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UNCONSTITUTIONAL STRIP SEARCH POLICIES: REDRESSIBILITY'S STATE OF UNDRESS AFTER *CITY OF LOS ANGELES V. LYONS*

Nancy Hark[1]

I. INTRODUCTION

The Supreme Court case of *City of Los Angeles v. Lyons*,[2] has had far reaching effects on civil rights standing in federal courts. Standing had historically been granted to a plaintiff who could show that he or she had suffered an injury and that the injury would be redressed by the intervention of the court.[3] The federal courts formerly had an array of remedies at their disposal to prevent abusive behavior by state actors; among that array was the power to issue an injunction. *Lyons* held, however, that the federal courts could not issue an injunction against a state police actor unless a plaintiff, who had been injured by this actor in the past, could prove he would be injured again in the same way.[4]

What this decision did was to insulate some police behavior from the injunctive power of the federal courts, no matter how blatantly unconstitutional the behavior. This behavior has ranged from the original subject matter of the *Lyons* case, lethal choke holds of arrestees in California,[5] to unconstitutional detainment of arrestees in the Seventh Circuit,[6] to racial profiling,[7] to the wide-spread practice of strip searching all arrestees.[8]

The majority of the Court in *Lyons* seemed to believe Justice Marshall was exaggerating when in his dissent he

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[2] 461 U.S. 95 (1983).

[3] *See* cases cited *infra* notes 55-57.

[4] *Lyons*, 461 U.S. at 101-09.

[5] *See infra* notes 177, 179-81 and accompanying text.

[6] *See infra* text accompanying notes 184-190.

[7] *See infra* text accompanying notes 191.

[8] *See* discussion *infra* Part III, V.

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predicted that the decision would immunize continuing unconstitutional practices as long as no plaintiff could prove future injury under that practice.[9] He stated, "[u]nder the view espoused by the majority today, if the police adopt a policy of 'shoot to kill' or a policy of shooting 1 out of 10 suspects, the federal courts will be powerless to enjoin its continuation. The federal judicial power is now limited to levying a toll for such a systematic constitutional violation."[10] Justice Marshall's predictions may be taken more seriously today than they were in 1983 because of events that have occurred since that time, such as the Abner Louima incident,[11] and the Amadou Diallo shooting,[12] and a growing realization that not all police action is benevolent.

In the Second Circuit, Police and Sheriff's departments have repeatedly been told by federal courts that the policy of strip searching misdemeanant arrestees, when there is no reasonable suspicion that the arrestee is carrying contraband or weapons is a Fourth Amendment violation.[13] Although some of the plaintiffs in these cases received damage awards, the municipalities, in general, have not been deterred by the damage awards. Additionally, since the *Lyons* decision, an injunction in a strip search case is almost impossible to pursue because of the heightened standing barrier in federal court.

The ongoing strip search policies become a reflection of a much larger problem: a loss of confidence in the way the process works. Simply put, the average person believes that after a

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[9] *Id.* at 137 (Marshall, J., dissenting).

[10] *Id.* (internal citations omitted).

[11] Joseph P. Fried, *Sentencing in Louima Case*, N.Y. TIMES, December 19, 1999, Sec. 4 at 2 ("former police officer convicted of torturing Abner Louima in a police stationhouse bathroom in 1997 was sentenced to 30 years in Prison.").

[12] *Diallo Murder Trial Set to Begin on Jan. 31*, N.Y. TIMES, December 30, 1999, at B6 ("The officers fired 41 bullets at Mr. Diallo, who was unarmed, striking him 19 times, as he stood in the vestibule of his Bronx apartment building . . . .").

[13] U.S. CONST. amend IV states in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . . ."; *see also* discussion *infra* at Part III.

federal court determines that a given conduct is unconstitutional, then the actor will stop the behavior. If citizens cannot look to the federal courts to halt unconstitutional behavior by state actors acting under color of law, if this loop-hole that was created by *Lyons* is left open, then the determination of our constitutional rights is left in the hands of our police force instead of in the hands of our courts. Instead of empowering the states in the realm of police power, the Court inadvertently has permitted practices more akin to a "Police State."

This article will address the problem with the barrier raised by *Lyons* in obtaining standing for injunctive relief, namely, that the appropriate remedy for unconstitutional policies of strip searching misdemeanant arrestees not suspected of hiding contraband, is to enjoin the continued use of those policies. The second part of this article will explore how damage awards against municipalities have not proven effective deterrents for this particular behavior. Finally, the article will address a possible alternate solution to the problem, which is to utilize the state courts to issue injunctions against state officials. While a federal court is the forum where one would expect to vindicate any constitutional claim, the state courts, which are also empowered to hear constitutional challenges,[14] are not subject to the same standing barriers as the federal courts, and are possibly the best forums currently available to address these problems.[15]

II. BACKGROUND: *CITY OF LOS ANGELES V. LYONS*

Adolph Lyons was driving his car with a broken tail-light. Officers of the Los Angeles Police Department (LAPD) pulled him over for this "unlawful" behavior, and told him to get out of his vehicle. At that point, something went terribly wrong. Lyons claimed that he was cooperating fully and did not resist the police, but he was placed in a choke hold; a police officer placed his nightstick or forearm across Lyons' throat, and from behind

[14] *See* Testa v. Katt, 330 U.S. 386, 391 (1947) (explaining that under Article IV of the Constitution, state are obligated to enforce federal law).

[15] *See* discussion *infra* Part VI.

Touro Law Review, Vol. 18 [2002], No. 2, Art. 23

applied extreme force. This force stopped the flow of blood to Lyons' brain and almost proved fatal. Lyons suffered permanent injury to his larynx.[16]

Lyons sued in Federal District Court under 42 U.S.C. § 1983,[17] seeking damages, injunctive relief, and declaratory relief, claiming that the LAPD's choke hold policy was unconstitutional.[18] The district court dismissed his claims for injunctive and declaratory relief without reasons.[19] The Ninth Circuit, assuming that the district court had taken this action because of the Supreme Court holdings of *O'Shea v. Littleton*,[20] and *Rizzo v. Goode*,[21] distinguished those decisions, and reinstated the claims.[22] The City petitioned the Supreme Court and the Court denied *certiorari*, (*Lyons I*), over a dissent by Justice White.[23] On remand, the parties agreed to separate the damage claim to await a later trial,[24] and the district court entered a preliminary injunction to enjoin the LAPD's "use of both the carotid-artery and bar arm holds under circumstances which do not threaten death or serious bodily injury."[25] The Ninth Circuit affirmed.[26] Now, with the injunction claim separated from the damages claim, the Supreme Court granted *certiorari*, (*Lyons II*).[27] The Supreme Court reversed the injunction by a vote of

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[16] *Lyons*, 461 U.S. at 97-98, 114-15.

[17] 42 U.S.C. § 1983 states, "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress . . . ."

[18] *Lyons*, 461 U.S. at 97-98.

[19] *Id.* at 98-99.

[20] 414 U.S. 488 (1974).

[21] 423 U.S. 362 (1976).

[22] *Lyons*, 461 U.S. at 99.

[23] 449 U.S. 934-35 (1980) (White, J., dissenting).

[24] *Lyons*, 461 U.S. at 105 n.6.

[25] *Id.* at 99-100.

[26] *Id.* at 100.

[27] *Id.* *Lyons II* is the only case that is relevant to the remainder of the discussion, and will hereafter be referred to only as *Lyons*.

five to four.[28] Justice White wrote the opinion for the Court, joined by Justices Powell, Burger, O'Connor and Rehnquist. Justice Marshall's dissent was joined by Justices Blackmun, Brennan, and Stevens.

A. *Mootness*

The Court's decision is composed of three distinct holdings, all related to standing. As a threshold issue, the Court declared that the claim was not moot. Although the police had voluntarily abandoned the choke hold policy, it had only decided to do so for a six-month period.[29] Lyon's argued for dismissal on the grounds of mootness, arguing that *certiorari* had been improvidently granted. However, the City argued that the claim was not moot because it could decide to reinstate the policy after the six month moratorium.[30] Some commentators believe that the Court's analysis here forever confused the doctrines of mootness and of standing.[31] "By displacing mootness with standing analysis, *Lyons* apparently erects a heightened barrier to the protection of federal rights in suits for injunctive relief."[32]

B. *Actual Injury Not Sufficient, Must Have a Threat of Future Injury*

The first holding concerning standing was that the plaintiff did not have a "case or controversy" under Article III, because Lyons only had a past injury, and could not prove a real and immediate threat of future injury.[33] The Court said that Lyons' past exposure to the harm did not entitle him to seek prospective injunctive relief because the relief he was requesting would not

[28] *Id.* at 95.
[29] *Lyons*, 461 U.S. at 101.
[30] *Id.*
[31] *See* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 25-27 (1984).
[32] *Id.* at 26.
[33] *Lyons*, 461 U.S. at 105.

redress his injury.[34] The Court explained the showing that a plaintiff must make to have a case or controversy: "the plaintiff must show that 'he *has* or is immediately in danger of sustaining some direct injury.'"[35] The plaintiff here *had* sustained an injury, but the court glossed over the language it had just used.

C. *No Future Injury: Displacing Mootness with Standing*

Second, looking to the possibility of future injury, the Court said that it found Lyons' argument "incredible" that the police would pull him over again and subject him to another choke hold; he would have to admit either that he was going to break the law or resist the police, or that the police routinely choked everyone they encountered for no apparent reason.[36]

The Court downplayed the argument that no plaintiff would ever be able to get standing to enjoin this particularly dangerous police behavior because, it said, an injured plaintiff could always get damages (or his relatives could if he was dead).[37] The Court also rejected the request for standing under the "capable of repetition yet evading review" doctrine because, it said, that doctrine only applies when a claim is moot and if the unconstitutional conduct might happen again to Lyons, not just to any person.[38]

The Court explained the "capable of repetition" doctrine as set out in *Sosna v. Iowa*, where it said "there must be a named plaintiff who has a case or controversy at the time the complaint is filed."[39] It seems that Lyons did not have much time to challenge the policy while in the choke hold; it was over in a matter of seconds. In *Roe v. Wade*,[40] the Court had invoked the "capable of repetition" doctrine, even though the named plaintiff

[34] *Id.* at 101.
[35] *Id.* at 101-02 (citations omitted) (emphasis added).
[36] *Id.* at 106.
[37] *Id.* at 111.
[38] *Lyons*, 461 U.S. at 109.
[39] 419 U.S. 393, 402 (1975).
[40] 410 U.S. 113, 125 (1973).

was no longer pregnant when the case reached the Supreme Court. According to one commentator, "[i]n light of public policy concerns militating in favor of judicial resolution, the Court in *Roe* was satisfied to recognize that 'pregnancy often comes more than once to the same woman.' On that basis, it found the case not moot."[41] If nine months is too short a period of time to get review before a claim is moot, then several seconds, the time frame of a choke hold, is definitely too short a period of time, and the same public policy should have militated in favor of resolving the issue in *Lyons*.

