

IS THERE A DOCTOR IN THE (STATION) HOUSE?: REASSESSING THE CONSTITUTIONALITY OF COMPELLED DWI BLOOD DRAWS FORTY-FIVE YEARS AFTER SCHMERBER

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ABSTRACT

*The vast majority of Fourth Amendment jurisprudence of the last century has been dedicated to parsing the physical and intangible boundaries of the home, developing the expectation of privacy, and, as of late, exploring the constitutional implications of an increasingly electronic society. In the midst of this development, one major area has quietly fallen by the wayside — the preservation of bodily integrity. As technology has rendered the human body an ever-increasing source of crucial evidence, the Supreme Court has remained largely silent on the government’s power to harvest information through medical procedures. Since the Court’s consideration of the constitutionality of compelled blood draws in *Schmerber v. California*, 384 U.S. 757 (1966), the Fourth Amendment questions attendant to bodily evidence have been largely left to the states. This Article examines a narrow subset of that state-level development: non-consensual DWI blood draws. A review of the state statutory and jurisprudential applications of *Schmerber* reveals increasing disagreement over the scope of the Fourth Amendment when police seek to recover fleeting evidence of blood alcohol content. Based on this review, this Article suggests a number of policy proposals designed to better insure police stay within the Fourth Amendment strictures of *Schmerber* while also procuring the most effective evidence possible.*

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A nearly forty-five year-old debate with constitutional implications was rekindled recently by a decision from an intermediate appellate court in Fort Worth, Texas. On November 5, 2009, the Court of Appeals of Texas, Second

District, ruled that police officers violated Christi Lynn Johnston's Fourth Amendment protection against unreasonable seizure when, following a DWI arrest, the officers physically restrained her at the police station and drew her blood themselves.¹ Johnston's arrest and the decision to draw her blood without her consent were nothing remarkable. Instead, it was the decision of the officers—trained in basic blood draws but hardly qualified phlebotomists—to personally undertake the task of procuring a blood sample in a medically unacceptable way that elevated a simple DWI to a matter of constitutional importance.² The *Johnston* case, though lacking far-reaching precedential value, represents the full realization of the precise constitutional concerns that accompanied the Supreme Court's original acceptance of compelled bodily invasions for the recovery of evidence in *Schmerber v. California*.³

With the advances in forensic science in the intervening decades since the *Schmerber* decision, the human body has become an increasingly important source of valuable, necessary, and expected evidence. In that same time, the Fourth Amendment jurisprudence underlying bodily seizures has diverged along numerous and incongruous paths in the various federal circuits and state court systems. Nowhere has this development been more prolific or more divergent than the area of DWI blood draws for the purpose of accurately assessing blood alcohol content (BAC). The widespread criminalization of driving with the specific BAC of 0.08%⁴ combined with the primary authority given blood tests over all other forms of assessing intoxication⁵ has made the need for clear constitutional guidance all the more important. Perhaps the quintessential “evanescent evidence,”⁶ the always time-sensitive nature of seizure and analysis of blood for the purposes of ascertaining BAC pits fundamental Fourth Amendment concerns⁷ against societal interests in protecting innocent citizens from the consequences of drunk driving.

¹ State v. Johnston, 305 S.W.3d 746 (Tex. App. 2009).

² *Id.* at 759–60; see also John Council, *Questions Remain After Decision on Blood Draws in DWI Arrests*, TEXAS LAW., Nov. 16, 2009, at 1, 19.

³ 384 U.S. 757 (1966).

⁴ See generally *.08 BAC Illegal per se Level*, 2 TRAFFIC SAFETY FACTS 1 (Nat'l Highway Traffic Safety Admin., Washington, D.C.), Mar. 2004, at 1, available at <http://www.nhtsa.gov/people/injury/new-fact-sheet03/fact-sheets04/Laws-08BAC.pdf> (discussing the development and widespread adoption of the 0.08 % standard).

⁵ Jennifer L. Pariser, Note, *In Vino Veritas: The Truth About Blood Alcohol Presumptions in State Drunk Driving Law*, 64 N.Y.U. L. REV. 141, 149 (1989) (discussing the primacy afforded blood tests relative to breath or urine tests).

⁶ *Hammer v. Gross*, 932 F.2d 842, 854, 854 n.1 (9th Cir. 1991) (Fernandez, J., dissenting) (“*Schmerber* and the other cases in this area are driven by the fact that evidence of intoxication is indeed evanescent.”).

⁷ See *Davis v. Hubbard*, 506 F. Supp. 915, 931 (N.D. Ohio 1980) (discussing that the right to the dignity of one's bodily integrity is as old as the common law and has been mentioned as being incorporated in the right of personal security identified in the 39th Article of Magna Carta).

This Article addresses the apparent constitutional boundaries surrounding this critically important area of Fourth Amendment jurisprudence, as announced by the Supreme Court and developed throughout the country. Part I explores the medical and physiological concerns underlying society's interest in forcibly removing blood from a suspect's body as well as the mechanics of assessing intoxication. Part II takes a broad look at the development of constitutional law on the issue of bodily intrusions and the interplay between various forms of seizures. Additionally, this part will also survey the measures undertaken by numerous states to strengthen Fourth Amendment protections of bodily integrity through statutory devices. Part III will examine *Schmerber's* progeny in detail. Specifically, it will address the general bifurcation of *Schmerber's* instruction: whether a constitutional blood draw requires just a qualified technician or both a qualified technician and a medical setting. It then concludes by proposing a non-elemental, holistic approach to *Schmerber's* reasonableness analysis. Part IV will detail the wide range of policy concerns informing the blood draw methods and protocols used around the country. Finally, Part V concludes by suggesting best practices for limiting liability, protecting Fourth Amendment rights, and securing DWI convictions, as drawn from the array of currently employed operating procedures.

I. THE MEDICINE AND SCIENCE BEHIND COMPULSORY BAC TESTING METHODOLOGIES

Taken in isolation, the concept of forcibly removing bodily fluids to assess BAC—much less in the environs of a police station and with other options available—appears unjustifiable. The science behind the evidence at the heart of DWI prosecutions represents a necessary starting point in understanding the development of this specialized area of Fourth Amendment law and why the extraordinary practice of compelled blood draws is, in fact, necessary. First, the methods of assessing intoxication vary from an officer's generally non-invasive request for a sample of a suspect's breath to forced restraint for blood draws or catheterization. Although each of these methods yields evidence of intoxication, their relative strengths and weaknesses inform the discussion of why blood draws represent such a substantial portion of DWI seizures. Second, the ephemeral nature of BAC evidence dictates that time is of the essence in pursuing proof of intoxication. Yet the realities of alcohol absorption and elimination represent an often-overlooked factor in considering the temporal boundaries justifying extreme measures like station house blood draws. Accordingly, this section briefly reviews the medical science underlying the process of assessing intoxication and the mechanics of producing the all-important quantified BAC figures that underlie virtually all DWI convictions.

A. *Methods of Assessing Intoxication*

With the debunking of traditional “common sense” methods of assessing alcohol consumption and intoxication,⁸ breath, blood, and urine tests have emerged as the most trusted sources of confirming evidence in DWI prosecutions.⁹ Though often treated as interchangeable options, important differences between each of these means of detecting intoxication inform the heavy reliance on blood tests in a large number of DWI investigations. Moreover, the varying degree of invasion and discomfort required for each test has produced, in itself, wide-ranging divergence in the caselaw. Ultimately, the judicial acceptance of blood draws as an accurate middle ground between the Breathalyzer and the catheter forms the foundation of an increasingly permissive Fourth Amendment standard governing these seizures.

1. The Breath Alcohol Test

The tried-and-true, standby method for assessing intoxication is the breath alcohol test, commonly referred to by its commercial name, the “Breathalyzer.” In reality, the Breathalyzer is one of three predominant types of alcohol detection devices: 1) the Breathalyzer; 2) the Intoxilyzer; and 3) the Alcosensor.¹⁰ All three types of breath alcohol tests require an individual to exhale a deep breath for analysis.¹¹ Once a breath sample is captured, each device employs a different method of measuring breath alcohol content from which blood alcohol content can be extrapolated.¹² The Breathalyzer contains chemicals that

⁸ See, e.g., Spurgeon Cole & Ronald H. Nowaczyk, *Field Sobriety Tests: Are They Designed For Failure?*, 79 PERCEPTUAL & MOTOR SKILLS 99, 101–02 (discussing police officers who were shown videos of individuals performing various field sobriety tests incorrectly asserted that the tests demonstrated intoxication in forty-six percent of the videos presented); Herbert Moscovitz et al., *Police Officers’ Detection of Breath Odors From Alcohol Ingestion*, 31 ACCIDENT ANALYSIS & PREVENTION 175, 179–80 (demonstrating police officers’ inability to accurately assess alcohol or predict intoxication when confronted by subjects with “alcohol on their breath”).

⁹ The most telling endorsement of chemical test evidence is the widespread criminalization and admissibility of refusals to submit to a blood, breath, or urine screening. See Jennifer E. Dayok, Comment, *Administrative Driver’s License Suspension: A Remedial Tool That is Not in Jeopardy*, 45 AM. U. L. REV. 1151, 1153 n.9, 1155 n.11 (1996) (surveying many of the state responses to noncompliance with chemical testing).

¹⁰ *Tech 101: How Stuff Works*, L.A. TIMES, June 28, 2001, at 8, available at <http://articles.latimes.com/2001/jun/28/news/tt-16067> [hereinafter *Tech 101*].

¹¹ *Id.*

¹² Pariser, *supra* note 5, at 149–54 (providing an extensive discussion of the retro-extrapolation method used to calculate alcohol content). Also of note, none of the breath alcohol tests actually measure BAC. Instead, all of these devices measure breath alcohol content or BrAC. That measurement is first subjected to a BAC conversion before applying the retro-extrapolation calculation discussed in Pariser. See E. John Wherry, Jr., *DWI Blood Alcohol Testing: Responding to a Proposal Compelling Medical Personnel to Withdraw Blood*, 18 SETON HALL LEGIS. J. 655, 658 n.19, 663–67 (1994) (explaining the difference between BAC and BrAC, as well as the BrAC-to-BAC extrapolation process). For a discussion of the possible problems

react with alcohol in the air causing them to change color and produce a variety of new compounds. The device then compares the resulting mixture with a control vial to reach a numerical determination.¹³ The Intoxilyzer works slightly differently. As succinctly explained by one Ninth Circuit panel, “[t]he Intoxilyzer works by shining a beam of infrared light through a chamber full of uncontaminated air When new air is breathed into the chamber, the amount of light will be decreased if there is alcohol in the breath, because alcohol, apparently colorless, has a color just past red in the rainbow. The decrease in light due to alcoholic breath is measured and converted into an alcohol percentage.”¹⁴ Finally, the Alcosensor converts alcohol in the air into electricity by way of a chemical reaction, and the resulting electrical current is measured and converted into a BAC reading.¹⁵ Despite variances in their inner workings, all three breath alcohol tests, when properly administered with calibrated equipment, have been almost universally accepted as reliable sources of BAC in DWI prosecutions.¹⁶

As is relevant to this discussion, the breath alcohol test’s biggest shortcoming is that it requires cooperation from suspects. All three breath methods require an individual to inhale deeply and exhale completely into a fixed opening. None of the extant methods of testing breath alcohol content lend themselves to compelled sampling. Moreover, many states require police officers to administer two or more breath tests to a suspect to confirm the accuracy of initial results—thus further increasing the required cooperation between often intoxicated suspects and officers.¹⁷ As such, while generally accepted and comparatively non-invasive, the various approaches to breath alcohol testing simply do not work with non-compliant individuals. Once a suspect refuses, an officer has no choice but to abandon this least offensive measure and move to blood or urine testing immediately to avoid the destruction of evidence through the body’s normal absorptive processes.

with BrAC-to-BAC conversion, see Wayne A. Morris, *DWI*, *The CHAMPION*, August 2009, at 44, available at <http://www.nacdl.org/public.nsf/0/c231d5f57fcc15f485257643005f5782?OpenDocument>.

