An Exaggerated Response: Possible Reactions to Florence v. Board of Chosen Freeholders in South Carolina

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AN EXAGGERATED RESPONSE:
POSSIBLE REACTIONS TO FLORENCE V. BOARD OF CHOSEN FREEHOLDERS IN SOUTH CAROLINA

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I. INTRODUCTION

Recently, a man was sitting inside the living room of his South Carolina home watching a basketball game when his wife arrived. According to the police report, he was visibly drunk and became upset with her. He never

2. Id.
physically touched her, but he “did admit to yelling and moving several objects out of the way.”\(^3\) The police arrived, handcuffed him, and booked him on disorderly house charges, which “appl[y] when the conduct of its inhabitants is such as to become a public nuisance.”\(^4\)

Imagine finding yourself, as this South Carolina man did, behind bars for something you did not even know was illegal—namely, having a few drinks and knocking over items in your home. Further, imagine that upon entering the detention center after being arrested for this unusual charge, you were subjected to a full-body strip search. Had this scenario taken place in Burlington County, New Jersey—as opposed to South Carolina—a strip search would indeed have been the result.\(^5\)

A strip search involves “squatting, bending one’s buttocks, and in the case of male inmates—lifting one’s genitalia.”\(^6\) In the recent case of *Florence v. Board of Chosen Freeholders,*\(^7\) the United States Supreme Court held that suspicionless strip searches of detainees being admitted to the general jail population did not violate the Fourth or Fourteenth Amendments. The arguments accepted by the Supreme Court in finding suspicionless strip searches constitutional hinge on the impracticability of a reasonable suspicion standard.\(^8\) Interestingly, South Carolina county detention centers and minimum security level prisons use variations of a reasonable suspicion standard.\(^9\) Although South Carolina has yet to see a case concerning a detainee or inmate claiming privacy violations upon entering a jail, that fact alone does not lead to the conclusion that a reasonable suspicion standard is optimal.\(^10\) Arguments exist that both support and deter blanket strip search policies in this state.\(^11\)

The implications of *Florence* in South Carolina remain debatable due to the fact-specific nature of its holding.\(^12\) The Court cautioned that while it was reasonable for corrections officials to decide that a reasonable suspicion standard would be unworkable,\(^13\) this may not always be the situation. In some instances, such a determination may be an “exaggerated” response to the circumstances.\(^14\)

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3. *Id.*
4. *Id.*
6. *Id.*
8. *See id.* at 1520–22.
9. *See infra* notes 124–42 and accompanying text.
12. *Florence III*, 132 S. Ct. at 1524 (Alito, J., concurring) (“The Court holds that jail administrators may require all arrestees who are committed to the general population of a jail to undergo visual strip searches not involving physical contact by corrections officers.”).
13. *Id.* at 1520.
14. *Id.* at 1518 (citing Block v. Rutherford, 468 U.S. 576, 584–85 (1984)).
This Note analyzes whether the adoption of a suspicionless strip search policy in South Carolina would be an “exaggerated response” to the demands of this state’s incarceration system. Because of South Carolina’s explicit constitutional right to privacy, the lack of evidence invalidating a reasonable suspicion standard, and public policy considerations, the move to a blanket strip search policy would neither be reasonable nor necessary in local-jurisdiction detention centers. Part II of this Note provides the facts, procedural history, and holding in Florence, and it also offers an analysis of what the Court determined to be legitimate state interests. Part III gives an overview of the incarceration framework in South Carolina. Part IV analyzes the arguments in favor of implementing suspicionless strip searches, and Part V analyzes arguments against such an implementation. Finally, Part VI concludes that in South Carolina, it would not be reasonable to adopt a policy of suspicionless searches for minor offenders.

II. THE SUPREME COURT’S DECISION IN FLORENCE V. BOARD OF CHOSEN FREEHOLDERS

In 2012, the United States Supreme Court held that suspicionless strip searches of detainees being admitted to the general jail population did not violate the Fourth or Fourteenth Amendments, even when the offender at issue has committed only a minor offense. This Part provides the facts, procedural history, and holding in Florence. It also analyzes those state interests that the Court considered significant to warrant intrusion into a person’s privacy rights.

A. Facts of the Case

On March 3, 2005, Albert Florence was riding as a passenger in his sport utility vehicle in Burlington County, New Jersey. Upon pulling over Florence’s wife, the driver of the vehicle at the time, the state trooper noticed an outstanding bench warrant for Florence. The warrant was issued in 2003 because Florence fell behind on court-ordered payments and failed to appear at an enforcement hearing for a prior, unrelated offense. Although Florence had paid the outstanding balance less than a week after the hearing, the warrant remained in a statewide computer database. After unsuccessfully protesting the warrant’s validity, Florence was transported to the Burlington Jail and later

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15. Id. at 1514–15, 1523.
17. Id.
19. Id.
transferred to a second county jail, the Essex County Correctional Facility.\textsuperscript{21} The issue before the Court related not to his arrest or confinement in the county jails, but rather the strip searches he experienced at each facility.\textsuperscript{22}

At the Burlington County Jail, an officer ordered Florence to strip into the nude, and while naked, “open his mouth, lift his tongue, hold his arms out, turn fully around, and lift his genitals.”\textsuperscript{23} During the search, the officer sat approximately “arms-length” away.\textsuperscript{24} The officer then directed Florence to shower before finally admitting him to the general jail population.\textsuperscript{25}

After six days of confinement at the Burlington facility, Florence was transferred to the Essex County Corrections Facility (ECCF) and subjected to a second suspicionless strip search.\textsuperscript{26} Upon arrival at ECCF, Florence and four other detainees were forced to “strip naked and shower under the watchful eyes of two corrections officials.”\textsuperscript{27} Similar to the procedures at the Burlington County Jail, the Essex County corrections officials required him “to open his mouth and lift his genitals.”\textsuperscript{28} Unlike at Burlington, however, the ECCF officials ordered him to turn around, squat, and cough.\textsuperscript{29} Jail personnel never physically touched Florence during the intake procedure at either facility.\textsuperscript{30} Florence was released the next day when the minor charges against him were dismissed.\textsuperscript{31}

\hspace*{1cm} \textbf{B. Procedural History}

After he was released, Florence filed a class action lawsuit in the United States District Court for the District of New Jersey against both counties, both county jails, and one warden.\textsuperscript{32} The court defined the class as:

All arrestees charged with non-indictable offenses who were processed, housed or held-over at Defendant Burlington County Jail and/or Essex County Correctional Facility from March 3, 2003 to the present date who were directed by Defendants’ officers to strip naked before those officers, no matter if the officers term that procedure a ‘visual

\hspace*{1cm} \textbf{21.} Florence\textsuperscript{III}, 132 S. Ct. at 1514. “The Essex County Correctional Facility, where petitioner was taken after six days, is the largest county jail in New Jersey. It admits more than 25,000 inmates each year and houses about 1,000 gang members at any given time.” \textit{Id.} (citation omitted).

\hspace*{1cm} \textbf{22.} \textit{Id.} at 1514–15.

\hspace*{1cm} \textbf{23.} \textit{Florence I}, 595 F. Supp. 2d at 496–97.

\hspace*{1cm} \textbf{24.} Florence v. Bd. of Chosen Freeholders (\textit{Florence II}), 621 F.3d 296, 299 (3d Cir. 2010), \textit{aff’d}, 132 S. Ct. 1510 (2012).

\hspace*{1cm} \textbf{25.} \textit{Id.}

\hspace*{1cm} \textbf{26.} \textit{Id.}

\hspace*{1cm} \textbf{27.} \textit{Id.}

\hspace*{1cm} \textbf{28.} \textit{Id.}

\hspace*{1cm} \textbf{29.} Florence\textsuperscript{III}, 132 S. Ct. 1510, 1514 (2012).

\hspace*{1cm} \textbf{30.} \textit{Id.} at 1514–15.

\hspace*{1cm} \textbf{31.} Florence\textsuperscript{II}, 621 F.3d at 299.

