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## Strip Searching in the Age of Colorblind Racism: The Disparate Impact of *Florence v. Board of Chosen Freeholders of the County of Burlington*

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STRIP SEARCHING IN THE AGE OF  
COLORBLIND RACISM: THE DISPARATE IMPACT OF  
*FLORENCE V. BOARD OF CHOSEN FREEHOLDERS  
OF THE COUNTY OF BURLINGTON*

*André Keeton*★

*In 2012, the Supreme Court of the United States decided Florence v. Board of Chosen Freeholders of the County of Burlington.<sup>1</sup> The Court held that full strip searches, including cavity searches, are permissible regardless of the existence of basic reasonable suspicion that the arrestee is in possession of contraband.<sup>2</sup> Further, the Court held that law enforcement may conduct full strip searches after arresting an individual for a minor offense and irrespective of the circumstances surrounding the arrest.<sup>3</sup> These holdings upended typical search jurisprudence. Florence sanctions the overreach of state power and extends to law enforcement and corrections officers the unfettered discretion to conduct graphically invasive, suspicion-less strip searches.<sup>4</sup>*

*The Court's dereliction of duty is enough to concern all citizens. However, the impact of this phenomenal lapse will not be felt equally in the age of what Bonilla-Silva has termed colorblind racism.<sup>5</sup> In 2013, in the case of Floyd v. City of New York, Judge Shira A. Scheindlin found that between January 2004 and June 2012, the New York City Police Department ("NYPD") made 4.4 million stops.<sup>6</sup> She further found that more than eighty percent of these 4.4*

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1. *Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington*, 132 S. Ct. 1510 (2012).

2. *See id.* at 1517-21.

3. *See id.* at 1512, 1526-27 (citing *Atwater v. Lago Vista*, 532 U.S. 318 (2001), where the Court determined that individuals arrested for traffic infractions could be arrested and jailed absent a warrant or a serious [major] infraction).

4. *See id.* at 1516, 1523.

5. *See* EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* (2d ed. 2006). Bonilla-Silva coined the term colorblind racism in part to describe the post de jure or "legal" oppression of African-Americans and the institution of the common de facto or "disparate outcome" whereby African-Americans are disproportionately negatively affected as compared to other racial and ethnic groups, particularly Whites. *Id.* at 2-4. As he states, "Whereas Jim Crow racism explained blacks' social standing as the result of their biological and moral inferiority, color-blind racism avoids such facile arguments. Instead, whites rationalize minorities' contemporary status as the product of market dynamics, naturally occurring phenomena, and blacks' imputed cultural limitations." *Id.*

6. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556, 558 (2013).

million stops were of Blacks or Hispanics.<sup>7</sup> Specifically, Judge Scheindlin found that in “52% of the 4.4 million stops, the person stopped was black, in 31% the person [stopped] was Hispanic, and in 10% the person stopped was white.”<sup>8</sup> This rate of stops and frisks is grossly disproportionate to Black and Hispanic population representation in New York City and the United States in general.<sup>9</sup> Further, as Judge Scheindlin astutely points out, “The NYPD’s policy of targeting ‘the right people’ for stops . . . is not directed toward the identification of a specific perpetrator, rather, it is a policy of targeting expressly identified racial groups for stops in general.”<sup>10</sup> These findings make clear that Florence and color-blind racism enable law enforcement to wage war against the civil rights of minority citizens. This Article argues that the Court’s phenomenal lapse in Florence and its general abdication of law enforcement oversight inevitably subjects minorities, particularly Blacks and Latinos, to the blanket authority of law enforcement to harass and humiliate based on perfunctory arrests predicated on the slightest of infractions.

Other legal analyses of Florence have largely ignored, and hence minimized, the salience of race when thinking about strip searches. In light of the significant consequential impacts of this decision on minority populations, this oversight is itself unreasonable. This paper will analyze the rationale and policy implications, particularly for people of color, in light of Florence. Finally, I will also propose policy recommendations to temper the projected negative impacts of the decision.

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7. *Id.* at 556.

8. *Id.* at 559.

9. *Id.* (Judge Scheindlin cites 2010 Census data indicating that New York City’s resident population was roughly twenty-three percent Black, twenty-nine percent Hispanic, and thirty-three percent White.).

10. *Id.* at 664.

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## INTRODUCTION

The Court's abdication of its power to oversee law enforcement policies is most obvious in the context of jails and prisons. Some deference to administrative policies to ensure security in correctional facilities is necessary. But these policies require restraint. Indeed, the U.S. Supreme Court recognizes that "a prisoner is not wholly stripped of his constitutional protections when imprisoned for crime."<sup>11</sup> Despite this proclamation, the Court has historically exercised a deferential policy when it comes to jails and prisons. Though the incarcerated theoretically retain basic constitutional rights, the Court defers to the judgments made by jail and prison administrators, even at the risk of undermining the constitutional rights of arrestees and the incarcerated.<sup>12</sup>

Prior to the 1960s, this high degree of deference to correctional facilities led to numerous abuses of the constitutional rights of the incarcerated.<sup>13</sup> Since the 1960s, the Court has become more willing to intervene in correctional settings.<sup>14</sup> Still, the Court continues to exercise an expansive degree of deference, largely allowing jails and prisons to operate with autonomy.<sup>15</sup>

In *Bell v. Wolfish* (1979),<sup>16</sup> the Court deferred to the expertise of correctional facilities, upholding a blanket policy rule of conducting a visual search of the body cavities of every inmate that had contact with any individual from outside the facility.<sup>17</sup> More recently, in *Florence v. Board of Chosen Freeholders of the County of Burlington*, the Court pronounced that the severity of an offense and the reasonable suspicion standard do not

11. *Wolff v. McDonnell*, 418 U.S. 539, 555, 581, 593 (1974).

12. *Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington*, 132 S. Ct. 1510, 1513-14 (2012).

13. *See Wolff*, 418 U.S. at 598-600 (Douglas, J., concurring in part and dissenting in part).

14. *See Robinson v. California*, 370 U.S. 660 (1962) (applying the Eighth Amendment's prohibition of cruel and unusual punishment to state actions); *Cooper v. Pate*, 378 U.S. 546 (1964) (permitting incarcerated individuals to file federal claims for abuses of their constitutional rights).

15. *Florence*, 132 S. Ct. at 1513-14, 1523 (2012).

16. 441 U.S. 520 (1979).

17. *Id.* at 520, 558.

exempt any arrestee from strip searches prior to exposure to the general population.<sup>18</sup>

The Court's decision in *Florence* grants immense discretionary power to the administrators of correctional facilities, and further diminishes the reasonable suspicion standard and privacy interests of the incarcerated.<sup>19</sup> It will likely have disastrous consequences and embolden law enforcement, particularly in their interactions with people of color. This Article seeks to provide the perspective largely missing from other legal analyses of *Florence* by examining strip search jurisprudence and law enforcement policies under a socio-historical lens that recognizes society has entered into a period of color-blind racism. This Article argues that the Court's failure to uphold a reasonable suspicion standard of possession of contraband (at a minimum for minor infractions) in correctional settings will disproportionately impact communities of color.

Part I of this Article will analyze the Court's precedent leading to *Florence*, including *Bell v. Wolfish* (1979),<sup>20</sup> *Block v. Rutherford* (1984),<sup>21</sup> *Hudson v. Palmer* (1984),<sup>22</sup> and *Turner v. Safley* (1987).<sup>23</sup> Part II will review the procedural and factual history of *Florence* and critique the Court's rationale. Part III will analyze *Florence* in the context of the criminal justice system and describe the past and potential future impacts of strip searches on racial minorities. This section will also argue that a general policy of strip-searching disadvantages minorities due to their overrepresentation at every stage of the criminal justice process. Part IV proposes policy reforms that can temper the growing, negative impact of the *Florence* decision on communities of color.

## I. THE EVOLVING STRIP SEARCH STANDARDS

In June 1968, the Supreme Court decided the case of *Terry v. Ohio*,<sup>24</sup> a case that affirmed the constitutionality of what became known as “stop-and-frisk” searches. In an opinion by Chief Justice Earl Warren, the Court laid out a reasonable suspicion standard and decided that in the context of a seizure and a search, “our inquiry is a dual one – whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”<sup>25</sup> The Court further stated:

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18. *Florence*, 132 S. Ct. 1510, 1518 (2012).

19. *Id.*

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

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

22. *Hudson v. Palmer*, 468 U.S. 517 (1984).

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

24. *Terry v. Ohio*, 392 U.S. 1 (1968).

25. *Id.* at 20-27.

In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen' . . . for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'<sup>26</sup>

The Court ultimately declared that the governmental interests of "effective crime prevention and detection" necessitate that law enforcement be granted flexibility in carrying out their duty to serve and protect.<sup>27</sup> The Court indicated that the Constitution allowed for some flexibility for law enforcement to act between doing nothing and arrest.

The Court determined that in order for law enforcement to effectively act to safeguard society and themselves, there should be a less demanding standard than probable cause available for law enforcement. However, the Court acknowledged that "even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience."<sup>28</sup> Additionally, the Court stated, "It is simply fantastic to urge that [a frisk] performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.'"<sup>29</sup> For this reason, the Court determined that "in the absence of probable cause . . . [a search] . . . must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. Thus, it must be limited to that which is *necessary* . . ."<sup>30</sup> Despite these warnings and the Court's recognition of the intrusion on liberty inherent in any search and detention, in practice the standard of reasonable suspicion for police work has extended beyond the mere search for weapons to a general applicability in determining criminal wrongdoing and the concealment of contraband.

Ultimately, the Court held that the reasonable suspicion standard is a constitutional balance between governmental interests and the private in-

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26. *Id.* at 20-21 (citing *Camara v. Municipal Court of the City and Cnty. of San Francisco*, 387 U.S. 523, 534-37 (1967)).

27. *Id.* at 22-27. The Court determined that "effective crime prevention and detection" warranted greater flexibility in the carrying out of duties. *Id.* Pursuant to *Terry*, police officers may conduct an investigatory stop and possible search if the officer could articulate facts indicating a reasonable belief that the detained party was engaged in criminal wrongdoing, if there was no probable cause. *Id.* at 21.

28. *Id.* at 25-27. In the context of *Terry*, the Court was referring most specifically to the concealment of weapons that could be used to injure police officers or third parties. *Id.* at 31-32.

29. *Terry*, 392 U.S. at 16-17.

30. *Id.* at 25-26 (citing *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

terests of individuals.<sup>31</sup> The Court declared that a search is reasonable under the Fourth Amendment “where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . .”<sup>32</sup>

After *Terry*, the Court began to cede too much deference to correctional institutions on the basis of maintaining order and safety and thereby failed to engage in the proper analysis of competing concerns: governmental interest and privacy rights. The following cases illustrate the Court’s overly deferential approach.

