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Blanket Policies for Strip Searching Pretrial Detainees: An Interdisciplinary Argument for Reasonableness

Daphne Ha

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NOTES

BLANKET POLICIES FOR STRIP SEARCHING PRETRIAL DETAINEES: AN INTERDISCIPLINARY ARGUMENT FOR REASONABLENESS

*Daphne Ha**

In 2010, the U.S. Courts of Appeals for the Third and Ninth Circuits joined the U.S. Court of Appeals for the Eleventh Circuit in upholding the constitutionality of blanket strip search policies in correctional institutions. As a result, more government officials across the country can strip search arrestees and pretrial detainees as a matter of routine procedure without any reasonable suspicion that the detainees have contraband. These detainees include individuals without criminal histories who are arrested for traffic or other minor offenses, and who have done nothing to suggest that they are attempting to smuggle contraband into correctional facilities.

This Note recognizes that an objective legal analysis can be informed by relevant social science findings and relies on an interdisciplinary approach in analyzing the constitutionality of strip search policies. Research has consistently found that strip searches are invasive, humiliating, and traumatizing even when conducted professionally and according to protocol. At worst, strip search policies allow corrections officers to abuse their power and systematically perpetrate sexual violence toward detainees. Ultimately, this Note argues that blanket strip search policies are unconstitutional and that courts must only uphold strip searches when there is an individualized, reasonable suspicion that a detainee is concealing contraband.

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* J.D. Candidate, 2012, Fordham University School of Law; M.A. Forensic Psychology, 2009, John Jay College of Criminal Justice; B.A. 2007, Barnard College. I thank Professor Martha Rayner for her guidance. I also thank my family, friends, and Gordon for their tremendous support and constant encouragement.

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INTRODUCTION

The San Francisco Sheriff’s Department implemented a policy that required visual strip searches of all arrestees brought into its six county

jails.¹ As a result, sheriffs strip searched numerous individuals including Mary Bull, who was arrested during a political protest.² Jailors forcibly removed her clothing, left her naked in a cell for eleven hours, and subjected her to two body cavity searches.³ They released her after another twelve hours without any charges.⁴ Similarly, Leigh Fleming, arrested for disturbing the peace, underwent a body cavity search and was left naked for five hours.⁵ She was never charged with a crime.⁶ Charli Johnson, a third victim, was arrested after driving with a suspended license.⁷ Male officers forcibly strip searched her in a hallway and left her naked for twelve hours.⁸ Like Bull and Fleming, Johnson was released the next day without any charges.⁹

On February 9, 2010, the U.S. Court of Appeals for the Ninth Circuit held in *Bull v. City and County of San Francisco*¹⁰ that the policy of the San Francisco Sheriff's Department did not violate these individuals' Fourth Amendment rights.¹¹ In so holding, the Ninth Circuit overruled its own case law,¹² joining a circuit split created in 2008 by the U.S. Court of Appeals for the Eleventh Circuit in *Powell v. Barrett*.¹³ Even more recently, on September 21, 2010, the U.S. Court of Appeals for the Third Circuit agreed that correctional facilities' policies of strip searching all arrestees were reasonable.¹⁴ Together, these cases suggest a general trend of interpreting the Fourth Amendment to allow "[s]uspicionless, routine, mandatory strip search policies."¹⁵ The relevance of such a trend cannot be

1. *Bull v. City & Cnty. of San Francisco*, 595 F.3d 964, 966 (9th Cir. 2010).

2. *Id.* at 989 (Thomas, J., dissenting).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. 595 F.3d 964 (9th Cir. 2010).

11. *See id.* at 966.

12. *See, e.g.,* *Giles v. Ackerman*, 746 F.2d 614, 615 (9th Cir. 1984) (holding that jailors violated the defendant's Fourth Amendment rights by strip searching her after she was arrested for a minor offense and there was no reasonable suspicion that she had contraband or a communicable disease), *overruled by Bull*, 595 F.3d 964; *infra* notes 273–74.

13. 541 F.3d 1298, 1306–07 (11th Cir. 2008) (en banc) (recognizing that other circuit courts have required reasonable suspicion in justifying strip searches, but declining to do so). In *Powell*, the Eleventh Circuit also overruled one of its prior cases. *Id.* at 1307; *see* *Wilson v. Jones*, 251 F.3d 1340, 1341 (11th Cir. 2001) (holding that a blanket policy requiring strip searches of all arrestees admitted to the county jail was unconstitutional), *overruled by Powell*, 541 F.3d 1298; *see also Bull*, 595 F.3d at 980–81 (agreeing with the Eleventh Circuit's reasoning that strip search policies do not violate the rights of arrestees who are mixed with the general jail population); *infra* Part II.B.1.

14. *Florence v. Bd. of Chosen Freeholders of Burlington*, 621 F.3d 296, 308 (3d Cir. 2010).

15. *Bull*, 595 F.3d at 991 (Thomas, J., dissenting).

overstated in our post-9/11 society, in which concerns about security and the constitutional rights of individuals are particularly strong.¹⁶

Recently, the American Civil Liberties Union (ACLU) wrote a letter to the Colorado Department of Corrections (DOC), arguing that a DOC body cavity search policy at Denver Women's Correctional Facility violated the Fourth and Eighth Amendments.¹⁷ Importantly, the letter also discussed the detrimental impact of the searches on the prisoners' mental health.¹⁸ Female prisoners stated that the invasive searches made them cry and worsened their prior traumas by causing flashbacks of prior incidents of sexual abuse.¹⁹ In addition, the letter suggested that the search policy threatened prisoners' successful rehabilitations.²⁰ To support this proposition, the ACLU cited social science sources to argue that traumatizing body searches will lead prisoners to refuse visits from friends and family, ultimately making the prisoners' assimilation into society more difficult upon release.²¹

To date, law review articles discuss the constitutionality of strip search policies in correctional settings under purely legal frameworks.²² However,

16. Security and civil rights issues are relevant not only in a penological context, but in emerging debates about national security, technology, and virtual strip searches. *See* Petition for Review, Elec. Privacy Info. Ctr. v. Napolitano, No. 10-1157 (D.C. Cir. July 2, 2010) (lawsuit filed by a nonprofit organization against the Transportation Security Administration's (TSA) full-body scanner program, alleging that the program violates travelers' Fourth Amendment rights); *see also* Susan Stellan, *Are Scanners Worth the Risk?*, N.Y. TIMES, Sept. 12, 2010, (Travel) at 3 (listing the many concerns about body scanners, including their radiation levels, lack of thorough testing, and ability to save photos of travelers' bodies); Gary Stoller, *Debate Rages Over Full-Body Scans*, USA TODAY, July 13, 2010, at 4B (discussing the growing opposition to TSA scanners that "strip-search" passengers without probable cause to do so). Furthermore, the advent of new technologies such as full body scanners allows correctional institutions and airports to conduct similar searches and cooperate with each other in doing so. *See* Christina M. Wright, *Correctional Facility Uses Donated Airport Scanners to Detect Drugs*, THE HERALD BULL. ONLINE (June 24, 2010), <http://heraldbulletin.com/local/x1617562558/Correctional-facility-uses-donated-airport-scanners-to-detect-drugs> (reporting that, after getting new equipment, the TSA donated seven machines that analyze microscopic particles from clothing and skin to the Indiana Department of Corrections).

17. Letter from the Am. Civil Liberties Union to Ari Zavaras, Exec. Dir., Colo. Dep't of Corr. 2 (Aug. 23, 2010), *available* at http://www.aclu.org/files/assets/Zavaras_ACLU_8-23-10.pdf [hereinafter ACLU Letter].

18. *See id.* at 2-3.

19. *See id.* (quoting a self-identified survivor of sexual trauma who stated that the strip searches encouraged her post-traumatic stress disorder and flashbacks, and that she observed women cry during searches); *id.* at 3 ("Prisoners at [Denver Women's Correctional Facility (DWCF)] have complained that the new breed of search exacerbates prior sexual trauma . . .").

20. *See id.* at 3.

21. *See id.* at 3 & nn.10-11 (citing various criminal justice, criminology, and therapy sources).

22. *See, e.g.,* Andrew A. Crampton, *Stripped of Justification: The Eleventh Circuit's Abolition of the Reasonable Suspicion Requirement for Booking Strip Searches in Prisons*, 57 CLEV. ST. L. REV. 893, 893-909 (2009) (discussing the history leading up to *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008); the decision itself; and post-*Powell* reactions from other circuits); Deborah L. MacGregor, *Stripped of All Reason? The Appropriate Standard for Evaluating Strip Searches of Arrestees and Pretrial Detainees in Correctional Facilities*,

merely considering case law and legal standards ignores the very personal experiences and reactions of the detainees who are searched. Strip searches, even when conducted professionally and privately, often cause feelings of disgust, annoyance, trauma, and humiliation, similar to the experiences of victims of sexual abuse and rape.²³ Although prior legal articles rely only on judicial precedents, an objective analysis need not exclude detainees' responses to strip searches. Accordingly, this Note discusses the unresolved circuit split on blanket strip search policies in jails and prisons (when applied to pretrial detainees). Moreover, this Note introduces into the literature extralegal factors relevant to such policies, including the psychological and social effects of strip searches. This information will allow courts and others to reflect on strip searches not only as a means of preventing contraband in correctional institutions, but also as a potential form of power, control, and sexual violence systematically perpetrated by corrections officers.²⁴

Part I of this Note provides a legal and social science background of strip search policies by discussing major Fourth Amendment cases, interdisciplinarity in the law, and social science research on strip searches. Next, Part II explores the circuit split on the constitutionality of blanket strip searches, describing the arguments for and against blanket policies. Part III assesses the opposing views of strip search policies in the context of relevant case law and social science literature. It argues that, because the intrusion posed by a strip search is so severe, strip searches should only be conducted when a police or corrections officer reasonably suspects that a detainee is concealing contraband. The justification for a strip search must be compelling enough to substantiate such an invasive procedure, and anything less than a reasonable suspicion should be considered insufficient.

I. STRIP SEARCHES OF PRETRIAL DETAINEES: THE LEGAL AND SOCIAL SCIENCE PERSPECTIVES

Part I discusses case law and social science findings regarding strip search policies. Part I.A focuses on the law of strip searches, beginning with the Fourth Amendment and its protections. It then discusses the only U.S. Supreme Court case involving blanket strip searches of pretrial detainees, *Bell v. Wolfish*,²⁵ and the Court's subsequent cases involving detainees' constitutional rights. Next, Part I.B explains interdisciplinarity and considers its application in the legal field with specific examples from anthropology, family law, and community development. Part I.B concludes by discussing the Supreme Court's approach to interdisciplinarity. Finally, Part I.C discusses the social science research on strip searches, including

36 COLUM. J.L. & SOC. PROBS. 163, 178–83 (2003) (arguing that courts should evaluate the constitutionality of strip search policies by combining the standards articulated in *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Turner v. Safley*, 482 U.S. 78 (1987)).

23. See *infra* Part I.C.

24. See *infra* Part I.C.

25. 441 U.S. 520 (1979).

the effects of strip searches on individuals and the potential for abusive searches.

A. *The Law Governing Strip Searches of Pretrial Detainees*

Part I.A provides a legal background of the constitutionality of strip search policies. Part I.A.1 defines the term “strip search” as used in this Note. Part I.A.2 discusses the Fourth Amendment and its protections, particularly involving searches of arrestees. Next, Part I.A.3 examines *Bell’s* analysis of the constitutionality of blanket strip searches of pretrial detainees. Finally, Part I.A.4 considers two Supreme Court cases decided after *Bell*: *Block v. Rutherford*²⁶ and *Turner v. Safley*.²⁷

1. Definition of “Strip Search”

A strip search is “[a] search of a person conducted after that person’s clothes have been removed, the purpose usu[ally] being to find any contraband the person might be hiding.”²⁸ Strip searches generally do not involve scrutiny of body cavities.²⁹ However, policies in correctional facilities tend to include visual body cavity searches under the broad term “strip searches,” and only distinguish between visual and physical body cavity searches.³⁰ This definitional problem is aggravated when courts describe strip search policies without clarifying whether a search includes a visual search of body cavities.³¹

In this Note, the term “strip search” refers to non-physical searches in which an individual removes all of his/her clothes while observed by a law enforcement officer, whether there is a visual body cavity search or not.³² The stated purpose for the removal of clothing is irrelevant. Thus, for example, in *Wood v. Hancock County Sheriff’s Department*,³³ the county argued that corrections officers only required Wood to disrobe in order to search his clothing, and “any observation of Wood’s naked body was

26. 468 U.S. 576 (1984).

27. 482 U.S. 78 (1987).

28. BLACK’S LAW DICTIONARY 1469 (9th ed. 2009).

29. 68 AM. JUR. 2D *Searches and Seizures* § 259 (2010).

30. *See, e.g., Bull v. City & Cnty. of San Francisco*, 595 F.3d 964, 968 n.4 (9th Cir. 2010). The written policy at issue said: “Strip searches include a visual body cavity search. A strip search *does not* include a physical body cavity search.” *Id.*

31. *See, e.g., Stewart v. Lubbock Cnty.*, 767 F.2d 153, 154 (5th Cir. 1985) (simply stating that Class C misdemeanants “were strip searched at the Lubbock County jail pursuant to jail policy,” without providing the text of the policy or describing what the search entails).

