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LENGTHY DETENTIONS AND INVASIVE SEARCHES AT THE BORDER: IN SEARCH OF THE MAGISTRATE

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Over the past thirty years, national concern has increasingly focused on the growing illicit drug trade. Much of this attention has manifested itself in intensified law enforcement activities aimed at eliminating or substantially curbing the flow of illicit drugs from foreign countries into the United States. This, in turn, has prompted traffickers to develop and implement ever more ingenious techniques of smuggling, including the use of human body cavities and the human digestive tract. As the law enforcement establishment responds to these techniques, significant fourth amendment issues arise.

This Article examines a recent Supreme Court decision approving the lengthy, judicially unauthorized detention of an individual suspected of concealing illicit drugs in her digestive tract. The Article proposes alternatives to the Supreme Court's holding. These proposals would interpose prior judicial approval of law enforcement efforts aimed at detecting internally concealed drugs. These proposals further the substantial interest of interdicting the influx of illicit drugs, yet respect the dignity and privacy interests of drug trafficking suspects.

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I. INTRODUCTION: *UNITED STATES V. DE HERNANDEZ*[1]

Rosa Elvira Montoya de Hernandez arrived unaccompanied at Los Angeles International Airport on a flight from Bogota, Colombia shortly after midnight March 5, 1983.[2] She carried a purse and one suitcase.[3] The purse contained pictures of her children, a pen, a handkerchief, an array of make-up, and a smaller purse containing toiletries.[4] In addition, the purse contained $5,000.00 in United States currency.[5] Her suitcase contained a pair of jeans, a suit, a skirt, blouses, slacks, a nightgown, and an assortment of underwear.[6]

De Hernandez proceeded to Immigration and presented her travel documents.[7] Her documents were in order[8] and customs agents stamped her passport and visa "admitted."[9] De Hernandez then proceeded to Customs.[10] Since de Hernandez arrived from Colombia, a known origin for cocaine smuggled into the United States, customs agents directed her to a secondary checkpoint for a more thorough inspection.[11]

The customs agents' inquiry focused on the purpose and duration of de Hernandez' visit.[12] Responding to questioning, de Hernandez indicated that

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1. 105 S. Ct. 3304 (1985).

The authors compiled the factual background presented in the Introduction from the following sources: the Supreme Court opinion; the briefs of the petitioner, the United States, and the respondent, de Hernandez; and the Joint Appendix submitted by the parties to the Court. The Joint Appendix was a particularly fruitful source of facts because it contains an account of the hearing held on de Hernandez' motion to suppress evidence as well as the stipulation of facts entered into by the parties prior to her trial on a two-count indictment for possession of cocaine with intent to distribute (21 U.S.C. § 841(a)(1)(1982)) and importation of cocaine (21 U.S.C. §§ 952(a), 960(a)(1)(1982)). Joint Appendix, United States v. de Hernandez, 105 S. Ct. 3304 (1985).

2. *de Hernandez*, 105 S. Ct. at 3307.

3. 105 S. Ct. at 3307; Joint Appendix, *supra* note 1, at 9.

4. Joint Appendix, *supra* note 1, at 9. This detailed account of the contents of de Hernandez' purse and suitcase is necessary because customs agents use the contents of such possessions as the basis for reasonable suspicion justifying detentions as well as x-ray, strip-, and body-cavity searches at the border. *See, e.g.*, United States v. Padilla, 729 F.2d 1367, 1368 (11th Cir. 1984) (strip and x-ray searches)("[The customs inspector] found that he had only a few pairs of dungarees, a couple of t-shirts, and very little toiletries, which she considered unusual for a visit of ten days."); United States v. Henao-Castano, 729 F.2d 1364, 1365 (11th Cir. 1984) (x-ray search)("[He] had come to Miami for an 8 to 10 day vacation. . . . [and] was only carrying one inexpensive suitcase. The suitcase contained a small amount of poor quality clothing. . . ."), *cert. denied*, 105 S. Ct. 3552 (1985). United States v. Vega-Barvo, 729 F.2d 1341, 1343, 1349 (11th Cir. 1984) (x-ray search)("[The customs inspector] searched Vega-Barvo's one bag and discovered it 'contained mainly rags.' ") *cert. denied*, 105 S. Ct. 597 (1984).

It is the authors' position that the contents of de Hernandez' purse and suitcase were at least as consistent with her stated travel purpose (a business-purchasing trip) as they were with a potential alimentary-canal smuggling purpose. *See infra* text accompanying notes 183-209. We contend that more was required to establish the reasonable suspicion necessary to detain and search de Hernandez beyond her secondary stop for questioning, a search of her possessions, and a pat-down search. Such "secondary" detentions and searches are considered routine and reasonable under the fourth amendment when occurring at the border. United States v. Ramsey, 431 U.S. 606, 616-19 (1977).

5. Joint Appendix, *supra* note 1, at 41-42.

6. *Id.* at 9.

7. *de Hernandez*, 105 S. Ct. at 3306-07.

8. *Id.*

9. Joint Appendix, *supra* note 1, at 8.

10. *de Hernandez*, 105 S. Ct. at 3306-07.

11. *Id.* at 3307.

12. *Id.*; Joint Appendix, *supra* note 1, at 14-15.

she was in Los Angeles on a business trip for her husband.[13] She stated that she would be purchasing merchandise—clothing and small appliances—for resale at her husband's store in Colombia.[14] De Hernandez corroborated these statements by displaying her husband's business card as well as a collection of invoices and receipts from past buying trips to the United States.[15] Indeed, de Hernandez' passport indicated "at least eight recent trips" to this country.[16]

The examination of de Hernandez' purse and suitcase, coupled with the results of this interrogation, led customs agents to conclude that "she fit the profile of persons suspected of carrying drugs in their bodies."[17] Based upon this suspicion, the customs agents subjected de Hernandez to a pat-down search.[18] This search revealed a fullness in the abdominal area and prompted a strip-search.[19] The strip-search was negative for illicit drugs but revealed that de Hernandez was wearing two pairs of elastic underwear with paper towelling in the crotch.[20] As a result, de Hernandez was confined to a manifest room,[21] under the surveillance of customs agents, pending determi-

13. *de Hernandez*, 105 S. Ct. at 3307.

14. *Id.*

15. *Id. Cf.* United States v. Pino, 729 F.2d 1357, 1357 (11th Cir. 1984) (Airline passenger from Bogota, Colombia claimed he entered the United States to purchase parts for his TV repair business but was unable to name the parts he planned to purchase, could not indicate where he would purchase the parts, and carried "no business cards, manuals, forms, or other business-related accounterments."); United States v. Henae-Castano, 729 F.2d 1360, 1365-66 (11th Cir. 1984) (Airline passenger from Cali, Colombia claimed he owned an electronics parts store and entered the United States to purchase parts, but he displayed little knowledge of electronics, indicated that he would take parts back to Colombia in his suitcase, and carried no business cards, credit cards, or checks.); United States v. Padilla, 729 F.2d 1367, 1368 (11th Cir. 1984) (Airline passenger from Bogota, Colombia claimed that he was a salesman here to purchase machine parts and several xerox color-copiers. The passenger claimed he would purchase the copies with $971.00 in cash and transport them back to Colombia in his luggage. The passenger could not produce business cards or other identification to support his assertions.).

16. *de Hernandez*, 105 S. Ct. at 3307.

17. Joint Appendix, *supra* note 1, at 62.

18. *de Hernandez*, 105 S. Ct. at 3307 Pat-down searches of persons at United States' border crossings are deemed routine searches justified by the plenary authority of the government to regulate the entry (or re-entry) of persons and things. These searches are deemed reasonable per se under the fourth amendment. *Id.* at 3309. *See also* United States v. Ramsey, 431 U.S. 606, 616-19 (1977); Carroll v. United States, 267 U.S. 132, 153-54 (1925). For a more detailed discussion, *see infra* notes 105-08 and accompanying text.

19. *de Hernandez*, 105 S. Ct. at 3307; Joint Appendix, *supra* note 1, at 26-27, 64.

20. *de Hernandez*, 105 S. Ct. at 3307; Joint Appendix, *supra* note 1, at 63. The authors' contend, assuming the validity of the strip-search, that its result was sufficient to support customs officials' efforts to secure a court order or warrant. The initial strip-search occurred early enough (approximately one-half hour after de Hernandez' arrival) so that, if a court order or warrant issued, the remainder of the detention would have been unassailable. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 238-41 (1982).

The constitutionality of the initial strip-search, however, is debatable. Counsel for de Hernandez never conceded its constitutionality. Joint Appendix, *supra* note 1, at 34-35; Respondent's Brief at 28, *de Hernandez*, 105 S. Ct. 3304. We believe that there was insufficient justification for the initial strip-search just as there was insufficient justification for the lengthy detention. *See infra* text accompanying notes 121-289 (Parts III and IV). Nonetheless, the crucial point remains: if the initial strip-search was valid, its result provided customs agents a sufficient basis to appear before a magistrate. The government conceded this point at the suppression hearing. Joint Appendix, *supra* note 1, at 34. Consequently, no justification existed for the judicially unreviewed and unapproved detention of de Hernandez beyond the first strip-search.

21. *de Hernandez*, 105 S. Ct. at 3313 (Brennan and Marshall, JJ., dissenting); Joint Appendix, *supra* note 1, at 20, 25. The manifest room was outfitted for business purposes. It contained a table and several chairs with slightly curved backs and no padding. The floor was not carpeted. There

nation by supervisory customs officials as to the appropriate course of action.

Customs agents follow a standard procedure in such cases, which consists of advising the "suspect" of the following options: a) voluntary submission to an x-ray; b) confinement until a bowel movement and its examination for the presence of illicit drugs; or c) return to the country of origin.[22] The customs agents presented these options to de Hernandez,[23] who initially consented to an x-ray examination of her abdomen.[24] She later withdrew consent upon learning that she would be handcuffed and her pant legs taped during the trip to the hospital.[25] De Hernandez then opted to return to Colombia.[26] While awaiting arrangement of a return flight, de Hernandez remained under surveillance in the manifest room and underwent a second strip-search, which again proved negative.[27] Throughout her detention, customs agents required de Hernandez to evacuate any bodily wastes into a wastebasket to permit later examination for the presence of illicit drugs.[28]

Customs agents did attempt to arrange a return flight for de Hernandez.[29] At the same time, they considered seeking a court order for an x-ray search.[30] During the first sixteen hours of de Hernandez' detention,[31] customs agents did not seek a court order ostensibly because such action did not comport with standard operating procedure.[32] Since de Hernandez did

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was no bed, couch, or other accommodation for sleeping. De Hernandez was held in this room for between 24 and 27 hours until the court order was issued and agents took her to the hospital for the authorized searches. 105 S. Ct. at 3314 (Brennan and Marshall, JJ., dissenting).

22. *de Hernandez*, 105 S. Ct. at 3307; Joint Appendix, *supra* note 1, at 39, 63. In this context "country of origin" means the country from which the trip to the United States originated and applies only to foreign-national, nonresident travelers. Presumably, a foreign-national, nonresident traveler has a return ticket to the country of origin.

23. 105 S. Ct. at 3307.

24. *Id.*

25. *Id.*; Respondent's Brief at 4; Joint Appendix, *supra* note 1, at 47.

26. 105 S. Ct. at 3307.

27. *Id.* at 3314 (Brennan and Marshall, JJ., dissenting).

28. 105 S. Ct. at 3307.

29. *Id.*

30. Joint Appendix, *supra* note 1, 22-23, 63.

31. 105 S. Ct. at 3308. There is no doubt that de Hernandez' detention constituted a seizure. She was essentially in custody and not free to leave. 105 S. Ct. at 3307-08; Joint Appendix, *supra* note 1, at 13-14. Under Terry v. Ohio, 392 U.S. 1 (1968) and its progeny, such a detention is a seizure for purposes of the fourth amendment. *Id.* at 16-17. Under the *Terry* line of cases, detention-type seizures require reasonable suspicion in order to comport with the fourth amendment's fundamental requirement of reasonableness. *Id.* at 9, 21. For example, reasonable suspicion is an articulable suspicion that the particular person is armed and presently dangerous. *Id.* at 21, 23-24, 30, that he is not entitled to be in this country (United States v. Martinez-Fuerte, 428 U.S. 543, 555-56 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 881-84 (1975)), or that he is attempting to bring illicit drugs into the country (United States v. Vega-Barvo, 729 F.2d at 1341, 1349 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 597 (1984).

The Supreme Court did not question the validity of these principles in *de Hernandez*, but simply applied them and found that reasonable suspicion existed. 105 S. Ct. at 3311-12. The authors challenge this finding in Part III of this Article. *See infra* text accompanying notes 121-227.

32. Joint Appendix, *supra* note 1, at 23, 39, 63. This may have been the policy. However, customs agents at this same airport—Los Angeles International Airport—on several prior occasions sought and obtained a court order authorizing an x-ray search of a suspected alimentary-canal smuggler. *See, e.g.*, United States v. Mendez-Jimenez, 709 F.2d 1300, 1302 (9th Cir. 1983); United States v. Quintero-Castro, 705 F.2d 1099, 1100 (9th Cir. 1983); United States v. Couch, 688 F.2d 599, 607 (9th Cir. 1982), *cert. denied*, 459 U.S. 857(1982); United States v. Ek, 676 F.2d 379, 381 (9th Cir. 1982). And, in *de Hernandez*, of course, a court order eventually was sought and obtained. 105 S. Ct. at 3308; Joint Appendix, *supra* note 1, at 50, 64.

not eat, take fluids, or evacuate either her bladder or bowels during this period, the supervising customs official decided to seek a court order authorizing x-ray and body-cavity searches.[33] Another eight hours elapsed, however, before the official requested the order. This delay meant it was approximately twenty-four hours before customs officials submitted de Hernandez' detention to the scrutiny of an independent judicial officer.[34] Throughout this time, de Hernandez was held *incommunicado*.[35]

The order issued, but the x-ray examination[36] became unnecessary when the attending physician first performed a rectal examination and discovered the first of 88 cocaine-filled balloons swallowed by Hernandez.[37]

De Hernandez filed a motion to suppress the cocaine on the grounds that her seizure and the subsequent searches were unreasonable. De Hernandez' motion to suppress was denied.[38] The trial court ruled that the 24-hour detention was reasonable under the fourth amendment.[39] The court held that the government had the requisite suspicion to hold de Hernandez until it could ascertain whether or not she was carrying contraband in her alimentary tract.[40] Finding reasonable suspicion,[41] the court upheld the magistrate's order authorizing the x-ray and body-cavity searches.[42] As a result, the cocaine was admissible at de Hernandez' bench trial.

The trial court convicted de Hernandez of possession of cocaine with intent to distribute and importation of cocaine.[43] She appealed and the

33. 105 S. Ct. at 3308; Joint Appendix, *supra* note 1, at 50, 64.

34. 105 S. Ct. at 3314 (Brennan and Marshall, JJ., dissenting).

35. *Id.* at 3312.

36. *Id.* at 3307.

De Hernandez claimed that she was pregnant. Hence, the magistrate conditioned the order authorizing the x-ray and body-cavity searches on a negative medical determination as to pregnancy. The tests were negative. *Cf.* United States v. Vega-Barvo, 729 F.2d 1341, 1348 (11th Cir. 1984) (X-ray search performed on a pregnant female suspected of smuggling drugs in her alimentary tract. Suspect subsequently aborted on medical advice suggesting x-ray damage to the fetus), *cert. denied*, 105 S. Ct. 597 (1984). *See also de Hernandez*, 105 S. Ct. at 3304, 3313 (Stevens, J., concurring).

37. 105 S. Ct. at 3308.

The Fifth Circuit Court of Appeals summarized the procedure utilized for the balloon-smuggling of cocaine as follows: "The cocaine is placed in rubber balloons or fingers from rubber gloves, which are then wrapped in tin foil and a second balloon of prophylactic rubber. The courier swallows the balloons, enters the United States, then excretes the balloons." United States v. Mejia, 720 F.2d 1378, 1380 n.1 (5th Cir. 1983). Concealment in vaginal and rectal canals is another way of utilizing the interior of the body to conceal drugs. Prior to *de Hernandez*, the reasonable suspicion standard had been applied to the search of a traveler's rectum as a site of concealment. *See, e.g.*, United States v. Pino, 729 F.2d 1357 (11th Cir. 1984). *De Hernandez* has controlled in reviewing the search of a traveler's vagina as a site of concealment. United States v. Ogberaha, 771 F.2d 655, 657-58 (2nd Cir. 1985).

38. 105 S. Ct. at 3308.

39. Joint Appendix, *supra* note 1, at 34-38.

40. *Id.*

41. *Id.* The reasonableness of the detention is critical because it legitimates the actions flowing from it—the two strip-searches, the court order authorizing x-ray and body-cavity searches, the actual searches, and any evidence seized thereby. Had the detention been unreasonable, the fruit of the poisonous tree doctrine would preclude the use of the cocaine eventually seized against de Hernandez. *See generally* 3 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4 (1978).

42. 105 S. Ct. at 3308. The trial court did not address the level of reasonable suspicion necessary to justify the x-ray search. Joint Appendix, *supra* note 1, at 34-38. Likewise the Supreme Court failed to address this issue. 105 S. Ct. at 3311, n.4.

43. *de Hernandez*, 105 S. Ct. at 3308.

Ninth Circuit Court of Appeals reversed her conviction in a divided decision.[44] The court of appeals held that de Hernandez' detention was unreasonable because the government lacked a "clear indication" that she was an alimentary-canal smuggler; therefore the cocaine eventually seized was inadmissible.[45] The United States Supreme Court reversed, holding that the requisite level of suspicion was present to support de Hernandez' lengthy detention.[46] In so ruling, the Court reserved for another day defining the level of suspicion required by the fourth amendment to conduct x-ray, strip-, and body-cavity searches.[47]

This Article presents a critical examination of the issue addressed by the Supreme Court—the reasonableness of de Hernandez' length detention—and the issue reserved—the level of suspicion required by the fourth amendment to justify x-ray, strip-, and body-cavity searches. Concerning the first issue, the Article concludes that the Court's holding sets a dangerous precedent and is constitutionally infirm.[48] As to the second issue, the Article argues for the adoption of a *per se* rule requiring prior judicial approval of all such searches.[49] The Article closes with a discussion of alternatives to lengthy, indefinite detention and intrusive bodily searches, which would respect fourth amendment values while serving the governmental interest of disrupting the influx of illicit, internally concealed drugs into the United States.

