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Stripped of Justification: The Eleventh Circuit's Abolition of the Reasonable Suspicion Requirement for Booking Strip Searches in Prisons

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STRIPPED OF JUSTIFICATION: THE ELEVENTH CIRCUIT'S
ABOLITION OF THE REASONABLE SUSPICION
REQUIREMENT FOR BOOKING STRIP SEARCHES IN PRISONS

ANDREW A. CRAMPTON*

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I. INTRODUCTION

Throughout the first three weeks of November 2003, thousands of protesters convened in Miami, Florida to protest the Free Trade Area of Americas negotiations.¹ Hundreds of the protesters were arrested.² On November 21, a “jail

* J.D. expected, May 2010, Cleveland State University, Cleveland-Marshall College of Law; B.A. Loyola College Maryland (now known as Loyola University Maryland). The author would like to thank all those who assisted him in the composition of this Note, especially Joshua Klarfeld, Sheldon Gelman, and his fellow members of the *Cleveland State Law Review*.

¹ Tamara Lush, *Miami Police Keep Lid on Trade Protesters*, ST. PETERSBURG TIMES, (Nov. 21, 2003), http://www.sptimes.com/2003/11/21/State/Miami_police_keep_lid.shtml. Protesters gathered in Miami to protest the “world’s largest proposed free trade area.” *Id.* The week-long protest was massive, with reports of a gathering of up to 12,000 current and retired union members in one location. *Id.* The vast majority of the protesters were peaceful. *Id.* However, the violence (and subsequent arrests) was reportedly sparked by “young anarchists, who oppose government and all forms of societal hierarchy.” *Id.*

² Steve Ellman, *Free-Trade Protesters Eye Suits Over Treatment* (Jan. 9, 2004), <http://www.law.com/jsp/article.jsp?id=1073157024071>. Ellman’s article focused on Laura Ripple, a twenty-one-year-old woman who alleged police abuse after she was arrested for unlawful assembly, a criminal misdemeanor. *Id.* According to Ripple’s personal account:

[S]he found herself being half-carried and half-dragged, fully dressed, into a makeshift shower for “decontamination.” After the shower, she was surrounded by four male officers in full-body hazardous material suits and gas masks. In a daze, she realized

solidarity rally” was held in front of the Miami-Dade County Pre-Trial Detention Center³ to protest the detention of those who had been arrested earlier.⁴ Among those participating in the rally was Judith Haney, a fifty-year-old Oakland, California native who worked as a management employee for a biotechnology corporation.⁵ During this rally, Haney, three other women, and three other men were sitting on the sidewalk across from the Center when they were arrested for “failing to disburse.”⁶ They were immediately escorted across the street and into the Detention Center for processing.⁷

they were cutting off her clothes with scissors. She was left naked. Her clothes and possessions were thrown into the garbage. “I screamed and asked for a female officer but they ignored me,” she said. She was handed a paper hospital gown, and later given prison garb to wear. She made bail at 3 the next morning. “I was completely shocked,” Ripple said. “I felt violated.”

Id. It appears Ripple was arrested at the same peaceful protest as Judith Haney. *Id.* See Haney Statement, *infra* note 4, at 1.

³ The Miami-Dade County Pre-Trial Detention Center is a 1,712 bed booking facility, “which processes and houses all classifications of inmates” ranging “from traffic offenders to capital offenders.” Miami-Dade County Corrections, http://www.miamidade.gov/corrections/pre_trial_detention.asp (last visited Jan. 15, 2010).

⁴ Judith Haney, Statement of Judy Haney to the Commission on Safety and Abuse in America’s Prisons 1 (Apr. 19, 2005), http://www.prisoncommission.org/statements/haney_judith.pdf [hereinafter Haney Statement]. Ms. Haney’s statement and case were brought to this author’s attention by Margo Schlanger’s pre-*Powell* overview of jail strip search litigation. See Margo Schlanger, *Jail Strip-Search Cases: Patterns and Participants*, 71 SPG LAW & CONTEMP. PROBS. 65, 67-73 (2008). Beginning in March 2005, The Commission on Safety and Abuse in America’s Prisons was:

[a year-long exploration of] violence and abuse in America’s prisons and jails and how to make correctional facilities safer for prisoners and staff and more effective in promoting public safety and public health. The Commission examined dangerous conditions of confinement—violence, poor medical and mental health care, and inappropriate segregation—that can also endanger the public; the challenges facing labor and management; weak oversight of correctional facilities; and serious flaws in available data about violence and abuse in prisons and jails. The Commission’s findings and a set of 30 practical recommendations for operating correctional facilities that reflect America’s values and serve our best interests are captured in the report, *Confronting Confinement*.

The Commission is co-chaired by former United States Attorney General Nicholas de B. Katzenbach and the Honorable John Gibbons, former Chief Judge of the United States Court of Appeals for the Third Circuit. The 20-member panel includes Republicans and Democrats, conservatives and liberals, those who run correctional systems and those who litigate on behalf of prisoners, scholars, and individuals with a long history of public service and deep experience in the administration of justice. The Commission is staffed by and funded through the Vera Institute of Justice.

Commission on Safety and Abuse, Mission, <http://www.prisoncommission.org/mission.asp> (last visited Jan. 15, 2010).

⁵ Class Action Complaint at ¶¶ 10, 15, *Haney v. Miami-Dade County*, No. 04-20516, 2004 WL 2868044, (S.D. Fla. Mar. 5, 2004).

⁶ *Id.* at ¶ 11.

⁷ Haney Statement, *supra* note 4, at 1.

Haney and the women were led down a long hallway lined with several small rooms, where they were sat down on a bench.⁸ A guard removed one of the women from the group and placed her into one of these small rooms.⁹ Moments later, Haney overheard the guard asking the woman to remove her clothes.¹⁰ Haney's mind began racing. She described her thoughts:

Hearing that startled and surprised me. We had not done anything that involved drugs or weapons; we were behaving peacefully and had been compliant with the requests of the corrections officers during the booking process. . . .

I leaned over to the young woman to my left and said in a very quiet voice, "Are they strip searching us? That's unconstitutional." I'm not sure I'd even taken a breath when the guard standing nearest came over to me and in a very severe tone asked, "Are you refusing?"

What happened next happened very quickly, but in my mind I had a lot to consider. I knew that the likelihood was close to zero that if I responded, "Yes, I'm refusing—this is an unreasonable search and is unconstitutional," that the guard would say, "Oh, all right—we won't do it then."

. . . If I refused, would they punish not only me, but the women arrested with me? While I was considering what I would do, the other women on the bench responded to the guard for me—saying in unison "No, she's not refusing." This all happened very quickly, and I knew that I wasn't ready to risk the possible consequences of refusing to be strip searched as well as putting the other women in jeopardy.¹¹

When it was Haney's turn to be searched, she was taken to the same small, 6' x 8' room in which the others had been.¹² She was told to face the guard, who was standing in the doorway, and ordered to remove her clothing piece by piece.¹³ She further described the experience:

After I removed all my clothes, the guard told me to turn around, bend all the way over, and spread my cheeks. I'm not sure that I can really convey the emotional and physical complexity of the situation. Bending over and "spreading my cheeks" exposed my genitalia and anus to a complete stranger, who had physical authority over me, so that she could visually inspect my body cavities. The only way I could cope with this was to stay

⁸ *Id.* at 1-2.

⁹ *Id.* at 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 3.

¹³ *Id.*

very focused in my head and just separate from my body. The feeling was sort of like floating while also feeling like a big lump.

The guard's next set of instructions were to squat—and then—to hop like a bunny. Remember, I'm still "spreading my cheeks," so I can't use my arms to balance or assist me in the hopping process

I stood, bent over, and hopped naked under orders and in view of at least two guards in a small room with a door open to a hallway that passersby could see in for about 10 to 15 minutes. My genitalia and anus were exposed and viewable to anyone passing through the hallway for over 5 minutes.¹⁴

Shortly thereafter, Haney sought counsel and filed a federal class-action suit against Miami-Dade County, claiming the County's blanket strip search booking policy violated her and other arrestee's Fourth Amendment rights.¹⁵ In April 2005, the parties settled for \$6.2 million.¹⁶ Fortunately for Haney and her fellow class members, this settlement occurred several years prior to the Eleventh Circuit's ruling in *Powell v. Barrett*.¹⁷ Had their case been analyzed under the rationale set forth in *Powell*, it is likely that the court would have found the above strip search to be entirely permissible under the Fourth Amendment.

In 1979, the Supreme Court in *Bell v. Wolfish* explored the scope of a blanket policy that required inmates, including pre-trial detainees, to be strip searched after each planned visit with a person from outside the institution.¹⁸ It held that such searches may be conducted on "less than probable cause" and provided a multifactor test to be conducted in each case in order to balance "the need for the particular search against the invasion of personal rights that the search entails."¹⁹ Since then, the circuit courts have many times faced the issue of the validity of prison policies that require strip searches to be conducted as a part of an arrestee's *booking*

¹⁴ *Id.* at 3-4.

¹⁵ Class Action Complaint, *supra* note 5, at ¶ 1.

¹⁶ Associated Press, Miami agrees to pay \$6 million to women who were strip-searched, (April 19, 2005), http://www.courtstv.com/news/2005/0419/strip_ap.html (last visited Oct. 20, 2008). The article noted:

[Haney and the two other women from her group] were joined by four other plaintiffs, and the seven will divide \$300,000, under the settlement. Thousands of others strip-searched in the county between March 2000 and February 2005 could get awards ranging from \$10 to thousands of dollars. In all, those searched could receive \$4.85 million, with the rest of the roughly \$6.2 million settlement going to attorney's and administration fees and expenses.

