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In Search of Evidence Against A Criminal Defendant: The Constitutionality of Judicially Ordered Surgery

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IN SEARCH OF EVIDENCE AGAINST A CRIMINAL DEFENDANT: THE CONSTITUTIONALITY OF JUDICIALLY ORDERED SURGERY*

INTRODUCTION

In *Schmerber v. California*,[1] the United States Supreme Court held that a blood sample could be taken involuntarily from the person of a criminal suspect and a chemical analysis thereof could properly be admitted into evidence against the accused at trial.[2] With this seminal opinion as a foundation, several lower courts have considered whether more substantial bodily intrusions than the kind authorized in *Schmerber* may be permitted. The question in these cases has involved whether a criminal suspect may be compelled to submit to a surgical operation for the purpose of obtaining real evidence linking the individual to a crime.[3] In each case,

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[1] 384 U.S. 757 (1966).

[2] *Id.* at 760, 765, 772.

[3] Although the use of court ordered surgery to obtain evidence would not appear to be limited to any one particular set of circumstances, the constitutionality of this procedure has only been put in issue when a state has sought to have a bullet removed from the body of a criminal suspect who was allegedly shot at the scene of the crime. The distinguishing characteristic in these cases has been the severity of the defendant's wounds. These injuries have ranged from a bullet superficially lodged under the skin of the defendant's forearm, United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976) (en banc), to a bullet located in the lower part of the defendant's spinal canal, Bowden v. State, 256 Ark. 820, 510 S.W.2d 879 (1974).

In the civil area, the courts have considered the constitutionality of compulsory medical treatment when a patient refuses, for religious or other reasons, to accept medical aid. In determining whether an individual in this situation may be constitutionally compelled to receive medical attention, a crucial factor for the court to determine has been the competency of the patient. Absent some compelling state interest, a competent adult is generally free to decide for himself whether or not to accept medical treatment. *See* Roe v. Wade, 410 U.S. 113 (1973); *In re* Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965); Erickson v. Dilgard, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (Sup. Ct. Nassau County 1962). Compelling state interests which have been held to be sufficient to warrant compulsory medical treatment for a nonconsenting competent adult include the community's desire to check the spread of disease, *see* Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory smallpox vaccination), and the welfare of an unborn child, *see* Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson, 42 N.J.

the courts have inquired into the nature and extent of the surgical procedure involved in order to determine whether it exceeded the dictates of *Schmerber*. This Note will examine the opinions of these courts and will analyze the constitutionality of judicially ordered surgery in light of *Schmerber* and other applicable Supreme Court precedents.

Rochin AND *Breithaupt:* CONSIDERATIONS OF DUE PROCESS

In *Rochin v. California,*[4] law enforcement authorities had obtained information which indicated that the defendant was selling narcotics. Acting upon this knowledge without first obtaining a warrant, three Los Angeles County Deputy Sheriffs entered the Rochin home and forced their way into the defendant's bedroom. Two capsules were observed on a night table. When asked whose they were, the defendant attempted to swallow them. The deputies immediately seized Rochin and attempted to remove the capsules from his mouth. When this proved unsuccessful, defendant was handcuffed and taken to a hospital where a physician administered an emetic solution in order to induce vomiting. As a result, the capsules, later shown to contain morphine, were recovered. At trial these capsules were admitted into evidence and the defendant was subsequently convicted of violating a state law prohibiting possession of morphine.[5]

On appeal, however, the United States Supreme Court reversed.[6] Since neither the privilege against self-incrimination guaranteed by the fifth amendment nor the fourth amendment's exclusionary rule[7] had yet been held applicable to state criminal proceedings,[8] the Court limited its

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421, 201 A.2d 537, *cert. denied,* 377 U.S. 985 (1964) (pregnant woman compelled to submit to blood transfusion). For a discussion of court ordered medical treatment in the noncriminal setting, see Riga, *Compulsory Medical Treatment of Adults,* 22 CATH. LAW. 105 (1976); Note, *Compulsory Medical Treatment: The State's Interest Re-evaluated,* 51 MINN. L. REV. 293 (1966).

[4] 342 U.S. 165 (1952).

[5] *Id.* at 166. The defendant's conviction was affirmed by the California District Court of Appeals despite that court's strong condemnation of the deputies' conduct in the case. 101 Cal. App. 2d 140, 143, 225 P.2d 1, 3 (Dist. Ct. App. 1950). This affirmance may be attributed to the fact that California had not yet adopted an exclusionary rule as to illegally seized evidence. People v. Gonzales, 20 Cal. 2d 165, 124 P.2d 44 (1942). *See* notes 7-8 *infra.* The California appellate court in *Rochin* noted that the defendant's remedy for the deputies' "reprehensible" conduct was an action for damages. 101 Cal. App. 2d at 143, 225 P.2d at 3.

[6] 342 U.S. at 174.

[7] The exclusionary rule, as developed in the federal court system, operates to prevent evidence seized in violation of a defendant's fourth amendment rights from being admitted against the defendant at trial. *See* Weeks v. United States, 232 U.S. 383 (1914). For a discussion of the historical development of the exclusionary rule, see Comment, *Admissibility of Illegally Seized Evidence—The Federal Exclusionary Rule—An Historical Approach,* 38 U. DET. L. REV. 635 (1961).

