Indiana Law Journal

Volume 62 | Issue 4 Article 7

Fall 1987

Bodily Intrusion in Search of Evidence: A Study in Fourth Amendment Decisionmaking

Michael G. Rogers
Indiana University School of Law

Bodily Intrusion in Search of Evidence: A Study in Fourth Amendment Decisionmaking

Introduction

Two recent cases from the United States Supreme Court told two very different stories about evidence from within the human body.

Arriving in Los Angeles from Bogota, Columbia, Rosa Elvira Montoya de Hernandez proceeded to Customs where an inspector noticed on her passport that she had recently made several trips from Bogota to Los Angeles and Miami. Unconvinced by Montoya de Hernandez' explanation that she frequently traveled to the United States to buy merchandise for her husband's department store, the inspector took her to a back room where she was subjected to a patdown and a strip search. No contraband was revealed, but the inspector felt a firmness in Montoya de Hernandez' abdomen and saw that she was wearing two pair of underwear with a paper towel lining the crotch area.

The inspector suspected that Montoya de Hernandez was a "balloon swallower" hiding narcotics in her alimentary canal. When she refused to be x-rayed, Montoya de Hernandez was locked in a small office and told she could not leave until she squatted over a wastebasket and produced a monitored bowel movement. She remained locked away in this room without a bed or a couch, unable to phone her attorney or her husband, for over sixteen hours before customs officials went to a magistrate for a search warrant.[1]

In Richmond, Virginia, Ralph Watkinson was closing his shop for the night when he noticed an armed man approaching from across the street. When the man told Watkinson to freeze, Watkinson drew his own gun and fired on the man who fired back. Watkinson was wounded in the legs and saw his attacker, apparently wounded in the left side, run away.

A short while later, the police found Rudolph Lee a few blocks away from Watkinson's shop with a gunshot wound to the left side of his chest. When Lee was taken to a nearby hospital for treatment, Watkinson who was being treated for his wounds, exclaimed, "That's the man that shot me." After Lee was arrested, the prosecutor sought a court order to surgically remove the bullet from beneath Lee's collarbone. The bullet could then be tested to show whether it came from Lee's gun.[2]

---

1. United States v. Montoya de Hernandez, 105 S. Ct. 3304, 3306-07 (1985).
2. Winston v. Lee, 470 U.S. 753, 756-57 (1985).

The Supreme Court held that the proposed surgery on Lee would be an unreasonable search under the fourth amendment,[3] yet found nothing unreasonable in the custom officials' detention of Montoya de Hernandez.[4]

These outcomes seem anomalous.[5] Watkinson spontaneously identified Lee; Lee was found wounded only a few blocks from Watkinson's shop; and the location of Lee's wound matched Watkinson's account of the attempted robbery. All of this provided ample reason to arrest Lee and ample reason to believe surgery would yield relevant evidence. Montoya de Hernandez, on the other hand, was detained, subjected to a strip search, and locked away in a bare room for over sixteen hours, all on a mere hunch.

The immediate solution is that the fourth amendment is applied differently in the context of a border search.[6] This Note, however, contends that a more fundamental distinction can be drawn. *Winston v. Lee* and *Montoya de Hernandez* represent more than decisionmaking under separate areas of fourth amendment law. The two cases represent two fundamentally different ways of deciding fourth amendment cases.[7]

This Note will trace the evolving analysis of bodily intrusion in search of evidence through a series of four Supreme Court decisions.[8] Included will be a survey of the current status of various bodily searches. This Note will argue that, taken together, the Supreme Court's bodily intrusion decisions represent a consistent and workable approach to search and seizure law. As ad hoc evaluations of reasonableness the Court's bodily intrusion decisions will be contrasted with the arbitrary line drawing and constant tinkering that plagues fourth amendment decisions such as *Montoya de Hernandez*. Ultimately, this Note contends that the Court's bodily intrusion decisions offer an escape from the bewildering morass that has become fourth amendment decisionmaking.

---

3. *Id.* at 766.

4. *Montoya de Hernandez*, 105 S. Ct. at 3313.

5. To distinguish *Montoya de Hernandez* as not involving actual penetration beyond the body's surface is to ignore the major disruption of the defendant's bodily processes. Just as the government in *Winston v. Lee* sought to reach inside of Lee's body to retrieve the bullet, the government in effect reached inside of the defendant's body to retrieve the contents of her bowel movements. In both cases, the individual's autonomy over his own body is implicated.

6. "[T]he Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior." *Montoya de Hernandez*, 105 S. Ct. at 3309. A separate body of fourth amendment law has grown up in the context of border searches. *See generally* 3 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.5 (1978 & Supp. 1986); for a discussion of *Montoya de Hernandez*, see *id.* at Supp. § 10.5 (a-1) at 151. For the most part, border search doctrine is beyond the scope of this Note. *See infra* note 60.

7. *See infra* notes 137-63 and accompanying text.

8. Those decisions are *Winston*, 470 U.S. 753; Schmerber v. California, 384 U.S. 757 (1966); Breithaupt v. Abram, 352 U.S. 432 (1957); and Rochin v. California, 342 U.S. 165 (1952).

I. PREINCORPORATION ANALYSIS OF BODILY INTRUSION

A. Rochin v. California

The United States Supreme Court first addressed bodily intrusion in search of evidence in *Rochin v. California*.[9] The police illegally broke into a narcotics suspect's bedroom. Rochin quickly swallowed two capsules laying on the night stand. A violent struggle ensued as the police tried unsuccessfully to retrieve the capsules from Rochin's mouth.[10] Rochin was then taken to a hospital where a doctor forced an emetic through a tube into Rochin's stomach. Rochin vomited up the capsules which proved to contain morphine. Rochin was convicted of unlawful possession of a preparation of morphine. The chief evidence against him was the two capsules which were admitted over his objections.

The California appeals court found that the police "were guilty of unlawfully breaking into and entering defendant's room and were guilty of unlawfully assaulting and battering defendant while in the room," and that the police and the doctor "were guilty of unlawfully assaulting, battering, torturing and falsely imprisoning the defendant at the alleged hospital."[11] The court, however, upheld Rochin's conviction because at that time illegally obtained evidence was admissible on a criminal charge in California.[12]

Rochin was decided before the fifth amendment and the exclusionary rule against evidence obtained in violation of the fourth amendment had been applied to the states through the fourteenth amendment. The issue before the Court was the "limitations which the Due Process Clause of the Fourteenth Amendment imposes on the conduct of criminal proceedings by the States."[13] The Court overturned Rochin's conviction with the oft-quoted holding:

> [T]he proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities.

---

9. 342 U.S. 165 (1952).

10. At trial one officer testified that "the three deputies jumped upon the defendant, grabbed him by the throat, and began to squeeze his throat in an effort to eject the capsules from his mouth; that force was applied to his throat; that defendant 'hollered a little bit'; that he (Jones) put his fingers in defendant's mouth . . . ." People v. Rochin, 101 Cal. App. 2d 140, 140-41, 225 P.2d 1, 1-2 (Cal. Dist. Ct. App. 1950).

11. *Id.* at 143, 225 P.2d at 3.

12. *Id.*

13. *Rochin*, 342 U.S. at 165.

> They are methods too close to the rack and the screw to permit of constitutional differentiation.[14]

Rochin marks an interesting point of departure for the analysis of bodily intrusion. Much of the Court's analysis within the broad contours of preincorporation due process is in terms of self-incrimination rather than unreasonable search and seizure. *Rochin* draws a clear analogy between forcible extraction of evidence from the body and coerced confession. "It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach."[15] This view of *Rochin* is supported by the Court's refusal to distinguish "real evidence" from verbal confessions. The Court stated that to do so would "ignore the reasons for excluding coerced confessions."[16] Regardless of whether "real evidence" from the body was reliable, to forcibly extract the evidence would be offensive to the community's sense of fair play.[17]

The Court also focused on the behavior of the police. It was a "course of proceedings" that the Court found constitutionally objectionable. *Rochin* acknowledges the "use of modern methods and devices for discovering wrongdoers and bringing them to book," but refuses to "legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record."[18] This language indicates an unreasonable search and seizure line of analysis. The development of modern technology makes it possible to obtain evidence from the human body. The Court balances society's interest in detecting and punishing crime with the individual's interest in personal privacy. In this instance, the behavior of the police in obtaining evidence from the body (as opposed to the mere fact evidence was obtained from the body) was such that the search was impermissible.

