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Notes

THE FOURTH AMENDMENT STRIPPED BARE: SUBSTANTIATING PRISONERS' REASONABLE RIGHT TO BODILY PRIVACY

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ABSTRACT—Prisoners' rights to bodily privacy under the Fourth Amendment are limited, allowing detention officials to strip-search them for contraband. The extent to which the Fourth Amendment protects prisoners, however, is uncertain. Questions regarding whether strip searches require reasonable suspicion and the manner in which officials may conduct strip searches have troubled courts for decades. In the absence of clear guidance from the Supreme Court, courts have reached inconsistent conclusions, imperiling the human rights and dignity of prisoners. This Note argues that courts should define and apply prisoners' rights to bodily privacy with reference to international human-rights law, specifically the United Nations Standard Minimum Rules for the Treatment of Prisoners. By looking to this standard, courts can define the right to bodily privacy under the Fourth Amendment in a manner that aligns with the informed and carefully debated consensus of nations, moving away from the inconsistent decision-making of the lower courts that has failed to produce any cognizable doctrine. Resolving this uncertainty will not only allow for greater doctrinal clarity in this area of law, but also bolster the human rights and basic dignity of prisoners as guaranteed to them by the Constitution.

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INTRODUCTION

Roughly five years ago, Deanna Jones was arrested for credit-card fraud.[1] Following Jones's arrest, officials took her to Burlington County Detention Center, where she underwent a strip search.[2] Officers directed Jones, who was completely naked throughout the search, to bend over, expose her breasts and genitals for inspection, and cough.[3] They then sent her to another facility where officials strip-searched her again.[4] Soon after, she was released and the charges were dropped.[5] Subsequently, Jones filed suit against the detention centers and officers who had conducted the strip searches for violating her Fourth Amendment right to bodily privacy.[6] But the United States District Court for the District of New Jersey rejected her claim, holding that strip-searching detainees is constitutional because detainees may pose a security risk by bringing contraband into a detention facility, even when they are arrested on minor charges and prison officials lack reasonable suspicion.[7] This troubling decision adds to the murky,

[1] Jones v. Burlington Township, No. 1:17-cv-01871-NLH-AMD, 2017 WL 6372232, at *1–2 (D.N.J. Dec. 13, 2017).

[2] *Id.* at *2.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at *4–5, *8.

unsettled debate surrounding prisoners' Fourth Amendment right to bodily privacy.[8]

The problem stems from the great uncertainty among circuits regarding the extent to which the Fourth Amendment protects prisoners from strip searches.[9] A "strip search" refers to the search of a person's body in a state of partial or full undress.[10] Such searches can be merely visual, with an officer observing a detainee's body for contraband, or more intrusive, if they include the inspection of body cavities (i.e., genital and rectal areas).[11] In the past forty years, the Supreme Court has only decided two cases on this topic and both times produced narrow holdings.[12] Lower courts note that these decisions offer little guidance on how to navigate more difficult cases[13] and that "[t]he law governing . . . [strip] searches is far from settled; the rules alter with circumstances, and the circumstances are myriad."[14] In the absence of clear guidance from the Supreme Court regarding strip searches, courts often reach contradictory conclusions on the same set of facts—sometimes

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[8] *See, e.g.*, Gabriel M. Helmer, Note, *Strip Search and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U. L. REV. 239, 242 (2001) (arguing that the Supreme Court's "minimal guidance to lower courts" on the proper application of its rulings has made unclear the extent of the Fourth Amendment's protection for prisoners against strip searches); Julian Ellis, Comment, Florence v. Board of Chosen Freeholders*: The Resurrection of* Bell v. Wolfish *and the Questions to Follow*, 90 DENV. U. L. REV. 559, 559 (2012) (contending that the Court's refusal to create a consistent, defined factor test for evaluating the constitutionality of strip searches "provides little guidance to circuit courts").

[9] This Note uses "prisoner" and "detainee" as all-encompassing terms for any person held in detention by the criminal justice system for any period of time and for any offense. Such use is consistent with the broad language used by the Supreme Court in relevant opinions. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 546 (1979) (referencing both "prisoners" and "detainees").

[10] William J. Simonitsch, *Visual Body Cavity Searches Incident to Arrest: Validity Under the Fourth Amendment*, 54 U. MIAMI L. REV. 665, 667–68 (2000) (noting that some courts use the term "strip search" to refer to both the viewing of an undressed person as well as the visual inspection of genital and rectal areas).

[11] *Id.* Simonitsch uses "body cavity search" as an umbrella term and makes a distinction between strip searches and visual body-cavity searches. *Id.* This Note, by contrast, uses "strip search" as an umbrella term.

[12] Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 338–39 (2012) (finding constitutional the suspicionless strip search of a misdemeanor arrestee in a detention facility before officials admitted him into the general population); *Bell*, 441 U.S. at 558 (upholding a prison's blanket policy of strip-searching pretrial felony detainees following visits during which they could have obtained contraband). For analysis of why these holdings are narrow and may apply only in the precise factual circumstances addressed, see *infra* Sections I.A., I.C.

[13] *See, e.g.*, United States v. Perez, No. 17-10391-RGS, 2019 WL 181283, at *5 n.5 (D. Mass. Jan. 11, 2019); Brownell v. Montoya, No. 11-0979 MV/GBW, 2013 WL 12334217, at *17 (D.N.M. Mar. 28, 2013); Ford v. City of Boston, 154 F. Supp. 2d 131, 140 (D. Mass. 2001).

[14] Gonzalez v. City of Schenectady, 728 F.3d 149, 158 (2d Cir. 2013).

finding strip searches unreasonable when conducted in a nonprivate setting[15] and other times justifying similarly nonprivate group searches for reasons of expediency.[16] Prison administrators are similarly impeded by uncertainty as to whether, when, and how they can strip-search detainees.[17] This "inconsistent . . . analytic framework"[18]—in the words of one court—poses a practical problem from a doctrinal perspective.

The extreme intrusion of privacy a strip search constitutes underscores the severity of this problem. Strip-search survivors do not suffer a merely abstract harm but rather a cognizable physical and psychological injury. Victims of such searches have described them as "sexually degrading," "inhumane," and akin "to a forced self-rape act."[19] Searches are so humiliating that survivors even refuse visits from their own children and attorneys to avoid having to strip before prison officials before or after the meeting.[20] The resulting trauma has forced survivors into treatment for suicidal depression, triggered memories of past sexual and physical abuse, and interfered with their ability to advocate for themselves at parole hearings and in mandatory reentry programs, impeding their release from incarceration.[21] Many suffer a level of trauma similar to that of rape survivors, regardless of whether they are recent arrestees or long-term inmates.[22]

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[15] *See, e.g.*, Stoudemire v. Mich. Dep't of Corr., 705 F.3d 560, 573–74 (6th Cir. 2013) (finding strip search of a detainee unreasonable in part because it was conducted in a public setting); Lopez v. Youngblood, 609 F. Supp. 2d 1125, 1138–40 (E.D. Cal. 2009) (holding that a facility's blanket policy of group strip searches violates the Fourth Amendment).

[16] *See, e.g.*, Sumpter v. Wayne County, 868 F.3d 473, 484–85 (6th Cir. 2017) (upholding a facility's practice of strip-searching five prisoners at a time because of the expediency offered by a group search); Lewis v. Sec'y of Pub. Safety & Corr., 870 F.3d 365, 368–69 (5th Cir. 2017) (finding reasonable a group strip search of ten prisoners at once).

[17] *See, e.g.*, *Sumpter*, 868 F.3d at 488 (granting qualified immunity to a prison official who executed a strip search because the law was unclear regarding whether group strip searches are unreasonable, so "no reasonable officer would have known" how to proceed); Holland v. City of New York, 197 F. Supp. 3d 529, 544–45 (S.D.N.Y. 2016) (granting qualified immunity to a prison official who conducted a cross-gender strip search because the law in both the Second Circuit and elsewhere is unclear and unsettled regarding this issue).

[18] *Ford*, 154 F. Supp. 2d at 140.

[19] *Invasive Search*, ACLU, https://www.aclu.org/invasive-search [https://perma.cc/ZJG6-W454] (quoting inmates at Michigan's Women's Huron Valley Correctional Facility); *see also* Kelleher v. N.Y. State Trooper Fearon, 90 F. Supp. 2d 354, 357 (S.D.N.Y. 2000) (observing that an arrestee testified to feeling "violated," "humiliated," and "scared" after a strip search).

[20] Michelle VanNatta, *Conceptualizing and Stopping State Sexual Violence Against Incarcerated Women*, 37 SOC. JUST. 27, 34 (2010).

[21] *Invasive Search*, *supra* note 19.

[22] Daphne Ha, Note, *Blanket Policies for Strip Searching Pretrial Detainees: An Interdisciplinary Argument for Reasonableness*, 79 FORDHAM L. REV. 2721, 2740–41 (2011). Prisoners have felt that strip

Certain factors can further exacerbate the trauma associated with strip searches. For instance, nonprivate searches—those occurring in view of other prisoners or more guards than necessary—deepen the violative exposure and humiliation felt by victims.[23] Gender also necessarily affects a victim's feelings regarding a search—female prisoners often find such searches more harmful than their male counterparts.[24] Detainees who are lactating[25] or menstruating[26] during a search may also be more impacted. In a particularly egregious example, menstruating inmates were forced to strip as a group before male guards during a training exercise.[27] Guards forced the inmates to remove all tampons and sanitary pads without offering any replacements, leaving the inmates to stand barefoot and bleeding out on the floor while the officers yelled numerous derogatory and abusive comments at them.[28] Finally, trans women may also find such searches particularly traumatic because of the resultant exposure of their genital characteristics and the potential for guards to use such searches to harass them.[29]

The Supreme Court is not unaware of these physical and psychological harms: one Justice has noted how strip searches force inmates into "the most degrading position possible" and heighten their fear of physical abuse and sexual assault.[30] Lower courts too have acknowledged the deeply invasive[31]

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searches were "increasingly hard to bear" and were "conducted with unnecessary disregard for personal dignity." RUSSELL P. DOBASH, R. EMERSON DOBASH & SUE GUTTERIDGE, THE IMPRISONMENT OF WOMEN 204 (1986).

[23] Sumpter v. Wayne County, 868 F.3d 473, 483 (6th Cir. 2017) ("Intrusive under ideal circumstances, strip searches are especially humiliating when they are conducted in front of other inmates."); Williams v. City of Cleveland, 771 F.3d 945, 953 (6th Cir. 2014) ("The wider an audience for a strip search, the more humiliating it becomes, especially when the stripped individual is exposed to bystanders who do not share the searching officers' institutional need to view her unclothed.").

[24] Margo Schlanger, *Jail Strip-Search Cases: Patterns and Participants*, 71 LAW & CONTEMP. PROBS. 65, 75–76 (2008).

[25] In one such scenario, a female detainee began lactating during the strip search and was disallowed from covering herself, while a male jailer gave her a cut maxi pad. Archuleta v. Wagner, 523 F.3d 1278, 1282 (10th Cir. 2008).

[26] Brief for Sister Bernie Galvin et al. as Amici Curiae Supporting Petitioner at 11–12, Florence v. Bd. of Chosen Freeholders, 566 U.S. 318 (2012) (No. 10-945) (detailing traumatic experience of female student who was menstruating during a strip search).

[27] Henry v. Hulett, 969 F.3d 769, 774–75 (7th Cir. 2020).

[28] *Id.*

[29] Kyle Kirkup, *Indocile Bodies: Gender Identity and Strip Searches in Canadian Criminal Law*, 24 CANADIAN J.L. & SOC'Y 107, 107 (2009); NAT'L CTR. FOR TRANSGENDER EQUAL., LGBTQ PEOPLE BEHIND BARS: A GUIDE TO UNDERSTANDING THE ISSUES FACING TRANSGENDER PRISONERS AND THEIR LEGAL RIGHTS 15 (2018).

[30] *See* Bell v. Wolfish, 441 U.S. 520, 577–78 (1979) (Marshall, J., dissenting).

[31] Wood v. Clemons, 89 F.3d 922, 928 (1st Cir. 1996).

and humiliating nature of strip searches,[32] deeming the procedures "demeaning, dehumanizing, undignified, . . . terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission."[33] The severe health impact of strip searches underscores the need to determine the extent of the Fourth Amendment's protections against them.

In addition to the consequences of strip searches, prisoners suffer harm from the uncertainty of the state of the law. The Supreme Court has stated that "[p]risoners retain the essence of human dignity inherent in all persons."[34] To abide by this would require recognizing the impact that inconsistent strip searches have on prisoners' dignity. Whether a detainee will be stripped naked and invasively searched or not owes often to circumstantial procedural differences in their conditions—such as whether one is being held in the general prison population or at a police station.[35] As one court has explained, "Strip search litigation in general is inherently risky because of the deference given jail officials, because a split in circuits has developed, and because the case law that does exist is not directly on point."[36] In the absence of a coherent doctrine governing the reasonability of strip searches, prisoners will continuously be left in the lurch about their "most personal and deep-rooted expectation[] of privacy"—privacy in their bodies.[37] A clear doctrine regarding strip searches would allow courts to resolve cases more consistently, enable prisoners to be on notice of their rights, and require prison administrators to be aware of their responsibilities.

To resolve the debate regarding strip searches, this Note proposes defining and applying the right to bodily privacy for prisoners with reference to international human-rights law, specifically the United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners (SMRs).[38] In contrast to the current regime, the SMRs provide standards fashioned by vigorous cross-cultural debate for how and when to carry out strip searches.

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[32] Stoudemire v. Mich. Dep't of Corr., 705 F.3d 560, 572–73 (6th Cir. 2013).

[33] Tinetti v. Wittke, 479 F. Supp. 486, 491 (E.D. Wis. 1979) (quoting Transcript of Oral Opinion at 715(a), 717(a), 719(a), Sala v. County of Suffolk, 604 F.2d 207 (E.D.N.Y. 1978) (No. 75-CV-486)), *aff'd*, 620 F.2d 161 (7th Cir. 1980). "This language describing strip and visual body cavity searches was repeated in *Tinetti* and has become the standard description adopted by most courts." Howard Friedman & Robert Rufo, Strip Searches and the Fourth Amendment Rights of Prisoners 3 (Apr. 21, 2004) (unpublished manuscript), 2004 WL 2800491, at *6.

[34] Brown v. Plata, 563 U.S. 493, 510 (2011).

[35] *See* Fate v. Charles, 24 F. Supp. 3d 337, 350–52 (S.D.N.Y. 2014).

[36] Lopez v. Youngblood, No. CV-F-07-0474 DLB, 2011 WL 10483569, at *7 (E.D. Cal. Sept. 2, 2011).

[37] Missouri v. McNeely, 569 U.S. 141, 148 (2013) (quoting Winston v. Lee, 470 U.S. 753, 760 (1985)).

[38] G.A. Res. 70/175 (Jan. 8, 2015).

