

CRYING *WOLFISH*: THE UPCOMING CHALLENGE TO BLANKET STRIP-SEARCH POLICIES IN *FLORENCE V. BOARD OF CHOSEN FREEHOLDERS*

AARON JOHNSON*

I. INTRODUCTION

The question of the appropriate balance between security and individual rights—an intractable problem in any society committed to both—lies at the heart of the upcoming Supreme Court case *Florence v. Board of Chosen Freeholders*.¹ In *Florence*, the Court will address a specific iteration of this perennial issue: whether the Fourth Amendment² permits jail policies mandating strip searches of every person arrested, even when the offense is trivial and there is no reasonable suspicion that the arrestee is attempting to smuggle weapons, drugs, or other contraband.³

The Court addressed a similar issue once before. In its five-to-four 1979 decision *Bell v. Wolfish*,⁴ the Court created and applied a four-factor balancing test for evaluating the constitutionality of physically

* 2013 JD/MA candidate, Duke University School of Law. I am grateful for the efforts of Hannah Banks, whose industry, insight, and eye for detail made this commentary possible.

1. *Florence v. Bd. of Chosen Freeholders*, No. 10-945 (U.S. argued Oct. 12, 2011).

2. The Fourth Amendment, incorporated and made applicable against the states through the Fourteenth Amendment, provides in relevant part that “[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated.” U.S. CONST. amend. IV.

3. Brief for Petitioner at i, *Florence v. Bd. of Chosen Freeholders*, No. 10-945 (U.S. filed June 20, 2011). “Reasonable suspicion” is a very low standard. As the Court has noted, “reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, [it] requires at least a minimal level of objective justification. . . . [An] officer must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity.” *Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000) (internal citations and quotations omitted).

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

intrusive searches conducted within detention facilities.⁵ The Court divided closely,⁶ but ultimately upheld a policy requiring that all inmates submit to a visual body-cavity search after each contact visit with someone from outside the facility.⁷

Despite previous agreement on the proper interpretation of *Bell*, a circuit split has recently developed, with each side emphasizing different aspects of the decision. Because each side can fairly claim consistency with *Bell*, the Court's decision in *Florence* is difficult to predict and may ultimately depend on the Court's value judgment as to whether security should trump individual rights in this particular context. Adding further uncertainty is a separate precedent, *Turner v. Safley*,⁸ which may have subsumed *Bell* and provides a more deferential and generally applicable standard for evaluating detention regulations.⁹ If *Bell* is applied, blanket policies mandating strip searches of all arrestees likely will be upheld by a closely divided Court. However, if the Court decides that *Turner* supplies the proper standard, the Court probably will remand to the Third Circuit with instructions to apply *Turner's* reasonable-relationship test.

II. FACTS

On March 3, 2005, Albert Florence was pulled over by a state trooper in Burlington County, New Jersey.¹⁰ After asking for identification, the trooper arrested Florence pursuant to a bench warrant issued in 2003 for his failure to pay a fine.¹¹ Although Florence's wife provided the arresting officer with official documentation showing that the ticket had already been paid, the

5. *Id.* at 559–60.

6. The Court was divided five-to-four on the issue of strip searches only. Regarding the panoply of other issues it considered, the Court's vote was six-to-three. *See id.* at 522.

7. *Id.* at 559–60. Some courts and policies employ terminology that differentiates between “strip searches” and “visual body-cavity searches,” although others do not. *Compare* Bull v. City & Cnty. of San Francisco, 595 F.3d 964, 969 n.4 (9th Cir. 2010) (en banc) (citing a policy stating that “[s]trip searches include a visual body cavity search. A strip search *does not* include a physical body cavity search”), *and* Roberts v. Rhode Island, 239 F.3d 107, 108 n.1 (1st Cir. 2001) (“A ‘strip search’ involves a visual inspection of the naked body of an inmate. A ‘visual body cavity search’ is a strip search that includes the visual examination of the anal and genital areas.”), *with* Hill v. Bogans, 735 F.2d 391, 393 n.1 (10th Cir. 1984) (defining “strip search” as “having an arrested person remove or arrange some or all of his or her clothing so as to permit a visual inspection of the genitals, buttocks, anus, or female breasts of such person”).

8. 482 U.S. 78 (1987).

9. *Id.* at 81.

10. *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).

11. *Id.*

county had failed to update its computer system and the officer continued with the arrest.¹²

After arresting Florence on the defunct warrant, the officer brought him to the Burlington Jail.¹³ There, Florence was directed, in line with a policy applicable to all arrestees, to undress completely, hold his arms out, and turn fully around while an officer sat within arm's length.¹⁴ Florence was also told, possibly in violation of the jail's own policy,¹⁵ to "open his mouth, lift his tongue . . . and lift his genitals."¹⁶ He was then directed to shower.¹⁷

After six days of imprisonment in Burlington, Florence was transported to the Essex Jail.¹⁸ There, pursuant to a similar policy,¹⁹ Florence was strip searched a second time.²⁰ Officers directed him and several others to strip and shower while two officers watched; he was then told to open his mouth and lift his genitals, turn away, squat and cough, then turn back around.²¹ The next day, the charges against Albert Florence were dismissed.²²

III. LEGAL BACKGROUND

Since deciding *Bell v. Wolfish* in 1979, the Court has considered other cases involving intrusive searches²³ and has repeatedly recognized the importance of prison security.²⁴ However, *Bell* remains

12. Brief for Petitioner, *supra* note 3, at 3.

13. *Florence*, 595 F. Supp. 2d at 496.

