Visual Body Cavity Searches Incident to Arrest: Validity Under the Fourth Amendment

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"But the character of every act depends upon the circumstances in which it is done."

Oliver Wendell Holmes

I. INTRODUCTION

'Raise your left breast,' one of the matrons ordered. Joan did. 'Now raise your right breast.' Joan did as she was told. She was no longer protesting. She wasn't saying a word. Then the matrons told Joan to 'spread your lips,' ... Joan opened her mouth. The matrons were yelling now. 'Spread your lips!' Joan opened her mouth wider. 'Your pussy lips, lady, your pussy!'\textsuperscript{1}

This is the visual body cavity search. Many people would be offended, disgusted or embarrassed just by reading the excerpt. As a polite society we do not discuss such things. The courts have historically brandished colorful expressions of shock and dismay over questionable uses of such searches. Despite their apparent revulsion, the courts fear second guessing the decisions of police and prison security experts.

In the last twenty years, some state legislatures have provided protection where the courts were unwilling. Some police departments,

\textsuperscript{1} Ellen Alderman & Caroline Kennedy, \textit{The Right to Privacy} 5 (Vintage Books 1997) (1995) (interviewing a plaintiff from \textit{Mary Beth G. v. Chicago}).
whether concerned with the just application of their authority or with avoiding lawsuits, have independently set procedural safeguards with regards to body cavity searches. If states have begun to address the issue, and police departments are slowly becoming more cautious, then why is it important to discuss the reasonableness of visual body cavity searches under the Fourth Amendment?

First, too many states and police departments have not addressed the issue or have done so incompletely. In Massachusetts, the Boston Police Department settled a 1998 lawsuit filed by a woman because the department had no written policy defining strip search procedures. In Illinois, the Cook County sheriff was found to have violated the constitutional rights of women by establishing a policy of strip searching female suspects when they returned from court, even when the women were cleared of charges and returned for processing. No such policy existed for male suspects.

Second, some courts have found that where a state statute does not specifically address suppression of evidence as the remedy for violations of strip and body cavity search regulations, the fruit of the poisonous tree doctrine and its prophylactic protection do not apply. Thus, State statutory protection can be incomplete or simply insufficient.

Third, a meaningful understanding of case law in this area will continue to be difficult to decipher until a common lexicon is used to categorize and discuss the searches themselves.

Therefore, a review of the treatment of visual body cavity searches and a determination of the scope of our federal constitutional protection under the Fourth amendment is still vital.

This article specifically will address issues relating to visual body cavity searches conducted incident to an arrest. Part II will discuss the often overlapping and conflicting terminology used by the courts and in statutes to describe and categorize the body cavity search. Part III will compare and contrast the tests found in *Bell v. Wolfish* and in *Schmerber v. California* for determining the constitutionality of visual body cavity searches. It will also show that the two tests can operate in harmony to provide greater Fourth Amendment protection from visual body cavity searches incident to arrest. Part IV will discuss the danger to

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5. See *infra* Part II.A.

6. See *infra* Part III.B.

7. See *infra* Part III.A.
Fourth Amendment protection against unreasonable strip or body cavity searches posed by the inevitable discovery exception to the exclusionary rule and by judicial deference to prison policymakers.

II. The Language Gap

"Body cavity search" is an umbrella term for a range of searches intrusive to one’s person. Unfortunately, the terms used to describe and categorize the searches, such as strip search, visual body cavity search, and physical body cavity search, are often used interchangeably in court opinions and in state legislation. This inconsistency in language results in a confused body of law.

Clarification is necessary because, as this article will explain, a person’s reasonable expectation of privacy regarding a particular body search can depend upon the category a court or state places the search, as well as the investigative status of the person being searched.

A. Defining the Categories

This article considers body cavity searches as having three distinct categories: strip searches, visual body cavity searches, and manual body cavity searches. For the purpose of this article, the strip search includes only those searches that do not involve a visual or manual inspection of the genitals or anus. Some courts and state statutes agree with this definition, but others consider the visual inspection of genital and anal regions as merely part of viewing the naked body in a basic strip search.8

Visual body cavity searches, for the purpose of this article, include only searches where there is a visual inspection of a person’s genitals or anus, but no physical contact or intrusion. As mentioned above, visual body cavity searches have been classified by some as being within the definition of a strip search. Other jurisdictions consider the visual body cavity search as being an independent category level between the basic strip search and the manual body cavity search.9 Still others consider a

8. See Chapman v. Nichols, 989 F. 2d 393, 394 (10th Cir. 1993) (holding that visual inspection of the pubic area of one arrestee and requiring another to bend over and grab her ankles was not considered a visual body cavity search); Kan. Crim. Proc. Code Ann. § 22-2520(a),(b) (West 1997) (defining "strip search" as "removing or rearranging some or all of a person’s clothing, by or at the direction of a law enforcement officer, so as to permit a visual inspection of the genitals, buttocks, anus or female breasts of such person"); and "body cavity" search as "the touching or probing of a person’s vaginal or rectal cavity by or at the direction of a law enforcement officer").

9. “A ‘strip search’ . . . generally refers to an inspection of a naked individual, without scrutiny of any of the subject’s body cavities. A ‘visual body cavity search’ extends to visual inspection of the anal and genital areas. A ‘manual body cavity search’ includes some degree of touching or probing of body cavities.” Blackburn v. Snow, 771 F.2d 556, 561 n.3 (1st Cir. 1985)
visual search of the genitals or anus to be within the same class as searches, where a physical intrusion into an orifice takes place, and call both "body cavity searches." No matter what category visual body cavity searches are placed in, even absent physical contact, they are considered "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, [and] signifying degradation and submission . . . "

For the purpose of this article, manual body cavity searches, also known as physical body cavity searches, include not only those performed by insertion of, or manipulation with, the fingers, but also endoscopic examinations and the use of gynecological devices. Such searches are considered among the most distasteful intrusions of the body, outside of intrusions where the human body or its functions are controlled by someone other than the person themselves.

