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CONSTITUTIONAL LAW—PERMITTING BLANKET STRIP-SEARCH POLICIES FOR ALL ARRESTEES ENTERING GENERAL JAIL POPULATION—FLORENCE V. BOARD OF CHOSEN FREEHOLDERS OF BURLINGTON COUNTY, 621 F.3D 296 (3D CIR. 2010)

The Fourth Amendment of the United States Constitution prevents government officials from executing unreasonable searches and seizures. The Supreme Court has established that enforcing a policy to strip-search all inmates after contact visits is permissible under the Fourth Amendment, however, the circuit courts are split as to whether a similar policy is constitutional for all arrestees entering the general jail population. In Florence v. Board of Chosen Freeholders of Burlington County, the United States Court of Appeals for the Third Circuit considered whether a policy to strip-search all arrestees, regardless of offense, was constitutional. The Third Circuit held that a blanket policy to strip-search all incoming inmates was constitutionally permissible because a prisons’ security interests trumped the privacy interests of the inmates.

On March 3, 2005, a New Jersey State Trooper stopped a vehicle in which Albert Florence was a passenger. The trooper arrested Florence pursuant to a bench warrant for a non-indictable form of civil contempt, previously issued on April 25, 2003. Florence protested his arrest to the
officer and claimed that he had paid the fine. The trooper took Florence into custody and transported him to the Burlington County Jail ("BCJ").

After six days of detention, Florence was transferred to Essex County Correctional Facility ("ECCF").

During intake at BCJ and ECCF, corrections officers performed a strip-search and body-cavity search on Florence. At BCJ, Florence was directed to remove all of his clothing, open his mouth and lift his tongue, lift his arms and turn around, and lift his genitals while an officer observed. At ECCF, officers directed Florence and four other inmates to strip naked and shower in separate stalls. While Florence showered, a corrections officer looked on and informed Florence to open his mouth, lift his genitals, and then turn around, squat, and cough. The charges against Florence were dismissed the following day and, after his release, he brought this action against BCJ and ECCF for violating his Fourth Amendment rights.

The district court granted summary judgment for Florence but certified its order for appeal.

The Fourth Amendment of the United States Constitution ensures that government officials do not perform unreasonable searches and seizures against or upon citizens of the United States. The Constitution’s
application in prisons has changed as the judiciary’s approach has evolved from “hands off” to a model based on deference to the judgment of prison administrators. The applicable precedent governing this case clearly states that inmates do not lose their constitutional rights upon entering prison; their rights, however, are not as extensive as those possessed by the ordinary citizen. Inmates’ rights are limited because prisons are unique institutions fraught with inherent dangers. The tension between protecting constitutional rights and preventing inherent danger within a prison requires a careful balancing of inmate rights and institutional objectives. A court must balance the fact that prison management is the

a standard of reasonableness in order to avoid arbitrary invasions of a citizen’s privacy. See Camara v. Mun. Ct. of S.F., 387 U.S. 523, 528 (1967) (noting Court consistently holds Fourth Amendment exists to protect privacy of individual).


See Bell, 441 U.S. at 559 (stating prisons are “fraught with serious security dangers”). One of the chief problems prisons face is the smuggling of contraband by defendants; this accomplishment is often achieved by defendants concealing contraband in body cavities during contact visits. See, e.g., Overton v. Bazzetta, 539 U.S. 126, 134 (2003) (noting drug smuggling is serious problem in prisons); Block v. Rutherford, 468 U.S. 576, 586 (1984) (declaring contact with visitors poses risk of smuggling contraband into prison); Bell, 441 U.S. at 559 (acknowledging instances of smuggling in body cavities); United States v. Park, 521 F.2d 1381, 1382 (9th Cir. 1975) (describing visitor’s attempt to smuggle valium tablets in vaseline coated balloon).

