FLORENCE V. BOARD OF CHOSEN FREEHOLDERS: THE RESURRECTION OF *BELL V. WOLFISH* AND THE QUESTIONS TO FOLLOW

ABSTRACT

The balance between Fourth Amendment rights and strip search polices in a correctional setting has garnered limited attention from the U.S. Supreme Court. Moreover, the interpretation of Supreme Court precedent by circuit courts has been inconsistent, and at times irreconcilable, with the governing standards. In upholding the strip search policies at issue in *Florence v. Board of Chosen Freeholders*, the Court sought to add clarity to the existing law and reign in circuits that had expanded the Court's precedent beyond established measures. The *Florence* Court premised its decision primarily on the need for deference to correctional expertise and the security concerns that invasive strip search policies seek to preclude. Furthermore, in the face of a highly critical dissent, the Court declined to adopt the majority of circuits' view that a heighted standard of suspicion is required to justify a strip search.

Although the *Florence* majority's holding may seem harsh on its face because of the degrading nature of invasive strip searches, the Court's decision is consistent with the standards promulgated in *Bell v. Wolfish* and ensures the protection of many over the rights of a single individual. This Comment concludes that the Court's holding promotes adaptive, rather than reactive, policies in the hands of those with the greatest expertise. Moreover, blanket strip search policies protect those incarcerated by both subjecting arrestees to the same, consistent policy and by eliminating forms of dangerous contraband.

Finally, although the strip search policies were upheld in *Florence*, there are potential mitigating factors that will have to be addressed in the coming years. This Comment opines that both the presence of alternative holding facilities and the emergence of new technologies represent the most viable mechanisms for dampening the perceived harshness of the Court's holding. However, the Court's refusal to define such factors in *Florence* provides little guidance to circuit courts and encourages them to continue to push the boundaries of *Bell*, and now *Florence*.

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INTRODUCTION

Correctional facilities today house over two million[1] convicted and detained inmates and have been described as "'a world of violence,' 'a walled battlefield,' and 'Hobbesian.'"[2] Despite these depressing descrip-

1. LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, NCJ 236319, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010, at 3 tbl.1 (2011).

2. Christopher P. Keleher, *Judges as Jailers: The Dangerous Disconnect Between Courts and Corrections*, 45 CREIGHTON L. REV. 87, 87 (2011) (footnotes omitted) (quoting MATTHEW SILBERMAN, A WORLD OF VIOLENCE 2 (1995), James E. Robertson, *"Fight or F . . ." and Constitutional Liberty: An Inmate's Right to Self-Defense When Targeted by Aggressors*, 29 IND. L. REV.

tions, the U.S. Supreme Court has consistently held that prisoners are not beyond the reach of constitutional protections.[3] The question, however, is how far should constitutional protections extend, and at what point does the security of others and of the overall facility restrict personal rights?[4]

The constitutionality of strip-searching detained persons, including body-cavity searches, has garnered limited attention from the Supreme Court.[5] Furthermore, circuit courts have construed the limited precedent inconsistently[6] and have created standards that are irreconcilable with controlling law.[7] The Supreme Court in *Florence v. Board of Chosen Freeholders*[8] sought to add clarity by addressing a correctional facility's intake strip search policy vis-à-vis Fourth Amendment rights.[9] The *Florence* Court in a 5–4 decision rightly resurrected prior precedent[10] by concluding that such policies do not violate Fourth Amendment rights.[11] Despite this holding, however, concurring opinions by Chief Justice Roberts and Justice Alito consider mitigating factors that will likely garner further review by courts in the years to come. These considerations serve as viable mechanisms that may dampen the degrading effects of the strip searches that gave the dissent pause.

Part I of this Comment provides a brief record of Supreme Court jurisprudence and its various interpretations governing the constitutionality of strip-searching detained persons. Next, Part II summarizes the facts, procedural history, and opinions of *Florence*. Lastly, Part III examines the justifications and applicability of the decision in *Florence*, along with potential exceptions and how those exceptions will guide future decisions.

I. BACKGROUND

The Fourth Amendment to the U.S. Constitution grants individuals the right to be free from "unreasonable searches and seizures."[12] Moreover, the U.S. Supreme Court has recognized that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Con-

339, 341 (1995), and James E. Robertson, *Surviving Incarceration: Constitutional Protection from Inmate Violence*, 35 DRAKE L. REV. 101, 102 (1985), respectively).

3. *See, e.g.*, Hudson v. Palmer, 468 U.S. 517, 523 (1984) (noting that the Court has "repeatedly held" prisoners maintain some constitutional rights).

4. *See* David M. Shapiro, *Does the Fourth Amendment Permit Indiscriminate Strip Searches of Misdemeanor Arrestees?:* Florence v. Board of Chosen Freeholders, 6 CHARLESTON L. REV. 131, 132–33, 136 (2011).

5. *Id.* at 132–33 (explaining only one Supreme Court case, *Bell v. Wolfish*, 441 U.S. 520 (1979), directly addresses strip-searching inmates).

6. Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1518 (2012).

7. Keleher, *supra* note 2, at 89–90.

8. 132 S. Ct. 1510 (2012).

9. *Id.* at 1514–15.

10. *Id.* at 1518 (explaining that *Florence* "is set against this precedent and governed by the principles announced in *Turner* and *Bell*").

11. *Id.* at 1523.

12. U.S. CONST. amend. IV.

stitution."[13] However, arrestees may not be "accorded those rights . . . fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration."[14] For instance, the Supreme Court cautions that the right to privacy in the traditional Fourth Amendment sense may not be compatible with prison confines.[15] Although the Supreme Court does not strictly preclude Fourth Amendment rights in such a setting, the balance of institutional security weighs in favor of the government, and individual rights must therefore yield.[16]

A. Bell v. Wolfish[17]

Bell v. Wolfish is the seminal starting point to Fourth Amendment challenges by detainees regarding their privacy, or more specifically, the search of their persons.[18] In *Bell*, the U.S. Supreme Court addressed several conditions of confinement claims by detainees and convicted inmates of the Metropolitan Correctional Center (MCC) in New York City.[19] At issue was MCC's strip search policy requiring all detainees partaking in contact visits with outside persons to submit to a visual body-cavity search after every visit.[20] The detainees averred that the blanket policy infringed on their constitutional rights.[21] Both the District Court for the Southern District of New York and the Second Circuit agreed.[22] The Second Circuit noted that privacy is "fundamental to [the] decent treatment of an inmate."[23] Moreover, the "gross violation of personal privacy" inflicted by the strip searches did not outweigh the "government's security interest."[24] In considering the "deep level of degradation and submission," the court held absent probable cause that the detainees were concealing contraband, the Fourth Amendment prohibited such searches.[25]

The Supreme Court reversed the Second Circuit's decision and concluded that MCC's strip search policy did not violate the Fourth Amendment's ban on unreasonable searches.[26] The Court noted that although the nature of the body-cavity search caused it to "pause," in this situation the policy was constitutional.[27] Furthermore, the Court conclud-

13. Turner v. Safely, 482 U.S. 78, 84 (1987).
14. Hudson v. Palmer, 468 U.S. 517, 523 (1984).
15. *See, e.g.*, *id.* at 527–28.
16. *Id.*
17. 441 U.S. 520 (1979).
18. Keleher, *supra* note 2, at 91.
19. *Bell*, 441 U.S. at 523.
20. *Id.* at 558.
21. *Id.* at 527.
22. *Id.* at 558.
23. Wolfish v. Levi, 573 F.2d 118, 131 (2d Cir. 1978), *rev'd sub nom. Bell*, 441 U.S. at 520.
24. *Id.*
25. *Id.* (quoting United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114, 147 (S.D.N.Y. 1977)).
26. *Bell*, 441 U.S. at 558.
27. *Id.*

ed that although the "test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," courts must balance four substantive factors: "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."[28] The Court explained that these factors "[b]alanc[e] the significant and legitimate security interests of the institution against the privacy interests of the inmates."[29]

In holding that the search policy was reasonable under the Fourth Amendment, the Court placed the greatest weight on the justification factor.[30] The Court explained that imminent security dangers represent legitimate interests of detention facilities[31] and justify permitting strip searches on less than probable cause.[32]

B. Turner v. Safley[33]

In *Turner v. Safley*, a class of inmates brought suit challenging the constitutionality of two regulations promulgated by the Missouri Division of Corrections concerning prison mail and inmates' right to marry.[34] The questioned mail regulation limited correspondence between inmates at separate prison facilities to only family members,[35] and the marriage regulation restricted inmates from marrying without direct consent of the superintendent.[36] The District Court for the Western District of Missouri determined that both regulations were unconstitutional, and the Eighth Circuit affirmed.[37]

The U.S. Supreme Court upheld the ruling as to the unconstitutionality of the regulation prohibiting inmates from marrying[38] but reversed the decision as to the prison-mail regulation.[39] In its opinion, the Court developed a standard of review for constitutional claims made by prisoners,[40] stating that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[41] The Court explained that its rationale was not to "[s]ubject[] the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis" but instead to defer judgment to officials

