

THE CONSTITUTIONALITY OF GOVERNMENT-IMPOSED BODILY INTRUSIONS

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Throughout its history, this country has recognized the common law right against bodily intrusions. It is considered among the most cherished of rights. It seems beyond debate that a parallel right against government-imposed bodily intrusions should receive robust constitutional protection. Yet the Supreme Court's treatment of the right against government-imposed bodily intrusions is muddled and lacks an overarching theory. Far from recognizing the right as fundamental, the Court has effectively demoted the right from its deserved status through two major analytical missteps. First, the Court has created arbitrary doctrinal barriers between different manifestations of the same right rather than consistently treating it as a unitary, fundamental substantive due process right. Second, it has given *insufficient weight to the nonphysical*, or "psychological" harms of forced bodily intrusions, and has deferred excessively to the government's justifications for intruding. This Article is the first to conduct a comprehensive analysis of the scattered Supreme Court precedents on government-compelled bodily intrusions. In place of the ad hoc balancing tests the Court has tended to employ, this Article proposes a unified framework for assessing government-compelled bodily intrusions that recognizes substantive due process as the matrix for the right and that takes meaningful account of the psychological harms that accompany forced physical intrusions and the importance of considering less intrusive alternatives. This Article then applies the framework to a case currently before the Supreme Court involving *forced blood drawing* and to state pre-abortion ultrasound mandates, the subject of a developing circuit split. The proposed framework finally places the right

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against government-imposed bodily intrusions on its proper constitutional footing.

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I. INTRODUCTION

The common law right not to have our bodies touched or invaded without our consent is so well established that most of us take its existence for granted. The Supreme Court has described it as the most “sacred” of rights.¹ Given the heft of the common law right, it is perhaps surprising that the constitutional right against government-imposed bodily intrusions is much more tenuous. Why should the right be any less sacred when the state seeks to violate it? Of course, the government possesses police power that private parties do not, and it has many reasons to want to use that power to invade our bodies. It wants to know if crimes have been committed. It wants to safeguard the public health. It wants to protect individuals from harming themselves or others. It wants to keep order. These are important purposes, yet—in a nation that prizes liberty as an unalienable right—surely there are limits to what the government can do to our bodies to serve its own ends.

The Supreme Court has indeed interpreted the Constitution to provide protection against certain bodily intrusions by the state. But its commitment to this right is murky and equivocal.² The difficulties begin with the Court’s tendency to place bodily intrusions into compartments that focus too narrowly on the type of intrusion involved³ or the government’s reasons for intruding.⁴ The Court has not fully appreciated that corporal punishment, compelled administration of antipsychotic medication, forced blood drawing, and body-cavity searches all involve the same violation: the state using its power to commit an invasion of a person’s body that under the common law would clearly be a tort.⁵ While it makes good sense to focus on similar types of intrusions as part of the analysis, the Court’s untidy approach would benefit from recognizing the common starting point, or matrix, shared by all violations of this right.

In earlier case law, the Court generally adhered to substantive due process as the constitutional source of protection for the right against government-imposed bodily intrusions.⁶ Even in those cases, however,

1. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (“No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”); *see also* *Schmerber v. California*, 384 U.S. 757, 772 (1966) (“The integrity of an individual’s person is a cherished value of our society.”).

2. *See* Seth F. Kreimer, *Rejecting “Uncontrolled Authority Over the Body”: The Decencies of Civilized Conduct, the Past and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 423, 423 (2007) (describing how constitutional protection of the body against the state “has been woven under several doctrinal rubrics” and lacks “a canonical theory”).

3. *See, e.g.*, *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990) (discussing “constitutionally protected liberty interest in refusing unwanted medical treatment”); *Washington v. Glucksberg*, 521 U.S. 702, 723 (1997); *cf.* *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 388 n.3 (2009) (Thomas, J., dissenting) (defining “bodily intrusion” as “a physical intrusion, penetrating beneath the skin” (citation and internal quotation marks omitted)).

4. *See infra* Part IV.A (critiquing the Court’s compartmentalized Fourth Amendment treatment of bodily searches).

5. *See Botsford*, 141 U.S. at 252; *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914); RESTATEMENT (SECOND) OF TORTS §§ 13, 16, 18, 19 (1965).

6. *See infra* Part II.B.1; II.B.3; text accompanying note 229.

the Court often failed to acknowledge the fundamental nature of the right. The Court employed a simple balancing test that weighed the individual's interests against the government's. Under this calculus, the individual often lost.⁷ The Court still has not clearly established strict scrutiny as the presumptive standard that applies to this time-honored right. More recently, the Court has also imposed an artificial doctrinal barrier between bodily intrusions based on whether they are deemed to constitute a search. Thus, the Court has analyzed bodily intrusions performed for purposes of a government search exclusively under the Fourth Amendment.⁸ The Court's Fourth Amendment balancing test is likewise a bare-bones framework that in most cases provides minimal protection.⁹

When the Court has employed rudimentary balancing tests in place of strict scrutiny, its analysis has suffered from two major infirmities. First, although it purports to assess the intrusiveness of the government's conduct, the Court often has not taken seriously the nonphysical, or what I will refer to as "psychological," harms that flow from state-imposed bodily intrusions. These psychological harms encompass assaults on person's mental well-being, including his or her dignity, autonomy, and sense of safety and security. The Court has sometimes paid lip service to the intrusiveness of, for example, a pre-trial detainee having to expose his body cavities to correctional officials in front of other inmates.¹⁰ But even when it has acknowledged serious psychological invasions, the Court has not commensurately intensified its scrutiny of the state's conduct, and has often upheld the intrusions.¹¹ It is hard to imagine that the Court would treat substantial physical invasions with the same disregard.¹²

Failure to appreciate the true invasiveness of many bodily intrusions has made the Court exceedingly deferential to state authority and "professional judgment" in deciding when intrusions are necessary.¹³ Most significantly, the Court has generally refused to consider whether less restrictive alternatives could reasonably accomplish the state's purpose.¹⁴ But when the government sees itself as acting in the interests of protecting public health and safety, maintaining order, or enforcing the laws, it has little incentive to consider less intrusive options. It is the Court's job to protect individual bodily privacy from overzealous governmental tendencies.

There is plentiful scholarship that touches on certain aspects of this issue. Some scholars have written broadly about the right against inva-

7. See *infra* text accompanying notes 78-79.

8. See *infra* text accompanying notes 65-67.

9. See *infra* Part II.B.2.

10. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 558 (1979).

11. See *infra* Parts III.B.4-III.B.5.

12. See, e.g., *Winston v. Lee*, 470 U.S. 753 (1985) (holding compelled surgery to remove bullet unconstitutional); *Rochin v. California*, 342 U.S. 165 (1952) (holding forced stomach-pumping unconstitutional).

13. See, e.g., *infra* Parts III.B.4.a-III.C.2.

14. See *infra* text accompanying notes 299, 318-20, 486.

sions of privacy, without focusing specifically or exclusively on the body.¹⁵ Some scholars have addressed the right to bodily integrity,¹⁶ but this right encompasses not just the right to repel bodily intrusions but also the right to affirmative decision making about one's body, such as the right to use contraception,¹⁷ to choose a sexual partner of either sex,¹⁸ or to seek a certain course of medical treatment.¹⁹ Still other scholars have examined particular kinds of bodily intrusions, such as the right against forced mental health treatment²⁰ or cesarean sections.²¹

It is important to examine bodily intrusions as a distinct category of the right to bodily integrity. The right against compelled bodily intrusions is important to us not simply because such intrusions can sometimes be painful or can risk or cause physical harm; the idea of unwanted physical touch is repellant to us.²² Moreover, bodily intrusions are not necessarily physical, since our bodies can be violated even without touch.²³ Bodily intrusions are different than confinement. While confinement of course affects bodily freedom, it is not a direct assault on the sanctity of the body itself. A person can be confined yet retain a measure of privacy if the body itself is undisturbed. Even as technology threatens our privacy in ever new and alarming ways, at a primitive level, the inviolability of the human body is the most important aspect of privacy.²⁴ The body is where a person's life is centered at any one moment. The body marks the final boundary that no person has the privilege to cross uninvited. The Supreme Court's various bodily intrusion cases are united by this common individual interest in protecting the body from forcible outside encroachment.

This Article breaks new ground in undertaking a comprehensive analysis of Supreme Court case law addressing government-imposed bodily intrusions of all kinds, analyzing the relationship between Fourth Amendment and substantive due process protections in this context, critiquing the Court's severance of that relationship, and proposing a unified constitutional theory for the right against bodily intrusions.

15. See, e.g., Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 266 (1977); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006); Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890).

16. See, e.g., Gowri Ramachandran, *Against the Right to Bodily Integrity: Of Cyborgs and Human Rights*, 87 DENVER U.L. REV. 1, 17–20 (2009); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U.L. REV. 359 (2000).

17. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

18. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

19. See B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 TEX. L. REV. 277 (2007).

20. See, e.g., Bruce J. Winick, *New Directions in the Right to Refuse Mental Health Treatment: The Implications of Riggins v. Nevada*, 2 WM. & MARY BILL RTS. J. 205 (1993).

21. See, e.g., Daniel R. Levy, *The Maternal-Fetal Conflict: The Right of a Woman to Refuse a Cesarean Section Versus the State's Interest in Saving the Life of the Fetus*, 108 W. VA. L. REV. 97 (2005).

22. This is clearly reflected in the tort concept of battery, which encompasses offensive but non-harmful bodily contact. RESTATEMENT (SECOND) OF TORTS § 16(1).

23. See *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 252 (1891) (“The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow.”).

24. Gerety, *supra* note 15, at 266 (“Any plausible definition of privacy . . . must take the body as its first and most basic reference for control over personal identity.”).

Part II of this Article begins with an overview of the common law roots and constitutional sources of protection for the right against government-imposed bodily intrusions. Part III comprehensively examines the Supreme Court's treatment of such intrusions. Part IV reexamines the right against bodily intrusions in light of the case law and proposes a unified framework for assessing alleged violations that recognizes substantive due process as the source of the right and the appropriate starting point for analysis. Part IV concludes by discussing recent and ongoing litigation in the Supreme Court and in the lower federal courts, respectively, over two kinds of bodily intrusions—forced blood draws and pre-abortion ultrasound mandates—and considers how these intrusions might fare under the proposed framework.

II. CONSTITUTIONAL BASES FOR THE RIGHT AGAINST GOVERNMENT-COMPELLED BODILY INTRUSIONS

A. *Roots of the Constitutional Right Against Bodily Intrusions*

The common law of the United States has always recognized a right to bodily integrity that protects individuals from unwanted physical intrusions by private parties.²⁵ This right is reflected in the torts of battery and trespass.²⁶ At common law, if a person merely touched another without consent and without legal justification, he committed a battery.²⁷ The doctrine of informed consent in medicine arose out of the principle that “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.”²⁸ In 1891, in *Union Pacific Railway Co. v. Botsford*, the Supreme Court addressed a woman's tort claim for injuries she incurred while in a sleeping berth on a Union Pacific Railway train.²⁹ The Supreme Court ruled that a federal court could not issue an order compelling the woman to undergo a surgical examination, pursuant to the defendant's request, to determine the extent of her injuries.³⁰ The Court declared, “No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”³¹

25. Warren & Brandeis, *supra* note 15, at 193 (“That the individual shall have full protection in person and in property is a principle as old as the common law . . .”).

26. See *Mills v. Rogers*, 457 U.S. 291, 294 n.4 (1982) (tracing common law right to refuse medical treatment to torts of trespass and battery, “which were applied to unauthorized touchings by a physician”).

27. *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 269 (1990) (citing W. KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS § 9, pp. 39–42 (5th ed. 1984)); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973).

28. *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) (noting, for this reason, that “a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages”).

29. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891).

30. *Id.* at 251.

31. *Id.*

The Court in *Botsford* described the right against bodily intrusions in expansive terms. It emphasized the indignity and invasiveness of bodily intrusions regardless of whether they inflict pain or impose medical risk, or even whether the body is physically touched by a third party. The Court stated, “The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow.”³² The Court observed that at common law the right to be free from physical interference was “a right of complete immunity.”³³ Even items like jewelry or watches could not be removed “under distress” from a person’s body in order to satisfy a debt, rent obligation, or attachment.³⁴ The Court noted that common law contexts permitting certain physical intrusions emanated from “ruder ages” and were never imported to the United States.³⁵

The well-established common law right against bodily intrusions of course had a flagrant exception in the United States, slavery. As Seth Kreimer points out, “[I]n antebellum American law, one of the defining differences between slavery and other domestic relations was precisely that the body of the slave was subject to the master’s ‘uncontrolled authority’; physical assault was a master’s prerogative.”³⁶ The Thirteenth Amendment’s eradication of slavery clinched the country’s rejection of “uncontrolled authority” over the bodies of citizens by any private party.³⁷

The U.S. Constitution similarly rejects the government’s “uncontrolled authority” over the body. This constitutional right against governmental bodily intrusions fits logically within the common law tradition of protection for the right to bodily privacy and self-determination.³⁸ Indeed, the Constitution is especially necessary to protect against government-imposed invasions of the body, given the state’s disproportionate power over individuals.³⁹ Even where governmental aims are well-intentioned, the state possesses the power to commit grave physical harm.⁴⁰

Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious en-

32. *Id.* at 252.

33. *Id.* at 251 (internal quotations omitted); *see also Schloendorff*, 105 N.E. at 93.

34. *Botsford*, 141 U.S. at 251.

35. *Id.* at 252.

36. Kreimer, *supra* note 2, at 424 (citations omitted).

37. *Id.* at 425.

38. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 305 (1990) (Brennan, J., dissenting); *see also Washington v. Glucksberg*, 521 U.S. 702, 725 (1997) (“The right assumed in *Cruzan* [to refuse life-sustaining medical treatment] . . . was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation’s history and constitutional traditions.”).

39. JUDITH N. SHKLAR, *ORDINARY VICES* 238–39 (1984).

40. Professor Kreimer has argued that the state’s capacity for physical brutality as well as its “plausible excuses” for such cruelty are growing. Kreimer, *supra* note 2, at 447.

croachment by men of zeal, well-meaning but without understanding.⁴¹

Government-imposed intrusions often occur in closed environments in which public safety and order are at risk, such as in jails and prisons, schools, and mental health institutions.⁴² These environments implicate state interests that may justify certain kinds of intrusions, but individuals in these settings are also often vulnerable and in a poor position to exercise autonomy and refuse objectionable intrusions. In these and other contexts, the Constitution provides a vital check on the state's power to invade a person's body to serve its own ends.

B. Constitutional Protection Against Bodily Intrusions

While court decisions have recognized constitutional protection for the body, “[t]he pattern does not appear clearly in most constitutional law casebooks, for it has been woven under several doctrinal rubrics.”⁴³ Regardless of the particular constitutional provision applied, courts have most often analyzed the constitutional right against bodily intrusions under the rubric of privacy.⁴⁴ Privacy provides a strong historical and theoretical foundation for constitutional protection against governmental interference with the body.⁴⁵ In fact, the rubric of privacy may provide the strongest possible safeguard for the right against bodily intrusions.⁴⁶ Recent case law suggests the Supreme Court may be moving toward a preference for grounding the right in the concept of “liberty,”⁴⁷ but given the broad meaning the Court has given the term “privacy” in its decisions on bodily autonomy, this is largely a semantic distinction.⁴⁸ However

41. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

42. *See, e.g.*, *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002) (addressing schools); *Bell v. Wolfish*, 441 U.S. 520 (1979) (addressing incarceration); *Young v. Romeo*, 457 U.S. 307 (1982) (addressing mental health institutions).

43. Kreimer, *supra* note 2, at 423.

44. *See infra* Part III; *see also* Kreimer, *supra* note 2, at 431–32; Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 199–201 & n.18 (1995); Warren & Brandeis, *supra* note 15, at 213. Other frameworks have occasionally been employed. Property is the primary alternative framework for legal protection of bodily integrity. Rao, *supra* note 16, at 367–87. However, this framework is problematic in its application to governmental invasions of the living human body. *See id.* at 386–390.

45. *See generally* Caitlin E. Borgmann, *Abortion, the Undue Burden Standard, and the Evisceration of Women's Privacy*, 16 WM. & MARY J. WOMEN & L. 291 (2010); McClain, *supra* note 44.

46. The right to privacy is considered by many to be “the right most valued by civilized men.” *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting); *see* Borgmann, *supra* note 45, at 298–308.

47. *See, e.g.*, *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 n.7 (1990) (“Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest.”); Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715, 719 (2010) (“[T]he gradual transformation of the right to make fundamental personal decisions from an aspect of privacy emerging from the penumbrae of the Bill of Rights into an aspect of constitutional liberty and equality protected by the Due Process Clause is now complete.”).

48. *See* Borgmann, *supra* note 45, at 299–301 (arguing, in the context of abortion decision making, that “there is no distinct and obvious line between liberty and privacy”); *see also* McClain, *supra* note 44, at 199–201 (“[S]ome notion of inviolability, or a realm within which one is free from interference or invasion, links the different forms of privacy and constitutes a prominent normative basis for rights of privacy.”).

“liberty” and “privacy” are defined, the two concepts are closely related, since the inability to refuse a significant interference with one’s body affects a person’s autonomy and self-determination. “Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.”⁴⁹ In recognizing a constitutional right against governmental bodily intrusions, courts have also referred to more specific individual interests in a person’s own health and safety,⁵⁰ in avoiding pain,⁵¹ in personal dignity,⁵² and in freedom from punishment.⁵³

Unlike in the private context, where the right against bodily intrusions is virtually absolute,⁵⁴ the government may assert interests that can justify certain types of bodily interference. The Court has considered a variety of interests the government has offered to support bodily intrusions, including: (1) protecting public safety or public health;⁵⁵ (2) protecting the individual’s own health or safety;⁵⁶ (3) determining guilt or innocence or searching for evidence of a crime;⁵⁷ (4) imposing discipline or punishment;⁵⁸ and (5) protecting the integrity of the medical profession.⁵⁹ From the Court’s perspective, the most compelling of these by far is the first category. The Court has applied a public safety and/or public health rationale to uphold, under certain circumstances, blood alcohol testing, urine testing, strip and body-cavity searches, vaccination, administration of anti-psychotic medication, physical restraint of a person’s arms, sterilization, and corporal punishment.⁶⁰

Although the right against bodily intrusions traditionally has been located in the Fifth and Fourteenth Amendment’s Due Process Clauses,⁶¹ it bears a kinship to, and overlaps with, protections embodied in other constitutional provisions. In particular, bodily searches implicate the Fourth Amendment.⁶² Claimants challenging bodily intrusions have also sought protection under the Eighth Amendment’s guarantee against

49. *Cruzan*, 497 U.S. at 287 (O’Connor, J., concurring).

50. *See Riggins v. Nevada*, 504 U.S. 127, 133–36 (1992).

51. *See Rochin v. California*, 342 U.S. 165, 172–175 (1952).

52. *See Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 365–67 (2009).

53. *See Bell v. Wolfish*, 441 U.S. 520, 535 n.17 (1979).

54. *See supra* note 32.

55. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 628 (1989).

56. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 284 (1990).

57. *Winston v. Lee*, 470 U.S. 753, 760–763 (1985).

58. *Ingraham v. Wright*, 430 U.S. 651, 673–74 (1977).

59. *Cruzan*, 497 U.S. at 271 (recognizing this as potential state interest but noting its inapplicability to that case).

60. *See, e.g., Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1521–23 (2012) (addressing strip searches); *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 837–38 (2002) (addressing urine testing); *Washington v. Harper*, 494 U.S. 210, 227 (1990) (addressing anti-psychotic medication); *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (addressing “soft” arm restraints); *Bell v. Wolfish*, 441 U.S. 520, 560 (1979) (addressing body-cavity searches); *Ingraham*, 430 U.S. at 683 (addressing corporal punishment); *Schmerber v. California*, 384 U.S. 757, 758–59 (1966) (addressing blood testing); *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) (addressing vaccination).

61. *See infra* Part II.B.1.

62. *See infra* Part II.B.2.

cruel and unusual punishment, the Fifth Amendment's right against self-incrimination, and the Sixth Amendment's Confrontation Clause.⁶³

Which constitutional provision the Court uses to analyze bodily intrusion claims depends in part on the context, although context alone does not fully explain the Court's choices. Typically, compelled intrusions that occur outside of the criminal law context and that do not involve searches are analyzed as substantive due process violations. In civil or criminal cases involving searches, the relevant constitutional provision once depended on whether the act was committed by state or federal authorities. Until the Fourth Amendment was deemed incorporated by the Fourteenth Amendment,⁶⁴ claims against state-level actors were analyzed as due process violations.⁶⁵ After incorporation, the Supreme Court began to apply the Fourth Amendment (although not necessarily exclusively) when a search was involved.⁶⁶ In 1989, in *Graham v. Connor*, the Court ruled that in police brutality cases, where the Fourth Amendment is applicable, substantive due process should not be invoked at all.⁶⁷ Lower federal courts have interpreted *Graham* more broadly as establishing the principle that, where any other amendment provides "an explicit textual source of constitutional protection,"⁶⁸ that provision must be applied to the exclusion of substantive due process.⁶⁹ Thus, *Graham* raises the question whether substantive due process can continue to coexist with other constitutional protections and provide a parallel source of protection within a single lawsuit against a governmental bodily intrusion.⁷⁰

1. *Substantive Due Process*

Substantive due process is the framework under which the Supreme Court has most commonly evaluated bodily intrusion claims against government actors.⁷¹ The long and revered history of the common law right

63. See *infra* Part II.B.3.

64. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

65. See, e.g., *Rochin v. California*, 342 U.S. 165, 172–74 (1952).

66. See *infra* Part III.B.

67. 490 U.S. 386, 394–95 (1989).

68. *Id.* at 395.

69. See Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 1002–05 (2000) (discussing and criticizing the "Graham doctrine" in the context of property takings). The Supreme Court has recently indicated that the *Graham* doctrine does extend beyond the Fourth Amendment. See *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 560 U.S. 702, 720 (2010) (applying the *Graham* doctrine to the Takings Clause); see also *Chavez v. Martinez*, 538 U.S. 760, 773 n.5 (2003) (suggesting in dicta that the *Graham* doctrine applies to the Fifth Amendment's Self-Incrimination Clause); *United States v. Lanier*, 520 U.S. 259, 272 & n.7 (1997) (applying *Graham* to the Eighth Amendment). The Court has not consistently applied *Graham* in this way, however. See Toni M. Massaro, *Reviving Hugo Black? The Court's "Jot for Jot" Account of Substantive Due Process*, 73 N.Y.U. L. REV. 1086, 1108–09, 1113 & n.132 (1998).

70. See *infra* Part IV.A.

71. See *infra* Part III. The Court has sometimes also applied a procedural due process analysis. See, e.g., *Washington v. Harper*, 494 U.S. 210, 219–28 (1990) (addressing both procedural and substantive due process claims); *Ingraham v. Wright*, 430 U.S. 651, 672–81 (1977) (addressing procedural due process but declining to review substantive due process claim).

against bodily intrusions, coupled with the Court's well-developed line of cases protecting personal privacy,⁷² would seem to support a ready inference that the right against government-compelled bodily intrusions is fundamental.⁷³ If so, then strict scrutiny should supply the basic framework for analyzing alleged violations of this right.⁷⁴ Yet the Court has rarely expressly declared the constitutional right against bodily intrusions to be fundamental or clearly applied strict scrutiny.⁷⁵ Certainly, the extent of the intrusion at issue affects whether the Court perceives the right to be implicated at all. Sometimes the Court has suggested that bodily intrusions must "shock the conscience" before they warrant constitutional protection.⁷⁶ Once an infringement is found, however, one might imagine that a traditional fundamental rights analysis would be self-evident.

