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UNWARRANTED POWER AT THE BORDER: THE INTRUSIVE BODY SEARCH

by Rosemary Ryan Alexander

Every country has the inherent sovereign power to protect its territory from the invasion of unauthorized persons and merchandise.[1] Thus, any traveler desirous of crossing an international border may be the subject of a border search.[2] Border searches are classified as intrusive or nonintrusive, depending on the scope of the inspection. Nonintrusive border searches are limited to examination of a person's wearing apparel and personal property, and may range from a cursory glance at personal effects to a thorough inventory of the contents of baggage or vehicle. Intrusive border searches focus on search of a person's body and body cavities; while an intrusive search may be restricted to a strip search with visual inspection of the body surface, it may also progress to manual probing of a body cavity.

The range of intrusiveness possible under the comprehensive term "border search" allows a customs official to proceed from a minimal invasion, such as a luggage search, to the serious affront to personal dignity of a body cavity probe on the mere subjective basis of the officer's personal observations and interpretation of travelers' suspicious appearances and behavior.

This Comment considers current customs statutes, which do not militate against overly intrusive searches,[3] and examines the fourth amendment's protection against unreasonable searches and seizures as it is currently applied to border searches. Additionally, this Comment proposes an alternative procedure to govern initiation of body cavity searches through

1. Carroll v. United States, 267 U.S. 132, 153 (1925) (dictum); *cf.* Witt v. United States, 287 F.2d 389, 391 (9th Cir.), *cert. denied*, 366 U.S. 950 (1961) (by reason of entry alone, the United States may search anyone entering the country); *see* United States v. Glaziou, 402 F.2d 8, 12 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969).

2. United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969), lists the classes of people who may be searched by customs inspectors: (1) those who cross the border, (2) those who are employed in the border area, and (3) any person who engages in suspicious activity in the area of the border; in addition, those who have already crossed the border and been searched there may again be searched some distance from the border. 402 F.2d at 13-14. The *Glaziou* test is: "[W]hen an individual has direct contact with a border area, or an individual's movements are reasonably related to the border area, that individual is a member of the class of persons that a customs officer may, if his suspicions are aroused, stop and search . . . ." *Id.* (citations omitted). Thus, border searches include searches conducted at the point of entry and extended border searches, that is, searches conducted away from the international boundary but inside an elastic border area. *See* note 26 *infra*. The subject of extended border searches is beyond the scope of this Comment.

3. For a discussion of border searches generally and of the current law's inconsistency with the fourth amendment, see Comment, *Border Searches—A Prostitution of the Fourth Amendment*, 10 ARIZ. L. REV. 457 (1968).

judicial issuance of warrants based on showings of clear indication that contraband is concealed within a body.

I. THE FOURTH AMENDMENT

By its prohibition of general searches, the fourth amendment to the United States Constitution protects its citizens from unreasonable search and seizure.[4] Accordingly, general searches have long been held to violate an individual's fundamental right to privacy.[5] As a procedural safeguard against unreasonable searches, the fourth amendment has been interpreted to require that a search warrant be issued by a "neutral and detached magistrate"[6] only upon a showing that probable cause exists to search.[7]

The term "border search" has been judicially limited "to distinguish official searches which are reasonable because made solely in the enforcement of Customs laws from other official searches made in connection with general law enforcement."[8] An effect of this special classification apart from other searches is that neither probable cause nor a warrant is necessary to initiate a border search.[9] A historical justification for the border search exception to the fourth amendment has been drawn from the chronological circumstances surrounding the adoption of the fourth amendment. Before the passage of the fourth amendment, the government had the right to conduct border searches.[10] The First Congress passed a revenue statute in 1789[11] that authorized customs officials to stop and examine any bag-

4. U.S. CONST. amend. IV:
The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

5. *See, e.g.*, Marron v. United States, 275 U.S. 192, 195 (1927).

6. Aguilar v. Texas, 378 U.S. 108, 115 (1964).

7. Probable cause exists when the facts and circumstances within the knowledge of those conducting the search, based on trustworthy information, are "sufficient in themselves to warrant a man of reasonable caution" to believe that an offense has been committed. Carroll v. United States, 267 U.S. 132, 162 (1925).

8. Alexander v. United States, 362 F.2d 379, 382 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966).

9. *See, e.g.*, United States v. Himmelwright, 551 F.2d 991 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977); Perel v. Vanderford, 547 F.2d 278 (5th Cir. 1977); United States v. Cameron, 538 F.2d 254 (9th Cir. 1976); United States v. Mastberg, 503 F.2d 465 (9th Cir. 1974); United States v. Diemler, 498 F.2d 1070 (5th Cir. 1974); United States v. Byrd, 483 F.2d 1196 (5th Cir. 1973); United States v. Thompson, 475 F.2d 1359 (5th Cir. 1973); United States v. Summerfield, 421 F.2d 684 (9th Cir. 1970). Exempted from the warrant requirement are stop and frisk searches, Terry v. Ohio, 392 U.S. 1 (1968), automobile searches, Chambers v. Maroney, 399 U.S. 42 (1970), and searches incident to arrest, Chimel v. California, 395 U.S. 753 (1969). Recently, the Supreme Court held that the contents of an automobile which had been taken off the street and impounded could be taken from the car (inventoried) without probable cause or a warrant authorizing the search. South Dakota v. Opperman, 428 U.S. 364 (1976).

10. The fourth amendment was passed by Congress on Sept. 25, 1789. The first border search law was passed on July 31, 1789.

11. Act of July 31, 1789, Pub. L. No. 1-1, ch. 5, § 24, 1 Stat. 29, 43 (1789) provided:
[E]very collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and author-

gage, vehicle, or person upon entry into the United States on the suspicion that contraband, merchandise subject to duty or illegal in nature, was hidden.[12] Later, the First Congress rendered the proposed Bill of Rights.[13] This sequence of events has been interpreted as signifying Congress' intent that the prohibition against unreasonable searches and seizures contained in the fourth amendment is not a legal constraint on the discretion of border agents to conduct searches.[14] This conclusion, however well-settled, does not recognize that the congressional imagination at that time could not foresee that the majority of people subjected to border searches in the

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> ity, to enter any ship or vessel, in which they shall have reason to suspect any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise . . . .

The Act does not mention intrusive body searches, which were not medically feasible at the time.

12. Border searches are currently authorized by the following statutes:

19 U.S.C. § 482 (1976):

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise . . . .

19 U.S.C. § 1582 (1976):

> The Secretary of the Treasury may prescribe regulations for the search of persons and baggage and he is authorized to employ female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations.

19 U.S.C. § 1581(a) (1976):

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States . . . or at any other authorized place . . . and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

The power to search for aliens is derived from a statute which does not require suspicion on the officer's part. 8 U.S.C. §§ 1357(a), (c) (1976). For a discussion of immigration searches, see Comment, *Border Search in the Ninth Circuit: Almeida-Sanchez—A Borderline Decision*, 23 HASTINGS L.J. 1309 (1972). The Fifth Circuit appears to be the only circuit that does not treat border searches and alien searches as separate entities. 19 U.S.C. § 1401(i) (1976) provides that a border patrol agent may be authorized to act simultaneously as a customs agent. *See* United States v. Settles, 481 F.2d 1272 (5th Cir. 1973); United States v. Wright, 476 F.2d 1027 (5th Cir. 1973); United States v. Thompson, 475 F.2d 1359 (5th Cir. 1973); United States v. McDaniel, 463 F.2d 129, 134 (5th Cir. 1972) ("Border Patrol agents wear two hats, one as an immigration officer and the other as a customs officer").

13. 1 ANNALS OF CONG. 88, 913 (Gales & Seaton eds. 1789).

14. Boyd v. United States, 116 U.S. 616, 623 (1886), stated in dictum:

> [T]his act [Act of July 31, 1789] was passed by the same Congress which proposed for adoption the original amendments to the Constitution, [and] it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the [fourth] amendment.

