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VISUAL RAPE: A LOOK AT THE DUBIOUS LEGALITY OF STRIP SEARCHES

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"I feel so scared when I'm in Chicago now. It's like you're going to be raped or robbed or something. And I can't believe the policemen here. They have so much authority. It's like they're God or something. It's just not fair."

A false arrestee speaks**

For some time now, law enforcement officers have routinely conducted post-arrest strip searches of suspects.[1] Although these searches drastically invade the privacy rights of those subjected to this demeaning experience, there has been very little litigation involving their propriety.[2] Usually, the constitutionality of a search is decided in a suppression hearing[3]—an abbreviated proceeding at best. Until recently, the constitutionality of strip searches was not a central issue in criminal cases nor in civil suits for damages.

Litigation of strip search problems has produced disparate judicial holdings. Two trends have emerged, however: (1) the obvious unwillingness of courts to extend scrutiny beyond the particular facts and render a broad decision; (2) the avoidance of federal constitutional adjudication where reliance on state constitution and statutory policy will suffice. In *Tinetti v.*

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** 2 (M)aced out in tow-to-tow row, Chicago Sun-Times, Sept. 18, 1979, at 12, col. 1.

1. *See* Huguez v. United States, 406 F.2d 366 (9th Cir. 1968); State v. Ramos, 11 Ariz. App. 196, 463 P.2d 91 (1969); People v. Woods, 139 Cal. App. 2d 515, 293 P.2d 901 (1956). *See generally* Eckhardt, *Intrusion into the Body*, 52 MIL. L. REV. 141 (1971); Simon, *Strip Searches*, 6 BARRISTER 10 (1979) [hereinafter cited as Simon].

2. Most of the cases have not undertaken an in-depth analysis of these searches. *See* State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974). *But see* Huguez v. United States, 406 F.2d 366 (9th Cir. 1968); Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967).

3. *See generally* W. LAFAVE, SEARCH AND SEIZURE § 11.2 (1978) [hereinafter cited as LAFAVE].

Wittke,[4] currently on appeal to the Seventh Circuit, the court condemned the practice of routine strip searching absent probable cause, but the decision was expressly limited to non-misdemeanor traffic offenders. Most recently, the Illinois Appellate Court in *People v. Seymour*[5] affirmed an order suppressing evidence discovered after the station house strip search of a misdemeanant entitled by state supreme court rule to post pre-set bail without being incarcerated. Fourth amendment analysis was not undertaken, the court relying alternatively on the invasion of privacy provision of the Illinois Constitution.

National attention was directed to the propriety of strip searches as the result of publicity surrounding *Doe v. City of Chicago*.[6] In that case, the plaintiffs alleged that women arrested in Chicago were routinely strip searched, regardless of the circumstances of their arrests or offenses. Some women were strip searched after posting bail, although their arrests were for minor traffic violations; others were strip searched merely because they were in the company of individuals who were arrested. The city police claimed that this practice was pursuant to regulations.[7] Incidents of routine strip searches for no ascertainable reason and for the pettiest offenses began to surface in other cities.

In Racine, Wisconsin, police strip searched a group of teachers who were arrested for disorderly conduct in connection with a strike.[8] In *Tinetti*, police arrested and strip searched a nonresident, who had committed a minor traffic offense, because she possessed only an out-of-state driver's license.[9] In Houston, Texas, police routinely strip search female traffic offenders.[10] These incidents are not isolated; rather, they only represent the tip of the iceberg.

A strip search entails forcing an individual to disrobe, rummaging through clothing, and then forcing the person to bend

4. 479 F. Supp. 486 (E.D. Wis. 1979), *appeal docketed*, No. 79-2442 (7th Cir. Nov. 30, 1979).

5. 80 Ill. App. 3d 221, 398 N.E.2d 1191 (1979).

6. No. 79 C 789 (N.D. Ill. 1979). A settlement was offered for $1000 for women who had been subjected to body-cavity searches and $250 for "mere" strip searches. Further, the Chicago Police Department admitted no wrongdoing. General Stipulation and Order, Mar. 27, 1980.

7. *See* Simon, *supra* note 1; McIntyre & Chabraja, *The Intensive Search of a Suspect's Body and Clothing*, 58 J. CRIM. L. & CRIMINOLOGY 18 (1967) [hereinafter cited as McIntyre & Chabraja]. This article purports to study the practice of the Chicago Police of strip searching 20,000 female arrestees annually. The basis for this policy seems to lie in the supposition that women have more places to hide weapons than men.

8. Simon, *supra* note 1.

9. 479 F. Supp. at 487.

10. Simon, *supra* note 1.

over and spread his or her legs to expose the genital and anal areas.[11] A body-cavity search consists of the additional step of probing the individual's anal or vaginal cavity.[12] To the person being strip searched, there is in reality very little difference between a body-cavity search and a strip search.[13] However, courts have scrutinized strip searches under less stringent fourth amendment standards than those used for body-cavity searches.[14] Most notably, the Fifth and Ninth Circuits have distinguished strip searches from body-cavity searches.[15] To initiate a strip search, a border official must have a "real suspicion supported by objective, articulable facts" that narcotics, weapons, or evidence of crime are concealed on the person.[16] To conduct a body-cavity search, however, there must be a "clear indication" that narcotics, weapons, or evidence of crime will be found.[17]

This differentiation disregards the individual expectations of privacy and considerations of human dignity which should control the power of an officer to force one to disrobe. In essence, the glassy eyes of an arrestee would support an officer's "real suspicion" that drugs would be found. The ensuing strip search might result in the officer finding further evidence, such as a greasy substance near the body cavity. This discovery would satisfy the "clear indication" requirement, and the officer would be justified in performing a body-cavity search.[18] The rationale supporting this strained distinction is formulated from the perspective of the state's evidentiary needs, rather than the

11. *See* People v. Woods, 139 Cal. App. 2d 515, 293 P.2d 901 (1956).

12. *Id.*; *cf.* Bell v. Wolfish, 441 U.S. 520 (1979) (pretrial detainees).

13. *Cf.* United States *ex rel.* Guy v. McCauley, 385 F. Supp. 193 (E.D. Wis. 1974) (pregnant woman); State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974) (cannot strip search unless there is a "clear indication"). *But see* Huguez v. United States, 406 F.2d 366 (9th Cir. 1968); People v. Woods, 139 Cal. App. 2d 515, 293 P.2d 901 (1956).

14. *See* People v. Woods, 139 Cal. App. 2d 515, 293 P.2d 901 (1956). A strip search can be conducted pursuant to a "real suspicion" that drugs are being smuggled, while in order to institute a body search, the official must have a clear indication. *Id.*

15. *Compare* United States v. Afanador, 567 F.2d 1325 (5th Cir. 1978); United States v. Price, 472 F.2d 573 (9th Cir. 1973); *and* United States v. Castle, 409 F.2d 1347 (9th Cir. 1969) *with* Huguez v. United States, 406 F.2d 366 (9th Cir. 1968).

16. *See* Schmerber v. California, 384 U.S. 757, 771 (1966); *cf.* United States v. Afanador, 567 F.2d 1325 (5th Cir. 1978) (partial corroboration from reliable source); United States v. Price, 472 F.2d 1173 (5th Cir. 1973) (looked as though something was under clothing).

17. *See* Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967); *cf.* Huguez v. United States, 406 F.2d 366 (9th Cir. 1968) (there was a lack of clear indication).

18. *See* People v. Woods, 139 Cal. App. 2d 515, 293 P.2d 901 (1956).

individual's privacy expectations.[19] The law of searches incident to arrest does not support this rationale.[20]

The lack of cases addressing the constitutionality of strip searches has fostered confusion in both federal and state courts. By analyzing these searches in light of fourth amendment and due process standards, courts should recognize that police and border officials cannot conduct strip searches based on standards less rigorous than those used for body-cavity searches. In balancing privacy rights against the interests of the state, both fourth amendment[21] and due process standards[22] require officers to obtain warrants based upon probable cause prior to conducting strip searches. In controlling strip searches, legislatures must take cognizance of the need to interpose judicial warrant machinery prior to both strip searches and body-cavity searches.

HISTORICAL BASES OF STRIP SEARCH ANALYSIS

The United States Supreme Court has not had occasion to pass directly on the constitutionality of strip searches incident to lawful arrests. Other Court opinions on ancillary issues must be analyzed, however. This requires consideration of fourth and fourteenth amendment problems.

Fourth Amendment

The fourth amendment vests every individual with the right to be free from unreasonable searches[23] and creates a right of

19. *But see* Delaware v. Prouse, 440 U.S. 648 (1979) (police power must be balanced with individual rights).

20. *See* notes 109-30 and accompanying text *infra*.

21. U.S. CONST. amend. IV provides in relevant part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated. . . ." *See* Katz v. United States, 389 U.S. 347 (1967) (recognized expectation of privacy as basis of fourth amendment).

22. U.S. CONST. amends. V & XIV; *see* Rochin v. California, 342 U.S. 165 (1952) (shocks the Court's conscience).

23. Katz v. United States, 389 U.S. 347 (1967); Weeks v. United States, 232 U.S. 383 (1914). In *Katz*, Justice Harlan reasoned in a concurring opinion:

> The question, however, is what protection it affords to those people . . . . My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as "reasonable."

389 U.S. at 361; *see* United States v. Fluker, 543 F.2d 709, 716 (9th Cir. 1976). That people have an expectation in the privacy of their bodies and that society deems such expectation reasonable is without question. *See* United States *ex rel.* Guy v. McCauley, 385 F. Supp. 193 (E.D. Wis. 1974); *cf.*

privacy.[24] In protecting this right, the Court has read certain requirements into the amendment. The most significant is that a warrant issued on probable cause must be obtained before a search takes place.[25] The purpose of the warrant is to interpose a neutral party between the police officer and the individual. In *Johnson v. United States*,[26] the Court explained that:

> [T]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[27]

Absent certain exceptional circumstances, the warrant requirement is absolute. The Court in *Katz v. United States*[28] clarified the scope of the fourth amendment, stating 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."[29]

The most important and widespread exception to the warrant requirement is the search incident to arrest.[30] This exception arose from the common law rule which sought to protect the officer, prevent the escape of the arrestee, and gather evi-

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Schmerber v. California, 384 U.S. 757 (1966) (dignity and sanctity of the body).

24. Katz v. United States, 389 U.S. 347 (1967).

25. U.S. CONST. amend. IV; Brinegar v. United States, 338 U.S. 160 (1949). The *Brinegar* Court stated:

> Because many situations which confront officers in the source of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law abiding citizens at the mercy of the officer's whim or caprice.

Id. at 176.

Probable cause has come to mean more than bare suspicion. One must consider facts and circumstances within one's knowledge, reasonably trustworthy information. *Id.* at 175; *see* Husty v. United States, 282 U.S. 694 (1931).

26. 333 U.S. 10 (1948).

27. *Id.* at 13-14; *accord*, Schmerber v. California, 384 U.S. 757 (1966).