\hspace*{1cm} \textbf{32.} \textit{Id.}
observation’ or otherwise, without the officers first articulating a reasonable belief that those arrestees were concealing contraband, drugs or weapons.33

Florence sought relief under 42 U.S.C. § 1983, arguing that the suspicionless strip searches violated his Fourth and Fourteenth Amendment rights under the United States Constitution.34 The crux of his argument was that “persons arrested for a minor offense could not be required to remove their clothing and expose the most private areas of their bodies to close visual inspection as a routine part of the intake process.”35 Instead, Florence maintained that officials should be able to “conduct this kind of search only if they had reason to suspect a particular inmate of concealing a weapon, drugs, or other contraband.”36

The district court granted Florence’s motion for summary judgment regarding the unlawful search claim—concluding that “any policy of ‘strip searching’ non-indictable offenders without reasonable suspicion violates the Fourth Amendment.”37 The court also held that whether the inspections at the facilities were labeled “visual observations” or “strip searches,” the procedures involved were still searches for purposes of the Fourth Amendment.38

On appeal, the Third Circuit reversed.39 A majority of the divided panel held that the procedures of the Burlington and Essex County Jails “struck a reasonable balance between inmate privacy and the security needs of the two jails.”40 The court stressed the detection of contraband, identification of gang members, and prevention of the spread of contagious diseases as the valid penological interests justifying the strip search procedures.41

The decision on appeal placed the Third Circuit on one side of a split among the federal courts of appeals regarding the issue of whether the “privacy right” of the Fourth Amendment requires reasonable suspicion to exist before an inmate can be strip searched by a correctional official.42 The divide arose after the Supreme Court’s landmark decision in Bell v. Wolfish.43 In Bell, the Court noted that “[t]hose at all Bureau of Prison facilities . . . [were] required to expose

35. Id.
36. Id. at 1515.
37. Id.
38. Florence I, 595 F. Supp. 2d at 503. At the Burlington County Jail, the searches were actually labeled “visual observations.” Id. at 502.
42. Florence III, 132 S. Ct. at 1518 (citing Florence II, 621 F.3d at 303–04 & n.4).
43. 441 U.S. 520, 559 (1979).
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.\textsuperscript{44}

The \textit{Bell} Court held that because of the security interests involved in the operation of a detention center, strip searches after contact visits were not unreasonable and thus not a violation of the Fourth Amendment.\textsuperscript{45} In so holding, the Court reasoned that anal and genital inspections are reasonable whenever prison officials deem them necessary, even if the circumstances indicate no possibility of hidden contraband.\textsuperscript{46} In reaching this conclusion, the Court established and relied on a test that weighed “the need for the particular search against the invasion of personal rights.”\textsuperscript{47}

The \textit{Bell} decision dealt only with the issue of searches after contact visits from outside visitors;\textsuperscript{48} the issue of whether reasonable suspicion is a minimal-threshold requirement for strip searches of \textit{incoming inmates or prettrial detainees} was left unaddressed for the lower courts.\textsuperscript{49} Of the courts that addressed the issue after \textit{Bell}, eight circuit courts of appeals\textsuperscript{50} and various other district courts favored inmates’ rights to privacy.\textsuperscript{51} These circuits required reasonable suspicion, at a minimum, in order to conduct a strip search at the intake process.\textsuperscript{52} Two other circuit courts of appeals held otherwise, finding reasonable suspicion an unnecessary prerequisite to conducting a strip search.\textsuperscript{53}

\textsuperscript{44} Id. at 558. The strip search enabled the officers to conduct a visual cavity inspection, including the anal cavity and genital regions. \textit{Florence I}, 595 F. Supp. 2d 492, 504 (D.N.J. 2009), amended by 657 F. Supp. 2d 504 (D.N.J.), rev’d, 621 F.3d 296 (3d Cir. 2010), aff’d, 132 S. Ct. 1510 (2012) (citing \textit{Bell}, 441 U.S. at 558). The stated purpose of correctional facilities in performing the strip searches on inmates was the detection and deterrence of contraband, weapons, and drugs. \textit{Id.} (citing \textit{Bell}, 441 U.S. at 558). In \textit{Bell}, “[t]he question before the Supreme Court was ‘whether visual body-cavity inspections as contemplated by the . . . rules can ever be conducted on less than probable cause.’” \textit{Id.} (alterations in original) (quoting \textit{Bell}, 441 U.S. at 560).

\textsuperscript{45} \textit{Bell}, 441 U.S. at 558 (“The Fourth Amendment prohibits only unreasonable searches, and under the circumstances, we do not believe that these searches are unreasonable.” (citing Carroll v. United States, 267 U.S. 132, 147 (1925)).

\textsuperscript{46} Id. at 558–60.

\textsuperscript{47} Id. at 559. The test involved considering the scope of the intrusion, the manner in which the search is conducted, the justification behind conducting the search, and the place in which it is undertaken. \textit{Id.}

\textsuperscript{48} Id. at 528.

\textsuperscript{49} \textit{Florence I}, 595 F. Supp. 2d at 504.

\textsuperscript{50} See Bull v. City of San Francisco, 539 F.3d 1193, 1201 (9th Cir. 2008); Roberts v. Rhode Island, 239 F.3d 107, 110 (1st Cir. 2001); Weber v. Dell, 804 F.2d 796, 804 (2d Cir. 1986); Masters v. Crouch, 872 F.2d 1248, 1257 (6th Cir. 1989); Jones v. Edwards, 770 F.2d 739, 742 (8th Cir. 1985); Stewart v. Lubbock Cty., Tex., 767 F.2d 153, 156–57 (5th Cir. 1985); Hill v. Bogans, 735 F.2d 391, 394–95 (10th Cir. 1984); Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1273 (7th Cir. 1983); Logan v. Shealy, 660 F.2d 1007, 1013 (4th Cir. 1981).

\textsuperscript{51} See, e.g., O’Brien v. Borough of Woodbury Heights, 679 F. Supp. 429, 434 (D.N.J. 1988) (noting that in the absence any suspicion that plaintiffs were concealing a weapon, the strip searches of plaintiffs were unconstitutional).

\textsuperscript{52} See, e.g., Roberts, 239 F.3d at 110 (“[W]e consider [strip] searches an ‘extreme intrusion’ on personal privacy and an ‘offense to the dignity of the individual’ . . . .” (quoting Wood v. Clemons, 89 F.3d 922, 928 (1st Cir. 1996))); Chapman v. Nichols, 989 F.2d 393, 395 (10th Cir. 1993).
C. Holding and Analysis

1. Holding

Writing for the Court in *Florence*, Justice Kennedy limited the scope of his opinion to address “whether every detainee who will be admitted to the general population may be required to undergo a close visual inspection while undressed.”54 The Court then weighed the competing interests: the individual’s right to privacy and the state’s interest in safe correctional facilities.55

Florence argued that detainees not arrested for or convicted of serious crimes or offenses involving weapons or drugs should be exempt from invasive searches, unless the officers have reason to suspect that they are smuggling contraband.56 The State of New Jersey maintained that visual inspections are the only realistic way to uncover contraband, spot contagious diseases visible on skin, and identify possible gang allegiances.57 Furthermore, the State argued that the officials responsible for the daily operations of the jails, not the judiciary, are better suited to determine the policies concerning detention centers.58

In a split decision (3–1–1–4),59 the Supreme Court affirmed the decision of the Third Circuit and indirectly upheld the decision in *Bell v. Wolfish*.60 The

1993 (“It is axiomatic that a strip search represents a serious intrusion upon personal rights.”); *Mary Beth G.*, 723 F.2d at 1272 (adopting the opinion that “strip searches involving the visual inspection of the anal and genital areas [are] ‘demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission . . . .’” (quoting Tinetti v. Witte, 479 F. Supp. 486, 491 (E.D. Wis. 1979)).

53. See *Stanley v. Henson*, 337 F.3d 961, 966–67 (7th Cir. 2003) (upholding a clothing exchange program that required inmates to disrobe in front of same-sex officers and put on jail-imposed garments); *Powell v. Barrett*, 541 F.3d 1298, 1314 (11th Cir. 2008) (en banc) (overruling its prior decision requiring reasonable suspicion for strip searches). Although it could be argued that a circuit split had developed, given the fact-specific nature of this issue, eight cases are certainly not dispositive on this point.


