Seizing Evidence From Suspects For Forensic Analysis

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Forensic Science: Seizing Evidence From Suspects for Forensic Analysis

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As the O.J. Simpson case illustrates, trace evidence can be used to establish a link between a suspect and a crime scene. Blood, semen, hair, fibers, soil, and fingerprints have all been used in this manner. In addition, bite marks, gunshot residues, handwriting, and voice exemplars have been used to connect a suspect and a crime. In some cases, procedures as invasive as the surgical removal of bullets from suspects has occurred. Moreover, the advent of DNA profiling and DNA data banks foreshadow an increase in the use of scientific evidence.

These techniques often require the suspect’s cooperation, ranging from passive presence for fingerprinting or blood extraction to active participation in providing voice or handwriting samples. This contact between the police and a suspect implicates several constitutional rights: (1) the privilege against self-incrimination; (2) the right to counsel; (3) the right to be free from unreasonable searches and seizures; and (4) due process. This column examines these issues.

Self-Incrimination

Testimonial vs. Physical Evidence

The leading case on the applicability of the Fifth Amendment privilege to the collection of physical evidence is *Schmerber v. California.* While being treated at a hospital for injuries sustained in an automobile collision, Schmerber was arrested for driving under the influence of alcohol. At the direction of the investigating police officer, a physician obtained a blood sample from Schmerber. Before the Supreme Court, Schmerber argued that the extraction of blood violated the privilege against self-incrimination. Rejecting this argument, the Court held that the privilege covers only communicative or testimonial evidence, not physical or real evidence. According to the Court:

It is clear that the protection of the privilege reaches an accused’s communications, whatever form they might take. . . . On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. 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 suspect or accused the source of “real or physical evidence” does not violate it.  

* Albert J. Weatherhead III & Richard W. Weatherhead Professor of Law, Case Western Reserve University. This column is based in part on P. Giannelli & E. Imwinkelried, *Scientific Evidence* (2d ed. 1993). Reprinted with permission.


2 Id. at 763–764.
Subsequent Supreme Court cases reaffirmed the testimonial-physical evidence distinction. In *Gilbert v. California*,\(^3\) the Court concluded that the compelled production of a "mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the Fifth Amendment's] protection."\(^4\) Similarly, in *United States v. Dionisio*,\(^2\) the Court ruled that compelling a defendant to speak for the purpose of voice analysis did not violate the Fifth Amendment because the "voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said."\(^6\)

In its most recent case on the subject, *Pennsylvania v. Muniz*,\(^7\) the Court once again applied the *Schmerber* rule. Muniz was asked to perform a horizontal gaze nystagmus test, a "walk and turn" test, and a "one leg stand test." A videotape of his performance was shown at trial. The Court wrote:

> Under *Schmerber* and its progeny, ... any slurring of speech and other evidence of lack of muscular coordination revealed by Muniz's responses to Officer Hosterman's direct questions constitute nontestimonial components of those responses. Requiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound produced by his voice, see *Dionisio* . . . , does not, without more, compel him to provide a "testimonial" response for purposes of the privilege.\(^8\)

In contrast, Muniz's inability to answer when requested to state the date of his sixth birthday amounted to a testimonial response and should have been excluded.\(^9\)

Under *Schmerber*, obtaining evidence for most forensic techniques is free from Fifth Amendment concerns because these techniques involve physical, not testimonial, evidence. Thus, the lower courts have applied *Schmerber* to cases involving handwriting,\(^10\) fingerprints,\(^11\) voice exemplars,\(^12\) dental impressions,\(^13\) urine

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\(^{1}\) 388 U.S. 263 (1967).


\(^{3}\) 410 U.S. 1 (1973).

\(^{4}\) Id. at 7. See also United States v. Wade, 388 U.S. 218, 222 (1967) (compelling an accused to exhibit his person for observation was compulsion "to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have").

