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ANALYZING THE REASONABLENESS OF BODILY INTRUSIONS

I. INTRODUCTION

The right to privacy embraces the human body as the " 'first and most basic reference for control over personal identity.' "[1] An invasion of this bodily privacy, that is, an unwanted touching, influences an individual's personal dignity. However, not every unwanted touching, no matter how minor, should be considered a violation of the self.[2] It is appropriate, therefore, that the protection of the right to privacy distinguish between serious invasions which threaten one's dignity and minor invasions which should not. The fourth amendment[3] affords such protection against unwarranted governmental intrusions.

The fourth amendment's prohibition against unreasonable searches and seizures is the most fundamental protection afforded the right to privacy.[4] This constitutional right protects persons who exhibit an actual expectation of privacy that society recognizes as reasonable.[5] However, a legitimate expectation of privacy is not enough to render an invasion violative of the fourth amendment. The search or seizure must also be unreasonable under the particular facts and cir-

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1. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-9, at 913 (1978) (quoting Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 266 & n.119 (1977)).

2. L. TRIBE, *supra* note 1, § 15-9, at 913.

3. The fourth amendment provides in part: "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. This prohibition is applicable to the states through the fourteenth amendment. *See infra* note 13. See *infra* note 19 for the United States Supreme Court's rejection of a fifth amendment privilege against self-incrimination argument.

4. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 734-35 (2d ed. 1983) ("The phrase ['right to privacy'] . . . has several meanings in terms of constitutional analysis. The oldest constitutional right to privacy is that protected by the fourth amendment's restriction on governmental searches and seizures."). "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." Schmerber v. California, 384 U.S. 757, 767 (1966).

5. Smith v. Maryland, 442 U.S. 735, 740 (1979); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The principal remedy for an unreasonable search and seizure by the government is to exclude the illegally procured evidence from the criminal prosecution. Weeks v. United States, 232 U.S. 383 (1914) (federal prosecutions); Mapp v. Ohio, 367 U.S. 643 (1961) (state prosecutions).

cumstances involved.[6] Thus, when the government procures evidence from the *body* of a criminal suspect or defendant,[7] the central question becomes whether the search was reasonable and therefore permissible under the fourth amendment.[8]

Accordingly, this Comment will focus upon the analysis of reasonableness in cases involving the removal of evidence from the human body. The few leading cases will be discussed,[9] and a framework for analysis will be proposed.[10] This framework is not designed as a rigid standard. Instead, it seeks to expose the bases upon which a search may be found to be unreasonable. The framework must remain flexible in order to properly evaluate and balance the particular facts and circumstances presented in a specific case.

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6. Schmerber v. California, 384 U.S. 757, 768 (1966) ("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.").

7. The methods of obtaining bodily evidence may be classified as nontechnical procedures, routine medical procedures, and complex medical procedures. Nontechnical procedures include cutting hair, scraping under fingernails, taking a saliva or voluntary urine sample, or swabbing skin with chemically treated cotton. Examples of routine medical procedures are body cavity examinations and blood tests. Complex medical procedures include induced regurgitation, manual massage of the prostate gland administered through the rectum, and surgery.

For a discussion of a case involving the issue of surgical procurement of evidence from a *victim*, see *infra* note 26.

8. *Schmerber*, 384 U.S. at 768. *See supra* note 6. *See generally* 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.6(a) (1978 & Supp. 1984) (personal characteristics); 2 *id.* §§ 4.1(d), 5.3(c) (intrusions into and inspections of the body); L. TRIBE, *supra* note 1, § 15-9 (governmental intrusion on the body); Eckhardt, *Intrusion Into the Body*, 52 MIL. L. REV. 141 (1971); Kroll, *Constitutionally Permissible Invasions of the Body*, 39 OKLA. B.J. 1904 (1968); McIntyre & Chabraja, *The Intensive Search of a Suspect's Body and Clothing*, 58 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 18 (1967); Comment, *Search and Seizure: Compelled Surgical Intrusions?*, 27 BAYLOR L. REV. 305 (1975) [hereinafter cited as Comment, *Compelled Surgery*]; Comment, *Constitutionality of Stomach Searches*, 10 U.S.F.L. REV. 93 (1975) [hereinafter cited as Comment, *Stomach Searches*]; Note, *Significant Medical Intrusions Under the Military Rules of Evidence*, 67 VA. L. REV. 1069 (1981) [hereinafter cited as Note, *Medical Intrusions*]; Note, *Nonconsensual Surgery: The Unkindest Cut of All*, 53 NOTRE DAME LAW. 291 (1977) [hereinafter cited as Note, *Nonconsensual Surgery*].

9. *See infra* notes 11-37 and accompanying text.

10. *See infra* notes 38-150.

II. Leading Cases

The leading cases involving the removal of bodily evidence[11] demonstrate the flexibility required for determining the reasonableness of a particular search. Each decision focused upon different factors, but each factor is helpful in deriving an overall framework.

In 1952, the United States Supreme Court ruled in *Rochin v. California*[12] that evidence obtained in violation of the due process clause of the fourteen amendment[13] was not admissible in a criminal trial.[14] The police had forcibly entered Rochin's bedroom in search of illegal narcotics and observed him put two capsules into his mouth. After failing to extract the capsules themselves, the police took Rochin to a hospital. Pursuant to police direction, a doctor forced an emetic solution through a tube into Rochin's stomach. Rochin vomited two morphine capsules which were subsequently used in the prosecution against him.[15] In reversing the conviction, the Court concluded:

> [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 pro-*

11. Schmerber v. California, 384 U.S. 757 (1966); Rochin v. California, 342 U.S. 165 (1952); United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1062 (1977). For additional United States Supreme Court decisions, see South Dakota v. Neville, 103 S. Ct. 916 (1983) (admission of defendant's refusal to submit to blood-alcohol test violated neither right against self-incrimination nor due process); Bell v. Wolfish, 441 U.S. 520 (1979) (visual body cavity searches of pretrial detainees conducted on less than probable cause were reasonable because of institution's legitimate security interests); Cupp v. Murphy, 412 U.S. 291 (1973) (fingernail scraping was reasonable because of destructibility of evidence); Breithaupt v. Abram, 352 U.S. 432 (1957) (blood sample by physician while defendant was unconscious following automobile accident did not shock Court's conscience).

12. 342 U.S. 165 (1952).

13. The fourteenth amendment provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

14. The exclusionary rule was not yet applicable to the states. *See supra* note 5.

15. *Rochin*, 342 U.S. at 166-67.

> *ceedings*[16] 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.[17]

This focus on the totality of circumstances demonstrates that the whole character of a search, not just the sum of its aspects, must be reasonable.

In *Schmerber v. California*,[18] a 1966 decision, the Supreme Court affirmed a conviction for operating an automobile while under the influence of alcohol. The Court held that the taking of a blood sample for purposes of chemical analysis was not an unreasonable search and seizure in violation of the fourth amendment.[19] After finding probable cause for Schmerber's arrest, the Court focused on three factors.[20] First of all, there was a "clear indication"[21] that the desired evidence would be found.[22] Second, a "reasonable

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16. The *Rochin* decision has been interpreted as condemning the whole course of events rather than the stomach search procedure per se. *See, e.g.*, United States v. Owens, 475 F.2d 759 (5th Cir. 1973) (per curiam); People v. Jones, 20 Cal. App. 3d 201, 97 Cal. Rptr. 492 (1971). *See also* Comment, *Stomach Searches*, *supra* note 8, at 93 ("Although no case has as yet ruled unequivocally that stomach searches *per se* are forbidden by the Constitution, the courts have placed extensive limitations on the use of such a procedure.").