28. *Id.* at 559.
29. *Id.* at 560.
30. *See id.* at 559.
31. *Id.* (noting that "[s]muggling of money, drugs, weapons, and other contraband is all too common an occurrence").
32. *Id.*
33. 482 U.S. 78 (1987).
34. *Id.* at 81–82.
35. *Id.*
36. *Id.* at 82.
37. *Id.* at 83.
38. *Id.* at 99.
39. *Id.* at 93.
40. Keleher, *supra* note 2, at 95.
41. *Turner*, 482 U.S. at 89. *But see* Johnson v. California, 543 U.S. 499, 509–10 (2005) (refusing to apply *Turner* to constitutional challenges regarding a racial segregation policy).

who are in the best position to "anticipate security problems" and "adopt innovative solutions."[42] The Court followed by holding that the policy regulating mail correspondence between inmates ensured security at prison facilities—a legitimate penological interest.[43] However, the Court declined to find an adequate penological interest in the regulation limiting inmates' ability to marry.[44]

C. The Departure from Bell v. Wolfish

In the years following *Bell*, ten circuit courts attempted to reconcile the Court's finding in *Bell* with the strip-searching of individuals arrested for minor offenses.[45] These circuits held that strip searches in this instance violated the Fourth Amendment absent "reasonable suspicion" that the arrestee was hiding contraband.[46] To provide greater protection to detainees, these circuit courts selectively read and distinguished *Bell* on varying grounds.[47]

In *Mary Beth G. v. City of Chicago*,[48] the Second Circuit examined a policy requiring the strip search of female misdemeanants placed in detention facilities of the Chicago Police Department.[49] The court explained that *Bell* is not controlling because the detainees in *Bell* were "awaiting trial on serious federal charges" rather than being "minor offenders who were not inherently dangerous."[50] Furthermore, the court noted *Bell*'s balancing test "does not validate strip searches in detention

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

43. *Id.* at 93.

44. *Id.* at 99.

45. Florence v. Bd. of Chosen Freeholders, 621 F.3d 296, 303–04 (3d Cir. 2010), *aff'd*, 132 S. Ct. 1510 (2012).

46. *See* Wilson v. Jones, 251 F.3d 1340, 1342 (11th Cir. 2001) (requiring reasonable suspicion for arrestee detained for driving under the influence), *overruled by* Powell v. Barrett, 541 F.3d 1298, 1314 (11th Cir. 2008) (en banc); Roberts v. Rhode Island, 239 F.3d 107, 108, 112 (1st Cir. 2001) (requiring reasonable suspicion for an arrestee pulled over for an expired tag and detained for an "outstanding body attachment"); Kelly v. Foti, 77 F.3d 819, 821 (5th Cir. 1996) (requiring reasonable suspicion for arrestees detained for minor offences); Maters v. Crouch, 872 F.2d 1248, 1253 (6th Cir. 1989) (requiring reasonable suspicion for arrestees detained for "simple traffic violations"); Weber v. Dell, 804 F.2d 796, 804 (2d Cir. 1986) (requiring reasonable suspicion for arrestees detained for misdemeanors); Jones v. Edwards, 770 F.2d 739, 741–42 (8th Cir. 1985) (concluding that an arrestee detained for violating a leash law and who gave the officer "no other reason to suspect [the arrestee] was harboring [contraband]" was unconstitutional); Giles v. Ackerman, 746 F.2d 614, 617 (9th Cir. 1984) (requiring reasonable suspicion for arrestees detained for minor offences), *overruled by* Bull v. City of San Francisco, 595 F.3d 964 (9th Cir. 2010) (en banc); Hill v. Bogans, 735 F.2d 391, 394 (10th Cir. 1984) (adopting the analysis of *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981), requiring reasonable suspicion for detainees arrested for misdemeanors); Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1273 (7th Cir. 1983) (requiring reasonable suspicion for arrestees detained for misdemeanors); Logan v. Shealy, 660 F.2d 1007, 1009, 1013 (4th Cir. 1981) (requiring reasonable suspicion for arrestees detained for driving while intoxicated).

47. *See, e.g.*, *Mary Beth G.*, 723 F.2d at 1273; *see also* Shapiro, *supra* note 4, at 140–42 (distinguishing on varying grounds, including felonies or misdemeanors, probable cause or reasonable suspicion, and contact visits or arrests).

48. 723 F.2d 1263 (7th Cir. 1983).

49. *Id.* at 1267.

50. *Id.* at 1272.

settings *per se*."[51] The court concluded that because of the "substantial nature of the intrusions involved" and the differences depicted in *Bell*, the court was justified in initiating its own inquiry as to whether the strip search policy was unreasonable under the Fourth Amendment.[52]

Mary Beth G. is the beginning of the *Bell* distortion and represents the foundation for which circuits have distinguished *Bell* and imparted a reasonable suspicion standard.[53] Commentators have noted that narrowed interpretations like those depicted in *Mary Beth G.* depart from the holding in *Bell* and exhibit confusion,[54] or blatant disregard,[55] by circuits of the Supreme Court's intended application.

D. The Return to Bell v. Wolfish

More recently, three circuits have resurrected *Bell* by finding intake strip search policies constitutional despite the absence of reasonable suspicion.[56] In 2008, the Eleventh Circuit, sitting en banc in *Powell v. Barrett*,[57] considered a Fulton County Jail policy that required arrestees entering the jail's general population to submit to a mandatory strip search.[58] The *Powell* court held that the Fourth Amendment does not require reasonable suspicion to conduct strip searches—including a search of body cavities—of detainees entering or re-entering general prison population.[59] The Eleventh Circuit noted that it and other circuits were misguided in distinguishing *Bell* on the severity of an arrestee's offense.[60] The court explained that the policy upheld in *Bell* applies to all inmates "regardless of whether there was any reasonable suspicion to believe that the inmate was concealing contraband."[61] This decision on its own practically ended years of misapplication of *Bell*, and has marked a turning point in the view of at least two other circuits.[62]

Similarly, in *Bull v. City of San Francisco*,[63] the Ninth Circuit, also sitting en banc, reversed the district court's finding that a San Francisco jail policy requiring all arrestees to submit to a strip search was unconstitutional.[64] The Ninth Circuit in *Bull* directly reversed a line of its own

51. *Id.*
52. *Id.*
53. Keleher, *supra* note 2, at 97.
54. *See* Deborah L. MacGregor, *Stripped of All Reason? The Appropriate Standard for Evaluating Strip Searches of Arrestees and Pretrial Detainees in Correctional Facilities*, 36 COLUM. J.L. & SOC. PROBS. 163, 199 (2003).
55. *See* Keleher, *supra* note 2, at 108.
56. *Id.* at 108–09.
57. 541 F.3d 1298 (11th Cir. 2008) (en banc).
58. *Id.* at 1301.
59. *Id.* at 1307.
60. *Id.*
61. *Id.*
62. *See* Keleher, *supra* note 2, at 110, 112 (stating that the Ninth Circuit "follows" *Powell* and the Third Circuit "endorses" *Powell*).
63. 595 F.3d 964 (9th Cir. 2010) (en banc).
64. *Id.* at 982.

cases requiring reasonable suspicion and held that its prior case law was inconsistent with *Bell*, *Turner*, and the general principles embodied in those decisions.[65] The court explained that *Bell*'s blanket policy, which required all inmates to submit to a mandatory strip search after contact visits regardless of the level of suspicion, was constitutional.[66] Returning to *Bell* and *Turner*, the court found that documented evidence of "ongoing, dangerous, and perplexing" contraband in the jail represented a legitimate penological interest that justified the strip search policy.[67] Moreover, the court warned that decisions departing from *Bell* and *Turner* were "inconsistent with the Supreme Court's warning that federal courts must avoid substituting their judgment for the 'professional expertise of corrections officials.'"[68]

The basis for examining correctional strip searches promulgated in *Bell*, and its subsequent resurrection by the Ninth and Eleventh Circuits, proved to be of greater precedential value to the five-Justice majority in *Florence*.

II. *FLORENCE V. BOARD OF CHOSEN FREEHOLDERS*

A. Facts

In 1998, officers arrested Albert Florence after he attempted to evade arrest in Essex County, New Jersey.[69] Florence was charged with obstruction of justice and use of a deadly weapon, and was sentenced to pay a fine in monthly installments.[70] In 2005, a New Jersey state trooper pulled Florence over and noticed there was an outstanding bench warrant for his arrest.[71] The officer arrested Florence and took him to the Burlington county jail.[72] The warrant, which related to an unpaid fine from his 1998 conviction, was later determined to be erroneous because Florence had paid the fine in 2003.[73]

Before admittance to the general population at the Burlington county jail (Burlington), Florence was required to shower with a delousing agent and submit to a strip search to be checked for scars, gang tattoos, and contraband.[74] This process included lifting his genitals for visual inspection.[75] Six days later, officers transferred Florence to the Essex County Correctional Facility (Essex), New Jersey's largest county jail.[76]

65. *Id.* at 980.
66. *Id.* at 975.
67. *Id.* at 977.
68. *Id.* at 980 (quoting Bell v. Wolfish, 441 U.S. 520, 548 (1979)).
69. Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1514 (2012).
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*

Similar to that of Burlington, Essex's policy required all incoming detainees, regardless of the circumstances, to submit to a strip search.[77] The search required visual inspection of *all* body cavities, including a genital lift and a process in which the detainee squatted and coughed.[78] Charges were dismissed the following day, and Florence was released.[79]

