bull, 595 F.3d at 975.
search claim and denied the correctional officials’ cross-motion seeking immunity.\textsuperscript{226} The district court then certified the following question to the Third Circuit: “whether a blanket policy of strip searching all non-indictable arrestees admitted to a jail facility without first articulating reasonable suspicion violates the Fourth Amendment.”\textsuperscript{227} This was an issue of first impression for the Third Circuit.\textsuperscript{228} Surveying the landscape, the court noted that ten circuit courts uniformly concluded that minor offenders may not be strip searched without reasonable suspicion, but then the Eleventh and Ninth Circuits reversed their prior precedent and found reasonable suspicion was not needed.\textsuperscript{229} \textit{Florence} thus had to determine “which line of cases is more faithful to the Supreme Court’s decision in \textit{Bell}.”\textsuperscript{230}

The Third Circuit tipped its hand early when it noted the persons searched in \textit{Bell} included “witnesses in protective custody, contemnors, inmates awaiting sentencing or transportation to federal prison, inmates serving relatively short sentences . . . .”\textsuperscript{231} Moreover, \textit{Bell}’s emphasis on privacy was embellished as it “included just one sentence discussing the scope of the privacy intrusion . . . .”\textsuperscript{232} The Third Circuit rejected the argument that jails have little interest in strip searching minor offenders because it defied \textit{Bell}.\textsuperscript{233}

Also discredited was the notion that evidence of contraband was needed. It cited \textit{Bell}, where the single instance of attempted smuggling did not undermine the justification for the search.\textsuperscript{234} The absence of contraband instead evinced the policy’s deterrent effect.\textsuperscript{235} Moreover,

\begin{itemize}
\item \textsuperscript{224} Id. at 982.
\item \textsuperscript{225} \textit{Florence v. Board of Chosen}, 621 F.3d 296 (3rd Cir. 2010).
\item \textsuperscript{226} \textit{Id.} at 299.
\item \textsuperscript{227} \textit{Id.} at 301.
\item \textsuperscript{228} \textit{Id.} at 298.
\item \textsuperscript{229} \textsuperscript{229} \textit{Id.} at 299.
\item \textsuperscript{230} \textit{Id.}
\item \textsuperscript{231} 621 F.3d at 302, citing \textit{Bell}, 441 U.S. at 559.
\item \textsuperscript{232} 621 F.3d at 303.
\item \textsuperscript{233} \textit{Id.} at 308.
\item \textsuperscript{234} \textit{Id.} at 309.
\end{itemize}
not subjecting minor offenders to automatic search “would create a security gap which offenders could exploit with relative ease.”\textsuperscript{236} Because arrests are sometimes anticipated, incarcerated persons might “recruit others to subject themselves to arrest on non-indictable offences to smuggle weapons or other contraband into the facility. This would be especially true if we were to hold that those incarcerated on non-indictable offenses are, as a class, not subject to search.”\textsuperscript{237} The intake strip search was thus permissible because preventing contraband “is a legitimate interest of concern for prison administrators . . . vital to the protection of inmates and prison personnel alike.”\textsuperscript{238}

4. **Summation.**

*Powell, Bull,* and *Florence* are a welcome respite from *Bell’s* circumvention. In rejecting decades of precedent, these decisions read *Bell* plainly. They recognized a blanket search policy after contact visits meant blanket policies at intake were permissible. And their recognition that contraband could be brought in through intake just as it could through contact visits deftly disposed of cases such as *Mary Beth G.* Moreover, *Bell’s* facts do not cease to exist because they have been ignored, and *Powell, Bull,* and *Florence* recognized that persons not even charged were searched in *Bell.* Finally, these three cases signify an embrace of correctional security and deference, which is critical as the American correctional population burgeons and the potential for inmate violence increases.

The issue of correctional strip searches has created a tangled web of institutional security, bodily privacy, and divergent precedent. If the Supreme Court revisits *Bell,* a number of points warrant scrutiny.