#### A. *Bell v. Wolfish* (1979)

The Fourth Amendment provides protection against “unreasonable searches and seizures.”<sup>33</sup> The debate over what constitutes a *reasonable* search and/or seizure has driven much of Fourth Amendment analysis. The Court has repeatedly stated that warrants are preferred.<sup>34</sup> Nevertheless, since *Terry*, the Court has extended those instances in which law enforcement are allowed to forego the warrant requirement.<sup>35</sup> Within this framework, the starting point for an examination of the Court’s legal standards as concerns strip search jurisprudence is *Bell v. Wolfish*.<sup>36</sup>

In *Bell*, the Court deferred to correctional institution administrators, even at the behest of individual privacy.<sup>37</sup> The Court characterized the case as “requiring us to examine the constitutional rights of pretrial detainees—those persons who have been charged with a crime but who have not yet been tried on the charge.”<sup>38</sup> “Those persons” constituted a class action of pre-trial detainees and sentenced persons at the Metropolitan Correc-

31. *Id.* at 27.

32. *Id.* at 30-31.

33. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

34. *Terry*, 392 U.S. at 20 (“We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . . .”).

35. See *United States v. Robinson*, 414 U.S. 218, 235 (1973) (holding that incident to a lawful arrest, a warrantless search of the arrestee is a reasonable exercise of police authority in order to protect police safety); *Chimel v. California*, 395 U.S. 752, 763 (1969) (holding that incident to a lawful arrest, a warrantless search of the area immediately within the arrestees reach is constitutionally permissible); *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) (holding that when exigency demands, the police are not authorized to obtain a warrant, especially when their lives or the lives of third parties are threatened).

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

37. *Id.* at 556-57.

38. *Id.* at 520, 523.

tional Center.<sup>39</sup> They challenged the conditions of their confinement pursuant to Bureau of Prisons facilities' policies.<sup>40</sup> One controversial policy required detainees and sentenced prisoners to submit to invasive visual cavity searches "after every contact visit with a person from outside the institution."<sup>41</sup>

The district court for the Southern District of New York enjoined many of the challenged practices, including the cavity search requirement.<sup>42</sup> The district court held that this strip search procedure was unconstitutional in light of *Terry* "absent probable cause to believe that the inmate is concealing contraband."<sup>43</sup> Additionally, the district court held that detained inmates are "presumed to be innocent and held only to ensure their presence at trial" and that "any deprivation or restriction of . . . rights beyond those which are necessary for confinement alone must be justified by a compelling necessity."<sup>44</sup> The Court of Appeals affirmed the district court's prohibition of the use of cavity searches.<sup>45</sup>

The Supreme Court reversed. While maintaining that inmates retain Constitutional rights,<sup>46</sup> the Court determined that reasonableness "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails."<sup>47</sup> After engaging in this balancing,<sup>48</sup> the Court found that the uniqueness and the security concerns of a detention facility<sup>49</sup> require that the balance be struck in favor of the knowledge, skill, and expertise of the facility administrators, *not* in favor of the privacy of individual inmates.<sup>50</sup> Unlike the district and appellate courts, the Court found that invasive cavity searches absent probable cause are constitutionally reasonable.<sup>51</sup>

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39. *Id.*

40. *Id.*

41. *Id.* at 520, 527-28.

42. *Id.*

43. *Id.* at 558.

44. *Id.* at 520, 527-28.

45. *Id.* at 530.

46. *Id.* at 545 ("[C]onvicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison. There is no iron curtain drawn between the Constitution and the prisons of this country.") (internal citations omitted).

47. *Id.* at 559.

48. *Id.* To determine reasonableness, the Court's analysis considered four factors: (1) the scope of the particular intrusion, (2) the manner in which the intrusion is conducted, (3) the justification for initiating the intrusion, and (4) the place of the intrusion. *Id.*

49. *Id.* at 558-60 (finding that the smuggling of money, drugs, weapons, and other contraband is all too common an occurrence).

50. *Id.* at 545-48, 565.

51. *Id.* at 559-60.

In *Bell*, the Court focuses on whether the strip search was “reasonably related to legitimate governmental (penological) interests.”<sup>52</sup> In doing so, the Court began a process of relaxing the standard of reasonable suspicion first articulated in *Terry*. Today, the Court gives great deference to correctional institutions. Within the four-part *Bell* framework, this deference always weighs in favor of security over individual privacy rights.<sup>53</sup> As a result, the Court fails to wholly consider the Fourth Amendment rights of the incarcerated, detained, and other suspects. In the end, this regime of deference disproportionately disadvantages racial and ethnic minorities in the criminal justice system.

#### B. *Block v. Rutherford (1984)*

The Court applied the rule of deference implied in *Bell* when reviewing rules and regulations within the correctional context. For example, in *Block v. Rutherford*,<sup>54</sup> the Court decided whether Los Angeles County Central Jail pretrial detainees have a constitutional right to observe searches of their prison cells by correctional officials.<sup>55</sup> Pretrial detainees challenged other “policies and practices and conditions of their confinement.”<sup>56</sup> Specifically, the detainees challenged the policies of (1) “contact visits with their spouses, relatives, children, and friends” and (2) the policy of “irregularly scheduled shakedown searches of individual cells in the absence of the cell occupants.”<sup>57</sup> Agreeing with respondents, the district court found that “the ability of a man to embrace his wife and children from time to time during the weeks or months while he is awaiting trial is a matter of great importance.”<sup>58</sup> Though security is an immediate concern, the district court held that correctional facility policies should be “least restrictive” and take into account different security concerns for those inmates considered low and high risk, thus allowing for a more individualized assessment of each inmate rather than a blanket generally applicable standard.<sup>59</sup> Contrary to the deference espoused in *Bell*, the district court also held that disallowing inmates from watching cell inspections was an unreasonable institutional balancing of individual inmate’s interests in personal space and property and security concerns.<sup>60</sup>

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52. *Id.* at 552.

53. *Id.* at 520, 561-63.

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

55. *Id.* at 577.

56. *Id.* at 578.

57. *Id.*

58. *Id.* at 578.

59. *Id.* at 578-79 (The District Court found that inmates with low-risk classifications and those incarcerated longer than two weeks had a constitutional right to contact.).

60. *Id.* at 579.

Interestingly, while this case was being heard in the district court, the U.S. Supreme Court decided *Bell*.<sup>61</sup> The deferential language towards the skill and expertise of correctional administration officials from *Bell* seems to err against a finding for the inmates in *Block*. However, even in light of the holding in *Bell*, the district court did not defer to correctional facility policies in *Block*.<sup>62</sup>

The Ninth Circuit affirmed the district court's finding that, though correctional facilities had significant security concerns, "the psychological and punitive effects which prolonged loss of contact visitation has upon detainees" made a blanket prohibition of contact visits an "unreasonable, exaggerated response to security concerns."<sup>63</sup>

The well-considered and balanced approach to penal interests on the one hand and the due process and individual interests on the other by the lower courts in *Block* adheres to the Supreme Court's assertion that "[a] prisoner is not wholly stripped of his constitutional protections" when imprisoned for a crime."<sup>64</sup> Both the district court and the Court of Appeals acknowledged that correctional institutions have a unique function in our society and that due deference should be paid.<sup>65</sup> However, these courts recognized not only the due process concerns inherent in the arguments of the inmates, but also the privacy concerns. As a result, they sought a reasonable constitutional balance to mitigate their concerns.

Applying *Bell*,<sup>66</sup> the Supreme Court reversed. Rather than consider the rights of the incarcerated, the Court focused on governmental interests. Specifically, the Court determined that the correctional facilities' policies are constitutional because they were reasonable in light of the governmental goal of security.<sup>67</sup> Further, the Court indicated that as long as the correctional facility's policies and regulations did not constitute punishment of the pretrial detainees,<sup>68</sup> "administrators [are to be afforded] wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."<sup>69</sup> The Court reiterated

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

62. *Block v. Rutherford*, 468 U.S. 576, 580-81(1984) (The district court in *Block* was specifically instructed on remand to consider the *Bell* decision when reviewing an inmate's interest and the burden on the prison. The district court affirmed its prior decision in favor of the inmate, reasoning that the institution's policies were "excessive.").

63. *Id.* at 582.

64. *Wolff v. McDonnell*, 418 U.S. 539, 540 (1974).

65. *Block v. Rutherford*, 468 U.S. 578-82, 585 (1984).

66. *Bell*, 441 U.S. at 559 (To determine reasonableness, the Court's analysis considered four factors: (1) the scope of the particular intrusion, (2) the manner in which the intrusion is conducted, (3) the justification for initiating the intrusion, and (4) the place of the intrusion.).

67. *Block*, 468 U.S. at 586.

68. *Id.* at 584.

69. *Id.* at 585 (citing *Bell v. Wolfish*, 441 U.S. 520, 547 (1979)).

that in the absence of arbitrariness or punitive action, it would be much more likely to acquiesce to correctional administrators;<sup>70</sup> “that this is a matter lodged in the sound discretion of the institutional officials.”<sup>71</sup>

### C. Hudson v. Palmer (1984)

The Court further disregarded inmates’ rights and privacy interests in *Hudson v. Palmer*.<sup>72</sup> In *Hudson*, the Court considered whether inmates have a reasonable expectation of privacy in their individual cells under the Fourth Amendment.<sup>73</sup>

During a routine search of an inmate’s cell, correctional officers discovered a ripped pillow case in a trash can next to his bed.<sup>74</sup> The inmate was charged with destroying the pillowcase and subsequently found guilty of destruction of state property.<sup>75</sup> Among other complaints, the inmate argued that the search of his cell violated his constitutional right to privacy.<sup>76</sup> The district court found in favor of the correctional officer.<sup>77</sup> However, the Supreme Court found that searches conducted solely to harass or to humiliate were not covered by the *Bell* reasonableness framework and thus violated a “limited privacy interest.”<sup>78</sup>

The Court of Appeals found that “while persons imprisoned for crime enjoy many protections of the Constitution, it is clear that imprisonment carries with it the circumscription or loss of many significant rights.”<sup>79</sup> This holding declared that in the correctional context, the contours of the Fourth Amendment require that “the person invoking its protection can claim a ‘justifiable,’ a ‘reasonable,’ or a ‘legitimate expectation of privacy’ that has been invaded by government action.”<sup>80</sup> In short, pur-

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70. *Id.* at 584.

71. *Id.* at 591 (“reaffirm[ing] that ‘proper deference to the informed discretion of prison authorities demands that they, and not the courts, make the difficult judgments which reconcile conflicting claims affecting the security of the institution, the welfare of the prison staff, and the property rights of detainees.’”).

