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BRIGHT LINES, BLACK BODIES: THE *FLORENCE* STRIP SEARCH CASE AND ITS DIRE REPERCUSSIONS

*Teresa A. Miller**

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Albert Florence is a tall, African American man with dark brown skin. In March 2005, Florence experienced a police encounter that would change his life—and that of his wife and children—forever. Florence was the finance director for a car dealership in New York, married, and the father of three children—William, Shamar, and Elijah—with a fourth child on the way.¹ A New Jersey State Trooper arrested Florence in Burlington County, New Jersey after his pregnant wife, April, was stopped for a traffic infraction.² She was driving Florence's BMW X5 sport utility, with their four year-old son in the backseat.³ When Florence identified himself as the owner of the vehicle, the officer ran his name through a records search using a computer database, New Jersey's Criminal Justice Information System.⁴ The database reported that Florence was the subject of an outstanding arrest warrant in Essex County, New Jersey for failing to pay a fine, a civil violation in New Jersey.⁵

The officer proceeded to take Florence into custody, despite being shown an official document confirming that Florence had indeed paid the fine upon which the warrant was based.⁶ The trooper handcuffed and transported Florence to the State Police Barracks, then on to the Burlington County Jail, where Florence was strip-searched, contrary to New Jersey law and the policy of the jail.⁷ At the time, New Jersey law imposed strict limitations on strip searches of individuals such as Florence who had been detained or arrested for non-criminal offenses.⁸ The express policy of the Burlington County Jail prohibited strip searches of a non-criminal detainee in the absence of a search warrant, consent, or reasonable suspicion that he or she possessed contraband.⁹

1. Petition for Writ of Certiorari at 3 *Florence v. Bd. of Chosen Freeholders*, 132 S.Ct. 1510 (2012) (No. 10-945), 2011 WL 220710.

2. *Id.*

3. *Id.*

4. *Florence*, 132 S.Ct. at 1515.

5. Petition for Writ of Certiorari, *supra* note 1, at 3-4.

6. According to Florence's original complaint, he produced for the officer a certified letter dated October 2004, with a raised seal from the State of New Jersey stating that all judgments against Plaintiff were satisfied and that no warrant existed against him. Complaint at ¶ 20 *Florence v. Bd. of Chosen Freeholders*, 595 F.Supp.2d 492 (N.J. Dist. Ct., 2009) (No. 05CV3619(JHR)), 2005 WL 2099622.

7. Petition for Writ of Certiorari, *supra* note 1, at 3-5.

8. N.J. STAT. ANN. §2A:161A-1 (West 2012).

9. During the various court proceedings, there were a number of terms used to describe the searches conducted at the Burlington and Essex County Jails. A number of officers from the Burlington County Jail testified to the fact that non-indictable arrestees are subject to a "visual inspection" but not a "strip search," which was reserved for arrestees being held on indictable offenses. The difference appears to be that the former involved inspecting the naked bodies of

In a stall with a partially opened curtain, Florence was ordered to remove all of his clothing, open his mouth, lift his tongue, lift his arms, turn fully around and turn back around and lift his genitals, all in front of an officer who stood an arm's length away.¹⁰

For Albert Florence, the stakes in being arrested and detained were high. Pending financial transactions at the dealership would be at risk if he simply failed to show up for work. His pregnant wife would have to care for their three young children without his assistance. His children would be worried if their father suddenly did not come home. And his oldest child, the four year-old son who witnessed him being handcuffed and taken away, would be understandably distraught and anxious about his father's fate. Florence pleaded with law enforcement officials at the State Police Barracks, and again at the Burlington County Jail, to verify the validity of the warrant—a request that was refused.¹¹ At the Police Barracks, he was told that the responsibility for clearing up any error was that of police in Essex County.¹² At the Burlington County Jail, not only were no attempts made to determine the validity of the warrant, but no bail was set for Florence within twelve hours as required by New Jersey law,¹³ nor was Florence brought before a judicial officer within the required seventy-two hour period, despite the ready availability of a judge.¹⁴ Instead, Florence was held in the Burlington County Jail for

arrestees for tattoos, other body marks, injuries, and vermin as they undressed and showered while the latter was “a little more thorough,” according to one officer, because it required inmates to do such things as open their mouth, bend over, squat and cough, and lift their genitals. *Florence*, 595 F.Supp.2d at 498-499. Essex County Jail policy subjected all arrestees, regardless of offense category, to a “strip search” resembling that reserved for indictable arrestees at the Burlington County Jail. *Id.* at 499. Albert Florence claimed that he was subjected to a “full strip and body cavity search” at both facilities. *Id.* at 496-97.

10. Petition for Writ of Certiorari, *supra* note 1, at 5. At the time New Jersey law defined a “strip search” as “the removal or rearrangement of clothing for the purpose of visual inspection of the person’s undergarments, buttocks, anus, genitals or breasts.” N.J. STAT. ANN. §2A:161A-3 (West 2012).

11. Petition for Writ of Certiorari, *supra* note 1, at 4.

12. *Id.*

13. N.J.R.Ct. 3:4-1(b) (West 2012) (“If bail was not set when an arrest warrant was issued, the person who is arrested on that warrant shall have bail set without unnecessary delay, and no later than 12 hours after arrest.”).

14. N.J. R.Ct. 3:4-2(a) (West 2012) (“Without unnecessary delay, following the filing of a complaint the defendant shall be brought before a judge for a first appearance as provided in this Rule. If the defendant remains in custody, the first appearance shall occur within 72 hours after arrest, excluding holidays, and shall be before a judge with authority to set bail for the offenses charged.”); N.J. R.Ct. 9-5(II)(A) (West 2012) (“Criminal Presiding Judges and Municipal Presiding Judges must ensure that all defendants held on bail receive their first appearance within 72 hours pursuant to R. 3:4-2 and R. 7:3-1.”). During the entire time that Florence was held at the Burlington County Jail, he was refused access to the phone, refused access to the shower, refused a kit that would have contained a tooth brush, towel and soap, and refused permission to talk to a social

five days before being transferred, on the sixth day, to Essex County, a larger, more urban municipality.¹⁵

At the Essex County Correctional Facility, two officers made Florence and four other detainees collectively shower and then strip-searched them together in the presence of each other and other people moving through the room.¹⁶ They were all ordered to open their mouths, lift their genitals, turn around, squat, and cough.¹⁷ Unlike the Burlington County Jail, the Essex County Correctional Facility practiced “blanket” strip searching of all arrestees without regard to the nature of the offense for which they were arrested.¹⁸ The next day, Florence appeared before a judge for the first time.¹⁹ The judge ordered that Florence be immediately released from custody.²⁰

Florence subsequently filed a § 1983 action against the state actors in Burlington and Essex Counties involved in arresting and strip searching him. In March 2008, Judge Rodriguez of the New Jersey Federal District Court granted Florence class certification.²¹ After a civil trial, Judge Rodriguez held that the blanket policy of strip searching persons arrested for non-criminal offenses (New Jersey uses the term “non-indictable offenses”) in the absence of either consent, a search warrant, or reasonable suspicion that the individual is in possession of contraband, violated the Fourth Amendment of the U.S. Constitution.²² Judge Rodriguez found that in the context of degradation and humiliation of the non-criminal arrestee, the privacy rights of the individual superseded the interest of jail officials in administrative

worker. Complaint, *supra* note 6, at ¶ 25. When Plaintiff requested any of those services, the officers denied him stating that he was a “holdover,” meaning they were waiting to transport Plaintiff to Essex County. *Id.*

15. Florence v. Bd. of Chosen Freeholders, 132 S.Ct. 1510, 1514 (2012).

16. Petition for Writ of Certiorari, *supra* note 1, at 6.

17. *Id.*

18. See *supra*, note 9. This policy was clearly inconsistent with New Jersey law limiting strip searches to circumstances in which either the arrestee consents, a search warrant is obtained (in other words, upon probable cause), or jail officials have reason to suspect that the arrestee is in possession of contraband. N.J. STAT. ANN. § 2A:161A-1 (West 2012).

19. Petition for Writ of Certiorari, *supra* note 1, at 7.

20. *Id.*

21. The class consisted of: “All arrestees charged with non-indictable offenses who were processed, housed or held over at Defendant Burlington County Jail and/or Defendant Essex County Correctional Facility from March 3, 2003 to the present date who were directed by Defendants’ officers to strip naked before those officers, no matter if the officers term that procedure a ‘visual observation’ or otherwise, without the officers first articulating a reasonable belief that those arrestees were concealing contraband, drugs or weapons.” Florence v. Bd. of Chosen Freeholders, No. 05-3619, 2008 WL 800970 at *17 (N.J. Dist. Ct., Mar. 20, 2008).

22. Florence v. Bd. of Chosen Freeholders, 595 F.Supp.2d 492, 513 (N.J. Dist. Ct., 2009).

efficiency, particularly in the absence of any evidence that Burlington and Essex Counties were experiencing problems with smuggling of contraband.²³

In granting Florence's summary judgment motion, Judge Rodriguez relied upon the four-part balancing test of *Bell v. Wolfish*,²⁴ a 1979 Supreme Court case holding that strip searches of pre-trial detainees after contact visits in a federal jail could be conducted on less than probable cause, but he left unresolved the issue of whether reasonable suspicion was a minimal, threshold standard.²⁵

On appeal, the Third Circuit Court of Appeals reversed Judge Rodriguez. The Court held that a policy of strip-searching all arrestees was reasonable under the Fourth Amendment and struck the proper balance between a jail's interest in preventing the smuggling of contraband during intake and the detainee's interest in bodily privacy.²⁶

This article has five sections. Part I is a brief history of Search and Seizure law, focusing on seismic doctrinal shifts that occurred from the 1950s to the present. As a framework for the important cases, the Founders' concerns about abuse of governmental authority are discussed, as well as the rights protected by the Fourth Amendment. Various governmental programs will also be presented, such as the War on Drugs and its call for a large-scale federal anti-drug policy, first initiated by President Richard Nixon in 1969. Part II is a description of the central reasoning presented in *Florence v. Board of Chosen Freeholders*,²⁷ including the majority opinion written by Justice Kennedy and also the concurring and dissenting opinions. Part III will be a discussion of the four major cases that the Supreme Court relied upon in *Florence*: *Bell v. Wolfish*,²⁸ *Hudson v. Palmer*,²⁹ *Turner v. Safley*,³⁰ and *Atwater v. Lago Vista*.³¹ Part IV presents four major points that emerge from Albert Florence's predicament and the *Florence* decision. First, Florence's arrest and detention was predicated on law enforcement's overreliance on information databases, which in this case contained inaccurate information. Second, strip searches degrade those subjected to them and, in the vast majority of cases, are simply

23. *Id.* at 512-13.

24. 441 U.S. 520 (1979).

25. *Florence*, 595 F.Supp.2d at 504.

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

27. 132 S.Ct. 1510 (2011).

28. 441 U.S. 520 (1979).

29. 468 U.S. 517 (1984).

30. 482 U.S. 78 (1987).

31. 441 U.S. 520 (2001).

unnecessary. Indeed, the bodily submission, surveillance, and inspection entailed in strip searches eerily resembles previous rituals of coercive, discriminatory race-making, especially those associated with slave markets. Third, Justice Kennedy's endorsement of categorical rules and "bright line" tests as constitutional guides for law enforcement practice puts far too much discretionary power in the hands of law enforcement and invites abuse of authority. Ironically, in recent Fourth Amendment decisions involving searches of automobile occupants, the Court has criticized and limited the application of bright line rules due to similar concerns about abuse of police authority.³² Fourth, the *Florence* decision and categorical strip searches both exemplify policies informed by fear, which oscillate between depictions of inflammatory dangerousness and super villains, like Timothy McVeigh, and hyper-vigilant, risk management. The paper concludes with a discussion of the possible repercussions and legacy of *Florence* on future Fourth Amendment litigation involving jails and prisons.