In a more recent Supreme Court case, *County of Riverside v. McLaughlin*,[42] the standing technicalities for injunctive relief were clarified. The plaintiff brought an action on behalf of himself and others similarly situated to enjoin the county's policy of detaining individuals who were arrested without warrants, and were held beyond the two-day period prescribed by law without giving them a probable-cause hearing.[43] Because McLaughlin had already been released from detainment, the county filed a motion to dismiss, arguing that the plaintiff did not have standing for injunctive relief under the *Lyons* reasoning.[44] While the motion to dismiss was pending, McLaughlin found three additional plaintiffs who were still in custody, and amended the complaint to add these plaintiffs.[45] The Supreme Court found that because there were those three additional plaintiffs, who had a live controversy at the time of the amended complaint, there was Article III standing for injunctive relief in this case.[46] The Court said, "some claims are so inherently transitory" that the "relation back" doctrine should be used to preserve the claim for review.[47]

The distinction between *Lyons* and *McLaughlin* is merely form over substance. In *McLaughlin*, the Court used the fiction of

[41] Fallon *supra* note 31, at 27 (citing *Roe*, 410 U.S. at 125).
[42] 500 U.S. 44 (1991).
[43] *Id.* at 47.
[44] *Id.* at 48.
[45] *Id.* at 49.
[46] *Id.* at 51-52.
[47] *McLaughlin*, 500 U.S. at 52.

the relation back doctrine to fix everything, but it did not change anything. If the justification of needing a "live case or controversy" is that the plaintiff must have a true stake in the outcome "in order to 'assure that concrete adverseness which sharpens the presentation of issues' necessary for the proper resolution of constitutional questions,"[48] the additional plaintiffs had no more 'concrete adverseness' than McLaughlin by the time the trial process began. McLaughlin could not show a likelihood of future injury, but the three new plaintiffs, who were released a day or two after the amended complaint, did not have to show a likelihood of future injury. The Court said Article III requires a "live controversy" at the time the complaint is filed, however, by the time of resolution, all the Court will have is a past injury that is redressible. The technicalities imposed are not imposed by Article III, but by the Court's tortured interpretation of Article III.

D. Federalism

The last standing consideration in *Lyons* was the paean to federalism. The Court said that it was not the role of federal courts to dictate to state police officials what they should and should not do in a particular situation.[49] "The need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officials engaged in the administration of the state's criminal laws in the absence of irreparable injury which is both great and immediate."[50] The Court meant irreparable injury to Adolph Lyons, not to the population as a whole.

Between 1975 and the time of the Court's decision in *Lyons*, sixteen people had died as a result of the Los Angeles police choke hold policy.[51] These injuries were irreparable to them. To borrow a standing doctrine from the First Amendment

[48] *Lyons*, 461 U.S. at 101 (citing Baker v. Carr, 369 U.S. 186, 204 (1962)).
[49] *Id.* at 112.
[50] *Id.*
[51] *Id.* at 115-16 (Marshall, J., dissenting).

area, where the rules of standing are less stringently applied because of the importance to us as a nation for speech to be protected, perhaps Lyons should have invoked the overbreadth doctrine;[52] he should have argued that the policy had a chilling effect on "life." The Court seems to be saying, 'just don't break the law, and you won't have to worry about getting murdered by the police.'

E. *The Dissent*

Justice Marshall explained, insightfully, the impossible standing barrier the Court had just imposed:

> The Court today holds that a federal court is without power to enjoin the enforcement of the city's policy, no matter how flagrantly unconstitutional it may be. Since no one can show that he will be choked in the future, no one - not even a person who, like Lyons, has almost been choked to death - has standing to challenge the continuation of the policy.[53]

Justice Marshall argued that never before did a litigant have to prove standing for each type of relief sought; all a litigant had to do to have Article III standing was show a personal stake in the dispute, different or greater than just a member of the population as a whole.[54] The Court has always asked 1) whether the plaintiff "personally has suffered some actual or threatened injury,"[55] 2) whether the injury "fairly can be traced to the

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[52] The overbreadth doctrine is an exception to ordinary standing requirements, and is justified by the recognition that free expression may be inhibited as much by the threatened use of power as by the actual use of the power. *See* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984); Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940).

[53] *Lyons*, 461 U.S. at 113 (Marshall J., dissenting).

[54] *Id.* at 128.

[55] *Id.* (citing Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 99 (1979)).

challenged action,"[56] and 3) whether plaintiff's injury "is likely to be redressed by a favorable decision."[57] This was always the criteria, and there was never a reason to fragment the inquiry for each type of claim. "The Court's decision turns these well-accepted principles on their heads by now requiring a separate inquiry with respect to each request for relief."[58] Justice Marshall pointed out that the majority had drastically altered the entire jurisprudence of standing.[59]

He continued that this fragmentation was "inconsistent with the way the federal courts have treated remedial issues since the merger of law and equity."[60] Deciding if a plaintiff was entitled to an injunction was an issue to be determined after a full hearing of the merits, not an issue to be addressed on the pleadings.[61] "There are dangers inherent in any doctrine that permits a court to foreclose any consideration of [a] remedy by ruling on the pleadings that a plaintiff lacks standing to seek it."[62] As one commentator phrased it; "although the fragmentation of the standing inquiry into separate hurdles was entirely unprecedented, the Court portrayed itself as choiceless."[63]

F. Discussion

There was very little precedent to support the Court's decision. The first case relied on by the majority was *Rizzo v. Goode*,[64] where the district court had issued detailed orders to the Philadelphia police department concerning new policies of dealing with citizen complaints on a day to day basis, and had reserved

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[56] *Id.* (citing Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41 (1976)).
[57] *Id.* (citing *Simon*, 426 U.S. at 38).
[58] *Lyons*, 46 U.S. at 130-31 (Marshall J., dissenting).
[59] *Id.* at 130.
[60] *Id.*
[61] *Id.*
[62] *Id.* at 131.
[63] Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1339 (1999).
[64] *Rizzo*, 423 U.S. at 362.

continuing jurisdiction in order to oversee the implementation of the new procedures.[65] The Supreme Court did not approve of such a drastic interference with a police department's internal operating procedure.[66] Furthermore, there was a substantive problem in the *Rizzo* case. The *Rizzo* Court found that the theory underlying the plaintiff's claims was not that the city had a *policy* of misconduct, but only that the city had *failed to act* in the face of statistical evidence.[67] The Court in *Rizzo* believed that the case was actually a controversy between the entire citizenry of Philadelphia and the police department, and as such, did not present a concrete case or controversy to meet Article III requirements.[68] According to another commentator:

> There was a considerable difference between the relief requested in *Rizzo* on the one hand and in *Lyons* on the other. The plaintiffs in *Rizzo* sought a substantial restructuring of police department procedures. The plaintiff in *Lyons*, by contrast, asked the district court to do no more than what courts traditionally have done and have done effectively: to enjoin the defendant from continuing a particular course of unlawful conduct.[69]

The second case relied on by the *Lyon*'s majority was *O'Shea v. Littleton*, which was a class action suit brought against the prosecutor, state judiciary and various other officials, alleging discriminatory practices in the criminal justice system.[70] The Court in *O'Shea* said that the plaintiffs were requesting an injunction that seemed to conflict directly with the doctrine underlying *Younger v. Harris*.[71] The Court believed an

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[65] *Id.* at 365; *see also id.* at 365 n.2.
[66] *Id.* at 366.
[67] *Id.* at 375-76 (emphasis added).
[68] *Id.* at 371.
[69] Fallon, *supra* note 31, at 44.
[70] *O'Shea*, 414 U.S. at 490.
[71] *Id.* at 500; *Younger*, 401 U.S. 37, 53 (1971) (holding that a defendant in a state criminal proceeding cannot invoke the jurisdiction of the federal courts until the proceeding is concluded absent the threat of irreparable injury).

injunction of this type would be "intrusive and unworkable."[72] "The objection is to unwarranted anticipatory interference in the state criminal process by means of continuous or piecemeal interruption of the state proceedings by litigation in the federal courts . . . ."[73] The Court found the constant monitoring imposed by the injunction "antipathetic to established principles of comity."[74]

On the other hand, Justice Marshall, in *Lyons*, cited numerous decisions where the Court had approved of the issuance of injunctions by federal courts against state or municipal police departments.[75] Justice Marshall pointed out that with the exception of the enjoining of state criminal proceedings, the Court had never limited its reach over cities and municipalities. "Whatever the precise scope of the *Younger* doctrine may be, the concerns of comity and federalism that counsel restraint when a federal court is asked to enjoin a state criminal proceeding simply do not apply to an injunction directed solely at a police department."[76]

It would seem to follow logically from the *Lyons* decision that a federal court will not enjoin state police actors, however, that is not what happens in practice. Police departments are enjoined by federal courts when a law-abiding plaintiff can show a threat of future injury.[77] The key seems to be that the standing requirement for likelihood of future injury is impossible to obtain if the injury occurred because of the plaintiff's "criminal" behavior, such as having a broken tail-light.