[8] In Twining v. New Jersey, 211 U.S. 78 (1908), the Court had occasion to consider whether the fifth amendment privilege against self-incrimination was applicable to state criminal proceedings via the due process clause of the fourteenth amendment. Justice Moody examined the privilege from the historical viewpoint of the drafting of the Bill of Rights, and

discussion to an examination of whether the procedures employed comported with traditional notions of due process as embodied in the fourteenth amendment.[9] Justice Frankfurter, writing for the Court, denounced

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concluded that

> [t]his survey does not tend to show that it was then in this country the universal or even general belief that the privilege ranked among the fundamental and inalienable rights of mankind; and what is more important here, it affirmatively shows that the privilege was not conceived to be inherent in due process of law . . . .

Id. at 110. *Twining* was not overruled by the Court until Malloy v. Hogan, 378 U.S. 1 (1964). For a discussion of *Malloy*, see note 26 *infra*.

Similarly, the federal exclusionary rule, *see* note 7 *supra*, was not held to be binding on state criminal proceedings until 1961, when the Court handed down its decision in Mapp v. Ohio, 367 U.S. 643 (1961). For a discussion of *Mapp*, see note 26 *infra*. Prior to *Mapp*, the Court had held that "[t]he security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society," and thus applicable to the states through the due process clause. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949). The *Wolf* Court, however, did not view the exclusion of evidence seized in violation of the fourth amendment as an essential ingredient of that right. *Id.* at 29. The states were thus left to fashion whatever remedies they saw fit to protect a defendant's rights under the fourth amendment. In *Rochin*, the defendant's remedy under California law was an action for damages. *See* note 5 *supra*.

[9] The Supreme Court of the United States has consistently held that the due process clause of the fourteenth amendment does not automatically incorporate the specific protections embodied in the Bill of Rights and make them applicable to state criminal proceedings. *See, e.g.*, Wolf v. Colorado, 338 U.S. 25, 26 (1949); Palko v. Connecticut, 302 U.S. 319, 323 (1937). Certain personal rights, however, which are safeguarded against federal infringement by the Bill of Rights, are also safeguarded against state infringement by the due process clause of the fourteenth amendment. Where this is so, it is not because these rights are included in the Bill of Rights, but because they are embodied in the concept of due process of law. *See* Twining v. New Jersey, 211 U.S. 78, 99 (1908). The standard utilized to determine which rights are included in this conception of due process of law has been expressed by the Supreme Court in several different ways. For example, Justice Cardozo, writing for the Court in Snyder v. Massachusetts, 291 U.S. 97 (1934), noted that a state is free to regulate its own judicial procedure and policy "unless in doing so it offended some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 105. Similarly, in Malinski v. New York, 324 U.S. 401 (1945), Justice Frankfurter, in a separate opinion, stated that

> when a conviction in a state court is properly here for review, under a claim that a right protected by the Fourteenth Amendment has been denied, the question is not whether the record can be found to disclose an infraction of one of the specific provisions of the first eight amendments. . . . Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . .

Id. at 416-17. It was this view of the due process requirements which led the *Rochin* Court to reverse the defendant's conviction. 324 U.S. at 169. In a concurring opinion, however, Justice Black rejected the amorphous due process rationale of the majority and argued for reversal on the basis of the specific provisions of the fifth amendment. According to Justice Black, "faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards stated by the majority." *Id.* at 175 (Black, J., concurring). It should be noted, however, that

the entire procedure by which the evidence was obtained, stating:

> 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. They are methods too close to the rack and the screw to permit of constitutional differentiation.[10]

Although the Court did not permit the search for evidence to extend into the defendant's body, the import of *Rochin* has been difficult to assess in view of the unusual facts of the case. Several commentators have suggested that it was not any specific act, but rather the totality of the official misconduct which shocked the conscience of the Court.[11] The question whether a bodily intrusion alone, in the absence of other more clearly excessive actions by state officials, would constitute a violation of due process was not considered by the Court until *Breithaupt v. Abram.*[12]

The defendant in *Breithaupt* was convicted of involuntary manslaughter as a result of his involvement in an automobile accident which took the lives of three persons. Shortly after the accident, while the defendant was unconscious in a hospital emergency room, a police officer directed the attending physician to remove a small sample of blood from the defendant's body.[13] Chemical analysis of this blood sample indicated that the defendant was intoxicated, and testimony regarding the results of the blood analysis was admitted at trial. Subsequently, Breithaupt sought release from prison by petition for a writ of habeas corpus, contending that the involuntary blood test deprived him of his liberty without due process of law under the fourteenth amendment.[14]

Justice Black had long been a proponent of the view that the fourteenth amendment incorporates the specific protections of the Bill of Rights. *See, e.g.,* Adamson v. California, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting).

[10] 324 U.S. at 172.

