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Clause,⁹⁶ and now they may under *Flast*. Many of the types of aid previously provided by legislatures with impunity may now be subject to attack.

A substantial barrier remains in the path of increased aid which is theoretically unaffected by *Allen*. Almost every state has a constitutional provision prohibiting the "establishment of religion," many of which are stricter than the United States Constitution.⁹⁷ And state courts acting under their own constitutions have prohibited aid to parochial schools by striking down such legislation, even though approved by the Supreme Court as not violative of the first amendment.⁹⁸

Having made the transition from police and fire protection to bus fares and books, it is unlikely that the Supreme Court in the face of post-*Flast* opposition will invalidate state legislative efforts even beyond books. And the states themselves, more closely attuned to the apparent need, coupled with the growing realization that these schools could be forced to cease operation, will follow the lead of the Supreme Court and relieve the strictures exerted by state constitutions.⁹⁹ The question is no longer if, but how far, and it is a much shorter step from books to buildings than it was from buses to books.

Thomas Coffey

⁹⁶ *Frothingham v. Mellon*, 262 U.S. 447 (1923).

⁹⁷ See Note, 50 YALE L.J. 917 (1941). See generally ANTIEUA CARROLL & BURKE, RELIGION UNDER THE STATE CONSTITUTION 173-239 (1965).

⁹⁸ Most states in which the issue was considered rejected the theory. See Note, 17 CATH. U.L. REV. 242 (1967). See also McKenna, *The Transportation of Private and Parochial School Children at Public Expense*, 35 TEMP. L.Q. 259 (1962) for a broad coverage of cases forbidding aid under state constitutions.

⁹⁹ The leading case prohibiting state lending of textbooks is *Judd v. Board of Educ.*, 278 N.Y. 200, 15 N.E.2d 576 (1938). This decision was accepted by the courts of several states. See, e.g., *Gurney v. Ferguson*, 190 Okla. 254, 122 P.2d 1002 (1941); *Mitchell v. Consol. School Dist.*, 17 Wash.2d 61, 135 P.2d 79 (1943); *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961). Possibly indicating the beginning of a trend at the state court level, *Judd* was overruled by *Board of Educ. v. Allen*, 20 N.Y.2d 109, 228 N.E.2d 791 (1967).

CRIMINAL LAW—BORDER SEARCHES—REQUIRING A "CLEARER INDICATION" IN ALLOWING INTRUSIVE BODY SEARCHES

On March 13, 1966, Oscar John Huguez and a companion traveled by automobile from Tijuana, Mexico, to San Ysidro, California, where they were stopped by United States customs officials for routine border questioning. During this questioning, Inspector Teela became suspicious, because of the unnatural appearance of the two men's eyes, that they were under the influ-

ence of narcotics. Neither Huguez nor his companion registered as a narcotic addict or user under 18 U.S.C. § 1407.¹

Teela's suspicion prompted him to conduct a strip and skin search with the help of another agent. No contraband was discovered, but the agents observed needle marks on both men's arms and Teela noticed a "greasy substance" on Huguez' buttocks. Following the strip and skin search, the two men were turned over to the assistant customs agent-in-charge, who took them to a room equipped with an examination table, which served as a doctor's office.

Although Huguez objected and physically resisted, he was forced to submit to a digital examination of his rectum by the physician. Four packets containing approximately four ounces of heroin were removed from the rectal cavity. The heroin was subsequently introduced into evidence, over Huguez' objection, when he was brought to trial in the United States District Court for the Southern District of California on May 26, 1966. Upon conviction of violating 21 U.S.C. § 174,² Huguez appealed, specifying as error the denial of his motion to suppress the use of the heroin in evidence because it had been unlawfully seized.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the decision of the District Court on the ground that the appellant's rights under both the fourth³ and fifth amendments⁴ had been violated. *Huguez v. United States*, 406 F.2d 366 (9th Cir. 1968).