II. THE LAW OF SEARCH AND SEIZURE: AN OVERVIEW

A. The Foundation

The general principles regulating the search or seizure of both persons and things established by the fourth amendment[50] are well accepted.[51] Under the first of these principles, unreasonable searches or seizures are *per se* violative of the fourth amendment.[52] Generally, the fruit of any search or

44. United States v. de Hernandez, 731 F.2d 1369 (9th Cir. 1984).

45. *Id.* at 1371, 1373. *See infra* notes 251-53 for an analysis of the "clear indication" standard, one of several levels of suspicion that the cases suggest justify x-ray, strip-, and body-cavity searches under the fourth amendment.

46. 105 S. Ct. at 3306. Both the Ninth Circuit and the Supreme Court focused on the 16-hour detention before customs officials sought a court order for the x-ray and body-cavity searches.

47. 105 S. Ct. at 3311 n.4.

48. *See infra* notes 121-227 and accompanying text (Part III).

49. *See infra* notes 228-89 and accompanying text (Part IV).

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

This Article does not present a thorough or exhaustive review of search and seizure law. The following discussion is an overview of search and seizure law as it pertains to the nation's border.

51. The Supreme Court has consistently identified the precepts of fourth amendment jurisprudence and considered them self-evident. *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973) (Powell, J., concurring); *see also* Michigan v. Clifford, 464 U.S. 287, 294, 296 (1984); United States v. Place, 462 U.S. 696, 701 (1983); Florida v. Royer, 460 U.S. 491, 498-99 (1983); Dunaway v. New York, 442 U.S. 200, 208-10, 212-14 (1979); Michigan v. Tyler, 436 U.S. 499, 506 (1978); Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978); Almeida-Sanchez, 413 U.S. at 270, 287 (White, J., dissenting); See v. City of Seattle, 387 U.S. 541, 543 (1967); Camara v. Municipal Court, 387 U.S. 523, 528-29, 534, 538-39 (1967).

52. This *per se* rule is made explicit by the terms of the fourth amendment. The implications of

seizure judicially deemed unreasonable is inadmissible at trial on the issue of guilt.[53]

The second principle posits that the express language of the fourth amendment enunciates the fundamental test for distinguishing a reasonable from an unreasonable search or seizure. Thus, the Supreme Court has derived a single fundamental rule governing the law of search and seizure. The rule incorporates the following elements: a) prior review and approval; b) of a probable cause claim[54] propounded by law enforcement personnel; c) by an independent[55] judicial officer; and d) judicial issuance of a warrant representing an independent finding of probable cause and containing a limitation

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this language, however, may be of greater significance than the language itself. The prohibition against unreasonable searches and seizures means that no amount of effort, exercise of reason, or presence of exigencies can rehabilitate and render reasonable an unreasonable search or seizure. Hence, law enforcement agents go to considerable lengths to present at least a minimal basis for characterizing a given search or seizure as reasonable. Some of the bases used to demonstrate reasonableness include "reasonable under the circumstances," United States v. Sharpe, 470 U.S. 675, 683 (1985) and New Jersey v. T.L.O., 105 S. Ct. 733, 743-44 (1985); reasonable based upon the experience of law enforcement personnel and the reasonable inferences drawn from that experience, Terry v. Ohio, 392 U.S. 1, 27, 30 (1968) and United States v. Cortez, 449 U.S. 411, 417-18 (1981); reasonable because of articulable facts regarding a particular person, place, or thing, Reid v. Georgia, 448 U.S. 438, 440 (1980) and United States v. Vega-Barvo, 729 F.2d 1341, 1349 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 597 (1984); reasonable, with probable cause but without a warrant, because in immediate pursuit of a suspect or of evidence, Warden v. Hayden, 387 U.S. 294, 298 (1967) (entry into a private dwelling and subsequent search and seizure while in hot pursuit of a suspected felon) and Ker v. California, 374 U.S. 23, 40-41 (1963)(entry into a private dwelling and seizure to prevent destruction of evidence); reasonable, with probable cause but without a warrant, because the time taken to secure a warrant would result in losing the location of a suspect, Carroll v. United States, 267 U.S. 132, 149 (1925)(stop of an automobile and subsequent search and seizure of its contents), or reasonable because the item seized was in plain view, Harris v. United States, 390 U.S. 234, 236 (1968) and *Ker*, 374 U.S. at 43, or reasonable because search and seizure incident to a lawful arrest, United States v. Robinson, 414 U.S. 218, 235-36 (1973); Chimel v. California, 395 U.S. 752 (1969); Weeks v. United States, 232 U.S. 383, 392 (1914).

53. *Weeks*, 232 U.S. at 398 (applying the exclusionary rule to evidence sought to be introduced by the federal government); Mapp v. Ohio, 367 U.S. 643, 655 (1961)(extending the exclusionary rule to evidence which state or local governments seek to introduce).

54. *See* Brinegar v. United States, 338 U.S. 160 (1949):

> In dealing with probable cause, . . . we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.
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> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." And this "means less than evidence which would justify condemnation" or conviction. . . . [But] it has come to mean more than bare suspicion. . . .

Id. at 175 (citations omitted). Probable cause, in the context of the seizure and subsequent search of a person, means probable cause to arrest for a crime, and, which is defined as the existence of "facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.' " Gerstein v. Pugh, 420 U.S. 103, 111 (1975) (quoting Beck v. Ohio, 379 U.S. 89, 91 (1964)). Probable cause, in the context of the search of premises, papers, or things and any subsequent seizure of items uncovered, is defined as the existence of "facts and circumstances . . . sufficient in themselves to warrant a man of reasonable caution in the belief that . . . [the entity subject to search and seizure is or contains contraband or evidence of a crime]." *Carroll*, 267 U.S. at 162; *see also* United States v. Place, 462 U.S. 696, 701 (1983); Illinois v. Gates, 462 U.S. 213, 238 (1983).

Both probable cause to arrest an individual and probable cause to search premises or things relate to the context of enforcing the criminal law. Probable cause is also the fourth amendment standard for civil searches of homes and businesses to enforce health and safety laws. *See infra* note 74 for a discussion of civil search and seizure.

55. The term "independent," used throughout this analysis to describe the judiciary or a judicial officer, means: a) *neutral* with respect to assessing the competing interests of the individual regarding his personal dignity and privacy and of the society in the enforcement of its laws; and b)

upon the scope of any search and seizure authorized.[56] A warrant constitutes a prior judicial authorization of a specific search and seizure of a specified person or thing.[57] A search or seizure is reasonable if it satisfies these elements.[58]

These fundamental precepts of the law of search and seizure are grounded in the Supreme Court's consistent interpretation of both the lan-

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separate and *detached* from law enforcement personnel. *See* Shadwick v. City of Tampa, 407 U.S. 345, 350-51 (1972).

56. For cases citing these elements with approval, *see, e.g.*, New York v. Belton, 453 U.S. 454, 457 (1981); *Gerstein*, 420 U.S. at 111-16; Almeida-Sanchez v. United States, 413 U.S. 266, 287 (1983) (White, J., dissenting); Camara v. Municipal Court, 387 U.S. at 523, 532-33 (1967); Johnson v. United States, 333 U.S. 10, 14 (1948). *See also*, United States v. Place, 462 U.S. 696, 701, 721-22 (1983)(Blackmun & Marshall, JJ., concurring); Florida v. Royer, 460 U.S. 491, 499 (1983). *See supra* note 54 for the definition of probable cause to arrest.

57. This refers to the particularity requirement of the fourth amendment: "and particularly describing the place to be searched, and the person or things to be seized." U.S. CONST. amend. IV. *See supra* note 50 for the full text of the fourth amendment. The requirement of a warrant, evidencing prior judicial review and a prior judicial determination that probable cause exists to justify a search or seizure, is waived where circumstances require immediate execution of a particular search or seizure. *See* Michigan v. Tyler, 436 U.S. 499, 509-10 (1978) (immediate investigation of the cause of a fire); Chimel v. California, 395 U.S. 752, 762-63 (1969) (warrantless search of the area immediately surrounding an individual subsequent to a valid arrest in order to seize any weapon or to seize evidence); Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (hot pursuit); Ker v. California, 374 U.S. 23, 42 (1963) (prevention of imminent destruction of evidence); Carroll v. United States, 267 U.S. 132, 156 (1925) (automobile exception); North American Cold Storage v. Chicago, 211 U.S. 306, 307(1908)(seizure of tainted food); Jacobson v. Massachusetts, 197 U.S. 11 (1905)(compulsory vaccination); Compagnie Francaise v. Board of Health, 186 U.S. 380 (1902)(quarantine).

These exceptions still require that probable cause exists at the time of a given search or seizure. Where any of the above exceptions apply, the existence of probable cause is ascertained by an independent judicial officer subsequent to, rather than prior to, the execution of the search or seizure. With respect to items seized, subsequent judicial assessment of probable cause usually occurs at a hearing held on a defendant's motion to suppress evidentiary use of the items. With respect to the seizure *qua* arrest of the person and any continued confinement, subsequent judicial assessment of probable cause occurs in an informal hearing held "promptly after arrest." Gerstein v. Pugh, 420 U.S. 103, 114, 121, 125 (1975).

58. Reasonableness is the principal fourth amendment requirement applicable to any search or seizure. *See, e.g.*, United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983); Michigan v. Summers, 452 U.S. 692, 699-700 (1981); Camara v. Municipal Court, 387 U.S. 523, 539 (1967); Terry v. Ohio, 392 U.S. 1, 20 (1968). The express language of the fourth amendment only prohibits unreasonable searches and seizures. This omission, by implication, permits reasonable searches and seizures. Because the language is clear in this regard, it is well accepted that the basic inquiry in any search-and-seizure case is reasonableness. There are, however, two distinct theories of reasonableness, and there is considerable controversy concerning which theory reflects the intent of the fourth amendment drafters.

The traditional theory defines reasonableness in terms of the express language of the fourth amendment. Thus, reasonableness requires a warrant issued subsequent to a showing of probable cause. Under this theory, the fourth amendment *itself* provides that the right to be secure from unreasonable searches and seizures shall not be violated. The right is not violated where a warrant based upon probable cause authorizes a specific and delimited search and seizure. Unless excused by exigent circumstances, authorization must occur *prior* to conducting a search and seizure.

Advocates of this theory believe that the framers of the fourth amendment weighed society's interest in law enforcement against the individual's interest in dignity and privacy and determined that such intrusions must be hedged by safeguards. Those safeguards are manifested in a warrant issued only upon probable cause. Despite the exceptions to this theory, advocates insist the first rule of fourth amendment jurisprudence is that searches and seizures are presumptively reasonable only when conducted pursuant to a warrant evidencing a prior judicial determination of probable cause. Law enforcement personnel carry the burden of establishing valid grounds for utilizing any of the exceptions to the rule. For Supreme Court cases discussing and applying the traditional theory of reasonableness, see United States v. Place, 462 U.S. 696, at 701 and 721-22 (1983)(Blackmun & Marshall, JJ., concurring); Michigan v. Tyler, 436 U.S. 499, 506 (1978); Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978); and Camara v. Municipal Court, 387 U.S. 523, 528-29, 534, 539 (1967).

guage and intent of the fourth amendment. Recently, the Court reasserted these principles. Regarding the detention[59] of a suspected drug courier, the Supreme Court reaffirmed the general rule that ". . .seizures of the person require probable cause to arrest."[60] Similarly, with respect to the seizure of a suspected drug courier's luggage, the Supreme Court stated: "[i]n the ordinary case,[61] the Court has viewed a seizure of personal property as *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized."[62]

Fundamental fourth amendment jurisprudence regulating and limiting governmental[63] intrusions into the privacy of the person[64] and his possessions[65] are predicated upon central concerns[66] that the Supreme Court at-

59. Detention of an individual by law enforcement personnel is a seizure for fourth amendment purposes. Terry v. Ohio, 392 U.S. 1, 16-17 (1968). Detention *qua* seizure occurs whenever a law enforcement agent restrains an individual's freedom of movement such that he is not free to walk away. *Id.*

60. Florida v. Royer, 460 U.S. 491, 499 (1983). *See supra* note 54 for the definition of probable cause to arrest.

61. In this context, the "ordinary case" means the absence of circumstances necessitating an immediate response, including any concomitant search or seizure, by law enforcement personnel. *See supra* note 57 for a summary of cases recognizing various types of circumstances where warrantless immediate action is permissible under the fourth amendment.

62. United States v. Place, 462 U.S. 696, 701 (1983).

63. Since 1949, the fourth amendment has circumscribed the actions of state and local law enforcement personnel as well as their federal counterparts. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

64. The fourth amendment principally protects the individual and his reasonable expectation of privacy. Katz v. United States, 389 U.S. 347, 351, 361 (1967) (Harlan, J., concurring). By the express terms of the fourth amendment, there is a conclusive presumption that an individual has a reasonable expectation of privacy in his physical being. *See supra* note 50 for the complete text of the fourth amendment. Elsewhere, we argue that an individual also has an identical interest in his mental being. Mandell & Richardson, *Surgical Search: Removing a Scar on the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY, 525, 540-46 (1984).

65. The fourth amendment expressly established a conclusive presumption that an individual has a reasonable expectation of privacy in his home, his papers, and his physical possessions with which he surrounds himself in his home. *See supra* note 50 for the complete text of the fourth amendment.

It is particularly important to note that the fourth amendment protection accorded to one's reasonable expectation of privacy extends beyond the individual in his home, the home itself, and his possessions within the home. Thus, *Katz* recognized the fourth amendment could protect an individual's telephonic conversations whether or not such conversations originated from the home. *Katz*, 389 U.S. at 359. Further, *Terry* directly acknowledged that an individual's reasonable expectation of privacy in his physical being accompanies him as he ventures into the public domain. Terry v. Ohio, 392 U.S. 1, 16-19, 23, 26 (1968).

Other fourth amendment cases recognize that an individual's reasonable expectation of privacy remains a protectible interest beyond the home. Thus, an individual on the street has a protectible interest in his clothing. *Terry*, 392 U.S. at 17, 19, 23, 25, 26. An individual has a protectible interest in his pockets and their contents. Ybarra v. Illinois, 444 U.S. 85, 91-92 (1979). An individual has a protectible interest in a purse and its contents. United States v. Burnette, 698 F.2d 1038, 1048 (9th Cir. 1983). An airport traveler has a protectible interest in his luggage. United States v. Place, 462 U.S. 696, 701-02 (1983); Florida v. Royer, 460 U.S. 491, 507(1983). The owner or driver of an automobile has a protectible interest in its interior and contents therein. South Dakota v. Opperman, 428 U.S. 364, 367 (1976).

Recent cases acknowledging that an individual's reasonable expectation of privacy in things (papers and effects) is a protectible interest have linked the privacy interest in the things to the individual's possessory interest therein. *See* Rawlings v. Kentucky, 448 U.S. 98, 105 (1980); United States v. Salvucci, 448 U.S. 83, 91-93 (1980). This limitation, however, does not diminish the central point that a protectible interest in the privacy of an individual's personal papers and effects extends to them even when not located in the home.

tributes to the framers of the fourth amendment. Foremost among these concerns was limiting the scope of discretion available to law enforcement agents.[67]

The Supreme Court has recognized repeatedly that the zeal of law enforcement personnel, by its nature, accords more weight to the investigation of crime than to the protection of the person and its effects.[68] For the Supreme Court, the framers of the fourth amendment were only too aware of the balance law enforcement agents, if left to their own devices, would strike between the detection and punishment of criminals and the preservation of personal dignity and privacy.[69] For the framers, warrantless searches and seizures and the general warrant symbolized the balance between these competing values if their discretion was unconstrained. For law enforcement personnel, warrantless searches and seizures permitted their unmonitored intrusion into the domains of personal dignity and privacy. The general warrant sanctioned their unlimited intrusion into these areas. Particularly, the general warrant authorized the search of nonparticularized

66. Two of these concerns are personal privacy and personal dignity. In the authors' view, these are interrelated but separate concerns, the former being a logical and pragmatic extension of the latter. As a result, personal privacy is a central fourth amendment interest because of its relationship to the irreducible value accorded the individual. It is this *a priori* value accorded the individual that creates the notion of personal dignity. What is valued must be respected. Consequently, personal dignity becomes a protectible interest.

Personal dignity is furthered by recognizing a domain where the individual is paramount, and other private individuals or societal representatives enter by invitation only. It is this domain of personal dominance that is denoted as personal privacy. Thus, the privacy interest is a protectible interest because it secures the dignity and integrity of the individual.

67. Michigan v. Summers, 452 U.S. 692, 703 n.18 (1981); Delaware v. Prouse, 440 U.S. 648, 653-54 (1979); Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978); United States v. Martinez-Fuerte, 428 U.S. 543, 557, 559 (1976); United States v. Ortiz, 422 U.S. 891, 896 (1975); Almeida-Sanchez v. United States. 413 U.S. at 266, 270 (1973), 273-74; See v. City of Seattle, 387 U.S. at 541, 545 (1967); Camara v. Municipal Court, 387 U.S. 523, 532 (1967). A critical conclusion to be drawn from these cases is that personal dignity and personal privacy require clear and continuous limits upon the discretion available to law enforcement personnel.

68. *Ameida-Sanchez*, 413 U.S. at 280 (Powell, J., concurring); Shadwick v. Tampa, 407 U.S. 345, 350 (1972); Johnson v. United States, 333 U.S. 10, 13-14 (1948).

Regarding the role of the fourth amendment, the *Johnson* Court noted:

> The point of the Fourth Amendment, which often is not grasped by the zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. . . . [but that] [i]ts protection consists in requiring that those inferences be drawn by a neutral and detached magistrate *instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.*

Id. at 13-14 (emphasis added). *See* Brinegar v. United States, 338 U.S. 160, 181-82 (1949) (Jackson, J., dissenting); McDonald v. United States, 335 U.S. 451, 451-56 (1948); United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

69. *See supra* note 68. *See also* United States v. Ortiz, 422 U.S. at 891, 895-96 (1975). The Supreme Court has consistently recognized that the person, property, and liberty of the individual requires constant protection from law enforcement agents. The Court has noted that the fourth amendment was designed expressly to protect those interests. Winston v. Lee, 470 U.S. 753 (1985) (privacy and bodily integrity); Florida v. Royer, 460 U.S. at 491, 499 (1983) (personal security); United States v. Martinez-Fuerte, 428 U.S. at 543, 554 (1976) (privacy and security); United States v. Brignoni-Ponce, 422 U.S. 873, 878-79 (1975) (security and liberty); *Ortiz*, 422 U.S. at 895 (liberty and privacy); Davis v. Mississippi, 394 U.S. 721, 726-27 (1969) (personal security); Terry v. Ohio, 392 U.S. at 1, 16, 26-27 (1968) ("sanctity of the person," privacy and security); Camara v. Municipal Court, 387 U.S. 523, 523 (1967) (privacy as it attaches to homes and businesses); Schmerber v. California, 384 U.S. 757, 767, 772 (1966) (personal privacy and dignity); Henry v. United States, 361 U.S. 98, 102 (1959) (privacy and security); Johnson v. United States, 333 U.S. 10, 14-15 (1948) (privacy). *See supra* note 67 for a brief analysis of the relationship between personal dignity and privacy as protectible interests under the fourth amendment.

places and the seizure of unnamed persons and things without any specific information that a crime or other offense had been, was, or was about to be committed.[70]

The solicitude accorded governmental interests at the expense of individual interests, embodied in warrantless searches and seizures and the general warrant, was categorically repugnant to those drafting the fourth amendment. Consequently, the framers struck a balance more solicitious of the individual.[71] Thus, all searches or seizures of either persons or personal things must be reasonable.[72] The primary measure of this reasonableness is probable cause.[73] That authority was vested affirmatively in the judgment of an independent judiciary. An independent judiciary applies the balance of the fourth amendment before, rather than after, law enforcement agents intrude into an individual's personal dignity and privacy.[74] Prior judicial approval of proposed actions, as well as judicial limitations on those actions, is expressed in a judicially authorized warrant.[75] The discretion of law enforcement personnel is monitored and restrained by an independent judiciary which, by constitutional mandate, applies the balance between competing values established by the fourth amendment.

