

# **Strip Searches and the Fourth Amendment Rights of Prisoners**

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The author thanks Mark Hentz, Esq. for his assistance on this paper.

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## **FOURTH AMENDMENT RIGHTS OF PRE-TRIAL, PRE-AND POST-ARRAIGNMENT DETAINEES**

### **I. INTRODUCTION**

In 1984 the Supreme Court held that prisoners have no privacy interest protected by the Fourth Amendment in their prison cell. *Hudson v. Palmer*, 468 U.S. 517 (1984). This is still the law. As discussed below, convicted prisoners have very limited Fourth Amendment rights. But without saying that a different standard applies, pre-arraignment detainees, detainees waiting for their first court appearance, and pre-trial detainees have been found to have a more significant fourth amendment expectation of privacy in their bodies. The Constitution limits strip searches of these people. These materials discuss the contours of this right.

#### **A. *Bell v. Wolfish* - Individualized Reasonable Suspicion**

The Fourth Amendment guarantees that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” The question is when is a strip search unreasonable?

The now heavily litigated area of the constitutionality of strip searches began with *Bell v. Wolfish*, 441 U.S. 520 (1979). *Bell* was a challenge to conditions at the federal detention center in New York City designed to hold pre-trial detainees. The plaintiffs challenged the policy of strip searching prisoners after contact visits. The Supreme Court’s majority opinion written by Justice Rehnquist said the practice “instinctively gives up the most pause” but went on to find these strip searches to be reasonable under the Fourth Amendment. The Court held:

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case, it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

The justification for the search is the most frequently litigated issue, but even if a strip search is justified, it may be unconstitutional if it is conducted in an unreasonable manner or place.

*Bell* held that pre-trial detainees could be strip searched after a contact visit. After *Bell* the lower courts began to applying its reasoning to intake strip searches of people who had just been arrested and had yet to go to court for a determination of bail<sup>1</sup>. The first cases after *Bell* held that blanket strip search policies of arrestees at a police station or on admission to detention facilities were unconstitutional. The courts reasoned that most people do not start their day planning to be arrested. The courts quickly agreed that an admission strip search, at least of a minor offender can take place if the police or corrections officers has a reasonable suspicion to suspect the person has concealed contraband. The initial cases were brought by people charged with minor offenses. Thus, the holdings were limited to the rights of detainees held on such minor offenses. *See Tinetti v. Wittke*, 479 F.Supp 486 (E.D. Wisc. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980)(speeding); *Logan v. Shealy*, 590 F.2d 1224 (4th Cir. 1981)(operating under the influence); *Tikalsky v. City of Chicago*, 687 F.2d 175 (7th Cir. 1982)(disorderly conduct); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983)(women charged with traffic, regulatory, or misdemeanor offenses); *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984)(warrant for an outstanding speeding ticket and violation of a restriction on driver's license.); *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984)(warrant for outstanding parking tickets); *Stewart v. Lubbock County*, 767 F.2d 153 (5th Cir. 1985)(arrest for misdemeanors punishable only by fines, public intoxication and an outstanding warrant for issuing a bad check, following a routine traffic stop); *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985)(summons for a violation of the local leash law); *Weber v. Dell*, 804 F.2d 796 (2nd Cir. 1986)(misdemeanors for false report and resisting arrest) *Watt v. City of Richardson Police Department*, 849 F.2d 195 (5th Cir. 1988) (warrant for failing to register a dog violating a city ordinance).

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<sup>1</sup> This group is referred to as arrestees or pre-arraignment detainees, typically it includes people arrested on default warrants and those held on non-criminal material witness warrants.

The first reported case after *Bell* to challenge an admission strip search conducted without any evaluation for cause was *Tinetti v. Wittke*, 479 F.Supp 486 (E.D. Wisc. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980). The *Tinetti* court relied on an unpublished case from New York, *Sala v. County of Suffolk*, (E.D.N.Y. 11/28/78), in which one of the plaintiffs had been arrested for failure to pay a speeding fine and the other plaintiff for failing to respond to a summons which had been sent to the wrong address. The district judge in *Sala*, stated:

Here on one side of the balance scale we have the intrusion into personal dignity and privacy in a way that for some people at least might cause serious emotional distress. A search of (this) . . . type . . . including the visual inspection of the anal and genital areas, has been characterized by various witnesses here, and by judges in some other cases, as demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission . . .

This language describing strip and visual body cavity searches was repeated in *Tinetti* and has become the standard description adopted by most courts.

The decisions in these materials describe well-settled law but in September 2008 a split developed in the circuit courts which could lead to a decision on this issue by the Supreme Court. On September 4, 2008, the 11<sup>th</sup> Circuit sitting *en banc* broke with its own precedent in *Powell v. Barrett*, F.3d , 2008 WL 4072800 (11<sup>th</sup> Cir 2008) and created a split in the Circuits based on their reinterpretation of the Supreme Court's 1979 decision in *Bell v. Wolfish*, 441 U.S. 520 (1979). The 11<sup>th</sup> Circuit has some support from an unlikely place, the 9<sup>th</sup> Circuit. *Bull v. City and County of San Francisco*. 539 F.3d 1193 (9<sup>th</sup> Cir. 2008). This panel decision upheld district judge Breyer's ruling that blanket strip searches are unconstitutional but a dissent by Judge Tallman argued that the appellate courts had lost sight of the meaning of *Bell*, and the concurring opinion by Judge Ikuta agreed that precedent in the circuit required affirmation but made it clear that she favored hearing *en banc* starting his opinion stating: "While compelled by Ninth Circuit case law, the disposition is in tension with Supreme Court precedent."<sup>11</sup>

## **II. WHAT IS A STRIP SEARCH?**

The term "strip search" has different meanings to correctional administrators and officers than it does to lawyers. It is essential to understand these differences so that lawyers, clients and witnesses can meaningfully communicate with one another. A corrections employee may honestly state that a person was not strip searched, although the person

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<sup>11</sup> I understand that the defendants will be requesting a rehearing *en banc* which is likely to be granted in light of *Powell*.

was required to remove all of his clothing and was viewed while naked, because this procedure is not defined as a “strip search” in the institution’s policies. Further muddling the definition, many states have statutes that purport to define strip searches. Lawyers can confuse the issue as well by using the term strip search to refer to any procedure that requires individualized reasonable suspicion, including, for example, searches of an individual’s body cavities.

**A. Correctional Administrator’s Definition**

When prison or jail administrators refer to a strip search, they are typically talking about a search that involves the examination of an inmate’s body conducted in a prescribed order and involving specific areas of the inmate’s body. These areas usually include the mouth, hair, armpits, fingers, toes, soles of the feet, and groin area. This is typically the definition contained in the institution’s policy manual.

**B. Statutory Definition**

Many states statutorily define strip searches. The plaintiff in *Stanley v. Henson*, 337 F.3d 961 (7th Cir. 2003), pointed to 14 states’ definitions, including Illinois (725 ILL. COMP. STAT. 5/103-1(d)), Florida (F.S.A. § 901.211), Ohio (R.C. §2933.32) and Michigan (M.C.L.A. 764.25a). It is imperative to remember that just because a department or state has a definition, the definition may not be constitutionally appropriate.

**C. Fourth Amendment Definition**

Under the fourth amendment, the term strip search typically refers to a search that requires exposure of a portion of a person’s body that is ordinarily private. For example, one court has stated that “include[d] within the term strip search [is] any exposure or observation of a portion of a person’s body where that person has a ‘reasonable expectation of privacy.’” *Doe v. Calumet City*, 754 F.Supp. 1211, 1216 n.9 (N.D. Ill. 1990). The *Doe* court went on to hold that “[t]here is simply no question that plaintiffs had a reasonable expectation of privacy in those private parts. Deeply imbedded in our culture ... is the belief that people have a reasonable expectation not to be unclothed involuntarily, to be observed unclothed or to have their ‘private’ parts observed or touched by others.” *Id.* at 1218. The parts of a person’s body where there exists a reasonable expectation of privacy are not universally agreed upon. Some courts include only the genitals, buttocks and, for females, breasts, while others include bare skin when it is visible only if forcibly shown.

**1. Application of the Fourth Amendment Definition**

**a. Complete nudity is not required**

Under the Fourth Amendment, a strip search may take place even though the person is not required to remove all of his or her clothing. For example, in *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989), the plaintiff was initially required to unbutton her blouse and expose her chest for inspection and later was required to completely disrobe and submit to a visual body cavity inspection. The Sixth Circuit noted that there were two incidents and that “either would be treated as a strip search if it occurred alone.” *Id.* at 1253. *See also, Mason v. Village of Babylon*, 124 F.Supp.2d 807 (E.D.N.Y. 2001)(The plaintiff was ordered to raise her shirt and expose her bra. She was then asked to pull out, but not remove, her bra so as to dislodge anything that might be hidden underneath. She was also asked to lower her pants to her thighs. While she was not asked to remove her underwear, she was required to reposition them. This was analyzed as a strip search.); *Gonzalez v. City of Schenectady*, 141 F.Supp.2d 304 (N.D.N.Y. 2001); *Huck v. City of Newburgh*, 712 N.Y.S.2d 149 (N.Y. App. 2000)(The plaintiff was asked to remove all her outer garments and, while in her underwear, she was asked to lift her bra exposing her breasts. The court analyzed this as a strip search.). The First Circuit noted that “precedent does not require that a search be either prolonged or thorough to be termed a strip search.” *Wood v. Hancock County*, 354 F.3d 57, 63 (1st Cir. 2003). In a case involving the search of student in a school the Ninth Circuit agreed that requiring her to strip to her bra and underwear and to shake her undergarments was a strip search. *Redding v. Stafford Unified School District* 541 F.3d 1071, 1081 (9<sup>th</sup> Cir. 2008).