\textsuperscript{235} *Id.* (citing *Bell,* 441 U.S. at 559).
\textsuperscript{236} 621 F.3d at 309.
\textsuperscript{237} *Id.* The Third Circuit cited the Eleventh Circuit in *Powell* for the position that gang members would be likely to exploit an exception from security procedures for minor offenders. *Powell,* 541 F.3d at 1311.
III. ANALYSIS

A typical strip search entails an arrestee disrobing completely, opening his mouth, displaying the soles of his feet, and presenting open hands and arms. There is no question this process is intrusive, embarrassing, and uncomfortable. But such discomfort pales in comparison to the mayhem unleashed when contraband slips into a correctional facility. Contraband engenders assault, rape, and murder, the brunt borne by inmates. Searching persons at intake uncovers an array of items. It also deters. Because strip searches reduce contraband, this bulwark against correctional violence should remain.

In the rush to elevate privacy, courts have misconstrued numerous principles of Supreme Court jurisprudence. These concern correctional deference, the felony-misdemeanor distinction, reasonable suspicion, diminished privacy in jail, and the obligations of correctional officials. Each is addressed in turn.

A. Deferring to Correctional Officials.

At the heart of correctional search policies should be the deference afforded correctional officials. On close questions, deference tips the outcome in officials’ favor. With the competing interests of privacy and security, strip searches are the epitome of a close question. But as deference languishes at derisory levels, the terms of the debate have shifted. In fact, without deference, rulings against correctional officials have almost been a foregone conclusion.

Correctional deference derives from well-established sources. First, separation of powers—correctional facilities are creatures of the legislative and executive branches. Second,

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238 Id. at 307.
where state prisons are involved, federalism is implicated.\textsuperscript{241} Third, managing correctional facilities has been decried as “squandering judicial resources”\textsuperscript{242} which courts are “ill equipped to deal with.”\textsuperscript{243} Fourth, running a correctional facility involves obstacles “too apparent to warrant explication.”\textsuperscript{244} Deference is thus needed because the problems that arise in the daily operation of a corrections facility “are not susceptible of easy solutions.”\textsuperscript{245} Of course, limits to deference exist. Even \textit{Bell} recognized that individuals do not forfeit all constitutional protections by reason of their confinement, “including the limited protection of the fourth amendment’s prohibition against unreasonable searches.”\textsuperscript{246}

The intake process exemplifies why deference exists. Security interests are strongest when a detainee enters a correctional facility. Gang members may get themselves arrested to smuggle contraband. An arresting officer’s pat-down search may miss items which are then concealed during booking. Courts have recognized the risks at intake. As the Sixth Circuit explained, “[t]he security interests of the jail in conducting a search at [intake are] strong.”\textsuperscript{247} Every correctional facility has their own unique challenges, but virtually all have to grapple with the menace of contraband. And most facilities have determined that searching detainees entering a jail minimizes contraband. This determination should be respected because it is made by those who maintain the facility. The damage wrought by contraband is felt by correctional officials via injured staff and inmates and corresponding litigation. As violence amongst inmates is conferred with the same discrimination as confetti, security must be foremost. Indeed, security is “perhaps

\begin{itemize}
\item \textsuperscript{213} \textit{Sandin v. Conner}, 515 U.S. 472, 482 (1995).
\item \textsuperscript{242} \textit{Id.} at 482. \textit{See also Jones v. N.C. Prisoners’ Labor Union, Inc.}, 433 U.S. 119, 126 (1977).
\item \textsuperscript{243} \textit{Procunier v. Martinez}, 416 U.S. 396, 405 (1974).
\item \textsuperscript{244} \textit{Id.} at 404.
\item \textsuperscript{245} \textit{Bell v. Wolfish}, 441 U.S. 520, 547 (1974); \textit{see also Turner}, 482 U.S. at 84.
\item \textsuperscript{246} \textit{Bell}, 441 U.S. at 545, 558.
\item \textsuperscript{247} \textit{Dobrowolsky v. Jefferson County}, 823 F.2d 955, 959 (6th Cir. 1987).
\end{itemize}
the most legitimate of penological goals.” Because deference is most appropriate in matters relating to security, the decision to enact blanket strip search policies should be respected.

