Q&A

Strip Searches

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August 2005

Q: The staff at a state psychiatric facility strip searched a number of patients after a nurse could not find her purse. Did the staff violate the law? Would the answer be different at a private facility or a juvenile facility? What about requirements that a patient remove her clothing in emergency department settings?

A: The law regarding the permissibility of strip searches is extremely individualized, and case outcomes depend on a number of factors. These include 1) the identity of the persons undertaking the search; 2) the purpose of the search; 3) whether the search is pursuant to a blanket policy or an individualized suspicion or probable cause to believe that the individual is concealing weapons, drugs, or contraband; 4) the gender, age, and legal status of the person being searched; and 5) the environment in which the search occurs.

Generally, staff searches of psychiatric patients for safety purposes will be judged under a different standard than those seeking to recover stolen items. The facility should have a search policy that permits searches only with reasonable, individualized suspicion that a resident has contraband that would raise a risk of injury or harm to that individual or others. Strip searches of a group of individuals to try to locate a missing item are disfavored by the courts.

In addition, the intrusiveness of the search must be proportional to the articulated risk, and the facility should have a search policy in place. The search should be done by an individual with clinical training, and preferably of the same gender as the client (or the gender preferred by

the client). Outside of this framework, a strip search in a state facility is likely to violate the constitutional rights of the clients. The court may, however, find that defendants are protected by qualified immunity.

Requirements that all individuals with psychiatric disabilities seen in an emergency room setting must disrobe may fall afoul of the Americans with Disabilities Act in several different ways, depending on whether these requirements are imposed on medical patients and whether waiving the requirement could constitute a reasonable accommodation under the Americans with Disabilities Act.

I. General Jurisprudence in Challenges to Strip Searches

A. Strip Searches Initiated by State Actors v. Private Actors

The majority of cases challenging strip and body cavity searches occur in the context of law enforcement–challenging the actions of police or corrections personnel. Because police and corrections officials are state actors, most strip search cases in the law enforcement/criminal context are Section 1983 claims alleging violations of the Fourth, Eighth, or Fourteenth Amendments.[1] These cases generally are brought on behalf of suspects, arrestees, or prisoners,

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[1] *Burns v. Loranger*, 907 F.2d 233, 236 (1st Cir. 1990)(suspect strip searched by police loses constitutional claim because police established reasonableness and exigent circumstances); Masters v. Crouch, 872 F.2d 1248 (6th Cir.) cert. denied, 110 S. Ct. 503 (1989)(a person arrested for a minor offense has a clearly established constitutional right to be free of being strip searched unless there is reasonable individualized suspicion that the arrestee is carrying contraband).

but sometimes also involve prison or jail visitors. [2]

However, other state personnel also conduct strip searches: school officials,[3] child

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[2] *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985)(strip searches of visitors must be based upon individualized suspicion); *Spear v. Sowders*, 71 F.3d 626, 630 (6th Cir. 1995) (en banc)(body cavity searches of visitors must be based on "reasonable suspicion"); *Daugherty v. Campbell*, 935 F.2d 780, 784 (6th Cir. 1991), cert. denied, 112 S. Ct. 939 (1992). The requirement of reasonable or individualized suspicion is not the same as the requirement of probable cause, however, and at least one circuit court has held that prison visitors do not have a constitutional right not to be searched absent probable cause, *Long v. Norris*, 929 F.2d 1111, 1116 (6th Cir.), cert. denied, 502 U.S. 863 (1991)("The asserted right of prison visitors to be free from strip and body cavity searches without probable cause was not clearly established under the Fourth Amendment.").

[3] *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991)(finding that like police officers, the discretion exercised by school officials should not lightly be second-guessed by the courts); *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980)(strip search of 13 year old student unconstitutional in the absence of any suspicion); *Jenkins v. Talladega City Board of Education*, 115 F.3d 821, 826 (11th Cir.)(en banc), cert. denied, 118 S. Ct. 412 (1997)(finding school officials enjoyed qualified immunity in strips search of two female students by female teacher after theft); *Lamb v. Holmes*, 2005 WL 118360 (Ky. May 19, 2005). Some states prohibit strip and body cavity searches of students by statute, see Cal.Educ.Code 49050 (Deering 2004)(prohibits body cavity searches of students by school employees); Iowa Code Ann.

protective service workers,[4] staff at juvenile detention facilities[5], and personnel at state psychiatric facilities. [6]