14. *Id.* at 496–97.

15. The policy of the Burlington Jail differentiated between "visual observation" and "strip searches." The former involved having the inmates undress so that an officer could check them for scars, marks, and tattoos. *Id.* at 498. The latter also included telling the inmates to "spread their buttocks and/or lift their genitals." *Id.* According to the Burlington Jail's internal policies, detainees like Florence, who did not provide a basis for reasonable suspicion, were supposed to be subjected to "visual observation" but not to "strip searches." *Id.* at 497.

16. *Id.* at 496–97.

17. *Id.* at 497.

18. *Id.*

19. In contrast to the policy at Burlington, the policy in force at the Essex Jail required all arrestees to submit to a strip search, and did not differentiate between "strip searches" and "visual observation." *Id.* at 499.

20. *Id.* at 497.

21. *Id.*

22. *Id.*

23. *E.g.*, *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2637 (2009) (holding unconstitutional a strip search of a teenage girl); *United States v. Montoya de Hernandez*, 473 U.S. 531, 544 (1985) (upholding the detention and manual body-cavity search of a woman suspected of smuggling drugs in her alimentary canal).

24. *E.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005) ("[P]rison security is a compelling state interest . . ."); *Turner v. Safley*, 482 U.S. 78, 89 (1987); *Hudson v. Palmer*, 468

the only case in which the Court has addressed blanket policies mandating strip searches of arrestees or pretrial detainees.²⁵ Accordingly, it likely will be central to the Court's decision in *Florence*.

In the alternative, the Supreme Court may instead apply the highly deferential standard from *Turner v. Safley*.²⁶ *Turner*'s reasonable-relationship test is limited "only to rights that are 'inconsistent with proper incarceration'"²⁷ and the Court has not directly applied *Turner* to Fourth Amendment rights within a prison or jail.²⁸ Still, the Court has held that Fourth Amendment rights are severely limited within detention facilities²⁹ and could establish *Turner*'s standard as the proper test for Fourth Amendment violations in such locations.

A. *The Key Precedent: Bell v. Wolfish*

The most important precedent for the resolution of *Florence* is the Supreme Court decision authored by Justice Rehnquist in *Bell v. Wolfish*. In that case, the Supreme Court considered challenges to several practices at a federal custodial facility in New York City.³⁰ The facility primarily held pretrial detainees, but also housed smaller numbers of convicted inmates serving short sentences, people charged with contempt, and witnesses held in protective custody.³¹ One challenged policy mandated that every inmate submit to a strip and visual body-cavity search after every contact visit with a person from outside the facility.³² This policy applied to all inmates, regardless of the reason for their incarceration, and did not require any level of suspicion that they possessed contraband.³³

U.S. 517, 526 (1984).

25. Daphne Ha, *Blanket Policies for Strip Searching Pretrial Detainees: An Interdisciplinary Argument for Reasonableness*, 79 FORDHAM L. REV. 2721, 2731 (2011).

26. *Turner*, 482 U.S. at 89.

27. *Johnson v. California*, 543 U.S. 499, 510 (2005) (quoting *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003)).

28. *Florence v. Bd. of Chosen Freeholders*, 621 F.3d 296, 306 n.5 (3d Cir. 2010).

29. *E.g.*, *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (holding that there is no Fourth Amendment protection for a prisoner's cell because such protection "cannot be reconciled with the . . . needs and objectives of penal institutions").

30. *Bell v. Wolfish*, 441 U.S. 520, 523 (1979).

31. *Id.* at 523–24.

32. *Id.* at 558. The Court described the visual body-cavity search as follows: "If the inmate is a male, he must lift his genitals and bend over to spread his buttocks for visual inspection. The vaginal and anal cavities of female inmates also are visually inspected." *Id.* at 558 n.39.

33. *Id.* at 558.

The Court noted that both convicted prisoners and pretrial detainees retain some constitutional protections.³⁴ The Court also recognized, however, that these retained rights can be limited or retracted in the interest of internal discipline.³⁵ Given the importance of this interest, “[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices . . . needed to . . . maintain institutional security.”³⁶

Against this deferential backdrop, the Court assumed (without deciding) that both convicted prisoners and pretrial detainees retain some Fourth Amendment rights, but noted that the Fourth Amendment prohibits only searches that are unreasonable under the circumstances.³⁷ What is reasonable “is not capable of precise definition or mechanical application,” and requires “a balancing of the need for the particular search against the invasion of personal rights that the search entails.”³⁸ Regarding a strip search in a detention facility, courts must consider four factors: “[T]he scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.”³⁹

Applying this four-factor balancing test, the Court combined consideration of the place and justification factors and opined that “[a] detention facility is a unique place fraught with serious security dangers.”⁴⁰ Even though body-cavity searches revealed hidden contraband only once during the jail’s short history, the Court read the absence of a record as “a testament to the effectiveness of this search technique as a deterrent.”⁴¹ Such disregard for a requirement of a factual record implies that security against contraband is so central to jail and prison administration that the need for specific measures need not actually be proven.

In contrast to its analysis of the location and jail’s security concerns, the Court spent very little time on the manner of the search or the individual interests at stake, offering briefly that it did “not

34. *Id.* at 545.

35. *Id.* at 546. The Court later clearly held that “prison security is a compelling state interest.” *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005).

36. *Bell*, 441 U.S. at 547; *see also* *Pell v. Procunier*, 417 U.S. 817, 827 (1974) (stating that security decisions are “peculiarly within the province . . . of corrections officials, and . . . courts should ordinarily defer to their expert judgment”).

