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Naked before the Law: The Illinois Strip Search Statute, 23 J. Marshall L. Rev. 425 (1990)

Vito LoVerde

NAKED BEFORE THE LAW: THE ILLINOIS STRIP SEARCH STATUTE

The Illinois Strip Search Statute was enacted on September 21, 1979. The statute severely limits the circumstances under which strip searches can be conducted by providing that no person arrested for a traffic, regulatory, or misdemeanor offense, can be strip searched unless there is a reasonable belief that the person is concealing a weapon or controlled substance.[1] The penalty provision of

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1. ILL. REV. STAT. ch. 38, para. 103-1 (1989) (effective Sept. 21, 1979) provides:
Rights on arrest. (a) After an arrest on a warrant the person making the arrest shall inform the person arrested that a warrant has been issued for his arrest and the nature of the offense specified in the warrant.

(b) After an arrest without a warrant the person making the arrest shall inform the person arrested of the nature of the offense on which the arrest is based.

(c) No person arrested for a traffic, regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched unless there is reasonable belief that the individual is concealing a weapon or controlled substance.

(d) "Strip search" means having an arrested person remove or arrange some or all of his or her clothing so as to permit a visual inspection of the genitals, buttocks, anus, female breasts or undergarments of such person.

(e) All strip searches conducted under this Section shall be performed by persons of the same sex as the arrested person and on premises where the search cannot be observed by persons not physically conducting the search.

(f) Every peace officer or employee of a police department conducting a strip search shall:

(1) Obtain the written permission of the police commander or an agent thereof designated for the purpose of authorizing a strip search in accordance with this Section.

(2) Prepare a report of the strip search. The report shall include the written authorization required by subsection (e); (1) the name of the person subjected to the search; (2) the names of the persons conducting the search; and (3) the time, date and place of the search. A copy of the report shall be provided to the person subject to the search.

(g) No search of any body cavity other than the mouth shall be conducted without a duly executed search warrant; any warrant authorizing a body cavity search shall specify that the search must be performed under sanitary conditions and conducted either by or under the supervision of a physician licensed to practice medicine in all of its branches in this State.

(h) Any peace officer or employee who knowingly or intentionally fails to comply with any provision of this Section is guilty of official misconduct as provided in Section 103-8; provided however, that nothing contained in this Section shall preclude prosecution of a peace officer or employee under another section of this Code.

(i) Nothing in this Section shall be construed as limiting any statutory or common law rights of any person for purposes of any civil action or injunctive relief.

(j) The provisions of subsections (c) through (h) of this Section shall not apply when the person is taken into custody by or remanded to the sheriff or

the statute provides for criminal prosecution of those individuals who violate its provisions, however, the statute does not specifically preclude the introduction of evidence seized as a result of the impermissible search.[2]

The Illinois legislature enacted the statute in direct response to media coverage of numerous complaints of abusive police conduct involving strip searches.[3] These complaints were lodged by women searched incidental to minor arrests, primarily involving violations of traffic regulations under the Illinois Vehicle Code.[4] Prompt legislative action, however, has resulted in a statute that reaches far beyond the drafters' intent.

The drafters of the statute, pressured for a legislative response by the intense media coverage of the complaints, attempted to limit the circumstances under which strip searches would be permissible.[5] Of particular concern were those arrests involving minor traffic infractions.[6] The drafters attempted to ensure compliance with the provisions of the statute through inclusion of severe criminal penalties for intentional noncompliance.[7]

The Illinois statute resulting from these concerns forbids police officers from conducting searches traditionally upheld in both federal and state courts: (1) searches aimed at recovery of evidence; and (2) searches designed to ensure the security of police detention facilities.[8] Searches conducted under these circumstances were exceptions to both the fourth amendment's warrant requirement[9] and prohibition against unreasonable searches.[10] In addition to an overly broad reach, the statute's criminal sanction provision leads to anomalous results, and provides severe criminal penalties for searches conducted in intentional violation of its restrictions. Constitutional standards governing admission of evidence suggest that evidence seized in violation of the statute would be admissible against both

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correctional institution pursuant to a court order.

2. *Id.*

3. Chicago Tribune, Feb. 14, 1979, § 1, at 3, col. 4.

4. *Id.*

5. ILLINOIS HOUSE OF REPRESENTATIVES, TRANSCRIPTION DEBATE, April 27, 1979, at 26.

6. *Id.* at 31.

7. The statute provides that intentional violation of its provisions constitutes official misconduct, a class three felony. ILL. REV. STAT. ch. 38, para. 103-1(h) (1989).

8. *See, e.g.*, People v. Seymour, 84 Ill. 2d 24, 39, 416 N.E.2d 1070, 1077 (1981) (the court stated two separate justifications for conducting strip searches: (1) incident to a custodial arrest; and (2) prior to incarceration).

9. *See generally* People v. Machroli, 44 Ill. 2d 222, 254 N.E.2d 450 (1969) (warrantless search incident to lawful arrest is authorized when reasonably necessary to protect arresting officer from serious bodily harm, to prevent prisoner from escaping, or to discover fruits of crime).

10. *Id.*

the individual searched and the officer who conducted the search.[11]

This comment will address the confusion created by the Illinois Strip Search Statute and will offer a suggested revision to cure those deficiencies while still addressing the valid concerns of the legislature. First, this comment will examine the circumstances and activities immediately preceding the legislative action. Next, the traditional constitutional limitations imposed on searches of arrested persons will be contrasted with the limitations imposed by the Illinois Strip Search Statute. This comment will then discuss the difficulties created by the statute's excessive reach. This comment will next identify specific areas in which the statute poses difficulty for law enforcement officials and compare those areas with similar provisions in statutes from other jurisdictions. In conclusion, this comment will suggest modifications of the statute designed to more accurately reflect the legislature's intent and address the needs of law enforcement.

I. Events Leading to the Statute's Enactment

The policy of conducting routine strip searches of people arrested for minor traffic violations first came to public attention in Illinois on Monday, February 12, 1979. A television news investigator for WMAQ-Channel 5 of Chicago, Illinois, reported that Chicago police officers at the Belmont-Western station were strip searching women motorists arrested for minor traffic violations.[12] The following day, the American Civil Liberties Union ("ACLU") announced that it had received 150 phone calls from women alleging unnecessary strip searches by police.[13] Jay Miller, then executive director of

11. In 1914, the Court ruled that evidence seized in violation of the fourth amendment was not admissible in court. Weeks v. United States, 232 U.S. 383 (1914). *See infra* notes 106-110 and accompanying text for a discussion of the constitutional standards governing admission of evidence.

12. Chicago Tribune, Feb. 14, 1979, § 6, at 9, col. 1. The Chicago Tribune reported that channel five had first learned of the Chicago Police policy of strip searching traffic offenders in December, 1978. Channel five attempted to confirm the information with the help of one of its female employees. The employee drove into the Belmont-Western district and attempted to get arrested for a traffic infraction. On Monday, January 22, 1979, Chicago police officers arrested her for an illegal left hand turn and instructed her to follow the officers to the station. The employee reported that the officers then threatened to strip search her and advised her that people would be watching on TV monitors. The officers, however, did not search the employee or require her to post a bond. The Chicago Tribune characterized the channel five story as a "blistering" report on the physical and emotional savagery that police officers inflict on women arrested for minor traffic violations. *Id.*

13. Jay Miller, executive director of the American Civil Liberties Union ("ACLU"), stated that one complaint received was from a teen-aged girl who had been strip searched after a security guard had discovered her walking through her high school without a pass. Police subsequently charged the teenager with disorderly conduct. Chicago Tribune, Feb. 14, 1979, § 1, at 3, col. 4.

In response to these allegations, then Police Superintendent, James O'Grady, an-

the ACLU, announced plans to file a federal class action suit against the City of Chicago and the Chicago Police Department on behalf of the women who had been "illegally and outrageously harassed."[14] Miller added, however, that no law prohibited police from conducting strip searches.[15] On March 1, 1979, the ACLU announced that it had filed a suit charging the Chicago Police Department with violating the civil rights of five women by conducting illegal strip searches.[16]

Approximately one month after the first public reports of police strip searches, the Conference of Women Legislators announced that it had introduced House Bill 889 ("Bill").[17] The Bill was designed to:[18]

1. Prohibit the strip search of persons held for traffic and misdemeanor offenses unless police believe the individual to be concealing weapons or drugs;

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nounced that he had issued new guidelines concerning strip searches. The guidelines required that:

1. No strip searches of traffic violators would be conducted unless other factors such as an outstanding arrest warrant or a revoked driver's license were present;
2. No strip search would be conducted without the written approval of the watch commander;
3. All strip searches deemed necessary would be conducted by members of the same sex;
4. No body cavities would be touched.

Violations of the guidelines would result in disciplinary actions that could result in removal from duty.

Chicago Tribune, Feb. 15, 1979, § 1, at 3, col. 1.

14. Chicago Tribune, Feb. 14, 1979, § 1, at 3, col. 4. Miller further alleged that male police officers monitored the strip searches of female prisoners over closed-circuit television but stated that he lacked evidence to support this allegation. *Id.*

15. *Id.*

16. Doe v. City of Chicago, No. 79 C 789 (N.D. Ill. 1979). The city offered a settlement of $1,000 to women who had been subjected to body cavity searches and $250 to women who had been strip searched. The Chicago Police Department admitted no wrongdoing. General Stipulation and Order, Mar. 27, 1980. *See* Shuldiner, *Visual Rape: A Look at the Dubious Legality of Strip Searches*, 13 J. MARSHALL L.REV. 272, 273 (1979); *see also* Mary Beth G. v. Chicago, 723 F.2d 1263 (7th Cir. 1983). In *Mary Beth G.*, the court affirmed judgments in favor of three woman who were strip searched by Chicago police after traffic violations. *Id.* The searches were conducted pursuant to the police policy of strip searching all women detained in city lockups. *Id.* The court ruled that the searches were unconstitutional where the officers had no belief that the women were concealing weapons or contraband. Therefore, a full custodial search was unreasonable under the circumstances. *Id.*

17. The bill was subsequently passed and signed and became known as the Illinois Strip Search Statute. For full text of the statute, see *supra* note 1.

