JUDGES AS JAILERS: THE DANGEROUS DISCONNECT BETWEEN COURTS AND CORRECTIONS

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I. INTRODUCTION

Picture a town inhabited only by convicts. The town's police force is unarmed, patrols on foot, and is outnumbered fifty to one. This is not the backdrop of a post-apocalyptic dystopian film. Rather, it is a correctional officer's daily reality. Correctional facilities house throngs of criminally prone, gang-affiliated individuals in close quarters. This setting has thus been described as "a world of violence,"[1] "a walled battlefield,"[2] and "Hobbesian."[3] It is this environment that correctional officers must pacify. If they fail, their lives, and those of fellow officers, inmates, and correctional staff are imperiled.

The already arduous task facing correctional officers is exacerbated by contraband. Contraband includes transparently troublesome things like drugs and weapons but also inherently innocuous items like paper clips and currency. Uncovering contraband during the correctional intake process is a task of Sisyphean proportions because officers must be omniscient, whereas a smuggler need only be successful once. Additionally, the rewards for getting contraband into a jail are immediate and personal while the benefits of uncovering it are long term and abstract. Moreover, smugglers defy profiling. Some are forced—weaker individuals used as pawns. Some are ordered—gang members following instructions. Some are hooked—drug addicts. These dynamics, the deadly consequences of contraband, and the fact that the anal cavity is often used to smuggle, necessitate strip searches when arrestees enter a correctional facility.

If the realities of the correctional intake process are not problematic enough, legal challenges to strip searches have made it even harder to stop contraband. Lawsuits alleging constitutional violations have forced correctional officials to reduce the scope of intake searches

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1. MATTHEW SILBERMAN, A WORLD OF VIOLENCE 2 (1995) (describing the prison as a "world of violence in which weakness is shunned and strength is worshipped").

2. James E. Robertson, *"Fight or F. . ." and Constitutional Liberty: An Inmate's Right to Self-Defense when Targeted by Aggressors*, 29 IND. L. REV. 339, 341 (1995).

3. James E. Robertson, *Surviving Incarceration: Constitutional Protection from Inmate Violence*, 35 DRAKE L. REV. 101, 102 (1985-86) (footnotes omitted) (internal quotation marks omitted).

or scrap them altogether. Such suits have revolved around the poles of privacy and security, and privacy has been winning thoroughly. While privacy is a worthwhile goal, three points must be remembered. First, the traditional notion of privacy is inapplicable in the correctional context. Second, correctional officials have a legal duty to protect inmates. Third, the unintended but certainly foreseeable consequence of elevating privacy is increased contraband. Courts continually fail to recognize the realities of contraband—who carries it, how they carry it, and why they carry it. Courts also evade the murders, rape, and drug abuse contraband spawns. Thus, the irony that elevating inmate privacy endangers inmate lives goes unnoticed.

Increased contraband is not the only consequence of finding strip searches unconstitutional. The financial impact of such lawsuits is staggering. Payouts stemming from jury verdicts and settlements include:

Cook County, IL	$55 million[4]
New York, NY	$50 million[5]
Seminole County, FL	$34.8 million[6]
Los Angeles County, CA	$27 million[7]
San Bernardino County, CA	$25.5 million[8]
Sacramento County, CA	$15 million[9]
Suffolk County, MA	$10 million[10]
Camden County, NJ	$7.5 million[11]
St. Croix, WI	$6.9 million[12]

4. *County Settles Jail Strip-Search Case for $55M*, NBC CHI. (Nov. 16, 2010), http://www.nbcchicago.com/news/politics/cook-county-jail-settlement-strip-searches-108476464.html.

5. Benjamin Weiser, *New York Will Pay $50 Million in 50,000 Illegal Strip-Searches*, N.Y. TIMES, Jan. 10, 2001, http://www.nytimes.com/2001/01/10/nyregion/new-york-will-pay-50-million-in-50000-illegal-strip-searches.html?src=pm.

6. Robert PeRez, *Judge Gives Final OK of Award in Seminole Strip-Search Case*, ORLANDO SENTINEL, May 25, 2007, http://articles.orlandosentinel.com/2007-05-25/news/STRIPSEARCH25_1_jail-strip-searched-seminole.

7. Erin Carroll & Gina Keating, *Supervisors Pay $27 Million to Settle Strip-Search Class Actions*, DAILY J., Aug. 15, 2001, http://www.johnburtonlaw.com/news/jot%20settlement.htm.

8. Joe Mozingo & Maeve Reston, *Payout to End Strip Search Lawsuit*, L.A. TIMES, Sept. 25, 2007, http://articles.latimes.com/2007/sep/25/local/me-sbjails25.

9. Denny Walsh & Sam Stanton, *$15 Million Deal on Jail Searches*, SACRAMENTO BEE, June 14, 2004.

10. Katherine Zezima, *New England: Massachusetts: Strip-Search Settlement*, N.Y. TIMES, June 1, 2002, http://www.nytimes.com/2002/06/01/us/national-briefing-new-england-massachusetts-strip-search-settlement.html.

11. Jillian Bauer, *Camco to Pay $7.5 Million in Illegal Strip Search Settlement*, NJ.COM (Sept. 6, 2007), http://www.nj.com/south/index.ssf/2007/09/camco_to_pay_75_million_in_set.html.

12. Kevin Harter, *St. Croix Settles Suit over Strip-Searches for $7M*, PIONEER PRESS, Dec. 8, 2003.

Cook County, IL	$6.8 million[13]
Miami-Dade County, FL	$6.25 million[14]
Alameda County, CA	$6.15 million[15]
Bexar County, TX	$5.5 million[16]
Santa Cruz County, CA	$3.875 million[17]
Knox County, ME	$3 million[18]
New Haven, CT	$2.5 million[19]
Will County, IL	$2.15 million[20]

In a time of contracting municipal coffers, these sums are troubling. They dilute funding for education, healthcare, and law enforcement. And the economically disenfranchised who depend on social services suffer as lawyers pocket millions. If correctional search practices were barbaric, these multi-million dollar figures might be justified. But they are not. Instead, plaintiffs secure these awards thanks to a number of misconceptions, the most notable being that reasonable suspicion is needed for correctional searches. Since the 1980s, federal courts have repeatedly held that the Fourth Amendment to the United States Constitution forbids strip searching misdemeanant arrestees absent reasonable suspicion.[21] Yet in its 1979 decision of *Bell v. Wolf-*

13. Robert Becker, *County Moves to Settle Lawsuit*, CHI. TRIB., July 11, 2001, http://articles.chicagotribune.com/2001-07-11/news/0107110332_1_federal-court-presiding-cook-county-jail.

14. Chrystian Tejedor et al., *Miami-Dade Settles Strip-Search Lawsuit*, SUN SENTINEL, Apr. 19, 2005, http://articles.sun-sentinel.com/2005-04-19/news/0504190167_1_strip-searches-people-invasive-searches-three-women-activists.

15. Henry K. Lee, *Alameda County Settles Strip-Search Suit*, S.F. CHRONICLE, July 25, 2008, http://articles.sfgate.com/2008-07-25/bay-area/17172132_1_illegal-strip-strip-search-juvenile-hall.

16. *Bexar County Settles Strip Search Lawsuit for $5.5 Million*, NEWS 4 WOAI (Nov. 30, 2010), http://www.woai.com/news/local/story/Bexar-County-settles-strip-search-lawsuit-for-5-5/-CilA2mu20GyNRoou5IpvQ.cspx.

17. Jennifer Squires, *Santa Cruz County Settles $4M Strip Search Lawsuit*, SANTA CRUZ SENTINEL, Aug. 22, 2008, http://www.santacruzsentinel.com/localnews/ci_10278421.

18. Betty Adams, *Cash Awaits Detainees in Rockland Strip Search Case*, MORNING SENTINEL, Jan. 25, 2007, http://findarticles.com/p/news-articles/morning-sentinel-waterville-me/mi_8150/is_20070125/cash-awaits-detainees-rockland-strip/ai_n50639687/.

19. *Committee Approves Strip Search Settlement*, NEWS-TIMES, Apr. 18, 2006, http://www.newstimes.com/news/article/Committee-approves-strip-search-settlement-101967.php.

20. *Will County Inmate Illegal Strip Search Class Action Settlement, IL*, MORRIS DAILY HERALD, Sept. 23, 2006.

21. *See* Weber v. Dell, 804 F.2d 796, 802 (2d Cir. 1986) (holding that strip and body cavity searches of inmates convicted of misdemeanors are unconstitutional under the Fourth Amendment without reasonable suspicion); Stewart v. County of Lubbock, 767 F.2d 153, 156-57 (5th Cir. 1985) (holding that strip searches of minor offenders awaiting bond are unconstitutional under the Fourth Amendment without reasonable suspicion); Giles v. Ackerman, 746 F.2d 614, 617 (9th Cir. 1984) (holding that a strip search of an

ish,[22] the United States Supreme Court held the exact opposite.[23] Deviating from Supreme Court precedent is troubling, especially when it is the basis for bankruptcy-flirting municipalities to dispense millions.

The premise of this Article is simple. Judges invalidate strip searches without understanding the underlying law or the consequences of their rulings. Worse, they ignore or distort Supreme Court precedent in the process. These are strong charges, but they can be proved. Part II of this Article outlines the neglected law, specifically, the Supreme Court's treatment of the Fourth Amendment in the correctional context.[24] Part II then examines how the circuit courts and district courts have handled correctional search policies.[25] These courts have misconstrued Supreme Court precedent, most notably *Bell v. Wolfish*, by mandating reasonable suspicion or a history of contraband for correctional strip searches.[26] However, the trend is changing as three recent decisions debunked the myth that *Bell* mandated reasonable suspicion.[27]

Correctional strip searching is a contentious issue given the equally worthy goals of privacy and security. As such, the state of the circuits is not a split but a chasm. The Supreme Court thus recently granted certiorari in *Florence v. Board of Chosen Freeholders of Burlington*.[28] Part III suggests that the Court in *Florence* confirm the propriety of correctional strip searches.[29] The Court should further reaffirm that while intrusive, strip searches save lives and correctional deference necessitates them.

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inmate convicted of traffic violations and other minor offenses was unconstitutional under the Fourth Amendment without reasonable suspicion); Hill v. Bogans, 735 F.2d 391, 394 (10th Cir. 1984) (holding that a strip search of a man detained for traffic violations violates the Fourth Amendment without reasonable suspicion); Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1273 (7th Cir. 1983) (holding that strip searches are unconstitutional under the Fourth Amendment without reasonable suspicion for inmates charged with misdemeanors); Logan v. Shealy, 660 F.2d 1007, 1013 (4th Cir. 1981) (holding that a strip search of an inmate held for a DWI was unconstitutional without reasonable suspicion).

22. 441 U.S. 520 (1979).

23. Bell v. Wolfish, 441 U.S. 520 (1979) (holding that misdemeanant arrestees can be strip searched absent reasonable suspicion).

24. *See infra* notes 35-91 and accompanying text.

25. *See infra* notes 92-290 and accompanying text.

26. *See infra* notes 92-218 and accompanying text.

27. *See infra* notes 219-90 and accompanying text.

28. 621 F.3d 296, 298-99, 311 (3d Cir. 2010), *cert. granted*, 131 S.Ct. 1816 (Apr. 4, 2011) (No. 10-945).

29. *See infra* notes 291-411 and accompanying text.

II. BACKGROUND

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures.[30] This right encompasses, to varying degrees, one's person, home, and vehicle.[31] However, the dynamics change when one is admitted to a correctional facility.[32] Traditional Fourth Amendment protections are anathema in the correctional context because "privacy is the thing most surely extinguished by a judgment committing someone to prison."[33] As the United States Supreme Court explained, "the prisoner's expectation of privacy always [must] yield to what must be considered the paramount interest in institutional security."[34]

A. THE UNITED STATES SUPREME COURT DISAVOWS THE NOTION OF INSTITUTIONAL PRIVACY

1. Bell v. Wolfish

Bell v. Wolfish[35] is the starting point of any correctional privacy discussion. A class action suit challenged numerous conditions of confinement at the Metropolitan Correctional Center ("MCC") in New York City.[36] The class averred deprivations of their statutory and constitutional rights based on overcrowding, length of confinement, improper searches, inadequate recreational opportunities, and restrictions on personal items.[37] The United States District Court for the Southern District of New York agreed, enjoining over twenty MCC practices on constitutional and statutory grounds.[38] The United States Court of Appeals for the Second Circuit largely affirmed the district court's decision, holding that under the Due Process Clause of the Fifth Amendment to the United States Constitution, arrestees may "be subjected to only those 'restrictions and privations which in-

30. U.S. CONST. amend. IV.

31. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976) ("The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.").

32. This Article will use the terms "corrections" or "institutional" to encompass jails and prisons, as the distinctions between jails and prisons are irrelevant hereto. Additionally, for a discussion pointing out that "jail" and "prison" are "all-but interchangeable," see Shain v. Ellison, 273 F.3d 56, 72 n.3 (2d Cir. 2001) (Cabranes, J., dissenting).

33. Johnson v. Phelan, 69 F.3d 144, 146 (7th Cir. 1995).

34. Hudson v. Palmer, 468 U.S. 517, 528 (1984). For a thorough look at the history of prison strip searches, see Gabriel M. Helmer, *Strip Search and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U. L. REV. 239, 243 (2001).

35. 441 U.S. 520 (1979).

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

37. *Bell*, 441 U.S. at 523.

