

Bronwyn FORD, Plaintiff,

v.

**CITY OF BOSTON, Suffolk County, and Richard J. Rouse, Sheriff of Suffolk County,
Defendants.**

No. CIV. 98-11346-NG.

United States District Court, D. Massachusetts.

July 31, 2001.

133 *132 *133 Audrey Samit, Eric N Klein, Klein & Miller, Howard Friedman, Boston, MA, for Plaintiffs.

Michael A. Goldsmith, Assistant Corporation Counsel, City of Boston Law Department, City Hall, Eve Anne Piemonte-Stacey, Rose E. King, Assistant General Counsel, Suffolk County Sheriff's Dept., Melissa J. Garand, Suffolk County Sheriff's Department, Boston, MA, for Defendants.

MEMORANDUM RE: MOTIONS FOR SUMMARY JUDGMENT BY AND AGAINST THE CLASS PLAINTIFFS

GERTNER, District Judge.

I. INTRODUCTION

Between December 10, 1995, and September 20, 1999 ("class period"), the City of Boston ("City") followed an express policy of transferring all female arrestees who could not post bail to Suffolk County's maximum security Nashua Street Jail ("Jail"). In contrast, the City held male arrestees in City facilities. During the same time period, the Suffolk County ("County") Sheriff's Department followed an express policy of subjecting these Jail admittees—all women—to strip and visual body cavity searches.

Until May 24, 1999, the County's search policy was astonishingly broad. Under this pre-May 1999 policy, County officials strip-searched all arrestees admitted to the Jail, regardless of the crimes with which they were charged, or any other individual factors. Women were searched following arrests for crimes as minor as peddling sausages without a license, and larceny under \$250 associated with the failure to return a rented video game.

The searches could not have been more degrading. Officers inspected each woman's ears, mouth, and nostrils, humiliating or offensive to the dignity of the woman, asked her to lift each breast and to spread the cheeks of her buttocks so that the officers could inspect her genitals.

From May 24, 1999, until the end of the class period, the search policy was more limited, requiring a determination of probable cause prior to searches of misdemeanants. The amended policy continued to permit suspicionless strip-searches of all arrestees charged with felonies, however, and it made no attempt to distinguish between arrestees charged with offenses involving violence or illicit substances, and other felony arrestees arguably less likely to be carrying weapons or contraband.

134 As a direct result of the City's transfer policy and the County's search policies, *134 more than five thousand women^[1] taken into custody by the Boston Police Department ("BPD") during the class period were transferred to the County Jail, where they were subjected to "routine"^[2] strip and visual body cavity searches. At issue here are the basic rights of this class of women—many of whom were detained solely because they could not afford to post bail. The women—a certified class—challenge the constitutionality of the Jail strip-searches on Fourth Amendment and equal protection grounds.^[3]

This memorandum and order addresses the class' motion for summary judgment [docket entry # 75], as well as the cross motion for partial summary judgment filed by the County, Richard J. Rouse ("Rouse") and Jane Doe ("Doe") (together, "County defendants") [docket entry # 92]. For the reasons discussed below, I find and DECLARE the County's search policies during the class period facially unconstitutional. Summary judgment is therefore GRANTED in favor of the plaintiffs on all questions relating to the facial constitutionality of those policies.

I further find the County and the City liable under 42 U.S.C. § 1983 ("§ 1983") for violation of the Fourth Amendment rights of all class members charged with felonies or misdemeanors involving neither violence nor drugs, and class members held on default warrants for similar offenses. Accordingly, summary judgment of liability against the County and City is GRANTED in favor of those plaintiffs.

With respect to Sheriff Rouse, I find that he is entitled to qualified immunity for his role in any unconstitutional strip-searches that occurred prior to June 25, 1997, when the First Circuit decided Swain v. Spinney, 117 F.3d 1 (1st Cir. 1997). As detailed below, however, he is liable for all unconstitutional strip-searches that occurred after that date. Accordingly, summary judgment of liability against Sheriff Rouse is GRANTED in part and DENIED in part.

Because of the state of the record, this Memorandum reaches no decision as to the defendants' Fourth Amendment liability for strip-searches of women arrested initially or on default warrants for crimes involving violence or drugs.^[4] Accordingly, the plaintiffs' request for summary judgment of liability under the Fourth Amendment, and the County defendants' corresponding cross-motion for partial summary judgment, are DENIED with respect to those searches. As described below, further briefing and factual development is necessary to clarify the claims of these class members.

135 *135 To facilitate resolution of the remaining issues in this case, I hereby create two sub-classes of women: (1) those class members arrested (initially or on default warrants) for crimes involving neither drugs nor violence ("Sub-Class I"); and (2) those class members arrested (initially or on default warrants) for offenses involving either drugs or "violence" ("Sub-Class II"). See Fed.R.Civ.P. 23(c)(4). The plaintiffs are DIRECTED to identify a named representative for Sub-Class II, or to propose further divisions of the sub-class, by August 15, 2001. This filing should also propose a suitable definition for the term "violence" in the context of this case. The defendants' response is due within fifteen days thereafter.

Finally, I turn to the plaintiffs' claims against the City for violation of the Equal Protection Clause of the Fourteenth Amendment. On this question, my holding is clear: The record is more than sufficient to establish that the City denied *all* plaintiffs, in both Sub-Classes I and II, the equal protection of the laws. Accordingly, the plaintiffs' motion for summary judgment of liability against the City for violation of the Equal Protection Clause is GRANTED.

II. BACKGROUND

A. Facts as Presented by the Plaintiff Class

The basic, largely uncontested facts of this case are both straightforward and appalling. During the almost four-year period at issue here (and for several previous years), the City transported all female arrestees who could not post bail to the Suffolk County Jail, a maximum security pre-trial detention facility,^[5] for detention pending their initial court appearance.^[6] From the beginning of the class period until late May 1999 (almost a year after this action was filed), most if not all of these women—regardless of the crime with which they were charged, or any other individual characteristics—were strip-searched upon their admission to the Jail.^[7] Worse still, these routine strip-searches were mandated by Sheriff's Department policy ("Policy I").