B. Procedural History

Florence sought relief from multiple defendants under 42 U.S.C. § 1983 for alleged violations of his Fourth and Fourteenth Amendment rights.[80] He asserted that the Constitution prohibits correctional facilities from mandating the strip search of those arrested for minor offenses absent reasonable suspicion of concealed contraband.[81] The New Jersey district court, following a majority of circuits,[82] distinguished *Bell* and granted Florence's motion for summary judgment.[83]

On appeal, a divided panel of the Third Circuit reversed the district court's decision.[84] In its holding, the Third Circuit rejected the district court's narrow interpretation of *Bell* and concluded that the strip search policies reasonably balanced the security needs of the facilities and Florence's personal rights.[85] The U.S. Supreme Court then granted certiorari.[86]

C. Majority Opinion

In a 5–4 decision, the Court framed the issue as "whether every detainee who will be admitted to the general population may be required to undergo a close visual inspection while undressed."[87] In an opinion authored by Justice Kennedy—and joined in whole by Chief Justice Roberts and Justices Alito and Scalia, and in all but Part IV of the opinion by Justice Thomas—the Supreme Court affirmed the Third Circuit's decision, holding that such strip search polices were constitutional.[88]

The Court's underlying theme was institutional security,[89] premised on three tenants specific to correctional facilities: (1) "substantial discretion" to correctional officials;[90] (2) the need for the search balanced

77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 1514–15.
82. Shapiro, *supra* note 4, at 147.
83. *Florence*, 132 S. Ct. at 1515.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 1513.
88. *Id.* at 1523.
89. *See id.* at 1513 ("Correctional officials have a legitimate interest . . . to ensure jails are not made less secure.").
90. *Id.* at 1515–16.

against the "resulting invasion of personal rights";[91] and (3) the "ability to conduct searches without predictable exceptions."[92] The Court explained that without substantial evidence that correctional officials' response was exaggerated, the governing standard required deference to correctional expertise.[93]

In its holding, the *Florence* Court placed its greatest emphasis on the *Bell* balancing test, weighing the need for the search against the invasion of personal rights.[94] In characterizing the need and the resulting justifications, Justice Kennedy enumerated risks such as wounds and infections, gang markings and affiliations, and contraband that the strip searches in question would reveal.[95] The Court held that despite the invasion on Florence's personal rights, there was a "substantial interest" in alleviating these risks before individuals reached a jail's general population in order to protect others in the facility.[96] Moreover, Justice Kennedy noted that "[t]he difficulties of operating a detention facility should not be underestimated"[97] and explained that officials deserve latitude to form policies that detect and deter the entrance of contraband.[98]

As to Florence's contention that people arrested for minor crimes must be exempted from strip searches absent reasonable suspicion, the Court concluded that neither the Fourth nor Fourteenth Amendment requires such a standard.[99] Justice Kennedy acknowledged the differing views among circuits on this issue but stressed the importance of reestablishing the foundational rules set forth in *Bell* and *Turner*.[100]

The *Florence* Court's rationale for declining to adopt a reasonable suspicion standard is based on two premises.[101] First, Justice Kennedy explained that the severity of an offense is an inadequate predictor of those who have contraband, noting that "[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals."[102] The Court pointed to examples in which some of the most dangerous and hardened criminals were stopped for minor driving infractions during the midst of grievous criminal activity.[103] Moreover, Justice Kennedy ex-

91. *Id.* at 1516.
92. *Id.*
93. *Id.* at 1518 (setting forth the standard promulgated in *Block v. Rutherford*, 468 U.S. 576, 584–85 (1984)).
94. *Id.* at 1521 (explaining that exempting people arrested for minor offenses would increase both the risk to others and of contraband).
95. *Id.* at 1518–19.
96. *Id.* at 1520.
97. *Id.* at 1515 (citing Turner v. Safley, 482 U.S. 78, 84–85 (1987)).
98. *Id.* at 1517.
99. *Id.* at 1514–15, 1523.
100. *See id.* at 1518.
101. *See id.* at 1520–21.
102. *Id.* at 1520.
103. *Id.* (noting that hours before the Oklahoma City bombing, Timothy McVeigh was pulled over by a state trooper for driving without a license plate and that a terrorist associated with the 9/11 attacks was ticketed for speeding just two days prior to the attacks).

plained that exempting those detained for minor offenses would encourage experienced detainees to enlist outsiders to bring in contraband or weapons.[104] He opined that the resulting effect would be coercion by those in superior positions.[105]

Second, the Court noted that classifying arrestees by current and prior offenses would be difficult at the time of the search due to incomplete or inaccurate identifying information.[106] Consequently, the lack of information is contrary to a central principle set forth in *Atwater v. City of Lago Vista*[107] that "[o]fficers who interact with those suspected of violating the law have an 'essential interest in readily administrable rules.'"[108] The Court also sympathized with correctional officials' position against a "complicated constitutional scheme requiring them to conduct less thorough inspections of some detainees based on their behavior, suspected offense, criminal history, and other factors."[109]

Lastly, Part IV of the opinion, joined by Chief Justice Roberts and Justices Scalia and Alito, reserved several questions that were not at issue in *Atwater*.[110] The first question reserved was whether a strip search violates the Fourth Amendment when "a detainee will be held without assignment to the general jail population and without substantial contact with other detainees."[111] The second was whether "an arrestee whose detention has not been reviewed by a magistrate or other judicial officer, and who can be held in available facilities removed from the general population, may be subjected to the types of searches at issue here."[112]

D. Chief Justice Roberts's and Justice Alito's Concurring Opinions

In separate concurring opinions, Chief Justice Roberts and Justice Alito emphasized the importance of not foreclosing exceptions to the Court's holding.[113] Chief Justice Roberts noted that Florence's arrest was for an outstanding warrant, and there were no other alternatives to general-population detention.[114] Due to the particular facts of the case, there was no opportunity to consider exceptions to the rule proffered by the Court.[115] However, Chief Justice Roberts concluded that the Court is

104. *Id.* at 1521.
105. *Id.*
106. *Id.*
107. 532 U.S. 318 (2001).
108. *Florence*, 132 S. Ct. at 1522 (quoting *Atwater*, 532 U.S. at 347).
109. *Id.*
110. *Florence*, 132 S. Ct. at 1522–23 (plurality opinion). Justice Thomas did not join in Part IV of the opinion.
111. *Id.* at 1522.
112. *Id.* at 1523.
113. *Id.* at 1523 (Roberts, C.J., concurring) (stating that the Court is "wise to leave open the possibility of exceptions"); *id.* at 1524 (Alito, J., concurring) (stating "the Court does not hold that it is *always* reasonable" to strip-search an arrestee).
114. *Id.* at 1523 (Roberts, C.J., concurring).
115. *Id.*

"wise to leave open the possibility of exceptions" but acknowledged that the Court "makes a persuasive case for the general applicability of the rule."[116]

Justice Alito went a step further and detailed possible mitigating factors, stating that "the Court does not hold that it is *always* reasonable to conduct a full strip search."[117] First, he explained that the majority's holding might not apply to scenarios where there are feasible alternative holding facilities available for those arrested for minor crimes.[118] For example, the Federal Bureau of Prisons requires the segregation of arrestees for some minor offenses from a jail's general population.[119] Second, Justice Alito pointed out that the majority opinion explicitly reserves the question of the reasonableness of a strip search of an arrestee prior to review by a judicial officer.[120]

E. Dissenting Opinion

The dissenting opinion, authored by Justice Breyer and joined by Justices Ginsburg, Sotomayor, and Kagan, sharply criticized the Court's holding by proclaiming that "such a search of an individual arrested for a minor offense . . . is an 'unreasonable searc[h]' forbidden by the Fourth Amendment, unless prison authorities have reasonable suspicion to believe the individual possesses drugs or other contraband."[121] Justice Breyer's criticism focused on the degradation of the type of search that Florence was subjected to, specifically the genital lift and "squat coughing," explaining that such searches are "harmful, humiliating, and degrading."[122] Justice Breyer acknowledged that the *Bell* balancing test was the "applicable standard"[123]; however, he explained that unlike the majority's reasoning, the "invasion of personal rights here is very serious and lacks need or justification."[124]

In addressing the Court's justifications, the dissent concluded that the risks proffered by the Court—wounds and infections, gang markings and affiliations, and contraband—were not "legitimate penological interests" requiring deferral to correctional expertise.[125] Justice Breyer ex-

116. *Id.*
117. *Id.* at 1524 (Alito, J., concurring).
118. *Id.*
119. *Id.*
120. *Id.* at 1525. Justice Alito cited Part IV of the opinion for support of this contention. Despite Part IV's limited endorsement by the *Florence* Court, it is likely that the contentions set forth therein represent a controlling view by the Court, taking into consideration the dissenting Justices. Therefore, Justice Alito's concurrence likely takes on greater precedential value considering its general acceptance among at least seven Justices of the Court.
121. *Id.* at 1525 (Breyer, J., dissenting) (second alteration in original).
122. *Id.* at 1525–26.
123. *Id.* at 1526.
124. *Id.*
125. *Id.* at 1527–28 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)) (internal quotation marks omitted).