55. See generally *id.* at 1515–23 (balancing the state’s interest of maintaining safety and order in correctional institutions with an individual’s constitutional right to be free from unreasonable searches and seizures).

56. *Id.* at 1518.

57. *See id.* at 1520.

58. As stated by the Supreme Court in *Florence III*, “[t]he task of determining whether a policy is reasonably related to legitimate security interests is ‘peculiarly within the province and professional expertise of corrections officials,’” *id.* at 1517 (quoting *Bell v. Wolfish*, 441 U.S. 520, 548 (1979)), and “in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations courts should ordinarily defer to their expert judgment in such matters,” *id.* at 1517 (quoting *Block v. Rutherford*, 468 U.S. 576, 584–585 (1984)) (internal quotation marks omitted).

59. *Id.* at 1513. Some commentators speculate that if the facts were changed slightly, Alito may have dissented and held that this search violated the Fourth Amendment, thus changing the outcome. See Linda Greenhouse, ‘*Embarrass the Future’*, N.Y. TIMES (Apr. 4, 2012, 8:30 PM), http://opinionator.blogs.nytimes.com/2012/04/04/embarrass-the-future/.

60. *Florence III*, 132 S. Ct. at 1523.
Court affirmed that a policy of no-contact strip-searching arrestees who are admitted to the general jail population is reasonable and therefore does not violate the Fourth Amendment as it is incorporated to the states via the Fourteenth Amendment.61

Justice Kennedy’s opinion did not mandate or urge the adoption of suspicionless strip searches by state and local jurisdictions.62 Rather, the Court suggested jail administrators may adopt a policy that requires all arrestees who are committed to the general population of a jail to undergo visual strip searches not involving physical contact by corrections officers if the administration can show that this policy is a reasonable search policy furthering a legitimate (or significant) state interest.63 The correctional officials and the police cannot themselves decide to conduct suspicionless searches absent an existing policy.64

2. Legitimate State Interests

In upholding the jail administrators’ policies of searching all detainees at intake, the Court balanced the detainee’s right of privacy with the state’s interests.65 In *Florence*, predictability66 and efficiency67 are both provided as support for a suspicionless standard. Ultimately, however, the safety of inmates via the detection of contraband was found to be the primary interest rendering the searches reasonable.68 Under the facts presented in *Florence*, the proposed reasonable suspicion standard would be “unworkable.”69

a. Predictability

Before arriving at its conclusion, the Court addressed the problems with a reasonable suspicion standard that could arise due to the fast and fluid nature of the intake process.70 Guards are often forced to make quick judgments to

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61. *Id.* at 1524 (Alito, J., concurring).
63. *Id.*
64. *See id.* at 1517 (noting that precedent has allowed correctional officials to adopt reasonable policies to detect and deter the smuggling of contraband).
65. *See generally id.* at 1515–23 (balancing the state’s interest of maintaining safety and order in correctional institutions with an individual’s constitutional right to be free from unreasonable searches and seizures).
66. *See id.* at 1520 (noting that adopting a reasonable suspicion standard may be unworkable because “the seriousness of an offense is a poor predictor of who has contraband”).
67. *Id.* at 1521 (noting that the “laborious administration of prisons would become less effective, and likely less fair and evenhanded,” if the reasonable suspicion standard was imposed).
69. *Id.* at 1520.
70. *See id.* at 1516 (citing Hudson v. Palmer, 468 U.S. 517, 529 (1984)) (recognizing “that deterring the possession of contraband depends in part on the ability to conduct searches without predictable exceptions”).
determine when an entering detainee’s conduct warrants a strip search.\textsuperscript{71} Other
factors typically considered in the reasonableness assessment are the nature of
the charge, the characteristics of the detainee, and the circumstances surrounding
the arrest.\textsuperscript{72} Leaving the strip search decision to a guard’s often snap
determination of “reasonably suspicious” opens the door to discriminatory
application and the resulting threat of lawsuits.\textsuperscript{73}

If the court later decides there was not reasonable suspicion, the guard may
be subject to liability.\textsuperscript{74} Accordingly, officers might be inclined not to conduct a
thorough search in any close case in order to avoid liability, thus creating
unnecessary risk for the entire jail population.\textsuperscript{75} If a guard determines that a
detainee is not suspicious, opts to forgo a strip search, and ends up being
mistaken, the consequences are dire.\textsuperscript{76} The entire jail population—guards, other
inmates, and the detainee himself—are exposed to a facility ridden with
contraband and its concomitant threats.\textsuperscript{77} Suspicionless strip searches, the Court
instructed, avoid this problem by imposing a structure of predictability and
efficiency.\textsuperscript{78}

\textbf{b. Efficiency}

As the Court pointed out, “[guards] would be required, in a few minutes, to
determine whether any of the underlying offenses were serious enough to
authorize the more invasive search protocol.”\textsuperscript{79} When determining one’s
suspicion, the guard may use the type of offense for which the detainee was
arrested as one, if not the main, indicia of suspicion.\textsuperscript{80} However, according to
the Supreme Court, “the seriousness of an offense is a poor predictor of who has
contraband and... it would be difficult in practice to determine whether
individual detainees fall within the proposed exemption.”\textsuperscript{81} In addition, the
Court noted that “[e]ven if people arrested for a minor offense do not themselves
wish to introduce contraband into a jail, they may be coerced into doing so by
others.”\textsuperscript{82}

Justice Kennedy explained that it is also difficult to classify inmates and
detainees by their current and prior offenses before the intake search process.\textsuperscript{83}

\begin{itemize}
\item \textsuperscript{71} See id. at 1522.
\item \textsuperscript{72} See Dobrowsolsky v. Jefferson Cnty., Ky., 823 F.2d 955, 957 (6th Cir. 1987).
\item \textsuperscript{73} Florence \textit{III}, 152 S. Ct. at 1522.
\item \textsuperscript{74} See id.
\item \textsuperscript{75} Id.
\item \textsuperscript{76} Id.
\item \textsuperscript{77} See id.
\item \textsuperscript{78} See supra notes 66–67 and accompanying text.
\item \textsuperscript{79} Florence \textit{III}, 152 S. Ct. at 1522.
\item \textsuperscript{80} See id.
\item \textsuperscript{81} Id. at 1520.
\item \textsuperscript{82} Id. at 1521.
\item \textsuperscript{83} Id.
\end{itemize}
A further impediment to using the type of offense as an indicator of suspicion is that many officers who conduct the initial search do not have access to criminal history records, and even if they do, the records are often "inaccurate or incomplete." At the outset, correctional officials know very little about an arrestee, for many times inmates will carry false identification or lie about their identity.

Furthermore, using the type of offense as an indicator of reasonable suspicion creates the problem of where to draw the line as to what offenses create reasonable suspicion. A formulaic approach that distinguishes between felonies and misdemeanors or indictable and non-indictable offenses would still create problems for a municipality, as arrestees with misdemeanor charges are not always less threatening than their felony-charged counterparts. The Court used the examples of Timothy McVeigh, who was arrested hours after the Oklahoma City bombing for driving without a license plate, and serial killer Joel Rifkin, who was arrested for the same reason. These two men rank as infamous criminals in American history, yet both were originally detained as a result of misdemeanor charges.

Finally, the felony–misdemeanor framework "underestimates inmate ingenuity." Even if an individual arrested for a minor offense has no desire to smuggle in forbidden items, he still may be pressured into doing so by others. The Court stated that a rule "[e]xempting people arrested for minor offenses from a standard search protocol thus may put them at greater risk and result in more contraband being brought into the detention facility." Prisoners are adept at learning the loopholes in the system and, once discovered, would be sure to

84. Id.
85. Id.
86. See id. at 1520–22.
88. See Florence III, 132 S. Ct. at 1520 ("People detained for minor offenses can turn out to be the most devious and dangerous criminals.").
92. Id.
95. Id.
exploit them.96 Any time a felon and a person convicted of a minor offense are held in the same area (for instance a holding cell), the hardened criminal could coerce the minor offender into smuggling in his contraband since he knows no strip search will be performed.97

In summation, using the type of offense as indicia of suspicion appears workable on the surface; however, in practice, relying on the type of offense proves to be an unrealistic solution.98 The Court suggested that a blanket strip search policy is more efficient, because it eliminates the problems associated with particularized suspicion.99

c. Safety of Detainees Through Determining Possession of Contraband

The primary consideration of those operating prisons and jails is the safety of the individuals in its confines.100 Contraband, in the form of weapons, drugs, tobacco, or gum, arguably poses the most substantial threat to safety.101 Strip searches allow corrections officers a predictable and efficient means of detecting and confiscating dangerous contraband.