The need for a common language with which to discuss these searches is crucial in order to communicate with one another in an effective way. Both the legislature and the courts will fail in their duty to

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10. See State v. Kelly, No. S-92-34, 1993 WL 241727, at *3 n.1 (Ohio App. June 30, 1993) ("'Body cavity search' means an inspection of the anal or vaginal cavity of a person that is conducted visually, manually, by means of any instrument, apparatus, or object, or in any other manner while the person is detained or arrested for the alleged commission of a misdemeanor or traffic offense."); Tenn. Code. Ann. § 40-7-121(a) (1998) ("'body cavity search' means an inspection, probing or examination of the inside of a person's anus, vagina or genitals . . ."); N.J. Stat. Ann. § 2A: 161A-3 (West 1998) ("'body cavity search'; means the visual inspection or manual search of a person's anal or vaginal cavity").

11. State v. Clark, 654 P.2d 355, 359 n.8 (Haw. 1982) (quoting Tinetti v. Wittke, 479 F. Supp. 486, 491 (E.D. Wis. 1979) (citing an oral decision in Sala v. County of Suffolk (E.D. N.Y. 1978)); Canedy v. Boardman, 16 F.3d 183, 185 (7th Cir. 1994) (holding that freedom from strip searches and degrading body searches is basic to the concept of privacy; therefore, a state's right to interfere with bodily integrity by means of strip searches is constitutionally limited).
advise both the citizenry and the law enforcement bodies of the limitations of body cavity searches until it is clear to all what is meant by physical, visual, and body cavity search.

B. Investigative Statuses Which Affect Reasonable Expectations of Privacy

A person’s reasonable expectation of privacy and the levels of suspicion necessary to justify a visual body cavity search not only depend on the nature of the search itself, but also on which stage of the police investigative process the search occurs. This article describes four status categories for the purpose of delineation: pre-arrest, incident to arrest, pre-trial detention, and convicted prisoner.

A person in pre-arrest status is one engaged in any interaction with police prior to an arrest. This includes voluntary interactions, stops, and Terry searches. At this point a person has the highest expectation of privacy in his body, and a warrantless strip search or visual body cavity search is not permitted.

A more thorough search incident to arrest is permitted without a warrant, but it must occur within a limited scope and time frame. The United States Supreme Court, in *Chimel v. California*,16 described the circumstances under which searches incident to arrest could take place and for what purpose:

The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused’s person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest.17

When a suspect is detained at a detention facility after an arrest, he is a pre-trial detainee. With regards to search acts which may be carried out during that detention, the pre-trial detainee has a reasonable expectation of privacy equal to or less than that which he had incident to the arrest.18 In *Fischer v. Washington Metropolitan Area Transit Authority*, the court indicated that pre-trial detainees’ “protectible rights of privacy under the due process clause are necessarily more substantial in general than are those of convicted inmates.”19

To varying degrees, depending on the specific jail configuration or

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17. Id. at 764.
19. See id.
purpose, the pre-trial detainee’s privacy rights are subordinated by the state’s interest in institutional security and court deference to the expertise of prison management.\(^{20}\) So much weight is given to prison security interests, particularly with regard to illicit drugs, that upon mere reasonable suspicion, non-incarcerated prison visitors may be subjected to strip searches,\(^ {21}\) and pre-trial detainees, whose charges have been dismissed, can be forced to undergo visual body cavity searches when returning to the detention center to complete release procedures.\(^ {22}\) Pre-trial detainees have greater rights than convicts, but they may be treated as prisoners to the extent that security, internal order, health, and discipline of the prison demand.\(^ {23}\)

A convicted prisoner has the lowest expectation of privacy, although incarceration is not a wall between the convict and the Constitution.\(^ {24}\) Surprisingly, because of the frequent utilization of mixed-use facilities, where both pre-trial detainees who are awaiting arraignment, bail posting, or trial and incarcerated convicts are housed (though usually classified by a number of objective and subjective factors including the alleged or proven crime), the limitation of Fourth Amendment constitutional protections for pre-trial detainees are often indistinguishable from those already convicted because of prison security interests.\(^ {25}\)

III. **Tests of Permissibility Under the Fourth Amendment**

The courts have analyzed intrusive body searches by examining a person’s expectation of privacy, the reasonableness of the search, and the state’s interest in conducting the search.

A. The *Schmerber* Test

Some people may consider blood tests for alcohol, drugs, HIV, and DNA as more intrusive than visual body cavity searches because the former searches intrude beneath the skin and remove material from the body. Conversely, some may view blood tests as common, causing little trauma, pain, or risk, and involving little humiliation or loss of dignity.

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20. See infra Part III.B.
22. See Gary v. Sheahan, No. 96-C-7294, 1998 WL 547116, at *1-2 (N.D. Ill. 1998). All female detainees, including those whose charges were dismissed, were subjected to a strip search before returning to their Division. First, they were required to remove all of their clothing. Second, after removing all their clothing, the women were required to open their mouths and to run their hands through their hair. Third, while naked, the women were required to squat or bend over several times and cough.
25. See infra Part III.B.
Therefore, others may feel blood tests are less intrusive than a visual or manual body cavity search.

The United States Supreme Court in Schmerber v. California\textsuperscript{26} discussed for the first time searches that intrude beneath the body's surface under a Fourth Amendment analysis. Previously, searches such as blood tests and stomach pumping were tested under a Fourteenth Amendment due process or Fifth Amendment self-incrimination analysis.\textsuperscript{27} The Schmerber Court broke down the issues into: 1) whether police were justified in requiring a blood test in this case incident to arrest and 2) whether the means and procedures used to take blood test were reasonable.\textsuperscript{28} The search involved in Schmerber was a blood test to determine whether Mr. Schmerber was driving while intoxicated at the time of his accident. The blood was drawn by a physician in a hospital, despite Mr. Schmerber's objections to the procedure.\textsuperscript{29} Unfortunately, the Court did not take the opportunity to speak more on "intrusions beyond the body's surface," specifically on what an intrusion entails.