plained the first two risks could be addressed through less invasive searches such as pat-downs, metal detectors, making inmates shower in delousing agents, and searching inmates' clothing.[126]

As to the contraband, Justice Breyer recognized that the lack of justification was "less obvious" but determined that it was "no less real."[127] Justice Breyer divided his response to the majority's contraband risk into three parts.[128] First, he criticized the majority's reliance on security justifications by pointing to multiple empirical studies that suggested the level of contraband risk would not increase if more invasive strip search procedures were eliminated.[129] Second, he explained that there was a "plethora" of correctional associations and other professional organizations that have "promulgated a standard that forbids suspicionless strip searches,"[130] and many correctional facilities already apply a reasonable suspicion standard to general-population inmates.[131] Third, Justice Breyer pointed to at least ten states and seven courts of appeals that have considered and adopted a reasonable suspicion standard.[132] The dissent concluded its analysis of Justice Kennedy's justifications by noting that the Court is only "left with the word of prison officials in support of its contrary proposition."[133]

As for *Bell*, the *Florence* dissent distinguished the seminal case by explaining that the arrestees in *Bell*, in comparison to Florence, were a "greater risk to jail security" and had time to plan to smuggle contraband.[134] Justice Breyer noted that "[t]he *Bell* Court had no occasion to focus upon those arrested for minor crimes, prior to a judicial officer's determination that they should be committed to prison."[135] Justice Breyer opined that it would be "highly questionable that officials would be justi-

126. *Id.* at 1528.

127. *Id.*

128. *See id.* at 1527–28.

129. *Id.* at 1528–29. In support, the dissent noted a study by the New York federal district court in which 23,000 arrestees were strip-searched between 1999 and 2003 at the Orange County correctional facility. *Id.* at 1528. Of the 23,000 searched, five were found to possess contraband—three in their anal cavities and two in their underwear. *Id.* The study found that of the five instances, "there may have been 'reasonable suspicion' to search" the arrestees in four of the cases. *Id.* (quoting Dodge v. Cnty. of Orange, 282 F. Supp. 2d. 41, 70 (S.D.N.Y. 2003)). Also, the dissent noted a study produced in *Shain v. Ellison*, 273 F.3d 56, 60 (2d Cir. 2001). *Florence*, 132 S. Ct. at 1528–29. That study analyzed 75,000 strip searches of new inmates that occurred over a period of five years. *Id.* at 1529. Of the 75,000, sixteen instances led to the discovery of contraband. *Id.* Based on the record, thirteen instances would have been detected through less invasive searches such as a pat-down. *Id.* Of the three remaining instances, "there was a drug or felony history that would have justified a strip search on individualized reasonable suspicion." *Id.*

130. *Id.* at 1529.

131. *Id.*

132. *Id.* at 1529–30.

133. *Id.* at 1531.

134. *Id.* (quoting Bell v. Wolfish, 441 U.S. 520, 546 n.28 (1979)) (internal quotation mark omitted).

135. *Id.*

fied" in directing those arrested for minor crimes into the "dangerous world of the general jail population."[136]

Lastly, Justice Breyer cited Justice Alito's concurring opinion, noting Justice Alito's reservations about searches before an arrestee's detention has been reviewed by a judicial officer.[137] He concluded that the issue "remains open."[138]

III. ANALYSIS

The U.S. Supreme Court in *Florence* properly took the first step to reign in circuits departing from established Fourth Amendment precedent governing detainee search processes. Despite the humiliating burdens these processes carry,[139] the Court found greater weight in penological interests related to correctional-officer discretion and heightened security needs.[140] The Court's emphasis on deference to correction officials places difficult security issues in the hands of those with the greatest expertise and allows for adaptive, rather than reactive, policies. Moreover, by upholding the blanket strip search policies in *Florence*, the Court protected the deterrent effect of strip searches and emphasized the protection of many over the rights of a single individual. Lastly, in striking down a reasonable suspicion standard, the *Florence* Court correctly highlighted the inadequacies of basing bright-line search rules on the seriousness of the offense charged.[141]

Although the majority upheld the constitutionality of the intake strip search policies in *Florence*, questions remain unanswered. For instance, Justice Alito's concurrence raised issues left dormant in the majority opinion that may act as mitigating factors to the Court's holding. Furthermore, as technology continues to advance, the need for strip searches like those at issue in *Florence* will be greatly diminished.

A. The Realities of Diminished Privacy During Detention and Its Justifications

Although detainees retain some constitutional rights once committed to correctional facilities,[142] the "[l]oss of freedom of choice and privacy are inherent incidents of confinement."[143] Supreme Court precedent

136. *Id.* at 1532. In justifying its position, the dissent relied heavily on the question of the constitutionality of committing to a jail's general population those arrested for minor offenses. As the dissent noted, "[I]t remains open for the Court to consider whether it would be reasonable to admit an arrestee for a minor offense to the general jail population." *Id.*

137. *Id.* at 1531–32.

138. *Id.* at 1532.

139. *See id.* at 1526.

140. *Id.* at 1515 (majority opinion) (maintaining that safety and order requires the expertise of detention officials).

141. *Id.* at 1520.

142. *Id.* at 1525 (Breyer, J., dissenting).

143. Hudson v. Palmer, 468 U.S. 517, 528 (1984) (alteration in original) (quoting Bell v. Wolfish, 441 U.S. 520, 537 (1979)) (internal quotation marks omitted).

justifying the invasion of privacy by strip-searching detainees can be grouped into two categories: correctional officers' need for discretion[144] and security interests.[145]

1. Correctional Officers' Need for Discretion

Judicial deference to correctional officials is rooted in the doctrine of separation of powers.[146] The "unifying theme" among Supreme Court cases such as *Bell*, *Turner*, and *Block v. Rutherford*[147] has been to defer to correctional expertise rather than to force stricter alternatives.[148] As noted in *Turner*, operating detention facilities is inherently difficult and requires specific expertise[149] that "courts are ill equipped to deal with."[150] Despite the call for deference, the Supreme Court does recognize that deference to correctional expertise has its limits. For instance, the Supreme Court has consistently held that prison walls do not absolve constitutional protections.[151]

a. Who Is in the Best Position and with the Greatest Expertise?

The *Florence* Court, in finding the intake strip search policies constitutional, correctly held that correctional officials must be given deference to implement reasonable search policies that detect and deter contraband.[152] To support the holding, the Court deferred policy-making authority to government officials in the best position and with the greatest expertise.

The Supreme Court has long recognized that there are inherent operational difficulties within correctional facilities and has concluded that they are not amenable to easy solutions.[153] Moreover, maintaining safety and order within correctional facilities is a fundamental requirement in promoting effective detention.[154] As the *Florence* Court noted, respond-

144. *See* Turner v. Safley, 482 U.S. 78, 84–85, 90 (1987) (explaining that running a prison is difficult and requires expertise and planning).

145. *Bell*, 441 U.S. at 559 ("A detention facility is . . . fraught with serious security dangers."); *see also Florence*, 132 S. Ct. at 1512 (majority opinion) (noting that the admission of detainees creates numerous risks).

146. Keleher, *supra* note 2, at 115.

147. 468 U.S. 576 (1984).

148. Keleher, *supra* note 2, at 117.

149. *Turner*, 482 U.S. at 84–85.

150. *Id.* at 84 (quoting Procunier v. Martinez, 416 U.S. 396, 405 (1974)) (internal quotation marks omitted).

151. *E.g.*, *id.*

152. Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1517 (2012).

153. *See* Bell v. Wolfish, 441 U.S. 520, 547 (1979).

154. *See id.* at 546.

ing to these difficulties, while ensuring effective detention, requires the "expertise of correctional officials."[155]

In reliance on this expertise, the Supreme Court has directed that correction officials be accorded "wide-ranging deference in the adoption and execution of policies and practices."[156] Furthermore, the Court has explained that the judgment of correctional officials enables the preservation of "internal order and discipline" and "institutional security" needs.[157] Accordingly, Supreme Court precedent rightly recognizes the day-to-day difficulties of running correctional facilities and directs lower courts to provide general deference to correctional officials, allowing them to apply their expertise to ensure security. The *Florence* Court rightly found credence in these principles and stressed the importance of allowing correctional officials the autonomy to manage operations, including the right to effectively and reasonably enforce blanket strip search policies.[158]

b. The Need for Adaptive, Rather Than Reactive, Policies

Deferring authority to officials inside correctional facilities allows for adaptive policies that evolve with the ever-changing dynamics of a correctional environment. There are over 5,000 prisons in the United States with no two prisons alike, as each is made up of different demographics.[159] Moreover, as the nation's population continues to grow and America's social norms change, so does the "internal society" within correctional facilities.[160]

Because of the numerous moving parts correctional officials face on a daily basis, the importance of deference in general policy-making authority is paramount. Given the dissimilarities among correctional facilities and the array of purposes served, correctional officials' ability to conform policies within narrow judicial standards would be both difficult and impractical. Correctional deference must continue to be amenable to reasonable judicial review; however, as in *Florence*, courts must provide latitude to those with subject-matter expertise absent substantial evidence of an exaggerated response. Additionally, beyond correctional officials' need for deference, the courts involvement in the "day-to-day manage-

155. *Florence*, 132 S. Ct. at 1515 ("Maintaining safety and order at [correctional] institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face.").