\(^{5}\) 496 U.S. 582 (1990).
samples, gunshot residues, and other techniques. Nevertheless, the application of the Schmerber rule continues to provoke disagreement in some situations. For example, in State v. Maze, the court ruled that "recitation of the alphabet is not testimonial in that it does not require a suspect to communicate any personal beliefs or knowledge." In contrast, in Allred v. State, the Florida Supreme Court ruled that evidence of the defendant's incorrect recitation of the alphabet when stopped for driving under the influence violated the state constitution: "Failure to accurately recite the alphabet 'discloses information beyond possible slurred speech; it is the content (incorrect recitation) of the speech that is being introduced, rather than merely the manner (slurring) of speech.'

State Constitutions

As Allred indicates, an accused may not have to rely on federal law. A state is always free to provide greater self-incrimination protection than is afforded by the Fifth Amendment. For example, passive submission while evidence is obtained does not violate the self-incrimination clause of the Georgia Constitution. Thus, fingerprints could be compelled. However, compelled active participation, such as requiring a suspect to place a foot in a cast, is prohibited.

Refusal to Submit to Intoxication Tests

In South Dakota v. Neville, the Supreme Court considered whether the admission into evidence of a defendant's refusal to submit to a blood-alcohol test violated the Fifth Amendment. Instead of relying on the testimonial-physical evidence distinction, the Court rested its decision on different grounds. According to the Court, refusal to take the test did not amount to "compulsion" within the meaning of the privilege: "A refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination." The Court explained that the respondent concedes, as he must, that the State could legitimately compel the suspect, against his will, to accede to the test. Given, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no less legitimate when the State offers a

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18 Id. at 1173.
19 622 So. 2d 984 (Fla. 1993).
20 Id. at 987.
23 Id. at 564.
second option of refusing the test, with the attendant penalties for making the choice.24

A number of courts have reached the same result on state constitutional grounds.25 The Supreme Judicial Court of Massachusetts, however, has reached a different conclusion under its constitution. That court has written:

It does not logically follow, however, that, because test results are not testimonial, refusal evidence falls in the same category. In the ordinary case a prosecutor would seek to introduce refusal evidence to show, and would argue if permitted, that a defendant’s refusal is the equivalent of his statement, “I have had so much to drink that I know or at least suspect that I am unable to pass the test.” . . .

If refusal evidence has relevance to any issue essential to the prosecution’s case, it is because it is reflective of the knowledge, understanding, and thought process of the accused.26 Consequently, evidence of refusal to take a breathalyzer test violates the state self-incrimination clause. In a later case, the same court ruled that evidence of a defendant’s refusal to submit to a gunshot residue test also violated the state constitution: “If the fact that the defendant refused to allow the hand-swabbing demonstrates consciousness of guilt, such refusal rises to the level of a self-accusation.”27

Polygraph Examinations

Some types of forensic techniques, however, may implicate Fifth Amendment issues. As the Supreme Court has noted, the “distinction between real or physical evidence, on the one hand, and communications or testimony, on the other, is not readily drawn in many cases.”28 Polygraph testing is an example.29 The Court in Schmerber commented on the Fifth Amendment aspects of polygraph examinations:

Some tests seemingly directed to obtain “physical evidence,” for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment.30

Courts that have admitted polygraph evidence have recognized the applicability of the privilege in this context.31

24 Id. at 563.
26 Opinion of the Justices to the Senate, 591 N.E.2d 1073, 1077–1078 (Mass. 1992). The Massachusetts Constitution contains an additional clause; it prohibits compelling a person to “furnish evidence against himself.” The Court has ruled that this provision requires a “broader interpretation” than that of the Fifth Amendment. Id. at 1078.
29 Id. at 561 n.12.
30 384 U.S. at 764.
31 E.g., Commonwealth v. A Juvenile, 313 N.E.2d 120, 127 (Mass. 1974)
FORENSIC SCIENCE

Right to Counsel

The Sixth Amendment guarantees an accused the right to counsel. This right has not been limited to trial but has been extended, under some circumstances, to identification procedures and interrogations. Although defendants have argued that the right to counsel also applies when evidence is obtained from them for scientific analysis, this argument has failed for two reasons.