There emerge then two ways of reading *Rochin*. *Rochin* can be read as essentially a fifth amendment decision prohibiting forcible extraction of evidence from the body as a form of self-incrimination. *Rochin* can also be read as essentially a fourth amendment decision condemning a particular course of conduct by the police.

B. Breithaupt v. Abram

In *Breithaupt v. Abram*,[19] the Court moved away from the self-incrimination aspects of *Rochin*. The police ordered a blood sample to be taken

14. *Id.* at 172.
15. *Id.* at 173.
16. *Id.*
17. *Id.* at 172.
18. *Id.* at 174.
19. 352 U.S. 432 (1957).

from a suspected drunk driver. The blood sample was taken from Breithaupt while he lay unconscious in an emergency room where he was being treated for injuries he had suffered in a fatal automobile accident. The results of the blood test were admitted as evidence of intoxication at Breithaupt's trial for manslaughter.

The Supreme Court refused to overturn Breithaupt's conviction holding that "a blood test taken by a skilled technician is not such 'conduct that shocks the conscience.' "[20] The Court ignored *Rochin*'s analogy between extracting evidence from the body and coerced confession. The Court's focus, instead, was on the behavior of the police and the routine nature of a blood test.

The Court found "nothing comparable here to the facts in *Rochin.*"[21] Breithaupt was unconscious when the blood was taken, "but the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right."[22] The Court also pointed out that "[t]he blood test has become routine in our everyday life."[23] Finally the court noted that the blood sample was taken by a skilled medical person in a hospital.[24]

Dissenting, Chief Justice Warren adhered to an interpretation of *Rochin* as a prohibition of extracting evidence from the body.[25] Under this interpretation, *Rochin* and *Breithaupt* involve essentially the same fact pattern. In both cases the government forcibly extracted evidence from the defendant's body.[26] Warren argued that distinguishing *Rochin* from *Breithaupt* on the basis of police behavior "would make physical resistance by a prisoner a prerequisite to the existence of his constitutional rights."[27] Warren went on to point out that the stomach pumping in *Rochin* was also a common medical procedure performed by a doctor in a hospital.[28] According to Warren, the Court had reduced *Rochin* to "an instance of personal revulsion against particular police methods."[29]

Clearly the Court in *Breithaupt* refused to read *Rochin* as a fifth amendment-type prohibition of extracting evidence from the body. The Court's methodology is more akin to a fourth amendment reasonableness analysis. *Breithaupt* recognizes that competing interests in privacy and law enforcement

---

20. *Id.* at 437.
21. *Id.* at 435.
22. *Id.*
23. *Id.* at 436.
24. *Id.* at 438.
25. *Breithaupt*, 352 U.S. at 440 (Warren, C.J., dissenting).
26. For a discussion of *Rochin* as a prohibition of extracting evidence from the human body see *supra* notes 15-17 and accompanying text.
27. *Breithaupt*, 352 U.S. at 441.
28. *Id.* at 440.
29. *Id.*

are at stake and balances those interests in terms of public policy. The Court cites "[t]he increasing slaughter on our highways,"[30] and concludes:

> [S]ince our criminal law is to no small extent justified by the assumption of deterrence, the individual's right to immunity from such invasion of the body as is involved in a properly safeguarded blood test is far outweighed by the value of its deterrent effect due to public realization that the issue of driving while under the influence of alcohol can often by this method be taken out of the confusion of conflicting contentions.[31]

Although *Breithaupt* was decided four years before *Mapp v. Ohio* enforced the exclusionary rule against the states the Court was already engaged in what was essentially a fourth amendment analysis.

II. Analysis of Bodily Intrusion Under the Fourth Amendment

A. Schmerber v. California

Decided five years after *Mapp v. Ohio* enforced the exclusionary rule against the states, *Schmerber v. California*[32] explicitly brought analysis of bodily intrusion under the fourth amendment. *Schmerber* also involved a blood sample taken from a suspected drunk driver. Schmerber, however, was conscious when the police ordered the blood test and on advice of counsel he objected to the test. The results of the test were admitted at trial and Schmerber was convicted of driving an automobile while under the influence of intoxicating liquor.

Schmerber claimed that taking the blood sample was (1) a denial of due process under *Rochin* and *Breithaupt,* (2) a violation of the fifth amendment privilege against self-incrimination, and (3) an unreasonable search in violation of the fourth amendment. The Court rejected all three arguments.[33]

Rejecting the due process claim, the Court turned Chief Justice Warren's *Breithaupt* dissent back upon itself.[34] Since there had been no due process violation in *Breithaupt,* holding for Schmerber after holding against Breithaupt would indeed make actual resistance a prerequisite to the constitutional right established by *Rochin.*[35]

---

30. *Id.* at 439.
31. *Id.* at 439-40.
32. 384 U.S. 757 (1966).
33. The Court also rejected Schmerber's sixth amendment right to counsel claim. Since Schmerber was not entitled to assert his fifth amendment privilege against self-incrimination, *see infra* notes 36-37 and accompanying text, he had no greater right because counsel erroneously advised him that he could assert it. *Schmerber,* 384 U.S. at 765-66.
34. *See supra* text at note 27.
35. *Schmerber,* 384 U.S. at 759-60.

Rejecting the privilege against self-incrimination claim, the court held that the privilege applies only to evidence of a "testimonial or communicative nature."[36] The Court cited Justice Holmes as authority that, "[t]he prohibition of compelling a man in criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."[37]

The Court addressed Schmerber's fourth amendment claim under the premise that "the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner."[38] The blood test was found to be both justified and properly performed.

Two conditions were set for performing bodily intrusions. First, the court required a "clear indication" that evidence would be found.[39] Second, the government must obtain a search warrant whenever practicable.[40] The Court found that the same facts which established probable cause to arrest (at the accident scene the police smelled liquor on Schmerber's breath and described his eyes as having a "bloodshot, watery, sort of glassy appearance"[41]) also "suggested the required relevance and likely success" of a test of Schmerber's blood for alcohol.[42] Although the blood sample was taken without a warrant, the search was proper because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system."[43]

The Court found the blood test to be a reasonable procedure. The blood test was a highly effective means of determining the degree to which a person is under the influence of alcohol. As in *Breithaupt,* blood testing was described as a "commonplace in these days of periodic physical examinations."[44] It was also pointed out that "for most people the procedure involves virtually no risk, trauma, or pain."[45]

---

36. *Id.* at 761.
37. *Id.* at 763 (quoting Holt v. United States, 218 U.S. 245, 252-53 (1910)).
38. *Id.* at 768.
39. "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." *Id.* at 769-70.
40. "The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." *Id.* at 770.
41. *Id.* at 769.
42. *Id.* at 770.
43. *Id.*
44. *Id.* at 771.
45. *Id.*

Finally, the Court concluded that the blood test had been reasonably performed. The blood sample was taken by a physician in a hospital according to accepted medical practices.[46]

Although *Schmerber* was decided under the fourth amendment rather than general due process, the Court's analysis is virtually identical to its analysis in *Breithaupt*. Both decisions contrast the behavior of the police with the behavior in *Rochin*.[47] Both decisions point to blood testing as a safe commonplace procedure.[48] In both cases the blood sample is taken by a skilled medical person in a hospital.[49] Finally, both decisions pointed to blood testing as an effective means of determining intoxication.[50]

By explicitly bringing bodily intrusion analysis under the fourth amendment, *Schmerber* represents a complete break from the self-incrimination aspects of *Rochin*. But like *Breithaupt, Schmerber* is consistent with a reading of *Rochin* as a condemnation of a particular course of police conduct.[51] *Schmerber* also echoes *Rochin*'s broad concern for human dignity:[52]

> The integrity of an individual's person is a cherished value in our society. That we today hold that the Constitution does not forbid the States 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.[53]

B. Categorization of Bodily Searches Since Schmerber

In the proliferation of fourth amendment rulings since *Mapp v. Ohio,* the Supreme Court has labored in vain to create a coherent body of search and seizure law. Rather than decide reasonableness on an ad hoc case-by-case basis, the Court has sought to distill the amorphous concept of reasonableness into a series of separate inquiries. This attempt to isolate issues and set clear rules has done more harm than good,[54] yet the Court continues to pursue its separate inquiries. Given how the Court decides fourth amendment cases, it is useful to categorize methods for obtaining evidence from the human

---

46. *Id.*
47. *Breithaupt,* 352 U.S. at 435, *Schmerber,* 384 U.S. at 760.
48. *Breithaupt,* 352 U.S. at 436, *Schmerber,* 384 U.S. at 771.
49. *Breithaupt,* 352 U.S. at 438, *Schmerber,* 384 U.S. at 771.
50. *Breithaupt,* 352 U.S. at 439, *Schmerber,* 384 U.S. at 771.
51. *See supra* text at notes 18-19, 20-21.
52. *See supra* text at note 18.
53. *Schmerber,* 384 U.S. at 772.
54. *See* Bradley, *Two Models of the Fourth Amendment,* 83 MICH. L. REV. 1468 (1985). "The fourth amendment is the Supreme Court's tarbaby: a mass of contradictions and obscurities that has ensnared the 'Brethren' in such a way that every effort to extract themselves only finds them more profoundly stuck." *Id.* at 1468. For a discussion of how the attempt to promulgate "clear rules" in fourth amendment law only sinks the court deeper into confusion, see *infra* notes 144-53 and accompanying text.

body under three separate fourth amendment inquiries: (1) is there a search? (2) is a warrant required? and (3) is the search permissible under any circumstances?

