

Constitutional Limitations on the Taking of Body Evidence

A criminal suspect's physical characteristics and features constitute important evidence linking him with the crime charged or excluding him from further suspicion.¹ Much of this evidence, such as the suspect's sex, race, height, build, hair color, and facial marks, is openly visible and hence accessible to the police once the suspect is in custody. Presenting this evidence to eye-witnesses, however, may require the suspect's cooperation in line-ups or similar identification procedures. Other less accessible items of body evidence, such as the suspect's fingerprints, the composition of his blood, and scars or other marks normally concealed by clothing, may be secured only through intrusions of varying intensity into the suspect's privacy. Procedures that go beyond simple police observation to obtain evidence from a suspect's body may usefully be termed "body evidence examinations."²

In the relatively few cases involving body evidence to reach the Supreme Court, the Federal Constitution has been interpreted to permit most types of body evidence examinations. Recently, in cases concerning blood tests,³ line-ups,⁴ and voice⁵ and handwriting⁶ identifications, the Court reaffirmed that the use of body evidence at trial does not infringe the suspect's fifth amendment privilege against self-incrimination.⁷ The Court has, however, held that the Constitution imposes

1. While this Note is not intended as an analysis of any particular case or group of cases, the kinds of problems discussed are rather starkly presented by *Wainwright v. New Orleans*, 392 U.S. 598 (1968) (certiorari dismissed as improvidently granted) (facts and lower court holding are given in dissenting opinion of Warren, C.J.).

2. A more exhaustive presentation of the varieties of body evidence can be found in 8 J. WIGMORE, EVIDENCE § 2265 (McNaughton ed. 1961). Wigmore's compilation includes two examinations, mental examinations and lie detector tests, which are excluded from consideration here because they give rise to testimonial rather than real evidence.

3. *Schmerber v. California*, 384 U.S. 757 (1966); cf. *Breithaupt v. Abram*, 352 U.S. 432 (1957) (due process).

4. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263, 269 (1967); cf. *Stovall v. Denno*, 388 U.S. 293 (1967) (due process).

5. *United States v. Wade*, 388 U.S. 218 (1967).

6. *Gilbert v. California*, 388 U.S. 263 (1967).

7. Other types of body evidence have likewise been held outside the privilege: Fingerprints: *Smith v. United States*, 324 F.2d 879 (D.C. Cir. 1963), cert. denied, 377 U.S. 951 (1964); *United States v. Krapf*, 285 F.2d 647 (3d Cir. 1961), aff'g 180 F. Supp. 886 (D.N.J. 1960); *United States v. Kelly*, 55 F.2d 67 (2d Cir. 1932). Photographs: *United States v. Amorosa*, 167 F.2d 596 (3d Cir. 1948). Removal of narcotics from rectum: *Blackford v. United States*, 247 F.2d 745 (9th Cir. 1957), cert. denied, 356 U.S. 914 (1958). Putting on clothing: *Holt v. United States*, 218 U.S. 245, 252 (1919). Taking a stance: *Schmerber v. California*, 384 U.S. 757, 764 (1966) (dictum). See generally 8 J. WIGMORE, *supra* note 2, § 2265.

certain restraints on the manner in which body evidence may be taken. Shocking brutality is proscribed by the constitutional guarantee of due process,⁸ and in cases involving blood tests⁹ and fingerprinting¹⁰ police have been required to meet fourth amendment standards for reasonable searches and seizures. Furthermore, for those examinations such as line-ups that may be easily manipulated against an uncounseled suspect, the Court has applied the sixth amendment's guarantee of right to counsel.¹¹

Governmental attempts to obtain or use body evidence¹² without transgressing these constitutional limits raise two fundamental questions:¹³ (1) What government officer may lawfully require that a suspect submit to a particular body evidence examination? and (2) What may the state do if a suspect refuses to comply with an order authorizing an examination?

I. Authorizing the Taking of Body Evidence

Present law and practice initially entrusts the power to authorize body evidence examinations to the police and the prosecutor,¹⁴ and unjustified refusal to comply with a police examination order is a viola-

8. *Rochin v. California*, 342 U.S. 165 (1952); *cf. Schmerber v. California*, 384 U.S. 757 (1966); *Breithaupt v. Abram*, 352 U.S. 432 (1957). The due process guarantee also prohibits examination procedures so unfair as to infect the trial itself. *Cf. Stovall v. Denno*, 388 U.S. 293, 301-02 (1967).

9. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

10. *Davis v. Mississippi*, 37 U.S.L.W. 4369 (U.S. Apr. 22, 1969); *Bynum v. United States*, 262 F.2d 465, 467 (D.C. Cir. 1958).

11. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967). Voice examinations, like line-ups, would also seem to be a critical stage of the criminal process. Examinations for body evidence capable of "systematized or scientific [analysis]," *United States v. Wade*, 388 U.S. at 227, and, specifically, the taking of handwriting exemplars, *Gilbert v. California*, 388 U.S. at 267, are not critical stages in the same sense. Hence, the vast majority of examinations do not at present require presence of counsel.

12. Recent decisions of the Supreme Court limiting the availability of the technique of custodial interrogation are likely to result in heavier reliance on identifications and other body evidence examinations, as police are required "to establish guilt by evidence independently and freely secured . . ." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

13. This statement refers to the law in federal cases and in state cases under the fourth amendment and due process clause of the fourteenth amendment. Occasionally, state constitutions have been held more restrictive on this type of evidence. *E.g.*, *Allen v. State*, 183 Md. 603, 39 A.2d 820 (1944) (putting on hat while on witness stand violated self-incrimination privilege); *State v. Taylor*, 213 S.C. 330, 49 S.E. 2d 289 (1948) (speaking for identification violated privilege). In addition, state statutes may limit the admissibility of body evidence. This is particularly true, in the blood test area where several states require actual consent to the test for admissibility. *E.g.*, D.C. CODE ANN. § 1312 (Supp. 1, 1968), *prior version construed in State v. Merrow*, 161 Me. 111, 208 A.2d 659 (1965); WASH. REV. CODE ANN. § 46.61, 505(3),-(4) (Supp. 1968).