72. *Hudson v. Palmer*, 468 U.S. 517 (1984).

73. *Id.* at 519.

74. *Id.*

75. *Id.* at 519–20.

76. *Id.* at 520.

77. *Id.*

78. *Id.* at 522.

79. *Id.* at 524.

80. *Id.* at 524–25.

suant to *Katz*,<sup>81</sup> “a prisoner’s expectation of privacy in his prison cell is the kind of expectation that ‘society is prepared to recognize as reasonable.’ ”<sup>82</sup>

In reversing, the Supreme Court found for correctional institutions.<sup>83</sup> The Court held, for the first time, that inmates have no reasonable expectation of privacy in their individual cells. In so doing, the Court deprived incarcerated citizens of any Fourth Amendment protections against searches, holding wholesale that there is no “proscription against unreasonable searches . . . within the confines of the prison cell.”<sup>84</sup> In deciding that irregular, non-scheduled, suspicion-less searches were constitutionally permissible, the Court solidified its previous determination that the time, manner, and scope of searches are left to the determination of correctional institution administrators.<sup>85</sup> Again, when considering the right of individual inmates to privacy as compared with those of correctional facility administrators to security and order, the Court focused on the latter.<sup>86</sup> The Court may have sought to “strike the balance,”<sup>87</sup> but it made clear that institutional security goals are sacrosanct, thereby jeopardizing individual rights.

#### D. *Turner v. Safley (1987)*

*Turner v. Safley*<sup>88</sup> required the Court to decide whether the reasonableness standard was to be the *sine qua non* of correctional facility analysis or whether there were certain burdens upon fundamental rights that required a heightened level of scrutiny.<sup>89</sup>

Inmates detained by the Missouri Division of Corrections (MDC) challenged the MDC regulations relating to correspondence exchanges as unconstitutional.<sup>90</sup> Specifically, the inmates objected to the regulation prohibiting correspondence between inmates of different institutions unless the correspondence was (1) with family members who were also incarcerated, (2) related to legal matters involving both inmates, or (3) approved

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81. In *Katz*, the Court was called upon to decide whether the Fourth Amendment’s prohibition against unreasonable searches and seizures protected individuals in making private phone calls from a public telephone booth. *Katz v. United States*, 389 U.S. 347 (1967). The Court determined that (1) The government’s placing of a listening device on the outside of the phone booth constituted a violation of privacy and a violation of search and seizure and (2) that prior to placing listening devices, warrants are required. *Id.* at 360-61 (Harlan, J., concurring).

82. *Hudson v. Palmer*, 468 U.S. 517, 525 (1984) (citing *Katz*, 389 U.S. at 361).

83. *Id.* at 525-26.

84. *Id.* at 521-22, 526.

85. *Id.* at 527 (citing *Pell v. Procunier*, 417 U.S. 817, 823 (1974)) (explaining that “institutional security is central to all other goals”).

86. *Id.* at 526-27.

87. *Id.* at 527.

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

89. *Id.* at 85.

90. *Id.* at 81.

by a “classification/treatment team” and “deemed to be in the best interest of the parties involved.”<sup>91</sup>

The District Court ruled that the regulation amounted to a practice that “inmates may not write non-family inmates.”<sup>92</sup> Applying a “strict scrutiny standard,” the district court found the correspondence regulation was unconstitutionally broad and consequently enjoined the MDC from enforcing it.<sup>93</sup> Indicating that the correctional officials could have chosen a less restrictive means of addressing any security concerns,<sup>94</sup> the district court decided that the correspondence regulations were “applied in an arbitrary and capricious manner.”<sup>95</sup>

The Eighth Circuit affirmed, holding that the district court appropriately applied strict scrutiny and that the correspondence regulation could be sustained “only if it furthers an important or substantial governmental interest unrelated to the suppression of expression, and the limitation is no greater than necessary or essential to protect that interest.”<sup>96</sup>

The Supreme Court reversed.<sup>97</sup> The Court observed that “in none of these four ‘prisoners’ rights’ cases did the Court apply a standard of heightened scrutiny, but instead inquired whether a prison regulation that burdens fundamental rights is ‘reasonably related’ to legitimate penological objectives, or whether it represents an ‘exaggerated response’ to those concerns.”<sup>98</sup> The application of this lesser standard allowed the Court to find that the correspondence restrictions by the MDC were related to “legitimate security interests” and were thus constitutional.<sup>99</sup> *Turner* is yet another example of the Court’s continued deference to the judgment and practice of correctional institutions.

## II. *FLORENCE V. BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON* (2012)

In *Florence*, the Supreme Court held that the Fourth Amendment does not require that prison officials possess “reasonable suspicion” when

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91. *Id.* at 81-82.

92. *Id.* at 82.

93. *Id.* at 83.

94. *Id.*

95. *Id.*

96. *Id.* (explaining that the Eighth Circuit concluded that the regulations failed to satisfy the strict scrutiny standard because they “w[ere] not the least restrictive means of achieving the asserted goals of rehabilitation and security”).

97. *Id.* at 84 (affirming that in discussing the principles framing prisoners’ constitutional claims, federal courts must take cognizance of the valid constitutional claims of prison inmates and that courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform).

98. *Id.* at 87.

99. *Id.* at 91.

determining whether to strip search individuals.<sup>100</sup> The Court, in a final show of deference to correctional institutions at the expense of individual rights, found that the strip search procedures at the Burlington and Essex facilities were permitted unless the inmate or the accused could demonstrate with substantial evidence that the procedure was an “exaggerated response” to the issues of security.<sup>101</sup> Absent this showing, the Court found that the Fourth Amendment’s reasonableness requirement does not prohibit implementation of general strip search procedures and that the practice of strip searching every inmate “struck a reasonable balance between inmate privacy and the needs of the institutions.”<sup>102</sup> The Court’s understanding of the facts in *Florence*, its rationale, and the practical consequences of its decision represent dangerous jurisprudence in the age of colorblind racism.

#### A. *The District Court’s Findings of Fact and Holdings*

The facts of *Florence* were undisputed. On March 3, 2005, the New Jersey State Police stopped Albert Florence, an African-American male, and his wife while she was driving him in his SUV on Interstate Highway 295 in Burlington County, New Jersey.<sup>103</sup> The New Jersey State Trooper directed him to exit his vehicle and then placed him under arrest for an expired warrant that had been issued on April 25, 2003.<sup>104</sup> The warrant charged Florence with a non-indictable variety of civil contempt.<sup>105</sup> Though initially valid, Florence had paid off the civil penalties prior to this arrest.<sup>106</sup> Despite Florence’s protests, the state trooper arrested him and transported him to Burlington County Jail.<sup>107</sup>

Once he arrived at the jail, Albert Florence alleged he was subjected to a mandatory strip and body cavity search.<sup>108</sup> Despite the fact that the underlying charges were for nonviolent, non-indictable civil contempt, Florence was required to “remove all his clothing and, while nude, open his mouth, lift his tongue, hold his arms out, turn fully around, and lift his genitals.”<sup>109</sup> Six days later, officials from the Essex County Sheriff’s De-

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100. *Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington*, 132 S. Ct. 1510, 1523 (2012).

101. *Id.* at 1510, 1512-14.

102. *Id.* at 1510, 1523.

103. *Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington*, 595 F. Supp. 2d 492, 495-96 (D.N.J. 2009); see also Adam Liptak, *No Crime, but an Arrest and Two Strip-Searches*, N.Y. TIMES (Mar. 7, 2011), [www.nytimes.com/2011/03/08/us/08bar.html?r=0](http://www.nytimes.com/2011/03/08/us/08bar.html?r=0).

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

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 496-97.

109. *Id.*

partment arrived to transport Florence to the Essex Jail.<sup>110</sup> Upon his arrival, Florence alleged that he was subjected to another mandatory full body search as well as a cavity search when he was processed.<sup>111</sup> Following this, Florence was placed in general population.<sup>112</sup>

Florence sued, arguing the strip searches were violations of constitutional law. Specifically, Florence argued that “the undisputed facts establish that Defendants’ policy of strip-searching all arrestees without individualized suspicion is a violation of clearly established constitutional law.”<sup>113</sup> Florence and those in his class (“arrestees charged with non-indictable offenses who were [strip searched by officers] . . . without the officers first articulating a reasonable belief that those arrestees were concealing contraband, drugs or weapons”) moved for summary judgment on the grounds that the practices of the Burlington and Essex jail facilities unconstitutionally violated their rights.<sup>114</sup> The plaintiffs claimed that strip-searching without reasonable suspicion or individualized suspicion was a violation of clearly established law.<sup>115</sup> The Burlington and Essex jails sought dismissal of the plaintiffs’ claims and stated that “visual observation/strip search policies are constitutional.”<sup>116</sup>

When considering whether the jails’ actions were reasonable, the district court considered and applied the jail’s written policies and normal practices. First, the district court stipulated that the Burlington Jail’s policies and procedures defined a strip search as “a physical search of an inmate . . . while unclothed consisting of routine and systematic visual observation of the inmate’s physical body to look for distinguished identifying marks, scars or deformities, signs of illness, injury or disease and/or the concealment of contraband on the inmate’s body.”<sup>117</sup> The district court further

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110. *Id.* at 497.

111. *Id.* (Florence testified that he and four other arrestees were told to “enter separate shower stalls, strip all their clothing and shower” while being watched by two other officers. Florence also testified that once showered, he was “directed to open his mouth and lift his genitals, . . . [and then] ordered to turn . . . away from the officers . . . squat and cough . . .”) (internal citations omitted).

112. *Id.*

113. *Id.* at 500-01.

114. *Id.* at 495-96, 500.

115. *Id.* at 500-01. Florence and others similarly situated brought a 42 U.S.C. § 1983 claim alleging violation of their constitutional rights and seeking injunctive relief. *Id.* The plaintiffs claim that both Burlington and Essex officials “‘admit that every unnamed class member . . . has been ordered’ to completely disrobe and stand nude upon admission to the jail facilities, ‘without [said officials] first articulating a reasonable basis to do so.’” *Id.* at 500. Plaintiffs further allege that, “at minimum, individualized reasonable suspicion for weapons, drugs, or other contraband must first exist before a jail official may strip search anyone charged with a non-indictable offense.” *Id.*

116. *Id.* at 496, 501.

