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United States v. Montoya de Hernandez: Swallowing up Probable Cause

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I. INTRODUCTION

On March 5, 1983, Rosa Elvira Montoya de Hernandez arrived at Los Angeles International Airport after a ten-hour flight from Bogotá, Colombia.[1] After examining her passport and the contents of her valise, customs officials detained de Hernandez on the grounds that she fit the profile[2] of a "balloon swallower."[3] A female customs inspector then subjected de Hernandez to a patdown and strip search. Though the search did not reveal any contraband, the inspectress noted that de Hernandez had on two pairs of paper towel-lined underpants and that her stomach felt firm and full. The inspectress reported her findings to the inspector in charge. The inspector then told de Hernandez that he suspected she was smuggling drugs in her alimentary canal. Customs officials gave de

1. Respondent passed through immigration and proceeded to customs because her visa was in order. 105 S. Ct. 3304, 3306 (1985).

2. de Hernandez recently had made at least eight trips to either Miami or Los Angeles. She spoke no English and had no friends or relatives in the United States. She also had made no hotel reservations. Moreover, respondent told the customs agents that she planned to buy merchandise for her husband's store in Bogotá, although, she had no appointments and carried no checks, credit cards, waybills or letters of credit. She did possess $5,000, most of which was in $50 bills. *Id.* at 3307.

3. A "balloon swallower" is one who attempts to smuggle narcotics by ingesting narcotic filled balloons into the alimentary canal.

Hernandez three choices: (1) return to Colombia on the next available flight; (2) agree to an x-ray examination; or (3) remain in detention until she produced a monitored bowel movement that would confirm or rebut the inspectors' suspicions. De Hernandez chose to return to Colombia and was placed in a room, under observation, to await the next flight. The officials told her that if she went to the toilet she would have to use a waste basket so that her feces could be inspected for balloons or capsules containing narcotics.[4] De Hernandez remained in the observation room for the rest of the night. During this time officials tried to place her on a Mexican airline that was flying to Bogotá via Mexico City the next morning. De Hernandez, however, was not permitted on the flight because she lacked a Mexican visa necessary to land in that country. The officials then told her that she was not free to leave and that they would detain her until she consented to an x-ray examination or submitted to a monitored bowel movement. She did not consent.[5]

After sixteen hours, de Hernandez had neither defecated nor agreed to an x-ray examination. At that point the customs agents sought a court order permitting a physician to conduct a pregnancy test along with an x-ray and rectal examination. Eight hours later the agents obtained the order and procured a physician to perform the examinations.[6] During the rectal examination, the physician discovered a cocaine-filled balloon. The customs agents immediately placed de Hernandez under arrest. During the ensuing four days, respondent passed eighty-eight cocaine-filled balloons.

The district court denied de Hernandez's motion to suppress the cocaine and a jury convicted her of possession of cocaine with intent to distribute,[7] and importation of cocaine.[8] The United

4. The officials refused respondent's request to make a telephone call. *de Hernandez*, 105 S. Ct. at 3307.

5. During this time, de Hernandez remained in detention and under observation. She declined offers of food and drink and refused to use the toilet facilities. The Ninth Circuit noted that respondent appeared to have symptoms of discomfort associated with "heroic efforts to resist the usual calls of nature." Montoya de Hernandez v. United States, 731 F.2d 1369, 1371 (9th Cir. 1984).

6. The order instructed the physician to honor respondent's claim of pregnancy. The respondent took a pregnancy test, the results of which turned out negative. The rectal examination, however, was conducted before the results of the pregnancy test were known. 105 S. Ct. at 3308.

7. 21 U.S.C. § 841(a)(1) (1982).

8. 21 U.S.C. §§ 952(a), 960(a) (1982).

States Court of Appeals for the Ninth Circuit reversed, holding that the sixteen-hour detention violated respondent's fourth amendment rights.[9] The Ninth Circuit asserted that a justifiably high level of official skepticism existed as to respondent's good faith as a tourist. The court reasoned that it took customs officals more than sixteen hours to feel confident that they could obtain a search warrant. Thus, the customs officials did not have a "clear indication"[10] of alimentary canal smuggling at the inception of the detention.[11] The United States Supreme Court *held*, reversed: A detention of an incoming traveler at the border which exceeds the scope of a routine customs search and inspection is justified at its inception if customs officials, considering all of the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal. *United States v. Montoya de Hernandez*, 105 S. Ct. 3304, *rev'g*, 731 F.2d 1369 (1985).

