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WINSTON v. LEE:* COURT-ORDERED SURGERY: PERSONAL DIGNITY CONCERNS CREATE ADDITIONAL AMBIGUITY

The use of compelled surgery to procure evidence from the body of a criminal suspect constitutes an invasion of privacy[1] and physical security unequalled in the realm of search and seizure.[2] The gravity of such a search has led to considerable disagreement among the courts[3] as to if, and when, compelled surgery meets the fourth

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* 105 S. Ct. 1611 (1985).

1. The U.S. Constitution does not explicitly mention any right of privacy. The Supreme Court has, however, recognized a constitutional right to privacy based upon provisions of the first, third, fourth, fifth, and ninth amendments and their respective "penumbras." Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965). The right to privacy is a "fundamental personal right, emanating 'from the totality of the constitutional scheme.'" *Id.* at 494 (Goldberg, J., concurring) (quoting Poe v. Ullman, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting)).

In Katz v. United States, 389 U.S. 347, 361 (1967), Justice Harlan, in his concurring opinion, found the fourth amendment protects "expectations of privacy." *Id. Cf.* Note, *Protecting Privacy Under the Fourth Amendment*, 91 YALE L.J. 313, 315-16 (1981) (discussion of the shortcomings of the reasonable expectation of privacy test as enunciated in *Katz*). *See also* J. HALL, SEARCH AND SEIZURE 2.4-7 (1982 & Supp. 1985) (discussion of expectation of privacy test). The individual has "the right to be left alone—the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States, 277 U.S. 438, 478 (1927) (Brandeis, J., dissenting).

2. For examples of other, less severe, bodily intrusion cases, see Cupp v. Murphy, 412 U.S. 291 (1973) (fingernail scraping not unconstitutional); Breithaupt v. Abram, 352 U.S. 432 (1957) (blood sample taken from an unconscious suspect not unconstitutional); Brent v. White, 398 F.2d 503 (5th Cir. 1968) (scraping suspect's penis for evidence of victim's blood not unconstitutional), *cert. denied*, 393 U.S. 1123 (1969); United States *ex rel.* Parson v. Anderson, 354 F. Supp. 1060 (D. Del. 1972) (combing suspect's pubic hair not unreasonable search), *cert. denied*, 414 U.S. 1072 (1973).

3. *See* United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976) (en banc) (court-ordered surgical removal of a bullet from defendant's right arm held to be a reasonable search and seizure), *cert. denied*, 429 U.S. 1062 (1977); Bowden v. State, 256 Ark. 820, 510 S.W.2d 879 (1974) (court refused to order surgical removal of bullet from defendant's spinal canal); Doe v. State (McCaskill), 409 So. 2d 25 (Fla. Dist. Ct. 1981) (per curiam) (surgical removal of bullet located in left leg, one-half inch deep, found to be reasonable; surgery denied, however, because bullet had only speculative evidentiary value), *cert. denied*, 418 So.2d 1280 (1982); Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (1972) (surgical removal of bullet from defendant's chest held reasonable), *cert. dismissed*, 410 U.S. 975 (1973); Allison v. State, 129 Ga. App. 364, 199 S.E.2d 587 (1973) (removal of bullet lodged just beneath the skin held reasonable), *cert. denied*, 414 U.S. 1145 (1974); Adams v. State, 260 Ind. 663, 299 N.E.2d 834 (1973) (court held that it was reversible error to admit into evidence a bullet removed from defendant's buttocks), *cert. denied*, 415 U.S. 935 (1974); Hughes v. State, 56 Md. App. 12, 466 A.2d 533 (1983) (removal of three bullets from defendant's abdomen, hip, and back held reasonable); State v. Overstreet, 551 S.W.2d 621 (Mo. 1977) (surgery to remove bullet considered reasonable; however, court did not order removal because of inadequate procedural protections); State v. Richards, 585 S.W.2d 505 (Mo. Ct. App. 1979) (removal of bullet lodged four inches deep in right hip con-

amendment[4] standards of reasonableness. In *Winston v. Lee*,[5] the United States Supreme Court reviewed the constitutionality of a court-ordered surgical intrusion to remove a bullet from the chest[6] of an unconsenting criminal suspect for use as evidence. Noting that the proposed surgery would be a severe[7] intrusion into an area in which our society recognizes a critically important privacy interest,[8] the Court held that the surgery would be a violation of the defendant's fourth amendment right to be secure in his person.

In *Lee*, a shopkeeper was closing his store for the night when he was approached by a man with a gun.[9] The shopkeeper drew his own gun and shots were exchanged. Both men were wounded,[10] but the assailant, who appeared to be wounded in his left side, ran from the scene.[11] A short time after the shooting incident, police found Rudolph Lee suffering from a bullet wound to his chest.[12] Both men

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sidered reasonable); State v. Lawson, 187 N.J. Super. 25, 453 A.2d 556 (App. Div. 1982) (removal of bullet from defendant's thigh permitted); Bloom v. Starkey, 65 A.D.2d 763, 409 N.Y.S.2d 773 (Sup. Ct. App. Div. 1978) (court refused to allow surgery to remove bullet from defendant's left thigh); People v. Smith, 80 Misc. 2d 210, 362 N.Y.S.2d 909 (Sup. Ct. 1974) (order to remove bullet from defendant's back denied; surgery too complicated); State v. Allen, 277 S.C. 595, 291 S.E.2d 459 (1982) (surgery on appellant found to be reasonable; surgery on co-defendant denied due to higher degree of risk).