1. Is There a Search?

According to *Katz v. United States*[55] the reach of the fourth amendment is measured by a person's reasonable expectation of privacy. A government action which does not intrude upon that expectation of privacy is not a "search" and does not trigger fourth amendment protection. Under *Katz,* "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[56] By this reasoning, the Court has found characteristics such as a person's fingerprints,[57] voice,[58] and handwriting[59] to lie beyond the reach of the fourth amendment. Therefore, compelled disclosure of these characteristics does not intrude upon a person's expectation of privacy and is not a "search" under the fourth amendment.

This is not to say that *detention* of a person to obtain such evidence does not implicate the fourth amendment.[60] For instance, in *Davis v. Mississippi,*[61] Davis and twenty-four other black youths were rounded up for questioning and fingerprinting in connection with a rape for which the only leads were a general description by the victim and a set of fingerprints taken from the scene of the crime. The Court excluded Davis' fingerprints as the fruit of a constitutionally impermissible dragnet, but held that fingerprinting itself "involves none of the probing into an individual's private life and thoughts which marks an interrogation or search."[62]

2. Is a Warrant Required?

Under the foregoing analysis, physical evidence from the human body will usually involve a "search." Of more practical import is whether the government must get a warrant before searching. One may doubt that the

---

55. 389 U.S. 347 (1967).
56. *Id.* at 351.
57. Davis v. Mississippi, 394 U.S. 721 (1969).
58. United States v. Dionisio, 410 U.S. 1 (1973).
59. United States v. Mara, 410 U.S. 19 (1973).
60. According to the Supreme Court, *Schmerber* established that "the obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels—the 'seizure' of the 'person' necessary to bring him into contact with government agents, and the subsequent search for and seizure of the evidence." *Dionisio,* 410 U.S. at 8 (citation omitted). This Note focuses on fourth amendment analysis of the search itself. Fourth amendment analysis at the first level is beyond the scope of this Note.
61. 394 U.S. 721 (1969).
62. *Id.* at 727.

warrant process effectively interposes a "neutral and detached magistrate" between a suspect and the police,[63] yet the warrant process is a potential limit on police discretion at the moment of initial custody. Obviously such a limit is important to someone confronted with the prospect of an intrusive bodily search.

Courts have upheld a wide array of warrantless bodily searches.[64] *Schmerber* upheld taking a blood sample without a warrant provided there is probable cause to search and exigent circumstances making it impracticable to obtain a warrant.[65] In *United States v. Robinson,*[66] however, the Supreme Court held that "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."[67] A critical bodily search issue will be whether *Robinson* is found to authorize warrantless bodily searches that do not meet *Schmerber*'s probable cause requirements.

The cases in this area are not very helpful because decisions citing *Robinson* to uphold warrantless bodily searches incident to arrest also point out that the search in question conforms to *Schmerber*'s probable cause requirements.[68] One case that does expressly use *Robinson* to chip away at *Schmerber* is *United States ex rel. Guy v. McCauley.*[69] Acting on five-year old information that the defendant was known to carry heroin in her vagina, the police conducted separate strip searches at the defendant's home and at the station house. The court objected to the searches because they were per-

---

63. See 2 W. LAFAVE, *supra* note 6, at § 4.2(d) for a discussion of whether laypersons such as court clerks can effectively administer the warrant system.

64. Among the procedures which have been upheld are: combing hair from head and face, United States v. Weir, 657 F.2d 1005 (8th Cir. 1981), but warrant required to pluck pubic hairs, Bouse v. Bussey, 573 F.2d 548 (1977); placing hands beneath an ultra-violet lamp, United States v. Kenaan, 496 F.2d 181 (1st Cir. 1974); swabbing hands with a chemical substance, United States v. Bridges, 499 F.2d 179 (7th Cir. 1974), *cert. denied,* 419 U.S. 1010; scraping beneath fingernails, Cupp v. Murphy, 412 U.S. 291 (1973); swabbing penis with a chemical substance, United States v. Smith, 470 F.2d 377 (D.C. Cir. 1972); scraping surface of penis, Brent v. White, 398 F.2d 503 (5th Cir. 1968), but warrant required to squeeze secretion from penis, McClain v. State, 274 Ind. 250, 410 N.E.2d 1297 (1980); giving a breathalyzer examination, Burnett v. Municipality of Anchorage, 678 P.2d 1364 (Alaska App. 1984), *cert. denied,* 105 S. Ct. 190; and taking a urine sample, Ewing v. State, 160 Ind. App. 138, 310 N.E.2d 571 (1974). *See generally* 2 W. LAFAVE, *supra* note 6, at § 5.3(c).

65. *See supra* notes 39-43 and accompanying text.

66. 414 U.S. 218 (1973).

67. *Id.* at 235.

68. Professor LaFave points to State v. Magness, 115 Ariz. 317, 565 P.2d 194 (1977), where the defendant was arrested on information he was carrying heroin. A search of the defendant's car and person revealed nothing, but a strip search revealed a lubricant in his anal area where he was carrying a packet of heroin. The court upheld the search as a *Robinson*-type search incident to arrest, but then stressed probable cause was present. 2 W. LAFAVE, *supra* note 6, at § 5.3(c) n.93.

69. 385 F. Supp. 193 (E.D. Wis. 1974).

formed by nonmedical personnel in nonmedical surroundings.[70] But defendant's argument that the police lacked probable cause to search "miss[ed] the mark" in light of *Robinson*.[71]

The court purported to be shocked by the "common and routine practice in the City of Milwaukee to search the body cavities of females."[72] The court's holding, however, authorizes that practice so long as the searches are performed by medical personnel in medical surroundings. To the extent that *Robinson* is interpreted as authorizing strip searches without probable cause, it is in direct conflict with *Schmerber*'s teaching that the fourth amendment forbids intrusions into the body "on the mere chance that desired evidence might be obtained."[73]

The Supreme Court has yet to resolve this issue,[74] but it seems that *Schmerber*'s requirements should apply to strip searches. First, *Robinson* did not involve a search of the body.[75] Second, in *Robinson* the Court pointed out that the search in question "partook of none of the extreme or patently abusive characteristics which were held to violate the Due Process Clause . . . in *Rochin v. California*."[76] Although *Schmerber* was decided under the fourth amendment rather than the due process clause, if *Schmerber* is seen as an elaboration on the issues presented in *Rochin*,[77] *Robinson* cannot mean to authorize searches that are improper under *Schmerber*. Third, *Schmerber* did not challenge the traditional right to make more routine searches incident to arrest. *Schmerber* only held that the policies behind that right have "little applicability with respect to searches involving intrusions beyond the body's surface."[78]

Because they address different kinds of searches, there is no inherent conflict between *Schmerber* and *Robinson*. The cases occupy separate terrain. Routine searches incident to arrest may be made under *Robinson*, but searches which intrude upon a person's body in an intimate way[79] will be subject to

---

70. *Id.* at 199.
71. *Id.* at 197.
72. *Id.* at 199.
73. *Schmerber*, 384 U.S. at 770.
74. In Illinois v. Lafayette, 462 U.S. 640 (1983), the Court stated, "We were not addressing in *Edwards*, [United States v. Edwards, 415 U.S. 800 (1974) (holding that a search which would have been proper incident to arrest can be performed later at the police station)] and do not discuss here, the circumstances in which a strip search of an arrestee may or may not be appropriate." *Id.* at 646 n.2 (citation added).
75. *Robinson* involved heroin found in a cigarette package taken from the arrestee's front coat pocket. 414 U.S. at 223.
76. *Id.* at 236.
77. This Note contends that such is the case. *See supra* notes 51-52 and accompanying text; *infra* notes 139-43 and accompanying text.
78. *Schmerber*, 384 U.S. at 769.
79. Although *Schmerber* specifically dealt with an intrusion beyond the body's surface, procedures such as plucking pubic hairs or scraping the surface of the penis (as opposed to combing hair from the head or scraping beneath the fingernails) would seem to implicate the same interests in human dignity and privacy as the blood test in *Schmerber*.

