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Constitutional Law: Search and Seizure: An Analysis of Federal and Oklahoma Law in Light of Recent Chicago Strip Search Cases

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> Last spring, a Chicago college student made an illegal left turn as she drove to a home for retarded children where she occasionally taught. The police stopped her and, because she had left her license at home, asked her to follow them to the 19th Precinct Station for routine questioning.
>
> Once there, she was led to a back room equipped with cameras where a matron asked her to take off her jacket and lift up her shirt so she could search her. Understandably upset, the student reminded the woman that she was there only on a traffic violation. She refused to follow instructions. As she said later, she hadn't been told she was under arrest nor had she been charged with any serious crime. The matron persisted and reluctantly the student gave in, thinking the ordeal was over.
>
> But it wasn't. The matron then asked her to pull down her pants, squat three times and spread her vagina. Horrified, the student refused until the matron threatened to bring three male officers into the room to force her to cooperate. The student did as she was told but later complained to the judge who dismissed her traffic ticket out of hand. A verbal apology was eventually offered by the city's police department but the practice allegedly wasn't stopped. As the precinct's commanding officer explained to a nun who wrote complaining of a friend's similar treatment, he found no violation had occurred "in the safe, correct and expeditious processing of persons temporarily in our custody."[1]

The shocking situation above illustrates an abusive police practice that is apparently widespread—the routine strip searching of women who are arrested on misdemeanor charges. The Chicago cases, one of which was described above, caused a public uproar after they were brought to light by Chicago television station WMAQ-TV. After the WMAQ broadcast, American Civil Liberties Union branches in Houston, Texas, St. Louis, Missouri, Racine, Wisconsin, and New York City received complaints (which were almost always from women) that degrading strip search procedures were being unnecessarily employed by the police in these cities.[2]

This note will analyze, in light of the recent abuses, the law regarding personal searches incident to arrest. Because all search and seizure law in this country is limited by the protections provided by the fourth amendment of the United States Constitution,[3] the discussion will begin with a look at

[1] Simons, *Strip Search*, 6 BARRISTER 8 (Summer 1979) [hereinafter cited as Simons].
[2] *Id.*
[3] U.S. CONST. amend. IV.

United States Supreme Court decisions that outline the basic factors to be considered when deciding whether a search is reasonable under the fourth amendment. The discussion will then focus on Oklahoma law. The next section will be devoted to constitutional arguments criticizing the current law. Finally, it will be argued that the Oklahoma law of personal search incident to arrest should be clarified and brought into line with the fundamental principles of the fourth and fourteenth amendments of the United States Constitution.

Because neither the United States nor the Oklahoma Supreme Courts have decided a strip search case, the relevant principles of constitutional and Oklahoma law will be taken from related search and seizure cases. For purposes of analysis these principles will then be applied to situations involving strip searches incident to a routine traffic offense. There are several reasons for limiting this discussion to traffic offense situations. First, the cases that brought the problem of routine strip searching to national attention involved traffic arrests. Second, the legal issues that determine whether a search incident to arrest is reasonable are more clear in the routine traffic arrest situation. The issues are more clear because (1) a routine traffic violation does not usually involve a weapon, (2) a traffic violation produces no evidence which could be concealed on the arrestee's person, and (3) the interests of justice can often be served by issuing the traffic violator a citation rather than taking him or her into custody.

Fourth Amendment Analysis of Search and Seizure

The fourth amendment provision[4] against unreasonable search and seizure has long been held to protect individuals from unreasonable intrusions upon their privacy.[5] Although exactly what constitutes a reasonable intrusion must be resolved according to the facts of each case,[6] a search without a warrant, where no exigent circumstances are present, has generally been held to be an unreasonable search.[7]

The general requirement of a warrant prior to any search apparently

[4] *Id.*: "The 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 the persons or things to be seized."

