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Florence, Atwater & The Erosion of Fourth Amendment Protections for Arrestees

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*FLORENCE, ATWATER & THE EROSION OF FOURTH AMENDMENT
PROTECTIONS FOR ARRESTEES¹*

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If there is an animating imperative behind the Supreme Court’s decision in *Bell v. Wolfish*, it is this: when confronted with a question regarding strip searching arrestees, courts must seek a careful balance.² The Fourth Amendment, the Court held, cannot be confined to a “mechanical application.”³ Instead, it “requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.”⁴ In essence, while authorities may be justifiably concerned about the presence of contraband in prisons, there are limits to the policies they may pursue. These limits become especially important in the context of strip searches, which, given the degree of invasion involved, the Supreme Court has placed within a “category of [their] own demanding [their] own specific suspicions.”⁵

Decades later, the Supreme Court appears to have deviated from *Bell*’s moorings. In *Florence v. Chosen Board of Freeholders*, the Court examined the constitutionality of blanket search policies, which require that all arrestees be strip searched regardless of individualized suspicion or the nature of the offense.⁶ In a 5-4 ruling, the Court upheld such searches as constitutional.⁷ The opinion is more fragmented than the initial vote count suggests—Justice Thomas refused to join for all parts of the majority opinion, and Justices Roberts and Alito wrote separate concurrences to explicate limitations to the Court’s ruling.⁸ But a new line had been drawn. For the first time, the Court held

² 441 U.S. 520 (1979).

³ *Id.* at 559.

⁴ *Id.*

⁵ *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009).

⁶ *See Florence v. Bd. of Chosen Freeholders*, 566 U.S. ___ (2010).

⁷ *Id.*

⁸ Justice Kennedy, writing for the Court, secured a majority for Parts I, II, III and V. *Id.* The unusually long delay in producing a final decision (it took almost six months) may further reflect the degree of unease among the bench. As Lyle Denniston notes, while it was “unclear . . . why it had taken almost six months to decide” the “[t]he case was among the earliest argued in the Term that had not yet been decided.” Lyle Denniston, “Routine jail strip searches OK,” SCOTUSblog (April 2, 2012), *available at* <http://www.scotusblog.com/?p=142415>.

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

that prisons seeking to implement strip search policies were free to dispense with any level of reasonable suspicion or tailored justification.⁹ I argue in the following analysis that *Florence* constitutes an unfortunate erosion of Fourth Amendment protections for arrestees. The Court’s opinion represents a misreading of *Bell* and of the Court’s broader jurisprudence on the Fourth Amendment. Even more striking, the most unsettling issues posed by *Florence*—those which hint at the potential for future abuse—remain unresolved.

A. Analytical Template and Existing Literature

Among scholars inside and outside the judiciary, this topic is contentious. Some say that the degree of invasiveness is the crucial factor determining whether or not a strip search is permissible.¹⁰ Some argue that the arrestee’s status in the adjudicatory process should be more closely considered,¹¹ while others assert that courts should look only at when (or if) the arrestee is introduced to the general prison population.¹² And a final group of scholars maintains that the decision should be contingent upon the *type* of offense with which the arrestee has been charged.¹³

⁹ As explained below, the opinion leaves unresolved the constitutionality of strip searches for a certain class of detainees.

¹⁰ The difference between a search conducted at a distance of two feet or five feet has been heavily litigated. See *e.g.*, *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009). It was also the subject of debate among the Justices during *Florence* oral arguments. See Oral Argument at 10:17, *Florence v. Bd. of Chosen Freeholders*, 131 S. Ct. 1816 (2012), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-945.pdf.

¹¹ See Howard Friedman, *Strip Searches and the Fourth Amendment Rights of Detainees and Prisoners*, GEORGETOWN UNIVERSITY LAW CENTER CONTINUING LEGAL EDUCATION, 27TH ANNUAL SECTION 1983: CIVIL RIGHTS LITIGATION (2009). Cf. *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (“The presumption of innocence in favor of the accused is undoubted law. . . . But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.”).

¹² See *e.g.*, *Masters v. Crouch*, 872 F.2d 1248, 1254 (6th Cir. 1989) (“Intermingling alone has never been found to justify such a search without consideration of the nature of the offense and the question of whether there is any reasonable basis for concern that the particular detainee will attempt to introduce weapons or other contraband into the institution.”).

¹³ See Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1 (2011); Camille Gauthier, *Is It Really that Simple?: Circuits Split Over Reasonable Suspicion Requirement for Visual Body-Cavity Searches of Arrestees*, 86 TUL. L. REV. 247 (2011); Gabriel Helmer, *Strip Search and the Felony Detainee: A Case for Reasonable Suspicion* 81 B.U. L. REV. 239 (2001); David Shapiro, *Does the Fourth Amendment Permit Indiscriminate Searches of Misdemeanor Arrestees?: Florence v. Board of Chosen Freeholders*, 6 CHARLESON L. REV 131 (2011).

Although many of these arguments represent important contributions to the field, this paper is premised on the idea that the debate cannot be quite so easily siloed. In fact, as will be explained to come, *all* of these arguments are featured at least once in the range of opinions issued in *Florence*. I argue that the state of the current law is the product of two things: a substantial deviation from prior Supreme Court precedent, and an insufficient focus on future risks. With these aims in mind, this paper comprises several Parts. Part I takes up the work of historical analysis, and situates the current discrepancy in a broader legal and historical framework. Part II highlights why the Court’s decision in *Florence* represents a deviation from traditional jurisprudence. Although it has been the subject of little attention by scholars, *Florence* relies heavily on holdings regarding deterrence-based policies. For a variety of reasons, these holdings are inapposite to the debate over post-arrest strip search policies. After arriving at a clearer understanding of how such precedent should be applied, I conclude that, contrary to the Court’s assessment, existing precedent militates strongly *against* blanket strip search policies. In Part III, I set aside the doctrine, and look to the ground-level ramifications that an endorsement of blanket strip search policies would create. Perhaps most importantly, I take a closer look at the more unsettling aspect of the *Florence* decision—the unresolved intersection with *Atwater*. Recent changes in the amount of discretion that an officer may use during an arrest have increased the power of police. If that power is now coupled with the uniform application of suspicionless strip searches—a practice which now bears “constitutional imprimatur”¹⁴—the risk of abuse may increase dramatically. While this issue received very little of the Court’s attention in *Florence*,¹⁵ and is almost entirely unexamined in the secondary literature, it deserves equal, if not greater, attention as any issue of jurisprudence.

¹⁴ As Harvard Law Professor Carol Steiker notes of the decision, “[w]hat the court did was to take a practice that was not universal and give it its constitutional imprimatur.” Nina Totenberg, “Supreme Court OKs Strip Searches For Minor Offenses,” NPR (April 2, 2012), *available at* <http://www.wbur.org/npr/149866209/high-court-supports-strip-searches-for-minor-offenders>. The unresolved question is “whether states that have forbidden this practice will now move to permit blanket strip searches of those arrested for minor charges.” *Id.*

¹⁵ In a nineteen page opinion, the Court allocated two sentences to the potential for abuse: “Petitioner’s *amici* raise concerns about instances of officers engaging in intentional humiliation and other abusive practices. There

B. A Tale of Two Arrests

On an afternoon in March, a man in his late thirties, Albert, is driving with his family on a state highway.¹⁶ He is on his way to his in-laws' to celebrate the recent purchase of a new home.¹⁷ But before arrival, they are stopped by the police for reasons that are unclear. Upon request, Albert identifies himself, and is then immediately arrested in front of his family.¹⁸ The officers cite an outstanding warrant for Albert's arrest based on his failure to pay a contempt violation.¹⁹ Despite Albert's protestations, the arrest continues. The officers transport him to a nearby jail facility and order him to do something that strikes Albert as wholly unnecessary—take off his clothes and undergo a strip search.²⁰ Neither the circumstances of his arrest, nor his purported offense, create any suspicion that he may be carrying contraband. But the jail's policy dictates that all arrestees must be strip-searched.²¹ While an officer looks on, Albert is forced to remove all of his clothing, and then to open his mouth, lift his arms, rotate, and lift his genitals for closer inspection.²² After six days in jail, he is escorted to another facility and put through a second, more invasive strip search.²³ This time, Albert is searched along with two other detainees, who are forced to strip in the presence of one another.²⁴ They are told to lift their genitals, turn around, squat and cough.²⁵ Albert is afraid and

also may be legitimate concerns about the invasiveness of searches that involving the touching of detainees. These issues are no implicate on the facts of this case, however, and it is unnecessary to consider them here.” 566 U.S. ___ *19 (2012) (Kennedy J. writing for four Justices in Part IV of the majority opinion) (citations omitted).

¹⁶ See *Florence v. Bd. of Chosen Freeholders*, 621 F.3d 296, 299 (3d Cir. 2010), *aff'd*, 566 U.S. ___ (2012).

¹⁷ See Brief for Petitioner at 2, *Florence v. Bd. of Chosen Freeholders* 566 U.S. ___ (2012).

¹⁸ See *Florence*, 621 F.3d at 299.

¹⁹ See *Florence v. Bd. of Chosen Freeholders*, 566 U.S. ___ * 2 (2012).

²⁰ See *Florence*, 621 F.3d at 299.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

deeply humiliated throughout the process.²⁶ The next day, following what is now a week of confinement, he is finally able to see a magistrate.²⁷ Upon learning that the fine has been paid, the magistrate orders Albert's immediate release.²⁸

On another afternoon in March, a woman named Gail is driving her children home from soccer practice.²⁹ She is traveling at approximately fifteen miles per hour through a residential neighborhood just north of Austin, Texas, when she, too, is stopped by the police.³⁰ Upon inquiry, she is informed that the officer stopped her because he noticed that neither Gail, nor her children, were wearing seatbelts.³¹ Before Gail can proceed very far with an explanation, the officer does something that strikes her as wholly unnecessary—he announces that he is going to arrest her for her seat belt transgression.³² When she realizes the officer is serious about his intentions, she asks if she might first take her children, who are now crying, to a friend's house nearby.³³ The officer rejects the request outright, and continues with the arrest (fortunately, a friend is able to come and retrieve Gail's children).³⁴ Gail is then handcuffed and placed in the squad car. She is taken to the local police station and "processed," which involves having her "mug shots" taken, and being placed alone in a jail cell.³⁵ When she is able to see a magistrate, she quickly pleads no contest to the misdemeanor seatbelt offense, pays money for a fine and bail bond, and is released.³⁶

²⁶ See Nina Totenberg, "Supreme Court Weighs Legality of Strip Searches," NPR (Oct 12, 2011), *available at* <http://www.npr.org/2011/10/12/141286747/supreme-court-weighs-legality-of-strip-searches>.

²⁷ See Brief for Petitioner at 7, *Florence v. Bd. of Chosen Freeholders* 566 U.S. ___ (2012).

²⁸ *Id.*

²⁹ Brief for the ACLU as Amici Curiae Supporting Petitioner at 2, *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

³⁰ *Id.*

³¹ See *Atwater v. City of Lago Vista*, 532 U.S. 318, 323-324 (2001).