32. *See Kelsey v. Cnty. of Schoharie*, 567 F.3d 54, 62 (2d Cir. 2009) (“The term ‘strip search’ is used generally to describe any inspection of the naked body.”). Although a search involving disrobing and a manual body cavity search is also a strip search, the definition of “strip search” in this Note excludes manual body cavity searches. Case law suggests that such searches may undergo a different legal analysis. *See* 16C C.J.S. *Constitutional Law* § 1543 (2005) (“Because of the special insult to human dignity involved when the police seek evidence in body apertures . . . , special rules restrict internal body searches, and if the bodily intrusion is conducted by means so patently abusive as to shock the conscience, the search may violate due process.”).

33. 354 F.3d 57 (1st Cir. 2003).

incidental.”³⁴ Nevertheless, as the U.S. Court of Appeals for the First Circuit held, the intrusion into individual privacy stems from having one’s naked body shown to and scrutinized by an official, regardless of the stated purpose for such exposure.³⁵ In defining a “strip search,” this Note shares the view of the First Circuit that requiring an individual to stand naked before a law enforcement official meets the definition of a “strip search,” regardless of the official’s intentions.³⁶

2. The Fourth Amendment

The Fourth Amendment protects people from unreasonable searches by limiting the government’s ability to conduct searches.³⁷ The text of the Fourth Amendment states, in relevant part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”³⁸

The Fourth Amendment was “designed ‘to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.’”³⁹ Although courts initially construed the Amendment as protecting property interests rather than persons, they later found that it primarily safeguards individuals against invasions of privacy.⁴⁰

a. The Scope of Protection Afforded by the Fourth Amendment

Having established that the Fourth Amendment protects persons, the next step is to consider the scope of protection available. In *Katz v. United States*,⁴¹ the Supreme Court held that people are free from unreasonable searches and seizures regardless of their location.⁴² In his oft-cited concurrence, Justice John M. Harlan agreed that the Fourth Amendment

34. *Id.* at 59.

35. *See id.* at 63–64. *But see Kelsey*, 567 F.3d at 63–64 (holding that a county jail’s clothing exchange policy did not violate the Fourth Amendment because incidentally seeing detainees’ bodies and genitals during a clothing exchange does not amount to a strip search or an unreasonable search). However, in her dissent, then Second Circuit Judge Sotomayor wrote that the majority used the wrong version of facts and ignored key testimony by the plaintiffs. *Id.* at 65–67 (Sotomayor, J., dissenting). She stated that although clothing exchanges may serve important objectives, they violated the plaintiffs’ constitutional right against unreasonable searches. *Id.* at 70–71.

36. *Wood*, 354 F.3d at 63–64.

37. U.S. CONST. amend. IV.

38. *Id.* The Fourth Amendment has been incorporated into the Due Process Clause of the Fourteenth Amendment, rendering it enforceable against states. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

39. *INS v. Delgado*, 466 U.S. 210, 215 (1984) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 266 (1990) (stating that historical sources suggest that the Fourth Amendment was meant to protect people from arbitrary actions by the federal government).

40. *See Warden v. Hayden*, 387 U.S. 294, 304 (1967).

41. 389 U.S. 347 (1967).

42. *See id.* at 358–59 (holding that the defendant was as entitled to his Fourth Amendment rights in a telephone booth as a person in a business office, apartment, or taxicab).

does not ask where a person is, but rather where a person can reasonably expect privacy.⁴³ He articulated a two-prong reasonable expectation of privacy test: first, a person must have “an actual (subjective) expectation of privacy,” and second, the expectation must be objectively reasonable by societal standards.⁴⁴

In general, police must secure a warrant before conducting a search,⁴⁵ and probable cause must exist before a warrant can be issued.⁴⁶ However, the Supreme Court has established various exceptions to this rule.⁴⁷ For example, in *Terry v. Ohio*,⁴⁸ the Court upheld warrantless searches based on less than probable cause as long as the searches are based on specific facts, not vague hunches or good faith.⁴⁹ This is based on the rationale that police officers engage in “necessarily swift action predicated upon the on-the-spot observations of the officer on the beat.”⁵⁰ However, because the purpose of the *Terry* exception is to protect police officers and others nearby, the warrantless search must be limited to looking for potential weapons that can be used in an assault.⁵¹

b. Searches of Arrestees

In the years after *Terry*, the Court expanded the exceptions to the warrant requirement to arrestees and prisoners. In *Chimel v. California*,⁵² the Supreme Court established that police officers can conduct warrantless searches of lawfully-arrested persons and areas within their reach.⁵³ Such searches are justified by the need to protect the officer, prevent escape, and prevent the destruction of evidence.⁵⁴ The Court in *United States v. Robinson*⁵⁵ reiterated and clarified this holding, stating that during a lawful arrest, “a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.”⁵⁶

In *Robinson*, the police officer lawfully arrested the respondent, conducted a pat-down search, and felt an object through the respondent’s left breast jacket pocket.⁵⁷ The officer reached in the pocket and retrieved a

43. *Id.* at 361 (Harlan, J., concurring).

44. *Id.*

45. *See, e.g., Maryland v. Dyson*, 527 U.S. 465, 466 (1999) (per curiam).

46. U.S. CONST. amend. IV (“[N]o warrants shall issue, but upon probable cause . . .”).

47. *See, e.g., Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009) (stating that a search incident to a lawful arrest is an exception to the warrant requirement); *Katz*, 389 U.S. at 357 & n.19 (stating that there are “a few specifically established and well-delineated exceptions” to the warrant requirement, and listing cases).

48. 392 U.S. 1 (1968).

49. *See id.* at 21–22.

50. *Id.* at 20.

51. *Id.* at 29.

52. 395 U.S. 752 (1969).

53. *Id.* at 762–63.

54. *Id.* at 764.

55. 414 U.S. 218 (1973).

56. *Id.* at 235.

57. *Id.* at 221–23.

crumpled cigarette package, which contained fourteen capsules of heroin.⁵⁸ Although the Court stated that such a “full search” is constitutional,⁵⁹ a subsequent Supreme Court case made clear that the holding did not apply to routine strip searches of arrestees.⁶⁰

Nevertheless, the Supreme Court has not shied away from cases involving strip searches of pretrial detainees. Although the Court has adamantly recognized that prisoners have constitutional protections, it has also held that the effective administration of prisons allows for some curtailment of rights.⁶¹

3. Searches of Pretrial Detainees: *Bell v. Wolfish*

In the 1979 case of *Bell v. Wolfish*,⁶² the Supreme Court considered, for the first time, whether the Constitution protects pretrial detainees against strip searches.⁶³ In *Bell*, detainees in New York City’s Metropolitan Correctional Center (MCC) filed a class action lawsuit challenging the constitutionality of over twenty institutional practices, including visual body cavity searches of inmates after they receive visits.⁶⁴ Both the U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit held that the MCC had to justify its conditions under a “compelling necessity” standard.⁶⁵ The Supreme Court disagreed, stating it could not find a source in the Constitution for such a standard.⁶⁶

Instead, the Court held that the proper analysis is to determine whether the conditions at MCC were imposed to punish or to serve a legitimate governmental purpose.⁶⁷ Unless there is an express intent to punish, a court must consider if there is an alternative purpose for the restriction, and if so, whether the restriction seems excessive given this alternative purpose.⁶⁸ The Court then held that the government has a legitimate interest in managing its correctional facilities, which includes maintaining security and

58. *Id.* at 223.

59. *Id.* at 235.

60. See *Illinois v. Lafayette*, 462 U.S. 640, 646 n.2 (1983) (“We . . . do not discuss here[] the circumstances in which a strip search of an arrestee may or may not be appropriate.”); see also Katarzyna Homenda, Note, *The Court is a Fan of Fans: Johnston v. Tampa Sports Authority Correctly Refused to Extend the Special Needs Doctrine to Pat-Downs at Raymond James Stadium*, 57 DEPAUL L. REV. 755, 775 n.170 (2008) (citing *Robinson* in support of the proposition that a full search of a person includes touching under his/her garments).

61. See *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974) (holding that “[t]here is no iron curtain drawn between the Constitution and the prisons of this country,” but recognizing that institutional demands may diminish prisoners’ rights).

62. 441 U.S. 520 (1979).

63. *Id.* at 523–24.

64. *Id.* at 523, 528.

65. *Id.* at 530.

66. *Id.* at 532.

67. *Id.* at 535–38.

68. *Id.* at 538.

preventing weapons and drugs from reaching detainees.⁶⁹ Thus, actions taken by corrections officers in furtherance of these objectives are valid and not intended as punishment.⁷⁰ Taking this proposition one step further, the Court held that the need to run a correctional facility effectively can restrict individual rights.⁷¹ Accordingly, there is no distinction between pretrial detainees and convicted prisoners, because the nature of incarceration justifies depriving both groups of their full set of constitutional rights.⁷²

Furthermore, the Court emphasized that the judiciary must defer to corrections officers and policies:

[T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison 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. "Such considerations are peculiarly within the province and professional expertise of corrections officials"⁷³

However, the Court qualified that courts should default to their own judgment in cases with "substantial evidence . . . that the officials have exaggerated their response to these considerations."⁷⁴

The Court then addressed the constitutionality of various MCC practices, including a policy requiring a visual inspection of detainees' body cavities after every contact visit with a person from outside MCC.⁷⁵ In determining whether such a search is reasonable, the Court applied a balancing test and weighed the necessity of the search against the invasion of personal rights.⁷⁶ It listed four factors to 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."⁷⁷

Despite providing these factors, the Court did not clearly apply its balancing test to the MCC strip search policy. Rather, it recognized that detention centers have "serious security dangers," including the possibility that inmates will smuggle items into the facilities in their body cavities.⁷⁸ The Court also acknowledged that strip searches are invasive and provide a potential for abuse by security guards.⁷⁹ Then, in an abrupt conclusion,

69. *Id.* at 540.

70. *Id.*

71. *Id.* at 546–47.

72. *Id.* at 546.

73. *Id.* at 547–48 (citations omitted) (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

74. *Id.* at 548. *But see id.* at 568 (Marshall, J., dissenting) (acknowledging the necessity of imposing limitations on prisoners and detainees, but stating that the majority was "blindly deferring to administrative judgments on the rational basis for particular restrictions," which "is an abdication of an unquestionably judicial function").

75. *Id.* at 558 (majority opinion).

76. *Id.* at 559.

77. *Id.*

78. *Id.*

79. *Id.* at 560; *see also infra* Part I.C.1.

Bell held that visual body cavity inspections can be conducted on less than probable cause, without explaining what level of cause is sufficient to meet constitutional standards.⁸⁰

While the majority made no mention of social science theories or testimony, both Justice Thurgood Marshall and Justice John Paul Stevens did so in their dissents.⁸¹ A psychiatrist testified that visual body cavity searches “placed inmates in the most degrading position possible.”⁸² This was consistent with inmates’ testimony that they feared sexual assault and forwent their personal visits to avoid being searched.⁸³ There was also medical testimony that “inserting an object into the rectum is painful,” difficult, and uses more time and opportunity than inmates have during contact visits.⁸⁴ Moreover, visual searches are unlikely to reveal the presence of objects in the rectum.⁸⁵ Both Justices Marshall and Stevens agreed that visual body cavity strip searches are unnecessary and degrading.⁸⁶

To date, *Bell* remains the only Supreme Court case to consider policies requiring blanket strip searches of pretrial detainees.⁸⁷ It is not surprising that the Court’s vague guidelines have caused lower courts to interpret the case in divergent ways.⁸⁸

80. *Bell*, 520 U.S. at 560. Justice Lewis Powell stated that some cause, such as a reasonable suspicion, is necessary to justify anal and genital searches. *Id.* at 563 (Powell, J., concurring in part and dissenting in part). Justice Thurgood Marshall stated that courts should not consider whether a restriction is punitive, but whether the government’s interests outweigh individual deprivations. *Id.* at 564 (Marshall, J., dissenting). Justice John Paul Stevens expressed a need for objective criteria, and urged for “careful scrutiny” when correctional facilities do not distinguish among detainees based on dangerousness. *Id.* at 588 (Stevens, J., dissenting).

81. *Id.* at 577–78 (Marshall, J., dissenting); *id.* at 593, 599 (Stevens, J., dissenting); *see also infra* Part I.B.3 (analyzing Supreme Court Justices’ approaches to extralegal disciplines).

82. *Bell*, 441 U.S. at 577 (Marshall, J., dissenting); *see also id.* at 593 (Stevens, J., dissenting) (stating that searches “engender ‘deep degradation’ and ‘terror’ in the inmates” (quoting *United States ex rel. Wolfish v. Levi*, 439 F. Supp. 114, 147 (S.D.N.Y. 1977))).

83. *Id.* at 577 (Marshall, J., dissenting); *id.* at 593 (Stevens, J., dissenting).

84. *Id.* at 578 (Marshall, J., dissenting).

85. *Id.*

86. *Id.* at 577; *id.* at 599 (Stevens, J., dissenting).