Courts should interpret the scope of the Fourth Amendment's protections in light of the SMRs because they reflect international consensus on a topic of grave importance where domestic jurisprudence has failed to resolve the debate.[39] When domestic jurisprudence has failed, international law (such as the SMRs) can provide insight through authorities that "by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat."[40] This Note's analysis of the right to bodily privacy is grounded in U.S. constitutional law but draws on nonbinding international law to help guide its interpretation—a practice not without precedent in the Supreme Court and other federal courts.[41]

This Note is the first piece of scholarship to propose interpreting the Fourth Amendment's protection against unreasonable searches in light of the SMRs. Scholars have previously explored the application of the SMRs to domestic jurisprudence, but have focused on the Eighth Amendment's protection against cruel and unusual punishment.[42] Such scholars have recognized the persuasive weight of the SMRs and encouraged domestic courts to follow the their guidance when determining how the Eighth Amendment's protections apply to prisoners.[43] No scholar has yet suggested using the SMRs to steer the application of the Fourth Amendment in prison.[44]

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[39] *See* Rex D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 EMORY INT'L L. REV. 197, 206 (2011) (explaining that "the practices of countries which repeatedly interact with one another will increasingly grow more convergent until eventually they reach a level of basic uniformity that gives rise to an implicit acknowledgement that such practice has to be followed out of a sense of legal requirement," which is international customary law). The SMRs are an example of such international customary law. *See* HUMAN RIGHTS SOURCEBOOK 115 (Albert P. Blaustein, Roger S. Clark & Jay A. Sigler eds., 1987).

[40] The Paquete Habana, 175 U.S. 677, 700 (1900).

[41] *See infra* notes 228–237 and accompanying text.

[42] *See, e.g.*, Nan D. Miller, Comment, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 CAL. W. INT'L L.J. 139, 168, 171 (1995) (arguing that U.S. courts should find solitary confinement to violate the Eighth Amendment's ban on cruel and unusual punishment because of the SMRs' disapproval of the practice); Susanna Y. Chung, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, 68 FORDHAM L. REV. 2351, 2391 (2000) (contending that the SMRs "may aid in interpreting the Eighth Amendment because they provide a more comprehensive understanding of the contemporary standard of decency"); Amanda Dick, *The Immature State of Our Union: Lack of Legal Entitlement to Prison Programming in the United States as Compared to European Countries*, 35 ARIZ. J. INT'L & COMPAR. L. 287, 317 (2018) (arguing that the Supreme Court should fashion a standard for the Eighth Amendment "more consistent with today's international norms on penal justice, which are reflected in the UN's adoption of the Standard Minimum Rules").

[43] *See* Miller, *supra* note 42, at 147–48, 167–68.

[44] The closest is a student note observing in a brief aside that "a compelling argument can be made on the basis of international law" to stop cross-gender pat (not strip) searches of inmates. Robyn Gallagher, Note, *Constitutional Law—Cross-Gender Pat Searches: The Battle Between Inmates and*

This may owe to the fact that the original SMRs in 1957 and 1977 did not include a rule regarding strip searches,[45] but the revised 2015 version does.[46] Notably, even post-2015 scholarship on the use of the SMRs in domestic constitutional interpretation has continued to focus on their applicability to the Eighth Amendment.[47] This Note advances the scholarly conversation by importing the use of the SMRs to interpret the Eighth Amendment in a related but novel context—the Fourth Amendment sphere of jurisprudence.

Part I of this Note outlines the historical development of the right to bodily privacy, progressing from the Supreme Court's first discussion of the constitutionality of strip-searching prisoners in *Bell v. Wolfish*,[48] the uncertainty among federal courts for over thirty years following *Bell*, the Court's unsuccessful attempt to resolve the uncertainty in *Florence v. Board of Chosen Freeholders* in 2012,[49] and the current state of the law. It describes how the Court's decision in *Florence* has only produced further uncertainty in the lower courts, which have granted detention centers essentially carte blanche to conduct such searches, leading to controversial decisions such as that in Deanna Jones's case.[50]

Part II then explores solutions others have recommended in response to the Court's failure to explicate a clear doctrine regarding strip searches, and it explains why these may fail to persuade the Court. Scholars want the Court to require individualized, reasonable suspicion for strip searches and offer varying reasons why the Court should do so, but these rationales by themselves may not provide sufficient support. International consensus, however, provides a greater weight of authority that this Note suggests can be used to more thoroughly tip the balance in favor of adopting a reasonable suspicion standard. Part II also posits that the inexorable entanglement of the Fourth Amendment with a fundamental human right (here, bodily privacy) makes it ripe for contextualization and development within the international norm.

Corrections Officers Enters the Courtroom, 33 W. NEW ENG. L. REV. 567, 598 n.224 (2011). This point owes to the original SMRs' disapproval of cross-gender supervision of prisoners. *Id.*

[45] *See* G.A. Res. 663 C (XXIV) (July 31, 1957); G.A. Res. 2076 (LXII) (May 13, 1977).

[46] *See* G.A. Res. 70/175, *supra* note 38, at 18–19; *UN Launches 'Nelson Mandela Rules' on Improving Treatment of Prisoners*, UNITED NATIONS (Oct. 7, 2015), https://news.un.org/en/story/2015/10/511912-un-launches-nelson-mandela-rules-improving-treatment-prisoners [https://perma.cc/666N-9AJH].

[47] *See, e.g.*, Dick, *supra* note 42, at 317; Federica Coppola, *The Brain in Solitude: An (Other) Eighth Amendment Challenge to Solitary Confinement*, 6 J.L. & BIOSCIENCES 184, 224 (2019).

[48] 441 U.S. 520, 558 (1979).

[49] 566 U.S. 318, 338–39 (2012).

[50] Jones v. Burlington Township, No. 1:17-cv-01871-NLH-AMD, 2017 WL 6372232, at *8 (D.N.J. Dec. 13, 2017) (relying on *Florence* to dismiss Jones's complaint).

Part III proposes a novel solution using the international norm—creating a coherent doctrine around strip searches in prisons by looking to standards of international human-rights law, specifically the SMRs. It begins by explaining why this practice is advisable and supported by robust domestic precedent. As an exemplar of international customary law,[51] the SMRs serve as persuasive authority to U.S. federal courts.[52] The Supreme Court has previously used international customary law, including the SMRs, to help interpret the extent of protection offered by the Eighth Amendment[53] and would be well advised to do the same with strip searches under the Fourth Amendment. This Note then responds to and refutes commonly posed counterarguments to the use of international law in domestic jurisprudence and, more specifically, as a tool of constitutional interpretation.

Finally, Part III sets out how to use the SMRs' Rule 52 to guide the application of the Fourth Amendment in prison.[54] This Note examines three of these requirements: (1) conducting strip searches only where absolutely necessary, (2) using alternatives to strip searches wherever possible, and (3) only conducting strip searches in private. The proposed standards are easily applicable in the domestic context and lower courts can use them to resolve the uncertainty regarding what level of bodily privacy prisoners can expect. Resolving this uncertainty will not only allow for greater doctrinal clarity in this area of law but will also bolster the human rights and basic dignity of prisoners as guaranteed by the Constitution.

I. THE HISTORY OF THE FOURTH AMENDMENT IN PRISON

This Part details the development of the legal standard surrounding strip searches in prison, beginning with the Supreme Court's holding in *Bell v. Wolfish*, which failed to explicate what level of cause is necessary before conducting a search. This Part then follows how this narrow ruling led to a great deal of confusion in lower courts, which in turn produced a circuit split over the level of cause justifying a search. The Court attempted to resolve this split in *Florence v. Board of Chosen Freeholders* but once again failed to produce a cognizable standard for courts to determine the constitutionality of any given strip search, leading to even further confusion.

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[51] HUMAN RIGHTS SOURCEBOOK, *supra* note 39, at 115.

[52] *See supra* note 42.

[53] Estelle v. Gamble, 429 U.S. 97, 104 n.8 (1976). In this case, the Court held that "deliberate indifference to serious medical needs of prisoners . . . [is] proscribed by the Eighth Amendment." *Id.* at 104. The Court found such indifference to contradict agreed-upon standards of decency like those found in the SMRs. *Id.* at 104 n.8.

[54] G.A. Res. 70/175, *supra* note 38, at 18–19.

A. Bell v. Wolfish *and Suspicionless Strip Searches*

The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable searches" by the government.[55] The Amendment usually requires a showing of probable cause before a search can be conducted.[56] However, the Court has found exceptions to this general requirement,[57] including for searches conducted in prison. The government's compelling interest in promoting safety in prison, "a unique place fraught with serious security dangers,"[58] renders, for example, searches of an inmate's cell categorically reasonable.[59]

In *Bell v. Wolfish*, the Supreme Court directly addressed the constitutionality of strip searches in prison for the first time.[60] In *Bell*, detainees at the Metropolitan Correctional Center (MCC) in New York City claimed that a blanket policy requiring them to undergo a body-cavity search every time they returned from a contact visit violated their Fourth Amendment right to bodily privacy.[61] The Court upheld the policy, stating that the Fourth Amendment requires only that a strip search be reasonable, which is determined by balancing the facility's security interest in the search (i.e., its interest in preventing the smuggling in of contraband like money, drugs, and weapons) against the privacy interest of the prisoner.[62] A four-factor test guides the balancing analysis: (1) "the scope of the particular intrusion," (2) "the manner in which it is conducted," (3) "the justification for initiating it," and (4) "the place in which it is conducted."[63]

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[55] *See* U.S. CONST. amend. IV.

[56] *Id.* ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[57] *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (doing away with probable-cause requirements for consent searches); Terry v. Ohio, 392 U.S. 1, 20 (1968) (finding stop-and-frisk searches to not require a showing of probable cause).

[58] Bell v. Wolfish, 441 U.S. 520, 559 (1979).

[59] Hudson v. Palmer, 468 U.S. 517, 527–28 (1984).

[60] 441 U.S. at 558.

[61] *Id.* A contact visit allows "visitors and inmates to have a limited degree of contact without a glass-barrier." ACLU NAT'L PRISON PROJECT, KNOW YOUR RIGHTS: RESTRICTIONS ON VISITATION 2 (2005), https://www.acluok.org/sites/default/files/wp/wp-content/uploads/2011/04/Know-Your-Rights-Restrictions-On-Visitation.pdf [https://perma.cc/WH3P-278Q].

[62] *Bell*, 441 U.S. at 558–59.

[63] *Id.* at 559. Despite announcing this multifactor test, the Court did not actually discuss how the first, second, or fourth factors applied to the particular case. At best, the majority opinion did note that an abusive search would be unreasonable. *Id.* at 560. The abusive nature of a search is likely tied up with the "scope" and "manner" of the intrusion, so this may have been where the Court was inviting such analysis. *See* Helmer, *supra* note 8, at 261.

The Court did not impose a specific standard for justification under the third factor, instead merely finding that a strip search in the circumstances presented (i.e., involving detainees returning from a contact visit) could "be conducted on less than probable cause."[64] In a separate opinion, Justice Lewis Powell noted the majority's omission and argued for the use of reasonable suspicion.[65] Reasonable suspicion is a lower evidentiary standard than probable cause,[66] but it still requires a showing of specific, articulable facts suggesting "that criminal activity may be afoot."[67]

Some scholars interpret Justice Powell's separate opinion regarding a showing of cause as proof that the majority *never* thought such a showing was necessary.[68] Therefore, these scholars read *Bell* as broadly sanctioning strip searches conducted without any substantial showing of cause.[69] Other scholars, however, agree with Justice Powell that individualized, reasonable suspicion is necessary, concluding that the limiting language of the majority opinion "suggests that the Court . . . was staking out a small area of exception to the general requirement of individualized suspicion. That is, in a narrow class of detainees—those in transition back from contact visits—prison authorities could dispense with the usual requirements of individualized suspicion."[70] Finally, scholars who read *Bell* narrowly argue that because reasonable suspicion is a lower standard than probable cause, Justice Powell's opinion is consistent with the majority's statement that searches can sometimes "be conducted on less than probable cause."[71]

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[64] *See Bell*, 441 U.S. at 558–60.

[65] *Id.* at 563 (Powell, J., concurring in part, dissenting in part) ("[S]ome level of cause, such as a reasonable suspicion, should be required.").

[66] *See* Spear v. Sowders, 71 F.3d 626, 631 (6th Cir. 1995) ("Reasonable suspicion does not mean evidence beyond a reasonable doubt, or by clear and convincing evidence, or even by a preponderance of the evidence. Reasonable suspicion is not even equal to a finding of probable cause. Rather, reasonable suspicion requires only specific objective facts upon which a prudent official, in light of his experience, would conclude that illicit activity might be in progress.").

[67] *See* Terry v. Ohio, 392 U.S. 1, 30 (1968). In *Terry*, which concerned reasonable suspicion on a public street, the specific, articulable facts that suggested "that criminal activity may be afoot" included three people speaking to one another while walking up and down a street repeatedly and glancing into a store window. *See id.* at 6.

[68] *See, e.g.*, Deborah L. MacGregor, *Stripped of All Reason? The Appropriate Standard for Evaluating Strip Searches of Arrestees and Pretrial Detainees in Correctional Facilities*, 36 COLUM. J.L. & SOC. PROBS. 163, 172 (2003).

[69] *See* Christopher P. Keleher, *Judges as Jailers: The Dangerous Disconnect Between Courts and Corrections*, 45 CREIGHTON L. REV. 87, 93 (2011); *see also* Ellis, *supra* note 8, at 580 (arguing that *Bell* does not require reasonable suspicion to justify strip searches).

[70] Julian Simcock, Florence*,* Atwater*, and the Erosion of Fourth Amendment Protections for Arrestees*, 65 STAN. L. REV. 599, 619 (2013).

[71] David M. Shapiro, *Does the Fourth Amendment Permit Indiscriminate Strip Searches of Misdemeanor Arrestees?* Florence v. Board of Chosen Freeholders, 6 CHARLESTON L. REV. 131, 137

For all those not returning from contact visits, however, is reasonable suspicion still required? Or, because of the nature of detention, is no showing of cause required? The majority opinion did not answer such questions, only holding that strip searches are not facially unconstitutional under the Fourth Amendment and that the strip-search policy in the context presented was constitutionally permissible.[72] Such a narrow holding, however, left lower courts with little guidance as to what level of cause makes a strip search reasonable under the Fourth Amendment.[73]

B. Uncertainty Among the Circuits

After *Bell*, the circuits struggled to understand what level of suspicion the Constitution required prison officials to hold before conducting a strip search. The Court in *Bell* had addressed only searches of pretrial detainees following contact visits during which they could have obtained contraband.[74] The danger raised by contact with the outside world underlaid the suspicion justifying the search.[75] Lower courts, however, were unsure how to extend *Bell*'s logic to cases where, for example, detainees had committed lesser offenses or had recently been arrested and therefore were less likely to have contraband on their person.[76] "Much of the current confusion over the measures of the due process rights of pretrial detainees," one court opined, "stems from the divergent ways in which lower courts have applied *Bell*."[77]

The means by which lower courts distinguished *Bell* varied. Some courts adopted a felony-versus-misdemeanor distinction, not allowing invasive searches when detainees faced misdemeanor charges.[78] Such courts determined that the lower risk posed by minor offenders reduced the governmental need to conduct the search, thereby tipping the balance in

(2011) (quoting Bell v. Wolfish, 441 U.S. 520, 560 (1979)); *see also* Tracy McMath, Comment, *Do Prison Inmates Retain Any Fourth Amendment Protection from Body Cavity Searches?*, 56 U. CIN. L. REV. 739, 745–46 (1987) (arguing that *Bell* "should not be read so broadly as to deny all challenges to body cavity searches").

