Searches of Airline Passengers in the USA: Sexual Issues

Keywords

agent, agents, airline, airport, body cavity, border, breast, breasts, buttock, buttocks, case, cases, civil, clothing, consent, constitutional, contraband, court, crotch, Customs, enforcement, evidence, examination, federal, feel, felt, female, Fourth Amendment, frisk, frisks, gender, genital, genitals, government, groin, groping, innocent, inspection, international, intimate, intrusion, intrusive, law, legal, male, officer, officers, patdown, pat-down, patdowns, pat, patted, passenger, passengers, personal, police, prison, privacy, private, probable cause, public, reasonable, right, rights, search, searched, searches, security, sex, smuggling, states, strip, Supreme Court, suspicion, suspicious, touching, testicles, traveler, travelers, TSA, unconstitutional, unreasonable, United States, U.S., USA, violation, visual, woman, X-ray

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Introduction

All airline passengers have been searched before they are allowed to board an airplane in the USA since the early 1970s, in attempts to prevent hijackings of airplanes. These searches became much more intrusive in the post-11 Sep 2001 environment. My companion essay, *Legal Aspects of Searches of Airline Passengers in the USA,* http://www.rbs2.com/travel.pdf , discusses issues of constitutional law concerning these searches.

Beginning 22 Sep 2004, the U.S. Government screeners began routinely patting breasts and buttocks of some female airline passengers. A number of female airline passengers complained to journalists or to the TSA about this groping by airport screeners.[1] This groping raises special issues beyond the basic aspects of searches of passengers and their luggage that were considered in my companion essay. The present essay considers whether it is legally permissible for government agents to feel breasts, buttocks, or genitalia during a search for weapons at an airport. In posting long quotations from court cases here, I hope to achieve two goals:

1. Inform citizens of the USA about offensive law enforcement tactics and the legal boundaries. Citizens who are outraged over these intrusive searches should write their legislators and request a new statute regulating such searches.
2. Provide a resource for attorneys who are filing litigation on behalf of innocent people who were abused by government agents.

I made several searches in Westlaw of cases in federal courts, then I wrote this essay. I caution the reader that I have not carefully read and analyzed the cases that I found. In fact, I did not print any of these cases, but only read them on the screen of my computer. For these reasons, I have marked the bottom of each page of this essay with the label preliminary draft. As an attorney and consultant in solo practice, I can not afford to spend more of my unpaid time on this topic. I would welcome a grant or contract to enable me to continue working on this topic. Nonetheless, I believe what is contained in this draft will be useful.

[1] Citations to some articles by journalists on this topic are given in *Legal Aspects of Searches of Airline Passengers in the USA,* http://www.rbs2.com/travel.pdf , 7 Dec 2004.

This essay is intended only to present general information about an interesting topic in law and is *not* legal advice for your specific problem. See my disclaimer at http://www.rbs2.com/disclaim.htm .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

Warning: sexually explicit language

Finally, I warn the reader that the following text includes sexually explicit terms that might be offensive to some readers. It is not possible to accurately discuss the legal aspects of such searches without using the proper anatomical terms, indeed many opinions of courts mention the same words that I use. The intent here is *not* erotic gratification, but accurate description of rather repulsive or offensive searches by law enforcement agents. Using euphemisms (e.g., "private parts" or "body cavity searches") helps people avoid confronting the emotional brutality and outrageousness of these searches, therefore I avoid the euphemisms.

Overview

Because intrusive searches of airline passengers for explosives that might be used by terrorists is a new phenomenon, there are not yet any reported court cases on this specific issue. However, there are many reported court cases on similar searches in other contexts.

In general, having a stranger or co-worker touch one's crotch or buttocks, or touch a woman's breast, is not only offensive, but legally actionable. The perpetrator of such unwelcome touching could be charged with the crime of sexual assault or battery. There is also the possibility of tort litigation for infliction of emotional distress, sexual harassment, invasion of privacy, etc.. In the special case of frisks by government agents, there is also the possibility of litigation for civil rights violations.

border search for illicit drugs

Since the early 1970s, people carrying illicit drugs into the USA have used a number of techniques to attempt to hide those drugs from law enforcement agents at airports. Common techniques include (1) taping envelopes of drugs to people's crotch, buttocks, or breasts, (2) putting heroin inside a condom and either swallowing the condom or hiding the condom inside a vagina. Law enforcement agents responded to these techniques by making more intrusive searches of suspected couriers of illicit drugs. These intrusive searches generally begin with a frisk (i.e., pat-down) of the suspect's body, including breasts, buttocks, and crotch. If something suspicious was felt during the frisk, the search progresses to a "strip search", in which

law enforcement agents demand that the suspect remove his/her clothing, including underwear, so that agents can see his/her buttocks, his/her crotch, and her breasts. Still further, there is a manual body cavity search to determine if contraband is hidden inside a vagina or anus. Unfortunately for innocent people, judicial opinions justifying these intrusive searches for illicit drugs have eroded the privacy rights of *everyone.*

searches in prisons

Another group of cases involves legal rights of inmates in prison, who have alleged strip searches, being seen nude by guards of the opposite gender, and other indignities. When considering these cases, one must recognize that prisoners have fewer rights than people in general, because the prisoners are obviously being punished for some crime. Furthermore, having hundreds of people who were convicted of violent crimes in a building prudently requires extraordinary security measures. Still further, many people in some prisons are former habitual users of illicit drugs, and there is valid concern that drugs may arrive via mail or via visitors, which prudently requires searches to find and to remove drugs. However, any search that would be legally *im*permissible for prisoners is probably also legally *im*permissible at airports, where nearly all travelers are innocent of any crime. There are also a few reported cases (e.g., *Blackburn* and *Spear*) involving searches of intrusive searches of visitors to prisons, which searches may be analogous to searches at airports.

cross-gender searches

Finally, *if* frisks of the crotch and buttocks, and of female breasts, are legally permissible, then there is an additional question of whether the law enforcement agent must be the same gender as the victim of the search, to decrease embarrassment or humiliation. This is an important question because there are fewer female law enforcement agents than male agents, and approximately half of airline passengers are women. My search of federal cases[2] in Westlaw on 16 Dec 2004 for

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(male man) /S (female woman girl) /S (frisk pat-down)
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and

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cross-gender /S (frisk pat-down)
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back to 1980, plus my following some citations to other cases, has found the following relevant cases:

- *York v. Story,* 324 F.2d 450, 455 (9th Cir. 1963) (Female victim of assault went to police station to complain. A male policeman photographed her nude in "various indecent positions", then distributed photographs. Held: "We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figured from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity. A search of one's home has been established to be an invasion of one's privacy against intrusion by the police, which, if 'unreasonable,' is arbitrary and therefore banned under the Fourth Amendment. [footnote omitted] We do not see how it can be argued that the searching of one's home deprives him of privacy, but the photographing of one's nude body, and the distribution of such photographs to strangers does

[2] On 20 Dec 2004, I did the same search in the Westlaw databases for all cases in state supreme courts, but found only a few cases.

not."), *cert. den.,* 376 U.S. 939 (1964).

- *Sterling v. Cupp,* 625 P.2d 123, 131-133 (Or. 1981) (Held that male inmates could *not* have searches of clothed anal-genital area by female officers, unless such search was immediately necessary. Grounds for decision was Oregon state constitution's prohibition of "unnecessary rigor" in prison conditions. At 132, the court noted that "male guards do not frisk female prisoners.").

- *Smith v. Fairman,* 678 F.2d 52, 55 (7th Cir. 1982) ("We think that by instructing female guards to exclude the genital area on male inmates in conducting a frisk, defendants have afforded plaintiff whatever privacy right he may be entitled to in this context. While plaintiff evidently finds even this limited touching by a person of the opposite sex to be offensive, we do not read the Constitution so broadly."), *cert. den.,* 461 U.S. 907 (1983).

- *Madyun v. Franzen,* 704 F.2d 954, 956-957, n. 2 (7th Cir. 1983)(Inmate in Illinois prison complained about nongenital frisk by female guard. Held: no violation of his constitutional rights.), *cert. den.,* 464 U.S. 996 (1983).

- *Rivera v. Smith,* 472 N.E.2d 1015, 1016 (N.Y. 1984) ("Under the Constitution and statutes of the State of New York, it would have been a violation of the right of a Muslim inmate to free exercise of his religious beliefs, in the limited circumstances of this case, for him to have been subjected to a random pat frisk performed by a correction officer of the opposite sex. This intrusion on the prisoner's religious beliefs would not have been justified here by the State's interests in maintaining prison security or in providing equal opportunity for women to serve as prison guards." At 1017: "... the Qu'ran forbids a Muslim from revealing his genitals to or having them touched by a member of the opposite sex other than his spouse.").

- *Grummett v. Rushen,* 779 F.2d 491, 496 (9th Cir. 1985) (Holding that male prisoners in California state prison can be searched by female guards: "These searches are done briefly and while the inmates are fully clothed, and thus do not involve intimate contact with the inmates' bodies. The record indicates that the searches are performed by the female guards in a professional manner and with respect for the inmates. Therefore such searches are acceptable under the fourth amendment. *Bagley,* 579 F.Supp. at 1103. The record indicates that the female guards do not routinely conduct or observe strip or body cavity searches. It has been shown that only on two or three occasions, in emergency situations, have female guards observed strip searches.").

- *U.S. v. Kelly,* 913 F.2d 261 (6th Cir. 1990) (Man carrying 11 kg of cocaine in the Memphis airport alleged he was patted down by a female sheriff. See note 2 in the majority opinion and Judge Merritt's concurring opinion at 267, which says: "I do not see the pat-down search of the defendant's person by the female officers as an illegal search. I would attribute no significance to the fact that the female officers did not search the defendant's genital area. The breakdown of Victorian values notwithstanding, I would not fault a female officer for failing to touch a male suspect's groin in conducting a search of the person. Social sensitivity about stereognosis of the male groin should not been seen as sexual "stereotyping," as the Court suggests. Nor would I suggest that compunctions about the stereognosis of the breasts and genital area of a female suspect "stereotypes" the male officer. Officers should continue to have some sense of "delicacy," as the Court calls it.").

- *Martin v. Swift,* 781 F.Supp. 1250 (E.D.Mich. 1992) (Woman alleged that male police officer frisked her, and he allegedly "touched her breast inside her jacket, rubbed his hands on the inside of her thighs and touched her genital area." At pages 1253-54:"During oral argument plaintiff challenged the City's practice of allowing male police officers to conduct pat-down searches of females accused of misdemeanors. However, plaintiff has failed to present any evidence that such a policy is unconstitutional. Furthermore, there is no question that such a practice *would* pass constitutional muster.")

- *Jordan v. Gardner,* 986 F.2d 1521 (9th Cir. 1993) (Male guards searched female inmates at a Washington state prison in 1989, including pat-downs of the clothed women's breasts and crotches. En banc decision held it was cruel and unusual punishment. At pages 1524-1525: "Although the inmates here may have protected privacy interests in freedom from cross-gender clothed body searches, such interests have not yet been judicially recognized. On the other hand, the Eighth Amendment right of incarcerated persons to be free from the unwarranted infliction of pain is clearly established. As both amendments are applicable, and we affirm the district court upon the basis of the Eighth Amendment, we do not reach the Fourth Amendment claims." At page 1526: "The record in this case supports the postulate that women experience unwanted intimate touching by men differently from men subject to comparable touching by women.").

- *Canedy v. Boardman,* 16 F.3d 183 (7th Cir. 1994), *appeal after remand,* 91 F.3d 30 (7thCir. 1996) (Male inmate in Wisconsin strip-searched by female guards and female guards viewed him during showers and while he used the toilet. U.S. Court of Appeals held he was entitled to "reasonable accommodations" to prevent viewing of his nude body by female guards.) On remand, Plaintiff lost. *aff'd,* 91 F.3d 30 (1996).

- *Johnson v. Phelan,* 69 F.3d 144, 152 (7th Cir. 1995) (Male inmate of county jail in Illinois alleged that female guards could see nude male inmates in their cells, in the showers, and using the toilet. Defendants granted summary judgment, because inmate failed to state a claim on which relief can be granted, and the U.S. Court of Appeals affirmed. Chief Judge Posner dissented on the Eighth Amendment issue: "The nudity taboo retains great strength in the United States. It should not be confused with prudery. It is a taboo against being seen in the nude by strangers, not by one's intimates."), *cert. den. sub nom., Johnson v. Sheahan,* 519 U.S. 1006 (1996).

- *Somers v. Thurman,* 109 F.3d 614, 622 (9th Cir. 1997) (Allegations by male prison inmate in California state prison that female guards observed him showering and female guards gave him body cavity searches. Held: "... it is highly questionable even today whether prison inmates have a Fourth Amendment right to be free from routine unclothed searches by officials of the opposite sex, or from viewing of their unclothed bodies by officials of the opposite sex." The court distinguished *Jordan* from this case.), *cert. den.,* 522 U.S. 852 (1997).

- *Rice v. King County,* 2000 WL 1716272 (9th Cir. 15 Nov 2000) ("In general, cross-gender pat-down searches of male inmates by female prison guards are constitutionally permissible.").

- *Casas v. City of Overland Park,* 2001 WL 584426, at *2 (D.Kan. 14 May 2001) (Mentions training of police officers in one Kansas county: "The training included instruction that officers should seek assistance from a female officer to search a female detainee. If a female officer is not available the officer may do the search himself with a second officer present and in view of the video camera in his police cruiser. Officers are instructed to use the blade of the hand or the back of the hand to avoid the appearance that the officer is groping the female detainee." In this case a male policeman felt a woman's crotch and then fondled a woman's breasts for "about 47 seconds". He was sentenced to four years in state prison for sexual battery and then sued in tort.).

- *Robins v. Centinela State Prison,* 19 Fed.Appx. 549, 550 (9th Cir. 19 Sep 2001) (Holding that male prisoner who alleged female corrections officer "inappropriately groping him while conducting a clothed body search" had stated a valid cause of action for violation of his Fourth Amendment rights.) On 10 Dec 2004, here is no further opinion in Westlaw for this case.

- *State v. Adams,* 836 So.2d 9, 12-14 (La. 2003), 2001-3231 at 4-7 (La. 14 Jan 2003) (Collecting cases on standard practices by police departments nationwide for pat-downs of women by male officers. Held: "Given these considerations, we conclude that the Fourth Amendment neither compels nor precludes a male police officer's decision to defer the frisk of a female suspect he is otherwise lawfully entitled to perform to a female officer and that he may do so under circumstances in which the detention of the individual is not unduly prolonged and the safety rationale for conducting such searches is not outstripped. In the present case, the initial frisk conducted by Officer Hickman's partner by design did not include respondent's groin area, "a common area for weapons to be hidden." *Kelly,* 913 F.2d at 264. The officers solution to this situation, handcuffing respondent for safety's sake and for the few minutes it took a female officer to arrive while they conducted identification and warrant checks on the three other individuals who had been standing on the sidewalk with respondent, appears entirely reasonable.").

- *State v. Temple,* 854 So.2d 856, 858, n. 3 (La. 2003), 2002-1895 (La. 9 Sep 2003) (Facts include male officers who called a female officer to search a female suspect. "At trial, Officer Brooks testified that male officers "tend not to want to touch females because of complaints." In fact, deference of male police officers to female officers in conducting the frisk of female suspects appears a common, if certainly not exclusive, practice throughout the country. *State v. Adams,* 01-3231 (La.1/10/03), 836 So.2d 9.").

- *Laing v. Guisto,* 92 Fed.Appx. 422, 424 (9th Cir. 20 Jan 2004) ("We have repeatedly held that searches or surveillance of male prisoners by female guards does not violate the constitution." [citing two cases]).

In reading these cases, the law of searches of prison inmates appears to be evolving and, further, it is not clear how courts will apply the law to searches of innocent airline passengers. Hence it is not possible to say with certainty what the law is. It may be *un*constitutional for a male TSA employee (or a male policeman) to pat-down a clothed female airline passenger, including feeling her breasts and her crotch. However, it seems that the current law may permit a female TSA employee to pat-down a male airline passenger, including feeling his crotch. Personally, I believe that cross-gender searches of airline passengers should be a civil rights violation, regardless of gender.

Interestingly, having female guards in prisons with only male inmates was justified on grounds of giving women equal access to employment, under the Civil Rights Act of 1964. By solving the gender discrimination problem for female guards, the government created a possible privacy problem for male inmates.

U.S. Supreme Court Decisions

Terry and consent to search

The U.S. Supreme Court described a typical pat-down 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.' [FN13] It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly. [footnote omitted]
>
> FN13 Consider the following apt description:
>
> > (T)he officer must feel with sensitive fingers every portion of the prisoner's body. A through search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.
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> Priar & Martin, Searching and Disarming Criminals, 45 J.Crim.L.C. & P.S. 481 (1954).

Terry v. Ohio, 392 U.S. 1, 16-17 (1968).

This remark in *Terry* means that consent to a frisk or pat-down *automatically* includes consent to having one's crotch felt.

- *U.S. v. Richardson,* 1992 WL 20637, *1 (D.C.Cir. 1992) (three-judge panel includes Ruth Bader Ginsburg, who was later appointed to the U.S. Supreme Court);
- *U.S. v. Rodney,* 956 F.2d 295, 298 (D.C.Cir. 1992);
- *U.S. v. Dickson,* 2000 WL 519056, *1 (9th Cir. 2000);
- *U.S. v. King,* 18 Fed.Appx. 480, 481 (9th Cir. 2001) (does not mention consent, but held that pat-down search of groin was "reasonable"), *cert. den.,* 534 U.S. 1095 (2002);
- *U.S. v. Wilson,* 94 Fed.Appx. 14, 16 (2nd Cir. 2004) (does not cite note 13 in *Terry*).

I suspect that people who are not familiar with Fourth Amendment law would be astounded at this result, which is accepted law in the USA since 1968. However, at least one case held that consent to frisk does *not* include touching the genitals. *U.S. v. Blake,* 718 F.Supp. 925, 927 (S.D.Fla. 1988) (does not cite note 13 in *Terry*), *aff'd,* 888 F.2d 795, 801 (11th Cir. 1989) ("One might even reasonably expect the traditional frisk search, described in *Terry v. Ohio,* 392 U.S. 1, 17 n. 13, ... (1968), as a 'thorough search ... of ... arms and armpits, waistline and back, the groin and area about the testicles, and the entire surface of the legs down to the feet.' [footnote omitted] However, the district court was not clearly erroneous in concluding that the consent given in this case, under all the circumstances, did not extend to touching the genitals.").

Bell v. Wolfish

In a case in which an inmate of a federal prison in New York City alleged violations of his constitutional rights (including body-cavity searches following meetings with visitors), the U.S. Supreme Court announced a general standard for evaluating Fourth Amendment cases involving sexual searches:

> The Fourth Amendment prohibits only unreasonable searches, *Carroll v. United States*, 267 U.S. 132, 147, 45 S.Ct. 280, 283, 69 L.Ed. 543 (1925), ...
>
> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *E. g., United States v. Ramsey*, 431 U.S. 606, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

Bell v. Wolfish, 441 U.S. 520, 558-559 (1979).

The U.S. District Court described the searches in this case:

> Under the questioned practice, every inmate — including pre-trial detainees held on charges ranging from mail embezzlement through stock fraud to narcotics dealings and bank robbery — undergoes a strip search upon returning to his quarters from any visit. In the presence of a corrections officer, the male inmate must remove his clothes, display his armpits, open his mouth, raise his genitals, display the bottoms of his feet, and spread his buttocks for visual anal inspection. Female inmates must follow a similar procedure, including a visual vaginal inspection. The testimony of inmates and experts alike reveals qualities in this experience that a court might come close to noticing judicially. The stripping is unpleasant, embarrassing, and humiliating. The spreading and lifting of genitalia and the bending over to spread buttocks for anal inspection plunge the reaction to a level of deep degradation and submission. The postures petitioners are compelled to assume are calculated to trigger, in the officer and inmate respectively, feelings of sadism, terror, and incipient masochism that no one alive could have failed to predict. In the MCC [Metropolitan Correctional Center in New York City], as elsewhere in such situations, male correction officers have been incited by the temptation to indulge the sense of a cheap machismo. There have been insultingly suggestive remarks and banal but terrifying expressions of aggression like those of guards threatening in the time of nakedness to "put (a) foot up (the) ass" or merely to "kick the ass" of the humbled prisoner. The court credits the testimony of inmates who have found this so high a price as to forego visits or to feel after a visit that it was not worthwhile.
>
> ....

> The asserted justification for this grisly procedure is, of course, the claim that it is needed for security against the smuggling of weapons, drugs, and other contraband. As for specific experience, one female officer once espied in a prisoner's vagina a red balloon containing heroin. Another testified to discovering drugs in an inmate's shoes. There was no evidence that anal inspections had ever revealed any attempts at smuggling, and this is no surprise. The evidence is clear and uncontradicted that a person bent upon this mode of transport could insert an object beyond the anal sphincter and render it invisible until its retrieval at some private moment later on.
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> ....
>
> For the probably slim minority who might attempt to smuggle things in their bodies, there remain search techniques short of the loathesome practice now in force. The paramount worry is, or ought to be, over possible importation of weapons or other dangerous instruments. These are discoverable by metal detecting devices and, if necessary, other equipment employed for airline security and other purposes.