28. 389 U.S. 347 (1967).

29. *Id.* at 357; *see* Schneckloth v. Bustamonte, 412 U.S. 218 (1973); *cf.* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (must determine whether the search was reasonable); United States v. Rabinowitz, 339 U.S. 56 (1950) (not whether it was reasonable to procure warrant).

30. *See* United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752 (1969).

dence which would otherwise be concealed or destroyed.[31] The exception has evolved into the principal justification for searches. In fact, the number of incident searches far exceeds those pursuant to warrants.[32]

Within the context of incident searches, the analysis must not stop at the arrest. The scope of a search must be governed by the reasons for conducting it.[33] Generally, the reasons for conducting searches incident to arrest are to disarm the arrestee so to protect the officer and to gather evidence which may otherwise be destroyed.[34] Incident to an arrest, "it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape"[35] and also "to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction."[36] Until recently, however, it was unclear whether the right to conduct these searches was truly incidental to the arrest,[37] or whether such searches could only be performed when facts indicated some likelihood that either evidence or weapons would be found.[38] In *United States v. Robinson*,[39] the Supreme Court held that a complete and thorough search could be conducted incident to an arrest.

Those advocating the legitimacy of strip searches rely on *Robinson*.[40] There, the Court held that once an individual is lawfully arrested, "a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."[41] The

31. *See* Schmerber v. California, 384 U.S. 757 (1966); *cf.* Terry v. Ohio, 392 U.S. 1 (1968) (can protect one's self).

32. *See* LAFAVE, *supra* note 3, at § 2.1.

33. *See* Terry v. Ohio, 392 U.S. 1 (1968). The scope has generally been limited to disarming the arrestee and in procuring evidence which would otherwise be destroyed. *See* Schmerber v. California, 384 U.S. 757 (1966).

34. *See* Schmerber v. California, 384 U.S. 757 (1966); Terry v. Ohio, 392 U.S. 1 (1968).

35. Chimel v. California, 395 U.S. 752, 762-63 (1969); *see* Terry v. Ohio, 392 U.S. 1 (1968).

36. Chimel v. California, 395 U.S. 752, 765 (1969); *see* Schmerber v. California, 384 U.S. 757 (1966) (blood test).

37. *E.g.*, United States v. Simmons, 302 A.2d 728 (D.C. App. 1973); Watts v. State, 196 So. 2d 79 (Miss. 1967); State v. Coles, 20 Ohio Misc. 12, 249 N.E.2d 553 (1969); State v. Giragosian, 107 R.I. 657, 270 A.2d 921 (1970); Lane v. State, 424 S.W.2d 925 (Tex. Crim. App. 1967).

38. *E.g.*, People v. West, 31 Cal. App. 3d 175, 107 Cal. Rptr. 127 (1973); People v. Jordan, 11 Ill. App. 3d 482, 297 N.E.2d 373 (1973); State v. Curtis, 290 Minn. 429, 190 N.W.2d 631 (1971); People v. Adams, 32 N.Y.2d 451, 299 N.E.2d 653, 346 N.Y.S.2d 229 (1973); Commonwealth v. Freedman, 222 Pa. Super. Ct. 178, 293 A.2d 84 (1972).

39. 414 U.S. 218 (1973).

40. *See* State v. Magness, 115 Ariz. 317, 565 P.2d 194 (1977).

41. 414 U.S. at 235.

"police officer's determination as to how and where to search the person of a suspect . . . is necessarily a quick *ad hoc* judgment"[42] which the Court will uphold with no further examination into probable cause for the scope and intensity of the search. The officer's judgment controls in the absence of bad faith or gross misconduct.

For the purpose of determining the validity of a strip search conducted in connection with an arrest, particular attention must be focused upon the permissible intensity of the search.[43] Most of the Court's fourth amendment holdings have dealt primarily with the scope of searches incident to arrest. Since the concern regarding strip searches is with their intensity, and because it has been impliedly accepted that the arrestee's person is subject to a search for weapons or evidence of the crime for which he was arrested,[44] it is of little assistance to analyze strip searches in light of traditional "search incident to" principles. The intensity of a search is rarely analyzed because the important concern normally has been with the scope of the search.[45] In general, courts have rarely considered whether a search within a proper scope has gone beyond the permissible intensity.

The *Robinson* Court did not analyze the intensity of the in-

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42. *Id.* The Court explicitly rejected the need for any case by case adjudication. *See* Gilligan, *Search of Premises, Vehicles, and the Individual Incident to Apprehension*, 61 MIL. L. REV. 89 (1973).

43. *See* notes 48-61 and accompanying text *infra*. Few Supreme Court cases have addressed the permissible intensity of searches. *See, e.g.*, Schmerber v. California, 384 U.S. 757 (1966); Breithaupt v. Abram, 352 U.S. 432 (1957); Rochin v. California, 342 U.S. 165 (1952); *see* Huguez v. United States, 406 F.2d 366 (9th Cir. 1968) (applied *Rochin*).

44. *See* Chimel v. California, 395 U.S. 752 (1969), where the Court explained why the cases concerning the scope of the search could not be used to analyze the intensity of the search, stating:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, 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. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Id. at 763.

45. The intensity of a search has been addressed in three major cases. *See* note 43 *supra*.

trusion in that case. Rather, the majority noted that the facts of that particular search disclosed reasonable behavior on the part of the arresting officer.[46] A decision on a search more intensive than the one condoned in *Robinson* was reserved for another case.[47] Further, no strip search is conducted truly incidental to an arrest; rather, it is performed in a stationhouse or jail. It could be argued that the time and space limitations of incident searches would foreclose a strip search.

The Intensity of Bodily Invasions

The Supreme Court has ruled on the permissible intensity of the search of a suspect in three cases. The first, *Rochin v. California*,[48] invoked the due process clause of the fourteenth amendment in declaring the forced stomach pumping of a narcotics suspect unconstitutional. State officers had broken into the defendant's abode without a warrant and, upon seeing him hurriedly swallowing capsules, transported him to a hospital where, without obtaining a warrant, his stomach was forcibly pumped. The Court concluded that the evidence retrieved from defendant's stomach was inadmissible because the conduct of the police was too brutal to be tolerated.[49] It held:

> [This] is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.[50]

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46. 414 U.S. at 236; *see id.* at 237 (Powell, J., concurring), "The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest."

47. *Id.* In Bell v. Wolfish, 441 U.S. 520 (1979), the Court held that a pretrial detainee could be strip searched after seeing visitors. However, *Bell* can be distinguished from the normal pretrial detainee case because there the officials had probable cause to believe that Wolfish was smuggling articles into the jail. First, Wolfish had committed a violent offense; second, it was a common occurrence for drugs and weapons to be smuggled in through body cavities; finally, in the other type of cases, that is where there is no probable cause to believe drugs or weapons are being smuggled (*i.e.*, when there is no history of drug use, absent needle marks, glassy eyes, or appearance of carrying something), then there can be no search. *See* United States v. Mills, 472 F.2d 231 (D.C. Cir. 1972).

48. 342 U.S. 165 (1952).

49. *Id.* at 171; *accord*, United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); *see* United States v. Russell, 411 U.S. 423 (1973). *But see* Breithaupt v. Abram, 352 U.S. 432 (1957); *cf.* Schmerber v. California, 384 U.S. 757 (1966) (there was no brutality); Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967).

50. 342 U.S. at 172; *cf.* White v. Rochford, 592 F.2d 381 (7th Cir. 1979) (arbitrary violation of one's fundamental rights).

Although the evidence was excluded, the Court relied on a fourteenth, not fourth amendment analysis.[51] Thus, even though searches comport with the requirements of the fourth amendment, the conduct of the state in procuring evidence may violate the fourteenth.[52] The guiding light for courts in assessing whether conduct "shocks the conscience" is whether the "canons of decency and fairness which express the notions of justice of English-speaking peoples" are offended.[53] Although it is difficult to say where judges should look to find these "canons of decency," this vague criterion can be applied in a manner which yields predictable results.

In *Breithaupt v. Abram*,[54] the Court looked to the degree of brutality employed by the police. In *Breithaupt*, a sample of blood was taken from an unconscious driver after an accident. He was convicted of manslaughter, the alcohol content of the blood sample indicating that he had been intoxicated at the time of the accident. In ruling on the propriety of this invasion by police, the Court first looked to the manner in which it was performed. Concluding that it was hardly offensive to undergo a blood test in a hospital, the Court distinguished *Rochin* by noting the absence of brutality attributable to the police.[55] *Rochin*'s due process test was clarified by the Court's following statement: "Due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct."[56] However, courts must equally be aware that application of the *Rochin* doctrine cannot be stric-

51. Reliance was placed on a violation of those standards of decency and ordered liberty expected by society. This infringed Rochin's due process rights. 342 U.S. at 172.

52. No court has held that a search which "shocks the court's conscience" is a *per se* fourth amendment violation. *Cf.* Katz v. United States, 389 U.S. 347 (1967) (recognized expectation of privacy which is violated if invasion is not pursuant to a warrant).

53. 342 U.S. at 169; *cf.* White v. Rochford, 592 F.2d 381 (7th Cir. 1979) (*Rochin* due process argument not limited to brutality involved).

The problem with reliance on a due process analysis is that there is a chance judges will apply a subjective standard of what they believe the law should be today. *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); *see* L. TRIBE, CONSTITUTIONAL LAW 1097 (1977) (applying a logical sense of righteousness to reason out opinions).

54. 352 U.S. 432 (1957).

55. *Id.* at 435; *accord*, Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967); *see* Schmerber v. California, 384 U.S. 757 (1966); *cf.* United States v. Robinson, 414 U.S. 218 (1973) (conduct was not unreasonable).

56. 352 U.S. at 436.

tured to the thinking of one court at one particular time.[57]

Another traffic case, *Schmerber v. California*,[58] completed the Court's analytical trilogy of the permissible intensity of searches. Blood was extracted from a conscious driver who had been involved in an accident. The suspect had refused on advice of counsel to submit to the blood test. The totality of the circumstances legitimated the invasion because the test had taken place in a hospital and had been administered by a physician.

The Court set forth a test to determine the legality of invasions of the body in searches for evidence.[59] This test was not associated with due process; rather, it was predicated on the fourth amendment. It mandated a "clear indication" that evidence to convict the suspect for the crime for which he was arrested would be found by intruding beyond the body surface.[60] The Court reasoned:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.[61]

Together these cases set forth the fourth and fourteenth amendment limitations imposed on the intensity of searches. In summary, the law on bodily invasions is that first, there must be a clear indication that the suspect is secreting weapons, evidence, or contraband. Second, efforts to extract this evidence must not be offensive or shocking to the conscience. Finally, the measure of whether the conduct is offensive is the concept embodied in traditional notions of decency and fairness.