Balancing the fourth amendment proscription against unreasonable searches and seizures with the governmental interest of protecting the integrity of the border, the *de Hernandez* Court confronted the issue of what level of suspicion is necessary to justify a seizure of an incoming traveler for purposes other than a routine border search. In determining that "reasonable suspicion" satisfies the fourth amendment reasonableness requirements, the *de Hernandez* Court focused on three factors: (1) the governmental interest in protecting the border;[12](2) the difficulty in detecting alimentary canal smugglers;[13] and(3) the "veritable national crisis" in law enforcement caused by narcotics smuggling.[14] The Court was quick to adopt the intermediate, and often arbitrary, standard of "reasonable suspicion" in this case, and was also quick to discard the "clear indication" standard.[15]

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9. 105 S. Ct. at 1373.

10. *See* Schmerber v. California, 384 U.S. 757, 770 (1960) (officials must have a clear indication of possession of narcotics before a search may be made).

11. The court noted that if the facts apparent upon arrival would not authorize issuance of a warrant, then it would be difficult to hold that these same facts authorize the long period of detention which eventually did produce some additional evidence in support of a warrant. 731 F.2d at 1372.

12. 105 S. Ct. at 3309.

13. *Id.* at 3312.

14. *Id.* at 3309.

15. The Court discards "clear indication" as a standard so that case results may be facilitated where paramount policy interests exist. In support of this rejection, the Court asserts that "subtle verbal gradations may obscure rather than elucidate the meaning of the provision in question." *Id.* at 3311. It seems improbable, however, that less obscurity will

II. Prior Fourth Amendment Law

An historical examination of detention cases serves as a framework for understanding the problems the Supreme Court faced in *de Hernandez*. This Comment will focus on the Ninth Circuit's oscillation between competing standards of reasonableness, as well as seminal Supreme Court detention cases.

In the landmark case of *Terry v. Ohio*,[16] the Supreme Court grappled with the meaning of the word 'seizure' as stated in the fourth amendment.[17] The Court held that a seizure exists whenever a police officer accosts an individual and restrains his freedom to walk away.[18] The Court held further that a police officer may, in certain circumstances, approach a person for purposes of investigation though no probable cause exists to make an arrest. In *Terry*, where the officer had conducted a patdown search to determine if the defendant was armed, the Court upheld a brief detention of the defendant.[19] To justify the particular detention, however, the police officer must be able to show specific and articulable facts, which taken together with rational inferences therefrom, reasonably warrant the detention.[20] The Court pointed out that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant requirement.[21] The Court also noted that the validity of the "stop and frisk" was predicated on the officer's need for personal security.[22]

The *Terry* Court determined the reasonableness of the deten-

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result by rejecting a third standard, when the alternative standards, "reasonable suspicion" and "probable cause," certainly lack definition and are thus obscure as well.

16. 392 U.S. 1 (1968).

17. *Terry* was an action by the state against a pedestrian for carrying a concealed weapon.

18. *Terry*, 392 U.S. at 16.

19. The Court stated that it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a search. Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and is not to be undertaken lightly. *Id.* at 16-17.

20. *Id.* at 21. The Court stated that the search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible. The Court also stated that a detention which is reasonable at its inception may violate the fourth amendment by virtue of its intolerable intensity and scope.

21. *Id.* at 20.

22. *Id.* at 21.

tion by applying the balancing test announced in *Camara v. Municipal Court*.[23] In *Camara*, the State brought criminal charges against a tenant for violating a housing code provision which permitted a warrantless search of the premises.[24] The Court held that administrative searches constitute a significant intrusion into the interests which the fourth amendment protects. Such searches, when authorized and conducted without a warrant procedure, lack the traditional safeguards which the fourth amendment guarantees to the individual, and, therefore are unreasonable.[25] In cases where the fourth amendment requires that a search warrant be obtained, the probable cause standard is used to determine whether a particular decision to search meets the constitutional mandate of reasonableness.[26] To apply this standard, the governmental interest in effecting a seizure must be balanced against the intrusion into the individual's fourth amendment rights.[27]

A. Border Searches in the Ninth Circuit

As far back as 1966, the United States Court of Appeals for the Ninth Circuit applied this balancing test to border searches. In *Blefare v. United States*,[28] the court upheld a search where officials inserted a tube into the stomach of two defendants in order to induce vomiting.[29] The defendants vomited packets of heroin. The court opined that the induced vomiting was neither shocking nor

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23. 387 U.S. 523 (1967).