18. Representative Willer, formally of Hillside, Illinois, sponsored the Illinois Strip Search Statute in the Illinois House of Representatives. She is no longer a member of the Illinois House. On September 22, 1989, this writer contacted her at her current residence in Portland, Oregon. Representative Willer, now enjoying her retirement, is no longer actively involved in politics but maintains her association with the League of Women Voters. *See infra* note 123 for information concerning this writer's conversation with Representative Willer.

2. Require police to prepare a report of all strip searches;

3. Provide that violations of the legislation would constitute official misconduct,[19] a felony.[20]

On March 21, 1979, the United States Attorney, Thomas P. Sullivan, stated that his office had reviewed 150 complaints from women who reported that Chicago police officers had stripped searched them. He found no basis for criminally prosecuting the officers involved.[21] He reasoned that it appeared the officers had followed applicable policy and regulations.[22]

Several weeks later on April 7, 1979, the Illinois House Judiciary Committee II unanimously approved the Bill.[23] In doing so, several representatives expressed concern that the term "strip search" was not adequately defined and thereby left the doors open for litigation.[24] Shortly thereafter, the Illinois House of Representatives[25]

19. A public officer or employee convicted of official misconduct, a class three felony, faces a possible sentence of two to five years in the state penitentiary, a fine up to $10,000, and the additional penalty of forfeiture of office or employment. ILL. REV. STAT. ch. 38, para. 33-3 (1989).

20. House Bill 889 came before the House of Representatives April 11, 1979 for second reading. ILLINOIS HOUSE OF REPRESENTATIVES, TRANSCRIPTION DEBATE, Apr. 11, 1979, at 20.

The House vote on the bill occurred April 27, 1979. The bill passed on a vote of 155 to 2 and the question was sent to the Illinois Senate. ILLINOIS HOUSE OF REPRESENTATIVES, TRANSCRIPTION DEBATE, Apr. 27, 1979, at 36.

House Bill 889 came before the Illinois Senate for second reading June 21, 1979. ILLINOIS SENATE, TRANSCRIPTION DEBATE, June 21, 1979, at 48. The Senate vote occurred on June 27, 1979. The bill passed the Senate on a vote of 54 to none. ILLINOIS SENATE, TRANSCRIPTION DEBATE, June 27, 1979, at 315.

21. United States Attorney, Thomas P. Sullivan stated, "In our judgment it would be fruitless to pursue criminal charges." Chicago Tribune, Mar. 21, 1979, § 1, at 2, col. 1. Additionally, Sullivan stated that while the overwhelming number of complaints received involved the Chicago Police Department, his office also received complaints against 15 suburban police departments. *Id.*

22. The policy of conducting routine strip and visual body cavity searches of women arrested and detained in Chicago lockups existed from 1952 to 1980. Mary Beth G. v. Chicago, 723 F.2d 1263 (7th Cir. 1983). *See supra* note 17 for additional information on this case.

23. The Chicago Tribune reported on March 28, 1979, that Mrs. Sylvester White, wife of the chief judge of the Cook County Juvenile Court, had appeared before the House Judiciary Committee II. Mrs. White testified that Chicago police officers had strip searched her at the Chicago Police Headquarters. Mrs. White stated she was arrested after she refused to pay a cabdriver who had taken her to the wrong address. After being taken to the police station, a police matron ordered Mrs. White to strip, and then told her, "Squat lady. Spread your legs." Mrs. White testified that "it was the most horrifying thing I had ever gone through." The Committee also received testimony from WMAQ-TV, the American Civil Liberties Union, and the United States Attorney's office suggesting a widespread policy of conducting such searches. Chicago Tribune, Mar. 28, 1979, § 1, at 14, col. 1.

24. House Judiciary Committee II Chairman, Harold Katz, noted that the committee could not arrive at an appropriate definition of the term "strip search" and that he did not believe it could be defined. Chicago Tribune, Apr. 5, 1979, § 1, at 3, col. 1.

25. *See supra* note 21 for dates of the House debate and vote.

and Illinois Senate[26] approved the legislation and Governor Thompson signed the Illinois Strip Search Statute into law on September 20, 1979.[27]

II. Constitutional Limitations on Strip Searches

A. *Federal Courts*

Prior to passage of the Illinois Strip Search Statute, no statute specifically regulated strip searches. Rather, such searches were subjected to constitutional analysis under the fourth amendment.[28] The United States Supreme Court has determined that the fourth amendment's sanction against unreasonable search and seizure requires that police obtain a warrant issued on probable cause before a search will be allowed.[29] In 1967, the Court emphasized the warrant requirement, stating that with few exceptions searches without a warrant were unreasonable under the fourth amendment.[30] Exceptions to this warrant requirement generally involve arrest situations and are considered reasonable when conducted for the purpose of protecting the officer from injury, preventing the prisoner from escaping, or discovering evidence of crime.[31]

The Supreme Court examined the reasonableness of searches

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26. The Senate Judiciary Committee, on June 7, 1979, unanimously passed the House bill and sent it to the full Senate. The Senate voted on, and passed the bill on June 27, 1979. *See supra* note 21 for information on the Senate debate and vote.

27. *See* Ill. Rev. Stat. ch. 38, para. 103-1 (1989).
See *supra* note 1 for full text of the statute.

28. The fourth amendment provides in pertinent part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . .."
U.S. Const. amend. IV.

The mandates of the fourth amendment are enforceable against the States through the Due Process Clause of the fourteenth amendment. Mapp v. Ohio 367 U.S. 643, 655 (1961).

29. In *Weeks v. United States*, the Supreme Court discussed the history and scope of the fourth amendment's protection against unreasonable searches and the warrant requirement. 232 U.S. 383, 389-92 (1914). The Court spoke of the framers' determination to protect people from unreasonable searches and seizures, such as those previously permitted in England. *Id.* at 390. The Court stated that the effect of the fourth amendment was to put the courts and federal officials, under limitations and restraints, and to forever secure the people against all unreasonable searches and seizures. *Id.* at 392.

30. In *Katz v. United States*, the Court stated that searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the fourth amendment, subject only to a few specifically established and well-delineated exceptions. 389 U.S. 347, 357 (1967).

31. In Illinois, such exceptions to the warrant requirement were specifically established by statute. The Illinois Code of Criminal Procedure provides that when a lawful arrest is made by an officer, the

> officer may reasonably search the person arrested for the purpose of: (a) protecting the officer from attack; (b) preventing the person from escaping; (c) discovering the fruits of the crime; or (d) discovering any instrument, articles

conducted incident to an arrest in *United States v. Robinson*.[32] The Court held that the right to search incident to a lawful arrest was justified by the need to disarm and to discover evidence, and did not rest upon the degree of probability of the officer actually discovering weapons or evidence.[33] The Court stated that while the fourth amendment protects against unreasonable searches, a lawful arrest is a reasonable intrusion and a search incident to that arrest does not require additional justification.[34] The Court further stated that a full search of the person subsequent to an arrest was a "reasonable search under . . . [the fourth] amendment."[35] In 1977, the Court further clarified the arrest exception, ruling that a police officer need not believe the subject possesses a weapon or evidence before he could conduct a warrantless search incident to an arrest.[36] When conducted incident to arrest, such searches required no additional

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or things that had been used in the commission of, or which constitute evidence of, any offense.

ILL. REV. STAT. ch. 38, para. 108-1(1) (1989).

See generally People v. Allen, 407 Ill. 596, 96 N.E.2d 446 (1950). In *Allen*, the court noted that the Illinois Constitution protects only against unreasonable searches and seizures. *Id.* at 599, 96 N.E.2d at 447. Therefore, the court concluded that reasonable regulatory statutes, designed to protect the public welfare, are not within this protection. *Id. See also* People v. Fletcher, 66 Ill. App. 3d 502, 383 N.E.2d 1285 (1978) (police are authorized by statute to make warrantless arrests based on probable cause and therefore a search incident to the arrest may also be warrantless).

However, the right to search a person incident to a lawful arrest has traditionally been recognized by the courts and does not depend solely on statutory exceptions. *See* People v. Seymour, 84 Ill. 2d 24, 33, 416 N.E.2d 1070, 1074 (1981) (right to search incident to arrest does not depend solely on statute and has been recognized both in England and in this country). *See also* United States v. Rabinowitz, 339 U.S. 56 (1950) (framers of the Constitution recognized there were reasonable searches for which no warrant was required and that after a valid arrest there is an unquestionable right to search); Weeks v. United States, 232 U.S. 383, 392 (1914) (the right of the government to search and seize evidence after an arrest has always been recognized); People v. Machroli, 44 Ill. 2d 222, 254 N.E.2d 450 (1969) (warrantless search incident to lawful arrest is authorized when reasonably necessary to protect arresting officer from serious bodily harm, to prevent prisoner from escaping, or to discover fruits of crime) People v. Jefferies, 6 Ill. App. 3d 648, 285 N.E.2d 592 (1972), *cert. denied*, 410 U.S. 932 (1973) (search incident to arrest is authorized when necessary to protect officer, to prevent escape, or to discover evidence).

32. United States v. Robinson, 414 U.S. 218 (1973).

33. People v. Seymour, 84 Ill. 2d 24, 34, 416 N.E.2d 1070, 1074 (1981) (discussing United States v. Robinson, 414 U.S. 218 (1973)). In *Robinson*, the Court considered the development of the right to search incident to arrest. United States v. Robinson, 414 U.S. 218 (1973). The Court held that the justification for such a search is the need to disarm and to discover evidence, but did not depend on the probability that these items would in fact be found. *Id.* at 235.