[5] United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Warden v. Hayden, 387 U.S. 294 (1967); Schmerber v. California, 384 U.S. 757 (1966) (overriding function of fourth amendment is to protect personal privacy and dignity against unwarranted intrusion by the state); Jones v. United States, 357 U.S. 493 (1958) (essential purpose of fourth amendment is to shield the citizen from unwanted intrusions into his privacy); Harris v. United States, 331 U.S. 145 (1947) (right of privacy and personal security which is protected by the fourth amendment is the "very essence of constitutional liberty"); Davis v. United States, 328 U.S. 582 (1946) (fourth and fifth amendments protect individuals' right to privacy); United States v. Lefkowitz, 285 U.S. 452 (1932) (fourth amendment construed liberally to safeguard right of privacy).

[6] Bell v. Wolfish, 441 U.S. 520 (1979); Ker v. State, 374 U.S. 23 (1963).

[7] Arkansas v. Sanders, 442 U.S. 753 (1979); Mancusi v. DeForte, 392 U.S. 364 (1968).

stems from a general recognition by the Supreme Court that the decision as to when probable cause to search exists should be made by a neutral magistrate who is not involved in the competitive business of detecting crime.[8] The magistrate must actually make the decision and issue the warrant before the search is initiated. Consequently, even where probable cause is undeniably present, a search is unconstitutional if a warrant is not obtained prior to the search.[9] "[O]nly in a few specifically established and well-delineated situations . . . may a warrantless search . . . withstand constitutional scrutiny, even though the authorities have probable cause to conduct it."[10] The "few specifically established and well-delineated situations" referred to by the Court[11] have grown into several categories of exceptions. The two categories pertinent for discussion here are (1) situations involving "exigent circumstances," and (2) searches incident to arrest.

Exigent Circumstances: Search of Premises

Whenever an officer must conduct an *immediate* search in order to preserve evidence of crime, to capture a suspected felon, to prevent danger to others, or to prevent danger to himself, the Court has held the search to be constitutional, referring to the situation as an "exigent circumstance."[12] The following discussion of cases will set forth some of the basic factors considered by the Supreme Court when determining whether a warrantless search is justified by exigent circumstances.

In the case of *Warden v. Hayden*,[13] police arrived at a certain house less than five minutes after witnesses purportedly saw a suspected armed robber enter. The officers entered the house and searched it without a warrant.[14] They found petitioner Hayden in a bed feigning sleep, a pistol and a shotgun in the flush tank of a toilet, clothing matching the description of that worn by the armed robber, and ammunition for the firearms.[15] The Supreme Court held that the warrantless search was constitutional.[16] Justice Brennan, in his delivery of the opinion of the Court reasoned as follows:

> [T]he exigencies of the situation made [the warrantless search] imperative. McDonald v. United States, 335 U.S. 451. . . . [The police] acted

[8] Chambers v. Maroney, 399 U.S. 42 (1970); Schmerber v. California, 384 U.S. 757 (1966); Aquilar v. Texas, 378 U.S. 108 (1964).

[9] Vale v. Louisiana, 399 U.S. 30 (1970) (involved a search of a dwelling).

[10] *Id.* at 34, *quoting from* Katz v. United States, 389 U.S. 347 (1967).

[11] *Id.*

[12] Michigan v. Tyler, 436 U.S. 499 (1978); Pennsylvania v. Mimms, 434 U.S. 106 (1977); Terry v. Ohio, 392 U.S. 1 (1968); Warden v. Hayden, 387 U.S. 294 (1967).

[13] Warden v. Hayden, 387 U.S. 294 (1967).

[14] The state postconviction court found that Mrs. Hayden consented to the entry of the house, but the federal habeas corpus court decided that the issue of Mrs. Hayden's consent to the officers' entry did not require resolution, because the officers were "justified in entering and searching the house for the felon, for his weapons and for fruits of the robbery." *Id.* at 297 n.4.

[15] *Id.* at 298.

[16] *Id.* at 298, 310.

> reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation *if to do so would gravely endanger their lives or the lives of others.* Speed here was essential. . . . The permissible scope of the search must, therefore, at least be as broad as may be reasonably necessary to prevent the dangers that the suspect at large in the house may resist or escape.[17]

Warden established that a warrantless search may be conducted where speed is essential in (1) reducing danger to officers' lives, (2) protecting the lives of others, or (3) capturing a suspected felon.

In the case of *Michigan v. Tyler*,[18] officials investigating the cause of a midnight fire at a furniture store conducted a series of warrantless searches and seizures at the site of the fire. The Supreme Court held that the searches and seizures, which occurred on succeeding days after the fire, were unconstitutional.[19] Searches and seizures that occurred at the time the fire was being extinguished, however, were justified on the basis that the *fire itself* provided sufficient exigency to allow firemen to make a warrantless entry. Once inside the building, the firemen could constitutionally seize evidence of arson that was in plain view.[20]

The Court also held that fire officials need no warrant to remain in a building for a *reasonable* time to investigate the cause of a fire after it has already been extinguished.[21] Although the Court did not talk about "danger to life and limb" in connection with the "fire exigency," one may assume that one reason why "a burning building clearly presents an exigency of sufficient proportion to render a warrantless entry 'reasonable' "[22] is because unchecked fires are a threat to life.

Exigent Circumstances With Respect to Warrantless Searches of Persons: Terry v. Ohio

Even though parties seeking to justify warrantless searches in given circumstances have argued that the fourth amendment applies mainly to homes, offices, and other places where one has a high expectation of privacy, the Supreme Court has ruled that "the Fourth Amendment protects people, not places."[23] In the case of *Terry v. Ohio*,[24] petitioner Terry was convicted of

[17] *Id.* at 298-99 (emphasis added).

[18] 436 U.S. 499 (1978).

[19] *Id.* at 511. The court said entries on the succeeding days after the fire was extinguished "were clearly detached from the initial exigency. . . ."

[20] *Id.* at 509.

[21] *Id.* at 510.

[22] *Id.* at 509.

[23] Katz v. United States, 389 U.S. 347, 351 (1967).

[24] 392 U.S. 1 (1968).

carrying a concealed weapon that was found on his person by a police officer, one McFadden, in the course of a brief pat down search.[25] Officer McFadden testified that on the day in question, the suspicious behavior of Terry and a codefendant attracted his attention and caused him to believe that they might be planning a daylight armed robbery.[26] After observing the men for ten minutes or so, McFadden confronted them, identified himself as a police officer, and asked for their names.[27] When the men "mumbled something" in response to his question, Officer McFadden grabbed petitioner Terry, spun him around, and patted down the outside of his clothing. McFadden felt a pistol in the pocket of Terry's overcoat, and proceeded to remove a .38 caliber revolver from the pocket.[28]

In holding that the warrantless search of Terry was *reasonable* under the fourth amendment, the Court first determined that the amendment came into play the instant that Terry was "seized" by McFadden.[29] The Court defined "seizure" as the lack of the freedom to "walk away."[30] Thus, the Court held that no formal arrest is required to activate the protections of the fourth amendment.[31]

In determining whether the search was reasonable, the Court formulated a test that balances the *need to search* against the *invasion* that the search entails.[32] The Court stated that "in justifying the particular intrusion the police officer must be able to point to *specific* and *articulable* facts which, taken together with rational inferences from those facts reasonably warrant that intrusion."[33] Under the circumstances, the sole justification for the search of Terry was "protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."[34]

It is important to remember that the rules discussed by the Supreme Court in *Terry* were intended to apply to situations where there is not probable cause to make an arrest.[35] The Court seemed to draw a "bright line" between search situations prior to formal arrest, and search situations incident to a formal arrest based on probable cause.[36] In recent years, however, this "bright line" has dimmed somewhat.[37]

[25] *Id.* at 7.
[26] *Id.* at 5-6.
[27] *Id.*
[28] *Id.*
[29] *Id.* at 16.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 21.
[33] *Id.* (emphasis added).
[34] *Id.* at 29.
[35] *Id.* at 25.
[36] *Id.*
[37] *See* Cupp v. Murphy, 412 U.S. 291 (1973).

