

# NOTE

## DRUNK DRIVING, BLOOD, AND BREATH: THE IMPACT OF *BIRCHFIELD* V. *NORTH DAKOTA*

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INTRODUCTION . . . . .	842
I. WARRANTS AND SEARCHES UNDER THE FOURTH AMENDMENT . . . . .	844
A. <i>The Search Incident to Arrest Exception to the             Warrant Requirement</i> . . . . .	845
B. <i>Exigent Circumstances Exception</i> . . . . .	845
1. <i>Schmerber v. California</i> . . . . .	846
2. <i>Missouri v. McNeely</i> . . . . .	846
II. <i>BIRCHFIELD V. NORTH DAKOTA</i> . . . . .	848
A. <i>Facts of the Case</i> . . . . .	848
B. <i>Majority Opinion</i> . . . . .	850
C. <i>Dissenting Opinions</i> . . . . .	852
III. IMPACT OF <i>BIRCHFIELD</i> . . . . .	854
A. <i>Two Views of Criminal Procedure</i> . . . . .	854
B. <i>Bodily Integrity and New Technology</i> . . . . .	855
C. <i>How will the States Respond to Birchfield?</i> . . . . .	856
1. <i>Predictions</i> . . . . .	856
2. <i>Recent Developments</i> . . . . .	858
D. <i>Alternatives to Implied Consent Laws to Combat             Drunk Driving</i> . . . . .	859
CONCLUSION . . . . .	861

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## INTRODUCTION

On May 14, 1988, after consuming numerous beers and vodka, thirty-four-year-old factory worker Larry Mahoney was traveling north in the southbound lane of Interstate 71 in Carrollton, Kentucky.<sup>1</sup> At approximately 10:55 PM, Mahoney's Toyota pickup truck struck a church bus returning from an amusement park and ruptured its unprotected sixty-gallon gasoline tank, engulfing the bus in flames.<sup>2</sup> Twenty-seven people died and thirty-four were injured in what is still the deadliest drunk driving accident in United States history.<sup>3</sup> More than two decades after the Carrollton bus crash, twenty-nine people daily and approximately ten thousand annually lose their lives as a result of driving under the influence.<sup>4</sup>

Driving under the influence is an unquestionably serious concern—thousands of lives and over a hundred billion dollars are lost every year due to motorists consuming alcohol and other intoxicating substances before getting behind the wheel.<sup>5</sup> States realized the dangers of drunk driving after the automobile came into popular use in the early part of the twentieth century and passed laws which made it illegal to drive while intoxicated.<sup>6</sup> At first, police officers and prosecutors relied on physical signs of intoxication, such as stumbling and slurred speech.<sup>7</sup> Eventually, after consulting with medical experts, states outlawed driving with above a certain blood alcohol content (BAC).<sup>8</sup> To measure a suspect's BAC, a police officer could directly analyze the suspect's blood or, less popularly, urine.<sup>9</sup> The most common and economic method, however, is to measure the amount of alcohol in a person's breath using a device known as a breathalyzer.<sup>10</sup>

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<sup>1</sup> Daily Mail Reporter, *Survivors of Deadliest Drunk Driving Crash in U.S. History Still Bear Scars 25 Years after 27 were Killed in Horrific Bus Fire*, DAILY MAIL, May 15, 2013, 12:18 AM) <http://www.dailymail.co.uk/news/article-2324709/Carrollton-bus-crash-25-years-deadliest-drunk-driving-crash-history-killed-27.html>.

<sup>2</sup> Jack Brammer, *Survivors of Carrollton Bus Crash Face the Inferno Again in Documentary Film*, LEXINGTON HERALD-LEADER, May 3, 2013, 5:52 PM) <http://www.kentucky.com/news/hot-topics/article44422317.html>.

<sup>3</sup> *Id.*

<sup>4</sup> NHTSA, DOT HS 812 456, 2016 FATAL MOTOR VEHICLE CRASHES: OVERVIEW (2017); NHTSA, *Drunk Driving*, 2017, <https://www.nhtsa.gov/risky-driving/drunk-driving> (last visited Nov. 1, 2017).

<sup>5</sup> Mothers Against Drunk Driving (MADD), MADD'S FIFTH ANNIVERSARY REPORT TO THE NATION: CAMPAIGN TO ELIMINATE DRUNK DRIVING (2011).

<sup>6</sup> See *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2167 (2016).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 2170, n.1. While BAC may be determined by testing a subject's urine, urine tests appear to be less common in drunk-driving cases than breath and blood tests, and none of the cases consolidated in *Birchfield* involve a urine test.

<sup>10</sup> *Id.* at 2167–68.

Although the suspect's cooperation is not necessary for a blood draw,<sup>11</sup> a breath test, which requires the suspect to breathe out alveolar air into a mouthpiece that connects to the breathalyzer, necessitates the suspect's cooperation.<sup>12</sup> To ensure cooperation, individual states, beginning with New York in 1953, implemented implied consent laws; these laws provided that by exercising the privilege of driving on public roads, suspected drunk drivers must submit to BAC testing.<sup>13</sup> When the Supreme Court decided *Birchfield v. North Dakota* in 2016, all fifty states had some variety of implied consent laws in place.<sup>14</sup> Soon after the states adopted implied consent laws, a problem arose: if the penalties for repeat violations or a significantly-elevated BAC exceeded the penalty for refusing BAC testing, a suspected drunk driver had an incentive to simply refuse the test and take the lesser punishment.<sup>15</sup> As a result, states augmented the consequences for refusing testing, and several states went as far as to enact statutes codifying refusal to submit to testing as a separate criminal offense.<sup>16</sup> At least based on the decreased number of deaths due to drunk driving, these measures were successful.<sup>17</sup> Then came the *Birchfield* decision, which critics fear may undermine the effect of implied consent laws.<sup>18</sup>

The Court held in *Birchfield v. North Dakota* that a police officer can administer a warrantless breath test to a suspected drunk driver as a search incident to arrest, but not a blood draw.<sup>19</sup> Additionally, the Court struck down implied consent laws to the extent they criminalized refusal to submit to blood testing, but otherwise upheld implied consent laws.<sup>20</sup> Overall, the *Birchfield* decision is a compromise—one side, as exemplified by dissenting Justice Sotomayor, argued that police officers should secure warrants before performing both blood and breath tests.<sup>21</sup> The other side, as exemplified by dissenting Justice Thomas, believed the 4th amendment does not require a warrant in either circumstance.<sup>22</sup>

The impact of the *Birchfield* decision will be substantial on implied consent laws, which will inevitably have to be altered to eliminate sec-

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 2168.