37. *Bell*, 441 U.S. at 558.

38. *Id.* at 559.

39. *Id.*

40. *Id.*

41. *Id.*

underestimate the degree to which these searches may invade the personal privacy of inmates” and that “conduct[ing] the search in an abusive fashion . . . cannot be condoned.”⁴² But ultimately, to the question of whether visual body-cavity searches can “*ever* be conducted on less than probable cause,”⁴³ the Court answered yes.

B. Circuit Split on the Meaning of Bell

The federal circuit courts were in accord as recently as 2007 regarding the unconstitutionality of policies requiring strip searches (or other similarly intrusive searches) of all detainees, regardless of reasonable suspicion.⁴⁴ Since then, however, two circuits have reversed course and upheld such policies. In *Florence v. Board of Chosen Freeholders*,⁴⁵ the Third Circuit joined them.⁴⁶

1. Circuit Decisions Striking Down Blanket Strip-Search Policies

The circuit courts applying the *Bell* four-factor balancing test to strike down blanket strip-search policies generally have emphasized the intrusiveness of the search, downplayed security concerns (especially as compared to those in *Bell*), and noted that less restrictive alternatives would serve the same goals just as well. First, the First Circuit described a strip search as “an extreme intrusion on personal privacy and an offense to the dignity of the individual.”⁴⁷

42. *Id.* at 560.

43. *Id.* Notably, this language leaves in serious doubt just what “less than probable cause” means, and thus what the Fourth Amendment requires before a strip search of a pretrial detainee is permissible. Justice Powell wrote a brief separate opinion bearing on this issue, the entirety of which reads:

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

Id. at 563 (Powell, J., concurring in part and dissenting in part). However, this opinion has not been dispositive of *Bell*’s meaning for lower courts.

44. See Katherine A. James, *Standard Operating Procedure: Take It All Off* [N.G. Ex Rel. S.C. v. Connecticut, 382 F.3d 225 (2d Cir. 2004)], 44 WASHBURN L.J. 665, 675 (2005).

45. *Florence v. Bd. of Chosen Freeholders*, 621 F.3d 296 (3d Cir. 2010).

46. Compare *id.* at 311 (upholding strip searches without reasonable suspicion), *Bull v. City & Cnty. of San Francisco*, 595 F.3d 964, 982 (9th Cir. 2010) (en banc) (same), and *Powell v. Barrett*, 541 F.3d 1298, 1307 (11th Cir. 2008) (en banc) (same), with *Roberts v. Rhode Island*, 239 F.3d 107, 108 (1st Cir. 2001) (requiring reasonable suspicion to justify a strip search), *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989) (same), *Weber v. Dell*, 804 F.2d 796, 798 (2d Cir. 1986) (same), *Jones v. Edwards*, 770 F.2d 739, 741 (8th Cir. 1985) (same), *Stewart v. Lubbock County*, 767 F.2d 153, 156–57 (5th Cir. 1985) (same), *Hill v. Bogans*, 735 F.2d 391, 394–95 (10th Cir. 1984) (same), *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983) (same), *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981) (same).

47. *Roberts*, 239 F.3d at 110 (internal citations and quotations omitted). Other courts have

Second, the court opined that new arrestees are less likely to smuggle contraband than detainees leaving a contact visit because arrests, unlike contact visits, are generally unplanned.⁴⁸ Third, given the paucity of instances in which a body-cavity search was necessary to discover contraband, less extreme measures—such as only searching the clothes of petty offenders or requiring reasonable suspicion—would have been equally effective.⁴⁹ In sum, the intrusiveness of the search, the lower security risks involved, and the availability of alternatives rendered the policy unconstitutional.⁵⁰

2. Circuit Decisions Upholding Blanket Strip-Search Policies

On the other side of the split, the three Circuits that applied *Bell*'s four-factor test to uphold blanket strip-search policies have emphasized security concerns, deference toward prison officials, the minimal factual record of smuggling in *Bell*, and the similarly or less intrusive nature of the searches as compared to those in *Bell*. First, the Eleventh Circuit, for example, reiterated the dangers of smuggling and added the further security concern of identifying gang members who “are often more violent, dangerous, and manipulative than other inmates, regardless of the charges against them.”⁵¹ The court rejected the argument that arrest usually comes as a surprise as “factual[ly] . . . unsupportable” because some members see arrest coming, others turn themselves in, and others (especially gang members) *deliberately* get themselves arrested.⁵² Second, the court noted that the policy upheld in *Bell* was extraordinarily broad: despite the minimal factual record of smuggling, it required no level of suspicion and did not differentiate between convicted felons, suspected misdemeanants, and the unaccused.⁵³ Finally, the searches at issue were less intrusive than those in *Bell*.⁵⁴ In short, because the balance between privacy and security so closely resembled that in *Bell*, the policy was

used even stronger language. *E.g.*, *Chapman v. Nichols*, 989 F.2d 393, 395 (10th Cir. 1993) (describing a strip search as “an invasion of personal rights of the first magnitude”).

48. *Roberts*, 239 F.3d at 111; *see also* Howard Friedman, *Strip Searches and the Fourth Amendment Rights of Detainees and Prisoners*, 2004 WL 2800491, at *8 (2009) (“Policies involving routine strip searches upon admission of people who have just been arrested and are waiting for bail to be set or for a first court appearance have been held unconstitutional, in part because such individuals do not typically plan to be arrested.”).