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70. For an overview of the history of the general warrant and its abuses, see Frank v. Maryland, 359 U.S. 360, 363-65, 367-68 (1959). *See also* United States v. Chadwick, 433 U.S. 1, 7-9 (1977); Stanford v. Texas, 379 U.S. 476, 481-85 (1965); Marcus v. Search Warrant of Property at 104 East Tenth Street, Kansas City, Missouri, 367 U.S. 717, 724-29 (1961); Henry v. United States, 361 U.S. 98, 100-01 (1959).

71. United States v. Place, 462 U.S. 696, 721-22 (1983)(Blackmun and Marshall, JJ., concurring). *See also* Dunaway v. New York, 442 U.S. 200, 208, 214 (1979); Henry v. United States, 361 U.S. 98, 100-01 91959); McDonald v. United States, 3345 U.S. 451, 455-56 (1948); Johnson v. United States, 333 U.,S. 10, 14-15 (1948); United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

72. The fourth amendment, as noted, protects an individual's reasonable expectation of privacy (Katz v. United States, 389 U.S. 347, 361 (1967)(Harlan, J., concurring)) in his person and in those things so closely identified with him as to be deemed extensions of his individuality.

73. *Place*, 462 U.S. at 701; Florida v. Royer, 460 U.S. 491, 498-99 (1983); Michigan v. Summers, 452 U.S. 692, 699-700 (1981); Dunaway v. New York, 442 U.S. 200, 208, 212, 213-14 (1979); United States v. Ortiz, 422 U.S. 891, 897-98 (1975); Gerstein v. Pugh, 420 U.S. 103, 111 (1975); Almeida-Sanchez v. United States, 413 U.S. 266, 269-70 (1973); Chambers v. Maroney, 399 U.S. 42, 51 (1970); Terry v. Ohio, 392 U.S. 1, 20-22 (1968); Carroll v. United States, 267 U.S. 132, 155-56 (1925). *But see supra* note 58 for an overview of an alternative theory of reasonableness focusing on whether or not the situation reasonably gives rise to the need to search or seize rather than upon the presence of probable cause.

74. *See Place*, 462 U.S. at 701; New York v. Belton, 453 U.S. 454, 457 (1981); *Almeida-Sanchez*, 413 U.S. at 270; *Terry*, 392 U.S. a 21-22; *Henry*, 361 U.S. 100-02; *Johnson*, 333 U.S. at 14.

Defining reasonableness in terms of probable cause, and requiring that an independent judicial officer ascertain the presence of probable cause, is also the standard applicable to civil search-and-seizure cases. Camara v. Municipal Court, 387 U.S. at 523, 534 (1967). *See also* Michigan v. Clifford, 464 U.S. at 267, 296 (1984); Michigan v. Tyler, 436 U.S. at 499, 506, 508 (1979); Marshall v. Barlow's, Inc., 436 U.S. at 307, 323 (1978); See v. City of Seattle, 387 U.S. at 523, 545 (1967). The probable cause required in civil search-and-seizure cases involves less particularity than in criminal cases. Thus, it is unnecessary to establish probable cause to believe that a *specific* violation of a regulation exists at a *specific* location. It is only necessary to establish a reasonable basis to support the inspection coupled with a showing that the actual intrusion would not unduly invade the owner's or occupier's reasonable expectation of privacy in the premises. *Tyler*, 436 U.S. at 506-07; *Barlow's, Inc.*, 436 U.S. at 320; *Camara*, 387 U.S. at 536-37, 538.

75. Prior judicial evaluation and approval yields where immediate law enforcement action is required. *See* New York v. Belton, 453 U.S. 454, 457 (1981)("[While i]t is a first principle of Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so, [t]his Court has recognized, . . ., that 'the exigencies of the situation' may sometimes make exemption from the warrant requirement 'imperative.' ". *See supra* note 57.

It is to this unrestrained discretion that the fourth amendment is directed. It is this unrestrained discretion that requires an independent judiciary to apply the test of probable cause. And, it is this unrestrained discretion that the Supreme Court has been careful not to unleash when deciding whether to recognize exceptions to the balance of values articulated in the fourth amendment.

B. Limiting the Judiciary: Fashioning Exceptions to Fourth Amendment Jurisprudence

The warrant requirement of the fourth amendment interposes delay between the time law enforcement personnel initially believe that there is probable cause to search or seize a person, structure, or other thing and the time they receive the authority, via a judicially issued warrant, to do so. This delay may affect adversely the execution of the warrant. In some instances, this delay may result in the inability to execute the warrant with the attendant risk that a guilty person will evade detection and punishment.[76]

The Supreme Court is no stranger to arguments that the inherent hiatus fashioned by the fourth amendment's warrant-based-upon-probable-cause requirement frees the culpable. Initially, the Court responded by crafting limited exceptions to this requirement.[77]

In *Terry v. Ohio*, the Court enunciated the principal and, ultimately, the most far-reaching exception.[78] The *Terry* Court held that a police officer could temporarily seize, i.e. detain,[79] and conduct a pat-down search of a person without probable cause to arrest where there are "reasonable grounds to believe[80] that [he is] armed and dangerous, and it [is] necessary for the protection of himself and others to take swift measures to discover the true

76. It is difficult to compile statistical analyses providing estimates of the number of guilty persons who evade detection, prosecution, and punishment as a direct result of time spent securing a warrant. But, because the warrant requirement protects personal dignity and privacy, it would appear reasonable to require evidence, rather than speculation, that at least a substantial minority of culpable persons are escaping justice before the courts or Congress dilute the requirement. *See infra* notes 181-82, 210, 225 and accompanying text.

77. There are, of course, circumstances necessitating immediate action by law enforcement personnel. *See supra* note 57. Such waivers, however, are treated as exceptions to the general rule that a warrant is the fundamental condition precedent to conducting a constitutional search or seizure. For example, in 1925 the Court promulgated an exception whereby law enforcement officers could stop and search automobiles without a warrant where probable cause existed. Carroll v. United States, 267 U.S. 132, 149 (1925). Under continuing pressure, the Court went a step further articulating a less stringent standard of probable cause to secure a warrant in civil search-and-seizure cases. Camara v. Municipal Court, 387 U.S. at 523, 536-37, 538-39 (1967). *See supra* note 74. With respect to heavily regulated businesses and industries, however, the Court has upheld as reasonable warrantless civil searches and seizures. *See* Donovan v. Dewey, 452 U.S. 594, 598-600, 602-03 (1981); United States v. Biswell, 406 U.S. 311, 317 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970).

78. 392 U.S. 1 (1968). It can be argued that *Terry* is an exigent-circumstance case. *Id.* at 23, 24, 27, 30. Insofar as Terry is a species of exigent-circumstance cases, the intrusions require probable cause. *See supra* note 58.

79. *See supra* note 59. "Detention" is synonymous with "seizure" and triggers an analysis pursuant to established fourth amendment jurisprudence.

80. "Reasonable grounds to believe" is synonymous with "reasonable suspicion." The latter is used more frequently in the cases. *See* United States v. Vega-Barvo, 729 F.2d 1341, 1349 (1984), *cert. denied*, 105 S. Ct. 597 (1984); United States v. Pino, 729 F.2d 1357, 1358, 1359 (11th Cir. 1984); United States v. Castaneda-Castaneda, 729 F.2d 1360, 1363, 1364 (11th Cir. 1984); United States v. Henao-Castano, 729 F.2d 1364, 1366 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 3552 (1984); United

facts and neutralize the threat of harm if it materialized."[81] The Court defined "[r]easonable grounds to believe" in terms of the presence of "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion."[82]

The *Terry* holding and its rationale were especially significant in two respects. First, it opened the door to a case-by-case balancing of competing values in certain kinds of search-and-seizure cases.[83] The Supreme Court abandoned the guiding principle that the balance already struck by the fourth amendment between the conflicting interests of law enforcement and personal dignity and privacy requires a warrant authorizing a specific search or seizure based upon a showing of probable cause made before an independent judicial officer, not an interested police officer.[84] Second, *in dicta* the Court announced that the irreducible requirement necessary for constitutional searches and seizures was not a warrant issued upon a showing of probable cause but, rather, was the reasonableness, under the circumstances, of a given search or seizure.[85] As will be developed,[86] this latter-day formulation, invoked to validate after the fact searches and seizures, threatens to eviscerate the guarantees of the fourth amendment.

Adams v. Williams extended *Terry* four years later.[87] The *Adams* Court upheld as reasonable a search and subsequent arrest of a person possessing a weapon[88] and illicit drugs. An informant's tip which did not amount to probable cause prompted the seizure and subsequent search in *Adams*.[89]

States v. Padilla, 729 F.2d 1367, 1368 (11th Cir. 1984); United States v. De Montoya, 729 F.2d 1369, 1370 (11th Cir. 1984).

The "reasonable grounds to believe" or "reasonable suspicion" standard justifying both "safety-measure" and investigative seizures under the fourth amendment requires that the suspicion to be both reasonable and particularized to a given individual. *See* United States v. Cortez, 449 U.S. 411, 418 (1981). Additionally, the Supreme Court considers reasonable suspicion an objective standard because it requires law enforcement officials to rely upon specific, enumerated facts that focus attention upon a particular individual. *Id.* at 417-18; Reid v. Georgia, 448 U.S. at 438, 440-41 (1980).

81. Terry v. Ohio, 392 U.S. 1, 30 (1968). The seizure and subsequent search sanctioned in *Terry* was not an investigative seizure, but rather was a "safety-measure" seizure. *Id.* at 19 n.17. Not long after the *Terry* Court approved safety-measure seizures based upon reasonable suspicion, the Court extended the holding to investigative seizures. United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975); Adams v. Williams, 407 U.S. 143, 145 (1972). At present, *Terry*-type seizures and subsequent searches of the person are principally for investigative rather than for protective purposes.

82. *Terry*, 392 U.S. at 21. The intrusion, of course, is the detention *qua* seizure and the resultant search.

83. *Terry*, 392 U.S. at 21.

84. *See supra* notes 68-74 and accompanying text.

85. *Terry*, 392 U.S. at 19.

86. *See infra* notes 121-227 and accompanying text (Part III) and notes 228-89 and accompanying text (Part IV).

87. 407 U.S. 143 (1972).

88. *Id.* at 145-46. In Connecticut, possessing a weapon is legal if authorized by a license. *Id.* at 149-51. (Douglas, J., dissenting). *See also id.* at 160 (Marshall, J., dissenting). Absent threatening gestures with the weapon, the officer should not conduct a search for the weapon prior to seeking production of a license; he should proceed to search only if the license was not forthcoming. There were no threatening gestures in *Adams*.

89. *Adams*, 407 U.S. at 144-45. Pursuant to the tip that "an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist," the officer approached Robert Williams and asked him to open the vehicle's door. *Id.* Instead, Williams rolled down the window. The officer then reached into the car and removed a loaded revolver from Williams' waistband. *Id.* At no time did the officer personally view the resolver before reaching for it. *Id.* at 145.

The officer conducting the seizure and search did not use any of his own observations and experience to rationally infer potential danger as had the officer in *Terry*.[90] Thus, by upholding the search and arrest the *Adams* Court dispensed with the principal rationale supporting *Terry*: that searches and seizures conducted on less than probable cause be based upon rational inferences from the officer's own observations that the person seized and searched was armed or presently dangerous.[91]

Terry and *Adams* established a radical course[92] in search-and-seizure jurisprudence. For the first time, the standard of "reasonable grounds to believe" justified a warrantless intrusion.[93] For the first time, reasonableness was to be reviewed by the courts on a case-by-case basis.[94] In each case, the courts balanced the values of law enforcement, pressed ever more vigor-

90. *Adams*, 407 U.S. at 145. *See supra* note 89. *Cf. Terry*, 392 U.S. at 5-7. While the officer in *Terry* had not seen a weapon prior to his detention and search, he drew a "reasonable" conclusion based upon personal observation lasting at least one hour, that weapons were present. *Id.* at 6, 30-31. Thus, unlike *Adams*, the officer in *Terry* was not acting solely upon an informant's tip unsupported by subsequent observations of the officer. *Id.* at 5-7, 30-31.

91. *Terry*, 392 U.S. at 23-24, 29.

92. In this context, "radical" means completely different. That certain searches or seizures may be predicated solely upon reasonable suspicion rather than upon probable cause is completely foreign to the Court's prior interpretation of the fourth amendment. *See supra* notes 54-55, 73-76. *See also infra* note 93 for the distinction between probable cause and reasonable suspicion as standards of reasonableness.

The course charted by the Court's decision in *de Hernandez*, 105 S. Ct. 3304 (1985) is also radical. The *de Hernandez* Court's approval of investigatory detentions measured in hours constitutes a quantum leap from the approval given in *Terry* and its progeny to investigatory detentions measured in minutes. Additionally, *Terry* only authorized a pat-down search, not the highly intrusive searches conducted in *de Hernandez*. *See infra* notes 121-227 and accompanying text (Part III) for an analysis of the decision in *de Hernandez* with respect to the issue of investigatory detentions.

93. *Terry*, 392 U.S. at 20-21; *see supra* note 60. Probable cause is not tantamount to certainty. Brinegar v. United States, 338 U.S. 160, 175 (1949). Probable cause does not insure that innocent people will never face intrusions into their fourth amendment interests. Instead, probable cause works to minimize the rate of erroneous intrusions.

Probable cause is essentially an inference. It is an inference based upon adduced facts: these facts concern the actual or planned commission of a specific crime and are specific as to dates, times, places, and persons. They link particular persons and places to a specific committed or anticipated crime. In so doing, interest is directed to some person, some place, or some thing because of an articulated connection supported by articulated facts. Further, probable cause requires authentication of these facts in one of two ways: (a) the knowledge and direct observations of law enforcement personnel or, (b) the corroboration of information received from others. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 241-46 (1983).

On the other hand, reasonable suspicion, while requiring objective and articulable facts focusing on a particular person, place, or thing, requires that the suspicion generated by these facts be real and reasonable. The reasonableness of the suspicion generated is judged against what a reasonable, experienced law enforcement agent in similar circumstances would experience. *See*, United States v. Cortez, 449 U.S. 411, 418 (1981); *Terry*, 392 U.S. at 21-22, 27. Reasonable suspicion validates the experience of suspicion, not the likelihood of crime. In contradistinction, probable cause as a measure of reasonableness examines the likelihood of crime.

Errors occur under either standard of reasonableness. However, *more errors will occur where facts are employed to establish the reasonableness of someone's experience of suspicion than in establishing the relationship between crime and particular persons, places, or things.*. It simply requires less cogent evidence to conclude that an experience of suspicion is reasonable than to conclude that *this* person, place or thing is related to *this* crime in *this* specific way.

The use to which facts are put is the elementary difference between probable cause and reasonable suspicion. Because there is a fundamental difference in the nature of the conclusion to be proved, facts are treated more stringently under probable cause than under reasonable suspicion. As a result, mistakes are likely to be fewer under a probable cause standard. Fewer errors means fewer innocent people falsely subjected to official intrusion and inquiry.

94. *Terry*, 392 U.S. at 30.

ously, against the values of personal dignity and privacy,[95] which the fourth amendment had been fashioned to protect.

The impact of *Terry* and *Adams* is particularly significant and far-reaching in two areas of law enforcement: 1) investigatory detentions[96] and subsequent searches for illegal aliens at or near the border;[97] and 2) investigatory detentions and subsequent searches at or near the border to detect the smuggling of illicit drugs[98] by persons entering or re-entering[99] the country. This second application of *Terry* and *Adams* is the focus of the present analysis.

C. *Discretion Unrestrained: Privacy and Dignity Succumb to the Search for Contraband*

Our nation's border is accorded a preferred status in the law of search and seizure.[100] The border is a fundamental, definitive component of nationhood. It physically establishes a nation as a distinct entity vis-á-vis all other nations. A nation's border also establishes the physical limits of its government; it is the border which defines both the place and time at which governmental authority begins and ends. An essential element of governmental authority symbolized by and activated at its national boundary is its control of who and what enters and exits. In the United States, this control is plenary and is vested in the federal government.[101]

Plenary authority, while complete, is not necessarily unbridled. Thus, in the United States, plenary federal authority to control the national border is circumscribed by constitutional parameters, particularly in the Bill of Rights.[102] *A fortiori*, the fourth amendment is applicable at the border.[103]

Applicability of the fourth amendment creates a tension between the

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95. *Terry*, 392 U.S. at 16-20, 21.

96. Detentions are seizures for purpose of the fourth amendment. *See supra* notes 59, 81.

97. *See* United States v. Martinez-Fuerte, 428 U.S. at 544, 545 (1976) (search and seizure 66 miles north of the United States-Mexico border); United States v. Brignoni-Ponce, 422 U.S. at 873, 874 (1975) (search and seizure south of San Clemente, California, "near" the United States-Mexico border); United States v. Ortiz, 422 U.S. at 891, 892 (1975) (search and seizure near San Clemente, California); Almeida-Sanchez v. United States, 413 U.S. 266, 268 (1973) (search and seizure 25 miles north of the United States-Mexico border). *See also* United States v. Cortez, 449 U.S. 411, 417-18 (1981) (the Court generally discussing the basis for investigatory detentions at or contiguous with the border).