<sup>13</sup> Penn Lerblance, Implied Consent in Intoxication Tests: A Flawed Concept, 54 ST. JOHN'S L.REV. 39, 47–48.

<sup>14</sup> *Birchfield*, 136 S. Ct. at 2169.

<sup>15</sup> *Id.*; Steven Oberman, *Blood or Breath in Birchfield: The Supreme Court Draws a Critical Distinction*, 40 CHAMPION 47, 47 (2016).

<sup>16</sup> *Birchfield*, 136 S. Ct. at 2169.

<sup>17</sup> NHTSA, DOT HS 812 231, ALCOHOL IMPAIRED DRIVING (2015).

<sup>18</sup> See Steven Oberman, *supra* note 15, at 49.

<sup>19</sup> *Birchfield*, 136 S. Ct. at 2184.

<sup>20</sup> See *id.* at 2185–86.; Oberman, *supra* note 15, at 49.

<sup>21</sup> See *Birchfield*, 136 S. Ct. at 2187–96 (Sotomayor, J., dissenting).

<sup>22</sup> See *id.* at 2196–98 (Thomas, J., dissenting).

tions threatening criminal punishment for refusing blood draws. *Birchfield* will likely also encourage more police departments to rely on breath tests in determining BAC, incentivizing the development of more cost-effective and accurate breathalyzer machines. In the end, police officers will most likely continue to rely on consent for most searches incident to a traffic stop, including both breath and blood tests. Whether *Birchfield*'s somewhat unique approach, considering the level of intrusiveness of a particular search to determine if the warrant requirement may be waived, will be incorporated in future cases remains to be seen.

Accordingly, this Note will address several key questions that arose in the aftermath of *Birchfield*. For example, how will state legislatures respond to the part of the decision striking down criminal penalties for refusing a blood draw? How will police officers modify their behavior when responding to a suspected DUI? What are some viable alternatives to implied consent laws to discourage drunk driving? Where does *Birchfield* fit into the greater scope of bodily integrity jurisprudence and criminal procedure?

This Note will attempt to answer these questions using *Birchfield* and its predecessors, current implied consent laws, and statistics and data regarding DUI stops and police practices. Part I explores the progression of the Court's Fourth Amendment jurisprudence on the warrant requirement, specifically relating to bodily intrusions. Part II summarizes the key facts and holding of *Birchfield*, including the dissenting opinions. Finally, Part III attempts to answer the questions posed earlier and ultimately predicts what the ramifications of the court's decision in *Birchfield* will be.

## I. WARRANTS AND SEARCHES UNDER THE FOURTH AMENDMENT

The Fourth Amendment of the United States Constitution reads, "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."<sup>23</sup> Both blood draws and breathalyzer tests have been held to be searches under the Fourth Amendment.<sup>24</sup> Generally, a warrantless search is *per se* unreasonable unless one of the exceptions to the warrant requirement applies.<sup>25</sup> Recognized exceptions to the warrant requirement that are relevant to this discussion are the search incident to arrest and exigent circumstances.

<sup>23</sup> U.S. CONST. amend. IV.

<sup>24</sup> *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616–17 (1989).

<sup>25</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967).

A. *The Search Incident to Arrest Exception to the Warrant Requirement*

In *Chimel v. California*, the Court articulated the exception to the warrant requirement for a search incident to arrest.<sup>26</sup> Police confronted petitioner Ted Chimel at his house and arrested him for an alleged burglary.<sup>27</sup> Police asked Chimel for permission to look around, which he refused to give.<sup>28</sup> Despite this, police still conducted a search of the entire house and seized incriminating evidence.<sup>29</sup> The *Chimel* Court ultimately held the search to be unreasonable because it extended beyond the area within Chimel's immediate control.<sup>30</sup> The Court further articulated the modern search incident to arrest exception to the warrant requirement, holding that the exception is justified to protect officer safety ("remove any weapons that the latter may seek to use"), and relevant for the purposes of this Note, to "seize any evidence on the arrestee's person in order to prevent its concealment or destruction."<sup>31</sup> Evidence of alcohol consumption is naturally "destroyed" shortly after one stops drinking; BAC percentage diminishes by approximately 0.015 to 0.02 per hour.<sup>32</sup> Despite this, the Court has since held that valid searches incident to arrest do not include searches beyond the body's surface.<sup>33</sup>

B. *Exigent Circumstances Exception*

Under the exigent circumstances exception to the warrant requirement, when the police are placed in a situation that requires them to act immediately or risk either imminent danger to themselves or the destruction of evidence, the warrant requirement is excused.<sup>34</sup> The prerequisites for a warrantless search under the exigent circumstances exception are: 1) circumstances presented the police with a sufficiently compelling urgency, and 2) police had probable cause to believe items relating to the crime (e.g. high BAC) would be found.<sup>35</sup> Warrantless minor bodily intrusions have generally been upheld if the above elements have been met. For example, in *Cupp v. Murphy*, the Court upheld the warrantless extraction of scrapings underneath the suspect's fingernails because police

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<sup>26</sup> 395 U.S. 752 (1969).

<sup>27</sup> *Id.* at 753.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *See id.* at 768.

<sup>31</sup> *See id.* at 762–63.

<sup>32</sup> Jordan D. Santo, *Waiting Is Warranted: Giving Meaning to the Supreme Court's Ruling in Missouri v. McNeely*, 24 TEMP. POL. & CIV. RTS. L. REV. 247, 261–62 (2014).