49. *Roberts*, 239 F.3d at 112.

50. *Id.* at 111–13.

51. *Powell*, 541 F.3d at 1311 (internal quotations omitted).

52. *Id.* at 1313.

53. *Id.*

54. *Id.* at 1314.

constitutional.⁵⁵

C. A Possible Alternative: The Reasonable-Relationship Test of Turner v. Safley

In *Turner v. Safley*, the Supreme Court articulated a highly deferential and more generally applicable standard for evaluating the constitutionality of policies that impinge upon the retained constitutional rights of prisoners.⁵⁶ In striking down a provision that limited inmates' ability to get married and upholding a provision restricting correspondence between inmates, the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."⁵⁷

This reasonable-relationship test considers four factors. First, there must be a valid, rational connection between the regulation and a legitimate, neutral government interest.⁵⁸ Second, courts should consider whether there remain alternative means of exercising the asserted right.⁵⁹ Third, courts should take into account the impact of accommodating the right, particularly on guards, other inmates, and the allocation of detention resources.⁶⁰ Fourth, the absence of feasible alternatives that present only a *de minimis* cost to prisons can indicate unreasonableness, but there is no requirement that a regulation be the least-restrictive alternative.⁶¹

The *Turner* standard is more deferential than the standard in *Bell*.⁶² Although it applies "only to rights that are 'inconsistent with proper incarceration,'"⁶³ it has been construed broadly to include claims regarding freedom of association, inmate correspondence, receipt of publications, attendance at religious services, and the right

55. *Id.* at 1302. *Accord* Bull v. City & Cnty. of San Francisco, 595 F.3d 964, 975 (9th Cir. 2010) (en banc).

56. *Turner v. Safley*, 482 U.S. 78, 89–91 (1987).

57. *Id.* at 89.

58. *Id.*

59. *Id.* at 90.

60. *Id.*

61. *Id.* at 90–91.

62. *E.g.*, *Powell v. Barrett*, 541 F.3d 1298, 1302–03 (11th Cir. 2008) (en banc) ("Because we conclude that plaintiffs lose even under the . . . approach of *Bell*, we need not decide if that approach has been superseded by the more deferential *Turner* one.").

63. *Johnson v. California*, 543 U.S. 499, 510 (2005) (quoting *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003)).

not to be forcibly medicated.⁶⁴ The Supreme Court has upheld limitations on Fourth Amendment rights in detention facilities in a number of cases,⁶⁵ but “has [never directly] applied the reasonable-relationship test of *Turner* to a Fourth Amendment challenge to prison policies.”⁶⁶ In addition, it is unclear whether *Turner* even applies to jails or is limited only to prisons.⁶⁷ Nonetheless, the Court could extend the *Turner* standard to the Fourth Amendment issues in *Florence*.⁶⁸

IV. HOLDING

In *Florence v. Board of Chosen Freeholders*, the Third Circuit reversed the district court and held that a blanket policy of strip searching all arrestees, regardless of their suspected offense and in the absence of reasonable suspicion, is constitutional under the Fourth Amendment and the Supreme Court’s decision in *Bell v. Wolfish*.⁶⁹

The Third Circuit began by laying out its task: “[T]o determine which line of cases [in the circuit split] is more faithful to the Supreme Court’s decision in *Bell*.”⁷⁰ The court applied the four-factor test from *Bell* to balance government interests in security against the personal rights of inmates.⁷¹ Regarding invasiveness, the court found that “the searches at issue [were] less intrusive than the visual body-cavity searches” in *Bell*.⁷² It likewise concluded that the manner and place prongs were satisfied because of the similarities with *Bell*.⁷³

64. *Id.* at 510; *see also* *Beard v. Banks*, 548 U.S. 521, 524–25 (2006) (applying *Turner* to uphold the denial of newspapers, magazines, and photographs to dangerous inmates); *Lewis v. Casey*, 518 U.S. 343, 361–62 (1996) (applying *Turner* to strike down a court’s requirement of sweeping changes to a prison’s library and legal systems).

65. *E.g.*, *Hudson v. Palmer*, 468 U.S. 517, 536 (1984) (finding no Fourth Amendment protection within prison cells).

66. *Florence v. Bd. of Chosen Freeholders*, 621 F.3d 296, 306 n.5 (3d Cir. 2010). However, in *Washington v. Harper*, the Court applied the *Turner* standard to a due process challenge to uphold a prison policy that impinged upon bodily autonomy by allowing the forced medication of seriously mentally ill inmates. 494 U.S. 210, 224–25 (1990).

67. *Compare* *Shain v. Ellison*, 273 F.3d 56, 65 (2d Cir. 2001) (limiting the application of *Turner* to prisons), *with* *Jones v. Salt Lake County*, 503 F.3d 1147, 1155 (10th Cir. 2007) (opining that *Turner* does apply to jails).

68. *See* *Bull v. City & Cnty. of San Francisco*, 595 F.3d 964, 973 (9th Cir. 2010) (en banc) (“Although *Bell* continues to provide definitive guidance for analyzing detention-facility strip searches under the Fourth Amendment, *Turner v. Safley* is also relevant to our analysis.”).

69. *Florence*, 621 F.3d at 311.

70. *Id.* at 299.

71. *Id.* at 301.

72. *Id.* at 307.

73. *Id.* at 308.