34. *Id.* The Court stated: "In the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but it is also a 'reasonable' search under that Amendment." *Id.*

35. *Id.* In 1974, the Supreme Court ruled that a police officer could require an individual under lawful arrest, without further justification, to remove and exchange his clothing before incarceration. United States v. Edwards, 415 U.S. 800, 805 (1974). The Court characterized such activity as a "normal incident of custodial arrest." *Id.*

36. United States v. Chadwick, 433 U.S. 1 (1977).

probable cause as justification.[37]

Searches conducted incident to a lawful arrest are reasonable and therefore constitute an exception to the warrant requirement of the fourth amendment.[38] In *Tinetti v. Wittke*,[39] however, the Seventh Circuit Court of Appeals went a level further and created an exception to the exception. The court ruled that when the arrest involved only a non-misdemeanor traffic offense the search was unreasonable.[40] The court affirmed a district court's order restraining the Sheriff of Racine County, Wisconsin from strip searching persons charged with non-misdemeanor traffic offenses.[41] In *Tinetti*, Jill Tinetti, a resident of Colorado, was driving in Racine, Wisconsin.[42] When a sheriff's officer arrested her for speeding, he informed her that she was required to post a forty dollar cash bond.[43] Tinetti, unable to post the bond, was brought to the Racine County Jail, strip searched and incarcerated.[44] In conducting the strip search, the officers complied with a written policy of the Racine County Sheriff's Department directing that all persons, regardless of the offense involved, be strip searched prior to incarceration.[45]

The district court issued a preliminary injunction enjoining the sheriff from conducting strip searches on non-misdemeanor traffic offenders.[46] The court subsequently ruled that the strip search was unconstitutional,[47] and distinguished this case from the general exception allowing warrantless searches incident to lawful arrests.[48]

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37. *Id.*

38. *See* United States v. Rabinowitz, 339 U.S. 56 (1950) (the framers of the Constitution recognized that there were reasonable searches for which no warrant was required and that after a valid arrest there is an unquestionable right to search).

39. 620 F.2d 160 (7th Cir. 1980). *See* Tinetti v. Wittke, 479 F. Supp. 486 (E.D. Wis. 1979), for the facts surrounding this decision.

40. *Tinetti, 620 F.2d at 161.*

41. *Id. See* Tinetti v. Wittke, 479 F. Supp. 486 (E.D. Wis. 1979), *aff'd* 620 F.2d 160 (7th Cir. 1980) for the lower court's ruling and the facts of the case.

42. *Id.* at 488.

43. *Id.*

44. *Id.* Tinetti was not a resident of Wisconsin and therefore could not post her drivers license as bond.

45. *Id.* Tinetti's uncle posted the forty dollar bond about two hours later.

46. The court's preliminary injunction of August 10, 1979, enjoined the defendants from undertaking, exploring, maintaining or adopting any policies, procedures, practices or acts of strip searching persons charged with non-misdemeanor traffic offenses, except where law enforcement officials have probable cause to believe that the offender is concealing contraband or weapons on his body. *Tinetti*, 479 F. Supp. at 488.

47. The court stated that strip searching Tinetti, "a non-misdemeanor traffic violator . . . incarcerated due to the inability to post cash bail, was an unconstitutional denial of the personal liberty guaranteed her by the United States Constitution." *Id.* at 490.

48. *Id. See, e.g., Robinson*, 414 U.S. at 218 (after a custodial arrest, a search of the person requires no additional justification); Chimel v. California, 395 U.S. 752 (1969) (reasonable to search an arrested person for weapons and evidence which may be destroyed).

The court acknowledged the reasonableness of the general exception allowing such warrantless searches in light of the possibility of discovering weapons or evidence.[49] However, the court emphasized that weapons were rarely involved in a simple speeding offense, and that the only evidence of Tinetti's speeding was the reading on the speedometer of her automobile.[50]

The court limited its ruling to the particular facts presented and specifically commented on the difference between Ms. Tinetti, charged only with a non-misdemeanor traffic offense, and individuals who were detained subsequent to a criminal charge.[51] The court's final ruling, a permanent injunction, specifically incorporated this distinction and applied only to those situations involving non-misdemeanor traffic arrests.[52]

B. Illinois Courts

The decisions reached in Illinois courts have mirrored those of the federal courts. In a thorough discussion of the issues presented by warrantless searches, the Illinois Supreme Court concluded that the United States Supreme Court had consistently authorized searches incident to a legal arrest. The court had not limited the searches to only those occasions in which the officer had probable cause to believe that weapons or evidence would be found.[53]

In 1979 the Illinois Appellate Court determined that there were circumstances under which a strip search of an arrested individual was not reasonable. In *People v. Seymour*,[54] Seymour was arrested

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49. *Tinetti*, 479 F. Supp. at 490.

50. The court reasoned that the "fact that a person is validly arrested, however, does not mean that he may be subject to any search which the arresting officer feels is necessary." *Id.* (citing United States v. Mills, 472 F.2d 1231 (D.C. Cir. 1972)).

51. The court stated that "unlike pretrial detainees charged with a criminal offense," traffic violators held because they cannot post a cash bond will seldom conceal contraband or weapons. *Id.* at 491.

52. The permanent injunction issued by the court prohibited strip searching persons charged with non-misdemeanor traffic offenses except where the officer has probable cause to believe that contraband or weapons are being concealed. *Id.*

53. People v. Seymour, 84 Ill. 2d 24, 34, 416 N.E.2d 1070, 1074 (1981). Previously, the Illinois Appellate Court ruled that the strip and body cavity search of a defendant, under custodial arrest for a narcotics offense, was legal, and evidence found as a result of the search was admissible. People v. Green, 52 Ill. App. 3d 636, 367 N.E.2d 1061 (1977). In *Green*, the police searched defendant Green twice. *Id.* at 638, 367 N.E.2d at 1063. They conducted a strip and body cavity search for narcotics at the scene of his arrest and a second strip and body cavity search before placing Green in the lockup. *Id.* Heroin, found during the second body cavity search was the basis for Green's conviction. *Id.* at 641, 367 N.E.2d at 1065.

54. People v. Seymour, 80 Ill. App. 3d 221, 398 N.E.2d 1191 (1979), *rev'd*, 84 Ill. 2d 24, 416 N.E.2d 1070 (1981). On July 27, 1977, at about 9 p.m., two Chicago police officers observed Seymour leaning through the passenger window of a parked car. *Id.* at 225, 398 N.E.2d at 1194. When the officers approached, Seymour stood up and began to walk away. *Id.* The officers noticed that the parked car had keys in its igni-

for unlawful use of a weapon, a misdemeanor offense.[55] The officer discovered the weapon, a handgun, in Seymour's waist band. His shirt concealed it.[56] Although Seymour had enough money with him to post the required bond, the officer transported Seymour to the police station and conducted a strip search.[57] As a result of that search, the officer discovered a quantity of cocaine.[58] The appellate court ruled that when the police arrest an individual for a misdemeanor offense, the officer must immediately inform him of the bond required and allow him to post the bond and be released.[59] Since Seymour had more than the required bond, the court ruled that both his incarceration and strip search were unnecessary.[60]

The appellate court's decision relied on the specific circumstances of an arrestee who was able to post the required bail immediately. The decision appeared to restrict the general exception allowing searches incidental to custodial arrests. Subsequently, the decision was reviewed by the Illinois Supreme Court in its most thorough analysis of the question to date.[61] The court's review resulted in a reversal of the lower court.[62]

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tion and ordered Seymour to stop. *Id.* The officers asked Seymour for identification and Seymour began to reach into his pants pocket. *Id.* The officers patted Seymour down and found a loaded .38 revolver in his waistband. *Id.* Seymour was arrested and brought to the 18th District Chicago Police Station. *Id.* Seymour was fingerprinted and strip searched. *Id.* In Seymour's clothing, the officers discovered a tinfoil packet containing cocaine. *Id.* at 225-26, 398 N.E.2d at 1194.

55. ILL. REV. STAT. ch. 38, para. 24-1 (1989) provides in pertinent part:

> Unlawful Use of Weapons. (a) A person commits the offense of unlawful use of weapons when he knowingly:
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> (4) Carries or possesses in any vehicle or *concealed on or about his person* except when on his land or in his own abode or fixed place of business any pistol, revolver, stun gun or taser or other firearm;
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> (b) Sentence. A person convicted of a violation of Subsection 24-1(a)(1) through (5) . . . commits a *Class A misdemeanor.*

Id. (emphasis added).

56. *Seymour*, 80 Ill. App. 3d at 225, 398 N.E.2d at 1194, *rev'd*, 84 Ill. 2d 24, 416 N.E.2d 1070 (1981).

57. *Id.* at 225-26, 398 N.E.2d at 1194.

58. *Id.* at 226, 398 N.E.2d at 1194.

59. *Id.* at 229-30, 398 N.E.2d at 1197.

60. The court reasoned:

> The right to privacy protects only against unreasonable intrusions. Lawful incarceration deprives prisoners of many of the rights and privileges of other citizens, and warrantless searches of jail cells and prisoners under certain conditions do not violate article I, section 6. But the strip search of an individual arrested for a misdemeanor offense who has the funds in his possession to immediately post bond and be released is not reasonable. A strip search can be justified when the modesty of one lawfully arrested must give way to reasonable precautionary procedures designed to detect hidden evidence, drugs or objects which might be used against others or to cause self-inflicted harm. However, when the defendant is charged only with a misdemeanor and may gain his release immediately, his modesty and privacy must remain inviolate.

Id. at 1197-98.

61. *See* People v. Seymour, 84 Ill. 2d 24, 416 N.E.2d 1070 (1981).

62. *Id.* at 41, 416 N.E.2d at 1077.