¹³ *State v. Williams*, 480 A.2d 1383, 1385 (R.I. 1984); *Tech 101*, *supra* note 10, at 8; see also *How Many Drinks Does It Take?*, INTECH, Feb. 28, 2001, at 24, available at 2001 WLNR 4335245 [hereinafter *How Many*].

¹⁴ *United States v. Brannon*, 146 F.3d 1194, 1195 (9th Cir. 1998); see also *Tech 101*, *supra* note 10, at 8.

¹⁵ *Tech 101*, *supra* note 10, at 8; see also *How Many*, *supra* note 13, at 24.

¹⁶ See generally *State v. Chun*, No. 58,879, 2007 N.J. LEXIS 39 (Feb. 13, 2007) (describing the process by which all three methods garnered widespread scientific and legal acceptance) *aff’d*, *State v. Chun*, 943 A.2d 114 (N.J. 2008).

¹⁷ See, e.g., MINN. STAT. § 169A.51 (2010) (requiring two samples); NEV. REV. STAT. § 484C.200 (2010) (same); and WIS. STAT. § 343.305 (2010) (same).

2. The Urinalysis Test

The urinalysis test occupies the opposite end of the spectrum from breath alcohol tests. At minimum, a urinalysis test requires a suspect to be observed urinating to insure the integrity of the sample tested.¹⁸ Where a suspect complies, the urine sample is merely collected and submitted for chemical testing. The more extreme scenario arises, however, when an individual refuses to comply and officers resort to compelled urinalysis by catheterization. In such a scenario, a suspect is typically physically restrained while the catheter is inserted by a medically qualified individual.¹⁹ This process has been described as both excruciatingly painful and humiliating.²⁰ A urine sample is extracted by way of a catheter and submitted for laboratory testing to ascertain the chemical content.²¹

As this short description makes clear, urinalysis for the purposes of assessing BAC is problematic at best. Numerous courts have recognized that forced removal of urine samples for chemical testing may be widespread and not per se unconstitutional, but it is an undesirable method likely to produce constitutional violations.²² Moreover, even where suspects comply with testing, the scientific community has cast a skeptical eye on urinalysis after research has revealed that it may not be an accurate predictor of BAC.²³ Even those researchers willing to stand by the results of urinalysis BAC tests require added precautions such as repeated tests or sample extraction over a period of time to guarantee accuracy.²⁴ In fact, some jurisdictions affirmatively require that an

¹⁸ *Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602, 617 (1989).

¹⁹ *E.g., Forced Catheterization Used in DUI Case: Suit Claims Police, Hospital Acted Improperly*, WLWT.COM (Sept. 3, 2009, 8:59 AM), <http://www.wlwt.com/health/20703731/detail.html> [hereinafter *Forced Catheterization*] (“[The suspect’s] attorney said his client was shackled to a gurney and had a catheter inserted against his will.”); *Tube Inserted into Man Who Refused to Give Urine Sample*, THE SEATTLE TIMES (Mar. 4, 2008, 6:10 PM), http://seattletimes.nsource.com/html/localnews/2004259711_apwafordcatheterization.html [hereinafter THE SEATTLE TIMES] (“[H]e was held down kicking and screaming And a tube was inserted into his bladder to withdraw the urine. . . . A settlement was reached Friday in which he was paid \$15,000 . . .”).

²⁰ *See Forced Catheterization*, *supra* note 19; *see also* THE SEATTLE TIMES, *supra* note 19.

²¹ *See Forced Catheterization*, *supra* note 19; *see also* THE SEATTLE TIMES, *supra* note 19.

²² *Yanez v. Romero*, 619 F.2d 851, 854 (10th Cir. 1980); *see also* *Ellis v. City of San Diego*, 176 F.3d 1183, 1192 (9th Cir. 1999) (denying qualified immunity where plaintiff alleged he was sedated and forced to submit to catheterization procedure); *Levine v. Roebuck*, No. 06-6040-CV-NKL-P, 2007 U.S. Dist. LEXIS 77073, *16–17 (W.D. Mo. Oct. 16, 2007) (finding catheterization of sixty-eight year-old man in non-DWI circumstances was an unreasonable seizure because it required a “gross personal indignity”).

²³ Charles L. Winek et al., *The Unreliability of Using a Urine Ethanol Concentration to Predict a Blood Ethanol Concentration*, 25 FORENSIC SCI. INT’L 277, 280 (1984).

²⁴ Alfred A. Biasotti & Thomas E. Valentine, *Blood Alcohol Concentration Determined from Urine Samples as a Practical Equivalent or Alternative to Blood and Breath Alcohol Tests*, 30 J. FORENSIC SCI. 194, 206 (1985); John H. Mulholland & Francis J. Townsend, *Bladder Beer* —A

initial urine test be discarded entirely.²⁵ Though the original method of assessing BAC, these significant drawbacks have caused urinalysis to increasingly fall out of favor with police, prosecutors, and courts alike given the greater ease of administering breath tests to cooperative suspects and the relatively better option of forcibly extracting blood from more recalcitrant individuals.

3. The Blood Test

The middle ground of BAC testing has always belonged to the blood test. The process of extracting blood for the purposes of assessing BAC is no different from a standard blood test administered for medical reasons.²⁶ The only minor variation between a BAC test and a standard blood test is that the site of extraction for BAC testing typically must be sterilized with a special non-alcohol based solution in order to avoid tainting the specimen.²⁷ Unlike administering a breath test or collecting a urine sample, extracting blood typically requires a significant degree of training. Though the legal implications and regional variations in required qualification are discussed at length below, the general standard is that an individual must at least have received certification as a phlebotomist before performing blood draws for law enforcement purposes.²⁸

Blood tests are also often regarded as the gold standard of DWI evidence. While breath tests and voluntary urinalysis tests are easy to administer, they are also easily corrupted by errors on the part of the administering police officers.²⁹ Blood tests, on the other hand, are typically performed by medical

New Clinical Observation, 95 TRANSACTIONS OF THE AM. CLINICAL CLIMATOLOGICAL ASS'N 34 (1984) (acknowledging that the spontaneous production of alcohol within the bladder itself can taint subsequent chemical testing).

²⁵ See CAL. CODE REGS. tit. 17, § 1219.2 (2010) (requiring a voiding of the bladder before taking the tested sample); *Tucker v. State*, No. CACRO1-6, 2002 Ark. App. LEXIS 253, at *3 (Ark. Ct. App. Apr. 24, 2002) (citing ARKANSAS DEP'T OF HEALTH, ARKANSAS REGULATIONS FOR ALCOHOL TESTING § 3.30 (1995)). *But see Hayes v. Comm'r of Pub. Safety*, 773 N.W.2d 134, 138 (Minn. Ct. App. 2009) (declining to require voiding absent statutory or regulatory mandate); *State v. Jones*, 721 A.2d 903 (Conn. App. Ct. 1998) (same).

²⁶ This fact, though largely empirically true, is essentially a judicial fact established by the frequent citation to *Schmerber*'s assertion that blood draws are merely a commonplace occurrence of little consequence in everyday life. *Schmerber v. California*, 384 U.S. 757, 771 (1966). See *Skinner*, 489 U.S. at 625; *United States v. Weikert*, 504 F.3d 1, 12 (1st Cir. 2007); *United States v. Amerson*, 483 F.3d 73, 84 (2d Cir. 2007); *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005) (citing *Skinner* for the same proposition); *Jones v. Murray*, 962 F.2d 302, 307 (4th Cir. 1992); *United States v. Zimmerman*, 514 F.3d 851, 855 (9th Cir. 2007); *Johnson v. Quander*, 440 F.3d 489, 496 (D.C. Cir. 2006).

²⁷ See, e.g., *State v. Hanners*, 774 S.W.2d 568 (Mo. Ct. App. 1989) (suppressing test evidence where alcohol-based swab used). *But see State v. Phillips*, 790 P.2d 390 (Idaho Ct. App. 1990) (admitting BAC results notwithstanding failure to follow proper sterilization procedures).

²⁸ See, e.g., ARIZ. REV. STAT. ANN. § 28-1388 (2010); CAL. VEH. CODE § 23158 (West 2010); N.Y. VEH. & TRAF. LAW § 1194 (McKinney 2010) (codifying a similar list but requiring physician supervision).

²⁹ See text accompanying note 12 (breath) and *supra* notes 22–23 (urine).

professionals.³⁰ More specifically, with rare exception such as the *Johnston* case discussed above, most blood draws are performed by doctors, nurses, and phlebotomy technicians.³¹ Additionally, the process of analyzing the blood is conducted by forensic specialists or medical personnel.³² As such, unlike a roadside breath test or station house urine collection, blood tests carry with them an air of independent, scientific analysis because police officers rarely come into direct contact with the tested specimen.

Yet blood tests suffer from a single debilitating problem—time. As discussed at greater length below, the human body absorbs alcohol rather quickly, thus eliminating valuable evidence.³³ Consequently, blood testing demands quick extraction to achieve an accurate result—so much so that some states have statutory requirements designating the maximum lapse of time between arrest and extraction.³⁴ Given the general preference for blood draws in medical settings, the need to reduce the time between arrest and blood draw often requires police officers to act quickly and to immediately take suspects to a local hospital to preserve evidence. It is this fundamental, key issue—the need for quick action—that presents the primary problem with blood testing for DWI purposes and, perhaps even more than the nature of the intrusion itself, has led to the detailed development of Fourth Amendment blood seizure jurisprudence.

B. Alcohol Absorption Over Time and Its Effect on the Assessment of Intoxication

Blood tests represent the most readily available and generally acceptable means of assessing the BAC of non-compliant suspects. As noted above, though, the fleeting presence of alcohol in the blood stream after consumption reduces the success of blood tests to a race against the clock, and the parameters of that race have formed the foundation of a broad swath of the Fourth Amendment guidance controlling police conduct in this area. The source and extent of this exigency is best understood by briefly considering the natural processes that cause the elimination of alcohol in the human bloodstream and the effect of those processes on the assessment of intoxication through the various available tests but, most importantly, blood testing.

Though variations exist, the following standards represent the generally accepted premises upon which the scientific and medical communities assess alcohol intoxication. One serving of alcohol is defined as a single twelve-ounce

³⁰ See cases cited *supra* note 27; see also *infra* Part II.B.2.

³¹ See cases cited *supra* note 27; see also *infra* Part II.B.2.

³² See cases cited *supra* note 27; see also *infra* Part II.B.2..

³³ See *infra* Part I.B; see also *Schmerber*, 384 U.S. at 770–71 (discussing the absorption and elimination of alcohol in the blood stream as an exigency).