156. *Bell*, 441 U.S. at 521.

157. *Id.* at 547.

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

159. John J. Gibbons & Nicholas De B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, 22 WASH. U. J.L. & POL'Y 385, 398 (2006).

160. Curtis R. Blakely & Vic W. Bumphus, *American Criminal Justice Philosophy: What's Old—What's New?*, 63 FED. PROBATION 62, 65 (1999). The authors noted that the population in prisons quintupled between 1975 and 1995. *Id.* The authors also noted that during the 1970s and early 1980s prison riots were a common occurrence leading correctional officials to "limit[] or eliminate[] activities not seen as absolutely necessary." *Id.*

ment of prisons" is a "squandering [of] judicial resources with little offsetting benefit to anyone."[161] Allowing correctional facilities to proactively adapt policies to current needs serves both the effectiveness of detention and the preservation of scarce judicial resources.

c. The Cost in Relation to the Proposed Benefit

The final rationale for deference to correctional expertise is correctional officials' inherent ability to weigh a policy's cost in relation to the proposed benefit. Basic economic theory stipulates that when the cost of policy changes exceeds the proposed benefit, the policy should not be enforced.[162] Moreover, correctional officials are in the best position to examine both the monetary and personnel cost against the likely benefits of policy changes.[163] Understandably, *Florence* properly noted that courts must continue to be the arbiter of personal rights; however, when the cost associated with maintaining those rights reaches unattainable levels, the courts must defer to correctional expertise.[164]

Judge Easterbrook of the Seventh Circuit in *Johnson v. Phelan*[165] noted that there are always "[l]ess-restrictive-alternative arguments."[166] For example, the court explained, "[A] prison always can do something, at some cost, to make prisons more habitable."[167] However, Judge Easterbrook concluded that if "courts assess and compare these costs and benefits then judges rather than wardens are the real prison administrators."[168] Although the *Florence* Court did not directly address the point in a monetary context, the Court's resurrection of the principles in *Bell* emphasizes fundamental jurisprudence that "judges [must] respect [the] hard choices made by prison officials."[169] By allowing correctional officials to maintain broad control over detention policies, courts will facilitate an environment that freely adapts to changing correctional dynamics, while maintaining economic efficiency.

2. Security Interest

Beginning with *Bell*, the Supreme Court has placed added emphasis on the justification factor in determining the balance between the requisite need and an invasion of personal rights.[170] Consistently, justification

161. Sandin v. Conner, 515 U.S. 472, 483 (1995).

162. E. Thomas Sullivan & Brian A. Marks, *The FTC's Deceptive Advertising Policy: A Legal and Economic Analysis*, 64 OR. L. REV. 593, 623–24 (1986).

163. *See* Johnson v. Phelan, 69 F.3d 144, 145 (7th Cir. 1995).

164. Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1522 (2012) ("The restrictions suggested by petitioner would limit the intrusion on the privacy of some detainees but at the risk of increased danger to everyone in the facility . . . .").

165. 69 F.3d 144 (7th Cir. 1995).

166. *Id.* at 145.

167. *Id.*

168. *Id.*

169. *Id.*; *see also* O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987).

170. *E.g.*, Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1516 (2012).

has been anchored in the basic tenet that security is a necessary condition for effective detention.[171] The Court in *Florence* extended that logic and rightly affirmed precedent that ensures the security of the entire institutional setting.

a. The Safety of Many over the Personal Rights of an Individual

The *Florence* Court began its security-justification analysis by explaining that "[t]he admission of inmates creates numerous risks for facility staff, for the existing detainee population, and for a new detainee."[172] The Court pointed out that the need for heightened security is the greatest at the initial point of contact with a detention facility[173] and enumerated specific risks that intake strip search policies seek to preclude.[174]

Although the Eighth Amendment's ban on cruel and unusual punishment does not "mandate comfortable prisons,"[175] the Eighth Amendment does impart upon correctional facilities an obligation to care for detained persons when they are deprived of the liberty to care for themselves.[176] To ensure the greatest level of security and care to inmates, blanket strip search policies are enforced for the protection of the very detainees who now challenge the constitutionality of such policies.[177] Numerous judicial opinions have documented the alarming rates of violence among inmates in correctional facilities.[178] This increased violence, in part, is exacerbated by the availability of contraband, which plays a significant role in inmate-on-inmate violence.[179] By not foreclosing correctional officials' ability to use blanket strip search policies, the Court correctly concluded that a single right of a single individual does not supersede the rights of the detained population as a whole.

The final beneficiaries of blanket strip search policies are the men and women who work at correctional facilities each day. The Supreme Court accepts that "[p]risons are dangerous places."[180] However, as commentators have noted, just because prisons house dangerous people

171. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 546 (1979) (maintaining that security in prisons is an essential goal).

172. *Florence*, 132 S. Ct. at 1518.

173. Keleher, *supra* note 2, at 115 ("Security interests are strongest when a detainee enters a correctional facility.").

174. *Florence*, 132 S. Ct. at 1520 (noting "disease, gang affiliations, and contraband").

175. Farmer v. Brennan, 511 U.S. 825, 832 (1994) (quoting Rhodes v. Chapman, 452 U.S. 337, 349 (1981)) (internal quotation mark omitted).

176. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 198–99 (1989).

177. Bruscino v. Carlson, 854 F.2d 162, 165 (7th Cir. 1988).

178. Keleher, *supra* note 2, at 126–27 (noting multiple examples of violence, including a Florida jail reporting 150 assaults among 600 inmates in eleven months, another detention facility reporting 330 incidents of violence among 650 inmates during one year, and a Tennessee jail reporting 685 incidents of violence among 2,300 inmates in six months).

179. LaMarca v. Turner, 995 F.2d 1526, 1536 (11th Cir. 1993).

180. Johnson v. California, 543 U.S. 499, 515 (2005).

does not mean that prisons have to be dangerous places.[181] The level of danger is a direct by-product of the mode of operation, including blanket strip search policies.[182] Correctional officers are at the heart of facility operations and interact daily with those incarcerated for a multitude of reasons. This begs the question whether judges, who are far removed from the realities of prison life, should prohibit security measures meant to protect those on the front line. The *Florence* Court answered in the negative.[183] Blanket strip search policies ensure institutional security and safeguard correctional officials against unnecessary danger due to diminished security protocols.

b. Deterrent Effect and the Manipulation of the System

The *Florence* Court noted that blanket strip search policies detect and deter the entrance of contraband, protecting all involved, including guards and other detainees.[184] As did the Court in *Bell*, the *Florence* Court relied on deterrence to shift the balance and justify a finding that the strip search policies were reasonable under the Fourth Amendment.[185] However, the *Florence* dissent[186] and others[187] have opined that the deterrent effect in *Florence* is distinguishable from *Bell* because those arrested for minor offenses have inadequate time to plan to smuggle contraband. The parties expressing these opinions greatly discount the abilities of a criminal mind. For instance, the *Florence* Court aptly explained that exempting certain detainees from strip searches before entry would encourage "experienced" detainees to manipulate the system in order to obtain contraband.[188]

Admittedly, Florence was not likely plotting to bring in contraband, and further, such plots may not frequently occur. However, the *Florence* Court was correct in finding that inmates will seek to take advantage of loopholes created without the enforcement of blanket strip search policies. Moreover, correctional officials' inability to enforce blanket policies would greatly diminish the level of deterrence, resulting in an increase in security breaches. The effectiveness of blanket policies like those at issue in *Florence* depends on the foreclosure of predictable exceptions.[189] The Supreme Court in *Hudson v. Palmer*[190] explained that

181. *See, e.g.*, Donald Specter, *Making Prisons Safe: Strategies for Reducing Violence*, 22 WASH. U. J.L. & POL'Y 125, 126 (2006).
182. *Id.*
183. Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1517 (2012).
184. *Id.*
185. *See id.*
186. *Id.* at 1531 (Breyer, J., dissenting).
187. *See, e.g.*, Amanda Laufer, Comment, *The Pendulum Continues to Swing in the Wrong Direction and the Fourth Amendment Moves Closer to the Edge of the Pit: The Ramifications of* Florence v. Board of Chosen Freeholders, 42 SETON HALL L. REV. 383, 414 (2012).
188. *Florence*, 132 S. Ct. at 1522 (majority opinion).
189. *Id.* at 1516.
190. 468 U.S. 517 (1984).

stipulating that prison searches can only be conducted pursuant to a general policy "ignore[s] the realities of prison operation[s]."[191] By banning predictable exceptions that inmates may take advantage of, as in *Florence*, courts enable strip search policies to maintain their integrity and maximum deterrent effect. The result of such measures is added security, translating into further protection for all who come into contact with the correctional facility.

c. Contraband and the Correctional Facility's Underground Economy

Finally, although the level of danger can be minimized in correctional facilities, the reality is that some facilities are dangerous places housing dangerous people. With no form of status other than potential affiliations with other inmates, detainees sometimes look to contraband as a form of protection, manipulation, and currency.[192] With contraband forming the basis of this underground economy, one can envision detainees exploiting the system to obtain forbidden items.

