Comments

BORDER SEARCHES — A PROSTITUTION OF THE FOURTH AMENDMENT

GEORGE A. REMPE III

The protection afforded by the fourth amendment against unreasonable searches and seizures is two pronged.[1] The first prong deals with whether it is reasonable to make a search in the first instance. This reasonableness has traditionally included the requirement of probable cause.[2] Although probable cause is a difficult standard to define,[3] it must be established from the facts and circumstances of a particular case. The second prong deals with the reasonableness of the actual physical search, notwithstanding the existence of probable cause.[4] Both of these standards must be met for a search and seizure to be valid under the fourth amendment.[5]

Border searches[6] are considered an exception to the fourth amend-

---

[1] *See* Note, *Search and Seizure at the Border — The Border Search,* 21 RUTGERS L. REV. 513, 515 (1967).

[2] Although the Supreme Court has not yet ruled on a border search case, it has set out the requirements necessary for a constitutional search and seizure under the fourth amendment. As the Court has interpreted the Constitution, a reasonable search, either with or without a warrant, must be based upon probable cause. Wong Sun v. United States, 371 U.S. 471 (1963).

[3] 'The substance of all definitions' of probable cause 'is a ground for the belief of guilt'

> . . . [I]t has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their [the officers] knowledge, and of which they had reasonably trustworthy information sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

[4] A search which is reasonable at its inception may violate the fourth amendment by virtue of its intolerable intensity and scope. Kremen v. United States, 353 U.S. 346 (1957).

[5] Schmerber v. California, 384 U.S. 757 (1966). *But see* Terry v. Ohio, 88 S. Ct. 1868 (1968) (frisk for and seizure of a weapon upheld on less than probable cause); *cf.* Camara v. Municipal Court, 387 U.S. 523 (1967).

Although the Supreme Court upheld the conviction in *Terry,* its departure from the need for probable cause is distinguishable from other search situations — particularly an intrusive body search — aimed at uncovering contraband. The Court made it clear that the sole justification for the search was "the protection of the investigating officer and others nearby," and that the search must be confined "to an intrusion reasonably designed to discover" weapons that could be used for an "assault of the police officer." The Court further added that even if there was a reasonable fear of assault, the officer was confined to a "carefully limited search of the outer clothing." 88 S. Ct. at 1884-85.

[6] Border searches are authorized by the following statutes:

19 U.S.C. § 482 (1964):

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

ment.[7] Although it is generally stated that border searches are an exception only to the probable cause requirement,[8] as opposed to the entire fourth amendment, it is submitted that ignoring the probable cause mandate eviscerates the fourth amendment and renders it ineffective as a constitutional protection against unreasonable searches and seizures.[9]

FOURTH AMENDMENT PARADOX

The reason border searches are an anomaly to the fourth amendment is that lower federal courts have prostituted the requirement of probable cause in the name of reasonableness.[10] Through unique manip-

---

by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise.

19 U.S.C. § 1582 (1964):

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

19 U.S.C. § 1581(a) (1964):

> Any officers of the customs may at any time go on board of any vessel or vehicle at any place in the United States . . . or at any other authorized place, without as well as within his district, . . . and examine, inspect, and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

For historical justification of border searches and applicable statutes *see* Barnett, *A Report On Search And Seizure At The Border*, 1 AM. CRIM. L.Q. 36 (1963).

[7] U.S. CONST. amend. IV:

> 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 Warrant shall issue, but upon probable cause supported by Oath or Affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

[8] Searches at the border are authorized and conducted on the basis of suspicion. Suspicion is not probable cause notwithstanding efforts made by some to correlate suspicion under the facts and circumstances at the border with probable cause under the fourth amendment.

> No question of whether there is probable cause for a search exists when the search is incidental to the crossing of an international border, for there is reason and probable cause to search every person entering the United States from a foreign country, by reason of such entry alone. Witt v. United States, 287 F.2d 389, 391 (9th Cir. 1961).

This statement is merely a legal fiction, a rephrasing of the doctrine "that it is permissible to make searches at the border" on mere suspicion; in reality "customs officials make searches which are clearly not based on probable cause." Comment, *Intrusive Border Searches — Is Judicial Control Desirable,* 115 U .PA. L. REV. 276, 279 (1966).

[9] Notwithstanding the Supreme Court's circumscription of traditional fourth amendment standards in *Terry,* when a search is conducted for the purpose of detecting contraband — with no fear of physical assault — there must be a showing of probable cause for a constitutional search under the fourth amendment, particularly when the search proceeds beyond the outer surface of one's clothing. *See* Henry v. United States, 361 U.S. 98 (1959). *See also* Terry v. Ohio, 88 S. Ct. 1868, 1887 (1968) (dissenting opinion).

[10] Courts have consistently stated that the fourth amendment only prohibits unreasonable searches and seizures. Border searches constitute a class separate and apart from ordinary searches and their validity is measured by different criteria.

ulation of this word, the courts have managed to make a conceptual understanding of the whole area almost impossible.

