

# STRIP SEARCHES INCIDENT TO ARREST: CABINING THE AUTHORITY TO HUMILIATE

EUGENE L. SHAPIRO\*

## I. INTRODUCTION

One of the more puzzling characteristics of current Fourth Amendment jurisprudence has been the inadequacy of judicial evaluation of strip searches that are conducted upon the sole justification that they are incident to a lawful arrest. At first glance, the issue may seem to arise infrequently in light of an arrestee's possible incarceration and the well-known latitude afforded jail administrators when addressing the special requirements of a prison environment.<sup>1</sup> But the more-than-occasional case has placed a judicial imprimatur upon the warrantless strip search of an arrestee where no mingling with a jail population is imminent or even contemplated.<sup>2</sup> With one exception, federal circuits have approached the matter as if the Fourth Amendment's preference for warrants is not sufficiently implicated to merit discussion and the Amendment's mandates are fulfilled solely by inquiry into the particularized facts possessed by the police.

Part II of this article will address the prevalent trend, exemplified by the recent en banc opinion of the Court of Appeals for the Eleventh Circuit in *Evans v. Stephens*,<sup>3</sup> and will evaluate the apparent assumptions upon which this approach is grounded. Part III will examine a contrary view held by the Court of Appeals for the Ninth Circuit.<sup>4</sup> Its approach contemplates the participation of a magistrate only when a search extends into a body cavity, an approach which insufficiently acknowledges the intrusiveness of other strip searches. Part IV will then suggest a more focused approach, which most appropriately comports with the Fourth Amendment's preference for warrants, its constitutional standard of reasonableness, and the practical realities of arrests.

---

\*Professor of Law, Cecil C. Humphreys School of Law, The University of Memphis.

1. In *Bell v. Wolfish*, the Supreme Court addressed the constitutionality of visual body cavity searches of inmates who were examined after contact visits with individuals from outside of the institution. See *infra* notes 163-67 and accompanying text (discussing the Supreme Court's decision in *Bell*).

2. See *infra* notes 163-166 and accompanying text.

3. 407 F.3d 1272 (11th Cir. 2005) (en banc).

4. See *Fuller v. M.G. Jewelry*, 950 F.2d 1441, 1437 (9th Cir. 1991).

Identification of the range of activity that will be included within the term “strip search” for purposes of this article is necessary. At a minimum, the term refers to visual examination of the intimate surfaces of the body, i.e., the genitals, anus, and female breasts. Such examination is, however, often inseparable from actions of the officer or compelled actions by the arrestee which are tied to the process. Reported accounts are replete with often jarring descriptions of the manipulation of the genitals and buttocks and other compelled bodily movements.<sup>5</sup> Visual examination may also be accompanied by the physical penetration of the body, by either the officer or the arrestee upon command.<sup>6</sup> The degree of intrusion has, of course, been important in the assessment of Fourth Amendment reasonableness. Moreover, the wide variety of circumstances under which strip searches have been undertaken has not been a barrier to the emergence among the circuits of a clear trend in their articulation of constitutional standards.

## II. THE PREVALENT TREND

In several respects, the Eleventh Circuit’s opinion in *Evans* highlighted a number of significant and frequent aspects of the prevalent treatment of the subject. Characteristically, while purporting to impose restraints upon the police with the articulation of its standards, the court assumed that the issue was adequately addressed by its discussion of requirements which may be imposed upon permissible warrantless searches of the person. The warrant requirement was not explored. The allegations before the court also reflected the types of issues that might arise concerning potential abuse in the area. Moreover, in the context of a civil rights action and a defendant’s claim of qualified immunity, the court addressed the question of whether its standard for the initiation of a properly conducted strip search of an arrestee was clearly established at the time of the search. With *Evans* and the other cases discussed in this article, it is important to emphasize that the courts recounted and evaluated plaintiffs’ allegations and not proven fact.

---

5. See, e.g., *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1267 (7th Cir. 1983) (involving a strip search policy that required bending and squatting); *Way v. County of Ventura*, 445 F.3d 1157, 1158-59 (9th Cir. 2006) (discussing a policy allegedly requiring an arrestee’s compelled manipulation of genitalia). See generally M. Margaret McKeown, *Strip Searches Are Alive and Well in America*, 12 HUM. RTS. 37, 38 (1984-1985) (describing strip searches and what they entail); John Gibeaut, *Marked for Humiliation*, 85 A.B.A. J. 46, 46-47 (1999) (discussing claims or allegations of strip searches).

6. See, e.g., *Amaechi v. West*, 237 F.3d 356, 361 (4th Cir. 2001) (involving an allegation of vaginal penetration by an officer); *Kennedy v. L.A. Police Dep’t*, 901 F.2d 702, 711-12 (9th Cir. 1989) (involving an allegation of compelled vaginal and anal penetration by arrestee).

Peter Evans and Detree Jordan filed an action under 48 U.S.C. § 1983, charging that their Fourth Amendment rights were violated by strip searches on January 22, 1999.<sup>7</sup> They alleged the following, which was discussed in the Eleventh Circuit's en banc opinion<sup>8</sup> and assumed by the court to be accurate upon its review of the denial of defendant's motion for summary judgment:<sup>9</sup> Evans and Jordan were male African-American students or former students at Georgia Southern University in Statesboro.<sup>10</sup> They were both in their early and mid-twenties, and while driving a rental car at night from Atlanta to Statesboro they became lost and found themselves on Interstate 85 instead of Interstate 75.<sup>11</sup> Attempting to return to that route, Evans drove through the city of Zebulon, Georgia, where the car was stopped by a white male officer, Denis Stephens, for driving 72 miles per hour in a 45 miles per hour zone.<sup>12</sup> The stop was recorded by the officer's video camera, and as Stephens approached the car an officer from the City of Concord arrived.<sup>13</sup> Officer Stephens, who believed that Evans had been driving while intoxicated, ordered him to step out of the car and searched his pockets.<sup>14</sup> Evans denied committing the offense, and Stephens claimed that he found a beer bottle top in a pocket, although he did not show it to the recording camera.<sup>15</sup> Evans denied the top's existence.<sup>16</sup>

While Evans was at the rear of his car, Officer Stephens obtained Jordan's drivers license and asked him to step out of the vehicle.<sup>17</sup> Stephens then received Evans' permission to search the vehicle, and did so for about five minutes.<sup>18</sup> While Officer Stephens stated that he discovered

---

7. *Evans*, 407 F.3d at 1277; see *Evans v. City of Zebulon*, 351 F.3d 485, 487 (11th Cir. 2003) (panel opinion), *vacated*, 364 F.3d 1298 (11th Cir. 2004) (involving an action by the arrestees in *Evans v. Stephens* against the City of Zebulon for the same incident). The action had initially alleged the violation of the Fourth, Fifth and Fourteenth Amendments, as well as Title VII of the 1965 Civil Rights Act, but the claims were narrowed to those based upon the Fourth Amendment. *Evans*, 407 F.3d at 1277.

8. See *Zebulon*, 351 F.3d at 487-89 (providing additional details of Evans and Jordan's accounts).

9. The court "accept[s] the nonmovant's version of the events when reviewing a decision on summary judgment." *Evans*, 407 F.3d at 1278. Consequently, when the opinion cited allegations by Evans or Jordan which were contradicted by the defendant officer, the opinion credited the plaintiffs' versions. *Id.*

10. *Id.* at 1275.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 1275-76.

an open container of alcohol, Evans denied the item's existence.<sup>19</sup> Although the officer usually showed such containers to the video camera, he did not do so in this instance.<sup>20</sup> A third officer from the county sheriff's office had by then joined the group.<sup>21</sup>

Officer Stephens charged Evans with speeding, read him the Georgia Implied Consent Law, and asked if Evans would consent to a breathalyzer test.<sup>22</sup> When Evans stated that he wanted to call his lawyer, Officer Stephens placed him under arrest.<sup>23</sup> Evans repeated the request and received the same response.<sup>24</sup> Evans was then charged with "D.U.I. refusal" and speeding and was placed in the patrol car.<sup>25</sup> The court noted that at Officer Stephens' deposition he stated that Evans had "alcohol on his breath, bloodshot eyes, and an unstable demeanor."<sup>26</sup> By radio, Officer Stephens then requested a check for outstanding warrants against Jordan.<sup>27</sup> The dispatcher replied that an arrest warrant was outstanding against a "Detre Jordan" who had Plaintiff Jordan's date of birth.<sup>28</sup> Officer Stephens then placed Jordan under arrest, searched his pockets, and said that he would release Jordan if the warrant was not for him.<sup>29</sup> During the subsequent litigation, the parties agreed that the warrant was for someone other than Plaintiff Jordan.<sup>30</sup> The officers searched the car and surrounding area for about seven minutes before a tow truck arrived, and found nothing.<sup>31</sup>

Evans and Jordan were driven to the Pike County Jail.<sup>32</sup> On the way, Jordan continued to protest that the warrant was not for him and requested a phone call.<sup>33</sup> Both arrestees stated that Officer Stephens said "he is the judge and jury in Zebulon and that he decides who can make phone calls."<sup>34</sup> Evans recalled the officer stating that he would "send you niggers away for a long time."<sup>35</sup> The arrestees were patted down before entering the county

---

19. *Id.* at 1276.

20. *Id.*

21. *Id.* at 1276 n.2.

22. *Id.* at 1276.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 1276 n.3.

31. *Id.* at 1276.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

jail building.<sup>36</sup> The jailer on duty was informed of the charges, and after reviewing the report about the subject of the arrest warrant, he concluded that it was not Plaintiff Jordan and encouraged Officer Stephens to release him.<sup>37</sup>

It was further alleged that Officer Stephens “became angry and walked Jordan to a room that appeared to be a supply closet or mop storage room.”<sup>38</sup> Plaintiffs alleged the following sequence of events: Officer Stephens then used “racist language,” and required Jordan to place his hands on the wall, and had him remove his shirt and shoes.<sup>39</sup> After Jordan complied, Officer Stephens ordered him to take off his remaining clothes.<sup>40</sup> When Jordan was asked to remove his underwear, Jordan protested, turned and stated that Officer Stephens had the wrong person.<sup>41</sup> Jordan stated that Officer Stephens then placed him in a chokehold and held Jordan against the wall until he began to gag.<sup>42</sup> Jordan again faced the wall, and stated that Evans was thrown into the room against him, causing them both to fall.<sup>43</sup> Jordan attempted to stand and was hit on his side by Officer Stephens with a baton-like, cold, black, cylindrical object.<sup>44</sup>

Plaintiffs also alleged that after Evans was in the room, Officer Stephens again ordered Jordan to remove his underwear.<sup>45</sup> “According to Jordan, after Officer Stephens—in Evans’s presence—pulled Jordan’s underwear to his ankles, Officer Stephens used the same ‘cold black’ object to separate Jordan’s butt cheeks and ‘stuck [it] in [his] anus.’”<sup>46</sup> Evans testified that Officer Stephens then turned to him, and told Evans “to remove his underwear and then—in Jordan’s presence—placed ‘the [same] stick in [my] ass.’”<sup>47</sup> Evans testified that Stephens then used the same baton to lift Evans’ and Jordan’s testicles and did not wipe or clean the baton during the search.<sup>48</sup>

---

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* Evans testified that the chokehold occurred later, after Evans was in the room. *Id.* at 1276 n.4.

43. *Id.* at 1276.

44. *Id.* at 1276-77, 1277 n.5.

45. *Id.* at 1277.

46. *Id.*

47. *Id.*

48. *Id.* See *Evans v. City of Zebulon*, 351 F.3d 485, 489 n.7 (11th Cir. 2003) (panel opinion), *vacated*, 364 F.3d 1298 (11th Cir. 2004) (providing more details of the plaintiffs’ accounts of the incident).