Ironically, courts that have disabused the notion of deference in the intake search context have invoked it for other searches. In Arruda v. Fair, the First Circuit cited deference in upholding blanket strip searches of inmates transferring between different areas of the prison. The policy in Arruda mandated strip searches when inmates went to the library, infirmary, or visiting room. Citing Bell, the First Circuit upheld the procedure, noting it was “most hesitant to overturn prison administrator’s good faith judgments.” If searching inmates moving between sections of a facility is permissible, it would seem searching them when arriving from the facility’s outside should also be permitted.

The Seventh Circuit has also invoked deference to uphold strip searches. The court held lesser intrusive alternatives were irrelevant in determining whether constitutional rights are violated. Deference was the catalyst. “A prison always can do something, at some cost . . . but if courts assess and compare these costs and benefits then judges rather than wardens are the real prison administrators.” In another case, the Seventh Circuit considered an Eighth Amendment claim where a physician’s assistant performed a rectal probe of a prisoner in a hospital lobby. The court found no constitutional violation. Alternative technology for rectal searches was irrelevant because contemplating alternatives would be “tantamount to federal court micro-

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249 Arruda v. Fair, 710 F.2d 886 (1st Cir. 1983).
250 Id. at 887.
251 Id.
252 Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995).
253 Id. at 145-46.
254 32 F.3d 1024, 1038 (7th Cir. 1994).
management of a penological facility.”

While it is difficult to reconcile such deference-driven decisions with Mary Beth G., Mary Beth G. remains good law.

It is facile to argue that a decision adverse to correctional officials means deference was held in abeyance, but scrutiny of invalidated strip search policies reveals that deference has been downplayed. Courts have discussed deference in a perfunctory manner, consuming no more than a couple sentences. Courts never consider deference in conjunction with contraband. Also evaded is the aftermath of contraband—rape, stabbings, and drug use—that must be handled by officials. The disconnect between Bell and subsequent circuit court decisions is also apparent with the issue of deference. The unifying theme of Bell, Block, and Turner was correctional deference. Indeed, it was often the strongest factor in the rejection of inmates’ claims. For example, the Block Court was adamant that due to “wide-ranging deference”, the judiciary should not second-guess correctional officials by considering less restrictive alternatives for security measures.256 Thus, in downplaying deference, lower courts have disregarded clear Supreme Court pronouncements.


The next most critical misstep by courts is the false distinction between felons and misdemeanants. Courts have focused on arrestees’ charges in calculating the reasonableness of a search. The root of this fixation is Mary Beth G.257

The distinction between felon and misdemeanor defies law and fact, rendering the reasonableness test of Bell nugatory while ignoring intake’s realities. Whether a person is charged with a felony or misdemeanor should have no bearing on the reasonableness calculation. To the contrary: “the assumption that a ‘felon’ is more dangerous than a misdemeanor [is]

255 Id. at 1042.
untenable.” Thus, all inhabitants of an institutional facility should be searched when arriving from the outside.

Claiming non-felon status inoculates an arrestee from being searched ignores Bell on multiple grounds. First, Bell articulated no such distinction. This was reflected by the Eleventh Circuit’s criticism of the Sixth and Seventh Circuits. “Those decisions are wrong. The difference between felonies and misdemeanors or other lesser offenses is without constitutional significance . . . [and] finds no basis in the Bell decision, in the reasoning of that decision, or in the real world of detention facilities.” Second, those searched in Bell included persons not even charged with a crime. Thus, to claim minor offenders may not be searched because of the nature of their offense is unfathomable. Third, the test is “whether a prison search policy is ‘reasonable’ under the circumstances.” Instead of concluding the search is impermissible because an individual is a misdemeanant, a court must consider the “why” and “where” of the search. The reason an individual was arrested is not dispositive. His entry into a correctional facility is. Yet courts have bypassed this critical point and focused on the underlying charges. Many facilities do not have the ability to segregate misdemeanants from felons. Nor do they have the authority to turn away minor offenders. Thus, the ultimate destination of the detainee is the central reason for searching and should be the central focus of the reasonableness test. Because the felon-misdemeanant distinction defies Bell, it should be laid to rest.