On May 24, 1999, the County amended its policy to require a finding of probable cause prior to a strip-search of an arrestee charged with a misdemeanor, but the new policy ("Policy II") continued to require strip-searches of all

arrestees charged with felonies. Not until September 20, 1999^[8] the end of the class period^[9] did the County finally eliminate routine strip-searches of all pre-arraignment detainees, including those charged with felonies.^[8]

136 *136 The County concedes that it made the first of these policy changes to conform^[9] albeit two years late^[9] to a 1997 First Circuit ruling, which held that "[s]trip and visual body cavity searches must be justified by at least a reasonable suspicion that [an] arrestee is concealing contraband or weapons."^[9] *Swain*, 117 F.3d at 6. The County apparently made the second change to bring its search policy into conformity with both state law and the BPD's newly adopted search policy.^[10]

During the years in which strip-searches of women arrestees were routine, the searches were conducted without any individualized findings of reasonable suspicion. Many of the plaintiffs were searched following arrests for misdemeanors or non-violent felonies, in situations in which there was no apparent reason to suspect them of carrying weapons or contraband. For example, the class representative, Katrina Mack, was strip-searched on March 5, 1998, after she was arrested for operating a motor vehicle while under the influence of alcohol and leaving the scene after causing property damage.^[11] Another plaintiff was strip-searched after she was arrested for violating a municipal ordinance that prohibits peddling sausages without a license.^[12] A third was arrested on a default warrant for larceny under \$250.00, issued after her children failed to return a rented Sega video game.^[13]

Even more troubling, the plaintiffs represent that many of the women strip-searched at the Jail had already been searched^[9] and some had undergone visual body cavity inspections^[9] while in BPD custody. That is, according to the plaintiffs, these class members were first strip-searched by the BPD, then transported *in BPD custody* to the Jail, and then strip-searched *again* by the officials at the Jail.

Pursuant to the Sheriff's Department's Policy S507(B), the strip-searches at the Jail were incredibly thorough and invasive. Jail officials were told to:

- 137 *137
1. Instruct the inmate to empty his/her pockets and set aside property for searching.
 2. Instruct the inmate to remove all clothing and set aside clothes for searching.
 3. Visually examine the inmate's entire body in a careful and systematic order ... to identify and seize contraband
 4. Start with the inmate's head and hair. Have the inmate run through his/her hair with his/her fingers.
 5. Examine behind the inmate's ear.
 6. Check the inmate's mouth by having him/her open wide
 7. Check the inmate's nostrils for any abnormalities.
 8. ... Check his/her entire back and chest down to the waist line. Then have the inmate roll his/her hands 180 degrees forward and then backwards with his/her fingers widespread. You should also check under his/her fingernails. Check his/ her armpits carefully and then examine down the sides of his/her body to the waist line. If the inmate is female, she must lift each breast separately so that you can check for possible contraband
 9. ... [E]xamine the inmate's buttocks and groin area
 - a. The inmate must be told to bend forward and spread the cheeks of his/her buttocks. Be sure to look for possible strings protruding from the anus or vagina
 - b. The front groin (pubic) area and in between the inmate's legs must be checked thoroughly
 10. ... [S]earch down both of the inmate's legs^[9] front, back, inside and out.

11. ... [C]heck the inmate's feet. Don't forget to look between each toe and check the bottom of each foot.

Although the County issued a new strip-search policy every year, the basic procedure did not change.

Despite this exhaustive search procedure, plaintiffs assert, strip-searches of BPD arrestees during the class period only uncovered contraband 0.063% of the time¹³⁸ on five occasions, during a period in which almost 8,000 female arrestees were brought to the Jail by Boston police.

Another disturbing aspect of this story is the City's disparate treatment of male and female arrestees. In accordance with City policy during the class period, only female arrestees who could not post bail were transported to the Jail. As a result, although both male and female arrestees were subjected to searches during booking at City police stations,^[14] male arrestees who could not post bail were then held in City police lockups and only rarely subjected to a second search, while female arrestees were brought to the Jail, where they were routinely subjected to humiliating strip and visual body cavity searches.

B. Contested Issues of Fact Identified by the County and Sheriff Rouse

138 The defendants concede many of the facts detailed above, but they insist that a *138 few key issues remain in dispute. For example, the County challenges the plaintiffs' assertion that only 0.063% of searches conducted at the Jail produced contraband. The County argues¹³⁹ with some testimonial support, but no data¹⁴⁰ that Jail officers in fact uncovered contraband "on a regular basis" as a result of searching BPD detainees. Further, the County maintains that the very fact that some of the Jail searches of BPD detainees uncovered contraband indicates that "proper searches were not conducted by Boston Police before transportation to the Jail."

The County also takes issue with the plaintiffs' statistics regarding the crimes with which class members were charged, and it offers alternative data. Of most relevance here, the County indicates that it believes there were 7,907 admissions of BPD detainees during the relevant time period,^[15] of which 5,080 were held on misdemeanors only, 2,048 were held on felonies only, and 774 were held on both misdemeanors and felonies.^[16] The County emphasizes that these figures do *not* indicate that 7,907 women were strip-searched during the class period. It concedes, however, that its policy until May 1999 was to strip-search all arrestees admitted to the Jail except those who specifically objected to the search, and it offers no data regarding the number of women who objected during the period.

Turning to the question of liability, the County argues that its obligation to ensure safety at the Jail raises an issue of material fact that cannot be addressed on summary judgment. Specifically, the County notes that the Jail is primarily a maximum security pretrial detention facility. It suggests that institutional security concerns during the class period required that BPD detainees entering the Jail be strip-searched before they were brought in contact with the general population. In light of these concerns, the County argues that before this Court can evaluate the reasonableness of the contested strip-searches, the fact-finder must determine the appropriate "weight to be given the institutional security needs" at the Jail.

Finally, the County and Sheriff Rouse argue that there is an outstanding issue of fact regarding the role that Rouse played in promulgating Suffolk County Sheriff's Department policies. The County avers that it will demonstrate at trial that "someone other than ... Rouse had final authorization" to issue such policies.

C. Contested Issues of Fact Identified by the City

The City, too, identifies issues of fact that it believes preclude summary judgment for the plaintiffs. Specifically, although the City admits that it transferred all of the plaintiffs to the Jail, it asserts that it had no authority or control over the manner in which they were treated at the Jail, and it further suggests that it was entitled to assume that the County's treatment of the women was constitutional. At "worst" (from its perspective), the City

139 argues that any question of vicarious City liability for searches conducted pursuant to County strip-search policies raises issues of fact regarding whether the City had *139 actual or constructive knowledge of the County policies.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In this context, "material" means that "a contested fact has the potential to change the outcome of the suit ... if the dispute over it is resolved favorably to the nonmovant." *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir.1995). Similarly, "genuine" means that "the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party." *Id.*

In ruling on a summary judgment motion, a court must view the facts in the light most favorable to the non-moving party. *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.*, 181 F.3d 15, 19 (1st Cir.1999). Overall, therefore, Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Finally, I note that where, as here, there are dueling motions for summary judgment, the Rule 56 standard remains intact. The motions "simply demand that all factual disputes and any competing rational inferences be resolved in the light most favorable to the party opposing summary judgment." *Santana v. Deluxe Corp.*, 12 F.Supp.2d 162, 167 (D.Mass.1998) (citing *Den Norske Bank v. First Nat'l Bank of Boston*, 75 F.3d 49, 53 (1st Cir.1996)).

