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## Futile degradation

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In *People v. Hall*, 2008 N.Y. Slip 02676, the New York State Court of Appeals considered the issue of whether a “visual body cavity inspection” of an arrestee may be conducted in the absence of a warrant.

The court distinguished between three types of progressively invasive bodily searches prior to reaching its conclusion: “A ‘strip search’ requires the arrestee to disrobe so that a police officer can visually inspect the person’s body. The second type of examination — a ‘visual body cavity inspection’ — occurs when a police officer looks at the arrestee’s anal or genital cavities, usually by asking the arrestee to bend over; however, the officer does not touch the arrestee’s body cavity. In contrast, a ‘manual body cavity search’ includes some degree of touching or probing of a body cavity that causes a physical intrusion beyond the body’s surface.”

The court then concluded that “visual cavity” inspections were constitutionally permissible as long as the police had reasonable suspicion to believe that contraband, evidence or a weapon was hidden inside the arrestee’s body, while “body cavity” searches conducted in the absence of exigent circumstances were unconstitutional unless authorized by a warrant.

In his concurring opinion, Judge Carmen Beauchamp Ciparick agreed with the majority’s conclusion regarding the constitutionality of manual body cavity searches, but disputed the majority’s determination regarding visual body cavity searches: “[J]ust like a manual body cavity search, this intrusive, degrading, and humiliating species of search may only be conducted upon a neutral and detached magistrate’s issuance of a warrant based upon probable cause. . . . The search incident to arrest exception to the warrant requirement does not apply to ‘searches involving intrusions beyond the body’s surface’ (*Schmerber*, 384 US at 769). Rather, to safeguard the interests in the ‘human dignity and privacy’ that the Search and Seizure Clauses were designed to protect, an intrusion extending beyond the body’s surface

may not be undertaken on the ‘mere chance that evidence might be obtained’ (*id.* at 769-770).”

Judge Ciparick’s convincing arguments notwithstanding, warrantless visual cavity searches of arrestees are now permissible in New York.

The majority asserts these invasive searches are required to locate contraband, weapons or drugs, which is certainly the case with those already incarcerated, such as convicted prisoners or pre-trial detainees.

However, outside of the prison environment, visual cavity searches generally are used in an attempt to locate drugs on a recently arrested person suspected of dealing drugs. Thus, as was the case in *Hall*, these humiliating and degrading searches occur most frequently in the context of the never-ending “war on drugs.”

This “war” has resulted in an ever-increasing number of drug prosecutions. More and more Americans are imprisoned, many on drug charges, resulting in the incarceration of about 1 percent of the U.S. population. Our jails are overcrowded and bursting at the seams, yet drug abuse remains relatively steady.

Drug use has been around since the dawn of time. In comparison, the concept of civil rights is a relatively new concept — one that has served as the bedrock of this great nation.

Sadly, in an effort to win this war on drugs, our Fourth Amendment rights have been eroded slowly to the point that they are no longer recognizable. The *Hall* decision continues this trend by permitting law enforcement officers to conduct warrantless and extremely invasive searches as part of a never-ending and futile quest to win a war that cannot be won.

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