Instead, the Court has often articulated only a basic balancing test that simply weighs the individual's interest against the government's. This balancing test has sometimes looked more like strict scrutiny⁷⁷ and sometimes more like rational basis review.⁷⁸ Thus, the Court has not given consistent guidance as to the strength of governmental interests that will justify an intrusion, or how closely tailored the practice at issue must be to those goals. In the incarceration context, the Court has ducked the question whether the right is fundamental under the theory that a lesser standard applies to constitutional rights in prison, regardless of the protection those rights receive in other contexts.⁷⁹

The primacy of substantive due process as the basis for the right against bodily intrusions traditionally led the Court to entertain substantive due process claims even when other amendments were also relevant.⁸⁰ More recently, as discussed above, *Graham v. O'Connor* has posed a challenge to the dominance of the substantive due process

72. See *Washington v. Glucksberg*, 521 U.S. 702, 710–19 (1997) (recounting this history and asserting that right is firmly grounded in common law tradition and constitutional history).

73. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 304 (1990) (Brennan, J., dissenting) ("[I]f a competent person has a liberty interest to be free of unwanted medical treatment . . . it must be fundamental.")

74. See *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 506 (6th Cir. 2012) (discussing right against "forcible physical intrusions" and stating that Supreme Court applies review similar to strict scrutiny, while declining to label it as such).

75. See, e.g., *Riggins v. Nevada*, 504 U.S. 127, 136 (1992) ("Contrary to the dissent's understanding, we do not 'adopt a standard of strict scrutiny.' We have no occasion to finally prescribe such substantive standards" (internal citation omitted)); see also *infra* text accompanying notes 205–12 (discussing *Riggins*). But cf. *Rochin v. California*, 342 U.S. 165, 169 (1952) (implying that right against forced stomach pumping is a "personal immunit[y] . . . 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'" (citation omitted)); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (applying equal protection but stating that "strict scrutiny" must apply given fundamental nature of right to procreate).

76. See, e.g., *Breithaupt v. Abram*, 352 U.S. 432, 437 (1957) ("[A] blood test taken by a skilled technician is not such 'conduct that shocks the conscience . . .'" (citing *Rochin*, 342 U.S. at 172)).

77. See, e.g., *Riggins*, 504 U.S. at 136. The Court disavowed that the test it employed in *Riggins* was in fact strict scrutiny. See *infra* note 205 and accompanying text.

78. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982); see also *infra* notes 374–85 and accompanying text.

79. See *infra* Part III.B.4.a.

80. See, e.g., *Schmerber v. California*, 384 U.S. 757 (1966) (addressing both substantive due process and Fourth Amendment claims).

framework.⁸¹ Perhaps influenced by *Graham*, the Court seems to have largely abandoned the practice of assessing the right against bodily intrusions under multiple, parallel constitutional frameworks.⁸²

2. *Fourth Amendment*

Courts have applied the Fourth Amendment, which protects “[t]he right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and seizures,”⁸³ to bodily searches both within and outside the criminal context.⁸⁴ The Supreme Court has made clear that the Fourth Amendment is not coextensive with a general right to privacy.⁸⁵ Nevertheless, an essential purpose of the Fourth Amendment is to protect “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”⁸⁶ The Court has observed that “[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”⁸⁷

Supreme Court decisions analyzing forced bodily intrusions under the Fourth Amendment are firmly grounded in this privacy rationale.⁸⁸ The reference to “searches” in the Fourth Amendment is often seen as particularly addressing privacy concerns.⁸⁹ Indeed, the Court has defined a Fourth Amendment “search” as occurring “when an expectation of privacy that society is prepared to consider reasonable is infringed.”⁹⁰ Of course, bodily intrusions may also occur in the context of seizures, for example in cases of excessive force during arrest,⁹¹ where the privacy framework may not be as apt.

The Supreme Court has recognized that the Fourth Amendment’s protection of privacy, including bodily privacy, is critical to liberty and autonomy. As Justice O’Connor pointed out in her concurring opinion in *Cruzan*, the Fourth Amendment “echoe[s] th[e] same concern” found

81. See *supra* text accompanying notes 68–71.

82. See also *infra* text accompanying notes 121–25. This Article criticizes this phenomenon. See *infra* Part IV.A. But cf. *Riggins* 504 U.S. at 132–33 (addressing both substantive due process and Sixth Amendment claims post-*Graham*).

83. U.S. CONST. amend. IV (emphasis added).

84. See, e.g., *Schmerber*, 384 U.S. at 767 (holding that DWI blood tests are a Fourth Amendment search); *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364 (2009) (holding that a school’s strip search of a thirteen-year-old girl violated the Fourth Amendment).

85. *Katz v. United States*, 389 U.S. 347, 350 (1967) (“[T]he Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’ That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.”).

86. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

87. *Schmerber*, 384 U.S. at 766 (citing *Wolf v. Colorado*, 338 U.S. 25, 27 (1949); *Mapp v. Ohio*, 367 U.S. 643 (1961)).

88. See *Redding*, 557 U.S. at 374–77; *Winston v. Lee*, 470 U.S. 753, 758–59 (1985); *Schmerber*, 384 U.S. at 757.

89. This view of the Amendment links “searches” to privacy and “seizures” to property. See William C. Heffernan, *Property, Privacy, and the Fourth Amendment*, 60 BROOK. L. REV. 633, 637 (1994).

90. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

91. See *infra* Part III.C.1.

in the Due Process Clause for the importance of “physical freedom and self-determination” to our conception of liberty.⁹² The Court has repeatedly asserted that personal privacy and dignity are “basic to a free society.”⁹³ Accordingly, when bodily intrusions implicate “personal and deep-rooted expectations of privacy,” the Court has held, the Fourth Amendment demands “a discerning inquiry into the facts and circumstances to determine whether the intrusion was justifiable.”⁹⁴

The Fourth Amendment prohibits “unreasonable” searches and seizures. Thus, once the Court has determined that a search or seizure has occurred, it asks whether the action was reasonable. The Court has described the test for reasonableness as a “case-by-case approach, in which the individual’s interests in privacy and security are weighed against society’s interests in conducting the [search].”⁹⁵ This of course reveals little about whether a given action crosses the line of permissibility.⁹⁶ In *Winston v. Lee*, the Court summarized factors to help courts assess the reasonableness of a bodily intrusion for purposes of the Fourth Amendment.⁹⁷

The *Winston* Court first admonished that the “ordinary requirements” of the Fourth Amendment, including search warrants and probable cause, apply as “threshold requirements” absent an emergency.⁹⁸ Assuming these requirements are met, a “crucial factor” in determining reasonableness should be the extent to which the procedure might threaten the recipient’s health or safety.⁹⁹ Second, the Court should examine the extent of the intrusion on the recipient’s “dignitary interests in personal privacy and bodily integrity.”¹⁰⁰ Finally, against these individual interests the Court must balance “the community’s interest in fairly and accurately determining guilt or innocence.”¹⁰¹ The Court in *Winston* noted that while probable cause is ordinarily sufficient to render most searches reasonable under the Fourth Amendment, it does not justify every bodily search. Some “intrusion[s] into an individual’s body . . . implicate[] expectations of privacy . . . of such magnitude that [they] may be ‘unreasonable’ even if likely to produce evidence of a crime.”¹⁰²

The balancing test described in *Winston* traditionally came at the end of an analysis that began (as *Winston* acknowledges) with the

92. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 287–88 (1990) (O’Connor, J., concurring).

93. *Winston*, 470 U.S. at 760 (quoting *Schmerber*, 384 U.S. at 767).

94. *Id.*

95. *Id.*

96. *Id.* (“[T]he question whether the community’s need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers.”).

97. *Id.* at 760–63 (drawing these factors from *Schmerber*, 384 U.S. 757).

98. *Id.* at 760–61 (citing *Schmerber*, 384 U.S. 757).

99. *Id.* at 761.

100. *Id.*

101. *Id.* at 762.

102. *Id.* at 759, 766–67 (invalidating use of forced surgery to produce bullet allegedly received at the crime scene).

amendment's Warrant Clause.¹⁰³ Under the traditional approach, the Court found per se unreasonable any full-scale search that was conducted without a warrant¹⁰⁴ (unless a recognized exception applied)¹⁰⁵ or lacked probable cause.¹⁰⁶ The Court regarded probable cause as an independent requirement, "an indispensable prerequisite for a full-scale search, regardless of whether such a search was conducted pursuant to a warrant or under one of the recognized exceptions to the warrant requirement."¹⁰⁷ For searches that were minimally intrusive and thus did not qualify as a full-scale search, the Court still required individualized though lesser suspicion, such as "reasonable suspicion."¹⁰⁸ Assuming a valid basis for the search, the Court then asked whether the search was conducted in a reasonable manner.¹⁰⁹ This final inquiry subsumed the balancing test described above.¹¹⁰

Beginning in the mid-1980s, the Court developed a broad exception to the warrant and probable cause requirement known as the "special needs doctrine."¹¹¹ Under the special needs doctrine, a search is not per se unreasonable for lacking a warrant and/or probable cause where "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."¹¹² In *Board of Education v. Earls*, the Court explained that probable cause is generally required in criminal investigations but may be less suited to noncriminal contexts.¹¹³ For example, the Court has commonly found that special needs excuse the government from complying with the Warrant Clause when conducting bodily searches for safety purposes in institutional settings such as prisons¹¹⁴ and schools.¹¹⁵ When the Court determines that the special needs exception applies, it proceeds straight to a balancing

103. See U.S. CONST. amend. IV ("[A]nd no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

104. *E.g.*, *Katz v. United States*, 389 U.S. 347, 357 (1967).

105. Recognized exceptions include "brief stops for questioning or observation at a fixed Border Patrol checkpoint, or at a sobriety checkpoint, and administrative inspections in 'closely regulated' businesses." *Chandler v. Miller*, 520 U.S. 305, 308 (1997) (internal citations omitted).

106. See, e.g., *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

107. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 637 (1989) (Marshall, J., dissenting).

108. *Id.* at 638; see, e.g., *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

109. *New Jersey v. T.L.O.*, 469 U.S. 325, 354-55 (1985) (Brennan, J., concurring in part and dissenting in part) (summarizing this framework).

110. See *id.* at 351-52 (Blackmun, J., concurring).

111. This doctrine was first applied in *New Jersey v. T.L.O.* and received its name from Justice Blackmun's concurring opinion in that case. See *id.* (supporting exception to warrant and probable cause requirement for "exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable").

112. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring)).

113. *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 828 (2002).

114. See, e.g., *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012); *Bell v. Wolfish*, 441 U.S. 520 (1979); see also *infra* Part III.B.4.

115. See, e.g., *Earls*, 536 U.S. at 822; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); see also *infra* Part III.B.4.b. & Part III.B.5.

test for reasonableness. The Court has often applied the special needs doctrine to bodily intrusions under the Fourth Amendment.¹¹⁶

One question that arises in the context of Fourth Amendment protection against bodily intrusions is how the Fourth Amendment dovetails with substantive due process. Do the Fourth Amendment and substantive due process provide parallel protection, or does the Fourth Amendment displace a substantive due process claim where the former applies? Until the Court ruled that the Fourth Amendment's exclusionary rule applies to the states through the Fourteenth Amendment's Due Process Clause, the Court analyzed bodily intrusion claims against state-level actors as violations of substantive due process.¹¹⁷ Even after the incorporation of the exclusionary rule,¹¹⁸ the Court continued to consider substantive due process claims alongside Fourth Amendment claims in cases against state-level officials.¹¹⁹

Graham v. Connor,¹²⁰ decided in 1989, calls this approach into question. In *Graham*, the Court applied the Fourth Amendment to the exclusion of substantive due process in a case involving a claim of excessive force during arrest. The Court explained that, in excessive force cases, the amendment that "provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct . . . [and] not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."¹²¹ Thus, under *Graham*, substantive due process is completely displaced by the Fourth Amendment wherever the latter applies.¹²²

The Court appears to have followed the *Graham* doctrine, at least implicitly, in cases involving search-related bodily intrusions; in post-1989 cases, the Court has applied the Fourth Amendment without considering the possibility of a substantive due process claim.¹²³ This has not been an explicit shift,¹²⁴ but *Graham* seems to have cast its long shadow over these cases. Indeed, plaintiffs appear to assume the Court will treat these

116. See *infra* Part III.B.5.

117. See, e.g., *Breithaupt v. Abram*, 352 U.S. 432 (1957); *Rochin v. California*, 342 U.S. 165 (1952).

118. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

119. See, e.g., *Bell*, 441 U.S. 520 (considering on merits, but rejecting, substantive due process claim in context of body-cavity search); see also *Schmerber v. California*, 384 U.S. 757, 759 (1966) (considering on the merits, but rejecting, substantive the due process claim in context of blood alcohol test).

120. 490 U.S. 386 (1989).

121. *Id.* at 395 (suggesting that either Fourth Amendment or Eighth Amendment should displace substantive due process where one of the former applies).

122. See *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) ("*Graham* . . . requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth . . . Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.>").

123. See, e.g., *Florence v. Bd. Of Chosen Freeholders*, 132 S. Ct. 1510, 1523 (2012); *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 379 (2009).

124. Neither *Redding* nor *Florence* mentions *Graham*.

claims purely as Fourth Amendment violations and litigate the cases accordingly.¹²⁵

3. *Other Constitutional Protections*

Although the Supreme Court has decided the vast majority of constitutional bodily intrusion cases under either substantive due process or the Fourth Amendment, it has considered several other potential constitutional arguments against bodily intrusions. In most instances, it has rejected these alternative constitutional bases. In *Riggins v. Nevada*, the Court suggested, but did not directly rule, that the forced administration of anti-psychotic medications to render a criminal defendant competent to stand trial might violate his rights under the Sixth Amendment's Confrontation Clause.¹²⁶ In *Rochin v. California*, Justices Black and Douglas, in separate concurrences, argued that forcible stomach-pumping to extract narcotics violated the Fifth Amendment's right against self-incrimination.¹²⁷ But the Court held that the Fifth Amendment's Self-Incrimination Clause was not implicated by a blood alcohol test in *Schmerber v. California*.¹²⁸ The Court has also held that the Eighth Amendment's prohibition on cruel and unusual punishment is not applicable to corporal punishment in schools¹²⁹ or to body-cavity searches of pretrial detainees.¹³⁰

Finally, governmental bodily intrusions may raise procedural due process questions.¹³¹ How much process is due before the state may subject a person's body to a physical intrusion depends on the strength of the individual's substantive right to avoid such intrusions.¹³² Once the substantive right and potentially overriding state interests are identified, there remains the question of "the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance."¹³³ The Court in *Washington v.*

125. See, e.g., Brief for Respondent at 16-47, *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) (No. 11-1425).

126. 504 U.S. 127, 132-33 (1992); *id.* at 142-45 (Kennedy, J., concurring) (addressing Confrontation Clause claim); see *infra* note 185; *cf.* *Illinois v. Allen*, 397 U.S. 337, 344 (1970) (suggesting in dicta that binding and gagging a disruptive defendant in order that he can remain in the courtroom for trial is preferable under the Sixth Amendment to removing him from the courtroom).

127. 342 U.S. 165, 174-75 (1952) (Black, J., concurring); *id.* at 179 (Douglas, J., concurring). The majority did not consider this claim because the Court had previously ruled the Fifth Amendment's protection against self-incrimination inapplicable to the states. *Id.* at 175 (Douglas, J., concurring).

128. 384 U.S. 757, 761 (1966).

129. *Ingraham v. Wright*, 430 U.S. 651, 671 (1977).

130. *Bell v. Wolfish*, 441 U.S. 520, 535-37 (1979).

131. State and lower federal courts have addressed other possible sources of constitutional protection against bodily intrusions. See, e.g., *In re Matter of Patricia DuBreuil*, 629 So. 2d 819, 822 (Fla. 1993) (finding that refusal of Jehovah's Witness to accept blood transfusion implicated right to free exercise of religion); Dennis E. Cichon, *The Right to "Just Say No": A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 L.A. L. REV. 283, 319-26 (1992) (discussing cases applying First Amendment values such as freedom of thought and communication to forced administration of anti-psychotic medications and electroconvulsive therapy).

132. *Washington v. Harper*, 494 U.S. 210, 220 (1990).

133. *Mills v. Rogers*, 457 U.S. 291, 299 (1982).

Harper explained the distinction: “the substantive issue is what factual circumstances must exist before the State may [impose a particular bodily intrusion]; the procedural issue is whether the . . . mechanisms used to determine the facts in a particular case are sufficient.”¹³⁴ The Court has considered procedural due process arguments in only a few bodily intrusion cases.¹³⁵

III. SUPREME COURT DECISIONS

The government seeks to intrude on people’s bodies for many different reasons and in many different ways. These myriad intrusions can be divided into three main categories.¹³⁶ The first comprises forced medical procedures not performed for purposes of a search.¹³⁷ These procedures are sometimes imposed for the recipient’s protection and sometimes to protect third parties. A second category of intrusions consists of the government’s searching for something, usually evidence of a crime or infraction, or of a weapon or other item that poses a public safety risk. These searches may entail the use of a medical procedure. The third category involves intrusions used to restrain or discipline the recipient. The following sections describe how the Supreme Court has treated a variety of intrusions that fall within these categories.

A. *Non-Search-Related Forced Medical Procedures*

The Supreme Court’s decisions on forced medical procedures has followed a tentative trajectory of greater to lesser tolerance for such invasions. These cases include landmark decisions that are often regarded as quintessential fundamental rights cases. *Skinner v. Oklahoma*, for example, helped lay the foundation for fundamental privacy rights.¹³⁸ Other cases reflect the Court’s continuing (if sometimes grudging) respect for such rights.¹³⁹ The decisions themselves, however, are much more ambiguous than often portrayed.

134. *Harper*, 494 U.S. at 220.

135. *Id.*; *Mills*, 457 U.S. at 299; *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

136. Placing bodily intrusions into these categories helps facilitate an overview of the relevant Supreme Court case law by looking at the most common reasons why the government seeks to intrude on people’s bodies. It is not, however, intended to suggest a doctrinal distinction among the scenarios. Indeed, it is the purpose of this Article to break down artificial doctrinal barriers among different types of bodily intrusions.

137. I avoid the term “medical treatment,” because some of the medical procedures are not used or intended to “treat” the recipient (as in to improve his or her health or wellbeing) but rather for other purposes, such as to protect third parties or the general public, or to punish the recipient. See Cichon, *supra* note 131, at 316–17 (discussing difference between treatment and punishment in cases of forced medication).

138. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942); see also *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (stating, “In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the right[] . . . to have children,” and citing *Skinner*).

139. See, e.g., *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990).

In cases in which the Supreme Court has had to address the permissibility of state-imposed medical procedures, the state interests have primarily comprised broad health and safety rationales, aimed at protecting either the general public or a subset of the public such as prison inmates and/or staff. The Court has not addressed a case in which the government sought a forced medical intrusion in order to protect individual third parties, such as the recipient's children.¹⁴⁰

1. Vaccination

*Jacobson v. Massachusetts*¹⁴¹ “is often regarded as the most important judicial decision in public health.”¹⁴² It is also one of the earliest cases in which the Supreme Court addressed the constitutionality of a government-compelled bodily intrusion, medical or otherwise. In response to a smallpox outbreak in Cambridge in the early 1900s, the Massachusetts Board of Public Health, pursuant to statutorily granted authority, passed a regulation requiring all persons to be vaccinated. The penalty for refusing was a fine of \$5.¹⁴³ Henning Jacobson refused, was fined, and sued to challenge the law as “an assault upon his person” and “hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best.”¹⁴⁴ The Supreme Court did not deny that the forced vaccination implicated Jacobson's liberty, although it devoted virtually none of its opinion to describing the outlines or strength of this right.¹⁴⁵ Rather, it focused on its limits, noting that “the liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.”¹⁴⁶

140. State courts have decided such cases, and the trend is for courts to invalidate these intrusions (although this was not always so). Courts have addressed forced cesarean sections, *In re A.C.*, 573 A.2d 1235, 1247 (D.C. App. 1990) (finding right to refuse), and forced blood transfusions for parents of minor children, *In re Matter of Patricia Dubreuil*, 629 So. 2d 819, 822 (Fla. 1993) (finding right to refuse). See Rao, *supra* note 16, at 393–94; cf. *Cruzan*, 497 U.S. at 313 n.13 (1990) (Brennan, J., dissenting) (asserting that “I would find that the Due Process Clause places limits on what invasive medical procedures could be forced on an unwilling comatose patient in pursuit of the interests of a third party,” and reciting parade of horrors). *But cf.* Rao, *supra* note 16, at 412–13 (discussing case in which court denied right of incompetent pregnant woman to be removed from life support).

141. 197 U.S. 11 (1905).

142. Lawrence O. Gostin, *Jacobson v Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95 AM. J. PUB. HEALTH 576, 576 (2005).

143. Wendy K. Mariner et al., *Jacobson v Massachusetts: It's Not Your Great-Great-Grandfather's Public Health Law*, 95 AM. J. PUB. HEALTH 581, 582 (2005) (noting that this fine would equal about \$100 today).

144. *Jacobson*, 197 U.S. at 26.

145. The Court made only passing reference to Jacobson's subjective reasons for refusing the vaccination, *see id.* at 36–37, and assumed that he was a “fit subject of vaccination,” *id.* Jacobson had in fact alleged that he had a “dread” of vaccinations, having suffered serious adverse reactions to a vaccination as a child and having witnessed his son's similar reactions to vaccination. *Id.* at 36.

146. *Id.* at 26; *see also id.* at 26–27 (“Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will.”). The Court did not expressly mention the Due Process Clause, although its repeated references to “liberty” suggest that this is the provision it applied. The Court also referred to the “liberty secured by the Fourteenth Amendment,” *id.* at 29, and to “right[s] appertaining to life, liberty, or property,” *id.* at 38.

On the flip side, the opinion is replete with references to the state's police power to protect the public's "general comfort, health, and prosperity,"¹⁴⁷ at times referring to this power as a "right" of the community.¹⁴⁸ The Court warned of the "disorder and anarchy" that would result if individual rights were not subordinated to the common good.¹⁴⁹ Nevertheless, the Court emphasized the judiciary's responsibility to guard against arbitrary impositions. It held that a statute would be unconstitutional if it lacked a "real or substantial relation" to purported goals of protecting public health, safety, or morals, or if it was, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."¹⁵⁰ The requirement of a "substantial" connection appears to reflect the narrow tailoring of strict or heightened scrutiny, but in fact the Court was exceedingly deferential to the legislature's authority to render factual judgments about the safety of, and need for, vaccinations.¹⁵¹ The Court did suggest outermost limits to this discretion, however, conceding that the judiciary could step in to protect an individual for whom the harms of a vaccination "would be cruel and inhuman in the last degree."¹⁵²

Most commentators agree that the Court would reach the same outcome if *Jacobson* were decided today, albeit with a lesser emphasis on police power and a more robust vision of individual rights.¹⁵³ Indeed, as discussed below, the Court has since approved other medical interventions in the name of protecting public safety.¹⁵⁴

2. Sterilization

The Supreme Court first addressed the issue of forced sterilization in 1927 in the infamous case of *Buck v. Bell*.¹⁵⁵ According to Justice Holmes, who wrote the majority opinion, Carrie Buck was "a feeble-minded white woman who was committed to the [Virginia] State Colony [for Epileptics and Feeble Minded] . . . [and who] is the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child."¹⁵⁶ Operating from the eugenic premise

147. *Id.* at 26.