17. *Rochin*, 342 U.S. at 172 (emphasis added). Justices Black and Douglas filed separate concurrences, contending that the induced-regurgitation procedure violated Rochin's fifth amendment privilege against self-incrimination. *Id.* at 175 (Black, J., concurring); *id.* at 179 (Douglas, J., concurring).

18. 384 U.S. 757 (1966).

19. *Id.* at 772. The Court also rejected several other bases for reversal. The Supreme Court adhered to its position in Breithaupt v. Abram, 352 U.S. 432 (1957), where it rejected a *Rochin* due process claim against a similar blood test procedure. *See Schmerber*, 384 U.S. at 760. The Court held that the fifth amendment privilege against self-incrimination is limited to evidence of a testimonial or communicative nature. *Id.* at 761. And the absence of a fifth amendment right precluded a sixth amendment right to counsel violation. *Id.* at 765-66.

20. *Schmerber*, 384 U.S. at 769. The Court excused the search warrant requirement because of exigent circumstances, namely the threatened destruction of evidence. *Id.* at 770. *See infra* notes 127-29 and accompanying text.

21. For a further discussion of the term, see *infra* notes 44-52 and accompanying text.

22. *Schmerber*, 384 U.S. at 770.

> 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. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

test" was chosen; it was highly reliable, medically routine, and virtually without risk, trauma, or pain.[23] And finally, performance of the test, in this case "by a physician in a hospital environment according to accepted medical practices," was reasonable.[24] The Court was careful, however, to limit its holding:

> [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 State's 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.[25]

The Supreme Court has yet to consider these "more substantial intrusions" under a fourth amendment analysis. The foremost case on the issue whether or not a criminal defendant[26] may be compelled to submit to surgery in order

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Id. at 769-70.

23. *Id.* at 771. *See infra* notes 86-102 and accompanying text.

24. *Schmerber*, 384 U.S. at 771. The Court stated that "serious questions . . . would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment. . . ." *Id.* at 771-72. *See, e.g.*, United States *ex rel.* Guy v. McCauley, 385 F. Supp. 193, 198 (E.D. Wis. 1974) (search of vaginal cavity "abused common conceptions of decency" where "the two policewomen who perpetrated the search were not medically trained, nor did they utilize medical facilities or equipment to aid them in their search, nor was it done in a hospital or medical environment."). *See infra* notes 103-06 and accompanying text.

25. *Schmerber*, 384 U.S. at 772. Chief Justice Warren dissented on the basis of the *Rochin* due process test. *Id.* at 772 (Warren, C.J., dissenting). Justices Black and Fortas dissented on the basis of the fifth amendment right against self-incrimination. *Id.* at 773 (Black, J., dissenting); *id.* at 779 (Fortas, J., dissenting). Justice Douglas agreed with both these analyses and further found that the procedure violated both the penumbra right of privacy under Griswold v. Connecticut, 381 U.S. 479 (1965), and the fourth amendment right to be secure in one's person. *Schmerber*, 384 U.S. at 778-79 (Douglas, J., dissenting).

26. In State v. Haynie, 240 Ga. 866, 242 S.E.2d 713 (1978), *rev'g*, 141 Ga. App. 688, 234 S.E.2d 406 (1977), it was the *victim* who was asked to submit to surgery. The defendant had moved for an order requiring removal of a bullet from the aggravated assault victim's body. The trial court denied the motion, but the court of appeals reversed, holding the order would be proper if the trial court found that the surgery would not be dangerous to the victim. It failed "to see why the state should be able to acquire [evidence derived from a surgical procedure] against asserted violations of the constitutional protection of the Fourth and Fifth Amendments if a criminal defendant is denied the same privilege." 141 Ga. App. at __, 234 S.E.2d at 409. The Georgia Supreme Court, however, perceived such a distinction. In reversing the court of appeals decision, the supreme court held that the "Fourth Amendment right of the

for the prosecution to obtain evidence, such as a bullet,[27] is *United States v. Crowder*,[28] in 1976. There, the defendant was arrested for the murder and robbery of a dentist. The police noticed that Crowder himself had bandages on his right wrist and left thigh. Subsequent X-rays disclosed metallic substances resembling bullets in both locations. A five-to-four majority of the District of Columbia Circuit Court of Appeals affirmed the district court's order authorizing surgery on Crowder's arm but not his thigh.[29] In distinguishing between the minor surgery utilizing a local anesthetic on the defendant's arm[30] and the major surgery requiring a general anesthetic for his thigh, the majority noted:

> Reasonableness of course is a matter of degree and we do not say that a court may authorize any challenged operation, no matter how major. . . . [W]e are not here called upon to give general approval of surgical operations in search of evidence. We are concerned only with the proce-

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victim to be secure against an unreasonable search must prevail over the right of the accused to obtain evidence for his defense." 240 Ga. at __, 242 S.E.2d at 715. A concurrence argued that the motion had to be denied because "there is neither common law nor statutory authorization for such action — *not* because the victim's Fourth Amendment rights prohibit it." *Id.* at __, 242 S.E.2d at 715 (Hall, J., concurring) (emphasis in original).

27. Lower courts have split on the issue. *See* Lee v. Winston, 717 F.2d 888 (4th Cir. 1983) (unreasonable), *cert. granted*, 104 S. Ct. 1906 (1984); United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976) (en banc) (reasonable), *cert. denied*, 429 U.S. 1062 (1977); Bowden v. State, 256 Ark. 820, 510 S.W.2d 879 (1974) (unreasonable); Doe v. State (McCaskill), 409 So. 2d 25 (Fla. Dist. Ct. App.) (per curiam) (reasonable), *cert. denied*, 418 So. 2d 1280 (Fla. 1982); Allison v. State, 129 Ga. App. 364, 199 S.E.2d 587 (1973) (reasonable), *cert. denied*, 414 U.S. 1145 (1974); Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (1972) (reasonable), *cert. denied*, 410 U.S. 975 (1973); Adams v. State, 260 Ind. 663, 299 N.E.2d 834 (1973) (unreasonable per se), *cert. denied*, 415 U.S. 935 (1974); Hughes v. State, 56 Md. App. 12, 466 A.2d 533 (1983) (reasonable); State v. Overstreet, 551 S.W.2d 621 (Mo. 1977) (unreasonable); State v. Richards, 585 S.W.2d 505 (Mo. Ct. App. 1979) (reasonable); People v. Smith, 80 Misc. 2d 210, 362 N.Y.S.2d 909 (1974) (unreasonable). Except for the *Adams* decision which adopted a per se rule, the determinative factor has been the seriousness of the proposed operation: major surgery necessitating the use of general anesthetic is unreasonable, while minor surgery utilizing local anesthetic is reasonable. *See generally* 2 W. LAFAVE, *supra* note 8, § 4.1 at 14-21; Comment, *Compelled Surgery*, *supra* note 8, at 309-12; Note, *Nonconsensual Surgery*, *supra* note 8, at 296-302.

28. 543 F.2d 312 (D.C. Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1062 (1977).

29. *Id.* at 316.

30. The total time of the operation, from scrubbing to closing the incision, was about ten minutes. And although the procedure could have been done on an outpatient basis, Crowder was hospitalized for four or five days for observation. *Id.* at 315.

> dures followed in this case. We think those procedures were reasonable and justified in the circumstances. We repeat and summarize the factors that lead us to this conclusion: (1) the evidence sought was relevant, could have been obtained in no other way, and there was probable cause to believe that the operation 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.[31]

The *Crowder* decision produced two strident dissenting opinions. Judge Leventhal would have required a strong showing by the prosecution "that the surgical procedure is necessary in order to prevent a miscarriage of justice."[32] And Judge Robinson[33] urged a per se rule prohibiting any "greater bodily explorations than the ubiquitous needle-insertion permitted in *Schmerber*."[34] Robinson argued that surgery was not routine and involved a high degree of risk, discomfort, and anxiety.[35] What both the majority and dissenting opinions indicate is that as the degree of bodily intrusion increases so must the protection of the fourth amendment.