See, e.g., Hudson, 468 U.S. at 524; Bell, 441 U.S. at 546 (finding prisoner rights may be subject to limitations to maintain institutional security); Price v. Johnston, 334 U.S. 266, 285 (1948) (noting goals of incarceration justify limitations of rights), abrogated by McCleskey v.
province of the executive and legislative branches with the knowledge that prisoners cannot address their grievances at the ballot box but must use the courts.22

The Court in *Bell v. Wolfish*, examining the legality of body cavity searches after contact visits, noted that a court must consider “the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.”23 The Ninth and Eleventh Circuits have applied the *Bell* test and held that blanket strip-search policies during booking were constitutional.24 The First, Second, Fourth, Fifth, Sixth, and Eighth Circuits have addressed this issue and found strip-searches unconstitutional under *Bell*.25 To satisfy Fourth

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22 See *Bell*, 441 U.S. at 548 (“[T]he operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.”). But see Gutterman, *supra* note 18, at 898-99 (noting prisoners may only rely on courts to correct violations of rights). Deference to prison officials results in control for prison officials, who then defer supervisory control to guards, thereby making guards the final adjudicator of prisoner rights. *Id.* at 900. If courts do not correct this situation, they encourage violation of the prisoner rights they refuse to recognize. *Id.* at 900-01.

23 441 U.S. at 559. *Bell* addressed procedures at the Metropolitan Correctional Center (“MCC”) of New York City. *Id.* at 523. The MCC faced issues of overcrowding as a result of an increased number of pretrial detainees, requiring single rooms to serve as doubles and the placement of cots in common areas for multiple inmates. *Id.* at 525-26. In light of its test, the Court held that body-cavity searches in this instance were constitutionally permissible. *Id.* at 560. The dissent noted that the *Bell* test, as applied, permits limitations on detainee rights in whatever way correction officials decide is appropriate. *Id.* at 579 (Marshall, J., dissenting). Further, such invasions of privacy should not be sanctioned against presumptively innocent individuals. *Id.*

24 See *Bull v. City & Cnty. of S.F.*, 595 F.3d 964, 982 (9th Cir. 2010); *Powell v. Barrett*, 541 F.3d 1298, 1300 (11th Cir. 2008). Specifically, the court in *Bull* reviewed empirical evidence of attempts to smuggle contraband during booking but ultimately refused to rely on it, stating no empirical evidence was necessary. 595 F.3d at 982. Instead, the court relied on testimony of corrections officers stating that they believed the best opportunity to smuggle contraband into the prison was during booking. *Id.* at 967. But see Andrew A. Crampton, Note, Stripped of Justification: The Eleventh Circuit’s Abolition of the Reasonable Suspicion Requirement for Booking Strip Searches in Prisons, 57 CLEV. ST. L. REV. 893, 918 (2009) (noting relatively low occurrence of arrestees smuggling contraband during bookings). The Eleventh Circuit addressed only strip-searches where inmates were nude and whose front and backsides were examined. *Powell*, 541 F.3d at 1313 n.6 (describing manner of strip-searches). The court stated that the factual circumstances were similar to *Bell* and, therefore, a blanket policy was justified. *Id.* at 1302. But see *id.* at 1318 (Barkett, J., dissenting) (stating majority’s opinion concerning risk of smuggling by arrestees was “unwarranted speculation”); see also Crampton, *supra*, at 918 (describing low incidence of smuggling during booking).

25 See, e.g., *Shain v. Ellison*, 273 F.3d 56, 64 (2d Cir. 2001) (acknowledging lack of notice of arrest diminishes ability to smuggle contraband); *Roberts v. Rhode Island*, 239 F.3d 107, 111 (1st Cir. 2001) (stating *Bell* test frowns on strip-searches of “far less dangerous inmates”); *Kelly v. Foti*, 77 F.3d 819, 821 (5th Cir. 1996) (requiring “reasonable suspicion” inmate is hiding weapons or contraband to strip-search minor offenders); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir.
Amendment concerns, the majority of the circuit courts have required reasonable suspicion for corrections officials to strip-search arrestees.\(^{26}\)

The Supreme Court has clearly stated that it has a limited role in prison management.\(^{27}\) The Court has noted, however, that the judiciary should no longer take a deferential stance when substantial evidence exists that corrections officials are overreacting to institutional needs.\(^{28}\) Strip-searches have been described as one of the most invasive intrusions to a person’s privacy, leading some detainees to commit suicide as a result.\(^{29}\)