The significance of the above discussion with respect to the issue of strip searching incident to arrest is that the exigency cases illustrate the fundamental nature of the reasonableness requirement in fourth amendment search and seizure analysis. The reasonableness requirement, as illustrated by the exigency cases, can be summarized as follows: In order for a search to be reasonable, it generally must be done pursuant to a warrant. If a warrant is not obtained prior to searching, the search is unreasonable unless it can be justified by some exigent circumstance, such as the need to protect life or preserve evidence when the officers do not have time to procure a warrant. A court should balance the *need to search* against the *invasion* that the search entails in order to determine when a warrantless search is reasonable.

In *United States v. Robinson*[38] the United States Supreme Court held that a search incident to arrest requires no justification other than the arrest itself. This holding is inconsistent with the reasonableness requirement because it requires no exigency or probable cause to justify a warrantless search of the arrestee. The Court in *Robinson* held that a search incident to a valid arrest was reasonable because the arrest itself was reasonable,[39] thus extinguishing the need for a balancing test to determine reasonableness. Despite the Court's holding in *Robinson*, a Wisconsin federal district court in *Tinetti v. Wittke*[40] enjoined a county sheriff from routinely strip searching persons who were placed in custody pursuant to a routine traffic arrest. The court held that the mere fact that a person is validly arrested does not mean that he may be subjected to any search that the arresting officer feels is necessary.[41] The court reasoned that warrantless searches incident to custodial arrest are traditionally justified by the need to discover (1) weapons or (2) evidence that might be concealed on the arrestee's person.[42] The search of plaintiff Tinetti was justified by neither of these needs.[43] A routine traffic violation does not usually involve a weapon, and, in this case, the plaintiff's actions had given the officer no reason to suspect that she was dangerous.[44] Furthermore, the kind of offense for which Tinetti was arrested produces no evidence that could be found by means of a strip search.[45] Therefore, the court concluded that the officer had no reason to suspect the existence of any evidence which would be discovered through a strip search of Tinetti.[46] Although the court made reference to the "prevalent rule" of *Robinson*, the case was decided on the basis of a balancing test similar to the one used by the United States Supreme Court in *Terry*.[47]

[38] 414 U.S. 218 (1973).

[39] *Id.* at 235.

[40] 479 F. Supp. 486 (E.D. Wis. 1979). Plaintiff Tinetti had been arrested, taken to the police station, and strip searched after being stopped for speeding.

[41] *Id.* at 490.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 490-91.

Personal Searches Incident to Arrest: United States v. Robinson

The language often used in cases that involve searches incident to arrest indicates that they are closely related to, and governed by, many of the same principles found in the exigency cases.[48] However, the Supreme Court held in *United States v. Robinson*[49] that searches incident to arrest are a separate category.[50] More specifically, the Court said:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on . . . the probability in a particular arrest situation that weapons or evidence would in fact be found on the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest *requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search*. . . .[51]

The Court distinguished *Robinson* from *Terry v. Ohio*[52] and ruled that the standards governing a search incident to a lawful arrest are not commuted to the strict *Terry* standards by the absence of probable fruits or further evidence of the crime for which the arrest is made.[53]

When conducting the arrest and subsequent search of Robinson, the arresting officer was acting in accordance with established police procedures. The officer had probable cause to believe that Robinson had committed an offense for which District of Columbia statutes provided a mandatory fine or jail sentence.[54] The District of Columbia Police Department had established policies detailing when a defendant may be subjected to a full body search. When the arresting officer searched Robinson, he was following the mandates of this policy.[55]

The holding in *Robinson*, however, was not limited to situations where the arrest was mandatory and the search was conducted according to an established policy. In *Gustafsen v. Florida*[56] the Court upheld a warrantless search of an arrestee where the arrest was not mandatory and where there were no established police procedures detailing the circumstances under which an arrestee could be fully searched. The Court in *Gustafsen* ruled that

[48] *See* Chimel v. California, 395 U.S. 752, 762-63 (1969); Preston v. United States, 376 U.S. 364, 367 (1967); Agnello v. United States, 269 U.S. 20, 30 (1925).