87. *See, e.g.*, *Bull v. City & Cnty. of San Francisco*, 595 F.3d 964, 973 (9th Cir. 2010) (stating that *Bell* remains a guiding case for strip search policies). Two years after *Bell*, Justice William Rehnquist temporarily stayed a mandate by the U.S. Court of Appeals for the Fourth Circuit to remand a case, after the Fourth Circuit held that strip searches cannot be conducted without probable cause. *Clements v. Logan*, 454 U.S. 1304, 1307–09 (Rehnquist, Circuit Justice 1981); *see also infra* notes 205–12 and accompanying text. Justice Rehnquist reiterated *Bell*’s holding that probable cause or a weapons- or drug-related arrest was not necessary to justify a strip search. *Clements*, 454 U.S. at 1309–10. However, the Supreme Court later denied the application for stay and vacated Justice Rehnquist’s order. *Clements v. Logan*, 454 U.S. 1117 (1981).

88. *See infra* Part II.

4. Supreme Court Cases after *Bell*

The Supreme Court has not addressed strip search policies in detention facilities after *Bell*, but the Court has deviated from *Bell*'s four-factor balancing test in deciding subsequent cases involving detainees' constitutional rights. In *Block v. Rutherford*,⁸⁹ pretrial detainees at the Los Angeles County Central Jail argued that several jail policies, including a blanket prohibition on contact visits, violated their substantive due process rights.⁹⁰ After emphasizing the importance of deferring to institutional practices designed to maintain security and order,⁹¹ the Court upheld the prohibition because it rationally related to internal security.⁹²

Three years later, the Court in *Turner v. Safley*⁹³ also used a rational relationship test, stating that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."⁹⁴ Four factors must be considered in deciding whether a reasonable relationship exists: first, whether the government objective is legitimate and neutral, rather than arbitrary and remote; second, whether alternative means exist through which inmates can exercise their rights; third, the impact of accommodating these rights on guards, other inmates, and prison resources; and fourth, the absence of ready alternatives.⁹⁵ These factors differ from those in *Bell*, and so it remains unclear what test applies when evaluating the constitutionality of policies in correctional facilities.⁹⁶ The circuit courts still apply *Bell* to blanket strip search policies in jails and prisons, but reach different conclusions despite interpreting the same case and using the same balancing test.⁹⁷

B. Law and Interdisciplinarity

Part I.A discussed the Supreme Court's interpretation of the Fourth Amendment in regards to arrestees, pretrial detainees, and policies in correctional facilities. However, relying solely on a legal perspective is insufficient for a thorough analysis of the constitutionality of strip searches, which are inherently personal experiences. The study of law has been criticized for its "traditional preoccupation with doctrine," and "accused of being rigid, dogmatic, formalistic, and close-minded."⁹⁸ On the other hand, interdisciplinary work has been "dismissed as substandard, superficial, and

89. 468 U.S. 576 (1984).

90. *Id.* at 578.

91. *Id.* at 584–85 (citing *Bell*, 441 U.S. at 547).

92. *Id.* at 586.

93. 482 U.S. 78 (1987).

94. *Id.* at 89.

95. *Id.* at 89–90.

96. See generally MacGregor, *supra* note 22, at 168–78 (reviewing in more detail other Supreme Court cases involving prisoners' rights).

97. See *infra* Part II.

98. Douglas W. Vick, *Interdisciplinarity and the Discipline of Law*, 31 J.L. & Soc'y 163, 181 (2004).

ill-informed,” and interdisciplinary researchers have been called “‘ivory tower dilettantes.’”⁹⁹ This section begins by defining and presenting the arguments for and against interdisciplinarity. Next, Part I.B.2 discusses interdisciplinarity in the field of law and presents relevant examples. Finally, Part I.B.3 explores Supreme Court decisions that have considered extralegal disciplines.

1. Interdisciplinarity: Definitions, Advocates, and Critics

A discipline is “a ‘comparatively self-contained and isolated domain of human experience which possesses its own community of experts’ who share a distinctive set of ‘goals, concepts, facts, tacit skills, and methodologies.’”¹⁰⁰ As such, a discipline has both scholarly and social traits, with its own body of knowledge, as well as members who share similar histories, goals, traditions, values, and ways of thinking and communicating.¹⁰¹ Because each discipline has a distinct identity, disciplines want to “protect their territories” and “preserve their traditions . . . into posterity.”¹⁰²

Although the categorization of knowledge into disciplines has endured from ancient Greece to now, disciplines themselves have changed and evolved over time.¹⁰³ As disciplines specialized and grew apart from each other, scholars expressed the need for interdisciplinarity, though no clear consensus exists on how interdisciplinarity is defined or why it is necessary.¹⁰⁴ Generally, interdisciplinarity is not merely a “transplant[] of methodology from one discipline to another,” though this occurs occasionally, but involves scholars considering a problem from the viewpoints of different disciplines.¹⁰⁵

Advocates have listed numerous benefits to interdisciplinarity. Some are merely practical, such as allowing scholars to distinguish themselves in competitive academic environments, get published in more prestigious journals, or secure research grants.¹⁰⁶ More generally, collaboration promotes the creative combination of ideas and tools from different fields

99. *Id.* at 186 (quoting Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 36 (1992)).

100. *Id.* at 166 (quoting Moti Nissani, *Fruits, Salads, and Smoothies: A Working Definition of Interdisciplinarity*, 29 J. EDUC. THOUGHT 121, 122 (1995)).

101. *Id.* at 166–68.

102. *Id.* at 169.

103. *Id.* at 166, 172.

104. *Id.* at 164–65 (discussing different definitions and descriptions of the term “interdisciplinarity”); see also JOE MORAN, INTERDISCIPLINARITY 15 (2002) (arguing that the ambiguity of the term “interdisciplinary” reflects its “flexibility and indeterminacy”).

105. Kenneth G. Dau-Schmidt, *Pittsburgh, City of Bridges: Developing a Rational Approach to Interdisciplinary Discourse on Law*, 38 LAW & SOC’Y REV. 199, 200 (2004) (discussing the development of a multidisciplinary discourse involving law, society, and economics). However, when disciplines mix together successfully, the mixture may be routine and thus no longer considered interdisciplinary. Vick, *supra* note 98, at 172–73.

106. Vick, *supra* note 98, at 171.

when tackling complex societal problems.¹⁰⁷ Interdisciplinary approaches can challenge outdated theories, produce innovative theories and methods, and foster creativity.¹⁰⁸

Certainly, interdisciplinarity also poses challenges. The term “interdisciplinarity” is vague and can be manipulated.¹⁰⁹ A practical manifestation of this problem occurs when universities downsize and cut costs by changing or merging disciplines, and then claim that the changes were made to embrace interdisciplinarity.¹¹⁰ Moreover, differences between disciplines, including different vocabularies and approaches to practice, may make it difficult to understand and assess the credibility of research across disciplines.¹¹¹ For example, social scientists regularly critique each other’s methodologies, analyses, and conclusions in peer evaluations.¹¹² However, this process may be construed by those outside the social sciences as criticism of weak research.¹¹³

2. Applying Interdisciplinarity in Law

Law is a unique discipline that does not rely on experimentation and quantitative data to discover new knowledge.¹¹⁴ Instead, law is created, interpreted, and enforced by lawyers, courts, and legislatures.¹¹⁵ Advocates of interdisciplinarity in law believe that merely considering the law is not enough.¹¹⁶ Rather, they argue, lawyers need to look to the social sciences and evaluate how legal institutions affect society and public values.¹¹⁷ On the other hand, some scholars feel that law must be clear and that complicating legal doctrines with other disciplines will undermine the law by fostering uncertainty.¹¹⁸

107. Emily Bruusgaard et al., “Are We All on the Same Page?”: *The Challenges and Charms of Collaboration on a Journey Through Interdisciplinarity*, 7 GRADUATE J. SOC. SCI. 39, 43 (2010); see also *id.* at 44 (emphasizing flexibility and openness in interdisciplinary collaboration).

108. MORAN, *supra* note 104, at 182.

109. *Id.* at 182–84.

110. *Id.*

111. Bruusgaard et al., *supra* note 107, at 43.

112. Ronald Roesch et al., *Social Science and the Courts: The Role of Amicus Curiae Briefs*, 15 LAW & HUM. BEHAV. 1, 4–5 (1991).

113. *Id.* at 5. *But see* Vick, *supra* note 98, at 185 (stating that people may believe that scientific studies involving numbers are more conclusive than other studies).

114. Vick, *supra* note 98, at 177–79 (stating that the law is a closed system that requires considering only a finite group of authorities).

115. See *id.* at 177–78 (stating that lawyers primarily study what judges, juries, and other decision makers have done, then manipulate and present their cases according to those decisions).

116. *Id.* at 183.

117. *Id.* (discussing that legislators also may look to the social sciences in bringing about legal reforms).

118. See, e.g., Geoffrey Samuel, *Interdisciplinarity and the Authority Paradigm: Should Law Be Taken Seriously by Scientists and Social Scientists?*, 36 J.L. & SOC’Y 431, 437 (2009).

One worry about interdisciplinarity is that it may weaken the field of law or merge legal and nonlegal scholarship,¹¹⁹ which has occurred in anthropology.¹²⁰ However, this is unlikely to occur because the legal field has a strong and stable disciplinary identity.¹²¹ As a result, other disciplines necessarily have a limited effect in the legal realm because laws can be repealed or changed.¹²² Moreover, written case law and rules guide the interpretation of laws, so weak or wrong interpretations can be refused or otherwise ignored.¹²³

Still, judges and other legal scholars may be reluctant to rely on nonlegal disciplines because of the law's sole emphasis on legal precedent, and because of unfamiliarity with social science methodologies and statistics.¹²⁴ However, the successful implementation of interdisciplinary approaches in various legal forums undermines the hesitation of skeptical judges and scholars. For example, in 1969, legal anthropologist Klaus-Friedrich Koch wrote about the relevance of anthropological research in three areas of law: the law of newly independent nations, laws in our contemporary American society, and international law.¹²⁵ He concluded that lawyers must go beyond case law and statutes, and cooperate with social scientists to render law "an effective instrument of deliberate and guided change."¹²⁶

Another successful implementation of interdisciplinarity in law is the use of social science research on wills and people's estate distribution plans in intestacy and family law.¹²⁷ Yet another example is the integration of law and social science in academia and training. Fordham University's graduate law and social work programs created an interdisciplinary domestic violence course.¹²⁸ Researchers concluded that, compared with students who did not enroll in the class, students in the course increased their knowledge about domestic violence, harbored fewer myths and stereotypes about domestic violence, and showed increased positive attitudes about interdisciplinary work.¹²⁹ The researchers noted that domestic violence is by nature "a complicated, multisystem problem, and one profession cannot be expected to have all the knowledge and skills to

119. Vick, *supra* note 98, at 186–87.

120. Samuel, *supra* note 118, at 440 (stating that anthropology has been described as losing its identity as a distinct discipline).

121. *Id.*

122. *Id.* at 439.

123. *Id.* at 441.

124. See Roesch et al., *supra* note 112, at 3.

125. Klaus-Friedrich Koch, *Law and Anthropology: Notes on Interdisciplinary Research*, 4 *LAW & SOC'Y REV.* 11, 17–21 (1969).

126. *Id.* at 20.

127. See Monica K. Johnson & Jennifer K. Robbennolt, *Using Social Science to Inform the Law of Intestacy: The Case of Unmarried Committed Partners*, 22 *LAW & HUM. BEHAV.* 479, 480, 497 (1998) (stating that such research can reach policymakers and, through them, change the legal and social climate for unmarried committed partners and their families).

128. Lisa Colarossi & Mary Ann Forgey, *Evaluation Study of an Interdisciplinary Social Work and Law Curriculum for Domestic Violence*, 42 *J. SOC. WORK EDUC.* 307, 307 (2006).

129. *Id.* at 318. However, the authors of the article recognized that there could be a selection bias. *Id.* at 319–20.

intervene in a multidimensional way.”¹³⁰ Thus, they concluded, professions should learn to work with each other to assist clients effectively, holistically, and readily, without being anxious about losing their identities or failing to dominate over other disciplines.¹³¹

As a final example, interdisciplinary collaboration also occurs in the Middle East to help communities end war.¹³² Both law and social work are concerned about relationships, rights, and responsibilities, but law on its own may “disregard the everyday life experiences of individuals and communities that can be very different from acceptable norms as created by the State.”¹³³ Because social work deals with individuals and communities deprived of their basic rights, social workers help when lawyers alone cannot organize communities against oppressive conditions.¹³⁴ Interdisciplinary practice centers in Israel, Palestine, and Jordan rely on the expertise of lawyers, social workers, doctors, accountants, and other professionals to attain goals such as teaching Islamic women about their rights, ensuring clean drinking water, and setting up food cooperatives.¹³⁵

3. Interdisciplinarity in Supreme Court Case Law

As early as 1908, the Supreme Court in *Muller v. Oregon*¹³⁶ relied on social science data to decide the constitutionality of limiting the number of hours that females work.¹³⁷ Attorney (and later-Supreme Court Justice) Louis Brandeis submitted a brief compiling economics-based arguments along with reports and statistics of domestic and European committees, hygiene commissioners, and factory inspectors stating that long hours of labor were dangerous for women.¹³⁸ While the Supreme Court recognized that these “may not be, technically speaking, authorities” in the legal field, they were still “worthy of consideration.”¹³⁹

Since *Muller*, numerous cases have included social science briefs, including cases on the death penalty, homosexuality, abortion, jury size, the rights of mentally ill individuals, violent video games, and disparaging trademarks.¹⁴⁰ Courts may be more open to an amicus curiae brief than to a

130. *Id.* at 320.