³² See *Atwater*, 532 U.S. at 324.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

The facts contained in the first story have now been widely publicized. It is a summarized account of Albert Florence's arrest in 2005.³⁷ Following his ordeal, Florence commenced a lawsuit pursuant to 42 U.S.C. § 1983, alleging that the suspicionless strip searches to which he was exposed constituted violations of his Fourth Amendment rights.³⁸ His case, as alluded to earlier, was eventually heard by the Supreme Court. The second story, though less current and perhaps less widely known, is also salient. It is the story of Gail Atwater's arrest in 1997 in Lago Vista, Texas. Following the ordeal, she, too, commenced a lawsuit pursuant to 42 U.S.C. § 1983, and her case also made it as far as the Supreme Court.³⁹ As will be further explored in the analysis to come, both sets of claims were rebuffed—the Court found that the authorities in both cases had acted within the purview of the constitution.

I provide these stories for two reasons. First, they convey the reality of living through an arrest and a strip search. Much of the literature on this topic is filled with references to Supreme Court precedent and legalese (and, to be fair, so are parts of this paper). But given that *personal* privacy rights lie at the heart of this debate, it is appropriate to pause and consider the details of what such personal invasion entails. It is not necessary to sensationalize such accounts in order to recognize how deeply invasive and humiliating they can be.⁴⁰ Second, these stories anchor my research goals in functional terms. They contain elements that non-legal readers might consider “unfair”—what started as a normal afternoon quickly became the stuff of confusion, arbitrariness, and humiliation. And yet, from a legal perspective, the counterarguments do have some logical purchase. Albert Florence did, after all, have an outstanding warrant for his arrest; and so while the

³⁷ See also Nina Totenberg, “Supreme Court Weighs Legality of Strip Searches,” NPR (Oct 12, 2011), available at <http://www.npr.org/2011/10/12/141286747/supreme-court-weighs-legality-of-strip-searches>.

³⁸ See *Florence v. Bd. of Chosen Freeholders*, 621 F.3d 296 (3d Cir. 2010), *cert. granted*, 131 S. Ct. 1816, 179 L. Ed. 2d 772 (2011).

³⁹ See *Atwater v. City of Lago Vista*, 532 U.S. 318, 325 (2001).

⁴⁰ A range of important work has been done on the disproportionately severe impact that such searches have on women, in particular. See *Women in Prison: A Report By The Anti-Discrimination Commission*, 72 QUEENSLAND (2006), Margo Schlanger, *Jail Strip Search Cases: Patterns and Participants*, 71 LAW & CONTEMP. PROBS. 65 (2008).

strip search may appear unnecessary, his arrest appears somewhat more justifiable.⁴¹ And while Gail was put through a very difficult experience, she *was* guilty of the minor seatbelt infraction. Even more importantly, her troubles stopped short of removing any clothing.

What is striking in their comparison, however—and what I aim to explore in the analysis that follows—is what happens when the factual circumstances behind these stories are combined. That is, what if there had been no arrest warrant for Albert Florence, as was the case with Gail? What if, based on some level of minor seat belt infraction, an officer could conduct an arrest and *also* a full body strip search—all without having encroached on any constitutional rights? These are not questions of narrow applicability. Each year, approximately 700,000 people find themselves in similar circumstances to Albert Florence,⁴² and vastly more than that are guilty of the minor infractions committed by Gail Atwater.⁴³ This is what’s now at stake. Following *Florence*, the Court has abandoned existing legal barriers, and officer discretion—a demonstrably fallible and inconsistent standard—may be all that remains between the public and substantial violations of privacy.

I. THE STATE OF EXISTING FOURTH AMENDMENT LAW

The history of Fourth Amendment law provides important context for the way in which we should evaluate contemporary strip search policies. In this Part, I illustrate several relevant themes that have emerged in the Court’s jurisprudence to date. In particular, the Court has been reluctant to depart from standards of individualized suspicion, and, prior to *Florence*, it had put forth no holdings

⁴¹ In actuality, Florence’s arrest was a mistake. The contempt citation had been paid, but the payment had not been properly recorded in the county’s computer system. *See Florence v. Bd. of Chosen Freeholders*, 595 F. Supp. 2d 492, 496 (D.N.J. 2009), *rev’d*, 621 F.3d 296 (3d Cir. 2010). Yet, while this fact certainly exacerbated the sense of unfairness Florence felt, the legal inquiry remains. That is, we are still left to question the whether or not the search would have been constitutional in an instance of a “proper” arrest.

⁴² Nina Totenberg, “Supreme Court Weighs Legality of Strip Searches,” NPR (Oct 12, 2011), *available at* <http://www.npr.org/2011/10/12/141286747/supreme-court-weighs-legality-of-strip-searches>.

⁴³ Jails admit more than 13 million inmates per year. *See* Dept. of Justice, Bureau of Justice Statistics, T. Minton, *Jail Inmates at Midyear 2010—Statistical Tables 2* (2011); Nina Totenberg, “Supreme Court OKs Strip Searches For Minor Offenses,” NPR (April 2, 2012), *available at* <http://www.wbur.org/npr/149866209/high-court-supports-strip-searches-for-minor-offenders>.

that endorsed entirely indiscriminate strip search policies. In addition, where the Court *has* allowed for a more categorical approach, it has done so largely based on deterrence rationales, and, even then, only with express reservations.

A. Terminology

Some of the upcoming complexities merit a brief clarification about terminology. This paper employs the following definitions.

A *strip search* refers to the “search of a person conducted after that person’s clothes have been removed . . . to find any contraband the person might be hiding.”⁴⁴ More specifically, I mean to refer to a search that is conducted in close proximity to the arrestee (i.e. a close inspection conducted by an official only a few feet away),⁴⁵ which includes “visual cavity searches.”⁴⁶ This terminology is in keeping with the definitions in *Florence*, which emphasize both that the search at issue involves “close observation of the private areas of a person’s body”⁴⁷ but also that it “does not include any touching of unclotted areas.”⁴⁸

⁴⁴ Black’s Law Dictionary 1469 (9th ed. 2009).

⁴⁵ This issue was the subject of much debate in the *Florence* oral arguments. Consider the following exchange between Justice Alito and Florence’s lawyer:

Alito: Suppose a jurisdiction has the policy of requiring every inmate who is arrested and is going to be held in custody to disrobe and take a shower and apply medication for the prevention of the spread of lice and is observed while this is taking place from some distance by a corrections officer, let’s say 10 feet away. Is that -- does that require a reasonable suspicion?

Mr. Goldstein: It does not. The -- and -- and--

Justice Samuel Alito: So your -- your only concern is searches that go further than that.

Mr. Goldstein: --That’s exactly right. The very close inspection of the individual’s genitals, which can occur absolutely so long as there is some minimal level of suspicion that’s created.

Oral Argument at 15:17, *Florence v. Bd. of Chosen Freeholders*, 131 S. Ct. 1816 (2012), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-945.pdf.

⁴⁶ The overwhelming weight of authority suggests that visual body cavity searches routinely fall within the realm of strip searches conducted by prison facilities, and because such searches were a component of Albert Florence’s experience, they are directly implicated in the Fourth Amendment analysis currently before the Court. See Howard Friedman, *Strip Searches and the Fourth Amendment Rights of Detainees and Prisoners*, GEORGETOWN UNIVERSITY LAW CENTER CONTINUING LEGAL EDUCATION, 27TH ANNUAL SECTION 1983: CIVIL RIGHTS LITIGATION (2009).

⁴⁷ *Florence v. Bd. of Chosen Freeholders*, 566 U.S. ___ * 1 (2012) (Breyer, J., dissenting).

⁴⁸ *Florence*, 566 U.S. at 5. In the majority opinion, Justice Kennedy pushes generally for greater specificity: “The term [strip search] is imprecise. It may refer simply to the instruction to remove clothing while an officer

By *prison*, or *prison facility*, I mean to include a range of penological institutions—including jails. In *Florence*, the Court uses a different approach, employing the term “jail” in a “broad sense to include prisons and other detention facilities.”⁴⁹ But while this assertion is technically accurate, it is somewhat misleading. The distinction between jails and prisons often sheds light on the length of time that arrestees will be detained—a distinction which is of critical importance to the intersection of *Atwater* and *Florence*. As such, for the purposes of the following analysis, I use *prisons* or *prison facilities* to refer to institutions that house a general prison population. But I use *holding facilities* to refer to institutions that house individuals for a shorter period of time, and which do not contain a general population of prisoners.⁵⁰

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

B. Historical Doctrine

The Fourth Amendment states in relevant part: “The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated.”⁵¹ Although the Court’s early jurisprudence viewed this guarantee as one that pertained predominantly to property rights, since 1967, the court has held that the Fourth Amendment also protects the right to an *individual’s*

observes from a distance of, say, five feet or more; it may mean a visual inspection from a close, more uncomfortable distance; it may include directing detainees to shake their heads or to run their hands through their hair to dislodge what might be hidden there; or it may involve instructions to raise arms, to display foot insteps, to expose the back of the ears, to move or spread the buttocks or genital areas, or to cough in a squatting position.” *Id.*

⁴⁹ 566 U.S. ___, *1 (2012).

⁵⁰ As a functional matter, these categories are also slightly clumsy. *See supra* Part III.

⁵¹ U.S. CONST. amend. IV.

privacy.⁵² This holding gave way to extensive litigation, culminating in Justice Harlan's now famous two part test: in order to be protected under the Fourth Amendment, an individual must have both a subjective expectation of privacy (i.e. the individual must personally feel an expectation of privacy), and also an objective expectation of privacy (i.e. society must deem that person's expectation reasonable given the circumstances).⁵³

A somewhat more difficult inquiry arises when examining Fourth Amendment privacy rights in context of penological institutions. The Supreme Court has long held that inmates must forgo many of the constitutional rights enjoyed by non-incarcerated individuals—a retraction which the Court has deemed “justified by the considerations underlying our penal system.”⁵⁴ In many respects, this is a logical accommodation of rights and institutional needs (the act of forced incarceration itself might otherwise be considered an inappropriate infringement on constitutional rights). But by the Court's own decree, this circumscription of rights should be carefully monitored: “Prison walls,” after all, “do not form a barrier separating prison inmates from the protections of the Constitution.”⁵⁵ To that end, the Court has upheld a range of constitutional protections for inmates: the right to marry,⁵⁶ the right to religious worship,⁵⁷ First Amendment freedoms to contact members of the press,⁵⁸ as well as a range of safeguards under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment.⁵⁹

Further complication is introduced when considering the Fourth Amendment rights of *pre-trial* arrestees. Because pre-trial arrestees have yet to benefit from any type of adjudicatory process,

⁵² *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, (1967) (“We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.”).

⁵³ *Katz v. United States*, 389 U.S. 347, 361 (1967).

⁵⁴ *Price v. Johnston*, 334 U.S. 266, 285 (1948).

⁵⁵ *Turner v. Safley*, 482 U.S. 78, 64 (1987).

⁵⁶ *See id.*

⁵⁷ *Cooper v. Pate*, 378 U.S. 546 (1964).

⁵⁸ *Pell v. Procunier*, 417 U.S. 817 (1974).