U.S. ex rel. Wolfish v. Levi, 439 F.Supp. 114, 146-147 (S.D.N.Y. 1977).

The U.S. Supreme Court held that those searches were reasonable:

> Inmates at all [U.S.] Bureau of Prison facilities, including the MCC, are required to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution. [FN39] Corrections officials testified that visual cavity searches were necessary not only to discover but also to deter the smuggling of weapons, drugs, and other contraband into the institution. App. 70-72, 83- 84. The District Court upheld the strip-search procedure but prohibited the body-cavity searches, absent probable cause to believe that the inmate is concealing contraband. 439 F.Supp., at 147-148. Because petitioners proved only one instance in the MCC's short history where contraband was found during a body-cavity search, the Court of Appeals affirmed. In its view, the "gross violation of personal privacy inherent in such a search cannot be outweighed by the government's security interest in maintaining a practice of so little actual utility." 573 F.2d, at 131.
>
> FN39. If the inmate is a male, he must lift his genitals and bend over to spread his buttocks for visual inspection. The vaginal and anal cavities of female inmates also are visually inspected. The inmate is not touched by security personal at any time during the *visual* search procedure. 573 F.2d, at 131; Brief for Petitioners 70, 74 n. 56.
>
> Admittedly, this practice instinctively gives us the most pause. However, assuming for present purposes that inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility, see *Lanza v. New York, supra; Stroud v. United States*, 251 U.S. 15, 21, 40 S.Ct. 50, 52, 64 L.Ed. 103 (1919), we nonetheless conclude that these searches do not violate that Amendment. The Fourth Amendment prohibits only unreasonable searches, *Carroll v. United States*, 267 U.S. 132, 147, 45 S.Ct. 280, 283, 69 L.Ed. 543 (1925), and under the circumstances, we do not believe that these searches are unreasonable.

Bell v. Wolfish, 441 U.S. 520, 558 (1979).

> We do not underestimate the degree to which these searches may invade the personal privacy of inmates. Nor do we doubt, as the District Court noted, that on occasion a security guard may conduct the search in an abusive fashion. 439 F.Supp., at 147. Such an abuse cannot be condoned. The searches must be conducted in a reasonable manner. *Schmerber v. California, supra*, 384 U.S. at 771-772, 86 S.Ct. at 1836-1837. But we deal here with the question whether visual body-cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can. [FN41]
>
> FN41. We note that several lower courts have upheld such visual body-cavity inspections against constitutional challenge. See, *e. g., Daughtery v. Harris*, 476 F.2d 292 (CA10), cert. denied, 414 U.S. 872, 94 S.Ct. 112, 38 L.Ed.2d 91 (1973); *Hodges v. Klein*, 412 F.Supp. 896 (DCNJ 1976); *Bijeol v. Benson*, 404 F.Supp. 595 (SD Ind. 1975); *Penn El v. Riddle*, 399 F.Supp. 1059 (ED Va. 1975).

Bell v. Wolfish, 441 U.S. 520, 560 (1979).

Justices Powell, Marshall, Stevens, and Brennan all dissented on the issue of the body cavity searches in *Bell v. Wolfish* at the U.S. Supreme Court. Justice Marshall was concerned that the inmates in the MCC had *not* been convicted of a crime:

> ... all of these detainees are presumptively innocent and many are confined solely because they cannot afford bail.

Bell v. Wolfish, 441 U.S. 520, 563 (1979) (Marshall, J., dissenting).

> In my view, the body-cavity searches of MCC inmates represent one of the most grievous offenses against personal dignity and common decency. After every contact visit with someone from outside the facility, including defense attorneys, an inmate must remove all of his or her clothing, bend over, spread the buttocks, and display the anal cavity for inspection by a correctional officer. Women inmates must assume a suitable posture for vaginal inspection, while men must raise their genitals. And, as the Court neglects to note, because of time pressures, this humiliating spectacle is frequently conducted in the presence of other inmates.

Bell v. Wolfish, 441 U.S. 520, 576-577 (1979) (Marshall, J., dissenting).

> That the Court can uphold these indiscriminate searches highlights the bankruptcy of its basic analysis. Under the test adopted today, the rights of detainees apparently extend only so far as detention officials decide that cost and security will permit. Such unthinking deference to administrative convenience cannot be justified where the interests at stake are those of presumptively innocent individuals, many of whose only proven offense is the inability to afford bail. I dissent.

Bell v. Wolfish, 441 U.S. 520, 579 (1979) (Marshall, J., dissenting).

Justice Stevens, in a dissent joined by Justice Brennan, began:

> This is not an equal protection case. [footnote quotes 14th Amendment] An empirical judgment that most persons formally accused of criminal conduct are probably guilty would provide a rational basis for a set of rules that treat them like convicts until they establish their innocence. No matter how rational such an approach might be--no matter how acceptable in a community where equality of status is the dominant goal — it is obnoxious to the concept of individual freedom protected by the Due Process Clause. If ever accepted in this country, it would work a fundamental change in the character of our free society.

> Nor is this an Eighth Amendment case. [footnote quotes 8th Amendment] That provision of the Constitution protects individuals convicted of crimes from punishment that is cruel and unusual. The pretrial detainees whose rights are at stake in this case, however, are innocent men and women who have been convicted of no crimes. Their claim is not that they have been subjected to cruel and unusual punishment in violation of the Eighth Amendment, but that to subject them to any form of punishment at all is an unconstitutional deprivation of their liberty.
>
> This is a due process case. [footnote quotes 5th Amendment and notes that MCC is a "federal facility"] The most significant — and I venture to suggest the most enduring — part of the Court's opinion today is its recognition of this initial constitutional premise. The Court squarely holds that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." [FN4] *Ante*, at 1872.
>
> FN4. Because Mr. Justice MARSHALL does not accept this basis for analysis, see *ante*, at 1889-1890, I have added this separate dissent even though I agree with much of his analysis and most of his criticism of the Court.

Bell v. Wolfish, 441 U.S. 520, 579-580 (1979) (Stevens, J., dissenting).

I do not know why Justice Stevens omitted the Fourth Amendment here, but he did mention it later in his dissent, in the following footnote:

> The First Amendment is not the only victim of the Court's analysis. It also devalues the Fourth Amendment as it applies to pretrial detainees. This is particularly evident with respect to the Court's discussion of body-cavity searches. Although it recognizes the detainee's constitutionally protected interest in privacy, the Court immediately demeans that interest by affording it "diminished scope." The reason for the diminution is the detainee's limited expectation of privacy. *Ante,* at 1883, 1884. At first blush, the Court's rationale appears to be that once the detainee is told that he will not be permitted to carry on any of his activities in private, he cannot "reasonably" expect otherwise. But "reasonable expectations of privacy" cannot have this purely subjective connotation lest we wake up one day to headlines announcing that henceforth the Government will not recognize the sanctity of the home but will instead enter residences at will. The reasonableness of the expectation must include an objective component that refers to those aspects of human activity that the "reasonable person" typically expects will be protected from unchecked Government observation. Cf. *Katz v. United States,* 389 U.S 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (Harlan, J., concurring). Hence, the question must be whether the Government *may,* without violating the Fourth Amendment, tell the detainee by words or by action that he has no or virtually no right to privacy. In my view, the answer to this question must be negative: despite the fact of his confinement and the impossibility of retreat to the privacy of his home, the detainee must have the right to privacy that we all retain when we venture out into public places. And surely the scope of that privacy is not so diminished that it does not include an expectation that body cavities will not be exposed to view. Absent probable cause, therefore, I would hold that such searches of pretrial detainees may not occur.

Bell v. Wolfish, 441 U.S. 520, 589, n. 21 (1979) (Stevens, J., dissenting).

> The body-cavity search — clearly the greatest personal indignity — may be the least justifiable measure of all. After every contact visit a body-cavity search is mandated by the rule. The District Court's finding that these searches have failed in practice to produce any demonstrable improvement in security, *id.*, at 147, is hardly surprising. [FN27] Detainees and their visitors are in full view during all visits, and are fully clad. To insert contraband in one's private body cavities during such a visit would indeed be "an imposing challenge to nerves and agility." *Ibid.* There is no reason to expect, and the petitioners have established

none, that many pretrial detainees would attempt, let alone succeed, in surmounting this challenge absent the challenged rule. Moreover, as the District Court explicitly found, less severe alternatives are available to ensure that contraband is not transferred during visits. *Id.*, at 147-148. Weapons and other dangerous instruments, the items of greatest legitimate concern, may be discovered by the use of metal detecting devices or other equipment commonly used for airline security. In addition, inmates are required, even apart from the body-cavity searches, to disrobe, to have their clothing inspected, and to present open hands and arms to reveal the absence of any concealed objects. These alternative procedures, the District Court found, "amply satisf[y]" the demands of security. *Id.*, at 148. In my judgment, there is no basis in this record to disagree.

> FN27. Indeed, the District Court found the searches entirely ineffective in some of their most offensive manifestations (e. g., anal searches). 439 F.Supp., at 147.

It may well be, as the Court finds, that the rules at issue here were not adopted by administrators eager to punish those detained at MCC. The rules can all be explained as the easiest way for administrators to ensure security in the jail. But the easiest course for jail officials is not always one that our Constitution allows them to take. If fundamental rights are withdrawn and severe harms are indiscriminately inflicted on detainees merely to secure minimal savings in time and effort for administrators, the guarantee of due process is violated.

In my judgment, each of the rules at issue here is unconstitutional. The four rules do indiscriminately inflict harm on all pretrial detainees in MCC. They are all either unnecessary or excessively harmful, particularly when judged against our historic respect for the dignity of the free citizen. I think it is unquestionably a form of punishment ... to compel him to exhibit his private body cavities to the visual inspection of a guard. Absent probable cause to believe that a specific individual detainee poses a special security risk, none of these practices would be considered necessary, or even arguably reasonable, if the pretrial detainees were confined in a facility separate and apart from convicted prisoners. If reasons of convenience justify intermingling the two groups, it is not too much to require the facility's administrator to accept the additional inspection burdens that would result from denying them the right to subject citizens to these humiliating indignities.

Bell v. Wolfish, 441 U.S. 520, 594-596 (1979) (Stevens, J., dissenting).

Montoya de Hernandez

U.S. v. Montoya de Hernandez, 731 F.2d 1369 (9th Cir. 1984), *rev'd,* 473 U.S. 531 (1985).

In 1983, a woman passenger arrived at the San Francisco airport on a flight from Bogota, Columbia. A U.S. Customs agent, Serrato,

immediately suspected that de Hernandez was carrying drugs internally because she fit the common profile of an internal-body carrier. [FN3]

> FN3. De Hernandez had paid cash for her ticket, came from a source port of embarcation, carried $5,000 in U.S. currency, had made many trips of short duration into the United States, had no family or friends in the United States, had only one small piece of luggage, had no confirmed hotel reservations, did not speak English, and said she was planning to go shopping using taxis for transportation. Prior cases of body smugglers had taught the agents to regard these factors in various combinations as highly likely to identify a drug carrier. This particular suspect possessed almost all of the indicators.

> Serrato had de Hernandez taken to another room for a pat down. That search failed to reveal evidence of contraband. The arriving passenger was then asked if she would consent to an x-ray search. She initially indicated that she would consent, but when she was told she would be taken to a hospital in handcuffs for the x-ray, she withdrew her consent. Officer Serrato's supervisors then contacted Special Agent Windes for the purpose of obtaining a court order for an x-ray search.
>
> Windes decided that the facts then known probably would not support a court ordered x-ray examination. At this time the arriving passenger had not yet been detained for an unusual period of time. Windes told Serrato and his supervisors to give the passenger three choices: She could either consent to an x-ray search, be held in custody until her bowels moved, or depart the United States on the next plane for Colombia. De Hernandez reluctantly consented to leave for Colombia, but the next flight could not be arranged for several more hours. She was therefore left with the "choice" of consenting to an x-ray or remaining in custody until her peristaltic functions produced a monitored bowel movement. She was taken to a room and held under the observation of Serrato and other inspectors for the remainder of the night and most of the next day, a total of some 16 hours.
>
> A strip search after the 16-hour delay again failed to reveal contraband. Agent Windes decided to seek a court order for an x-ray and body cavity search. The application for the court order contained information gleaned during the 16-hour detention and observation of the passenger. This information included refusal of food and water and symptoms of discomfort suspected to arise out of, or at least to be consistent with, heroic efforts to resist the usual calls of nature. At midnight the order was issued, nearly 24 hours after her plane had landed.
>
> De Hernandez was taken to a hospital where a rectal examination revealed a balloon containing cocaine. She was given the *Miranda* warnings and taken to jail. During the next 4 days she passed 88 balloons containing cocaine.

Montoya de Hernandez, 731 F.2d at 1371.

The trial judge admitted the evidence of cocaine and she was convicted of possession of cocaine with intent to distribute and importation of cocaine. She appealed and the U.S. Court of Appeals reversed, writing:

> "As a search becomes more intrusive, it must be justified by a correspondingly higher level of suspicion of wrongdoing." *United States v. Ek,* 676 F.2d 379, 382 (9th Cir. 1982) (citing *United States v. Aman,* 624 F.2d 911, 912-13 (9th Cir. 1980)). Therefore, a "real suspicion" that contraband is concealed on the body of the person to be searched is required for a strip search. *United States v. Guadalupe-Garza,* 421 F.2d 876, 879 (9th Cir. 1970). X-ray and body cavity searches are more intrusive than a strip search. Such searches require a " 'clear indication' or 'plain suggestion' that the person is carrying contraband within his body." *Ek,* 676 F.2d at 382 (citation omitted.) In this case, the officers had a strong suspicion that de Hernandez was carrying drugs in her body, but for more than 16 hours they did not apply for a court order. The officers decided, instead, to wait for nature to provide the stronger evidence that would support an order. This decision necessarily impacted both the comfort and the dignity of a human being.
>
> The degree of suspicion necessary to justify a detention for the purpose of having a suspect produce a bowel movement has not been established. In *United States v. Couch,* 688 F.2d 599 (9th Cir. 1982), *cert. denied,* 459 U.S. 857, 103 S.Ct. 128, 74 L.Ed.2d 110 (1982), we affirmed the conviction. The customs officials in *Couch* had the usual indications of internal smuggling, plus an informant's tip. The suspect's detention while a court order for an

> x-ray was sought was therefore reasonable. We did not then have to reach the issue whether the customs officials without a court order, could have detained the suspect on the same level of suspicion until his bodily processes had cleared his digestive tract of its contents. *Couch,* 688 F.2d at 603 n. 5. In *Couch* we noted that such a detention could last two or three days. *Id.*
>
> What circumstances justify the delay imposed in this case? These cases usually turn upon the sufficiency of the original evidence which establishes in the customs officer's mind the belief that the incoming passenger "fits the drug courier profile". If that evidence is strong, and where it is enhanced by a tip from a reliable informer, we have upheld lengthy delays and highly obtrusive searches. *See, e.g., Erwin, Couch, Ek,* and cases discussed therein. These cases suggest that when in doubt the customs officers should present their information to a magistrate and permit that judicial officer to exercise judicial discretion in striking the delicate balance between human rights and the practical necessities of border security.
>
> In the case at bar, there was a justifiably high level of official skepticism about the woman's good faith as a tourist; but at the same time the officers knew that thousands of unusual looking persons cross international borders daily on all sorts of errands, many of which are wholly innocent. At the time the officers offered de Hernandez the alleged choice of taking the next plane back to Bogota (and remaining under observation during the wait), or submitting to a custodial x-ray examination, the officers knew that no plane would be leaving for Bogota for several more hours. The officers accordingly knew that the woman would suffer many hours of humiliating discomfort if she chose not to submit to the x-ray examination. Under the circumstances of this Hobson's choice, one can hardly characterize as voluntary any decision on the part of de Hernandez to consent to wait under observation. Rather, the officers effectively decided that if she did not wish to submit to an x-ray examination, she could just wait until natural processes made that type of examination unnecessary, no matter how long that might be.

Montoya de Hernandez, 731 F.2d at 1371-72.

> ... the decision by the customs officers in the present case not to seek a court order for an x-ray search was based in part on their belief that they did not have sufficient facts to support the issuance of the order. We find that, in the instant case, the evidence available to the customs officers when they decided to hold de Hernandez for continued observation was insufficient to support the 16-hour detention.

Montoya de Hernandez, 731 F.2d at 1373.

The U.S. Government appealed to the U.S. Supreme Court, which reversed the Court of Appeals. The opinion of the U.S. Supreme Court notes some additional facts:

> The inspectors requested a female customs inspector to take respondent to a private area and conduct a patdown and strip search. During the search the female inspector felt respondent's abdomen area and noticed a firm fullness, as if respondent were wearing a girdle. The search revealed no contraband, but the inspector noticed that respondent was wearing two pairs of elastic underpants with a paper towel lining the crotch area.

Montoya de Hernandez, 473 U.S. at 534.

The Supreme Court recognized the extreme physical discomfort of the drug courier after the ten-hour flight from Columbia.

> She was told that if she went to the toilet she would have to use a wastebasket in the women's restroom, in order that female customs inspectors could inspect her stool for balloons or capsules carrying narcotics. The inspectors refused respondent's request to place

a telephone call.

Respondent sat in the customs office, under observation, for the remainder of the night. During the night customs officials attempted to place respondent on a Mexican airline that was flying to Bogota via Mexico City in the morning. The airline refused to transport respondent because she lacked a Mexican visa necessary to land in Mexico City. Respondent was not permitted to leave, and was informed that she would be detained until she agreed to an x ray or her bowels moved. She remained detained in the customs office under observation, for most of the time curled up in a chair leaning to one side. She refused all offers of food and drink, and refused to use the toilet facilities. The Court of Appeals noted that she exhibited symptoms of discomfort consistent with "heroic efforts to resist the usual calls of nature." 731 F.2d, at 1371.

At the shift change at 4 o'clock the next afternoon, almost 16 hours after her flight had landed, respondent still had not defecated or urinated or partaken of food or drink. At that time customs officials sought a court order authorizing a pregnancy test, an x ray, and a rectal examination. The Federal Magistrate issued an order just before midnight that evening, which authorized a rectal examination and involuntary x ray, provided that the physician in charge considered respondent's claim of pregnancy. Respondent was taken to a hospital and given a pregnancy test, which later turned out to be negative. Before the results of the pregnancy test were known, a physician conducted a rectal examination and removed from respondent's rectum a balloon containing a foreign substance. Respondent was then placed formally under arrest. By 4:10 a.m. respondent had passed 6 similar balloons; over the next four days she passed 88 balloons containing a total of 528 grams of 80% pure cocaine hydrochloride.

Montoya de Hernandez, 473 U.S. at 535-36.

The U.S. Supreme Court recognized that border searches could be conducted without a warrant and without probable cause.

Here the seizure of respondent took place at the international border. Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country. See *United States v. Ramsey,* 431 U.S. 606, 616-617, 97 S.Ct. 1972, 1978-1979, 52 L.Ed.2d 617 (1977), citing Act of July 31, 1789, ch. 5, 1 Stat. 29. This Court has long recognized Congress' power to police entrants at the border. See *Boyd v. United States,* 116 U.S. 616, 623, 6 S.Ct. 524, 528, 29 L.Ed. 746 (1886). As we stated recently:

> Import restrictions and searches of persons or packages at the national border rest on different considerations and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad comprehensive powers "[t]o regulate Commerce with foreign Nations," Art. I, 8, cl. 3. Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry.

Ramsey, supra, 431 U.S. at 618-619, 97 S.Ct., at 1979-1978, quoting *United States v. 12 200-Ft. Reels of Film,* 413 U.S. 123, 125, 93 S.Ct. 2665, 2667, 37 L.Ed.2d 500 (1973).

Consistently, therefore, with Congress' power to protect the Nation by stopping and examining persons entering this country, the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior. Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant, [footnote omitted] and first-class mail may be opened without a warrant on less than probable cause, *Ramsey, supra.* Automotive travelers may be stopped at fixed checkpoints near the border without individualized suspicion even if the stop is based

largely on ethnicity, *United States v. Martinez-Fuerte,* 428 U.S. 543, 562-563, 96 S.Ct. 3074, 3085, 49 L.Ed.2d 1116 (1976), and boats on inland waters with ready access to the sea may be hailed and boarded with no suspicion whatever. *United States v. Villamonte-Marquez, supra.*

These cases reflect longstanding concern for the protection of the integrity of the border. This concern is, if anything, heightened by the veritable national crisis in law enforcement caused by smuggling of illicit narcotics, see *United States v. Mendenhall,* 446 U.S. 544, 561, 100 S.Ct. 1870, 1880, 64 L.Ed.2d 497 (1980) (POWELL, J., concurring), and in particular by the increasing utilization of alimentary canal smuggling. This desperate practice appears to be a relatively recent addition to the smugglers' repertoire of deceptive practices, and it also appears to be exceedingly difficult to detect. [FN2] Congress had recognized these difficulties. Title 19 U.S.C. § 1582 provides that "all persons coming into the United States from foreign countries shall be liable to detention and search authorized ... [by customs regulations]." Customs agents may "stop, search, and examine" any "vehicle, beast or person" upon which an officer suspects there is contraband or "merchandise which is subject to duty." § 482; see also §§ 1467, 1481; 19 CFR §§ 162.6, 162.7 (1984).