B. Constitutionality of the Search Policies

The plaintiffs' overarching request is that I "declare that the policy or practice of conducting routine strip-searches and routine visual body cavity searches of women is illegal and unconstitutional" and "enjoin enforcement" of the challenged County search policies.^[17] For the reasons discussed below, these requests are GRANTED with respect to both Policies I and II.^[18]

1. Legal Background

140 As the First Circuit recently held in a similar case, "[b]oth convicted prisoners and pretrial detainees" and therefore, clearly, the pre-arraignment arrestees who largely make up the plaintiff class here "retain constitutional rights despite their incarceration, including basic Fourth Amendment rights against unreasonable searches and seizures." *Roberts v. Rhode Island*, 239 F.3d 107, 109-110 (1st Cir. 2001).^[19] Since the detainees are confined, their rights may be somewhat more limited than those of the general public, but they are not the nullity that Suffolk County's expansive strip-search policies would suggest.

Strip and visual body cavity searches are far from "routine." The Supreme Court indicated more than twenty years ago that such searches "instinctively give[it] ... pause," *Bell v. Wolfish*, 441 U.S. 520, 558, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), and since then courts have used much stronger language. The First Circuit, for example, deems such searches "an `extreme intrusion' on personal privacy and `an offense to the dignity of the individual.'" *Roberts*, 239 F.3d at 110 (citing *Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir.1996)). The Seventh Circuit's language is even more strident: "[S]trip searches involving the visual inspection of the anal and genital areas [are] demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive,

signifying degradation and submission." *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir.1983) *modified* (1984) (internal citations omitted).

These strong sentiments, which I share, provide the backdrop for my analysis of the challenged County search policies. In addition, the courts have provided a more explicit^[20]if occasionally inconsistent^[21]analytic framework. The foundation for this framework is the Supreme Court's observation in *Bell* that the "test of reasonableness under the Fourth Amendment ... requires a balancing of the need for the particular search against the invasion of personal rights that the search entails."^[20]*Bell*, 441 U.S. at 559. To perform this "*Bell* balancing test," the Court instructed future courts to "consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.*

Applying this test almost two decades later, the First Circuit concluded that strip and visual body cavity searches "must be justified by *at least* a reasonable suspicion that the [*particular*] arrestee is concealing contraband or weapons." *Swain*, 117 F.3d at 7 (emphasis added). Earlier this year, the First Circuit again applied the "reasonable suspicion" standard to strike down two Rhode Island policies under which arrestees were routinely strip-searched prior to admission to a state prison. *Roberts*, 239 F.3d at 108. Further, the Court found the Rhode Island blanket strip-search policies unconstitutional even though the plaintiff in the case was held in a maximum security facility where arrestees routinely "mingle[d] with the general population"^[21]circumstances arousing precisely the same institutional security concerns invoked by the defendants here.^[21]*Id.* at 112-13.

141 In their filings, the defendants cite the *Roberts* decision, for the proposition that the reasonable suspicion standard only applies "in the context of prisoners held in local jails for minor offenses." Further, the County invokes *Roberts* to support its *141 institutional security arguments, because the *Roberts* court observes in passing, "institutional security is a legitimate need of law enforcement, and may provide a compelling reason for a warrantless strip-search absent reasonable suspicion of individual wrongdoing." *Roberts*, 239 F.3d at 110, 111.

The County takes these quotations entirely out of context. Both of these observations appear in dicta preceding the court's discussion of *Roberts*' specific claims. Further, even in its discussion of "compelling" institutional security concerns, the *Roberts* court provides only two examples of circumstances in which blanket warrantless and suspicionless searches may be constitutional: (1) searches of inmates after largely private, full-contact visits with outsiders; and (2) searches of "particularly dangerous inmates" returning to a "special security area" of a maximum security prison after a visit to the law library or infirmary.^[22]*Id.* at 111 (citing *Bell*, 441 U.S. at 558^[22]59; *Arruda v. Fair*, 710 F.2d 886, 888 (1st Cir.1983)). Neither example applies here.

The *Roberts* court's only other reference to circumstances possibly justifying a blanket search policy that does not require individualized suspicion is its later observation, also in dicta, that the "reasonable suspicion standard may be met simply by the fact that the inmate was charged with a *violent* felony." *Id.* at 112 (emphasis added). These dicta, however, give little guidance as to what sort of felony is categorized as "violent," or why someone charged with such an offense should be suspected of concealing weapons or contraband. One might argue, for example, that while the nature of the crime for which someone was arrested should be *considered* in evaluating the presence or absence of a "reasonable suspicion" to search, does not independently establish "reasonable suspicion" sufficient to justify a blanket search policy.

2. Policy I

The First Circuit's analysis in *Roberts* may signal a certain ambivalence about the reasonable suspicion standard and the relationship between that standard and institutional security concerns, but that ambivalence does not affect the outcome here. In this case, there is absolutely no question that the County's concern for the security of the Jail does not justify its pre-May 1999 policy of searching all BPD arrestees without any individual or class-wide findings of reasonable suspicion.

To begin with, by the defendants' own admission, the majority of the BPD arrestees were charged with misdemeanors or other minor offenses, and fewer than a quarter of those arrestees were charged with drug offenses. Further, the record in this case clearly indicates that many or even most members of the plaintiff class

142 had already been searched^[23] during booking by the BPD, and had been transported to the Jail *in BPD custody*.^[24] Under these *142 circumstances, the County cannot reasonably have suspected the women, as a class, of harboring weapons or contraband at the time of admission.

The County posits that because BPD arrestees joined the general population at the maximum security Jail, they could have served as a conduit for the introduction of drugs or other illicit items. I find this unlikely. It defies belief to suppose that any of the plaintiffs deliberately sought arrest in order to smuggle contraband or weapons into the Jail. *Cf. Roberts*, 239 F.3d at 111 (noting the "essentially unplanned nature of an arrest and subsequent incarceration"). Further, Jail officials here had no reason to believe—and, indeed, numerous reasons to doubt—that the BPD arrestees, as a class, were particularly dangerous. It may be reasonable "to safeguard[] institutional security" by engaging in "extra efforts to ensure that the most dangerous inmates do not have access to weapons or contraband," but "the extension of the intrusion to far less dangerous inmates ... is a severe incursion on privacy frowned upon by the Bell balancing test." *Id.* at 111.

Finally, I note that if the County truly had serious concerns about allowing the BPD arrestees to mingle with the general population, it could simply have held the women in a separate area of the Jail during their short stays. Indeed, the County admits that since May 1999, when it abandoned Policy I, it has housed all BPD arrestees in a booking area separate from the Jail's main housing unit. In light of this policy change, which clearly indicates the ready availability of isolated space to house BPD arrestees, the County's earlier choice to strip-search all BPD arrestees is nothing short of outrageous.