14. *W. LAFAVE, ARREST* 24-28, 308-13 (1965). This is true at least when the body evidence examination is given subsequent to a lawful arrest. The police may not, however, take a body evidence examination as part of a general investigation prior to arrest without a magistrate's warrant. *Davis v. Mississippi*, 37 U.S.L.W. 4359 (U.S. Apr. 22, 1969).

tion of law.¹⁵ The dangers of reliance on police authorization for normal searches have long been recognized. When unrestrained by judicial officials, police officers who are engaged in "the often competitive enterprise of ferreting out crime"¹⁶ will sometimes attempt to invade citizens' privacy unreasonably.¹⁷ Since most victims of such intrusions will be unable¹⁸ or unwilling¹⁹ to prevent a search, a formal check is necessary to protect citizens from excessive police zeal. The check provided in the Constitution is the fourth amendment's requirement that the police obtain prior approval of a search from a magistrate.²⁰ Though some have criticized the practical effectiveness of the warrant procedure as a restraint on police abuses,²¹ in theory the requirement of a magistrate's scrutiny and authorization should discourage the police from attempting clearly unjustified searches and should permit a detached judicial officer to appropriately limit the scope and intrusiveness of searches for which probable cause exists.²²

15. Resistance to such an order of a police officer is punishable in every jurisdiction. The precise statutory violation involved varies from state to state as does the perceived seriousness of the violation and the severity of punishment. For example, the United States Code and some state codes expressly punish interference with a search. *See, e.g.*, 18 U.S.C. § 2231 (1964) (felony) (up to 3 yr. imprisonment and/or \$5,000 fine); CONN. GEN. STAT. § 54-33d (1968) (misdemeanor) (up to 1 yr. imprisonment and/or \$1,000 fine). More commonly, statutes prohibiting "resistance to a public officer in the performance of his duty" are applicable to this refusal. *See, e.g.*, CAL. PENAL CODE § 69 (West Supp. 1968) (misdemeanor) (up to 5 yr. imprisonment and/or \$5,000 fine), § 148 (West Supp. 1968) (misdemeanor) (up to 1 yr. imprisonment and/or \$1,000 fine); CONN. GEN. STAT. § 53-165 (1968) (misdemeanor) (up to 6 mo. imprisonment and/or \$250 fine); IND. ANN. STAT. § 10-1005 (Supp. 1968) (misdemeanor) (up to 6 mo. imprisonment and/or \$100 fine); N.Y. PENAL LAW § 195.05 (McKinney 1967) (Class A misdemeanor) (up to 1 yr. imprisonment and/or fine); WASH. REV. CODE ANN. § 9.69.040 (1961) (misdemeanor) (up to 90 days imprisonment and/or \$250 fine). Forcible resistance is specifically punishable as an assault in a few states. *See, e.g.*, N.Y. PENAL LAW § 120.05(3) (McKinney 1967) (Class D felony) (up to 7 yrs. imprisonment and/or fine); WASH. REV. CODE ANN. § 9.11.020(6) (1961) (felony) (up to 10 yrs. imprisonment and/or \$1,000 fine). *See also* tampering with physical evidence, N.Y. PENAL LAW § 215.40 (Class E felony) (up to 4 yrs. imprisonment and fine).

16. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

17. *See, e.g.*, *Kremen v. United States*, 353 U.S. 346 (1957); *McDonald v. United States*, 335 U.S. 451 (1948); *United States v. Townsend*, 151 F. Supp. 378 (D.D.C. 1957).

18. *E.g.*, *United States v. Townsend*, 151 F. Supp. 378 (D.D.C. 1957).

19. It appears that suspects tend to be submissive to the police and rarely assert their rights. This is so even where the police warn the suspect of his rights and inferentially legitimize their exercise. One study of the effect of the *Miranda* decision concluded that suspects who seemed to want to assert their fifth amendment rights very frequently did confess regardless of warnings. Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1577-78 (1967).

Moreover, since the exclusionary rule will exclude any evidence discovered as a result of an unconstitutional body evidence examination, suspects aware of their rights may be tempted to forego assertion of those rights when faced with strong police pressures for compliance and with the possibility of formal punishment for the erroneous good-faith assertion of objections to an examination.

20. *Weeks v. United States*, 232 U.S. 383, 392-93 (1914).

21. *See Remington, The Law Relating to "On The Street" Detention, Questioning and Frisking of Suspected Person and Police Arrest Privileges in General*, 51 J. CRIM. L.C. & P.S. 386, 388 (1960).

22. For this to occur, it must be assumed, as the Supreme Court appears to assume,

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In recent cases involving housing inspections²³ and eavesdropping,²⁴ the Supreme Court has emphasized the value of the warrant procedure and has held that except in exigent circumstances no search is constitutionally permissible unless it has been authorized by a magistrate.

Most body evidence examinations involve significant intrusions on personal privacy and dignity beyond the intrusion of the arrest itself. In an examination for hidden marks or objects that requires the suspect to disrobe,²⁵ the suspect must surrender his most elemental personal privacy. In other examinations, such as blood or urine tests, the bodily integrity of the suspect is invaded in ways that are offensive to some.²⁶ Finally, in line-ups and voice identifications, the suspect suffers the indignity of being exhibited as a criminal suspect²⁷ to those members of the public who claim to be witnesses of the crime charged. The intrusiveness of these examinations would seem to require a finding that they are "searches" or "seizures" governed by the fourth amendment.

If intrusiveness alone is not enough, the possibilities for police abuse are sufficient to justify employment of the warrant procedure whenever possible. The police may be tempted to seek body evidence of unsolved crimes from an arrested suspect who could not be charged with such crimes prior to the search.²⁸ In some cases the police might arrest a person for a minor crime merely as a pretext²⁹ for an examination,

that truly independent magistrates exist and that requests for warrants are examined in a judicial fashion. At the very least magistrates must be willing to say no to the police. *But see* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

23. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

24. *Katz v. United States*, 389 U.S. 347, 357 (1967). *See also* *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (stop and frisk).

25. *E.g.*, *United States v. Townsend*, 151 Supp. 378 (D.D.C. 1957); *McManus v. Commonwealth*, 264 Ky. 240, 94 S.W.2d 609 (1936); *State v. Emerson*, 266 Minn. 217, 123 N.W.2d 382 (1963).

26. For this reason, perhaps, some states expressly make blood-alcohol testing voluntary. *See* note 13 *supra*.

27. The protection of a suspect's privacy as against the charge of being labeled a criminal has occasionally been recognized. *Itzkovitch v. Whitaker*, 115 La. 479, 39 So. 499 (1905); *Downs v. Swann*, 111 Md. 53, 73 A. 653 (1909).

28. Evidence of a crime found in a search for evidence of another crime is properly seizable and admissible. *Harris v. United States*, 331 U.S. 145, 154 (1947). *But see* *FED. R. CRIM. P.* 41(c) to -(e). This rule may be too great an encouragement to pretext arrests and exploratory searches. Similar practices are common: for example, the use of custodial interrogation to attempt to solve related crimes and to "clear" cases. Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967).

29. This would seem to be the case in *Wainwright v. City of New Orleans*, 392 U.S. 598 (1968) (cert. dismissed as improvidently granted). *See also* *Amador-Gonzalez v. United States*, 391 F.2d 308 (5th Cir. 1968); *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961). 3 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 667 (1969).

based on no more than suspicion,³⁰ designed to find evidence of a more serious offense. Even in the search for evidence of the crime for which the suspect was arrested, the probable cause for arrest should sometimes be held insufficient "probable cause"³¹ for a particularly intrusive body evidence examination desired by the police. To control these dangers of abuse inherent in police authorization of intrusions, recent fourth amendment cases involving housing inspections³² and eavesdropping³³ suggest that the warrant procedure is the constitutionally mandated remedy.³⁴

Unlike many searches away from the police station which are permitted without warrant because the police must act immediately,³⁵ body evidence examinations, with few exceptions, do not require immediate action.³⁶ The only common tests that would normally need to be conducted without delay are blood and urine tests for alcohol or narcotics.³⁷ For other examinations, police can practically seek war-

30. Where the police forego even the formality of a pretext arrest, body evidence examinations are impermissible. *Davis v. Mississippi*, 37 U.S.L.W. 4359 (U.S. Apr. 22, 1969).

