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AT THEIR MERCY:

**WHY THE PROTECTION OF OUR MOST PERSONAL
PRIVACY INTERESTS SHOULD NOT BE PLACED
SOLELY IN THE HANDS OF HEALTH CARE
FACILITIES**

Lily Alves

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INTRODUCTION

Searches and seizures are an intrusive yet integral part of American life. Americans seem to tolerate this invasion, in part because of their understanding that they are protected from unreasonable searches and seizures by the Fourth Amendment.¹ Under the Fourth Amendment, searches must be (1) based on probable cause; (2) conducted pursuant to the authority of a warrant; and (3) reasonable.² What Americans may not know is that the Fourth Amendment does not necessarily provide protection even where extremely invasive searches are concerned.³ Specifically, many people might be surprised to know that the Fourth Amendment's protections are relatively limited in the context of strip searches and body cavity searches performed on patients in health care facilities for non-law enforcement purposes.

We know intuitively that strip and body cavity searches at health care facilities must occur under private, even secretive, conditions because hospital staff obviously cannot disrobe or examine the body cavities of patients in an area that is visible to other patients and staff not involved in the search. Most likely, the only individuals present are the subject of the search and the individual executing the search. The extremely invasive and secretive nature of this type of search, combined with the potentially acute vulnerability of the subject of the search, could facilitate exploitative practices by health care providers who are in a position of trust. Lack of regulation in executing invasive searches, therefore, is a troubling aspect of current patient care standards in the United States.

This Comment will (1) examine the body of federal common law and state statutory law that governs strip search and body cav-

¹ U.S. CONST. amend. IV.
² *Id.*
³ *Klarfeld v. United States*, 944 F.2d 583, 586 (9th Cir. 1991) (quoting *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1243 (9th Cir. 1989)).

ity search procedures for both public and private health care facilities; (2) explain why the current level of protection is inadequate; and (3) propose three possible solutions to remedy the current lack of protection. As referenced in this Comment, an “invasive search” is either a strip search or a body cavity search. A “health care facility” includes any facility that treats patients, including hospitals, psychiatric institutions, rehabilitation facilities, detoxification centers, skilled nursing facilities, and residential care facilities.

I. BACKGROUND

A. Searches Generally

In the legal community we are accustomed to characterizing searches and seizures as an issue of criminal procedure rather than an issue of health care. The frequency of searches and seizures in this context is in part attributable to the fact that police officers are permitted to search an arrestee incident to a valid arrest.⁴ However, many searches occur outside of the arrest or search warrant context.⁵ Administrative searches can be conducted without a warrant or consent “as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime.”⁶ The warrant requirement is diminished or even absent for administrative searches, but these searches must still meet the Fourth Amendment’s reasonableness requirement.⁷ Thus, administrative searches can often be executed without a warrant, but they must be reasonable in order to pass constitutional muster.

The administrative search doctrine under the Fourth Amendment is an important basis for studying the validity of invasive searches performed at health care facilities. As discussed later in this section, the doctrine is inapplicable in several contexts. However, the administrative search doctrine at least provides a foundation for judging invasive searches performed at health care facilities on which standards can be formed and applied.

The starting point for the discussion of administrative searches is the state action doctrine. The development of this doctrine dates

⁴ *Michigan v. DeFillippo*, 443 U.S. 31, 35 (1979) (“Under the Fourth and Fourteenth Amendments, an arresting officer may, without a warrant, search a person validly arrested.”).

⁵ *Klarfeld*, 944 F.2d at 586 (quoting *\$124,570 U.S. Currency*, 873 F.2d at 1243).

⁶ *Id.*

⁷ *Id.* (citing *United States v. Davis*, 482 F.2d 893, 910 (9th Cir. 1973)).

back to the reconstruction amendments that were passed after the Civil War, with the turning point occurring in 1883 with the *Civil Rights Cases* decision.⁸ A famous section of the opinion delivered by Justice Bradley stated:

The wrongful act of an individual, unsupported by any such [State] authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress.⁹

Thus, as it applies to this discussion, the Fourth Amendment's reasonableness requirement for administrative strip and body cavity searches performed at psychiatric and medical facilities limits only *public* facilities as well as those searches performed at either private or public health care facilities for law enforcement purposes.¹⁰ This leaves invasive searches performed at private facilities largely untouched by Fourth Amendment constraints and the administrative search doctrine.

The Fourth Amendment's requirements also extend to governmental institution employees because they "are government actors, subject to the strictures of the Fourth Amendment" where searches and seizures are concerned.¹¹ Thus, both private facilities and their employees are limited only by state statutory and regulatory schemes.

Remedies for Fourth Amendment violations vary widely, but their application to invasive searches conducted at health care facilities appears limited. Exclusion of improperly obtained evidence from trial proceedings is one of the most common remedies for an unreasonable search and seizure; however, the exclusionary rule only pertains to evidence obtained during a criminal investigation.¹² Thus, this remedy is not applicable if the search was performed for health and safety reasons. Other remedies include state common

⁸ *Civil Rights Cases*, 109 U.S. 3 (1883).

⁹ *Id.* at 25–26.

¹⁰ *Cf. Klarfeld*, 944 F.2d at 586 (quoting *\$124,570 U.S. Currency*, 873 F.2d at 1243) (noting that administrative searches of private property can be reasonable even when invasive, under certain circumstances such as entering "sensitive" public spaces).

¹¹ *Ferguson v. City of Charleston*, 532 U.S. 67, 76 (2001).

¹² MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURE: CASES, STATUTES, AND EXECUTIVE MATERIALS* 335–38, 383 (2d ed. 2003). Black's Law Dictionary states that under the exclusionary rule, evidence must be excluded when it is "obtained by an unreasonable search and seizure." BLACK'S LAW DICTIONARY 564 (6th ed. 1990).

law actions for false imprisonment or trespass.¹³ Battery could potentially be added to this common law list. A further remedy is a civil rights action under 42 U.S.C. section 1983.¹⁴ Civil lawsuits against government actors are not common because of the doctrines of sovereign immunity for governmental entities and qualified immunity for individual governmental agents.¹⁵ Therefore, by extension, Fourth Amendment suits against public health care facilities are also rare.

Rodriquez v. Furtado is an example of how the qualified immunity doctrine can operate in the public health care facility context to shield both physicians and medical facilities from liability for performing an invasive search of a patient's body.¹⁶ The case arose out of a body cavity search performed on a woman who police suspected of carrying heroin.¹⁷ Police obtained a warrant and then brought the suspect to a private hospital to have a physician perform the body cavity search.¹⁸ The physician performed the search and the suspect subsequently brought a section 1983 action against, among others, the physician and the hospital.¹⁹ She asserted that the hospital became a state actor when it followed its internal policy of obeying court orders.²⁰

The court held that the physician was entitled to qualified immunity despite being the employee of a private facility because he exercised a search-and-seizure function with the authority of the state, and thus was afforded the same qualified immunity protection that would be extended to a police officer.²¹ The court also held

¹³ *Id.* at 383.

¹⁴ *Id.* A section 1983 lawsuit allows parties to sue governmental entities when they have suffered a deprivation of rights by "any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." 42 U.S.C. § 1983 (2004).

¹⁵ MILLER & WRIGHT, *supra* note 12, at 383. Sovereign immunity is founded on the principle that the government, or sovereign, cannot be sued for damages unless it gives its consent. See *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 258 (1999). Qualified immunity provides public officials a shield from liability from lawsuits arising from an alleged dereliction of a constitutional duty, "unless their conduct was unreasonable in light of clearly established law." *Elder v. Holloway*, 510 U.S. 510 (1994). The purpose of the doctrine "is to protect [public officials] from undue interference with their duties and from potentially disabling threats of liability." *Id.* at 514 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982)).

¹⁶ See *Rodriquez v. Furtado*, 771 F. Supp. 1245 (D. Mass. 1991).

¹⁷ *Id.* at 1248.

¹⁸ *Id.* at 1247-49.

¹⁹ *Id.* at 1249-50.

²⁰ *Id.* at 1251.

²¹ *Rodriquez*, 771 F. Supp. at 1262.

that the hospital could not be held liable because the warrant was constitutionally sufficient, and therefore the hospital's approval of the search did not injure the plaintiff.²² Additionally, the hospital's policy of obeying court orders "cannot be considered deliberately indifferent to the rights of [the city of] Taunton's inhabitants."²³ Although *Rodriquez v. Furtado* is confined to situations where medical facilities and physicians act according to the orders of a lawful search warrant,²⁴ the case demonstrates how the doctrines of sovereign and qualified immunity can protect physicians and medical facilities from liability due to infringement of an individual's Fourth Amendment rights.

Another illustrative use of sovereign and qualified immunity in the health care facility context is found in *Quintero v. Bedi*.²⁵ The case involved a 10-year-old schizophrenic girl who was institutionalized at a state hospital where, pursuant to the facility's policy, she underwent a gynecological and rectal examination.²⁶ After she became agitated and upset, the physician halted the examination.²⁷ Her parents brought a section 1983 action against the facility and the physicians connected with their daughter's treatment.²⁸ The plaintiff asserted that the conduct of the physicians paralleled that of a strip search.²⁹ Defendants countered that the examination did not resemble a strip search because it was medical treatment, not law enforcement.³⁰ The court agreed, and went on to hold that while a gynecological and rectal examination of a young girl may be unusual, it does not amount to gross negligence on the part of the physician and therefore the patient's right to privacy under the Fourth Amendment was not violated.³¹

The plaintiff in *Quintero* would probably not have been successful in a tort action against the facility or the physicians because of the sovereign immunity doctrine. The fact that the facility was public meant that its physicians were state actors.³² The public sta-

²² *Id.* at 1265.

²³ *Id.*

²⁴ *Id.* at 1262-64.

²⁵ See *Quintero v. Bedi*, No. C-91-1071 SI, 1995 WL 705156, at *1 (N.D. Cal. Nov. 20, 1995).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at *4.

³⁰ *Quintero*, 1995 WL 705156, at *4.