The recent cases[11] of the Ninth Circuit, *Rivas v. United States,*[12] *Henderson v. United States*[13] and *Huguez v. United States,*[14] along with earlier cases, principally *Blackford v. United States,*[15] demonstrate the paradox in approaching border searches from fourth amendment standards. The court has stated unequivocally from the beginning that border searches are unique,[16] and probable cause to search is not required;[17]

While they are not exempt from the constitutional test of reasonableness, probable cause is not required. Morales v. United States, 378 F.2d 187 (5th Cir. 1967). A search that would be unreasonable within the meaning of the fourth amendment, if conducted by police officers in an ordinary case, may be a reasonable search if conducted by customs officials in lawful pursuit of unlawful imports. Alexander v. United States, 362 F.2d 379, 381 (9th Cir.), *cert. denied,* 385 U.S. 977 (1966). *But cf.* Henry v. United States, 361 U.S. 98 (1959). The fourth amendment only prohibits unreasonable searches and seizures; but a search made without probable cause is unreasonable. *Id.*

[11] This section is limited to body cavity searches and the facts of the cases examined. The reason for the stress on body cavity searches at this point is because of the seriousness of these invasions and because the unsatisfactory approach by the courts has rendered the fourth amendment meaningless as a constitutional protection. For a general review of other border search situations, including further discussion of intrusive body searches, see pp. 464-67, 470-72 *infra.*

[12] 368 F.2d 703 (9th Cir. 1966), *cert. denied,* 386 U.S. 945 (1967). Rivas crossed the border and presented a registration certificate showing he was a previously convicted and registered user of narcotics. When he presented this certificate to the customs inspector, he appeared nervous. The customs inspector also noticed what he believed to be fresh needle marks. A second agent made a personal search of Rivas and when he refused to spread his buttocks cheeks for inspection, the agent concluded that Rivas might be concealing something in his rectum. The suspect was then taken to a doctor's office. At the doctor's office Rivas consented to an examination of his arms and eyes. As a result of this test the doctor determined that Rivas was under the influence of drugs. Due to this conclusion and the fact Rivas had not consented to the anal examination by the agent, the doctor was requested to make a rectal search. When Rivas refused to consent and resisted, *the customs officers arrested* him for *impeding* a federal officer in the performance of his duty. Physical force was then used to conduct the examination. The rectal probe was performed in the usual medical manner and contraband was found.

[13] 390 F.2d 805 (9th Cir. 1967). Henderson crossed the border in a car driven by one Banks. The customs people had no prior information concerning the car or the riders. Neither person was a known user of narcotics nor possessed needle marks, and nothing was said or done to arouse suspicion. The initial strip search was performed because of an incorrect recollection that Henderson had been caught previously with contraband. During the strip search an official demanded that Henderson bend over and, with her hands, pull her buttocks apart and up to permit inspection of her vagina. Henderson did not cooperate and it was concluded that there was something concealed in her vagina. Because of this *further suspicious action,* Henderson was sent to a doctor and heroin was found.

[14] No. 21,518 (9th Cir. Sept. 30, 1968).

[15] 247 F.2d 745 (9th Cir. 1967), *cert. denied,* 356 U.S. 914 (1958). This case involved the use of a rectal probe after an admission by the defendant, corroborated by other evidence (*e.g.,* needle marks, previous narcotics conviction, greasy substance on the rectum), that he had concealed heroin in his rectum. The court held that the search was reasonable because the officers used only slight force, took thorough medical precautions and had precise knowledge "of what and how much was where." *Id.* at 753.

[16] *See* Taylor v. United States, 352 F.2d 328 (9th Cir. 1965); Witt v. United States, 287 F.2d 389 (9th Cir.), *cert. denied,* 366 U.S. 950 (1961).

[17] *See* King v. United States, 348 F.2d 814 (9th Cir. 1965); Bible v. United States, 314 F.2d 106 (9th Cir.), *cert. denied,* 375 U.S. 862 (1963); Denton v. United States, 310 F.2d 129 (9th Cir. 1962).

but then it has said these searches are still subject to the fourth amendment requirement of overall reasonableness.[18] In *Blackford* it was implied that border searches, even strip searches, may be initiated on mere or no suspicion.[19] In *Rivas* the court was concerned with the ultimate question — was the search reasonable under the circumstances? In answer, the "clear indication" test was adopted.[20] This test, as applied in *Rivas,* was an after-the-fact determination which looked to all the events, including the initial detention, the strip search, and finally the anal probe. Each step leading to the anal probe was examined and weighed to determine whether there was a "clear indication" that evidence would be found in the defendant's rectum. However, because of the border search exception to probable cause, it did not matter if the intermediate steps logically justified a further step. Conjecturely, none of the factors[21] contributing to overall reasonableness, standing alone, would have justified the anal probe;[22] but considered together, the court decided that the ultimate search was not unreasonable.[23]

The *Rivas* case may have been decided correctly in abstract terms of overall reasonableness, but was not correctly decided under concrete fourth amendment standards where the initial strip search also must

---

[18] *See* Blefare v. United States, 362 F.2d 870 (9th Cir. 1966).

[19] 247 F.2d 745 (9th Cir. 1957), *cert. denied,* 356 U.S. 914 (1958).

[20] An honest 'plain indication' that a search involving an intrusion beyond the body's surface is justified cannot rest on the *mere chance* that desired evidence may be obtained. . . . There must exist facts creating a clear indication, or plain suggestion of the smuggling. Nor need those facts reach the dignity of nor be the equivalent of 'probable cause' necessary for an arrest and search at a place other than a border. 368 F.2d at 710. (emphasis original).

[21] The fact Rivas was a registered narcotics user, appeared nervous, and displayed needle marks on his arm may have been justification for a further investigation and *possibly* a strip search, including a casual examination of the naked body. Once this was accomplished and nothing was found, *e.g.,* vasoline in the outer area of the rectum, the investigation should have ended. It appears, however, that because the agent found nothing in the suspect's clothing or on the outer skin, coupled with Rivas's refusal to spread his buttocks cheeks for visual inspection, the only *logical* conclusion was that something must be inside. Query, is this sound reasoning, even for a customs agent, and would these facts constitute probable cause for either an arrest for possession of narcotics, or an intrusive body search for such by police in the United States interior?