At present, no viable alternatives exist that accomplish precisely what a strip search can.102 One item of technology that is repeatedly mentioned is the "BOSS Chair," or the Body Orifice Scanning System.104 In fact, this security method was in place at the Essex County Detention Center in Florence.105 The chair is "[a] non-intrusive scanning system designed to detect small weapons or contraband metal objects concealed in oral, anal, or vaginal cavities."106 Though less invasive than a strip search, "there is no evidence regarding the efficacy of the BOSS Chair in detecting metallic objects."107 Moreover, it cannot detect
drugs and other non-metallic contraband.\textsuperscript{108} It also cannot discover contagious skin infections, such as MRSA,\textsuperscript{109} or gang affiliations.\textsuperscript{110} Pat-down searches would fail even more drastically for the same reasons.\textsuperscript{111} Until some new technology reaches the marketplace that can detect metal, cash, drugs, disease, and gang affiliations, strip searches will continue to protect those in a corrections facility.

III. THE INCARCERATION NETWORK IN SOUTH CAROLINA

As mentioned in Part II, the issue confronting the Court in Florence pertained to arrestees brought into a jail or detention center.\textsuperscript{112} In South Carolina, jails and detention centers are operated by local jurisdictions; however, the detention centers are required to meet the minimum standards outlined in South Carolina Code sections 24-9-10 through 24-9-50.\textsuperscript{113} If any facility does not comply with the minimum standards established by the South Carolina Association of Counties and adopted by the Department of Corrections, the Director of the Department of Corrections may order that facility to be closed if no corrective action is initiated within ninety days.\textsuperscript{114} All of the detention centers must adhere to the baseline requirements but have wide latitude to implement the policies to accomplish those purposes.\textsuperscript{115}

In addition to county detention centers, the South Carolina Department of Corrections (SCDC) operates twenty-seven prisons throughout the state.\textsuperscript{116} While the SCDC prisons only house convicted felons and not pretrial detainees,\textsuperscript{117} the issue in Florence arguably still applies, because the term “jail”

\textsuperscript{108} Id.

\textsuperscript{109} Id.

\textsuperscript{109} MRSA, or methicillin-resistant staphylococcus aureus, is a highly contagious “superbug,” if left untreated, can cause serious health problems including death. Brief of Policemen’s Benevolent Ass’n, supra note 103, at 12–13, 2011 WL 3808399, at *12–13. It is often detected by the presence of “abscesses, cellulitis, boils, carbuncles and impetigo.” Id.

\textsuperscript{110} See, e.g., id. at 14 (“Visual inspections are vital to prevent inmates with contagious diseases from entering the general prison population.”); id. at 15 (“[C]orrections officers rely on visual inspections to identify gang members and keep them away from inmates aligned with rival gangs.”).

\textsuperscript{111} See id.

\textsuperscript{112} Email from Harry H. Stokes, Jr., Deputy Gen. Counsel, S.C. Dep’t of Corr., to author (Oct. 12, 2012, 15:59 EST) [hereinafter Stokes Email] (on file with author). The terms “jail” and “detention center” are used interchangeably.


\textsuperscript{115} See Minimum Standards, supra note 113, at 4.


\textsuperscript{117} Stokes Email, supra note 112. Inmates must have been convicted of an offense and sentenced to a prison term of at least ninety-one days. Id.
was used “in a broad sense to include prisons and other detention facilities.”

Justice Kennedy further explained that “[t]he specific measures being challenged will be described in more detail; but, in broad terms, the controversy concerns whether every detainee who will be admitted to the general population may be required to undergo a close visual inspection while undressed.” Therefore, if the prison inmate is going to be admitted to the general population, Florence likely would apply. Accordingly, the following discussion will highlight both the local and state prison policies.

A. County Detention Centers

There are currently fifty-two detention centers in counties across the state. These facilities are classified into eight “types,” designated by various factors including length of stay, sentencing status, and age. Each detention center can establish and enforce a written plan that assigns its inmates to classified categories for placement in the facility. The categories are based on determinants including age, sex, behavioral habits, severity of crimes committed, sentence status, and medical history.

As far as searches are concerned, the Minimum Standards manual sets forth that in Type II facilities (and presumably higher level facilities as well) each inmate will undergo a “[p]roper search” upon entering the detention center. In addition to the search upon initial entry, officials also search the inmates upon both leaving and reentering the confines of the facility regardless of their reason for leaving. While the Minimum Standards manual does not mandate the type of search that must be conducted, the manual does specify that inmates must be separated from the general jail population during the intake process.

119. Id.
121. Minimum Standards, supra note 113, at 5–6. A “Type I Facility” refers to facilities used “for the temporary detention of persons who are being held while awaiting a judicial hearing.” Id. at 5. However, if detainment will exceed forty-eight hours, he or she will be transferred to a Type II facility notwithstanding a compelling reason not to do so. Id. A “Type II Facility” is a city, county, or multijurisdictional jail “which houses persons awaiting court action, inmates sentenced to three (3) months or less, and civil contemptors.” Id. “Type III” centers house “only sentenced adult inmates.” Id. Persons awaiting court action, those in civil contempt, inmates sentenced to three months or less, and those with longer sentences under an agreement with the Department of Corrections are confined to “Type IV” centers. Id. at 6. Finally, a “Type V Facility” is a “work/punishment center, stand alone or otherwise, which houses sentenced inmates and civil contemplors who are participating in community programs such as work release or education release.” Id. Types VI, VII, and VIII are all centers for juveniles. Id.
122. Id. at 25.
123. Id.
124. Id. at 18.
125. Id. at 23.
126. Id. at 37.
booking area, medical examination room, shower facilities, telephone facilities, and similar areas are all to be apart from the general population. In theory, this means that the situation experienced by Albert Florence—getting searched in front of other inmates—would not occur in a South Carolina detention center.

Because no definition of “proper search” is provided by the Minimum Standards, county detention centers have broad discretion in determining its meaning and implementation. As a result, there is variability in the intake procedures across the state. For the most part, the goal is to conduct a search with “maximum respect and minimum physical discomfort to the inmate as allowed by safety and security considerations.”

At the Spartanburg County jail, a corrections officer will direct the entering individual to empty his pockets and undergo a “pat-down” search for weapons. Strip searches are not normally conducted upon initial entry at this facility, except when there is “probable cause that the individual has a weapon and/or other contraband on his/her person based on the type [of] offense, personal observation of officers and staff, previous history, and/or other valid reasons.” If justified, the strip search must be done in private and by an officer of the same sex.

At the opposite end of the state, the Beaufort County Detention Center takes a similar approach. All inmates entering the facility are searched thoroughly with a handheld metal detector to guarantee that no metal objects enter the facility. Inmates that arrive with drug trafficking charges are subjected to a frisk search, as well as an additional strip search if suspicion exists. Law enforcement officers can request a strip search of an individual they bring in, but the officer must agree to sign a waiver to be kept on file at the Beaufort County jail.