³¹ *Id.*

³² *Dolihite v. Maughon*, 74 F.3d 1027, 1044 (11th Cir. 1996).

tus of the facility insulated its physicians from ordinary civil liability.³³ Because the facility's policy was not unconstitutional, the actions of its employees in carrying out that policy could not be attacked using a Fourth Amendment argument. Thus, the physicians could easily have defended themselves in a tort or civil rights action under a theory of qualified or sovereign immunity.

Rodriguez v. Furtado and *Quintero v. Bedi* demonstrate that public medical and psychiatric facilities, or private facilities acting pursuant to a lawful search warrant, are subject to the requirements of the Fourth Amendment when conducting strip searches.³⁴ However, one can also glean from these cases that bringing suit under the Fourth Amendment is not often a successful endeavor for plaintiffs; thus, health care facilities are generally well-insulated from liability for performing unreasonable invasive searches.³⁵ If the patient is able to prove that the provider is a government actor, he or she still has to overcome the problem of immunity, which is a considerable challenge.³⁶

Because the Fourth Amendment's protections in the context of invasive searches performed at health care facilities extend only to those patients who can establish that the facility is a governmental actor, the problem of protecting the privacy interests of patients in private institutions falls to the states and to the individual facilities.³⁷ Aspects of the administrative search doctrine, discussed *infra*, are still relevant to private facilities because of the guidance they provide facilities on how to conduct reasonable invasive searches. Beyond the federal aspects of search doctrine, then, the issues that will still remain are (1) whether states and state agencies adequately protect patients from unreasonable invasive searches at health care facilities; and (2) to what degree should individual facilities be entrusted with protecting highly sensitive patient privacy rights.

B. Administrative Search Requirements Under Federal Common Law

As discussed in the preceding section, public facilities must abide by the reasonableness requirements of the Fourth Amend-

³³ *Id.* at 1045.

³⁴ See, e.g., *Rodriguez*, 771 F. Supp. at 1245; *Quintero*, 1995 WL 705156, at *1.

³⁵ *Id.*

³⁶ *Dolihite*, 74 F.3d at 1044–45.

³⁷ *Rodriguez*, 771 F. Supp. at 1258–59.

ment under the administrative search doctrine.³⁸ Thus, any discussion regarding invasive searches performed at public facilities should include an examination of these requirements. The guidelines for conducting reasonable administrative searches were established by *New Jersey v. T.L.O.*³⁹ The Court stated that both the probable cause and warrant requirements for a search may be relaxed in certain limited circumstances.⁴⁰ Under these circumstances, the search must be “reasonable” even if the purpose for conducting the search does not rise to the level of probable cause.⁴¹ The Court held that an administrative search is reasonable if it is “justified at its inception” and conducted in a manner that is “reasonably related in scope to the circumstances which justified the interference in the first place.”⁴² Thus, the *T.L.O.* case created a framework for judging the reasonableness of all future administrative searches, including those performed at public health care facilities for non-law enforcement purposes.

The federal common law doctrine regarding administrative searches was further developed by the Ninth Circuit in *United States v. Bulacan*.⁴³ In that case, a woman who entered a federal building intending to apply for a new social security card was approached by a security officer who informed her that he needed to search her bag.⁴⁴ She relinquished the bag to the officer, who conducted a search and found drug paraphernalia and crystal methamphetamine.⁴⁵ The items were confiscated, and Bulacan was subsequently charged with possession of methamphetamine with intent to distribute.⁴⁶

³⁸ *Klarfeld v. United States*, 944 F.2d 583, 586 (9th Cir. 1991) (quoting *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1243 (9th Cir. 1989)).

³⁹ See *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985).

⁴⁰ *Id.* The *T.L.O.* case involved a 14-year-old student and her friend caught smoking in a high school lavatory. *Id.* at 328. They were taken to the principal’s office, where the assistant vice principal searched the student’s purse. *Id.* He found several drug-related items that formed the basis of the state bringing delinquency charges against T.L.O. *Id.* at 328–29. T.L.O. claimed a Fourth Amendment violation and attempted to have the evidence uncovered from her purse suppressed, but the court held that the search was reasonable. *Id.* at 329. The Appellate Division affirmed. *Id.* at 330. The Supreme Court of New Jersey reversed. *Id.* The U.S. Supreme Court reversed, holding that the search of T.L.O.’s purse was reasonable. *Id.* at 333.

⁴¹ *Id.* at 341.

⁴² *Id.*

⁴³ *United States v. Bulacan*, 156 F.3d 963 (9th Cir. 1998).

⁴⁴ *Id.* at 966.

⁴⁵ *Id.*

⁴⁶ *Id.*

In finding that the search of Bulacan was unconstitutional, the Ninth Circuit applied a balancing test that involved weighing the need to search against the invasion that the search entailed.⁴⁷ Additionally, the court evaluated the validity of the entire administrative scheme under which the search was conducted.⁴⁸ This determination involved an assessment of whether the scheme served a narrow but compelling administrative need that justified the search.⁴⁹ The court found that governmental building safety was the compelling administrative need that justified the search, particularly in the wake of the Oklahoma City bombings.⁵⁰ However, the court went on to find that the search was not narrowly tailored enough to serve its goal of safety, because it not only encompassed a permissible purpose—that of finding weapons and explosives—but also an impermissible one, that of finding drugs.⁵¹ Moreover, the individual conducting the search was given too much discretion in how he selected someone to search, and this was contrary to the Fourth Amendment’s requirement for reasonableness.⁵² Thus, the Ninth Circuit test for reasonableness of an administrative search requires that the following factors be met: (1) the need to search must be greater than the invasion of the individual; and (2) the search must be narrowly tailored to meet a compelling administrative interest.⁵³ The test for reasonableness requires determining the degree of discretion involved in a search conducted by an administrative agency’s employee.⁵⁴ The secondary purpose of finding drugs was impermissible because “[s]earches conducted as part of a general regulatory scheme must further an administrative purpose, rather than further a criminal investigation.”⁵⁵ The primary purpose of finding weapons and explosives was permissible because they constituted an immediate threat to the occupants of the building.⁵⁶ However, searching visitors for drugs was impermissible because

⁴⁷ *Id.* at 967.

⁴⁸ *Bulacan*, 156 F.3d at 968.

⁴⁹ *Id.* (citing *\$124,570 U.S. Currency*, 873 F.2d at 1244–45).

⁵⁰ *Id.*

⁵¹ *Id.* at 973.

⁵² *Id.*

⁵³ *Bulacan*, 156 F.3d at 967–68.

⁵⁴ *Id.* at 970.

⁵⁵ *Id.* at 973.

⁵⁶ *Id.* at 973–74.

the presence of narcotics did not present an immediate threat to occupant safety.⁵⁷

The *Bulacan* case provides guidance on how medical facilities are permitted to handle evidence that they obtain from their patients in the course of conducting searches. Few would dispute that a medical or psychiatric facility should be able to conduct an invasive bodily search if it will prevent drugs or weapons from entering the facility and endangering the staff or patients. However, this does not mean that any contraband obtained is permissible as evidence in a criminal investigation.

An example of how a medical facility strayed over the line between legitimate administrative search goals of health and safety and the non-legitimate goal of criminal investigation is seen in *Ferguson v. City of Charleston*.⁵⁸ The case involved a policy at the Medical University of South Carolina to test the urine of pregnant women suspected of cocaine use—without first obtaining their consent.⁵⁹ The hospital developed a cooperative policy with the County Substance Abuse Commission and the Department of Social Services that entailed threatening patients who tested positive with contacting law enforcement agencies if the patient did not agree to enter into substance abuse counseling.⁶⁰ The Court determined that the search of pregnant women in *Ferguson* fell under the “special needs doctrine.”⁶¹ A search performed pursuant to this doctrine falls within a “closely guarded category of constitutionally permissible suspicionless searches.”⁶² If a search meets a “special need,”⁶³ then the warrant and probable cause requirements of the Fourth Amendment are replaced by the requirement that the search be reasonable.⁶⁴

⁵⁷ *Id.*

⁵⁸ *Ferguson v. City of Charleston*, 532 U.S. 67, 85–86 (2001).

⁵⁹ *Id.* at 70.

⁶⁰ *Id.* at 71–72.

⁶¹ *Id.* at 74–76.

⁶² *Id.* at 77 (quoting *Chandler v. Miller*, 520 U.S. 305, 309 (1997)).

⁶³ A “special need” is a need, other than the normal need for law enforcement, that provides sufficient justification to conduct a search without a warrant or probable cause. *Ferguson*, 532 U.S. at 74 n.7.

⁶⁴ *Id.* at 74 n.7 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (stating that “there are limited exceptions to the probable cause requirement in which reasonableness is determined by a careful balancing of governmental and private interests” and that such a balancing test should only be applied in special needs circumstances)).

Determining reasonableness involves balancing government and private interests.⁶⁵ The *Ferguson* Court explained that the special needs doctrine should only be employed “in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.”⁶⁶ *Ferguson* held that administrative agencies cannot conduct warrantless searches for the purpose of generating evidence to turn over to law enforcement.⁶⁷ Thus, in case there was any doubt before *Ferguson*, the current state of the law is clear: Medical facilities and psychiatric centers cannot use administrative searches conducted in the name of health and safety as a source of evidence for criminal investigations.

The lone federal case that deals with hospital strip-search policies is *Aiken v. Nixon*.⁶⁸ Fortunately, it provides detailed guidelines for the writers of current and future hospital strip-search policies.⁶⁹ *Aiken* involved the patient search policy of the Capital District Psychiatric Center (“CDPC”), a state psychiatric facility.⁷⁰ A patient claimed that he was illegally strip-searched and body-cavity searched upon admission to the facility.⁷¹ The court found that the search policy did not contain an “overt indication of any entanglement with law enforcement.”⁷² Therefore, because the search fell under the special needs doctrine, the test for validity was one of reasonableness.⁷³

In finding that the CDPC search policy was constitutional, the court employed a two-pronged reasonableness test that involved: (1) “comparing the individual’s legitimate expectation of privacy with the intrusiveness of the search,” and (2) assessing the reasonableness of the government’s legitimate interest in the “context of the intrusion on the fundamental right to privacy.”⁷⁴ In applying this test to the case at bar the court found that, first, individuals’ expectation of privacy is diminished in the context of a voluntary admis-

⁶⁵ *Id.*

⁶⁶ *Id.* at 74 n.7.

