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Routine Strip Searches to Combat Contraband

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Introduction

A federal appeals court, ruling en banc, has upheld a San Francisco policy requiring that all arrestees to be placed in the general population of the jail for custodial housing be subjected to a strip search. The court found that, in balancing the intrusion on personal rights represented by the searches and the need for the searches to combat an existing contraband problem in the jail, the balance weighed in favor of the jail's institutional needs. [Bull v. San Francisco](#), #05-17080, 2010 U.S. App. Lexis 2684 (9th Cir.).

This represents a new direction for the law on strip searches by the U.S. Circuit Court of Appeals, which had, like most federal appeals courts, required individualized reasonable suspicion of possession of weapons or contraband to justify such searches. If not overturned by the U.S. Supreme Court, it provides an opening for routine blanket strip searches of inmates booked into a jail's general population.

The decision is only binding precedent in states and territories within the 9th Circuit, which are Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and the Northern Mariana Islands. This, however, is a significant portion of the country, and the 9th Circuit has previously been an influential court on the issue of strip searches, with many other courts following its approach on the issue.

The 11th Circuit Court of Appeals, which covers Alabama, Florida, and Georgia, in some respects preceded the 9th Circuit in adopting a rule of greater deference towards the attempts of jail management to use strip searches to combat the problem of contraband entering their facilities. In [Powell v. Barrett](#), #05-16734, 541 F.3d 1298 (11th Cir. 2008), that court, also ruling en banc, upheld a policy of conducting blanket strip searches of detainees being placed in a jail's general population without requiring reasonable suspicion of possession of contraband. It is not possible to say, at this point, whether other federal

appeals courts will follow the lead of the 9th and 11th Circuits in this new direction, but it is certainly possible that some will.

What reasoning did the 9th Circuit utilize for adopting this new approach? What limits or considerations did the court indicate still had to be observed in carrying out such blanket strip searches of incoming detainees? What steps could an agency or facility interested in making a case for the adoption of a similar policy with regards to its own inmate population take? This article briefly examines these questions. At the conclusion of the article, there is a list of relevant resources and references. While the article mentions, in passing, the issue of the participation by or observance of strip searches of detainees by employees of the opposite gender, that subject will be discussed in more detail in a future article in this publication.

Routine Strip Searches to Combat Contraband

Many detention facilities have attempted to use strip searches of incoming arrestees to combat the serious problem of weapons, drugs, and other contraband being brought into the general population. Earlier decisions of the 9th Circuit, however, took the approach that routine blanket strip searches of incoming detainees, including those arrested for less serious and non-violent crimes, were constitutionally impermissible, even if they were to be transferred into a jail's general population, and that strip searches of such detainees could only be conducted on the basis of individualized reasonable suspicion of possession of contraband. See [Thompson v. City of Los Angeles](#), #88-5943, 885 F.2d 1439 (9th Cir. 1989) and [Giles v. Ackerman](#), #83-3751, 746 F.2d 614 (9th Cir. 1984) (per curiam), overruled on other grounds by [Hodgers-Durgin v. de la Vina](#), #97-16449, 199 F.3d 1037 (9th Cir. 1999) (en banc).

Approximately 50,000 arrestees a year are booked and processed into the six county jails under the supervision of the San Francisco, California Sheriff's Department. Faced with a serious problem of contraband smuggling, the Sheriff instituted a policy of requiring strip searches of all arrestees prior to their transfer into the general jail population for custodial housing.

The written policy instructions for conducting strip searches stated that the following was mandated:

1. Strip searches include a visual body cavity search. A strip search does not include a physical body cavity search.
2. The search will be conducted in a professional manner in an area of privacy so that the search cannot be observed by persons not participating in the search."
3. The searching officer will instruct the arrestee to:

- a. Remove his/her clothing.
 - b. Raise his/her arms above their head and rotate 360 degrees.
 - c. To bend forward and run his/her hands through his/her hair.
 - d. To turn his/her head first to the left and then to the right so the searching officer can inspect the arrestee's ear orifices.
 - e. To open his/her mouth and run his/her finger over the upper and lower gum areas, then raise his/her tongue so the officer can inspect the interior of the arrestee's mouth. Remove dentures if applicable.
 - f. To turn around and raise first one foot, then the other so the officer can check the bottom of each foot.
4. The searching officer will visually inspect the arrestee's breasts, buttocks, and genitalia.
 5. The searching officer will thoroughly search the arrestee's clothing, underclothing, shoes, and socks.
 6. At the completion of the search, the searching officer will instruct the arrestee to dress.