The Illinois Supreme Court, in reviewing *People v. Seymour*, first ruled that the officers had lawfully arrested Seymour on the weapons charge and that it was proper to transport him to the police station.[63] The court next cited section 108-1 of the Illinois Code of Criminal Procedure that provides that an officer, after a lawful arrest, may search the person for items that may constitute evidence of any offense.[64] The court stated that in addition to the statutory authority to conduct a search of Seymour, both the common law and constitutional analysis support the authority to conduct a search incidental to Seymour's lawful arrest.[65]

The court next examined the reasonableness of the search in light of the prohibition against unreasonable searches and seizures contained in the fourth amendment of the United States Constitution and article I, section 6, of the Illinois Constitution. The court, citing *United States v. Rabinowitz*,[66] stated that although no rule exists for determining the reasonableness of a search, such determination depends on the facts of each given case.[67] The court discussed *Terry v. Ohio*,[68] noting that although a search may initially be reasonable, it may become unreasonable due to its intensity or scope.[69] However, the court noted that besides the concern for pro-

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63. *Seymour*, at 33, 416 N.E.2d at 1074.

64. For the text of section 108-1, see *supra* note 31.

65. The court stated that since a custodial arrest, based on probable cause is reasonable under the fourth amendment, a search incident to the arrest requires no additional justification. *Seymour*, 84 Ill. 2d at 34, 416 N.E.2d at 1074 (citing United States v. Robinson, 414 U.S. 218, 235 (1973)).

66. 339 U.S. 56 (1950).

67. *Seymour*, 84 Ill. 2d at 35, 416 N.E.2d at 1075 (citing United States v. Rabinowitz, 339 U.S. 56, 60 (1950)) The court explained that the reasonableness of a search is not determined by a fixed formula, nor does the Constitution define reasonable searches, but rather the reasonableness of a search is determined by the circumstances of the case. *See generally* People v. Cole, 54 Ill. 2d 401, 298 N.E.2d 705 (1973), *on remand*, 29 Ill. App. 3d 369, 329 N.E.2d 880 (1975) (in determining reasonableness of a search, the critical issue is whether the situation that confronted the officers justified the search); *In re* Marsh, 40 Ill. 2d 53, 237 N.E.2d 529 (1968) (a search is reasonable if made incident to an arrest, provided that probable cause exists for the arrest); People v. Jordan, 87 Ill. App. 2d 338, 231 N.E.2d 630 (1967) (the court must determine the reasonableness of a particular search in light of the facts and circumstances that confronted the officers making the arrest); People v. Panozzo, 48 Ill. App. 2d 385, 199 N.E.2d 259 (1964) (the court must decide each case involving reasonableness of search without warrant but incidental to valid arrest upon its own facts and circumstances).

68. 392 U.S. 1 (1968). In *Terry*, a police officer observed Terry acting suspiciously. *Id.* at 5-7. The officer believed Terry was about to commit a crime and approached him. *Id.* at 6. The officer patted Terry's outer clothing and felt an object that he believed was a weapon. *Id.* at 7. The officer removed Terry's coat, searched the coat, and discovered a weapon. *Id.* Terry was charged with the weapon offense. *Id.* Terry moved to have the evidence suppressed as an illegal search and seizure. *Id.* The Court ruled that the initial stop and pat down was legal and that the subsequent search of Terry's coat was legal. *Id.* at 30.

69. *Seymour*, 84 Ill. 2d at 35, 416 N.E.2d at 1075 (citing Terry v. Ohio, 392 U.S. 1, 18-19 (1968)). The court pointed out that although *Terry* indicated the scope and

tecting the officer from assault, a search incident to an arrest is permissible on other grounds and can therefore involve an "intensive exploration of a person."[70] For example, a search intended to reveal a concealed weapon would require minimal intrusion into the person, while a search intended to recover a small package of contraband would require the more intensive exploration discussed by the court.

Seymour argued that a strip search was a degrading invasion of his rights and a search of such intensity was unjustified.[71] The court conceded that a strip search was a serious invasion of an individual's rights and could be viewed as a fourth amendment violation when made following an arrest for a minor offense.[72] The court stated, however, that even in such minor cases, it may uphold a strip search if the officer reasonably believed the person was concealing weapons or contraband.[73] The court distinguished Seymour's offense from what it considered minor offenses.[74] The court explained that the officers had charged Seymour with a weapon's offense, and although a misdemeanor, a weapon's offense was "not a minor offense in the same sense that certain traffic offenses can be said to be minor offenses."[75]

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intensity of a search must be justified, since *Terry*, the Supreme Court has not limited full searches incident to lawful arrests. *Id. See* United States v. Robinson, 414 U.S. 218, 235 (1973) (once there is a custodial arrest a full search of the person requires no additional justification). *See generally* People v. Robinson, 62 Ill. 2d 273, 342 N.E.2d 356 (1976) (a search without a warrant is reasonable if it is incident to a lawful arrest); People v. Wright, 42 Ill. 2d 457, 248 N.E.2d 78 (1969) (the police may conduct a reasonable search, incident to an arrest, without a search warrant); People v. Helms, 67 Ill. App. 3d 729, 385 N.E.2d 127 (1978) (search without warrant is reasonable if incident to a lawful arrest); People v. Jackson, 57 Ill. App. 3d 720, 373 N.E.2d 729 (1978) (a search or seizure made incident to a valid arrest does not violate the fourth amendment despite the absence of a warrant).

70. *Seymour*, 84 Ill. 2d at 35, 416 N.E.2d at 1075. The court also discussed its own prior decisions, citing People v. Hayes, 55 Ill. 2d 78, 302 N.E.2d 37 (1973) and People v. Holloman, 46 Ill. 2d 311, 263 N.E.2d 7 (1970). In *Hayes*, the police arrested the defendant for a firearms violation and, in a subsequent search, discovered a controlled substance. *Hayes*, 55 Ill. 2d at 79, 302 N.E.2d at 38. In *Holloman*, the defendant was arrested for driving without a license and a search incidental to his arrest revealed a controlled substance. *Holloman*, 46 Ill. 2d at 313, 263 N.E.2d at 8-9. In both cases the court upheld the validity of the search. *Hayes*, 55 Ill. 2d at 80, 302 N.E.2d at 38; *Holloman*, 46 Ill. 2d at 10, 263 N.E.2d at 10.

71. *Seymour*, 84 Ill. 2d at 36, 416 N.E.2d at 1075. The Illinois Appellate Court agreed. People v. Seymour, 80 Ill. App. 3d 221, 398 N.E.2d 1191 (1979), *rev'd*, 84 Ill. 2d 24, 416 N.E.2d 1070 (1981). The court characterized a strip search as humiliating, degrading and embarrassing. *Id.* at 223, 398 N.E.2d at 1193. The court ruled that Seymour's right to modesty and privacy superseded the right to search incident to an arrest. *Id.* at 230-31, 398 N.E.2d at 1197-98.

72. *Seymour*, 84 Ill. 2d at 36, 416 N.E.2d at 1075.

73. *Id.*

74. *Id.* at 36-37, 416 N.E.2d at 1075-76.

75. *Id.* at 37, 416 N.E.2d at 1075. The court also expressed its concern for the greater danger inherent in custodial arrest situations than in non-custodial arrests, pointing out that even the dissenting opinion in *United States v. Robinson* had ac-

The Illinois Supreme Court disagreed with the lower court's single issue analysis of the case.[76] The court stated that viewing Seymour's search only in relation to his ability to post bond, and thereby avoid incarceration, was insufficient.[77] Rather, the court found Seymour's strip search justified as incident to his arrest, and stated that this was distinct from the need to prohibit weapons or contraband from entering the detention facility.[78] Further, the court concluded that the arresting officer may conduct a search incident to a lawful arrest even without a showing of probable cause.[79] The court reversed the order suppressing the evidence.[80]

Under both federal and Illinois court decisions, a basic authority exists to conduct strip searches incident to an arrest.[81] The courts provide two separate justifications in support of this exception to the general warrant requirement. First, the authority to search incident to a lawful arrest, justified to protect the safety of the arresting officer, to prevent escape, and to recover evidence.[82] Second, the authority to search prior to incarceration, justified to protect the integrity of the detention facility.[83] Although the courts consistently support this authority in arrests involving felonies and misdemeanors, some courts have ruled that non-misdemeanor of-

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knowledged such a distinction. *Seymour*, 84 Ill. 2d at 37, 416 N.E.2d at 1076. Justice Marshall, in his dissent in *Robinson* stated:

> If the individual happens to have a weapon on his person, he will certainly have much more opportunity to use it against the officer in the in-custody situation. The prolonged proximity also makes it more likely that the individual will be able to extricate any small hidden weapon which might go undetected in a weapons frisk, such as a safety pin or razor blade. In addition, a suspect taken into custody may feel more threatened by the serious restraint on his liberty . . . and may therefore be more likely to resort to force.

United States v. Robinson, 414 U.S. 218, 254 (1973) (Marshall, J., dissenting). The *Seymour* court stated that the difference between custodial and non-custodial arrests was not a greater probability that a person under custodial arrest would be armed, but rather the increased likelihood of danger to the officer if in fact the person is armed. *Seymour*, 84 Ill. 2d at 38, 416 N.E.2d at 1076.

76. *Seymour*, 84 Ill. 2d at 41, 416 N.E.2d at 1077.

77. *Id.* at 39, 416 N.E.2d at 1076.

78. *Id.* at 39, 416 N.E.2d at 1077.

79. *Id.* at 40, 416 N.E.2d at 1077. *See also* United States v. Klein, 522 F.2d 296, 300-01 (1st Cir. 1975) (court held a brief strip search of a defendant, conducted without abuse and in a professional manner, is not unconstitutional). The *Klein* court reasoned that in arrest situations modesty must give way to reasonable precautionary procedures designed to detect hidden evidence, drugs, or dangerous objects. *Id.*

80. People v. Seymour, 84 Ill. 2d 24, 41, 416 N.E.2d 1070, 1077.

81. *See generally* United States v. Chadwick, 433 U.S. 1 (1977); United States v. Edwards, 415 U.S. 800 (1974); United States v. Robinson, 414 U.S. 218 (1973); United States v. Rabinowitz, 339 U.S. 56 (1950); Weeks v. United States, 232 U.S. 383 (1914); People v. Seymour, 84 Ill. 2d 24, 416 N.E.2d 1070 (1981); People v. Green, 52 Ill. App. 3d 636, 367 N.E.2d 1061 (1977).