4. The fourth amendment provides in part: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV. The fourth amendment has been held applicable to the states through the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961). *See generally* 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.1(d) (1978 & Supp. 1984) (discussion of intrusions into the body within the context of the fourth amendment) [hereinafter W. LAFAVE]; Comment, *Analyzing the Reasonableness of Bodily Intrusions*, 69 MARQ. L. REV. 130 (1984) (framework for bodily intrusion cases proposed); Comment, *Lee v. Winston: Court-Ordered Surgery and the Fourth Amendment—A New Analysis of Reasonableness*, 60 NOTRE DAME L. REV. 149 (1984) (analysis of the court of appeals decision in *Lee*).

5. 105 S. Ct. 1611 (1985).

6. *Id.* at 1614. Pre-surgery x-rays showed that the bullet was buried two-and-one-half to three centimeters (approximately one inch) deep in muscular tissue in Lee's chest. *Id.* at 1615.

7. *Id.* at 1620.

8. *Id.*

9. *Id.* at 1614.

10. *Id.* The victim, Ralph E. Watkinson, was wounded in the legs. In State v. Haynie, 240 Ga. 866, 242 S.E.2d 713 (1978), the Georgia Supreme Court addressed the issue of whether the *victim* of a crime can be compelled to undergo surgery to prove the innocence of the defendant. The Georgia Supreme Court held that the "fourth amendment right of the victim to be secure against an unreasonable search must prevail over the right of the accused to obtain evidence for his defense." *Id.* at 867, 242 S.E.2d at 715. In a concurring opinion, Justice Hall argued that there is no logical basis under the fourth amendment for treating the victim and the defendant differently. *Id.* at 873, 242 S.E.2d at 717 (Hall, J., concurring).

11. *Lee*, 105 S. Ct. at 1614.

12. *Id.* Lee was found eight blocks from where the earlier shooting occurred. He was suffering from a gunshot wound to his left chest area and told police he had, himself, been the victim of an attempted robbery. *Id.*

were taken to the same hospital, where the shopkeeper identified Lee as the assailant.[13] Authorities subsequently charged Lee with attempted robbery.[14]

Before trial, the Commonwealth of Virginia sought an order directing the compelled surgical removal of the bullet from Lee's chest for use as evidence.[15] The court granted the order based on a physician's testimony that the surgery would be performed under local anesthesia and would invoke little or no danger to the patient.[16] Lee brought an action in the United States District Court for the Eastern District of Virginia to enjoin the operation on fourth amendment grounds, but the court refused to issue the injunction.[17] Presurgery x-rays, however, showed the bullet to be deeper than had been thought,[18] necessitating the use of a general anesthetic. Lee returned to the federal district court,[19] which, based on the new evidence, enjoined the threatened surgery.[20] The Court of Appeals for the Fourth Circuit affirmed.[21]

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13. *Id.* When Lee entered the emergency room, the victim, who was also in the emergency room, exclaimed, "That's the man who shot me." *Id.*

14. *Id.* Lee was also charged with malicious wounding and two counts of using a firearm in the commission of a felony. *Id.*

15. *Id.*

16. *Id.* Several evidentiary hearings were held. At the first hearing, the Commonwealth's expert testified that the surgery would take 45 minutes and would involve a three-to-four-percent chance of temporary nerve damage, a one-percent chance of permanent nerve damage, and a one-tenth of one-percent chance of death. At the second hearing the expert testified that after reexamining Lee, he now believed that the bullet was "just beneath the skin," requiring an incision of only one-half inch, using local anesthesia, and resulting in "no danger" since no general anesthesia is needed. *Id.*

After hearing the evidence, the trial court granted the motion to compel surgery. The court based its decision on four factors: there was adequate opportunity to litigate the issue, there was sufficient need for the bullet, the bullet could be obtained in no other way, and removal involved minor surgery. Lee's subsequent petition to the Virginia Supreme Court for a writ of prohibition or habeas corpus was also denied. *See* Lee v. Winston, 551 F. Supp. 247, 248 (E.D. Va. 1982).

17. Lee v. Winston, 551 F. Supp. 247 (E.D. Va. 1982). After considering a four-part balance-of-hardship test consisting of: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with the injunction; (3) plaintiff's likelihood of success on the merits, and (4) the public interest, the court concluded Lee did not have a likelihood of succeeding on the merits. *Id.*

18. *See supra* notes 6, 16.

19. Before returning to federal court, Lee filed a motion for a rehearing in the Richmond Circuit Court. The state court again ruled that the surgery could proceed because there was no material change in circumstances. *See* Lee v. Winston, 551 F. Supp. 247 (E.D. Va. 1982).

