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# Fourth Amendment Balancing and Searches into the Body

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# Fourth Amendment Balancing and Searches into the Body

*The United States Court of Appeals for the District of Columbia Circuit upheld as reasonable the surgical removal of a bullet from the defendant's body without his consent. The author analyzes the court's reasoning and suggests an analytical approach for courts to use when dealing with such bodily intrusions. The author concludes that the courts should weigh such factors as the seriousness of the crime, the importance of the evidence, the probability of obtaining the evidence, the availability of alternative evidence and the risk of danger to the defendant.*

Acting on information obtained from a confederate, the Washington, D.C. police arrested James L. Crowder for the slaying of Dr. James Bowman. The police believed that two bullets fired from the same pistol that slayed the decedent were embedded within Crowder's body.[1] Desiring the bullets for use at trial the police brought Crowder to D.C. General Hopsital. Their suspicions were confirmed when x-rays disclosed metal slugs lodged in his left thigh and right forearm.[2] The state subsequently obtained a limited court order authorizing the surgical removal of the bullet in Crowder's arm by establishing probable cause[3] to believe that Crowder had killed the decedent and that evidence of the crime was located inside his body, and through submission of a medical affidavit that attested to the minimal nature of the surgery required to obtain the bullet.[4] The

1. The police based their belief on information obtained from an informant and the circumstances of the case. The informant told the police that she and Crowder went to the victim's office to rob him. When Crowder confronted the victim with a toy pistol, the victim reached into his desk drawer and picked up a revolver. A scuffle ensued between the victim and Crowder. The informant fled, hearing gun shots as she ran. After rejoining her, Crowder stated that he had been shot twice but thought he had killed the victim. In the vicinity of this meeting, the police later found a .32 caliber Smith & Wesson revolver with four of its six chambers empty. The two wounds in Crowder's body, together with the fact that the deceased had been shot twice by a .32 caliber firearm, and the condition of the weapon found near the scene of the crime (four or its six chambers were empty), raised the inference that the two missing rounds were embedded within Crowder's wounds.

2. The record does not indicate that the state obtained a warrant before x-rays were administered. A Connecticut court recently has required that a warrant be obtained prior to taking x-rays of an in-custody defendant. State v. Anonymous, 32 Conn. Supp. 306, 353 A.2d 789 (Super. Ct. 1976).

3. The existence of probable cause was unchallenged by both the defense and the dissent.

4. The doctor's affidavit, in discussing the extent of the surgery, stated that "[i]t was a very superficial wound . . . . [I]t is a superficial lesion, just like removing a small seba-

denial of a petition for writ of prohibition against execution of the court order paved the way both for the surgery and the admission into evidence of the discovered bullet at Crowder's trial. Upon conviction Crowder appealed, contending *inter alia*[5] that the district court erred in receiving into evidence the bullet removed without his consent.[6] Initially the court of appeals reversed the district court.[7] On rehearing en banc, held, *affirmed*: Surgery to obtain a bullet from the body of a suspect as evidence of his crime is a constitutionally permissible search.[8] *United States v. Crowder*, 543 F.2d 312 (D.C. Cir. 1976).

With the increasing application of scientific techniques to police investigatory procedures, the courts have been compelled to confront fourth amendment problems not contemplated by the framers of the constitution.[9] These techniques include electronic eavesdropping,[10] blood testing,[11] use of voice exemplars,[12] x-rays,[13] laboratory analysis of fingernail scrapings[14] and other scientific developments.[15] Although these techniques are primarily used to identify

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ceous cyst; it would not produce any lasting defect that I can envision." 543 F.2d at 314. The court refused to permit the removal of the bullet in Crowder's leg because the doctor indicated that it posed a significantly greater risk of danger to the defendant.

5. Crowder also argued that the denial of a self-defense instruction to the jury was reversible error. This note will not deal with that issue.

6. It has been held that bullets obtained through an operation on the defendant to which he consented in advance were not excludable on the basis of unreasonable search and seizure. Webb v. State, 467 S.W.2d 449 (Tex. Crim. App. 1971).

7. United States v. Crowder, 513 F.2d 395 (D.C. Cir. 1975). This opinion was withdrawn upon notice of rehearing en banc.

8. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV.