[22] According to the court, there was, at the time of the rectal probe, a "clear indication" that evidence would be found. And while it is true that contraband was found in Rivas' rectum, it might be asked what would have happened had it not been?

Assume nothing was found and Rivas was then requested to drink an emetic, which was refused. Would the pyramiding effect of the previous facts along with his refusal constitute a "clear indication" that evidence would be found by pumping his stomach?

[23] The court in finding the rectal probe to be reasonable stated:

We believe a previously convicted and registered user of narcotics . . . , coming across the border under the influence of narcotics [not proven to be true until a later *visual* examination by the doctor], . . . disclosing . . . 'recent' needle marks . . . who acts 'in an extremely nervous manner' may be searched, as one reasonably portraying a 'clear indication' he may be smuggling contraband. 368 F.2d at 710.

be reasonable — based upon probable cause.[24] The fact that the defendant presented his narcotic registration certificate[25] and appeared nervous[26] certainly would not be probable cause for a strip search that included an examination of his rectum. The certificate was hardly cause[27] to make a *reasonable man* think Rivas was carrying contraband in his rectum. It is submitted that most people are nervous crossing the border when it is known they may be subjected to a search if they do not meet with the approval of the customs official.

Henderson extended the "clear indication" test further. The court decided that the unrestricted authority to make border searches on mere or no suspicion only applied to searches of vehicles, baggage, and the contents of a person's purse, wallet or pockets.[28] It further stated that if a strip search is to be required, then something more must be shown, that is, "a real suspicion directed specifically to that person."[29] Finally, if there is to be more than a casual examination of the naked body, *e.g.*, the person is required to manually open his body cavity for visual inspection, then there should be at least a "clear indication" or "plain suggestion" that evidence will be found.[30]

The *Henderson* approach, beginning with the strip search, is analytically the same as the fourth amendment with its two pronged requirements for a reasonable search. However, it is not the same in degree. The "real suspicion" necessary for a strip search correlates with probable cause and the "clear indication" test correlates with the reasonableness of the actual physical search — similar to the Supreme Court test for intrusive body searches set out in *Schmerber v. California*.[31] Here

---

[24] *See* Henry v. United States, 361 U.S. 98 (1959); Brinegar v. United States, 338 U.S. 160 (1949). *See also* Aguilar v. Texas, 378 U.S. 108 (1964).

[25] A narcotics addict or convicted offender is required, under 18 U.S.C. § 1407 (1964), to register at the border on entering and leaving the United States.

> The purpose of this statute was to make a classification of persons who were narcotics prone in order that they might be *given suitable attention* at the border when they entered the United States. 368 F.2d at 705 (emphasis added).

[26] The fact the agent also noticed what appeared to be fresh needle marks adds nothing to the justification for a strip search and attempted rectal examination for two reasons. First, under present standards, the nervous manner and narcotics registration supplied sufficient cause for a strip search. Second, the needle marks were evidence that Rivas was using narcotics and not that he was carrying such in his rectum. Notwithstanding that the evidence recovered should have no bearing on the reasonableness of the search, it should be pointed out that it was Percodan pills that were found, not narcotics which are administered by a syringe which would account for needle marks. Query, what if the contraband had been *precious gems*?

[27] A past conviction for a crime does not alone justify a finding of probable cause, but may properly be taken into account. Beck v. Ohio, 379 U.S. 89 (1964).

[28] 390 F.2d at 808.

[29] *Id.*

[30] *Id.*

[31] 384 U.S. 757 (1966). The original "clear indication" test was advanced in *Schmerber*, a non-border search case, which involved a blood test on a person arrested for drunk driving. The arrest was based upon probable cause but the Supreme Court implied that something more was needed for an intrusive body search.

again, however, "real suspicion" does not equal probable cause necessary for an initial search, and the "clear indication" test of the Ninth Circuit does not equal the dignity of *Schmerber*.[32]

Huguez is the most recent Ninth Circuit border search case. The court applied *Rivas, Henderson,* and allegedly *Schmerber* to reach the result that the search was in violation of the fourth amendment.[33] The case is difficult to analyze rationally because of the varying emphasis placed upon the facts by the majority and minority opinions. Both sides go to great lengths to make the facts appear in accord with their conclusions. Aside from this confusion, there are some interesting points to the case. The majority takes a *Henderson-Rivas* approach: for the initial strip search, there must be "real suspicion;" for the anal probe, there must be a "clear indication" that evidence will be found. Applying this approach, the court determined that although there *may have been* the needed "real suspicion"[34] for the strip search, there was not the "clear indication"[35] necessary to justify the anal probe.

> The interest in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search. *Id.* at 769-70.

The Supreme Court went on to add a warning that appears to have been disregarded in intrusive border searches:

> The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid . . . *minor intrusions* into an individual's body under *stringently limited conditions in no way indicates that it permits more substantial* intrusions under other conditions. *Id.* at 772 (emphasis added).

[32] Because of the lack of probable cause in the border search context, it would seem that the court's abortive application of *Schmerber* has a rather sterile effect as an additional constitutional safeguard if *reasonableness* is the only standard for a valid search under the fourth amendment.

> The circuit court asserted that such an indication was required under the rubric of reasonableness that it had previously applied in intrusive border search cases. . . . Thus, the court seems to have assumed that a crossing of the border served as a triggering event for application of a "clear indication" test in the same way that an arrest upon probable cause triggered the test in *Schmerber.* Since there was no underlying finding of any probable cause . . . , the court by "applying" *Schmerber* simply placed a putatively libertarian gloss on the border search doctrine while changing its substance little if at all. Note, *Border Searches and the Fourth Amendment,* 77 YALE L.J. 1007, 1009 (1968).