31. Probable cause is no longer being envisioned as a unitary concept; rather, probable cause will vary with the nature and intrusiveness of the search. For a development of this notion of "variable probable cause," see Note, *Scope Limitations for Searches Incident to Arrest*, 78 YALE L.J. 443 (1969); Note, *The Fourth Amendment and Housing Inspections*, 77 YALE L.J. 521 (1968).

32. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

33. *Katz v. United States*, 389 U.S. 347 (1967).

34. One theoretical alternative limitation of police discretion without resort to a warrant procedure—enactment of statutes authorizing specifically described and limited body evidence examinations in specifically defined circumstances—would seem to be impractical. The task of defining in the abstract sufficient limitations on the police or of cataloging with adequate detail the wide variety of contexts which would justify a body evidence examination while simultaneously prohibiting all unconstitutional examinations is beyond the ability of legislators. Such an attempt to codify the meaning of "probable cause" for these examinations would either fetter the government unduly or leave the police with virtually all the discretion they have today.

35. Warrantless searches are permitted if incident to a lawful arrest. The basis of the exception is the protection of the officer, the prevention of flight and the preservation of evidence against destruction by the suspect. *Preston v. United States*, 376 U.S. 364, 367 (1964). Similarly, searches of automobiles and other movables and simple frisks are permissible in certain circumstances. See Note, *Scope Limitations for Searches Incident to Arrest*, 78 YALE L.J. 443 (1969); Cardin, *Federal Power to Seize and Search Without Warrant*, 18 VAND. L. REV. 1 (1964).

36. *Davis v. Mississippi*, 37 U.S.L.W. 4359, 4361 (U.S. Apr. 22, 1969).

37. The most common exception is blood-alcohol testing for driving while intoxicated. The level of blood-alcohol declines so rapidly that immediate testing is necessary to insure accuracy; indeed, it appears that a delay of two hours after apprehension makes the test results meaningless. See N.Y. VEHICLE & TRAFFIC LAW § 1194 (McKinney Supp. 1968). Therefore, warrantless testing is proper. *Schmerber v. California*, 384 U.S. 757, 770-71 (1966). For a further discussion of special procedures made necessary by this property of blood-alcohol testing, see note 92 *infra*. A few less common tests also measure deteriorative evidence, e.g., urine tests for narcotics and the nitrate test for recent firing of guns. These too could be administered immediately after a lawful arrest without a warrant under the *Schmerber* rationale. Finally, it may be necessary to conduct an immediate "show-up" if an eyewitness is near death. See *Stovall v. Denno*, 388 U.S. 293 (1967).

rants since the suspect is in custody³⁸ and the passage of time will not alter the examination results.³⁹

Besides cases in which there is not time to seek a warrant, the only further exception to the warrant requirement should be for examinations that are part of the arrest and booking process. Fingerprinting and photographing, for example, involve only minimal additional intrusions beyond custody itself and yet are important to the state for administrative and security reasons.⁴⁰ Moreover, the probable cause needed for arrest almost always will justify these small intrusions necessary for the maintenance of an efficient jail system.⁴¹ Thus the balance should be struck in favor of allowing the police to conduct these examinations without obtaining a warrant. Except for these examinations basic to police operations, only exigent circumstances should justify bypassing the protections afforded by the warrant procedure.

If the fourth amendment's warrant requirement is applied to body evidence examinations, a suspect's uncounselled consent to a warrantless examination should never be taken as a waiver of the right to a magistrate's authorization.⁴² A suspect being forcibly detained by police in the coercive atmosphere of the station house cannot be taken to have freely consented to a police request that he yield his rights to a warrant.⁴³ A court should find a valid waiver of the warrant right only when a suspect consents to a warrantless examination on the advice of

38. It is precisely this need to bring the suspect into custody thereby preventing flight and the destruction of evidence that justifies the police in arresting without warrants if probable cause exists. *See Ford v. United States*, 352 F.2d 927 (D.C. Cir. 1965). This policy of immediate custody, together with a policy of preventing violence, has led some states to limit the right of suspects to resist arrest regardless of legality. *See the discussion in MODEL PENAL CODE* § 3.04, Comment (Tent. Draft No. 8, 1958).

39. Compare the housing inspection area where there are no exigent circumstances and the timing of the searches is at the discretion of the inspector. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

Similarly, the use of administrative warrants or warrants examined by the district attorney may not satisfy the constitutional standard. *But see Abel v. United States*, 362 U.S. 217 (1960).

40. The recent *Davis* case is not to the contrary. There the fingerprinting occurred during an illegal detention as part of a dragnet investigation. Additionally, the purpose of the test was an evidentiary one solely, and it is therefore unlike the routine fingerprinting here excepted from the warrant requirement. *Davis v. Mississippi*, 37 U.S.L.W. 4359 (U.S. Apr. 22, 1969).

41. Full strip searches of arrested suspects are frequently made and justified as a matter of routine to insure the security of the jail. Since a partial strip and a close pat-down would be enough to sufficiently yield all but the most esoteric weapons, the rubric of administrative routine should not extend this far.

42. For a discussion of the problem of "consent" searches in a different context, see Note, *The Fourth Amendment and Housing Inspections*, 77 YALE L.J. 521, 528-29 (1968).

43. *Cf. Bumper v. North Carolina*, 391 U.S. 542, 546-50 (1968) (consent to search cannot be relied on where a householder submits to police claiming to possess a warrant).

counsel or before the magistrate himself. Unless counsel for a suspect is present, the police should not be permitted even to ask a suspect to cooperate in an examination that has not received a magistrate's approval.⁴⁴

In contrast to present practice in the issuance of most arrest and search warrants, it would probably be desirable to permit a suspect to raise objections to the issuance of the examination warrant.⁴⁵ With the suspect in custody, the primary reason for issuing arrest and search warrants *ex parte*—to avoid giving warning to a suspect who might flee the jurisdiction or conceal the evidence sought before the warrant could be executed—would not apply; even the most detailed knowledge of the examination proposed would not enable the suspect to alter or conceal his physical features successfully.⁴⁶ Permitting adversary proceedings on the issuance of these warrants should make the magistrate's authorization a more meaningful curb on police demands since the presentation of objections would counter possible tendencies for a magistrate merely to rubber-stamp the police department decisions he is supposed to control.⁴⁷ At such a hearing,⁴⁸ the suspect could dispute the existence of probable cause for the proposed examination or ask

44. This concept of waiver is admittedly more restrictive than that permissible in the case of other guarantees; particularly, it goes beyond that adopted in *Miranda* in not permitting an uncounseled waiver. See *Miranda v. Arizona*, 384 U.S. 436, 475-77 (1966). The need to go beyond the *Miranda* formula is in the first instance suggested by the failure of that formula. Project, *supra* note 19, at 1562-68, 1615-16. Secondly, the rule sharply reflects the problems of proof of a knowing waiver. Thus, waivers of both counsel and the warrant are disallowed. Finally, the limitation imposed on legitimate police investigation is less serious than in the case of confessions. The police (and the suspect) are "handcuffed" only until the suspect can be brought before a magistrate, before whom the suspect may waive his right to counsel, see p. 1081 *infra*, and all objections to the search. See also note 46 *infra*.