⁶⁷ *Id.* at 86.

⁶⁸ *Aiken v. Nixon*, 236 F. Supp. 2d 211 (N.D.N.Y. 2002).

⁶⁹ *Id.* at 237–38.

⁷⁰ *Id.* at 218.

⁷¹ *Id.*

⁷² *Id.* at 231.

⁷³ *Aiken*, 236 F. Supp. 2d at 231.

⁷⁴ *Id.* at 231–32 (citing *Sec. & Law Enforcement Employees v. Carey*, 737 F.2d 187, 201 (1984)).

sion to a crisis psychiatric ward.⁷⁵ This is because the individuals must know that they cannot bring weapons or illicit drugs into the ward.⁷⁶ The individuals also must know that they may be subjected to invasive medical procedures when they are admitted to a medical facility.⁷⁷ Thus, a bodily search, while intrusive, is not unanticipated in the psychiatric treatment facility context. Second, the government's interest in keeping weapons and drugs out of psychiatric wards is significant.⁷⁸ The significance of the interest correlates with the extreme danger that is presented to staff and patients, as well as to the patient who is the subject of the search, from ingestion of illicit drugs or from weapons.⁷⁹ This heightened danger makes even intrusive strip-searches and body cavity searches reasonable in this context.⁸⁰ The reasonableness of the searches is further supported by the policy of the facility that contested searches do not occur in the absence of individualized reasonable suspicion that a patient possesses drugs or weapons.⁸¹ Moreover, the facility's search policy "specifically provide[d] that the level of intrusion into a patient's privacy rights must be based upon the degree of individualized suspicion, and that the level of intrusion must be carefully tailored to address each person's individual situation."⁸²

The court relied on an internal facility policy in stating:

a reasonable state official working for the facility could assume that the policy's requirement that:

- 1) all searches required a "potential risk and/ or reasonable possibility that the patient possesses" a weapon or contraband, combined with
- 2) the provision that strip searches are justified "on rare occasion, based on clinical judgment," and
- 3) that body cavity searches are justified only "upon reasonable belief and to prevent serious harm to themselves,"

meant that the such [sic] searches were allowed only upon possession of reasonable suspicion and/or probable cause to believe that the person possessed contraband (drugs) or a weapon.⁸³

These factors are not only a constitutionally sufficient means for conducting invasive searches at public health care facilities; they

⁷⁵ *Id.* at 232.

⁷⁶ *Id.* at 232.

⁷⁷ *Id.*

⁷⁸ *Aiken*, 236 F. Supp. 2d at 234.

⁷⁹ *Id.* at 234.

⁸⁰ *Id.* at 234.

⁸¹ *Id.* at 237.

⁸² *Id.*

⁸³ *Aiken*, 236 F. Supp. 2d at 237–38 (internal citation omitted).

also provide excellent guidelines for private facilities. As developed in the discussion and analysis sections of this paper, the factors listed by the *Aiken v. Nixon* court can provide guidance for: (1) state legislatures and regulatory agencies that can use the factors for their invasive bodily search statutes or regulations in the form of licensure requirements or patient rights statutes; (2) accreditation agencies that use the factors as a basis for intrusive bodily search standards; (3) Medicaid and Medicare certification standards; and (4) health care organizations that need to formulate intrusive bodily search standards in their organizational policy and procedure.

C. State Statutory Schemes Regarding Strip Searches and Body Cavity Searches

Statutes that are promulgated by state legislatures relate to strip searches in a variety of ways. Not all states have passed statutes that contain language pertaining to strip searches or body cavity searches specifically.⁸⁴ In these jurisdictions, cases brought due to an allegedly unreasonable or unlawful intrusive search cite to a hodgepodge of state statutes or constitutional amendments that pertain to searches and seizures.⁸⁵ For example, the jurisdictions of Ari-

⁸⁴ For example, searching an online database of Alaska law uncovers a constitutional search provision, ALASKA CONST. art. I, § 14, but no strip or body cavity search provisions.

⁸⁵ See, e.g., ALA. CODE §§ 14-6-1, 14-6-95, 15-5-2 (2004) (explaining the requirements for the issuance of search warrants, prohibiting unsanitary practices in jails, and giving the sheriff custody of all prisoners); ALASKA CONST. art. I, § 14 (giving Alaskans the right to be secure against unreasonable searches and seizures); HAW. CONST. art. I, § 7 (giving Hawaiians the right to be secure against unreasonable searches and seizures); IND. CONST. art. 1 § 11 (giving the residents of Indiana the right to be secure against unreasonable searches and seizures); IND. CODE ANN. §§ 35-44-3-3, 35-48-4-1, 35-48-4-6 (Michie 2004) (making it a misdemeanor or felony offense to resist arrest, defining the offense of cocaine or narcotic drug dealing, and defining the offense of possession of a narcotic drug, respectively); MASS. CONST. pt. 1, art. XIV (giving the residents of Massachusetts the right to be secure against unreasonable searches and seizures); MASS. GEN. LAWS ch. 127, § 32 (2004) (requiring that prisoners be treated with kindness based on “obedience, industry and good conduct”); MASS. GEN. LAWS ch. 258, §§ 9, 9A, 13 (2004) (detailing indemnity procedures for public employees, for state police, and municipal officials, respectively); MONT. CONST. art. II §§ 10, 11 (giving Montanans a right of privacy and a right to be secure against unreasonable searches and seizures); MONT. CODE ANN. § 46-5-101 (2003) (explaining under what circumstances searches and seizures are authorized); N.M. STAT. ANN. §§ 30-20-1, 30-22-14, 30-22-24, 30-31-30 (Michie 2004) (defining disorderly conduct, defining and setting penalties for bringing contraband into places of imprisonment, defining battery upon a peace officer, and setting powers of enforcement, respectively); N.Y. CONST. art. 1, § 12 (giving New York citizens the right to be protected from unreasonable searches and seizures); N.Y. CIV. RIGHTS LAW § 8 (McKinney 2004) (giving residents of New York the right to be protected from unreasonable searches and seizures); N.Y. CRIM. PROC. LAW §§ 690.05, 690.15, 690.40, 690.45, 690.50 (McKinney 2004) (defining search warrant; defining to whom and to what search warrants may be directed; explaining the court’s procedure for grant-

zona, Delaware, the District of Columbia, Georgia, Idaho, Kentucky, Louisiana, Maryland, Mississippi, Nebraska, Nevada, New Hampshire, Oregon, Rhode Island, Utah, and Vermont would likely follow this example in the event of a suit brought in state court as a result of an invasive search, since these jurisdictions lack specific statutory clauses regarding strip searches or body cavity searches. The jurisdictions that do have statutes that deal specifically with intrusive searches regulate the following categories of searches: (1) searches performed on arrestees or pursuant to a lawful search warrant;⁸⁶ (2) searches performed on prisoners;⁸⁷ (3) searches performed

ing or denying an application for a search warrant; setting the requirements for the contents of search warrants; and describing the methods with which search warrants must be executed).

⁸⁶ See, e.g., ARK. CODE ANN. §§ 16-82-301, 16-82-302 (Michie 2003-04) (stating that arrestees cannot refuse body cavity searches, and that if feasible, the employees of public institutions or public medical personnel will perform body cavity searches pursuant to the Arkansas Rules of Civil Procedure, respectively); COLO. REV. STAT. § 16-3-405 (2004) (prescribing the conditions under which the performance of strip searches and body cavity searches on arrestees are permitted); CONN. GEN. STAT. ANN. §§ 54-33k, 54-33l (West 2004) (defining "strip search" in the arrestee context and setting procedures for conducting strip searches and body cavity searches, respectively); FLA. STAT. ANN. § 901.211 (West 2004) (defining strip searches and body cavity searches in the context of searching arrestees); IOWA CODE ANN. §§ 702.23, 804.30 (West 2004) (defining "strip search" and setting procedure for conducting strip searches of arrestees, respectively); KAN. STAT. ANN. §§ 22-2520, 22-2521, 22-2522 (2003) (defining "strip search" and "body cavity search"; setting limits for conducting strip searches on arrestees, and detailing requirements for conducting a body cavity search pursuant to a search warrant, respectively); ME. REV. STAT. ANN. tit. 5, § 200-G (West 2004) (setting strip search and body cavity search procedures for arrestees in Maine); MICH. COMP. LAWS. ANN. §§ 764.25a-b (West 2004) (defining "strip search" and "body cavity search" in the context of conducting these searches on arrestees, respectively); MO. ANN. STAT. § 544.193 (West 2004) (defining "strip search" and "body cavity search," and prescribing procedures for conducting these searches on arrestees); OHIO REV. CODE ANN. § 2933.32 (Anderson 2004) (defining "strip search" and "body cavity search" and prescribing procedures for conducting these searches on arrestees); TENN. CODE ANN. §§ 40-7-119, 40-7-121 (2004) (defining and limiting strip searches conducted on arrestees and defining and limiting body cavity searches conducted on arrestees, respectively); VA. CODE ANN. § 19.2-59.1 (Michie 2004) (defining "strip search" and setting limits for conducting these searches on arrestees); WASH. REV. CODE ANN. §§ 10.79.060, 10.79.070, 10.79.090, 10.79.110, 10.79.120, 10.79.130, 10.79.140, 10.79.150, 10.79.160 (West 2004) ((1) establishing the intent of the Washington legislature to create policies for conducting strip searches on arrestees, and restricting the use of strip searches to occasions when absolutely necessary; (2) defining "strip search" and "body cavity search"; (3) clarifying that statutes detailing with invasive searches do not preclude or prevent the administration of medical care; (4) allowing for an injured party to bring a civil suit as a result of a violation of any statute from the section dealing with invasive searches; (5) applying sections dealing with invasive searches to all individuals in custody at a "holding, detention, or local correctional facility"; (6) setting exceptions to the warrant requirement for conducting strip and body cavity searches; (7) detailing less-intrusive alternatives to conducting a strip or body cavity search; (8) requiring that a written record be created every time a strip search is conducted; and (9) excluding physical examinations for public health purposes from the

on prison visitors;⁸⁸ and (4) searches performed on schoolchildren.⁸⁹ Body cavity searches and strip searches performed on patients in health care institutions for non-law enforcement purposes are dealt with in state regulatory schemes, discussed below.