The search of body cavities by federal agents to obtain evidence of criminal activities is a comparatively recent development. In 1949, a federal district court refused to convict a narcotics violator where the prosecution's primary

¹ 18 U.S.C. § 1407 (1965): "[N]o citizen of the United States who is addicted to or uses narcotic drugs, as defined in section 4731 of the Internal Revenue Code of 1954, as amended (except a person using such narcotic drugs as a result of sickness or accident or injury to whom such narcotic drug is being furnished . . . by a duly licensed physician . . .) . . . shall depart from or enter into or attempt to depart from or enter into the United States, unless such person registers . . . with a customs official, agent, or employee at a point of entry or a border customs station."

² 21 U.S.C. § 174 (1965): "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000."

³ 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 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."

⁴ U.S. CONST. amend. V: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

evidence was obtained by forcing the defendant to submit to having his stomach pumped. In holding the search to be unreasonable, the court said:

The circumstances surrounding the search which disclosed the narcotics are most unusual, and we can find only one instance in the reported cases where evidence procured from the stomach of the defendant was offered in a court of the United States. We can find, in no reported case, nor have we ever heard before, that an officer acting under the authority of the United States government, and sworn to uphold the Constitution, including the Fourth Amendment, has participated in a search such as this.⁵

Since 1949, however, searches which invaded the body of the suspect have recurred, and the courts have taken a more tolerant view of them. In the 1957 case of *Breithaupt v. Abram*,⁶ the defendant, while driving a truck, had an accident that resulted in the death of three people. While he was still unconscious following the accident, a sample of his blood was taken and it showed him to be drunk. The Supreme Court affirmed a conviction of involuntary manslaughter, holding that there was nothing "brutal or offensive" in the taking of the blood sample. The Court further stated, "[m]odern community living requires modern scientific methods of crime detection lest the public go unprotected."⁷

A more recent Supreme Court case is *Schmerber v. California*.⁸ This case also involved a blood test following an accident; but there the petitioner was conscious and objected to the blood sample being taken. The Court held that the petitioner's constitutional rights had not been violated and, with particular reference to the fourth amendment, stated, ". . . the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner."⁹

The above three cases, while similar to *Huguez* in that they involve searches which intrude into the body, differ from *Huguez* in one important aspect. *Willis*, *Breithaupt*, and *Schmerber* involved searches conducted well within the boundaries of the United States; *Huguez* involved a search incident to a border crossing.

Border searches have been recognized as a separate and distinct category in the broad area of search and seizure in countless decisions.¹⁰ To conduct a search away from the border, a police officer must first procure a warrant

⁵ *United States v. Willis*, 85 F. Supp. 745, 747 (S.D. Cal. 1949).

⁶ 352 U.S. 432 (1957).

⁷ *Id.* at 439.

⁸ 384 U.S. 757 (1966).

⁹ *Id.* at 768.

¹⁰ *See, e.g.*, *Boyd v. United States*, 116 U.S. 616 (1886); *Carroll v. United States*, 267 U.S. 132 (1925); *Landau v. United States*, 82 F.2d 285 (2d Cir. 1936); *United States v.*

upon a showing of probable cause.¹¹ An exception to this requirement is where the search is incident to a lawful arrest.¹² To conduct a search at the border, however, a customs agent need not acquire a warrant,¹³ make an arrest,¹⁴ have probable cause to believe that a crime is being committed,¹⁵ nor, in some instances, have any suspicions.¹⁶

The type of border search which requires no suspicion on the part of the border official is that with which most people are familiar: the search of baggage and vehicles of persons who enter the United States from another country. It has been allowed since 1799¹⁷ and is permissible any time a person crosses the border.¹⁸ This right of customs agents to search baggage and vehicles has been described as a right exercised by the government in exchange for which it grants individuals the privilege of entering the country.¹⁹

If the official wants to extend the search beyond the baggage and vehicle of a traveler to the personal clothing and skin of the person, then there must be some suspicion of the one to be searched to avoid a violation of the person's rights.²⁰

The more intensive a search becomes, the more delicate becomes the

Yee Ngee How, 105 F. Supp. 517 (S.D. Cal. 1952); Witt v. United States, 287 F.2d 389 (9th Cir. 1961); Denton v. United States, 310 F.2d 129 (9th Cir. 1962).