None of the above cases have designed a uniform analysis to be employed in all situations where the government procures evidence from a criminal defendant's body. Invariably, the courts have been wary of transcending the particu-

31. *Id.* at 316.

32. *Id.* at 318 (Leventhal, J., dissenting). He continued: "No such showing was made here, in my view. The prosecution may have thought it convenient to extract the bullet as part of an investigation, but that is not enough." *Id.* *See infra* notes 70-82 and accompanying text.

33. Chief Judge Bazelon and Judge Wright joined in the opinion.

34. *Crowder*, 543 F.2d at 322 (Robinson, J., dissenting).

35. *Id.* at 321. *See infra* notes 91-102. Robinson also asserted that the bullet had no evidentiary significance since Crowder never disputed his presence at the scene of the crime. *Crowder*, 543 F.2d at 322 (Robinson, J., dissenting). For a related view, compare Judge Leventhal's need requirement discussed *supra* note 32 and accompanying text.

lar facts and circumstances of the case.[36] However, the courts have focused on four interrelated factors: the evidence, the defendant's right to privacy, society's interest in prosecuting criminals, and the procedures utilized in the invasion.[37] Consideration of these four basic elements permits the assemblage of a framework for analysis.

III. THE FRAMEWORK

In any case involving the removal of evidence from the body of a criminal defendant, the ultimate question to be answered is whether, given the facts and circumstances presented, the search is reasonable.[38] However, in order to arrive at a fair and just determination, five basic components of reasonableness must be considered: the probability that the desired evidence might be obtained;[39] the relationship of the evidence to the charges;[40] the degree of bodily intrusion;[41] procedural safeguards;[42] and the existence of exigent circumstances.[43]

A. *What is the Probability that the Desired Evidence Might be Obtained?*

The United States Supreme Court established the "clear indication" standard in *Schmerber v. California*:[44] there must exist a clear indication that the desired evidence would be found during the search.[45] Although the precise meaning of the term is not self-evident, clear indication most logically requires something more than probable cause.[46] Indeed, in

36. *See supra* text accompanying notes 17, 25 & 31.
37. *See supra* notes 12-35 and accompanying text.
38. *See supra* notes 1-8 and accompanying text.
39. *See infra* notes 44-52 and accompanying text.
40. *See infra* notes 53-82 and accompanying text.
41. *See infra* notes 83-114 and accompanying text.
42. *See infra* notes 115-23 and accompanying text.
43. *See infra* notes 124-50 and accompanying text.
44. 384 U.S. 757 (1966). *See supra* notes 18-25 and accompanying text.
45. *Schmerber*, 384 U.S. at 770. For the Court's language, see *supra* note 22.
46. 2 W. LAFAVE, *supra* note 8, § 4.1(d), at 12. *Accord* People v. Williams, 192 Colo. 249, __, 557 P.2d 399, 406 (1976) ("Rather *Schmerber* established a higher, more protective standard for these attempts to find evidence within the body. To protect human dignity such internal body searches may be made only where, in addition to the probable cause supporting the arrest, there exists a 'clear indication' to believe that relevant evidence will be obtained."). *Contra* Rivas v. United States, 368

Schmerber there was a very high probability that a blood sample would disclose an illegal blood-alcohol content since the defendant had crossed a road and struck a tree while returning from a night of drinking at a tavern.[47]

The Court would have been faced with a different situation if a significant amount of time had elapsed from the time drinking stopped to the time the blood sample was taken 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."[48] An analogous situation arises in surgery cases where a bullet may be unidentifiable even if removed.[49] In denying a request to compel the defendant to undergo surgery, the Fourth Circuit Court of Appeals noted in *Lee v. Winston*[50] that "[a] bullet inside the human body deteriorates, the rate of deterioration dependent upon the time the bullet is inside the body and also upon the body chemistry of the wounded person."[51] Clearly, searches which have a great potential for disclosing

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F.2d 703 (9th Cir. 1966) (border search case defining "clear indication" as something less than probable cause).

47. *Schmerber*, 384 U.S. at 758 n.2. *Accord* People v. Duemig, __ Colo. __, 620 P.2d 240 (1980), *cert. denied*, 451 U.S. 971 (1981) (blood test taken following automobile accident in which defendant drove off road). *See also* State v. Carthan, 377 So. 2d 308 (La. 1979) (gonorrhea test performed on defendant after semen taken from rape victim was found to contain gonorrhea); People v. Holloway, 416 Mich. 288, 330 N.W.2d 405 (1982), *cert. denied*, 103 S. Ct. 1900 (1983) (extraction of heroin packets from defendant's mouth after police officers noticed defendant's uncharacteristic silence, defendant's chewing, and several film cannisters, frequently used in the drug trade, between defendant's legs on carseat).

48. *Schmerber*, 384 U.S. at 770. *Accord* People v. Williams, 192 Colo. 249, 557 P.2d 399 (1976) (no evidence defendant drank anything or how much or when). Where a blood sample will be used for comparison of blood types, the blood found at the scene of the crime must be known to be of human origin, and not from the victim's body. *E.g.*, United States v. Allen, 337 F. Supp. 1041 (E.D. Pa. 1972); State v. Acquin, 177 Conn. 352, 416 A.2d 1209 (1979) (per curiam); Cole v. Parr, 595 P.2d 1349 (Okla. Crim. App. 1979).

49. Or where the firearm may be unidentifiable. *See, e.g.*, State v. Haynie, 240 Ga. 866, __, 242 S.E.2d 713, 715 (1978).

50. 717 F.2d 888 (4th Cir. 1983), *cert. granted*, 104 S. Ct. 1906 (1984).

51. *Id.* at 901 n.15. The bullet had been in the defendant's chest for nine months. *But see* Doe v. State (McCaskill), 409 So. 2d 25 (Fla. Dist. Ct. App.) (per curiam), *cert. denied*, 418 So. 2d 1280 (Fla. 1982) (minor surgery authorized despite fact that bullet had been in defendant's leg for five and one-half years).

useless evidence do not meet the clear indication requirement as enunciated in *Schmerber*.[52]

B. How Essential is the Evidence to a Fair Determination of the Charges?

The relationship between the evidence sought to be obtained and the offense charged against the defendant has a bearing on the reasonableness of a search.[53] Certainly, the desired evidence must be relevant to the prosecution of the case.[54] For example, saliva[55] and semen[56] samples taken from a defendant may be relevant evidence in a sexual assault trial. A murder victim's blood, skin, or hair particles found under the defendant's fingernails[57] or the victim's bullet lodged in the defendant's body[58] would be relevant to the identity of an assailant. A blood sample may help prove identity when it is compared to blood, other than the victim's,[59] found at the scene of a crime.[60] Blood[61] and urine[62] samples can disclose the presence of controlled substances in

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52. *See, e.g.*, United States v. Allen, 337 F. Supp. 1041 (E.D. Pa. 1972) (government failed to establish that blood and hair were evidence of an armed bank robbery); State v. Acquin, 177 Conn. 352, 416 A.2d 1209 (1979) (per curiam) (government failed to establish that substance on alleged murder weapons was in fact blood); Cole v. Parr, 595 P.2d 1349 (Okla. Crim. App. 1979) (government failed to establish any rational connection between hair, blood, saliva, and semen samples in its possession and the samples sought from the defendant).

53. Warden v. Hayden, 387 U.S. 294, 307 (1967) ("There must, of course be a nexus . . . between the item to be seized and criminal behavior.").