<sup>33</sup> Paul Clark, *Do Warrantless Breathalyzer Tests Violate the Fourth Amendment?* 44 N.M. L. REV. 89, 91 (2014).

<sup>34</sup> *Schmerber v. California*, 384 U.S. 757, 769–70 (1966).

<sup>35</sup> *Crim. Pro. E&E*, at 140.

had probable cause to believe that the suspect had just strangled his wife, and the suspect could have easily washed away the dried blood.<sup>36</sup>

### 1. *Schmerber v. California*

*Schmerber v. California* was one of the main precedent cases involving the exigent circumstances exception that the Court in *Birchfield* considered.<sup>37</sup> Armando Schmerber was involved in an automobile accident, arrested under suspicion of driving under the influence, and taken to a hospital to receive medical treatment due to the resulting injuries.<sup>38</sup> Despite Schmerber's refusal to consent to a blood draw and the police lacking a warrant, a physician extracted a blood sample at the direction of a police officer.<sup>39</sup> The Court ultimately held the search to be constitutional under the exigent circumstances exception, explaining that the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence."<sup>40</sup> To support its reasoning, the Court noted that evidence could have been lost because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system."<sup>41</sup>

The Court in *Schmerber* concluded that the search was reasonable overall, emphasizing the "commonplace" nature of the blood test.<sup>42</sup> The court viewed the blood draw as a minimal intrusion which involved "no risk, trauma, or pain."<sup>43</sup> Critics believe that the decision rested on the subjective feelings of the justices, who did not view blood tests as serious bodily intrusions.<sup>44</sup> The Court in *Birchfield* explicitly rejected this conclusion, holding that "blood draws are significant bodily intrusions."<sup>45</sup>

### 2. *Missouri v. McNeely*

Prior to *Birchfield*, the most recent case relating to warrantless searches of suspected drunk drivers was *Missouri v. McNeely*. A police officer stopped McNeely after observing him repeatedly drive over the centerline at an excessive speed.<sup>46</sup> The police officer placed McNeely

<sup>36</sup> 412 U.S. 291, 296 (1973).

<sup>37</sup> See *Birchfield*, 136 S. Ct. at 2173–74.

<sup>38</sup> *Schmerber*, 384 U.S. 757, 758–59 (1966).

<sup>39</sup> *Id.* at 758–59, 765–66.

<sup>40</sup> *Id.* at 770.

<sup>41</sup> *Id.*

<sup>42</sup> Clark, *supra* note 33, at 92.

<sup>43</sup> *Schmerber*, 384 U.S. at 771.

<sup>44</sup> See Clark, *supra* note 33, at 92.

<sup>45</sup> *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2178 (quoting *Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (Roberts, C.J., dissenting)).

<sup>46</sup> *McNeely*, 569 U.S. at 145.

under arrest after McNeely, who performed poorly on field-sobriety tests, refused to undergo a preliminary breath test.<sup>47</sup> The police officer initially planned to take McNeely to the police station to provide a breath sample, but decided instead to take McNeely to a nearby hospital for a blood draw.<sup>48</sup> At the hospital, the arresting officer read to McNeely Missouri's implied consent law, alerting McNeely that if he refused the blood draw, McNeely would immediately lose his driver's license for one year and that the refusal could be used against him in court.<sup>49</sup> Despite the possible consequences, McNeely still refused to consent to the blood draw.<sup>50</sup> The police officer, however, ignored McNeely's refusal and directed a hospital lab technician to take a blood sample; the officer did not first obtain a search warrant.<sup>51</sup> McNeely's BAC was measured at 0.154, almost double the legal limit of 0.08.<sup>52</sup> McNeely was subsequently charged with driving while intoxicated, which he appealed, arguing that taking his blood without a warrant violated his Fourth Amendment rights.<sup>53</sup>

Missouri urged the Court to adopt a *per se* rule that because alcohol is naturally metabolized by the body, an exigent circumstance exists which excuses the warrant requirement.<sup>54</sup> The Court disagreed, instead holding that, "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances."<sup>55</sup> The court emphasized that unlike in *Schmerber*, where the police officer expended time to transport the suspect to a hospital for treatment and investigate the scene of the crime, arguably leaving no time to secure a warrant, the facts in *McNeely* corresponded with a routine DUI stop.<sup>56</sup> Thus, the court reasoned that the Fourth Amendment requires a police officer to obtain a warrant before drawing a blood sample, unless obtaining the warrant would "significantly undermin[e] the efficacy of the search."<sup>57</sup>

*McNeely* explicitly contradicted the Court's view in *Schmerber* that blood tests are minimal intrusions.<sup>58</sup> The *McNeely* Court instead emphasized that drawing blood was a particularly intrusive type of search: "Such an invasion of bodily integrity implicates an individual's most per-

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 145–46.

<sup>49</sup> *Id.* at 146 (referencing MO. ANN. STAT. §§577.020.1, 577.041 (West 2011)).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Missouri § 577.012.1.

<sup>53</sup> *McNeely*, 569 U.S. at 146.

<sup>54</sup> *Id.* at 163–64.

<sup>55</sup> *Id.* at 156.

<sup>56</sup> *Id.* at 151–52.

<sup>57</sup> *Id.* at 153.

<sup>58</sup> See *Schmerber*, 384 U.S. at 771.

sonal and deep-rooted expectations of privacy.”<sup>59</sup> Prior to *Birchfield*, it was unclear how a search’s level of intrusiveness affected the legal analysis. The black letter law was that a warrantless search—no matter how benign—was *per se* unreasonable unless a recognized exception applied.<sup>60</sup> Critics dismissed the Court’s emphasis of the intrusiveness of blood tests as merely dicta that “only confuses the legal analysis.”<sup>61</sup> Nevertheless, the Court’s analysis of the level of intrusiveness of blood tests compared to breath tests in *McNeely* was prophetically crucial to the Court’s subsequent decision in *Birchfield*.