131. *Id.*

132. See Merav Moshe Grodofsky, *The Contribution of Law and Social Work to Interdisciplinary Community Development and Peace Building in the Middle East*, 15 J. COMMUNITY PRAC. 45 (2007).

133. *Id.* at 51.

134. *Id.* at 52.

135. *Id.* at 53–58.

136. 208 U.S. 412 (1908).

137. *Id.* at 417.

138. *Id.* at 419 n.1. Legal briefs that contain extralegal analyses of statistics and other sources have become known as “Brandeis briefs” after *Muller*. See Danaya C. Wright, *The Logic and Experience of Law: Lawrence v. Texas and the Politics of Privacy*, 15 U. FLA. J.L. & PUB. POL’Y 403, 409–17 (2004) (providing a history of the Brandeis brief).

139. *Muller*, 208 U.S. at 420–21.

140. See, e.g., Brief of Amici Curiae Lambda Legal Defense & Education Fund, Inc. and Gay & Lesbian Advocates & Defenders in Support of Respondents, *Christian Legal Soc’y Chapter of Univ. of Cal. v. Martinez*, 130 S. Ct. 2971 (2010) (No. 08-1371), 2010 WL

social scientist's expert testimony because experts are hired by a party to testify, while brief writers are unpaid, usually work as a team with other groups or organizations, and cite their sources.¹⁴¹

The Supreme Court has gone beyond briefs to directly cite both legal and nonlegal sources relying on social science research.¹⁴² A well-known example is *Brown v. Board of Education*,¹⁴³ in which the Court cited six psychology sources which found that segregation promotes feelings of inferiority and is detrimental to children's educational and mental development.¹⁴⁴ More recently, in *Maryland v. Craig*,¹⁴⁵ the Court, in holding that face-to-face confrontation of a child witness may cause significant emotional distress, relied on academic literature on the psychological trauma of child witnesses.¹⁴⁶

Sometimes, Supreme Court Justices show skepticism towards the social sciences. For example, in *Parents Involved in Community Schools v. Seattle School District No. 1*,¹⁴⁷ the Court held that basing admissions decisions in part on students' race in order to have a diverse student body violated the Equal Protection Clause of the Fourteenth Amendment.¹⁴⁸ Although the plurality opinion did not cite social science sources, it discussed earlier cases, including *Brown*, when the Court referenced psychological findings.¹⁴⁹ However, Justice Thomas in his concurrence—though citing some nonlegal sources on student achievement in minority schools—stated that relying on social science evidence “would leave our equal protection jurisprudence at the mercy of elected government officials evaluating the evanescent views of a handful of social scientists.”¹⁵⁰ He argued that Justice Breyer's dissent overemphasized social science and

989697 (homosexuality); Brief of Social Scientists, Medical Scientists, & Media Effects Scholars as Amici Curiae in Support of Respondents, *Schwarzenegger v. Entm't Merchs. Ass'n*, 130 S. Ct. 2398 (2010) (No. 08-1448), 2010 WL 3697191 (violent video games); Brief of Psychology Professors as Amici Curiae in Support of Petitioners, *Harjo v. Pro-Football, Inc.*, 130 S. Ct. 631 (2009) (No. 09-326), 2009 WL 3359185 (disparaging trademarks); Roesch et al., *supra* note 112, at 1–2 (collecting cases with social science briefs on the other topics).

141. Roesch et al., *supra* note 112, at 4.

142. See Linda R. Tropp et al., *The Use of Research in the Seattle and Jefferson County Desegregation Cases: Connecting Social Science and the Law*, 7 ANALYSES SOC. ISSUES & PUB. POL'Y 93, 94 (2007) (stating that the Supreme Court relied on social science research on sex role stereotyping in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and on the beneficial effects of student body diversity in *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

143. 347 U.S. 483 (1954).

144. *Id.* at 494 & n.11 (citing books and psychology journal articles from the 1940s and 1950s on the effects of discrimination and segregation).

145. 497 U.S. 836 (1990).

146. *Id.* at 855 (citing an amicus curiae brief by the American Psychological Association (APA) and a conference paper presented at an APA conference).

147. 551 U.S. 701 (2007).

148. *Id.* at 711, 735.

149. *Id.* at 746 (discussing *Brown*'s holding that race-based segregation denotes inferiority, as well as other cases involving government classifications that “contribut[e] to an escalation of racial hostility and conflict” and “demean[] the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities”).

150. *Id.* at 763, 766 (Thomas, J., concurring).

“would constitutionalize today’s faddish social theories” on segregation when the Constitution operates independent of such theories.¹⁵¹ Similarly, Justice Kennedy expressed concern that the dissent’s reliance on its “general conclusions . . . have no principled limit and would result in the broad acceptance of governmental racial classifications in areas far afield from schooling.”¹⁵² In addressing these criticisms, Justice Breyer noted that “[i]f we are to insist upon unanimity in the social science literature before finding a compelling interest, we might never find one.”¹⁵³

Psychologists agree with Justice Breyer on the impossibility of having unanimous and completely objective social science findings.¹⁵⁴ They reason that social scientists, like everyone else, hold societal norms and standards which inevitably influence their theories.¹⁵⁵ They “emphasize that recognizing some degree of subjectivity in our decision-making processes need not diminish the rigor of our work or the sound reasoning that underlies the conclusions we draw.”¹⁵⁶ Rather, social scientists

should allow [them]selves to be continually inspired by [their] morals, ethics, and values. Indeed, it could be argued that the judiciary is successful precisely because it celebrates the best of these elements as it allows voices from the community to have input at the societal level. Thus, rather than attempting to eliminate values and subjectivity from [their] decision-making processes, [social scientists] should continue to ask [them]selves how [they] can thoughtfully and meaningfully blend the two.¹⁵⁷

Supreme Court Justices may feel differently about integrating social science into their decision-making processes. However, their divergent opinions will not stop social scientists from continuing to express their views and research findings in amicus curiae briefs and scholarly journals.

C. The Social Sciences on Strip Searches

Given that there may be a place in the law for social science, Part I.C discusses the social science research on strip searches.¹⁵⁸ Part I.C.1 begins

151. *Id.* at 780.

152. *Id.* at 791 (Kennedy, J., concurring).

153. *Id.* at 845 (Breyer, J., dissenting).

154. Tropp et al., *supra* note 142, at 113.

155. *Id.*

156. *Id.*

157. *Id.* at 114. Moreover, social scientists maintain that advocacy does not diminish science and research: “[A] truly neutral brief is an elusive if not an impossible goal. . . . It is possible to be scientific without being neutral, to be objective yet form an opinion about the implications of the research.” Roesch et al., *supra* note 112, at 7.

158. The research discussed in this section, and generally in this Note, only focuses on the effects of strip searches as conducted according to the policies in correctional facilities, assuming officers do not abuse their power in conducting the searches. However, the potential for abuse exists and is a factor that courts may take into account when deciding the constitutionality of corrections officers strip searching all individuals upon arrest. *See ALLEN J. BECK ET AL., U.S. DEP’T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008–09*, at 23–24 (2010) (finding that at least four of every ten

by considering the general effects of strip searches on individuals, then discusses the targeted use of strip searches as a vehicle for racial discrimination. Part I.C.2 considers the particular problems that strip searches create among females. Finally, in light of courts' deference to institutional settings like prisons and jails, Part I.C.3 examines the effects of implementing policies and routines in institutional settings like prisons and jails.

There is a paucity of social science research on the prevalence and effects of strip searches on detainees in the United States. Consequently, this section primarily focuses on studies conducted in Canada, Ireland, and the United Kingdom. These studies are pertinent to the inquiry in this Note because the criminal justice policies at issue are similar to policies of American law enforcement agencies.¹⁵⁹

Several reasons have been posited to explain the lack of research: it is difficult to scrutinize police treatment of suspects in custody;¹⁶⁰ detainees may not report abuse out of fear or because of limited financial resources;¹⁶¹ and detainees may not want to relive the experience of a strip search.¹⁶² One woman stated: "It was just the most horrifying thing that I have ever gone through and I could not tell my husband. I could not tell my family, I couldn't tell anyone. It was such a traumatic thing to me I couldn't even talk about it."¹⁶³

Moreover, police precincts and correctional institutions withhold information from the public.¹⁶⁴ There is little evidence of what occurs in correctional facilities, and the public typically only notices when egregious violations of individual rights are documented. For example, in 1994, an emergency response team in the Kingston Prison for Women in Ontario, Canada, strip searched female inmates during a riot.¹⁶⁵ Because the

victims of sexual misconduct by prison staff reported being sexually touched during a strip search or pat down).

159. Strip search policies are also a matter of concern for courts of other countries. The Canadian Supreme Court held that strip searches are "inherently humiliating and degrading" no matter how they are carried out, and therefore cannot be used routinely. *R. v. Golden*, [2001] 3 S.C.R. 679, para. 90 (Can.).

160. See Tim Newburn et al., *Race, Crime and Injustice?: Strip Search and the Treatment of Suspects in Custody*, 44 *BRIT. J. CRIMINOLOGY* 677, 679 (2004).

161. See Kyle Kirkup, *Indocile Bodies: Gender Identity and Strip Searches in Canadian Criminal Law*, 24 *CANADIAN J.L. & SOC'Y* 107, 114 (2009) (stating that these problems are especially prevalent in minority populations, given the gross power imbalance between them and the police).

162. M. Margaret McKeown, *Strip Searches Are Alive and Well in America*, 12 *HUM. RTS.* 37, 42 (1985) (stating that detainees may not even tell their families about their experiences after being strip searched).

163. *Id.*

164. See MAEVE MCMAHON, *WOMEN ON GUARD: DISCRIMINATION AND HARASSMENT IN CORRECTIONS* 178 n.6 (1999); see also James Barron, *Times Sues City Police, Saying Information Has Been Illegally Withheld*, *N.Y. TIMES*, Dec. 22, 2010, at A29 (stating that the New York Times sued the New York Police Department for violating a state Freedom of Information Law that requires the Department to provide information to the press and public).

165. See MCMAHON, *supra* note 164, at 178 n.5.

searches were videotaped, there was extensive media and public attention which led to the establishment of a royal commission that examined related events at the prison.¹⁶⁶ It is “suspect[ed] that if the videotape had not existed, or had not been made public, the incidents and their context would have, as is more generally the case, escaped systematic scrutiny.”¹⁶⁷

1. The Effects and Discriminatory Use of Strip Searches

Being strip searched leaves people disgusted and annoyed, or worse, degraded, humiliated, and paralyzed.¹⁶⁸ Victims may feel helpless, indignant, and shocked, and may experience, for several years, psychological symptoms of trauma similar to those endured by rape survivors.¹⁶⁹ Even in prisons where inmates are strip searched so regularly that prison staff thought that inmates “got used to it,” the reality for many is that searches become “increasingly hard to bear,” and “serve[] a symbolic function of reaffirming imprisonment, shame, and lack of status.”¹⁷⁰ Feelings of humiliation and helplessness may be amplified if an arrestee exhibits physical manifestations of an illness or hormonal change, such as females who are lactating¹⁷¹ or menstruating,¹⁷² or arrestees who are otherwise perceived as different, including transgendered individuals.¹⁷³

One study on the role of closed circuit television in a London police station emphasizes the potential for abuse and discrimination when police officers have discretion to strip search detainees.¹⁷⁴ From May 1999 to

166. *Id.* at 178 n.6.

167. *Id.*

168. See McKeown, *supra* note 162, at 37, 42; see also RUSSELL P. DOBASH ET AL., THE IMPRISONMENT OF WOMEN 204 (1986) (stating that female prisoners in Scotland felt that the benefits of receiving visits were outweighed by their feelings of degradation and humiliation after body searches).

169. McKeown, *supra* note 162, at 42 (“Post-search symptoms include sleep disturbance, recurrent and intrusive recollections of the event, inability to concentrate, anxiety, depression and development of phobic reactions.”).

170. DOBASH ET AL., *supra* note 168, at 204–05.

171. See *Archuleta v. Wagner*, 523 F.3d 1278, 1282 (10th Cir. 2008) (stating that the plaintiff lactated during the strip search, was not allowed to cover herself and instead was given a cut maxi-pad by the booking officer and a male jailer, neither of whom used gloves upon handling the pad).

172. See DOBASH ET AL., *supra* note 168, at 205; Linda Moore & Phil Scraton, *The Imprisonment of Women and Girls in the North of Ireland: A “Continuum of Violence”*, in THE VIOLENCE OF INCARCERATION 124, 128 (Phil Scraton & Jude McCulloch eds., 2009); see also Jude McCulloch & Amanda George, *Naked Power: Strip Searching in Women’s Prisons*, in THE VIOLENCE OF INCARCERATION, *supra*, at 107, 119 (stating that requiring women to remove their tampons and to squat and cough will not cause items concealed in the vagina to fall out, and that a contrary belief “reveals either a profound ignorance of women’s anatomy or an indifference to the stated purpose of strip searches in favour of a deliberate strategy to humiliate and degrade women”).

173. See *Kirkup*, *supra* note 161, at 107 (stating that a preoperative male-to-female transgendered woman who was arrested and strip searched in Ontario, Canada claimed that her requests for female officers to conduct the searches were denied and that she was subjected to a “split search” in which “male officers examined [her] ‘male’ lower body while female officers inspected her ‘female’ upper body”).