117. *Id.* at 497 (citing Burlington Jail’s Policies and Procedures: Search of Inmates—No. Section 1186) (internal citation omitted).

stipulated that Burlington Jail's policy indicates that " 'a person who has been detained or arrested for commission of an offense other than a crime . . . shall not be subject to a strip-search unless there is a *reasonable suspicion* that a weapon, controlled dangerous substance or contraband will be found.' "118

The district court also determined that the Burlington Jail policy indicated that "arrestees for non-indictable offenses, such as civil contempt (Florence's warrant charge), should not be strip searched."<sup>119</sup> However, the district court also noted the jail allowed for "a visual observation [of all inmates] irrespective of whether they are [detained on] indictable or non-indictable [charges]."<sup>120</sup>

The district court explained that the Essex County Correctional Facility's policies and procedures in effect at the time in question required that "upon arrival at the Essex Jail, all arrestees shall be strip searched and then required to shower."<sup>121</sup> The court noted that the facility required "an arrestee [to] undress completely . . . while officers carefully observe."<sup>122</sup> Under the facility's procedures in place at the time, officers were to "examine the interior of the arrestee's mouth; his or her ears, nose, hair and scalp; his or her fingers, hands, arms and armpits; and all body openings and the inner thighs."<sup>123</sup> The court noted that April 2005, not long after Florence was transported and held at the facility, the jail reformed its policy and "facially prohibit[ed] strip searching non-indictable arrestees in

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118. *Id.* (emphasis added).

119. *Id.*

120. *Id.* at 498-99. According to the testimony of Officer Haywood Reeder, an employee of the Burlington facility since 1990, a strip search is defined as "searching various parts of a nude inmates body for contraband, scars, marks, or tattoos," whereas "a visual observation includes: (1) checking a nude arrestee for scars, marks, and tattoos while he strips for a mandatory shower; (2) instructing the nude arrestee on the application of a delousing agent; and (3) instructing the nude arrestee to change into jail clothing following his shower." *Id.* at 498. Warden Juel Cole, an employee of the Burlington facility since 1976, "confirmed that an arrestee admitted for a non-indictable offense is subjected to a visual observation, which involves an officer 'mak[ing] a quick check' on a nude inmate while he changes clothing or during his shower for bruises, tattoos, or 'any item like that of any importance.'" *Id.* at 499. The District Court found that "according to Warden Cole, a visual observation of an arrestee's nude body does not constitute a 'search' under the Burlington Jail's definition of that term." *Id.*

121. *Id.* at 499.

122. *Id.*

123. *Id.* at 499-500 (citing Dep't of Public Safety: General Order No. 89-17). Warden Larry Glover testified about intake procedures at the facility, stating that "for intake processing purposes, all arrestees are treated the same, without any distinction based on whether the arrestee is accused of an indictable or a non-indictable offense." *Id.* at 499. According to Sergeant Thomas Logue, "[O]fficers call up to three arrestees at a time to enter the shower area during processing. Once there, corrections officers direct the arrestees to remove their clothing and place them into gray bins. The arrestees then simultaneously undress while the officers view their nude bodies." *Id.* at 500 (internal citations omitted).

the absence of *reasonable suspicion* that the search will produce weapons, drugs, or contraband.”<sup>124</sup>

The district court held that an order to “take off all your clothes” is, at its essence, a strip search and that calling this “a visual observation is a matter of semantics.”<sup>125</sup> The court reasoned that “if the less intrusive Burlington procedure constitutes a search for purposes of the Fourth Amendment, it follows that the more-intrusive Essex procedure also constitutes a search.”<sup>126</sup> The court returned to the Supreme Court’s analytical framework in *Bell* that purported to balance “the need for the particular search against the invasion of personal rights that the search entails.”<sup>127</sup> While acknowledging that the Fourth Amendment prohibits only unreasonable searches and seizures, the district court emphasized that *Bell* requires a very careful balancing of the “significant and legitimate interests of the institution against the privacy interests of the inmates.”<sup>128</sup>

Ultimately, the district court determined that the procedures at Burlington and Essex are not constitutionally reasonable within the parameters established by *Bell*.<sup>129</sup> It distinguished the *Bell* searches, which the Supreme Court had deemed reasonable from the blanket strip searches.<sup>130</sup> The district court stressed that the searches in *Bell* “were conducted after contact visits with outside visitors, during which time exposure to contraband is heightened. [These] visits, by their very nature, may then provide the requisite reasonable suspicion for jail officers to justify the blanket search policy.”<sup>131</sup>

The district court found that a blanket policy of strip searching under particular circumstances *may* be constitutional provided it is supported by the balancing test set forward in *Bell*.<sup>132</sup> It found that both jail’s procedures were impermissibly humiliating, involving a “complete disrobing, examination of the nude inmates body, followed by a supervised shower . . . in the presence of other inmates (further contributing to the humiliating and degrading nature of the experience).”<sup>133</sup>

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124. *Id.* at 499 (citing Dep’t of Public Safety: General Order No. 04-06) (emphasis added).

125. *Id.* at 503.

126. *Id.*

127. *Id.* at 504 (citing *Bell v. Wolfish*, 441 U.S. 558, 559 (1979)). To determine reasonableness, the Court’s analysis considered four factors: (1) the scope of the particular intrusion, (2) the manner in which the intrusion is conducted, (3) the justification for initiating the intrusion, and (4) the place of the intrusion. *Id.*

128. *Id.* (citing *Bell*, 441 U.S. at 559).

129. *Id.* at 511-12.

130. *Id.*

131. *Id.* at 509.

132. *Id.* at 509-10.

133. *Id.* at 512.

Most importantly, the district court found that the existence of the blanket, general strip search policy in question leads to unjust results.<sup>134</sup> Given that both facilities perform strip searches “without distinction between indictable and non-indictable offenders,”<sup>135</sup> the district court reasoned that “a priest or minister arrested for allegedly skimming the Sunday collection would be subjected to the same degrading procedure as a gang-member arrested on an allegation of drug charges.”<sup>136</sup> Further, the district court found the intrusive nature of the searches to which Florence and his class were subjected were unreasonable, despite agreeing with officials from both facilities that if “reasonable suspicion exists” nothing prohibits such searches.<sup>137</sup>

From the district court’s perspective, conducting general or blanket strip searches without articulable reasonable suspicion—that is, without distinction between severity of offense, attention to the dignity of the inmates and the sensitivity of such an invasive exercise, or exploration of procedures less intrusive to accomplish the stated security goals—violates the Fourth Amendment.<sup>138</sup> In short, “the search policies at issue fail the *Bell* balancing test.”<sup>139</sup>

#### B. *The Third Circuit Rules in Favor of Burlington and Essex*

The Third Circuit reversed based on its interpretation that the Supreme Court precedent required deference to the correctional facilities’ judgment.<sup>140</sup> The Third Circuit held that (1) security interests of the facilities trumped the rights of the individual inmates, (2) the searches were not so intrusive as to violate *Bell*, and (3) promoting equal treatment of inmates trumped the district court’s determination that indicted and non-indicted inmates must be treated differently.<sup>141</sup>

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134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 512-14.

138. *Id.* at 512.

139. *Id.* at 513.

140. *Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington*, 621 F.3d 296, 298-99, 302 (3d Cir. 2010) (“In *Bell*, the Supreme Court rejected a Fourth Amendment challenge to a policy of visual body cavity searches for all detainees—regardless of the reason for their incarceration—after contact visits with outsiders. The Court applied a balancing test and concluded that the visual body cavity searches were reasonable because the prison’s security interest justified the intrusion into the detainees’ privacy.”) (internal citations omitted).

141. *Id.* at 296 (See Judge Hardiman’s opinion for the Third Circuit in which he states that the strip search policies of the jails were reasonable and in compliance with the Court’s holding in *Bell* and not in violation of the Fourth Amendment. Further, Judge Hardiman enumerates the rationales for reversing the district court’s finding that blanket strip searches without articulable suspicion do not comply with *Bell*. The above summarized holdings reflect the Third Circuit’s reasoning.).

The Third Circuit reached this result even while reciting the Supreme Court's maxim that "prisons are not beyond the reach of the Constitution."<sup>142</sup> It did so by echoing the Court in *Hudson*, noting that detention "carries with it the circumscription or loss of many significant rights"<sup>143</sup> and that "[t]he curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of institutional needs and objectives of prison facilities, chief among which is internal security."<sup>144</sup> In holding that security outweighs arguments of individual constitutional due process and privacy, the Third Circuit reinforced the increasing belief that prisons are beyond judicial inquiry: "[T]he Supreme Court . . . has also emphasized that the judiciary has a 'very limited role' in the administration of detention facilities."<sup>145</sup>

Though Florence and his co-plaintiffs never argued that the purpose of detention facilities was detainment and not correctional, the Court of Appeals repeatedly reiterated the correctional nature of prisons. It stated that "[l]oss of freedom of choice and privacy are inherent incidents of confinement in such a facility."<sup>146</sup> Moreover, it noted that "[a] prison is not a summer camp and prison officials have the unenviable task of preserving order in difficult circumstances."<sup>147</sup> This reasoning continues to further diminish the individual rights of inmates and detainees and further immunizes correctional facilities from judicial oversight.

In ruling in favor of the County of Burlington, the Third Circuit reinforced the notion that the Fourth Amendment's requirement of individualized reasonable suspicion does not apply in the context of invasive visual and strip searches, even for non-indictable, low-risk offenders. The court ultimately declared: "In sum, balancing the Jail's security interests at the time of intake before arrestees enter the general population against the privacy interests of the inmates, we hold that the strip search procedures described by the District Court at BCJ ("*Burlington County Jail*") and ("*Essex County Correctional Facility*") are reasonable."<sup>148</sup>

### C. U.S. Supreme Court Affirms the Third Circuit

In Justice Kennedy's opinion, the Supreme Court affirmed the Third Circuit's decision, finding that blanket strip search policies, including invasive visual and/or body cavity searches, strike the proper balance between

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142. *Id.* at 302 (quoting *Hudson v. Palmer*, 468 U.S. 517, 523-24 (1984)).

143. *Id.* at 301 (internal citations omitted).

144. *Id.*

145. *Id.* at 302 (quoting *Block v. Rutherford*, 468 U.S. 576, 584 (1984)).

146. *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520, 537 (1979)).

147. *Id.* at 307-08 (quoting *E.E.O.C. v. The GEO Group, Inc.*, 616 F.3d 265, 275 (3d Cir. 2010)).