257 Mary Beth G., 723 F.2d 1263.
259 Powell, 541 F.3d at 1309, citing Masters v. Crouch, 872 F.2d 1248 (6th Cir. 1989) and Mary Beth G., 723 F.2d 1263.
260 Powell, 541 F.3d at 1310.
261 Bell, 441 U.S. at 524.
262 Arruda, 710 F.2d at 887.
263 Bell, 441 U.S. at 559.
Beyond circumventing precedent, the correctional realities evaded by the felon-misdemeanant test are significant. In the eyes of a correctional officer, whether a person is charged with a felony or misdemeanor is a distinction without a difference. Any detainee can possess contraband, and thus must be treated as such. This may seem like overcompensation for an individual arrested on minor charges, but when the context is considered, it is necessary. Courts strike search policies because misdemeanants are, in theory, less dangerous than felons. Since *Mary Beth G.*, this assertion has become an article of faith. The rationale has some facial allure but is ultimately myopic. While a felon may be more likely to carry contraband, it does not diminish the possibility a misdemeanant is carrying. Moreover, this logic underestimates inmate ingenuity. Gangs and recidivists can exploit the disjunctive treatment. The Supreme Court endorsed this notion: “[i]t is not unreasonable to assume ... that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates.” 264 The Court’s concern was echoed by the Eleventh Circuit’s warning that officials do not know whether someone is a “minor offender or is also a gang member who got himself arrested so that he could serve as a mule smuggling contraband in to other members.” 265 The Third Circuit concurred, describing this scenario as “plausible.” 266

In foisting the felon-misdemeanant distinction upon officials, courts drift mindlessly towards the maelstrom. Correctional violence and drug abuse correlates with population size and the number of serious offenders. 267 Given the significant gang presence in correctional facilities, it would be negligent not to treat every detainee as a potential smuggler. The felony-misdemeanor distinction is counter-intuitive for another reason. “Some felonies do not lend

265 *Powell*, 541 F.3d at 1311.
266 *Florence*, 621 F.3d at 309.
themselves to expectations of violence or smuggling, while some misdemeanors (such as menacing) arguably do.” Courts have recognized this logic. The Sixth Circuit noted that certain misdemeanors are associated with weapons, which could raise a reasonable suspicion that such detainees may be concealing a weapon. On the other hand, as the Ninth Circuit observed, felonies such as tax evasion or securities fraud have a lesser risk of smuggling than misdemeanor offenses. This is especially true when considering misdemeanors such as assault or being under the influence of a controlled substance.

Finally, the felon-misdemeanant distinction ignores the intermingling of convicted persons and detainees. Most detainees, whatever their underlying charges, intermingle with a facility’s general population, which often includes convicted felons. In upholding an intake search, the Tenth Circuit cited “the obvious security concerns inherent in a situation where the detainee will be placed in the general prison population.” The First Circuit noted that “[i]ntermingling of inmates is a serious security concern that weighs in favor of the reasonableness, and constitutionality, of the search.” Intermingling is a tangible justification for strip searches which courts have glossed over. Again, courts have suspended Bell’s reasonableness test by downplaying the “where” and “why” of intake searches. While not a panacea, strip searches are the best measure to stop contraband. Forbidding strip searches on some arrestees is a virtual guarantee that contraband will enter.

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267 See Falls v. Nesbit, 966 F.2d 375, 380 (8th Cir. 1992) (“Prisons are, by the very nature of the persons housed within their walls, dangerous, violent, and sometimes unpredictable.”).
269 Dobrowolskyj, 823 F.2d at 958-59.
270 Kennedy, 901 F.2d at 713-14.
271 Id.
272 Archuleta v. Wagner, 523 F.3d 1278, 1284 (10th Cir. 2008).
273 Roberts v. Rhode Island, 239 F.3d 107, 112 (1st Cir. 2001).
274 Bell, 441 U.S. at 559-560.
C. Reasonable Suspicion is not Necessary to Search.