⁵⁹ *See Lee v. Washington*, 390 U.S. 333(1968); *see also Meachum v. Fano*, 427 U.S. 215, 225 (1976); *Wolff v. McDonnell*, 418 U.S. 539 (1974).

they have not yet received any formal assessment of culpability. These concerns stem largely from a fundamental tenet within the American justice system: that individuals have the right to remain free of punishment until they have been proven guilty. As a result, many have argued that the line-drawing exercise for pre-trial arrestees should be less clear—have these individuals, by mere function of having been arrested, given up the same level of constitutional protection as those that are adjudicated guilty? The following case, *Bell v. Wolfish*, has become a seminal holding in this realm of litigation, in part because it takes up some of these difficult issues.

C. *Bell v. Wolfish*

The Supreme Court’s 1979 decision in *Bell v. Wolfish* explicitly addressed the constitutional rights of pre-trial arrestees held at a federally operated detention facility.⁶⁰ The facility, known as the Metropolitan Correctional Center, primarily housed persons “being detained in custody *prior to* trial for federal criminal offenses.”⁶¹ As part of the facility’s policy, prisoners were forced to undergo a strip search—including a visual body cavity inspection—following every contact visit with an individual from outside the prison.⁶² The search policy was applied in a uniform manner to all inmates that engaged in contact visits, without regard for individualized suspicion or probable cause.

Of the range of constitutional violations the prisoners alleged, the Court admitted that the suspicionless strip search policy gave it the most “pause.”⁶³ Close inspection of the record revealed that the blanket policy had resulted in the discovery of *only one* additional item of contraband.⁶⁴ Nevertheless, the Court held that the strip searches at issue were not unreasonable, and therefore were

⁶⁰ 441 U.S. 520 (1979).

⁶¹ *Id.* at 524 (emphasis added).

⁶² *Id.* at 530.

⁶³ *Id.* at 558.

⁶⁴ *Id.*

not prohibited under the Fourth Amendment.⁶⁵ In addressing the scant empirical evidence available, the Court placed emphasis on the deterrence-based rationale behind the policy. “That there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person,” the Court noted, “may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises.”⁶⁶ Further, in order to parse such problems going forward, the Court created a balancing approach that has featured in decades of litigation on the issue: “each case requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.”⁶⁷ In operation, this requires a four-part assessment. Courts must examine “[1] the scope of the particular intrusion, [2] the manner in which it is conducted, [3] the justification for initiating it, and [4] the place in which it is conducted.”⁶⁸ Although all four pieces have been the subject of litigation, the first and third bear most directly on the analysis at hand. That is, assuming that a strip search is conducted appropriately and in a permissible location, courts are still left to grapple with what constitutes a sufficient *justification* for such an invasive search in the first place. As addressed in Part II, this issue—and, in particular, the role that deterrence-based policies play in the justification prong of the test—has been the subject of misinterpretation.

The *Bell* Court also touched upon the issue of whether or not pre-trial arrestees, by virtue of not yet having been to trial, may have greater Fourth Amendment protections than those that have been adjudicated guilty. The answer, at least as it pertained to the violations alleged in *Bell*, was no.⁶⁹

⁶⁵ *Id.* at 559 (“The Fourth Amendment prohibits only unreasonable searches, and under the circumstances, we do not believe that these searches are unreasonable.” (citing *Carroll v. United States*, 267 U.S. 132, 147 (1925))).

⁶⁶ *Id.*

⁶⁷ *Bell*, 441 U.S. at 559.

⁶⁸ *Id.*

⁶⁹ In other aspects of the opinion, however, the Court portrayed the difference as more narrow. Logic suggests that pre-trial detainees should possess *more* rights than convicted prisoners, and the Court echoes similar logic: “A *fortiori*, pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.” *Bell*, 441 U.S. at 545. But it quickly tempers whatever distance might have been created between such gaps. “There must be a ‘mutual accommodation

Writing for the majority, Justice Rehnquist explained: “Without question, the presumption of innocence plays an important role in our justice system. . . . But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.”⁷⁰ Justice Rehnquist went on to intimate that detainee classifications may in fact retain *no* Fourth Amendment rights whatsoever. He begins his evaluation of the strip search policies with the following caveat: “[A]ssuming for present purposes that inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility. . . .”⁷¹ As a result, arguments related to due process and an arrestee’s status in the adjudicatory process largely dissipated in post-*Bell* litigation. Ironically, as we will see in the discussion of the concurring opinions, the Court’s opinion in *Florence* may have breathed new life into what once appeared to be an obsolete area of jurisprudence.

Finally, two of the dissenting opinions are relevant to the contemporary debate over *Bell*. Because they are explored in greater detail to come, they are mentioned only briefly here. First, Justice Powell argued for a reasonable suspicion standard to be applied to the strip searches, starting that “[i]n view of the serious intrusion on one’s privacy occasioned by such a search, I think at least some level of cause, such as a reasonable suspicion, should be required.”⁷² In a separate dissent, Justice Stevens raised the possibility that strip searches could be considered a form of punishment.⁷³ “I think it is unquestionably a form of punishment to . . . compel [a prisoner awaiting trial] to exhibit his private body cavities to the visual inspection of a guard.”⁷⁴ The majority balked at this suggestion, holding that, “[a]bsent a showing of an expressed intent to punish on the part of detention facility

between institutional needs and objectives and the provisions of the Constitution that are of general application.’ This principle applies equally to pretrial detainees and convicted prisoners. A detainee simply does not possess the full range of freedoms of an unincarcerated individual.” *Id.* at 546.

⁷⁰ *Id.* at 553.

⁷¹ *Id.* at 558 (citations omitted) (emphasis added).

⁷² *Id.* at 563.

⁷³ *Id.* at 594 (Stevens, J., dissenting).

⁷⁴ *Id.*

officials,” the Court would not uphold a finding of punitive behavior.⁷⁵ Instead, “if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to ‘punishment.’”⁷⁶ This holding has played a particularly important, albeit largely unrecognized, part in shaping the legal landscape on prison searches. Without some form of “expressed intent” on the part of prison authorities or police officials, it is difficult to prove that an individual is being put through such procedures for punitive (and perhaps unconstitutional) purposes.

Several applicable themes emerge as we look back over this brief history of Fourth Amendment law. First, with respect to arrestees (including those that have been convicted, and also those that are awaiting trial), the Court has, *at times*, been willing to depart from the individualized standards that inform the majority of its Fourth Amendment jurisprudence.⁷⁷ The Court has not, however, endorsed policies that lack any form of tailoring whatsoever. In *Bell* (which provided the most substantial departure prior to *Florence*), the Court found that a blanket strip search policy was constitutional as applied to a specific category of inmates—those that had engaged in contact visits. The Court was specifically focused, however, on the deterrence-based rationale of the *Bell* policy. As a function of their ability to conduct contact visits, the prisoners at the MCC may have been inclined to take advantage of the opportunity to smuggle contraband *back* into the prison. The Court’s basic contention was that prisoners who knew that a full strip search was coming would be deterred. Equally important, the Court issued its *Bell* holding with the express directive that future policies be based upon a “balance.” With these themes in mind, it would be reasonable to question how, given the Court’s emphasis in *Bell*, the law has since gravitated towards such a distinct outcome. With that, we turn to a more detailed analysis of the *Florence* decision itself.

⁷⁵ *Id.* at 539.

⁷⁶ *Id.* at 539 (citations omitted).

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

D. *Florence v. Chosen Board of Freeholders*

In the aftermath of *Bell*, case law regarding strip searching arrestees splintered. Prior to *Florence*, three policy approaches were endorsed by courts: (1) the reasonable (or individualized) suspicion standard;⁷⁸ (2) the categorical (or categorized) suspicion standard;⁷⁹ and (3) the suspicionless (or blanket) standard, which was the subject of the Court’s attention in *Florence*.⁸⁰ While all three standards were—and are—employed in varying iterations through the United States, the fault lines of the debate largely set the first and second standard against the third.⁸¹ This is partly a function of practical realities.⁸² The reasonable suspicion standard and the categorical suspicion standard have much in common, and, in fact, they are often employed in unison.⁸³ A prison official may be responsible for searching all arrestees that have committed a certain category of offense, but may also have the flexibility to search someone for other reasons—such as their behavior upon arrest.⁸⁴ This gives officers fuller discretion to exercise their own (reasonable) judgment during the arrest process.

⁷⁸ See, e.g., *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983).

⁷⁹ See *Roberts v. Rhode Island*, 239 F.3d 107, 111 (1st Cir. 2001).

⁸⁰ See *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc) (overruling *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001)); *Bull v. San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc) (overruling *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984)); *Florence v. Bd. of Chosen Freeholders*, 621 F.3d 296, 298 (3d Cir. 2010), *cert. granted*, 131 S. Ct. 1816, 179 L. Ed. 2d 772 (2011).

⁸¹ Traditionally, this discussion has also pitted two familiar narratives against one another. On the government’s side, advocates claim that the Court owes deference to prison administrators when it comes to penological policymaking. On the other hand, civil rights advocates argue that the Court has a serious role ensuring that the Constitution is not “abandoned at the prison gates.”

⁸² It is also partly a function of the role of absolutes—those that advocate for a suspicionless standard often believe that arrestees have no Fourth Amendment right to any kind of mitigating standard in the search process.

⁸³ In many states and counties, for example, the category of the offense that the arrestee has been charged with informs whether or not an officer has an individualized reason for searching an arrestee. If the arrestee was arrested for some form of drug possession, for example, or for some form of violent crime committed with a weapon.

⁸⁴ See e.g., *Bull v. San Francisco*, 595 F.3d 964, 986 (9th Cir. 2010) (Kozinski, J., concurring in the judgment) (“[P]laintiffs classify an arrestee who was “nodding off,” and another who was “nervous,” as inmates as to whom there was individualized suspicion. If “nodding off” and “nervous” are sufficient for individualized suspicion, can “gave me a dirty look,” “was hyperactive” or “had poor posture” be far behind?”).