To make matters more confusing for non-lawyers, the term strip search is at times used as legal shorthand to refer to any search that is so intrusive that it requires individualized reasonable suspicion. *See, e.g., Justice v. City of Peachtree*, 964 F.2d 188, 191 (11th Cir. 1992)(Requiring a 14 year-old girl to strip down to her underwear because the officers suspected her of concealing drugs on her person was found to be a strip search under this definition.). In *Pace v. City of Des Moines*, 201 F.3d 1050 (8th Cir. 2000), the court found that a person has a reasonable expectation of privacy in the upper body and any tattoos on the upper body. Thus, an order by a policeman that the plaintiff remove his shirt to permit photographing of a tattoo on his chest violated his fourth amendment rights. This was true even though the plaintiff had been seen wearing a tank top that exposed most of the tattoo in

public on numerous occasions. Some courts have generally referred to a person's right not to be involuntarily required to disrobe. See *Justice v. City of Peachtree City*, 964 F.2d 188 (11th Cir. 1992). *Stanley v. Henson*, 337 F.3d 961(7th Cir. 2003) (held that a policy requiring detainees to strip to their underwear is analyzed as a strip search but found the policy to be reasonable).

**b. Observation while using the bathroom**

Courts have required individualized reasonable suspicion when police officers observe a detainee using the bathroom, even if the officer did not ask the person to disrobe. See *DiLoreto v. Borough of Oaklyn*, 744 F.Supp. 610, 620 (D.N.J. 1990). Note, however, that observation may be considered reasonable while a person is giving a urine sample for a drug test.

**c. Observation during a changeover, dress-out or clothing search**

A changeover, or dress-out, is the process during admission, into a detention facility where a detainee is required to remove his or her street clothing and get dressed in a uniform. The process may be accompanied by a strip search and/or delousing. Observation of inmates during a changeover, or dress-out, may require individualized reasonable suspicion. For example, in *Doan v. Watson*, 168 F.Supp.2d 932 (S.D. Ind. 2001), the observation of misdemeanor arrestees while showering and delousing prior to being dressed in prison-issued uniforms by officers who were specifically instructed to examine the prisoners' entire bodies for contraband, was found to violate the prisoners' Fourth Amendment rights. The specific instruction to prison officers to examine the inmates' bodies was viewed as a blanket strip search policy.

Observation of a detainee while she changed into a jail-issued uniform was characterized as a strip search in *Burns v. Goodman*, 2001 WL 498231 (N.D. Tex. May 8, 2001), *aff'd*, 2002 WL 243248 (5th Cir. Jan. 16, 2002), *cert. denied*, 537 U.S. 840 (2002). In *Burns*, a male corrections officer observed the plaintiff, a female detainee, change into a prison-issue dress. Such observation was in violation of the facility's policy, although there was evidence that such observation was common practice. The court acknowledged that if "this was the customary practice, it would constitute a strip search." *Id.* at \*5.

A similar episode ended in a different result in *Stanley v. Henson*, 337 F.3d 961 (7th Cir. 2003). The plaintiff was arrested for assaulting a police officer. Jail policy required that all detainees who were not to be released on their own recognizance be changed into jail-issue uniforms and for a same-sex officer to observe the changeover. The policy allowed detainees to leave their undergarments on. However, the plaintiff was not wearing a brassiere at the time of her arrest, so the changeover resulted in the exposure of her bare breasts. The court analyzed the changeover as a strip search, but found it to be a relatively minimal intrusion, pointing to the brief period of observation/exposure, the policy that undergarments may remain on, and the fact that there was no touching by the officer. The court found this minimal intrusion to be justified because Stanley was arrested for assaulting a police officer and her jailers knew nothing of the circumstances of her arrest. The court focused on the reasonableness of the policy in general rather than its effect on the plaintiff.

**d. Vermin inspection**

Some facilities inspect the bodies of detainees for vermin and/or delouse new detainees. In *Skurstenis v. Jones*, 236 F.3d 678 (11th Cir. 2000), the court upheld as reasonable a physical examination of the plaintiff by an opposite gender nurse's assistant. The search consisted of the male nurse's assistant running his fingers through plaintiff's cranial and pubic hair. The Eleventh Circuit held that "it is not inappropriate for medical personnel to conduct a strip search of an inmate of the opposite sex." *Id.* at 684. Unusual in this case was the fact that Skurstenis was not searched until shortly before she left the jail. The court dismissed this oddity as acceptable, given that the medical personnel were previously unavailable to perform the examination. Further, the court noted that the Sheriff's office was specifically charged by the Alabama legislature to "exercise every precaution to prevent the spread of disease among the inmates." Alabama Code §14-6-95. The spread of lice, which was apparently prevalent amongst inmates in Alabama, was of particular concern.

One must wonder how effective a disease prevention program is if detainees are not searched upon admission to the facility. While physical or visual examinations of detainees' naked bodies for vermin are generally upheld, the details of the procedure should be

carefully examined. Such a search represents a tempting subterfuge to skirt the limitations on strip searches.

**e. Touching bare body parts**

Courts apply the individualized reasonable suspicion standard for searches in which a detainee is subjected to touching of the genitals, buttocks or, for women, bare breasts. Courts utilize the body of law developed for strip searches to analyze such cases, even though this physical touching is more than a strip search. *See Schmidt v. City of Lockport*, 67 F.Supp.2d 938 (N.D. Ill. 1999). While a pat search through clothing may be conducted as part of an intake procedure, touching a person's bare body requires at least reasonable suspicion.

**f. Intent Required**

The fact that a law enforcement officer views a person's naked body does not, by itself, mean that a strip search has taken place. The viewing must be part of a search procedure, rather than inadvertent or accidental viewing. Accidental viewing, sometimes called incidental, occurs when an officer who is not involved in a search unintentionally or unavoidably views a person's naked body. For example, an officer may walk past a shower while a person is exiting. The First Circuit requires an "inspection," which is defined to include "formal or official viewing or examination." *Wood v. Hancock County*, 354 F.3d 57 (1st Cir. 2003). *Wood* held that the officer's intent is not controlling. A district court recently held that the only intent required is the intent to search. *See Blihovde v. St. Croix County*, 2003 WL 23139401 (W.D. Wisc. 2003). The fourth amendment applies only to unreasonable searches, so the viewing must be part of a process aimed at detecting contraband. Of course, as discussed above, changing the stated purpose in an attempt to evade the constitutional requirements is unlikely to succeed.

**III. FOURTH AMENDMENT STANDARD**

**A. The Plaintiff's Status as Pre-Arrest, Pre-Trial, or Post-Conviction Changes the Balance**

The standard for evaluating reasonableness does not change as a detainee's status changes, but the balance of interests articulated in *Bell* does. As the level of judicial process an inmate receives increases, the balance shifts further in favor of institutional security concerns. The interaction between the status of the individual detainee and the nature of the institution where the inmate is being held must also be kept in mind and will be discussed later in these materials.

At the pre-arraignment and post-arraignment-awaiting-bail stages, the nature of the crime with which an individual is charged plays a role in establishing the standard for justifying a strip search, as will be discussed shortly. By the time an inmate is being held pending trial or serving a sentence, the specifics of the crime are not a factor and the standard depends more on the detainee's status and the nature of the facility holding the detainee.

### **1. Admission to the General Population**

Typically detainees awaiting a first court appearance are held in a police lock-up or a county jail separate from other prisoners. Our smallest state, Rhode Island, established a "unified" system in which such detainees were held in an intake facility, which was classified as a maximum security prison, and where the detainees were mixed with the general prison population. The First Circuit rejected the claim that this intermingling provided a basis for strip searching the detainees because it was "inherently limited and avoidable" and the security interests of a facility do not always outweigh the privacy interests of detainees. *Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001). Other courts agree. *Calvin v. Sheriff of Will County*, 405 F.Supp. 2d 933 (N.D. Ill. 2005); *Cruz v. Finney County*, 656 F. Supp 1001 (D.Kan. 1987). However, other courts have held that pre-arraignment detainees can be strip searched without evaluating for reasonable suspicion before the detainee is to be placed in the general population of a jail. *Evans. Stephens*, 407 F.3d 1272 (11<sup>th</sup> Cir. 2005) (*en banc*); *Gustafson v. Polk County Wis.*, 226 F.R.D. 601 (W.D. Wis. 2005).