I. A SHORT HISTORY OF SEARCH AND SEIZURE LAW

A. *Fourth Amendment Search Doctrine and Its Origins*

Prior to 1967, a search was conceptualized as a physical intrusion by a state actor into a constitutionally protected area.³³ This formulation of a governmental "search" was understood to implicate Fourth Amendment rights every time a government agent physically looked for evidence hidden from public view in a person's home, business, or on their person.³⁴ It was a highly serviceable definition until modern electronic technologies rendered a trespass-based search doctrine obsolete. For example, government agents could significantly intrude into private conversations and not trigger Fourth Amendment constitutional protections under the "trespass-based" formulation of a search. This tangible notion of privacy left unprotected governmental intrusions upon, *inter alia*, telephonic communications and other

32. See *Thorton v. United States*, 541 U.S. 615 (2004).

33. See *Olmstead v. United States*, 277 U.S. 438 (1928); *Goldman v. United States*, 316 U.S. 129 (1942). In 1976, the United States Supreme Court in *Katz v. United States*, 389 U.S. 347, 353 (1967), held, "Fourth Amendment protects people-and not simply 'areas'-against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."). *Id.* at 353.

34. See *Goldman*, 316 U.S. at 139-140 (Murphy, J., dissenting) (contesting the majority opinion that use of a listening apparatus and dictaphone to listen to the defendant's conversations, without a warrant, was not a violation of the Fourth Amendment due to the lack of physical entry).

emerging technologies. In 1967, the Supreme Court reformulated the doctrine of searches in the prescient case of *Katz v. United States*.³⁵

Since *Katz*, a search is now understood to be a governmental intrusion into a place, thing, or activity in which an individual expects privacy, and that society is prepared to accept as reasonable.³⁶ The first criterion is *subjective*: Does the individual have an actual expectation that the activity is private? The second criterion is objective, and judged by a normative standard: Is the person's expectation of privacy *reasonable*?³⁷ *Katz* completely overhauled the concept of a search within the meaning of the Fourth Amendment.

The Fourth Amendment is the primary means by which individuals are protected from searches conducted by law enforcement officers and other state actors. Consisting of only fifty-four words, the Fourth Amendment contains two clauses. The first—the Reasonableness Clause—protects people from searches that are *unreasonable*.³⁸ The second—the Warrants Clause—describes the requirements for a warrant. According to the Fourth Amendment, in order to obtain a warrant to conduct a search, police must have a fairly high level of suspicion (i.e., probable cause), state the basis of their suspicion, swear to it under oath, and itemize who, where, or what they intend to search.³⁹

The Fourth Amendment was ratified with the intention of protecting an “almost sacred right” American Colonists had—to be secure in and around their homes, businesses, persons, and other private premises.⁴⁰ In enacting the Reasonableness Clause, the Framers of the Bill of Rights emphatically declared that people's bodies, homes, papers, and effects enjoyed security from all unreasonable searches. On the other hand, the Warrants Clause of the Fourth Amendment was crafted to specifically outlaw the notorious general warrant by forbidding the issuance of *any* warrant except the type required under English law to search private homes. Under the Warrants Clause, issuance of a special warrant would now be predicated upon swearing under oath that the warrant was supported by probable cause and not being sought for

35. 389 U.S. 347. This understanding of a search emerged from Justice Harlan's prominent concurring opinion.

36. *Id.* at 361.

37. *Id.*

38. “The right of the person to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.” U.S. CONST. amend. IV.

39. *Id.*

40. PHILLIP HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 77 (2005).

arbitrary or capricious reasons.⁴¹

General exploratory searches had been abused by British customs officers stationed in the American Colonies through the device of general warrants (also known as general writs of assistance).⁴² These warrants and writs were used to uncover goods smuggled into the Colonies when Great Britain severely restricted colonial trade with nations outside the British Empire,⁴³ and to ferret out purveyors of publications critical of the King of England.⁴⁴ These searches provoked deep resentment on both sides of the Atlantic.⁴⁵ General writs of assistance authorized customs officials to conduct wide-reaching exploratory searches of private homes, unconfined to any particular set of circumstances, for a virtually unlimited amount of time.⁴⁶ Thus, the Warrant Clause was crafted to interpose between government agents and private persons a neutral, judicial officer, to whom probable cause must be demonstrated before a search of a home or a seizure (arrest) takes place.⁴⁷

Today, the Fourth Amendment's protections extend to houses, cars, offices, phone booths, and just about anywhere that a person can subjectively expect to have privacy, as long as it is also a place, thing, or activity that society is prepared to recognize as private.⁴⁸ Today, the doctrine of Fourth Amendment searches regulates a vast array of police-citizen encounters including traffic stops and roadblocks;⁴⁹ searches of homes, offices, automobiles, prison cells,⁵⁰ and packages;⁵¹ body searches that are visual, hands on, and invasive;⁵² manual searches and technology-assisted searches;⁵³ bus searches;⁵⁴ and searches at the

41. *Id.*

42. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 992-93 (1999).

43. Silas L. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L. REV. 19, 81-81, 55 n.147 (1988).

44. NELSON BERNARD LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 20-22, 23 (1937).

45. *Id.* at 42-78.

46. *Id.* at 53.

47. *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963).

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

49. *See Delaware v. Prouse*, 440 U.S. 648 (1979); *City of Indianapolis v. Edmund*, 531 U.S. 32 (2000).

50. *See Lanza v. New York*, 370 U.S. 139 (1962).

51. *See Walter v. United States*, 447 U.S. 649 (1980).

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

53. *See Kyllo v. United States*, 533 U.S. 27 (2001); *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986); *California v. Ciraolo*, 476 U.S. 207 (1986).

54. *See Florida v. Bostick*, 501 U.S. 429 (1991).

border.⁵⁵

B. Fourth Amendment Application to Arrestees and Detainees

The *Florence* case represents a particular application of the Fourth Amendment to arrestees and detainees. This Fourth Amendment context has its own unique history; one that has been shaped by seismic shifts in the scope of prisoners' rights, perceptions of crisis, and notions about the appropriateness of categorical rules (in lieu of case-by-case determinations).

As late as 1871, prisoners were regarded as "slaves of the state."⁵⁶ Their rights were limited to that which the state—in its mercy and beneficence—chose to grant them. As felons, they were considered "civilly dead," and therefore excluded from the protections of the Bill of Rights.

The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. Such men have some rights, it is true, such as the law in its benignity accords to them, but not the rights of freemen. They are the *slaves of the State* undergoing punishment for heinous crimes committed against the laws of the land.⁵⁷

From Reconstruction through and beyond the turn of the 20th Century, federal courts refused to constitutionally review the mistreatment of prisoners and detainees by state law enforcement and corrections officials.⁵⁸ Congress passed the Ku Klux Klan Act in 1871,⁵⁹ and in doing so, created a procedural vehicle by which a person deprived of a constitutional right by persons acting "under color of state law," can bring an action against them in federal court.⁶⁰ Gradually, federal courts recognized that prisoners retained the protection of the Constitution even after they were convicted. Nevertheless, the courts did not see it as their role to intervene into the operation of state prisons, and to protect prisoners' rights, viewing it instead as a responsibility of the executive and legislative branches. This judicial refusal to engage

55. See *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

56. *Ruffin v. Commonwealth*, 62 Va. 790, *4 (Va. App. Div. 1871).

57. *Id.* (emphasis added).

58. Jack E. Call, *The Supreme Court and Prisoners' Rights*, 59 FED. PROBATION, 36, 36 (1995).

59. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1985(3) (2013)). The act is also known as the Civil Rights Act of 1871 (and codified at Title 42, Section 1983).

60. 42 U.S.C.A. § 1983 (West 2013).

the substantive claims of prisoners was known as the hands-off doctrine.⁶¹ In 1949, a federal court abstained from addressing prisoner complaints absent an allegation of serious bodily injury.⁶² Anything short of this extreme was considered by federal courts to constitute impermissible “co-administering” of state prisons.⁶³ Indeed, as late as 1951, a federal judge refused to intervene in the confinement of prisoners in an Alaska jail so overcrowded that forty prisoners occupied a mere twenty-seven square feet of space. Prisoners had to sleep in shifts because there was only one bunk for every two prisoners, no recreational facilities were provided, and the building was described by the judge as an aging “firetrap” lacking an emergency exit, adequate ventilation, bathing, and toileting facilities.⁶⁴

At this same time—during the hands-off period—ordinary individuals not in criminal custody were likewise deprived of Fourth Amendment protections due to courts’ reluctance to intervene in the affairs of state law enforcement officials. Not until *Wolf v. Colorado*⁶⁵ considered the constitutionality of Colorado courts, in a criminal trial, admitting evidence discovered during the course of an unlawful search, was the Fourth Amendment incorporated to the states through the Due Process Clause of the Fourteenth Amendment. Even then, when state police were found to have unlawfully trespassed and violated the Fourteenth Amendment, the remedy of exclusion was denied to criminal defendants until 1961 when the Supreme Court decided *Mapp v. Ohio*.⁶⁶

61. Note and Comment, *Beyond the Ken of the Courts: A Critique of the Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L. J. 506 (1963).

62. *Seigel v. Ragen*, 88 F. Supp. 996, 999 (N.D. Ill. 1949) (“[E]ven though it is determined that the acts of the defendants fall within the scope of the Civil Rights Act, it still remains to be seen whether the rights allegedly violated are within the purview of the Federal Constitutional protections. There is very little case authority in regard to the rights of inmates of a penitentiary. . .”).

63. *Id.* “This Court is prepared to protect State prisoners from death or serious bodily harm in the hands of prison authorities, but is not prepared to establish itself as a ‘co-administrator’ of State prisons along with the duly appointed State officials.”

64. *Ex Parte Pickens*, 101 F. Supp. 285 (Ala. Dist. Ct. 1951). US District Judge Dimond made the following comment in his opinion: “Altogether, the place is not fit for human habitation and to crowd into this room so many prisoners at once well justifies the comment of representatives of the health service of the Federal Government who referred to it as a ‘fabulous obscenity.’” *Id.* at 287.

65. 338 U.S. 25 (1949).

66. 367 U.S. 643 (1961). The *Mapp* Court overturned an Ohio Supreme Court ruling that had affirmed the conviction of a Dolly Mapp for possession of illicit pornography. The police found the illicit material by chance after conducting a broad, exploratory search of Mapp’s home for bomb-making supplies suspected to be possessed by a boarder in her home. This evidence was never discovered. Police initially asked Mapp for permission to search her home, but after she refused, they returned later brandishing a piece of paper they claimed to be a search warrant, but

The demise of the hands-off doctrine in both criminal investigations and incarceration came about at roughly contemporaneous moments. As judges became more aware of rampant police abuse of criminal suspects, much of which was racially motivated at the time, they came to see the application of Fourth Amendment standards to state criminal investigations as a necessary step to preserve the integrity of the judicial process. In holding that the federal exclusionary rule (excluding unlawfully seized evidence from the jury) must apply equally to state criminal investigations and trials, the majority in *Mapp* declared that:

[w]ere it otherwise, then just as without the [federal exclusionary] rule the assurance against unreasonable federal searches and seizures would be “a form of words,” valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the *freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court’s high regard as a freedom “implicit in the concept of ordered liberty.”*⁶⁷

The majority went on to say, “If the Government becomes a lawbreaker, it breeds contempt for law, it invites every man to become a law unto himself, and it invites anarchy.”⁶⁸

As applied to prisoner lawsuits, the hands-off doctrine precluded judges from determining what rights survived incarceration. This approach to prisoners’ claims of constitutional violations by prison officials was rejected by federal courts in the late 1960s and early 1970s, reflecting a historic transformation by the federal judiciary.⁶⁹ The

which could not be produced subsequently. The police refused to present the warrant to the woman or her attorney. After the woman successfully snatched it from one of the officers, she was handcuffed while the officers searched the home from top to bottom. The Supreme Court found that the police violated the Fourth Amendment in opening a suitcase in *Mapp*’s basement to discover the pornographic material. The Court declared the evidence inadmissible and overturned the conviction. Thereafter, local police were required to adhere to the constraints of the Fourth Amendment in conducting searches. *Id.*

67. *Id.* at 655 (emphasis added).