D. State Regulatory Schemes Regarding Strip Searches and Body Cavity Searches

State regulations that pertain or relate to invasive searches fall into four dominant categories: (1) regulations that require humane treatment by health care facilities, often including language guaranteeing a right to privacy;⁹⁰ (2) regulations that define conditions

requirements of strip and body cavity searches); WIS. STAT. ANN. § 968.255 (West 2004) (defining “strip search” and setting procedures for conducting strip searches on detainees).

⁸⁷ See, e.g., TENN. CODE ANN. § 41-1-102(d)(2) (2004) (setting requirements for conducting strip searches on prisoners).

⁸⁸ See, e.g., OHIO REV. CODE ANN. §§ 5120.421, 5139.251 (Anderson 2004) (allowing strip searches of visitors to halfway house facilities and to youth correctional institutions, respectively).

⁸⁹ See, e.g., CAL. EDUC. CODE § 49050 (Deering 2004) (prohibiting body cavity searches of elementary and secondary school pupils by school employees); IOWA CODE ANN. § 808A.2(4)(a)–(b) (West 2004) (prohibiting strip searches and body cavity searches on students of public schools by school officials); N.J. STAT. ANN. § 18A:37-6.1 (West 2004) (prohibiting teaching staff members, principals, and other education personnel from conducting strip searches or body cavity searches of pupils); OKLA. STAT. ANN. tit. 70, § 24-102 (West 2004) (allowing searches of pupils but disallowing strip searches); S.C. CODE ANN. § 59-63-1140 (Law. Co-op. 2003) (prohibiting school administrators or officials from conducting strip searches of pupils); VA. CODE ANN. § 22.1-279.7 (Michie 2004) (charging the Board of Education for developing search policies, including policies regarding strip searches); WASH. REV. CODE ANN. § 28A.600.230 (West 2004) (prohibiting strip searches or body cavity searches of students by principals, vice principals, or anyone acting under their direction); WIS. STAT. ANN. §§ 118.32, 948.50 (West 2004) (prohibiting any official, employee or agent of any school from conducting a strip search of a pupil).

⁹⁰ See generally ARIZ. ADMIN. CODE §§ R9-21-101(B)(40), R9-21-202 (A)(1)(C)(v) (2004) (defining “inhumane” and describing the right of behavioral health patients to humane treatment); GA. COMP. R. & REGS. rr. 290-4-2-.25(a)(1), 290-4-9-.02(1)(a), 290-4-12-.17(1)(a), 290-9-12-18(1)(a) (2004) (guaranteeing humane treatment to the clients of substance abuse, mental health, and mental retardation programs); MASS. REGS. CODE tit. 104, §§ 32.02, 32.03, 32.05 (2004) (defining “inhumane,” and detailing investigation and reporting procedures and responsibilities when inhumane treatment is suspected within the department of mental health); MASS. REGS. CODE tit. 115, §§ 5.03, 9.01, 9.06, 9.08 (2004) (describing general standards to promote dignity within the Department of Mental Health; explaining that the purpose of the regulatory scheme is to promote the reporting and investigation of allegations of inhumane treatment; and describing how filing and investigation are carried out); MO. CODE REGS. ANN. tit. 9, §§ 10-5.200, 40-1.015(DD)(2) (2004) (including “inhumane treatment” in the definition of “physical abuse” of a mental health client); OHIO ADMIN. CODE § 5122-30-22(C)(5) (2004) (detailing the rights of children in residential mental health facilities as including “the right to be free from inhumane treatment”); S.D. ADMIN. R. 46:17:04:14 (2004) (establishing a behavior intervention committee to protect patients at mental health centers from inhumane treatment); TENN. COMP. R. & REGS. 1200-8-21-

under which seclusion and restraint may occur;⁹¹ (3) guidelines for conducting invasive searches on children;⁹² and (4) regulations that

.12(5)(a) (2004) (explaining that the clients of substance abuse facilities have a right to a humane treatment environment); 25 TEX. ADMIN. CODE §§ 133.42(a)(1)(B), 125.6(f)(10)(b)(iii), 125.6(f)(11) (West 2004) (making the right of patients to “considerate and respectful care” a part of the operational requirements for a hospital seeking a license to operate, and delineating humane treatment requirements for residential special care facilities).

⁹¹ See generally ARIZ. ADMIN. CODE §§ R9-21-101(B)(50), (56)–(57) (2004) (defining “personal restraint,” “restraint,” and “seclusion,” respectively, for behavioral health programs); MASS. REGS. CODE tit. 115, § 5.11 (2004) (prohibiting the use of seclusion and delineating conditions under which emergency, physical, mechanical, and chemical restraint for mental health facilities may be used); MO. CODE REGS. ANN. tit. 9, § 40-1.015(F), (W), (EE), (OO) (2004) (defining “chemical restraints,” “mechanical restraints,” and “physical restraint” as well as “seclusion” in the context of licensing rules for mental health facilities); OR. ADMIN. R. 309-032-0810(4)(f), 309-032-0870(10)(b)(F), 309-032-1110(9), (50), (77), 309-032-1170(13), 309-032-1190(2)–(8), 309-033-0530(3)(a)–(b), 309-033-0710(17)–(18), 309-033-0720, 309-033-0730, 309-035-0167, 309-035-0260(41)–(42), 309-040-0005(e)(C)–(D), (27), (44), 309-041-0405(1)(g)–(h), 309-112-0005(7), 309-112-0010, 415-050-0020(4) (2004) ((1) guaranteeing children in intensive mental health treatment programs the right to be free from restraint and seclusion unless used in compliance with all applicable statutes and administrative rules; (2) ensuring that the behavior treatment plans for enhanced care services bar the use of locked seclusion and restraint; (3) creating a standard for approval of regional acute care psychiatric services that the facility create a written annual report that addresses use of seclusion and restraint as part of its quality assessment and improvement; (4) defining various restraint and seclusion terms in the context of children’s intensive mental health treatment services; (5) setting procedures for conducting restraint and seclusion on patients of children’s intensive mental health treatment services; (6) distinguishing between facilities approved to conduct restraint and seclusion and facilities not approved to conduct restraint and seclusion in the context of sites that provide care to committed persons or to persons in custody or on diversion; (7) defining “restraints” and “seclusion” in the context of facilities approved to perform these actions on committed persons or on persons in custody or on diversion; (8) delineating requirements for a facility’s application for approval to provide seclusion and restraint to committed persons and to persons in custody or on diversion; (9) setting procedure for conducting restraint and seclusion on committed persons and on person in custody or on diversion; (10) setting procedures for using restraint and seclusion in residential care facilities for mentally or emotionally disturbed persons; (11) defining “restraint” and “seclusion” in the context of residential care facilities for persons who are mentally or emotionally disturbed; (12) characterizing the use of restraint and seclusion as potentially abusive as well as defining the term “restraints”; (13) characterizing the use of restraint as potentially abusive in the context of case management services for individuals with developmental disabilities; (14) defining restraint terms in the context of the use of restraint on patients and residents in state institutions; (15) delineating general policies for the use of restraint on patients and residents in state institutions; and (16) recommending against the use of restraint or seclusion on patients in alcohol detoxification programs).

⁹² See generally ARIZ. ADMIN. CODE R6-5-7457 (2004) (limiting strip searches on children in residential group facilities and outdoor experience programs to disrobing no further than down to underwear); FLA. ADMIN. CODE ANN. IT. 6D-7.007(3)(d), 65E-20.013(4) (2004) (prohibiting strip searches on pupils of the Florida School for the Deaf and the Blind and providing guidelines for searching clients of a mental health forensic program); IDAHO ADMIN. CODE §§ 16.06.02.760(02), 16.06.02.842(02) (2004) (delineating guidelines for con-

explain under which conditions strip searches and body cavity searches may occur in health care facilities, if at all.⁹³

The first category could potentially be used by a plaintiff seeking recovery for abusive, invasive search. The second category of restraint and seclusion potentially speaks to the issue of invasive searches because this type of search almost certainly entails some kind of restraint. However, this is not always the case, and the patient who consents to a search and thus does not have to be restrained, would not be afforded protection from a wrongful or abusive search. The third category, like the first, could potentially be used by a plaintiff to achieve recovery if the search is not performed as specified.

The last category, that of health care facility strip search regulations, reveals relatively few statutes on point.⁹⁴ Of those statutes that *are* on point, none regulate all health care environments in general.⁹⁵ Rather, they are limited to specific facilities like inpatient detoxification programs and state mental health facilities.⁹⁶ Therefore, strip searches and body cavity searches are largely unregulated in the majority of health care facilities across the nation.

Health care facilities may suffer penalties for not following administrative regulations.⁹⁷ For example, a special care facility in

ducting invasive searches on children in residential care facilities and in therapeutic outdoor programs); OR. ADMIN. R. 413-210-0771(2)(c)-(d) (2004) (prohibiting the performance of strip searches and body cavity searches on the participants in outdoor youth programs that are a part of residential care); 25 TEX. ADMIN. CODE § 133.42(b)(1)(D) (West 2004) (stating that minors are entitled to a humane treatment environment as part of the operational requirements for a hospital seeking licensure).