148. *Id.* at 27.

149. *Id.* at 26; *see also id.* at 38 (recognizing the Court's duty to "guard with firmness every right appertaining to life, liberty, or property as secured to the individual by the supreme law of the land," but describing deference to state police power as an even higher duty).

150. *Id.* at 31.

151. *See id.* at 30–31.

152. *Id.* at 38–39.

153. *See, e.g.,* Gostin, *supra* note 142, at 580; Mariner et al., *supra* note 143, at 581–82.

154. *See infra* Part III.B.2 (discussing DWI blood draws).

155. 274 U.S. 200, 205–06 (1927).

156. *Id.* at 205. Although the trial testimony focused on Buck's own supposed immorality in bearing an "illegitimate" child, *see* Paul A. Lombardo, *Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom*, 13 J. CONTEMP. HEALTH L. & POL'Y 1, 9 (1996), in fact Buck had been raped by the nephew of her adoptive mother. The adoptive parents then sought to have Buck committed to the Colony, thus preserving their own reputation. Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 54 (1985).

that “heredity plays an important part in the transmission of insanity, imbecility, etc.,” Virginia had passed a statute giving superintendents of institutions, including the Colony, the authority to sterilize male and female residents “who if now discharged would become a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and to society.”¹⁵⁷ The Colony petitioned to have Carrie Buck sterilized via salpingectomy (surgical removal of the fallopian tubes), and she challenged the petition, claiming that it violated her rights to bodily integrity and equal protection.¹⁵⁸

The Court swiftly disposed of her substantive due process claim, finding that the “facts” about Buck’s “socially injurious tendencies”¹⁵⁹ automatically justified the sterilization.¹⁶⁰ It relied on *Jacobson*, stating, “The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.”¹⁶¹ As in *Jacobson*, the Court sounded the theme of individual sacrifice as a person’s dues for enjoying the protection of a well-ordered society. The Court pointed out that the nation at times calls upon its “best citizens” to give their lives for the public welfare.¹⁶² Buck’s surgical sterilization was a “lesser sacrifice” in order to protect society from “being swamped with incompetence.”¹⁶³ Justice Holmes gave no consideration, let alone weight, to any liberty interest Carrie Buck might have in avoiding the surgery.¹⁶⁴

Justice Butler was the lone dissenter among the Justices¹⁶⁵ on a bench that included Justice Brandeis, a principal architect of the constitutional right to privacy. Although *Buck* has never been officially overruled, it seems highly unlikely that such a ruling would emerge from the Court today.¹⁶⁶ The Court has since firmly established that the constitutional right to privacy encompasses reproductive decision making.¹⁶⁷ It has also rejected the constitutionality of forced surgical interventions in other contexts.¹⁶⁸

157. *Buck*, 274 U.S. at 205–06.

158. *Id.* For a disturbing account of the *Buck* case, including evidence that Buck’s own lawyer colluded with the state, see generally Lombardo, *Three Generations*, *supra* note 156.

159. *Skinner v. Oklahoma*, 316 U.S. 535, 544 (1942) (Stone, J., concurring) (referring to *Buck*).

160. *Buck*, 274 U.S. at 207 (“In view of the general declarations of the [l]egislature and the specific findings of the Court obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result.”).

161. *Id.* at 207.

162. *Id.*

163. *Id.*

164. *Id.* The Court also rejected Buck’s equal protection argument, concluding that, although the sterilization policy applied only to residents of certain institutions, the state need not tackle the whole of a social problem at once but rather could “do[] all that it can.” *Id.* at 208.

165. He dissented without opinion. *See id.*

166. *See* Mariner et al., *supra* note 143, at 586–87; Lombardo, *Medicine*, *supra* note 156, at 8. *But cf.* B. Jessie Hill, *supra* note 19, at 300 (“[*Buck*] fits within the paradigm of the public-health line of cases, characterized by its deference to legislative findings of medical fact and its blindness to claims of individual autonomy in favor of the population view, which sees sick individuals primarily as threats to the public health.”).

167. *See* *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

168. *Winston v. Lee*, 470 U.S. 753, 767 (1985); *see infra* Part III.B.3.

The Court's other sterilization decision, *Skinner v. Oklahoma*,¹⁶⁹ on first glance appears to be a complete about-face from *Buck*. The decision addressed a challenge to an Oklahoma statute that provided for the surgical sterilization of men or women deemed to be "habitual criminals." Habitual criminals were defined as persons "convicted two or more times for crimes 'amounting to felonies involving moral turpitude.'"¹⁷⁰ The statute excepted from this definition "'offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses.'"¹⁷¹ Jack Skinner was convicted once of stealing chickens and twice of robbery, crimes qualifying as crimes of moral turpitude. When the attorney general commenced proceedings against him for sterilization, Skinner challenged the statute as unconstitutional under the Fourteenth Amendment.¹⁷²

Skinner is a paradoxical decision. Justice Douglas opened the opinion with apparent recognition of the fundamental right at stake, acknowledging that the case addressed "a sensitive and important area of human rights."¹⁷³ And, in the passage for which the decision has become famous, the Court declared:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.¹⁷⁴

This passage seems to amount to a wholehearted condemnation of *Buck*. Citing the fundamental nature of the right to procreation, the Court applied strict scrutiny to its equal protection analysis of the Oklahoma law,¹⁷⁵ the direct opposite of the lenient review the Court had accorded the Virginia statute in *Buck*.

Yet, to the extent its decision contradicted *Buck*, the Court simply ignored the contradiction, declining to raise doubts about *Buck*'s continuing validity let alone overrule it. In fact, the *Skinner* Court's reasoning implicitly reaffirmed the state's police power to sterilize for eugenic purposes.¹⁷⁶ Although the law in *Buck* applied only to institutionalized per-

169. 316 U.S. 535, 536 (1942).

170. *Id.*

171. *Id.* at 537.

172. *Id.*

173. *Id.* at 536.

174. *Id.* at 541.

175. *Id.*

176. *See id.* at 541 (disavowing any intent "to reexamine the scope of the police power of the States" recognized in *Buck*); *see also id.* at 544 (Stone, C.J., concurring) ("Undoubtedly a state may, after appropriate inquiry, constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies." (citing *Buck v. Bell*, 274 U.S. 200 (1927))).

sons, the *Skinner* Court described as a “saving feature” the fact that, once sterilized and freed, these persons would open up space in the institution for other “feeble-minded persons” to be sterilized.¹⁷⁷ Thus the Virginia statute came closer to equal-opportunity sterilizing of the feeble-minded, as contrasted with the Oklahoma law, under which only certain types of criminals were “forever free” of sterilization.¹⁷⁸ The Court seemingly did not question the state’s general power to sterilize unsavory populations, only its authority to draw unfounded distinctions within those populations.¹⁷⁹

Victoria Nourse points out that both *Buck* and *Skinner* were decided during an era in which the Court and legal discourse about the Constitution were far less focused on the substantive content of rights than on the police power of the state.¹⁸⁰ The “common welfare”—including public health and safety—in most cases easily defeated claims of rights. Although *Skinner* helped to lay the foundation for the right to individual privacy and autonomy as we know it today, Professor Nourse argues that the case was neither litigated nor decided as a case about civil rights, as the decision’s focus on equal protection evidences.¹⁸¹

3. *Antipsychotic Medication*

The Supreme Court has addressed several cases involving the involuntary administration of antipsychotic (or psychotropic) drugs, twice addressing federal constitutional claims on the merits.¹⁸² Antipsychotic medications are often used to treat mental disorders such as schizophrenia.¹⁸³ The Supreme Court has primarily analyzed the forced administration of psychotropic drugs under the rubric of substantive due process.¹⁸⁴

177. *Id.* at 542 (majority opinion).

178. *Id.*

179. *See id.* (“We have not the slightest basis for inferring that that line [drawn by the Oklahoma law] has any significance in eugenics, nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offenses.”).

180. VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS 125 (2008); *see also* Mariner et al., *supra* note 143, at 582–84 (discussing importance of respect for state’s police power to Court’s reasoning in *Jacobson* and *Buck*).

181. NOURSE, *supra* note 180, at 16, 125.

182. *Riggins v. Nevada*, 504 U.S. 127, 131 (1992); *Washington v. Harper*, 494 U.S. 210, 214 (1990); *supra* note 173. The Court has not directly addressed the right to refuse forms of psychiatric treatment other than psychotropic drugs. *Cf. Vitek v. Jones*, 445 U.S. 480, 494 (1980) (noting the “stigmatizing consequences” of involuntary psychiatric treatment including “mandatory behavior modification”). However, some state courts have ruled that there is a fundamental privacy interest in the freedom to refuse electroconvulsive therapy. *See, e.g., In re the Detention of Schuoler*, 723 P.2d 1103, 1108 (Wash. 1986); *see also* Elizabeth R. Newell, Note, *Competency, Consent, and Electroconvulsive Therapy: A Mentally Ill Prisoner’s Right to Refuse Invasive Medical Treatment in Oregon’s Criminal Justice System*, 9 LEWIS & CLARK L. REV. 1019, 1030–31 (2005) (collecting cases).

183. *Harper*, 494 U.S. at 214.

184. This substantive right has raised subsidiary constitutional questions. For example, *Harper* also addressed a procedural due process claim. *See infra* text accompanying note 195; *see also Vitek*, 445 U.S. 480 (addressing procedural protections constitutionally owed to prison inmates before transfer to a mental hospital). Two years later, in *Riggins v. Nevada*, the Court addressed a Sixth Amendment claim in conjunction with a substantive due process claim against forced antipsychotic medication. *See infra* text accompanying notes 204–209.

The Court has recognized that “[t]he forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty”¹⁸⁵ and that individuals, including prisoners, possess “a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the *Due Process Clause of the Fourteenth Amendment*.”¹⁸⁶ It has not expressly identified this interest as “fundamental,” however, and it has found that state interests may justify this interference in certain cases.

In *Washington v. Harper*, the Court upheld the government’s right to administer anti-psychotic drugs to a prison inmate against his will where the inmate has a serious mental illness, is dangerous to himself or others, and the treatment is in the inmate’s medical interest.¹⁸⁷ Walter Harper was a prison inmate diagnosed with various conditions including manic-depressive disorder and schizophrenia. Although he had accepted medications voluntarily for a time, he eventually refused to continue taking them.¹⁸⁸ He then challenged under the Due Process Clause the procedures whereby the state could override his choice to refuse the drugs.¹⁸⁹ The Court acknowledged Harper’s “significant liberty interest” in avoiding the forced medication.¹⁹⁰ Because Harper was an inmate, however, the Court invoked the *Turner v. Safley* standard, which the Court applies to prison regulations and which asks whether the challenged policy is “reasonably related to legitimate penological interests.”¹⁹¹ Invoking *Turner* allowed the Court to dodge the question whether the right is fundamental and therefore whether strict scrutiny would apply to similar claims asserted outside of the prison context.¹⁹²

The Court held that the state’s policy regarding forced administration of antipsychotic drugs to inmates met the *Turner* standard.¹⁹³ It found the state’s interest—in protecting Harper as well as prison staff and prisoners—to be particularly important in the prison environment, which it maintained is populated by “persons with a demonstrated pro-

185. *Harper*, 494 U.S. at 229.

186. *Id.* at 221–22 (emphasis added); see also *Mills v. Rogers*, 457 U.S. 291, 299 n.16 (1982) (“[A]ssum[ing] for purposes of this discussion that involuntarily committed mental patients do retain liberty interests directly protected by the Constitution . . . and that these interests are implicated by the involuntary admission of antipsychotic drugs.”).

187. 494 U.S. at 227. In two earlier cases, the Court had side-stepped the issue of whether there is a constitutional right to avoid antipsychotic medication. See *Rennie v. Klein*, 458 U.S. 1119, 1119 (1982); *Mills*, 457 U.S. at 299 n.16.

188. *Washington*, 494 U.S. at 214.

189. *Id.* at 222.

190. *Id.* at 221.

191. *Id.* at 223 (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987) and *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 342 (1987)).

192. The Court asserted that the *Turner* test is appropriate even where the right claimed is fundamental and where a stricter test would ordinarily apply. *Id.* The Washington Supreme Court had distinguished *Turner* and *Shabazz* and had applied strict scrutiny, but the U.S. Supreme Court found that the court had erred in doing so. *Id.* at 223–24. The Court neither affirmed nor denied that the right at issue was fundamental and would ordinarily demand strict scrutiny.

193. The policy applied exclusively to “inmates who are mentally ill and who, as a result of their illness, are gravely disabled or represent a significant danger to themselves or others.” *Id.* at 226.

clivity for antisocial criminal, and often violent, conduct.”¹⁹⁴ The Court acknowledged that antipsychotic drugs can have “serious, even fatal, side effects” but also noted agreement within the psychiatric profession that their proper use “is one of the most effective means of treating and controlling a mental illness likely to cause violent behavior.”¹⁹⁵ The Court also found that Harper’s proposed alternatives of physical restraint or seclusion could not be provided “at *de minimis* cost to valid penological interests.”¹⁹⁶ Finally, evaluating Harper’s procedural due process claim, it found that the state provided constitutionally adequate procedures to ensure that any decision to medicate an inmate involuntarily was neither arbitrary nor erroneous.¹⁹⁷

Justice Stevens dissented, arguing that the majority had “virtually ignore[d] the several dimensions” of the liberty interest it recognized.¹⁹⁸ He noted that a forced administration of medication is especially troubling if it “creates a substantial risk of permanent injury and premature death.”¹⁹⁹ He also recognized that such intrusions are “degrading” when performed against the will of a competent person.²⁰⁰ But what he found most disturbing about the particular medications at issue was that their very purpose is to “alter the will and the mind of the subject,” an invasion Stevens found to be “a deprivation of liberty in the most literal and fundamental sense.”²⁰¹ He viewed the severity of the medication’s effects on the psyche as comparable to psychosurgery or electroconvulsive therapy.²⁰²

Unlike the majority, Justice Stevens also took note of Harper’s particular, subjective view of the forced medications. After detailing the many disturbing side effects of Prolixin, one of the injections administered to Harper, Stevens pointed out that at an involuntary medication hearing Harper had declared that “he would rather die than take medication.”²⁰³ Justice Stevens contended that the prison policy, which addressed only the security of the prison environment, did not meet the Court’s own test of permitting only forced treatments that advance the prisoner’s medical interests.²⁰⁴ He also found the state’s procedures for approving forced administration of psychotropic drugs to be biased and therefore constitutionally deficient.²⁰⁵

194. *Id.* at 225 (internal quotation marks omitted).

195. *Id.* at 226, 229.

196. *Id.* at 226 (quoting *Turner*, 482 U.S. at 91). The Court noted that these methods would exact a greater toll than medications in terms of effectiveness, risk of injury to staff or the inmate, and prison resources. *Id.* at 226–27.

197. *Id.* at 228. The Court disagreed with the Washington Supreme Court’s view that a full judicial hearing was necessary for this purpose. *Id.*

198. *Id.* at 237 (Stevens, J., dissenting).

199. *Id.*

200. *Id.*

201. *Id.* at 237–38.

202. *Id.* at 240–41 (agreeing with Washington Supreme Court’s assessment).

203. *Id.* at 239 (internal quotation marks omitted).

204. *Id.* at 243–45; *see supra* text accompanying note 185.

205. *Id.* at 250–57.

In *Riggins v. Nevada*, the Supreme Court addressed whether the forced administration of antipsychotic medication to a defendant during trial violates the defendant's due process and Sixth Amendment rights.²⁰⁶ David Riggins was convicted of murder and robbery. As a pretrial detainee, Riggins sought medical help for hearing voices and difficulty sleeping. A psychiatrist at the county jail gave Riggins Mellaril, an antipsychotic drug. The state continued to administer the drug during the trial, despite Riggins's objection. Riggins intended to offer an insanity defense at trial and wanted jurors to observe his "true mental state."²⁰⁷ Riggins contended that forced administration of the medication for purposes of trial violated his rights under *Harper* as well as his right to a full and fair trial.

The Court applied the test from *Harper*, finding that the state had not met its burden to establish both the need for the drug and its medical appropriateness to the defendant.²⁰⁸ The Court disavowed applying strict scrutiny,²⁰⁹ but it did suggest (although it did not "finally prescribe") that the state was obligated to show that the medication was the least intrusive means of achieving an "essential" state purpose, such as ensuring Riggins's competence for trial or protecting his safety or that of others.²¹⁰ The Court was vaguer in addressing the Sixth Amendment claim, stating only that the trial court's failure to "acknowledge the defendant's liberty interest in freedom from unwanted antipsychotic drugs . . . may well have impaired the constitutionally protected trial rights Riggins invokes."²¹¹

Justice Kennedy, concurring, expressed particular concern that the state sought the forced medication in order to render Riggins competent to stand trial. He noted the importance of a criminal defendant's "capacity or willingness to react to the testimony at trial or to assist his counsel" as well as the potentially significant effect of "the defendant's behavior, manner, facial expressions, and emotional responses, or their absence" on the outcome of a trial.²¹² Justice Kennedy thus maintained that the state should be forbidden to force medication upon a criminal defendant absent a showing that the medication's side effects "will not alter the de-

206. 504 U.S. 127, 132–33 (1992). The Court did not specify whether the "due process" right at issue was substantive or procedural due process. It did, however, clearly affirm *Harper*'s recognition of a substantive due process right against forced medication by quoting its statement that such intrusions are a substantial interference with a person's liberty. *Id.* at 134.

207. *Id.* at 130.

208. *Id.* at 135 (noting that the Fourteenth Amendment "affords at least as much protection to persons the State detains for trial" as to inmates).

209. *See id.* at 136. The Court did not identify what standard it was applying. Because this case, unlike *Harper*, involved the administration of medication to a pretrial detainee for the purposes of standing trial, the Court could not duck behind the more lenient "legitimate penological interest" standard of *Turner v. Safley*. *See supra* notes 191–92 and accompanying text.

210. *Riggins*, 504 U.S. at 135–36, 138.

211. *Id.* at 137. Justice Thomas's dissent criticized the Court for its failure to answer the Sixth Amendment question directly and to distinguish between that claim—which he found meritless—and Riggins's *Harper* claim, which Justice Thomas contended could not be redressed through a reversal of Riggins's conviction. *Id.* at 146–57 (Thomas, J., dissenting).

212. *Id.* at 139–44 (Kennedy, J., concurring).

fendant's reactions or diminish his capacity to assist counsel," a showing the state had not made and which he doubted could be made.²¹³

4. *Life-Prolonging Medical Intervention*

In *Cruzan v. Director, Missouri Department of Health*,²¹⁴ the Supreme Court confronted the question whether an incompetent adult has a constitutional right to have life-sustaining nutrition and hydration withdrawn. Nancy Cruzan sustained severe injuries in a car accident that put her first into a coma and eventually into a persistent vegetative state. Cruzan's parents sought a court order directing that artificial feeding and hydration equipment be withdrawn after it became apparent that Cruzan had virtually no chance of regaining her cognitive faculties yet could conceivably remain alive in a vegetative state for decades.²¹⁵ The question before the Court was whether Missouri's rules for determining the wishes of an incompetent person—standards the Missouri appellate courts found Cruzan's parents had failed to meet—violated the Constitution.²¹⁶

The Court first addressed whether competent persons have a right to refuse life-prolonging medical interventions. The majority acknowledged that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."²¹⁷ It declined to find this right under a "generalized constitutional right of privacy," preferring instead to identify it as "a Fourteenth Amendment liberty interest."²¹⁸ As Justice Brennan pointed out in dissent, however, the majority failed to discuss "either the measure of th[is] liberty interest or its application . . ."²¹⁹ Rather, the majority opinion merely "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."²²⁰ The Court explained the need to balance a competent individual's liberty interest against asserted state interests, but it did not specify how strong the state's interests must be or how close the tailoring.²²¹ Because Nancy Cruzan was incompetent, the Court instead turned to the separate question whether Missouri's procedures for establishing the intent of an incompetent person violated the Constitution.²²² The Court concluded that they did not.²²³

213. *Id.* at 143.

214. 497 U.S. 261 (1990).

215. *Id.* at 265–66.

216. *Id.* at 268–69.

217. *Id.* at 278 (citing *Washington v. Harper*, 494 U.S. 210, 221–22 (1990); *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957); *Jacobson v. Massachusetts*, 197 U.S. 11, 24–30 (1905)).

218. *Id.* at 279 n.7.

219. *Id.* at 304 (Brennan, J., dissenting). In discussing Missouri's standard of proof for determining an incompetent person's wishes regarding life-prolonging treatment, the Court did concede that the "interests at stake . . . are more substantial, both on an individual and societal level, than those involved in a run-of-the-mine civil dispute." *Id.* at 283.

220. *Id.* at 279.

221. *Id.*

222. Missouri required clear and convincing evidence of the patient's wishes. *Id.* at 280.

Justice Brennan, dissenting, would have forthrightly found “a fundamental right to be free of unwanted artificial nutrition and hydration.”²²⁴ He would therefore apply strict scrutiny to any significant infringements on that right.²²⁵ Although he admitted that the right to refuse medical treatment is not absolute, he maintained that “no state interest could outweigh the rights of an individual in Nancy Cruzan’s position.”²²⁶ According to Justice Brennan, “the State has no legitimate general interest in someone’s life, completely abstracted from the interest of the person living that life, that could outweigh the person’s choice to avoid medical treatment.”²²⁷ He argued that the state’s only valid interest in this case was ensuring that Cruzan’s wishes were accurately ascertained, but that Missouri’s procedures were unconstitutionally biased toward the state’s favored result.²²⁸

B. Searches of the Body

The Supreme Court’s early cases on bodily invasions conducted for purposes of a government search did not apply a Fourth Amendment analysis, since the exclusionary rule was not enforced against the states until 1961.²²⁹ Most of the cases instead were decided under substantive due process. Substantive due process still made an occasional appearance in search cases even after *Mapp v. Ohio* but has come to be supplanted completely by the Fourth Amendment.

1. Stomach Pumping

In *Rochin v. California*,²³⁰ the Court ruled that the forced stomach-pumping of Richard Rochin in an attempt to produce evidence of illegal drug possession violated the Fourteenth Amendment’s Due Process Clause.²³¹ When the police had attempted to arrest Rochin in his home, he had placed two capsules in his mouth. The officers seized Rochin and tried unsuccessfully to remove the capsules by forcing open his jaw.

223. *Id.* In a later proceeding, Cruzan’s family was able to satisfy Missouri’s standards for substituted judgment, and the treatment was ultimately discontinued. See *Frontline: The Death of Nancy Cruzan* (PBS television broadcast Mar. 24, 1992) (transcript available at <http://www.pbs.org/wgbh/pages/frontline/programs/transcripts/1014.html>).

224. *Cruzan*, 497 U.S. at 302 (Brennan, J., dissenting); see also *id.* at 304 (“[I]f a competent person has a liberty interest to be free of unwanted medical treatment . . . it must be fundamental.”) (Brennan, J., dissenting).

225. *Id.* at 303 (Brennan, J., dissenting).

226. *Id.* at 312 (Brennan, J., dissenting).

227. *Id.* at 313 (Brennan, J., dissenting). Justice Stevens likewise criticized the majority for “permit[ting] the State’s abstract, undifferentiated interest in the preservation of life to overwhelm the best interests of Nancy Beth Cruzan” *Id.* at 331 (Stevens, J., dissenting).