Bell v. Wolfish

The Supreme Court has never had occasion to apply these constitutional criteria to a strip search incident to an arrest. The Court has only recently addressed the propriety of conducting strip and body-cavity searches.[62] In *Bell v. Wolfish*,[63] the respondents were pretrial detainees confined in the Metropolitan

57. *See* White v. Rochford, 592 F.2d 381 (7th Cir. 1979).

58. 384 U.S. 757 (1966).

59. *Id.* at 770 (clear indication test); *accord*, Huguez v. United States, 406 F.2d 366 (9th Cir. 1968); Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967). But this test is not used for "mere" strip searches. *See* notes 11-18 and accompanying text *supra*.

60. 384 U.S. at 770.

61. *Id.*

62. *E.g.*, Bell v. Wolfish, 441 U.S. 520 (1979).

63. *Id.*

Correctional Center (MCC), a federally operated short-term custodial facility in New York City. They complained of both the overcrowded conditions at the facility and the strip searching of those detainees returning from the facility's visiting center. The government contended that the searches were conducted because of increased drug traffic and weapons discoveries within the facility.[64] However, these searches had not markedly decreased drug traffic or availability of weapons.[65] Respondents argued that the searches violated their fourth, eighth, and fourteenth amendment due process rights. The government countered, claiming that providing security for the prisoners was a compelling interest.

The Court analyzed the complaint on the basis that the respondents had been arrested; thus, their constitutional rights were diminished in comparison to individuals who had committed no offense.[66] In rejecting respondents' claims that the strip searches violated their constitutional rights, the Court classified the pretrial detainees in the same category as convicted felons.[67] This determination was itself improper since the due process clause affords more protection to those not convicted of crimes

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64. Other facilities had allowed such searches. *See, e.g.*, Ferraro v. United States, No. 78-5250 (6th Cir. Dec. 15, 1978); United States v. Park, 521 F.2d 1381 (9th Cir. 1975).

65. Only one person was caught smuggling drugs into the facility. Bell v. Wolfish, 441 U.S. at 559.

66. *See* Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977); Wolff v. McDonnell, 418 U.S. 539, 555 (1974); Pell v. Procunier, 417 U.S. 817, 822 (1974); Morrissey v. Brewer, 408 U.S. 471 (1972). The *Morrissey* Court said:

> Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."
>
> To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

408 U.S. at 481.

67. *But see* McGinnis v. Royster, 410 U.S. 263, 273 (1972) (Court shielded person awaiting trial from potentially oppressive governmental actions); Stack v. Boyle, 342 U.S. 1, 4 (1952) (right to bail preserves presumption of innocence). *See also* Taylor v. Kentucky, 436 U.S. 478 (1978). The presumption or assumption of innocence that is indulged in until evidence has convinced a jury to the contrary beyond a reasonable doubt, colors all of the government's actions toward persons not yet convicted. Bell v. Wolfish, 441 U.S. at 582 (Stevens, J., dissenting).

than those who have been.[68] Second, the classification violated the equal protection rights of those pretrial detainees who, not being able to post bail, were denied constitutional protections.[69] The group detained in *Bell* was actually confined due to financial status rather than guilt or dangerousness.[70]

Granted, "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[71] However, withdrawals based upon an individual's financial ability work a grave disservice to the expectations of privacy and due process guaranteed by the fourth, fifth, and fourteenth amendments. In effect, a pretrial detainee has the constitutional rights of a man presumed guilty until he has proven his innocence.[72]

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68. Taylor v. Kentucky, 436 U.S. 478 (1978); *see* McGinnis v. Royster, 410 U.S. 263 (1972); *cf.* Morrissey v. Brewer, 408 U.S. 471 (1972) (due process is flexible).

69. The dissent in *Bell v. Wolfish* stated:

> The fact that an individual may be unable to pay for a bail bond, however, is an insufficient reason for subjecting him to indignities that would be appropriate punishment for convicted felons. Nor can he be subject on that basis to onerous restraints that might properly be considered regulatory with respect to particularly obstreperous or dangerous arrestees. An innocent man who has no propensity toward immediate violence, escape, or subversion may not be dumped into a pool of second-class citizens and subjected to restraints designed to regulate others who have. For him, such treatment amounts to punishment. And because the due process guarantee is individual and personal, it mandates that an innocent person be treated as an individual human being and be free of treatment which, as to him, is punishment.

441 U.S. at 583-84 (Stevens, J., dissenting); *cf.* Woodson v. North Carolina, 428 U.S. 280 (1976) (must treat each person differently).

70. There is a large class of persons for whom any bail at all is "excessive bail." They are the people loosely referred to as "indigents." *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 216 n.10 (1968). This could be a "logical corollary to the 'No Excess Bail' Clause." 441 U.S. at 583 n.13 (Stevens, J., dissenting).

71. 441 U.S. at 546; Price v. Johnston, 334 U.S. 266, 285 (1948); *see* Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Wolff v. McDonnell, 418 U.S. 539 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

72. *Cf.* Bell v. Wolfish, 441 U.S. at 589-91 (Stevens, J., dissenting):

> There is no question that jail administrators have a legitimate interest in preventing smuggling. But it is equally clear that that interest is being served here in a way that punishes many if not all of the detainees.
>
> The challenged practices concededly deprive detainees of fundamental rights and privileges of citizenship beyond simply the right to leave. The Court recognizes the premise, but it dismisses its significance by asserting that detainees may be subjected to the "withdrawal or limitation" of fundamental rights. I disagree. The withdrawal of rights is itself among the most basic punishments that society can exact, for such a withdrawal qualifies the subject's citizenship and violates his dignity. Without question that kind of harm is an "affirmative disability" that "has historically been regarded as a punishment."

Assuming that it is permissible to conduct strip searches in certain cases, the determination of when to conduct them cannot be settled arbitrarily by administrative processes. Deprivation of a person's fourth amendment right to be free from unreasonable searches and seizures constitutes imposition of a penalty of the highest magnitude, especially since the pretrial detainee may not have committed any crime.[73]

Of course, security interests were of paramount importance in *Bell v. Wolfish*. However, intrusions into individuals' expectations of privacy must not only be considered in light of the place in which searches are conducted, but also with due regard to "the scope of the particular intrusion, the manner in which it is conducted, and the justification for initiating it."[74] Although a great number and variety of contraband articles were being smuggled into the facility, the searches of all returning convicts and pretrial detainees resulted in the discovery of only one inmate having contraband on his person.[75] The fact that smuggling continued indicated that a permissible scope for searches still existed. However, the Court failed to address the justification for conducting these searches arbitrarily and en masse.[76]

The fourth amendment provides that searches may only be conducted on probable cause.[77] Although this right may be restricted for pretrial detainees, it is not non-existent, nor should it be diminished to the level allowed convicted felons.[78] The justification must be arrived at by balancing each individual's circumstances with the government's interest.[79] In *Bell*, the fact that only one person was caught severely undermines the government's interest. Once that interest has been satisfied, the government cannot continue the search; to do so would be even more unreasonable.[80] Before a search can be conducted, cir-

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73. *Id.*

74. *Id.* at 559; *see* United States v. Ramsey, 431 U.S. 606 (1977); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); Schmerber v. California, 384 U.S. 757 (1966).

75. 441 U.S. at 559. The Court reasoned that the arbitrary search served as a deterrent. But the dissent argued that the search was not purposeful and therefore beyond the scope and intensity of a permissible search.

76. Once the purpose for the search has been satisfied, the search must cease. *See* United States v. Mills, 472 F.2d 1231 (D.C. Cir. 1972).

77. U.S. CONST. amend. IV; *accord*, United States v. Rabinowitz, 339 U.S. 56 (1950); *cf.* Massey v. Wilson, No. 79-C-652 (D. Colo. Feb. 29, 1980) (refused to dismiss suit to redress fourth amendment rights infringed by prison strip searches).

78. Taylor v. Kentucky, 436 U.S. 478 (1978).

79. Delaware v. Prouse, 440 U.S. 648 (1979).

80. United States v. Mills, 472 F.2d 1231 (D.C. Cir. 1972).

cumstances amounting to probable cause must exist.[81] The fact that detainees have received visitors may be considered, but that alone should not be controlling where previous history indicates that these visits rarely result in smuggling.

Less intrusive searches would be adequate.[82] Mr. Justice Stevens suggests that having metal detectors such as those used for airlines would be much more effective and less intrusive.[83] To detect the smuggling of drugs, dogs could be used which are even more sensitive than the human eye or fingers. Thus, there are less intrusive means for securing prisons.

Although the *Bell* Court did apply a fourth amendment analysis to the issue of the body-cavity searches, it failed to examine anything beyond the permissible scope. It failed to apply previous fourth amendment analysis because it assumed that pretrial detainees have restricted constitutional rights. Therefore, the Court's reasoning was faulty. It did not include analysis pertaining to the permissible intensity of the searches. Although *Bell* was a pretrial detainee case, and not directly relevant to search incident problems, the decision provides lower courts authority for upholding strip searches.

STRIP SEARCHES IN ILLINOIS

The public uproar over strip searches emanated from the publicity surrounding these searches in Chicago. Illinois is one of the few states to condemn strip searches conducted absent probable cause.[84] In *Newell v. City of Elgin*,[85] the Illinois Appellate Court reversed an order dismissing a civil rights action brought under the Illinois and United States Constitutions. The court held that a cause of action arose when the police for no

81. Brinegar v. United States, 338 U.S. 160 (1949).

82. United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114, 149 (S.D.N.Y. 1977).

83. Bell v. Wolfish, 441 U.S. at 594-95 (Stevens, J., dissenting).

84. *See, e.g.*, People v. Seymour, 80 Ill. App. 3d 221, 398 N.E.2d 1191 (1979); *cf.* Newell v. City of Elgin, 34 Ill. App. 3d 719, 340 N.E.2d 344 (1976) (a cause of action lies where strip search is conducted and there is no probable cause); P.A. 81-896, 1979 Ill. Legis. Serv. (West) (prescribes standards for strip and body-cavity searches).

85. 34 Ill. App. 3d 719, 340 N.E.2d 344 (1976). In *Newell*, plaintiff was riding his motorcycle when the police forced him off the road, injuring him. " '[O]ne or more' of the eight police officers ordered plaintiff to remove his boots, shirts and trousers; when plaintiff refused to . . . remove his trousers, physical force was used to the extent that plaintiff consented to do it." *Id.* at 720, 340 N.E.2d at 346. The court cited Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), supporting a cause of action under the fourth amendment, and People v. Martin, 382 Ill. 192, 45 N.E.2d 997 (1942) for a cause of action under the Illinois Constitution. *See* ILL. CONST. art. I, § 6 (1970).

apparent reason stopped the plaintiff, arrested him, and forced him to strip.