Schmerber's probable cause requirements. Under this scheme, absent exigent circumstances, a warrant will be required for most bodily searches.

3. Is the Search Permissible Under Any Circumstances?

Finally, there are bodily searches so intrusive that they may be impermissible under any circumstances. Most notable in this category is court ordered surgery. Compelled surgery cases arise out of robberies where the victim is armed and fires on his assailant. After confirming the presence of a bullet-like object in the defendant's body, the government seeks to surgically remove the object and determine if it is the bullet from the victim's gun. Although these cases occur infrequently, they are the subject of lively debate among judges and commentators because they represent the furthest limit thus far of bodily intrusion analysis.[80]

i. *United States v. Crowder*

The federal courts first addressed compelled surgery in *United States v. Crowder*.[81] Acting on information from an accomplice, the police arrested a robbery suspect who was bandaged on the right wrist and the left thigh. The prosecutor sought an order authorizing removal of a bullet-like object from Crowder's forearm.[82] The object was located immediately below the skin and the surgery was to be performed under a local anesthetic. After an adversarial hearing, the district judge authorized the surgery which took only ten minutes, did not harm Crowder, and produced a bullet traced to the victim's gun.[83]

The United States Court of Appeals for the D.C. Circuit held that the operation was a reasonable search under the fourth amendment. The court listed the following factors to support its decision:

> (1) [T]he evidence sought was relevant, could have been obtained in no other way, and there was probable cause to believe that the operation

---

80. *See* Mandell & Richardson, *Surgical Search: Removing a Scar on the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 525 (1984); Comment, *Search and Seizure: Compelled Surgical Intrusion?* 27 BAYLOR L. REV. 305 (1975); Note, *Analyzing the Reasonableness of Bodily Intrusions*, 68 MARQ. L. REV. 130 (1984); Note, *Nonconsensual Surgery: The Unkindest Cut of All*, 53 NOTRE DAME LAW. 291 (1977); Comment, *Criminal Law*—Lee v. Winston: *Court-Ordered Surgery and the Fourth Amendment—a New Analysis?* 60 NOTRE DAME L. REV. 149 (1984); Note, *Constitutional Law—Search and Seizure—Court-Ordered Surgical Removal of a Bullet from an Unconsenting Defendant for Evidentiary Purposes Held Reasonable Under the Fourth Amendment*, 55 TEX. L. REV. 147 (1976) [hereinafter *Court-Ordered Surgical Removal*] Note, *Surgery and the Search for Evidence:* United States v. Crowder, 37 U. PITT. L. REV. 429 (1975).

81. 543 F.2d 312 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

82. Doctors advised against removing the bullet from the left thigh because such a procedure might reduce the use of Crowder's left leg. *Id.* at 313.

83. *Id.* at 314-15.

> would produce it; (2) the operation was minor, was performed by a skilled surgeon, and every possible precaution was taken to guard against any surgical complications, so that the risk of permanent injury was minimal; (3) before the operation was performed the District Court held an adversary hearing at which the defendant appeared with counsel; (4) thereafter and before the operation was performed the defendant was afforded an opportunity for appellate review by this court.[84]

Factor (1) reiterates *Schmerber*'s concern that the intrusive procedure is likely to produce the desired evidence. Factors (3) and (4) expand on *Schmerber*'s procedural requirements. Not only must a search warrant be obtained, but the defendant must also be afforded an adversarial hearing and an opportunity for appellate review.

Factor (2), however, is a marked departure from *Schmerber*. In *Schmerber*, the Supreme Court noted that taking a blood sample "involves virtually no risk, trauma, or pain."[85] In *Crowder*, the court says only that "the risk of permanent injury was minimal." Obviously, there is a wide range of experiences with little risk of permanent injury that involve trauma or pain.[86]

A vigorous dissent insisted that the court had overstepped the bounds of *Schmerber*. Surgery, with its anesthesia, stitches, and scars, is not a routine event like blood testing.[87] The dissent also argued that the court's analysis relied too heavily on medical criteria. If the distinction between major intrusions and minor intrusions is based primarily on medical criteria, judges are ill-equipped to make that distinction.[88] Furthermore, there is disparate access to expert medical testimony between prosecutor and defendant.[89]

---

84. *Id.* at 316. *Crowder* had a marked impact on state courts considering compelled surgery cases. Prior to *Crowder*, only Georgia, in Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (1972) and Allison v. State, 129 Ga. App. 364, 199 S.E.2d 587 (1973) had approved a court-ordered surgery under local anesthetic.

Courts in three states had disapproved court-ordered surgeries. Arkansas, in Bowden v. State, 256 Ark. 820, 510 S.W.2d 879 (1974) and New York, in People v. Smith, 80 Misc. 2d 210, 362 N.Y.S.2d 909 (1974), disapproved surgical procedures that threatened to permanently injure the defendant. Indiana, in Adams v. State, 260 Ind. 663, 299 N.E.2d 834 (1973), held court-ordered surgery to be unreasonable per se under *Schmerber*.

After *Crowder*, four of the six state courts addressing the issue have upheld court-ordered surgeries. All six courts have followed the *Crowder* guidelines in reaching their decisions. Maryland, in Hughes v. State, 56 Md. App. 12, 466 A.2d 533 (1983), Missouri, in State v. Richards, 585 S.W.2d 505 (Mo. Ct. App. 1979); New Jersey, in State v. Lawson, 187 N.J. Super. 25, 453 A.2d 556 (App. Div. 1982); and South Carolina, in State v. Allen, 277 S.C. 595, 291 S.E.2d 459 (1982), approved court-ordered surgeries.

Missouri, in State v. Overstreet, 551 S.W.2d 621 (Mo. 1977) and Florida, in Doe v. State, 409 So.2d 25 (Fla. Dist. Ct. App. 1981) disapproved court-ordered surgeries. The Missouri Supreme Court found that the trial court below had failed to follow *Crowder*'s procedural requirements. The Florida court held that the sought-after bullet would be of little evidentiary value after spending four years inside the defendant's leg. *Doe*, 409 So.2d at 27.

85. *Schmerber*, 384 U.S. at 771.

86. A trip to the dentist, for instance.

87. *Crowder*, 543 F.2d at 321 (Robinson, Circuit J., dissenting).

88. *Id.* at 323.

89. *Id.* at 323-24.

Finally, the dissent argued that, because testimony was available from the defendant's accomplice, there was little evidentiary need for surgery to retrieve the bullet.[90]

Commentators also criticized *Crowder* for measuring intrusiveness solely by medical criteria.[91] The court was accused of ignoring *Schmerber*'s emphasis on privacy and human dignity.[92]

ii. *Lee v. Winston*

In *Lee v. Winston,*[93] the federal courts struggled to define the proper role of medical criteria in bodily intrusion analysis. After the Virginia trial court granted the prosecutor's Motion to Compel Evidence, Lee sought to enjoin the proposed surgery. When the Virginia Supreme Court rejected Lee's petition for habeas corpus, Lee turned to the federal courts for relief. On October 15, 1982 the United States District Court for the Eastern District of Virginia denied relief,[94] but on November 12, after receiving new evidence about the location of the bullet in Lee's body, the district court issued an injunction.[95]

The district court dismissed Lee's petition when the evidence showed that the bullet was immediately below the surface of the skin.[96] After learning that the bullet was actually 2.5 to 3 centimeters below the surface of the skin, the court found that circumstances were materially changed because the proposed surgery would require general anesthetic rather than local anesthetic, and an incision of 5 centimeters rather than 1.5 centimeters.[97]

The district court first of all refused to read *Schmerber* as announcing a litmus test for reasonableness. *Schmerber* was read as "merely identifying elements of the situation . . . that supported the conclusion that the intrusion in that case was constitutionally permissible."[98] The district court, however,

---

90. *Id.* at 318 (Levanthal, Circuit, J., dissenting).