9. *See generally*, Boyd v. United States, 116 U.S. 616 (1886); J. LANDYNSKI, SEARCHES AND SEIZURES AND THE SUPREME COURT (1966); Weinreb, *Generalities of the Fourth Amendment* 42 U. CHI. L. REV. 47 (1974). These sources indicate that the hated "general warrant" issued by the British particularly concerned the drafters of the fourth amendment.

10. Katz v. United States, 389 U.S. 347 (1967); Olmstead v. United States, 277 U.S. 438 (1928).

11. Schmerber v. California, 384 U.S. 757 (1966); Breithaupt v. Abram, 352 U.S. 432 (1957); Graves v. Beto, 424 F.2d 524 (5th Cir.), *cert. denied*, 400 U.S. 960 (1970).

12. United States v. Dionisio, 410 U.S. 1 (1973).

13. State v. Anonymous, 32 Conn. Supp. 306, 353 A.2d 789 (Super. Ct. 1976).

14. Cupp v. Murphy, 412 U.S. 291 (1973).

15. Other instances of forensic science raising fourth amendment questions are Davis v. Mississippi, 394 U.S. 721 (1969) (fingerprinting); United States v. Bridges, 499 F.2d 179 (7th

the perpetrator of a crime, the police have begun to apply them to the gathering of evidence bearing directly on the crime itself.[16] Regardless of the technique employed, common to them all is a level of intrusiveness unrecognized (and unprovided for) when the fourth amendment was adopted.[17] In this context the important question is posed: what is the proper analysis the courts should apply when confronted with such highly intrusive police conduct.[18] In answering this question a framework of analysis will first be developed and then applied to the intrusions made in the instant case.

Both the majority and the dissent in *Crowder* cite *Schmerber v. California*[19] as controlling precedent for their position on the reasonableness of the search. In *Schmerber*, the Supreme Court upheld the admission into evidence of the results of a nonconsensual blood test, rejecting appellant's claims under the fourth and fifth amendment[20] and the fourteenth amendment due process clause.[21] The

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Cir.) (swabbing the suspect's hands with a chemical agent to determine if he had recently handled explosives), *cert. denied*, 419 U.S. 1010 (1974); United States v. D'Amico, 408 F.2d 331 (2d Cir. 1969) (snipping strands of the suspect's hair); United States *ex rel.* Parson v. Anderson, 354 F. Supp. 1060 (D. Del. 1972) (fingernail scraping, combing of pubic hair, and blood test), *aff'd*, 418 F.2d 94 (3d Cir.), *cert. denied*, 414 U.S. 1072 (1973); *cf.* People v. Williams, 164 Cal. App. 2d Supp. 858, 331 P.2d 251 (1958) (administering Nalline test to determine if suspect is under the influence of drugs).

16. This latter development is in part attributable to the demise of the "mere evidence" rule, thereby removing constitutional restraints that previously limited the police to searching for instrumentalities and fruits of crime along with contraband, while prohibiting their search for mere evidence of a crime. Warden v. Hayden, 387 U.S. 294 (1967), *overruling* Gouled v. United States, 255 U.S. 298 (1921). Arguably all forensic techniques (i.e. fingerprinting, voice and handwriting exemplars, etc.) are ultimately employed for evidentiary purposes. Certain techniques are distinguishable from others, however, in that their evidentiary value does not depend on the biological uniqueness of the suspect (for example, electronic eavesdropping and alcohol blood testing). The application of these highly intrusive invasions have troubled the courts because of their adverse effects on the individual's right of privacy. *See* cases cited note 15, *supra*.

17. *See* note 9, *supra*.

18. Under the majority's statement of the facts this case provides a textbook example of the problem. The state not only established probable cause for the court order but provided the suspect with a hearing and counsel to determine the matter, followed by right of appeal. The order issued by the court was narrowly drawn permitting removal only of the bullet in the suspect's arm and only under the most stringent medical guidelines.

19. 384 U.S. 757 (1966).

20. Appellant argued that the blood test was testimonial in character and so its introduction into evidence violated his fifth amendment privilege against self-incrimination. The Court rejected this claim stating: "The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a subject or accused the source of 'real or physical evidence' does not violate it." *Id.* at 764.