20. *Lee*, 551 F. Supp. at 260. The United States District Court held that whereas the circumstances in the original district court hearing constituted "essentially the limit in the degree and kind of intrusion constitutionally permissible," the present set of facts exceeds the limit. *Id.*

21. Lee v. Winston, 717 F.2d 888 (4th Cir. 1983), *cert. granted*, 104 S. Ct. 1906 (1984). The court held that the use of general anesthesia to surgically explore for a bullet that may or may not have probative value "goes beyond the police practices

The United States Supreme Court granted certiorari to address the issue of whether the compelled surgical removal of a bullet from a criminal defendant's body is reasonable under the fourth amendment.[22] The Court ruled that the proposed surgery would intrude substantially on the suspect's fundamental right of privacy[23] and security. The Court also found that the state had failed to show a compelling need for the bullet as evidence.[24] The proposed surgery, therefore, was held to be an unreasonable search under the fourth amendment.

The Court began its analysis by stating that a compelled surgical intrusion evokes such intense expectations of privacy, that the intrusion may be "unreasonable" even if likely to produce evidence of a crime.[25] The Court ruled that reasonableness, therefore, must be determined on a case-by-case approach with *Schmerber v. California*[26] providing the appropriate framework for analysis. This framework consists of a balancing test[27] in which the individual's interests in privacy and physical security are weighed against society's interest in conducting the procedure.[28]

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which the state can legitimately undertake within the bounds of the fourth amendment." *Id.* at 901.

22. The fourth amendment does not protect individuals against all bodily intrusions, only those considered unreasonable under the circumstances. *Lee*, 105 S. Ct. at 1616.

23. *See supra* note 1.

24. *Lee*, 105 S. Ct. at 1620.

25. *Id.* at 1616. This statement demonstrates the *Lee* Court's shifting emphasis from health risk factors to privacy concerns. Earlier courts have stressed the belief that, notwithstanding the existence of probable cause, a surgical search may be unreasonable if it endangers the *life or health* of the suspect. *See infra* note 54. The *Lee* Court, in contrast, stated that *"expectations of privacy and security"* may prevent an otherwise justified search. *Lee*, 105 S. Ct. at 1616 (emphasis added). *See generally* Comment, *Lee v. Winston: Court-Ordered Surgery and the Fourth Amendment—A New Analysis of Reasonableness*, 60 NOTRE DAME L. REV. 149 (1984) (author suggests that the court of appeals decision in *Lee* has broadened the application of the fourth amendment by emphasizing privacy and dignity).

26. 384 U.S. 757 (1966). In *Schmerber*, the United States Supreme Court held that a state may compel a person suspected of drunk driving to submit to a blood test without violating the suspect's right, not to be subjected to unreasonable searches and seizures. *Id.* at 772. The Court also rejected two other constitutional attacks on the blood test. Affirming its position in Breithaupt v. Abram, 352 U.S. 432 (1957), the Court held that a blood test does not offend the traditional notions of due process under the fourteenth amendment. *Schmerber*, 384 U.S. at 759-60. The Court also held that the fifth amendment privilege against self-incrimination applies only to evidence that is testimonial or communicative. *Schmerber*, 384 U.S. at 765. *See* Recent Cases, *Criminal Law—Admissibility in Evidence of Blood Tests over Defendant's Objection*, 20 VAND. L. REV. 655, 657-58 (1967) (discussion of framework used in *Schmerber* to determine the reasonableness of bodily intrusions).

27. *See infra* note 44. The *Lee* Court refers to the balancing of factors in *Schmerber* as a framework, not a test. *Lee*, 105 S. Ct. at 1617. Similarly, the district court in Lee v. Winston, 551 F. Supp. 247 (E.D. Va. 1982), stated that the opinion in *Schmerber* does not set forth a test, but merely "identifying elements" that support the conclusion that the intrusion was unreasonable.

28. In *Schmerber*, the vital importance of blood tests in enforcing drunken driv-

The *Lee* Court considered three factors in determining the weight of the individual's interest. The Court stated that the ordinary requirements of the fourth amendment constitute the threshold requirement for conducting any surgical search.[29] Next, the threat to the safety and health of the individual was determined.[30] Finally, the extent of the intrusion upon the individual's dignitary interest in personal privacy and bodily integrity was considered.[31] Against these individual liberty concerns, the Court weighed society's interest in "fairly and accurately determining guilt or innocence."[32] The evidence sought must be more than merely "useful" to the State in prosecuting the suspect.[33] The state must demonstrate a "compelling need" for the evidence.[34]

The Court applied this balancing test and found that the uncertainty of the medical risks along with the severity of the intrusion outweigh the state's need for the evidence.[35] The scope of the surgery and its attendant risks were the subject of considerable dispute.[36] Moreover, surgery against one's will using general anesthesia

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ing laws justified the intrusion. *Schmerber*, 384 U.S. at 771. *See* Breithaupt v. Abram, 352 U.S. 432 (1957) (blood test held reasonable because it was routine and there was a great state interest in preventing deaths caused by drunk drivers). *See also* Recent cases, *Constitutional Law—Due Process—Admissibility in State Criminal Prosecution of Results of Blood Test Taken While Accused Was Unconscious*, 11 VAND. L. REV. 196, 198-99 (1957) (*Breithaupt* Court ruled that society's interest in preventing drunk driving is more important than the rights of the individual).