### **2. Before Arraignment or a First Court Appearance**

Policies involving routine strip searches upon admission of people who have just been arrested and are waiting for bail to be set or for a first court appearance have been held unconstitutional, in part because such individuals do not typically plan to be arrested. In *Roberts*, the First Circuit noted that "the deterrent rationale for the *Bell* search is simply less relevant given the essentially unplanned nature of an arrest and subsequent incarceration." *Id.* at 111. The Ninth Circuit expressed a similar view in

*Giles v. Ackerman*, stating “there is no indication whatsoever that the county’s strip search policy could or did have any deterrent effect. Visitors to the detention facility in *Bell* could plan their visits and organize their smuggling activities. In contrast, arrest and confinement in the Bonneville County Jail are unplanned events, so the policy could not possibly deter arrestees from carrying contraband.” *Id.* at 617.

*Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983), challenged Chicago’s practice of strip searching women arrested on misdemeanor offenses before admitting them to city lock-ups to await bail. The Seventh Circuit acknowledged that strip searches are invasive stating, “we can think of few exercises of authority by the state that intrude on the citizen’s privacy and dignity as severely as the visual anal and genital searches practiced here.” *Id.* at 1272. This extreme invasion of privacy weighed heavily on one side of the balancing test established in *Bell*, requiring the City to demonstrate a strong need for the searches. The court recognized that “the more intrusive the search, the closer governmental authorities must come to demonstrating probable cause for believing that the search will uncover the objects for which the search is being conducted.” *Id.* at 1273. Authorities must have a specific reasonable suspicion that an arrestee is concealing contraband to outweigh the extreme intrusion involved in strip searching an arrestee. *See id.*

The nature of the reasonable suspicion necessary to constitutionally strip search a pre-arraignment detainee was discussed in *Kelly v. Foti*, 77 F.3d 819 (5th Cir. 1996). “A strip search is permissible only if the official has an individualized suspicion that the arrestee is hiding weapons or contraband. This suspicion must relate to the individual arrestee, not a category of offenders and does not arise merely because an arrestee fails to post bond immediately and police move him to general population. In short, pure speculation does not create a reasonable suspicion; nor does a generalized fear of a category of arrestees.” *Id.* at 822 (citations omitted). This general standard has been widely embraced. *See, e.g., Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001)(holding unconstitutional the strip search of DUI arrestee detained until blood alcohol level diminished); *Weber v. Dell*, 804 F.2d 796, 804 (2nd Cir. 1986) (“We conclude that a reasonable suspicion that an accused misdemeanant or other minor offender is concealing weapons or other contraband – suspicion based on the particular traits of the offender, the arrest and/or the crime charged – is necessary before subjecting the arrestee to the indignities of a strip/body cavity search.”); *Chapman v. Nichols*, 989 F.2d 393 (10th Cir.

1993)(holding unconstitutional the strip searches of women arrested for traffic offenses and not suspected of having concealed weapons or drugs).

**a. Default warrants**

Many cases challenging strip search policies have been brought by people arrested on default warrants. While some people may have defaulted after their first court appearance, these individuals are treated the same as pre-arraignment detainees. *See Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989)(default warrant for failing to appear for a traffic hearing); *Hill v Bogans*, 735 F.2d 391 (10th Cir. 1984)(arrest on a bench warrant for failing to appear at a hearing for traffic offenses).

**b. Parole or probation violations**

Since many courts have held that, in some instances, a criminal charge itself can provide reasonable suspicion to support a strip search, it is necessary to determine how to treat an arrest for parole or probation violations. An arrest for violating probation or parole is distinct from the underlying offense that resulted in the imposition of probation or parole in the first place. A violation can include a wide range of conduct, including acts that are not crimes, such as missing an appointment with a parole officer, as well as acts that could indicate criminal conduct, such as a positive drug test. The nature of the probation violation itself and not just the fact that there has been a violation, must play a role in determining whether reasonable suspicion exists to justify a strip search.

The issue of strip searches of probation violators is discussed in *Silvia v. Clackamas County*, 2001 WL34039482 (D. Or. Nov. 14, 2001). Clackamas County argued that strip searches of probation violators should be evaluated using the standard for convicted prisoners. The County reasoned that the violation resulted in the reimposition of the original sentence, rendering the plaintiff a prisoner. The court rejected this contention, holding instead that “probation violations relate to conduct which is separate and apart from the conduct underlying the original conviction.” The court applied the standard for pretrial detainees in evaluating the strip search of the plaintiff. The notion that a probation violation alone is not an automatic justification for a strip search was embraced in *Dodge v. County of Orange*, 209 F.R.D. 65 (S.D.N.Y. 2002). The *Dodge* court granted a preliminary injunction prohibiting the Orange County Correctional Facility from maintaining its current

strip search policy, holding that, based on the information before it, “[b]eing admitted for a violation of probation or parole does not in and of itself provide individualized reasonable suspicion.” *Id.* at 77. A probation violation is a factor that may be considered in forming the reasonable suspicion necessary to justify a strip search, but is not itself automatic justification for a strip search.

**2. Post-Arrest-Awaiting-Bail**

Once bail has been set, individuals may be detained while waiting to post bail. In *Wachtler v. County of Herkimer*, 35 F.3d 77 (2nd Cir. 1994), the plaintiff was arrested for obstructing governmental administration, a misdemeanor, when he refused to answer an officer's questions during a routine traffic stop. Wachtler was taken before the nearest available judge, bail was set and he was taken to the county jail. As part of processing Wachtler into the jail, he was strip searched and placed in solitary confinement. Overturning the district court's dismissal of Wachtler's claim, the Second Circuit applied the basic misdemeanor standard holding that, “if the standard procedure included routine strip-searches of misdemeanor arrestees, absent reasonable suspicion of weapons or contraband, and if no reasonable suspicion concerning Wachtler's possession of such items existed, then Wachtler would prevail.” *Id.* at 82. In *Shain v. Ellison*, 273 F.3d 56, 64 (2<sup>nd</sup> Cir. 2001) the court affirmed that, even after an arraignment, a misdemeanor arrestee cannot be strip searched without reasonable suspicion.

**3. Pre-Trial Inmates**

The balance between a detainee's privacy rights and a detention facility's need to strip search detainees shifts when detainees are held pending trial, as demonstrated by the decision in *Bell*. *Bell* addressed challenges to a variety of prison procedures brought by pre-trial detainees at a short-term federal detention facility, including strip searches of detainees after contact visits. The Court emphasized the status of pretrial detainees, noting that “a person in the federal system is committed to a detention facility only because no other less drastic means can reasonably ensure his presence at trial.” *Bell*, 441 U.S. at 1866. The Court further cautioned that “[a] detention facility is a unique place fraught with serious security dangers.” *Id.* at 1884. Given the deference that must be provided to jail administrators, it is not surprising that the Court upheld the strip search policy which was reasonably limited to searching inmates after they had an opportunity to obtain contraband during contact visits.

The importance of taking into account the dangers inherent in a pre-trial detention facility and inmates held pending trial is highlighted in *Shain v. Ellison*, 273 F.3d 56 (2nd Cir. 2001). In *Shain*, a family court judge ordered the plaintiff held without bail following his arrest for a misdemeanor offense, harassment. Upon admission to the Nassau County Correctional Center (NCCC), Shain was strip searched in accordance with institutional policy. The court applied the standard for misdemeanor arrestees in evaluating the strip search. Using this standard, the court found that “it was clearly established in 1995 that persons charged with a misdemeanor and remanded to a local correctional facility like NCCC have a right to be free of a strip search absent reasonable suspicion that they are carrying contraband or weapons.” *Id.* at 66.

While the strip searches in *Bell* were upheld by the Supreme Court, it is not a per se validation of strip searches in a detention setting, or even of strip searches of pretrial detainees. *See Masters v. Crouch*, 872 F.2d 1248, 1252 (6th Cir. 1989) (“*Bell v. Wolfish* did not give carte blanche approval to a practice of strip searching all pretrial detainees.”); *Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001); *Dobrowolskyj v. Jefferson County*, 823 F.2d 955 (6th Cir. 1987). The plaintiff in *Covino v. Patrissi*, 967 F.2d 73 (2nd Cir. 1992), was also a pretrial detainee challenging a policy under which he was subjected to random strip searches. Unlike the plaintiffs in *Bell*, Covino was held in a state prison pending trial and intermingled with convicted inmates. The search policy was upheld under the deferential *Turner* standard for evaluating prison regulations. (This standard is discussed later in these materials, in the sections addressing the reasonableness standard applied in a prison setting.)

Thus, the constitutionality of strip searches of pretrial detainees is determined by a balancing of interests. The status of the pretrial detainee shifts the balance of interests, and the decisions of prison/jail administrators to strip search detainees is shown greater deference.

#### **4. Former Inmates, Released After Court Proceedings**

Once a person held pre-trial is freed from any pending criminal charges, he regains his full rights under the Fourth Amendment. As a result, if a prisoner who was held pending trial goes to court and is found not guilty, he may not be strip searched on his return to the jail to pick up his belongings. While this seems obvious, plaintiffs have brought suit to establish this right in several jurisdictions. *See Bynum v. District of Columbia*, 217 F.R.D. 43 (D.D.C. 2003)(class action challenging practice

of strip searching court returns after they have been ordered released); *Gary v. Sheahan*, 1998 WL 547116 (N.D. Ill. 1998).