24. *Id.* at 525.

25. *Id.* at 534.

26. *Id.*

27. In *Camara*, the law enforcement interest of housing code enforcement was weighed against the violation of fourth amendment rights that occurs when a warrantless inspection is conducted. The Court proffered that, unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails. *Id.* at 536-37.

28. 362 F.2d 870 (9th Cir. 1966). It is noteworthy that the decision in this case precedes both *Camara* and *Terry*.

29. The defendants drove across the California border from Mexico and were detained after an informant notified officials that they might be smuggling narcotics. Officials knew that Blefare had crossed the border five weeks earlier and had been searched without results, and that he stated that at that time he had heroin in his stomach. The officials knew that both defendants were addicts. Blefare was also suspected of smuggling drugs into Canada. Moreover, Blefare told the officials, after being detained, that his co-defendant had heroin in his stomach. The officials saw Blefare vomit and reswallow an object. The officials also justified the search on the grounds that needle marks were found on the defendants' arms. *Id.* at 874.

unreasonable. The court, citing *Witt v. United States*,[30] stated that

> 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. That the customs authorities do not search every person crossing the border does not mean they have waived their right to do so, when they see fit.[31]

Quoting language from *Rochin v. California*,[32] the court asserted that it would "shock" the conscience of law abiding citizens if the officers, with the knowledge that these officers had, were frustrated in the recovery and use of this evidence.[33]

In *Rivas v. United States*,[34] which was decided exactly five months after *Blefare*, the Ninth Circuit again upheld a rectal search of the defendant. The court found that a "clear indication"[35] existed that the defendant was under the influence of narcotics and was suspected of attempting to smuggle narcotics into the country.[36] The court stressed that national security considerations require that citizens be protected from wholesale introduction of narcotic drugs into this country.[37] The court, in attempting to balance the governmental interest in apprehending drug smugglers with the protections afforded by the fourth amendment, leaned towards the side of government. In 1970, however, the pendulum swung back once again.

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30. 287 F.2d 389, 391 (9th Cir. 1961).

31. *Blefare*, 362 F.2d at 874.

32. 342 U.S. 165 (1952) (evidence was illegally obtained by forcing the defendant to swallow an emetic solution. The Court concluded that this is conduct that shocks the conscience).

33. Evidently, the court in *Blefare* tortured the concept established in *Rochin* so that unpalatable police conduct could be upheld.

34. 368 F.2d 703 (9th Cir. 1966).

35. *Id.* at 710. The court cited Schmerber v. California, 384 U.S. 757 (1966) for the proposition that officials must have a clear indication of the possession of narcotics before a border search may be made. In *Rivas*, the court stated that an intrusion beyond the body's surface required a clear indication or plain suggestion. *Rivas*, 368 F.2d at 710.

36. At the border, the defendant presented customs officials with a registration certificate pursuant to 18 U.S.C. § 1407. This statute was repealed on October 26, 1970. The purpose of this statute was to make a classification of persons who were narcotic prone so that customs officials could be on notice when these persons crossed the border. After presentation of this certificate, officials found other characteristics that suggested defendant was a drug smuggler; fresh needle marks on defendant's arms and defendant's nervous appearance. *Rivas*, 368 F.2d at 705.

37. 368 F.2d at 711.

In *United States v. Guadalupe-Garza*,[38] the court held that heroin recovered from the defendant was the result of an illegal search, where the only external signs of suspicious behavior were the defendant's nervousness and needle marks found on his arm.[39] The court, in this case, applied the "real suspicion" standard.[40] This standard requires a customs official to have at least a real suspicion directed specifically to that person in order to sustain such a search of the defendant.[41] The Court stated:

> "Real suspicion" justifying the initiation of a strip search is subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body for the purpose of transporting it into the States contrary to law.[42]

In *Guadalupe-Garza*, the weight of the court's balancing test landed on the side of the individual. The court refused to uphold a search where the articulable facts (the defendant's nervousness and needle marks) did not bear some reasonable relationship to suspicious behavior.