91. *Court-Ordered Surgical Removal, supra* note 80, at 147.

92. *Id.* at 158-59.

93. 551 F. Supp. 247 (E.D. Va. 1982), *aff'd in part, vacated in part,* 717 F.2d 888 (4th Cir. 1983), *cert. granted,* 104 S. Ct. 1905 (1984). These are the lower court holdings leading to Winston v. Lee, 470 U.S. 753 (1985). The facts of the case are set forth *supra* text at note 2.

94. *Lee,* 551 F. Supp. at 248-53.

95. *Id.* at 253-61. The district court enjoined the surgery in response to both Lee's petition for writ of habeas corpus and his claim under 42 U.S.C. § 1983. *Id.* at 257-59. The fourth circuit later determined that the proposed surgery was not "custody" within the meaning of 42 U.S.C. § 2254, the federal habeas statute. Lee's claim was treated as being solely under 42 U.S.C. §1983 to enjoin persons acting under color of state law from depriving Lee of his fourth amendment right to be free of unreasonable searches and seizures. *Lee,* 717 F.2d at 891-93.

96. *Lee,* 551 F. Supp. at 251-52.

97. *Id.* at 259.

98. *Id.* at 260.

did look to *Schmerber* for "guidance as to the *kinds* of factors considered relevant to a determination of whether an intrusion is 'minor' and performed 'under stringently limited circumstances.' "[99]

Crowder's heavy reliance upon medical criteria was rejected. "Whether or not a surgeon would characterize the procedure as 'minor surgery' is of no moment; there is no reason to suppose that the definition of a medical term of art should coincide with the parameters of a constitutional standard."[100] The district court concluded that:

> The procedure contemplated here goes far beyond the prick of a needle in *Schmerber,* the slight intrusion in *Crowder,* and the minor procedure originally supposed to be required in this matter. The Commonwealth proposes to forcibly subdue petitioner by injection, make a substantial incision into his body, retract muscle tissue in an attempt to locate the subject bullet, and if successful in locating it, extract it from his body. All of this is to be done where the procedure is concededly not medically necessary for the preservation of petitioner's life and health. Considering the scope of the intrusion, the risks involved, and the affront to petitioner's dignity, the Court concludes the procedure contemplated is more akin to the impermissible activity in *Rochin* than to the minor intrusion in *Schmerber.*[101]

In a split decision, the United States Court of Appeals for the Fourth Circuit upheld the district court's ruling. The court of appeals agreed that "[t]he judicial inquiry is not to make the medical estimate in medical terms, but is whether, under the totality of the circumstances presented, the procedure proposed by the state is constitutionally unreasonable."[102] The court's opinion went on to state:

> Viewed starkly, the state proposes to drug this citizen—not yet convicted of a criminal offense—with narcotics and barbiturates into a state of unconsciousness, then surgically to open his chest and there to explore for a bullet . . . . We hold that this goes beyond the police practices which the state can legitimately undertake within the bounds of the fourth amendment.[103]

While the results in *Crowder* and *Lee* are arguably consistent,[104] the approaches of the two decisions are not. In *Crowder,* the D.C. Circuit relied on medical criteria to determine the scope of permissible intrusion under *Schmerber.* This approach reduces *Schmerber* to an evaluation of medical

---

99. *Id.*
100. *Id.*
101. *Id.* at 261.
102. *Lee,* 717 F.2d at 901.
103. *Id.*
104. In purely medical terms, it seems that the surgery contemplated in *Lee* would entail a greater risk of permanent injury than the surgery in *Crowder. But see* Mandell & Richardson, *supra* note 80, at 541 n.83 (use of local or general anesthetic is not the determining factor in evaluating potential risk of harm).

risk and ignores *Schmerber's* emphasis on human dignity. Furthermore, *Crowder* employs a more permissive "risk of permanent injury" standard rather than *Schmerber's* "no risk, trauma, or pain" standard.[105]

In *Lee v. Winston,* both the district court and the court of appeals reject *Crowder's* reliance on medical criteria. More fundamentally, both courts rejected *Crowder's* reductionist approach to analyzing bodily intrusion. Instead of trying to lay down a four-part test for all bodily intrusions, the *Lee* decisions accept that bodily intrusions must be evaluated case-by-case given the totality of circumstances in each case.[106] Such an approach conforms more closely to the Supreme Court's approach in *Schmerber*[107] and provides a better model of fourth amendment decisionmaking.[108]

C. Winston v. Lee

Returning to the subject of bodily intrusion for the first time since *Schmerber,* the Supreme Court in *Winston v. Lee*[109] affirmed the decisions of the district court and the fourth circuit below. The Court first restated the procedural requirements of *Schmerber*[110] and implicitly endorsed the special procedural protections afforded to Lee.[111] The Court then characterized *Schmerber* as establishing a balancing test weighing the extent of intrusion upon the individual against the community's need for evidence.[112]

Intrusiveness upon the individual was measured not only in terms of medical risk, but also in terms of affront to human dignity.[113] The community's need for evidence was measured not only by relevance, likelihood of retrieval, and unavailability without surgery, but also by the availability of alternative evidence and the probative value of the desired evidence.[114]

Applying its balancing test to the facts of the case, the Court found the proposed surgery to be highly intrusive. The Court pointed to conflicting testimony about medical risk, but seemed to admit that the surgery posed little threat to Lee's health.[115] The surgery, however, was highly offensive

---

105. *See supra* text at note 45.
106. *Lee,* 551 F. Supp. at 260, 717 F.2d at 901.
107. *See supra* notes 38-50 and accompanying text.
108. *See infra* notes 137-63 and accompanying text.
109. 105 S. Ct. 1611 (1985). For commentary, see Tolley & Hull, *Court Ordered Surgery to Retrieve Evidence in Georgia in Light of the United States Supreme Court Decision in* Winston v. Lee, 37 MERCER L. REV. 1005 (1986); Note, *Fourth Amendment—Reasonableness of Surgical Intrusions,* 76 J. CRIM L. & CRIMINOLOGY 972 (1985); Note, *Constitutional Law—Compelled Surgical Intrusions Restricted by the Fourth Amendment,* 25 WASHBURN L.J. 123 (1985).
110. *Winston,* 470 U.S. at 761.
111. *Id.* at 763 n.6.
112. *Id.* at 758-60. The Court claims it is applying the "*Schmerber* balancing test." *Id.* at 1618.
113. *Id.* at 761.
114. *Id.* at 762-63.
115. *Id.*

to Lee's interests in human dignity and bodily integrity.[116] Of particular concern was the use of general anesthetic. After repeating the fourth circuit's stark description of the surgery,[117] the Court concluded that "[t]his kind of surgery involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin."[118]

Correspondingly, the state had failed to show a compelling need to perform the surgery.[119] Watkinson's spontaneous identification of Lee, taken together with Lee being found wounded near the scene of the robbery, dissipated to the state's need to retrieve the bullet.[120] The Court also expressed doubt about the probative value of the bullet due to corrosion while inside of Lee's body.[121]

Winston v. Lee's two most notable features are the Court's strong reaction in terms of human dignity to surgery under general anesthetic and the Court's consideration of the availability of alternative evidence as a factor in its determination of the government's need to search. If *Winston v. Lee* is thought of as an ad hoc evaluation of reasonableness, the decision is well-founded. If, on the other hand, *Winston v. Lee* is read as establishing a set balancing formula for the analysis of bodily intrusion, the decision is problematical. The decision is problematical because first, human dignity does not function well as a factor in a mechanical balancing test, and second, an amorphous concept like reasonableness cannot be arrived at through a mechanical balancing test.

It is interesting that the Court refers to the "*Schmerber* balancing test" when the *Schmerber* decision makes no reference to balancing. The "balancing test" language may be insignificant in that any determination of reasonableness under the fourth amendment involves balancing competing interests.[122] But so far as the Court is establishing a formula for future analysis, the Court is embarking on a dangerous course.

Human dignity and medical risk are the two factors in the Court's determination of reasonableness. Clearly, human dignity is something a court should think about when it evaluates the reasonableness of a bodily intrusion.[123] But it is difficult to assign a calculable weight to a concept like human dignity. Because of this difficulty, in the context of a mechanical balancing formula, human dignity will either be outweighed by more tangible factors or become an empty principle that justifies a judge's subjective responses.