38. *See* Wolfish v. Levi, 439 F. Supp. 114 (S.D.N.Y. 1977).

here in their confinement itself or which are justified by compelling necessities of jail administration.'"[39]

At the heart of *Bell* was MCC's strip search policy.[40] Everyone had to "expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution."[41] It was a blanket policy encompassing felons, misdemeanants, persons held in contempt, and even witness protection participants.[42] The district court prohibited the searches unless there was probable cause to believe the person had contraband.[43] Describing the searches, the district court noted that they were "calculated to trigger, in the officer and inmate respectively, feelings of sadism, terror, and incipient masochism that no one alive could have failed to predict."[44] Because contraband was found only once as a result of the policy, "[t]hese affronts, repulsive in the most evident respects," could not be justified.[45] Highlighting the dearth of contraband, the Second Circuit affirmed.[46] According to the Second Circuit, the "gross violation of personal privacy inherent in such a search cannot be outweighed by the government's security interest in maintaining a practice of so little actual utility."[47]

The United States Supreme Court reversed the Second Circuit's decision, holding that correctional officers could strip search without probable cause if done reasonably.[48] The Court assessed the reasonableness of each search by balancing "the need for the particular search against the invasion of personal rights that the search entails."[49] Specifically, the Court considered four factors: the scope of the search, the manner in which it was conducted, the justification for searching, and the location.[50] The "where" and "why" of the searches motivated the Court's decision in *Bell*. First, the MCC was a "unique place fraught with serious security dangers."[51] Second, the searches were designed to stop the smuggling of contraband, which "is all too common an occurrence."[52] The Court recognized the lure of contraband and "inmate

39. Wolfish v. Levi, 573 F.2d 118, 124 (2d Cir. 1978) (quoting Rhem v. Malcolm, 507 F.2d 333, 336 (2d Cir. 1974)).
40. *Bell*, 441 U.S. at 558.
41. *Id.*
42. *Id.* at 524.
43. *Wolfish*, 439 F. Supp. at 147-48.
44. *Id.* at 147.
45. *Id.* at 148.
46. *Wolfish*, 573 F.2d at 131.
47. *Id.*
48. *Bell*, 441 U.S. at 559-60.
49. *Id.* at 559.
50. *Id.*
51. *Id.*
52. *Id.*

attempts to secrete these items into the facility by concealing them in body cavities . . . ."[53] The paucity of contraband found during searches at the MCC was of no import. It was instead "a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates . . . ."[54] The Court's opinion contrasted with those of the district court and Second Circuit, which made no mention of deterrence. As post-*Bell* cases demonstrate, this omission would be repeated.

The "wide-ranging deference" afforded correctional administrators on security matters also motivated the *Bell* Court.[55] Such deference has a structural basis in that "the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial."[56] Deference precluded the class in *Bell* from carrying its "heavy burden" to show an exaggerated response to legitimate security considerations.[57] The Court recognized less intrusive alternatives to strip searches existed.[58] However, it refused to consider whether metal detectors were less intrusive than strip searches.[59] Such a query would "'raise insuperable barriers to the exercise of virtually all search-and-seizure powers.'"[60] Regardless, in a footnote, the Court rejected metal detectors since strip searches were more effective.[61]

The Court restated the issue in closing: "whether visual body-cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause."[62] The Court found they could, saying nothing about a level of cause required. Justice Lewis F. Powell, Jr. highlighted the lack of reasonable suspicion in his three-sentence dissent by concluding that "some level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches described in this case."[63] Thus, due to contraband, deter-

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53. *Id.*

54. *Id.*

55. *Id.* at 547 (citing Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 128 (1977); Meachum v. Fano, 427 U.S. 215, 228 (1976); Procunier v. Martinez, 416 U.S. 396, 404-5 (1974), *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401 (1989)).

56. *Id.* at 548.

57. *Id.* at 561-62.

58. *Id.* at 559-60.

59. *Id.* at 559 n.40.

60. *Id.* (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 556-57, n.12 (1976)).

61. *Bell*, 441 U.S. at 559 n.40. "Money, drugs, and other nonmetallic contraband still could easily be smuggled into the institution." *Id.*

62. *Id.* at 560.

63. *Id.* at 563 (Powell, J., dissenting). Justice Powell's dissent has been viewed only as a critique of the majority's silence in failing to articulate a level of cause. *See* Deborah L. MacGregor, *Stripped of All Reason? The Appropriate Standard for Evaluating Strip*

rence, and deference, the Court held strip searches conducted regardless of offense or reasonable suspicion were reasonable under the Fourth Amendment.[64]

2. *The Supreme Court Builds on* Bell v. Wolfish

Since *Bell v. Wolfish*,[65] the United States Supreme Court has not addressed correctional search policies. However, in *Hudson v. Palmer*[66] it relied on *Bell*. Once again, contraband was the focus. The plaintiff sued after an officer searched his cell, raising the question of whether an inmate had a reasonable expectation of privacy in his cell.[67] The Court held that the Fourth Amendment proscription against unreasonable searches did not apply in a jail cell.[68] Weighing institutional security against inmate privacy, the Court favored the former because privacy rights "cannot be reconciled with the concept of incarceration . . . ."[69] Underlying its determination was the incessant violence in correctional facilities, including suicides.[70] The Court found the dangers of contraband also relevant. The Court noted that correctional officials must be "ever alert to attempts to introduce drugs and other contraband into the premises which, we can judicially notice, is one of the most perplexing problems of prisons today."[71] Echoing *Bell*, the Court in *Hudson* concluded that "'loss of freedom of choice and privacy are inherent incidents of confinement.'"[72]

The Supreme Court next invoked *Bell* in *Block v. Rutherford*.[73] In *Block*, pretrial detainees housed at the Los Angeles County Jail claimed a prohibition on contact visits was unconstitutional.[74] The Court rejected this claim, citing contraband and correctional deference. Because *Bell* upheld strip searches after contact visits, the Court concluded that the prohibition of contact visits "cannot be considered a more excessive response to the same security objectives."[75] The Court in *Block* rejected the less intrusive alternative test.[76] Given the "wide-ranging deference" to correctional officials in formulating security pol-

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Searches of Arrestees and Pretrial Detainees in Correctional Facilities, 36 COLUM. J.L. & SOC. PROBS. 163, 172 (2003).

64. *Bell*, 441 U.S. at 559-60 (majority opinion).
65. 441 U.S. 520 (1979).
66. 468 U.S. 517 (1984).
67. Hudson v. Palmer, 468 U.S. 517, 522 (1984).
68. *Hudson*, 468 U.S. at 526.
69. *Id.*
70. *Id.*
71. *Id.* at 527.
72. *Id.* at 528 (quoting *Bell*, 441 U.S. at 537).
73. 468 U.S. 576 (1984).
74. Block v. Rutherford, 468 U.S. 576, 578 (1984).
75. *Block*, 468 U.S. at 588
76. *Id.* at 581-82.

icies, the Court stated that the judiciary should not second-guess officials by considering less restrictive alternatives.[77] The Court noted that forbidding contact visits fostered security because correctional officials must ensure "'no weapons or illicit drugs reach the detainees.'"[78] Finally, the detainees argued they did not merit the jail's security concerns because they had not yet been convicted.[79] The Court disagreed. It found the detainee-inmate distinction immaterial because detainees did not pose a lesser security risk than convicted inmates.[80] Furthermore, divining which detainees had propensities for drug smuggling would be impossible.[81]

In *Turner v. Safley*,[82] the Supreme Court reiterated *Bell*'s holding. *Turner* involved the constitutionality of a regulation prohibiting inmate mail correspondence and a regulation prohibiting inmates from marrying.[83] The Court upheld the former but struck down the later. Citing *Bell*, the Court in *Turner* articulated a standard of review for prisoner constitutional claims that was deferential to correctional officials.[84] "When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[85] The Court's rationale was simple: subjecting 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."[86] Thus, the Court stated that a correctional regulation is reasonable if (1) there is a rational connection between it and a governmental interest; (2) accommodating inmates' constitutional rights will infringe on the rights of officers or other inmates; and (3) there are no other methods to accommodate inmates' rights at a minimal cost to penological interests.[87] Applying this deferential standard, the Court upheld the correspondence regulation but struck down the marriage restriction.[88] The Court upheld the regulation of inmate mail because it prevented communication between gang members and communication about escape plans.[89]

77. *Id.* at 585.
78. *Id.* at 585 n.8 (quoting *Bell*, 441 U.S. at 540).
79. *Id.* at 588-89.
80. *Id.* at 587.
81. *Id.*
82. 482 U.S. 78 (1987).
83. Turner v. Safley, 482 U.S. 78, 89 (1987).
84. *Turner*, 482 U.S. at 89.
85. *Id.*
86. *Id.*
87. *Id.* at 89-90.
88. *Id.* at 95.
89. *Id.* at 91-92.

Four points can be gleaned from *Bell* and its progeny. The first point is the Court's emphasis on contraband. The Court has recognized that contraband leads to murder, rape, and drug abuse and must be kept out of correctional facilities. The second point is that correctional facilities are dangerous places demanding vigilance. The third point is that correctional security trumps inmate privacy because security is "perhaps the most legitimate of penological goals."[90] Finally, the fourth point is the Court's willingness to defer to the correctional official's judgment. As the United States Court of Appeals for the Seventh Circuit explained, *Bell* "emphasized what is *the* animating theme of the Court's prison jurisprudence for the last 20 years: the requirement that judges respect hard choices made by prison administrators."[91] But many courts have shunned these positions by reading *Bell* narrowly or misreading it completely.

B. The Erosion of *Bell v. Wolfish* and Its Progeny

Lower courts have misread *Bell v. Wolfish*[92] in numerous ways, including requiring reasonable suspicion and consideration of an arrestee's charges for a strip search when *Bell* required neither;[93] asserting the persons searched in *Bell* were serious offenders when the policy encompassed persons arrested for contempt and witness protection participants;[94] downplaying the "wide-ranging deference" to correctional officials emphasized in *Bell* and its progeny;[95] concocting criteria for the contraband found by defendant officials; and finally, ignoring the deterrence element of strip searches. The source of these flaws is simple: an interpretation of what judges want *Bell* to say, not what it does.

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90. Overton v. Bazzetta, 539 U.S. 126, 133 (2003); *see also* Pell v. Procunier, 417 U.S. 817, 823 (1974) ("Central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves.").

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

92. 441 U.S. 520 (1979).

93. Bell v. Wolfish, 441 U.S. 520, 524 (1979). *But see* Wilson v. Jones, 251 F.3d 1340, 1343 (11th Cir. 2001) ("This court recognizes that 'reasonable suspicion' is sufficient to justify the strip search of a pretrial detainee."); Swain v. Spinney, 117 F.3d 1, 7 (1st Cir. 1997) ("[C]ourts have concluded that, to be reasonable under *Wolfish*, strip and visual body cavity searches must be justified by at least a reasonable suspicion that the arrestee is concealing contraband or weapons."); Masters v. Crouch, 872 F.2d 1248, 1255 (6th Cir. 1989) ("[A] strip search of a person arrested for a traffic violation or other minor offense not normally associated with violence and concerning whom there is no individualized reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband, is unreasonable.").

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

95. Block v. Rutherford, 468 U.S. 576, 585 (1984); *Bell*, 441 U.S. at 547.

1. Circuit Court Decisions Misconstruing Bell v. Wolfish

Virtually every circuit court considering correctional strip searches has mandated reasonable suspicion, consideration of the detainee's underlying charges, or a history of contraband.[96] Examining every such decision would belabor the point. For that reason, this Article analyzes the seminal United States Court of Appeals for the Seventh Circuit case of *Mary Beth G. v. City of Chicago*[97] along with three circuit court cases adopting the logic of *Mary Beth G.*[98]

a. *Mary Beth G. v. City of Chicago*

Mary Beth G. v. City of Chicago[99] is the origin of *Bell v. Wolfish*'s[100] distortion. A City of Chicago policy mandated the strip searching of female misdemeanants in police lockups.[101] A group of women arrested for traffic offenses sued and the United States Court of Appeals for the Seventh Circuit declared the policy unconstitutional. The Seventh Circuit distinguished *Bell* because the detainees in *Bell* "were awaiting trial on serious federal charges after having failed to make bond . . . ."[102] In contrast, the *Mary Beth G.* plaintiffs were "not inherently dangerous and . . . were being detained only briefly while awaiting bond."[103] Further, *Bell's* contraband concerns were inapplicable because "those dangers are [not] created by women minor offenders entering the lockups for short periods while awaiting bail."[104] This was bolstered by the paucity of contraband recovered from female misdemeanants.[105] As for *Bell's* balancing test, the Seventh Circuit referenced it but did not embrace it. The Seventh Circuit cited *Terry v. Ohio*[106] and *Delaware v. Prouse*[107] instead. Relying on *Terry*, the Sev-

96. *See* Weber v. Dell, 804 F.2d 796, 802 (2d Cir. 1986) (requiring reasonable suspicion for strip searches of inmates detained for misdemeanors); Stewart v. County of Lubbock, 767 F.2d 153, 156-57 (5th Cir. 1985) (requiring reasonable suspicion for strip searches of inmates detained for misdemeanors); Giles v. Ackerman, 746 F.2d 614, 617 (9th Cir. 1984) (requiring reasonable suspicion for strip searches of inmates detained for traffic violations and other minor offenses); Hill v. Bogans, 735 F.2d 391, 394 (10th Cir. 1984) (requiring reasonable suspicion for strip searches of inmates detained for traffic violations); Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983) (requiring reasonable suspicion for strip searches of inmates detained for misdemeanors); Logan v. Shealy, 660 F.2d 1007, 1013 (4th Cir. 1981) (requiring reasonable suspicion for strip searches of inmates detained for DWI).

97. 723 F.2d 1263 (7th Cir. 1983).

98. *See infra* notes 99-168 and accompanying text.

99. 723 F.2d 1263 (7th Cir. 1983).

100. 441 U.S. 520 (1979).

101. Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1264 (7th Cir. 1983).

102. *Mary Beth G.*, 723 F.2d at 1272.