³⁴ See, e.g., 75 PA. CONS. STAT. ANN. § 3802 (2010) (requiring the tested blood sample to be extracted no more than two hours after operation of a motor vehicle).

beer, six-ounce glass of wine, or 1.5-ounce serving of distilled liquor.³⁵ Such a serving contains ten to fifteen grams of ethanol and, on an empty stomach, will reach a maximum concentration in the blood stream thirty to ninety minutes after consumption.³⁶ The average individual will absorb 3.3 millimoles of alcohol per hour or, stated otherwise, the body can remove fifteen milligrams of alcohol per 100 milliliters of blood per hour.³⁷ Notably, at higher concentrations, such as after three pints of beer or six shots of whiskey, the rate at which alcohol is removed from the blood drops dramatically and alcohol levels will register at the peak of the BAC curve for much longer.³⁸ After absorption peaks, BAC will fall at a rate generally tracing a half-life curve until alcohol is completely eliminated up to eight hours after consumption.³⁹

The consequences of this rapid absorption process are perhaps best embodied in the state rules governing the use of blood evidence in DWI prosecutions. In Indiana, a BAC test will only create a presumption of intoxication—and then only a rebuttable presumption—if administered less than three hours after a law enforcement officer had probable cause to believe the suspect had committed a DWI offense.⁴⁰ Hawaii, Ohio, and Wisconsin also allow the admission of a BAC test only so long as it was administered within three hours of operation of a vehicle.⁴¹ Some states go even further and require testing within two hours.⁴² Only a small number of states permit the admission of BAC testing completed at any time after arrest.⁴³ This sampling of state statutes reveals both the legislative effort to acknowledge the realities of blood alcohol elimination and, perhaps more importantly, the dispositive effect of a relatively inflexible timeline on the entire evidentiary weight of BAC test results.

C. *The Mechanics of BAC Calculation*

Finally, before turning to the Fourth Amendment, it is important to understand the meaning of the all-important BAC figures that compelled blood draws are attempting to ascertain in the first place. First, the BAC test administered by the arresting officer produces an initial figure. In the case of the breath

³⁵ Patrick G. O'Connor, *Alcohol*, THE MERCK MANUAL ONLINE (July 2008), <http://www.merck.com/mmpe/sec15/ch198/ch198g.html>.

³⁶ *Id.*

³⁷ Alex Paton, *ABC of Alcohol: Alcohol in the Body*, 330 BRIT. MED. J. 85, 86 (2005).

³⁸ *Id.*

³⁹ *Id.* at Fig. 4.

⁴⁰ IND. CODE § 9-30-6-2(c) (2010).

⁴¹ HAW. REV. STAT. § 291E-3 (2010); OHIO REV. CODE ANN. § 4511.19 (West 2010); WIS. STAT. § 885.235 (2010).

⁴² *See, e.g.*, IOWA CODE § 321J.2 (2010); W. VA. CODE § 17C-5-8 (2010).

⁴³ *See, e.g.*, WASH. REV. CODE § 46.61.502 (2010) ("Analyses of blood or breath samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or more . . .").

test, this initial figure will likely constitute the evidence of intoxication later used at trial. In the case of a blood test, the figure calculated by the testing laboratory will likely need to be subjected to a complex mathematical process of backward extrapolation to accurately assess intoxication at the time of vehicle operation.⁴⁴ In either scenario, the initial BAC number represents the percentage, by weight, of alcohol in a given volume of blood at the time the test is administered.⁴⁵ As mentioned above, blood test cases will often rely upon this second number extrapolated from the initial results. Ultimately, this extrapolated figure alone—once proven—suffices to create per se criminal liability in virtually all jurisdictions.

II. THE JURISPRUDENCE OF BODILY INVASIONS AND STATE STATUTORY RESPONSES

The Fourth Amendment expressly provides for the protection of an individual's person against unreasonable searches and seizures.⁴⁶ The fact that the Fourth Amendment lists the protection of one's person ahead of "houses, papers, and effects" may be more than mere accident. After all, as the Tenth Circuit pointedly explained, "[a] person's home is his or her castle, and throughout history, one of the key purposes of a castle's walls has been to protect the castle-owner's blood."⁴⁷ Nonetheless, the caselaw governing searches involving the removal of bodily fluids, or extraction of foreign physical evidence contained within the body, is governed by a very small universe of Supreme Court decisions. Moreover, the cases in this area, as discussed at length below, set an exceedingly low standard for most Fourth Amendment intrusions. In response, many states have undertaken legislative efforts, by promulgating statutes, in order to strengthen Fourth Amendment protections governing invasive personal searches. Part II first surveys the watershed cases that make up the principle guidance on bodily intrusions, then examines a sampling of the state measures designed to further limit this type of evidentiary search.

A. *The Supreme Court's Treatment of Bodily Intrusions*

The Supreme Court's acceptance and limitation of bodily intrusions ranging from stomach pumping to blood draws to the surgical removal of physical evidence can be succinctly presented through a quite limited canon of four landmark cases and a smattering of clarifying decisions. Though the Court has addressed some of the nuance of certain searches in greater detail, the hallmark principles guiding bodily searches under the Fourth Amendment are derived

⁴⁴ For a thorough and detailed discussion of the processes of backward extrapolation in DWI prosecutions, see Pariser, *supra* note 5, at 151.

⁴⁵ STEPHEN BRENT & SHARON STILLER, *HANDLING DRUNK DRIVING CASES* 26 (1985).

⁴⁶ U.S. CONST. amend. IV.

⁴⁷ *Marshall v. Columbia Lea Reg'l Hosp.*, 474 F.3d 733, 745 (10th Cir. 2007).

almost entirely from the decisions in *Rochin v. California*,⁴⁸ *Breithaupt v. Abram*,⁴⁹ *California v. Schmerber*,⁵⁰ and *Winston v. Lee*.⁵¹ Those general parameters have only been reconsidered or adjusted on rare occasion. Though other cases have touched upon or otherwise considered the issue of bodily intrusion, this four-case sequence represents the primary foundation upon which DWI blood draws are permitted and the context in which they are understood. This sub-section briefly details each of these four watershed cases and a limited selection of other relevant decisions in order to provide greater illustration of the facts that gave rise to the Court's far reaching conclusions and general understanding of the propriety of bodily searches.

1. *Rochin v. California*

Second in importance only to *Schmerber*, the *Rochin* decision marked the Supreme Court's first modern foray into the relationship between the Constitution and bodily intrusions. More than any of the other cases, *Rochin*'s jurisprudential developments reflect the shocking facts of the case. On July 1, 1949, police, acting on an informant's tip, went to the home of Antonio Rochin to investigate reports that Rochin had been selling narcotics.⁵² Upon entering Rochin's home without a warrant, officers observed Rochin as he quickly swallowed two capsules on his bedside table.⁵³ The officers rushed to Rochin and attempted to prevent him from swallowing the capsules, but to no avail.⁵⁴ In an effort to recover the now-consumed evidence, the officers took Rochin to the hospital where doctors inserted a tube into his throat and forced emetic solution into his stomach.⁵⁵ This "stomach pumping" caused Rochin to vomit the capsules.⁵⁶ It was later proven that the capsules contained morphine, and Rochin was convicted under a California statute for unlawful possession of a preparation of morphine.⁵⁷

Addressing the reasonableness of the search of Rochin's stomach, the Court held that the officers' actions "shocked the conscience" and, hence, the evidence was inadmissible in state court under the Due Process Clause of the

⁴⁸ 342 U.S. 165 (1952).

⁴⁹ 352 U.S. 432 (1957).

⁵⁰ 384 U.S. 757 (1966).

⁵¹ 470 U.S. 753 (1985).

⁵² *Rochin*, 342 U.S. at 166.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

Fourteenth Amendment.⁵⁸ In so holding, though, the Court's opinion was absolutely wedded to the specific facts of the search. The Court catalogued injury-upon-injury perpetrated by the officers as they illegally entered Rochin's home, physically assaulted him in an effort to prevent him from swallowing the capsules, and caused the forcible extraction of his stomach contents.⁵⁹ Reflecting upon this particularly egregious chain of conduct, the Court explained that the officers "methods [were] too close to the rack and the screw to permit of constitutional differentiation."⁶⁰ In so holding, the Court planted the first jurisprudential flag in the realm of bodily intrusions: the Constitution will not permit the admission of evidence—even in state court—where that evidence was seized in a manner that shocks the conscience.

Rochin, of course, no longer represents the governing law in the area of bodily searches such as those at issue here. As subsequent authority explains, the combined effect of the decisions in *Mapp* and *Schmerber* was to reduce the standard from the virtually insurmountable "shocks the conscience" standard to a more attainable "objective reasonableness" test.⁶¹ Despite this putative shift, *Rochin* remains a critical milestone in this area. Though it does not per se provide the governing standard, the *Rochin* Court's fact-intensive analytical method persists and has never been fully supplanted by the factored tests announced in later cases.⁶² In this way, *Rochin* lives on and remains a salient consideration in any bodily seizure scenario.

⁵⁸ Notably, the language of the *Rochin* decision addresses the Due Process Clause of the Fourteenth Amendment rather than, like the remaining cases, the Fourth Amendment. 342 U.S. at 179. The reason for this slight variation is that the Supreme Court had declined to incorporate the Fourth Amendment exclusionary rule at the time. See *Wolf v. Colorado*, 338 U.S. 25 (1949). The Court subsequently reversed itself in *Mapp v. Ohio*, 367 U.S. 643 (1961). Since that time, *Rochin* has been treated as informing evidentiary non-seizure exclusions post-*Mapp* in the context of Fourteenth Amendment Due Process analysis. See *Chavez v. Martinez*, 538 U.S. 760, 774 (2003) (applying *Rochin* to a Fourteenth Amendment exclusion question); *Arar v. Ashcroft*, 585 F.3d 559, 599 (2d Cir. 2009) (conducting a mixed Fourth-Fourteenth Amendment analysis relying upon *Rochin*); *Garner v. Grant*, 328 F. App'x 325, 327–28 (6th Cir. 2009) (unpublished) (applying *Rochin*); *United States v. Zimmerman*, 514 F.3d 851, 855 (9th Cir. 2007) (evaluating a compelled blood draw as a Fourth Amendment claim under *Schmerber* and as a Fourteenth Amendment claim under *Rochin*); *Cummings v. McIntire*, 271 F.3d 341, 344 (1st Cir. 2001) (distinguishing Fourth Amendment and Fourteenth Amendment cases and applying *Rochin*); *United States v. Husband*, 226 F.3d 626, 630 & n.2 (7th Cir. 2000) (same).

⁵⁹ *Rochin*, 342 U.S. at 172.

⁶⁰ *Id.*

⁶¹ See *Lester v. City of Chicago*, 830 F.2d 706, 711 (7th Cir. 1987).

⁶² See, e.g., *Ove v. Gwinn*, 264 F.3d 817, 824–25 (9th Cir. 2001) (requiring more than mere allegations of lack of qualification or bald assertion that medical standards were not upheld); *Hammer v. Gross*, 932 F.2d 842, 846 (9th Cir. 1991) (considering a variety of factual circumstances including consent to other forms of tests as part of the *Schmerber* analysis); *People v. Kraft*, 84 Cal. Rptr. 280, 284–85 (Cal. Ct. App. 1970) (considering all of the contextual facts in conducting *Schmerber* analysis against the background of the "*Rochin* rule"); *State v. Ravotto*, 777 A.2d 301, 309–10 (N.J. 2001) (emphasizing "shocks the conscience"—like facts including the

2. *Breithaupt v. Abram*

Another pre-*Mapp* case, *Breithaupt v. Abram*, decided five years after *Rochin*, marked the Court's first attempt to assess the boundaries of compelled blood tests.⁶³ Like in *Rochin*, the Court's assessment in *Breithaupt* was limited to Fourteenth Amendment Due Process concerns.⁶⁴ Also like in *Rochin*, the underlying facts formed the beginning and ending point of the Court's analytical rubric. Unlike the *Rochin* decision, however, the reasoning of the *Breithaupt* Court's decision has survived intact through the transition from the pre-*Mapp* Fourteenth Amendment inquiry to the post-*Mapp* Fourth Amendment inquiry.