Strip searches were not conducted on arrestees who were not being transferred into a jail's general population, such as those placed in holding cells and released on bond, intoxicated person released after they became sober, or those given citations and then released. Those detainees were pat-searched, scanned with a metal detector, fingerprinted and booked.

In rejecting the claim, in a class action on behalf of those subjected to the routine strip searches, that the searches violated their Fourth Amendment rights, the en banc appeals court noted that, between April 2000 and December 2004, searches of the San Francisco general jail population resulted in the discovery of 1,574 item of contraband, which included 662 controlled substance pills, 106 shanks and other weapons, and numerous other items, such as multiple instances of handcuff keys, rock cocaine, powder cocaine, methamphetamine, tar heroin, marijuana, ecstasy, pipes, and homemade alcohol ("Pruno"), as well as a screwdriver, and a hypodermic needle.

The court found that this clearly indicated a serious, ongoing problem of drugs, weapons, and other contraband being smuggled into the jails, representing a threat to the health and safety of inmates, corrections officers, and jail employees. The record contained reports of an inmate's death from drugs he obtained in the facility, a detainee who set her clothes on fire with a lighter smuggled into her cell, a detainee who mutilated himself with

smuggled staples, and an arrestee who attempted suicide with razor-blades smuggled into the jail in his rectal cavity.

The strip search policy had been adopted on the basis of a determination that “the greatest opportunity for the introduction of drugs and weapons into the jail occurs at the point when an arrestee is received into the jail for booking and, thereafter, housing.” The strip search policy authorized visual searches only, with officers not allowed to physically touch detainees’ body cavities. The strip searches conducted uncovered numerous instances of illegal drugs, drug paraphernalia, and weapons, including on detainees held on “non-violent” offenses such as public drunkenness, public nuisance, or violation of a court order.

Upholding the constitutional validity of the strip search policy, the court pointed to the principles set forth in [Bell v. Wolfish](#), #77-1829, 441 U.S. 520 (1979) and [Turner v. Safley](#), #85-1384, 482 U.S. 78 (1987).

In [Bell](#), the U.S. Supreme Court upheld a policy of visual body cavity searches of detainees at a federally operated short-term custodial facility after every contact visit with a person from outside the institution, finding no violation of the Fourth or Fifth Amendments. The Court ruled that prisoners, while not forfeiting all constitutional protections because of their incarceration, were subject to restrictions and limitations based on “institutional needs and objectives,” including maintaining institutional security, order, and discipline.

The Court ordered that “wide-ranging” deference be given to corrections officials in the adoption and carrying out of policies and practices designed to serve these objectives. Such deference was not dependent, the Court further noted, on whether persons being housed in a facility were pre-trial detainees or had been convicted of a crime, but instead was based on the complex and difficult tasks that such officials face in running their facilities.

Security concerns therefore supported the searches, including visual body cavity inspections, and could help both discover and deter the introduction of contraband. In [Bell](#), indeed, the 9th Circuit pointed out, the Court did not even require that there have been a long or pervasive history of smuggling at the facility, or substantial evidence that persons involved in contact visits were sources of contraband, upholding the policy since it was not “irrational or unreasonable.”

In [Turner v. Safley](#), the 9th Circuit further pointed out, the U.S. Supreme Court ruled that a correctional facility’s restrictions of constitutional rights would be upheld if “reasonably related to legitimate penological interests.” Factors to be considered included the existence of a “valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it”; “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the

allocation of prison resources generally,” and “the existence of obvious, easy alternatives” as evidence that the regulation “is an “exaggerated response” to prison concerns, as well as the need to defer to the “informed discretion” of facility management.

Applying these general principles to the San Francisco strip search policy, the court found it apparent that the scope, manner, and justification for it was not meaningfully different from the scope, manner, and justification for the strip search policy upheld in Bell. Indeed, the court found, the circumstances justifying the San Francisco strip search policy were “weightier” than those in Bell, based on a record of a “pervasive and serious” contraband problem in San Francisco’s jails, and the record of having found drugs, weapons, and items useable in escapes smuggled in by detainees in their body cavities.

Application of the principles in Turner, which provide even more deference to the decisions of corrections officials, led to the same result, that the strip search policy was justified and reasonable.

Applying the tests in Turner, the 9th Circuit found a valid, rational connection between the policy and the goal of reducing the amount of smuggled contraband. As for Turner’s concern about appropriate use of institutional resources, the court noted that “undisputed” evidence indicated that eliminating the strip searches would lead to more contraband in the jails and that implementation of “more targeted” policies would require more resources which were in scarce supply, including in supervisory and line staff training that would take time away from other essential tasks.