Compare *Lyons* with the case of *Roe v. City of New York*.[78] The plaintiffs in *Roe* were intravenous drug users taking part in the City's needle exchange program.[79] While their drug

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[72] *O'Shea*, 414 U.S. at 500.
[73] *Id.*
[74] *Id.* at 501.
[75] *Lyons*, 461 U.S. at 133 n.23. (Marshall, J., dissenting).
[76] *Id.* at 135.
[77] *See, e.g.*, Roe v. City of New York, 151 F. Supp. 2d 495, 503 (S.D.N.Y. 2001) (citing cases); *infra* text accompanying notes 78-84.
[78] 151 F. Supp. 2d at 504-08.
[79] *Id.* at 499.

use was not legal, the exchange program was. It was alleged that the police were arresting the plaintiffs for possessing hypodermic needles on their way in or out of the program.[80] These plaintiffs were able to get standing for injunctive relief against the police department for arresting them in this manner because the activity they wanted to engage in was legal, therefore they could adequately show a likelihood of future injury.[81] No mention was made of the federalism concern raised in *Lyons*. No one questioned that a federal court was enjoining a state police entity. It seems that once a plaintiff who is attempting to engage in legal activity can show a case or controversy and a threat of even speculative future injury, then the standing requirements for injunctive relief are satisfied. What should be noted is that in *Roe*, the plaintiffs' claims were of two isolated arrests that had occurred more than a year apart by different officers and in different boroughs of the City of New York.[82] In determining the standing issue, the court relied in part on a Fifth Circuit case, *Hernandez v. Cremer*,[83] which stated that courts should not be reluctant to find that the plaintiff will be subject to future police conduct placing him at risk of injury when "the injury alleged to have been inflicted did not result from an individual's disobedience of official instructions [or any other form of misconduct]." [84] The court said this was the "critical factual distinction" from the *Lyons* decision.[85]

One begins to wonder if the Court merely does not want to "reward" a plaintiff with an injunction if all that plaintiff has to do to avoid future injury is keep out of trouble. But, what happens if the trouble is not all the fault of the plaintiff? How does this fit in with the racial profiling cases? How does this fit in with the decision of *Whren v. United States*,[86] and the

[80] *Id.* at 500.
[81] *Id.* at 501-02.
[82] *Id.* at 502.
[83] 913 F.2d 230, 234-35 (5th Cir. 1990).
[84] *Id.* at 234.
[85] *Roe*, 151 F. Supp. 2d at 503.
[86] 517 U.S. 806 (1996).

constitutionality of pretext arrests? How will it all fit together with *Atwater v. City of Lago Vista*?[87]

In *Whren*, the Court held that the police do not need a subjectively reasonable motive to stop someone in their vehicle, only probable cause that there was some actual violation of the law.[88] "We have never held, outside the context of inventory search or administrative inspection, that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment."[89] The actual violations that police can stop someone for include, of course, misdemeanors. It was an open question if the New York Constitution would be interpreted to afford more rights than the U.S. Constitution in the area of pretext stops, however, the New York Court of Appeals has recently adopted *Whren* as the law of this state.[90]

In *Atwater*, decided last term, the Supreme Court held that the police had discretion to arrest misdemeanants as long as there was probable cause that the person had broken the law in their presence; any law, including a seat belt law.[91] Recently, Justice Ginsberg, joined by Justice Stevens, Justice O'Connor, and Justice Breyer, voiced some concern regarding the Court's recent line of Fourth Amendment decisions.[92] She stated that given the holding of *Whren*, the decision in *Atwater* should be reconsidered if in practice it leads to "'an epidemic of unnecessary minor-offense arrests,'" something discounted by the majority in the *Atwater* opinion.[93] Taking that analysis one step further, the holding of *Atwater* and *Whren*, given the holding in *Lyons*, adds up to: the Supreme Court has put the actions of police departments beyond the reach of the federal courts if the police violate our civil rights every time we forget to wear our seat belts.

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[87] 532 U.S. 318 (2001).
[88] *Whren*, 517 U.S. at 812-13.
[89] *Id.* at 812.
[90] People v. Robinson, 97 N.Y.2d 341, 346 (2001).
[91] *Atwater*, 532 U.S. at 327.
[92] *See* Arkansas v. Sullivan, 532 U.S. 769, 772-73 (2001) (Ginsberg, J., concurring).
[93] *Id.* at 773 (citing *Atwater*, 532 U.S. at 353).

I believe that *Whren* is a dangerous decision. It will lead to many more police encounters with innocent citizens, and things will go wrong. *Whren* combined with *Lyons* is severely dangerous, for there will be no accountability if and when things go wrong routinely. *Whren, Lyons* and *Atwater* taken all together have given away the farm.[94]

Somehow, there does not seem to be a huge line separating misdemeanants from everyday ordinary citizens engaged in legal activities. That is quintessentially the problem; misdemeanants are all of us. Although we are not often arrested for the behavior, we all have the expectation that if we *are* arrested our civil rights will not be violated.

III. THE EFFECT OF *LYONS* IN NEW YORK: STRIP SEARCH POLICIES

One day you can be a perfectly upstanding citizen, worthy of the full protection of the law, the next day you can be arrested for something as innocuous as having an unlicensed dog.[95] Suddenly, you are a misdemeanant.[96] If you are an arrested misdemeanant, your chances are very good, under the local policy, that you will be subjected to an unconstitutional strip and

[94] For example, here is a hypothetical situation: A teenager, who is driving his mother's Mercedes is pulled over on a pretext; the police do not believe that this teenager could own such a car. They ask for his license and registration, and find that he is driving with a learner's permit, a misdemeanor. They handcuff the teen, but inadvertently hurt his arm, he begins to protest and struggle. The police start to get annoyed so they place him in a choke hold, which makes the boy struggle even more, involuntarily, because his body is experiencing the "fight or flight" response. He starts writhing and kicking. The police, subjectively believing that he is resisting arrest, shoot him and the boy dies. The boy's parents might be entitled to damages, but they would not be entitled to an injunction.

[95] *See* Huck v. City of Newburgh, 275 A.D.2d 343, 344, 712 N.Y.S.2d 149, 151 (2d Dep't 2000).

[96] N.Y. CRIM. PROC. LAW §§ 140.10(1)(a) and (2) (McKinney 2001) ("officer may arrest when officer has probable cause to believe any offense has been committed in his presence and probable cause to believe person to be arrested committed the offense").

Touro Law Review, Vol. 18 [2002], No. 2, Art. 23

body cavity search. At that point, it would be too late to try to get a court to issue an injunction unless you happen to carry one around with you. You are now left with the consolation of being able to seek damages in a federal court, but you will not have standing in that same court to challenge the future use of this policy. While, concededly, it is not the most serious problem facing our world today, it has affected many people. In the words of Judge Pratt, strip searches are "an intrusion into personal dignity and privacy . . . that for some people at least might cause serious emotional distress. A search of this type . . . has been characterized . . . as demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, [and] signifying degradation and submission."[97] Before *Lyons*, one of the first courts in this country to hold unconstitutional the policy of strip searching all misdemeanant arrestees, even when there is no reasonable basis to believe that the arrestee is hiding contraband or weapons, was the Eastern District of New York in *Sala v. County of Suffolk*.[98] That case occurred in 1978, before the *Lyons* decision, and was one of only a few cases that research has uncovered on the subject where an injunction issued.[99] The decision, by Judge Pratt, is still quoted

[97] Tinetti v. Wittke, 479 F. Supp. 486, 491 (E.D. Wis. 1979) (citing Sala v. County of Suffolk, No. 75-CV-486 (E.D.N.Y. Nov 11, 1978) (unpublished transcript Pratt, J.)), *aff'd*, 620 F.2d 160 (7th Cir. 1980).

[98] *See* Sala v. County of Suffolk, 604 F.2d 207 (2d Cir. 1979) (affirming district court decision on other grounds), *vacated and remanded by* 446 U.S. 903 (1980). The Second Circuit decision in the case revolved around the government's entitlement to "good-faith" immunity from suit in § 1983 cases, a question that had been left open in *Monell v. New York Dep't of Social Services*, 436 U.S. 658 (1978). *Sala*, 604 F.2d at 210. The Supreme Court vacated and remanded the *Sala* case for reconsideration under *Owen v. City of Independence*, 445 U.S. 622 (1980), which had been decided while the *Sala* case was on appeal. 466 U.S. at 903. *Owen* held that a municipality may not assert the "good-faith" of its officers as a defense to liability under § 1983. 445 U.S. at 638.

[99] *See* discussion *infra* at Part V.

today throughout the country[100] as courts continually find these policies to be violative of the Fourth Amendment.[101]

The Second Circuit Court of Appeals has consistently held since 1986, in *Weber v. Dell*,[102] that strip and body cavity searches conducted on misdemeanant arrestees, when there is no reasonable cause to suspect that the arrestee is carrying contraband or weapons on his or her person, is a constitutional violation of that person's Fourth Amendment rights to be free of unwarranted searches.[103]

In *Weber*, the court also held that the law was clearly established regarding blanket strip searches, and that the officials implementing such a policy were not entitled to qualified immunity under section § 1983.[104] Qualified immunity is a major issue in § 1983 cases, since officials are given great leeway in using their discretion.[105] What is very clear, however, is that an official is charged with knowing the law, especially the law as handed down by the Supreme Court and the law of the circuit.[106] The *Weber* court held that although the circuit court had not directly ruled on the issue, at least eleven circuit court decisions had so held, and there could be no objective reasonableness to the official conduct.[107]

The unconstitutionality of blanket strip searches was again made clear by the Second Circuit two years later in the case of *Walsh v. Franco*.[108] In *Weber* and *Walsh*, the court said that the police could justify these searches only by taking into account the surrounding circumstances of the arrest and the nature of the

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[100] *See infra* note 237.

[101] *See* discussion *infra* at Part V.

[102] 804 F.2d 796 (2d Cir. 1986), *cert. denied sub nom.* County of Monroe v. Weber, 483 U.S. 1020 (1987).

[103] *Id.* at 802.

[104] *Id.* at 803-04.

[105] *See* 2 IVAN BODENSTEINER AND ROSALIE LEVINSON, STATE & LOC GOV'T CIV RIGHTS LIAB §1A:05 77-303 (West Group 2000 & Supp. 2002) (discussing qualified immunity).

[106] *See id.* at 91.

[107] *Weber*, 804 F.2d at 803-04.

[108] 849 F.2d 66 (1988).