[33] *Huguez* was also reversed on the grounds that the action taken by the officials and the doctor shocked the conscience in violation of the due process clause of the fifth amendment. The majority, contrary to the dissent felt that excessive force was used and the probe was not performed under medically approved conditions. No. 21,518 at 26.

[34] Using the "real suspicion" test, it appears there was some justification for the strip search. In this case, unlike *Henderson,* the customs agents became suspicious that the defendant was under the influence of narcotics because his eyes appeared to be glassy and pinpointed. *Id.* at 19-20.

[35] Judge Barnes, in dissent, makes it quite clear that he is not particularly pleased with the outcome of the case. He felt there was a "clear indication" and that the conviction should have been upheld. One can not help but feel that the outcome of this case depended solely upon the makeup of the court. Where Judge Barnes has been a member of the court, his view of what is or is not a "reasonable" search

Under present pseudo fourth amendment standards, *Huguez* was decided correctly or incorrectly depending on one's determination of whether or not there was a "clear indication" that evidence would be found. Here, as in *Henderson,* the court attempted to align its approach with the fourth amendment and *Schmerber.* Here again, however, the paradox exists. "Real suspicion" to make the initial strip search is not probable cause, and probable cause to arrest or search must exist for a valid application of the *Schmerber* "clear indication" test. Notwithstanding the same end result, had this not been a border search case, the search clearly would have been in violation of the fourth amendment at the initial stage, and the findings of the anal probe would not have been admitted as "fruits of the poisonous tree."

A Proper Balance

The first section of this comment dealt with the efforts by the lower federal courts to bring the border search within the fourth amendment. Although the courts have established some desperately needed constitutional safeguards, they have been unable to: (1) satisfactorily justify their disregard for probable cause, (2) develop a consistent and logical approach in the area, and (3) provide adequate protection of important constitutional rights. In an effort to correct these faults, two recommendations should be considered. First, if probable cause is to be disregarded, then due process — not the fourth amendment — should be utilized to construct a constitutional framework for this complex area. Second, within this due process framework, there should be some type of judicial control over strip and intrusive body searches.

A. *Due Process — A Homogeneous Approach*

In order for there to be a valid application of the fourth amendment, probable cause must exist. The specific mandate of probable cause goes to the heart of the constitutional protection afforded by that amendment. If probable cause is an unacceptable requirement in border search cases, then it is contended that the current interpretation of the fourth amendment by the lower courts is unacceptable also, and a different approach should be adopted. The suggested approach is

---

has generally been followed. He wrote the opinion in *Rivas,* was absent in *Henderson,* and wrote the dissent in *Huguez. See, e.g.,* Blackford v. United States, 247 F.2d 745 (9th Cir. 1957), *cert. denied,* 356 U.S. 914 (1958).

It appears that Judge Ely was the winner this round but, because of the different interpretations of fact and *possibly law* among the judges, it is difficult to predict the outcome of future contests. Under present conditions, a legal scholar could examine the facts of a particular case, even in light of *Rivas, Henderson* and *Huguez,* but could not even surmise the outcome without first knowing the combination of judges that will comprise the court.

one consistent with due process of law.[36] Due process under the fifth and fourteenth amendments is the key to an understanding of the mystic border search rubric. The reasonableness standard implicit in due process is based upon a balancing of conflicting interests.[37] The balance involved is the public need for and enforcement of customs laws weighed against individual freedom from governmental invasion. The issue to be resolved is how much individual freedom should be sacrificed and under what conditions. In other words is it reasonable or consistent with due process to allow a particular search, and what authority is to determine *reasonableness* under the facts and circumstances?

Balancing of conflicting interests and reasonableness under due process, as opposed to a diluted fourth amendment, are the tools to be used to build the suggested homogeneous approach to border searches.[38]

1. *Identification of Person and Property Admitted into the Country.*

Involved here is the balancing of an individual's right to privacy[39] against the country's right to protect itself from the illegal entrance of persons and contraband. The inconvenience of being required to state one's place of birth and to declare what objects were acquired in the foreign country would seem to be minimal in terms of reasonableness and certainly should be allowed in the public interest.[40] In addition, a cursory search of the vehicle should be allowed incident to the crossing, provided the search is administered in a courteous and non-destructive manner.[41]

---

[36] Due process was the standard in earlier border search cases. The test was whether the search went beyond "civilized standards of decency." The standard was later changed by adding the fourth amendment proscription against unreasonable searches and seizures. The court felt that the fourth amendment requirement of *reasonableness* was a sterner test than due process. Blackford v. United States, 247 F.2d 745, 748-53 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958). While it is conceded that the fourth amendment requirement of *reasonableness*, which includes probable cause, is a sterner test, it is hypothesized that the present misapplication of the fourth amendment is no more demanding than the reasonableness standard in due process. Due process demands the means taken not be unreasonable, arbitrary or capricious. Nebbia v. New York, 291 U.S. 502 (1949).

[37] It is submitted that that basis must be the one upon which the common law has always sought to proceed, the one implied in the very term "due process of law," namely a weighing or balancing of the various interests which overlap or come in conflict and a rational reconciling or adjustment. Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 4 (1943).

[38] For a discussion of the lack of uniformity in the border search area and the need for a homogeneous approach *see* Note, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007, 1012-18 (1968).