[49] 414 U.S. 218 (1973).

[50] *Id.* at 224-25, 228, 235.

[51] *Id.* at 235 (emphasis added).

[52] *Id.* at 234-35.

[53] 414 U.S. 234 (1973).

[54] *Id.* at 220.

[55] *Id.* at 221.

[56] 414 U.S. 260 (1973).

the questions of (1) whether the arrest was mandatory, and (2) whether the search was executed according to established policy, were not determinative of the constitutional issue.[57]

The Supreme Court had never directly ruled on the right to conduct a personal search incident to arrest prior to the decision in Robinson.[58] Because the Court has not subsequently reversed or expressly limited *Robinson*, it is still the leading Supreme Court case on the subject of the permissible scope of a personal search incident to arrest.[59]

The purpose at hand is to determine whether the broad language of *Robinson* creates a "blanket of constitutionality" that covers every search incident to a valid arrest. If *Robinson* is a "blanket justification" for all searches of arrestees, then the Supreme Court has in effect ruled that the routine strip searching of traffic violation arrestees is constitutional. However, it is submitted—and will be discussed later in this note—that *Robinson* is not an all-encompassing justification for a search incident to arrest. Before those arguments are put forth in detail, the following section will explain how the Oklahoma courts have expressly adopted *Robinson* as the controlling case on search incident to arrest questions.

Oklahoma Search and Seizure Law

The Oklahoma statutory and case law with respect to search and seizure incident to arrest has closely followed the principles of the United States Constitution, as interpreted by the United States Supreme Court.[60] Article II, Section 30 of the Oklahoma constitution is much like the fourth amendment to the United States Constitution.[61]

In addition, Title 22, Section 206 of the Oklahoma Statutes expressly provides authority for disarming a person.[62] The opinions in most Oklahoma search and seizure cases rely upon and cite Article II, Section 30 of the Oklahoma constitution or the fourth amendment to the United States Constitution.[63]

The most recent Oklahoma case to rule on the propriety of a personal

[57] *Id.* at 265.

[58] United States v. Robinson, 414 U.S. 218, 230 (1973).

[59] The holding in *Robinson* has been criticized on many grounds. Perhaps the most telling criticism has been that *Robinson* seems to discard the fundamental principles that have characterized fourth amendment jurisprudence over the years. *See* 414 U.S. 218, 238 (1973) (Marshall, J., dissenting). These fundamental principles also were discussed in connection with the exigency cases. See text accompanying notes 12-37, *supra*.

[60] *See* Hughes v. State, 522 P.2d 1331 (1974).

[61] U.S. CONST. amend. IV, cited at note 4, *supra*.

[62] "Any person making an arrest must take from the person arrested all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken." This section of the Oklahoma Statutes largely has been ignored by the Oklahoma courts.