¹¹ Probable cause is said to exist when "the facts and circumstances within their [officers making search] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief" that an offense has been or is being committed. Carroll v. United States, 267 U.S. 132, 162 (1925).

¹² See, e.g., Preston v. United States, 376 U.S. 364 (1964). Arresting officers are allowed to search without a warrant to discover weapons and to prevent the destruction of evidence of the crime for which the arrest was made.

¹³ Landau v. United States, 82 F.2d 285 (2d Cir. 1936); United States v. Yee Ngee How, 105 F. Supp. 517 (S.D. Cal. 1952); United States v. Rodriguez, 195 F. Supp. 513 (D. Tex. 1960); Thomas v. United States, 372 F.2d 252 (5th Cir. 1967).

¹⁴ Landau v. United States, 82 F.2d 285 (2d Cir. 1936); United States v. Yee Ngee How, 105 F. Supp. 517 (S.D. Cal. 1952); Rivas v. United States, 368 F.2d 703 (9th Cir. 1966) (Appellant was arrested, but the search made was not incidental to the arrest).

¹⁵ Murgia v. United States, 285 F.2d 14 (9th Cir. 1960); Plazola v. United States, 291 F.2d 56 (9th Cir. 1961); Mansfield v. United States, 308 F.2d 221 (5th Cir. 1962); Marsh v. United States, 344 F.2d 317 (5th Cir. 1965); King v. United States, 348 F.2d 814 (9th Cir. 1965); Morales v. United States, 378 F.2d 187 (5th Cir. 1967); Thomas v. United States, 372 F.2d 252 (5th Cir. 1967).

¹⁶ Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967).

¹⁷ Act of Mar. 2, 1799, 1 Stat. 661.

¹⁸ *Supra* note 16, at 808.

¹⁹ Carroll v. United States, 267 U.S. 132 (1925).

²⁰ *Supra* note 16, at 808: "If, however, the search of the person is to go further, if the party . . . is to be required to strip, we think that something more, at least a real suspicion, directed specifically to that person, should be required."

balance between the necessity of conducting the search and the right of the individual to be free from unreasonable invasions of his privacy. The most intensive type of border search is that with which the *Huguez* court had to deal: the search of a body cavity. The courts recognize the necessity of allowing border officials to conduct intrusive searches of the body because of the frequency with which narcotics smugglers use their bodies as repositories for contraband.²¹ At the same time, the fact cannot be ignored that such a search is an invasion of privacy and subjects the individual searched to a loss of dignity.

In recent years, Courts of Appeals in both the Fifth and Ninth Circuits have been confronted with a growing number of cases attacking the constitutionality of body cavity searches conducted under the authority granted to customs agents.²² The rectal cavity is the part of the body most often used for smuggling purposes,²³ but a number of cases where narcotics have been recovered from the suspect's stomach have also been reported.²⁴ Both types of search have been upheld as lawful border searches.

In upholding these searches, the courts have been influenced in part by the very broad scope traditionally ascribed to border searches along with the difficulty inherent in policing the border,²⁵ and in part by the seriousness of the problem created by narcotics smuggling.²⁶ This is not to say, however, that the courts have complacently endorsed indiscriminate invasions of travelers' bodies by agents in search of contraband. There have been vigorous dissents to some decisions upholding such searches²⁷ as well as expressions of concern for the protection of innocent travelers in the majority opinions.²⁸

²¹ *Blackford v. United States*, 247 F.2d 745 (9th Cir. 1957); *Denton v. United States*, 310 F.2d 129 (9th Cir. 1962); *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966); *Rivas v. United States*, 368 F.2d 703 (9th Cir. 1966); *Henderson v. United States*, 390 F.2d 805 (9th Cir. 1967).

²² *See, e.g., King v. United States*, 258 F.2d 754 (5th Cir. 1958) and *Rivas v. United States*, 368 F.2d 703 (9th Cir. 1966).

²³ *Murgia v. United States*, 285 F.2d 14, 15 (9th Cir. 1960).

²⁴ *United States v. Michel*, 158 F. Supp. 34 (D. Tex. 1957); *King v. United States*, 258 F.2d 754 (5th Cir. 1958); *Lane v. United States*, 321 F.2d 573 (5th Cir. 1963); *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966).