Paul Breithaupt was driving a pickup truck on a New Mexico highway when his vehicle collided with an oncoming passenger car.⁶⁵ Three occupants of the car were killed, and Breithaupt was seriously injured.⁶⁶ A nearly empty alcohol container was found in the wrecked pickup truck, and alcohol could be detected on his breath.⁶⁷ While in the emergency room for treatment, a state patrolman requested a blood sample for BAC testing while Breithaupt was still unconscious from the accident.⁶⁸ Thus, without Breithaupt's consent, the treating physician took a blood sample which, after testing, revealed a BAC of 0.17 % alcohol.⁶⁹ Based on this evidence, Breithaupt was convicted in a New Mexico state court of involuntary manslaughter.⁷⁰

Breithaupt challenged his conviction, citing *Rochin*.⁷¹ After reciting the facts of *Rochin*, the Court concluded that "there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done, as in this case, under the protective eye of a physician."⁷² The Court explained that, though a physical invasion of the body, blood extraction was a commonplace practice undertaken for a wide variety of reasons in American society.⁷³ Accordingly, "a blood test taken by a skilled technician [does] not . . . 'shock[] the conscience.'"⁷⁴ Ultimately,

officers' insistence on a blood test notwithstanding the suspect's paralyzing fear of needles and willingness to submit to an alternative test).

⁶³ *Breithaupt v. Abram*, 352 U.S. 432 (1957).

⁶⁴ *See supra* note 58. Unlike *Rochin*, *Breithaupt* has been quite directly folded into the Fourth Amendment jurisprudence post-*Mapp*. *See* *United States v. Hook*, 471 F.3d 766, 773 (7th Cir. 2006); *Johnson v. Quander*, 440 F.3d 489, 496 (D.C. Cir. 2006); *United States v. Kincade*, 379 F.3d 813, 836–37 (9th Cir. 2004); *Hedges v. Musco*, 204 F.3d 109, 120 (3d Cir. 2000).

⁶⁵ *Breithaupt*, 352 U.S. at 433.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Breithaupt*, 352 U.S. at 435.

⁷² *Id.* at 435.

⁷³ *Id.* at 436.

⁷⁴ *Id.* at 437 (citing *Rochin*, 342 U.S. at 172).

the Court concluded that the social value derived in avoiding “[t]he increasing slaughter on our highways” far outweighed the “slight . . . intrusion as is involved in applying a blood test.”⁷⁵ As one commentator has pointed out, the dissent strongly objected to majority’s reliance on *Rochin*’s standard.⁷⁶ Chief Justice Warren, writing for himself, Justice Black, and Justice Douglas, explained that the lack of consent, rather than the force used in procuring the evidence, gave rise to the constitutional violation.⁷⁷ The dissent explained that *Rochin*, like *Breithaupt*, had not resisted the medical procedure itself.⁷⁸ Accordingly, relying upon the initial violence in *Rochin* to distinguish subsequent cases did not make sense, as the violation did not occur until some time later, in the calmer setting of the hospital.⁷⁹

Ultimately, *Breithaupt* served two important purposes in the cases that followed. First, it represents the first major case justifying a bodily intrusion on the basis of “the intruder’s” professional qualification. Whereas *Rochin* did not bother to address the effect of the fact that doctors performed the stomach pumping, the physician’s “protective eye” over the blood draw process appears to have been an almost dispositive fact in *Breithaupt*.⁸⁰ This emphasis on who draws blood and how it is drawn would become even more important with the *Schmerber* decision. Second, Chief Justice Warren’s observations, interestingly enough, portended the difficult question in the caselaw that has followed: what happens when an individual is unwilling to exacerbate their position by resisting and only registers their non-consent verbally? This question has yet to be satisfactorily resolved but frames much of the post-*Schmerber* precedent of the lower courts.

3. *Schmerber v. California*

More than forty years after it was decided, *Schmerber v. California* remains the single leading precedent controlling non-consensual blood draws for the collection of evidence. Coming fourteen years after *Rochin*, *Schmerber* radically altered the constitutional boundaries of bodily intrusions, and for the first time applied those boundaries through the exclusionary rule of the Fourth Amendment as incorporated through *Mapp v. Ohio*.⁸¹ In so doing, the Court reduced the prevailing standard while also embracing the preexisting fact-specific analysis that guided the dispositions of *Rochin* and *Breithaupt*. At the

⁷⁵ *Id.* at 439.

⁷⁶ Robert Brooks Beauchamp, Note, *Shed Thou No Blood: The Forcible Removable of Blood Samples from Drunk Driving Suspects*, 60 S. CAL. L. REV. 1115, 1123–24 (1987).

⁷⁷ *Breithaupt*, 352 U.S. at 441 (Warren, C.J., dissenting).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 436.

⁸¹ 367 U.S. 643 (1961).

same time, the Court's efforts to tailor its ruling to the facts before it transformed the question of blood draws into an insular area of bodily intrusion jurisprudence.

The facts of *Schmerber* were unremarkable. Armando Schmerber was hospitalized after an automobile accident.⁸² Schmerber was formally arrested while receiving treatment at the hospital.⁸³ The arresting officer subsequently instructed the treating physician to take a blood sample to test for BAC.⁸⁴ On the strength of the blood evidence, Schmerber was convicted of driving under the influence.⁸⁵ He appealed, claiming that the admission of the blood evidence—taken without his consent—violated his Fifth Amendment right against self-incrimination and his Fourth Amendment protection against unreasonable search and seizure.⁸⁶

The Court immediately dispensed with Schmerber's self-incrimination claim. Citing *Breithaupt*, the Court concluded that the information derived from blood did not constitute testimonial or communicative evidence.⁸⁷ According to the Court, the Fifth Amendment does not protect the body against a search aimed at *discovering* evidence. Instead, the privilege against self-incrimination only reached evidence requiring a defendant to testify against himself *as a witness*.⁸⁸ Ultimately, "[s]ince the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds."⁸⁹

Acknowledging that it was "writ[ing] on a clean slate" with respect to bodily intrusion under the Fourth Amendment,⁹⁰ the Court then turned to Schmerber's Fourth Amendment issue. The Court conceded that a bodily intrusion for the extraction of blood "plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment."⁹¹ First, the Court considered whether the arresting officer required a warrant to effect the blood draw. For the first time, the Court resorted to the medical evidence discussed above regarding absorption and elimination, though in greatly condensed form, to conclude that the arresting officer was faced with an emergency situation in which

⁸² *Schmerber*, 384 U.S. at 758.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 759.

⁸⁷ *Id.* at 760 ("*Breithaupt* summarily rejected an argument that the withdrawal of blood and the admission of the analysis report involved in that state case violated the Fifth Amendment privilege of any person . . .").

⁸⁸ *Schmerber*, 384 U.S. at 761–62.

⁸⁹ *Id.* at 765.

⁹⁰ *Id.* at 768.

⁹¹ *Id.* at 767.

“the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence.”⁹² Accordingly, *Schmerber* essentially created a blanket exigency exception to permit warrantless DWI blood draws.

Second, and more important to this inquiry, the Court addressed the reasonableness of the test chosen to measure the petitioner’s blood-alcohol level. Again citing *Breithaupt*, the Court reasoned that blood tests represent a commonplace event in society involving minimal pain or medical consequence.⁹³ The Court intimated that individuals who do not suffer an extreme fear, health concern, or religious scruple preventing blood draws simply could not complain of being forced to submit to such a minimally invasive procedure following an arrest.⁹⁴ Then the Court, perhaps in dicta or perhaps not, announced what would become the rule and mark the boundaries for future blood draw assessments:

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 questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.⁹⁵

This concluding paragraph to the Court’s Fourth Amendment analysis marked a major, albeit subtle, sea-change. The *Schmerber* decision essentially replaced the “shocks the conscience” fact question with a more manageable reasonableness test. Moreover, with respect to blood draws, *Schmerber* ultimately defined the reasonableness inquiry in a strictly elemental fashion—(1) under what circumstances was the blood drawn, and (2) by whom was it drawn.

As discussed below, the *Schmerber* two-part test quickly gave rise to confusion as lower courts began to wrestle with the necessity of both elements in assessing reasonableness. Nonetheless, *Schmerber*’s two factors persist as the fundamental issues in blood draw cases and, through *Schmerber*’s progeny, some other forms of bodily intrusion.⁹⁶ This effect has only been enhanced by the Court’s dispensing with the warrant requirement. Though state regulation and lower court precedent have tweaked these principles, *Schmerber*’s funda-

⁹² *Id.* at 770 (citations omitted).

⁹³ *Id.* at 771.

⁹⁴ *Schmerber*, 384 U.S. at 771.

⁹⁵ *Id.* at 771–72.

⁹⁶ See *Richmond v. City of Brooklyn Ctr.*, 490 F.3d 1002, 1009 (8th Cir. 2007) (applying *Schmerber* to cavity search); *Evans v. Stephens*, 407 F.3d 1272, 1296–97 (11th Cir. 2005) (visual strip search); *Sparks v. Stutler*, 71 F.3d 259, 261 (7th Cir. 1995) (forced catheterization); *United States v. Vega-Barvo*, 729 F.2d 1341, 1345 (11th Cir. 1984) (taking x-ray images).

mental assertion remains true: warrant or not, non-consensual blood draws will be assessed on the medical reasonableness of their conduct. They need not shock the conscience and magistrate approval will not insulate them from invalidation.

4. *Winston v. Lee*

Though perhaps not as significant as *Schmerber*, *Winston v. Lee* represents the last major bodily intrusion case to issue from the Supreme Court that is relevant to blood draw jurisprudence. Often overlooked in the scholarly literature addressing *Schmerber*, *Winston* serves to bookend the long and winding thirty-three year path that began with *Rochin* by again providing a quantification of bodily intrusions under the paradigm created by the *Schmerber* Court. In so doing, *Winston* simultaneously extended *Schmerber*'s factored balancing test while also providing a major outer boundary to the determination of what can be deemed reasonable under the Fourth Amendment.

In the early morning hours of July 18, 1982, Ralph Watkinson shot an unidentified, armed man who approached his shop and attempted to rob him at gunpoint.⁹⁷ Twenty minutes later, officers found Rudolph Lee eight blocks away suffering from a gunshot wound to the chest.⁹⁸ At the hospital, Watkinson identified Lee as his assailant.⁹⁹ Before trial, the state moved to compel Lee to submit to a surgical procedure to remove the bullet from his body for forensic testing.¹⁰⁰ The Supreme Court granted certiorari after two rounds of motions and appeals through the state and federal courts attempting to stop the surgery.¹⁰¹

Reconciling *Schmerber* with the res nova issue of surgical intrusion, the Court determined that all non-consensual "surgical intrusions beneath the skin depend[] 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."¹⁰² The Court asserted that *Schmerber* provided the appropriate framework for striking that balance, as it cited to *Schmerber*'s strong emphasis on the physical medical risk to the individual created by the circumstances of a given intrusion.¹⁰³ In short, surgery, given its highly intrusive nature, requires not only a heightened satisfaction of the questions "where" and "by whom," but also a stronger societal interest.

⁹⁷ *Winston v. Lee*, 470 U.S. 753, 755 (1985).

⁹⁸ *Id.* at 756.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 756–58.

¹⁰² *Id.* at 760.

¹⁰³ *Winston*, 470 U.S. 753, 760–61 (1985).