103. *Id.*

104. *Id.* at 1273.

105. *Id.*

106. 392 U.S. 1 (1968).

enth Circuit articulated its own approach: "the more intrusive the search, the closer governmental authorities must come to demonstrating probable cause for believing that the search will uncover the objects for which the search is being conducted."[108] The Seventh Circuit found the strip searches bore an insubstantial relationship to security needs.[109] As such, strip searching misdemeanants required "reasonable suspicion by the authorities that either of the twin dangers of concealing weapons or contraband existed."[110]

The flaws of *Mary Beth G.* are pronounced. The Seventh Circuit's determination that those searched in *Bell* faced "serious federal charges" is wrong.[111] The blanket search policy in *Bell* included misdemeanants and witnesses in protective custody.[112] Ignoring this fact enabled the Seventh Circuit to evade *Bell* and plot its own course. The Seventh Circuit was concerned that some searches occurred in front of other arrestees and male officers.[113] These troubling facts aside, *Mary Beth G.*'s selective reading of *Bell* is indefensible. Worse, the Seventh Circuit questioned the search's utility based on the minimal contraband found.[114] This defied *Bell*, which had one instance of contraband.[115] Finally, the Seventh Circuit abandoned *Bell*'s reasonableness test, opting for standards annunciated in *Terry* and *Prouse*.[116] *Terry* considered whether police could stop and search a suspect on a street if there was reasonable suspicion to believe a person engaged in criminal activity.[117] While less than an arrest, a *Terry* stop involves police compulsion to the extent that a reasonable person would not feel free to ignore the police request.[118] *Prouse* involved an officer stopping vehicles to check drivers' license and registration.[119] Thus, *Mary Beth G.* disregarded the unique nature of correctional facilities—thousands of inmates in close quarters—by transplanting the tests in *Terry* and *Prouse* for the Court's reasoning in *Bell*. Moreover, detainees entering correctional facilities are not searched for the possibility of wrongdoing. They already have been found to have engaged in criminal activity. This point is embodied by *Bell*, which did not rely on *Terry* or

107. 440 U.S. 654 (1979).
108. *Mary Beth G.*, 723 F.2d at 1273 (citing Terry v. Ohio, 392 U.S. 1, 18 n.15 (1968)).
109. *Id.*
110. *Id.*
111. *Id.* at 1272.
112. Bell v. Wolfish, 441 U.S. 520, 524 (1979).
113. *Mary Beth G.*, 723 F.2d at 1275.
114. *Id.* at 1273.
115. *Bell*, 441 U.S. at 558.
116. *Mary Beth G.*, 723 F.2d at 1273.
117. *Terry*, 392 U.S. at 18.
118. *Id.*
119. Delaware v. Prouse, 440 U.S. 648, 654 (1979).

Prouse and required no level of suspicion to search.[120] The Seventh Circuit thus had no basis to supplant the *Bell* correctional test with the street test in *Terry* and *Prouse*.

If *Mary Beth G.* was an aberration, its holding could be downplayed. But its effect has been far-reaching. As one commentator explained, *Mary Beth G.* "opened the floodgates for other courts to adopt the reasonable suspicion standard without first discussing whether the holding in *Bell* directly controls."[121] Relying on *Mary Beth G.* to invalidate strip searches, later courts overlooked the Seventh Circuit's misreading of *Bell* and perpetuated its myth that reasonable suspicion and consideration of an arrestee's charges are necessary. Furthermore, *Mary Beth G.* is factually distinguishable from the typical correctional search case. The search in *Mary Beth G.* applied to female traffic offenders at city lockups, not detainees booked into the general population of a large, gang-infested jail. Moreover, unlike the smattering of contraband in *Mary Beth G.*'s city lockup, contraband is endemic in most jails. Finally, the correctional violence fostered by contraband distinguishes *Mary Beth G.*[122] Because the Seventh Circuit's analysis of *Bell* is mistaken, *Mary Beth G.* rests on a frail foundation, and any reliance on *Mary Beth G.* renders those decisions suspect.

b. The Legacy of *Mary Beth G. v. City of Chicago*

In *Weber v. Dell*,[123] the United States Court of Appeals for the Second Circuit invoked *Mary Beth G. v. City of Chicago*,[124] which was only three years old at the time, to consider the constitutionality of strip searching all persons booked into a jail.[125] Citing *Bell v. Wolfish*[126] and *Block v. Rutherford*,[127] the United States District Court for the Western District of New York found reasonable suspicion was not needed. Per *Bell* and *Block*, "a district court should not substitute its view on the proper administration of a jail" for that of the correctional officials.[128] The Second Circuit rejected the district court's reading, citing *Mary Beth G.*[129] The Second Circuit stated, "An examination of

120. *Bell*, 441 U.S. at 560.

121. Andrew A. Crampton, *Stripped of Justification: The Eleventh Circuit's Abolition of the Reasonable Suspicion Requirement for Booking Strip Searches in Prisons*, 57 CLEV. ST. L. REV. 893, 906 (2010).

122. *See* Holly v. Woolfolk, 415 F.3d 678, 679 (7th Cir. 2005) (describing "the dangerous general-population area" of the Cook County Jail and citing reports of stabbings and murders in there).

123. 804 F.2d 796 (2d Cir. 1986).

124. 723 F. 2d 1263 (7th Cir. 1983).

125. Weber v. Dell, 804 F.2d 796 (2d Cir. 1986).

126. 441 U.S. 520 (1979).

127. 468 U.S. 576 (1984).

128. Weber v. Dell, 630 F. Supp. 255, 258 (W.D.N.Y. 1968).

129. *Weber*, 804 F.2d at 800.

cases from other circuits supports our view that *Block* and *Wolfish* do not suggest, much less require, the result reached here."[130] Thus, the Second Circuit found the Fourth Amendment precluded correctional officials from strip searching arrestees charged with minor offenses unless they have reasonable suspicion.[131]

In *Walsh v. Franco*,[132] the Second Circuit again considered misdemeanant strip searches. The defendants argued that searching all arrestees was constitutional because misdemeanants lived with the jail's general population.[133] The Second Circuit, like the United States District Court for the District of Vermont, rejected this argument, reasoning that the risk of a misdemeanant introducing contraband into the general population did not warrant strip searching all detainees.[134] Finally, in *Shain v. Ellison*,[135] the Second Circuit reiterated its position that correctional searches required reasonable suspicion. At issue in *Shain* was the Nassau County Correctional Center's policy of strip searching all detainees at intake.[136] The Second Circuit held that the County's policy of strip searching misdemeanants who were remanded to local jail following their arraignment, absent reasonable suspicion that the misdemeanants were carrying weapons or contraband, violated the Fourth Amendment.[137]

In addition to the Second Circuit, the United States Court of Appeals for First Circuit also prominently featured *Mary Beth G.* In *Swain v. Spinney*,[138] the plaintiff was strip searched at a police station. The United States District Court for the District of Massachusetts held the search was compatible with the Fourth Amendment.[139] The First Circuit reversed, citing *Bell*'s "explicit recognition of the invasiveness of strip and visual body cavity searches."[140] Pointing to *Mary Beth G.*, the First Circuit also noted that "to be reasonable under *Wolfish*, strip searches must be justified by at least a reasonable suspicion . . . ."[141]

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130. *Id.* at 801.
131. *Id.*
132. 849 F.2d 66, 67 (2d Cir. 1988).
133. Walsh. v. Franco, 849 F.2d 66, 68 (2d Cir. 1988).
134. *Walsh*, 849 F.2d at 69-70.
135. 273 F.3d 56 (2d Cir. 2001). For an extensive look at *Shain v. Ellison*, see MacGregor, *supra* note 63, at 172.
136. Shain v. Ellison, 273 F.3d 56, 61 (2d Cir. 2001).
137. *Shain*, 273 F.3d. at 63 (citing *Weber*, 804 F.2d at 802); *see also Walsh*, 849 F.2d at 68-69 (reaffirming the *Weber* holding); Wachtler v. County of Herkimer, 35 F.3d 77, 81-82 (2d Cir. 1994) (assuming *Weber's* applicability to the post-arraignment strip search of a person charged only with a misdemeanor).
138. 117 F.3d 1 (1st Cir. 1997).
139. Swain v. Spinney, 932 F. Supp. 25 (D. Mass. 1996).
140. Swain v. Spinney, 117 F.3d 1, 7 (1st Cir. 1997) (citing Bell v. Wolfish, 441 U.S. 520, 558 (1979)).
141. *Swain*, 117 F.3d at 7.

In *Roberts v. Rhode Island*,[142] the First Circuit cited *Swain*, along with *Mary Beth G.*, which it cited four times. The United States District Court for the District of Rhode Island in *Roberts* held that correctional officers must have reasonable suspicion before strip searching.[143] The First Circuit affirmed, its reasoning fourfold.[144] First, reasonable suspicion was required per *Mary Beth G.*[145] Second, the searches violated personal privacy.[146] Third, again citing *Mary Beth G.*, the searches uncovered little contraband.[147] Fourth, searching a person's clothes for contraband was less intrusive than strip searching.[148]

The First and Second Circuit decisions underscore the impact of *Mary Beth G.*; it was the faulty foundation on which over twenty years of precedent would be built. The First and Second Circuits effectively replaced *Bell* with *Mary Beth G.* as the authority on correctional searches.[149] In doing so, they abdicated their duty to analyze whether *Bell* controlled. Without *Mary Beth G.*, these courts might have recognized that *Bell* did not mandate reasonable suspicion. Indeed, if witness protection participants could be strip searched, so could misdemeanants. But the First and Second Circuits evaded this reality. They also found contraband less likely to be smuggled during the intake process and that deterrence was diminished at intake because arrests often occur without notice.[150] Unfortunately, such rhetoric does not reflect reality. Correctional officials do not know from where arrestees came, whether they had access to contraband, or how long they were detained. These unknowns eviscerate the notion that arrestees are immediately entering the facility fresh from an unanticipated arrest.

A final example of *Mary Beth G.*'s legacy can be found in Ninth Circuit jurisprudence. In *Giles v. Ackerman*,[151] the United States Court of Appeals for the Ninth Circuit considered the strip searching of all persons booked into a jail on minor traffic offenses.[152] Like the United States Court of Appeals for the Seventh Circuit, the Ninth Circuit misread *Bell*, stating "[t]he inmates in *Bell* were charged with of-

142. 239 F.3d 107 (1st Cir. 2001).
143. Roberts v. Rhode Island, 175 F. Supp. 2d 176, 183 (D.R.I. 2000).
144. Roberts v. Rhode Island, 239 F.3d 107, 111-12 (1st Cir. 2001).
145. *Roberts*, 239 F.3d. at 112.
146. *Id.* at 111.
147. *Id.* at 112.
148. *Id.*
149. *See Shain*, 273 F.3d at 64; *Roberts*, 239 F.3d at 111-12.
150. *See Shain*, 273 F.3d at 64; *Roberts*, 239 F.3d at 111.
151. 746 F.2d 614 (9th Cir. 1984).
152. Giles v. Ackerman, 746 F.2d 614, 615 (9th Cir. 1984), *overruled on other grounds by* Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999).

fenses more serious than minor traffic violations, and they were therefore detained for substantial pretrial periods."[153] This error enabled the Ninth Circuit to elude the reasoning of *Bell* and rely on *Mary Beth G.* In *Giles*, the Ninth Circuit further found, contra *Bell*, that the correctional officials did not establish their security interests because "only eleven persons had concealed anything that warranted a report . . . ."[154] Relying on *Mary Beth G.*, the Ninth Circuit required reasonable suspicion for correctional searches.[155]

In *Thompson v. City of Los Angeles*,[156] the Ninth Circuit reaffirmed its reliance on *Mary Beth G.* While *Thompson* ultimately upheld the challenged search, the Ninth Circuit determined the reasonableness of a search "hinges upon the nature of the grand theft auto offense" with which the plaintiff was charged.[157]

Eventually, the Ninth Circuit's decision in *Kennedy v. Los Angeles Police Department*[158] undercut *Thompson*. Although the Ninth Circuit did not cite *Mary Beth G.*, *Kennedy* departed even further from *Bell*. In *Kennedy*, a City of Los Angeles policy required all felony arrestees to be strip searched at intake. Plaintiffs sued because those charged with misdemeanors were searched only upon reasonable suspicion.[159] The Ninth Circuit concluded that a felony arrest did not alter the level of cause required.[160] It stated that the felony-misdemeanor dichotomy did not preserve security because it indicated little about the likelihood of an arrestee concealing contraband.[161] While a felony charge "might inform the *presence* of suspicion . . . it does not inform the *level* of suspicion required."[162] Finding no evidence that felons smuggled contraband more often than misdemeanants, the Ninth Circuit chastised the search process as "a ham-handed approach to policy making" resting on assumptions and societal judgments.[163]

Kennedy never discussed the individuals searched in *Bell*. This is not surprising because the fact that minor offenders and witness protection participants in *Bell* could be strip searched eviscerates *Kennedy's* logic. Moreover, *Bell's* holding was misconstrued. The Ninth

153. *Giles*, 746 F.2d at 617.
154. *Id.*
155. *Id.* (citing *Mary Beth G.*, 723 F.2d at 1273).
156. 885 F.2d 1439 (9th Cir. 1989).
157. Thompson v. City of Los Angeles, 885 F.2d 1439, 1447 (9th Cir. 1989).
158. 901 F.2d 702 (9th Cir. 1989), *overruled on other grounds by* Hunter v. Bryant, 502 U.S. 224 (1991).
159. Kennedy v. L.A. Police Dep't 901 F.2d 702, 716 (9th Cir. 1989).
160. *Kennedy*, 901 F.2d at 716.
161. *Id.* at 714.
162. *Id.* at 716.
163. *Id.* at 713.