The Court found this search to plainly fall within the constraints of the Fourth Amendment. It then formulated a test to determine the constitutionality of such intrusions around the principle that the Fourth Amendment does not prohibit all such searches, but only those that are not justified by the circumstances or performed in an improper manner.\textsuperscript{30}

In Schmerber, because the blood test was carried out as a search incident to arrest, justification started with probable cause to arrest. Usually, when it is established that probable cause for an arrest exists and that an arrest was made, a search of the person incident to arrest for weapons or readily destructible evidence is permitted.\textsuperscript{31} However, the Court here found this principle inapplicable where a search beyond the body's surface is involved.\textsuperscript{32}

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 \textit{clear indication} that in fact such evidence will be found, these \textit{fundamental human interests} require law enforcement officers to suffer the risk that such evidence may disappear unless there is an immediate

\textsuperscript{26} 384 U.S. 757 (1966).
\textsuperscript{27} \textit{Id.} at 768; Rochin v. California, 342 U.S. 165 (1952); Breithaupt v. Abram, 352 U.S. 432 (1957).
\textsuperscript{28} Schmerber, 384 U.S. at 768.
\textsuperscript{29} See \textit{id.} at 759.
\textsuperscript{30} \textit{Id.} at 768.
\textsuperscript{31} See Weeks v. United States, 232 U.S. 383, 392 (1914).
\textsuperscript{32} Schmerber, 384 U.S. at 769.
The Court also found it indisputably important that a neutral magistrate be the one to determine whether or not to invade another’s body in search of incriminating evidence. Warrantless searches are permitted only when an emergency situation exists that threatens the destruction of the evidence and when the chance of loss is increased by delay. Although the Court did not expressly require that there be probable cause to conduct a search, it is inherent in issuing a search warrant that probable cause be present. Next, the Court determined whether the blood test itself was reasonable based upon the commonality of the test on the one hand, and the possibility of risk, trauma or pain on the other. Finally, the Court discussed whether the manner in which the test was carried out was reasonable, taking into account who conducted the test and where it took place. The Court warned that just because it found a minor intrusion conducted under strictly controlled conditions to be reasonable, this did not mean that more substantial intrusions, under other conditions, would not be considered unreasonable.

The most vexing issue for courts after Schmerber was the meaning of “clear indication.” Clear indication that evidence would be found in the bloodstream existed in Schmerber according to Justice Brennan because “the facts which established probable cause to arrest ... suggested the required relevance and likely success of a test.” Several jurisdictions subsequently attributed a variety of meanings to “clear indication” including: reasonable suspicion, probable cause, as requiring greater evidence than probable cause, and as a third level of suspicion greater than reasonable suspicion, but less than probable cause. This conundrum was addressed by the United States Supreme Court in United States v. Hernandez. In the opinion below, the Ninth Circuit Court of Appeals used the Supreme Court’s language in Schmerber to hold that a “clear indication” evidence would be found in plaintiff’s body cavity was necessary in order to detain her. The Ninth Circuit’s interpretation of “clear indica-

33. Id. at 769-70 (emphasis added).
34. Id. at 770.
35. See id.
36. Id. at 772.
37. Id. at 770.
38. See United States v. Mosquera-Ramirez, 729 F.2d 1352, 1355 (11th Cir. 1984).
41. See United States v. Mendez-Jiminez, 709 F.2d 1300, 1302 (9th Cir. 1983) (holding that “clear indication” means more than real suspicion but less than probable cause).
43. United States v. Hernandez, 731 F.2d 1369 (9th Cir. 1984).
tion” was as a standard greater than reasonable suspicion, but less than probable cause. Although the issue in Hernandez was not the suspicion necessary to search, but to detain, the Supreme Court discussed the Ninth Circuit’ mis-interpretation of “clear indication”. Justice Stevens described “clear indication” not as a new level of suspicion, but merely a “particularized suspicion” that evidence is located in a body cavity, not merely on the person, and that the evidence is likely to be found. The Hernandez Court went on to determine that only reasonable suspicion was necessary to detain the plaintiff and not probable cause and clear indication. The Court did not determine what level of suspicion is required to perform a strip or body cavity search.

The Schmerber Court’s test for warrantless blood tests incident to arrest under the Fourth Amendment, can be distilled as follows. First, was there a lawful arrest? Second, was there probable cause to search the person? Third, was there a clear indication that the secreted evidence will be found in a body cavity, and not just anywhere on the person? Fourth, was there an emergency circumstance that could have destroyed the evidence? Fifth, what is the level of risk, trauma, and pain associated with this type of search? Sixth, was the search itself carried out in a reasonable manner?

B. The Wolfish Test

At issue in Bell v. Wolfish was whether a blanket policy requiring a visual body cavity search for all pre-trial detainees subsequent to visitations with persons from outside the prison was constitutional under the Fourth Amendment. The Supreme Court refined the issue as “whether a visual body cavity search as contemplated by the [correctional center’s] rules could ever be conducted on less than probable cause.”

In Wolfish, the plaintiffs were housed in a federally maintained, short-term housing facility designed primarily to house pre-trial detainees. The facility also provided temporary housing for convicted inmates awaiting sentencing or transportation to federal prison, and for

44. The Ninth Circuit referred to its decision in United States v. Mendez-Jimenez, 709 F.2d at 1355.
46. See id. at n.4.
48. See supra Part II.
49. See Schmerber, 384 U.S. at 770.
50. See id. at 771.
51. See id.
52. 441 U.S. 520 (1979).
53. Id. at 560.
54. See id. at 520.
those inmates serving short term sentences in a service capacity for the facility. The pre-trial detainees were not touched during the visual cavity inspection, but they were required to open their body cavities for viewing. The District court had held that absent probable cause to search, strip searches were reasonable, but visual body cavity searches were not. The Court of Appeals had affirmed because it questioned the utility of the searches and believed that the state’s interest in conducting the searches were outweighed by the “gross violation of personal privacy inherent in such a search. . .”

In deciding this case, Justice Rehnquist stated that “a balancing of the need for a particular search against the invasion of personal rights” is necessary in each case because “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application.” To properly measure the balance, courts must consider: 1) the scope of the intrusion, 2) the manner in which the search is conducted, 3) the justification for initiating the search, and 4) the place in which the search is conducted.

The Wolfish Court determined that the facility’s legitimate security interests in preventing the smuggling of weapons, money, drugs, and other contraband into a joint housing facility outweighed the intrusion of a visual body cavity search to an inmates privacy interests, when carried out reasonably, even absent probable cause, particularized suspicion, or clear indication. A detention facility “is a unique place fraught with serious security dangers.” The presumption of innocence in favor of the accused was viewed as having “no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.” The presumption only “allocates the burden of proof in criminal trials.”

C. The Mixed Applications of the Schmerber Test and the Wolfish Test to Visual Body Cavity Searches Incident to Arrest

The Supreme Court ruled in Chimel v. California that a police officer may lawfully search an individual incident to lawful arrest to

55. See id.
56. See id. at n.39.
60. See id.
61. Id. at 560.
62. Id. at 559.
63. Id. at 533.
discover the fruits or evidence of a crime. Later, in United States v. Robinson, the Supreme Court stated that a “full body search” was reasonable as a search incident to arrest. Lower courts thereafter permitted strip and body cavity searches incident to arrest under that premise, even for misdemeanor offenses.