Plaintiffs stated that during this period, Stephens “taunted both Plaintiffs with laughter, racist language and threats of prison.”<sup>49</sup> Plaintiffs also stated that after the search, they were required to dress quickly, were handcuffed to the bench in front of the jailer, and were then placed with the general jail population for the night.<sup>50</sup> Officer Stephens denied the arrestees’ account, stating that while he asked them to remove their clothing in a trustee cell, he did not touch or taunt them.<sup>51</sup> Officer Stephens later testified that the search for drugs was appropriate because “he had reasonable suspicion that Plaintiffs had drugs based on their demeanor (nervousness at the roadside stop) and their story of being lost,” and he stated that their possession of a rental car contributed to his suspicion.<sup>52</sup>

The federal district court denied Officer Stephens’ motion for summary judgment with respect to the claims that the searches had been conducted without reasonable suspicion and in an unconstitutional manner.<sup>53</sup> It also held that Officer Stephens was not entitled to qualified immunity on either claim.<sup>54</sup> On appeal, a panel of the Court of Appeals analyzed the searches under the standards it perceived to be applicable for arrestees “who are to be detained in the general jail population,”<sup>55</sup> and found that the alleged searches were unconstitutional, both with respect to the basis for their initiation and the manner in which they were allegedly conducted.<sup>56</sup> Nevertheless, the panel found that Officer Stephens was entitled to qualified immunity on both claims, stating that on January 22, 1999, the law was not clearly established that “reasonable suspicion was required to conduct a strip search or body cavity search of an arrestee detained in the general jail population,”<sup>57</sup> and there were “no materially similar precedents that

---

49. *Evans*, 407 F.3d at 1277. The earlier panel opinion referenced Jordan’s statement in his deposition that Stephens was “saying comments like I am going to send you boys to prison, y’all are going to get butt fucked up the ass. I am going to send y’all up the road for a long time, boy.” *Zebulon*, 351 F.3d at 489 n.8. Evans testified that Stephens was “saying you better get used to this, this is how it is in the big house, this is where you getting ready to go. Somebody is going to be butt fucking you for the next 20 years, all because you got a smart mouth.” *Id.*

50. *Evans*, 407 F.3d at 1277.

51. *Id.* at 1277 n.6.

52. *Id.* at 1277, 1280.

53. *Id.* at 1277. The district court granted the motion for summary judgment of the other two defendants, the City of Zebulon and the Chief of the Zebulon Police Department, and granted Stephens’ motion with respect to the claim that there was no probable cause for the arrests. *Zebulon*, 351 F.3d at 489-90.

54. *Evans*, 407 F.3d at 1277.

55. *Zebulon*, 351 F.3d at 490.

56. *Id.* at 490-93.

57. *Id.* at 492.

provided Stephens fair warning of the unconstitutionality” of the manner in which the searches were performed.<sup>58</sup>

After vacating the panel’s decision and rehearing the appeal en banc, the Eleventh Circuit concluded:

[O]n reflection, this case provides no opportunity to decide the question of when jailers (for security and safety purposes) may lawfully conduct strip searches of persons about to become inmates in the general jail population. This case raises no questions about the necessities of jail administration. This case involves a different kind of search altogether: a post-arrest investigatory strip search by the police looking for evidence (and not weapons). Officer Stephens—who was not a jailer—testified (without contradiction from others) that he strip-searched Plaintiffs because he (as the arresting officer) believed them to be in possession of illegal drugs: the search was part of a criminal investigation looking for evidence.<sup>59</sup>

The court examined plaintiffs’ constitutional claims separately. First, it examined whether the Fourth Amendment required reasonable suspicion for the initiation of such a “post-arrest investigatory” strip search.<sup>60</sup> Secondly, it discussed whether the manner of the alleged searches was constitutionally reasonable.<sup>61</sup> With regard to the former, the court noted that the Supreme Court never explicitly addressed the requirements for such a search away from the context of the nation’s borders and jail administration.<sup>62</sup> Succinctly stating that it was balancing “the need for investigative strip searches for evidence that might be hidden on the arrestee’s body

---

58. *Id.* at 494. *Zebulon* observed that *Hope v. Pelzer* entitled an official to “qualified immunity for liability arising out of his discretionary actions unless those actions violated a clearly established federal right of which a reasonable person would have known.” *Id.* at 490. The court recalled *Hope* had stated that “the salient question . . . is whether the state of the law . . . [at the relevant time] gave the . . . [officers] fair warning” that their alleged action was unconstitutional. *Id.* (quoting *Hope*, 536 U.S. at 741). The panel added that in the Eleventh Circuit “[o]nly decisions of the Supreme Court, the Eleventh Circuit, and the highest court of the relevant state clearly establish the law for purposes of qualified immunity.” *Id.* at 494 n.15. Judge Propst dissented on the issue of qualified immunity with respect to the manner in which the search was conducted. *Id.* at 497-99 (Probst, J., dissenting).

59. *Evans*, 407 F.3d at 1279 (internal citations omitted). The court added that the issue here involved such a search “away from the complicated context of the nation’s borders.” *Id.*

60. *Id.* at 1278.

61. *Id.*

62. *Id.* at 1279. The court listed several cases which “provide guidance,” briefly discussing only *Bell v. Wolfish*. *Id.* The cases cited were: *Maryland v. Buie*, 494 U.S. 325 (1990); *Bell v. Wolfish*, 441 U.S. 520 (1979); *United States v. Edwards*, 415 U.S. 800 (1974); *United States v. Robinson*, 414 U.S. 218 (1973); and *Gustafson v. Florida*, 414 U.S. 260 (1973). *Id.*

against the intrusiveness inherent in a strip search,”<sup>63</sup> the court concluded that *Maryland v. Buie*<sup>64</sup> provided “the analytical framework that, *at a minimum*, would apply to strip searches for evidence.”<sup>65</sup> The court observed that, in *Buie*, the Supreme Court had permitted “a post-arrest protective sweep search of the arrestee’s house,”<sup>66</sup> concluding that “searches of property incident to arrest must be justified by ‘articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing’ the search was necessary.”<sup>67</sup> The Court of Appeals added:

Put differently, we are confident that an officer must have at least a reasonable suspicion that the strip search is necessary for evidentiary reasons. Perhaps the actual standard is higher than reasonable suspicion, especially where, as here, the search includes touching genitalia and penetrating anuses. But because Officer Stephens—in the light of the supposed facts—did not meet even the minimum possible standard of reasonable suspicion, we need not decide if the actual standard is something even higher to decide whether Officer Stephens failed to comply with the Constitution.<sup>68</sup>

The court observed that the existence of reasonable suspicion is to be measured from the view of a reasonable officer under the totality of the circumstances.<sup>69</sup> In the instant case, Officer Stephens’ assertion that the arrestees’ nervousness, their story about being lost, and their use of a rental car did not constitute a sufficient basis for establishing a reasonable suspicion that they possessed drugs.<sup>70</sup> The court stated that they had not been

---

63. *Evans*, 407 F.3d at 1279.

64. 494 U.S. 325 (1990).

65. *Evans*, 407 F.3d at 1279 (emphasis in original).

66. *Id.*

67. *Id.* (quoting *Buie*, 494 U.S. at 334). In *Buie*, to protect arresting officers against assaults by criminal confederates, the Supreme Court authorized a two-stage sweep of premises incident to arrest. *Buie*, 494 U.S. at 336-37. Without probable cause or reasonable suspicion, the area immediately adjacent to the place of arrest may be subjected to a brief examination of those places “from which an attack could be immediately launched.” *Id.* at 334. The Court continued, “Beyond that . . . we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” *Id.* In *Evans*, the court noted that *Buie* had relied upon *Terry v. Ohio*, 392 U.S. 1 (1968). *Evans*, 407 F.3d at 1279.

68. *Evans*, 407 F.3d at 1279-80 (internal citations omitted). The court emphasized that this standard did not apply to strip searches for other purposes, such as searches of arrestees bound for a jail’s general population or a search by officers for weapons which might pose a threat. *Id.* at 1279 n.8.

69. *Id.* at 1280.

70. *Id.*

arrested for drug-related offenses and added that, even if there had been an initial suspicion of drugs, “the strength of that suspicion was undermined by other events before the strip search got started.”<sup>71</sup> The plaintiffs’ car had been searched for over ten minutes and the surrounding area examined, and the police found nothing remotely relating to drugs.<sup>72</sup> Stephens had checked plaintiffs’ pockets, twice patted them down, and discovered nothing.<sup>73</sup> The plaintiffs were never observed attempting to hide items on their persons.<sup>74</sup> The court therefore concluded that the alleged action “violated Plaintiffs’ right to be free from an unreasonable search when he performed an investigatory strip search for drugs.”<sup>75</sup>

While it concluded that the alleged initiation of the search violated Evans’ and Jordan’s Fourth Amendment rights, the court found that Officer Stephens was protected by qualified immunity, which “shields public officers from liability so long as the transgressed right, given the circumstances, was not already clearly established.”<sup>76</sup> As the panel opinion noted, the issue was one of notice to a reasonable officer, and the en banc opinion cited the Eleventh Circuit’s formulation of the inquiry as follows: “The applicable law is clearly established if the ‘preexisting law dictates, that is, truly compel[s],’ the conclusion for all reasonable, similarly situated public officials that what Defendant was doing violated Plaintiffs’ federal rights in the circumstances.”<sup>77</sup> The court observed that, “[i]n rare circumstances, a ‘right may be so clear from the text of the Constitution or federal statute that no prior decision is necessary to give clear notice of it to an official,’”<sup>78</sup> but it added that in 1999, a post-arrest investigatory strip search “did not obviously violate the Fourth Amendment” or applicable precedents.<sup>79</sup> In light of the Eleventh Circuit’s stringent focus on the clarity of precedent, the court’s reluctance in *Evans* to explore the precise parameters of the appropriate constitutional standard for the permissible initiation of a “post-arrest investigatory” strip search may have obvious ramifications in future cases involving qualified immunity claims. Nevertheless, as will be discussed, the court’s conclusion that, “at a minimum,” reasonable

---

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 1282.

77. *Id.* (quoting *Marsh v. Butler County*, 268 F.3d 1014, 1031 (11th Cir. 2001) (en banc) (citation omitted)).

78. *Id.* (quoting *Rowe v. Ft. Lauderdale*, 279 F.3d 1271, 1280 n.10 (11th Cir. 2002)).

79. *Id.* at 1282-83. Judge Barkett dissented with regard to this finding of qualified immunity. *Id.* at 1295-97 (Barkett, J., concurring in part and dissenting in part).

suspicion is required, parallels the conclusions of a significant number of other circuits.

With regard to the plaintiffs' second Fourth Amendment claim, the court found that, upon the plaintiffs' account of the events, their rights were violated by the manner of the alleged searches, and Officer Stephens had no protection of qualified immunity on the issue.<sup>80</sup> Once again, "taking the facts most favorable to Plaintiffs' version,"<sup>81</sup> the court characterized the manner of the alleged searches as "disturbing" and "degrading."<sup>82</sup> Reviewing specific aspects of the allegations and recalling the Fourth Amendment's requirement that a search be performed in a reasonable manner, the court noted that plaintiffs asserted that with "[i]ttle respect for privacy" they had been "taken to and searched in an abnormal place (thus, capable of exciting more fear)" and that each was allegedly "forced to disrobe, ridiculed, and penetrated by an object in front of the other."<sup>83</sup> The court characterized the alleged force as unnecessary, and stated that "[i]t matter[ed] that a body cavity search was undertaken."<sup>84</sup> In its review of the allegations, the court found "highly unsanitary" the claimed insertion of the same uncleaned baton or club into each arrestee's anus and subsequent use of the still uncleaned item to lift each man's testicles.<sup>85</sup> It also found the alleged "terrifying,"<sup>86</sup> "threatening and racist language"<sup>87</sup> to contribute to the unreasonableness of the searches.<sup>88</sup> Officer Stephens had no protection of qualified immunity with regard to the claim concerning the manner of the searches, because the text of the Fourth Amendment itself, which prohibits "unreasonable searches," provided him sufficient notice.<sup>89</sup> "Every objectively reasonable officer would have known that, when conducting a strip search, it is unreasonable to do so in the manner demonstrated by the sum of the facts alleged by Plaintiffs."<sup>90</sup>

With regard to the initiation of a strip search incident to arrest, the most basic assumption upon which *Evans*' analysis rests remained unexplored in the opinion. *United States v. Robinson*,<sup>91</sup> the cornerstone for the

---

80. *Id.* at 1281, 1283.

81. *Id.* at 1281.

82. *Id.* at 1281, 1283.

83. *Id.* at 1281.

84. *Id.*

85. *Id.*

86. *Id.* at 1282.

87. *Id.* at 1281.

88. *Id.* at 1282.

89. *Id.* at 1283.

90. *Id.*

91. 414 U.S. 218 (1973).

proposition that the search of the person of an arrestee may proceed without a warrant, was cited without discussion.<sup>92</sup> The *Evans* court made no mention of any potential applicability of the warrant requirement to a “post-arrest investigatory” strip search, and one can only conclude that the court found *that* issue to be sufficiently settled by *Robinson* and its progeny.<sup>93</sup> But was it? Although the opinions addressing such strip searches in some of the other circuits have also neglected the matter of the warrant requirement, they have nevertheless often found it appropriate to discuss the reach of *Robinson* and its consideration of the interests of an arrestee in the integrity of his or her person.