FN2. See *United States v. DeMontoya,* 729 F.2d 1369 (CA11 1984) (required surgery; swallowed 100 cocaine-filled condoms); *United States v. Pino,* 729 F.2d 1357 (CA11 1984) (required surgery; 120 cocaine-filled pellets); *United States v. Mejia,* 720 F.2d 1378 (CA5 1983) (75 balloons); *United States v. Couch,* 688 F.2d 599, 605 (CA9 1982) (36 capsules); *United States v. Quintero-Castro,* 705 F.2d 1099 (CA9 1983) (120 balloons); *United States v. Saldarriaga-Marin,* 734 F.2d 1425 (CA11 1984); *United States v. Vega-Barvo,* 729 F.2d 1341 (CA11 1984) (135 condoms); *United States v. Mendez-Jimenez,* 709 F.2d 1300 (CA9 1983) (102 balloons); *United States v. Mosquera-Ramirez,* 729 F.2d 1352 (CA11 1984) (95 condoms); *United States v. Castrillon,* 716 F.2d 1279 (CA9 1983) (83 balloons); *United States v. Castaneda-Castaneda,* 729 F.2d 1360 (CA11 1984) (2 smugglers; 201 balloons); *United States v. Caicedo-Guarnizo,* 723 F.2d 1420 (CA9 1984) (85 balloons); *United States v. Henao-Castano,* 729 F.2d 1364 (CA11 1984) (85 condoms); *United States v. Ek,* 676 F.2d 379 (CA9 1982) (30 capsules); *United States v. Padilla,* 729 F.2d 1367 (CA11 1984) (115 condoms); *United States v. Gomez-Diaz,* 712 F.2d 949 (CA5 1983) (69 balloons); *United States v. D'Allerman,* 712 F.2d 100 (CA5 1983) (80 balloons); *United States v. Contento-Pachon,* 723 F.2d 691 (CA9 1984) (129 balloons).

Balanced against the sovereign's interests at the border are the Fourth Amendment rights of respondent. Having presented herself at the border for admission, and having subjected herself to the criminal enforcement powers of the Federal Government, 19 U.S.C. § 482, respondent was entitled to be free from unreasonable search and seizure. But not only is the expectation of privacy less at the border than in the interior, see, *e.g., Carroll v. United States,* 267 U.S. 132, 154, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925); cf. *Florida v. Royer,* 460 U.S. 491, 515, 103 S.Ct. 1319, 1333, 75 L.Ed.2d 229 (1983) (BLACKMUN, J., dissenting), the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is also struck much more favorably to the Government at the border. [citation to earlier in this opinion deleted]

Montoya de Hernandez, 473 U.S. at 537-540.

After that review of law, and recognizing the necessity of solving the "veritable national crisis in law enforcement caused by smuggling of illicit narcotics",[3] it was simple for the U.S. Supreme Court to declare that the search was not only lawful, but also that the Customs agent had "reasonable suspicion" that she was a drug smuggler.

> We hold that the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal. [FN4]
>
> FN4. It is also important to note what we do *not* hold. Because the issues are not presented today we suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body cavity, or involuntary x-ray searches. Both parties would have us decide the issue of whether aliens possess lesser Fourth Amendment rights at the border; that question was not raised in either court below and we do not consider it today.
>
> The "reasonable suspicion" standard has been applied in a number of contexts and effects a needed balance between private and public interests when law enforcement officials must make a limited intrusion on less than probable cause. It thus fits well into the situations involving alimentary canal smuggling at the border: this type of smuggling gives no external signs and inspectors will rarely possess probable cause to arrest or search, yet governmental interests in stopping smuggling at the border are high indeed. Under this standard officials at the border must have a "particularized and objective basis for suspecting the particular person" of alimentary canal smuggling. *United States v. Cortez,* 449 U.S. 411, 417, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981); *id.,* at 418, 101 S.Ct., at 695, citing *Terry v. Ohio,* 392 U.S. 1, 21, n. 18, 88 S.Ct. 1868, 1879, n. 18, 20 L.Ed.2d 889 (1968).
>
> The facts, and their rational inferences, known to customs inspectors in this case clearly supported a reasonable suspicion that respondent was an alimentary canal smuggler. We need not belabor the facts, including respondent's implausible story, that supported this suspicion. [citation to earlier in this case omitted] The trained customs inspectors had encountered many alimentary canal smugglers and certainly had more than an "inchoate and unparticularized suspicion or 'hunch,' " *Terry, supra,* at 27, 88 S.Ct., at ----, that respondent was smuggling narcotics in her alimentary canal. The inspectors' suspicion was a " 'common-sense conclusio[n] about human behavior' upon which 'practical people,' — including government officials, are entitled to rely." *T.L.O.,* 469 U.S., at 346, 105 S.Ct., at 746, citing *United States v. Cortez, supra.*

Montoya de Hernandez, 473 U.S. at 541-42.

The U.S. Supreme Court then considered the other issue in this case: whether the 24-hour detention without an warrant (or 16-hour detention before deciding to seek a warrant) was lawful.

> The rudimentary knowledge of the human body which judges possess in common with the rest of humankind tells us that alimentary canal smuggling cannot be detected in the amount of time in which other illegal activity may be investigated through brief *Terry* -type stops. It presents few, if any external signs; a quick frisk will not do, nor will even a strip search. In the case of respondent the inspectors had available, as an alternative to simply awaiting her bowel movement, an x ray. They offered her the alternative of submitting

[3] *Montoya de Hernandez,* 473 U.S. at 538. Quoted with approval in *National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 668 (1989).

herself to that procedure. But when she refused that alternative, the customs inspectors were left with only two practical alternatives: detain her for such time as necessary to confirm their suspicions, a detention which would last much longer than the typical *Terry* stop, or turn her loose into the interior carrying the reasonably suspected contraband drugs.

The inspectors in this case followed this former procedure. They no doubt expected that respondent, having recently disembarked from a 10-hour direct flight with a full and stiff abdomen, would produce a bowel movement without extended delay. But her visible efforts to resist the call of nature, which the court below labeled "heroic," disappointed this expectation and in turn caused her humiliation and discomfort. Our prior cases have refused to charge police with delays in investigatory detention attributable to the suspect's evasive actions, see *Sharpe,* 470 U.S., at 687-688, 105 S.Ct., at 1576; *id.,* at 697, 105 S.Ct., at 1581 (MARSHALL, J., concurring in judgment), and that principle applies here as well. Respondent alone was responsible for much of the duration and discomfort of the seizure.

Under these circumstances, we conclude that the detention in this case was not unreasonably long. It occurred at the international border, where the Fourth Amendment balance of interests leans heavily to the Government. At the border, customs officials have more than merely an investigative law enforcement role. They are also charged, along with immigration officials, with protecting this Nation from entrants who may bring anything harmful into this country, whether that be communicable diseases, narcotics, or explosives.

....

Respondent's detention was long, uncomfortable, indeed, humiliating; but both its length and its discomfort resulted solely from the method by which she chose to smuggle illicit drugs into this country. In *Adams v. Williams,* 407 U.S. 143, 92 S.Ct. 1921, 1922, 32 L.Ed.2d 612 (1972), another *Terry* - stop case, we said that "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Id.,* at 145, 92 S.Ct., at 1923. Here, by analogy, in the presence of articulable suspicion of smuggling in her alimentary canal, the customs officers were not required by the Fourth Amendment to pass respondent and her 88 cocaine-filled balloons into the interior. Her detention for the period of time necessary to either verify or dispel the suspicion was not unreasonable. The judgment of the Court of Appeals is therefore *Reversed.*

Montoya de Hernandez, 473 U.S. at 543-44.

The decision in *Montoya de Hernandez* was by a 7 to 2 vote. Justice Brennan wrote a dissenting opinion, in which Justice Marshall joined. Justice Brennan eloquently wrote:

... "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." *United States v. Rabinowitz,* 339 U.S. 56, 69, 70 S.Ct. 430, 436, 94 L.Ed. 653 (1950) (Frankfurter, J., dissenting). The standards we fashion to govern the ferreting out of the guilty apply equally to the detention of the innocent, and "may be exercised by the most unfit and ruthless officers as well as by the fit and responsible." *Brinegar v. United States,* 338 U.S. 160, 182, 69 S.Ct. 1302, 1313, 93 L.Ed. 1879 (1949) (Jackson, J., dissenting). [footnote omitted] Nor is the issue whether there is a "veritable national crisis in law enforcement caused by smuggling of illicit narcotics." *Ante,* at 3309. There is, and "[s]tern enforcement of the criminal law is the hallmark of a healthy and self-confident society." *Davis v. United States,* 328 U.S. 582, 615, 66 S.Ct. 1256, 1272, 90 L.Ed. 1453 (1946) (Frankfurter, J., dissenting). "But in our democracy such enforcement presupposes a moral atmosphere and a reliance upon intelligence whereby the effective administration of justice can be achieved with due regard for those civilized standards in the use of the criminal law which are formulated in our Bill of Rights." *Ibid.*

> The issue, instead, is simply this: Does the Fourth Amendment permit an international traveler, citizen or alien, to be subjected to the sort of treatment that occurred in this case without the sanction of a judicial officer and based on nothing more than the "reasonable suspicion" of low-ranking investigative officers that something might be amiss? The Court today concludes that the Fourth Amendment grants such sweeping and unmonitored authority to customs officials. **....**

Montoya de Hernandez, 473 U.S. at 548-49 (Brennan, J., dissenting).

Justice Brennan concluded his dissent with the following paragraph:

> In my opinion, allowing the Government to hold someone in indefinite, involuntary, incommunicado isolation without probable cause and a judicial warrant violates our constitutional charter whether the purpose is to extract ransom or to investigate suspected criminal activity. Nothing in the Fourth Amendment permits an exception for such actions at the Nation's border. It is tempting, of course, to look the other way in a case that so graphically illustrates the "veritable national crisis" caused by narcotics trafficking. [citation to majority opinion in this case deleted] But if there is one enduring lesson in the long struggle to balance individual rights against society's need to defend itself against lawlessness, it is that
>
> > [i]t is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.
>
> *Davis v. United States,* 328 U.S., at 597, 66 S.Ct., at 1263 (Frankfurter, J., dissenting).

Montoya de Hernandez, 473 U.S. at 566-67 (Brennan, J., dissenting).

U.S. Courts of Appeals Decisions

On 10 Dec 2004, my search of the Westlaw database of opinions of the U.S. Court of Appeals for `(frisk pat-down) /S (breast genital groin crotch buttock)` returned 83 cases, some of which used these words incidentally in discussing other cases. I quickly reviewed these cases back to the year 1980, and followed some citations to other cases. I generally ignored cases that were not published in the *Federal Reporter,* as these unpublished cases are not precedent.

Holtz

U.S. v. Holtz, 479 F.2d 89 (9th Cir. 1973).

The facts of this case:

> On February 2, 1972, Holtz crossed the border at Nogales, Arizona, in an automobile with two male companions. At the port of entry, an inspector questioned the three, noticed they were unkempt, anxious and uneasy and directed them to the secondary area of inspection.
>
> At secondary, another inspector noticed that one of the men was very nervous and "strung out" and that he kept blinking his eyes. He observed that the driver was suspicious-looking and subdued and that Holtz also seemed nervous. He became more suspicious when he noted that the car had New Mexico license plates, yet the occupants had no luggage and had declared no purchases. He ordered all three out of the car and commenced to search it. Although he found nothing, he thought he could smell marijuana. He then searched Holtz's

> purse and found a contraceptive. Concurrently, he noticed that one of the men was increasingly nervous.
>
> He next asked all three for identification. The men had none, but all three gave a name and address. He entered this information into a Bureau of Customs computer which identified one of the men as a known associate of a heroin dealer in New Mexico. At this point, the inspector called for assistance from another inspector. They examined the arms of both men and found fresh needle marks. A strip search of the two men was then conducted, but no contraband was found. During the strip search, one of the men became so sick that he vomited.
>
> The officers then ordered a strip search of Holtz. The inspectress conducting the search required Holtz to take off her clothes. As part of the search, she asked Holtz to bend over and spread her buttocks; then she saw part of a rubber prophylactic hanging down from Holtz's vaginal area. The inspectress stated that the prophylactic was readily viewable and that she finished removing it from Holtz's vagina.

Holtz, 479 F.2d at 90-91.

The condom contained heroin and Holtz was arrested and convicted of smuggling merchandise. She appealed and the U.S. Court of Appeals affirmed, holding that "objective articulable facts are required for a strip search" and the Customs agents had such facts in *Holtz.* One of the three judges dissented, writing:

> ... we confront a disgusting and saddening episode at the Mexican border involving the disrobing and search of a woman by United States border police. That the woman so degraded herself as to offend the sensibilities of any decent citizen is not questioned. Nevertheless, if we are to continue to safeguard the innocent and virtuous from the potential degradation and humiliation of "strip searches", we cannot permit our revulsion at one woman's acts to induce our Court to depart from its established principles. "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." *United States v. Rabinowitz,* 339 U.S. 56, 69, 70 S.Ct. 430, 436, 94 L.Ed. 653 (1950) (Frankfurter, J., dissenting).

Holtz, 479 F.2d at 94 (Ely, J., dissenting).[4]

Judge Ely noted in *Holtz* at 94 that he had previously, in the year 1969, written that *at least* 80% of people given body cavity searches at the border were innocent of any crime. *Morales v. United States,* 406 F.2d 1298, 1300 n. 2 (9th Cir. 1969), *cert. den.,* 397 U.S. 927 (1970).

similar cases

Three months after *Morales,* Judge Ely wrote a dissenting opinion in another case with similar issues:

> ... we have the disturbing, even appalling, information that '80 to 85 per cent', at least four-fifths, of all border transients whose bodily cavities are invaded by the border police are innocent of the suspected wrongdoing. [FN1] *Morales v. United States,* 406 F.2d 1298, 1300, n.2 (9th Cir. 1969). I suppose we should presume that those who violated the personal dignity of those innocent people believed that there were 'clear indications' that their searches

[4] Judge Ely's words "disgusting and saddening episode" were quoted in a dissent by Justice Brennan in a case at the U.S. Supreme Court. *U.S. v. Montoya de Hernandez,* 473 U.S. 531, 545, n. 1 (1985) (Brennan, J., dissenting).

would be fruitful. [FN2] I suspect, also, that the innocent individuals whose rectums have been probed, as well as the touring females whose vaginas have been explored, have, in most instances, chosen to suffer their shame in silence. I cannot remain silent, however, until our court or some other responsible agency undertakes to furnish more effective judicial safeguards against the infliction of these indignities.

FN1. These statistics reflect the experience of a physician, who according to the records of our court, frequently assists the border police in their searches of bodily cavities. I think it not unreasonable to believe that in situations wherein the police may not seek medical assistance, an even greater percentage of innocent persons are offended.

FN2. The appellant crossed the border with two companions. The rectums of all three were probed, and if these searches were justified, the justification rested upon the same 'clear indication.' Yet the searches of the cavities of appellant's two companions were unproductive.

Thompson v. U.S., 411 F.2d 946, 948 (9th Cir. 1969) (Ely, J., dissenting).

Justice Douglas, in a dissent to denial of certiorari in a case involving a warrantless body cavity search at the border, cited *Thompson.*[5] Justice Brennan cited the statistics in *Morales, Thompson,* and *Holtz* in a dissenting opinion.[6]

A 1976 case involved a smuggler who swallowed a condom containing heroin, then he crossed the border from Mexico to California, where he was arrested for smuggling. Anthony Kennedy, later a Justice on the U.S. Supreme Court, wrote in the majority opinion for this case:

These considerations suffice to dispose of the case before us. We are, however, troubled by the recurring nature of the question here presented. We have noted elsewhere that thousands of people cross our borders every year and that of course the overwhelming majority do not carry contraband. *Henderson v. United States,* supra, 390 F.2d [805] at 808. Each is potentially exposed to search constituting a serious affront to bodily integrity and personal dignity. The fact that the affront can take the dimensions of that perpetrated upon the appellant in this case underscores the seriousness of the problem. We are also aware that narcotic peddlers will not hesitate to pervert their own bodies to smuggle drugs into this country. Such practices would be encouraged if the customs service were not allowed to conduct an adequate detection program.

In deciding the instant matter, we were somewhat limited in our inquiry by the unavailability of data on body cavity searches in border crossing cases. Government counsel stated at oral argument that he did not have such information. Because of the serious interests implicated on both sides, the agency in charge of conducting the searches and the United States Attorney should closely scrutinize the incidence, extent, and rate of success of these searches. It is disturbing indeed to note that the success rate for body cavity searches may be as low as 15 or 20 percent. See *Morales v. United States,* 406 F.2d 1298, 1300 n. 2 (9th Cir. 1969). See also *United States v. Guadalupe-Garza,* supra, 421 F.2d [876] at 879 n.2, 880 n. 4 (fewer than one out of three persons subjected to strip searches found to carry contraband). It may well be that excesses in both the incidence and the extent of body searches are inherent in the manner in which the agency conducts its procedures. If that is the case, this would be highly relevant in weighing the effect of failure to obtain a warrant in any

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[5] *Mason v. U.S.,* 414 U.S. 941, 942 (1973) (Douglas, J., dissenting to denial of *cert.*).

[6] *U.S. v. Montoya de Hernandez,* 473 U.S. 531, 557, nn. 25-26 (1985) (Brennan, J., dissenting).

particular case.

We suggest that the agency keep careful statistics henceforth and make them available to the United States Attorney. Information on the incidence of body cavity searches and what contraband, if any, is recovered in each case is necessary if we are to be fully advised in determining whether to adhere to the rule that a warrant is not a per se requirement in body search cases.

U.S. v. Cameron, 538 F.2d 254, 259-260 (9th Cir. 1976).

My quick search of Westlaw on 18 Dec 2004 disclosed no further opinions in the U.S. Courts of Appeals with statistics for body cavity searches on innocent people, although I did find one later dissenting opinion that mentions this topic.[7]

Himmelwright

U.S. v. Himmelwright, 406 F.Supp. 889 (S.D.Fla. 1975), 551 F.2d 991 (5th Cir. 1977), *cert. den.,* 434 U.S. 902 (1977).

The U.S. Court of Appeals described the facts of this case:

On June 7, 1975, Mary Ann Himmelwright arrived at Miami International Airport aboard a flight from Colombia. She was wearing platform shoes and her clothing was not bulky or loose-fitting. She went through customs, where the matter-of-course search of her baggage produced no evidence of any crime. Himmelwright declared a few items and appeared calm throughout this routine phase of the customs investigation.

After Himmelwright's baggage had been searched, two customs patrol officers approached her. In the experience of these customs officials, a young woman traveling alone, especially on a short excursion to Colombia, was a somewhat suspicious circumstance. Additionally, the officers knew from their experience that platform shoes were often used as a cache for smuggled contraband. Because of these facts, and because Himmelwright appeared unusually calm, [FN1] the officials asked to see her passport. The passport revealed that Himmelwright had been out of this country for seven days. The customs patrol officers asked what Himmelwright's occupation was and she told them that she was a secretary to an insurance company. As the discussion progressed, however, Himmelwright's story changed. She first altered her response by saying that she was an agent for an insurance company, and later told the officers that she was an insurance broker. Throughout this colloquy, Himmelwright continued to appear excessively calm to the customs officers.

FN1. At the suppression hearing, one of the customs officers testified that Himmelwright's calm demeanor was a suspicion-arousing factor:

> Usually when people come in here they are a little apprehensive when they come into the Customs enclosure, a little nervous, such as I am now. And she had none of these characteristics about her. She was extremely calm and this brought my attention to her.

Transcript of suppression hearing at 16.

Because of Himmelwright's excessive calmness and evasive answers to the queries about her occupation, the officers determined that a further investigation was warranted and decided to summon two female customs inspectors who were on duty at the time. After one officer

[7] *U.S. v. Gonzalez-Rincon,* 36 F.3d 859, 871 (9thCir. 1994) (Nelson J., dissenting).

had left to find the female officers, the remaining officer commented on certain matchbooks in Himmelwright's purse. Himmelwright then explained that she worked as a cocktail waitress in a bar. This last change in Himmelwright's description of her occupation led the officer in charge to the conclusion that a "100% search" [FN2] was in order.

FN2. At the suppression hearing, the officers testified to the effect that a "100% search" entails a thorough examination of a suspect's outer clothing and underclothing, as well as a "visual search" of the body. Such a search does not involve a search of body cavities, since the customs agents testified that they are not authorized to go that far. As one officer explained, "(o)nly a qualified physician is authorized to do that." Id. at 37.