Following the Third Circuit’s decision in *Florence v. Chosen Board of Freeholders*,⁸⁵ the Supreme Court recognized that Circuit Courts had arrived at “differing conclusions”⁸⁶—and granted certiorari to resolve the split.⁸⁷ As alluded to earlier, *Florence* concerned the application of blanket-strip search policies as practiced by two facilities: the Burlington County Detention Center, and the Essex County Correctional Facility.⁸⁸ Albert Florence was forced to undergo strip-searches pursuant to mandatory practices at both facilities.⁸⁹ The question before the Court was whether blanket strip search policies for arrestees at prisons were constitutional, or whether the Fourth Amendment requires a more tailored search approach—such as the categorical or reasonable suspicion standard.⁹⁰

The Court recognized *Bell v. Wolfish* as “the starting point for understanding how th[e] framework applies to Fourth Amendment challenges.”⁹¹ It also acknowledged, briefly, that “the need for a particular search must be balanced against the resulting invasion of personal rights.”⁹² Beyond that, however, overtures to *Bell*’s balancing test were sparse. Instead, the Court placed a premium on

⁸⁵ The lead up to the decision in *Florence* was similarly varied. Initially, the District Court of New Jersey found the searches impermissible, holding that “blanket strip searches of non-indictable offenders, performed without reasonable suspicion for drugs, weapons, or other contraband, [are] unconstitutional.” *Florence v. Bd. of Chosen Freeholders*, 595 F. Supp. 2d 492, 509-10 (D.N.J. 2009) *amended*, 657 F. Supp. 2d 504 (D.N.J. 2009) and *rev’d*, 621 F.3d 296 (3d Cir. 2010). In arriving at its conclusion, the district court, like many circuit courts, read a reasonable suspicion requirement into the *Bell* holding: “just because the searches in *Bell* were conducted pursuant to a blanket policy does not mean that reasonable suspicion was lacking. . . . [Contact] visits, by their very nature, may . . . provide the requisite reasonable suspicion for jail officers to justify the blanket search policy.” *Id.* The Third Circuit Court of Appeals reversed, largely based on a different interpretation of *Bell*. As the court noted, “[l]ike the Ninth and Eleventh Circuit Courts of Appeals, we conclude that the security interest in preventing smuggling at the time of intake is as strong as the interest in preventing smuggling after the contact visits at issue in *Bell*. We reject Plaintiffs’ argument that blanket searches are unreasonable because jails have little interest in strip-searching arrestees charged with non-indictable offenses. This argument cannot be squared with the facts and law of *Bell*.” *Florence v. Bd. of Chosen Freeholders*, 621 F.3d 296, 308 (3d Cir. 2010), *cert. granted*, 131 S. Ct. 1816, 179 L. Ed. 2d 772 (U.S. 2011).

⁸⁶ *Florence*, 566 U.S. at 5.

⁸⁷ *Id.*

⁸⁸ *Florence*, 566 U.S. at 2.

⁸⁹ There is some debate about the extent to which all aspects of Albert Florence’s strip search at Burlington County Detention Center were expressly part of institutional protocol. The Court describes the process as follows: “Burlington County jail procedures required every arrestee to shower with a delousing agent. Officers would check arrestees for scars, marks, gang tattoos, and contraband as they disrobed. Petitioner claims he was also instructed to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. (It is not clear whether this last step was part of the normal practice.)” *Florence*, 566 U.S. at 3 (2012) (citations omitted).

⁹⁰ Citation. Again, “prisons” refer to institutions which contain a general jail population.

⁹¹ *Florence*, 566 U.S. at 6.

⁹² *Id.*

deference to correctional facilities,⁹³ and the need for an easily administrable standard. “[C]ourts,” the majority wrote, “must defer to the judgment of correctional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of jail security.”⁹⁴ The Court’s ultimate judgment was that the “necessary showing has not been made in this case.”⁹⁵

In fashioning its opinion, the majority relied on several Supreme Court precedents. First, the Court’s holding in *Turner v. Safely* provided a foothold for deference to prison officials.⁹⁶ The *Florence* Court argued that *Turner* had “confirmed the importance of deference to correctional officials” and “explained that a regulation impinging on an inmate’s constitutional rights must be upheld ‘if it is reasonably related to legitimate penological interests.’”⁹⁷ For instances in which the Supreme Court had upheld prison policies that lacked reasonable suspicion, it cited three holdings: *Bell v. Wolfish*, *Block v. Rutherford* (which concerned a county jail’s decision to ban all contact visits),⁹⁸ and *Hudson v. Palmer* (which addressed the question of whether prison officials could search inmate lockers without particularized suspicion).⁹⁹ Finally, the petitioner’s request that detainees involved in non-violent or drug-free crimes be exempt absent a particular reason to suspect the presence of contraband was unavailing. The Court called instead for administrative ease. “It is

⁹³ The dangers of excess deference in this field have been well documented. See JOHN J. DILULIO, GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT (1987); see also Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prison*, U. PA. L. REV. (1990). Cf Chris Keleher, *The Dangerous Disconnect Between Courts and Corrections*, CREIGHTON L. REV. 45 (2011).

⁹⁴ *Florence*, 566 U.S. at 2.

⁹⁵ *Id.*

⁹⁶ *Id.* at 5.

⁹⁷ *Id.* (citing *Turner v. Safely*, 482 U.S. 78, 89 (1984)). This is not the first instance in which *Turner*—a case which upheld the right to marriage among inmates—has actually been used to circumscribe the rights of prisoners. See e.g. Kyrsten Sinema, Note, *Overton v. Bazzetta: How the Supreme Court Used Turner to Sound the Death Knell for Prisoner Rehabilitation*, 36 ARIZ. ST. L.J. 471 (2004).

⁹⁸ 468 U.S. 576 (1984).

⁹⁹ 468 U.S. 517 (1984).

reasonable,” the Court argued, “for correctional officials to conclude this standard would be unworkable.”¹⁰⁰

As alluded to in the introduction, the *Florence* opinion was fragmented, inferring a degree of discord among the majority. In Part IV, for example, Justice Kennedy attempts to draw some limitations to the Court’s ruling: “This case does not require the Court to rule on the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees.”¹⁰¹ He intimates instead that the “accommodations provided in these situations may diminish the need to conduct some aspects of the searches at issue.”¹⁰² But Justice Thomas refused to join for this part, reticent to draw such an explicit exemption.¹⁰³

Finally, although the Court’s concurrences will be covered in greater detail in the upcoming analysis of *Atwater*, they, too, underscore the nuances of the ruling. Chief Justice Roberts argued that the Court “does not foreclose the possibility of an exception to the rule it announces.”¹⁰⁴ Justice Alito was also quick to “emphasize the limits of [the] holding.”¹⁰⁵ As he explains, “the Court holds that jail administrators may require all arrestees *who are committed to the general population of a jail* to undergo visual strip searches not involving physical contact by corrections officers.”¹⁰⁶ In total, therefore, the opinion contains two important considerations, one definitive and one less so. First, the

¹⁰⁰ *Florence*, 566 U.S. at 14.

¹⁰¹ *Id.* at 18.

¹⁰² *Id.*

¹⁰³ It is interesting to note, however, that this distinction is already made partially clear in the opening salvo of the majority opinion. In Part I of the opinion, which Justice Thomas joined, the majority writes, “[t]he case proceeds on the understanding that the officers searched detainees prior to their admission to the general population, as the Court of Appeals seems to have assumed.”¹⁰³ See also Lyle Denniston, “Routine jail strip searches OK,” SCOTUS BLOG (April 2, 2012) (noting in reference to the exception alluded to in Part IV that “Justice Thomas apparently did not want to leave that option open for a future challenge”) available at <http://www.scotusblog.com/?p=142415>.

¹⁰⁴ *Florence*, 566 U.S. at 1 (Roberts, C.J., concurring).

¹⁰⁵ *Id.* at 1 (Alito, J. concurring).

¹⁰⁶ *Id.* (emphasis in the original).

holding governs “arrested persons who are to be held in jail while their cases are being processed.”¹⁰⁷ Second, for now, the holding pertains only to individuals who enter prisons with *general populations*. As we will see, however, these qualifications do little to mitigate what is otherwise a substantial departure from Fourth Amendment safeguards.

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

Despite the proliferation of blanket search policies, and contrary to the opinion in *Florence*, a faithful application of existing law makes clear that suspicionless strip searches cannot be justified. In this Part, I explore some of the mistaken rationales that formed the Court’s contrary assessment in *Florence*. Chief among them is a misunderstanding of the way in which deterrence-based policies factor into the Court’s prior holdings. In earlier instances where the Court has allowed blanket search policies—and in virtually all of the operative cases cited by the majority in *Florence*—the prison policies at issue were based in part on deterrence. But that rationale was decidedly absent in *Florence*. The result, as is made clear by the majority opinion, was that the Court was left to reach for legal footholds where none were available. Second, and again contrary to the Court’s original intentions, because *Bell*’s ultimate conclusion was to uphold a form of suspicionless search policy (as applied to inmates who engaged in contact visits), the *Bell* decision has often been invoked as a full-throated endorsement of blanket strip search policies of all kinds. We see evidence of this trend in *Florence*. A more faithful reading, however, clearly depicts that the Court intended *Bell* as a departure from the norm, rather than as the new standard.

¹⁰⁷ *Id.* at 1.

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

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

1. *An Inappropriate Invocation of Deterrence-Based Precedent*

The first invocation of precedent came in the form of *Bell* itself. Following a brief overview of *Bell*'s framework, the *Florence* Court explained that *Bell*, like the present case, concerned a form of blanket strip search policy. Specifically, *Bell* “addressed a rule requiring pretrial detainees in any correctional facility run by the Federal Bureau of Prisons ‘to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution.’”¹⁰⁸ As the *Florence* Court recalls, despite the *Bell* petitioners’ appeal for a more narrow approach, the “Court nonetheless upheld the search policy.”¹⁰⁹ But as the majority admits, the policy in *Bell* was partially premised on deterrence: “[The Supreme Court] deferred to the judgment of correctional officials that the inspections served not only to discover drugs but also to *deter* the smuggling of weapons, drugs, and other prohibited items inside.”¹¹⁰ The logic is understandable. As a function of their exposure to outside visitors—and given their advanced knowledge of such visits—prisoners might use the opportunity to smuggle contraband.

As the facts of the case make clear, however, deterrence is a far less appropriate rationale for the policies featured in *Florence*. Albert Florence had no knowledge that he would be arrested.¹¹¹ Nor

¹⁰⁸ *Florence*, 566 U.S. at 6 (citing *Bell*, 441 U.S. at 558).

¹⁰⁹ *Id.*

¹¹⁰ *Florence*, U.S. 566 at 6 (emphasis added).

¹¹¹ See Brief for Petitioner at 3, *Florence v. Bd. of Chosen Freeholders* 566 U.S. __ (2012).

did he have any reason to believe that he would be entering a prison that afternoon.¹¹² In fact, it is difficult to argue that *any* arrestee anticipates an arrest in the way presumed by the majority.

Remember that the strip searches at issue in *Florence* are highly invasive. They entail a close visual inspection of body cavities. While offenders may conceal weapons or drugs during the commission of crimes, the notion that an offender would conceal such items in body cavities—and all in advanced anticipation of an unforeseen arrest—is harder to entertain. In this respect, while the policy in *Bell* may have had some appeal from a deterrence perspective, the same cannot be said for a policy that applies to arrestees upon *initial* processing.

The other major precedents cited by the majority in *Florence* founder based upon a similar analysis. The Court cites *Block v. Rutherford* to support its contention that “[p]olicies designed to keep contraband out of jails and prisons have been upheld in cases decided since *Bell*.”¹¹³ But the policies at issue in *Block* were also based on contact visits, and therefore promulgated with an eye towards deterrence. As the *Block* Court explained, “[v]isitors can easily conceal guns, knives, drugs, or other contraband . . . [a]nd these items can readily be slipped from the clothing of an innocent child, or transferred by other visitors permitted close contact with inmates.”¹¹⁴ Finally, while the *Florence* Court’s final invocation of precedent—*Hudson v. Palmer*—does not pertain to contact visits, a deterrence-based rationale was nevertheless present. *Hudson* addressed the question of “whether prison officials could perform random searches of inmate lockers and cells even without reason to suspect a particular individual of concealing a prohibited item.”¹¹⁵ In upholding the constitutionality of the search policy, the *Hudson* Court argued that “[f]or one to advocate that prison searches must be conducted only pursuant to an enunciated general policy or when suspicion is

¹¹² *Id.*

¹¹³ *Florence*, U.S. 566 at 6.