Id. See also Stipulation of Settlement at ¶ 28, *Haney v. Miami-Dade County*, No. 04-20516 (S.D. Fla. Apr. 13, 2005).

¹⁷ *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc).

¹⁸ *Bell v. Wolfish*, 441 U.S. 520 (1979).

¹⁹ *Id.* at 558-60.

process.²⁰ Amazingly, through the use of the balancing test in *Bell*, these courts have been nearly unanimous in their conclusions: a reasonable suspicion to believe that the arrestees were concealing contraband is necessary in order for such searches to be considered “reasonable” under the Fourth Amendment.²¹

On September 4, 2008, however, the Eleventh Circuit Court of Appeals, in *Powell v. Barrett*, upheld a blanket strip search policy used in booking arrestees, regardless of whether there was any reasonable suspicion to believe that the arrestees were concealing contraband.²² The Court in *Powell* applied the *Bell* balancing test, but, running counter to nearly thirty years of judicial interpretation, held that virtually all of the federal circuits, including their own, were incorrect in their prior holdings, which required an existence of reasonable suspicion to conduct such a search.²³ In doing so, the Eleventh Circuit, in essence, established a per se rule allowing strip searches—an act that has been described by circuit courts as “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission”²⁴ and has

²⁰ See, e.g., *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) (“[S]trip and visual body cavity searches must be justified by at the least a reasonable suspicion.”); *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.”); *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) (“We hold that the Fourth Amendment precludes prison officials from performing strip/body cavity searches of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest.”); *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984) (“[W]e hold that arrestees charged with minor offenses may be subjected to a strip search only if jail officials possess a reasonable suspicion that the individual arrestee is carrying or concealing contraband.”), *overruled on other grounds by* *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999) (en banc); *Stewart v. Lubbock County*, 767 F.2d 153, 156-57 (5th Cir. 1985) (“Because Lubbock County’s strip search policy was applied to minor offenders awaiting bond when no reasonable suspicion existed that they as a category of offenders or individually might possess weapons or contraband, under the balancing test of *Wolfish* we find such searches unreasonable and the policy to be in violation of the Fourth Amendment.”); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983) (“[W]e agree with the district court in *Jane Does* that ensuring the security needs of the City by strip searching plaintiffs-appellees was unreasonable without a reasonable suspicion by the authorities that either of the twin dangers of concealing weapons or contraband existed.”).

²¹ *Wilson*, 251 F.3d at 1343; *Swain*, 117 F.3d at 7; *Masters*, 872 F.2d at 1255; *Weber*, 804 F.2d at 802; *Giles*, 746 F.2d at 617, *overruled on other grounds by* *Hodgers-Durgin*, 199 F.3d at 1040 n.1; *Stewart*, 767 F.2d at 156-57; *Mary Beth G.*, 723 F.2d at 1273.

²² *Powell*, 541 F.3d at 1300.

²³ *Id.* at 1310.

²⁴ *Mary Beth G.*, 723 F.2d at 1272.

“instinctively give[n] [the Supreme Court] most pause”²⁵—to be conducted, *absent any cause*, on *all* arrestees during the process of booking.²⁶

The Eleventh Circuit’s decision in *Powell v. Barrett* misinterpreted the rationale and balancing test provided by the Supreme Court in *Bell v. Wolfish*. This misinterpretation lies in the Eleventh Circuit’s failure to recognize the fundamental factual distinctions between, and thus, the different justifications behind, strip searches of inmates *after planned contact visits* (as in *Bell*) and strip searches of arrestees as part of the facility’s *booking process* (as in the *Powell* and the “reasonable suspicion” cases). Because of the difference between the facts in *Bell* and the facts set forth before it, the Eleventh Circuit should not have found the *Bell* case to be specifically controlling, and, in the alternative, should have found, as nearly all the federal circuits had before it, that reasonable suspicion is required to conduct strip searches of arrestees during the booking process.

Part II of this Note will provide an historical judicial background of the decisions leading up to the *Powell v. Barrett* decision. This section will first take a brief look at the history of the prison strip search before conducting an in-depth analysis at the *Bell v. Wolfish* decision, including the facts, rationale, and ambiguities of the decision. Next, this Note will examine the subsequent use of the *Bell v. Wolfish* decision by the federal courts in the context of strip searches conducted pursuant to facilities’ booking policies, focusing on the rise of the “reasonable suspicion” standard. Part III of this Note will look at the decision in *Powell* itself. This section will start by examining the factual background of the case. It will then delve into a detailed analysis of the rationale that the Eleventh Circuit employed to reach its decision and demonstrate why this rationale is misapplied in light of the Supreme Court’s decision in *Bell v. Wolfish* and the federal court decisions that followed. Finally, this Note will examine reactions from other circuit courts since the Eleventh Circuit decided *Powell*.

II. BACKGROUND

A. Fourth Amendment Historical Background

The Fourth Amendment provides, in pertinent part:

The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.²⁷

The plain language of the amendment states that one only has a right to be free from searches that are “unreasonable” in nature.²⁸ As expected, the historical

²⁵ *Bell*, 441 U.S. at 558.

²⁶ *Powell*, 541 F.3d at 1316.

²⁷ U.S. CONST. amend. IV. *See also* *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that the Fourth Amendment is enforceable against the states through the Due Process Clause of the Fourteenth Amendment).

²⁸ U.S. CONST. amend. IV; *see* Gabriel M. Helmer, *Strip Search and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U. L. REV. 239, 243 (2001).

development of the Fourth Amendment has been largely consumed by the debate over what, in fact, constitutes an “unreasonable” (or “reasonable”) search.²⁹ However, in the context of prisons, the historical debate, for the majority of the Fourth Amendment’s existence, has not been whether searches of those in prisons, including arrestees, were “reasonable” or “unreasonable,” but whether such persons were even afforded certain rights under the Constitution.³⁰ Until the mid-twentieth century, the answer was clear: They were not.³¹

Gabriel Helmer, in his article *Strip Search and the Felony Detainee: A Case for Reasonable Suspicion*, provides a thorough look at the history of prison strip searches in the United States.³² He notes that the ratification of the Fourth Amendment essentially brought no change to the rights of arrestees.³³ Those entering jails in the early 1800s were “still routinely stripped and examined.”³⁴ Quoting a work on the history of imprisonment in the United States, Helmer remarks on the brutality and inhumanity of the searches that continued to exist under the Fourth Amendment:

The prison authorities put their new arrival through a crunching but meticulously organized admission ritual, which, besides degrading him, was meant to extract every kind of personal information, for entry into the prison record he never was permitted to see. There was the mortification of being stripped naked in front of others, and the mortification of being exposed to naked others. He was probed and tested, and layer by layer his individuality was stripped away, and he was assigned a new identity. . . .³⁵

Not only were such acts being carried out, but they were, in essence, being permitted by the courts.³⁶ Helmer notes the “slaves of the state” concept some courts adopted prior to the civil rights movement when establishing prisoners’ individual rights:

A convicted felon, whom the law in its humanity punishes by confinement in the penitentiary instead of with death, is subject while undergoing that punishment, to all the laws which the Legislature in its wisdom may enact He has, as a consequence of his crime, not only forfeited his liberty,

²⁹ Helmer, *supra* note 28, at 243-44.

³⁰ *Id.* at 248.

³¹ *Id.* (citing SCOTT CHRISTIANSON, WITH LIBERTY FOR SOME: 500 YEARS OF IMPRISONMENT IN AMERICA 251-52 (1998)) (noting that “[i]nmates were not entitled to life, liberty, and the pursuit of happiness” and later, “Americans’ constitutional rights effectively stopped at the prison gate”).

³² Helmer, *supra* note 28, at 242-50.

³³ *Id.* at 247 (citing CHRISTIANSON, *supra* note 31, at 114) (describing how each convict arriving at the New York State Prison at Auburn during the mid 1820s “was admitted according to a carefully developed ritual. First his irons were taken off and he was stripped naked by other convicts . . . under the watchful eyes of a keeper”).

³⁴ Helmer, *supra* note 28, at 247.

³⁵ *Id.* (quoting CHRISTIANSON, *supra* note 31, at 230).

³⁶ Helmer, *supra* note 28, at 249.

but all his personal rights except those which the law in its humanity accords to him. He is for the time being a slave of the State. He is *civilliter mortuus*; and his estate, if he has any is administered like that of a dead man.³⁷

During this time, the “courts employed a ‘hands-off’ approach that detained the Constitution at the prison gate”—providing “absolute deference to prison officials.”³⁸ However, “[d]uring the 1940s courts limited this ‘hands-off’ approach,” with some holding that a “prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.”³⁹

After the passage of the Civil Rights Act of 1964, penal officials began to openly recognize “the value of preserving—to the maximum feasible extent—civil rights and privileges during incarceration.”⁴⁰ Finally, in 1974 the Supreme Court, in *Wolff v. McDonnell*, held that “[t]here is no iron curtain between the Constitution and the prisons of this country.”⁴¹ Thus, “170 years after the ratification of the Fourth Amendment” both prisoners and arrestees gained some limited protection from the Bill of Rights.⁴²

B. *Bell v. Wolfish*

On November 28, 1975, just seventeen months after the Supreme Court’s proclamation in *Wolff*, Louis Wolfish, an inmate at the Metropolitan Correctional Center (“MCC”) in New York City, sought a writ of habeas corpus because of allegedly unconstitutional conditions at the facility.⁴³ A week later, the suit was declared a class action on behalf of all inmates at the facility.⁴⁴

At the time of the action, the MCC was just several months old.⁴⁵ The facility housed a wide variety of inmates, ranging from pretrial detainees to sentenced prisoners.⁴⁶ Justice Rehnquist colorfully described the MCC as differing “markedly

³⁷ *Id.* (quoting *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871)).