The form of contraband does not have to be inherently dangerous to pose a threat to a correctional facility.[193] Correctional officers describe the use of contraband as a currency, whereby inmates barter and sell contraband for "[other] contraband, favors, services, or even money."[194] The trade of drugs makes up a large part of the economy and "command[s] a high price within . . . jail[s]."[195] Moreover, the trade of contraband is not limited to drug users; an officer familiar with the trade of contraband has noted that even non-drug users are encouraged to trade as a form of protecting themselves or obtaining other valuable items.[196] Consequently, the trade of contraband inside prison walls creates distinct classes—those who have and those who have not.[197] The "skewed general order" of prisons' social structure as a result of contraband creates dangerous or even deadly tension between and among fellow inmates and staff.[198]

A contraband specialist who worked for twenty-six years in a correctional setting noted, "The vast majority of inmates . . . are familiar with the jail operations and know that they are going to be strip searched

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

192. *Florence*, 132 S. Ct. at 1519 (noting the value of contraband in an underground economy).

193. Johannes v. Alameda Cnty. Sheriff's Dep't, No. C04-458MHP, 2006 U.S. Dist. LEXIS 63378, at *14–15 (N.D. Cal. Aug. 28, 2006) (quoting a contraband specialist who explained that it is important to control contraband whether it is a dangerous item or a "seemingly innocuous" item).

194. *Id.* at *15.

195. *Id.*

196. *Id.*

197. Dodge v. Cnty. of Orange, 282 F. Supp. 2d 41, 47 (S.D.N.Y. 2003).

198. Brief for Policeman's Benevolent Ass'n et al. as Amici Curiae Supporting Respondents at 11, Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012) (No. 10-945), 2011 WL 3808399, at *11 [hereinafter Amici-Respondents Brief].

when they first enter the jail population . . . ."[199] Moreover, inmates have adequate time on their hands "to plot and scheme."[200] Given the value and protection that contraband can carry, it is not unreasonable to imagine instances in which inmates might coerce others to smuggle contraband into correctional facilities. If the Court in *Florence* had adopted the view of the dissent, whereby certain arrestees would be constitutionally exempt from strip searches, then inmates inside correctional facilities would be encouraged to game the system and use those who are inferior on the outside as their pawns. The result of operational loopholes would be an increase in contraband and a compromise of institutional security as a whole.

B. The Fallacies of the Dissent's Rationale

1. Mandating a "Reasonable Suspicion" Standard

The *Florence* dissent chastised the Court for declining to adopt a reasonable suspicion standard for strip-searching those arrested for minor crimes.[201] The dissent explained there is no convincing evidence that "in the absence of reasonable suspicion, involuntary strip searches of those arrested for minor offenses are necessary in order to further the penal interests."[202] Justice Breyer supported his lack of "penal interest" claim by citing to empirical studies and noting that several correctional facilities already require reasonable suspicion before strip-searching those arrested for minor offenses.[203]

The *Florence* dissent, in advocating a reasonable suspicion standard for those arrested for "minor offenses," would have required officers to conduct a series of steps before justifying the strip search of a detainee.[204] First, the dissent would have required officers to conduct a pat-down or a search of the arrestee's outer clothing.[205] If an initial search indicated added suspicion, then a strip search would be justified. Second, an officer would have been required to review an arrestee's prior arrest record to determine if there was cause (e.g., a felony history) to initiate a strip search.[206] Each of these factors disregard controlling precedent enunciated in *Bell* and would facilitate increased discretion to officers, leading to possible discrimination and other legal difficulties.

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199. Johannes v. Alameda Cnty. Sheriff's Dep't, No. C04-458MHP, 2006 WL 2504400, at *5 (N.D. Cal. Aug. 29, 2006).

200. Amici-Respondents Brief, *supra* note 198.

201. Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1528 (2012) (Breyer, J., dissenting).

202. *Id.*

203. *Id.* at 1529.

204. *Id.* (explaining that a pat-down, search of outer clothing and shoes, or felony history may suffice to provide reasonable suspicion for a strip search).

205. *Id.*

206. *Id.*

a. Reasonable Suspicion Is Not Reconcilable with *Bell*

Reading a reasonable suspicion standard into the Constitution for those arrested for minor offenses fails to leverage correctional officials' expertise, limits available remedies, and contradicts Supreme Court precedent..[207] Lower courts have interpreted *Bell* to mandate reasonable suspicion before justifying a strip search;[208] however, such a reading is inconsistent with *Bell* and the Fourth Amendment.[209] In fact, *Bell* stands for just the opposite.[210] *Bell* addressed a blanket strip search policy that applied to *all* detainees following contact visits regardless of any reasonable suspicion.[211] The Eleventh Circuit has provided the greatest context to the Supreme Court's interpretation of *Bell*: "When the Court stated that 'these searches' do not violate the Fourth Amendment, it obviously meant the searches that were before it, and those searches were conducted under a blanket policy without reasonable suspicion. It really is that simple."[212]

The *Florence* Court took great effort to document the split among circuits as to the requirement of reasonable suspicion for arrestees detained for minor crimes.[213] In doing so, the Court highlighted the departure from *Bell* through the lower courts' narrow interpretation. Although the *Florence* Court's resurrection of *Bell* may be restricted somewhat by the further defining of the mitigating factors exposed in the concurring opinions, the proposition holds that those arrested for minor offenses are given no preferential treatment if their destination is a jail's general population. Such a holding is the most plausible reading of precedent and rightly corrects years of misapplication of *Bell* by multiple circuit courts.

b. Reasonable Suspicion Is an Unreasonable Expectation for Officers

Mandating that the Fourth Amendment require reasonable suspicion before searching arrestees for minor offenses has significant negative effects, especially on the officers required to comply with the heightened standard.[214] For instance, officers regularly have incomplete information during intake as to the circumstances surrounding an arrestee's arrest because the processing officer in most cases is different from the arresting officer.[215] Furthermore, the way arrestees enter correctional facilities

207. Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel . . . .").

208. *E.g.*, Swain v. Spinney, 117 F.3d 1, 7 (1st Cir. 1997) ("[T]o be reasonable under [*Bell*], strip and visual body cavity searches must be justified by at least a reasonable suspicion that the arrestee is concealing contraband or weapons.").

209. Powell v. Barrett, 541 F.3d 1298, 1307 (11th Cir. 2008).

210. *Id.*

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

212. *Powell*, 541 F.3d at 1307 (quoting *Bell*, 441 U.S. at 558).

213. Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1518 (2012).

214. Keleher, *supra* note 2, at 121.

215. *Id.*

varies, making it difficult to track fact-specific determinations required to find reasonable suspicion.[216] Consequently, reasonable suspicion from an officer's perspective should not even be a question when an arrestee's destination is a jail's general population. Those committed to the jail's general population are searched because they are entering highly secured facilities, not for the factual nuances underlying what they have done.

c. Reasonable Suspicion Promotes Unpredictable and Discriminatory Practices

The *Florence* Court correctly concluded that if a reasonable suspicion standard were implemented, "[t]he laborious administration of prisons would become less effective, and likely less fair and evenhanded."[217] The Supreme Court is not the first to stress the importance of removing discretionary decision-making authority from officers for strip searches.[218] The Third Circuit in *Florence* held that the implementation of blanket policies subjects arrestees to the same, consistent policy and diminishes correctional facilities' liability for equal protection issues.[219] Eliminating discretionary standards not only reduces liability for correctional institutions but also decreases the likelihood of discriminatory and retaliatory acts as a result of case-by-case standards. Courts have described the reasonable suspicion standard as "lines drawn by courts" that tend to be "ambiguous, subject to manipulation and difficult to administer."[220] In response to the operational difficulties, officers are encouraged to forgo searches in close cases, thereby leading to a decrease in liability

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216. *Id.* Arrestees enter correctional facilities under differing circumstances. For instance, an arrestee may enter as a single admit, or as part of a larger group. Similarly, arrestees may be booked under a variety procedural directives, i.e., by the arresting officer or by another officer upon arrival at the correctional facility. These varying circumstances pose an immediate problem to officers applying a reasonable suspicion standard. *See id.* As the circumstances change from admit to admit, it becomes increasingly difficult to regularly, and consistently, apply the fact-specific determinations that form the basis of the reasonable suspicion standard. *See id.*

217. *Florence*, 132 S. Ct. at 1521.

218. Florence v. Bd. of Chosen Freeholders, 621 F.3d 296, 310 (3d Cir. 2010), *aff'd*, 132 S. Ct. 1510 (2012). The Third Circuit described the risk associated with a reasonable suspicion standard as "high, particularly where reasonable suspicion may be based on such subjective characteristics as the arrestee's appearance and conduct at the time of arrest." *Id.* at 310–11.

219. *Id.*

220. Bull v. City of San Francisco, 595 F.3d 964, 984 (9th Cir. 2010) (Kozinski, C.J., concurring). Chief Judge Kozinski paralleled the adoption of a reasonable suspicion standard to recent substantive changes to commercial airline searches. As he described:

> Treating everyone who gets on a commercial plane the same is simple: If you want to get on a plane, you take off your shoes, leave behind any liquids over three ounces, remove your laptop from its carrying case and pass through the metal detector—no exceptions. If we were to order an exemption for the least risky segments of the population, we'd have to worry about how to identify those people—that is, what kind of screening we'd have to set up to make sure no fakers get into the system—and then, at the point of entry, we'd have to confirm that the people presenting themselves for boarding were, in fact, the ones cleared in advance. The operation, and recent failure, of the Clear system (which let you cut to the front of the line but otherwise didn't exempt you from much of anything) showed that kind of exemption is difficult and costly to administer, and results in a lot of dirty looks from those you cut in front of.