68. *Id.* at 659 (quoting *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting)).

69. Summarizing the brief, but steep, rise of prisoners’ rights in the United States, veteran corrections professional and university professor James E. Robertson explains that between 1967 and 1977, the federal judiciary abandoned the hands-off doctrine, and constitutionalized most aspects of incarceration, including classification of inmates, discipline, medical care, access to the courts, religious freedom, exercise, prison rules, treatment of pre-trial detainees, speech, search and seizure, food, shelter, clothing, sanitation, and general living conditions. For an overview of how this formed a broader “prisoners’ right movement” that profoundly affected prison routines and bureaucracies, see RONARD BERKMAN, *OPENING THE GATES: THE RISE OF THE PRISONERS’*

rejection of hands-off was made explicit in two U.S. Supreme Court cases, *Wolff v. McDonnell*⁷⁰ and *Procunier v. Martinez*.⁷¹ In *Wolff*, a Due Process case involving a prisoners' loss of good time credits, Justice White "sounded the death knell to the hands-off doctrine"⁷² in a single declaration: "[T]here is no iron curtain drawn between the Constitution and the prisons of this country."⁷³ In *Martinez*, Justice Powell put all doubts about the survival of the hands-off doctrine to rest when he proclaimed: "[A] policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."⁷⁴

The demise of the hands-off doctrine cleared the way for federal judges to define the parameters of prisoners' rights. As we shall see, while the courts greatly expanded and recognized prisoners' and detainees' rights in the 1970s, they soon began to restrict them severely in the 1980s to facilitate the War on Drugs. The case of Albert Florence graphically illustrates just how far courts, freed from the jurisdictional constraints of hands-off, would roll back the doctrine of Fourth Amendment searches, limit substantive protections of incarcerated persons, and effectively recreate the effects of the hands-off doctrine.

II. THE DECISION IN *FLORENCE V. THE BOARD OF CHOSEN FREEHOLDERS*

In a slim five-to-four majority,⁷⁵ the U.S. Supreme Court held on April 2, 2012, that a categorical strip search policy for all arrestees being "booked" into jails—irrespective of the seriousness of the charge, the suspiciousness of the arrestee, or accuracy of the database upon which jail officials rely—comports with the Fourth Amendment protections

MOVEMENT (1979); MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998); James B. Jacobs, *Prisoners' Rights Movement and Its Impacts, 1960-1980*, 2 CRIME & JUST. 460 (1980); Christopher E. Smith, *Black Muslims and the Development of Prisoners' Rights*, J. BLACK STUD. 24 (1993).

70. 418 U.S. 539 (1974).

71. 416 U.S. 396 (1974).

72. 1 MICHAEL B. MUSHLIN, THE RIGHTS OF PRISONERS 9 (4th ed. 2009). The demise of the hands-off doctrine and the beginning of prisoners' rights law.

73. *Wolff*, 418 U.S. at 555-56.

74. *Procunier*, 416 U.S. at 405-06.

75. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012). With Chief Justice Roberts and Justice Alito writing brief, but noteworthy, concurring opinions, and Justices Breyer, Sotomayor, Ginsburg and Kagan dissenting, Justice Kennedy's majority opinion represents the complete expression of only three justices.

enshrined in the U.S. Constitution.⁷⁶ Justice Kennedy wrote for the majority, relying heavily upon several Supreme Court cases that dramatically narrowed the scope of prisoners' rights in the late 1970s and 1980s.⁷⁷ Justice Kennedy framed the question at issue broadly by asking what limitations the Constitution imposes on searches of arrestees transferred into detention, and whether they can be subjected to a close visual body search while naked.⁷⁸ In prefacing his doctrinal analysis, Justice Kennedy emphasizes the Court's lack of expertise, as well as the absence of a record demonstrating that the categorical strip search policy employed by the detention facilities in Burlington and Essex Counties was either unnecessary or unjustified.⁷⁹

Justice Kennedy starts by introducing *Bell v. Wolfish*, a 1979 Supreme Court case that upheld the practice of conducting visual body cavity searches (the equivalent of the searches Albert Florence underwent) after contact visits in a federal detention facility, holding that such searches—conducted on “less than probable cause”—were constitutional because they were not “unreasonable” within the meaning of the Fourth Amendment.⁸⁰ The Court in *Bell* applied a “balancing test” that weighed the need for the searches against the gravity of the personal rights intruded upon by the search.⁸¹ Five justices determined that the Constitution condoned conducting visual body cavity searches in the federal jail on *less than probable cause*, while the remaining four justices would require a level of suspicion equivalent to that of a search warrant.⁸²

Next, Justice Kennedy introduces two cases, *Block v. Rutherford* and *Hudson v. Palmer*, to support the position that correctional officials can employ categorical rules to maintain institutional security.⁸³ *Block* was a 1984 Supreme Court case in which officials in the Los Angeles County Jail banned contact visits due to the threat they posed to security in the jail.⁸⁴ Justice Kennedy uses *Block* to establish that jail officials need not customize procedures designed to enhance security according to the risk posed by individual detainees, but may adopt a general ban.⁸⁵

76. *Id.*

77. *Id.* at 1513-23.

78. *Id.* at 1513.

79. *Id.* at 1513-14.

80. *Id.* at 1516. *See also* *Bell v. Wolfish*, 441 U.S. 520 (1979).

81. *Bell*, 441 U.S. at 573.

82. *See id.*

83. *Florence*, 132 S. Ct. at 1516.

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

85. *Florence*, 132 S. Ct. at 1516.

Hudson was a 1984 Supreme Court case in which prison officials categorically searched inmates' cells in the absence of individualized suspicion of concealing contraband.⁸⁶ Justice Kennedy draws from each of these cases the principle that carceral officials are not required to fashion policies that distinguish high risk and low risk offenders when protecting institutional security.⁸⁷

Justice Kennedy moves on to expand the scope of this principle to arrestees, people who are not in jail or prison, but whose liberty is nevertheless limited by virtue of criminal suspicion. He considered the case of *Atwater v. Lago Vista*, a criminal seizure (arrest) case known for the principle that that law enforcement officers "in the field" are given great latitude in deciding whether or not to arrest a suspect, even when the offense committed is only punishable by a fine.⁸⁸ In that case, the reasonableness of Gail Atwater's arrest under the Fourth Amendment, declared Justice Souter, was best determined by an easily administered, bright-line rule that did not require law enforcement officers in the field to make case-by-case determinations about whether the offense for which they are arresting the person would result in jail time, or there was a compelling need for detention.⁸⁹ *Atwater* established that in striking the proper Fourth Amendment balance between the need for the seizure and the intrusion upon the individual's personal rights, the application of a categorical "bright line" rule is reasonable and therefore constitutional.

The issue of Fourth Amendment limits on the lawfulness of invasive searches of non-criminal arrestees when they are "booked" into a jail is not addressed by *Atwater*. Nevertheless, with the categorical approach of *Atwater* (with regard to an officer's decision, in the field, to arrest or not) firmly established, Justice Kennedy goes on in *Florence* to consider the decision of correctional officials whether or not to conduct an invasive bodily search upon an arrestee being admitted into a jail absent evidence that he or she may be in possession of contraband.

Justice Kennedy frames the question in the case as follows: can security imperatives in a jail override the assertion that some detainees must be exempt from invasive search procedures absent reasonable suspicion that a detainee is harboring contraband?⁹⁰ He adds weight to the security side of the equation and sets the bar high for detainees by reminding us that the Court must defer to jail officials unless there is

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

87. *Florence*, 132 S. Ct. at 1516.

88. 532 U.S. 318 (2001).

89. *Id.*

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

“substantial evidence” their response to the situation is “exaggerated.”⁹¹

With the question so framed, Justice Kennedy describes and cites a host of medical, statistical, correctional, and other sources cited in the fourteen amicus briefs in support of the respondents (Burlington and Essex Counties) to establish the weight of the state’s interest in preventing contraband from coming into jails, the appropriateness of deferring to the judgments of jail officials with regard to how best to do accomplish this goal, and to demonstrate that the practice of conducting strip searches on arrestees being admitted into Burlington and Essex County Jails without regard to the nature of the offense prompting the arrest is rational and not an “exaggerated” response to security concerns.⁹²

Next, Justice Kennedy elaborates upon a whole host of external threats to safety and security that plague contemporary jails and detention centers. Kennedy recites a litany of risks that the admission of new inmates poses to jail staff, existing detainees, and the new detainee. These risks include everything from the menacing to the mundane: the introduction of lice and contagious infections; contraband weapons and drugs; wounds or other injuries requiring immediate medical attention; admission of gang members and the propensity for violence rival gang affiliations cause; and everyday items such as lighters, matches, cell phones, and common medications, as well as chewing gum, hairpins, and wigs.⁹³ According to Kennedy, the introduction of any unauthorized item that is scarce in jails puts an entire jail at risk because it will be prized in the underground economy and spark predation and violence.⁹⁴ Writes Kennedy: “Correctional officials inform us ‘[t]he competition . . . for such goods begets violence, extortion, and disorder.’”⁹⁵

The heightened risk that these objects, menacing or mundane, might be introduced into a jail by an arrestee acting willfully, or coerced by others, justifies, in Kennedy’s mind, intrusive searches of detainees without regard to the nature or seriousness of the offense charged.

91. *Id.* at 1518 (citing *Block v. Rutherford*, 468 U.S. 576, 584-585 (1984)).

92. *Id.* 1518-23. The Court in *Turner v. Salfey* identified four factors to consider to determine the reasonableness of the regulation at issue: (1) Whether there is a valid, rational connection between the regulation and governmental interest put forward to justify it; (2) Whether there are alternative means to exercising the right that remain open to prison inmates; (3) What impact with the accommodation of the asserted right have on other inmates, and the allocation of prison resources generally; (4) Whether there is an absence of other alternatives, which is evidence that the regulation is reasonable. *Turner v. Salfey*, 482 U.S. 78, 89-91 (1987).

93. *Id.* at 1518-19.

94. *Id.* at 1519.

95. *Id.*

Justice Kennedy cites examples of police intercepting notorious criminals in traffic stops as evidence that individuals detained by law enforcement officers for minor offenses can be “the most devious and dangerous criminals.”⁹⁶

Timothy McVeigh was stopped by a state trooper who noticed he was driving without a license plate. Police stopped serial killer Joel Rifkin for the same reason. One of the terrorists involved in the September 11 attacks was stopped and ticketed for speeding just two days before hijacking Flight 93. Reasonable correctional officials could conclude these uncertainties mean they must conduct the same thorough search of everyone who will be admitted to their facilities.⁹⁷

The separate concurring opinions written by Justices Roberts and Alito and the dissenting opinion of Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, demonstrate the polarization of the justices’ interpretations of the Fourth Amendment’s proscription of unreasonable searches in the context of intrusive and humiliating strip searches of arrestees. The two concurring justices, Roberts and Alito, are most discomfited by the application of a categorical rule. Justice Roberts’ concurrence carves out an exception to the categorical rule adopted by the majority when the facts are friendlier to the arrestee.⁹⁸ In other words, if Florence were arrested for a minor traffic offense (not an outstanding arrest warrant) or if Florence was detained away from the general population of the jail (instead of being “booked” into the general population), Roberts would oppose the application of a categorical rule. He admonishes the court to “leave open the possibility of exceptions, to ensure that we ‘not embarrass the future.’”⁹⁹

Justice Alito similarly concurs with a caveat that demonstrates his discomfort with a categorical rule. He understands the lead opinion to reserve judgment on the blanket reasonableness of a full strip search of an arrestee when his detention has not been reviewed by a judicial officer and he can be detained apart from the general population.¹⁰⁰ Justice Alito is concerned that persons arrested for minor offenses will be traumatized by full strip searches. Most persons arrested for minor offenses are not dangerous and will be released as soon as they appear before a magistrate, many will have the charges dropped, and only a few

96. *Id.* at 1520.