45. Although some states have statutes providing that a suspect may controvert the allegations of a warrant, these states in fact refer to proceedings for suppression and return of evidence rather than an adversary warrant procedure. CAL. PENAL CODE § 1589 (West Cum. Supp. 1968); N.Y. CODE OF CRIM. PROC. § 807-08 (1958), construed in *People v. Hoey*, 54 Misc. 2d 1083, 283 N.Y.S.2d 1004 (1967); *People v. Brown*, 40 Misc. 2d 35, 242 N.Y.S.2d 555 (1963).

46. These arguments apply whether or not the suspect has yet been brought before a magistrate and admitted to bail. Where the bail hearing precedes the body examination, bail can of course be conditioned upon the suspect remaining available for line-ups, blood-tests, and so forth. Only in the unlikely case in which freedom may enable the suspect to change his physical characteristics—by a hair-cut, for example—might bail be denied until the police have examined him. Since the need for a body-evidence examination will not normally introduce another factor relevant to bail, the danger that, for example, station-house bail would be denied to a suspect because the no-waiver-without-counsel rule precludes an immediate physical examination, should not overbalance the usefulness of the rule.

47. Miller & Tiffany, *Prosecutor Dominance of the Warrant Decision: A Study of Current Practices*, 1964 WASH. U.L.Q. 1; Remington, *supra* note 21.

48. The mere fact that this warrant procedure is adversary should not make it less judicata to a later examination of the warrant issues, since there is no appeal and since the magistrate's court is one of inferior jurisdiction. See pp. 1090-91 *infra*; cf. *People v. Ortiz*, 29 App. Div. 2d 392, 280 N.Y.S.2d 480 (1967) (semble).

for safeguards to prevent unfairness⁴⁹ and unnecessary intrusiveness.⁵⁰ Short oral⁵¹ or written presentations, supported where appropriate by affidavits, should be adequate to bring to the attention of the magistrate the suspect's objections without making the warrant issuing process unduly slow and costly.⁵²

The proposed system of judicial authorization after an abbreviated adversary hearing would obviously not fully protect the suspect unless he were entitled to be represented by counsel at the authorization hearing. Since the examination warrant hearing is the only point at which the suspect can effectively assert his rights to personal privacy and dignity by preventing an unconstitutional examination, the sixth amendment guarantee of the right to the assistance of counsel should be applicable.⁵³

II. Obtaining the Suspect's Cooperation in a Lawfully Authorized Examination

Once a police officer or a magistrate has authorized a specific body evidence examination, the great majority of suspects readily cooperate.

49. This would appear to be the most appropriate method of effectuating the protection sought to be insured by *United States v. Wade*, 388 U.S. 218 (1967). This procedure would make the lawyer more than merely a passive observer but give him an active role in providing a fair identification procedure.

50. The suspect should also be permitted to put forward bona fide medical and religious objections. In addition, uses of the examination that unduly invade the privacy of the suspect could be prevented. See cases cited note 27 *supra*.

51. Federal practice requires that only written presentations may be used in the warrant procedure, yet the magistrate may question the police officers about assertions made in their presentation. *United States v. Halsey*, 257 F. Supp. 1002, 1006 (S.D.N.Y. 1966). State practice permits oral testimony. There would appear to be no objections to oral presentations if a proper record could be made at this hearing. See *State v. Chakos*, — Wash. 2d —, 443 P.2d 815 (1968), *cert. denied sub nom. State v. Christofferson*, 393 U.S. 1090 (1969) (dissent of Brennan, J.); *State v. Walcott*, — Wash. 2d —, 435 P.2d 994, 999 (1968). See generally 3 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 670 (1969).

52. The objective is to avoid a costly extended hearing. Similarly, it might be possible to save some time by combining the warrant process with another hearing before the magistrate. This could be done at the time of advice as to rights and admission to bail. See *FED. R. CRIM. P.* 5(b); note 46 *supra*. It might also be possible to combine the warrant hearing with the preliminary examination. See *FED. R. CRIM. P.* 5(c). This result is less desirable since the usual practice is that at this point the police have completed all investigation and the decision to prosecute has been made. The body evidence examination may properly be given during the investigatory stage.

53. The right to counsel at the preliminary hearing is recognized in federal law, but not yet constitutionally required. Here, however, there seems to be a valid "critical stage" argument. Cf. the "lost defenses" test of *White v. Maryland*, 373 U.S. 59 (1963), and *Hamilton v. Alabama*, 368 U.S. 52 (1960). In addition, the right to counsel laid down in *United States v. Wade*, 388 U.S. 218 (1967), would seem best implemented by such an adversary hearing. It is worth noting that a suggestion by counsel of a different way of taking some particular evidence may reduce the danger to the police that the evidence may later be suppressed.

Most no doubt do so out of a general respect for authority.⁵⁴ Others who would be tempted not to may often yield because they fear informal penalties—suspects may well feel that uncooperative conduct will bring less favorable treatment on questions committed to police or prosecutorial discretion, such as where they will be jailed and what amount of bail will be sought at arraignment.⁵⁵ Though reasonable obedience of police orders is desirable, the unchecked use of the threat of informal penalties to obtain that obedience is not.⁵⁶

To enable the state to obtain necessary body evidence and, coordinately, to prevent misuse of the discretionary powers of police and prosecutor, formal measures must be available to deal with cases of noncooperation.⁵⁷ In the past, the police have responded to resistance in two ways: sometimes the fact that the suspect refused to comply with an examination order has been admitted into evidence⁵⁸ at trial as a substitute for the evidence sought in the examination; more frequently, the police have used force⁵⁹ to carry out the examination or have attempted to compel the suspect's submission by threatening to seek the imposition of formal punishment for noncooperation.⁶⁰

A. *Evidentiary Use of the Fact of a Suspect's Refusal to Cooperate*

One possible response to a suspect's refusal to cooperate is to accept the refusal and offer the fact of noncooperation in evidence against the suspect. Such an approach is now used in some states when a person charged with driving while intoxicated refuses to submit to a blood-alcohol test.⁶¹ The fact of refusal is relevant as circumstantial evidence

54. See by analogy the reaction to interrogation discussed in Project, *supra* note 19, at 1562-78.

55. W. LAFAVE, ARREST 132-37, 192 (1965); Project, *supra* note 19, at 1545.

56. See p. 1085 *infra*.

57. Although the vast majority submit, a small and possibly growing number resist. The causes of resistance are many. First, and probably most likely, is awareness of guilt. Similarly, a suspect may resist to avoid disclosure of prior criminal activity or to attempt to protect another. Others may resist because they misapprehend their rights or because they seek to expand their rights by self-help. Resistance may be induced by a fear of harassment or unfairness at the hands of the police. Finally, resistance may spring from medical, religious, or dignitary objections or simple emotional shock and confusion.

