

## JAIL STRIP-SEARCH CASES: PATTERNS AND PARTICIPANTS

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*Abstract: This essay, for an issue of Law & Contemporary Problems in honor of the work and influence of Marc Galanter, looks at a small case-type, jail strip-search litigation, and at its participants, to analyze its internal dynamics and what they have to teach us about the relation between litigation and society. Among the unusual features of these cases is that many different kinds of lawyers work on them—employees of public interest organizations; large law firm lawyers, often working pro bono, with a cooperating relationship with such a public interest organization; lawyers with a private prisoners' rights or police misconduct practice; and lawyers with a more varied or general class-action practice. The differences in lawyer type do not, however, demonstrably correspond to differences among case outcomes. However, interviews did surface some marked variation, by lawyer type, in the lawyers' orientations towards their own fees, the threat of adverse legal change, and the appropriate response to such a threat.*

### I

#### INTRODUCTION

Among Marc Galanter's many important insights is that understanding litigation requires understanding its participants. In his most-cited work,<sup>1</sup> *Why the 'Haves' Come Out Ahead*,<sup>2</sup> Galanter pioneered a somersault in the typical approach to legal institutions and legal change:

Most analyses of the legal system start at the rules end and work down through institutional facilities to see what effect the rules have on the parties. I would like to reverse that procedure and look through the other end of the telescope. Let's think about the different kinds of parties and the effect these differences might have on the way the system works.<sup>3</sup>

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<sup>1</sup> Fred R. Shapiro, *The Most Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751 tbl.1.

<sup>2</sup> Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). See also IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD (Herbert M. Kritzer & Susan S. Silbey eds. 2003).

<sup>3</sup> *Id.* at 97.

The interested parties—plaintiffs, defendants, and their counsel—are key, Galanter suggests. Indeed, this is one of the recurring themes of his work. If we wish to understand legal change, he warns us not to “exclude[] or marginalize[]” “[s]ources of legal change other than changes in the rules . . . (for example, changes in the number, organization, or style of lawyers and changes in the expectations, organization, or capabilities of litigants).”<sup>4</sup> Differences among litigants and lawyers mean that “the same rule change may bring about quite varied changes of practice in different settings.”<sup>5</sup> More generally, Galanter urges us to resist “identifying ‘law’ with doctrine”;<sup>6</sup> law, he counsels, must not be “viewed as a thing apart from practice or action,” nor “doctrinal change [be] isolated from other kinds of legal change.”<sup>7</sup> He asks us to preserve “the richness of context—and with it the indeterminacy and wildness that is entwined with the stability and routine of legal life.”<sup>8</sup> “If we want to understand legal change,” he explains, “we will have to move further from the ambit of conventional legal analysis.”<sup>9</sup>

An additional insight, equally crucial, is that to understand litigation and legal change it is also necessary to disaggregate litigation data, to organize it by what Galanter calls a “case congregation.”<sup>10</sup> Galanter explains:

These congregations are cultural categories, part of the culture of the regulars, created by an act of labeling, that in turn intensifies interaction and mutual influence. Labels may be shared by litigants, court officials, insurers, the legal press, academics, and the popular press; they may be institutionalized in lawyers’ networks, in publishers’

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<sup>4</sup> Marc Galanter, *Conceptualizing Legal Change and Its Effects: A Comment on George Priest’s “Measuring Legal Change”*, 3 J. L. ECON. & ORG. 235, 236 (1987) [hereinafter Galanter, *Conceptualizing Legal Change*].

<sup>5</sup> *Id.* See also Galanter, *The Radiating Effects of Courts*, in EMPIRICAL THEORIES ABOUT COURTS 117, 127 (Keith O. Boyum & Lynn Mather, eds., 1983) (“The endowments that courts confer depend on the capabilities of actors to receive, store, and use them, capabilities that reflect their skills, resources, and opportunities.”).

<sup>6</sup> Galanter, *Conceptualizing Legal Change*, *supra* note 4, at 235.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 240.

<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., Marc Galanter, *Case Congregations and Their Careers*, 24 LAW & SOC’Y REV. 371 (1990) [hereinafter Galanter, *Case Congregations*]; Marc Galanter, *The Life and Times of the Big Six; Or, the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921 (1988).

newsletters or continuing legal education seminars; sometimes official record keepers will adopt such categories. . . .

[Accordingly,] examination of these case congregations and their careers will reveal something about the internal dynamics of litigation as an institution and will assist us in constructing a more refined picture of the relation between litigation and society.<sup>11</sup>

This essay follows these two strictures by looking at a small case-type, jail strip-search litigation, and at its participants, to analyze its “internal dynamics” and what they have to teach us about the “relation between litigation and society.” Among the interesting features of these cases is that many different kinds of lawyers work on them—employees of public interest organizations; large law firm lawyers, often working pro bono, with a cooperating relationship with such a public interest organization; lawyers with a private prisoners’ rights or police misconduct practice; and lawyers with a more varied or general class-action practice. This is somewhat unusual; the litigation bar has, by all accounts, grown increasingly specialized over the past several generations.<sup>12</sup> One interesting research question, then, is which of the two sites of analysis Galanter highlights matters more for outcomes and dynamics—the case category or the type of plaintiffs’ lawyer. I have previously argued that plaintiffs counsel’s background and orientation is crucial to understanding the framing and conduct of litigation.<sup>13</sup> Here, however,

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<sup>11</sup> Galanter, *Case Congregations*, *supra* note 10, at 373.

<sup>12</sup> As Stephen Daniels and Joanne Martin have summarized,

[O]ne of the most important innovations within the plaintiffs’ bar in the past 35 to 40 years is the development of narrow specialization. Rather than simply specializing in plaintiffs’ practice (itself an even earlier innovation), some lawyers concentrate on a particular type of case, such as medical malpractice, products liability, airplane disasters, or car wrecks. Some are so specialized that virtually their entire practice is devoted to a very specific type of case within an already narrow category. For instance, a lawyer may develop a specialization within medical malpractice handling “bad baby” cases or brain injury cases. Within products liability a lawyer may specialize in breast implants or phen-fen or tire blow-out cases and so on. Additionally, some lawyers specialize procedurally rather than substantively by focusing on litigation itself.

Stephen Daniels & Joanne Martin, “*We Live on the Edge of Extinction All of the Time:*” *Entrepreneurs, Innovation, and the Plaintiffs’ Bar in the Wake of Tort Reform*, in *LEGAL PROFESSIONS: WORK, STRUCTURE AND ORGANIZATION* 149, 156 (Jerry Van Hoy ed., 2001).

<sup>13</sup> See Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 *MICH. L. REV.* 1994, 2014–26 (1999) [hereinafter Schlanger, *Beyond the Hero Judge*].

differences among cases brought by different kinds of lawyers, while present, are subtler than might be expected.

## II

### JAIL STRIP-SEARCH LITIGATION: THE MIAMI CASE

In November 2003, officials from dozens of Western Hemisphere countries traveled to Miami for a meeting on the Free Trade Area of the Americas. Thousands of protestors came, as well; several hundred were arrested, most on misdemeanor charges such as failure to obey police orders to disperse. One of them was Judith Haney, a San Francisco resident, about fifty years old, visiting Miami for the protest. After the protestors were booked, officers at the Miami Pre-Trial Detention Center followed their ordinary practice and strip-searched the women, conducting visual body-cavity inspections. Haney, who was eventually the lead plaintiff in a class action that ended routine strip searches of female prearrest minor offenders in Miami, later described the search:

After I removed all my clothes, the guard told me to turn around, bend all the way over, and spread my cheeks [which] exposed my genitalia and anus to a complete stranger, who had physical authority over me, so that she could visually inspect my body cavities. . . . The guard's next set of instructions were to squat—and then—to hop like a bunny.<sup>14</sup>

All charges against Haney were eventually dismissed.

The Supreme Court has said very little about the lawfulness of jail strip searches. In *Bell v. Wolfish*, in 1979, the Court held that the Fourth Amendment standard of “reasonableness” did not forbid a jail to conduct routine visual body-cavity searches for pretrial detainees after contact visits. No individualized probable cause was required.<sup>15</sup> The Court has not shed any subsequent

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<sup>14</sup> Judy Haney, Statement to the Commission on Safety and Abuse in America's Prisons (Apr. 19, 2005), available as document JC-FL-0012-0007 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu> [hereinafter Haney Statement].