[63] *See, e.g.*, Hughes v. State, 522 P.2d 1331 (Okla. Cr. 1974); Robedeaux v. State, 232 940 Okla. Crim. 171, P.2d 642 (1951); McAfee v. State, 82 65 Okla. Crim. 65, P.2d 1006 (1938).

search incident to an arrest for a traffic violation was *Hughes v. State*.[64] In *Hughes*, the defendant was arrested for reckless driving without a valid operator's license. The officer involved testified that he had observed the defendant's automobile cross the center line, then weave to the opposite side of the road, to the extent of running off the road. After the officer stopped Hughes, handcuffed him, and placed him in custody, he searched Hughes "by putting his hands into [Hughes's] pockets."[65] A bottle of codeine pills was found and became the basis for Hughes's conviction for unlawful possession of a controlled substance.[66]

The Oklahoma Court of Criminal Appeals took notice of Oklahoma precedents that stand for the propositions that "ordinarily, a minor traffic violation will not support a search and seizure,"[67] and that a search incident to arrest is limited by the need (1) to discover and seize weapons, and (2) to discover evidence *of the crime for which the defendant was arrested*.[68] Even so, the Oklahoma court upheld the search of defendant Hughes on the basis of the United States Supreme Court's holding in *United States v. Robinson*.[69] Specifically, the Oklahoma court held that (1) "a *full* personal search incident to a valid, custodial arrest, based on probable cause does *not require further justification*, and does not violate Article 2, § 30 of the Oklahoma Constitution . . . ,"[70] and (2) that "all cases in conflict with this opinion and the opinions of the Supreme Court in *Robinson* . . . are expressly overruled."[71] Thus, the Oklahoma cases that indicate that a search incident to arrest is limited by the justifications of (1) finding weapons, and (2) discovering evidence connected with the crime, were overruled.

Constitutional Arguments: Why Robinson and Hughes Do Not Permit a Strip Search Incident to a Routine Traffic Arrest

Fourth Amendment Argument

In deciding whether the rules set forth in *Robinson* and *Hughes* can justify a strip search or a body cavity search incident to a routine traffic arrest, the first question to be decided is whether a custodial arrest of a traffic offender is reasonable at its inception.[72] Whenever a police officer stops a car, the persons therein have been "seized," and the protections of the fourth amendment are activated.[73] This seizure, entailing a brief stop of the

[64] 522 P.2d 1331 (1974).
[65] *Id.* at 1332.
[66] *Id.*
[67] *Id.* The court cited Lawson v. State, 484 P.2d 1337 (Okla. Cr. 1971).
[68] *Id.* at 1332-33. The court cited Mahan v. State, 508 P.2d 703 (Okla. Cr. 1973); Ricci v. State, 506 P.2d 601 (Okla. Cr. 1973); Hampton v. State, 501 P.2d 523 (Okla. Cr. 1972); Lawson v. State, 484 P.2d 1337 n.45 (Okla. Cr. 1971).
[69] Hughes v. State, 522 P.2d 1331, 1334 (1974).
[70] *Id.* (emphasis added).
[71] *Id.*
[72] *See* Sibron v. New York, 392 U.S. 40, 62-63 (1968).
[73] Terry v. Ohio, 392 U.S. 1, 16 (1968).

motorist, is less of an intrusion than a full custodial arrest, and, therefore, the search rules enunciated in *Terry v. Ohio* apply.[74] If a full custodial arrest is made, the "search incident" rules of *Robinson* and *Hughes*[75] would apply, and the arrestee would be taken to the police station to be detained until he could be brought before a magistrate.

In the case of *Pennsylvania v. Mimms*,[76] the Supreme Court dealt with the narrow question of whether a police officer was justified in ordering a driver out of his car after an initial stop for a traffic offense. The initial stop was admittedly justified, but the Court's opinion focused on the reasonableness under the fourth amendment of the *incremental intrusion* resulting from the request to get out of the car once the vehicle was lawfully stopped.[77] In deciding this issue the Court used the familiar balancing test, where the state's interest is balanced against the seriousness of the intrusion upon the driver's fourth amendment rights.[78]

The Court analyzed each intrusion separately, applying the balancing test in the only instance where the reasonableness of an intrusion was contested. Because the Court analyzed the *Mimms* issue in this way, it can be argued that *Mimms* stands for the proposition that each additional intrusion upon an arrestee's fourth amendment rights must be reasonable, and that the reasonableness of each intrusion must be determined by applying the balancing test.