808A.2(4)(a)-(b)(West 2004)(prohibiting strip searches and body cavity searches of students by school employees); Okla.Stat.Ann.tit. 70, 24-102 (West 2004)(prohibiting strip searches of students); S.C. Code Ann. 59-63-114- (Law Co-op 2003)(prohibits school administrators or officials from conducting strip searches of students); Va. Code Ann. 22.1-279.7 (Michie 2004)(requiring Board of Education to develop strip search policy); Wash.Rev.Code Ann. 28A.600.230(West 2004)(prohibiting strip search or body cavity search of students by principals, vice-principals, or anyone acting under their direction); Wisc.Stat.Ann. 118.32, 948.50 (West 2004)(prohibiting any official, employee or agent of any school from conducting a strip search of pupils).

[4] *Roe v. Texas Department of Protective and Regulatory Services*, 299 F.3d 395 (5th Cir. 2002); *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999) (social worker's warrantless entry into home and strip search of child were not protected by qualified immunity; it was clearly established that absent exigent circumstances, search warrant is required for social workers to enter a home to conduct a child abuse investigation); *Good v. Dauphin County Social Services*, 891 F.2d 1087, 1092 (3rd Cir. 1989)(if no consent or exigent circumstances, social workers must obtain warrant before conducting body search of child suspected of being abuse victim), *Tennenbaum v. Williams*, 193 F.3d 581 (2nd Cir. 1999)(hospital medical examination of five year old child for signs of sexual abuse without warrant was unconstitutional search); *Franz v. Lytel*, 997 F.2d 784, 788 (10th Cir. 1993).

[5] *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225 (2nd Cir. 2004); *Justice v. City of Peachtree City* [sic], 961 F.2d 188, 193 (11th Cir. 1992)(upholding strip searches of incarcerated juveniles only on a showing of reasonable suspicion of possession of contraband).

[6] *Aiken v. Nixon*, 236 F.Supp.2d 211 (N.D.N.Y. 2002), *aff'd* 80 Fed.Appx. 146 (2nd Cir. 2003), brought by Disability Advocates, a P&A subcontractor in New York. The New Jersey P&A brought litigation for damages and injunctive relief challenging a strip search involving a number of about 26 patients that occurred over the period of a week, *New Jersey Protection and Advocacy Inc, v. Smith*, No. 01-5505 (D.N.J. filed Dec. 2, 2001); *Upshaw v. Mayberg*, No. CV

Sometimes state personnel act in conjunction with private actors in strip searches. Increasingly, health care professionals, social workers and crisis workers are being sued for searches done at the instigation of law enforcement, [7] or in conjunction with law enforcement [8] and cases challenging these searches generally include constitutional claims. These cases have varying degrees of success: even when the health care professional or social worker is found to be a state actor for the purpose of the claim, courts frequently find such defendants protected by qualified immunity on the basis that they could not objectively have known that their behavior violated the constitutional rights of the individual searched.

Finally, some requirements of clothing removal take place solely at the hands of private actors. It is quite common for emergency department staff, for example, to insist that individuals who come to the emergency department because of psychiatric crisis–or even those with treatment histories for psychiatric disabilities–remove their clothing. This practice has been challenged under the Americans with Disabilities Act when it is applied only to psychiatric patients.[9] Cases against private actors–and some public ones–generally include claims of assault and battery or negligence under state tort law.

B. Reason for the Search: Evidence vs. Safety/Administrative Reasons

Cases challenging strip searches generally fall into several dichotomies in terms of the applicable jurisprudence. The first is the distinction between searches for evidence of crimes or

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99-08407 R (Ex) (C.D.Ca. filed Aug. 18, 1999)(California P&A challenges Atascadero temporary admission policy including strip searches in front of other patients).

[7] *Rodriquez v. Furtado*, 950 F.2d 805 (1st Cir. 1991)(doctor who performed vaginal search pursuant to warrant was state actor); *Warner v. Grand County*, 57 F.3d 962 (10th Cir. 1995)(crisis worker who performed search of females for drugs was state actor).

[8] *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

malfeasance, and searches for safety/security purposes, a distinction that has made a difference in a number of case outcomes.[10] Searches for evidence of crime generally require the prior issuance of a search warrant supported by probable cause to believe that identified items will be found.