Circuit concluded that *Bell* did not specify "a 'level of cause' against which the constitutionality of the particular searches were to be tested."[164] This logic is difficult to comprehend. *Bell* specified no "level of cause" because it required none, as evinced by Justice Powell's dissent.[165] The blanket search policy in *Bell* mandated everyone be searched regardless of reasonable suspicion.[166] Thus, the felon-misdemeanant distinction was irrelevant to the United States Supreme Court's analysis in *Bell*. Additionally, the Court in *Bell* demanded that "wide-ranging deference" be the central consideration.[167] In *Kennedy*, the Ninth Circuit addressed deference before evaluating reasonableness, merely recognizing that deference is a threshold consideration preventing "delicate balancing."[168] But excising deference from the balancing of interests irreparably altered the test.

2. *United States District Court Decisions Misreading* Bell v. Wolfish

Many district courts have mandated reasonable suspicion or consideration of an arrestee's charges for strip searching. In lieu of discussing every district court decision invalidating correctional search policies, this Article discusses only the United States District Court for the Northern District of Illinois's handling of the issue. This jurisdiction was not selected at random, but rather because in *Young v. County of Cook*,[169] it faced the largest strip search class action in the country—a class of over 200,000 people and a settlement of $55 million.[170] Bound by *Mary Beth G. v. City of Chicago*,[171] the Northern District of Illinois district court decisions are the direct progeny of the United States Court of Appeals for the Seventh Circuit's ill-conceived decision.

a. The Road to *Young v. County of Cook*

Young v. County of Cook[172] warrants particular scrutiny because the summary judgment decision engendering the $55 million settlement defies the holding in *Bell v. Wolfish*.[173] Before delving into *Young*, however, a brief background is necessary. *Young* was not the first strip search case emanating from the Cook County Jail ("CCJ").

164. *Id.* at 715.
165. *Bell*, 441 U.S. at 560 (Powell, J., dissenting).
166. *Id.*
167. *Id.* at 547.
168. *Kennedy*, 901 F.2d at 712.
169. 616 F. Supp. 2d 834 (N.D. Ill. 2009).
170. Young v. Cnty. of Cook, 616 F. Supp. 2d 834 (N.D. Ill. 2009).
171. 723 F.2d 1263 (7th Cir. 1983).
172. 616 F. Supp. 2d 834 (N.D. Ill. 2009).
173. 441 U.S. 520 (1979).

The CCJ has been a fertile and lucrative source of strip search litigation. The CCJ is a dangerous place, amplifying the dangers of contraband. Brawls, stabbings, and rape are routine.[174] Even the United States Court of Appeals for the Seventh Circuit has decried the dangers of the CCJ's general population.[175]

In *Thompson v. County of Cook*,[176] the plaintiff alleged CCJ officials violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution by strip searching him.[177] A jury found for the officials, but the District Court for the Northern District of Illinois ordered a new trial.[178] In arguing against a new trial, the officials claimed there was reasonable suspicion that the plaintiff was carrying contraband because officers had observed the detainees squatting near each other and conversing.[179] The district court disagreed, noting that per *Mary Beth G. v. City of Chicago*,[180] "non-specific testimony, even in combination with the specific testimony, did not create a reasonable suspicion that minor offenders were concealing contraband."[181] Citing *Terry v. Ohio*,[182] the district court demanded "'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion.'"[183] Finally, the district court stated that the officials' decision to intermingle misdemeanants and felons was of no import because it would provide "a basis for blanket strip searches of detainees irrespective of the presence of individualized reasonable suspicion."[184] Ironically, that was the exact scenario of *Bell*.[185] Thompson was not retried as the matter settled.

Gary v. Sheahan,[186] which followed *Thompson*, involved a class action challenge to the CCJ's policy of strip searching every female inmate returning from court, including those for whom a court had

174. *See 3 Inmates Stabbed in County Jail Fight*, CHI. TRIB., May 29, 2008, at 3; *11 Guards, 7 Inmates Injured in Cook Jail Brawl*, CHI. TRIB., May 14, 2008, at 3; *6 Cook Jail Inmates Injured in Brawl*, CHI. TRIB., Dec. 30, 2007, at 3.

175. *See* Holly v. Woolfolk, 415 F.3d 678, 679 (7th Cir. 2005) (describing "the dangerous general-population area" of the Cook County Jail and citing reports of stabbings and murders there).

176. 428 F. Supp. 2d 807 (N.D. Ill. 2006).

177. Thompson v. Cnty. of Cook, 428 F. Supp. 2d 807 (N.D. Ill. 2006).

178. *Thompson*, 428 F. Supp. 2d at 807.

179. *Id.* at 813.

180. 723 F.2d 1263 (7th Cir. 1983).

181. *Thompson*, 428 F. Supp. 2d at 813 (N.D. Ill. 2006) (citing Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272-73 (7th Cir. 1983)).

182. 392 U.S. 1 (1968).

183. *Thompson*, 428 F. Supp. 2d at 814 (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).

184. *Id.* at 815.

185. Bell v. Wolfish, 441 U.S. 520, 524 (1979).

186. No. 96 C 7294, 1998 U.S. Dist. LEXIS 13378 (N.D. Ill. Aug. 19, 1998).

ordered released.[187] The United States District Court for the Northern District of Illinois found the CCJ's policy violated the Equal Protection Clause because male inmates were not always strip searched upon returning from court.[188] The court relied on *Mary Beth G.* to conclude that such a policy violated "constitutional standards, where no substantial relation between the disparity of treatment and an important state purpose is shown."[189] The court also found the policy violated the Fourth Amendment. Applying *Bell's* balancing test, the district court determined that since there was no basis for the plaintiffs' detentions because the court had already ordered their release, their privacy interests were greater than those of pretrial detainees.[190] Additionally, officials must have "a reasonable suspicion that the plaintiff class member is carrying a weapon or contraband."[191] In the end, *Gary* was not appealed because the matter settled.

In *Bullock v. Sheahan*,[192] the United States District Court for the Northern District of Illinois assessed the policy litigated in *Gary*, but as applied to males. Members of the *Bullock* class alleged their constitutional rights were violated when police officers strip searched them upon returning to the CCJ after a court ordered their discharge.[193] In denying the defendants' motion for summary judgment, the district court cited *Mary Beth G.* and found a Fourth Amendment violation. Quoting *Mary Beth G.*, the court stated that "'[t]he more intrusive the search, the closer the governmental authorities must come to demonstrating probable cause for believing that the search will uncover the objects for which the search is being conducted.'"[194] Again quoting *Mary Beth G.*, the court found the intrusion "'demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, [and] signify [] degradation and submission.'"[195] Finally, the court found the defendants' argument that contraband justified the strip search was insufficient since only one class member had contraband.[196] *Bullock* would later be settled as part of the *Young* settlement.

187. Gary v. Sheahan, 1998 U.S. Dist. LEXIS 13378, at *1-2 (N.D. Ill. Aug. 19, 1998).

188. *Gary*, 1998 U.S. Dist. LEXIS at *27.

189. *Id.* (citing *Mary Beth G.*, 723 F.2d at 1274).

190. *Id.* at *38.

191. *Id.*

192. 568 F. Supp. 2d 965, 974 (N.D. Ill. 2008).

193. Bullock v. Sheahan, 568 F. Supp. 2d 965, 969 (N.D. Ill. 2008).

194. *Bullock*, 568 F. Supp. 2d. at 974 (quoting *Mary Beth G.*, 723 F.2d at 1273).

195. *Id.* at 975 (quoting *Mary Beth G.*, 723 F.2d at 1272).

196. *Id.*

b. *Young v. County of Cook*: An Anatomy in Precedent Evasion

Young v. County of Cook[197] was the culmination of *Gary v. Sheahan*,[198] *Bullock v. Sheahan*,[199] and *Thompson v. County of Cook*.[200] These three decisions were featured prominently in *Mary Beth G. v. City of Chicago*[201] as *Bell v. Wolfish*[202] was pushed to the periphery. The *Young* plaintiffs, a class of over 200,000 persons, challenged the Cook County Jail's ("CCJ") intake process, whereby strip searches were conducted without regard to an individual's charges or reasonable suspicion.[203] However, unlike most correctional facilities, detainees entering the CCJ had to undergo a probable cause hearing pursuant to *Gerstein v. Pugh*[204] before the CCJ accepted them.[205] Both parties moved for summary judgment.[206] While the United States District Court for the Northern District of Illinois denied both motions, its denial of the defendants' motion is eye opening.

To prove the intake searches secured the CCJ, defendants submitted over 2,000 pages of contraband reports detailing the contraband found at the CCJ.[207] These reports should have been the basis for a finding of reasonableness, but the district court dismissed the reports on multiple grounds. First, the court stated that most reports "appear to deal with contraband that is not inherently dangerous, such as money."[208] Second, the court found the reports provided no "basis to support [the defendants'] contention that these events occur 'routinely.'"[209] Third, the court noted the reports did not specify if class members were involved.[210] Fourth, the court stated the reports did not indicate whether the contraband was discovered because of a strip search, found in a detainee's clothing, or surrendered.[211] For these reasons, the court determined the contraband reports were insufficient "as a matter of law" to justify the strip searches.[212]

197. 616 F. Supp. 2d 834 (N.D. Ill. 2009).
198. No. 96 C 7294, 1998 U.S. Dist. LEXIS 13378 (N.D. Ill. Aug. 19, 1998).
199. 568 F. Supp. 2d 965 (N.D. Ill. 2008).
200. 428 F. Supp. 2d 807 (N.D. Ill. 2006).
201. 723 F.2d 1263 (7th Cir. 1983).
202. 441 U.S. 520 (1979).
203. Young v. Cnty. of Cook, 616 F. Supp. 2d 834, 837-38 (N.D. Ill. 2009).
204. 420 U.S. 103 (1975).
205. *Young*, 616 F. Supp. 2d at 838; *see* Gerstien v. Pugh, 420 U.S. 103 (1975) (stating that a probable cause determination may be made by a judicial officer without an adversary hearing).
206. *Young*, 616 F. Supp. 2d at 837.
207. *Id.* at 838.
208. *Id.*
209. *Id.*
210. *Id.* at 847.
211. *Id.* at 848.
212. *Id.* (citing Roberts v. Rhode Island, 239 F.3d 107, 112 (1st Cir. 2001)) ("The lack of specific instances where a body cavity search was necessary to discover contraband

With the search's *raison d'être* gutted, defendants' downfall was inevitable. Using *Mary Beth G.* as cover, the court in *Young* distinguished *Bell* because unlike planned contact visits in *Bell*, the plaintiffs in *Young* did not know they would be arrested.[213] The court stated that "[t]he unexpected nature of the detainees' arrest also undermines any deterrence argument, contrary to the situation with the plaintiffs in *Bell*, who could have used scheduled contact visits as an opportunity to attempt to smuggle contraband."[214] The court decided that intermingling with the general population was also not enough to justify strip searches. With correctional deference in abeyance, the court questioned why the CCJ searched "all detainees charged only with misdemeanors without giving those detainees the option to remain outside of the jail's general population."[215] Putting the onus on the defendants, the court was unimpressed with their rationale for "why a finding of probable cause that an individual has committed a misdemeanor unrelated to drugs or weapons provides any basis for conducting a highly intrusive strip or body cavity search of that detainee."[216] The court in *Young* thus concluded that a detainee held on a non-weapon or drug misdemeanor charge may not be strip searched without reasonable suspicion. Pointing to *Mary Beth G.*, the court stated, "[C]ourts have generally required jail officials to have either individualized suspicion or suspicion arising from the nature of the charged offense before conducting a strip search of a detainee charged with a misdemeanor that does not involve drugs or weapons."[217] After the plaintiffs prevailed in liability and damages trials, *Young* settled for $55 million.

While *Young*'s settlement award was unprecedented, it would not have been possible without *Mary Beth G.* In evading *Bell*, *Young* took the path that *Mary Beth G.* forged, courts such as the United States Courts of Appeals for the First, Second, and Ninth Circuits legitimized, and cases such *Gary*, *Bullock*, and *Thompson* traveled. Nevertheless, *Young*'s disregard for *Bell* was unparalleled as deference, deterrence, and contraband were either ignored or treated as an afterthought. Thus, *Young* and *Bell* are not merely irreconcilable, they are unrecognizable. While *Bell* found one instance of contraband supported strip searches, *Young* found thousands did not. While witness

supports a finding that the policy of searching all inmates is an unreasonable one."); Calvin v. Sheriff, 405 F. Supp. 2d 933, 944 (N.D. Ill. 2005).

213. *Young*, 616 F. Supp. 2d at 848.

214. *Id.* (citing Shain v. Ellison, 273 F.3d 56, 63 (2d Cir. 2001).

215. *Id.*

216. *Id.* at 849.

217. Masters v. Crouch, 872 F.2d 1248, 1254 (6th Cir. 1989); *Young*, 616 F. Supp. 2d at 847 (citing *Shain*, 273 F.3d at 63; *Roberts*, 239 F.3d at 112) (requiring "a reasonable suspicion that the individual inmate is concealing contraband").

protection participants in *Bell* could be searched, misdemeanant detainees who had undergone a probable cause hearing in *Young* could not. And while "wide-ranging deference" in *Bell* supported the search policy, the CCJ officials' inability to prove the need for intake searches was their downfall. The juxtaposition of *Young* and *Bell* is not merely academic—*Young* settled for $55 million dollars. If courts follow *Young* in every correctional search suit, taxpayer-funded windfalls would be a *fait accompli*.

3. *Summation*

Reasonable minds will differ about strip searches. However, the selective reading of *Bell v. Wolfish*[218] is inexcusable. Circumventing *Bell* was a sharp blow to the principle of precedent. According to *Bell*, a policy that combats contraband by strip searching every arrestee is reasonable. The above cases thus ignore *Bell* and the consequences of contraband.