⁹³ See generally MASS. REGS. CODE tit. 105 §§ 160.305(B)(1), 750.380 (B)(1)(b) (2004) (guaranteeing patients of inpatient substance abuse detoxification treatment services freedom from strip searches and conditioning approval of licensure for drug treatment programs on the guaranteeing of these rights); N.C. ADMIN. CODE tit. 10A, r. 28C.0307(c)(3) (2004) (stating that body cavity searches may only be performed at state mental health facilities when there is probable cause to conduct such a search and that only a physician may perform such a search in the presence of a member of the nursing staff where at least one staff member is the same sex as the client); TENN. COMP. R. & REGS. 0940-2-4-.03, 0940-2-4-.09 (2004) (defining strip searches and visual and manual body cavity searches, and stating that the patients and residents of mental health facilities are subject to any necessary invasive searches conducted by clinical staff); 40 TEX. ADMIN. CODE § 148.316 (West 2004) (outlining guidelines that residential drug and alcohol facilities must follow regarding all client searches, including strip searches, in order to obtain licensure); 25 TEX. ADMIN. CODE § 404.153(12) (West 2004) (defining intrusive searches in the context of mental health patient rights).

⁹⁴ See statutes cited *supra* note 93.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ 25 TEX. ADMIN. CODE § 125.9(b)(1) (West 2004).

Texas may be subject to administrative penalties in the amount of \$1,000 per violation for violating any of the special care facility regulations.⁹⁸ Collected penalties are “deposited in the state treasury in the general revenue fund.”⁹⁹ Facilities that object to paying the penalty may request a hearing with an administrative law judge.¹⁰⁰

E. Health Care Organization Accreditation Standards for Strip Searches and Body Cavity Searches

Accreditation “is a private voluntary approval process through which a health care organization is evaluated and can receive a designation of competence and quality.”¹⁰¹ Currently, most accreditation is conducted by the Joint Commission for the Accreditation of Healthcare Organizations (“JCAHO”).¹⁰² JCAHO is governed by the hospital industry via such organizations as “the American Hospital Association, the American College of Surgeons, and the American College of Physicians.”¹⁰³ It tends to be a very powerful organization within the hospital industry because “virtually no hospital of respectable size risks the business consequences of jeopardizing its accreditation status.”¹⁰⁴ Thus, while accreditation is technically voluntary, for practical purposes it is a necessary component of operating a health care facility.

JCAHO does not incorporate strip search or body cavity search policies into the standards it uses to determine whether or not to accredit a health care organization.¹⁰⁵ JCAHO does require that hospitals respect patient confidentiality, privacy, and security.¹⁰⁶ Accreditation is assessed in the area of patient privacy by giving a score of two if patient privacy is satisfactorily compliant, and zero if the hospital is insufficiently compliant.¹⁰⁷ Similarly, when security is

⁹⁸ *Id.* The term “special care facility” includes residential facilities where medical services are provided primarily to individuals with AIDS and other terminal illnesses. 25 TEX. ADMIN. CODE § 125.2 (31) (West 2004).

⁹⁹ *Id.* at § 125.9 (a)(2).

¹⁰⁰ 25 TEX. ADMIN. CODE § 125.9(e) (West 2004).

¹⁰¹ MARK A. HALL ET AL., HEALTH CARE LAW AND ETHICS 1073 (6th ed. 2003) (1955).

¹⁰² *Id.*

¹⁰³ *Id.* at 1073–74.

¹⁰⁴ *Id.* at 1074.

¹⁰⁵ See JOINT COMMISSION ON ACCREDITATION OF HEALTHCARE ORGANIZATIONS, AUGUST 2004 COMPREHENSIVE ACCREDITATION MANUAL FOR HOSPITALS: THE OFFICIAL HANDBOOK (2004) [hereinafter JCAHO ACCREDITATION MANUAL 2004].

¹⁰⁶ *Id.* at RI-15.

¹⁰⁷ *Id.*

at issue, JCAHO inquires whether “[t]he hospital provides for the safety and security of patients and their property.”¹⁰⁸ Scoring is the same as for patient privacy.¹⁰⁹ Thus, while strip searches and body cavity searches are not referenced by JCAHO specifically, it is possible that the provisions regarding privacy and security could be interpreted to pertain generally to the areas of strip searches and body cavity searches.

It is curious that JCAHO does not have specific standards for strip searches and body cavity searches when it does contain fairly detailed standards on a related issue of patient treatment: restraint and seclusion.¹¹⁰ A strip search or body cavity search could certainly involve physical restraint of some kind in order for those performing the search to carry out their task on a patient who is unable or unwilling to consent to the search. Therefore, the JCAHO standards would extend protection to the patient under these circumstances.

The JCAHO standards contain a gap in that they do not assist the patient who voluntarily submits to an invasive search and who, therefore, does not have to be physically restrained. Additionally, JCAHO states that its restraint and seclusion standards do *not* apply to “[f]orensic restrictions and restrictions imposed by correction and law enforcement authorities for security purposes.”¹¹¹ The manual goes on to say that “restraint or seclusion use related to the clinical care of an individual under forensic or correction restrictions is surveyed under these [restraint and seclusion] standards.”¹¹² Therefore, JCAHO protects patients undergoing an invasive search where physical restraint is involved, but the protection could lapse in those situations where no physical restraint is involved or when the search is conducted for law enforcement purposes.

Even if the JCAHO standards would apply to an invasive search where the patient was physically restrained, the issue remains whether these standards are detailed enough to provide adequate protection. JCAHO requires that restraint and seclusion only be used in “situations where there is appropriate clinical justification.”¹¹³ Further requirements include: (1) development of appropriate policies regarding restraint and seclusion;¹¹⁴ (2) use of

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See JCAHO ACCREDITATION MANUAL 2004, *supra* note 105, at PC.25.40.

¹¹¹ *Id.* at PC.31.

¹¹² *Id.*

¹¹³ *Id.* at PC.11.10.

¹¹⁴ *Id.* at PC.12.10.

performance-improvement processes that could reduce the use of restraint and seclusion;¹¹⁵ (3) protection of “patient rights, dignity, and well-being”;¹¹⁶ (4) correct use of seclusion and restraint techniques by staff that is competent and trained;¹¹⁷ (5) documentation of restraint and seclusion in the patient’s medical records that is consistent with organizational policy;¹¹⁸ (6) review, evaluation, and approval of seclusion and restraint techniques by qualified staff;¹¹⁹ and (7) use of restraint or seclusion is initiated either by an individual order or an approved protocol.¹²⁰

When explaining its use of restraint and seclusion standards, JCAHO states that the overall organizational approach to restraint and seclusion should protect the patient and preserve his or her rights, dignity, and well-being during use.¹²¹ JCAHO takes restraint and seclusion very seriously because these practices have “the potential to produce serious consequences, such as physical or psychological harm, loss of dignity, violation of a patient’s rights, and even death.”¹²² The gravity of JCAHO’s tone in relation to restraint and seclusion seems to indicate that any kind of physical contact to which the patient has not consented must be handled delicately. Strip searches and body cavity searches also imply physical contact with the patient that can be adverse to the patient’s wishes, but JCAHO does not address this topic.

The standards within JCAHO’s restraint and seclusion section provide some general guidelines for physically handling patients when the patient might find this contact objectionable or when the contact might abridge their normal liberties, but the nature of a strip search or body cavity search differs significantly from restraint and seclusion. These standards ultimately do not provide guidance that is detailed enough to provide adequate protection. Thus, while the restraint and seclusion standards contain language that is a good start for incorporating standards relevant to invasive searches into the accreditation process, more specific guidelines would provide better protection.

¹¹⁵ JCAHO ACCREDITATION MANUAL 2004, *supra* note 105, at PC.11.20.

¹¹⁶ *Id.* at PC.11.40.

¹¹⁷ *Id.* at PC.12.20–30.

¹¹⁸ *Id.* at PC.12.40.

¹¹⁹ *Id.* at PC.12.90, PC.12.110.

¹²⁰ JCAHO ACCREDITATION MANUAL 2004, *supra* note 105, at PC.12.70.

¹²¹ *Id.* at PC.11.100.

¹²² *Id.* at PC.11.100.

II. DISCUSSION & ANALYSIS

A. Health Care Facility Patients Are Not Adequately Protected from Unreasonable Invasive Searches by the Current Statutory, Regulatory, and Accreditation Schemes.

Examination of the interplay between state statutes, regulations, and accreditation standards pertaining to invasive searches reveals that patient privacy interests do not receive enough attention.¹²³ Shockingly, it seems that health care facilities practically have free rein to disrobe a patient and probe their bodies with no one but the subject of the search and the individual(s) executing the search present in the room.

Protections from invasive searches are piecemeal or nonspecific. The promulgated guidelines discussed in the preceding sections that deal directly with invasive searches, or at least relate to them, either (1) pertain to a very select group of patients; or (2) are so broad and general that a health care facility cannot realistically build a working invasive-search policy based on the guidelines.¹²⁴

It defies reason that the states and the federal government provide far more comprehensive protections regarding strip searches or body cavity searches for convicted felons and drunk drivers than for the average patient who has committed no crime and who enters a hospital emergency center or a psychiatric facility.¹²⁵ While Fourth Amendment protections are adequate for the average patient, the number of facilities owned and operated by local, state, or federal governments consists of just over one-quarter of all facilities.¹²⁶ This leaves regulation of invasive searches performed in the majority of health care facilities, for reasons other than by lawful search warrant, to the states. The states, however, have mostly overlooked this area of patient care, as is evidenced by the paucity of statutes or regulations that provide guidelines for conducting invasive searches. Therefore, most health care facilities in most states decide how and when to conduct an invasive search of a patient at their own discretion.

The judgment of the individual facility may not necessarily be poor, but this does not mean it should be unlimited. If law enforce-

¹²³ See *supra* notes 69, 70, 72; see also *id.* at PC.11.10–PC.12.110.

¹²⁴ See *supra* notes 81–101.

¹²⁵ See *supra* notes 64–67.

¹²⁶ HALL ET AL., *supra* note 101, at 14 (citing JOSEPH WHITE, *COMPETING SOLUTIONS: AMERICAN HEALTH CARE PROPOSALS AND INTERNATIONAL EXPERIENCE* (1995)).

ment is not given complete discretion to conduct invasive searches of arrestees, then why should health care facilities have unfettered discretion to do the same with patients? Tort law does not provide an adequate deterrent to abusive practices by health care facilities. Formulating a common law claim for trespass or battery is not likely to fit the circumstances surrounding an invasive search because the patient may have consented to the initial search. Common law claims also do not provide an adequate solution to patients because of naturally decreased expectations of privacy in health care facilities. Finally, encouraging more tort claims in a health care industry that is already struggling under the weight of malpractice issues is not a laudable pursuit. Rather, implementation of clear guidelines for conducting invasive searches should be the ultimate objective.