Id. at 984–85.

but an increase in security breaches.[221] Lastly, the removal of discretion from the operational level in correctional facilities furthers the general rule of deference to correctional expertise as set forth in *Bell* and *Turner*.

2. The Severity of an Offense Is an Inadequate Standard

Both the *Florence* dissent[222] and legal scholars[223] suggest that policies governing intake strip search procedures should be determined based on the underlying offense. This Comment endorses the *Florence* Court's[224] explicit disagreement with that assertion. Furthermore, this Comment seeks to take the *Florence* decision a step further[225] and establish that a detainee's ultimate destination is the determinative factor when considering the constitutionality of blanket strip search policies.

As described in *Florence*, a detainee's underlying charge is a poor and often inaccurate predictor of the level of harm or the likelihood of concealed contraband.[226] To minimize the security risk, courts should instead look to an arrestee's destination to determine the permissible level of personal invasion. By focusing on where the arrestee is going, correctional officials are able to easily distinguish and segregate those who need more invasive searches from those who do not. In *Florence*, for instance, correctional personnel subjected Florence to the jail's general population.[227] Therefore, regardless of the potential charge, an arrestee in Florence's position should be required to submit to an invasive strip search solely because his ultimate destination is the general population. Following this line of reasoning is most analogous to Supreme Court precedent focusing on penological interests and resurrects foundational rules promulgated in *Bell*.

Supporters of the level-of-the-offense standard suggest that officials should segregate arrestees on the severity of the offense charged.[228] However, a blanket rule mandating the segregation of those arrested for

221. *Florence*, 132 S. Ct. at 1522. Admittedly, the doctrine of qualified immunity often precludes officer liability; however, there are instances where the predictability of blanket policies will further reduce overall liability. *See id.* For example, standardized processes decrease the likelihood of retaliatory acts by officers that are likely outside the realm of qualified immunity.

222. *Id.* at 1526 (Breyer, J., dissenting).

223. Shapiro, *supra* note 4, at 153.

224. *Florence*, 132 S. Ct. at 1520 (noting that detainees arrested for minor offenses can be dangerous criminals).

225. The facts in *Florence* were limited in that (i) Florence was not arrested prior to judicial review, and (ii) there were no available holding facilities at either correctional facility in question in the case. Because the facts in *Florence* were not conducive to Justice Alito's exceptions, the Court explained that it was restricted from considering the narrow exceptions. *Id.* at 1523. This Comment reaches beyond the factual nuances of *Florence* and seeks to examine and opine on the legitimacy of the potential exceptions raised by Justice Alito.

226. *See id.* at 1520; *see also* Clements v. Logan, 454 U.S. 1304, 1305 (1981) (explaining that the facility enacted its intake strip search policy following the shooting of a deputy by an unsearched misdemeanant).

227. *Florence*, 132 S. Ct. at 1514.

228. *Id.* at 1532 (Breyer, J., dissenting) (stating it is questionable that persons arrested for minor crimes should be committed to the general population).

minor offenses from the general population is impractical from an operational perspective. To date, pivotal Supreme Court cases addressing detainee strip search policies have pertained only to larger metropolitan correctional facilities.[229] The economic reality is, however, that smaller, rural correctional facilities often do not have the resources to maintain multiple units to segregate different classifications of detainees. For example, a rural county with a small population likely only maintains a single jail facility. That facility will hold both convicted inmates and temporary detainees. If correctional officials in this example were required to follow a "level of the offense" standard, then arrestees for minor offenses would have the opportunity to introduce dangerous contraband into the facility. In sum, adopting strict rules as proffered by the *Florence* dissent would force rural correctional officials to choose between risking constitutional claims for noncompliance or allowing potentially dangerous detainees to infiltrate the general jail population without adequate search policies.

It should be noted that this Comment does not opine that it is always reasonable to commit those arrested for minor offenses to the general population. This Comment only concludes that it is impractical to mandate correctional facilities with different levels of operational and economic capabilities to require segregation. Consequently, the question remains whether it is constitutional to commit to the general population, and thus strip-search, one who has been arrested for a minor offense where alternative holding facilities are available.[230]

C. Possible Exceptions and Their Likely Outcomes

The concurring opinions of Chief Justice Roberts[231] and Justice Alito[232] in *Florence*, as well as Justice Breyer's dissent,[233] all alluded to future exceptions to the Court's decision to uphold the intake strip search policy. Although the concurring opinions offer possible exceptions to the Court's holding, neither concurrence acts as a defining mechanism to the holding. Instead, each simply seeks to highlight potential mitigating circumstances that may influence the Court under the right set of facts.[234] Both concurrences and the dissent detailed two possible exceptions: feasible alternative holding facilities[235] and arrestees whose detentions lack

229. *Id.* at 1514 (noting that the Essex County Correctional Facility is the largest county jail in New Jersey); Bell v. Wolfish, 441 U.S. 520, 523 (1979) (noting that the Metropolitan Correctional Center is in New York City).

230. *Florence*, 132 S. Ct. at 1524 (Alito, J., concurring); *see also* discussion *infra* Part III.C.2.

231. *Id.* at 1523 (Roberts, C. J., concurring).

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

233. *Id.* at 1531–32 (Breyer, J., dissenting).

234. Justice Alito explained, "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 . . . ." *Id.* at 1524 (Alito, J. concurring). However, he also asserted that "the Court does not hold that it is *always* reasonable to conduct a full strip search" and followed by detailing possible mitigating factors. *Id.*

235. *Id.* at 1524.

judicial review.[236] In addition to the exceptions provided by the concurring and dissenting opinions, this Comment explores a third possible exception: the emergence of new technologies.

1. Arrestees Whose Detention Lack Judicial Review

Justice Breyer concluded his dissent in *Florence* by underlining the preserved issue of whether it would be reasonable for an arrestee to submit to a strip search prior to review by a judicial officer.[237] Justice Alito expressed a similar reservation in his concurrence.[238] Considering that Florence's arrest was premised on an outstanding warrant, albeit a defective one, the majority was not required to address this issue to reach a final decision.[239] However, the dissent and Justice Alito's concurrence raise an interesting question—Would the strip search of Florence have been constitutional if he had been arrested prior to any judicial review?[240]

As most notably expressed in the *Florence* dissent, it is "highly questionable" to subject those arrested for minor crimes prior to judicial determination to the "dangerous world of the general jail population" and concurrently subject them to a strip search.[241] The example given by the dissent was that of a jaywalker.[242] For instance, should a correctional facility be permitted to subject an arrestee arrested for jaywalking to a strip search? There are two constitutional issues presented by this hypothetical scenario: (1) whether it is reasonable under the Fourth Amendment to subject those arrested for minor crimes, prior to judicial review, to a strip search; and (2) whether it is constitutional to direct those arrested for minor crimes to a jail's general population.

Ultimately, the first issue will likely depend upon the same justifications relied on by the Court to define the penological interest at issue in *Florence*. If viewed on the basis of the arrestee's ultimate destination, the security interest underlined by the *Florence* Court is unchanged. The Fourth Amendment in no way restricts correctional officers from strip-searching arrestees who are to be placed in a jail's general population, notwithstanding the possible alternative-holding-facility argument.[243] *Florence* made clear that "there is a substantial interest in preventing *any* new inmate" from putting others at risk when admitted to the general population.[244]

236. *Id.*; *see also id.* at 1531–32 (Breyer, J., dissenting).
237. *Id.* at 1531–32 (Breyer, J., dissenting).
238. *Id.* at 1524 (Alito, J., concurring) (noting that intake strip search policies may not always be reasonable for an arrest prior to judicial review).
239. *Id.* at 1514 (majority opinion).
240. *Id.* at 1524 (Alito, J., concurring); *Id.* at 1531–32 (Breyer, J., dissenting).
241. *Id.* at 1532 (Breyer, J., dissenting).
242. *Id.*
243. *Id.* at 1515 (majority opinion).
244. *Id.* at 1520 (emphasis added).

The counterargument is that the security risks of those arrested prior to judicial review do not substantiate the personal invasion of a strip search. This argument, however, depends upon a similar logic struck down in a previous subpart of this Comment.[245] Precluding correctional officials from using tools that effectively act as a deterrent will encourage the manipulation of the correctional system, resulting in increased danger to the entire correctional community. Therefore, if this issue is limited to the *Florence* Court's reasoning, it is reasonable to conclude that the Fourth Amendment would not preclude strip searches for warrantless arrestees arrested for minor offenses.