C. RESTORING *BELL V. WOLFISH*

By 2008, prior case law had gutted *Bell v. Wolfish.*[219] Municipalities relying on *Bell* to defend blanket strip searches paid heavily—over $300 million. The American Jail Association conceded the futility of defending such policies. It published *Jail and Prison Legal Issues: An Administrator's Guide*, which summarized the harsh reality:

> Despite the huge weight of authority regarding arrestee strip searches, one continues to hear of jail administrators searching for loopholes to the reasonable suspicion rule. In weighing whether to try to find a loophole in the traditional "reasonable suspicion" rule, a jail policy-setter needs to recognize several things. Legal research fails to reveal any loopholes. . . . So, pushing the limits of the traditional rule can be costly for the individual policy setter, for the city or county, and perhaps even for officers carrying out the policy.[220]

Fortunately, things changed suddenly because the United States Court of Appeals for the Eleventh Circuit resurrected *Bell* and en banc upheld a strip search policy.[221] Then in 2010, the United States Court of Appeals for the Ninth Circuit en banc did the same.[222] These en banc decisions persuaded the United States Court of Appeals for the Third Circuit to renounce *Bell*'s misapplication and uphold an intake

218. 441 U.S. 520 (1979).
219. 441 U.S. 520 (1979).
220. WILLIAM COLLINS, AMERICAN JAIL ASSOCIATION, JAIL AND PRISON LEGAL ISSUES: AN ADMINISTRATOR'S GUIDE (2004).
221. Powell v. Barrett, 541 F.3d 1298, 1300 (11th Cir. 2008) (en banc).
222. Bull v. City of San Francisco, 595 F.3d 964, 966 (9th Cir. 2010) (en banc).

strip search policy.[223] Rejecting almost thirty years of precedent, these three decisions marked a paradigm shift away from inmate privacy.

1. *The Eleventh Circuit's Watershed Decision of* Powell v. Barrett

In *Powell v. Barrett*,[224] a class of detainees challenged a Fulton County Jail's search policy where "neither the charge itself nor any other circumstance supplied reasonable suspicion to believe that the arrestee might be concealing contraband."[225] Officers searched detainees solely because they were entering the jail.[226] Detainees stood naked in a group of forty, while officers inspected each detainee.[227] Defendants moved to dismiss, arguing they were entitled to immunity.[228] The United States District Court for the Northern District of Georgia granted qualified immunity; it assumed that the policy was unconstitutional, but found the unconstitutionality was not clearly established.[229]

On appeal, the United States Court of Appeals for the Eleventh Circuit considered whether intake strip searches required reasonable suspicion. It first addressed cases requiring reasonable suspicion. Those decisions emanated not only from other circuits, but also from the Eleventh Circuit itself.[230] For example, *Skurstenis v. Jones*[231] held a strip search policy violated the Fourth Amendment because it did not require reasonable suspicion.[232] Additionally, in *Wilson v. Jones*,[233] the Eleventh Circuit found a Fourth Amendment violation because an intake search did not require reasonable suspicion.[234] *Powell* rebuked these decisions because they "misread *Bell v. Wolfish*[235] as requiring reasonable suspicion."[236] *Bell* instead upheld searches conducted "regardless of whether there was any reasonable

223. Florence v. Bd. of Chosen Freeholders of Burlington, 621 F.3d 296, 298-99, 311 (3d Cir. 2010), *cert. granted*, 131 S.Ct. 1816 (Apr. 4, 2011) (No. 10-945).
224. 541 F.3d 1128 (11th Cir. 2008) (en banc).
225. Powell v. Barrett, 541 F.3d 1298, 1300 (11th Cir. 2008) (en banc).
226. *Powell*, 541 F.3d at 1300.
227. *Id.* at 1301.
228. Powell v. Barrett, 496 F.3d 1288, 1296-97 (11th Cir. 2007), *vacated*, 541 F.3d 1298 (11th Cir. 2008) (en banc).
229. Powell v. Barrett, 376 F. Supp. 2d 1340, 1349-50 (N.D. Ga. 2005), *aff'd in part*, 541 F.3d 1298 (11th Cir. 2008) (en banc).
230. *Powell*, 541 F.3d at 1301 (citing Wilson v. Jones, 251 F.3d 1340 (11th Cir. 2001); Skurstenis v. Jones, 236 F.3d 678, 682 (11th Cir. 2000); Cuesta v. Sch. Bd., 285 F.3d 962, 969 (11th Cir. 2002)).
231. 236 F.3d 678 (11th Cir. 2000).
232. *Skurstenis*, 236 F.3d at 682.
233. 251 F.3d 1340 (11th Cir. 2001).
234. *Wilson*, 251 F.3d at 1341.
235. 441 U.S. 520 (1979).
236. *Powell*, 541 F.3d at 1307.

suspicion to believe that the inmate was concealing contraband."[237] After discarding *Skurstenis* and *Wilson*, the Eleventh Circuit considered decisions from other circuits. Singling out *Mary Beth G. v. City of Chicago*,[238] the Eleventh Circuit noted "[t]he MCC was hardly a facility where all of the detainees were 'awaiting trial on serious federal charges,' as some of the opinions incorrectly state."[239] *Powell* also rejected the argument that *Bell* was distinguishable because it addressed searches after contact visits, not searches at intake.[240] The Eleventh Circuit highlighted that, if anything, searches were more pressing at intake. Detainees might hide contraband before intake because gang members "have all the time they need to plan their arrests and conceal items on their persons."[241] This was a rare instance in which a court acknowledged the reality of intake.

Powell is a seminal case. The Eleventh Circuit undid years of courts (including the Eleventh Circuit) misreading *Bell*. Those courts should have held that reasonable suspicion was not required. Instead, they did the exact opposite. *Powell* recognized that *Bell* said nothing about reasonable suspicion. Additionally, the facts of *Bell* suffered years of distortion. The Eleventh Circuit was the first circuit court to accurately portray *Bell*. The Eleventh Circuit in *Powell* recognized that *Bell* not only did not involve "serious offenders," it included non-offenders.[242] Thus, because the blanket search was upheld in *Bell*, it was permissible in *Powell*. By a vote of eleven to one, the Eleventh Circuit in *Powell* thus reversed its prior decisions and split with eleven circuits.

2. *The Ninth Circuit Follows* Powell v. Barrett *in* Bull v. City of San Francisco

Bull v. City of San Francisco,[243] which followed *Powell v. Barrett*,[244] involved a Fourth and Fourteenth Amendment class action challenge to the San Francisco Jail's strip search policy. That policy mandated strip searches of all arrestees entering the Jail's general population.[245] The district court found the policy violated the Fourth Amendment.[246] The United States Court of Appeals for the Ninth Cir-

237. Bell v. Wolfish, 441 U.S. 520, 524 (1979).
238. 723 F.2d 1263 (7th Cir. 1983).
239. *Powell*, 541 F.3d at 1310 (quoting Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983)).
240. *Id.*
241. *Id.* at 1314.
242. *Id.* at 1310 (citing *Bell*, 441 U.S. at 558).
243. 595 F.3d 964 (9th Cir. 2010) (en banc).
244. 541 F.3d 1298 (11th Cir. 2008) (en banc).
245. Bull v. City of San Francisco, 595 F.3d 964, 966 (9th Cir. 2010) (en banc).
246. *Bull*, 595 F.3d at 970.

cuit en banc reversed.[247] The court was swayed by "evidence of the ongoing, dangerous, and perplexing contraband-smuggling problem . . . ."[248] The court acknowledged the United State Supreme Court's recognition that "'that the unauthorized use of narcotics is a problem that plagues virtually every penal and detention center in the country.'"[249] The record in *Bull* exemplified that problem. Contraband in the San Francisco Jail enabled an inmate to overdose, another to set her clothes on fire, and still another to attempt suicide.[250] Uncovered contraband included "handcuff keys, syringes, crack pipes, heroin, crack-cocaine, rock cocaine, and marijuana."[251] Weapons were *de rigueur*: "a seven-inch folding knife, a double-bladed folding knife, a pair of 8-inch scissors, a jackknife, a double-edged dagger, a nail, and glass shards."[252] For these reasons, the need for security outweighed the invasion of privacy.[253]

Bull disavowed prior Ninth Circuit cases that "failed to give due weight to the principles emphasized in [*Bell v. Wolfish*[254]] . . . ."[255] Those decisions included *Thompson v. City of Los Angeles*[256] and *Giles v. Ackerman*.[257] *Bull* found *Giles* flawed for three reasons. First, it required reasonable suspicion for strip searches.[258] Second, it reasoned arrestees charged with minor offenses "'pose[d] no security threat to the facility.'"[259] Third, it determined eleven instances of smuggling did not constitute a smuggling problem.[260] Like the United States Court of Appeals for the Eleventh Circuit, the Ninth Circuit also criticized other courts. Those decisions distinguished "*Bell* on several grounds: that persons arrested on certain minor offenses do not represent a security concern . . . [and] that persons who are arrested are less likely to smuggle contraband than detainees already in the general jail population who engage in contact visits."[261] The Ninth Circuit rejected such reasoning because it was inconsistent with *Bell*'s general principles and the application of those principles to the search in

247. *Id.* at 982.
248. *Id.* at 977 (citing Turner v. Safley, 482 U.S. 78, 90 (1987)).
249. *Id.* at 966 (quoting Block v. Rutherford, 468 U.S. 576, 588-89 (1984)).
250. *Id.* at 967.
251. *Id.* at 969.
252. *Id.*
253. *Id.* at 976-77.
254. 441 U.S. 520 (1979).
255. *Bull*, 595 F.3d at 977.
256. 885 F.2d 1439 (9th Cir. 1989).
257. 746 F.2d 614 (9th Cir. 1984).
258. *Bull*, 595 F.3d at 978.
259. *Id.* (quoting Giles v. Ackerman, 746 F.2d 614, 618 (9th Cir. 1984)).
260. *Id.* at 979 (citing *Giles*, 746 F.2d at 617-18).
261. *Id.* at 980 (citing Roberts v. Rhode Island, 239 F.3d 107, 1111-12 (1st Cir. 2001); Masters v. Crouch, 872 F.2d 1248, 1255 (6th Cir. 1989)).

Bell.[262] *Bull* relied on much of *Powell's* logic, including its view that decisions interpreting *Bell* to require reasonable suspicion were flawed.[263] The Ninth Circuit concluded, "[T]he scope, manner, and justification for San Francisco's strip search policy was not meaningfully different from the scope, manner, and justification for the strip search policy in *Bell*."[264]

The final vote of the judges was seven to four. The dissent recycled the themes of its (now discredited) precedent. It contended that strip searches required reasonable suspicion.[265] It also argued *Bell* was inapplicable because it had a "record of smuggling," unlike *Bull* which had no "evidence at all of any attempts by anyone to *smuggle* contraband via arrest."[266] The majority brushed these contentions aside, noting the facility in *Bell* had "'only one instance . . . where contraband was found during a body-cavity search.'"[267] The majority also pointed out the irrelevance of whether anyone from the class was caught with contraband during the search.[268] In sum, the Ninth Circuit's en banc decision, like the Eleventh Circuit's en banc decision before it, halted the erosion of *Bell* and gave correctional search policies a new life.

3. *The Third Circuit Endorses* Powell v. Barrett *and* Bull v. City of San Francisco *in* Florence v. Board of Chosen Freeholders of Burlington

In *Florence v. Board of Chosen Freeholders of Burlington*,[269] the United States Court of Appeals for the Third Circuit examined the dichotomy between *Powell v. Barrett*[270] and *Bull v. City of San Francisco*[271] and the rest of the circuits. In *Florence*, an arrestee charged with civil contempt was subjected to a strip search at intake. The District Court for the District of New Jersey granted his motion for summary judgment on the unlawful search claim and denied the correctional officials' cross-motion seeking immunity.[272] The district court then certified the following question to the Third Circuit: "'[W]hether a blanket policy of strip searching all non-indictable ar-

262. *Id.*
263. *Id.* at 979-81.
264. *Id.* at 975.
265. *Id.* at 994-95 (Thomas, J., dissenting).
266. *Id.* at 998.
267. *Id.* at 975 (majority opinion) (quoting *Bell*, 441 U.S. at 558).
268. *Id.* at 982.
269. 621 F.3d 296, 299 (3d Cir. 2010), *cert. granted*, 131 S.Ct. 1816 (Apr. 4, 2011) (No. 10-945).
270. 541 F.3d 1298 (11th Cir. 2008) (en banc).
271. 595 F.3d 964 (9th Cir. 2010) (en banc).
272. *Florence*, 621 F.3d at 301.

restees admitted to a jail facility without first articulating reasonable suspicion violates the Fourth Amendment . . . .'"[273] This was an issue of first impression for the Third Circuit.[274] The court observed that ten circuit courts uniformly concluded that minor offenders may not be strip searched without reasonable suspicion, but then the United States Courts of Appeals for the Eleventh and Ninth Circuits reversed their prior precedent and found reasonable suspicion was not needed.[275] The court in *Florence* considered "which line of cases is more faithful" to *Bell v. Wolfish*'s[276] holding.[277]

The Third Circuit tipped its hand early when it noted the persons searched in *Bell* included "witnesses in protective custody, contemnors, inmates awaiting sentencing or transportation to federal prison, and inmates serving relatively short sentences . . . ."[278] Moreover, the Third Circuit noted that courts had embellished *Bell*'s emphasis on privacy as *Bell* "included just one sentence discussing the scope of the privacy intrusion . . . ."[279] The Third Circuit rejected the argument that jails have little interest in strip searching minor offenders because that argument defied *Bell*.[280]

The court also discredited the notion that evidence of contraband was needed to justify an intake strip search. In *Florence*, the Third Circuit noted the single instance of attempted smuggling in *Bell* did not undermine the justification for the search.[281] The absence of contraband instead evinced the policy's deterrent effect.[282] Not automatically subjecting minor offenders to a search "would create a security gap which offenders could exploit with relative ease."[283] Because arrests are sometimes anticipated, incarcerated persons might "recruit others to subject themselves to arrest on non-indictable offences to smuggle weapons or other contraband into the facility. This would be especially true if we were to hold that those incarcerated on non-indictable offenses are, as a class, not subject to search."[284] Thus, the Third Circuit found that the intake strip search was permissible be-

273. *Id.* at 301 (quoting Florence v. Bd. of Chosen Freeholders of Burlington, 657 F. Supp. 2d 504, 511 (D.N.J. 2009)).
274. *Id.* at 298.
275. *Id.* at 299.
276. 441 U.S. 520 (1979).
277. *Florence*, 621 F.3d at 299.
278. *Id.* at 302 (citing Bell v. Wolfish, 441 U.S. 520, 559 (1979)).
279. *Id.* at 303.
280. *Id.* at 308-09.
281. *Id.* at 309.
282. *Id.* (citing *Bell*, 441 U.S. at 559).
283. *Id.*
284. *Id.* at 308. *Florence* cited *Powell* for the position that gang members would be likely to exploit an exception from security procedures for minor offenders. *See* Powell v. Barrett, 541 F.3d 1298, 1311 (11th Cir. 2008).

cause preventing contraband was a legitimate interest "vital to the protection of inmates and prison personnel alike."[285] In March 2011, the United States Supreme Court granted certiorari in *Florence* and will hear the case in the fall of 2011.