¹¹⁴ *Block v. Rutherford*, 468 U.S. 576, 586 (1984).

¹¹⁵ *Florence*, U.S. 566 at 7 (citing *Hudson v. Palmer*, 468 U.S. 517, 522-23 (1984)).

directed at a particular inmate is to ignore the realities of prison operation.”¹¹⁶ But once again, these policies concerned individuals who were *already* detained. The presence of random and indiscriminate searches, therefore, had appeal as a deterrent. Otherwise, as the *Florence* Court reiterated, “[i]nmates would adapt to any pattern or loopholes they discovered in the search protocol and then undermine the security of the institution.”¹¹⁷

2. *Grappling with Hypotheticals in Lieu of Evidence*

Lacking a controlling legal precedent, Justice Kennedy, writing for the majority, attempts to bridge the divide with empirical evidence from the record. He cites instances from two amicus briefs where individuals arrested for misdemeanor violations attempted to smuggle contraband into jails or prisons.¹¹⁸ But in at least one of the instances cited, the arrestee *knew* he would be going to jail in advance (because he self-reported).¹¹⁹ For the others, the amicus briefs provide little indication of whether a reasonable suspicion standard may have sufficed rather than the blanket standard; the very crux of what’s at issue in *Florence*.

Further, if empirical assessments can be used to plug legal holes, then the majority takes a decidedly narrow view of the empirical landscape. The majority speaks broadly of the inherent “difficulties in operating a detention center”¹²⁰ and writes at length about the gravity of the problem contraband presents in contemporary prison facilities.¹²¹ But if isolated instances of smuggling can be used to justify the reasonableness of blanket search policies, shouldn’t the Court also be looking to

¹¹⁶ *Hudson*, U.S. 517 at 529.

¹¹⁷ *Florence*, U.S. 566 at 7.

¹¹⁸ *See Florence*, U.S. 556 at 15.

¹¹⁹ *See* Brief for the United States as Amici Curiae Supporting Respondent at 25 n.15, *Florence v. Bd. of Chosen Freeholders* 566 U.S. ___ (2012) (citing to an incident in Bangor, Maine, in which an “inmate who *self-reported* to serve sentence for refusing to submit to arrest smuggled a marijuana cigarette into jail in his rectum” (emphasis added)). Given the problem of advanced knowledge in instances of self-reporting, such arrests could simply be placed within a category that merits strip searching under the reasonable suspicion standard.

¹²⁰ *Florence*, U.S. 556 at 5.

¹²¹ *See id.* at 5, 11-13.

the broader elements of the problem? It is well-documented, for example, that prison guards themselves constitute a part of the smuggling problem in U.S. prisons.¹²² In fact, “[a]rrests of federal prison guards soared nearly 90% over the last decade.”¹²³ Between 2001 and 2009, there were 16,717 substantiated instances of misconduct by Correctional Officers in the Federal Bureau of Prisons, many of which pertained to contraband.¹²⁴ This does not, of course, discount the need for an inmate search policy; nor the utility of empirics. But it provides context for the way in which isolated instances of empirics should be evaluated in light of broader underlying causes.

Given the absence of legal or empirical support, the majority is left mostly to grapple with hypotheticals.¹²⁵ For example, the majority posits that concealing contraband “*might* be done as an officer approaches a suspect’s car or during a brief commotion in a group holding cell.”¹²⁶ Similarly,

¹²² See e.g., Robert Faturechi and Jack Leonard, *L.A. County jail guards aid drug trading, sources say*, L.A. TIMES (Oct. 2, 2011), <http://articles.latimes.com/2011/oct/02/local/la-me-jail-contraband-smuggle-2011100>; Jessica Hopper, *Texas Jail Guard Guilty of Sneaking Hacksaw Blade in Taco*, ABC NEWS (July 27, 2011), <http://abcnews.go.com/US/texas-jail-guard-found-guilty-sneaking-hacksaw-taco/story?id=14171253>; Samuel Rubinfeld, *2 Prison Guards Indicted On Bribery, Smuggling Charges*, WALL ST. J. (June 26, 2012), <http://blogs.wsj.com/corruption-currents/2012/06/26/2-prison-guards-indicted-on-bribery-smuggling-charges/>; Amber Stegall, *Prison guard takes money from inmate to smuggle in contraband*, WAFB (June 27, 2012), <http://www.wafb.com/story/18857788/prison-guard-takes-money-from-inmate-to-smuggle-in-contraband>; *Federal prison guard admits smuggling contraband to inmates at Seagoville*, DALLAS MORNING NEWS, (Sept. 3, 2011), <http://crimeblog.dallasnews.com/2011/09/federal-prison-guard-admits-sm.html/>.

¹²³ Alexa Vaughn, *Federal prison guard arrests increase dramatically, report finds*, LA TIMES (Sept. 29, 2011), <http://articles.latimes.com/2011/sep/29/nation/la-na-prison-guards-20110930>.

¹²⁴ U.S. DEP’T OF JUSTICE, ENHANCED SCREENING OF BOP CORRECTIONAL OFFICER CANDIDATES COULD REDUCE LIKELIHOOD OF MISCONDUCT 14 (2011) (“While there is no single explanation for the increase in Correctional Officer arrests from FY 2001 to FY 2010, during the course of our review BOP officials suggested two factors likely to have contributed to the rise. First, in 2004 the BOP implemented a near-total ban on lighted tobacco products in its prisons, which had the effect of turning cigarettes into contraband. Second, recent years have seen stricter enforcement of prohibitions against inappropriate sexual relationships in prison due to heightened awareness and federal legislation.”)

¹²⁵ Most courts have placed far too much weight on empirical comparisons. While the *Bell* decision did feature an analysis of empirics, the analysis was highly cursory, lasting only long enough to dispel the lower court’s assessment, and to offer an (unsubstantiated) supposition about why the record might have contained so few instances of smuggling. This is not to say that the Court was excusing itself from the matter entirely. It reiterated past precedent that the Court has a role to play where “[prison] officials have exaggerated their response to [security] considerations.”¹²⁵ *Bell*, 441 U.S. at 559 (citing *Pell v. Procunier*, 417 U.S. 817, 827 (1974)). But it is clear that, in determining what constitutes an exaggerated response, the Court was focused mostly on the *qualitative* aspects of the search policy.

¹²⁶ *Florence*, 566 U.S. at 13 (emphasis added). Evidence aside, a brief reflection on this argument also suggests it is implausible. The overwhelming impulse prior to arrest is surely to get *rid* of contraband as an officer approaches. In addition, the notion that many people would be capable of hiding contraband in a body cavity *while an officer approaches* is difficult to entertain.

[s]omething small *might* be tucked or taped under an armpit, behind an ear between the buttocks, in the instep of a foot, or inside the mouth or some other body cavity.”¹²⁷ Further, “even if people arrested for a minor offense do not themselves wish to introduce contraband into a jail, they *may* be coerced into doing so by others.”¹²⁸ Such an occurrence “*could* happen any time detainees are held in the same area, including in a van on the way to the station or in the holding cell of a jail.”¹²⁹ But the Court cites no evidence from the record for the first two of these propositions. For the others, the evidence cited once again pertains to cases about *contact* visits; not to individuals arrested without warning.¹³⁰

Ultimately, the circumstances in *Florence* had little to do with deterrence. As a result, analogies to precedent regarding deterrence-based search policies are inapt. So, too, are the Court’s efforts to buttress its conclusion with empirical evidence.

B. An Exception, Rather Than a New Norm

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

“[W]e deal here,” the *Bell* Court explained, “with the question whether visual body-cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy

¹²⁷ *Id.* (emphasis added).

¹²⁸ *Id.* at 15 (emphasis added).

¹²⁹ *Id.* (emphasis added).

¹³⁰ See *Florence*, 566 U.S. at 15 (citing *Block*, U.S. 468 at 587 (“It is not unreasonable to assume, for instance, that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied *contact visits*.” (emphasis added))).

interests of the inmates, we conclude that they can.”¹³¹ This language overwhelming suggests that the Court saw its intervention as a deviation from the norm (the italicized emphasis on the word “ever” is not aesthetic—it features in the Court’s original opinion). So while the Court ultimately found that a full body strip search could be conducted without more individualized suspicion, it was quite clearly staking out a small area of exception. That is, in a narrow class of detainees—those in transition back from contact visits—prison authorities could disband with the usual requirements of individualized suspicion. But the *category* of these arrestees continued to play a clear role in informing the need for a strip search. The record provides no evidence whatsoever that the correctional facility had been applying such policies to *all* arrestees.¹³² Nor does the Court’s opinion suggest such an expansive application.

This contention also finds support in secondary literature written not long after the *Bell* decision. As one commentator notes, “[t]he common denominator in [the cases leading up to *Bell*] was that the body cavity search policy was used only when prisoners came into contact or reasonably could come into contact with persons from outside the prison facility.”¹³³ Of the decisions that reached further afield, the commentator notes that they “fail to take into account prior case law and tend to ignore Justice Rehnquist’s very particular limitation on the issue decided.”¹³⁴

In keeping with this more cabined reading, Justice Powell’s dissent in *Bell* lends additional guidance. Powell’s dissent states, in full: “I join the opinion of the Court except the discussion and holding with respect to body-cavity searches. In view of the serious intrusion on one’s privacy occasioned by such a search, I think at least some level of cause, such as a reasonable suspicion,

¹³¹ *Bell v. Wolfish*, 441 U.S. 520, 560 (1979).

¹³² This was the subject of some dispute during oral argument. See Oral Argument at 14:11, *Florence v. Bd. of Chosen Freeholders*, 131 S. Ct. 1816 (2012), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-945.pdf.

¹³³ Comment, *Do Prison Inmates Retain Any Fourth Amendment Protection From Body Cavity Searches?*, 56 U. Cin. L. Rev. 739, 746 (1987).

¹³⁴ *Id.* at 745.

should be required to justify the anal and genital searches described in this case.”¹³⁵ Because Powell shapes his argument as a dissent, many lower courts have taken this to mean that the controlling opinion in *Bell* rejects the need for any form of suspicion.¹³⁶ But such an interpretation neglects the specific language employed in the majority opinion. Reinquist concluded that these searches could, at times, be conducted on “less than probable cause.” But holding that prison authorities may sometimes be justified in departing from a probable cause standard is by no means a necessary rejection of the claim that *some* level of cause should accompany strip searches. Moreover, the fact that a specific standard was not expressly adopted by the majority may speak more to the judicial minimalism of the Court than to any implicit effort to reject a reasonable suspicion standard. Judge Barkett of the Eleventh Circuit Court of Appeals made a similar point in arguing against the blanket strip search policy: “Nor does the fact that *Bell* upheld a blanket policy, *after a trial*, mean that the Supreme Court implicitly rejected a finding that reasonable suspicion is ever necessary to justify strip searches or strip search policies. This is too broad a constitutional principle to derive from an allegedly implicit holding of the Supreme Court. A more reasonable interpretation would be that the Supreme Court did not need to address the issue because reasonable suspicion was present in the evidentiary record based on the detainees' planned contact with outsiders knowing they would be returning to the general population of the detention center after the visit.”¹³⁷ Given the facts at issue in *Bell*, the majority may simply have felt that an explication of a new, defining standard was unnecessary; whereas Justice Powell may have felt that greater specificity was needed.