[11] *See* Eckhardt, *Intrusion Into the Body,* 52 MIL. L. REV. 141, 143 n.12 (1971) [hereinafter cited as Eckhardt]; Comment, *Search and Seizure: Compelled Surgical Intrusions?,* 27 BAYLOR L. REV. 305, 307 (1975). *But see* Comment, *Intrusive Border Searches—Is Judicial Control Desirable?,* 115 U. PA. L. REV. 276, 280-81 (1966), where the author, although recognizing some ambiguity in this aspect of *Rochin,* concluded that it was the stomach pumping act alone which the Court found offensive to due process.

[12] 352 U.S. 432 (1957).

[13] *Id.* at 433. An almost empty whiskey bottle was found in the glove compartment of the defendant's car, and the odor of liquor could be detected on his breath. *Id.* Thus, it appears that the police officer who requested that the sample be taken had the requisite probable cause to believe that the defendant had been driving while intoxicated.

[14] *Id.* at 433-34. Breithaupt also argued that the specific protections afforded by the fourth and fifth amendments should be applicable to him via the due process clause of the fourteenth amendment. As in *Rochin,* however, the Supreme Court summarily rejected this argument, citing, *inter alia,* Wolf v. Colorado, 338 U.S. 25 (1949), and Twining v. New Jersey, 211 U.S. 78 (1908). 352 U.S. at 434. *See* note 8 *supra.* Having thus disposed of Breithaupt's preliminary arguments, the Court proceeded to consider the constitutionality of the blood test under the traditional due process standard employed in *Rochin. See* note 9 *supra.*

The Supreme Court, however, found no due process violation and affirmed denial of the writ.[15] The Court distinguished *Rochin*, stating that "there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done, as in this case, under the protective eye of a physician."[16] Justice Clark, writing for the majority, noted that blood tests have become a routine procedure in everyday life. When such tests are administered by a skilled technician, they could "not be considered offensive by even the most delicate."[17] The Court also noted with concern the growing number of highway fatalities, particularly those caused by intoxicated motorists.[18] To reach its decision, the Court balanced the right of an individual to be free from the limited bodily intrusion occasioned by a blood test against the public's interest in avoiding highway fatalities through "scientific determination of intoxication."[19] The former interest was found to be "far outweighed" by the latter.[20] Thus, for the first time, the Supreme Court in *Breithaupt* approved a search which extended into the body of an individual. This set the stage for *Schmerber v. California*,[21] in which the Court, on similar facts, confronted specific fourth and fifth amendment challenges to the constitutionality of an involuntary bodily intrusion in the search for evidence.

Schmerber: THE COURT SETS STANDARDS FOR BODILY INTRUSIONS

In *Schmerber,* the defendant was hospitalized after the car which he had been driving skidded off the road and struck a tree. A police officer at the scene of the accident detected the odor of liquor on the defendant's breath and observed other symptoms of inebriation. Less than 2 hours

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[15] 352 U.S. at 436-40.

[16] *Id.* at 435. In his dissenting opinion, Chief Justice Warren rejected the majority's finding that *Breithaupt* was distinguishable from *Rochin* due to the "brutal" and "offensive" state conduct present in the latter. According to the Chief Justice, the majority opinion suggested that an invasion is "brutal" or "offensive" only when police officers forcibly attempt to overcome the resistance of a suspect. This analysis, the dissent argued, leads to an unacceptable conclusion "that would make physical resistance by a prisoner a prerequisite to the existence of his constitutional rights." *Id.* at 441 (Warren, C.J., dissenting). Chief Justice Warren asserted "that due process means at least that law-enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids . . . ." *Id.* at 442. This should hold true, according to the Chief Justice, whether the suspect states that he objects to the intrusion, protests the intrusion by physical violence, or, as in the case of the unconscious defendant in *Breithaupt,* is in such a condition that he is unable to protest. *Id.* at 441.

[17] *Id.* at 436 (Clark, J.).

[18] *Id.* at 439. In this context, the Committee on Medicolegal Problems of the American Medical Association has noted that "[t]he frequency with which drinking drivers are involved in accidents in comparison with nondrinking drivers indicates a definite relationship between the consumption of alcoholic beverages and the deterioration of driving ability to the point that an undesirable event occurs." COMMITTEE ON MEDICOLEGAL PROBLEMS, AMERICAN MEDICAL ASSOCIATION, ALCOHOL AND THE IMPAIRED DRIVER 58 (1968).

[19] 352 U.S. at 439.

[20] *Id.* at 439-40.

[21] 384 U.S. 757 (1966) (5-4 decision).

later, at a hospital, the police officer again noted the defendant's apparent intoxicated condition and placed him under arrest. Over the objection of the defendant, who was fully conscious at the time,[22] the police officer directed a doctor to remove a small quantity of the defendant's blood for chemical analysis. At trial, a report of this analysis, indicating a high alcohol content, was admitted into evidence, and the defendant was convicted of operating an automobile while under the influence of intoxicating liquor.[23]

On appeal to the Supreme Court, the defendant first contended that the blood testing procedure deprived him of his right to due process under the fourteenth amendment.[24] The Court summarily rejected this claim, reaffirming *Breithaupt's* mandate that the withdrawal of blood under supervised conditions did not offend the traditional notions of due process embodied in the fourteenth amendment.[25]

Since the provisions of the fifth amendment as well as the fourth amendment's exclusionary rule had by this time been held to be within the ambit of the fourteenth amendment and thus applicable to state criminal proceedings,[26] the *Schmerber* Court next considered whether the blood sampling procedure had violated the defendant's fourth or fifth amend-

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[22] The fact that the defendant in *Schmerber* was fully conscious at the time the blood sample was removed and voiced his objection to that procedure, represents the only significant factual difference between this case and *Breithaupt*. *See* note 25 *infra*.