Nothing on the record before me, therefore, justifies the search policy in place at the Jail prior to May 24, 1999.^[25] Jail officials made no individualized findings of reasonable suspicion prior to conducting strip-searches of BPD arrestees. Nor were there any class-wide characteristics or factual circumstances that warranted such searches in every case. While I understand the County's concern over institutional security, that concern does not excuse the County's decision to require the women in the plaintiff class—many of whom had yet to see a judge—to endure the indignities of a strip and visual body cavity search. "[A]n indiscriminate strip-search policy routinely applied ... can not be justified simply on the basis of administrative ease in attending to security considerations." *Roberts*, 239 F.3d at 113 (quoting *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir.1981)).

Thus, Policy I fails to satisfy the *Bell* balancing test and falls well short of the constitutional standards articulated by the First Circuit in *Swain* and *Roberts*. Accordingly, I find the policy facially unconstitutional under the Fourth Amendment.

143 *143 **3. Policy from May 24 to September 20, 1999**

As noted above, the County amended its search policy on May 24, 1999, to require a finding of probable cause prior to a strip-search of any pre-arraignment detainee arrested for a misdemeanor. With County approval, though, Jail officials continued to search everyone else—all BPD arrestees charged with felonies, and apparently, those held on default warrants—without any individualized finding of reasonable suspicion, let alone probable cause.

Policy II also fails Fourth Amendment scrutiny. As indicated above, the First Circuit has only identified a few narrow circumstances in which the reasonable suspicion standard is inapplicable, and blanket strip-searches permissible. None of those circumstances is present here. This case does not involve full-contact visits with outsiders, but rather routine admissions of new arrestees. There is no indication that women arrested by the BPD after May 1999 were "particularly dangerous," or that the Jail had a "lengthy [documented] history" of "contraband problems."^[26] Finally, the County made no effort to distinguish women charged with violent felonies from those held on default misdemeanor warrants or charged with lesser felony offenses—like the plaintiff charged with larceny over \$250.00 for failing to return a rented video game.^[27] I find no support in the First Circuit case law, or anywhere else, for the County's peculiar conviction that State officials may constitutionally strip-search all felony arrestees, and all arrestees held on default warrants, upon admission to the Jail.

Indeed, quite apart from First Circuit law, there is simply no rational basis for making such a consequential and yet arbitrary distinction between groups of BPD arrestees. While the felony-misdemeanor distinction provides a convenient benchmark by which society can estimate the seriousness of an offense, it offers little information about the likelihood that an individual arrestee is concealing weapons or contraband.^[28] Why, for example, should a woman charged with larceny over \$250.00 be suspected of concealing contraband and therefore subjected to a routine suspicionless strip-search, when a woman charged with misdemeanor possession of drugs cannot be strip-searched without probable cause? A blanket search policy that distinguished between violent and nonviolent felons might be closer to the mark, offering an arguably reasonable—or at least rational—approach to balancing the need for particular searches against the indignities consequent to such invasions of privacy, but drawing the line between misdemeanants and felons is not.

144 Similarly, the mere fact that women held on default warrants "ha[ve] been arraigned, ha[ve] had bail set and ha [ve] defaulted on ... court appearance[s]" does not, as the County maintains, justify routine suspicionless strip-searches. There is no reason to suppose that a woman who once failed to appear before a court is, as a result, more likely to be carrying a weapon or contraband if and when she is later arrested. Indeed, the plaintiff in *Roberts* was arrested on such an outstanding warrant, and the First Circuit itself observed ^{*144} that "both highly dangerous and relatively harmless offenders may be incarcerated with judicial approval." *Roberts*, 239 F.3d at 111. In light of this observation, the County's position that the "need" to search all women arrested on default warrants somehow outweighs the resulting invasion of personal rights is simply incomprehensible.

In short, I find no reason to believe that a woman charged with a felony or held on a default warrant inherently presents a greater risk to prison security (through introduction of weapons or contraband) than a woman charged with a misdemeanor. As a result, I am not persuaded that the County corrected the constitutional deficiencies in Policy I simply by instituting a requirement of probable cause prior to a strip-search of misdemeanor arrestees. The Fourth Amendment right against unreasonable searches mandates some effort by Jail officials either to premise searches on individualized reasonable suspicion or to identify classes of arrestees that reasonably pose a heightened risk to institutional security. Policy II does neither and is therefore facially unconstitutional.

C. Defendants' Liability

Although the County's search policies during the class period are facially unconstitutional and warrant declaratory relief for the plaintiffs, the defendants' liability for the promulgation and implementation of those policies—and thus, the damages due to the individual plaintiffs—presents a harder question. I first discuss the County's liability under the Fourth Amendment. I then consider Sheriff Rouse's claim of qualified immunity for unconstitutional searches. Finally, I turn to the City's liability for the searches, first under the Fourth Amendment and then under the Equal Protection Clause of the Fourteenth Amendment.

1. The County's Liability for Fourth Amendment Violations

To hold a local government entity liable under 42 U.S.C. § 1983 for civil rights violations committed by its employees, a plaintiff must establish that the violations resulted from implementation or execution of a policy or custom of the entity. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690⁹¹, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Here, there can be no question that (1) prior to May 1999, Suffolk County had an explicit policy of strip-searching every BPD arrestee admitted to the Jail, regardless of any individual characteristics, and (2) between May and September 1999, the County had an explicit policy of strip-searching all BPD felony arrestees and arrestees held on default warrants, again regardless of any individual characteristics. Thus, if any of the resulting searches were unconstitutional, the County is liable under *Monell*.

The next question, therefore, is whether any or all Jail searches of BPD arrestees during the class period violated the arrestees' civil rights. As Policies I and II are facially unconstitutional, it is tempting to conclude that all searches conducted while those policies were in effect were also unconstitutional. At this stage, however, I decline to make such a broad finding as a matter of law. Among other issues, it may well be that women charged with certain violent felonies are not entitled to damages for violations of their Fourth Amendment rights in

connection with the Jail searches. Even though the County policies under which these women were searched were unconstitutional, the particular searches may not have been. Thus, I find it appropriate to subdivide the plaintiff class into two sub-classes, the first made up of women to whom the County is clearly liable in damages as a matter of law, and the second *145 made up of women whose stories present more difficult questions.

In identifying the line that separates these sub-classes, I am guided at this preliminary stage by my conviction that arrestees charged with offenses—felonies or misdemeanors—that involve neither drugs nor violence pose no inherent risk to the institutional security of a detention facility. I am also guided by the First Circuit's suggestion in dicta that the "reasonable suspicion standard may be met simply by the fact that [an] inmate was charged with a violent felony." *Roberts*, 239 F.3d at 112. While I am not persuaded that this statement governs my decisions in this case, it does convince me that on the record now before me, I cannot determine that all plaintiffs charged with violent felonies are entitled to damages from the County as a matter of law.