Court, which had previously condoned the use of nonconsensual blood tests, took the opportunity in *Schmerber* to place them squarely within a fourth amendment framework.[22] The Court analyzed the case by applying traditional fourth amendment questions to the search, implicitly holding that blood tests and body intrusions were not per se unreasonable. The search was found reasonable because sufficient probable cause existed for the officer to believe that alcohol would be found in the suspect's blood, the test applied was itself reasonable, and the manner in which it was conducted was reasonable.[23]

The majority in *Crowder* felt that the *Schmerber* standard was satisfied by four elements: (1) the establishment of probable cause that Crowder was the murderer and that evidence was lodged within his body; (2) the procedural protections afforded the defendant for challenging issuance of the order; (3) the minor nature of the surgery involved; and (4) the stringent medical safeguards taken in his behalf.[24] In so holding, the majority ignored the specific considerations that convinced the Court in *Schmerber* to find that blood tests were themselves reasonable tests. The majority instead chose to focus on the reasonableness of the manner in which the search was performed

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The Court limited its holding to an interpretation of the federal privilege and expressed no opinion as to broader state self-incrimination privileges. However, a state court in which a broad self-incrimination privilege existed ("No person . . . shall be compellable to give evidence for or against himself." GA. CODE ANN. §§ 38-416 (1974)) compelled a defendant to submit to a nonconsensual surgical search for a bullet to be admitted into evidence against him. Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (1972), *cert. dismissed*, 410 U.S. 975 (1973). This decision was seriously questioned but followed by a lower Georgia court. Allison v. State, 129 Ga. App. 364, 199 S.E.2d 587 (1973), *cert. denied*, 414 U.S. 1145 (1974).

21. Neither *Schmerber* nor *Crowder* found violations of due process. In both instances, the courts found procedural satisfaction of the standards enunciated in Rochin v. California, 342 U.S. 165 (1952). In the context of the issues herein raised, note Justice Black's remark in Breithaupt v. Abrams, 352 U.S. 432 (1957):

> We should, in my opinion, hold 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, whether they contemplate doing it by force or stealth.

*Id.* at 442.

22. Breithaupt v. Abrams, 352 U.S. 432 (1957), while constitutionally validating blood tests, did so on due process grounds. This was partly because the exclusionary rule had not yet been applied to the states. After the Court's decision applying the exclusionary rule to the states in Mapp v. Ohio, 367 U.S. 643 (1961), the question of the reasonableness of the search under the fourth amendment became primary.

23. Schmerber v. California, 384 U.S. at 768-72.

24. 543 F.2d at 316.

and the existence of probable cause.[25] The majority cited *Schmerber* in support of its holding by quoting broad fourth amendment dicta stated therein.[26] A close reading of both cases will suggest that each court confronts the fourth amendment problem similarly by applying a "reasonableness under the circumstances" approach.[27] *Crowder*, however, neither mentions the specific reasonableness criteria that guided the Court in *Schmerber*[28] to approve blood tests nor formulates specific criteria of its own.[29]

Unlike the majority, the dissent in *Crowder* examined and relied upon the specific policy considerations found in *Schmerber*. The dissent argued that blood tests and surgery differed significantly in that surgery was not commonplace and involves far greater risk, pain, and trauma. In addition, the dissent noted that surgery has no deterrent effect on criminal behavior, in contrast to the discernible effect that blood tests may have on drunk driving. Moreover, while blood tests are generally dispositive of the question of inebriation, surgery offers no similar conclusiveness.[30] Finally the dissent contended that judges lack the competency to authorize nonconsensual surgery because of the multitude of medical considerations involved and the lack of reliable medical guidance.[31]

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25. *Id.*

26. The majority quoted language from *Schmerber*: "[T]he Fourth Amendment's proper function is to constrain, not against all instrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." 543 F.2d at 316, *citing* Schmerber v. California, 384 U.S. at 768.

27. This formulation of the applicable standard appears throughout fourth amendment case law. Schmerber v. California, 384 U.S. at 768; Ker v. California, 374 U.S. 23, 33 (1963); United States v. Rabinowitz, 339 U.S. 56, 61-64 (1950); Go-Bart Importing Co., v. United States, 282 U.S. 344, 357-58 (1931).

28. 384 U.S. at 770-72.

29. The author of the majority opinion, dissenting on the first appeal decision, argued that the surgery could be justified by the state's interest "in bringing a murderer to book." United States v. Crowder, 513 F.2d at 405 (opinion withdrawn).

30. The fact that a bullet removed from Crowder's body is shown to come from the same gun that killed the victim does not conclusively establish that Crowder killed the victim.