[39] Notwithstanding the right of privacy balance under the fourth amendment, it is submitted that this same balance is involved under due process. The Supreme Court in *Rochin v. California* spoke in terms of invasion of privacy while deciding the case under due process and not fourth amendment standards. 342 U.S. 165, 172 (1952).

[40] Carroll v. United States, 267 U.S. 132, 154 (1925) (dictum). *See* Note, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007, 1014 (1968).

[41] It is the purported policy of the Customs Department to act in this manner. Barnett, *A Report On Search And Seizure At The Border*, 1 AM. CRIM. L.Q. 36, 44 (1963).

It is at this point, however, that the blanket permission to invade an individual's privacy should end. In order to proceed further with a search, *i.e.*, tearing seats out of vehicles, cutting open cushions and headliners or destroying an individual's property in any other manner, there should be more than mere suspicion on the part of the customs official. Additional facts and circumstances should be required to justify a further invasion. While the infringement may not be severe in constitutional terms, *i.e.*, destruction of one individual's property balanced against the *public's interest in possibly catching a smuggler here and there,* it is at this juncture that the greatest danger of harassment occurs. This is the point at which many innocent people may be subjected to arbitrary and undue inconvenience. When a customs official does not like a particular person's attitude or appearance, he is able, under the present system, to abuse his discretion with no apparent purpose other than to assert his authority.[42]

While it is difficult to set out empirical facts necessary for a more extensive search, it is suggested that past experience or prior information, concerning a particular individual,[43] should be required. Without either of these, or other substantial evidence indicating illegal activity by a person suspected, it is unreasonable to proceed past the initial cursory search.

If a person is actually involved in smuggling items of vital concern to the national defense or public interest, *e.g.*, espionage material, marijuana, or narcotics, he will not secure them in a place susceptible to discovery even by a somewhat destructive search. These items will be placed in various unique and devious places, and absent specific information, the customs officials will generally find nothing.[44]

2. *Strip Searches and Intrusive Body Searches.*

The strip search is the next stage in balancing the public interest against individual rights.[45] These searches are severe invasions of privacy

[42] It is not contended that all or even a majority of customs agents conduct themselves in this manner, but it appears that some, in fact, do act in this fashion. *See* Blackford v. United States, 247 F.2d 755 (9th Cir. 1957), *cert. denied,* 356 U.S. 914 (1958) (dissenting opinion).

[43] The fact that a person is in a class that sets off immediate suspicion in the mind of the official is not sufficient, even if certain groups, *e.g.*, students, hippies, Negroes, Mexicans, etc., have been shown in the past to be involved in various smuggling operations, such as, alcohol, fireworks, marijunana and narcotics. *Cf.* Note, *The Limits of Stop and Frisk — Questions Unanswered by Terry,* p. 419, 436 *infra.*

[44] Since it is almost impossible to determine what the percentages are for discovery in these cases, it is difficult to balance the individual's rights against the public interest. It is submitted, however, that the degree of success, in searches not based upon informers' tips concerning particular individuals, is minimal. *See* Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967).

[45] It may validly be argued that this is the point where the border search exception to probable cause should end. *See* Comment, *Intrusive Border Searches — Is Judicial Control Desirable,* 115 U. PA. L. REV. 276, 285 (1966); 21 RUTGERS L. REV. 513, 519-20 (1967). If the lower courts were to require probable cause at this point, it *might* be possible to create a homogeneous structure in the border search

and an affront to human dignity.[46] Although there may be no physical pain involved, it would seem that individual rights outweigh the public interest[47] unless there is judicial approval based upon facts sufficient to justify this type of search.[48]

There are two main types of intrusive body searches. The first is the body cavity probe.[49] If these probes are conducted correctly and without force there should be no physical pain.[50] They are, however, extremely offensive invasions of privacy. Because of this offensiveness, and the probability that totally innocent persons will be invaded in the process, it is essential to require strict guidelines in the interest of fundamental fairness and due process.[51] The second type of intrusive body search is the stomach pump method.[52] The use of emetic solutions administered through tubes placed in a suspect's nose or mouth induces vomiting in an effort to recover previously consumed objects.[53] This method is in a class all by itself, and is not only an invasion of individual rights, but is also physically uncomfortable if not painful. Induced vomiting is extremely offensive and should be constitutionally suspect under any set of facts.[54]

Due process offers two approaches to the intrusive body search situations described above. The first is the *Rochin v. California*[55] stand-

---

area consistent with the fourth amendment as interpreted by the Supreme Court. To briefly illustrate: 1. *Terry* may offer some justification for allowing an initial detention and cursory search of persons and vehicles at the border. While the policeman's safety provided the underlying rationale for sidestepping probable cause, this reasoning could be stretched to include the protection of society from the influx of narcotics. 2. Under this approach probable cause would be required for a strip search and visual examination of the naked body. 3. If a body cavity exploration is desired by the customs officials, then there would have to be a showing of probable cause, and a clear indication that evidence would be found — consistent with *Schmerber*. 4. Finally, a search warrant, based upon probable cause, should be required in all non-emergency intrusive body search situations.

[46] The strip search has traditionally been allowed on mere or no suspicion. Witt v. United States, 287 F.2d 389 (9th Cir.), *cert. denied*, 366 U.S. 950 (1961).

[47] Although the courts have never given a satisfactory reason for allowing strip searches on mere suspicion, *conjecturally*, it would appear that the public interest in preventing smuggling provides sufficient justification, *regardless of the number of innocent persons also searched.*

[48] For discussion of judicial control consistent with due process see pp. 468-70 *infra*. *See also* 18 W. RES. L. REV. 1007, 1012 (1967).