29. *Lee*, 105 S. Ct. at 1617. "The importance of informed detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is undisputable and great." *Schmerber*, 384 U.S. at 770.

Although the *Schmerber* Court ruled that a search warrant is required for intrusions into the body, none was needed in that case. *Schmerber*, 384 U.S. at 771. The existence of "exigent circumstances" permits warrantless search when exigencies make the search imperative. *See* Preston v. United States, 376 U.S. 364 (1964) (facts and circumstances of case determine whether a warrant is needed). Exigent circumstances may exist when there is a possibility that the evidence will be destroyed. In *Schmerber*, the Court ruled that since the percentage of alcohol in the blood begins to diminish shortly after drinking stops, a warrant was not needed. *Schmerber*, 384 U.S. at 770. *See also* Ewing v. State, 160 Ind. App. 138, 310 N.E.2d 571, 578 (1974) (drug content of urine diminishes with them). *See generally* C. WHITEBREAD, CONSTITUTION CRIMINAL PROCEDURE § 5.1-9.6 (1978 & Supp. 1981) (discussion of exceptions to warrant requirement).

30. *Lee*, 105 S. Ct. at 1617. *See supra* note 25 (discussing the Court's shifting emphasis towards privacy concerns).

31. *Lee*, 105 S. Ct. at 1617. *See supra* note 1 (discussing the basis for the right to privacy).

32. *Lee*, 105 S. Ct. at 1618.

33. *Id.* at 1620.

34. *See infra* notes 38-79.

35. *Lee*, 105 S. Ct. at 1620.

36. *Id.* at 1618. One surgeon testified that the procedure would take only 15-20 minutes; another predicted it would take up to two and one-half hours. *Id.* One expert testified that there was virtually no risk of muscle or tissue damage while another said that the difficulty of discovering the exact location of the bullet "could require extensive probing and retracting of the muscle tissue," resulting in risks of injury to muscles, nerves, blood vessels, and other tissue. *Lee*, 717 F. 2d at 900.

"involves a virtually total divestment of [defendant, Lee's] ordinary control over surgical probing beneath the skin."[37] The Court felt that the state, on the other hand, had failed to demonstrate a compelling need to recover the bullet.[38] The state had enough evidence to negate the need for compelled surgery. Consequently, the *Lee* Court, in a unanimous decision, held that the proposed surgery in this case would be "unreasonable" under the fourth amendment.[39]

Although the *Lee* Court was correct in its resolution of this particular case,[40] the decision will influence future surgical intrusion analyses in three undesirable ways. First, privacy and dignity concerns will play a paramount role in decisions which previously emphasized physical risk factors,[41] resulting in additional ambiguity as well as inconsistent results. Second, the harsh language of the Court will, in effect, make court-ordered surgery requiring general anesthe-

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37. *Lee*, 105 S. Ct. at 1619. The *Lee* Court noted that different issues would be raised if the use of general anesthesia was necessary because of the suspect's failure to cooperate. In State v. Lawson, 187 N.J. Super. 25, 28-29, 453 A.2d 556, 558 (App. Div. 1982), the order compelling surgery included instructions stating that should the defendant resist, the surgeon may take "appropriate and necessary steps" to control the patient, as in any other case involving a difficult patient. *Id.* *See* text accompanying notes 63-69.

38. *Lee*, 105 S. Ct. at 1619. The Court found that other evidence was available to the state to support the inference that Lee was in fact the robber. The shopkeeper made a spontaneous identification of Lee at the hospital. The state could also prove that Lee was found in the immediate vicinity of the victim's store shortly after the incident. *Id.*

The Court also raises the possibility that the bullet, even if retrieved, will have no probative value. The bullet's markings may have been corroded during the time it was in Lee's shoulder. There was also a possibility that the gun was incapable of firing bullets that have consistent markings. *See* Joling, *An Overview of Firearms Identification Evidence for Attorneys I: Salient Features of Firearms Evidence*, 26 J. FORENSIC SCI. 153, 153-54 (1981). *But see Lee*, 717 F.2d at 908 n.3 (Widener, J., dissenting) (medical evidence indicates that such deterioration is rare and when it does occur, may produce lead poisoning necessitating surgery anyway).

39. *Lee*, 105 S. Ct. at 1620. Justice Brennan delivered the opinion of the Court. Justices Blackmun and Rehnquist concurred without opinion. Chief Justice Burger also concurred based on his belief that the opinion does not prevent detention of an individual if there are grounds to believe that natural bodily functions will disclose the presence of contraband that had been secreted internally. *See* United States v. Montoya de Hernandez, 105 S. Ct. 3304 (1985) (detention of suspected alimentary canal smuggler for 16 hours held reasonable).