31. Among the considerations raised by the dissent to support this contention are that: (1) little guidance from precedent is available to aid the judge in making his determination; (2) an infinite amount of variables are involved, thus preventing the development of a useful body of case law and further complicating the decisionmaking process; (3) an absence of safeguards insuring the accuracy of medical evidence exists; (4) an unequal access to medical experts prevents the judge from obtaining the wide range of medical opinion necessary for the issuance of medically safe court orders; and (5) potentially disastrous consequences can result if either the judge is misled or the medical practitioner errs.

Courts have, however, made decisions in the past involving medical considerations in a reliable fashion. Buck v. Bell, 274 U.S. 200 (1927); Jacobson v. Massachusetts, 197 U.S. 11

Thus the majority and dissent in *Crowder* rely on different aspects of *Schmerber* and consequently fail to directly confront each other's arguments. The result is not surprising in light of the precautionary language[32] stated in *Schmerber* and the variety of issues raised. The difficulty in coherently applying *Schmerber* has been evidenced by the various propositions for which it has been cited by other courts.[33]

Although *Schmerber* is the Supreme Court decision most closely paralleling *Crowder* factually, its factual bearing on *Crowder* is not free from limitation; that is, the former involved a blood test to establish intoxication of a driver, while the latter involved surgery to obtain evidence for the prosecution of a suspected murderer. The *Crowder* majority circumvents this factual distinction by relying upon *Schmerber's* broad fourth amendment language rather than its specific analysis of the facts.[34] The majority is thus able to avoid the specific medical considerations stated in *Schmerber* which the dissent deemed so important. Moreover, through use of a "reasonableness under the circumstances" approach, the court is able to distinguish the condoned surgery from the aggravated and

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(1905); In re President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964). *See also* Roe v. Wade, 410 U.S. 113 (1973); Huguez v. United States, 406 F.2d 366 (9th Cir. 1968); Blefare v. United States, 362 F.2d 870 (9th Cir. 1966).

32. The Court somewhat ambiguously limited its holding, stating: "That we today hold that the Constitution does not forbid the States *minor intrustions* into a individual's body under stringently limited conditions in no way indicates that it permits more *substantial intrusions*, or intrusions under other conditions." 384 U.S. at 772 (emphasis added). However, nowhere in the opinion does the Court specifically define what is meant by "minor intrusions" and "more substantial intrusions," nor does it expressly forbid more substantial intrusions.

33. *See, e.g.*, Graves v. Beto, 424 F.2d 524 (5th Cir.) (a blood test must be consented to unless taken under emergency conditions), *cert. denied*, 400 U.S. 960 (1970); Rivas v. United States, 368 F.2d 703, 710 (9th Cir. 1966) (if a border search is to include an exploration of body cavities there must be a "clear indication" that evidence is hidden therein), *cert. denied*, 386 U.S. 945 (1967); Brown v. Jones, 407 F. Supp. 686 (W.D. Tex. 1974) (the fourth amendment does not protect against warrantless searches per se, but only against unreasonable searches and whether a search is unreasonable is to be determined by the facts of a given case), *aff'd sub nom.* Brown v. Estelle, 526 F.2d 1391 (5th Cir. 1976); United States *ex rel.* Parson v. Anderson, 354 F. Supp. 1060, 1087 (D. Del. 1972) (a warrantless search of the person after a legal arrest does not violate the fourth amendment), *aff'd*, 481 F.2d 94 (3d Cir.), *cert. denied*, 414 U.S. 1072 (1973); United States v. Rubin, 343 F. Supp. 625, 630 (E.D. Pa. 1972) (a warrant may be unnecessary where the evidence ultimately seized is in the process of destruction), *vacated*, 474 F.2d 262 (3d Cir.), *cert. denied*, 414 U.S. 833 (1973). *See also* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 463-64 n.393 (1974).

34. *See* note 26 *supra*.

brutal conduct present in *Rochin v. California*.[35] In this manner the majority utilizes the distinction to illustrate the procedural safeguards and medical precautions which were present in *Crowder*, but absent in *Rochin*. However, the court never squarely confronted the problem of justifying the more significant intrusion of surgery as compared with blood tests. It is submitted that the justification may be found in the greater state interest "in bringing a murderer to book"[36] in contrast to that involved in convicting an inebriated driver. If so, it appears that implicit in the majority's opinion is a fourth amendment balancing test against which their decision should be tested.[37]

Before applying this balancing analysis to the instant case, it is necessary to establish the conflicting fourth amendment values which it embodies. Although the fourth amendment does not specifically provide for it,[38] the right to privacy is the most often mentioned right protected by that amendment.[39] The individual's interest in privacy must be weighed against the various state interests which sanction the intrustions that occur during searches.[40] These interests include, but are not limited to, the need for reasonable police investigation,[41] maintaining the moral equilibrium,[42] and deterring criminal behavior.[43] Essentially the reasonableness of the search (and hence its constitutionality) is determined by balancing the two interests against one another in light of the circumstances

35. 342 U.S. 765 (1952).