In *Robinson*, the defendant had been arrested for driving after the revocation of his driver’s permit, and, following a frisk which had detected an unidentifiable object, the arresting officer had retrieved and examined a crumpled cigarette package from Robinson’s left breast pocket.<sup>94</sup> Robinson was convicted for possession of the heroin found in the package, and the Court held that the fact of the lawful arrest had authorized a warrantless “full search” of the arrestee’s person without the need for a preliminary limited frisk.<sup>95</sup> Such a search of the person was justified by the need to protect the police from any concealed weapon, which might pose a threat during the prolonged personal contact of an arrest, and by the need to prevent the destruction of evidence.<sup>96</sup> Rather than requiring the case-by-case assessment of the facts that had characterized the doctrine permitting a limited frisk for weapons under *Terry v. Ohio*,<sup>97</sup> the Court stated that police needed “no additional justification” apart from the fact of the lawful arrest.<sup>98</sup> The bright-line character of this approach, designed to provide the police with a clear rule protecting officer safety, has continued to characterize *Robinson* searches of the person incident to arrest.<sup>99</sup>

In *Swain v. Spinney*,<sup>100</sup> the Court of Appeals for the First Circuit encountered the issue of strip searches incident to arrest in the context of a suit under 42 U.S.C. § 1983 and a Massachusetts statute,<sup>101</sup> which alleged a

---

92. See *Evans*, 407 F.3d at 1279.

93. See *id.*

94. *Robinson*, 414 U.S. at 221-23.

95. *Id.* at 234-35.

96. *Id.* at 233-34.

97. 392 U.S. 1 (1968).

98. *Robinson*, 414 U.S. at 235.

99. See generally Wayne R. LaFare, *The Fourth Amendment in an Imperfect World: On Drawing “Bright Lines” and “Good Faith,”* 43 U. PITT. L. REV. 307, 322-23 (1982) (discussing the Court’s use of a bright-line rule in *Robinson*).

100. 117 F.3d 1 (1st Cir. 1997).

101. *Swain*, 117 F.3d at 5; MASS. GEN. LAWS ch. 12 §§ 11H, 11I (1979).

violation of the Fourth Amendment and the Constitution of Massachusetts.<sup>102</sup> Reviewing a grant of summary judgment for the defendants,<sup>103</sup> the court set forth and addressed the following allegations by the plaintiff: On the morning of May 18, 1993, Kalli Swain and her boyfriend, Christopher Milbury, had been looking for an apartment around Danvers, Massachusetts when Milbury told her that he wished to stop at Moynihan Lumber for some items.<sup>104</sup> Milbury entered the store while Swain remained in the car, and when he returned he placed a bag behind the seat.<sup>105</sup> As they started to leave the parking area, Swain saw store employees pointing at their car and saw a police car pulling into the lot.<sup>106</sup> Swain “became very upset [and] [s]he began questioning Milbury about what was going on.”<sup>107</sup> The police car followed them and pulled their car over.<sup>108</sup>

As Officer Robert Marchionda approached the car, Milbury stepped out and was soon handcuffed.<sup>109</sup> Swain then left the vehicle, dropping a bag of marijuana on the grass about three feet away from the car.<sup>110</sup> The officer saw her do so, but at that time could not identify the item.<sup>111</sup> Officer Marchionda radioed for backup, and another officer arrived.<sup>112</sup> Swain approached the officers, asking “what was going on,” but was stopped and told that Milbury was suspected of theft from the lumber store.<sup>113</sup> Officer Marchionda then arrested Swain and handcuffed her.<sup>114</sup> While he was doing so, Officer Marchionda identified the object she had dropped as a “baggie” containing marijuana and retained it.<sup>115</sup> Swain was frisked and nothing was found on her.<sup>116</sup>

In the trunk of the car, the officers found \$400 worth of hardware which had been taken from another store, and under the front seat they discovered \$400 worth of sawblades wrapped in a hardware flyer.<sup>117</sup> Swain

---

102. *Swain*, 117 F.3d at 3, 11-12.

103. *Id.* at 2.

104. *Id.*

105. *Id.*

106. *Id.* at 2-3.

107. *Id.* at 3.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

was surprised to see the sawblades.<sup>118</sup> When the police accused her of being an accomplice, she reiterated that she knew nothing about the theft, and Milbury told the police that she was innocent.<sup>119</sup> The officers did not ask her about the marijuana, and she did not know if they were aware of it.<sup>120</sup> After Swain and Milbury were taken to the North Reading police station, Swain's handcuffs were removed and she was seated at a booking desk, where she signed a rights card.<sup>121</sup> The police chief's secretary, Matron Laura Spinney, was called to the desk because of Swain's gender.<sup>122</sup> Swain asked to go to the bathroom, and Matron Spinney escorted her but did not enter the room.<sup>123</sup> Spinney remained outside with the door ajar.<sup>124</sup> When Swain returned to the booking area, she "was told that she could make a phone call."<sup>125</sup> She did so in an office and spoke with her attorney.<sup>126</sup> Swain's pocketbook was searched after her return to the booking area, and cigarette rolling papers were discovered.<sup>127</sup> While no one discussed those papers with Swain, she was told that marijuana had been found earlier and that she would be charged.<sup>128</sup> She denied that the marijuana was hers.<sup>129</sup> At some point, Milbury claimed its ownership.<sup>130</sup>

Plaintiff further alleged the following sequence of events: After Swain was fingerprinted and photographed, Sergeant Ed Hayes, the detective department supervisor, ordered Matron Spinney to escort Swain to a cell.<sup>131</sup> Spinney frisked Swain before doing so and found nothing.<sup>132</sup> Swain was left alone in the cell, and alleged that after about twenty minutes, Hayes entered and for another period of about fifteen minutes "attempted to question [Swain] about Milbury's criminal activities. Hayes yelled at Swain, telling her that she was lying. . . . Swain, who was crying hysterically, kept repeating that she honestly knew nothing."<sup>133</sup> Hayes allegedly

---

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *See id.* at 9.

131. *Id.* at 3.

132. *Id.*

133. *Id.*

“walked out in a huff.”<sup>134</sup> Five to ten minutes later, Spinney returned and “apologetically informed Swain that Hayes had ordered her to strip search Swain.”<sup>135</sup> Spinney did not know whether the strip search was ordered before or after Hayes spoke with Swain.<sup>136</sup> Swain, who did not understand why she was being searched, began to cry again.<sup>137</sup> She was told by Spinney that the video camera in the cell was turned off.<sup>138</sup> Spinney allegedly ordered Swain “to remove all of her clothing except for her bra. Spinney shook out each item as Swain took it off. Spinney then made Swain bend over and spread her buttocks. Swain was very upset and shaking uncontrollably the entire time.”<sup>139</sup> Nothing was found during the fifteen-minute procedure.<sup>140</sup>

The court also recounted Hayes’s version of the events. He stated that he ordered Swain’s strip search immediately upon his arrival at the booking desk, and, he believed, before he spoke with her.<sup>141</sup> Spinney had not been told what to look for, but assumed that she was looking for drugs because she was aware that marijuana had been found earlier at the scene.<sup>142</sup> Both Hayes and Spinney stated that they were unaware that the town of North Reading had a policy with regard to strip searches,<sup>143</sup> and Hayes testified that he ordered the strip searches “whenever narcotics were involved in the case.”<sup>144</sup> Having examined Milbury’s record during booking, Hayes had known that he had a history of drug convictions and was on probation.<sup>145</sup>

---

134. *Id.* In his testimony, Hayes stated that he only remained with Swain for about a minute and did not recall what was said. *Id.* at 3-4. Milbury, who was in another cell, stated that he heard Hayes talking to Swain and heard her crying and maintaining her innocence. *Id.* at 4.

135. *Id.* at 4.

136. *Id.* Spinney stated that the order came “almost immediately” after she brought Swain to the cell, rather than a “significant” time later. *Id.*

137. *Id.*

138. *Id.* Spinney did not recall discussing the camera with Swain. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* In addition to testifying that he ordered the search because of his practice concerning drug arrests, Hayes stated that he suspected Swain of carrying a concealed weapon, “although he acknowledge[d] that this was a generalized suspicion of narcotics suspects, rather than a suspicion based on any characteristics of Swain.” *Id.*

142. *Id.*

143. *Id.* at 5. While the town’s written policy stated that a strip search of an arrestee was warranted “only if the police have probable cause to believe the arrestee is concealing contraband or weapons on his body,” and the Municipal Police Institute’s policies (allegedly adhered to by North Reading) required “reasonable suspicion,” the town police chief testified that all arrestees were strip searched “in any arrest involving drugs.” *Id.* at 4, 5.

144. *Id.* at 5.

145. *Id.* at 4.

Milbury was not strip-searched.<sup>146</sup> Swain had no prior convictions.<sup>147</sup> The charges against Swain were later nol prossed.<sup>148</sup>

Swain's action was filed against Spinney, Hayes and the town of North Reading, and on defendants' motion for summary judgment the district court found no violation of her federal or state constitutional rights and that, in any event, the individual defendants were entitled to qualified immunity.<sup>149</sup> The town's motion was granted on the ground that the standards for municipal liability under 42 U.S.C. § 1983 had not been met.<sup>150</sup> On appeal, Swain argued that probable cause was necessary for the strip search of an arrestee.<sup>151</sup>

The First Circuit held that Swain's allegations had stated a sufficient claim against the individual defendants, and that "[a] strip and visual body cavity search of an arrestee must be justified, at the least, by a reasonable suspicion."<sup>152</sup> The court added that, although this standard was clearly established at the time of the search, it was not possible to resolve the immunity issue on summary judgment because of significant factual disputes.<sup>153</sup>

The court's discussion of the appropriate standard began with a quotation of *Robinson's* observation that "[i]n 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 is also a 'reasonable' search under that Amendment."<sup>154</sup> As a result, if an arrest is lawful an officer does not need any additional justification to perform a full body search of an arrestee.<sup>155</sup> The court also observed that, under *United States v. Edwards*,<sup>156</sup> a search incident to arrest need not occur at the arrest scene, but may later

---

146. *Id.*

147. *Id.*

148. *Id.* at 2.

149. *Id.* at 5.

150. *Id.* This aspect of the district court's ruling was affirmed on appeal. *Id.* at 11.

151. *Id.* at 5.

152. *Id.*

153. *See id.* at 5. The court stated that factual issues such as the timing of the search must be resolved by the trier of fact before it could be determined whether the defendants' conduct was objectively reasonable. *Id.* at 10. In addition, "further resolution of the facts [was] necessary to determine whether or not this case falls into the category of 'close cases' in which the police are accorded 'a fairly wide zone of protection.'" *Id.* (quoting *Roy v. Inhabitants of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994)).

154. *Id.* at 5 (quoting *United States v. Robinson*, 414 U.S. 218, 235 (1973)).

155. *Id.* at 5-6.

156. 415 U.S. 800 (1974).

be conducted upon the arrestee's arrival "at the place of detention."<sup>157</sup> It added, "[h]owever, *Robinson* did not hold that all possible searches of an arrestee's body are automatically permissible as a search incident to arrest. To the contrary, any such search must still be reasonable . . . ."<sup>158</sup> The court noted *Edwards*' observation that "[h]olding the Warrant Clause inapplicable to the circumstances present here does not leave law enforcement officials subject to no restraints. This type of police conduct 'must [still] be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.'"<sup>159</sup> Most significantly, the court observed that in *Robinson*, the Supreme Court had noted that the search involved "did not have 'extreme or patently abusive characteristics.'"<sup>160</sup> The First Circuit therefore observed that "'*Robinson* simply did not authorize' a strip and visual body cavity search."<sup>161</sup> Accordingly, such a search requires "independent analysis under the Fourth Amendment."<sup>162</sup>

The court then went on to discuss the approach of *Bell v. Wolfish*,<sup>163</sup> in which the Supreme Court permitted "a prison policy that required arraigned pre-trial detainees to 'expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution.'"<sup>164</sup> The First Circuit noted that in *Wolfish*, the Supreme Court had stated that the practice "instinctively [gave] the Court 'the most pause,'"<sup>165</sup> and its analysis required "a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."<sup>166</sup>

---

157. *Swain*, 117 F.3d at 6 (quoting *Edwards*, 415 U.S. at 803). In *Edwards*, the Court permitted the search of an arrestee's clothing at the stationhouse ten hours after he had been placed under arrest. *Edwards*, 415 U.S. at 803-08.

158. *Swain*, 117 F.3d at 6.

159. *Id.* (quoting *Edwards*, 415 U.S. at 808 n.9). The court added that later, in *Illinois v. Lafayette*, the Supreme Court explicitly stated that neither *Edwards* nor *Lafayette* addressed "the circumstances in which a strip search of an arrestee may or may not be appropriate." *Swain*, 117 F.3d at 6. See *Illinois v. Lafayette*, 462 U.S. 640, 646 n.2 (1983) (permitting the inventory search of an arrestee's shoulder bag).