Of course, we do not know whether or not the First Congress compared the new customs act provisions with the standards of the proposed fourth amendment. For a discussion which criticizes the significance attached to the sequence of passage of the customs act and the fourth amendment, see Note, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007, 1011 (1968).

future would be American citizens returning from brief sojourns in Mexico rather than aliens entering the United States from foreign countries.

The judiciary has consistently recognized that "different rules of law"[15] are applicable to the search of persons coming into the United States from a foreign country[16] since the border search is an exercise of the inherent sovereign power[17] in the interest of self-protection. The security of the nation's borders provides a compelling rationale for subjecting everyone entering the country to a search before admittance.[18] Thus, the right of privacy is necessarily restricted and a quantum of invasion is justified on the mere basis of international travel.

Present judicial willingness to uphold intrusive body searches at the border may additionally reflect recognition of the difficulty of maintaining adequate surveillance over the border,[19] exacerbated by the increasing problem of narcotics smuggling.[20] Some judges have hinted that those who engage in the practice of body smuggling are not as deserving of the protection of the Constitution as others.[21]

II. THE NONINTRUSIVE BORDER SEARCH

Under the fourth amendment exemption, most border searches are made on "mere" or "unsupported suspicion." These two terms have been used interchangeably to denote the same level of cause.[22] This mere suspicion or no suspicion criterion applies to the general border search, the stopping of an individual pursuant to a search of his baggage, vehicle, and personal items. There is no invasion of the bodily privacy of the traveler in a general border search.

The minimal invasion of privacy inherent in a general border search of vehicle and person without a showing of probable cause or issuance of a warrant is justified by the interest of the government in self-protection and

15. Witt v. United States, 287 F.2d 389, 391 (9th Cir.), *cert. denied*, 366 U.S. 950 (1961).

16. *See, e.g.*, Denton v. United States, 310 F.2d 129, 131 (9th Cir. 1962).

17. Cross v. Harrison, 57 U.S. (16 How.) 164, 166 (1853).

18. R. DAVIS, FEDERAL SEARCHES AND SEIZURES 368 (1961).

19. *See generally* Thomas v. United States, 372 F.2d 252, 254 (5th Cir. 1967) (special treatment afforded border searches is based on a policy recognizing the problem of surveillance of national boundaries); King v. United States, 348 F.2d 814, 818 (9th Cir.), *cert. denied*, 382 U.S. 926 (1965) (difficult law enforcement problems at the border support the exempt classification accorded border searches).

20. *See generally* Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967); Blefare v. United States, 362 F.2d 870 (9th Cir. 1966).

21. As stated by Judge Chambers, concurring in Blackford v. United States, 247 F.2d 745, 754 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958), and quoted by Judge Barnes in Rivas v. United States, 368 F.2d 703, 710 (9th Cir. 1966): "[I]t was Blackford who . . . first takes us into this disgusting sequence. He made the deposit . . . through the anal opening . . . . I do not say that the depraved have no rights. But . . . to my sensibilities all of the shockingness was Blackford's." Judge Ely of the Ninth Circuit criticized this deviance from equal protection standards: "[I]f we are to continue to safeguard the innocent and virtuous from the potential degradation and humiliation of 'strip searches,' we cannot permit our revulsion . . . to induce our Court to depart from its established principles." United States v. Holtz, 479 F.2d 89, 94 (9th Cir. 1973) (dissenting opinion).

22. *See* Rodriguez-Gonzales v. United States, 378 F.2d 256 (9th Cir. 1967); Alexander v. United States, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966).

the interest of the public in collection of customs duties.[23] A customs official may initiate a general search without suspicion that the subject is smuggling contraband.[24] Cause to search has been stated to exist by reason of the subject's crossing the border and by the requirements of national security.[25] Most general border searches, however, are made on the basis of the observations of an experienced customs official whose suspicions have been aroused by a nervous traveler. These searches are routinely conducted and upheld because of the official's "mere suspicion."[26]

III. INTRUSIVE BORDER SEARCHES

A. *The Strip Search*

Because of the increasing frequency of travelers' smuggling contraband in their undergarments and body cavities,[27] customs officials have responded with intrusive border searches consisting of the strip, or skin, search and the body cavity search.[28] A customs agent may examine a

23. The power to regulate the entry of foreign goods was early recognized as a necessary exercise of the right of the sovereign. Cross v. Harrison, 57 U.S. (16 How.) 164, 166 (1853).

24. "No question of whether there is probable cause for a search exists when the search is incidental to the crossing of an international border, for there is reason and probable cause to search every person entering the United States from a foreign country, by reason of such entry alone." Witt v. United States, 287 F.2d 389, 391 (9th Cir.), *cert. denied*, 366 U.S. 950 (1961); *see, e.g.*, King v. United States, 348 F.2d 814, 817 (9th Cir.), *cert. denied*, 382 U.S. 926 (1965); Denton v. United States, 310 F.2d 129 (9th Cir. 1962); Murgia v. United States, 285 F.2d 14 (9th Cir. 1960), *cert. denied*, 366 U.S. 977 (1961); Landau v. United States, 82 F.2d 285 (2d Cir. 1936); United States v. Yee Ngee How, 105 F. Supp. 517 (N.D. Cal. 1952).

25. Carroll v. United States, 267 U.S. 132 (1925). Appellant was charged with a violation of the Prohibition laws. The Court upheld the warrantless search and in dictum approved the border search exception. *Id.* at 154.

26. A border search encompasses not only a search made at a geographical point of entry but, under certain circumstances, a search made away from the boundary, an extended border search. Although extended border searches are not conducted at the border, the purpose of the search is the same as of a border search. *See, e.g.*, United States v. Warner, 441 F.2d 821 (5th Cir.), *cert. denied*, 404 U.S. 829 (1971); Alexander v. United States, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966). The place where an extended border search occurs has been termed the "functional equivalent" of the border. Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (8 U.S.C. § 1357(a) (1976) authorizes searches made without a warrant or on less than probable cause only if made within a reasonable distance of the border). *See also* United States v. Martinez, 481 F.2d 214 (5th Cir. 1973) (search held valid when customs agents followed a truck for over five days before stopping and searching the vehicle 150 miles inland from the border); United States v. Hill, 430 F.2d 129 (5th Cir. 1970) (search of a truck two miles from the marina where the truck was observed loading boxes from a vessel which had crossed the U.S. international boundary upheld as a border search); United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969) (search of two French seamen as they were leaving the pier where their vessel was docked upheld as a border search); Sutis, *The Extent of the Border*, 1 HASTINGS CONST. L.Q. 235, 237-50 (1974); Note, *Fourth Amendment Applications to Searches Conducted by Immigration Officials*, 38 ALB. L. REV. 962, 971-74 (1974).

27. Blackford v. United States, 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958), was the first appeal of a conviction of illegally importing and concealing narcotics based on evidence obtained from a body cavity probe at the border.

28. The rectum is the most often used cavity for smuggling. The vagina also is frequently used. At least 93 grams of heroin can be hidden in a woman's vagina. *See* Henderson v. United States, 390 F.2d 805, 806 (9th Cir. 1967). *See also* United States v. Himmelwright, 551 F.2d 991 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977); United States v.

person's outer clothing during the course of a routine border search, even without cause. In contrast, a traveler may be forced to disrobe only if a customs official can show "real suspicion"[29] or "reasonable suspicion"[30] that contraband is concealed on a suspect's body.[31] Some examples of suspicion that have been found to support strip searches are an informer's tip[32] or an overly bulky, suspicious appearance of a suspect's clothing.[33] To date only the Ninth Circuit[34] has adopted the real suspicion standard,[35] which was announced in *Henderson v. United States*.[36] The facts of the case revealed that the defendant was subjected first to a strip search and thereafter to a body cavity search which revealed a cache of heroin. The strip search was initiated because the customs agent erroneously believed the defendant had been searched on a prior occasion and found to be carrying narcotics in her purse. The agent had not attempted to verify his recollection before the commencement of the strip search, and since no independent facts existed to suggest contraband on the defendant's person, the court invalidated the strip search as an unwarranted invasion of personal privacy. It stated that examination beyond a search of the victim's outer clothing or contents of his personal effects requires a higher standard

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Carter, 480 F.2d 981 (9th Cir. 1973). It has been estimated that one fifth of all drugs smuggled from Mexico are concealed in body cavities. Blackford v. United States, 247 F.2d 745, 752 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958). Contraband is occasionally swallowed. *See, e.g.*, Blefare v. United States, 362 F.2d 870 (9th Cir. 1966).

29. Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967). Prior to *Henderson* a strip search based on "mere" suspicion was held lawful in Witt v. United States, 287 F.2d 389 (9th Cir.), *cert. denied*, 366 U.S. 950 (1961). Customs officers received a tip describing a particular car as possibly carrying heroin. A description of the passengers was not provided. The *Witt* court upheld the strip search of the female appellant, stating that "[m]ere suspicion has been held enough cause for search at the border." 287 F.2d at 391 (citing Cervantes v. United States, 263 F.2d 800, 803 n.5 (9th Cir. 1959)). The court also pointed to current customs laws, 19 U.S.C. § 1582 (1976), which provide for women to be searched by female customs inspectors as evidence of the implied congressional intent that such searches could be conducted. 287 F.2d at 391 & n.1.

30. United States v. Himmelwright, 551 F.2d 991 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977).

31. Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967). *See also* United States v. Diaz, 503 F.2d 1025 (3d Cir. 1974); United States v. Forbicetta, 484 F.2d 645 (5th Cir. 1973). A traveler may be required to remove his coat without a showing of real suspicion by the customs officer. Murray v. United States, 403 F.2d 694 (9th Cir. 1968).

32. United States v. Marti, 321 F. Supp. 59 (E.D.N.Y. 1970).

33. United States v. Berard, 281 F. Supp. 328 (D. Mass. 1968). A strip search standard has not been developed in any circuit other than the Fifth and Ninth. *See* United States v. Flores, 477 F.2d 608 (1st Cir. 1973).

34. Most border search cases arise in the Ninth and Fifth Circuits, whose jurisdictions include the California-Mexico border and the Texas-Mexico border, respectively. See notes 49-71 *infra* and accompanying text for discussion of the Fifth Circuit's standard applicable to strip searches and comparison of this with the Ninth Circuit standard. Other courts look to these circuits when deciding a border search case. *See, e.g.*, United States v. Glaziou, 402 F.2d 8 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969); United States v. Pedersen, 300 F. Supp. 669 (D. Vt. 1969).

35. The fourth amendment's protection against unreasonable search and seizure encompasses two phases of a search: whether or not it is reasonable to initiate the search and the reasonableness of the search itself.

36. 390 F.2d 805 (9th Cir. 1967). See notes 102-03 *infra* and accompanying text for discussion of this case in the body cavity search context.

than mere suspicion.[37]

The real suspicion test was further delineated in *United States v. Guadalupe-Garza*.[38] In that case the defendant, who had already passed one inspector, was strip searched by a subsequent agent because he suspiciously turned his head to the side. The court invalidated the search because the agent's suspicions were without any objective factual basis. The court further noted that a traveler at the border does not have an expectation of a strip search. The court refined the *Henderson* proposition that actual suspicion is required for a strip search:

> 'Real suspicion' . . . is subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person . . . is concealing something on his body . . . . [S]imple good faith on the part of the customs official in entertaining subjective suspicion unsupported by objective facts does not convert 'mere suspicion' into real suspicion.[39]

The Ninth Circuit also upheld a strip search based on real suspicion in *United States v. Summerfield*.[40] Customs agents noticed the defendant's extreme nervousness, fresh needle marks on his arms, and contracted pupils.[41] Further, a search of the defendant's wallet revealed three rolled up cotton balls which were of the kind frequently used by narcotics users.[42] In *United States v. Shields*[43] a strip search was upheld because of the customs agent's observation of the presence of needle marks on the defendant's arms and his unusual nervousness. As in other cases, the short duration of the defendant's visit to Mexico was also a suspicious fact.[44]

The fact situation which provokes the suspicions of the inspecting official must be capable of being categorized into specific observations which, when accumulated, "bear some reasonable relationship to suspicion that something is concealed on the body of the person to be searched."[45] For instance, indications that contraband is concealed in an automobile in which a suspect is riding do not provide the requisite real suspicion to validate a strip search of the suspect because the indications do not point to a smuggling offense or the suspicion that contraband is concealed on the suspect's body.[46] In *Guadalupe-Garza* the fact that the defendant turned his head to one side in a shy manner was held not to constitute an objective, articulable fact that would lead a customs official to suspect that the victim harbored contraband on his body. Also, if the facts creating the

37. 390 F.2d at 808.
38. 421 F.2d 876 (9th Cir. 1970).
39. *Id.* at 879.
40. 421 F.2d 684 (9th Cir. 1970).
41. *Id.* at 685.
42. *Id.*
43. 453 F.2d 1235 (9th Cir. 1972). See notes 116-18 *infra* and accompanying text for discussion of this case in the body cavity search context.
44. 453 F.2d at 1236.
45. United States v. Guadalupe-Garza, 421 F.2d 876, 879 (9th Cir. 1970).
46. United States v. Williams, 459 F.2d 44 (9th Cir. 1972).

original suspicion are discovered to be erroneous, the search must be discontinued instantly.[47]

In formulating the standards which govern intrusive searches, the Ninth Circuit measured the intrusion into individual privacy against the government's need for an effective means to combat smuggling.[48] Significantly, however, the courts do not view the strip search as violative of human dignity, and thus are likely to uphold the search based on the government's greater need.

The standard presently applicable to the initiation of strip searches in the Fifth Circuit is not based on as much case law. Until recently,[49] only one strip search case had been reported, *United States v. Forbicetta*.[50] As the appellant was returning from a trip to Colombia, she was stopped in the Miami airport because the customs agents concluded that she matched a "smuggling profile." The suspect wore a loose fitting dress and it was the observation of the customs authorities that the usual female airline traveler wore tight fitting clothes. In addition, the suspect had nothing to declare and carried only one suitcase for a trip to Colombia, a place where she had no relatives.[51] A strip search resulted in the discovery of two and one-half pounds of cocaine concealed in the defendant's girdle. In affirming the smuggling conviction, the Fifth Circuit stated that the border search was legal based on precedent.[52] The cases relied on by the *Forbicetta* court did not address the issue of requisite suspicion standards pertaining to the initiation of strip searches; rather, the cases cited for support involved nonintrusive extended border search situations arising in the Fifth Circuit.[53] Although there was no strip search precedent in the Fifth

47. *See, e.g.*, United States v. Price, 427 F.2d 573 (9th Cir. 1973). Defendant was observed to have an unusual bulge in the area of her midsection. The customs official, guessing that the suspect was wearing a belt full of narcotics, ordered the suspect to strip. Pursuant to the strip, it became obvious that the suspicious protrusion was body fat, but the inspector ordered that the search continue. Narcotics were discovered in the suspect's underwear. The court held that although the outward appearance of the defendant validated the strip search, the search should have ceased when the bulge was verified as body tissue because the specific suspicion upon which the search was based was cleared.

A search reasonable at its beginning may violate the fourth amendment if the original valid search progresses beyond its original scope. *See, e.g.*, Kremen v. United States, 353 U.S. 346 (1957).

48. United States v. Guadalupe-Garza, 421 F.2d 876, 878-79 (9th Cir. 1970).

49. The most recent strip search case reported in the Fifth Circuit is United States v. Himmelwright, 551 F.2d 991 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977). *See* notes 57-68 *infra* and accompanying text.

50. 484 F.2d 645 (5th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

51. 484 F.2d at 646.