The Supreme Court commented in a later case that Robinson did not discuss strip or body cavity searches. Several circuit courts have since recognized that Robinson “simply did not contemplate the significantly greater intrusions that occur” in visual body cavity inspections.

For this reason, the First Circuit in Swain v. Spinney decided the visual body cavity search of an arrestee incident to arrest could not be appropriately analyzed under Robinson and required independent analysis under the Wolfish test. In Swain, a woman was subjected to a strip search and visual body cavity search, while being held in a cell at the local police station. The court balanced the “dehumanizing, undignified, humiliating, terrifying” search against legitimate law enforcement needs such as institutional security and the need to discover evidence. The Court determined that to be reasonable under the Fourth Amendment “strip and visual body cavity searches must be justified by at least reasonable suspicion that the arrestee is concealing contraband or weapons.” The court rejected the Ninth Circuit’s opinion in Fuller v. M.G. Jewelry, that absent jail security concerns, probable cause to search is required and the Schmerber test applies.

In Fuller, the Ninth Circuit did not disregard the Wolfish test. After reaching the same conclusion as the First Circuit with regards to the limitations of Robinson, the court discussed the reasonableness of the search in Wolfish according to the specific facts of that case. The Ninth Circuit concluded that it was because of the overwhelming interest “to protect prisons and jails from smuggled weapons, drugs or other contraband which poses a threat to the safety and security of penal institu-

66. See id. at 235.
68. See, e.g., Giles v. Ackerman, 746 F.2d 614, 616 (9th Cir. 1984); see also Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1271 (7th Cir. 1983).
69. 117 F.3d 1 (1st Cir. 1997).
70. Id. at 3.
71. See id. at 6.
72. Justice v. Peachtree, 961 F.2d 188, 193 (11th Cir. 1992). But see Fuller v. M.G. Jewelry, 950 F.2d 1437, 1446 (9th Cir. 1991) (holding that visual body cavity search as a search for evidence, without penological security interest, must be justified by probable cause).
73. Swain, 117 F.3d at 5.
74. 950 F.2d 1437, 1449-50 (9th Cir. 1991).
75. See Swain, 117 F.3d at 7.
tions," that the searches were acceptable with less than probable cause.

The court also examined the decisions in other circuits to confirm that strip and body cavity searches must be justified by institutional security needs to be valid with less than probable cause. In Fuller, the objective of the search was to discover ordinary stolen property (a missing ring), not a weapon or "dangerous" contraband. The Fullers were searched while detained at a stationhouse where they would not be mixed with a general jail population. The court declined to extend the reasonable suspicion standard to "searches for ordinary stolen property."

In the absence of Wolfish's institutional security interests, the Ninth Circuit held the search in question to be more like the search incident to arrest in Schmerber. The court recognized "the interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that the desired evidence might be obtained." "Schmerber governs all searches that invade the interior of the body—whether by a needle that punctures the skin or a visual intrusion into a body cavity." The invasion of dignity and privacy incurred by even visual body cavity searches was deemed to be "at least" as great as those from a blood test.

The Missouri Court of Appeals in DaVee v. Mathis also addressed the applicability of Schmerber to visual body cavity searches, but it reached opposite result. In DaVee, the search was conducted pursuant to a search warrant, but the reasonableness of execution was in question. The court believed that the citation to Schmerber by Justice Rehnquist in Wolfish created a link between the reasonableness of a search and the medical qualifications of the person conducting the search. The Court

76. Fuller, 950 F.2d at 1447.
77. See id. (citing to Watt v. Richardson Police Dept., 849 F.2d 195, 198 (5th Cir. 1988) (concluding that it was reasonable for police to strip search arrestees where their offenses "posed the very threat of violence by weapons or contraband drugs that they must curtail in prisons"); Weber v. Dell, 804 F.2d 796, 800 (2d Cir. 1986); Mary Beth G. v. Chicago, 723 F.2d 1263, 1271 (7th Cir. 1983); Holton v. Mohon, 684 F. Supp. 1407, 1415 (N.D. Tex. 1987) (holding that purpose of strip and body cavity search is to look for weapons or contraband to protect inmates as well as jail personnel)).
78. See Fuller, 950 F.2d at 1449.
79. See id. at 1448.
80. Id.
81. Id.
82. Id. at 1448-49.
83. Id. at 1449.
84. See id.
85. 812 S.W.2d 816 (Mo. App. 1991).
86. See id. at 824.
87. Id.
quoted this passage of the *Schmerber* opinion:

> [T]he record shows the test was performed in a reasonable manner. Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practices. We are thus not presented with the serious question which would arise if a search involving use of a medical technique, even the most rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of the station house.\(^8\)

The *DaVee* court interpreted *Schmerber* to mean that “some body cavity searches rise to the level of rudimentary medical techniques and are, thus, unreasonable if conducted by nonmedical personnel.”\(^9\) After considering the decisions of other courts regarding the constitutionality of body cavity searches, the Missouri Court of Appeals determined that “body cavity searches involving only the visual examination of an individual’s body cavities . . . are not the type of rudimentary medical technique discussed in *Schmerber* and nonmedical personnel may conduct visual body cavity searches without violating any Fourth amendment rights.”\(^9\) The court considered this type of search “essentially a thorough strip search.”\(^9\)

The *DaVee* court partially relied on *United States ex rel. Guy v. McCauley*,\(^9\) but erred in its understanding of the facts of the case. The *Guy* court stated that a visual body cavity search by police officers violated due process because, “[w]hile the probing and *regarding* of body cavities and sexual organs is a routine medical practice, it is not normal for it to be forced on individuals by nonmedical police personnel in nonmedical surroundings.”\(^9\)

The intrusion into *or examination* of either vaginal or anal cavities must be made by skilled medical technicians for at least two reasons.