174. Newburn et al., *supra* note 160, at 679.

September 2000, officers in the station processed over 7000 arrests.¹⁷⁵ The station's policy allowed officers of the same sex to conduct strip searches only if they felt it was necessary to remove drugs or a harmful object.¹⁷⁶

For each arrest, the researchers documented the detainee's age, sex, ethnicity, and offense.¹⁷⁷ A statistical analysis of these factors revealed that, as expected, people arrested for drug offenses were the most likely to be strip searched.¹⁷⁸ The results also showed that while all other variables (age, sex, and offense) were controlled, females were less likely to be strip searched than males, and arrestees who were seventeen to twenty-three years old were more likely to be strip searched than other age groups.¹⁷⁹ In addition, ethnicity influenced whether a strip search was conducted even when all other variables were taken into account. Specifically, compared to white Europeans, African-Caribbeans were twice as likely to be searched while Arabics and Orientals were half as likely.¹⁸⁰ The researchers in the study concluded that the data at least "raise . . . the spectre of police racism" and reveal that "policing is unequally experienced," though it is impossible to determine whether the disproportionate number of strip searches of African-Caribbeans is due to institutional racism or unintentional discrimination.¹⁸¹

2. Strip Searches of Female Inmates

This section discusses the effects of strip searches on female inmates. While the overall experience of convicted inmates serving a prison sentence is obviously different from that of an arrestee or pretrial detainee, the specific effects and psychological reactions of being naked and strip searched are likely similar among arrestees and inmates.¹⁸²

175. *Id.* at 679–80.

176. *Id.* at 679.

177. *Id.* at 681–83.

178. *Id.* at 688.

179. *Id.*

180. *Id.* at 688–89. "White European" referred to "apparently-white British-born detainees, but may also have been used by the police to refer to someone born, for example, in Canada, France or Australia." *Id.* at 681. Similarly, the study did not distinguish between black Caribbeans and black Africans. *Id.* at 680–81 (explaining that ethnic classifications were based on police assessments of ethnicity, and that although these assessments may be inaccurate, they reflect the police officers' perceptions of detainees' ethnicities which ultimately influence treatment of the detainees).

181. *Id.* at 693.

182. An important distinction is that, unlike for arrestees, strip searches of inmates constitute one part of a total system of control and isolation, and thus may have more profound, negative effects. See McCulloch & George, *supra* note 172, at 112–13 (stating that routine strip searches in prisons discourage female inmates from seeing visitors and undermine prisons' attempts to rehabilitate, counsel, and improve women's self-esteem and skills). In addition, strip search policies applied to inmates may perpetuate a vicious cycle in which drug-abusing inmates—who pose the greatest risk of smuggling drugs, syringes, and other contraband into prisons—may experience powerlessness, lowered self-esteem, mental anguish, and suicidal thoughts, which increase the need for drugs. *Id.* at 119–20.

Strip searches of women have been labeled as sexual violence and compared to rape.¹⁸³ Only in correctional settings can officials claim to coerce someone into removing their clothing as part of their job, when the same coercion anywhere else would be a sexual assault.¹⁸⁴ Psychiatrists have found that survivors of sexual humiliation often feel “shame and self-blame,” which negatively impacts their feelings of “capability and autonomy.”¹⁸⁵ In addition, female inmates who were strip searched expressed feeling objectified and deprived of their personhood, like “cattle in a market.”¹⁸⁶ One woman said that the vulnerability, weakness, and anger inherent in being naked took away her will to fight back and caused her to prefer being beaten rather than strip searched.¹⁸⁷ Even if female prisoners do fight back and resist strip searches, it only makes the search more violent and reminiscent of a sexual assault, as one prisoner described:

[T]hey literally had to pull the clothes off you. That was embarrassing because you were kicking and struggling and they were ripping the clothes completely off you You felt as if you were nothing, you feel degraded. It’s like a rape of some kind. They are ripping the bra and the panties off you [sigh] you felt like crying, you felt like rolling back in a ball and getting into the corner and never coming out of there again!¹⁸⁸

Being strip searched is particularly traumatizing for conservative, religious persons¹⁸⁹ and for domestic or sexual abuse survivors.¹⁹⁰ Paula Richardson, a twenty-three year-old inmate in Australia, was raped several months before her imprisonment and strip search.¹⁹¹ Paula called her mother after the strip search, when she was “inconsolable with distress and kept saying ‘they’ve done it again, they’ve done it again.’”¹⁹² Paula’s mental well-being and behavior deteriorated after the search, as evidenced

183. *R. v. Golden*, [2001] 3 S.C.R. 679, para. 90 (Can.) (stating that strip searches are described as “visual rape” and victims, particularly women and minorities, may experience a search as a sexual assault); Begoña Aretxaga, *The Sexual Games of the Body Politic: Fantasy and State Violence in Northern Ireland*, 25 *CULTURE, MED. & PSYCHIATRY* 1, 6 (2001) (stating that the process of strip searching a female political prisoner “inscrib[es] the body . . . with the meanings of sexual subjugation through a form of violence that phantasmatically replicates the scenario of rape”); McCulloch & George, *supra* note 172, at 109 (stating that prisoners experience strip searches “as a form of sexual violence or coercion”).

184. McCulloch & George, *supra* note 172, at 109.

185. *Id.* at 113.

186. Aretxaga, *supra* note 183, at 15.

187. *Id.*

188. *Id.* at 15–16.

189. McCulloch & George, *supra* note 172, at 114 (discussing the traumatizing effects of strip searches on Catholic women imprisoned in Northern Ireland). Strip searches were also used to exploit and bring psychological harm to Muslim/Arab prisoners in Abu Ghraib. *Id.* (“Muslim victims of sexual torture forever carry a stigma. . . . [M]erely being stripped naked implies the breaking of a strict taboo, which leaves victims feeling extremely exposed and humiliated.”).

190. *Id.* (stating that strip searches can re-victimize women who were traumatized in incidents with men in the past); Moore & Scraton, *supra* note 172, at 128 (stating that women survivors of domestic abuse experienced additional trauma from strip searches).

191. McCulloch & George, *supra* note 172, at 116.

192. *Id.*

in her prison records and according to prison officials and her parents.¹⁹³ Six weeks later, she hung herself with a shower curtain in a cell; the coroner who investigated her death said that the strip search was unnecessary, invasive, and inappropriate.¹⁹⁴

3. Policies and Routines in Institutional Settings

While no researcher to date has studied the effect of implementing blanket strip search policies in correctional facilities, a well-known psychology experiment suggests that such policies may lead to indifference, mistreatment, and even intentional harassment by officers.¹⁹⁵ The 1973 Stanford Prison Experiment (SPE) demonstrated the extraordinary influence of institutional settings by showing that even self-described college pacifists would, within hours of pretending to be prison guards, intentionally mistreat their peers who were pretending to be prisoners.¹⁹⁶ Indeed, “the SPE underscored the degree to which institutional settings can develop a life of their own, independent of the wishes, intentions, and purposes of those who run them.”¹⁹⁷ Thus, the environment outweighed the law-abiding nature, caring personalities, and good intentions of the guards.¹⁹⁸ Instead, “[r]outines develop[ed]; rules [were] made and applied, altered and followed without question; policies enacted for short-term convenience bec[a]me part of the institutional status quo and difficult to alter.”¹⁹⁹ The SPE researchers noted that this applies particularly to prisons, which can withstand strong pressures for change and escape outside scrutiny of their day-to-day operations.²⁰⁰ This view is bolstered by *Bell v. Wolfish*’s instruction for courts to afford wide-ranging deference to prison officials and policies.²⁰¹

The SPE researchers argue that because prison settings can skew the judgments of administrators, people outside the prison system should be responsible for making institutional changes.²⁰² The researchers call for psychologists and social scientists to more thoroughly examine social and policy issues in prisons, discard outdated theories on which criminal justice

193. *Id.*

194. *Id.* at 116–17.

195. See Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Prison Experiment*, 53 AM. PSYCHOLOGIST 709 (1998).

196. *Id.* at 710; see also *id.* at 709 (stating that the guards were so abusive that the two-week experiment was stopped after six days).

197. *Id.* at 721.

198. *Id.* But see generally Thomas Carnahan & Sam McFarland, *Revisiting the Stanford Prison Experiment: Could Participant Self-Selection Have Led to the Cruelty?*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 603 (2007) (finding, in a separate experiment using an identical ad used to recruit participants for the Stanford Prison Experiment (SPE), that volunteers for the study scored significantly higher on measures of aggressiveness, authoritarianism, narcissism, and social dominance, and lower on empathy and altruism, thus suggesting that there may be a selection bias that influenced the outcomes of the SPE).

199. Haney & Zimbardo, *supra* note 195, at 721.

200. *Id.*

201. *Bell v. Wolfish*, 441 U.S. 520, 547–48 (1979).

202. Haney & Zimbardo, *supra* note 195, at 721.

practices are based, and develop better alternatives backed by concrete data and creative ideas.²⁰³

II. THE WIDENING CIRCUIT SPLIT: THE REASONABLENESS OF BLANKET STRIP SEARCH POLICIES UNDER THE FOURTH AMENDMENT

As Part I discussed, *Bell* is the only Supreme Court case to date that specifically addressed the constitutionality of strip search policies involving pretrial detainees. Part II describes the widening circuit split on this issue, and begins by discussing cases by eight circuits that interpret *Bell* to hold that strip search policies violate the Fourth Amendment. Part II.B analyzes more recent opinions by three circuits that interpret *Bell* to hold the opposite. Finally, Part II.C presents the social science arguments used by parties and amici curiae in the two most recent circuit court decisions.

A. *Blanket Strip Search Policies Violate Fourth Amendment Rights*

The United States Courts of Appeals for the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have held that routine strip searches of pretrial detainees pursuant to correctional policies violate the Fourth Amendment when there is no individualized suspicion that the detainees have weapons or contraband.²⁰⁴

1. The Circuit Courts' General *Bell* Analysis

*Logan v. Shealy*²⁰⁵ was the first federal appellate court case to hold that a strip search policy violated the Fourth Amendment. Logan was arrested for driving while intoxicated and taken to the Arlington County Detention Center.²⁰⁶ She was released on her own recognizance but had to wait four hours before leaving unless someone picked her up.²⁰⁷ Logan was placed in a holding cell and strip searched pursuant to a policy requiring strip searches of all persons held at the Detention Center, regardless of their arrest charge.²⁰⁸ Within an hour after the search, Logan was released to a friend.²⁰⁹ Logan sued, alleging that the strip search policy was unreasonable and violated her Fourth and Fourteenth Amendment rights.²¹⁰

The Fourth Circuit held that the Detention Center policy was unconstitutional under *Bell*: Logan was not mixed with the general jail

203. *Id.* at 721–22.

204. *See, e.g.,* Wood v. Hancock Cnty. Sheriff's Dep't, 354 F.3d 57 (1st Cir. 2003); Shain v. Ellison, 273 F.3d 56 (2d Cir. 2001); Jones v. Edwards, 770 F.2d 739 (8th Cir. 1985); Stewart v. Lubbock Cnty., 767 F.2d 153 (5th Cir. 1985); Hill v. Bogans, 735 F.2d 391 (10th Cir. 1984); Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983); Dufirin v. Spreen, 712 F.2d 1084 (6th Cir. 1983); Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981).

205. 660 F.2d 1007.

206. *Id.* at 1009.

207. *Id.* at 1010.

208. *Id.* The policy was instituted after a misdemeanor who was not strip searched shot a deputy. *Id.*

209. *Id.*

210. *Id.* at 1011.

population and there was no indication that she had weapons or contraband, especially because she was not even frisked.²¹¹ The court concluded that “[a]n indiscriminate strip search policy routinely applied to detainees such as Logan along with all other detainees cannot be constitutionally justified simply on the basis of administrative ease in attending to security considerations.”²¹²

Other circuits have also relied on a *Bell* analysis to hold that strip searches violated arrestees, and detainees’ Fourth Amendment right to be free from unreasonable searches.²¹³ Most of the cases involve plaintiffs arrested for traffic offenses and non-violent misdemeanors.²¹⁴ In addressing the first *Bell* prong, the scope of intrusion,²¹⁵ several circuits use strong language to describe the invasiveness of strip searches. For example, the First Circuit stated that “visual body cavity [strip] searches ‘impinge[d] seriously upon’ Fourth Amendment values”²¹⁶ and constituted “‘an offense to the dignity of the individual,’”²¹⁷ and the Seventh Circuit described searches as “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, [and] signifying degradation and submission.”²¹⁸

In assessing the two *Bell* factors of the manner and place in which a search is conducted, courts note that blanket policies generally require searches to be conducted professionally and privately by officers of the same sex as the inmate.²¹⁹ Thus, strip searches in non-private areas, such

211. *Id.* at 1013.

212. *Id.*

213. *See, e.g.*, *Watt v. City of Richardson Police Dep’t*, 849 F.2d 195, 196 (5th Cir. 1988) (recognizing that an analysis of strip search policies both facially and as applied “begins, and practically ends,” with *Bell*). *But see Stewart v. Lubbock Cnty.*, 767 F.2d 153, 156 (5th Cir. 1985) (citing *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1271 (7th Cir. 1983), for the proposition that reasonableness cannot be precisely defined or mechanically applied).

