

法學英文

攻略 VI

林利芝 / 編著

Legal English



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寫在前面

許多法律人認為，目前律師考試科目並無法學英文一門，因此對於學校所開設的英法學習較不熱衷。雖然通過律師考試是目前成為我國律師的主要途徑，但是臺灣的法律系學生與律師必須了解，對身處於國際地球村時代的法律人而言，涉獵多國法律是相當必要的，而英法更應是學習外國法律的重點。

學習英法，從案例直攻，對於法律人有很多的好處：

第一，幫助法律人打破平日所自囿的思考模式，以更開闊的視野面對律師考試或其他類型的考試。像是法學英文“閱讀技巧”的訓練，可以幫助讀者迅速找出法律爭議。“搜尋技巧”可以用來確認適用在法律爭議上的法律或法則。“分析技巧”可以將正確的法律或法則適用在具體的事實情況。而“寫作技巧”則能幫助讀者有條理地分析考題。

第二，讀者可以從案例的研讀學習到律師執業技巧，對日後的生涯規劃有相當大的幫助。臺灣的經濟繁榮和政治安定吸引許多外國人士來臺觀光或投資，每分鐘有數以百計的國際商業交易，每天更有數以千計的臺灣旅客在世界各國旅行。面對往來頻繁，像是造成死亡或人身財產傷害的犯罪行為、違約行為、和侵權行為在臺灣境內、外層出不窮，而這些紛爭皆需倚靠律師的協助來解決。尤其臺灣已經加入世界貿易組織，在不久的將來，外國律師將被允許在臺灣執行涉外法律事務。屆時，唯有法學英語流利、精通外國法律（尤其是英法）、並且具備解決跨國爭議經驗的本國律師，才能輕鬆面對外國律師（尤其是美國律師）競爭下的強大壓力。

第三，對於想要精通專利法、著作權法、商標法、營業秘密法、及公平交易法等新興法律領域的讀者有非常大




的幫助。臺灣許多法律受到英美法，尤其是美國法的影響甚深。眾多法律的制定與修正，亦經常借鏡美國的相關法律制度。研讀美國法律和案例的英文原文，很自然地會學習到法律條文中專用的法學英文字彙，並且直接地了解這些法律設計的目的，進而去比較我國與美國法律的差異與制度的優劣，最後有能力去重新審視並建構適合我國國情的法律。

第四，對於具有提昇台灣國際競爭力使命的法律人更需要藉由法學英文的研讀增強自己的實力。以目前臺灣的形勢迫切地需要兼備英語能力的律師，代表臺灣出席世界貿易組織（WTO）或其他國際組織。雖然臺灣已在國際上擔當大任，但是因為中國大陸的阻撓和打壓，使得臺灣不被認同是一個“主權獨立”的國家，而無法成為聯合國的會員。為突破中國大陸所造成的政治孤立，臺灣雖然積極地參與許多國際組織，但是在多國貿易協商中，因缺乏強勢的法律代表捍衛臺灣人民的權益，經常使台灣在國際上屈居下風。英語已然是全世界通用的語言，而法律則是全世界統合的基礎，必須了解只有仰賴全世界都聽得懂的語言，表達立場才能突破台灣現有的格局，與世界各國建立起此對等的聯繫。

本書的目的是希望法律人在了解到學習法律英文的好處以及重要性之後，能用不同的心情面對這門學科。也希望藉由本書可以減少法律人在學習英美法時所產生的焦慮與苦惱。本書是根據作者身為美國法學院 J.D. 學生的經驗來撰寫，希望讀者在閱讀本書之後能用更寬闊的視野面對自己的法律專業。

林利芝

台北，2004.03



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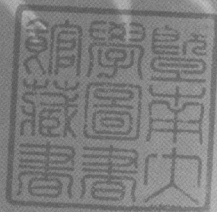
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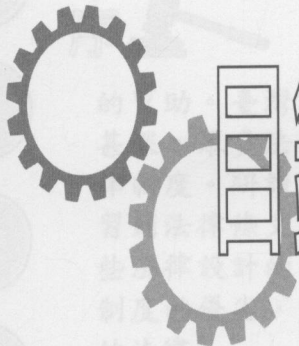
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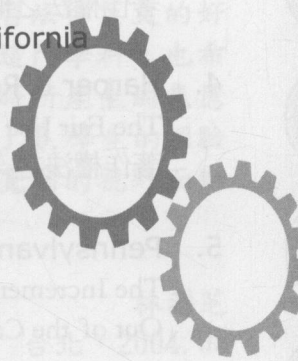
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Winston v. Lee

Compel a Suspect to
Undergo Surgery in a Search
for Evidence of a Crime

強制嫌犯進行一般麻醉手術
以搜索犯罪證據(子彈)
的取證行為

此篇英文原文是摘錄自美國最高法院判決
Winston v. Lee, 470 U.S. 753; 105 S. Ct. 1611 (1985).



