KEEPING FAITH WITH THE FOURTH AMENDMENT: WHY STATES SHOULD REQUIRE A WARRANT FOR BREATHALYZER TESTS IN THE WAKE OF *BIRCHFIELD V. NORTH DAKOTA*

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INTRODUCTION

> *"I fear that if the Court continues down this road, the Fourth Amendment's warrant requirement will become nothing more than a suggestion."*[1]

Over the past few decades, the Supreme Court has been increasingly willing to dispense with the Fourth Amendment's warrant clause. In *Birchfield v. North Dakota,* the Supreme Court continued this pattern and created yet another exception to the already deteriorating warrant requirement. In *Birchfield*, the question before the Court was whether, in the absence of a warrant, states may make it a crime for a person to refuse to take a blood or breath test to measure the alcohol in their bloodstream.[2] The majority held that states may criminalize the

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[1] Birchfield v. North Dakota, 136 S. Ct. 2160, 2196 (2016) (Sotomayor, J., concurring in part and dissenting in part).

[2] *Id.* at 2172 (majority opinion).

refusal to submit to a breath test, but not a blood test.[3] In other words, the Court held that a warrant is required for blood tests but that warrantless breath tests are permissible under the search incident to arrest exception to the Fourth Amendment's warrant requirement.[4]

This Comment is the first to urge states to provide greater protections to their citizens under the Fourth Amendment analogs in their state constitutions by requiring warrants for breathalyzer tests. States should require police officers to obtain a warrant before conducting a breathalyzer test for four main reasons.

First, the majority in *Birchfield* relied on an arbitrary dividing line between breath and blood tests to justify its reasoning, and traditional search incident to arrest doctrine does not justify a warrantless breathalyzer test. The search incident to arrest exception attaches only where it is necessary to either preserve evidence or promote officer safety.[5] Further, the search incident to arrest must be limited to the area within the person's immediate control,[6] may not extend beyond the body's surface,[7] and must be contemporaneous with the arrest.[8]

Second, requiring police to obtain warrants for breathalyzer tests would not impose a sufficiently significant burden on state resources to justify the elimination of the warrant requirement. The majority in *Birchfield* performed a balancing test to weigh the state's interest against the privacy implications of breath tests. But where an officer can secure a warrant within the time it takes to transport the motorist and prepare the breath test, the Supreme Court has said, "there would be no plausible justification for an exception to the warrant requirement."[9] With new advancements in technology, warrant applications are more

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[3] *See id.* at 2184.

[4] *Id.* at 2184-85.

[5] *See* Arizona v. Gant, 556 U.S. 332, 338-39 (2009).

[6] *Id.* (citing Chimel v. California, 395 U.S. 752, 763 (1969)).

[7] Schmerber v. California, 384 U.S. 757, 769-70 (1966).

[8] *See* Preston v. United States, 376 U.S. 364 (1964).

[9] *Birchfield*, 136 S. Ct. at 2193 (quoting Missouri v. McNeely, 133 S. Ct. 1552, 1561 (2013).

expeditious to process, and studies have shown that warrants are more effective in obtaining drunk driving convictions.[10]

Third, requiring a warrant for breathalyzer tests is practical in light of the exigent circumstances exception to the Fourth Amendment. In the rare case where officers are truly faced with a "now or never"[11] situation, the exigency exception may allow a warrantless breath test. Further, "a case-by-case approach [in assessing exigency] will incentivize law enforcement to carefully consider whether the circumstances justify dispensing with the warrant requirement."[12]

Finally, there is a risk of further deterioration of the Fourth Amendment warrant requirement and, consequently, an individual's right to privacy and personal liberty. Justice Scalia said that the Fourth Amendment is becoming "unrecognizable,"[13] and it seems as if exceptions to the warrant requirement are becoming the rule. "[M]ere convenience in investigating drunk driving cannot itself justify an exception to the warrant requirement,"[14] and "[i]f a narrower exception . . . adequately satisfies the governmental needs asserted, a more sweeping exception will be overbroad and could lead to unnecessary and 'unreasonable searches' under the Fourth Amendment."[15]

Accordingly, state courts of last resort should reject the majority's holding in *Birchfield* and instead offer greater individual privacy protections under their state constitutions and Fourth Amendment analogs. Part I of this Comment will discuss the *Birchfield* decision, and other relevant Fourth Amendment precedent, as well as typical DUI stop procedure and breathalyzer

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[10] *See* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 811 461, USE OF WARRANTS TO REDUCE BREATH TEST REFUSALS: EXPERIENCES FROM NORTH CAROLINA (2011). *See also* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 810 852, USE OF WARRANTS FOR BREATH TEST REFUSAL: CASE STUDIES (2007).

[11] Riley v. California, 134 S. Ct. 2473, 2487 (2014).

[12] Adam Lamparello & Cynthia Swann, Birchfield v. North Dakota*: Why the United States Supreme Court Should Rely on* Riley v. California *to Hold that Criminalizing a Suspect's Refusal to Consent to a Warrantless Blood Test Violates the Fourth Amendment*, 22 WASH. & LEE J. C.R. & SOC. JUST. 107, 120 (2016) (citing Missouri v. McNeely, 133 S. Ct. 1552, 1563 (2013)).

[13] California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring in the judgment).

[14] *Birchfield*, 136 S. Ct. at 2194.

[15] *Id.* at 2190 n.3.

technology. Part II will argue that states should reject the majority's holding in *Birchfield* by discussing arguments that counter the *Birchfield* decision. Part III will explain the practical application of a warrant requirement for breathalyzer tests in light of the exigency exception. Lastly, Part IV will explore the policy implications behind more Fourth Amendment warrant exceptions and demonstrate that states are the last best defense for preserving the Fourth Amendment.

I. BACKGROUND

A. What is a Search?

One of our most cherished liberties is the freedom from unreasonable searches and seizures as guaranteed by the Fourth Amendment.[16] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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.[17]

In analyzing any Fourth Amendment issue, two questions must be answered: (1) Does the Fourth Amendment apply to the conduct and, (2) if so, was the Fourth Amendment satisfied?[18] In answering the first question, for the Fourth Amendment to apply there must have been a "search."

A "search" under the Fourth Amendment is an action by the government that violates an individual's reasonable expectation of privacy.[19] Physical intrusions into private homes or buildings have

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[16] Michael A. Sabino & Anthony Michael Sabino, *Warrantless Blood Tests, Drunk Driving, and "Exigent Circumstances": Preserving the Liberty Guarantee of the Fourth Amendment While Evolving the Exceptions to the Warrant Requirement*, 34 REV. LITIG. 27, 30 (2015). *See, e.g.*, Wolf v. Colorado, 338 U.S. 25, 27 (1949) ("The security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society.").

[17] U.S. CONST. amend. IV.

[18] *See* 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 67 (6th ed. 2013); Thomas K. Clancy, *What Is a "Search" Within the Meaning of the Fourth Amendment?*, 70 ALB. L. REV. 1 (2006).

[19] *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967).

routinely been characterized as searches.[20] Similarly, physical examinations of a person's body are considered searches, whether it be externally, such as a pat-down,[21] or internally, such as a compelled surgery to remove a bullet from a suspect's chest.[22] Over several decades, the Supreme Court has continued to examine and refine the definition of Fourth Amendment searches, especially in light of technological advances.[23]

Most relevant to this Comment, however, is that Fourth Amendment jurisprudence has long recognized that a "'compelled intrusio[n] into the body for blood to be analyzed for alcohol content' must be deemed a Fourth Amendment search."[24] In light of protected privacy concerns, the physical intrusion of inserting a needle to penetrate one's skin "infringes an expectation of privacy that society is prepared to recognize as reasonable . . . ."[25]

The same is true of breath tests.[26] In fact, the Supreme Court has held that "[s]ubjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis . . . implicates similar concerns about bodily integrity and . . . should also be deemed a search . . . ."[27]

B. Fourth Amendment Warrant Requirement

Although the text of the Fourth Amendment "does not specify when a search warrant must be obtained,"[28] the Supreme Court has "inferred that a warrant must generally be secured."[29] The

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[20] *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914) (physical intrusion of home is an unreasonable search absent a warrant); Michigan v. Tyler, 436 U.S. 499 (1978) (entry into private dwelling is a search).

[21] *See, e.g.*, United States v. Robinson, 414 U.S. 218 (1973) (patting down and reaching into suspect's pocket); Terry v. Ohio, 392 U.S. 1 (1968).

[22] Winston v. Lee, 470 U.S. 753, 759 (1985).

[23] *See, e.g.*, Kyllo v. United States, 533 U.S. 27 (2001) (whether the use of a thermal-imaging device aimed at a private home is a search).

[24] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 616 (1989) (quoting Schmerber v. California, 384 U.S. 757, 767-68 (1966)).

[25] *Id.*

[26] *Id.*

[27] *Id.* at 616-17 (citing California v. Trombetta, 467 U.S. 479, 481 (1984)).

[28] *See* Kentucky v. King, 563 U.S. 452, 459 (2011); *see also* California v. Acevedo, 500 U.S. 565, 581 (1991) (Scalia, J., concurring in the judgment) ("What [the Fourth Amendment] explicitly states regarding warrants is by way of limitation upon their issuance rather than requirement of their use.").