214. *See, e.g.*, *Roberts v. Rhode Island*, 239 F.3d 107, 108 (1st Cir. 2001) (police arrested plaintiff Roberts based on an administrative error for an outstanding warrant which was actually withdrawn seven months earlier); *Jones v. Edwards*, 770 F.2d 739, 740 (8th Cir. 1985) (plaintiff Jones was arrested on a warrant for refusing a summons after failing to leash his dog); *Stewart*, 767 F.2d at 154 & n.1 (stating that approximately one thousand strip searches were conducted each month pursuant to a blanket jail policy, including strip searches of a plaintiff arrested for public intoxication and another plaintiff arrested on a warrant for issuing a bad check); *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984) (plaintiff was arrested on a warrant for a speeding ticket on his way to work at 7:30a.m.); *Mary Beth G.*, 723 F.2d at 1267 n.2 (three plaintiffs were arrested for traffic offenses and one plaintiff was arrested for a subsequently-dismissed disorderly conduct charge).

215. *See supra* text accompanying note 77.

216. *Roberts*, 239 F.3d at 110 (quoting *Swain v. Spinney*, 117 F.3d 1, 6 (1st Cir. 1997)).

217. *Id.* (quoting *Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir. 1996)).

218. *Mary Beth G.*, 723 F.2d at 1272 (quoting *Tinetti v. Wittke*, 479 F. Supp. 486, 491 (D. Wis. 1979)); *see also Jones*, 770 F.2d at 742 (describing a strip search as “intrusive, depersonalizing, and distasteful”).

219. *See, e.g., Roberts*, 239 F.3d at 113; *Dufirin v. Spreen*, 712 F.2d 1084, 1087 (6th Cir. 1983).

as a police station hallway, weigh strongly against a holding that blanket strip search policies are constitutional.²²⁰

Finally, courts consider correctional institutions' justifications for conducting strip searches.²²¹ City and county governments state that strip searches help secure lockups by preventing the smuggling of weapons or contraband.²²² Although institutional security is a legitimate government interest,²²³ circuit courts have held that the lack of a specific justification for strip searches outweigh a general interest in institutional security.²²⁴ The courts also pointed out instances in which strip searches were blatantly unnecessary, including when plaintiffs were strip searched multiple times.²²⁵ Furthermore, though some policies may require strip searches only if detainees are intermingled with the general prison population, courts hold that intermingling is merely one factor among many to consider.²²⁶

2. Requiring a Case-by-Case Analysis

Unlike the Fourth Circuit in *Logan*, some circuit courts refrain from directly holding that a blanket strip search policy is unconstitutional. Instead, they emphasize that whether a strip search pursuant to jail policies violates Fourth Amendment rights depends on the circumstances.²²⁷ The

220. See *Masters v. Crouch*, 872 F.2d 1248, 1250 (6th Cir. 1989) (noting that the plaintiff, arrested for failing to appear in court after a judge's administrative error of recording the wrong court date, was told to open her blouse for inspection in plain view of others and then strip searched on a different floor); *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984) (stating that Hill was strip searched in the vicinity of almost a dozen people after he had already been frisked).

221. See *supra* text accompanying notes 76–77.

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

223. *Roberts*, 239 F.3d at 111.

224. See, e.g., *id.* at 111–12 (stating that detainees are unlikely to smuggle contraband when handcuffed and arrested spontaneously, and further stating that police officers can use less invasive searches such as a clothing search to look for contraband); see also *Shain v. Ellison*, 273 F.3d 56, 65 (2d Cir. 2001) (stating that misdemeanants who remain detained because they do not post bail usually cannot afford bail, refuse bail, or had family court issues, and none of these reasons pose a reasonable suspicion that they have weapons or contraband); *Mary Beth G.*, 723 F.2d at 1272–73 (holding that the city failed to show that women arrested for traffic or other minor offenses and who are in the lockups only to await bail pose severe dangers to the security of the lockups).

225. See *Archuleta v. Wagner*, 523 F.3d 1278, 1282 (10th Cir. 2008) (stating that Archuleta was frisked once at the scene of arrest and two more times at the detention facility, then strip searched even after the booking officer saw that Archuleta lacked the moles and tattoos described in an arrest warrant and told a receptionist “this isn’t her”); *Roberts*, 239 F.3d at 108–09 (stating that Roberts was subjected to a visual body cavity strip search which revealed no contraband, but still underwent a similar search later that day); *Jones v. Edwards*, 770 F.2d 739, 740 (8th Cir. 1985) (stating that Jones was subjected to a visual body cavity strip search at the jail despite the police arresting him from his home and after going upstairs with him while he dressed and used the bathroom).

226. See *Masters v. Crouch*, 872 F.2d 1248, 1254 (6th Cir. 1989) (stating that mingling with prison inmates weighs in favor of heightened security measures, but does not by itself justify strip searches without considering the offense or whether an arrestee has weapons or contraband); *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984) (similar).

227. See, e.g., *Archuleta*, 523 F.3d at 1286 & n.5 (declining to adopt a bright-line rule for constitutional strip searches and requiring more fact-intensive inquiries with at least

need for a case-by-case analysis is particularly strong if a routine strip search policy is not carried out consistently. For example, in *Bull*, despite being detained in jails that operate under the same detailed guidelines,²²⁸ Mary Bull, Leigh Fleming, and Charli Johnson were all subjected to different procedures and even different types of searches.²²⁹ Similarly, corrections officers perform body searches in various ways, as detailed in the ACLU's letter to the Colorado DOC.²³⁰ The DOC's body cavity search policy at Denver Women's Correctional Facility required prisoners to hold open their labia for inspection.²³¹ One prisoner stated that officers perform the procedure differently, so that she has had to undergo the search "simply standing; from a sitting position with [her] legs spread eagle and having a flashlight shined at [her] genitals; from a standing position with a foot perched on a toilet and an officer's face inches from [her] genitals."²³²

In *Watt v. City of Richardson Police Department*,²³³ the Fifth Circuit approved a blanket strip search policy facially but held that the policy was unconstitutional as applied to the plaintiff, Lynda Watt.²³⁴ Watt was arrested on an outstanding warrant for failure to license her dog.²³⁵ She was cooperative and admitted to a minor drug conviction eleven years earlier,²³⁶ which the police would not have known about otherwise.²³⁷ However, city policy required strip searches of detainees charged with or having a history of weapons, shoplifting, or drug charges.²³⁸ As a result, a

reasonable suspicion of weapon, drug, or contraband possession); *Masters*, 872 F.2d at 1255 (holding that while a strip search is objectively reasonable for arrestees charged with violent crimes, it is not reasonable in traffic violations or other nonviolent minor offenses without any individualized reasonable suspicion of the arrestee having a weapon or contraband).

228. The written policy in *Bull* contains thorough instructions such as "[r]aise his/her arms above their [sic] head and rotate 360 degrees," and "turn his/her head first to the left and then to the right so the searching officer can inspect the arrestee's ear orifices." *Bull v. City & Cnty. of San Francisco*, 595 F.3d 964, 968 n.4 (9th Cir. 2010).

229. The first sentence of the policy states that strip searches do not include physical body cavity searches. *Id.* However, both Mary Bull and Leigh Fleming alleged that they were subjected to body cavity searches. *See supra* text accompanying notes 3, 5.

230. ACLU Letter, *supra* note 17, at 1–2.

231. *See id.* at 1.

232. *Id.* On September 24, 2010, the Colorado Department of Corrections (DOC) issued a new regulation that no longer includes labia lifts, but requires women to lift their breasts and men to "lift genitalia and pull back foreskin of penis." COLO. DEP'T OF CORR., ADMINISTRATIVE REGULATION NO. 300–06, SEARCHES AND CONTRABAND CONTROL 6 (2010). Inmates also need to turn their back to DOC officers, squat and cough, then bend forward and separate their buttocks for inspection. *Id.*

233. 849 F.2d 195 (5th Cir. 1988).

234. *Id.* at 195. Indeed, *Kelly v. Foti*, 77 F.3d 819 (5th Cir. 1996), characterized *Watt* as holding that officials can only strip search a minor offender who posts bond if there is a reasonable suspicion that the detainee has weapons or contraband. *Id.* at 821. *Kelly* held that strip searching a woman arrested for making an illegal turn and driving without a license was not objectively reasonable. *Id.* at 822.

235. *Watt*, 849 F.2d at 196.

236. *Id.* at 196 & n.2 (stating that the conviction was set aside after Watt completed sixteen months of probation).

237. *Id.* at 196. Additionally, police knew that Watt's release was imminent because she called her neighbor for bail. *Id.*

238. *Id.*

female officer conducted a visual body cavity inspection of Watt.²³⁹ Because the policy targeted specific classes of offenders thought to pose a threat to prison security,²⁴⁰ the Fifth Circuit held that it would justify certain searches.²⁴¹ As applied to Watt, however, the court held that the search was “undeniably offensive” and thus unconstitutional given her minor offense, cooperative nature, sobriety, and minimal criminal history.²⁴²

Similarly, the Sixth Circuit has also refrained from holding that blanket strip search policies are per se unconstitutional. In *Dufrin v. Spreen*,²⁴³ Caroline Dufrin was arrested on a warrant for assault.²⁴⁴ She was taken to the Oakland County Jail, where she underwent a strip search pursuant to a jail policy that applied regardless of the offense.²⁴⁵ The court, relying on *Bell*, recognized that courts must give “wide-ranging deference” to prison policies and practices.²⁴⁶ Dufrin was charged with a violent felony and came in contact with the general jail population.²⁴⁷ The Sixth Circuit distinguished the case from other circuits that held blanket strip searches were unconstitutional when they involved minor offenses not usually associated with weapons and contraband.²⁴⁸ The court concluded that the Constitution does not require the sheriff to subjectively decide if a less intrusive search can be used based on the nature of the offense.²⁴⁹ Accordingly, the court held for the defendant sheriff.²⁵⁰

B. Blanket Strip Searches Do Not Violate Fourth Amendment Rights

The U.S. Courts of Appeals for the Third, Ninth, and Eleventh Circuits have held that blanket strip search policies of pretrial detainees, even absent individualized suspicion, do not violate the Fourth Amendment. These cases will be discussed in chronological order.

1. Eleventh Circuit

On September 4, 2008, the Eleventh Circuit decided *Powell v. Barrett*,²⁵¹ a class action lawsuit brought by eleven plaintiffs strip searched at a

239. *Id.*

240. *See id.* at 197.

241. *Id.* at 198.

242. *Id.* at 199.

243. 712 F.2d 1084 (6th Cir. 1983).

244. *Id.* at 1085.

245. *Id.*

246. *Id.* at 1087 (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979)).

247. *Id.*

248. *Id.* at 1088.

249. *Id.* at 1089.

250. *Id.*; *see also* *Dobrowolskyj v. Jefferson Cnty.*, 823 F.2d 955, 958 (6th Cir. 1987) (upholding a strip search because the security interests are even stronger than those in *Dufrin*, since plaintiff *Dobrowolskyj* was arrested for menacing, an offense typically associated with weapons, and came into contact with the general jail population).

251. 541 F.3d 1298 (11th Cir. 2008) (en banc).

Georgia county jail.²⁵² Five plaintiffs were searched as part of the booking process upon first entering the jail, even though police had no reasonable suspicion that any of them had contraband.²⁵³ The charges against the plaintiffs were revoking bail on a disorderly conduct charge, a traffic ticket warrant, driving under the influence, contempt for failure to pay child support, and a non-violent burglary.²⁵⁴ The Fulton County Jail's policy required the arrestees to remove their clothes, take a group shower with thirty to forty other arrestees, and stand for visual inspections by deputies.²⁵⁵

The Eleventh Circuit analyzed the searches under *Bell*, rejecting the county and city defendants' argument that the more deferential *Turner v. Safley* standard should apply.²⁵⁶ The court held that *Bell* did not interpret the Fourth Amendment to require individualized reasonable suspicion because *Bell* involved a blanket visual body cavity strip search policy, not individualized searches.²⁵⁷ Furthermore, *Powell* held that other circuits that differentiate between felonies, misdemeanors, and lesser offenses like traffic violations in justifying strip searches were not faithful to *Bell*, which did not distinguish between detainees based on their arrest charges.²⁵⁸ The court stated that a minor offender may be a gang member attempting to smuggle contraband into the facility,²⁵⁹ or someone pulled over in a vehicle who had enough time to hide contraband on his/her person before an officer got to the car door.²⁶⁰ The court concluded that arrestees may be as likely to conceal contraband as inmates receiving contact visits.²⁶¹

The Eleventh Circuit further analogized inmates after contact visits to arrestees during the booking process by stating 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."²⁶² It expressed that the plaintiffs' "claims would not have a prayer of surviving even the most cursory reading of *Bell*" had they involved strip searches after a contact visit instead of during booking.²⁶³ The court then held that a blanket strip search policy applied to arrestees during the booking process did not violate the Fourth Amendment.²⁶⁴

252. *Id.* at 1300.

253. *Id.*

254. *Id.* at 1301.

255. *Id.*

256. *Id.* at 1302; *see also supra* notes 93–97 and accompanying text.