The amount of discretion left to the individual health care facility in deciding to conduct an invasive search on a patient is troubling because of the acute level of intrusion into a very private aspect of our lives. Patients differ from arrestees in that the reason for their presence at the facility is to receive treatment, not because they have possibly committed a crime. For this reason, a strip or body cavity search performed for purposes other than law enforcement is the height of invasiveness. Furthermore, patients are vulnerable because, compared with the general population, they are more likely to be unable to consent to a search; unwilling to consent to a search; or unduly frightened or humiliated by a search. Issues surrounding consent, fear, and humiliation arise in part from an elevated possibility that the subject of the search could also be mentally ill, in pain, or experiencing emotional or physical trauma. This mental and physical vulnerability is coupled with the patients' expectations that they are in an environment where those responsible for their care have their best interests at heart.

The trust that patients place in health care facilities compares with no other venue in daily life. Patrons of a department store or sports fans at an arena would not disrobe and allow the staff to prod and poke them. Patients, however, might reasonably expect that health care facility staff could need to access bodily surfaces and interiors in order to provide medical treatment. Patients might also fear that they will not receive treatment if they do not comply with invasive searches. This level of trust and reduced expectation of privacy can easily lend itself to exploitative or harmful practices, even where health care providers had no intention to harm any patients. Patients' vulnerability, therefore, is a central problem of unregulated invasive searches at health care facilities.

As an example of why strip search standards are necessary, here is a hypothetical. Take the example of someone who has been in a motor vehicle accident. Emergency medical services (“EMS”) personnel have reason to believe that the individual, a young male, may have ingested drugs because of the presence of paraphernalia at the accident site. The patient is semiconscious and unable to speak, but the reason for his altered mental status is not readily ascertainable; EMS takes the patient to a private local hospital, where they express their concerns about possible drug use. The treating physician decides to conduct a strip search of the patient in order to locate any potential illicit substances or paraphernalia on the patient’s body, because the patient seems unwilling or unable to communicate regarding any ingestion prior to the accident.

The state has no regulations or statutes on point. Hospital policy dictates that a physician must order a strip search, but the policy does not provide any further details regarding how a search should be conducted. The physician approves the search and instructs a male nurse to remove the patient’s clothing. The nurse takes the patient to a private room and conducts the search. While he is searching, the patient becomes conscious, and then quickly becomes distraught and combative at finding himself disrobed and being searched by the nurse. The nurse took no restraint precautions because he did not realize in time that this would be necessary, and the nurse is physically injured by the patient.

Had the facility provided more detailed guidelines about how to conduct the search correctly, including performing the search under the supervision of a physician rather than according to the physician’s authorization, then the injury might have been averted. Additionally, it will now be much more difficult to sort out whether the nurse acted appropriately, because no other staff member was present during the search to corroborate his actions.

As another example, a middle-aged female with paranoid schizophrenia is brought to a state inpatient psychiatric unit by ambulance after being triaged at a local emergency room. She stopped taking her medications, and in her psychotic state, does not cooperate with the staff during their efforts to complete intake. She threatens to stab the treating staff, and insults the chief psychiatrist on duty several times. Her statements irritate the psychiatrist and lead the staff to believe that she may be concealing a knife.

The state in this hypothetical does not have a strip search or body cavity search statute or regulation, but the hospital has a policy that strip and body cavity searches must be performed by a phy-

sician. The psychiatrist determines that the patient's disruptive behavior presents a risk to the safety of the patient, the staff, and other patients at the facility, and decides to conduct an invasive search in order to determine whether the patient is carrying a weapon. He enlists the aid of a male psychiatric technician, and they search the patient in a private examination room. The patient, already frightened and unable to appreciate that the search was undertaken to protect her, becomes terrified during the search. A body cavity search in fact reveals that the patient had concealed a small pocketknife. She is humiliated by the experience and the facility soon faces a suit for infringement of the patient's Fourth Amendment rights on the basis that having two men conduct a body cavity search on a woman behind closed doors amounts to an unreasonable search. The facility's legal position is further compromised by the fact that the patient may have a valid argument that the search included a retaliatory element because of the psychiatrist's irritation with her insulting comments. While it was not per se unreasonable to conduct the search, the manner in which the search was conducted rendered it unreasonable.

Both the patient's humiliation and discomfort, as well as the lawsuit, could have been avoided if the hypothetical state had a regulation similar to that of North Carolina, where, given these same circumstances, the facility would have been permitted to perform the search, given the disruptive, threatening behavior of the patient.¹²⁷ However, the following procedures would have to have been followed: (1) the psychiatrist would have performed the body cavity search, having established probable cause to do so; (2) the search would have been performed in the presence of a member of the nursing staff; and (3) the physician or nursing staff member present would have been of the same sex as the patient.¹²⁸ The facility came close to following this procedure, but the last step was overlooked and the consequences of overlooking this small detail could prove significant.

It is not the object of this discussion to advocate that intrusive searches should not be performed in health care facilities. Indeed, such searches are, at times, absolutely necessary to the well-being of patients and staff alike. Facilities should be encouraged to perform invasive searches, if the circumstances warrant, because the conse-

¹²⁷N.C. ADMIN. CODE tit. 10A r. 28C.0307(c)(3) (2003).

¹²⁸*Id.*

quences of failing to do so might be far worse than any humiliation or fright suffered by the patient.

Baptist Medical Center v. Trippe is a tragic illustration of where a facility failed to perform a necessary invasive search.¹²⁹ In this case, a patient suffering from bipolar disorder with suicidal ideation was voluntarily admitted to the psychiatric unit at Baptist Medical Center Montclair.¹³⁰ One of the nurses performed a cursory search of the patient, but not a strip search or a body cavity search.¹³¹ The patient removed all of her clothing and changed into a hospital gown.¹³² Because of her suicidal ideation, she was transferred to a wing of the unit where she could be observed by video monitor.¹³³ She spent about two days in the unit without making any suicidal gestures; however, she did make a few comments indicating suicidal ideation.¹³⁴

On her third day in the psychiatric unit, a nurse observed the patient “standing on her bed and reaching toward the light fixture in her room.”¹³⁵ After being moved to a new room, the nurses began making several trips to and from the patient’s room for various reasons.¹³⁶ First, a nurse retrieved the metal part of an identification bracelet with which the patient was rubbing her wrists.¹³⁷ Next, the nurse observed the patient with something in her hands through the video monitor and confiscated matches and a cigarette.¹³⁸ Ultimately, the nurses observed on the video monitor that the patient had an item which she had pulled out from under her sweater.¹³⁹ The item turned out to be a gun, and while one of the nurses called for assistance the patient lifted the gun to her chest and fatally shot herself.¹⁴⁰

The administrator of the patient’s estate subsequently sued the facility for breach of the standard of care and negligence in provid-

¹²⁹ See *Baptist Med. Ctr. v. Trippe*, 643 So.2d 955 (Ala. 1994).

¹³⁰ *Id.* at 955.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Baptist Med. Ctr.*, 643 So.2d at 956.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Baptist Med. Ctr.*, 643 So. 2d at 956.

¹⁴⁰ *Id.*

ing medical services.¹⁴¹ An evidentiary dispute arose regarding whether there had been epithelial cells on the gun that would have indicated that the patient had concealed the gun inside a body cavity.¹⁴² The court ultimately did not reach the issue of whether the trial court committed a harmless error when it refused to allow the defendant's witness to testify that the lawyers for the plaintiff cleaned the gun after their own expert examined it because the case was overruled on other grounds in favor of the defendant.¹⁴³ The Alabama Supreme Court remanded the case for a new trial after it ruled that the trial court erred when it allowed the plaintiff to introduce evidence of subsequent remedial measures.¹⁴⁴

Notwithstanding the issues of evidence tampering and subsequent remedial measures in *Baptist Medical Center v. Trippe*, it seems unlikely that the patient could have gotten the gun into the psychiatric unit via any other means but inside a body cavity. The facility evidently agreed, because it changed its strip search procedure following Trippe's death.¹⁴⁵ Additionally, had the facility performed a more thorough search of the patient, the staff probably would have discovered the weapon. Still, the focus of this discussion is not about the standard of care in conducting the strip searches. Rather, this case serves to illustrate why correctly conducted invasive searches are crucial in health care facilities.

Baptist Medical Center v. Trippe also illustrates how, despite the presence of a written strip search policy, drugs or weapons may still find their way into the facility to cause injury or death to patients or staff. Despite the institution of a strip search policy at Baptist Medical Center,¹⁴⁶ this measure failed to prevent Trippe's death. Thus, it seems risky to allow health care facilities free rein in deciding whether to create an invasive search policy, the content of the policy, and in how they will implement and enforce minimum standards. In short, given the risk of abuse, injury, and death associated both with performing and not performing invasive searches, it makes sense to standardize search policies across all facilities. Rather than continuing to leave formulation of these policies en-

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Baptist Med. Ctr.*, 643 So.2d at 961–62. The subsequent remedial measures involved a change in Baptist Medical Center's strip search policy to allow routine strip searches of all psychiatric patients. *Id.*

¹⁴⁵ *Id.* at 961.

¹⁴⁶ *Id.* at 957.

tirely to individual health care facilities, standardization ensures the inclusion of certain minimum standards.

The primary problem with the statutory, regulatory, and accreditation schemes relating to invasive searches is that there are not enough of them. Given the dearth of standards in this area, there is currently no way of gauging whether the majority of invasive searches are conducted correctly, or for the right reasons. Provisions that guarantee patients respectful or humane care are not detailed enough to provide practical guidance to facilities that need to incorporate these concepts into actual policies and procedures that staff can follow.¹⁴⁷ Similarly, provisions dealing with restraint are not specific enough with respect to the action entailed in conducting an invasive search.¹⁴⁸ Usually, there is more than just restraint involved when an invasive search is conducted, if restraint is even involved at all.