97. *Id.* (citations omitted).

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

99. *Id.* (Roberts, C.J., concurring) (quoting Justice Frankfurter in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 300 (1944)).

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

will be sentenced to incarceration.¹⁰¹ “For these persons,” Alito contends, “admission to the general jail population, with the concomitant humiliation of a strip search, may not be reasonable”¹⁰²

Finally, dissenting Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, takes the position of the majority of the Circuit Courts of Appeal, that the invasion of privacy occasioned by strip-searching arrestees for minor offenses is not reasonable in the absence of reasonable suspicion.¹⁰³ He begins by identifying the applicable standard as the *Bell v. Wolfish* “balancing test,” a test of reasonableness that, in the words of the *Bell* Court, “is not capable of precise definition or mechanical application.”¹⁰⁴ The *Bell* “balancing test” considers the scope of the intrusion into the personal privacy of the person being searched, and “balances” it against the stated justification for the intrusion, taking into account the manner and place in which the search is conducted.¹⁰⁵

After setting forth the applicable test, Justice Breyer goes on to consider the nature of the intrusion entailed by strip searches. He characterizes such searches as “serious invasion[s] of privacy” that are inherently “harmful, humiliating, and degrading,”¹⁰⁶ even when they are carried out by guards in a respectful, touchless manner. In contrast to the litany of dangers Justice Kennedy recounts while drawing on the briefs of *amici curiae* for the respondent county jails, Justice Breyer describes the variety of arrestees subjected to visual strip searches named in the briefs of *amici curiae* for the petitioner, *Florence*. They include a nun arrested for trespassing in an anti-war demonstration, women strip-searched while menstruating, victims of sexual violence, and others detained for infractions as minor as driving with a noisy muffler, failing to use a turn signal, and riding a bicycle without an audible bell.¹⁰⁷

After describing the intrusion on the arrestee’s privacy, Justice Breyer considers the justifications given by prison officials for strip

101. *Id.*

102. *Id.*

103. “In my view, such a search of an individual arrested for a minor offense that does not involve drugs or violence—say a traffic offense, a regulatory offense, an essentially civil matter, or any other such misdemeanor—is an ‘unreasonable search[h]’ forbidden by the Fourth Amendment, unless prison authorities have reasonable suspicion to believe that the individual possesses drugs or other contraband.” *Id.* at 1525 (Breyer, J., dissenting).

104. *Id.* at 1526.

105. *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

106. *Id.*

107. *Id.* at 1527.

searches—detecting diseases that may spread within close confinement, identifying gang members to avoid violence, and intercepting contraband—and finds “no convincing reason why, absent reasonable suspicion, involuntary strip searches of those arrested for minor offenses are necessary in order to further the penal interests” proffered.¹⁰⁸

In striking the balance in favor of requiring jail authorities to justify the necessity of these strip searches, Breyer emphasizes the lack of empirical evidence that visual strip searches—particularly the most degrading elements, i.e. lifting genitals for visual inspection and “squat and cough” for anal inspection—have any rational connection to health or gang affiliations, disease, or contraband.¹⁰⁹ And with regard to detecting contraband, Breyer cites empirical studies demonstrating that strip searches are generally unreliable in revealing contraband, and generally less effective than pat frisks.¹¹⁰ Adding the weight of the “best practices” of standard-bearing organizations such as the American Correctional Association (that promulgated a standard forbidding suspicionless strip searches) and the Justice Department’s National Institute of Corrections (whose standard desk reference for sound correctional practices advises against suspicionless strip-searches), Breyer sides with the seven Courts of Appeal that have considered the issue and interpreted the Fourth Amendment as requiring jail officials to have reasonable suspicion that an arrestee is concealing weapons or contraband before strip searching him or her.¹¹¹

The announcement of the Florence decision immediately elicited polarized responses from law enforcement, urban communities of color, and civil rights-civil liberties advocates. The *Times of Trenton* called the Supreme Court’s interpretation of the Constitution “outrageous,” and characterized the opinion as a “disgrace.”¹¹² Reporting for the *Washington Post*, Richard Cohen criticized the Supreme Court for going

108. *Id.* at 1528.

109. “[T]here is no connection between the genital lift and the ‘squat and cough’ that Florence was allegedly subjected to and health or gang concerns,” urged Breyer, citing the Brief for Academics on Gang Behavior as *Amici Curiae* and the Brief for Medical Society of New Jersey et al. as *Amici Curiae*. *Id.* at 1528.

110. *Id.* at 1528-29.

111. *Id.* at 1529-30. *Roberts v. Rhode Island*, 239 F.3d 107, 112-13 (1st Cir. 2001); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981); *Stewart v. Lubbock Cty., Tex.*, 767 F.2d 153, 156-57 (5th Cir. 1985); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983); *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985); *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984).

112. *Editorial: U.S. Supreme Court strip-search ruling is a disgrace*, THE TIMES OF TRENTON (Apr. 10, 2012, 7:09 AM), http://www.nj.com/times-opinion/index.ssf/2012/04/editorial_us_supreme_court_str.html.

“so far over the line of common sense that the majority looks both foolish and vindictive” in offering a ruling Cohen describes as “inane.”¹¹³ In response to the decision, the ACLU of New Mexico sent letters to county jails throughout the state interpreting the state constitution as requiring reasonable suspicion before an arrestee being admitting into a jail can be searched and urging the jails to disregard the Court’s ruling in *Florence*.¹¹⁴ In sharp contrast to uniformly scathing responses by the press and civil liberties advocates, *Law Enforcement Today*’s corrections expert Peter Curcio hailed the *Florence* decision as a “major win for correctional staff nationwide”¹¹⁵ because jails across the country could now pursue blanket strip searches of all detainees without fear of costly litigation due to vague or ill-defined legal standards.

III. THE IMPORTANT CASES IN *FLORENCE*

It is important to look closely at Justice Kennedy’s use of several of the key cases in his opinion to discern the Court’s rationale and appreciate the legal maneuvers Justice Kennedy makes in arguing against the weight of both judicial precedent and correctional best practices. Kennedy cites four cases in particular, selectively drawing from them to craft a bright line rule supporting the use of categorical strip searches. The cases are: *Bell v. Wolfish* (1979), *Hudson v. Palmer* (1984), *Turner v. Safley* (1987), and *Atwater v. Lago Vista* (2001).

A. *Bell v. Wolfish*

Since the late 1970s, the Court decided several Fourth Amendment cases concerning prisons that featured prominently in the *Florence* decision. In *Bell v. Wolfish*, the Court addressed the issue of strip searches in a correctional setting.¹¹⁶ The case considered a host of complaints about the conditions in the Metropolitan Correctional Center (“MCC”), a federal jail in New York City designed primarily to house pretrial detainees.¹¹⁷ The MCC opened in 1975, but as was typical after states enacted harsh, sweeping sentencing reforms (in this case,

113. Richard Cohen, *In strip-search case, the Supreme Court shows a lack of common sense*, WASH. POST, Apr. 3, 2011.

114. Micah McCoy, *ACLU Warns NM Jails Against Routine Strip Searches*, ACLU OF NM (May 8, 2012), <http://www.aclu-nm.org/aclu-warns-nm-jails-against-routine-strip-searches/2012/05/>.

115. Peter Curcio, *Major Win for Corrections*, LAW ENFORCEMENT TODAY (May 12, 2012), <http://lawenforcementtoday.com/2012/05/12/major-win-for-corrections/>.

116. 441 U.S. 520 (1979).

117. *Id.* at 523.

mandatory minimum sentences under the Rockefeller Drug Laws, enacted in 1973),¹¹⁸ the facility was outdated and insufficient in short order. While the building was under construction, the number of persons going into pre-trial detention skyrocketed, and the design capacity of the facility was exceeded shortly after it opened.¹¹⁹ In response, the Bureau of Prisons began double-bunking the population, accommodating detainees on cots in common areas, and initiated draconian security measures to cope with the security concerns that attend overcrowding, including subjecting detainees to body-cavity searches after contact visitation.¹²⁰ After considering “a veritable potpourri of complaints that implicated virtually every facet of the institution’s conditions and practices,”¹²¹ the Court upheld the practice of conducting visual body cavity searches (the equivalent of the searches Albert Florence underwent) after contact visits, holding that such searches—conducted on “less than probable cause”—were constitutional because they were not “unreasonable” within the meaning of the Fourth Amendment.¹²² In determining whether the practice was reasonable, the Court balanced the jail’s need for the search against the invasion of personal rights attending it.¹²³ On the jail’s side of the balance sheet, Justice Rehnquist cited unique security dangers such as the smuggling of money, drugs, weapons, and other contraband, and on the detainee’s side, the interests involved were personal privacy and protection from abusive searches.¹²⁴

Ultimately, on the visual body cavity search issue, five justices determined that the Constitution condoned conducting them on *less than probable cause*,¹²⁵ while the remaining four justices required a level of suspicion equivalent to that of a search warrant.¹²⁶ The *Bell* Court’s precise language demonstrates the narrowness of the holding:

The [visual body cavity] searches must be conducted in a reasonable manner. But we deal here with the question whether visual body-cavity inspections as contemplated by the MCC rules can ever be

118. The Rockefeller Drug Laws require judges to give mandatory minimum sentences based on the type or amount of the drug sold or possessed. See N.Y. PENAL LAW § 220 (McKinney 2012).

119. *Bell*, 441 U.S. at 524.

120. *Id.* at 525-26, 530.

121. *Id.* at 527.

122. *Id.* at 557.

123. *Id.* at 569-70.

124. *Id.* at 556-57.

125. *Id.* 520-63.

126. *Id.* at 563 (Powell, J., concurring in part and dissenting in part); *Id.* at 563-579 (Marshall, J., dissenting); *Id.* at 579-99 (Stevens, J. & Brennan, J., dissenting).

conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can.¹²⁷

There are several problems with Justice Kennedy's reliance upon the *Bell* precedent, both doctrinal and factual. First, *Bell* concerned prisoners held under a court order in a federal detention center.¹²⁸ It did not concern the average citizen just taken off the streets prior to being seen by a judge, as was the case for Albert Florence. *Bell* held only that the type of search Albert Florence underwent could be conducted constitutionally on less than probable cause. *Bell* held that a visual body cavity inspection on this basis was "reasonable," and therefore did not violate the Reasonableness Clause of the Fourth Amendment.¹²⁹ Significantly, *Bell* did not consider a categorical policy of strip-searching in the absence of any level of suspicion on the part of correctional staff. Second, *Bell* only addressed the use of close visual inspection of naked detainees after contact visitation with visitors.¹³⁰ Such visits are commonly known by prison officials to be one of the most likely vectors of contraband into prisons and jails. Notwithstanding the degrading nature of such searches by prison guards under *any* circumstances, the detainees in *Bell* could avoid the violation of their bodily privacy either by refusing visits altogether or electing to have non-contact visits. Arrestees being admitted to the Burlington and Essex County detention facilities could not "opt out" of being strip-searched. Third, the strip searches the Supreme Court considered in *Bell* were conducted under policies explicitly authorized by the Bureau of Prisons, the supervising agency.¹³¹ In contrast, the officials who strip-searched Albert Florence did so in violation of New Jersey State Law and the procedural rules of the two jails. Fourth, the *Bell* decision occurred at a time of profound crisis in jails and prisons, when these institutions were inundated with new commitments that severely taxed resources. Search policies like the one addressed in *Bell* were a direct product of this moment rather than a timeless standard of jail management.