228. *Id.* at 316–17 (Brennan, J., dissenting).

229. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

230. 342 U.S. 165 (1952).

231. *Id.* at 166–67, 174. The case preceded incorporation of the Fourth Amendment’s exclusionary rule. See *Wolf v. Colorado*, 338 U.S. 25, 33 (1949) (holding Fourth Amendment exclusionary rule not incorporated against the states). The Court had also ruled, in *Adamson v. California*, 332 U.S. 46, 56 (1947), that the Fifth Amendment right against self-incrimination does not apply to the states.

Rochin was then taken to a hospital, where the officers directed a doctor to pump an emetic solution into Rochin's stomach through a tube, causing Rochin to vomit up two capsules containing morphine.²³²

Justice Frankfurter, writing for the majority, declared:

This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.²³³

Frankfurter did not identify the particular due process right the officers' conduct offended. Rather, he stated more broadly that the Due Process Clause "imposes upon this Court an exercise of judgment upon the whole course of [state criminal justice] proceedings . . . in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."²³⁴ Justice Black's concurrence criticized this conception of due process as too vague and subject to the personal preferences of the individual Justices.²³⁵ But Justice Frankfurter refused to "defin[e], and thereby confin[e], these standards of conduct more precisely," preferring a flexible standard that could accommodate "the needs both of continuity and of change in a progressive society."²³⁶

The majority opinion repeated the now-familiar test for determining which rights are protected as fundamental under the Due Process Clause, namely "those personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or are 'implicit in the concept of ordered liberty.'"²³⁷ The Court's emphasis on the "brutality"²³⁸ of the officers' conduct in *Rochin* could be read to condemn only heinous intrusions tantamount to torture.²³⁹ In any event, the Court made clear that substantive due process protections do not ex-

232. *Rochin*, 342 U.S. at 166.

233. *Id.* at 172.

234. *Id.* at 169 (internal quotation marks omitted).

235. *Id.* at 174–77 (Black, J., concurring).

236. *Id.* at 172–73.

237. *Id.* at 169 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), and *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Justice Black, who concurred in the judgment, objected to this broad interpretation and argued that the Fifth Amendment's guarantee against self-incrimination should be applied to the states through the Fourteenth Amendment and that it supplied the proper constitutional basis for the Court's ruling. *Id.* at 174–75 (Black, J., concurring); see also *id.* at 179 (Douglas, J., concurring) (agreeing that the Fifth Amendment is the proper basis for the Court's ruling).

238. *Id.* at 173–74.

239. See *id.* at 172 (noting that the methods used against Rochin were "too close to the rack and the screw to permit of constitutional differentiation"); Lombardo, *Medicine*, *supra* note 156, at 8 (interpreting *Rochin* as holding that, "when medical procedures start looking like torture, and are used solely to enhance police interrogation, they are forbidden by the Constitution").

tend to conduct provoking only “fastidious squeamishness or private sentimentalism.”²⁴⁰

2. *Blood Draws*

The Court has held that forced blood draws for purposes of an alcohol-analysis test can be constitutional under certain conditions.²⁴¹ The Court first addressed the issue in 1957 in *Breithaupt v. Abram*.²⁴² Paul Breithaupt had been driving his pickup truck and collided with another car, whose occupants were killed. Breithaupt was taken to a hospital emergency room unconscious. Because a nearly empty whiskey bottle had been found in Breithaupt’s glove compartment, a state patrol officer requested that a sample of his blood be taken. A physician drew the sample from the still-unconscious man and delivered it to the officer. Laboratory tests of the blood showed that Breithaupt was intoxicated.²⁴³

Breithaupt argued that his subsequent conviction for involuntary manslaughter violated the Due Process Clause of the Fourteenth Amendment because it was based upon the results of an involuntary blood draw.²⁴⁴ Justice Clark, writing for the majority, described the case as pitting “the right of an individual that his person be held inviolable” against “the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road.”²⁴⁵ But the Court rejected any comparison to *Rochin* on the grounds that “there is nothing ‘brutal’ or ‘offensive’ in the taking of a sample of blood when done . . . under the protective eye of a physician.”²⁴⁶ It emphasized the importance of the state’s interest in public safety, asserting that “modern scientific methods” are necessary to counter the “increasing slaughter on our highways” caused by drunk driving.²⁴⁷ The Court noted that, in addition to the public safety rationale, the test could benefit its subject since it “likewise may establish innocence”²⁴⁸

Attempting to explain how acceptable forced physical intrusions are to be distinguished from unacceptable invasions, the Court remarked that “due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of ‘decency and fairness’ that has been woven by com-

240. *Rochin*, 342 U.S. at 172.

241. The Court also upheld the constitutionality of blood alcohol testing for administrative purposes in *Skinner v. Railway Labor Executives’ Association*, 489 U.S. 602, 633–34 (1989). The regulations at issue in *Skinner* also required urine and breath tests. *Skinner* is discussed in Part III.B.5, which addresses urine testing for drug use.

242. 352 U.S. 432 (1957).

243. *Id.* at 433.

244. *Id.* at 433–34. The Court rejected Breithaupt’s Fourth and Fifth Amendment claims since these protections had been held not applicable to the states. *Id.*; see *supra* note 231.

245. *Breithaupt*, 352 U.S. at 439.

246. *Id.* at 435.

247. *Id.* at 439.

248. *Id.*

mon experience into the fabric of acceptable conduct.”²⁴⁹ The Court noted that blood tests are “routine in our everyday life”²⁵⁰ and that blood tests to determine intoxication while driving were widespread in the states, which the Court found “negative[d] the suggestion that there is anything offensive about them.”²⁵¹ The Court was also undisturbed by the drawing of blood from an unconscious person, declaring that “the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right”²⁵² Nevertheless, the Court stopped short of ruling that forced blood drawing is always permissible. Rather, it limited its holding to blood “taken by a skilled technician” and suggested that the taking of blood under different circumstances could rise to the level of unconstitutional “brutality” found in *Rochin*.²⁵³

Chief Justice Warren dissented. He argued that the importance of the state’s interest alone was insufficient to overcome the right against physical intrusions, since the state interest in *Rochin*—state efforts to curb narcotics trafficking—was at least as compelling as that in *Breithaupt*.²⁵⁴ Warren also disagreed with the majority’s assessment that the blood draw was significantly less intrusive than the intrusion in *Rochin*. He pointed out that doctors had performed both procedures in hospitals, and that both involved the “extraction of body fluids” through procedures that normally bear minimal risk of harm to the subject.²⁵⁵ He blamed the Court for applying a test that, contrary to its protestations, distinguished among procedures based only on the Justices’ “personal reaction[s].”²⁵⁶ Warren concluded, “[D]ue process means at least that law-enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth.”²⁵⁷

In *Schmerber v. California*, the Supreme Court again upheld the administration of a forced blood alcohol test, in an opinion written by Justice Brennan.²⁵⁸ A police officer had directed that a blood sample be withdrawn from Armando Schmerber, over his refusal, while he was being treated in a hospital for injuries sustained in a car accident.²⁵⁹ A chemical analysis of the blood showed that Schmerber was legally intoxi-

249. *Id.* at 436.

250. *Id.*

251. *Id.* at 436 n.3.

252. *Id.* at 435. The Court also questioned the involuntariness of the blood draw despite *Breithaupt*’s unconsciousness, suggesting that it might be assumed that drivers consent to blood tests by operating a vehicle on public highways. *Id.* at 435 n.2.

253. *Id.* at 436–38.

254. *Id.* at 440 (Warren, C.J., dissenting).

255. *Id.* at 442.

256. *Id.*

257. *Id.* at 442; *see also id.* at 443 (Douglas, J., dissenting).

258. 384 U.S. 757 (1966).

259. *Id.* at 761.

cated.²⁶⁰ Schmerber argued that the test violated his Fourteenth Amendment Due Process rights, his Fourth Amendment right against unreasonable searches and seizures, and his Fifth Amendment right against self-incrimination, among other claims.²⁶¹ In a 5-4 decision, the Court rejected defendant's arguments. The Court held that its decision on the due process claim was dictated by *Breithaupt*.²⁶² The Court noted that in both cases there was "ample justification for the officer's conclusion that the driver was under the influence of alcohol."²⁶³ The Court also noted that in *Breithaupt*, "as here, the extraction was made by a physician in a simple, medically acceptable manner in a hospital environment."²⁶⁴

The Court was equally unconvinced by Schmerber's argument that the blood test amounted to an improper search and seizure under the Fourth Amendment. The Court admitted that "[t]he overriding function of the *Fourth Amendment* is to protect personal privacy and dignity against unwarranted intrusion by the State."²⁶⁵ The Court further noted, "Because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers . . . we write on a clean slate."²⁶⁶ The Court first found that the failure to obtain a warrant did not render the search improper because the officers could reasonably have believed that the situation was an emergency, in that alcohol concentration in the blood diminishes after drinking stops, and therefore the evidence might have been lost.²⁶⁷ In considering whether the blood test amounted to a reasonable search under the Fourth Amendment, the Court was "satisfied that the test chosen to measure petitioner's blood-alcohol level was a reasonable one."²⁶⁸ The Court noted that blood tests are "commonplace" and minimally intrusive, opining that "experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain."²⁶⁹

Four Justices dissented in *Schmerber*. Three, Justices Warren (relying on his dissent in *Breithaupt*), Douglas, and Fortas, were disturbed by the intrusive nature of the blood draw and argued that this violated the

260. *Id.* at 759.

261. *Id.* at 759. These amendments had by this time been incorporated.

262. *Id.* at 760-61; *see also Breithaupt*, 352 U.S. 432.

263. *Schmerber*, 384 U.S. at 759.

264. *Id.*

265. *Id.* at 767 (emphasis added).

266. *Id.* at 767-68.

267. *Id.* at 770-71.

268. *Id.* at 771.

269. *Id.* The Court also rejected Schmerber's claim that the blood test violated his Fifth Amendment privilege against self-incrimination. The Court distinguished between what it perceived as "testimonial" or "communicative" evidence, which it held did not include a compelled blood test, and physical evidence drawn from the petitioner's body. *Id.* at 761-65. However, it conceded a limit to this distinction, suggesting that a lie detector test, although measuring bodily responses, could cross the line from purely physical testing to compelled testimony. *Id.* at 764.

right to privacy under the Due Process Clause.²⁷⁰ Justice Douglas emphasized that the forced blood draw violated the general right to privacy that, in *Griswold v. Connecticut*, he had found pervaded the Constitution through the “penumbra[s]” of many of the Bill of Rights’ provisions.²⁷¹ He concluded, “No clearer invasion of this right of privacy can be imagined than forcible bloodletting of the kind involved here.”²⁷² Justice Fortas agreed with Douglas that a blood draw, however commonplace, amounted to a serious physical intrusion when forced upon a person.²⁷³ He contended that, “[a]s prosecutor, the State has no right to commit any kind of violence upon the person, or to utilize the results of such a tort, and the extraction of blood, over protest, is an act of violence.”²⁷⁴

The Supreme Court recently addressed the constitutionality of forced blood drawing, as discussed in Part IV.C.1.

3. *Surgery*

In *Winston v. Lee*, the Court rejected the use of compelled surgery to remove a bullet for evidentiary purposes. Rudolph Lee was accused of attempting to commit armed robbery.²⁷⁵ The incident had involved a confrontation in which the victim, who was also armed, shot the perpetrator in the chest.²⁷⁶ On the night of the attempted robbery, police officers found Lee on a nearby street with a gunshot wound.²⁷⁷ Doctors determined that a bullet was lodged in his chest, and the state of Virginia sought to compel Lee to undergo surgery under general anesthesia to remove the bullet in order to prove Lee’s guilt.²⁷⁸

Unlike in *Schmerber*, the Court did not even consider whether the proposed invasion violated Lee’s substantive due process rights.²⁷⁹ But, as in *Schmerber*, its Fourth Amendment analysis strongly sounded the theme of personal privacy.²⁸⁰ The Court found that the state met the requirement of probable cause, and that Lee had enjoyed “a full measure of procedural protections” in litigating the issues.²⁸¹ Turning its attention to “the extent of the intrusion on respondent’s privacy interests and . . .

270. Justice Black, joined by Justice Douglas, argued that the blood test violated the Fifth Amendment right against self-incrimination. *Id.* at 773 (Black, J., dissenting).

271. *Id.* at 778 (Douglas, J., dissenting) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

272. *Id.* at 779. This was an interesting departure from Douglas’s concurrence in *Rochin*, which argued against a due process approach for fear that it risked leaving protection of important constitutional rights subject to the “idiosyncrasies of the judges who sit here.” See *Rochin v. California*, 342 U.S. 165, 177–79 (1952) (Douglas, J. concurring); *supra* note 235.

273. *Schmerber*, 384 U.S. at 779 (Fortas, J., dissenting).

274. *Id.*

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

276. *Id.*

277. *Id.*

278. *Id.* at 756.

279. The Court may have been following the doctrine of *Graham v. Connor*, which by then had been decided, see *infra* Part III.C.1., but the opinion does not mention *Graham*.

280. See *Winston*, 470 U.S. at 758–60; *supra* Part II.B.2.

281. *Winston*, 470 U.S. at 763.

the State's need for the evidence,"²⁸² however, the Court found the proposed surgery extraordinarily intrusive.²⁸³ The medical risks to the patient were "apparently not extremely severe" but nevertheless "of considerable dispute."²⁸⁴ Moreover, the Court found, the intrusion on Lee's privacy could "only be characterized as severe."²⁸⁵ The Court noted that consensual surgery requiring general anesthesia would not ordinarily be considered demeaning or intrusive.²⁸⁶ But here, "the Commonwealth proposes to take control of respondent's body, to 'drug this citizen—not yet convicted of a criminal offense—with narcotics and barbiturates into a state of unconsciousness,' and then to search beneath his skin for evidence of a crime."²⁸⁷

On the other side of the balance, the Court was unpersuaded that the state had a compelling need to extract this evidence from Lee. The Court found that "[t]he very circumstances relied on in this case to demonstrate probable cause to believe that evidence will be found tend to vitiate the Commonwealth's need to compel respondent to undergo surgery."²⁸⁸ The Court therefore concluded that the proposed search was not reasonable under the terms of the Fourth Amendment.²⁸⁹

4. *Strip and Body-Cavity Searches*

a. Criminal Setting

An exhaustive review of the Supreme Court's opinions in the area of traditional Fourth Amendment bodily searches is well beyond this Article's scope. But it is instructive to examine how the Supreme Court views the intrusiveness of certain types of bodily searches. The Supreme Court has of course upheld the constitutionality of external bodily searches in a variety of contexts. For example, the Court has held permissible full external searches of a person as a product of arrest,²⁹⁰ and frisks or pat-downs during a stop based on reasonable suspicion of criminal activity.²⁹¹ But the Court has not been oblivious to the intrusiveness of such searches. In *Terry v. Ohio*, the Court described pat-downs as acute invasions of privacy:

[I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a

282. *Id.*

283. *See id.* at 766.

284. *Id.*

285. *Id.*

286. *Id.* at 765.

287. *Id.* (quoting *Lee v. Winston*, 717 F.2d 888, 901 (4th Cir. 1983)) (citations omitted).

288. *Id.*

289. *Id.* at 767.

290. *United States v. Robinson*, 414 U.S. 218, 235 (1973); *Gustafson v. Florida*, 414 U.S. 260, 266 (1973).

291. *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a “petty indignity.” It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.²⁹²

The Supreme Court’s rulings on fingerprinting, fingernail scraping, pat-downs, and strip and body-cavity searches are context-specific and have depended on factors such as the circumstances of the detention, the type of evidence sought, and whether the police (or other official) had probable cause.²⁹³ While the Court has described almost all of these methods as serious intrusions,²⁹⁴ the level of intrusiveness ultimately has seemed to contribute little to the analysis. In particular, the Court has been highly deferential to the judgments of prison officials regarding their need to conduct invasive searches even on pretrial detainees, in order to maintain order and safety.

The Court’s treatment of body-cavity and strip searches, among the most intrusive of (nonsurgical) bodily searches, exemplifies its prioritizing of government’s professed concerns for safety over the extent of a search’s intrusiveness. In *Bell v. Wolfish*, the Supreme Court rejected a constitutional challenge to routine body-cavity searches of pretrial detainees after contact visits.²⁹⁵ The detainees in *Bell* were required “to expose their body cavities for visual inspection.”²⁹⁶ The Court admitted that the “this practice instinctively gives us . . . pause.”²⁹⁷ In setting forth the relevant Fourth Amendment balancing test, the Court suggested that this intrusiveness mattered. The Court called for “a balancing of the need for the particular search against the *invasion of personal rights* that the search entails. Courts must consider the *scope of the particular intrusion*, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.”²⁹⁸

292. *Id.* at 17 (citations omitted); *see also id.* at 24–25 (“Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.”).

293. *Compare, e.g.,* *Davis v. Mississippi*, 394 U.S. 721, 728 (1969) (ruling inadmissible fingerprints obtained as part of a brief detention in the absence of probable cause) *with* *Cupp v. Murphy*, 412 U.S. 291, 296 (1973) (upholding admissibility of forced fingernail scraping following voluntary questioning at station-house, where probable cause existed); *see also* *Ker v. California*, 374 U.S. 23, 33 (1963) (“[T]here is no formula for the determination of reasonableness [under the Fourth Amendment]. Each case is to be decided on its own facts and circumstances.” (internal quotation marks omitted)).

294. The Court appears to regard fingerprinting as significantly less intrusive than fingernail scraping, although it is not obvious why. *See Davis*, 394 U.S. at 727. In *Davis*, the Court remarked that fingerprinting does not involve “probing into an individual’s private life and thoughts.” *Id.* But the Court failed to acknowledge that, depending on the circumstances, it could still “inflict great indignity and arouse strong resentment.” *Terry*, 392 U.S. at 17 (addressing pat-downs); *see also Cupp*, 412 U.S. at 295 (opining that fingernail scraping, unlike fingerprinting, goes “beyond mere ‘physical characteristics . . . constantly exposed to the public,’ and constitute[s] [a] ‘severe, though brief, intrusion upon cherished personal security’” (citations omitted)).

295. 441 U.S. 520, 522 (1979). The detainees had been charged with crimes but not yet tried. *Id.* at 523.

296. *Id.* at 528.

297. *Id.* at 559; *see also id.* at 560 (“We do not underestimate the degree to which these searches may invade the personal privacy of inmates.”).

298. *Id.* at 559 (emphases added).

Yet, in applying this test, the Court quickly abandoned concern for the extreme intrusiveness of the searches in favor of effectively complete deference to prison officials. The Court dismissed the need to consider less restrictive alternatives, such as a metal detector.²⁹⁹ The Court emphasized that detention centers are “unique place[s] fraught with serious security dangers,”³⁰⁰ and it swiftly concluded that the judiciary could not demand probable cause as a precondition for body-cavity searches of pretrial detainees.³⁰¹

The Court also considered whether the body-cavity searches amounted to a violation of the Fifth Amendment Due Process Clause.³⁰² The Court rejected the idea that a fundamental privacy right was at stake. It found that the Due Process Clause protects only two potential rights of pretrial detainees, the right to be free from punishment and the right to be as comfortable as possible during confinement.³⁰³ The Court found that this latter right “simply does not rise to the level of those fundamental liberty interests delineated in cases” protecting a constitutional right to privacy.³⁰⁴ As to the former, the Court concluded that the body-cavity searches did not constitute “punishment” under the Due Process Clause.³⁰⁵

Justice Marshall, dissenting, criticized the Court for its “virtually unlimited deference to detention officials’ justifications for particular impositions” as well as its failure to consider “the most relevant factor, the impact that restrictions may have on inmates.”³⁰⁶ For Justice Marshall, the level of scrutiny should rise in direct correlation with the intrusiveness of the search.³⁰⁷ Thus, he argued that “where [a practice] implicates interests of fundamental importance or inflicts significant harms, the Government should demonstrate that the restriction serves a compelling necessity of jail administration.”³⁰⁸ Turning to the body-cavity searches at issue, Justice Marshall wrote:

In my view, the body-cavity searches of MCC inmates represent one of the most grievous offenses against personal dignity and common decency. After every contact visit with someone from out-

299. *Id.* at 559 n.40. The Court admitted that a metal detector might identify weapons, but added that it would not identify nonmetal contraband, such as money or drugs, ignoring that these latter items did not pose the immediate risk to safety that the Court found so paramount. *See id.*; *see also id.* at 565 (Marshall, J., dissenting) (criticizing the majority for “los[ing] interest in the inquiry concerning excessiveness, and, indeed, eschew[ing] consideration of less restrictive alternatives.”).

300. *Id.* at 559.

301. *Id.* at 560.

302. Justice Stevens declared the Court’s admission that the case implicated the Due Process Clause to be “[t]he most significant—and I venture to suggest the most enduring—part of the Court’s opinion today.” *Id.* at 580 (Stevens, J., dissenting).

303. *Id.* at 534.

304. *Id.* at 534–35 (citing *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

305. *Id.* at 538–39, 560–61.

306. *Id.* at 563 (Marshall, J., dissenting).

307. *Id.* at 571 (“As the substantiality of the intrusion on detainees’ rights increases, so must the significance of the countervailing governmental objectives.”).

308. *Id.* at 570.

side the facility, including defense attorneys, an inmate must remove all of his or her clothing, bend over, spread the buttocks, and display the anal cavity for inspection by a correctional officer. Women inmates must assume a suitable posture for vaginal inspection, while men must raise their genitals. And, as the Court neglects to note, because of time pressures, this humiliating spectacle is frequently conducted in the presence of other inmates.³⁰⁹

Justice Marshall found that these searches were clearly of “sufficient gravity to invoke the compelling-necessity standard,” a test which they could not meet.³¹⁰ “Indeed,” Marshall contended, “the procedure is so unnecessarily degrading that it ‘shocks the conscience.’”³¹¹

The Supreme Court recently relied on *Bell* in upholding the constitutionality of strip search policies in *Florence v. Board of Chosen Freeholders*.³¹² There the Court addressed whether it was permissible under the Fourth Amendment for two correctional facilities to conduct suspicionless strip searches of all persons, including pretrial detainees, before their admission to a general population unit. The challenged search processes involved officers inspecting detainees’ “ears, nose, mouth, hair, scalp, fingers, hands, arms, armpits, and other body openings.”³¹³ The searches were conducted “regardless of the circumstances of the arrest, the suspected offense, or the detainee’s behavior, demeanor, or criminal history.”³¹⁴ Albert Florence, who had been mistakenly detained for failure to pay a fine that he had in fact already paid, alleged that he was “required to lift his genitals, turn around, and cough in a squatting position as part of the process.”³¹⁵

Justice Kennedy wrote the opinion for the Court. The Court purported to apply the test set forth in *Turner v. Safley*, which holds that restrictions on prisoners’ constitutional rights are permissible so long as they are “‘reasonably related to legitimate penological interests.’”³¹⁶ Justice Kennedy looked to *Bell* to provide “the starting point for understanding how this framework applies to Fourth Amendment challenges.”³¹⁷ The Court adopted *Bell*’s extraordinary deference to correctional officials, reading it and other precedents to mean that courts must defer to the officials’ judgment “unless there is ‘substantial evidence’ demonstrating their response to the situation is exaggerated.”³¹⁸ The Court even

309. *Id.* at 576–77.

310. *Id.* at 578.