The court concluded that its earlier decisions in Thompson and Giles failed to “give due weight” to the principles in Bell and Turner. The court reasoned that, in those earlier cases, it had improperly substituted its own judgment for that of corrections officials, and erroneously determined that arrestees charged with minor offenses posed no security threat. These cases were therefore explicitly overruled.

The 9th Circuit also explicitly rejected the reasoning of other appeals courts that have held that strip searches of arrestees entering the general jail population are per se unreasonable in the absence of individualized reasonable suspicion that an arrestee is smuggling contraband. See, e.g., [Roberts v. Rhode Island](#), #00-1752, 239 F.3d 107 (1st Cir. 2001); [Shain v. Ellison](#), #00-7061, 273 F.3d 56 (2nd Cir. 2001); and [Masters v. Crouch](#), #88-5477, 872 F.2d 1248 (6th Cir. 1989).

The court concluded that there was no violation of detainees’ Fourth Amendment rights and granted the defendant sheriff qualified immunity.

Things to Remember and Suggestions

In light of the fact that the court in Bull recited at such length the record of the introduction of contraband into San Francisco jail, including by those arrested for minor or nonviolent offenses, corrections officials seeking to justify such policies may well want to maintain detailed records concerning the frequency, amount, and types of contraband found during searches, especially contraband detected in searches of those detained for non-violent crimes.

AELE has created an example form, downloadable [here](#), which an agency may wish to examine in the course of discussing the issue with local counsel and modify appropriately in the course of designing your own record keeping form. It is not a “model,” but only an example, and no warranty or representation is made that it will necessarily meet a particular agency’s needs, or that a court in a particular jurisdiction will necessarily uphold a strip search policy similar to that upheld by the 9th Circuit based on such record keeping.

The form includes spaces to record the description of contraband or weapons found as a result of a search conducted at a booking desk or inside a detention area, as well as the time and date, the method of discovery (such as by booking desk pat-down or strip search, cell shakedown, or other described circumstances, the officers conducting the search, and the name of the inmates possibly involved in possession of the items, as well as the reason they were in custody (felony, misdemeanor, traffic, or civil arrest).

It is also important to remember well the limitations of what the 9th Circuit court decided in this case. The court was quick to point out that it was not disturbing its prior decisions concerning searches of arrestee not classified for housing in the general jail or prison population, such as, among others, [Way v. County of Ventura](#), #02-56457, 445 F.3d 1157 (9th Cir. 2007) (involving an intoxicated arrestee released when sober and never placed in the general population), [Act Up!/Portland v. Bagley](#), #90-35888, 988 F.2d 868 (9th Cir. 1993) (involving arrestees who were cited and released), and [Kennedy v. L.A. Police Dept.](#), #87-6316, 901 F.2d 702 (8th Cir. 1990) (involving an arrestee placed in a holding cell until he posted bond).

The policy upheld requires that searches be conducted in a “professional manner,” and prohibited officers of the opposite sex to be present. Were those requirements violated, the court commented, individual detainees might well have “strong claims against San Francisco.”

Maryland Circuit Judge Emory A. Plitt, Jr., who serves as the course director for AELE’s Jail and Prisoner Legal Issues Seminar has made a number of suggestions

designed to attempt to avoid problems, including litigation, arising in the context of strip searches. They should be carefully considered:

1. Except in extreme emergencies, strip and body cavity searches should only be performed by staff of the same sex as the prisoner.
2. Officers or staff of the opposite sex should not be allowed in the room where the search is being conducted except in the case of some compelling need such as a disturbance, security, an unruly prisoner, etc.
3. The room where the search is conducted should be shielded from outside observation. Consider also the use of translucent screens or 'modesty panels' to ensure some degree of privacy.
4. Any body cavity search that involves actual manual probing of body cavities should normally be done only by qualified medical personnel except in the most urgent circumstances. The argument that you might make that 'nobody was around' can be blown out of the water by a prisoner simply showing that he/she could have been secured and not allowed movement while someone was called.
5. Staff should always inquire to see if the prisoner has any medical problem or condition that might affect or be affected by the search. Imagine the humiliation of a female prisoner who is menstruating, a male prisoner with a prostate problem, a person with hemorrhoids, etc. Any search that is needed when such a condition exists must take the condition into consideration.
6. Any time a strip or body cavity search is performed, a written record should be made of the fact and the reason(s) for it. Some departments have started or are seriously considering videotaping the search for their own protection. Videotaping is certainly not necessary, but if you consider it take care that the entire process is recorded with no selective editing. The tapes must be carefully stored and access limited. Do not, as one midwestern city did, allow the tapes to be accessible to other employees for entertainment!
7. There should be a written policy that states when and under what circumstances body cavity and strip searches may be performed and who is authorized to order or approve them.
8. When such searches are being conducted, all employees must conduct themselves in a professional manner. This means no jokes, snide remarks or comments.
9. All prisoners must be made aware of the circumstances under which such searches can and will be done. Ideally as with many other things, if time and circumstances permit,