127. See id.
130. See id. at 4.
131. See, e.g., Email from Melissa Thornley, Sergeant, Hill-Finklea Det. Ctr., to author (Oct. 26, 2012, 16:19 EST) [hereinafter Thornley Email] (on file with author) (discussing procedure of performing unclothed searches before placing inmates in the general population); Email from Jeff Vortisch, Office of Prof’l Standards, Beaufort Cnty., Det. Ctr., to author (Oct. 18, 2012, 13:32 EST) [hereinafter Vortisch Email] (on file with author) (outlining intake procedures which involve thorough frisk searches and use of metal detectors).
134. Id.
135. Id.
136. See Vortisch Email, supra note 131.
137. Id.
138. Id.
139. Id.
As a final example, the Berkeley County Detention Center conducts clothed frisk searches on every entering arrestee.140 "Unclothed searches" occur when an individual is booked for a weapons or drug charge or at the arresting officer’s request based upon reasonable suspicion.141 Additionally, strip searches occur when an inmate is to be placed in the general population, analogous to the procedures in Florence.142

The methods described above demonstrate the varying means used to reach the same end. Interestingly, some county jails in South Carolina seem to be applying their own versions of a “reasonable suspicion” standard, with or without actually labeling it as such.143

B. South Carolina Prisons

The SCDC controls the prisons throughout the state.144 The prisons are categorized by increasing level of security: minimum (level 1-B), medium (level 2 or L2), and maximum (level 3).145 The level 3 facilities house violent offenders and inmates who exhibit behavioral problems, and thus necessitate high security.146 The level 2 and level 3 prisons utilize a blanket strip search policy—inmates undergo a strip search whenever entering the institution, whether for the first time or upon reentering after leaving.147 The minimum security level inmates, by contrast, are not subjected to a strip search upon entering the facility; a strip search will only be performed when they have left the facility and are reentering.148

Although there have been no cases to date related to issues with the reasonable suspicion standard, that does not mean this approach is preferred over a suspicionless search policy; there are arguments for and against both approaches.149 The Supreme Court noted that “[t]hese cases establish that correctional officials must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their facilities,”150 and that “in the absence of substantial evidence in the record to indicate that the officials

140. Thornley Email, supra note 131.
141. Id.
142. Id.
143. See supra notes 122–29 and accompanying text.
146. Id.
148. Id.
149. See infra Parts IV and V.
have exaggerated their response to these considerations courts should ordinarily defer to their expert judgment in such matters.\textsuperscript{151}

In \textit{Florence}, it was reasonable under the conditions in those facilities for the administration to adopt a strip search policy for all detainees.\textsuperscript{152} However, the determination of whether it would be a reasonable or an “exaggerated response” to implement a suspicionless strip search policy in a South Carolina facility is not as simple.\textsuperscript{153}

IV. PUBLIC POLICY FOR IMPLEMENTING SUSPICIONLESS STRIP SEARCHES IN SOUTH CAROLINA

In \textit{Florence}, the Supreme Court articulated the reasons why jail officials could deem a reasonable suspicion standard unworkable in the Burlington County and Essex County facilities.\textsuperscript{154} This Part extends those arguments to the jails in South Carolina.

A. Identification of Security Threats

The opening line of Justice Kennedy’s opinion states that “[c]orrectional officials have a legitimate interest, indeed a responsibility, to ensure that jails are not made less secure by reason of what new detainees may carry in on their bodies.”\textsuperscript{155} This need for security is trifold: to protect facility staff, the existing detainee population, and the new detainee.\textsuperscript{156} Prevention of contraband is the first of many measures in place to provide security.\textsuperscript{157}

1. Contraband

According to South Carolina Regulation 33-1, “contraband” is “[a]ny item which was not issued to the prisoner officially or which can be purchased” in the jail canteen.\textsuperscript{158} Weapons of any kind, drugs, alcoholic drinks or liquids containing alcohol, keys and locks, tools, and money in any denomination are the basic prohibited items.\textsuperscript{159} Some jails have specified additional items that are disallowed.\textsuperscript{160} For example, the Spartanburg County Detention Center bans

\textsuperscript{151} Id. (emphasis added) (quoting Block v. Rutherford, 468 U.S. 576, 584–585 (1984)) (internal quotation mark omitted).
\textsuperscript{152} See id. at 1523.
\textsuperscript{153} See infra Part V.
\textsuperscript{154} \textit{Florence III}, 132 S. Ct. at 1520–23.
\textsuperscript{155} Id. at 1513.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 1517.
\textsuperscript{158} S.C. CODE ANN. REGS. 33-1 (2011).
\textsuperscript{159} Id.
“chewing gum, chewing tobacco, and snuff.”  

Something as innocent as a toothbrush or pen can be sharpened into a weapon, bobby pins and hairpins can open handcuffs, and cigarettes and matches can start fires. The necessity of a visual strip search to identify these often-overlooked items cannot be overstated.

The first concern is the safety of the guards and other prison staff. For example, the Charleston County Detention Center offers “[d]irect supervision housing,” which consists of cells arranged around a common area with an officer stationed inside the unit to interact with the inmates and maintain security. Unlike traditional designs, this type of housing provides no isolated control booth for the supervising officer and puts no physical barriers between the guards and the inmates. Charleston County is not alone; Beaufort County also operates as a direct supervision facility. According to the Beaufort County web site, an “officer oversees the day-to-day activities of up to 56 persons by him or herself.”

Given the extent to which officers are outnumbered and the lack of secure barriers, correctional officers would be at a severe disadvantage if contraband entered the jail environment and a fight erupted or an assault occurred. The Supreme Court pointed out that this fear is legitimate, because “[i]nmates commit more than 10,000 assaults on correctional staff every year.”

A suspicionless strip search policy in South Carolina would help in reducing such risks, ensuring that the protection of the detention center personnel is at the forefront.

The safety of other inmates presents another concern. Certain jails around the state house hundreds to thousands of individuals on any given day. Additionally, some jails around the state have seen a growth in the number of

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164. Id.
166. Id.
average inmates. In Anderson County, for example, there has been a rapid increase in the average daily population since 2001. Specifically, the average daily population increased nearly 100% over a six-year period. Even more disconcerting, the Anderson County jail is understaffed by sixteen officers. When such a shortage of officers exists, heightened measures taken upon entry could be deemed reasonable to ensure that no contraband enters. As opposed to other methods, such as the BOSS Chair, strip-searching all entering inmates is a proven way to locate forbidden objects and better guarantee adequate protection.

The third consideration is the security of the new detainee. Entering inmates who are first-time offenders and new to the detention center environment are not yet accustomed to the unspoken rules of the jail, and thus are at an increased risk when compared to other hardened criminals and repeat offenders. Contraband must be prevented in order to stop further victimization of new detainees.

In addition, some counties have extremely large prison populations. For example, Charleston County had an average daily population of 1,451 in 2012. While this number is a decrease from prior years, when the average hovered around 1,700, a substantial threat exists when a new detainee is exposed to a general population of that size. One way to reduce the threat of violence is to identify contraband at the outset via a strip search.

171. Id.
172. Id. (showing an increase in the average daily population from 220 in 2000 to 434 in 2006).
175. See id. at 18 (citing Bell v. Wolfish, 441 U.S. 520, 546 (1979)).
176. See Alberti v. Sheriff of Harris Cnty., Tex., 406 F. Supp. 649, 691 (S.D. Tex. 1975) (“Exposure to persons with extensive criminal backgrounds can harm first offenders and other inmates who enter the system with little propensity for future criminal conduct and are prime candidates for rehabilitation.”); see also Florence III, 132 S. Ct. 1510, 1521 (2012) (discussing coercion by hardened criminals to force new detainees to smuggle contraband into the detention centers).
177. See Florence III, 132 S. Ct. at 1521.
180. See supra notes 176–77 and accompanying text.
2. Gang Affiliations

While contraband prevention remains the most noted element of security, strip searches also identify gang affiliations via gang tattoos or branding. A "criminal gang" refers to a "formal or informal ongoing organization, association, or group that consists of five or more persons who form for the purpose of committing criminal activity and who knowingly and actively participate in a pattern of criminal gang activity." In other words, gangs are groups of individuals who "claim control over certain territories and engage in illegal behavior." Often volatile and unpredictable individuals, gang participants commit "acts of violence toward rival gang members or the general public for even minor infractions of their code.

The issues that gangs present to the public in general are magnified in the confines of a jail. Rivalries between opposing gang members create a climate of tension and coercion, causing other inmates to feel the need to arm themselves. Furthermore, gangs put an entire facility at risk by "orchestrat[ing] thefts, commit[ting] assaults, and approach[ing] inmates in packs to take the contraband from the weak." The Supreme Court noted that "[j]ails and prisons...face grave threats posed by the increasing number of gang members who go through the intake process." In South Carolina, gang rates are on the rise as well. According to one news source, "All indicators demonstrated a statewide growth in gang activity and membership. The rate of gang violence increased 90 percent between 1998 and 2007. Data supports the number of gang murders increased from zero reported in 1998 to 21 reported in 2007." In July 2012, thirty-one individuals were arrested in Richland County due to their involvement with the...