## II. *BIRCHFIELD V. NORTH DAKOTA*

### A. *Facts of the Case*

In *Birchfield v. North Dakota*, the Court consolidated three separate cases: *State v. Birchfield*, *State v. Bernard*, and *Beylund v. Levi*.<sup>62</sup> The main issue that the Court sought to address was whether “motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream.”<sup>63</sup> In the first case, Danny Birchfield drove his car off a North Dakota highway and into a ditch.<sup>64</sup> While Birchfield unsuccessfully attempted to get his car out of the ditch, a police officer approached Birchfield, noticed signs of inebriation, and requested that Birchfield perform several field sobriety tests, which he failed.<sup>65</sup> Birchfield subsequently consented to a roadside breath test,<sup>66</sup> which officers use in North Dakota solely to determine if further testing is necessary.<sup>67</sup> The roadside breath test estimated that Birchfield’s BAC was more than three times the legal limit, leading the responding officer to arrest Birchfield.<sup>68</sup>

After arresting Birchfield, the police officer read to Birchfield North Dakota’s implied consent statute, informing him that refusing to undergo chemical testing is a criminal offense.<sup>69</sup> Nevertheless, Birchfield refused to let his blood be drawn, later arguing unsuccessfully in state court that the Fourth Amendment, as applied to the states by the Fourteenth Amendment, prohibited North Dakota from criminalizing his refusal to

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<sup>59</sup> Clark, *supra* note 33, at 98–99 (quoting *McNeely*, 569 U.S. at 148).

<sup>60</sup> *See id.*

<sup>61</sup> *Id.* at 99.

<sup>62</sup> Oberman, *supra* note 15, at 47.

<sup>63</sup> *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2172 (2016).

<sup>64</sup> *Id.* at 2170.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> N.D. CENT. CODE, § 39-20-14 (2017).

<sup>68</sup> *Birchfield*, 136 S. Ct. at 2170.

<sup>69</sup> *Id.*



submit to the test.<sup>70</sup> Birchfield was subsequently sentenced to thirty days in jail, one year of unsupervised probation, mandatory participation in a sobriety program, and \$1,750 in fines and fees.<sup>71</sup>

In *State v. Bernard*, three men attempted to retrieve their boat from a river and got their truck stuck in the process.<sup>72</sup> Witnesses told the responding police officers that a man in underwear, William Robert Bernard, Jr., was the one who drove the truck.<sup>73</sup> Police noticed Bernard exhibited various signs of intoxication and arrested him for driving while impaired.<sup>74</sup>

Police transported Bernard to the police station where they read to him Minnesota's implied consent advisory, which like North Dakota's, informs the suspect that refusal to undergo a BAC test is a crime.<sup>75</sup> Bernard declined to take a breath test despite knowing the consequences of his refusal. Prosecutors charged Bernard, who had four prior impaired-driving convictions,<sup>76</sup> with first-degree test refusal, which carries a mandatory minimum three-year prison sentence.<sup>77</sup> Although the district court notably dismissed the charges against Bernard, holding that the Fourth Amendment protects defendants against warrantless breath tests,<sup>78</sup> both the Minnesota Court of Appeals and the Minnesota Supreme Court disagreed and reinstated the charges.<sup>79</sup>

Last, in *Beylund v. Levi*, a police officer in North Dakota saw petitioner Michael Beylund nearly strike a stop sign while attempting to turn into a driveway.<sup>80</sup> When the responding officer approached Beylund's stopped car, he smelled alcohol and noticed an empty wine glass in the center console.<sup>81</sup> The officer arrested Beylund and took him to a nearby hospital, where he read to Beylund North Dakota's implied consent advisory.<sup>82</sup> Beylund agreed to have his blood drawn; the subsequent analysis of Beylund's blood revealed a BAC of 0.25.<sup>83</sup>

Following an administrative hearing, Beylund relinquished his driver's license for two years.<sup>84</sup> Beylund later appealed his license sus-

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 2171.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> MINN. STAT. §169A.51, subd. 2 (2014).

<sup>76</sup> *Birchfield*, 136 S. Ct. at 2171.

<sup>77</sup> MINN. STAT. § 169A.276, subd. 1 (2017).

<sup>78</sup> *Birchfield*, 136 S. Ct. at 2171.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 2171–72.

<sup>81</sup> *Id.* at 2172.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

pension, arguing that he only consented to the blood draw after the officer informed him that refusing to consent was illegal.<sup>85</sup> Both the state district court and North Dakota Supreme Court rejected Beylund's argument.<sup>86</sup>

To summarize, the three separate cases the Supreme Court consolidated in *Birchfield v. North Dakota* had several key similarities and differences. Petitioners Birchfield and Beylund both faced blood draws following DUI arrests in North Dakota, while Bernard was told he had to submit to a breath test in Minnesota.<sup>87</sup> Both Birchfield and Bernard refused to consent to a BAC test, and both were convicted of a crime as a result.<sup>88</sup> In contrast, Beylund consented (which he later challenged) to a blood draw, which revealed a high BAC; Beylund consequently received civil penalties including license suspension.<sup>89</sup>

### B. *Majority Opinion*

Before *Birchfield*, the Court traditionally employed a balancing test to determine whether a particular type of search was exempt from the warrant requirement.<sup>90</sup> The Court in *Birchfield* did partially rely on the balancing test, derived from the *Katz* decision,<sup>91</sup> which weighs the privacy interest of an individual against the necessity of the intrusion to promote governmental interests.<sup>92</sup> Yet, in a somewhat unexpected turn, the *Birchfield* Court then explicitly modified the traditional *Katz* test by looking at the degree of intrusiveness of the search in question.<sup>93</sup> The Court acknowledged that the people who ratified the Fourth Amendment in 1791 likely did not contemplate searches of modern technology such as cellphones<sup>94</sup> or any variant of a BAC test.<sup>95</sup> The Court reasoned that to determine whether a warrant is required for a search that involves modern technology not present in the founding era, courts should balance “the degree to which [the search] intrudes upon an individual’s privacy”

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *See id.* at 2170–72.