[29] *King*, 563 U.S. at 459.

warrant requirement has been widely held as a "centerpiece of the law of search and seizure, and that pre-screening by neutral and detached magistrates is [at] the heart of citizens' protection against police overreaching."[30]

The warrant clause was included in the Fourth Amendment as a result of the use of "writs of assistance" by English colonial authorities.[31] These writs of assistance were a form of "general warrant," or legal document that allowed English officials to search the colonists' homes and persons whenever and wherever they wanted.[32] In fact, the "driving force behind the adoption of the [Fourth] Amendment . . . was [the] widespread hostility among" American colonists about the arbitrary action by their own government.[33]

The use of warrants is significant to our constitutional history because it was designed as a "safeguard against recurrence of abuses so deeply felt by the [c]olonies as to be one of the potent causes of the Revolution . . . ."[34] As a result, the Supreme Court has made it clear on many occasions that the Fourth Amendment demonstrates a "strong preference for searches conducted pursuant to a warrant[.]"[35]

The Supreme Court has explained the warrant requirement as follows: "In a long line of cases, this Court has stressed that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.'"[36] Thus, a warrantless

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[30] William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 882 (1991).

[31] RUSSELL L. WEAVER, LESLIE W. ABRAMSON, JOHN M. BURKOFF & CATHERINE HANCOCK, PRINCIPLES OF CRIMINAL PROCEDURE 68 (4th ed. 2012).

[32] *Id.* The "general warrant" allowed officials to perform a general search "rather than specifically targeting a particular place and particular evidence of criminal activity." *Id.*

[33] *Id.* at 69 (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990)).

[34] *Id.* (quoting United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting)).

[35] Illinois v. Gates, 462 U.S. 213, 236 (1983).

[36] Thompson v. Louisiana, 469 U.S. 17, 19-20 (1984) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

search of a person is reasonable only if it falls within one of the well-delineated exceptions to the warrant requirement.[37]

C. Exceptions to the Warrant Requirement

Throughout the development of Fourth Amendment jurisprudence, the Supreme Court has enumerated several exceptions to the usual warrant requirement.[38] Absent more clear-cut guidance from the founding era, the Court generally determines whether to exempt a certain type of search from the warrant requirement by assessing, on the one hand, the degree to which it "intrudes upon an individual's privacy, and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[39] After weighing these privacy-related and law enforcement-related concerns, the Court determines whether the intrusion was reasonable.[40]

Today, there are more than twenty exceptions to the warrant requirement.[41] The two that are most relevant to this Comment are the search incident to arrest exception and the exigent circumstances exception.

1. Search Incident to Arrest Exception

The search incident to arrest exception applies categorically to all arrests and is one of the more well-established exceptions to the Fourth Amendment warrant requirement.[42] This exception "provides that, when police make a lawful arrest, they have the right to make a search incident to that arrest."[43]

While early precedent suggests that there is an unrestricted "right on the part of the Government, always recognized under English and American law, to search the person of the accused

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[37] *See, e.g.*, Missouri v. McNeely, 133 S. Ct. 1552, 1554 (2013).

[38] *See, e.g.*, Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (cataloguing nearly twenty exceptions to the warrant requirement).

[39] 68 AM. JUR. 2D *Searches and Seizures* § 14 (2010). *See also* Birchfield v. North Dakota, 136 S. Ct. 2160 (2016).

[40] *See, e.g.*, Maryland v. King, 133 S. Ct. 1958 (2013); *Birchfield*, 136 S. Ct. 2160.

[41] *See* California v. Acevedo, 500 U.S. 565, 581 (Scalia, J., concurring in the judgment); Bradley, *supra* note 38.

[42] WEAVER ET AL., *supra* note 31, at 104. *See* United States v. Robinson, 414 U.S. 218, 225 (1973).

[43] WEAVER ET AL., *supra* note 31, at 104.

when legally arrested to discover and seize the . . . evidences of crime," the mere fact of a lawful arrest does not end the inquiry.[44]

The rationale behind the search incident to arrest exception is twofold: first, the need to protect law enforcement officers from any weapons an arrestee might use to resist arrest, and second, the need to prevent the destruction of evidence within the arrestee's immediate control.[45]

i. Chimel v. California

The seminal case regarding the search incident to arrest exception is *Chimel v. California*. In that case, Chimel was lawfully arrested at his home for the burglary of a coin shop.[46] Without a search warrant and without permission, the police officers conducted a search of Chimel's entire home.[47] The officers instructed Chimel's wife to remove items from drawers, and eventually the police found and seized numerous coins, tokens, and medals.[48] The search lasted between forty-five minutes to an hour.[49] Over Chimel's objection, the coins and other items were introduced at trial, and he was convicted.[50]

On appeal, the courts affirmed the decision holding that the search was valid as a search incident to a lawful arrest.[51] But the Supreme Court reversed and held that a warrantless search incident to arrest can only cover the area in possession or control of the arrestee.[52] The Court reasoned that when an arrest occurs, it is reasonable for police to search the arrestee for weapons and to ensure no evidence is destroyed.[53]

The search in this case went "far beyond [Chimel's] person and the area from within which he might have obtained either a

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[44] Schmerber v. California, 384 U.S. 757, 769 (1966) (internal quotation marks omitted) (quoting Weeks v. United States, 232 U.S. 383, 392 (1914)).

[45] *See, e.g.*, Arizona v. Gant, 556 U.S. 332, 338 (2009); Preston v. United States, 376 U.S. 364, 367 (1964); Riley v. California, 134 S. Ct. 2473, 2485 (2014).

[46] Chimel v. California, 395 U.S. 752, 753 (1969).

[47] *Id. at* 753-54.

[48] *Id.* at 754.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 754-55.

[52] *Id.* at 752, 768.

[53] *Id.* at 762-63.

weapon or something that could have been used as evidence against him."[54] Therefore, the search of Chimel's entire home was not justified without a search warrant.[55]

ii. Riley v. California

In *Riley v. California*, a set of two consolidated cases, the issue before the Supreme Court was "whether [the] police may, without a warrant, search [the] digital information on a cell phone seized" incident to an arrest.[56]

In the first case, police officers searched defendant David Riley incident to an arrest and seized a smartphone from his pocket.[57] The police searched the smartphone and used information found on it as evidence against Riley at trial.[58] Riley moved to suppress the evidence, contending that the search was unconstitutional because it was performed without a warrant and absent exigent circumstances.[59] The trial court convicted Riley, and the state appellate court held that the warrantless search was a valid search incident to arrest.[60]

In the second case, police searched defendant Brima Wurie incident to an arrest for selling drugs and seized a flip-phone found on his person.[61] Officers used items seized from the flip-phone to obtain a search warrant for Wurie's residence.[62] The district court admitted the evidence found at Wurie's residence, but the court of appeals held that the evidence was the fruit of an unconstitutional search.[63]

The Supreme Court held that police officers must "generally secure a warrant before conducting" a search of the contents of a cell phone seized incident to an arrest.[64] The Court reasoned that the search incident to arrest exception did not apply to searches of

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[54] *Id.* at 768.
[55] *Id.*
[56] Riley v. California, 134 S. Ct. 2473, 2480 (2014).
[57] *Id.*
[58] *Id.* at 2480-81.
[59] *Id.* at 2481.
[60] *Id.*
[61] *Id.*
[62] *Id.* at 2481.
[63] *Id.* at 2482.
[64] *Id.* at 2485.

data on cell phones because (1) "digital data stored on a cell phone cannot . . . be used as a weapon to harm an . . . officer or [aid in an] arrestee's escape," and (2) once the cell phone has been seized, there is little risk of destruction of evidence stored on the phone.[65]

2. Exigent Circumstances Exception

The exigent circumstances exception applies when "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment."[66] Such exigencies could include the need to render emergency aid,[67] protect another from imminent injury,[68] pursue a fleeing suspect,[69] or prevent the imminent destruction of evidence.[70]

Exigent circumstances imply that law enforcement officers did not have sufficient time to secure a warrant before conducting a search or seizure.[71] Thus, an important consideration in determining exigency is the time it would take for an officer to obtain a search warrant, including the availability of telephonic search warrants.[72]

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[65] *Id.* at 2485-86.

[66] Kentucky v. King, 563 U.S. 452, 460 (2011) (internal quotation marks omitted) (quoting Mincey v. Arizona, 437 U.S. 385, 394 (1978)).

[67] Michigan v. Fisher, 558 U.S. 45, 49 (2009) (police saw man was bleeding from a cut on his hand and entered to render first aid).

[68] Brigham City v. Stuart, 547 U.S. 398, 400 (2006) ("[P]olice may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.").

[69] Warden v. Hayden, 387 U.S. 294 (1967) (suspected felon ran inside house only minutes before police arrived).

[70] United States v. Banks, 540 U.S. 31 (2003) (destruction of drug evidence by flushing the drugs down the drain); *accord King*, 563 U.S. 452.

[71] Michigan v. Tyler, 436 U.S. 499, 509 (1978) ("[A] warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and *no time to secure a warrant*." (emphasis added)); Birchfield v. North Dakota, 136 S. Ct. 2160, 2193 (2016) (noting that where an officer has time to obtain a warrant, there is no justification for an exception to the warrant requirement).

[72] *E.g.*, Missouri v. McNeely, 133 S. Ct. 1552, 1562-63 (2013) ("[T]echnological developments that enable police officers to secure warrants more quickly . . . are relevant to an assessment of exigency."); Bailey v. Newland, 263 F.3d 1022, 1033 (9th Cir. 2001) (noting that the government bears the burden of showing that a warrant could not have been obtained in time); State v. Townsend, 380 P.3d 698, 702-03 (Idaho Ct. App. 2016) (no finding of exigency when officers could have reasonably obtained a warrant).