In *People v. Seymour*,[86] the defendant was arrested for a misdemeanor for which an Illinois Supreme Court Rule had set a predetermined bail amount.[87] The police never informed Seymour that he could post bond and leave the station without being locked up or strip searched.[88] Instead, the police kept Seymour at the station for over two hours and strip searched him. They found a small packet of cocaine in his sock. The Cook County Circuit Court suppressed the evidence. The appellate court affirmed, holding that failure to inform defendant of his right to post bail could not be condoned by allowing police the use of the evidence.[89]

The court alternatively stated that Illinois' invasion of privacy constitutional provision protected citizens from "highly intrusive invasions." The court analyzed:

> 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 imme-

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86. 80 Ill. App. 3d 221, 398 N.E.2d 1191 (1979). In *Seymour*, defendant was arrested for carrying a concealed weapon. The police conducted four pat down searches, a strip search and a body-cavity search. They found a minute quantity of drugs hidden inside a sock. The court outlined the types of searches that police perform, stating:

> Before discussing these rationales, it is useful to draw distinctions between the various types of searches of an individual's person. Taken in the order by which they intrude into an individual's privacy, they are: First, the "pat-down," in which police frisk a suspect's outer clothing in order to find concealed weapons; second, the "pocket search," in which police rummage through a suspect's pockets, usually to find weapons but also to find the fruits of a crime or contraband; third, the "clothing search," in which police closely examine a suspect's clothes; fourth, the "strip search," in which a suspect is forced to strip naked under the glaring eye of a police examination; fifth, the "body cavity search," in which police strip the suspect naked and examine all openings of the body where contraband or weapons could be secreted; sixth, the "body intrusion," in which the examination goes beyond the outer limits of a suspect's body and the police pump the stomach or remove the blood without consent.

Id. at 224, 398 N.E.2d at 1193.

87. *See, e.g*, ILL. REV. STAT. ch. 110A, 528-530 (1979).

88. *See* P.A. 81-896, 1979 Ill. Legis. Serv. (West).

89. People v. Seymour, 80 Ill. App. 3d at 229-30, 398 N.E.2d at 1196-97; *accord*, United States v. Mills, 472 F.2d 1231 (D.C. Cir. 1972); People v. Longwill, 14 Cal. 3d 943, 538 P.2d 753, 123 Cal. Rptr. 297 (1975); People v. Overlee, 174 Colo. 202, 483 P.2d 222 (1971); People v. Dixon, 392 Mich. 691, 222 N.W.2d 749 (1974); *see* Wong Sun v. United States, 371 U.S. 471 (1963) (the fruits of the breach cannot be used to insure that the rights will not be breached in the future).

> diately 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.[90]

The court saw no reason to undertake fourth and fourteenth amendment analysis. It hinted, however, that if Seymour could not have posted bail, or had committed a felony, a strip search could have been conducted.[91] By indicating that strip searches must conform to the same search and seizure standards controlling body-cavity searches, the Illinois Appellate Court went beyond the standards recently established by the Illinois legislature.[92] The legislature, like the Fifth and Ninth Circuits, established a "reasonable belief" test for strip searches while imposing a "probable cause" standard for body-cavity searches. The *Seymour* court, however, did not rely on or mention the statute.

Other Lower Court Treatment of Strip Searches

In analyzing strip searches incident to arrest, it is helpful to consider four different situations premised on the cause for the arrest.[93] The first scenario involves defendants arrested for narcotics violations.[94] In these cases, the official generally has

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90. 80 Ill. App. 3d at 230, 398 N.E.2d at 1197-98. The court continued, stating that when a defendant is charged only with a misdemeanor and could regain his release immediately, the police must protect his privacy rights. Seymour had no fruits of crime on him, and a search for contraband was unjustified since he did not need to be locked up.

91. *Id.* at 231, 398 N.E.2d at 1197. The court stated, "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." *Id.* at 230, 398 N.E.2d at 1197-98; People v. Elkins, 60 Ill. App. 3d 883, 377 N.E.2d 569 (1978); *see* Bell v. Wolfish, 441 U.S. 520 (1979).

92. 80 Ill. App. 3d at 230, 398 N.E.2d at 1197-98; P.A. 81-896, 1979 Ill. Legis. Serv.; *see* notes 177-85 and accompanying text *infra*.

93. The first scenario is when the search is pursuant to a drug-related arrest, *see* notes 94-100 and accompanying text *infra*; the second is when the search is incident to an arrest for a violent crime, *see* notes 101-04 and accompanying text *infra*; the third is when the search is pursuant to a traffic violation, *see* notes 105-06 and accompanying text *infra*; and the final scenario is when the search is conducted despite the absence of a criminal violation, *see* notes 107-09 and accompanying text *infra*.

94. *See, e.g.*, State v. Ramos, 11 Ariz. App. 196, 463 P.2d 91 (1969). In *Ramos*, the court stated:

> [E]yewitness report of an actual crime gave the officer probable cause to arrest. Reliable informant provided information led to three arrests and one conviction; informant stated he actually had seen the heroin in defendant's possession. We also believe that the officers, on the basis of the information, had the right, incident to a lawful arrest, to conduct

some indication that the defendant is harboring a controlled substance. Within the Fifth and Ninth Circuits and in many states, a strip search can be conducted pursuant to a "real suspicion" that drugs are being concealed.[95] The real suspicion test is satisfied when the arrestee has glassy eyes, recent needle marks, or acts as though he is hiding something.[96] While conducting a strip search, the official may expose more evidence such as grease at the opening of the body cavity.[97] This would

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the strip search of defendant's person for the specific evidence which they were told could be found.

Id. at 199, 463 P.2d at 93; People v. Woods, 139 Cal. App. 2d 515, 293 P.2d 901 (1956) (defendant had glassy eyes and recent needle marks); *see* Morales v. United States, 406 F.2d 1298 (9th Cir. 1969) (20% of body-cavity searches performed are productive). *See generally* McIntyre & Chabraja, *supra* note 7.

95. *See, e.g.*, United States v. Himmelwright, 551 F.2d 991 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977); Henderson v. United States, 390 F.2d 805 (9th Cir. 1967); People v. Woods, 139 Cal. App. 2d 515, 293 P.2d 901 (1956).

96. United States v. Mastberg, 503 F.2d 465 (9th Cir. 1974). The *Mastberg* court stated:

> In analyzing our border search cases, we find that certain factors have been instrumental in establishing a real suspicion of smuggling. Also, certain factors tend to bear a more direct relationship to suspicion of smuggling than others. Some of these factors are present in this case. For example, a person's nervousness while crossing the border is frequently a fact taken into account in determining whether to conduct a strip search or body-cavity search. Similarly, needle marks on the person's arms are frequently a factor. Both of these elements were present in this case. In addition, there were the open milk cartons and the balloons. A customs inspector testified that addicts often carry liquids with them and frequently conceal contraband drugs in body cavities by using balloons.
>
> Obviously, some of the factors in the present case are more important than others in determining whether a real suspicion of smuggling was established. If we were to consider each of the factors separately, the needle marks would be the most likely indication of smuggling and the element to which we lend greater weight. In degree of relative importance, nervousness would rank next. Neither the needle marks nor the nervousness can be considered totally innocuous. However, the milk containers and balloons each considered separately could be totally innocuous and are the least likely indication of smuggling. Many persons crossing the border probably carry balloons or open liquid containers and yet do not arouse a suspicion of smuggling. The open liquid containers and the balloons, even when considered together, could be totally innocuous. However, we do not view each of these separately to determine the reasonableness of the search. We must consider the totality of the factors, viewing them in the light of an experienced customs inspector, when determining the legality of the strip search.

Id. at 468-69; *see* United States v. Cameron, 538 F.2d 254 (9th Cir. 1976) (pinpointed eyes, slurred speech and recent needle marks); United States v. Holtz, 479 F.2d 89 (9th Cir. 1973) (defendant arrived with two men who had fresh needle marks, computer check list indicated one man had history of being a heroin dealer); United States v. Shields, 453 F.2d 1235 (9th Cir. 1972) (nervous, needle marks and stay in Mexico was unusually short); People v. Woods, 139 Cal. App. 2d 515, 293 P.2d 901 (1956).

97. *See, e.g.*, People v. Woods, 139 Cal. App. 2d 515, 293 P.2d 901 (1956); *cf.*

create a clear indication that drugs will be found, and a body-cavity search can be conducted.[98] In such circumstances, courts have refused to apply *Rochin*.[99] But where there are exceptional circumstances, such as the defendant is seven months pregnant or is physically brutalized, the courts generally will apply the *Rochin* doctrine.[100]

Within the first group of cases, the courts could apply a probable cause standard and protect the interests of the state at the same time. One interest is to gather evidence of the crime of smuggling a controlled substance. In the second group of cases, where the defendant is arrested for a violent crime,[101] the state

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United States v. Holtz, 479 F.2d 89 (9th Cir. 1973). *But see* Note, *From Bags to Body Cavities: The Law of Border Searches*, 74 COLUM. L. REV. 53 (1974), which analyzed strip searches at the border for lesser cause than body-cavity searches. The article states:

> Indeed, considerations of human dignity may require that any search in which a suspect must expose vagina and/or anus to examination be subject to a higher standard of justification than that required for the skin search. It is one thing to be made to stand denuded before an inspector of one's own sex; it is quite another to endure a sharp-eyed probe of one's rectal or vaginal area, or to suffer the indignity of having one's anal surface wiped for tell-tale signs of lubricating grease. To call this invasion a strip search is a nonsensical classification for it is nearly as humiliating as the probe of the cavity itself. The body cavity probe standard should be applied to both.

Id. at 79-80.

It should also be noted that these courts have distinguished between searches of men and women. *See* Henderson v. United States, 390 F.2d 805 (9th Cir. 1967). In *Henderson*, the court stated that a strip search ended and a body-cavity search began when a woman "manually open[ed] her vagina for visual inspection to see if she [had] something concealed there . . . ." *Id.* at 808. In Morales v. United States, 406 F.2d 1298 (9th Cir. 1969), the Ninth Circuit suppressed evidence when the border official saw a packet of heroin protruding from the vaginal cavity. There the cavity was not penetrated. In United States v. Holtz, 479 F.2d 89 (9th Cir. 1973), the Ninth Circuit stepped back from its *Morales* holding and held that only a "real suspicion" was needed when the border official saw a prophylactic, containing heroin, hang down from the vagina. *See generally* Note, *From Bags to Body Cavities: The Law of Border Searches*, 74 COLUM. L. REV. 53, 57-81 (1974).

98. Rivas v. United States, 368 F.2d 366 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967); People v. Woods, 139 Cal. App. 2d 515, 293 P.2d 901 (1956). This complies with the standards established by *Schmerber*. *See* Huguez v. United States, 406 F.2d 366 (9th Cir. 1968).

99. *See, e.g.*, Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967); People v. Woods, 139 Cal. App. 2d 515, 293 P.2d 901 (1956). The courts have generally restricted *Rochin* to its facts. *See* Breithaupt v. Abram, 352 U.S. 432 (1957).

100. *See, e.g.*, Huguez v. United States, 406 F.2d 366 (9th Cir. 1968) (no clear indication, and the search was not sanitary); United States *ex rel.* Guy v. McCauley, 385 F. Supp. 193 (E.D. Wis. 1974) (plaintiff was seven months pregnant).