In any case, interpretive acrobatics are unnecessary. In *Bell*, the fairest reading of the opinion is simply that the Court intended to uphold a discrete deviation from the probable cause standard.

¹³⁵ *Bell v. Wolfish*, 441 U.S. 520, 563 (1979) (Powell, J., concurring in part and dissenting in part).

¹³⁶ See *Bull v. San Francisco*, 595 F.3d 964, 978 (9th Cir. 201) (en banc); *Powell v. Barrett*, 541 F.3d 1298, 1307-09 (11th Cir. 2008) (en banc); David Shapiro, *Does the Fourth Amendment Permit Indiscriminate Searches of Misdemeanor Arrestees?: Florence v. Board of Chosen Freeholders*, 6 CHARLESON L. REV 131 (2011).

¹³⁷ *Powell v. Barrett*, 541 F.3d 1298, 1316-17 (11th Cir. 2008) (Barkett, J., dissenting).

Despite the new trend at work in *Florence*, there is little evidence to indicate that the Court was considering a more expansive application to all arrestees.

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

As the above sections depict, a sound understanding of the Court’s past jurisprudence and a fair reading of *Bell* should provide sufficient grounds to renounce blanket strip search policies. But perhaps the most compelling case against suspicionless searches lies in the realm of *practical* considerations. In this Part, I leave the historical and doctrinal analysis behind and focus on several changes in contemporary case law that have led to a new, and deeply concerning, set of ground-level ramifications. In particular, the Court’s 2001 holding in *Atwater v. Lago Vista* dramatically expanded the range of offenses that may merit arrest. Now that *Atwater* has been augmented by the Court’s endorsement of blanket strip search policies, the combination allows for an unprecedented degree of police power; and, in turn, elevates the risk of abuse by police officers.¹³⁸ While the intersection with *Atwater* does surface in the *Florence* opinions, ultimately the holding provides no express protections from police abuse. Further, as the analysis below depicts, this concern is not mere speculation—recent litigation and political developments make clear that the risks are real. In light of these concerns, moreover, Justice Stevens’ dissent in *Bell* re-emerges as a prescient analysis of how strip searches might be used as a punitive tool.

¹³⁸ To date, there has been no serious scholarly attempt to address these issues. Further, because these factors emerged entirely in the post-*Bell* environment, they necessarily fell beyond the purview of the Court’s consideration when it was first evaluating the constitutionality of strip searches following contact visits.

A. *Introducing Atwater v. Lago Vista*

Although there has been a variety of litigation concerning strip search policies in the aftermath of *Bell*, somewhat surprisingly, the most substantial change to the legal landscape had little to do with strip searches. In 2001, the Supreme Court decided *Atwater v. Lago Vista*.¹³⁹ As alluded to in the introduction, the case featured a Fourth Amendment challenge brought by petitioner Gail Atwater who had been arrested and detained for a seat-belt violation (her children were sitting in the front seat without seatbelts).¹⁴⁰

Following her release, Atwater filed a 42 U.S.C. § 1983 claim alleging that the local police official had violated her Fourth Amendment “right to be free from unreasonable seizure.”¹⁴¹ Her chief legal argument was grounded in common law. “Founding-era common-law rules,” she argued, “forbade peace officers to make warrantless arrests except in cases of ‘breach of the peace’”—an exception which historically included only non-felony offenses that “involve[d] or tend[ed] toward violence.”¹⁴² The Court admitted that Atwater’s claims in this regard were “by no means insubstantial.”¹⁴³ But it refused to endorse her challenge. Writing for the majority, Justice Souter took issue with what he perceived to be Atwater’s overly simplistic assertions about the common law: in the Court’s opinion, there was “disagreement, not unanimity, among both the common-law jurists and the text writers.”¹⁴⁴ The Court also balked at the suggestion that it should create a new—or at least, more explicit—constitutional rule to protect individuals alleged to have committed only nonviolent minor offenses. In the Court’s assessment, the political process, coupled with the requirement of

¹³⁹ *Atwater v. City of Lago Vista*, 532 U.S. 318, 324 (2001).

¹⁴⁰ To re-iterate briefly, following what might normally have been a routine traffic stop and citation, the officer took the unusual step of arresting Atwater. After a brief period of detainment at a local jail, Atwater ultimately pled no contest to the seatbelt violation, and was released following a bail bond of \$310.00. In total, Atwater was charged with “driving without her seatbelt fastened, failing to secure her children in seatbelts, driving without a license, and failing to provide proof of insurance.” *Id.* All charges were dismissed with the exception of the seatbelt violation.

¹⁴¹ *Id.* at 325.

¹⁴² *Id.* at 327.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 332.

probable cause, were sufficient protective barriers to prevent a parade of abuse.¹⁴⁵ The Court also ratcheted up the bar necessary to plead a valid Fourth Amendment claim for an unconstitutional arrest. In order to warrant Fourth Amendment protection, the arrest had to be “conducted in an extraordinary manner, unusually harmful to [a defendant’s] privacy or even physical interests.”¹⁴⁶ Going forward, therefore, the implications of *Atwater* were clear but expansive: “If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”¹⁴⁷

When *Atwater* is coupled with the application of suspicionless strip searches, the ramifications become quickly apparent. Traditionally, a court could take comfort in the knowledge that the arrest itself provided *some* form of buffer. While an individual alleged to have committed a violent offense could almost certainly be arrested, it was a far less likely occurrence for an individual who had participated in no serious wrongdoing. Following *Atwater*, this buffer was substantially weakened. Now, while officers must continue to summon the requisite probable cause in order to make an arrest, the gravity of the offense no longer weighs in the calculus. The functional result was that a broad array of individual offenses that had previously been beyond the scope of warrantless arrest were now within its purview.¹⁴⁸ Following the chain of events only a few steps further leads to a concerning conclusion. An individual could begin her afternoon as Gail Atwater did, and end up in circumstances similar to those of Albert Florence. Following the holding in *Florence*, such an

¹⁴⁵ *Id.* at 321 (“The upshot of all these influences, combined with the good sense (and, failing that, the political accountability) of most local lawmakers and peace officers, is a dearth of horrors demanding redress.”).

¹⁴⁶ *Id.* at 325.

¹⁴⁷ *Id.* at 354.

¹⁴⁸ Over the course of the Fourth Amendment’s evolution in the lower courts, individuals have been arrested and strip searched for a wide array of offenses. The chief difference of course, is that, barring the few exceptions at issue in this paper, courts ultimately found the strip searches unconstitutional because prison officials failed to provide any form of reasonable or categorical suspicion. *See Jones v. Edwards*, 770 F.2d 739, 740-42 (8th Cir. 1985) (arrested and strip searched for refusing to sign a summons); *Walsh v. Franco*, 849 F.2d 66, 68-70 (2d Cir. 1988) (not paying parking tickets); *Chapman v. Nichols*, 989 F.2d 393, 394-95 (10th Cir. 1993) (driving with a suspended license); *Watt v. City of Richardson Police Dep’t*, 849 F.2d 195, 196 (5th Cir. 1988) (failing to license a dog); *Powell v. Barrett*, 541 F.3d 1298, 1300-01 (11th Cir. 2008) (en banc) (and failing to pay child support).

experience entails no clear deprivation of constitutional rights, and no recognizable legal claim or remedy.

B. The Florence Concurrences

Atwater received almost no attention from either party during briefing in *Florence*.¹⁴⁹ But it troubled the Justices. The case is cited prominently by the majority and dissent, and it serves as the unarticulated backdrop for both concurrences.¹⁵⁰ Ultimately, however, the Court does little more than intimate the possibility of one day providing protection for individuals in *Atwater*'s circumstances. Further, if the concurrences are an accurate depiction of how these protections may eventually materialize, the final framework will remain prone to abuse.

As alluded to earlier, Justice Kennedy, writing for the majority, was the first to broach the issue of *Atwater*. He notes that, for individuals in *Atwater*'s circumstances, "the accommodations provided in [such] situations may diminish the need to conduct some aspects of the searches at issue."¹⁵¹ For the time being, however, because Albert Florence was housed in an institution that contained a general prison population, "[t]he circumstances before the Court . . . d[id] not present the opportunity to consider a narrow exception."¹⁵²

The concurring opinions, written by Justice Roberts and Justice Alito, built upon Kennedy's initial foray. In total, they spanned almost the full gamut of issues that have come to shape the Court's Fourth Amendment jurisprudence. Justice Roberts, for example, raised the issue of warrants as a delineating factor. He notes that Florence's "circumstances include the facts that Florence was

¹⁴⁹ It features only once in the Brief for Essex County, and, even then, appears as support for a proposition entirely different from the issue raised in this article. Brief for Respondent at 18, *Florence v. Bd. of Chosen Freeholders*, 566 U.S. __ * 2 (2012) ("Even if historical practices do not 'clear[ly] answer' whether the Fourth Amendment applies here, *Atwater v. City of Lago Vista*, 532 U.S. 318, 345 (2001), this Court's modern cases foreclose any claim that inmates have a reasonable expectation of privacy against intake searches conducted to serve institutional, not law enforcement, purposes.")

¹⁵⁰ See *Florence*, 566 U.S. at 18; *Florence*, 566 U.S. at 4 (Breyer, J. dissenting); *Florence*, 566 U.S. at 1 (Roberts, C.J., concurring); *Florence*, 566 U.S. at 1 (Alito, J., concurring).

¹⁵¹ *Florence*, 566 U.S. at 18.

¹⁵² *Id.* at 19.

detained not for a minor traffic offense but instead pursuant to a warrant for his arrest, and that there was apparently no alternative, if Florence were to be detained, to holding him in the general jail population.”¹⁵³ As such, “[t]he Court is . . . wise to leave open the possibility of exceptions, to ensure that we ‘not embarrass the future.’”¹⁵⁴ The first part of this delineation—dividing detainees arrested pursuant to warrant from those who are not—is mostly temporal. It shifts the buffer from one point in the process (the arrest phase) to a later point (the strip search phase). But it alone does little to fulfill the majority’s desires for a workable bright line rule. That is, the presence or absence of a warrant alone is unlikely to say much about the presence of contraband. Justice Alito, writing separately, sought clarity in a different type of temporal delineation. As he explained, most arrestees “are released from custody prior to or at the time of their initial appearance before a magistrate.”¹⁵⁵ This contention, however, is in some conflict with Justice Rehnquist’s holding in *Bell*, which made clear that an arrestee’s status in the adjudicatory process should not play a decisive role in the nature of an arrestee’s Fourth Amendment rights.¹⁵⁶

The most common thread among the opinions, however—and the issue upon which future protections are most likely to hinge—pertains to a prison’s general population. The logic underlying the distinction is that inmates housed in a temporary holding facility have no access to a prison’s general population and therefore pose a reduced risk of smuggling contraband.¹⁵⁷ As Justice Alito notes in reference to Justice Kennedy’s position, “admission to the general jail population, with the concomitant humiliation of a strip search, may not be reasonable, particularly if an alternative procedure is feasible.”¹⁵⁸ Here, it is helpful to parse the language carefully. Justice Kennedy writes that for arrestees in *Atwater*’s circumstances, the *accommodations* provided may provide an outlet by

¹⁵³ *Florence*, 566 U.S. at 1 (Roberts, C.J., concurring).