In 1973, the court vacillated again, finding a valid search in two cases; *United States v. Holtz*[43] and *United States v. Almeida-Sanchez*.[44] In *Holtz*, the court reiterated the "real suspicion" standard espoused in *Guadalupe-Garza*. The court held that only a real suspicion was necessary to search the defendant at the border,[45] where she was commanded to spread her buttocks. As a re-

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38. 421 F.2d 876 (9th Cir. 1970).

39. *Id.* at 879-80. Defendant acted suspiciously and officials subjected him to a strip search but no contraband was found. After defendant was taken to a hospital and administered emetics, however, he vomited two balloons of heroin. *Id.* at 877.

40. The *de Hernandez* Court refused to recognize real suspicion as a standard. 105 S. Ct. 3304.

41. *Gaudalupe-Garza*, 421 F.2d at 876 (citing Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967)).

42. 421 F.2d at 879. The Ninth Circuit also asserted that the objective, articulable facts must bear some reasonable relationship to suspicion that something is concealed on the body of the person to be searched; otherwise, the scope of the search is not related to the justification for its initiation, as it must be to meet the reasonableness standard of the fourth amendment. *Id. See* Terry v. Ohio, 392 U.S. 1, 29 (1968).

43. 479 F.2d 89 (9th Cir. 1973).

44. 413 U.S. 266 (1973).

45. The female defendant had crossed the border in an automobile with two male companions. At the port of entry officials became suspicious when the three seemed unkempt, anxious, and uneasy. Thereafter, the three individuals were searched. Fresh needle marks were found on the men. The two men then were strip searched, but no contraband was

sult of the search, the inspectress found a narcotic-filled prophylactic suspended from the defendant's vaginal area. The search was held valid in this case[46] based on articulable facts that related to suspicious behavior: two of the defendant's companions appeared nervous and had fresh needle marks on their arms. The same articulable facts in *Guadalupe-Garza*, however, did not give rise to suspicious behavior. Moreover, in *Guadalupe-Garza*, the *defendant* exhibited the needle marks and the nervous behavior, not two of his companions.

Based on the cases examined thus far, it is important to note that the court seems to have manipulated the facts to justify an often contradictory conclusion. In *Guadalupe-Garza* the facts would seem to allow a valid search; the defendant exhibited needle marks. Whereas in *Holtz* the facts giving rise to a search of the defendant were not based on the defendant, but on two of her traveling companions. However, the court in *Holtz* found a valid search.

Initially, in *United States v. Almeida-Sanchez*,[47] the Ninth Circuit held that a warrantless roving border search was constitutional.[48] On certiorari, however, the Supreme Court of the United States reversed. The Court held that a warrantless search of an automobile, made by a roving patrol without probable cause or consent, violates the fourth amendment right to be free from unreasonable searches and seizures.[49] By overruling the Ninth Circuit, the *Almeida-Sanchez* Court established that the governmental interest in deterring the unlawful entry of aliens does not outweigh the violation of fourth amendment rights that occurs when a vehicle is stopped without a warrant or probable cause.

Chronologically, the next decision involving border searches was *United States v. Ortiz*.[50] In *Ortiz* the Ninth Circuit followed

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found. The officers then strip searched Holtz. *Holtz*, 479 F.2d at 91.

46. It is noteworthy that Judge Ely, of the Ninth Circuit, dissents in this case, where an intrusive search was upheld, as well as in *Blefare*, where another bodily search was upheld. Judge Ely concurred in the result in *Guadalupe-Garza*, however, where an intrusive bodily search was held unlawful.

47. 452 F.2d 459 (9th Cir. 1971).

48. 413 U.S. 266 (1973).

49. The defendant was stopped in California by a roving border patrol, about 25 miles north of the Mexican border. The roving border patrol served to apprehend illegal aliens. Subsequent to the stop, the border patrol discovered a large quantity of illegally imported marijuana in the defendant's automobile. *Id.* at 267, 268.