---

116. *Id.* at 764 n.7.
117. *Id.* at 765.
118. *Id.*
119. *Id.* at 765-66.
120. *Id.* at 765.
121. *Id.* at 766 n.10.
122. *See infra* notes 141-43 and accompanying text.
123. *See infra* notes 154-62 and accompanying text.

In *Winston v. Lee* the Court finds that the proposed surgery is highly intrusive. The focus of the Court's finding is that compelled surgery under general anesthetic is highly intrusive in terms of human dignity. The Court, however, fails to distinguish, in terms of human dignity, surgery under general anesthetic from surgery under local anesthetic.

The Court states that compelled surgery under general anesthetic completely deprives a person of "ordinary control over surgical probing beneath his skin."[124] This implies that compelled surgery under local anesthetic entails a lesser deprivation. How is this so?[125] Crowder remained conscious during his operation, but he exercised no control over the probing beneath his skin. In what sense does a person undergoing a rectal probe feel more "dignified" than a person being operated on under a general anesthetic?

The Court fails to make a meaningful distinction in terms of human dignity because human dignity is given no content beyond invoking the fourth circuit's ominous description of routine surgery.[126] As a formula for determining intrusiveness, *Winston v. Lee* produces a meaningless distinction based upon an empty principle.

The other scale of the Court's balancing test, the government's need to search, provides a clearer distinction between *Winston v. Lee* and *Crowder*. In *Winston v. Lee*, the availability of alternative evidence was a factor in determining the government's need to search. This factor was not considered

---

124. *Winston*, 470 U.S. at 765.

125. For an argument that there is a significant distinction in terms of human dignity between surgery under general anesthetic and surgery under local anesthetic, see Mandell & Richardson, *supra* note 80, at 542-45. They argue that surgery under general anesthetic is a greater affront to human dignity for two reasons. First, in as much as consciousness is definitive of being human, involuntary termination of consciousness is a clear affront to the defendant's humanity. Second, compelled surgery under general anesthetic invades the defendant's innermost physical and mental privacy. *Id.* at 542-43.

Mandell & Robinson define consciousness as "an awareness of self and one's surroundings, the capacity to consider various courses of action and to choose among them, the capacity to think, believe, feel, and judge." *Id.* at 542. Under general anesthetic a person is temporarily unaware and temporarily unable to think, believe, feel, and judge. Going into and coming out of surgery, however, the defendant is aware of what will or what just has happened. The defendant is in the situation of a person falling asleep in jail and waking up in jail. More importantly, any defendant compelled to undergo any search has lost his "capacity to consider various courses of action and choose among them." Any search undermines the autonomy of the individual. The temporary loss of consciousness during surgery does not meaningfully distinguish *Lee* from *Crowder*.

Mandell & Richardson's second point ignores *Schmerber*'s distinction between physical and testimonial evidence. They describe surgery under general anesthetic as an invasion of the defendant's mental privacy because the defendant is rendered unconscious. But the defendant's private thoughts and feelings are not revealed, the surgery provides access only to physical evidence. In searching for physical evidence the government is constrained by the fourth amendment's reasonableness standard. Reasonableness, however, is not arrived at by considering only the use of general anesthetic. Reasonableness for this search like any other search involves a multi-faceted inquiry.

126. *Winston*, 470 U.S. at 765 (quoting 717 F.2d at 901). *See supra* text at note 103.

in *Crowder*. Because the availability of highly probative alternative evidence[127] was taken into account, the government had less need to search in *Winston v. Lee* than in *Crowder*.

By looking at the availability of alternative evidence while at the same time reiterating *Schmerber*'s probable cause requirements, *Winston v. Lee* creates a logical bind for prosecutors seeking bodily intrusions. It will be difficult to clear the Court's procedural hurdles[128] and still demonstrate a need to perform the search. The same facts required to show probable cause that the search will produce relevant evidence will often serve as alternative proof of whatever the sought-after evidence was to prove.[129] Because the government already has alternative proof, the need to perform surgery is diminished.

When the Court considers the availability of alternative evidence it puts itself in the difficult position of determining in advance the strength of the government's case.[130] The Court might also encourage sloppy police work that relies on bodily intrusions.[131] A better approach to evaluating the government's need to search may be to consider if there is a link between the type of search in question and the broad policy to be served by the search.

Often the results will be identical. The blood tests in *Breithaupt* and *Schmerber* served a substantial public interest in deterring drunk driving. The blood tests also provided reliable scientific evidence that would be more useful in court than alternative evidence such as what a policeman saw or smelled.[132] Bullet-retrieval surgery, however, serves no public interest beyond bringing a particular criminal to justice. These cases arise too infrequently for compelled surgery to have any overall deterrence effect on the rate. Also, in order to have probable cause that a bullet from the victim's gun is inside a suspect's body, the government will need solid information about when the suspect was wounded, where the shooting occurred, and the location

---

127. Lee was found wounded near the scene of the crime, Watkinson spontaneously identified Lee in the emergency room, and the location of the bullet underneath the left collarbone correlated with Watkinson's statement that the robber jerked to the left when he was shot. *Winston*, 470 U.S. at 765.

128. Particularly if the special procedural protections from *Crowder* are adopted. Because Lee was given a full adversary hearing and an opportunity for appellate review, they did not reach the question whether a surgical search can be ordered absent such procedural protections. *Id.* at 763 n.6.

129. "The very circumstances relied on in this case to demonstrate probable cause to believe that evidence will be found tend to vitiate the Commonwealth's need to compel respondent to undergo surgery." *Id.* at 765.

130. *Id.*

131. This could become especially true as technology becomes more sophisticated, and bodily intrusions entailing less medical risk reveal more information.

132. The *Breithaupt* decision pointed out that blood tests can also "establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses." 352 U.S. at 439.

of the gunshot wounds. This information will serve as alternative proof that the suspect was wounded by the victim during the crime.

Seen as an ad hoc evaluation of reasonableness, *Winston v. Lee* makes a great deal of sense. Privacy and autonomy are at the core of one's sense of dignity and compelled surgery certainly intrudes upon those interests.[133] There was conflicting testimony about the degree of medical risk involved in the proposed surgery. The proposed surgery was not a routine event like the blood test in *Schmerber*. There was doubt about the evidentiary value of the sought-after bullet. The government already had a great deal of evidence with which to make a case against Lee. Finally, performing surgery served no public interest beyond convicting Lee.

Seen as a balancing formula for future cases, *Winston v. Lee* is very troublesome.[134] The decision stresses the distinction, in terms of human dignity, between surgery under general anesthetic and surgery under local anesthetic. Because the Court fails to make a meaningful distinction, one must conclude that the Court either thought that *Crowder* was wrongly decided or chose to create a *per se* rule against compelled surgery under general anesthetic. If the former is true, the Court should have openly rejected *Crowder* and said why. If the latter is true, the Court has simply created another "clear rule" under the fourth amendment. The rule will increase litigation, spawn "well defined exceptions," and end in confusion or arbitrary decisionmaking or both.[135]

Hopefully, future courts will read *Winston v. Lee* the way the district court in *Lee v. Winston* read *Schmerber*.[136] Then, rather than becoming a litmus test, *Winston v. Lee* will instead become a broad-based evaluation

---

133. Although human dignity alone does not provide the basis for distinguishing the result in *Crowder* from the result in *Winston v. Lee*, compelled surgery implicates intimate expectations of privacy. Because "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State," *Schmerber*, 384 U.S. at 767, a court must carefully scrutinize all of the circumstances surrounding a compelled surgical search.

134. *See supra* notes 122-27 and accompanying text.

135. For the view that *Winston v. Lee* should have given specific weight to the factors it considered in order to insure more uniform lower court application of its balancing test, see Note, *supra* note 109, at 981-82.

136. The court wrote:

> The Court will, however, apply the explicit holding of *Schmerber*:
>
> > That we hold today that the Constitution does not forbid the State minor intrusions into an individual's body under under stringently limited circumstances in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.
>
> 384 U.S. at 772, 86 S.Ct. 1836. And while the Court does not find a litmus test in the Supreme Court's observations as to the facts before it, the Court does find some guidance as to the *kinds* of factors considered relevant to a determination of whether an intrusion is "minor" and performed under stringently limited circumstances.

Lee, 551 F. Supp. at 260 (quoting *Schmerber*, 384 U.S. at 772) (emphasis in original).

of reasonableness conforming to the model of fourth amendment decisionmaking advocated by this Note.