<sup>15</sup> *Bell v. Wolfish*, 441 U.S. 520, 558–59 (1979).

light on the subject. Since the 1980s, the federal courts of appeals have repeatedly and without exception held that the Fourth Amendment forbids police and jail authorities to strip search all misdemeanor arrestees prior to arraignment.<sup>16</sup> Nearly all the cases hold that officials can perform visual body-cavity searches only if they have a “reasonable suspicion” that the subject of the search might be hiding contraband; a few of the cases take a different doctrinal route to the same outcome.<sup>17</sup>

In the Eleventh Circuit, where Miami is located, the court of appeals ruled on a closely related issue for the first time in 1992, in a case upholding a jail’s strip search of a juvenile.<sup>18</sup> The court held that the standard for evaluating the search’s constitutionality was whether the jail officers had a “reasonable suspicion . . . that the juvenile is concealing weapons or contraband.”<sup>19</sup> A few years later, the court stated that it would be unconstitutional for a jail to require that each prisoner be strip searched, before being placed in a cell, without any

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<sup>16</sup> See *Swain v. Spinney*, 117 F.3d 1 (1st Cir. 1997); *Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001); *Savard v. Rhode Island*, 320 F.3d 34 (1st Cir. 2003); *Wood v. Hancock County Sheriff’s Dept.*, 354 F.3d 57 (1st Cir. 2003); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986); *Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001); *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981); *Amaechi v. West*, 237 F.3d 356 (4th Cir. 2001); *Stewart v. Lubbock County*, 767 F.2d 153 (5th Cir. 1985); *Watt v. City of Richardson Police Department*, 849 F.2d 195 (5th Cir. 1988); *Williams v. Kaufman*, 352 F.3d 994 (5th Cir. 2003); *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983); *Kraushaar v. Flanigan*, 45 F.3d 1040 (7th Cir. 1995); *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985); *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984), overruled on other grounds by *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1040 n. 1 (9th Cir. 1999); *Kennedy v. Los Angeles Police Department*, 901 F.2d 702 (9th Cir. 1990); *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984); *Chapman v. Nichols*, 989 F.2d 393 (10th Cir. 1993); *Cottrell v. Kaysville City*, 994 F.2d 730, 734 (10th Cir. 1993); *Justice v. City of Peachtree City*, 961 F.2d 188 (11th Cir. 1992); *Skurstenis v. Jones*, 236 F.3d 678 (11th Cir. 2000); *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001); *Hicks v. Moore*, 422 F.3d 1246 (11th Cir. 2005); *Powell v. Barrett*, 496 F.3d 1288 (11th Cir. 2007). There is no appellate case law in the Third Circuit or the D.C. Circuit, but in both, district courts have issued opinions similar to the appellate ones cited.

<sup>17</sup> Compare, e.g., *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) (articulating “reasonable suspicion” standard), with *Logan v. Shealey*, 660 F.2d 1007, 1009-10 (4th Cir. 1981) (balancing the need for the particular search against the invasion of privacy rights, and holding “an indiscriminate search policy routinely applied to detainees such as [plaintiff] along with other detainees cannot be constitutionally justified simply on the basis of administrative ease in attending to security considerations”).

<sup>18</sup> *Justice v. City of Peachtree City*, 961 F.2d 188 (11th Cir. 1992).

<sup>19</sup> *Id.* at 193.

individualized evaluation of the likelihood of the presence of contraband.<sup>20</sup> Yet in the past several years, several Eleventh Circuit opinions have expressed skepticism about that court's own precedent in this area. In an en banc 2003 opinion, Judge Edmondson wrote for the Eleventh Circuit that "Most of us are uncertain that jailers are required to have a reasonable suspicion of weapons or contraband before strip searching—for security and safety purposes—arrestees bound for the general jail population."<sup>21</sup> The court found that the issue was not properly before it, and so did not resolve it. In a detailed special concurrence, Judge Carnes (joined by two other judges) explained:

My present view is that reasonable suspicion is not necessary for a strip search of an arrestee who is to be detained in the general jail population, if that search is conducted pursuant to a generally applicable, reasonable jail policy designed to promote safety and security by guarding against the smuggling of weapons and other contraband into a detention facility. This view is contrary to the current circuit law on the subject, at least insofar as misdemeanor arrestees are concerned.<sup>22</sup>

The concurrence focused on the dangerousness of jails to justify this view:

The need for strip searches at county jails is not exaggerated. Employees, visitors, and those who are themselves detained face a real threat of violence, and administrators must be concerned on a daily basis with the smuggling of contraband on the person of those accused of misdemeanors as well as those accused of felonies.<sup>23</sup>

A handful of other court of appeals opinions include similar discussions.<sup>24</sup> And this makes sense, considering the recently increasing conservatism of the federal appellate bench.<sup>25</sup> Likewise,

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<sup>20</sup> Skurstenis v. Jones, 236 F.3d 678, 682 (11th Cir. 2000).

<sup>21</sup> Evans v. Stephens, 407 F.3d 1272, 1278 (11th Cir. 2005) (en banc).

<sup>22</sup> *Id.* at 1284 (Carnes, J., concurring specially).

<sup>23</sup> *Id.* at 1291.

<sup>24</sup> See Hicks v. Moore, 422 F.3d 1246, 1248 (11th Cir. 2005) ("Because we are overcome by this Circuit's precedent, we must agree . . . that . . . a general practice [of strip searching all detainees to be placed in general jail population regardless of reasonable suspicion], for now at least, is an unlawful basis for . . . searches."); Powell v. Barrett, 2007 WL 2386610 (11th Cir. 2007) (expressing "uncertainty about . . . precedent holding that strip searches of arrestees to be placed in the jail's general population absent reasonable suspicion, violate the Fourth Amendment"); Shain v. Ellison, 273 F.3d 56, 72 (Cabranes, J., dissenting in part) (expressing dissatisfaction with circuit precedent requiring "reasonable suspicion," and arguing that the appropriate standard would be contract "envision[] a flexible, multifactor inquiry," that would more easily accommodate cavity search policies).

given the Roberts Court's emerging record in civil rights cases,<sup>26</sup> the Supreme Court seems likely to view this issue with a jaundiced eye.

For now, however, the case law is uniformly against what are usually called “blanket strip search” policies. A publication of the American Jail Association, *Jail and Prison Legal Issues: An Administrator's Guide*, even has the heading “Arrestee Strip Searches: There Are No Loopholes.”<sup>27</sup> Its author, Bill Collins, summarizes the current state of the law as favoring plaintiffs in these cases:

Despite the huge weight of authority regarding arrestee strip searches, one continues to hear of jail administrators searching for loopholes to the reasonable suspicion rule. In weighing whether to try to find a loophole in the traditional “reasonable suspicion” rule, a jail policy-setter needs to recognize several things. Legal research fails to reveal any loopholes. . . . So, pushing the limits of the traditional rule can be costly for the individual policy-setter, for the city or county, and perhaps even for officers carrying out the policy.<sup>28</sup>

During the winter of Judith Haney's Miami arrest, the costs of blanket strip-search policies were much in evidence in her home state of California. The topic was particularly salient in San Francisco, at least among activists. Just days before the Miami trade meeting, the *San Francisco Chronicle* ran a 3800-word front-page article investigating and criticizing the San Francisco jails' strip-search practices.<sup>29</sup> And Haney was herself friendly with Mary Bull, the named plaintiff in *Bull v. City and County of San Francisco*, the class-action lawsuit challenging

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<sup>25</sup> For an estimate of the aggregated ideological predispositions of the judges of each federal court of appeals, as the makeup of those benches has changed over time, see Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303, 312 fig.4 (2007). The published figure extends only to 2000, but the authors have made available data up through 2006 at <http://epstein.law.northwestern.edu/research/JCS.html> (last visited February 10, 2008). This article's point depends on the web-posted data.

<sup>26</sup> See, e.g., Simon Lazarus, *The Most Activist Court*, AM. PROSPECT, June 29, 2007, [http://www.prospect.org/cs/articles?article=the\\_most\\_activist\\_court](http://www.prospect.org/cs/articles?article=the_most_activist_court) (describing recent decisions of the Roberts Court).

<sup>27</sup> COLLINS, *supra* note **Error! Bookmark not defined.**, at 227.

<sup>28</sup> *Id.* at 231–32.

<sup>29</sup> See Elizabeth Fernandez & Stephanie Salter, *Stories of Anguish: Jail has Man Disrobe to Photograph His Tattoos*, S.F. CHRON., Nov. 16, 2003, at A1.

pre-arraignment strip-search practices that prompted that article.<sup>30</sup> That case had been filed just months before, and once the federal district court allowed it to go forward as a class action, the San Francisco jails promptly amended the relevant policies.<sup>31</sup> In fact, Mary Bull was *also* the first-named plaintiff in a similar case in Sacramento, *Bull v. County of Sacramento*. In the Sacramento case, the state court had held earlier in the same year that state statutory law forbade the county's blanket policy of stripping everyone admitted to the jail, regardless of the charge against them or the absence of reasonable suspicion that they might be carrying contraband. (The Sacramento jail soon changed its policy, and the case settled in June 2004 for \$15 million dollars.<sup>32</sup>) As in Miami, the San Francisco and Sacramento cases originated in political protesters' arrests. Moreover, it had only been a year since the settlement of a much-publicized Los Angeles jail strip-search case involving women protestors for \$2.75 million,<sup>33</sup> and only a

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<sup>30</sup> *Bull v. City and County of San Francisco*, No. 3:03-CV-01840 (N.D. Cal. filed Apr. 23, 2003). The case is currently pending on appeal of the district court's grant of partial summary judgment to the plaintiffs. *Bull*, 2006 WL 449148 at \*1. Many of the crucial unpublished documents—the docket and complaint, among others, along with a summary of the litigation—are available at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu> (search for case JC-CA-0007 under “Clearinghouse ID”). Opinions in the case are also available at 2003 WL 23857823 (Oct. 27, 2003) (order granting defendants' motion to compel production of documents and denying motion for protective order), and 2005 WL 40072 (Jan. 5, 2005) (order granting plaintiffs' second motion to compel responses to interrogatories and request for sanctions).

<sup>31</sup> Elizabeth Fernandez & Stephanie Salter, *S.F. Jails Ease Up on Strip-Search Procedures: Lawsuits, Public Outcry Bring Effort to Comply with State Law*, S.F. CHRON., Jan. 13, 2004, at A1.