36. *See* note 29 *supra*.

37. *See generally* Amsterdam, *supra* note 34, at 388-95; LaFave, *"Street Encounter" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 39, 53-59 (1968); Comment, 27 BAYLOR L. REV. 305, 313-16 (1975).

38. Katz v. United States, 389 U.S. 347, 350-51 (1967).

39. *See* Katz v. Untied States, 389 U.S. 347, 350 (1967); Warden v. Hayden, 387 U.S. 294, 304 (1967); Schmerber v. California, 384 U.S. 757, 767 (1966); United States v. Jeffers, 342 U.S. 48, 52 (1951); Johnson v. United States, 333 U.S. 10, 14 (1948); Harris v. United States, 331 U.S. 145, 150 (1947); United States v. Lefkowitz, 285 U.S. 452, 464 (1932); Boyd v. United States, 116 U.S. 616, 630 (1886). *See generally* Clark, *Constitutional Sources of the Penumbral Privacy*, 19 VILL. L. REV. 833, 857-71 (1974); Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47 (1974). *See also* Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965).

40. Terry v. Ohio, 392 U.S. 1, 20-21 (1968); Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967); Note, 14 U.C.L.A. L. REV. 680 (1967); THE SUPREME COURT, 1967 TERM, 82 HARV. L. REV. 63, 178-96 (1968).

41. Terry v. Ohio, 392 U.S. 1, 22 (1968).

42. *See* Kant, *The Right to Punish*, PUNISHMENT AND REHABILITATION 35 (1973).

43. *See, e.g.*, Blackford v. United States, 247 F.2d 745, 752 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958).

of the case.[44] The justification required for a search varies with the level of intrusiveness; a highly intrusive search requires greater justification than a less intrusive search.[45]

The proposed balancing analysis finds considerable support in past declarations of the Court,[46] in the judicial treatment of the

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44. Terry v. Ohio, 392 U.S. 1, 20-21 (1968); Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967); Johnson v. United States, 333 U.S. 10, 14 (1948); United States v. Rubin, 474 F.2d 262, 268 (3d Cir.), *cert. denied*, 414 U.S. 833 (1973).

In *Terry*, the Court made its most definitive statement on the manner of determining reasonableness, when it stated:

> In order to assess the reasonableness of officer McFadden's conduct as a general proposition, it is necessary "first to focus upon the government interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails."

392 U.S. at 20-21, *quoting* Camara v. Municipal Court, 387 U.S. 523, 534-35, 536-37 (1967). *See also* Schmerber v. California, 384 U.S. 757, 767-68 (1966). As suggested previously, if this is the correct analysis of fourth amendment questions, the majority's disposition of the issue in *Crowder* is consistent with traditional fourth amendment methodology. *See generally* M. TOBIAS & R. PETERSEN, PRE-TRIAL CRIMINAL PROCEDURE (1972).

45. Terry v. Ohio, 392 U.S. 1 (1968), is particularly instructive in that the Court essentially held that because a "stop and frisk" involved a lesser instrustion than a full search, the police officer's justification for the instrustion could be correspondingly less than probable cause. *See* Camara v. Municipal Court, 378 U.S. 523 (1967), for an application of this premise to the requirement of probable cause for issuance of a warrant.

Other analyses of reasonableness have been mentioned by the Court in the past. An example is "reasonableness under the circumstances" which, apparently, is the same analysis under a different name. Ker v. California, 374 U.S. 23, 33-34 (1963); United States v. Rabinowitz, 399 U.S. 56, 63-66 (1950); Harris v. United States, 331 U.S. 145, 150 (1947); Go-Bart Importing Co. v. United States, 282 U.S. 344, 356-58 (1931). Another example is the equating of reasonableness with probable cause. Wong Sun v. United States, 371 U.S. 471, 479 (1963); Draper v. United States, 358 U.S. 307, 310 (1959). This contention, however, has generally been directed to preventing warrantless searches on less than probable cause, rather than stating the definitive requirements of reasonableness. Both *Wong Sun* and *Draper*, for example, involved warrantless arrests. Moreover, a search may still be invalidated although probable cause exists if it is not conducted in a reasonable manner or by reasonable means. *See* Terry v. Ohio, 392 U.S. 1 (1968); Schmerber v. California, 384 U.S. 757 (1966).