**5. Convicted Prisoners**

Once a detainee has been convicted and sentenced, the required balancing of interests is weighted even more heavily in favor of the detention facility's security concerns. In *Arruda v. Fair*, 710 F.2d 886 (1st Cir. 1983), the court upheld a policy of strip searching inmates in the segregation unit of a state prison every time they left, or entered, the unit. The court compared the challenged search policy to that in *Bell*, and found even greater reasons to justify a search in the prison setting. If the *Bell* strip searches were constitutional, the court reasoned, the prison policy must also be constitutional given the additional justifications for the searches. Both search policies dealt with searches after inmates had an opportunity to acquire contraband in settings fraught with serious dangers. Additional factors justifying the searches in the prison setting included that the facility was a maximum security prison with the segregation unit holding only the most dangerous inmates and that there was a long history of contraband problems in the facility, including a documented history of guards smuggling in contraband. All of these factors made the prison's strip search policy reasonable and outweighed any invasion of the prisoners' privacy rights.

This result has been reached consistently by courts evaluating strip searches in the prison setting. *See Hay v. Waldron*, 834 F.2d 481 (5th Cir. 1988); *Goff v. Nix*, 803 F.2d 358 (8th Cir. 1986); *Michenfelder v. Sumner*, 860 F.2d 328, 332 (9th Cir. 1988), *Thompson v. Souza*, 11 F.3d 694 (9th Cir. 1997). Strip searches of convicted prisoners should still meet the *Bell* requirements. Thus, strip searches designed to humiliate or intimidate prisoners can be unconstitutional.

**6. Juveniles**

Two circuit courts held that juveniles can be strip searched on arrest based on the doctrine of *in loco parentis*. *N.G. v. Connecticut*, 382 F.3d 225 (2<sup>nd</sup> Cir.2004). This was followed by the 8<sup>th</sup> Circuit in a case where the juvenile was only required to strip to her underwear. *Smook v. Minnehaha County* F.3d (8<sup>th</sup> Cir. 2006) reversing, 353 F.Supp.2d 1059, (D.S.D. 2005.) At least one district court disagreed with this analysis applying *Bell* to find such routine strip search unconstitutional. *Moyle v. County of Contra Costa*, 2007 WL 4287315 (N.D. Cal. 2007).

**B. Cause to Support a Strip Search**

**1. Factors To Be Considered**

The three broad categories typically considered when evaluating the reasonableness of a strip search are:

- the nature of the criminal charge
- the characteristics of the arrestee; and
- the circumstances of the arrest.

*See Weber v. Dell*, 804 F.2d 796 (2nd Cir. 1986); *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984); *Dobrowolskyj v. Jefferson County*, 823 F.2d 955, 957 (6th Cir. 1987); *Kelly v. Foti*, 77 F.3d 819 (5th Cir. 1996).

**2. The Nature of the Criminal Charge**

The nature of the crime charged is a factor in making a decision whether a detainee may be strip searched. Some courts have held that the charge alone provides reasonable suspicion to conduct a strip search.

**a. The charge alone may be enough**

The offense with which a detainee is charged plays a role in justifying a strip search of the detainee upon arrest or while awaiting bail. Decisions holding that the criminal charge alone supports a strip search are based on the view that the charge itself supplies the needed reasonable suspicion. *See Weber v. Dell*, 804 F.2d 796 (2nd Cir. 1986); *Dufrin v. Spreen*, 712 F.2d 1084, 1087 (6th Cir. 1983). Interestingly, the concept that those charged with more serious crimes or crimes of violence are more likely to be carrying concealed contraband that could only be detected through a strip search is not supported by any scientific studies.

**b. Traffic violations and minor offenses**

Traffic violations and minor offenses normally preclude a strip search in the absence of individualized reasonable suspicion that the detainee is concealing contraband. The prevalence of this standard is reflected by the court's remarks in *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989), that "[t]he decisions of all the federal courts of appeals that have considered the issue reached the same conclusions: a strip search of a person arrested for a traffic violation or other minor offense not normally associated with violence and concerning whom there is no individualized reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband is unreasonable."

**c. Drug charges**

Because illegal drugs are often in small, easy-to-hide packages, strip searches are frequently conducted to search for drugs. The Tenth Circuit held that the fact that a person was arrested for a drug charge and is going to be placed in the general population provides reasonable suspicion to support a strip search. *See Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1434 (10th Cir. 1984), *vacated for reconsideration on other grounds*, 474 U.S. 805 (1985), *aff'd*, 796 F.2d 1307 (10th Cir.), *cert. denied*, 479 U.S. 884 (1986). In contrast, in the First Circuit, the fact that a detainee is charged with a drug offense is not, by itself, enough to justify a strip search. In *Swain v. Spinney*, 117 F.3d 1 (1st Cir. 1997), the fact that Swain was alleged to have dropped a baggie of marijuana at the scene of the arrest was not enough to justify a strip search.

*Swain* holds that the justification for the search must be legitimate, rather than pretextual. Swain had been at the police station for some time before the decision was made to strip search her. During that time, she had been permitted to use the bathroom unsupervised and had been left unsupervised in a cell. According to the plaintiff, it was not until she refused to provide the police with information regarding her boyfriend that the officer strip searched her. The court held that there was a possibility that the strip search was conducted in retaliation for her non-cooperation. *Id.* at 8. A pretextual justification does not provide the reasonable suspicion necessary to justify a strip search and, thus, any search based on such a premise is unconstitutional. *See also, Sarnicola v. County of Westchester*, 229 F.Supp.2d. 259 (S.D.N.Y. 2002)(holding that a drug-related arrest does not automatically justify a strip search). Similarly in *Doe v. Burnham*, 6 F.3d 476 (7th Cir. 1993) the court remanded for trial a claim of an unconstitutional strip search even though the officers claimed they thought the plaintiff had marijuana.

**d. Crimes involving violence**

A number of courts have found that crimes involving violence create a presumption that the detainee is concealing weapons or other contraband and create the reasonable suspicion necessary to justify a strip search. *See Dufrin v. Spreen*, 712 F.2d 1084, 1087 (6th Cir. 1983). The court upheld a strip search of Ms. Dufrin because she was charged with a violent felony, assaulting her stepdaughter with a broom handle, and because she would

potentially be introduced into the general jail population. The court also found that the search had been conducted in a reasonable manner. The Sixth Circuit stated that it was not establishing a bright-line rule, but the opinion has been interpreted to permit strip searches of people charged with violent felonies.

Two oddities about *Dufrin* are worth mentioning. First, the assault at issue occurred two months before Dufrin was arrested, so the presumption arose from the nature of the charge itself. It had nothing to do with a close proximity between the crime and the arrest, which could suggest that the arrestee still possesses the weapon used in committing the crime. Secondly, although the court relied on the fact that the potential existed for Dufrin to mingle with the general jail population, she actually spent her time in a holding cell by herself. *See also, Dobrowolskyj v. Jefferson County*, 823 F.2d 955, 958–59 (6th Cir. 1987)(holding that “[m]enacing [a violent misdemeanor] is an offense that is associated with weapons, and may well raise reasonable suspicion on the part of jail officials that a person detained on that charge may be concealing weapons or other contraband”).

A similar position is advocated in dicta in *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1989). “It is objectively reasonable to conduct a strip search of one charged with a crime of violence before that person comes into contact with other inmates. There is an obvious threat to institutional security.” *Id.* at 1255.

In an effort to establish a bright-line rule, many courts have permitted strip searches based on the title given a crime by the legislature. The theory is that people charged with “violent” offenses are more likely to have hidden weapons or contraband. However, the title of a criminal offense does not always tell whether a weapon was actually used, much less whether the person is likely to have anything hidden on or in his body. “Assault and battery with a dangerous weapon,” for example, sounds like a violent crime involving a weapon that could justify a strip search. But, if the police report or criminal complaint describes the weapon as a “shod foot,” the claim makes no sense, since a person who kicks someone while wearing a shoe is hardly more likely than anyone else to have hidden weapons. In *Durfin*, the plaintiff had threatened her stepdaughter with a broom handle. It is reasonable to assume that the case more likely involved a weapon

chosen based on its availability at the time, rather than a weapon used by a calculating person, who is likely to have hidden other weapons in her body cavities.

**e. Misdemeanor/felony distinction**

Some courts have held that the classification of a crime as a misdemeanor or a felony charge is not a significant factor in evaluating the reasonable suspicion necessary to justify a strip search. *Kennedy v. LAPD*, 901 F.2d 702 (9th Cir. 1990), is the first circuit court case to hold that a blanket policy of strip searching all felony arrestees is unreasonable. Kennedy was charged with grand theft for stealing her roommate's television. The court recognized that the classification of an offense as a felony offered little insight into the likelihood that the arrestee was concealing weapons or contraband. In assessing the constitutionality of the strip search, the court held, "[t]hat this case involves a felony arrest does not alter the level of cause required to justify a visual body cavity search." *Id.* at 716.

A number of district courts have likewise found that the classification of an offense does not provide reasonable suspicion. *See Murcia v. County of Orange*, 226 F.Supp.2d 489 (S.D.N.Y. 2002); *Mack v. Suffolk County*, 154 F.Supp.2d 131, 143 (D. Mass. 2001); *Elliott v. Strafford County*, 2001 U.S. Dist. LEXIS 1246(D.N.H. 2001); *Tardiff v. Knox County*, F. Supp. 2d. (D.Me. 2005) For a scholarly discussion of using the felony/misdemeanor distinction to justify strip searches, *see* Gabriel M. Helmer, Note, *Strip-Search and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U. L.Rev. 239 (2001).