1989) (holding need for reasonable belief of smuggling to strip-search those arrested for traffic violations); Jones v. Edwards, 770 F.2d 739, 741-42 (8th Cir. 1985) (holding violation of leash law did not permit strip-search under Bell); Logan v. Shealy, 660 F.2d 1007, 1013 (4th Cir. 1981) (holding indiscriminate strip-search policy for all detainees cannot be upheld). In Roberts, the First Circuit required officers to have “reasonable suspicion” prior to conducting a strip-search for the following reasons: (1) that the Bell test frowns upon a gross invasion of privacy because of the low risk of smuggling subsequent to arrest; (2) the deterrent effect of strip-searches because arrests are generally unplanned and; (3) a reasonable suspicion standard provided an apt way to discover contraband. 239 F.3d at 111-12.

\(^{26}\) See, e.g., Kelly, 77 F.3d at 821 (requiring “reasonable suspicion that [prisoner] is hiding weapons or contraband”); Masters, 872 F.2d at 1255 (requiring reasonable belief of smuggling); Weber v. Dell, 804 F.2d 796, 802 (2d Cir. 1986) (holding Fourth Amendment requires reasonable suspicion that arrestee is hiding weapons or contraband); see also Bull, 595 F.3d at 990 (Thomas, J., dissenting) (noting quarter-century of Ninth Circuit law required reasonable suspicion); Powell, 541 F.3d at 1317 (Barkett, J., dissenting) (noting Bell should not be read to mean reasonable suspicion not required). The “reasonableness” requirement exists to ensure that government officials have adequate justification that can be reviewed by a court. See Gabriel M. Helmer, Note, Strip Search and the Felony Detainee: A Case for Reasonable Suspicion, 81 B.U. L. Rev. 239, 242-43 (2001). Reasonable suspicion is the “most clearly defined . . . tool to assess the constitutional validity of a strip search . . . .” Id. at 288. Justice Powell’s dissent in Bell noted that reasonable suspicion should be the standard for corrections officers when deciding to strip-search a detainee. See 441 U.S. 520, 563 (1979) (Powell, J., concurring in part and dissenting in part); see also Helmer, supra, at 265 (describing adoption of reasonable suspicion in the Ninth Circuit).

\(^{27}\) See Pell v. Procunier, 417 U.S. 817, 827 (1974); see also Block v. Rutherford, 468 U.S. 576, 584 (1984) (reaffirming limited role of judiciary in prison management); Bell, 441 U.S. at 547 (stating prison administrators should be provided wide-ranging deference to deal with management matters). The separation of powers doctrine requires judicial deference because prison management lies within the province of the executive and legislative branches. See Bell, 441 U.S. at 548 (citing Procunier v. Martinez, 416 U.S. 396, 405 (1974)) (stating underlying principles of judicial deference to corrections officials).

\(^{28}\) See Bell, 441 U.S. at 540 n.23 (quoting Pell, 417 U.S. at 827) (noting jails afforded deference absent substantial evidence that officials overreacted to security considerations); see also David C. James, Note, Constitutional Limitations on Body Searches in Prisons, 82 Colum. L. Rev. 1033, 1056 (1982) (stating privacy rights of inmates meaningless if corrections officials afforded broad discretion).

\(^{29}\) See Bell, 441 U.S. at 558 (stating strip-searches “instinctively give[] [the Court] the most pause”); United States v. Whitted, 541 F.3d 480, 486 (3d Cir. 2008) (noting strip-searches are “significant intrusion” of individual’s privacy); see also M. Margaret McKeown, Strip Searches Are Alive and Well in America, Hum. Rts. Spring 1985, at 37, 42 available at http://heinonline.org/HOL/Page?handle=hein.journals/huril12&div=42&g_sent=1&collection=jou
Judges and researchers have also noted the minimal threat that arrestees and pretrial detainees pose to smuggling contraband into prisons. 30 In Florence, the Third Circuit considered whether strip-searches of all arrestees entering a general jail population are permissible under the Fourth Amendment. 31 Joining the Ninth and Eleventh Circuits, the court held that the strip-searches were reasonable because the jail’s interest in maintaining security outweighed the privacy interest of the inmates. 32 The court first assumed that prisoners retain some constitutional rights in prisons and stated that strip-searches are considerable invasions on individual privacy. 33 The court then discussed the Bell factors and noted that the searches before the court were less intrusive than those considered in Bell. 34 The court moved to the second and fourth factors, finding that strip-searches occurred in a similar place and manner as those in Bell. 35