Touro Law Review, Vol. 18 [2002], No. 2, Art. 23

crime charged.[109] The circuit court evaluated the strip searches in these cases against the Supreme Court decision of *Bell v. Wolfish*.[110] In *Bell*, the Court had said that detainees arrested for felonies can be subjected to strip searches because of security concerns.[111] The Second Circuit analyzed *Bell*, and determined that *Bell* had not read unreasonable searches out of the constitution.[112] Generally, when persons are arrested for violent crimes and drug crimes, there is a valid reason to search the arrestee; the need to search for weapons and drugs. General security concerns, however, were rejected as an excuse for a blanket search, especially of people arrested for minor violations. The court said in *Weber*, that the risk of a misdemeanant arrestee introducing contraband into the general jail population simply did not warrant strip searches of all arrestees.[113]

The three cases discussed below, *Lee v. Perez*,[114] *Shain v. Ellison*,[115] and *Ciraolo v. City of New York*,[116] were all decided in the last two years, well after the unconstitutionality of blanket strip search policies was clearly established in the Second

[109] *Id.* at 68-69; *Weber*, 804 F.2d at 802.
[110] 441 U.S. 520 (1979).
[111] *Id.* at 559-60.
[112] *Weber*, 804 F.2d at 800.
[113] *Id.* at 802.
[114] 175 F. Supp. 2d 673 (S.D.N.Y. 2001).
[115] 273 F.3d 56 (2d Cir. 2001).
[116] 216 F.3d 236 (2d Cir.), *cert. denied*, 531 U.S. 993 (2000).

Circuit.[117] The three cases are not isolated incidents in this circuit; they are merely three examples.[118]

Lee v. Perez

Frederick Lee's cousin was being evicted from her apartment. The cousin called Lee to help her recover some of her things. When Lee got to the apartment, the landlord would not let him in. Lee called the police, and was subsequently arrested when he attempted to leave the area when told not to do so. He was charged with obstructing governmental administration, disorderly conduct and criminal mischief,[119] taken to the police station and held for arraignment. After his arraignment he was transported to another facility where he was subjected to a strip and body cavity search. The personnel at the facility had no reason to suspect that Lee was carrying any weapons or contraband on his person. The search was done pursuant to the sheriff's policy whereby everyone who entered the facility as a detainee was searched in this manner, even if he or she was able to make bail and would never leave the general processing area, as was the case in *Lee*.[120]

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[117] As a threshold matter, unless specifically noted, all of the cases cited herein were brought under 42 U.S.C. § 1983, which is the vehicle for seeking damages or injunctive relief when a state actor has violated one's federal constitutional rights. In addition, all of the cases were brought against municipalities, as well as against individual defendants. In *Monell v. New York City Dep't of Soc. Serv.*, 436 U.S. 658 (1978), the Supreme Court held that municipalities are persons under § 1983, and therefore can be sued for constitutional injuries. A municipality, however, cannot be held responsible on a *respondeat superior* theory; liability may be imposed only if the plaintiff can establish that his injuries were inflicted pursuant to an official policy or custom. *Id.* at 690-94.

[118] *See infra* text accompanying notes 202-19 for other recent Second Circuit cases.

[119] *Lee*, 175 F. Supp. 2d at 675. Disorderly conduct is a violation under N.Y. PENAL LAW § 240.20, the other two charges are misdemeanors under N.Y. PENAL LAW § 145 and § 195.05 (McKinney 2001).

[120] *Lee*, 175 F. Supp. 2d at 675-79.

Shain v. Ellison

Ray Shain was separated from his wife, but living in the same house with her. Shain's wife had an order of protection against him, but it had recently expired. After Shain purportedly came into his wife's bedroom unbidden and unwelcome, his wife called the police. The police decided to charge him with first degree harassment, a class B misdemeanor, and to arrest him. Shain was subsequently taken to the Nassau County Correctional Center, booked, and subjected to a body cavity and strip search, although the personnel at the jail had no reason to suspect that Shain was carrying weapons or contraband on his person. He was released the next day and sent home.[121]

Ciraolo v. City of New York

Debra Ciraolo was involved in a legal dispute with her next-door neighbor. One day, apparently in the midst of some sort of argument, Ciraolo's neighbor called the police, who subsequently arrested Ciraolo, charging her with aggravated harassment in the second degree, a misdemeanor. She was taken to Central Booking to be processed, and there she was subjected to a strip and body cavity search, even though the police had no cause to suspect that Ciraolo was carrying weapons or contraband on her person. The next day Ciraolo was released on her own recognizance.[122]

A. *The Policies Are Freely Admitted To*

In the *Lee* case, Judge McMahon had to direct a new trial because although the jury had found that Lee had been strip-searched, the jury also found that it was objectively reasonable for the Sheriff to conduct that search. This finding clearly went against the evidence in the case, for the Sheriff had admitted he could not know what Lee had been charged with and he could not have relied on any particular set of factors in deciding to search

[121] *Shain*, 273 F.3d at 60.
[122] *Ciraolo*, 216 F.3d at 237.

him.[123] Judge McMahon commented that this was "an appalling admission, in view of settled law" and vacated the jury verdict.[124] Lee did not seek injunctive relief.

B. The Typical Constitutional Injury Award

In *Shain,* the plaintiff successfully proved that his constitutional rights had been violated and that the jail was not entitled to qualified immunity for implementing its blanket strip search policy.[125] Shain received one dollar in nominal damages for this constitutional violation.[126] The plaintiff's request for an injunction had not been addressed by the district court, and the case was remanded for a determination on the issue of an injunction.[127] *Shain* is currently on remand to Judge Wexler in

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[123] *Lee*, 175 F. Supp. 2d at 681.

[124] *Id.*

[125] *Shain*, 273 F.3d at 62. The Supreme Court has never ruled on the issue of whether it is unconstitutional to strip search an arrested misdemeanant when there is no individualized suspicion that the arrestee is carrying contraband or weapons. The closest the issue ever came to that Court was the *Sala* case which the Court remanded for the determination of damages under *Owen*. *See supra* note 98. There was one dissenting vote in the *Shain* decision. Judge Cabranes believed that the Supreme Court decision of *Turner v. Safley*, 482 U.S. 78 (1987), controlled the outcome of the case. *Shain*, 273 F.3d at 70 (Cabranes, J., dissenting). In *Turner*, the Court held that the penological interest of prison officials outweigh privacy interests of prisoners, and that a very deferential standard must be used in favor of the officials in evaluating any case concerning detainee or prisoner's rights. *Turner*, 482 U.S at 89-90. The majority of the Second Circuit distinguished *Turner* and continued to rely on the precedent of the circuit. *Shain*, 273 F.3d at 65-66. It remains an open question. However, the case of *Atwater* may shed some light on where the Supreme Court might stand on the *Turner* holding as applied to arrested misdemeanants. In *Atwater*, the Court noted, in particular, that Mrs. Atwater's privacy had not been unduly interfered with. *Atwater*, 532 U.S. at 354 (conceding that plaintiff's arrest was humiliating, but not more harmful to her privacy interests than the normal custodial arrest). The Court stated that if the police had subjected her to any unreasonable privacy deprivations she would have had an individualized cause of action for that reason. *Id.* at 352-53.

[126] *Shain*, 273 F.3d at 62.

[127] *Id.* at 67.

Touro Law Review, Vol. 18 [2002], No. 2, Art. 23

the Eastern District of New York to determine the injunctive relief claim.[128] The odds of an injunction being issued in that case are improbable considering the current state of the law, but one can only hope that someone may have the right arguments to overcome nearly twenty years of a ham-strung federal court.

C. *Actual and Punitive Damages*

In *Ciraolo*, the concurring opinion only briefly mentioned an injunction, saying that "standing doctrine . . . generally precludes a § 1983 plaintiff from obtaining injunctive relief unless she can demonstrate that she is likely to be subjected to the same conduct in the future, a showing that can be very difficult to make."[129] In *Ciraolo*, the plaintiff was able to prove actual damages to a jury. She had suffered posttraumatic stress as a result of the incident, and had incurred medical bills.[130] The jury awarded her $19,645 in compensatory damages.[131]

More interestingly, the jury also awarded her $5,000,000 in punitive damages when it found that the City had acted in wanton disregard of Ciraolo's rights.[132] The district court concluded that punitive damages were available in this case because the City policy was contrary to well settled law in this circuit.[133] The district court had charged the jury "to consider whether compensatory damages would be adequate to deter future unlawful conduct."[134] On appeal, however, the punitive damage award was set aside.[135]

The circuit court was obviously displeased with the result in this case. First, it was uncertain whether the jury would have awarded Ciraolo more compensatory damages had they known

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[128] *Id.*
[129] *Ciraolo*, 216 F.3d at 248 (Calabresi, J., concurring) (citing *Lyons* as the basis for his conclusion).
[130] *Id.* at 237.
[131] *Id.* at 238.
[132] *Id.*
[133] *Id.*
[134] *Ciraolo*, 216 F.3d at 238.
[135] *Id.* at 242.

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they could not award her punitive damages.[136] Second, the court was frustrated by the fact that the police department readily admitted to its unconstitutional policy, but there was very little the court could do about it.[137] Relying on *City of Newport v. Fact Concerts*,[138] the circuit court said, "While we emphatically deplore the City's conduct in adopting a policy that this Circuit had earlier clearly held unconstitutional, the taxpayers themselves cannot be held to be responsible for the policy . . . ."[139]

In *City of Newport*, the Supreme Court held that municipalities are not liable for punitive damages in § 1983 claims because if punitive damages are assessed the entity that is really being punished is the taxpayer, not the responsible officials or the municipality.[140] The Court held that although punitive damages are not specifically precluded under § 1983, to punish a municipality is not "sensible."[141] The Court said, 1) it was unclear that municipal officers would be deterred by the damage awards, since the cost was born by the taxpayers, 2) voters would still be likely to vote wrongdoing officials out of office because they had done wrong, and because of compensatory damage awards, 3) if punitive damages were assessed at all, they should be assessed directly against the officials and 4) punitive damages could risk a city's financial integrity.[142]

The Court also said that municipal immunity from punitive damages was "well established" when Congress enacted the Civil Rights Act of 1871.[143] Therefore, it must be presumed that the legislature intended to preserve that principle unless the statute clearly indicates otherwise.[144] Although the Court alluded

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[136] *Id.* at 242 n.2.

[137] *Id.* at 242 ("We are seriously troubled by the City's adoption of a policy we had previously held unconstitutional.").

[138] 453 U.S. 247 (1981).

[139] *Ciraolo*, 216 F.3d at 241-42.

[140] *City of Newport*, 453 U.S. at 263.