[72] *See Bell*, 441 U.S. at 560.

[73] Helmer, *supra* note 8, at 262.

[74] *See Bell*, 441 U.S. at 558.

[75] *See id.*

[76] *See infra* notes 78–80 and accompanying text.

[77] Hare v. City of Corinth, 74 F.3d 633, 639 (5th Cir. 1996).

[78] *See, e.g.*, Roberts v. Rhode Island, 239 F.3d 107, 112–13 (1st Cir. 2001) (disallowing a suspicionless search of a misdemeanor arrestee under the Fourth Amendment); Wachtler v. County of Herkimer, 35 F.3d 77, 81–82 (2d Cir. 1994) (same); Stewart v. Lubbock County, 767 F.2d 153, 156–57 (5th Cir. 1985) (same); Hill v. Bogans, 735 F.2d 391, 394 (10th Cir. 1984) (same).

favor of protecting the plaintiffs from such a severe invasion of privacy.[79] Other courts refused to uphold suspicionless searches immediately following arrest because of the low likelihood that a suspect would attempt to conceal contraband while in handcuffed custody as opposed to a contact visit when an inmate could have planned specifically to obtain contraband.[80] Over time, the majority of circuit courts—the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits—read *Bell* to require individualized, reasonable suspicion before conducting a search.[81] In contrast, the Third, Ninth, Eleventh, and D.C. Circuits read *Bell* as holding all blanket strip-search policies constitutional.[82]

The Court left lower courts bereft of guidance on how to apply the commands of the Constitution.[83] Finally, after the Third Circuit held that blanket strip-search policies were constitutional in *Florence v. Board of Chosen Freeholders*,[84] the Court agreed to resolve thirty years of confusion.[85]

C. Florence v. Board of Chosen Freeholders*: The Supreme Court Speaks Again*

In *Florence v. Board of Chosen Freeholders*, the Court aimed to resolve the dispute regarding the extent to which the Fourth Amendment protects

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[79] *See, e.g.*, Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1273 (7th Cir. 1983) (holding that, in the cases of "minor offenders," the need for body-cavity searches was not "substantial enough . . . to justify the severity of the governmental intrusion" they entail).

[80] *See, e.g.*, Shain v. Ellison, 273 F.3d 56, 64 (2d Cir. 2001) ("It is far less obvious that misdemeanor arrestees frequently or even occasionally hide contraband in their bodily orifices. Unlike persons already in jail who receive contact visits, arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something."); Giles v. Ackerman, 746 F.2d 614, 617 (9th Cir. 1984) ("Visitors to the detention facility in *Bell* could plan their visits and organize their smuggling activities. In contrast, arrest and confinement . . . are unplanned events."); Thompson v. County of Cook, 412 F. Supp. 2d 881, 890 (N.D. Ill. 2005) ("[I]t is a relatively safe assumption . . . that only a negligible portion of arrestees have concealed contraband in body cavities *prior to* their encounter with law enforcement.").

[81] Swain v. Spinney, 117 F.3d 1, 5 (1st Cir. 1997) (requiring reasonable suspicion for a strip search and visual body-cavity search of a misdemeanor arrestee); N.G. v. Connecticut, 382 F.3d 225, 232 (2d Cir. 2004) (same); Logan v. Shealy, 660 F.2d 1007, 1013 (4th Cir. 1981) (same); Kelly v. Foti, 77 F.3d 819, 821 (5th Cir. 1996) (same); Masters v. Crouch, 872 F.2d 1248, 1255 (6th Cir. 1989) (same); *Mary Beth G.*, 723 F.2d at 1273 (same); Goff v. Nix, 803 F.2d 358, 370 (8th Cir. 1986) (same); *Hill*, 735 F.2d at 394–95 (same).

[82] Bame v. Dillard, 637 F.3d 380, 386 (D.C. Cir. 2011) (finding strip searches conducted in the absence of individualized, reasonable suspicion constitutional); Florence v. Bd. of Chosen Freeholders, 621 F.3d 296, 310 (3d Cir. 2010) (same); Bull v. City of San Francisco, 595 F.3d 964, 975, 982 (9th Cir. 2010) (en banc) (same); Powell v. Barrett, 541 F.3d 1298, 1307, 1309 (11th Cir. 2008) (en banc) (same).

[83] Helmer, *supra* note 8, at 242.

[84] 621 F.3d at 310.

[85] 621 F.3d 296, *cert. granted*, 563 U.S. 917 (2011).

prisoners' bodily privacy.[86] Following his arrest for an outstanding warrant for a minor traffic offense, the petitioner, Albert Florence, was strip-searched at two separate jail facilities under a blanket policy affecting all incoming detainees.[87] Both searches required Florence to lift his genitals, and the second search also required Florence to cough while squatting naked before officers.[88] He later brought suit against the jails and other defendants for strip-searching him after an arrest for a minor offense in the absence of reasonable suspicion.[89]

The Court upheld the blanket strip-search policy, reading *Bell* to authorize exactly such a search.[90] In doing so, the Court rejected the felony-versus-misdemeanor distinction adopted by some lower courts, citing evidence in the record showing that even minor offenders can be dangerous and can easily smuggle in contraband.[91] The Court held the invasion of detainees' privacy permissible because it was "reasonably related to legitimate penological interests" in maintaining security.[92] Because detention officials are in the best position to determine and respond to security threats, the Court decided it best to trust their judgment "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to" any threat.[93]

Despite the Court's claim that the search in *Bell* was similar enough to the one in *Florence* for the former to control, scholars have noted significant differences between the cases.[94] Most strikingly, *Bell* concerned searching

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[86] 566 U.S. 318 (2012).

[87] *Id.* at 323–24.

[88] *Id.*

[89] *Id.* at 324.

[90] *Id.* at 334–38.

[91] *Id.* at 334–37.

[92] *Id.* at 326 (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

[93] *Id.* at 328 (quoting Block v. Rutherford, 468 U.S. 576, 584 (1984)).

[94] *See generally* Teresa A. Miller, *Bright Lines, Black Bodies: The* Florence *Strip Search Case and Its Dire Repercussions*, 46 AKRON L. REV. 433, 453 (2013) (observing that *Bell* concerned the strip-searching of federal detainees after a contact visit in accordance with a policy approved by the Bureau of Prisons, in contrast with *Florence*, where an arrestee who had not undergone any contact with the outside world postarrest was strip-searched in a manner inconsistent with New Jersey state law and the procedural rules of both facilities in which he was searched); Nina Gleiberman, Florence v. Board of Chosen Freeholders*: Maintaining Jail Security While Stripping Detainees of Their Constitutional Rights*, 72 MD. L. REV. ENDNOTES 81, 98–100 (2013) (arguing that the *Florence* Court's reliance on *Bell* was inapposite because, unlike the felony detainees in *Bell*, Florence was arrested for a minor offense and had not had his detainment reviewed by a magistrate judge prior to being strip-searched); Amanda Laufer, Comment, *The Pendulum Continues to Swing in the Wrong Direction and the Fourth Amendment Moves Closer to the Edge of the Pit: The Ramifications of* Florence v. Board of Chosen Freeholders, 42 SETON HALL L. REV. 383, 413–14 (2012) (arguing that *Florence* is distinguishable from *Bell* because the justifications

prisoners after a contact visit during which they could have received and concealed contraband, whereas *Florence* concerned a general arrestee entering the prison population from the outside world.[95] In *Bell*, prisoners could simply choose not to go to visits or have contact during them to avoid undergoing a search upon their return, but in *Florence*, an arrestee could not avoid such a search.[96] The Court overlooked this and other distinctions, instead deferring to the security interest of the jails.[97]

The Court refused to go so far as to say that the Fourth Amendment offers pretrial detainees (and prisoners) no protection from strip searches.[98] Rather, the majority opinion, along with Chief Justice John Roberts's and Justice Samuel Alito's concurrences, merely stated that searches in circumstances like those presented (i.e., in detention facilities, applied only to detainees when they are admitted into the general population) are constitutional.[99] Once again, the Court produced a narrow holding, upholding a particular strip search. The *Bell* Court, understandably, resisted any attempt to mechanically define what is "reasonable[]" under the Fourth Amendment[100] but, in turn, provided little guidance for lower courts. The *Florence* Court, as noted in Chief Justice Roberts's concurrence, followed this trend to carefully limit its holding and not speak on different factual circumstances than those present "to ensure that we 'not embarrass the future.'"[101] This restraint, however, reproduced the inconsistent outcomes in lower courts that had occurred before *Florence*.

D. The Current State of the Law: Renewed Uncertainty

Florence's narrow holding, like *Bell*'s, has only furthered confusion among the lower courts. Courts variously complain that "[i]n the wake of *Florence*, it is unclear what standards apply under the Fourth . . . Amendment[] . . . to pretrial detainees who will not be placed in the general

for strip searches during contact visits are distinguishable from those during arrests for minor offenses); Simcock, *supra* note 70, at 615–16 (arguing that the deterrence-based rationale that justified the blanket strip-search policy in *Bell*, where detainees could plan their contact visits around the illicit admission of contraband, was absent in *Florence*, where Albert Florence had no reason to suspect that he would be in custody and therefore no motivation to smuggle contraband into jail).

[95] Miller, *supra* note 94, at 453–54.

[96] *Id.*

[97] Simcock, *supra* note 70, at 613.

[98] *Florence*, 566 U.S. at 338–39.

[99] *Id.* at 338, 340 (Roberts, C.J., concurring); *id.* at 341 (Alito, J., concurring).

[100] Bell v. Wolfish, 441 U.S. 520, 559 (1979).

[101] *Florence*, 566 U.S. at 340 (Roberts, C.J., concurring) (quoting Nw. Airlines, Inc. v. Minnesota, 322 U.S. 292, 300 (1944)).

jail population,"[102] that "*Florence* left many questions unanswered,"[103] and that decisions are difficult to make because "the case law is inconsistent."[104]

Some courts have responded to this uncertainty by upholding strip searches in scenarios not explicitly contemplated by the Court. These courts have read *Florence* to authorize strip searches before and after a court hearing[105] or a rebooking,[106] even when detention officials present scant evidence that the detainee could have smuggled in contraband at any point.[107] Other courts have extended the holding of *Florence* to cover strip searches in nonintake contexts, like when prisoners are reentering their cells after being in the prison yard,[108] law library,[109] or dining hall,[110] and upon returning from work.[111] Finally, despite the fact that *Florence* concerned private strip searches,[112] courts have been similarly deferential when upholding nonprivate strip searches of multiple prisoners at a time.[113]

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[102] Phillips v. Sheridan Cnty. Sheriff's Off., No. 12-CV-153-ABJ, 2015 WL 13689047, at *9 (D. Wyo. May 4, 2015).

[103] Brownell v. Montoya, No. 11-0979 MV/GBW, 2013 WL 12334217, at *17 (D.N.M. Mar. 28, 2013).

[104] United States v. Perez, No. 17-10391-RGS, 2019 WL 181283, at *5 n.5 (D. Mass. Jan. 11, 2019).

[105] *See, e.g.*, Montgomery v. Hall, No. 11 Civ. 4645(PAC)(GWG), 2013 WL 1982920, at *3–4 (S.D.N.Y. May 15, 2013), *report and recommendation adopted*, 2013 WL 3816706 (S.D.N.Y. July 22, 2013) (upholding strip search before heading to court hearing); Myers v. City of New York, No. 11 Civ. 8525(PAE), 2012 WL 3776707, at *9 (S.D.N.Y. Aug. 29, 2012), *appeal dismissed*, No. 12-3824 (2d Cir. Nov. 8, 2012), *and judgment aff'd*, 529 F. App'x 105 (2d Cir. 2013) (same); Hanson v. Church, No. 11-cv-534-SM, 2012 WL 4936491, at *3 (D.N.H. Sept. 4, 2012) (upholding visual cavity strip search before returning to detention after court hearing); Marzett v. Brown, No. 11-2264, 2012 WL 4482941, at *4 (E.D. La. Sept. 28, 2012), *appeal dismissed*, No. 12-31113 (5th Cir. Mar. 6, 2013) (same).

[106] *See, e.g.*, Bayard v. Currier, No. 11-cv-598-SM, 2012 WL 4450836, at *10 (D.N.H. Aug. 8, 2012) (upholding strip search following rebooking before returning to detention).

[107] Christopher Totten & Jamie Dapremont, *Criminal Law Commentary: Post*-Florence *Interpretive Cases: An Analysis and Assessment*, CRIM. L. BULL. ART, Summer 2014, at 7–8.

[108] Barber v. Jones, No. 12-2578 (SRC), 2013 WL 211251, at *8 (D.N.J. Jan. 18, 2013).

[109] Grant v. Wisener, No. 6:11cv372, 2013 WL 1196090, at *3–5 (E.D. Tex. Mar. 22, 2013).

[110] Waddleton v. Jackson, No. C-10-267, 2012 WL 5289779, at *8 (S.D. Tex. Oct. 3, 2012), *report and recommendation adopted*, 2012 WL 5289708 (S.D. Tex. Oct. 24, 2012), *aff'd*, No. 12-41256 (5th Cir. Dec. 12, 2013).

[111] Tennell v. Rupert, No. 6:11cv448, 2012 WL 1899320, at *3 (E.D. Tex. May 24, 2012).

[112] Florence v. Bd. of Chosen Freeholders, 621 F.3d 296, 307 (3d Cir. 2010), *aff'd*, 566 U.S. 318 (2012).

[113] Sumpter v. Wayne County, 868 F.3d 473, 483 (6th Cir. 2017) (acknowledging especially intrusive nature of nonprivate strip search, but upholding because of *Florence*'s instruction to defer to prison officials' expertise regarding the expediency of group searches); Lewis v. Sec'y of Pub. Safety & Corr., 870 F.3d 365, 367–69 (5th Cir. 2017) (upholding a strip search of up to ten prisoners at a time in part because of *Florence*'s directive to defer to the judgment of prison administrators); Small v. Wetzel, 528 F. App'x 202, 206–07 (3d Cir. 2013) (relying on *Florence* to uphold cross-gender group searches in an open area following a prison lockdown).