<sup>32</sup> *Bull v. County of Sacramento*, 01-AS-01545 (Sacramento County Super. Ct. filed March 13, 2001). Some of the key documents, including the settlement agreement and claim forms, are available at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu> (search for case JC-CA-0043 under “Clearinghouse ID”). Under the settlement, the lawyers received \$3 million, class administrators received \$500 thousand, \$410 thousand was split among the seven named plaintiffs, and the rest was distributed to the approximately 4000 class members who submitted claim forms. *See also* Denny Walsh, *Judge OKs Strip-Search Accord: Historic Multimillion-Dollar Deal Settles Jail Lawsuits*, SACRAMENTO BEE, at B1 (Oct. 23, 2004).

<sup>33</sup> *Musso v. County of Los Angeles*, BC 249462 (L.A. Super. Ct., filed Jan. 18, 2001). Information is available at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu> (search for case JC-CA-0021 under “Clearinghouse ID”); *see also* Sue Fox, *\$2.75 Million Proposed for Cyclists Arrested in Protest*, L.A. TIMES, Mar. 25, 2003, at B1.

few years since Los Angeles had settled a larger strip-search case for \$27 million, the county's largest settlement ever.<sup>34</sup>

So Haney was familiar with the jail strip-search issue, and she was convinced even as she was being searched that her treatment was unlawful—a belief she says was strengthened when she was released (thirty-five hours after her arrest) and discussed the matter with her fellow protesters who were men, discovering that none of them had been strip searched. When she went home to California, she soon got in touch with Mark Merin, a civil rights lawyer in Sacramento who was counsel in both the San Francisco and Sacramento cases.<sup>35</sup> Merin was beginning to make something of a specialty of strip-search class actions, the publicity from the Sacramento case, in particular, garnering him phone calls not only from protestors but from other people arrested and strip searched. In fact, Merin filed six juvenile-detention and jail strip-search class actions in 2004 (and has filed another nine since then), all but Haney's case in northern California.<sup>36</sup>

Merin needed a Florida lawyer to work with, and he brought in Randall Berg, director of the Florida Justice Institute, an organization well known for its work on behalf of prison and jail inmates. They filed the case in March 2004 as a (putative) class action, with three class representatives—all female protesters arrested at the free trade demonstrations; additional, and more typical, female arrestees were added two months later.<sup>37</sup> The complaint, captioned *Haney v.*

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<sup>34</sup>Williams v. County of Los Angeles, CV 97-03826-CW (C.D. Cal, Dec. 5, 2002) (order regarding settlement, release, and dismissal of claims in class action), available as document JC-CA-0033-0005 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>; Troy Anderson, *Ex-Inmates Win Record County Award*, [L.A.] DAILY NEWS, Aug. 15, 2001, at N1.

<sup>35</sup> Haney Statement, *supra* note 14, at 4.

<sup>36</sup> For a list of cases, search for “Merin” at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>.

<sup>37</sup> See Complaint at 2, No. 1:04-cv-20516 (S.D. Fl. March 5, 2004); Second Amended Complaint at 2, No. 1:04-cv-20516 (S.D. Fl., May 4, 2004), available, respectively, as documents JC-FL-0012-0014 and JC-FL-0012-0001 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>.

*Miami-Dade County*, alleged that Miami had a practice of conducting visual body-cavity searches on all women arrested, pre-arraignment.<sup>38</sup> The county disagreed on the facts, and also argued that the plaintiffs lacked standing to seek injunctive relief (since none of them lived in Miami and they were therefore unlikely to be arrested again).<sup>39</sup> The case was assigned to Adalberto Jordan, a Clinton appointee to the U.S. District Court for the Southern District of Florida. Once Judge Jordan denied the county's motion to dismiss the injunctive claims,<sup>40</sup> mediated settlement negotiations ran relatively smoothly,<sup>41</sup> in large part because discovery bore out the plaintiffs' version of jail practice. The parties reached agreement in February 2005, after two days of mediation.<sup>42</sup> The jail's spokeswoman even told the press, "We have become aware of our strip-search practices and as a result of the lawsuit we have changed our policy. . . . We want to compensate those people who have been hurt."<sup>43</sup> The jail implemented a new policy, which allowed strip searches prior to formal first appearance before a judge and subsequent incarceration in general population only if the charged offense involved violence, weapons, or drugs, or if there was some other individualized suspicion relating to contraband.<sup>44</sup>

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<sup>38</sup> Complaint at 5, *Haney v. Miami-Dade County*, No. 1:04-cv-20516 (S.D. Fl. March 5, 2004), available as document JC-FL-0012-0014 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>.

<sup>39</sup> Order Denying Defendants' Motion to Dismiss, *Haney v. Miami-Dade County*, No. 1:04-cv-20516 (S.D. Fla. Aug. 24, 2004), available as document JC-FL-0012-0011 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>.

<sup>40</sup> *Id.*

<sup>41</sup> Telephone Interview with Randall Berg, Director, Florida Justice Institute (June 5, 2007).

<sup>42</sup> Mediation Report, *Haney v. Miami-Dade County*, No. 1:04-cv-20516 (S.D. Fla.), available as document JC-FL-0012-0010 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>.

<sup>43</sup> Chrystian Tejedor, *Lawsuit Settled on Strip Searches: Miami-Dade Agrees to pay \$4.5 Million to 100,000 People*, S. FLA. SUN-SENTINEL, Apr. 19, 2005, at 1A; Noaki Schwartz & Trenton Daniel, *Lawsuit on Strip Searches Settled: Miami-Dade Settles Class Action in Which Thousands of Women Say They Were Illegally Strip Searched by Corrections Department*, MIAMI HERALD, Apr. 19, 2005, at 1A.

<sup>44</sup> See *Miami-Dade County Corrections and Rehabilitation Department, Frisk and Strip Search Procedures* (D.S.O.P. 11-022), at E. (Mar. 16, 2005), available as document JC-FL-0012-0012 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>.

The new policy was filed with the court as part of the settlement, but not entered as a court-enforceable injunction. So, the settlement's principle focus was monetary. The total settlement fund was \$6.25 million—\$4,550,000 for verified claims by class members; \$1 million for attorneys' fees; \$100,000 for plaintiffs' costs and expenses; \$300,000 for the five class representatives; and \$300,000 for settlement administration.<sup>45</sup> The court approved the settlement after a fairness hearing in September 2005;<sup>46</sup> the money was distributed in June 2006<sup>47</sup>. The class could have been as large as 12,000, but in the event, as is typical in these cases, only a portion—eleven percent—submitted claims.<sup>48</sup> Those 1312 claimants split the \$4.55 million, with each person's share based on the number of times she was strip searched and the presence or absence of various aggravating circumstances. The average award was about \$3000.<sup>49</sup> Note that the total attorneys' fee award amounted to just sixteen percent of the total settlement amount—about one-sixth, rather than the familiar benchmark of one-third. Merin says it is his ordinary practice in these cases to ask for well under a third in attorneys' fees, and to calculate his fees on an hourly rather than a percentage basis:

I would be overcompensated if I got standard compensation with respect to the common fund—here in California, that's generally 25%, but that high a fee would be hard to justify in relation to the effort these cases take. So instead I do a lodestar calculation with fully documented hours.<sup>50</sup>

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<sup>45</sup> Stipulated Motion for Preliminary Approval of Provisional Settlement Class and Settlement of Class Action, *Haney v. Miami-Dade County*, No. 1:04-cv-20516 ( S.D. Fl. Apr. 13, 2005), available as document JC-FL-0012-0008 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>.

<sup>46</sup> Agreed Order and Judgment of Dismissal, *Haney v. Miami-Dade County*, No. 1:04-cv-20516 (S.D. Fla.), available as document JC-FL-0012-0004 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>.

<sup>47</sup> E-mail from Randall Berg, Director, Florida Justice Institute (Dec. 17, 2007).

<sup>48</sup> Interview with Randall Berg, *supra* note 41. The settlement also included a very large subclass of women and men whose strip-searches would have been lawful under state law had it been approved in writing by a supervising officer; they were each entitled to \$10. Only 224 of this group, which might have been as large as 100,000 people, actually submitted claims. E-mail from Randall Berg, *supra* note 47.

<sup>49</sup> *Id.*; E-mail from Randall Berg, Director, Florida Justice Institute (Feb. 12, 2008)

<sup>50</sup> Telephone Interview with Mark Merin, civil rights attorney (June 13, 2007).

There was no occasion for the Miami case to get to the potentially hostile Eleventh Circuit before its settlement—Judge Jordan’s denial of the defendants’ motion to dismiss the request for injunctive relief was the only substantive ruling made by the district court, and that ruling was not appealable.<sup>51</sup> In the end, then, the Miami strip-search lawsuit accomplished two objectives. First, it provoked policy change in Miami; no longer are women arrested for minor crimes in Miami subjected to intrusive visual inspection of their naked orifices. Second, it caused a number of transfers of money from public budgets: an unknown amount to defense counsel; a large amount to the plaintiffs’ lawyers, one in a private civil rights practice, the other at a civil rights non-profit; a fairly large amount of money to each of the class representatives; and a smaller amount of money to claiming class members.<sup>52</sup>

### III

#### JAIL STRIP-SEARCH LITIGATION MORE GENERALLY

##### A. Case Category Features

The jail strip-search case category is small, but it is big enough to conceptualize as a category: I have located nearly a hundred jail strip-search class actions,<sup>53</sup> and there have been hundreds more individual cases, both affirmative civil actions and criminal cases in which criminal defendants seek the suppression of evidence by attacking the strip search that lead to its discovery. The class cases have mostly involved two different moments in jail procedures: strip searches prior to arraignment, and strip searches after a release order is issued but prior to

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<sup>51</sup> See 28 U.S.C. §§ 1291, 1292.