Searches for administrative or safety reasons, on the other hand, may fall under the "special needs" doctrine. The "special needs" doctrine was first conceptualized by Justice Blackmun in his concurrence in *New Jersey v. T.L.O.*, a case involving a challenge to a school's policy of randomly searching student lockers.[11] The search was upheld, and the doctrine, which provides that "in the context of safety and administrative regulations a search unsupported by probable cause may be reasonable when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[12] The special needs doctrine has been expanding to encompass many of the kinds of searches that P&As will want to challenge,[13] and deserves particular attention from any P&A seeking to challenge strip

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[9] *Scherer v. Waterbury Hospital*, No. CV 97-0137075, 2000 Conn.Super.LEXIS 481 (Conn.Super. Feb. 22, 2000).

[10] See, e.g. *Evans v. Stephens*, 407 F.3d 1272 (11th Cir.2005)(en banc), *Tennenbaum v. Williams*, 193 F.3d 581 (2nd Cir. 1999)(noting that medical examination of child suspected of being abuse victim served "primarily an investigative function"); *Aiken v. Nixon* (finding that the policy of strip searching all patients initially admitted to a state psychiatric facility did not have an "overt indication of any entanglement with law enforcement" and therefore fell under the "special needs" doctrine).

[11] 469 U.S. 325, 351 (1985)(Blackmun, J., concurring).

[12] *Board of Education v. Earls*, 536 U.S. 822, 829 (2002)(internal citations and quote marks omitted)(upholding random urine testing of middle and high school students participating in extracurricular activities under the special needs doctrine).

[13] *Aiken v. Nixon*, 236 F.Supp.2d 211 (N.D.N.Y. 2002), *aff'd* 80 Fed.Appx. 146 (2nd Cir. 2003). While the judge in the *Aiken* case held that the "special needs" doctrine applied because law enforcement was not overtly involved with the searches, he also held that the rights of patients at psychiatric facilities could be most closely analogized to visitors in the prison setting; none of these cases has ever been analyzed under the "special needs" doctrine.

searches of its clients.

C. Searches Pursuant to Blanket Policies vs. Searches Pursuant to Individualized Suspicion

Another significant distinction is between challenging an individual instance of strip searching as unreasonable, e.g., a strip search of an individual student for narcotics in the absence of any reason to believe she possessed narcotics,[14] and cases challenging a uniform policy of strip searching, as in the cases involving blanket strip searches of all arrestees for misdemeanor offenses. Some cases brought by P&As involve hybrids of these situations, as in a client whose psychiatric chart contained a standing order for a strip and body cavity search upon each admission to the facility[15] or the case of a mass strip search of over 20 patients over a week-long period.[16]

Early strip search cases in the law enforcement/criminal area successfully challenged policies by jails of strip-searching all arrestees, regardless of the charge, [17] although such

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[14] *Doe v. Renfrew*, 631 F.2d 91, 92-93 (7th Cir. 1980).

[15] *Aiken v. Nixon*, 236 F.Supp.2d 211 (N.D.N.Y. 2002), *aff'd* 80 Fed.Appx. 146 (2nd Cir. 2003).

[16] *New Jersey Protection and Advocacy v. Smith*, No. 01-5505 (D.N.J. filed Dec. 2, 2001).

[17] *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986), cert. denied, 483 U.S. 1020 (1987). See also *Walsh v. Franco*, 849 F.2d 66 (2d Cir. 1988)(blanket policy of strip searching all misdemeanor arrestees is unconstitutional). The Tenth Circuit found that the law was clearly established in 1991 and 1992 that the Fourth Amendment bars strip searches of women arrested for minor traffic violations without reasonable suspicion to believe that they were concealing weapons or contraband. *Chapman v. Nichols*, 989 F.2d 393 (10th Cir. 1993); *Act Up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993)(clearly unconstitutional to strip-search arrestees charged with minor crimes unless there is reasonable suspicion that the arrestee is carrying contraband); *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1450-51 (9th Cir. 1991)(blanket policy of strip searching felony arrestees was unconstitutional).