¹⁵⁴ *Id.* (citing *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 300 (1944) (Frankfurter, J.)).

¹⁵⁵ *Florence*, 566 U.S. at 1 (Alito, J. concurring).

¹⁵⁶ *See infra*, Part I, C.

¹⁵⁷ *See*, for example, Rhode Island’s “unified system,” in which detainees awaiting a first court appearance were held at an “intake facility” which held that classification of a maximum security prison. *Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001).

¹⁵⁸ *Florence*, 566 U.S. at 1 (Alito, J. concurring).

which to avoid the strip search.¹⁵⁹ The difficulty with this type of categorization, however, is that it is inherently arbitrary. An arrestee's rights would be dictated not by the nature of the crime, or in fact, by any action of the arrestee's own agency; but instead by whether or not the jurisdiction in which her or she is arrested happens to contain facilities with general prison populations.

As an initial matter, the proliferation of long-term holding facilities and other forms of hybrid transition facilities has made this classification murky. In many parts of the United States, contemporary holding "facilities" have replaced traditional jails for the purposes of housing pre-trial detainees. In *Bell*, for example, the Court examined the policies of an institution called the Metropolitan Correctional Center," which, while designed "primarily to house pretrial detainees" also contained a number of "convicted criminals."¹⁶⁰

A quick glance at the policies provided by the Federal Bureau of Prisons also makes clear why the concurrences' proposed delineation may be problematic. The Federal Bureau of Prisons operates a wide array of facilities. The term "Administrative Facilities" alone, for example, encompasses, "institutions with special missions, such as the detention of *pretrial offenders*; the treatment of inmates with serious or chronic medical problems; or the containment of extremely dangerous, violent, or escape-prone inmates."¹⁶¹ In function, therefore, administrative facilities include all of the following: "Metropolitan Correctional Centers (MCCs), Metropolitan Detention Centers (MDCs), Federal Detention Centers (FDCs), and Federal Medical Centers (FMCs), as well as the Federal Transfer Center (FTC), the Medical Center for Federal Prisoners (MCFP), and the

¹⁵⁹ *Florence*, 566 U.S. at 18.

¹⁶⁰ 441 U.S. 520, 523 (1979) (emphasis added). Albert Florence's own experience also blurs this line: he was first strip searched in "Burlington County Jail," and then again upon his arrival at the "Essex County Correctional Facility"—the latter of which houses pre-trial detainees as well as longer term convicted inmates. *Id.* at 583 (Stevens, J., dissenting). As such, the arguments presented during *Florence* oral arguments draw no distinction between jails and prisons for the purposes of applying the Fourth Amendment analysis. See Oral Argument, *Florence v. Bd. of Chosen Freeholders*, 131 S. Ct. 1816 (2012), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-945.pdf.

¹⁶¹ FEDERAL BUREAU OF PRISONS, PRISON TYPES & GENERAL INFORMATION (2012), available at <http://www.bop.gov/locations/institutions/index.jsp> (emphasis added).

Administrative-Maximum (ADX) U.S. Penitentiary.”¹⁶² All of these facilities “except the ADX, are capable of holding inmates *in all security categories*.”¹⁶³

The arbitrary nature of the general population distinction also stands to affect a vast number of arrestees. A recent study from the Department of Justice reports that, as of 2010, about 2,266,800 inmates are incarcerated “in local jails or in the custody of state or federal prisons.”¹⁶⁴ Of that total, approximately *one in three* is housed in local jails.¹⁶⁵ That number includes, among others, “inmates under the age of 18 who were tried or awaiting trial as an adult.”¹⁶⁶ The inference is clear. While the concurrences offer some promise that protections may one day be afforded to individuals in *Atwater*’s circumstances, untangling the maze of institutions may be difficult. If one third of all incarcerated individuals are doing time in local jails, that suggests that a huge number of arrestees in *Atwater*’s circumstances (who would be processed at these facilities) may still be subject to strip searches.

Finally, it is worth recalling that the concurrences are not law. Nor, given Justice Thomas’s abstention, is Part IV of the majority opinion in which the intersection with *Atwater* is first addressed. The result is that while the Court has intimated the possibility of future protections, none are provided in the holding. If this wasn’t clear from the language of the opinions, it certainly becomes clear in the Court’s final prescription. As the majority notes, “[i]ndividual jurisdictions can of course choose ‘to impose more restrictive safeguards through statutes limiting warrantless arrests for minor offenders.’”¹⁶⁷ That is, while the states are still free to provide further protections, the Court has chosen not to do so. Ironically, the Court’s citation for this final proposition is *Atwater* itself.¹⁶⁸

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010 at 2 (2011).

¹⁶⁵ *Id.* at 3, Table 1.

¹⁶⁶ *Id.* at 3, Table 1. n.d.

¹⁶⁷ *Florence*, 566 U.S. at 18 (citing *Atwater*, 532 U.S. at 352).

¹⁶⁸ *Id.*

C. The Risk of Abuse by Police Officials

When combined with the expansive implications of *Atwater*, the blanket strip search policies that were sanctioned in *Florence* could lead to very real risks of abuse. In a functional respect, these holdings essentially create a new method of enforcing “street justice.” Police, armed with the knowledge that any arrest for any minor infraction would lead to a strip search, could put that leverage to use in a variety of manners. While this argument is not intended as a sweeping indictment of police behavior (common sense suggests that the vast majority of officers making road stops have little interest in arresting traffic offenders), the risks merit consideration. In function, the legal changes at issue have the potential to produce systemic results.¹⁶⁹ Individuals are fallible. If strip searches are allowed in instances where only a minor infraction has taken place, and where there is no suspicion of contraband, the discretion of the officer is the *only* remaining protection that a traffic offender has at her disposal. What if Gail Atwater had been a member of an unpopular political group, or an activist organization that routinely challenged local police? Or what if she had been a member of a community that was wary of police abuse, and therefore reticent to engage at all? Under the legal scheme envisioned, an officer need only wait until some minor infraction has occurred, and then proceed with a chain of legal enforcements entirely within his or her discretion. The full, lawful, pathway might look as follows: (a) threaten an individual with arrest for a minor infraction; (b) inform the individual that a mandatory strip search would be conducted soon thereafter (perhaps in the full view of other officers and arrestees); and (c) suggest that their full cooperation would be one manner of avoiding such an unpleasant outcome.

¹⁶⁹ An oft-cited example of this phenomenon is the “Stanford Prison Experiment.” See PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* (2008). The dynamic in the case at hand, of course, is very different. In the wake of *Atwater* and the ruling in *Florence*, police officers would not be handed “new roles” in quite so clear a fashion. Instead, their room to maneuver would be expanded, and the risk is that the officers would gradually move to adopt their new-found freedoms.

1. Demonstrated Incidences of Abuse

This analysis need not be speculative. The Court in *Atwater* noted concerns about the behavior of the very officer that was at issue before the Court. While “common sense says [Atwater] would almost certainly have buckled up as a condition of driving off with a citation,” the officer had proceeded with the arrest regardless.¹⁷⁰ In the Court’s view, in fact, “the physical incidents of [Atwater’s] arrest were merely *gratuitous humiliations* imposed by a police officer who was (at best) exercising extremely poor judgment. Atwater’s claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case.”¹⁷¹ Further, the Supreme Court’s rendition of the facts attests to a degree of personal animosity between the police officer and Atwater. In the opening salvo of Gail Atwater’s exchange with the officer, he purportedly yelled “[w]e’ve met before’ and ‘[y]ou’re going to jail.”¹⁷²

The irony, of course, is that the Supreme Court’s actions have done little to aid Atwater or similarly situated individuals in their endeavor to live “free of pointless indignity.” A wide array of cases regarding strip searches feature similar instances of personal animosity between suspects and police officers. Judith Haney, for example, was arrested following a political protest in Miami in 2003.¹⁷³ Although she was arrested along with several hundred protestors, only the women arrestees

¹⁷⁰ *Atwater v. City of Lago Vista*, 532 U.S. 318, 346 (2001).

¹⁷¹ *Id.* at 354.

¹⁷² *Id.* at 324. The back story, as recounted in the petitioner’s brief, is that “several months previously Turek had stopped Atwater, apparently suspecting that her son was riding in the car without a seat belt, which turned out not to be the case.” *Atwater v. City of Lago Vista*, 2000 WL 1299527 (U.S.), 4 (U.S. Pet. Brief, 2000). Moreover, Atwater does not appear to have been hostile during the encounter: “There is no evidence in this summary judgment record indicating in any way that Gail Atwater was sarcastic or belligerent, or that she challenged Officer Turek’s authority. Ms. Atwater was not under the influence of drugs or alcohol. She was not acting suspicious in any way, she did not pose any threat to Officer Turek, and she was not engaged in any illegal conduct in the officer’s view, other than her violation of the seat belt law, when he announced his intention to arrest her.” *Id.* (citations omitted).

¹⁷³ *Haney v. Miami-Dade County*, 2004 WL 2203481 (S.D. Fla. Aug. 24, 2004); *See also*, Margo Schlanger, *Jail Strip-Search Cases: Patterns and Participants*, 71 *LAW & CONTEMP. PROBS.* 65 (2008) (examining the participants in jail strip search cases, including Judith Haney’s case).

were forced to undergo a strip search upon arrival at the jail.¹⁷⁴ As Haney later reported, her perception was that the strip search was about “humiliation and control, not about safety.”¹⁷⁵ Haney’s experience also hints at the potential for misuse: “The guard’s next set of instructions were to squat and then to hop like a bunny. . . . I didn’t do it to the guard’s liking, so I had to do it over several times.”¹⁷⁶

Although less explicit, we see a similar set of issues at play in *Florence*. As the majority notes, Florence was exposed to two different strip searches. During the second search, Florence recalled that he was “instructed to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals.”¹⁷⁷ The Court notes, however, that it was “not clear whether this last step was part of the normal practice.”¹⁷⁸ One reading of this qualification is that the Court intended to cast subtle doubt on Florence’s account of how events took place. But another possible inference is that the police stepped beyond the bounds of normal processes. That is, they may have exercised discretion to expose Florence to a more invasive strip search than was called for by protocol.¹⁷⁹

In some respects, submerged issues of abuse have long been a component of strip search litigation. In an early case before the Eighth Circuit, the court explored whether Marlin Jones, having been arrested for refusing to sign a court summons, could be subjected to a strip search.¹⁸⁰ His case, like Atwater’s, hints at a degree of personal animosity exhibited by the police officer. The offender, Jones, had been a repeated violator of a local leash law (that is, he often failed to leash his dog appropriately). What might normally have warranted only a warning prompted the animal control

¹⁷⁴ See Maria Sprow, *Strip Search Under Seizure: Class Action Lawsuits Challenge Blanket Search Policies in Jail* 1 TEXAS ASSOCIATION OF COUNTIES MAGAZINE (2004).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Florence*, 566 U.S. at 3.