160. *Id.* (quoting *United States v. Robinson*, 414 U.S. 218, 236 (1973)). In *Robinson*, the Court observed that "[w]hile thorough, the search 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*, 342 U.S. 165 (1952)." *Robinson*, 414 U.S. at 236.

161. *Swain*, 117 F.3d at 6 (quoting *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th Cir. 1991)).

162. *Id.*

163. 441 U.S. 520 (1979).

164. *Swain*, 117 F.3d at 6 (quoting *Wolfish*, 441 U.S. at 558).

165. *Id.* (quoting *Wolfish*, 441 U.S. at 559).

166. *Id.* (quoting *Wolfish*, 441 U.S. at 559).

In *Swain*, the court further observed that *Wolfish* did not “read out of the Constitution” the generally applicable requirement “that a search be justified as reasonable under the circumstances.”<sup>167</sup> Applying the “*Wolfish* balancing test” to the case before it, the court observed that it had judicially acknowledged that visual body cavity searches “impinge seriously upon the values that the Fourth Amendment was meant to protect.”<sup>168</sup> An arrestee is required “not only to strip naked in front of a stranger, but also to expose the most private areas of her body to others.”<sup>169</sup> “This is often . . . done while the person arrested is required to assume degrading and humiliating positions.”<sup>170</sup> The court noted that the First Circuit had previously described such interference with a person’s privacy as “severe if not gross,”<sup>171</sup> and “an offense to the dignity of the individual.”<sup>172</sup> The court also quoted the Seventh Circuit’s statement in *Mary Beth G. v. City of Chicago*,<sup>173</sup> discussed below,<sup>174</sup> where it had cited both the “demeaning” and “dehumanizing” characteristics of visual body cavity searches and the “degradation and submission” they entail.<sup>175</sup> *Wolfish*’s balancing approach also required that law enforcement’s legitimate needs be considered by the court, as was the imperative of institutional security in that case.<sup>176</sup> The First Circuit acknowledged that some other courts have held that “the need to discover and preserve concealed evidence of a crime” may justify a warrantless strip search.<sup>177</sup> In light of these concerns, the court held that a strip and visual body cavity search of an arrestee “must be justified by at least a reasonable suspicion that the arrestee is concealing contraband or weapons.”<sup>178</sup>

With regard to the allegations before it, viewing them in the light most favorable to the plaintiff, the court found that Swain brought a “trialworthy claim under 42 U.S.C. § 1983.”<sup>179</sup> The court stated that on the facts alleged

---

167. *Id.* (quoting *Weber v. Dell*, 804 F.2d 796, 800 (2d Cir. 1986), *cert denied sub nom.* *County of Monroe v. Weber*, 483 U.S. 1020 (1987)).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* (quoting *Arruda v. Fair*, 710 F.2d 886, 887 (1st Cir. 1983), *cert. denied*, 464 U.S. 999 (1983)).

172. *Id.* (quoting *Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir. 1996)).

173. 723 F.2d 1263 (7th Cir. 1983).

174. *See infra* notes 197-252 and accompanying text.

175. *Swain*, 117 F.3d at 6-7 (quoting *Mary Beth G.*, 723 F.2d at 1272 (internal quotation marks omitted)).

176. *Id.* at 7.

177. *Id.*

178. *Id.*

179. *Id.* at 8.

“there appears to be the distinct possibility that Officer Hayes ordered the strip search in retaliation for his failed interrogation of Swain in her cell, imposing sexual humiliation on her as a punishment for what he perceived as her non-cooperation.”<sup>180</sup> The court said that such an inference was raised by Hayes’s alleged anger after their conversation and by the timing of the search.<sup>181</sup> It then proceeded to discuss whether “an objective officer would have had a reasonable suspicion that Swain was concealing drugs or contraband on her person.”<sup>182</sup> The court stated that three factors reflected the inadequacy of any grounds for that conclusion. The first factor was the timing of the search, which was significant in several respects. The search was conducted after Swain had been alone in the cell for some time “and no one thought it important to search her before she angered Hayes.”<sup>183</sup> The court added, “[p]erhaps more importantly, she had been allowed to go to the bathroom by herself, unobserved, prior to being taken to her cell.”<sup>184</sup> This indicated “that no one thought she had secreted drugs in her private parts.”<sup>185</sup> If “there was any reason to believe such evidence still existed, further delay to obtain a warrant would not have significantly increased the risk of destruction,” especially in light of the observation by video camera in the cell.<sup>186</sup> Second, as there was no risk of contact with other prisoners, or that Swain would “be able to smuggle contraband into a secure environment,” the institutional security justification appeared to be absent.<sup>187</sup> As a third factor, the court cited the “differential treatment” by the police of Swain and Milbury.<sup>188</sup> The two had been stopped because of the latter’s shoplifting, and Hayes knew of Milbury’s probation and drug convictions.<sup>189</sup> Swain, in contrast, had no criminal record, and Milbury “had told the officers, including Hayes, that the marijuana was his.”<sup>190</sup> But “Milbury was not strip searched.”<sup>191</sup> “If there was an objective basis—apart from retaliation—for stripping Swain, it would have been objectively reasonable, and more so, to search Milbury as well.”<sup>192</sup> While the court did observe

---

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* (This was a rare reference to the warrant process in the opinion.)

187. *Id.*

188. *Id.*

189. *Id.* at 8-9.

190. *Id.* at 9.

191. *Id.*

192. *Id.*

that Swain had dropped a baggie of marijuana and Hayes had expressed the view that a strip search was appropriate in all narcotics cases,<sup>193</sup> the court added that the record did not reveal how much marijuana was involved or whether possession of that quantity constituted a misdemeanor or a felony under state law.<sup>194</sup> Nothing indicated that Swain was suspected of being a drug distributor, and her possession of “some unspecified amount of marijuana is not enough to overcome, as a matter of law, the [above] factors . . . under which a jury could find the search of Swain unreasonable.”<sup>195</sup> Consequently, Swain had “stated a claim for [the] violation of her Fourth Amendment right[s].”<sup>196</sup>

In 1983, in *Mary Beth G. v. City of Chicago*, the Seventh Circuit addressed a challenge to the city’s policy, existing from 1952 to 1980, which “required a strip search and a visual inspection of the body cavities of all women arrested and detained in the City lockups, regardless of the charges.”<sup>197</sup> No similar policy applied to men.<sup>198</sup> The four female plaintiffs had been arrested for misdemeanors and allegedly strip searched in city lockups “while awaiting the arrival of bail money.”<sup>199</sup> Three of the plaintiffs filed a class action lawsuit (the “*Jane Does*” case),<sup>200</sup> seeking to establish the unconstitutionality of the policy as applied to those “detained . . . for an offense no greater than a traffic violation or a misdemeanor”<sup>201</sup> on both Fourth Amendment and equal protection grounds, and requesting damages and injunctive relief.<sup>202</sup> Another, Mary Ann Tikalsky, had sued for false arrest and excessive force as well as unlawful search.<sup>203</sup> In *Jane Does*, the parties had entered into an agreement and stipulation before trial, settling the claims for injunctive relief but admitting no liability.<sup>204</sup> In fact, before that stipulation and agreement, the disclosure of the city’s policy “moved the Illinois legislature to amend the Illinois statute

---

193. *Id.* The court found Hayes’s statement inconsistent with the town’s policy and “belied by his failure to strip search Milbury.” *Id.*

194. *Id.*

195. *Id.*

196. *Id.* On plaintiff’s state law claim, the court concluded that because the Massachusetts Constitution provided at least the level of protection against strip and visual body cavity searches as did the Fourth Amendment, her state law claim against the individual defendants should be reinstated. *Id.* at 11-12.

197. *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1266 (7th Cir. 1983).

198. *Id.*

199. *Id.*

200. *Id.* at 1266, 1267 n.2. See *Jane Does v. City of Chicago*, No. 79 C 789, 1982 U.S. Dist. LEXIS 14417, at \*1 (N.D. Ill. Jan. 12, 1982).

201. *Mary Beth G.*, 723 F.2d at 1267 n.2.

202. *Id.* at 1266.

203. *Id.* at 1267.

204. *Id.* at 1266.

governing ‘Rights on Arrest’ to prohibit strip searches of persons arrested for traffic, regulatory, or misdemeanor offenses” without a reasonable belief that weapons or contraband is concealed on the arrestee’s person.<sup>205</sup> In *Jane Does*, the district court granted plaintiffs’ motion to sever the issues of liability and constitutionality, and plaintiffs moved for partial summary judgment, arguing that Chicago’s policy was unconstitutional on its face.<sup>206</sup> The district court agreed, finding it violative of the Fourth Amendment and the Equal Protection Clauses of the federal and Illinois constitutions.<sup>207</sup> The court ordered that “typical cases” be selected for trial on the issue of damages,<sup>208</sup> and it returned damage awards for Mary Beth G., Sharon N. and Hinda Hoffman.<sup>209</sup> The city appealed both the determination that the policy was unconstitutional and the damage awards.<sup>210</sup> In the civil rights action by Mary Ann Tikalsky, a jury trial resulted in the acquittal of the defendants of the charges of false arrest and use of excessive force, but the plaintiff’s claim of illegal search was successful and compensatory damages were awarded.<sup>211</sup>

While the court of appeals acknowledged that the “circumstances surrounding the arrests and detentions of each of the plaintiffs-appellees . . . are not identical,” each woman alleged that she had been subjected to Chicago’s strip search policy after a misdemeanor arrest.<sup>212</sup> Mary Beth G. and Sharon N. had been arrested because of outstanding parking tickets.<sup>213</sup> Hinda Hoffman was stopped for making an illegal left turn and arrested for failing to produce a driver’s license.<sup>214</sup> Mary Ann Tikalsky was arrested for disorderly conduct.<sup>215</sup> The court described Chicago’s policy as follows:

---

205. *Id.* at 1266 n.1.

206. *Id.* at 1266.

207. *Id.*

208. *Id.* The damages issue did not proceed as a class action but instead as individual trials, since the district court found that the proposed class did not meet the requirements under FED. R. CIV. P. 23 (b)(3). *Id.* at 1267 n.2.

209. *Id.* at 1266. Mary Beth G. and Sharon N. were awarded \$25,000, and Hinda Hoffman was awarded \$60,000. *Id.*

210. *Id.*

211. *Id.* at 1267. Mary Ann Tikalsky had initially been awarded \$30,000 against the city and an individual defendant. The district court granted judgment notwithstanding the verdict in favor of the individual defendant. While it then ordered a new trial against the city because of the jury instruction, the Court of Appeals reversed that judgment and ordered the verdict and award reinstated. *Tikalsky v. City of Chicago*, 687 F.2d 175, 182 (7th Cir. 1982). In *Mary Beth G.*, the city appealed the reinstated judgment. *Mary Beth G.*, 723 F.2d at 1267.

212. *Id.*

213. *Id.* at 1267 n.2.

214. *Id.*

215. *Id.* at 1267 n.2.

That policy, as described by the City, required each woman placed in the detention facilities of the Chicago Police Department and searched by female police personnel to:

- 1) lift her blouse or sweater and to unhook and lift her brassiere to allow a visual inspection of the breast area, to replace these articles of clothing and then
- 2) to pull up her skirt or dress or to lower her pants and pull down any undergarments, to squat two or three time facing the detention aide and to bend over at the waist to permit visual inspection of the vaginal and anal area.<sup>216</sup>

The policy was not applied to males.<sup>217</sup> Instead, males were thoroughly searched by hand and strip searched only if there was reason to believe that they had concealed weapons or contraband.<sup>218</sup>

The court began its analysis with the terms of the Fourth Amendment itself, with its guarantee that “[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.”<sup>219</sup> Viewing its task as the determination of whether the city’s policy was “unreasonable under established [F]ourth [A]mendment principles,”<sup>220</sup> the court began with the observation that “searches of the person are generally impermissible absent a search warrant.”<sup>221</sup> It characterized the city’s position as resting upon two “related” exceptions stemming from the arrest process: the first permitting “warrantless searches incident to custodial arrest;” and the second permitting “warrantless searches incident to the detention of persons lawfully arrested.”<sup>222</sup> With regard to the latter, the court quoted the Supreme Court’s observation in *Illinois v. Lafayette*<sup>223</sup> that “the factors justifying a search of the person and personal effects of an arrestee upon reaching a police station but prior to being placed in confinement are somewhat different from the factors justifying an immediate search at the time and place of arrest.”<sup>224</sup> It also observed that the *Lafayette* Court considered a search at the place of detention as part of

---

216. *Id.* at 1267.