Bell established that a reasonable search within the meaning of the Fourth Amendment strikes a balance between the government's need for

127. *Id.* at 560 (majority opinion) (citation omitted).

128. *Id.* at 520.

129. *Id.* at 559-60.

130. *Id.* at 528.

131. *Id.* at 525-26, 558.

the search and the individual's right of privacy.¹³² To strike a "balance" in favor of a categorical rule all but eviscerates the weight of the interests on one side of the scale. Justice Kennedy justifies a "balance" in favor of a categorical rule by stressing the importance of eliminating all exceptions to the rule. He cites a well-known criminal procedure case, *Atwater v. Lago Vista* (described below), that affords great latitude to law enforcement officers "in the field" to arrest a suspect on a non-jailable offense.

B. Hudson v. Palmer

Five years after the *Bell v. Wolfish* decision, the Court moved more clearly in the direction of establishing categorical rules concerning the application of the Fourth Amendment to prison settings. In *Hudson v. Palmer*, the Court addressed the issue of whether correctional officials could lawfully conduct a random, suspicionless "shakedown" search of an inmate's cell without violating the Fourth Amendment.¹³³ A divided (five-to-four) Court found that a prison cell bears none of the characteristics of a home and that inmates had "no legitimate expectation of privacy in their individual cells."¹³⁴ As such, the Fourth Amendment's protection of the individual against "unreasonable" governmental searches does not apply to a prison cell.¹³⁵ The *Hudson* Court "balanced" the interests of the government against those of the individual prisoner and found that a categorical rule struck the proper balance.¹³⁶ When addressing the potential for abuse that a blanket suspicionless search policy may invite, the *Hudson* Court briefly acknowledged the danger of such searches being used to harass prisoners,¹³⁷ and in the next breath extolled their effectiveness on the same basis—correctional officers may conduct them at will, and without

132. The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *Id.* at 559.

133. 468 U.S. 517 (1984).

134. *Id.* at 523.

135. "[W]e hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." *Id.* at 525-26.

136. *Id.* at 527.

137. "Of course, there is a risk of maliciously motivated searches, and of course, intentional harassment of even the most hardened criminals cannot be tolerated by a civilized society." *Id.* at 528.

justification: “The uncertainty that attends random searches of cells renders these searches perhaps the most effective weapon of the prison administrator in the constant fight against the proliferation of knives and guns, illicit drugs, and other contraband.”¹³⁸ In other words, the Court argued that the expectation of random searches provided an additional deterrent to contraband trafficking. While the ruling notably did not extend to bodily searches, it nevertheless established that “the prisoner’s expectation of privacy always yield[s] to what must be considered the paramount interest in institutional security.”¹³⁹

While adopting *Hudson*’s categorical approach to prisoners’ cell shakedowns, Justice Kennedy ignores the fact that *Hudson* failed to apply a categorical approach to searches of prisoners’ bodies. Again, Kennedy is using case law that addressed a much different situation. *Hudson* considered convicted felons serving sentences in a maximum-security state prison, but Kennedy cites it as a precedent for a county jail and an unconvicted citizen arrested on an invalid bench warrant. The *Hudson* Court reached only the constitutionality of the cell search at issue and the attending destruction of a prisoner’s personal effects that occurred. It left unaddressed the question of a prisoners’ bodily privacy.

C. *Turner v. Safley*

A 1987 decision, *Turner v. Safley*, profoundly altered the trajectory of prisoners’ rights by granting greater deference to prison officials when prison policies or practices impinge on prisoners’ constitutional rights.¹⁴⁰ In deciding a rather narrow question concerning whether inmates in Missouri prisons could exchange letters with each other and whether they could marry without the approval of prison authorities, the Court crafted a four-factor test to ascertain the reasonableness of prison regulations. This four-factor test has subsequently influenced numerous court decisions at the federal and state level concerning the constitutionality of prison regulations and policies. The first factor requires prison officials to specify “a valid, rational connection” between the restrictions in question and penological objectives, such as security

138. *Id.*

139. *Id.* at 528.

140. 482 U.S. 78 (1987). For an critical assessments of the impact of the *Turner* decision, see MUSHLIN, *supra* note 72; James E. Robertson, *The Rehnquist Court and the “Turnerization” of Prisoners’ Rights*, 10 N.Y. CITY L. REV. 97 (2006); Trevor N. McFadden, Note, *When to Turn to Turner?: The Supreme Court’s Schizophrenic Prison Jurisprudence*, 22 J. L. & POL. 135 (2006); Cheryl Dunn Giles, *Turner v. Safley and Its Progeny: A Gradual Retreat to the “Hands-Off” Doctrine*, 35 ARIZ. L. REV. 219 (1993).

or rehabilitation.¹⁴¹ The second seeks to ascertain if there are alternative means that an inmate could exercise the specific right.¹⁴² The third factor considers how the exercise of the right would affect prison staff, other inmates, and other aspects of prison operations.¹⁴³ The final factor asks whether prison officials have alternative means of achieving their objectives.¹⁴⁴

While the *Turner* Court laid out these factors in detail, they failed to provide guidance on how to weigh each factor or how to resolve situations where the answers to each factor contradict one another.¹⁴⁵ As Michael Mushlin has observed, in applying the *Turner* standard, “the Court eschews a strict scrutiny analysis, which is normally called for when the state impinges on fundamental constitutional rights of citizens, when the rights of prisoners are involved.”¹⁴⁶ Rather, the four-factor reasonability test limits the normal standard because, as the *Turner* opinion states:

Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decision-making process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem.¹⁴⁷

Turner contemplates a kind of deference that prioritizes the judgments and expertise of corrections officials. It is ironic, then, that in Albert Florence’s case the expertise and judgment jail officials might have used was subordinated to information contained in a database. *Turner* has been widely criticized as a return to the hands-off doctrine.¹⁴⁸

D. *Atwater v. Lago Vista*

Justice Kennedy also based his willingness to defer to prison authorities in their treatment of Albert Florence on a well-known

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

142. *Id.* at 90.

143. *Id.*

144. *Id.*

145. MUSHLIN, *supra* note 72, at 46.

146. *Id.*

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

148. *See supra*, note 140.

criminal procedure case, *Atwater v. Lago Vista*. *Atwater* stands for the proposition that law enforcement officers “in the field” are afforded great latitude to arrest a suspect on a non-jailable offense (e.g., a mere civil violation, or a fine-only criminal offense).¹⁴⁹ The question in the case was whether the Fourth Amendment restricts police officers from conducting a warrantless arrest for a minor criminal offense that is punishable by a fine only.¹⁵⁰ *Atwater* concerned a driver who was arrested for a non-jailable, misdemeanor seatbelt violation, and who contested her arrest as an unlawful seizure under the Fourth Amendment. The reasonableness of *Atwater*’s arrest under the Fourth Amendment, declared Justice Souter writing for the five justices in the majority, was best determined by an easily administered, “bright line” rule (rather than a balancing test) that did not require law enforcement officers in the field to make case-by-case determinations about whether the offense for which they are arresting the person would result in jail time, or whether there was a compelling need for detention.¹⁵¹

There are several points to be gleaned from Kennedy’s use of these particular cases as precedents. First, there is little discussion of harm done to Albert Florence in the case at hand, although there is plenty of discussion of citizen, detainee, and prisoner rights in the cases cited. Second, while these cases refer to the standards employed by the various agencies involved, Kennedy ignores the American Correctional Association “best practices,” the National Institute of Corrections desk reference standards, and the discussion of standards in cases by the seven Federal Circuit Courts of Appeal that decided this issue differently. Deference to administrators and corrections professionals, the keystone of *Turner*, is decisive only as long as Kennedy agrees with their conclusions. Otherwise, their expertise is disregarded. Third, Kennedy has chosen cases that lean toward greater deference to correctional authorities and law enforcement officers, reinforcing the trend of the last few decades of the War on Drugs to allow correctional officials, not courts, to set standards for the what is reasonable in the prison and jail setting, and heading back toward the hands-off era. Finally, the Court has specifically chosen to use doctrine and specific cases that do not match the situation of Florence. Florence involves the arrest of a citizen taken to jail on what later turns out to be an invalid bench warrant. In this case, the Court allows full-blown convicted felon,

149. 532 U.S. 318 (2001).

150. *Id.* at 323.

151. *Id.* at 345.

maximum security thinking to apply. None of the cases really address Florence's situation. *Bell* dealt with a federal detention center with inmates held over by the court. Both *Hudson* and *Turner* took place in a state prison with convicted felon. The situation in *Atwater* involved an arrestee and car search.

IV. ANALYSIS

Florence is a case marked by unsatisfactory solutions. Justice Kennedy's response to a multi-faceted situation with many significant interests involved is to impose a categorical rule that defers to the judgments of jail officials and prioritizes their interests. This way of reading the situation fails to consider other valid frames. This decision has several problematic aspects to it, four of which will be discussed in this section—the Information Age, race, “bright lines,” and fear-mongering.

First, the *Florence* decision fails to see Albert Florence's wrongful arrest and detention (as well as the attending strip search and denial of Due Process) as a problem of the Information Age for law enforcement and society. The facts of the *Florence* case demonstrate that inaccuracies in criminal databases can result in harsh consequences. Although apparently lost upon Justice Kennedy in his eagerness to defer to the expertise of law enforcement and jail officials in the *Florence* case, these officials cede their expertise to a computer. In doing so, they cease to exercise the unique expertise, experience and judgment that forms the underlying rationale for letting these officials, rather than judges, determine the parameters of what is reasonable.

A. *Problem of the Information Age*

“Misinformation has a way of fouling up people's lives, especially when the party with the inaccurate information has an advantage in power and authority.”

— Richard O. Mason, “Four Ethical Issues of the Information Age”¹⁵²

The avoidable humiliation to which Albert Florence was subjected underscores a growing problem of the Information Age—overreliance upon computer databases for accurate information about a person's criminal status. The event that triggered Florence's arrest was a “hit” on

152. Richard O. Mason, *Four Ethical Issues of the Information Age*, MGMT. INFO. SYS. Q., Mar. 1986, at 5, 7, available at <http://www.gdrc.org/info-design/4-ethics.html>.

a statewide computer database that inaccurately reflected an outstanding bench warrant. Had the information in the database been accurate, Mrs. Florence might have received a citation for speeding, but Albert Florence would never have been arrested, booked into the Burlington County Jail, and made to stand naked in front of a jail official while being inspected at close range. But for that county's failure to bring Florence before a magistrate within the prescribed seventy-two hours, Florence might not have undergone a second strip search upon his transfer to the Essex County Correctional Facility.

As information has become more accessible on the Internet and across information systems, law enforcement officers have moved from investigating a suspect's background on the scene through radio contact with a dispatcher (at most), to accessing information about suspects through a whole range of new technology options, including pulling up information about suspects using on-board computers in their patrol cars. The latter takes one-third of the time.¹⁵³ The premise behind having computer databases accessible from a squad car is that law enforcement officers can take precautions to protect themselves and the public based upon the information they have access to on-site and investigate crime more efficiently because the technology makes them more aware of crimes that may be afoot. However, this enhanced efficiency and greater security is predicated upon the accuracy of the information being conveyed to police officers.