30 See Powell, 541 F.3d at 1318 (Barkett, J., dissenting) (stating majority’s opinion concerning risk of smuggling by arrestees is “unwarranted speculation”); Shain v. Ellison, 273 F.3d 56, 64 (2d Cir. 2001) (unplanned nature of arrest generally does not allow arrestees to hide contraband); Roberts, 239 F.3d at 111 (lacking notice of arrest means arrestees do not have opportunities to hide things). Studies have noted that prison staff and visitors, not inmates, are the most likely sources for drug smuggling. See William R. Bell, Practical Criminal Investigations in Correctional Facilities 8-14 (2002) (citing visitors as one of main avenues for contraband in prisons); Mark S. Fleisher & Richard H. Rison, Gang Management in Corrections, in Prison and Jail Administration, Practice and Theory 232, 234-35 (Peter M. Carlson & Judith Simon Garrett eds., 1999) (stating jailed gang members recruit people outside prison to smuggle contraband through visits); Dennis J. Stevens, Prison Regime and Drugs, 36 How. J. Crim. Just. 1, 25 (1997) (stating inmates unlikely vehicle to smuggle drugs). A study of convicted drug smugglers noted most drugs found in prisons are smuggled via prison staff members. See Stevens, supra.


32 Id. at 308 (“Like the Ninth and Eleventh Circuit Courts of Appeals . . . [w]e reject Plaintiffs’ argument that blanket searches are unreasonable . . .”).

33 Id. at 307 (discussing foundation of court’s reasoning).

34 Id. at 308 (distinguishing Florence’s search from searches in Bell). The court stated that the searches only required a visual inspection of the arrestees’ nude bodies while Bell required a body-cavity search. Id. at 307. The primary force of the court’s reasoning involved a discussion of the Bell factors, along with distinguishing the facts at bar from those in Bell. Id. at 308-10.

35 Id. at 307 (discussing circumstances of strip-search). The court stated that the search
The court finally addressed the justification for initiating the search, the third factor of the *Bell* test, and stated that the potential for inmates to smuggle drugs, weapons, and other contraband was the greatest threat to security facing prisons.\(^{36}\) Relying again on the *Bell* decision, the court reasoned that non-indictable arrestees could not be considered a lesser security risk than other inmates.\(^{37}\) The court relied on its conclusion that a person may get arrested on purpose for a non-indictable offense in order to take advantage of a procedure where non-indictable arrestees were not strip-searched.\(^{38}\) The plaintiffs contended that no evidence existed of a smuggling threat from non-indictable arrestees, but the court stated it was unnecessary because *Bell* did not require such evidence.\(^{39}\) The court finally stated that a blanket policy removes discretionary authority from corrections officers, ensuring similar treatment of all arrestees and therefore easing equal protection concerns.\(^{40}\) For the foregoing reasons, the Third Circuit held that a blanket strip-search policy for all arrestees entering the general jail population was constitutional.\(^{41}\)

In the instant case, the Third Circuit improperly deferred to the judgment of prison officials where ample evidence exists of the impropriety of blanket strip-search policies.\(^{42}\) While smuggling in prisons is a serious issue that must be dealt with by prison officials, a strip-search is displayed less intrusiveness than that in *Bell* because it lasted only a few minutes, it was conducted in private, and it was performed in a professional manner.\(^{36}\)

\(^{36}\) *Florence*, 621 F.3d at 307 (noting security interest of prisons). The security interest of the prison was the only fact that the court believed the plaintiffs could reasonably distinguish from the facts in *Bell*.\(^{37}\) The court found that preventing smuggling of contraband was a legitimate security interest because it was necessary to protect both inmates and security personnel.\(^{37}\)

\(^{37}\) *Id.* at 308 (noting *Bell* court refused to use grounds for detention as indicator when strip-search proper).