[23] 384 U.S. at 758-59, 768-69.

[24] *Id.* at 759. *See* notes 9 & 14 and accompanying text *supra*.

[25] 384 U.S. at 759-60. In support of its holding that the compelled extraction of a blood sample, over the objections of a fully conscious defendant, was not violative of due process, the *Schmerber* Court quoted from Chief Justice Warren's dissenting opinion in *Breithaupt*, stating: "We 'cannot see that it should make any difference whether [the defendant] states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest.'" *Id.* at 760 n.4, *quoting* Breithaupt v. Abram, 352 U.S. 432, 441 (1957) (Warren, C.J., dissenting). Use of this authority by the Court is surprising, however, in light of the fact that the thrust of the Chief Justice's statement was that a mandatory blood test should be *illegal* regardless of whether the defendant is conscious or not. In any event, the *Schmerber* Court went on to suggest that if the police initiated the violence, or reacted to resistance with inappropriate force, a different case would be presented. 384 U.S. at 760 n.4.

[26] In Malloy v. Hogan, 378 U.S. 1 (1964), the Supreme Court overruled Twining v. New Jersey, 211 U.S. 78 (1908), and held that

> [t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.

378 U.S. at 8. Similarly, in Mapp v. Ohio, 367 U.S. 643 (1961), the Court overruled Wolf v. Colorado, 338 U.S. 25 (1949), and held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." 367 U.S. at 655. For a discussion of *Twining* and *Wolf*, see note 8 *supra*. Both *Malloy* and *Mapp* have been the subject of extensive commentary. *See, e.g.*, Note, *Due Process and Search-and-Seizure—A Historical Look at* Mapp v. Ohio, 31 CIN. L. REV. 41 (1962); 29 ALB. L. REV. 129 (1965); 42 B.U.L. REV. 119 (1962); 36 ST. JOHN'S L. REV. 149 (1961).

ment rights. Justice Brennan, author of the majority opinion, first addressed the fifth amendment[27] claim, noting initially that " 'our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.' "[28] While this statement goes to the heart of the fifth amendment's protection, the courts historically have had to wrestle with the question of the breadth of the amendment's coverage.[29] As Justice Brennan noted, "the privilege has never been given the full scope which the values it helps to protect suggest."[30]

Based upon this interpretation of the amendment's ambit, the *Schmerber* Court rejected the defendant's claim, declaring that the fifth amendment "privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a *testimonial* or *communicative* nature . . . ."[31] Although in the instant case there could be no doubt that the defendant was being forced to submit to a search for incriminating evidence, the *Schmerber* Court reasoned that his "testimonial capacities were in no way implicated," and thus the privilege was not applicable.[32]

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[27] The fifth amendment provides in pertinent part that "no person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

[28] 384 U.S. at 762, *quoting* Miranda v. Arizona, 384 U.S. 436, 460 (1966).

[29] The scope of the fifth amendment protection has been steadily enlarged by the courts over the years. At an early date the Supreme Court held that the privilege was available to a witness in a criminal proceeding as well as the defendant. Counselman v. Hitchcock, 142 U.S. 547 (1892). Subsequently, in McCarthy v. Arndstein, 266 U.S. 34 (1924), the Court further extended the privilege to protect a witness in a civil proceeding when the testimony might subject the witness to criminal responsibility. *Id.* at 40. The privilege has now been broadened to cover a wide variety of situations, including delinquency proceedings, *In re* Gault, 387 U.S. 1 (1967), and disbarment proceedings, Spevack v. Klein, 385 U.S. 511 (1967). Indeed, Justice White, concurring in Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), noted that

> [t]he privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory, and it protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might so be used.

Id. at 94 (citations omitted) (White, J., concurring).

[30] 384 U.S. at 762.

[31] *Id.* at 761 (footnote omitted) (emphasis added). In Justice Black's dissenting opinion it was argued that the blood test did indeed have a testimonial or communicative nature since the purpose of the procedure was to provide the basis for testimony by a medical examiner that the defendant was intoxicated. *Id.* at 774 (Black, J., dissenting). In response to this argument, the majority asserted that only acts on the part of the person to whom the privilege inures are within the ambit of the fifth amendment. *Id.* at 761 n.5 (Brennan, J.).