184. *Id.*
188. *Id.* at 1518.
190. *Id.*
gang known as the “United Blood Nation.”\textsuperscript{191} In order to combat this growing threat, some counties in South Carolina have developed gang task forces.\textsuperscript{192}

The harsh reality remains that when detained, these gang members pose a real security threat to detention center populations.\textsuperscript{193} While “[t]here are gangs exclusive to Black members, Hispanics, Asians and Whites . . . . [t]here are also a number of gangs that cross racial boundaries.”\textsuperscript{194} Many of these gangs use tattoos or other branding marks to indicate gang membership.\textsuperscript{195} The primary method of identifying and monitoring gang affiliations is through strip-searching.\textsuperscript{196}

3. Health Concerns

The final way strip searches enhance detention center security is through the identification of contagious infections.\textsuperscript{197} Visually searching a detainee’s unclothed body enables corrections officers to locate cuts and wounds that may have been incurred during the arrest process.\textsuperscript{198} It also allows guards to discover possible diseases like MRSA.\textsuperscript{199} Without detecting these problems at the intake stage, the health of other inmates and jail officials is unnecessarily risked.\textsuperscript{200}

B. Uniform Implementation

The second advantage of a policy requiring blanket strip searches of individuals being admitted to the general population is uniformity across the state. Currently, the only rule for local jurisdictions is that searches must be “proper.”\textsuperscript{201} Each county facility can determine what exactly “proper” requires or entails.\textsuperscript{202} Some of the detention centers in the state only perform a search if the entering individual gives an official or officer “reasonable suspicion.”\textsuperscript{203} In


\textsuperscript{192} See, e.g., Anderson County Gang Task Force, ANDERSON CNTY. SHERIFF’S OFFICE, supra note 183 (“The Gang Task Force was formed for an immediate response to a rise in gang violence . . . .”).

\textsuperscript{193} See supra notes 180–88 and accompanying text.

\textsuperscript{194} Anderson County Gang Task Force, ANDERSON CNTY. SHERIFF’S OFFICE, supra note 183.

\textsuperscript{195} See Florence III, 132 S. Ct. at 1510, 1519 (2012).

\textsuperscript{196} Brief of Policemen’s Benevolent Ass’n, supra note 103, at 15, 2011 WL 3808399, at *15.

\textsuperscript{197} Florence III, 132 S. Ct. at 1518.

\textsuperscript{198} See id.

\textsuperscript{199} Brief of Policemen’s Benevolent Ass’n, supra note 103, at 11–12, 2011 WL 3808399, at *11–12.

\textsuperscript{200} Id. at 12.

\textsuperscript{201} Minimum Standards, supra note 113, at 18.

\textsuperscript{202} See id. at 4.

\textsuperscript{203} See supra notes 130–41 and accompanying text.
some jails, an arrestee with a drug charge is reasonably suspicious; in other jails, drug and weapons offenses provide reasonable suspicion.

The area of the state one is in at the time of the arrest should not determine whether one will receive a strip search. Furthermore, a blanket suspicionless strip search policy would provide individuals with constructive or inquiry notice of what to expect when they enter a facility, rather than surprising and distressing them during the intake process. While there is no way to determine if knowledge of an impending strip search will act as a deterrent to committing a crime, it is not hard to fathom that uniformity across jurisdictions could increase consistency and stability.

C. Administrative Ease

Security and uniformity are not the only benefits of a blanket policy; this approach would also provide administrative ease for detention center staff. As recognized by the Supreme Court, there are countless difficulties associated with administering a reasonable suspicion standard. Deciphering the definition of “suspicious” and attempting to draw the line by type of offense appear to offer solutions but in actuality only create more problems. The stressful and often challenging determinations by the corrections officers at intake would be eliminated entirely with a blanket policy that everyone would be searched. In conclusion, a blanket policy offers easier administration and effectively prevents inconsistent application.

V. PUBLIC POLICY FOR NOT ADOPTING SUSPICIONLESS STRIP SEARCHES IN SOUTH CAROLINA

While arguments exist favoring the adoption of suspicionless strip searches, such a move may not be reasonable in South Carolina detention centers based on several factors, including population, number of inmates, and

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204. See, e.g., Vortisch Email, supra note 131 ("Inmates that arrive with drug trafficking charges are subject to . . . an additional strip search if needed.").
205. See, e.g., Thornley Email, supra note 131 (describing Hill-Finklea Detention Center’s policy of performing unclothed searches of new detainees who are booked on weapons or drug charges).
206. See 66 Am. Jur. 2D Records and Recording Laws § 75 (2011) ("There are two types of constructive notice: notice arising from documents and instruments filed with a county recorder pursuant to a recording statute and inquiry notice arising from knowledge of certain facts that should impart to a person, or lead him or her to, knowledge of an ultimate fact." (citing First Am. Title Ins. Co. v. J.B. Ranch, Inc., 966 P.2d 834, 837–38 (Utah 1998))).
209. See id.
210. See supra Part IV.
average length of sentences. The Supreme Court cautioned that while the corrections officials’ determination to use strip searches was reasonable in *Florence*, in some instances, a policy of suspicionless strip searches would be an exaggerated response to the circumstances.\(^\text{211}\) Given that the reasonableness standard currently in use is arguably working and one reason jail officials would alter procedures now is because *Florence* said they may be able to, a sudden adoption of a blanket strip search standard would be an exaggerated response.\(^\text{212}\) Furthermore, South Carolina’s state constitution grants its citizens an explicit right to privacy.\(^\text{213}\) Although strip searches may be constitutional under the Fourth Amendment of the United States Constitution,\(^\text{214}\) the same may not be true under the South Carolina Constitution.\(^\text{215}\) Finally, public policy considerations favor keeping a reasonable suspicion standard over adopting a blanket approach.

A. A Working Standard

Many jails in states throughout the country, from Rhode Island to Oklahoma to Idaho, impose a strip search on every arrestee regardless of suspicion.\(^\text{216}\) However, nothing in the Supreme Court opinion mandates the implementation of a suspicionless strip search policy.\(^\text{217}\) The holding in *Florence* was fact specific: at the Burlington County and Essex County facilities, the respective policies of the corrections officials were found to be reasonably related to the justifying “penological interest,” after analyzing the jails’ compositions and the present security threats.\(^\text{218}\)

South Carolina presents a different situation. A jail in rural South Carolina does not necessarily encounter the same regular security threats as a jail in urban New Jersey.\(^\text{219}\) Additionally, jails in South Carolina house smaller populations

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\(^{212}\) See id.

\(^{213}\) S.C. CONST. art. I, § 10.

\(^{214}\) See Bell v. Wolfish, 441 U.S. 520, 558 (1979) (upholding a prison’s strip search policy as not violating the Fourth Amendment).

\(^{215}\) See State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001) (“The South Carolina Constitution, with an express right to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment.”).

\(^{216}\) *Florence III*, 132 S. Ct. at 1517.

\(^{217}\) Id. at 1524 (Alito, J., concurring).

\(^{218}\) See id. at 1527–28.

\(^{219}\) See Bilal R. Muhammad, Rural Crime and Rural Policing Practices (Multi Cultural Law Enforcement) 7–8 (2002) (unpublished manuscript), available at http://www.enich.edu/cems/downloads/papers/PoliceStaff/Patrol,%20Operations,%20Tactics/RURAL,%20POLICING.pdf (“The belief that crime is less frequent in rural areas is supported by recent Uniform Crime Reports (UCR) data that present crime by type and population group. [For example,] Index offence rates, including homicide, are higher for urban areas than for rural areas.”).
than other states in our region.\textsuperscript{220} For example, the Abbeville County Detention Center can only house 105 inmates and the Anderson County Detention Center only houses approximately 400 inmates.\textsuperscript{221} Moreover, it is not uncommon in South Carolina for the composition of a jail, unlike a state prison, to consist primarily of minor offenders.\textsuperscript{222} To illustrate, 79.38\% of inmates at the Beaufort County Detention Center are pretrial detainees.\textsuperscript{223} These offenses can range from underage possession of alcohol to failure to pay child support—not the typical offenses that come to mind as justification for a strip search.\textsuperscript{224}

Adopting suspicionless strip searches in facilities throughout the state (even in the larger centers such as those in Richland County and Charleston County) likely would require more officers to be hired to conduct the searches. As discussed previously, county detention centers are understaffed.\textsuperscript{225} Requiring additional staff members to perform the searches could impose significant financial burdens on these counties. If jails in South Carolina are already experiencing regular staffing difficulties, how are they to be expected to finance an increase in personnel to accomplish a blanket search policy?