311. *Id.* (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)). Justices Marshall and Stevens pointed out, among other things, how difficult it would be for detainees to hide contraband in bodily orifices during contact visits, for which they wore one-piece jumpsuits and which took place in closely monitored, glass-enclosed spaces. *Id.* at 577–78 (Marshall, J., dissenting); *see also id.* at 594 (Stevens J., dissenting).

312. 132 S. Ct. 1510 (2012).

313. *Id.* at 1514 (citation omitted).

314. *Id.*

315. *Id.*

316. *Id.* at 1515 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

317. *Id.* at 1516 (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)).

318. *Id.* at 1513–14, 1518 (citation omitted).

seemed to suggest that courts must defer to officials on the very question of whether they had met the *Turner* standard.³¹⁹ As in *Bell*, the Court did not consider whether a higher standard should be applied when serious bodily intrusions are involved, again essentially ignoring the part of the *Bell* balancing test that looks to the extent of the intrusion in question.³²⁰

Two Justices wrote separately to express reservations about a broad rule allowing suspicionless strip searches without exception, given the intrusiveness of such searches. Chief Justice Roberts declared, “The Court is nonetheless wise to leave open the possibility of exceptions, to ensure that we ‘not embarrass the future.’”³²¹ Justice Alito allowed that requiring detainees to disrobe and in some cases “to manipulate their bodies” in an inspection “is undoubtedly humiliating and deeply offensive to many,” and he suggested that it might be unreasonable to admit those arrested for minor offenses to the general population, thus subjecting them to such a humiliating search.³²²

Justice Breyer observed in dissent that the strip searches in question were uniquely intrusive and that recipients perceived them as “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive, signifying degradation and submission.”³²³ In his view, “such a search of an individual arrested for a minor offense that does not involve drugs or violence . . . is an ‘unreasonable search[h]’ forbidden by the Fourth Amendment, unless prison authorities have reasonable suspicion to believe that the individual possesses drugs or other contraband.”³²⁴

b. Schools

The Court has shown greater concern for the intrusiveness of strip searches in school. In *Safford Unified School District #1 v. Redding*,³²⁵ the Supreme Court ruled unconstitutional the strip search of a thirteen-year-old student where school officials had no reason to believe she was

319. *See id.* at 1517 (“The task of determining whether a policy is reasonably related to legitimate security interests is ‘peculiarly within the province and professional expertise of corrections officials.’” (citation omitted)). Justice Breyer disagreed that *Bell* stood for the proposition that “the word of prison officials (accompanied by a ‘single instance’ of empirical example) is sufficient to support a strip search policy.” *Id.* at 1531 (Breyer, J., dissenting) (citation omitted).

320. *See supra* text accompanying notes 280–83, 293–94. Other than *Bell*, the cases the Court cited involved no bodily intrusions on inmates but rather involved measures like blanket prohibitions on contact visits or random searches of inmates’ cells and lockers. *See Florence*, 132 S. Ct. at 1516–17 (discussing *Block v. Rutherford*, 468 U.S. 576 (1984); *Hudson v. Palmer*, 468 U.S. 517 (1984)).

321. *Id.* at 1523 (Roberts, C.J., concurring) (citation omitted).

322. *See id.* at 1524 (Alito, J., concurring).

323. *Id.* at 1526 (Breyer, J., dissenting) (citations omitted) (internal quotation marks omitted). Justice Breyer listed examples of individuals arrested for minor offenses who had been subjected to strip searches, including a nun, lactating and menstruating women, and sexual assault survivors. *Id.* at 1527.

324. *Id.* at 1525.

325. 557 U.S. 364 (2009).

concealing dangerous contraband in her underwear.³²⁶ Savana Redding was searched on a (false) uncorroborated tip from another student that she was carrying prescription strength ibuprofen in her backpack. Two female staff members ordered Redding to strip to her underwear. Redding “was told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree.”³²⁷

The Court noted that the Fourth Amendment generally requires probable cause to justify a search. School searches, however, require only reasonable suspicion and are permissible when the “measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”³²⁸ The Court thus implied that in some circumstances, particularly those involving potential danger to the community, a strip search of a minor in school might be permissible.³²⁹

In this case, the Court found that school officials had sufficient grounds, based on the tip and other facts, to search Redding’s backpack and outer clothing.³³⁰ However, further justification was needed for the strip search. The Court recognized that the intrusiveness of a strip search rendered it “categorically distinct” from a search of her outer clothing.³³¹ The combination of imposed nakedness, “adolescent vulnerability,” and the suggestion of guilt “intensifie[d] the patent intrusiveness” of the strip search as judged by “reasonable societal expectations of personal privacy.”³³² The Court also looked to Redding’s subjective experience of the search as “embarrassing, frightening, and humiliating” in concluding that the strip search required “distinct elements of justification” from school authorities.³³³ Here, the Court found two particular elements lacking: a sufficient indication of danger to students and a particularized suspicion that Redding had hidden the pills in her underwear.³³⁴ The Court concluded that “the combination of these deficiencies was fatal to finding the search reasonable.”³³⁵

Redding contrasts strikingly with the Court’s analysis of strip searches in the incarceration setting. Here, the Court tempered its deference to school officials with attentiveness to a strip search’s impact on students, whereas in *Bell* and *Florence*, the Court paid only token acknowledgment to the intrusiveness factor and ultimately deferred without question to prison authorities. This is so even though the Court rec-

326. The Court ruled 8-1 on the search, but by a 7-2 vote found qualified immunity for the school officials because it said the case law regarding school strip searches had not been clear. *Id.* at 368, 379–82.

327. *Id.* at 369.

328. *Id.* at 370 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)).

329. *See id.* at 376 (emphasizing the “nondangerous” nature of the pills at issue).

330. *Id.* at 373–74.

331. *Id.* at 374.

332. *Id.* at 374–75.

333. *Id.*

334. *Id.* at 376–77.

335. *Id.* at 377.

ognized that safety is highly important in the school setting, and that this particular school had witnessed a history of students distributing and ingesting prescription medications with some becoming ill.³³⁶ For Justice Thomas, who would have found no Fourth Amendment violation, the threat to safety called for far greater deference to school authorities.³³⁷ He felt that the majority's call for suspicion of danger and a specific reason to search Redding's underwear to be new and burdensome requirements not supported by Fourth Amendment doctrine.³³⁸

5. *Urine Testing*

The Court has decided five cases in which it addressed whether suspicionless urine drug tests “fit within the closely guarded category of constitutionally permissible suspicionless searches.”³³⁹ In four out of the five, it upheld the tests as reasonable under the Fourth Amendment.³⁴⁰ In all five cases, the Court analyzed the cases under the “special needs” doctrine, which provides an exception to the general rule that a nonconsensual governmental search is unconstitutional if not authorized by a valid warrant.³⁴¹ In each case, the Court purported to balance the intrusion on individual privacy interests against its promotion of “legitimate governmental interests.”³⁴²

Examining the extent of intrusiveness, the Court acknowledged that urine tests are a significant invasion of a person's privacy. In fact, in *Skinner*, the Court regarded the issue of urine testing as “more difficult” than that of blood tests.³⁴³ Although they are not physically invasive,

336. *Id.* at 371–73.

337. *Id.* at 384 (Thomas, J., dissenting) (“[S]chool officials retain broad authority to protect students and preserve ‘order and a proper educational environment’ under the Fourth Amendment.” (citation omitted)).

338. *Id.* at 387.

339. *Ferguson v. City of Charleston*, 532 U.S. 67, 77 (2001) (quoting *Chandler v. Miller*, 520 U.S. 305, 309 (1997)).

340. *See* *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002) (addressing high school students participating in extracurricular activities); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (addressing high school students participating in interscholastic sports); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (addressing United States Customs Service employees seeking promotion to certain sensitive positions); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1989) (addressing railroad employees involved in certain train accidents or who violate certain safety rules). *But see* *Chandler v. Miller*, 520 U.S. 305 (1997) (holding unconstitutional urine tests for candidates for state elected office).

341. *See* *Ferguson v. City of Charleston*, 532 U.S. 67, 74 n.7 (2001) (“[I]n limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when ‘special needs’ other than the normal need for law enforcement provide sufficient justification.”). The Justices have disagreed over whether and when “special needs” can ever encompass law enforcement objectives. *See id.* at 79 n.15 (discussing dispute); *see also supra* text accompanying notes 105–10, 115–20 (discussing special needs doctrine).

342. *See, e.g., Skinner*, 489 U.S. at 619 (citation omitted).

343. *Id.* at 626. *Skinner* addressed Federal Railroad Administration regulations that called for blood tests, breath tests, and urine tests of railroad employees following certain rail accidents or rule infractions. The Court found that the urine tests were the most intrusive. It was less bothered by the blood tests, which it found “do not constitute an unduly extensive imposition on an individual's privacy and bodily integrity.” *Id.* at 625 (citation omitted). The breath tests it found did not “implicate[] significant privacy concerns,” as these tests entail no skin piercing, cause little embarrassment, and reveal nothing about the recipient but blood alcohol level. *Id.* at 625–26.

urine tests “require employees to perform an excretory function traditionally shielded by great privacy” and therefore raise “concerns not implicated by blood or breath tests.”³⁴⁴ The Court quoted the Fifth Circuit’s observation in *Von Raab* about the intimate nature of urination:

“There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.”³⁴⁵

The Court also recognized that chemical analysis of urine can reveal intimate medical facts about a person beyond the question of drug use, such as “whether he or she is epileptic, pregnant, or diabetic.”³⁴⁶

Nevertheless, the tests’ intrusiveness did not ultimately sway the Court in any of the five cases. Ironically, in the one case in which the Court *struck down* suspicionless urine testing, the procedures employed were the most protective of privacy.³⁴⁷ Still, even in the remaining cases, the Court found mitigating factors. In all four, the Court found that the test subjects had a diminished expectation of privacy,³⁴⁸ although the Court admitted this was the most questionable in *Earls*.³⁴⁹ The Court also found ameliorating the fact that most of the testing was not visually observed, although in at least three cases aural monitoring was required.³⁵⁰ In *Skinner*, the regulations provided for testing in a medical environment, which the Court found minimized the intrusion.³⁵¹ Finally, the Court found significant that urine was tested only for specified drugs,

344. *Id.* at 626.

345. *Id.* at 617 (quoting *Nat’l Treasury Emps. Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987)).

346. *Id.* at 617.

347. *See* *Chandler v. Miller*, 510 U.S. 305, 318 (1997) (holding that the “State could not be faulted for excessive intrusion” where the candidate could provide a urine specimen in the office of his or her private physician, and where results of the test were given first to the candidate, who controlled further dissemination).

348. *See* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995) (student athletes are accustomed to “communal undress” before and after practices and events, and knowingly subject themselves to higher degree of regulation, including routine physicals, than other students); *Skinner*, 489 U.S. at 627 (railroad employees participate in an “industry that is regulated pervasively to ensure safety”); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 672 (1989) (government employees required to carry firearms or involved in drug interdiction “reasonably should expect effective inquiry into their fitness and probity”).

349. *See* *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 831 (2002) (finding that although students participating in nonathletic extracurricular activities are not subject to regular physicals and communal undress and therefore may have a stronger expectation of privacy than athletes, this distinction was “not essential to our decision in *Vernonia*”); *see also id.* at 847–48 (Ginsburg, J., dissenting) (disputing that nonathletes carried same reduced expectations of privacy as athletes).

350. *Id.* at 832 (majority opinion); *Vernonia*, 515 U.S. at 658 (girls were monitored only aurally; boys “produce[d] samples at a urinal along a wall” while fully clothed and “observed from behind, if at all”); *Von Raab*, 489 U.S. at 661, 672 n.2; *cf. Skinner*, 489 U.S. at 626 (regulations did not require monitoring, although they recommended it as a best practice and the field manual called for “direct observation” during testing); *id.* at 646 (Marshall, J., dissenting) (same).

351. *Skinner*, 489 U.S. at 626–27; *see also Von Raab*, 489 U.S. at 661 n.1.

which the Court saw as minimizing the intrusion on informational privacy.³⁵²

Turning to the government's interest, the Court found in all four cases that the government had a strong interest in reducing drug use and protecting public safety, that this interest justified the intrusions on individual privacy, and that requiring individualized suspicion would undermine the goals and effectiveness of each of the policies.³⁵³ The Court supported the public safety rationale even in *Earls*, where the school had not demonstrated a significant problem of drug use among its students,³⁵⁴ let alone among those engaged in nonathletic extracurricular activities.³⁵⁵

In contrast, although a generalized national problem of drug use was deemed sufficient to justify the testing in *Earls*, the Court was unpersuaded by a similar rationale in *Chandler v. Miller*.³⁵⁶ There, the Court held that the government had not established a sufficiently immediate problem of drug use to justify blanket urine testing of candidates running for state office in Georgia, even though the Court found that the testing procedures in *Chandler* were minimally intrusive.³⁵⁷ The Court cited the absence of any demonstrated problem of drug use among elected officials.³⁵⁸ It also seemed to consider the existence of less intrusive alternatives, although the Court has repeatedly asserted that such an examination is unnecessary when determining Fourth Amendment reasonableness.³⁵⁹ Thus, the *Chandler* Court noted that "respondents have offered no reason why ordinary law enforcement methods would not suffice to apprehend . . . addicted individuals, should they appear in the limelight of a public stage."³⁶⁰

In addition to suspicionless urine testing, the Court has considered—and invalidated—the use of urine tests targeting pregnant women believed to have used cocaine while pregnant. In *Ferguson v. City of Charleston*,³⁶¹ the Medical University of South Carolina (MUSC), in cooperation with the city's solicitor, adopted a policy requiring the noncon-

352. *Vernonia*, 515 U.S. at 658; *Von Raab*, 489 U.S. at 662, 672 n.2. *But see Skinner*, 489 U.S. at 626 n.7 (admitting that when employees produce urine samples they must disclose medications taken during last 30 days and that this procedure "permits the Government to learn certain private medical facts that an employee might prefer not to disclose," but concluding "this procedure [is not] a significant invasion of privacy").

353. *Earls*, 536 U.S. 822; *Vernonia*, 515 U.S. 646; *Skinner*, 489 U.S. 602; *Von Raab*, 489 U.S. 656.

354. *Compare Earls*, 536 U.S. at 834–36 (supporting drug testing in a school that did not have a "pervasive" drug problem), and *id.* at 849 (Ginsburg, J., dissenting) (criticizing majority for deferring to an undemonstrated threat at the school), with *Vernonia*, 515 U.S. at 662–63 (describing rampant drug use at school among students, especially athletes).

355. *See Earls*, 536 U.S. at 853 (Ginsburg, J., dissenting) (asserting that this population was in fact at reduced risk of drug use).

356. 520 U.S. 305 (1997).

357. *See id.* at 318–19; *see also supra* note 320 and accompanying text.

358. *Chandler*, 520 U.S. at 319.

359. *See, e.g., supra* note 297 and accompanying text.

360. 520 U.S. at 320.

361. 532 U.S. 67 (2001).

sensual³⁶² testing of pregnant women for cocaine use through a urine drug screen if they met at least one of nine criteria.³⁶³ The policy provided for police to be notified, and the patient arrested, after two positive tests.³⁶⁴

The Court analyzed the policy under the special needs doctrine. The policy did not call for blanket, suspicionless testing of all pregnant women, but nor did MUSC have probable cause, or even reasonable suspicion, to test the women.³⁶⁵ In fact, the criteria for testing were negligibly correlated to potential drug use. For example, they included whether a woman had received no prenatal care, little prenatal care, or late prenatal care or whether she had experienced certain conditions including placental abruption or intrauterine fetal death.³⁶⁶

The Court began by examining the extent of the intrusion and found the invasion of privacy “far more substantial” than in *Chandler*, *Vernonia*, *Skinner*, and *Von Raab*.³⁶⁷ In those cases, “there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties.”³⁶⁸ But the Court found the critical distinction between *Ferguson* and the other cases to lie in the governmental purpose underlying the searches:

In each of those earlier cases, the “special need” that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State’s general interest in law enforcement. . . . In this case, however, the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment.³⁶⁹

MUSC defended its ultimate motive as getting women “into substance abuse treatment and off of drugs” rather than prosecution.³⁷⁰ The Court, however, held that a laudable ultimate social purpose could not save a program directly linked to law enforcement, since “law enforcement involvement always serves some broader social purpose or objective.”³⁷¹

362. The question of consent had been disputed in the case. The Court did not resolve this question but “assume[d] for purposes of [its] decision . . . that the searches were conducted without the informed consent of the patients.” *Id.* at 76.

363. *Id.* at 71. Some women were also tested after labor. *Id.* at 72.

364. *Id.* The policy targeted almost exclusively African American women. *Id.* For the importance of judicial review to halt the discriminatory use of bodily intrusions, see *infra* text accompanying notes 451–54.

365. *Ferguson*, at 532 U.S. at 76–77 (describing lower court findings to this effect).

366. *Id.* at 71 n.4, 77 n.10 (“[MUSC fails to] point to any evidence in the record indicating that any of the nine search criteria was more apt to be caused by cocaine use than by some other factor, such as malnutrition, illness, or indigency.”). While MUSC did not concede that its searches were entirely suspicionless, its “legal argument . . . rest[ed] on the premise that the policy would be valid even if the tests were conducted randomly.” *Id.* at 77 n.10.

367. *Id.* at 77–81.

368. *Id.* at 78.

369. *Id.* at 79–80; see also *id.* at 81 (“[T]he purpose actually served by the MUSC searches ‘is ultimately indistinguishable from the general interest in crime control.’”).

370. *Id.* at 82–83.

371. *Id.* at 83–86.

C. *Physical Restraint and Corporal Punishment*

1. *Excessive Force*

Excessive force cases constitute another body of case law too extensive to be reviewed exhaustively here. The cases, moreover, often differ from most of the other bodily intrusion cases discussed in this Article in that they do not involve a deliberate and continuing policy or practice that the government seeks to justify. The Court in these cases, however, has established rules about the intersection between substantive due process claims and the Fourth Amendment that have affected how the Court now analyzes other bodily intrusion cases. In *Graham v. Connor*,³⁷² the Supreme Court held that § 1983 claims of excessive force by law enforcement or corrections officials were not properly analyzed as substantive due process claims but rather must be brought under a more specific constitutional standard where applicable, generally the Fourth or Eighth Amendment.³⁷³ In particular, the Court held that

all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other “seizure” of a free citizen should be analyzed under the Fourth Amendment and its “reasonableness” standard, rather than under a “substantive due process” approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of “substantive due process,” must be the guide for analyzing these claims.³⁷⁴

For fifteen years before *Graham*, most lower federal courts had followed the lead of the Second Circuit in *Johnson v. Glick*,³⁷⁵ applying substantive due process doctrine to excessive force claims and adopting *Glick*’s four-part test to determine whether a substantive due process violation had occurred.³⁷⁶ The *Graham* Court disagreed that substantive due process should be applied “indiscriminately to all excessive force claims lodged against law enforcement and prison officials”³⁷⁷ But it conceded that due process may still provide the appropriate framework in some cases where it is not clear whether the Fourth Amendment applies, including

372. 490 U.S. 386 (1989).

373. *Id.* at 394.

374. *Id.* at 395. The Court also noted that, “[a]fter conviction, the Eighth Amendment ‘serves as the primary source of substantive protection . . . in cases . . . where the deliberate use of force is challenged as excessive and unjustified.’” *Id.* at 395 n.10 (citing *Whitley v. Albers*, 475 U.S. 312, 327 (1986)).

375. 481 F.2d 1028 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973).

376. *Graham*, 490 U.S. at 393. In *Glick*, Judge Friendly wrote that in distinguishing between permissible and unconstitutional force by corrections officers, a court must look to factors including:

[1] the need for the application of force, [2] the relationship between the need and the amount of force that was used, [3] the extent of injury inflicted, [4] and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

481 F.2d at 1033.

377. 490 U.S. at 393.

those involving “the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins”³⁷⁸ As discussed above,³⁷⁹ the Court seems to have, at least implicitly, adopted the *Graham* doctrine in bodily intrusions cases in which the Fourth Amendment applies.

2. *Bodily Restraint of Mental Health Patients*

In *Youngberg v. Romeo*, the Supreme Court ruled that bodily restraint of mental health patients might in some circumstances violate the Due Process Clause.³⁸⁰ In *Youngberg*, the mother of Nicholas Romeo, an involuntarily committed patient at a mental health institution, filed suit challenging as unconstitutional his conditions of confinement.³⁸¹ Her claims included the assertion that Romeo was physically restrained for prolonged periods every day in violation of his constitutional rights to freedom of movement and freedom from bodily restraint.³⁸²

The Court acknowledged the existence of a right to “[l]iberty from bodily restraint [which] always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”³⁸³ The Court noted that the right is not absolute and stated that whether Romeo’s right was violated must be determined by balancing “‘the liberty of the individual’ and ‘the demands of an organized society.’”³⁸⁴ Citing *Bell v. Wolfish*³⁸⁵ the Court declared that restraints “‘reasonably related to legitimate government objectives and not tantamount to punishment’” were permissible.³⁸⁶ The Court admitted that this standard was “‘lower than the ‘compelling’ or ‘substantial’ necessity tests the Court of Appeals would require.’”³⁸⁷

Like in *Bell*, the Court showed great reluctance to second-guess professional judgment. It stated that the “proper balance” between liberty and governmental interests “only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable

378. *Id.* at 395 n.10.

379. *See supra* text accompanying notes 116–20.

380. 457 U.S. 307, 319 (1982).

381. Ms. Romeo had successfully petitioned to have her son committed to a state facility on a permanent basis, as she was unable to care for him or control his violence. *Id.* at 309.

382. *Id.* at 315–16. The restraints primarily consisted of “‘soft’ restraints” on Romeo’s arms. *Id.* at 311 n.4. Romeo also claimed the right to safe conditions of confinement and to minimally adequate training. *Id.* at 315–16.

383. *Id.* at 316 (internal quotation marks omitted). Romeo had also claimed a violation of the Eighth Amendment, but the Third Circuit held that the Eighth Amendment was “not an appropriate source for determining the rights of the involuntarily committed.” *Id.* at 312. Romeo no longer relied on this claim before the Supreme Court. *Id.* at 314 n.16.

384. *Id.* at 320 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

385. For a discussion of *Bell*, *see supra* text accompanying notes 293–310.

386. *Youngberg*, 457 U.S. at 320 (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)).

387. *Id.* at 322.

choices should have been made.”³⁸⁸ In contrast to *Bell*, however, the Court obliquely indicated that an inquiry into less restrictive alternatives might be appropriate. Referring to Romeo’s claim for adequate training,³⁸⁹ the Court ventured, “[i]t may well be unreasonable not to provide training when training could significantly reduce the need for restraints or the likelihood of violence.”³⁹⁰ The Court seemingly intended any such judgment to be left to “appropriate professional[s],” however, concluding that the decisions of such professionals should be accorded a “presumption of correctness.”³⁹¹

3. Corporal Punishment of Children

Other than in the case of strip searches, the Court has been highly deferential to school officials’ judgments that bodily intrusions are necessary. In *Vernonia* and *Earls*, for example, where the Court upheld urine testing in the school setting, the Court accorded a deference to school officials similar to that it granted to prison authorities in *Bell* and *Florence*, and mental health professionals in *Youngberg*.³⁹² *Ingraham v. Wright*³⁹³ is another case in which the Court subordinated students’ rights against bodily intrusions to professional judgment.³⁹⁴ *Ingraham* addressed the constitutionality of “the paddling of students as a means of maintaining school discipline.”³⁹⁵ The Court pointed out that, while corporal punishment had generally been abandoned in prisons, the practice was still prevalent in schools.³⁹⁶ The Court also noted that expert and public opinion had been “sharply divided on the practice . . . for more than a century.”³⁹⁷

The Court’s certiorari grant encompassed two claims: (1) whether the paddling constituted cruel and unusual punishment in violation of the Eighth Amendment, and (2) whether, if paddling is constitutionally permissible, students retained a procedural due process right to prior notice and an opportunity to be heard.³⁹⁸ The plaintiffs had also alleged a substantive due process violation, but the Court declined to grant review of

388. *Id.* at 321 (internal quotation marks omitted); *see also id.* at 322 (applying a stricter standard of review would “place an undue burden on the administration of institutions such as Pennhurst and also would restrict unnecessarily the exercise of professional judgment as to the needs of residents”).