It is reasonable that state and federal statutory and regulatory schemes outline steps to ensure minimum quality standards are followed when health care facilities conduct invasive searches. Possible means of implementing this concept are discussed below.

B. One Possible Solution: Make Guidelines for Strip and Body Cavity Searches a Part of the Facility Licensure Process

The most appropriate branch of government to promulgate invasive search standards is probably an administrative agency responsible for health care facility licensure. Licensure is defined as “the mandatory governmental process whereby a health care facility receives the right to operate.”¹⁴⁹ The process is governed by state law, and health care facilities cannot open for operation unless they receive state licensure.¹⁵⁰ Health care facilities are already subject to the oversight of such administrative agencies as health departments and state licensing boards.¹⁵¹ Regulations pertaining to strip searches could easily fit into the regulatory schemes of the state ad-

¹⁴⁷ See *supra* note 90.

¹⁴⁸ See *supra* notes 92–93.

¹⁴⁹ HALL ET AL., *supra* note 101, at 1073.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1071–72 (citing JOHN C. GOODMAN & GERALD MUSGRAVE, *PATIENT POWER: SOLVING AMERICA’S HEALTH CARE CRISIS* (1992)). As an example of the great degree of regulation in the healthcare industry, the authors point out Scripps Memorial Hospital in San Diego, California. *Id.* at 1071–72. The facility answers to thirty-nine governmental bodies and seven nongovernmental bodies, “and [is obliged to] periodically file 65 different reports, about one report for every four beds.” *Id.* at 1071–72.

ministrative agency charged with regulating health care facility licensure.

State legislatures are probably not the best source for promulgating invasive search standards within health care facilities because recognizing the necessary factors for this variety of standard may be beyond their area of expertise. Designating administrative agencies such as state licensure boards or health departments as responsible for implementing invasive search standards ensures that the entity promulgating the guidelines will have some knowledge of which standards will work in the patient treatment environment. If different standards are needed for different facilities, then a specialized agency should be able to recognize these variations. For example, a behavioral health center could be permitted to perform more invasive searches than a dialysis center. Using administrative agencies will also allow both the facilities and agencies to come together through the public comment and testimony process to produce the best strip search and body cavity search regulation for their state.

Invasive search regulation could operate in the following manner. Any health care facility seeking licensure or renewal of licensure would be required to have and follow a written invasive search policy in order to obtain or keep their license to operate. This is not a novel concept. In Texas, for example, residential facilities treating drug and alcohol abuse are required to adopt a written policy on client searches in order to obtain licensure.¹⁵² The facilities are required (1) to limit their searches to those that “protect the health, safety, and welfare of clients”;¹⁵³ (2) to conduct strip searches in a “professional manner that maintains respect and dignity for the client”;¹⁵⁴ (3) to avoid conducting directly observed strip searches of clients;¹⁵⁵ (4) to have a witness present during all searches;¹⁵⁶ (5) to limit the staff and witnesses involved in a search to those who are the same gender as the client;¹⁵⁷ and (6) to document searches in the client’s record, “including the reason for the search, the result of the search, and signatures of the individual conducting the search and the witness.”¹⁵⁸ This regulation covers the basic necessities for the

¹⁵² 25 TEX. ADMIN. CODE § 448.708(a) (West 2005).

¹⁵³ § 448.708(b).

¹⁵⁴ § 448.708(c).

¹⁵⁵ *Id.*

¹⁵⁶ § 448.708(d).

¹⁵⁷ 25 TEX. ADMIN. CODE § 448.708(e) (West 2005).

¹⁵⁸ § 448.708(f).

sort of patient search policy upon which licensure would be conditioned and would be a good fit for any health care facility. Contraband obtained as a result of the search should be destroyed unless it was obtained pursuant to a lawful warrant, so that the facility does not run afoul of *Ferguson*, discussed *supra*.¹⁵⁹ The administrative agency could also require additional details in the facility's strip search policy such as identification of terms and probable cause, discussed below.

It should be noted that this discussion focuses only on invasive search standards for *patients*. Some health care facilities may also require that visitors subject themselves to a search before entering the facility. Standards for this type of search might also be incorporated into a general search policy. This particular variety of search is unlikely ever to rise to the level of the invasive searches addressed by this discussion.

Reporting is another possible regulatory provision that could either be incorporated into the facility licensure requirements or into a separate health department or hospital commission regulation. An agency dedicated to overseeing humane treatment of patients would be uniquely suited to monitoring the number and frequency with which facilities conduct invasive searches. In Arizona, for example, an independent human rights committee oversees and reviews "allegations of illegal, dangerous, or inhumane treatment" of state behavioral health patients.¹⁶⁰ The responsibilities of such an agency might also be expanded to include monitoring invasive search practices at all health care facilities. The individual health care facility would be responsible for compiling reports that avoid the inclusion of any information that identifies the patient. Hypothetically, the report could include: (1) the age and sex of the patient; (2) the reason for conducting the search; (3) the name of the clinician who authorized the search; (4) the result of the search; and (5) the names and genders of all individuals who were present when the search occurred.

Facilities should be required to submit these reports in order to obtain or retain licensure, but the reports should not be used to penalize the facility. Rather, if a facility seems to perform an unusually high number of strip searches in comparison to other similar facilities, then the administrative agency should recommend a change in the facility's invasive search policy. For example, in a metropolitan

¹⁵⁹ See *supra* note 12.

¹⁶⁰ ARIZ. ADMIN. CODE § R9-21-105(G)(1) (2004).

area with two Level I trauma centers of comparable size, does one seem to perform more invasive searches than the other?¹⁶¹ If so, why?

Unfortunately, it will be difficult to determine what constitutes an unusually high number of invasive searches for an individual facility until more data are compiled on the subject. For less populous states, agencies might be compelled to gather information on numbers of invasive searches performed in comparable facilities in other states. Additionally, the agency should work with the facility to find less invasive alternatives for searching patients.

Health care facilities would undoubtedly find a reporting provision burdensome both in terms of the obligation to produce reports and the additional regulatory oversight of their operation. However, invasive searches are—or at least should be—rare practices. Thus, compiling information about them should not require an inordinate amount of time or effort by the facility. With minimal effort on the part of the facility it will enjoy benefits from this arrangement. First, the administrative agency will provide standards regarding the performance of invasive searches. If the facility simply builds its search policy around these standards, then this may head off potential civil liability for allegedly unreasonable invasive searches. A facility facing a private tort suit can use compliance with administrative regulations as evidence of reasonableness of their invasive search policy.¹⁶² Some states might even choose to grant immunity for alleged injury arising out of an invasive search for facilities able to make this showing.

Second, the facility can enlist the aid of the administrative agency to find solutions for invasive search problems at their facility. For example, problems with implementing recommended invasive search policy provisions could include: (1) inordinate frequency of strip searches; or (2) logistical problems in conducting the search, e.g., staff shortages of the requisite gender. In this way, health care facilities can share the responsibility for conducting reasonable invasive searches with the state. Not only does this give facilities more access to information about how to create a safe and humane invasive search policy, it also serves to limit the overly broad discretion

¹⁶¹ Trauma centers are designated Level I, II, III, or IV according to “specific criteria and standards of care.” A Level I trauma center is the most comprehensive and advanced type of facility providing emergency medical services. Mississippi Trauma Care System, Trauma Center Levels, at http://www.trauma.doh.ms.gov/trauma/trauma_center_levels.html (last visited November 19, 2004).

¹⁶² RESTATEMENT (SECOND) OF TORTS § 288 cmt. a (1965–2004).

that facilities currently exercise in determining how and when to search a patient.¹⁶³

The policy that the facility ultimately adopts should have some minimum standards while leaving the facility free to add additional protections for the patient if it chooses. The following minimum standards could be incorporated into a facility’s written invasive search policy in order to satisfy licensure requirements.

1. Definitions of the Terms Used in the Invasive Search Policy

Invasive searches involve specific practices and accordingly should be defined with specificity. First, an “intrusive” or “invasive” search could be defined as, “the tactile and/or visual examination of an individual’s partially clothed (a state of undress that would not be acceptable in public) or fully unclothed body”¹⁶⁴

One could also include a definition of what an intrusive or invasive search is *not*, including: (1) “superficial external pat-downs by staff of the same sex”;¹⁶⁵ (2) “physical assessments by nurses and physicians”;¹⁶⁶ and (3) “searches of the person’s outer clothing, hair, or mouth, unless the search is resisted by the person, in which case all procedures for intrusive searches are to be followed.”¹⁶⁷ This last definition would protect patients who are confused, stressed, or humiliated by a simple “pat-down” search because it allows for the implementation of invasive search procedures where there is an indication of resistance by the patient to a non-invasive search.

A “strip search” could be defined as:

an inspection of the genitalia, buttocks, breasts, or undergarments of a person that is preceded by the removal or rearrangement of some or all of the person’s clothing that directly covers the person’s genitalia, buttocks, breasts, or undergarments and that is conducted visually, manually, by means of any instrument, apparatus, or object, or in any other manner.¹⁶⁸

Additionally, a “body cavity search” could be defined as “an inspection of the anal or vaginal cavity of a person that is conducted visually, manually, by means of any instrument, apparatus, or object or in any other manner.”¹⁶⁹ It is conceivable that the definition could

¹⁶³ See discussion *supra* Part II.B and *infra* Parts II.C, II.D.

¹⁶⁴ 25 TEX. ADMIN. CODE § 404.153(12) (West 2005).

¹⁶⁵ § 404.153(12)(B).

¹⁶⁶ § 404.153(12)(D).

¹⁶⁷ § 404.153(12)(E).

¹⁶⁸ OHIO REV. CODE ANN. § 5120.421(A)(5) (Anderson 2004).

¹⁶⁹ § 5120.421(A)(1).

include inspection of the mouth and nose, as these areas could potentially be considered body cavities.