52. *Id.*

53. United States v. Cyzewski, 484 F.2d 509 (5th Cir. 1973) (upheld airport search of baggage which revealed marijuana pursuant to positive magnetometer reading); United States v. Thompson, 475 F.2d 1359 (5th Cir. 1973) (search of car and marijuana discovery upheld as car was on a road frequently used to smuggle aliens, thus providing the border patrol with the requisite reasonable suspicion); United States v. Maggard, 451 F.2d 502 (5th Cir. 1971) (car stopped after it passed checkpoint when it was noticed to be unusually low—reasonable suspicion to search for aliens); United States v. Hill, 430 F.2d 129 (5th Cir. 1970) (seizure of liquor from panel truck upheld as based on reasonable suspicion as truck observed loading from ship which had crossed international boundary); Rodriguez v. United

Circuit, the court did not refer to the strip search standard of the Ninth Circuit.[54] Instead, the court equated the suspicion necessary to initiate a strip search of a suspect's body with the standard applicable to his luggage.[55] The only language in the opinion acknowledging any difference between a nonintrusive border search and an intrusive body search referred to the fact that this was not a body cavity search.[56]

The most recent case in which the Fifth Circuit considered strip searches, *United States v. Himmelwright*,[57] suggests a trend towards narrowing the standard governing the initiation of strip searches. Agents had observed that the suspect was excessively calm,[58] was wearing platform shoes,[59] offered conflicting information regarding her employment,[60] and had been in Colombia an unusually short period of time. A strip search revealed an object protruding from the defendant's vagina; upon the request of the inspectress, the defendant removed 105 grams of cocaine from her vagina. At no time did the agent touch the suspect's body.[61] In upholding the search the court described the real suspicion test of the Ninth Circuit, but concluded that it could not follow their specific approach.[62] The court discussed the reasons for rejecting the fixed standard of the Ninth Circuit. The court noted the "inherent indefiniteness" of the terms "real suspicion," which is necessary to validate a strip search, and "clear indication," which must be present before the official may proceed with a body cavity search. In addition, the court reasoned that it was not always clear where to draw the line between body cavity searches and strip searches in order to determine which test to apply.[63] In a footnote, the opinion illustrated this point by comparing two Ninth Circuit cases involving substantially the same search, one case classifying the search as a body

States, 292 F.2d 709 (5th Cir. 1961) (affirmed conviction of defendant who crossed the border without registering as one is required to do if convicted of violating marijuana laws).

54. 484 F.2d at 646. The only intrusive body search case cited was United States v. Briones, 423 F.2d 742 (5th Cir. 1970), which upheld a stomach search by the administration of an emetic solution based on an informant's tip that the defendant would attempt to smuggle heroin in his stomach. The court held the search to be reasonable under either the mere suspicion or clear indication standard. *Id.*

55. The court relied on a case upholding the search of an airline passenger who matched a skyjacking profile, United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973). The *Skipwith* search, however, ended with the emptying of the suspect's pants pockets, which produced a bag of cocaine. By relying on this case, the *Forbicetta* court seemingly equated the level of suspicion necessary for the emptying of one's pockets with a strip search.

56. 484 F.2d at 646-47.

57. 551 F.2d 991 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977).

58. Apparently, customs officials expect a modicum of nervousness to be exhibited by the ordinary passenger coming into customs over to what extent their personal effects will be investigated; therefore, an extremely calm or an overly nervous person arouses suspicions of border agents. *See* 551 F.2d at 992 n.1.

59. During their popularity, platform shoes became a frequent cache for smuggled contraband.

60. Himmelwright first told the officers that she was a secretary. She then purported to be an agent for an insurance company. The last occupation she claimed was that of a cocktail waitress. 551 F.2d at 992-93.

61. *Id.* at 993.

62. *Id.* at 995.

63. *Id.*

cavity search and the other case as a strip search.[64]

The *Himmelwright* court instead adopted the "reasonable suspicion" standard for strip searches because it was more flexible and could still provide the full protection of the fourth amendment.[65] The court then described a requirement of the reasonable suspicion standard:

> '[R]easonable suspicion' in this context includes a requirement that customs officials have cause to suspect that contraband exists in the *particular place* which the officials decide to search. . . . [A] generalized suspicion of criminal activity such as . . . when one closely resembles a 'smuggling profile' will not normally in itself permit a reasonable conclusion that a strip search should occur.[66]

The court's reference to the insufficiency of a suspect's close resemblance to a smuggling profile to uphold the initiation of a strip search narrows the *Forbicetta* interpretation of the requisite standard.[67] It is clear that the *Forbicetta* interpretation equating a general border search with the initiation of a strip search, has been superseded by *Himmelwright*. The latter opinion reflects a recognition of the difference in its statement that the intrusion of a strip search is much greater than the intrusion occasioned by a customs official's search of baggage or inspection of a visa.[68]

Distinguishing the real suspicion test of the Ninth Circuit from the reasonable suspicion test as recently announced by the Fifth Circuit is less a matter of differing substantive standards, as they are difficult to differentiate in the abstract, and more a matter of applying the law to the facts.[69] The Fifth Circuit, more than the Ninth, has strained to find border search law applicable to a particular search.[70] Facts can be more easily interpreted to constitute a basis for reasonable suspicion than real suspicion. This distinction will become either more or less apparent, depending on the Fifth Circuit's future application of the reasonable suspicion test as delineated by *Himmelwright*[71] to the initiation of strip searches.

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64. *Id.* at 995 n.11 (discussing United States v. Mastberg, 503 F.2d 465 (9th Cir. 1974) (characterized as a body cavity search); United States v. Holtz, 479 F.2d 89 (9th Cir. 1973) (characterized as a strip search)).

65. 551 F.2d at 995. In holding that the reasonable suspicion standard governed the initiation of strip searches, the court stated that several other courts had adopted the "real" or "reasonable" suspicion standard and then cited Perel v. Vanderford, 547 F.2d 278 (5th Cir. 1977), as the most recent example in the Fifth Circuit. 551 F.2d at 994; *see* note 69 *infra*.

66. 551 F.2d at 995 (emphasis in original).

67. *See* notes 51-56 *supra* and accompanying text.

68. 551 F.2d at 994.

69. In the case preceding *Himmelwright* the Fifth Circuit upheld the refusal of the district court to charge the jury that the lawfulness of a strip search at the border depended upon a showing of probable cause. "It has been held in this circuit . . . that *real* or *reasonable suspicion* is the proper standard governing strip searches at the border." Perel v. Vanderford, 547 F.2d 278, 280 (5th Cir. 1977) (emphasis added). Note that the court used the "real" or "reasonable" terms interchangeably.

70. *Compare* United States v. Himmelwright, 551 F.2d 991, 995 (5th Cir.), *cert. denied*, 434 U.S. 902 (1977), *with* United States v. Guadalupe-Garza, 421 F.2d 876, 878 (9th Cir. 1970).

71. The Fifth Circuit also applies a "reasonable suspicion" standard to extended border

B. *The Body Cavity Search*

When an object is either illegal or subject to duty, smugglers frequently employ their bodies to secrete the contraband.[72] For example, varying types of narcotics and gems are swallowed[73] or secreted in the vagina or rectum. The increased practice of using body cavities for this purpose has prompted the body cavity search, which includes, besides the cavity probe, the use of emetics or stomach pumps.[74] Procedures which induce vomiting are less acceptable to the courts than probing, which is considered a more common practice presenting fewer, if any, hazards. Courts that have considered the reasonableness of the search itself view any pain accompanying a rectal examination as more acceptable than pain involved in stomach pumping because the accused made the original decision to deposit the contraband in his rectum and would necessarily inflict some type of pain on himself in removing the hidden substance.[75]

The legality of extracting evidence from a body cavity was first considered by the Supreme Court in *Rochin v. California*,[76] in which the Court considered the reasonableness of a search effected through the use of a stomach pump.[77] Narcotics officers who had broken into the defendant's room saw the defendant place two narcotics capsules into his mouth. The officers failed to prevent him from swallowing the substance. Subsequent pumping of the defendant's stomach recovered the evidence. The defendant's conviction for the illegal possession of morphine was reversed by the Supreme Court on the grounds that admission of this evidence violated the due process clause of the fourteenth amendment,[78] even though the proce-

searches. *See, e.g.*, United States v. McDaniel, 463 F.2d 129 (5th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); United States v. Hill, 430 F.2d 129 (5th Cir. 1970).