217. *Id.* at 1268.

218. *Id.*

219. *Id.* (quoting U.S. CONST. amend. IV).

220. *Id.*

221. *Id.*

222. *Id.*

223. 462 U.S. 640 (1983).

224. *Mary Beth G.*, 723 F.2d at 1269 (quoting *Lafayette*, 462 U.S. at 645).

the arrest procedure, “since ‘that is no more than a continuation of the custody inherent in the arrest status.’”<sup>225</sup>

The Seventh Circuit thus separately addressed both what it termed a “search incident to arrest” at the scene and the search of an arrestee at the police station.<sup>226</sup> Examining the former, the court recalled that the exception to the warrant requirement arose “because of the need ‘to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape’ and the need to prevent the concealment or destruction of evidence.”<sup>227</sup> The Court discussed *Robinson’s* statement that an officer need not assess the likelihood of these possibilities in an individual case, “but may undertake a ‘full search’” of an arrestee.<sup>228</sup> It observed, “[i]t is worth noting, however, that in reaching this conclusion the Court was concerned mainly with *whether* a search calculated to disarm the suspect and to preserve evidence on the suspect’s person could be undertaken, not with the intensity of the particular search itself.”<sup>229</sup> The Court added that *Robinson* “did not suggest that a person validly arrested may be subject to *any* search the arresting officer feels is necessary.”<sup>230</sup> The court continued:

The majority [in *Robinson*] merely concluded that because each arrest brings with it certain factors . . . the application of a straightforward rule that always permits a concomitant “full search” incident to custodial arrest aimed toward the discovery of weapons and contraband would conclusively be presumed to be a reasonable one. . . . Under *Robinson*, a “full search” is the maximum intensity of the search allowable to achieve that end, unless specific reasons exist that justify intensifying the search. In characterizing what constitutes a full search incident to arrest, the *Robinson* Court quoted with approval language from *Terry* that describes a reasonable search incident to arrest as one involving “a relatively extensive exploration of the person[.]” . . . The majority [in *Robinson*] specifically noted that it would be willing to find unconstitutional a search that was “extreme or patently abusive.”<sup>231</sup>

---

225. *Id.* at 1270 (quoting *Lafayette*, 462 U.S. at 645).

226. *Id.* at 1268-69.

227. *Id.* at 1269 (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

228. *Id.*

229. *Id.* (emphasis in original).

230. *Id.* (emphasis in original).

231. *Id.* at 1269-70 (emphasis omitted) (internal citations omitted). With regard to the court’s last statement, the quoted language of *Robinson* (set forth earlier at note 160), appeared as follows: “[w]hile thorough, the search 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*, 342 U.S. 165 (1952).” *Robinson*, 414 U.S. at 236.

The court concluded that “the *Robinson* Court simply did not contemplate the significantly greater intrusion that occurred here.”<sup>232</sup>

The Seventh Circuit’s discussion of an exception to the warrant requirement when the search of an arrestee is delayed until the stationhouse brought it to a similar conclusion. It discussed *United States v. Edwards*,<sup>233</sup> in which the Supreme Court permitted the police to exchange, search and test the clothing of an arrestee for traces of destructible evidence after he had been in custody for ten hours,<sup>234</sup> and it also cited the Court’s discussion in *Illinois v. Lafayette*,<sup>235</sup> in which it had permitted the inventory search of an arrestee’s shoulder bag before incarceration.<sup>236</sup> The Seventh Circuit noted that in *Lafayette* the Supreme Court expressly stated, “[w]e were not addressing in *Edwards*, and do not discuss here, the circumstances in which a strip search of an arrestee may or may not be appropriate.”<sup>237</sup> The Seventh Circuit concluded:

Indeed, the focus in *Edwards*, as in *Robinson*, once again seems to have been on the permissible scope of searches incident to arrest; the Court accepted the proposition that the scope of the search at the stationhouse could be at least as broad as that at the time of the arrest, thus approving the search of items that were on the arrestee at the time of the arrest.<sup>238</sup>

In the court’s view, *Edwards* also reaffirmed “the controlling principle” that searches incident to arrest must be reasonable.<sup>239</sup> Examining that issue and applying the balancing test of *Wolfish*,<sup>240</sup> the court then characterized “strip searches involving the visual inspection of the anal and genital areas as ‘demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.’”<sup>241</sup> It continued, “[i]n short, we can think of few exercises of authority by the state that intrude on the citizen’s privacy and dignity as

---

232. *Id.* at 1271.

233. 415 U.S. 800 (1974).

234. *Edwards*, 415 U.S. at 800. The Court later said that it had “made clear” in *Edwards* that “the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street.” *Illinois v. Lafayette*, 462 U.S. 640, 645 (1983).

235. 462 U.S. 640 (1983).

236. *Lafayette*, 462 U.S. at 648.

237. *Id.* at 646 n.2. The court also found *Bell v. Wolfish* to be inapposite because of its institutional context. *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983).

238. *Mary Beth G.*, 723 F.2d at 1270.

239. *Id.*

240. *Bell v. Wolfish*, 441 U.S. 520 (1979). See *supra* notes 163-66 and accompanying text.

241. *Mary Beth G.*, 723 F.2d. at 1272 (quoting *Tinetti v. Wittke*, 620 F.2d 120 (7th Cir. 1980)).

severely as the visual anal and genital searches practiced here.”<sup>242</sup> Weighed against this intrusion was the governmental interest involved.<sup>243</sup> The city had asserted the need to maintain security in the lockup, and the need “was apparently felt to be so great that women misdemeanants were strip searched even when there was no reason to believe they were hiding weapons or contraband on their persons.”<sup>244</sup> The court found that the evidence belied these concerns.<sup>245</sup> The affidavits of lockup personnel, “which lack[ed] specificity,” indicated that “only a few items have been recovered from the body cavities of women arrested on minor charges over the years.”<sup>246</sup> The one analytical study introduced, which was conducted in 1965 and discussed the strip searches of 1800 women over a thirty-five day period, indicated that items were taken from the body cavities of women “charged with either prostitution (7 items), assault (1 item), or a narcotics violation (1 item).”<sup>247</sup> The court added that “[t]hese are the kinds of crimes, unlike traffic or other minor offenses, that might give rise to a reasonable belief that the woman arrestee was concealing an item in a body cavity.”<sup>248</sup> The court found that the evidence did not support the city’s assertion “that those dangers are created by women minor offenders entering the lockups for short periods while awaiting bail.”<sup>249</sup> Consequently, because of their insubstantial relationship to security needs, the searches alleged “[could] not be considered ‘reasonable.’”<sup>250</sup> With regard to the appropriate standard for the initiation of strip searches of arrestees, the court noted that

[t]he more intrusive the search, the closer governmental authorities must come to demonstrating probable cause for believing that the search will uncover the objects for which the search is being conducted. . . . [W]e agree with the district court in *Jane Does* that ensuring the security needs of the City by strip searching plaintiffs-appellees was unreasonable without a reasonable

---

242. *Id.* The court also cited the views of Justices Marshall and Stevens in their dissenting opinions in *Wolfish*: “see also [Bell v. Wolfish,] 441 U.S. at 576-77 . . . (Marshall, J., dissenting) (‘the body cavity searches of MCC inmates represent one of the most grievous offenses against personal dignity, and common decency’); 441 U.S. at 594, . . . (Stevens, J., dissenting) (‘the body-cavity search—clearly the greatest personal indignity—may be the least justifiable measure of all [the security practices at the institution].’).” *Id.*

243. *Mary Beth G.*, 723 F.2d at 1272.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 1272-73.

248. *Id.* at 1273.

249. *Id.*

250. *Id.*

suspicion by the authorities that either of the twin dangers of concealing weapons or contraband existed.<sup>251</sup>

The court also found that the city's policy violated the Equal Protection Clause.<sup>252</sup>

The Seventh Circuit's concern about the application of a blanket strip search policy to those arrested for minor crimes was paralleled by the later opinion of the Fifth Circuit in *Stewart v. Lubbock County*.<sup>253</sup> In terms narrower than those employed in the discussion by the Seventh Circuit, the *Stewart* court confined its focus to the strip searches of "minor offenders awaiting bond."<sup>254</sup> The Lubbock County jail's policy permitted the strip search of any arrestee without regard to individualized suspicion or the severity of the charge.<sup>255</sup> Arrestees for "misdemeanors punishable by fine only" were therefore included.<sup>256</sup> Lubbock County conducted about 1,000 strip searches per month "before arraignment and before the arrestee had an opportunity to arrange for bail."<sup>257</sup> The two plaintiffs on the consolidated appeal had sued under 42 U.S.C. § 1983 for alleged strip searches conducted after their respective arrests for public intoxication and issuing a bad check after a routine traffic stop.<sup>258</sup> The court relied upon the analysis in *Mary Beth G.* holding:

Because Lubbock County's strip search policy was applied to minor offenders awaiting bond when no reasonable suspicion existed that they as a category of offenders or individually might possess weapons or contraband, under the balancing test of *Wolfish* we find such searches unreasonable and the policy to be in violation of the Fourth Amendment.<sup>259</sup>

The Second Circuit adopted a similar policy with regard to strip searches of those arrested for minor offenses. A United States District Court recently observed that the circuit "has firmly held that strip searches of persons lawfully arrested for minor infractions (misdemeanors and violations) must be justified by an individualized reasonable suspicion of

---

251. *Id.* (internal citations omitted).

252. *Id.* at 1273-74. The city failed to demonstrate an "exceedingly persuasive justification" for its conclusion that a difference in gender "made it necessary to strip search only women . . . and unnecessary to search the body cavities of males, which can be and occasionally are used to conceal weapons or contraband." *Id.* at 1274.

253. 767 F.2d 153 (5th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986).

254. *Lubbock*, 767 F.2d at 156.

255. *Id.* at 154.

256. *Id.*

257. *Id.*

258. *Id.* at 154 n.1, 155 n.2.

259. *Id.* at 156-57.

concealed weapons or contraband.”<sup>260</sup> It also acknowledged that the Second Circuit has not “spoken directly to the appropriate test for the validity of a strip search incident to a felony arrest.”<sup>261</sup> The district court found it appropriate to apply the “particularized reasonable suspicion test” to a felony arrest as well.<sup>262</sup>

The Seventh Circuit’s discussion in *Mary Beth G. of Chicago’s* proffered analytical study, together with the court’s observation that there are “kinds of crimes . . . that may give rise to a reasonable belief that [a] woman arrestee was concealing an item in a body cavity,”<sup>263</sup> raises a basic question about the extent to which the inherent nature of the offense alleged might in itself be probative. The Tenth Circuit, which has also endorsed the view that reasonable suspicion is a necessary predicate for a strip search incident to arrest, has addressed this issue in connection with allegations surrounding an arrest for driving under the influence of drugs. In *Foote v. Spiegel*,<sup>264</sup> in the context of denying a defendant qualified immunity in a 42 U.S.C. § 1983 action, the court reviewed its policy.<sup>265</sup> It was alleged that police stopped Plaintiff Foote’s car because of a suspected alteration of the vehicle’s paper temporary registration permit, and because she had been driving slowly in the left lane.<sup>266</sup> While the officer’s suspicion concerning the registration proved to be groundless, his and an expert officer’s observations led to their belief that Foote had been driving under the influence of marijuana.<sup>267</sup> She was arrested, but was not placed in the general jail population at the stationhouse.<sup>268</sup> Foote alleged that she was strip searched at the request of one of the officers, and asserted that this was pursuant to a practice under which “[a]ll persons arrested on drug charges [were] subjected to strip searches.”<sup>269</sup> The police found no drugs.<sup>270</sup> Almost a year earlier, that same jail’s blanket policy of conducting such strip searches had been held unconstitutional by the Tenth Circuit in *Cottrell v.*

---

260. *Sarnicola v. County of Westchester*, 229 F. Supp. 2d 259, 269 (S.D.N.Y. 2002). See *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986), *cert. denied sub nom.*, *County of Monroe v. Weber*, 483 U.S. 1020 (applying the particularized reasonable suspicion test); *Kaufman v. Rivera*, No. 98-7888, 1999 WL 197199, at \*2 (2d Cir. Apr. 1, 1999).

261. *Sarnicola*, 229 F. Supp. 2d at 270.

262. *Id.* at 270-75.

263. *Mary Beth G.*, 723 F.2d at 1273.

264. 118 F.3d 1416 (10th Cir. 1997).

265. *Foote*, 118 F.3d at 1419.

266. *Id.* at 1419.

267. *Id.* at 1420.

268. *Id.* at 1420-21.

269. *Id.* at 1421.