58. *E.g.*, *People v. Ellis*, 65 Cal. 2d 529, 55 Cal. Rptr. 385, 421 P.2d 393 (1966); *People v. Sudduth*, 65 Cal. 2d 543, 55 Cal. Rptr. 393, 421 P.2d 401 (1966); *cf.* 2 J. WIGMORE, EVIDENCE § 275-76 (1940).

59. *E.g.*, *Rochin v. California*, 342 U.S. 165 (1952); *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961); *Smith v. United States*, 187 F.2d 192 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 927 (1951); *United States v. Townsend*, 151 F. Supp. 378 (D.D.C. 1957).

60. *E.g.*, 18 U.S.C. § 401(3) (1964). The formal means have been used far more frequently to compel testimony rather than to compel body evidence examinations. *Shillitani v. United States*, 384 U.S. 364 (1966); *Yates v. United States*, 355 U.S. 66 (1957).

61. N.C. GEN. STAT. § 20-16.2(6) (1965); *People v. Sudduth*, 65 Cal. 2d 543, 55 Cal. Rptr. 393, 421 P.2d 401 (1966). *Contra*, VA. CODE § 18.1-55.1(i) (Supp. 1968).

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of the suspect's belief that the results of the examination would have been incriminating.⁶² Evidence of refusal to cooperate in an examination thus can take substantially the same place in the prosecution's chain of proof as the body evidence that the prosecution sought to obtain through the resisted examination.⁶³

Although this response avoids the use of force, it is best rejected because it yields inferior evidence and is in general unduly prejudicial to defendants. The evidence of refusal is most obviously improper when the evidence sought in an examination is not relevant to the prosecution's chain of proof. But even in the trial context, the evidence of a suspect's refusal to cooperate is less reliable than the evidence produced by a body evidence examination since a suspect may refuse to cooperate for reasons other than a fear that the examination would yield evidence of guilt.⁶⁴ The jury, however, may often disregard this deficiency in probative value and ascribe undue weight to the evidence of refusal because of an exaggerated sensitivity to the evidence as an indication that the defendant believes that he is guilty.⁶⁵ Moreover, the jury may be tempted to convict the defendant of the substantive offense charged as a punishment⁶⁶ for the collateral and comparatively minor⁶⁷ offense of noncompliance with an examination order. The possibility for prejudice is increased if the suspect had an innocent reason for refusing the examination but cannot personally present his explanation to the jury because, for other reasons, he exercises his privilege not to testify.⁶⁸

Not only is evidence of refusal a crude and often prejudicial substi-

62. Cf. 2 J. WIGMORE, EVIDENCE § 285-291 (1940); 8 J. WIGMORE, EVIDENCE § 2272-73 (McNaughton rev. ed. 1951) (failure to produce evidence gives rise to inference that evidence is unfavorable).

63. Additionally, the evidence may serve the more general function of showing the suspect's consciousness of guilt. *People v. Ellis*, 65 Cal. 2d 529, 537-38, 55 Cal. Rptr. 385, 389, 421 P.2d 393, 397 (1966); cf. 2 J. WIGMORE, EVIDENCE § 273-76 (1940). Traynor's discussion in *Ellis* is the most cogent statement of the arguments for admission of this type of evidence.

64. *State v. Paschal*, 253 N.C. 795, 117 S.E.2d 749 (1961) (defendant feared he would have to pay for the test); *Columbus v. Mullis*, 162 Ohio St. 419, 123 N.E.2d 422 (1954) (defendant refused to submit to test without presence of doctor); *Engler v. State*, 316 P.2d 625 (Okla. Crim. 1957) (bona fide doubts as to reliability); cf. *Wong Sun v. United States*, 371 U.S. 471, 483 n.10 (1963) (flight doctrine questioned).

65. *Wong Sun v. United States*, 371 U.S. 471, 483 n.10 (1963); *Miller v. United States*, 320 F.2d 767 (D.C. Cir. 1963). See also *Hubbard v. State*, 202 Miss. 229, 30 So.2d 901 (1947).

66. The evidence is admissible only to give rise to an inference of suspect's belief that the evidence would incriminate him and of his guilty state of mind. It does not create a presumption of guilt. See *State v. Mobley*, 273 N.C. 471, 160 S.E.2d 334 (1968).

67. See note 15 *supra*.

68. *Griffin v. California*, 380 U.S. 609, 615 (1965). One might question whether the admission of the evidence of refusal with its accompanying pressure on defendant to testify to explain his refusal may not be considered compulsion to testify prohibited by *Griffin*.

tute for the body evidence itself, but under some circumstances the admission of evidence of refusal might be viewed as transgressing the fifth amendment's command that "No person shall be . . . compelled in any criminal case to be a witness against himself . . ."⁶⁹ Evidence of a suspect's refusal, whether expressed orally or by physical resistance,⁷⁰ is relevant to the crime charged only in its testimonial aspect, as the approximate equivalent of the statement, "Because I fear that the examination will produce evidence of my guilt, I refuse to permit it." Therefore, the privilege against self-incrimination seems relevant.⁷¹ There remains the question of whether such testimonial evidence is "compelled" for purposes of applying the fifth amendment standard. In one sense the testimonial action is obviously not compelled—the state is not ordering the suspect to *refuse* cooperation. But the state does compel a suspect to choose⁷² between submitting to a perhaps unpleasant examination and producing testimonial evidence against himself.⁷³ The suspect's option to submit to a lawfully imposed burden instead of implicitly testifying against himself does not necessarily save the procedure: lifting a lawful burden—the examination—is in effect an inducement⁷⁴ that casts doubt on the "voluntariness"⁷⁵ of the testimonial evidence thereby obtained.

69. U.S. CONST. amend. V.

70. *Schmerber v. California*, 384 U.S. 757, 761 n.5 (1966).

71. This argument is suggested by a confusing footnote in *Schmerber v. California*, 384 U.S. 757, 765-66 n.9 (1966), from which it can be argued that evidence of any refusal to cooperate is not admissible because it is a tacit admission of guilt. See *Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1968); *Smith v. Brierly*, 384 F.2d 992 (3d Cir. 1967); *Staino v. Brierly*, 387 F.2d 597 (3d Cir. 1967); *Commonwealth v. Bravecz*, 424 Pa. 582, 227 A.2d 904 (1967); Note, *Tacit Criminal Admissions in Light of the Expanding Privilege Against Self-Incrimination*, 52 CORN. L.Q. 338 (1967); Note, *Tacit Criminal Admissions*, 112 U. PA. L. REV. 210 (1963). The California Supreme Court has refused to follow the *Schmerber* lead. "[G]uilty conduct is not a testimonial statement of guilt. By acting like a guilty person, a man does not testify to his guilt but merely exposes himself to the drawing of inferences from circumstantial evidence of his state of mind." *People v. Ellis*, 65 Cal. 2d 529, 537-38, 55 Cal. Rptr. 385, 389-90, 421 P.2d 393, 397-98 (1966). See also note 76 *infra*.