46. Prior to Katz v. United States, 389 U.S. 347 (1967), the case law contained a variety of distinctions in the standards the government must meet before a search was reasonable, indicating an implicit balancing test. *E.g.*, Preston v. United States, 376 U.S. 364, 366-67 (1964) (the inherent nature of a car permitted lesser grounds of justification for a search than a house); Harris v. United States, 331 U.S. 145, 151 n.15 (1947) (a search of a house requires more justification than a search of a business); Davis v. United States, 328 U.S. 582, 588-91 (1946) (the government may seize property if it is produced for administrative purposes although the government may not seize it if testimonial in nature); Carroll v. United States, 267 U.S. 132, 150-53 (1925) (the inherent nature of car permitted lesser grounds of justification for a search than a house); Gouled v. United States, 255 U.S. 298 (1921) (mere evidence could not be seized while "fruits" and "instrumentalities" of a crime and contraband could),

underlying policies involved,[47] and in decisions upholding warrantless searches.[48] Moreover, the literal text of both clauses of the fourth amendment facilititates a balancing analysis. The first clause explicitly recognizes a reasonableness requirement, and the second clause incorporates a balancing analysis into the probable

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*overruled*, Warden v. Hayden, 387 U.S. 294 (1967). *See* Brinegar v. United States, 338 U.S. 160, 182-83; (Jackson, J., dissenting) cited by the majority in Terry v. Ohio, 392 U.S. at 18 n.15 (the more serious the crime the lesser the government showing required to justify a search); *see* Weinreb, *supra* note 9, at 70-73.

*Katz* also suggests a balancing approach by inquiring into the individual's reliance on privacy on the occasion he was searched to determine whether a warrant was necessary. The more the individual relies on his privacy, the heavier is the state's burden to provide justification for the search and to explain why a warrant was not procured.

47. For example, the Court has recognized that the right of privacy is not absolute, but rather depends on the reasonableness of the individual's expectation of privacy. Katz v. United States, 397 U.S. 347, 361 (1967) (Harlan, J., concurring). The successive levels of justification required for increasingly intrusive searches at borders exemplify the Court's varying respect for the right of privacy. *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (a person may be stopped at a border and be required to identify himself and his belongings without any cause shown based on the interest of national protection); Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967) (a traveler may be forced to disrobe, however, only where there is a "real suspicion"); Rivas v. United States, 368 F.2d 703, 710 (9th Cir. 1966) (more intrusive searches into the traveler's body cavities require a showing of "clear indication as plain suggestion of smuggling"). In order to conduct a search involving an intrusion into the individual's body, there must be a "clear indication" that the evidence sought is enclosed therein. *See* Schmerber v. California, 384 U.S. 757, 769-70 (1966); People v. Bracamonte, 15 Cal. 3d 394, 403, 540 P.2d 624, 630, 124 Cal. Rptr. 528, 534 (1975).

The state's justification for conducting the search lies in its proving that it had a reasonable basis to believe that the evidence sought would be discovered during the search. *See* Spinnelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964); Draper v. United States, 358 U.S. 307 (1959). *See also* Terry v. Ohio, 392 U.S. 1, 21 (1968); Schmerber v. California, 384 U.S. 757, 769-70 (1966). The scope of the search may be broadened as probable cause increases. Terry v. Ohio, 392 U.S. at 17-19.

The state's justification for conducting the search also varies with the government's interest in either deterring the conduct involved, *e.g.*, Breithaupt v. Abrams, 352 U.S. 432, 439-40 (1957), or having the criminal be punished for his crime, *e.g.*, Moore v. United States, 353 A.2d 16, 28-29 (D.C. Ct. App. 1974) (dissenting opinion).