72. *See* McIntyre & Chabraja, *The Intensive Search of a Suspect's Body and Clothing*, 58 J. CRIM. L. 18, 23 (1967), contending that the Constitution does not give anyone a right to use his body to secrete contraband.

73. There is some danger in swallowing narcotics. If the container (usually a rubber condom) should rupture, instant death could result. Further, medical testimony in Blefare v. United States, 362 F.2d 870, 873-74 (9th Cir. 1966), reveals that packets of heroin can decompose in a human body.

74. *See, e.g.*, Rochin v. California, 342 U.S. 165 (1952).

75. *See* Blackford v. United States, 247 F.2d 745, 754 (9th Cir. 1957) (concurring opinion). For discussion of certain medical procedures and the judiciary's objection to the pain involved, see 58 COLUM. L. REV. 565 (1958); 9 HASTINGS L.J. 227 (1958).

76. 342 U.S. 165 (1952). It should be noted that the decision in *Rochin* was based on the due process clause of the fourteenth amendment and not upon the search and seizure clause of the fourth amendment. *See* note 78 *infra*.

77. Previously, federal appeals courts considering the question had generally suppressed such evidence. *See, e.g.*, United States v. Willis, 85 F. Supp. 745 (S.D. Cal. 1949) (stomach pumping to recover narcotic evidence). Typically, the courts were offended by the notion that evidence was forcibly removed from the human body. For example, in *Willis* the court stated: "We can find, in no reported case, nor have we ever heard before, that an officer acting under the authority of the United States government, and sworn to uphold the Constitution, including the Fourth Amendment, has participated in a search such as this." *Id.* at 747.

78. *Id.* The exclusion of the evidence was held the proper remedy because of the Supreme Court's earlier ruling that illegally obtained evidence is inadmissible under the province of the fourth amendment. Weeks v. United States, 232 U.S. 383 (1914). Exclusion of evidence also applies to state seizures. Mapp v. Ohio, 367 U.S. 643 (1961).

dure was an approved medical practice and, when properly administered, should not be painful. The Court expressed its shock at the policemen's methods, stating:

> It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach . . . . This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents . . . are methods too close to the rack and the screw . . . .[79]

Thus, the standard applied under the due process clause is whether the search process shocked the conscience or offended a sense of justice. In upholding a rectal probe as reasonable in a border search context, *Blackford v. United States*[80] held that the search and seizure itself, incident to a lawful arrest, must comport in nature and scope with the reasonableness standard of the fourth amendment.[81] The court emphasized that this standard was more stringent than that applied to state proceedings under the due process clause of the fourteenth amendment set forth in *Rochin*.[82] The suspect in *Blackford* voluntarily removed his coat revealing numerous puncture marks in the veins of his arms. He then admitted to the customs officer that he used narcotics occasionally and had been convicted previously on narcotics charges. The defendant willingly disrobed and the inspector noted a greasy substance around the suspect's rectum.[83] After interrogation, the defendant admitted that he was carrying heroin encased in a rubber condom in his rectum, and, following several unsuccessful attempts to remove the contraband himself, he was arrested. A forcible

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Rochin was decided before Schmerber v. California, 384 U.S. 757 (1966), which held that governmental intrusions into the human body constitute searches and seizure subject to the protection of the fourth amendment. *See* notes 94-97 *infra* and accompanying text.

79. 342 U.S. at 172-73.

80. 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958). The court stated: "There is nothing in the Bill of Rights which makes body cavities a legally protected sanctuary for narcotics. It is not per se violative of the Constitution to remove foreign matter from body cavities . . . ." 247 F.2d at 753. *Blackford* was the first appellate case to challenge a body cavity probe at the border. Standards governing strip and body cavity searches did not evolve until 1966. *See* Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967).

81. "The Fourth Amendment . . . makes no differentiation between persons and property. It does not value property over human anatomy, nor differentiate between them." 247 F.2d at 750.

Blackford preceded Schmerber v. California, 384 U.S. 757 (1966), in which the Supreme Court addressed the issue of the fourth amendment's protection as applied to bodily intrusion. *See* notes 94-97 *infra* and accompanying text.

82. 247 F.2d at 750. *Rochin*, decided under the due process clause of the fourteenth amendment, was a state action. The exclusionary rule of the fourth amendment did not apply to state searches at the time. *See* note 78 *supra* and note 95 *infra*.

83. This is a strong indication to a customs inspector that something is being secreted in a body cavity. Smugglers frequently apply a lubricant to the body orifice to facilitate insertion of the contraband. *See, e.g.*, United States v. Sosa, 469 F.2d 271, 273 (9th Cir. 1972), *cert. denied*, 410 U.S. 945 (1973); United States v. Velasquez, 469 F.2d 264, 266 (9th Cir. 1972), *cert. denied*, 410 U.S. 945 (1973); Huguez v. United States, 406 F.2d 366, 370 (9th Cir. 1968).

search of the defendant's rectum performed by a physician resulted in recovery of the heroin. The degree of suspicion necessary to initiate the search was not discussed because the authorities proceeded with the suspect's consent until he was arrested. The court held that the search itself was reasonable, emphasizing that the officers used only slight force, took medical precautions, and knew "what and how much was where."[84] The *Blackford* court did not address the indignity of the search; rather, in holding the search reasonable, it stressed the medically approved, routine procedure and sanitary conditions incident to the search.

The imposition of a stricter standard than due process on body cavity searches was followed in *Blefare v. United States*.[85] The defendant previously had admitted to Canadian officials that he carried heroin in his stomach from the United States into Canada. American border officials at the United States-Mexican border were informed of this fact and asked to be on the alert. The defendant and his companion were stopped, identified, and taken to a search room. After officials observed recent needle marks on their arms, they were taken to a hospital.[86] The defendant drank an emetic solution and regurgitated an object but reswallowed it. A tube was then forcibly passed through his nose and throat, and into his stomach. Two packets of heroin were finally expelled. The search was upheld as being reasonable. The *Blefare* court distinguished *Rochin* on the ground that a border search was involved. The concurring opinions in *Blefare* and *Blackford* suggested as an additional consideration that since the defendant so degraded himself by concealing narcotics in such a manner, it was not unreasonable to administer a procedure to recover the contraband that the defendant would have administered to himself.[87]

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84. 247 F.2d at 753.

85. 362 F.2d 870 (9th Cir. 1966).

86. Because border searches do not have to be performed exactly at the border line, the search conducted in *Blefare* was considered a border search. *See* King v. United States, 348 F.2d 814 (9th Cir.), *cert. denied*, 382 U.S. 926 (1965); Murgia v. United States, 285 F.2d 14 (9th Cir. 1960), *cert. denied*, 366 U.S. 946 (1964); Ramirez v. United States, 263 F.2d 385 (5th Cir. 1959). The right to a border search diminishes once a suspect is far past the border. Marsh v. United States, 344 F.2d 317 (5th Cir. 1965); Contreras v. United States, 291 F.2d 63 (9th Cir. 1961). A search still qualifies as a border search if the defendant is kept under surveillance from the time he leaves the border, even if lost from sight for a short time. Leeks v. United States, 356 F.2d 470 (9th Cir. 1966); Lane v. United States, 321 F.2d 573 (5th Cir. 1963), *cert. denied*, 377 U.S. 936 (1964). The Supreme Court recently addressed the problem of roving border patrols searching for illegal aliens in United States v. Martinez-Fuerte, 428 U.S. 543 (1976), and United States v. Ortiz, 422 U.S. 891 (1975). A leading case in the Ninth Circuit holds that a border search will result if there is reason to believe that there has been no change in the condition of the automobile from the time it crossed the border until it was stopped. Alexander v. United States, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966). For a discussion of the application of the *Alexander* search, see Note, *From Bags to Body Cavities: The Law of Border Search*, 74 COLUM. L. REV. 53, 57-62 (1974).