[49] It has become popular to place items of contraband in the various body cavities in order to avoid detection. Denton v. United States, 310 F.2d 703 (9th Cir. 1962).

[50] Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967).

[51] Although the present guidelines established by the Ninth Circuit fall below Supreme Court fourth amendment standards, these guidelines may be at least substantively, though not procedurally, consistent with due process under the fifth amendment.

[52] Lane v. United States, 321 F.2d 573 (5th Cir. 1963), *cert. denied*, 377 U.S. 936 (1964); King v. United States, 258 F.2d 754 (5th Cir. 1958).

[53] Blefare v. United States, 362 F.2d 870 (9th Cir. 1966); Barrera v. United States, 276 F.2d 654 (5th Cir. 1960).

[54] *See* 18 W. RES. L. REV. 1007, 1013 (1967).

[55] 342 U.S. 165 (1952). Although *Rochin* dealt with a stomach pump, its standard would appear to be applicable in other intrusive body search situations.

ard — looking at the operative facts in retrospect, was a particular defendant subjected to actions which "shock the conscience."[56] While it is unclear whether it was the stomach pumping or the whole series of illegal events that shocked the Court's conscience in *Rochin*,[57] it would appear to be immaterial in border search cases.[58] Where customs officials initiate intrusive body searches without sufficient cause, they too are in effect "breaking into the privacy" of an individual, and forcibly extracting the contents of the stomach, rectum or vagina.[59] However, because of the border search rubric, the initial stages of a search, up to the actual probe or induced vomiting, generally are not considered to be *illegal invasions* of privacy.[60] It would appear, therefore, that, because of the difficulty in delineating the substantive differentiations between illegal and permissible invasions of privacy and because of the non-existence of procedural safeguards, *Rochin* is inadequate as a shield against illegal intrusive body searches

The second approach to intrusive body searches — including strip searches — is through the use of judicial control. It does not seem reasonable or consistent with due process to allow authorization of these invasions to rest in the discretion of a customs official, regardless of his status or successful history in catching smugglers. There should be a judicial determination based upon the facts and circumstances of each case.

---

[56] In *Rochin*, the police forced their way into the defendant's room and saw him put two capsules into his mouth. After failing to extract the capsules, the police took the defendant to a hospital against his will and held him while a doctor forced a tube down his throat and administered an emetic solution. The induced vomiting produced the morphine capsules which were used as evidence. The Supreme Court reversed the conviction and condemned the entire procedure as "conduct that shocks the conscience." 342 U.S. at 172.

[57] Mr. Justice Frankfurter wrote for the majority:

> *Illegally* breaking into the *privacy of the petitioner*, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents — this course of proceedings by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and screw to permit of constitutional differentiation. 342 U.S. at 172 (emphasis added).

[58] *See* Comment, *Intrusive Border Searches — Is Judicial Control Desirable*, 115 U. PA. L. REV. 276, 281 (1966).

[59] *See* Blefare v. United States, 362 F.2d 870, 886 (9th Cir. 1966) (dissenting opinion). *See also* 18 W. RES. L. REV. 1107, 1011-13 (1967).

[60] *See generally* Blefare v. United States, 362 F.2d 870 (9th Cir. 1966); Lane v. United States, 321 F.2d 573 (5th Cir. 1963), *cert. denied*, 377 U.S. 936 (1964); King v. United States, 258 F.2d 754 (5th Cir. 1958). The almost unrestricted power of border officials to conduct initial searches makes it difficult to do justice to the *Rochin* standard. Consider the following hypothetical situation: Mr. X is staying in a motel room about fifty yards from the border in the United States. Mr. X returning from Mexico crosses the border on foot but is not immediately stopped. While Mr. X is walking towards his motel room a customs official decides he looks suspicious and goes after him to investigate. By the time the official gets to the motel, the suspect has entered and closed the door. The alert customs official — thinking Mr. X has seen him and may try to escape through another door or window — enters the room, and sees the suspect *hastily* put what appears to be capsules in his mouth. After failing to extract the capsules, the official takes Mr. X to a hospital where the capsules are removed by medically approved induced vomit-

B. Judicial Supervision

This section is divided into a two part discussion of judicial supervision. The first part suggests and briefly describes a system of judicial control consistent with due process as opposed to the warrant procedure of the fourth amendment. The second part is intended to illustrate the danger in not requiring prior judicial authorization for intrusive body searches.

1. *A Neoteric Procedure.*

Judicial supervision in the border search area has been recommended in the past,[61] but the courts have not yet deemed such a procedure essential to a reasonable search.[62] The courts have been reluctant to adopt any system of judicial control because the fourth amendment proscribes the issuance of a warrant on less than probable cause.[63] And while it is true that probable cause is needed for a search warrant under the fourth amendment, it would seem that a different system of control could be established under due process.

Since border searches may be made on less than probable cause, the suggested judicial procedure would not have to reflect the fourth amendment procedure for the issuance of a warrant. If the present standards of "real suspicion" to strip and "clear indication" to probe are to be maintained, then these guidelines can be the basis of a magistrate's decision. The magistrate's function would be to determine whether a search can be sanctioned in good conscience with due process. Or in other words, is the proposed action of a customs official justifiable

---

ing. The recovered morphine capsules are used in evidence. This not too far-fetched example illustrates a proceeding that would probably be in violation of due process if used by the police in the United States, but could possibly be given sanction as a "reasonable" border search under the facts and circumstances. *But see* Henderson v. United States, 390 F.2d 805 (9th Cir. 1967).