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88. Id.
89. Id.
90. Id. at 825-26.
91. Id. The court considered three decisions. First, *Huguez v. United States*, 406 F.2d 366, 391-92 (9th Cir. 1968), which the Missouri Court of Appeals read as suggesting that removal of a foreign object (such as a bag of heroin) from a body cavity violates constitutional rights unless performed by medical personnel. Second, *United States ex rel. Guy v. McCauley*, 385 F. Supp. 193, 199 (E.D. Wis. 1974), which followed a due process analysis to determine that a physical vaginal cavity search violated due process when carried out by a police officer rather than a doctor or nurse. Third, *United States v. Klein*, 522 F.2d 296, 300-01 (1st Cir. 1975), which determined that a body cavity search without piercing, probing or forced entry beyond the body’s surface did not fall under the heightened standard set by *Schmerber*.
93. Id. at 199 (emphasis added). The court relied on the holding in *Rochin v. California*, 342 U.S. 165 (1952), where the Court determined that the forced stomach pumping of an arrestee was a Fifth amendment violation.
The first is that the examination be carried out under sanitary conditions so that the dangers of physical harm to the individual be reduced. Second, the magnitude of the intrusion to the individual's integrity and dignity becomes greater if the search is perpetrated by a police officer rather than a doctor or nurse.94

Guy actually supports the view that visual body cavity searches are a rudimentary medical procedure and thus still classifiable under Schmerber.

IV. Reconciling the Schmerber Test and the Wolfish Test

Both Swain and Fuller concerned searches incident to arrest.95 Both courts determined that visual body cavity searches exceed those normally permitted under the search incident to arrest doctrine.96 The defendants in both cases were determined to have less weighty institutional security concerns than those in Wolfish. One court, however, recognized Schmerber as the controlling case, and the other court recognized Wolfish.

A. Reconciling Schmerber and Wolfish to Provided More Stringent Fourth Amendment Protection

The category of the intrusion in Schmerber was the blood test, and the plaintiff's status was incident to arrest. The intrusion in Wolfish was a visual body cavity search, and the status of the plaintiffs was that of pre-trial detainees in a mixed-use facility. In order to harmonize these two landmark cases and hypothesize as to the appropriate test for visual body cavity searches incident to arrest, it must first be recognized that nowhere in Wolfish does the court state or discuss whether a visual body cavity search is an intrusion beneath the body's surface. Schmerber was cited by the Wolfish court only to support the necessity of the search being carried out in a reasonable manner.97 Additionally, nowhere in Schmerber does the Supreme Court clarify what constitutes a bodily intrusion. It is an insufficient analysis to assume that if Schmerber tests intrusions below the body's surface, and the court declined to use this in Wolfish, then a visual body cavity search is not considered such an intrusion. It is just as insufficient to assume that if a visual body cavity search is an intrusion below the body's surface, then Wolfish impliedly limits Schmerber to blood test cases or other physically intrusive medical practices. Can the two cases be reconciled to provide the public with greater

94. Id. (emphasis added).
95. See supra at Part III.C.
96. See id.
Fourth Amendment protection? Yes, by examining how the two tests have spilled over into related areas.

The courts have addressed the issue of intrusions beyond the body's surface such as blood tests, DNA sampling, and HIV tests in the prison context, and they found that probable cause is required where the searches are for the discovery of evidence.\footnote{98} Where there is a distinct and significant state interest, such as control of the AIDS epidemic\footnote{99} and the genetic fingerprinting of convicted sex offenders,\footnote{100} the search acts are reasonable under the Fourth Amendment without probable cause. The reasonableness of these searches seems to not only rely on the state's interest, but also on the low expectation of privacy retained by convicted prisoners. As discussed previously, the state also has significant interest in maintaining prison security and safety. Therefore, a visual body cavity search, framed as an intrusion beyond the body's surface, performed without probable cause upon a pre-trial detainee in a joint housing facility, could be consistent with \textit{Wolfish}. Despite the detainee's now greater Fourth Amendment protection, the pre-trial detainee's privacy interests would still be outweighed by the state's interest in guarding against the real and immediate danger presented by smuggled weapons, drugs, or contraband, just as detainee interests were outweighed by the state's interests in the HIV testing and DNA sampling cases.

Consider also that while Justice Brennan dismissed the recognized search incident to arrest considerations in \textit{Schmerber} as having "little applicability to intrusion beyond the body's surface,"\footnote{101} he did include in his opinion that "the attempt to secure evidence of blood alcohol content in this case was an appropriate incident to the petitioner's arrest."\footnote{102} This suggests that the Court recognized a person's reduced expectation of privacy in the incident to arrest status, but it found in \textit{Schmerber} that it was not so low that a warrantless blood test would be permitted without probable cause to search, a clear indication that evidence will be found, and exigent circumstances. The pattern suggests that just as the warrant requirement to search a person diminishes when a suspect is

\footnote{98} See State v. Olivas, 856 P.2d 1076 (Wash. 1993).
\footnote{99} See People v. Adams, 597 N.E. 2d 574 (Ill. 1992) (requiring incarcerated persons convicted of prostitution, sex crimes or drug use involving hypodermic needles to submit to involuntary HIV tests was constitutional under the Fourth Amendment because of state's interest in preserving public health).
\footnote{100} See Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995) (requiring felons convicted of murder or specific sexual offenses to submit blood sample for a DNA databank was deemed constitutional under the Fourth Amendment because of the public's interest in preventing recidivism and in accurately identifying and prosecuting murderers and sex offenders).
\footnote{102} \textit{Id.} at 771.
shifted from pre-arrest to search incident to arrest status, a similar diminishment can occur to the Schmerber probable cause and clear indication requirement when a suspect shifts from incident to arrest to pre-trial detainee status.

Because visual body cavity searches can be categorized as intrusions beneath the body’s surface without conflicting with Wolfish, how do such searches fare under the Schmerber test? The answer depends on whether a visual body cavity search is a minor intrusion, equal to, or greater than a blood test. Courts have described blood tests as being more than an ordinary search, as requiring special treatment, and as a violation of bodily integrity. Nevertheless, blood tests have not been described nearly as colorfully or with such a sense of horror as the visual body cavity search. If a minor, medically common, non-traumatic procedure, such as drawing blood, requires probable cause and a clear indication, then certainly a “de-humanizing” process, such as these visual body cavity inspections, deserves the same protection.

An important question remains: why should visual body cavity searches be in the bodily intrusion category in the first place? They cannot be placed in a more regulated category simply because they are distasteful or offensive.