While *Winston* expanded *Schmerber*'s reach to all bodily intrusions, it also dramatically, though perhaps accidentally, altered *Schmerber*'s test for blood draws. In many ways, the extensive split on the issue of whether a blood draw must be assessed in light of the location of seizure and the identity of the seizing official stems from *Winston*. *Schmerber*—with its warning against police blood draws in the station house—appears to set out a clear minimum standard; *Winston* suggests that neither element is necessary so long as medical risk is accounted for by the entity seeking to compel the bodily intrusion and societal interests outweigh that risk. As a consequence, *Winston*'s legacy has been the bifurcation of the lower courts: one group demanding a qualified technician and reasonableness; the other group requiring a qualified technician and a medical environment to overcome per se unreasonableness. This result has not only produced inconsistency between jurisdictions but, perhaps more importantly, a degree of unpredictability in those jurisdictions declining to inquire into both the location and agent of a challenged compelled blood-draw.¹⁰⁴

5. Miscellaneous Decisions

Two other Supreme Court cases following *Schmerber* deserve brief consideration before turning to the state responses to the Court's jurisprudential developments. Both *Welsh v. Wisconsin*¹⁰⁵ and *Skinner v. Railway Labor Executives Ass'n*¹⁰⁶ accept as given *Schmerber*'s permissive acceptance of blood draws and go further to consider the circumstances under which such a seizure is permissible absent a warrant. Though not obviously necessary to a consideration of the post-*Winston* version of *Schmerber*'s test, *Welsh* and *Skinner* mark important developments in the warrant requirement so easily dismissed in the *Schmerber* opinion—again emphasizing the case-by-case approach necessary to evaluating bodily intrusion seizures.

In *Welsh*, police, acting without a warrant, raided the home of Edward Welsh to arrest him on suspicion of driving while intoxicated.¹⁰⁷ After being taken to the station, Welsh refused to submit to any form of BAC testing.¹⁰⁸ The state subsequently attempted to admit Welsh's refusal into evidence, notwithstanding the fact that his presence at that police station had been procured by a warrantless arrest in his home.¹⁰⁹ The *Welsh* Court rejected the state's argument that entry into the home was justified by the exigent circumstance that the alco-

¹⁰⁴ See Jay A. Gitle, *Fourth Amendment—Reasonableness of Surgical Intrusions: Winston v. Lee*, 105 S. Ct. 1611 (1985), 76 J. CRIM. L. & CRIMINOLOGY 972, 981 (1985) (discussing the pitfalls of the "flexibility" added to the *Schmerber* test via *Winston*).

¹⁰⁵ 466 U.S. 740 (1984).

¹⁰⁶ 489 U.S. 602 (1989).

¹⁰⁷ *Welsh*, 446 U.S. at 743.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 746–47.

hol in Welsh's blood was being eliminated with each passing minute.¹¹⁰ In so doing, *Welsh* added two qualifications to *Schmerber*. First, the excuse from getting a warrant to draw blood did not extend so far as to create an exigency justifying an in-home warrantless arrest.¹¹¹ Second, and more importantly, the *Welsh* Court considered the severity of the particular crime charged as another factor in assessing reasonableness¹¹²—adding yet another layer to *Schmerber* analysis.

Five years later, the Supreme Court relaxed its holding in *Welsh*, albeit indirectly, via the decision in *Skinner*. In *Skinner*, the Court considered the constitutionality of several federal regulations requiring railroad employers to conduct BAC and drug tests following accidents.¹¹³ The Court held that suspicionless, warrantless blood testing that otherwise comported with *Schmerber* did not violate the Fourth Amendment because of the “special needs” beyond law enforcement at stake.¹¹⁴ More than just an expansion of “special needs” jurisprudence, *Skinner* reinforced the sense from *Welsh* that the propriety of a blood draw seizure depends both on the circumstances of the seizure and the specific importance of the interest—often in terms of the severity of the crime to be charged—advanced by the blood evidence.

Together, *Welsh* and *Skinner* resolved much of the lingering uncertainty about *when* a compelled blood draw can be carried out, particularly without a warrant. Ultimately though, neither decision, and no decision since, has clarified the requirements of *Schmerber* beyond the limited guidance added by *Winston* in 1985. Courts addressing this issue since that time have been left to struggle with more questions than answers and, ultimately, only two enduring instructions: (1) bodily intrusions must be reasonable under the circumstances of a given case and (2) reasonableness will be assessed in whole or in part based upon the identity of the individual who extracts the bodily evidence and where the extraction occurs.

B. A Sampling of State Responses to the Supreme Court's Permissive Fourth Amendment Rules

The Supreme Court's largely pro-search jurisprudence in the area of compelled blood draws has provoked a wide variety of statutory responses around the country. For the most part, states have opted for a more restrictive approach and have limited the circumstances and conditions of this form of seizure. More specifically, state efforts in response to the *Schmerber* approach to seizures by bodily intrusion have resulted in three major statutory reactions: 1)

¹¹⁰ *Id.* at 753.

¹¹¹ *Id.*

¹¹² *Id.* (placing emphasis on the “gravity of the underlying offense”).

¹¹³ *Skinner*, 489 U.S. at 609.

¹¹⁴ *Id.* at 620, 634.

restrictions on the use of force; 2) limitations on who may conduct a compelled blood draw; and 3) miscellaneous constraints affecting everything from the location of blood draws to the necessity of a warrant. The ultimate consequence of these state regulations has been to greatly limit, if not foreclose, the universe of compelled blood draws in a great many jurisdictions.

1. Restrictions on the Use of Force

Though many states have altered the *Schmerber* test by statute, many more have opted to address the even more fundamental question of whether they want to conduct compelled blood draws at all. Rather than parsing who can draw blood and where it may be drawn, numerous jurisdictions have addressed the blood draw question in terms of use of force, and the response is both varied and striking. Specifically, states have largely responded in one of four ways. First, some states have simply adopted *Schmerber* in total and simply codified the right of the state to use force to conduct a non-consensual blood draw.¹¹⁵ At the other extreme, a number of states have adopted an absolute right to refuse.¹¹⁶ Rather than compel searches, these states frequently criminalize refusal itself and/or permit the introduction of a refusal as evidence. The third statutory response seeks to achieve a middle ground by only permitting compelled draws under particularly severe circumstances. Nevada, for instance, limits compelled draws to cases involving death, serious bodily injury, or a repeat offender.¹¹⁷ Numerous other states have adopted similar measures, though often varying as to the specific circumstances allowing a forcible extraction.¹¹⁸ Finally, a small number of jurisdictions require police to advise a suspect that reasonable force will be used if they refuse to comply but otherwise impose no additional restrictions.¹¹⁹

2. Identity Limitations

Responding to *Schmerber*'s "police officers drawing blood" hypothetical, the second major area of state regulation has addressed who may conduct a compulsory blood draw. Virtually every jurisdiction permitting compelled

¹¹⁵ See, e.g., ALASKA STAT. § 28.35.035 (2010) (permitting non-consensual seizures without added qualification).

¹¹⁶ See, e.g., GA. CODE ANN. § 40-5-67.1 (2010) (barring non-consensual tests); KY. REV. STAT. ANN. § 189A.105 (LexisNexis 2010) (implicitly barring non-consensual draws by codifying a refusal right); MO. REV. STAT. § 577.041 (2010) (same); MONT. CODE ANN. § 61-8-402 (2010) (same); see also N.J. STAT. ANN. § 39:4-50.2 (West 2008) (same).

¹¹⁷ NEV. REV. STAT. § 484C.160 (2010).

¹¹⁸ See FLA. STAT. § 316.1933 (2010) (requiring serious bodily injury or death); MD. CODE ANN., TRANSP. § 16-205.1 (LexisNexis 2010) (same); N.Y. VEH. & TRAF. LAW § 1194 (Consol. 2010) (same); see also HAW. REV. STAT. § 291E-21 (2009) (requiring any physical injury as a result of the charged offense).

¹¹⁹ See, e.g., OHIO REV. CODE ANN. § 4511.191 (LexisNexis 2010).

draws maintains a codified statutory list of who may actually execute such a seizure. The extent of those lists, however, varies widely. Florida, for example, permits blood to be drawn by “a physician, certified paramedic, registered nurse, licensed practical nurse, other personnel authorized by a hospital to draw blood, or duly licensed clinical laboratory director, supervisor, technologist, or technician.”¹²⁰ Most states permitting compelled draws have adopted a list like that used in Florida with small alterations.¹²¹ Maryland has taken a different tack and, instead, merely mandates all blood draws be conducted by a “qualified medical person” rather than providing a list of who qualifies.¹²² Nevada provides the most direct response to *Schmerber* by specifically *excluding* a specific party from drawing blood regardless of qualification—the arresting officer.¹²³ Nevada also takes the unique approach of allowing any person with “special knowledge” falling outside its otherwise exclusive list to qualify as an acceptable seizing individual.¹²⁴ The question of identity addressed in these statutes represents the primary area of post-*Schmerber* regulation designed both to protect citizens’ right to be free from unreasonable seizures and the integrity of DWI evidence.

3. Miscellaneous Protections

Several states have also introduced innovative responses to *Schmerber* in a number of other ways. California only allows certified technicians to conduct compelled blood draws in jails and other police settings.¹²⁵ Kentucky, Arizona, and New York require an arresting officer to secure a warrant or court order before conducting a compelled blood draw.¹²⁶ Nevada specifically prohibits the use of compelled blood draws when the suspect is a hemophiliac or takes anticoagulant medications.¹²⁷ South Dakota gives suspects an absolute right to refuse but only if they properly invoke the statutory provision.¹²⁸

These unusually strong and widely varied statutory responses demonstrate more than the general state of the law on compelled blood draws. They reflect the fine line between social necessity and personal privacy tread by states seeking to discourage DWI offenses and related crimes. Moreover, they suggest

¹²⁰ FLA. STAT. § 316.1933 (2010).

¹²¹ See, e.g., ARIZ. REV. STAT. ANN. § 28-1388 (2010); CAL. VEH. CODE § 23158 (Deering 2009); N.Y. VEH. & TRAF. LAW § 1194 (Consol. 2010) (codifying a similar list but requiring physician supervision).

¹²² MD. CODE ANN., CTS. & JUD. PROC. § 10-304 (LexisNexis 2006).

¹²³ NEV. REV. STAT. § 484C.250 (2010).

¹²⁴ *Id.*

¹²⁵ CAL. VEH. CODE § 23158 (Deering 2009).

¹²⁶ ARIZ. REV. STAT. ANN. § 28-1321 (2010); KY. REV. STAT. ANN. § 189A.105 (LexisNexis 2010); N.Y. VEH. & TRAF. LAW § 1194 (Consol. 2010).

¹²⁷ NEV. REV. STAT. § 484C.160 (2010).

¹²⁸ S.D. CODIFIED LAWS § 32-23-13 (2009).

a certain reservation and wariness to invade the human body notwithstanding the blessing of the *Schmerber* Court. These attempts at local regulation have, in many ways, had an equal if not more formative effect on the Fourth Amendment jurisprudence of blood draws than much of the caselaw in this area.

III. THE DIVERGENT JUDICIAL APPROACHES TO *SCHMERBER* ANALYSIS

The state-driven effort to create additional protections beyond *Schmerber* has ultimately produced a split in Fourth Amendment jurisprudence. Though the statutory requirements discussed supra theoretically only create a statutory remedy, state courts have frequently imported their state's unique approach to compelled blood draws into their *Schmerber* reasonableness analysis. Born also from *Schmerber* Court's troubled reservation of judgment as to draws "administered by police in the privacy of the stationhouse,"¹²⁹ the result has been a bifurcation of states that permit compelled draws into two large categories: 1) states requiring a trained medical technician in a medical environment and 2) states requiring only a trained medical technician. Where a state falls in this split directly controls the policies and procedures used to secure DWI blood samples in a given jurisdiction. Though courts have treated both approaches as equally reasonable interpretations of an ambiguous test, only one understanding of *Schmerber* is correct—the Fourth Amendment test announced in *Schmerber* creates a per se requirement for medical technicians and all other considerations are merely weights on the scale of reasonableness.