4. Summation

Powell v. Barrett,[286] *Bull v. City of San Francisco*,[287] and *Florence v. Board of Chosen Freeholders of Burlington*[288] are a welcome respite from *Bell v. Wolfish*'s[289] circumvention. In rejecting decades of precedent, these decisions read *Bell* plainly. They recognized a blanket search policy after contact visits meant blanket search policies at intake were permissible. Observing that contraband could be brought in through intake just as it could through contact visits deftly disposed of *Mary Beth G. v. City of Chicago*[290] and other such cases. *Powell*, *Bull*, and *Florence* also recognized that officers in *Bell* searched non-offenders. Finally, these three cases embrace correctional security and deference, which is critical as the American correctional population burgeons and the potential for inmate violence increases.

III. ANALYSIS

A typical strip search entails an arrestee disrobing completely, opening his mouth, displaying the soles of his feet, and presenting open hands and arms.[291] This process is intrusive, embarrassing, and uncomfortable. But such discomfort pales in comparison to the mayhem unleashed when contraband slips into a correctional facility. Contraband engenders assault, rape, and murder, the brunt of which is borne by inmates. Searching persons at intake uncovers an array of items. It also deters. Because strip searches reduce contraband, this bulwark against correctional violence should remain.

In the rush to elevate privacy, courts have misconstrued numerous principles of the United States Supreme Court's jurisprudence. These include correctional deference, the felony-misdemeanor distinction, reasonable suspicion, diminished privacy in jail, and the obligations of correctional officials. Each is addressed in turn.

285. *Id.* at 307 (citing *Bell*, 441 U.S. at 547).
286. 541 F.3d 1298 (11th Cir. 2008) (en banc).
287. 595 F.3d 964 (9th Cir. 2010) (en banc).
288. 621 F.3d 296 (3d Cir. 2010).
289. 441 U.S. 520 (1979).
290. 723 F.2d 1263 (7th Cir. 1983).
291. David C. James, Note, *Constitutional Limitations on Body Searches in Prisons*, 82 COLUM. L. REV. 1033, 1033 n.2 (1982). For a thorough discussion of the types of strip searches and their characteristics, see William J. Simonitsch, Comment, *Visual Body Cavity Searches Incident to Arrest: Validity Under the Fourth Amendment*, 54 U. MIAMI L. REV. 665, 667-68 (2000).

A. Deferring to Correctional Officials

At the heart of the correctional search analysis should be the deference afforded correctional officials. On close questions, deference ought to tip the outcome in the officials' favor. With the competing interests of privacy and security, strip searches are the epitome of a close question. Yet, as deference languishes at derisory levels, the terms of the debate have shifted. In fact, without deference, rulings against correctional officials have been a foregone conclusion.

Correctional deference derives from well-established sources. First, it is a product of the doctrine of separation of powers because correctional facilities are creatures of the legislative and executive branches.[292] Second, it implicates federalism whenever state prisons are involved.[293] Third, deference includes the management of correctional facilities, which has been decried as "squandering judicial resources" and with which courts are "ill equipped to deal . . . ."[294] Fourth, running a correctional facility involves obstacles "too apparent to warrant explication."[295] Deference is thus needed because the problems that arise in the daily operation of a corrections facility "are not susceptible of easy solutions . . . ."[296] Of course, limits to deference exist. Even *Bell v. Wolfish*[297] recognized that individuals do not forfeit all constitutional protections by reason of their confinement, including the protection of the Fourth Amendment to the United States Constitution's prohibition against unreasonable searches.[298]

The intake process exemplifies why deference exists. Security interests are strongest when a detainee enters a correctional facility. Gang members may get themselves arrested to smuggle contraband. An arresting officer's pat-down search may miss items that are concealed during booking. Courts have recognized these risks at intake. As the United States Court of Appeals for the Sixth Circuit explained, "The security interests of the jail in conducting a search at [intake are] strong."[299] Every correctional facility has its own unique challenges, but virtually all grapple with the menace of contraband. Most facilities have determined that searching detainees entering a jail minimizes contraband. This determination should be respected because it

292. Turner v. Safley, 482 U.S. 78, 85 (1987).

293. *See* Sandin v. Conner, 515 U.S. 472, 482 (1995) (explaining that federal courts have been involved in daily prison management).

294. *Sandin*, 515 U.S. at 482; *see also* Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 126 (1977); Procunier v. Martinez, 416 U.S. 396, 405 (1974), *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

295. *Procunier*, 416 U.S. at 404.

296. Bell v. Wolfish, 441 U.S. 520, 547 (1979); *see also Turner*, 482 U.S. at 84.

297. 441 U.S. 520 (1979).

298. *Bell*, 441 U.S. at 545, 558.

299. Dobrowolskyj v. Jefferson Cnty., 823 F.2d 955, 959 (6th Cir. 1987).

is made by those who maintain the facility. The damage wrought by contraband is felt by correctional officials via injured staff and inmates and corresponding litigation. As violence amongst inmates is conferred with the same discrimination as confetti, security must be foremost. Indeed, security is "perhaps the most legitimate of penological goals . . . ."[300] Because deference is most appropriate in matters relating to security, the decision to enact blanket strip search policies should be respected.

Ironically, courts that have disabused the notion of deference in the intake search context have invoked it for other searches. In *Arruda v. Fair*,[301] the United States Court of Appeals for the First Circuit cited deference in upholding blanket strip searches of inmates transferring between different areas of the prison.[302] The policy in *Arruda* mandated strip searches when inmates went to the library, infirmary, or visiting room.[303] Citing *Bell*, the First Circuit upheld the procedure, noting it was "most hesitant to overturn prison administrators' good faith judgments."[304] If searching inmates transferring between sections of a facility is permissible, searching them when they arrive at the facility from the outside should be permissible as well.

In *Johnson v. Phelan*,[305] the United States Court of Appeals for the Seventh Circuit also invoked deference to uphold strip searches. The Seventh Circuit held the availability of less intrusive alternatives was irrelevant in determining whether constitutional rights were violated.[306] The Seventh Circuit stated that deference was the catalyst: "[A] prison always can do something, at some cost . . . but if courts assess and compare these costs and benefits then judges rather than wardens are the real prison administrators."[307] In another case, the Seventh Circuit considered an claim under the Eighth Amendment to the United States Constitution where a physician's assistant performed a rectal probe of a prisoner in a hospital lobby.[308] The court found that no constitutional violation existed. Furthermore, the Seventh Circuit noted that alternative technology for rectal searches was irrelevant because contemplating alternatives would be "tantamount to federal court micro-management of a penological facility."[309] While it is difficult to reconcile such deference-driven decisions with the Sev-

300. Overton v. Bazzetta, 539 U.S. 126, 133 (2003).
301. 710 F.2d 886 (1st Cir. 1983).
302. Arruda v. Fair, 710 F.2d 886 (1st Cir. 1983).
303. *Arruda*, 710 F.2d. at 887.
304. *Id.*
305. 69 F.3d 144 (7th Cir. 1995).
306. Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995).
307. *Johnson*, 69 F.3d at 145-46.
308. Del Raine v. Williford, 32 F.3d 1024, 1038 (7th Cir. 1994).
309. *Del Raine*, 32 F.3d at 1042.

enth Circuit's decision in *Mary Beth G. v. City of Chicago.*,[310] *Mary Beth G.* remains good law.

A decision adverse to correctional officials does not mean deference was ignored. However, scrutiny of invalidated strip search policies reveals that deference has been downplayed. Courts discuss deference in a perfunctory manner, consuming a couple sentences; however, they never view deference in conjunction with contraband. Courts also have evaded the aftermath of contraband—rape, stabbings, and drug use—that falls on officials. Deference highlights the disconnect between *Bell* and subsequent circuit court decisions. The unifying theme of *Bell*, *Block v. Rutherford*,[311] and *Turner v. Safley*[312] was correctional deference. Indeed, it was often the reason for rejecting inmates' claims. For example, in *Block*, the United States Supreme Court was adamant that due to "'wide-ranging deference,'" the judiciary should not second-guess correctional officials by considering less restrictive alternatives.[313] Thus, in downplaying deference, lower courts have undermined clear Supreme Court precedent.

B. The Felon-Misdemeanor Dichotomy Frustrates Security

The next most critical misstep by courts is the false distinction between felons and misdemeanants. Per *Mary Beth G. v. City of Chicago*,[314] courts have focused on arrestees' charges in calculating the reasonableness of a search. But this distinction renders the reasonableness test of *Bell v. Wolfish*[315] nugatory while ignoring intake's realities. Whether a person is charged with a felony or misdemeanor should have no bearing on reasonableness. To the contrary: "the assumption that a 'felon' is more dangerous than a misdemeanant [is] untenable."[316] All inhabitants of an institutional facility should be searched upon arrival.

Claiming non-felon status inoculates an arrestee from search ignores *Bell* on multiple grounds. First, *Bell* articulated no such distinction. This was reflected by the United States Court of Appeals for the Eleventh Circuit's criticism of the United States Courts of Appeals for the Sixth and Seventh Circuits.[317] The Eleventh Circuit stated, "Those decisions are wrong. The difference between felonies and mis-

310. 723 F.2d 1263 (7th Cir. 1983).
311. 468 U.S. 576 (1984).
312. 482 U.S. 78 (1987).
313. Block v. Rutherford, 468 U.S. 576, 585 (1984) (quoting *Bell*, 441 U.S. at 547).
314. 723 F.2d 1263 (7th Cir. 1983).
315. 441 U.S. 520 (1979).
316. Tennessee v. Garner, 471 U.S. 1, 14 (1985).
317. Powell v. Barrett, 541 F.3d 1298, 1309 (11th Cir. 2008) (en banc) (citing Masters v. Crouch, 872 F.2d 1248 (6th Cir. 1989); Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983)).

demeanors or other lesser offenses is without constitutional significance . . . [and] finds no basis in the *Bell* decision, in the reasoning of that decision, or in the real world of detention facilities."[318] Second, those searched in *Bell* included persons not even charged with a crime.[319] Thus, to claim minor offenders may not be searched because of their offense defies precedent. Third, the test is "whether a prison search policy is 'reasonable' under the circumstances."[320] Instead of concluding the search is impermissible because an individual is a misdemeanant, a court must consider the "why" and "where" of the search.[321] The reason an individual was arrested is not dispositive. His entry into a correctional facility is. Yet courts have bypassed this critical point and focused on the underlying charges. Many facilities do not have the ability to segregate misdemeanants from felons, nor do they have the authority to turn away minor offenders. Thus, the ultimate destination of the detainee is the reason for searching and should be the focus of the reasonableness test. Because the felon-misdemeanant distinction flouts *Bell*, it should be laid to rest.

Beyond circumventing precedent, the correctional realities evaded by the felon-misdemeanant test are significant. To a correctional officer, whether a person is charged with a felony or a misdemeanor is immaterial. Any detainee can possess contraband and thus must be treated as such. This may seem like overcompensation with regard to an individual arrested on minor charges, but when the context is considered, it is necessary. Courts strike search policies because misdemeanants are, in theory, less dangerous than felons. That rationale has some facial allure but is ultimately myopic. The fact that a felon may be more likely to carry contraband does not diminish the possibility that a misdemeanant is carrying contraband. Moreover, this logic underestimates inmate ingenuity. Gangs and recidivists can exploit the disjunctive treatment. The United States Supreme Court warned, "It is not unreasonable to assume . . . that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates . . . ."[322] The Eleventh Circuit echoed the Supreme Court's concern that officials do not know whether someone is a "minor offender or is also a gang member who got himself arrested so that he could serve as a mule smuggling contraband in to other mem-

318. *Id.* at 1310.
319. *Bell*, 441 U.S. at 524.
320. Arruda v. Fair, 710 F.2d 886, 887 (1st Cir. 1983).
321. *Bell*, 441 U.S. at 559.
322. Block v. Rutherford, 468 U.S. 576, 587 (1984).

bers."[323] The United States Court of Appeals for the Third Circuit concurred, describing this scenario as "plausible."[324]

In the book *Black Hand*, reformed Mexican Mafia leader "Boxer" Enriquez offered insight into the extent of correctional drug trade.[325] Boxer was housed in the maximum-security section of the Los Angeles County Jail.[326] There he met John Stinson, a top-ranking member of the Aryan Brotherhood prison gang.[327] Prosecutors estimated that Stinson "was making at least $5,000 a week while locked up in maximum-security" through the jail drug trade.[328] Stinson eventually brought Enriquez into the operation. Enriquez explained, "Whatever drugs were available on the street were available in County Jail. It was—and still is—big business. Security at county was easier to breach with a large number of inmates coming and going each day."[329] Enriquez's experience is a microcosm of correctional drug trade. The money and power at stake is staggering, and gangs parlay intake search restrictions into fortunes.[330] In foisting the felon-misdemeanant distinction upon officials, courts drift mindlessly towards the maelstrom. Correctional violence and drug abuse correlates with population size and the number of serious offenders.[331] Given the significant gang presence in correctional facilities, it would be negligent not to treat every detainee as a potential smuggler.