B. Why Visual Body Cavity Searches Should be Considered Intrusions Beyond the Body’s Surface

The Court in Schmerber never mentions that its holding is limited to physical intrusions. In fact, physicality is not mentioned at all. Rather, the Court refers to “intrusions beyond the body’s surface” that jeopardize “interests in human dignity and privacy.” The Court often uses the term “intrusion” to discuss Fourth Amendment issues and has not limited its use to the description of only physical penetrations.

In Katz v. United States, the Supreme Court stated, “[O]nce it is recognized that the Fourth Amendment protects people—and not simply ‘areas’—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.” The Katz Court decided whether the wire tapping of a phone booth (where there was no physical penetration of the area around the suspect) was an unconstitutional search and seizure.

103. See supra Part III.A.
104. Schmerber, 384 U.S. at 769.
105. Id. at 769-770.
107. Id. at 353.
The Court, in analyzing the case, explained:
that a duly authorized magistrate, properly notified of the need for
such investigation, specifically informed of the basis on which it was
to proceed, and clearly appraised of the precise intrusion it would
entail, could constitutionally have authorized, with appropriate safe-
guards, the very limited search and seizure that the Government
asserts in fact took place.\textsuperscript{108}

Does \textit{Schmerber} protect minor physical invasions of the body over
extreme visual invasions of the body, despite the possible emotional
consequences? The Court did not express its concern over blood tests
because breaking the skin is in and of itself detestable. It was the con-
cern for “human dignity and privacy” that such an intrusion would
threaten if its use was without stringent restriction.\textsuperscript{109}

The possible lasting effects of visual body cavity searches are
“shock, panic, depression, shame, rage, humiliation, and nightmares.”\textsuperscript{110}
The psychological effects on some people reportedly resemble those of
rape victims.\textsuperscript{111} The persons searched are required to humiliate them-
soever by stripping off all their clothes and then must reveal their most
private parts to complete, intimidating, and threatening strangers.

If a minor intrusion, such as a blood test,\textsuperscript{112} which results in “virtu-
ally no risk, trauma, or pain,”\textsuperscript{113} must meet a high Fourth Amendment
reasonableness standard, then visual body cavity searches should meet
the same standard. This is particularly so when visual body cavity
searches can fall under the established category of “intrusions beyond
the body’s surface” without a significant expansion in the meaning of
the phrase.

C. Law Enforcement Ramifications

The dual purposes of searches incident to arrest are to search for
weapons and to discover the fruits of the crime that may be concealed or
destroyed.\textsuperscript{114} If the probable cause/clear indication standard is set for
visual body cavity searches, will it jeopardize the safety of police officer
and result in lost evidence?

Two states, New Jersey and Tennessee, have passed statutes requiring
a search warrant or consent in order to perform a visual body cavity

\begin{itemize}
\item \textsuperscript{108} Id. at 354.
\item \textsuperscript{109} See \textit{Schmerber} v. California, 384 U.S. 757, 769-70 (1966).
\item \textsuperscript{110} Id. at 354.
\item \textsuperscript{111} Id. at 770.
\item \textsuperscript{112} Id. at 771.
\item \textsuperscript{113} Id. at 770.
\item \textsuperscript{114} \textit{See supra} Part II.
\end{itemize}
search. The New Jersey statute defines a body cavity search as "the visual or manual search of a person's anal or vaginal cavity." The search must be authorized by warrant or consent unless the person is lawfully confined to an adult county correctional facility and the search is based on reasonable suspicion. This statute was enacted in 1991.

A Tennessee statute defines a body cavity search as "an inspection, probing or examination of the inside of a person's anus, vagina, or genitals." A warrant for a body cavity search is likewise required by Tennessee. Tennessee's statute was enacted in 1993.

The heightened requirement of search warrants, implying at least a probable cause requirement, has been tested by these two states for over six years. There are no apparent movements pushing for a reversion to prior standards. If this is accurate, it is a testament that safety and functionality can continue to be preserved under a probable cause standard. The barring of visual body cavity searches incident to arrest does not appear to be an impediment to police officers safely and effectively carrying out their duties. However, a more thorough and scientific testing would be necessary to support this view definitively.

V. The Inevitable Discovery Obstacle

It is widely accepted that because of the distinct and overwhelming interest in preserving prison security, a custodial search prior to admittance to a municipal detention center is permitted. For example, in Jersey City, New Jersey, arrestees are first taken to the precinct house for preliminary procedures. They are then sent to another facility for prints and processing. Finally, arrestees are brought to the central booking facility. Prior to arrival at the central booking facility, only pat downs are carried out on arrestees. Articulable suspicion and supervisory approval are required before more intrusive searches can be performed. The Jersey City booking center is a mixed-use facility, so both pre-trial detainees and incarcerated convicts are held there. Upon

117. TENN. CODE. ANN. § 40-7-121(a) (1998).
118. TENN. CODE. ANN. § 40-7-121(b) (1998).
119. Telephone Interview with Lt. Louf, Jersey City Police Dept, in Jersey City, N.J. (January 12, 1999).
120. See supra Part III.B. (The Wolfish Test).
121. See Telephone Interview with Lt. Louf, Jersey City Police Dept, in Jersey City, N.J. (Jan. 12, 1999).
122. See id.
123. See id.
124. See id.
125. See id.
arrival, mandatory strip and visual body cavity searches are made and physical body cavity searches can be carried out if reasonable suspicion exists.\textsuperscript{126} Such procedures are an expected result where only minor search intrusions can be made outside of penal facilities.

Many courts and state legislatures have prohibited blanket strip/visual body cavity searches for misdemeanor arrestees, unless there is individualized suspicion.\textsuperscript{127} The catalyst for this movement was \textit{Mary Beth G. v. City of Chicago}.\textsuperscript{128}

In \textit{Mary Beth G.}, Chicago had a blanket policy of performing visual body cavity searches on female misdemeanor and traffic offenders who were not inherently dangerous and who were being detained briefly while awaiting bond.\textsuperscript{129} The official City policy was to:

1) lift her blouse or sweater and to unhook and lift her brassiere to allow a visual inspection of the breast area, to replace these articles of clothing and then
2) to pull up her skirt or dress or to lower her pants and pull down any undergarments, to squat two or three times facing the detention aide and to bend over at the waist to permit visual inspection of the vaginal and anal area.\textsuperscript{130}

The Seventh Circuit found that unlike the detainees in \textit{Wolfish}, the women in \textit{Mary Beth G.} were minor offenders, and not inherently dangerous. On the other hand, the detainees in \textit{Wolfish} were awaiting trial on serious federal charges after having failed to make bond and were being searched after contact visits.\textsuperscript{131} The court applied the \textit{Wolfish} test and determined that although detention centers may be “fraught with

\textsuperscript{126} See id.