101. *See* State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974). In *Kaluna*, defendant was arrested after a robbery. The police initiated a strip search. Defendant gave the police a small rolled up package. The policewoman

interest is weaker. Here, the state's interest is to protect the police officer and to maintain safety in jails.[102] However, when the police are satisfied that the arrestee is carrying no weapons, the search must cease.[103] Secondly, even here, the police must have probable cause to conduct the search.[104]

A situation where the officer is even less likely to find a controlled substance or a weapon on the defendant is when he is arrested for a traffic violation.[105] Here, the courts almost uniformly condemn the police practice of conducting strip and body-cavity searches.[106] Finally, where the defendant was merely accompanying a drug user, or as in *People v. Seymour* held at the station longer than needed, the courts have generally condemned strip searches.[107] However, if there is reason to support the search, the courts do sometimes justify the invasion.[108]

CONSTITUTIONAL ANALYSIS OF STRIP SEARCHES

The Need for Stringent Fourth Amendment Safeguards

Lower courts' varied analyses of strip searches illustrate that their constitutionality is an unsettled issue. As illustrated by the lower court cases, few jurisdictions apply traditional search and seizure analysis. Rather, the courts and the police regard extensive searches of the body incident to an arrest as

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opened the package and found a controlled substance. The court suppressed the evidence because the search should have ended when the policewoman was sure that defendant did not possess a weapon. At that point, the interest of the government was satisfied. *But cf.* Bell v. Wolfish, 441 U.S. 520 (1979) (court held that when prisoners are taken into custody they can be strip searched to ensure safety of prison).

102. Bell v. Wolfish, 441 U.S. 520 (1979) (pretrial detainees); State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974).

103. United States v. Mills, 472 F.2d 1231 (D.C. Cir. 1972); State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974).

104. State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974). *But see* Bell v. Wolfish, 441 U.S. 520 (1979).

105. *See* Tinetti v. Wittke, 479 F. Supp. 486 (E.D. Wis. 1979).

106. *See, e.g.*, United States v. Mills, 472 F.2d 1231 (D.C. Cir. 1972); Tinetti v. Wittke, 479 F. Supp. 486 (E.D. Wis. 1979); People v. Mercurio, 10 Cal. App. 3d 426, 88 Cal. Rptr. 750 (1970). In *Mercurio*, the court recognized that the police had a right to conduct a complete search of the person. But it pointed out that a simple traffic violation, standing alone, ordinarily does not justify a generalized search of the person. "A traffic violation ordinarily involves no tangible property; hence no implement or fruit of the crime or infraction will be found and any search beyond that required for protection against violence is an unjustified intrusion." *Id.* at 429, 88 Cal. Rptr. at 751.

107. Williams v. State, 338 So. 2d 233 (Fla. App. 1976); *cf.* United States v. Afanador, 567 F.2d 1325 (5th Cir. 1978) (companion stewardess could not be strip searched).

108. *See* Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1963); People v. Seymour, 80 Ill. App. 3d 221, 398 N.E.2d 1191 (1979).

proper.[109] However, even though the search is within a proper scope, when no facts would lead a reasonable person to believe that a weapon or evidence of the crime is hidden in the clothing, a strip search extends beyond the permissible intensity for searches.[110]

To analyze the constitutionality of strip searches, the courts must balance the competing interests of the government's protection of society and its police officers and the individual's right to privacy.[111] The governmental interest in disarming an arrestee and finding evidence which he could destroy or conceal is not furthered by an arbitrary searching of all arrestees. Once it has been determined that there is little reason to suspect that a weapon or evidence of crime is being concealed, the government's interest is satisfied, and further searching must be prohibited.[112] Continued investigation has no utility other than to complete the administrative procedure initiated by the arrest. This justification for a search cannot be allowed to eradicate one's reasonable expectation of privacy.[113]

Unfortunately, there is no language in *Robinson* to guide the courts in determining the validity of strip searches. Justice

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109. *Compare* Huguez v. United States, 406 F.2d 366 (9th Cir. 1968) (drugs inadmissible because there was no clear indication for conducting the search) *and* State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974) (refused to apply *Robinson* to search incident to arrest) *with* State v. Ramos, 11 Ariz. App. 196, 463 P.2d 91 (1969) (police had probable cause) *and* People v. Woods, 139 Cal. App. 2d 515, 293 P.2d 901 (1956) (restricted *Rochin* to brutality).

110. *See* United States v. Mills, 472 F.2d 1231 (D.C. Cir. 1972); People v. Mercurio, 10 Cal. App. 3d 426, 88 Cal. Rptr. 750 (1970); *cf.* State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974) (a rule of reason must be applied to searches).

111. *See* Delaware v. Prouse, 440 U.S. 648, 654 (1979), where the Court stated:

> [T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests. . . . [T]he reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against an "objective standard," whether this be probable cause or a less stringent test.

See also Tinetti v. Wittke, 479 F. Supp. 486 (E.D. Wis. 1979).

112. United States v. Mills, 472 F.2d 1231 (D.C. Cir. 1972); State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974).

113. *See* notes 114-17 and accompanying text *infra*. *But see* United States v. Robinson, 414 U.S. at 235:

> A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification . . . [W]e hold that 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.

Some courts have relied on this language to justify strip searches. *See* note 40 *supra*.

Rehnquist, in the majority opinion, stated that the search in that case "partook of none of the extreme or patently abusive characteristics which were held to violate the Due Process Clause of the Fourteenth Amendment in *Rochin v. California*."[114] Justice Powell concurred, noting that once the expectation of privacy has been abated, any search of the person is lawful unless perpetrated abusively.[115] The question to be raised is whether police officers have unrestrained power over the body of an arrestee. Reading *Robinson* broadly, an officer may have unrestrained authority in his search. However, analysis is incomplete without considering prior fourth amendment restrictions on the intensity of searches.[116]

The analysis used in deciding fourth amendment claims is helpful in resolving the constitutionality of a strip search. In *Robinson*, the Court surveyed early doctrines which granted an unlimited right to search once an individual was arrested.[117]

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114. United States v. Robinson, 414 U.S. at 236; *see* Rochin v. California, 342 U.S. 165 (1952). *But see* notes 131-76 and accompanying text *infra*.

115. 414 U.S. at 238 (Powell, J., concurring). The Court, however, did not overrule Katz v. United States, 389 U.S. 347 (1967), where Mr. Justice Harlan concurred, explaining:

> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

389 U.S. at 361. The lower courts concluded that the amendment created a right to privacy in the person. *E.g.*, United States v. Solis, 536 F.2d 880, 882 (9th Cir. 1976); United States v. Portillo-Reyes, 529 F.2d 844 (9th Cir. 1975); United States *ex rel.* Gedko v. Meer, 406 F. Supp. 609 (W.D. Wis. 1975), *appeal dismissed*, 588 F.2d 840 (7th Cir. 1978). *See generally* LAFAVE, *supra* note 3, at § 2.1.

116. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); Schmerber v. California, 384 U.S. 757 (1966); *see* Chimel v. California, 395 U.S. 752 (1969). *See also* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1979).

117. 414 U.S at 224-29. The Court first stated that the law has always recognized the right of an officer to conduct a thorough search pursuant to an arrest. *See, e.g.*, Cupp v. Murphy, 412 U.S. 291 (1973); Adams v. Williams, 407 U.S. 143 (1972); Chimel v. California, 395 U.S. 752 (1969); Agnello v. United States, 269 U.S. 20 (1925); Weeks v. United States, 232 U.S. 383 (1914). The Court then proceeded to limit Terry v Ohio, 392 U.S. 1 (1968), to its facts, stating that there, the police did not have probable cause to arrest and that the search was limited to a frisk. 414 U.S. at 227. It continued, claiming that

The Court employed these precedents to justify its holding. In *Schmerber*, however, the Court had concluded that these same doctrines were not applicable to intensive searches of the body. It held:

> Whatever the validity of these considerations in general, they have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.
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> . . . Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. . . . The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.[118]

The *Schmerber* Court upheld the invasion, finding sufficient exigencies stemming from the dissipation of the blood-alcohol level with the passage of time. Yet it is readily apparent from the foregoing that, absent an emergency situation, *Schmerber* requires *both* a warrant and a "clear indication" before justifying intensive searches of the body.

This is not simply persuasive authority. In border search cases, the Fifth and Ninth Circuits use the "clear indication" test in determining when body-cavity searches may be instituted[119] and require a "reasonable suspicion" for strip searches. The rationale involved in border search cases is that there is a high incidence of smuggling across the border, and in certain circumstances a strip search will likely uncover contraband.[120] This expectation, however, cannot be transferred to criminal suspects who are arrested by police for other offenses. Smuggling is rarely the primary activity for which these individuals are ar-

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when an officer has probable cause to arrest, a full search can be conducted. *Id.* at 228.

118. Schmerber v. California, 384 U.S. at 769; *see* State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974).

119. United States v. Mastberg, 503 F.2d 465 (9th Cir. 1974); United States v. Mason, 480 F.2d 563 (9th Cir. 1973); United States v. Briones, 423 F.2d 742 (5th Cir. 1970); Huguez v. United States, 406 F.2d 366 (9th Cir. 1968); Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert denied*, 386 U.S. 945 (1967). For the test for strip searches, see People v. Woods, 139 Cal. App. 2d 515, 293 P.2d 901 (1956).

120. *See* McIntyre & Chabraja, *supra* note 7. *But see* Morales v. United States, 406 F.2d 1298 (9th Cir. 1969). Eighty per cent of the body-cavity searches performed by customs officials at the border are unproductive. Considering this, one must ask whether the fruits of the search do establish probable cause. *See* Brinegar v. United States, 338 U.S. 160 (1949).

rested. Consequently, it is difficult to visualize a person hiding drugs in her underwear while driving a car, or extracting a weapon from under the clothing while handcuffed and under police surveillance.[121] Experienced police officials are fond of saying that, indeed, strip searches turn up evidence and weapons.[122] But no reputable studies have been made on this subject,[123] and in the absence of such studies, it is incumbent on the courts not to accord these assertions too much weight in balancing privacy interests versus the need to acquire evidence.[124]

Unfortunately, the clear indication test has been employed only in cases involving physical penetrations of body surfaces.[125] Although *Schmerber* concluded that a more restrictive test should be applied when the body surface is penetrated, that rationale cannot be limited to such cases. *Schmerber*'s rationale was premised on the sanctity and dignity of the human body.[126] Certainly, the forced exposing of one's sexual and anal organs to

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121. *See* Sibron v. New York, 392 U.S. 40 (1968) (search of suspect's pockets not justified if police have neither probable cause to arrest nor reasonable suspicion that suspect is armed and dangerous); *cf.* Terry v. Ohio, 392 U.S. 1 (1968) (frisk reasonable if suspicion of armed and dangerous).