50. 422 U.S. 891 (1975).

the dictates of the Supreme Court in *Almeida-Sanchez*, when it held a border search invalid.[51] On appeal, the Supreme Court affirmed the Ninth Circuit's decision in *Ortiz*. The *Ortiz* Court set forth the same reasoning for its decision as it had stated in *Almeida-Sanchez*. The Court asserted that travelers have a constitutional right to be free from warrantless roving stops conducted without consent or probable cause. In two subsequent decisions, however, the Ninth Circuit found that the respective searches did not violate the fourth amendment. *United States v. Ek*[52] and *United States v. Couch*[53] involved the same incident, but the two men, who were arrested following a border search, were tried separately. In *Ek*,[54] the court rearticulated the "clear indication"[55] standard[56] using it as the basis for upholding the search. In *Couch*, the court first relied on *United States v. Ramsey*[57] and held that persons entering the country are subject to routine searches without probable cause. In addition, the court then held that a border detention of a suspect, pending procurement of a warrant does not violate the suspect's fourth amendment rights. Apparently, following the *Ek* and *Couch* decisions, the Court favored governmental concerns rather than individual right concerns. The pendulum, however, did not remain motionless for long.

One year later, in *United States v. Quintero-Castro*,[58] the Ninth Circuit held that an x-ray examination violated the defendant's fourth amendment rights. The defendant exhibited nervous behavior and had other characteristics of drug smugglers.[59] Nevertheless, the court found that no "clear indication" existed that would support issuance of an order to conduct an x-ray examination. The court's oscillation continued, this time, in the same year.

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51. *Ortiz* involved the illegal transportation of aliens, not drug smuggling.

52. 676 F.2d 379 (9th Cir. 1982).

53. 688 F.2d 599 (9th Cir. 1982).

54. The defendant, along with Couch, was detained at Los Angeles International Airport when a customs inspector suspected the two men of smuggling narcotics. The customs officials were acting upon a confidential informant's tip that the two men were smuggling narcotics. A court-ordered x-ray examination revealed that the two men had ingested narcotics. *Couch*, 688 F.2d at 609.

55. *See* Rivas v. United States, 368 F.2d 703 (9th Cir. 1966).

56. It is notable that the court uses the word *standard* to explain clear indication. The *de Hernandez* Court refrained from identifying clear indication as a standard.

57. 431 U.S. 606 (1977).

58. 705 F.2d 1099 (9th Cir. 1983).

59. The defendant was travelling from a drug source country and had relatives in town but had planned to stay at a hotel. *Quintero-Castro*, 705 F.2d at 1100.

In *United States v. Mendez-Jimenez*,[60] the Ninth Circuit, once again, favored governmental concerns. The court held that the detention and search of defendant was reasonable. The defendant was carrying an anti-diarrhea medication and had consumed no food or drink since before leaving Colombia. Furthermore, the defendant had no relatives in the United States and his passport reflected tampering. The court reasserted that the "clear indication" standard supported its holding.[61] The court also justified its holding by noting that there was a strong public interest in apprehending drug smugglers.[62]

Finally, in *United States v. Montoya de Hernandez*,[63] the Court of Appeals for the Ninth Circuit found that customs officials did not have a "clear indication" that defendant was smuggling narcotics in her alimentary canal. The resulting detention, therefore, was unreasonably long and violated the defendant's fourth amendment rights. The Supreme Court, however, disagreed with the lower court's holding.

A survey of the Ninth Circuit cases suggests that the court is attempting to reconcile the often-conflicting societal goals of protecting individuals from invasions of privacy, with allowing the government an effective means to detect and deter criminal activity. Although the fourth amendment[64] generally requires that probable cause be established for all arrests and searches, a warrant need not always be procured before an arrest or search is conducted. As a result, exceptions to the warrant requirement, such as the "stop and frisk" exception[65] and regulatory searches,[66] have been established because of certain exigent circumstances.[67] These

60. 709 F.2d 1300 (9th Cir. 1983).

61. *Mendez-Jimenez*, 709 F.2d at 1304. The facts of this case and the facts of *Quintero-Castro* are quite similar, however, the court decides this case differently.

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

63. 731 F.2d 1369 (9th Cir. 1984).