\(^{38}\) *Id.* (dismissing plaintiffs’ argument that non-indictable arrestees are minimal threat to smuggle). Noting the Eleventh Circuit’s opinion, the Third Circuit agreed that gang members would likely seek to exploit non-indictable arrestee status as not included in blanket search policies.\(^{37}\) The court also stated that the risk of smuggling in *Bell* was low, as it would be hard to smuggle through contact visits when in full view of prison officials, and the policy was still upheld.\(^{37}\) *Id.* at 309.

\(^{39}\) *Id.* (stating why actual evidence is unnecessary). The Supreme Court has a long-standing policy of deferring to the corrections officials’ authority, and the court noted that policy made the lack of evidence reasonable.\(^{37}\) *Id.* at 310.

\(^{40}\) *Id.* at 310-11 (stating positive aspects of blanket policy). The court stated that the use of a reasonable suspicion standard to determine who should undergo a strip-search would have a high potential for abuse.\(^{37}\) *Id.* The court further noted that a majority of its sister courts apply a reasonable suspicion standard.\(^{37}\) *Id.* at 304 n.4.

\(^{41}\) *Florence*, 621 F.3d at 311.

\(^{42}\) See *Id.* at 308 (following the Ninth and Eleventh Circuits and holding blanket policies constitutionally permissible); *supra* notes 28, 30 and accompanying text (stating deference to prison officials is unwarranted in certain circumstances).
one of the most invasive procedures to a person’s privacy, and can subject
victims to serious psychological damage.\textsuperscript{43} The court attempted to balance
these concerns but failed to note that incoming arrestees are unlikely
vehicles for smuggling contraband.\textsuperscript{44} As a result, the application of these
policies will require the strip-searches of both the convicted drug trafficker
and the person arrested for failing to leash a dog.\textsuperscript{45}

The Florence court also incorrectly interpreted Bell when it stated
that the justifications for each search were similar.\textsuperscript{46} The Florence
court assumes from Bell that no evidence of smuggling is necessary, although
Bell noted instances of smuggling were in the record.\textsuperscript{47} Furthermore, there
is outside evidence that prisoners utilize contact visits to smuggle
contraband while there is not similar evidence regarding incoming arrestees
like those in Florence.\textsuperscript{48} Therefore, under the Bell analysis, justification is
lacking, as the threat of smuggling by incoming arrestees is low.\textsuperscript{49} Still,
Bell should have guided the Florence court, but only to the extent that the

\textsuperscript{43} See supra note 29 and accompanying text (describing possible psychological effect of
strip-searches). One study noted that women who were strip-searched are left with similar
psychological effects as rape victims. See Simons, supra note 29, at 8, 56.

\textsuperscript{44} See supra note 30 and accompanying text (stating reason justifying strip-searches is
unwarranted).

\textsuperscript{45} See Florence, 621 F.3d at 299 (summarizing circumstances of arrest and strip-search);
Jones v. Edwards, 770 F.2d 739, 740 (8th Cir. 1985) (describing strip-search after arrest for
violation of leash law). In Jones, the arrestee was held for failing to abide by a leash law for his
dog and was strip-searched while waiting for a friend to post bail. 770 F.2d at 740.

\textsuperscript{46} See supra notes 37, 38 and accompanying text (stating court found similar justification for
search). The court stated that non-indictable arrestees could not be considered a lesser security
because, hypothetically, gang members would seek to use their exclusion from strip-searches to
smuggle contraband. See supra note 38 and accompanying text (describing the court’s
reasoning). But see Powell v. Barrett, 541 F.3d 1298, 1318 (11th Cir. 2008) (Barkett, J.,
dissenting) (“[T]he assertion that pretrial detainees booked on petty misdemeanor charges might
anticipate their arrests or that gang members might deliberately get arrested in order to smuggle
weapons and drugs into jail is unwarranted speculation . . . .”).

\textsuperscript{47} See Bell, 441 U.S. at 559 (stating smuggling through body cavities during contact visits in
record and other cases); see also supra note 30 (stating prisoners are unlikely avenues to smuggle
drugs upon arrest).