If it seems peculiar to allow the police to require cooperation in getting a voice sample for use as evidence and at the same time forbid them from using a refusal to cooperate as evidence, it is the *Schmerber* dictum—that a voice sample is not testimonial—that is the source of the anomaly. See note 92 *infra*.

72. This construction depends, of course, on the fact that the suspect is informed that this is his choice—to submit or to have his refusal offered against him. Likewise, it is crucial that the state use only the evidentiary penalty.

73. See *Simmons v. United States*, 390 U.S. 377 (1968) (defendant's incriminating testimony at unsuccessful suppression hearing was inadmissible at the trial in chief; the hearing testimony was not voluntary where defendant sought the "benefit" of the exclusionary rule).

74. The fact that the burden is lawful is irrelevant. For example, if the government offered to forgive a suspect's taxes should he testify, clearly the testimony would not be voluntary.

75. The concept of voluntariness has been strictly interpreted in the confession cases. See, e.g., *Haynes v. Washington*, 373 U.S. 503, 513-14 (1963); *Bram v. United States*, 168 U.S. 532, 543, 554, 562-65 (1897).

Thus the element of compelled self-incrimination inherent in the use against a suspect of evidence of noncooperation raises further questions regarding the propriety of this means of dealing with a suspect's refusal to cooperate in an authorized body evidence examination.⁷⁶ The constitutional doubt coupled with the relative weakness of the evidence of refusal and the danger of prejudicial reaction by a jury would seem to require that a state face squarely⁷⁷ the problem of compelling examinations instead of evading the problem by allowing noncooperation to be admissible as evidence of the substantive offense.

B. *Use of Physical Force by the Police*

The most direct way to carry out an authorized body evidence examination that a suspect resists would be to use physical force. In theory force could be used by the police either punitively to break the suspect's will to resist by making resistance too painful, or nonpunitively to carry out the examination over the suspect's contrary will. The fundamental principle that governmental punishment must be judicially imposed⁷⁸ clearly precludes police-initiated use of physical force to break the suspect's will to resist, but there is no similar constitutional prohibition against the reasonable use by the police of nonpunitive restraining force to obtain body evidence.⁷⁹ Only a few types of body evidence can be taken from a suspect firmly bent on resistance, however, if the force used is limited to restraining force.⁸⁰ A sample of hair

76. Like most arguments about the privilege against self-incrimination, the one presented here would seem to prove too much. It would not, of course, reach all evidence of conduct manifesting consciousness of guilt, but only such evidence where the element of legal compulsion was present. Thus, flight from the scene of a crime would normally be admissible, but destruction of evidence, where that is—quite legitimately—made a separate offense, would not. See note 92 *infra*.

77. Cf. *State v. Jones*, 277 Minn. 174, 152 N.W.2d 67 (1967) (state could not rely on inference from failure of codefendant to testify if state could compel the testimony by grant of immunity).

78. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *United States v. Lovett*, 328 U.S. 303, 316 (1946); *Screws v. United States*, 325 U.S. 91 (1945). See also *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233 (1968).

79. Cf. *Costello v. United States*, 298 F.2d 99 (9th Cir. 1962). The outside limit on the use of force in search is set by *Rochin v. California*, 342 U.S. 165 (1952).

80. Even the most simple of examinations may not be amenable to the use of restraining force. For example, it may be possible for a suspect to smudge his fingerprints by slight movements that could not be prevented by restraint.

Some of these examinations which cannot be carried out by the use of restraining force, could be carried out by making the suspect's will to resist irrelevant through the use of deception. Thus, his speech could be recorded by bugs planted in the cell, and the suspect could be observed or photographed in his cell through a concealed peephole. There are no published reports of such examinations through deception, and there is reason to feel that most such examinations would run afoul of the fourth amendment's requirements by unnecessarily invading the privacy of arrested suspects. Since deception is normally effective only if it is not announced in advance, it would not be possible to ask suspects to cooperate and then to use deception only against those who refuse. Hence, some victims

may be cut, a sample of blood may be taken, and the suspect may be stripped and examined for scars or other marks, but no amount of nonpunitive force⁸¹ can bring forth an example of the suspect's voice and handwriting.⁸²

Although the use of reasonable restraining force in the few cases in which it is sufficient is no more objectionable constitutionally than the use of force when necessary to carry out an authorized search of a dwelling,⁸³ when force is used not to open a locked door but rather to hold a suspect still while a sample of blood is taken, the opportunity exists for police officers to apply a certain amount of corporal punishment thinly disguised as restraint.⁸⁴

Because permissible restraining force may verge imperceptibly into impermissible punitive force, the use of restraining force to effect an authorized body evidence examination should be strictly limited to situations in which the evidence sought must be obtained quickly⁸⁵ and the examination can be conducted without the cooperation of the suspect. The police should never even attempt to conduct an examination by force if using force to restrain or move the suspect's body against his will would not be sufficient to obtain the desired evidence.⁸⁶ Even when restraining force alone will be sufficient and the evidence must be obtained quickly or not at all, a magistrate rather than a police officer should whenever possible pass on the necessity for the particular application of force that the police propose to employ.

of deceptive examinations would have to be persons against whom the use of deception was unnecessary. For all suspects subjected to unannounced intrusion of the deceptive surreptitious examination, it is a substantially greater intrusion on the privacy and dignity of the suspect than an examination pursuant to a publicly issued warrant. In view of the fact that open coercion is possible, the government would not seem justified in conducting examinations through deception.

Examinations could also be taken if a suspect were drugged so that he was unwilling or unable to resist. Such a practice would seem sufficiently offensive to community standards of decency in law enforcement as to be a denial of due process.

81. Restraining or nonpunitive force in the text refers to that minimal force necessary merely to hold a suspect stationary and disable him from interfering with an examination.

82. Restraining force could be equally ineffective in carrying out a line-up against a suspect's will. If a suspect actively resists during the line-up, he calls attention to himself and thereby makes more doubtful the reliability of the line-up. To achieve laboratory conditions, it would then be necessary to restrain all suspects, a rather ludicrous result. Neither of these results is acceptable if judicial compulsion is available.

83. *E.g.*, 18 U.S.C. § 3109 (1964); CAL. PENAL CODE § 1531 (West 1956); *Ker v. California*, 374 U.S. 23 (1963); *United States v. Whiting*, 311 F.2d 191 (4th Cir. 1962), *cert. denied*, 372 U.S. 935 (1963); *United States v. Gorman*, 208 F. Supp. 747 (E.D. Mich. 1962).