64. The fourth amendment provides, "[t]he right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath of Affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. CONST. amend. IV.

65. *Terry*, 392 U.S. 1.

66. Schmerber v. California, 384 U.S. 757 (1966).

67. Such exigent circumstances include preventing harm to police officers — as in the stop and frisk exception — and preventing the imminent destruction of evidence — as in the regulatory exception. Other exceptions include Warden v. Hayden, 387 U.S. 294 (1967)(hot pursuit); Coolidge v. New Hampshire, 403 U.S. 443 (1971)(plain view); Carroll v. United States, 267 U.S. 132 (1925)(automobile searches).

limited exceptions have been carved out of the general rule of probable cause, because obtaining a warrant in these situations is either not feasible or counterproductive. These limited intrusions, however, in the absence of probable cause, must nonetheless be reasonable. The requirement of reasonableness in these limited circumstances ensures that the balance between the interests of government and those of the individual will not shift too far towards the side of government. Unfortunately, however, the line of cases beginning with *Terry* and ending with *de Hernandez*, have evinced a gradual, inexorable, and indeed regrettable emasculation of the requirement of probable cause.

B. Seminal Supreme Court Cases Concerning the Fourth Amendment

Before *Terry*, only seizures based on probable cause were held to satisfy the fourth amendment. The eschewing of probable cause in *Terry* was predicated on the notion that certain exigent circumstances—in this case the need to act quickly and to protect the officer—warrant a limited privacy intrusion. The Court was notably circumspect, however, in narrowing its holding to the facts. The Court was concerned that the stop and frisk exception might be broadened and allowed to swallow the general rule of probable cause.[68]

The *Terry* rationale was extended in *Adams v. Williams*[69] and *Michigan v. Long*.[70] The *Adams* decision allowed an officer to stop a vehicle, without probable cause, and for reasons not based on his own observations. The *Long* decision upheld an officer's search for weapons in the passenger compartment of an automobile, even though the suspect was outside the car. The exigent circumstance in these cases focused on the officer's personal security. Although these two cases broadened *Terry*, the nature and scope of the detention was neither lengthy nor intrusive.

In *United States v. Place*[71] and *Florida v. Royer*,[72] the Court also confronted the issue of determining the reasonableness of the

68. The Court in *Terry* was careful to note that the manner and scope of the search and seizure must be limited; the seizure and search must be reasonably related in scope to the justification for their initiation. *Terry*, 392 U.S. at 29.

69. 407 U.S. 143 (1972).

70. 463 U.S. 1032 (1983).

71. 462 U.S. 696 (1983).

72. 460 U.S. 491 (1983).

detention and subsequent intrusion of an individual's privacy. In *Place*, the Court extended *Terry* by upholding the seizure of property. *Place* involved luggage reasonably suspected of containing illegal drugs. The Court asserted, however, that only a brief and limited detention would satisfy the requirement of reasonableness. The Court found that a ninety minute seizure of luggage was too lengthy to qualify as a brief detention under *Terry* and its progeny.[73]

In *Royer*, the officials reasonably suspected the defendant was transporting narcotics.[74] The defendant was taken to a small room at the airport for questioning, where he was detained for only fifteen minutes. The Court held, however, that while the initial stop of the defendant constituted a valid *Terry* stop, the subsequent detention was more intrusive than necessary to further the purposes of the investigation.[75] The Court was most precise on the scope of permissible *Terry*-type detentions: "An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the *least intrusive means* reasonably available to verify or dispel the officer's suspicion in a short period of time"[76] (emphasis added). As Justice Brennan's concurrence noted, the plurality in *Royer* clearly appreciated the narrow scope of *Terry* and its progeny.

> The scope of a *Terry*-type "investigative" stop and any attendant search must be extremely limited or the *Terry* exception would swallow the general rule, that Fourth Amendment seizures and searches are 'reasonable' only if based on probable cause . . . . Any suggestion that the *Terry* reasonable suspicion standard justifies anything but the briefest of detentions or the most limited of searches finds no support in the *Terry* line of cases.[77]

III. An Analysis of de Hernandez

The general rule of probable cause would continue to exist if

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73. *Place*, 462 U.S. at 709-10.