82. *See, e.g.*, *Chadwick*, 433 U.S. 1; *Robinson*, 414 U.S. 218; People v. Allen, 407 Ill. 596, 96 N.E.2d 446 (1950).

83. *Seymour*, 84 Ill. 2d at 39, 416 N.E.2d at 1077.

fenses provide insufficient grounds for conducting strip searches.[84] However, even in non-misdemeanor, regulatory, or traffic situations, the courts imply that full searches may be upheld when supported by a reasonable belief that the subject is concealing a weapon or contraband.[85]

III. Reach of Illinois Strip Search Statute

The Illinois Legislature's action has resulted in a statute that exceeds its intended scope, creates difficulties for law enforcement, and poses a question to the courts. To demonstrate these difficulties this first section of the comment examines the legislative intent underlying the statute. Next, a hypothetical situation implicating the statute will be set forth. The statute will then be applied to the hypothetical. Finally, this section examines the resultant question confronting the court, whether evidence seized in violation of the statute is admissible evidence.

A. Legislative Intent

The legislative intent underlying the Illinois Strip Search Statute, as reflected in the House and Senate floor debates, does not appear to be accurately reflected in the language of the resulting statute.[86] Representative Willer, sponsor of the Strip Search Statute, stated that the bill was intended, "simply to protect people from unreasonable search and seizure."[87] However, the representatives ex-

84. *See generally* Tinetti v. Wittke, 479 F. Supp. 486 (E.D. Wis. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980) (strip search after inability to post cash bond on minor traffic infraction held unreasonable under fourth amendment); *see also* Mary Beth G. v. Chicago, 723 F.2d 1263 (7th Cir. 1983) (court concluded that strip search of minor traffic violators was unreasonable); Hunt v. Polk County, 551 F. Supp. 339 (S.D. Iowa 1982) (strip search of traffic offender violated fourth amendment absent suspicion of concealed weapons or contraband).

85. In *Seymour*, the court stated a strip search was a serious invasion of rights which could be viewed as a fourth amendment violation when conducted following an arrest for certain minor offenses. *Seymour*, 84 Ill. 2d at 36, 416 N.E.2d at 1075. The court stated, however, that even in minor cases, a reasonable belief that the individual is concealing a weapon or contraband may justify the search. *Id. See Tinetti*, 479 F. Supp. at 490 (strip search after arrest for traffic infraction found unreasonable where no probable cause existed to believe arrestee was concealing weapons or contraband); *see also Mary Beth G.*, 723 F.2d at 1273 (policy of routine strip search of traffic violators, even when officer had no reason to suspect they were concealing weapons or contraband, was unreasonable).

86. *See generally* Illinois House of Representatives, Transcription Debate, Apr. 11, 1979, at 20; Illinois House of Representatives, Transcription Debate, Apr. 27, 1979, at 24; Illinois Senate, Transcription Debate, June 21, 1979, at 48; Illinois Senate, Transcription Debate, June 27, 1979, at 314. See *infra* note 123 for the conversation with Representative Willer, sponsor of the statute.

87. Illinois House of Representatives, Transcription Debate, April 27, 1979, at 26.

perienced difficulty articulating what circumstances would be appropriate for conducting strip searches.[88] Representative Willer stated that it was not necessary for an officer to make a judicial determination of probable cause before conducting a strip search.[89] Rather, the officer could base such a search on his knowledge that the individual had a record of previous arrests or the officer's "hunch" that the individual was concealing a weapon or drugs.[90]

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88. *Id.* at 26-28.

89. *Id.* at 26.

90. During the discussion of the bill in the Illinois House of Representatives on April 27, 1979, the following exchange took place:

> Breslin: Okay, and when you refer to probable cause as a criterion for making a strip-search, are you requiring the policeman to make a judicial determination of probable cause before it's reviewed by courts?
>
> Willer: No. Absolutely not . . . Well, probable cause, as you know and as Representative Breslin pointed out, is a . . . different matters [sic] from this Bill and the judicial proceedings. [When] we tried to define it, [we] found we could not. [I]t seems to me, that it's simply based on common sense on the part of the arresting officer, based on his experience, the events surrounding the arrest, and if he, the arresting officer, believes that there is reason to suspect the person is concealing . . . a weapon or drugs, that constitutes probable cause. He may then search the person.
>
> Leinenweber: What would be the basis for such a belief?
>
> Willer: Well, policemen have often told me that after you're a policeman for a few years, you have what you call, [a] sixth sense, . . . and I think its probably true. It may be someone that they recognize, who has been arrested before, and you realize that this [statute] is only necessary to get this permission for people arrested in a minor traffic regulation, a violation of a minor regulation, and a misdemeanor that does not involve drugs or guns to begin with. So, you're talking about minor infractions of the law to begin with. Now say the policeman gets . . . a hunch, based on knowing the person, . . . that, to me, constitutes probable cause.
>
> Leinenweber: Do you feel, though, that if the policeman is exercising his hunch, that there may be contraband on his person, that this would permit him if he follows the procedure which you've set forth, to have a strip-search conducted?
>
> Willer: That is correct.

Id. at 26-3.

Various courts have ruled that probable cause requires considerably more than a mere suspicion or a "hunch." Probable cause for a search without a warrant requires more than a bare suspicion and only exists where the facts known to the officer are sufficiently trustworthy in themselves to warrant a man of reasonable caution to believe that a crime has been committed. Brinegar v. United States, 338 U.S. 160 (1949). Probable cause does not, however, require absolute certainty. State v. Dean, 282 S.C. 136, 317 S.E.2d 744 (1984). *Accord* People v. Hall, 164 Ill. App. 3d 770, 518 N.E.2d 275 (1987), *cert. denied*, 109 S. Ct. 174 (1988) (probable cause exists when totality of circumstances within police officer's knowledge at time of arrest would warrant a man of reasonable caution in believing that an offense has been committed); People v. Franklin, 159 Ill. App. 3d 923, 512 N.E.2d 1318 (1987) (probable cause is shown where facts would warrant a person of reasonable caution to believe that an offense has occurred); People v. Haymer, 154 Ill. App. 3d 760, 506 N.E.2d 1378 (1987) (probable cause exists when officer has knowledge which would lead a reasonable person to believe that a crime has been committed); People v. Juban, 154 Ill. App. 3d 155, 506 N.E.2d 970 (1987) (probable cause exists where facts and circumstances known to the arresting officer are sufficient to warrant a person of reasonable caution to believe an offense has been committed); People v. Simpson, 129 Ill. App. 3d 822, 473 N.E.2d 350 (1984) (probable cause exists in the objective sense if the facts and

Representative Deuster expressed his concern for the security of police lockup facilities because under the proposed legislation individuals detained awaiting bond could not be strip searched before the officer placed them in the holding facility.[91] Representative Deuster stated that this presented a potential danger to the officer and other individuals in the facility. Representative Willer responded by stating that she did not see "why a person has to be locked up in a cell for the minor infractions of the laws we're talking about."[92] However, the language the legislators selected in the statute includes not only traffic and regulatory violations, but also misdemeanors. It would appear reasonable to characterize traffic and regulatory infractions as "minor infractions," since conviction carries no possibility of incarceration. However, such a characterization of misdemeanor offenses, for which the court can sentence the offender to up to one year in jail, does not appear nearly as reasonable.[93]

Additionally, the legislators had difficulty defining exactly what actions would constitute a strip search. Representative Getty asked Representative Willer to explain exactly what activity the statute was regulating.[94] Representative Willer responded, "I would submit that . . . if your strip-searched, you know you're strip-searched."[95]

Representative Willer may have most accurately expressed the feeling of the legislature in her closing remarks when she stated, "We've heard enough testimony. I would only say that this [b]ill is in response to what can clearly be described as sexual exploitation, because women were the victims."[96] The legislature's desire to address these problems is demonstrated by their swift passage of the Illinois Strip Search Statute. In its haste, however, the legislature failed to consider the consequences of its action. The statute imposes unreasonable constraints on effective law enforcement and af-

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circumstances within the officer's knowledge are sufficient to warrant a man of reasonable caution in believing that an offense has been committed and that the person arrested has committed the offense); People v. Walls, 87 Ill. App. 3d 256, 408 N.E.2d 1056 (1980) (probable cause exists if a reasonable and prudent man in possession of the knowledge which has come to the arresting officer would believe that the person arrested has committed a crime).

91. ILLINOIS HOUSE OF REPRESENTATIVES, TRANSCRIPTION DEBATE, Apr. 27, 1979, at 31.

92. *Id.*

93. "No person arrested for a traffic, regulatory or misdemeanor offense . . . shall be strip searched." ILL. REV. STAT. ch. 38, para. 103-1(c) (1989). *See supra* note 1 for full text of Illinois' Strip Search Statute. *See infra* note 123 in which Representative Willer explained that the intent of the legislature was to exclude minor offenses, not misdemeanors.

94. ILLINOIS HOUSE OF REPRESENTATIVES, TRANSCRIPTION DEBATE, Apr. 27, 1979, at 33.

95. *Id.*

96. *Id.* at 35.

fects areas beyond the legislature's intent.[97]

B. Hypothetical Situation

The Illinois Strip Search Statute prohibits searches that would be permissible under both the United States Constitution and the Illinois Constitution. An example may best demonstrate the reach of this statute. A police officer responds to a call at a restaurant. He is met by the restaurant owner who explains that he observed a man reach behind the cashier's counter and steal a green money pouch containing $100. The owner accompanies the officer outside and they observe the man standing in a corner of the parking lot holding the green money pouch. As the officer approaches the suspect, he observes him slide the pouch inside his slacks. The restaurant owner identifies the suspect as the man who stole the pouch and the officer places the offender under arrest. The officer conducts a pat down of the offender and can feel the money pouch in the man's trousers. The officer orders the offender to hand over the money pouch. The offender opens his trousers and hands the officer the stolen money pouch.