**3. The Characteristics of the Arrestee**

**a. Criminal History as a Basis for Reasonable Suspicion**

The Fifth Circuit held that an eleven-year-old minor drug offense does not provide reasonable suspicion to support a strip search in *Watt v. City of Richardson Police Department*, 849 F.2d 195 (5th Cir. 1988). Ms. Watt was arrested on an outstanding warrant for failing to register her dog. She volunteered that she had been convicted of a minor drug offense eleven years earlier. The conviction had been expunged from her record. The city's policy required that any arrestee charged with drug, weapons or shoplifting offenses, or with a history of such charges, was to be

strip searched. Ms. Watt challenged the constitutionality of the strip search. The court recognized that strip searches of pre-trial detainees and convicted prisoners have been upheld as constitutional, but noted that searches of “minor offense arrestees, who would be detained pending the posting of bond, often for short periods of time, have been scrutinized much more closely.” *Id.* at 197. The court ruled that justifying strip searches of arrestees based on prior criminal history can be reasonable. However, based on the facts presented by Ms. Watt’s case, her strip search was unconstitutional. See also, *Burns v. Goodman*, 2001 WL 498231 (N.D.Tex.,2001) (an arrest for marijuana four months earlier could not justify a strip search since the defendants did not rely on the arrest at the time of the search). Since a balancing test is applied, the older the criminal charge, the less likely it could serve as a basis for a strip search. A better practice, as discussed below, is to rely on numerous characteristics of the arrestee, with criminal history being only one of those characteristics. See, *Nieves v. State*, 2003 WL 23004983 (Md.App.,2003) (Court refuses to allow strip searches on arrest for a minor offense when person had a prior drug offense two years earlier.

**b. Individual Characteristics of Arrestees**

Any individual characteristic of an arrestee may be considered and may help create reasonable suspicion. Factors that are considered include furtive gestures, gang affiliations, signs of recent intravenous drug use and, most importantly, previous attempts to bring contraband into a facility. No matter what the charge, individualized suspicion based on characteristics of the arrestee may support a strip search.

**4. Circumstances of Arrest**

Officials may have reasonable suspicion to strip search a detainee based on behavior observed during an arrest or processing. An example of this is seen in *Skurstenis v. Jones*, 236 F.3d 678 (11th Cir. 2000), where the strip search of a DUI arrestee was upheld based on the presence of a handgun in her car at time of arrest. The Eleventh Circuit ruled that “this court holds that possession of a weapon by a detainee provides the reasonable suspicion necessary to authorize a strip search.” *Id.* at 682. In other situations, a combination of circumstances have created reasonable suspicion. For example, in *Justice v. City of Peachtree City*, 961 F.2d 188 (11th Cir. 1992), officers formed reasonable suspicion based on a variety

of circumstances, including: that the arrest took place in a parking lot, where it was suspected that drinking and drug activity regularly occurred; observation by an officer of one suspect handing something to the suspect strip searched; and the nervousness of the suspect strip searched.

If the circumstances existing at the time of the arrest are considered, should the fact that the arresting officers conducted a strip search at the police station be considered when the prisoner is brought to the holding facility while waiting for court? In other words, if the arresting officers have already conducted a constitutional strip search, can the holding facility officials conduct a subsequent strip search on the same basis? This question has yet to be decided.

**5. Contact with Outsiders**

*Bell* held that a strip search of pre-trial detainees in federal detention after a contact visit was reasonable because of the danger that contraband could be introduced into the facility. Since *Bell*, courts have generally held that strip searches after contact visits or other contact with outsiders is reasonable. See, *Wood v. Hancock County Sheriff's Department*, 354 F.3d 57,68-69 (1<sup>st</sup>. Cir. 2003) ("The widely acknowledged risk posed by contact visits furnishes sufficient suspicion to justify a blanket policy." Under *Bell*, "except in atypical circumstances, a blanket policy of strip searching inmates after contact visits is constitutional.") *Elliott v. Strafford County*, 2001 WL 274827 (N.H. 2000)(dismissing claims for strip searches after contact visits and court appearances.). If the strip search policy after contact visits is not applied uniformly or if the strip search is used for the purpose of harassment, it would be unconstitutional.

**6. Stripping Inmates Naked for Suicide Prevention or Prevention of Rowdiness**

It is unconstitutional under *Bell* to strip detainees naked and leave them naked in a cell for refusing to answer intake questions asking whether or not they feel suicidal. *Wilson v. City of Kalamazoo*, 127 F.Supp.2d 855 (W.D. Mich. 2000). However, the same court held that placing inmates who refused to answer if they were suicidal in a cell clad only in their underwear is constitutional. *Johnson v. City of Kalamazoo*, 124 F.Supp.2d 1099, 1106 (W.D. Mich. 2000). Similarly, placing detainees naked in administrative segregation as punishment for rowdy and disruptive behavior during booking is unconstitutional. *Rose v. Saginaw County*, 353 F.Supp.2d 900 (E.D. Mich. 2005).

Complete nudity has been found acceptable by some courts in certain situations. See *McMahon v. Beard*, 583 F.2d 172, 175 (5th Cir. 1978) (finding permissible the confinement of prisoner completely naked in a cell where prisoner had previously attempted to commit suicide by hanging but was cut down by jailers, and had threatened future self harm).

#### **D. Reasonable Manner**

##### **1. No Touching by the Officer**

Many courts upholding challenged strip searches of all classes of prisoners have mentioned favorably the fact that the search was visual only, with the searching official never touching the detainee. See *Michenfelder v. Sumner*, 860 F.2d 328, 332 (9th Cir. 1988) (“The searches are conducted on convicted prisoners in [the] most restrictive unit, and are visual only, involving no touching.”); *Stanley v. Henson*, 337 F.3d 961, 965 (7th Cir. 2003) (“[She] was not touched during the search.”); *Dufrin v. Spreen*, 712 F.2d 1084, 1089 (6th Cir. 1983) (“[T]he search actually conducted was visual only.”); *Fernandez v. Rapone*, 926 F.Supp. 255, 262 (D. Mass. 1996) (“[N]or were the prisoners touched during the searches, which lasted only minutes.”).

Inappropriate touching of the detainee resulted in a search being held unconstitutional in *Amaechi v. West*, 237 F.3d 356 (4th Cir. 2001). Amaechi was searched incident to arrest on the street in front of her house before she was placed in the patrol car. She was wearing a light house dress that had no buttons below the chest, leaving her exposed from the chest down. She alleged that the officer touched her skin with his hand, penetrated her genitalia and kneaded her buttocks during a pat search. The officer claimed the “right to conduct a full search of the person under *Robinson* includes the right to briefly ‘swipe’ the arrestee’s outer genitalia and slightly penetrate the genitalia.” The court allowed the plaintiff’s claim to go to trial.

Touching by medical personnel is treated differently. For example, in *Skurstenis v Jones*, 236 F.3d 678 (11th Cir. 2000), the court held that it was appropriate for an opposite gender nurse’s assistant to touch Skurstenis, by running his fingers through her head and pubic hair, as he examined her for lice.

##### **2. Limits on Instructing the Person to Touch Himself**

Basic touching to help facilitate the search has not gone unchallenged. In this category of instructions are orders to open the mouth, move the

tongue, run the hands through hair, splay fingers, bend over and spread the buttocks, lift arms and/or legs, lift and/or move genitals or breasts, and squat and cough.

As with all features of strip searches, such instructions are subject to the test for reasonableness. Instructions that are reasonable in the context of facilitating the search by allowing the officer to conduct the search without having to touch the inmate, are permissible. These would include instructions to open the mouth, move the tongue, raise the arms, and so forth. Instructions that are intended purely to humiliate or embarrass or those which serve no legitimate penological purpose are likely unreasonable. So, for example, ordering an inmate to probe her own body cavities, is likely to be held to be unreasonable. Such an instruction would serve no purpose, since an arrestee who had drugs hidden in a body cavity would be unlikely to report this finding to the authorities.

**3. Derogatory Comments**

Officers conducting strip searches, regardless of the type of facility or status of the detainee, should conduct themselves professionally. This includes refraining from the use of derogatory or abusive language. This tenet appears in almost all written policies governing how a strip search is to be conducted. In practice, these policies are not always adhered to.

Verbal abuse alone will not give rise to a constitutional claim. In examining a claim of qualified immunity involving the use of abusive language during a strip search, the Eleventh Circuit reviewed cases dealing with verbal abuse, including cases from the First, Fifth, Eighth and Eleventh Circuits, and concluded that, “[i]n light of this case law treating verbal abuse, even vile language and racial epithets, as insufficient to constitute a constitutional violation, we cannot conclude that it was clearly established that [the searching officer’s] taunts and threats of prison rape might so exacerbate the intrusiveness of the strip search as to violate the appellees’ constitutional rights.” *See Evans v. City of Zebulon*, 351 F.3d 485, 495 (11th Cir. 2003), vacated for reh’g en banc, 2003 WL 23351898 (11th Cir. March 31, 2004).