74. The defendant fit a drug courier profile. *Royer*, 460 U.S. at 493.

75. *Royer*, 460 U.S. at 504. The Court noted that the defendant's detention was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity. *Royer*, 460 U.S. at 504.

76. *Id.* at 500.

77. *Id.* at 510-11.

Brennan's concurrence in *Royer* were heeded in *de Hernandez*.[78] Justice Rehnquist's majority opinion has significantly broadened *Terry*[79] and its progeny to a most unsavory extreme. At first glance, respondent's initial detention seems to have satisfied *Terry's* reasonable suspicion exception to probable cause. However, *incommunicado* detention for sixteen hours in a small room, without permission to make a phone call, where officials continually subjected respondent to strip searches and commanded her to defecate into a wastebasket, was not a brief and limited intrusion. In *Place*,[80] the Court held that ninety minutes was unreasonably lengthy for detention of luggage. Why, then, is sixteen hours reasonable for human beings? And, if a fifteen minute detention was too intrusive in *Royer*,[81] why is a sixteen hour detention not unreasonable in *de Hernandez*? Surely it cannot be, as the Court suggests, that "authorities must be allowed to graduate their response to the demands of any particular situation."[82] It is for this very reason that we have detached and neutral magistrates. Nor can it be, as the Court also suggests, that the respondent's long, uncomfortable, and humiliating detention "resulted solely from the method by which she chose to smuggle drugs into this country."[83] The concurrence implied and the dissent explicitly stated, "such post hoc rationalizations have no place in Fourth Amendment jurisprudence, which demands that we prevent hindsight from coloring the evaluation of the reasonableness of a search or seizure."[84]

Searches and seizures at the international border pose a special exigency which affords the government significant leeway; our nation has a vital interest in protecting the integrity of its borders. The statutory latitude given to customs officials and border patrol agents exemplifies this notion of the sacrosanctity of our nation's boundaries.[85] This careful vigilance at our borders reflects more than xenophobia, especially where drug smuggling is concerned. The drug crisis in the United States, caused by the massive influx of narcotics from Latin America, is most certainly a tangible evil.[86]

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78. 105 S. Ct. 3304 (1985).

79. 392 U.S. 1 (1968).

80. 462 U.S. 696 (1983).

81. 460 U.S. 491 (1983).

82. *de Hernandez*, 105 S. Ct. at 3311 (1985).

83. *Id.* at 3312.

84. *Id.* at 3321 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 565 (1976)).

85. *See, e.g.*, 19 U.S.C. § 482, 19 U.S.C. § 1581, 19 U.S.C. § 1582. These statutes concern customs searches of vessels, persons, and baggage.

86. "Virtually all of the cocaine and marijuana flooding South Florida comes from

This crisis is exacerbated by the problems of detecting body cavity smugglers. The drug crisis and the problem of detection are facts that do shift the pendulum of fourth amendment reasonableness in the government's favor.

The majority emphasized the crisis in law enforcement caused by the smuggling of narcotics, the problems in detection of alimentary canal smuggling, and the necessity to maintain the integrity of our national borders. These policy considerations strike the balance in favor of the government, and serve as a justification for a *Terry*-type seizure. Once that balance has been struck, however, and the customs officials are permitted to detain the suspect, the scope of the detention must not last longer than is necessary to effectuate the purpose of the stop. The methods employed must be "the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."[87]

The purpose of the stop in *de Hernandez* was to prevent drugs from coming into the country. Given this purpose, the alternatives facing the customs officials were to: (1) allow the respondent to pass into the interior of the country; (2) allow the respondent to return to Colombia; (3) require the respondent to submit to an x-ray examination; or (4) force the respondent to remain in custody until a bowel movement confirmed or refuted their suspicions.

The first and second alternatives noted above were not feasible under the circumstances.[88] The third alternative, proffered by Justice Stevens in his concurring opinion, would allow the customs officials to administer an x-ray examination without prior judicial authorization. This choice, however, is problematic because of the health problems associated with exposure to x-rays and because of the constitutional issues that may be raised by the imposition of involuntary x-rays.[89] The fourth alternative, providing for custo-

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South America and the Caribbean." *Drug War Failing at Home, Abroad*, Miami Herald, Dec. 8, 1985, A 10, col. 2. "Peru and Bolivia are believed to account for 92 percent of the coca plants that eventually are smuggled into the U.S. as cocaine. Colombia is still thought to be the shipment point for more than 80 percent of the cocaine reaching the U.S. . . ." *Id.* at col. 3.