A. *The Federal Courts of Appeals and Schmerber*

The federal courts of appeals have had only a handful of occasions to meaningfully address the Supreme Court's approach to compelled blood draws. DWI is primarily and overwhelmingly a state crime, and most federal interaction with *Schmerber* has arisen from either far more serious crimes or congressional statutory mandates. As such, the federal courts have rarely faced the hard *Schmerber* balancing question pitting simple DWI against the right to personal privacy and bodily integrity. Where federal courts have addressed *Schmerber*, their view has been uniformly dismissive. Every single circuit to address this issue has adopted some form of *Briethaupt's* position that blood draws are commonplace and represent a de minimis invasion of personal privacy.¹³⁰ The Eleventh Circuit has held that strip searches involve a greater personal indignity

¹²⁹ *Schmerber*, 384 U.S. at 772.

¹³⁰ See *United States v. Stewart*, 532 F.3d 32, 35 (1st Cir. 2008); *Wilson v. Collins*, 517 F.3d 421, 427 (6th Cir. 2008); *Amerson*, 483 F.3d at 84; *Zimmerman*, 514 F.3d at 855; *United States v. Hook*, 471 F.3d 766, 773 (7th Cir. 2006); *United States v. Kraklio*, 451 F.3d 922, 924 (8th Cir. 2006); *Johnson*, 440 F.3d at 496; *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005); *Boling v. Romer*, 101 F.3d 1336, 1340 (10th Cir. 1996); *United States v. Bullock*, 71 F.3d 171, 176 (5th Cir. 1995); *Jones*, 962 F.2d at 310; *Vega-Barvo*, 729 F.2d at 1347.

and Fourth Amendment concern than blood draws.¹³¹ As it applies to *Schmerber* analysis, the Ninth Circuit, in at least one case, has upheld the admission of blood draw evidence secured by an unqualified individual and has intimated that lack of qualification alone—failing the more relaxed “Single Element” test discussed below—is not enough to create a constitutional violation.¹³² On occasion, a handful of courts have given greater weight to blood draw claims.¹³³ But these decisions represent an exception to the general implicit rule that *Schmerber* all but requires the same “shocks-the-conscience” level of indignity discussed in *Rochin* if a blood draw is to rise to the level of a Fourth Amendment violation. Nonetheless, the small number of federal cases combined with the primary application in the state courts has resulted in the federal courts of appeals wielding little influence in the development of blood draw jurisprudence.

B. The Two Element Approach

A significant number, albeit a minority, of the roughly sixteen states to address *Schmerber*'s analytical framework have opted for something looking like a two-factor per se reasonableness test. Rather than explore the murky waters of “reasonableness,” these states have built their judicial understanding of *Schmerber* from the Supreme Court's instruction that taking blood by way of a physician in a hospital according to accepted medical practices constitutes a reasonable seizure. More precisely, they have taken this instruction along with the Court's concerns regarding police blood draws in the station house to mean that the Fourth Amendment affirmatively requires both a medical technician and a medical environment. All other circumstances, these courts reason, run afoul of *Schmerber*'s constitutional boundary. Ultimately, the “two elements” at issue here represent a Fourth Amendment floor—a draw by a qualified person in an acceptable environment is not a free pass, but failure to meet either of these requirements is an automatic fail.

New Jersey is the leading proponent of the “two element” approach. As early as 1984, the New Jersey Supreme Court in *State v. Dyal* noted in dicta that the Fourth Amendment required compulsory blood draws to be conducted “at a

¹³¹ *Evans v. Stephens*, 407 F.3d 1272, 1297 (11th Cir. 2005).

¹³² *See, e.g., Revelles v. Stout*, 103 F. App'x 622, 626–27 (9th Cir. 2004); *Ove v. Gwinn*, 264 F.3d 817, 824 (9th Cir. 2001) (allegations that technicians were “untrained” or “unqualified” deemed insufficient).

¹³³ *United States v. Askew*, 529 F.3d 1119 (D.C. Cir. 2008) (describing compelled blood draws as a serious intrusion); *Richmond*, 490 F.3d at 1009 (describing the threat posed by non-medical personnel conducting blood draws); *Marshall v. Columbia Lea Reg'l Hosp.*, 474 F.3d 733 (10th Cir. 2007) (affirming civil verdict against police officers for non-consensual blood draw on misdemeanor charge); *Martin v. Red Lion Police Dep't*, 146 Fed. App'x. 558 (3d Cir. 2005) (broadly considering a blood draw under a holistic reasonableness approach); *Nelson v. City of Irvine*, 143 F.3d 1196 (9th Cir. 1998) (same); *Hammer v. Gross*, 932 F.2d 842 (9th Cir. 1991) (discussing the limits of reasonable force).

hospital or other suitable health care facility.”¹³⁴ Ten years later, another New Jersey court, citing *Dyal*, concluded that both the identity of the individual conducting the blood draw and the location of the blood draw represent the necessary inquiries under *Schmerber*.¹³⁵ Though New Jersey’s caselaw reveals occasional variation before the *Dyal* decision issued,¹³⁶ this emphasis on these two key circumstances of the blood draw appears to control in the majority of decisions.¹³⁷

Several other states have followed New Jersey’s lead. In both *State v. Diaz*¹³⁸ and *State v. DeWitt*,¹³⁹ the Idaho courts recently reaffirmed their emphasis on identity and location when they recited facts regarding both elements in affirming the admission of blood draw evidence. In Ohio, a state intermediate court concluded that procedures were medically reasonable notwithstanding the fact that the suspect suffered extensive bruising from an inexperienced blood draw because the draw was performed “by a qualified medical technician in a hospital setting.”¹⁴⁰ In Texas, the *Johnston* case is not the only decision to conclude that location represents a key component of the *Schmerber* calculus. In *Burns v. State*, a Texas court concluded that, notwithstanding the fact that officers used force to restrain the suspect, the blood draw was reasonable because it was conducted “in a medically acceptable manner by a hospital laboratory technician in the hospital.”¹⁴¹

Though only a small number of jurisdictions, these states impose an important Fourth Amendment minimum directly shaping the means and methods of conducting compelled blood draws in their territories. To be assured of admission, blood evidence may not be taken in the jailhouse, booking room, or sally port. Often times, officers will have to choose between going straight to the station or straight to the hospital to preserve rapidly depleting evidence. At the same time, as evidenced by the *Sisler* decision out of Ohio, the use of a solid two element standard can be misconstrued to excuse even flagrant violations where the naked “elements” have been satisfied—even where a more holistic approach would otherwise show the exact same conduct to be medically unac-

¹³⁴ 478 A.2d 390, 395 (N.J. 1984) (citing *Schmerber*, 384 U.S. at 771–72).

¹³⁵ *State v. Warmbrun*, 648 A.2d 1153, 1160 (N.J. Super. Ct. App. Div. 1994).

¹³⁶ See *State v. McMaster*, 288 A.2d 583, 584 (N.J. Super. Ct. App. Div. 1972) (upholding a blood draw by an arguably unqualified individual in a proper environment approximately twelve years before the *Dyal* decision).

¹³⁷ See, e.g., *State v. Ravotto*, 777 A.2d 301 (N.J. 2001); *State v. Woomer*, 483 A.2d 837, 838 (N.J. Super. Ct. App. Div. 1984).

¹³⁸ 160 P.3d 739, 742 (Idaho 2007).

¹³⁹ 184 P.3d 215, 219–20 (Idaho Ct. App. 2008).

¹⁴⁰ *State v. Sisler*, 683 N.E.2d 106, 109 (Ohio Ct. App. 1995).

¹⁴¹ *Burns v. State*, 807 S.W.2d 878, 883 (Tex. App. 1991), *abrogated on other grounds by* *Nguyen v. State*, 292 S.W.3d 671 (Tex. Crim. App. 2009).

ceptable.¹⁴² This inherent flaw calls into question the value of any added protection afforded by imposing a location requirement.

C. *The Single Element Approach*

The majority of states to take on *Schmerber* have read the discussion of hospitals-and-physicians versus station houses-and-officers as a guideline rather than a steadfast rule. These “single element” jurisdictions all share two characteristics in their understanding of the appropriate Fourth Amendment analysis of blood draws. First, all of these courts, though in varying degree, place significant emphasis on who conducts a compelled blood draw. Second, while the identity element can have dispositive effect, most of the “single element” jurisdictions constantly emphasize that they review the totality of the circumstances to assess reasonableness. This take on *Schmerber* usually results in a more permissive view of compelled blood draws but can, on occasion, invalidate unreasonable seizures that would pass muster under the stricter two element regimes.

The single element jurisdictions largely coalesce into two distinct groups: 1) pure totality and 2) identity-emphasizing. The smaller pure totality group of states includes only California and, perhaps, New Mexico.¹⁴³ Under this approach, location is virtually irrelevant and identity, while important, is not always dispositive. Case-in-point, the California Court of Appeals in *People v. Matejlan* held that a compelled blood draw by an individual falling outside of the state list of qualified medical technicians did not violate the Fourth Amendment.¹⁴⁴ The court reached this conclusion notwithstanding an offer of testimony suggesting that blood draws by the individuals with training like that of the technician at issue fell below medically acceptable standards. The *Matejlan* court nonetheless affirmed the draw citing the fact that the record did not demonstrate that the blood draw was unsanitary or that it resulted in unusual pain or indignity.¹⁴⁵ This refusal to find a Fourth Amendment violation on the basis of

¹⁴² *Sisler*, 683 N.E.2d at 109 (simultaneously finding a blood draw medically acceptable under the Fourth Amendment and shocking to the conscience per *Rochin* and the Fourteenth Amendment).

¹⁴³ See *State v. Trujillo*, 510 P.2d 1079, 1083 (N.M. Ct. App. 1973) (use of unlicensed technologist satisfied statute and Fourth Amendment under the circumstances); *State v. Wiberg*, 754 P.2d 529, 531 (N.M. Ct. App. 1988), *overruled on other grounds by* *State v. Santillanes*, 998 P.2d 1203 (N.M. Ct. App. 2000) (use of unlicensed nurse satisfied statute and Fourth Amendment under the circumstances), *as recognized in* *State v. Nez*, No. 26,811, 2009 N.M. App. LEXIS 234, at *3–4 (N.M. Ct. App. Apr. 20, 2009).

¹⁴⁴ 28 Cal. Rptr. 3d 506, 512 (Cal. Ct. App. 2005).

¹⁴⁵ *Id.* at 511 (“Moreover, in light of the expert testimony presented by the city and county, the trial court could conclude that the draws were performed in a manner which did not create undue harm or risk to appellants. Thus the draw did not intrude upon appellants’ Fourth Amendment rights.”).

identity absent more runs consistently through the California caselaw¹⁴⁶ and was perhaps stated best in *People v. Sugarman*: “Those who draw blood need not be doctors, but they may not expose the defendant to an unreasonable risk of infection or pain.”¹⁴⁷ This approach to *Schmerber* appears to treat the discussion of medical standards, identity, and location as dicta useful as little more than abstract guidance.

Identity-emphasizing jurisdictions take a slightly different approach. These courts view the identity of the individual drawing the blood as a necessary aspect of ascertaining whether a compelled draw was conducted under medically acceptable conditions. The reasoning behind this approach is simple. For these courts, the heart of *Schmerber* analysis is assessing the risk of harm posed to the suspect. As one South Dakota court stated the issue, the Fourth Amendment inquiry boils down to determining “the extent to which the procedure may threaten the safety or health of the individual” and little more.¹⁴⁸ Although allowing an unqualified individual to conduct a blood draw presents obvious risks (and limited utility), the risk of a qualified individual conducting a blood draw in a non-medical environment is less obvious.¹⁴⁹ In other words, a judicial inquiry into the *risk* of specific pain and indignity posed by the performance of a blood draw by a non-medically qualified individual presents a sufficiently obvious problem to permit a *per se* rule. As such, though these jurisdictions devote a great deal of effort to assessing the totality of the circumstances in each given case, they also emphasize that the identity of the individual performing the actual mechanical task of extracting the blood serves as a foundational question and frequent first step in *Schmerber* analysis.