<sup>88</sup> *See id.*

<sup>89</sup> *Id.*

<sup>90</sup> Oberman, *supra* note 15, at 48.

<sup>91</sup> *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Justice Harlan’s phrasing of the Court’s rule, that a person is protected by the Fourth Amendment from unreasonable searches when the person has “exhibited an actual expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable,’” has since been popularly known as the *Katz* test.

<sup>92</sup> *See id.*; Oberman, *supra* note 15, at 48.

<sup>93</sup> Oberman, *supra* note 15, at 48.

<sup>94</sup> *See Riley v. California*, 134 S. Ct. 2473, 2484 (2014) (holding that police officers must generally secure a warrant before searching a cellphone).

<sup>95</sup> *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2176 (2016).

with “the degree to which it is needed for the promotion of legitimate government interests.”<sup>96</sup>

To assess the degree of intrusiveness of each test, the Court considered the actual process of obtaining the sample, the extent of the physical intrusion, the nature of the sample obtained, and the potential evidence available in the sample.<sup>97</sup> First, in regards to breath tests, the Court reasoned that the physical intrusion is insignificant.<sup>98</sup> The only physical intrusion involved in a breath test is a mouthpiece that is inserted in-between the suspect’s lips.<sup>99</sup> Second, considering the nature of the sample, the Court noted that people normally do not have a possessory interest or any emotional attachment to the air in their lungs.<sup>100</sup> Furthermore, a person cannot hold his or her breath indefinitely, and all the air that is blown out during a breath test will be exhaled eventually even without the test.<sup>101</sup>

The Court reasoned that breath tests, unlike blood tests, are capable of revealing only one bit of information: the amount of alcohol in the suspect’s breath.<sup>102</sup> Additionally, the Court contrasted what remained with the police after the completion of each test, noting that after an officer administers a breath test, the officer does not retain a sample of the suspect’s DNA.<sup>103</sup> Last, the Court asserted that the actual process of obtaining a breath sample is minimally intrusive.<sup>104</sup> The Court noted that breath tests are unlikely to increase the embarrassment inherent in any arrest, since such tests are usually conducted out of the public view.<sup>105</sup> Thus, the Court held that a breath test does not “implicat[e] significant privacy concerns.”<sup>106</sup>

The Court reasoned that blood tests, which require piercing the suspect’s skin with a foreign object and extracting a part of the suspect’s body, are significantly more intrusive than breath tests.<sup>107</sup> The court noted that unlike air, which people regularly exhale, blood is not naturally shed by the body without outside intervention.<sup>108</sup> In addition, the Court theorized that the government could retain the blood sample for

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<sup>96</sup> *Id.* at 2176 (quoting *Riley*, 134 S. Ct. at 2484).

<sup>97</sup> *See id.* at 2176–78; Oberman, *supra* note 15, at 48.

<sup>98</sup> *See Birchfield* at 2176.

<sup>99</sup> *Id.*

<sup>100</sup> *See id.* at 2177.

<sup>101</sup> *Id.*; *see* JOHN E. HALL, GUYTON AND HALL TEXTBOOK OF MEDICAL PHYSIOLOGY 519–20 (13th ed. 2016).

<sup>102</sup> *See Birchfield*, 136 S. Ct. at 2177.

<sup>103</sup> *See id.*

<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

<sup>106</sup> *Id.* (quoting *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 626 (1989)).

<sup>107</sup> *See id.* at 2178.

<sup>108</sup> *See id.*

future use, even if the police are expressly forbidden from testing the blood for any purpose other than to measure BAC.<sup>109</sup>

Next, the Court conducted a traditional *Katz* analysis of the government's interest in obtaining BAC readings for drunk driving suspects.<sup>110</sup> The Court highlighted that alcohol consumption is a leading cause of automobile-related fatalities and injuries, noting that a person is killed because of drunk driving approximately every fifty-three minutes.<sup>111</sup> Thus, the Court concluded that the government has a compelling interest in both maintaining the safety of public highways and deterring drunk driving.<sup>112</sup>

Ultimately, the Court issued a controversial two-part opinion.<sup>113</sup> Relying on both the traditional *Katz* test and degree of intrusiveness analysis, the Court held that warrantless breath tests are permitted incident to arrests for drunk driving.<sup>114</sup> The Court reasoned that "the impact of breath tests on privacy is slight, and the need for BAC testing is great."<sup>115</sup> In contrast, the Court ruled that police must secure a warrant before demanding that a suspect provide a blood sample.<sup>116</sup>

The Court then readdressed the constitutionality of implied consent laws specifically relating to blood draws.<sup>117</sup> Although the Court reaffirmed its support for the general idea of implied consent laws, the Court cautioned that the punishment motorists may be subject to must have a limit.<sup>118</sup> The Court struck down the imposition of criminal sanctions for refusal to submit to a blood draw, concluding that a motorist cannot legitimately consent to a blood test if threatened with another criminal charge for refusing to consent.<sup>119</sup> Despite this analysis, the Court somewhat incongruously not only upheld criminal sanctions for refusing to submit to a breath test but also declined to limit the punishment that motorists who refuse such a test can receive.<sup>120</sup>

### C. *Dissenting Opinions*

Justices Sotomayor and Thomas's dissenting opinions represent opposite ends of the debate on whether a warrant is necessary to perform a search incident to an arrest for driving under the influence. Justice

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<sup>109</sup> *See id.*

<sup>110</sup> *See id.*

<sup>111</sup> *See id.*

<sup>112</sup> *See id.* at 2179.

<sup>113</sup> Oberman, *supra* note 15, at 48.

<sup>114</sup> *See Birchfield*, 136 S. Ct. at 2184.

<sup>115</sup> *Id.* at 2184.

<sup>116</sup> *See id.*

<sup>117</sup> *See id.* at 2185–86.

<sup>118</sup> *See id.* at 2185.

<sup>119</sup> *See id.* at 2186.