The Third Circuit devoted much of its analysis to the justifications for the search, determining that “the security interest in preventing smuggling at the time of intake is as strong as the interest in preventing smuggling after . . . contact visits.”⁷⁴ As in *Bell*, the low risk and minimal record of smuggling were insufficient to require the jails to differentiate between different types of inmates or to articulate individualized suspicion to justify a strip search.⁷⁵ Critically, the Third Circuit rejected the argument that the security risk was lower than in *Bell* because arrests for trivial offenses are usually by surprise.⁷⁶ Even if such arrests are *usually* unexpected, sometimes they are not, and people arrested for serious crimes could coerce or cajole those accused of minor crimes to smuggle weapons or contraband for them.⁷⁷

Ultimately, because of the policies’ similarity to the one upheld in *Bell*, the Third Circuit concluded that the facilities’ security interests outweighed the deprivations of inmate privacy, and held the policies of Burlington and Essex Counties constitutional.⁷⁸

V. ARGUMENTS

A. *Petitioner Florence’s Arguments*

Petitioner Florence’s overarching argument is that the *Bell* balancing test requires reasonable suspicion before conducting a strip search of a minor offender.⁷⁹ In general, this five-point argument is heavy on anecdotal evidence of the harms of strip searches and empirical evidence of the feasibility of alternatives, but lighter on relevant Supreme Court precedent.

First, Florence argues that a practical consensus developed in the wake of *Bell*, asserting that strip searches of minor offenders are unreasonable without individualized suspicion. Until recently, this

74. *Id.* at 307. The court also considered two further interests advanced by the government: identification of gang members by observing their tattoos, and preventing the spread of contagious diseases. *Id.*

75. *Id.* at 308–09.

76. *Id.* at 308.

77. *Id.* The Supreme Court has found such reasoning persuasive at least once before. In upholding an across-the-board ban on contact visits in a jail, the Court opined that “[i]t 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.” *Block v. Rutherford*, 468 U.S. 576, 587 (1984).

78. *Florence*, 621 F.3d at 311.

79. See Brief for Petitioner, *supra* note 3, at 3.

consensus included every circuit to consider the issue, “every relevant division of the U.S. Department of Justice,” including the Bureau of Prisons, several other government offices, and eighteen states.⁸⁰

Second, Florence also presses that strip searches are an extreme invasion of personal dignity, especially for sensitive populations like victims of sexual assault, first-time offenders, members of religious communities that emphasize modesty, and women who are menstruating or lactating.⁸¹ Blanket policies preclude the discretion necessary to accommodate these groups.

Third, Florence offers several stark examples to show that blanket strip-search policies have “sweeping implications” given the “number of trivial offenses for which individuals are regularly arrested.”⁸² For example, the Essex and Burlington Jails alone had strip searched individuals charged only with car equipment violations, failure to use a turn signal, or riding a bicycle without an audible bell.⁸³ These examples illustrate the disproportionate treatment blanket policies permit, especially in the case of arrests by overzealous officers.

Fourth, Florence concedes that smuggling is a problem, but argues that a standard of individual suspicion, coupled with other less intrusive detection measures, would just as effectively safeguard security interests. Florence offers the findings of a federal court, which reviewed 23,000 suspicionless strip searches of arrestees during a four-year period and concluded that “there was at most *one* instance in which a person smuggling drugs—and none carrying weapons—might have evaded detection under a reasonable suspicion regime.”⁸⁴

80. *Id.* at 13–17.

81. *Id.* at 23–25. For example, one Chicago physician subjected to a strip search became paranoid and depressed, suffered suicidal feelings, and could no longer disrobe anywhere but in a closet. *Id.* at 23. A rape victim called her mother after a strip search and told her repeatedly “they’ve done it again, they’ve done it again.” *Id.* at 24 (internal alterations omitted). And a Colorado woman strip searched after a wrongful arrest began lactating, was ordered not to cover herself with her arms, and had to use a maxi pad to absorb her breast milk. *Id.* at 24 (citing *Archuleta v. Wagner*, 523 F.3d 1278, 1282 (10th Cir. 2008)).

82. *Id.* at 24–25. Importantly, the Supreme Court has affirmed the constitutionality of arrests for very minor offenses that do not include the threat of incarceration. *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001).

83. Brief for Petitioner, *supra* note 3, at 25. Florence’s parade of horrible continues with examples from other districts, such as a woman in Washington, D.C., arrested and strip searched for eating a sandwich on the Metro, another woman in D.C. arrested for “false pretenses” after entering a parking garage and immediately leaving because the cost was too high, and a nun arrested for trespassing at an anti-war protest. *Id.* at 25–26.

84. *Id.* at 29–30.

Because arrests for minor offenses are almost always unexpected,⁸⁵ it is hardly surprising that “there is not a single documented example of anyone concealing contraband during arrest for a minor offense with the intent of smuggling contraband into the jail.”⁸⁶

Fifth, Florence argues that other alternatives would serve jails’ security interests just as effectively. Upon arrival, jail officials could search detainees’ clothing and personal property, pat them down, visually examine them in their underwear, and put them through metal detectors; individualized suspicion could then justify more intrusive measures.⁸⁷ Such suspicion could be based on the nature of the offense, the circumstances of arrest, or the arrestee’s prior history.⁸⁸

In short, the problems that the blanket policy addresses, but reasonable suspicion would not, are at best overstated and at worst nonexistent. For these reasons, Petitioner Florence insists that the Court should strike down such blanket strip-search policies.