270. *Id.*

*Kaysville City*.<sup>271</sup> Foote was released on bond shortly after the alleged search and the charges were dropped after the receipt of the negative results of a urine test.<sup>272</sup>

Denying the officer qualified immunity, the court stated that in May, 1994, it was clearly established that “reasonable suspicion that the arrestee has drugs or weapons hidden on his or her person” must exist before a strip search of “a person arrested for driving while under the influence of drugs but not placed in the general jail population.”<sup>273</sup> The court noted that, according to the facts alleged, the police had no particularized reasons to believe that Foote had drugs on her person.<sup>274</sup> She was not suspected of smuggling, and a thorough pat-down search revealed nothing.<sup>275</sup> The court stated that while it may be reasonable to believe that a person driving under the influence might have marijuana in a pocket container or elsewhere in the vehicle, Foote had “no opportunity to hide anything beneath her clothing.”<sup>276</sup> It continued, noting “the strip search could be justified only if it were reasonable to believe persons driving while under the influence of marijuana, who have no particular reason to expect they will be searched, routinely carry a personal stash in a body cavity. That belief is unreasonable.”<sup>277</sup>

In a 1987 unpublished opinion, the Fourth Circuit made an arguably different generalization. The court in *DeSantis v. Peregoy*<sup>278</sup> found that a strip search was permissible based upon the “sound determination that drug offenders are very likely to be carrying contraband.”<sup>279</sup> DeSantis had not been charged with personal drug use or driving under the influence, however. He had instead been misidentified and arrested along with thirty-one others as participants in an alleged “drug operation.”<sup>280</sup>

The leading Fourth Circuit case in the area, *Amaechi v. West*,<sup>281</sup> emphasizes the balancing of interests inherent in the determination of Fourth Amendment reasonableness, in the context of reviewing allegations

---

271. 994 F.2d 730, 734 (10th Cir. 1993).

272. *Foote*, 118 F.3d at 1421.

273. *Id.* at 1425.

274. *Id.*

275. *Id.* at 1425-26.

276. *Id.* at 1426.

277. *Id.* See also *Way v. County of Ventura*, 445 F.3d 1157, 1160-62 (9th Cir. 2006) (determining that a blanket policy authorizing strip searches of all alleged drug offenders upon booking is unconstitutional).

278. 1987 WL 37310 (4th Cir. May 5, 1987).

279. *DeSantis*, 1987 WL at \*1.

280. *Id.*

281. 237 F.3d 356 (4th Cir. 2001).

in a 42 U.S.C. § 1983 action of both a public strip search and the penetration of female genitalia by a male officer.<sup>282</sup> As before, upon the appeal of a denial of the defendant officer's motion for summary judgment based upon a claim of qualified immunity, the court "accept[ed]" and examined the following version of events asserted by the plaintiff: Lisa Amaechi resided with her husband and five young children in a townhouse in Dumfries, Virginia.<sup>283</sup> The children played music loudly, resulting in a neighbor's complaint to the police in August of 1997.<sup>284</sup> Officer Stephen Hargrave of the Dumfries Police Department responded to the complaint, told Amaechi to lower the volume, and she did so.<sup>285</sup> Officer Hargrave allegedly said that she would not be arrested unless another complaint about noise was received.<sup>286</sup> Amaechi believed that Hargrave had been impolite and complained to the Prince William County Police Department about the matter.<sup>287</sup> According to her assertions, two days later, without any additional complaints about noise, Hargrave obtained a misdemeanor arrest warrant charging Amaechi for the earlier violation of the Dumfries noise ordinance.<sup>288</sup> At 9:00 p.m. that evening, two other officers, Sergeant Bernard Pfluger and trainee Matthew West, arrived at the Amaechis' townhouse to execute the warrant.<sup>289</sup>

Amaechi's allegations concerning subsequent events, recited by the court, provided the basis for her constitutional claim: Amaechi stated that when the police knocked on the door, she was in her upstairs bathroom, nude, preparing for bed.<sup>290</sup> She covered herself with a housedress and accompanied her husband downstairs.<sup>291</sup> The housedress, made of light weight fabric, "had buttonholes all the way down the front."<sup>292</sup> All of the buttons "from immediately below the chest" were missing, however, "requiring Amaechi to gather the dress with her hand to keep it closed."<sup>293</sup> When the couple opened the door, Sergeant Pfluger told Ms. Amaechi that she was under arrest.<sup>294</sup> She cooperated fully, but when she was told that

---

282. *Amaechi*, 237 F.3d at 359.

283. *Id.* at 358-59.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* Amaechi did not call the Dumfries police because she believed that they would have been unresponsive. *Id.* at 359 n.4.

288. *Id.* at 359.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 359 n.7.

293. *Id.*

294. *Id.* at 359.

she was to be handcuffed, she “pointed out to the officers that she was completely naked under the dress and requested permission to get dressed because she would no longer be able to hold her dress closed once handcuffed.”<sup>295</sup> She was denied permission to do so.<sup>296</sup> When her hands were cuffed behind her back, her dress fell open below her chest.<sup>297</sup> Amaechi was then allegedly escorted by West out to the police car, walking past several other officers.<sup>298</sup> Amaechi stated that before she was permitted to enter the police car, West informed her that he would have to search her.<sup>299</sup> She protested that she was wearing no underwear, but West allegedly stated that the search was necessary.<sup>300</sup> According to Amaechi, West stood in front of her, “squeezed her hips, and inside her opened dress, ‘swiped’ one ungloved hand, palm up, across her bare vagina, at which time the tip of his finger slightly penetrated Amaechi’s genitals.”<sup>301</sup> She stated that she jumped back, exclaiming, “I told you I don’t have on any underwear,” and that West did not respond.<sup>302</sup> West allegedly placed his hand upon her buttocks, “knead[ing]” them.<sup>303</sup> West then permitted her to enter the car.<sup>304</sup> The search occurred in front of Amaechi’s townhouse, “where the other police officers, Amaechi’s husband, her five children, and all of her neighbors had the opportunity to observe.”<sup>305</sup> Amaechi was never convicted of the misdemeanor, and her dispute with the neighbor was resolved through mediation.<sup>306</sup>

Amaechi sued West, Pfluger and the town of Dumfries under 42 U.S.C. § 1983 and state law, alleging, inter alia, the unconstitutionality of the search and an assault and battery on West’s part.<sup>307</sup> The district court granted summary judgment on the counts concerning Pfluger and the town,<sup>308</sup> and denied West’s motion for summary judgment based upon a

---

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* at 359-60.

305. *Id.* at 360.

306. *Id.* at 359 n.5.

307. *Id.* at 360, 360 n.9. Counts alleging the intentional infliction of emotional distress by West and the unconstitutionality of the town’s policy permitting arrest for violation of the noise ordinance were voluntarily withdrawn. *Id.* at 360.

308. *Id.* Amaechi did not cross-appeal these rulings. *Id.* at 360 n.8.

defense of qualified immunity.<sup>309</sup> On appeal, the court addressed “whether Amaechi’s complaint has alleged a deprivation of her constitutional right to be free from an unreasonable search and . . . whether that right was clearly established at the time of her arrest.”<sup>310</sup>

With regard to the former issue, the court was less than receptive to West’s argument that *Robinson*’s policy permitting a search of an arrestee “includes the right to briefly ‘swipe’ the arrestee’s outer genitalia and slightly penetrate the genitalia.”<sup>311</sup>

*Robinson* did not, nor could it, rewrite the Fourth Amendment to exclude the explicit requirement that no search be unreasonable. Nor did *Robinson* hold that all searches incident to arrest, no matter how invasive, are inherently reasonable. To the contrary, since *Robinson*, the Supreme Court has continued to emphasize that Fourth Amendment jurisprudence prohibits unreasonable searches incident to arrest . . . . Therefore, to determine whether West’s search of Amaechi is constitutional, it is not enough to conclude that it was a search incident to a valid arrest. Rather, we must determine whether the search was unreasonable.<sup>312</sup>

The court turned to the balancing approach of *Bell v. Wolfish*, concluding that the highly intrusive search that was alleged had no apparent justification.<sup>313</sup> It noted that Amaechi had peacefully submitted to an arrest for a two-day-old misdemeanor noise violation, and she had advised the police that she was wearing no underclothes.<sup>314</sup> The court stated that instead of granting her request to dress before being handcuffed, “the officers secured [her] hands behind her back and made her walk to the car and stand in the street with her dress open and lower body exposed.”<sup>315</sup> West’s alleged subsequent “touching and penetrating [of] Amaechi’s genitalia and kneading [of] her buttocks with his ungloved hand” was likewise “subject to viewing by Amaechi’s family, the public, and the other officers.”<sup>316</sup> No perceived threat to the officers’ safety was offered as justification for the manner of the search, and “[i]n fact, West could not rely upon any type of security justification . . . in that the dress was thin and was

---

309. *Id.* at 360.

310. *Id.*

311. *Id.* at 361.

312. *Id.*

313. *Id.* See *supra* notes 163-66 and accompanying text (explaining the *Wolfish* balancing approach).

314. *Id.*

315. *Id.* at 361.

316. *Id.*

almost completely open, making any weapons immediately apparent.”<sup>317</sup> There was no possibility that Amaechi would destroy or conceal evidence relating to the noise misdemeanor, and “the invasiveness of Amaechi’s search far outweighed any potential justification for the scope, manner, and place under which it was conducted.”<sup>318</sup> Consequently, the court found the alleged search unreasonable and unconstitutional.<sup>319</sup> Examining the question of “whether Amaechi’s right to be free from this sexually invasive search” was clearly established, the court concluded that it was.<sup>320</sup> It observed that it previously “recognized the fact, first established in *Bell*, that the intrusive, highly degrading nature of a strip search demands a reason for conducting such a search that counterbalances the invasion of personal rights,”<sup>321</sup> adding that “[i]t is not a new rule of law that searches involving the public exposure, touching, and penetration of an arrestee’s genitalia are subject to limitations under the Fourth Amendment.”<sup>322</sup>

The Eighth Circuit has joined those which have afforded relief to an arrestee who has been strip searched without a sufficient individualized factual basis, without judicial discussion of the Fourth Amendment’s preference for warrants. In *Jones v. Edwards*,<sup>323</sup> the court concluded that 42 U.S.C. § 1983 plaintiff Marlin Jones’s motion for a judgment notwithstanding the verdict should have been granted.<sup>324</sup> Jones had been arrested for refusing to sign a summons and complaint concerning a leash law violation.<sup>325</sup> At the time of his early morning arrest at the door of his home, he became “vulgar and abusive” to the arresting officers and was accompanied upstairs “for ‘security reasons’ while he dressed and went to the bathroom.”<sup>326</sup> Jones continued his verbal abuse on the way to the jail and during booking, and “[w]itnesses agreed that although Jones was angry, he made no attempt to abuse any officer physically.”<sup>327</sup> According to his allegations, Jones was strip searched “[a]s a final step in the booking

---

317. *Id.* at 362.

318. *Id.*

319. *Id.*

320. *Id.* at 362-65.

321. *Id.* at 364. See also *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981), *cert. denied sub nom. Clements v. Logan*, 455 U.S. 942 (1982).

322. *Amaechi*, 237 F.3d at 364.

323. *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985).

324. *Id.* at 741-42.

325. *Id.* at 740. When an animal control officer observed Jones’s unleashed dog and recognized it from earlier violations, Jones allegedly refused to sign the complaint, verbally abused the control officer and a police officer, and “slammed the door . . . after threatening them with suit.” *Id.*

326. *Id.*

327. *Id.*

procedure.”<sup>328</sup> Then, while nude, he was required to display his anal and genital areas to a jail official in an alcove of the hallway.<sup>329</sup> He was then allowed to dress and wait in a minimum security cell until a friend posted bail.<sup>330</sup>

Applying the balancing approach of *Bell v. Wolfish*, the court found the district court’s denial of Jones’s motion to have been in error.<sup>331</sup> It noted that Jones’s offense was “hardly the sort of crime to inspire officers with the fear of introducing weapons or contraband into the holding cell” and that the officers “had no other reason to suspect Jones was harboring these items.”<sup>332</sup> The police had been with him “every moment after they read him the warrant . . . thereby eliminating any chance that he might have secreted a weapon on his person.”<sup>333</sup> While Jones had been uncooperative, he was not charged with any offense “which might justify a more intrusive search,”<sup>334</sup> and the court observed that “neither the officers nor the jailers attempted a less intrusive pat-down search, which would have detected the proscribed items they sought without infringing Jones’s constitutional protections.”<sup>335</sup> As to the magnitude of the invasion of Jones’s rights, the court found it to be “broad” in scope:

Jones was nude and forced to display himself to the visual inspection of a stranger. Although the manner in which the search was conducted was not brutal, it was intrusive, depersonalizing, and distasteful for Jones to be peremptorily subjected to this kind of search by a stranger in the alcove of the hallway. Finally, although the location of the search did not expose Jones to the scrutiny of other jailers or passersby, this degree of privacy seems to have been entirely fortuitous.<sup>336</sup>

The court also stated that security concerns cannot justify the “blanket deprivation of rights of the kind incurred here.”<sup>337</sup>

---

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* at 741.