D. *Choosing the Best Interpretation of Schmerber*

Given these varying approaches to *Schmerber*, which approach is best? The Supreme Court has yet to intervene and resolve this simmering dispute between the various inconsistent state court positions. That silence, though, in-

¹⁴⁶ See *People v. Esayian*, 5 Cal. Rptr. 3d 542, 550 (Cal. Ct. App. 2003); *People v. McHugh*, 14 Cal. Rptr. 3d 142, 149–50 (Cal. Ct. App. 2004) (use of unlicensed phlebotomist deemed reasonable); *but see* *Ross v. Dep’t of Motor Vehicles*, 268 Cal. Rptr. 102, 104 (Cal. Ct. App. 1990) (suspects are “entitled to assurances” that the individual conducting the blood draw is “a person qualified by statute to draw blood in a proper manner”); *People v. Kraft*, 84 Cal. Rptr. 280, 284–85 (Cal. Ct. App. 1970) (extreme use of force to secure sample sufficient to render seizure less than medically acceptable).

¹⁴⁷ *People v. Sugarman*, 116 Cal. Rptr. 2d 689, 693 (Cal. Ct. App. 2002).

¹⁴⁸ *State v. Sickler*, 488 N.W.2d 70, 73 (S.D. 1992); *see also* *State v. Lanier*, 452 N.W.2d 144, 146 (S.D. 1990) (“We interpret *Schmerber* and its progeny to hold that blood tests are not required to take place in a hospital but rather under conditions which provide a medically approved manner for the specific purpose of drawing blood.”).

¹⁴⁹ See generally *State v. Cardona*, 2008 Del. Super. LEXIS 414, at *32–34 (Del. Super. Ct. Dec. 3, 2008) (expressly rejecting the argument that a medical environment necessarily presents the same inherent risk of unnecessary pain or indignity as the use of an unqualified technician).

forms which option represents the best approach to applying the Fourth Amendment context. *Schmerber* should be interpreted as requiring a holistic analysis of the reasonableness of a given blood draw with near, but not absolute, invalidation applied whenever a seizure is conducted by an unqualified individual. This approach represents the least-restrictive commonly held standard, and it strikes the proper balance between the successful procurement of necessary evidence and the need to preserve privacy and personal dignity.

The logical problems with the strict two-element approach are apparent. A Wisconsin court explained the decision to largely ignore location thusly: “Although *Schmerber* urged caution, it did not categorically reject the possibility that a blood draw could take place in a non-medical setting.”¹⁵⁰ Not only did the Supreme Court decline to create a categorical bar, such a bar simply would not make sense. As the same Wisconsin court went on to note, the assumption that conducting blood draws in a jailhouse facility automatically creates a greater risk of injury or infection lacks factual support.¹⁵¹ Obviously, a particularly dangerous non-medical environment might suffice to create a Fourth Amendment violation. In reality, though, the station house environment could conceivably be *safer* than a medical environment. After all, jails are better equipped to require unruly, intoxicated individuals to do things they simply do not want to do. Whereas a typical emergency room is heavy laden with hazards, the austerity of a properly selected holding environment eliminates a certain risk. Accordingly, the emphasis placed on environment by states like New Jersey and Idaho looks more like blind adherence to a misread Supreme Court opinion rather than reasoned imposition of Fourth Amendment safeguards.

At the same time, California’s completely open-ended approach and willingness to tolerate blood draws by entirely unqualified individuals appears to overreach the bounds of *Schmerber*. The California cases universally miss a key aspect of *Schmerber*. The *Schmerber* Court was focused on the *risk* of harm—not only the realization of that risk.¹⁵² In each of the California cases tolerating unqualified agents, except for the *Sugarman* decision, the courts have consistently cited the lack of realized serious harm as a justification for approving the seizure.¹⁵³ This sort of *ex post facto* analysis is inevitable if identity is not afforded proper weight, and it runs afoul of *Schmerber*.

Ultimately, the identity-heavy approach used by the other single element jurisdictions best conforms to *Schmerber*’s somewhat amorphous standards. Though these courts need not impose a *per se* invalidation based on identity, their inclination to do so has worked to keep the issue of risk out in front.

¹⁵⁰ State v. Daggett, 640 N.W.2d 546, 550 (Wis. Ct. App. 2001).

¹⁵¹ See *id.* at 550–51.

¹⁵² *Schmerber*, 384 U.S. at 772 (warning against seizures that “invite an unjustified element of personal risk of infection and pain”).

¹⁵³ See *People v. Mateljan*, 28 Cal. Rptr. 3d 506, 511 (Cal. Ct. App. 2005); *People v. Esayian*, 5 Cal. Rptr. 3d 542, 550 (Cal. Ct. App. 2004); *People v. McHugh*, 14 Cal. Rptr. 3d 142, 149–50 (Cal. Ct. App. 2003).

At the same time, their refusal to blindly adhere to a two-factor test has helped avoid situations like that in *State v. Ravotto*, in which lower courts looked past egregious government conduct because it occurred at the hands of a physician in a medical environment.¹⁵⁴ Under such a system, lower courts are encouraged to ignore even glaring unreasonableness to focus exclusively on two discrete inquiries and, in the case of *Ravotto*, only the state Supreme Court was able to get past this mechanical approach to reach the readily apparent, commonsense result.¹⁵⁵ Though the question of what municipalities *should* do as a matter of policy may demand a higher standard, this identity-heavy, totality review best conforms to the *minimum* constitutional requirements set out by the Supreme Court nearly half a century ago.

IV. POLICY CONCERNS GUIDING THE CONSTRUCTION OF A *SCHMERBER* COMPLIANT BLOOD DRAW PROGRAM

The suggestion that an identity-heavy, totality approach is the best reading of *Schmerber* does not mean that it necessarily represents a good target for the purpose of policy-setting. As demonstrated in the *Johnston* case, conducting compelled blood draws outside a medical setting or with minimally qualified individuals carries with it certain risks left uncontained by meeting the minimum constitutional standards. Though the list of potential consequences is limitless, the caselaw and statutory guidance discussed above evinces three primary concerns: 1) the procurement of usable evidence; 2) the avoidance of constitutional invalidation; and 3) the risk of unique tort harms. These three issues and a smattering of smaller matters inform, although inconsistently and incompletely, the full array of statutory rules and state judicial decisions.

A. *The Evidentiary Concern*

The first and most significant policy concern underpinning compulsory blood draw guidelines has nothing to do with liability. Instead, the first priority must be the acquisition of reliable, admissible evidence in determining when, where, and how to draw blood. More precisely, the purpose of a compelled blood draw is to get an accurate BAC reading. Setting aside the question of judicial suppression, the initial and overriding goal of any compelled blood draw program should be to secure the best blood sample possible in order to most effectively assess a suspect's offense conduct. The numerous state regulations discussed *supra* generally support this policy goal in varying degrees. For instance, the identity requirement itself not only lends expertise to the procedure

¹⁵⁴ *State v. Ravotto*, 777 A.2d 301 (N.J. 2001) (reversing *State v. Ravotto*, 755 A.2d 602 (N.J. Super. Ct. App. Div. 2000)).

¹⁵⁵ *Id.*

but often interjects a third party not involved in the arrest—thus better insulating the resulting evidence from charges of fabrication.¹⁵⁶

Moreover, the presentation of BAC evidence derived from a sample often taken more than an hour after driving presents basic jury acceptance issues.¹⁵⁷ As one commentator has noted, “there remains the nagging feeling that the removal of blood from within the body of the accused by means of force in [a] . . . routine drunk driving case shocks the conscience, as in *Rochin*.”¹⁵⁸ Though that view has not been born out across the board, it remains an ever-present concern in structuring blood draw programs. The decision in some jurisdictions to conduct compelled draws in a medical setting with individuals easily identified as medical personnel appears likely to further enhance the value of BAC evidence by reducing it to a purely scientific inquiry divorced from the emotion of the arrest and booking process. In short, the goal of conducting a forced blood draw is to produce evidence that is not only admissible but that will effectively persuade a jury. By imposing added protections, a jurisdiction can advance that end and, thereby, better serve the social concerns justifying this invasion of bodily integrity in the first place.

B. *Avoiding Constitutional Invalidity*

Assuming the BAC evidence gathered by force is persuasive to a jury, the next concern is persuading the courts to admit it as a matter of constitutional law. Though constitutional or statutory liability may pose a small concern, the overwhelming majority of state cases already surveyed do not concern either statutory or 42 U.S.C. § 1983 actions. Instead, *Schmerber* is a case designed to guide lower courts in making suppression decisions. Read in this way, *Schmerber* provides the clearest and best endorsement for adopting elevated compelled blood draw standards. The *Schmerber* Court provided two factual scenarios: 1) a doctor in a medical facility, and 2) a police officer in the station house.¹⁵⁹ The Court enthusiastically endorsed the former with almost dismissive ease and assertions that blood draws represent a de minimis concern.¹⁶⁰ That tone changed rather starkly when the Court turned to the “officer at the stationhouse” hypothetical. Though the Court did not expressly address it, the tone of *Schmerber*

¹⁵⁶ This benefit is particularly apparent in the case of the Nevada statute. Under Nevada Revised Statute § 484C.250, an arresting officer may not conduct the blood draw. This forced interjection of a third party provides the state with a potential testifying witness who was not involved in the arrest process in every case.

¹⁵⁷ For a discussion of the complexities and variables frequently presented to juries considering DWI charges based on BAC calculations, see J. Nicholas Bostic, *Alcohol-Related Offenses: Retrograde Extrapolation After Wager*, MICH. B.J., Jun. 2000, available at <http://www.michbar.org/journal/article.cfm?articleID=83&volumeID=8>.

¹⁵⁸ Beauchamp, *supra* note 76, at 1135.

¹⁵⁹ *Schmerber*, 384 U.S. at 771–72.

¹⁶⁰ *Id.*

made apparent that such a scenario would have been virtually guaranteed to be invalidated.¹⁶¹ As the previous section makes clear, numerous courts have spent the last four decades charting a middle ground between these two scenarios.¹⁶² As some, like California, creep ever closer to the lower boundary, however, they risk the validity of the most valuable and necessary piece of evidence underlying their ability to secure DWI convictions for the benefit of the public.¹⁶³

C. *The Egg-Shell Plaintiff and Johnston's Warning*

The *Johnston* case that began this inquiry also provides insight into a policy concern governing the mechanical implementation of a blood draw program in light of constitutional boundaries. Much of the decision to invalidate the blood draw in *Johnston* turned on the failure of the officers conducting the draw to solicit a *medical history* from the suspect before conducting the *medical procedure* of extracting blood.¹⁶⁴ What sorts of risks perpetuated by the simple failure to take a medical history may have caused the court's concern? The answer again lies in the Nevada statute governing compelled blood draws. Nevada expressly forbids the use of compelled blood draw in cases involving hemophiliacs or individuals taking anti-coagulant medications.¹⁶⁵ Unfortunately, thus far, only this single statute has recognized the *Johnston* problem: any given suspect subjected to a compelled blood draw could be the egg-shell plaintiff severely harmed by an otherwise safe procedure.

In formulating policy, policy-makers must consider the likelihood that requiring lesser qualifications might result in a missed warning sign or, more likely, a complete failure to look for warning signs in the first place. Similarly, conducting draws in the station house tends to obscure the fact that a blood draw, however simple, is a medical procedure requiring extreme care and attention to detail. The enormous and easily avoidable liability exposure created by, as in *Johnston*, having an otherwise properly trained officer conduct a blood draw and consequently forget something as small as asking a few simple questions to identify particularly vulnerable individuals militates in favor of a more structured methodology removed from the process, location, and emotion of booking suspects.