148. *Id.* at 311.

inmate privacy and the needs of correctional facilities.<sup>149</sup> The Court found that Florence failed to provide “substantial evidence” that the strip search policies enforced by the Burlington and Essex jails “[were] an unnecessary or unjustified response to problems of jail security.”<sup>150</sup> Further, the Court determined that such procedures do not offend the Fourth and Fourteenth Amendments of the U.S. Constitution, and that there is no constitutional requirement to distinguish between serious and minor offenses.<sup>151</sup>

The Court maintained its pattern of deference to the correctional facilities, explaining that “[t]he task of determining whether a policy is reasonably related to legitimate security interests is peculiarly within the province and professional expertise of corrections officials.”<sup>152</sup> The Court established the procedural and substantive lodestar for correctional facilities in determining that when correctional officials intrude on the rights of inmates, these rights must give way to regulations “reasonably related to legitimate penological interests.”<sup>153</sup>

Turning to *Bell*, the Court stated that “there is no mechanical way to determine whether intrusions on an inmate’s privacy are reasonable”<sup>154</sup> and that “[t]he need for a particular search must be balanced against the resulting invasion of personal rights.”<sup>155</sup> The Court explained that attempting to determine minor as opposed to serious offenses would be “a difficult if not impossible task.”<sup>156</sup> Having abandoned concern for individual rights, the Court turned its attention to the interests of correction officials, stating, “Correctional officials have a significant interest in conducting a thorough search as a standard part of the intake process. The admission of inmates creates numerous risks for facility staff . . . .”<sup>157</sup> The Court pointed to the “introduc[tion] of lice or contagious infections” and/or “wounds or other injuries” to argue that “[i]t may be difficult to identify and treat these problems until detainees remove their clothes for a visual inspection.”<sup>158</sup> The Court claimed that intake is the place where

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149. *Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington*, 132 S. Ct. 1510, 1523 (2012).

150. *Id.* at 1513-14.

151. *Id.*

152. *Id.* at 1510, 1517 (quoting *Bell v. Wolfish*, 441 U.S. 520, 548 (1979)).

153. *Id.* at 1515-16 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

154. *Id.* at 1516 (citing *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). *Bell* established reasonableness as hinging on “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.” *Bell*, 441 U.S. at 529.

155. *Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington*, 132 S. Ct. 1510, 1516 (2012).

156. *Id.*

157. *Id.* at 1518 (quoting *Block v. Rutherford*, 468 U.S. 576, 587 (1984)).

158. *Id.* at 1518 (citing *PRISON AND JAIL ADMINISTRATION: PRACTICE AND THEORY* (Carlson & Garrett eds., 2d ed. 2008)).

“jails and prisons face grave threats posed by the increasing number of gang members who go through the intake process.”<sup>159</sup>

Florence acknowledged precedent and only objected to the application of invasive strip searches to detainees who have “not been arrested for a serious crime or for any offense involving a weapon or drugs” as constitutionally unreasonable.<sup>160</sup> The Court rejected his argument in stating that “[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals.”<sup>161</sup> Indeed, this statement tended to criminalize people who come into contact with law enforcement.

In determining that Florence and those similarly situated should not be segregated from the more dangerous arrestees at intake, the Court painted a dangerous and unsubstantiated picture of the population that comes into contact with law enforcement. It stated that “people arrested for minor offenses have tried to smuggle prohibited items into jail, sometimes by using their rectal cavities or genitals for the concealment.”<sup>162</sup> The Court further noted that “[e]ven if people arrested for minor offenses do not themselves wish to introduce contraband into a jail, they may be coerced into doing so by others.”<sup>163</sup> The Court imagined this population as weak and vulnerable, stating “a hardened criminal or gang member can, in just a few minutes, approach the person and coerce him into hiding the fruits of a crime, a weapon, or some other contraband.”<sup>164</sup> Additionally, the Court held that officers’ jobs would become more difficult if they were required “to classify inmates by their current and prior offenses before the intake search.”<sup>165</sup> Further, “under [Florence’s] proposed regime, officers would be required, in a few minutes to determine whether any of the underlying offenses were serious enough to authorize the more invasive search protocol.”<sup>166</sup>

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159. *Id.* at 1518-19 (citing the Policeman’s Benevolent Association and the New Jersey Commission of Investigation in concluding that “[g]ang rivalries spawn a climate of tension, violence, and coercion”). The Court explains that “[gangs] recruit [new] members by force, engage in assaults against staff, and give other inmates a reason to arm themselves.” *Id.* at 1518. As the Court asserts, “Fights among feuding gangs can be deadly, and the officers who must maintain order are put in harm’s way.” *Id.* at 1518-19. For these reasons, the Court determined that “the identification and isolation of gang members before they are admitted protects everyone in the facility.” *Id.* at 1519.

160. *Id.* at 1520.

161. *Id.*

162. *Id.*

163. *Id.* at 1521 (citing Brief of Amicus Curiae New Jersey County Jail Wardens Assoc. in Support of Respondents at 16, *Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington*, 132 S. Ct. 1510 (2012) (No.10-945)); *cf.* *Block v. Rutherford*, 468 U.S. 576, 587 (1984) (“It is not unreasonable to assume, for instance, that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied contact visits.”).

164. *Id.*

165. *Id.*

166. *Id.* at 1522.

Justice Kennedy was less concerned with the individual rights of petitioners than he was with the morale of jail and prison officials. He wrote, “The officials in charge of the jails in this case urge the Court to reject any complicated constitutional scheme requiring them to conduct less thorough inspections of some detainees . . . .”<sup>167</sup> The Court argued that though the scheme proposed by Florence “would limit the intrusion on the privacy of some detainees,”<sup>168</sup> this increased privacy “would be at the risk of increased danger to everyone in the facility, including the less serious offenders themselves.”<sup>169</sup>

Chief Justice Roberts and Justice Alito wrote in concurrence with the majority,<sup>170</sup> but stressed that the Court was not foreclosing the possibility of a situation arising in which a strip search of an arrestee would be considered *unreasonable*.<sup>171</sup> The disparity between the majority and the concurrence is significant.

Chief Justice Roberts acknowledged the need to “not embarrass the future,”<sup>172</sup> while proceeding to do just that by endorsing the strip searching of a man arrested on an invalidly sustained bench warrant.<sup>173</sup> Further, Justice Alito hesitated to vilify detained citizens, stating that “[m]ost of those arrested for minor offenses are not dangerous . . . . For these persons, admission to the general jail population, with the concomitant humiliation of a strip search, may not be reasonable, particularly if an alternative procedure is feasible.”<sup>174</sup> However, while saying that the Court “does not hold that it is always reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population,”<sup>175</sup> the concurring justices proceeded to endorse a majority opinion which did just that.<sup>176</sup> Nonetheless, the concurrence suggests some possibility of a factual scenario wherein the Court would decide in favor of individual privacy over institutional security concerns. But, given that no factual scenario has been adequate so far, the forecast is bleak.

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167. *Id.* (Florence proposed that the Court adopt a scheme rooted in reasonable suspicion or require corrections officials to consider factors such as the detainee’s behavior, suspected offense, or criminal history before permitting a strip search.).

168. *Id.*

169. *Id.* at 1513.

170. *Id.* at 1523 (Roberts, C.J., concurring); *id.* at 1524-25 (Alito, J., concurring).

171. *Id.* at 1523 (Roberts, C.J., concurring); *id.* at 1524-25 (Alito, J., concurring).

172. *Id.* at 1523 (Roberts, C.J., concurring) (quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 300 (1944)).

173. *Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington*, 595 F. Supp. 2d 492, 495-96 (D.N.J. 2009).

174. *Florence*, 132 S. Ct. at 1524 (Alito, J., concurring).

175. *Id.* (emphasis omitted).

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

Small consolation for Albert Florence is found in a dissenting opinion by Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan.<sup>177</sup> Reviewing the facts, Justice Breyer observed the unusual invasiveness of the strip search conducted by Burlington County jails.<sup>178</sup> Justice Breyer indicated that “the searches here involve close observation of the private areas of a person’s body and for that reason constitute a far more serious invasion of that person’s privacy.”<sup>179</sup> Ultimately, Justice Breyer would hold that “a search of an individual arrested for a minor offense that does not involve drugs or violence . . . is an ‘unreasonable search’ forbidden by the Fourth Amendment unless prison authorities have *reasonable suspicion* to believe that the individual possesses drugs or other contraband.”<sup>180</sup>

Justice Breyer placed the question at issue in a larger context, stating, “The constitutional right at issue here is the Fourth Amendment right to be free of ‘unreasonable searches and seizures.’”<sup>181</sup> He agreed with the majority that the balancing inquiry enunciated by the Court in *Bell* is the standard of reasonableness to be applied.<sup>182</sup> He stated that “the place, scope and manner” of the “particular intrusion” was a serious “invasion of personal rights” as it involves “a stranger peering without consent at a naked individual, and in particular at the most private portions of that person’s body . . . .”<sup>183</sup>

Justice Breyer determined that the procedures at issue in *Florence* were an unjustified violation of the Fourth Amendment prohibition of unreasonable searches and seizures.<sup>184</sup> He described the privacy interests in question as “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, and repulsive, signifying degradation and submission.”<sup>185</sup> At the same time, his dissent recognized the penological interests advanced by the majority—“(1) to detect injuries or diseases, such as lice, which might spread in confinement, (2) to identify gang tattoos, which might reflect a need for special housing to avoid violence, and (3) to detect contraband, including drugs, guns, knives, and even pens or chewing gum”<sup>186</sup>—and acknowledged that the job of correctional officials “is

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

178. *Id.*

179. *Id.*

180. *Id.* (emphasis added) (In concluding that absent reasonable suspicion there is no support in the Constitution for such searches, Justice Breyer defines minor offenses as those such as “traffic offenses, a regulatory offense[s], an essentially civil matter, or any other such misdemeanor.”).

181. *Id.* at 1525–26.

182. *Id.* at 1526 (internal citations omitted).

183. *Id.*

184. *Id.*

185. *Id.* (citing *Mary Beth G. v. Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1984)).

186. *Id.* at 1527.

an inordinately difficult undertaking.”<sup>187</sup> The dissent deferred to correctional facilities to some extent, affirming that regulations that “interfere with important constitutional interests are generally valid as long as they are ‘reasonably related to legitimate penological interests.’ ”<sup>188</sup>

Keeping in mind the interests of all individuals and institutions involved, his dissent found nothing, absent reasonable suspicion of wrongdoing, demonstrating that the penological interests at issue in *Florence* are reasonable.<sup>189</sup> Instead, Justice Breyer pointed out the unreasonableness and irrelevance of the County’s intake procedures.<sup>190</sup> In particular, he stated that “there is no connection between the genital lift and the ‘squat and cough’ that Florence was allegedly subjected to and health or gang concerns.”<sup>191</sup> Justice Breyer noted empirical data indicating that despite the “large number of inmates” at the facilities in question, there were very few instances that officers discovered contraband at intake.<sup>192</sup> Finally, Justice Breyer highlighted the opinions of professional bodies, practices of correctional facilities and laws in many states<sup>193</sup> to demonstrate that the penological interests advanced by the majority were unnecessary to advance security interests and were thus inconsistent with the application of the reasonable suspicion standard.<sup>194</sup>

#### D. *Beyond Florence*

In finding that the invasive strip searches performed on Albert Florence were constitutionally reasonable and struck the proper balance between individual privacy and institutional security,<sup>195</sup> the Court cemented the practice of performing invasive visual and/or body cavity searches on every arrestee being introduced into general population.<sup>196</sup> The Court thus alerted every correctional institution that in the context of strip search procedures, minor crimes warranted no differentiation from serious crimes. Everyone from the soccer mom to the drug dealer was to be considered potentially diseased or concealing contraband.<sup>197</sup>

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187. *Id.*

188. *Id.* at 1527-28.