<sup>120</sup> *See id.* at 2185–86.

Sotomayor expressly rejected the majority's conclusion that there was a constitutionally significant difference between the level of intrusion inherent in a blood test compared to a breath test.<sup>121</sup> Justice Sotomayor relied on *Missouri v. McNeely* in her opinion, seemingly to remind the majority that *McNeely* held that if an officer can secure a warrant while transporting the suspect and preparing the test, "there would be no plausible justification for an exception to the warrant requirement."<sup>122</sup>

In applying the above rule from *McNeely*, Justice Sotomayor argued that the delay inherent in conducting a breath test usually provides police ample time to secure a warrant.<sup>123</sup> For example, officers must observe the suspect for fifteen to twenty minutes before administering the breath test to ensure that residual mouth alcohol, which can inflate results and undermine the validity of the test at trial, has dissipated.<sup>124</sup> Justice Sotomayor noted that if one considers the time it takes to transport the suspect to the equipment site and to set up the breathalyzer machine, breath tests typically require forty-five minutes to two hours to complete.<sup>125</sup> Consequently, Justice Sotomayor argued that a categorical exception to the warrant requirement is inappropriate in this case.<sup>126</sup> Justice Sotomayor would consider both breath and blood tests on a case-by-case basis under the exigent circumstances exception to the warrant requirement, with the default rule being that both tests are unreasonable without a warrant.<sup>127</sup>

Like Justice Sotomayor, Justice Thomas disagreed with the majority's differentiation of blood and breath tests, calling the distinction an "arbitrary line in the sand."<sup>128</sup> Unlike Justice Sotomayor, however, Justice Thomas believed that a search warrant is unnecessary in either instance.<sup>129</sup> Instead, Justice Thomas would apply a *per se* rule that both warrantless blood and breath tests are constitutional because "the natural metabolism of [BAC] creates an exigency once police have probable cause to believe the driver is drunk."<sup>130</sup> Justice Thomas argued that his

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<sup>121</sup> Oberman, *supra* note 15, at 49.

<sup>122</sup> *Birchfield*, 136 S. Ct. at 2193 (quoting *Missouri v. McNeely*, 133 S. Ct. 1552, 1561 (2013)).

<sup>123</sup> *See id.* at 2191.

<sup>124</sup> *Id.* at 2192.

<sup>125</sup> *Id.*; *see also* *State v. Chirpich*, 392 N.W.2d 34, 37 (Minn. App. 1986). While BAC procedures vary from state to state, many states, including Minnesota, require officers to give the suspect a window of time within which the suspect can contact an attorney before undergoing the test. Breathalyzer machines can take a considerable amount of time to set-up; North Dakota's Intoxilyzer 8000 machine can take as long as thirty minutes to "warm-up."

<sup>126</sup> *See Birchfield*, 136 S. Ct. at 2195–96.

<sup>127</sup> *See id.*; Oberman, *supra* note 15, at 49.

<sup>128</sup> *Birchfield*, 136 S. Ct. at 2197 (Thomas, J., dissenting).

<sup>129</sup> *See id.* at 2198.

<sup>130</sup> *Id.* at 2198 (quoting *Missouri v. McNeely*, 133 S. Ct. 1552, 1576 (2013) (Thomas, J., dissenting)).

approach does a better a job at conveying predicable rules to law enforcement officers than the majority's approach, which he believed leaves the law in a "confused and unstable state."<sup>131</sup>

### III. IMPACT OF *BIRCHFIELD*

#### A. *Two Views of Criminal Procedure*

Traditionally, the way the Court and society have viewed the purpose of criminal procedure has fallen into two distinct paradigms. Under one view, the purpose is to effectively separate the "us" from the "them"—the good citizen from the criminal.<sup>132</sup> Proponents of this view believe the criminal justice system should stigmatize and impose a new social status on most criminal defendants, effectively reducing an individual defendant to a symbol of moral wrong.<sup>133</sup> In contrast, proponents of the second view believe that the purpose of criminal procedure is to protect the citizenry from an overzealous state; those who adhere to the later view tend to believe that a carceral state exacerbates rather than diminishes crime.<sup>134</sup> Based on their respective dissents in *Birchfield*, Justice Thomas most closely subscribes to the former view of criminal procedure, while Justice Sotomayor adheres to the latter.

The *Birchfield* majority, however, seemed to jump back and forth between the two views. On the one hand, the Court focused on the degree of intrusiveness of blood and breath tests, and in distinguishing the former from the latter, expressed concern about the potential for the government to abuse its power and retain a blood sample for improper use.<sup>135</sup> In this instance, the Court seemed to believe that it must protect motorists from an overreaching government. On the other hand, the Court declined to curtail implied consent laws outside of the specific context of those laws that impose criminal sanctions for refusing a blood draw.<sup>136</sup> The Court instead stressed the government's compelling interest in combating drunk driving, arguing that civil sanctions such as license suspension are inadequate to persuade dangerous, repeat drunk drivers to cooperate.<sup>137</sup> By emphasizing the risks associated with particularly dangerous offenders, the Court apparently believes that the criminal justice system should separate the "us"—law abiding drivers—from the

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<sup>131</sup> *Id.* at 2197–98.

<sup>132</sup> This view was particularly popular in the 1980s–90s, during the height of the War on Drugs.

<sup>133</sup> WERNER J. EINSTADTER & STUART HENRY, *CRIMINOLOGICAL THEORY: AN ANALYSIS OF ITS UNDERLYING ASSUMPTIONS* 228–29 (2006).

<sup>134</sup> *See id.*

<sup>135</sup> *See Birchfield*, 136 S. Ct. 2160, 2178 (2016). *See also* Oberman, *supra* note 15, 48 (2016).

<sup>136</sup> *See Birchfield*, 136 S. Ct. at 2185–86.

<sup>137</sup> *See id.* at 2179.

“them”—dangerous drunk drivers. Depending on how the composition of the Court continues to change under the Trump administration, the Court may further revert to the “us versus them” approach to criminal procedure in future rulings.