**4. No More People than Necessary**

To insure that a strip search is no more humiliating and demeaning than necessary, only those officers required to safely and effectively carry out the search should be present. The presence of additional officers or others may violate the Fourth Amendment. A number of cases comment on the presence, or absence, of unnecessary personnel during a strip search. For

example, one of the factors mentioned by the Tenth Circuit in *Hill* in finding the search at issue unconstitutional, was the fact that it took place in a public area where 10 to 12 people were milling about. *See Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984). Similarly, in *Abshire v. Wells*, 830 F.2d 1277, 1280 (4th Cir. 1987), the court pointed to the presence of “six to eight police officers – five who were in the room with [the detainee] and several others, including a female officer, who witnessed the search while standing in the adjacent hallway,” as one of the factors that properly made the reasonableness of the search at issue a jury question.

The absence of excess personnel is often cited as demonstrating the reasonableness of a particular strip search. *See Dufrin v. Spreen*, 712 F.2d 1084 (6th Cir. 1983); *Stanley v. Henson*, 337 F.3d 961 (7th Cir. 2003)(the presence of a single same-sex officer listed as a factor in finding the search was minimally intrusive). *See also, Justice v. City of Peachtree City*, 961 F.2d 188 (11th Cir. 1992)(holding that, even though two officers were present for a strip search of the juvenile, the search was conducted in the least intrusive manner possible).

#### **5. Strip Search By Opposite Sex Officer**

The fact that a detainee is searched by a same sex officer is often cited as one factor rendering a search reasonable. *See Justice v. City of Peachtree City*, 961 F.2d 188 (11th Cir. 1992)(noting approvingly that the search was conducted by two officers of the same sex); *Stanley v. Henson*, 337 F.3d 961 (7th Cir. 2003); *Dufrin v. Spreen*, 712 F.2d 1084 (6th Cir. 1983). A strip search by an opposite sex officer is unreasonable, unless it was unavoidable due to emergency conditions.

In *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994), a convicted prisoner sued seeking damages and injunctive relief, alleging that female guards strip searched him during a shakedown of his housing unit and regularly observed male inmates while they slept, showered and dressed. The Seventh Circuit reversed dismissal of the complaint, ruling that it was possible for the plaintiff to state a claim for relief on these facts. In *Somers v. Thurman*, 109 F.3d 614 (9th Cir. 1997), the Ninth Circuit evaluated a claim of qualified immunity for female prison guards who regularly conducted non-emergency strip searches on a male inmate in violation of prison policy. The court held that, as of October 1993, when the searches occurred, there was no clearly established right of a male inmate to be free of opposite gender strip searches.

In an emergency situation, presence of an opposite sex officer is likely to be reasonable under the Fourth Amendment. For example, it is reasonable to have male officers assist in transferring a naked and unruly female detainee, who is a danger to herself. Once that inmate has been transferred and restrained, however, it would be unreasonable to continue to allow male officers to view her naked body. *See Hill v. McKinley*, 311 F.3d 899 (8th Cir. 2002).

**6. Videotaping a Strip Search**

Videotaping of strip searches is occasionally mentioned, although no reported cases directly address the constitutionality of the practice. Cameras at jails are usually said to be either switched off or covered when a strip search is occurring in the room. *See Swain v. Spinney*, 117 F.3d 1, 4 (1st Cir. 1997). The majority of taped searches occur in the prison setting, either for training purposes or when the search takes place as part of a confrontation with the inmate, e.g., when a response team is sent in to compel a prisoner to comply with instructions or to remove him from his cell. In this circumstance, the entire process is taped, not just the search. If taping the strip search of a prisoner serves a legitimate security interest, courts allow the taping. For example, in *Hayes v. Marriot*, 70 F.3d 1144, 1148 (10th Cir. 1996), the court concluded that “[w]e certainly agree with the prison officials that legitimate security interests, as well as other interests, may support the videotaping of prisoner searches.” Searches that are taped for illegitimate reasons, such as humiliating or punishing a prisoner, would be unconstitutional. Videotaping presents a danger for administrators because liability may arise if the tapes are misused. Because this is a severe invasion of privacy, such tapes must be properly secured.

**E. Reasonable Place**

A detainee should only be strip searched in a location that allows the detainee the maximum amount of privacy, thus minimizing embarrassment, while still allowing the search to be conducted safely and efficiently. This principle was reflected nearly twenty years ago in *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985). Jones was strip searched at the jail in a sheltered alcove off of a hallway, without a screen. The court advised that, “although the location of the search did not expose Jones to the scrutiny of other jailers or passersby, this degree of privacy seems to have been entirely fortuitous; we suggest that where legitimate security concerns justify this kind of search, jail officials should take precautions to insure that the detainee’s privacy is protected from exposure to others unconnected to the search.” *Id.* at 742. One way to protect a prisoner’s privacy

during a strip search is a privacy screen. This is used in Cook County. *Bullock v. Sheahan*, --- F.Supp.2d ----, 2008 WL 2931606 (N.D.Ill.).

Requiring that a strip search be conducted in a reasonable place helps to protect the privacy concerns previously addressed.

**1. Outside**

An obvious example of an unreasonable place to conduct a strip search is on the side of a road. In *Starks v. City of Minneapolis*, 6 F.Supp.2d 1084 (D. Minn. 1998), police officers searched a drug suspect by the side of the road, only three to five minutes away from the police station. This was held to be an unreasonable place. In ruling on the issue of qualified immunity for the searching officer, the court held that “a reasonable police officer would not be justified in assuming an on-street strip search was within the constitutional boundaries defined by the Fourth and Fourteenth Amendments of the United States Constitution.” *Id.* at 1088. The court remarked that it was difficult to find case law explaining that a public strip search is inappropriate because the principle is so self-evident, such searches simply do not take place.

In *Amaechi v. West*, 237 F.3d 356 (4th Cir. 2001), an officer searched the plaintiff on the street in front of her house. The court found this to be unreasonable because she could be viewed by her “family, the public, and the officers.” *Id.* at 361. Even if an officer has reasonable suspicion to conduct a strip search, the search will be unconstitutional if it takes place outside, where the person could be viewed by others.

**2. In a Police Vehicle**

Strip searching a suspect in a drug bust in a police van was upheld in *United States v. Dorlouis*, 107 F.3d 248 (4th Cir. 1997). Police were searching for marked currency used to purchase drugs from the suspect earlier in the day. The court concluded that “the search in question was not an unconstitutional strip search. The search did not occur on the street subject to public viewing but took place in the privacy of the police van.” *Id.* at 256. Obviously it is important that the vehicle was private. A police car would be inappropriate because the person being searched could be viewed through the windows.

**3. Rooms with a View**

Strip searches should not be conducted in rooms that allow the naked detainee to be seen by those outside the room. The door to a strip search room should be closed and any windows should be covered. *Logan v.*

*Shealy*, 660 F.2d 1007 (4th Cir. 1981), demonstrates this premise. Logan was searched in a holding cell off of the booking area, in which she claimed the blinds were either broken or not closed. In discussing the officer's claim of qualified immunity at this early date, the Fourth Circuit stated, "we think that, as a matter of law, no police officer in this day and time could reasonably believe that conducting a strip search in an area exposed to the general view of persons known to be in the vicinity whether or not any actually viewed the search is a constitutionally valid governmental 'invasion of (the) personal rights that (such a) search entails.'" *Id.* at 1014 (citation omitted). *See also, Iskander v. Village of Forest Park*, 690 F.2d 126, 129 (7th Cir. 1982). The Massachusetts Appeals Court held that even for convicted prisoners "a strip search conducted in nonprivate areas viewed by nonessential persons (particularly of the opposite sex), violate the Fourth Amendment to the United States Constitution unless justified by legitimate penological interests." *Sabree v. Conley*, 62 Mass. App. Ct. 901 (2004).

#### **4. Group Strip Searches**

Since strip searches should be conducted in a manner that minimizes the embarrassment and humiliation of the detainee being searched, detainees should not be strip searched in groups. *See Gary v. Sheahan*, 1998 WL 547116 (N.D. Ill. Aug. 20, 1998)(female inmates returning from court ordered to spread out in a line for strip searches without any privacy).

#### **F. Strip Searches of Convicted Prisoners**

The balancing of interests required by *Bell* is heavily weighted in favor of prison administrators when evaluating strip searches in a prison setting. Remember that the typical prison inmate is a convicted, sentenced offender.

Most courts reason that since the strip searching of pretrial detainees was upheld by the *Bell* Court, then the strip searching of convicted inmates serving sentences in prison should likewise be upheld. The rationale for deferring to administrators' expertise in *Bell* is more compelling when dealing with convicted prisoners; a prison is at least as dangerous a setting as a short-term detention center and the dangers of contraband being smuggled into the facility are likewise at least as serious. As the Seventh Circuit said, "given the considerable deference prison officials enjoy to run their institutions it is difficult to conjure up too many real-life scenarios where prison strip searches of inmates could be said to be unreasonable under the Fourth Amendment." *Peckham v. Wisconsin Department of Corrections*, 141 F.3d 694 (7th Cir. 1998).