If South Carolina chooses to retain a standard based on reasonable suspicion, it would not be alone.\textsuperscript{226} Many large and prominent facilities continue to use a reasonable suspicion standard before strip-searching inmates entering the general jail population, despite present “penological interests.”\textsuperscript{227} The United States Marshals Service, the Immigration and Customs Enforcement, and the Bureau of


\textsuperscript{224} See Florence III, 132 S. Ct. at 1525 (Breyer, J., dissenting).

\textsuperscript{225} See, e.g., supra note 173 and accompanying text (noting that the Anderson County Detention Center is understaffed by sixteen officers).

\textsuperscript{226} See, e.g., Colo. Rev. Stat. § 16-3-405(1) (2012) (“No person arrested for a traffic or petty offense shall be strip searched unless there is reasonable belief that the individual is concealing a weapon or controlled substance . . .”); 725 Ill. Comp. Stat. Ann. 5/103-1(c) (West 2006) (“No person arrested for a traffic, regulatory, or misdemeanor offense shall be strip searched unless there is a reasonable belief that the individual is concealing a weapon or controlled substance.”); Iowa Code Ann. § 804.30 (West 2003) (“A person arrested for a [misdemeanor] shall not be subjected to a strip search unless there is probable cause to believe the person is concealing a weapon or contraband.”); Kan. Stat. Ann. § 22-2521(a) (2007) (“No person detained or arrested solely for . . . a traffic, regulatory or nonviolent misdemeanor offense shall be strip searched unless there is probable cause to believe that the individual is concealing a weapon or controlled substance.”).

\textsuperscript{227} See Florence III, 132 S. Ct. at 1529 (Breyer, J., dissenting).
Indian Affairs all continue to use a reasonable suspicion standard.228 If these facilities, which are larger than even the largest South Carolina center, continue to find the standard sufficient, surely it should suffice for a South Carolina county.229 In addition to other facilities, at least ten other states disapprove of performing suspicionless strip searches on minor offenders and forbid the practice by statute.230 Three of these are also states that have explicit rights to privacy in their constitutions.231

In South Carolina, specifically, there is little evidence indicating that the reasonable suspicion standard employed is not working; on the contrary, national statistics indicate that a reasonable suspicion standard works just as efficiently as a suspicionless strip search standard.232 In his dissenting opinion, Justice Breyer found it telling that the majority could not supply an example of any instance in which contraband was found on an individual through an inspection of their private parts that could not have been found under a policy requiring reasonable suspicion.233 The dissent cited a particular study of 75,000 new inmates over a span of five years who received a suspicionless strip search.234 Of the 75,000, only sixteen of the searches yielded a discovery of contraband.235 A pat-down or a search of outer clothing could have detected the contraband in thirteen of those sixteen searches.236 In the remaining three instances, which contained contraband in a body orifice, there was a drug charge or felony history that would have justified a strip search on particularized reasonable suspicion.237 In summation, little proof exists to establish that a suspicionless strip search exceeds the benefits of a reasonable suspicion standard.

B. The Right to Privacy

Following the holding in Florence, South Carolina facilities could implement a blanket strip search policy under the United States Constitution for

228. Id.
233. Id. at 1530.
235. Id. at 1529 (citing National Police Accountability Project, supra note 234, at 10, 2011 WL 2623450, at *10).
236. Id.
237. Id. (citing National Police Accountability Project, supra note 234, at 10, 2011 WL 2623450, at *10).
all entering inmates and detainees in county detention centers, provided the
facilities demonstrate that a suspicionless policy is a reasonable response to the
existing circumstances. However, unlike the United States Constitution, the
South Carolina Constitution contains an explicit right to privacy, especially in
the context of searches and seizures. Article I, section 10 states:

The right of the people to be secure in their persons, houses, papers,
and effects against unreasonable searches and seizures and
unreasonable invasions of privacy 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, the person or thing
to be seized, and the information to be obtained.

The Fourth Amendment to the United States Constitution grants no such
privacy right, simply stating, “The right of the people to be secure in their
persons, houses, papers, and effects, against unreasonable searches and seizures,
shall not be violated.” The plain difference in language—the explicit
right in article I, section 10 of the South Carolina Constitution versus the implied
“penumbra” of the Fourth Amendment to the United States Constitution
supports the inference that the right to privacy created by the former is broader
than that offered by the latter.

Case law in South Carolina supports this argument. In State v. Weaver, the
South Carolina Supreme Court stated, “By articulating a specific prohibition
against ‘unreasonable invasions of privacy,’ the people of South Carolina have
indicated that searches and seizures that do not offend the federal Constitution
may still offend the South Carolina Constitution.” The South Carolina
Supreme Court in State v. Forrester expanded on this notion, recognizing that
“many of the states that have adopted explicit state constitutional right to privacy
provisions have read their constitutions as applying protection above and beyond
the protection provided by the federal Constitution.” The court in Forrester
also found it noteworthy that “[t]en states have express right to privacy
provisions in their constitutions. South Carolina and five other states have [that]

238. See id. at 1517 (majority opinion) (quoting Block v. Rutherford, 468 U.S. 576, 584–85
(1984)).
240. Id. (emphasis added).
241. U.S. CONST. amend. IV.
the Bill of Rights have penumbras, formed by emanations from those guarantees that help give
them life and substance,” and noting the “many controversies over these penumbral rights of
privacy and repose.”).
244. Id. at 322, 649 S.E.2d at 483 (citing State v. Forrester, 343 S.C. 637, 644, 541 S.E.2d
837, 841 (2001)).
245. Forrester, 343 S.C. at 645, 541 S.E.2d at 841.
right to privacy provision included in the section prohibiting unreasonable searches and seizures.\footnote{246}

The dicta in both Weaver and Forrester create a compelling argument that South Carolina citizens are given greater privacy protection, even though the situations in the two cases are not analogous with Florence.\footnote{247} Weaver concerned a police officer’s warrantless search of the defendant’s car,\footnote{248} and Forrester dealt with a police officer searching and seizing the clutch of an individual outside of a Burger King and discovering crack cocaine.\footnote{249} However, Florence dealt with the strip search of a detainee entering a federal correctional facility.\footnote{250} In fact, there is no South Carolina case specifically relating to the privacy rights of inmates or detainees being searched. However, in view of the fact that South Carolina affords its citizens greater privacy rights when their purses or cars are being searched, it follows that South Carolina courts will give more privacy rights regarding body cavities.\footnote{251} The lack of judicial interpretation regarding the right’s scope in an incarceration context leaves open the possibility that a challenge to the state constitutionality of strip searches may not yield the same result as under the United States Constitution. In other words, what survives a constitutional challenge federally may not mirror what survives locally.\footnote{252}

In addition to the inferences to be drawn from Weaver and Forrester, the explicit vocabulary, in combination with the placement of the term “privacy,” suggests that South Carolina values personal autonomy for its residents.\footnote{253} The emphasis on personal autonomy is also evidenced by South Carolina’s requirement to separate a detainee or inmate from other prisoners during the admissions process.\footnote{254} In this respect, the policies in South Carolina detention centers suggest respect for the individual.