The felony-misdemeanor distinction is counter-intuitive for another reason. "[S]ome felonies do not lend themselves to expectations of violence or smuggling, while some misdemeanors (such as menacing) arguably do."[332] Courts have recognized this logic. The United States Court of Appeals for the Sixth Circuit noted that certain misdemeanors are associated with weapons, which could raise a reasonable suspicion that misdemeanants may be concealing a weapon.[333] On the other hand, as the United States Court of Appeals for the Ninth Circuit observed, felonies such as tax evasion or securities fraud have a

323. *Powell*, 541 F.3d at 1311.

324. Florence v. Bd. of Chosen Freeholders of Burlington, 621 F.3d 296, 308 (3d Cir. 2010), *cert. granted*, 131 S.Ct. 1816 (Apr. 4, 2011) (No. 10-945).

325. CHRIS BLATCHFORD, BLACK HAND: THE BLOODY RISE AND REDEMPTION OF "BOXER" ENRIQUEZ, A MEXICAN MOB KILLER (2008).

326. *Id.* at 95.

327. *Id.*

328. *Id.*

329. *Id.* at 96.

330. PETE EARLEY, THE HOT HOUSE: LIFE INSIDE LEAVENWORTH PRISON (1993) (exploring the subject of contraband and prison drug trade).

331. *See* Falls v. Nesbit, 966 F.2d 375, 380 (8th Cir. 1992) ("Prisons are, by the very nature of many of those persons housed within their walls, dangerous, violent, and oftentimes unpredictable.").

332. MacGregor, *supra* note 63, at 200.

333. Dobrowolskyj v. Jefferson Cnty., 823 F.2d 955, 958-59 (6th Cir. 1987).

lesser risk of smuggling than misdemeanor offenses.[334] This is especially true when considering misdemeanors such as assault or being under the influence of a controlled substance.[335]

Finally, the felon-misdemeanant distinction ignores the intermingling of convicted persons and detainees. Most detainees, whatever their underlying charges, intermingle with a facility's general population, which often includes convicted felons. In upholding an intake search, the United States Court of Appeals for the Tenth Circuit cited, "The obvious security concerns inherent in a situation where the detainee will be placed in the general prison population . . . ."[336] The United States Court of Appeals for the First Circuit also noted that "[i]ntermingling of inmates is a serious security concern that weighs in favor of the reasonableness, and constitutionality, of the search."[337] Intermingling is a tangible justification for strip searches which courts have glossed over. Again, courts have suspended *Bell*'s reasonableness test by downplaying the "where" and "why" of intake searches.[338] While not a panacea, strip searches are the best measure to stop contraband. Forbidding strip searches on some arrestees is a virtual guarantee that contraband will enter a correctional facility.

C. Reasonable Suspicion Is Not Necessary to Search

Until *Powell v. Barrett*,[339] *Bull v. City of San Francisco*,[340] and *Florence v. Board of Chosen Freeholders of Burlington*,[341] every correctional strip search case injected a reasonable suspicion standard. By detaching themselves from the rigors of *Bell v. Wolfish*,[342] the courts in these cases were able to apply the reasonable suspicion standard. Not only was reasonable suspicion absent from *Bell*, the United States Supreme Court in *Bell* held the exact opposite. As pointed out by Justice Powell's dissent, the Court required no level of cause to strip search, rendering the reasonable suspicion requirement nugatory.[343]

Despite rejecting the reasonable suspicion test, *Powell*, *Bull*, and *Florence* did not elaborate on the test's fundamental incompatibility

334. Kennedy v. L.A. Police Dep't, 901 F.2d 702, 713 (9th Cir. 1989).
335. *Kennedy*, 901 F.2d at 713-14.
336. Archuleta v. Wagner, 523 F.3d 1278, 1284 (10th Cir. 2008).
337. Roberts v. Rhode Island, 239 F.3d 107, 112 (1st Cir. 2001) (citing *Dobrowolskyj*, 823 F.2d at 959).
338. *Bell*, 441 U.S. at 559-560.
339. 541 F.3d 1298 (11th Cir. 2008) (en banc).
340. 595 F.3d 964 (9th Cir. 2010) (en banc).
341. 621 F.3d 296 (3d Cir. 2010), *cert. granted*, 131 S.Ct. 1816 (Apr. 4, 2011) (No. 10-945).
342. 441 U.S. 520 (1979).
343. Bell v. Wolfish, 441 U.S. 520, 563 (1979) (Powell, J., dissenting).

with the correctional context. However, this issue merits attention. Reasonable suspicion is not conducive to the correctional context because it is a fact-specific determination based on the circumstances of each search. The test demands the officer conducting the search "point to specific objective facts and rational inferences that they are entitled to draw from those facts in light of their experience."[344] In other words, the suspicion must be directed to a specific individual.[345] This suspicion cannot relate to a "category of offenders, and does not arise merely because an arrestee fails to post bond immediately and police move him to general population."[346] Nevertheless, this is the precise reason correctional officials search. All individuals, regardless of their circumstances, are searched because they are entering a correctional facility. Reasonable suspicion should never enter the equation because the arrestees' specific circumstances are irrelevant.

Some commentators argue even blanket searches of felons are impermissible. One such commentator stated: "The reasonable suspicion standard does not yield under the weight of a felony charge. Instead, this standard requires a more nuanced, individualized inquiry than mere classification between felony or misdemeanor offenses."[347] But the need for individualized inquiry is the inherent problem with reasonable suspicion. Officials do not have the luxury of mulling the circumstances of each arrestee. The intake process is fluid. Arrestees enter in varying numbers and information about the arrestee or underlying arrest may be incomplete. The Supreme Court in *Block v. Rutherford*,[348] recognized the burden of reasonable suspicion made by "the brevity of detention and the constantly changing nature of the inmate population."[349] These facts are coupled with the reality that arrestees go to extremes to smuggle contraband.[350] Mail, visits, and the bribery and coercion of staff are the most commonly used methods

344. Hunter v. Auger, 672 F.2d 668, 674 (8th Cir. 1982) (citing Terry v. Ohio, 392 U.S. 1, 21, 27 (1968); United States v. Clay, 640 F.2d 157, 159 (8th Cir. 1981); United States v. Asbury, 586 F.2d 973, 976-77 (2d Cir.1978); United States v. Himmelwright, 551 F.2d 991, 995 (5th Cir. 1977)).

345. *Hunter*, 672 F.2d at 675 (citing Ybarra v. Illinois, 444 U.S. 85 (1979); *Clay*, 640 F.2d at 160; United States v. Afanador, 567 F.2d 1325, 1331 (5th Cir. 1978)).

346. Kelly v. Foti, 77 F.3d 819, 822 (5th Cir. 1996) (citations omitted).

347. Helmer, *supra* note 34, at 242.

348. 468 U.S. 576 (1984).

349. Block v. Rutherford, 468 U.S. 576, 587 (1984).

350. *See* WILLIAM R. BELL, PRACTICAL CRIMINAL INVESTIGATIONS IN CORRECTIONAL FACILITIES 8-14 (2002) (mail, visiting, drug drops, work programs, and staff); MARK S. FLEISHER, BEGGARS AND THIEVES: LIVES OF URBAN STREET CRIMINALS 171 (1995) (visits and staff bribes); LOUIS KONTOS & DAVID C. BROTHERTON, ENCYCLOPEDIA OF GANGS 100 (2008) (throwing drugs over the prison wall, air drops, recruiting/coercing correctional officers); Chad Trulson, *The Social World of the Prisoner*, *in* PRISONS: TODAY AND TOMORROW 79, 111 (Joycelyn M. Pollock ed., 2d ed. 2006) ("[v]isitors, contractors, inmates, and even staff" as methods for smuggling).

of infiltrating contraband into a prison facility.[351] However, gangs and recidivists will know if certain offenders are not being searched at intake, and with millions in profits at stake, such individuals' interests are not passing. To sustain drug activity in jails, gangs "depend on street contacts . . . to smuggle rock cocaine, marijuana, and other drugs . . . ."[352] The fluidity of intake and difficulty of uncovering contraband demonstrate reasonable suspicion is a dangerous standard.

Another reality cutting against reasonable suspicion is that most drugs are smuggled via body cavities.[353] The proclivity to smuggle contraband anally renders strip searches reasonable. "The scope of a search is generally defined by its expressed object."[354] The objective here is to uncover and prevent contraband. Because the anal cavity is the most common place to hide contraband, strip searches, not pat downs, are necessary. Yet courts refuse to address the popularity and effectiveness of smuggling via the anal cavity. Instead, courts equate the intake search process with post-arrest searches; however, the interests of the two are not aligned. The consequences of overlooking contraband are greater at intake than in post-arrest situations. At intake, the impetus to conceal contraband is greater than it is in a post-arrest situation because individuals may know they will be entering jail and have an opportunity to get contraband to smuggle or they may be entering jail with the sole purpose of smuggling contraband.[355] If a blanket search policy after meeting outside visitors is permissible, it is difficult to discern why blanket searches of detainees coming to the facility from the outside would not be. The need to prevent contraband after entry is no different from the need at entry. One court explained why *Bell* applied to intake strip searches: "The newly-admitted detainees in this case are in a similar position to the inmates in *Bell.* Neither is yet convicted of a crime, but both are entering (or re-entering) a prison institution after contact with the public."[356]

Finally, the reasonable suspicion requirement does not take into account deterrence. *Bell* upheld the Metropolitan Correctional Center's policy despite only one instance of smuggling. The Supreme Court found it sufficient that "attempts to secrete these items into the facility by concealing them in body cavities are documented in this

351. Crampton, *supra* note 121, at 915.

352. Mark S. Fleisher & Richard H. Rison, *Gang Management in Corrections, in* PRISON AND JAIL ADMINISTRATION: PRACTICE AND THEORY 232, 234 (Peter M. Carlson & Judith Simon Garrett eds., 1st ed. 1999).

353. BELL, *supra* note 350, at 9.

354. Florida v. Jimeno, 500 U.S. 248, 251 (1991) (citing United States v. Ross, 456 U.S. 798 (1982)).

355. Powell v. Barrett, 541 F.3d 1298, 1311 (11th Cir. 2008); Florence v. Bd. of Chosen Freeholders of Burlington, 621 F.3d 296, 309 (3d Cir. 2010).

356. Magill v. Lee Cnty., 990 F. Supp. 1382, 1389-90 (M.D. Ala. 1998).

record and in other cases."[357] In other words, the possibility of contraband was enough to warrant strip searches. Whether contraband plagues a facility, like the Cook County Jail or the San Francisco Jail, correctional officials should have the ability to keep a facility contraband-free. Officials should not have to wait until a critical mass of contraband appears before a court approves their intake procedure. As explained above, *Mary Beth G. v. City of Chicago*[358] is the wellspring of the reasonable suspicion requirement.[359] However, the issue of deterrence is inapplicable to *Terry*-type searches. Deterrence is a critical component of searching because contraband in jails is a well-known and well-established problem. Reasonable suspicion is also unsuited for correctional searches because deterrence transcends reasonable suspicion.

The folly of applying reasonable suspicion to arrestees may be best embodied by the fact that correctional officers and visitors can be searched when reasonable suspicion exists. Thus, the reasonable suspicion requirement places arrestees on the same level as prison visitors and correctional officers.[360]

D. Diminished Privacy Is a Reality of Correctional Life

Prohibiting strip searches because of privacy concerns has some facial allure. Nonetheless, on closer examination, such a position is difficult to sustain. This is especially true because privacy does not exist in institutional life. Decisions striking search policies are suspect because they refuse to acknowledge the lack of privacy in jails.

Although *Powell v. Barrett*,[361] *Bull v. City of San Francisco*,[362] and *Florence v. Board of Chosen Freeholders of Burlington*[363] never discussed why courts have taken an expansive view of privacy, the answer may lie in century-old precedent. "There was a time, not so very long ago, when prisoners were regarded as slave[s] of the State, [having] not only forfeited [their] liberty, but all their personal

357. *Bell*, 441 U.S. at 559 (citations omitted).

358. 723 F.2d 1263 (7th Cir. 1983).

359. Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1273 (7th Cir. 1983) (citing *Terry*, 392 U.S. at 18 n.15 (1968)).

360. *See* Cochrane v. Quattrocchi, 949 F.2d 11, 13 (1st Cir. 1991) (applying reasonable suspicion standard when prison visitors are strip searched); Thorne v. Jones, 765 F.2d 1270, 1276 (5th Cir. 1985) (same); Sec. & Law Enforcement Emps., Dist. Council 82 v. Carey, 737 F.2d 187, 201 (2d Cir. 1984) (applying reasonable suspicion standard when correctional officers are strip searched); Hunter, 672 F.2d at 673-74 (8th Cir. 1982) (same).

361. 541 F.3d 1298 (11th Cir. 2008) (en banc).

362. 595 F.3d 964 (9th Cir. 2010) (en banc).