C. Application of the Statute to the Hypothetical

Although this search unquestionably falls within constitutional constraints,[98] it violates the Illinois Strip Search Statute. First, the search violates the Illinois statute because it fits within the statute's definition of a strip search. The statute defines a strip search to include the rearranging of a suspect's outer garments to permit a visual inspection of the undergarments.[99] Therefore, when the offender opened his trousers, exposing his undergarment, he had been strip searched under the meaning of the statute. Second, the search violates the statute's preclusion of searches incident to misdemeanor arrests which do not involve weapons or controlled substances.[100] Since the hypothetical involved a misdemeanor (theft under $300),[101] did not involve either a weapon or controlled substance,

97. *See infra* note 123 for conversation with Representative Willer.

98. The search is constitutionally acceptable both as incidental to a lawful arrest and to recover evidence. *See generally supra* notes 84-85 and accompanying text for a discussion of the validity of searches under the fourth amendment. *See supra* note 66 and accompanying text for discussion of statutory rights to search for evidence.

99. ILL. REV. STAT. ch. 38, para. 103-1(d) (1989). *See supra* note 1 for full text of the Illinois Strip Search Statute.

"An undergarment" is "a garment to be worn under another." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2488 (1981).

100. ILL. REV. STAT. ch. 38, para. 103-1(c) (1989). *See supra* note 1 for full text of the Illinois Strip Search Statute.

101. "Theft of property, other than a firearm, not from the person and not ex-

and since the officer did not have reason to believe the offender was concealing either a weapon or controlled substance, the search was illegal. Therefore, the statute forbids a strip search of the arrestee.[102]

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ceeding $300 in value is a Class A misdemeanor." ILL. REV. STAT. ch. 38, para. 16-1(b)(1) (1989) (effective July 1, 1988).

102. The Illinois Attorney General's office issued an opinion dealing with the Illinois Strip Search Statute. The opinion was written in response to an inquiry from the Honorable Richard M. Baner, State's Attorney, Woodford County, Eureka, Illinois. Mr. Baner explained that the "booking-in" procedure of the Woodford County jail, prior to the issuance of a court order, included removal of the arrestee's clothing in order that a "medical information sheet" be completed. Mr. Baner requested the Attorney General advise on the legality of such a practice under the newly passed Illinois Strip Search Statute. Additionally, Mr. Baner asked the Attorney General if the provisions of section 103-1 diminish the right of a police officer, as established by existing law, to conduct a protective search of an arrested person.

The Attorney General's response, in pertinent part, stated:

> The medical information sheet used by the Woodford County sheriff's department consists of a health questionnaire and a diagram, depicting front, back and side views of the body, on which the booking officer is to [mark] the location of cuts and bruises, scars, tattoos, etc. . . . Obtaining the data for the diagram on the medical information sheet would require a strip search within the plain meaning of subsection 104-1(d). Therefore, any search or inspection of the arrested person's body in order to obtain the data called for by the diagram is plainly prohibited . . . except where: (a) the arrest involves weapons or a controlled substance; or (b) there is a reasonable belief that the person is concealing a weapon or a controlled substance . . ..
>
> In order to answer your [second] question, it is useful to review the existing law relating to protective searches incident to an arrest.
>
> The rights of a police officer to conduct a search of a person arrested without a warrant, are set forth in section 108-1 . . . which states:
>
> When a lawful arrest is effected a peace officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of:
>
> (a) Protecting the officer from attack; or
>
> (b) Preventing the person from escaping; or
>
> (c) Discovering the fruits of the crime; or
>
> (d) Discovering any instruments, articles, or things which may have been used in the commission of, or which may constitute evidence of, an offense.
>
> The scope of a valid search incident to a lawful arrest was stated by the United States Supreme Court in Chimel v. California (1969), 395 U.S. 752 . . . as follows: 'When an arrest is made . . . it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. . ..'
>
> It is my opinion that the provisions of section 103-1 do not limit the rights of a police officer under case law, to conduct a protective weapons search which includes a pat-down and a search of the pockets and outer clothing of an arrested person. Furthermore, where the officer discovers a weapon, or an object which he suspects is a weapon, the statute does not affect his right to reach into the person's clothing to retrieve it. Terry v. Ohio (1968), 392 U.S. 1.
>
> The statute does, in my opinion, place restriction on searches which go beyond these bounds . . .. Further, where an arrest has been effected for a traffic, regulatory or misdemeanor offense not involving weapons or a controlled substance, in order for a strip search to be carried out there must exist, in addition to probable cause to make the arrest, a reasonable belief that the arrested person is concealing weapons or a controlled substance. The requirement of additional justification to conduct a strip search in these circumstances is a departure from the doctrine of United States v. Robinson . . . and

D. Admissibility of Evidence Seized in Violation of the Statute

The court would be confronted with an interesting question under these circumstances. The Strip Search Statute provides that the officer's violation constitutes official misconduct, a class three felony.[103] However, the statute does not address the exclusion of evidence seized in violation of its provisions.[104] Absent specific language addressing this issue, the courts would rely upon the exclusionary rule to determine the admissibility of evidence obtained from the search. Under the judicially-created exclusionary rule, evidence is excluded from admission if it is found to have been obtained in violation of the requirements of the fourth amendment. The exclusionary rule applies only to evidence seized in violation of constitutional standards.[105] Since the officer's search did not violate constitutional standards,[106] one could argue that the evidence seized should not be excluded by the court.[107] This could lead to an anomalous result. The court could admit the evidence recovered by the officer both in the prosecution of the arrestee for misdemeanor theft and for the subsequent prosecution of the officer on felony charges of official misconduct.[108]

Gustafson v. Florida, . . . where the United States Supreme Court held that where an arrest is based on probable cause a search incident to the arrest requires no additional justification.

80 Op. Att'y. Gen. 90 (1980).

103. ILL. REV. STAT. ch. 38, para. 103-1(h) (1989) (effective Sept. 21, 1979). *See supra* note 1 for full text of statute.

Official misconduct occurs when:

A public officer or employee commits misconduct when, in his official capacity, he commits any of the following acts:

(a) Intentionally or recklessly fails to perform any mandatory duty as required by law; or

(b) Knowingly performs an act which he knows he is forbidden by law to perform; or

(c) With intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or

(d) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law.

A public officer or employee convicted of violating any provision of this Section forfeits his office or employment. In addition, he commits a Class 3 felony.

ILL. REV. STAT. ch. 38, para. 33-3 (1989).

104. *See generally* Singer, *Strip and Body Cavity Searches in Illinois*, ILL. B.J., 86 (Oct. 1980) (for discussion of suppression of evidence under the Illinois statute).

105. *See generally* Weeks v. United States, 232 U.S. 383 (1914) (discussing the courts obligation to enforce the guarantees of the fourth amendment through exclusion of evidence recovered as a result of unreasonable searches).

106. *See supra* note 100 and accompanying text for a discussion of the applicable constitutional standards.

107. Since the Illinois Strip Search Statute imposes a higher standard than required under either the United States or Illinois Constitution, it is not clear whether courts will exclude evidence seized in violation of the statute. Singer, *supra* note 105, at 91.

108. The exclusionary rule is a judicially created method of deterring violations

Surely, this was not the legislature's intent. The legislature intended to deter unreasonable searches.[109] This would best be achieved by including a definitive sanction that would enjoy consistent application by the courts. The legislators did not envision official misconduct, a felony offense, to be a ready remedy for violation of the statute.[110] This belief finds support in the fact that there have been no cases in which the State's Attorney has been willing to prosecute an officer for violation of the provisions of the Strip Search Statute. Compliance with the provisions of the Strip Search Statute would more likely be attained through inclusion of specific language requiring the exclusion of evidence seized in violation of the statute. Since 1914, the exclusion of evidence seized in violation of constitutional principles, the exclusionary rule, has been the method chosen by the courts to deter illegal search and seizure.[111] Prohibiting the

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of the fourth amendment. In 1914 the United States Supreme Court held that federal agents could not use evidence seized in violation of the amendment in a federal prosecution as it involved "a denial of the constitutional rights of the accused." *Weeks* 232 U.S. 398. The Court found support for its decision in the fourth amendment, stating that the effect of the fourth amendment,

> put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints [and] . . . forever secure[d] the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law . . . and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.

Id. at 391-92.

The basis for the exclusionary rule, therefore, rests squarely on constitutional authority and solely concerns constitutional violations. Mapp v. Ohio, 367 U.S. 643, 648 (1961) (stating that, although some feel that the exclusionary rule is a rule of evidence, the plain and unequivocal language of *Weeks* demonstrates that the rule is of constitutional origin).

109. *See supra* text accompanying note 89 discussing legislative intent supporting passage of the statute.

110. Representative Willer, commenting that prosecution of an officer for violating the statute would be unlikely, stated: "So, I think [when] a policeman . . . in good faith, makes a mistake, . . . the complainer would have to prove [the search] . . . was willfully or knowingly done without any basis of probable cause." ILLINOIS HOUSE OF REPRESENTATIVES, TRANSCRIPTION DEBATE, Apr. 27, 1979, at 28.

111. *See* Mapp v. Ohio, 367 U.S. 643 (1961). In *Mapp*, the Supreme Court established a rule of constitutional law that all evidence obtained in violation of the federal constitutional provision against unreasonable searches and seizures is inadmissible in state, as well as federal criminal trials. *Id.* at 660. The *Mapp* rule, which has come to be called the exclusionary rule, has been examined and defined by subsequent decisions. The exclusionary rule is not a personal constitutional right, but rather a judicially-created remedy. State v. Young, 234 Ga. 488, 216 S.E.2d 586, (1975), *cert. denied*, 423 U.S. 1039 (1975) (citing United States v. Calandra, 414 U.S. 338, 348 (1974)). The rule not only bars evidence directly seized in violation of the fourth amendment, but it also bars derivative evidence discovered as a result of the tainted seizure. State v. Cook, 106 Idaho 209, 677 P.2d 522 (1984). In 1968 the Court ruled that the exclusionary rule was applicable to evidence introduced in state courts. Terry v. Ohio, 392 U.S. 1, 8-9 (1968). *See supra* note 70 for a discussion of the *Terry* case. However, the Supreme Court has refused to review appeals based on purported violations of the exclusionary rule where the state has provided an opportunity for full and fair litigation of fourth amendment claims. Stone v. Powell, 428 U.S. 465, 494

introduction of evidence seized as a result of an illegal strip search could prove to be a more effective deterrent and would more accurately fulfill the legislature's intent.