[141] *Id.* at 267.

[142] *Id.* at 270.

[143] Ch. 22, 17 Stat. 13, § 1 (1871) (codified as amended at 42 U.S.C. § 1983); *City of Newport*, 453 U.S. at 263.

[144] *City of Newport*, 453 U.S. at 263; *see also* Katt v. City of New York, 151 F. Supp. 2d 313, 332-33 (S.D.N.Y. 2001) (explaining the Supreme

to cases where it may be just to hold the taxpayer responsible for constitutional violations, the Court said, however, those cases would be rare.[145]

In *Ciraolo*, the plaintiff argued to the Second Circuit that she should be able to keep the $5,000,000 punitive damage award because of the exception to municipal punitive damages left open in *City of Newport*.[146] She argued that because of the particularly "outrageous abuse" suffered at the hands of the police, this case should be one of the exceptions to the non-liability rule.[147] The Second Circuit analyzed Ciraolo's claim and decided that her case did not fit into one of those 'rare' categories.[148] The court interpreted the narrow exception the Supreme Court had left open in *City of Newport* to be an exception for cases where it would be justifiable to punish abuses for which the taxpayers were directly responsible.[149] "Although it could be argued that, to the extent that they are also voters who play a part in choosing municipal officials, taxpayers are always responsible for municipal policies . . . ."[150] However, the court found this correlation too indirect. The court considered that there could be cases where the taxpayers themselves were responsible for an invalid policy; for example, if there were a referendum instituting such a policy - that would present a closer link.[151]

Court's reasoning in *Newport* and finding that the City is not liable in punitive damages under New York City's Human Rights Law for substantially the same reasons).

[145] *City of Newport*, 453 U.S. at 267 n.29.

[146] *Ciraolo*, 216 F.3d at 238.

[147] *Id.* at 240.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Ciraolo*, 216 F.3d at 240. Judge Katzmann, who concurred in the reversal of the punitive award, specifically declined to join in the speculation as to what type of exceptions to the non-liability rule the footnote in *City of Newport* might have created. "Whatever the nature of any exception created by footnote 29 . . . 'such an occurrence is sufficiently unlikely that we need not anticipate it here.'" *Id.* at 250-51 (Katzmann, J., concurring in part) (quoting *City of Newport*, 453 U.S. at 267 n.29).

D. *"Underterrence"*

Judge Calabresi wrote a lengthy concurring opinion in *Ciraolo,* where he acknowledged that the Supreme Court precedents controlled the outcome of the case, but believed that "the policies behind punitive damages and the purpose of § 1983 would be better furthered by a different outcome."[152] According to Judge Calabresi, the continuing practice of strip searches should be analyzed under a cost-benefit analysis. A city will usually be "influenced by the extent to which it is made to bear the costs associated with its behavior."[153] But, strip search cases, usually with low compensatory damage awards, will not add up to enough disincentive to persuade the City to change its behavior. He called this phenomenon "underdeterrence."[154]

First, Judge Calabresi argued that not all injured parties sue for these injuries, especially when they know how low a compensatory award will be, or even worse, that they might receive only one dollar in nominal damages for the constitutional injury. Second, harms that disproportionately affect the poor are less likely to be redressed because the poor are frequently not able to bring suit to redress their injuries, or even if able, there is little incentive for them to do so "given the lack of sympathy this group of plaintiffs can expect from the trier of fact."[155] Judge Calabresi felt that in this case using punitive damages as a deterrent, instead of as retribution, would be appropriate.

> I respectfully suggest that the purpose of § 1983, to protect federal constitutional rights against infringement by state actors, is not served when - as in the case before us - the prospect of damages awarded pursuant to the statute manifestly fails to deter a municipality from adopting a policy that it

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[152] *Id.* at 242 (Calabresi, J., concurring).
[153] *Id.* at 243 n.1.
[154] *Id.*
[155] *Id.* at 247-48.

clearly knows or should know violates the Fourth Amendment.[156]

A different analysis of how damages affect a city's behavior can be found in the opinion of Professor Susan Bandes, who says that plaintiffs are denied standing and therefore can only seek damages "instead of seeking the *appropriate* system-wide declaratory and injunctive relief."[157] This only works, Bandes argues, if the defendants are individual wrongdoers, but if the governmental problem is systemic, damages do not work. "It is often far easier to ask the taxpayer to pay and pay than to take the politically risky position that the police department has to change its wrongful practices."[158]

Judge Calabresi believed that a possible solution might lie in the class action suit. However, he believed that a class action had its own problems: the loss of plaintiff autonomy; the expense of administering the class; possible conflicts among class members; and possible problems in meeting the numerosity requirement for some municipal behavior.[159]

E. The Class Action

If underdeterrence was the problem with New York City at the time of the *Ciraolo* decision, then theoretically, it should no longer be the problem. A $50,000,000 class action suit, *Tyson v. New York City*,[160] which sought damages for misdemeanants subjected to New York City's blanket strip search policy, settled on June 13, 2001, a year after *Ciraolo*, and sixteen years after the *Weber* decision.

Plaintiffs in the case were arrested for such things as driving with a suspended driver's license, loitering, and jumping

[156] *Ciraolo*, 216 F.3d at 250.
[157] Bandes, *supra* note 63, at 1338 (emphasis added).
[158] *Id.*
[159] *Ciraolo*, 216 F.3d at 248 (Calabresi, J., concurring).
[160] No. 97-CIV-3762 (S.D.N.Y.) (J. S. Martin).

a subway turnstile.[161] Danni Tyson, the named plaintiff, was arrested because she asked a police officer to move out of the way so that she could board a train; he purportedly arrested her because she "wouldn't stop talking."[162] The *Tyson* class action settled for up to $50,000,000, depending upon the number of plaintiffs who come forward to claim damages.[163] It is estimated that between 57,000 and 65,000 people were illegally searched in accordance with New York City's blanket strip search policy between July 1996 and May 1997.[164] According to the plaintiff's lawyer, Richard Emery, this was the largest settlement of a civil rights lawsuit against a municipality in the United States.[165]

Meanwhile, in Nassau County, three separate class actions were filed very soon after Judge Wexler announced his intention to grant summary judgment in favor of the plaintiff in the *Shain* case.[166] The three class actions, *Augustin v. Jablonsky*, *O'Day v. Nassau County*, and *Iaffaldano v. Nassau County*, were consolidated in March 2001. However, in *Augustin* after consolidating the cases, Judge Hurley decided that a class action would not be the most efficient way of dealing with the plaintiff's claims. He said that this was not primarily an injunctive class seeking damages as a secondary issue; this was primarily a damage suit, and the plaintiff's claims did not have enough commonality.[167] On the plaintiff's leave to reconsider, Judge Hurley affirmed the denial of the class certification.[168] The Second Circuit refused to hear the case on appeal and affirmed by

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[161] Benjamin Weiser, *New York Will Pay $50 Million In 50,000 Illegal Strip Searches*, N.Y. TIMES, January 10, 2001, at A1.

[162] CNN TODAY, January 10, 2001 Trans # 01011007V13 (quote from Danni Tyson).

[163] *Today's News Update*, 6/14/2001 N.Y.L.J. 1. (col. 1).

[164] Henry Goldman, *Judge Approves $50 Million payment in NYC Strip Search Lawsuit*, BLOOMBERG NEWS, June 13, 2001.

[165] *Id.*

[166] Augustin v. Jablonsky, 3/28/2001 N.Y.L.J. 31, (col. 3) (E.D.N.Y.).

[167] *Id.*

[168] *In re* Nassau County Strip Search Cases, 6/5/2001 N.Y.L.J. 29, (col. 4) (E.D.N.Y.).

order.[169] It was estimated in *Augustin* that the plaintiff class would have consisted of approximately 19,000 persons.[170]

The question remains, however, as to whether the policies have been discontinued. In *Augustin*, Judge Hurley said that the plaintiff's injunctive claim was most likely moot because defendant Nassau County had changed its strip search policy right after the *Shain* decision.[171] Similarly, speaking for New York City's policy, Bernard Kerik said, "When it was brought to the Department's attention that the policy of strip-searching all pre-arraignment detainees was inappropriate, the practice was stopped immediately."[172] If the municipalities have changed their policies, that may be the end of the problem for now. Nevertheless, one must still wonder if it should take sixteen years, perhaps up to 84,000 constitutional injuries and a huge expenditure by the taxpayers to halt unconstitutional behavior by our police.

One must also wonder if the purported voluntary compliance is sufficient at this point, since the police departments could re-institute their policies at any time. An illustration of this concern is Mary Novak, an 82-year old Brooklyn resident who alleges she was arrested by the N.Y.P.D for playing 'rap' music too loudly, and then subjected to a "humiliating" strip search.[173] The purported search of Ms. Novak occurred *after* the *Tyson* settlement.[174] Apparently, $50,000,000 later, New York City may still be underdeterred.

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[169] *Today's News Update*, 6/26/2001 N.Y.L.J. 1, (col. 1).

[170] *Augustin*, 3/28/2001 N.Y.L.J. 31, (col. 3).

[171] *Id.* Arguably, under the *Lyons* reasoning, if the claim is moot, then the court can grant standing for an injunction under the "capable of repetition, yet evading review" doctrine. However, also following the *Lyons* reasoning, the behavior is not moot because the county could decide to reinstate its policy at any time.

[172] Weiser, *supra*, note 161.

[173] Susan Saulny, *Charges Dropped, Woman Alleges Strip Search and Plans Suit*, N.Y. TIMES, July 6, 2001, at B2.

[174] *Id.*

IV. OTHER CIRCUITS: A SAMPLING OF THE EFFECTS OF *LYONS*

The Ninth Circuit is where *Lyons* originated, and ironically, that same Circuit was one of the last to realize the full import of the Supreme Court's disposition of the case. Just a few months after *Lyons*, the Ninth Circuit, in *Gonzalez v. Peoria*,[175]distinguished *Lyons* and held that because the damage claim and the injunctive claim were brought at the same time, and the relief sprang from the same set of operative facts, the plaintiff had standing for injunctive relief.[176] This reasoning resulted in several cases where the Circuit court issued injunctions in circumstances that seemed to implicate the Supreme Court's *Lyons* decision.[177]

Notably, one of those cases, *Giles v. Ackerman*, discussed below, concerned an unconstitutional strip search policy.[178] Even more notably, one of those cases, *Nava v. City of Dublin*, decided in 1997, concerned issuing an injunction against the California Highway Patrol for their choke hold policy.[179] The court in *Nava* actually admitted that the case seemed "remarkably similar" to the *Lyons* case.[180] And it was remarkably similar, except for one small fact; in *Nava*, the plaintiff had died after being choked for only a few seconds, and the executor of the decedent's estate maintained the suit.[181] Fifteen years after the

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[175] 722 F.2d 468 (9th Cir. 1983), *overruled by* Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999) (*en banc*).