To determine whether the exigent circumstances exception applies, courts look to the totality of the circumstances and decide on a case-by-case basis.[73] Because the Fourth Amendment's reasonableness inquiry is fact specific, it "demands that we evaluate each case of alleged exigency based 'on its own facts and circumstances.'"[74]

i. Schmerber v. California

In *Schmerber v. California*, defendant Schmerber was hospitalized after an automobile accident involving the car he had been driving.[75] Suspecting Schmerber was intoxicated, police requested a blood alcohol test.[76] When Schmerber refused to give a blood sample for chemical analysis, an officer directed a physician to take a sample anyway.[77] The blood test showed that Schmerber was intoxicated at the time of the accident, and the analysis was admitted as evidence at trial.[78] Schmerber objected to the use of the blood test analysis, contending that the forced blood draw was a violation of the Fourth Amendment.[79]

The question before the Court was "whether the police were justified in requiring [Schmerber] to submit to [a warrantless] blood test."[80] The Court held that the blood draw was justified in this case because the evidence–the alcohol in the bloodstream–would have been lost if police had been required to obtain a warrant.[81] In other words, an exigency excused the requirement of a warrant.[82]

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[73] *See* Missouri v. McNeely, 133 S. Ct. 1552, 1559 (2013).

[74] *Id.* (quoting Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931)).

[75] Schmerber v. California, 384 U.S. 757, 758 (1966).

[76] *Id.*

[77] *Id.* at 758-59

[78] *Id.* at 759.

[79] *Id.* Schmerber also argued that the admission of the chemical analysis denied him due process under the Fourteenth Amendment, violated his privilege against self-incrimination under the Fifth Amendment, and violated his right to counsel under the Sixth Amendment. *Id.*

[80] *Id.* at 768.

[81] *Id.* at 770-71. Almost fifty years after deciding *Schmerber*, the Supreme Court clarified that the dissipation of BAC does not alone create an exigency. Missouri v. McNeely, 133 S. Ct. 1552, 1554-55 (2013).

[82] The fact that "time had to be taken to bring the accused to a hospital and to investigate the scene of the accident" was essential to the Court's finding of exigency. *Schmerber*, 384 U.S. at 770-71.

Although a warrantless search was permissible in this case, the Court was careful to note that any intrusive bodily search would violate the Fourth Amendment unless (1) the police are justified in requiring a person to submit to the test and (2) the means and procedures employed in conducting the test are reasonable.[83]

ii. Missouri v. McNeely: The Court's Refusal to Adopt a Per Se Exigency Exception for Drunk Driving Cases

In *Missouri v. McNeely*, the Supreme Court resolved a longstanding circuit split on the issue of whether the natural dissipation of blood alcohol content (BAC) establishes a *per se* exigency that justifies an exception to the warrant requirement for nonconsensual blood testing in drunk driving investigations.[84] In other words, whether dissipation of BAC evidence *always* justifies a warrantless blood alcohol test.

The case began when defendant McNeely was pulled over for speeding and repeatedly crossing the centerline of the road.[85] The police officer noticed signs that McNeely was intoxicated.[86] After McNeely performed poorly on a number of field sobriety tests and refused to submit to a portable breath test, the officer placed him under arrest.[87]

The officer "began to transport McNeely to the [police] station . . . . [b]ut when McNeely indicated that he would again refuse to provide a breath sample," the officer instead headed to a local hospital for blood testing.[88]

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[83] *Id.* at 772 ("It bears repeating, however, that we reach this judgment *only on the facts of the present record.*" (emphasis added)).

[84] *McNeely*, 133 S. Ct. at 1558. *Compare* State v. McNeely, 358 S.W.3d 65, 67 (Mo. 2012) (en banc) ("[T]hat blood-alcohol levels dissipate after drinking ceases, is not a *per se* exigency . . . justifying an officer to order a blood test without obtaining a warrant"), State v. Rodriguez, 156 P.3d 771 (Utah 2007) (same conclusion), *and* State v. Johnson, 744 N.W.2d 340 (Iowa 2008) (same), *with* State v. Shriner, 751 N.W.2d 538 (Minn. 2008) (holding that the natural dissipation of alcohol in the bloodstream alone constitutes a *per se* exigency), State v. Bohling, 494 N.W.2d 399 (Wis. 1993) (same conclusion), *and* State v. Woolery, 775 P.2d 1210 (Idaho 1989) (same). This circuit split arose because of different States' interpretations of *Schmerber*.

[85] *McNeely*, 133 S. Ct. at 1556.

[86] *Id.*

[87] *Id.* at 1556-57.

[88] *Id.*

The officer never attempted to secure a warrant before taking a blood sample from McNeely.[89]

At trial, McNeely moved to suppress the results of the blood test contending that, under the circumstances, the warrantless blood draw violated his Fourth Amendment rights.[90] The trial court agreed, and the Missouri Supreme Court affirmed.[91]

Ultimately, the United States Supreme Court affirmed and refused to create a *per se* exigency exception for the natural dissipation of BAC to justify warrantless blood draws.[92]

The Court held that the Fourth Amendment's warrant requirement applies to blood alcohol tests unless specific exigent circumstances exist.[93] Because exigency must be determined case-by-case based on the individual facts, there may be cases where the natural dissipation of BAC would be considered an exigent circumstance, but the Court found no reason to create a categorical rule.[94]

The majority specifically declined to provide the factors to be taken into account in determining whether a warrant is required to compel a blood sample, explaining that:

> Because this case was argued on the broad proposition that drunk-driving cases present a *per se* exigency, the arguments and the record do not provide the Court with an adequate analytic framework for a detailed discussion of all the relevant factors that can be taken into account in determining the reasonableness of acting without a warrant.[95]

Nevertheless, the Court did provide some guidance when it stated: "In those drunk-driving investigations where police officers

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[89] *Id.* At trial, the arresting officer testified that he could have reasonably obtained a warrant before conducting the blood draw. *Id.* at 1567. The trial court concluded that there was no exigency and found that "a prosecutor was readily available to apply for a search warrant and a judge was readily available to issue a warrant." *Id.* (citation omitted) (internal quotation marks omitted).

[90] *Id.* at 1557.

[91] *Id.*

[92] *Id.* at 1558.

[93] *Id.*

[94] *Id.* at 1561. The Court noted that although an exigent circumstance existed in *Schmerber* such that a warrantless blood draw was permissible, it does not mean the same is true in all other cases. *Id.*

[95] *Id.* at 1568.

can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so."[96]

D. Drunk Driving Stops and Breathalyzer Usage

1. DUI Stop Procedure

Before a law enforcement officer can pull over and conduct a traffic stop on a driver, the officer must have reasonable suspicion that a crime has or is being committed, or that a driver is driving under the influence.[97] Once the driver is pulled over, the officer may request the person to perform a standardized field sobriety test.[98] Field sobriety tests are subjective in nature and are used to detect impairment and develop probable cause for an arrest.[99] Standard field sobriety tests generally consist of: a horizontal gaze "nystagmus" test, a "walk and turn" test, and a "standing on one leg" test.[100] After the field sobriety test, an officer may conduct a preliminary breath test where the suspect will be instructed to blow into a handheld breathalyzer machine.[101] But in most states,

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[96] *Id.* at 1561.

[97] *See* Rodriguez v. United States, 135 S. Ct. 1609, 1611 (2015) (routine traffic stop is more analogous to a *Terry* stop).

[98] *DUI Police Stop Procedure—Probable Cause*, DRINKDRIVING.ORG, http://www.dui-usa.drinkdriving.org/dui_dwi_information.php [https://perma.cc/L85L-GY5J] (last visited Jan. 24, 2017).

[99] *Id.*

[100] *Id.* In a horizontal gaze "nystagmus" test, the officer will move an object from side to side approximately 12 inches away from the suspect's face, all the while watching the suspect's eyes for an involuntary nystagmus, or jerking movement. *Id.* In a "walk and turn" test, the suspect is instructed to "take 9 heel-to-toe steps down a straight line[,]" turn, and then repeat the process back to the starting position. *Id.* In a "standing on one leg" test, the suspect stands with their heels together before raising one leg off the ground while their arms remain by their side. The suspect will be instructed to count out loud before switching legs. *Id.* In each of these tests, the officer is looking for obvious signs of the suspect's difficulty in carrying out the test, eyelid or body tremors, loss of balance, or other signs of impairment. *Id. See also* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING: PARTICIPANT GUIDE (2013) [hereinafter TESTING GUIDE], http://www.njsp.org/division/investigations/pdf/adtu/20160105_paticipantmanual.pdf [https://perma.cc/6DM8-63T2].

[101] DRINKDRIVING.ORG, *supra* note 98. *See also* Birchfield v. North Dakota, 136 S. Ct. 2160, 2191-92 (Sotomayor, J., concurring in part and dissenting in part).

preliminary breath test results are not admissible as substantive evidence against a defendant in court.[102]

If the officer gathers enough evidence to constitute probable cause to arrest a suspect for DUI, then the suspect will be mirandized, transported to a police station or other testing facility, and will be given a chemical test, such as a breath or blood test, to determine BAC.[103] At the equipment site, unlike on the side of the road, officers have access to "reliable, evidence-grade breath testing machinery."[104] When conducting this evidentiary breath test, officers must first observe the arrestee for fifteen to twenty-minutes to ensure that any residual mouth alcohol has dissipated and that the arrestee has not ingested any food or drink.[105] Finally, if a breathalyzer machine is not already active, an officer must set one up.[106]

2. Using Breathalyzer Technology

"Breathalyzer" is a brand name that has become a well-known synonym for a breath analyzer.[107] Breathalyzers are one type of device that measures Blood Alcohol Content (BAC), which refers to the number of grams of alcohol per one-hundred milliliters of a person's blood.[108] A breath test does not actually test BAC.[109] Instead, breathalyzers estimate BAC indirectly.[110] Alcohol is not chemically changed in the bloodstream, so as the blood moves through the lungs, some of the alcohol evaporates and

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[102] *See* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 811 461, USE OF WARRANTS TO REDUCE BREATH TEST REFUSALS: EXPERIENCES FROM NORTH CAROLINA (2011); *Birchfield*, 136 S. Ct. at 2191-92.