When the two female customs inspectors arrived, they took Himmelwright to a "secondary search" room. This room was completely enclosed and removed from the view of those outside. The inspectresses asked Himmelwright to remove her platform shoes, and these were handed to an officer outside the room for X-ray examination. Himmelwright was next requested to remove her blouse. A thorough search of the blouse revealed no contraband. Himmelwright replaced her blouse and was then asked to remove her slacks and stand with her legs spread apart. She wore no undergarments. An inspectress crouched in front of Himmelwright and noticed a one-quarter inch tab protruding from Himmelwright's vagina. In response to the inspectress's inquiry, Himmelwright stated that the object was a tampon. She soon changed her mind, however, and told the inspectress that the protruding object was a tissue. The inspectress did not believe that the protruding object resembled either a tampon or a tissue, and requested that Himmelwright remove the object. Himmelwright did so, and the object in question turned out to be one of six rubber condoms secreted in Himmelwright's vagina. Altogether, the six condoms contained a total of 105 grams of cocaine. At this point, Himmelwright was placed under arrest.

At no point during their examination of Himmelwright did the female customs inspectors touch her body. Of course, neither was Himmelwright ever subjected to a probing search of her orifices.

Himmelwright, 551 F.2d at 992-993.

At trial, she was convicted Himmelwright of smuggling cocaine. The only issue on appeal to the U.S. Court of Appeals was whether the search was *un*constitutional. In affirming Himmelwright's conviction, the Court of Appeals discussed the law of searches:

... "reasonableness" in the fourth amendment sense always depends upon a balance which must be struck between, on the one hand, the level of official intrusion into individual privacy and, on the other hand, the public interest to be served by such an intrusion.[FN6] Our constitution of course demands that most "searches" or "seizures" be predicated upon probable cause. However, it is equally clear that certain genres of search or seizure based upon less than probable cause are constitutionally legitimate. The matter-of-course search of luggage at the border typifies one such genre; other examples are the "stop-and-frisk" situation involved in Terry and at least the early phases of automobile stops accomplished at permanent checkpoints which operate some distance from our national border or the "functional equivalent" thereof.[FN7] In each of these instances, it is the weighing of the public interest against the level of personal intrusion which leads to the conclusion that fourth amendment reasonableness allows such searches or seizures to be based upon less than probable cause.

FN6. As Mr. Justice Powell stated in *United States v. Martinez- Fuerte,* 428 U.S. 543, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116 (1976), "In delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interest

of the individual . . . ." Id. at 3081, citing *United States v. Brignoni-Ponce,* 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), and *Terry v. Ohio,* 392 U.S. 1, 20-21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

FN7. See *United States v. Martinez-Fuerte,* 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976).

This same weighing process convinces us that not all searches at the border can be constitutionally justified regardless of whether the government officials had any reason to suspect that criminal activity might be afoot. The level of intrusion occasioned by a strip search is significantly greater than the intrusion involved when customs officials search a person's luggage or stop a person to examine a visa. For this reason, several courts have adopted a "real" or "reasonable" suspicion standard to govern strip searches at the border. The most recent example in this circuit is *Perel v. Vanderford,* 547 F.2d 278 (5th Cir. 1977), a Bivens -type civil action alleging an unconstitutional strip search at the El Paso, Texas, border station. In that case, we upheld a district court's refusal to charge a jury that the lawfulness of a strip search at the border depended upon the existence of probable cause. Instead, the panel stated, a "real or reasonable suspicion" is all that the fourth amendment requires.[FN8]

FN8. See also *United States v. Forbicetta,* 484 F.2d 645 (5th Cir. 1973), cert. denied, 416 U.S. 993, 94 S.Ct. 2404, 40 L.Ed.2d 772 (1974); *United States v. Diaz,* 503 F.2d 1025 (3d Cir. 1974); *United States v. Guadalupe-Garza,* 421 F.2d 876 (9th Cir. 1970).

The *Perel* panel also pointed out in a footnote that "there may be substantive differences between the 'real suspicion' standard and the 'reasonable suspicion' standard." Id. at 280, n.1. This observation stems from an examination of the Ninth Circuit's experience with border search cases involving greater than average degrees of intrusion. That court has attempted, it seems, to establish standards of fourth amendment reasonableness which demand some degree of articulable suspicion without requiring full-blown probable cause. In a strip search case, the court requires a "real suspicion" of criminal activity as a condition precedent to a valid strip search. [FN9] In cases involving "body cavity" searches, the court looks to whether there was a "clear indication" of criminal conduct justifying the search. [FN10]

FN9. See *United States v. Guadalupe-Garza,* 421 F.2d 876 (9th Cir. 1970).

FN10. See *Rivas v. United States,* 368 F.2d 703 (9th Cir. 1966), cert. denied, 386 U.S. 945, 87 S.Ct. 980, 17 L.Ed.2d 875 (1967). See also *United States v. Sosa,* 469 F.2d 271 (9th Cir. 1972), cert. denied, 410 U.S. 945, 93 S.Ct. 1399, 35 L.Ed.2d 612 (1973) (rectal search); *United States v. Shields,* 453 F.2d 1235 (9th Cir.), cert. denied, 406 U.S. 910, 92 S.Ct. 1615, 31 L.Ed.2d 821 (1972) (vaginal search); *United States v. Castle,* 409 F.2d 1347 (9th Cir.), cert. denied, 396 U.S. 975, 90 S.Ct. 443, 24 L.Ed.2d 443 (1969) (rectal search); *Morales v. United States,* 406 F.2d 1298 (9th Cir. 1969) (vaginal search); *Henderson v. United States,* 390 F.2d 805 (9th Cir. 1967) (vaginal search).

As the Ninth Circuit's experience demonstrates, however, the application of these variegated tests is not without its problems as a matter of case-by-case analysis. Aside from the inherent indefiniteness of the terms "real suspicion" and "clear indication," it is not always apparent where one should draw the line between strip searches and body cavity searches in order to determine which test should be applied.[FN11] For these reasons, we are unwilling to adopt the specific approach utilized by the courts of the Ninth Circuit. Instead, we feel that the "reasonable suspicion" standard is flexible enough to afford the full measure of protection which the fourth amendment commands.

FN11. Compare *United States v. Mastberg,* 503 F.2d 465 (9th Cir. 1974) (search analyzed as "body cavity" search) with *United States v. Holtz,* 479 F.2d 89 (9th Cir. 1973) (substantially similar

search analyzed as "strip" search).

Nor is it clear to us that all body cavity searches involve the same level of intrusion upon individual privacy. One could certainly argue the validity of a distinction between, say, the cursory inspection of a suspect's oral cavity and a probing search of the same suspect's vaginal cavity.

We would hasten to add that "reasonable suspicion" in this context includes a requirement that customs officials have cause to suspect that contraband exists in the particular place which the officials decide to search. [FN12] In border search cases, it is true that reason to suspect someone of criminal activity may often give reason to search that person, for the very nature of the suspected crime is that contraband is secreted somewhere in the person's belongings or on the person. But a generalized suspicion of criminal activity such as that which is fostered, for example, when one closely resembles a "smuggling profile" will not normally in itself permit a reasonable conclusion that a strip search should occur. A fruitless search of the person's luggage may well dispel the reasonableness of any previously held suspicions. In another case, however, the circumstances notwithstanding the fruitless search of the luggage may well render a physical search reasonable under the fourth amendment. As the courts have universally recognized in these fourth amendment cases, each case must finally turn on its own facts.

FN12. See, e. g., *United States v. Bailey,* 458 F.2d 408 (9th Cir. 1972); *United States v. Flanagan,* 423 F.2d 745 (5th Cir. 1970). See also *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

Examining the particular facts of this case, then, we observe that the search of Himmelwright progressed through several stages. First, her luggage was routinely searched. Next, she was orally questioned about her background and the nature of her trip to Colombia. Third, her outer garments were searched, which search included an X-ray examination of her platform shoes. Fourth, her exterior body surface was examined. It was this last stage of the overall search which led to the discovery of the contraband.

In considering the objective facts which were known to the customs officials in Himmelwright's case, we conclude that those facts justified the decision to search her exterior body surface. Himmelwright fit a known pattern of characteristics which experience had associated with smuggling activity: she was a woman, traveling alone, wearing platform shoes, and recently returning from a short stay in Colombia.[FN13] More significantly, she gave evasive and contradictory answers when questioned about her employment. Under those circumstances, the decision to search her exterior body surface was a reasonable one within the meaning of the fourth amendment.

FN13. We should add parenthetically that it is doubtful that in this day these characteristics standing alone would justify a body search. It is in conjunction with the other facts known to the customs officials that we accord significance to Himmelwright's possession of these characteristics.

We should point out what this case does not involve. The most suspicious fact here that is, the tab protruding from Himmelwright's vagina was discovered in the course of an exterior search of the suspect's body. There was no probing search of Himmelwright's orifices. [footnote omitted] Had the customs inspectress not seen a protruding object, any further search may well have been constitutionally impermissible. On the facts before us, however, it was reasonable for the customs officers to request that Himmelwright remove the suspicious object from her body.

> For these reasons we conclude that the district court properly denied Himmelwright's motion to suppress. Accordingly, the judgment below is AFFIRMED.

Himmelwright, 551 F.2d at 994-996.

Purvis

U.S. v. Purvis, 632 F.2d 94 (9th Cir. 1980).

The facts of this case:

> Purvis arrived at San Francisco International Airport on June 20, 1979, from Bangkok, Thailand. Questioning by Customs revealed that Purvis was a cocktail waitress from Birmingham, Alabama, who had been vacationing in Bangkok, had paid cash for her airfare and had nothing to declare on the Customs Declaration form. The Customs examiner concluded that a more detailed examination was indicated and escorted her to the secondary search area. A second inspection officer noticed that Purvis walked in a slow and careful manner. A third examiner in the search room observed that when she seated herself in a chair she crossed her legs and appeared to put her weight only on one side of her buttocks. Two female inspectors conducted a strip search which disclosed that Purvis was wearing tampons different from those in her luggage. That, along with discrepancies between Purvis's story and that of her traveling companion and items associated with smuggling found in the companion's luggage, led Customs officers to obtain an ex parte order for an x-ray examination. That examination disclosed foreign material which turned out to be an ounce of heroin. At a court trial, the district judge found Purvis guilty.

Purvis, 632 F.2d at 95.

The entire opinion of the U.S. Court of Appeals in *Purvis* is given in a few terse paragraphs:

> In *United States v. Rodriguez,* 592 F.2d 553, 556 (9th Cir. 1979), we held the rule to be that:
>
> > While anyone at a border may be stopped for questioning and subject to an inspection of luggage, handbags, pockets, wallets, without any suspicion at all on the part of customs officials, "real suspicion" is required before a strip search may be conducted, and the "clear indication" test is used for body cavity searches. (Citation omitted.)
>
> In *United States v. Guadalupe-Garza,* 421 F.2d 876, 879 (9th Cir. 1970), we 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 United States contrary to law.
>
> The facts here are clearly sufficient to support the actions taken by Customs. See *United States v. Aman,* 624 F.2d 911, (9th Cir. 1980); *United States v. Palmer,* 575 F.2d 721 (9th Cir. 1975).
>
> We find no merit in Purvis's allegations that she did not receive a fair trial. The judgment is AFFIRMED.

Purvis, 632 F.2d at 95.

Hill

Hill v. Bogans, 735 F.2d 391 (10th Cir. 1984).

The facts of this case:

> On February 1, 1980, Bogans, a Denver police officer, stopped Hill for driving with an expired automobile inspection sticker. In accordance with police procedures, Bogans made a routine warrant check on Hill by calling the police station. After being informed that there was an outstanding bench warrant on Hill, Bogans arrested Hill, handcuffed him, and transported him to the police station.

Hill, 735 F.2d. at 392.

The bench warrant had been canceled in June 1979, but some clerk failed to purge the warrant from the county's computer system. On his arrival at jail:

> When the elevator doors opened Hill stepped into a lobby area where he observed ten to twelve people in the immediate vicinity. A guard asked Hill to face the wall immediately across from the elevators and to drop his pants and undershorts. The guards examined his backside and his pants, without touching him, and then permitted Hill to pull up his shorts and trousers. This search procedure was apparently in accordance with procedures applied to all prisoners in the jail. [footnote omitted] Shortly thereafter Hill was released when his wife arrived and posted bail. Five days later the county court called Hill and told him that a mistake had been made and that he could come to the station and claim his bond.

Hill, 735 F.2d. at 393.

Hill sued the arresting officer and Denver County. Judge Matsch of the District Court dismissed Hill's suit and Hill appealed. The final paragraphs of the U.S. Court of Appeals opinion held that the strip search had no justification:

> No other conceivable justification exists for the strip search in this case. There were no circumstances here indicating that Hill might possess either a weapon or drugs. Hill was arrested while on his way to work at about 7:30 a.m. for an outstanding speeding ticket and violation of a restriction on his driver's license. These are not offenses associated with the concealment of weapons or contraband in a body cavity. In fact, a peculiar aspect of the strip search in this case is that the officer did not carefully examine Hill's body cavities, but instead merely looked in his trousers and at his buttocks. Almost anything that the examining officer could have found through this procedure would already have been discovered during the pat down search that had been conducted on Hill's arrival at the jail.
>
> In addition to considering the justification for a strip search, *Wolfish* requires us to consider the scope of the particular intrusion and the manner and place in which it is conducted. 441 U.S. at 559, 99 S.Ct. at 1884. Although the search conducted in this case was not as humiliating as a full body cavity search, Hill was required to submit to the search while standing and facing a wall in a room in which ten to twelve people were milling about. A jail's desire to maintain security, to avoid charges of discriminatory treatment, and to promote administrative convenience simply does not justify routine strip searches in a public area of persons detained for minor traffic offenses.

Hill, 735 F.2d. at 394-395.

This case was remanded to the District Court for trial on the civil rights violation by Denver County. There is no further opinion for this case in the Westlaw database, so the final result is not known.

Jones

Jones v. Edwards, 770 F.2d 739 (8th Cir. 1985).

Jones was arrested in North Platte, Nebraska after his dog was found wandering without a leash.

> On the way to and inside the jail, Jones became loud and abusive and, as his booking procedure progressed, he grew increasingly profane and waved his arms about. Witnesses agreed that although Jones was angry, he made no attempt to abuse any officer physically. As a final step in the booking procedure, jail officials performed a non-contact visual strip search of Jones; one jailer stepped with Jones (who was nude) into a sheltered alcove [footnote omitted] and visually inspected Jones's anal and genital area. After the search, Jones was permitted to dress and he waited in a minimum security cell until a friend posted his bail.

Jones, 770 F.2d at 740.

Jones sued the law enforcement officers for civil rights violations. The jury found for defendants and the trial judge denied Jones' motion for judgment notwithstanding the verdict. Jones appealed and the U.S. Court of Appeals, in an unusual decision, held that the trial judge should have granted Jones' motion for judgment.

> Our review of those and other cases considering the application of the *Bell* test to detainees charged with misdemeanors convinces us that, on the facts of this case, the district court erred in failing to grant Jones's motion for judgment notwithstanding the verdict. Under the first prong of the *Bell* test (the need for the search), we note that Jones was arrested for failing to sign a summons and complaint arising from a leash law violation — hardly the sort of crime to inspire officers with the fear of introducing weapons or contraband into the holding cell. In addition, officers had no other reason to suspect Jones was harboring these items: he was arrested early in the morning at his home and was not suspected of other crimes. Officers were with him every moment after they read him the warrant; they watched him dress and go to the bathroom, thereby eliminating any chance that he might have secreted a weapon on his person. Moreover, although the record suggests that Jones was uncooperative with officers, he was not charged with resisting arrest or with any sort of public misconduct which might justify a more intrusive search. We also note that neither the officers nor the jailers attempted a less intrusive pat-down search, which would have detected the proscribed items they sought without infringing Jones's constitutional protections. Thus, we find that the strip search was unjustified.
>
> The second prong of the *Bell* test — the invasion of personal rights — also weighs in Jones's favor. The scope of the particular invasion was broad: Jones was nude and forced to display himself to the visual inspection of a stranger. Although the manner in which the search was conducted was not brutal, it was intrusive, depersonalizing, and distasteful for Jones to be peremptorily subjected to this kind of search by a stranger in the alcove of the hallway. Finally, although the location of the search did not expose Jones to the scrutiny of other jailers or passersby, this degree of privacy seems to have been entirely fortuitous; we

suggest that where legitimate security concerns justify this kind of search, jail officials should take precautions to insure that the detainee's privacy is protected from exposure to others unconnected to the search. *See* Colo.Rev.Stat. 16-3-405(3) ("Any strip search * * * shall be performed * * * on premises where the search cannot be observed by persons not physically conducting the search.").

Although we recognize that the security of detention facilities is an important concern of correction officials who are, in part, responsible for the safety of their charges, we also recognize that security cannot justify the blanket deprivation of rights of the kind incurred here. [FN4] Accordingly, we find that the district court erred in failing to grant Jones's motion for judgment notwithstanding the verdict, and we remand for determination of the proper damages to remedy this constitutional deprivation. Because we find no suggestion of evil motive or intent nor of reckless or callous indifferences to the federally protected rights of others, *see Smith v. Wade,* 461 U.S. 30, 56, 103 S.Ct. 1625, 1640, 75 L.Ed.2d 632 (1983), we decline to allow any award of punitive damages in this case and limit the district court's determination to the proper compensatory damages.

FN4. Jones suggests that the district court's instructions to the jury entitled "Affirmative Defense--Good Faith" were inappropriate. He argues that, by referring to the appellees' subjective knowledge or belief, the district court departed from recent Supreme Court decisions regarding qualified immunity. We agree and we conclude that appellees are not protected by qualified immunity in the circumstances of this case.

In *Davis v. Scherer,* 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984), the Supreme Court declared that:

> Under *Harlow,* officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Whether an official may prevail in his qualified immunity defense depends upon the "objective reasonableness of [his] conduct as measured by reference to clearly established law." No other "circumstances" are relevant to the issue of qualified immunity.

Id. 468 U.S. at ----, 104 S.Ct. at 3018, 82 L.Ed.2d at 147 (citations and footnote omitted).

We hold that the fourth amendment's protection against the kind of search of which Jones complains was well-established at the time his search took place. Aside from the wording of the fourth amendment itself and the many decisions of the Supreme Court limiting the authority of officials to search suspects, the Seventh Circuit had already affirmed a district court's disapproval of a strip search of a motorist unsuspected of harboring weapons or contraband. *Tinetti v. Wittke,* 479 F.Supp. 486 (E.D.Wis. 1979), *aff'd,* 620 F.2d 160 (1980) (per curiam). *See also Morales v. United States,* 406 F.2d 1298, 1299 (9th Cir. 1969) (vaginal search at border was improper absent "clear indication appellant was possessing narcotics"); *Huguez v. United States,* 406 F.2d 366, 378-79 (9th Cir. 1968) (intrusive rectal search at border was improper absent "clear indication" or "plain suggestion" that Huguez carried narcotics in his rectal cavity); *People v. Seymour,* 398 N.E.2d 1191, 1197, 80 Ill.App.3d 221, 35 Ill.Dec. 241 (1979) (strip search invalidated under Illinois' constitutional provision similar to fourth amendment). *See also generally* P. Schuldiver, *Visual Rape: A Look at the Dubious Legality of Strip Searches,* 13 John Marshall L.Rev. 273 (1980).

Jones, 770 F.2d at 741-742.

Blackburn

Cole v. Snow, 586 F.Supp. 655 (D.Mass. 1984),
588 F.Supp. 1386 (D.Mass. 1984) (Blackburn "entitled to award of prejudgment interest"),
aff'd in part, sub nom., Blackburn v. Snow, 771 F.2d 556 (1st Cir. 1985).

Two female visitors (Cole[8] and Blackburn) to a Massachusetts county jail were strip-searched, under sheriff Snow's policy of strip-searching *all* visitors.

> Pursuant to Snow's order, Blackburn was required to submit to a thorough strip search on three occasions when she sought to visit her brother in April 1977. On the first occasion, a matron directed Blackburn to a small room and instructed her to remove all of her clothing. The matron then checked Blackburn's ears and looked down her throat using a "stick" and a small flashlight. The matron examined Blackburn's hair, looked in her armpits and lifted her breasts to inspect underneath them for contraband. The matron required Blackburn to turn toward a wall and stand "spread eagled" while the matron conducted a visual inspection of Blackburn's anus.
>
> On the second visit, during which she was accompanied by her brother Mathew, a different matron inspected Blackburn. Blackburn testified that this matron "was much more gruff and seemed hostile toward me, and she seemed to be enjoying what she was doing." This matron lifted Blackburn's breasts, "twice on each side," and manually spread Blackburn's buttocks.
>
> At the conclusion of their visit, Blackburn and Mathew were walking across the Plymouth lawn. Snow, accompanied by another person, directed them to stop. He told them that they were not to cross the lawn. He also expressed his concern that, if visitors were permitted to do so, they might drop contraband on the lawn for the inmates to retrieve later.
>
> Blackburn, who had had no prior contact with Snow, responded that she had no intention of leaving contraband on the lawn. Snow in turn told her: "Well, I don't want to see your face around here anymore." Although Blackburn understood Snow's admonition to mean that she should not walk across the lawn during future visits, his intention was to inform her that she was prohibited from visiting her brother in the future. [footnote omitted]

586 F.Supp. at 658-659.

The visitors sued the county and sheriff Snow under 42 USC § 1983. The District Court held that there was no consent to these strip searches.