³⁸ Helmer, *supra* note 28, at 249 (citing *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1029 (2d Cir. 1985)) (describing standards for reviewing claimed violations of prisoners’ rights).

³⁹ Helmer, *supra* note 28, at 249-50 (quoting *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944)).

⁴⁰ Helmer, *supra* note 28, at 250 (quoting AMERICAN BAR ASSOCIATION AND COUNCIL OF STATE GOVERNMENTS, COMPENDIUM OF MODEL CORRECTIONAL LEGISLATION AND STANDARDS, V-3 (1972)).

⁴¹ Helmer, *supra* note 28, at 250 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974)).

⁴² Helmer, *supra* note 28, at 250.

⁴³ *Wolfish v. Levi*, 573 F.2d 118, 121-23 (2d Cir. 1978).

⁴⁴ *Id.* at 122.

⁴⁵ *Id.* The MCC was opened in August, 1975. *Id.* at 121.

⁴⁶ The MCC held pretrial detainees, convicted inmates awaiting sentencing or transportation to federal prison, convicted inmates who were serving relatively short sentences in a service capacity, convicted inmates who were being held at the MCC on writs to testify or stand trial, witnesses in protective custody, and persons incarcerated for contempt of court. *Id.*

from the familiar image of a jail; there are no barred cells, dank, colorless corridors, or clanging steel gates. It was intended to include the most advanced and innovative features of modern design of detention facilities.”⁴⁷

Despite the facility’s modern design, the jail quickly encountered issues with overcrowding.⁴⁸ Due to an “unprecedented rise in pretrial and sentenced” inmates, “the MCC’s administrators . . . pressed into service every square foot of space which conceivably could be used as sleeping space,” with many new arrivals “forced to sleep on sofas or cots in the common areas under the glare of constantly burning lights.”⁴⁹ The result was the destruction of “any modicum of privacy for many pretrial detainees.”⁵⁰

These conditions were the impetus for the original action, but the petition was soon amended to include a “litany of woes [that] touched on almost all aspects of the institution’s conditions and practices,” including the facility’s strip search policy.⁵¹ The policy consisted of “strip searching” every inmate at MCC after every contact visit with a person from outside the institution.⁵² If male, the search consisted of the inmate, “[i]n the presence of a corrections officer, . . . remov[ing] his clothes, display[ing] his armpits, open[ing] his mouth, rais[ing] his genitals, display[ing] the bottoms of his feet, and spread[ing] his buttocks for visual anal inspection.”⁵³

at 123 n.6. At the time of the district court’s order, the MCC was, in essence, a short-term detainment facility, with 50% of all MCC inmates spending less than thirty days at the facility and 73% less than sixty days. *United States ex rel. Wolfish v. Levi*, 439 F. Supp. 114, 127 (S.D.N.Y. 1977). Of the unsentenced detainees, over half spent ten days or less at the MCC, three-quarters were released within a month, and more than 85% were released within sixty days. *Wolfish*, 573 F.2d at 129 n.25.

⁴⁷ *Bell*, 441 U.S. at 525.

⁴⁸ *Wolfish*, 573 F.2d at 122.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 123. Including the strip search policy, this “litany of woes” also contained complaints of:

inadequate phone service; . . . room searches outside the inmate’s presence; a prohibition against the receipt of packages or the use of personal typewriters; interference with, and monitoring of, personal mail; inadequate and arbitrary disciplinary and grievance procedures; inadequate classification of prisoners; improper treatment of non-English speaking inmates; unsanitary conditions; poor ventilation; inadequate and unsanitary food; the denial of furloughs; unannounced transfers; improper restrictions on religious freedom; and an insufficient and inadequately trained staff.

Id. at 123 n.7. With respect to modern complaints regarding prison conditions, it should be noted that the Prison Litigation Reform Act of 1997 requires prisoners to first exhaust administrative remedies before bringing suit in federal court. See Danielle M. McGill, *To Exhaust or Not to Exhaust?: The Prisoner Litigation Reform Act Requires Prisoners to Exhaust All Administrative Remedies Before Filing Excessive Force Claims in Federal Court*, 50 CLEV. ST. L. REV. 129 (2003).

⁵² *Bell*, 441 U.S. at 558.

⁵³ *Wolfish*, 439 F. Supp. at 146.

Female inmates were subject to a similar procedure, with the inclusion of a visual vaginal inspection.⁵⁴

The district court described the act as “unpleasant, embarrassing, and humiliating” and “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.”⁵⁵ Weighing the fact that only one item of contraband had been found as a result of the policy, the court held that “[t]hese affronts, repulsive in the most evident respects, [were] not warranted by the suspicions” shown by the facility.⁵⁶ The Second Circuit affirmed, holding: “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.”⁵⁷ On October 2, 1978, the Supreme Court granted certiorari.⁵⁸

Of the original “litany of woes” that were addressed by the district court, only five, including the strip search policy, were at issue before the Supreme Court.⁵⁹ Before addressing each issue individually, the Court acknowledged that “the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions,” and thus, “[p]rison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”⁶⁰ The majority decision, scribed by Justice Rehnquist, then moved on to resolve the issue of the MCC’s strip search policy in just three paragraphs and three footnotes.⁶¹ In determining the reasonableness of the policy, the Court reasoned that “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 148. It must be noted that the district court, while finding a visual body-cavity search impermissible, did provide that the MCC could conduct a less intrusive visual strip search: “[T]he demands of security are amply satisfied if inmates are required to disrobe, to have their clothing subjected to inspection, and to present open hands and arms to demonstrate the absence of concealed objects.” Yet, the court did so with hesitation: “Even this much the court allows with grave reluctance, inviting reconsideration by wiser judges or respondents themselves in the more mature wisdom of future times. *Id.* The distinction between the visual strip search and the visual body-cavity search, for the purpose of this Note, are further discussed *infra* note 140.

⁵⁷ *Wolfish*, 573 F.2d at 131.

⁵⁸ *Bell v. Wolfish*, 439 U.S. 816 (1978).

⁵⁹ *Bell*, 441 U.S. at 520-22. The four other issues were: the confinement of two inmates in cells originally intended for one; a rule prohibiting inmates from receiving hardcover books that were not mailed from publishers or bookstores; a rule prohibiting the receipt of outside packages of food and personal items; and a requirement that pretrial detainees remain outside their rooms during “shake-down” inspections. The Court ruled in favor of the facility on all four of these issues. *Id.*

⁶⁰ *Id.* at 547.

⁶¹ *Id.* at 558-60.

of personal rights that the search entails.”⁶² The Court then provided a four-factor balancing test, which would be oft-applied by subsequent lower courts in the specific context of prison facilities: “Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.”⁶³

The opinion then attempted to apply this balancing test, albeit in an implicit and out-of-order fashion. First, the Court combined the third and fourth factors (justification and place), noting that the “[s]muggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities [have been] documented.”⁶⁴ In addressing the lower courts’ belief that the searches were not justified, in part, because only one item of contraband had resulted from the searches under the policy, the Court held that such a fact was likely indicative of the effectiveness of the policy as a deterrent (as opposed to a lack of actual interest to smuggle items into the facility).⁶⁵ In addressing the scope of the visual body-cavity search, the Court stated that it did not “underestimate the degree to which these searches may invade the personal privacy of inmates.”⁶⁶ The Court also acknowledged that such searches have the possibility of being conducted in an abusive manner.⁶⁷ However, the Court concluded that it would be improper to invalidate all searches of this kind just because of a rare potential for abuse.⁶⁸ In closing, the Court restated the issue: “[W]e deal here with the question whether visual body-cavity inspections as contemplated by the MCC rules can ever be conducted on less than probable cause.”⁶⁹ Without providing what specific level of cause, if any, is necessary, the Court stated that after “[b]alancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can.”⁷⁰

Further muddling the issue of the level of cause required is Justice Powell’s dissent on the issue of the Court’s holding on body-cavity searches.⁷¹ The dissent, in

⁶² *Id.* at 559.

⁶³ *Id.* (citing *United States v. Ramsey*, 431 U.S. 606 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry v. Ohio*, 392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Schmerber v. California*, 384 U.S. 757 (1966)).

⁶⁴ *Bell*, 441 U.S. at 559.

⁶⁵ *Id.*

⁶⁶ *Id.* at 560.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Bell*, 441 U.S. at 560. The emphasized “ever,” as the Eleventh Circuit in *Powell* correctly interprets, refers to the prior sentence, which discusses the “manner of the search” factor of the balancing test. The “ever” “served to underscore the assumption that the searches will be conducted in a non-abusive, reasonable manner.” *Powell*, 541 F.3d at 1305-06.

⁷⁰ *Bell*, 441 U.S. at 560.

⁷¹ *Id.* at 563.

its near-entirety, states: “In view of the serious intrusion on one’s privacy occasioned by such a search, I think at least some level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches described in this case.”⁷² The interpretation of this dissent has been debated. Some have viewed the dissent as a simple critique of the majority’s silence in failing to articulate a level of cause required to strip search a detainee,⁷³ while others, such as the majority opinion in *Powell*, see the dissent as a strong indication that the reasonable suspicion standard was not applied or used in *Bell*, and thus should not, and cannot, be applied in subsequent cases.⁷⁴

In summary, the Supreme Court in *Bell v. Wolfish* held that a policy requiring every inmate to be subject to a visual body-cavity search after every contact visit with a person from outside the institution was “reasonable” under the Fourth Amendment.⁷⁵ The Court did not expressly state a specific level of cause required to conduct such searches, vaguely concluding that the searches could be “conducted on less than probable cause.”⁷⁶ This conclusion was reached through the balancing of the scope, the manner, the justification, and the place of the search.⁷⁷

C. Booking Strip Searches in Post-Bell Courts

1. The Issue of Interpretation

The *Bell* decision has been criticized for not providing enough guidance for subsequent courts because it failed to expressly articulate a particular level of cause.⁷⁸ It has been noted that the factors in the balancing test in *Bell* are not unlike the traditional and “common tools used to determine the extent of constitutional protection [under the Fourth Amendment]: the degree of individual violation balances against the importance and necessity of the public interest.”⁷⁹ As a result, post-*Bell* courts were essentially left with a non-particularized balancing test, no explicitly mentioned level of cause (just “less than probable cause”), and a holding that only directly resolved one particular strip search policy (after contact visits).