¹⁶¹ *Id.*

¹⁶² *See supra* Part II.B and Part III.

¹⁶³ *See, e.g.,* Jeffrey N. Wilins, *Do I Really Have a Choice? Compulsory Blood Tests on Drunk Drivers and the Fourth Amendment*, 25 W. ST. U.L. REV. 43 (1997) (discussing, for example, California's move towards compelled blood tests where a suspect would submit to another test as an example of the increasingly questionable use of forcibly obtained blood draws).

¹⁶⁴ *State v. Johnston*, 305 S.W.3d 746, 759–61 (Tex. App. 2009).

¹⁶⁵ NEV. REV. STAT. § 484C.160 (2010).

D. *Other Risks Informing Blood Draw Planning*

Numerous other risks inform the policy choices driving the precise mechanics of compelled blood draws around the country. For example, the different approaches to conducting compelled blood draws carry with them differing degrees of risk for the officers and other participants involved. Policy-makers must determine whether the threat to non-law enforcement participants and bystanders in a hospital environment outweighs the risk posed to multi-tasking officers attempting to maintain order while conducting a “medically acceptable” blood draw in the environs of a station house. In another example, as public fervor for DWI prosecutions waxes and wanes, policy-makers must consider the public perception of excess and punitive intent in the act of forcibly restraining an intoxicated individual and extracting blood. In the heat of conducting an arrest and investigation, the force used—however necessary—could easily be perceived as vindictive and undermine police efficacy on a broader scale in the community.

As always, no single policy appears likely to address all of these concerns. In fact, a policy-maker likely should not spend a particularly significant amount of time on some them. Nonetheless, a policy-maker must consider the disparity between the courtroom where suppression is considered and the police cruisers, station houses, and emergency rooms where the mechanics of these programs are implemented. While litigation reduces the *Schmerber* question to an isolated, fact-intensive inquiry, the process of securing BAC measurements from unwilling suspects occurs in high volume and requires fluid consistency to remain effective. As such, each of these potential issues stemming from the way in which compelled blood draws are conducted demonstrates the need to look past the constitutional floor set by *Schmerber* and even the heightened statutory protections mandated by certain states to achieve the most balanced, effective seizure policy possible.

V. THE BETTER BLOOD DRAW: A POLICY PROPOSAL FOR BALANCING LAW ENFORCEMENT AND FOURTH AMENDMENT NEEDS

Commentators have long suggested alternatives that would completely supplant the compelled blood draw.¹⁶⁶ The statutes and caselaw from every court surveyed reveal that states are simply unwilling to adopt these alternatives as wholesale replacements for their *Schmerber*-driven programs. Left only with the compelled blood draw, then, an ounce of prevention, as the saying goes, is worth a pound of cure. Most of the existing statutory schemes ignore this sage advice in a variety of ways. New Jersey and the other two-element states putatively seek to prevent constitutional violations, but do so in a way that can blind

¹⁶⁶ See Beauchamp, *supra* note 76, at 1136–40; Wilins, *supra* note 163, at 61–62.

them to common-sense violations.¹⁶⁷ California's open-ended approach utterly abandons prevention in favor of flexibility and strips away all predictability.¹⁶⁸ Finally, most of the one-element states simply stop short of fully addressing the Fourth Amendment concerns at stake. Ultimately, the model blood draw process derives largely from the Nevada standards. Adjusted to better address the question of location, Nevada's heavy emphasis on the ends of *Schmerber* makes it the ideal springboard for crafting a policy that properly balances social necessity, Fourth Amendment rights, and the variety of policy concerns previously discussed. Building off of the Nevada standard, an ideal policy must address and accommodate three issues: 1) the question of identity; 2) the question of location; 3) the need to easily dispose of frivolous litigation.

First, the question of identity must be given greater priority. Unlike most current regimes, policy-makers must begin to take identity seriously rather than merely dismissing it, like so many reviewing state courts and state legislatures. The wide-open, permissive nature of many of the existing schemes should be abandoned in favor of a concrete, list-based standard of medical professionals easily identified by officer and suspect alike. Statutes like the one employed in Arizona that refuse to make identity an evidentiary foundation pay lip-service to *Schmerber* at their own peril.¹⁶⁹ The quality of BAC evidence depends upon how it was procured, and the question of who drew tested blood will continue to sit at the heart of that inquiry. Additionally, as required in Nevada, arresting officers should be prohibited from conducting blood draws on their own suspects regardless of their qualification. Further still, uniformed police officers in general should not be permitted to conduct the draws. Such a policy would eliminate the appearance of collusion and bullying apparent in cases like *Johnston*.¹⁷⁰ Such a rule does not mean the person conducting the blood draw may not be an employee of the police department. Instead, the individual tasked with extracting blood from unwilling DWI suspects should be someone not otherwise or typically involved in the process of conducting arrests, and, preferably, someone serving the police in a medical capacity. By relying on jailhouse nurses rather than uniformed officers, policy-makers can

¹⁶⁷ See *State v. Ravotto*, 755 A.2d 602 (N.J. Super. Ct. App. Div. 2000) (holding that non-consensual blood draw of suspect exhibiting a hysterical response to needles and offering to take other tests did not violate the Fourth Amendment because the blood draw occurred in a hospital setting and was conducted by a medical technician), *rev'd*, 777 A.2d 301 (N.J. 2001).

¹⁶⁸ As an example, California is the only state to repeatedly litigate the boundaries of medical qualification. See *People v. Mateljan*, 28 Cal. Rptr. 3d 506, 511 (Cal. Ct. App. 2005); *People v. Esayian*, 5 Cal. Rptr. 3d 542, 550 (Cal. Ct. App. 2004); *People v. McHugh*, 14 Cal. Rptr. 3d 142, 149–50 (Cal. Ct. App. 2003); *People v. Ford*, 5 Cal. Rptr. 2d 189, 190–92 (Cal. Ct. App. 1992).

¹⁶⁹ ARIZ. REV. STAT. ANN. § 28-1388 (2010).

¹⁷⁰ See *State v. Johnston*, 305 S.W.3d 746, 759–61 (Tex. App. 2009) (taking a skeptical view of forcible extraction by two officers notwithstanding their training because of the decidedly non-medical circumstance of submitting to a blood draw by two police officers in a station house without a medical technician present).

help defuse an otherwise volatile situation, protect officer safety, encourage cooperation, and produce evidence that will appear less unsavory.

Second, blood draws should be conducted in designated medical locations. Such a requirement does not mean blood draws can only be conducted in hospitals. On the contrary, hospitals do not appear to present a better environment than station houses for this sort of police activity. Taking drunken, resistant suspects to busy, hazard strewn hospitals appears to create unnecessary risks while adding little to Fourth Amendment protections. At the same time, the austere environs of a police station sally port or holding cell unnecessarily add to the “personal indignity” underpinning so much of the Supreme Court’s bodily intrusion jurisprudence. Police stations desiring to conduct in-house draws should designate and prepare sterile medical spaces, or use existing space of this sort to seize blood evidence. Such an approach will reduce the risks inherent to traveling to emergency rooms and exposing hospital employees and patients to intoxicated suspects. More importantly, though, the use of a designated medical space will help control the use of force and other surrounding circumstances that so often invalidate blood seizures by simply reminding officers and technicians that they are participating in a medical procedure.

Third, as is increasingly true in all use of force cases, police should videotape the process of conducting a compelled blood draw, regardless of the identity of the party conducting the draw, where it is conducted, or how much or how little the non-consenting suspect resists. The use of videotaping has fundamentally changed the way courts address a wide-range of constitutional claims—largely to the benefit of the police in the form of earlier dismissals and grants of summary judgment.¹⁷¹ Such a videotaping procedure would inoculate police against liability and aid in the process of making Fourth Amendment determinations. Additionally, displays of intoxication in resisting the blood draw could themselves be evidence while softening the suggestion of brutality that often attends the idea of a compelled draw. Ultimately, this minor step would give greater and more accurate weight to the totality of circumstances so often touted in the various state court decisions.

This three-part solution represents a compromise between a wide range of competing demands, and it carries its own drawbacks. Admittedly, it asks policy-makers to proactively contain risks by affording DWI suspects protections beyond the minimums mandated by either the Constitution or most state legislatures. Such a stance is clearly susceptible to “soft on crime” political

¹⁷¹ See generally John J. Gibbons and Nicholas de B. Katzenbach, *Prison Reform: Commission on Safety and Abuse in America's Prisons: Confronting Confinement*, 22 J.L. & POL. 385, 434 (2006) (discussing the role of videotaping as a protective measure in prisons); Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras as Tools of Justice*, 23 J. MARSHALL J. COMPUTER & INFO. L. 771 (2005) (surveying the rise of police use of video cameras to document confessions); Leah Walker, Comment, *Will Video Kill the Trial Courts' Star?: How "Hot" Records Will Change the Appellate Process*, 19 ALB. L.J. SCI. & TECH. 449 (2009) (describing the effect of the Supreme Court's acceptance of appellate review of videotape evidence in *Scott v. Harris*, 550 U.S. 372 (2007), will effect future litigation).

attacks. Additionally, it asks policy-makers to stretch already limited resources to pay for more qualified phlebotomists, specially designated space, and essentially prophylactic video equipment. This sort of “unnecessary” spending, or at least not judicially-mandated spending, could expose policy-makers to additional criticism in this era of severe budget shortfalls and looming municipal bankruptcies. Most importantly, all of these suggestions would require policy-makers to act upon a problem that may not otherwise be apparent until failure to meet Fourth Amendment standards either allows a particularly notorious guilty individual to walk free or results in enormous civil liability.

Still, these three simple suggestions represent the best way to ameliorate the need for efficient, cost-effective procedures with the policy concerns set out in Part IV. The goal of compelled blood draws is to secure evidence of intoxication to protect the public at large from drivers who operate their vehicle under the influence of alcohol. A policy that afford as-yet innocent suspects the respect of a well-qualified, detached technician in a medical environment will produce concrete, conclusive evidence of intoxication devoid of the distasteful appearance of forcibly taking a human being’s bodily fluids. In those rare cases in which these protections are not enough, the use of video evidence will help courts correctly ascertain what happened, why it happened, and whether it comported with the Fourth Amendment—thus furthering the paramount goal of procuring good, reliable, constitutional evidence.

VI. CONCLUSION

Faced with a police officer conducting compelled blood draws in the back of his cruiser, an Arizona trial judge opined, “[r]omantic though it may sound, phlebotomy in the back seat by the dashboard lights is, in this humble trial judge’s opinion, unconstitutional.”¹⁷² It is only a small and constitutionally insignificant leap from the backseat of the cruiser in that case to the station house in *Johnston*. Yet courts around the country continually disagree on the latter while virtually all would take issue with former. The usually warrantless, non-consenting invasion of the human body by force for the purpose of extracting evidence of criminal activity represents a severe affront to human dignity and bodily integrity. Though necessitated by the extreme social danger posed by incidents of DWI, courts applying *Schmerber* nearly a half-century after its decision should continually remember the significance of the seizure they are asked to approve. Viewed from that perspective, the state responses to *Schmerber* largely underestimate the severity of the task at hand. By demanding just a bit more, these same courts can preserve or even improve the efficacy of BAC evidence derived from compelled draws, while preserving the all-important right to security in one’s person enshrined as the first and most important right protected by the Fourth Amendment.

¹⁷² A.J. Flick, *Judge: Troopers’ DUI Blood Tests Unconstitutional*, TUCSON CITIZEN (Aug. 30, 2008), <http://www.tucsoncitizen.com/daily/local/95312.php>.