原文

Schmerber v. California, held, that a State may, over the suspect's protest, have a physician extract blood from a person suspected of drunken driving without violation of the suspect's right secured by the Fourth Amendment not to be subjected to unreasonable searches and seizures. However, *Schmerber v. California* cautioned: "That we today hold that the Constitution does not forbid the States' minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." In this case, the Commonwealth of Virginia seeks to compel the respondent Rudolph

Lee, who is suspected of attempting to commit armed robbery, to undergo a surgical procedure under a general anesthetic for removal of a bullet lodged in his chest. Petitioners allege that the bullet will provide evidence of respondent's guilt or innocence. We conclude that the procedure sought here is an example of the "more substantial intrusion" cautioned against in *Schmerber v. California*, and hold that to permit the procedure would violate respondent's right to be secure in his person guaranteed by the Fourth Amendment.

At approximately 1 a. m. on July 18, 1982, Ralph E. Watkinson was closing his shop for the night. As he was locking the door, he observed someone armed with a gun coming toward him from across the street. Watkinson was also armed and when he drew his gun, the other person told him to freeze. Watkinson then fired at the other person, who returned his fire. Watkinson was hit in the legs, while the other individual, who appeared to be wounded in his left side, ran from the scene. The police arrived on the scene shortly thereafter, and Watkinson was taken by ambulance to the emergency room of the Medical College of Virginia (MCV) Hospital.

Approximately 20 minutes later, police officers responding to another call found respondent eight blocks from where the earlier shooting occurred. Respondent was suffering from a gunshot wound to his left chest area and told the police that he had been shot when two individuals attempted to rob him. An ambulance took respondent to the MCV Hospital. Watkinson was still in the MCV emergency room and, when respondent entered that room, said "that's the man that

shot me." After an investigation, the police decided that respondent's story of having been himself the victim of a robbery was untrue and charged respondent with attempted robbery, malicious wounding, and two counts of using a firearm in the commission of a felony.

The Commonwealth shortly thereafter moved in state court for an order directing respondent to undergo surgery to remove an object thought to be a bullet lodged under his left collarbone. The court conducted several evidentiary hearings on the motion. At the first hearing, the Commonwealth's expert testified that the surgical procedure would take 45 minutes and would involve a three to four percent chance of temporary nerve damage, a one percent chance of permanent nerve damage, and a one-tenth of one percent chance of death. At the second hearing, the expert testified that on reexamination of respondent, he discovered that the bullet was not "back inside close to the nerves and arteries," as he originally had thought. Instead, he now believed the bullet to be located "just beneath the skin." He testified that the surgery would require an incision of only one and one-half centimeters, could be performed under local anesthesia, and would result in "no danger on the basis that there's no general anesthesia employed."

The state trial judge granted the motion to compel surgery. Respondent petitioned the Virginia Supreme Court for a writ of prohibition and/or a writ of habeas corpus, both of which were denied. Respondent then brought an action in the

United States District Court for the Eastern District of Virginia to enjoin the pending operation on Fourth Amendment grounds. The court refused to issue a preliminary injunction, holding that respondent's cause had little likelihood of success on the merits.

On October 18, 1982, just before the surgery was scheduled, the surgeon ordered that X rays be taken of respondent's chest. The X rays revealed that the bullet was in fact lodged two and one-half to three centimeters deep in muscular tissue in respondent's chest, substantially deeper than had been thought when the state court granted the motion to compel surgery. The surgeon now believed that a general anesthetic would be desirable for medical reasons.

Respondent moved the state trial court for a rehearing based on the new evidence. After holding an evidentiary hearing, the state trial court denied the rehearing, and the Virginia Supreme Court affirmed. Respondent then returned to federal court, where he moved to alter or amend the judgment previously entered against him. After an evidentiary hearing, the District Court enjoined the threatened surgery. A divided panel of the Court of Appeals for the Fourth Circuit affirmed. We granted certiorari, to consider whether a State may consistently with the Fourth Amendment compel a suspect to undergo surgery of this kind in a search for evidence of a crime.