<sup>52</sup> In many counties in Florida, the settlement would have been paid not directly from the County’s budget, but by the states’ sheriffs’ insurance cooperative; annual contributions by members approximate vary, but for example, Seminole County paid in about 1.25% of the Sheriff’s total budget of nearly \$70 million, the year before the County settled a strip search litigation for about \$575,000. Miami’s sheriff is not, however, a member of the Florida Sheriffs Self-Insurance Fund, so it paid its own damages. E-mail from Thomas Poulton, attorney for Florida Sheriffs Self-Insurance Fund (July 17, 2007).

<sup>53</sup> A list of the cases I have located is available as Appendix A; it is posted at <http://schlanger.wustl.edu>, under “Publications.” [NOT YET POSTED, 2/28/2008]

release. Possibly the earliest was a case filed in 1979 by the Chicago ACLU. Captioned *Jane Does 1-05 v. City of Chicago*,<sup>54</sup> it started after women who had been strip searched got in touch with a lawyer at the ACLU, who in turned fed the story to Chicago's NBC affiliate television station. When WMAQ-TV aired a series of investigative pieces on Chicago's practice of performing visual body cavity searches of every woman arrested, no matter how minor the charge, there was an uproar and hundreds of complaints were made to the ACLU, whose phone number was included in the segments.<sup>55</sup> The lawsuits soon followed. In recent years, the number of jail strip-search class actions has grown; over the past three years, both new settlements and new cases have been filed just about every month. (From 2005 through 2007, for example, at least [thirty-five] new class cases were filed.<sup>56</sup>)

Jail strip-search litigation is highly salient within both the prisoners' advocacy and the corrections-administration communities. For example, most issues of the *Correctional Law Reporter*, a newsletter whose subscribers are mostly jail and prison legal staff, describe one or two cases.<sup>57</sup> Similarly, *Prison Legal News*, a publication aimed at prisoners and their advocates, rarely publishes an issue in which a jail strip-search filing or settlement is not featured.<sup>58</sup> The American Jail Association guide to *Jail and Prison Legal Issues* describes "strip searches of

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<sup>54</sup> *Jane Does v. City of Chicago*, 79 C 789 (N.D. Ill. 1984) (filed Mar. 1, 1979). Opinions, on various issues not discussed in text, are available at 723 F.2d 1263 (7th Cir. 1983), and 687 F.2d 175 (7th Cir. 1982). For background information on this case, see Ellen Alderman & Caroline Kennedy, *The Right to Privacy* 3-18; *Civil Rights Litigation Clearinghouse*, <http://clearinghouse.wustl.edu>, case JC-IL-0011.

<sup>55</sup> *See id.*; Telephone Interview with Jan Susler, attorney, People's Law Office (June 18, 2007); Unit 5 Investigative Series, *Strip & Search* (WMAQ-TV television broadcast 1979), video on file with author. The news segments were awarded the George Foster Peabody award, so information about them is available in the Peabody Awards Collectino Archives, at [http://dbs.galib.uga.edu/cgi-bin/ultimate.cgi?dbs=parc&userid=galileo&action=search&\\_cc=1](http://dbs.galib.uga.edu/cgi-bin/ultimate.cgi?dbs=parc&userid=galileo&action=search&_cc=1) (last visited Feb. 14, 2008).

<sup>56</sup> *See* Appendix A, *supra* note 53.

<sup>57</sup> *See, e.g., Two Strip Search Policies Stricken*, 17 CORRECTIONAL L. REP. 74 (2006) ("Another jail strip search policy—actually two policies—bite the dust, this time in Will County, Illinois, just south of Chicago and Cook County.").

<sup>58</sup> *See, e.g., \$2.5 Million Settlement in Schenectady County Strip Search Suit*, PRISON LEGAL NEWS, June 2007 at 18.

arrestees incident to booking into the jail” as “the most controversial and oft-litigated correctional search issue.”<sup>59</sup>

That salience seems to have two causes. First, in a corrections setting, cases with seven- and eight-figure damage totals get noticed<sup>60</sup> Another, and perhaps more interesting, factor contributing to the currently extremely high profile of jail strip-search cases is the contrast between the law and the preferences of many jail officials. The controversy the American Jail Association guide describes is not legal doubt—recall, it refers to “the huge weight of authority” against blanket strip searches, but rather the conflict between the continuing wish by at least some jail authorities to strip search everyone they book into a jail, and their repeated court losses. All the lawyers who practice in this area describe what sheriffs’ counsel Tom Poulton termed “a contingent in the law enforcement community that thinks that everyone should get strip searched going into a jail.”<sup>61</sup> That contingent often assumes that its views, which feel mainstream to its members, are consonant with the law. After all, constitutional case law nearly always defers to corrections officials’ felt necessities.<sup>62</sup> The *Sacramento Bee* summed this point up in an article

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<sup>59</sup> COLLINS, *supra* note **Error! Bookmark not defined.**, at 227.

<sup>60</sup> In some areas of litigation, these kinds of numbers would not attract as much attention. But jail litigation is unusual. Even though it is a high docket, in most of its categories plaintiffs lose most of their cases, and when they win, the awards tend to be low (though not as low as in prison litigation). See, e.g., Anne Morrison Piehl & Margo Schlanger, *Determinants of Civil Rights Filings in Federal District Court by Jail and Prison Inmates*, 1 J. EMPIRICAL LEGAL STUD. 79 (2004); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003). For a discussion of injunctive cases involving jails, see Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006) [hereinafter Schlanger, *Civil Rights Injunctions Over Time*].

<sup>61</sup> Telephone Interview with Thomas Poulton, attorney for Florida Sheriffs Self-Insurance Fund (July 11, 2007).

<sup>62</sup> See, e.g., *Turner v. Safley*, 482 U.S. 78, 87 (1987) (holding that the Constitution allows prison regulations to “burden fundamental rights” if they are “reasonably related to legitimate penological objectives”).

about Sacramento's strip-search case. Notwithstanding solid circuit precedent against them from 1984 on,<sup>63</sup> "County officials were stunned when a judge ruled against them."<sup>64</sup>

## B. Participants

As Galanter has advised, understanding this litigation requires analysis of its participants. The sections below first discuss the plaintiffs and then plaintiffs' counsel. (It would be interesting to look, as well, at defendants and their counsel, but this article does not do that.)

### 1. Plaintiffs

Even though the vast majority of people arrested are poor and male,<sup>65</sup> it appears that a disproportionate number of the class cases involve women and middle-class arrestees. Several reasons for these features of the docket seem clear. Looking first at gender, quite a few of the cases allege that women are singled out for more invasive search procedures than men,<sup>66</sup> perhaps because jail authorities believe that vaginal smuggling of contraband is easier (or more common) than anal smuggling, and therefore that there is a greater need for highly intrusive searches of women.<sup>67</sup> Possibly more important than different practices is differently *experienced* practices: women might well feel more harmed than men by a visual body-cavity search. After all, given

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<sup>63</sup> *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984), overruled on other grounds by *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1040 n. 1 (9th Cir. 1999); *Kennedy v. Los Angeles Police Department*, 901 F.2d 702 (9th Cir. 1990).

<sup>64</sup> *Mareva Brown, Strip-search Ruling Forces Big Changes*, SACRAMENTO BEE, June 7, 2003, at A1. The case was *Bull v. City and County of Sacramento*, discussed in text accompanying note 32.

<sup>65</sup> See DORIS J. JAMES, OFFICE OF JUSTICE STATISTICS, PROFILE OF JAIL INMATES, 2002, NCJ 201932, at 2, 9 (July 2004) (rev'd Oct. 10, 2004), available at <http://ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf> (12% of jail inmates at midyear 2002 were female; 59% reported monthly income under \$1000; and 14% were homeless at some point in the prior year).

<sup>66</sup> In addition to the Miami and Chicago cases already discussed, see, for example, *Musso v. County of Los Angeles*, BC 249462 (L.A. Super. Ct. Cal. filed Jan. 18, 2001), and *Connor v. Plymouth County*, No. 1:00-cv-10835 (D. Mass. filed May 1, 2000). Information about these cases is retrievable by their case names or case codes—JC-CA-0021 and JC-MA-0009 respectively—at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>.

<sup>67</sup> Telephone Interview with Jennifer Duncan-Brice, Judge, Circuit Court of Cook County (IL) (June 4, 2007). Judge Brice worked in the Chicago Corporation Counsel's office and represented the city in the *Jane Does* litigation. See also Interview with Randall Berg, *supra* note 41.

the gender distribution of jail workforces,<sup>68</sup> women arrestees may be more likely than men to have the search done or observed by someone of the other sex; they may be menstruating or pregnant, both conditions that render searches particularly objectionable;<sup>69</sup> and they may care more about bodily privacy than men.

As for the evident tilt towards middle-class instigating plaintiffs, that seems predictable enough. Members of the middle class are more likely to be startled and surprised by humiliating treatment by authorities, and more likely to be able to generate attention by both the media and lawyers. Mary Bull, the named plaintiff in the San Francisco and Sacramento cases mentioned above, made this point to the *Sacramento Bee*, which reported,

Bull said she believes that middle-class, educated women, like herself, are obligated to speak out about the civil rights violations they experience in jail.