[103] DRINKDRIVING.ORG, *supra* note 98; *Birchfield*, 136 S. Ct. at 2191-92.

[104] *Birchfield*, 136 S. Ct. at 2192.

[105] *Id.*

[106] *Id.* (noting that North Dakota's breathalyzer machine can take up to thirty minutes to set up).

[107] Jacob Silverman, *How DUI Works*, HOWSTUFFWORKS.COM, http://auto.howstuffworks.com/car-driving-safety/accidents-hazardous-conditions/dui3.htm [https://perma.cc/ENV5-P3QA] (last visited Sept. 11, 2017).

[108] TESTING GUIDE, *supra* note 100.

[109] David J. Hanson, *Accuracy of Breathalyzers a Threat to Law-Abiding Drivers*, ALCOHOL PROBS. & SOLUTIONS, http://www.alcoholproblemsandsolutions.org/accuracy-breathalyzers-threat-law-abiding-drivers [https://perma.cc/Z7LJ-7PP4] (last visited Jan. 24, 2017).

[110] *Id.*

passes across the membranes of the lung's air sacs (alveoli).[111] The concentration of alcohol in a person's alveolar air is related to the alcohol concentration in their blood.[112]

Every breath test device has a mouthpiece, a tube through which the person exhales air, and a sample chamber where the air goes.[113] A breath test "requires the subject to actively blow alveolar (or "deep lung") air into the machine" for a sustained period of time.[114] Operators of breath testing devices must be properly trained to use and calibrate the machines.[115]

Larger machines typically yield better estimates than hand-held breathalyzers, so that is why many states do not allow hand-held, preliminary breath test estimates in court.[116]

E. Birchfield v. North Dakota*: The Decision*

1. Facts and Procedural History

In June 2016, the Supreme Court of the United States decided *Birchfield v. North Dakota*, which consisted of three consolidated drunk driving cases. In the first, defendant Danny Birchfield accidentally drove his car off a North Dakota highway and into a ditch.[117] When an officer arrived on the scene, he believed Birchfield was intoxicated.[118] Birchfield was arrested after failing both the field sobriety tests and the roadside breath test.[119] The arresting officer informed Birchfield of his obligation to consent to a BAC test under North Dakota law, but Birchfield nevertheless refused to let his blood be drawn.[120] Birchfield was

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[111] Craig Freudenrich, *How Breathalyzers Work*, HOWSTUFFWORKS.COM, http://electronics.howstuffworks.com/gadgets/automotive/breathalyzer2.htm [https://perma.cc/Y85Q-R9MJ] (last visited Sept. 11, 2017).

[112] *Id.*

[113] *Id.*

[114] *See* Birchfield v. North Dakota, 136 S. Ct. 2160, 2194 (citing Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 616 (1989)).

[115] Freudenrich, *supra* note 111.

[116] Hanson, *supra* note 109.

[117] *Birchfield*, 136 S. Ct. at 2170.

[118] *Id.* North Dakota statute defines "chemical test" as a test of either the "blood, breath, or urine for the purpose of determining alcohol concentration . . . ." N.D. CENT. CODE § 39-20-01 (2017).

[119] *Birchfield*, 136 S. Ct. at 2170.

[120] *Id.*

charged with a misdemeanor for refusing to consent to a chemical test in violation of North Dakota law.[121]

In the second case, police were called to a boat launch where three apparently drunk men were attempting to pull a boat out of the water and onto their truck.[122] Defendant William Robert Bernard, Jr. admitted to drinking and had the keys to the truck in his hand, but he denied driving the truck and refused to perform a field sobriety test.[123] Bernard was arrested for driving while impaired and transported to the police station, where he refused to consent to a breath test in violation of Minnesota state law.[124] He was charged with test refusal in the first degree.[125]

In the third case, an officer saw defendant Steve Beylund hit a stop sign after unsuccessfully trying to turn into a driveway.[126] The officer noticed that Beylund "smelled of alcohol" and "had an empty wine glass in the . . . console next to him," so Beylund was arrested for driving while intoxicated.[127] The arresting officer transported Beylund to a local hospital and informed him that it would be a criminal offense to refuse a blood alcohol test in North Dakota.[128] Beylund consented to a blood test, which confirmed that he was over the legal limit, and he was charged with driving under the influence.[129]

All three defendants challenged the state statutes criminalizing the refusal to submit to blood alcohol tests, contending that the statutes violated their Fourth Amendment rights to be free from unreasonable searches and seizures when there is no warrant.[130] The Supreme Court of Minnesota and the Supreme Court of North Dakota held that criminalizing the refusal to submit to a blood alcohol test was reasonable under the Fourth Amendment.[131] The Supreme Court of the United States granted certiorari to decide whether states may criminalize an

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[121] *Id.* at 2170-71
[122] *Id.* at 2171.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.* at 2171-72.
[127] *Id.* at 2172.
[128] *Id.*
[129] *Id.*
[130] *Id.* at 2160.
[131] *Id.*

individual's refusal to submit to a warrantless blood alcohol test.[132]

2. Majority Opinion

The majority held that states may criminalize the refusal to submit to a warrantless breath test, but not a warrantless blood test.[133] In sum, the Court dictated that the Fourth Amendment allows warrantless breath tests incident to an arrest for drunk driving, but because blood tests are "significantly more intrusive," a warrant is required.[134]

The majority justified the constitutionality of warrantless breath tests under the search incident to arrest exception to the Fourth Amendment's warrant requirement.[135] Breath tests, the Court reasoned, involve minimal physical intrusion to capture something routinely exposed to the public, reveal only a limited amount of information, and do not enhance the embarrassment that is inherent in any arrest.[136]

Blood tests, on the other hand, implicate privacy interests because they are more physically intrusive—they require piercing an individual's skin—and they produce a sample that can be used to obtain information beyond just a person's blood alcohol content.[137] Further, criminalizing the refusal to submit to a breath test serves the government's interest in preventing drunk driving, while the same rationale does not apply to blood tests because of the greater degree of intrusion.[138]

3. Sotomayor's Dissent

Justice Sotomayor, joined by Justice Ginsburg, wrote a separate opinion concurring in part and dissenting in part. Justice Sotomayor wrote that the Fourth Amendment's prohibition against warrantless searches should apply to breath tests, as well

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[132] *Id.* at 2172.
[133] *Id.* at 2160.
[134] *Id.* at 2184.
[135] *Id.* at 2174-76.
[136] *Id.* at 2177.
[137] *Id.* at 2178.
[138] *Id.* at 2160.

as blood tests, unless exigent circumstances justify one in a particular case.[139]

In delineating exceptions to the warrant requirement, the Supreme Court has routinely examined whether a legitimate governmental interest justifies the search in light of the individual's privacy interest and whether that determination should be made according to a case-by-case analysis or a categorical rule.[140] Based on this analysis, Justice Sotomayor argued that a categorical rule allowing warrantless breath tests incident to arrest was unnecessary to protect the governmental interest of combating drunk driving; once an officer makes the stop, the drunk driver is off the road, and a warrant could be obtained if necessary.[141]

Additionally, Justice Sotomayor noted that neither the State nor the majority demonstrated that "requiring police to obtain warrants for breath tests would impose a sufficiently significant burden on state resources to justify the elimination of the Fourth Amendment's warrant requirement."[142]

4. Thomas's Dissent

Justice Thomas also wrote a separate opinion concurring in part and dissenting in part. He argued that the Court should have applied the *per se* rule rejected in *Missouri v. McNeely* to hold that "both warrantless breath and blood tests are constitutional because 'the natural metabolization of [BAC] creates an exigency once police have probable cause to believe the driver is drunk.'"[143] In other words, Justice Thomas argued that the exigent circumstances exception should apply categorically to all blood and breath tests.[144]

Justice Thomas expressed concern with the majority's distinction between blood tests and breath tests and noted that

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[139] *Id.* at 2187 (Sotomayor, J., concurring in part and dissenting in part).

[140] *Id.* at 2187-89.

[141] *Id.* at 2191 ("[O]nce a person is stopped for drunk driving and arrested, he no longer poses an immediate threat to the public.").

[142] *Id.* at 2193.

[143] *Id.* at 2198 (Thomas, J., concurring in the judgment in part and dissenting in part) (quoting Missouri v. McNeely, 133 S. Ct. 1552, 1576 (2013) (Thomas, J., dissenting)).

[144] *Id.* at 2197-98.

this "hairsplitting makes little sense" when applying a categorical approach.[145] He further argued that by drawing "an arbitrary line in the sand between blood and breath tests," the majority decision chipped away at the well-established exceptions to the Fourth Amendment and is "bound to cause confusion in the lower courts."[146]

F. Federalism and the Protection of Individual Rights

"[B]uilt into the general structure of the Constitution is a libertarian bias based on checks against constitutionally suspect laws and in favor of the broadest . . . constructions" of our rights.[147] Constitutional federalism is something of a double-edged sword, where state and national government "can deploy its powers to police the constitutional limits on the other's powers and remedy the other's constitutional violations."[148] This separation provides "'a double security [that] arises to the rights of the people' by virtue of the fact that 'the different governments will control each other.'"[149]

Under this system of federalism, states are not dependent solely on the Federal Constitution to protect constitutional rights.[150] Particularly in the context of the Fourth Amendment, each state has its own constitution, many of which include an "analog" to the Federal Fourth Amendment.[151] In fact, "examples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing[.]"[152]

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[145] *Id.* at 2197.

[146] *Id.* at 2197-98.

[147] Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1504 (1987) (citing THE FEDERALIST No. 73, at 443-44 (Alexander Hamilton)).

[148] *Id.* at 1492-93.