IV. Areas of Concern

Although no cases directly involving the Illinois Strip Search Statute have reached the Illinois Appellate Courts, the language of the statute presents the potential for unintended and unnecessary litigation. These potential difficulties center on the following areas:

A. Scope of the statute:

The Illinois statute forbids a strip search of an individual arrested for a misdemeanor unless there are reasonable grounds to believe the individual is concealing a weapon or controlled substance.[112]

B. Effect of violation of the statute:

Violation of the Illinois Strip Search Statute constitutes official misconduct, a class three felony. However, the statute does not address the question of the admissibility of evidence seized in violation of its requirements.

V. Similar Statutes in other States

Examination of the language contained in similar statutes from other states offers a partial solution to the problems the Illinois Statute presents.

(1976). Further, the Court has refused to expand the rule to apply to witness testimony before a grand jury. United States v. Calandra, 414 U.S. 338, 354 (1974). In Terry v. Ohio the Court explained that the purpose of the exclusionary rule was to deter and limit the illegal search that had produced the evidence. *Terry*, 392 U.S. at 29 (citing Katz v. United States, 389 U.S. 347, 354-56 (1967)).

112. Ill. Rev. Stat. ch. 38, para. 103-1(c) (1989). *See supra* note 1 for full text of the Illinois Strip Search Statute.

The Illinois statute defines "controlled substance" as "a drug, substance, or immediate precursor in the Schedules of Article II of [the Illinois Controlled Substances Act]." Ill. Rev. Stat. ch. 56 ½, para. 1102(f) (1989).

Offenses involving a controlled substance fall into two general categories: possession of controlled substance; and delivery of controlled substances. The statute establishes penalties for possession of controlled substances which range from a class one felony to a class four felony depending on the quantity of controlled substance involved. Possession of any quantity of controlled substance is a felony, not a misdemeanor. Ill. Rev. Stat. ch. 56 ½, para. 1402(b) (1989). Since both the offense of possession of a controlled substance and delivery of a controlled substance are felonies, including an exception for misdemeanors involving controlled substances is unnecessary, if not illogical.

A. Scope of statutes in other states

In contrast to the language contained in the Illinois statute, many states, while limiting the scope of permissible strip searches, permit strip searches if the arrest involves weapons, controlled substances, violence, or when the officer believes the arrestee is concealing a weapon, controlled substance, contraband, or evidence of a crime.[113] Additionally, the statutes in some states reflect the legisla-

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113. Several states have passed legislation limiting the circumstances under which arrested persons may be strip searched. Although the statutes bear similarity in most of their provisions, some notable differences exist. One area in which the statutes differ is in the scope of items that constitute the object of the search. While the Illinois Strip Search Statute restricts searches to those instances in which the officer believes an individual is concealing a weapon or controlled substance, other states allow such searches under additional instances if the officer believes the individual is concealing evidence or contraband.

In 1984, California addressed the strip searching of arrested individuals and enacted California Penal Code § 4030. *See* CAL. PENAL CODE § 4030 (West 1989). The statute precludes strip searches of persons arrested and held in custody on misdemeanor or infraction offenses "except those involving weapons, controlled substances *or violence.*" *Id.* at (f) (emphasis added). Additionally, the statute allows an officer to conduct a strip search as an exception to these limitations when he believes the person is "concealing a weapon *or contraband.*" *Id.* (emphasis added).

In contrast with the Illinois statute, the California statute would appear to allow for the "routine" strip search of persons arrested for offenses involving violence, besides those whose offense involved either a weapon or controlled substance. The Illinois Strip Search Statute limits strip searches to offenses involving either a weapon or controlled substance, but does not allow searches of persons arrested for misdemeanors involving "violence." *See supra* note 1 for full text of the Illinois Strip Search Statute. Further, for offenses not involving a weapon, controlled substance, or violence, the statute permits an officer to conduct a strip search on those individuals suspected of concealing a weapon or contraband. The California legislature, in allowing searches for "contraband", permits a broader permissible range of searches than allowed under the Illinois statute in allowing searches for "controlled substances." The Illinois statute allows strip searches as an exception to the general restriction only if the officer believes the individual is concealing a weapon or controlled substance. "Contraband," while including controlled substances, is a more expansive term. *See supra* note 1 for full text of the Illinois Strip Search Statute.

Connecticut adopted a "strip search" statute in 1980. CONN. GEN. STAT. ANN. § 54-33k (West 1989).

The Connecticut statute forbids strip searches of misdemeanants unless there is reasonable belief that the individual is "concealing a weapon, a controlled substance *or contraband.*" *Id.* at § 54-331 (a) (emphasis added). The Connecticut statute's inclusion of an exception for searches for "contraband" would include not only controlled substances, but also other items inherently illegal to possess.

Florida's strip search statute, FLA. STAT. ANN. § 901.211 (West 1989), forbids the strip searching of minor offenders unless a weapon or controlled substance is involved. However, the statute contains an exception allowing searches when the crime is "*violent in nature.*" *Id.* at (2) (emphasis added). Additionally, the statute allows strip searches, when the officer believes the individual is concealing stolen property. *Id.* at (2)(a).

The Iowa statute, IOWA CODE ANN. § 804.30 (West 1989), allows strip searching misdemeanor offenders when it is believed the offender is concealing "a weapon *or contraband.*" *Id.* (emphasis added).

The Missouri statute states that non-felony offenders may not be strip searched unless there is probable cause to believe that the "person is concealing a weapon, *evidence of the commission of a crime or contraband.*" MO. REV. STAT. § 544.193 (2)

ture's concern for the security of detention facilities,[114] as well as the

(1989) (emphasis added).

In New Jersey, the statute prohibits the strip search of a persons arrested for offenses "other than a crime" unless there is probable cause to believe that a weapon, controlled substance "*or evidence of a crime* will be found." N.J. STAT. ANN. § 161A-3 (West 1989) (emphasis added).

Ohio's Code allows an officer to conduct a strip search when there is probable cause to believe the arrestee is "concealing *evidence of the commission of a criminal offense, including fruits or tools of a crime, contraband,* or a deadly weapon . . . that could not otherwise be discovered." OHIO REV. CODE ANN. § 2933.32 (B)(2) (Anderson 1989) (emphasis added). The Code provides guidance in determining probable cause and instructs the officer to consider the nature of the offense, the circumstances of the arrest, and the prior conviction record of the person. *Id.*

In Tennessee, the Code is similar to the Illinois Statute in forbidding the strip search of individuals arrested for traffic, regulatory or misdemeanor offenses. However, the Tennessee Code includes contraband in its list of items justifying a search. TENN. CODE ANN. § 40-7-119 (b) (1989).

The Wisconsin legislature enacted a strip search statute that prohibits conducting strip searches on people arrested for certain misdemeanor offenses unless there is probable cause to believe the person is concealing a weapon "*or a thing which may constitute evidence of the offense for which he or she is detained.*" WIS. STAT. ANN. § 968.255 (1)(a)4 (West 1989) (emphasis added).

The statutes in these states allow reasonable searches which are precluded under the Illinois statute. Although the statutes exhibit differences in language, all appear to allow searches designed to recover evidence. The Illinois statute is notable for its failure to allow searches under these circumstances.

114. In Maine, the legislature adopted a statute that not only permits searches under more arrest situations then allowed by the Illinois statute, but additionally reflects a concern for the security of the detention facility. The statute precludes the routine strip search of persons arrested for minor offenses unless there is reasonable cause to believe that the individual is concealing a weapon, "*contraband or evidence of a crime,*" or unless the arrestee "*is about to come into contact with the inmate population of a detention facility.*" ME. RE. STAT. ANN. tit. 5, § 200-G (2)(A) (1989) (emphasis added).

The Washington statute, the most detailed statute examined in this comment, states:

> 10.79.130 Strip, body cavity searches——Warrant required——Exceptions.
>
> (1) No person . . . may be strip searched without a warrant unless:
>
> (a) There is a reasonable suspicion to believe that a strip search is necessary to discover weapons, *criminal evidence, contraband, or other thing concealed on the body of the person to be searched, that constitutes a threat to the security of a holding, detention, or local correctional facility*;
>
> (b) There is probable cause to believe that a strip search is necessary *to discover other criminal evidence* concealed on the body of the person to be searched, but not constituting a threat to facility security; or
>
> (c) There is a reasonable suspicion to believe that a strip search is necessary to discover a health condition requiring immediate medical attention.
>
> (2) For the purposes of subsection (1) of this section, a reasonable suspicion is deemed to be present when the person to be searched has been arrested for:
>
> (a) A violent offense . . .;
>
> (b) An offense involving escape, burglary, or the use of a deadly weapon; or
>
> (c) An offense involving possession of a drug or controlled substance . . ..

WASH. REV. CODE § 10.79.130 (1989) (emphasis added).

In contrast, the Illinois statute fails to exhibit any concern for the security of detention facilities. Under the conditions of the Illinois statute, prisoners could conceivably be incarcerated while concealing matches or other items posing a security threat to the facility.

recovery of weapons or evidence.[115]

B. *Penalty for violation of statute in other states*

In other states with strip search statutes the penalty for intentional violation of the statute is either a misdemeanor or a civil offense.[116]

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115. In six of the statutes examined, a strip search is permissible to discover contraband. *See supra* notes 115 and 116 concerning the statutes in California, Connecticut, Iowa, Ohio, Tennessee, and Washington.

In seven of the statutes, a strip search is permissible to discover evidence. *See supra* notes 115 and 116 concerning the statutes in Florida, Maine, Missouri, New Jersey, Ohio, Washington, and Wisconsin.