¹⁷⁸ *Id.*

¹⁷⁹ Florence also voiced concerns that his race was a factor in why he was initially stopped by the police. Lyle Denniston, “Routine jail strip searches OK,” SCOTUS BLOG (April 2, 2012), *available at* <http://www.scotusblog.com/?p=142415>. This is a distinct matter from the issue of the strip searches (he does not claim that he was *searched* as a function of his race). But it provides further context for arbitrary way in which such procedures can be carried out—and the potential for animus.

¹⁸⁰ *Jones v. Edwards*, 770 F.2d 739, 740 (8th Cir. 1985).

official—and the police officer he called in for support—to pursue more assertive methods.¹⁸¹ The additional steps required to resolve the issue were no doubt frustrating for the police officer. The process required numerous procedural hurdles: “The officers [a] consulted their superiors, [b] filled out their reports, and [c] presented the matter to the county attorney. The county attorney [d] reviewed the information, and . . . [e] presented an affidavit for an arrest warrant to the county judge, who [f] issued the warrant.”¹⁸² Making matters worse, upon arrival at the jail, Jones displayed behavior that surely incited further frustration. “On the way to and inside the jail, Jones became loud and abusive and, as his booking procedure progressed, he grew increasingly profane and waved his arms about.”¹⁸³ The officers at the jail facility ultimately ordered a strip search—a decision which the court noted as highly unusual given the facts of the case.¹⁸⁴

Although the court’s decision in *Jones* focused largely on the Fourth Amendment balancing test, the case also illustrates the degree of discretion and personal motives that may be involved in strip searches. The record in *Jones* makes clear that the arrestee was difficult and offensive. The officers had every right to be frustrated with his behavior. They did not, however, have the right to order a strip search, as the court made clear in its final ruling.¹⁸⁵ “[S]ecurity” the Court held, “cannot justify the blanket deprivation of rights of the kind incurred.”¹⁸⁶ And this is the critical difference at stake in *Florence*. Regardless of what the actual motives of the officers in *Jones* may have been, it is not difficult to imagine a scenario in which an officer orders a strip search in a retributive fashion. In

¹⁸¹ It is important to keep in mind, however, that this instance is distinct from *Atwater*’s. Jones was arrested based on his refusal to sign a court summons, not based on the more minor dog leash transgression. *Id.* at 741.

¹⁸² *Id.* at 740.

¹⁸³ *Id.*

¹⁸⁴ *See id.* at 741 (“Moreover, although the record suggests that Jones was uncooperative with officers, he was not charged with resisting arrest or with any sort of public misconduct that might justify a more intrusive search. We also note that neither the officers nor the jailers attempted a less intrusive pat-down search, which would have detected the proscribed items they sought without infringing Jones’s constitutional protections.”)

¹⁸⁵ *Id.* at 740 (“Although we recognize that the security of detention facilities is an important concern of correction officials who are, in part, responsible for the safety of their charges, we also recognize that security cannot justify the blanket deprivation of rights of the kind incurred here. Accordingly, we find that the district court erred in failing to grant Jones’s motion for judgment notwithstanding the verdict, and we remand for determination of the proper damages to remedy this constitutional deprivation.”).

¹⁸⁶ *Id.*

Jones, the court—and the constitution—provided the final protective barrier. Now that the Supreme Court has discarded that barrier in *Florence*, the demonstrably fallible standard of officer discretion is the only thing to take its place.

2. Application in Context of Contemporary Developments

These new police powers, moreover, have surfaced at a time of increasing tension between the civil rights community and law enforcement officials. New York City provides an illustrative example. The city government is currently engaged in a policing policy that requires an extensive number of police stops in Manhattan and the surrounding boroughs.¹⁸⁷ These practices, known commonly as “stop and frisk,” often include interrogations and body searches (fully clothed)—and they are applied to “hundreds of thousands of New Yorkers every year.”¹⁸⁸ An adverse ruling in *Florence* would place a swath of New Yorkers only a few procedural steps away from detainment and a strip search. Moreover, for those in communities where stop and frisk policies have produced fatigue and frustration, the risks of “talking back” to police officials have suddenly grown more severe.

Recent political unrest highlights a similar concern. Protests on either side of the political aisle are often rife with the kind of minor infractions that may warrant arrest under *Atwater*. In the case of Judith Haney, mentioned earlier, hundreds of protestors were arrested on misdemeanor charges for simply “fail[ing] to follow police orders to disperse.”¹⁸⁹ Because citizens almost always have a statutory responsibility to obey police directives, the line between legal activity and minor illegal infractions is especially thin in such instances. Recent events have made clear how quickly an

¹⁸⁷ *Stop-and-Frisk Campaign: About the Issue*, NEW YORK CIVIL LIBERTIES UNION (Dec 19, 2011), available at <http://www.nyclu.org/issues/racial-justice/stop-and-frisk-practices>.

¹⁸⁸ A report by the New York Civil Liberties Union reveals that “more than 4 million innocent New Yorkers were subjected to police stops and street interrogations from 2004 through 2011, and that black and Latino communities continue to be the overwhelming target of these tactics.” *Id.*

¹⁸⁹ *Haney v. Miami-Dade County*, 2004 WL 2203481 (S.D. Fla. Aug. 24, 2004); see also Maria Sprow, *Strip Search Under Seizure: Class Action Lawsuits Challenge Blanket Search Policies in Jail 1* TEXAS ASSOCIATION OF COUNTIES MAGAZINE (2004).

otherwise peaceful sit in on a university campus can result in pepper spray.¹⁹⁰ Moreover, while protestors who purposefully “risk arrest” may have a greater tolerance for the invasions of personal privacy that follow, many others are likely to be unaware of the risks. Would a protestor be less likely to attend a rally if it included not only the risk of arrest, but also the possibility that they may finish the day standing naked before police officers? Although it lies largely beyond the scope of this paper, such considerations also highlight implications for further First Amendment analysis.

D. The Rising Spectre of Stevens’ Dissent in Bell

With the emergence of practical concerns regarding police abuse also comes a renewed doctrinal concern. Recall that, in *Bell*, Stevens anchored his dissent on the notion that suspicionless strip searches constitute a form of unjustifiable punishment. Not punishment that strayed beyond the confines of the Eighth Amendment, but punishment that nevertheless violated an individual’s Due Process right to “not be punished prior to an adjudication of guilt in accordance with due process of law.”¹⁹¹ In defense of that argument, Stevens admitted that “[it] is not always easy to determine whether a particular restraint serves the legitimate, regulatory goal of ensuring a detainee’s presence at trial and his safety and security in the meantime, or the unlawful end of punishment.”¹⁹² But Stevens nevertheless declared that “courts have performed that task in the past, and can and should continue to perform it in the future.”¹⁹³ The majority in *Bell* disagreed, noting simply that there had been no credible suggestion that the “restrictions and practices were employed by [prison officials] with an *intent* to punish the pretrial detainees housed there.”¹⁹⁴

In light of *Atwater*, Stevens’ dissent has renewed salience. In circumstances where an individual is alleged to have committed a crime of some severity—and one which bears some relation

¹⁹⁰ See Kevin Fagan, “UC Davis Protestors Confront Chancellor,” SF CHRONICLE (Nov. 22, 2011).

¹⁹¹ *Bell v. Wolfish*, 441 U.S. 520, 582 (1979) (Stevens, J., dissenting).

¹⁹² *Id.* at 583.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 561 (emphasis added).

to contraband—it may be possible to perceive of a strip search as a largely procedural tool. But in context of individuals that have committed only minor infractions, the punitive aspects loom much larger. For most, the prospect of receiving a fine after a traffic offense is trivial by comparison to being strip searched—and yet the current legal regime reverses these classifications. The fine is punishment; the strip search is procedure. One manner of conceptualizing the shift, therefore, is to think of the strip search as an *additional* component of the common law or statutory punishments for every criminal offense. That is, now that *Atwater* has been amplified by the Supreme Court’s endorsement of blanket strip search policies, the combined rulings effectively add the term “strip search” in invisible parentheses to all enumerated misdemeanor punishments. In this respect, Justice Stevens’ conceptualization of what a strip search entails is far closer to the ground level reality than that depicted by the majority in *Bell*. As he notes of the correctional facility’s policies in *Bell*, “The challenged practices . . . deprive detainees of fundamental rights and privileges of citizenship beyond simply the right to leave. . . . The withdrawal of rights is itself among the most basic punishments that society can exact, for such a withdrawal qualifies the subject’s citizenship and violates his dignity. Without question that kind of harm is an ‘affirmative disability’ that ‘has historically been regarded as a punishment.’”¹⁹⁵

In light of the concerns raised in *Atwater*, and given the dramatic expansion in suspicionless strip search policies, it is useful to consider what the *Bell* Court’s analysis might look like in a contemporary context. The above concerns regarding police encroachment and the risk of abuse suggest that Stevens’ dissent would almost certainly have garnered greater traction. In many instances, the only utility to be gained by subjecting an individual to a strip search is humiliation and retributive satisfaction—both of which fall clearly constitute punishments. A police officer may know that the arrest has no likelihood of increasing safety through either deterrence or incapacitation, and likewise, he may also know that the chance of finding contraband is essentially zero. Nevertheless,

¹⁹⁵ *Id.* at 590 (citations omitted).

the officer may proceed legally, provided that he or she is careful not to display objective indicia of intent to punish. In that context, we need look no further than the cases featured here-in. If, after subjecting Gail Atwater to a strip search, the officer featured in *Atwater* was still found to have behaved legally (as he almost certainly would be), proving some form of culpable intent will be an onerous hurdle to climb.

CONCLUSION

The Supreme Court's ruling in *Florence* threatens the "balance" that was once an explicit part of Fourth Amendment doctrine. It also leaves arrestees with a substantially circumscribed set of constitutional protections. This detour is largely the product of misapplied precedent. While deterrence once featured as a fundamental consideration in the Court's jurisprudence on blanket search policies, that consideration is decidedly absent in *Florence*. This, coupled with an unwieldy and expansive interpretation of the majority opinion in *Bell*, has produced an unfortunate distortion of *Bell*'s originally narrow holding.

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

Like many issues of Fourth Amendment law, these developments pose very real day-to-day risks. The unwieldy nature of the Court's rulings in *Atwater* and *Florence* has left the public with even fewer buffers from the reach of police power. Moreover, given the punitive functions they may serve, strip searches have become a dangerous tool. As the risk of arrest for a minor infraction has increased, so too has the range of disciplinary leverage at an officer's disposal. Now is the time for Supreme Court assistance—and a sliver of protection remains possible. Given the magnitude of the risks involved, the Court has more reason than ever to revert back to safer territory.