Attachment of Right

First, the Supreme Court has held that the right to counsel attaches only after the "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." An arrest, by itself, does not trigger the right to counsel.

Frequently, evidence that is submitted for scientific analysis has been obtained from defendants during the investigatory stage, prior to commencement of formal criminal proceedings, and thus before the time when the right to counsel attaches. Cases involving swabbing for gunshot residues and the taking of teeth impressions have been decided on this basis. Similarly, a person arrested for driving while intoxicated does not have a federal constitutional right to counsel when deciding whether to take a blood-alcohol test. In some jurisdictions, however, a right to "consult" counsel may be guaranteed by state law.

Critical Stages

The right to counsel often does not apply for a second reason. Neither the obtaining of evidence for scientific analysis nor the analysis itself is a "critical" stage within the meaning of the Sixth Amendment.

In United States v. Wade, the Supreme Court held that the right to counsel applied to lineup identifications. According to the Court, a lineup presents "grave potential for prejudice . . . which may not be capable of reconstruction at trial, and [the] presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial." The Court, however, distinguished eyewitness identification procedures from the scientific analysis of physical evidence:

The Government characterizes the lineup as a mere preparatory step in the gathering of the prosecution's evidence, not different—for banc) (teeth impressions taken before right to counsel attached), cert. denied, 499 U.S. 932 (1991).


40 Id. at 236.
Sixth Amendment purposes—from various other preparatory steps, such as systemized or scientific analyzing of the accused’s fingerprints, blood sample, clothing, hair, and the like. We think there are differences which preclude such stages being characterized as critical stages at which the accused has the right to the presence of his counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government’s case at trial through the ordinary processes of cross-examination of Government’s expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel’s absence at such stages might derogate from his right to a fair trial. 41

In a companion case, Gilbert v. California, 42 the defendant contended that his right to counsel had been violated when he was compelled to provide handwriting exemplars in the absence of an attorney. Whereas Wade focused on the time of laboratory analysis, Gilbert focused on the time the evidence is obtained from the suspect. Nevertheless, the result was the same; the right to counsel did not apply. The Court in Gilbert found significant differences between conducting a lineup and obtaining exemplars:

The taking of the exemplars was not a “critical” stage of the criminal proceedings entitling petitioner to the assistance of counsel. . . . [T]here is minimal risk that the absence of counsel might derogate from his right to a fair trial. . . . If, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts. Thus, “the accused has the opportunity for a meaningful confrontation of the [State’s] case at trial through the ordinary processes of cross-examination of the [State’s] expert [handwriting] witnesses and the presentation of the evidence of his own [handwriting] experts.” 43

Hence, unlike eyewitness identification procedures, the adversary process is thought to afford a criminal defendant an adequate opportunity to confront and challenge scientific evidence. Moreover, as one court has remarked: “Not only is the taking of the exemplars not at a critical stage of the proceedings entitling an accused to the assistance of counsel, but Appellant has pointed to no function counsel could perform, were he present, save the futile advice not to give the sample.” 44

Accordingly, courts have held the right to counsel does not apply when gunshot residues, 45 fingerprints,
prints,\textsuperscript{46} palmprints,\textsuperscript{47} blood,\textsuperscript{48} hair,\textsuperscript{49} and other types of evidence\textsuperscript{50} are obtained from suspects. In a recent case, the Washington Supreme Court noted that "the taking of nontestimonial physical evidence [blood for DNA testing] is not usually a critical stage at which the right to counsel attaches."\textsuperscript{51}

\section*{Search and Seizure}

The Fourth Amendment guarantees the right to be free from unreasonable governmental searches and seizures. In some cases, evidence that may be subjected to scientific analysis is seized from a specific location.\textsuperscript{52}

Typically, there are two distinct Fourth Amendment issues raised when physical evidence is obtained from a suspect for the purpose of scientific analysis. First, there is a "seizure" of the person that brings the suspect under the control of the police. Second, there is a subsequent search and seizure of physical characteristics, biological specimens, or trace evidence from the seized person.\textsuperscript{53}