[32] *Id.* at 765. Justice Black, however, argued that the Court's restrictive reading of the fifth amendment "gives the Bill of Rights' safeguard against compulsory self-incrimination a construction that would generally be considered too narrow and technical even in the interpretation of an ordinary commercial contract." *Id.* at 777 (Black, J., dissenting). This position in favor of a broad interpretation of the fifth amendment privilege is supported by previous Supreme Court decisions. *See, e.g.*, Counselman v. Hitchcock, 142 U.S. 547, 562-63 (1892), *discussed at* note 29 *supra*. *See also* Boyd v. United States, 116 U.S. 616 (1886), wherein the

While the Court determined that blood sampling does not "implicate" the privilege afforded by the fifth amendment, the majority concluded that the search and seizure provisions of the fourth amendment[33] are clearly applicable in the case of a bodily intrusion such as a blood test.[34] Initially, it should be noted that the fourth amendment does not prohibit all searches and seizures, but only those which are unreasonable.[35] As the Court has stated previously, whether a search and seizure is reasonable is to be determined by an examination of all the facts and circumstances of the particular case.[36] Thus, the *Schmerber* Court, writing on a "clean slate" in the area of bodily intrusions and the fourth amendment, proceeded to develop what might be considered a tripartite test for assessing the reasonableness of the procedure utilized.

The Court first required a "clear indication" that the evidence sought to be recovered would be found as a result of the contemplated search,[37] since "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusion on the mere chance that desired evidence might be obtained."[38] Although in *Schmerber* this element was established simply by showing that probable cause existed for the defendant's arrest, the "clear indication" requirement will ordinarily have to be separately proven.[39]

Court asserted that "constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance." *Id.* at 635.

For examples of nontestimonial compulsion where the privilege against self-incrimination was held not to apply, see United States v. Wade, 388 U.S. 218 (1967) (criminal suspect required to stand in line-up and utter words spoken at the scene of the crime); Gilbert v. California, 388 U.S. 263 (1967) (defendant forced to provide handwriting exemplars); Holt v. United States, 218 U.S. 245 (1910) (suspect required to wear shirt worn by criminal). *But see* Boyd v. United States, 116 U.S. 616 (1886) (defendant may not be compelled to produce incriminating commercial invoices).

[33] "The right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV (emphasis added).

[34] 384 U.S. at 767.

[35] *E.g.*, Harris v. United States, 331 U.S. 145, 150 (1947); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931); Carroll v. United States, 267 U.S. 132, 147 (1925).

[36] *E.g.*, Cooper v. California, 386 U.S. 58, 59 (1967) (approving warrantless search of impounded automobile one week after seizure); Ker v. California, 374 U.S. 23, 33 (1963) (warrantless search of defendant's apartment incident to lawful arrest found reasonable); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931) (search and seizure held to be unreasonable where no suggestion that defendant was committing a crime when arrested).

[37] The requirement of a clear indication that the desired evidence will be found must be distinguished from the probable cause necessary for the arrest itself. Although in *Schmerber* both clear indication and probable cause were established from the observation that the defendant was intoxicated, generally they are two independent inquiries. For a discussion of the distinction between clear indication and probable cause, see Eckhardt, *supra* note 11, at 150-51.

[38] 384 U.S. at 769-70.

[39] *Id.* at 770. *See* note 37 *supra*.

The second element to which the Court looked was the reasonableness of the challenged procedure as a means for achieving the prosecution's goal. Echoing a conclusion voiced previously in *Breithaupt,* the Court held that the blood test employed in the instant case was reasonable, asserting that it "is a highly effective means of determining the degree to which a person is under the influence of alcohol."[40] Crucial to the Court's determination as to the reasonableness of the blood sampling procedure was its finding that "for most people [blood testing] involves virtually no risk, trauma, or pain."[41]

The final element in the *Schmerber* Court's analysis concerned the manner in which the blood test was administered. Justice Brennan noted that this requirement would be satisfied when, as in the instant case, the blood testing procedure was performed in a hospital, by a physician, and in accordance with accepted medical practices.[42]

The Supreme Court's decision in *Schmerber* thus established a constitutional basis for evaluating involuntary bodily intrusions to obtain blood samples from criminal defendants. The question whether the analysis employed in *Schmerber* is applicable to bodily intrusions more extensive than a blood test, however, remains unanswered. In considering the propriety of judicially ordered surgery, it is important to bear in mind Justice Brennan's oft-quoted admonition regarding any extension of *Schmerber:*

> [W]e reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of 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.[43]

Schmerber EXTENDED: THE EVOLUTION OF JUDICIALLY ORDERED SURGERY: *United States v. Crowder*

To date, only a handful of courts have considered whether more extensive bodily intrusions than the kind authorized in *Schmerber* may be permitted in the search for evidence against criminal suspects.[44] Most re-

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[40] 384 U.S. at 771.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 772. In the context of judicially ordered surgery, Justice Brennan's admonition has been considered by numerous courts. *See, e.g.,* United States v. Crowder, 543 F.2d 312, 322 (D.C. Cir. 1976) (en banc) (Leventhal, J., dissenting); Bowden v. State, 256 Ark. 820, 822, 510 S.W.2d 879, 880 (1974); Adams v. State, 260 Ind. 663, 668, 299 N.E.2d 834, 837 (1973), *cert. denied,* 415 U.S. 935 (1974).