> Contrary to defendants' contention, this court finds that Blackburn did not voluntarily consent to be strip searched. An individual whose right to visit a prison inmate is conditioned on her submission to a strip search is subjected to a "search" within the meaning of the fourth amendment. The mere fact that she submits to the search does not render it "voluntary" where her consent is given in "inherently coercive circumstances." *See Palmigiano v. Travisono,* 317 F.Supp. 776, 792 (D.R.I. 1970). [FN14]

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[8] "No evidence was presented on behalf of Shirley Cole's claims. Her claims, therefore, are dismissed." 586 F.Supp. at 657, n. 2. However, Cole's name remained on the caption of this case until the appeal.

> FN14. The argument is all the more persuasive here where visitors to the prison did not have the option of avoiding the strip search by electing to have a non-contact visit.

586 F.Supp. at 661.

The District Court held that the searches were *un*reasonable and that the searches violated the Fourth Amendment protections.

> The Supreme Court has held that, in evaluating the reasonableness of a search, a court must balance "the need for the particular search against the invasion of personal rights that the search entails." *See Bell v. Wolfish,* 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979). Specifically, a court "must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.*
>
> The extremely intrusive impact of strip searches that include even visual inspection of body cavities is well recognized by the courts today. *See Bell v. Wolfish,* 441 U.S. 520, 560, 99 S.Ct. 1861, 1885, 60 L.Ed.2d 447; *Arruda v. Fair,* 710 F.2d 886, 887 (1st Cir.), *cert. denied,* 464 U.S. 999, 104 S.Ct. 502, 78 L.Ed.2d 693 (1983); *Hunter v. Auger,* 672 F.2d 668, 674 (8th Cir. 1982); *Black v. Amico,* 387 F.Supp. 88, 91 (W.D.N.Y. 1974). Moreover, the manner in which strip searches are conducted is "of course, as vital a part of the inquiry as whether [the searches] were warranted at all." *See Terry v. Ohio,* 392 U.S. at 28, 88 S.Ct. at 1883; *see also Schmerber v. California,* 384 U.S. 757, 772, 86 S.Ct. 1826, 1836, 16 L.Ed.2d 908 (1966) ("That we today hold that the Constitution does not forbid the States [sic] minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.")
>
> The searches of Blackburn were not merely visual searches, but involved the manipulation of her breasts and buttocks. The searches were conducted in an atmosphere of marginal privacy. Furthermore, these searches were undertaken by personnel who had received no training or guidance as to how or where the searches were to take place. In light of these flagrant deficiencies, this court finds that the strip searches of Blackburn violated her fourth amendment rights.
>
> In their effort to justify these searches, defendants offered no evidence that would even suggest that Blackburn was carrying contraband. Clearly, she was not a legitimate target of suspicion. The question remains, however, whether the overall visitor experience at the institution justified implementation of a blanket strip search policy. Relevant to that inquiry is an examination of the frequency of incidents involving visitors and the adequacy of security prior to the institution of the policy.
>
> **....** The implementation of a blanket visitor strip search policy was an unnecessary, overbroad and impermissibly intrusive step that violated plaintiff's constitutional rights.

586 F.Supp. at 661-662.

"Following the strip searches, Blackburn developed symptoms of post-traumatic stress syndrome." *Id.* at 666. Because of the severity of her injuries, the District Court awarded Blackburn "$150,000 as compensation for the emotional and physical consequences of these unjustified strip searches", in addition to awarding Blackburn "$27,040 for her future medical costs." 586 F.Supp. at 667.

The defendants appealed and the U.S. Court of Appeals affirmed that the search was *un*constitutional and also affirmed the amount of damages, but reversed and remanded on the issue of prejudgment interest.

> That appellants may have put Blackburn on "notice" that she would be subject to an examination of her body cavities before entering the Jail cannot determine the "controlling" question: namely, whether her expectation that she would be free of such searches was one society would call reasonable. [FN4] And we think it is clear that society is "prepared to recognize" that free citizens entering a prison, as visitors, retain a legitimate expectation of privacy, albeit one diminished by the exigencies of prison security. **....** ... we conclude that Blackburn was entitled to expect at least some measure of personal privacy while at the Jail. In so holding, we are in accord with all the published federal court opinions of which we are aware that involve Fourth Amendment challenges by prison visitors. *See Hunter v. Auger,* 672 F.2d 668 (8th Cir. 1982); *Thorne v. Maggio,* 585 F.Supp. 910 (M.D.La. 1984); *Black v. Amico,* 387 F.Supp. 88 (W.D.N.Y. 1974); *cf. Security & Law Enforcement Employees v. Carey,* 737 F.2d 187 (2d Cir. 1984) (prison employees retain limited expectation of privacy).
>
> FN4. As professor Amsterdam points out:
>
> > [A subjective expectation of privacy] can neither add to, nor its absence detract from, an individual's claim to Fourth Amendment protection. If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance.
>
> Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn.L.Rev. 349, 384 (1974). *See Hudson v. Palmer, supra,* 104 S.Ct. at 3199-3200, n. 7 ("The Court's refusal to adopt a test of 'subjective expectation' is understandable; constitutional rights are generally not defined by the subjective intent of those asserting the rights. The problems in such a standard are self-evident.") (citations omitted). Without finding that Blackburn lacked any subjective expectation of privacy after the first search, we reject the argument that its absence could deprive her of an otherwise reasonable expectation.

Blackburn, 771 F.2d at 563.

The Court of Appeals then found the strip search of *all* visitors, without any suspicion of particular individuals, was *un*reasonable.

> Here, in deciding to what standard of reasonableness prison officials strip searching visitors should be held, we must balance the official interest in maintaining security against the intrusion entailed by a strip search. That intrusion must, of course, be viewed in light of Blackburn's diminished expectation of privacy.
>
> We have previously recognized, "as have all courts that have considered the issue, the severe if not gross interference with a person's privacy that occurs when guards conduct a visual inspection of body cavities." *Arruda v. Fair,* 710 F.2d 886, 887 (1st Cir), *cert. den.,* 464 U.S. 999, 104 S.Ct. 502, 78 L.Ed.2d 693 (1983). As the seventh Circuit has recently noted, body cavity searches are " 'demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.' " *Marybeth G. v. City of Chicago,* 723 F.2d 1263, 1273 (7th Cir. 1983) (quoting *Tinetti v. Wittke,* 479 F.Supp. 486, 491 (E.D.Wis. 1979), *aff'd without opin.* 620 F.2d 160 (7th Cir. 1980)). The searches to which Ruth Blackburn was subject — which involved not only the *visual* inspection of body cavities present in the above cases, but the manual spreading of buttocks and lifting of breasts — produced exactly these feelings of humiliation in her. Her uncontroverted testimony was that she felt "very degraded", was shaking, sweating and sick to her stomach, and could hardly stand.

Against this intrusion, perhaps "the greatest personal indignity" searching officials can visit upon an individual, *Bell v. Wolfish,* 441 U.S. 520, 594, 99 S.Ct. 1861, 1903, 60 L.Ed.2d 447 (1979) (Stevens, J., dissenting), we must balance the appellants' "paramount interest in institutional security." *Hudson v. Palmer, supra,* 104 S.Ct. at 3201. The Supreme Court has admonished that the interest of prison officials in intercepting contraband and maintaining internal order must be accorded great weight, *e.g., id.; Block v. Rutherford, supra,* 104 S.Ct. at 3232-3234; *Bell v. Wolfish, supra,* 441 U.S. at 547, 99 S.Ct. at 1878; and this Court has echoed that sentiment, *e.g. Arruda v. Fair, supra,* 710 F.2d at 887; *cf. Gomes v. Fair,* 738 F.2d 517 (1st Cir. 1984). And, as we have noted, this interest must not only be weighted heavily in striking the Fourth Amendment balance, but courts must, in addition, accord appropriate deference to the "professional expertise of corrections officials," *Wolfish, supra,* 441 U.S. at 548, 99 S.Ct. at 1879 (quoting *Pell v. Procunier,* 417 U.S. 817, 827, 94 S.Ct. 2800, 2806, 41 L.Ed.2d 495 (1974)) in selecting measures calculated to preserve the security of the facility. *See Arruda, supra,* 710 F.2d at 887. Appellants need not convince us that the Sheriff required considerable latitude in accomplishing this goal.

We reject the argument that the security needs of the Jail justified the blanket rule, however, because we believe that the record in this case shows that no unusual need for special security measures such as a strip search of all prison visitors existed, and that absent such unusual need, the Constitution normally requires a more particularized level of suspicion before individuals wishing to visit a jail may permissibly be subject to a grossly invasive body search. So basic is this constitutional norm, in fact, that appellants cannot cite, nor are we aware of, any published federal case — other than those involving *incarcerated individuals* — in which a court has approved body cavity searches of individual visitors about whom *no* particular suspicion is harbored. Certainly, this position finds no support in the federal precedents concerning strip searches of prison visitors, in which the debate has always been over what level of suspicion is appropriate, not whether any such suspicion is required. *Hunter v. Auger, supra,* 672 F.2d at 674 (strip searches conducted unconstitutional because visitors were not target of "reasonable suspicion"); *Thorne v. Jones, supra,* 585 F.Supp. at 918 (same); *Black v. Amico, supra,* 387 F.Supp. at 91 (strip searches conducted unconstitutional because visitor was not target of "real suspicion"). Cases concerning strip searches of other classes of unincarcerated individuals who have a diminished expectation of privacy have generally taken a similar approach. *See, e.g., Security Employees v. Carey, supra,* 737 F.2d at 205, 208 (requiring "reasonable suspicion" to strip search prison guards and probable cause and warrant to conduct body cavity search of prison guards); *Marybeth G. v. City of Chicago, supra,* at 1273 (requiring "reasonable suspicion" to strip search misdemeanor arrestees confined while awaiting bail money); *United States v. Kallevig,* 534 F.2d 411, 413 (1 Cir. 1976) (requiring either "real suspicion" or "mere suspicion" to strip search at border); *Doe v. Renfrow,* 631 F.2d 91, 93 (7th Cir. 1980) (*per curiam*), *cert. den.,* 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395 (1981) (requiring "reasonable cause" to believe contraband is hidden on person to strip search minor student).

Appellants themselves concede that exceptions to the general Fourth Amendment requirement that normally some level of individual suspicion be present before a search is conducted are appropriate only when, among other things, "the privacy interests implicated by a search are minimal." Reply Brief, at 1112 (quoting *New Jersey v. T.L.O., supra,* 105 S.Ct. at 745, n. 8). Even in light of her diminished expectation of privacy, Blackburn's interest in preserving the privacy of her body cavities can scarcely be thought "minimal." It is not surprising that appellants find no authority for their view, especially in light of the Fourth Amendment principle that " 'the greater the intrusion, the greater must be the reason for conducting a search,' " *United States v. Afanador,* 567 F.2d 1325, 1328 (5th Cir. 1978) (quoting *United States v. Love,* 413 F.Supp. 1122, 1127 (S.D.Tex.), *aff'd,* 538 F.2d 898 (5th

Cir.), *cert. den.,* 429 U.S. 1025, 97 S.Ct. 646, 50 L.Ed.2d 628 (1976)); *see United States v. Sanders,* 663 F.2d 1, 3 (2d Cir. 1981); *cf. Terry v. Ohio,* 392 U.S. 1, 18, 88 S.Ct. 1868, 1878, 20 L.Ed.2d 889 ("a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope.") [FN5]

FN5. The severe intrusion entailed by strip searching Blackburn was exacerbated by the manner in which the searches were carried out. The district court found, and the record shows, that the searches were conducted "in an atmosphere of marginal privacy," 586 F.Supp. at 662, and undertaken by personnel who received no training, medical or otherwise, as to how or where to conduct strip searches, *id.* Furthermore, as we have noted, the searches included manipulation of Blackburn's breasts and spreading of her buttocks. Even courts that have upheld body cavity searches of inmates, *e.g. Bell v. Wolfish, supra,* 441 U.S. at 558, n. 39, 99 S.Ct. at 1884, n. 39, or of other individuals where a sufficient level of suspicion was present, *e.g. United States v. Klein,* 522 F.2d 296, 298 (1st Cir. 1975), have emphasized that those searches included no touching at all. *Cf. United States v. Kallevig,* 534 F.2d 411 (1st Cir. 1976).

Blackburn, 771 F.2d at 564-565.

Finally, the U.S. Court of Appeals rejected Defendant's arguments that Blackburn consented to the searches as a condition of visiting her brother in jail.

Appellants finally argue that, even if deemed otherwise unreasonable, the strip searches did not violate the Fourth Amendment because Blackburn consented to them. They point to several supporting facts in the record: that Blackburn signed 16 visitor slips between January-April, 1977, consenting to a search of her person and property; that officials posted a sign announcing that all visitors would be "skin searched"; that Blackburn was free to leave the Jail if she wished to forego visiting, but instead chose to submit to the searches; and that Blackburn voluntarily returned to the Jail on two occasions after the first search. Blackburn takes the position that, as a factual matter, no consent could properly be found here because, as her testimony and that of Dr. Grassian showed, circumstances in her family background caused her to feel so uniquely responsible for her siblings that she had no real "choice" but to do whatever was necessary, even if self-destructive, to see her brother — especially because he was in 23 hour a day lock up at the time. [FN9] In addition to this factual argument, appellee has adopted the reasoning of the district court, which rejected the consent claim because it believed that "(a)n individual whose right to visit a prison inmate is conditioned on her submission to a strip search is subjected to a 'search' within the meaning of the fourth amendment" and cannot be said to have voluntarily consented under such " 'inherently coercive' circumstances." 586 F.Supp. at 661 (quoting *Palmigiano v. Travisono,* 317 F.Supp. 776, 792 (D.R.I. 1970)). We need not decide whether, as a factual matter, the particular circumstances of Blackburn's background rendered any consent she gave ineffective, for we agree with the district court that, as a matter of law, Blackburn's submission to the searches under these circumstances cannot properly constitute consent because her access to the Jail was impermissibly conditioned on that submission. We do not agree, however, that Blackburn must have had a constitutional right to visit the institution in order to reach this result.

FN9. The evidence showed that Blackburn's brother was confined in this way not for disciplinary reasons, but because he had received a sentence at another institution and was, on that basis, administratively classified as an escape risk.

Rather, it has long been settled that government may not condition access to even a gratuitous benefit or privilege it bestows upon the sacrifice of a constitutional right. As the Supreme Court explained sixty years ago:

> It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost v. Railroad Commission, 271 U.S. 583, 593-94, 46 S.Ct. 605, 607, 70 L.Ed. 1101 (1925).

Since *Frost,* which struck down a state statute conditioning the use of public highways on compliance with regulatory requirements otherwise violative of the due process clause, the doctrine of unconstitutional conditions has been applied in the context of numerous constitutional protections, *e.g., Perry v. Sindermann,* 408 U.S. 593, 598, 92 S.Ct. 2694, 2698, 33 L.Ed.2d 570 (1972) (state may not condition continued public employment on relinquishment of protected speech rights); *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1967) (state may not condition receipt of unemployment benefits on relinquishment of right to free exercise of religion); *Garrity v. New Jersey,* 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) (state may not condition continued public employment on relinquishment of right to invoke Fifth Amendment privilege against self-incrimination); *id.* at 500, 87 S.Ct. at 620 (collecting cases discussing other "rights of constitutional stature whose exercise a state may not condition by the exaction of a price"), and several courts have applied it in Fourth Amendment situations analogous to the one before us, *e.g., Armstrong v. New York State Commissioner of Correction,* 545 F.Supp. 728, 731 (N.D.N.Y. 1982) (state may not condition continued employment of prison guards on submission to unreasonable strip searches); *Gaioni v. Folmar,* 460 F.Supp. 10, 13 (M.D.Ala. 1978) (state may not condition public access to civic center on submission to unreasonable searches).

We find this constitutional rule dispositive of the consent issue here because Sheriff Snow expressly conditioned Blackburn's access to the Jail upon sacrifice of her right to be free of an otherwise unreasonable strip search. The Sheriff freely admits to having structured the choice to bar *any* visit, absent submission to a strip search; he does not claim to have offered those not wishing to be strip searched a non-contact visit in the facility's screened area. Irrespective of whether Blackburn had a constitutional right to visit the Jail, as the district court thought, or a mere privilege, as the appellants argue, the principle established in the cases we have cited is that the Sheriff was not free to condition the visitation opportunity on the sacrifice of Blackburn's protected Fourth Amendment rights. Nor is it any answer to say that Blackburn could have left at any time, or declined to return after the first strip search, for it is the *very choice to which she was put* that is constitutionally intolerable — and it was as intolerable the second and third times as the first. [FN10]

FN10. This does not, of course, mean that the government may never condition access to a privilege it controls upon submission to a search. It is perfectly clear that the government may do so, when the search it requires, unlike here, independently satisfies the Fourth Amendment requirement of reasonableness. *See, e.g., Wyman v. James,* 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971) (upholding requirement that welfare recipients permit caseworkers to visit their homes because, if properly considered "searches" at all, the visits are reasonable under the Fourth Amendment); *United States v. Bell,* 464 F.2d 667, 674-675 (2d Cir. 1972) (Friendly, J., concurring)

(upholding requirement that airline passengers submit to metal detector searches because such searches are reasonable under the Fourth Amendment). As Justice White explained in *See v. City of Seattle,* a case which struck down as violative of the Fourth Amendment a requirement that warehouse owners permit warrantless administrative searches of their property:

> We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product. Any constitutional challenge to such programs can only be resolved, as many have been in the past, on a case-by-case basis under the general Fourth Amendment standard of reasonableness.

387 U.S. 541, 546, 87 S.Ct. 1737, 1741, 18 L.Ed.2d 943 (1967).
See also W. LaFave, *Searches and Seizures,* 8.2(K), at 677 (1978).

We therefore find that, in the absence of legally cognizable consent, [footnote omitted] the strip search violated Blackburn's Fourth Amendment rights.

Blackburn, 771 F.2d at 567-569.

Casarez

U.S. v. Casarez, 1990 WL 191699 (9th Cir. 30 Nov 1990); *cert. den.,* 499 U.S. 968 (1991).

In a remarkably terse unreported opinion, the U.S. Court of Appeals disposed of a case involving a pat-down of a clothed woman's breast and crotch in an airport by agents of unspecified gender, followed by a strip search by female agents that found heroin. She was arrested, convicted, and the U.S. Court of Appeals tersely affirmed her conviction:

> The search began with an external pat-down of Casarez's clothing, including that part covering her breast and groin areas. The pat-down revealed hard objects beneath Casarez's clothes. Female officials then conducted a strip search, which resulted in the discovery of the drugs.
>
> Casarez contends that a higher degree of suspicion was required to justify the pat-down than that which the officials had. Customs officials testified that Casarez appeared nervous. One noted that her hands were trembling and another that she was smoking nervously. The officials also testified that her travel itinerary was suspicious because she had travelled a long distance to Mexico City, alone, for a short period of time. Adding to the suspicion was Casarez's statement that she had no friends or relatives in Mexico City.
>
> Searches conducted at the border are presumptively reasonable. *United States v. Ramsey,* 431 U.S. 606, 616 (1977). Routine border searches require neither individualized nor reasonable suspicion. *United States v. Montoya de Hernandez,* 473 U.S. 531 (1985); *United States v. Sandoval Vargas,* 854 F.2d 1132 (9th Cir.), *cert. denied,* 488 U.S. 912 (1988). We need not decide whether the pat-down of Casarez required more suspicion than is required for a routine border search. The observations of the Customs officials created a sufficient degree of suspicion to justify the search that occurred in this case.

Casarez, 1990 WL 191699 at *1. (I changed "petitioner" to "Casarez" in this quotation.)

Both *Purvis* (at page 27 above) and *Casarez* are examples of how guilty importers of heroin get little consideration of their legal rights from appellate courts. I quote these two cases to give balance to this essay, by showing cases where law enforcement agents had reasonable suspicion that justified a search.

Rodney

U.S. v. Rodney, 956 F.2d 295 (D.C.Cir. 1992).