A persistent minority of courts, however, have read *Florence* narrowly and refused to apply it except where the facts align completely.[114] For instance, in *Fate v. Charles*, the United States District Court for the Southern District of New York refused to apply *Florence* where a search was discretionary (rather than blanket), a body-cavity search (rather than a mere visual inspection), and conducted at a police station (rather than a jail).[115] Each of these differences was major because *Florence* "cannot be read . . . to authorize suspicionless visual body cavity searches as a matter of law."[116]

Courts looking to distinguish *Florence* often reference Part IV of the majority opinion where the Court declined to comment on the applicability of its holding to circumstances where: "a detainee will be held without assignment to the general jail population and without substantial contact with other detainees"; "an arrestee['s] . . . detention has not yet been reviewed by a magistrate or other judicial officer, and [the arrestee] can be held in available facilities removed from the general population"; "officers engag[e] in intentional humiliation and other abusive practices"; and "searches . . . involve the touching of detainees."[117] Accordingly, some courts challenge strip searches carried out before a judge has reviewed the validity of a misdemeanor detainee's detention.[118] Others refuse to apply *Florence* when the plaintiff was not entering the general population of a facility, as Albert Florence was, but rather was confined to a single-person cell and/or not interacting with other detainees,[119] or when the plaintiff underwent an especially intrusive search.[120] Moreover, courts have also found

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[114] *See, e.g.*, Williams v. City of Cleveland, 771 F.3d 945, 951 (6th Cir. 2014) (reading *Florence* to only apply to the facts before it, leaving open constitutional analyses of other blanket strip-search policies for reasonableness). "*Florence* does not stand for the proposition that every search conducted pursuant to a jail's uniformly applicable search policy is impregnable from attack on that basis alone." *Id.*

[115] 24 F. Supp. 3d 337, 350–52 (S.D.N.Y. 2014).

[116] *Id.* at 350.

[117] Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 338–39 (2012).

[118] Haas v. Burlington County, 955 F. Supp. 2d 334, 338–39, 342–45 (D.N.J. 2013).

[119] *See, e.g.*, Hinkle v. Beckham Cnty. Bd. of Cnty. Comm'rs, 962 F.3d 1204, 1238 (10th Cir. 2020) ("*Florence* does not sanction such a policy—strip searching detainees not destined for the jail's general population."); Parkell v. Danberg, 833 F.3d 313, 329 (3d Cir. 2016) (refusing to apply *Florence* to strip searching "inmates who have previously been thoroughly searched and held in a stripped-down isolation cell without human contact ever since"); Cantley v. W. Va. Reg'l Jail & Corr. Facility Auth., 771 F.3d 201, 208 (4th Cir. 2014) ("*Florence* made clear that blanket strip searches prior to arraignment of arrestees not designated for assignment to the detention facility's general population are constitutionally suspect in the absence of some particularized justification.").

[120] Brown v. Polk County, 965 F.3d 534, 539 (7th Cir. 2020) (requiring a showing of reasonable suspicion when an inmate was singled out for an invasive search because *Florence* only allowed a suspicionless search following a contact visit); Shorter v. Baca, 895 F.3d 1176, 1188 (9th Cir. 2018) (declining to extend *Florence*'s deference to jail officials for a strip search where officials "left

unreasonable searches that go beyond visual inspection, as in *Florence*, to forcibly seize items from an inmate's body cavity.[121]

After forty years of debate and much spilled ink, the law surrounding strip-searching prisoners still lacks cognizable doctrinal contours. No clear circuit split has emerged post-*Florence*, but the majority of lower courts has embraced expanding and extending the reach of the decision to essentially grant carte blanche to correctional facilities to search as they see fit.[122] As such, the disparities between the circuits have only become starker since *Florence*, imperiling prisoners' rights to bodily privacy.

II. RATIONALES FOR AN INDIVIDUAL-SUSPICION STANDARD

Numerous scholars have noted and criticized the Court's failure to articulate a consistent standard for assessing the constitutionality of strip searches in prison.[123] In response to this doctrinal ambiguity, scholars have proposed various solutions, the majority of which involve requiring individualized, reasonable suspicion before conducting a search. Though this Note ultimately advocates for the same standard, it interrogates the rationales scholars use to justify this standard and questions whether the Court would be persuaded by such rationales. This Part briefly reviews a selection of these justifications and explains why they may, at least by themselves, prove unpersuasive. It then addresses why the Court's shift to a reasonable suspicion standard may be more persuasively justified by referencing international human-rights customs, previewing the ultimate solution that will be explored in the next Part.

Scholars have asserted diverse rationales for why courts should adopt a reasonable suspicion standard. Nina Gleiberman has recommended that the

noncompliant female inmates shackled to their cell doors for hours, virtually unclothed, and without access to meals, water, or a toilet").

[121] Chavarriaga v. N.J. Dep't of Corr., 806 F.3d 210, 231 (3d Cir. 2015); United States v. Fowlkes, 804 F.3d 954, 966 (9th Cir. 2015).

[122] Totten & Dapremont, *supra* note 107, at 8–9.

[123] *See, e.g.*, Diana R. Donahoe, *Fourth Amendment "Cheeks" and Balances: The Supreme Court's Inconsistent Conclusions and Deference to Law Enforcement Officials in* Maryland v. King *and* Florence v. Board of Chosen Freeholders of the County of Burlington, 63 CATH. U. L. REV. 549, 587 (2014) (critiquing "the Court's inconsistent application of the Fourth Amendment" to strip-searching detainees and stating that it constitutes a judicial abdication of the responsibility to protect prisoners' rights to bodily privacy); Gleiberman, *supra* note 94, at 103 (noting that the Court's deferential decision-making "has been overly broad and poorly defined, causing confusion among lower courts"); Merrick D. Cosey, *"Turn Around," "Bend Over," "Squat," and "Cough": The Supreme Court Strips the Fourth Amendment "Naked" in* Florence v. Board of Chosen Freeholders, 40 S.U. L. REV. 515, 516 (2013) (criticizing the Court's unclear signaling to lower courts while "sen[ding] a very clear message to [strip-search victims:] . . . you have been stripped of your dignity").

Court adopt American Bar Association (ABA) Standard 23-7.9,[124] which requires a showing of individualized, reasonable suspicion before strip-searching detainees arrested for minor, nonviolent, non-drug-related offenses in order to better protect detainees' rights to bodily privacy.[125] Daphne Ha has suggested courts require reasonable suspicion because social-science research has shown that strip searches traumatize prisoners.[126] Finally, Professor Diana R. Donahoe has pointed to the use of reasonable suspicion in numerous state laws[127]—as well as in federal law enforcement agencies such as the United States Marshals Service, the Immigration and Customs Service, and the Bureau of Indian Affairs—as evidence that the Supreme Court should adopt such a standard.[128]

Despite their consensus on the appropriate standard, all three scholars' rationales may face skepticism from judges. Gleiberman's proposal asks the Court to follow the conclusions of an organization composed entirely of lawyers, which has produced standards which reflect only one viewpoint.[129] Her primary reason for advancing the proposal is its workability, as reflected in the fact that "[s]everal jurisdictions have implemented statutes that mimic the ABA strip search policy."[130] As she herself notes, however, the limited authorities that have adopted this standard still diverge from one another—with the Federal Bureau of Prisons and certain states adopting a reasonability standard for any *minor* offense versus other states requiring the same even for major crimes.[131] The difference in such laws is far from minor. The patchwork nature of the ABA policy's adoption underscores the need for reliance on a greater authority (namely, an international one) if a uniform standard is to be adopted domestically.

Ha has argued that by going beyond a bare legal analysis, and incorporating social-science research into their opinions, judges can make a more appropriate assessment of the constitutionality of strip searches.[132] Her social-science approach, however, may attract skepticism from those judges

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[124] ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS 223 (3d ed. 2011).

[125] Gleiberman, *supra* note 94, at 104–05.

[126] Ha, *supra* note 22, at 2739–43, 2758 (detailing studies conducted in Canada, Australia, and the United Kingdom surveying the psychological impact of strip searches on detainees).

[127] Donahoe, *supra* note 123, at 583–84 n.233.

[128] *Id.* at 584.

[129] *See About the ABA*, AM. BAR ASS'N, https://www.americanbar.org/about_the_aba/ [https://perma.cc/7Z52-7Z6H].

[130] Gleiberman, *supra* note 94, at 105.

[131] *Id.*

[132] Ha, *supra* note 22, at 2732.

who disfavor reliance on social-science research to make legal decisions,[133] or, conversely, from those who can cite to conflicting studies or a lack of conclusive evidence on the matter as a reason for striking down reasonable suspicion.[134] Ha acknowledges the reluctance a social-science-based rationale may face from judges[135] but contends that social-science research will continue nonetheless.[136] This response does not, however, explain why skeptical judges would nevertheless be persuaded by such rationales. Ha notes that the Court has at times cited social-science research in its opinions,[137] but, more often, various justices have reacted with strong skepticism to arguments premised on social science.[138] Indeed, as Ha mentions, Pennsylvania Prison Society filed an amicus brief in *Florence* at the circuit court level that cited to the body of research detailing the psychologically deleterious effects of strip searches on prisoners as a reason for the Court to limit such searches, but to no avail.[139] The Court was unpersuaded by this rationale and, as such, Ha's argument that courts should favor reasonable suspicion is less strong.

Professor Donahoe's evidence of other authorities using reasonable suspicion is useful in showing that such a standard is feasible, but it may not wholly persuade the reader that such a standard is normatively desirable or the only constitutional option. That select authorities or certain states have adopted a standard does not necessarily comment on its applicability or desirability to be implemented nationwide. By contrast, the fact that an

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[133] Amy Rublin, *The Role of Social Science in Judicial Decision Making: How Gay Rights Advocates Can Learn from Integration and Capital Punishment Case Law*, 19 DUKE J. GENDER L. & POL'Y 179, 211 (2011) ("Courts sometimes acknowledge the existence and potential significance of empirical outcomes but prefer to push interpretation upon legislatures on the basis that legislatures allegedly have superior tools for comprehending studies.").

[134] *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 763, 766 (2007) (Thomas, J., concurring) (contending that social-science-based arguments "would leave our . . . jurisprudence at the mercy of elected government officials evaluating the evanescent views of a handful of social scientists"); Roper v. Simmons, 543 U.S. 551, 618 (2005) (Scalia, J., dissenting) ("Given the nuances of scientific methodology and conflicting views, courts—which can only consider the limited evidence on the record before them—are ill equipped to determine which view of science is the right one.").

[135] Ha, *supra* note 22, at 2732–33.

[136] *Id.* at 2738.

[137] *Id.* at 2736.

[138] *See, e.g.*, *Parents Involved*, 551 U.S. at 780 (Thomas, J., concurring) (arguing that following social-science research in cases of constitutional interpretation "would constitutionalize today's faddish social theories"); *see also supra* note 134.

[139] Ha, *supra* note 22, at 2753 (citing Brief on Behalf of Amicus Curiae Pennsylvania Prison Society in Support of Plaintiff-Appellee Albert W. Florence, Florence v. Bd. of Chosen Freeholders, 621 F.3d 296 (3d Cir. 2010) (Nos. 09-3603, 09-3661)).

international consensus has coalesced around a particular standard alleviates concerns that one may be favoring a "provincial standard[] that can fluctuate according to local tastes and politics."[140] Unlike with merely state or federal law, an internationally approved standard adds objectivity.[141]

The rationale this Note proposes—following international customary law in the form of the SMRs—takes into account the consensus of over 100 nations, as well as social-science researchers, civil-society advocates, and correctional professionals, thus providing additional persuasive support for the reasonable suspicion standard.[142] International law does not rest on fluctuating social-science findings alone, like Ha's solution, and, by representing international norms, is arguably more objective (in that it takes into account the input of global authorities) than Gleiberman's and Professor Donahoe's suggestions.

Though certain domestic authorities advocate for the use of a reasonable suspicion standard in strip-searching prisoners,[143] the debate is far from settled in the United States. By contrast, the international norm represents unified support of reasonable suspicion following robust debate among various international organizations, scholars, and governments.[144] The argument for the adoption of reasonable suspicion grows stronger, therefore, when moving beyond "a more insular American outlook," to the weight of international consensus.[145] When domestic jurisprudence has failed, courts are well-advised to move beyond the partial knowledge of local institutions and instead also rely upon the "accumulated wisdom of the world on rights and justice."[146] In particular, where a legal problem touches on "dignitarian issues and . . . tangled issues of culpability,"[147] such as the

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[140] Chung, *supra* note 42, at 2396.

[141] *Id.*

[142] *See United Nations Prison-Related Standards and Norms*, UN OFF. ON DRUGS & CRIME, http://www.unodc.org/newsletter/pt/perspectives/no02/page004a.html [https://perma.cc/6Z98-XLVW] (noting that over 100 countries have followed the SMRs); Aleksandra Gruevska Drakulevski, *The Nelson Mandela Rules: The Revised United Nations Standard Minimum Rules for the Treatment of Prisoners—Short Review*, 8 IUSTINIANUS PRIMUS L. REV. 1, 2, 6 (2017); Jennifer Peirce, *Making the* Mandela Rules*: Evidence, Expertise, and Politics in the Development of Soft Law International Prison Standards*, 43 QUEEN'S L.J. 263, 291–93 (2018).

[143] *See infra* notes 243–248 and accompanying text.

[144] Glensy, *supra* note 39, at 254.

[145] *Id.* at 237; *see also* Jeremy Waldron, *Foreign Law and the Modern* Ius Gentium, 119 HARV. L. REV. 129, 138 (2005) (arguing that "judges sound more substantial when they talk about 'the overwhelming weight of international opinion'" in their opinions (quoting Roper v. Simmons, 543 U.S. 551, 578 (2005))).

[146] Waldron, *supra* note 145, at 138.

[147] *Id.* at 143–44.

debate on capital punishment or prisoners' bodily privacy, courts can find useful ideas in norms with more widespread backing than merely those from domestic authorities.

An additional reason why looking to the international norm may prove more persuasive is because the nature of the problem—the vagaries of the Fourth Amendment—itself beckons such a solution. Many areas of American law, for varying reasons, suffer from doctrinal uncertainty, but the Fourth Amendment is unique because the right to bodily privacy is globally recognized. The fundamental right of bodily privacy is therefore best understood within a global context. In this manner, the Fourth Amendment is like the Eighth Amendment, which the Supreme Court has noted also concerns "certain fundamental rights" whose understanding "by other nations and peoples . . . underscores the centrality of those same rights within our own heritage of freedom."[148] Scholars have argued that as an amendment concerning fundamental rights, standards under the Eighth Amendment "should not merely mirror the subjective views of judges, but should be based on objective factors as developed by human rights theorists and organizations."[149] Other scholars have utilized international norms when interpreting amendments related to other fundamental rights, such as equal protection and substantive due process,[150] as well as other constitutional features, including takings, eminent domain, just compensation, involuntary servitude, and procedural due process.[151]

Moreover, like the Fourth Amendment, the Eighth Amendment has suffered from inconsistent application, which has led multiple scholars to suggest that international norms may introduce uniformity into the analysis.[152] Such an international outlook is appropriate because, in the words of former Chief Justice Earl Warren writing for a plurality of the Court,

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[148] Roper v. Simmons, 543 U.S. 551, 578 (2005).