54. United States v. Crowder, 543 F.2d 312, 316 (D.C. Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1062 (1977).

55. *See, e.g.*, Cole v. Parr, 595 P.2d 1349 (Okla. Crim. App. 1979).

56. *See, e.g.*, People v. Scott, 21 Cal. 3d 284, 578 P.2d 123, 145 Cal. Rptr. 876 (1978); McClain v. State, ___ Ind. ___, 410 N.E.2d 1297 (1980); State v. Carthan, 377 So. 2d 308 (La. 1979); Cole v. Parr, 595 P.2d 1349 (Okla. Crim. App. 1979).

57. *See, e.g.*, Cupp v. Murphy, 412 U.S. 291 (1973); United States *ex rel.* Parson v. Anderson, 354 F. Supp. 1060 (D. Del. 1972), *aff'd per curiam*, 481 F.2d 94 (3d Cir.), *cert. denied*, 414 U.S. 1072 (1973).

58. *See, e.g.*, Lee v. Winston, 717 F.2d 888 (4th Cir. 1983), *cert. granted*, 104 S. Ct. 1906 (1984); United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1062 (1977); Bowden v. State, 256 Ark. 820, 510 S.W.2d 879 (1974); Doe v. State (McCaskill), 409 So. 2d 25 (Fla. Dist. Ct. App.) (per curiam), *cert. denied*, 418 So. 2d 1280 (Fla. 1982); Allison v. State, 129 Ga. App. 364, 199 S.E.2d 587 (1973), *cert. denied*, 414 U.S. 1145 (1974); Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (1972), *cert. denied*, 410 U.S. 975 (1973); Adams v. State, 260 Ind. 663, 299 N.E.2d 834 (1973), *cert. denied*, 415 U.S. 935 (1974); Hughes v. State, 56 Md. App. 12, 466 A.2d 533 (1983); State v. Overstreet, 551 S.W.2d 621 (Mo. 1977); People v. Smith, 80 Misc. 2d 210, 362 N.Y.S.2d 909 (1974).

59. *See supra* note 52 and accompanying text.

the body. Searches of a defendant's mouth,[63] vagina,[64] anus,[65] and stomach[66] may expose concealed evidence of crime, particularly evidence of drug offenses. Gunpowder[67] or dynamite[68] residue on a defendant's hands may be relevant to the identity of a criminal offender. A hair sample may be relevant evidence whenever hair found at the scene of a crime most likely belongs to the criminal offender.[69] But a finding of relevancy does not end the inquiry.

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60. *See, e.g.*, Graves v. Beto, 424 F.2d 524 (5th Cir.), *cert. denied*, 400 U.S. 960 (1970); State v. Acquin, 177 Conn. 352, 416 A.2d 1209 (1979) (per curiam); Ferguson v. State, 573 S.W.2d 516 (Tex. Crim. App. 1978), *cert. denied*, 442 U.S. 934 (1979).

61. *See, e.g.*, Schmerber v. California, 384 U.S. 757 (1966); Breithaupt v. Abram, 352 U.S. 432 (1957); United States v. Harvey, 701 F.2d 800 (9th Cir. 1983); People v. Duemig, __ Colo. __, 620 P.2d 240 (1980), *cert. denied*, 451 U.S. 971 (1981); People v. Williams, 192 Colo. 249, 557 P.2d 399 (1976).

62. *See, e.g.*, Yanez v. Romero, 619 F.2d 851 (10th Cir.), *cert. denied*, 449 U.S. 876 (1980); People v. Williams, 192 Colo. 249, 557 P.2d 399 (1976); Ewing v. State, 160 Ind. App. 138, 310 N.E.2d 571 (1974).

63. *See, e.g.*, State v. Lewis, 155 Ariz. 530, 566 P.2d 678 (1977); Foxall v. State, 157 Ind. App. 19, 298 N.E.2d 470 (1973); State v. Jacques, 225 Kan. 38, 587 P.2d 861 (1978); People v. Holloway, 416 Mich. 288, 330 N.W.2d 405 (1982), *cert. denied*, 103 S. Ct. 1900 (1983); State v. Santos, 101 N.J. Super. 98, 243 A.2d 274 (1968); Hernandez v. State, 548 S.W.2d 904 (Tex. Crim. App. 1977).

64. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979); United States *ex rel.* Guy v. McCauley, 385 F. Supp. 193 (E.D. Wis. 1974); State v. Clark, __ Hawaii __, 654 P.2d 355 (1982); State v. Fontenot, 383 So. 2d 365 (La. 1980). For a discussion of searches of the vagina at American borders, see generally 3 W. LAFAVE, *supra* note 8, § 10.5(c).

65. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979). For a discussion of searches of the anus at American borders, see generally, 3 W. LAFAVE, *supra* note 8, § 10.5(c).

66. *See, e.g.*, Rochin v. California, 342 U.S. 165 (1952); United States v. Owens, 475 F.2d 759 (5th Cir. 1973) (per curiam); United States v. Willis, 85 F. Supp. 745 (S.D. Cal. 1949); People v. Bracamonte, 15 Cal. 3d 394, 540 P.2d 624, 124 Cal. Rptr. 528 (1975); People v. Rodriguez, 71 Cal. App. 3d 547, 139 Cal. Rptr. 509 (1977); People v. Jones, 20 Cal. App. 3d 201, 97 Cal. Rptr. 492 (1971). For a discussion of searches of the stomach at American borders, see generally 3 W. LAFAVE, *supra* note 8, § 10.5(c).

67. *See e.g.*, Strickland v. State, 247 Ga. 219, 275 S.E.2d 29, *cert. denied*, 454 U.S. 882 (1981).

68. *See, e.g.*, United States v. Bridges, 499 F.2d 179 (7th Cir.), *cert. denied*, 419 U.S. 1010 (1974).

69. *See, e.g.*, *In re* Grand Jury Proceedings (Mills), 686 F.2d 135 (3d Cir.) (hair found in ski mask worn by bank robber), *cert. denied*, 103 S. Ct. 386 (1982); United States v. Weir, 657 F.2d 1005 (8th Cir. 1981) (per curiam) (hair found in ski mask worn by bank robber); Bouse v. Bussey, 573 F.2d 548 (9th Cir. 1977) (per curiam) (pubic hair found in rape investigation); United States v. D'Amico, 408 F.2d 331 (2d Cir. 1969) (per curiam) (hair found in hat worn by armed robber); United States *ex rel.* Parson v. Anderson, 354 F. Supp. 1060 (D. Del. 1972) (pubic hair found in rape-murder investigation), *aff'd per curiam*, 481 F.2d 94 (3d Cir.), *cert. denied*, 414 U.S. 1072 (1973); State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978) (pubic hair found in

The desired evidence must also be necessary,[70] a means of determining an essential element of the crime.[71] However, this necessity requirement is not absolute; the degree of necessity required should increase as the degree of bodily intrusion increases.[72] In the case of a nontechnical search,[73] the need element will be satisfied where the search is a means of proving an element of the offense. For example, in *United States v. Weir*[74] the Eighth Circuit Court of Appeals found that the comparison of Weir's hair to hair inside the bank robber's ski mask was a means of establishing identity.[75] When a routine medical procedure[76] is required, the government must show a higher degree of need. In *Schmerber v. California*[77] the Supreme Court approved of the extraction of a blood sample because it was virtually the only "highly effective means of determining the degree to which a person is under the influence of alcohol."[78] A more complex

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rape investigation); State v. Sharpe, 284 N.C. 157, 200 S.E.2d 44 (1973) (hair found under murder victim's fingernail); State v. Downes, 57 N.C. App. 102, 291 S.E.2d 186 (hair found in glove and mask worn by murderer), *cert. denied*, 306 N.C. 388, 294 S.E.2d 213 (1982); Faulkner v. State, 646 P.2d 1304 (Okla. Crim. App. 1982) (hair found in mask worn by armed robber); Commonwealth v. Robson, 461 Pa. 615, 337 A.2d 573 (pubic hair found in murder victim's bedroom where murderer was thought to have engaged in homosexual relations with the victim), *cert. denied*, 423 U.S. 934 (1975); Patterson v. State, 598 S.W.2d 265 (Tex. Crim. App. 1980) (facial and head hair found at scene of rape); State v. McCumber, 622 P.2d 353 (Utah 1980) (rapist's head hair found on victim's bed).