87. *See Royer*, 460 U.S. at 500.

88. Officials did attempt to place respondent on a flight to Colombia via Mexico; however, the Mexican airline would not transport her without a Mexican visa. *de Hernandez*, 105 S. Ct. at 3307.

89. While Justice Stevens' alternative would certainly enhance the efficiency of detecting and preventing alimentary canal smuggling, it would be prudent to await congressional legislation in this area before permitting such searches.

dial detention, presents the most viable solution of those suggested. The *de Hernandez* Court, however, failed to recognize a fifth alternative: obtaining a search warrant from a magistrate. A simple telephonic warrant[90] would have allowed the officials to verify or dispel their suspicions soon after the initial stop, thereby obviating any need to wait until probable cause did or did not ripen. Allowing customs officials to hold a suspect until they can be certain probable cause exists makes a mockery of the requirement that a detached and neutral magistrate decide if there is sufficient evidence for probable cause to attach.[91]

Even if obtaining a warrant was not feasible, and the only viable alternative was to detain the suspect until she produced a monitored bowel movement, the duration and conditions of this detention—indefinite, incommunicado confinement—certainly approached that of an arrest. Yet, the respondent was not afforded any of the rights and benefits that accrue with an arrest. The respondent was denied permission to use the telephone and also denied legal counsel, certainly "basic amenities that would have been provided to even the vilest of criminals."[92] That a sixteen-hour incommunicado detention is more akin to a full custodial arrest than a brief *Terry*-type stop seems obvious.

The *de Hernandez* decision is of great practical significance because thousands of international travelers cross our borders each day. It is important to remember that the law applies to guilty and innocent travelers alike. It does not require remarkable prescience to see the practical effect of *de Hernandez*; many travelers could be subjected to long, uncomfortable, and humiliating searches. The warning from the *de Hernandez* Court is clear: If you are an international traveler who loosely fits a drug courier profile, the possibility exists that you may be subjected to a "brief detention" like Rosa de Hernandez. Every international traveler, especially those coming from drug source countries in Latin America, should be

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90. This simple procedure was ultimately used in *de Hernandez* 27 hours after the initial stop.

91. As stated in *Terry*:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

Terry, 392 U.S. at 21.

92. 105 S. Ct. at 3319.

aware of the strong warning offered by the *de Hernandez* Court.

IV. Conclusion

In the border search area, the Ninth Circuit has struggled to find the standard of reasonableness necessary to allow a *Terry*-type detention. The Supreme Court, in turn, has struggled with the quest of limiting the scope and duration of the intrusion once the *Terry*-type stop begins. The paramount purpose of *Terry* is to allow only limited intrusions into an individual's privacy, and only when these intrusions are reasonable. A determination of reasonableness derives from a balancing of the interests of government and the individual. The reasonableness requirement, however, does not end when the intrusion begins. The ensuing intrusion must be reasonable at all phases, not just at inception. By subjecting searches and seizures at all times to the reasonableness requirement, the fourth amendment better serves to reconcile the competing interests of government and the individual. This proscription will also ensure that the courts do not end their inquiry once a presumption in favor of either the government or the individual is established.

This, then, is the problem with the *de Hernandez* decision. The Court essentially ended its inquiry after it reasoned that the balance had been struck in the government's favor, owing to the law enforcement problems this nation faces in stanching the massive inflow of drugs at our borders. The dangerous and debilitating effects that the massive inflow of drugs have on this country are self-evident and alarming. The problem of preventing this inflow through detection of smuggling is equally alarming. Understandably, these crises serve as a valid rationale for invasions of privacy. Nevertheless, there must be times when we as a nation, through our Supreme Court, say that these vital state interests, while indeed compelling, cannot be tolerated because their implementation has crossed the threshold of reasonableness. It is at these times when the Court must realize that there is a point at which to draw back. Regrettably, this realization was lost in *de Hernandez*, much to the detriment of innocent and guilty alike.

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