257. *Powell*, 541 F.3d at 1307; *see also id.* at 1309 (stating that upon remand from the Supreme Court in *Bell*, the district court in the case must have recognized that reasonable suspicion was not required for strip searches, and then stating that other courts should recognize the same).

258. *Id.* at 1310.

259. *Id.* at 1311.

260. *Id.* at 1313.

261. *Id.* at 1314.

262. *Id.* at 1313.

263. *Id.*

264. *Id.* at 1314.

2. Ninth Circuit

As previously discussed, in *Bull*, the Ninth Circuit joined the circuit split created by the Eleventh Circuit.²⁶⁵ Jail administrators in *Bull* said that “based on their experience, ‘the greatest opportunity for the introduction of drugs and weapons into the jail occurs at the point when an arrestee is received into the jail.’”²⁶⁶ They also produced evidence that strip searches at the county jail uncovered seventy-three instances of illegal drugs and drug paraphernalia in arrestees’ body cavities between April 2000 and April 2005.²⁶⁷ Drugs, drug paraphernalia, and weapons were found in body cavities even in cases involving minor non-violent offenses like public drunkenness and public nuisance.²⁶⁸

The Ninth Circuit analyzed the county jail policy under the guidance of *Bell* and *Turner*.²⁶⁹ As in *Bell*, the strip searches of the plaintiffs were visual, professional, private, and done so to combat a serious contraband problem in San Francisco jails.²⁷⁰ The Ninth Circuit found that the facts of *Bull* and *Bell* were not meaningfully distinguishable and thus, respecting *Bell*’s mandate of deferring to corrections officials, upheld the strip searches as constitutional.²⁷¹ The court stated that a *Turner* analysis leads to the same conclusion since the strip searches are rationally related to the legitimate governmental interest of keeping contraband out of jails.²⁷²

The court then discussed two of its earlier decisions, both of which held that blanket strip search policies of arrestees were per se unconstitutional, even if the arrestees were intermingled with the general prison population.²⁷³ According to the court, these prior decisions were erroneous for four reasons: (1) the judges substituted their judgment for that of corrections officials, (2) arrestees should not be distinguished by the severity of their offenses, (3) counties do not need to demonstrate an extensive history of smuggling incidents to justify a blanket strip search policy, and (4) such policies may deter arrestees from concealing contraband in body cavities.²⁷⁴ Ultimately, because *Bell* did not require individualized reasonable suspicion or statistical evidence to support a blanket strip search policy, the Ninth Circuit held that the San Francisco policy is reasonable under the Fourth Amendment.²⁷⁵

265. *See supra* notes 1–13 and accompanying text.

266. *Bull v. City & Cnty. of San Francisco*, 595 F.3d 964, 967 (9th Cir. 2010).

267. *Id.* at 969 (stating that weapons were also found in body cavities).

268. *Id. But see id.* at 991 (Thomas, J., dissenting) (stating that there was no empirical evidence that body cavity searches decreased the amount of contraband in jails).

269. *Id.* at 971 (majority opinion).

270. *Id.* at 975.

271. *Id.*

272. *Id.* at 976.

273. *Id.* at 977 (discussing *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989), and *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984) (per curiam)).

274. *Id.* at 978–81.

275. *Id.* at 982. The Ninth Circuit decided *Bull* solely on the grounds that a strip search policy can apply to all arrestees introduced into the general jail population, but not arrestees

3. Third Circuit

On September 21, 2010, the Third Circuit further widened the circuit split on the constitutionality of blanket strip search policies in *Florence v. Board of Chosen Freeholders of Burlington*.²⁷⁶ Plaintiff Albert Florence was arrested on a bench warrant for an offense punishable by a fine, which Florence had already paid.²⁷⁷ Florence was strip searched at the Burlington County Jail, then transported to the Essex County Correctional Facility six days later, where he showered before two corrections officers and was strip searched again.²⁷⁸ Both jails required Florence to lift his genitals, and the facility in Essex County further required him to squat and cough.²⁷⁹

The Third Circuit applied *Bell*'s four-factor balancing test.²⁸⁰ First, the strip searches were less intrusive than the visual body cavity searches in *Bell*.²⁸¹ The searches were conducted in private, under sanitary conditions, and by professionals.²⁸² The justifications for the strip searches were different from those in *Bell*.²⁸³ Specifically, the jails' security interests included detecting and deterring the smuggling of weapons and contraband into jails, identifying gang members from their tattoos, and preventing disease.²⁸⁴ The court held that, of the three, smuggling during intake posed the greatest security threat and was as strong as the interest in *Bell* of preventing smuggling after contact visits.²⁸⁵ Like the Eleventh and Ninth Circuits, the court stated that *Bell* did not require individualized suspicion and did not differentiate based on detainees' offenses.²⁸⁶ Rather, the security risk posed by arrestees was inherent in their detention in a correctional facility.²⁸⁷ Furthermore, the court stated that individuals can plan their arrests in order to smuggle contraband or weapons, especially if courts forbid searches of certain groups of arrestees.²⁸⁸ The Third Circuit thus deferred to and agreed with prison administrators that blanket strip search policies decrease the subjectivity entailed in requiring reasonable suspicion to conduct strip searches.²⁸⁹ The court held that the strip search

charged with minor offenses who remain at police stations. *See Ederly v. City & Cnty. of San Francisco*, 599 F.3d 946, 957 (9th Cir. 2010).

276. 621 F.3d 296 (3d Cir. 2010).

277. *Id.* at 299. The charges against Florence were ultimately dismissed. *Id.*

278. *Id.*

279. *Id.*

280. *See id.* at 306; *see also supra* note 77 and accompanying text.

281. *Florence*, 621 F.3d at 307.

282. *Id.* (discussing the place and manner in which the searches were conducted, two of the four factors in *Bell*'s balancing test).

283. *Id.*

284. *Id.*

285. *Id.* at 308. *But see id.* at 312 (Pollak, J., dissenting) (noting that both counties failed to present evidence of smuggling problems in their jails).

286. *Id.* at 308 (majority opinion).

287. *Id.*

288. *Id.* at 309.

289. *Id.* at 310.

policies in both New Jersey jails were reasonable and did not violate Florence's Fourth Amendment rights.²⁹⁰

C. Social Science Arguments in Briefs

Although most of the briefs submitted to the Courts of Appeals in the cases discussed in Parts II.A and II.B did not include social science arguments, the appellant's opening brief in *Bull* and several amicus curiae briefs in *Florence* referenced social science sources and findings.

In its opening brief in *Bull*, the City and County of San Francisco argued that strip searches are necessary regardless of the offense committed because any arrestee can hide contraband on his/her body or inside bodily orifices.²⁹¹ Moreover, any arrestee, even one charged with prostitution or a property crime, may be a drug addict, user, or otherwise connected to drugs.²⁹² The City cited a research article which found that drug-using criminals are motivated to commit more crimes because they need money for drugs.²⁹³

Similarly, two amicus curiae briefs supporting the Burlington County Jail and Essex County Correctional Facility stressed the dangers that jailors face. One amicus brief referred to a New Jersey government investigation of organized criminal street gangs in New Jersey prisons.²⁹⁴ The report found that contraband confiscated in New Jersey prisons included drugs, weapons, cell phones, SIM cards, and money.²⁹⁵ The brief stated that not allowing jailors to identify gang members hinders their ability to safeguard the facilities.²⁹⁶

The Policemen's Benevolent Association (PBA) also discussed the importance of identifying gang members and keeping rival gangs away from each other.²⁹⁷ Citing the defendants-appellants' brief, the PBA stated that identifying tattoos is a simple and reliable method of finding gang affiliations.²⁹⁸ They also listed a medical justification for strip searches, namely, to detect contagious diseases that manifest with abscesses, boils, and other external symptoms.²⁹⁹ The PBA concluded that not allowing

290. *Id.* at 312.

291. Appellant's Opening Brief at 15–19, *Bull v. City & Cnty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (No. 06–15566), 2007 WL 1302885.

292. *Id.* at 18.

293. *Id.* at 18–19 (citing ABA SPECIAL COMM. ON CRIME PREVENTION AND CONTROL, NEW PERSPECTIVES ON URBAN CRIME 25 (1972); Joseph A. Califano, Op-Ed., *A National Attack on Addiction is Long Overdue*, N.Y. TIMES, Sept. 23, 1986, at A35).

294. Brief of Sheriff's Ass'n of New Jersey et al. as Amici Curiae in Support of Defendants-Appellants' Brief on Appeal at 20, *Florence v. Bd. of Chosen Freeholders of Burlington*, 621 F.3d 296 (3d Cir. 2010) (Nos. 09-3603, 09-3661), 2009 WL 5635568.

295. *Id.*

296. *Id.*

297. Brief on Behalf of Amicus Curiae Policemen's Benevolent Ass'n, Local 249 at 13, *Florence*, 621 F.3d 296 (Nos. 09-3603, 09-3661), 2009 WL 5635567.

298. *Id.* at 13.

299. *Id.* at 15.

strip searches leads to the “unconscionable” result of risking the health, safety, and welfare of corrections officials.³⁰⁰

In contrast to the amicus curiae briefs for the defendants-appellants in *Florence*, a brief in support of plaintiff-appellee Albert Florence extensively discussed the psychological impact of strip searches on detainees.³⁰¹ The Pennsylvania Prison Society (PPS) stated that the Third Circuit must begin its analysis by considering “the unique emotional and psychological ramification of forcing arrestees to remove all clothing and be visually inspected by a stranger.”³⁰² After citing Supreme Court case law on the unique protections given to an individual’s interests in bodily privacy and integrity, the PPS noted that any detainee can experience the indignity of strip searches if reasonable suspicion is not required.³⁰³ The “dehumanizing search” may impact victims in the long-term as they experience sleeping problems, flashbacks, and other symptoms of psychological disorders.³⁰⁴ In addition, “strip searches can have an irreversible effect on personal identity: ‘a systematic deprivation of privacy and dignity can weaken the individual’s sense of self’ . . . [which] may have the unintended consequence of ‘increas[ing] violent and irrational behavior.’”³⁰⁵ The PPS concluded its brief with a quote from *The Brothers Karamazov* about the feelings of degradation, awkwardness, guilt, and despicableness a character felt when forced to undress during an interrogation.³⁰⁶ Finally, the PPS referred again to the psychological effects of strip searches:

This transcendent principle of our humanity—that strip searches are tools for humiliation and dehumanization—is that which animates the current state of constitutional law. . . . [W]e respectfully urge this Court to join the overwhelming majority of federal courts in recognizing that the unique psychological effects of strip searches visited upon any human being should be avoided in cases, like this one, where literally anyone could be the next target.³⁰⁷

300. *Id.*

301. *See generally* Brief on Behalf of Amicus Curiae Pennsylvania Prison Society in Support of Plaintiff-Appellee Albert W. Florence, *Florence*, 621 F.3d 296 (No. 09-3603; No. 09-3661), 2010 WL 341403.

302. *Id.* at 9.

303. *Id.* at 9–10 (citing *Cruzan v. Dir. of Mo. Dep’t of Health*, 497 U.S. 261 (1990); *Winston v. Lee*, 470 U.S. 753 (1985); *Schmerber v. California*, 384 U.S. 757 (1966); *Rochin v. California*, 342 U.S. 165 (1952)).

304. *Id.* at 11 (citing McKeown, *supra* note 162, at 42); *see also supra* note 169 and accompanying text.

305. *Id.* (second alteration in original) (citation omitted) (quoting David C. James, Note, *Constitutional Limitations on Body Searches in Prisons*, 82 COLUM. L. REV. 1033, 1049–50 (1982)).

306. *Id.* at 20.

307. *Id.* at 20–21.

III. REMOVING BLANKET POLICIES AND SEARCHING FOR REASONABLENESS

Part II described the circuit split regarding the constitutionality of blanket strip search policies as applied to pretrial detainees. Because social science research shows that strip searches can cause serious psychological effects, courts must hold that blanket strip search policies are unconstitutional. Strip searches should only be conducted when a law enforcement officer reasonably suspects that a detainee has contraband. Part III.A argues that more research on American detainees is necessary, since the bulk of social science research on strip searches is conducted overseas. It also advocates for courts to use interdisciplinary views to inform their legal analyses. Next, Part III.B uses current social science research to apply the Supreme Court's four-pronged balancing test from *Bell v. Wolfish*, and concludes that the justification for a search must be very strong to outweigh the extreme intrusion of a strip search. Finally, Part III.C proposes several nonlegal remedies to ensure that strip searches are conducted in a non-discriminatory manner and that detainees, especially trauma victims and females, are treated with care during and after a strip search.

A. *A Call for Greater Reliance on the Social Sciences*

There are several barriers to conducting research on strip searches of arrestees and detainees who, unlike prisoners, may be released shortly after being booked and strip searched.³⁰⁸ Detainees may not want to discuss their feelings because they feel humiliated and traumatized, or because they want to avoid reliving the strip search.³⁰⁹ Moreover, the public generally is not concerned with police precincts and correctional facilities unless there is evidence of severe violations of individual rights.³¹⁰ Correctional institutions are likely to withhold information from the public, and it is almost impossible to observe corrections officers' daily activities and interactions with detainees.³¹¹

Despite these difficulties, more research into the prevalence and effects of strip searches is needed to ensure that current findings are reliable. Specifically, findings must be consistent over time and applicable to broader populations of detainees, rather than only those involved in a given study. Currently, strip search studies are primarily conducted in Canada, Ireland, and the United Kingdom.³¹² While the criminal justice systems and policies of these countries are similar to those of the United States, only further research can determine whether overseas studies can be generalized to American policies and detainees. Similarly, a study on the effects of strip searches in one American correctional facility may not yield the same

308. See, e.g., *supra* notes 2–9 and accompanying text (describing three detainees who were released twelve hours or less after being strip searched).