98. See United States v. Vega-Barvo, 729 F.2d at 1341 (11th Cir. 1984) *cert. denied*, 105 S. Ct. 3552 (1984), and its companion cases cited *supra* at note 80. *See also* United States v. Castrillon, 716 F.2d 1279 (9th Cir. 1983); United States v. Couch, 688 F.2d 599 (9th Cir. 1982), *cert. denied*, 459 U.S. 857 (1982); United States v. Ek, 676 F.2d 379 (9th Cir. 1982).

99. "Entering" applies to foreign citizens traveling to the United States. "Re-entering" applies to American citizens and resident aliens returning to the United States after traveling abroad.

100. United States v. Ramsey, 431 U.S. 606, 619 (1977); Almeida-Sanchez v. United States, 413 U.S. 266, 288 (1973) (White, J., dissenting); United States v. 12,200-Ft. Reels of Film, 413 U.S. 123, 125 (1973); United States v. Thirty-seven Photographs, 402 U.S. 363, 376 (1971); Carroll v. United States, 267 U.S. 132, 153-54 (1925).

101. *de Hernandez*, 105 S. Ct. at 3309; Plyler v. Doe, 457 U.S. 202, 225 (1982); United States v. Ramsey, 431 U.S. 606, 619-24 (1977).

102. *Ramsey*, 431 U.S. at 520. For example, arrest at the border triggers applicability of the right to remain silent, the right to an attorney, the right to a speedy public trial by jury, and the prohibition against cruel and unusual punishment.

103. *de Hernandez*, 105 S. Ct. 3304 at 3310-11. For other analyses of the fourth amendment at the border, *see* Ittig, *The Rites of Passage: Border Searches and the Fourth Amendment*, 40 TENN. L. REV. 329 (1973); Note, *From Bags to Body Cavities: The Law of Border Search*, 74 COLUM. L. REV. 53 (1974); Note, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007 (1968).

federal government's plenary authority over every person and thing crossing its border, and the amendment's constraints tempering the extent and manner of that authority's exercise. This tension is exacerbated when the issue becomes how and to what extent this plenary authority can be utilized to detain and probe the body[104] of a person seeking to cross the border. The Supreme Court has resolved this conflict by enunciating a bright-line rule. The Court has defined as routine[105] certain types of personal seizures, temporary detentions,[106] and the concomitant searches of persons and possessions during these detentions. The Court has declared these routine seizures and searches *per se* reasonable and exempt from the warrant and probable cause constraints of the fourth amendment.[107] Thus, as a condition of crossing the border, a person may be detained, his external person searched,[108] and his possessions examined. Anything constitutionally seizable may be seized and used as evidence in any subsequent trial.[109]

Bright-line rules that diminish constitutional protections can beget additional bright-line rules that further reduce these protections.[110] This is the situation in the most recent Supreme Court opinion addressing the fourth amendment propriety of searches and seizures at the border. In *United States v. de Hernandez*,[111] the Court held that a detention lasting sixteen hours requires only reasonable suspicion and that it may last as long as necessary to confirm or dispel this reasonably based suspicion.[112]

The *de Hernandez* Court analyzed the fourth amendment implications

104. We contend that the intrusion into an individual's physical dignity and privacy occasioned by nonroutine searches, particularly strip-searches and body-cavity searches, constitutes a *per se* intrusion into his mental dignity and privacy as well. An individual's feelings, perceptions, and evaluations of himself are inextricably bound to his physical dignity and integrity. *See* Mandell & Richardson, *supra* note 64, at 540-46.

105. In this context, "routine" means briefly detaining both foreign travelers and returning citizen or resident alien travelers, in order to 1) ascertain the reason for and authority of the person's entry or re-entry into the United States; 2) check for the presence of contraband; and 3) levy duties on certain goods brought into the country. During this process, travelers are subject to questioning and limited searches. A routine search can extend to an examination of luggage, packages, briefcases, purses, contents of pockets, and outer clothing. *See, e.g.*, United States v. Ramsey, 431 U.S. at 606, 616-19 (1977).

106. The Supreme Court has not defined "temporary" for the purpose of detentions under the fourth amendment, nor has it established the outer temporal limits of such detentions. In two nonborder-crossing drug cases, however, the Court has held the 90-minute detention of a traveler's luggage unreasonable while the 20-minute detention of the driver of an automobile was reasonable. United States v. Place, 462 U.S. 696, 710 (1983); United States v. Sharpe, 470 U.S. 675, 683, 687 (1985).

107. *de Hernandez*, 105 S. Ct. at 3309; *Ramsey*, 431 U.S. at 616-19.

108. This is simply a pat-down search.

109. The exclusion of items *qua* evidence at trial on the issue of guilt occurs only where law enforcement agents seized the items in violation of the fourth amendment. *See* Weeks v. United States, 22 U.S. 383 (1914) (applying the exclusionary rule to the federal government); Mapp v. Ohio, 367 U.S. at 643 (1961)(applying the exclusionary rule to the states under the fourteenth amendment). Since routine searches and seizures at the border are *per se* reasonable under the fourth amendment, items so seized are taken in conformity with the fourth amendment and are not subject to exclusion as evidence on the issue of guilt.

110. The bright-line rule that temporary detentions, external searches of the person, and searches of possessions at the border are *per se* reasonable spawned the bright-line rule of *de Hernandez*: detentions at the border may last as long as necessary "to verify or dispel" the reasonable suspicion that the detainee is harboring illicit drugs somewhere within the body. *de Hernandez*, 105 S. Ct. at 3313.

111. 105 S. Ct. 3304 (1985).

112. *Id.* at 3313. While the court sanctioned a 16-hour detention, customs agents actually de-

of such an indefinite, nonroutine detention[113] under *Terry v. Ohio*.[114] Following *Terry*, the Court determined that only the reasonableness standard of the fourth amendment, implemented by a case-by-case balancing test, applies to the lengthy detention of persons at the border.[115] Consequently, there is no warrant or probable cause requirement for lengthy, indefinite seizures of the person at the border. Border officials need only point to articulable facts that reasonably draw their suspicion to a particular person in order to justify the lengthy detention of that person under the fourth amendment. Further, under *de Hernandez*, this reasonable suspicion is not subject to prior evaluation by an independent judicial officer.

In abrogating the probable cause standard, the warrant requirement and, with it, the role of an independent judiciary as a restraint on the discretion of law enforcement personnel becomes superfluous. Moreover, the claim of reasonable suspicion is not subject to evaluation by an independent judicial officer, even for the purpose of seeking a court order,[116] since the Court has refused to require any form of prior judicial oversight in these cases.[117] Thus, the *de Hernandez* rule virtually eliminates[118] any role for the judiciary prior to or during nonroutine,[119] border-crossing detentions. Border officials exercise principal, if not total discretion when deciding to detain a person at the border and when determining the length of any such detention. As a result, a fundamental purpose of the fourth amendment—to restrain the discretion of those enforcing the law—has been abandoned at the border.[120]

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tained de Hernandez 24 hours before they sought judicial review and 27 hours before they arrested her. *Id.* at 3314 (Brennan and Marshall, JJ., dissenting).

113. *Id.* at 1310-11. The Court characterized de Hernandez' detention as nonroutine. *See supra* note 103 for the definition of a nonroutine seizure.

114. 392 U.S. 1 (1968).

115. *de Hernandez*, 105 S. Ct. at 3308. The case-by-case balancing test for reasonableness applies to searches and seizures away from but continguous to the border. United States v. Martinez-Fuerte, 428 U.S. 543, 556-60 (1976). Further, this test has been applied at least once to drug-related searches and seizures in the interior of the United States. United States v. Sharpe, 105 S. Ct. 1568 (1985).

116. A court order is issued pursuant to the All Writs Act, 28 U.S.C. § 1651 (1982). Under the Act, a judicial officer has statutory authority to issue all orders necessary to effectuate the duties of his office subject only to recognized legal constraints.

Nonroutine border searches have been authorized by court orders issued pursuant to this Act. *See* United States v. Mendez-Jimenez, 709 F.2d 1300 (9th Cir. 1983); United States v. Quintero-Castro, 705 F.2d 1099, 1100 (9th Cir. 1983); *Couch*, 688 F.2d at 601; *Ek*, 676 F.2d at 381. Since the Supreme Court has sanctioned nonroutine searches and seizures based only upon reasonable suspicion, requiring use of court orders for nonroutine searches and seizures would reinstate prior judicial review. Such review would be limited to assessing the assertion of reasonable suspicion. But, at least, law enforcement personnel would not be the sole arbiters of permissible conduct under the fourth amendment.

117. *de Hernandez*, 105 S. Ct. at 3309.

118. Perhaps a detention lasting several days or a week might necessitate some form of judicial review. Having approved a detention of two-thirds of a day without judicial review, the Court no doubt will have occasion to review an even lengthier detention since law enforcement agents continually test boundaries established by the courts. Almeida-Sanchez v. United States, 413 U.S. at 266, 280 (1973) (Powell, J., concurring); Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

119. *See supra* note 105 and *infra* note 123 for the definition of routine and nonroutine detentions.

120. Perhaps this fundamental purpose has also been abandoned in the interior. United States v. Sharpe, 105 S. Ct. 1568 (1985).

III. THE DETENTION OF *DE HERNANDEZ*

The *de Hernandez*[121] rule is disturbing on its terms and in its implications. Under *de Hernandez*, "the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal."[122] Because the Court found customs officials had reasonable suspicion at the inception of de Hernandez' nonroutine[123] detention, it held that the sixteen hour detention[124] was reasonable.[125] As a result, an individual entering or re-entering[126] the United States[127] is potentially subject to nonroutine, *incommunicado*[128] detention of up to sixteen hours without prior judicial review.

De Hernandez provokes alarm on two fronts. First, it is alarming because of the radical reach[129] of the seizure it approved. Second, it is dis-

121. United States v. de Hernandez, 105 S. Ct. 3304 (1985).

122. *de Hernandez*, 105 S. Ct. at 3311.

123. *Id.* A nonroutine seizure is a lengthy detention. A nonroutine seizure extends beyond the time necessary for law enforcement officials to examine a traveler's personal possessions and to question him regarding the purpose of his trip to the United States and its duration. Nonroutine border searches include strip-searches, body-cavity searches, and x-ray searches.

124. De Hernandez' nonroutine detention actually lasted longer than 16 hours. At the 16-hour mark, customs agents decided to seek a court order authorizing an x-ray and body-cavity search. 105 S. Ct. at 3312. Joint Appendix, *supra* note 1, at 28-29, 30, 38-39. The detention continued for another eight hours before being presented to a magistrate for a court order. *de Hernandez*, 105 S. Ct. at 3314 n.13 (Brennan and Marshall, JJ. dissenting); Joint Appendix at 39. Thus, de Hernandez' detention lasted a total of 24 hours before a judicial officer became involved. Both the Supreme Court and the court of appeals focused on the 16-hour figure, apparently because it was the point at which customs agents decided to seek the authorization of an independent judicial officer. It is the 16-hour period the Court specifically sanctioned in *de Hernandez*.

125. *Id.* at 3312.

126. While a narrow reading of *de Hernandez* might limit its application to the entry of foreign nationals, it is the authors' view that it can apply to persons re-entering the country as a matter of right.

127. *See supra* text accompanying notes 100-08 for a discussion of the favored status accorded the border under search-and-seizure law. Search-and-seizure rules developed originally in the context of the border are applicable with equal force at its functional equivalents. *See* Almeida-Sanchez v. United States, 413 U.S. at 266, 272 (1973).

The Supreme Court has held that a domestic post office receiving mail sent from a foreign country is a functional equivalent of the border for purposes of the seizure and search of mail. United States v. Ramsey, 431 U.S. 606, 622 (1977). The Court also has held that established checkpoints operated by the United States Border Patrol and located contiguous to, but not at the border, are functional equivalents of the border. *Almeida-Sanchez*, 413 U.S. at 272-73. International airports are such functional equivalents. *See Almeida-Sanchez*, 413 U.S. at 273 ("a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search."); United States v. Couch, 688 F.2d 599, 602 (9th Cir. 1982) (involving a detention at Los Angeles International Airport and a subsequent court-ordered x-ray search); United States v. Erwin, 625 F.2d 838, 841 (9th Cir. 1980) (involving a detention at San Francisco International Airport and a subsequent court-ordered x-ray search).

128. *de Hernandez*, 105 S. Ct. at 3312. Customs agents detained de Hernandez *incommunicado*, a fact the Court noted without comment in its decision. *Id.* at 3307. It appears, therefore, that the Court approved *sub silentio* the *incommunicado* nature of border-crossing detentions. *See infra* notes 217-18 and accompanying text.

129. The decision is characterized as radical because of the unprecedented duration and intrusiveness of the investigatory detention it sanctioned. Just three and one-half months prior to *de Hernandez*, the Court took some care in ultimately approving a *20-minute* detention under the reasoning of *Terry* and its progeny. United States v. Sharpe, 105 S. Ct. 1568 (1985). The Court noted "[o]bviously, if an investigative stop continues indefinitely, at some point it can no longer be justified

turbing because of the lengthy seizures and even more intrusive searches it invites.[130]

A. De Hernandez*: An 'Unprecedented' Precedent*

The fourth amendment buffers the zeal of law enforcement and the interests of personal dignity and privacy.[131] The *de Hernandez* rule is a manifest departure from this historic role because it vests border agents[132] with unmonitored, unrestrained discretion to implement lengthy and nonroutine detentions.[133] A traveler—citizen or noncitizen; resident alien or nonresident alien[134]—can be confronted by a customs agent or other border-crossing officer and be detained on the reasonable suspicion that he is concealing illicit drugs within his body.[135]

The critical question is what precisely renders a claim of reasonable suspicion constitutionally viable under the fourth amendment. Under *de Hernandez*, suspicion is reasonable because law enforcement agents say it is. *De Hernandez* allows potentially self-interested, law enforcement assertions to evade prior judicial evaluation and approval. Moreover, when the detainee asks how long he will be detained, the agent can reply for the "period

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as an investigative stop." *Id.* at 1575. The Court suggested that the requirement of brevity could be modified in light of "the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes." *Id.* Notwithstanding this observation, the Court certainly did not abandon the long recognized element of brevity as being a critical factor in assessing the constitutionality of investigatory stops. The *Sharpe* Court merely refused to establish a *per se* rule setting the outer temporal limit of detentions. In refusing to set an outer limit, however, the Court gave no warning that the next investigatory detention it would approve would be *16 hours.* Indeed, only two years before *de Hernandez* the Court refused to sanction a 90-minute seizure of an airline passenger's luggage under *Terry*. United States v. Place, 462 U.S. 696, 709-10 (1983). In *Place*, the Court again stressed the importance of brevity in evaluating the fourth amendment reasonableness of an investigatory detention under the *Terry* line of cases. *Id.* at 709.

130. *See infra* notes 213-89 and accompanying text (Parts III B and IV). *See also de Hernandez*, 105 S. Ct. at 3311 n.4 (the Court specifically refused to express a view on what level of suspicion is required for nonroutine border searches or whether aliens possess lesser fourth amendment rights at the border); Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) (fourth amendment protections cannot be invoked prior to the threat of their violation, their preservation depends on the nature of the individual arresting officer).

131. *See supra* notes 70-81 and accompanying text.

132. *De Hernandez* vests this unmonitored discretion in all border-crossing officers, e.g., border patrol, Drug Enforcement Administration agents, Immigration and Naturalization Service agents, and customs agents. However, while customs agents may know a great deal about what items may enter the United States, it is unlikely that they are as schooled in the fourth amendment as are the border patrol or agents of the Drug Enforcement Administration and the Immigration and Naturalization Service. Nevertheless, under *de Hernandez*, the discretion of the former to intrude into protected fourth amendment interests may be based upon an unmonitored determination of reasonable suspicion.

133. *de Hernandez*, 105 S. Ct. at 3311.

134. *See supra* note 125.

135. *de Hernandez*, 105 S. Ct. at 3313. Internal drug smuggling can involve use of the alimentary tract, viz. the digestive system as in *de Hernandez*, or body-cavities such as rectal or vaginal canals.

The detainee might be told that he can shorten his detention by submitting to a body-cavity or an x-ray search by voluntarily and quickly defecating, or by voluntarily taking a laxative. Refusing to consent to one of these alternatives prolongs the detention, in that the length of the detention is determined by the time necessary for normal bodily processes to produce a stool sample law enforcement agents can examine for the presence of illicit drugs. Further, refusing consent shifts the responsibility for the length of detention from law enforcement personnel to the detainee himself. *See infra* notes 219-27 and accompanying text. Indeed, the Court in *de Hernandez* sanctioned this shift of responsibility.

of time necessary to either verify or dispel the [agent's] suspicion"[136] and, in some cases, at least sixteen hours.[137]

If the detainee seeks the assistance of relatives, friends, or legal counsel the agent can deny the request.[138] If the detainee asks why he is being detained, he may be told that in the agent's experience,[139] "considering all the facts surrounding the traveler and [the] trip,"[140] it has been determined that reasonable suspicion exists for doing so. If the detainee presses this point, asking what specific 'facts' constitute reasonable suspicion in the agent's experience, the agent may cite one or more of the following (these are known as polarity factors): a) traveling alone[141] or traveling with someone;[142] b) having relatives or friends in this country[143] or not having relatives or friends in this country;[144] c) personally purchasing one's airline ticket for cash[145] or not knowing the specifics of the ticket-purchase;[146] d) dressing inappropriately,[147] poorly,[148] inexpensively,[149] casually,[150] conservatively,[151] or well;[152] e) wearing clothing that is too tight,[153] too loose,[154] or ill fitting;[155] f) carrying inexpensive or poor quality luggage,[156] or carrying

136. *Id.* at 1313.

137. *But see supra* note 123 concerning the actual length of de Hernandez' detention.

138. *Id.* at 3307 (de Hernandez denied permission to use the telephone; *id.* at 3314 (Brennan and Marshall, JJ., dissenting) (de Hernandez denied permission to telephone her husband. Additionally, customs agents refused her request to contact her attorney.) For a recent analysis of the evils of such *incommunicado* seizures, *see* Moran v. Burbine, 106 S. Ct. 1135, 1150 n.9 (1986) (Stevens, Brennan, Marshall, JJ., dissenting).

139. *de Hernandez*, 105 S. Ct. at 3311.

140. *Id.*

141. United States v. De Montoya, 729 F.2d 1369, 1370 (11th Cir. 1984); United States v. Pino, 729 F.2d at 1357, 1358 (11th Cir. 1984); United States v. Vega-Barvo, 729 F.2d 1341, 1343 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 597 (1984); United States v. Caicedo-Guarnizo, 723 F.2d 1420, 1421 (9th Cir. 1984); United States v. Mendez-Jimenez, 709 F.2d 1300, 1301 (9th Cir. 1983).