In *Arruda v. Fair*, 710 F.2d 886 (1st Cir. 1983), *cert. denied*, 464 U.S. 999 (1983), the plaintiff was an inmate in the segregation unit of a maximum security facility with a history of contraband problems. He challenged the legality of a prison regulation requiring inmates in the segregation unit to be strip searched every time they left the unit. The court upheld the policy, reasoning that if contraband concerns in *Bell* justified strip searching pretrial detainees after contact visits, the justification in *Arruda* was even more compelling. Given the dangerousness of the inmates held in the segregation unit and the history of contraband problems experienced by the facility, “these searches [were] more, not less, reasonable than those in *Wolfish*.” *Id.* at 887. The court reasoned that, leaving the tier presented an opportunity for inmates in the segregation unit to acquire contraband and, thus, strip searches were justified to prevent the introduction of weapons or other contraband into the segregation unit.

Courts have affirmed strip searches of convicted prisoners in groups in some circumstances. *Fernandez v. Rapone*, 926 F.Supp.255 (D.Mass. 1996), involved a challenge by state prisoners to a policy of strip searching inmates in groups of up to ten prisoners following contact visits. A provision in the policy provided that an inmate could opt out of the group strip search and insist on being searched individually. The court upheld the searches, ruling that “the fact that plaintiffs were often searched in the presence of other inmates being searched does not render the searches unreasonable.” *Id.* at 262.

There have been situations where a strip search policy has been struck down due to abuse during the search. In *Hurley v. Ward*, 584 F.2d 609 (2nd Cir. 1978), an inmate housed in the special housing unit of the state prison refused to comply with portions of the facility’s strip search policy and was forcibly searched on several occasions as a result. These forcible searches included verbal abuse. The court upheld a preliminary injunction barring searching Hurley in this manner, stating “it is clear to us that here also the gross violation of personal privacy involved in the anal/genital searches of Hurley especially in view of the physical and verbal abuse incident to the procedure far outweighed the evidence adduced by the State at the preliminary hearing to justify the searches as a prison security measure.” *Id.* at 611. The specific physical and verbal abuse referred to by the court is not contained in the record, so it is impossible to know what the threshold is, or if verbal abuse alone could rise to a level at which the court would find a search unreasonable.

A similar case challenging strip searches of state prisoners in a location exposing them to viewing by other inmates is *Franklin v. Lockhart*, 883 F.2d 654 (8th Cir. 1989). *Franklin* addressed the reasonableness of searches of groups of inmates as they returned to the barracks. Inmates were returned four at-a-time and were

brought just inside the barracks to be strip searched. The location of the searches exposed the nude inmates to observation by other inmates already inside the barracks. The search policy was upheld based on security concerns of the prison, which had insisted that conducting the searches in this way was necessary to insure safety.

A different standard applies in emergency situations, for example, following a riot or other disturbance. *See Elliot v. Lynn*, 38 F.3d 188 (5th Cir. 1994)(upholding the strip searching of inmates in the most efficient way possible when the prison was in a state of emergency).

*Turner v. Safley*, 482 U.S. 78 (1987), established a deferential standard of review for prison regulations. “[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” *Id.* at 89.

The Court provided four factors to guide lower courts in the application of this rule:

- 1) Is there a rational relationship between the regulation and alleged governmental interest?
- 2) Is there an alternative means of exercising the right? (Note that this factor is not applicable in the strip search context.)
- 3) What impact would the accommodation of the asserted right have on prison guards, inmates and other prison resources?
- 4) Does the absence of alternatives provide evidence of the reasonableness of the policy?

In the prison setting, a strip search policy that serves a legitimate penological purpose outweighs the invasion of a prisoner’s privacy rights.

However, “not all strip search procedures will be reasonable; some could be excessive, vindictive, harassing or unrelated to any legitimate penological interest.” *Michenfelder v. Sumner*, 860 F.2d 328, 332 (9th Cir. 1988). A search carried out for any of the reasons mentioned above would lack a valid penological interest and thus, would fail the test set forth in *Turner v. Safley*, 482 U.S. 78 (1987). The Massachusetts Appeals Court held that “a strip search conducted in nonprivate areas viewed by nonessential persons (particularly of the opposite sex), violate the Fourth Amendment to the United States Constitution unless justified by legitimate penological interests.” *Sabree v. Conley*, 62 Mass. App. Ct. 901 (2004).

Despite this limitation, most strip searches in a prison setting are upheld as serving a legitimate penological interest. Examples include rulings that:

- Strip searching inmates in the administrative segregation unit of a maximum security prison every time they leave their cells is rationally related to the penological interest of maintaining internal security. *See Rickman v. Avanti*, 854 F.2d 327 (9th Cir. 1988).
- Strip searching inmates in maximum security every time they leave their tier, even when the search is conducted in view of other inmates and extraneous opposite gender correctional officers, is reasonably related to a legitimate penological interest. *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988).
- *Williams v. Price*, 25 F.Supp.2d 605 (W.D.Pa.,1997). The strip search of convicted prisoners after a non-contact visit was upheld under *Turner*.
- The strip search of an inmate during a search for drugs in the institution based on the fact that the inmate shared a cell with an inmate who had a history of drug use while in prison was upheld. *See Thompson v. Souza*, 111 F.3d 694 (9th Cir. 1997).
- The strip search of a pretrial detainee being held at the prison and commingled with sentenced inmates, pursuant to a policy where each night two cells were randomly selected for search, including strip searches of the inmates in the cells in order to help control contraband at the facility was upheld. *See Covino v. Patrissi*, 967 F.2d 73 (2nd Cir. 1992).

#### **G. Physical Body Cavity Searches**

Physical body cavity inspections of non-convicted prisoners should be conducted when there is probable cause. They should be conducted by medical personnel. For a physical examination of the body cavity of a prisoner, the facility needs reasonable suspicion and a valid penological need for the search. *Vaughan v. Ricketts*, 950 F.2d 1464, 1469 (9th Cir. 1991); *Tribble v. Gardner*, 860 F.2d 321,325 (9th Cir. 1988). Such a search must be conducted in a reasonable manner. *Bonitz v. Fair*, 804 F.2d 164 (1st Cir. 1986).

#### **H. Equal Protection**

The equal protection clause has been held to require that strip search policies be applied equally to men and women. There have been a number of cases where blanket strip searches were conducted on women, but not to men in similar circumstances. Courts have consistently found such practices unconstitutional.

The leading case is *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983). Starting in 1952, Chicago had a policy of conducting strip and visual body cavity searches of every woman who was arrested, but not of men. Four women arrested for minor offenses challenged Chicago's policy of subjecting all female detainees to a strip and visual body cavity search, while similarly situated male detainees were only thoroughly hand searched. In analyzing the city's policy, the court stated, "the party seeking to uphold a policy that expressly discriminates on the basis of gender must carry the burden of showing an exceedingly persuasive justification for the differing treatment. The burden is met only by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 1273-74 (citations omitted). Attempting to justify the disparate treatment, the city claimed that the strip searches were necessary due to women's ability to conceal weapons in the vaginal cavities. The court rejected this justification, pointing to the fact that men were also able to conceal contraband in their anal cavities, and that the city produced no evidence to show that women were more likely to conceal contraband in their body cavities than men.

In another case from Illinois, *Gary v. Sheahan*, 1998 WL 547116 (N.D. Ill. Aug. 20, 1998), female court returns were strip searched while male court returns were not. The defendant's policies required a strip search of men and women, but men were not strip searched because there were too many of them. This practice was held unconstitutional. Ironically the same county was sued again when it stopped strip searching women but sent male court returns to their housing units while waiting to be released and thus strip searched all of the male court returns. *Bullock v. Sheahan*, --- F.Supp.2d ----, 2008 WL 2931606 (N.D.Ill.). Similarly, in *Ford v. City of Boston*, 154 F.Supp.2d 131 (D. Mass. 2001), the city was found to be violating the equal protection clause by sending female arrestees to jail, where they were routinely strip searched, while male arrestees were held in city lock-ups, where they were not strip searched. The city did not have an important governmental objective that this policy was substantially related to achieving. *See also, Wilson v. Shelby County Alabama*, 95 F.Supp.2d 1258, 1264, n.3 (N.D. Ala. 2000).

#### **I. Effectiveness of Intake Strip Searches**

The statistics cited in the case law indicate that strip searches of newly admitted detainees only rarely discover contraband. In *Dodge v. County of Orange*, 209

F.R.D. 65 (S.D.N.Y. 2002), jail records submitted to the court covering a fifty-month period encompassing the admission of approximately 23,000 inmates, showed only five incidences where contraband was discovered in the body cavity or undergarments of a detainee. Of those five incidents, the judge determined that “there may have been reasonable suspicion to strip search four of these five detainees, based upon either the nature of the offense or the characteristics of the detainee.” *Id.* at 70. Thus, in the absence of the blanket strip search policy, if the correct reasonable suspicion standard had instead been employed, there was one instance in the processing of 23,000 detainees where contraband would have entered the facility. These numbers are consistent with what other courts have reported. See, *Bull v. City and County of San Francisco*, 2006 WL 449148 (N.D.Cal.) *affirmed in part*, 539 F.3d 1193 (9th Cir. 2008).