309. See *supra* notes 162–63 and accompanying text.

310. See *supra* notes 165–67 and accompanying text.

311. See *supra* notes 164–67 and accompanying text.

312. See *supra* note 159 and accompanying text.

results in a different facility in another part of the country. Only continued research in different facilities and geographic locations can reveal whether the findings on discrimination, trauma, humiliation, and desensitization in strip search research are consistent across populations.³¹³

However, research is not helpful if the courts turn a blind eye to it. Courts rightly defer to legislatures and administrative agencies to ensure that policies are reasonable and useful,³¹⁴ but they must draw a line between deference and willful ignorance of relevant research. While judges should be skeptical about the validity and reliability of interdisciplinary research, there is no reason to dismiss social science or other disciplines outright as “faddish” or “hav[ing] no principled limit.”³¹⁵ Interdisciplinary views can inform legal analysis, and courts that take into account a variety of reliable sources can make more reasoned decisions than courts that blindly defer to government agencies and legislatures no matter how egregious and harmful a policy may be. Indeed, the fact that law enforcement officials may be desensitized to the harmfulness of strip searches suggests that courts need to weigh objective social science data when deciding an issue as intimate as strip searches.³¹⁶

B. A Call for Reasonableness: Applying Bell’s Balancing Test in Light of Current Social Science Research

The Supreme Court has consistently held that the government can curtail individual rights to maintain security in correctional institutions.³¹⁷ In *Bell v. Wolfish*, the Court employed a four-factor balancing test, considering the scope of the intrusion, the justification for initiating the intrusion, and the manner and place in which it is conducted, to uphold a blanket strip search policy applied to pretrial detainees.³¹⁸ The circuit courts have all applied the *Bell* test to cases when plaintiffs allege that strip searches violated their constitutional rights.³¹⁹ However, the courts apply the test inconsistently, resulting in a circuit split on the constitutionality of blanket policies requiring strip searches of pretrial detainees.³²⁰ This section will apply social science research to *Bell*’s four-factor balancing test, thereby providing a more uniform and objective application of *Bell* to strip searches of pretrial detainees.

313. See *supra* Part I.C.

314. See *supra* note 73 and accompanying text.

315. See *Parents Involved in Cmty. Sch. V. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 780 (2007) (Thomas, J., concurring); *id.* at 791 (Kennedy, J., concurring); see also *supra* notes 151–52 and accompanying text.

316. See *supra* notes 202–03 and accompanying text.

317. See *supra* Part I.A.2–3.

318. See *supra* Part I.A.3.

319. See *supra* Part II.A.1, II.B.

320. See *supra* notes 87–97 and accompanying text. Compare Part II.A, with Part II.B.

1. Scope of the Intrusion

Because *Bell* did not articulate the magnitude of intrusion posed by a strip search, there is little guidance for courts applying *Bell*'s balancing test.³²¹ Circuit courts holding that blanket strip search policies are unconstitutional emphasize the extreme scope of intrusion posed by strip searches.³²² In contrast, the Third Circuit found that a visual strip search, genital lift, and squat and cough were less intrusive than the visual body cavity searches in *Bell*.³²³ The Eleventh and Ninth Circuits have not explicitly broken down their analyses according to *Bell*'s four-factor test. Instead, they have held that the facts before them were indistinguishable from the facts in *Bell*, and therefore follow *Bell*'s holding that blanket strip search policies are constitutional.³²⁴

Clearly, additional research is critical in guiding the courts on this prong of the *Bell* test. Judges alone cannot decide that one strip search procedure is less intrusive than another based solely on their own perceptions of the experience of undergoing a strip search. For example, the Third Circuit did not state why lifting one's genitals, squatting, and coughing is less intrusive than undergoing a visual body cavity search.³²⁵ Indeed, the social science literature suggests that feelings of degradation and trauma would be similar among those who are strip searched, regardless of the specific actions that a detainee performs during a search.³²⁶ The process of having to strip naked, being observed, and being told to comply with different commands, while naked, appears to cause individuals to feel humiliated and ashamed.³²⁷ Moreover, strip searches make detainees feel helpless and relive traumatic moments of sexual or physical violence.³²⁸ Such evidence shows that strip searches are extremely intrusive, and therefore can only be justified upon a higher showing of the three other *Bell* prongs.³²⁹

2. Place and Manner of the Strip Search

Courts must—and generally do—require that strip searches be conducted professionally, by an officer of the same sex as the detainee, and in a private

321. *Bell* did not clearly apply the balancing test to the strip search policy at issue in the case, but merely recognized the security dangers in the detention facility and the invasive nature of strip searches. See *supra* notes 78–80 and accompanying text.

322. See *supra* notes 215–18 and accompanying text.

323. See *supra* notes 278–81 and accompanying text.

324. See *supra* Part II.B.1–2.

325. See *supra* text accompanying notes 279, 281.

326. See *supra* Part I.C.

327. See *supra* Part I.C.

328. See *supra* Part I.C.

329. Courts must be wary of being swayed by current events and trends, thereby going beyond the constitutional limits of reasonableness. See *Richards v. Wisconsin*, 520 U.S. 385, 392 n.4 (1997) (Scalia, J., concurring) (stating that this would go against the purpose of the reasonableness requirement, which was adopted to protect peoples' privacy and property "even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable'" (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993))).

area.³³⁰ Given the serious nature of a strip search, a search conducted in any other manner or place should be presumed unreasonable.³³¹

3. Justification for the Strip Search

The last prong of the *Bell* four-factor balancing test is the justification for the strip search. Governments usually justify their interest in strip searching with the security of correctional institutions and preventing the smuggling of weapons, drugs, or other contraband.³³² The circuit courts recognize that institutional security is a legitimate government interest. However, courts holding that blanket strip search policies are unconstitutional have found this interest outweighed by the lack of justification for strip searches in all cases, such as for handcuffed detainees, misdemeanants who cannot post bail, and people arrested for traffic or other minor offenses.³³³ On the other hand, the Eleventh, Ninth, and Third Circuits held that ensuring correctional facilities are secure and free of contraband justifies blanket strip searches.³³⁴

The justification for a strip search must be strong in order to outweigh the high scope of intrusion involved.³³⁵ Thus, a law enforcement officer should only strip search a detainee suspected of concealing contraband, such as after a drug- or weapon-related arrest, or when a detainee's criminal record includes recent drug or weapons possession. Strip searches cannot be allowed on individuals arrested for traffic offenses or for non-violent misdemeanors that do not involve drugs. Such a policy would ensure that arrestees like Mary Bull, Leigh Fleming, and Charli Johnson are not subjected to traumatizing strip searches after being arrested for minor charges like disturbing the peace, and when they lack criminal records suggesting they are likely to smuggle contraband.³³⁶

Moreover, corrections officers should not resort to strip searches if other resources exist to prevent detainees from smuggling contraband into a jail or prison. For example, an arrestee in a single cell at a police station or county jail who is isolated from other detainees will not be able to smuggle drugs into the general prison population. Such an arrestee need only be frisked, even if a small bag of drugs in a body cavity will go undetected. This is true even for individuals arrested for a drug offense unless police officers reasonably believe that they hid drugs in their body cavities. As the First Circuit recognized in *Roberts v. Rhode Island*,³³⁷ it is unlikely that detainees will smuggle contraband when they are handcuffed and likely did

330. *See supra* note 219 and accompanying text; *see also supra* notes 270, 282 and accompanying text.

331. *See supra* note 220 and accompanying text.

332. *See supra* note 222 and accompanying text.

333. *See supra* note 224 and accompanying text.

334. *See supra* notes 259–63, 266–72, 284–85, 288 and accompanying text.

335. *See supra* Part I.C.

336. *See supra* notes 2–9 and accompanying text.

337. 239 F.3d 107 (1st Cir. 2001).

not plan their arrests.³³⁸ Even if they did plan their arrests, they simply cannot smuggle contraband when completely isolated from other detainees.

C. Thinking Outside the Box: Nonlegal Suggestions

Research shows that giving police officers discretion to conduct strip searches may increase the chance of racial, gender, ethnic, or other forms of discrimination.³³⁹ However, preventing discrimination alone should not be enough to justify blanket strip searches that can psychologically damage thousands of detainees. Corrections officers must be able to explain their reasons for subjecting individual detainees to strip searches. Furthermore, other means exist to monitor police discrimination and abuse of strip search policies, such as installing closed circuit television in police stations.³⁴⁰ A less expensive alternative would be to monitor the records of police precincts and correctional facilities to ensure that strip searches are conducted only when there is reasonable suspicion that a detainee is smuggling contraband. Though this may require more paperwork and decrease the efficiency of the corrections system, increased transparency may encourage officers to exercise more caution before conducting a strip search. It may also encourage detainees to speak out if they feel discriminated against or otherwise abused during the strip search, so that others will scrutinize the accused police officers' actions.³⁴¹ Of course, these are not determinations for a court, but for a legislature or an administrative agency. Again, this is a field that would benefit from research looking into effective ways to monitor discrimination and abuse in the corrections system.³⁴²

A final consideration for legislatures and agencies overseeing correctional facilities is to ensure that police and corrections officers are adequately trained in conducting strip searches. Institutions within a county or city under the same strip search policy should make sure that strip searches are carried out consistently across detainees.³⁴³ Policies should also specify procedures for common occurrences like menstruation or lactation among female detainees, or for strip searches of transgendered individuals, particularly in cities with a significant transgendered population.³⁴⁴ Additionally, officers should be aware of the psychological

338. *See supra* note 224 and accompanying text. Similarly, expert testimony in *Bell* stated that there is not enough time and opportunity to hide contraband in a body cavity during a visit at a detention facility. *See supra* note 84 and accompanying text. This is likely also true of individuals who are arrested and who did not plan their arrests.

339. *See supra* notes 174–81 and accompanying text.

340. This was done in Newburn's research study that discovered that police officers who had discretion to strip search detainees exercised this discretion in discriminatory ways. *See supra* notes 174–81 and accompanying text.

341. *See supra* notes 164–67 and accompanying text.

342. *See supra* notes 159–67 and accompanying text; *see also supra* notes 308–13 and accompanying text.

343. *See supra* notes 228–32 and accompanying text.

344. *See supra* notes 171–73 and accompanying text.

damage sustained by those who are strip searched.³⁴⁵ Detainees, especially females, who violently resist, cry, or show other signs of trauma should be handled cautiously and, if possible, debriefed after the strip search procedure to ensure their mental well-being.³⁴⁶ This is particularly true if the female detainee is known to have suffered sexual violence in the past.³⁴⁷ Moreover, officers should be cognizant that even repeat offenders do not simply “[get] used to” strip searches, and may actually find searches increasingly shameful and difficult to bear.³⁴⁸

Despite corrections officers’ important roles in safeguarding institutions while processing arrestees day after day, they must be reminded in periodic training sessions that the detainees they watch over are human beings entitled to basic levels of respect. Supervisors and legislators who create policies receive wide-ranging deference from the courts, but their judgments may be clouded by the nature of working in institutional environments.³⁴⁹ They should take an interdisciplinary approach when creating and implementing policies for precincts and jails, consult with specialists like psychologists and social scientists on the effects of strip searches, and use less invasive alternatives to finding contraband.³⁵⁰

CONCLUSION

Because of the widening circuit split on the constitutionality of blanket strip search policies applied to pretrial detainees, more and more government officials across the country are stripping detainees as a matter of routine procedure without any reasonable suspicion. Courts that uphold these blanket policies emphasize the security dangers in correctional institutions³⁵¹ while turning a blind eye to the extremely intrusive and humiliating nature of strip searches.³⁵² Even judges that are skeptical about the reliability of social science research cannot dismiss the unanimous findings to date that strip searches are like sexual assaults that can cause trauma and psychological harm to detainees.³⁵³ Courts must recognize that an interdisciplinary approach and the use of social science research are necessary given the very personal issue at hand. Incorporating interdisciplinary research leads to one logical conclusion: blanket strip search policies must be held unconstitutional. Strip searches are so invasive that individualized reasonable suspicion must be required each time an

345. *See supra* Part I.C.

346. *See supra* notes 183–88 and accompanying text.

347. *See supra* notes 190–94 and accompanying text.

348. DOBASH ET AL., *supra* note 168, at 204; *see also supra* note 170 and accompanying text.

349. *See supra* notes 195–203 and accompanying text.

350. *See supra* note 203 and accompanying text.

351. *See supra* Part II.B.

352. *See, e.g., supra* notes 301–07 and accompanying text. The Third Circuit in *Florence* made no mention of the social science arguments in the amicus brief submitted to the court. *See Florence v. Bd. of Chosen Freeholders of Burlington*, 621 F.3d 296 (3d Cir. 2010); *supra* Part II.C.

353. *See supra* notes 168–73, 182–94 and accompanying text.

officer subjects a detainee to a strip search. Holding otherwise would simply undermine the Fourth Amendment's protections against unreasonable searches.