Police are accessing information from a multitude of sources, relying on databases to provide an accurate assessment of the risk that a particular individual encountered on the road or on the street is dangerous. Currently, police receive information from more databases than ever. For example, law enforcement officers now standardly use a broad range of technologies in street encounters with the public as well as in police investigations, including the National Crime Information Center ("NCIC") computerized database,¹⁵⁴ Automatic License Plate

153. *Crime Fighting Computers*, TECH CONNECTION ONLINE: TECH. FOUND., http://www.glencoe.com/sec/computered/techconnect/student/pdfs/TechFoundations_11.pdf (last visited Dec. 28, 2012).

154. The National Crime Information Center maintains a massive database of information about crimes and criminal offenders. In 2009, NCIC contained more than 15 million active records. Local, state and federal criminal justice agencies enter records in the NCIC and those records are categorized and shared nationwide. The NCIC database consists of nineteen files: seven property files containing records of stolen articles, boats, guns, license plates, parts, securities, and vehicles; and twelve persons files containing the Supervised Release; National Sex Offender Registry; Foreign Fugitive; Immigration Violator; Missing Person; Protection Order; Unidentified Person; U.S. Secret Service Protective; Gang; Known or Appropriately Suspected Terrorist; Wanted Person; and Identity Theft Files. The system also contains images that can be associated with NCIC records

Recognition Technology,¹⁵⁵ Law Enforcement Automated Data Services,¹⁵⁶ and the CLEAR database.¹⁵⁷

Law enforcement field officers receive information from the NCIC that is both criminal and civil in nature. Since August 2003, the NCIC database has reported civil immigration violations.¹⁵⁸ These violations result from actions like overstaying a visa or failing to leave the United States after being ordered removed. Under the Secure Communities federal immigration enforcement program, local law enforcement officials booking any individual into a jail are required to conduct a fingerprint check of all immigration databases in order to identify all non-U.S. citizens and all civil immigration offenders and report their presence in the jail to ICE.¹⁵⁹

As police get more information from computer databases, the risk of error becomes more significant. The FBI cautions local law enforcement officials not to rely on the data contained in the NCIC alone as a basis for action (e.g. arrest or detention), but to make contact with the entering agency to verify the information is accurate and up-to-date.¹⁶⁰ Once the record is confirmed, the inquiring agency may take action to arrest a fugitive, return a missing person, charge a subject with

to help agencies identify people and property items. The Interstate Identification Index, which contains automated criminal history record information, is accessible through the same network as NCIC. *National Crime Information Center*, FBI, <http://www.fbi.gov/about-us/cjis/ncic> (last visited Dec. 28, 2012). On a single day in 2009, NCIC processed more than 7.9 million transactions. *Id.*

155. ALPRT is an integrated camera-database technology captures images of license plates while the squad car is moving or stationary, and processes the numbers and letters using optical character recognition software, comparing them against a known database. Suspected “hits” are relayed to police officers either visually or verbally. Paul D. Schultz, *The Future is Here: Technology in Police Departments*, LXXV THE POLICE CHIEF 6 (June 2008), available at http://www.policechiefmagazine.org/magazine/index.cfm?article_id=1527&fuseaction=display&issue_id=62008.

156. Most local law enforcement officers have on-board computer access or smartphone/tablet access to a LEADS (Law Enforcement Agencies Data System) database that consolidates information on crimes and criminal suspects across the state’s law enforcement agencies.

157. CLEAR stands for Citizen Law Enforcement Analysis and Reporting. By 2007, the CLEAR database was used by 411 police departments in Illinois, Indiana and Wisconsin. It contains millions of incident reports and other information that officers can query using wireless, touchscreen notebooks in their cars. The data allows officers to instantly check suspects against the database of fugitives, parolees, and offenders who are wanted on warrants. *Citizen Law Enforcement Analysis and Reporting (CLEAR)*, HARVARD KENNEDY SCHOOL (2012), <http://www.innovations.harvard.edu/awards.html?id=85381>.

158. Maria Fernando Parra-Chico, *An Up-Close Perspective: The Enforcement of Federal Immigration Laws by State and Local Police*, 7 SEATTLE J. FOR SOC. JUST. 321, 328 (2008).

159. Rachel Zoghlin, *Insecure Communities: How Increased Localization of Immigrant Enforcement Under President Obama Through the Secure Communities Program Makes us Less Safe, and May Violate the Constitution*, 6 MOD. AM. 20, 21 (2010).

160. *National Crime Information Center*, *supra* note 154.

violation of a protection order, or recover stolen property. Albert Florence urged the New Jersey State Trooper who stopped his car, as well as the Burlington County Jail officials, to do exactly what the FBI recommends. He urged them to verify the accuracy of their records with the Essex County Police Department, the agency to whom he paid the fine. It was their refusal to follow the FBI's suggestion that lead to Florence's arrest, booking, and strip search humiliation.

A study of local police enforcement of federal immigration law demonstrates the danger of overreliance on information from a computer database. In 2005, researchers found that forty-two percent of all NCIC immigration hits in response to a police query were "false positives."¹⁶¹ Yet once the data is in the database, responsibility for inaccuracies is diffuse. Police officers are not required to independently investigate the validity of a facially valid arrest warrant, even when the arrestee informs the officer that the warrant is erroneous.¹⁶² This is so even if the arrest is made pursuant to a bench warrant that was invalid at the time of arrest.¹⁶³ The state trooper who disregarded Florence's entreaties, and reasonably relied upon the information contained in the New Jersey law enforcement database, is considered not to have violated the Due Process Clause or the Fourth Amendment, and, as such, is entitled to qualified immunity in any civil rights action Florence might bring for false arrest.¹⁶⁴ And we 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. The number of names on the Terrorist Watchlist has grown steeply in the past decade, compounding the problem of inaccuracies. Whereas 288,000 names were on the list in 2005, the number had grown to 1.1

161. HANNAH GLADSTEIN ET AL, MIGRATION POLICY INST., *BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE* 12 (2005).

162. *Mann v. Hamilton*, No. 90-3377, 1991 WL 87586, at *2 (N.J. Dist. Ct. May 20, 1991) (holding that a police officer who executes a facially valid arrest warrant does not have a "duty under the fourth amendment to investigate the validity of the warrant upon a protest by the arrestee that the warrant is invalid.").

163. *Mitchell v. Aulis*, 872 F.2d 577, 579 (4th Cir. 1989) (granting summary judgment for deputy sheriffs on civil rights claim where they made arrest pursuant to bench warrant that had been recalled, even though plaintiff informed them of status).

164. *Capone v. Marinelli*, 868 F.2d 102, 105-06 (3d Cir. 1989) (holding police officer who reasonably relied upon facially valid written bulletin indicating warrant for arrest existed was entitled to qualified immunity in civil rights action for unlawful arrest). The court must determine, as a matter of law, whether a defendant's "belief that a warrant or probable cause existed was reasonable." *Sharrar v. Felsing*, 128 F.3d 810, 828 (3d Cir. 1997) (citing *Rogers v. Powell*, 120 F.3d 446, 455-57 (3d Cir. 1997)). To make this determination, the court must examine the information possessed by the defendants when they relied on the warrant. *Rogers*, 120 F.3d at 455.

million by 2009.¹⁶⁵ A Justice Department audit of the watch list in 2009 revealed a thirty-five percent rate of error, and disclosed that in seventy-two percent of the cases, the FBI failed to respond to these errors by removing the person from the watch list in a timely manner.¹⁶⁶

B. Strip Searches: The “Auction Block” of the New Jim Crow

The spectrum of risks and dangers Albert Florence’s custodial arrest raises for at least three of the nine justices, and the priority those potential harms are accorded in the parsing of individual rights and institutional interests, represent one view of the facts. Another equally compelling view would shift the scales in another direction. This other compelling tale is one familiar to African Americans who have experienced traffic stops, and faced the specter of detention—either brief or prolonged—and abuse of power based upon criminal suspicion. It is also a view of the facts that incites fear, but not of the arrestee. Instead the fear is of unchecked discretionary police power. It is a tale of racial double standards, procedural exceptionalism, and sexual humiliation at the hands of state—and often white—authority figures.

Albert Florence was a black man who owned, and drove, one of the ultimate status symbols of the day—the coveted BMW X5 sport utility vehicle. The car was stopped by a state trooper patrolling outside the boundaries of urban New Jersey, in suburban Burlington County. Florence’s past experiences with “Driving While Black” made him wary enough of traffic stops by police to store in his car a copy of the court document certifying that the unsatisfied judgment (fine) upon which the bench warrant was issued had been satisfied.¹⁶⁷ The state trooper who stopped Florence’s vehicle ignored his documentation and protestations that the outstanding warrant for his arrest was erroneous. The trooper used his discretion in the field to apprehend and arrest Florence. Once taken into custody, Florence was subjected to a strip search at the Burlington County Jail in violation of both New Jersey law and the jail’s own policy against strip searching persons arrested for minor offenses in

165. Ruxandra Guidi, *Growing Terror Watch List Flags People in Error*, KPBS (May 31, 2011), <http://www.kpbs.org/news/2011/may/31/terror-watch-lists-grow-reasons-many-it-remain-mys/>; Press Release, ACLU, FBI Inspector General Reports 35 Percent Error Rate on Terror Watch List (May 6, 2009), available at <http://www.aclu.org/technology-and-liberty/fbi-inspector-general-reports-35-percent-error-rate-terror-watchlist>.

166. *Audit Says FBI’s Watchlist Riddled With Errors*, CHARITY & SEC. NETWORK (June 8, 2009), http://www.charityandsecurity.org/news/FBI_Watchlist_Riddled_Errors.

167. Petitioner kept with him a copy of the official document certifying that fact because in his view he had been previously been detained as an African American who drove nice cars and he wanted to avoid being wrongly arrested. Petition for Writ of Certiorari, *supra* note 1, at 3.

the absence of reasonable suspicion.¹⁶⁸ This procedural irregularity caused Florence to be visually inspected by a jail official at close range while standing naked and being directed to open his mouth and lift his tongue, lift his arms, rotate, and lift his genitals. Florence was then made to shower in the officer's sight.¹⁶⁹

Next, Florence was denied a prompt probable cause determination before a magistrate that is required under both the Fourth Amendment and by New Jersey state law. Indeed, for arrests with a warrant, New Jersey law requires that the arrestee be brought before a judge for a bail hearing "no later than 12 hours after arrest."¹⁷⁰ Despite repeated requests by Florence, his wife, and his attorney, jail officials in Burlington County denied Florence an appearance before a judge for six days.¹⁷¹ Had he been granted a prompt bail hearing, the fact that the database was in error would have come to the judge's attention and Florence would have been released immediately. Instead, the denial of a prompt hearing caused Florence to languish in jail, deprived of a shower, a toothbrush, toothpaste, and soap for six days.

On the sixth day, Florence was transported in a jail uniform and handcuffs to Essex County, where he was once again subjected to a strip search. The second strip search was more intrusive than the first. Upon being booked into the Essex County Correctional Facility, Florence was ordered to strip naked in a shower area in the presence of several others and shower. Under close supervision of the officers and in the plain sight of each other and employees entering the room, the prisoners were collectively ordered to open their mouths, lift their genitals, turn around, squat, and cough. Florence was held overnight at the Essex County

168. N.J. STAT. ANN. §2A:161A-1 (West 2012) (providing that an individual arrested for a "non-indictable" offense, a minor offense in the vernacular of New Jersey state law, "shall not be subjected to a strip search" absent a search warrant, consent, or reasonable suspicion that he may possess contraband); Burlington County Search of Inmates Procedure § 1186 (prohibiting strip searches "unless there is a reasonable suspicion that a weapon, controlled dangerous substance or contraband will be found"), Petition for Writ of Certiorari, *supra* note 1, at 3-4. Burlington County distinguishes "visual observation" from "strip searches" on the basis that the former is only conducted to uncover identifying marks or wounds, whereas the latter is conducted "systematically" for the purpose of intercepting contraband. The distinction is specious. Even Justice Kennedy conceded that the use of the term strip search is imprecise. He goes on to treat the searches Albert Florence was subjected to as strip searches.