87. "It does not shock my conscience to require a defendant to do, under careful medical supervision, that which defendant himself willingly and knowingly proposed to do, without medical supervision, for his own selfish pleasure . . . ." Blefare v. United States, 362 F.2d at 878 (Barnes, J., concurring); *see* note 21 *supra* for the *Blackford* language.

Blackford went beyond the due process standard announced in *Rochin* by imposing an additional fourth amendment restriction of reasonableness on the search.[88] Following *Blackford*, the standard of reasonableness applied by the courts to the nature and extent of body cavity searches at the border was based on the *Blackford* interpretation of the fourth amendment.[89] The reasonableness requirement under the fourth amendment pertains to the reasonableness of the initiation of the search and the reasonableness of the search, including the manner and scope of the search.[90]

Although the reasonableness of the initiation of an intrusive body search need not meet the probable cause requirement, the analysis of some courts addressing the initiation issue falls within the sphere of probable cause. In *Blefare v. United States*[91] the court conceded that a finding of probable cause is not a prerequisite to initiation of a valid border search, and justified the pumping of the defendant's stomach on the basis of the reasonableness standard.[92] Nevertheless, the court's analysis was based on evidence that meets the probable cause test: the agents witnessed the defendant reswallow an object which he had regurgitated and recognized him as a known addict who had made a prior admission of smuggling on other occasions.[93]

The initiation of intrusive body searches in a nonborder context was addressed by the Supreme Court in *Schmerber v. California*,[94] involving a challenge to the constitutionality of an involuntary extraction of a blood sample. The Court held that governmental intrusions into the human body constitute searches and seizures and are subject to the fourth amendment standard of reasonableness.[95] Regarding the issue of the quantum of suspicion necessary to initiate a bodily invasion, the Court said:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may

88. "There may be, we conceive, conduct which, while unreasonable, is not so unconscionable that it 'shocks the conscience' . . . . On the other hand, if conduct is reasonable, it must perforce satisfy Due Process requirements." 247 F.2d at 750.

89. Examples of post-*Blackford*, pre-*Schmerber* configurations of the standard of reasonableness are Lane v. United States, 321 F.2d 573 (5th Cir. 1963), and Denton v. United States, 310 F.2d 129 (9th Cir. 1962). The *Lane* court held that "[a]dministering emetics to cause vomiting in order to recover narcotics is not an unreasonable search of the person." 321 F.2d at 576. In *Denton*, which involved a rectal probe, the court stated that there was nothing unreasonable about the entire examination, considering the circumstances. 310 F.2d at 133.

90. *See* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 42 (1966).

91. 362 F.2d 870 (9th Cir. 1966).

92. *Id.* at 874.

93. *Id.* at 871, 874 & 876.

94. 384 U.S. 757 (1966).

95. *Id.* at 767. Wolf v. Colorado, 338 U.S. 25 (1949), applied the reasonableness standard of the fourth amendment to state searches and seizures. Not until *Schmerber*, however, did the reasonableness standard of the fourth amendment clearly apply to bodily intrusions conducted as state and federal searches and seizures.

disappear unless there is an immediate search.[96]

Schmerber, if applied to a border search, clearly mandates that a body cavity probe could be justified only by a clear indication that the body contained contraband.[97]

Following *Schmerber*'s holding that bodily intrusion based on mere chance that evidence would be found violated the fourth amendment,[98] the Ninth Circuit in *Rivas v. United States*[99] applied the clear indication test of *Schmerber*[100] to the initiation of a border search. The defendant in *Rivas* concealed narcotics in his rectum. He appeared to be nervous and the customs official observed what he believed were fresh needle marks. Another customs official searched Rivas, who refused to spread his buttocks for inspection. It was thus concluded that Rivas was concealing contraband in his rectum and he was taken to a doctor's office. Rivas refused to permit the doctor to perform a rectal search and was arrested by the customs officer for impeding a federal officer in the performance of his duty. The examination was then performed using physical force. The Ninth Circuit found that the initiation of the search of the defendant's rectum was not unreasonable and affirmed his conviction. The clear indication test was met by a combination of facts: Rivas was a registered user of narcotics and was under the influence of narcotics when he crossed the border. The court explained the mere suspicion would not have been an acceptable basis for a body cavity search at the border, and that a body cavity search was not justified merely because it was performed at the border. *Rivas* required that a plain suggestion or clear indication of smuggling be present for a body cavity search to be legal.[101]

In *Henderson v. United States*[102] the clear indication standard adopted by *Rivas* was affirmed in a vaginal search case. In contrast to the facts presented in *Rivas*, there were no circumstances present in the border crossing to arouse suspicion. The suspect was subjected to a strip search because of the border official's mistaken recollection that the defendant had previously been arrested for carrying narcotics. Because Henderson did not cooperate with the search, it was concluded that she was smuggling something in her vagina. About three ounces of heroin was later found while in a doctor's office. The *Henderson* examination was not upheld because it was performed before the clear indication requirement was met. The court commented that the custom official's recollection was not only too removed in time, but also based merely on the suspect's physical appearance, not her name. Further, the alleged prior event, though erroneous, did not even involve the use of a body cavity. The suspicion of the

96. 384 U.S. at 769-70.

97. *Id.* at 767-70. The four dissents in *Schmerber* urged that the majority did not go far enough in protecting the sanctity of the body. *Id.* at 772-79. An extraction of a blood sample is less affronting to one's individual privacy than a body cavity search.

98. *Id.* at 769-70.

99. 368 F.2d 703 (9th Cir. 1966).

100. *See* text accompanying note 96 *supra*.

101. 368 F.2d at 710.

102. 390 F.2d 805 (9th Cir. 1967).

agent could have been verified through facilities at the border station; however, no attempt was made to do this.[103] The court stated that if a strip search were required, then something more must be shown, that is, "a real suspicion directed specifically to that person."[104] Further, if there were more than an examination of the surface of the naked body, such as a manual opening of a body cavity for inspection, then there should exist at least a "clear indication" that the evidence would be found.[105] In dictum the court stated that a strip search ended and a body cavity probe began when a suspect manually opened her vagina for visual examination to determine if she had something secreted.[106]

Post-*Henderson* cases show widespread adoption of the clear indication standard and its application in varying contexts. In *Morales v. United States*,[107] the first case to interpret *Henderson*, the defendant had been singled out for a strip search because an informer warned the authorities that the car in which she was riding had been observed the same day at the residence of a known narcotics dealer.[108] During the strip search, Morales was forced to bend over and expose her vaginal area. Something "sort of like a bubble" was observed protruding from her vagina. The defendant was taken to a doctor, who, after finding no indication of drug use, performed a vaginal search and discovered a packet of heroin. This evidence was suppressed because the standard for body cavity probes was not satisfied.[109] The search was not justified on the basis of what was disclosed by the vaginal search and there was no clear indication present prior to the strip search.