Because of the ambiguity of the decision, subsequent courts that had to determine the validity of prison facility strip searches that took place outside the particular context of contact visit had the difficult task of deciding how to apply and interpret

⁷² *Id.*

⁷³ See, e.g., Deborah L. MacGregor, *Stripped of All Reason? The Appropriate Standard for Evaluating Strip Searches of Arrestees and Pretrial Detainees in Correctional Facilities*, 36 COLUM. J.L. & SOC. PROBS. 163, 172 (2003); Helmer, *supra* note 28, at 262.

⁷⁴ See *Powell*, 541 F.3d at 1307-08.

⁷⁵ *Bell*, 441 U.S. at 560.

⁷⁶ *Id.*

⁷⁷ *Id.* at 559.

⁷⁸ Helmer, *supra* note 28, at 257.

⁷⁹ *Id.* at 258-59 (citing *Terry*, 392 U.S. at 21) (“[T]here is ‘no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.’” (quoting *Camara v. Mun. Ct. of San Francisco*, 387 U.S. 523, 536-37 (1967) (alteration in original))).

the Supreme Court's holding in *Bell*. In the particular context of a booking strip search, should a court wish to uphold the facility's policy, it could interpret *Bell* as not requiring *any* cause to conduct strip searches and determine that this interpretation of the Court's holding should control searches taking place as part of the booking process, as well as searches after contact visits. In contrast, should a court find the facility's policy objectionable, it could distinguish from *Bell* and use the balancing test to establish at least some particular level of cause required to conduct strip searches as part of the booking process. Incredibly, nearly all the federal courts faced with booking strip searches post-*Bell* chose the latter route, quickly selecting reasonable suspicion as the appropriate level of cause required.⁸⁰

2. The Rise of Reasonable Suspicion

The first court to apply a specific standard of cause required for booking strip searches was the Seventh Circuit in *Mary Beth G. v. City of Chicago*.⁸¹ The plaintiffs were three women who were arrested as a result of minor traffic violations and subjected to the City of Chicago's strip search policy that applied to all incoming detainees.⁸² The search was a visual body-cavity search similar to the one conducted in *Bell*.⁸³

The court refused to be controlled by the specific holding in *Bell* "because the particularized searches in that case were initiated under different circumstances."⁸⁴ These "different circumstances" appeared to lie in what the court saw as different conditions upon which the search was predicated (searches conducted as part of the booking process rather than after each visit—noting the former cannot act as a deterrent) and different arrestees (minor misdemeanants as opposed to those "awaiting trial on serious federal charges").⁸⁵ In the latter "different circumstance," the court mischaracterized the type of detainees held at the MCC in *Bell*.⁸⁶ As noted earlier, those detained at the MCC ranged from witnesses held for protective orders to those serving, in general, short-term sentences for federal offenses; thus, most were not "awaiting serious federal charges."⁸⁷

The court began its analysis by using the *Bell* balancing test as a touchstone to reach the conclusion that "[w]hile the need to assure jail security is a legitimate and substantial concern, we believe that, on the facts here, the strip searches bore an insubstantial relationship to security needs so that, when balanced against [plaintiffs'] privacy interests, the searches cannot be considered 'reasonable.'"⁸⁸ In

⁸⁰ See cases cited *supra* note 20.

⁸¹ *Mary Beth G.*, 723 F.2d 1263.

⁸² *Id.* at 1267. Two women were arrested for outstanding parking tickets after being stopped for traffic violations. The other woman was arrested when she failed to produce her driver's license after a traffic stop. *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1272.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *supra* text accompanying note 46.

⁸⁸ *Mary Beth G.*, 723 F.2d at 1273.

establishing a reasonableness standard, the court stated the need for an “objective standard” of measure⁸⁹ and cited the established rule that “[t]he 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.”⁹⁰ Pursuant to these principles, the court held “that ensuring the security needs of the City by strip searching [plaintiffs] was unreasonable without a *reasonable suspicion* by the authorities that either of the twin dangers of concealing weapons or contraband existed.”⁹¹

The Seventh Circuit in *Mary Beth G.* provided two methods to distinguish from *Bell* the circumstances of a booking strip search policy. The first, and more emphasized method, is to distinguish the types of prisoners being searched.⁹² As discussed above, this distinction is not made on solid ground, as the MCC detainees in *Bell* did not in fact entirely consist of “those awaiting serious federal charges.”⁹³ The second, stronger, approach is to distinguish between the circumstantial differences of a strip search employed after visits and a strip search applied to all arrestees as part of a facility’s booking process, noting that a booking search lacks the deterrent factor that a post-visit search may have.⁹⁴

However, it appears this Seventh Circuit case merely opened the floodgates for other courts to adopt the reasonable suspicion standard without first discussing whether the holding in *Bell* directly controls.⁹⁵ After *Mary Beth G.*, rare is the opinion that distinguishes the circumstances in *Bell* from those involved in a blanket strip search booking policy.⁹⁶ The few courts that venture to make such a distinction, however, do so in convincing fashion. In *Roberts v. State of Rhode Island*, the plaintiff was arrested and subject to an intake facility’s strip search policy for failure to appear at a judicial proceeding.⁹⁷ The First Circuit distinguished the

⁸⁹ *Id.* (citing *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).

⁹⁰ *Id.* (citing *Terry*, 392 U.S. at 18 n.15).

⁹¹ *Id.* (emphasis added).

⁹² *Id.* at 1272.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See, e.g., *Wilson*, 251 F.3d at 1343 (“This court recognizes that “reasonable suspicion” is sufficient to justify the strip search of a pretrial detainee.”); *Swain*, 117 F.3d at 7 (. . . courts 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 This court has held that the reasonable suspicion standard is the appropriate one for justifying strip searches in other contexts.”); *Masters*, 872 F.2d at 1255 (“The decisions of all the federal courts of appeals that have considered the issue reached the same conclusion: 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.”); *Weber*, 804 F.2d at 800 (“We . . . adopt the reasonable suspicion standard that governs in other circuits, which we think *Wolfish* suggests”).

⁹⁶ See *Roberts v. Rhode Island*, 239 F.3d 107, 111 (1st Cir. 2001); *Shain v. Ellison*, 273 F.3d 56, 64 (2d Cir. 2001).

⁹⁷ *Roberts*, 239 F.3d at 108.

circumstances, and thus, the justifications, of a booking strip search from the *Bell* post-contact visit search in two ways.⁹⁸ First, the court distinguished the probability of the introduction of contraband in the two circumstances:

Although inmates such as Roberts certainly have the opportunity to introduce contraband to the prison, and may have even done so in the past, it is far less likely that smuggling of contraband will occur subsequent to an arrest (when the detainee is normally in handcuffed custody) than during a contact visit that may have been arranged solely for the purpose of introducing contraband to the prison population.⁹⁹

In essence, the court stated that a strip search conducted as part of the booking process is less justified than a *Bell* search because it is less likely that contraband will be smuggled into the facility under the circumstances of a booking search when compared to the circumstances of a post-contact visit search.¹⁰⁰ However, it should be noted that the Supreme Court in *Bell* recognized only one occasion where contraband was found in a post-contact visit search, and yet still found the search justified—stating the lack of contraband was likely due to the policy’s utility as deterrent.¹⁰¹ Yet, this potential argument was quickly struck down when the First Circuit stated its second important distinction from *Bell*, holding that “the deterrent rationale for the *Bell* search is simply less relevant [in the context of a booking search] given the essentially unplanned nature of an arrest and subsequent incarceration.”¹⁰² Therefore, the court held that the “only justification for this severe invasion is that [the facility in question] is a maximum security facility where arrestees mingle with the general population.”¹⁰³ This, the court concluded, was not a sufficient enough “reason not to require reasonable suspicion for inmate body cavity searches.”¹⁰⁴

The Second Circuit employed similar reasoning in *Shain v. Ellison*.¹⁰⁵ In *Shain*, the plaintiff was subject to Nassau County Correctional Center’s booking strip search policy after being arrested for first degree harassment, a “Class B” misdemeanor.¹⁰⁶ Using nearly an identical distinction as the First Circuit in *Roberts*, the court noted that “*Bell* authorized strip searches after contact visits, where contraband often is passed.”¹⁰⁷ In contrast, the court recognized that “[i]t is far less obvious that misdemeanor arrestees frequently or even occasionally hide contraband in their

⁹⁸ *Id.* at 111.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Bell*, 441 U.S. at 559.

¹⁰² *Roberts*, 239 F.3d at 111.

¹⁰³ *Id.* at 112.

¹⁰⁴ *Id.*

¹⁰⁵ *Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001).

¹⁰⁶ *Id.* at 60.