122. *See* McIntyre & Chabraja, *supra* note 7. In the past year, many instances of strip searches based on less than probable cause have arisen. *See, e.g.*, Tinetti v. Wittke, 479 F. Supp. 486 (E.D. Wis. 1979) (Racine, Wisconsin police strip searched an out-of-state woman for a traffic infraction). *See also* Simon, *supra* note 1, at 56. Chicago police have for many years, routinely strip searched women brought to the station for minor traffic offenses. *Id.*

123. One report resembling a study is McIntyre & Chabraja, *supra* note 7, which is a survey of the Chicago Police Department practice of routinely strip searching 20,000 female arrestees annually. Possibly if the police keep accurate records pursuant to Illinois' new strip search law, there will be a better basis for a study. *See* note 177 *infra*. *But see* Morales v. United States, 406 F.2d 1298 (9th Cir. 1969) (80% of the body-cavity searches perpetrated are unproductive).

124. Delaware v. Prouse, 440 U.S. 648 (1979); *see* Brinegar v. United States, 338 U.S. 160 (1949) (cannot use fruit of crimes to support the search, must have prior probable cause); *cf.* United States v. Mills, 472 F.2d 1231 (D.C. Cir. 1972) (cannot search if arrestee is able to post bond).

125. *See* People v. Woods, 139 Cal. App. 3d 515, 293 P.2d 901 (1956). *Compare* United States v. Himmelwright, 551 F.2d 991 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977) *and* Henderson v. United States, 390 F.2d 805 (9th Cir. 1967) ("real" or "reasonable" suspicion tests) *with* Huguez v. United States, 406 F.2d 366 (9th Cir. 1968) (clear indication test).

126. *See* Schmerber v. California, 384 U.S. 757 (1966), where the Court stated:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusion on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Id. at 770; *cf.* Davis v. Mississippi, 394 U.S. 721 (1969) (concern for bodily integrity).

view by arresting officials is a gross invasion of that sanctity and dignity.[127] The psychological effects of strip searches reportedly resemble those suffered by rape victims.[128] Thus, *Schmerber*'s strict fourth amendment requirements should apply to strip searches as well as body-cavity searches.

Requiring police to adhere to the warrant requirement for strip searches would not be overly burdensome. Moreover, there is no reason why a neutral figure such as a magistrate should not be required to order these searches.[129] In most cases, evidence hidden in a body cavity or underclothing, so that a pat down would not detect it, could not be easily discarded while the person is handcuffed. While at the station waiting for a warrant, police officials can oversee arrestees who are believed to be hiding drugs. Therefore, when there is probable cause that evidence is being hidden, the police generally will have an opportunity to obtain a warrant without losing key evidence.

In the rare possibility that evidence is of such a nature that it may dissolve within the body, then reasonable means could be used to procure it. This exception is granted by *Schmerber* but should be strictly limited by the courts. Furthermore, the searches should only be conducted when there is a clear indication that evidence will be destroyed. This clear indication requires more than observing that the arrestee has glassy eyes, or information based on rumors. Clear indication would necessi-

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127. United States *ex rel.* Guy v. McCauley, 385 F. Supp. 193 (E.D. Wis. 1974); *see* Simon, *supra* note 1, at 56 (women suffered many of the after effects that rape victims experience).

128. Simon, *supra* note 1, at 56.

129. Probable cause could exist when there are recent needle marks, *see, e.g.*, United States v. Cameron, 538 F.2d 254 (9th Cir. 1976); United States v. Summerfield, 421 F.2d 684 (9th Cir. 1970), or when there is information from a reliable informant that the arrestee is a drug addict or carries drugs under clothing, *see, e.g.*, United States v. Afanador, 567 F.2d 1325 (5th Cir. 1978) (there was pretrial corroboration and it was not paid for); United States v. Castle, 409 F.2d 1347 (9th Cir.), *cert. denied*, 396 U.S. 1063 (1969); *but see* United States *ex rel.* Guy v. McCauley, 385 F. Supp. 193 (E.D. Wis. 1974) (information was several years old); or because it appears something is hidden under his clothing, *see, e.g.*, United States v. Olcott, 568 F.2d 1173 (5th Cir. 1978); United States v. Price, 472 F.2d 573 (9th Cir. 1973); or when the arrestee acts contradictory *and* fits a mold of those bringing drugs in from the border, *see, e.g.*, United States v. Smith, 557 F.2d 1206 (5th Cir. 1977), *cert. denied*, 434 U.S. 1073 (1978) (defendant went on a one-day "vacation" to Bogata, while carrying only one suitcase, was an unemployed truck-driver and had a wife and child); United States v. Himmelwright, 551 F.2d 991 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977) (woman, traveling alone, wearing platform shoes, and returning after a very short stay in Columbia, gave evasive and contradictory answers about her employment). Once the search reaches the limits imposed by the probable cause requirement, the search must cease. *See, e.g.*, United States v. Price, 472 F.2d 573 (9th Cir. 1973); State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974).

tate that the official learned from a reputable source that drugs are hidden on the suspect's body.

Without meeting these requirements, arrestees' fourth amendment rights will be violated. The fact that only twenty per cent of border strip searches are productive suggests that the standards used are not stringent enough.[130] Adhering to the *Schmerber* mandate of presenting probable cause to a neutral judicial figure should protect the rights of individuals while safeguarding the interests of the state.

Rochin *Due Process Analysis*

The gross invasion inherent in a strip search not only violates one's expectation of freedom from search and seizure, but it also violates that standard of decency and ordered liberty that American society expects.[131] A strip search therefore infringes an arrestee's due process rights.[132] In substantive due process analysis, the initial inquiry is whether there are fundamental rights involved. The United States Constitution and its amendments impliedly create a right to privacy.[133] Although not an enumerated right, it is recognized as an important one which is accorded full constitutional protection.[134] This fundamental

130. Morales v. United States, 406 F.2d 1298 (9th Cir. 1969). There is even greater reason to suspect addicts and people crossing the border. But the expectation lessens when in a non-drug related context. Then police should have to sustain an even greater burden.

131. United States *ex rel.* Guy v. McCauley, 385 F. Supp. 193, 198 (E.D. Wis. 1974).

132. *Id.*

133. *See* note 7 *supra*.

134. In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court invalidated a Connecticut birth control prohibition on the basis of the right to privacy. This right was seen as an implicit protection afforded by specific guarantees in the Bill of Rights. These guarantees were seen as creating zones of protection. Privacy is considered to be one such zone, without which several provisions in the Bill of Rights would lose vitality.

Roe v. Wade, 410 U.S. 113 (1973), strengthened that position:

> The Constitution does not explicitly mention any right of privacy. [However], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the Fourth and Fifth Amendments [*e.g.*, Terry v. Ohio]; in the penumbras of the Bill of Rights; in the Ninth Amendment [*id.*]; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.

Id. at 152. *Roe v. Wade* used this analysis to invalidate a Texas abortion law. In doing so, the Court stated that any privacy right must always be balanced against the interest of the state in regulating the public health and safety. In Katz v. United States, 389 U.S. 347 (1967), the Court recognized the right of privacy in the fourth amendment, holding that one is secure in his person.

right is violated by a strip search.[135] Yet, as in fourth amendment analysis, even though there is an invasion of privacy, it must be balanced against the state's interest in protecting police and gathering evidence of crimes.[136] In promoting these competing interests, states must be cognizant of the standards of human decency.[137]

In *United States ex rel. Guy v. McCauley*,[138] Judge Reynolds used *Rochin* to declare a strip search unconstitutional. The holding was grounded on the offensiveness of the actual strip search and the abnormality of being forced to submit to the inspection of one's sexual organs by nonmedical personnel.[139] The district judge stated:

> The police actions in this case abused common conceptions of decency and civilized conduct. It is true that the searches were carried out in what appear to have been sanitary conditions. . . . These facts, however, do not overcome several important facts. Petitioner, at the time of the searches, was seven months pregnant; she was forced to bend over twice; and the two policewomen who perpetrated the search were not medically trained. . . .[140]

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135. United States *ex rel.* Guy v. McCauley, 385 F. Supp. 193 (E.D. Wis. 1974). Even in the Ninth Circuit, where strip and body-cavity searches are permitted, the circuit recognizes that the fourth amendment does create a right to privacy, which is violated if there is no cause to search.

136. *See* Roe v. Wade, 410 U.S. 113 (1973).

137. *But see* Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967), where the court held that a body-cavity search instituted pursuant to a clear indication is not within the ambit of *Rochin*. It stated:

> Here the evidence shows a technical physical assault (in that hands were laid upon appellant), but no degrading or shameful physical assault upon him, in the sense the Supreme Court found in *Rochin*, supra. It was a technical assault similar to that upheld as proper in *Blackford*, supra. Again, technically, the physical assault, the "gentle" probing of the rectum, was not as pronounced an assault, medically, as the puncture of the skin in Breithaupt v. Abram, 352 U.S. 432 (1957). In *Breithaupt*, the blood was taken while the appellant was unconscious. But "the taking of blood by a skilled technician" is not "conduct that shocks the conscience," nor such a method of obtaining evidence as offends a "sense of justice," said the Supreme Court, citing and distinguishing *Rochin*, supra, and Brown v. Mississippi, 297 U.S. 278 (1936). Cf. Schmerber v. California, 384 U.S. 757 (1966).
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> The use of evidence in this case, like *Rochin, Schmerber, Blackford*, et al. (in fact, in any case where a body cavity is gently, in a medically approved manner, searched), does not (a) involve evidence of a testimonial nature; (b) require a defendant to testify against himself; (c) constitute a denial of due process.

Id. at 711.

138. 385 F. Supp. 193 (E.D. Wis. 1974).

139. *Id.* at 199. The court also paid particular attention to plaintiff's condition, being seven months pregnant and having difficulty bending over. *But see* Blefare v. United States, 362 F.2d 870 (9th Cir. 1966) (not within *Rochin* if conducted by medical personnel).

140. 385 F. Supp. at 198.

It is difficult to predict the outcome of a suit which grounds its objections in *Rochin*.[141] The difficulty lies in the fact that the *Rochin* test is very subjective.[142] In a search of a non-pregnant woman who was concealing drugs, a court may very well uphold the search.[143]

There is available, however, much authority which exalts the sanctity of human dignity in our constitutional history.[144] *Rochin* is the most articulate expression of judicial thinking on the due process clause.[145] It has not been overruled, nor has it been substantially distinguished.[146] But sole reliance on one's sensibilities is not enough. *Rochin* was premised on the shocking police brutality in pumping one's stomach.[147] In strip searches, what is shocking is the gross invasion of privacy. Whether it is sufficiently shocking must be dealt with on a case by case basis as in *Guy*.[148]

Courts should not restrict the application of *Rochin* to merely offensive police brutality. In *White v. Rochford*,[149] the Seventh Circuit held that *Rochin* was premised on the due process clause. Therefore, it reasoned that it should be applied whenever police arbitrarily deprive individuals of a recognized right.[150] Clearly, the invasion of privacy is one such deprivation.