\textsuperscript{127} See \textit{FLA. STAT.} § 901.211 (West 1991):

(2) No person arrested for a traffic, regulatory, or misdemeanor offense, except in a case which is violent in nature, which involves a weapon, or which involves a controlled substance, shall be strip searched unless:

(a) There is probable cause to believe that the individual is concealing a weapon, a controlled substance, or stolen property; or

(b) A judge at first appearance has found that the person arrested cannot be released either on recognizance or bond and therefore shall be incarcerated in the county jail.

\textit{See also} Masters v. Crouch, 872 F.2d 1248, 1253 (6th Cir. 1989); Watt v. Richardson Police Dep't, 849 F.2d 195, 199 (5th Cir. 1988); Walsh v. Franco, 849 F.2d 66, 68 (2d Cir. 1988); Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986); Jones v. Edwards, 770 F.2d 739, 742 (8th Cir. 1985); Hill v. Bogans, 735 F.2d 391, 394 (10th Cir. 1984); \textit{Mary Beth G. v. City of Chicago}, 723 F.2d 1263, 1273 (7th Cir. 1983); Logan v. Shealy, 660 F.2d 1007, 1013 (4th Cir. 1981).

\textsuperscript{128} 723 F.2d 1263 (7th Cir. 1983).

\textsuperscript{129} Id. at 1267-68.

\textsuperscript{130} Id. at 1267.

\textsuperscript{131} See supra Part III.B.
serious security dangers,” there was insufficient evidence that “those dangers are created by female minor offenders entering the lockups for short periods while awaiting bail.” The need for strip or visual body cavity searches, in the absence of evidence regarding incidences of weapons and contraband found in the body cavities of misdemeanor offenders, did not outweigh the “severity of the governmental intrusion.”

In contrast, with the exception of the Ninth Circuit, no court or legislature has provided the same protection for felony arrestees. Blanket strip/visual body cavity of felony arrestees are permitted. One sentiment on this matter was put forth by the United States District Court of Maryland which asserted, “[R]easonable suspicion exists to strip search all felony arrestees . . .” How true is this? Is there evidence to suggest that all felony arrestees are likely to be secreting contraband or weapons in a body cavity? Rather than linking blanket policies to specific types of felonies, such as those involving weapons, violence, or narcotics, the policy of searching the body cavities of felony arrestees, without regard for the crime alleged, has been permitted without dispute.

The danger presented by failing to provide the same protection to felony detainees as provided to misdemeanor detainees is that the suspected felon’s right to suppress illegally obtained evidence, established

132. Mary Beth G., 723 F.2d at 1273 (citing Bell v. Wolfish, 441 U.S. 520, 559 (1979)).
133. Id.
134. Id.
135. The Ninth Circuit, in Kennedy v. Los Angeles Police Dept., 901 F.2d 702 (9th Cir. 1989), reviewed a blanket policy requiring visual body cavity searches of all felony arrestees regardless of reasonable suspicion. Ms. Kennedy held her roommate’s property as security until her debts were paid. Id. She was arrested for grand theft, a felony, and brought to the Van Nuys jail. Id. There, she was forced to remove all her clothing, and, after a basic strip search, she “was required to insert her fingers into her vagina and anus so that the policewomen could check whether she had concealed any drugs or contraband in these body cavities.” Id. at 711.

The court recognized the legitimate security interest in preventing drugs, contraband, weapons, or other unlawful objects from entering penal facilities, but a search as intrusive as a visual body cavity inspection must not rest on “societal judgements” or felony/misdemeanor classifications. Id. at 717. Rather, there must be reasonable suspicion that the individual is concealing contraband. “Reasonable suspicion may be based upon the nature of the offense, the arrestee’s appearance and conduct, and the prior arrest record.” Id. at 716 (citing Giles v. Ackerman, 746 F.2d 614, 617 (9th Cir. 1984)).

136. Smith v. Montgomery County, Maryland, 643 F. Supp. 435, 439 (D. Md. 1986) (holding that blanket strip and visual body cavity search policy covering all temporary detainees at the county detention center did not violate the Fourth Amendment with regards to felony arrestees and those misdemeanor offenders for whom there was individualized reasonable suspicion that they were concealing weapons or contraband); see Davis v. Camden, 657 F. Supp. 396, 400-401 (D. N.J. 1987) (holding blanket policy requiring strip searches for all arrestees regardless of the nature of the charged offense or individualized suspicion invalid, but a blanket policy which only requires such a search for felony offenders and misdemeanors involving weapons or contraband is based on a reasonable justification that such arrestees will likely conceal weapons or contraband).
by *Mapp v. Ohio*,\(^{137}\) will be trumped automatically by the inevitable discovery exception in strip and visual body cavity search cases.\(^{138}\) The suppression of ill-gotten evidence is a prophylactic doctrine to help prevent abuses by law enforcement officers.\(^{139}\) This safeguard may be rendered impotent when improper physical searches of felony suspects, for whom there is probable cause to arrest, are made outside of the stationhouse or detention center.

This strategy worked for the defendants in *Louisiana v. Bullock*.\(^{140}\) There, police officers properly executed a warrant to search the residence of suspected cocaine dealer, Willie Cole.\(^{141}\) Upon entering, the police found Dawn Bullock (the defendant) and Cole lying on a bed in the bedroom. Another woman, one of four present in the house, was found attempting to flush down the toilet a plastic bag, later found to contain cocaine. In the bedroom, a handgun was found.\(^{142}\) Because both Cole and Bullock had prior felony convictions, they were both arrested for being convicted felons in possession of a handgun.\(^{143}\) A female DEA agent then took Bullock into a bathroom in the house, conducted a strip search, and found the end of a plastic bag protruding from her vagina.\(^{144}\) The agent pulled out the bag and, as a result of a physical body cavity search, discovered another bag of what was later determined to be cocaine.\(^{145}\)

The court agreed with the defendants that the search of Bullock exceeded the scope of the warrant that it also exceeded the scope of a search incident to arrest allowed by both *Chimel* and *State v. Wilson*.\(^{146}\) It likewise found that with respect to the manual cavity search, the Schmerber test was applicable to determine the search’s permissibility absent a warrant.\(^{147}\) The search failed this test due to a lack of emergency. However, because there was already probable cause to arrest for possession of the firearm, and Bullock would have been reasonably searched at Central Lockup, the evidence would have inevitably been discovered and therefore, suppression was not required.\(^{148}\)

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\(^{140}\) 661 So. 2d 1074 (La. App. 1995).