[61] *See* Blefare v. United States, 362 F.2d 870 (9th Cir. 1966) (dissenting opinion).

> When time permits and when the contemplated search procedure is extreme, if not shockingly offensive, the search, if made without authority therefore having been sought of a magistrate, is unreasonable . . . . *Id.* at 887.

See also Comment, *Intrusive Border Searches — Is Judicial Control Desirable,* 115 U. PA. L. REV. 276 (1966).

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

[63] *See* Huguez v. United States, No. 21,518 (9th Cir. Sept. 30, 1968) (dissenting opinion). *See also* Camara v. Municipal Court, 387 U.S. 523 (1967) (search warrant, based upon probable cause, required for administrative inspections). Although the Supreme Court said a warrant procedure was needed, it departed from particularized probable cause, used in criminal cases, to a group or area approach. There is probable cause for a search warrant if there is a reasonable basis for believing that an inspection should be made of all premises within a given area — even though there may be no reason to believe that any particular premise is maintained in volation of law. For discussion concerning a fourth amendment warrant procedure for border searches, consistent with the *Camara* group approach, *see* Note, *Border Searches and the Fourth Amendment,* 77 YALE L.J. 1007, 1011-15 (1968).

and necessary in a specific case, or is it merely an unreasonable, arbitrary or capricious assertion of authority.[64]

2. *Procedural Safeguards Needed.*

The present substantive standards for strip and intrusive body searches are arguably consistent with due process — though not with the fourth amendment — and they may provide sufficient constitutional protection for a convicted smuggler.[65] These substantive safeguards do not, however, secure adequate protection for the thousands of innocent men and women who cross the border each year. For a clear indication of the dangers involved, one has only to consider the facts of *Henderson*.[66] The only atonement to be gained from this case is that the conviction was reversed.[67] This is not, however, the satisfaction that one readily accepts. The desired satisfaction should be the protection of all persons from such arbitrary and offensive treatment by the government.[68] To achieve this goal it is essential to require judicial

---

[64] *See generally* Blackford v. United States, 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958) (dissenting opinion).

> To authorize the ex parte star chamber invasion of body privacy by inspectors at our ports is shocking and abhorrent and is fraught with almost certain abuse. I fully appreciate the high character of most of the inspectors and the very difficult duty which is theirs, but the power to subject one entering this country through its ports to the possibility of such an inquisition and manhandling seems on its face to come within the interdiction of the Fourth Amendment. *Id.* at 754-55.

[65] Notwithstanding the supposed truth that the Constitution protects everyone, guilty as well as innocent, there is an apparent attitude on the part of some judges that people who use the tactic of body cavity smuggling are *possibly* not as deserving of protection as others. In other words, what may be an unreasonable intrusion of an innocent person may not be quite as unreasonable if contraband is found in a guilty person's rectum, vagina or stomach. As stated by Judge Chambers in *Blackford* and quoted by Judge Barnes in *Rivas*,

> here it was Blackford who created, who first takes us into this disgusting sequence. He made the deposit in his body through the anal opening. . . . I do not say that the depraved have no rights. But I do say that to my sensibilities all the shockingness was Blackford's. 247 F.2d at 745, *quoted in* 368 F.2d at 710.

[66] Although narcotics were fortuitously found, it should be apparent that the same sequence of events could have occured when an innocent person was involved. There was no justification, other than the border crossing, to conduct the initial strip search, and the subsequent intrusive probe was performed for the sole reason that the defendant would not consent to the visual examination of her vagina. 390 F.2d at 810. It is difficult to believe that an innocent person would not react in the same manner to this insulting affront.

[67] *See* Henry v. United States, 361 U.S. 98 (1959).

> Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better . . . that the guilty sometimes go free than that citizens be subject to easy arrest. *Id.* at 104.

See generally Breithaupt v. Abram, 352 U.S. 432 (1957) (dissenting opinion) (blood test case).

> If law enforcement were the chief value in our constitutional scheme then due process would shrivel and become of little value in protecting the rights of the citizen. But those who fashioned the Constitution put certain rights out of the reach of the police and preferred other rights over law enforcement. *Id.* at 442-43.

[68] *See generally* Swartz, *On Current Proposals To Legalize Wiretapping*, 103 U. PA. L. REV. 157 (1954).

> [T]he worth of a society will eventually be reckoned not in proportion to

authorization in all non-consenual strip and intrusive body search situations.[69]

Judicial supervision over these intrusive searches is not intended to frustrate the work of custom officials, but is designed to protect the rights of the individual. This procedure would not seriously hamper the customs officials effectiveness in ferreting out smugglers, but would tend to discourage unfounded searches.[70] If the official has to take the time to go before a magistrate, he will not likely make the effort when he knows he has no basis for the search; on the other hand, if he has good reason, there should be no objection to seeking judicial authorization. This should not be too much to require if there is to be a true balance between the public and individual interests involved.[71]

BORDER SEARCHES EXTENDED IN TIME AND DISTANCE

On numerous occasions, border officials have conducted searches of persons and vehicles in the interior of the United States.[72] Probable cause is not required for these searches provided certain other tests are met.[73] Notwithstanding the present tests, it is contended that these

---

the number of criminals it crucifies, burns, hangs or imprisons, but rather by the degree of liberty experienced by the great body of its citizenry. There have never been more determined law enforcers than Nazi Germany or the Soviet. *Id.* at 158.

[69] *See* Blefare v. United States, 362 F.2d 870, 887 (9th Cir. 1966) (dissenting opinion). In the intrusive body search — if not strip — situations, it would not take any longer to get judicial sanction than it does to take a suspect to a doctor's office for cavity probes or induced vomitings.