B. The Respondent Jails’ Arguments

The Respondent Jails offer three reasons why the Court should affirm the Third Circuit and uphold policies requiring strip searches of all arrestees. First, recent Supreme Court jurisprudence holds that the Fourth Amendment does not apply to intake searches of arrestees,⁸⁹ or applies in only a minimal way.⁹⁰ Whether the Fourth Amendment applies to a particular expectation of privacy hinges on whether “society is prepared to recognize [that expectation] as reasonable,”⁹¹ and recent cases have opined that “a right of privacy . . . is *fundamentally incompatible* with the close and continued surveillance of inmates and their cells.”⁹² Thus, because it cannot comport with security interests, no right to privacy exists within detention facilities.⁹³

85. *Id.* at 38 (contrasting the planned visits in *Bell* with unplanned arrests).

86. *Id.* at 29 (internal quotations and alterations omitted).

87. *Id.* at 31–32.

88. *Id.* at 32–33.

89. Brief for Respondents Essex Cnty. Corr. Facility & Essex Cnty. Sheriff’s Dep’t at 3, *Florence v. Bd. of Chosen Freeholders*, No. 10-945 (U.S. filed Aug. 19, 2011) [hereinafter Brief for Essex].

90. Brief for Respondents Bd. of Chosen Freeholders et. al at 20, *Florence v. Bd. of Chosen Freeholders*, No. 10-945 (U.S. filed Aug. 19, 2011) [hereinafter Brief for Burlington].

91. Brief for Essex, *supra* note 89, at 16 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (internal quotations omitted)).

92. *Id.* at 19 (quoting *Hudson*, 468 U.S. at 527–28).

93. *Id.* at 21.

The Jails backed off this claim during oral arguments, however, by conceding that there should be *some* level of suspicion to justify a manual body-cavity search.⁹⁴ This concession implies that inmates retain *minimal* privacy interests, rather than *no* privacy interests.

Second, if inmates retain any privacy rights, then the reasonable-relationship test of *Turner v. Safley* should apply, which the policies at issue easily satisfy.⁹⁵ *Turner* applies whenever a detention policy implicates a constitutional right that is inconsistent with proper incarceration, and privacy under the Fourth Amendment falls squarely within that category.⁹⁶ *Turner*'s highly deferential test requires only that the policy be "reasonably related to legitimate penological interests."⁹⁷ The burden is on the prisoner to prove unreasonableness, and given the deference due to detention officials, that burden is not easily satisfied.⁹⁸ Respondents argue that "there is an unquestionably valid, rational connection between the searches and security."⁹⁹ Furthermore, there is no reason to differentiate between minor and serious offenders; if such a distinction were recognized, those charged with serious crimes might coerce minor offenders into secreting contraband for them.¹⁰⁰ Because there is no way to accommodate the individual's privacy interest without sacrificing security or imposing substantial costs on the detention facility, Respondents argue, the policies should be upheld under *Turner*.¹⁰¹

Third, an analysis under the balancing test of *Bell v. Wolfish* yields the same result.¹⁰² *Bell*, they argue, created a "special needs" exception, applicable here, which eliminates the normal requirement for either reasonable suspicion or probable cause before searching an individual.¹⁰³ Moreover, each of the factors considered in *Bell*¹⁰⁴—the

94. Transcript of Oral Arguments at 40–41, *Florence v. Bd. of Chosen Freeholders*, No. 10-945 (U.S. argued Oct. 12, 2011) [hereinafter Transcript], available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-945.pdf.

95. Brief for Essex, *supra* note 89, at 25; see also Brief for Burlington, *supra* note 90, at 26.

96. Brief for Essex, *supra* note 89, at 26–27.

97. Brief for Burlington, *supra* note 90, at 26 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)); see also *id.* at 25 (contrasting "reasonably related" with "arbitrary or purposeless").

98. *Id.* at 27 (quoting *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) ("The burden . . . is not on the State to prove the validity of prison regulations but on the prisoner to disprove it.")).

99. Brief for Essex, *supra* note 89, at 30.

100. *Id.* at 34–35.

101. *Id.* at 37–39.

102. *Id.* at 39.

103. *Id.* at 39–41.

104. See *supra* Part III.A.

scope of the intrusion and the manner, place, and justifications of the search—weigh at least as heavily in *Florence* as they did in *Bell*.¹⁰⁵ Further, in addition to smuggling concerns, the Jails add the interest of identifying gang members¹⁰⁶ and preventing the spread of lice and communicable disease.¹⁰⁷

In brief, the Jails argue that the reduced privacy interests in detention facilities, the compelling interest in security, and the similarities between the circumstances of *Florence* and *Bell* require that the policies be affirmed as constitutional.

VI. ANALYSIS

The circuits requiring reasonable suspicion before strip-searching minor offenders have been faithful to *Bell* insofar as they have applied its balancing test fairly and produced outcomes that are consistent with the specific language of its holding.¹⁰⁸ The Third Circuit, however, employed the stronger interpretation of *Bell*—it looked at not only what the Court *said* but what it *did*.¹⁰⁹ The policy upheld in *Bell* was extraordinarily broad: it did not differentiate between categories of inmates, but required strip searches of suspected felons, misdemeanants, and the unaccused alike. Moreover, it required only the flimsiest factual record of a smuggling problem that only strip searches could address. And perhaps most importantly, as Justice Powell’s separate opinion made clear, the *Bell* majority expounded no limiting requirement of reasonable suspicion.¹¹⁰

Here, there are only two material differences between the facts of *Bell* and the facts of *Florence*. First, the policies involved in *Florence* are, if anything, less intrusive than the one at issue in *Bell*. The policies in *Florence* always require strip searches, and only sometimes require

105. Brief for Essex, *supra* note 89, at 41–44.

106. *Id.* at 28, 34.