70. *See generally* 2 W. LAFAVE, *supra* note 8, § 4.1(d), at 12-20.

71. The element will often be identity or possession of narcotics. *See supra* notes 54-69 and accompanying text.

72. *See infra* notes 83-114 and accompanying text.

73. *See supra* note 7.

74. 657 F.2d 1005 (8th Cir. 1981) (per curiam).

75. *See id.* at 1007. For additional cases, see *supra* note 69.

76. *See supra* note 7.

77. 384 U.S. 757 (1966). *See supra* notes 18-25 and accompanying text.

78. *See id.* at 771. " '[T]he need to search' . . . was an extremely important factor in *Schmerber*. The Court approved the taking of a blood sample only because it was 'a highly effective means' of determining an essential element of the crime of which the defendant was suspected." 2 W. LAFAVE, *supra* note 8, § 4.1(d), at 19.

A blood sample to be used for comparison of blood types must also be a means of establishing an element. *See, e.g.*, United States v. Allen, 337 F. Supp. 1041 (E.D. Pa. 1972); State v. Acquin, 177 Conn. 352, 416 A.2d 1209 (1979) (per curiam); Cole v. Parr, 595 P.2d 1349 (Okla. Crim. App. 1979). In *Allen* the district court denied the government's motion for an order compelling the defendant to submit to a blood test because the government did not establish a link between the evidence and an element of bank robbery. 337 F. Supp. at 1044. In *Acquin* the Connecticut Supreme Court

medical procedure,[79] however, requires an even stronger showing of necessity. Although the bullet recovered in *United States v. Crowder*[80] suggested the defendant was present at the scene of the crime, the bullet was not necessary to establish this fact. An accomplice testified as to Crowder's presence, and the defendant conceded the issue.[81] As Professor LaFave has commented, "[t]he *Crowder* decision is most vulnerable on this score."[82]

C. *What is the Degree of Intrusion of the Defendant's Body?*

Degree of bodily intrusion should be evaluated in terms of the nature of the test,[83] the manner in which it is per-

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reversed an order compelling the defendant to submit a blood test where the government failed to establish "that the 'substance' found on the alleged murder weapons was in fact blood . . . ." 177 Conn. at __, 416 A.2d at 1211. In *Cole* the Oklahoma Court of Criminal Appeals reversed an order compelling the defendant to submit to a blood test because, without knowing that the other blood specimen was of human origin, was not the victim's, and was from the scene of the crime, the proposed blood test would not establish any element of rape or assault and battery. 595 P.2d at 1351.

A blood test is not of such an intrusive degree so as to demand absolute necessity. *See, e.g.*, Brichfield v. State, 412 So. 2d 1181, 1183-84 (Miss. 1982) (sample taken for identity purposes reasonable despite fact that the only issue in dispute was rape victim's consent); Ferguson v. State, 573 S.W.2d 516, 521 (Tex. Crim. App. 1978) ("Given the wealth of evidence of appellant's guilt, we conclude that the admission in evidence of the blood sample was harmless error beyond a reasonable doubt."), *cert. denied*, 442 U.S. 934 (1979).

79. *See supra* note 7.

80. 543 F.2d 312 (D.C. Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1062 (1977). *See supra* notes 28-35 and accompanying text.

81. 543 F.2d at 318 (Leventhal, J., dissenting); *id.* at 322 (Robinson, J., dissenting).

Surgery may be unnecessary where there are more than enough facts demonstrating the defendant's guilt. In fact, the "circumstances suggesting a clear indication that the desired evidence will be obtained through surgery may also demonstrate a clear indication of a defendant's guilt and thereby eliminate the need for surgical intrusion." Note, *United States v. Crowder*, 55 TEX. L. REV. 147, 156 (1976).

No matter how great the need, major surgery should not be authorized. *See infra* note 102.

82. 2 W. LAFAVE, *supra* note 8, § 4.1(d), at 19 (footnote omitted).

> The majority never discussed the need factor at all, apparently because it was thought sufficient that 'the evidence sought was relevant' and 'could have been obtained in no other way.' Had the need part of the *Schmerber* formula been taken into account, the court would likely have come out the other way.

Id. (footnote omitted).

83. *See infra* notes 86-102 and accompanying text.

84. *See infra* notes 103-06 and accompanying text.

formed,[84] and the availability of less intrusive alternatives.[85] The United States Supreme Court set forth the criteria for a reasonable test in *Schmerber v. California*.[86] First, the test must be a reliable means of establishing the fact sought.[87] While the test in *Schmerber* was a highly effective means of determining blood-alcohol content,[88] other scientific tests are highly circumstantial and speculative. For example, in *People v. Scott*[89] the California Supreme Court concluded that a test designed to detect trichomoniasis, a sexually transmitted disease, lacked reliability:

> The People's showing was that the procedure had "approximately a seventy percent probability" of demonstrating whether defendant had trichomoniasis; at trial it was explained that "positive" results were a reliable indicator of the infection, but that if the results were "negative" there remained a 30 percent statistical chance that the infection was nonetheless present. Thus, not only was the procedure not a "highly effective means" of establishing the presence or absence of trichomoniasis, its unreliability was biased against the defendant.[90]

Second, the acts involved in administering the test must be routine or "commonplace."[91] On the one hand, it is obvious that cutting hair,[92] washing hands,[93] cleaning finger-

85. *See infra* notes 107-14 and accompanying text.

86. 384 U.S. 757 (1966). *See supra* notes 18-25.

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

88. *Id.*

89. 21 Cal. 3d 284, 578 P.2d 123, 145 Cal. Rptr. 876 (1978). In *Scott* the defendant was convicted of incest and child molestation. Part of the evidence related to a medical test for trichomoniasis, a sexually transmitted disease. The test was prompted by an examination of his daughter revealing the presence of the disease. It consisted of a fifteen minute, manual massage of the prostate gland administered through the rectum, resulting in a discharge of semen. The results of defendant's test were negative, but did reveal a chronic prostate inflammation, of which trichomoniasis was one of the three probable causes. 21 Cal. 3d at 288-89, 578 P.2d at 124-25, 145 Cal. Rptr. at 877-78.

90. *Id.* at 295, 578 P.2d at 128, 145 Cal. Rptr. at 881.

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

92. But forcibly plucking pubic hair is not as routine. *See, e.g.*, Bouse v. Bussey, 573 F.2d 548 (9th Cir. 1977) (per curiam) (police officers restrained defendant, unzipped his jail uniform, and forcibly plucked his pubic hair); State v. Gammill, 2 Kan. App. 2d 627, 585 P.2d 1074 (1978) (about twenty-five pubic hairs were "yanked" from defendant's body).

93. The analogous procedure is swabbing the skin with chemically treated cotton.

nails,[94] and giving a urine[95] or blood[96] sample is a routine occurrence in our society. On the other hand, it is less obvious that a manual massage of the prostate gland administered through the rectum,[97] a procedure inducing regurgitation,[98] or any surgical procedure[99] is routine. The same distinction appears with respect to the final *Schmerber* criterion for a reasonable test: "that for most people the procedure involves virtually no risk, trauma or pain."[100] The routine occurrences typically involve minor discomfort, while the more complicated procedures "involve much more in the way of physical and mental discomfort and anxiety [and] pose significantly higher risks of infection and post-[procedure] complications, and an immensely greater personal affront."[101] In these situations, the proper standard for both the commonplace and freedom from risk and pain cri-

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94. *See, e.g.*, Cupp v. Murphy, 412 U.S. 291, 296 (1973) (fingernail scraping was a "very limited intrusion").