[149] Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421 (1996) (quoting THE FEDERALIST No. 51, at 288 (Alexander Hamilton) (E.H. Scott ed., 1894)).

[150] *See* Stephen E. Henderson, *Learning from All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 CATH. U. L. REV. 373, 373-74 (2006).

[151] *Id.* at 374.

[152] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 500 (1977).

Justice Brennan has been "regularly credit[ed]" for "launching the renewal of state constitutional law" with his 1977 article, *State Constitutions and the Protections of Individual Rights.*[153] Justice Brennan noted that "Supreme Court decisions under the fourteenth amendment have significantly affected virtually every other area, civil and criminal, of state action."[154] Accordingly, Justice Brennan stressed that as "guardians of our liberties . . . . state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[155] Thus, Justice Brennan argues that states should provide greater constitutional protections than those afforded by federal courts when necessary.

II. STATES SHOULD REQUIRE A WARRANT FOR BREATHALYZER TESTS

The majority's holding regarding breath tests in *Birchfield v. North Dakota* is a misstep in Constitutional analysis for three reasons. First, the distinction between breath tests and blood tests is an arbitrary line that chips away at well-established Fourth Amendment jurisprudence. Second, warrantless breath tests do not fall within the rationale of the search incident to arrest exception, and therefore cannot be justified under traditional search incident to arrest doctrine. Third, the significant privacy implications of breath tests outweigh the minimal burden that a warrant requirement would impose on the states. Thus, states should provide greater protections for citizens under their state constitutions and require a warrant for breathalyzer tests.

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[153] Shepard, *supra* note 149, at 421. "Brennan's 1977 article in the *Harvard Law Review* has been called 'the starting point of the modern re-emphasis on state constitutions.'" *Id.* at 421-22 (citing David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1197 n.1 (1992)). "Brennan 'is primarily responsible for this revamping of federalism.'" *Id.* at 422 (citing John D. Boutwell, *The Cause of Action for Damages Under North Carolina's Constitution:* Corum v. University of North Carolina, 70 N.C. L. REV. 1899, 1910 n.70 (1992)).

[154] Brennan, *supra* note 152, at 491.

[155] *Id.*

A. Arbitrary Distinction Between Breath and Blood Tests

The majority in *Birchfield* relied heavily on the distinction between breath tests and blood tests in its holding—that warrantless breath tests are constitutional while warrantless blood tests are not. But this distinction is feeble. Until the Court's decision in *Birchfield*, breath tests and blood tests were considered indistinguishable. The Court made it clear in *McNeely* that police officers need a warrant before drawing a person's blood, and that the natural dissipation of BAC cannot itself constitute an exigent circumstance. By that logic, it seems that breath tests should fall under the same reasoning. Instead, however, the Court resorts to "hairsplitting" and draws an "arbitrary line in the sand" to distinguish between two almost identical tests.[156] Considering the Court's increasing willingness to depart from the Fourth Amendment warrant requirement, this arbitrary distinction is not strong enough of a division to keep the Court from continuing its overreaching and inconsistent application of the warrant exceptions.

B. Traditional Search Incident to Arrest Doctrine Does Not Justify a Warrantless Breath Test

Warrantless searches are *per se* unreasonable unless they fall within one of the "established and well-delineated exceptions [to the Fourth Amendment warrant requirement]."[157] Among these exceptions is a search incident to a lawful arrest.[158] In conducting a lawful arrest, this exception allows an arresting officer to search the arrestee for weapons the person might seek to use in order to evade arrest and search for and seize evidence on the arrestee's person to prevent its concealment or destruction.[159] Thus, the primary rationale behind the search incident to arrest exception is to (1) promote officer safety and (2) preserve evidence.[160] But the

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[156] Birchfield v. North Dakota, 136 S. Ct. 2160, 2197 (2016) (Thomas, J., concurring in the judgment in part and dissenting in part).

[157] Arizona v. Gant, 556 U.S. 332, 338 (2009) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

[158] *Gant*, 556 U.S. at 338.

[159] Chimel v. California, 395 U.S. 752, 762-63 (1969).

[160] *See Gant*, 556 U.S. 332. *See also* United States v. Robinson, 414 U.S. 218, 230-34 (1973); *Chimel*, 395 U.S. at 762-63.

scope of a search incident to arrest is limited to "the arrestee's person and the area 'within his immediate control' . . . [specifically,] the area from within which he might gain possession of a weapon or destructible evidence."[161]

After examining the traditional search incident to arrest doctrine and its application in case law precedent, a breath test conducted without a warrant does not appear to fall within the bounds of the exception. Thus, a warrantless breath test is not justified by the search incident to arrest exception to the Fourth Amendment's warrant requirement.

1. Search Incident to Arrest Exception Exists to Promote Officer Safety and Prevent Destruction of Evidence

A warrantless breath test is not justified under the search incident to arrest doctrine because it does not fall within the rationale of the exception: to promote officer safety or prevent destruction of evidence.[162] The Supreme Court has repeatedly reaffirmed the limitations of the search incident to arrest exception and held that searches that do not fit within the exception are unconstitutional.[163]

For instance, in *Riley v. California*, the Court held that the search of cell phone data is not justified under the search incident to arrest exception because "[d]igital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape."[164] Additionally, the government's concerns about the loss of cell phone data by remote wiping or encryption are "distinct from *Chimel*'s focus on a defendant who responds to arrest by trying to conceal or destroy evidence within his reach."[165]

Once a person has been stopped and arrested for drunk driving, there is no longer any immediate threat to police. Just like the cell phone data in *Riley,* a person's breath cannot be used

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[161] *Gant*, 556 U.S. at 339 (quoting *Chimel* 395 U.S. at 763).

[162] Birchfield v. North Dakota, 136 S. Ct. 2160, 2196 (2016) (Sotomayor, J., concurring in part and dissenting in part) ("[T]he search-incident-to-arrest exception is particularly ill suited to breath tests.").

[163] *See, e.g.*, Riley v. California, 134 S. Ct. 2473 (2014); *Chimel*, 395 U.S. 752.

[164] *Riley*, 134 S. Ct. at 2485.

[165] *Id.* (citing *Chimel*, 395 U.S. at 763-64).

as a weapon. Further, the concern that an arrestee might conceal or destroy evidence cannot, without more, justify a search of the person's breath. It is impossible for a person to "reach into his lungs or blood stream to remove alcohol and destroy evidence,"[166] so the exception should not apply. There is a widespread myth that drinking water or coffee, taking a cold shower, or napping will help a person sober up, but in fact, what matters most is the body having time to metabolize the alcohol content.[167] Alcohol metabolizes at a relatively predictable rate of about one ounce per hour, and a blood alcohol level of 0.08 takes approximately five-and-a-half hours to leave the system.[168]

2. Search Incident to Arrest Exception Does Not Apply to Searches Inside the Body

The Supreme Court has held that the search incident to arrest exception does not extend to "intrusions beyond the body's surface."[169] Indeed, the Court has held that "'absent an emergency, [a search warrant is] required where intrusions into the human body are concerned,' even when the search was conducted following a lawful arrest."[170]

A breath test is a search of a person[171] that requires the suspect to insert a tube into their mouth, exhale for an extended period of time, and produce alveolar or "deep lung" breath for chemical analysis.[172] The deep lung exhalation comes from within a person's body, and the insertion of a tube inside of a person's

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[166] Paul A. Clark, *Do Warrantless Breathalyzer Tests Violate the Fourth Amendment?*, 44. N.M. L. REV. 89, 113 (2014).

[167] Silverman, *supra* note 107.

[168] *How Long Does Alcohol Stay in Your System?*, AM. ADDICTION CTRS., http://americanaddictioncenters.org/alcoholism-treatment/how-long-in-system [https://perma.cc/K6RY-ZH23] (last visited Jan. 25, 2017). This rate does not take into account differences in height, weight, gender, food consumption, etc.

[169] Schmerber v. California, 384 U.S. 757, 769 (1966).

[170] Missouri v. McNeely, 133 S. Ct. 1552, 1558 (2013) (quoting *Schmerber*, 384 U.S. at 770).

[171] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 616-17 (1989) ("[A] breathalyzer test . . . implicates similar concerns about bodily integrity and . . . should also be deemed a search" (citations omitted)).

[172] *See id.* at 616. *See, e.g.*, California v. Trombetta, 467 U.S. 479, 481 (1984).

mouth is certainly an intrusion beyond the body's surface.[173] Thus, the search incident to arrest exception does not apply to warrantless breath tests.

3. Temporal and Spatial Limitations of the Exception

The search incident to arrest exception is also subject to temporal and spatial limitations. The exception only applies if the search is contemporaneous in time and place with the arrest, and it is limited to the area within the arrestee's "immediate control."[174] The phrase, "immediate control," has come to mean the area into which an arrestee "might [reach] for a weapon or for evidence to destroy."[175]

The Supreme Court explained that the justifications for the search incident to arrest exception are "absent where a search is remote in time or place from the arrest."[176] Some delay before a breath test is "inevitable regardless of whether police officers are required to obtain a warrant," so it is unlikely that the search of a suspect's breath can ever be conducted contemporaneously with the arrest.[177] The standard evidentiary breath test is conducted after a suspect is arrested, transported to a police station or testing facility, and after a fifteen to twenty-minute observation period to ensure that any residual mouth alcohol has dissipated.[178] In other words, once the arrestee is removed from the location of the initial stop, placed into custody, transported to the police station, and observed for fifteen minutes before the breathalyzer test, the search of the person's breath is no longer an "incident" of the arrest.[179]

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[173] *Cf.* Cupp v. Murphy, 412 U.S. 291 (1973) (scraping material from under the suspect's fingernails was justified without a warrant).