The Ninth Circuit found that since 1987 it has been clearly unconstitutional for a police officer to subject all felony arrestees to strip searches. "Given the state of the law regarding institutional

policies continue to exist (and be successfully challenged with significant money damages) to this day.[18]

Cases challenging individual strip searches on the grounds that reasonable suspicion did not exist are usually brought as damage actions, while cases challenging blanket policies generally involve requests for injunctive relief. Protection and Advocacy agencies have generally brought cases requesting damages for individuals as well as injunctive relief involving a cessation or modification of the strip search policy.[19]

Blanket strip search policies, without individualized reasonable suspicion, are generally disfavored by the courts, with one significant exception. In the prison setting, it is virtually impossible to challenge either uniform strip search policies or random strip searches. The United States Supreme Court upheld a blanket policy requiring strip searches, including visual inspection of body cavities, of both prisoners and pre-trial detainees after contact visits, although the Court conceded that strip searches could violate the constitutional rights of pretrial detainees

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strip search policies in 1987, it can hardly be said that a reasonable police officer could have believed that any strip search conducted pursuant to felony arrest was lawful." However, it was not clearly established in 1987 that the Fourth Amendment required a search warrant for a police officer to conduct a strip and body cavity search while attempting to recover stolen property incident to an arrest.

[18] *Savard v. Rhode Island*, 338 F.3d 23 (1st Cir. 2003)(although strip searching non-violent, non-drug related misdemeanor arrestees was unconstitutional, defendants granted qualified immunity); Florida Justice Institute, Press Release, "Court Preliminarily Approves 6.25 Million Class Action Settlement of Strip and Visual Body Cavity Searches of Women in Miami's Jails," April 18, 2005. New York City also recently spent millions of dollars settling a lawsuit challenging blanket strip searches of misdemeanor arrestees, Michael Weissenstein, "NYC changing policy on inmates' gynecological exams," Boston Globe, July 15, 2005, p. A4 (noting that New York City "also agreed to pay millions of dollars in settlements to people who were strip searched in city jails after arrests on suspicion of misdemeanor charges or violations such as traffic infractions").

[19] See cases at note 6.

under some circumstances.[20] The Fifth Circuit has excluded strip searches of prisoners from the ambit of the Eighth Amendment entirely.[21] However, as noted recently by a Second Circuit judge, "with the exception of the prison setting, we have never found that a strip search in the absence of individualized suspicion was reasonable."[22]

Finally, one case suggests that the prison exception does not apply in the case of programs for civilly committed violent sexual predators.[23] In that case, a court issued an injunction to bring the program for sexually violent predators into conformity with the federal constitution, finding that the elimination of routine strip searches of residents following every visit was necessary to achieve this goal. The strip searches were a procedure which was adopted after Special Commitment Center relocated to a correctional center. Notably, "the [Special Commitment Center] director testified that he found the routine strip searching to be 'an abomination' which made it more difficult for him to do his job."[24]

D. Strip Searches of Men vs. Strip Searches of Women

Even in the prison setting, some searches have been found to be unconstitutional. Significantly, random pat downs and of women prisoners were found to violate the Eighth Amendment in *Jordan v. Gardner* because of the emotional damage to the women subject to

[20] *Bell v. Wolfish*, 441 U.S. 520, 558-560 (1979).
[21] *Moore v. Carwell*, 168 F.3d 234, 237 (5th Cir. 1999).
[22] *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225, 240 (2nd Cir. 2004)(Sotomayor, J., dissenting from a ruling that a juvenile justice facility was justified in a blanket strip search of all individuals initially admitted to the facility under the special needs doctrine).
[23] *Sharp v. Weston*, 233 F.3d 1166 (9th Cir. 2000).
[24] *Id.* at 1170-71.

these searches, most of whom had severe histories of sexual abuse. [25] In prison and other settings, distinctions have been made between searches of women and searches of men, and these distinctions have been upheld by courts against equal protection challenges.[26]

More than 78% of female prisoners and 72% of female jail inmates have histories of physical or sexual abuse.[27] These women are particularly injured and retraumatized by prison and jail strip searches, and the emotional damage they suffer in strip searches–and the need to adjust prison and jail policies accordingly-- has been recognized by both policy advocates and courts.[28]

E. Strip Searches of Children and Youth

In addition to gender, courts have recognized a distinction between strip searches of children and strip searches of adults. At least one court has concluded that "the adverse psychological effect of a strip search is likely to be more severe upon a child than an adult, especially a child who has been the victim of sexual abuse."[29]

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[25] *Jordan v. Gardner*, 986 F.3d 1521, 1544 (9th Cir. 1993)(en banc). It is unclear whether the same result would obtain today, given the Prison Litigation Reform Act's requirement of "physical injury."