Rodney arrived in Washington, DC aboard an interstate bus in February 1990. Detectives approached Rodney in the bus terminal and obtained Rodney's consent to a search. There is no indication that the detectives were searching for weapons, which is the justification of the traditional *Terry* frisk. The detectives found crack cocaine hidden near Rodney's crotch. They arrested him and he was subsequently convicted. On appeal, the U.S. Court of Appeals held that consent to search included consent to having one's genitals frisked. 956 F.2d. at 297-298. (See the discussion of *Terry,* above at page 8.) Judge Wald wrote a good dissent, which is worth quoting. Wald begins by saying:

> I disagree with the panel ruling that a citizen's consent to a search of his "person" on a public thoroughfare, given in response to a police request made in the absence of probable cause or even "reasonable suspicion" to believe that he has committed a crime, encompasses authority to conduct a palpation of the person's genital area in an effort to detect drugs. Because I believe that in this case such an intimate and intrusive search exceeded the scope of any general permission to search granted, I would find the search nonconsensual and the drugs seized inadmissible.

Rodney, 956 F.2d at 299 (Wald, J., dissenting).

> Furthermore, it does not move our inquiry ahead to say, as the majority does, that a frisk of a person's genitals through his clothing is not a "full search" (whatever that means), or that a "fully-clothed" body search is "not unusually intrusive ... relative to body searches generally." Maj. op. at 298. The issue before us is whether a person against whom there is no articulable suspicion of wrongdoing who is asked to submit to a body search on a public street expects that search to include manual touching of the genital area.
>
> I do not believe any such expectation exists at the time a cooperative citizen consents to an on-the-street search. Rather, that citizen anticipates only those kinds of searches that unfortunately have become a part of our urban living, searches ranging from airport security personnel passing a hand-held magnetometer over a person's body, to having a person empty his pockets, and subject himself to a patting-down of sides, shoulders, and back. Any search that includes touching genital areas or breasts, would not normally be expected to occur in public.
>
> In all aspects of our society, different parts of the body are subject to very different levels of privacy and expectations about intrusions. We readily bare our heads, arms, legs, backs, even midriffs, in public, but, except in the most unusual circumstances, certainly not our breasts or genitals. On the streets, in elevators, and on public transportation, we often touch, inadvertently or even casually, each others' hands, arms, shoulders, and backs, but it is a serious affront, and sometimes even a crime, to intentionally touch another's intimate body parts without explicit permission; and while we feel free to discuss other people's hair, facial features, weight, height, noses or ears, similar discussions about genitals or breasts are not acceptable. Thus in any consensual encounter, it is not "objectively reasonable" for a citizen desiring to cooperate with the police in a public place to expect that permission to search her body includes feeling, even "fully clothed," the most private areas of her body. Under our social norms that requires "special permission," given with notice of the areas to be searched.

Rodney, 956 F.2d at 300 (Wald, J., dissenting).

> In sum, *Terry* does not purport to define the limits of a cooperating citizen's right to privacy; it defines the balance between a suspect's right to privacy and the need of the police to protect themselves from ambush. The *Terry* authorization cannot, therefore, provide the safe haven for the police search of the intimate body parts of an ordinary citizen against whom there is no suspicion of crime.
>
> Nor can the mere fact that drug couriers often hide their stash in the crotch area justify the search of such area without some elementary form of notice to the citizen that such an offensive procedure is about to take place. The ordinary citizen's expectation of privacy in intimate parts of her body is certainly well enough established to merit a particularized request for consent to such an intimate search in public. The Eleventh Circuit so found, and I do not find my colleagues' attempt to distinguish that case persuasive. Whether the "touching" begins in the genital area, or ends up there after an initial "sweep" along the legs hardly seems material to the intensity of the intrusion; and indeed we cannot be sure at all from the record here that this search was really the equivalent of a *Terry* pat-down, which the *Blake* court did not reach; or something more intrusive. In any case, I agree with Judge Shoob's concurring opinion in *Blake* that "intimate searches may not occur as part of random stops absent explicit and voluntary consent." 888 F.2d at 801 (Shoob, J., concurring).

Rodney, 956 F.2d at 301 (Wald, J., dissenting).

Judge Wald concludes his dissent by saying:

> A general consent to a search of a citizen's "person" in a public place, does not include consent to touch the genital or breast areas. The majority today upholds a practice that allows police under the rubric of a general consent to conduct intimate body searches, and in so doing defeats the legitimate expectations of privacy that ordinary citizens should retain during cooperative exchanges with the police on the street. I believe the search was impermissible under the fourth amendment, and the drugs seized should have been suppressed.

Rodney, 956 F.2d at 300 (Wald, J., dissenting).

Spear

Spear v. Sowders, 71 F.3d 626 (6th Cir. 1995).

Spear went to a Kentucky State Prison to visit an inmate. She was given a strip search and body cavity search, and her car was also searched. She sued the guards for civil rights violations. The opinion mentions that the guards had “information from a confidential prison informant that ... an inmate ... ‘was receiving drugs every time a young unrelated female visitor visited.’” Records show that Spear was the only unrelated woman to visit this particular inmate. Both the District Court and the U.S. Court of Appeals held that these facts gave the guards reasonable suspicion to justify the searches. The District Court granted the guards immunity from suit, but the Court of Appeals reversed the immunity.

> The natural extension of this principle is that prison authorities have much greater leeway in conducting searches of visitors. Visitors can be subjected to some searches, such as a pat-down or a metal detector sweep, merely as a condition of visitation, absent any suspicion. However, because a strip and body cavity search is the most intrusive search possible, courts have attempted to balance the need for institutional security against the remaining privacy

> interests of visitors. Those courts that have examined the issue have concluded that even for strip and body cavity searches prison authorities need not secure a warrant or have probable cause. However, the residual privacy interests of visitors in being free from such an invasive search requires that prison authorities have at least a reasonable suspicion that the visitor is bearing contraband before conducting such a search.

Spear, at 71 F.3d 630.

> As we have noted, because of the need for prison security, visitors do not have the same right of unimpeded access to prisoners, without government scrutiny, that they would have to persons in society outside prison. *Bell,* 441 U.S. at 559, 99 S.Ct. at 1884-85; *Hudson,* 468 U.S. at 527, 104 S.Ct. at 3200-01. However, just as with the special circumstances that justify an electronic search by a metal detector at an airport, *see, e.g., United States v. Davis,* 482 F.2d 893 (9th Cir. 1973), the government's power to intrude depends on the fact that the person insists on access. There is no authority supporting the proposition that prison officials, relying on their special power to conduct administrative searches, may search a visitor who objects, without giving the visitor the chance to abort the visit and depart. Here, Spear alleges that prison officials detained her, that such detention was without probable cause, and that they told her she would not be permitted to depart without consenting to a search. These circumstances, if proven true, would vitiate her consent and would amount to a violation of her constitutional right to be free from being detained absent probable cause. While a person may consent to less invasive searches merely by entering the facility, we do not think that a person consents to a strip and body cavity search by simply appearing at a visiting center. Instead, the same logic that dictates that such a search may be conducted only when there is reasonable suspicion also demands that the person to be subjected to such an invasive search be given the opportunity to depart.

Spear, at 71 F.3d 632.

Pena-Saiz

U.S. v. Pena-Saiz, 161 F.3d 1175 (8th Cir. 1998).

On 13 June 1997, Pena-Saiz traveled by airplane from El Paso, Texas to Omaha, Nebraska. She

> was stopped by three narcotics officers at Omaha's Eppley Airfield. During the twenty-one minute encounter, which began in the baggage claim area and concluded in the airport's drug interdiction office, the officers questioned Pena-Saiz, reviewed her driver's license and plane ticket, searched her duffel bag, found within the bag a wrapped gift, and asked to take the gift to the interdiction office so that the officers could open it and review its contents. Pena-Saiz followed the officers to the interdiction office, traveling to the escalator, which was 200 feet from the baggage claim area, upstairs, behind a pair of doors, and down a hallway. During the trip to, and within, the interdiction office and, in fact, throughout the entire encounter, the officers never informed Pena-Saiz either that she was free to leave or that she did not have to answer their questions.
>
> The officers neither found any drugs in Pena-Saiz' bag and gift, nor observed any odd bulges in Pena-Saiz' clothing. Nonetheless, the officers persisted. They twice asked Pena-Saiz for her consent to a pat-down search. When she did not accede, the officers told her "This is our job. This is what we do. We talk to people, we search people's bags, we pat search people. This is what we do everyday." R. at 32. Upon Pena-Saiz' third refusal, the officers allegedly told Pena-Saiz that she was under arrest. Believing that she had no choice, Pena-Saiz told the officers to "do what you have to do." *Id.* One of the officers proceeded

> with the pat-down search and discovered on Pena-Saiz' breast area an elastic bandage covering a bundle of white powder, which later tested positive for cocaine. Pena-Saiz was arrested and charged with possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1).

Pena-Saiz, 161 F.3d at 1176.

The U.S. District Court held that there was no articulable suspicion that she was carrying illicit drugs and also held that she did *not* consent to the search. The District Court refused to admit the cocaine as evidence, because it was *un*lawfully seized, and the U.S. Government appealed.

The U.S. Court of Appeals affirmed.

> We turn to the constitutionality of the pat-down search. To come within the bounds of a permissible Fourth Amendment search, the officers in this case needed either reasonable articulable suspicion or Pena-Saiz' consent. *United States v. Green,* 52 F.3d 194, 197-98 (8th Cir. 1995). The government does not claim any reasonable articulable suspicion as a basis for the search; nonetheless, we determine that the officers possessed no such basis. Reasonable articulable suspicion must be more than a hunch. *Terry v. Ohio,* 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In this case, the officers' searches and questioning had turned up nothing. There were no strange bulges in Pena-Saiz' clothing or anything to indicate that she was engaged in drug activity. Thus, the officers possessed no reasonable articulable suspicion to continue harassing Pena-Saiz for consent to a pat-down search.

Pena-Saiz, 161 F.3d at 1177.

Saffell

Saffell v. Crews, 1998 WL 832653 (N.D.Ill. 1998), *rev'd,* 183 F.3d 655 (7th Cir. 1999).

The findings of facts of this case, as told by the U.S. District Court in its Amended Memorandum Opinion and Order:

> Ms. Saffell is an American citizen born in Jamaica and living in Wisconsin. In November 1995, she visited Jamaica to attend her father's funeral and after a week's stay, returned to this country through O'Hare International Airport. Her sojourn was anything but routine. A Customs Service canine alerted when sniffing her luggage, and she was detained. The subsequent search of her luggage and her person, including intimate parts of her body, form the basis of her *Bivens* and state causes of action, which were tried by this Court.
>
> When Ms. Saffell's flight from Jamaica landed at O'Hare, she was traveling with a purse, two pieces of luggage, and several documents. She had her U.S. passport, which showed her to be a citizen of the United States who had traveled to Jamaica three times during the preceding fourteen months (but only once in the preceding nine). Second, she had her airplane tickets and papers from a travel agent, which demonstrated that she had purchased her ticket for Jamaica several weeks before the trip, that she paid by check, and that she had obtained a low round-trip fare. These documents also showed that Ms. Saffell's trip had lasted one week. Ms. Saffell also had a U.S. Customs' declaration form attesting that she was not bringing any food, valuables, or contraband into the United States.
>
> Ms. Saffell cleared the Immigration checkpoint without incident. Unknown to her, a canine trained to detect the odor of narcotics alerted at one of her two bags, indicating the presence of narcotics. Following Customs' policy, the dog handler alerted the Customs agent on the floor of the terminal (known as a "rover"). The suspicious bag was held until the end of the off loading so that whoever picked up the luggage would be clearly visible to the

Customs agent assigned to intercept Ms. Saffell — one Agent Carrie Crews. Agent Crews stopped Ms. Saffell and directed her to a separate area in order to conduct a search of the luggage.

Ms. Saffell became angry almost immediately. When asked where she had been in Jamaica, she asked Agent Crews if she had ever been to Jamaica. When Agent Crews said "No," Ms. Saffell retorted that then there was no reason to answer the agent's inquiry. Crews proceeded to search quite carefully both of Ms. Saffell's bags. She found nothing except a tin of cheese, which she punctured and satisfied herself that it did not contain money or drugs.

At this point, one might rationally conclude that the confrontation was at an end. A dog had indicated the scent of drugs on or in Ms. Saffell's bags. A thorough search revealed nothing. But the confrontation continued. Ms. Saffell was ordered into a private room by Agent Crews. (A second agent, Ms. Diez, came along as required by Customs' policy.) Ms. Saffell was told to lean against a wall with her arms extended, away from her body, and to spread her legs. When Ms. Saffell objected, she was told that she must comply because Agent Crews was going to conduct a patdown search. A "patdown" search consists of the agent moving her hands all over the clothed body of the detainee, including the area of her breasts and groin. The purpose of the search is to detect objects in the clothing or against the skin. Ms. Saffell was now furious. She demanded to know what gave the agents the right to conduct this personal search. She also requested names and badge numbers of the agents. Ms. Saffell even demanded to see a Customs supervisor. During the search, Agent Crews located a small bulge in the area of Ms. Saffell's bra and another in the area of Ms. Saffell's crotch. Ms. Saffell was ordered to remove the lump in her bra, which turned out to be $80 for a limousine ride to her home in Wisconsin. She was told to hike up her dress and lower her underwear. [FN2] Ms. Saffell did so under protest, and a visual examination of her now naked genitalia area revealed a sanitary napkin. [FN3]

FN2. Up to this point, the facts are largely uncontroverted, at least in a sense. Ms. Saffell testified to most of them and neither Agent Crews nor Diez have any recollection of the events that evening. The agents did prepare a report, however, nearly contemporaneously with the events. Further, both testified extensively as to their custom and practice when conducting these searches. Fed.R.Evid. 405. This Court has sometimes accepted the agents' testimony of their standard procedure over some of Ms. Saffell's assertions.

FN3. Ms. Saffell contends that she was wearing a tampon, and Crews ordered her to remove it, which she did after first refusing to do so. We reject this testimony. A tampon in Saffell's body would have revealed no telltale bulge or bump, which was what triggered the strip search in the first place. Further, Crews' actions, as testified to by Saffell, would have seriously violated Customs' policies. We do not believe Agent Crews, a Customs agent with over twenty years experience, would do so for no reason, and no reason is revealed by the testimony.

Saffell, 1998 WL 832653 at *1.

The facts of this case, as told by the U.S. Court of Appeals:

At the time of this incident, in November 1995, Crews, a veteran of twelve years with the Customs Service, was working as a roving inspector in the international terminal at O'Hare International Airport. Her job was to assist with interviewing and processing of arriving international passengers and their baggage and, in particular, to help intercept drug smugglers. Saffell, a naturalized citizen residing in Wisconsin, arrived back in the United States on November 1, 1995, after spending a week in Jamaica. Crews was notified that a narcotics detection dog had alerted to Saffell's luggage. When Saffell retrieved her luggage at the baggage carousel, Crews asked Saffell to follow her to a search area, which Saffell did.

> A patdown search by Crews revealed a bulge under Saffell's clothes in the most intimate area of her body, a place where drugs are sometimes known to be secreted by women. A partial strip search followed the patdown but no drugs were found.
>
> Crews' version of the strip search, much more limited in scope than Saffell's version, was accepted by the district court. Saffell's account was found not to be truthful. Had Saffell's version alleging extreme intimate personal contact and intrusion been accepted by the district court this case could have been more difficult. The district court found that Crews was justified in performing the patdown search which disclosed the bulge in Saffell's clothing.
>
> The [district] court noted the canine alert as justification together with the fact that Saffell had just arrived from a country with the reputation of being a source of narcotics where Saffell had been three times in a little over a year. Upon questioning, Saffell declined argumentatively to discuss the trip or her personal situation with Crews. As it turned out, had Saffell communicated her reasonable explanations to Crews that would have helped her. However, the district court concluded that although the original patdown search was justified, Crews lacked reasonable suspicion to proceed further and to perform the partial strip search. The bulge and the other surrounding circumstances were not considered sufficient to justify the strip search.

Saffell, 183 F.3d at 656-657.

Saffell sued the U.S. Government under the theory in *Bivens,* and she also sued for intentional infliction of emotional distress under Illinois law. Saffell also sued Inspector Crews personally. The trial judge in U.S. District Court found for the Government, but awarded plaintiff Saffell $25,000 on her *Bivens'* claim against Crews. Crews appealed and the U.S. Court of Appeal reversed.

> Prior to trial, Crews and two other Customs inspectors initially named as defendants filed a motion for summary judgment on the basis of qualified immunity. That motion was granted with respect to the other two inspectors, but denied as to Crews. To reach that result the district court credited Saffell's account of the strip search, an account which it later rejected at trial. However, the district court did not revisit its first immunity ruling as to Crews when it drastically amended its factual strip search findings later at trial.
>
> **....** Because O'Hare is an international gateway into the United States, arriving passengers are subject to searches in the same category as searches at the border. *United States v. Johnson,* 991 F.2d 1287, 1290 (7th Cir. 1993). The government under that standard is allowed a little more leeway "pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country." *United States v. Ramsey,* 431 U.S. 606, 616, 619, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977). In those searches, the rights of the government compared with the privacy rights of international travelers are "more favorable to the government." *United States v. Montoya de Hernandez,* 473 U.S. 531, 539-40, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985).
>
> We fully agree with the district court that there was justification for the initial search, and finding no clear error, we accept the district court's final factual findings later made at trial about the limited extent of the strip search. We therefore disregard the district court's findings of fact on summary judgment which findings were later rejected by the district court.
> We must disagree, however, with the district court's holding that Crews was not entitled to qualified immunity. First of all, considering all the facts and circumstances in this case we see no Fourth Amendment violation of the right to be secure from unreasonable searches and seizures. We believe that the partial strip search was fully justified. The Customs Service has had experience with clever and devious smugglers including ways in which the body can be and is used to secrete narcotics. In any event, as we discuss below, we find Crews to be

entitled to qualified immunity on Saffell's *Bivens* claim.

....

In the present case, Crews is entitled to qualified immunity if a reasonable officer could have rationally believed that the strip search was not unlawful in light of clearly established law and the information she possessed at the time. *See Hunter v. Bryant,* 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991). The district court found that Crews did not knowingly violate any law, but was following Customs policy as she understood it. Even if Crews made a mistake, which we do not think she did, qualified immunity provides "ample room for mistaken judgments" and protects government officers except for the "plainly incompetent and those who knowingly violate the law." *Id.* at 229, 112 S.Ct. 534. Crews, an experienced Customs inspector, was neither incompetent, nor did the district court find that she intentionally violated any law.

Saffell, 183 F.3d at 657-658.

Amaechi

Amaechi v. West, 87 F.Supp.2d 556 (E.D.Va. 2000), *aff'd,* 237 F.3d 356 (4th Cir. 2001).

Amaechi was arrested at her home at 21:00 "for violation of a town noise ordinance" that had occurred two days earlier. (The actual reason for the arrest may have been retaliation for a complaint that Amaechi had filed against an allegedly impolite policeman.) When two policemen, Pfluger and West, arrived at night to arrest Amaechi on a warrant,

a nude Amaechi was in her bathroom preparing for bed. She covered herself with a house dress and followed her husband downstairs. [FN7]

FN7. The housedress was made of a light weight fabric, had spaghetti straps, and had buttonholes all the way down the front. It was missing all of its buttons from immediately below the chest, however, requiring Amaechi to gather the dress with her hand to keep it closed.

When Amaechi answered the door with her husband, Pfluger told her she was under arrest. Amaechi fully cooperated during the arrest, but when told that she was to be handcuffed, Amaechi pointed out to the officers that she was completely naked under the dress and requested permission to get dressed because she would no longer be able to hold her dress closed once handcuffed. This request was denied, and Amaechi's hands were secured behind her back, causing her dress to fall open below her chest.

Pfluger then turned to West, who was at the door with Pfluger, and told him to complete Amaechi's processing. West escorted Amaechi to the police car in her semi-clad state, walking past several officers on the way to the car. Amaechi proceeded to enter the back door of the car, which West had opened. West stopped her and told her that he would have to search her before she entered the car. Amaechi protested that she was not wearing any underwear, and West said, "I still have to search you." (J.A. at 33). West then stood in front of Amaechi, squeezed her hips, and inside her opened dress, "swiped" one ungloved hand, palm up, across her bare vagina, at which time the tip of his finger slightly penetrated Amaechi's genitals. Amaechi jumped back, still in handcuffs, and exclaimed, "I told you I don't have on any underwear." (J.A. at 40). West did not respond and proceeded to put his hand "up into [her] butt cheeks," kneading them. (J.A. at 41). West then allowed Amaechi to enter the car. This search took place directly in front of the Amaechis' townhouse, where

> the other police officers, Amaechi's husband, her five children, and all of her neighbors had the opportunity to observe.

Amaechi, 237 F.3d at 359-360.