[176] *Id.* at 481 (deciding ultimately not to issue an injunction because it was not clear that the police had a "policy" that needed to be redressed).

[177] *See also* Smith v. City of Fontana, 818 F.2d 1411 (9th Cir. 1987) (reinstating a claim for injunctive relief against Fontana police practice of discriminating against blacks suspects, involving an arrestee who was placed in a choke hold, then beaten, and then shot in the back), *overruled by Hodgers-Durgin*, 199 F.3d at 1037.

[178] 746 F.2d 614 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985), *overruled by Hodgers-Durgin*, 199 F.3d at 1037.

[179] 121 F.3d 453, 454 (9th Cir. 1997), *overruled by Hodgers-Durgin*, 199 F.3d at 1037.

[180] *Id.* at 455.

[181] *Id.* at 454.

Touro Law Review, Vol. 18 [2002], No. 2, Art. 23

Lyons decision, California police still used the choke hold restraint. Obviously, damage suits were an underdeterrent in California also. It was not until 1999 in the case of *Hodgers-Durgin v. De La Vina*,[182] that the Ninth Circuit court, *en banc*, reconsidered its circuit precedent in light of *Lyons*, and expressly overruled the line of cases that had been inconsistent with *Lyons*.[183]

In the Seventh Circuit, in *Williams v. City of Chicago*,[184] a plaintiff representing herself and all others similarly situated, arrestees who had been illegally detained for more than 72 hours without a probable cause or a bond hearing, lacked standing to seek injunctive relief. The court said that the plaintiff could not show that she would again be detained in the future, citing the *Lyons* decision.[185] The court acknowledged that because of the length of the detention periods involved, it was unlikely that an arrestee could ever have enough time to file a complaint before he or she was released. The court continued:

> As a result, the federal courts are rendered impotent to order the cessation of a policy which may indeed be unconstitutional and may harm many persons. Nevertheless, the Court is constrained by *Lyons* and other Supreme Court decisions to limit its censure of unconstitutional police practices as alleged here to individual awards of money damages.[186]

Four years after the *Williams* case, came *Robinson v. City of Chicago*,[187] a consolidated appeal of two separate suits which stated the same complaint as *Williams* had, and had exactly the same outcome; no named plaintiff in either action had standing to sue.[188] The district court found that the City of Chicago routinely held misdemeanants in detention while "ostensibly" clearing their

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[182] 199 F.3d at 1037.
[183] *Id.* at 1040.
[184] 609 F. Supp. 1017 (D.C. Ill. 1985).
[185] *Id.* at 1018.
[186] *Id.* at 1020 n.7.
[187] 868 F.2d 959 (7th Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990).
[188] *Id.* at 966.

fingerprints, but actually, the detainment was punishment for the misdemeanors themselves.[189] On appeal, the Seventh Circuit held that just as in *Lyons*, the plaintiffs could not allege that they would again encounter the police because their future conduct would presumably give the police no cause to arrest them.[190] More recently in the Seventh Circuit, the *Lyons* decision was prevalent in determining the plaintiffs' lack of standing in a racial profiling case brought under Title VI.[191]

In the Second Circuit, shortly after the *Lyons* decision was issued, the court had to reverse an injunction issued by the District Court of Connecticut. In *Curtis v. City of New Haven*,[192] the plaintiffs had successfully proved that the police had negligently sprayed mace into their faces and eyes and failed to give plaintiffs prompt medical attention, and that the city had not properly trained the police officers in the use of the substance.[193] The District Court issued the injunction, and then six days later, the Supreme Court decided the *Lyons* case.[194] On rehearing, the District Court would not set aside the injunction, instead it distinguished *Lyons* on the ground that this case involved a policy or custom of the police department.[195]

Judge Pratt, writing for the Second Circuit panel noted that *Lyons* was not distinguishable here; "Plaintiffs have not alleged that it is likely that they will be stopped by City police in the future and, for no reason and without provocation, assaulted with mace and not given treatment afterward." [196]

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[189] *Id.* at 965.

[190] *Id.* at 966.

[191] Chavez v. Illinois State Police, 1999 U.S. Dist. LEXIS 11976 *9-*67. *But see* Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131 (N.D. Cal. 2000) (finding in a similar Title VI case that plaintiffs might be able to show a likelihood of future injury, and that the plaintiffs' claim survived a motion to dismiss).

[192] 726 F.2d 65, 65 (2d Cir. 1984).

[193] *Id.* at 66.

[194] *Id.* at 67.

[195] *Id.* at 68.

[196] *Id.*

Touro Law Review, Vol. 18 [2002], No. 2, Art. 23

V. STRIP SEARCH CASES IN OTHER CIRCUITS

All of the Federal Circuits have passed on the strip search problem, and the circuit courts are unanimous that the behavior is unconstitutional when applying the balancing test as set forth in the case of *Bell.* In addition to the *Sala* case, discussed previously in Part I, four other courts issued injunctions; however, three of those cases were decided in 1977, 1979 and 1981, pre-*Lyons*. In the fourth, the defendant failed to appeal the injunction, and the Circuit court, recognizing the plaintiff did not have standing for an injunction in light of *Lyons*, would not reverse the injunction *sua sponte*. In one other case, an injunction resulted as part of a stipulation of settlement in a class action suit. The rest of the cases either do not mention injunctions at all,[197] or the court explains why it cannot issue one. The following excerpts tell the story.

First Circuit:

1997, *Swain v. Spinney*.[198] Holding: "A strip search of an arrestee must be justified, at the least, by a reasonable suspicion."[199] Plaintiff, who was strip-searched because her boyfriend was caught shoplifting, while boyfriend was not strip-searched, stated a trial-worthy claim. "If there was an objective basis - apart from retaliation - for stripping Swain, it would have been objectively reasonable to search [the boyfriend] as well."[200] "Our Circuit has 'recognized, as have all courts that have considered the issue, the severe if not gross interference with a person's privacy that occurs when guards conduct a visual inspection of body cavities.'"[201] Injunctive relief is not mentioned.

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[197] Most of the cases are appellate cases, and the injunction claim may have been dismissed below and not appealed, or it might not have been part of the plaintiff's claim at all. In light of the *Lyons* precedent, the former rationale seems most likely.

[198] 117 F.3d 1 (1st Cir. 1997).

[199] *Id.* at 5.

[200] *Id.* at 9.

[201] *Id.* at 6 (citing Arruda v. Fair, 710 F.2d 886, 887 (1st Cir. 1983)).

Hark: Strip Search Policies

Second Circuit:

2002, *Murcia v. County of Orange.*[202] Excerpt: The plaintiff was arrested in a case of mistaken identity, and subjected to four separate strip searches.[203] The case arose in the same county and before the same Judge as the *Lee* case discussed in Part III. The defendants attempted to argue that the sheriff is a state official, entitled to eleventh amendment immunity under § 1983.[204] The court took great umbrage at this argument:

> The law in this Circuit is EXTREMELY well settled; counties, not the State, are liable in damages if sheriffs, acting as head of a county correctional facility, promulgate unconstitutional strip search policies and County officials remain deliberately indifferent to that policy . . . .Indeed, the law is so well settled that Orange County could not possibly have a good faith basis for asserting that it is not liable for [these] policies . . . .The county is warned: the next time any of its many lawyers . . . tries to make this argument in front of this judge, the County and its counsel will be sanctioned for frivolous litigation tactics.[205]

Injunctive relief was not mentioned in this decision.

2001, *Gonzalez v. City of Schenectady.*[206] Holding: The city's policy of strip searching all detainees, regardless of their individual circumstances, was unconstitutional under the clearly established precedent of the circuit.[207] Injunctive relief was not mentioned.

2000, *Mason v. Village of Babylon.*[208] Holding: "It is the clear law in this circuit that the Fourth Amendment precludes prison officials from performing strip searches of arrestees

[202] 185 F. Supp. 2d 290 (S.D.N.Y. 2002).
[203] *Id.* at 290.
[204] *Id.* at 292.
[205] *Id.* at 292-93.
[206] 141 F. Supp. 2d 304 (N.D.N.Y. 2001).
[207] *Id.* at 307.
[208] 124 F. Supp. 2d 807 (E.D.N.Y. 2000).

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charged with misdemeanor or minor offenses absent a reasonable suspicion that the person being searched is concealing weapons or other contraband."[209] The plaintiff had been arrested and then subsequently strip searched because of a mistake made at the courthouse. Someone had forgotten to cancel a warrant issued on an unpaid ticket; the ticket was for a broken tail light. The court reserved for trial the issues of damages, qualified immunity and municipal liability.[210] No mention was made of injunctive relief.

2000, *Sorensen v. City of New York.*[211] Holding: Jury award of $60,000 in punitive damages had to be set aside because, "[t]he *Ciraolo* decision is dispositive here and the award of punitive damages cannot be sustained."[212] "Somehow, a decade after the *Weber* decision, it appears that the Police Department and/or the Department of Correction were still not abiding by the law."[213] "[T]he fact that the City of New York countenanced this lawlessness, at least until recently, and long after the Circuit Court of Appeals decision, stretches credulity . . . ."[214] Injunctive relief is not mentioned.

1999, *Flores v. City of Mount Vernon.*[215] Excerpt: "The utterly outrageous facts of this matter are not in dispute."[216] The plaintiff was subjected to a full body cavity strip search "pursuant to an admitted policy of the city of strip searching everyone who was arrested for narcotics activity."[217] What made the case so outrageous was that Mrs. Flores "WAS NOT CHARGED WITH ANY CRIME;" she was brought to the station house "FOR THE SOLE PURPOSE OF BEING SEARCHED."[218] The court said, "That turns the Constitution on its head and violates Mrs. Flores'

[209] *Id.* at 815.
[210] *Id.* at 817.
[211] 2000 U.S. Dist. LEXIS 15090.
[212] *Id.* at *23.
[213] *Id.* at *43.
[214] *Id.* at *46.
[215] 41 F. Supp. 2d 439 (S.D.N.Y. 1999).
[216] *Id.* at 440.
[217] *Id.* at 446.
[218] *Id.* at 445 (emphasis in original).

right to be free from unwarranted searches."[219] The court did not mention injunctive relief.