[174] Arizona v. Gant, 556 U.S. 332, 340-41 (2009) (citing New York v. Belton, 453 U.S. 454, 460 (1981)).

[175] *See* DRESSLER & MICHAELS, *supra* note 18, at 191.

[176] Preston v. United States, 376 U.S. 364, 367 (1964) (citing Agnello v. United States, 269 U.S. 20, 31 (1925)).

[177] Missouri v. McNeely, 133 S. Ct. 1552, 1561 (2013).

[178] Birchfield v. North Dakota, 136 S. Ct. 2160, 2192 (2016) (Sotomayor, J., concurring in part and dissenting in part).

[179] *See* DRESSLER & MICHAELS, *supra* note 18, at 189. *See also* Preston v. United States, 376 U.S. 364, 367 (1964) (after police towed the arrestee's car to the police garage, the search of the vehicle was no longer justified on search incident to arrest grounds); *Birchfield*, 136 S. Ct. at 2196. "[B]reath tests are not, except in rare

Also, a breath test does not satisfy the spatial limitation of the search incident to arrest exception because the search extends beyond the area within the person's "immediate control." It is physically impossible for a person to reach inside his own body to use his breath as a weapon or to destroy the alcohol content in his bloodstream. Therefore, a warrantless breath test does not fall within the bounds of conventional search incident to arrest doctrine.

C. The Court's Balancing Test Weighs in Favor of a Warrant Requirement

It seems that the black letter law of the search incident to arrest exception would have dictated a different outcome for *Birchfield v. North Dakota* with regards to breath tests.[180] But instead of looking to a conventional reading of the exception, the Court turned to a balancing test to weigh the state's interest against the privacy implications of breathalyzer tests.[181] This balancing test is typically used to determine whether to exempt a certain type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[182] In doing so, the Court "lurche[s] back and forth between imposing a categorical warrant requirement and looking to reasonableness alone."[183] The use of this balancing test muddies the legal waters regarding the search incident to arrest doctrine, and it continues the "inconsistent jurisprudence that has been with us for years."[184]

There is no dispute that states have an interest in combating the problem of drunk driving–but while the interest in deterring

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circumstances, conducted at the time of arrest . . . . That alone should be reason to reject an exception forged to address the immediate needs of arrests." *Id.*

[180] *See* Clark, *supra* note 166, at 101.

[181] *Birchfield*, 136 S. Ct. at 2176.

[182] *Id.* (internal quotation marks omitted) (citing Riley v. California, 134 S. Ct. 2473 (2014)). Although the Court justified warrantless breath tests under the search incident to arrest exception, it nevertheless applied this balancing test.

[183] California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring in the judgment).

[184] *Id.* at 583.

drunk driving cannot be overstated, the importance of safeguarding privacy rights is far too often understated. Where an officer can secure a warrant within the time it takes to transport the motorist to the station or testing facility and prepare the breath test, the Supreme Court has said, "there would be no plausible justification for an exception to the warrant requirement."[185]

1. Breath Tests Are Physically Intrusive

Under our Constitution, "[n]o right is held more sacred, or is more carefully guarded . . . 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."[186] The "security of one's privacy [is] . . . basic to a free society and therefore implicit in the concept of ordered liberty."[187]

The modern definition of privacy was articulated in *Katz v. United States*: "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[188] "[W]hen the Court rules against a privacy claim . . . [the] intrusion is [no longer] deemed . . . a 'search' or 'seizure' . . . regulated by the Fourth Amendment."[189]

But as discussed *infra*, a breath test is a physical intrusion that "implicates similar concerns about bodily integrity and . . . should also be deemed a search" for purposes of the Fourth Amendment.[190] Such an invasion implicates an individual's "most personal and deep-rooted expectations of privacy."[191] Further, in describing DNA buccal swabs, Justice Scalia declared in his scathing dissent in *Maryland v. King*: "I doubt that the proud men

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[185] *Birchfield*, 136 S. Ct. at 2193 (quoting Missouri v. McNeely, 133 S. Ct. 1552, 1561 (2013)).

[186] Terry v. Ohio, 392 U.S. 1, 9 (1968) (emphasis added) (quoting Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

[187] ROBERT M. BLOOM, SEARCHES, SEIZURES, AND WARRANTS 21 (2003).

[188] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[189] WEAVER ET AL., *supra* note 31, at 92.

[190] Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 616-17 (1989).

[191] Winston v. Lee, 470 U.S. 753, 760 (1985).

who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection."[192]

The type of exhalation required for a breathalyzer test is not the ordinary kind of breath that is routinely exposed to the public. A breath test implicates privacy concerns "far beyond those implicated by the search of a cigarette pack, a wallet, or a purse."[193] If a warrant is ordinarily required for a search of a person's dwelling, we should expect no less where intrusions into the human body are concerned.[194]

2. Burden on State Resources is Not Sufficient to Justify Elimination of Warrant Requirement

In applying the balancing test in *Birchfield*, Justice Sotomayor noted that the state's interest turns on "whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[195] But once a drunk-driver is arrested and placed into custody prior to the administration of a breathalyzer test, "there can be no serious claim that the time it takes to obtain a warrant would increase the danger that drunk driver poses to fellow citizens."[196]

Further, in examining the window of time between arrest and the administration of the test, advancements in warrant technology, and the overall advantages of warrants, imposing a warrant requirement for breath tests would not be an onerous burden on the states.

i. DUI Stop and Breathalyzer Procedure

The Court in *McNeely* stated: "In those drunk-driving investigations where police officers can reasonably obtain a

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[192] Maryland v. King, 133 S. Ct. 1958, 1989 (2013) (Scalia, J., dissenting).

[193] Riley v. California, 134 S. Ct. 2473, 2488-89 (2014) (discussing the differences in privacy concerns of cell phone data versus other physical items).

[194] Schmerber v. California, 384 U.S. 757, 770 (1966). *See also* Missouri v. McNeely, 133 S. Ct. 1552, 1558 (2013).

[195] Birchfield v. North Dakota, 136 S. Ct. 2160, 2188 (2016) (internal quotation marks omitted) (quoting Camara v. Mun. Court, 387 U.S. 523, 533 (1967)). *See also* United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 315 (1972) ("We must . . . ask whether a warrant requirement would unduly frustrate the [governmental interest.]").

[196] *Birchfield*, 136 S. Ct. at 2191 (Sotomayor, J., concurring in part and dissenting in part).

warrant . . . without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so."[197] Further, "[w]here 'an officer can . . . secure a warrant while' the motorist is being transported and the [breath] test is being prepared, this Court has said that 'there would be *no plausible justification* for an exception to the warrant requirement.'"[198]

The standard evidentiary breath test is conducted long after an arrest is effectuated.[199] The motorist is first arrested and transported to police station or other testing site, observed for fifteen to twenty minutes for any residual mouth alcohol to dissipate, and if a breath test machine is not already active, an officer must take time to set one up.[200]

Because of this built-in window of time between the arrest and the evidentiary breath test, it is reasonable for an officer to secure, or at least take steps to secure, a warrant within that timeframe, especially in light of advances in warrant processing technology.

ii. Advancements in Warrant Technology

With new advancements in technology, warrant applications are more expeditious to process, "particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple."[201] Most states accept remote applications for search warrants through telephone, radio communication, e-mail, and video conference.[202] To further

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[197] *McNeely*, 133 S. Ct. at 1561. *See also Birchfield*, 136 S. Ct. at 2193 ("Neither the Court nor the States provide any evidence to suggest that, in the normal course of affairs, obtaining a warrant and conducting a breath test will exceed the allotted 2-hour window.").

[198] *Id.* at 2193 (emphasis added) (quoting *McNeely*, 133 S. Ct. at 1561).

[199] *See Birchfield*, 136 S. Ct. at 2192 ("The Minnesota Court of Appeals has explained that nearly all breath tests 'involve a time lag of 45 minutes to two hours.'") (quoting State v. Larson, 429 N.W.2d 674, 676 (Minn. Ct. App. 1988)). Further, some states give police a timeframe after the motorist is pulled over within which to administer a breath test. For example, "[b]oth North Dakota and Minnesota give police a 2-hour period of time from the time the motorist was pulled over within which to administer a breath test." *Id.* (citing N.D. CENT. CODE ANN. §39-20-04.1(1) (West 2008); MINN. STAT. § 169A.20, subd. 1(5) (2014)).

[200] *See Birchfield*, 136 S. Ct. at 2192; *supra* Part I.D.

[201] *McNeely*, 133 S. Ct. at 1561-62.

[202] *Id.* at 1562 n.4.

streamline the warrant process, some jurisdictions use "standard-form warrant applications for drunk-driving investigations."[203] Some jurisdictions even have "on-call" magistrate judges to make sure a judge is available to review warrant applications at all hours of the day and night.[204]

In her partial dissent in *Birchfield,* Justice Sotomayor examined the burden that a warrant requirement would place on magistrate judges: "[E]ach of the State's 82 judges and magistrate judges would need to issue fewer than two extra warrants per week."[205] And even that calculation overstates the additional requirement because it does not account for drivers who voluntarily consent to breath tests.[206] Additionally, "the facts that establish probable cause are largely the same from one drunk-driving stop to the next," so it would not take a magistrate judge much time to review a warrant request in those situations.[207]

iii. Search Warrants Are More Effective

Part of evaluating a burden also requires considering any benefits that result; specifically, in evaluating the burden of a warrant requirement, it is important to consider the added effectiveness of warrants and any available alternatives. Studies indicate that obtaining warrants "may successfully reduce breath test refusals and result in more pleas, fewer trials, and more

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[203] *Id.* at 1562. *See also* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 810 852, USE OF WARRANTS FOR BREATH TEST REFUSAL: CASE STUDIES 8 (2007).