[70] *See generally* Schoenfeld, *The "Stop And Frisk" Law Is Unconstitutional,* 17 SYRACUSE L. REV. 627 (1965).

Even if the tasks of the police were made somewhat more difficult by adherence to lawful procedures, it would be a small price to pay for the preservation of individual liberty. If it is conceded that law enforcement is not as effective as it could be, it is fallacious to argue that it would necessarily be improved if short cut methods were approved. *Id.* at 633-34.

[71] *See* Blefare v. United States, 362 F.2d 870 (9th Cir. 1966) (dissenting opinion).

That customs officials should seek judicial authorization . . . before engaging in extremely unusual invasions of the human body would appear to be a wholly reasonable requirement, a requirement which would protect the constitutional rights of individuals who cross our international borders and not significantly thwart the necessary regulation of border traffic. *Id.* at 888.

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

[73] The Ninth Circuit test for allowing extended border searches was expressed in *Alexander.*

Where, however, a search for contraband by Customs officers is not made at or in the immediate vicinity of the point of international border crossing, the legality of the search must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States. Any search by Customs officials which meets this test is properly called a 'border search.' 362 F.2d at 382.

The Fifth Circuit has always granted customs officers great latitude in conducting extended border searches, but it has also recognized that there is some geographical

extended searches should not come under the general dragnet of the border search rubric.[74]

Although there are some sound reasons for excepting border searches from the full operation of the fourth amendment, this exception should not extend to searches conducted after a person has legitimately entered the country, either by crossing the border without being searched[75] or by being allowed to proceed after a search.[76] At this point, the individual should not be subject to the sweeping scope of the border search,[77] and he is entitled to the two pronged protection of the fourth amendment. In order to stop and search a person or vehicle subsequent to a legitimate entry a customs official should be required to have probable cause and the actual physical search must be reasonable.[78]

The primary purpose of the border search is to prevent the entrance of contraband into the country;[79] apprehension of criminals is only a

---

point where probable cause takes over and the border search rubric ends. *See* Note, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1107, 1011 n.15 (1968). Thomas v. United States, 372 F.2d 252, 254 (5th Cir. 1967) (dictum).

[74] *See* Note, *Search and Seizure at the Border — The Border Search*, 21 RUTGERS L. REV. 513, 524 (1967).

[75] *But see* Murgia v. United States, 285 F.2d 14 (9th Cir. 1960). Murgia, a known addict, entered the United States from Mexico on foot. He was not searched at the border but was followed by an agent for four blocks where he entered a car with three others. Murgia and the others were then followed for another mile or so until stopped by the customs agents.

[76] *But see* Morales v. United States, 378 F.2d 187 (5th Cir. 1967). One defendant entered the United States by car. He was stopped at the customs station. He was searched, as was the car, including the trunk. He was then released without being followed. Shortly thereafter, the second defendant, Morales, crossed the border on foot. The same agent searched him and found nothing illegal. He was released but was put under surveillance until picked up in a car driven by the first defendant. The car was stopped and the occupants were searched for weapons. They were then taken, along with the car, back to the station where another search revealed marijuana in a spare tire in the trunk. Judge Thornberry in affirming the conviction stated:

> It would be clearly contrary to the policies that justify our border search laws to hold that once a person or vehicle has been examined, any further search must be based upon probable cause even where, as here, facts giving rise to a reasonable suspicion came to light subsequent to the initial search. *Id.* at 190.

[77] *See* Carroll v. United States, 267 U.S. 132 (1925).

> Travellers may be . . . stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. *Id.* at 154.

[78] *See* Note, *Search and Seizure at the Border — The Border Search*, 21 RUTGERS L. REV. 513, 524 (1967).

[79] While there may be a valid interest in finding "Mr. Big" in the smuggling business, and while the easiest way to effectuate this interest is to keep suspected smugglers under surveillance until contact is made with the "powers that be," this secondary purpose does not justify a sidestepping of the fourth amendment requirement of probable cause. *See generally* Note, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007, 1010-12 (1968).

side effect.[80] This prevention should be accomplished at the border, and not through an unconstitutional device such as the extended border search. If the present customs administration is unable to cope with the smuggling problem at the border, then the remedy is to overhaul that administration. The remedy is not a further prostitution of the fourth amendment and the rights it secures.[81]

CONCLUSION

While it is clear that the United States Supreme Court should enunciate the constitutional standards needed for uniformity in the delicate area of the border search, it is submitted that a logical and congruous solution is possible under either fourth amendment or due process standards.

If the fourth amendment is to apply to border searches, it should be used in its full force. If this route is taken, probable cause should not be ignored or further emasculated by the circumlocution of legal acrobatics. This approach would invalidate present statutes authorizing border searches on the basis of suspicion and would necessitate reversal of convictions based upon evidence obtained without the requisite probable cause.

It would seem that the best approach to this perplexing problem, is to retain the present fourth amendment immunization, except in the extended border search cases, and apply due process standards of reasonableness and fundamental fairness which must include, by necessity, judicial supervision over strip and intrusive body searches.

---

[80] *See* Blackford v. United States, 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958).

[81] *See generally*, Schoenfeld, *The "Stop and Frisk" Law Is Unconstitutional*, 17 SYRACUSE L. REV. 627 (1965).

> Effectiveness should not be measured in terms of the number of convictions obtained. The ultimate goal of our society is not to punish criminals; rather, it is to preserve liberty. Whenever police act illegally — whatever their purpose — our society suffers. *Id.* at 633.