84. This may have been the case in *United States v. Townsend*, 151 F. Supp. 378 (D.D.C. 1957).

85. This would apply to the examinations described at pp. 1078-79 *supra*, with the exception of blood-alcohol tests for which a special procedure is desirable. See note 92 *infra*.

86. The caution refers particularly to examinations of voice and handwriting that cannot be taken over the resistance of the suspect.

To guard against the danger that the force employed may exceed legitimate bounds, it would be highly desirable to monitor in some way any examinations carried out against the will of a suspect. Taking motion pictures of the examination would be a relatively inexpensive solution.⁸⁷ A more effective but more costly alternative would be to require the presence of the suspect's counsel at any forced examination.⁸⁸

C. *Judicially Authorized Punishment for Noncooperation*

Except for the few occasions in which restraining force is appropriate, a recalcitrant suspect should be induced to cooperate in an authorized body evidence examination only through the threat and use of judicially authorized punishment. This punishment can serve two related functions: to deter the initial act of noncompliance and to induce eventual compliance from a suspect who has refused to cooperate.

Clearly the appropriate punishment for an initial act of noncompliance is the penalty that is usually imposed for petty crimes—a short jail sentence or fine. When the examination has been properly authorized by a police officer under circumstances permitting no delay, such a sentence may be imposed under the obstructing justice statutes⁸⁹ that prohibit disobedience to a policeman's lawful order. When the authorization is by magistrate, similar sentences may be imposed as a punishment for the suspect's criminal contempt of the magistrate's warrant,⁹⁰ which should be viewed as a judicial order directed in part to the suspect.⁹¹

But criminal penalties for past noncompliance are not alone sufficient to induce the prompt compliance required by the state;⁹² to

87. The use of cameras in the station house is not unknown. A few western cities have tried this procedure to obtain ironclad evidence of drunkenness. See generally Note, *Self-Incrimination: Testimonial vs. Non-Testimonial Evidence*, 43 DENVER L.J. 501 (1956); Note, *Sound Motion Pictures as Evidence of Intoxication in Drunken Driving Prosecutions: Constitutional Standards*, 52 CORN. L.Q. 323 (1967); Seymour, *Admissibility of Police Movies of Drunk Drivers*, 1966 INS. L.J. 754.

88. Counsel is presently required at line-ups, *United States v. Wade*, 388 U.S. 218, 228-39 (1967), but not when handwriting or voice samples are taken. *Gilbert v. California*, 388 U.S. 263 (1967); see note 11, *supra*. Since force and unfairness are always possible with body examinations it would be desirable to have counsel present at all examinations.

89. See note 15 *supra*.

90. E.g., *Bryan v. State*, 99 Ark. 163, 137 S.W. 561 (1911); *Critelli v. Tidrick*, 244 Iowa 462, 56 N.W.2d 159 (1952); *Battini v. Grund*, 244 Iowa 623, 56 N.W.2d 166 (1952); *Burtch v. Zeuch*, 200 Iowa 49, 202 N.W. 542 (1925).

91. No jury trial is necessary if the sentence is shorter than 6 months. *Bloom v. Illinois*, 391 U.S. 194 (1968); *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

92. This may be particularly true of blood-alcohol examinations where a short penalty after the fact would be little inducement to comply. Several states responded to this problem by the enactment of implied consent statutes. To induce compliance with the examination, such statutes require that a suspect lawfully arrested for driving while in-

the short fixed jail sentence should be added the traditional sanction used to compel obedience to a court order: incarceration for civil contempt of court⁹³ until the contemnor complies with the order or compliance becomes impossible or unnecessary.⁹⁴ Any fixed-term sentence for noncompliance should not begin until after the civil commitment is terminated, to prevent the fixed sentence from cancelling the immediate coercive impact of the commitment for civil contempt.⁹⁵

In the vast majority of cases, the threat of criminal punishment and

toxicated submit to a test for blood-alcohol on penalty of license suspension. This penalty is sufficiently severe that most submit. Indeed, it is often a matter of indifference to the state if they refuse since in either case drunken drivers' licenses are suspended. Details vary from state to state but all statutes contain the characteristic penalty scheme and the implied consent rationale. This rationale is that all drivers in the state consent to the examination in return for the privilege of driving in the state. Cf. *Hess v. Pawloski*, 274 U.S. 352 (1927).

Although there has been no Supreme Court adjudication of constitutionality, several state courts have upheld these statutes. See, e.g., *State v. Johnson*, 257 Iowa 1052, 1062-63, 135 N.W.2d 518, 525 (1965) (dictum); *Ballou v. Kelly*, 12 Misc. 2d 178, 176 N.Y.S.2d 1005 (Sup. Ct.) (1958). Representative state statutes are: CONN. GEN. STAT. § 14-2276 (Supp. 1968); N.Y. VEH. & TRAF. LAW § 1194 (McKinney Supp. 1968); N.C. GEN. STAT. § 20-16.2 (1965) (penalty is admissibility of refusal to submit to exam); N.D. CENT. CODE § 89-20-01 et seq. (1960); VA. CODE § 18.1-55.1 (Supp. 1968); see Comment, *The Status of Implied Consent Legislation Since Schmerber v. California*, 1967 UTAH L. REV. 168; *Alcohol Testing: Connecticut's Implied Consent Statute*, 38 CONN. B.J. 16 (1964); Comment, *Chemical Tests and Implied Consent*, 42 N.C.L. REV. 841 (1964); Comment, *Virginia's Implied Consent Statute: A Survey and Appraisal*, 49 VA. L. REV. 386 (1963). See also *Breithaupt v. Abram*, 352 U.S. 435 (1957) (absence of conscious consent, without more, does not necessarily render the taking of blood unconstitutional).

Today this conditioned privilege theory is less acceptable constitutionally; but reliance on the theory of implied consent to avoid fifth amendment problems is unnecessary in the light of *Schmerber v. California*, 384 U.S. 757 (1966).

Since the sanction for refusal to take a blood-alcohol examination test may be almost as severe as—and nearly identical to—the sanction for drunken driving, it may seem unnecessarily baroque to allow punishment for the refusal and not allow the refusal to be conclusive on the issue of drunkenness in the trial for the substantive offense. But the distinction, while it may be purely formal from the perspective of the criminal sanctions, does seem to reflect some of the values which the privilege against self-incrimination has been taken to protect.

93. This is the method most frequently used to compel testimony. *Shillitani v. United States*, 384 U.S. 364 (1966); *Yates v. United States*, 355 U.S. 66 (1957). The imprisoned is said to hold the "keys to his prison." *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902). No jury trial is required for civil contempt. *Shillitani v. United States*, *supra*.

94. Compliance might become impossible or unnecessary because an eye-witness dies, because the statute of limitations ran, if the trial were completed, or because the evidence were otherwise rendered useless. See *Shillitani v. United States*, 384 U.S. 364 (1966).