give the prisoner a copy of the regulations (they may be in some kind of prisoner handbook, etc.) and have him/her sign an acknowledgement of receiving it. Keep it on file. Why? It helps to sweep away any argument they may make about an expectation of privacy when you show that they were put on notice right up front.

10. All staff must be trained in how to conduct such searches and the circumstances under which they may be done. Keep records of this activity so you can avoid a policy or procedure claim based on an allegation of failure to train or supervise.
11. Be consistent. If you have a policy that all prisoners who are housed in maximum security are to be strip-searched after visits, that's what it means. If you do not follow your own policy, you may face an argument that your use of these searches is arbitrary and not related to any legitimate governmental purpose.
12. Careful records must be kept of incidents that occur in the facility concerning contraband and/or weapons. A history of incidents and types can be very important in showing the justification for intrusive search policies.
13. Always try to have a witness present when any such search is done.
14. There should be some management oversight, on a periodic basis, to make sure that the standard procedures are followed.

Resources and References

The following are a few useful resources and references related to the topic of this article. Inclusion of an item does not necessarily imply agreement with or approval of its contents.

Resources:

- [Search: Body Cavity](#). Summaries of cases reported in AELE publications.
- [Search: Prisoners/Cells](#). Summaries of cases reported in AELE publications.
- [Strip Search: Prisoners](#). Summaries of cases reported in AELE publications.
- [“Strip Searches for Institutional Security in a Jail or Lock-up Setting,”](#) by Jack Ryan, J.D., Legal & Liability Risk Management Institute. Includes links to a very useful summary of strip search law by federal appeals circuit.
- [Booking Search Miscellaneous Report Form](#). An example form created by AELE.

- Federal Detention Center Houston, [Inmate Admission and Orientation Handbook](#) (2009) (Includes notice concerning inmate searches).
- Georgia Association of Chiefs of Police Model Policies, [Chapter 9, Search and Seizure](#). (2010). (Includes strip searches).
- [Arizona Dept. of Corrections Strip Search Policy](#) (2000).
- Federal Bureau of Prisons video, “The [Correct Procedure for a Visual Search](#).”
- Federal Bureau of Prisons, Program Statement 5521.05, “[Searches of Housing Units, Inmates, and Inmate Work Areas](#).” (1997).
- Federal Bureau of Prisons Form: “[Search for Contraband: Digital, Simple Instrument, X-Ray Examination](#).” (1994).

References (chronological):

- Jack Ryan, J.D., “[9th Cir, 2010 Update: The United States Court of Appeals for the Ninth Circuit Upholds the Blanket Strip Search Policy of San Francisco County](#),” PATC Legal & Liability Risk Management Institute (2010).
- Jailhouse Lawyers’ Manual, Chapter 25: “[Your Right To Be Free From Illegal Body Searches](#),” (Columbia Human Rights Law Review, 8th Edition, 2009).
- Tom Newburn, Michael Shiner, Stephanie Hayman, “Race, Crime and Injustice? Strip Searches and the Treatment of Suspects in Custody,” 45 British Journal of Criminology 5, 677-694 (Sept. 2004). ([Abstract](#)).
- Judge Emory A. Plitt Jr., “Prisoner Privacy and Staff Employment,” [Corrections Legal Defense Quarterly](#), No. 98-1 (1998). Includes a discussion of issues arising relating to the use of employees of the opposite gender from the prisoner conducting or participating in a search, including a strip search.
- Judge Emory A. Plitt Jr., “Searches of Prisoners and Visitors,” [Corrections Legal Defense Quarterly](#), #96-1 (1996). Includes sections discussing strip and body cavity searches.
- R. Sabbatine, D. Leach, “New Strip Search Paradigm,” American Jails, 10, 5, 1996, 39-43. ([Abstract](#))

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Bernard J. Farber
Jail & Prisoner Law Editor
P.O. Box 75401
Chicago, IL 60675-5401 USA
E-mail: bernfarber@aele.org
Tel. 1-800-763-2802

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