389. *See supra* text accompanying note 380.

390. *Youngberg*, 457 U.S. at 324.

391. *Id.*

392. *See supra* Parts III.B.4, III.B.5, III.C.2.

393. 430 U.S. 651 (1977).

394. *See id.* at 681–82 (“Assessment of the need for, and the appropriate means of maintaining, school discipline is committed generally to the discretion of school authorities subject to state law.”).

395. *Id.* at 653. Dade County School Board policy

authorized punishment consist[ing] of paddling the recalcitrant student on the buttocks with a flat wooden paddle measuring less than two feet long, three to four inches wide, and about one-half inch thick. The normal punishment was limited to one to five “licks” or blows with the paddle and resulted in no apparent physical injury to the student.

Id. at 656–57.

396. *Id.* at 660.

397. *Id.* at 660–61.

398. *Id.* at 653.

that claim.³⁹⁹ The Court's refusal to consider the substantive due process claim could suggest that it believed the claim was without merit, and that the Eighth Amendment provided the only potential source of substantive protection. Portions of the majority opinion seem to support this interpretation.⁴⁰⁰ On the other hand, some lower courts have viewed the Court's reservation of the substantive due process question and its treatment of the procedural due process question as not foreclosing substantive due process claims.⁴⁰¹ In particular, the Fourth Circuit found that the predicate finding in the Court's procedural due process analysis—that corporal punishment in public schools implicates a constitutionally protected liberty interest—implies that some substantive right exists.⁴⁰²

Although the Supreme Court declined to examine the permissibility of corporal punishment under substantive due process, its Eighth Amendment analysis sheds some light on how the Court might view such a claim. The Court found the Eighth Amendment prohibition against cruel and unusual punishment inapplicable to the school setting, holding that the Amendment's prohibitions generally apply only to criminal punishments.⁴⁰³ The Court was not swayed by plaintiffs' suggestion that it was "anomalous" to allow "schoolchildren [to] be beaten without constitutional redress, while hardened criminals suffering the same beatings at the hands of their jailers might have a valid claim under the Eighth Amendment."⁴⁰⁴ Rather, the Court assured, "[t]he schoolchild has little need for the protection of the Eighth Amendment" because students are not physically restrained from leaving school during school hours (except when very young), students have the support of their families after school hours, and during school hours there are many potential witnesses should children be mistreated.⁴⁰⁵ The Court added that common law remedies afford children an additional safeguard in cases of excessive corporal punishment.⁴⁰⁶

As mentioned above, the Court's analysis of the procedural due process claim hinged on its initial substantive finding that "corporal pun-

399. *Id.* at 659 & n.12, 679 n.47 ("We have no occasion in this case . . . to decide whether or under what circumstances corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause."); *see also id.* at 689 n.5 (White, J., dissenting).

400. *See, e.g., id.* at 670, 671, 670 n.39 ("[T]he logic of the dissent would make the judgment of which disciplinary punishments are reasonable and which are excessive a matter of constitutional principle in every case, to be decided ultimately by this Court The Eighth Amendment is inapplicable. The *pertinent constitutional question* is whether the imposition is consonant with the requirements of [procedural] due process." (emphasis added)).

401. *See, e.g., Hall v. Tawney*, 621 F.2d 607, 611 (4th Cir. 1980) (discussing *Ingraham* and concluding that "there may be circumstances under which specific corporal punishment administered by state school officials gives rise to an independent federal cause of action to vindicate substantive due process rights under 42 U.S.C. § 1983").

402. *Id.*; *see infra* text accompanying notes 400–06 (discussing procedural due process claim).

403. *Ingraham*, 430 U.S. at 666–67, 669 n.37 (reserving question whether some other conditions, such as involuntary civil commitment, might trigger Eighth Amendment protections).

404. *Id.* at 669.

405. *Id.* at 670.

406. *Id.*

ishment in public schools implicates a constitutionally protected liberty interest.”⁴⁰⁷ The Court declared, “Among the historic liberties [the Due Process Clause was intended to protect] was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.”⁴⁰⁸ The Court noted that it had not yet fully defined the contours of this liberty interest but recognized that it encompasses a right against some bodily intrusions.⁴⁰⁹ The Court found that this interest was at stake in the case, albeit only as to physical punishment that met the threshold of “inflicting appreciable physical pain.”⁴¹⁰ Because there existed a “common-law privilege permitting teachers[] to inflict reasonable corporal punishment on children in their care,” however, the Court found that customary advance procedural safeguards were not relevant.⁴¹¹ Rather, the question was whether common law remedies afforded due process. The Court concluded that the remedies provided by Florida law, including traditional judicial hearings and the possibility of an award of damages, were “fully adequate to afford due process.”⁴¹² The Court added that advance process, while concededly a better protection against abuse, would impose unacceptable administrative costs.⁴¹³

IV. GOVERNMENT-COMPELLED BODILY INTRUSIONS REEXAMINED

A. *Substantive Due Process as Matrix*

The right against government-compelled bodily intrusions is a substantive due process right. This is where the Supreme Court originally located it, and—given the Court’s earlier rulings—this is where it logically belongs. “Our Nation’s history, legal traditions, and practices . . . provide the crucial ‘guideposts’ . . . [in the Court’s] exposition of the Due Process Clause.”⁴¹⁴ Both common law history⁴¹⁵ and constitutional privacy doctrine amply support recognition of a substantive due process right against bodily intrusions. The Court’s most important decisions about bodily privacy have all been decided under the due process clause.⁴¹⁶

407. *Id.* at 672.

408. *Id.* at 673.

409. *Id.* at 673–74 (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251–52 (1891)).

410. *Id.* at 674 (noting that there is “a de minimis level of imposition with which the Constitution is not concerned”).

411. *Id.*

412. *Id.* at 672, 676–78. The Court found the fact that no reported decision in Florida had ever recognized a damage remedy for corporal punishment to signify only that excessive punishment in Florida was “exceedingly rare.” *Id.* at 677 n.45.

413. *Id.* at 678–82.

414. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

415. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 304–06 (1990) (Brennan, J., dissenting) (tracing common law history of right “to determine what shall be done with one’s own body”).

416. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Cruzan*, 497 U.S. 261; *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

It is true that the current Court is sharply divided over whether the Constitution protects unenumerated rights in the first place. It is also reluctant to “break new ground” in recognizing substantive due process rights.⁴¹⁷ And even when it recognizes such rights, the Court has become increasingly reluctant to call them fundamental.⁴¹⁸ But the right against bodily intrusions should be a cinch for the Court. This is not a controversial or new right, but one “as old as the common law.”⁴¹⁹ Moreover, the right is clearly fundamental.⁴²⁰ To determine whether a substantive due process right is fundamental, the Court asks whether the right is deeply rooted in the nation’s history and traditions, and whether it is implicit in the concept of ordered liberty.⁴²¹ The right not to have one’s person invaded without consent has been recognized as a common law right throughout our history, and by the Supreme Court specifically since at least 1891.⁴²² That there is a constitutional right against such intrusions when imposed by the government is only logical in light of this venerated common law history.⁴²³ In fact, the Supreme Court, in an opinion authored by Justice Rehnquist and joined by Justices Scalia and Thomas, already conceded that the right to refuse unwanted medical interventions, a subset of the right against bodily intrusions, is “entirely consistent with this Nation’s history and constitutional traditions.”⁴²⁴ The right is also clearly implicit in the concept of ordered liberty. “Ordered” implies some sacrifice for the sake of the whole, but a government that holds the authority to invade the bodies of its citizens with impunity is not a government of liberty, it is totalitarian.

The Supreme Court has created unfairness and confusion for litigants by refusing to consistently recognize the validity of challenging bodily intrusions as violations of substantive due process. The *Graham* doctrine forces litigants to choose another provision to the exclusion of substantive due process whenever it “covers” their claim. *Ingraham*’s choice of the Eighth Amendment over substantive due process in its certiorari grant, only to reject that claim on the merits,⁴²⁵ shows how the *Graham* doctrine puts bodily intrusion claimants in an impossible position. If in fact a specific provision provides no protection for a plaintiff,

417. *Glucksberg*, 521 U.S. at 720, 735 (refusing to recognize right to physician-assisted suicide) (internal quotation marks omitted).

418. *E.g.*, *Lawrence*, 539 U.S. at 593; *Casey*, 505 U.S. at 840. *But see Glucksberg*, 521 U.S. at 720 (explaining that the due process clause “provides heightened protection against government interference with certain fundamental rights and liberty interests” and listing cases).

419. Warren & Brandeis, *supra* note 15, at 193.

420. *Glucksberg*, 521 U.S. at 720 (reciting “long line of cases” in which the Supreme Court has recognized fundamental substantive due process rights).

421. *Id.* at 721.

422. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

423. *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 304 (1990) (Brennan, J., dissenting).

424. *Glucksberg*, 521 U.S. at 725.

425. *Ingraham* was decided before *Graham*, but the way in which its choice of issues on review forced plaintiffs with a due process claim to litigate exclusively under the Eighth Amendment presented the exact same problem. *See supra* note 370 and accompanying text.

how is she even to know that it “covers” her claim and therefore is the claim she should be pleading (in place of substantive due process)?⁴²⁶

These problems would be resolved if the Court would recognize substantive due process as the matrix for the right against bodily intrusions. Thus, constitutional analysis of government-compelled bodily intrusions should always at least begin with substantive due process.⁴²⁷ Once the fundamental nature of the right is recognized, the proper framework—strict scrutiny—is predetermined and familiar,⁴²⁸ and affords much clearer guidance than the Supreme Court currently provides, even under the supposedly more textually explicit Fourth Amendment.

Since *Graham*, the Supreme Court has taken the opposite tack and has analyzed bodily searches and seizures exclusively under the Fourth Amendment wherever it applies.⁴²⁹ This unspoken application of the *Graham* doctrine should be reconsidered.⁴³⁰ The *Graham* doctrine is intended to apply to rights not clearly encompassed by substantive due process doctrine.⁴³¹ Even proponents of the doctrine have acknowledged the longstanding establishment of bodily integrity as a substantive due process right. In *Albright v. Oliver*, the Court applied *Graham* to a malicious prosecution case, reaffirming that the Court should favor the application of “explicit textual source[s] of constitutional protection”⁴³² over the “scarce and open ended guideposts” of substantive due process.⁴³³ Yet in arguing that the Court should not recognize a substantive due process right against false prosecution, Justice Rehnquist pointed out that, in contrast, “[t]he protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity” (to which the right against bodily intrusions belongs).⁴³⁴

Moreover, the Court’s apparent preference for analyzing bodily intrusions under the Fourth Amendment does not make sense on the merits. The amendment does not supply a superior framework for assessing the right. First, the amendment applies only to a subset of bodily intru-

426. See Massaro, *supra* note 69, at 1090 (arguing that *Graham* may “create unanticipated interpretation complexities” for courts and litigants concerning whether a claim is “covered” by a more specific amendment).

427. See *infra* Part IV.B. My argument is not that substantive due process should be applied to the exclusion of other provisions (a sort of reverse-*Graham* doctrine). See *infra* text accompanying notes 443–46.

428. See *Glucksberg*, 521 U.S. at 721 (“[T]he Fourteenth Amendment ‘forbids the government to infringe . . . “fundamental” liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.’” (citation omitted)).

429. See *supra* Part III.C.1.

430. Some commentators have criticized the *Graham* doctrine on its own terms. See, e.g., Massaro, *supra* note 69, at 1116, 1121 (criticizing *Graham* for creating “[t]wo wholly incompatible logics” within substantive due process doctrine—one limited to bill of rights protections and one that recognizes unenumerated rights).

431. See *Graham v. Connor*, 490 U.S. 386, 393–95 (1989).

432. 510 U.S. 266, 273 (quoting *Graham*, 490 U.S. at 395) (internal quotation marks omitted).

433. *Id.* at 275 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)) (internal quotation marks omitted).

434. *Id.* at 272 (emphasis added).

sions cases. To treat the Fourth Amendment as the exclusive source of constitutional protection for bodily intrusions that happen to be searches is to cleave the constitutional analysis of bodily intrusions for no obvious reason. The identical intrusion by implication could receive wholly different constitutional treatment depending on whether it happens to be a search. For example, a surgery (say, to remove a bullet) performed to extract evidence would be analyzed under the Fourth Amendment, but the same surgery performed to save the life of a parent of minor children would be analyzed under substantive due process.⁴³⁵ Of course the government's purpose is different in each case, but this difference should matter only in the application of the relevant test. Using the government's interest to determine which constitutional provision is applicable, to the exclusion of all others, is the tail wagging the dog.

This approach is particularly illogical since the Supreme Court's own definition of a Fourth Amendment "search" suggests its commonality with all government-imposed bodily intrusions: "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."⁴³⁶ This broad definition could easily double as a generic definition for bodily intrusions in general, reflecting the futility of according different and mutually exclusive constitutional provisions to different types of intrusions based on whether the government is searching for something or not. From the recipient's perspective, an intrusion that meets the Fourth Amendment's definition is the same violation as one that would be analyzed under due process.

Second, the Fourth Amendment does not provide a clearer framework than substantive due process for evaluating bodily intrusions.⁴³⁷ The supposed benefit of applying the Fourth Amendment is that it provides a more "explicit textual source of [federal] constitutional protection" than the "generalized notion of 'substantive due process.'"⁴³⁸ This distinction seems intuitively correct, but it does not reflect the reality of current Fourth Amendment doctrine. The Court increasingly ignores the express provisions of the Fourth Amendment that supply its purported advantage over the substantive due process analysis. As discussed above, in an increasingly broad swath of contexts the Court has dispensed with

435. An adult might refuse such surgery for religious reasons. See, e.g., Paul Vitello, *Christian Science Church Seeks Truce With Modern Medicine*, N.Y. TIMES, Mar. 23, 2010, <http://www.nytimes.com/2010/03/24/nyregion/24heal.html> (explaining that, for over 130 years, Christian Scientists "have been taught to avoid doctors at all cost"). State courts have addressed similar claims in the context of competent, adult Jehovah's Witnesses refusing blood transfusions. See, e.g., *In re Fetus Brown*, 689 N.E.2d 397 (Ill. App. Ct. 1997) (analyzing claim under federal substantive due process right to refuse medical treatment); *In re Matter of Patricia Dubreuil*, 629 So. 2d 819, 822 (Fla. 1993) (analyzing claim under state constitutional rights of privacy and free exercise of religion).

436. See *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

437. See Kreimer, *supra* note 2, at 437 ("[Graham's] reference to the Fourth Amendment text [does not] substantially confine judicial discretion; the task of construing the class of 'unreasonable seizures' is equally amenable to historical inquiry, . . . moral casuistry or free-form balancing . . ."); Massaro, *supra* note 69, at 1090 (pointing out that there are ambiguities in other constitutional provisions and that this is therefore an unconvincing reason to allow those provisions to trump substantive due process).

438. *Graham v. Connor*, 490 U.S. 386, 395 (1989).

both the warrant requirement and the probable cause requirement.⁴³⁹ In place of this, it employs a nebulous balancing test that assesses “reasonableness” by simply weighing the government’s interest against the intrusion.⁴⁴⁰ This test certainly provides no clearer “guideposts” than the strict scrutiny framework traditionally applied under substantive due process fundamental rights analysis. Indeed, it is not at all clear whether this balancing test should resemble strict scrutiny, rational basis review, or some other standard, or whether it depends on the context.⁴⁴¹

The special needs doctrine is particularly problematic as applied to bodily intrusions. “[S]pecial needs[] beyond the normal need for law enforcement” are typically interests, such as public health and safety, to which the Court tends to be highly deferential.⁴⁴² This deference often affects how the Court assesses the other side of the balance, the individual’s interests. For example, in addressing urine testing in schools, the Court has assumed that the fact that testing does not lead to criminal consequences ameliorates its intrusiveness. In *Earls*, the Court emphasized that positive drug tests led to no criminal or even disciplinary action, but rather simply disqualified the student from participating in extracurricular activities.⁴⁴³ But the consequences surely did not seem minimal to students. First, after a single positive result, students’ parents or guardians were notified and summoned to a meeting at the school.⁴⁴⁴ Moreover, disqualification from activities is punitive. The testing in *Earls* extended to students engaged in nonathletic activities, for which drug use posed no particular danger.⁴⁴⁵ Rather, the policy was clearly meant to punish by making an example out of students who failed the tests. While this punishment is of course less severe than a criminal punishment, it is precisely what makes the testing humiliating and stressful. Such testing carries a suggestion of guilt that is absent from high school physical examinations, which the Court dubiously suggested are comparable.⁴⁴⁶

The point here is not that the Court should never analyze bodily searches under the Fourth Amendment. But it should not force claimants to litigate solely under that amendment. In all other contexts, litigants are not confined to a single constitutional provision in seeking re-

439. See *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 637–38 (Marshall, J., dissenting); *supra* Part II.B.2.

440. See *Skinner*, 489 U.S. at 637–38.

441. In *Board of Education of Independent School District No. 92 v. Earls*, the Court’s formulation sounded much like rational basis review. See 536 U.S. 822, 830 (2002) (“[Appropriate test is] a fact-specific balancing of the intrusion on the children’s Fourth Amendment rights against the promotion of legitimate governmental interests.”).

442. *Id.* at 829, 830, 834, 837–38.

443. *Id.* at 833.

444. *Id.*

445. *Id.* at 835.

446. *Id.* at 830–31.

lief.⁴⁴⁷ It is wrong to force claimants to abandon a valid substantive due process claim in favor of a potentially less-protective alternative amendment. To do so is “to force the square peg of a substantive due process claim into the round hole of a different legal claim.”⁴⁴⁸ Ironically, even as the Court forces claims into compartments the claimants have not chosen, the Court’s “preferred specific textual provision [often] yields little or no protection for the party invoking it.”⁴⁴⁹ The Court’s assessment that a specific constitutional provision is the relevant one for analysis does not necessarily mean that it will afford the claimant relief.⁴⁵⁰ If a claimant has a valid due process argument, the Court should consider it.

If the Court were to settle on substantive due process as the matrix for bodily intrusions claims, two options would be available to the Court in search and seizure cases. The Court could continue to entertain both claims, as it did pre-*Graham*.⁴⁵¹ It is of course likely that if the due process claim fails, the Fourth Amendment claim will too. The same right that is insufficiently weighty under due process will not fare well against the government’s interests in the Fourth Amendment balancing test.⁴⁵² And conversely, a successful due process claim will generally obviate the need to consider the Fourth Amendment at all. But this merely underscores the close link between the two frameworks and the artificiality of banishing all consideration of substantive due process from Fourth Amendment analysis in the bodily intrusions context.

Even if the Supreme Court is disinclined to entertain substantive due process claims alongside the Fourth Amendment, it should look to the substantive due process framework to help determine Fourth Amendment reasonableness. Traditional due process analysis will help put some meat on the bones of the balancing test, helping the Court to determine when an intrusion is particularly intrusive, and when governmental purposes are sufficiently weighty to overcome significant intrusions. This process of “constitutional borrowing” is a well-established practice.⁴⁵³ It is especially logical to borrow from substantive due process doctrine in assessing state-level bodily intrusions under the Fourth

447. See Kreimer, *supra* note 2, at 436 (“On its face, a doctrine requiring an election of constitutional rights is anomalous; the usual analysis recognizes that state action can violate more than one constitutional provision.”); Massaro, *supra* note 69, at 1090, 1113 (stating the same thing).

448. Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 834 (2003).

449. Massaro, *supra* note 69, at 1091.

450. See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 659 & n.12, 679 n.47 (1977) (refusing to review substantive due process claim but ruling Eighth Amendment does not apply to school setting); *supra* note 392 and accompanying text.

451. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 544 (1979) (addressing both due process and Fourth Amendment claims on the merits); *id.* at 580 (Stevens, J., dissenting) (identifying as the most important part of the Court’s opinion its admission that due process was relevant); *Schmerber v. California*, 384 U.S. 757, 759 (1966) (addressing both due process and Fourth Amendment claims on the merits); *id.* at 778 (Douglas, J., dissenting) (arguing that a blood draw is unconstitutional under substantive due process).

452. This was the result in both *Bell* and *Schmerber*. See *supra* note 451.

453. See generally Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010).

Amendment. After all, as Professor Kreimer points out, the Fourth Amendment is not textually applicable to the states and is enforced against them only through the Court's broad account of due process.⁴⁵⁴

Looking to the strict scrutiny test applied under substantive due process when evaluating bodily intrusions for Fourth Amendment reasonableness should remind the Court to pay greater attention to all aspects—including psychological—of bodily searches. It should also remind the Court to consider less intrusive alternatives. Thus, for example, when the Fifth Circuit recently considered the Fourth Amendment reasonableness of a proctoscopic search for drugs, it found the search unreasonable both because of the search's extreme psychological intrusiveness and because less drastic means were readily available.⁴⁵⁵ Both of these inquiries are often neglected under the bare-bones Fourth Amendment balancing test.⁴⁵⁶

The Venn diagram below depicts bodily searches as the area of overlap between substantive due process bodily intrusions doctrine and Fourth Amendment search doctrine. Recent Supreme Court bodily search cases treat the overlapping area as one that can simply be excised from due process doctrine. But the excision is arbitrary. A more rational approach would treat the overlap as an area implicating both constitutional provisions or, at the very least, as a signal that any Fourth Amendment analysis must borrow heavily from the relevant substantive due process doctrine.

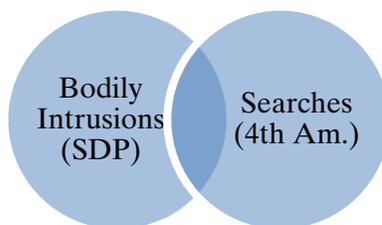
454. Kreimer, *supra* note 2, at 436–37 (“Whatever the virtues of Fourth Amendment ‘reasonableness’ as a guide to the limits on state action, . . . they hardly arise from the textual enumeration of the phrase in the original Bill of Rights, which applies against the states only by grace of the Court’s account of a well-ordered society.”).

455. [Although] the magnitude/danger of the proctoscopy appears to be slight[,] . . . the proctoscopy here was a greater affront to [defendant’s] dignitary interest than full-on exploratory surgery. Though sedated, [defendant] was conscious throughout the entire procedure. Moreover, the procedure targeted an area of the body that is highly personal and private. In our society, the thought of medical technicians, under the direction of police officers, involuntarily sedating and anally probing a conscious person is jarring. Such a procedure is degrading to the person being probed—both from his perspective and society’s. . . . [In addition,] there were other available avenues for obtaining this evidence, such as a cathartic or an enema. Such alternatives militate against society’s great interest “in conducting *the* procedure” used in this case—proctoscopy.