40. Although the *Lee* decision failed to give sufficient deference to medical testimony, the final pre-surgery x-rays indicated a sufficient increase in physical risk to prohibit surgery. The final x-rays showed the bullet to be twice as deep as previously thought. This change in circumstances substantially increased the risk of nerve and tissue damage. *See supra* notes 36, 38. *See also* Brief for Respondent at 3, Winston v. Lee, 717 F.2d 888 (4th Cir. 1983). Thus, even under a pure physical risk analysis, the surgery would have been prohibited. *But see* Comment, *Lee v. Winston: Court-Ordered Surgery and the Fourth Amendment—A New Analysis of Reasonableness*, 60 NOTRE DAME L. REV., 149, 160 (1984) (*Lee* surgery would have been ordered under a physical risk analysis).

41. *See infra* note 54 (for a list of cases which emphasize the physical risk to the suspect).

sia *per se*, unreasonable[42] under the fourth amendment. This result is too inflexible to accommodate the case-by-case approach advocated by the Court.[43] Third, states will have an unreasonably difficult time demonstrating a "compelling need" for the bullet as evidence.

The Supreme Court originally developed the framework used in *Lee* in the leading bodily intrusion case of *Schmerber v. California*.[44] In *Schmerber*, the Court determined the reasonableness of a compelled blood test by balancing the risk to the suspect's health against the state's interest in prosecuting drunk drivers.[45] Justice Brennan, emphasizing the fact that the blood test involved very little physical risk to the suspect, concluded that the intrusion was reasonable.[46] Many courts broadly interpreted *Schmerber* as permitting compelled surgical removal of bullets for use as evidence.[47] But whereas *Schmerber* and its progeny based their decisions primarily on the level of medical risk to the suspect,[48] the *Lee* Court's decision relied almost exclusively on the suspect's privacy interests.

Prior to *Lee*, the foremost case concerning the compelled surgical removal of bullets was *United States v. Crowder*.[49] In *Crowder*,

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42. Only one state has held all surgical intrusions to be *per se* unreasonable under the fourth amendment. *See* Adams v. State, 260 Ind. 663, 299 N.E.2d 834 (1973), *cert. denied*, 415 U.S. 935 (1974). *See generally* Note, *Surgery and the Search for Evidence: United States v. Crowder*, 37 U. PITT. L. REV. 429, 434-40 (1975) (advocates a *per se* rule prohibiting surgery to obtain evidence). *But see* Note, *Nonconsensual Surgery: The Unkindest Cut of All*, 53 NOTRE DAME LAW. 291 (1974) (disagreeing with *per se* prohibition—author advocates a case-by-case analysis).

43. *See infra* note 74. The very existence of a case-by-case approach indicates that one rule cannot serve as a talisman in solving all bodily intrusion cases.

44. The "framework" the *Lee* Court refers to consists of several factors set out in *Schmerber* to determine whether an intrusion is reasonable. *Schmerber*, 384 U.S. at 770. First, there must be a substantial need for the evidence. *Id.* Second, there must be a "clear indication" that the evidence will be found. *Id. See infra* note 76. Third, the procedure must involve "virtually no risk, trauma, or pain." *Id.* at 771. Fourth, the procedure must be carried out in a hospital environment. *Id. See also* Recent Cases, *Criminal Law—Admissibility in Evidence of Blood Tests over Defendant's Objection*, 20 VAND. L. REV. 655, 657-58 (1967) (discussion of factors used in *Schmerber* to determine reasonableness).

45. *See supra* note 28.

46. *Schmerber*, 384 U.S. at 772.

47. *See supra* note 3.

48. *See infra* note 54.

49. 543 F.2d 312 (D.C. Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1062 (1977). The *Crowder* Court delineated a four-part test to determine the reasonableness of court-ordered surgery: first, the desired evidence must be relevant and obtainable in no other way; second, the operation must be minor, with the risk of permanent injury being minimal; third, the defendant must be given an adversarial hearing before surgery is performed, and fourth, the defendant must be given an opportunity to appeal before the surgery is performed. *Id.* at 316. *See generally* Note, *Criminal Procedure—Court-Ordered Surgical Removal of Bullet From Accused is not Unreasonable Search and Seizure Under the Fourth Amendment Where Legal and Medical Safeguards Provide Sufficient Protection—United States v. Crowder, No. 73-1635* (D.C. Cir., July 12, 1976), 50 TEMP. L.Q. 164, 174-75 (1976) (author contends that the

the defendant had two bullets lodged in his body: one in his left thigh and one in his right forearm.[50] The Court of Appeals for the District of Columbia relied heavily on the level of risk to the defendant in upholding the district court's order authorizing surgery on Crowder's arm but not his thigh.[51] The opinion contained numerous references to medical testimony which indicated that the risk to the defendant was "negligible"[52] and similar to the risk involved in "crossing the street."[53] Clearly the *Crowder* court felt that the degree of risk to the defendant should be the primary consideration in determining whether the court can authorize compelled surgery. Many courts adopted the *Crowder* physical risk analysis in order to establish a practical method of reviewing proposed surgical procedures.[54]

The *Lee* decision, however, is a marked departure from this trend of decisions emphasizing physical risk factors. Although the *Lee* Court stated that the threat to the safety and health of the suspect was a crucial factor,[55] it was given only cursory consideration. After briefly acknowledging the existence of conflicting medical testimony, the Court concluded that the very uncertainty militates against finding the surgery to be "reasonable."[56] If the uncertainty of medical risks is to be fatal to proposed surgery, future defendants will be able to avoid surgery by merely introducing conflicting medical testimony. This potential for abuse would have been avoided if the *Lee* Court had advocated the use of additional medical testi-

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Crowder court's procedural approach places too little emphasis on bodily integrity).