Statistics examined in *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983), showed nine incidences of contraband discovered in 1800 searches over a two-month period. Other cases support a very low incidence of “hits.” See *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984)(only 11 persons out of 3,500 searched had concealed anything warranting a report); *John Does 1-100 v. Boyd*, 613 F. Supp. 1514 (D. Minn. 1985)(13 incident reports of contraband over an 11-year period and all of the items were found in clothing, not through a strip search); *Shain v. Ellision*, 1999 U.S. Dist. Lexis 8401 (June 1, 1999)(over a two-year period, with approximately 14,000 inmates admitted per year, there were six instances in which a weapon was discovered during the intake strip search and eight instances where drugs were discovered).

#### **J. Qualified Immunity for Strip Searches**

When considering qualified immunity, courts are challenged to strike a balance between protecting the public’s constitutional rights and affording governmental officials the protection to reasonably react in confrontational situations without fear of subsequent individual liability. The fundamental justification for the defense of qualified immunity is that public officials performing discretionary functions should be free to act without fear of punitive litigation except when they can fairly anticipate that their conduct will expose them to liability. See *Davis v. Scherer*, 468 U.S. 183 (1984).

The Supreme Court established the standards for qualified immunity over two decades ago in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) stating,:

Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or

constitutional rights of which a reasonable person would have known . . . .

The standard of inquiry is an objective one and the inquiry into the reasonableness of a governmental official's conduct should focus on the discernable case law at the time of the alleged occurrence. *See Savard v. Rhode Island*, 338 F. 3d 23, 27 (1st Cir. 2003). The law governing strip-searches has changed significantly over the last thirty years. For example, the First Circuit case of *Swain v. Spinney*, 117 F 3d 1 (1st Cir. 1997), stands for the proposition that strip and visual body cavity searches cannot be conducted without individualized reason to suspect that a person is harboring weapons or contraband. Prior to *Swain*, a review of relevant case law in the First Circuit could have allowed a reasonable person in a position of authority over persons in custody to believe that a routine strip search policy was within constitutional boundaries.

Qualified immunity is generally granted and the defendant shielded from liability if the defendant did not violate plaintiff's constitutional rights or if there is no Supreme Court or relevant circuit court case law clearly establishing the plaintiff's right at the time of the event in controversy. *Harlow*, 457 U.S. at 818. However, a public official's hands-off approach to his job does not absolve him of the responsibility for unconstitutional policies developed and promulgated by his underlings. *See Ford*, 154 F.Supp.2d at 146. The threshold inquiry a court must undertake in a qualified immunity analysis is whether the plaintiff's allegations, if true, establish a constitutional violation. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). In the absence of a constitutional violation, the need for further analysis is over. Generally, courts will decline to consider whether the right was clearly established before granting qualified immunity and releasing the defendant from liability on this issue.

Even if a plaintiff's rights are violated, defendants will be entitled to qualified immunity if an objectively reasonable officer in the defendant's position could argue that the action taken was within the boundaries of permissible behavior under existing law. *Harlow*, 457 U.S. at 818. For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002). This is a purely objective standard; the defendant's subjective intent is irrelevant.

The theory of qualified immunity is that if a public official is to be punished by the imposition of damages against him personally, the punishment must be for violating some clear, legal duty he plainly already had at the time of the event. *See Hope*, 536 U.S. at 737. He should not be punished for violating what is, in

effect, some new legal duty recognized or announced by the judge and jury in the official's trial. Preexisting case law that is materially similar to the circumstances facing an official, when the specific current circumstances are enough like the facts in the prior precedent, might make a difference to the conclusion about whether the official's conduct was lawful or unlawful, in light of the precedent. *See id.*, at 744.

Officers are protected by qualified immunity from 42 U.S.C.A. §1983 claims unless a constitutional violation occurred; a reasonable officer similarly situated would have known the right was clearly established; and, the officer acted objectively unreasonable in light of the clearly established constitutional right.

One area where an officer might successfully claim a qualified immunity defense in the area of strip searches is routine strip searches of felony arrestees. Most of the case law on strip searches of arrestees has involved individuals charged with minor offenses. The Ninth Circuit in *Kennedy v. LAPD*, 901 F.2d 702 (9th Cir. 1990) and district courts in *Murcia v. County of Orange*, 226 F.Supp.2d 489 (S.D.N.Y. 2002); *Mack v. Suffolk County*, 154 F.Supp.2d 131, 143 (D. Mass. 2001); *Elliott v. Strafford County*, 2001 U.S. Dist. LEXIS 1246 (D.N.H. 2001) have held that a blanket policy of strip searching all felony arrestees is unreasonable, an officer, in a different jurisdiction could argue that law was not so clearly established at the time that his actions could be found to be objectively unreasonable. If successful, he would be entitled to qualified immunity for his actions.

#### **K. Class Action Challenges to Strip Search Policies**

Most courts that have considered whether a class action is appropriate in strip search cases have certified the class where plaintiffs are challenging a policy or custom of conducting strip searches of pre-arraignment detainees without evaluating for reasonable suspicion. *See, Tardiff v. Knox County*, 365 F.3d 1 (1st Cir. 2004) (April 9, 2004); *Eddleman v. Jefferson County*, 96 F.3d 1448 (Table), 1996 WL 495013 (6th Cir. 1996); *Johnson v. District of Columbia*, 248 F.R.D. 46, (D.D.C. 2008); *Blihovde v. St. Croix County*, 219 F.R.D. 607 (W.D. Wisc. 2003); *Bynum v. District of Columbia*, 217 F.R.D. 27 (D.D.C. 2003); *Maneely v. City of Newburgh*, 208 F.R.D. 69 (S.D.N.Y. 2002); *Dodge v. County of Orange*, 209 F.R.D. 65 (S.D.N.Y. 2002); *Mack v. Suffolk County*, 191 F.R.D. 16 (D. Mass. 2000); *Doe v. Calumet City*, 754 F.Supp. 1211 (N.D. Ill. 1990); *Smith v. Montgomery County*, 573 F.Supp. 604 (D. Md. 1983). However, a few courts have disagreed. *See Klein v. DuPage County*, 119 F.R.D. 29 (N.D. Ill. 1988); *Bledsoe v. Combs*, 2000 WL 681094 (S.D. Ind. 2000); *Augustin v. Jablonsky*, 2001 WL 770839 (E.D.N.Y. March 8, 2001); *Rattray v. Woodbury County, Iowa*, --- F.Supp.2d ----, 2008 WL 4099880 (N.D.Iowa 2008). Most of

the cases in which a class was certified, involved damages class actions under Federal Rule of Civil Procedure 23(b)(3). Some were certified for injunctive relief under (b)(2) only, or for both damages and injunctive relief.

**L. Damages for Unlawful Strip Searches**

Most strip search cases involve visual searches without any touching by the correctional officer. Some cases have resulted in large verdicts, particularly when the plaintiff was arrested on a minor charge or a warrant for a minor offense that had been recalled, and was subjected to a search that was not private. Some of these plaintiffs have had significant psychological trauma as a result of the search. See *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985)(plaintiff who suffered depression, sexual dysfunction and post traumatic stress disorder, awarded \$177,040 for three manual body cavity searches). In *Martinez v. Tully*, 1994 U.S. Dist. LEXIS 20935 (E.D. Ca. 1994), four women arrested for disturbance of a public assembly and other offenses, including one woman who was charged with assault with a deadly weapon, an egg, which could be a misdemeanor or a felony, received verdicts of \$175,000 in compensatory damages for three of the women, and \$225,000 for the remaining woman, who was menstruating at the time of the search.

*Levka v. City of Chicago*, 748 F.2d 421 (7th Cir. 1984), reviewed strip search cases with judgments ranging from \$112,000 to \$3,300 (the \$112,000 judgment was reduced by the district court to \$75,000). In *Young v. City of Little Rock*, 249 F.3d 730 (8th Cir. 2001), a jury awarded \$65,000 for an unlawful 2 ½ hour detention and strip search. The plaintiff in *Watt v. Richardson*, 849 F.2d 195 (5th Cir. 1988) was awarded \$20,000 in compensatory damages. She had been strip searched following her arrest on a warrant for failing to register her dog and was searched based on an 11 year-old drug conviction. In *Abshire v. Wallis*, 830 F.2d 1277 (4th Cir. 1987), the plaintiff received a total award of \$7000 based on his unconstitutional strip search following his arrest for disorderly conduct. In contrast, the plaintiff in *Foote v. Spiegel*, 2001 U.S. App. LEXIS 2405 (10th Cir. 2001), was awarded only \$1.00 and, in *Stewart v. Lubbock County*, 767 F.2d 153 (5th Cir. 1985), one plaintiff received only \$1.00, while the other received \$15,000.

**M. The Effect of the PLRA on strip search litigation**

The Prison Litigation Reform Act (PLRA) prevents damage suits for unconstitutional visual strip searches from being filed by current inmates because the act requires a physical injury to file suit. 42 U.S.C. Sec. 1997e(e). However, the PLRA does not apply to cases brought by people who are not incarcerated when the suit is filed. See *Doan v. Watson*, 168 F.Supp.2d 932 (S.D. Ind. 2001), and *Kerr v. Puckett*, 138 F.3d 321 (7th Cir.1998), Cf. *Milledge v. McCall*, 2002

WL 1608449 (10th Cir. July 22, 2002) (prisoner cannot bring a strip search claim while confined under the PLRA). One reason strip search cases are filed for people who were temporary detainees is because they were only in custody for a short time so they can file after release.