95. But forced catheterization is not as routine. But see Yanez v. Romero, 619 F.2d 851 (10th Cir.), *cert. denied*, 449 U.S. 876 (1980), in which the Tenth Circuit Court of Appeals found no constitutional violation in a police officer's threat to catheterize the defendant. "[T]he threat is not quite the same as the actual invasion." *Id.* at 855-56. *See infra* notes 140-50.

96. The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer routine in becoming blood donors.

Breithaupt v. Abram, 352 U.S. 432, 436 (1957).

97. *See, e.g.*, People v. Scott, 21 Cal. 3d 284, 578 P.2d 123, 145 Cal. Rptr. 876 (1978).

98. *See supra* note 66 and accompanying text.

Stomach searching can be accomplished by various means. The simplest method is to have the subject merely swallow an emetic solution if he or she is willing. Otherwise, the solution must be introduced into the stomach by means of a tube inserted into the stomach through the nostril. Regurgitation has also been compelled by injecting apomorphine into the blood stream by hypodermic needle. It can be produced by the administration of a saline solution or epsom salt. The suspect is thus caused to regurgitate any contraband contained in the stomach.

Comment, *Stomach Searches*, *supra* note 8, at 93 n.2.

99. *See supra* note 27.

100. *Schmerber*, 384 U.S. at 771. The question of how much force may accompany a given procedure is a separate issue from the question of how painful the procedure is. Any procedure accompanied by excessive force may become painful. *See infra* notes 140-50.

101. United States v. Crowder, 543 F.2d 312, 321 (D.C. Cir. 1976) (en banc) (Robinson, J., dissenting), *cert. denied*, 429 U.S. 1062 (1977).

teria is whether virtually anyone in the defendant's position would submit to the procedure, absent a desire to deprive the prosecution of the evidence.[102]

The performance of the test also affects the degree of intrusion. The *Schmerber* Court found that a blood sample "taken by a physician in a hospital environment according to accepted medical practices" was extracted in a reasonable manner.[103] Certainly, the same precautions must be taken for more complex medical procedures, such as the minor surgery performed in *United States v. Crowder.*[104] But where a nontechnical procedure is utilized, many courts, but not all,[105] omit these stringent medical requirements since "[t]he

102. This standard is an extension of Professor LaFave's surgical procedure standard. *See* 2 W. LAFAVE, *supra* note 8, § 4.1(d), at 16 ("It would seem, however, that certain surgical procedures are so minor that they are 'commonplace' in the sense that virtually anyone finding himself in Crowder's position would (absent the desire to deprive the authorities of the evidence) have sought removal of the bullet."). There is no reason such a standard would not work equally well in those situations in which a certain procedure becomes routinely conducted given a set of medical circumstances. This standard would also preclude major surgery on the basis of the prosecution's need for the evidence. It could not be reasoned that "virtually anyone" whose life was not threatened by the presence of a bullet would seek removal of it through a procedure where death was an inherent risk. *Cf.* 2 W. LAFAVE, *supra* note 8, § 4.1(d), at 18 ("certainly nothing more than minor surgery should be permitted no matter how great the need."); Comment, *Compelled Surgery, supra* note 8, at 315 ("The showing of attendant risk is so strong [where major surgery is proposed] as to render any attempted removal unreasonable per se."); Note, *Nonconsensual Surgery, supra* note 8, at 303 ("Nonconsensual major surgery should be a *per se* violation of both the fourth and fourteenth amendment.").

103. *See Schmerber,* 384 U.S. at 771. *Accord* State v. Cary, 49 N.J. 343, ___, 230 A.2d 384, 386 (1967). *See also* United States *ex rel.* Guy v. McCauley, 385 F. Supp. 193 (E.D. Wis. 1974) (search of vaginal cavity was unreasonable where not performed by medically trained person in medical environment with medical equipment). *But see, e.g.,* State v. Carthan, 377 So. 2d 308 (La. 1979) (taking of blood sample by lab technician, not physician, was reasonable).

104. 543 F.2d 312, 316 (D.C. Cir. 1976) (en banc), *cert. denied,* 429 U.S. 1062 (1977). See *supra* text accompanying note 31 for the court's language.

105. *See, e.g.,* State v. Gammill, 2 Kan. App. 2d 627, ___, 585 P.2d 1074, 1077 (1978) ("Furthermore, provisions could have been made for a physician or medical technician to obtain the [pubic hair] sample under circumstances which would afford the defendant the dignity to which every person is entitled under his presumption of innocence."). *See also* People v. Rankins, 81 Mich. App. 694, 265 N.W.2d 792 (1978) (hair samples taken by doctor in hospital where defendant was being treated following a high speed automobile accident).

simplicity of the test makes it unnecessary to have it conducted by a physician."[106]

However, a reasonable test that is reasonably performed does not necessarily ensure that the degree of bodily intrusion is insignificant. The availability of less intrusive alternatives must be considered.[107] In nontechnical procedure cases, this concern will rarely be a problem since the intrusion itself is so minor.[108] And only in limited cases will it be unreasonable to administer a blood-alcohol test when a breathalyzer test[109] or the admission of the defendant's refusal to submit to such a blood test[110] is available.[111] But in complex medical procedure cases the alternatives become much more important. Courts have recognized that induced regurgitation should never be resorted to where the drugs in the defendant's stomach are known to be stored in an insoluble container[112] and are expected to pass safely through the digestive tract.[113] And the *Crowder* decision mandates that

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106. United States v. Smith, 470 F.2d 377, 379 (D.C. Cir. 1972) (per curiam). In *Smith* the defendant was convicted of assault with intent to commit rape, partly on the basis of a benzidine test. The test entailed "swabbing the suspected area with cotton that has been saturated with water. The cotton is then immersed in a benzidine solution. . . . Even the most minute quantity of blood will trigger [a color-change] reaction." *Id.* at 378 n.3. The test was positive indicating the presence of blood on the defendant's penis. *Id.* at 377-79. *See also* United States v. Weir, 657 F.2d 1005 (8th Cir. 1981) (per curiam) (reasonable search where FBI agents combed and plucked the defendant's head, beard, and mustache for hair samples); United States v. Bridges, 499 F.2d 179 (7th Cir.) (reasonable search where FBI agents swabbed the defendant's hand in order to determine the presence of dynamite particles), *cert. denied*, 419 U.S. 1010 (1974).

107. An officer faced with alternative means of obtaining evidence must use the most reasonable one. Comment, *Stomach Searches*, *supra* note 8, at 99.

108. *See supra* notes 91-102 and accompanying text.

109. *See, e.g.*, Commonwealth v. Quarles, 229 Pa. Super. 363, 324 A.2d 452 (1974); State v. Swiderski, 94 N.J. Super. 14, 226 A.2d 728 (1967).

110. *See, e.g.*, South Dakota v. Neville, 103 S. Ct. 916 (1983).

111. Such a case may involve one who refuses on "grounds of fear, concern for health, or religious scruple." *Schmerber*, 384 U.S. at 771. The *Schmerber* decision left the issue undecided. *Id.*

Where only the defendant's blood type is desired for comparison purposes, records containing this medical information may be a reasonable alternative if available.