¹⁰⁷ *Id.* at 64 (citing *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

bodily orifices.”¹⁰⁸ Again, in strikingly similar fashion to the First Circuit’s rationale in *Roberts*, the court dismissed the booking strip search’s justification as a deterrent when it observed that “[u]nlike persons already in jail who receive contact visits, arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something.”¹⁰⁹

The analysis of the First and Second Circuits highlight the two main methods for distinguishing between the justification, or lack thereof, behind a booking strip search policy and the justification behind a post-contact visit search policy, such as the one discussed in *Bell*. Firstly, the above courts concluded that it was less likely that drugs would be smuggled into the facility during the booking process when compared to the planned contact visit, and thus, a search as intrusive as a strip search was not justified, or perhaps, not as justified, as it was in *Bell*.¹¹⁰ Secondly, both courts also found the booking strip search policy less justified because, in contrast to *Bell*, such a policy is not effective as a deterrent—as an arrest is generally unplanned and without notice.¹¹¹

However, in contrast to the two courts above, the majority of the courts have spent their efforts discussing what suffices as a “reasonable suspicion,” especially in the context of what circumstances are sufficient to meet such a standard.¹¹² Specifically, there has been much debate over whether the nature of the arrestee’s crime, in the context of a felony-misdemeanor distinction, should be determinative in establishing the reasonableness of a facility’s strip search.¹¹³ For instance, some early courts only applied the reasonable suspicion standard to misdemeanants or other minor offenders, remaining silent on the standard necessary for a reasonable search of felony offenders.¹¹⁴ In *Dufrin v. Spreen*, an early Sixth Circuit case, the court, without applying, or even mentioning, the reasonable suspicion standard, upheld the booking strip search of an arrestee detained for allegedly committing a “felony involving violence.”¹¹⁵ Yet, just four years after *Dufrin*, the Sixth Circuit, in

¹⁰⁸ *Shain*, 273 F.3d at 64.

¹⁰⁹ *Id.*

¹¹⁰ *See Roberts*, 239 F.3d at 111; *Shain*, 273 F.3d at 64.

¹¹¹ *Id.*

¹¹² *See Kennedy v. L.A.P.D.*, 901 F.2d 702, 714 (9th Cir. 1989); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1447 (9th Cir. 1989); *Dobrowolskyj v. Jefferson County*, 823 F.2d 955, 958 (6th Cir. 1987); *Dufrin v. Spreen*, 712 F.2d 1084, 1089 (6th Cir. 1983). Gabriel Helmer’s article focuses directly on the issue of what standard should be applied to felony arrestees who are subject to a booking strip search. Helmer, *supra* note 28, at 242-43. The above cases were brought to this author’s attention by Helmer’s article, in which they are discussed at length.

¹¹³ *See Helmer, supra* note 28.

¹¹⁴ *See, e.g., Masters*, 872 F.2d at 1255 (“a person arrested for a traffic violation or other minor offense not normally associated with violence”); *Weber*, 804 F.2d at 802 (“arrestees charged with misdemeanors or other minor offenses”); *Giles*, 746 F.2d at 617 (“arrestees charged with minor offenses”), *overruled on other grounds by Hodgers-Durgin*, 199 F.3d at 1040-41 n.1; *Stewart*, 767 F.2d at 156-57 (“minor offenders”); *Mary Beth G.*, 723 F.2d at 1272-73 (“minor offenders who were not inherently dangerous”).

¹¹⁵ *Dufrin*, 712 F.2d at 1085.

Dobrowolskyj v. Jefferson County, Kentucky, appeared to reinterpret this decision, stating: “automatic strip searches of all detainees violate the [F]ourth [A]mendment without a reasonable suspicion, based on the nature of the charge, the characteristics of the detainee, or the circumstances of the arrest.”¹¹⁶ Applying this rationale, the court upheld the search of an arrestee detained for menacing, a “violent misdemeanor,” as the nature of the alleged offense alone was interpreted to create reasonable suspicion that the arrestee was concealing weapons or contraband.¹¹⁷ Thus, the Sixth Circuit moved from a rationale that could have well been interpreted as distinguishing between felonies and misdemeanors, to a rationale that that distinguishes between violent and non-violent offenses, at least in the context of a strip search for weapons.

Today, the reasonable suspicion standard appears to be required regardless of whether the alleged offense was a misdemeanor or felony. The Ninth Circuit, in *Kennedy v. Los Angeles Police Department*, clearly lays out the modern use of the reasonable suspicion standard, in the context of a strip search:

That this case involves a felony arrest does not alter the level of cause required to justify a visual body-cavity search. Logically, the classification of the offense in some cases might inform the *presence* of suspicion, but it does not inform the *level of suspicion required*. Indeed, the reasonable suspicion standard . . . prudently invites the consideration of the nature of the crime charged in determining the constitutionality of an individual search.¹¹⁸

Thus, the nature of the crime itself may give rise a reasonable suspicion, but reasonable suspicion remains the standard regardless of whether the crime is a misdemeanor or felony.¹¹⁹ Yet, some courts still opine that a distinction exists, creating, as seen in *Powell*, some confusion.¹²⁰ It is quite possible such confusion exists because modern courts, when ruling on policies applied to misdemeanor offenders, continue to cite earlier cases, such as *Mary Beth G.*, that addressed the reasonable suspicion standard in the context of plaintiffs before them (for example, only minor misdemeanors)—creating, in effect, the illusion of a felony-misdemeanor distinction.

¹¹⁶ *Dobrowolskyj v. Jefferson County*, 823 F.2d at 957 (emphasis added) (citing *Weber*, 804 F.2d at 802; *Jones v. Edwards*, 770 F.2d 739, 742 (8th Cir. 1985); *Stewart*, 767 F.2d at 157; *Giles*, 746 F.2d at 615; *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984); *Mary Beth G.*, 723 F.2d at 1273; *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981); *Fann v. City of Cleveland*, 616 F. Supp. 305, 313 (N.D. Ohio 1985); *Tinetti v. Wittke*, 479 F. Supp. 486, 490-91 (E.D. Wis. 1979), *aff’d*, 620 F.2d 160, 160-61 (7th Cir. 1980) (per curiam)).

¹¹⁷ *Dobrowolskyj*, 823 F.2d at 958-59.

¹¹⁸ *Kennedy*, 901 F.2d at 716, *overruled on other grounds by* *Hunter v. Bryant*, 502 U.S. 224 (1991).

¹¹⁹ *Id.*

¹²⁰ *See Powell*, 541 F.3d at 1309 (“some other circuits draw a distinction between whether the person has been arrested on a felony charge or just for a misdemeanor or some other lesser violation” (citing *Masters*, 872 F.2d at 1255; *Stewart*, 767 F.2d at 156-57; *Giles*, 746 F.2d at 617, *overruled on other grounds by* *Hodgers-Durgin*, 199 F.3d at 1041 n.1; *Mary Beth G.*, 723 F.2d at 1272).

In spite of the courts' difficulty in interpreting the standard, reasonable suspicion quickly became the accepted and unquestioned requirement for all strip searches to be conducted as a part of a facility's booking process.¹²¹ This standard would remain on solid ground until 2005, when the Eleventh Circuit began questioning the reasonable suspicion standard in *dicta*¹²²—a certain precursor to the court's en banc decision in *Powell v. Barrett* three years later.

III. THE ELEVENTH CIRCUIT'S INTERPRETATION OF *BELL*: THE *POWELL V. BARRETT* DECISION

A. *Facts and Background*

On April 21, 2004, a class action suit was filed on behalf of eleven former inmates of Georgia's Fulton County Jail.¹²³ The plaintiffs objected to blanket strip searches that were conducted upon entering and/or returning to the jail.¹²⁴ The plaintiffs were divided into one or more of three classes, based upon the search policy or policies to which they were subjected.¹²⁵ One of these groups was the "AR [arrestee] group."¹²⁶ This group was subject to the jail's booking policy, which required each inmate to be strip searched upon entering into the general jail population for the first time.¹²⁷ Eight of the eleven former inmates were a part of this class.¹²⁸

This particular portion of the booking process involved having the arrested person go into a large room with thirty to forty inmates, remove all of his clothes, and take a group shower.¹²⁹ After the shower, each arrestee "either singly, or standing in a line with others, is visually inspected" by standing before a guard, "front and center, and showing his front and back sides while naked."¹³⁰

¹²¹ See, e.g., cases cited *supra* note 20.

¹²² *Evans v. Stephens*, 407 F.3d 1272, 1278 (11th Cir. 2005) ("Most of us are uncertain that jailers are required to have a reasonable suspicion of weapons or contraband before strip searching—for security and safety purposes—arrestees bound for the general jail population.").

¹²³ *Powell*, 541 F.3d at 1300.

¹²⁴ *Id.*

¹²⁵ *Powell v. Barrett*, 496 F.3d 1288, 1298 (11th Cir. 2007). The three groups consisted of: "(1) blanket strip searches of arrestees as part of their point-of-entry booking into the Jail (AR Group); (2) blanket strip searches of detainees who posted bond or were ordered released at the Jail before their point-of-entry booking into the Jail was started or completed (AL Group); and (3) blanket strip searches of detainees who return from a court appearance after having been ordered released in state court (CR Group)." *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 1297.

¹²⁹ *Powell*, 541 F.3d at 1301.