169. Petition for Writ of Certiorari, *supra* note 1, at 5. The officials at the jail knew that Florence had been arrested for the non-indictable offense of "civil contempt," would have been aware of the circumstances in which petitioner was arrested (leaving a traffic stop) and whether he had a history of carrying contraband, and would have checked his criminal history to assess whether there was "reasonable suspicion" to strip search him.

170. N.J.R.Ct. 3:4-1(b) (West 2012).

171. *Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991); N.J.R.Ct. 3:4-1(b), 2(a) (West 2012).

Correctional Facility before being transported to the Essex County Courthouse to finally appear before a judge, who emphatically ordered him released on the basis that no ground for arresting him existed.

It is not lost on the average African American in the United States that current strip searches are remarkably similar to the way slaves were treated on the auction block.¹⁷² Recent scholarship on slave markets points out that this sort of “reading of bodies,” as it is described in the literature, is a form of race-making in both the context of the strip search and the operation of the auction block. Despite the obvious differences in inspecting black bodies for the purposes of private sale rather than governmental detention, the lived experience of the strip search in the slave market and in the jail is hauntingly similar. The goals of the searches are quite similar. As Walter Johnson makes clear in his analysis and captivating description of the slave markets in the Antebellum South, slaves were physically inspected, sorted, and classified by potential buyers for the purpose of eliminating risk in the slave buying transaction.¹⁷³ The risk slave buyers and their agents sought to eliminate was the danger of a deception by the slave merchant—obscuring with garments and padding illness, infirmity, and the unsuitableness of a slave to work.¹⁷⁴ Thus strip searches were conducted to facilitate the “reading” of slaves’ bodies, to reveal hidden insights about them in the absence of reliable information about their origins.¹⁷⁵ To that end, buyers would engage in practices ranging from closely visually inspecting the naked bodies of slaves to inserting their thumbs into the mouths of slaves in order to examine their gums and teeth, including running their hands over slaves’ bodies, fingering their joints, and kneading their flesh.¹⁷⁶

Justice Kennedy’s majority opinion defends the authority of jail officials to perform strip searches on detainees, in the absence of a reasonable suspicion that they possess contraband, as a standard part of the intake process. Kennedy’s defense of the practice of strip-searching detainees is premised on the interest of jailers in reducing the risk that

172. This view of police treatment of African Americans can be criticized for failing to take into account the socio-economic class dynamics of police encounters with African American men who drive high-status cars. The notion that not only race is made, but class status is contested, in these encounters can be discerned as a subjugation of black men who don’t “know their place.” It is a class critique I intend to explore in the future scholarship.

173. See WALTER JOHNSON, *SOUL BY SOUL: LIFE IN AN ANTEBELLUM SLAVE MARKET* (1999).

174. *Id.* at 137-61.

175. *Id.*

176. *Id.* at 141.

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.

C. Taking a Dim View of Bright Lines

Judicial infatuation with “bright line” rules has been very pronounced in the evolution of Fourth Amendment doctrine over the past forty years of the War on Drugs. To enable police officers to more readily detect and intercept a voluminous and ever-changing drug trade, federal courts adopted “bright line” rules, in which courts deferred to the discretionary judgments of law enforcement officers in the field and limited the application of legal standards that would allow courts to evaluate the circumstances after the fact, and perhaps reach a different conclusion. Until recently, federal judges progressively expanded the latitude of law enforcement officers to treat arrestees categorically in the doctrine of searches incident to lawful arrest for automobile occupants. However, as law enforcement agencies developed policies based upon these “one size fits all” rules and adopted practices that strained judicial standards and “untether[ed] the rule from [its] justifications,”¹⁷⁷ the Supreme Court has reinterpreted the Fourth Amendment in a manner that reconnected the rule to its rationale.

Specifically, in the context of searches incident to the lawful arrest of automobile occupants, the Supreme Court retreated from the application of a categorical rule. The Supreme Court carved out an exception to the rule that warrantless searches are *per se* unreasonable in *Chimel v. California*. The Court decided that contemporaneous to a lawful arrest, police could search without a warrant “the area from within which [an arrestee] might gain possession of a weapon or destructible evidence,” or the arrestee’s “wingspan.”¹⁷⁸ When the Supreme Court expanded the “search incident to a lawful arrest” exception to cover police stops and arrests of automobile occupants in *New York v. Belton*, a drug interdiction case, they interpreted the “wingspan” of an arrestee to categorically include the entire passenger compartment of the automobile. This “bright line” rule was based upon the assumption that articles inside a vehicle’s passenger compartment are “generally . . . within ‘the area into which an arrestee might

177. *Arizona v. Gant*, 556 U.S. 332, 343 (2009).

178. 395 U.S. 752, 763 (1969).

reach.”¹⁷⁹

Law enforcement agencies then read the “bright line” rule of *Belton* to authorize a host of automobile searches in circumstances increasingly more remote to the justification upon which the rule was based. Examples include *United States v. Hrasky*,¹⁸⁰ *United States v. Weaver*,¹⁸¹ and *United States v. White*.¹⁸² In each of these instances, the search was justified on the basis of the exception created by *Belton*, but the search was unhinged from the original rationale. That disconnection created space for abuses of the warrantless search by law enforcement officers.

A case that clearly demonstrates this abuse is *Thornton v. United States*.¹⁸³ In 2001, a police officer patrolling the streets of Norfolk, Virginia became suspicious of a driver, Marcus Thornton, whose car displayed license plates that were registered to another vehicle.¹⁸⁴ Before the officer could pull him over, he drove into a parking lot, parked, and got out of the vehicle.¹⁸⁵ When questioned by the officer, Thornton replied that he had no weapons or narcotics on him, but when he consented to a pat frisk, bags of marijuana and crack cocaine were found on his person.¹⁸⁶ After the officer handcuffed Thornton, arrested him, and placed him in the back seat of his patrol car, he searched the vehicle and found a 9-millimeter handgun under the driver’s seat.¹⁸⁷

In spite of the impossibility of *Thornton* reaching the passenger compartment of the vehicle, as he was handcuffed in the back of a patrol car, the Supreme Court upheld the warrantless search of the car, largely on the basis of the “bright line” rule that construed the entire passenger compartment of a vehicle as “accessible” to an arrestee without regard to actual improbability.¹⁸⁸ Indeed, Justice O’Connor criticized the holding in her concurring opinion when she observed that: “[L]ower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a *police entitlement* rather than as an

179. *New York v. Belton*, 453 U.S. 454, 460 (1981).

180. 453 F.3d 1099, 1102 (8th Cir. 2006) (upholding a search conducted an hour after the arrestee was apprehended and after he had been handcuffed and placed in the back of a patrol car).

181. 433 F.3d 1104, 1106 (9th Cir. 2006) (upholding a search conducted ten to fifteen minutes after an arrest and after the arrestee had been handcuffed and secured in the back of a patrol car).

182. 871 F.2d 41, 44 (6th Cir. 1989) (upholding a search conducted after the arrestee had been handcuffed and secured in the back of a police cruiser).

183. 541 U.S. 615 (2004).

184. *Id.* at 618.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 622-23.

exception justified by the . . . rationale[] of *Chimel*.”¹⁸⁹

In 2009, the Supreme Court, in *Arizona v. Gant*, rejected the extreme application of *Belton*’s “bright line” rule and returned the doctrine to the rationale that initially justified the creation of the warrant exception.¹⁹⁰ On facts similar to *Thornton*, Rodney Gant was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car.¹⁹¹ While immobilized in the back of the patrol car, Gant had his car searched by police officers, who discovered cocaine in the pocket of a jacket on the backseat.¹⁹² The Arizona Supreme Court held that the search-incident-to-arrest of an automobile occupant exception to the Fourth Amendment’s warrant requirement did not justify the search.¹⁹³ The State’s position was that *Belton* searches were reasonable regardless of the possibility of access in a given case because an expansive rule correctly balanced law enforcement interests, including the interest in a bright-line rule, with an arrestee’s limited privacy interest in his vehicle.¹⁹⁴ In other words, the bright line rule served the interests of law enforcement officers and took priority over the arrestee’s privacy. In emphatically rejecting this reasoning, Justice Stevens criticized the State for undervaluing the privacy interest of the arrestee and exaggerating the clarity the bright line rule provides.¹⁹⁵

D. Fear-Mongering and the Danger Orgy

Justice Kennedy’s argument in *Florence v. Board of Chosen Freeholders of County of Burlington* is essentially that the risks to jail officials, other detainees, and the public are too great *not* to apply a categorical rule requiring the visual inspection at close range while naked of *all* arrestees coming into jail facilities. He cites a vast array of empirical sources to establish the gravity of risk stemming from the introduction of lice or contagious infection, the increasing number of gang members going through the intake process, concealment of weapons and contraband, and dominant inmates coercing weak arrestees to smuggle contraband into jails.¹⁹⁶

189. *Id.* at 624 (O’Connor, J., concurring in part) (emphasis added).

190. 556 U.S. 332 (2009).

191. *Id.* at 335.

192. *Id.*

193. *Id.*

194. *Id.* at 343.

195. *Id.* at 344-45.

196. *Florence v. Bd. of Chosen Freeholders*, 132 S.Ct. 1510, 1518 (2012). Justice Kennedy never considers the culpability of staff who bring contraband into jails. Nor does he discuss visitors as a source of contraband. Not only are these well-known vectors of contraband, *Petition for Writ*

This part of Kennedy's opinion can at best be described as a "danger orgy." In the context of Justice Kennedy's opinion in *Florence*, fear and danger are far more salient than the empirical data on contraband in jails that suggests strip searches uniformly conducted on all detainees are unlikely to be dramatically more effective than non-uniform strip searches.

In regard to this danger orgy, Kennedy makes two important assertions. First, jails are fraught with danger, even from the most innocuous source, and therefore staff and detainees are constantly at risk of harm from any new detainee who is not thoroughly searched.¹⁹⁷ For example, Justice Kennedy argues that minor offenders can be among the most dangerous, citing Timothy McVeigh as an example.¹⁹⁸ McVeigh was stopped by a state trooper for driving without a license plate, only hours after the Oklahoma City bombing.¹⁹⁹ Second, the less dangerous arrestees appear to be, the more vigilant jail officials must be, and therefore only a categorical rule with no exceptions is sufficient to address the danger.²⁰⁰ In support of this assertion, Kennedy describes how a person arrested on a minor offense may be targeted by a "hardened criminal" or gang member and coerced into smuggling contraband into the facility.²⁰¹

This kind of reasoning reflects two prominent features of lawmaking during the War on Drugs: fear-mongering and actuarial justice.²⁰² Fear-mongering during the War on Drugs was a conscious

of Certiorari, *supra* note 1, at 23, but there is even recent evidence of guards smuggling contraband into one of the specific jails in this case. Several years after Albert Florence was strip searched in the Essex County Correctional Facility, while the case was winding its way through the federal courts, two Essex County officers were arrested for playing a leading role in a smuggling ring that "hand-delivered drugs and cell phones" to detainees. See James Queally & Amy Ellis Nutt, *Essex jail inmates were hand-delivered drugs, cell phones in smuggling scheme*, THE STAR-LEDGER (July 31, 2010, 7:54 AM), http://www.nj.com/news/index.ssf/2010/07/guards_hand-delivered_drugs_ce.html. Abuse of power of this nature is facilitated by the extreme deference jail officials are afforded in searches by the *Florence* case.