95. The combination of sanctions for criminal and civil contempt is permissible. *Yates v. United States*, 355 U.S. 66, 74 (1957) (no double jeopardy). When a police officer's authorization is resisted, the sanction of imprisonment for civil contempt can be imposed only if the police order is first transformed into a judicial order. This is clear from the fact that 18 U.S.C. § 401(3) refers only to orders of courts. The contempt sanction arose and exists to vindicate the judiciary and its process. Yet it would be a simple matter for the court sentencing a suspect for disobeying a police order to adopt that order as its own and commit the suspect until he complies. As part of the trial for obstruction of justice, the court would have heard and decided any objections to the lawfulness of the police order. At the time of sentencing the court could easily order the defendant to comply with that initial order. Hence it would be possible to combine a criminal penalty with commitment for civil contempt regardless of whether the order for an examination is given initially by a magistrate or a police officer.

commitment for civil contempt should induce prompt cooperation from reluctant suspects, but in a very unusual set of circumstances the sentence of imprisonment until compliance may offer little or no inducement for a suspect to cooperate. Thus a suspect who could not hope for release on bail⁹⁶ and who would certainly be convicted and imprisoned for a long term if the withheld body evidence was made available to the police, would face extended incarceration regardless of whether he cooperated in the body evidence examination. Such a suspect might find it a good tactic to refuse cooperation for a very extended period with the objective of weakening the prosecution's case through delay.⁹⁷ To meet such an exceptional case, once it appeared that the threat of extended incarceration would not bring compliance, the body evidence should, if possible, be taken by the use of restraining force. If this alternative is unavailable, the state should either try the suspect without the disputed evidence; or, if a trial without the body evidence would be futile, the state should be permitted to delay the trial until the suspect cooperates⁹⁸ and in the interim to preserve essential testimony for an eventual trial by taking depositions of key witnesses.⁹⁹

At the trial of a suspect for noncompliance with an authorized examination, the suspect must, of course, be permitted to show cause why he should not be punished.¹⁰⁰ To insure that no suspect is punished for refusing to cooperate in an authorized examination without at least one judicial evaluation of his objections to the examination, a suspect being tried for noncooperation must be allowed to challenge the legality of that examination if it was authorized only by a police officer.¹⁰¹ The police-authorized examination could be attacked on the

96. Capital offenses are usually non-bailable. FED. R. CRIM. P. 46(a)(1); 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 765 (1969). The same would be true of a suspect who reasonably apprehended that bail would be set beyond his resources.

97. A second objective could be to await the death of an eye-witness or one of the other events that would make the examination impossible and thus require the suspect's release. See note 94 *supra*.

98. Delay caused by the defendant himself is not a denial of his right to a speedy trial. *Powell v. United States*, 352 F.2d 705, 709 (D.C. Cir. 1965); *Smith v. United States*, 331 F.2d 704 (D.C. Cir. 1964); cf. *Harlow v. United States*, 301 F.2d 361, 366-67 (5th Cir. 1962) (delay caused by prosecution and third party).

99. Use of these depositions at trial is not a denial of defendant's right to confront witnesses if the witness is actually unavailable and defendant is given an opportunity to cross-examine when the depositions are taken. See *Barber v. Page*, 390 U.S. 719, 725-26 (1968).

100. See *Harris v. United States*, 382 U.S. 162 (1965); *In re Oliver*, 333 U.S. 257, 273-78 (1948); *Hooley v. United States*, 209 F.2d 219, 222-23 (1st Cir. 1954); FED. R. CRIM. P. § 42(b).

101. That is to say that the illegality of the examination or arrest may be raised as a defense. *Bad Elk v. United States*, 177 U.S. 529 (1900); *People v. Cedeno*, 218 Cal. App.

same grounds that are available when a suspect is raising objections to a magistrate's issuance of an examination warrant;¹⁰² however, if police authorization is confined to routine examinations such as fingerprinting, the only objection that would normally be raised would be an objection to the lawfulness of the arrest of which the examination was a part.¹⁰³

It is less clear that suspects should be allowed to attack the legality of an authorized examination when a magistrate has heard and denied the suspect's claims.¹⁰⁴ For a trial judge to hear arguments already rejected by the authorizing magistrate involves what may seem a wasteful duplication of judicial effort. In addition one might accept the position taken by the Supreme Court in other contexts that even an invalid judicial order must be respected and that disobedience to such an order may be punished to vindicate the dignity of the issuing authority.¹⁰⁵ This rule is perhaps less harsh when applied to body evidence examinations since any evidence produced as a result of an illegal examination may later be suppressed prior to trial¹⁰⁶—an unlawful examination thus constitutes no threat to the security of the suspect though it is still an invasion of his privacy and dignity.

Against these arguments are to be set arguments based on the importance of preventing judicial compulsion of unlawful intrusions on a suspect. If a suspect's claim was erroneously rejected by the authorizing magistrate but is not heard by the judge sentencing for contempt, the result will be to compel the suspect by threat of indefinite imprisonment to submit to an unjustifiable examination. Since a magistrate's consideration of the legality of proposed examinations will often be cursory and superficial,¹⁰⁷ such subversions of individual rights and the integrity of the courts could easily occur. A second, more careful

2d 213, 227, 32 Cal. Rptr. 246, 255 (1963); *Jackson v. Superior Ct.*, 98 Cal. App. 2d 183, 219 P.2d 879 (1950); *People v. Ross*, 19 Cal. App. 469, 126 P. 375 (1912); *State v. Mobley*, 240 N.C. 476, 83 S.E.2d 100 (1954); *Seattle v. Gordon*, 51 Wash. 2d 51, 342 P.2d 601 (1959).

102. See pp. 1080-81 *supra*.

103. See, e.g., *Davis v. Mississippi*, 37 U.S.L.W. 4359 (U.S. Apr. 22, 1969); *Smith v. United States*, 324 F.2d 879 (D.C. Cir. 1963).

104. Compare *Crabtree v. State*, 238 Ark. 358, 381 S.W.2d 729 (1964), with *State ex rel. Register v. MaGahey*, 12 N.D. 535, 97 N.W. 865 (1903).

105. See *United States v. United Mine Workers*, 330 U.S. 258 (1947). See also *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (*semble*).

106. E.g., FED. R. CRIM. P. 41(e). It is of course not possible to find consent to the examination under these circumstances. *Bumper v. North Carolina*, 391 U.S. 543 (1968).

107. The hearing as proposed is an abbreviated one. See p. 1081 *supra*. At present, detailed examination of the warrants and affidavits is exceptional. See articles cited in note 47 *supra*.

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evaluation¹⁰⁸ by a trial court seems necessary for those close cases in which a suspect chooses to risk punishment by challenging a magistrate's authorization.

108. This conclusion is buttressed by the lack of an appeal from the warrant-issuing procedure. *Cf. People v. Ortiz*, 29 App. Div. 2d 392, 280 N.Y.S.2d 480 (1967) (*semble*).