107. Brief for Burlington, *supra* note 90, at 41.

108. *E.g.*, *Roberts v. Rhode Island*, 239 F.3d 107, 108 (1st Cir. 2001) (“[In *Bell*,] the Court found that visual body cavity searches . . . can be conducted on less than probable cause. . . . This Court held [later] that, at least in the context of prisoners held for minor offenses, the *Bell* balance requires officers to have a reasonable suspicion that a particular detainee harbors contraband prior to conducting a strip or visual body cavity search.” (internal citations and quotations omitted)).

109. *See supra* Part III.B.2.

110. *Bell v. Wolfish*, 441 U.S. 520, 563 (1979) (Powell, J., concurring in part and dissenting in part) (“In view of the serious intrusion on one’s privacy occasioned by such a search, I think at least some level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches described in this case. I therefore dissent on this issue.”).

visual body-cavity searches.¹¹¹ In contrast, *Bell* mandated visual body-cavity searches for *everyone* after a contact visit.¹¹² This difference weighs in favor of finding the searches constitutional.

The second difference—the strength of the security interest—cuts the other way. As many of the circuit courts have emphasized, arrests for trivial offenses, such as traffic violations and failure to pay fines, are usually unexpected; therefore, the risk of planned smuggling is minimal.¹¹³ The problem with relying on this difference to justify a divergent outcome is that *Bell* did not require a record.¹¹⁴ Rather, the Court's deference was so extreme that "security" became almost a magic word, erasing any requirement that even demeaning practices be justified by a showing of necessity. As a result, the differences surrounding the strip searches are probably too slender a reed to distinguish *Bell*.

In short, there is no major problem with the Third Circuit's reading of *Bell*—the problem is with *Bell* itself. For at least three reasons, the Court should reconsider this decision or limit its reach.

First, *Bell* dramatically undervalues the invasive nature of strip searches.¹¹⁵ The Seventh Circuit has appropriately described them "as demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, [and] signifying degradation and submission,"¹¹⁶ and commentators have noted that strip searches would be considered sexual assault in any other context.¹¹⁷ Moreover, the Court has repeatedly recognized strong, constitutionally significant interests in bodily integrity. For example, in medical decision-making and reproductive rights cases,¹¹⁸ this interest has been described as nearly inviolate and founded on basic human dignity. Why such logic loses its force at the prison gate is a mystery.

111. *Florence v. Bd. of Chosen Freeholders*, 595 F. Supp. 2d 492, 497–99 (D.N.J. 2009), *rev'd*, 621 F.3d 296 (3d Cir. 2010).

112. *Bell*, 441 U.S. at 558.

113. *Roberts*, 239 F.3d at 111; *see also* Friedman, *supra* note 48, at *8.

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

115. *See generally* Brief for Psychiatrists as Amici Curiae in Support of Petitioner, *Florence v. Bd. of Chosen Freeholders*, No. 10-945 (U.S. filed June 27, 2011) [hereinafter Brief for Psychiatrists].

116. *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983) (internal quotations omitted).

117. *See* Ha, *supra* note 25, at 2742; *see also supra* Part V.A.

118. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992) (referring to "the urgent claims of the woman to retain the ultimate control over her destiny and her body, [which is] implicit in the meaning of liberty").

Second, reasonable suspicion is so low a standard that it is difficult to imagine that its application could noticeably hinder security efforts. Reasonable suspicion requires only “a minimum level of justification” and that an officer “be able to articulate more than an inchoate and unparticularized suspicion or hunch” that the detainee has contraband.¹¹⁹ Reasonable suspicion could be provided by the nature of the charge, the inmate’s behavior, or the circumstances surrounding arrest.¹²⁰ This standard thus provides at least some—but likely too little—protection for the individual privacy interests at stake.

Third, it is important to keep in mind that most people housed in jails have only been convicted of a minor offense, or have not yet been convicted of anything. Despite the Court’s holdings that not all deprivations within a detention facility technically qualify as “punishment,”¹²¹ it is doubtful that this distinction provides inmates much comfort.

The Third Circuit’s decision in *Florence* is faithful to *Bell*, and its analysis is generally sound. But because *Bell* fails to appreciate the severe invasiveness of strip searches, the Supreme Court should reconsider this precedent—or at least cabin its influence.

VII. POSSIBLE DISPOSITIONS

Assuming it reaches the merits,¹²² it is difficult to predict the outcome of *Florence v. Board of Chosen Freeholders*. In general, the Court’s recent record regarding the conditions in detention facilities has been mixed,¹²³ and oral arguments did little to clarify how the Court is likely to rule.¹²⁴ Which test the Court will apply is still

119. *Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000) (internal citations and quotations omitted).

120. It is true that this standard requires discretion, that discretion can be abused, and that a standard of reasonable suspicion could be employed in a discriminatory manner. But the alternative—that everyone is forced to undergo a strip search—simply extends the abuse to everyone. This is a strange sort of equality.

121. *E.g.*, *Bell v. Wolfish*, 441 U.S. 520, 536–37 (1979).

122. It is possible the Court will remand because the question of whether the policies at issue violate state law has not yet been fully addressed; *see* Brief of Former Attorneys General as Amici Curiae in Support of Petitioner at 4–11, *Florence v. Bd. of Chosen Freeholders*, No. 10-945 (U.S. filed June 24, 2011).