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

198. *Id.* at 1520.

199. *Id.* (Reportedly, McVeigh was stopped by a state trooper for a driving without a license plate only hours after he bombed the federal building in Oklahoma City).

200. *Id.* at 1520-21.

201. "Even if people arrested for a minor offense do not themselves wish to introduce contraband into a jail, they may be coerced into doing so by others." *Id.* at 1521.

202. See FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA (2001); KATHERINE A. BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA (Sage Publ'ns, ed. 2000); KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997); STUART A. SCHEINGOLD, THE POLITICS OF STREET CRIME CRIMINAL PROCESS AND CULTURAL OBSESSION (1992); STUART A. SCHEINGOLD & MALCOLM M. FEELEY, THE POLITICS OF LAW AND

strategy by politicians on both sides of the aisle, corporations, and the media to exploit the anxieties of the middle-class in order to achieve numerous objectives including winning elections, selling real estate in gated communities,²⁰³ selling sport utility vehicles to city dwellers, and distracting attention from state failures.²⁰⁴ Who can forget George H.W. Bush's relentless attack on Democratic presidential candidate Michael Dukakis over an assault-rape committed by the convicted murderer Willie Horton while on a Massachusetts weekend prison furlough? Justice Kennedy discusses Timothy McVeigh to make a point about danger, and to justify the fear that any single person arrested in a traffic stop can be a dangerous criminal. He then uses that fear—the specter of bringing a domestic terrorist into a jail—to justify searching any and all arrestees upon admission into a jail, regardless of the reason for their arrest.

Justice Kennedy's syllogism disregards the fact that McVeigh may well have been dangerous, stopped by police for a minor traffic offense, and yet present a low risk as a person being admitted into the general population of a jail. As the dissenting justices point out, the likelihood that someone apprehended by police officers on the street would be equipped with contraband ready to be introduced into a jail facility is quite low.²⁰⁵ McVeigh may well have been both a domestic terrorist, and a low-risk admit, however, Justice Kennedy fails to acknowledge that McVeigh is not typical of the vast majority of arrestees. And yet Kennedy focuses on McVeigh. The very mention of his name is calculated to elicit knee-jerk anxiety, rather than a rational weighing of the risks against the arrestee's interest in privacy.

It has long been known among corrections staff and researchers that people often behave differently inside prisons than they do in outside settings and that an offenders' current crime of conviction, criminal history, or outstanding retainers cannot be the sole guide to how they will adjust to imprisonment. Since the 1970s, research on inmate classification and inmate prison adaption has shown that numerous other factors (such as mental illness, drug abuse, personality, and previous imprisonment) need to be weighed to determine the potential threat to

ORDER: STREET CRIME AND PUBLIC POLICY (Quid Pro, LLC, ed. 2011); MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960s (2005); STUART HALL ET AL, POLICING THE CRISIS: MUGGING, THE STATE AND LAW AND ORDER (1978).

203. See MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES (1992).

204. See DAVID GARLAND, CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001); David Garland, *Limits of the Sovereign State*, 36 BRIT. J. CRIMINOLOGY 445 (1996).

205. *Florence*, 132 S. Ct. at 1528-29.

institutional security posed by any particular inmate. Inmate classification systems often distinguish between public security threats and institutional security threats. Offenders who commit horrific crimes may in fact present little threat to prison order. The nature of the crime committed might even make such inmates especially vulnerable in prison.²⁰⁶

Justice Kennedy's reasoning about the difficulty of assessing the dangerousness of minor offenders also resonates with a model of correctional administration that became much more prominent during the 1980s. Referred to variously as "actuarial justice" or the "new penology," this model prioritizes the concept of risk and incapacitation over other penal rationales, like rehabilitation or retribution.²⁰⁷ It seeks

206. For a general sampling of this literature see, DON A. ANDREWS & JAMES BONTA, *PSYCHOLOGY OF CRIMINAL CONDUCT* (5th ed. 2010); Don A. Andrews et al, *The Recent Past and Near Future of Risk and/or Need Assessment*, 52 CRIME & DELINQ. 7 (2006); James Austin, *Assessing the New Generation of Prison Classification Models*, 29 CRIME & DELINQ. 561 (1983); *Special Issue: Prison Classification Systems*, 32 CRIME & DELINQ. 251 (1986); Carl B. Clements, *The Future of Offender Classification: Some Cautions and Prospects*, 8 CRIM. JUST. & BEHAV. 15 (1981); Carl B. Clements, *Offender Classification: Two Decades of Progress*, 23 CRIM. JUST. & BEHAV. 121 (1996); PREDICTION AND CLASSIFICATION: CRIMINAL JUSTICE DECISION-MAKING (Don M. Gottredson & Michael Tonry eds., 1988); PATRICIA L. HARDYMAN ET AL, *INTERNAL PRISON CLASSIFICATION SYSTEMS: CASE STUDIES IN THEIR DEVELOPMENT AND IMPLEMENTATION* (General Books ed. 2011); Philip W. Harris, *The Interpersonality Maturity Level Classification System: I-Level*, 15 CRIM. JUST. & BEHAV. 58 (1988); Carl Jesness, *The Jesness Inventory Classification System*, 15 CRIM. JUST. & BEHAV. 78 (1988); HERBERT QUAY, *MANAGING ADULT INMATES: CLASSIFICATION FOR HOUSING AND PROGRAM ASSIGNMENTS* (1984); HANS TOCH, *LIVING IN PRISON* (Free Press ed. 1977); HANS TOCH, *THE MOSAIC OF DESPAIR: HUMAN BREAKDOWNS IN PRISON* (1992); PATRICIA VAN VOORHIS, *PSYCHOLOGICAL CLASSIFICATION OF THE ADULT MALE PRISON INMATE* (1994). For a discussion of the political contest and transnational diffusion of the classification reforms of the 1970s and 1980s, see Joshua R. Coene, *"Putting the Value Back in Punishment": Transforming Prisons and Politics in New South Wales and Pennsylvania, 1970-1995* (unpublished PhD diss., Univ. of Mich., 2013 expected) (on file with author).

207. The literature on risk in criminal law and penology is extensive. For influential works discussing how risk relates to recent changes in penal policy and practice, see Theodore Caplow & Jonathan Simon, *Understanding Prison Policy and Population Trends*, 26 CRIME & JUST. 63 (Prisons) (1999); *IMAGINARY PENALTIES* (Pat Carlen ed., 2008); STANLEY COHEN, *VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT, AND CLASSIFICATION* (1985); Leonidas K. Cheliotis, *How Iron is the Iron Cage of New Penology?: The Role of Human Agency in the Implementation of Criminal Justice Policy*, 8 PUNISHMENT & SOC'Y 313 (2006); Malcolm Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992); Malcolm Feeley & Jonathan Simon, *Actuarial Justice: The Emerging New Criminal Law*, in *THE FUTURES OF CRIMINOLOGY* (David Nelken ed. 1994); GARLAND, *THE CULTURE OF CONTROL*, *supra* note 204; Garland, *The Limits of the Sovereign State*, *supra* note 204; Daniel Glaser, *Who Gets Probation and Parole: Case Study Versus Actuarial Decision Making*, in *CRIME AND THE RISK SOCIETY* (Pat O'Malley ed. 1998); KELLY HANNAH-MOFFAT, *PUNISHMENT IN DISGUISE: PENAL GOVERNANCE AND CANADIA WOMEN'S IMPRISONMENT* (2001); Kelly Hannah-Moffat, *Moral Agent or Actuarial Subject: Risk and Canadian Women's*

to identify high-risk offenders and situations and deploy techniques for managing or neutralizing them rather than transforming or reforming them. In this sense, it resembles the actuarial practices that are commonplace in the insurance industry. Like determining the riskiness of certain people and activities for setting premiums, jail officials see detainees less as individuals with specific biographic histories in this model and more as assortments of various risks. This way of viewing inmates would, of course, depend on other factors such as the situation at hand. Moreover, other rationales still inform many aspects of incarceration and how inmates are viewed and treated. Risk management practices tend to adhere more frequently at certain decision points, like in boards determining discretionary release and parole, or in settings that contain a large degree of uncertainty or potential for disruption. The intake unit of a detention center or county jail, where little information would be known about the detainees being brought into the facility, is just such a setting.

V. CONCLUSION

Florence is remarkable in that its holding departs from recent Fourth Amendment decisions rejecting categorical approaches to arrestees and bright line rules. It is also unique in its abandonment of the “reasonable suspicion” standard for strip searches adopted by the majority of the Circuit Courts of Appeal. Moreover, *Florence* is striking in its dismissal of the best practices urged by some of the most influential corrections associations in the country.

Imprisonment, 3 THEORETICAL CRIMINOLOGY 71(1999); GENDERED RISKS (Kelly Hannah-Moffat & Pat O'Malley eds., 2006); BERNARD E. HARCOURT, AGAINST PREDICTION: PUNISHING AND POLICING IN AN ACTUARIAL AGE (2006); BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2d ed. 2005); PAT O'MALLEY, CRIME AND RISK (2010); Kimberly Kempf-Leonard & Elicka S.L. Peterson, *Expanding Realms of the New Penology: The Advent of Actuarial Justice for Juveniles*, 2 PUNISHMENT & SOC'Y 66 (2000); Pat O'Malley, *The Uncertain Promise of Risk*, 37 AUSTL. & N.Z. J. CRIMINOLOGY 323 (2004); Pat O'Malley, *Volatile and Contradictory Punishment*, 3 THEORETICAL CRIMINOLOGY 175 (1999); Pat O'Malley, *Risk, Power and Crime Prevention*, 21 ECON. & SOC'Y 252 (1992); JOHN PRATT, GOVERNING THE DANGEROUS (1998); Nancy Reichman, *Managing Crime Risks: Toward an Insurance Based Model of Social Control*, in 8 RESEARCH IN LAW, DEVIANCE AND SOCIAL CONTROL (Stephen Spitzer & Andrew Scull eds., 8th vol. 1988); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2d ed. 2009); Jonathan Simon, *The Emergence of a Risk Society: Insurance, Law and the State*, 95 SOCIALIST REV. 61 (1987); Jonathan Simon, *The Ideological Effect of Actuarial Practices*, 22 LAW & SOC'Y REV. 771 (1988); MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA (1995); LOÏC WACQUANT, PRISONS OF POVERTY (2009); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009).

In Part I of this article, we have reviewed the history of search and seizure law, especially in its more recent formulation by the Court since the 1960s and how it was subsequently affected by the War on Drugs. Part II is a description of Justice Kennedy's majority opinion in the *Florence* case and the concurring and dissenting opinions. Part III is a discussion of the four major cases relied upon by the *Florence* Court: *Bell v. Wolfish*, *Hudson v. Palmer*, *Turner v. Safley*, and *Atwater v. Lago Vista*. Writing for the majority, Justice Kennedy read these cases selectively to support a bright line rule, failing to consider how these four precedents differed significantly from the situation of Albert Florence. Part IV presents four major points of analysis. Law enforcement relied too heavily on inaccurate information about Albert Florence contained in a database. Second, strip searches are largely unnecessary and degrade those subjected to them in the majority of cases. Indeed, strip searches echo previous rituals of coercive discriminatory practices associated with slave markets. Third, the constitutional guides provided by *Florence* put far too much discretionary power in the hands of law enforcement and invite abuse of authority. Fourth, the *Florence* decision mobilizes fear through repeated references to extreme dangerousness and risk in the nature of jail and invokes super villains like Timothy McVeigh. This is a poor decision and poor precedent that will need to be overcome instead of followed.