Until Powell, Bull, and Florence, virtually every correctional strip search case injected a reasonable suspicion standard. Applying reasonable suspicion was possible because these prior decisions detached themselves from the rigors of Bell’s facts. But not only was reasonable suspicion absent from Bell, the Court held the exact opposite. As pointed out by Justice Powell’s dissent, the Court required no level of cause to strip search, rendering the reasonable suspicion requirement nugatory.275 In other words, a blanket search is just that.

Despite rejecting the reasonable suspicion test, Powell, Bull, and Florence did not elaborate on the test’s fundamental incompatibility with the correctional context. But this issue merits attention. Reasonable suspicion is not conducive to the correctional context because it is a fact-specific determination based on the unique circumstances of each search. The test demands the officer conducting the search “point to specific objective facts and rational inferences that they are entitled to draw from those facts in light of their experience.”276 In other words, the suspicion must be directed to a specific individual in order to justify the search.277 This suspicion cannot relate to a “category of offenders, and does not arise merely because an arrestee fails to post bond immediately and police move him to general population.”278 Yet, this is the precise reason correctional officials search. All individuals, regardless of individual circumstances, are searched because they are entering a correctional facility. Reasonable suspicion should thus never enter the equation because the dispositive fact is the arrestees’ destination, not his specific circumstances.

275 Bell, 441 U.S. at 563, (Powell, J., dissenting).
276 Hunter v. Auger, 672 F.2d 668, 674 (8th Cir. 1982).
277 Hunter, 672 F.2d at 675.
278 Kelly v. Foti, 77 F.3d 819, 822 (5th Cir. 1996) (citations omitted).
Some commentators have gone as far as arguing blanket searches of felons are impermissible. “The reasonable suspicion standard does not yield under the weight of a felony charge. Instead, this standard requires a more nuanced, individualized inquiry than mere classification between felony or misdemeanor offenses.” But that is the inherent problem with reasonable suspicion. Officials do not have the luxury of mulling the circumstances of each arrestee. The intake process is fluid. Arrestees enter in varying numbers. Information about the arrestee or underlying arrest may be incomplete. The Supreme Court in Block recognized the burden of reasonable suspicion made by “the brevity of detention and the constantly changing nature of the inmate population.” Couple these circumstances with the reality that arrestees go to extremes in smuggling contraband. “The consensus of scholarly sources cites mail, visits, and the bribery and coercion of staff as the most commonly used methods of infiltrating contraband into a prison facility, with visits being the most common method of these three.” And while contact visits are popular, gangs and recidivists are savvy enough to know if certain offenders are not being searched during intake. Moreover, such individuals do not have a merely passing interest in these matters. To sustain drug activity in correctional facilities, gangs “depend on street contacts . . . to smuggle rock cocaine, marijuana, and other drugs into jail and prison

visiting rooms.”

Thus, the ever-evolving nature of intake, coupled with the difficulty of uncovering contraband, establish reasonable suspicion is a dangerous standard to use in the correctional context.

Another reality cutting against reasonable suspicion is that most drugs are smuggled via body cavities. The proclivity to smuggle contraband through the anal cavity renders strip searches reasonable. “The scope of a search is generally defined by its expressed object.” And here the object is to uncover contraband. Because the anal cavity is the most common place to hide contraband, strip searches, not pat downs, are necessary. Courts have refused to address the popularity and effectiveness of using the anal cavity to smuggle. Instead, courts have equated the intake search process with post-arrest searches. But the interests of the two are not aligned. The consequences of overlooking contraband are greater and the stakes higher during intake. Detainees have more impetus to secret contraband. Some individuals know they will be entering the jail. While waiting to be processed into a correctional facility, they can attempt to find contraband. For others, smuggling is the reason for entering. If a blanket search policy after meeting outside visitors is permissible, it is difficult to discern why blanket searches of detainees coming from the outside would not be. The need to prevent contraband after entry is no different from the need at entry. One court explained why Bell applied to intake strip searches: “the newly-admitted detainees in this case are in a similar position to the inmates in Bell. Neither is yet convicted of a crime, but both are entering (or re-entering) a prison institution after contact with the public.”