United States v. Gray, 669 F.3d 556, 564–65 (5th Cir. 2012) (citations omitted). Although the court found the proctoscopy unreasonable, it nevertheless admitted the evidence, finding that the “good faith” exception to the exclusionary rule applied, since the warrant did not clearly state that the proctoscopy was “off-limits.” *Id.* at 565–66.

456. See *supra* Part III.B.

FIGURE 1



B. *A Framework for Analyzing State-Imposed Bodily Intrusions*

Recognizing substantive due process as the matrix for constitutional protection against bodily intrusions points to a unified framework for analyzing such claims. This country's history and legal traditions demonstrate that the right against government-compelled bodily intrusions is fundamental. This fundamental right logically encompasses all bodily intrusions, not merely some subset such as medical treatment or non-search-related intrusions. Accordingly, any governmental action that significantly interferes with this right must be subjected to strict scrutiny.⁴⁵⁷

The well-established test for strict scrutiny requires that significant bodily intrusions be justified by a compelling governmental interest. The intrusion must also reflect means narrowly tailored to achieve that interest.⁴⁵⁸ Courts must therefore look at the existence and feasibility of less intrusive alternatives.⁴⁵⁹ Some intrusions are so egregious that they shock the conscience and should never be permitted. For example, the government should never forcibly remove an organ or other body part from a person in order to save another. On the other hand, some bodily intrusions are too negligible to trigger strict scrutiny.⁴⁶⁰ The first question, then, is how to distinguish significant from minor intrusions.

Bodily intrusions all implicate the body, but they may do so on different levels. When we imagine bodily intrusions, we may initially think of intrusions in which the government (or a nongovernmental party, acting pursuant to governmental command) touches us. We may also think of intrusions that produce physical pain, as with a needle injection, or subject us to physical risk, as with forced medication. But some bodily intrusions bear none of these physical aspects. Strip and body-cavity searches and some body scanners reveal intimate details about our bod-

457. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 303 (1990) (Brennan, J., dissenting) (citing *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978)). For insignificant intrusions, rational basis suffices. See *Zablocki*, 434 U.S. at 386. This Article does not address whether a lesser standard might apply in prisons pursuant to *Turner v. Safley*. See 482 U.S. 78 (1987).

458. *Reno v. Flores*, 507 U.S. 292, 302 (1993).

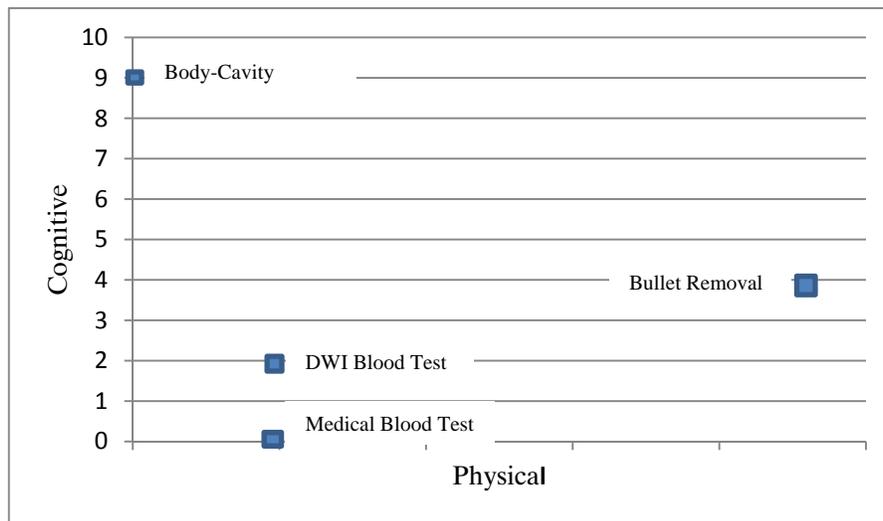
459. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-19, at 1333 (2d ed. 1988).

460. *Zablocki*, 434 U.S. at 386.

ies without any third party touching us at all, and generally without causing pain or risking our health and safety.⁴⁶¹

We can map bodily intrusions onto a graph (depicted below) with axes representing, respectively, the purely physical aspects of such intrusions and the purely psychological aspects. The “physical” axis represents the tangible effects an intrusion has on the body, such as the causation of physical pain, disfigurement, or other ensuing complication; the risk of injury to health; or the danger to life.⁴⁶² The “psychological” axis represents assaults on a person’s mental well-being, including his or her dignity, autonomy, and sense of safety and security.

TABLE 1



Courts and scholars discussing bodily intrusions most often focus on concerns represented by the “physical” axis of this graph. Bodily intrusions can of course cause pain. The stomach-pumping that Richard Rochin endured most certainly was a physically uncomfortable experience. They can also pose risks to health and safety. The attendant health risks of the proposed surgery to remove a bullet from Rudolph Lee were a major issue in *Winston v. Lee*. The Justices deciding *Washington v. Harper* and *Riggins v. Nevada* detailed the disturbing side effects anti-psychotic medications may cause.⁴⁶³

But the physical dimensions of a bodily intrusion are only one part of what makes the intrusion disturbing to an individual, and indeed they may not be the most distressing part. Forced bodily intrusions impose

461. See *infra* Part IV.B (discussing public concern about health risks of backscatter X-ray technology used in some body scanners).

462. TRIBE, *supra* note 459, § 15–19, at 1333 (suggesting that courts should invalidate government-compelled bodily intrusions that carry these consequences).

463. See *Riggins v. Nevada*, 504 U.S. 127, 134 (1992); *Washington v. Harper*, 494 U.S. 210, 229 (1990).

psychological harms, including what Daniel Solove calls harms of “exposure.”⁴⁶⁴ These are “dignitary harms,” such as “the harms of incivility, lack of respect, or causing emotional angst.”⁴⁶⁵ In this sense, bodily intrusions bear a kinship to other types of privacy invasions that do not involve the body at all, such as violations of informational privacy.⁴⁶⁶ Yet bodily intrusions are immediate and direct in ways that sharpen the invasion. Virtually all government-compelled bodily intrusions have some psychological dimension, regardless of where they register on the “physical” axis. By definition, these intrusions are not voluntary.⁴⁶⁷ Thus, the intrusion can never be comparable to the identical action performed in a different context with the subject’s consent.⁴⁶⁸ When the government invades our bodies without our invitation, we feel its power acutely.

Purely psychological bodily intrusions involve the gathering or revealing of information about, or using, our bodies. These intrusions naturally reveal whatever information the government seeks, which implicates individuals’ separate interest in informational privacy.⁴⁶⁹ But many bodily intrusions also collect and reveal information that is of no official interest to the government. Yet it is often precisely this “irrelevant” information whose revelation most disturbs the subject of a compelled bodily search.

For example, when a body is scanned at the airport, the government seeks to know whether the subject has hidden weapons on her person. The government has no interest in knowing whether the person has a colostomy bag. If the scanner, however, unavoidably conveys this information to the government,⁴⁷⁰ the humiliating aspect of the search is not the government’s knowledge of whether she is carrying a weapon. Rather, it is her awareness that the government agents who inspected her now know of this intimate (yet wholly extraneous, from the government’s perspective) fact about her private life. Indeed, a search need not reveal anything more unusual than a person’s naked body to cause that person great anxiety. Intrusions that suggest the subject’s potential guilt or moral culpability, whether criminal or not, especially threaten a person’s dignity. While people have differing levels of comfort with appearing naked before others, disrobing for a medical visit or in a gym locker

464. Solove, *supra* note 15, at 487–91 (discussing nonbodily invasions of privacy).

465. *Id.* at 487.

466. *See id.*; Warren & Brandeis, *supra* note 15, at 196 (“[M]odern enterprise and invention have, through invasions upon [a person’s] privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.”).

467. *Cf. infra* Parts IV.C.1 & IV.C.2 (discussing voluntariness in contexts of blood tests and mandatory ultrasounds).

468. *See* *Winston v. Lee*, 470 U.S. 753, 765 (1985) (noting that general anesthesia and surgery is normally not considered demeaning, but here “the Commonwealth proposes to take control of respondent’s body, to ‘drug this citizen—not yet convicted of a criminal offense—with narcotics and barbiturates into a state of unconsciousness,’ and then to search beneath his skin for evidence of a crime.” (quoting Court of Appeals) (citation omitted)).

469. *See* Solove, *supra* note 15, at 487.

470. *See* SUSAN N. HERMAN, *TAKING LIBERTIES: THE WAR ON TERROR AND THE EROSION OF AMERICAN DEMOCRACY* 7–81 (2011) (discussing privacy concerns raised by first generation of body scanners the Transportation Security Administration installed in airports starting in 2010).

room carries no connotation of guilt. Having intimate bodily details revealed by an airport scanner, or in a pretrial strip or body-cavity search, forces a person into a vulnerable position on the assumption that the person has, or may have, done something wrong.⁴⁷¹

The Supreme Court's Fourth Amendment analysis of home searches reflects the understanding that physical touching is not the *sine qua non* of an intrusive search. For example, in *Kyllo v. United States*, the Supreme Court recognized that police use of a thermal-imaging device aimed at a home is no less a "search" than a physical invasion.⁴⁷² The Court pointed out that such searches, like physical searches, could capture innocent details and that, "[i]n the home, . . . all details are intimate details, because the entire area is held safe from prying government eyes."⁴⁷³ Likewise, searches of the body inevitably yield intimate and potentially embarrassing details regardless of whether the body is touched.

Bodily intrusions may cause heightened psychological harms when they target a minority, or politically vulnerable or unpopular group, such as welfare recipients, abortion patients, or children. For example, because of the greater extent of government involvement in their lives, the poor may be more commonly subjected to unwanted touchings.⁴⁷⁴ The awareness that one's economic condition opens the door to more intrusions makes those intrusions all the more offensive and degrading. Similarly, intrusions raise greater concerns when government officials have discretion in choosing their subject. There may be morally offensive profiling involved in the selection.⁴⁷⁵ An intrusion imposed randomly or on everyone, including the economically privileged and politically well-connected, is likely to seem less distasteful. Of course, equal-opportunity imposition may not be enough to overcome significant physical or psychological intrusions, especially where less intrusive alternatives are available. Where this is the case, however, the political process may be effective in halting or minimizing the intrusion, obviating the need for judicial review.⁴⁷⁶

In assessing whether a bodily intrusion is sufficiently severe to warrant strict scrutiny, courts should evaluate its impact both objectively and subjectively. The objective view asks whether the intrusion "infringes an expectation of privacy that society is prepared to recognize as reasonable."⁴⁷⁷ This perspective may sometimes work to justify an intrusion in

471. Of course, these examples do not suggest guilt to an equal degree. In an airport, where every passenger is screened in a setting that itself does not imply wrongdoing, most will perceive the screening as far less intrusive than a strip or body-cavity search in an incarceration setting.

472. 533 U.S. 27, 34–35 (2001).

473. *Id.* at 37.

474. *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 583 n.12 (Stevens, J., dissenting); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997); Kreimer, *supra* note 2, at 451.

475. *See* HERMAN, *supra* note 470, at 81–85; *see also, e.g.*, *supra* notes 354–61 and accompanying text (discussing *Ferguson* case, in which low-income, pregnant black women were targeted for drug testing).

476. *See, e.g.*, *infra* text accompanying notes 482–93 (discussing TSA scanners).

477. *Skinner v. Ry. Labor Excs.' Ass'n.*, 489 U.S. 602, 616 (1989).

the face of subjective qualms.⁴⁷⁸ But the objective view may also help to show why an intrusion should be prohibited. Just because an individual has come to accept a particular intrusion does not mean that we as a society should be prepared to accept it as reasonable. Otherwise the government could justify intrusions simply by imposing them and thereby altering subjective expectations.⁴⁷⁹ For example, there is indisputably a reduced expectation of privacy in prison, especially post-conviction, but the government should not be able to further reduce expectations simply by layering on the intrusions.⁴⁸⁰ Similarly, courts should be wary of the erosion of subjective expectations of privacy through “privacy creep,” the growing ubiquity of intrusive searches of the general public in the post-9/11 era. Objective reasonableness serves as a check on rapid acceptance of intrusions that would have been considered alarming only recently.⁴⁸¹

Subjective experiences of intrusions are also important to consider, however, and sometimes they should override the objective viewpoint. In particular, intrusions are more troubling if they violate a particular person’s strongly held belief system or disproportionately risk their health or wellbeing. People may oppose certain intrusions on religious grounds, for example. Christian Scientists traditionally oppose virtually any medical intervention, no matter how safe and routine the rest of the population might find it.⁴⁸² Similarly, most of us would readily accept a blood transfusion if needed to save our lives, but to a Jehovah’s Witness it might mean the loss of any possibility of salvation. Bodily intrusions can be particularly traumatic when they resemble other traumatic experiences to which an individual has been subjected. For example, rape survivors may be particularly disturbed by certain kinds of intrusions, such as strip searches.⁴⁸³

Once a court ascertains that an intrusion is significant and thus that strict scrutiny applies, it must assess whether the intrusion is narrowly tailored to promote a compelling government interest. In most of the bodily intrusion cases reviewed in Part III, the asserted state interests would surely qualify as compelling. Most of these cases concerned the government’s interest in protecting individual or public health and safety,⁴⁸⁴ or

478. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 36–7 (1905) (discounting Jacobson’s concerns over vaccination and finding vaccinations objectively harmless).

479. *Bell*, 441 U.S. at 590 (Stevens, J., dissenting).

480. See *id.* at 586 (criticizing Court for relying on reduced expectation of privacy among preconviction detainees to justify highly intrusive body-cavity searches).

481. Cf. *Rochin v. California*, 342 U.S. 165, 170–73 (discussing need to avoid “freezing ‘due process of law’ [as applied to bodily intrusions in criminal context] at some fixed point in time” and importance of “reconciling the needs of both continuity and of change in a progressive society”).

482. See *supra* note 431.

483. Brief of Former Attorneys General of New Jersey Robert J. Del Tufo, et al., at 30–31, *Florence v. Bd. of Chosen Freeholders*, 132 S.Ct. 1510 (2012) (No. 10-945) (explaining that female inmates are far more likely than males to be sexually abused, and that for such women “strip searching can be more than a humiliating and undignified experience”); see also *infra* Part IV.C.2 (discussing pre-abortion ultrasound).

484. See *Hill*, *supra* note 19, at 329.

determining guilt or innocence,⁴⁸⁵ which are interests the Court has traditionally regarded as substantial.

The Court, however, has tended to discount the need for narrow tailoring in analyzing bodily intrusions. In particular, it has often refused to examine the availability of less intrusive means.⁴⁸⁶ Narrow tailoring would thus amount to a departure from the Court's current approach in many instances. In strip search cases, for example, courts should consider an approach similar to that recommended by the American Bar Association, which suggests, "In conducting a search of a prisoner's body, correctional authorities should strive to preserve the privacy and dignity of the prisoner. Correctional authorities should use the least intrusive appropriate means to search a prisoner."⁴⁸⁷ This may mean relying on metal detectors and other screening devices or employing a reasonable suspicion standard, especially in the context of pretrial detainees charged with minor offenses.⁴⁸⁸

This country's experience with airport body scanners provides an instructive example of a sort of strict scrutiny analysis conducted through the political process on a government-compelled bodily intrusion. The Transportation Security Administration (TSA) installed airport scanners nationwide after 9/11 that could more effectively detect security threats. The first versions of these scanners produced detailed anatomical images that many travelers found disturbing.⁴⁸⁹ These concerns were heightened when it was reported that U.S. marshals had retained 35,000 scanner images taken at a Florida courthouse, rather than immediately deleting them in accordance with required protocol.⁴⁹⁰ One hundred of the images were later leaked on the internet.⁴⁹¹ Some travelers were also concerned about the potential health effects of the X-ray technology used by one type of scanner.⁴⁹² The TSA allowed objecting passengers to choose a pat-down search instead, but many passengers, especially those from conservative religious backgrounds, found those offensive as well.⁴⁹³

New technology was eventually developed that eliminated the problem of detailed body images by producing only a generic avatar with areas of concern highlighted by a yellow box. Under pressure from the public, in 2012 Congress enacted a mandate requiring the TSA to replace all

485. See, e.g., *Winston v. Lee*, 470 U.S. 753, 762 (1985).

486. *Bell v. Wolfish*, 441 U.S. 520, 565, 574 (1979) (Marshall, J., dissenting).

487. American Bar Association, *Standards on Treatment of Prisoners: Standard 23-7.9(a)*, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html#23-7.9.

488. *Id.*; *Bell*, 441 U.S. at 594–95 (Marshall, J., dissenting) (discussing effective alternatives to strip searches in that case).

489. See, e.g., Tara Bahrapour, *TSA Scanners, Pat-Downs Particularly Vexing for Muslims, Other Religious Groups*, WASH. POST, Dec. 23, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/22/AR2010122202919.html?sid=ST2010122202299>.

490. See Joshua Norman, *Naked Body Scan Images Never Saved, TSA Says*, CBS NEWS (Nov. 16, 2010, 2:18 PM), <http://www.cbsnews.com/news/naked-body-scan-images-never-saved-tsa-says/>.

491. *Id.*

492. *Id.*

493. See Bahrapour, *supra* note 489.

of the old technology with this new software by June 2013.⁴⁹⁴ The TSA also removed all of the scanners using X-ray technology, reducing fears of health risks.⁴⁹⁵

A federal appeals court in 2011 upheld the TSA's use of the old, revealing scanners because travelers had the option of a pat-down.⁴⁹⁶ But the public demanded even less intrusive means. This example demonstrates that, even in the face of the government's clearly compelling interest in airline safety,⁴⁹⁷ the sky did not fall when less intrusive means were required. Necessity is the mother of invention. Governmental entities or officials lack incentive to implement less intrusive means without outside pressure. Indeed, a TSA official admitted that the agency would have continued to use the invasive scanners had Congress not mandated the change.⁴⁹⁸ In cases where the political process is not likely to produce change, however, this pressure will have to come from the courts.⁴⁹⁹

The contrast between the D.C. Circuit's ruling on the scanners and the congressional response suggests that courts examining bodily intrusions under the framework proposed here could reach different outcomes than under the Supreme Court's current approach. The D.C. Circuit Court's result flowed from its adoption of the Supreme Court's (i) tendency to minimize the psychological aspect of bodily intrusions and (ii) refusal to demand less intrusive alternatives.⁵⁰⁰ Of course, constitutional frameworks are flexible by design, so even this Article's approach may yield different outcomes based on the specific facts of a case or the inclinations of the judge applying it.

Nevertheless, here are a few examples of how plausible outcomes under my framework might compare with a few of the cases reviewed in Part III. First, corporal punishment—regardless of severity—should never be permissible. Severe instances of corporal punishment register sufficiently high on both the physical and psychological scales as to shock the conscience and, like in *Rochin*, should be held per se unconstitutional. But all corporal punishment should trigger strict scrutiny, and it cannot survive this standard. In *Ingraham*, the Court found that corporal punishment must inflict “appreciable physical pain” before it implicates Fourteenth Amendment liberty interests.⁵⁰¹ “De minimis” punishments are not sufficiently painful to warrant constitutional protection. This analysis misapprehends why corporal punishment is so offensive. Re-

494. FAA Modernization and Reform Act of 2012, H.R. 658, 112th Cong. § 826 (2012).

495. This development was not mandated by Congress but came because the manufacturer of the old scanners could not update its software in time to comply with the congressional mandate on images. See Jeff Plungis, *Naked-Image Scanners to Be Removed From U.S. Airports*, BLOOMBERG NEWS (Jan. 18, 2013, 4:05 PM), <http://www.bloomberg.com/news/2013-01-18/naked-image-scanners-to-be-removed-from-u-s-airports.html>.

496. Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 10–11 (D.C. Cir. 2011).

497. See *id.* at 10 (describing FAA's interest in passenger safety as “acute”).

498. Plungis, *supra* note 495.

499. See Kreimer, *supra* note 2, at 451–52.

500. See *Bell v. Wolfish*, 441 U.S. 520, 564–65, 574 (1979) (Marshall, J., dissenting) (criticizing Court on both these counts).

501. *Ingraham v. Wright*, 430 U.S. 651, 674 (1977).

ardless of its severity, it is humiliating, degrading, and frightening. Children are among our most vulnerable citizens, and they deserve special protection. Corporal punishment transforms teachers who should be mentors and role models of good citizenship into bullies immunized from normal constitutional constraints.⁵⁰² “De minimis” corporal punishment may rank low on the physical axis, but it ranks high on the psychological axis and should trigger strict scrutiny.

A court applying strict scrutiny should readily identify less intrusive means that can accomplish disciplinary purposes even more effectively.⁵⁰³ If discipline is the only purpose, students can be punished in nonphysical ways, such as requiring additional homework. If public safety is a concern, there are again alternatives, such as suspensions, that are likely to be as effective, if not more effective, than inflicting physical punishment.⁵⁰⁴

On the other hand, this Article’s approach would likely yield an outcome similar to *Jacobson* on the issue of mandatory vaccinations. For most people, vaccinations should not trigger strict scrutiny. The physical intrusion is meaningful but not substantial.⁵⁰⁵ And (assuming no religious or other compelling objection) vaccinations ordinarily register very low on the psychological scale, because there is no suggestion of guilt, the procedure reveals no intimate information, and it is done at least in part to protect the recipient’s own health. Vaccinations imposed on healthy individuals without religious objections therefore generally should receive only rational basis review. Assuming the vaccination in question is safe and addresses a legitimate public health concern, it should easily survive this test.⁵⁰⁶

C. *Applying the Framework: Blood Draws and Ultrasound Examinations*

This section discusses recent and ongoing constitutional litigation over two kinds of bodily intrusions and considers how these intrusions should fare under the proposed framework.

502. See *New Jersey v. T.L.O.*, 469 U.S. 325, 353–54 (1985) (Brennan, J., dissenting).

503. As Deana Pollard Sacks points out, social science in the thirty years since *Ingraham* has shown the grave harms as well as inefficacy of corporal punishment in school. Deana Pollard Sacks, *State Actors Beating Children: A Call for Judicial Relief*, 42 U.C. DAVIS L. REV. 1165, 1189 (2009).

504. See *id.*

505. Vaccinations are only mildly painful. Of course, some people are terrified of needles, and others believe vaccinations carry great medical risks. But a court could well find such concerns objectively unreasonable. See Shawn Lawrence Otto, *America’s Science Problem*, 307 SCI. AM. 62, 62, 65 (discussing unfounded fears that vaccinations cause autism).

506. Even if strict scrutiny were to apply, it is likely that, in many cases, no reasonable alternative means to protecting the public health would exist because vaccinations’ effectiveness often depends on broad public participation. See Paul Fine et al., “*Herd Immunity*”: *A Rough Guide*, 52 CLINICAL INFECTIOUS DISEASES 911 (2011).