In addressing the second issue, future petitioners will likely move beyond the subject of strip searches, and instead challenge the constitutionality of committing warrantless arrestees for minor offenses to a jail's general population.[246] If future petitioners establish that it is unconstitutional to commit to the general population those arrested for minor crimes prior to judicial review, then it would greatly diminish the justifications validating the strip search in *Florence*. In essence, correctional facilities would be left to make the difficult argument that invasive strip search policies are justified even when arrestees are not directed to the general population. By sidestepping the constitutional question of the search and focusing on the destination, a future petitioner may be able to effectively defeat an invasive strip search policy.[247]

2. Feasible Alternative Holding Facilities

Justice Alito's concurrence in *Florence* noted that it may not *always* be reasonable for an arrestee to submit to a strip search.[248] As he explained, many correctional facilities maintain separate holding areas outside the general population.[249] These areas are often used for temporary detainees or arrestees apprehended for minor offenses.[250] In such instances, Justice Alito suggested that *available* alternative holding facilities provide officers the opportunity to segregate minor-offense arrestees.[251]

245. *See* discussion *supra* Part III.A.2.b.

246. In his dissent in *Florence*, Justice Breyer suggested that he would find it questionable committing to the general population those arrested for minor offenses prior to judicial review. *Florence*, 132 S. Ct. at 1532 (Breyer, J., dissenting). Given that the Supreme Court has not directly addressed this issue, future petitioners may use this reasoning as a platform to support additional attacks on invasive strip search policies.

247. As an aside, this Comment opines that the Court likely would be reluctant to establish a definitive line of demarcation directing when correctional officials are prohibited from directing an arrestee to the general population. Due to the lack of uniformity in this country's prison system, such a strict demarcation would be infeasible for many correctional systems. Instead, it is likely that the Court would approach the issue by establishing mitigating factors or exceptions to the general holdings of *Bell* and *Florence*. *See id.* at 1523–24 (Roberts, C.J., concurring); *id.* at 1524 (Alito, J., concurring); *id.* at 1531–32 (Breyer, J., dissenting).

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

249. *Id.* (noting that the Federal Bureau of Prisons and some other jails segregate from general populations temporary detainees and arrestees for minor offenses).

250. *Id.*

251. *Id.*

Thus, because alternative holding areas eliminate security risk to the jail's general population, the likely penological interest justifying the *Florence* Court's holding is diminished. In such cases, Justice Alito inferred that the availability of alternative holding facilities would mitigate a finding that an invasive strip search was reasonable under the Fourth Amendment, even under a *Bell* or *Turner* analysis.[252]

It is crucial to note that Justice Alito did not suggest a *mandate* that correctional facilities segregate those arrested for minor offenses from the general population.[253] The dissent, on the other hand, suggested that "it is highly questionable that officials would be justified" in committing arrestees for minor crimes to the "dangerous world of the general population."[254] As the dissent would have it, courts would define a strict line of demarcation that would prohibit those arrested for minor crimes from being strip-searched and subsequently directed to the general population.[255] The distinction, however, between Justice Alito's viewpoint and the dissent's is one of discretionary versus mandatory control. Justice Alito's assertion properly takes into account the realities of varying correctional operations,[256] whereas the dissent would require a strict standard that undermines the operational flexibilities required by *Bell* and *Turner*. In the end, the reasonable-alternative-holding-facility exception represents one of the stronger mitigating influences that could dampen the "harshness" of the *Florence* decision. However, courts must realize that this consideration should not be a self-contained standard, but rather a single factor that may justify not applying the general rule resurrected in *Florence*.

3. Emergence of New Technologies

In Florence's brief to the Court, he expressed the availability of less invasive alternatives—such as pat-down searches, metal detectors, and the Body Orifice Screening System (BOSS chair)—and concluded that blanket strip search policies were inappropriate where less invasive alternatives were available.[257] In such circumstances, subjecting an arrestee to a strip search was unreasonable under the Fourth Amendment.[258] The Essex facility, where Florence was strip-searched the second time, operated a BOSS chair during the intake process and required the search of newly admitted detainees.[259] Essex's warden testified that the BOSS

252. *Id.* at 1524–25.

253. *Id.* (explaining that strip searches are not always reasonable when there are *available* alternatives).

254. *Id.* at 1532 (Breyer, J., dissenting).

255. *Id.*

256. Gibbons & Katzenbach, *supra* note 159.

257. *See* Reply Brief for the Petitioner at 16, Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012) (No. 10-945), 2011 WL 4500813, at *16 [hereinafter Petitioner Reply Brief].

258. *Id.* at 8–9.

259. Brief for the Petitioner at 5–6, Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012) (No. 10-945), 2011 WL 2508902 at *5–6.

chair pinpoints metal objects in inmates' body orifices more accurately than a standard strip search by an officer.[260] Florence asserted that individualized suspicion may permit further searches, and that absent reasonable suspicion, the strip search violated the Constitution.[261]

Florence's failure to consider the limitations of the less invasive search procedures represents a fatal flaw in his argument. For instance, pat-down searches fail to provide feedback as to contraband hidden in body cavities, and metal detectors and the BOSS chair are unable to detect non-metallic items.[262] Detecting numerous forms of non-metallic contraband like drugs, tobacco, paper currency, and plastic weapons is paramount to a correctional facility's security.[263] As stated previously, these items, although not as physically dangerous, are integral to the underground economy in correctional facilities[264] and compromise correctional officials' ability to minimize the negative effects that contraband has on correctional institutions.

The question remains, however, whether the emergence and availability of new technologies may act as an exception or mitigating factor to the *Florence* decision. In Illinois's Cook county jail, correctional officials have recently replaced outdated body scanning machines with four Canon RadPro SecurPass machines, at a total cost of $940,500.[265] Similar to the full-body scanners at airports that have attracted so much media attention, these full-body scanners "can spot minute amounts of contraband material" of any form.[266] A company spokesperson compares the process to looking at an x-ray and explains that "if there's something there that normally wouldn't be in your body, that God didn't give you, it jumps out of you."[267] Full-body scanners like these could add an additional level of scrutiny to cases brought under a *Florence* analysis and could prove to pacify some of the dissent's concern for the degrading nature of strip searches.[268] However, it is important to point out that be-

260. Petitioner Reply Brief, *supra* note 257, at 12.

261. Brief for the Petitioner, *supra* note 259, at 20.

262. Amici-Respondents Brief, *supra* note 198, at 10–11.

263. *See* People v. Duncantell, No. E053955, 2012 WL 2394824, at *1–2 (Cal Ct. App. June 26, 2012) (noting that the most common form of contraband in the prison was tobacco); Amici-Respondents Brief, *supra* note 198.

264. *See* discussion *supra* Part III.A.2.b.

265. Elaine Pittman, *Inside Out: County Jails Deploy Whole-Body Scanners to Detect Hidden Weapons or Contraband*, GOV'T TECH., May 2011, at 36, 38.

266. *Id.* at 36.

267. *Id.*

268. Florida's Collier County Sheriff's Office also uses Canon's new scanners. *Id.* However, the scanning process is classified as a "virtual strip search," and Florida state statutes restrict strip searches to cases where the arrestee meets certain enumerated criteria. *Id.* Therefore, although the scanners are not as invasive as a physical strip search, this possible exception may still cause petitioners to pause because of the inherent privacy concerns and the revealing nature of the images produced by the scanners.

cause of the significant costs of new technology, and the Court's general deference to operational decision makers, such devices will only act as a mitigating factor and will not likely dissuade the Court in future cases from the general holding set forth in *Florence*.[269]

CONCLUSION

To ensure equal protection to all, safety and security procedures at correctional facilities are paramount. Although it is essential that detained persons retain their constitutional rights, courts must nonetheless weigh these rights against the need for institutional security. The majority in *Florence* correctly recognized this fundamental need. By holding that the intake strip search policies in question were consistent with the Fourth Amendment's ban on unreasonable searches, the Court resurrected and affirmed existing precedent. Furthermore, the Court rightly confirmed that ever-changing security needs are best served at the hands of experienced correctional officials rather than from the removed benches of the courts.

Despite the Court's holding, the insightful concurrences in *Florence* point to several potential factual scenarios whereby a strip search may not be reasonable under the Fourth Amendment. Although the possible exceptions are worthy of consideration, the likely effect is added discretion among lower courts as they struggle to define and reconcile these considerations with the foundational rules of *Bell*, and now *Florence*. As circuits seek to apply the principles of *Florence* they will either return to a practice that departs from controlling precedent or establish exceptions or mitigating factors to what may appear to be a degrading rule proffered by the *Florence* Court.

Chief Justice Roberts closed his concurrence by announcing that the Court is "wise to leave open the possibility of exceptions, to ensure that we 'not embarrass the future.'"[270] Ultimately, however, it will be those exceptions, or the lack of definition thereof, that inhibits blanket strip search policies from becoming a foregone conclusion. Instead, as the

269. As this Comment has explained through the analysis of the *Florence* decision, courts should not force unworkable standards on correctional facilities that serve multiple correctional functions. Instead, as progeny like *Bell* and *Turner* have directed, courts must afford correctional expertise the latitude to make decisions that are in the best interest of the facility's overall security and that align with the economics of prison operation. However, as new technologies continue to emerge and become more cost effective to operate, the presence of less intrusive search methods will play a more significant role in the determination of the reasonableness of a search under the Fourth Amendment. Nevertheless, the echo of *Florence* should remain a guidepost to any exception contemplated by the Court, requiring that the overarching question be one of availability rather than mandatory control.

270. Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1523 (2012) (Roberts, C. J., concurring).

circuits wrangle with questions left exposed, it is almost certain that the issue will again require a grant of certiorari.

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