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286 *Powell*, 541 F.3d at 1311. *Florence*, 621 F.3d at 309.
Additionally, the reasonable suspicion requirement does not take into account deterrence. *Bell* upheld the MCC’s policy despite only one instance of smuggling. The Supreme Court found it sufficient that “attempts to secrete these items into the facility by concealing them in body cavities are documented in this record and in other cases.” In other words, the possibility of contraband was enough. Whether a facility is plagued by contraband like the Cook County or San Francisco Jails, correctional officials should have the ability to keep a facility contraband-free. Nor should officials have to wait until a critical mass of contraband appears before a court approves their intake procedure. The wellspring of the reasonable suspicion requirement is *Mary Beth G.*, which in turn relied on *Terry v. Ohio*. But the issue of deterrence is inapplicable to *Terry* type searches. Deterrence is a critical component of searching because contraband is a well known and well established problem. Because deterrence transcends reasonable suspicion, deterrence is one more reason why the reasonable suspicion test is unsuited for correctional searches.

In sum, the folly of applying reasonable suspicion to arrestees is best demonstrated by the fact that correctional officers and visitors can be searched when reasonable suspicion exists. Thus, the reasonable suspicion requirement places arrestees on the same level as prison visitors and correctional officers.

**D. Diminished Privacy is a Reality of Correctional Life.**

A cursory review of correctional strip searches might lead to the conclusion that the right of privacy should preclude blanket search policies. But on closer examination, such an
impression is difficult to sustain. This is especially true when one realizes privacy essentially
does not exist in institutional life. Thus, a fatal flaw of decisions striking search policies is the
refusal to acknowledge the absence of privacy in jails.

Powell, Bull, and Florence never discussed why courts have taken an unduly expansive
view of privacy. But the answer may lie in century-old precedent. “There was a time, not so very
long ago, when prisoners were regarded as slaves of the State, having not only forfeited their
liberty, but all their rights . . . .” Federal courts long maintained a “hands off” approach to
inmate complaints about their constitutional rights. In fact, this doctrine “was a near absolute
jurisdictional bar to federal court review of alleged violations of prisoners’ asserted
constitutional rights.” Courts assumed they were powerless even in the face of constitutional
violations. Perhaps because of this past, the pendulum has swung the other way. Sweeping
rulings in the 1970’s and 1980’s shored up inmates’ rights under the First, Eighth, and
Fourteenth Amendments. In expanding such rights, privacy was swept in the undertow.
While protecting constitutional rights for inmates is worthwhile, privacy is different. Yet, courts
have elevated privacy rights to the detriment of security in striking strip search policies. Using
privacy as the basis is tenuous because persons housed in correctional facilities surrender most
privacy rights: They cannot shower in private. They cannot use the bathroom in private. They

standard when correctional officers are strip searched); Hunter v. Auger, 672 F.2d 668, 673-74 (8th Cir. 1982)
(same).

Commonwealth, 62 Va. 790, 796 (1871) (Marshall, J., dissenting) (internal quotes omitted).

292 Bethea v. Crouse, 417 F.2d 504, 505 (10th Cir. 1969) (“We have consistently adhered to the so-called ‘hands off’
policy in matters of prison administration . . . .”); Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951) (“The courts
have no supervisory jurisdiction over the conduct of the various institutions provided by law for the confinement of
federal prisoners committed to the custody of the Attorney General . . . .”).


294 Banning v. Looney, 213 F.2d 771 (10th Cir. 1954).

295 Margo Schlanger, Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders, 81
cannot sleep in private. They cannot meet visitors in private. It is difficult to comprehend why their privacy rights are expanded at intake when the potential for contraband is greatest. Moreover, if one accepts the premise that privacy precludes strip searches, the broader argument that they must shower, use the toilet, and sleep in private is not without merit.

Courts are untroubled by lack of privacy during inmate showering. Officer surveillance of showering inmates does not violate the Fourth Amendment because “the privacy interests of the inmate almost always must yield.” Further instructive is the Seventh Circuit decision in Phelan. “Monitoring of naked prisoners is not only permissible--wardens are entitled to take precautions against drugs and weapons (which can be passed through the alimentary canal or hidden in the rectal cavity and collected from a toilet bowl)--but also sometimes mandatory.”