123. *Compare* *Beard v. Banks*, 548 U.S. 521, 524–25 (2006) (upholding a state prison policy denying especially dangerous inmates access to newspapers, magazines, and photographs), *with* *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011) (upholding a court order to reduce the population of severely overcrowded prisons).

124. *See generally* Transcript, *supra* note 94; *see also* Lyle Denniston, *Argument Recap: No Flat Rule on Strip-searches?*, SCOTUSBLOG (Oct. 12, 2011, 12:10 PM), <http://www.scotusblog.com>.

unsettled.¹²⁵ Given this ambiguity, *Florence* is likely to be a close case.

A. Applying *Bell v. Wolfish* to Uphold the Policies

By a slim margin, the most probable outcome is that the Court will apply the *Bell* balancing test to uphold the blanket strip-search policies.¹²⁶ Such an opinion might look much like the Eleventh Circuit's opinion in *Powell*¹²⁷: the Court could emphasize the sheer breadth of the policy at issue in *Bell*¹²⁸ and that the searches conducted in this case are less intrusive than those *Bell* upheld.¹²⁹ The Court would likely also reiterate the deference owed detention officials and the centrality of security concerns in jails and prisons.¹³⁰ It may also suggest that a blanket policy is actually *more* protective of individual dignity than reasonable suspicion because it precludes singling out specific inmates for worse treatment.¹³¹ In short, such an opinion would argue that the balance between security and privacy, and the similarity to *Bell*, require that the policies be upheld.

B. Applying *Bell v. Wolfish* to Strike Down the Policies

A second plausible opinion would apply the *Bell* balancing test to strike down the policies at issue. The holding of such an opinion probably would be limited. The Court may state that reasonable suspicion is required before conducting strip searches of suspected nondrug, nonviolent misdemeanants only, and may differentiate between strip searches and mandatory supervised showers.¹³² It would

com/2011/10/argument-recap-no-flat-rule-on-strip-searches/.

125. Of course, there is a possibility that the Court will conclude that both *Bell* and *Turner* reach the same result and thus would leave undecided which test is orthodox. See *Harmon v. Brucker*, 355 U.S. 579, 581 (1958) (describing “the Court’s duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case”).

126. This margin comes from oral arguments. Justice Kennedy is widely considered the key swing Justice and has been the deciding vote in some recent criminal cases. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910 (2011). During oral arguments, Justice Kennedy indicated his belief that a blanket policy is actually more protective of individual dignity than a standard of reasonable suspicion, which can be used to single out specific inmates. Transcript, *supra* note 94, at 6. However, there is also some indication that Justice Alito might defy expectations and vote to strike down the policies at issue. See Orin Kerr, *Thoughts on the Strip-Search Case*, SCOTUSBLOG (Oct. 12, 2011, 2:24 PM), <http://www.scotusblog.com/2011/10/thoughts-on-the-strip-search-case/>.

127. *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc).

128. *Id.* at 1303.

129. See *id.* at 1302.

130. See *id.* at 1311.

131. This is especially likely if Justice Kennedy writes the majority opinion. See *supra* note 126.

132. This seems to be the position *Florence*’s attorneys ultimately advocated at oral

almost certainly emphasize the degrading and potentially traumatic nature of strip searches, especially for sensitive populations.¹³³ In turn, it would minimize the security concern by noting that arrest for minor offenses is usually a surprise¹³⁴ and that an individual can be arrested and taken into custody on even minor charges.¹³⁵ Furthermore, the Court would probably also note that reasonable suspicion is a low standard and is easily satisfied.¹³⁶

C. Applying *Turner v. Safley*

A third plausible, but less likely, outcome would involve the Court's abandonment of the *Bell* standard in favor of the test in *Turner*.¹³⁷ In this case, one of two things would probably happen. The less likely option is that the Court would itself apply the highly deferential *Turner* standard to uphold the policies by emphasizing the rational connection between the policies and a compelling security interest.¹³⁸ The more likely option, however, is that the Court would hold that *Turner* supplies the proper standard and remand to the Third Circuit for its application.¹³⁹

The outcome of the decision is highly uncertain, but the most probable options are that the Court will either apply *Bell*'s broad mandates to uphold the challenged policies, carve out a narrow exception, or hold that the standard of *Turner* has subsumed *Bell* and remand. Though the decision seems likely to be hotly disputed, none of the plausible opinions will please ardent civil libertarians or the

arguments. Transcript, *supra* note 94, at 26–32.

133. See Brief for Psychiatrists, *supra* note 115, at 14–16 (describing women, children, survivors of sexual or domestic abuse, and those with particular religious or cultural beliefs as especially likely to suffer serious harm from a strip search).

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

135. *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001) (upholding the arrest of a woman for failure to wear a seatbelt, an offense punishable by a fine of up to fifty dollars); see also Transcript, *supra* note 94, at 37, 41–42.

136. See *Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000) (“While reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, [it] requires at least a minimal level of objective justification. . . . [An] officer must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity.” (internal citations and quotations omitted)).

137. It is possible the Court granted certiorari not just to resolve a circuit split, but to make clear that *Turner* had subsumed *Bell*.

138. See *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005) (“It bears repetition . . . that prison security is a compelling state interest”); *Turner v. Safley*, 482 U.S. 78, 89 (1987) (holding that “there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it” (internal quotations omitted)).

139. See *Johnson v. California*, 543 U.S. 499, 515 (2005) (remanding to the Ninth Circuit to apply strict scrutiny, rather than the *Turner* standard, to a race-based regulation in a prison).

defenders of the rights of the accused and the convicted. That battle was lost with *Bell*.