“Most of the people (in jail) are disempowered,” she said. “They’re not going to fight back. They don’t have the means or the motivation or the resources.”<sup>70</sup>

But of course, even if the instigating plaintiffs are better off, it follows from the demographics of policing that the full classes—people arrested and strip searched—are bound to comprise mostly those with lower socioeconomic status.<sup>71</sup> A large portion of the plaintiff class in the Miami case was prostitutes (and since the money was allocated per search, their repeat arrests multiplied the amount of their damages).<sup>72</sup> In Sacramento, about a quarter of the claiming class members were homeless.<sup>73</sup> In fact, perhaps it is in part because the plaintiff class tends to be

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<sup>68</sup> See JAMES J. STEPHAN, OFFICE OF JUSTICE PROGRAMS, CENSUS OF JAILS, 1999, NCJ 186633, at 9 tbl.13 (August 2001), available at <http://ojp.usdoj.gov/bjs/pub/pdf/cj99.pdf> (women are 34% of jail staff and 28% of correctional officers employed by jails).

<sup>69</sup> Many of the settlements give extra compensation to those members of the class who were either pregnant or menstruating at the time of the search. See, e.g., Stipulated Motion for Preliminary Approval of Provisional Settlement Class and Settlement of Class Action, at 11, Bull v. County of Sacramento, No. 01AS01545 (Sacramento Super. Ct. June 4, 2004).

<sup>70</sup> Mareva Brown, *Strip-search Ruling Forces Big Changes*, SACRAMENTO BEE, June 7, 2003, at A1.

<sup>71</sup> See JAMES, *supra* note 65 (describing the economic demographics of arrestees).

<sup>72</sup> Interview with Randall Berg, *supra* note 41; Interview with Thomas Poulton, *supra* note 61.

<sup>73</sup> Walsh, *supra* note 32.

poor, and therefore difficult to track down, that plaintiffs' claiming rates in these cases are usually only twenty percent or lower.<sup>74</sup>

## 2. Plaintiffs' Counsel

One of the reasons the “case congregation” idea is a useful organizing tool, Galanter explains, is that “lawyers often shape practice specialties around such congregations.”<sup>75</sup> The point holds with respect to the subspeciality of strip-search litigation. The plaintiffs' lawyers can be grouped into four subsets: some work for public interest organizations (for example, the ACLU, the Florida Justice Institute); a few have a cooperating relationship with such a public interest organization but do most of their work in some other area, so that strip-search litigation is basically a pro bono matter for them;<sup>76</sup> some have a private prisoners' rights or police misconduct practice;<sup>77</sup> some have a more varied or general class-action practice. I interviewed members of each subset.

I have argued in prior work that “the identity, priorities, litigating strategies, and resources of plaintiffs' counsel have been of great importance to the shape and success of

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<sup>74</sup>Interview with Randall Berg, *supra* note 41. Note that 20% would be a *high* claiming rate in some kinds of class actions—although there is no hard data publicly available, experts believe that the rate in consumer class actions, for example, is generally 1% to 5%. E-mail from Alexandra Lahav, Associate Professor of Law, University of Connecticut (Aug. 13, 2007) (on file with author). *See also, e.g.*, *Zimmer Paper Prod., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 89 (3d Cir. 1985) (describing a 12% response rate from largely commercial class members in an antitrust suit); Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 119–20 (2007) (discussing collective action problems as a contributor to low class-claiming rates).

<sup>75</sup> Galanter, *Case Congregations*, *supra* note 10, at 372.

<sup>76</sup> On the role of cooperating attorneys in the activities of different public interest law organizations, see, for example, Brenda Bratton Blom, *Cause Lawyering and Social Movements: Can Solo and Small Firm Practitioners Anchor Social Movements*, 39 STUD. L. POL. & SOC'Y 119, 127–30 (2006) (discussing small firm lawyers cooperating with the NAACP Legal Defense and Education Fund); Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 219–20 (1976) (discussing attorneys cooperating with the ACLU).

<sup>77</sup> On law-firm cause-lawyering, see Stuart Scheingold & Anne Bloom, *Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional*, INT'L J. LEGAL PROF. 5 (1998); Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3 (Austin Sarat & Stuart Scheingold eds., 1998).

litigated prison reform,”<sup>78</sup> and in particular, “the varying resources, goals, and strategies of [different prisoners’ rights] groups also shaped prison litigation’s history, affecting what claims the groups made, what violations were found, and the eventual remedies chosen.”<sup>79</sup> Other authors agree.<sup>80</sup> So when I began examination of jail strip-search cases, I expected to find examples of this general phenomenon—to find, for example, lawyers for prisoners’ rights groups and more focused private prisoners’ rights advocates more frequently negotiating decrees with substantial injunctive remedies and oversight of those remedies. In fact, it turns out that such remedies are rare for any of the lawyers<sup>81</sup>—perhaps because of standing obstacles,<sup>82</sup> or because

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<sup>78</sup> Schlanger, *Beyond the Hero Judge*, *supra* note 13, at 2015.

<sup>79</sup> *Id.* at 2020.

<sup>80</sup> See, e.g., JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 35 tbl.1.6 (1978) (identifying numerous characteristics of law reform groups that bear on the probability of success in their reform efforts, including their size, funding, institutional affiliation, technical expertise, and political resources); WAYNE N. WELSH, COUNTIES IN COURT: JAIL OVERCROWDING AND COURT-ORDERED REFORM 40–41, 49–53, 62–63, 79 (1995) (analyzing differences in the profile of jail reform litigation conducted by different types of plaintiffs’ counsel); Alvin J. Bronstein, *Prisoners and Their Endangered Rights*, PRISON J. (Spring–Summer 1985) at 3, 11 (“[I]t is likely that cases will succeed or fail not on the basis of how unconstitutional the conditions are, but on the basis of how resourceful the lawyers and experts are.”); Susan P. Sturm, *Lawyers at the Prison Gates: Organizational Structure and Corrections Advocacy*, 27 U. MICH. J.L. REFORM 1 (1993) (examining characteristics, strategies, and interests of various groups of plaintiffs’ counsel in correctional cases, including the ACLU National Prison Project, the Youth Law Center, legal services organizations, law firms, and law school clinics). For a related view, though one focusing less on organizational factors and more on practice style, see Anne Bloom’s contribution to this volume, *Practice Style and Legal Mobilization*, [] LAW & CONTEMP. PROB. [] (2008).

<sup>81</sup> Many of the cases seek cessation of the problematic strip searches, and an agreement to halt the practice is included in a few of the settlements. For example, in *Bynum v. District of Columbia*, the agreement provided,

The plaintiffs’ claims for prospective relief regarding the strip search class will be resolved by the D.C. Department of Corrections’ plan to divert inmates ordered released or otherwise entitled to release from the Superior Court of the District of Columbia to a secure location outside of the open population of the D.C. Jail or another location where they will not be subject to a strip search, absent individualized suspicion, while the record review for detainers and warrants and property retrieval are conducted prior to release. This process shall be implemented on or before August 31, 2005.

Settlement Agreement at 7, *Bynum v. District of Columbia*, 1:02-cv-00956-RCL (D.D.C. June 16, 2005), available as document JC-DC-0004-0006 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>. See also, e.g., Class Actions Injunctive Relief Agreement, *Riley v. Los Angeles*, BC 239825 (L.A. Super. Ct., Cal. Sept. 1, 2001), available as document JC-CA-0056-0001 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>. Provision for ongoing oversight of compliance—the kind of remedy that is commonplace in civil rights injunctive cases—is rarer. For one of the few examples, see the Stipulation for Entry of Partial Final Judgment, *Benjamin v. Malcolm*, 75 Civ. 3073 (S.D.N.Y. Mar. 14, 1979), available as document JC-NY-0002-0011 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>. See also Stipulation and Proposed Order at 10-11, *Benjamin v. Malcolm* (S.D.N.Y. Aug. 23, 1982), available as document JC-NY-0002-0012 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>.

agencies tend to cease their challengeable strip-search practices once sued, without waiting for entry of injunctive relief.<sup>83</sup> Ken Flaxman, a civil rights lawyer who was referred his first strip-search case by the ACLU of Northern Illinois, explained that he brings strip-search class actions as opt-out damages cases because he has to, in order to include a damages component, not because he wants to: “I try to do [injunctive] (b)(2) cases, but it’s become impossible, so now I do [damage] (b)(3) cases instead.”<sup>84</sup>

The terms of the monetary settlements these different types of lawyers have negotiated do not look strikingly different on first blush (although this generalization rests on less than a truly systematic analysis). Perhaps variation is a bit less available for monetary settlements than for the types of injunctions common in other areas of prison and jail practice.<sup>85</sup> In any event, many jail strip-search settlements have very similar features: they define their classes in similar terms and structure their payouts in similar ways, each using some kind of point or share system to allocate the payments to plaintiffs based on the presence or absence of various aggravating factors (pregnancy, menstruation, physical touching, being observed by other prisoners or by officers of the opposite sex, being ridiculed, and so on). An obvious difference across cases, and potentially across lawyer type, would be the actual amounts of money negotiated. Unfortunately,

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<sup>82</sup> See *Los Angeles v. Lyons*, 461 U.S. 95 (1983) (holding that a plaintiff subjected to a police choke hold did not have standing to seek change in choke hold policy, because it was unlikely that he would be subjected to a choke hold in the future).

<sup>83</sup> This is what happened, for example, in the cases in which the Florida Justice Institute served as plaintiffs’ counsel. See Stipulation of Settlement, *Haney v. Miami-Dade County*, No. 1:04-cv-20516 (S.D. Fl. Apr. 13, 2005), available as document JC-FL-0012-0002 at Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>; Stipulation of Settlement at 3, *Parilla v. Eslinger*, No. 6:05-cv-850 (S.D. Fla., Dec. 29, 2006), available as JC-FL-0013-0003 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>. Parilla included additional injunctive relief relating to its over-detention claim. *Id.* at 6-8.