1. *Blood Draws Redux*

The Supreme Court recently decided a case addressing whether a compulsory, warrantless blood draw violated a defendant's rights under the Fourth Amendment.⁵⁰⁷ The defendant, Tyler McNeely, was stopped by the Missouri State Highway Patrol for speeding. The officer smelled alcohol on his breath and performed some field sobriety tests, including a "horizontal gaze nystagmus test."⁵⁰⁸ McNeely exhibited six out of six clues for intoxication on this test.⁵⁰⁹ McNeely was then taken to a hospital after stating that he would refuse a breath or blood test administered at the police station. McNeely again refused to consent to a blood test, but the officer ordered hospital personnel to administer one anyway. McNeely was handcuffed and his arms restrained while his blood was drawn. The test showed he was legally intoxicated.⁵¹⁰

According to the Supreme Court, the case presented the question whether *Schmerber* allows *warrantless*, forced blood draws as a routine matter on persons arrested for drunk driving, or whether it calls for a case-specific inquiry to determine the presence of "special facts" similar to those identified in *Schmerber*.⁵¹¹ Because *Schmerber* found blood-drawing to be a reasonable test under the Fourth Amendment, subsequent cases challenging such tests have focused on whether or not a warrant is required in a given case rather than on whether this type of search itself is constitutional.⁵¹² In *McNeely*, the Court did acknowledge the intrusiveness of blood tests, remarking: "[T]he type of search at issue in this case, which involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation . . . implicates an individual's 'most personal and deep-rooted expectations of privacy.'"⁵¹³ Given *Schmerber*, however, this conclusion only led the Court to hold that a warrant may be required for such searches in some cases.⁵¹⁴

My framework suggests that forced blood draws of arrestees for DWI should trigger strict scrutiny, regardless of whether a warrant has been obtained. Despite the Court's acknowledgement in *McNeely*, Supreme Court decisions reveal ambivalence over the intrusiveness of blood tests. In *Schmerber*, the Court ignored the psychological intrusiveness of *forced* blood draws when it pointed out that blood tests "are a commonplace in these days of periodic physical examinations" and de-

507. *Missouri v. McNeely*, 133 S. Ct. 1552 (2013).

508. Brief for Respondent at 1, *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) (No. 11-1425).

509. *Id.*

510. *See id.* at 7.

511. *McNeely*, 133 S. Ct. at 1556, 1558 ("We granted certiorari to resolve a split of authority on the question whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations.") (internal quotation marks omitted).

512. *Id.* at 1558 n.2 (citing cases).

513. *Id.* at 1558 (citing *Winston v. Lee*, 470 U.S. 753, 760 (1985); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616 (1989)).

514. *Id.* at 1563, 1568.

scribed their minimal physical consequences.⁵¹⁵ The Court did acknowledge that certain people—“on grounds of fear, concern for health, or religious scruple”—might experience blood tests as psychologically intrusive.⁵¹⁶ But these concerns would apply to a noncriminal blood test as well. The Court largely discounted the way in which the suggestion of guilt heightens a blood draw’s intrusiveness.⁵¹⁷ In *Skinner*, the Court relied on *Schmerber* in similarly de-emphasizing the intrusiveness of a forced blood draw.⁵¹⁸

But when the Justices have honestly confronted the psychological dimensions of a forced blood draw, they have recognized it as a disturbing intrusion. Justice Douglas, dissenting in *Breithaupt*, referred to the “indignity” of a person’s body being “invaded and assaulted by the police who are supposed to be the citizen’s protector.”⁵¹⁹ In his *Schmerber* dissent, Douglas went even further, declaring, “No clearer invasion of th[e] right of privacy can be imagined than forcible bloodletting of the kind involved here.”⁵²⁰ In *Winston*, the Court acknowledged that the blood test upheld in *Schmerber* “perhaps implicated Schmerber’s most personal and deep-rooted expectations of privacy.”⁵²¹

The psychological/physical graph shows the difference between consensual blood tests done for medical purposes and involuntary tests done for determining intoxication. The intrusiveness of a forced blood draw must be measured according to *both* its physical and its psychological impact. To have a needle pierce one’s skin and draw blood from one’s body without consent,⁵²² based on an individualized suspicion of guilt, offends a person’s dignity in a way that a consensual blood test simply does not. In this case, McNeely’s arms had to be restrained so that his blood could be drawn. Safety risks of blood draws should be taken into account too.⁵²³ But while these risks can be ameliorated by administering the tests in a medical setting, this only addresses the physical aspect of

515. *Schmerber v. California*, 384 U.S. 757, 771 (1966).

516. *Id.*

517. *But see id.* at 762 (“The withdrawal of blood necessarily involves puncturing the skin for extraction, and the percent by weight of alcohol . . . is evidence of criminal guilt. Compelled submission fails on one view to respect the ‘inviolability of the human personality.’”) (quoting *Miranda v. Arizona*, 384 U.S. 436, 460 (1966)).

518. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 625 (1989). In *Skinner*, the drug test was a railway regulation enacted to address public safety. But the suggestion of wrongdoing accompanying such tests still makes it psychologically intrusive, just like the urine tests in *Board of Education of Independent School District No. 92 v. Earls*, 536 U.S. 822 (2002), and *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995). *See supra* note 342 and accompanying text.

519. *Breithaupt v. Abram*, 352 U.S. 432, 444 (1957) (Douglas, J., dissenting).

520. *Schmerber*, 384 U.S. at 779 (Douglas, J., dissenting).

521. *Winston v. Lee*, 470 U.S. 753, 760 (1985).

522. Some state laws deem drivers to have consented by law because they were driving on the road. *See supra* note 250. (Missouri’s law infers consent but allows a driver to withdraw it before testing.) While consent may be present in a technical legal sense, there is still a psychological dimension to the search that is lacking when a person’s has her blood tested for a medical purpose. The “consent” is illusory—people often have little real choice but to drive on the road.

523. *See, e.g., State v. Jimenez*, CR20051907 (Ariz. Sup. Ct. 2005), slip op. at 2–3 (describing mistakes made by deputy sheriff in drawing blood at roadside, and listing risks of blood-drawing in nonmedical settings).

the intrusion—that of safety and/or pain.⁵²⁴ Because forced blood draws for DWI have a meaningful psychological dimension in addition to the physical intrusion they impose, the Court should apply strict scrutiny.

Of course, determining that a blood test is significant enough to trigger strict scrutiny is only the first step of the analysis. Looking to substantive due process analysis and the framework outlined above likely would not lead the Court to conclude that blood tests are always unconstitutional. But a court that seriously applied strict scrutiny would, for example, be required to look at reasonable alternatives. In this case, according to one trooper's testimony, "the conviction rate for drivers who show four or more 'clues' out of six during the horizontal gaze nystagmus test is over 90%."⁵²⁵ McNeely exhibited six out of six. Courts should consider whether this evidence alone could be sufficient to convict a defendant.⁵²⁶ Moreover, drivers who really object to the intrusiveness of a blood test—as opposed to defendants who are simply trying to avoid a determination of guilt—will likely be much more willing to submit to a breath test. Perhaps a court would rule it permissible for a state to offer a breath test and, if the test is refused, to allow a jury to draw negative inferences from that refusal (but not from refusing a blood test). If nothing else, importing substantive due process values into the Fourth Amendment analysis might convince the Court that warrants should be obtained prior to DWI blood draws in all but exceptional circumstances.

2. *Forced Ultrasound Examinations*

Since the mid-1990s, twenty-four states have enacted laws that incorporate ultrasonography into abortion regulation in some manner.⁵²⁷ Five states—Louisiana, North Carolina, Oklahoma, Texas, and Wisconsin—have adopted "speech-and-display" versions of these laws. These laws, in addition to requiring abortion providers to perform a sonogram on a woman prior to performing the abortion, require providers to display the ultrasound images to the woman and to describe the images to her.⁵²⁸ The Oklahoma Supreme Court struck down that state's law in a

524. It is possible that a medical setting may also reduce the psychological impact of the test somewhat (although it will not eliminate it), as a forced blood draw over the hood of a patrol car is surely one of the more humiliating ways to have such a test administered. See *Jimenez*, slip op. at 2–3.

525. Brief for Respondent at 37, *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) (No. 11-1425).

526. See *Winston*, 470 U.S. at 765 ("[A]lthough we recognize the difficulty of making determinations in advance as to the strength of the case against respondent, petitioners' assertions of a compelling need for the bullet are hardly persuasive. The very circumstances relied on in this case to demonstrate probable cause to believe that evidence will be found tend to vitiate the Commonwealth's need to compel respondent to undergo surgery."). As the Court noted in *McNeely*, most states "either place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal (often limiting testing to cases involving an accident resulting in death or serious bodily injury) or prohibit nonconsensual blood tests altogether," without any apparent catastrophic effects on drunk-driving enforcement efforts. *Missouri v. McNeely*, 133 S. Ct. 1552, 1556–67 (2013).

527. These laws range from requiring that verbal counseling or written materials include information on accessing ultrasound services, to mandating that an abortion provider perform a sonogram on each woman seeking an abortion. GUTTMACHER INST., STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND (2014), available at http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf.

528. *Id.*

brief memorandum opinion.⁵²⁹ Two federal courts have divided over the constitutionality of the North Carolina and Texas laws, respectively.⁵³⁰ The cases have not been litigated or decided as bodily intrusion cases, however.⁵³¹ Rather, the issue in each case was whether the “speech-and-display” provisions of these laws violated the First Amendment rights of the abortion providers.⁵³² Viewing the laws through the lens of the bodily intrusion case law reveals another possible ground on which these laws should be invalidated.

At the outset, it should be clear that the undue burden standard, which applies to abortion regulations, does not govern this claim.⁵³³ This is not a claim that the ultrasound mandate interferes with the woman’s right to obtain an abortion, but rather that she has a right against undergoing a mandatory ultrasound, conducted in a manner dictated by the state in furtherance of anti-abortion aims. Thus, applying my framework, the first question is whether the sonogram imposes a significant intrusion, thereby triggering strict scrutiny.

The Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* identified “physical autonomy” as one of the “general rights” under which abortion is subsumed.⁵³⁴ The right to privacy and physical autonomy likewise encompasses the right against bodily intrusions (and, more narrowly, the right against forced medical procedures).⁵³⁵ A sonogram, whether performed transvaginally or transabdominally, implicates this right. The physical intrusion of a transabdominal sonogram is not extreme, but nor is it trivial. While it is generally painless and free of major medical risk, it involves at least partial undress and significant touching of intimate areas, including the application of a gel and re-

529. The opinion held that the law violated *Planned Parenthood of Southeastern Pennsylvania v. Casey* but did not explain how. *Nova Health Sys. v. Pruitt*, 292 P.3d 28, 28 (Okla. 2012).

530. See Michelle Olsen, *Abortion Ultrasound Cases (Updates and Correction)*, APPELLATE DAILY (May 25, 2012, 12:21 PM), <http://appellatedaily.blogspot.com/2012/05/abortion-ultrasound-cases-updates-and.html> (describing developing circuit split and asserting that the issue “could very well end up at the Supreme Court”).

531. The plaintiffs had made a substantive due process claim in the case challenging the North Carolina requirement, but this claim (which the court did not address on the merits) appeared to relate the “speech-and-display” requirements of the Act rather than raising a bodily intrusion claim. See *Stuart v. Loomis*, No. 1:11-CV-804, 2014 WL 186310, at *19 (M.D.N.C. Jan. 17, 2014).

532. *Id.* at *18; *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574–80 (5th Cir. 2012).

533. Some lower federal courts seem to interpret the undue burden standard as displacing all other analyses whenever abortion is involved. See, e.g., *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 506 (6th Cir. 2012) (rejecting claim that law forcing women to undergo surgical rather than medication abortions violated bodily integrity) (“[A]bortion regulations . . . are analyzed under the undue-burden framework and not the . . . physical-intrusion framework . . .”). This displacement is not supported by the *Graham* doctrine, since there is (famously) no textually explicit right to abortion in the Constitution. See *supra* text accompanying notes 67–70, 81–82; Caitlin E. Borgmann, *Abortion Exceptionalism and Undue Burden Preemption*, 71 WASH. & LEE L. REV. 1047 (2014). Accordingly, this trend is seriously misguided.

534. 505 U.S. 833, 884 (1992).

535. See *supra* Part III.A.1.

peated contact with a wand. Transabdominal ultrasound requires a full bladder, which may cause discomfort.⁵³⁶

Transvaginal sonograms require a more significant physical intrusion. This type of sonogram received much press attention in 2012, when a proposed pre-abortion ultrasound bill in Virginia specifically called for the procedure in early pregnancies.⁵³⁷ Transvaginal sonograms require the insertion of a long probe, or transducer, into the vagina. The technician moves the probe around inside the vagina during the examination.⁵³⁸ Sonograms are often performed transvaginally early in pregnancy because this produces a clearer image.⁵³⁹

Pre-abortion ultrasounds are a telling example of bodily intrusions whose psychological aspects may far surpass the physical. One argument that might be made *against* the bodily intrusion claim is that many abortion providers already routinely perform pre-abortion ultrasounds for medical purposes.⁵⁴⁰ How, then, can a procedure that the woman will already undergo be deemed too intrusive? The psychological/physical distinction helps explain why state-mandated sonograms are offensive even when the provider would perform a sonogram anyway.⁵⁴¹

All ultrasound requirements impose a bodily intrusion that should trigger strict scrutiny. But the speech-and-display requirements make the Louisiana, North Carolina, Oklahoma, Texas, and Wisconsin laws even more psychologically intrusive than a sonogram performed absent the mandate. The abortion provider is required to conduct the procedure in a way that clearly signals to the woman the state's displeasure with her choice, even as she is partly naked or exposed and being touched in intimate parts of her body. This psychological intrusion is heightened for a rape survivor who seeks an abortion early in pregnancy and must undergo a transvaginal ultrasound at the state's behest and in the manner it dictates.

The importance of the state's role in both requiring the procedure and orchestrating its performance cannot be understated; it also raises a

536. See *Ultrasound Imaging in Early Pregnancy*, NAT'L ABORTION FED., http://www.prochoice.org/education/cme/online_cme/m4ultrasound.asp#3 (last visited Apr. 17, 2014).

537. Laura Vozzella, *Gov. Bob McDonnell Blamed for Transvaginal Ultrasound Bill*, WASH. POST, May 30, 2012, http://www.washingtonpost.com/blogs/virginia-politics/post/gov-bob-mcdonnell-blamed-for-transvaginal-ultrasound-bill/2012/05/30/gJQAuoYYIU_blog.html. Other states have included such a requirement, either explicitly or implicitly. The Oklahoma law, now enjoined, mentioned it specifically. But because this method provides the clearest image early in pregnancy, other laws (including the Virginia mandate, from which the explicit language was removed), arguably require transvaginal ultrasound by implication in some circumstances.

538. Transvaginal Ultrasound, MEDLINEPLUS (Feb. 26, 2014), <http://www.nlm.nih.gov/medlineplus/ency/article/003779.htm>.

539. See *Ultrasound Imaging in Early Pregnancy*, *supra* note 536.

540. Ultrasound use is increasingly common in abortion provision and can increase safety and efficacy, although it is not medically necessary in the first trimester. NAT'L ABORTION FED., 2011 CLINICAL POLICY GUIDELINES 9–10 (2011), http://www.prochoice.org/pubs_research/publications/downloads/professional_education/2011%20CPGs.pdf.

541. This discussion assumes that abortion providers would perform a sonogram even without the law, because this presents the most challenging set of facts for the bodily intrusions claim. Not all providers do so, however, see GUTTMACHER INST., *supra* note 527, and in this case the bodily interest claim would only be strengthened.

distinction that is often missed. In the brouhaha over Virginia's bill, "transvaginal probe" was hurled like an epithet by Democrats and pundits opposed to the mandate.⁵⁴² These accusations missed the mark, however, in implying that the technology itself is offensive. As with all bodily intrusions, context matters. A vaginal probe inserted with a woman's consent because her doctor deems it to be in her best medical interests is very different from one that the state has demanded in an attempt to convince her that her decision to abort is morally bankrupt. Vaginal probes are not inherently good or bad. It depends on how and why they are used.

Having the woman's own abortion provider administer the sonogram does not magically separate the intrusion from the state's heavy hand. The Court in *Chandler* made this error when it suggested that the state had "effectively limited the invasiveness" of the urine testing required there by allowing a candidate to provide it "in the office of his or her private physician."⁵⁴³ The recipient of the search in both cases knows that the state has called for this procedure. And, in both cases, there is a suggestion of (potential) guilt that underlies this demand. A forced sonogram in this way is eerily similar to bodily intrusions seeking criminal evidence. It "force[s] from the accused" a kind of "evidence" of the moral wrongfulness of her conduct.⁵⁴⁴ As Carol Sanger writes, "[M]andatory ultrasound requires the woman to participate in the very production of information that she is now urged to consider. There is something both creepy and unjust in using a woman's innards to make the state's case against abortion and insisting she contemplate life as defined by the state."⁵⁴⁵

Like a criminal suspect subjected to a bodily search for weapons, evidence, or contraband, a pregnant woman is subjected to a physical invasion as well as a psychological invasion. This invasion carries a connotation of guilt or moral wrongdoing. Sonogram requirements threaten a woman's sense of autonomy over her bodily decision making by giving no weight to her right to refuse. The woman has done (or is about to do something) bad, and so she forfeits her right to the inviolability of her body.

Moreover, forced sonograms suggest a pregnant woman seeking an abortion is incapable of independent moral decision making. Proponents of ultrasound mandates attempt to portray them as autonomy-enhancing in that they provide the woman with important "information."⁵⁴⁶ But a *forced* procedure intended to inform suggests that women are of unsound

542. See, e.g., Vozzella, *supra* note 537 (noting a Democratic Virginia state senator nicknamed Republican Governor McDonnell, "Governor VP," for "vaginal probe").

543. *Chandler v. Miller*, 520 U.S. 305, 318 (1997).

544. *Schmerber v. California*, 384 U.S. 757, 762 (1966).

545. Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 391 (2008).

546. See Cynthia D. Coe & Matthew C. Altman, *Mandatory Ultrasound Laws and the Coercive Use of Informed Consent*, 16 TECHNÉ 16 (2012).

mind, unable to decide for themselves.⁵⁴⁷ Forced bodily intrusions most commonly occur in three contexts: when the recipient is sick, mentally incompetent, or suspected of a crime. Each of these frames reflects stereotypes about women who seek abortions that are disturbing when employed to justify intruding on the body of a healthy individual exercising a constitutionally protected choice. Pre-abortion ultrasounds are peculiarly autonomy-depriving because they allow a person to peer directly inside the woman, without relying on her to mediate and provide the information.⁵⁴⁸

Existing abortion jurisprudence is helpless to protect the woman against this invasion.⁵⁴⁹ The state's interest in the embryo or fetus, even if dubiously advanced by these requirements, automatically trumps under the "undue burden" analysis, which looks only at access to abortion on the woman's side of the equation.⁵⁵⁰ A bodily intrusion claim—by contrast—captures the distinct harms ultrasound mandates cause, harms that exist independent of whether the requirements hinder a woman's access to an abortion.

Nor is it fair to say that the woman has implicitly consented to the state's demands because the choice to undergo an abortion is hers. Because the procedure is a condition of getting the abortion, it is not truly consensual. To suggest that a woman could continue her pregnancy and bear a child if she finds the ultrasound too offensive is absurd. This says less about how minimally invasive a sonogram is than about how untenable unintended pregnancy and parenting can be for many women. The issue of consent here is similar to DWI blood draws; the law may consider her to have consented as a technical matter.⁵⁵¹ But, when measuring the extent of the intrusion, the person's lack of a real choice must be acknowledged.

Finally, the abortion ultrasound speech-and-display mandates are disturbing in how they commandeer the relationship between the woman and her physician for the state's moral purposes. The state exploits the relationship of trust between provider and patient and undermines the physician's role as healer. A doctor's duty is to her patient.⁵⁵² An abortion provider's ability to fulfill this duty is compromised when the state forces her to act as an agent of the state, which sees itself as protector of the embryo or fetus.⁵⁵³

547. See Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223 (2009).

548. F.A. Manning, Reflections on Future Directions of Perinatal Medicine, 13 *Seminars in Perinatology* 342, 343 (1989); Sanger, *supra* note 545, at 391.

549. See Borgmann, *supra* note 45.

550. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992); Borgmann, *supra* note 533.

551. See *supra* note 250.

552. *Washington v. Glucksberg*, 521 U.S. 702, 779 (1997) (Souter, J., concurring) ("[T]he Court's opinion in *Roe* recognized . . . that the good physician is . . . one who does more than treat symptoms, one who ministers to the patient.").

553. See Sarah E. Weber, Note, *An Attempt to Legislate Morality: Forced Ultrasounds as the Newest Tactic in Anti-Abortion Legislation*, 45 TULSA L. REV. 359, 379 (2009).

Given the significant psychological intrusions imposed by speech-and-display ultrasound mandates, courts should apply strict scrutiny, a test that these mandates fail. First, the government's interest is not compelling. In *Casey*, the Court recognized that the state's interest in potential life is "important" in the pre-viability stage, albeit not sufficiently important to justify an undue burden on a woman's right to a pre-viability abortion.⁵⁵⁴ The Court also recognized that the state may inform the woman of its preference for childbirth.⁵⁵⁵ But it never identified these interests as "compelling."⁵⁵⁶

Even if a court were to find the state's interests compelling, the laws are not narrowly tailored to meet these interests. While they are clearly intended to dissuade women from obtaining an abortion, it is not at all clear that they will have this effect.⁵⁵⁷ And regardless, there are other ways for the state to further its interests without forcing a woman to undergo a sonogram in the intrusive manner the laws mandate.⁵⁵⁸ "These alternatives might include making the information at issue available to the patient in written form . . . , or possibly offering to provide the verbal or visual information to the patient but respecting the patient's rejection of hearing or seeing the information."⁵⁵⁹

V. CONCLUSION

The common law right against bodily intrusions has enjoyed a long and venerated history. The inviolability of the body is a critical component of privacy. It seems beyond debate that this right should receive robust constitutional protection.

[J]ust as the constitutional protection for the "physical curtilage of the home . . . is surely . . . a result of solicitude to protect the privacies of the life within," so too the constitutional protection for the human body is surely inseparable from concern for the mind and spirit that dwell therein.⁵⁶⁰

Far from recognizing the fundamental nature of the right against government-imposed bodily intrusions, the Supreme Court's treatment of this right has sown confusion and has effectively demoted the right from its deserved status. The Court has created arbitrary doctrinal barriers

554. *Casey*, 505 U.S. at 875–76.

555. *See id.* at 878.

556. *Stuart v. Huff*, 834 F. Supp. 2d 424, 432 (M.D.N.C. 2011) (preliminarily enjoining part of North Carolina ultrasound requirement on First Amendment grounds but applying strict scrutiny and finding state's interest in promoting life and discouraging abortion not compelling (discussing *Casey*, 505 U.S. 833)).

557. *See, e.g.*, Stephanie Pappas, *Abortion Debate: Little Evidence Sonograms Change Minds, Doctors Say*, LIVESCIENCE (Feb. 16, 2011, 3:35 PM), <http://www.livescience.com/12886-abortion-sonogram-research.html>.

558. *Stuart*, 834 F. Supp. 2d at 432 (ruling that, even assuming the state's interest was compelling, there were less intrusive means of achieving this interest).

559. *Id.* at 432–33.

560. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 342–43 (1990) (Stevens, J., concurring in part and dissenting in part) (quoting *Poe v. Ullman*, 367 U.S. 497, 551(1961) (Harlan, J., dissenting)).

ers between different manifestations of the same right. And the Court has given insufficient weight to the psychological dimensions of forced bodily intrusions. This Article has drawn together and analyzed the scattered Supreme Court precedents on government-compelled bodily intrusions. In place of the *ad hoc* balancing tests the Court has tended to employ, the Article has offered a unified framework for assessing government-compelled bodily intrusions that recognizes substantive due process as the matrix for the right and that takes meaningful account of the psychological harms that accompany forced physical intrusions. This framework finally places the right against government-imposed bodily intrusions on its proper constitutional footing.