50. *Crowder*, 543 F.2d at 313. Crowder was arrested for the murder and robbery of a dentist. *Id.* The police noticed that his right wrist and left thigh were bandaged. *Id.* Crowder was taken to a hospital, where x-rays disclosed bullets lodged in both locations. *Id. See infra* note 54 (discussing cases which emphasize physical risk factors).

51. *Crowder*, 543 F.2d at 314. The court noted that it was medically inadvisable to remove the slug from Crowder's thigh because the procedure might have reduced the use or function of his left leg. *Id.* The surgery on Crowder's arm, however, involved almost no risk of harm or injury. *Id.* The operation required three or four stitches and lasted ten minutes. *Id.* If the surgery had been performed on a regular patient, he would been able to leave the hospital immediately after surgery. *Id.*

52. *Id.* at 315.

53. *Id.* at 314.

54. *See, e.g.*, Hughes v. State, 56 Md. App. 12, 466 A.2d 533 (1983) (removal of three bullets from defendant's hip, abdomen, and back reasonable under *Crowder* test); State v. Overstreet, 551 S.W.2d 621 (Mo. 1977) (medical risks reasonable, but surgery denied due to the state's failure to meet *Crowder* test's procedural safeguards); State v. Richards, 585 S.W.2d 505 (Mo. Ct. App. 1979) (medical testimony indicated there would be no danger of defendant's health); State v. Lawson, 187 N.J. Super. 25, 453 A.2d 556 (App. Div. 1982) (minimal risk posed by surgery) *see generally* Comment, *Lee v. Winston: Court-Ordered Surgery and the Fourth Amendment—A New Analysis of Reasonableness*, 60 NOTRE DAME L. REV. 149, 155-56 (1984) (every state court has applied the *Crowder* analysis in bullet-removal cases).

55. *Lee*, 105 S. Ct. at 1617.

56. *Id.* at 1620.

mony and risk analysis instead of treating the uncertainty itself as determinative.

The Court also noted that a medical designation of the surgery as "major" or "minor" is not controlling.[57] Admittedly, such medical terms of art should not "control" a decision. However, their significance with respect to the amount of risk involved should be strongly considered. Any penetration of the skin involves risk; a determination of how much risk is better left to qualified medical professionals, if necessary, using surgical categorizations. The *Lee* Court has taken one of the few tangible considerations used by previous courts and summarily reduced its significance.

The *Lee* Court has restricted the previously broad interpretation of *Schmerber*[58] by emphasizing elusive privacy criteria over physical risk analysis. The Court stressed the fact that intrusions that do not physically injure the person may, however, violate the individual's fourth amendment right to personal privacy and security.[59] This concern over procedures that constitute affronts to personal dignity deviates from prior Court analyses. Although the *Lee* Court claimed it was relying on the *Schmerber* framework, its emphasis was on factors closer to the vague personal dignity analysis espoused in *Rochin v. California*.[60] In *Rochin*, the United States Su-

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57. *Id.* at 1619. The Court stated that "[n]o specific medical categorization can control the multifaceted legal inquiry that the Court must undertake." *Id.* Prior to *Lee*, many state courts utilized a major surgery/minor surgery distinction in order to facilitate their determination of whether surgery was constitutionally permissible. *See, e.g.*, Bowden v. State, 256 Ark. 820, 510 S.W.2d 879 (1974) (court denied search warrant for removal of a bullet from suspect's spinal cavity because surgery was major, involving risk to life); Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (1972) (removal of bullet from suspect's chest permitted because it was a minor intrusion), *cert. dismissed*, 410 U.S. 975 (1973); People v. Smith, 80 Misc. 2d 210, 362 N.Y.S.2d 909 (Sup. Ct. 1974) (major surgery requiring a six-inch incision held to be an unreasonable search); State v. Allen, 277 S.C. 595, 291 S.E.2d 459 (1982) (minor surgery on one defendant permitted while major surgery on another defendant not permitted).

The *Lee* Court's aversion to medical categorization ignores court precedent in other, equally complex privacy cases. *See* Roe v. Wade, 410 U.S. 113 (1973) (extensive use of detailed medical categories in determining constitutional parameters). Medical categorization can be a useful method of providing an objective evaluation of complex surgical procedures. *See generally* 2 W. LAFAVE, *supra* note 4, at § 4.1(d), p. 16 (rather than major minor distinction, the standard should be whether virtually anyone in the victim's position—absent a desire to withhold evidence—would have sought removal of the bullet); Note, *Nonconsensual Surgery: The Unkindest Cut of All*, 53 NOTRE DAME LAW. 291, 303 (1974) (author argues that surgery should not be allowed if it is medically classified as "major").

58. For a list of cases that broadly interpreted *Schmerber* to include surgical intrusions, see *supra* note 3.

59. *Lee*, 105 S. Ct. at 1617.