<sup>84</sup> Telephone Interview with Kenneth Flaxman, civil rights attorney (June 13, 2007). The reference is to FED. R. CIV. P. 23(b)(2) and 23(b)(3), and the increasing stringency governing “hybrid” damages and injunctive class actions. See, e.g., Carol V. Gilden, *The Evolving Use of Rule 23(b)(2) in Hybrid Class Actions Seeking Monetary Damages: A Hybrid Approach*, 761 PRACTICING LAW INSTITUTE/LITIGATION 199 (2007).

<sup>85</sup> For a discussion of jail and prison injunctive practice, see, for example, Schlanger, *Civil Rights Injunctions Over Time*, *supra* note 60.

the many other potential sources of variation (size and insurance coverage of defendant, geographic and economic factors, and judicial differences) along with the relatively small number of cases observed precludes assessing whether variation in payouts can appropriately be attributed to the background of plaintiffs' counsel.

The next four subsections examine more subjective evidence of difference across lawyer groups; such evidence indicates little variation by lawyer type in the litigation's goals and framing. All the plaintiffs' lawyers interviewed for this article, regardless of their backgrounds, spoke similarly about the purpose of their litigation—about the humiliation of those subjected to unlawful strip searches and how important it is to end the practice. However, these interviews did surface some marked differences in the lawyers' orientations towards their own fees, the threat of adverse legal change, and the appropriate response to such a threat.

a. *Lawyers for public interest organizations.* Before 1996 (and especially before the Reagan Administration's 1981 budget cuts), legal services offices around the country handled quite a large amount of jail litigation.<sup>86</sup> The legal services jail practice was ended by a statutory ban on federally funded legal-services offices' representation of prisoners.<sup>87</sup> There are, however, two dozen or so organizations that handle civil litigation for prisoners; most though not all do at least some jail litigation as well.<sup>88</sup> Yet very few such organizations have taken on one of the jail

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<sup>86</sup> See Schlanger, *Beyond the Hero Judge*, *supra* note 13, at 2019 & nn. 124–128 (describing legal-services offices' involvement in jail and prison litigation).

<sup>87</sup> Omnibus Consolidated Rescissions & Appropriations Act of 1996, Pub. L. No. 104-134 § 504(15), 110 Stat. 1321, 1321–55 (1996); *see also* 45 C.F.R. §§ 1632.1–5 (1996).

<sup>88</sup> The only non-profit litigating organization of which I am aware that focuses nearly exclusively on jail cases is the Prisoners' Rights Project of the New York City Legal Aid Society. Its docket is limited to New York, and it has not been involved in strip-search litigation for many years. The national non-profit organizations that do civil suits representing prisoners are: ACLU National Prison Project (and the many local and regional ACLU chapters); Protection and Advocacy organizations affiliated with the National Disability Rights Network (whose work is limited to issues involving mental disability); U.S. Department of Justice, Civil Rights Division, Special Litigation Section; and Legal Services for Prisoners with Children. The regional organizations are: Columbia [WA] Legal Services; D.C. Prisoners' Legal Services Project; Florida Institutional Legal Services; Florida Justice Institute; Legal Services for Prisoners (in Kansas); Lewisburg [PA] Prison Project; Massachusetts Correctional Legal Services;

strip-search cases, particularly since the 1980s.<sup>89</sup> Because these are cases that can be profitable for private lawyers, public interest lawyers report that their organizations have by-and-large been happy to leave the field clear. (Like other non-firm lawyers, attorneys at public interest organizations do not themselves take home whatever they recover by way of fees.) As John Boston of New York City's Legal Aid Society Prisoners' Rights Project explains, recently his office "ha[s] not been involved in this, in large part because the private bar does get into these cases."<sup>90</sup>

Perhaps, in addition, lawyers for prisoners' rights organizations are more interested in the kinds of repeated abuses that affect people for longer periods of time, or more severely, than strip searches. Prisoners' rights groups' lawsuits tend to focus on life-and-death kinds of issues—medical and mental health care, protection from assault by other prisoners, excessive force, and the like. As Elizabeth Alexander, director of the ACLU National Prison Project, explains, "Recently we have just had other higher priorities."<sup>91</sup>

John Boston offers another reason his shop has stayed out of jail strip-search litigation over the past fifteen or more years (although it did litigate the issue as part of a comprehensive case dealing with Rikers Island beginning in the 1970s, and then negotiated modification in the

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North Carolina Prisoner Legal Services; Pennsylvania Institutional Law Project; Prison Law Office (in California); Prisoners' Legal Services of New York; Prisoners' Rights Information System of Maryland; Prisoners' Rights Office (in Vermont); Prisoners' Rights Project of the [NYC] Legal Aid Society; Southern Center for Human Rights (in Georgia); Southern Poverty Law Center (in Alabama); Youth Law Center (in California). This list comes from the NAT'L PRISON PROJECT, AMERICAN CIVIL LIBERTIES UNION, PRISONER'S ASSISTANCE DIRECTORY (15th ed. 2007), available at [http://www.aclu.org/images/asset\\_upload\\_file139\\_33694.pdf](http://www.aclu.org/images/asset_upload_file139_33694.pdf). There are also prisoners' rights clinics at various law schools that do a limited amount of work in this area. See AMERICAN ASSOCIATION OF LAW LIBRARIES, LAW SCHOOL CLINICS SERVING PRISONERS (Jul. 12, 2004), [http://www.aallnet.org/sis/ripssis/clinics\\_serving\\_prisoners.pdf](http://www.aallnet.org/sis/ripssis/clinics_serving_prisoners.pdf).

<sup>89</sup> The ACLU's litigation in Chicago was in the early 1980s.

<sup>90</sup> E-mail from John Boston, Director, New York City's Legal Aid Society Prisoners' Rights Project, to author (July 17, 2007) (on file with author); see also Interview with Randall Berg, *supra* note 41.

<sup>91</sup> E-mail from Elizabeth Alexander, Director, ACLU National Prison Project, to author (July 17, 2007) (on file with author).

early 1990s)<sup>92</sup>: “Some of us (like me) think that this is an accident looking for a Supreme Court to happen in.”<sup>93</sup> Better, therefore, not to litigate the issue too aggressively.

For these reasons, there are not many lawyers at public interest organizations to interview about recent jail strip-search cases. I was able to interview just one—Randall Berg, director of the Florida Justice Institute, who was counsel in the recent Miami litigation and who also litigated a strip-search case in Seminole County, Florida. Berg agreed with his public interest colleagues who have not worked on these cases that they are somewhat lower priority than ordinary conditions-of-confinement work because their economics makes it possible for private lawyers to take them instead. (As he put it, “there’s money to be made” on them.<sup>94</sup>) But he also pointed out that that money can be useful to his organization, as well: “I can’t live or exist on just foundation grants. And we’re getting injunctive relief in these cases, also—not just damages. To be able to do both ought to be appealing to public interest organizations.” Thus Berg’s two strip-search cases, each with substantial attorneys’ fees awards, have supported his office’s other litigation.<sup>95</sup> Asked whether he worries about eventual Eleventh Circuit or Supreme Court reversal of the current case law, and what that kind of worrying meant for decision to take on the strip-search issue, Berg replied:

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<sup>92</sup> E-mail from John Boston, *supra* note 90; Stipulation for Entry of Partial Final Judgment at 10, *Benjamin v. Malcolm*, 75 Civ. 3073 (S.D.N.Y., March 14, 1979) (settlement agreement setting out standards to govern body-cavity searches of jail inmates in New York City), available as document JC-NY-0002-0011 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>; Stipulation and Proposed Order, *Benjamin*, 75 Civ. 3073 (S.D.N.Y. Aug. 23, 1982), available as document JC-NY-0002-0012 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>. For information on this long-lived and very contentious litigation, see *Benjamin v. Malcolm*, 75 Civ. 3073 (S.D.N.Y., March 14, 1979), available at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu> (search for case JC-NY-0002 under “Clearinghouse ID”).

<sup>93</sup> E-mail from John Boston, *supra* note 90; *see also* Interview with Randall Berg, *supra* note 41.

<sup>94</sup> Interview with Randall Berg, *supra* note 41.

<sup>95</sup> Strip-search cases can have much higher attorneys’ fees even than other successful jail and prison litigation, for two reasons. First, not many types of prisoner damage claims can be aggregated as class actions. Second, because the claimants are no longer in jail or prison, the attorneys’ fees are not constrained by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(d), which sharply limits the hourly and percentage attorneys’ fees rate payable in cases brought by prisoners. In addition, jail litigation often has higher damages than prison litigation, for many reasons described in Schlanger, *Inmate Litigation*, *supra* note 60, at 1686-89.

As a civil rights attorney in this era of hostility to prison conditions cases, one could always be “worried” about the 11th Circuit or this Supreme Court’s possible reversal of current case law. . . . But being “worried” should not be justification for any civil rights attorney to not take a case which is morally wrong and against the current state of the law. If such paranoia becomes the basis for taking a case, one should get out of this line of work. Indeed, it did not stop me from taking the Seminole County case, which occurred long after the atrocious dicta in the 11th Circuit’s en banc decision in *Evans v. Stephens*.<sup>96</sup>

b. *Cooperating counsel*. It follows from the rarity of public interest organizations’ participation in this litigation that there are few attorneys involved who have what is usually called a “cooperating” relationship with those public interest organizations. The only such cooperating attorneys I was able to interview took on cases in the ACLU’s early 1980s Chicago litigation, *Jane Does 1-5 v. Chicago*.<sup>97</sup> In that case, the parties used a version of the “bellwether trial” technique,<sup>98</sup> trying some of the individual claims before juries as a way of setting realistic settlement figures.<sup>99</sup> This meant that quite a few lawyers were needed, so the ACLU sent out a call for cooperating counsel. Following its ordinary practice, the ACLU of Northern Illinois asked lawyers who took on a case in this way to give any fees they won to the ACLU; the representation was to be pro bono.<sup>100</sup> Accordingly (and as is usual), lawyers from Chicago’s large personal-injury bar were not among the list of cooperating counsel; rather, these were

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<sup>96</sup> E-mail from Randall Berg, *supra* note 47.