\textsuperscript{48} See Bell, supra note 30 (stating staff and visitors used most often to smuggle
contraband); Fleisher & Rison, supra note 30 (noting use of contact visits to smuggle
contraband). Studies and evidence point to the conclusion that incoming arrestees are one of the
least likely methods for smuggling contraband into prisons. See supra note 30 and accompanying
text (stating incoming arrestees rarely used to smuggle contraband).

\textsuperscript{49} See Bell, 441 U.S. at 559 (stating justification requirement). In Bell, the Court looked at
evidence of smuggling through contact visits in the record and the one noted instance at the
Metropolitan Correction Center. Id. The justification for the search in Florence was a
hypothetical of what may occur and does not live up to the justification set forth in Bell. See id.
(stating justification); Florence, 621 F.3d at 308 (relying on 11th Circuit’s hypothetical
conclusion that gang members would exploit the search exclusion).
court should not defer to the opinion of the corrections officials because substantial evidence exists that they are overreacting to security concerns.50

Finally, the Florence court mistakenly chose deference to prison officials instead of applying the reasonable suspicion standard like the majority of its sister courts.51 As Justice Powell noted in his dissent in Bell, reasonable suspicion satisfies the need for a level of cause to strip-search a detainee.52 The Florence court stated that a unified procedure took discriminatory power away from prison staff, but failed to see that deference to the judgment of those officials gave them the power to interpret the Fourth Amendment for prisoners.53 In the absence of evidence indicating smuggling by incoming arrestees, the Fourth Amendment may not bend far enough to allow blanket strip-search policies.54

In Florence v. Board of Chosen Freeholders of the County of Burlington, the Third Circuit decided that a blanket strip-search policy for all incoming inmates is constitutional. However, there was a lack of supporting evidence aside from the affirmations of prison officials that incoming arrestees will try to smuggle contraband during booking. Ample evidence exists to the contrary, including a poll of convicted drug traffickers that identified prison staff as the most likely vehicles for smuggling contraband. The Third Circuit broke off from a majority of the other circuits, which state reasonable suspicion is necessary to strip-search detainees in light of the Fourth Amendment. Prisons are fraught with security concerns, but the Third Circuit incorrectly deferred to the expertise of prison officials in matters considered so humiliating and invasive, likened to rape, where evidence exists contrary to the officials’ story. Prisoners may lack some of the constitutional protections possessed by ordinary

50 See Bell, 441 U.S. at 540 n.23 (citing Pell v. Procunier, 417 U.S. 817, 827 (1974)) (noting jails afforded deference absent substantial evidence that officials overreacted to security considerations); supra note 30 (noting substantial evidence concluding incoming arrestees are a low threat).

51 See supra note 28 (stating where evidence exists that prison officials overreacted, courts do not give deference). The Sixth Circuit specifically stated that absent a reasonable belief that a person will smuggle contraband, the fact that a prisoner will enter the general jail population is not enough cause to search a detainee. Masters v. Crouch, 872 F.2d 1248, 1255 (6th Cir. 1989).

52 See Bell, 441 U.S. at 563 (Powell, J., concurring in part and dissenting in part) (stating some level of cause is needed); see also Helmer, supra note 26, at 265 (arguing reasonable suspicion is most well-developed tool to determine constitutionality of blanket strip-search).

53 See Bell, 441 U.S. at 579 (Marshall, J., dissenting) (stating deference allows detainee rights to go only as far as corrections officers like); Gutterman, supra note 19, at 900 (stating guards become final adjudicators of prisoners’ rights through deference); see also Powell v. Barrett, 541 F.3d 1298, 1315 (Barkett, J., dissenting) (stating deference due but it does not mean prisoners give up their constitutional rights).

54 See supra notes 23, 26 and accompanying text.
citizens, but the Third Circuit has created a precedent that puts the extent of those protections in the hands of jailors. The blanket strip-search policies before the court were a clear instance where the deference to prison officials should break down and be substituted by the judgment of the Third Circuit concerning Fourth Amendment protections.

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