The prison environment carries with it many threats\footnote{255} that restrict, but do not destroy, the argument for greater privacy protection. The notion that privacy rights decline upon entering prison is widely accepted.\footnote{256} As the Court noted in

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\item \footnote{246}{Id. at 644, 649 S.E.2d at 841 (citing ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 6; ILL. CONST. art. I, § 6; I.A. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7).}
\item \footnote{247}{See Weaver, 374 S.C. at 321–22, 649 S.E.2d at 483; Forrester, 343 S.C. at 644–45, 541 S.E.2d at 840–41.}
\item \footnote{248}{Weaver, 374 S.C. at 318, 649 S.E.2d at 481.}
\item \footnote{249}{Forrester, 343 S.C. at 640–41, 541 S.E.2d at 839.}
\item \footnote{250}{Florence III, 132 S. Ct. 1510, 1514 (2012).}
\item \footnote{251}{See supra notes 244–47 and accompanying text.}
\item \footnote{252}{See Forrester, 343 S.C. at 645, 541 S.E.2d at 841.}
\item \footnote{253}{See id. at 643–45, 541 S.E.2d at 840–41.}
\item \footnote{254}{Minimum Standards, supra note 113, at 27.}
\item \footnote{255}{See Hudson v. Palmer, 468 U.S. 517, 526 (1984).}
\item \footnote{256}{See id. at 525–26 (noting that “privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions”); see also Florence II, 621 F.3d 296, 301 (3d Cir. 2010), aff’d, 132 S. Ct. 1510 (2012) (noting that “privacy is greatly curtailed by the nature of the prison environment”).}
\end{itemize}
Hudson v. Palmer,257 detention in a correctional facility “carries with it the
circumscripture or loss of many significant rights.”258 The Third Circuit noted
that “[b]ecause privacy is greatly curtailed by the nature of the prison
environment, a detainee’s Fourth Amendment rights are likewise diminished.”259

While it is true that an arrestee’s rights may certainly be “diminished,”
nowhere does the Court say this right is to be eliminated.260 On the contrary, the
Supreme Court has held that “[t]hose confined in prison retain basic
constitutional rights”;261 and that “[p]rison walls do not form a barrier separating
prison inmates from the protections of the Constitution.”262 This is not what
occurred in Florence; the petitioner’s right to privacy in essence vanished for the
sake of the state’s interests.263

Though searches upon entry are critical for ensuring safety and protecting
the health of everyone in the facility, is it necessary to reach the level of
undressing and getting completely naked? South Carolina’s constitutional
privacy grant and the nature of South Carolina detention centers support an
answer in the negative. The fundamental right to privacy afforded to the state’s
citizens warrants a less intrusive means of searching minor offenders in a
detention center.

C. An “Exaggerated Response”

Under the Florence standard, in a county permitting suspicionless strip
searches, an elderly man detained for driving with an inoperable headlight would
undergo the same routine “squat and cough” procedure as one entering for
murder charges.264 In a county permitting suspicionless strip searches, a
nineteen-year-old college sophomore arrested for public intoxication would have
to strip into the nude and have her intimate body cavities searched.265 In a
county permitting suspicionless strip searches, an elderly nun arrested for
trespassing during an antiwar demonstration would be stripped and inspected
from head to toe, inside and out.266 Situations such as these are not imaginary or

257. 468 U.S. 517.
258. Id. at 524.
259. Florence II, 621 F.3d at 301.
Wolfish, 441 U.S. 520, 545 (1979); Turner v. Safley, 482 U.S. 78, 84 (1987)).
261. Id. (citing Bell, 441 U.S. at 545; Turner, 482 U.S. at 84).
262. Id. (quoting Turner, 482 U.S. at 84).
263. See id. at 1526.
264. See id. at 1527.
265. See generally id. (discussing examples of arrests for minor offenses that have led to full-
body strip searches).
266. See id. (citing Brief for Sister Bernie Galvin et al. as Amici Curiae Supporting Petitioner,
merely hypothetical; rather, these situations occur often in counties with blanket strip search policies.267

Strip searches involve an intrusion to one’s personhood and an invasion of one’s autonomy.268 “Even when carried out in a respectful manner, and even absent any physical touching,” the practices are “inherently harmful, humiliating, and degrading.”269 Justice Breyer’s dissent in Florence points out that “the harm to privacy . . . [is] particularly acute where the person searched may well have no expectation of being subject to a search, say, because she had simply received a traffic ticket . . . or because he had not previously paid a civil fine.”270

Not all individuals admitted to a jail are bad people; some people in society are going to make mistakes and others may well be innocent, or at least not guilty of the offense for which they are detained. Not surprisingly, some entering arrestees in one South Carolina detention center are minor offenders.271 These offenders are “stopped and arrested unexpectedly” and do not have the time to hide contraband in their body cavities.272 The “widespread advocacy” and “widespread application” of a reasonable suspicion standard in many detention centers reflects recognition of this point as valid.273

Is a policy of suspicionless strip searches in South Carolina really desirable? Do we want our sons and daughters to be subjected to a strip search for a minor offense, particularly given the realistic composition of our detention centers? In South Carolina, adopting suspicionless strip searches would be an “exaggerated response” to the realities of our jails. Because strip searches go beyond violating privacy into invading one’s personhood, these searches should not be tolerated in South Carolina as a matter of public policy.

Additionally, not every strip search is constitutional.274 Even though in Albert Florence’s situation the Court determined that the jails’ policies were reasonable and hence not a violation of the Fourth Amendment, there are situations when strip searches could possibly be unreasonable.275 Due to the narrowness of the holding, certain “exceptions” have been contemplated to the Florence rule.276

In his concurring opinion, Chief Justice Roberts stated that the Court did “not foreclose the possibility of an exception to the rule it announce[d].”277 Justice Alito elaborated on this view, specifying specific instances that may

267. See generally id. (noting examples of strip searches for minor offenses).
268. See id. at 1526.
269. Id.
270. Id.
273. Id.
274. See id. at 1524 (Alito, J., concurring).
275. Id.
276. See id.
277. Id. at 1523 (Roberts, C.J., concurring).
qualify as an exception.\textsuperscript{278} He suggested that arrestees whose detention had not yet been reviewed by a magistrate or through other judicial review and who can be held in available facilities removed from the general population may not be subjected to suspicionless strip searches.\textsuperscript{279} For example, if it is possible to segregate temporary detainees who are minor offenders from the general population, then those arrestees may be eligible to avoid a strip search.\textsuperscript{280}

Although not explicitly referenced by the Supreme Court, incidents involving touching were not considered when determining the constitutionality of suspicionless strip searches.\textsuperscript{281} The constitutionality of searches amounting to intentional humiliation also was not discussed.\textsuperscript{282} In \textit{Marzett v. Brown},\textsuperscript{283} although a Louisiana court did not agree that the plaintiff was intentionally humiliated by a jail official, it recognized that there could be situations where humiliation is possible.\textsuperscript{284} In those instances, the strip search is not necessarily constitutional.

In summation, in situations where doing so would clearly shock the conscience, local detention centers in South Carolina should refrain from employing strip searches. Furthermore, depending on the circumstances, searches involving touching, humiliation, and a detainee that has not been before a judge may not be upheld as reasonable.\textsuperscript{285} In consideration of the policy arguments favoring the retention of the various reasonable suspicion standards in South Carolina counties and evidence indicating current standards are working, implementing suspicionless strip searches in this state would be an “exaggerated response” and thus unconstitutional under the federal and state constitutions.

\section*{VI. Conclusion}

In the wake of \textit{Florence}, local detention centers throughout South Carolina could implement a blanket strip search policy if they determined current reasonable suspicion standards were no longer workable. There are arguments for and against the implementation of this policy in detention centers, but ultimately in South Carolina, it would not be reasonable to adopt a policy of suspicionless searches for minor offenders.

The arguments in \textit{Florence}, while reasonable according to the facts of the case, are not entirely analogous to the centers in South Carolina that are, on average, significantly smaller. Furthermore, the privacy grant in the South

\begin{flushleft}
278. See id. at 1524 (Alito, J., concurring).
279. Id.
280. Id.
281. Id. at 1523 (majority opinion) (“There also may be legitimate concerns about the invasiveness of searches that involve the touching of detainees. These issues are not implicated on the facts of this case, however, and it is unnecessary to consider them here.”).
282. See id.
284. Id. at *4–5.
\end{flushleft}
Carolina Constitution bestows upon its citizens a greater right than that afforded under the United States Constitution. Though the prison environment curtails this argument somewhat, nowhere does the Court suggest these rights are to be eradicated completely; only diminished, at most. Finally, public policy supports continued use of a reasonable suspicion standard in South Carolina.

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