142. United States v. Castaneda-Castaneda, 729 F.2d 1360, 1361 (11th Cir. 1984); United States v. Quintero-Castro, 705 F.2d 1099, 1100 (9th Cir. 1983); United States v. Purvis, 632 F.2d 94, 95 (9th Cir. 1980).

143. United States v. Saldarriaga-Marin, 734 F.2d 1425 (11th Cir. 1984); United States v. Caicedo-Guarnizo, 723 F.2d 1420, 1421 (9th Cir. 1984); United States v. D'Allerman, 712 F.2d 100, 102 n.1 (5th Cir. 1983), *cert. denied*, 464 U.S. 899 (1983).

144. *de Hernandez*, 105 S. Ct. at 3307; United States v. Castrillon, 716 F.2d 1279, 1281 (9th Cir. 1983); United States v. Mendez-Jimenez, 709 F.2d 1300, 1304 (9th Cir. 1983).

145. *Caicedo-Guarnizo*, 723 F.2d at 1421; *Mendez-Jimenez*, 709 F.2d at 1304; United States v. Shreve, 697 F.2d 873, 874 (9th Cir. 1983); *Purvis*, 632 F.2d at 94, 95.

146. United States v. Padilla, 729 F.2d 1367, 1368 (11th Cir. 1984); United States v. Henao-Castano, 729 F.2d 1364, 1365 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 3552 (1984); United States v. Pino, 729 F.2d at 1357, 1358 (11th Cir. 1984); United States v. Vega-Barvo, 724 F.2d 1341, 1343 (11th Cir. 1984); United States v. Mejia, 720 F.2d 1378, 1380 (5th Cir. 1983); United States v. D'Allerman, 712 F.2d 100, 102 n.1 (5th Cir. 1983).

147. United States v. Saldarriaga-Marin, 734 F.2d 1425, 1426 (11th Cir. 1985) (wearing a party dress); United States v. Mejia, 720 F.2d 1378, 1380 (5th Cir. 1985) (not attired as a businessman though claiming to be one).

148. United States v. Henao-Castano, 729 F.2d at 1364, 1365 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 3552 (1984).

149. United States v. De Montoya, 729 F.2d 1369, 1370 (11th Cir. 1984); United States v. Pino, 729 F.2d 1357, 1358 (11th Cir. 1984).

150. Florida v. Royer, 460 U.S. 491, 493 n.2 (1983).

151. United States v. Vega-Barvo, 729 F.2d 1341, 1343 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 397 (1984).

152. United States v. Caicedo-Guarnizo, 723 F.2d 1420, 1421 (9th Cir. 1984).

153. *De Montoya*, 729 F.2d at 1370.

154. United States v. Ogberaha, 771 F.2d 655, 659 (2d Cir. 1985).

155. *De Montoya*, 729 F.2d at 1370.

good quality luggage;[157] g) appearing nervous,[158] calm,[159] or passive;[160] h) having made no prior trips,[161] a few prior trips,[162] or frequent trips[163] to the United States; i) having little or no money,[164] some money,[165] or a lot of money.[166] Alternatively, the agent may tell the detainee that one or more of the following 'facts' (these are known as litmus factors) support the agent's reasonable suspicion determination: a) an informant's tip that this specific detainee is a carrier and plans to use the body to conceal illicit drugs;[167] b) arriving in the United States from a country known as a source of illicit drugs;[168] c) possessing anti-diarrheal medication,[169] laxatives,[170] or lubricants;[171] d) having a record of illicit drug smuggling;[172] e) being a known user of illicit drugs;[173] f) traveling on an apparent fraudulent pass-

156. United States v. Henao-Castano, 729 F.2d at 1364, 1365 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 3552 (1984); *Vega-Barvo*, 729 F.2d at 1343.

157. Florida v. Royer, 460 U.S. at 491, 493 n.1 (1983).

158. *Ogberaha*, 771 F.2d at 659; United States v. Saldarriaga-Marin, 734 F.2d 1425, 1427 (11th Cir. 1985); United States v. Pino, 729 F.2d 1357, 1358 (11th Cir. 1984); United States v. Mosquera-Ramirez, 729 F.2d 1352, 1354 (11th Cir. 1984); *Vega-Barvo*, 729 F.2d at 1343; United States v. Gomez-Diaz, 712 F.2d 949, 950 (5th Cir. 1983); United States v. Mendez-Jimenez, 709 F.2d at 1300, 1304 (9th Cir. 1983); United States v. Quintero-Castro, 705 F.2d 1099, 1100 (9th Cir. 1983).

159. United States v. Mejia, 720 F.2d 1378, 1380 (5th Cir. 1985); United States v. D'Allerman, 712 F.2d 100, 102 n.1 (5th Cir. 1983).

160. United States v. Castaneda-Castaneda, 729 F.2d 1360, 1362 (11th Cir. 1984).

161. United States v. De Montoya, 729 F.2d 1369, 1370 (11th Cir. 1984); *Vega-Barvo*, 729 F.2d at 1343.

162. *Castaneda-Castaneda*, 729 F.2d at 1362 (one prior trip); *Mejia*, 720 F.2d at 1380 (two prior trips); *D'Allerman*, 712 F.2d at 103 n.1 (two prior trips).

163. *de Hernandez*, 105 S. Ct. at 3307 (eight prior trips).

164. United States v. Padilla, 729 F.2d 1367, 1368 (11th Cir. 1984) (carrying $971.00 in cash); *Vega-Barvo*, 729 F.2d at 1343 (having "little or no cash"); United States v. Mendez-Jimenez, 709 F.2d 1300, 1302 (9th Cir. 1983) (carrying $990.00 in cash).

165. United States v. Ogberaha, 771 F.2d 655, 659 (2d Cir. 1985) (carrying $2,000.00 in cash); *De Montoya*, 729 F.2d at 1370 (carrying $1,500.00 in cash); United States v. Henao-Castano, 729 F.2d 1364, 1366 (11th Cir. 1984) (carrying $2,000.00 in cash), *cert. denied*, 105 S. Ct. 3552 (1984); United States v. Pino, 729 F.2d 1357, 1358 (11th Cir. 1984) (carrying $1,200.00 in cash); United States v. Mosquera-Ramirez, 729 F.2d 1352, 1354 (11th Cir. 1984) (carrying $1,295.00 in cash); United States v. Caicedo-Guarnizo, 723 F.2d at 1420, 1421 (9th Cir. 1984) (carrying $1,200.00 in cash); *Mejia*, 720 F.2d at 1380) (carrying $2,000.00 in cash); United States v. Castrillon, 716 F.2d at 1281 (9th Cir. 1983) (carrying $2,000.00 in cash); United States v. D'Allerman, 712 F.2d 100, 102 n.1 (5th Cir. 1983) (carrying $2,000.00 in cash).

166. *de Hernandez*, 105 S. Ct. at 3307 (carrying $5,000.00 in cash).

167. United States v. Couch, 688 F.2d 599, 600, 605 (9th Cir. 1982); United States v. Ek, 676 F.2d 379, 380 (9th Cir. 1982).

168. *de Hernandez*, 105 S. Ct. at 3307 (arriving from Colombia); United States v. Ogberaha, 771 F.2d 655, 659 (2d Cir. 1985) (arriving from Nigeria); *Mejia*, 720 F.2d at 1380 (arriving from Colombia); *D'Allerman*, 712 F.2d at 102 n.1 (arriving from Colombia); United States v. Shreve, 697 F.2d 873, 874 (9th Cir. 1983) (arriving from Peru); *Mendez-Jimenez*, 709 F.2d at 1302 (arriving from Colombia).

169. *Mendez-Jimenez*, 709 F.2d at 1302, 1304.

170. United States v. Caicedo-Guarnizo, 723 F.2d 1420, 1421 (9th Cir. 1984).

171. United States v. Shreve, 697 F.2d 873, 874 (9th Cir. 1983) (carrying a bottle of oil); United States v. Aman, 624 F.2d 911, 912 (9th Cir. 1980) (carrying lubricants); United States v. Cameron, 538 F.2d 254, 256, 257 (9th Cir. 1976) (strip-search revealed "clear signs of vaseline or other lubricant in appellant's rectal area.").

172. *Aman*, 624 F.2d at 912.

173. *Cameron*, 538 F.2d at 255-56; United States v. Guadalupe-Graza, 421 F.2d 876, 877 (9th Cir. 1970); Rivas v. United States, 368 F.2d 703, 707 n.2 (9th Cir. 1966), *cert. denied*. 386 U.S. 945 (1967). This litmus factor is only significant if it is assumed that users of illicit drugs are more likely to smuggle drugs than nonusers. This point is debatable.

port;[174] and g) giving absurd or manifestly inconsistent answers to questions concerning the purpose and duration of the traveler's visit to the United States.[175] Lower federal court cases indicate that various combinations of both the polarity and litmus factors constitute reasonable suspicion in support of border-crossing detentions of varying duration.[176]

An examination of these factors suggests that some are more supportive of a reasonable suspicion determination than others. Further, it is apparent that reasonable minds could differ as to whether reasonable suspicion is established by a given configuration of factors. For example, the presence of one or more of the litmus factors may be more indicative of internal concealment of illicit drugs than is the presence of one or more of the polarity factors. Thus, agents could use litmus factors such as a detailed informant's tip,[177] a history of drug smuggling,[178] possession of anti-diarrheal medication, laxatives, or lubricants,[179] and inconsistent or incomprehensible reasons for coming to the United States,[180] separately or in combination, to differentiate internal drug smuggling travelers from those who are not smuggling drugs. Because of their greater predictive value,[181] litmus factors may have some validity in supporting the reasonable suspicion determination nec-

174. United States v. Mendez-Jimenez, 709 F.2d 1300, 1302, 1304 (9th Cir. 1983).

175. This factor only pertains to foreign nationals. Citizens and resident aliens are not asked their reasons for re-entering the country; they enter as of right. United States v. Saldarriaga-Marin, 734 F.2d 1425, 1427 (11th Cir. 1984); United States v. De Montoya, 729 F.2d 1369, 1370; United States v. Padilla, 729 F.2d 1367, 1368 (11th Cir. 1984); United States v. Henao-Castano, 729 F.2d 1364, 1365, 1366 (11th Cir. 1984); United States v. Castaneda-Castaneda, 729 F.2d 1360, 1362 (11th Cir. 1984); United States v. Pino, 729 F.2d 1357, 1358; United States v. Mosquera-Ramirez, 729 F.2d 1352, 1354 (11th Cir. 1984); United States v. Vega-Barvo, 729 F.2d 1341, 1343 (11th Cir. 1984); United States v. Cicedo-Gurnizo, 723 F.2d 1420, 1421 (9th Cir. 1984); United States v. Mejia, 720 F.2d 1378, 1380 (5th Cir. 1983); United States v. D'Allerman, 712 F.2d 100, 102 n.1 (5th Cir. 1983). *Cf. de Hernandez*, 105 S. Ct. 3304, 3307 (de Hernandez was asked "general questions concerning herself and the purpose of her trip." Her answers contributed to the inspector's suspicions).

176. *See supra* notes 141-75. *See also* Note, *Airport Drug Stops: Defining Reasonable Suspicion Based on the Characteristics of the Drug Courier Profile*, 26 B.C.L. REV. 693 (1985) for a discussion of factors the Supreme Court considers predictive of illicit drug smuggling at the border.

177. *See supra* note 167. *See also* Illinois v. Gates, 462 U.S. 213 (1983) (applying a totality-of-the-circumstances test to decide whether a search warrant should issue on the basis of information contained in an anonymous tip.

178. *See supra* notes 172-73. This factor encompasses all forms of illicit drug smuggling, e.g., by alimentary canal; by body-cavity; by concealment on, but not in, the body; by concealment in personal effects such as purses, luggage, packages and by international mail.

179. *See supra* notes 170-72.

180. *See supra* note 175.

181. A note of caution is in order. Though more powerful than polarity factors, most or all litmus factors might well be weak discriminators. Their use will generate a considerable number of false-positive outcomes. A false-positive outcome is the investigatory detention of innocent travelers. Given the level of intrusion into the interests of personal dignity and privacy occasioned by investigatory detentions, a false-positive rate exceeding 10 to 20% of all investigatory detentions should render use of the factor (or factors) per se unconstitutional. *See de Hernandez*, 105 S. Ct. at 3319 (Brennan and Marshall, JJ., dissenting) (citing figures showing an 80 to 85% error rate at the border); United States v. Cameron, 538 F.2d 254, 259-60 (9th Cir. 1976) (circuit court noting that the government had no data on the number of body-cavity searches conducted at the border and the rate at which illicit drugs are found).

The government has failed to present data in support of the discriminatory power of the factors currently relied on to supply the reasonable suspicion necessary to support an investigatory detention. *See de Hernandez*, 105 S. Ct. at 3319 n.26 ("The Government advised the Court at oral argument that it has more recent statistical evidence respecting the number of innocent travelers who are subjected to x-ray searches, but did not disclose that evidence because 'it's not in the record and it's not public.' "). *See also infra* notes 182-83.

essary for a lengthy, perhaps *incommunicado*, detention under the fourth amendment.

Use of the polarity factors, such as calm or nervous, well or poorly attired, clad in loose- or tight-fitting clothing, as grounds for detaining travelers creates a very different situation. Utilizing any of the polarity factors appears to sweep too broadly, eventuating in lengthy, perhaps *incommunicado*, detentions of innocent as well as guilty travelers. Furthermore, unless polarity factors are at least moderately powerful in their discriminatory potential,[182] the greater the number of polarity factors employed to establish reasonable suspicion, the greater the risk of detaining the innocent as well as the guilty. The result of employing these factors is not a reasonably accurate discrimination between internal smugglers and nonsmugglers *prior* to the initiation of detention.

These observations establish a context for evaluating *de Hernandez*. Under *de Hernandez*, polarity factors are as constitutionally valid as litmus factors in establishing the reasonable suspicion necessary to subject an individual to an *incommunicado* detention of up to 16 hours. Moreover, these detentions can occur in close factual circumstances as well as in relatively clear-cut factual situations where virtually all reasonable minds would conclude that drugs were being concealed.

De Hernandez is one such close case,[183] presenting only one of the lit-

182. In this context, moderately powerful discriminatory potential means yielding a number of false positives no larger than the number of true positives. Thus, the error rate characterizing moderately powerful discriminatory factors equals or is less than the number of accurate predictions.

Statisticians could ascertain the potential discriminatory power of either the polarity or litmus factors by one of two procedures. The first method calculates potential discriminatory power by determining: (a) the correlation between each of the polarity and litmus factors and the detention of travelers found to be smuggling drugs internally and (b) the correlation between each of the factors and the detention of travelers found *not* to be smuggling drugs internally. Those polarity and litmus factors that correlate positively to the detention of guilty travelers and negatively to the detention of innocent travelers are reasonably accurate discriminators. If the correlation established for any given factor is at least + .90 (+.90 with respect to guilty travelers, -.90 with respect to innocent travelers), the error rate is 19%, declining as the correlation approaches + 1.0. Calculate the error rate by squaring the correlation coefficient and subtracting the result from + 1.0. (For example, using the above numbers: 1) (+.90)2 = .81; 2) 1.00-.81=.19; and 3) the error rate is .19 or 19%).

A second method for ascertaining the potential discriminatory power of these factors uses configurations of factors rather than single factors. Here, a particular configuration of polarity or litmus factors might discriminate more accurately between smuggling and non-smuggling travelers than any single factor. Thus, while no single factor may reach a correlation coefficient of at least +.90, an undetermined combination of factors might attain that level.

It is important to recognize, however, that the government has not produced these, or any other statistical analyses establishing the discriminatory power of polarity or litmus factors. Moreover, the government has not cited any study ascertaining the discriminatory power of any of these factors. *See supra* note 181.

183. Personnel placed a more suspicious interpretation on the appearance of de Hernandez and the asserted reason for her visit. But, because both an "innocent" and a "guilty" construction were possible, and because a "guilty" construction poses serious fourth amendment implications, this is exactly the type of case that necessitates prior evaluation and approval by an independent judiciary.

An independent judiciary considers both the interests of the social whole and the interests of individual dignity and privacy. On the other hand, law enforcement personnel consider law enforcement interests. Fourth amendment case law recognizes this bias and the need to control discretionary conduct implementing it. Hence, the fourth amendment does not accord law enforcement personnel the authority to decide when and to what extent they may invade fourth amendment interests. Hence, the *de Hernandez* Court should have enunciated a *per se* rule requiring prior judicial review and approval of more-than-brief detentions. Such a rule could take two forms: 1) a review applying a reasonable suspicion standard, approval taking the form of a court order pursuant

mus factors. De Hernandez arrived from Colombia, a source-country for illicit drugs.[184] She was not the object of an informant's tip. She did not possess anti-diarrheal medication, laxatives, or lubricants.[185] She was not a known user of illicit drugs. She did not have a history of smuggling or attempting to smuggle illicit drugs. She did not give absurd or inconsistent responses when questioned about her visit to the United States.[186] For example, de Hernandez indicated that she was coming to the United States to purchase small appliances and clothing to take back to Colombia for resale.[187] In support, de Hernandez told customs agents that she had undertaken previous purchasing trips,[188] and she proffered a file of receipts and invoices from these trips.[189] De Hernandez told agents that she contemplated making purchases at stores such as K-Mart and J.C. Penney, which she would visit by taxi.[190] Unlike other foreign, noncitizen travelers who cited business purchasing as the reason for their trips,[191] de Hernandez' explanation was plausible.[192] In further support of her business-purchasing explanation, de Hernandez displayed her husband's business card[193] and gave customs agents her husband's telephone number to verify her assertion that he was the proprietor of a small store selling these items.[194]

On the other hand, de Hernandez could be described by some, but certainly not all, of the polarity factors.[195] She was neither poorly nor too well dressed.[196] She was not inappropriately dressed.[197] Her clothing fit properly.[198] She had clothing and toiletries which, although modest, would be

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to the All Writs Act (28 U.S.C. § 1651 (1982)); or 2) a review applying a probable cause standard, approval taking the form of a warrant. While we argue for the second alternative, the former is clearly preferable to the current situation established by *de Hernandez*. In our view, *de Hernandez* accelerates the erosion of the interests protected by the fourth amendment, an erosion beginning with *Terry v. Ohio*, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting). Perhaps a *per se* rule will emerge as reasonable suspicion detentions grow longer or move into the country's interior. *See infra* notes 213-17 and accompanying text and United States v. Sharpe, 470 U.S. 675 (1985).

184. *de Hernandez*, 105 S. Ct. at 3307.

185. De Hernandez, however, was "wearing two pairs of elastic underpants with a paper towel in the crotch area." *Id.* at 3307.