While the court has not ruled on the question of whether a *custodial arrest* pursuant to a routine traffic stop is reasonable, the reasoning in *Mimms* can be applied with interesting results. When a driver is pulled over for a routine traffic violation, what state interest is served by subjecting the driver to a custodial arrest? Because the state's interest in enforcing its traffic laws would be served by issuing the driver a citation, one could reasonably assume that the main purpose in arresting a traffic violator would be to force a driver to post a bond in the amount of the fine, thus insuring that the state receives payment. While this interest seems less than compelling, the intrusion of a custodial arrest upon the driver is severe. Upon arrest, a driver is subject to at least a limited search under *Robinson* and *Hughes*. He or she may be detained at the police station until appearance before a magistrate and bail is given.[79] Thus, even assuming that no abusive searches are performed upon the driver, it appears that in the case of a custodial arrest pursuant to a routine traffic stop, the invasion of the driver's personal security outweighs the state's interest in insuring the collection of a generally small fine. Even if the state's interest is the weightier consideration at this point, it appears that when a strip search or body cavity search is performed incident to the traffic arrest, this *additional* intrusion would outweigh the state's in-

[74] See text accompanying notes 23-34, *supra*.
[75] See text accompanying notes 49-51, 67-71, *supra*.
[76] 434 U.S. 106 (1977).
[77] *Id.* at 109.
[78] *Id.* at 111.
[79] *See* 22 OKLA. STAT. §§ 177-79, 185, 196 (Supp. 1980).

terest. In this example, the strip search or body cavity search would be unreasonable and, therefore, unlawful.

Fourteenth Amendment Due Process Argument

A second argument that points out the fallacy in using *Robinson* and *Hughes* to determine the permissible *intensity* of a search incident to arrest has to do with the relevant facts of those cases. In the *Robinson* case, the police officer searched the defendant by initially patting him down, and upon feeling an unidentifiable object, putting his hand in Robinson's pocket.[80] This manner of searching, though marginally more intrusive than a *Terry* search, is certainly not so intrusive as a strip search or a body cavity search. The Supreme Court implicitly recognized this distinction as illustrated by Justice Rehnquist's statement in the *Robinson* opinion: "While thorough, the search [of Robinson] 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*, ..."[81] If *Robinson* searches are to be distinguished from searches that are characterized by certain "extreme" or "patently abusive" procedures, and if Justice Rehnquist's allusion to *Rochin* is given due consideration, then it is arguable that "extreme" or "patently abusive" searches should be examined in light of *Rochin* rather than *Robinson*.

The Court in *Rochin* determined that if a procedure offends "those canons of decency and fairness which express the notions of justice of English speaking peoples. . . ,"[82] the procedure offends the due process clause of the fourteenth amendment, and is therefore unlawful.[83] Justice Frankfurter, writing for the Court, defined due process as "a summarized constitutional guarantee of respect for those personal immunities which are 'so rooted in the traditions and conscience of our people as to be ranked fundamental'. . . ."[84]

Although these rules do not rigidly define which procedures are "extreme" or "patently abusive," they appear firmer when viewed against a factual background. In *Rochin*, the incident the Court found violative of the petitioner's due process rights was the involuntary pumping of the petitioner's stomach.[85] The stomach pumping was initiated by the police after an officer saw the petitioner swallow capsules which were thought to be contraband.[86] In applying the general due process tests, the Court said, "[T]he proceedings by which [petitioner's] conviction was obtained do more than

[80] United States v. Robinson, 414 U.S. 218, 222-23 (1973).

[81] *Id.* at 236, *referring to* Rochin v. California, 342 U.S. 165 (1951).

[82] Rochin v. California, 342 U.S. 165, 169 (1951).

[83] *Id.* at 169-74.

[84] *Id.* Justice Frankfurter was quoting Justice Cardozo's opinion in Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[85] Rochin v. California, 342 U.S. 165, 165-66 (1951).