332. *Id.*

333. *Id.*

334. *Id.* at 741-42.

335. *Id.* at 742.

336. *Id.*

337. *Id.* It also found that, as “the [F]ourth [A]mendment’s protection against the kind of search of which Jones complains was well-established at the time his search took place[,]” defendants were not protected by qualified immunity. *Id.* at 742 n.4. The court declined to allow an award of punitive damages, since it found “no suggestion of evil motive or intent nor of reckless or callous indifferences” to federally protected rights. *Id.* at 742.

There can be little doubt that those circuits which have employed a requirement of particularized and reasonable suspicion in their standard for assessing the legality of a strip search incident to arrest have done so with the view that they have augmented the rigor of *Robinson's* approach. The methodology of the reasoning in these opinions has been similar. As the intrusiveness of a search extends beyond that which was contemplated in *Robinson*, constitutional reasonableness requires more in the way of facts bearing upon the existence of concealed evidence or weapons. *Robinson's* celebrated "bright line" approach (its green light to search triggered by the fact of a lawful arrest alone) has been viewed as insufficient to protect the universally acknowledged interests in privacy, bodily integrity and personal dignity, which are implicated when strip searches are undertaken. The heightening of the necessary factual predicate for these warrantless searches has been regarded as the appropriate judicial response.

### III. A CONTRARY VIEW: THE NINTH CIRCUIT'S APPROACH

One circuit, however, has found this trend to be insufficient in meeting the demands of the Fourth Amendment. The Ninth Circuit called into question a basic assumption of the foregoing cases, doubting that the permissibility of a visual body cavity search incident to arrest may be adequately addressed without reference to the warrant process. The matter was raised in 1991 in *Fuller v. M.G. Jewelry*.<sup>338</sup>

In *Fuller*, Annise Fuller and her daughter Roshaun brought a 42 U.S.C. § 1983 action seeking damages for their arrests and alleged subsequent strip searches following the disappearance of a ring from the M.G. Jewelry store.<sup>339</sup> Their allegations were as follows: In February 1987, plaintiffs and a friend had examined the ring at the store, and after their departure a store employee noticed it was missing and believed that they had taken the ring.<sup>340</sup> The Fullers had left the store, continued shopping and returned to the area to eat.<sup>341</sup> The employee approached them outside of the store, an altercation occurred, and a police investigation resulted in the arrest of the Fullers for grand theft.<sup>342</sup> During the officers' investigation, the women and their companion were patted down, a restaurant and a restroom Annise

---

338. 950 F.2d 1437 (9th Cir. 1991).

339. *Fuller*, 950 F.2d at 1439-40.

340. *Id.* at 1439.

341. *Id.*

342. *Id.* at 1436-40.

had entered were thoroughly searched, and witnesses were interviewed.<sup>343</sup> The officers did not find a ring.<sup>344</sup>

After the Fullers were transported to the Los Angeles Police Department (LAPD) central station, they were allegedly subjected to a strip search by female Officer Barham.<sup>345</sup> Plaintiffs stated that Officer Barham took each into a bathroom, had her undress, searched her clothing, and visually inspected her vagina and rectum.<sup>346</sup> Roshaun Fuller also stated, contrary to the officer's testimony, that she was required to remove a sanitary napkin for inspection.<sup>347</sup> A toilet was inspected after Roshaun had used it, and Annise was taken to a hospital for an x-ray. No stolen item, drug or contraband was discovered.<sup>348</sup> A police department policy had then required strip and body cavity searches of all felony arrestees, and that blanket policy was subsequently invalidated by the Ninth Circuit before its opinion in *Fuller*.<sup>349</sup> A second strip search of the Fullers was also allegedly conducted at the women's jail where they were booked, but as a result of a settlement the legality of that search did not arise as an issue before the *Fuller* court.<sup>350</sup>

Fuller filed a civil rights action against the city, the county, the store, its employee, and the police officers, challenging the legality of both the arrests and the strip searches under the Fourth and Fourteenth Amendments.<sup>351</sup> Before trial, the district court granted the defendants' motion for summary judgment and dismissed the action on the merits.<sup>352</sup> The court found that the officers "had reasonable cause to arrest plaintiffs" and "reasonable cause or suspicion to justify a full body cavity search incident to arrest and booking."<sup>353</sup> The Ninth Circuit concluded that the district court properly granted summary judgment in favor of the defendants on the issue of the warrantless arrest.<sup>354</sup> The officers adequately investigated the

---

343. *Id.*

344. *Id.* at 1439-40.

345. *Id.* at 1440.

346. *Id.*

347. *Id.* at 1440 n.1.

348. *Id.* at 1440.

349. *Id.* See *Kennedy v. L.A. Police Dep't*, 901 F.2d 702, 705 (9th Cir. 1989) (as amended) (involving the city of Los Angeles's blanket policy for body cavity searches of arrestees).

350. *Fuller*, 950 F.2d at 1440 n.3.

351. *Id.* at 1440.

352. *Id.*

353. *Id.* at 1440. The district court also found that, even if the search had been illegal, the officers were entitled to qualified immunity because its illegality was not clearly established at the time. *Id.* It added that the city had incurred no liability because the Fullers' rights had not been violated. *Id.* at 1440-41. The action against the private party defendants were dismissed. *Id.* at 1441.

354. *Id.* at 1442.

allegations at the scene, and could have reasonably believed that there was probable cause to arrest the Fullers.<sup>355</sup>

With regard to the alleged strip searches, defendants argued “that the searches were legal because they were conducted pursuant to a lawful arrest, and were justified by the officer’s individualized suspicion that the Fullers were harboring contraband—that is, a stolen ring.”<sup>356</sup> The court recognized that this asserted justification was quite independent of the need for institutional jail security involved in *Bell v. Wolfish* and its own earlier examination of the LAPD’s blanket strip search policy.<sup>357</sup> In detail, it proceeded to examine the implications of the defendants’ proffered justifications for the alleged warrantless strip searches incident to arrest.

The court stated at the outset that “[t]he intrusiveness of a body cavity search cannot be overstated.”<sup>358</sup> It noted that it had previously characterized such searches as “dehumanizing and humiliating”<sup>359</sup> and recalled Justice Marshall’s view, dissenting in *Bell v. Wolfish*, that “visual body cavity searches ‘represent one of the most grievous offenses against personal dignity and common decency.’”<sup>360</sup> The court separately considered two justifications which it viewed as offerings by the defendants to sustain the reasonableness of the alleged searches. As characterized by the court, the first asserted justification was “that the inspection was authorized as a search incident to arrest.”<sup>361</sup> A second and seemingly distinct proposed justification was “that the search was justified by the officer’s ‘individual suspicion’ that the arrestees were hiding the missing ring in a body cavity.”<sup>362</sup>

Turning to the language of *Robinson* in which the Supreme Court noted that “the scope of a search incident to arrest includes a ‘full search of the person,’”<sup>363</sup> the court addressed the defendants’ argument that, under that policy, “the body cavity search of the Fullers, conducted pursuant to lawful arrest to discover a missing ring, amounted to a ‘full search’ that was both reasonable and lawful.”<sup>364</sup> The court had earlier “rejected this very

---

355. *Id.* at 1444-45.

356. *Id.* at 1445.

357. *Id.* at 1445-46. See *Kennedy v. L.A. Police Dep’t*, 901 F.2d 702 (9th Cir. 1989) (as amended) (discussing the constitutionality of the city of Los Angeles’ blanket policy).

358. *Fuller*, 950 F.2d at 1445 (quoting *Kennedy*, 901 F.2d at 711).

359. *Id.* (quoting *Kennedy*, 901 F.2d at 711).

360. *Id.* (quoting *Bell v. Wolfish*, 441 U.S. 520, 576-77 (1977) (Marshall, J., dissenting)).

361. *Id.* at 1446 (citing *United States v. Robinson*, 414 U.S. 218, 235 (1973)).

362. *Id.*

363. *Id.* (quoting *Robinson*, 414 U.S. at 218).

364. *Id.*

argument”<sup>365</sup> in *Giles v. Ackerman*,<sup>366</sup> holding in that case—involving a misdemeanor arrest—“that the ‘full search’ authorized by *Robinson* was limited to a pat-down and an examination of the arrestee’s pockets, and did not extend to ‘a strip search or bodily intrusion.’”<sup>367</sup> The court observed in *Fuller* that the distinction between a misdemeanor and a felony arrest was inconsequential<sup>368</sup> and that *Robinson* “simply did not authorize the kind of search at issue in this case.”<sup>369</sup>

With regard to a strip and visual body cavity search based upon the existence of reasonable suspicion, the Ninth Circuit emphasized that it had acknowledged its appropriateness only in the context of the institutional security concerns of a jail environment. In the case before it,

[a]ppellees never contended that the search of the Fullers was necessary to maintain jail security. . . . Instead, Appellees maintain that Officer Barham conducted the body cavity searches “in order to discover and seize the fruits or evidence of crime”— that is, the missing ring. Appellees have offered no evidence that the ring itself posed any threat to the safety of other detainees, or to the security of the jail.

Moreover, there is no evidence that the Fullers were ever even incarcerated with the general jail population while being detained at the LAPD central station.<sup>370</sup>

As a result, the rationales of both *Bell v. Wolfish* and Ninth Circuit precedents were inapplicable to the case, and the court declined “to extend the reasonable suspicion standard to body cavity searches for ordinary stolen property.”<sup>371</sup>

The court found that such an extension would contravene “basic [F]ourth [A]mendment principles.”<sup>372</sup> The court cited *Schmerber v. California*,<sup>373</sup> in which, at the direction of the police, a blood sample had been drawn by a physician over the objection of the donor, who had been arrested for driving under the influence of intoxicating liquor.<sup>374</sup> The Supreme Court there held that requiring the arrestee to submit to the

---

365. *Id.*

366. 746 F.2d 614 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985).

367. *Fuller*, 950 F.2d at 1446 (quoting *Giles*, 746 F.2d at 616).

368. *Id.*

369. *Id.* (citing *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983)).

370. *Id.* at 1447-48 (internal citations omitted).

371. *Id.* at 1448.

372. *Id.*

373. 384 U.S. 757 (1966).

374. *Schmerber*, 384 U.S. at 758.

extraction did not violate the Fourth Amendment, since the process was predicated on probable cause and “the delay necessary to obtain a warrant, under the circumstances, threatened the ‘destruction of evidence’”<sup>375</sup> through the body’s elimination of alcohol from the blood.<sup>376</sup> In *Fuller*, the Ninth Circuit viewed *Schmerber* as holding that, under those circumstances, “in order for the police to draw blood . . . there must be, at the least, probable cause to believe that the blood test will reveal the presence of alcohol.”<sup>377</sup> Observing that both *Schmerber* and the *Fullers* were lawfully in custody when the searches were conducted, the court continued:

In our view, *Schmerber* governs all searches that invade the interior of the body whether by a needle that punctures the skin or a visual intrusion into a body cavity. “The interests in human dignity and privacy” invaded when a public official peers inside a person’s body cavity are at least as great as those invaded by a needle piercing the skin. Therefore, a body cavity inspection cannot be justified by a lesser standard than that applied in *Schmerber* for a blood test.<sup>378</sup>

The court acknowledged that in 1975 the First Circuit had held in *United States v. Klein*<sup>379</sup> that the body cavity search of an arrestee accused of cocaine distribution “was not governed by *Schmerber* because there was ‘no piercing or probing of Klein’s skin, nor forced entry beyond the surface of his body.’”<sup>380</sup> It nevertheless declined to restrict *Schmerber* “to cases in which the skin is pierced or entry is forced.”<sup>381</sup>

The court then added that *Schmerber* had made it clear that, had it not been for the exigent circumstance of the arrestee’s natural elimination of blood alcohol, a warrant would have been required.<sup>382</sup> The court concluded in *Fuller* that a warrant was necessary before the initiation of a body cavity search.<sup>383</sup> Based upon the allegations before it, it stated that no exigent circumstances existed for the failure of the police to seek a warrant.<sup>384</sup> “There was no risk that the ring, if hidden in a body cavity, would have been discarded or destroyed[,]” for the custodial setting easily permitted the

---

375. *Id.* at 770 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)).