III. The Supreme Court's Bodily Intrusion Decisions As a Model of Fourth Amendment Decisionmaking

Since *Rochin v. California* the Supreme Court has reshaped its analysis of bodily intrusion. The Court has transformed a general due process inquiry into a particular fourth amendment inquiry.[137] Accordingly, the Court has shifted its frame of reference form self-incrimination to search and seizure.[138] Yet despite these doctrinal changes in analysis, there is a continuity to the Court's bodily intrusion decisions. From *Rochin v. California* to *Winston v. Lee,* the Court has engaged in what amounts to a case-by-case evaluation of reasonableness,[139] given the totality of circumstances in each case. While the doctrine underlying the Court's analysis of bodily intrusion has changed, the relevant factors and competing interests underlying the court's evaluation of reasonableness have remained essentially the same.

Arguably the results if not the reasoning of all search and seizure cases are best understood in terms of a broad evaluation of reasonableness. In the field of bodily intrusion, however, the Court seems less inclined to cloak its decisions in fourth amendment technicalities and more inclined to openly base its decisions on the overall reasonableness of the particular bodily intrusion in question. This kind of frank and broad-based decisionmaking offers a path out of the wilderness that is current fourth amendment jurisprudence.

Each of the Court's bodily intrusion decisions can be understood as an overall evaluation of reasonableness which looks at (1) the police behavior giving rise to the government's desire to search, (2) the manner in which the search is performed, and (3) the link, if any, between the nature of the search and the government interest served by the search.[140] The Court at the

---

137. *See supra* notes 9-53 and accompanying text.

138. *Id.*

139. Clearly *Rochin*'s "shocks the conscience" standard is distinct from the fourth amendment's reasonable search standard. But for the purposes of the Note, the point is that in each of its bodily intrusion decisions (including *Rochin*), the Court evaluates the particular search in question rather than sets a clear rule to be followed in the future.

The distinction between the *Rochin* standard and the reasonable search standard may become important in the context of habeas corpus petitions. In Stone v. Powell, 428 U.S. 465 (1976), the Court held that a fourth amendment violation cannot be the basis for a habeas corpus petition. After *Stone v. Powell,* prisoners might argue instead that a particular search procedure "shocks the conscience" under *Rochin* and violates due process.

140. Perhaps this factor should be more broadly stated as the government's need to search. *Breithaupt* and *Schmerber,* however, can be more clearly distinguished from *Rochin* and Winston v. Lee, 470 U.S. 753 (1985) by the link (or lack of link) between the search procedure and the government interest served. *See supra* notes 30-31, 130-33 and accompanying text.

same time balances society's interest in detecting and punishing crime against the individual's interest in privacy and autonomy over his own body. Taken together under this view, the Supreme Court's bodily intrusion decisions form a coherent and predictable set of results.

In *Rochin,* the police behavior could hardly have been more objectionable. Without a warrant or showing of probable cause, the police burst into the suspect's bedroom and violently struggled to remove the capsules from his mouth. Seen as a continuation of the initial struggle to retrieve the capsules, the stomach pumping, although performed in a hospital, becomes a violent invasion of the suspect's body. Finally, there is no particular connection between stomach pumping as a search procedure and the goal of reducing the sale of illegal drugs.

In *Breithaupt,* the police behavior took on none of the violent characteristics from *Rochin.* The search procedure, withdrawing and testing a small sample of blood, was a safe and routine practice performed by a physician in a hospital. Finally, a scientifically accurate method of determining intoxication is closely linked to the important societal goal of fighting drunk driving. Likewise in *Schmerber,* the police behavior was beyond reproach, the blood sample was taken by a physician in a hospital, and the search was closely linked to enforcing drunk driving statutes.

In *Winston v. Lee,* the police behaved properly and the courts afforded the suspect a full array of procedural opportunities. Surgery under general anesthetic, however, is far more complex and risky than stomach pumping or blood testing. Finally, compelled surgery situations arise too infrequently for the procedure to have an impact on crime in the streets.

The Court considers these factors while balancing competing interests in law enforcement and personal privacy. In *Rochin,* the Court recognizes that it is exercising judgment "upon interests of society pushing in opposite directions."[141] *Breithaupt* balances the "right of an individual that his person be held inviolable" against the "interests of society in the scientific determination of intoxication, one of the . . . mortal hazards of the road."[142] While *Schmerber* does not explicitly state a conflict between law enforcement and personal privacy, the Court in *Winston v. Lee* refers to the "*Schmerber* balancing test" and applies that test to the surgical procedure in question.[143]

Aside from the probable cause requirement stated in *Schmerber* and reiterated in *Winston v. Lee,* these decisions do not attempt to enact hard and fast rules. Nonetheless, it is possible to discern what is important to the Court and to draw guidance from the decisions. A bodily intrusion in search of evidence must be supported by probable cause. The search must be

141. Rochin v. California, 342 U.S. 165, 171 (1952).
142. Breithaupt v. Abram, 352 U.S. 432 (1957).
143. Winston v. Lee, 470 U.S. 753, 763 (1985).

performed in a safe manner. As the search procedure becomes more complex and risky, the government must show a more compelling need to search. As with tort law, this process leads to an evolving set of principles and standards to guide judges, police, and prosecutors.

This case-by-case evaluation of overall reasonableness in the Court's bodily intrusion decisions can be contrasted with the futile line-drawing and constant tinkering that plagues the Court's decisions in other fields of fourth amendment law.[144] For instance, the Court has stated that subject "only to a few specifically established and well-delineated exceptions" searches conducted without prior approval by a judge or a magistrate are per se unreasonable.[145] In fact, the Court has never taken the warrant requirement seriously. The exceptions to the warrant requirement are "neither few nor well-delineated."[146]

One exception to the warrant requirement is for automobile searches. The exception began with *Carroll v. United States*[147] where the Court upheld the warrantless search of a car stopped by two prohibition agents sixteen miles outside of Grand Rapids, Michigan. The Court recognized that there is a difference between searching a house and searching an automobile and created an exception "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."[148] But the Court added, "[i]n cases where the securing of a warrant is reasonably practicable, it must be used."[149]

In *Chambers v. Maroney,*[150] the police seized a car, arrested its occupants, and drove the car to the police station where it was searched without a warrant. The Court, rather than applying the "warrant when reasonably practicable" requirement from *Carroll,* instead latched onto *Carroll*'s "cars

144. The following analysis of current fourth amendment adjudication is taken from Bradley, *supra* note 54. Professor Bradley asserts that in order to develop a workable fourth amendment doctrine, the Court must adopt one of two proposed models of the fourth amendment. Model I is a "no lines" approach insisting only that a search be reasonable, considering all relevant factors on a case-by-case basis. Model II is a "bright line" approach requiring a warrant for *every* search when it is practicable to obtain one. While recognizing that Model I will offend civil libertarians and Model II will offend "law and order" enthusiasts, Bradley insists that an intermediate approach will only sink the Court "ever deeper into the mire of contradiction and confusion" that now exists. *Id.* at 1501.

This Note contends that the Court's bodily intrusion decisions are a successful, if unwitting, example of the "no lines" approach proposed by Professor Bradley. As such, the Court's bodily intrusion decisions are a model of fourth amendment decisionmaking which should guide the Court in other areas of fourth amendment law.

145. United States v. Ross, 456 U.S. 798, 825 (1982) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

146. Bradley, *supra* note 54, at 1473. There are now over twenty exceptions to the warrant requirement, the probable cause requirement, or both. *Id.* at 1473-74.

147. 267 U.S. 132 (1925).

148. *Id.* at 153.

149. *Id.* at 156.

150. 399 U.S. 42 (1970).

are different from houses" language[151] and created an automobile search exception to the warrant requirement.

In *United States v. Ross,*[152] the Court held not only that an automobile may be searched without a warrant (regardless of whether it would be practicable to obtain one), but containers found within the automobile, including locked suitcases, may be searched as well. The process had now come full circle.

> [T]he automobile exception, which was originally developed to allow a flexible response to the mechanistic warrant requirement when the police behavior seemed reasonable, has developed a life of its own as a mechanistic rule. Even if in a particular case, it would not seem reasonable to search a car and its contents without a warrant, the automobile exception has created a new rule that can be applied mechanically to render patently unreasonable behavior "reasonable" under the fourth amendment.[153]

In fourth amendment adjudication, the Court has embarked upon two ultimately contradictory tasks. First, the Court has sought to provide clear rules. Second, the Court has sought to provide flexibility in response to reasonable police behavior. The Court has failed on both counts. The Court creates a clear rule (the warrant requirement). In an attempt to flexibly respond to reasonable police behavior, the Court carves out an exception to the clear rule (*Carroll*). Over time, the exception takes on a life of its own (*Chambers v. Maroney*), and the Court in its desire for certainty hardens the exception into a new rule (*Ross*). Seeking to provide clear rules and flexibility, the Court ends up with the worst of both worlds: confusing exceptions which evolve into rigid rules mechanically rendering unjust results.