¹³⁰ *Id.*

The defendants moved to dismiss on the ground they were entitled to qualified immunity.¹³¹ The district court granted qualified immunity, assuming that the policy was unconstitutional, yet finding that the unconstitutionality was not clearly established.¹³² The district court believed this lack of clarity was a result of the Eleventh Circuit's questioning of the reasonable suspicion standard in *dicta*.¹³³ On interlocutory appeal, an Eleventh Circuit panel reversed, recognizing the unconstitutionality of the policy and holding that the unconstitutionality was clearly established, because the court was bound by precedent, not *dicta*.¹³⁴ However, the panel addressed the Circuit's past *dicta* when it recognized that "a majority of our Court has expressed uncertainty about our precedent holding that strip searches of arrestees to be placed in the jail's general population, absent reasonable suspicion, violate the Fourth Amendment."¹³⁵ With the reasonable suspicion standard appropriately at issue before the court, the Eleventh Circuit granted an en banc rehearing addressing the constitutionality of the strip searches of the five plaintiffs who were searched absent reasonable suspicion (those searched solely as a result of the blanket policy).¹³⁶

B. Examination of the Eleventh Circuit's Rationale

The Eleventh Circuit began by providing an in-depth analysis of the Supreme Court's decision in *Bell v. Wolfish*, going into far more detail than the analysis set forth above.¹³⁷ The court thoroughly addressed the facts, holdings, and rationale of both lower courts, and finally, the Supreme Court's decision.¹³⁸ Once it finished addressing *Bell*, the court noted several cases that have "interpreted the *Bell* decision as requiring, or at least permitting lower courts to require, reasonable suspicion as a condition for detention facility strip searches."¹³⁹ The court moved quickly to assert its opinion on such interpretations, stating:

¹³¹ *Powell v. Barrett*, 376 F. Supp. 2d 1340 (N.D. Ga. 2005). In determining whether government officials are entitled to qualified immunity, the well-established two-pronged test of *Saucier v. Katz*, 533 U.S. 194, 201 (2001), is applied. The first prong requires the court to determine whether the "plaintiff has alleged facts which, when taken in the light most favorable to [him], show that the defendant-official's conduct violated a constitutionally protected right." *Comstock v. McCrary*, 273 F.3d 693, 702 (6th Cir. 2001) (citing *Katz*, 533 U.S. at 201). The second prong requires the court to "determine whether that right was clearly established such that a reasonable official, at the time the act was committed, would have understood that his behavior violated that right." *Id.*

¹³² *Powell*, 376 F. Supp. 2d at 1349-50.

¹³³ *Id.*

¹³⁴ *Powell*, 496 F.3d at 1315-17.

¹³⁵ *Id.* at 1312 (citing *Evans*, 407 F.3d at 1278).

¹³⁶ *Powell*, 541 F.3d at 1300.

¹³⁷ *Id.* at 1303-06.

¹³⁸ *Id.*

¹³⁹ *Id.* at 1306.

The *Bell* decision, correctly read, is inconsistent with the conclusion that the Fourth Amendment requires reasonable suspicion before an inmate entering . . . a detention facility may be subjected to a strip search that includes a body cavity inspection. And the decision certainly is inconsistent with the conclusion that reasonable suspicion is required for detention facility strip searches that do not involve body cavity inspections.¹⁴⁰

The court proceeded to explain why. “First, and most fundamentally,” Judge Carnes explained, “the Court in *Bell* addressed a strip search policy, not any individual searches conducted under it The policy that the Court categorically upheld in *Bell* applied to all inmates The policy did not require individualized suspicion.”¹⁴¹

The court then delved into a multi-faceted critique of the reasonable suspicion courts.¹⁴² This critique included a lengthy interpretation of Justice Powell’s dissent in *Bell* and a discussion of the misdemeanor-felony distinction that many of the reasonable suspicion courts had made.¹⁴³ In examining Justice Powell’s dissent, the court noted that the dissent “disagrees with only one aspect of the decision and that is the failure to require ‘some level of cause, such as a reasonable suspicion’ before the ‘anal and genital searches described in this case’ can be performed.”¹⁴⁴ Thus, the Eleventh Circuit reasoned that its sister circuits misread the “*Bell* decision as requiring, or at least permitting lower courts to require, reasonable suspicion as a condition for detention facility strip searches.”¹⁴⁵ Here, the Eleventh Circuit ignored the fact that the courts subsequent to *Bell*, ruling on booking strip searches, established reasonable suspicion because they did not find *Bell* to be specifically controlling due to the factual distinctions between the post-contract visit search of *Bell* and the booking searches before them.¹⁴⁶ Instead, the Eleventh Circuit assumed that *Bell* was controlling because the type of detainees were similar in both cases, reasoning that its sister circuits misread the dissent because “[i]f the majority had required reasonable suspicion for body cavity inspection strip searches of *pretrial detainees*, Justice Powell would not have dissented at all.”¹⁴⁷ Thus, the Eleventh

¹⁴⁰ *Id.* at 1307. In a typical analysis of a *Bell* case, it would be worthwhile to discuss the different degrees of searches that fall under the rule, as “scope of the particular intrusion” is indeed one of the factors listed in the *Bell* balancing test. However, because the Eleventh Circuit holds that the searches in this context would have been valid even if they were body-cavity searches (the more intrusive of the two), the distinction and analysis between the two, for the purpose of this Note, will not be made.

¹⁴¹ *Id.*

¹⁴² *Powell*, 541 F.3d at 1307-13.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1308.

¹⁴⁵ *Id.* at 1306-07.

¹⁴⁶ See, e.g., *Mary Beth G.*, 723 F.2d at 1272 (refusing to be controlled by the specific outcome in *Bell* “because the particularized searches in that case were initiated under different circumstances”); see also *supra* Part II.C.2.

¹⁴⁷ *Powell*, 541 F.3d at 1308 (emphasis added).

Circuit criticized the conclusion that its sister circuits reached (that reasonable suspicion is required) while entirely ignoring the premise that conclusion was based upon.

When discussing the alleged felony-misdemeanor distinction that had been applied by lower courts, the Eleventh Circuit rather bluntly stated that “[t]hose decisions are wrong.”¹⁴⁸ The court used the Seventh Circuit holding in *Mary Beth G. v. City of Chicago* discussed above, as an example for these “wrong” decisions, stating that “[t]he difference between felonies and misdemeanors or other lesser offenses is without constitutional significance when it comes to detention facility strip searches. It finds no basis in the *Bell* decision, in the reasoning of that decision, or in the real world of detention facilities.”¹⁴⁹ To classify these cases as creating a misdemeanor-felony distinction is misguided. As mentioned above, the Seventh Circuit in *Mary Beth G.* held that booking strip searches of minor misdemeanors was unreasonable absent reasonable suspicion.¹⁵⁰ However, the Seventh Circuit did not state that reasonable suspicion was or was not required for felons or for more serious misdemeanors—it simply did not address the issue. The court merely stated that the requirement for reasonable suspicion applied to minor-misdemeanors because those were the charges the plaintiffs in that case were facing.¹⁵¹ In fact, the term “felony” is not mentioned even once in the Seventh Circuit’s holding. Thus, one would be hard-pressed to argue that such a holding created, let alone promoted, a felony-misdemeanor distinction. The Seventh Circuit’s holding in *Mary Beth G.* is similar to many early post-*Bell* cases in that they dealt primarily with booking strip searches of minor-misdemeanants and traffic offenders.¹⁵² But, as we saw above, in the Sixth Circuit’s change of analysis from *Dufrin*¹⁵³ to *Dobrowolskyj*,¹⁵⁴ and in the Ninth

¹⁴⁸ *Id.* at 1309-10 (citing *Masters*, 872 F.2d at 1255; *Stewart*, 767 F.2d at 156-57; *Giles*, 746 F.2d at 617, *overruled on other grounds by Hodgers-Durgin*, 199 F.3d at 1041 n.1; *Mary Beth G.*, 723 F.2d at 1272).

¹⁴⁹ *Powell*, 541 F.3d at 1310. Judge Carnes summarizes these “felony-misdemeanor distinction” cases in the following manner:

While those decisions vary in detail around the edges, the picture they paint is essentially the same. The arrestee is charged with committing a misdemeanor or some other lesser violation and, while being booked into the detention facility, she is subjected to a strip search pursuant to the facility’s policy. She later sues the officials asserting that the search was unconstitutional because the guards did not have any reasonable basis for believing that she was hiding contraband on her person. *See, e.g., Mary Beth G.*, 723 F.2d at 1266. In each cited case, the court of appeals concludes that because the plaintiffs were “minor offenders who were not inherently dangerous,” *id.* at 1272, detention officials could conduct a strip search only where there was “a reasonable suspicion that the individual arrestee is carrying or concealing contraband,” *Giles*, 746 F.2d at 617. In each of the cases where reasonable suspicion was lacking, the search is held to violate the Fourth Amendment.

Id. at 1309-10.

¹⁵⁰ *Mary Beth G.*, 723 F.2d at 1272-73; *see supra* Part II.C.2.

¹⁵¹ *Mary Beth G.*, 723 F.2d at 1267.

¹⁵² *See, e.g.*, cases cited *supra* note 114.

¹⁵³ *Dufrin*, 712 F.2d at 1089.

¹⁵⁴ *Dobrowolskyj*, 823 F.2d at 958.

Circuit's more recent holding in *Kennedy*,¹⁵⁵ any felony-misdemeanor distinction that once existed should be considered an anomaly, as it appears most courts apply the reasonable suspicion standard in such cases to all crimes, regardless of felony or misdemeanor status.¹⁵⁶ Thus, it is both unfair and unwise to discredit the reasonable suspicion standard as a whole because of a few early and understandable misinterpretations of the holding in *Bell*.

The majority of the Eleventh Circuit opinion in *Powell* is spent attempting to discredit the reasonable suspicion courts by demonstrating that such a standard is completely contradictory to the Supreme Court's holding in *Bell*.¹⁵⁷ Despite these apparently weak arguments, they are only pertinent if the reasonable suspicion courts are, in fact, *controlled* by the *Bell* decision. Because the very existence of the reasonable suspicion requirement, in the context of booking strip searches, resulted from a court arguing that *Bell* was not controlling,¹⁵⁸ the outcome of *Powell* hinges on this very issue.