\section*{Seizure of the Person}

Before trace evidence or physical characteristics can be obtained from a suspect, the suspect must either consent or be detained under some form of government control. Such control raises the question whether the person has been "seized" within the meaning of the Fourth Amendment. Evidence submitted for scientific analysis has been collected from suspects (1) at the time of arrest; (2) during pretrial incarceration; (3) during detention on less than probable cause; and (4) pursuant to grand jury subpoenas and administrative summonses. If the initial seizure of the person violates Fourth Amendment requirements, evidence from the subsequent search of that person may be excluded at trial as "fruit of the poisonous tree."
Generally, if the arrest is valid, the seizure of physical evidence from the person incident to the arrest is also valid. While the arrest of a person in a public place does not require the issuance of an arrest warrant, it does require probable cause that a crime has been committed by the arrestee. For example, the Court addressed the constitutionality of the initial seizure (the arrest) before turning to the Fourth Amendment implications of withdrawing blood from Schmerber. The Court held that probable cause for the arrest existed based on the arresting officer’s observation of the defendant at both the scene of the accident and at the hospital.

In Davis v. Mississippi, the Court considered the constitutionality of a detention during which fingerprints were obtained from Davis. Although fingerprints were found on the window used by an assailant to gain entry into a rape victim’s house, the victim could not provide any description of her attacker other than his race and approximate age. The police conducted a dragnet procedure in which numerous young blacks, including Davis, were detained and fingerprinted. The Court ruled that the detention, based neither on probable cause nor a warrant, was illegal. Consequently, the fingerprint evidence was suppressed.

Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment. It is arguable, however, that, because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense. Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual’s private life and thoughts that marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person’s prints. Furthermore, fingerprinting is an inherently more reliable and effective crime solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper lineup and the “third degree.” Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time. For this same reason, the

57 392 U.S. 1 (1968).
general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.\(^5^8\)

As a result of this dictum, a number of statutes and court rules providing for detention on less than probable cause for the purpose of nontestimonial identification procedures have been adopted\(^5^9\) or proposed.\(^6^0\) For example, an Arizona statute provides for the issuance of judicial orders for obtaining “fingerprints, palm prints, footprints, measurements, handwriting, handprinting, sound of voice, blood samples, urine samples, saliva samples, hair samples, comparative personal appearance, or photographs of an individual.”\(^6^1\) Such an order may be issued if the following conditions are satisfied:

1. Reasonable cause for belief that a specifically described criminal offense punishable by at least one year in the state prison has been committed.
2. Procurement of evidence of identifying physical characteristics from an identified or particularly described individual may contribute to the identification of the individual who committed such offense.
3. Such evidence cannot otherwise be obtained by the investigating officer from either the law enforcement agency employing the affiant or the criminal identification division of the Arizona department of public safety.\(^6^2\)

The Arizona courts have upheld the constitutionality of this provision.\(^6^3\) Similarly, the Colorado rule on nontestimonial identification procedures also has been upheld.\(^6^4\)

Unlike other provisions, the Arizona statute does not specify the quantum of evidence required to subject a person to such an order. In contrast, an Idaho statute provides that a nontestimonial identification order may be issued if “[r]easonable grounds exist, which may or may not amount to probable cause, to believe that the . . . individual committed the criminal offense.”\(^6^5\)

\(^{58}\) Davis, 394 U.S. at 727-728. The Court then commented: “We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest. . . .” Id. at 728.


\(^{64}\) See People v. Davis, 669 P.2d 130, 133-135 (Colo. 1983) (nontestimonial order for photographs, fingerprints, and voice exemplar based on informant’s tip upheld); People v. Madson, 638 P.2d 18, 31-32 (Colo. 1981) (en banc) (handwriting exemplars).