²⁵ *Landau v. United States*, 82 F.2d 285 (2d Cir. 1936); *United States v. Rodriguez*, 195 F. Supp. 513 (D. Tex. 1960); *King v. United States*, 348 F.2d 814 (9th Cir. 1965); *Alexander v. United States*, 362 F.2d 379 (9th Cir. 1966); *Morales v. United States*, 378 F.2d 187 (5th Cir. 1967); *Thomas v. United States*, 372 F.2d 252 (5th Cir. 1967).

²⁶ *Blackford v. United States*, 247 F.2d 745 (9th Cir. 1957); *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966); *Rivas v. United States*, 369 F.2d 703 (9th Cir. 1966).

²⁷ *Blackford v. United States*, 247 F.2d 745 (9th Cir. 1957); *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966).

²⁸ *See, e.g., United States v. Michel*, 158 F. Supp. 34 (D. Tex. 1957).

Unfortunately, while the courts have struggled with the problem, they have been unable to come up with a clearcut and simple rule to control intrusive body searches at the border comparable to the "no suspicion required" rule for baggage and vehicle searches or the "mere suspicion" rule for strip and skin searches. The problem does not lend itself to a simple solution.

*Blackford v. United States*²⁹ was the first case involving a body cavity search at a border crossing to come up on appeal from a district court. The court expressed little doubt that customs officials had the authority to force the petitioner to submit to a rectal probe performed by a physician; removing narcotics from body cavities was deemed analogous to forcing a person with contraband in a clenched fist to open his hand.³⁰

The question of degree of suspicion necessary to initiate the search was not an issue because Blackford had already been arrested and had informed the agents of the heroin secreted in his rectum before the search was made. The primary issue, then, was the reasonableness of the conduct of the officers. The test of reasonableness that must be applied, the court held, was a stricter test than that applied to state proceedings under the Due Process Clause of the fourteenth amendment:

There may be, we conceive, conduct which, while unreasonable, is not so unconscionable that it "shocks the conscience" On the other hand, if conduct is reasonable, it must perforce satisfy Due Process requirements. Accordingly, if the actions here questioned were reasonable, they did not constitute a violation of either the Fourth or Fifth Amendments.³¹

Thus the *Blackford* court assured the suspected narcotics smuggler of a constitutional protection somewhat broader than that provided by the "vague contours of the Due Process Clause," which, according to the Supreme Court, "precludes defining."³²

Following *Blackford*, the standard of reasonableness, which itself "precludes defining,"³³ has been consistently applied by the courts in cases involving invasion of body cavities during border searches. In *Lane v. United States*,³⁴ the court held, "Administering emetics to cause vomiting in order

²⁹ 247 F.2d 745 (9th Cir. 1957).

³⁰ *Id.* at 753.

³¹ *Id.* at 750-51.

³² *Rochin v. California*, 342 U.S. 165, 170 (1952).

³³ *United States v. Rabinowitz*, 339 U.S. 56, 63 (1950): "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case."

³⁴ 321 F.2d 573 (5th Cir. 1963).

to recover narcotics is not an unreasonable search of the person."³⁵ Also in *Denton v. United States*,³⁶ which involved a rectal probe, the court stated, "Nowhere during the entire search and examinations, to and including recovery of the evidence, do we find anything unreasonable under the circumstances. . . ."³⁷

Still the question of degree of suspicion necessary to initiate a body cavity search was not answered, the courts emphasizing simply that probable cause was not required.³⁸ As recently as 1966, when *Blefare v. United States*³⁹ was decided, Judge Ely pointed out in his dissenting opinion, "Since, as a general rule, neither a warrant nor the existence of probable cause is a necessary prerequisite for a border search, suspicion alone might legally justify the 'stomach pumping'. . . ."⁴⁰

Later the same year, however, *Rivas v. United States*⁴¹ firmly disposed of the idea that a body cavity search could legally be initiated at the border if based on mere suspicion. "Thus we need not hold the search of any body cavity is justified merely because it is a border search, and nothing more. There must exist facts creating a clear indication, or plain suggestion, of the smuggling."⁴²

It should be noted that, while the *Rivas* court imposed stricter standards upon border officials to control initiation of a body cavity search, they nonetheless found that the search of the appellant's rectum was not unreasonable, and affirmed his conviction. The combined facts that *Rivas* was a registered user of narcotics and was under the influence of narcotics when he crossed the border created the necessary "clear indication."