60. 342 U.S. 165 (1952). In *Rochin*, police officers broke into a suspect's apartment and attempted to forcibly extract morphine capsules from his mouth. *Id.* at 166. When this failed, the officers took him to a hospital and directed that an emetic be administered to induce vomiting. *Id.* As a result, the capsules were recovered. *Id.* At trial, these capsules were admitted into evidence and the defendant was subsequently

preme Court held that the conduct of police officers in forcibly obtaining morphine from the stomach of a suspect "shocked the conscience"[61] of the Court and was "offensive to human dignity."[62]

Although the *Rochin* Court based its decision on the due process clause and not the fourth amendment,[63] it still burdened subsequent courts with the difficult task of determining what procedures are offensive to human dignity. The *Lee* Court's new emphasis on privacy in the surgical intrusion context will likewise result in additional ambiguity.[64] This emphasis on privacy concerns will result in inconsistent lower court rulings[65] due to disparate interpretations of the intangible concept of personal dignity. The *Lee* Court's reference to surgery as "probing beneath the skin"[66] certainly gives the impression that it is offensive to human dignity. But such squeamish descriptions of modern medical practice[67] can only serve to confuse

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convicted of possession of morphine. *Id.* at 167.

61. *Id.* at 172.

> Illegally, breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and screw to permit of constitutional differentiation.

62. *Id.* at 174. One problem with the decision in *Rochin* is that the Court did not clearly indicate whether the stomach pumping alone unconstitutional or whether the totality of the circumstances was unconstitutional. It can be inferred from the opinion, however, that the stomach pumping alone was not determinative. *See* Eckhardt, *Intrusion Into the Body*, 52 MIL. L. REV. 141, 143 n.12 (1971) (the writer suggests that totality of misconduct shocked the conscience of the court); Comment, *Search and Seizure: Compelled Surgical Intrusions?*, 27 BAYLOR L. REV. 305, 307 (1975) (stomach pumping alone not unconstitutional). *But see* Comment, *Intrusive Border Searches—Is Judicial Control Desirable?*, 115 U. PA. L. REV. 276, 280-81 (1966) (concludes that it was the stomach pumping alone that the *Rochin* Court found unconstitutional).

63. At the time of the decisions in Breithaupt v. Abrams, 352 U.S. 432 (1957) and Rochin v. California, 342 U.S. 165 (1952), the Court had yet to apply the fourth amendment exclusionary rule to the states. Thus, *Rochin* and *Breithaupt* were both decided on due process grounds. However, in 1961, the Court held that the exclusionary rule adopted for federal prosecutions in Weeks v. United States, 232 U.S. 383 (1914), was applicable to criminal prosecutions in state courts. Mapp v. Ohio, 367 U.S. 643, 655 (1961). Since *Schmerber* was decided in 1966, it was the first bodily intrusion case decided squarely on fourth amendment grounds. *Schmerber*, 384 U.S. at 767.

The limitations inherent in the exclusionary rule point out the importance of allowing the defendant to have an adversarial hearing and an opportunity for appeal *before* surgery. While the exclusionary rule will prevent evidence from being used at trial, it will do little to remedy the physical and psychological effects of unreasonable surgery. For an historical development of the exclusionary rule, see Comment, *Admissibility of Illegally Seized Evidence—The Federal Exclusionary Rule—An Historical Approach*, 38 U. DET. L. REV. 635 (1961).

64. *See Lee*, 717 F.2d at 908 (Widener, J., dissenting).

65. *Id.* Justice Widener notes "[a]ny surgical procedure is shocking to some, few are shocking to others." *Id.*

66. *Lee*, 105 S. Ct. at 1619.

67. The *Rochin* Court noted that conduct must "do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energet-

what needs to be a rational balancing of interests.

Moreover, another likely result of the *Lee* Court's language and analysis is that compelled surgery requiring general anesthesia will be considered *per se* unreasonable under the fourth amendment. Although the Court does not explicitly state this, the inference is unavoidable. The Court described the compelled use of general anesthesia as "demeaning,"[68] "intrusive,"[69] and involving a "virtually total divestment" of control over one's body.[70] The repugnance with which the Court spoke of general anesthesia leads to the inescapable conclusion that compelled use is considered unreasonable under all circumstances.

The *per se* prohibition of general anesthesia that will result from the *Lee* decision is inconsistent with the Court's analysis for several reasons. First, the decision to use local or general anesthesia is solely within the discretion of the surgeon. This contradicts the Court's aversion to letting medical categorization "control the multifaceted legal inquiry."[71] Second, a prohibition of general anesthesia gives the suspect complete control over whether the bullet will be removed or not. A *per se* prohibition creates the possibility that a suspect, knowing of the prohibition, will violently refuse to cooperate, thus making even the most basic operation impossible.[72] Third, the prohibition ignores the possibility that, in some cases, general anesthesia may actually reduce the risk to the suspect.[73] The court may be protecting the suspect's dignity at the expense of his health.

Against these interests in the suspect's privacy rights and health, the *Lee* Court balanced society's interest in fairly and accurately determining the guilt or innocence of the suspect.[74] The state must show a "clear indication"[75] that, in fact, desired evidence

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ically." *Rochin*, 342 at 172. *See infra* note 70.