\(^{65}\) Idaho Code § 19-625(B) (1987). See also Colo. R. Crim. P. 41.1(c)(2) (“reasonable grounds, not amounting to probable cause to arrest, to suspect that the person . . . committed the offense”).
The U.S. Supreme Court has yet to decide the constitutionality of such provisions. In *Hayes v. Florida*, however, the Court noted that it had "not abandon[ed] the suggestion in *Davis* . . . that under circumscribed procedures, the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station for the purpose of fingerprinting." The Court also noted that the state courts were divided on this issue. Some courts have refused to uphold the issuance of such orders, while other courts have sanctioned their use. Nevertheless, the Supreme Court strongly suggested that "a brief detention in the field for the purpose of fingerprinting," based on reasonable suspicion, would be constitutional.

The dictum in *Davis* and *Hayes*, however, was limited to fingerprinting, which the Court emphasized was not an intrusive procedure. The issuance of nontestimonial identification orders for more intrusive procedures, such as the extraction of blood, may conflict with *Schmerber* in which the Court required a more demanding standard.

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67 Id. at 817.
70 470 U.S. at 816.
71 See People v. Marshall, 244 N.W.2d 451, 456 (Mich. App. 1976) ("No judicial precedent was found, however, which sanctioned the use of a court order on less than probable cause in order to take blood samples from a suspect’s person. Indeed, the constitutionality of such a procedure appears doubtful in light of *Schmerber v. California*.")
73 Id. at 10.
74 Id. See also United States v. Euge, 444 U.S. 707 (1980) (Internal Revenue Service statutorily authorized to issue summonses compelling a taxpayer to provide handwriting exemplars).
The use of a grand jury subpoena to obtain blood samples, however, presents a different question. Such an under-the-skin intrusion raises significant Fourth Amendment issues. One federal district court has ruled that a grand jury subpoena for blood and saliva samples must be based on reasonable suspicion. Another district court disagreed, holding that the use of a subpoena for this purpose is improper; a warrant based upon probable cause is required. According to this court, "[t]o allow the United States to use a Rule 17(c) subpoena for this purpose would abrogate T.S.'s Fourth Amendment rights and, thus, transform the subpoena into an instrument by which an illegal search and seizure is effectuated." According to this court, "[t]o allow the United States to use a Rule 17(c) subpoena for this purpose would abrogate T.S.'s Fourth Amendment rights and, thus, transform the subpoena into an instrument by which an illegal search and seizure is effectuated." According to this court, "[t]o allow the United States to use a Rule 17(c) subpoena for this purpose would abrogate T.S.'s Fourth Amendment rights and, thus, transform the subpoena into an instrument by which an illegal search and seizure is effectuated." According to this court, "[t]o allow the United States to use a Rule 17(c) subpoena for this purpose would abrogate T.S.'s Fourth Amendment rights and, thus, transform the subpoena into an instrument by which an illegal search and seizure is effectuated." According to this court, "[t]o allow the United States to use a Rule 17(c) subpoena for this purpose would abrogate T.S.'s Fourth Amendment rights and, thus, transform the subpoena into an instrument by which an illegal search and seizure is effectuated."
person is also permissible. The initial inquiry is whether there is, in fact, a search within the meaning of the Fourth Amendment. If there is a "search," the next question is whether the search complies with Fourth Amendment constraints, such as the warrant and probable cause requirements.\(^{85}\)

**Physical Characteristics**

The leading case defining which governmental activities are "searches" within the meaning of the Fourth Amendment is *Katz v. United States*.\(^{86}\) *Katz* substituted a privacy approach for the traditional property approach to this issue. According to the Court:

"[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."\(^{87}\)

The *Katz* rationale played a major role in two cases that involved the compelled production of voice and handwriting exemplars by means of a grand jury subpoena. In *United States v. Dionisio*,\(^{38}\) after ruling that the compelled appearance of a person before a grand jury was not a "search," the Court considered whether the taking of a voice exemplar itself constituted a search:

The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.\(^{91}\)

Accordingly, there was no search.