Additionally, both the Maine and Washington statutes allow strip searches when an arrested individual is confined with the general incarcerated population of the detention facility. *See supra* note 116 for discussion of the Maine and Washington statutes.

116. The California strip search statute provides that knowing and willful violations constitute a *misdemeanor*. CAL. PENAL CODE § 4030 (West 1989). Additionally, the statute ensures that nothing in the statute should limit any *common law or statutory rights* available and provides for a minimum award of $1,000 for damages. *Id.* Further, the statute allows punitive damage awards, equitable relief, and reasonable attorney's fees. *Id.*

In Colorado, the legislation provides:

> (6) Any peace officer or employee of a police department or a sheriff's department who knowingly or intentionally fails to comply with any provision of this section commits *second degree official misconduct* . . . Nothing contained in this section shall preclude prosecution of a peace officer or employee of a police department of sheriff's department under any other provision of the law.
>
> (7) Nothing in this section shall be construed as limiting the *statutory or common-law rights* of any person for the purposes of any civil action of injunctive relief.

COLO. REV. STAT. § 16-3-405 (6) and (7) (1989) (emphasis added).

The Connecticut statute provides that a violating official may be prosecuted under any applicable provision of the general statutes and specifically states that it does not limit *statutory or common law rights* of any person for purposes of any civil action or injunctive relief. CONN. GEN. STAT. ANN. § 54-331 (e) and (f) (West 1989).

The Florida legislature has provided that the remedy for violation of the strip search statute shall be by *statutory or common-law civil action* or injunctive relief. FLA. STAT. ANN. § 901.211 (6) (West 1989).

In Ohio, the statute states that individuals who violate the provisions of the strip search statute are guilty of *a misdemeanor* of the first degree. The statute also states that failure to maintain the records required under the search constitutes *a misdemeanor* of the fourth degree. OHIO REV. CODE ANN. § 2933.32 (E) (Anderson 1989).

The State of Washington has established that any person harmed as a result of a violation of the strip search provision may bring a *civil action* to recover actual damages sustained. Additionally, the court may, in its discretion, award injunctive and declaratory relief as it deems necessary. The statute also states that it shall not be construed as limiting any *constitutional, common law, or statutory right* regarding any action for damages or injunctive relief, or as precluding prosecution under another provision of law. WASH. REV. CODE § 10.79.110 (1989).

The Wisconsin statute provides that individuals who intentionally violate its provisions may be *fined not more than $1,000* or *imprisoned not more than 90 days* or both. WIS. STAT. ANN. § 968.255 (1)(a)4 (West 1989).

VI. Suggested Changes in Statutory Language

Minor modifications in the language of the Strip Search Statute can alleviate potential problems. The proposed modifications of the Illinois Strip Search Statute would only affect two paragraphs of the statute. Paragraph (c) limits the circumstances under which officers may conduct a strip search. The current statute allows a strip search to be conducted only when weapons or controlled substances are involved.[117] The proposed statute would expand these exceptions in two specific areas. First, the proposed statute would allow searches of arrested persons believed to be concealing evidence of a crime or contraband.[118] Second, the proposed statute would allow searches reasonably required to protect the security of detention facilities.

At present, paragraph (c) reads:

"(c) No person arrested for a traffic, regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched unless there is reasonable belief that the individual is concealing a weapon or controlled substance."[119]

To effect the proposed changes paragraph (c) should read (emphasis added to demonstrate changes in statutory language):

(c) No person arrested for a traffic, regulatory, or misdemeanor offense, shall be strip searched unless:

1. there is reasonable belief that the individual is concealing a weapon, evidence of a crime, or contraband; or

2. the person arrested is about to be detained in a holding, detention, or local correctional facility, and there is reasonable belief that the individual is concealing any item that constitutes a threat to the security of that facility.

In addition to the changes in paragraph (c), paragraph (h) needs modification. Paragraph (h) of the Strip Search Statute contains the penalty provision for violations of the statute. The current statute provides a specific criminal sanction, in addition to the gen-

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117. Ill. Rev. Stat. ch. 38, para. 103-1(c) (1989).

118. The term "contraband" is generally subdivided into two classifications: contraband per se; and, derivative contraband. "Contraband per se" consists of those items for which possession alone constitutes a criminal offense. People v. Steskal, 55 Ill. 2d 157, 302 N.E.2d 321 (1973). "Derivative contraband" consists of property that is not inherently illegal, but becomes illegal because of its use in criminal activity. People v. Zimmerman, 44 Ill. App. 3d 601, 358 N.E.2d 715 (1976). Therefore, for purposes of this proposed statute, "contraband" would include: heroin, cocaine, cannabis, other controlled substances, automatic weapons, sawed-off shotguns, and other similar items under the subclassification of "contraband per se"; and handguns, stolen property, articles that could be used to effect escape, and other similar items under the subclassification of "derivative contraband".

119. Ill. Rev. Stat. ch. 38, para. 103-1(c) (1989). *See supra* note 1 for full text of the Illinois Strip Search Statute.

eral sanctions and civil remedies available, but does not address use of evidence illegally seized.[120] The proposed legislation would retain all general sanctions and civil remedies, would additionally prohibit the use of any illegally seized evidence.

At present, paragraph (h) reads:

> (h) Any peace officer or employee who knowingly or intentionally fails to comply with any provision of this Section is guilty of official misconduct as provided in Section 103-8; provided however, that nothing contained in this Section shall preclude prosecution of a peace officer or employee under another section of this Code.[121]

Proposed paragraph (h) would read (emphasis added to demonstrate changes in statutory language):

(h) *Any evidence seized or recovered as a result of a strip or body cavity search in which a peace officer or employee knowingly or intentionally failed to comply with any provision of this Section is inadmissible in any criminal proceeding in this state*; provided however, that nothing contained in this Section shall preclude prosecution of a peace officer or employee under another section of this Code.

Although the changes proposed are minor, the impact they would have is considerable. The proposed modification of paragraph (c) of the statute, while maintaining strict prohibition against conducting searches in "minor" offense situations, would achieve two specific objectives. First, the proposed modifications would allow for the search and seizure of evidence and contraband. Second, the proposed modifications would demonstrate safety concerns by including a safeguard for the security of detention facilities.

The proposed modification of paragraph (h) of the statute also serves two purposes. First, by removing the felony penalty provision from the statute, prosecutors will be more likely to enforce the statute. Second, including a sanction prohibiting the use of evidence seized in violation of the provisions of the statute provides a strong, and proven, deterrent against violation.

VII. Conclusion

Clearly, many police abuses of the authority to conduct warrantless strip searches have occurred in the past. In response to the abuses, the Illinois legislature has created a broad statute that overshadows legitimate government concerns and unduly precludes seizures of evidence and contraband. Law enforcement officers com-

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120. *Id.* at 103-1(h) (1989). *See supra* note 1 for fall text of the Illinois Strip Search Statute.

121. *See supra* note 1 for full text of the Illinois Strip Search Statute.

plying with the language of the current statute, are forbidden from recovering evidence that could prove beneficial to the trier of fact. Additionally, compliance with the statute precludes the search of individuals arrested for serious misdemeanor offenses prior to integration with the general population of a holding facility, thereby jeopardizing the security of the officer, other detainees, and the facility itself.

The prompt response of the legislature to the public outrage over insensitive police conduct is commendable. In its haste to address the problem, however, the legislature has unintentionally created new obstacles to effective law enforcement.[122] While acknowledging the legislature's legitimate concern for protecting the privacy

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122. This writer discussed these modifications of the Strip Search Statute with former member of the Illinois House of Representatives, Anne Willer, the sponsor of the statute, on Friday, 22 September 1989. During our discussion we examined various aspects of the Illinois Strip Search Statute. In discussing the fact that this writer had been unable to discover a single Illinois case involving prosecution for violation of the statute, Representative Willer suggested that the statute "had put the fear of God" into the police and violations were no longer committed. Telephone interview with Anne Willer, former member of the Illinois House of Representatives (Sept. 22, 1989, 11:00 a.m.). However, this writer pointed out the possibility that the reason for the lack of prosecution was that the statute contained such a severe penalty provision (violation of the statute constitutes a class 3 felony) that prosecutors were unwilling to proceed. Representative Willer expressed her surprise at the severity of the penalty and was unaware that it had been made a felony. *Id.*

This writer discussed with Representative Willer the difficulty that the statute causes for legitimate police activity by prohibiting searches to recover evidence and by precluding searches designed to ensure the security of lock-up facilities. Representative Willer responded: "You do have a problem. That's not what we tried to do." *Id.*

When asked if she felt the legislature should amend the statute to allow searches for evidence of a crime besides those searches allowed for weapons and controlled substances, Representative Willer stated that searches directed at the recovery of evidence should not have been precluded by the statute. *Id.*

In discussing the problem of security of the detention facility created by the statute, we discussed the fact that even people arrested for serious misdemeanors, potentially facing up to one year in jail, could not be searched before they were placed into a detention facility. Representative Willer was under the impression that the statute only applied to minor traffic violations and did not realize that the language of the statute included misdemeanor offenses. *Id.*

Representative Willer explained that the legislature passed the statute in direct response to the abuses that had come to light. She particularly recalled the "incredible incident with the judge's wife." *Id. See supra* note 24 discussing the testimony of Mrs. Sylvester White, wife of then chief judge of the Cook County Juvenile Court, before the House Judiciary Committee II.

Representative Willer explained that some of the statute's problems may have occurred because she was not an attorney. She added that she had received assistance in drafting the statute from attorneys affiliated with the American Civil Liberties Union. She commented that she did not realize that some of these problems would develop and expressed concern over the limitations imposed by the statute. *Id.*

Representative Willer suggested the statute be amended to a more workable form. *Id.* Representative Willer commented that of the modifications proposed in this comment sounded acceptable because they would address the problems created by the statute while still ensuring that strip search abuses would not be committed. *Id.*

of Illinois citizens, the modifications proposed in this comment demonstrate an understanding of law enforcement's legitimate needs.

Vito LoVerde