189. *Id.* at 1528, 1531.

190. *Id.* (Justice Breyer cited searches such as “(a) pat-frisking all inmates; (b) making inmates go through metal detectors (including the Body Orifice Screening System (BOSS) chair used at Essex County Correctional Facility that identifies metal hidden within the body); (c) making inmates shower and use particular delousing agents or bathing supplies; and (d) searching inmates’ clothing.”).

191. *Id.*

192. *Id.* at 1528-29.

193. *Id.* at 1529-30.

194. *Id.* at 1528-31.

195. *Id.* at 1523.

196. *Id.*

197. See *id.*

The great deference that the Court extended to correctional facilities to strip search anyone as long as the search is “related to legitimate penological interests”<sup>198</sup> serves as the final nail in the coffin of the longstanding constitutional pillar that *reasonable articulable suspicion* is necessary for detentions and searches.<sup>199</sup> Clearly, the Court’s understanding of the dignity and respect reserved for all citizens, even those arrested and facing general detention, has devolved since that body first declared that a strip search must, like any other search . . . be limited to that which is *necessary*.<sup>200</sup> A dangerous tradition of deference has replaced “a constitutional balance between governmental interests and the private interests of individuals.”<sup>201</sup>

The next section will analyze *Florence* in light of the disparate racial outcomes present in the criminal justice system and indicate that the Court’s unwillingness to require individualized suspicion of the commission of a serious offense or the concealment of a weapon or drugs impacts those who come into contact with the criminal justice system. This is particularly true for racial minorities who are disproportionately represented at every stage of our criminal justice system. *Florence* moves us further away from equality and instead contributes to polarizing communities of color.

### III. ANALYSIS OF *FLORENCE* IN THE CONTEXT OF COLORBLIND RACISM IN THE CRIMINAL JUSTICE SYSTEM

*Florence* should be read in the context of a criminal justice system that continues to have a disproportionately negative effect on Black and Latino communities, in order to recognize its practical impact on these minority communities. For example, despite the fact that all races and ethnicities commit crime,<sup>202</sup> the police stop Blacks and Latinos at rates that are much higher than whites. In major urban areas like New York City, where people of color make up approximately half of the population, the police stopped Blacks and Latinos eighty percent of the time. Moreover, when Whites were stopped, only eight percent were frisked. In contrast, when Blacks and Latinos were stopped, eighty-five percent were frisked.<sup>203</sup>

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198. *Id.* at 1511.

199. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

200. *Id.* at 25-26; *see also* *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring).

201. *Terry*, 392 U.S. at 30-31.

202. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: ARRESTS BY RACE (2012), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/43tabledatacoverviewpdf>.

203. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 573-76 (2013) (“Officers are required to complete a UF-250 form, also known as a ‘Stop, Question and Frisk Report Worksheet,’ after each Terry stop. Each side of the form contains checkboxes and fields in which officers are required to indicate the nature of the stop and the circumstances that led to and justified the stop (the ‘stop factors’).”).

Despite the fact that minorities experience policing differently, the language of *Florence* ostensibly extends the ‘blanket’ strip search powers of police in a nondiscriminatory fashion. However, social science literature is overwhelmingly decisive in showing how, post-*Brown v. Board of Education*,<sup>204</sup> *de jure* race neutrality in regulatory language does not necessarily result in a corresponding equal outcome among various races. In fact, social science and legal analyses overwhelmingly demonstrate that although *de jure* discrimination and state supported discrimination have largely been abandoned, *de facto* discrimination proliferates.<sup>205</sup>

Bonilla-Silva has theorized that the Court’s inability to identify discriminatory intent in the context of *de facto* segregation is a product of a new, post-Jim Crow racial reality known as “color blind racism.”<sup>206</sup> Further, Bonilla-Silva explained that while White actors appear “reasonable” and even “moral,” they effectively oppose almost all practical jurisprudential approaches to combat *de facto* racial inequality. Unlike *de jure* discrimination, *de facto* discrimination “practices [are] subtle, institutional, and apparently nonracial.”<sup>207</sup> The focus on intentional discrimination by bad actors, while ignoring substantial racial disparities in outcomes, is an untenable jurisprudential position. This approach results in the legalization and legitimization of statutes and regulations by the courts that continue to oppress and humiliate racial minorities, specifically Blacks and Latinos.

Other legal analyses of *Florence*<sup>208</sup> have largely ignored, and hence minimized, the salience of race when thinking about strip searches, potentially precluding lower courts from considering this literature. Nonetheless, law enforcement agencies with the discretion to write their policies and monitor their own practices should take this literature into consideration.

Analyses of discriminatory use of strip search policy are limited, given that there are few reliable sources and no uniform policy mandates the collecting and reporting of such data. As John Gibeaut noted, “Only a handful of states keep records on the number of minority searches.”<sup>209</sup> In the United Kingdom, however, which has been adopting U.S.-style policing tactics including discriminatory stop and search practices, Closed Circuit Television (“CCTV”) installed in police stations has allowed more

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204. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

205. Kimberly Grace, Note, *De Facto Segregation: How it is Affecting America’s Inner City Schools*, 1 LINCOLN L. REV. 183 (1994) (examining the history of slavery, *de jure* and *de facto* discrimination in our educational system, and the social, economic, and political effects on children and schools.)

206. See BONILLA-SILVA, *RACISM WITHOUT RACISTS*, *supra* note 5, at 2.

207. See *id.* at 28.

208. See generally Daphne Ha, Note, *Blanket Policies for Strip Searching Pretrial Detainees: An Interdisciplinary Argument for Reasonableness*, 79 FORDHAM L. REV. 2721, 2721-60 (2011).

209. John Gibeaut, *Marked for Humiliation*, 85 A.B.A. J. 46, 47 (1999).

detailed records of strip searches to be kept.<sup>210</sup> Researchers showed that in police stations, strip-search powers were used disproportionately against Afro-Caribbean arrestees, holding factors like sex, age, reason for arrest, and charge constant.<sup>211</sup> Although we do not have the advantage of CCTV and reliable statistics in the United States, we can glean from some sources the way in which strip-search policies have been imposed discriminatorily.

Teresa Miller reasoned that Florence's arrest and subsequent strip search were partially due to the police's over-reliance on technological advances.<sup>212</sup> According to Miller, the statewide computer database incorrectly reflected an outstanding warrant for Florence.<sup>213</sup> Mistakes like this are not uncommon, as police officers use disparate sources such as the National Crime Information Center (NCIC). The NCIC reports civil immigration violations in addition to criminal offenses, and state police budgets often do not allow for the contemporaneous updating of police databases.<sup>214</sup> She points out that research has shown that forty-two percent of all NCIC immigration 'hits' were false positives, a situation often repeated at airports.<sup>215</sup>

Miller's piece is compelling, but it fails to properly recognize the insidious role of race. Technology is not race/ethnicity neutral. To elaborate, Latinos are more likely to be stopped and subjected to strip searches if officers do not take extra steps to confirm the validity of systems reporting the names of illegal immigrants as false positives are more likely to be triggered by Hispanic last names.<sup>216</sup>

Miller noted that the unfounded 'fearmongering' about the dangerousness of those who have been accused of violating even minor criminal laws resulting from *Florence* is similar to the fearmongering propagated during the War on Drugs. She wrote, "Fear-mongering during the War on Drugs was a conscious strategy by politicians on both sides of the aisle, corporations, and the media to exploit the anxieties of the middle-class in

210. Tim Newburn, Michael Shiner & Stephanie Hayman, *Race, Crime and Injustice? Strip Search and the Treatment of Suspects in Custody*, 44 BRIT. J. CRIMINOL 677, 679-80 (2004).

211. *Id.* at 677 ("In recent years, police use of 'stop and search' has emerged as a key area of concern. The disproportionate application of this power against young black men has been described as 'the most glaring example of an abuse of police powers' and . . . 'nothing has been more damaging to the relationship between the police and the black community than the ill-judged use of stop and search powers.'") (internal citations omitted).

212. Teresa A. Miller, *Bright Lines, Black Bodies: The Florence Strip Search Case and Its Dire Repercussions*, 46 AKRON L. REV. 433, 456 (2013).

213. *Id.*

214. *Id.* at 459-60.

215. *Id.* at 461.

216. See *id.* ("[W]e are all too familiar with the scenario in which unsuspecting travelers are routinely flagged at airports because their names match or resemble one on the federal terrorist watch list.").

order to achieve numerous objectives including winning elections, selling real estate in gated communities, etc. . . .”<sup>217</sup>

Again, absent from this discussion is the way in which policing during the War on Drugs resulted in the mass incarceration of men of color in spite of seemingly race-neutral legislation. The result of racialized fearmongering during the War on Drugs foreshadowed how colorblind legislation in the context of strip searches may similarly impact minority communities. While it is certainly the case that socioeconomic status is a strong predictor of likelihood to be arrested for drug offenses, proof that race in addition to class has been salient abounds. Kenneth Nunn’s “Race, Crime and the Pool of Surplus Criminality: Or Why the ‘War on Drugs’ was a ‘War on Blacks’” argues, “The War on Drugs has had a devastating effect on African American communities nationwide. Throughout the drug war, African Americans have been disproportionately investigated, detained, searched, arrested and charged with the use, possession and sale of illegal drugs” in spite of drug use less than or equal to that of Whites.<sup>218</sup> This reality has been copiously noted elsewhere.

Miller’s treatment of race is more explicitly discussed primarily in terms of symbolism.<sup>219</sup> She makes a compelling argument that “current strip searches are remarkably similar to the way slaves were treated on the auction block.”<sup>220</sup> Her metaphor—the degradation of Blacks on the auction block and under the eyes of law enforcement—is apt.<sup>221</sup> Yet this symbolism does not describe how institutionalized racism impacts strip searches. Although the argument about the metaphorical significance of strip searches is compelling, it does not provide a clear sense of the way in which strip-searching fits seamlessly with other discriminatory criminal justice practices. It is not merely a glaring, incongruent barbarity, but a result of institutionalized racism in the criminal justice system.

Similarly, Daphne Ha’s assertion that “research shows that giving police officers discretion to conduct strip searches *may* increase the chance of racial, gender, ethnic, or other forms of discrimination,”<sup>222</sup> while correct, seems naïve and understated.