376. *Id.* at 770-71.

377. *Fuller*, 950 F.2d at 1448.

378. *Id.* at 1449.

379. 522 F.2d 296 (1st Cir. 1975).

380. *Fuller*, 950 F.2d 1449 n.11 (quoting *Klein*, 522 F.2d at 300).

381. *Id.*

382. *Id.* at 1449-50.

383. *Id.* at 1450, 1452.

384. *Id.* at 1450.

police to keep the Fullers under observation while a warrant was sought.<sup>385</sup> The ring was also unlikely to present a health problem to a person secreting it within her body.<sup>386</sup> As the failure to obtain the warrant was unexcused, the alleged body cavity searches were unconstitutional.<sup>387</sup>

It is, of course, clear that *Fuller* discusses only those searches which visually intrude into the body, leaving unaddressed the issue of strip searches which solely involve the examination of the body's outer surfaces. Nevertheless, the court's insistence upon the involvement of a magistrate is a striking contrast to the prevalent trend among the circuits.

#### IV. A PERSPECTIVE

To the extent that the courts of appeal have been sound in their conclusion that the intrusiveness of a strip search incident to arrest extends beyond that which was contemplated and authorized in *Robinson*, the Fourth Amendment's preference for the use of warrants requires that such searches be separately evaluated as potential exceptions to the warrant requirement. Such discussion, conspicuously absent from current discourse,<sup>388</sup> must necessarily include an examination of the role that a

385. *Id.*

386. *Id.*

387. *Id.* The court found that the district court was correct in finding that Officer Barham was entitled to qualified immunity with respect to the searches, since it did "not believe that a reasonable police officer would have necessarily understood at the time . . . that the searches violated the Fullers' Fourth Amendment rights." *Id.* at 1451. With regard to the city's liability, it remanded the case for a determination of whether the searches were conducted in accordance with LAPD policy. *Id.* at 1452.

In *Fuller*, the court noted that similar constitutional standards had been imposed by the Supreme Courts of Hawaii and Louisiana. *Id.* at 1450 n.12. See, e.g., *State v. Clark*, 654 P.2d 355, 359-62 (Haw. 1982) (determining that the warrantless physical vaginal search violated both state and federal constitutions); *State v. Fontenot*, 383 So. 2d 365, 367-68 (La. 1980) (finding a warrantless physical vaginal search violated Fourth Amendment). Since *Fuller*, the New York Court of Appeals has reached a similar conclusion. See *People v. More*, 764 N.E.2d 967, 969-70 (N.Y. 2002) (indicating that a warrantless visual rectal search and removal of item violated Fourth Amendment). See also *Commonwealth v. Gilmore*, 498 S.E.2d 464, 467-71 (Va. 1998) (holding that a physical vaginal search violated Fourth Amendment).

388. The suggestion that the warrant requirement may be applicable to strip searches is not a new one. In 1980, addressing both the broad issue and developments in Illinois which later culminated in *Mary Beth G.*, Paul R. Shuldiner argued that warrants are required under the Fourth Amendment and that state legislatures should also address the matter. See Paul R. Shuldiner, *Visual Rape: A Look at the Dubious Legality of Strip Searches*, 13 J. MARSHALL L. REV. 273, 276-280, 304-07 (1980). In 1975, the Model Code of Pre-Arrestment Procedure contemplated the use of the warrant process for body cavity searches in the following language:

Search of Body Cavities. Search of an arrested individual's blood stream, body cavities, and subcutaneous tissues may be conducted as incidental to an arrest only if there is a strong probability that it will disclose things subject to seizure and related to the offense for which the individual was arrested, and if it reasonably appears that the delay consequent upon procurement of a search warrant would probably result in the disappearance or destruction of the objects of the search, and that the search is

magistrate might be expected to play in this sensitive area of the law, the circumstances which have had a bearing upon whether the Supreme Court has been prepared to forego the use of a warrant, and the consequences of the exceedingly troublesome privacy implications of the strip searches themselves.

The Supreme Court's "longstanding understanding of the relationship between the two Clauses of the Fourth Amendment,"<sup>389</sup> has reflected itself in the principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject to only a few specifically established and well delineated exceptions."<sup>390</sup> While those exceptions are arguably more than the "few" contemplated by the Court when this description of the warrant requirement was reiterated in *Thompson v. Louisiana*,<sup>391</sup> this characterization of Fourth Amendment methodology remains sound. Exceptions to the warrant requirement must be both "specifically established" and "well delineated."<sup>392</sup> Moreover, in the instant context, the benefits of the constitutional requirement that an impartial judicial determination be interposed between the police and the subject of a search are especially strong.

The Supreme Court's emphasis upon the warrant requirement's goals of judicial objectivity and deliberative decision-making has been repeatedly reaffirmed.<sup>393</sup> "The right of the people to be secure in their persons" is the

---

otherwise reasonable under the circumstances of the case, including the seriousness of the offense and the nature of the physical invasion of the individual's person.

MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 230.3(2) (emphasis added). A search of "the surface of [an arrestee's] body" was authorized without regard to these factors. *Id.* § 230.3(1).

Other commentators have generally focused instead upon the desirability of adopting particularizing standards for warrantless strip searches. See Gabriel M. Helmer, Note, *Strip Search and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U. L. REV. 239, 240 (2001); William J. Simonitsch, Comment, *Visual Body Cavity Searches Incident to Arrest: Validity Under the Fourth Amendment*, 54 U. MIAMI L. REV. 665, 687-88 (2000) (arguing for a standard of probable cause).

389. *Thompson v. Louisiana*, 469 U.S. 17, 20 (1984). The Fourth Amendment states:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized.

U.S. CONST. amend. IV.

390. *Thompson*, 469 U.S. at 19-20 (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

391. 469 U.S. 17 (1984). Justice Scalia has stated that, in his view, by 1985 "the 'warrant requirement' had become so riddled with exceptions that it was basically unrecognizable." *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring).

392. *Thompson*, 469 U.S. at 410.

393. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 622 (1989) ("A warrant . . . provides the detached scrutiny of a neutral magistrate, and thus ensures an objective

first enumerated concern of the Amendment. In the context of a search of the person, the value of objectivity is reinforced in several ways. As with all searches, the judicial role involves review of the sufficiency of the facts to determine if an intrusion is justified by probable cause. With regard to a search of the person, the confrontational elements inherent in a face-to-face encounter between a potential search subject and the police are absent. In connection with an arrest, at an early date the Court expressed reservations about the judgment of “officers while acting under the excitement that attends the capture of persons accused of crime.”<sup>394</sup> Removed from this process, the magistrate is in a position to gauge the basis for the search, and the issuance of a warrant would convey an assurance to the subject of a strip search that the intrusive procedure was authorized and is not the “random or arbitrary act” of a governmental agent.<sup>395</sup> This is, in itself, an “essential purpose” of the warrant requirement.<sup>396</sup> Allegations and perceptions of retributive, racial, or other invidious motivations which can accompany strip searches may thus also be addressed in part by the process.<sup>397</sup>

The magistrate’s traditional role in determining the reasonable scope and manner of a search would have a tremendous impact in this area. The assertion of the police matron in *Swain* that she had not been told what to look for but had made assumptions about the object of the search<sup>398</sup> would not have been possible under a valid warrant. The Fourth Amendment’s requirement that searches be reasonable is as undermined by broad policies permitting the inspection of all intimate bodily areas, without tailoring the search to the items sought, as it has been by blanket policies authorizing the initiation of strip searches for all arrestees without regard to particularized facts. Overbroad, clumsy directives simply cannot suffice under the Fourth Amendment.

In addition to the need for an objective determination of the authorized scope of a strip search, the value of a judicial determination of the manner in which a search may be executed cannot be overstated. This is a problem that asserts itself in search after search, extending well beyond the stark

---

determination whether an intrusion is justified in any given case.”); *Johnson v. United States*, 333 U.S. 10, 14 (1948) (“Any assumption that evidence sufficient to support a magistrate’s disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people’s homes secure only in the discretion of police officers.”); *Groh v. Ramirez*, 540 U.S. 551, 558-59 (2004) (“We are not dealing with formalities.”) (quoting *McDonald v. United States*, 335 U.S. 451, 455 (1948)).

394. *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932).

395. *Skinner*, 489 U.S. at 621-22.

396. *Id.*

397. A perception of racial discrimination in the administration of strip searches has been forcefully expressed in commentary. See Gibeaut, *supra* note 5, at 46-47.

398. See *supra* note 141 and accompanying text.

allegations presented in *Evans* to the more common issues of locale, overall privacy, officer gender and sanitation. (One recalls the court's reference in *Amaechi* to the male officer's "ungloved hand" which was alleged to have been used to penetrate the female arrestee's genitalia.<sup>399</sup> Was this based upon its concern for hygiene or the exacerbation of the search's sexual intrusiveness?) Even if courts may not now be prepared to address the question of clinical requirements for the implementation of a strip search as a general issue of law,<sup>400</sup> it would be most appropriate for a magistrate to consider whether a particular contemplated search would be reasonable without its execution by trained personnel under specific sanitary conditions. The judicial imposition of objective clinical requirements may also have some ameliorative effect upon an arrestee's perception of the procedure's intrusiveness<sup>401</sup> a strong factor in the balancing of interests central to a determination of Fourth Amendment reasonableness.

Beyond a discussion of the benefits of judicial participation in the authorization process, it, of course, remains to be seen whether countervailing considerations should permit strip searches to be undertaken without a warrant. An unfortunate consequence of the courts' examination of warrantless strip searches incident to arrest as an adjunct of *Robinson's* concerns has been an occasional hide-bound focus upon *Robinson's* dual goals as seemingly inseparable.<sup>402</sup> Insofar as a strip search incident to arrest should be viewed as a distinct intrusion beyond *Robinson's* authorization, each of *Robinson's* concerns (the discovery of weapons which may be used against an officer and the prevention of the destruction of evidence) should be examined separately. These independent analyses yield contrasting results.

The discovery and neutralization of weapons which may be used against the police is so firmly established as an imperative justifying several exceptions to the warrant requirement that its importance has virtually become a postulate of Fourth Amendment law. In the absence of an arrest,

---

399. See *supra* note 316 and accompanying text.

400. For a rare holding that visual vaginal searches by nonmedical personnel violated an arrestee's due process rights, see *United States ex rel. Guy v. McCauley*, 385 F. Supp. 193, 193 (1974). The arrestee "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." *Id.* at 198. The court went on to generalize beyond the arrestee's circumstances: "The magnitude for the intrusion to the individual's integrity and dignity becomes greater if the search is perpetrated by a police officer rather than a doctor or nurse." *Id.*

401. See *id.* at 199.

402. This tendency has not been universal. See *Evans v. Stephens*, 407 F.3d 1272, 1279 (11th Cir. 2005).

*Terry v. Ohio*, *Michigan v. Long*,<sup>403</sup> and their progeny have of course entitled police to search expeditiously and incrementally, whether by pat-down or vehicular sweep, when reasonable inferences from specific, particularized facts indicate the presence of such a potential threat. *Robinson*'s conclusion that the threat from weapons is intensified by the more extensive contact inherent in an arrest is sound, and the inappropriateness of the warrant process in addressing the matter continues to be obvious. It is entirely in accord with these earlier analyses to conclude that, when an officer reasonably believes from specific, particularized facts that an arrestee has concealed a weapon under his or her clothing or in a body cavity, the officer can constitutionally conduct an appropriately tailored warrantless strip search. Such an exception to the warrant requirement comports with the reasonable prudence contemplated by the Fourth Amendment. Those strip searches incident to arrest which are motivated instead by a desire to search for destructible evidence present no parallel concern which would excuse a failure to comply with the warrant requirement. An arrestee may be closely monitored while a warrant is sought, and specific circumstances which threaten the destruction of evidence or health of the arrestee may be addressed as individual exigencies. Far from being inappropriate, the attributes of the warrant process noted above are particularly suited to the authorization of evidentiary strip searches.

Despite the thesaurus of adjectives that has been used to describe the invasive qualities and humiliating aspects of strip searches, the fundamental question to be faced in determining whether the warrant requirement is applicable to such searches incident to arrest is simply whether the Fourth Amendment can tolerate the courts' current approach to the basic relationship between the citizen and the police. The most striking characteristic of a strip search is the utter subjugation of individual dignity to the will of an individual police officer. Those analyses which have left the finality of these decisions in the hands of the officer have done so neither out of necessity nor with due regard to the Constitution's esteem for the right "to be secure" in one's person. If the Fourth Amendment's warrant requirement still has any meaningful role to play in its protection, it is surely in this area.

---

403. 463 U.S. 1032 (1983).