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141. *See, e.g.*, Breithaupt v. Abram, 352 U.S. 432 (1957) (limited *Rochin* to brutality). *Compare* Huguez v. United States, 406 F.2d 366 (9th Cir. 1968) *and* United States *ex rel.* Guy v. McCauley, 385 F. Supp. 193 (E.D. Wis. 1974) *with* Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967).

142. *See* Breithaupt v. Abram, 352 U.S. 432 (1957). At any given time it is difficult to determine what is "violent" within due process standards, *see* notes 161-69 and accompanying text *infra*, or whether other conditions could create a violation of those standards of decency and ordered liberty expected by our society. *See* notes 170-79 and accompanying text *infra*.

143. *See, e.g.*, United States v. Afanador, 567 F.2d 1325 (5th Cir. 1978) (a stewardess); United States v. Himmelwright, 551 F.2d 991 (5th Cir. 1977); United States v. Leverette, 503 F.2d 269 (9th Cir. 1974).

144. Rochin v. California, 342 U.S. 165 (1952); *see* Schmerber v. California, 384 U.S. 757 (1966).

145. *E.g.*, 40 CALIF. L. REV. 311 (1952).

146. *But see* Breithaupt v. Abram, 352 U.S. 432 (1957) (limited *Rochin* to its facts, that there was gross violence).

147. *Id.*

148. The "conscience" which has to be shocked in order to violate due process is not the "community sense" which the court looks to in obscenity cases, but rather, the sense of those minimal standards which are "of the essence of a scheme of ordered liberty." Rochin v. California, 342 U.S. at 172 (1952).

149. 592 F.2d 381 (7th Cir. 1979). In *White*, the court said: "Although state actions prohibited under this due process analysis may involve incursions on personal physical integrity, such as the induced vomiting disapproved by the Court in *Rochin*, this need not always be the case." *Id.* at 383; *see* Duncan v. Nelson, 466 F.2d 439 (7th Cir.), *cert. denied*, 409 U.S. 894 (1972).

150. 592 F.2d at 385: "[T]he second aspect of the Due Process Clause's

Therefore, strip searching, at least when there is no probable cause to believe that a weapon or evidence of crime is hidden under clothing, is a violation of due process standards.[151]

Courts must analyze those minimum standards which are the essence of decency and ordered liberty.[152] A majority of courts have been applying local standards of what is shocking to the conscience—usually amounting to nothing more than the opinions of judges as to the propriety of this type of search.[153] These cases have failed to apply "those canons of decency and fairness which express notions of justice of English-speaking peoples."[154]

The author advances the proposition that forcing an individual to submit to the indignity of a strip search based upon an

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protection—the prohibition against state actions which 'shock the conscience' or run counter to the fundamental notions of fairness—would also support a § 1983 cause of action here."

151. *See* United States *ex rel.* Guy v. McCauley, 385 F. Supp. 193 (E.D. Wis. 1974); *cf.* Tinetti v. Wittke, 479 F. Supp. 486 (E.D. Wis. 1979) (violates fourteenth amendment).

152. *See* Rochin v. California, 342 U.S. at 172, where the Court explained:

> In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

Cf. Haley v. Ohio, 332 U.S. 596 (1948) (Frankfurter, J., concurring) (fundamental notions of fairness and justice); Malinski v. New York, 324 U.S. 401 (1945) (Frankfurter, J., concurring) (those canons of decency and fairness which express the notions of justice of English-speaking peoples); Snyder v. Massachusetts, 291 U.S. 97 (1934) (principles of justice so rooted in the traditions and conscience of our peoples as to be ranked as fundamental).

153. Most of these cases involve Fifth and Ninth Circuit cases where the courts have upheld strip searches. *E.g.*, Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967) (technical physical assault, but no degrading nor shameful physical assault). But it must be remembered that "awful tortures . . . can be cloaked with such clockmark logic that many become persuaded of their perverse justice. Turning square corners then must never become a substitute for respecting the humanity of each individual." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 916-17 (1977).

154. Rochin v. California, 342 U.S. at 170. These cases have not failed to recognize *Rochin*'s doctrine. *See* Huguez v. United States, 406 F.2d 366 (1968); Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967). But, they have not considered fundamental rights beyond that of freedom from physical brutality. *See* Breithaupt v. Abram, 352 U.S. 432 (1957); Rivas v. United States, 368 F.2d at 710, "it was the *physical assault* in *Rochin* which caused reversal. . . . yet, this is not, and should not be limited to the law." *Cf.* White v. Rochford, 592 F.2d 381 (7th Cir. 1979) (those arbitrary violations of fundamental rights). *See also* Griswold v. Connecticut, 381 U.S. at 501 (Harlan, J., concurring) (the due process clause should not be subjected to " 'personal' interpretation by judges whose constitutional outlook is simply to keep the Constitution in supposed 'tune with the times.' ").

officer's judgment alone falls far short of those canons.[155] Likewise, the wholesale strip searching of women for minor offenses violates these standards.[156] Courts should enforce a standard of conduct upon police and border officials based on those canons of decency, fairness, and of the notions of justice expected by American society. The difficulty inheres in the attempted definition of those standards.[157]

In attempting to outline these standards, three areas must be considered. First, the courts must consider the violence involved in the police activity.[158] A strip search is prima facie violent.[159] Even where the subject willingly submits to a strip search, the act is instigated by an official order. Failure to obey may result in violence against the suspect.[160] The courts have always condemned official violence and the circumstances giving rise to it.[161] "As prosecutor, the state has no right to commit any kind of violence upon the person, or to utilize the results of such a tort. . . ."[162]

Official violence is sanctioned in very limited and controlled circumstances. It is permitted pursuant to a warrant,[163] by order of court,[164] in exigent circumstances such as when a suspect is fleeing arrest,[165] or by legislative order.[166] Given that a strip

155. Such searches, if constitutional under due process analysis, can only be performed when justified by the reasonableness of the discovery of (1) weapons or instruments of escape; or (2) evidence which could be otherwise concealed or destroyed. United States v. Edwards, 414 U.S. 213 (1974); United States v. Mills, 472 F.2d 1231 (D.C. Cir. 1972); Tinetti v. Wittke, 479 F. Supp. 486 (E.D. Wis. 1979).

156. In the case of the Chicago strip searches, extensive press coverage alerted the public to the practice of routine strip searches of females for minor traffic and other regulatory infractions. *See* "Outrage in the Station House," NEWSWEEK, March 3, 1979; public opinion against the practice was so strong that it resulted in a law being passed by the Illinois legislature curtailing these searches. *See* note 177 *infra*.

157. Griswold v. Connecticut, 381 U.S. at 501 (Harlan, J., concurring) (due process standard is subject to subjective applications).

158. Rochin v. California, 342 U.S. 165 (1952); *see* Breithaupt v. Abram, 352 U.S. 432 (1957) (limiting *Rochin*); Huguez v. United States, 406 F.2d 366 (9th Cir. 1968) (strip searching not conducted in a hospital); Blefare v. United States, 362 F.2d 870 (9th Cir. 1966).

159. Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1965); *cf.* United States *ex rel.* Guy v. McCauley, 385 F. Supp. 193 (E.D. Wis. 1974) (pregnant woman); Simon, *supra* note 1.

160. Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1965); Simon, *supra* note 1.

161. Schmerber v. California, 384 U.S. at 774 (Fortas, J., dissenting); *cf.* Breithaupt v. Abram, 352 U.S. 432, 440 (1957) (court limited *Rochin* to the violence involved therein).

162. Schmerber v. California, 384 U.S. at 774 (Fortas, J., dissenting).

163. Schmerber v. California, 384 U.S. at 765 (should have a neutral authority). *See also id.* at 774 (Fortas, J., dissenting).

164. Furman v. Georgia, 408 U.S. 238 (1972).

165. Wiley v. Memphis Police Dep't, 548 F.2d 1247 (9th Cir. 1977); *cf.* Mat-

search does involve a high degree of force or violence, the courts should limit the practice. Requiring a warrant to strip search an individual would not hinder police investigations, but it would curtail the abuse of permitting any strip search.

Secondly, the court must examine the degrading effects of such a search.[167] A strip search is inherently degrading. A graphic account of what is entailed was provided by Judge Reynolds in the *Guy* case.[168] The court held: "Applying these

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tis v. Schnarr, 547 F.2d 1007, 1009 (8th Cir. 1976), *rev'd on other grounds sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977), where the court stated, "The state in this case, must demonstrate the existence of an interest equivalent to, or greater than, the right of life to justify the use of deadly force against fleeing felons." The rhetorical question therefore is must police then balance the need for evidence with the individual's right to privacy?

166. *See* ILL. REV. STAT. ch. 38, §§ 9-1(b), 114-5 (1977) (provides for Illinois death penalty). *But cf.* Woodson v. North Carolina, 428 U.S. 280 (1976) (state cannot impose mandatory death penalty, but must treat each person as unique human being).

167. *See* Schmerber v. California, 384 U.S. at 775; Rochin v. California, 342 U.S. 165; United States *ex rel.* Guy v. McCauley, 385 F. Supp. 193 (E.D. Wis. 1974); *cf.* Huguez v. United States, 406 F.2d 366 (9th Cir. 1968) (considered harshness of search). *See also* Katz v. United States, 389 U.S. 347 (1967).

168. United States *ex rel.* Guy v. McCauley, 385 F. Supp. 193 (E.D. Wis. 1974), wherein the court reported these disgusting facts:

> Petitioner was searched twice. The first search was the result of entry into the petitioner's residence by several police officers pursuant to a valid arrest warrant, subsequent observation by these police officers of various paraphernalia commonly utilized in the heating and administering of heroin on petitioner's bedroom nightstand, and the presence of vague information several years old that petitioner was known to carry heroin in her vagina. This search took place in petitioner's own bathroom. At the time of the search, petitioner was clad only in a nightgown and underpants. The two policewomen present directed petitioner to lift up her nightgown, remove her underpants, bend over, and spread her buttocks. No touching occurred between the petitioner and the women officers. Since the bathroom was poorly lighted and quite small and since the door was closed to insure privacy, the policewomen were unable to conduct a thorough examination. It was determined that petitioner should get dressed and another search would be held at police headquarters, and the petitioner was taken to the police headquarters to be searched.
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> The second search occurred a short time later in the vice squad room at police headquarters. Again, the two women police officers were present. Petitioner was asked to disrobe and bend over. To facilitate her bending because of difficulty caused by her pregnancy petitioner leaned on a chair. Officer Atkinson aided petitioner in spreading her buttocks, and Officer Honeck held a flashlight. The former was wearing rubber gloves, and the latter did not touch the petitioner. Officer Atkinson observed that there was a piece of cellophane protruding from petitioner's vagina. She requested that petitioner remove this from her vagina. Petitioner complied by removing a small cellophane bag. At no time did Officer Atkinson place a finger or a hand in any of the orifices of petitioner's body. The period of time which passed between the arrest and the second search was approximately one hour.
>
> The police actions in this case abused common conceptions of decency and civilized conduct. It is true that the searches were carried

standards to the case at hand, I find that the instant situation falls within the specter of *Rochin*. The actions of the Milwaukee police shock the conscience of this court and this court's 'hardened' sensibilities."[169] But the effects of strip searches do not end at the station. Reports indicate that being subjected to a strip search causes many of the same psychological difficulties experienced by rape victims. Intrusions into sexual privacy have always offended;[170] customs have not been substantially altered to condone such conduct today.[171]

Finally, the courts must consider the punishment involved in the search.[172] Before one can be punished for his acts, he must be convicted.[173] A strip search can be punishment in and of itself. To illustrate, consider an individual who is arrested, but not ultimately charged. He will be strip searched without any opportunity for judicial, or in most cases, medical supervision. After the unsuccessful strip search, he will then be released, one supposes, with an apology.[174] In some instances, suspects were strip searched after they had posted bond and were entitled to be released. Where there is no probable cause to search for drugs or weapons, the effect of a strip search is nothing but de facto punishment without a criminal act.[175] This treatment is a clear example of a *Rochin* case.[176]

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out in what appear to have been sanitary conditions; that petitioner was never forced to lie down; that she was searched by other females; and that nothing was probed into any of her privates. These facts, however, do not overcome several other important facts. Petitioner at the time of the searches, was seven months pregnant; she was painfully forced to bend over twice; and the two policewomen who perpetrated the search were not medically trained, nor did they utilize medical facilities or equipment to aid them in their search, nor was it done in a hospital or medical environment.