186. This is the authors' conclusion and is based on the transcript of the hearing to suppress evidence, the stipulation of facts entered into at the hearing, and the comparison of this information with the factual situations presented in other cases involving the suspected internal concealment of illicit drugs. *See supra* note 175. *See also supra* note 15. The Supreme Court reached a different conclusion based on the same information, characterizing de Hernandez' explanation of her visit to the United States as an "implausible story." *de Hernandez*, 105 S. Ct. at 3311.

These differing assessments of the same information are significant because they suggest that de Hernandez presented a close judgment as to whether she was concealing drugs within her body. The extreme and serious nature of the intrusions de Hernandez and other travelers suspected of internal drug smuggling experienced necessitates greater control of investigatory activity at the border than the Court required in *de Hernandez*.

187. *Id.* at 3307.

188. Joint Appendix, *supra* note 1, at 10.

189. Joint Appendix, *supra* note 1, at 11, 15; *de Hernandez*, 105 S. Ct. at 3307.

190. Joint Appendix, *supra* note 1, at 53; *de Hernandez*, 105 S. Ct. at 3307.

191. *See supra* note 15.

192. *See supra* text accompanying note 199.

193. *de Hernandez*, 105 S. Ct. at 3307.

194. Joint Appendix, *supra* note 1, at 13.

195. *See supra* notes 141-66 and accompanying text.

196. *See supra* notes 148, 152. *See also supra* notes 147, 149-51.

197. *See supra* note 147.

198. *See supra* notes 153-55.

sufficient for a short business trip.[199] She did not appear unduly calm, passive, or nervous.[200] While de Hernandez did have $5,000.00 in her possession,[201] this amount of cash was not inconsistent with her physical appearance[202] or attire.[203] Moreover, it was consistent with the avowed purpose of her trip. The additional facts that she traveled alone,[204] did not have relatives in this country,[205] and had made eight previous trips to the United States[206] are also consistent with the asserted purpose of her trip.[207] This description of de Hernandez, together with the purported reason for her visit, suggests that it was as likely that she came to the United States for legitimate purposes as it was that she came as an alimentary-canal smuggler of illicit drugs.

Perhaps, there were legitimate reasons for the agents' suspicion. But given both the extent of the invasion of her fourth amendment interests[208] and the inconclusiveness of her appearance, any suspicion she kindled argues for prior evaluation by an independent judicial officer.

De Hernandez becomes progressively more unsettling in close cases. The decision permits law enforcement agents to undertake evaluations of circumstances and the balancing[209] of competing constitutional interests. Law enforcement agents were neither trained nor given responsibility for this task. Nevertheless, at least with respect to the interdiction of illicit drug smuggling at the nation's borders, the Supreme Court has decided that the historical and constitutional separation of the law enforcement and judicial

199. *See supra* text accompanying note 4; Joint Appendix, *supra* note 1, at 9, 42. The Court stressed that de Hernandez had only one pair of shoes, the high-heeled pair she was wearing. *de Hernandez*, 105 S. Ct. 3307. We seriously doubt that this fact is suspicious, particularly in light of other facts indicating de Hernandez had brought enough clothing for a "short business trip." Respondent's Brief at 6. If traveling with only one pair of shoes or only one pair of *high-heeled* shoes generates reasonable suspicion, either *per se* or in combination with other facts, it surely cannot sufficiently justify an *incommunicado* detention of 16 hours.

200. *See supra* notes 158-60. De Hernandez' nervousness is as easily explained by the indeterminate and *incommunicado* nature of her detention as it is by her status as an internal smuggler of illicit drugs. It is highly likely that anyone detained indeterminately and *incommunicado* would become nervous.

201. *de Hernandez*, 105 S. Ct. at 3307.

202. *Cf.* United States v. De Montoya, 729 F.2d 1369, 1370 (11th Cir. 1984) ("Although Montoya said her suit was new, it could not be buttoned over her bulging stomach . . . The condition of Montoya's hands and knees indicated she was used to a life of manual labor, . . . [and] the condition of her hands was partially disguised by a fresh manicure, . . ."); United States v. Castaneda-Castaneda, 729 F.2d at 1360, 1362 (11th Cir. 1984) (". . . her hands were very rough and red despite a fresh manicure.").

203. *See supra* notes 147-55.

204. *See supra* note 141.

205. *See supra* note 144.

206. *de Hernandez*, 105 S. Ct. at 3307. *See also supra* notes 161-62.

207. The government presented an entirely different interpretation of these facts. They argued these facts are consistent with an illegitimate visit. Once again, however, it is our position that the facts of this case are close, being compatible with and supportive of both interpretations. Hence, any determination as to whether these facts support reasonable suspicion should be made by an independent judicial officer. *See supra* note 196. *See also supra* notes 70-79 and accompanying text.

208. *de Hernandez*, 105 S. Ct. at 3310. The Court clearly recognized that de Hernandez, even as an alien attempting to enter the country, had interests in her personal dignity and privacy, protected by the fourth amendment. *See supra* note 32.

209. Reasonable suspicion necessary to support an investigatory detention is predicated on a case-by-case balancing of a detained individual's fourth amendment interests against law enforcement interests present in the particular case. Terry v. Ohio, 392 U.S. 1, 21-22, 29 (1967).

functions can and should be abandoned. By definition, this establishes that significant intrusions into personal dignity and privacy are as likely to happen to the innocent traveler as they are to the guilty traveler.[210]

De Hernandez permits persons with a vested interest in disregarding the rights protected by the fourth amendment to determine whether those interests merit protection. In close cases, both the pressure to disregard these interests and the harm occasioned by their disregard increase. With respect to curbing the influx of illicit, internally concealed drugs at the border, *de Hernandez* has loosened, to the point of abrogation, those restraints on the discretion of law enforcement personnel, which the framers of the fourth amendment deemed necessary to afford meaningful protection to personal dignity and privacy. Simply stated, the *de Hernandez* rule takes from an independent judiciary its historic and constitutional function of ascertaining the validity of searches or seizures prior to their execution.[211] We believe this is an ill-advised step toward a point where fewer and fewer intrusions into the interests of personal dignity and privacy will require prior judicial approval.[212]

B. Unresolved Detention-Related Issues After de Hernandez

The Supreme Court left open the maximum length of time customs agents, without judicial authorization, could detain travelers at the border who are reasonably suspected of concealing drugs within their bodies. Read narrowly, *de Hernandez* sanctions such detentions for up to sixteen hours without prior judicial review and approval if the government can establish reasonable suspicion for the detention *ex post facto*. The Court, however, did not draw a bright line at sixteen hours. Conceivably, detentions of twenty-four hours[213] predicated upon reasonable suspicion might pass muster under the *de Hernandez* interpretation of the fourth amendment, particularly given the Court's view that "[a] detention for a period of time necessary

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210. Where investigatory detentions are predicated on less than probable cause, only if half or more of all incoming travelers are concealing drugs within their bodies will a guilty traveler be equally or more subject to detention than an innocent traveler. Thus, it is important to reiterate the lack of any data indicating either the percentage or the absolute number of incoming travelers law enforcement agents actually find harboring illicit drugs within their bodies.

> One physician who at the request of customs officials conducted many "internal searches"—rectal and vaginal examinations and stomach-pumping—estimated that he had found contraband in only 15 to 20 percent of the persons he had examined. It has similarly been estimated that only 16 percent of the women subjected to body-cavity searches at the border were in fact found to be carrying contraband.

de Hernandez, 105 S. Ct. at 3319 (Brennan, J., dissenting). Furthermore, at oral argument in *de Hernandez*, the government refused to divulge recent statistics giving at least an indication of the number of innocent travelers subjected to x-ray investigatory detentions at the border. "[T]he Government advised the Court at argument that it has more recent statistical evidence respecting the number of innocent travelers who are subjected to x-ray searches, but did not disclose that evidence because 'it's not in the record and it's not public.' " *de Hernandez, id.* at 3319 n.26. *See also supra* note 181.

211. *See supra* notes 55-58, and accompanying text.

212. *See Terry*, 392 U.S. at 39 (Douglas, J., dissenting). We argue that *de Hernandez* presents the precise outcome that Justice Douglas, the sole dissenter in *Terry*, fearfully foresaw as the ultimate consequence of permitting warrantless, nonprobable cause searches or seizures.

213. *See supra* note 124.

to either verify or dispel the suspicion was not unreasonable."[214] Perhaps detentions of thirty, thirty-six, or even forty-eight hours will become permissible. Given the prevailing test of reasonableness in this area—reasonable suspicion under the totality of the circumstances[215]—*ex post facto* sanctioning of lengthier detentions without prior judicial approval can be anticipated.[216]

The *incommunicado* nature of these detentions is also an unresolved issue. *De Hernandez* may sanction the *incommunicado* nature as well as the duration of the detention. The Court did not expressly approve this aspect of the detention but did note that she was detained *incommunicado*[217] without indicating disapproval. It remains for future cases to establish the significance of *incommunicado* detentions in determining the reasonableness of lengthy detentions. Perhaps the Court will find the confluence of *incommunicado* detentions with detentions longer than sixteen hours unconstitutional,[218] unacceptably straining even the pliable limits of fourth amendment reasonableness.

De Hernandez also leaves unaddressed the propriety of requiring travelers *qua* detainees to forswear their constitutional interest in the dignity and privacy of their internal physical being[219] in order to shorten their detentions. *De Hernandez* clearly approved detentions of border-crossers suspected of drug smuggling "for the period of time necessary to either verify or dispel the suspicion"[220] that triggered the detention. In so doing, the Court subtly shifted the responsibility for the length of detention to the detainee.[221] To terminate detention, the detainee could choose to accept additional as-

214. *de Hernandez*, 105 S. Ct. at 3313.

215. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 19-20, 30 (1967).

216. Within three and one-half months the allowable length of an investigatory detention without prior judicial approval took a quantum leap from 20 minutes to 16 hours. *Compare* United States v. Sharpe, 470 U.S. 675, 688 (1985) (approving a detention of 20 minutes) *with, de Hernandez*, 105 S. Ct. at 3312 (approving a detention of 16 hours). *See also supra* note 129; Brinegar v. United States, 338 U.S. 160, 182 (Jackson, J., dissenting) ("We must remember that the extent of any privilege of search and seizure without warrant which we sustain, *the officers interpret and apply themselves and will push to the limit.*") (emphasis added); *Terry*, 392 U.S. at 39 (Douglas, J., dissenting); Johnson v. United States, 333 U.S. 10, 14 (1948).

It is possible that a court may find a detention of 16 hours or less unreasonable because of insufficient suspicion or inappropriate actions of law enforcement personnel separate and apart from the duration of the detention.

217. *de Hernandez*, 105 S. Ct. at 3312. *See also supra* note 127. The Court, however, has disapproved incommunicado detentions and arrests in the nation's interior where the leniencies permitted at the border are inapplicable.

218. *See* Reck v. Pate, 367 U.S. 433, 441, 443-44 (1961); Haley v. Ohio, 332 U.S. 596, 598, 600 (1948); Malinski v. New York, 324 U.S. 401, 405 (1945); Ashcraft v. Tennessee, 322 U.S. 143, 153 (1943); White v. Texas, 310 U.S. 530, 531 n.3 (1940); Chambers v. Florida, 309 U.S. 227, 231, 238-39 (1940).

219. A person's internal physical being is invaded by strip-searches, body-cavity searches, forced stomach-pumping, forced ingestion of emetics, x-ray searches, and surgical removals of bullets. *See* United States v. Vega-Barvo, 729 F.2d 1341, 1345-48 (1984); *see also* Winston v. Lee, 470 U.S. 753, 759-63, (1985) (removal of bullet); Bell v. Wolfish, 441 U.S. 520, 558-60, 576-77 (1979) (Marshall, J., dissenting) (body cavity searches "represent one of the most grievous offenses against personal dignity and common decency"); *id.* at 594, 595, (Stevens and Brennan, JJ., dissenting) (body-cavity searches are "clearly the greatest personal indignity"); Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272-73 (7th Cir. 1983) (routine strip and body-cavity searches of female minor offenders an unjustified and severe intrusion).

220. *de Hernandez*, 105 S. Ct. at 3313.

221. *Id.* at 1315 (Brennan and Marshall, JJ., dissenting). *See also supra* note 135.

saults on his dignity and privacy by: a) voluntarily defecating;[222] b) voluntarily ingesting a laxative to induce defecation;[223] c) consenting to a body-cavity search;[224] or d) consenting to an x-ray search.[225] It is unlikely, however, that those detainees erroneously suspected of alimentary canal or body-cavity smuggling will rejoice at these choices.[226]

It is this reality, coupled with the abrogation of judicial control over the discretion of law enforcement personnel, that makes *de Hernandez* so troubling. Because law enforcement personnel will err on the side of more and longer, rather than fewer and shorter detentions, it is likely that they will subject increasing numbers of innocent travelers to lengthy detentions.[227] As a result, increasing numbers of innocent travelers will face the choice of undergoing greater invasions of personal dignity and privacy in order to terminate the detention.

IV. THE SEARCHES OF DE HERNANDEZ

The detention of de Hernandez was one intrusion into her fourth amendment dignity and privacy interests.[228] The searches of de Hernandez were additional and more extensive intrusions of those interests. During her detention, customs officers subjected de Hernandez to two strip-searches.[229] The first strip-search occurred shortly after detention;[230] the second occurred some fifteen hours later.[231] Both were performed by customs officers without judicial authorization.[232]

De Hernandez also underwent a rectal body-cavity search[233] conducted pursuant to court order. The court order also authorized an x-ray search.[234]

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222. *de Hernandez*, 105 S. Ct. at 3307.

223. *See, e.g.*, United States v. Saldarriaga-Marin, 734 F.2d at 1425, 1427 (11th Cir. 1984).

224. *See, e.g*, United States v. Pino, 729 F.2d at 1357, 1360 (11th Cir. 1984) (consent to a rectal search).

225. *See, e.g.*, United States v. Caicedo-Guarnizo, 723 F.2d 1420, 1422-24 (9th Cir. 1984).

226. *de Hernandez*, 105 S. Ct. at 3321-22 (Brennan and Marshall, JJ., dissenting).

227. Law enforcement personnel are specially charged with enforcing federal laws aimed at eliminating the entry of illegal aliens and interdicting the flow of illicit drugs into this country. *See de Hernandez*; United States v. Martinez-Fuerte, 428 U.S. 544, 551-54 (1976); United States v. Brignoni-Ponce, 422 U.S. at 873, 878-80 (1975). Given the mission of law enforcement personnel at the border and the imprimatur *de Hernandez* provides to lengthy detentions, it is our belief that more detentions of longer duration are forthcoming. *See supra* notes 68, 216.

228. *de Hernandez*, 105 S. Ct. 3304 at 3310 n.3 (1985). The Supreme Court, however, found this intrusion reasonable given all of the surrounding facts and circumstances. *Id.* at 3311.

229. For both strip-searches, de Hernandez was required to remove her slacks and underwear. The extent of visual or manual inspection during these searches is not revealed in the record. According to the customs officers, both strip-searches were negative. Joint Appendix, *supra* note 1, at 26, 27, 64.

230. De Hernandez arrived at Los Angeles International Airport shortly after midnight. *de Hernandez*, 105 S. Ct. at 3306. The first strip-search occurred at approximately 12:30 a.m. on March 5th.

231. This search occurred at approximately 3:00 p.m. on March 5th. Joint Appendix, *supra* note 1, at 64.

232. *de Hernandez*, 105 S. Ct. at 3307 and at 3313-14 (Brennan and Marshall, JJ., dissenting).

233. This search produced a "balloon-shaped object" found to contain cocaine. Joint Appendix, *supra* note 1, at 51. *de Hernandez*, 105 S. Ct. at 3308.

234. *Id.* The court order provided:

> IT IS THEREFORE ORDERED: (1) That DEFENDANT submit to an x-ray examination of the abdominal area. . . . (2) That if such x-ray is positive for a foreign matter in the body cavity that DEFENDANT submit to a body-cavity search. (3) That any medi-

The x-ray search became unnecessary when the rectal search revealed the presence of contraband.[235]

The Supreme Court did not address the level of suspicion required by the fourth amendment to conduct strip- or body-cavity searches because it was not raised before the Supreme Court.[236] Given the Court's approval of lengthy, indeterminate detentions of border-crossers,[237] it can be expected that law enforcement officials will proceed to more extensive searches.[238] Consequently, the most probable issues for future Supreme Court review are: 1) detentions longer than sixteen hours,[239] and 2) physically intrusive searches, e.g. strip-, body-cavity, and x-ray searches conducted during an otherwise permissible detention. Therefore, the issue of intrusive bodily searches merits analysis in anticipation of Supreme Court review. Attention will focus first on strip- and body-cavity searches, followed by consideration of x-ray searches.

A. Probing the Body for Contraband

The border is a special place to a nation and its government.[240] Because of this, seizures and subsequent searches of the person and his immediate effects are accorded less fourth amendment protection than seizures and subsequent searches in the nation's interior. As previously discussed, seizures and searches of border-crossers are labeled routine and considered *per se*

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cal doctor take whatever means medically safe and appropriate to remove the foreign substance as expeditiously as medically feasible. (4) That DEFENDANT shall remain in federal custody until the foreign objects are removed from the body. IT IS FURTHER ORDERED that DEFENDANT is to submit to these medical procedures *without resistance. Medical personnel are authorized to use restraint or force to implement the order as they deem appropriate or reasonable under the circumstances.*

Joint Appendix, *supra* note 1, 44-45 (emphasis added).

235. Joint Appendix, *supra* note 1, at 44, 45, 64. Under the court order, the x-ray search was to occur prior to any body-cavity search. If the x-ray search disclosed the presence of a foreign object, the court order authorized a body-cavity search to remove it.

The sequence of the searches authorized by the court order is important if one assumes that an x-ray search is preferrable to a body-cavity search. *See infra* notes 277-80 and accompanying text. According to this view, requiring that an x-ray search precede a body-cavity search functions to minimize the nature and extent of the intrusions an innocent traveler must endure. A negative result terminates the detention and physical invasions. A positive result provides a reasonably sound basis to continue the detention.

236. *de Hernandez*, 105 S. Ct. at 3311 n.4.

Case law clearly indicates that the detention of a traveler suspected of concealing illicit drugs within his body almost invariably results in one or more physically intrusive searches. *See, e.g.*, United States v. Briones, 423 F.2d 742 (5th Cir. 1970) (detention eventuated in a stomach-search with an emetic), *cert. denied*, 399 U.S. 933 (1970); United States v. Saldarriaga-Marin, 734 F.2d 1425 (11th Cir. 1984) and United States v. Caicedo-Guarnizo, 723 F.2d 1420 (9th Cir. 1984) (detention eventuated in an x-ray search); United States v. Padilla, 729 F.2d 1367 (11th Cir. 1984) (detention eventuated in strip- and x-ray searches); United States v. Ogberaha, 771 F.2d 655 (2nd Cir. 1985) (detention for the purpose of conducting body-cavity searches).