112. Such as a balloon or condom. If it is thought that the narcotics would soon be absorbed into the defendant's digestive system, a procedure utilizing water instead of an emetic should be used. *See* People v. Jones, 20 Cal. App. 3d 201, 205, 97 Cal. Rptr. 492, 494 (1971) ("in the case of barbituric intoxication, the use of an emetic can cause deepening of an impending coma.").

113. *See, e.g.*, People v. Bracamonte, 15 Cal. 3d 394, 403-04, 540 P.2d 624, 630-31, 124 Cal. Rptr. 528, 534-35 (1975) ("It thus appears that defendant in the instant

compelled surgery never be performed where there is *any* alternative available.[114]

D. *What Procedural Safeguards are Required?*

In *Schmerber v. California*[115] the United States Supreme Court established a general rule requiring warrants when the dignity of the human body is threatened:

> Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. . . . 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.[116]

Some courts have refused to apply this rule to such a minor intrusion as the taking of a hair sample.[117] They argue that "the simple extraction of hair samples from the body of an accused is so minimal and unintrusive as to be a reasonable search, even absent a warrant for the purpose."[118] But other courts have required search warrants since "hairs may be expected to remain where they are for a considerable pe-

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case easily could have been transported to jail and placed in an isolation cell and kept under proper surveillance."); People v. Rodriguez, 71 Cal. App. 3d 547, 557-58, 139 Cal. Rptr. 509, 514 (1977) ("Nothing in this record justifies any conclusion but that, had the normal processes of digestion and elimination been allowed to take their course, the balloons would have been recovered and defendant been healthy."). *See generally* Comment, *Stomach Searches*, *supra* note 8, at 98-102.

114. *Crowder*, 543 F.2d at 316. See *supra* text accompanying note 31 for the court's language. Despite the lack of an alternative, major surgery should never be authorized. *See supra* note 102.

115. 384 U.S. 757 (1966). *See supra* notes 18-25 and accompanying text.

116. *Schmerber*, 384 U.S. at 770. *Accord* Graves v. Beto, 424 F.2d 524 (5th Cir.) (warrant required for testing of blood type), *cert. denied*, 400 U.S. 960 (1970); State v. Clark, ___ Hawaii ___, 654 P.2d 355 (1982) (a body cavity search without a warrant is presumptively unreasonable).

117. *See, e.g.*, United States v. Weir, 657 F.2d 1005 (8th Cir. 1981) (per curiam); United States v. D'Amico, 408 F.2d 331 (2d Cir. 1969) (per curiam); State v. Brierly, 109 Ariz. 310, 509 P.2d 203 (1973); State v. Downes, 57 N.C. App. 102, 291 S.E.2d 186, *cert. denied*, 306 N.C. 388, 294 S.E.2d 213 (1982); Faulkner v. State, 646 P.2d 1304 (Okla. Crim. App. 1982); State v. McCumber, 622 P.2d 353 (Utah 1980).

118. State v. McCumber, 622 P.2d 353, 358 (Utah 1980).

riod of time — certainly long enough to obtain a valid search warrant . . . ."[119]

On the other hand, where a surgical procedure is involved, much more than a search warrant is required.[120] The procedural requirements of *United States v. Crowder*[121] demand that the defendant be afforded an adversary hearing with right to counsel and an opportunity for appellate review prior to the operation.[122] Any decision to permit the surgery is to be a court's, not a surgeon's, because "surgical procedures are frequently subjects of divergent medical opinions as to their complexity and the seriousness of the risks involved."[123]

E. Are There any Exigent Circumstances?

A search that would ordinarily be considered unreasonable may be justified by the exigent circumstances presented in the case. These circumstances typically involve the possible destruction of evidence,[124] a threat to life,[125] or the use of force.[126]

The destruction of evidence concern may result from the nature of the evidence itself or the potential actions of the defendant. Although *Schmerber v. California*[127] set forth a general rule requiring a search warrant for intrusions upon the human body,[128] the Supreme Court excused noncompli-

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119. State v. Gammill, 2 Kan. App. 2d 627, __, 585 P.2d 1074, 1077 (1978). *Accord* Bouse v. Bussey, 573 F.2d 548 (9th Cir. 1977) (per curiam); Commonwealth v. Robson, 461 Pa. 615, 337 A.2d 573, *cert. denied*, 423 U.S. 934 (1975).

120. *See generally* 2 W. LAFAVE, *supra* note 8, § 4.1(d), at 20-21; Comment, *Compelled Surgery*, *supra* note 8, at 317; Note, *Nonconsensual Surgery*, *supra* note 8, at 302-04.

121. 543 F.2d 312 (D.C. Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1062 (1977).

122. *See id.* at 316. See *supra* text accompanying note 31 for the court's language.

123. *Crowder*, 543 F.2d at 323 (Robinson, J., dissenting) (footnote omitted). *Accord* State v. Overstreet, 551 S.W.2d 621 (Mo. 1977). In *Overstreet* the trial court, without an evidentiary hearing, ordered a doctor to remove a bullet from the defendant's buttocks if, after examining him, the physician felt removal would not endanger defendant's health, safety, or life. The doctor administered a local anesthetic and removed the bullet. 551 S.W.2d at 623-24. In reversing the defendant's conviction for first degree robbery and murder, the Missouri Supreme Court chastized the trial court for not following the procedural requirements applied in *Schmerber*. *Id.* at 627-28.

124. *See infra* notes 127-31 and accompanying text.

125. *See infra* notes 132-39 and accompanying text.

126. *See infra* notes 140-50 and accompanying text.

127. 384 U.S. 757 (1966). *See supra* notes 18-25.

128. *See supra* notes 115-19 and accompanying text.

ance with the rule in that case. The Court reasoned that since blood-alcohol content dissipates shortly after drinking stops, the threatened destruction of intoxication evidence presented "no time to seek out a magistrate and secure a warrant."[129] And in *Cupp v. Murphy*[130] the Supreme Court held that a fingernail scraping was a reasonable search where the defendant could have destroyed the evidence and had actually attempted to do so.[131]

A particular search may also be reasonable where a threat to human life is involved. In *Bell v. Wolfish*[132] the United States Supreme Court approved visual body cavity

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

> The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened "the destruction of evidence" . . . . Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an approximate incident to petitioner's arrest.

Id. at 770-71 (citation omitted). *See* Ewing v. State, 160 Ind. App. 138, __, 310 N.E.2d 571, 578 (1974) ("It is a physiological fact that narcotic drugs, like alcohol, will diminish or disappear as the human body eliminates it from the system." Urinalysis revealing morphine in violation of probation conditions was reasonable.). *See also* People v. Bracamonte, 15 Cal. 3d 394, 404, 540 P.2d 624, 631, 124 Cal. Rptr. 528, 535 (1975) ("If, in the instant case, there was reasonable cause to believe that the balloons would not pass through the digestive tract but instead would break open and thereby dissipate . . . the fear of the destruction of evidence might also justify [the intrusion into defendant's stomach].). *But see* People v. Rodriguez, 71 Cal. App. 3d 547, 139 Cal. Rptr. 509 (1977) (no exigent circumstances where narcotics in stomach were known to have been in a balloon); State v. Clark, __ Hawaii __, 654 P.2d 355 (1982) (no exigent circumstances since money secreted in vaginal cavity would not dissipate); State v. Fontenot, 383 So. 2d 365 (La. 1980) (no exigent circumstances since narcotics secreted in vaginal cavity were known to have been in a bottle).

130. 412 U.S. 291 (1973).