[86] *Id.*

offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience."[87] The Court went on to say that, "[These] are methods too close to the rack and screw to permit of constitutional differentiation."[88]

Even if the routine strip searching of offenders who have given officers no cause to believe they are concealing contraband or weapons is not precisely analogous to the "rack and screw," it is submitted that the callous strip searching of those committing minor traffic offenses certainly offends those canons of decency and fairness that express the notions of justice of our modern society.

The Need for Legislation

As illustrated by the arguments given above, *Robinson* does not provide a clear, authoritative answer to the question, "When is a strip search incident to arrest permissible?" Indeed, a superficial reading of *Robinson* seems to indicate that after a custodial arrest is made the permissible intrusiveness of the search can be decided by the police. This conclusion is not warranted, however, because it is contrary to the fundamental principles of constitutional search and seizure law.[89] Nevertheless, police have assumed the right to incorporate strip searches into routine procedure, regardless of constitutional principles.[90] For this reason, there have been calls for states to specifically limit strip searches by law.[91]

Because the Oklahoma case of *Hughes v. State*[92] expressly adopted the holding and rationale of *Robinson*, it gives no clearer rule than does *Robinson*. Although no scandal similar to the one in Illinois has yet arisen in Oklahoma, this affords no justification for failing to pass legislation that would bring Oklahoma search and seizure law into line with the fundamental principles of the fourth and fourteenth amendments. For, as the Supreme Court has always recognized, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear authority of law."[93]

The following is a model statute. It is similar to the one passed in Illinois as a measure to protect citizens against arbitrary and abusive searches by the police.[94]

[87] *Id.* at 172.

[88] *Id.*

[89] See text accompanying notes 4-9, *supra*.

[90] *See* Simons, *supra* note 1, at 10.

[91] *Id.*

[92] 522 P.2d 1331 (Okla. Cr. 1974).

[93] Terry v. Ohio, 392 U.S. 1, 9 (1968), *quoting from* Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891).

[94] *See* Shuldiner, *Visual Rape: A Look at the Dubious Legality of Strip Searches*, 13 JOHN MARSHALL L. REV. 273, 304 n.177 (1980); ILL. ANN. STAT. ch. 38 § 103-1 (1980).

Model Statute

(a) No person arrested for a traffic, regulatory, or misdemeanor offense shall be strip searched without a duly executed search warrant.

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

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

(d) No search of any body cavity shall be conducted without a duly executed search warrant.

(e) Any warrant authorizing a body cavity search shall specify that the search must be performed under sanitary conditions and conducted either by or under the supervision of a physician licensed to practice medicine in this state.[95]

(f) Any peace officer or employee who fails to comply with any provision of this section is guilty of a misdemeanor.

(g) Nothing contained in this section shall preclude prosecution of a peace officer or employee under another section of this code.

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

(i) Any peace officer or employee convicted of a misdemeanor under subsection (f) of this section shall be terminated in his or her employment with the state, for reason of official misconduct.

(j) The provisions of this section shall not apply when the arrestee is taken into custody, pursuant to a court order, for purposes of incarceration in a correctional institution.

Conclusion

The traditional presumption is that police conduct is appropriate.[96] In recent years, the increasing pressure to control crime has understandably caused public opinion to militate against restricting the powers of police.[97] Unfortunately, however, the problem of police accountability in Illinois reached scandalous proportions before a statute was passed to insure that police would be more sensitive to the fourth amendment rights of persons arrested on misdemeanor charges.[98] "One answer to the strip search issue is to

[95] This subsection is needed because some body cavity searches of women have been conducted in an unsanitary manner that was potentially physically harmful. *See, e.g.*, Simons, *supra* note 1, at 56.

[96] Simons, *supra* note 1, at 57.

[97] *Id.*

[98] ILL. ANN. STAT. ch. 38 § 103-1 (1980).