*Henderson v. United States*⁴³ reaffirmed the "clear indication" or "plain suggestion" standard adopted by the court in *Rivas*. *Henderson* involved a vaginal probe which revealed a hidden packet of heroin, on the evidence of which the appellant was convicted of a narcotics violation. The case differed from *Rivas* in that the customs agent had no information about the appellant. She was not under the influence of narcotics, and she had no needle marks on her arms. On appeal, the court determined that the search had been

³⁵ *Id.* at 576.

³⁶ 310 F.2d 129 (9th Cir. 1962).

³⁷ *Id.* at 133.

³⁸ See, e.g., *Murgia v. United States*, 285 F.2d 14 (9th Cir. 1960).

³⁹ 362 F.2d 870 (9th Cir. 1966).

⁴⁰ *Id.* at 886.

⁴¹ 368 F.2d 703 (9th Cir. 1966).

⁴² *Id.* at 710.

⁴³ 390 F.2d 805 (9th Cir. 1967).

initiated on mere suspicion and, therefore, had been conducted in violation of the appellant's fourth amendment rights.

It was in reliance upon *Rivas*, *Henderson*, and the non-border case of *Schmerber v. California*⁴⁴ that *Huguez* was decided. Here the court held that there was not sufficient "clear indication" that the appellant was concealing narcotics within his body to justify the rectal examination performed. This in spite of the fact that the agents and the doctor were of the opinion that Huguez was under the influence of narcotics,⁴⁵ and the fact that the court had previously taken judicial notice of the great danger that "there will be attempts to smuggle such drugs into the country every time an addict or user crosses the boundary line."⁴⁶ In addition, preliminary searches had eliminated the possibility that any narcotics that Huguez might have were secreted in his car, in his clothing, or on his body.

This decision represents a shift in judicial thinking as regards border searches. In the familiar problem of balancing the interests of society against the interests of the individual, there can be little doubt that the current trend in judicial reasoning generally is to favor the latter over the former. The trend has now encompassed the border search. In prior decisions can be found the recurrent theme that the privacy and dignity of an individual has not really been compromised by an intrusive search when the person searched chose to degrade himself by using his body as a repository for narcotics.⁴⁷ Such an idea is not even mentioned in *Huguez*. Rather, the court held that there was "a brutal invasion of privacy."⁴⁸

The "brutal invasion" that the appellant was subjected to here is generally regarded as the least objectionable of the bodily invasions. In *Rivas* the majority stated, "the physical assault, the 'gentle' probing of the rectum, was not as pronounced an assault, medically, as the puncture of the skin in *Breithaupt*. . . ."⁴⁹ And in *United States v. Michel*⁵⁰ the court indicated

⁴⁴ 384 U.S. 757 (1966).

⁴⁵ *Huguez v. United States*, 406 F.2d 366, 371 (9th Cir. 1968).

⁴⁶ *Reyes v. United States*, 258 F.2d 774, 785 (9th Cir. 1958).

⁴⁷ *Blackford v. United States*, *supra* note 29, at 754 (Chambers, J., concurring): "[T]he Supreme Court's policy is to uphold human dignity. . . . But here it was Blackford [the defendant] who created, who first takes us into this disgusting sequence. . . . I do not say that the depraved have no rights. But I do say that to my sensibilities all of the shockingness was Blackford's." *Blefare v. United States*, *supra* note 21, at 878: "It does not shock my conscience to require a defendant to do, under careful medical supervision, that which defendant himself willingly and knowingly proposed to do, without medical supervision, for his own selfish pleasure or profit. . . ."

⁴⁸ *Huguez v. United States*, *supra* note 45, at 379.

⁴⁹ *Rivas v. United States*, *supra* note 14, at 711.