363. 621 F.3d 296 (3d Cir. 2010), *cert. granted*, 131 S.Ct. 1816 (Apr. 4, 2011) (No. 10-945).

rights . . . ."[364] Federal courts long maintained a "hands off" approach to inmate complaints about their constitutional rights.[365] In fact, this doctrine "was a near absolute jurisdictional bar to federal court review of alleged violations of prisoners' asserted constitutional rights."[366] Courts assumed they were powerless to ameliorate constitutional violations.[367] Perhaps because of this past, the pendulum has swung back. Sweeping rulings in the 1970s and 1980s shored up inmates' rights under the First, Eighth, and Fourteenth Amendments to the United States Constitution.[368] In expanding such rights, privacy was swept in the undertow.[369] While protecting constitutional rights for inmates is worthwhile, privacy is different. Yet, courts have elevated privacy rights to the detriment of security by invalidating strip search policies. Privacy is a tenuous basis for invalidating strip searches because persons housed in correctional facilities surrender most privacy rights. They cannot shower in private. They cannot use the bathroom in private. They cannot sleep in private. They cannot meet visitors in private. It is difficult to comprehend why privacy is expanded at intake when the potential for contraband is greatest. Moreover, if one accepts the premise that privacy precludes strip searches, the broader argument that they must be allowed to shower, use the toilet, and sleep in private is not without merit.

Courts are untroubled by the lack of privacy during inmate showering.[370] Courts have held that officers monitoring showering inmates do not violate the Fourth Amendment because "the privacy interests of the inmate almost always must yield."[371] The United States Court of Appeals for the Seventh Circuit held: "[M]onitoring of naked prisoners is not only permissible—wardens are entitled to take precautions against drugs and weapons (which can be passed through the alimen-

364. Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 139 (1977) (quoting Ruffin v. Virginia, 62 Va. (21 Gratt.) 790, 796 (1871) (Marshall, J., dissenting)) (internal quotation marks omitted).

365. Bethea v. Crouse, 417 F.2d 504, 505-06 (10th Cir. 1969) ("We have consistently adhered to the so-called 'hands off' policy in matters of prison administration . . . ."); Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951) ("The courts have no supervisory jurisdiction over the conduct of the various institutions provided by law for the confinement of federal prisoners committed to the custody of the Attorney General . . . .").

366. Ramos v. Lamm, 485 F. Supp. 122, 130 (D. Colo. 1979).

367. Banning v. Looney, 213 F.2d 771, 771 (10th Cir. 1954).

368. Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 550 (2006).

369. Cheryl Dunn Giles, *Turner v. Safley and Its Progeny: A Gradual Retreat to the "Hands-Off" Doctrine?*, 35 ARIZ. L. REV. 219, 219 (1993).

370. Johnson v. Phelan, 69 F.3d 144, 146 (7th Cir. 1995).

371. Burge v. Murtaugh, No. 2:07-CV-0336PS, 2007 U.S. Dist. LEXIS 90736, at *4-5 (N.D. Ind. 2007); *see also* Rhoden v. DeTella, No. 95 C 5013, 1995 U.S. Dist. LEXIS 17354, at *10 (N.D. Ill. 1995) (noting no privacy violation where officers could view inmate in the shower).

tary canal or hidden in the rectal cavity and collected from a toilet bowl)—but also sometimes mandatory."[372] The Seventh Circuit also highlighted the prevalence of nudity in jails, stating, "Vigilance over showers, vigilance over cells—vigilance everywhere, which means that guards gaze upon naked inmates."[373]

Another Seventh Circuit decision captures the paradox of elevating privacy rights. In *Peckham v. Wisconsin Department of Corrections*,[374] the Seventh Circuit considered the reasonableness of "a visual inspection of a naked inmate" when the inmate returned from court or a contact visit.[375] The Seventh Circuit found the policy reasonable, noting "it is difficult to conjure up too many real-life scenarios where prison strip searches of inmates could be said to be unreasonable."[376] Body cavity searches "continue to turn up an impressive quantity and variety of contraband, including knives and hacksaw blades."[377] While strip searches may be embarrassing, "not every psychological discomfort a prisoner endures amounts to a constitutional violation."[378]

Most would agree strip searches are discomforting. But the reasonableness of a correctional search does not, and cannot, turn on the feelings the search elicits. Otherwise, no search would be permissible because even simple pat downs are unpleasant. Moreover, highlighting the embarrassment experienced during a search is not what *Bell v. Wolfish*[379] intended, finds no support in United States Supreme Court precedent, and would foreclose every search policy.

E. Correctional Officials' Obligation to Protect Inmates

The road to Hell is paved with good intentions. Nowhere does this aphorism hold truer than in the strip search litigation context. Under the guise of privacy, strip search policies have been dismantled. In succeeding, these lawsuits have excised a discomforting component of the correctional experience. But such victories are Pyrrhic. Less stringent intake procedures ease the process of smuggling contraband, thus promoting inmates' own liquidation. The United States Court of Appeals for the Seventh Circuit noted the irony that the search procedures inmates "describe as cruel and unusual punishment are the very procedures that are protecting them from murderous attacks by

372. *Johnson*, 69 F.3d at 146.
373. *Id.*
374. 141 F.3d 694 (7th Cir. 1998).
375. *Peckham v. Wis. Dep't of Corr.*, 141 F.3d 694, 695 (7th Cir. 1998).
376. *Peckham*, 141 F.3d. at 697.
377. Bruscino v. Carlson, 854 F.2d 162, 165 (7th Cir. 1988).
378. Calhoun v. DeTella, 319 F.3d 936, 939 (7th Cir. 2003).
379. 441 U.S. 520 (1979).

fellow prisoners."[380] Contraband is dangerous in whatever form because it alters the balance between inmates by strengthening some while disempowering others. Courts forget that when inmates are exposed to dangerous conditions, the liability of correctional officials escalates.

Additionally, correctional officials are held liable for inmate-on-inmate violence.[381] The United States Supreme Court explained that when a State, by imprisonment, prevents a person from caring for himself the United States Constitution imposes "a corresponding duty to assume some responsibility for his safety and general well being."[382] Taking "every means of self-protection and foreclos[ing] their access to outside aid," society may not simply lock away offenders and let "nature take its course."[383] Facilities thus cannot degenerate into places lacking basic standards of decency. While the Eighth Amendment "does not mandate comfortable prisons," it does not permit inhumane ones.[384] Yet "inhumane" is precisely what many institutions have become. Institutional violence is an accepted fact as courts routinely document the carnage. In *Miller v. Carson*,[385] a Florida jail was described as a "daily horror show."[386] Amongst 600 inmates, there were more than 150 reported assaults in eleven months.[387] In *Palmigiano v. Garrahy*,[388] there were "155 assaults, rapes, and major fights per year [among some 650 inmates] . . . 330 other incidents of violence, and personal harm to inmates."[389] These figures led the United States District Court for the District of Rhode Island to find "ever-prevalent fear and violence" at a Rhode Island prison.[390] Finally, a Tennessee jail examined in *Gilland v. Owens*[391] had an even higher rate of violence. In three months, 286 violent incidents oc-

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

381. *See, e.g.*, MacKay v. Farnsworth, 48 F.3d 491, 493 (10th Cir. 1995) (holding that prison guards knew that the plaintiff faced a risk of harm because guards had previously attempted to break up a fight between the plaintiff and another inmate); Walker v. Norris, 917 F.2d 1449, 1454 (6th Cir. 1990) (holding that prison guards violated the Eighth Amendment when they did not intervene in an attack); Serrano v. Gonzalez, 909 F.2d 8, 14 (1st Cir. 1990) (ruling that the officer's presence at an assault and his failure to intervene violated his duty to protect the plaintiff).

382. Helling v. McKinney, 509 U.S. 25, 32 (1993) (quoting DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199 (1989)).

383. Farmer v. Brennan, 511 U.S. 825, 833 (1994).

384. *Farmer*, 511 U.S. at 832.

385. 401 F. Supp. 835 (M.D. Fla. 1975), *aff'd in part, modified in part*, 563 F.2d 741 (5th Cir. 1977).

386. Miller v. Carson, 401 F. Supp. 835, 883 (M.D. Fla. 1975), *aff'd in part, modified in part*, 563 F.2d 741 (5th Cir. 1977).

387. *Miller*, 401 F. Supp. at 883.

388. 443 F. Supp. 956 (D.R.I. 1977).

389. Palmigiano v. Garrahy, 443 F. Supp. 956, 967 (D.R.I. 1977).

390. *Palmigiano*, 443 F. Supp. at 968.

391. 718 F. Supp. 665 (W.D. Tenn. 1989).

curred among 2,300 inmates; in a six-month period, the number climbed to 685.[392] These examples embody the correctional bloodshed.

A particularly tragic component of institutional violence is rape. "[P]erhaps more than anything else an inmate fears sexual assault."[393] The prevalence of this crime spurred Congress to enact the Prison Rape Elimination Act of 2003,[394] within which Congress indicated findings that 13% of inmates in the United States have been sexually assaulted.[395] Moreover, approximately 200,000 current inmates have been raped.[396] This is why preventing contraband is imperative. "[S]taff cannot or will not protect [inmates] from rape, assault, and other forms of victimization."[397] As another commentator explained, "prisons are largely unable to protect the physical safety of their inmates."[398] The link between rape and contraband is real. "Prison rapists frequently employ weapons to intimidate or immobilize victims."[399] Rapes involving weaponry are described as "strong arm rape."[400] Accounts of inmate rape where the assailant holds a knife to the victim's throat are ubiquitous.[401]

The failure to curtail contraband can demonstrate correctional officials' disregard for rape.[402] In a case involving unconstitutional levels of correctional violence, the United States Court of Appeals for the Eleventh Circuit found officials indifferent to the availability of weapons.[403] Bush axes, baseball bats, and shanks were used to commit horrific sexual abuse.[404] Notably, the Eleventh Circuit found this "[a]ggression was . . . exacerbated by the readily available contraband and an excessively permissive atmosphere."[405] The Eleventh Circuit ultimately concluded that the officials' laxity as to contraband demonstrated deliberate indifference to the inmates' safety.[406] Similar per-

392. Gilland v. Owens, 718 F. Supp. 665, 673-74 (W.D. Tenn. 1989).

393. Richard S. Jones & Thomas J. Schmid, *Inmates' Conceptions of Prison Sexual Assault*, 69 PRISON J. 53, 55 (1990).

394. 42 U.S.C. §§ 15601-09 (2003).

395. § 15601(2).

396. *Id.*; *see also* James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433, 442-44 (2003).

397. Robertson, *supra* note 2, at 339.

398. Peter Scharf, *Empty Bars: Violence and the Crisis of Meaning in Prison*, in PRISON VIOLENCE IN AMERICA 28 n.2 (Michael Braswell, Reid H. Montgomery, & Lucien X. Lombardo, eds., 2d ed. 1994).

399. Robertson, *supra* note 396, at 467.

400. VICTOR HASSINE, LIFE WITHOUT PAROLE: LIVING AND DYING IN PRISON TODAY 139 (2d ed. 1999).

401. WILBERT RIDEAU & RON WIKBERG, LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS 73 (1992).

402. Robertson, *supra* note 396, at 467.

403. LaMarca v. Turner, 995 F.2d 1526, 1536-38 (11th Cir. 1993).

404. *LaMarca*, 995 F.2d at 1533.

405. *Id.*

406. *Id.* at 1536-38.

missiveness prompted the United States Court of Appeals for the Fifth Circuit to observe that "inmate access to unsupervised machinery and other resources resulted in widespread possession of weapons" in a Louisiana prison.[407] A final example is *Tillery v. Owens*,[408] where a jaw-dropping list of contraband included brass rods, knife blades, metal bars, chisels, wrenches, hammer picks, ice picks, axes, spikes, and spears.[409] Allowing such conditions to fester facilitates all types of violent crime, underscoring the need to stop contraband at the jailhouse door. But if courts prohibit officials from conducting thorough searches at intake, it is illogical to hold them responsible when the impact of contraband is felt later.

Blanket strip searches are criticized because of "[t]he innocents who will be forced to suffer the indignities of a strip search as a result of prison facilities' security concerns remedied through overly-simple and broad blanket policies."[410] This argument, which underpins the strip search litigation, disregards correctional realities. It is those innocents who suffer when more dangerous inmates are fueled by drugs or armed with weapons. The danger faced by older or weaker inmates is best captured as follows: "To be an imprisoned male in the United States is to experience a Hobbesian world; one encounters a barely controlled jungle where the aggressive and the strong will exploit the weak and the weak are dreadfully aware of it."[411] Strip searches will not completely alleviate this anguish, but they will lessen the incidence of contraband. This enables correctional officials to better meet their obligations of protecting inmates.

IV. CONCLUSION

Correctional officers have a dangerous job. Occupational hazards include escape attempts, riots, and ambushes. Minimizing contraband is integral to maintaining order, but doing so is difficult, precisely because contraband smugglers are risk-takers who are wiling to jeopardize their health and risk additional jail time to realize the benefits of smuggling.

In the comfortable confines of chambers or the corner office, it is not the judge or lawyer who will experience the havoc wrought by contraband. That suffering is experienced by correctional officers and inmates. Stopping contraband will save lives, lessen injuries, and

407. Williams v. Edwards, 547 F.2d 1206, 1211 (5th Cir. 1977).
408. 719 F. Supp. 1256 (W.D. Pa. 1989).
409. Tillery v. Owens, 719 F. Supp. 1256, 1274 (W.D. Pa. 1989).
410. Crampton, *supra* note 121, at 919.
411. Robertson, *supra* note 3, at 102 (footnotes omitted) (internal quotation marks omitted).

diminish drug abuse. For that reason, reasonable suspicion, consideration of an arrestee's charges, and a history of contraband should not be prerequisites to intake strip searches.