[44] The constitutionality of judicially ordered surgery in search of evidence has been considered by one federal circuit court and by five state courts. *See* United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976) (en banc); Bowden v. State, 256 Ark. 820, 510 S.W.2d 879 (1974); Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (1972), *cert. dismissed,* 410 U.S. 975 (1973); Adams v. State, 260 Ind. 663, 299 N.E.2d 834 (1973), *cert. denied,* 415 U.S. 935 (1974); People

cently, in *United States v. Crowder,*[45] the issue was squarely confronted for the first time by a federal appellate court.

In December of 1970, a Washington, D.C. dentist was shot to death in his office. The victim's gun, containing four expended rounds, was found by police across the street from the scene of the crime. Only two bullets, however, were recovered from the body of the victim. According to the testimony of an alleged accomplice, the defendant and the accomplice had gone to the dentist's office intending to commit a robbery. During the course of this act a struggle ensued, as a result of which Crowder and the dentist were both shot with the victim's gun. Acting on this information, the police arrested Crowder. Subsequent x-rays revealed two bullets in the defendant's body—one lodged in his right forearm, the other in his left thigh.[46] When Crowder refused medical treatment for these wounds, the United States Attorney asked the federal district court for permission to surgically remove the bullet located in Crowder's forearm.[47] Following a hearing on the application, the court approved the surgery. The 10-minute operation was performed in a hospital under a local anesthetic after a writ of prohibition against execution of the trial court's order had been denied by the Court of Appeals for the District of Columbia Circuit.[48] According to testimony offered by the defendant's doctor, "the risk to the patient was 'negligible' although slightly more than there would be in drawing a sample of blood."[49] While Crowder was kept in the hospital for several days after the operation under close observation, it appears that the procedure was such that it could have taken place on an outpatient basis.[50]

On appeal from the defendant's subsequent conviction, the District of Columbia Circuit, eschewing any express reference to *Schmerber's* tripartite test, inquired instead into the reasonableness of the operation performed. Finding nothing comparable to the activity condemned in *Rochin,* the appellate court held that the procedures utilized "were reasonable and

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v. Smith, 80 Misc. 2d 210, 362 N.Y.S.2d 909 (Sup. Ct. Queens County 1974); State v. Burnett, No. 72-2023 (Cir. Ct. Crim. Causes, City of St. Louis, Sept. 24, 1973). This paucity of case law on the subject may be attributable to the improbable course of events which must occur before judicially ordered surgery is possible. As Judge McGowan remarked in *Crowder,* "[t]his case is something of a sport on its facts, and frequent recurrence of anything like it is hardly to be expected." 543 F.2d at 318 (McGowan, J., concurring).

[45] 543 F.2d 312 (D.C. Cir. 1976) (en banc) (5-4 decision).

[46] *Id.* at 313.

[47] The government did not seek to remove the bullet located in the defendant's thigh because medical testimony indicated that such an operation might reduce the mobility of Crowder's leg. No such problems were anticipated in connection with the bullet located superficially under the skin of the defendant's forearm. *Id.*

[48] *Id.* at 314-15.

[49] *Id.* at 315.

[50] *Id.* at 315-16. "Had Crowder been a private patient he would have been discharged immediately and told he might go back to work; the care ward precaution was imposed only because the surgeon 'bent over backwards,' no doubt having in mind the possibility of future legal complications." *Id.* at 316.

justified in the circumstances," and affirmed the defendant's conviction.[51] In reaching this conclusion, the *Crowder* court emphasized that an adversary hearing at which the defendant was represented by counsel, with opportunity for appellate review, was held before the surgery was performed.[52] As Judge McGowan stated in his concurring opinion, "[h]ad [the government] declined to invoke the authority of the judiciary in advance, relying instead upon after the fact justifications, we would have been presented with quite a different—and palpably more difficult—case."[53]

Another important factor in the court's decision was the nature of the particular surgical procedure employed. The small size of the required incision, the short duration of the operation, the surgeon's opinion regarding the "negligible" risks involved, and the fact that "every possible precaution was taken to guard against any surgical complications," all contributed to the majority's characterization of the surgery performed as "minor."[54] Finally, the court was of the opinion that removal of the bullet from Crowder's arm was necessary to the prosecution's case, and that there was sufficient probable cause to conclude that the operation would provide such evidence.[55]

In his dissenting opinion in *Crowder,* however, Judge Robinson was adamant in his assertion that *Schmerber* neither required nor supported the majority's position:

> Unlike the blood tests and perhaps a few other very minor medical procedures which most Americans regularly and unhesitatingly undergo, surgical

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[51] *Id.*

[52] *Id.*

[53] *Id.* at 318 (McGowan, J., concurring). The Supreme Court in *Schmerber* did not require that questions of probable cause, clear indication, and reasonableness of the intrusion be submitted preliminarily to a detached magistrate because prompt removal of the blood sample for analysis of alcoholic content was necessary in order to prevent dissipation of the evidence. 384 U.S. at 770. Previously, in Preston v. United States, 376 U.S. 364 (1964), the Court had recognized the right of a police officer to conduct a warrantless search of an accused's person when making a lawful arrest. The Court noted that one primary justification for such a search is preventing the destruction of evidence. It is submitted, however, that the "destruction of evidence" rationale would be inapplicable in the judicially ordered surgery cases, since delay in obtaining a search warrant ordinarily would not affect the availability of the desired evidence. Recognizing this distinction, the *Crowder* court appeared to require an adversary hearing with full opportunity for appellate review as a prerequisite to any judicially ordered surgery.