Based on these principles, I define the following sub-classes: (1) Sub-Class I: class members who were searched following arrests (either originally or on a default warrant) for offenses involving neither violence nor drugs (class representative Katrina Mack); and (2) Sub-Class II: the remaining class members, who were searched after following arrests for offenses (either misdemeanors or felonies) involving drugs or "violence" (class representative to be determined).^[29]

a. County Liability to Sub-Class I

There can be no question about the County's liability in damages to the women in Sub-Class I. All of these women were subjected to horribly invasive strip and visual body cavity searches. The County made no pretense of balancing the need for the searches against "the invasion of personal rights that the search[es] entail[ed]." *Bell*, 441 U.S. at 559.

Further, even if I were to allow the County now to propose a retroactive rationale for the searches, nothing the County could suggest would suffice to justify its routine policy of searching women whose alleged conduct—whether misdemeanor or felony—involved neither drugs nor violence. Why should a woman charged with uttering a forged check—or, for that matter, violating a regulation governing sausage peddling—therefore be suspected of carrying concealed weapons or drugs?^[30] There is no rational reason for the County to have concluded that these women, as a class, posed a threat to the institutional security of the Jail.

Accordingly, the plaintiffs' motion for summary judgment of liability against the County is GRANTED in part. The County is liable in damages for the unconstitutional searches of all women in Sub-Class I. With respect to Sub-Class I, therefore, this action will now proceed to individual hearings to determine the amount of damages owed to each woman. One further caveat: If the County can produce evidence suggesting that it had individualized reasonable suspicion to search any particular *146 woman in Sub-Class I—due, for example, to her conduct during arrest—it is invited to introduce that evidence during the individualized damages hearings. The Court or the fact-finder will then make findings of fact, and I will adjust my estimate of liability accordingly.

b. County Liability to Sub-Class II

On the record now before me, the County's liability in damages as a matter of law to the women in Sub-Class II is less clear. While I appreciate these plaintiffs' argument that they are entitled to damages because the County did not, at the time of the searches, conduct the *Bell* balancing test, let alone make individualized findings of reasonable suspicion, I also recognize that generic characteristics may occasionally generate sufficient security concerns to justify "warrantless strip-search[es] absent reasonable suspicion of individual wrongdoing." *Roberts*, 239 F.3d at 111. In this case, the maximum security Jail sought, reasonably, to prevent the introduction of drugs or weapons. It therefore seems plausible—albeit barely—that Jail officials could constitutionally have followed a policy of searching arrestees charged with certain crimes, namely those involving weapons or drugs, on the theory that perpetrators of such crimes are marginally more likely to be hiding weapons or drugs on their person at the time of the arrest.

I emphasize, however, that this discussion does not constitute a prediction that the County will ultimately be absolved of liability for the routine searches of the women in Sub-Class II. Rather, my point is merely that on the record now before me, I cannot conclude as a matter of law that those women are entitled to damages.

The plaintiffs' current filings paint a very sympathetic picture of the class as a whole, because they tell the stories only of those women arrested for minor and nonviolent offenses. Before I reach any decision regarding the County's liability to the women in Sub-Class II, I must have some better understanding of the types of crimes with which the women were charged. Accordingly, summary judgment of liability is DENIED with respect to Sub-Class II.

To facilitate resolution of the remaining issues relating to Sub-Class II, the plaintiffs are ORDERED to identify a sub-class representative, or to propose further subdivisions of the sub-class,^[31] by August 15, 2001. In this same filing, the plaintiffs are instructed to propose a suitable definition for the terms "violence" and "violent offense," as used herein. The defendants may respond within fifteen days thereafter.

2. Sheriff Rouse's Liability for Fourth Amendment Violations

The parties agree that the Sheriff of Suffolk County "has final policymaking authority for establishing policies for conducting searches of prisoners at the Nashua Street Jail." Thus, because Rouse became Sheriff in October 1996 and remained in that position for the rest of the class period, he clearly bears responsibility for the County's unconstitutional strip-search policies during most of the class period.

147 The County's argument to the contrary is that Rouse never directly "exercised [his authority]" to establish County search policies, but instead "relied on the expertise of his staff in promulgating Department policies" is unavailing. Sheriff Rouse's hands-off approach to his job does not absolve him of responsibility for unconstitutional policies developed and promulgated by his underlings on his watch.

The only outstanding question relevant to Rouse's liability in damages, therefore, is whether he is entitled to immunity for any of the unconstitutional searches performed during the class period. The Supreme Court established the standard for qualified immunity^[32] two decades ago, in *Harlow v. Fitzgerald*:

[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.... If the law at [the time of the offense] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Id., 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); see also *Blackburn v. Snow*, 771 F.2d 556, 569 (1st Cir.1985) (discussing a Sheriff's potential qualified immunity in a context similar to that here). This standard requires a court to inquire first whether the constitutional right in question was clearly established at the time of the injury, and second whether "a reasonable, similarly situated official [would have understood] that the challenged conduct violated that established right." *Swain*, 117 F.3d at 9. Applying this standard here, I find Sheriff Rouse entitled to qualified immunity for all unconstitutional searches conducted prior to the First Circuit's 1997 decision in *Swain*, but liable in damages for all such searches performed thereafter.

The law governing strip-searches has changed significantly over the last thirty years. As recently as 1975, the First Circuit held that post-arrest searches involving visual body cavity inspections were "plainly authorized" by Supreme Court precedent and required no further scrutiny under the Fourth Amendment. *United States v. Klein*, 522 F.2d 296, 300 (1975). Since then, the Court has come full circle, announcing on June 25, 1997 that *Klein* is no longer good law, and further, that strip and visual body cavity searches cannot be conducted without individualized reason to suspect that the arrestee is harboring weapons or contraband. *Swain*, 117 F.3d at 7.