<sup>97</sup> See *supra* note 54 and accompanying text.

<sup>98</sup> See MANUAL FOR COMPLEX LITIGATION, THIRD § 33.28 (describing use of “bellwether plaintiffs” in mass tort cases); see also MANUAL FOR COMPLEX LITIGATION, FOURTH, § 22.93 (describing use of “test case trials” to establish mass tort settlement figures); FED. R. CIV. PRO. P. 42(b); Alexandra D. Lahav, *Bellwether Trials*, G.W. L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=1018500>. Cf. *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997) (“The term bellwether is derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock.”).

<sup>99</sup> Interview with Jennifer Duncan-Brice, *supra* note 67; Telephone Interview with Harvey Gross, Director, ACLU of Northern Illinois (June 1, 2007). See also Docket at 12, *Jane Does 1-05 v. City of Chicago*, 79 C 0789 (N.D. Ill., Aug. 18, 1982), available as document JC-IL-0011-9000 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>.

<sup>100</sup> Telephone Interview with Fay Clayton, partner, Robinson, Curley & Clayton (May 31, 2007); Telephone Interview with Harvey Gross, *supra* note 99.

liberal lawyers from higher-status<sup>101</sup> law firms. I interviewed one such lawyer, Peter Carey, who recalls being quite uninterested in fees (which only makes sense, given the plan for turning those fees over to the ACLU), or, for that matter, injunctive relief. His focus, he remembers, was on maximizing individual damages in his individual trials.<sup>102</sup>

In another case of the same vintage, *Hunt v. Polk County*,<sup>103</sup> U.S. district judge Mark Bennett (then the civil rights lawyer who represented the plaintiff) reported a similar approach. *Hunt* was an individual damage action referred to Bennett by the Iowa affiliate of the ACLU. Like his four to six other jail strip-search cases, it was not a pro bono case, he said, but he was content with the standard percentage contingency fee on the individual damages he won. Asked why he didn't convert the lawsuit to a class action, he explained,

I did a lot of 23(b) class work and didn't do it in *Hunt*. I suspect Hunt was interested in his own case more than others, and I wanted to get a fast decision because it was cutting edge and the class cert[ification] always slowed things down. . . . I thought a favorable ruling at the district court would assist others around the country on this issue and . . . that if we made good law greedier lawyers could come in and make the money.<sup>104</sup>

In short, cooperating counsel for the ACLU in this area seem to have filed mostly individual actions, not class actions, and to have concentrated on maximizing returns for their individual clients rather than maximizing either attorneys' fees or total payments by defendants to a group of aggrieved plaintiffs.

*c. Private prisoners' rights or police misconduct lawyers.* Many of the lawyers who have worked on class-action strip-search cases have a private prisoners' rights or police misconduct practice, with occasional ventures into other kinds of civil rights (or criminal

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<sup>101</sup> See JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* (2005); JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982).

<sup>102</sup> Telephone Interview with R. Peter Carey, retired partner, Mandel, Lipton & Stevenson (June 13, 2007).

<sup>103</sup> 551 F. Supp. 339 (S.D. Iowa 1982).

<sup>104</sup> E-mail from Mark Bennett, Judge, U.S. District Court for the District of Iowa, to author (May 27, 2007) (on file with author).

defense) work. Some of these lawyers are quite radical. Jan Susler, who worked on one of the trials connected to the *Jane Does* class action in Chicago, and then on several other individual damage actions related to strip searches, is a member of the Chicago lawyers' collective the People's Law Office, which was founded in the 1960s in support of the Black Power movement. She has handled all kinds of police-misconduct litigation, including over a dozen police, jail, and prison strip-search cases—all but one brought on behalf of a single plaintiff, with settlements of \$40,000 to \$60,000, of which her office received one-third as attorneys' fees. She describes strip-search litigation as of a piece with her extremely political law practice; she explains that she handles civil rights cases, including strip-search cases, in order to simultaneously fight “excessive state power” and empower her clients (Susler's other major litigation area is Puerto Rican independence). Susler's approach to her cases seems somewhat inconsistent with class-action practice; she reports that she works hard to build a real and individual relationship with her clients.<sup>105</sup>

More typical of this category of lawyer is Howard Friedman—a well-known civil rights lawyer in Boston. Friedman's first job out of law school was as a staff attorney of the Prisoners' Rights Project in Boston (more recently called Massachusetts Correctional Legal Services). His private practice focuses on police-misconduct cases of various types, though he also does other civil rights work and occasional non-civil rights cases. He is the president of the National Lawyers Guild's National Police Accountability Project. Friedman has handled sixteen strip-search cases—five jail class actions, and the rest individual damage actions involving prisons and police departments.<sup>106</sup> Friedman explained to me that “class actions can be better for the

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<sup>105</sup> Telephone Interview with Jan Susler, *supra* note 55.

<sup>106</sup> For a list, search for Howard Friedman at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu/searchPeople.php>.

lawyer than for the client” because they take longer to settle and sometimes the instigating client ends up with less money.<sup>107</sup> On the other hand, he adds,

[T]here are some cases that I would only take as a class action. The defense in individual cases is to attack the plaintiff. Many people who were arrested and strip searched are susceptible to an attack, these people would do better as one of several class representatives or as a class member.<sup>108</sup>

His first strip-search class action, *Mack v. Suffolk County*,<sup>109</sup> was in the former category: it began as an individual damages case, and only when it became clear that Suffolk County would not settle did his client agree to seek class certification.<sup>110</sup> After the class was certified, the court granted the plaintiffs’ summary judgment on liability, and the case settled for \$10 million; Friedman’s client received \$35,690—about \$9,000 as a class member and the rest in “bonus” payments for her role as a class representative and her participation in depositions, trial preparation, and press coverage.<sup>111</sup> Friedman’s firm received thirty percent of the total fund as attorneys’ fees, plus costs. Nonrepresentative class members received between a few hundred dollars (for drug and sex-related arrestees) and \$9,000; there were about 1500 claimants.<sup>112</sup> But another case, *Nilsen v. York County*,<sup>113</sup> fits the latter category.

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<sup>107</sup> Telephone Interview with Howard Friedman, civil rights attorney (June 1, 2007). Galanter has brought together academic literature making the same point, *see Galanter, Case Congregations, supra* note 10, at 385 & n. 22 (listing many examples of studies demonstrating that “[i]n civil cases, there seems to be a discount for quantity—i.e., multiple plaintiffs receive less on the average than similarly injured individuals”).

<sup>108</sup> E-mail from Howard Friedman, civil rights attorney, to author (Aug. 13, 2007) (on file with author).

<sup>109</sup> 191 F.R.D. 16 (D. Mass. Feb. 16, 2000) (No. 98-12511-NG); information about this case is available at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>, under its case name or case code (JC-MA-0010).

<sup>110</sup> Telephone Interview with Howard Friedman, *supra* note 107.

<sup>111</sup> The class certification decision was made in February 2000. 191 F.R.D. 16 (D. Mass, 2000); summary judgment was granted in July 2001, 154 F.Supp.2d 123 (D. Mass 2001). For information about the settlement see Settlement Agreement, *Ford v. Suffolk County*, No. 98-11346-NG (D. Mass, July 8, 2002), and Distribution Formula, *Ford v. Suffolk County*, No. 98-11346-NG (D. Mass., undated), available respectively as documents JC-MA-0010-0001 and JC-MA-0010-0002 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>.

<sup>112</sup> E-mail from Howard Friedman, *supra* note 108.

<sup>113</sup> 400 F. Supp. 2d 266 (D. Me. 2005).

Asked about the Supreme Court’s reversal of the precedents on which these cases rely Friedman responded, “I am not sure what the Supreme Court as currently constituted would do with one of these cases. If the case is properly presented I think we can win since the ban on routine strip searches has been in place in many jails now without significant problems.”<sup>114</sup> He is, however, fully aware of the risk that the Roberts Court might disagree even with unanimous court of appeals precedent, noting, for example that the Court recently “reversed what all of the circuit courts had decided regarding *Heck v. Humphrey*.”<sup>115</sup>

One final profile completes this discussion of private civil rights counsel. Like Friedman and Susler, Barry Litt has been a civil rights lawyer for many years. He used to bring more individual actions, but he reports that in recent years he has filed mostly civil rights class actions. He explains that he likes to take strip-search cases because litigation “can’t impact jails very much, except on the way in and on the way out.”<sup>116</sup> Strip-search cases are on the way in, and they therefore fit into the narrow category of cases that “can make real change.”<sup>117</sup> In addition, “We have been able to turn them into pretty successful financial ventures—so we can use the money to fund other cases.”<sup>118</sup> Litt has handled eight strip-search class actions, two of them completed and six pending.<sup>119</sup> In the two that are finished, in Los Angeles and Washington, D.C., he and the other lawyers have ended up with attorneys’ fees of one-third of the total settlement fund— over \$13 million in attorneys’ fees from \$39 million in settlement funds. Another case,

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<sup>114</sup> E-mail from Howard Friedman, *supra* note 108.