[54] 543 F.2d at 316. The characterization of the surgery as "minor" was crucial, since no court has upheld the constitutionality of judicially ordered surgery when the operation was characterized as "major." *See* notes 65-66 and accompanying text *infra.*

[55] 543 F.2d at 316. Both dissenting opinions in *Crowder,* however, challenged the majority's finding that recovery of the bullet was necessary to the prosecution's case. *Id.* at 318 (Leventhal, J., dissenting); *id.* at 322 (Robinson, J., dissenting). This consideration appeared to be the determinative factor in Judge Leventhal's dissent, since he determined that minor surgery was not prohibited in all cases by the fourth amendment. *Id.* at 318 (Leventhal, J., dissenting).

> incisions entail preoperative anesthesia, post-operative pain killers, stitches and permanent scars. They involve much more in the way of physical and mental discomfort and anxiety. They pose significantly higher risks of infection and post-surgery complications, and an immensely greater personal affront.[56]

ANALYSIS OF THE CONSTITUTIONALITY OF JUDICIALLY ORDERED SURGERY

With its decision in *Crowder,* the District of Columbia Circuit added its voice to those few courts in the country which have sanctioned judicially ordered surgery.[57] Previously, in *Creamer v. State,*[58] the Supreme Court of Georgia had approved the removal of a bullet from the fat, subcutaneous area of the defendant's chest. As in *Crowder,* the operation was short in duration, performed under a local anesthetic, and characterized by the court as "minor" surgery.[59] Significantly, the *Creamer* court, unlike the District of Columbia Circuit, based its decision squarely on *Schmerber.*[60] It is suggested, however, that strict adherence to the tripartite test indicated in *Schmerber* compels the conclusion that judicially ordered surgery is an unreasonable search and seizure that is impermissible under the provisions of the fourth amendment.

Judicially Ordered Surgery Utilizing General Anesthesia

When the prosecution seeks to compel the surgical removal of real evidence in a situation requiring the use of a general anesthetic, it is clear that the risks involved are significantly greater than those associated with an ordinary blood test. The various complications which are produced by or associated with the state of general anesthesia include potential damage to both peripheral nerves and the central nervous system[61] as well as the

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[56] *Id.* at 321 (Robinson, J., dissenting) (footnote omitted).

[57] *See* Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (1972), *cert. dismissed,* 410 U.S. 975 (1973); State v. Burnett, No. 72-2023 (Cir. Ct. Crim. Causes, City of St. Louis, Sept. 24, 1973).

[58] 229 Ga. 511, 192 S.E.2d 350 (1972), *cert. dismissed,* 410 U.S. 975 (1973).

[59] 221 Ga. at 513-15, 192 S.E.2d at 352-53. The *Creamer* decision was followed, albeit reluctantly, in Allison v. State, 129 Ga. App. 364, 199 S.E.2d 587 (1973), *cert. denied,* 414 U.S. 1145 (1974). The *Allison* court was adamant, however, in its belief that the Georgia Supreme Court had misinterpreted *Schmerber* in its *Creamer* opinion, stating: "From reading Justice Brennan's opinion in *Schmerber* it is very doubtful that the Supreme Court would extend that case further, for a surgical knife is considerable more intrusion into the human body than a mere needle inserted for blood testing." 129 Ga. App. at 365, 199 S.E.2d at 589. It should be noted that the *Creamer* and *Allison* courts also considered the propriety of the surgical procedure under the Georgia State Constitution and other applicable state statutes. *See* GA. CODE ANN. § 2-106 (1973); *id.* § 38-416 (1974). The majority in *Allison,* as well as the dissent in *Creamer,* felt that compelled surgical removal of the bullet was violative of the defendant's rights under these provisions. 229 Ga. at 522-26, 192 S.E.2d at 357-59 (Gunter, J., dissenting); 129 Ga. App. at 365, 199 S.E.2d at 588.

[60] 229 Ga. at 514-15, 192 S.E.2d at 352-53.

[61] The risks created by general anesthetics are manifold:

possibility of acute cardiac[62] or respiratory[63] emergencies. While these risks may be minimized by skillful medical attention, it is not unlikely that complications will occur even in the absence of any negligence on the part of the attending physician.[64]

To date there apparently have been only two judicially ordered surgery cases in which the use of a general anesthetic was contemplated, and in both instances the courts refused to permit the operations.[65] Although the magnitude of the surgical intrusions involved was a major factor in each case,[66] it is submitted that the use of a general anesthetic, in and of itself, subjects a defendant to unreasonable risks which should preclude the judicial authorization of nonconsensual surgery.[67]

Judicially Ordered Surgery Utilizing Local Anesthesia

Local anesthetic techniques "tend to be more precise in their actions in contrast to the overall activity of general anesthetic agents on both central nervous system and other organs (e.g., the heart)."[68] Although the use of a local anesthetic may limit the risk of serious surgical complications, "minor" surgery performed under a local anesthetic still represents

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> Complications related to the central nervous system are caused by inadequate oxygenation of the brain. Peripheral nerve injuries, on the other hand, are caused by the stretching or compression of a peripheral nerve trunk. . . . Contributing to neurologic complications is that artificial unconsciousness deprives the patient of protective mechanisms that are active even during natural sleep, notably tingling and numbness, which develop during peripheral nerve compression.