[149] Chung, *supra* note 42, at 2395; *see also* Miller, *supra* note 42, at 171 ("Because the Eighth Amendment was meant to be dynamic[,] . . . the courts . . . should extend the prohibition against 'cruel and unusual punishments' to include any and all definitions provided by the international community."); Dick, *supra* note 42, at 317 (according to the Court, "the Eighth Amendment must draw its meaning from the evolving standards of decency in maturing societies[,] . . . . [so] the deprivation of prison programs arguably violates the Eighth Amendment").

[150] *See* Glensy, *supra* note 39, at 241–43; Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 20 (1983).

[151] *See* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 63–87 (2006).

[152] *See, e.g.*, Dick, *supra* note 42, at 317 (arguing "[t]he inconsistent application of the Eighth Amendment is in itself evidence that a reevaluation of the current standards is necessary" and urging courts to "develop a standard more consistent with today's international norms on penal justice"); Coppola, *supra* note 47, at 224 (noting an absence of domestic "jurisprudence on duration limits for solitary confinement").

"[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[153] In determining these standards, "'the climate of international opinion concerning the acceptability of a particular punishment' is an additional consideration which is 'not irrelevant'" to the Court's inquiry.[154] The Court has therefore "recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual."[155]

The Fourth Amendment fits into the above pattern in that its interpretation is served by using international norms. First, like the Eighth Amendment, the Fourth Amendment concerns a fundamental right with historical roots—bodily privacy,[156] which, like the bar against cruel and unsual punishment, similarly concerns "nothing less than the dignity of man."[157] Where this dignity is concerned, the Justices have supported looking toward international sources because "there's . . . some underlying common shared idea . . . [and] unified concept of what human dignity means."[158] With regard to concepts like cruel and unusual punishment and bodily privacy, "[t]he United States has never been a hermetically sealed legal system" because such concepts "have long carried global meaning."[159] The Fourth Amendment's text does not simply limit its understanding to domestic law.[160] As such, it is better understood by looking at domestic sources (as other

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[153] Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

[154] Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982) (quoting Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977)).

[155] Thompson v. Oklahoma, 487 U.S. 815, 830 n.31 (1988); *see also* Chung, *supra* note 42, at 2353 ("International norms can assist the courts in gaining a more comprehensive understanding of the contemporary standard of decency, an essential element in assessing Eighth Amendment claims."). In *Thompson*, the Court held "that the Eighth and Fourteenth Amendments prohibit the execution of a person who was" fewer than sixteen years old at the time of the crime. 487 U.S. at 838.

[156] *See, e.g.*, Winston v. Lee, 470 U.S. 753, 760 (1985) (noting that the Fourth Amendment's main purpose is to "protect personal privacy and dignity against unwarranted intrusion by the State" (quoting Schmerber v. California, 384 U.S. 757, 767 (1966))); Rochin v. California, 342 U.S. 165, 169 (1952) (finding that evidence obtained by pumping a suspect's stomach was inadmissible under the Fourteenth Amendment because it violated notions of human dignity among "English-speaking peoples" (quoting Malinski v. New York, 324 U.S. 401, 416–17 (1945))).

[157] *Trop*, 356 U.S. at 100 (using international materials to determine the contours of the Eighth Amendment).

[158] Jeffrey Toobin, *Swing Shift*, NEW YORKER (Sept. 12, 2005), https://www.newyorker.com/magazine/2005/09/12/swing-shift [https://perma.cc/UWH2-BF9V] (quoting Justice Anthony Kennedy).

[159] *See* Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 47 (2004).

[160] *See* James I. Pearce, *International Materials and the Eighth Amendment: Some Thoughts on Method After* Graham v. Florida, 21 DUKE J. COMPAR. & INT'L L. 235, 240 (2010) (noting the same for the Eighth Amendment).

scholars have proposed) as well as international norms.[161] Second, the Fourth Amendment too suffers from inconsistent application, as detailed in Part I.

Accordingly, this Note proposes using the Supreme Court's tried and tested methodology of referencing international norms in interpreting the Eighth Amendment to guide the application of the Fourth Amendment in prisons. The lifting of a tool of constitutional interpretation from one jurisprudential sphere to another to help clarify doctrinal ambiguities is not unprecedented. Aptly termed "constitutional borrowing" by Professors Nelson Tebbe and Robert L. Tsai, such a practice is both legitimate and common, used by judges to "import[] doctrines, rationales, tropes, or other legal elements from one area of constitutional law into another for persuasive ends"[162] and "to take advantage of accumulated wisdom."[163] In particular, where the attitude of various authorities has coalesced around a particular standard, the Court has used constitutional borrowing to interpret a constitutional provision in line with such a standard.[164] An example of this occurred in the 1980s, when then-Attorney General William French Smith's Task Force on Violent Crime advocated for the inclusion of a "good faith" exception to the Fourth Amendment exclusionary rule and Congress even debated changing the rule through legislative means.[165] The Court adopted this view a few years later in *United States v. Leon*,[166] in which it borrowed the idea of a "good faith" defense in the form of qualified immunity from constitutional tort law and imported it into Fourth Amendment jurisprudence to create the exception.[167] Similarly, here, as noted by Professor Donahoe,[168] domestic authorities have coalesced around the reasonable suspicion standard.[169] The Court would thus be well-advised to use the international-norm-focused methodology it has employed for decades in Eighth Amendment jurisprudence[170] to reach a similar result in the arena of Fourth Amendment debate.

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[161] *Id.* (arguing that the Eighth Amendment's "deep historical resonance[] arguably envisions a more expansive construction" for it).

[162] Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 461 (2010).

[163] *Id.* at 467.

[164] *See* Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 694–95 (2011).

[165] *Id.*

[166] 468 U.S. 897, 919–25 (1984).

[167] Laurin, *supra* note 164, at 672.

[168] Donahoe, *supra* note 123, at 583–84.

[169] *See id.*

[170] *See infra* notes 186–196 and accompanying text (listing where the Court has done so in Eighth Amendment cases).

This Part has shown that previously proposed solutions favoring the adoption of a reasonable suspicion standard may not ultimately persuade the Court through rationales grounded in domestic law. By contrast, looking to international consensus bolsters arguments in favor of a reasonable suspicion standard because it reflects the agreement of nations and experts. In tandem with other scholars' rationales, it makes a stronger case for requiring individualized, reasonable suspicion before conducting a strip search. This Part has additionally established that the Fourth Amendment's inexorable connection to a fundamental right (here, bodily privacy) and inconsistent application make it akin to the Eighth Amendment, which both the Court and scholars have understood with reference to international norms. The Court should thus import its international-norm-focused interpretation of the Eighth Amendment to the Fourth Amendment to similarly determine its contours. The next Part explores this novel international-norm-focused solution for the Fourth Amendment.

III. AN INTERNATIONAL HUMAN-RIGHTS SOLUTION

This Part begins by identifying why courts should look to international law—specifically international customary law—to resolve the current domestic legal uncertainty surrounding prisoners' rights to bodily privacy. It then briefly recounts the history of U.S. courts, including the Supreme Court, referencing and relying on international customary law in cases concerning human rights. In particular, this Part focuses on the Court's use of international customary law to interpret the Eighth Amendment and proposes using the same approach for the Fourth Amendment. This Part then addresses common counterarguments against the use of international customary law in domestic jurisprudence, including concerns that it will lead to an imposition of foreign values, curtail rights guaranteed by the Constitution, and weaken the legitimacy of the judiciary's decision-making. Finally, this Part describes the proposal to use the SMRs to guide the Court's interpretation of the Fourth Amendment as applied to prisoners' rights to bodily privacy and explores how this proposal would work in practice.

A. Using International Customary Law as a Tool of U.S. Constitutional Interpretation

To resolve the uncertainty surrounding the extent to which the Fourth Amendment protects prisoners' bodily privacy, this Note proposes looking to standards of international law. International law consists of both treaties

and customary law.[171] The former, when unratified, are unenforceable in the United States.[172] International customary law, however, can be applied without ratification because it represents the settled consensus among nations.[173] The norms do not, by themselves, create their own judicially enforceable private rights,[174] but they are persuasive authority for federal courts. Resolutions relating to human rights adopted by international organizations, such as the United Nations, are an example of international customary law.[175]

Courts have had difficulty ruling consistently on the constitutionality of prisoner strip searches because the Fourth Amendment right to bodily privacy is not clearly defined. The narrow holdings of *Bell* and *Florence* have left lower courts without direction, producing a maze of case law with inconsistent holdings,[176] and previously proposed solutions relying only on domestic sources may not carry enough weight.[177] Representing the consensus of nations, however, an international resolution responds to a "constitutional cacophony"[178] with a unified response. Such a response is the informed conclusion of knowledgeable bodies well versed in cross-cultural perspectives and therefore "preferable to the *ad hoc* articulation of values by

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[171] *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) (explaining the implications of international law in the United States).

[172] Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71, 110 (2000). Additionally, the United States has ratified only a few international human-rights treaties, and the few it has ratified require little by way of obligations. Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53, 62 (1990). Even when ratified, human-rights treaties are rarely found to be enforceable without enabling legislation from Congress and thus most human-rights treaties have no place in court. *Id.*

[173] Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1557 (1984) (arguing that international customary law, unlike treaties, is self-executing into domestic jurisprudence); *see also* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) ("When the *United States* declared their independence, they were bound to receive the law of nations.").

[174] *See* Princz v. Fed. Republic of Ger., 26 F.3d 1166, 1174–75 n.1 (D.C. Cir. 1994) ("While it is true that 'international law is part of our law,' it is also our law that a federal court is not competent to hear a claim arising under international law absent a statute granting such jurisdiction." (quoting The Paquete Habana, 175 U.S. 677, 700 (1900))).

[175] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 n.2.

[176] *See* Robin Lee Fenton, *The Constitutionality of Policies Requiring Strip Searches of All Misdemeanants and Minor Traffic Offenders*, 54 U. CIN. L. REV. 175, 176, 178 (1985) (noting that the *Bell* balancing test has led to doctrinal uncertainty and produced inconsistent holdings); Helmer, *supra* note 8, at 258 ("This ad hoc approach [of balancing] provides little guidance."); *see also supra* Sections I.B, II.A.

[177] *See supra* Part II.

[178] *See generally* Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1337 (2012) (analyzing circuit splits in Fourth Amendment law).

an individual judge," particularly when it comes to an issue as important as bodily privacy.[179] Where domestic jurisprudence has failed to resolve the debate, international law "expands the horizon and the interpretive field of vision" to "enrich[] the options available."[180] As persuasive authority representing the law of nations, an international resolution prevents judges from ruling in a vacuum and instead compels them to compare their decisions with those of an international body, such as the United Nations.[181] Thus, it is advisable for courts to use and apply international norms to resolve domestic disputes.[182]

There is a centuries-old precedent of referencing international customary law in domestic disputes. The Court's decisions from the late eighteenth and early nineteenth centuries consistently acknowledge and refer to international customary law.[183] At the turn of the twentieth century, the Court articulated the principle that international customary law is "part of our law."[184] Since then, the modern Court has repeatedly referenced international customary law in its opinions.[185] An example of this approach

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[179] Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 88 (1992).

[180] AHARON BARAK, THE JUDGE IN A DEMOCRACY 197 (2006).

[181] Glensy, *supra* note 39, at 223–24.

[182] *See, e.g.*, Waldron, *supra* note 145, at 131–32, 146 (arguing that, because international norms represent the settled consensus of nations on a matter, U.S. courts should draw upon them to resolve close questions on matters of penal law).

[183] *See, e.g.*, The Commercen, 14 U.S. (1 Wheat.) 382, 387–88 (1816); Brown v. United States, 12 U.S. (8 Cranch) 110, 128 (1814); *id.* at 139, 145, 147 (Story, J., dissenting); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 224, 229 (opinion of Chase, J.); *id.* at 269 (opinion of Iredell, J.); *id.* at 281 (opinion of Wilson, J.).

[184] The Paquete Habana, 175 U.S. 677, 700 (1900). In this case, the Court held that it was unlawful under the law of nations for American squadrons to seize fishing vessels as prizes of war. *Id.* at 714. Though this rule was not contained in any treaty or statute, it was reflective of the international consensus and therefore courts were to take notice of the rule in the United States. *Id.* This case was not, however, the first mention of such international consensus as persuasive legal authority. Over one hundred years prior, Chief Justice John Jay argued that "the *United States* had, by taking a place among the nations of the earth, become amenable to the laws of nations." Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793); *see also* The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (referencing the persuasive weight of the "law of nations"). *But see* Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on* Atkins *and* Lawrence, 98 AM. J. INT'L L. 69, 71–72 (2004) (arguing the Court's "scattered" appeals over time to international law have little precedential value); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 63 (2004) (arguing that international law "is not our protean law" and that "[t]he status of international law remains subconstitutional").

[185] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 576–77 (2003) (noting that Texas's ban on sodomy clashes with the laws of most Western nations and the decisions of the European Court of Human Rights, and that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries"); Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (Ginsburg, J.,

is *Trop v. Dulles*, where the Court found loss of nationality for military desertion to be a cruel and unusual punishment in violation of the Eighth Amendment.[186] The Court was persuaded that the Eighth Amendment forbids such a punishment because international consensus holds that loss of nationality is an unacceptable consequence for the commission of a crime.[187] The Court noted that the Eighth Amendment aims to protect human dignity, an amorphous concept incapable of precise definition.[188] Because it is so broad-reaching, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[189] International custom can thus help to define the Amendment's parameters.

Since *Trop*, the Court has continuously looked to the law of nations to further rule in the Eighth Amendment context.[190] The Court has referenced international law when outlawing the death penalty for juvenile defendants[191] and in part relied on the fact that sentencing intellectually disabled criminals to death is "overwhelmingly disapproved" of by "the world community"[192] to rule likewise in the domestic context.[193] Chief Justice William Rehnquist and Justice Antonin Scalia voiced consistent opposition to reliance on international norms, usually in dissent,[194] but occasionally as part of a

concurring) (referencing the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women); Gratz v. Bollinger, 539 U.S. 244, 302 (2003) (Ginsburg, J., dissenting) (relying on "[c]ontemporary human rights documents" such as United Nations-initiated Conventions on the Elimination of All Forms of Racial Discrimination and on the Elimination of All Forms of Discrimination Against Women to help create legal standards for racial equality).

[186] 356 U.S. 86, 103 (1957) (plurality opinion).

[187] *Id.* at 102.

[188] *Id.* at 100.

[189] *Id.* at 101.