⁵⁰ 158 F. Supp. 34 (D. Tex. 1957).

that the extraction of the stomach's contents is regarded as more extreme than a rectal probe by posing the question, "Is the narcotic subject to seizure if secreted within two inches of the anus, but secure and exempt if perchance the smuggler may lodge it at a greater distance within his intestine, or may retain it in his stomach until he has passed the inspection station?"⁵¹

Even Chief Justice Warren's very restrictive language in his dissenting opinion to *Breithaupt*, which at least one writer has interpreted to mean absolute proscription of any intrusion into the body,⁵² literally taken, would allow the examination of a suspect's rectal cavity. The Chief Justice's opinion was in part, "at least that law-enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking the skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth."⁵³

Obviously, a stomach pumping procedure, which extracts body fluids; and the taking of blood, which, in addition to extracting body fluids, breaks the skin, should, in Chief Justice Warren's opinion, be prohibited.

On the other hand, a properly conducted rectal probe neither bruises the body, breaks the skin, punctures tissue, nor extracts body fluids. Of course, the *Huguez* court did not prohibit searches of rectal cavities under all circumstances. However, it is of some significance that the search was held to be unreasonable although the medical procedure was a relatively simple one and the agents responsible for the search had at least some reason to believe that the appellant had secreted narcotics in his rectum.⁵⁴

If the emphasis on the individual's right to privacy and uncompromised dignity continues, as seems likely, the next logical step by the courts will be to require a search warrant to authorize an intrusive body search at the border. The possibility of such a requirement was mentioned in earlier cases⁵⁵ but did not receive much attention until *Blefare* was decided. In his dissenting opinion to that case, Judge Ely asserted that when time permits the obtaining of a warrant, and an extreme search procedure is commenced without authority therefore having been sought of a magistrate, the search is unreasonable.⁵⁶ This is the position that he reiterated in his concurring opinion in *Huguez*, and the position that has been adopted by other writers in the legal field.⁵⁷

⁵¹ *Id.* at 37.

⁵² Comment, *Intrusive Border Searches—Is Judicial Control Desirable?*, 115 U. PA. L. REV. 276 (1966).

⁵³ *Breithaupt v. Abram*, *supra* note 6, at 441.

⁵⁴ *Huguez v. United States*, *supra* note 45 (see dissenting opinion).

⁵⁵ See *United States v. Michel*, *supra* note 24; *Lane v. United States*, 321 F.2d 573 (5th Cir. 1963).

⁵⁶ *Blefare v. United States*, *supra* note 39, at 887.

⁵⁷ See, e.g., 77 YALE L.J. 1007 (1968); 21 RUTGERS L. REV. 513 (1967); Comment,

Some of the difficulties that would be involved should the courts follow Judge Ely's recommendation were suggested by the majority opinion in *Rivas* when it set up the requirement of "clear indication" as opposed to mere suspicion as grounds for a body cavity search.

If the government cannot search bodily cavities on bare suspicion, may it not on the basis of a reasonably clear indication? If the government has no basis to search on a clear indication, obviously it can have no reasonable cause to arrest. If the government cannot arrest, and must pursue the suspected individual, how far must it follow him, and when arrest? A thousand difficult problems are created.⁵⁸

*Camara v. United States*⁵⁹ offers the proposition that the necessity of obtaining a warrant before conducting a search "depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."⁶⁰ If the governmental purpose is likely to be frustrated anywhere by the requirement of a warrant, it is likely to be frustrated at the border. If the facts in *Huguez* did not create even a "clear indication" of smuggling, what, then, would be necessary to establish probable cause? Counsel for the appellee suggest that probable cause in this type of case will rarely ever be established in the absence of a confession by the smuggler or a conspirator.⁶¹

*Marsh v. United States*⁶² makes the unique statement that, "if the customs agents had any reason, even though not ordinarily measuring up to 'probable cause,' it might, under all of the circumstances, suffice to meet the constitutional test of reasonableness and amount to probable cause."⁶³ This is, in effect, taking facts that amount to a "clear indication" and attaching to them the appellation of "probable cause." In other words, if a warrant is to be required for border searches, then it should be obtainable on a showing of something less than probable cause. However, the advocates of requiring a warrant to initiate an intrusive body search make no mention of a deviation from the normally required probable cause to obtain it.