This is precisely the sort of situation for which the doctrine of qualified immunity was developed. The rationale for the doctrine is, in part, that it reduces the likelihood that "able citizens" will be deterred "from accept[ing] public

office" by the possibility of personal liability for actions taken in good-faith reliance on uncertain legal standards. *Harlow*, 457 U.S. at 814. I therefore find that Sheriff Rouse has established the defense of qualified immunity for those searches. Between 1975 and 1997, the lingering effects of *Klein* sufficiently muddied the waters of Fourth Amendment jurisprudence in this Circuit that a reasonable person in the Sheriff's position could, in good faith, have believed the County's routine search policy to be constitutional.^[33]

148 *148 In conclusion, therefore, summary judgment of liability against Sheriff Rouse is GRANTED in part, and the County defendants' motion for summary judgment is also GRANTED in part. I find Rouse liable in damages to all members of Sub-Class I who were searched at the Jail *after June 25, 1997*. As discussed above for the County, the amount of those damages will be determined in future, individualized hearings.^[34]

Rouse's liability for searches of the women in Sub-Class II remains to be determined, but should those searches ultimately be found to be unconstitutional, Rouse will only be responsible for searches conducted after June 25, 1997.^[35]

3. The City's Liability for Fourth and Fourteenth Amendment Violations

[12] City liability for the Jail searches of BPD arrestees poses an interesting question of institutional responsibility. Again, the governing standard derives from *Monell*: § 1983 provides a cause of action against a municipality for violations resulting from implementation or execution of city policies or customs. *Monell*, 436 U.S. at 690-91. In this case, though, the plaintiffs' claims fit none of the standard analytic models for municipal liability. For example, the City, unlike the County, had no express policy of subjecting all BPD arrestees to strip and visual body cavity searches. Indeed, the City claims—and I assume, for purposes of this ruling—that it had no control over the promulgation of the County policies proximately responsible for the challenged searches. Further, the record before me does not suggest that any City employees had a practice or custom of conducting such searches, let alone a practice sufficiently "well settled and widespread" as to be attributable to the City. *Bordanaro v. City of Everett*, 871 F.2d 1151, 1156 (1st Cir.1989). Finally, none of the challenged searches resulted directly from the City's failure to promulgate a search policy, e.g. *Cornfield v. Consolidated High School District No. 230*, 991 F.2d 1316 (7th Cir. 1993) ("[I]n situations that call for procedures, rules, or regulations, the failure to make a policy itself may be actionable"), nor from its failure to train its employees regarding the constitutional prerequisites to a search, *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388-90, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1988) ("[T]here are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under § 1983").

Nonetheless, the plaintiffs' claims against the City are clearly actionable under § 1983. The plaintiffs point to an express agreement between the City and the County Sheriff, under which the County agreed to "take custody of and house" BPD arrestees at the Jail. This case is thus best analyzed as involving a subcontract between the City and the County, under which Jail employees, acting as agents of the City, supervised and cared for City arrestees.^[36] As such, the City had *149 an affirmative obligation—as is present in the more standard models for municipal liability—to ensure that the policy of the Jail officials did not lead to widespread violation of BPD arrestees' constitutional rights. *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700, 705 n. 9 (11th Cir.1984) ("[W]here a governmental entity delegates the final authority to make decisions then those decisions necessarily represent official policy").

A simple example is sufficient to prove this point. Suppose the City had contracted with a private party to run a women's detention facility. If the wardens at that facility followed a deliberate and explicit policy of starving or torturing the women in their care, the City clearly could not argue that it bore no responsibility for those abuses. "In that sense, the [City's] duty [to detainees in its care] is non-delegable." *Id.* at 705. Similarly, here, "although the [County] ... contracted to perform an obligation owed by the [City], the [City] itself remains liable for any constitutional deprivations caused by the policies or customs of the [County]."^[37] *Id.*^[38]

Having established that the City had an affirmative obligation to monitor conditions for BPD arrestees housed at the Jail, I must next assess whether the City failed to meet that obligation. In so doing, I find the "deliberate

indifference" standard of *City of Canton* readily applicable. 489 U.S. at 388, 109 S.Ct. 1197. As in that action, the alleged municipal misdeed here is not an affirmative policy but a "failure" the failure adequately to monitor the search policies followed by City agents employed at the Jail, to ensure compliance with minimum constitutional standards. To establish liability, then, the plaintiffs must establish that the City's failure to monitor "amount[ed] to deliberate indifference to the rights" of BPD detainees. *City of Canton*, 489 U.S. at 388, 109 S.Ct. 1197.

150 The plaintiffs easily meet this standard. Strip-searches at maximum security detention facilities are an unfortunate fact of life, yet the City chose to house almost *150 ten thousand BPD arrestees in such a facility without once checking, even after the 1997 *Swain* decision, that the facility had a constitutional search policy let alone investigating the actual practices of Jail employees. For that matter, no City official apparently remarked on Jail personnel's surprising lack of curiosity about the precise nature of BPD booking searches. This lack of curiosity itself should have alerted City officials to the likelihood that the Jail followed a policy of routinely strip-searching all admittees rather than tailoring each search to the particular circumstances of an individual admittee's arrest. As this case sadly illustrates, the risks posed by the City's "glaring omissions" of oversight are concrete and obvious. *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 410, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). Those risks are more than sufficient to establish "deliberate indifference" as a matter of law. [39] *Id.*

To excuse its failure to monitor the Jail's search policy and practice, the City cites *Deaton v. Montgomery County, Ohio*, 989 F.2d 885, 888 (6th Cir.1993), for the proposition that it was entitled to assume that conditions at the Jail comported with constitutional standards. This argument might make some sense if the City had merely asked the County to house a few arrestees for a short period. Here, however, the City effectively used the County Jail as its own facility for almost a decade. To permit the City to escape liability in this case would be to sanction willful disregard of municipal obligations. The City presumably could have chosen to build a municipal facility for women, or to hold arrestees in one of the ten existing City police station lockups. [40] That it chose instead to contract with the County to house female arrestees did not entitle it to bury its head in the sand and ignore the manner in which the County treated those arrestees. Governmental entities may not "slough off their responsibility [ies]" by performing "a `shell game' with the legal ownership of prisons." *Deaton v. Montgomery County, Ohio*, 989 F.2d 885, 890 (6th Cir.1993) (Boggs, J., concurring).

Under these circumstances, there can be no question that the City's liability in damages for Jail violations of BPD arrestees' Fourth Amendment rights is coextensive with that of the County. Accordingly, the plaintiffs' request for summary judgment of City liability is GRANTED in part. The City is liable in damages for the unconstitutional searches of women in Sub-Class I throughout the class period. The City's liability for the searches of women in Sub-Class II remains to be determined.

4. The City's Liability for Equal Protection Violations

151 Finally, I turn to the plaintiffs' claim that the City denied female arrestees the equal protection of the laws. As (1) there can be no question that explicit City policy mandated that the women be sent to the Jail, and (2) I have already concluded that the City can be held liable under *151 § 1983 for subsequent Fourth Amendment violations at the Jail, the only issue that must be addressed to determine City liability on the plaintiffs' equal protection claim is whether the City policy, and the resulting searches, violate the Equal Protection Clause of the Fourteenth Amendment.

The City's policy of sending women to the County Jail resulted in a clear and significant gender disparity in the treatment of BPD arrestees. Both male and female arrestees were searched incident to booking, but only female arrestees were routinely subjected to degrading strip and visual body cavity searches thereafter. To satisfy the requirements of the Equal Protection Clause, the City would have to show that it had "an `exceedingly persuasive justification' for [this] differing treatment." *Mary Beth G.*, 723 F.2d at 1273 (citing *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982)).