In *United States v. Mara*,\(^{39}\) the Court reached the same conclusion with respect to handwriting: "Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice."\(^{91}\)

**Invasive Procedures**

All evidence of physical characteristics, however, is not beyond Fourth Amendment protection. In *Schmerber*, decided before *Dionisio*, the Court held that the extraction of blood for the purpose of scientific analysis "plainly constitute[s] searches of 'persons'"\(^{92}\) within the meaning of the Fourth Amendment. In *Dionisio*, the Court distinguished, rather than

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\(^{85}\) If a suspect consents, neither a warrant nor probable cause is required. However, the consent must be valid. See *Graves v. Beto*, 301 F. Supp. 264, 266 (E.D. Tex. 1969) (consent not valid where defendant deceived as to purpose of blood test), *aff'd*, 424 F.2d 524, 525 (5th Cir.), *cert. denied*, 400 U.S. 960 (1970).

\(^{86}\) 389 U.S. 347 (1967).

\(^{87}\) Id. at 351.

\(^{38}\) 410 U.S. 1 (1973).

\(^{39}\) Id. at 14.

\(^{40}\) 410 U.S. 19 (1973).

\(^{41}\) Id. at 21. Accord *United States v. Euge*, 444 U.S. 707, 718 (1980) ("Compulsion of handwriting exemplars is neither a search or seizure subject to Fourth Amendment protections . . . .")

overruled, Schmerber: "The required disclosure of a person's voice is thus immeasurably further removed from the Fourth Amendment protection than was the intrusion into the body effected by the blood extraction in Schmerber." 93

The difference between Dionisio and Schmerber turns on the bodily intrusion involved in the extraction of blood samples. In Skinner v. Railway Labor Executives' Ass'n, 94 the Court wrote that "it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable." 95 In addition, an ensuing chemical analysis of the blood sample to obtain physiological data "is a further invasion" of privacy interests. 96 Under this view, the analysis of breath to determine intoxication "implicates similar concerns about bodily integrity" and thus constitutes a search. 97

The Court in Skinner also considered the collection of urine samples. Even though this procedure does not involve a bodily intrusion, the Court held that it was a search. Like blood, the chemical analysis of urine can "reveal a host of private medical facts," including whether a person is epileptic, pregnant, or diabetic. Moreover, the manner of collection, which may involve visual or aural monitoring of urination, "itself implicates privacy interests." 98

In another case, Cupp v. Murphy, 99 the Court considered the legality of seizing fingernail scrapings from a suspect. After finding that the defendant had been detained on probable cause, the Court stated:

The inquiry does not end here, however, because Murphy was subjected to a search as well as a seizure of his person. Unlike the fingerprinting in Davis, the voice exemplar obtained in United States v. Dionisio . . . , or the handwriting exemplar obtained in United States v. Mara . . . , the search of the respondent's fingernails went beyond mere "physical characteristics . . . constantly exposed to the public." United States v. Dionisio . . . , and constituted the type of "severe, though brief, intrusion upon cherished personal security" that is subject to constitutional scrutiny. 100

In sum, any procedure more intrusive than the obtaining of fingerprints, voice, or handwriting exemplars implicates the Fourth Amendment. Taking shoe prints, 101 examining teeth, 102 and inspecting hands under ultraviolet light 103 are Amendment purposes."). cert. denied, 113 S. Ct. 1362 (1993).

93 410 U.S. at 14.
95 Id. at 616.
96 Id.
97 Id. at 616-617. See also Burnett v. Anchorage, 806 F.2d 1447, 1449 (9th Cir. 1986) ("[T]he administration of a breath test is a search within the meaning of the Fourth Amendment. . . .").
98 489 U.S. at 617. See also Forbes v. Trigg, 976 F.2d 308, 312 (7th Cir. 1992) ("Urine tests are searches for Fourth

100 Id. at 295.
103 See United States v. Kenann, 496 F.2d 181, 182-183 (1st Cir. 1974); but see People v. Santistevan, 715 P.2d 792, 795 (Colo.) (ultraviolet inspection of hands a search), cert. denied, 479 U.S. 965 (1986).
not considered searches. In contrast, taking hair samples generally has been characterized as a search. 104