\(^{141}\) See id. at 1075.

\(^{142}\) See id.

\(^{143}\) See id.

\(^{144}\) See id.

\(^{145}\) See id.

\(^{146}\) See id.

\(^{147}\) See id. at 1076.

\(^{148}\) See id. at 1077.
A similar, but unsuccessful attempt, to suppress evidence was made by the defendants in *Commonwealth v. DiCicco*.149 There, police officers had a warrant to search the person and automobile of DiCicco.150 The warrant was based on the affidavit of a confidential informant who alleged that DiCicco sold heroin and generally stored it in his anus.151 The police pulled DiCicco over in a well-lit, residential area with heavy vehicular and pedestrian traffic.152 While standing on the sidewalk, after initial questioning and a pat-down search, DiCicco was told to drop his pants and underwear to the ground.153 The officer inspected and briefly touched DiCicco’s genitals.154 Finding nothing, the officer next instructed DiCicco to turn around and bend over whereupon a small bag fell from between his buttocks.155 Subsequent tests later revealed the contents to be heroin. The court held the search to be unreasonable.156

The court found the scope and manner of the search severe and highly intrusive. A search such as this, in a public place, was constitutionally invalid.157 The Commonwealth argued in vain that DiCicco was shielded from public view by the seven police officers present, parked cars, overhanging trees, and a police dog.158

The Commonwealth also claimed that “because the Commonwealth could have lawfully obtained an arrest warrant for DiCicco and conducted a search of his person pursuant to that arrest, which search [sic] would have inevitably led to their discovery of the bag.”159 The court rejected this argument on two grounds. First, the Commonwealth did not present sufficient evidence that an arrest warrant would have been sought absent the discovery of the illegally discovered bag of heroin.160 Second, the court considered the constitutional violation in this case “to be so severe, the inevitable discovery exception to the exclusionary rule, should not apply.”161

This case again presents the problem of how to measure degrees of

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150. See id.
151. See id.
152. See id. at *2.
153. See id.
154. See id.
155. See id. at *3.
156. See id. at *4.
157. See id.
158. See id.
159. Id. at *4.
160. See id.
161. Id.; see also *Commonwealth v. O'Connor*, 546 N.E. 2d 336 (Mass. 1989) (“We think the severity of the constitutional violation is critical in deciding whether to admit evidence that it is shown would inevitably have been discovered.”).
intrusion where the searches themselves are difficult to quantify. Logically, as the intrusiveness of the search escalates, so should the safeguards against them. Likewise, as the expectation of privacy associated with a person’s status declines, fewer impediments to police and correctional measures remain. A court would be likely to find a warrantless manual body cavity search of an arrestee in public so unreasonable and such an extreme intrusion that the inevitable discovery exception would not be permitted. The line blurs considerably from there.

Not only is it difficult to determine a hierarchy of intrusiveness based upon the suspect’s status minus the scope or category of the search, but additional factors, such as the manner in which the search which it was carried out and the location of the suspect at the time of the search, complicate this calculus further. This makes it exceedingly difficult for there to be consistency in court decisions. For example, one might assume that a visual body cavity search or strip search in public view would violate all concepts of decency. Such was the holding in State v. Walker.\(^\text{162}\) However, what is deemed to be “in the public view” is subjective. In State v. Casterlow-Bey, a strip search in a mall parking lot, using a police car door as a privacy screen, was considered “a relatively private setting given the circumstances” and therefore a reasonable search.\(^\text{163}\) The inevitable discovery doctrine should not be a blanket and should not be used in all circumstances.\(^\text{164}\) This is especially so when its application may encourage law-enforcement shortcuts whenever evidence may be more readily obtained by unlawful means. If this doctrine must apply, then the adoption of a good faith requirement, as suggested by Professor Wayne La Fave, is the minimum the courts can do to provide protections from the abusive use of visual body cavity searches.\(^\text{165}\)

VI. Conclusion

The practice of performing warrantless visual body cavity searches with less than probable cause to search and a clear indication that evidence will be found is unconstitutional under the Fourth Amendment. Visual body cavity searches should satisfy the technical aspects and the

\(^{162}\) No. 97APA09-1219, 1998 WL 429121 (Ohio App. July 28, 1998) (holding that where a police officer pulled down suspect’s pants, saw a bag between the suspect’s buttocks, and retrieved the bag, the search was unreasonable because the act took place in public behind a van); see also Commonwealth v. Gilmore, 498 S.E.2d 464 (Va. 1998).


\(^{164}\) See State v. Ault, 72 P.2d 545 (Ariz. 1986) (holding the inevitable discovery exception does not apply to unconstitutional searches or seizures in the home).

\(^{165}\) See WAYNE LA FAVE, 4 W. LA FAVE, § 11.4(a), p. 383 (2d ed. 1987)
spirit of the *Schmerber v. California* decision. The Supreme Court set out to protect human dignity and privacy, and it did not seek to turn its back on this principle in *Bell v. Wolfish*. *Wolfish* represents the difficult choices the Court is often forced to make when weighing two vital interests: the privacy interests of pre-trial detainees versus the security interests of prison personnel and inmates. The Supreme Court’s prioritization of institutional security over individual privacy in *Wolfish* should not affect Fourth Amendment protection outside of the prison or detention center context.

Even more disturbing than visual body cavity searches incident to arrest on less than probable cause is the possibility of the Fourth Amendment losing more of its teeth. If courts allow the detention center pre-admission search to be grounds for inevitable discovery, then there will be little protection against bad faith abuses and intrusions to privacy. Such a loss of constitutional rights is unacceptable.

The courts must read and apply their own words—"demeaning," "dehumanizing," "degrading," and "repulsive." That is how they view the visual body cavity search. The courts need only to hold that the dignity and privacy of one’s body are vital human interests. The courts must find that, although permitted in jail on mere reasonable suspicion, authorities must meet the *Schmerber* standard in order to conduct visual body cavity searches incident to arrest. That is, they must establish that they have probable cause to search and clear indication that the evidence sought will be found.

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