Third Circuit:

1993, *Newkirk v. Sheers*.[220] Holding: The court analyzed the decisions from eight other circuits and agreed that a particularized suspicion was required to strip search arrestees under the *Bell* balancing test.[221] It also held that in the wake of decisional law in eight other Courts of Appeals, the law was clearly established, and the defendants were not entitled to qualified immunity.[222] The plaintiffs had been arrested in connection with a non-violent animal rights protest. They had tried to save pigeons from being shot by sportsmen in a "pigeon shoot" and were charged with theft.[223] They were subjected to a strip / body cavity search pursuant to a blanket strip search policy implemented by the county.[224] No mention was made of injunctive relief.

Fourth Circuit:

1981, *Logan v. Shealy*.[225] Holding: Permanent injunction entered against the county's strip search policy. The policy was "conclusively shown to be unconstitutional," notwithstanding the fact that the Sheriff revised the policy after the suit was instituted.[226] This injunction, issued in 1981, pre-dated the *Lyons* decision.

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[219] *Id.*
[220] 834 F. Supp. 772 (E.D. Pa. 1993).
[221] *Id.* at 791.
[222] *Id.*
[223] *Id.* at 775.
[224] *Id.* at 777.
[225] 660 F.2d 1007 (4th Cir. 1981), *cert. denied sub nom.* Clements v. Logan, 455 U.S. 942 (1982).
[226] *Id.* at 1013.

Touro Law Review, Vol. 18 [2002], No. 2, Art. 23

Fifth Circuit:

1985, *Stewart v. Lubbock County.*[227] Holding: The circuit court ruled that although the district court issued a permanent injunction, the defendant did not appeal that part of the decision; therefore, the issue was not before the court. If the issue had been before the court, it would have reversed the injunction because of the recent Supreme Court decision of *Lyons.*[228] The dissent in the case argued that standing is a jurisdictional matter, and that the court should have reversed the injunction.[229]

Sixth Circuit:

1989, *Masters v. Crouch.*[230] Holding: It was clearly established in 1986 that authorities may not strip search persons arrested for minor violations absent reasonable suspicion that the detainee is carrying weapons or contraband.[231] Plaintiff had erroneously been told the incorrect date to appear in court for a traffic ticket, and was subsequently arrested for failing to appear. Although the plaintiff specifically requested a permanent injunction, the issue was not addressed on appeal, nor was mention made of the district court's disposition of that part of her claim.

Seventh Circuit:

1979, *Tinetti v. Wittke.*[232] Holding: Arrestees for minor offenses may be subjected to a strip search only if jail officials have probable cause to believe that arrestees are concealing weapons or contraband.[233] The court found that the case was not moot even though the defendants had changed the policy, because the issue was "capable of repetition yet evading review." As to

[227] 767 F.2d 153 (5th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986).
[228] *Id.* at 155 n.3.
[229] *Id.* at 157 (Hinojosa, J., dissenting).
[230] 872 F.2d 1248 (6th Cir.), *cert. denied sub nom.* Frey v. Masters, 493 U.S. 973 (1989).
[231] *Id.* at 1255.
[232] 620 F.2d 160 (7th Cir. 1980) *aff'g*, 479 F. Supp. 486 (E.D. Wis. 1979).
[233] *Tinetti*, 479 F. Supp. at 491.

Hark: Strip Search Policies

plaintiff's standing, the court said that although the plaintiff brought the claim as an individual and not as part of a class action, "the requested injunctive relief is appropriate when it will benefit the claimant and all others subject to the practice under attack." The court quoted extensively from Judge Pratt's decision in *Sala*.[234] This injunction issued in 1979, pre-*Lyons*.

1982, *Jane Does v. City of Chicago*.[235] Stipulation of Settlement: The parties settled the plaintiff's claims for injunctive relief "whereby the City was permanently enjoined from instituting strip searches or body cavity searches on women and not similarly situated men charged with traffic, regulatory or misdemeanor offenses unless there was reason to believe that the arrestee was concealing weapons or contraband."

1983, *Mary Beth G. v. City of Chicago*.[236] Holding: Plaintiffs of the *Jane Doe* class action entitled to damages for the same behavior found unconstitutional in that case.[237]

Eighth Circuit:

1985, *John Does 1-100 v. Boyd*.[238] Holding: Although the policy of the county of strip searching every detainee is unconstitutional, the class can not be certified as a Rule 23(b)(2) class because the plaintiffs do not have standing under the Supreme Court decision in *Lyons*. "The named plaintiffs cannot establish a credible threat that they will be arrested again."[239]

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[234] *Id.*

[235] No. 79 C 789 (N.D. Ill. Jan 12, 1982). Subsequent to the class action suit, the Illinois legislature modified its "Rights on Arrest" statute to make the practice unlawful. MaryBeth G. v. City of Chicago, 723 F.2d 1263, 1266 n.2 (7th Cir. 1983); *see also* ILL. ANN. STAT. ch. 725, para. 5/103-1 (Smith-Hurd 1992).

[236] 723 F.2d at 1263.

[237] *Id.* at 1272 (the court relied partly on the decision of *Tinetti*, which in turn had relied on *Sala*). Many of the other circuits in turn rely on *Mary Beth G.*, and actually attribute Judge Pratt's language from *Sala* to the *Mary Beth G.* case.

[238] 613 F. Supp. 1514 (D.C. Minn. 1985).

[239] *Id.* at 1529.

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1985, *Jones v. Edwards.*[240] Holding: Security concerns cannot justify a blanket deprivation of rights of the kind incurred here.[241] "We hold that the fourth amendment's protection against the kind of search of which Jones complains was well-settled at the time his search took place."[242] No mention was made of injunctive relief.

Ninth Circuit:

1984, *Giles v. Ackerman.*[243] Holding: The county's policy of strip-searching all detainees without reasonable suspicion was unconstitutional as a matter of law.[244] The following portion of the decision of the court was subsequently overruled:

> Gile's request for injunctive and declaratory relief does not raise the issue of standing considered by the Supreme Court in *City of Los Angeles v. Lyons*. In *Lyons* the plaintiff's damages claim had been severed from his claim for injunctive relied. The Court was thus required to consider whether his request for an injunction, standing alone, presented a case or controversy. In contrast, it is clear that Giles has standing to bring her damages action and there is no question that a live controversy exists between her and the County.[245]

1986, *Ward v. County of San Diego.*[246] Holding: The County's policy of a blanket strip search of all arrestees without requiring that there be reasonable suspicion the arrestee is hiding

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[240] 770 F.2d 739 (8th Cir. 1985).

[241] *Id.* at 742.

[242] *Id.* (citing Seventh and Ninth Circuit precedent and the wording of the Fourth Amendment itself).

[243] 746 F.2d 614 (9th Cir. 1984), *cert. denied,* 471 U.S. 1053 (1985), *later overruled by Hodgers-Durgin,* 199 F.3d at 1037.

[244] *Id.* at 619.

[245] *Id.*

[246] 791 F.2d 1329 (9th Cir. 1986), *cert. denied sub nom* Duffy v. Ward, 483 U.S. 1020 (1987).

weapons or contraband is unconstitutional.[247] The County and the sheriff are not entitled to qualified immunity because the law was clearly established at the time the incident took place that this type of search was unlawful.[248] However, the injunction issued by the district court was reversed as improvidently granted because of the Supreme Court decision in *Lyons*.[249]

Tenth Circuit:

1993, *Chapman v. Nichols*.[250] Holding: The law was clearly established that a policy that subjects all detainees to a strip search, without regard to reasonable suspicion that the detainee is carrying weapons or contraband is unconstitutional; there is no qualified immunity available for having such a policy.[251] No mentioned was made of an injunction.

1984, *Hill v. Bogans*.[252] Holding: Plaintiff, who was arrested for an outstanding speeding ticket, and strip searched in a hallway with ten to twelve onlookers present, was entitled to a trial on the issue of damages.[253] No mention was made of an injunction, though the court did mention that partly in response to the incident, the Colorado legislature had enacted a statute proscribing strip searches.[254]

Eleventh Circuit:

2000, *Skurstenis v. Jones*.[255] Holding: The policy of the Jail which requires that each inmate be strip searched, and does not require any reasonable suspicion before doing so, does not

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[247] *Id.* at 1332.
[248] *Id.* at 1333.
[249] *Id.*
[250] 989 F.2d 393 (10th Cir. 1993).
[251] *Id.* at 397.
[252] 735 F.2d 391 (10th Cir. 1984).
[253] *Id.* at 394-95.
[254] COLO. REV. STAT. § 16-3-405(1) (2001) precludes blanket strip searches of arrestees unless there is a reasonable belief that the person is concealing contraband or a controlled substance; *see also* IOWA CODE § 804.30 (1994) (same); VA. CODE ANN, § 19.2-59.1 (Michie 2000) (same).
[255] 236 F.3d 678 (11th Cir. 2000).

comport with the requirements of the Fourth Amendment.[256] The court in this case, however, found that the search of this particular plaintiff was constitutional because she had a weapon in her possession when arrested.[257] The issue of an injunction was not mentioned.

D.C. Circuit:

2002, *Helton v. United States*.[258] Holding: The defendant's motion to dismiss plaintiffs' claim for invasion of privacy under the Federal Tort Claims Act denied.[259] Plaintiffs were arrested when taking part in a non-violent animal rights demonstration and were subsequently arrested and strip searched. The defendant argued that in order to prevail on an intrusion on seclusion claim, the invasion must rise to a level of a violation of the right to privacy protected by the Constitution.[260] The court believed the plaintiffs could easily make that showing based upon the precedent of most of the federal court of appeals, "some dating back over two decades" holding that these blanket policies are unconstitutional.[261] Plaintiffs were only requesting damages, not injunctive relief.