The prevalence of nudity in correctional houses was also significant. “Vigilance over showers, vigilance over cells--vigilance everywhere, which means that guards gaze upon naked inmates.”

Another Seventh Circuit decision captures the paradox of elevating privacy rights. In Peckham, the search policy challenged was “a visual inspection of a naked inmate” when prisoners returned from court or a contact visit. The Seventh Circuit found the policy reasonable, noting “it is difficult to conjure up too many real-life scenarios where prison strip searches of inmates could be said to be unreasonable.” Body cavity searches “continue to turn

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297 *Phelan*, 69 F.3d at 146 (7th Cir. 1995).
299 *Id.*
300 69 F.3d 144, 146.
301 *Peckham v. Wisconsin Dept. of Corr.*, 141 F.3d 694, 695 (7th Cir. 1998).
302 *Id.* at 697. *Bruscino v. Carlson*, 854 F.2d 162 (7th Cir. 1988).
up an impressive quantity and variety of contraband, including knives and hacksaw blades.” 303
The court further noted the irony that “the procedures that the Plaintiffs describe as cruel and unusual punishment are the very procedures that are protecting them from murderous attacks by fellow prisoners.” 304 While strip searches may be embarrassing, “not every psychological discomfort a prisoner endures amounts to a constitutional violation.” 305

Most would agree strip searches are unpleasant, discomforting, and embarrassing. But the reasonableness of a correctional search does not, and cannot, turn on the feelings the search elicits. Otherwise, no search would be permissible, for even simple pat downs are a disconcerting experience. Moreover, highlighting the discomfort experienced during a search is not what Bell intended, finds no support in Supreme Court precedent, and would foreclose every type of search.

E. Correctional Officials’ Obligation to Protect Inmates.

The road to hell is paved with good intentions. And nowhere does this aphorism hold truer than in the correctional strip search litigation. Under the guise of privacy, detainees have sought to dismantle strip search policies. In succeeding, they have certainly excised a discomforting component of the correctional experience. But such victories are Pyrrhic. Less stringent intake procedures ease the process of smuggling contraband, thus promoting inmates’ own liquidation. Contraband is dangerous in whatever form because it alters the balance between inmates, empowering some while disadvantaging others. But courts have forgotten that when inmates are exposed to dangerous conditions, the liability of correctional officials escalates.

303 Id. at 165.
304 Id.
305 Id.
Correctional officials can be held liable for inmate-on-inmate violence. The reason is simple. When the State, by imprisonment, prevents a person from caring for himself, the Constitution imposes “a corresponding duty to assume some responsibility for his safety and general well being.” Taking “every means of self-protection and foreclose[ing] their access to outside aid,” society may not simply lock away offenders and let “the state of nature take its course.” Facilities cannot degenerate into places lacking basic standards of decency. While the Eighth Amendment “does not mandate comfortable prisons” it does not permit inhumane ones. Yet that is precisely what many institutions have devolved into. Institutional violence is an accepted fact as courts have documented the habitual carnage for decades. For example, in Miller v. Carson, a Florida jail was described as a “daily horror show.” Amongst 600 inmates, there were more than 150 reported assaults in eleven months. In Palmigiano v. Garrahy, “155 assaults, rapes, and major fights per year [among some 650 inmates]; 330 other incidents of violence, and personal harm to inmates.” These figures led the court to find “ever-prevalent fear and violence” at a Rhode Island prison. Finally, a Tennessee jail examined in Gilland v. Owens had an even higher rate of violence. In two months, 298 violent incidents occurred.

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306 See, e.g., MacKay v. Farnsworth, 48 F.3d 491, 493 (10th Cir. 1995) (holding that prison guards knew that the plaintiff faced a risk of harm because guards had previously attempted to break up a fight between the plaintiff and another inmate); Walker v. Norris, 917 F.2d 1449, 1453 (6th Cir. 1990) (holding that prison guards violated the Eighth Amendment when they did not intervene in an attack); Serrano v. Gonzalez, 909 F.2d 8, 14 (1st Cir. 1990) (ruling that the officer's presence at an assault and his failure to intervene violated his duty to protect the plaintiff).