[204] *McNeely*, 133 S. Ct. at 1572 (Roberts, C.J., concurring in part and dissenting in part); *Birchfield*, 136 S. Ct. at 2192. *See also* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 810 852, USE OF WARRANTS FOR BREATH TEST REFUSAL: CASE STUDIES 7 (2007) (noting that officers in Arizona "have a list of judges in their jurisdictions who are available and willing to provide warrants, so officers rarely have difficulty locating a judge."). In Michigan, every county has a magistrate judge on-call at all times and a backup judge if a magistrate is unavailable for some reason. *Id.* at 17.

[205] *Birchfield*, 136 S. Ct. at 2192. *See also id.* at 2193 n.10.

[206] *Id.* at 2193. "States only need to obtain warrants for drivers who refuse testing . . . ." *Id.*

[207] *Id.* at 2181. Here, the majority argues that requiring a warrant in drunk driving cases would be inapposite because officers would typically recite the same facts that led to a finding of probable cause, so a magistrate judge "would be in a poor position to challenge" the warrant application. *Id.* But in actuality, the similar facts in most drunk driving cases make it easier to utilize standard, fill-in-the-blank warrant forms.

[drunk driving] convictions."[208] States have alternative, constitutional methods to force compliance with lawfully obtained warrants, and if a person refuses to submit to a breath test after a police officer has obtained a warrant, the person may be "subjected to serious penalties for obstruction of justice."[209]

In fact, in a case study conducted by the U.S. Department of Transportation, judges and prosecutors interviewed in all four case study states strongly supported warrants and agreed that "warrants have reduced breath test refusals and increased the proportion of DWI cases with BAC evidence in their jurisdictions. This in turn has produced more guilty pleas, fewer trials, and more convictions."[210]

3. The Balancing Test Favors a Warrant Requirement for Breath Tests

Mere convenience in investigating drunk driving cannot itself justify an exception to the warrant requirement,[211] and "[i]f a narrower exception adequately satisfies the governmental needs asserted, a more sweeping exception will be overbroad and could lead to unnecessary and 'unreasonable searches' under the Fourth Amendment."[212] Indeed, in her partial dissent in *Birchfield,* Justice Sotomayor stated:

> Although some searches are certainly more invasive than breath tests, this Court cannot do justice to their status as Fourth Amendment "searches" if exaggerated time pressures, mere convenience in collecting evidence, and the "burden" of asking judges to issue an extra couple of warrants per month are costs so high as to render reasonable a search without a

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[208] *See* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 811 727, COUNTERMEASURES THAT WORK: A HIGHWAY SAFETY COUNTERMEASURE GUIDE FOR STATE HIGHWAY SAFETY OFFICES (2013).

[209] *Birchfield,* 136 S. Ct. at 2194.

[210] NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 810 852, USE OF WARRANTS FOR BREATH TEST REFUSAL: CASE STUDIES vi (2007). This study provides information on the use of warrants in Arizona, Michigan, Oregon, and Utah.

[211] *Birchfield,* 136 S. Ct. at 2194.

[212] *Id.* at 2190 n.3; Riley v. California, 134 S. Ct. 2473 (2014); Missouri v. McNeely, 133 S. Ct. 1552 (2013).

> warrant. The Fourth Amendment becomes an empty promise of protecting citizens from unreasonable searches.[213]

Criminal investigations would always be simplified if warrants were not required, but "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment."[214] Imposing a warrant requirement for breath tests would not create an onerous burden on the states. Instead, it would protect the integrity and privacy of the states' citizens.

III. APPLYING THE EXIGENCY EXCEPTION IF OBTAINING A WARRANT IS UNFEASIBLE

A. States May Apply Exigency Exception if Obtaining a Warrant is Unfeasible

Although this Comment urges states to require a warrant for breath tests, that is not to say that there are never situations where obtaining a warrant would be impracticable. If officers are "truly confronted with a 'now or never' situation[,]"[215] they may be able to rely on the exigent circumstances exception to conduct a warrantless breath test. The exigent circumstances exception applies "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment."[216]

Improvements in warrant technology do not guarantee that a magistrate judge will be available when an officer seeks a warrant after making a late-night arrest.[217] But technological advancements that allow law enforcement officers to obtain warrants more quickly, and do so without undermining the role of a neutral magistrate judge as a check on police discretion, are relevant to an assessment of exigency.[218]

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[213] *Birchfield*, 136 S. Ct. at 2195.

[214] California v. Acevedo, 500 U.S. 565, 601 (1991) (quoting Mincey v. Arizona, 437 U.S. 385, 393 (1978)).

[215] *McNeely*, 133 S. Ct. at 1561.

[216] *Id.* at 1558 (quoting Kentucky v. King, 563 U.S. 452, 452 (2011) (alteration in original)).

[217] *Id.* at 1562.

[218] *Id.* at 1562-63.

The Court in *McNeely* noted that "some circumstances will make obtaining a warrant impractical[,]"[219] but that it is better to decide each case on its facts instead of imposing the "'considerable overgeneralization" that a *per se* [exigency] rule would reflect."[220]

B. Factors to Consider in Assessing Exigency

In *Missouri v. McNeely*, the Supreme Court declined to create a *per se* exigency rule for blood alcohol content and instead held that the exigency exception "must be determined case by case based on the totality of the circumstances."[221]

While the majority in *McNeely* did not provide "a detailed discussion of all the relevant factors" to consider,[222] it is helpful to examine how various state courts have applied the exigent circumstances exception in drunk driving situations. For example, in *State v. Walker*, the Tennessee Court of Criminal Appeals applied the totality of the circumstances approach and concluded that the facts of the case supported an exigency justifying a warrantless blood test.[223] In *Walker*, the defendant crashed his motorcycle, allegedly due to drunk driving.[224] The state trooper investigating the accident had to remain on the scene to aid in removing the motorcycle while the defendant was transported to the hospital to receive medical care.[225] Because it was over two hours before the trooper could question the defendant, and because there would have been considerable further delay in obtaining a search warrant, the court held that these circumstances made it impractical to obtain a warrant such that "the dissipation of alcohol from the bloodstream . . . support[ed] an exigency justifying a . . . warrantless blood test."[226]

Similarly, in *State v. Fischer*, the Supreme Court of South Dakota held that the facts of the case established exigent circumstances such that a warrantless blood test was

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[219] *Id.* at 1561.

[220] *Id.* (citation omitted) (internal quotation marks omitted).

[221] *Id.* at 1563.

[222] *Id.* at 1568.

[223] State v. Walker, No. E2013-01914-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 777, at *4, 5 (Tenn. Crim. App. Aug. 8, 2014).

[224] *Id.* at *1.

[225] *Id.*

[226] *Id.* at *4 (quoting *McNeely*, 133 S. Ct. at 1561).

reasonable.[227] In *Fischer*, the defendant sped through an intersection, striking multiple vehicles, a boat, and two bystanders who were immediately killed.[228] Due to the magnitude of the accident scene, the officers "were individually required to help at the scene rather than make efforts to obtain a warrant . . . ."[229] Additionally, the defendant sustained serious injuries and had to be airlifted to the hospital, and the officers feared that they would miss the helicopter had they stopped to obtain a warrant.[230]

Although *Walker* and *Fischer* dealt with warrantless blood tests, the same factors can be applied to warrantless breath tests. Thus, some of the relevant factors in determining whether a warrantless search is reasonable may include: (1) the procedures in place for obtaining a warrant; (2) the availability of a magistrate judge; (3) the practical problems of obtaining a warrant within a given timeframe; (4) the magnitude of the crime scene; (5) whether the motorist requires immediate medical care; and (6) the metabolization of alcohol and ensuing loss of evidence.[231] But as the Court emphasized in *McNeely*, the factors to consider in assessing whether the exigency exception applies "will no doubt vary depending upon the circumstances in the case."[232]

C. Totality of the Circumstances Approach Offers Better Constitutional Safeguards

While a categorical, bright-line rule may be easier to apply, it is notable that the Supreme Court specifically declined to create such a rule in *Missouri v. McNeely*.[233] The Court feared that a categorical, *per se* rule for the dissipation of blood alcohol content would be overly broad.[234] The Court in *McNeely* ultimately decided that the adverse effect of "dilut[ing] the warrant requirement in a

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[227] State v. Fischer, 2016 SD 12, ¶ 20, 875 N.W.2d 40, 47.

[228] *Id.* ¶ 2, 875 N.W.2d at 42.

[229] *Id.* ¶ 17, 875 N.W.2d at 46.

[230] *Id.* ¶ 15-18, 875 N.W.2d at 46-47.

[231] *McNeely*, 133 S. Ct. at 1568. But the dissipation of BAC alone does not constitute a per se exigency; other factors must be present to demonstrate an exigency. *See, e.g.*, State v. Townsend, 380 P.3d 698, 702 (Idaho Ct. App. 2016).

[232] *McNeely*, 133 S. Ct. at 1568.

[233] *Id.* at 1564 (plurality opinion). *See supra* Part I.C.2.ii.

[234] *McNeely*, 133 S. Ct. at 1561. *See supra* Part I.C.2.ii.

context where significant privacy interests are at stake" outweighed the benefits of a bright-line, categorical rule.[235]

Because of the importance of the protections offered by the Fourth Amendment, the "fact-specific nature of the reasonableness inquiry" requires that each case of exigency be evaluated based on its own facts and circumstances.[236] In fact, *McNeely* was not the first time the Court has refused to impose a categorical exception in favor of the totality of the circumstances approach.[237]

A case-by-case, totality of the circumstances analysis is a better approach in assessing whether obtaining a warrant is feasible before conducting a breathalyzer test because it "will incentivize law enforcement to carefully consider whether the circumstances justify dispensing with the warrant requirement, rather than give law enforcement freewheeling authority . . . ."[238] Further, it might encourage jurisdictions "to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement."[239]

IV. *BIRCHFIELD* NARROWS OUR CIVIL LIBERTIES

A. There is a Risk of Further Deterioration of the Fourth Amendment Warrant Requirement

For over one-hundred years, the Supreme Court has emphasized the importance of the warrant requirement.[240] The requirement for a warrant has always been the constitutional

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[235] *McNeely*, 133 S. Ct. at 1564 (plurality opinion).