1977, *Tatum v. Morton*.[262] A group of Quakers, who were peacefully demonstrating outside of the White House were arrested, and many of them were subjected to strip searches. The Circuit court said that "strip searches in the absence of any basis for suspicion of concealment of weapons, contraband or evidence was [a] . . . Fourth Amendment violation."[263] The court did not issue an injunction noting that another case had recently done so, prohibiting the District of Columbia police from conducting strip

[256] *Id.* at 682.
[257] *Id.*
[258] 191 F. Supp. 2d 179 (D.D.C. 2002).
[259] *Id.* at 184.
[260] *Id.* at 183.
[261] *Id.* at 184.
[262] 562 F.2d 1279 (D.C. Cir. 1977).
[263] *Id.* at 1284.

searches on parking and traffic arrestees without probable cause to suspect hidden weapons or contraband.[264]

VI. UTILIZING THE STATE COURTS

What most plaintiff's lawyers have overlooked in the *Lyon's* decision is the clear direction by the Court that cases seeking injunctions against state police powers should be taken up in the state courts.[265] "[T]he state courts need not impose the same standing or remedial requirements that govern federal court proceedings. The individual states may permit their courts to use injunctions to oversee the conduct of law enforcement authorities on a continuing basis."[266]

Article III standing is a jurisdictional requirement in federal court, but state courts are free to have their own standing requirements.[267] "The States are thus left free as a matter of their own procedural law to determine whether their courts may issue advisory opinions or to determine matters that would not satisfy the more stringent requirement in the federal courts that an actual case or controversy be presented for resolution."[268]

The only New York state court decision research has uncovered on the strip search issue is the Second Department case *Huck v. City of Newburgh*,[269] where a female misdemeanant, arrested for having an unlicensed dog, was subjected to an unconstitutional strip search pursuant to a city policy.[270] The plaintiff in *Huck*, however, did not request injunctive relief. If she had, she may have been able to get standing in the state court proceeding.

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[264] *Id.* at 1284 n. 14 (citing Civ. No. 75-2058 (D.D.C.)).

[265] *Lyons*, 461 U.S. at 113.

[266] *Id.*

[267] For attorneys interested in a full discussion of litigating a § 1983 case in state court there is a two volume treatise on the subject by STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS (CBC 1996 & West Group Supp. 1997-2001).

[268] New York State Club Assoc. v. City of New York, 487 U.S. 1 (1988).

[269] 275 A.D.2d 343, 344, 712 N.Y.S.2d 149, 151 (2d Dep't 2000).

[270] *Id.* at 344-45, 712 N.Y.S.2d at 151.

The New York Court of Appeals explained the historical requirement of standing in the case of *The Society of the Plastics Industry v. County of Suffolk.*[271] The court stated that the requirement of a case or controversy long pre-dated the federal constitution.[272] It was a common-law doctrine that insured that the party requesting relief had an actual stake in the dispute; an "injury in fact" was required so that a court was not being asked to merely render an advisory opinion.[273] See also *New York City Coalition for the Preservation of Gardens v. Guiliani*,[274] which states that a party must establish an injury in fact; "some concrete interest capable of sound and enduring judicial resolution."[275]

While New York has the same requirements for standing as the federal courts generally, it does recognize an important exception to the mootness doctrine. A claim is usually considered moot unless the rights of the parties will be directly affected by the judgment.[276] However, there is an exception for cases that present "important and recurring issues which, by virtue or their relatively brief existence, would be rendered otherwise nonreviewable."[277] There are usually "three common factors, (1) a likelihood of repetition, either between the parties *or among other members of the public*; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on . . . ."[278] Perhaps, if the strip search cases had been brought in a New York State court, the practice of blanket strip search policies would have been enjoined many years (and many taxpayer dollars) ago.

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[271] 77 N.Y.2d 761, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (1991).

[272] *Id.* at 772, 573 N.E.2d at 1040, 570 N.Y.S.2d at 784.

[273] *Id.* at 772-73, 573 N.E.2d at 1040, 570 N.Y.S.2d at 784.

[274] 175 Misc. 2d 644, 670 N.Y.S.2d 654 (N.Y. Sup. Ct. N.Y. County 1997), *aff'd* 246 A.D.2d 399, 666 N.Y.S.2d 918 (1st Dep't 1998).

[275] *Id.* at 650, 670 N.Y.S.2d at 659.

[276] *In re* Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714, 409 N.E.2d 876, 878, 431 N.Y.S.2d 400, 402 (1980).

[277] *Id.* (citing *Roe v. Wade*).

[278] *Id.* at 714-15, 409 N.E. at 878, 431 N.Y.S.2d at 402 (emphasis added).

There are other states that have made exceptions to the standing requirements of Article III. In *Duhon v. Gravett*,[279] a § 1983 case from Arkansas, a plaintiff brought suit to declare that Arkansas' post-judgment execution laws were unconstitutional. The plaintiff, before trial, recovered her property, and dismissed her claim against the retailer; however, she pressed the constitutional claim. The court held that although the issue was moot, it was still justiciable because "where considerations of public interest or the prevention of future litigation are present, the choice remains ours as to whether we may elect to settle an issue, even though moot. Future litigation may well be curtailed by our decision to resolve the issues presented in this appeal."[280] The court noted that "a substantial question exists underlying the constitutionality of Arkansas' writ of execution laws" that could affect many people.[281]

Similarly, the Hawaii Supreme Court in *Pele Defense Fund v. Paty*,[282] explains that the standing barrier for that state's court is lower in cases which are of concern to the public interest.[283] "Regardless of the standing theory, 'the crucial inquiry is "whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of . . . [the court's] jurisdiction and to justify exercise of this court's remedial powers on his behalf."'"[284] So that rights of the public will not be deprived of a judicial forum, the court had held in an earlier decision "that a member of the public can sue to enforce the rights of the public generally, if he can show that he had suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by any means, including a class action."[285]

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[279] 790 S.W.2d 155 (Ark. 1990).
[280] *Id.* at 156.
[281] *Id.*
[282] 837 P.2d 1247 (Haw. 1992).
[283] *Id.* at 1257.
[284] *Id.* (citations omitted).
[285] *Id.* (citing Akau v. Olohana Corp., 652 P.2d 1130, 1134 (Haw. 1982)).

There are similar cases arising in Missouri, Utah, Wisconsin, Texas and Maine.[286]

A very interesting case arose in California, *White v. Davis*, where police practices were challenged as a taxpayer's suit to enjoin the spending of public funds for illegal police activity.[287] The court held that under California's taxpayer suit provision, no special harm to the named plaintiffs need be shown, the purpose of the provision is to allow the "citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement."[288] It seems that someone could very well challenge the choke hold policy under this provision in California state court. Compare *White* with *Langford v. Gates*,[289] also brought as a California taxpayer suit, but brought in federal district court. In *Langford*, the plaintiffs challenged the illegal police conduct of the use of battering rams and grenades to storm residential structures suspected as places of unlawful narcotics activity.[290] In federal court, it was determined that the plaintiffs lacked a sufficient 'nexus' as taxpayers and the claim to be adjudicated sufficient to assure a personal stake in the outcome to satisfy the Article III case or controversy requirement.[291] Three of the plaintiffs had been in a house that had been stormed in such manner, yet they did not meet the 'substantial nexus' test under Article III analysis.[292]

There are also some state courts that require standing for § 1983 actions in the same way that the federal courts require it. For example, in *Langton v. Secretary of Public Safety*,[293] the Appeals Court of Massachusetts held that under § 1983 "a

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[286] *See* Steven H. Steinglass, 1 15TH ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION, *Litigating Section 1983 Actions in State Court*, 124-33 (Practicing Law Institute 1999) (surveying many state decisions which have allowed standing for § 1983 claims that would not have had standing if brought in federal court).

[287] 533 P.2d 222, 225 (Cal. 1975).

[288] *Id.* at 227.

[289] 610 F. Supp. 120 (C.D. Cal. 1985)

[290] *Id.* at 120.

[291] *Id.* at 121.

[292] *Id.* at 121-22.

[293] 636 N.E.2d 299 (Mass. 1994).

plaintiff must show that he has a 'personal stake in the outcome' and that 'he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'"[294] The Supreme Court of Oregon recently held that more stringent state standing requirements may not be applied in § 1983 claims heard in state court, however, it left open the question as to whether state justiciability standards would apply if those standards would be more favorable to a plaintiff instead of less favorable.[295]

It seems that the state courts that follow the federal standing requirements in this area should rethink the *Lyons* holding, and its myriad of implications, for currently, it seems that the state courts are the only judicial avenue left to wield some power over police activity that may run afoul of the Fourth Amendment.

VII. CONCLUSION

The strip search cases may be a chapter that is finally closing. The extensive publicity over the *Tyson* class action in New York City was hopefully a wake-up call for other municipalities. Yet, other problems persist, such as the choke hold policy in California, the illegal detainment of misdemeanants in Chicago, and the recent wave of racial profiling cases.

I realize we are living in a time when there are many valid security concerns facing our nation; however, it is just in such times of crisis that we should be the most vigilant in protecting our constitutional rights. For all too often, what we are willing to let happen because it is a time of crisis becomes a great blemish on our country and our legal system. *Hirabayashi v. United States*[296] and *Korematsu v. United States*[297] painfully proved that point. "[F]ew indeed have been the invasions upon

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[294] *Id.* at 303 (citing to federal case law).

[295] Barcik v. Kubiaczyk, 895 P.2d 765, 772-73 (Ore. 1995).

[296] 320 U.S. 81, 98-99 (1943) (upholding a curfew of all citizens of Japanese ancestry in certain areas because it was justified by emergency).

[297] 323 U.S. 214, 217-18 (1944) (upholding exclusion order of all citizens of Japanese ancestry from West Coast areas due to military emergency).

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essential liberties which have not been accompanied by pleas of urgent necessity advanced in good faith by responsible men."[298]

Now, as the government is instituting more and more security measures, and is giving more power to police departments, we are without a method of attacking those measures if they go too far. The loop-hole opened in *City of Los Angeles v. Lyons* should be closed, and the federal courts should be re-granted the power they were always meant to have, the power to enjoin unconstitutional behavior by anyone acting under "color of any"[299] law.

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[298] *Hirabayashi*, 320 U.S. at 113 (Murphy, J., concurring).
[299] 42 U.S.C. § 1983.