131. *Id.* at 296. *See* United States v. Bridges, 499 F.2d 179 (7th Cir.) (dynamite particles on defendant's hands could easily have been removed by washing his hands), *cert. denied*, 419 U.S. 1010 (1974); United States v. Smith, 470 F.2d 377 (D.C. Cir. 1972) (per curiam) (blood on defendant's penis could have been destroyed by a thorough washing); Brent v. White, 398 F.2d 503 (5th Cir. 1968) (blood on defendant's penis), *cert. denied*, 393 U.S. 1123 (1969). *But see* Cupp v. Murphy, 412 U.S. 291, 304 (1973) (Douglas, J., dissenting) (warrant requirement is not excused where defendant could be detained and prevented from destroying the evidence); State v. Clark, __ Hawaii __, 654 P.2d 355 (1982) (defendant could have been precluded from destroying the money secreted in her vaginal cavity); State v. Fontenot, 383 So. 2d 365 (La. 1980) (defendant could have been precluded from destroying the narcotics secreted in her vaginal cavity).

132. 441 U.S. 520 (1979).

searches[133] of pretrial detainees conducted on less than probable cause.[134] The Court reasoned that since "[a] detention facility is a unique place fraught with serious security dangers," these searches properly deterred and detected the smuggling of weapons into the facility.[135] But some searches are designed to protect the life of the defendant subjected to the search.[136] For example, in *United States v. Owens*[137] the authorities arrested a man suspected of secreting narcotics in his stomach. When the man lapsed into a semi-conscious or unconscious state, they took him to a hospital and directed a physician to "pump"[138] the man's stomach. The Fifth Circuit Court of Appeals held that the defendant could not complain that his rights were violated because the "officers acted in good faith to prevent further harm to him."[139]

Exigent circumstances may also justify the use of force to effectuate a search.[140] The defendant's "resistance alone does not make an otherwise proper search illegal."[141] Also, "the use of a reasonable amount of force by the government, in conjunction with the use of a reasonable method in exe-

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133. "If the inmate is male, he must lift his genitals and bend over to spread his buttocks for visual inspection. The vaginal and anal cavities of female inmates also are visually inspected." *Id.* at 558 n.39. The searches followed "every contact visit with a person from outside the institution." *Id.* at 558 (footnote omitted).

134. *Id.* at 560.

135. *Id.* at 559. The Court was also concerned with the smuggling of money, drugs, and other contraband. *Id.*

136. These cases typically arise when narcotics concealed in the stomach or vaginal or anal cavities threaten to be absorbed in the defendant's digestive system.

137. 475 F.2d 759 (5th Cir. 1973) (per curiam).

138. *See supra* note 98.

139. *Owens*, 475 F.2d at 760. *See* People v. Jones, 20 Cal. App. 3d 201, 97 Cal. Rptr. 492 (1971) (physician was motivated by concern for defendant's life; no police direction).

140. *See generally* Comment, *Stomach Searches*, *supra* note 8, at 104-06.

> Use of force, as a factor of reasonableness, is closely related to the proposition that a procedure used to seize evidence should involve virtually no risk, pain or trauma. However, the latter refers only to pain and trauma inherent in the procedure; whereas, the former refers to conduct which is itself necessary to effect the search. Both the terms "force" and "pain" are difficult of precise definition — the degree and kind that are permissible vary widely with different facts.

Id. at 104-05.

141. People v. Bracamonte, 15 Cal. 3d 394, 406, 540 P.2d 624, 632, 124 Cal. Rptr. 528, 536 (1975).

cuting the search . . . is constitutionally permissible."[142] However, use of force is constrained by both due process requirements[143] and medical risk.[144]

In *Rochin v. California*[145] the United States Supreme Court manifested the due process constraint. There, the Court was confronted with a course of events in which police officers illegally broke into the defendant's bedroom, struggled to open his mouth and remove what was there, and compelled a physician to forcibly extract what he had swallowed.[146] The Court reversed the defendant's conviction for possession of a narcotic and chastised the government for wielding "force so brutal and so offensive to human dignity."[147] Lower courts have similarly held searches to be unreasonable when the police conduct did not "afford the defendant the dignity to which every person is entitled under his presumption of innocence."[148]

The second constraint on the use of force to effectuate a search is the prohibition that the procedure become medi-

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142. People v. Holloway, 416 Mich. 288, __, 330 N.W.2d 405, 409 (1982), *cert. denied*, 103 S. Ct. 1900 (1983).

143. *See infra* notes 145-48 and accompanying text. The fifth amendment provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. For the language of the fourteenth amendment, see *supra* note 13.

144. *See infra* notes 149-50 and accompanying text.

145. 342 U.S. 165 (1952). *See supra* notes 12-17 and accompanying text.

146. *Rochin*, 342 U.S. at 172.

147. *Id.* at 174.

148. State v. Gammill, 2 Kan. App. 2d 627, __, 585 P.2d 1074, 1077 (1978) (forcibly "yanking" about twenty-five pubic hairs from the defendant was unreasonable). *Accord* Bouse v. Bussey, 573 F.2d 548 (9th Cir. 1977) (per curiam) (forcibly plucking pubic hairs was unreasonable); United States v. Townsend, 151 F. Supp. 378 (D.C. 1957) (restraining defendant by twisting his arms violated fifth amendment due process). *But see* Yanez v. Romero, 619 F.2d 851 (10th Cir.), *cert. denied*, 449 U.S. 876 (1980). In *Yanez* the defendant, who was under surveillance, entered a service station restroom. State police burst into the room where they saw a recently used hypodermic needle and fresh needlemarks on defendant's arm. Defendant was arrested and transported to a hospital for a urine sample. Defendant refused but subsequently submitted after being threatened with catheterization. The sample revealed the presence of morphine, and the defendant was convicted of unlawful possession. *Id.* at 851. A two-to-one majority of the Tenth Circuit Court of Appeals affirmed the conviction, holding that the threat alone, absent any actual violence or brutality, did not violate the *Rochin* due process standard. *Id.* at 854-56. Judge McKay dissented, arguing that *Rochin* condemned threatened indignities along with the actual conduct. *Id.* at 856 (McKay, J., dissenting).

cally unsafe.[149] "If the defendant chooses to resist [a procedure], the physician performing the test together with other authorized personnel may take such medically appropriate steps as they would use to control any difficult patient; [but] inappropriate force is condemned."[150]

IV. CONCLUSION

In the context of the human body, the fourth amendment's challenge is to reconcile dignity with justice. It must afford an environment of privacy in which personal dignity may flourish. But it must also prevent this environment from becoming a refuge for those who would ask the criminal justice system to ignore appropriate evidence. To answer this challenge, the fourth amendment must restrict bodily intrusions to only limited situations and in only a limited manner. The vehicle for this accommodation is "reasonableness."

A search designed to procure evidence from the human body must be reasonable given the facts and circumstances presented. The search should not be initiated unless there exists a high probability, or "clear indication," that the desired evidence will be produced. This evidence must be relevant to the offense charged and a means of determining an essential element of that offense; the degree of necessity should increase as does the degree of intrusion. The degree of intrusion must be as limited as reasonably practical; only a reasonable procedure that is performed in a reasonable manner and in the absence of any less intrusive alternative may be sanctioned. A search warrant issued by a neutral magistrate should be required unless the societal interests in preserving evidence and human life demand more immediate action. When minor surgical procedures are to be employed, a court order based on strict necessity must be granted only after an adversary hearing with counsel; furthermore, there must be an opportunity for appellate review.

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149. *See* Comment, *Stomach Searches, supra* note 8, at 106.

150. State v. Cary, 49 N.J. 343, __, 230 A.2d 384, 388 (1967). *See* People v. Duemig, __ Colo. __, 620 P.2d 240 (1980) (although force was used to restrain defendant, the blood sample was not unsafe under the circumstances), *cert. denied*, 451 U.S. 971 (1981).

And the use of force to effectuate the search must remain humane and medically appropriate. Such a concept of reasonableness promotes the interests of our society by preserving the individual's privacy interest and the government's need for evidence.

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