In its bodily intrusion decisions, the Court has avoided this dilemma. As seen above, the Court has developed a consistent approach to bodily intrusion utilizing a stable set of relevant factors and competing interests. This consistent approach falls short of setting clear rules, but it does provide guidance. Moreover, the Court's bodily intrusion decisions do not sacrifice flexibility to an illusory certainty.

The Court's bodily intrusion decisions avoid another pitfall in current fourth amendment adjudication. Postincorporation constitutional decisions based on specific Bill of Rights provisions have tended to focus on narrow definitional analysis at the expense of broad constitutional interests.[154] In fourth amendment decisions, this tendency has manifested itself as a focus on technical issues such as whether a particular police activity constitutes a

---

151. *Id.* at 48-49.
152. 456 U.S. 798 (1982).
153. Bradley, *supra* note 54, at 1477-78.
154. *See* Nowak, *Foreward—Due Process Methodology in the Postincorporation World,* 70 J. CRIM. L. & CRIMINOLOGY 397 (1979).

search within the scope of the fourth amendment[155] or when does a person have standing to raise a fourth amendment claim.[156] By focusing on these technical issues, the Court can avoid confronting basic privacy values that are protected by the due process clauses of the fifth and fourteenth amendments.

Take, for instance, an electronic "beeper" used to track a person's whereabouts. In *United States v. Knotts,*[157] the Court held that use of a beeper does not constitute a fourth amendment search. Pointing out that visual surveillance from public places along the suspect's route would have revealed to the police all of the information revealed by the beeper, the Court stated that "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case."[158] By focusing on the technical issue of whether there is a search, the Court avoids grappling with the broad privacy interests that would be implicated by widescale use of beepers.[159]

Throughout its bodily intrusion decisions, however, the Court has focused on the broad constitutional interests at stake. In the preincorporation *Rochin,* the Court speaks of the need to not "legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record."[160] In the postincorporation *Schmerber,* the Court states that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.[161] In *Winston v. Lee,* the Court reiterates this broad view of the fourth amendment and notes its concern with human dignity going back to *Rochin.*[162]

In its bodily intrusion decisions, the Supreme Court has maintained a consistent approach, fashioned a logically coherent set of results, and kept its focus on the broad values underlying the fourth amendment. The court has refused to engage in a confusing process of line-drawing and tinkering. The court has refused to hide behind definitional technicalities. For all of

155. Katz v. United States, 389 U.S. 347 (1967). *See supra* notes 55-62 and accompanying text.

156. For example, in Rakas v. Illinois, 439 U.S. 128 (1978), the Court held that passengers in an automobile lack standing to raise fourth amendment objections to a search of the automobile.

157. 460 U.S. 276 (1983).

158. *Id.* at 282.

159. Responding to the argument that its holding will allow unsupervised "twenty-four hour surveillance of any citizen in this country," the Court stated that "if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." *Id.* at 283-84.

All the same, the Court's definitional approach of *Knotts* provides an ideal vehicle for ignoring abuse of "beeper" technology should the Court choose to do so.

160. *Rochin,* 342 U.S. at 174.

161. *Schmerber,* 384 U.S. at 767.

162. *Winston,* 470 U.S. at 758, 762 n.5.

these reasons, the Court's bodily intrusion decisions represent a remarkable achievement.

One could speculate as to why the Court's bodily intrusion decisions have escaped the booby traps littering fourth amendment law. Perhaps the simple answer is that there are only four decisions over a period of thirty-five years. Because the Court has not muddied the waters with an endless series of rules and exceptions, the analysis of bodily intrusion has remained clearly focused on the essential question of reasonableness.[163] The question of why the Court has resisted the temptation to muddy the waters is left for another day.

CONCLUSION

Returning to *Montoya de Hernandez,*[164] it can be seen that the decision is subject to the criticisms of fourth amendment decisionmaking made in section III above. Because the Supreme Court bases the decision on border search exceptions to the warrant and probable cause requirements, the decision never directly confronts the reasonableness of what happened to the defendant. The Court simply finds 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."[165]

First the Court has engaged in line-drawing. From now on a lower quantum of evidence than probable cause[166] will justify prolonged detention of a suspected alimentary canal smuggler. By requiring such a low threshold of suspicion, the court insures that many innocent people will be harassed.[167]

---

163. Bradley, *The Uncertainty Principle in the Supreme Court,* 1986 DUKE L.J. 1, contends that there is an "uncertainty principle" at work in the judicial process. This judicial uncertainty principle is akin to the Heisenberg Uncertainty Principle in nuclear physics which holds that it is impossible to accurately determine both the position and velocity of a particle because the process of measuring one characteristic creates great uncertainty in the measurement of the other. *Id.* at 2 n.5. Likewise, argues Bradley, when the Supreme Court attempts to achieve certainty regarding a constitutional issue "[t]he process of rendering a decision will tend to distort the issue decided as well as the applicable precedents and doctrines." *Id.* at 2.

164. *See supra* notes 1-7 and accompanying text.

165. *Montoya de Hernandez,* 105 S. Ct. at 3311.

166. The difference between probable cause and reasonable suspicion is not clear. Probable cause, however, is understood as involving a higher quantum of evidence. *See generally* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 3.8 (1985 & Supp. 1986).

167. Dissenting, Justice Brennan pointed to a physician who had conducted internal searches for customs officials (rectal and vaginal examinations and stomach pumping). The physician testified that only 15% to 20% of persons he examined were carrying contraband. *Montoya de Hernandez,* 105 S. Ct. at 3319 (citing Thompson v. United States, 411 F.2d 946, 948 (9th Cir. 1969)).

Rather than making an ad hoc determination of reasonableness,[168] the Court creates a mechanical rule that will undoubtedly work harsh results.

Second, the Court's decision rests on technical distinctions between probable cause and reasonable suspicion. The Court never confronts broad principles such as human dignity. It is admitted that Montoya de Hernandez' detention was "long, uncomfortable, indeed, humiliating."[169] But the Court glibly remarks "both its length and its discomfort resulted solely from the method by which she chose to smuggle illicit drugs into this country."[170] The length of the detention is described as the time "necessary to either verify or dispel the suspicion"[171] that the defendant was a balloon swallower. Rather than deal with the fact that Montoya de Hernandez was detained incommunicado for over twenty-four hours, the Court sets up a technical level of suspicion and justifies the detention (regardless of the length and nature of the detention) so long as the suspicion remains.

By contrast the Court's mainstream bodily intrusion decisions directly confront the issue of reasonableness. The Court has fashioned a logically coherent set of results without having to wrench the broad concept of reasonableness into conformity with an endless set of "clear rules" and "narrow exceptions." As a series of ad hoc determinations of reasonableness, the bodily intrusion decisions shape the question of reasonableness for future courts,[172] retain flexibility in the face of varying fact patterns,[173] and focus on broad underlying principles.[174]

If the Supreme Court were to adopt its bodily intrusion decisions as a model for fourth amendment decisionmaking, perhaps the Court could bring a semblance of order to what is now chaos.

MICHAEL G. ROGERS

---

168. While it is difficult to imagine such a prolonged detention without seeking a warrant, a mainstream reasonableness analysis could be constructed. The Court points to a great deal of circumstantial evidence that the defendant was a balloon swallower. *Id.* at 3306-08. The Court also points to "the veritable national crisis in law enforcement caused by smuggling of illicit narcotics." *Id.* at 3309. There is also mention of the peculiar nature of alimentary canal smuggling and the difficulty of detecting such smugglers. *Id.* at 3309-10. All of these factors combined might somehow have justified the particular course of events in this case.

Such an analysis is problematical at best, but the point is that the Court would not be creating a set rule. An ad hoc determination of reasonableness would have only approved of a particular search without establishing a permissive reasonable suspicion standard for future detentions.

169. *Id.* at 3312.

170. *Id.*

171. *Id.* at 3313.

172. *See supra* text at note 144.

173. *See supra* text at note 154.

174. *See supra* text at notes 160-62.