[This] burden of justification is demanding and it rests entirely on the [City].... The [City] must show `at least that the [challenged] classification serves `important governmental objectives and that the

discriminatory means employed' are 'substantially related to the achievement of those objectives.'
The justification ... must not rely on overbroad generalizations about the different talents,
capacities, or preferences of males and females.

United States v. Virginia, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996).

The City fails to carry this burden. It explains its decision to house female arrestees at the County Jail by referring briefly to "the need to ensure the security, safety and health of the female prisoners, which could not adequately be fulfilled at the [BPD] area station houses." It indicates that "[p]olice district cells could not hold women, because they were not configured to separate women from men," and it argues "the department did not have the personnel and resources to administer holding cells for women."

These conclusory statements do little more than recast the City's original decision to discriminate in less offensive terms. To satisfy the strictures of the equal protection jurisprudence outlined above, the City would have to explain *why* it could find no satisfactory space for women in the BPD station houses, and *why* it felt its personnel and resources were better used to meet the needs of male rather than female arrestees.^[41] Vague and general references to funding and space constraints cannot justify a policy that resulted directly in the strip and visual body cavity searches of thousands of female arrestees, while permitting their male counterparts to rest in the relative comfort and security of BPD lockups. An explicit City policy of searching female but not male BPD arrestees would clearly violate the Equal Protection Clause. *E.g.*, Mary Beth G., 723 F.2d at 1273-74. The policy at issue here is an improvement in name only.

Thus, I find the City liable in damages for the violation of the equal protection rights of *all* women in the plaintiff class, regardless of the crimes with which they were charged, or the sub-class in which they fall for the Fourth Amendment analysis. The amount of damages remains to be determined.

IV. CONCLUSION

152 As detailed above, the plaintiffs' motion for summary judgment is ALLOWED in *152 part and DENIED in part. The County defendants' motion for summary judgment is DENIED.

The plaintiffs are ORDERED to name a representative for Sub-Class II^{or} alternatively, to propose further subdivision of that class^{by} August 15, 2001. The defendants' response is due within fifteen days thereafter.

SO ORDERED.

[1] As noted below, the defendants indicate that almost 8,000 women meet this class description. This larger number apparently includes many women who chose to opt out of the plaintiff class.

[2] I adopt the plaintiffs' terminology, but I note that I do not believe "a strip-search can ... be characterized as a routine procedure. ... Indeed, a strip-search, by its very nature, constitutes an extreme intrusion upon personal privacy, as well as an offense to the dignity of the individual." Wood v. Clemons, 89 F.3d 922, 928 (1st Cir.1996), cited with approval in Swain v. Spinney, 117 F.3d 1, 6 (1st Cir.1997).

[3] One individual plaintiff, Bronwyn Ford, opted out of the class but continues to pursue her claims as an individual party to this action. I discuss her claims in a separate Memorandum, also issued today.

[4] I note, however, that Sheriff Rouse's qualified immunity for searches conducted prior to June 25, 1997, extends to searches of women arrested initially or on default warrants for crimes involving violence or drugs.

[5] According to Sheriff Rouse, the Jail was never intended to house pre-arraignment detainees.

[6] This practice began in March 1991, when the City closed its House of Detention and established a policy whereby "[f]emale prisoners arrested or detained by members of the Boston Police Department ["BPD"] [were] processed in the usual manner and then transported to the Suffolk County Jail ... for detainment." BPD Rule 318-C. And the practice will apparently stop as of September 2001.

In apparent response to this ongoing class action, I note that the BPD recently announced that beginning as early as September 2001, it will no longer place female suspects awaiting arraignment in the custody of the County Sheriff's Department. Francie Latour, *Boston to Stop Holding Women Suspects in Suffolk Jail*, Boston Globe, June 7, 2001, at A21.

[7] The County indicates that prior to May 24, 1999, the only detainees not searched were those who explicitly refused the search. Those detainees were not housed with the general Jail population but were instead placed alone in a cell in the Booking Room and watched by a Jail officer. The County provides no record of the number of women who avoided a search in this way.

[8] The parties' various filings are strangely silent about the County's search policy for prisoners held pursuant to default felony or misdemeanor warrants. As the County defendants' various filings argue that routine searches of such women are constitutional, I proceed on the assumption that both Policy I and Policy II allowed such searches without a finding of reasonable suspicion or probable cause.

[9] See County's Suppl. Resp. to Pls.' Fourth Set of Interrogs at Resp. 4.

[10] *Id.* at Resp. 5.

In 1999, the SJC concluded that "probable cause is the appropriate standard to apply to strip and visual body cavity searches." *Commonwealth v. Thomas*, 429 Mass. 403, 708 N.E.2d 669, 673 (Mass.1999). The BPD then adopted a new policy, under which probable cause "to believe an arrestee has either contraband or weapons in his or her possession is necessary before a strip-search may be conducted." BPD Rule 318D.

[11] The plaintiffs' filings do not seem to indicate whether Mack was charged with a misdemeanor or a felony, but under Massachusetts law, "a first offense of operating while under the influence is a misdemeanor." *Commonwealth v. Savage*, 430 Mass. 341, 719 N.E.2d 473, 477 (Mass.1999). In the absence of any contrary indication, therefore, I will assume Mack was charged with a misdemeanor.

According to the plaintiffs, 575 other members of the class were also charged with motor vehicle violations, including operating under the influence, and operating without a license.

[12] Plaintiffs indicate that like this woman, 137 women in the class were arrested for miscellaneous minor misdemeanors.

[13] Plaintiffs maintain that 553 class members were charged with larceny, (90 for larceny under \$250.00, and 463 for larceny over \$250.00), 630 with shoplifting, and 156 with uttering.

Additional statistics provided by the plaintiffs include: 286 class members charged with trespass; 351 with disorderly conduct; 201 with receiving a stolen motor vehicle; 588 with domestic assault and battery; and 188 with violation of a restraining order.

[14] The City's search policy and practice apparently varied during the class period, but the plaintiffs allege that both men and women were frequently strip-searched incident to booking, and a few plaintiffs claim they were also subjected to visual body cavity inspections while in BPD custody.

[15] This number includes all BPD detainees admitted to the Jail during the time period at issue here. It therefore counts all women who fit the class description, including those who opted out of this action. (The parties offer no explanation for the difference between this figure (7,907) and the numbers cited by the plaintiffs (7,878 at one point, and 8,109 elsewhere)).

[16] Five women cannot be placed into one of these three categories due to an obscure problem with the County's charge data.