Unfortunately, the Eleventh Circuit did not mention this issue until the end of its argument and spent a relatively brief amount of time discussing it.¹⁵⁹ The Eleventh Circuit did, however, concede that the "best hope for distinguishing *Bell* lies in the fact that [the plaintiffs] were strip searched as part of the booking process instead of after contact visits."¹⁶⁰ Nonetheless, the court quickly dismissed this notion, as it viewed an inmate entering the facility for the first time as similar to one returning after "one big and prolonged contact visit with the outside world."¹⁶¹

The court rejected the argument that such a strip search policy fails to be justified as a deterrent, noting that "[n]ot everyone who is arrested is surprised, seized, and slapped into handcuffs without a moment's notice."¹⁶² The court provided instances, including the instance of one purposefully getting arrested, where the anticipation and knowledge of impending arrest could give the arrestee the opportunity to obtain and conceal contraband in order to smuggle it into prison.¹⁶³ "The point," the Eleventh Circuit held, "is that there are plenty of situations where arrestees would have had at least as much opportunity to conceal contraband as would inmates on a contact visit, which is the situation *Bell* involved."¹⁶⁴

In closing, the Eleventh Circuit held that the Fourth Amendment rights of arrestees are "are not violated by a policy or practice of strip searching each one of

¹⁵⁵ *Kennedy*, 901 F.2d at 714.

¹⁵⁶ *See supra* Part II.C.2.

¹⁵⁷ *Powell*, 541 F.3d at 1307-13.

¹⁵⁸ *See, e.g., Mary Beth G.*, 723 F.2d at 1272 (refusing to be controlled by the specific outcome in *Bell* "because the particularized searches in that case were initiated under different circumstances"); *see also supra* Part II.C.2.

¹⁵⁹ *Powell*, 541 F.3d at 1313-14.

¹⁶⁰ *Id.* at 1313.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 1314.

¹⁶⁴ *Id.*

them as part of the booking process, provided that the searches are no more intrusive on privacy interests than those upheld in the *Bell* case.”¹⁶⁵

C. Does Bell Control Booking Strip Searches?

The majority, in its “[f]irst, and most fundamental[.]” argument, noted that the “Court in *Bell* addressed a strip search policy, not any individual searches conducted under it,” in an attempt to compare the *Bell* search with the booking policy of the Fulton County Jail in its own case.¹⁶⁶ Despite the substantive distinguishing facts between the searches, apparently the Eleventh Circuit believed that the procedural similarity of both searches (both were implemented via prison policy) alone was sufficient enough to reach the same result as the Supreme Court did in *Bell*: that the policy was reasonable.¹⁶⁷ In doing so, the Eleventh Circuit displayed the major flaw that continued to appear throughout the opinion: the belief, in essence, that every prison’s blanket strip search policy (a policy that applies to *all* inmates, as opposed to *individual* inmates) is equally justified.

As mentioned above, the Court in *Bell* provided subsequent courts with a balancing test to determine the reasonableness of strip searches in prison facilities: “Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.”¹⁶⁸ Comparing the circumstances in *Bell* with the circumstances in *Powell*, one can easily discover the factor at issue. Firstly, the second and fourth factors (the manner of the search and place of the search, respectively) appear to be similar in both cases: both searches took place in a prison facility, and in neither case was there a claim that, outside of the search itself, the search was conducted in an inappropriate or abusive manner.¹⁶⁹ In comparing the first factor, the scope of the intrusion, the distinctions between the two are unclear. In *Bell*, the strip search employed was vividly described as a visual cavity search.¹⁷⁰ In contrast, the strip search in *Powell* was vaguely described as a showing of one’s “front and back sides while naked.”¹⁷¹ A reasonable comparison of the description of two searches could

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1307.

¹⁶⁷ *Id.* The Eleventh Circuit stated that “[w]hen the Court stated that ‘these searches’ do not violate the Fourth Amendment, it obviously meant the searches that were before it, and those searches were conducted under a blanket policy without reasonable suspicion. It really is that simple.” *Id.* Immediately thereafter, the court made a point to state “[i]f more is needed. . .” before continuing on with its lengthy rationale. The existence of this phrase tends to indicate that the court at least had the notion that this argument was sufficient enough alone to reach the court’s ultimate holding. *Id.*

¹⁶⁸ *Bell*, 441 U.S at 559.

¹⁶⁹ *Id.* at 560; *Powell*, 541 F.3d at 1301 (“Nor is there any allegation that the searches were conducted in an abusive manner.”) (citing *Powell*, 496 F.3d at 1310 n.28 (“We note that, in the instant case, Plaintiffs do not challenge the *manner* of the strip searches.”)).

¹⁷⁰ *Bell*, 441 U.S at 558 n.39 (“If the inmate is a male, he must lift his genitals and bend over to spread his buttocks for visual inspection. The vaginal and anal cavities of female inmates also are visually inspected.”).

¹⁷¹ *Powell*, 541 F.3d at 1301.

lead one to conclude that the *Powell* search was only slightly less invasive than the search in *Bell*, if at all. Therefore, based on judging the first three factors alone, it would be logical to conclude that the search in *Powell* was reasonable, as the only difference between the two is that the *Powell* search may have been *less* intrusive than the search that was upheld in *Bell*. Yet, the true distinction between the circumstances in *Bell* and *Powell* does not rest in these three factors of the *Bell* balancing test. Rather, the true distinction rests on the remaining factor: the justification for initiating the search, which is where the two searches divide sharply.

The majority unfairly, and without much thought, deems the justifications behind a post-contact visit search as equal to that of a booking policy search. As discussed earlier in *Roberts*¹⁷² and *Shain*,¹⁷³ such comparison should not be made because there exist two fundamental factual distinctions between the two types of searches: (1) the frequency of contraband being smuggled into the institutions for each type of search; and (2) the effectiveness as a deterrent for each type of search.

It is well-established that inmates will go to great lengths to smuggle contraband into prison facilities.¹⁷⁴ Such methods employed range from the simple, such as hiding drugs in the mail, to the elaborate, such as night-time airdrops into the prison yard.¹⁷⁵ The consensus of scholarly sources cite mail, visits, and the bribery and coercion of staff as the most commonly used methods of infiltrating contraband into a prison facility,¹⁷⁶ with visits being the most common method of these three.¹⁷⁷ It also has been noted that the “majority of illegal drugs introduced during visiting are done in body cavities.”¹⁷⁸ In contrast, while such authorities concede that inmates are likely to try anything, none make specific mention of the infiltration of drugs

¹⁷² *Roberts*, 239 F.3d at 111.

¹⁷³ *Shain*, 273 F.3d at 64.

¹⁷⁴ See LOUIS KONTOS & DAVID C. BROTHERTON, *ENCYCLOPEDIA OF GANGS* 100 (2008) (mentioning the following methods of getting illegal drugs into prisons: visits (“[t]he most common [way]”), 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) (citing the use of “[v]isitors, contractors, inmates, and even staff” as methods for smuggling); MARK S. FLEISHER, *BEGGARS AND THIEVES: LIVES OF URBAN STREET CRIMINALS* 171 (1995) (citing infiltration of contraband resulting from visits and staff bribes); WILLIAM R. BELL, *PRACTICAL CRIMINAL INVESTIGATIONS IN CORRECTIONAL FACILITIES* 8-14 (2002) (citing, under the subchapter “Methods of Drug Introduction in Prisons,” the following: mail, visiting, drug drops, work programs, and staff).

¹⁷⁵ See BELL, *supra* note 174; KONTOS & BROTHERTON, *supra* note 174.

¹⁷⁶ See BELL, *supra* note 174; KONTOS & BROTHERTON, *supra* note 174; TRULSON, *supra* note 174.

¹⁷⁷ See KONTOS & BROTHERTON, *supra* note 174; 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) (“[t]o sustain prison drug and other crime activity [prison gangs] depend on street contacts . . . still on the street to smuggle rock cocaine, marijuana, and other drugs into jail and prison *visiting rooms*.”) (emphasis added).

¹⁷⁸ BELL, *supra* note 174, at 9.

occurring as a result of improper booking techniques, nor do they mention the concept that some detainees may be getting themselves purposefully arrested with the intent of having an opportunity to smuggle contraband into the prison as a result.¹⁷⁹

Thus, it appears booking strip search policies only act as a deterrent under rare circumstances. The plain truth is that the vast majority of arrestees do not have time to plan or anticipate their impending arrest, while all inmates are entitled to planned contact visits. Judge Barkett, in writing the dissenting opinion in the en banc *Powell* decision, correctly opines that “[t]he majority’s assertion that pretrial detainees . . . might anticipate their arrests or that gang members might deliberately get arrested in order to smuggle weapons and drugs into jail is unwarranted speculation in this case.”¹⁸⁰ Such speculation is unwarranted because the frequency of such events occurring appears to be so low, especially in comparison to contact-visit smuggling. The fact that the majority finds it perfectly reasonable to rely on such rare instances where a booking strip search may act as a deterrent demonstrates the lack of importance the court places on the “justification” factor of the *Bell* balancing test. Any rational person could conclude that an intrusive practice employed to remedy or deter a problem that occurs with regular frequency is much more justified in its use than the same practice that is employed to remedy or deter a problem that occurs far less often. Yet, the Eleventh Circuit fails to apply such logic to the searches of *Bell* and *Powell*, considering them, in all practicality, equally justified.

This is not to say that the Eleventh Circuit’s arguments are completely without merit. Indeed, there are security risks involved with incoming arrestees—especially, as the Eleventh Circuit noted, with those who have an anticipation of their arrest. However, the Eleventh Circuit’s solution to these risks—approving a blanket strip search policy that is applied to all incoming arrestees—is simply far too broad and unjustified. Those who fall under the policy will be *anyone* entering the facility’s general population for the first time—from minor traffic offenders to those accused of violating housing or safety codes.¹⁸¹ Certainly there will be instances when these types of offenders should be searched, but one should not forget that nearly all of the federal circuits prior to *Powell* held that searches of these offenders may still take place if reasonable suspicion exists.¹⁸² The Eleventh Circuit should not have allowed the policy to extend to *all* of arrestees for the sake of convenience and extreme deference to prison facility operators. The Eleventh Circuit’s decision would be far more reasonable, and more consistent with its own rationale, if it applied its holding to only those arrestees who had the ability to anticipate their arrest. Or perhaps, for the sake of consistency among the federal circuits, the Eleventh Circuit could have promoted the use of the arrestee’s knowledge of impending arrest as another factor in establishing reasonable suspicion.