237. Given the *de Hernandez* decision, a detainee can challenge the constitutionality of his detention only if: (a) no reasonable suspicion existed, (b) it extends beyond the period sanctioned by *de Hernandez* or, (c) he was mentally or physically mistreated during the detention. Thus, a detainee's prinicipal constitutional challenge to the actions of law enforcement personnel concerns the physically intrusive searches occurring during a detention.

238. *See supra* notes 216, 228, 237.

239. *See supra* notes 212-16 and accompanying text.

240. *See supra* notes 100-08 and accompanying text.

reasonable under the fourth amendment.[241] These seizures and subsequent searches intrude upon fourth amendment interests of dignity and privacy. The intrusion, however, is outweighed by the salient interest of the government in preventing the entry of contraband and unauthorized or dangerous persons.

Just as the nation has a weighty interest in protecting its borders, the individual also possesses special places analogous to a nation's border that merit such protection. These private domains are of such personal signficance that a person can be expected to resist any uninvited intrusion. An example of such is the Supreme Court's recognition that surgery, pursuant to judicial authorization but resisted by the defendant, crossed into one of these special domains. In *Winston v. Lee*,[242] the Court refused to sanction the forced, but judicially approved, surgical removal of a bullet from a criminal suspect for use as evidence.[243] The Court noted that the proposed search constituted a significant and unacceptable intrusion into the physical being of the suspect.[244]

Such a search intrudes into two special domains of the individual.[245] It intrudes physically beneath his skin and into muscles, nervous and circulatory systems, and, possibly, into organs. Moreover, a surgical search is an intrusion into the emotional bond between the psychosocial self and the physical structure which is its home.[246]

A body-cavity search is also a significant intrusion into a domain that is analogous to a nation's boundary in its special status. These body parts are recognized by the individual and society as highly personal and private.[247]

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241. *See supra* notes 105-08 and accompanying text.

242. 470 U.S. 753 (1985).

243. *Id.* at 767.

244. The Court's analysis of the proposed surgical search focused on its reasonableness using a balancing test. *Id.* at 765-66. This approach was necessary because the trial court authorized the search and the Court found that probable cause supported the order. *Id.* at 763. Therefore, the reasonableness of the search turned upon the extent of the intrusion into Lee's protectible interests of dignity and privacy. *Id.* at 763.

245. *Lee* has important implications for the reasonableness of the physically intrusive searches considered here. It suggests that, even if such searches receive prior judicial authorization and are based upon probable cause, they nonetheless can be unreasonable. In *Lee*, the surgical search was unreasonable because it went too far in the absence of countervailing compelling governmental interests. *Id.* at 765-66.

246. *Lee* provides an additional level of protection against physically intrusive searches. We advocate this approach for securing the fourth amendment interests implicated by x-ray, strip-, and body-cavity searches. Thus, while we vigorously argue for a warrant-based-on-probable cause standard (and, minimally, a court order based upon a prior judicial finding of reasonable suspicion), meeting either standard may not accord sufficient protection to personal dignity and privacy. Consequently, applying *Lee*, each physically intrusive search merits further examination to determine whether or not its scope is limited and it is conducted with due regard for the interests of dignity and privacy.

247. *See* Bell v. Wolfish, 441 U.S. 520 (1979). Addressing visual strip-searches of pretrial detainees, the Court recognized that "this practice *instinctively* gives us the most pause" and that "[did] not underestimate the degree to which these searchers may *invade* the personal privacy of inmates." *Id.* at 558, 560 (emphasis added). *Bell* is disturbing in its implication for the types of bodily intrusive searches considered in this Article. The Court observed that it was "deal[ing] with the question whether visual body-cavity inspections . . . can *ever* be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can." *Id.* at 560 (emphasis in original). Three members of the

Individuals resist intrusions into these intimate areas.[248] When such intrusions occur, the individual experiences not simply fear and perhaps pain, but powerlessness and humiliation.[249]

Therefore, visual and manual inspections of body cavities are not simply intrusive, they are invasive. It is equally clear that such inspections constitute invasions of dignity and privacy regardless of the individual's guilt or innocence. Just as a nation does not forfeit its interest in controlling its border and protecting it from invasion because it supports or engages in illegal activities, an individual does not automatically forfeit an interest in protecting the dignity and privacy of these sensitive areas from invasion simply because the individual has committed an illegal act. Thus, whether or not a person is concealing contraband internally has little bearing on the salience of the interests invaded and on the experience of such an invasion.

Regardless of guilt or innocence, an individual's protection depends upon the fourth amendment.[250] More particularly, it depends upon the level of suspicion required by the fourth amendment to sustain searches. Many courts addressing strip- and body-cavity searches at the border have held that the fourth amendment requires something more than the reasonable suspicion justifying detentions. This higher standard of suspicion has been labeled real suspicion,[251] clear indication,[252] or plain suggestion[253] that an individual is concealing illicit drugs within the body. Away from the border,

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Court, however, believed that probable cause is required for visual strip-searches. *Id.* at 578 (Marshall, J., dissenting), 595 (Stevens and Brennan, JJ., dissenting).

Bell requires probable cause, at least for visual strip-searches, unless there is a significant countervailing governmental interest. In *Bell* the significant countervailing interest was the security of a custodial facility. Given the special status of the nation's border and the governmental interest in interdicting the flow of drugs, it is not difficult to conceive that these factors could outweigh the probable cause requirement. Thus, the state is set to circumvent a probable cause requirement for x-ray, strip-, and body-cavity searches. Consequently, all the more reason exists to insist on the prior judicial assessment of reasonable suspicion before the issuance of a court order authorizing an intrusive bodily search. *See infra* notes 284-94, 301 and accompanying text.

248. *See Bell*, 441 U.S. at 577 (Marshall, J., dissenting), 593 (Stevens and Brennan, JJ., dissenting). In particular, an individual's genital area is integral to a healthy sense of self. A healthy sense of self is related to an individual's recognition and acceptance of the genitalia of his or her physiological sex. This, in turn, becomes central to learning and internalizing the sociocultural meaning of being male or female, which is critical to the formation of a healthy sense of self as an adult. *See generally* Z. LURIA & M. ROSE, PSYCHOLOGY OF HUMAN SEXUALITY 125-160 (1979).

249. *See, e.g., Bell*, 441 U.S. at 577 (Marshall, J., dissenting) (the emotional response to visual strip-searches was described variously as " 'unpleasant, embarrassing, and humiliating' "), 593 (Stevens and Brennan, JJ., dissenting) (describing the emotional response engendered as "deep degradation" and "terror").

250. We are not aware of any official or unofficial estimate of the annual number of travelers seeking to enter or re-enter the United States who are subjected to strip-or body-cavity searches. Case law strongly suggests, however, that such searches are relatively frequent. Consequently, the number of persons searched is likely larger than many might expect. *See supra* notes 181, 210.

251. The real suspicion standard was defined in United States v. Guadalupe-Garza, 421 F.2d 876 (9th Cir. 1970) as follows:

> subjective suspicion *supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body* for the purpose of transporting it into the United States contrary to law.
>
> The *objective, articulable facts must bear some reasonable relationship to suspicion that something is concealed on the body of the person to be searched.*

Id. at 879 (emphasis added).

The appropriate standard has become a nebulous area of the law. Apparently the real suspicion standard is synonymous with the clear indication standard, which apparently is synonymous with

these searches require probable cause.[254] We urge that probable cause be established as the operative standard of suspicion at the border. It is our position that strip- and body-cavity searches conducted at the border without probable cause are *per se* unreasonable under the fourth amendment. Furthermore, an independent judicial officer must ascertain probable cause prior to the performance of such searches. Thus, the Court should deem strip- and body-cavity searches conducted without a warrant *per se* unreasonable even in the presence of probable cause.

The traditional warrant-based-upon-probable cause requirement of the

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the plain suggestion standard. Seemingly, these three standards of suspicion are merely different labels for a single standard. *See* Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967).

252. The Supreme Court enunciated the clear indication standard in Schmerber v. California, 384 U.S. 757 (1966). The Court, in upholding the nonconsensual, warrantless withdrawal of blood to ascertain the blood-alcohol content of a driver suspected of driving under the influence, held that such searches were permissible only upon a "clear indication that in fact [the] evidence [sought] will be found . . . [and] that such evidence may disappear unless there is an immediate search." *Id.* at 770.

A well-formulated definition of this standard as applied to strip-and body-cavity searches appears in Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967). The court noted:

> While we know of no accepted meaning of [the] term in law or as a word of art, it can readily be defined. "Indication" is defined as "an indicating suggestion." "Clear" is defined as "free from doubt"; "free from limitation"; "plain." . . . There must exist facts creating a clear indication, or plain suggestion, of the smuggling.

Id. at 710. Clear indication and plain suggestion were utilized interchangeably in *Rivas* and appear to be synonymous. In fact, in defining clear indication, the circuit court used "suggestion" to define "indication" and "plain" to define "clear." They utilized the words interchangeably in United States v. Cameron, 538 F.2d 254, 257 (9th Cir. 1976) and in Henderson v. United States, 390 F.2d 805, 806 (9th Cir. 1967).

The clear indication standard has been applied with some frequency to assess the reasonableness of strip-, body-cavity, and x-ray searches. United States v. Shreve, 697 F.2d at 873, 874 (9th Cir. 1983); United States v. Couch, 688 F.2d 599, 606 (9th Cir. 1982), *cert. denied* 459 U.S. 857 (1982); United States v. Ek, 676 F.2d 379, 383 (9th Cir. 1982); *Cameron*, 538 F.2d at 257-58; *Henderson*, 390 F.2d at 808; Rivas v. United States, 368 F.2d 703, 710-11 (9th Cir. 1966).

De Hernandez expressly rejected the clear indication standard of suspicion as an intermediate standard between probable cause and reasonable suspicion. *de Hernandez*, 105 S. Ct. at 3310. It appears the Court rejected any form of intermediate standard whatever its label.

The Court's rejection of an intermediate standard, however designated, seems justified because this intermediate standard is little more than a reformulation of the reasonable suspicion standard articulated in Terry v. Ohio, 392 U.S. 1, 21, 30 (1968). *Terry* formulated the reasonable suspicion standard as follows:

> [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational infirences from those facts, reasonably warrant that intrusion.
>
> . . . .
>
> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot . . . he is entitled . . . to conduct a carefully limited search. . . .

Id. at 21, 30 (citations omitted).

253. Plain suggestion does not appear to constitute an independent level of suspicion but merely another term for clear indication. Plain suggestion and clear indication appear synonymous with real suspicion.

Lower federal courts employ all three formulations to denote a standard of suspicion, intermediate between mere subjective suspicion and probable cause. Given the fact that they simply restate the reasonable suspicion standard enunciated in *Terry*, however, they are not true intermediate standards. The Supreme Court adopted this view in *de Hernandez*.

254. *See, e.g.*, Slinas v. Breier, 695 F.2d 1073, 1085 (7th Cir. 1982) (body-cavity searches, predicated upon probable cause, are reasonable under the fourth amendment); Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1271-73 (7th Cir. 1983) (implying, but not holding, that probable cause is the applicable standard of suspicion necessary to strip-search misdemeanor arrestees).

fourth amendment is the proper standard because of the quality of the interests to be protected and the extent those interests are invaded by strip- and body-cavity searches.[255] Intimate body parts are not like purses,[256] pockets,[257] brief cases,[258] and luggage.[259] They are not adjuncts of the person. They are the person. These intimate areas are part and parcel of both a person's physical and mental being. The quality of the areas searched during strip- and body-cavity searches are *sui generis* for purposes of the fourth amendment. Indeed, for purposes of fourth amendment analysis, we argue that the privacy associated with these areas is even more profound than is the privacy associated with a person's dwelling. Consequently, any search of these intimate areas requires at least the same fourth amendment protection accorded to dwellings—only searches pursuant to a warrant based upon probable cause.[260]

Additionally, a warrant must be required because of the extent of the invasion entailed by strip- and body-cavity searches. These searches reach beyond personal accouterments, beyond one's outer physical presence, beyond clothing, beyond skin. They invade in the same manner as the surgeon's scalpel would have invaded Rudolph Lee.[261] If the quality of the areas searched is not sufficient to mandate a *per se* rule requiring a warrant predicated upon probable cause, the extent of the invasion is.

This requirement will not diminish the governmental interest in preventing the flow of illicit drugs. Of course, the governmental interest is valid. So, too, are the interests in personal dignity and privacy[262] implicated by strip- and body-cavity searches.

The quality of these interests and the extent of their invasion by both visual and manual inspections elevates them to equal, if not greater status vis-á-vis the interests of the government. Because the interests implicated by strip- and body-cavity searches are *sui generis* for fourth amendment purposes, a warrant based upon probable cause is the absolute minimum requirement for reasonableness. Certainly, the Supreme Court's recurrent

255. We argue that a strip-search usually eventuates in either a body-cavity or an x-ray search. The principal reason for this progression is that a strip-search is unreliable in detecting the presence of illicit drugs within the body. *See supra* notes 229-34. *See also* Bell v. Wolfish, 441 U.S. 520, 578 (1979) (Marshall, J., dissenting). Unless law enforcement officers visually or manually discern a lubricant, or unless they see or feel a portion of a balloon, condom, pellet, or capsule protruding from the rectal or vaginal canals, a strip-search will be negative regardless of whether or not the individual has illicit drugs concealed internally. Because a strip-search may be negative despite the presence of drugs, law enforcement officers naturally seek a method of search that will serve as a reliable indicator of the presence of foreign objects within the body. Body-cavity and x-ray searches are such reilable methods.

256. *See, e.g.*, United States v. Burnett, 698 F.2d 1038, 1048 (9th Cir. 1983) (purse); United States v. Marchand, 564 F.2d 983, 991 (2d Cir. 1977) (wallet), *cert. denied*, 434 U.S. 1015 (1978).

257. *See, e.g.*, Ybarra v. Illinois, 444 U.S. 85, 91-92 (1979).

258. *See, e.g.*, United States v. Presler, 610 F.2d 1206, 1212-13 (4th Cir. 1979).

259. *See, e.g.*, United States v. Place, 462 U.S. 696, 701, 710 (1983).

260. This position reflects the general rule of search and seizure law. *See supra* notes 51-75 and accompanying text. The general rule is qualified by the presence of exigent circumstances. Where an immediate law enforcement response is required, law enforcement officers may dispense with the warrant requirement but not the probable cause requirement. *See supra* note 58. It is our view that at least the same rule and exception should apply to intimate areas of the body where fourth amendment interests of dignity and privacy are present.

261. Winston v. Lee, 470 U.S. at 753, 765-66 (1985).

262. *See supra* notes 247-49.

concern that law enforcement personnel acting independently will not secure fourth amendment interests[263] is even more compelling given the *sui generis* nature of the interests implicated by strip- and body-cavity searches.

It is possible that while fourth amendment interests are *sui generis*, so too are the competing interests of the government. Therefore, the government should not be obliged to establish probable cause before a magistrate or judge prior to conducting intrusive bodily searches. Instead, the applicable standard should be the reasonable suspicion standard approved in *de Hernandez*.[264]

This argument has a superficial plausibility given the *de Hernandez* decision. Since lengthy detentions are permissible without advance judicial review of the reasonableness of suspicion, so should the next level of intrusive search: strip- and body-cavity searches. Dicta in *de Hernandez* makes this argument even more credible. The Court suggested that internal drug smugglers bring the complained of governmental actions upon themselves by choosing this particular method of smuggling.[265] Thus, given the magnitude of the governmental interest and the individual's free choice, it can be concluded that a person subjected to a lengthy detention and intrusive bodily search deserves only that protection accorded by the reasonable suspicion standard.

If the nature of the interests implicated by strip- and body-cavity searches and the extent they are invaded do not sufficiently rebut this argument, the fact that most travelers crossing the border are not concealing illicit drugs within their bodies, or any place else, should be sufficient.[266] Furthermore, law enforcement personnel find that the vast majority—eighty per cent or more—of travelers characterized by features believed to suggest internal drug smuggling[267] are not concealing drugs.[268]

These realities, unrefuted by the government, militate against the extension of the reasonable suspicion standard to strip- and body-cavity searches. But even if reasonable suspicion, instead of probable cause,[269] becomes the applicable standard of reasonableness, prior judicial scrutiny should be an absolute prerequisite. It is important to recall that the suspect to be

263. *See supra* notes 68, 216, and accompanying text.

264. 105 S. Ct. at 3311. *See supra* note 65 for an analysis of this theory of reasonableness.

265. *de Hernandez*, 105 S. Ct. at 3312. *See also supra* note 135. Justice Stevens, concurring in *de Hernandez*, took issue with the majority's suggestion that the use of body cavities to smuggle drugs justified the customs agents' treatment of de Hernandez. "The rule announced in this case cannot . . . be supported on the ground that respondent's prolonged and humiliating detention 'resulted solely from the method by which she chose to smuggle illicit drugs into this country.' " *de Hernandez*, 105 S. Ct. at 3313 (Stevens, J., concurring). *See also* United States v. Sharpe, 470 U.S. at 675 (1985) where the Court noted that "[t]he delay in this case was attributable almost entirely to the evasive actions of Savage, who sought to elude police as Sharpe moved his Pontiac to the side of the road. Except for Savage's maneuvers, only a short and certainly permissible pre-arrest detention would likely have taken place."

266. *See supra* notes 181, 210.

267. *See supra* notes 181-82 and accompanying text for an analysis of the error rate associated with use of polarity and litmus factors as indicators of reasonable suspicion of internal drug smuggling.

268. *See supra* notes 181, 210.

269. *See supra* note 93 for the distinction between probable cause and reasonable suspicion as standards of fourth amendment reasonableness.

searched is in detention[270] and cannot flee while a court order is sought.[271]

The cost of seeking and securing prior judicial approval, therefore, is not the 'escape' of the culpable. Moreover, even an unmonitored bowel movement during the time taken to secure the court order is unlikely to be of significance if the detainee is an alimentary tract drug smuggler. Such individuals usually have between eighty and 150 drug-filled packets within their bodies.[272] Natural evacuation of these objects normally requires several days.[273] Consequently, there is little likelihood that evidence will be lost while judicial authorization is sought. The cost to the governmental interest is merely a modest delay in conducting a constitutionally proper intrusion. Only the refusal of law enforcement personnel to appreciate the nature of the interests routinely invaded by these searches, the extent of these invasions, and that innocent travelers receive the same treatment as guilty travelers, explains their resistance to prior judicial authorization.