### B. *Bodily Integrity and New Technology*

In concluding her dissent, Justice Sotomayor voiced a fear that if the Court continues down the road of expanding the permissible scope of warrantless searches, “the Fourth Amendment’s warrant requirement will become nothing more than a suggestion.”<sup>138</sup> Justice Sotomayor’s worry of a downward spiral regarding the warrant requirement is certainly legitimate in an age where government agencies collect internet communications<sup>139</sup> and “bulk data from the telephone calls of virtually every American”<sup>140</sup>—all without first securing a warrant. The very concept of bodily integrity seems to be fading in constitutional analysis; although the Court at least mentioned the phrase once in *McNeely*, observing that an invasion of “bodily integrity implicates an individual’s most personal and deep-rooted expectations of privacy,”<sup>141</sup> the phrase was not used in *Birchfield*.

Although Justice Sotomayor acknowledged the possible negative consequences of expanding exceptions to the warrant requirement, her reasoning may become moot in the upcoming years, partially because of *Birchfield*. Justice Sotomayor correctly pointed out that breath tests are presently conducted not at the time of arrest, but rather at a separate location forty minutes to two hours after the arrest.<sup>142</sup> Justice Sotomayor argued that this fact “alone should be reason to reject an exception[.]”<sup>143</sup> Yet, this may no longer be the case after *Birchfield*. Prior to *Birchfield*, many police departments relied solely on blood testing because the available breathalyzer machines were expensive, their reliability was under scrutiny, and too few machines were available at breath-testing sites.<sup>144</sup>

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<sup>138</sup> *Id.* at 2196.

<sup>139</sup> See Barton Gellman and Laura Poitras, *U.S., British Intelligence Mining Data From Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST (June 7, 2013), [https://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497\\_story.html?utm\\_term=.a388a9618043](https://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html?utm_term=.a388a9618043). This article refers to the NSA’s now-infamous PRISM program, which was revealed to the public by Edward Snowden.

<sup>140</sup> Pete Williams, *Massive NSA Phone Data Collection to Cease*, NBC NEWS (Nov. 27, 2015, 10:58 PM), <http://www.nbcnews.com/news/us-news/massive-nsa-phone-data-collection-cease-n470521>.

<sup>141</sup> *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013).

<sup>142</sup> *Birchfield*, 136 S. Ct. at 2196.

<sup>143</sup> *Id.*

<sup>144</sup> David J. Shrager, *Birchfield Ruling Disrupts Longstanding DUI Procedures*, 18 LAWYERS J. 5, 5 (2016).

After *Birchfield*, there will be a greater incentive to develop cheaper and more accurate breathalyzer machines. In fact, Swedish scientists have already designed a breathalyzer that can detect twelve different controlled substances, including methamphetamine, cocaine, heroin, morphine and marijuana.<sup>145</sup>

### C. *How will the States Respond to Birchfield?*

#### 1. Predictions

Prior to *Birchfield*, individual states used criminal penalties in several distinct ways to encourage suspected drunk drivers to consent to chemical testing. Some states, including both North Dakota and Minnesota, codified a separate criminal offense for refusing to undergo chemical testing.<sup>146</sup> As discussed above, *Birchfield* held that criminal sanctions are unconstitutional for refusing a warrantless blood test, but are an acceptable form of punishment for refusing a warrantless breath test.<sup>147</sup> *Birchfield*, however, did not directly address the approach taken by several other states, including Pennsylvania, which indirectly impose criminal penalties for refusing to undergo a BAC test.<sup>148</sup>

The Pennsylvania Vehicle Code establishes a three-tiered system for DUI offenses where the penalties for the crime depend on the defendant's BAC and number of prior DUI convictions.<sup>149</sup> Prior to *Birchfield*, police officers in Pennsylvania informed suspected drunk drivers that if they refused to submit to chemical testing (usually a blood test),<sup>150</sup> and are later convicted of or plead guilty to a DUI offense, they would be regarded as having BACs in the highest tier for sentencing.<sup>151</sup> For example, before *Birchfield*, someone accused of a first-offense DUI who refused a blood draw would face a mandatory seventy-two-hours imprisonment, a one-year license suspension, and a minimum \$1,000 fine.<sup>152</sup> After *Birchfield*, that same individual would likely risk no jail

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<sup>145</sup> Jason Koebler, *New Breathalyzer Can Detect Marijuana, Cocaine, Heroin*, U.S. NEWS, (Apr. 25, 2013, 7:00 PM), <http://www.usnews.com/news/articles/2013/04/25/new-breathalyzer-can-detect-marijuana-cocaine-heroin>.

<sup>146</sup> N. D. CENT. CODE ANN. §39-20-01(3)(a) (2016); MINN. STAT. §169A.51, subdiv. 2 (2014).

<sup>147</sup> See *Birchfield*, 136 S. Ct. at 2185–86.

<sup>148</sup> See Shrager, *supra* note 144, at 5.

<sup>149</sup> *Id.*; DUI & DWI in Pennsylvania, DMV, <http://www.dmv.org/pa-pennsylvania/automotive-law/dui.php> (last visited Nov. 30, 2017) ; 75 PA.C.S. § 3802 (2006), <http://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/75/00.038.002.000.htm>.

<sup>150</sup> Shrager, *supra* note 144, at 5. Since 2013, the Pennsylvania State Police, as well as many municipal police departments, have relied solely on blood testing because the breath machines they previously used were expensive and their reliability was under scrutiny.

<sup>151</sup> *Id.*; see 75 PA.C.S. § 1547 (2006).