Amaechi sued West, for a civil rights violation under 42 USC § 1983 and on state law counts. The District Court denied West's motion for summary judgment, and also "denied West's defense of qualified immunity" West made an interlocutory appeal on the issue of his immunity. The U.S. Court of Appeals affirmed the District Court's denial of immunity, and wrote:

> West's search was highly intrusive without any apparent justification. Amaechi was arrested for a two-day old misdemeanor noise violation, she submitted to arrest peacefully, she advised the officers that she had on no underclothes, and she requested the officers to allow her to get dressed before being placed in handcuffs. Instead, the officers secured Amaechi's hands behind her back and made her walk to the car and stand in the street with her dress open and lower body exposed. West proceeded to search by touching and penetrating Amaechi's genitalia and kneading her buttocks with his ungloved hand. This invasive search was not conducted in a private holding cell but rather was conducted on the street in front of Amaechi's home, subject to viewing by Amaechi's family, the public, and the other officers. *Cf. Polk v. Montgomery Co., Md.,* 782 F.2d 1196, 1201-02 (4th Cir. 1986) ("[Whether the strip search was conducted in private] is especially relevant in determining whether a strip search is reasonable under the circumstances."). West does not allege that he conducted the search in such a manner because of a perceived threat to his or the other officers' safety. *See generally Bell,* 441 U.S. at 559, 99 S.Ct. 1861 (requiring a court to weigh the intrusiveness of the search against the justification for conducting the search). In fact, West could not rely upon any type of security justification for this search, in that the dress was thin and was almost completely open, making any weapons immediately apparent. [FN12] Nor did the possibility exist that Amaechi would attempt to destroy or conceal evidence related to the noise violation. Because the invasiveness of Amaechi's search far outweighed any potential justification for the scope, manner, and place under which it was conducted, *see id.,* we agree with the district court that the search was unreasonable and, therefore, unconstitutional.
>
> FN12. To the extent that Amaechi's hands were secured behind her back, with her shoulders bare and dress open from the waist down, weapons easily could have been viewed without necessitating any pat down. The outline of possible weapons could have been seen through the thin material of the dress, and parts of Amaechi's body that were not already exposed could have been searched by a pat down.

Amaechi, 237 F.3d at 361-62.

> For purposes of analyzing whether West was on notice that his search of Amaechi was unlawful, we agree with the district court that precedent outlining limitations on the right to conduct strip searches are relevant. A strip search under federal law includes the exposure of a person's naked body for the purpose of a visual or physical examination. *See United States v. Dorlouis,* 107 F.3d 248, 256 (4th Cir. 1997) (treating the act of pulling down a suspect's trousers, while leaving his boxer shorts intact, as a strip search and equating "an unconstitutional strip search" with "an unnecessarily intrusive search"); *United States v. Vance,* 62 F.3d 1152, 1156 (9th Cir. 1995) (treating pulling down a suspect's trousers and underwear in public as a strip search); *United States v. Cardenas,* 9 F.3d 1139, 1145 (5th Cir. 1993) (noting that directing a suspect to undress amounts to a strip search). A body cavity search under federal law includes a visual or physical examination into the body's recesses. *See Bell v. Wolfish,* 441 U.S. 520, 558, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

> Amaechi's claim involves characteristics of both a strip search and a body cavity search. Although Amaechi was not per se "disrobed" by West, the officers in effect caused her substantial disrobing by refusing to allow her to change clothes after she informed them that handcuffing her would cause her naked body to be completely exposed from the waist down. Regardless of whether refusing to allow Amaechi to change was unreasonable, [footnote omitted] the officers certainly knew or should have known that handcuffing Amaechi would result in publicly exposing a significant portion of her naked lower body. Yet, they nevertheless proceeded to secure Amaechi's hands behind her back. Then, with Amaechi in this vulnerable position, West, without any suspicion of danger to the officers or the possibility of the destruction of evidence, proceeded to go beyond "visual examination" and a pat down of the outside of Amaechi's housedress and instead physically touched and penetrated her genitalia and kneaded her buttocks with his bare hand. Public exposure of the genitalia accompanied by physical touching is far more intrusive than directing an arrestee to remove her clothing in private for the purpose of "visually inspecting" the arrestee's genitalia. *See Bond v. United States,* 529 U.S. 334, 337, 120 S.Ct. 1462, 1464, 146 L.Ed.2d 365 (2000) ("Physically invasive inspection is simply more intrusive than purely visual inspection."). Physical penetration of the genitalia, no matter how slight, is an intrusion into the arrestee's body cavity and is the ultimate invasion of personal dignity. Accordingly, we have no difficulty concluding, as did the district court, that West's search, as described by Amaechi, is analogous to a strip search. [FN14]
>
> > FN14. Additionally, we need not decide whether West's search was a strip search to apply precedent involving strip searches because those cases are not limited to strip searches per se. Rather, *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), and subsequent cases involving strip searches express a more general concern with the Fourth Amendment implications underlying the violation of personal privacy inherent in sexually invasive searches. *See Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (refusing to require exact precedent as opposed to merely analogous precedent from which the unlawfulness of the officer's actions is made apparent). Because West's search involved the unwarranted public touching and penetration of Amaechi's genitalia, we believe that his search is guided by the principles found in *Bell* and subsequent cases governing sexually invasive searches.

Amaechi, 237 F.3d at 363-64.

> Moreover, this Court has recognized the fact, first established in *Bell,* that the intrusive, highly degrading nature of a strip search demands a reason for conducting such a search that counterbalances the invasion of personal rights that such a search involves. *Logan,* 660 F.2d [1007] at 1013 [(4thCir. 1981)]. In *Logan,* we held the fact that the arrestee was charged only with an offense that was not commonly associated with the possession of weapons or contraband, without any indication that the arrestee possessed weapons or other contraband, weighed against the constitutionality of the strip search because "Logan's strip search bore no ... discernible relationship to security needs at the Detention Center that, when balanced against the ultimate invasion of personal rights involved, it could reasonably be thought justified." *Id.* Similarly, because West had no reason to believe that Amaechi posed a danger to the officers, and because Amaechi was arrested for a misdemeanor noise violation, West should have known that his search of Amaechi similarly was unjustified and therefore unconstitutional.

Amaechi, 237 F.3d at 364-65.

The U.S. Court of Appeals concluded:

> The entire body of jurisprudence applying limits on the type of sexually intrusive search conducted by West provides West with notice that his search of Amaechi was unconstitutionally unreasonable. There was absolutely no justification for this type of public search, in the form of a safety, security, or evidentiary concern; it was made incident to a two-day old arrest for a minor noise violation; and West's kneading of Amaechi's buttocks and his touching and penetration of Amaechi's exposed genitalia with his ungloved hand affronts the basic protections of the Fourth Amendment, which at its core is designed to protect privacy and personal dignity against unjustified invasion by the State, *see Schmerber v. California,* 384 U.S. 757, 767, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Accordingly, on the facts shown by Amaechi, we conclude that Amaechi has alleged a deprivation of her constitutionally protected right to be free from an unreasonable search and that West is not entitled to qualified immunity. We, therefore, affirm the district court's denial of West's summary judgment motion based upon his asserted qualified immunity defense and remand for further proceedings.

Amaechi, 237 F.3d at 365-66.

On 10 Dec 2004, there was no further opinion in Westlaw for *Amaechi,* so the ultimate outcome is not known.

Brent

Brent v. U.S., 66 F.Supp.2d 1287 (S.D.Fla. 1999),
aff'd sub nom. Brent v. Ashley, 247 F.3d 1294 (11th Cir. 19 Apr 2001).

Facts of this case:

> On July 20, 1991, Rhonda Brent, a United States citizen, was returning home to Houston, Texas, aboard Alitalia Flight 618 from a vacation in Nigeria. During the Rome to Miami leg of her return flight, Brent met Kehinde Elbute, a black Nigerian man who was also en route to Houston. Brent and Elbute were the only black persons on the flight. The flight arrived at Miami International Airport and the passengers disembarked from the plane. As Brent entered the baggage claim area at the airport, she noticed Customs Agent Ricky Grim and his inspection dog with Elbute. Brent stopped briefly, observed Grim searching Elbute and his luggage, and shook her head in disapproval. Based on this look and gesture, Inspector Seymour Schor instructed Inspector Carl Pietri to detain Brent and escort her to the examination area where Elbute had been taken. Pietri seized Brent's passport and other documents, isolated her from other passengers and took her to the examination area for interrogation. Brent protested Pietri's actions, alleging that she was being singled out because she was black.
>
> Schor questioned both Brent and Elbute about the nature of their trips and personally conducted a thorough search of both of their luggage, in which he took every item out of their bags and examined each item separately and carefully. He found no narcotics, nor did he find any items commonly associated with drug couriers. Brent continued to protest the search stating that she was aware of her rights and that she was being treated this way because she was black. Despite finding no objective evidence that she was a drug courier, Schor continued to detain Brent for further questioning.

> Shortly thereafter, Schor was joined by Supervisor Inspector Prospero Ellis. Ellis re-examined Brent's travel documents, clothing and luggage, and questioned her. Both Ellis and Schor then decided to conduct a full body pat-down and strip search. The report form filed by the agents at the time of the search indicated that the reasons for conducting the search were Brent's nervousness and her arrival from a source country. [footnote omitted] Female customs agents Odesta Ashley, Lee Sanchez-Blair and Kathryn Dellane were called in to assist.
>
> The body pat-down and strip search, conducted by Blair and witnessed by Ashley and Dellane, consisted of touching Brent's crotch area, ordering her to pull down her clothes, removing and examining her sanitary napkin, squeezing her abdomen from the pubis to thorax, and monitoring her responsive reactions. The search revealed none of the typical indicators of internal drug smuggling. There was no rigid or distended abdomen, no girdle to hold up the abdomen, no synthetic lubricants, and no contraband could be seen in her body cavities. After the strip search, Brent asked if she could use the bathroom. She was allowed to use the bathroom, but was watched closely by the female agents and told not to flush the toilet. After she had gone to the bathroom, the agents examined Brent's urine for signs of contraband. None were found. At some point during her detention, Brent's name was entered into the Treasury Enforcement Computer Systems to search for frequent travels or past arrests. The inquiry returned nothing suspicious.
>
> Although the pat-down, strip search, and electronic record search revealed nothing, Ellis and Schor nonetheless decided that an x-ray and pelvic examination at the hospital should be performed. The search report form filed the day after the x-ray listed the reasons for conducting the examination as Brent's nervousness and her arrival from a source country. Dellane handcuffed Brent and transported her to Jackson Memorial Hospital. Prior to transport, Brent was presented with a consent form and told that if she refused to sign it she could be held for 35 days or indefinitely until a judge ordered the x-ray. She requested to speak with an attorney and to call home. Both requests were denied. She signed the consent form and waived her *Miranda* rights after being told she had no choice. Upon arrival at the prison ward of the hospital, Brent was told to sign another consent form. Inspector Francine Williams escorted Brent to the x-ray room and remained with Brent throughout the examination. The examination revealed a complete absence of drugs. Dellane drove Brent back to the airport and, ten hours after she was first detained, made arrangements for Brent to return home to Houston.

Brent, 247 F.3d at 1297-98.

> Brent filed this suit against the United States under the Federal Tort Claims Act ("FTCA") and against nine named customs employees, alleging the commission of common law torts and constitutional violations pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). The district court dismissed with prejudice Brent's FTCA claim for failure to file the action within the statutory time limits. The individual defendants then moved for summary judgment on Brent's *Bivens* claims based on qualified immunity. The district court granted the motion with regard to Ashley, Pietri, Williams, Grim, Sanchez, Dellane, and Sanchez-Blair, and denied the motion as to Ellis and Schor. This [interlocutory] appeal followed. [footnote omitted]

Brent, 247 F.3d at 1298.

The Court of Appeals held that:

1. The initial stop was a lawful "routine border search", which needed neither reasonable suspicion, probable cause, nor warrant.
2. The strip search was *not* supported by reasonable suspicion and was a violation of her Fourth Amendment rights.
3. The X-ray examination needed the same justification as a strip search, so the X-ray search also violated her Fourth Amendment rights.

On 10 Dec 2004, there was no further opinion in Westlaw for *Brent,* so the ultimate outcome is not reported. Information on the Internet indicates that *Brent* was settled in October 2003, when Brent was paid $ 350,000 by the U.S. Government.

Bradley

Bradley v. U.S., 164 F.Supp.2d 437 (D.N.J. 2001), *aff'd,* 299 F.3d 197 (3rd Cir. 2002).

> Yvette Bradley, an African-American woman, brought this *Bivens* action [*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971)] against the United States, the United States Customs Service, and a number of customs inspectors, supervisors, and officials. She alleged that her constitutional rights were violated when, on April 5, 1999, customs inspectors subjected her to a search of her suitcase, purse and backpack, as well as a patdown, when she arrived at Newark International Airport on a nonstop international flight from the island of Jamaica. Bradley argued that she was selected because of her race and gender, in violation of her equal protection rights under the Fifth and Fourteenth Amendments, and that the patdown was an illegal search under the Fourth Amendment. [FN2] The District Court granted defendants' motion for summary judgment, and Bradley now appeals.
>
> FN2. Bradley also raised a privacy claim under the Ninth Amendment, a procedural due process claim, a claim for supervisory liability, and various other claims against the United States under the Federal Tort Claims Act. She does not take issue with the District Court's decision regarding these claims and, accordingly, they are waived.

Bradley, 299 F.3d. at 200.

> While Bradley refers in passing to the search of her luggage, her challenge is directed almost exclusively to the patdown, albeit what she describes as the "intrusive patdown," to which she was subjected at an immigration checkpoint at the Newark International Airport. She argues that in granting summary judgment, the District Court failed to construe the facts in the light most favorable to her as, of course, it was required to do given that she was the non-moving party. The facts as relevant to her Fourth Amendment claim are, however, largely undisputed. Those facts, viewed against well-settled law, defeat that claim.
>
> It is not disputed, for example, that Jamaica is considered by Customs to be a source country for narcotics and that Jamaica Airlines Flight 19, on which Bradley arrived, is considered by Customs to be a high risk flight for narcotics, although Bradley herself does not believe either to be so. It is also not disputed that Bradley was subjected to a patdown, and not a strip search, a body cavity search, or any other type of highly intrusive search. It is not

> disputed that the patdown was done *over* Bradley's dress by a female inspector in the presence of a second female inspector and that Bradley's skin was not directly touched in any intimate area. It is not disputed that when the patdown reached what Bradley calls her "groin area," her internal genitalia were not penetrated through the dress. Crediting her version of the facts, the touching that occurred involved the inspector "us[ing] her fingers to inappropriately push on [Bradley's] breasts and into the inner and outer labia," Bradley aff. P 28, the latter concededly part of the external genitalia of a woman. [footnote omitted] Bradley, we note, was not wearing underwear and does not dispute that had she been doing so, the additional layer of cloth would have reduced any intrusion that took place. And, of course, Bradley does not dispute that no drugs or other contraband were found.

Bradley, 299 F.3d. at 201.

The Court of Appeals discussed the relevant law:

> We are not, of course, dealing here with a strip search or a body cavity search or any of the other typical nonroutine searches, but, rather, with a patdown. While the Supreme Court has never articulated what makes a border search routine and has never explicitly classified patdowns as routine, of those courts of appeals which have addressed the patdown issue since *Montoya de Hernandez*, none has held that a standard patdown at the border is a nonroutine search requiring reasonable suspicion and all have held that such patdowns come within the "routine" border search category and, thus, require no suspicion whatsoever. [FN6] *United States v. Beras*, 183 F.3d 22, 26 (1st Cir. 1999); *Gonzalez-Rincon,* 36 F.3d at 864 (luggage searches and patdowns are routine and do not require reasonable suspicion); *Carreon*, 872 F.2d at 1442; *Oyekan* 786 F.2d at 835; *c.f. Charleus,* 871 F.2d at 268 (the patdown *in that case* was a routine border search requiring no level of suspicion at all). [FN7] We now join those courts, although we do not foreclose the possibility that a patdown gone awry could become so intrusive as to become a nonroutine search requiring application of the reasonable suspicion standard. [FN8]
>
> FN6. The Second Circuit has also held that lifting a woman's skirt at the border to look for contraband is a routine search not requiring any suspicion. *See, e.g.*, *Charleus,* 871 F.2d at 268; *see also United States v. Braks,* 842 F.2d 509, 511-15 (1st Cir. 1988) (noting that the lifting of a woman's skirt to check for contraband was a routine search not necessarily requiring any degree of suspicion).
>
> FN7. Somewhat surprisingly, the government argues to us and argued before the District Court, with the District Court finding it "undisputed," that "[a]t the border, Customs Inspectors can send someone for a patdown with mere suspicion." JA47. The argument that "mere suspicion" is required is presumably based on the U.S. Customs Service's *Personal Search Handbook* that, in discussing "Procedures Applicable to Patdowns," states that "Some or Mere Suspicion is Required." The sole support for this statement, however, is a 1975 Ninth Circuit case which does not so clearly stand for the proposition for which it is cited and which, in any event, has been effectively overruled by the Ninth Circuit's post-*Montoya de Hernandez* decision in *Gonzalez-Rincon*.
>
> FN8. It appears that when the Seventh Circuit is called upon to decide the issue it, too, will join. The Court, in *Saffell v. Crews,* 183 F.3d 655 (7th Cir. 1999), although reviewing only a partial strip search, nonetheless observed that the patdown which had preceded the strip search revealed a bulge through Saffell's clothes "in the most intimate area of her body, a place where drugs are sometimes known to be secreted by women." 183 F.3d at 657. It found that "there was justification" for the patdown, *id*., and did not even suggest that patting down the crotch area turned the patdown into an intrusive patdown search requiring reasonable suspicion. It is unclear, however, by the use of the word "justification" whether it believed that the balancing test adopted in its 1981 *Dorsey* case, *see* n. 5 *supra*, continues to be viable after *Montoya de Hernandez*. It appears, however, that, while not ignoring *Dorsey*, the Court subsequently dropped that test when it held that there are but two

> categories of border searches--routine searches that require no suspicion and nonroutine searches that require reasonable suspicion. *United States v. Johnson,* 991 F.2d 1287, 1291-92 (7th Cir. 1993). Moreover, to employ a balancing test after *Montoya de Hernandez* would contravene the Supreme Court's warning against multiple gradations of suspicion.

> This, says Bradley, was just such a case, with the patdown to which she was subjected so intrusive that, although it was concededly not a body cavity or strip search, it became "nonroutine," thereby requiring reasonable suspicion which, she argues, did not exist. We need not decide whether the customs inspectors reasonably suspected that Bradley was smuggling contraband because we conclude that the patdown was not so intrusive as to be transformed into a nonroutine border search.

Bradley, 299 F.3d. at 203-04.

Kaniff

Kaniff v. U.S., 2002 WL 370210 (N.D.Ill. 8 Mar 2002), *aff'd,* 351 F.3d 780 (7th Cir. 2003).

> Kathryn Kaniff was singled out for further inspection as a suspected drug smuggler at O'Hare International Airport when she returned from a four-day trip to Jamaica over the Christmas holiday in 1997. After a pat-down search, a visual inspection of her body cavities, and an x-ray of Kaniff's abdomen failed to yield evidence of contraband, Customs officials allowed her to leave the airport. Understandably distressed by her ordeal, Kaniff sued the inspectors in their individual capacities, alleging common law tort and constitutional violations. The court later substituted the United States as the defendant, and Kaniff dismissed her suit against the individual officers with prejudice. After a full trial, an advisory jury recommended judgment in Kaniff's favor. The district judge, however, disagreed with the recommendation and entered judgment for the United States. Kaniff now appeals. We affirm, in essence because the Customs officials had sufficient grounds for their actions, even though their suspicions ultimately proved to be unfounded.

Kaniff, 351 F.2d 781-82.

Because Kaniff fit the U.S. Customs profile for possible drug smuggling, Kaniff was selected for questioning.

> Although a search of Kaniff's luggage and the box did not yield any contraband, [U.S. Customs agent] Martinez was unsatisfied with Kaniff's answers to several questions. She accordingly sought and obtained permission from her supervisor, Mark Woods, to subject Kaniff to a pat-down search. Kaniff complains about the questioning process itself, claiming that Martinez repeatedly cut her off and did not allow her to give complete answers to questions about the details of her trip to Jamaica, her income and employment.
>
> The pat-down search took place in a private room with Customs inspector Whyte observing Martinez's work. Claiming to have felt a thickness in Kaniff's crotch, Martinez asked Kaniff if she was wearing a sanitary pad or menstruating; Kaniff answered no to both questions. Martinez, now concerned that Kaniff may have hidden contraband in her pants or a body cavity, consulted a second time with Woods. She obtained permission to conduct a partial strip search during which Kaniff was told to lower her pants and underpants so that both could be inspected, and to spread her legs and buttocks with her hands so that inspector Martinez could visually inspect her anus. There was still no sign of contraband, and so Martinez consulted her supervisor once again.

Kaniff, 351 F.2d 782-83.