Searches Incident to Arrest

One of the major exceptions to the warrant requirement is the search incident to arrest doctrine. 105 In Cupp v. Murphy, 106 the Court upheld the seizure of fingernail scrapings under this doctrine. During the voluntary stationhouse questioning of Murphy about his wife’s strangulation murder, the police observed a dark spot on his finger, which they believed to be blood. Despite Murphy’s protests, fingernail scrapings were taken. The scrapings contained traces of skin and blood as well as fabric from the victim’s garments. The facts of Murphy are somewhat unusual because the defendant was not formally placed under arrest at the time the scrapings were removed. Nevertheless, the Court assumed probable cause for an arrest existed and held that the search incident to arrest justified the “very limited search necessary to preserve the highly evanescent evidence they found under his fingernails.” 107

In United States v. Edwards, 108 the defendant was arrested at night and


105 Under this exception, once a suspect has been arrested based on probable cause, a search of the arrestee’s person and the area within his immediate control is permitted. Chimel v. California, 395 U.S. 752 (1969).


107 Id. at 296.


then incarcerated in a local jail for attempting to break into a post office. Paint chips were found at the crime scene. The following morning, the police seized the defendant’s clothes. Examination of these garments disclosed paint chips that matched those found at the crime scene. The Supreme Court held that the delayed search of the clothing was constitutional, notwithstanding the absence of a warrant. According to the Court, the established rule is that:

[O]nce the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other. This is true where the clothing or effects are immediately seized upon arrival at the jail, held under the defendant’s name in the “property room” of the jail, and at a later time searched and taken for use at the subsequent criminal trial. The result is the same where the property is not physically taken from the defendant until sometime after his incarceration. 109

The seizure of gunshot residue, 110 fingerprints, 111 bomb resi-
due, hair, and urine as well as other types of physical evidence have been upheld as incident to a lawful arrest. Here, again, the Supreme Court has shown a greater concern for searches involving bodily intrusions than for other types of searches. For example, in Schmerber, the Court rejected the notion that the extraction of blood is automatically encompassed by the search incident to arrest doctrine. According to the Court, the justifications underlying that rule have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

The Court further considered the necessity of securing a warrant based on probable cause as a prerequisite to the extraction of blood. It found the purpose underlying the warrant requirement—the intervention of a neutral detached magistrate between the police and the citizen—applicable to bodily intrusions: "The importance of the informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." Nevertheless, because the alcohol content of blood diminishes with the passage of time, the Court recognized an "emergency" exception to the warrant requirement that was necessary to preclude the destruction of evidence. The emergency exception recognized in Schmerber, however, would not apply in other contexts—for example, when blood is sought for the purpose of typing or DNA profiling, which involve genetic characteristics that remain constant.

Surgical Procedures

The most intrusive procedures that have been challenged on Fourth Amendment grounds involve the surgical removal of bullets from suspects.
for the purpose of firearms identification. The Supreme Court considered this issue in *Winston v. Lee*. According to the Court:

The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual’s interests in privacy and security are weighed against society’s interests in conducting the procedure. In a given case, the question whether the community’s need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers.

The Court relied principally on two factors to determine that surgery would be unconstitutional in *Winston*. First, the Court referred to the risk to the defendant’s health as a “crucial factor.” For example, “a search for evidence of a crime may be unjustifiable if it endangers the life or health of the suspect.” The Court later noted that the record showed uncertainty about the medical risks involved. Other cases have permitted minor surgery, while precluding more serious medical procedures.

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120 Id. at 760.
121 Id. at 761.
122 Id.
123 Id. at 763–764.
126 470 U.S. at 766–767.
127 Id. at 763 n.6. See State v. Overstreet, 551 S.W.2d 621, 628 (Mo. 1977) (en banc) (minor surgery unconstitutional in absence of court approval).
128 470 U.S. at 766 n.10.
bullet did not match the suspect firearm.\textsuperscript{131}

\textbf{Administrative Searches}

The Supreme Court first considered the constitutionality of drug testing procedures in a pair of 1989 cases. Both cases involved regulatory or administrative searches. Unlike law enforcement searches, such procedures are intended to achieve governmental objectives other than the detection or prosecution of crime.