C. Hunter & W. Dornette, *Neurologic Injuries in the Unconscious Patient*, in LEGAL ASPECTS OF ANESTHESIA 362, 366 (1972).

[62] Indeed, "[c]ardiac arrest is a known and calculated risk in the giving of a general anesthetic. The statistics produced as to its frequency are highly conflicting. Certainly it can be said that it occurs rarely but constantly." Quintal v. Laurel Grove Hosp., 62 Cal. 2d 154, 160, 397 P.2d 161, 164, 41 Cal. Rptr. 577, 580 (1964) (en banc).

[63] *See generally* D. Mills & H. Engel, *Malpractice Prophylaxis: An Analysis of Ventilatory Problems in Anesthesia*, in LEGAL ASPECTS OF ANESTHESIA 455 (1972).

[64] *See id.* at 458.

[65] Bowden v. State, 256 Ark. 820, 824, 510 S.W.2d 879, 881 (1974); People v. Smith, 80 Misc. 2d 210, 215, 362 N.Y.S.2d 909, 914 (Sup. Ct. Queens County 1974).

[66] In Bowden v. State, 256 Ark. 820, 510 S.W.2d 879 (1974), the bullet sought to be recovered was located in the lower portion of the defendant's spinal canal. Two doctors testified that surgical removal could cause a worsening of the defendant's condition, and both described the proposed operation as a "major intrusion." *Id.* at 823-24, 510 S.W.2d at 881. The bullet in question in People v. Smith, 80 Misc. 2d 210, 362 N.Y.S.2d 909 (Sup. Ct. Queens County 1974), was "lodged beneath the [defendant's] rhomboid muscle in the posterior chest wall underneath the muscles of the chest wall, and outside the actual thoratic cavity itself." *Id.* at 211, 362 N.Y.S.2d at 911. One surgeon testified that an incision at least 6 inches long would have to be made to remove the slug, and the patient would have to be hospitalized for about 6 or 7 days. Again, the procedure was characterized as "major surgery." *Id.* at 211-12, 362 N.Y.S.2d at 911.

[67] *See* notes 61-64 and accompanying text *supra*.

[68] W. Dornette, *Some Problems in Anesthesia*, in LEGAL ASPECTS OF ANESTHESIA 285, 310 (1972).

a bodily intrusion of the most serious magnitude when compared with the blood test authorized by the Supreme Court in *Schmerber*.[69] As Judge Robinson observed in his dissenting opinion in *Crowder*, "it seems incontrovertible that, with its marked intensification of risk, pain, scarring and indignity, a surgical invasion of the body cannot be likened to the needle puncture which *Schmerber* condones, or justified constitutionally by uncritical comparisons with it."[70]

CONCLUSION

The future of judicially ordered surgery ultimately will turn upon the construction given to *Schmerber* by the lower courts. If this opinion is read broadly, then the door is open for the authorization of surgical procedures considerably more extensive than the sampling of blood. If the decision is construed narrowly, however, as is advocated herein, it will preserve the constitutional rights of criminal suspects, while allowing the state to make limited bodily intrusions in search of evidence.

It is particularly unfortunate that the *Crowder* and *Creamer* courts have extended the permissible scope of bodily intrusions to the point where a simple mistake in medical judgment or unforeseen turn of events may have serious and long-lasting consequences upon the life of an individual. It would seem preferable that future decisions in the field of judicially ordered surgery pay more heed to Justice Brennan's warning in *Schmerber* and limit bodily intrusions to the blood sampling situation.

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[69] *See* Adams v. State, 260 Ind. 663, 668, 299 N.E.2d 834, 837 (1973), *cert. denied*, 415 U.S. 935 (1974). In *Adams*, a judicially ordered surgical operation was performed under a local anesthetic in order to remove a bullet from the defendant's buttocks. 260 Ind. at 665, 299 N.E.2d at 835. Although it would appear that the surgery could be characterized as "minor," the Supreme Court of Indiana held that it was reversable error to admit the bullet into evidence at trial. *Id.* at 670, 299 N.E.2d at 838. In the words of Chief Judge Arterburn, writing for the majority:

> [I]t is evident that the Supreme Court has been faced with very limited intrusions into or upon the body of persons suspected of a crime. In the case at bar, however, we are confronted with an intrusion of the most serious magnitude. . . . We therefore hold that the Fourth Amendment prohibits the type of intrusion into the body of the suspect as occurred in this case.

Id. at 668, 299 N.E.2d at 837.

[70] 543 F.2d at 322 (Robinson, J., dissenting).