[26] *Lang v. Guisto*, 92 Fed.Appx 422, 2004 U.S.App.LEXIS 813 (9th Cir. Jan. 12, 2004)(female guards can pat down male prisoners, even though male guards cannot pat down female prisoners); *Oliver v. Scott*, 276 F.3d 736 (5th Cir. 2002)(cross sex surveillance by female guards of male prisoners showering and going to the bathroom permissible even though male guards cannot conduct such surveillance on female prisoners).

[27] Council of State Governments, Criminal Justice/Mental Health Consensus Project, www.consensusprojectorg/flowchart/ps18-development-treatment#_ftn6.

[28] Stephanie S. Covington and Barbara E. Bloom, "Gendered Justice: Programming for Women in Correctional Settings," presented at the annual meeting of the American Society of Criminology (2000), www.centerforgenderedjustice.org/genderedjustice_program.html; *Jordan v. Gardner*, 986 F.3d 1521, 1544 (9th Cir. 1993)(en banc).

[29] *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225, 232 (2nd Cir. 2004). At the same time, the court noted that the state has an "enhanced responsibility" to protect a child in its custody, *id.* at 236.

Finally, strip searches that take place in public or relatively public places, such as a facility bathroom[30], or in front of other clients or non-clinical personnel[31] such as the UPS man[32] or others are, understandably, especially disfavored by courts.

II. Challenges to Strip Searches and Clothing Removal in State Psychiatric Facilities and Emergency Departments

A. The Fourth Amendment

Constitutional protections apply only in the case of state action. If the hospital or emergency department is operated by the state, or, in some cases, if the health care personnel are acting at the direction of or in conjunction with state actors such as law enforcement personnel, patients are entitled to constitutional protections.

It should be noted that in many cases where the facts clearly reflect emergency department personnel working with at the direction of law enforcement personnel and searching for evidence, courts have found state action even when the health personnel are private employees. When there is an implicit understanding or cooperation between law enforcement

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[30] *Aiken v. Nixon*, see notes 6, 13, and 15.

[31] *Bonitz v. Fair*, 804 F.2d 164 (1st Cir. 1986).

[32] This was the case in *Upshaw v. Mayberg*, No. CV 99-08407 R (Ex) (C.D.Ca. filed Aug. 18, 1999). Personal communication from Pamila Low, of Protection and Advocacy Inc., the California P&A.

and private health care professionals, or when the primary conduct of the private health care professional is related to health care, the courts have divided on state action..

Although it should be emphasized that each state has its own statutes and each circuit its own case law, based on the case law about strip searches in general, as well as the ruling in *Nixon v. Aiken* and the settlement in *New Jersey Protection and Advocacy v. Smith*, it appears that the following conclusions are warranted: 1) strip search policies affecting all residents in psychiatric facilities are probably unconstitutional; 2) strip searches conducted in psychiatric facilities pursuant to a particularized reasonable suspicion or probable cause to believe that the individual has weapons or drugs are probably constitutional. Notably, the court in *Nixon v. Aiken* specifically held that suspicion that the person was concealing stolen property was constitutionally insufficient. This is important in light of the number of strip searches that take place in facilities when staff is missing personal property

Certain procedural protections are probably also requisite. These include having the procedure done by a clinician or nurse, preferably of the same gender as the person being searched. In addition, courts have underscored that body cavity searches, either visual or manual, raise different issues from strip searches and should not be considered permissible. Some justifications for body cavity searches, such as concealing items which could be used for self harm purposes, could be less restrictively accomplished by having the individual maintained on one-on-one while the facility seeks a court order.

Recently, a blanket strip search policy was approved, on admission only, in a juvenile

justice facility.[33] The court permitted only initial strip searches on admission to the facility, found all succeeding strip searches (after transfers and returns from other facilities) unconstitutional, and underscored that the state has a special responsibility under the *parens patriae* doctrine to protect juveniles in its care from harm. The decision provoked a strong dissent from Judge Sotomayor, and the majority acknowledged that the decision was "close" and difficult.

B. Patients' Rights: Federal law and regulations

Although the Constitution may not apply in private settings, other federal statutes do. The Americans with Disabilities Act may apply if the plaintiff can show either a blanket policy with clearly disparate applications as between psychiatric clients and other patients, or an instance where the requirement to undress was a direct result of stereotypes about people with psychiatric disabilities.[34] Title III of the ADA, which applies to public accommodations such as private hospitals, does not permit claims for damages, but does allow plaintiffs to sue for injunctive relief. Title II of the ADA, applying to public entities such as state or municipal hospitals,

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[33] *N.G. ex rel. S.C. v. Connecticut*, 382 F.3d 225, 232 (2nd Cir. 2004).