48. The Court has used exigent circumstances to justify warrantless searches where the exigent circumstances are established prior to the search. *E.g.*, United States v. Edwards, 415 U.S. 800 (1974) (The police may search to prevent the entry of contraband and weapons into a jail by an arrestee); Chimel v. California, 395 U.S. 752 (1969) (the police may search the area in the control of the arrestee for self-protection); Preston v. United States, 376 U.S. 364, 367 (1964) (the police may search to prevent the destruction of evidence); Carroll v. United States, 267 U.S. 132 (1925) (the police may search to prevent the loss of evidence due to the ease with which an automobile may be moved out of a locality). *See also* 1 J. VARON, SEARCHES, SEIZURES AND IMMUNITIES 252-54 (2d ed. 1974). The implication is that for the government to search without a warrant and thus abrogate the procedural safeguards of the fourth amendment, it must supply additional justification based on the circumstances of the case in addition to those which would have had to have been proffered to obtain a warrant.

cause requirement[49] together with an ultimate requirement that all searches (warranted and nonwarranted) conform to the standard of reasonableness.[50] It is submitted that the questions posed by the instant nonconsensual surgical search are better analyzed within this established balancing of interests framework.[51]

In light of the foregoing analysis, it is submitted that nonconsensual surgery should be forbidden unless at the time of the request the state can demonstrate: (1) probable cause that the evidence sought will be obtained by the search;[52] (2) that the serious intrusiveness is justified by the serious nature of the crime;[53] (3) that the risk of danger, permanent injury and serious deformity to the suspect are minimal,[54] (4) that no reasonable alternatives currently exist for proving the point that the sought evidence would demonstrate; and (5) the set of facts which the sought evidence would prove are an essential element of the government's case without which they cannot proceed.[55] These requisite criteria acknowledge

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49. This balancing test, similar to that of reasonableness, involves a balancing of the intrusion against the government's need to search, Camara v. Municipal Court, 387 U.S. 523, 534-37 (1967), and a weighing of the probabilities of finding that which is sought in light of the evidence offered to establish its existence, Aguilar v. Texas, 378 U.S. 108 (1964); Carroll v. United States, 267 U.S. 132 (1925).

50. Terry v. Ohio, 392 U.S. 1, 19 (1968); United States v. Rabinowitz, 339 U.S. 56, 66 (1950); Harris v. United States, 331 U.S. 145, 150 (1946); United States v. Lefkowitz, 285 U.S. 452, 464 (1932); White v. United States, 271 F.2d 829 (D.C. Cir. 1959). In *White*, the court of appeals stated that "[r]easonableness, whether or not there is a search warrant, is the ultimate constitutional test of the lawfulness of a search or seizure." 271 F.2d at 830. *See also* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 42-43 (1966).

51. The overall desirability of analyzing fourth amendment questions in this manner is beyond the scope of this note, although this question has been discussed by a few commentators. *See* Amsterdam, *supra* note 33 at 387-95; Lafave, *supra* note 37 at 53-59. In situations where a magistrate may apply the balancing test in a full and fair manner, this approach does offer the promise of a better reasoned body of precedent as long as the considerations behind the various judicial determinations are fully stated.

52. *See* Warden v. Hayden, 387 U.S. 294, 306-07 (1967).

53. Bearing in mind that the intrusion is extremely burdensome on the suspect, surgery should not be performed unless the alleged crime is of an equal or more serious magnitude. Otherwise, the court would be subjecting the suspect to investigatory procedures more punishing than the possible sentence that could result. Moreover, this requirement protects the police from using surgery as a form of harassment for petty offenses committed by suspected offenders who are in their disfavor.

54. All three of these factors are particularly crucial in light of the suspect's presumed innocence. If any of them were to occur, the suspect would have been de facto punished before conviction.

55. If either reasonable alternatives exist or the evidence sought is merely corroborative, then of course surgery should not be permitted. Any loss suffered by the state may in part be remedied by permitting the state to comment upon the defendant's unwillingness to submit

the great magnitude of the intrusion wrought by surgery and attempt to harmonize it with the important state interest in prosecuting serious crime. In so doing, a heavier burden is expressly imposed upon the state to justify a search into the person than, for example, to justify frisk searches[56] or searches of homes. These criteria, however, recognize the theoretical permissibility of such searches. This recognition, moreover, is in accord with both common law[57] and constitutional precedent.[58] The very acceptance of a balancing analysis encourages this result through its implicit lack of absolute limitation.[59] Finally, contrary to the fears of the dissent, courts have shown an ability to make the proposed substantive determinations in precisely the manner suggested herein.[60]

If these criteria had been applied to the instant case, the sur-

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to surgery. This may be effective in cases where the surgery could have proved the defendant's innocence. On the other hand, the defendant may rebut the state's implications by demonstrating both the existence of alternative methods of proving the point and the severity of the search. Since this is a fourth amendment problem, self-incrimination issues are not controlling. *See, e.g.*, Harris v. New York, 401 U.S. 222 (1971).