[17] I recognize that neither Policy I nor II remains in effect, and further, that the SJC's recent decision in *Commonwealth v. Thomas*, *supra* note 11, renders it unlikely that the City or County will ever again pursue a policy of strip-searching arrestees without probable cause. Nevertheless, the plaintiffs' claims for declaratory and injunctive relief are not moot, as the defendants have not established that it is "absolutely clear" their "wrongful

behavior" will not recur. Mack v. Suffolk County, 191 F.R.D. 16, 21 (D.Mass.2000) (citing City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1983)).

[18] I emphasize that this finding does not resolve the issue of the defendants' liability for the strip-searches of class members. That issue is discussed at length below.

[19] As indicated below, the *Roberts* decision involved a constitutional challenge to two Rhode Island blanket strip-search policies.

[20] This is commonly referred to as the "*Bell* reasonableness test." *E.g.*, *Roberts*, 239 F.3d at 108.

[21] I also note that *Roberts* was arrested on an outstanding "body attachment" — a Rhode Island writ that "allows officers to take the defendant into custody if the family court is not in session." *Id.* at 108 n. 2. Thus, *Roberts*' arrest was sanctioned by a judge, much like the arrests on default warrants at issue here.

[22] In addition to the factors referenced in the text, the prison in question also had a long, well-documented history of contraband problems. *Roberts*, 239 F.3d at 111 (citing *Arruda*, 710 F.2d at 888). Though the defendants here argue that the County Jail has such a contraband problem, they provide little data to support their contention that BPD arrestees contribute to the problem in any way.

[23] The defendants dispute the plaintiffs' claim that City police officers strip-searched female arrestees as part of a routine booking search. The City provides no evidence, however, to refute the numerous depositions submitted by the plaintiffs, in which female officers indicate that they routinely required women to strip, partially or completely, during a booking search.

[24] The County's observation that Jail officials found some contraband on BPD arrestees in spite of the prior booking searches does little to convince me that the contested searches were necessary. Though there is some factual dispute as to the amount of contraband discovered as a result of the strip-searches of BPD arrestees, the County has produced only five records indicating that Jail officials discovered contraband as a result of an intrusive strip-search. "The lack of specific instances where a body cavity search was necessary to discover contraband supports a finding that the policy of searching all [arrestees] is an unreasonable one." *Id.* at 112.

[25] I recognize that the challenged searches would have been still worse if, for example, Jail officials had performed them in a public setting, or if male officials had searched the female arrestees. The absence of these aggravating factors does not, however, render harmless the County's misguided search policy. *Cf. Roberts*, 239 F.3d at 107 (noting that the unconstitutional search at issue in that case was performed "in a relatively private manner").

[26] See *supra* note 22.

[27] Mass. Gen. L. ch. 266, § 30 (defining larceny over \$250.00 as a felony offense).

[28] See generally Gabriel M. Helmer, Note, *Strip-search and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U. L.Rev. 239, 284 (2001) (surveying cases and concluding that the "circuits have found, in interpreting the *Bell* standard, that the mere classification of the crime charged, whether felony or misdemeanor, is irrelevant.")

[29] I reach no decision here as to the definition of the term "violence" in the context of this case. As indicated below, the parties are invited to propose a suitable definition in their next filings to this Court. In so doing, the parties should keep in mind that the object of this endeavor is to separate offenses that inherently generate a suspicion the offender may be concealing weapons or contraband, from offenses that generate no such suspicion.

[30] This conclusion is only strengthened by the particular facts of this case, including the prior BPD booking searches, the women's transferral to the Jail *in BPD custody*, and the documentary evidence suggesting that full strip and visual body cavity searches only rarely resulted in the discovery of contraband.

[31] *Cf. United States Parole Commission v. Geraghty*, 445 U.S. 388, 408, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) (discussing "the burden of constructing subclasses").

[32] There can be no question that, "as a prison administrator, the Sheriff is entitled to invoke [this] immunity defense." *Blackburn v. Snow*, 771 F.2d 556, 569 (1st Cir.1985).

[33] In fact, the district judge in *Swain* himself concluded that "[a]lthough Klein predate[d] the premiere Supreme Court case on strip-searches, *Bell* ..., it remain[ed] valid First Circuit law." *Swain*, 932 F.Supp. 25 (D.Mass.1996), *rev'd*, 117 F.3d 1 (1st Cir. 1997).

[34] As the issue of punitive damages involves questions of Rouse's subjective knowledge and intent, that issue, too, is best reserved for resolution in individualized damages hearings.

[35] My findings regarding qualified immunity also extend to defendant Doe. The plaintiffs do not request summary judgment of their claims against Doe, however, so I do not here assess her liability for searches after June 25, 1997.

[36] I recognize that this would not be sufficient to support City liability under a theory of *respondeat superior*. *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 403, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) ("We have consistently refused to hold municipalities liable under a theory of respondeat superior." (internal citations omitted)). Here, however, the question is City liability for promulgation and implementation of an express County policy, not City liability for the negligent acts of County employees acting as agents of the City.

[37] That the County is a public entity does not alter this analysis. At least in the prison context, a private party that contracts to perform a public service is considered a "state actor" for purposes of § 1983 liability, so there is no reason to suppose that a municipality's constitutional obligations to its detainees are somehow more acceptably delegated to a public than a private entity. *E.g. West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (holding that for § 1983 purposes, a private physician under contract to provide medical services to inmates in a state prison system acted "under color of state law" when treating an inmate). Thus, any entity, public or private, that takes on the city's obligations may be held liable as a state actor under § 1983, but the city, too, retains its oversight obligations.

[38] *Accord Young v. City of Little Rock*, 249 F.3d 730 (8th Cir.2001). The Young case involved a situation similar to that here, in which the City of Little Rock contracted with Pulaski County for the housing of city prisoners. The plaintiff in the case, Willie Mae Young, sought to hold the City accountable for her strip-search at the County jail. The Eighth Circuit upheld the jury verdict for Young, reasoning as follows:

Strip-searching of prisoners is routine procedure, and the jury could reasonably infer that the City knew that a person entering the [County] jail, in jail clothing with a group of other detainees, would be strip-searched. In these circumstances, it is far from unfair to attribute to the City the policies routinely used by the County jail in the housing and processing of City prisoners.

Id. at 736.

[39] As further evidence of the City's deliberate indifference to the constitutional rights of its arrestees, the plaintiffs note that the City failed to adopt its own policy on the issue of strip-searches until September 1998, midway through the class period. Though regrettable, that omission is not directly relevant here. Even if the City had promulgated an explicit policy regarding strip-searches, the policy would not necessarily have protected female BPD arrestees from strip-searches at the Jail; the absence of such a policy is neither necessary nor sufficient to prove "deliberate indifference" to conditions at the Jail.

[40] In fact, this is what the City now proposes to do. City's Letter to the Court of June 6, 2001 [docket entry # 114].

[41] For example, cells in one of the existing station houses could have been devoted to female arrestees, as the City now proposes to do. *Id.*

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