\textbf{Drug Testing}

In \textit{Skinner v. Railway Labor Executives' Ass'n},\textsuperscript{132} the Court considered regulations issued by the Federal Railway Administration. The regulations mandated blood and urine tests for railroad employees who are involved in major accidents and permitted testing for employees who violate safety rules. The Court rejected the contention that permissive inspections by private railroads, which were authorized by the regulations, were private searches outside the purview of the Fourth Amendment.\textsuperscript{133} Moreover, blood, breath, and urine collection and testing procedures were searches within the meaning of the Fourth Amendment.

The Court also found, however, that the toxicological testing procedures were reasonable. The Court balanced the need for the search against the invasion of privacy involved, concluding that railroad employees "discharge duties fraught with . . . risks of injury to others" and "can cause great human loss before any signs of impairment becomes noticeable to supervisors or others."\textsuperscript{134}

In a companion case, \textit{National Treasury Employees Union v. Von Raab},\textsuperscript{135} the Court upheld an employee drug testing program, which included urinalysis, for federal customs officials who were transferred or promoted to positions involving the interdiction of illegal drugs or who were required to carry a firearm. Note that under both \textit{Skinner} and \textit{Von Raab}, neither probable cause, reasonable suspicion, nor a warrant is required. These cases, however, do not sanction all governmentally sponsored drug-testing procedures.

\textbf{DNA Data Bank Testing}

A number of jurisdictions have enacted statutes that require blood samples for persons convicted of crimes, or a specific category of crime, such as violent crimes or sex offenses. These provisions have been challenged on Fourth Amendment grounds. In \textit{State v. Olivas},\textsuperscript{136} the Washington Supreme Court rejected a search and seizure challenge to a DNA identification sex offender law. According to the Court, this provision constituted a valid regulatory search under \textit{Skinner}. In \textit{Jones v. Murray},\textsuperscript{137} the Fourth Circuit reached the same result but under a different Fourth Amendment analysis—the diminished privacy rights of convicted persons.

\textbf{Due Process}

The seizure of evidence for scientific analysis also has been challenged

\textsuperscript{132}489 U.S. 602 (1989).
\textsuperscript{133}Id. at 615–616 (The regulations "are clear indices of the Government's encouragement, endorsement, and participation, and suffice to implicate the Fourth Amendment.").
\textsuperscript{134}Id. at 628.
\textsuperscript{135}489 U.S. 656 (1989).
\textsuperscript{136}856 P.2d 1076 (Wash. 1993).
\textsuperscript{137}962 F.2d 302 (4th Cir.), cert. denied, 113 S. Ct. 472 (1992).
on due process grounds in several cases. In Rochin v. California, the Court held that the forcible stomach pumping of a suspect to recover narcotic pills "shocks the conscience" and does not comport with traditional ideas of fair play and decency, thereby violating due process. The Court distinguished Rochin in a later case, Breithaupt v. Abram, in which the Court upheld the compelled extraction of blood. In distinguishing the extraction of stomach contents from the extraction of blood, the Court emphasized that the latter procedure, "under the protective eye of a physician," was a routine and scientifically accurate method and therefore did not involve the "brutality" and "offensiveness" present in Rochin. This ruling was reaffirmed in Schmerber.

Rochin and Breithaupt predated the applicability of the Bill of Rights to the states through the due process clause of the Fourteenth Amendment, and thus the continued validity of an independent due process analysis is questionable. Such issues no longer need be addressed in terms of due process but rather as possible violations of specific constitutional guarantees enumerated in the Bill of Rights. For example, according to

139 Id. at 172–173.
140 352 U.S. 432 (1957).
141 Id. at 435.
143 This may explain why Rochin has not played a major role in subsequent cases. See Yanez v. Romero, 619 F.2d 851, 854 (10th Cir.) ("We do not say that the Supreme Court's decision in Rochin has eroded, but we do say that it has been applied in a positive way quite infrequently."); cert. denied, 449 U.S. 876 (1980).
But see Yanez v. Romero, 619 F.2d 851, 853 (10th Cir.) (Rochin due process "prohibition... is somewhat broader than the limitation provided by the Fourth Amendment."); cert. denied, 449 U.S. 876 (1980).