The Fourth Amendment protects "expectations of privacy," -- the individual's legitimate expectations that in certain places

and at certain times he has "the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men." Putting to one side the procedural protections of the warrant requirement, the Fourth Amendment generally protects the "security" of "persons, houses, papers, and effects" against official intrusions up to the point where the community's need for evidence surmounts a specified standard, ordinarily "probable cause." Beyond this point, it is ordinarily justifiable for the community to demand that the individual give up some part of his interest in privacy and security to advance the community's vital interests in law enforcement; such a search is generally "reasonable" in the Fourth Amendment's terms.

A compelled surgical intrusion into an individual's body for evidence, however, implicates expectations of privacy and security of such magnitude that the intrusion may be "unreasonable" even if likely to produce evidence of a crime. In *Schmerber v. California*, we addressed a claim that the State had breached the Fourth Amendment's protection of the "right of the people to be secure in their persons against unreasonable searches and seizures" when it compelled an individual suspected of drunken driving to undergo a blood test. Schmerber had been arrested at a hospital while receiving treatment for injuries suffered when the automobile he was driving struck a tree. Despite Schmerber's objection, a police officer at the hospital had directed a physician to take a blood sample from him. Schmerber subsequently objected to the introduction at trial of evidence obtained as

a result of the blood test.

The authorities in *Schmerber v. California* clearly had probable cause to believe that he had been driving while intoxicated, and to believe that a blood test would provide evidence that was exceptionally probative in confirming this belief. Because the case fell within the exigent-circumstances exception to the warrant requirement, no warrant was necessary. The search was not more intrusive than reasonably necessary to accomplish its goals. Nonetheless, Schmerber argued that the Fourth Amendment prohibited the authorities from intruding into his body to extract the blood that was needed as evidence.

Schmerber v. California noted that "the overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." Citing *Wolf v. Colorado*, and *Mapp v. Ohio*, we observed that these values were "basic to a free society." We also noted that "because we are dealing with intrusions into the human body, rather than with state interferences with property relationships or private papers -- houses, papers, and effects." The intrusion perhaps implicated Schmerber's most personal and deep-rooted expectations of privacy. The Court recognized that Fourth Amendment analysis thus required a discerning inquiry into the facts and circumstances to determine whether the intrusion was justifiable. The Fourth Amendment neither forbids nor permits all such intrusions; rather, the Fourth Amendment's "proper function is to constrain, not against all intrusions as such, but against intrusions which are not

justified in the circumstances, or which are made in an improper manner."

The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. We believe that *Schmerber v. California*, however, provides the appropriate framework of analysis for such cases.

Schmerber v. California recognized that the ordinary requirements of the Fourth Amendment would be the threshold requirements for conducting this kind of surgical search and seizure. We noted the importance of probable cause. And we pointed out: "Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great."

Beyond these standards, *Schmerber's* inquiry in considered a number of other factors in determining the "reasonableness" of the blood test. A crucial factor in analyzing the magnitude of the intrusion in *Schmerber v. California* is the extent to which the procedure may threaten the safety or health of the individual. "For most people a blood test involves virtually no risk, trauma, or pain." Moreover, all reasonable

medical precautions were taken and no unusual or untested procedures were employed in *Schmerber v. California*; the procedure was performed "by a physician in a hospital environment according to accepted medical practices." Notwithstanding the existence of probable cause, a search for evidence of a crime may be unjustifiable if it endangers the life or health of the suspect.

Another factor is the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity. Intruding into an individual's living room, eavesdropping upon an individual's telephone conversations, or forcing an individual to accompany police officers to the police station, typically do not injure the physical person of the individual. Such intrusions do, however, damage the individual's sense of personal privacy and security and are thus subject to the Fourth Amendment's dictates. In noting that a blood test was "a commonplace in these days of periodic physical examinations," *Schmerber v. California* recognized society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity.

Weighed against these individual interests is the community's interest in fairly and accurately determining guilt or innocence. This interest is of course of great importance. We noted in *Schmerber v. California* that a blood test is "a highly effective means of determining the degree to which a person is under the influence of alcohol." Moreover, there was "a clear indication that in fact desired evidence would be