[190] *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (holding that the death penalty was not an appropriate punishment for raping an adult woman and noting that a minority of major world nations still allow the death penalty for rape); Enmund v. Florida, 458 U.S. 782, 796–97 n.22 (1982) (observing that the Commonwealth countries and continental Europe had outlawed the death penalty for felony murder before holding likewise in the domestic context).

[191] Thompson v. Oklahoma, 487 U.S. 815, 830 n.31 (1988) (plurality opinion) (noting "the relevance of the views of the international community in determining whether a punishment is cruel and unusual").

[192] Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (holding that sentencing intellectually disabled criminals to death violates the Eighth Amendment).

[193] *Id.* at 321.

[194] *See* Roper v. Simmons, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) ("More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."); *Atkins*, 536 U.S. at 324–25 (Rehnquist, C.J., dissenting) ("I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination."). For further discussion of counterarguments to using international law, see *infra* Section III.B.

plurality.[195] By the early 2000s, however, any opposition was firmly relegated to the background,[196] and the use of international law even moved beyond the Eighth Amendment to include Fourteenth Amendment cases.[197]

The constitutional provisions the Court has used to interpret international customary law share one quality: they concern ideas of liberty and fundamental justice "that transcend[] borders" and are therefore amenable to interpretation in light of international norms.[198] As established in Part II, the Fourth Amendment shares these qualities—like the Eighth and Fourteenth Amendments, it aims to protect human dignity and is far-reaching in its protections.[199] The precise extent of these protections, however, is debatable. Thus, where the contours of Fourth Amendment rights have proven uncertain as applied to prisoners, the "customs and usages of civilized nations"[200] can offer some guidance.

B. Counterarguments to the Use of International Customary Law in Domestic Jurisprudence

This Section addresses and refutes counterarguments to applying international norms in domestic constitutional disputes. First, some scholars and jurists fear that being guided by international custom will lead to an imposition of foreign values in the domestic context.[201] This fear, however,

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[195] *E.g.*, Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (plurality opinion of Scalia, J.) (finding that, in interpreting the meaning of the Eighth Amendment, "it is *American* conceptions of decency that are dispositive"). In other words, what matters is what Americans think is "cruel and unusual punishment," not what the consensus of nations has determined.

[196] *Roper*, 543 U.S. at 575–76, 578 (relying on human-rights treaties, such as the United Nations Convention on the Rights of the Child, as well as the numerical minority of countries in the world who still execute juvenile offenders, as nonbinding but "instructive" authority to conclude that the death penalty for juveniles ran afoul of the Eighth Amendment). Justice Scalia once again protested this in dissent. *Id.* at 622–628 (Scalia, J., dissenting).

[197] Lawrence v. Texas, 539 U.S. 558, 573, 576–77 (2003) (noting Texas's ban on sodomy clashes with that of most Western nations and decisions of the European Court of Human Rights before striking down the ban under the Due Process Clause of the Fourteenth Amendment). Justice Scalia, in dissent, responded that "[c]onstitutional entitlements do not spring into existence . . . because *foreign nations* decriminalize conduct." *Id.* at 598 (Scalia, J., dissenting).

[198] Rex D. Glensy, *Which Countries Count?:* Lawrence v. Texas *and the Selection of Foreign Persuasive Authority*, 45 VA. J. INT'L L. 357, 382 (2005).

[199] *See* cases cited *supra* notes 156 (regarding the Fourth Amendment), 190 (regarding the Eighth Amendment).

[200] The Paquete Habana, 175 U.S. 677, 700 (1900).

[201] *See* Alford, *supra* note 184, at 58 (quoting Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1129 (2002)) (arguing that such a practice can allow the "'global opinions of humankind' . . . to thwart the domestic opinions of Americans"); Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT'L J. CONST. L. 269, 293–94 (2003) (contending that the use of international law to help

is inapposite because this Note does not argue (or even contemplate as feasible) that U.S. courts should listen to foreign guidance where such guidance clashes with settled domestic jurisprudence.[202] Similarly, in response to the concern that the use of international law may lead U.S. courts to eliminate certain rights under domestic law or limit the freedom of American citizens,[203] this Note emphasizes that such an outcome is not possible under the U.S. Constitution, which "prevents the Court from taking away rights simply because other countries do not afford their citizens the same rights."[204]

International law does not preside over or replace domestic law, but rather serves as a means of confirmation for domestic opinions concerning human rights. This more limited use of international customary law is favored by the Court, which has found that "the opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[205] This Note does not agree with the view that international customary law is binding upon all nations or adds to some sort of federal common law.[206] International norms are not a source of rights in themselves, but rather tools of interpretation for domestic constitutional provisions.[207] International materials serve to

interpret the Constitution subverts the authority of the unique American constitutional culture, as fashioned by domestic debate); *see also Roper,* 543 U.S. at 622 (Scalia, J., dissenting) (arguing that the use of international law in domestic jurisprudence renders "essentially irrelevant" American opinions regarding the law).

[202] *See* Glensy, *supra* note 39, at 254 (discussing when international law is persuasive). An example of this principle is found in Section III.C.1, where this Note interprets the SMRs' guidance that strip searches should be conducted only where "absolutely necessary" as pointing to reasonable suspicion, not probable cause, even if that is closer to "absolutely necessary," because *Bell* already settled that probable cause is not required to perform a strip search.

[203] *See* Alford, *supra* note 184, at 69 (noting that adopting other countries' less generous human-rights standards may lead to a curtailment of domestic liberties, "a prospect [that] should give one pause before embarking on the project of using international sources to interpret the Constitution"); Ramsey, *supra* note 184, at 81 (contending that the use of international customary law "requires that U.S. rights be cut back in areas where the United States is an outlier, and these instances probably far outnumber cases where international materials favor expanding rights").

[204] Jessica Mishali, Roper v. Simmons—*Supreme Court's Reliance on International Law in Constitutional Decision-Making*, 21 TOURO L. REV. 1299, 1313 (2006).

[205] *Roper*, 543 U.S. at 578. The Court added that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." *Id.*

[206] *See* Christenson, *supra* note 150, at 20 (finding theories regarding the "incorporation" of international law into domestic law weaker than other arguments and vulnerable to easy rejection by courts).

[207] *Id.*

confirm the Court's conclusions and offer a comparative tool by which to illuminate their decisions on matters of fundamental importance, such as basic human rights.[208] Looking to international custom contextualizes the Court's decisions regarding constitutional rights and helps to add weight to its conclusions where there may be uncertainty.[209] Used in tandem with other forms of persuasive authority, such as the practices of federal and state authorities, historical practices, and social-science research, international custom can tip the balance in favor of one particular view and afford it greater weight. This Note argues for precisely such a limited use of international law in the domestic sphere, only applying it where it is directly applicable with "due regard for . . . purpose and function in the constitutional design."[210] Specifically, this Note only uses international law where there is uncertainty regarding a matter of fundamental human right coupled with a strong and definitive international consensus on the protection of that right in prisons.

Second, there is a concern that allowing international norms to guide domestic interpretation will lessen the legitimacy of the domestic courts by sullying their decision-making with foreign sources.[211] Such a view, however, ignores the fact that aligning with the international consensus *promotes* legitimacy, rather than undermining it.[212] The normative value of having the United States take into account the consensus of the majority of nations cannot be understated. Currently, the United States' promotion of human rights abroad but failure to adopt widely accepted human-rights standards at home is an act of hypocrisy that reduces its credibility.[213] To ignore international law risks making the United States a legal outlier in the

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[208] *Id.* at 5.

[209] *Id.* at 17 ("[International] norms supply a context, guide interpretation and fill gaps in the positive law.").

[210] *See Roper*, 543 U.S. at 560.

[211] *See* Rosenkrantz, *supra* note 201, at 294 (arguing that the use of "foreign law deprives the courts that refer to it of the . . . finality that their rulings must provoke in order to be seen as the last word in our social confrontations"); LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 29–30 (1968).

[212] Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL'Y 653, 661 (2009) (arguing that the United States, like every other nation, "needs to be accepted as legitimate within the international system, and that too might require a broader role for foreign law in constitutional interpretation").

[213] Dick, *supra* note 42, at 321 (arguing that the United States talks "out of both sides of its mouth" about human rights (quoting Emily A. Whitney, *Correctional Rehabilitation Programs and the Adoption of International Standards: How the United States Can Reduce Recidivism and Promote the National Interest*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 777, 782 (2009))).

world, and not in a positive sense.[214] The United States should "not turn completely inward in judicial attitude in ways that deny the rich traditions of the rule of law beyond our borders."[215] Rather, domestic courts should resist irrational fears about takeover from foreign law and use international custom as a tool to strengthen their holdings.

C. Using the SMRs to Guide the Application of the Fourth Amendment in Prisons

Building from the robust tradition of analyzing the Constitution in light of the law of nations, this Note proposes that courts should look to international customary law to help interpret the Fourth Amendment and clarify its vagaries. The SMRs[216]—a key document of international customary law[217]—can help define the right to bodily privacy as applied to prisoners under the Fourth Amendment. The SMRs were adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955[218] and have been enormously influential, aiding in the creation of model penal codes and criminal-justice standards in over 100 countries.[219] The United States incorporated the SMRs' guidance into the 1962 Model Penal Code. States including Pennsylvania, South Carolina, Ohio, Minnesota, Connecticut, and Illinois then used the SMRs as a guide when passing a "Bill of Rights" for prisoners.[220] Decades later, the UN revised the rules to bring them into accordance with changing human-rights standards and social-science research on prison conditions.[221] The updated rules passed following the consensus of the UN member states, including the United States.[222]

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[214] Chung, *supra* note 42, at 2399 (suggesting that the United States should take a more active role on the world stage by implementing international human-rights standards within its own justice system).

[215] Christenson, *supra* note 150, at 35.

[216] G.A. Res. 70/175, *supra* note 38.

[217] *See* HUMAN RIGHTS SOURCEBOOK, *supra* note 39, at 115; *see also The Standard Minimum Rules for the Treatment of Prisoners in the Light of Recent Developments in the Correctional Field*, ¶ 50, Working Paper by the Secretariat, 4 U.N. Congress on the Prevention of Crime and the Treatment of Offenders, 1, 13–18, U.N. Doc. A/CONF. 43/3 (1970), *reprinted in* RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 296–300 (3d ed. 1995) (contending that the SMRs have "effective local judicial recognition" around the world because of their status as the recognized international standards).

[218] G.A. Res. 70/175, *supra* note 38, at 1.

[219] *United Nations Prison-Related Standards and Norms*, U.N. OFF. ON DRUGS & CRIME, http://www.unodc.org/newsletter/pt/perspectives/no02/page004a.html [https://perma.cc/7YBZ-2SWR].

[220] Daniel L. Skoler, *World Implementation of the United Nations Standard Minimum Rules for Treatment of Prisoners*, 10 J. INT'L L. & ECON. 453, 462 (1975).

[221] Drakulevski, *supra* note 142, at 2.

[222] Philipp Meissner, *Tom Lantos Human Rights Commission Hearing: Advancing Human Rights Through International Prison Reform*, U.N. OFF. ON DRUGS & CRIME (Jan. 18, 2018),

Rewritten in consultation with civil-society advocates and correctional professionals,[223] the rules have already been used by countries to revise their laws regarding prison conditions.[224] Legal advocates in Canada,[225] Argentina,[226] and Thailand[227] have already employed the rules in court cases concerning prison conditions.

The SMRs have also been enthusiastically applied in the domestic context, most consistently regarding the constitutional treatment of prisoners under the Eighth Amendment. The Supreme Court has called the SMRs an exemplar of the "contemporary standards of decency" regarding the medical treatment of prisoners.[228] The Sixth Circuit has relied on them to find that shackling pregnant detainees while in labor "offends contemporary standards of human decency such that the practice violates the Eighth Amendment's prohibition against the 'unnecessary and wanton infliction of pain.'"[229] The Second Circuit has likewise found that the SMRs are "one of many manifestations of 'contemporary standards of decency'" and has used

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https://humanrightscommission.house.gov/sites/humanrightscommission.house.gov/files/documents/Philipp%20Meissner%20-%20UNODC.pdf [https://perma.cc/9JSM-WXBK].

[223] Peirce, *supra* note 142, at 291.

[224] *Id.* at 265 (citing examples of Argentina and Thailand).

[225] *See* Corp. of the Canadian Civ. Liberties Ass'n v. Her Majesty the Queen, 2017 ONSC 7491, para. 53 (Can. Ont. Sup. Ct. J.); B.C. Civ. Liberties Ass'n v. Canada (Att'y Gen.), 2018 BCSC 62, para. 57 (Can. B.C.). Both cases found that the revised SMRs are relevant to understanding domestic Canadian law on prisoners' rights. Peirce, *supra* note 142, at 265 n.10.

[226] *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 3/5/2005, "Verbitsky, Horacio / habeas corpus," Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2005-328-1146). Argentina has long used the SMRs as a model for their prison-condition legislation, with the Argentinian Supreme Court holding in 2005 that the SMRs define the standard of dignified treatment for prisoners under Article 18 of the Constitution. Ministerio Público Fiscal, "Reglas Mandela": Reglas Mínimas de Naciones Unidas para el Tratamiento de los Reclusos, U.N. Doc. E/CN.15/L.6/Rev.1 (2015).

[227] Thailand is using the revised SMRs fully in one prison, Thonburi Remand Prison, and will use it to define the new standards in new laws passed about prisoners. Thongchai, *Implementation of the Nelson Mandela Rules in Thailand*, THAI. CRIMINOLOGY & CORR. (July 18, 2016), http://thaicriminology.com/implementation-of-the-nelson-mandela-rules-in-thailand.html [https://perma.cc/S9RW-MPSQ].

[228] Estelle v. Gamble, 429 U.S. 97, 103 (1976) (citing the SMRs). In this case, the Court held that "deliberate indifference to serious medical needs of prisoners . . . [is] proscribed by the Eighth Amendment." *Id.* at 104. The Court found such indifference to contradict agreed-upon standards of decency like those found in the SMRs. *Id.* at 103 n.8.