309 Id. at 832.


311 Id.


313 Id. at 968.

among 2,300 inmates; in a six month period, it climbed to 685. These examples are a microcosm of the correctional bloodshed.

A particularly unpleasant component of institutional violence is rape. The prevalence of this crime spurred Congress to enact the Prison Rape Elimination Act of 2003. The Act’s findings indicate that 13% of inmates in the United States have been sexually assaulted. Approximately 200,000 current inmates have been raped. The link between rape and contraband is real. As one commentator explains, “prison rapists frequently employ weapons to intimidate or immobilize victims.” Indeed, rapes involving weaponry and other applications of force have been described as “strong arm rape.” Accounts of inmate rape portraying the assailant holding a knife to the victim’s throat are ubiquitous.

The failure to seize contraband can demonstrate correctional officials’ disregard for rape. In a case involving unconstitutional levels of correctional violence, the Eleventh Circuit found officials indifferent to the availability of weapons. Bush axes, baseball bats, and shanks were used to commit perverted sexual abuse. Notably, the court found this “aggression was . . . exacerbated by the readily available contraband and an excessively permissive atmosphere.” The Eleventh Circuit ultimately concluded that officials’ laxity as to contraband demonstrated

315 Id. at 674.
317 Id. § 15601(2).
318 Id. See also James E. Robertson, A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison, 81 N.C. L. Rev. 433, 443-44 (2003).
322 James E. Robertson, A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison, 81 North Carolina L. Rev. 433, 467 (2003).
323 LaMarca v. Turner, 995 F.2d 1526, 1236-38 (11th Cir. 1993).
324 Id. at 1533.
325 Id.
deliberate indifference to the inmates’ safety.\textsuperscript{326} Similar permissiveness prompted the Fifth Circuit to observe that “inmate access to unsupervised machinery and other resources resulted in widespread possession of weapons” in a Louisiana prison.\textsuperscript{327} A final example is \textit{Tillery v. Owen}, where a jaw-dropping list of contraband was uncovered: brass rods, knife blades, metal bars, chisels, wrenches, hammer picks, ice picks, axes, spikes, and spears.\textsuperscript{328} Allowing such conditions to fester facilitates all types of violent crime, underscoring the need to stop contraband at the jailhouse door. But if courts preclude officials from conducting thorough searches at intake, it is illogical to hold them responsible when the impact of contraband is felt.

Scholars have criticized blanket strip search policies because of “[t]he innocents who will be forced to suffer the indignities of a strip search as a result of prison facilities’ security concerns remedied through overly-simple and broad blanket policies.”\textsuperscript{329} This argument, which underpins the strip search lawsuits, displays a disregard of correctional realities. For it is those innocents who suffer when more dangerous inmates are fueled by drugs or armed with weapons. The danger faced by older or weaker inmates is best captured as follows: “[t]o be an imprisoned male in the United States is to experience a Hobbesian world; one encounters a barely controlled jungle where the aggressive and the strong will exploit the weak and the weak are dreadfully aware of it.”\textsuperscript{330} Strip searches will not completely alleviate this anguish, but it will lessen the incidence of contraband. And in doing so, this will enable correctional officials to better meet their obligations of protecting inmates from themselves.

\textsuperscript{326} \textit{Id.} at 1536-38.
\textsuperscript{327} \textit{Williams v. Edwards}, 547 F.2d 1206, 1211 (5th Cir. 1977).
IV. CONCLUSION

Correctional officers have a dangerous job. Occupational hazards include escape attempts, riots, and ambushes. Minimizing contraband is integral to maintaining order. But doing so is difficult, precisely because the advantage is to the risk prone, and it is contraband smugglers who jeopardize their health and risk additional jail time.

In the comfortable confines of chambers or the corner office, it is not the judge or lawyer who will experience the havoc wrought by contraband. That suffering is experienced by correctional officers and inmates. Correctional facilities are a powder keg and stopping contraband will not make them a utopia. But it will reduce casualties, lessen injuries, and diminish drug abuse. For that reason, neither reasonable suspicion, consideration of an arrestee’s charges, nor a history of contraband should be prerequisites to intake strip searches.