¹⁷⁹ See sources cited *supra* notes 174, 177.

¹⁸⁰ *Powell*, 541 F.3d at 1318.

¹⁸¹ *Id.* at 1301.

¹⁸² See, e.g., *Wilson*, 251 F.3d at 1343; *Swain*, 117 F.3d at 7; *Masters*, 872 F.2d at 1255; *Weber*, 804 F.2d at 802; *Giles*, 746 F.2d at 617; *Stewart*, 767 F.2d at 156-57; *Mary Beth G.*, 723 F.2d at 1273.

As discussed above, the facts (and thus, the justification behind) the two searches are clearly distinguishable. Therefore, the *Bell* decision should not specifically control strip search policies outside the contact-visit searches. The facts of the booking search demonstrate less justification to implement such a policy because the frequency of such attempts are low and its factor as a deterrent only exists in rare and individual circumstances. Thus, the courts subsequent to *Bell* and prior to *Powell* have been appropriate in applying the *Bell* balancing test and concluding that individualized reasonable suspicion is required for the extremely intrusive and humiliating act of a strip search by prison officials during a facility's booking process.

D. Post-Powell Reactions from the Sister Circuits

A year after the its decision in *Powell*, the Eleventh Circuit remains alone in its holding that reasonable suspicion is not required to conduct a strip search of an arrestee as part of a prison's booking process.¹⁸³ While a handful of post-*Powell* district-level courts have declined to follow the Eleventh Circuit,¹⁸⁴ none has done so in a more thorough and convincing fashion as the Eastern District of Pennsylvania in *Allison v. GEO Group, Inc.*¹⁸⁵

In *Allison*, Judge DuBois succinctly touched upon many of the points discussed above. The court criticized the Eleventh Circuit's failure to properly understand its sister circuits' interpretation of *Bell* under the context of a policy requiring the strip search of all arrestees during booking:

[T]he Supreme Court, on the facts before it, approved a blanket policy requiring strip searches for all inmates following contact visits as reasonable and did not require searches conducted pursuant to that policy to be based on individualized reasonable suspicion. The Court did not have occasion to rule on the reasonableness of custodial strip searches in other circumstances or under what circumstances reasonable suspicion might be required Other courts did not hold that *Bell* "requires" reasonable suspicion; they held that *Bell* requires reasonableness and that reasonableness, in certain circumstances, requires that searches be based on individualized suspicion of wrongdoing measured against some objective standard such as reasonable suspicion.¹⁸⁶

Accordingly, DuBois concluded that the Eleventh Circuit was short-sighted in its attempt to "demonstrate that other circuit opinions were wrongly decided or that they misapplied *Bell*."¹⁸⁷

¹⁸³ See *Florence v. Bd. of Chosen Freeholders of Burlington*, 595 F. Supp. 2d 492, 508-11 (D. N.J. 2009); *Lopez v. Youngblood*, 609 F. Supp. 2d 1125, 1138 (E.D. Cal. 2009); *Young v. County of Cook*, 616 F. Supp. 2d 834, 847 (N.D. Ill. 2009); *Allison v. GEO Group, Inc.*, 611 F. Supp. 2d 433, 456-62 (E.D. Pa. 2009).

¹⁸⁴ See sources cited *supra* note 183.

¹⁸⁵ *Allison v. GEO Group, Inc.*, 611 F. Supp. 2d at 433 (E.D. Pa. 2009).

¹⁸⁶ *Id.* at 459.

¹⁸⁷ *Id.*

As a whole, the opinion conveys the notion that Judge DuBois was greatly concerned with the breadth of the policy that the Eleventh Circuit upheld.¹⁸⁸ When discussing the likelihood of the infiltration, specifically in response to the Eleventh Circuit's concept that "an inmate's initial entry into a detention facility might be viewed as coming after one big and prolonged contact visit with the outside world,"¹⁸⁹ DuBois held:

Although recent arrestees might have more opportunity to possess contraband than inmates, opportunity alone does not change the likelihood that a person arrested on non-violent, non-drug offenses actually possesses contraband. It also does not increase the chance that the contraband will be secreted in such a way that it will not be discovered by less invasive searches.¹⁹⁰

Likewise, when discussing the possibility of those deliberately subjecting themselves to arrest, Judge DuBois did not discount it as "unwarranted speculation," as Judge Barkett did in her dissent;¹⁹¹ rather, he addressed it as a concern that is best remedied under the individualized reasonable suspicion standard, stating: "In cases where arrestees self surrender or deliberately subject themselves to arrest, officials may well have reasonable suspicion to conduct an intake strip search"¹⁹²

It appears DuBois is clearly (and reasonably) concerned with the most disturbing consequence of the Eleventh Circuit's decision: the 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. In response, DuBois appears to quietly promote the continued use of the reasonable suspicion standard; whose individualized application, yet "relatively low burden in the Fourth Amendment context,"¹⁹³ provides the best balance of the right of the individual against the legitimate security interests of the prison facility.

IV. CONCLUSION

Perhaps a rarely cited decision from the Northern District of Indiana understood the issue best.¹⁹⁴ "The factual setting of *Bell v. Wolfish* . . . is light years away from

¹⁸⁸ *Id.* at 461-62 ("The hypothetical existence of reasonable arrestee strip searches does not, however, automatically justify an overinclusive *blanket* policy.").

¹⁸⁹ *Powell*, 541 F.3d at 1313.

¹⁹⁰ *Allison*, 611 F. Supp. 2d at 460.

¹⁹¹ *Powell*, 541 F.3d at 1318.

¹⁹² *Allison*, 611 F. Supp. 2d at 461.

¹⁹³ *Id.* at 455 (citing *Weber*, 804 F.2d at 802); see *Kennedy*, 901 F.2d at 714-15.

¹⁹⁴ *Bovey v. City of Lafayette*, 586 F. Supp. 1460 (N.D. Ind. 1984). In *Bovey*, the plaintiff was a lawyer (described as "a well educated, intellectually sophisticated, aggressive and sometimes intimidating advocate, both in and out of the courtroom, who is both blessed and cursed with an advanced case of self-righteousness") who was pulled over by a police officer (described as man "who has maintained his athletic handsomeness from twenty years ago when he was Mr. Basketball in Indiana, which under the prevailing cultural Hoosier mores is the rough equivalent to secular sainthood . . . [and] has the arrogance and aggressiveness born of public adulation.") for driving 49 m.p.h. in a 30 m.p.h. speed zone. *Id.* at 1461-62. At the

[the context of a booking strip search]” exclaimed Judge Sharp, holding: “There is little justification for the strip search of [the plaintiff] by anyone here.”¹⁹⁵ Because of the distinctions discussed above, Judge Sharp opined that the legal doctrine in *Bell* should be limited to the context it served, as legal doctrines “derive meaning and content from the circumstances that give rise to them and from the purposes they are designed to serve. To these they are bound as is a live tree to its roots.”¹⁹⁶ Even the balancing test provided in *Bell* itself states: “In *each* case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.”¹⁹⁷

Because of the factual differences between the two searches, the specific holding set forth in *Bell* should not apply outside of the contact-visit context. In particular, the decision in *Bell*, permitting mandated strip searches after visits absent specific cause, should not be extended to specifically control the less justified blanket policy of strip searching arrestees during booking. Courts should use the balancing test in *Bell* as a point of reference, but continue to apply the reasonable suspicion standard until the Supreme Court holds otherwise. Simply, the rights of *all* should not be sacrificed for the sake of extreme deference to absolute prison security.

stop, these two colorful personalities clashed, leading to Bovey’s arrest after forcefully resisting to being handcuffed. *Id.* at 1463. After being charged with “Speeding, Resisting Law Enforcement, Assault and Battery on a Policeman and Disorderly Conduct,” Bovey was subsequently subject to “the Tippecanoe County Sheriff to strip-search everyone who was to be placed in the jail.” *Id.* at 1463-64. He was subject to a body-cavity strip search. *Id.* at 1464.

¹⁹⁵ *Id.* at 1470.

¹⁹⁶ *Id.* (citing *Reid v. Covert*, 354 U.S. 1, 50 (1957)). Justice Black’s statement on legal doctrines is best understood in full:

Legal doctrines are not self-generated abstract categories. They do not fall from the sky; nor are they pulled out of it. They have a specific juridical origin and etiology. They derive meaning and content from the circumstances that gave rise to them and from the purposes they were designed to serve. To these they are bound as is a live tree to its roots. Doctrines . . . must be placed in their historical setting. They cannot be wrenched from it and mechanically transplanted into an alien, unrelated context without suffering mutilation or distortion. “If a precedent involving a black horse is applied to a case involving a white horse, we are not excited. If it were an elephant or an animal *ferae naturae* or a chose in action, then we would venture into thought. The difference might make a difference. We really are concerned about precedents chiefly when their facts differ somewhat from the facts in the case at bar. Then there is a gulf or hiatus that has to be bridged by a concern for principle and a concern for practical results and practical wisdom.”

Reid, 354 U.S. at 50-51 (quoting THOMAS REED POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION* 36 (The Lawbook Exchange 2002) (1955)).

¹⁹⁷ *Bell*, 441 U.S. at 559 (emphasis added).