On the issue of when a strip search ends and a body cavity search begins,[110] the *Morales* decision cited *Henderson* for the proposition that "when the cavity to be searched is a vagina, the cavity search commences with the visual inspection."[111] In *Henderson*, however, after the inspectress performed a visual examination of the defendant's body, she ordered the defendant to bend over and separate her buttocks with her hands so as to allow inspection of her vagina.[112] The decision that this search was illegal turned on the requirement that the vagina be manually opened.[113] The *Morales* opinion does not explain how the defendant exposed her vag-

103. *Id.* at 809.
104. *Id.* at 808.
105. *Id.*
106. *Id.*
107. 406 F.2d 1298 (9th Cir. 1969).
108. *Id.* at 1300.
109. *Id.* at 1299. That female officials preside over strip searches of female suspects is mandatory. 19 U.S.C. § 1582 (1976). *But see* United States v. Carter, 480 F.2d 981 (9th Cir. 1973) (two male customs officials present during a portion of defendant's strip search because defendant fought with the inspectress).
110. The Fifth Circuit criticized the Ninth Circuit's standards governing the initiation of strip and body cavity searches because of the difficulty of determining which standard to apply. *See* text accompanying note 63 *supra*.
111. 406 F.2d at 1299.
112. 390 F.2d 805, 809 (9th Cir. 1967).
113. "[I]f in the course of the search of a woman there is to be a requirement that she manually open her vagina for visual inspection to see if she has something concealed there,

inal area,[114] describing merely that the defendant was required "to bend over and expose her vaginal area."[115] The court does not state whether it is visual inspection of the vaginal cavity or inspection of the vaginal area that marks the initiation of the body cavity search.

United States v. Shields[116] sanctioned a strip search during which Shields, the defendant, was required to bend over. A condom containing heroin was observed extending from the defendant's vagina. In upholding the search, the court stated that there was real suspicion to support the strip search and the condom was discovered during the course of the skin search.[117] In an apparent effort to ignore the ambiguity presented in *Morales* concerning vaginal observation, the court stated that since the defendant was asked only to turn away and bend over, there was nothing to indicate that "this action alone was sufficient to expose the external vaginal area."[118]

In *United States v. Holtz*[119] the defendant was required to bend over and spread her buttocks. With Holtz in this position, a prophylactic was observed hanging down from her vagina. The court held that the discovery of the prophylactic occurred during a strip search and that only a real suspicion, present in this case, was necessary.[120] The court interpreted the *Henderson* rule to mean that absent a clear indication of contraband within a body cavity, "[o]nly an examination by means of a *manual or visual intrusion* into the cavity itself was forbidden."[121] A body cavity search began not by mere observation of the vaginal area, but only when the vaginal cavity was visually penetrated. The court said that examination of the genital surface was not precluded by *Morales* and *Henderson* since those cases were limited to visual inspections of the vaginal cavity.

The court further distinguished *Morales* in that there was no evidence that the inspectress was performing a body cavity search of Holtz. It was stated that during the visual exam with the defendant in the bent-down position, the inspectress was not required to confine her gaze to the rectal area as contraband could have been taped to the defendant's crotch.[122]

These Ninth Circuit cases on body cavity search demonstrate that if one has real suspicion to justify the strip search, the anal area may be visually examined during the skin search. Observations made during the skin search may provide the clear indication to search internally. What remains is a rectal-vaginal distinction. Present case law sanctions the visual

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we think that we should require more than a mere suspicion." *Id.* at 808; *see* United States v. Holtz, 479 F.2d 89, 93 (9th Cir. 1973).

114. Other Ninth Circuit courts have noted the ambiguity of the *Morales* facts as reported. United States v. Holtz, 479 F.2d 89, 93 (9th Cir. 1973); United States v. Shields, 453 F.2d 1235, 1237 (9th Cir.), *cert. denied*, 406 U.S. 910 (1972).

115. 406 F.2d at 1299.

116. 453 F.2d 1235 (9th Cir.), *cert. denied*, 406 U.S. 910 (1972).

117. *Id.* at 1236-37.

118. *Id.* at 1237.

119. 479 F.2d 89 (9th Cir. 1973).

120. *Id.* at 94.

121. *Id.* at 92 (emphasis added).

122. *Id.* at 93.

inspection of the rectum, but not the vagina, during the course of a strip search.[123] It seems that the classification of the two body cavities under the same standard would be more satisfactory.[124] To label the requirement to bend over to reveal the rectal area a strip search is nonsensical.

IV. PROPOSED CLEAR INDICATION STANDARD AND WARRANT REQUIREMENT

The judiciary has not yet determined that its supervision over the initiation of intrusive border searches is necessary to insure constitutionally permissible searches,[125] even though similar proposals have been previously made.[126] The current minimum safeguards of personal dignity governing initiation of such searches do not adequately protect the thousands of innocent travelers who transverse our borders every year. A physician in the *Morales* case who had performed many body cavity searches at the request of border officials testified that he found contraband in only fifteen to twenty percent of the accused that he examined.[127] The guilty have more protection than the innocent because evidence illegally seized is suppressed in a smuggling prosecution by operation of the exclusionary rule.[128] The accosted innocent person has no remedy against the federal government because of sovereign immunity and the false arrest and battery exceptions to the Federal Tort Claims Act.[129] Further, the wronged victim has no action for deprivation of rights by state officials under the Civil Rights Act of 1871 since customs officials are federal officers.[130] A

123. *See, e.g.*, United States v. Summerfield, 421 F.2d 684 (9th Cir. 1970).

124. *See* Note, *supra* note 86, at 79.

125. *See, e.g.*, Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967).

126. *See* Blefare v. United States, 362 F.2d 870 (9th Cir. 1966) (dissenting opinion). "When time permits and when the contemplated search procedure is extreme, if not shockingly offensive, the search, if made without authority therefor having been sought of a magistrate, is unreasonable . . . ." *Id.* at 887. *See also* Comment, *Intrusive Border Searches—Is Judicial Control Desirable*, 115 U. PA. L. REV. 276 (1966).

127. Morales v. United States, 406 F.2d 1298, 1300 n.2 (9th Cir. 1969). United States v. Holtz, 479 F.2d 89, 94-95 (9th Cir. 1973) (Ely, J., dissenting), presented the following data from Metropolitan News, June 28, 1972, at 1, col. 3, reporting hearings conducted by a California representative:

> '[O]f the 1,800 women stripped and searched [during a certain period] only 285 [approximately *16 percent*] were found carrying any contraband, and very few concealing it in body cavities.
>
> . . .
>
> [S]everal women testifed [*sic*] that they were subjected to humiliating body cavity probes by *nonmedical personnel under the most unsanitary conditions*.'

A recent example of a potentially unwarranted invasion can be found in the facts of United States v. Himmelwright, 551 F.2d 991 (5th Cir. 1977). *See* text accompanying notes 53-56 *supra*. A woman, traveling alone, wearing platform shoes, returned from a brief stay in Colombia. The woman's appearance and extreme calmness precipitated a strip search. Although narcotics were fortuitously discovered, the same set of circumstances could have involved an innocent person.

128. *See, e.g.*, Henderson v. United States, 390 F.2d 805, 810 (9th Cir. 1967) (citing Wong Sun v. United States, 371 U.S. 471, 484-88 (1963) (fruit of the poisonous tree)).

129. 28 U.S.C. § 2680(n) (1976).

130. 42 U.S.C. § 1983 (1976).

civil suit against the offending customs officer is possible on the authority of *Bivens v. Six Unknown Agents*,[131] but the adequacy of a civil remedy against the offending customs agent depends on the defendant's ability to satisfy the judgment.

Since a border search does not require a showing of probable cause, the possible need for a warrant in body cavity searches has not been adequately addressed. Nevertheless, the present lack of satisfactory after-the-fact redress available to the innocent victim may be mitigated by the imposition of a procedural safeguard against the initiation of intrusive body searches. The result would be fewer improper searches.