68. *Lee*, 105 S. Ct. at 1619.

69. *Id.*

70. *Id.* The Court's description of surgery under general anesthesia sounds more like a method of torture than a sophisticated medical procedure: "to drug this citizen—not yet convicted of a criminal offense—'with narcotics and barbituates into a state of unconsciousness' and then to search beneath his skin for evidence of a crime." *Lee*, 105 S. Ct. at 1619 (quoting Lee v. Winston, 717 F.2d 888, 901 (4th Cir. 1983)). If the Court did not intend to declare general anesthesia *per se* unreasonable, it should have tamed its vernacular so as not to leave that impression. The lower courts, faced with an intricate individual liberty problem, receive little guidance from this language.

71. *See supra* note 57.

72. *See supra* note 37.

73. Although in the abstract, general anesthesia involves slightly greater risks than local, these risks may be offset in situations where the general anesthesia allows the surgery to proceed more smoothly and safety. *Lee*, 717 F.2d at 906 (Widener, J., dissenting). In *Lee*, a doctor testified that although a local anesthesia could be used, surgery would be safer under general anesthesia. *Id.*

74. *Lee*, 105 S. Ct. at 1618.

75. The term "clear indication" originated in *Schmerber* as the requisite suspi-

would be found.[76] This "clear indication" represents the necessity for a particularized suspicion[77] that the bullet might be found within the body of the individual. The Court ruled that the very circumstances upon which the state relied to show probable cause to believe that the bullet would be found tend to "vitiate" the state's need to compel surgery.[78] The problem for the state is that if it could show enough evidence to meet the Court's compelling need requirement, it would not need the bullet to convict the suspect.[79]

This compelling need requirement essentially equates the "probable cause" needed to perform a search with the "beyond a reasonable doubt" standard needed to convict a suspect. The Court has created a legal quagmire, making it extremely difficult for the state to show the requisite need for the bullet. Just as the Court stated that the safety and health of the individual is a "crucial factor"[80] in the analysis, but gave it little consideration, the Court here stated that society's interest is "of course of great importance,"[81] but proceeded to establish a catch-22, making proof of the need for the bullet nearly impossible. It is undeniable that a stringent need requirement is necessary to justify a proposed intrusion into the body of a suspect.[82] But it is also undeniable that society has a crucial interest in identifying the perpetrators of another type of intrusion that violates individual rights—namely, criminals who shoot innocent citizens.

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cion needed to justify a bodily intrusion. *Schmerber*, 384 U.S. at 770. Although the Court has explicitly stated that "clear indication" is not a distinct fourth amendment standard, it does serve as a standard over and above probable cause. United States v. Montoya de Hernandez, 105 S. Ct. 3304, 3310 (1985). In *Schmerber*, it was used in contrast to "on the mere chance." In *Schmerber*, 384 U.S. at 770. "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." *Id.* at 770. *See* 2 W. LAFAVE, *supra* note 4, at § 4.1(d). *See also* Eckhard, *Intrusion Into The Body*, 52 MIL. L. REV. 141, 150-51 (1971) (discussion of clear indication as related to probable cause); Note, *Court-Ordered Surgical Removal of Bullet From an Unconsenting Defendant for Evidentiary Purposes Held Reasonable Under the Fourth Amendment*, 55 TEX. L. REV. 147, 156 (1976) (clear indication more demanding than probable cause).

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

77. United States v. Montoya de Hernandez, 105 S. Ct. 3304, 3310 (1985).

78. *Lee*, 105 S. Ct. at 1619.

79. *See* United States v. Crowder, 543 F.2d 312, 318 (D.C. Cir. 1976) (Levanthal, J., dissenting) (establishing "clear indication" may eliminate need for surgery). *See generally* 2 W. LAFAVE, *supra* note 4, at § 4.1(d), pp. 12-20 (the need for the search is an extremely important factor in bodily intrusions).

80. *Lee*, 105 S. Ct. at 1617.

81. *Id.* at 1618.

82. *See* J. HALL, SEARCH AND SEIZURE § 17.13 (1982 & Supp. 1985) ("The government has a much higher burden of proof and persuasion in compelled surgery cases than anywhere in the law of search and seizure.") *See generally* Comment, *Search and Seizure: Compelled Surgical Intrusions?*, 27 BAYLOR L. REV. 305, 313-14 (1975) (the author states that society's need for evidence is not sufficient unless the offense is a crime of violence).

In reaching the conclusion that the conditions present in *Lee* constitute an "unreasonable" intrusion violative of the fourth amendment, the *Lee* Court modified its analytic focus to emphasize privacy concerns. This modification will result in additional confusion as lower courts grapple with the abstract question of what constitutes an unreasonable intrusion upon an individual's dignity. The probable effect of the language used in the decision to defend these dignitary interests will be to make compelled surgery requiring general anesthesia *per se* unreasonable under the fourth amendment. Finally, in an attempt to additionally safeguard privacy rights, the Court has created an almost insurmountable burden for the state to overcome in order to show a compelling need for a bullet as evidence. These factors will produce undesirable results if lower courts, faced with the uncertainty created by this decision, deny otherwise reasonable surgery.

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