The reasonable suspicion standard of the fourth amendment, as currently utilized, is an unacceptable standard because it permits intrusive bodily searches merely on an officer's belief that illicit drugs are being concealed within the body.[274] Under this standard, a large number of innocent travelers are subject to strip- and body-cavity searches. While innocent travelers would continue to be subject to intrusive bodily searches under a probable cause standard, the number would be fewer. Surely the government is interested in minimizing its invasions of the rights of nonculpable travelers, in addition to maximizing the number of drug smuggling travelers searched.[275] Whichever standard is adopted, the fourth amendment at a minimum requires an independent judicial officer apply the standard. Furthermore, in applying either the probable cause or the reasonable suspicion standard, it is vital that judicial review not become perfunctory. Whether magistrate or

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270. The detention, of course, is considired constitutional, absent special circumstances present in a particular case, under the authority of *de Hernandez*. 105 S. Ct. at 3312-13.

271. *See supra* note 116 for reference to the statutory authority for issuances of court orders. Cases cited at *supra* note 32 concerned intrusive bodily searches conducted pursuant to a court order.

272. *de Hernandez*, 105 S. Ct. at 3308. *See also supra* notes 140-75 for a discussion of the factors used by agents to creat a suspicion.

273. De Hernandez evacuated 88 cocaine-filled balloons over four days. *de Hernandez*, 105 S. Ct. at 3308. *See, e.g.*, United States v. Caicedo-Guarnizo, 723 F.2d 1420, 1422 (9th Cir. 1984) (85 cocaine-filled balloons excreted over three days); United States v. Castrillon, 716 F.2d 1279, 1281 (9th Cir. 1983) (83 cocaine-filled balloons excreted over two days); United States v. Couch, 688 F.2d 599, 601 (9th Cir. 1982) (36 capsules of cocaine excreted over several days), *cert. denied*, 459 U.S. 857 (1982).

Monitored urination and defecation while a warrant or court order is being sought may be necessary where the detainee is a female traveler suspected of concealing drugs in her vagina, or female or male traveler suspected of secreting drugs in the rectum. In such cases, one unmonitored trip to a toilet would provide enough opportunity to dispose of any drugs.

274. *See supra* note 95.

275. Supporters of the reasonable suspicion standard argue that it maximizes the apprehension of internal drug smugglers. This substantially furthers the legitimate and significant governmental interest of stemming the flow of drugs into the country. Even under this standard, however, an undetermined number of internal drug smugglers continue to cross the border undetected. In fact, anything less than detention and an intrusive bodily search of every traveler permits culpable travelers to complete their illicit transactions. This may give pause to those who advocate the reasonable suspicion standard as the most effective approach to protecting the governmental interest. The cost of unprecedented, massive invasions of personal dignity and privacy still will not prevent successful internal drug smuggling.

judge, these independent officers are the sole guardians of individual rights at this stage of processing. This process requires time to question, to clarify, to evaluate. Thus, as a constitutional minimum, each strip- or body-cavity search should proceed only upon prior judicial authorization with each proposed search accorded vigorous and exacting examination.

B. X-ray Searches: An Alternative to Intrusive Bodily Searches

The physically and psychologically invasive nature of strip- and body-cavity searches is readily acknowledged.[276] These searches expose the most intimate areas of an individual's physical being to the eyes and hands of strangers. Moreover, because these strangers are law enforcement agents, the natural resistance to these searches is countered with the authorized application of force.[277] This process is particularly disturbing to a legal system that strives to protect the values of personal dignity and privacy. This concern has prompted judicial consideration of the x-ray as an alternative method of searching travelers reasonably suspected of concealing drugs internally.[278] Courts have noted that an x-ray search does not expose sensitive bodily areas to visual or manual intrusion.[279] Indeed, an x-ray search can be performed without any physical contact.[280] While the element of force remains, the exertion of force is directed to completing an intrusion that is less of an affront[281] to the individual's dignity and privacy.

The magistrate who issued the court order authorizing the searches of de Hernandez may have been operating on the basis of this distinction.[282] The magistrate's order provided first for an x-ray search,[283] and if this revealed the presence of foreign objects, the order provided for a body-cavity search.[284]

It is difficult to disagree with the position that x-ray searches for suspected internally concealed illicit drugs are less invasive of personal dignity and privacy. This is true for guilty as well as innocent travelers. Despite the

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276. *See supra* notes 247-49 and accompanying text.

277. The court order authorizing the x-ray and body-cavity searches of de Hernandez specifically ordered the application of force if she resisted the searches. *See supra* note 234 for the complete text of the court order.

278. *See* United States v. Vega-Barvo, 729 F.2d 1341, 1348 (11th Cir. 1984); United States v. Ek, 676 F.2d 379, 382 (9th Cir. 1982).

279. *See* United States v. Pino, 729 F.2d 1357, 1359 (11th Cir. 1984); *Vega-Barvo*, 729 F.2d at 1348.

280. The scope of an x-ray search appears limited to the stomach or abdominal area. United States v. Henao Castano, 729 F.2d 1364, 1366 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 3552 (1984); United States v. Castaneda-Castaneda, 729 F.2d at 1360, 1363 (11th Cir. 1984); *Pino*, 729 F.2d at 1359; United States v. D'Allerman, 712 F.2d 100, 103 (5th Cir. 1983), *cert. denied*, 464 U.S. 899 (1983).

281. *Pino*, 729 F.2d at 1359; *Vega-Barvo*, 729 F.2d at 1348-49; United States v. Mejia, 720 F.2d 1378, 1382 (5th Cir. 1983); United States v. Shreve, 697 F.2d 873, 874 (9th Cir. 1983); United States v. Ek, 676 F.2d 379, 382 (9th Cir. 1982).

282. See text of the court order at *supra* note 234.

283. The court order required that medical personnel administer a pregnancy test to de Hernandez. De Hernandez had misrepresented that she was pregnant.

284. The searches of de Hernandez did not conform to the court order. A physician performed the body-cavity search first. Because it was positive, an x-ray search was unnecessary. *See supra* text accompanying note 235.

potential hazards associated with irradiation,[285] it is not feasible to claim one x-ray search is so dangerous as to outweigh its use in furthering the government's interest of preventing the flow of drugs into this country. Certainly, those travelers choosing to utilize their inner bodies to smuggle drugs also choose to accept the risk of a judicially approved search.[286] Thus, the use of irradiation to search travelers reasonably suspected of internally concealing drugs achieves a workable compromise between the individual's fourth amendment interests and the legitimate interests of society. As with all nonexigent[287] searches of a person not under lawful arrest, however, the fourth amendment mandates prior judicial review and approval.[288]

It is preferable that x-ray searches, like all searches, be authorized by warrant upon a showing of probable cause. As noted, a showing of probable cause increases the likelihood that the person searched is a person concealing drugs within his body and decreases the likelihood that the person is an innocent traveler.[289] Nevertheless, in the event that Congress or the Court establishes reasonable suspicion as the standard of reasonableness necessary for x-ray searches, prior judicial evaluation and approval in the form of a court order should be a *per se* requirement.

Strip-, body-cavity, and x-ray searches at the border to stem alimentary tract and body-cavity drug smuggling may be reasonable under the fourth amendment. Ultimately, they may be deemed reasonable based upon a standard of reasonable suspicion rather than probable cause. Nonetheless, only an independent judicial officer should make that determination. Searches conducted in the absence of a court order should be *per se* unconstitutional. Without the restraining influence of an independent judiciary, the interests of personal dignity and privacy will disappear, swallowed by legitimate governmental interests gone awry.

Our constitutional system does not minimize the importance of those legitimate national or societal interests asserted by the government. But, our system is predicated on a decision that governmental interests cannot be forwarded at the expense of individual interests. These individual interests are

285. Courts are manifestly concerned about the dangers associated with irradiation, regardless of purpose. *See de Hernandez*, 105 S. Ct. at 3321-22 (Brennan and Marshall, JJ., dissenting); *Vega-Barvo*, 729 F.2d at 1349; *Ek*, 676 F.2d at 382.

For a general discussion of the human health risks of x-rays, see H. ANDREWS, RADIATION BIOPHYSICS 233-53, 291-92 (2d ed. 1974); J. GOFMAN, RADIATION AND HUMAN HEALTH 619-41 (1981); C. PANATI & M. HUDSON, THE SILENT INTRUDER: SURVIVING THE RADIATION AGE 3-53 (1981); D. PIZZARELLO & R. WITCOFSKI, MEDICAL RADIATION BIOLOGY 75-88 (1982).

286. Justice Stevens, concurring in *de Hernandez*, seems to argue that internal drug smugglers accept the risk of x-ray searches:

> The prolonged detention of respondent was, however, justified by a different choice that respondent made; she withdrew her consent to an x-ray examination that would have easily determined whether the reasonable suspicion that she was concealing contraband was justified. I believe that [c]ustoms agents may require that a non-pregnant person reasonably suspected of this kind of smuggling submit to an x-ray examination as an incident to a border search.

de Hernandez, 105 S. Ct. at 3313.

287. *See supra* notes 58, 78.

288. *See supra* notes 54-55, 72-75, 93. For cases upholding searches of the person subsequent to lawful arrest, *see, e.g.*, United States v. Robinson, 414 U.S. 218, 235-36 (1973); Chimel v. California, 395 U.S. 752, 762-63, 766 (1969); Weeks v. United States, 232 U.S. 383, 392 (1914).

289. *See supra* note 93.

recognized as essential to a free people, to an educated people, to a creative people, and to a people able to govern by free choice. Yet, history demonstrates that these personal interests, without a champion, are no match for the assertion of governmental interests. One champion is the fourth amendment whose appropriate role would be reinforced by a *per se* requirement of prior judicial authorization for lengthy detentions and intrusive bodily searches at the border.

V. CONCLUSION: SUGGESTED SOLUTIONS

Many law enforcement officials and their supporters defend lengthy detentions at the border. They believe the resultant erosion of the fourth amendment values of personal dignity and privacy is unavoidable because no other approach exists that will adequately protect the border.[290] It is argued that travelers reasonably and correctly suspected of internal drug smuggling would enter the country and complete their illegal missions.[291]

The government argues that it may be necessary to detain, perhaps indeterminately, the innocent in order to effectively thwart the guilty. The government further contends that the only alternative available to stem the flow of illicit drugs, a significant government interest, requires a technique of dragnet-like detections. Moreover, while arguing that such lengthy, indefinite detentions are the only alternative, the government asserts that the actual length of these detentions is not of its making. For those concealing drugs within their bodies, the length of detention is a consequence of their choices: first, to smuggle drugs; second, to employ the interior of their bodies to do so.[292] For those not smuggling drugs internally or in any other manner, the detention is brief once law enforcement officers verify their innocence through further assaults on the detainee's dignity and privacy.[293] Under this reasoning, detention, particularly of innocent travelers, is lengthened as a consequence of their choice to retain some measure of personal dignity and privacy. Given these decisions and because no other alternative is available, the supporters of such detentions conclude that the measures approved in *de Hernandez* are necessary, reasonable, and not of the government's making.

We disagree and suggest viable solutions to the serious problem of internal drug smuggling. These proposals are relatively nonpunitive and certainly are less extreme intrusions into the interests of personal dignity and privacy. These proposals acknowledge the important governmental interest in interdicting internally concealed drug smuggling. They also shield innocent travelers from unwarranted invasions of their rights, acknowledging that even the guilty have dignity and privacy interests meriting respect and protection.

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290. *de Hernandez*, 105 S. Ct. at 3309-3312.
291. *Id.*
292. *Id.*
293. In *de Hernandez*, an x-ray search was the alternative available to shorten her detention. *Id.* A detainee can consent to other alternative assaults on personal dignity and privacy to shorten a detention, e.g., induced vomiting; induced or "voluntary" defecation; or body-cavity search. *See supra* text accompanying notes 241-47.

Foreign travelers reasonably suspected of internally concealing illicit drugs could be detained and returned to their country of origin.[294] Law enforcement officials would detain these travelers only for the period of time required to arrange the return trip, not "the period of time necessary to either verify or dispel . . . suspicion."[295]

The detention procedure would recognize and preserve the dignity and privacy of detained foreign travelers. Such detentions would not be *incommunicado*.[296] Law enforcement officials would not monitor bowel movements and conduct intrusive bodily searches.[297] Officers would conduct any required surveillance while travelers await departure in a modified traveler's lounge.[298] Although not free to leave, the lounge would afford the detainees dignity and privacy pending departure.

Detention and return is appropriate since foreign nationals, whether or not concealing illicit drugs, have no right to enter the United States.[299] Reasonable suspicion of internal concealment of illicit drugs is sufficient to seize and return them to their country of origin. Under no circumstances is the government required to allow foreign nationals to enter, even where immigration documentation is in order.[300] Nonetheless, just because the government may refuse entry does not justify extraordinary invasions of the fourth amendment interests of innocent as well as guilty travelers through detentions, which may include monitored bowel movements, intrusive bodily searches, and prolonged periods lasting as long as necessary to "verify or dispel"[301] the reasonable suspicion of law enforcement personnel. True, under our approach, foreign-national travelers will be detained, but the length of detention will be a function solely of the time required to return detainees to their country of origin and the detention will not be used as an opportunity to undertake additional invasions of personal dignity and privacy.

This alternative approach keeps internally concealed illicit drugs out of the country. The sole cost of this approach is refusing entry to foreign-national travelers who are not engaged in internal drug smuggling. The benefits are significant. First, the approach vindicates national interests with decorum. Second, the approach subjects foreign-national travelers to the

294. *de Hernandez*, 105 S. Ct. at 3323 (Brennan and Marshall, JJ., dissenting). *See supra* note 22 for the definition of country of origin.

295. *de Hernandez*, 105 S. Ct. at 3313.

296. As defined by the detention of de Hernandez. *Id.* at 3312.

297. These invasions of personal dignity and privacy are unnecessary because law enforcement agents will not allow the foreign-national detainee to enter the country. Under this proposal, whether or not the detainee is internally concealing illicit drugs is irrelevant since the detainee cannot deliver the drugs to an American destination. The goal of interdicting the flow of illicit drugs is attained by detaining and returning the suspect.

It is true that, if the traveler is concealing drugs, law enforcement agents will neither seize the drugs nor prosecute the traveler. But, given the nature and extent of the interests implicated by these actions, the lost opportunity to prosecute is a minimal cost.

298. Law enforcement agents would hold foreign-national travelers who are detained pending return to their country of origin under guard in separate and secure detention areas until the return flight is ready for departure. At that time, the agents would escort the traveler to the plane and place them on board the plane. The guard would remain posted until the plane departs the boarding area.

299. *See supra* notes 99-109.

300. *See supra* notes 99-109.

301. *de Hernandez*, 105 S. Ct. at 3313.

least intrusive means available to secure a substantial governmental interest. This benefit is of particular importance to foreign-national travelers innocent of wrongdoing.[302]

Travelers who are United States' citizens or resident aliens pose a different problem. Such travelers have the right to re-enter the country in addition to their right to personal dignity and privacy. For those travelers reasonably suspected of concealing illicit drugs within their bodies, detention may be the only alternative to release into the United States, which would allow those correctly suspected to successfully conclude their illicit activities. These detentions can be implemented, however, with procedural safeguards.

It is suggested that citizen and resident alien detainees be given a *Miranda*-type warning[303] (the "Hernandez" warning) stating that customs agents can detain them until physiological processes reveal the presence or absence of illicit drugs or until they consent to either a body-cavity or x-ray search. Under this warning, agents would tell detainees the grounds relied upon for the asserted reasonable suspicion that justifies the detention. It is further suggested that a magistrate, at the earliest opportunity, determine the appropriateness of the detentions of citizen and resident alien travelers.[304] The magistrate would issue a court order authorizing the detention on the basis of his finding of reasonable suspicion.[305] Where a detention is ordered, agents should be required to allow detainees the opportunity to communicate the fact of their detention to a relative, friend or associate. Thus, potentially lengthy, indefinite, *incommunicado* detentions would be reviewed and approved by an independent judicial officer.

An important caveat accompanies these alternatives. Regardless of the status of travelers *qua* detainees—foreign national, citizen, resident alien—under no circumstances would strip-, body-cavity, or x-ray searches be authorized by a magistrate, since alternatives to these invasive searches are available. Foreign nationals are denied entry and returned to their country of origin.[306] Citizen and resident aliens are detained with procedural safeguards of immediate judicial evaluation and approval.[307]

It is to be noted that customs agents may ask any detainee, regardless of status, to consent to strip-, body-cavity, or x-ray searches in order to (a) shorten detention in the case of a citizen or resident alien detainee or, (b) secure entry in the case of a foreign national where immigration documentation is in order. Thus, consensual intrusive bodily searches are acceptable.

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302. *See supra* notes 181, 210 and accompanying text.

303. Miranda v. Arizona, 384 U.S. 436 (1966). The Miranda warning consists of several specific elements: a) the right to remain silent; b) an "explanation that anything said can and will be used against the individual in court;" c) the right to have an attorney present during the course of interrogation; and d) an explanation indicating that, if the individual is unable to afford an attorney, one will be appointed for him. *Id.* at 468-73.

304. At the border and its functional equivalents, magistrates should be available on a 24-hour basis.

305. We prefer a warrant-based-upon-probable cause standard of fourth amendment reasonableness. *See supra* note 93. For the moment, *de Hernandez* precludes application of this standard.

306. *See supra* notes 293, 296-97 and accompanying text.

307. *See supra* notes 304-06.

These alternative methods[308] afford protection to innocent travelers *qua* suspects who, under *de Hernandez*, are treated in the same manner as culpable suspects. This is particularly significant because the application of the less stringent reasonable suspicion standard results in the detention of more innocent than guilty travelers.[309] These alternatives minimize the intrusion into the fourth amendment interests of personal dignity and privacy while furthering legitimate and important governmental interests.

The appropriate balance between conflicting individual interests and societal interests established by the fourth amendment need not be sacrificed to the "war against drugs." These proposed solutions offer viable channels to solve the internal drug smuggling problem without abandoning our historic and philosophic commitment to the individual.

308. Implementation of these alternatives makes it necessary to decide what standard of reasonableness is required for intrusive bodily searches at the border, the principal focus of *supra* notes 228-88 and accompanying text (Part IV). Detention and return, in the case of foreign-national travelers, and detention (with safeguards) until suspicion is verified or dispelled, in the case of citizen and resident-alien travelers, serves the governmental purpose while obviating the need to compel bodily-intrusive searches. Avoiding such compulsion where feasible, as here, is the *sine qua non* of a free and open society.

309. *See supra* notes 181-82, 210.