<sup>115</sup> *Id.* The reference is to *Wallace v. Kato*, 127 S.Ct. 1091 (2007), which rejected circuit court precedent interpreting *Heck v. Humphrey*, 512 U.S. 477 (1994).

<sup>116</sup> Telephone Interview with Barrett Litt, partner, Litt, Estuar, Miller & Kitson (June 4, 2007).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> For a list, and more recent additions, search for Barrett Litt at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu/searchPeople.php>.

*Craft v. County of San Bernadino*,<sup>120</sup> has a \$25 million settlement (with twenty-five percent attorneys' fees) waiting for judicial approval.<sup>121</sup> Litt reports that his priority in the settlement negotiations is keeping the claims process simple and the claiming rate high, so more money goes to the claimants and less to the administrator. In response to a question about potential legal change, Litt reports that he is not currently moderating his approach to the litigation. But it is clear, he says, that such change is a possibility, particularly in the Eleventh Circuit. So if a circuit split develops, that obviously makes Supreme Court intervention in the issue more likely, and he will reevaluate then.<sup>122</sup>

*d. Class-action lawyers.* Finally, a few lawyers have worked on jail strip-search cases who work on a large variety of class actions—consumer cases, products cases, securities cases—with no notable focus on civil rights. Reports by others demonstrate that class-action lawyers do not often talk about their fees as funding their practice, the language used by the civil rights lawyers above. Rather, fees are conceptualized as the return on their investment. Fees, that is, are the output of a law practice, not its input.<sup>123</sup> No class-action lawyer interviewed for this article was quite so frank in his language. But it was clear, nonetheless, that for a class-action lawyer, strip-search cases are part of a business plan.

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<sup>120</sup> 468 F. Supp. 2d 1172 (C.D. Cal. 2006); more information available at the Civil Rights Litigation Clearinghouse <http://clearinghouse.wustl.edu> (case JC-CA-0044).

<sup>121</sup> See Stipulation and Order Granting Preliminary Approval to Class Settlement, *Craft v. County of San Bernadino County*, 5:05-cv-00359-SGL-OP, available as document JC-CA-0044-0003 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>.

<sup>122</sup> E-mail from Barry Litt, partner, Litt, Estuar, Miller & Kitson, to author (Aug. 13, 2007) (on file with author).

<sup>123</sup> See, e.g., Myriam Gilles, *The Survivors Bar: The Litigation Industry in the Wake of Reform* (July 17, 2007) (unpublished draft manuscript on file with author).

Charles LaDuca is one such lawyer. LaDuca's firm litigates mostly securities, anti-trust, and products class actions.<sup>124</sup> But over the past three or four years jail strip-search class actions have become about sixty percent of his practice. He has been involved in over a dozen of the cases, and has more in the works. It is possible, LaDuca says, that lawyers with no civil rights background or commitment might bring these cases entirely for the attorneys' fees, rather than the benefits to the class, and therefore agree to "settle the cases on the cheap."<sup>125</sup> But this is not LaDuca's approach, he says. He talks with energy about his substantive commitment to these cases. And yet he is much more business-like in his discussion of them than the other lawyers whose interviews have already been described. For example, he explains that the now-abundant settlement and litigation precedents set a fairly clear market rate for settlement: "about \$1000 per head if you were strip searched on a non-felony case without reasonable suspicion."<sup>126</sup> His settlements are in line with that market rate, he says, and he is content with that. For example, each claimant in his cases gets just one settlement, regardless of how many strip searches she or he experienced.<sup>127</sup> (This arrangement would likely be quite unappealing to counsel who identify more solidly as prisoners' rights lawyers—compare it, for example, to the outcome described

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<sup>124</sup> The firm's website states, "Our firm is involved in the prosecution of complex, serious cases involving fraud, conspiracy, antitrust violations, privacy violations, and violations of state and federal securities laws, as well as consumer protection and product liability cases, in federal and state courts throughout the United States." [http://www.cuneolaw.com/areas/fed\\_lit.cfm](http://www.cuneolaw.com/areas/fed_lit.cfm) (last visited Jan. 7, 2008).

<sup>125</sup> Telephone Interview with Charles LaDuca, partner, Cuneo, Gilbert & LaDuca (May 24, 2007). Because fees need to be approved by the district court, this can require some fancy paperwork to make the attorneys' fees look more reasonable. For example, a case with a total class of 3000 people could settle for a maximum of several million dollars and \$1,000 per claimant. If (as expected) only a few hundred people submit claims, that means the true settled payment to the class is much lower. But fees can be set as a percentage of the maximum fund, not the actual distributed benefit for the class members. For settlements with reverter structures, see, e.g., Settlement Agreement at 13, *Kahler v. Rensselaer County*, No. 03-cv-01324-TJM (N.D.N.Y. Aug. 16, 2004), available as document JC-NY-0045-0007 at the Civil Rights Litigation Clearinghouse, <http://clearinghouse.wustl.edu>; *Doan v. Watson*, 2002 WL 31730917, No. 99-4-C-B/S (S.D. Ind. Dec. 4, 2002); *Maneely v. City of Newburgh*, 256 F.Supp. 2d 204 (S.D.N.Y. 2003); *Eddleman v. Jefferson County*, 96 F.3d 1448 (6th Cir. 1996) (table op.), No. 3:91CV-144-J (W.D. Ky. settlement approved May 24, 1999). This issue and all of these cases are discussed in *Nilsen v. York County*, 400 F. Supp. 2d 266 (D. Me. 2005).

<sup>126</sup> Interview with Charles LaDuca, *supra* note 125.

<sup>127</sup> *Id.*

above in the Miami case.) LaDuca explains that he needs to work with criminal defense or civil rights lawyers on these cases because they “have the pulse of how things are happening at the jail.” But his contribution, he says, is the “ins and outs of Rule 23 practice.”<sup>128</sup> Perhaps, in addition, he contributes a kind of consumerist orientation—experience and comfort with small individual damages aggregated into large total awards.

To finish up the comparison, I asked LaDuca, too, whether he agreed that the strip-search precedents are vulnerable given the current ideological makeup of the Supreme Court, and what difference it should make if they are. This is a threat that does not seem to loom large for him:

I do have a lot of confidence, maybe blind confidence, in the many Circuit Courts that have weighed in favorably already. . . . Long and short of it, while this Supreme Court wouldn't exactly be considered favorable for our cause; I'm not going to stop bringing these cases, where applicable, because of the threat of a possible change.<sup>129</sup>

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Observers across civil rights fields have long noted the connections between the civil rights, personal injury, and class action bars.<sup>130</sup> But even within civil rights litigation, it is unusual to find a set of cases in which more than one kind of lawyer can be a specialist. I had expected to find differences in framing, goals, or outcomes—in particular, settlement terms—based on lawyer type. Instead, it seems there is much about jail strip-search cases that appears *not* to vary based on the orientation of plaintiffs' counsel. Still, a range of attitudes about

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<sup>128</sup> *Id.*

<sup>129</sup> E-mail from Charles LaDuca, partner, Cuneo, Gilbert & LaDuca (Aug. 12, 2007) (on file with author).

<sup>130</sup> See, e.g., Stephen C. Yeazell, Brown, *The Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975 (2004); Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorneys Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719 (1988); Christine Jolls, *The Role and Functioning of Public-Interest Legal Organizations in the Enforcement of the Employment Laws*, in EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 141, 162–64 (Richard B. Freeman et al. eds., 2005).

attorneys fees is evident—for some but not all of the lawyers, fees are extremely important.<sup>131</sup> This observation is descriptive rather than normative, but I should make clear that it does not seem problematic to me; I am not one of “those who believe that lawyers should bring civil rights actions out of the goodness of their hearts (perhaps while singing ‘Kumbaya’ or, for those of a more lefty persuasion, ‘If I Had a Hammer’).”<sup>132</sup> In addition, my interviews demonstrate lawyers’ varying views about the threat of impending adverse legal change, and suggest (without by any means establishing) that that range may be importantly connected to lawyer background.

#### IV

#### CONCLUSION

Of course, this brief essay has not exhausted the topic of jail strip-search litigation. In fact, the class of cases discussed here poses an enormously interesting field for research into the relationships between appellate-court doctrine, trial-court litigation, and government operations. If the law has been so clear for so long, why don’t jails follow it? What leads them to expose themselves to multi-million dollar judgments? If the judiciary’s shift to the right is so pronounced, why has that not *already* produced a change in doctrine? If there is a change in doctrine, eventually, what will it mean for this kind of litigation, and for jail operations? Will the evidently loose coupling between case law and jail policy stay as loose if the case law shifts against plaintiffs in these cases? All these are important questions, but beyond the scope of this short essay.

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<sup>131</sup> More generally, fees function as a vital impetus to civil rights enforcement by “private attorneys general.” Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 205; Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 UCLA L. REV. 1 (2006).

<sup>132</sup> Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 NW. U. L. REV. 1459, 1459 (2007); see also Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291, 373 (1990) (highlighting views by some that civil rights litigation “is not part and parcel of ordinary practice, but is more in the nature of charity or volunteer work”).

What I hope this essay has done is demonstrate two things. First, not only Galanter but others have focused their work dealing with case cohorts on very large categories of cases— asbestos claims, or employment litigation, for example. But Galanter’s insight—that disaggregation promotes learning—is a powerful one, and it holds true even for a very small case category such as jail strip-search litigation. Indeed, the small size of this case category makes it manageable. Second, Galanter’s insistence that analysis include litigation’s participants is similarly powerful. Even when (as here) differences among participants do not demonstrably correspond to differences among case outcomes, they matter nonetheless to other aspects of litigation and legal change.