2. *A Probable Cause Provision*

The facility needs to have a reason to conduct an invasive search. While the constitutional requirements of *Aiken v. Nixon* would not apply to private facilities, the court's commentary regarding the Capital District Psychiatric Center's strip search policy provides good guidelines for all health care facilities.¹⁷⁰ A facility could incorporate the following probable cause provisions into its strip search policy: (1) all invasive searches should require a "potential risk and/or reasonable possibility that the patient possesses" an item that poses a significant threat to the health and safety of the individual, other patients, and staff, such as a weapon or illicit drugs;¹⁷¹ and (2) the decision to conduct an invasive search is based on the clinical judgment of a physician.¹⁷²

A "reasonable possibility" that an individual possesses a harmful item could be assessed in part, but not exclusively, by a reasonable suspicion that the patient has been drinking or using drugs, "or has dangerous or stolen articles or substances."¹⁷³ This reasonable suspicion may be based on (1) ingestion that has been witnessed by an employee or reported by another reliable informant;¹⁷⁴ (2) behavioral changes "such as slurred speech, ataxia, odor of alcohol, and disruptive behaviors, excluding expected changes due to prescribed psychotropic medication";¹⁷⁵ (3) a positive breathalyzer or toxicology report;¹⁷⁶ and (4) "when a stolen item has been witnessed" and reported by another employee or reliable informant "or is clearly indicated by surrounding circumstances."¹⁷⁷ Other situations indicating probable cause for conducting a search might include comments made by a suicidal patient indicating intent to hurt himself.

Some facilities might advocate for a broad regulation that allows them to search all psychiatric patients, or patients manifesting suicidal ideation. This type of provision is probably too broad, given

¹⁷⁰ See *Aiken v. Nixon*, 236 F. Supp. 2d 211, 237 (N.D.N.Y. 2002) (internal citation omitted).

¹⁷¹ *Id.* at 237–38.

¹⁷² See *id.*

¹⁷³ See N.C. ADMIN. CODE tit. 10A r. 28C.0307(b)(3) (Jan. 2004).

¹⁷⁴ tit. 10A r. 28C.0307(b)(3)(A).

¹⁷⁵ tit. 10A r. 28C.0307(b)(3)(B).

¹⁷⁶ tit. 10A r. 28C.0307(b)(3)(C).

¹⁷⁷ tit. 10A r. 28C.0307(b)(3)(D).

that the strong possibility of further stress to a distraught patient. A better option is to determine the need for an invasive search for psychiatric or suicidal patients on a case-by-case basis absent any other clear indication they possess a harmful substance or weapon in order to avoid unnecessary emotional trauma for the patient.

3. *A Provision Defining the Scope of the Search*

As this is an administrative search, the intrusive search policy should clearly define the parameters of the search. One possible way to define the scope of the search is to ensure the procedures in the invasive search policy “are intended for internal security, to protect” the facility and its agents “from civil liability, and to provide an inventory of [the] client’s personal property, and are not intended for purposes of criminal prosecution.”¹⁷⁸

4. *A Provision Regarding Client Consent*

If the patient is able to consent to an intrusive search and the circumstances are not exigent, then the patient should be given an opportunity to consent. This will serve both to educate the patient and to assist the facility in averting civil liability. A waiver that is separate from the usual consent form could be entitled “Consent to Strip Search and Body Cavity Search.” The text could read as follows:

I knowingly and voluntarily consent” to be strip searched and “to have my body cavities searched immediately” by healthcare providers in the manner provided by the laws of this state.¹⁷⁹ By signing this consent form I understand that this search is being performed for my health and safety as well as the health and safety of those around me, and not for law enforcement purposes. “I understand that a body cavity search may involve both visual and physical probing into my genitals and anus.¹⁸⁰

Facilities must educate the patient that not signing the form does not mean that they will be refused treatment. Rather, a refusal to sign is an indication for humane use of restraints in order to perform a search.¹⁸¹ Most patients who are able to consent would hopefully choose to consent rather than be restrained. Furthermore, patients must be made to understand that any contraband obtained

¹⁷⁸ See N.C. ADMIN. CODE tit. 10A r.28C.0307(c).

¹⁷⁹ See TENN. CODE ANN. § 40-7-121(c) (2004).

¹⁸⁰ *Id.*

¹⁸¹ JCAHO ACCREDITATION MANUAL 2004, *supra* note 106, at PC. 11.10-11.100.

as a result of the search will be destroyed and not turned over to law enforcement.

5. *A Description of Intrusive Search Procedure*

The facility should state how the search will be conducted, with an emphasis on limiting the individual discretion of employees. Possible procedures could include: (1) that all invasive searches be authorized in writing by a physician, unless this is impracticable given exigent circumstances or that only physicians perform invasive searches;¹⁸² (2) that at least two facility employees be present during the search, and that at least one of them, but preferably both, are of the same gender as the patient;¹⁸³ (3) that the patient be given the opportunity to have the facility's patient advocate present during the search, if practicable;¹⁸⁴ and (4) that all searches be documented in the patient's medical record and in a separate report to an overseeing agency as to: the reason for the search, the result of the search, and the individuals present during the search.¹⁸⁵

C. **A Second Solution: Guidelines for Strip Searches and Body Cavity Searches Could Be Made a Requirement for Federal Program Participation**

Interfering with a health care facility's source of revenue will always get its attention. Certification for state Medicaid¹⁸⁶ and Medicare¹⁸⁷ is not mandatory, but health care providers must complete certification if they wish to be reimbursed by these programs for services rendered to eligible patients.¹⁸⁸ Federal programs could also adopt a requirement that health care facilities adopt a written invasive search policy if they wish to receive reimbursement for services

¹⁸² See N.C. ADMIN. CODE tit. 10A r. 28C.0307(c)(3) (Jan. 2004).

¹⁸³ See tit. 10A r. 28C.0307 (d)(1)(2).

¹⁸⁴ See *id.*

¹⁸⁵ See 25 TEX. ADMIN. CODE § 448.708(f) (West 2005).

¹⁸⁶ Medicaid is funded jointly by states and the federal government to provide health care funding for certain low-income individuals. Centers for Medicaid & Medicare Services, Welcome to Medicaid, at <http://www.cms.hhs.gov/medicaid/default.asp> (last visited November 19, 2004).

¹⁸⁷ Medicare is a federally funded program that funds health care services for individuals age sixty-five and older, disabled individuals, and individuals with end-stage renal disease. Centers for Medicaid & Medicare Services: Medicare Information Resource, at <http://www.cms.hhs.gov/medicare/default.asp> (last visited November 19, 2004).

¹⁸⁸ HALL ET AL., *supra* note 107, at 1074.

received by eligible patients. The requirements could be similar to those detailed in Part II (B) of this discussion.

Federal involvement probably does not make as much sense as leaving this issue to the states because individual states may require some leeway in developing policies that are most appropriate for their area. On the other hand, the benefit of this solution is that it provides the greatest amount of uniformity, and this uniformity may provide the most broad-based protection for all patients. Thus, making a written invasive search policy a requirement for federal program participation is a less practical option than that of linking policy requirements to facility licensure, but it is a potentially more uniform and consistent policy than that of state administrative agency involvement.

D. A Third Solution: Accrediting Agencies Can Incorporate a Requirement for the Development of Facility Strip Search Policies into Accreditation Requirements.

Given JCAHO's extensive standards regarding restraint and seclusion as discussed in Part I.E above, it is surprising that accreditation agencies have not addressed invasive searches. JCAHO's power in the health care industry makes it a possible agent for change. If JCAHO were to adopt a requirement that health care facilities adopt written invasive search policies with characteristics similar to those described in Part II.B of this discussion, then it seems likely that nearly all health care facilities would produce a written policy that is on point. This could be a better solution than leaving invasive search regulation to administrative agencies, because this would create greater potential for uniformity.

On the other hand, while JCAHO is a not-for-profit organization, its services come at a cost to the facility.¹⁸⁹ JCAHO might make itself available, but the cost of the consultation could be prohibitively expensive for the facility.¹⁹⁰ Thus, whether accrediting agencies or state administrative agencies provide invasive strip search guidelines may ultimately come down to an issue of cost effectiveness.

¹⁸⁹ See, e.g., Joint Commission on the Accreditation of Healthcare Organizations, *Cost of Survey*, at <http://www.jcaho.org/htba/hospitals/cost+of+survey.htm> (last visited Nov. 4, 2004). The cost of accreditation alone ranges between \$5,950 and \$23,000 for hospitals, depending on their size. *Id.*

¹⁹⁰ See *id.*

Facilities might also fear that invasive search policy violations could cost them their accreditation. Accrediting agencies do not work the same way as administrative agencies because they are corporations, not governmental entities. Thus, the facility does not have appeal rights when it gets a negative accreditation score. For this reason, facilities may be reluctant to seek assistance from an accrediting agency that can pull their accreditation without review by a court or other authority. Fear could prevent facilities from seeking assistance, and this would hinder the overall implementation of standards for invasive searches.

The process for providing facilities with guidance in formulating their invasive search policies cannot be punitive. Regardless of the agency promulgating the guidelines, there are a variety of options for implementing more consistent and uniform invasive search standards, and there is no reason why patients and facilities should not be afforded better protection both from unreasonable searches and civil suits.

III. CONCLUSION

The problem with invasive searches conducted in health care facilities is not that the practice rages unchecked across the country. Nor is the problem that health care facilities lack valid reasons to conduct administrative searches. Rather, the problem is that this type of search is necessarily conducted under conditions of utmost privacy, even secrecy. Under these conditions, there is always a danger that abuses will occur when individual organizations are entrusted with complete discretion in their dealings with the highly sensitive privacy interests of a vulnerable population. Furthermore, we currently have no way of knowing that patient rights are being infringed unless victims actually bring suit. Therefore, it is reasonable that the states and the nation take a more affirmative role in protecting patients, and that health care facilities start accounting for intrusive searches. A relatively minimal effort to regulate and standardize these practices could make an enormous difference in the lives of would-be unreasonable search victims, and to health care facilities facing civil liability for either failing to search or for conducting an unreasonable search. With so many federal and state standards readily available to guide legislators and agencies in formulating invasive search standards for health care facilities, the only remaining question is why the issue was not tackled sooner.