Intrusive Border Searches—Is Judicial Control Desirable?, 115 U. PA. L. REV. 276, 283 (1966): "The requirement of a hearing before an impartial judicial officer, as in an application for a warrant to search a building, further protects this privacy by increasing the accuracy of the determination of whether there is probable cause to search. When it has been adjudged that it is probable that a citizen is engaged in criminal activity, then the interest of society in law enforcement outweighs the interest in preserving the privacy of the suspect, and it is 'reasonable' to make the search."

⁵⁸ *Rivas v. United States*, *supra* note 14, at 711.

⁵⁹ 387 U.S. 523 (1967).

⁶⁰ *Id.* at 533.

⁶¹ Brief of Appellee, *Huguez v. United States*, *supra* note 45.

⁶² 344 F.2d 317 (5th Cir. 1965).

⁶³ *Id.* at 324.

In reversing Huguez' conviction, the court, by relying upon the standards set out in *Rivas*, *Henderson*, and *Schmerber*, left the imposition of a requirement of a search warrant, if it is to be required, up to some future court. It will be interesting to see how future decisions deal with the issue. One thing seems reasonably clear; the matter will be determined at the appeals court level. In the past, as applications for certiorari in cases involving body cavity searches at the border came up before the Supreme Court, they were consistently denied.⁶⁴

While the court in *Huguez* elected not to make a search warrant a legal prerequisite to a medical examination of a body cavity as part of a border search, it went further than any prior decision in restricting what is considered reasonable in the initiation of the search. According to this decision, even the physician who performs the medical examination must possess information amounting to a "clear indication" or "plain suggestion" that the suspect has hidden contraband in his body.⁶⁵ After stating that Agents Gates and Maxcy "did not and could not" have passed on to Dr. Salerno any information that they had about the appellant, the court concluded:

Without a search warrant, without any "clear indication" or "plain suggestion" that Huguez carried narcotics in his rectal cavity, and in fact without the slightest real suspicion of any such rectal cavity cache, Dr. Salerno proceeded to conduct the examination on his own initiative without any request or suggestion that he do so, but with the aid of the three customs agents—Gates, Maxcy and Spohr.⁶⁶

In none of the other cases cited in this note was the knowledge, or lack of knowledge, on the part of the physician who performed the examination mentioned. However, in the non-border case of *Lustig v. United States*⁶⁷ the Court made it clear that it is the conduct of federal agents, and not the conduct of someone else whose help is enlisted, that is determinative of the reasonableness of a search. There the Court stated, "[A] search is a search by a federal official if he had a hand in it. . . . It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it."⁶⁸ In

⁶⁴ *Blackford v. United States*, 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958); *King v. United States*, 258 F.2d 754 (5th Cir. 1958), *cert. denied*, 359 U.S. 939 (1959); *Murgia v. United States*, 285 F.2d 14 (9th Cir. 1960), *cert. denied*, 366 U.S. 977 (1961); *Bible v. United States*, 314 F.2d 106 (9th Cir. 1963), *cert. denied*, 375 U.S. 862 (1963); *Lane v. United States*, 321 F.2d 573 (5th Cir. 1963), *cert. denied*, 377 U.S. 936 (1964).

⁶⁵ *Huguez v. United States*, *supra* note 45, at 20.

⁶⁶ *Huguez v. United States*, *supra* note 45, at 20-21.

⁶⁷ 338 U.S. 74 (1949).

⁶⁸ *Id.* at 78-79.

Huguez, there is no doubt that the customs agents participated in the search. Furthermore, it is completely reasonable for the doctor to have assumed that the appellant was brought to the examination room for the purpose of a medical examination being performed. That, obviously, was the sole reason for the doctor's presence at the border station.