56. Less justification is required in a stop and frisk search due to the lower degree of intrusion. Terry v. Ohio, 392 U.S. 1 (1968).

57. The body has not been viewed as immune from intrusion at civil common law, although an intrusion must be specifically sanctioned by a statute. Camden & Suburban Ry. v. Stetson, 177 U.S. 172, 174 (1900); Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N.E. 860 (1891); Stock by New York, N.H. & H.R.R., 177 Mass. 155, 58 N.E. 686 (1900); McQuigan v. Delaware & L. & W.R.R., 129 N.Y. 50, 29 N.E. 235 (1891). *But see* Union Pacific Ry. v. Botsford, 141 U.S. 250 (1891). *See also* Sibbach v. Wilson & Co., 312 U.S. 1 (1941); FED. R. CIV. P. 35(a).

58. Constitutional interpretation has permitted states to make direct or indirect bodily intrusions upon a showing of a substantive state reason. Buck v. Bell, 274 U.S. 200 (1927); Jacobson v. Massachusetts, 197 U.S. 11 (1905). *See also* Roe v. Wade, 410 U.S. 113 (1973); Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); York v. Story, 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).

In People v. Vega, 51 App. Div. 2d 33, 379 N.Y.S. 2d 419 (1976), a New York court applied a substantive due process analysis to the question: can the police require a suspect to remove a beard before entering a police lineup? This suggests an alternative anaylsis for fourth amendment searches involving intrusions upon the individual's person.

59. A bottom line beneath which police conduct may not fall may be found in Rochin v. California, 342 U.S. 165 (1952). *See also* United States v. Russell, 411 U.S. 433, 431 (1973) (discussing minimum due process requirements of police conduct where defense of entrapment was raised). For other examples of *Rochin* used in this manner in a fourth amendment context, see United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); United States *ex. rel.* Guy v. McCauley, 385 F. Supp. 193 (E.D. Wis. 1974).

60. *See* Bowden v. State, 256 Ark. 820, 510 S.W.2d 879 (1974); People v. Smith, 80 Misc. 2d 210, 362 N.Y.S. 2d 909 (1974), wherein both courts refused to permit surgery where the risk of permanent injury to the suspect was significant although the state's need for the search was great. *See also* Adams v. State, 260 Ind. 663, 299 N.E. 2d 834 (1973) (surgery was absolutely prohibited because of the serious personal intrusion involved).

gery probably would not have been permitted because the state failed to demonstrate a compelling need to obtain the bullet to prosecute the case successfully. Crowder by his own testimony admitted his presence in the victim's office at the time of the slaying and further admitted wrestling with the victim for control of the death weapon shortly before the killing. Moreover, Crowder's principle defenses were that the murder was committed by a third accomplice and, in the alternative, that the shooting had occurred in self-defense.[61] Neither of these defenses would have been substantially affected by the introduction into evidence of the seized bullet. The seized bullet's sole evidentiary role was to corroborate a fact admitted by the defendant. Unless the defendant had denied his presence at the scene of the crime when the court order was sought, the evidence should have been excluded and the district court's refusal to do so would have been grounds for reversal at the appellate level.[62]

The application of a balancing analysis to fourth amendment problems, particularly those involving intrusions against the individual's body, will greatly assist judges in making well reasoned decisions. As a result, a more complete understanding of the full range of interests involved and the relative weight each should be accorded in the decisionmaking process would be established and more fully reviewed. In this context, *Crowder* makes a small contribution, although it fails to consider all the variables.

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61. This alternative defense, which was the second issue Crowder raised on appeal, was rejected because, *inter alia*, it clearly conflicted with his first defense.

62. Arguably it could be contended that the error was minor and should not be grounds for reversal. Since a principle justification for the exclusionary rule is deterrence (Brown v. Illinois, 422 U.S. 590, 599 (1975) and since unnecessary and unlawful surgical searches are particularly abhorrent, deterrence of unreasonable surgery could have been a rationale for reversal.