[229] Villegas v. Metro. Gov't of Nashville, 709 F.3d 563, 574 (6th Cir. 2013) (quoting *Estelle*, 429 U.S. at 104). "In its *Standard Minimum Rules for the Treatment of Prisoners*, the United Nations stated that restraints including handcuffs and leg irons should only be used '[a]s a precaution against escape,' '[o]n medical grounds by direction of the medical officer,' or 'if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property.'" *Id.* at 572–73 (quoting E.S.C. Res. 663 C (XXIV) (July 31, 1957), 2076 (LXII) (May 13, 1977), at Rule 33).

the SMRs to affirm a lower court holding that placing inmates in overcrowded prison conditions violates the Eighth Amendment.[230] Beyond the Eighth Amendment, the Second Circuit has also used the SMRs to support the finding that promoting basic prison hygiene and health is a duty of prison authorities.[231] Numerous district courts have also referenced the SMRs to allow prisoners' claims regarding unconstitutional treatment to proceed[232] and to review the use of solitary confinement in prison.[233] Another court referenced the SMRs to provide injunctive relief improving the recreational programming available in a county jail.[234] Finally, state supreme courts have used the SMRs to protect prisoners from cross-gender pat-down searches,[235] review the due process requirements in prison disciplinary proceedings,[236] and determine acceptable dimensions for prison cell size in the absence of any cognizable federal or state standard.[237]

Because the SMRs represent the international consensus on strip-searching prisoners,[238] the document can guide the domestic constitutional conversation forward after decades of stagnation. Rule 52 of the revised SMRs is the most on point. The rule clearly defines prisoners' rights to bodily privacy in relation to strip searches. In relevant part, it reads: "intrusive searches, including strip and body cavity searches, should be undertaken only if absolutely necessary. Prison administrations shall be encouraged to develop and use appropriate alternatives to intrusive searches.

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[230] Lareau v. Manson, 651 F.2d 96, 107 (2d Cir. 1981) (quoting *Estelle*, 429 U.S. at 103 n.8); *see also* Lareau v. Manson, 507 F. Supp. 1177, 1193–94 (D. Conn. 1980) (finding that "institutionalized overcrowding" of prisoners violates the Eighth Amendment), *aff'd in part and modified and remanded in part*, 651 F.2d 96 (2d Cir. 1981).

[231] Morgan v. LaVallee, 526 F.2d 221, 225–26 n.8 (2d Cir. 1975).

[232] Williams v. Coughlin, 875 F. Supp. 1004, 1012–13 (W.D.N.Y. 1995) (listing cases).

[233] United States v. D.W., 198 F. Supp. 3d 18, 143 (E.D.N.Y. 2016) ("Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review[.]" (internal quotation marks omitted) (quoting E.S.C. Res. 2015/20, at 17 (July 21, 2015)); *see also* Peoples v. Annucci, 180 F. Supp. 3d 294, 299 (S.D.N.Y. 2016) (quoting the same provision).

[234] Jones v. Wittenberg, 440 F. Supp. 60, 149 (N.D. Ohio 1977).

[235] Sterling v. Cupp, 625 P.2d 123, 131 (Or. 1981) (en banc).

[236] Avant v. Clifford, 341 A.2d 629, 637–38 (N.J. 1975).

[237] Crain v. Bordenkircher, 342 S.E.2d 422, 446, 446 n.16 (W. Va. 1986).

[238] In its own words, the revised SMRs give voice to "the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principles and practice in the treatment of prisoners." G.A. Res. 70/175, *supra* note 38, at 7. At minimum, the revised SMRs "confirm an array of binding norms observed across UN member states." Kasey McCall-Smith, *United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)*, 55 INT'L LEGAL MATERIALS 1180, 1182 (2016); *see also* Dick, *supra* note 42, at 318 ("There is a widespread acceptance of the Standard Minimum Rules on an international scale, which strengthens the proposition that these are forming recognizable and enforceable norms under [customary international law].").

Intrusive searches shall be conducted in private."[239] Lifting from Rule 52, there are three dimensions to protecting the right to bodily privacy: (1) prisons should require reasonable suspicion before conducting a search (which is how this Note interprets "absolutely necessary"); (2) prisons should use alternatives to strip searches whenever possible; and (3) prisons should conduct all nonemergency strip searches in private. All of these requirements can be feasibly applied in the domestic context and have local precedent.

1. Requiring Reasonable Suspicion Before Conducting a Strip Search

First, strip searches should be conducted only if absolutely necessary. This Note argues that, as applied in the domestic context, Rule 52 would require reasonable suspicion. The SMRs posit strips searches as an exception, not a daily practice,[240] and therefore limit their use to where "absolutely necessary." Though necessity could be read as requiring probable cause, such a conclusion would be inconsistent with *Bell*, where the Court explicitly held that strip searches could be constitutionally conducted in the absence of probable cause.[241] Furthermore, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has also read Rule 52's "absolutely necessary" language to require individualized suspicion and has mandated individualized suspicion in its own standards.[242] As such, reasonable suspicion is a plausible approximation of what "absolutely necessary" means in practice. This Note is not arguing that reasonable suspicion is per se interchangeable with absolute necessity, or that such a rendering of reasonable suspicion is appropriate in nonprison strip-search contexts, such as searches incident to arrest. It is merely stating that, in applying the SMRs to the United States, reasonable suspicion translates the necessity contemplated by the international consensus and imports it to a domestic context without running afoul of prior Supreme Court precedent in *Bell*.

Ending the debate over the level of cause by requiring reasonable suspicion would not be particularly earth-shattering—such a standard is already used by other domestic authorities that conduct strip searches, such

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[239] G.A. Res. 70/175, *supra* note 38, at 18–19.

[240] *See supra* note 239 and accompanying text.

[241] Bell v. Wolfish, 441 U.S. 520, 560 (1979).

[242] COUNCIL OF EUR., REPORT TO THE GOVERNMENT OF THE NETHERLANDS ON THE VISIT TO THE NETHERLANDS CARRIED OUT BY THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CPT) FROM 2 TO 13 MAY 2016, at 46 (2016), https://rm.coe.int/16806ebb7c [https://perma.cc/TXU6-6UTR].

as Immigration Customs and Enforcement,[243] the U.S. Marshals Service,[244] and others.[245] The American Correctional Association, in an expert opinion,[246] along with the American Jail Association, National Sheriffs' Association, National Institute of Corrections of the Department of Justice, and Federal Bureau of Prisons, has also come out against conducting strip searches in the absence of reasonable suspicion.[247] Furthermore, at least sixteen states forbid conducting strip searches of minor offenders in the absence of reasonable suspicion.[248] That other authorities hold this standard—as well as the fact that many lower courts have argued for it—

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[243] *See* ICE/DRO DETENTION STANDARD: SEARCHES OF DETAINEES 1 (2008), http://www.ice.gov/doclib/dro/detention-standards/pdf/searches_of_detainees.pdf [https://perma.cc/D987-DJBN]; ICE/DRO DETENTION STANDARD: ADMISSION AND RELEASE 4–5 (2008), https://www.ice.gov/doclib/dro/detention-standards/doc/admission_and_release.doc [https://perma.cc/3X4J-CSXD].

[244] *See* U.S. MARSHALS SERV., POLICY DIRECTIVE, PRISONER CUSTODY-BODY SEARCHES § 9.1(E)(3)(2010), https://web.archive.org/web/20120921011535/http://www.usmarshals.gov/foia/Directives-Policy/prisoner_ops/body_searches.pdf [https://perma.cc/VL9F-A3AG].

[245] The Bureau of Indian Affairs requires an even higher standard than reasonable suspicion to justify a strip search. BUREAU OF INDIAN AFFS., OFF. OF JUST. SERVS., THE DIRECTORATE OF OPERATIONS CORRECTIONS. HANDBOOK 211–12 (2012), https://govtribe.com/file/government-file/140a1619q0230-bia-ojs-corrections-handbook-5-31-12-04-dot-pdf [https://perma.cc/8S9P-FUEG].

[246] *See* Brown v. Plata, 563 U.S. 493, 540 (2011) ("[E]xpert opinion may be relevant when determining what is obtainable and what is acceptable in corrections philosophy.").

[247] AM. CORR. ASS'N, THE AMERICAN CORRECTIONAL ASSOCIATION (ACA) PERFORMANCE-BASED STANDARDS FOR ADULT LOCAL DETENTION FACILITIES 4-ALDF-2C-03 (4th ed. 2004); U.S. DEP'T OF JUST., FEDERAL PERFORMANCE-BASED DETENTION STANDARDS HANDBOOK § C.6 (2d ed. 2011), https://www.justice.gov/archive/ofdt/fpbds02232011.pdf [https://perma.cc/E4K6-LRRS]; ACA, CORE JAIL STANDARDS § 1-CORE-2C-02 (2010), http://correction.org/wp-content/uploads/2014/09/Core-Jail-Standards-as-printed-June-2010.pdf [https://perma.cc/8DLH-ZD5T]; MORRIS L. THIGPEN, LARRY SOLOMON, VIRGINIA A. HUTCHINSON & ALAN L. RICHARDSON, NAT'L INST. OF CORR., U.S. DEP'T OF JUST., RESOURCE GUIDE FOR JAIL ADMINISTRATORS 113 (2004), https://s3.amazonaws.com/static.nicic.gov/Library/020030.pdf [https://perma.cc/M6LB-RVCN]; MORRIS L. THIGPEN, LARRY SOLOMON, VIRGINIA A. HUTCHINSON & JIM T. BARBEE, NAT'L INST. OF CORR., U.S. DEP'T OF JUST., SHERRIFF'S GUIDE TO EFFECTIVE JAIL OPERATIONS 50 (2007), https://s3.amazonaws.com/static.nicic.gov/Library/021925.pdf [https://perma.cc/3YXV-4C2D].

[248] *See* CAL. PENAL CODE § 4030(f) (West 2020) (requiring reasonable suspicion); COLO. REV. STAT. § 16-3-405(1) (2020) (requiring reasonable belief); CONN. GEN. STAT. § 54-33l(a) (2012) (same); FLA. STAT. § 901.211(2) (2020) (requiring probable cause); 725 ILL. COMP. STAT. § 5/103-1(c) (2021) (requiring reasonable belief); IOWA CODE § 804.30 (2018) (requiring probable cause); KAN. STAT. ANN. § 22-2521(a) (2007) (same); MICH. COMP. LAWS § 764.25a(2) (2020) (requiring reasonable cause); MO. REV. STAT. § 544.193.2 (2011) (requiring probable cause); N.J. STAT. ANN. § 2A:161A-1(b) (2020) (same); OHIO REV. CODE. ANN. § 2933.32(B)(2) (West 2019–2020) (same); TENN. CODE ANN. § 40-7-119(b) (2020) (requiring reasonable belief); VA. CODE ANN. § 19.2-59.1(A) (2020) (requiring reasonable cause); WASH. REV. CODE ANN. § 10.79.130(1) (1986) (requiring reasonable suspicion or probable cause); 501 KY. ADMIN. REGS. 7:120(b) (2011) (requiring reasonable suspicion); 26-239-001 ME. CODE R. § II(1)(B) (LexisNexis 2020) (same).

means that such a standard is readily administrable by detention facilities.[249] Incorporating reasonable suspicion as part of the Fourth Amendment's application to strip searches would be consistent with *both* international and domestic authorities.

Reasonable suspicion can admittedly reproduce certain biases and perpetuate injustice. Because it is an inherently discretionary standard, reasonable suspicion can allow individual officers' prejudices to manifest as they make case-by-case assessments of whether to strip-search a prisoner.[250] Like searches conducted outside of prison, the impact can fall disproportionately on minorities.[251] For example, a study conducted over a year in a London police station found incidences of bias when tracking which arrestees officers viewed as being suspicious enough to strip-search—Afro-Caribbean detainees were twice as likely to be searched as their white counterparts, even when controlling for sex, age, and level of offense.[252]

Although conceding this downside to the reasonable suspicion standard, the potential for bias is not entirely unfettered. Reasonable suspicion requires that an official conducting a strip search "point to specific *objective* facts and rational inferences that they are entitled to draw from those facts in light of their experience."[253] As such, an official must offer some nondiscriminatory explanation for a search,[254] and, if he fails to, a prisoner can use the absence of an explanation as evidence of bias. Moreover, such a standard will lessen the number of searches conducted, which is

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[249] Professor Donahoe raised this argument concerning the feasibility of adopting a reasonability standard in her article, discussed earlier in this Note. *See* Donahoe, *supra* note 123, at 584; *see also supra* Part II.

[250] Indeed, the Third Circuit noted potential for abuse under reasonable suspicion as part of its rationale to uphold the blanket search in *Florence*. Florence v. Bd. of Chosen Freeholders, 621 F.3d 296, 310 (3d Cir. 2010), *aff'd*, 566 U.S. 318 (2012).

[251] Ha, *supra* note 22, at 2758 ("Research shows that giving police officers discretion to conduct strip searches may increase the chance of racial, gender, ethnic, or other forms of discrimination."); *see also* André Keeton, *Strip Searching in the Age of Colorblind Racism: The Disparate Impact of* Florence v. Board of Chosen Freeholders of the County of Burlington, 21 MICH. J. RACE & L. 55, 55–56 (2015) (noting that the Court's "phenomenal lapse" in the *Florence* holding disproportionately subjects minorities to harassment and humiliation at the hands of law enforcement).

[252] Tim Newburn, Michael Shiner & Stephanie Hayman, *Race, Crime and Injustice? Strip Search and the Treatment of Suspects in Custody*, 44 BRIT. J. CRIMINOLOGY 677, 689 (2004).

[253] Hunter v. Auger, 672 F.2d 668, 674 (8th Cir. 1982) (emphasis added).

[254] United States v. Afanador, 567 F.2d 1325, 1329 (5th Cir. 1978) (noting that a strip search was reasonable because it was based on the detailed testimony of a reliable informant); *Hunter*, 672 F.2d at 675 ("Mere physical proximity to or association with another individual suspected of smuggling activity does not provide the independent basis necessary for intruding on the privacy of the strip search candidate."); United States v. Himmelwright, 551 F.2d 991, 995 (5th Cir. 1977) (holding that merely matching a "profile" of a crime does not qualify as a reasonable suspicion justifying a strip search).

preferable to having this search happen to all detainees. Finally, even when bias manifests, the requirement to offer objective facts makes any discrimination more obvious, thus allowing plaintiffs to more easily file suit. At least with a uniform standard, victims of discrimination can more easily prove abnormal behavior deviating from the standard when bringing suit.

Additionally, to help control for these biases and avoid inconsistent, ad hoc decision-making, detention facilities could use checklists to guide officers through analyzing reasonable suspicion.[255] Such checklists are already in use in multiple jurisdictions[256] and consider factors such as "'(1) the crime charged, (2) the particular characteristics of the arrestee . . . (3) the circumstances of the arrest,' (4) the arrestee's criminal record, (5) the effect of placing the detainee in the general prison population, and (6) the safety concerns raised by the detainee."[257] The Los Angeles County Sheriff's Department, for instance, lists the appearance of the arrestee or inmate, her behavior throughout the arrest and/or booking process, and other conduct suggesting she has contraband on her person as types of specific, objective facts that justify reasonable suspicion.[258] A similar checklist from the Chapel Hill Police Department requires that officers satisfy one or more items before conducting a search; items include any information received from an informant suggesting the suspect is hiding evidence and the suspect's prior criminal history, though the manual emphasizes that prior history alone cannot justify a search.[259] When such checklists have only required officers to provide a rote list of generic reasons why they are choosing to search (such as in the case of stop and frisk), they have been less useful.[260] To successfully eradicate bias from an evaluation of reasonable suspicion, checklists should

[255] Donahoe, *supra* note 123, at 584 (noting the use of checklists in numerous jurisdictions to determine reasonable suspicion and suggesting that other jurisdictions adopt this practice).