> Concerned that Kaniff might be an "internal" drug smuggler (that is, someone who conceals the drugs somewhere inside her body), Woods advised her that she could: (1) wait and pass a bowel movement naturally; (2) take a laxative and wait to pass a bowel movement; or (3) consent to an x-ray. All three options involved a trip to a nearby hospital because it is Customs policy to take individuals suspected of smuggling drugs by ingesting them to a medical facility in case the package in which the drugs are sealed ruptures and leaks internally before the drugs are passed (a possibility that could be lethal). Woods also explained to Kaniff that if she chose to wait or refused to consent to an x-ray, Customs could seek a warrant to require her to have an x-ray. Kaniff then apparently signed a consent form, although the evidence of her consent was not as clear as it might have been. The government could not produce the original signed form, because it was lost or destroyed. Instead, it offered a copy that it had obtained from the hospital. The reproduced copy of the form contained Martinez's and Whyte's signatures, but Kaniff's signature was not visible because the copy was poor. After hearing testimony from Kaniff, Woods, Whyte and Martinez, the district court concluded that Woods credibly testified that he informed Kaniff of her right to refuse to consent to the x-ray and that Kaniff knowingly and voluntarily signed the consent form and thus agreed to submit to the procedure.
>
> Before taking Kaniff to a nearby hospital for the x-ray, Woods obtained permission to take this step from the Chief Customs inspector at O'Hare Airport. The Chief Customs inspector agreed that there were reasonable grounds to suspect Kaniff of internally smuggling narcotics. Kaniff was then handcuffed and taken by Woods, Martinez and Whyte to Resurrection Medical Center. The hospital was given a copy of Kaniff's signed consent form and, as was its policy, required her to take a pregnancy test before administering the x-ray. The pregnancy test necessitated a urine sample, which Kaniff was required to produce in the presence of inspectors Martinez and Whyte to ensure that contraband was not destroyed or lost in the process. After the pregnancy test came back negative, Kaniff's abdomen was x-rayed. The x-ray revealed no contraband. Her ordeal over, Kaniff was taken back to O'Hare, allowed to retrieve her belongings, and released.

Kaniff, 351 F.2d 783-84.

The District Court, affirmed by the Court of Appeals, found “reasonable suspicion” to justify the pat-down search.

> Next Kaniff attacks the district court's conclusion that the humiliating partial strip search was supported by reasonable suspicion. But the very same reasonable suspicion that supported the pat-down search was enough to justify this additional step, unpleasant though it may have been. In seeking approval to conduct a partial strip search, inspector Martinez had an additional factor to justify the search: she thought that she felt something hard in Kaniff's crotch during the pat-down search. When Kaniff indicated that she was neither menstruating nor wearing a sanitary pad, inspector Martinez had ample justification — especially in light of everything else that she knew about Kaniff's unusual circumstances and travel plans — to support the partial strip search.

Kaniff, 351 F.2d 788.

The Court of Appeals concluded:

> We have no wish to minimize the unpleasantness of the procedures to which Kaniff was subjected. Nevertheless, the law simply does not require law enforcement officials, including Customs inspectors, to be right every time. They are obliged instead to have the requisite level of information--sometimes reasonable suspicion, sometimes probable cause — before

they act. The district court's underlying fact findings here were not clearly erroneous, and we are satisfied on our *de novo* review that its conclusions were correct. We therefore AFFIRM the judgment of the district court.

Kaniff, 351 F.2d 790.

Anderson class action

Anderson v. Cornejo, 199 F.R.D. 228 (N.D.Ill. 10 Mar 2000).
Anderson v. Cornejo, 284 F.Supp.2d 1008 (N.D.Ill. 4 Sep 2003).

This case is too complicated to describe completely here, but the following quotations provide some indication of the current law.

Anderson filed class-action litigation alleging that "African-American women ... were improperly searched when going through customs at O'Hare International Airport in Chicago, Illinois" during July 1996 to May 1998. A female U.S. Customs inspector gave a pat-down of the clothed victim's breasts and crotch. Some victims also had a strip search, body cavity search of their vagina, x-ray examinations, and/or "monitored urination and/or bowel movements". The District Court held that intrusive searches must be justified by "reasonable suspicion" of individual travelers. 199 FRD 228.

C. Standard Patdown Searches

So far, the discussion has focused on a standard patdown search without defining what the standard patdown procedure is. Plaintiffs contend that the patdowns to which they were subjected were not standard, but intrusive. Plaintiffs contend their patdowns were not standard because (a) the patdowns were conducted in private where they could not be seen by others; (b) the patdowns were involuntary; (c) defendants did not explain why they were being patted down; (d) plaintiffs were not told how long they would be detained; and (e) plaintiffs' breasts and crotch area were patted down. None of those factors take the patdowns outside the definition of standard. Patdown searches conducted in private rooms at airports or in other areas separated from other travelers have been held to be routine types of patdowns. *See, e.g., Saffell III,* 183 F.3d at 657 (adopting *Saffell II,* 1998 WL 832653 at *2-3) (private room at O'Hare Airport); *Braks,* 842 F.2d at 510-11, 514-15 (private room at airport); *Oyekan,* 786 F.2d at 834, 835 (same); *Shepard,* 930 F.Supp. at 1192, 1195 (same); *Jerome-Oboh,* 883 F.Supp. at 919-20, 922 (train crossing border, traveler removed to dining car). Patting down in the breast and crotch area also does not turn the patdown into an intrusive patdown search requiring reasonable suspicion. *See, e.g., Saffell III,* 183 F.3d at 657 (adopting *Saffell II,* 1998 WL 832653 at *2-3); *Jerome-Oboh,* 883 F.Supp. at 920, 922. *Cf. Terry v. Ohio,* 392 U.S. 1, 17 n. 13, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (quoting Priar & Martin, *Searching & Disarming Criminals,* 45 J.Crim. L.C. & P.S. 481 (1954)) (describing standard patdown for weapons as: "[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin area about the testicles, and entire surface of the legs down to the feet."); *United States v. Rodney,* 956 F.2d 295, 298 (D.C.Cir. 1992) (patdown search not unusually intrusive when it included running hands over male's outer garments in his crotch area); *Stewart v. Rouse,* 1999 WL 102774 *3-4 (N.D.Ill. Feb. 22, 1999) (placing hands on breasts and in between legs during patdown search incident to arrest distinguished from fondling during patdown). The additional factors cited by plaintiffs are all standard

procedures at the routine stage of questioning an incoming traveler. Moreover, none of the searches presently under consideration lasted more than five minutes.

D. Intrusive Patdown Searches

Patdowns become intrusive and require reasonable suspicion when the inspector reaches under the traveler's clothes, particularly in the breast and crotch area. *Saffell I,* 1998 WL 142372 at *5. [FN33] *Cf. Schmidt v. City of Lockport, Ill.,* 67 F.Supp.2d 938, 944 (N.D.Ill. 1999) (during search incident to arrest, reaching under sweater to touch braless female's bare breasts and reaching under her pants is more intrusive than the ordinary patdown). Fondling of a traveler's genital area, breasts, or buttocks area during a patdown would also constitute an intrusive patdown. *See Watson v. Jones,* 980 F.2d 1165, 1165-66 (8th Cir. 1992) (during daily patdowns at prison, female guard's tickling and fondling of male inmates' genitals, anus, lower stomach, and thigh areas was a "physically intrusive patdown"); *Stewart,* 1999 WL 102774 at *3-4 (during search incident to arrest, police officer "aggressively groped [arrestee], grabbed her groin, and grabbed her breasts with two hands," stroked her buttocks, and joked about whether he was actually searching her, all of which constituted fondling).

> FN33. *Saffell I* is the district court's ruling on summary judgment. For purposes of summary judgment, it was assumed to be true that, during the patdown, the Customs inspector reached under Saffell's bra and under her underwear, examining Saffell's entire pubic area and inserting her finger in Saffell's vagina. Following the bench trial, the merits of the summary judgment ruling were not before the Seventh Circuit. Instead, different facts were before the Seventh Circuit based on the findings at the bench trial. The Seventh Circuit expressly noted that the case would have been "more difficult" if the summary judgment facts had been before it. *Saffell III,* 183 F.3d at 657.

Prior to 1996, it was well established that strip searches at the border required reasonable suspicion. *See* II(B) *supra.* Directly touching genitals, breasts, or buttocks is clearly more intrusive than observing such body parts unclothed. *Schmidt,* 67 F.Supp.2d at 944. During the 1996 to 1998 time period, a Customs inspector could not have reasonably believed that she could run her hands beneath clothes, directly touching a woman's breasts, pubic area, or buttocks even absent reasonable suspicion.

Arguably, even without a case on point, no Customs inspector could reasonably believe that it could be appropriate to fondle a female traveler's breasts, crotch area, or buttocks, even above her clothes. By fondle, this court means in a sexual or sexually suggestive manner. The plaintiffs under consideration, however, do not contend that they were fondled. Instead, some contend they were aggressively groped. Plaintiffs point to no cases discussing border searches involving above-clothes, aggressive patting down in the crotch or breast area and this court has not found any. At some point, repeated patting of any area of the body, and particularly those areas, would require an increased level of suspicion. Where the line should be drawn, however, was not clearly established during the 1996 to 1998 time period.

Anderson, 199 F.R.D. at 257-259.

Subsequently, the District Court determined that there was “no evidence” to support Plaintiffs’ allegation “Managerial Defendants are responsible for Customs inspectors' practice of searching passengers without adequate cause or suspicion. ” 225 F.Supp.2d 834, 864 (N.D.Ill. 14 Mar 2002), *rev’d in part on other grounds,* 355 F.3d 1021 (7th Cir. 21 Jan 2004).

Defendants made a motion for summary judgment and the District Court wrote an opinion that was published in the *Federal Supplement* reporter. The District Court summarized the applicable law of searches in the following words:

1. current Seventh Circuit case law provides that routine questioning and searching of luggage at the border does not require any level of suspicion. *See id.* at 255 (citing *United States v. Dorsey,* 641 F.2d 1213, 1217-18 (7th Cir. 1981)). *See also Kaniff v. United States,* 2002 WL 370210 *9 (N.D.Ill. March 8, 2002).
2. Performing a standard patdown search, requires some level of suspicion that the person has contraband on his or her person, with the level of suspicion required being balanced against the level of indignity imposed on the traveler. *See Anderson IV,* 199 F.R.D. at 255-56 (citing *Saffell III,* 183 F.3d at 657; *Dorsey,* 641 F.2d at 1215-19; *Saffell v. Crews,* 1998 WL 832653 * 1-3 (N.D.Ill. Nov. 20, 1998), *aff'd in part, rev'd in part on other grounds, Saffell III*). *See also Kaniff,* 2002 WL 370210 at *7; *United States v. Brown,* 2000 WL 33155619 *3-4 (N.D.Ill.Dec. 8, 2000). *Compare United States v. Ruimwijk,* 148 F.Supp.2d 947, 948-49 (N.D.Ill. 2001). *But see Bradley v. United States,* 299 F.3d 197, 204 n. 8 (3d Cir. 2002).
3. Intrusive patdowns [FN15] and whole or partial strip searches require reasonable suspicion that contraband is secreted under clothing or internally. *Anderson IV,* 199 F.R.D. at 248-49, 258 (citing *inter alia United States v. Montoya de Hernandez,* 473 U.S. 531, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985); *Saffell III,* 183 F.3d at 658-59; *Saffell v. Crews,* 1998 WL 142372 *5 (N.D.Ill. March 19, 1998) ("Saffell I")). *See also Kaniff,* 2002 WL 370210 at *7. The parties do not contend that Seventh Circuit or Supreme Court precedent as to the standards applicable to the different types of searches has changed since the ruling in *Anderson IV.* [footnote omitted] " 'Reasonable suspicion' is defined as 'a particularized and objective basis for suspecting the particular person' of smuggling contraband." *United States v. Johnson,* 991 F.2d 1287, 1291 (7th Cir. 1993) (quoting *Montoya,* 473 U.S. at 541, 105 S.Ct. 3304) (quoting *United States v. Cortez,* 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981)).

> FN15. The definitions of a standard patdown search and an intrusive patdown search are set forth in *Anderson IV,* 199 F.R.D. at 258.

Anderson, 284 F.Supp.2d at 1025-1026. (I inserted the three numbers at the left margin, to make this paragraph easier to read.)

The District Court described the searches experienced by several individual plaintiffs and applied the law to each plaintiff's search. Among the particularly intrusive searches are the following:

searches of Allen & Price

> After being questioned, Allen followed instructions to put her hands against the wall and spread her feet apart, and Martinez patted her down. Martinez stated that she felt a pad. There was, however, no pad or any other object or bulk in plaintiff's clothes. [FN10] In being strip searched, Allen raised up her body suit and pulled down her underwear. Martinez then conducted a visual inspection and did not touch Allen. Allen was then allowed to dress and leave.
>
> FN10. There is evidence that, as to at least five plaintiffs, Martinez claimed to have felt (or witnessed) something bulky in each woman's crotch area even though no bulkiness was there.

> For Price, Rocha was the primary and searching officer, Martinez was the witness, and Desmond was the authorizing officer. Corona had entered a PAU lookout which recommended "100% exam & PD; Susp Internal/Inserter." The reasons stated on the IOIL for the search were "PAX [passenger] returned from a 3 day trip from Jamaica. PAX was a PAU lookout, she appeared very nervous and wore loose fitting clothing. When asked how her trip was she almost wanted to cry and said that all she wanted to do was to see her kids. Drivers lic. was issued the day of departing to Cancun." Price was cooperative during questioning and the search of her luggage, which disclosed nothing suspicious. She explained what her job was and said that she paid cash because she had no credit cards and also because she was reimbursing Allen who had made all the arrangements. Price did not cry nor did she say anything about wanting to see her child. [footnote omitted] Price was wearing a one-piece bathing suit, loose overall shorts, and nothing else. As did Martinez with Allen, Rocha claimed she felt something in the crotch area during her patdown of Price even though there was nothing there to be felt. Price had to remove her bathing suit, bend over, and twice spread her buttocks while being visually inspected, but not touched. Price was allowed to dress and Desmond was brought in to request that Price consent to an X-ray examination. Price did not want to consent and asked to call her mother, which was allowed, but there was no answer. After being told she would be held for three bowel movements if she did not consent, Price signed the consent form. However, she was then permitted to leave and was not X-rayed.

Anderson, 284 F.Supp.2d at 1021-1022.

The District Court held that "there was no reasonable suspicion justifying the strip search" of either Allen or Price. *Id.* at 1026-27.

search of Jones

> After the patdown, Diez stated that she felt something between Jones's legs and requested that Jones lower her pants. Jones was wearing a makeshift sanitary pad consisting of toilet paper. Jones briefly lowered her pants so that Diez could see this and Jones was thereafter permitted to leave.

Anderson, 284 F.Supp.2d at 1023.

> Resolving disputed factual issues in plaintiff's favor, Jones was patted down based on the following reasons. She had a recently issued passport and state ID, was wearing a loose-fitting jacket, and stated she was an actress and lawyer. Additionally, before conducting a patdown, Diez had searched Jones's luggage and found nothing incriminating. The loose-fitting jacket is not a basis for a patdown because the passenger can instead be asked to remove the jacket. Being an actress and lawyer is not a ground for suspicion, especially since Jones cooperated in answering questions, explained the nature of her trip, and provided brochures corroborating the nature of her trip. Jones also informed Diez it was the first time she had been out of the country, which would explain the new passport. Diez also made no attempt to confirm Jones's statements by questioning her traveling companions. In light of the other information provided and the failure to find anything suspicious in the luggage, there was no level of suspicion supporting the standard patdown. However, as is discussed in IV(K)(1) *infra,* qualified immunity bars any damages claim based on the patdown alone.
>
> Before, the strip search of Jones, there was the additional factor that Diez felt something between Jones's legs. That provided a reasonable suspicion supporting the request to see if there was a pad. [FN18] *Cf. Kaniff,* 2002 WL 370210 at *9; *Ruimwijk,* 148 F.Supp.2d at 949. Moreover, the bulge felt between Jones's legs would have felt more suspicious than the ordinary sanitary pad since it was a makeshift pad of toilet paper, not the more consistent

form and texture of the usual sanitary pad. Furthermore, Jones was only required to briefly lower her pants; Diez did the minimum necessary to confirm what she felt was a sanitary pad. Jones's Count III and Count VI damages claims will be dismissed. [footnote omitted]

> FN18. Even if it were held that reasonable suspicion did not exist because a bulge between a woman's legs may often be a sanitary pad and there were insufficient other indicia of narcotics smuggling, defendants would be entitled to qualified immunity from damages because there is no clearly established law that feeling a bulge between a passenger's legs is an insufficient basis for searching further in order to confirm it is not contraband.

Anderson, 284 F.Supp.2d at 1027-1028.

As to Jones, there was not adequate suspicion to pat her down. Therefore, there would not have been adequate suspicion to strip search her if not for the improper patdown.

Anderson, 284 F.Supp.2d at 1034.

search of Mendenhall

After the patdown, the searching officer asked if Mendenhall was menstruating. [footnote omitted] Mendenhall responded affirmatively and the searching officer asked that she lower her pants to show the pad. Mendenhall pulled down her pants and underwear to show a pad.

Anderson, 284 F.Supp.2d at 1024.

Resolving disputed factual issues in Mendenhall's favor, she was patted down based on being on a flight from Jamaica following a four-day trip. Additionally, she was strip searched after responding that she was menstruating. The searching officer would have also been aware that a canine did not alert to Mendenhall and nothing suspicious was found in her luggage. Before the strip search, the searching officer had already patted down Mendenhall and felt nothing suspicious. Simply being on a flight from Jamaica after a relatively short trip does not constitute some suspicion justifying a standard patdown. As is discussed in IV(K)(1) *infra,* the damages claim based on a standard patdown is barred by qualified immunity. Being told that a woman is menstruating does not add suspicion justifying a strip search. Mendenhall was strip searched without reasonable suspicion. *See Anderson IV,* 199 F.R.D. at 261-62.

Anderson, 284 F.Supp.2d at 1028.

search of Milner

Upon deplaning, Milner passed a Customs Inspector with a [drug-detecting] dog and the dog did not alert to Milner. In secondary, Milner was questioned by Reyther and was cooperative. She showed Reyther her passport and "green card." Milner provided the information about staying at the Quality Inn and traveling separate from a friend. Milner's luggage was searched and nothing suspicious was found. Milner was wearing a white see-through blouse and baggy pants. Reyther directed Milner to a room where she was patted down, including under her blouse even though it was a see-through blouse. Reyther patted down Milner's breasts, but did not reach under her bra. Reyther also patted down Milner's fully visible stomach. Reyther then directed Milner to lower her pants and thereafter to pull down her underwear, which revealed a soiled pantiliner. Reyther asked if Milner was using a tampon and, after an affirmative response, directed Milner to show her the tampon which Milner did.

Anderson, 284 F.Supp.2d at 1025.

> Resolving disputed factual issues in Milner's favor, she was searched based on purchasing a ticket from Alpha Travel and returning separately from a friend with whom she had met in Jamaica but had not traveled with on her way to Jamaica. There is no evidence in support of finding that passengers who use Alpha Travel are so frequently smugglers of contraband that that factor alone constitutes some or reasonable suspicion. Before being patted down, Reyther was also aware that a canine had not alerted to Milner, nothing suspicious had been found in her luggage, and Reyther could see through Milner's blouse. Some suspicion did not exist for a standard patdown, but, as is discussed in IV(K)(1) *infra,* any damages claim for a standard patdown is barred by qualified immunity. However, Reyther also reached under Milner's blouse and patted her directly on the skin of her stomach and on her bra. That would be an intrusive patdown requiring a higher level of suspicion. *See Anderson IV,* 199 F.R.D. at 258-59. However, it was not clearly established in 1997 that touching under clothes but over a bra and directly touching the stomach under clothes constituted an intrusive patdown requiring reasonable suspicion. *Cf. id.* (collecting cases). Therefore, any damages claim based on the patdown is barred by qualified immunity. By the time of the strip search, Reyther also knew that he had patted down Milner and felt nothing suspicious. Reasonable suspicion did not support the strip search of Milner, including asking Milner to remove her tampon even though nothing suspicious had been felt or observed.

Anderson, 284 F.Supp.2d at 1028.

The District Court held that liability remained for the searching officer, her supervisor, and officers who may have witnessed the improper searches. As I write this essay on 12 Dec 2004, this complicated case is continuing.

Conclusion

The outrageousness of these intrusive searches, without probable cause and without a warrant, and often also without reasonable suspicion, needs no comment from me. I believe the privacy interests of innocent people should be legally superior to utilitarian interests in apprehending smugglers of contraband and other criminals. In the USA, people should *not* be required to prove their innocence. As was stated in my companion essay, *Legal Aspects of Searches of Airline Passengers in the USA,* at http://www.rbs2.com/travel.pdf , the U.S. Supreme Court and the U.S. Courts of Appeals have eroded the Fourth Amendment to help law enforcement in the crises involving illicit drugs and airplane hijackers. As many dissenting opinions have said, it is a bad idea to erode fundamental liberties because of a crisis.

Aside from the specific legal issues on searches of crotches, buttocks, female breasts, and body cavity searches, there is a general historical lesson here. Notice that the erosion of civil liberties first arose in the context of people at the bottom of society[9] (e.g., suspected smugglers of heroin into the USA and inmates in prisons). Then the eroded civil liberties affected everyone else, including innocent travelers at airports.

[9] See, e.g., *Johnson v. Phelan,* 69 F.3d 144, 151-152 (7th Cir. 1995) (Posner, J., dissenting).

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