In his article for the *ABA Journal*, John Gibeaut described cases in which Blacks have been targeted without reasonable suspicion at airports,

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217. *Id.* at 469.

218. Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks,”* 6 J. GENDER RACE & JUST. 381, 381 (2002).

219. *See* Miller, *supra* note 212, at 464.

220. *Id.*

221. *See id.* at 464–65 (“Kennedy’s defense of the practice of strip-searching detainees is premised on the interest of jailers in reducing the risk that detainees present to the facility and its occupants due to uncertainties about their health, injuries, gang affiliations, and propensity for violence. This mirrors exactly the premises of the slave merchants in the slave pens.”).

222. Ha, *supra* note 208, at 2758 (emphasis added).

such as Chicago's O'Hare, for invasive strip searches.<sup>223</sup> Black women in particular have fallen victim to the discriminatory searches, as evidenced by the eighty-five lawsuits brought in federal court.<sup>224</sup> Also, because Customs does report strip searches, data from the late nineties showed that sixty percent of those who were strip searched at airports were Black or Latino—a gross overrepresentation when, as Gibeaut points out, some estimates say that these two groups make up as little as five percent of those traveling.<sup>225</sup> In one example Gibeaut described, Patricia Appleton likened the experience of being strip searched to being raped.<sup>226</sup> Indeed, this sense of violation produced accords well with Miller's slavery analogy.

Not only are adults subjected to discriminatory strip searches, but Black and Latino schoolchildren are often subjected to arbitrary discipline as well.<sup>227</sup> For example, investigative reporting by the *Chicago Tribune* in 2012 revealed that these minority groups were more likely to be referred to the police for infractions, arrested, and suspended than their White counterparts.<sup>228</sup> These practices fuel the school-to-prison pipeline, wherein minority youth are channeled out of school and into the criminal justice system.<sup>229</sup> It is not surprising, then, that Dennis Parker described in his study of strip searches at school that “[f]or many students, frequently students of color and often students with troubled disciplinary records, intrusive searches can be more the rule than the exception.”<sup>230</sup> Moreover, he found that “[a]lthough these searches may be motivated by the desire to create a safe environment in the schools, the manner in which they are carried out can be ineffective or even counterproductive and may result in the creation of a school environment that more closely resembles a prison than an institution of learning.”<sup>231</sup> Dennis Parker documented studies of “policies and practices which did not appear to either serve the overall goals of student safety or protect the privacy and dignity of individual students.”<sup>232</sup>

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223. Gibeaut, *supra* note 209, at 46–48.

224. *Id.* at 46 (citing data from when the article was published in 1999, as more recent data has not been disseminated).

225. *Id.* at 47.

226. *Id.* at 46.

227. Diane Rado, *Punishment unequal in area schools*, CHI. TRIB., Sept. 26, 2012, at 1, 9.

228. *Id.*

229. *See id.*

230. Dennis D. Parker, *Discipline in Schools After Safford Unified School District #1 v. Redding*, 54 N.Y.L. SCH. L. REV. 1023, 1028 (2009–2010).

231. *Id.*

232. *Id.* at 1028–29 (referring to a joint report by the New York Civil Liberties Union and the Racial Justice Project of the National ACLU). The report “examined a host of security practices involving police and school resource officers and the use of metal detectors in New York City schools. The report is filled with examples of security practices that adversely affect the educational environment and alienate teachers and, on many occasions, the educational staff at the schools. Examples included the search of a New York City high school in which dozens of

Fortunately, the 2009 decision in *Safford Unified School District #1 v. Redding* extends some measure of protection to minors against unreasonable searches.<sup>233</sup> The Court, ruling in favor of the thirteen-year-old female plaintiff, who was strip-searched under suspicion of possessing prescription drugs, emphasized that the age of the child should motivate restraint when using such methods.<sup>234</sup> However, given that implicit biases affect law enforcement officers' perception of criminal behavior, it is unlikely that even with reasonable suspicion being a necessary prerequisite to a strip search of a child, law enforcement will cease to perform searches in a discriminatory manner.

As noted, there is little available evidence about the demographics of strip-searching. Nevertheless, even if there were extensive documentation of bias, "Generally, courts have refused to disallow the use of race as an indicia of criminality. Most courts have accepted this practice, so long as (1) race alone is not the rationale for the interdiction, and (2) it is not done for the purposes of racial harassment."<sup>235</sup>

Racial profiling in policing has not been explicitly declared unconstitutional. In the context of sentencing, it has not been accepted as a rationale for mitigating punishment. In *McCleskey v. Kemp* (1987), a Black defendant convicted of robbery and murder of a White police officer filed a petition for a writ of habeas corpus.<sup>236</sup> He alleged that his constitutional right to equal protection had been violated during his sentencing process.<sup>237</sup> He claimed that he would not have been sentenced to death if not for his race.<sup>238</sup> He cited statistical evidence produced by David Baldus ("The Baldus Study")<sup>239</sup> that showed Blacks who killed White victims are much more likely to receive death sentence than in any other victim-offender demographic pairing.<sup>240</sup>

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police officers and school security agents brought portable metal detectors and handheld wands, searched the school bags of every student, and subjected students to 'a steady barrage of yelling and cursing by the officers.' After the search, the school's principal described the effort as having done more harm than good. He complained that the 'tone of the building' was disrupted and that children were subjected to repeated instances of disrespect. Although the study was completed before the Redding decision was decided, anecdotal evidence suggests that the decision has not resulted in any large-scale shifts in the treatment of students by disciplinary schools." *Id.*

233. *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 374-79 (2009).

234. *Id.* at 377-78.

235. Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L.J.* 457, 460 (2000).

236. *McCleskey v. Kemp*, 481 U.S. 279, 279 (1987).

237. *Id.* at 286.

238. *Id.* at 292.

239. *Id.* at 286-92.

240. *Id.* at 287 n.5 (explaining the methodology of a statistical analysis conducted by Professors David Baldus, Charles Pulaski, and George Woodworth, which is known as the Baldus Study).

The Court ruled against McCleskey, holding that even if discrimination influenced sentencing generally, McCleskey failed to show discrimination was a factor in his particular case.<sup>241</sup> Writing for the majority, Justice Powell wrote, “Because of the risk that the factor of race may enter the criminal justice process, we have engaged in ‘unceasing efforts’ to eradicate racial prejudice from our criminal justice system. Our efforts have been guided by our recognition that ‘the inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice.’”<sup>242</sup> Justice Powell’s refusal to consider definitive evidence that race influences jury decisions is a prime example of how ignoring such evidence in jurisprudence — ruling colorblind — can be lethal.

#### IV. RECOMMENDATIONS

In *Florence*, the Court held that unless Albert Florence could demonstrate that conducting invasive strip searches of every detainee admitted to general population was an unnecessary and unjustified response to the problems of jail security, there was no constitutional violation.<sup>243</sup> The Court further held that irrespective of level of suspicion and offense, the invasive strip search procedures conducted in *Florence* “struck a reasonable balance between inmate privacy and the needs of the [correctional] institutions.”<sup>244</sup> In so holding, the Court once again determined that the “expertise and judgment” necessary to make such decisions should be exercised not by courts, but deference be given to correctional officials.

The *Florence* ruling, even without the existence of institutionalized racism, should be severely rebuked as one of the worst examples of judicial capitulation. But given the current reality in the United States of continued inequality at all stages of the criminal justice system, the circumstances are even more exigent. To be clear, nothing short of the idealistic eradication of institutionalized racism would equalize the disparate impact of strip search policy. Nevertheless, there are ways to minimize the harm done by this ruling. In giving unlimited discretion to correctional institutions and officials to determine the reasonableness of practices, the Court has diluted the reasonableness standard announced in *Terry* to an unrecognizable and unworkable patchwork of practice conducted institution by institution. I recommend that the Court, (1) adhere to the reasonable suspicion standard of particularized wrongdoing where minor offenses are concerned unless there is particularized suspicion of contraband; (2) Law enforcement and corrections voluntarily bring their practices and procedures more in line with the reasonable suspicion requirements of the Fourth Amendment;

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241. *Id.* at 292-94, 297.

242. *Id.* at 309.

243. *Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington*, 132 S. Ct. 1510, 1523 (2012).

244. *Id.*

and (3) activists and non-governmental organizations aggressively advocate for change in the political arena.

#### A. Reasonable Suspicion

*Terry* permits a police officer to intervene when he or she “observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous.”<sup>245</sup> In application, this should certainly require particularized and articulable suspicion of wrongdoing, especially when a practice as invasive and humiliating as a strip search is involved.

Throughout the majority opinion in *Florence*, Justice Kennedy repeatedly reiterates the Court’s precedent<sup>246</sup> that has afforded great deference to correctional institutions and officials in carrying out their duties, including the conducting of searches for contraband.<sup>247</sup> The majority opinion relies almost exclusively on this belief of the deference due to correctional institutions in determining whether the regulations and practices of correctional institutions are “reasonably related to legitimate penological interests,”<sup>248</sup> rather than assessing whether the regulations and practices themselves impinge on a protected constitutional right. For example, Justice Kennedy argued that “[t]he difficulties of operating a detention center must not be underestimated by the courts”;<sup>249</sup> “[m]aintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face”;<sup>250</sup> “there is no mechanical way to determine whether intrusions on an inmate’s privacy are reasonable”;<sup>251</sup> and “[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals.”<sup>252</sup> This deference obscures the constitutional violation at play here.

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245. *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968).

246. *See supra* Part II.

247. *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510, 1515-16 (2012); *see also supra* Part II.

248. *Florence*, 132 S. Ct. at 1515-16.

249. *Id.*

250. *Id.*

251. *Id.* at 1516.

252. *Id.* at 1520 (Alito, J., concurring) (“[T]he Court does not hold that it is always reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population. *Most of those arrested for minor offenses are not dangerous*, and most are released from custody prior to or at the time of their initial appearance before a magistrate.”) (emphasis added).

As Justice Breyer points out in his dissent, the Court has in the past recognized the degradation of such a practice.<sup>253</sup> Other members of the Court, while refusing to intervene, also acknowledged that such a practice has significant implications for those exposed.<sup>254</sup> Justice Alito and Chief Justice Roberts, while acknowledging that the majority opinion is limited and that some individuals should not be subjected to strip searches, nevertheless sign on to it.<sup>255</sup> In its zeal to defer to correctional institutions, the Court declared that holding correctional officials to a reasonable suspicion standard would be “unworkable.”<sup>256</sup>

Albert Florence was erroneously arrested, strip searched, and placed in general population based on a general strip search policy that failed to distinguish between those who are likely to possess drugs or engage in violence and those arrested erroneously or arrested for minor infractions such as traffic offenses. Despite no indication that Florence was violent, the Court found no violation due to its blind deference to correctional facility policies. It reasoned that as long as the practice is “reasonably related to legitimate penological interests,”<sup>257</sup> there is no requirement of a finding of an “unworkable” reasonable suspicion of articulable wrongdoing.<sup>258</sup> However, it is this lack of connection between the regulation and the conduct of the arrestee that makes the search per se unreasonable pursuant to the Fourth Amendment.