Id. at 198.

169. *Id.; see* Simon, *supra* note 1.

170. Simon, *supra* note 1.

171. *See* Federal Communications Comm'n v. Pacifica Foundation, 438 U.S. 726 (1978), where the Court held that the playing of George Carlin's monologue "Dirty Words" constituted a violation of the FCC Regulations against obscenity.

172. *See* Rochin v. California, 342 U.S. 165 (1952). Rochin was choked, he had his stomach pumped, his door was broken in, and his human dignity was violated. Before a person can be punished, he must be convicted. This is required by due process and the Anglo-American tradition that a person is innocent until proven guilty. U.S. CONST. amends. V & XIV.

173. U.S. CONST. amends. V & XIV.

174. Doe v. City of Chicago, No. 79 C 789 (N.D. Ill. 1979).

175. *See* Bell v. Wolfish, 441 U.S. at 595 (Stevens, J., dissenting); *cf.* Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1965) (woman left lying in corner crying after having clothes removed by male officers).

176. White v. Rochford, 592 F.2d 381 (7th Cir. 1979).

LEGISLATIVE ACTIVITIES

Recently, Illinois and California have enacted legislation to establish standards for conducting strip searches. The Illinois statute[177] was a direct response to the indiscriminate strip searching of women for traffic violations in Chicago. The standards promulgated established requirements which officers must meet before performing a strip or body-cavity search.

In analyzing this statute, one must distinguish between strip searches and body-cavity searches. The statute forbids

177. P.A. 81-896, 1979 Ill. Legis. Serv. (West) provides:

(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 purposes 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 correctional institution pursuant to a court order.

strip searches for misdemeanors except those where the police have a "reasonable belief" that the suspect is concealing a weapon or controlled substances. The strip search must be conducted by members of the same sex as the arrestee, in a place of privacy. Prior to a strip search, the officer must obtain the written approval of a commanding officer and must prepare a report on the search. No body-cavity search may be performed except by medical personnel after a judicial warrant has been obtained.[178] Intentional violation of the statutory provisions is characterized as "official misconduct" and constitutes a class three felony.[179] The statutory requirements are not applicable "when the person is taken into custody by or remanded to the sheriff or correctional institution pursuant to court order."[180]

The statute has its strong points. The most important protection offered arises from the fact that every strip search must be reduced to a writing and approved by a commanding officer. Should an aggrieved individual have his rights violated, this record will facilitate a lawsuit at a later date. It also allows the legislature and the courts to monitor compliance with the statute and will provide a basis for statistical studies of searches, thereby enabling informed modifications of current judicial or legislative views on this subject. The statute, quite commendably, demands a judicial warrant for body-cavity searches. This requirement ensures that each body-cavity search will be based upon "probable cause," a stricter standard than "reasonable belief."

In spite of the foregoing, the statute fails to grant individuals adequate protection against indiscriminate searches. Suppose that someone is strip searched after a lawful arrest for a traffic violation. If the search is unproductive, the officer will always claim that he was operating under a "reasonable belief" that the arrestee was carrying weapons or controlled substances. It would be very difficult to refute this contention in a civil suit against the officer due to the high regard that judges and juries place on police testimony. Nearly any fact could be raised to support this "reasonable belief," such as red eyes, furtive gestures, prior record of narcotics convictions, or the judgment of an experienced officer.[181] This standard fails to meet conventional fourth amendment requirements of probable

178. *Id.* § 103-1(g).

179. *Id.* § 103-8. In addition, a public officer or employee convicted of official misconduct forfeits his office or employment.

180. *Id.* § 103-1(j).

181. *Cf.* Morales v. United States, 406 F.2d 1298 (9th Cir. 1969) (only 20% of the body-cavity searches performed by custom officials at the border are productive).

cause. Even in body-cavity searches at the border, a clear indication is required.[182] And it is much more likely that an individual would be secreting contraband on his body at the border, than driving along a city street. Therefore, the Illinois standard is deficient.

Civil suits aside, it would be impossible to convict an officer under the Act for conducting a strip search without "reasonable belief" that the arrestee was concealing weapons or contraband. It would always be a case of the arrestee's word against that of one or more officers. The state's attorney's burden of proof would simply be too heavy. The only imaginable action by a police officer that would result in a conviction under this statute would be if he routinely conducted strip searches. This is small comfort to the individual subjected to abuse by police. Further, if the strip search is productive, *ipso facto* reasonable belief is substantiated. The fruits of the search thereby justify its perpetration.[183]

In fact, when the Chicago incidents were first publicized, police spokesmen claimed in every case that officers believed the suspects were hiding drugs.[184] This is precisely the reason why a "policeman's quick ad hoc judgment"[185] should be subjected to judicial scrutiny before the privacy of the individual is invaded. Thus, the statute fails because it does not establish a warrant requirement for strip searches.

The second problem with the Act is that it authorizes a strip search predicated upon the class of the offense, thereby divorcing it from any consideration of probable cause. For example, people may be freely strip searched if they are suspected of forgery, embezzlement, perjury, or any other felony where the individual is believed to be secreting a weapon or drugs upon his person. This distinction is ridiculous.

Stripped to its bare essentials, the Illinois law is too weak to protect the individual subjected to a strip search. It has the fatal

182. Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967) (real suspicion is enough for border strip search of person crossing border, probable cause not required); *see* Schmerber v. California, 384 U.S. 757 (1966) (clear indication test is more stringent than a reasonable belief and less stringent than probable cause).

183. *But cf.* Brinegar v. United States, 338 U.S. 160 (1949) (an officer may not stop every car at his whim, he must have probable cause to search); People v. Superior Ct., 14 Cal. App. 3d 935, 92 Cal. Rptr. 545 (1971) (no search is justified by the evidence it uncovers).

184. *See* note 23 *supra*.

185. United States v. Robinson, 414 U.S. 218 (1973) ("police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily 'a quick *ad hoc* judgment' which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search").

defect of shielding strip searches from judicial scrutiny before they occur. The police officer's judgment remains superior to the individual's expectation of privacy. This was precisely the law before the statute was passed.

Unlike Illinois, the legislation enacted in California was not specifically designed to reduce the incidence of strip searches. Rather, it represented the growing trend to decriminalize behavior and to streamline the judicial process by weeding out petty cases before trial.[186] The California statute partially ameliorates one problem, which still exists in Illinois, by limiting the instances whereby an individual may be arrested. The Penal Code provides that any person arrested for a misdemeanor shall be released with a notice to appear, rather than be incarcerated.[187] The officer may still incarcerate the individual for any other reason,[188] but he must state in writing why he did so, presumably for purposes of judicial scrutiny. Although this seems to be a major loophole, the California courts have, independently of the statute, restricted the power of police to search misdemeanants.[189]

Because this law provides for fewer arrests, there will be necessarily fewer opportunities for the police to search individuals. This should reduce the incidence of strip searches. The statute is an affirmative expression designed to limit the type of extended contact with police that jeopardizes privacy rights. However, a problem still exists because the statute, by its very nature, does not base strip searches upon probable cause. Anyone arrested for a felony in California may be strip searched because the statute only applies to misdemeanors. Furthermore, even misdemeanants may be incarcerated and thus subjected to a strip search.

CONCLUSION

The law of strip searches is still in the development stage. Public scrutiny has only recently been brought to bear upon this flagrant misuse of law enforcement authority. Unfortunately, the practice is not limited geographically. Many local strip

186. The maximum use of citations is encouraged by the Model Code of Pre-Arraignment Procedure § 120.2(4). (Proposed Official Draft, 1975) and the A.B.A. Standards Relating to Pretrial Release § 2.1 (Approved Draft, 1968). *See generally* Berger, *Police Field Citations in New Haven*, 1972 WIS. L. REV. 382; President's Comm'n on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 133 (1967).

187. CAL. [PENAL] CODE § 853.6 (West 1976).

188. *Id.* §§ 852.6(g), (j).

189. *E.g.*, People v. Rich, 72 Cal. App. 3d 115, 139 Cal. Rptr. 819 (1977). In *Rich*, the court applied a standard of reasonableness.

search policies draw support from the recommendations of national organizations. Nevertheless, comparatively few judicial and legislative pronouncements pervade this area.

Determination of the legality of a strip search necessarily requires examination of the interests and circumstances from the viewpoint of both the governmental authority which conducts it and the individual subject. Justification for strip searches has stemmed from the judicial exaltation of the state's interests in protecting its police officers, securing its custodial detention facilities, and preventing the secreting of incriminating evidence. Too often, the individual circumstance focused upon is the class of offense that the arrestee is claimed to have committed. Halting inquiry at that point, however, ignores the crux of the strip-search problem, by failing to consider the personal and societal perspectives.

The judicial system must reorder its priorities within the context of strip-search analysis. Courts should concentrate not on the underlying criminal or regulatory violation by the particular person subjected to the degrading strip-search experience, but on (1) the demeaning nature of these searches, regardless of their targets; and (2) the conceded fact that most strip searches are conducted, *as a matter of routine*, pursuant to blanket law enforcement policies which transcend offense classifications, without offering objective standards for gauging their propriety.

A strip search involving the visual exploration of body cavaties is dehumanizing and humiliating, even absent a repulsive manual body-cavity probe. The shocking invasion of personal privacy inherent in strip searches does not subside merely because one is arrested for an offense which, upon conviction, ultimately could result in incarceration. An individual should not be subjected to the humiliation of a strip search based solely on the fortuitous character of some underlying violation, when police engage in conduct so clearly deserving of universal reprobation. Stern judicial and legislative admonishments of these law enforcement procedures are needed.