Finally, the emphasis placed upon the amount of force exerted on the appellant bears mentioning. Although Judge Barnes, in dissenting, insisted that no more force than was necessary to complete the search was involved,⁶⁹ the majority held that the search was conducted in an unreasonable manner in addition to being initiated unreasonably.⁷⁰ In almost all searches of this type, some force is necessary.⁷¹ It seems highly unlikely that a suspect would willingly allow the contraband he is smuggling to be discovered by customs agents if there is any possibility of preventing the discovery.

Huguez is distinguished from *Blefare* in that *Blefare* willingly submitted to a rectal probe by a physician while *Huguez* resisted and had to be restrained by three customs agents before the examination could be completed.⁷² However, it is significant that *Blefare* had not concealed the narcotics he possessed in his rectal cavity, but in his stomach. He *did* object to and resist the insertion of a tube into his stomach to induce vomiting. In spite of his resistance, he, too, was restrained by customs officials while the physician inserted the tube. *Blefare's* conviction was affirmed on appeal; the court found no violation of his fifth amendment rights.⁷³

While it is well settled that a search conducted in an unlawful manner is not made lawful by the evidence discovered,⁷⁴ the courts have also emphasized that a premium should not be put on the suspect's resistance.⁷⁵ A search is not unlawful simply because some force had to be employed to effectuate it. Such an idea was firmly rejected in *Henderson*, the last intrusive search case decided in the Court of Appeals for the Ninth Circuit before *Huguez*. "This court has repeatedly upheld border searches of body cavities,

⁶⁹ *Huguez v. United States*, *supra* note 45, at 43.

⁷⁰ *Huguez v. United States*, *supra* note 45, at 26.

⁷¹ In *United States v. Michel*, *supra* note 24, at 37, the court said, "Where the smuggler so degrades himself as to secret the contraband in this fashion, the law is not powerless to cope with such tactics. The Fourth Amendment does not prevent its recovery because the hiding place is difficult of access or because its recovery causes some discomfort to him who placed it there." And in *Lane v. United States*, *supra* note 34, at 576, the court said, "Lack of force is not controlling. . . ."

⁷² *Huguez v. United States*, *supra* note 45, at 23.

⁷³ *Blefare v. United States*, *supra* note 21.

⁷⁴ *Byars v. United States*, 273 U.S. 28, 30 (1926); *Johnson v. United States*, 333 U.S. 10, 16-17 (1947); *United States v. DiRe*, 332 U.S. 581, 595 (1948).

⁷⁵ *United States v. Townsend*, 151 F. Supp. 378, 387 (D.D.C. 1957).

including such searches carried out in spite of the violent resistance of the person searched.⁷⁶

The total effect of the *Huguez* decision is one of tighter restrictions on border officials in the area of body cavity searches. Not only will the customs agents have to show substantial evidence to back up the initiation of any such search in the future, but they will have to handle the suspect in an extremely gentle manner. Also, the agents will have to take more care to pass on all information and suspicions they have to the physician before he attempts any medical examination.

Whether this will result in additional protection for innocent travelers or simply in the reversal of more narcotics convictions remains to be seen.

That the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of right by the police. . . . Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. . . . It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches.⁷⁷

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⁷⁶ *Henderson v. United States*, *supra* note 16, at 806-07.

⁷⁷ *Irvine v. California*, 347 U.S. 128, 136 (1953).

CRIMINAL LAW—GUIDELINES FOR EXPERT TESTIMONY IN THE INSANITY DEFENSE—MAKING THE “PRODUCT” PALPABLE

A jury convicted Thomas Washington, appellant, of rape, robbery and assault with a deadly weapon. The principal defense was insanity. The District of Columbia Court of Appeals affirmed the conviction, holding that sufficient evidence had been adduced to preclude a directed verdict. However, the court went on to criticize the quality of the evidence and wrote a model instruction setting forth guidelines for future testimony by expert witnesses on the insanity defense in criminal prosecutions. *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967).

The *Washington* case presents an interesting intertwining of criminal law substantive and evidentiary issues. The general scope of the opinion encompasses the insanity defense to criminal responsibility. Specifically, Chief Judge Bazelon, who wrote the opinion of the court, adjudged the role of psychiatric expert opinion testimony. But equally noteworthy are the implications of his expositive opinion, which typify the struggle courts are having