[256] L.A. CNTY. SHERIFF'S DEP'T, CUSTODY DIVISION MANUAL 5-08/010.00 Searches (2020), http://pars.lasd.org/Viewer/Manuals/14249/Content/13305 [https://perma.cc/TQ7N-RAX5]; CHAPEL HILL POLICE DEP'T, POLICY MANUAL 215–16 (2020), https://www.townofchapelhill.org/home/showdocument?id=28619 [https://perma.cc/GV6K-U7GJ]; Brief of Current and Former Jail & Corrections Professionals as Amici Curiae in Support of Petitioner at 17–18, Florence v. Bd. of Chosen Freeholders, 566 U.S. 318 (2012) (No. 10-945) (noting the use of such a checklist among sheriffs in Indiana).

[257] Donahoe, *supra* note 123, at 584 (internal citations omitted) (quoting Weber v. Dell, 804 F.2d 796, 802 (2d Cir. 1986)).

[258] L.A. CNTY. SHERIFF'S DEP'T, *supra* note 256.

[259] CHAPEL HILL POLICE DEP'T, *supra* note 256, at 215–16.

[260] Floyd v. City of New York, 959 F. Supp. 2d 540, 581–82 (S.D.N.Y. 2013) (noting how one officer who conducted many stops checked the same four boxes on 99% of his documentation forms and how another who conducted stops all over the city and throughout the day checked both "High Crime Area" and "Time of Day" on 75% of his forms).

require officers to provide a narrative for the basis of reasonable suspicion.[261] The checklists mentioned above do so because they require more details and do not rely on vague or subjective judgments.

Real-life examples can further illustrate how the checklist factors are applied. For instance, applying factor (1), where a detainee has been charged with an inherently violent crime such as grand theft auto, the offense itself contributes to reasonable suspicion.[262] This factor alone cannot justify the search but must be considered in tandem with other factors such as whether the detainee will be placed in the general population.[263] Such a factor test can also lead prison officials to *not* conduct a search. For example, a detainee arrested for driving under the influence of drugs not expecting to be searched would likely not be concealing drug contraband in a body cavity.[264] Absent the presence of another factor, such as safety concerns, an official would thus not be justified in conducting a strip search of this detainee.[265]

2. Adopting Alternatives to Strip Searches

Second, prisons should develop and use appropriate alternatives to strip searches.[266] Reading the Fourth Amendment in light of Rule 52 delineates the extreme invasion of bodily privacy risked by strip searches and highlights why such an invasion should be the exception, rather than the rule. Alternatives to strip searches are available, effective, and already in use in domestic prisons. For example, body scanners can search a person's body for the presence of contraband in a less intrusive manner, and they already exist in certain detention facilities around the country.[267] In fact, SecurPass, a type of body scanner, can find weapons and drugs hidden deep within a

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[261] *See id.* at 559–60.

[262] Thompson v. City of Los Angeles, 885 F.2d 1439, 1447 (9th Cir. 1989).

[263] *Id.*

[264] Foote v. Spiegel, 118 F.3d 1416, 1426 (10th Cir. 1997).

[265] *Id.*

[266] Scholars have previously discussed this solution, though not based on the persuasive rationale of using international norms. *See* Fenton, *supra* note 176, at 188 (arguing for the use of "valid alternatives to blanket strip search policies" such as "an adequate patdown search [that] would reveal weapons that might be concealed, satisfying the primary safety concern of the government" and "the use of metal detectors, which would reveal any concealed weapons that the patdown did not reveal"); McMath, *supra* note 71, at 750 ("Body cavity searches are not justified if there exist alternative means such as closer supervision or metal detector searches that better insure prison security and intrude less on prisoners' rights."); Cosey, *supra* note 123, at 550 (noting the availability of alternatives to strip searches that can maintain safety while burdening prisoners' Fourth Amendment rights less).

[267] Elaine Pittman, *County Jails Deploy Whole-Body Scanners to Detect Hidden Weapons or Contraband*, GOV'T TECH. (Apr. 27, 2011), https://www.govtech.com/public-safety/County-Jails-Deploy-Whole-Body-Scanners.html [https://perma.cc/29TN-97GZ] (noting the use of body scanners at Illinois's Cook County Jail and Florida's Collier County Sheriff's Office).

body cavity, beyond what the human eye can locate in a strip search.[268] Not only is this alternative *more* effective at uncovering contraband than strip searches, it also costs around $125,000 per machine—a fraction of the millions[269] cumulatively paid out by cities and counties in after-the-fact litigation challenging the constitutionality of such searches.[270] Other alternatives that are already in use include pat-down searches, metal detectors, and the Body Orifice Screening System (BOSS) chair.[271] These too are more successful at finding metal objects inside a detainee's body orifices than a strip search.[272] That these alternatives exist in facilities across the country proves that they are easily adoptable and administrable. By adhering to the standards in the SMRs, jails would be encouraged to implement the use of these body scanners and other means of searching for contraband. These alternatives to an invasive and degrading strip search not only preserve prisoners' dignity, but also help law enforcement be more effective *and* avoid taxpayer-funded litigation and costly settlements.

The issue does not appear to be the lack of available alternatives but rather some jails' stubborn refusal to adopt them. For example, alternatives such as "(1) pat frisking all inmates; (2) making inmates go through metal detectors . . . ; (3) making inmates shower and use particular delousing agents or bathing supplies; and (4) searching inmates' clothing" were *all* available in one of the defendant facilities in *Florence*, yet the majority opinion offered no reason as to why these alternatives should not have been used.[273] Similarly, in *Bell*, the Court rejected using a metal detector because it could only identify weapons, not nonmetal contraband (i.e., money and drugs).[274] The opinion failed to note, however, that additional alternatives, perhaps used in tandem, could identify nonmetal contraband, such as a pat-

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[268] Erin Hicks, *SecurPass Allows for Full Body Cavity Imaging*, CORRECTIONS1 (Aug. 16, 2011), https://www.corrections1.com/products/medical-supplies/articles/securpass-allows-for-full-body-cavity-imaging-nrghv3GozOflzlCQ/ [https://perma.cc/WUB3-M6SL].

[269] Schlanger, *supra* note 24, at 87.

[270] *Id.*; *see also* STEVEN SINCLAIR & ROBERT HERZOG, A REVIEW OF FULL BODY SCANNERS: AN ALTERNATIVE TO STRIP SEARCHES OF INCARCERATED INDIVIDUALS (2017), https://app.leg.wa.gov/ReportsToTheLegislature/Home/GetPDF?fileName=Body%20Scanners%20Report%202017%20%28002%29_9de3196e-0867-4f78-97ae-343f923e1c45.pdf [https://perma.cc/2BBR-8252].

[271] Brief for the Petitioner at 5–6, 39, Florence v. Bd. of Chosen Freeholders, 566 U.S. 318 (2012) (No. 10-945).

[272] Reply Brief for the Petitioner at 16, *Florence*, 566 U.S. 318 (No. 10-945) (noting that a BOSS chair is often just as successful at detecting contraband as a strip search).

[273] *Florence*, 566 U.S. at 348 (Breyer, J., dissenting); *see also* Levoy v. Mills, 788 F.2d 1437, 1439 (10th Cir. 1986) ("[T]he government must demonstrate a legitimate need to conduct such a search and that less intrusive measures would not satisfy that need.").

[274] Bell v. Wolfish, 441 U.S. 520, 559 n.40 (1979).

down search combined with making inmates shower and searching their clothing. In fact, such "layered" approaches combining various types of searches are thought to be even more comprehensive than a single strip search alone.[275] And, as previously stated, a body scanner could identify both metal and nonmetal contraband.[276] Justice Marshall's dissent in *Bell* accordingly took issue with the majority's "eschew[ing] consideration of less restrictive alternatives."[277]

The Court has noted that, when infringing upon prisoners' constitutional rights, prisons do *not* have to opt for the "least restrictive alternative."[278] But if an easy, less intrusive alternative is readily available, it can provide evidence that the challenged action is an "'exaggerated response' to prison concerns."[279] Less intrusive alternatives have long existed but have not been given their proper due. Rule 52 would reverse that trend and guide courts to take these alternatives more seriously as opposed to readily deferring to prison officials.

3. Conducting Strip Searches in Private

Third, prisons should conduct searches in private.[280] This final prong of Rule 52 recognizes that the invasion of privacy inherent in a strip search should be as limited as possible. The domestic conversation, however, has been markedly more inconsistent. Some courts have held that searches conducted in the presence of more prisoners or officers than necessary violate the Fourth Amendment.[281] These courts have accordingly highlighted

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[275] Rachel Zoch, *3 Ways to Keep Contraband Under Control with Detection Technology*, CORRECTIONS1 (Apr. 24, 2019), https://www.corrections1.com/products/facility-products/body-scanners/articles/3-ways-to-keep-contraband-under-control-with-detection-technology-sJUOpxnwH0BM9GDH/ [https://perma.cc/SX2T-V7MW] ("When you use varied methods [for searching inmates] . . . you have a complete screening solution.").

[276] *Id.*

[277] 441 U.S. at 565 (Marshall, J., dissenting).

[278] Turner v. Safley, 482 U.S. 78, 90–91 (1987). If required to always use the "least restrictive alternative," prison administrators would have to "set up and then shoot down every conceivable alternative method of accommodating" prisoners' rights. *Id.*

[279] *Id.* at 90.

[280] This solution has been previously proposed on noninternational-norm-based grounds. See Kenzie Ryback, *Dear Prisoners—Be Prepared to Be Gawked at: Other Prisoners Watching You Strip Naked Is Reasonably Related to Penological Interests, or Is It?*, 123 PENN ST. L. REV. 839, 862–65 (2019) (suggesting that the Court adopt the "less invasive alternative" test to analyze the reasonability of group strip searches and guide lower courts to find such searches unconstitutional where a private-search option is readily available).

[281] *See* Stoudemire v. Mich. Dep't of Corr., 705 F.3d 560, 574 (6th Cir. 2013) (finding strip search unreasonable in part because of its nonprivate nature); Abshire v. Walls, 830 F.2d 1277, 1280 (4th Cir. 1987) (finding the presence of an additional six to eight officers during a strip search of a detainee a factor raising the question of the reasonableness of the strip search); Hill v. Bogans, 735 F.2d 391, 394–95 (10th

the private nature of a search, conducted by one to two officers with the prisoner alone, as a factor making the search reasonable.[282] Other courts, however, have reached the opposite conclusion.[283] Holding fast to Rule 52's requirement of private searches would end this inconsistent decision-making and introduce uniformity across the circuits in-line with international consensus.

Requiring private searches would be easily administrable in the domestic context, as evidenced by the fact that it is already in place in certain facilities.[284] Officials can strip-search prisoners one at a time in a closed-off area or even place partitions between prisoners when they are being searched en masse.[285] Such partitions are used in multiple prisons nationwide.[286] Moreover, adherence to private searches does not have to come without exceptions. Multiple courts, including those that have found group strip searches to be unreasonable, have allowed for group searches when an emergency like a prison riot occurs.[287] But in day-to-day situations, the Fourth Amendment right to bodily privacy should protect against a group strip search. By incorporating the right to a private search as part of the application of the Fourth Amendment, there would be consistency in the

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Cir. 1984) (noting that the conducting of a strip search in a public area where an additional ten to twelve people were present contributed to making the search unconstitutional).

[282] *See* Stanley v. Henson, 337 F.3d 961, 965 (7th Cir. 2003); *see also* Justice v. City of Peachtree City, 961 F.2d 188, 193 (11th Cir. 1992) (finding search minimally intrusive because it was private, although it was in front of two officers); Dufrin v. Spreen, 712 F.2d 1084, 1087 (6th Cir. 1983) (finding search not improper in part because conducted in private by one female attendant).

[283] *See* Sumpter v. Wayne County, 868 F.3d 473, 485 (6th Cir. 2017) (upholding a facility's practice of strip-searching five prisoners at a time because of the expediency offered by a group search); Thompson v. Souza, 111 F.3d 694, 697, 701 (9th Cir. 1997) (upholding as reasonable the strip search of a prisoner in front of multiple other prisoners).

[284] *See, e.g.*, Young v. County of Cook, 616 F. Supp. 2d 834, 840 (N.D. Ill. 2009) (noting that women were strip-searched in cubicles and could not see individuals in other cubicles); Williams v. City of Cleveland, 907 F.3d 924, 938–39 (6th Cir. 2018) (White, J., dissenting), *reh'g denied*, 2018 U.S. App. LEXIS 34594 (6th Cir. Dec. 7, 2018).

[285] *See* Williams v. City of Cleveland, 210 F. Supp. 3d 897, 907 (N.D. Ohio 2016) (noting that a prison administrator "admitted that, while it may 'slow things down just a little bit,' detainees could easily be strip-searched individually versus as part of a group"), *rev'd and remanded*, 907 F.3d 924 (6th Cir. 2018), *reh'g denied*, 2018 U.S. App. LEXIS 34594 (6th Cir. Dec. 7, 2018).

[286] *Young*, 616 F. Supp. 2d at 840 (noting that defendant's expert did not know of any jails in the past twenty years that had carried out group strip searches without using a privacy partition); *Williams*, 907 F.3d at 938–39 (White, J., dissenting) (noting that the Ohio Corrections Officer Basic Training Manual states that the use of "modesty panels" in group searches indicates good faith to carry out a search in a constitutional manner).

[287] Williams v. City of Cleveland, 771 F.3d 945, 954 (6th Cir. 2014) (citing Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 327 (2012)) (suggesting allowing group searches where circumstances are "unusually dire"); Sumpter v. Wayne County, 868 F.3d 473, 498 (6th Cir. 2017) (Clay, J., dissenting); Stoudemire v. Mich. Dep't of Corr., 705 F.3d 560, 573–74 (6th Cir. 2013).

treatment of prisoners in line with internationally accepted standards of human dignity.

CONCLUSION

The Fourth Amendment does not simply vanish when confronting the specter of maintaining jail security. By looking to international customary law in the form of Rule 52, courts can consistently define the scope of the Fourth Amendment as applied to prisoners' bodily privacy. This will help resolve disputes that have plagued the Court and lower courts for decades, from *Bell* to *Florence*. Courts should do this not only because the SMRs represent the consensus of nations, but also because they are the product of careful research and debate. Adoption of Rule 52's standard would stem the flow of inconsistent decisions, thereby preserving prisoners' dignity and human rights. If the above standards were applied, the abusive strip search of Deanna Jones—whose arrest for a minor offender raised no suspicion—would not have happened. As a "minimum standard," the SMRs do not end the debate, but rather guide the conversation out of the morass in which it has been stuck for decades. As "a floor, not a statement of excellence,"[288] the rules can be a guidepost moving forward.

[288] Peirce, *supra* note 142, at 295.