[34]A state court in Connecticut held that a plaintiff who was locked in an assessment room also found that the complaint stated a claim under the ADA's prohibition of unnecessary segregation, *Scherer v. Waterbury Hospital*, No. CV 97-0137075, 2000 Conn.Super.LEXIS 481 (Conn.Super. Feb. 22, 2000).

permits injunctive relief and, perhaps, damages if intentional discrimination can be shown. The court in *Nixon v. Aiken* dismissed an ADA claim on behalf of all admittees to a psychiatric center, finding that the basis for the search was the admission to the facility, rather than their disability. This finding is somewhat disingenous since the facility in question was a psychiatric facility. However, if facilities search psychiatric patients, but not other patients, the holding in *Aiken v. Nixon* would support an ADA claim.

Section 504 of the Rehabilitation Act also provides an avenue for relief from discriminatory search policies that impact disparately on people with psychiatric disabilities, or which do not sufficiently provide reasonable accommodations for their disabilities.

The only federal regulations which govern strip searches are those promulgated by the Bureau of Prisons, which provide that prisoners may be strip searched whenever a reasonable suspicion exists that they have contraband, and after all contact visits. The Office of the Inspector General of the Department of Justice Office has recently recommended that the Bureau of Prisons change from a blanket policy of strip searches after contact visits to a more individualized approach, noting that prisoners are often shackled and observed by guards during visits, and that some

people forego visits in order to avoid strip searches.[35] The Bureau of Prison policy also permits strip searches of visitors when there is reasonable cause to believe they are carrying contraband.[36]

Patients' Rights: State law and regulations

Some states have statutes that prohibit or regulate strip searches in various kinds of state facilities. For example, Massachusetts forbids strip searches in inpatient substance abuse detoxification facilities, 105 C.M.R. 160.305(B)(1), and conditions licensure of these facilities on the guarantee of these rights, 105 C.M.R. 750.380(B)(1)(b). In North Carolina, body cavity searches of clients of state psychiatric facilities may only be performed when there is probable cause to conduct such a search, must be performed by a physician, and must be performed in the presence of a member of the nursing staff who is the same sex as the client, N.C. Admin.Code tit. 10A, r. 28C.0307©)(3). In Tennessee, strip searches and body cavity searches are specifically authorized on clients of state psychiatric facilities when "necessary" if conducted by clinical staff, Tenn. Comp. R.& Regs. 0940-2-4-.03, 0940-2-4-.09 (2004). Texas also has regulations which limit strip searches at certain state facilities, such as those providing treatment to people

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[35] Office of the Inspector General, Supplemental Report on September 11 Detainees' Allegations of Abuse at Metropolitan Detention Center in Brooklyn, New York (Dec. 2003) and An Analysis of the Federal Bureau of Prison's Response to the Report and Recommendations (Dec. 2003).

[36] 28 C.F.R. 511.12 (West 2004).

who are HIV-positive or have substance abuse problems.

For the most part, however, strip search policy is created facility by facility, with little uniformity and no standards imposed by the state. Certain episodes, such as the loss of staff property, or the seizure of contraband, may provoke mass strip searches. An episode such as this triggered *New Jersey P&A v. Smith*, which resulted in a settlement in which patients who had been strip searched received $5000.00 each. State tort law claims involving assault and battery were also asserted and upheld against defendants' motion to dismiss in *Nixon v. Aiken.* Such claims would, of course, be particularly relevant in cases involving private defendants.

The Role of Protection and Advocacy Agencies in Cases Involving Strip Searches of Patients

P&A standing is particularly helpful in cases challenging strip search policies and seeking injunctive relief, since individual patients subject to the policy are likely to be discharged during the pendency of the litigation, and their readmission may or may not be predictable enough to invoke the exception to mootness for cases that are capable of repetition yet evading review.

Attorneys interested in pursuing these claims should consult the law in their circuits carefully, as holdings vary from circuit to circuit. They should seek to analogize to cases involving misdemeanor arrestees and prison visitors, as well as utilizing existing case law developed by P&As. If state defendants raise the "special needs" doctrine, P&As should be conversant with the doctrine and able to argue that the search is not reasonable in the context of that jurisprudence.

Attorneys can be particularly alert to possibilities for actions under the ADA, Section 504

of the Rehabilitation Act, state tort law, and any applicable state law in their jurisdiction regarding strip searches.