The Ninth Circuit in *Huguez v. United States*[132] advocated imposition of a warrant requirement, stating:

> Extreme internal body searches, especially forcible, intrusive rectal cavity invasions, . . . perhaps should be authorized only upon the issuance of search warrants under appropriate judicial scrutiny . . . . Why any less protection should be given to the human body than to the human home is difficult to explain, even in the context of a border search.[133]

In his dissenting opinion in *United States v. Holtz*[134] Judge Ely suggested a limited warrant requirement as a prerequisite to the invasion of any body cavity. Under Judge Ely's proposal a warrant would issue only when a magistrate determined that there existed a clear indication that contraband was hidden within the body.[135]

In a nonborder case, *Camara v. Municipal Court*,[136] the Supreme Court held that safety inspections by building inspectors without a warrant were "significant intrusions upon the interests protected by the Fourth Amendment."[137] The Court required the issuance of a search warrant prior to these administrative searches of buildings. Significantly, the protection thus afforded in *Camara* to the buildings has not been deemed a proper safeguard for innocent people in the border search context.[138]

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131. 403 U.S. 388 (1971). Bivens was awarded money damages despite the fact that there was no statutory authorization for such a federal cause of action for embarrassment, humiliation, and mental suffering caused by federal officers who entered his home and effected an arrest by means of unreasonable force.

132. 406 F.2d 366 (9th Cir. 1968) (dictum). *See* Butz v. Economou, 98 S. Ct. 2894, 57 L. Ed. 2d 895, 915 (1978) (holding that federal officers in the executive branch are protected by only a qualified immunity from claims for damages arising from violation of citizens' constitutional rights).

133. *Id.* at 382 n.84.

134. 479 F.2d 89, 94 (9th Cir. 1973) (Ely, J., dissenting).

135. This suggestion has been discussed by other legal writers. *See* Note, *At the Border of Reasonableness: Searches by Customs Officials*, 53 CORNELL L. REV. 871, 880-85 (1968); Note, *Search and Seizure at the Border—the Border Search*, 21 RUTGERS L. REV. 513, 524-25 (1967).

136. 387 U.S. 523 (1967).

137. *Id.* at 534.

138. The Court stated that warrants would issue on a showing of probable cause to believe that the health code was being violated in a specified location. The Court stated that the administrative searches were an intrusion upon "interests protected by the Fourth Amendment." If the searches were conducted without a warrant, they would "lack the traditional safeguards which the Fourth Amendment guarantees to the individual." *Id.*

The warrant alternative offers protection for the rights of individual privacy without unduly frustrating the work of customs officials. Traditionally, frustration of purpose has been a concern to the courts when considering proposed administrative requirements and was recognized by the Supreme Court in *Camara*:

> In assessing whether the public interest demands creation of a general exception to the . . . warrant requirement, the question is . . . whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.[139]

The only frustration of purpose possible in the proposal that a showing of clear indication be made pursuant to the issuance of a warrant as a prerequisite to a body cavity search lies in the fact that the search might be delayed. In the interim, the government would risk destruction of the evidence or the possibility of leakage into the body of the suspect if a packet of narcotics should break.[140] A suspect detained[141] pending a determination of clear indication could be kept under constant surveillance to prevent destruction of the evidence. A required warning to such suspects of the hazards of harboring concentrated narcotics within the body would serve a twofold purpose: actual warning of the physical dangers involved and opportunity for the suspect to surrender the contraband.

Since probable cause defies an absolute definitional boundary, clear indication would provide a more workable standard as the level of suspicion required for the initiation of a body cavity search. This is especially fitting in the border search context since the officials that would be required to make a showing of clear indication are familiar with its threshold requirements. Clear indication requires that the facts and circumstances present immediately preceding the proposed body cavity search would lead the customs official to believe that the suspect has contraband concealed in a body cavity. It appears likely that those searches initiated on the clear indication standard would increase the proportion of successful searches,

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The *Camara* court concluded that probable cause to issue a warrant to search must exist as a check that legislative and administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. The Supreme Court took great strides to protect the privacy of an individual in his dwelling from any unwarranted administrative area search. It seems apparent that the privacy of an individual's body would demand the same, if not more, protection as the house in which he resides. In See v. City of Seattle, 387 U.S. 541 (1967), a companion case to *Camara*, the Court held that the same standards and requirements applied to commercial structures not used as private dwellings. *See also* Schmerber v. California, 384 U.S. 757, 767-68 (1966), in which Justice Brennan makes this distinction: "Because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers . . . we write on a clean slate."

139. 387 U.S. at 533.

140. *See* Blackford v. United States, 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958). The defendant cooperated with customs officials when a packet of heroin burst in his rectum.

141. The fourth amendment applies to involuntary detention. Davis v. Mississippi, 394 U.S. 721, 726-27 (1969). Implementation of this proposal would require detention procedures in compliance with fourth amendment requirements.

necessarily reducing the number of innocent victims intrusively searched.[142] An official who must demonstrate clear indication to a magistrate for issuance of a warrant authorizing a body cavity search would be less likely to insist on the examination unless he had good reason.

While a strip search is less intrusive than a body cavity search it is nonetheless a personal indignity which, as properly realized by the Ninth Circuit, demands greater threshold approval than that required for a nonintrusive border search.[143] The real suspicion test is an unsatisfactory approach because it is too vague to be effective in the thousands of border situations arising before the subjective eye of the border inspector. Besides being required to judge the legality of the initiation of the test on the elusive basis of deciding whether or not their suspicion is real, they also at a critical point must determine if there is sufficient cause to progress to a body cavity search. Nevertheless, a properly conducted strip search is perhaps not sufficiently intrusive to mandate the issuance of a warrant. Since strip searches occur with much greater frequency than cavity searches, a warrant requirement might prove an administrative problem. Although it has been argued that search warrants at the border are not administratively feasible,[144] body cavity searches do not occur with sufficient frequency to validate the argument. For the cavity search, the dignity and privacy of the victim can best be protected by subjecting the proposed invasion to the scrutiny of a disinterested third party, not a higher ranking customs official, to judge whether the action is merely a careless display of customs' authority or justifiable under the selected circumstances.[145]

Since the First Congress contemplated only the searches of ships and baggage, it is anomalous that the historical argument derived from the sequence of customs provisions would today preclude the imposition of judicial control over the initiation of intrusive border searches. The problem is ripe for solution and unimpeded by the present statutes regulating border search[146] which make no mention of intrusive searches.

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142. According to medical testimony, only 15-20% of the cavity probes ever produce contraband. *See* note 127 *supra*.

143. In United States v. Forbicetta, 484 F.2d 645 (5th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974), the court upheld a strip search by relying on nonintrusive extended border search authority based on reasonable suspicion that customs laws are being violated.

144. *See, e.g.*, Ittig, *The Rites of Passage: Border Searches and the Fourth Amendment*, 40 TENN. L. REV. 329, 358-59 (1973).

145. *See generally* Blackford v. United States, 247 F.2d 745, 754-55 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958) (dissenting opinion):

> [T]o authorize the ex parte star chamber invasion of body privacy by inspectors at our ports is shocking and abhorrent and is fraught with almost certain abuse. I fully appreciate the high character of most of the inspectors and the very difficult duty which is theirs, but the power to subject one entering this country through its ports to the possibility of such an inquisition and manhandling seems on its face to come within the interdiction of the Fourth Amendment.

146. 19 U.S.C. §§ 482, 1581(a), 1582 (1976). For the relevant text of these statutes, see note 12 *supra*.

V. CONCLUSION

Inherent in the nature of border searches is a conflict between individual personal rights and a legitimate governmental concern. Seemingly, a balance would be struck between the opposing interests by requiring a showing of clear indication and the issuance of a warrant before a body cavity search could be performed. Such judicial discretion imposed between customs officials and the individual would accord more fourth amendment protection than the present system, which permits initiation of a body cavity search on the basis of the searcher's own subjective determination of suspicion. The present procedures appear to confirm the suspicion that the lower courts have lost sight of the meaning of *Schmerber*, which recognized the integrity and dignity belonging to each individual and cautioned against the broadening of intrusions allowed in the future.[147] When the judiciary sacrifices personal dignity and constitutional rights for the sake of foolproof law enforcement, the framework upon which the Constitution rests has been seriously shaken, and perhaps replaced.

147. "The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body . . . in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." Schmerber v. California, 384 U.S. 757, 772 (1966).