#### B. Law Enforcement

It is necessary at the correctional level that strip searches be carried out in a way that minimizes humiliation and degradation, reduces differential impact of these negative consequences on Blacks and Hispanics, and ensures equality in the practice. As law enforcement officers are required to have a close and practical relationship with the communities they serve, law enforcement *must* act in ways to reduce the perception of inequality and bias. This is particularly true in light of heightened excessive use of force allegations and shootings of unarmed Black men and the resulting

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253. *Id.* at 1526–27 (Breyer, J., dissenting) (“We have recently said, in respect to a school-child (and a less intrusive search), that the ‘meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.’” (quoting *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009)); *Bell v. Wolfish*, 441 U.S. 520, 560 (1979) (“We do not underestimate the degree to which these searches may invade the personal privacy of inmates.”)).

254. *Id.* at 1524 (Alito, J., concurring) (“Undergoing such an inspection is undoubtedly humiliating and deeply offensive to many, but there are reasonable grounds for strip searching arrestees before they are admitted to the general population of a jail. As the Court explains, there is a serious danger that some detainees will attempt to smuggle weapons, drugs, or other contraband into the jail.”).

255. *Id.* at 1523 (Roberts, C.J., concurring); *id.* at 1524–25 (Alito, J., concurring).

256. *Id.* at 1520.

257. *Id.* at 1515–16.

258. *Id.* at 1520, 1523.

protests and riots.<sup>259</sup> The discretion exercised by law enforcement is substantial, and the ability of law enforcement to use that discretion to disadvantageously arrest and victimize people of color requires that law enforcement do a better job of policing itself. We as a society must more closely scrutinize and hold law enforcement accountable when their conduct does not meet the rigorous standards of legal and social transparency.

In the context of corrections, the Court has explicitly deferred to the expertise of corrections officials. Therefore, we must rely on institutional restraint in the application of strip searches and institutionalize policies that encompass a reasonable suspicion standard. Without enforcing a clear policy of reasonable suspicion, a blanket provision to strip search *all* detainees will result in gross violations of civil rights and liberties. Although the Court has ruled strip-searching for even minor infractions is constitutionally permissible, corrections officials should use heightened protocols to ensure that “strip searches” are only done when absolutely necessary. In other words, law enforcement agencies need not strip search simply because they can.

Encouragingly, there are extant examples of law enforcement officers who are actively resisting the implications of *Florence*. As Sheriff Garry Lucas announced, “Clark County and all jails within the State of Washington must conduct strip searches consistent with State Law RCW 10.79.”<sup>260</sup> State Law RCW 10.79 explicitly states that without a warrant, strip searches are not permissible except in cases where reasonable suspicion exists that the person is carrying contraband and the correctional facility is at risk or the person has engaged in crimes that would suggest he or she is likely to be carrying contraband.<sup>261</sup> In Albany, New York, the police are going beyond the minimum requirements required by the law.<sup>262</sup> Following a damaging report about strip searches in the *Albany Times Union*,<sup>263</sup> the police in 2013 decided to draft more stringent rules requiring reasonable suspicion, the searching of the person in a discreet location at the police station unless there is a “serious risk to safety,” and that the person be under arrest.<sup>264</sup>

Regardless of whether the lowered standards of *Florence* are followed, police departments should implement changes to their strip-search proto-

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259. See *Excessive or reasonable force by police? Research on law enforcement and racial conflict*, JOURNALIST'S RES. CTR. (Oct. 29, 2015), <http://journalistsresource.org/studies/government/criminal-justice/police-reasonable-force-brutality-race-research-review-statistics>.

260. John Branton, *Supreme Court ruling on strip searches won't change protocol at county jail*, THE COLUMBIAN (Apr. 11, 2012), <http://www.columbian.com/news/2012/apr/11/strip-searches-ok-in-jails-anytime-says-us-supreme/>.

261. *Id.*; see also Wash. Rev. Code Ann. § 10.79.130 (West).

262. Alysia Santo, *Tighter rules on personal searches*, TIMES UNION (Dec. 3, 2013), <http://www.timesunion.com/local/article/Tighter-rules-on-personal-searches5029352.php>.

263. *Id.*

264. *Id.*

cols. In many instances, police departments do not keep records of the number of strip searches conducted, the reasons why they were conducted, the results of the searches, or any type of demographic data about the people searched. Like police departments in the United Kingdom, police departments in the United States should begin keeping records and evaluating them. In the case of the Albany police department, an exposé would have been impossible without the existence of records. These records should be made publicly available, and a task force should be assigned by the state legislature to review the results and recommend policy changes. Public hearings about the impact of strip searches on individuals and the community may be necessary to effectuate important reforms. As a report to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment stated, “Allegations of racial bias, with media disclosure and Senate hearings, led US Customs to revise rules and issue a Personal Search Handbook, with details on approval of searches, selection criteria, registration, outside contact by those delayed, removal to a medical facility etc. ‘Diversity training’ is offered to customs officials to prevent racial discrimination.”<sup>265</sup>

Personal search handbooks and diversity training will not ensure the prevention of racial discrimination in strip searches. However, combined with an emphasis on the importance of reasonable suspicion, such guides would be a promising start in ensuring that increasingly large numbers of people, particularly Black and Hispanic people, are not subjected to the traumatic effects of strip searches. The types of protocol initiated by the Albany and Clark County police should be emulated widely in the United States. Unfortunately, the patchwork nature of criminal justice policy and state politics in no way guarantees their widespread adoption.

### C. *Social Movements, NGOs, and Concerned Citizens*

The Obama administration supported the *Florence* decision, once again highlighting the importance of recognizing the fallacy of a post-racial reality premised on the election of a Black president. Non-governmental organizations, civil rights groups, and criminal justice non-profits with social justice mission statements have a unique role to play in a post-*Florence* milieu. Although the Supreme Court has declared that reasonable suspicion is no longer necessary to initiate a search, the outcome does not have to be a race to the bottom. Elected representatives in state legislatures do not need to modify existing law, nor do law enforcement agencies need to change their protocols, which have previously enshrouded reasonable suspicion. In fact, they can demonstrate resistance to *Florence* by adopting (as the Albany police did) stricter parameters, they can attempt to better train

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265. Petur Hauksson, *Body Searches: The Problems and Guidelines*, EUROPEAN COMM. FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (2001), <http://www.cpt.coe.int/en/working-documents/cpt-2001-66-eng.pdf>.

their police to be aware of racial profiling, and they can create databases through which to monitor patterns of searching and conduct reviews of policy. However, there will be little impetus for the police and legislature to pursue these courses of action without pressure from their constituents, members of social justice and civil rights nonprofits, and guidance from these agencies.

There has been a small degree of discernible movement for advocates and NGOs to take interest generally on strip searches conducted by the police, including, prominently, through the American Civil Liberties Union (ACLU) and National Association for the Advancement of Colored People (NAACP). In 2006, for example, the NAACP and ACLU jointly filed a class action lawsuit alleging that the Baltimore police department was conducting strip searches of arrestees without probable cause or reasonable suspicion that they were carrying contraband, which is a “violation of the . . . Maryland Declaration of Rights.”<sup>266</sup> The ACLU-NJ, prior to the *Florence* ruling, filed an amicus brief on behalf of five former New Jersey Attorneys General, opposing the blanket strip search policies of the Burlington County Jail and Essex County Correctional Facility.<sup>267</sup> Furthermore, the New York Civil Liberties Union worked with the Albany police to draft new, stricter rules for their strip-searches in 2013.<sup>268</sup>

These examples, however, were not carried out directly in response to the *Florence* ruling. There has been no apparent response by the ACLU, NAACP, or other civil rights/social justice organizations that directly opposes the decreased search standard and organizes constituents to lobby their legislators or demand that local law enforcement evince transparency in their use of searches and abide by a reasonable suspicion standard. This is a mistake. In the same way that New York’s Stop and Frisk policy became a rallying point as evidence of its racial bias surfaced, the much more invasive and traumatizing policy of strip searching without reasonable suspicion, which disproportionately impacts people of color in spite of its seeming race-neutrality. The emergence of grassroots watchdog groups such as People’s Justice for Community Control is encouraging, but these groups must not only focus their attention on acts of police brutality that are able to be recorded in the streets; they should also track those that take place behind closed doors.

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266. Justin Fenton, *Agree with state on suit alleging improper strip searches arrests*, THE BALTIMORE SUN (Feb. 26, 2010), [http://articles.baltimoresun.com/2010-02-26/news/bal-md.ci.settlement26feb26\\_1\\_strip-searches-mass-arrests-city-jail](http://articles.baltimoresun.com/2010-02-26/news/bal-md.ci.settlement26feb26_1_strip-searches-mass-arrests-city-jail).

267. David Shapiro, *Florence v. Burlington: Arrestees Challenge Burlington County Jail Strip Search Policy*, AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, <https://aclu-nj.org/legal-docket/florencevburlington/> (last visited Dec. 12, 2014).

268. Santo, *supra* note 262.

## CONCLUSION

Nothing short of overturning *Florence* would enable the application of the reasonable suspicion standard to the strip-searching of arrestees. The standard the Court has established in *Florence* departs from the post-*Terry* requirement of law enforcement to adhere, at a minimum, to reasonable suspicion to engage in searches and seizures, and creates broad deference to law enforcement and correctional institutions largely unhinged from judicial review. The Court has held that prisoners are not beyond the reach of the Constitution,<sup>269</sup> yet makes the Constitution inapplicable when those most vulnerable need its protections most. This situation is untenable and can only be rectified by a strict adherence to constitutional principles already established, particularly those governing the use of law enforcement power to arrest and supervise during corrections.

Stricter adherence to reasonable suspicion is necessary to ensure that searches are documented and conducted sparingly. Social movements can demand fairness and transparency to help minimize disparities in the application of strip searches. In an era marked by colorblind racism in policy and practice, disparities cannot be abolished entirely. Yet, there is hope for conscious recognition of the institutionalized racial bias that played a role in the *Florence* ruling and that continues to play a role in other aspects of our criminal justice system. This recognition must produce action by law enforcement and concerned citizens to enable steady progress toward the ideal criminal justice system, untarnished by racial bias. Without this recognition and active, persistent efforts to overcome bias in our criminal justice system, we can never hope to achieve justice, equality, and liberty for all.

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269. See *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).