[236] Ohio v. Robinette, 519 U.S. 33, 39 (1996).

[237] In *Richards v. Wisconsin*, for example, the Supreme Court rejected a *per se* exigency exception to the knock-and-announce requirement for felony drug investigations. *See* 520 U.S. 385, 388 (1997).

[238] Lamparello & Swann, supra note 12, at 120 (citing *McNeely*, 133 S. Ct. at 1563).

[239] *McNeely*, 133 S. Ct. at 1563 (quoting State v. Rodriguez, 156 P.3d 771, 779 (Utah 2007)).

[240] *See generally* Donald L. Beci, *Fidelity to the Warrant Clause: Using Magistrates, Incentives, and Telecommunications Technology to Reinvigorate Fourth Amendment Jurisprudence*, 73 DENV. U. L. REV. 293 (1996).

"default."[241] Warrants serve as a "safeguard against unreasonable searches because they guarantee that the search is not a 'random or arbitrary ac[t] of government agents,' but is instead 'narrowly limited in its objectives and scope.'"[242] The Fourth Amendment is a vital restraint on Executive power that "constitutes the Framers' direct constitutional response to the unreasonable law enforcement practices employed" by the British Crown.[243] Dispensing with the warrant requirement and its promise of a neutral and detached magistrate could lead to abuse of discretion by the police and "no remedy for the individual who chooses not to cooperate with the officer demanding a search of the individual's body."[244]

Historically, the Court has maintained a preference for warrants, but in *California v. Acevedo,* Justice Scalia noted in his concurring opinion that that the Fourth Amendment's warrant requirement "had become so riddled with exceptions that it [is] basically unrecognizable."[245] Justice Scalia went on to say that "[o]ur intricate body of law regarding 'reasonable expectation of privacy' has been developed largely as a means of creating these exceptions [to the warrant requirement.]"[246]

In fact, the Court has gone so far as to say that "the label 'exception' is something of a misnomer . . . [since] warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant."[247] Although the Supreme Court has often stated that there are only "a few specifically established and well delineated exceptions" to the

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[241] *See* DRESSLER & MICHAELS, *supra* note 18, at 186 (explaining that the warrant requirement "applies until a compelling justification for acting without a warrant is present, and it applies again once that justification is absent").

[242] Birchfield v. North Dakota, 136 S. Ct. 2160, 2187 (2016) (Sotomayor, J., concurring in part and dissenting in part) (quoting Skinner v. Ry. Labor Execs.' Ass'n., 489 U.S. 602, 622 (1989)).

[243] California v. Acevedo, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting).

[244] Brief of Amicus Curiae Minnesota Ass'n of Criminal Defense Lawyers & Minnesota Society for Criminal Justice in Support of Petitioner at 9, Birchfield v. North Dakota, 136 S. Ct. 2160 (2016) (No. 14-1470), 2016 U.S. S. Ct. Briefs LEXIS 646, at *11.

[245] *Acevedo,* 500 U.S. at 582 (Scalia, J., concurring in the judgment).

[246] *Id.* at 583.

[247] Riley v. California, 134 S. Ct. 2473, 2482 (2014) (citing 3 WAYNE LAFAVE, SEARCH AND SEIZURE § 5.2(b), at 132 & n.15 (5th ed. 2012)).

warrant requirement, in truth, these "few" exceptions account for the "*overwhelming majority* of all searches performed by law enforcement officers."[248]

Indeed, recently, the Court has been increasingly willing to dispense with the warrant requirement and create additional exceptions to the warrant clause. Police are now free to search and seize curbside garbage,[249] search the passenger compartment of a vehicle and all closed containers therein,[250] seize anything that is "in plain view,"[251] and conduct administrative searches[252]—all without a warrant. But it doesn't stop there. In *Maryland v. King*, the Supreme Court dispensed with the warrant requirement to allow DNA searches following an arrest,[253] and in *Birchfield v. North Dakota*, the Court allowed warrantless breath tests.[254] *Birchfield* is part of a pattern, and if states adopt it and allow yet another exception to the Fourth Amendment, what is next? Will the Fourth Amendment continue to be whittled down to become "nothing more than a suggestion"[255] as feared?

The warrant requirement is "a part of the price that our society must pay in order to preserve its freedom"[256]—so it is unsettling to think that the Court is splitting hairs to create an arbitrary distinction between blood and breath tests as a means to unravel a valued part of our constitutional law.

B. States Are the Last Best Defense for Preservation of the Fourth Amendment

As Justice Brennan famously observed, "examples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing . . . ."[257]

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[248] WEAVER ET AL., *supra* note 31, at 70, 71 (emphasis in original).
[249] California v. Greenwood, 486 U.S. 35 (1988).
[250] New York v. Belton, 453 U.S. 454 (1981).
[251] Coolidge v. New Hampshire, 403 U.S. 443, 464 (1971).
[252] Camara v. Mun. Court, 387 U.S. 523 (1967).
[253] *See* Maryland v. King, 133 S. Ct. 1958 (2013).
[254] Birchfield v. North Dakota, 136 S. Ct. 2160, 2186 (2016).
[255] *Id.* at 2196 (Sotomayor, J., concurring in part and dissenting in part).
[256] California v. Acevedo, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting).
[257] Brennan, *supra* note 152, at 500.

Thus, it is up to the states to "choose[] to protect privacy beyond the level that the Fourth Amendment requires."[258]

In his article, *State Constitutions and the Protection of Individual Rights*, Justice Brennan noted that even though "the United States Supreme Courts is [not] necessarily wrong in its interpretation of the federal Constitution . . . the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law."[259] Instead, state courts should "scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees."[260]

As the guardians of civil liberties, states are the last best defense for the preservation of their citizens' constitutional rights. It is the duty of the states to prevent further deterioration of the Fourth Amendment and preserve what remains. State courts must not simply rely on the baseline standard set forward in *Birchfield*, but instead, states should consider individual rights under the meaning of their state constitutions—and find that a warrantless breath test, absent exigent circumstances, is a violation of the Fourth Amendment.

Each state also has "state constitutional rights that may provide greater protections than federal constitutional rights."[261] Most state constitutions have analogs to the Bill of Rights, and the state's highest court is the final authority on the meaning of such analogs.[262] Indeed, "federal Supreme Court interpretations of a particular [constitutional] right provide a model for interpretation of the state constitutional version of that right," but states may reject the federal model and instead "choose to provide greater protections for state court defendants."[263] In other words, "the federal constitution creates a 'floor' that establishes the minimum

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258 Virginia v. Moore, 553 U.S. 164, 171 (2008).

259 Brennan, *supra* note 152, at 502.

260 *Id.*

261 WEAVER ET AL., *supra* note 31, at 2.

262 *See id.*

263 *Id.*

rights that must be recognized in all criminal prosecutions, but the state courts are free to establish their own 'ceilings' that establish the maximum rights that will be enforced in state prosecutions."[264]

CONCLUSION

In *Birchfield v. North Dakota,* the Supreme Court held that warrantless breathalyzer tests are permissible under the search incident to arrest exception to the Fourth Amendment's warrant requirement. Thus, the Court continued its pattern of willingness to dispense with the warrant clause and created yet another exception to the already deteriorating warrant requirement. However, states should reject the majority's holding in *Birchfield* and instead extend greater Fourth Amendment protections to its citizens by imposing a warrant requirement for breathalyzer tests.

States should provide greater constitutional protections to their citizens by requiring warrants for breathalyzer tests for four reasons. First, the Court in *Birchfield* based its analysis on an unstable dividing line between breath and blood tests, and traditional search incident to arrest doctrine does not justify a warrantless breath test. Warrantless breath tests do not fall within the rationale of the search incident to arrest exception to (1) preserve evidence or (2) promote officer safety. Further, warrantless breath tests do not comport with the temporal and spatial limitations of the search incident to arrest exception because the search is not contemporaneous with the arrest, extends beyond the body's surface, and extends beyond the area within the person's immediate control.

Second, requiring police to obtain warrants for breath tests would not impose a sufficiently significant burden on state resources to justify the elimination of the warrant requirement. Where an officer can secure a warrant within the time it takes to transport the motorist and prepare the breath test, there is no plausible justification for an exception to the warrant requirement. Further, new advancements in technology make warrant applications more expeditious to process, and warrants are more effective in obtaining drunk driving convictions.

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[264] *Id.*

Third, requiring a warrant for breath tests is practical in light of the exigent circumstances exception to the Fourth Amendment. In the rare case where officers are truly faced with a "now or never" situation, the exigency exception may allow a warrantless breathalyzer test. A case-by-case exigency analysis offers better constitutional safeguards because it incentivizes law enforcement to carefully consider whether the particular circumstances justify dispensing with the warrant requirement.

Finally, there is a risk of further deterioration of the Fourth Amendment warrant requirement and consequently an individual's right to privacy and personal liberty. The Fourth Amendment is becoming unrecognizable, and it seems as if exceptions to the warrant requirement are becoming the rule. As guardians of our civil liberties, states are the last best defense for the preservation of the Fourth Amendment.

Accordingly, state courts of last resort should reject the majority's holding in *Birchfield*, and instead, offer greater individual privacy protections under their state constitutions by requiring a warrant for breathalyzer tests.

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