<sup>152</sup> Zachary B. Cooper, *Supreme Court Ruling To Have Major Impact On DUI Cases*, PENN. DUI L. BLOG (July 5, 2016), <http://www.pennsylvaniaiduilawyersblog.com/2016/07/05/supreme-court-ruling-major-impact-dui-cases/>.



time or license suspension if the responding officer did not secure a warrant before requesting the blood draw.<sup>153</sup>

States may worry that *Birchfield* will hinder their ability to effectively respond to drunk driving. Yet, the Court expressly approved the general concept of implied consent laws and only rejected criminal sanctions as a punishment for refusal of a blood draw.<sup>154</sup> Thus, states can seemingly get around *Birchfield* in several ways. First, states can simply increase the severity of civil sanctions that drunk driving suspects face for refusing to undergo a blood draw. For example, states can either increase the length of the suspect's license suspension or the amount of the fine. Second, states that rely primarily on blood tests can shift to breath tests for routine DUI stops. Last, states that choose to still rely on both tests can simply amend their implied consent statutes to remove the threat of increased criminal sanctions for blood draws, but still retain the same language for breath tests.

A police officer does not need a warrant if the suspect consents to the search, and consent searches comprise more than 90% of warrantless searches.<sup>155</sup> Police officers will likely rely even more on consent to conduct a warrantless blood draw after *Birchfield*. Prior to *Birchfield*, a significant majority of motorists suspected of drunk driving voluntarily consented to breath tests, even in states that did not impose criminal penalties for refusal.<sup>156</sup> Only 21% and 12% of people refused breath tests in North Dakota and Minnesota, respectively, prior to *Birchfield*; including states that impose only civil penalties for refusal, the average refusal rate between the states is only 24%.<sup>157</sup> Part of the reason that so many people consent to both BAC tests and other forms of searches is that police officers are specially trained to obtain consent during traffic stops.<sup>158</sup> Not only can the police employ a wide variety of psychological tactics to induce the suspect to consent, but a person, especially one who is inebriated, is likely to submit to the apparent authority of the responding police officer.<sup>159</sup> Thus, police officers will likely receive even more training in regards to how to effectively obtain consent for blood draws, and warrantless searches-by-consent will continue to be widely relied-upon by the police.

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<sup>153</sup> *Id.*

<sup>154</sup> See *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185–86 (2016).

<sup>155</sup> Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 511 (2015), <http://www.floralawreview.com/wp-content/uploads/7-Burke.pdf>.

<sup>156</sup> *Birchfield*, 136 S. Ct. at 2193.

<sup>157</sup> *Id.*

<sup>158</sup> See CHARLES R. EPP, ET AL., *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* 37–39 (2014).

<sup>159</sup> *Id.*

## 2. Recent Developments

A separate concern is whether police officers understand the state of the law after *Birchfield*. Based on the July 2017 incident involving Nurse Alex Wubbels, which garnered national media attention, at least some government officials are still confused about what the law regarding warrantless blood tests is.<sup>160</sup> Wubbels, a former Olympic skier, was performing her duties as the head nurse of the University of Utah's burn unit, when Detective Jeff Payne sought to obtain a blood sample from an unconscious patient.<sup>161</sup> The patient was a victim in a fatal truck crash, and he himself was not charged with a crime.<sup>162</sup> Despite this, Payne demanded that he be allowed to secure a blood sample, referring to "implied consent law" and "exigent circumstances."<sup>163</sup> Wubbels refused Payne's request, informing him that under hospital policy, Payne could not collect a blood sample unless he first arrested the patient, secured a warrant for the blood draw, or received the patient's consent.<sup>164</sup> In response, the officer arrested Wubbels.<sup>165</sup> Although Wubbels was soon released and never charged with a crime, her arrest sparked national outrage.<sup>166</sup> Ultimately, Wubbels settled for \$500,000 with the Salt Lake City Police Department.<sup>167</sup>

The commentary following Wubbels' arrest demonstrates that many people, even legal scholars, are still confused over what the state of the law is. Amy Swearer, a visiting legal fellow at the Meese Center for Legal and Judicial Studies at The Heritage Foundation, suggests that in order to perform a blood draw, Payne needed to secure a warrant, receive consent from the patient, or arrest the patient, in which case the exigent circumstances exception to the warrant requirement would apply.<sup>168</sup> In contrast, Paul Cassell, the Ronald N. Boyce Presidential Professor of Criminal Law at the S.J. Quinney College of Law at the University of Utah, argues that because Utah's implied consent law only imposes civil penalties (such as driver's license suspension), the law is still constitu-

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<sup>160</sup> See Faith Karimi & Artemis Moshtaghian, *Utah Nurse's Arrest Violated Policies, Investigation Shows*, CNN (Sept. 15, 2017 12:07 AM), <http://www.cnn.com/2017/09/14/health/utah-nurse-salt-lake-officers-internal-investigation/index.html>.

<sup>161</sup> Amy Swearer, *Utah Blood Draw Incident Shows the Limits of Police Authority*, THE DAILY SIGNAL (Sept. 6, 2017), <http://dailysignal.com/2017/09/06/utah-blood-draw-incident-shows-limits-police-authority/>.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> See *id.*; see also Karimi, *supra* note 160.

<sup>167</sup> Simone Francis, *Utah Nurse at Center of Controversial Arrest Announces \$500K Settlement*, GOOD4UTAH (Oct. 31, 2017, 6:16 PM), <http://www.good4utah.com/news/local-news/utah-nurse-at-center-of-controversial-arrest-announces-500000-settlement/848569559>.

<sup>168</sup> Swearer, *supra* note 161.

tional after *Birchfield*.<sup>169</sup> Yet, Cassell admits that even if Utah's current implied consent law is constitutional, the law still did not permit Payne to perform the blood draw.<sup>170</sup> Utah's implied consent law permits an officer to only extract blood from a person the officer reasonably believes drove "while in violation of" the laws regarding driving under the influence of alcohol or other substances.<sup>171</sup> Here, the unconscious patient was the victim, and the officer did not believe that the patient was driving under the influence.<sup>172</sup>

#### D. Alternatives to Implied Consent Laws to Combat Drunk Driving

Although the Supreme Court declined to invalidate implied consent laws in *Birchfield*, several state supreme courts have held that such laws violate the Fourth Amendment.<sup>173</sup> Many state courts throughout the country prior to *Birchfield* have generally upheld warrantless BAC tests under the exigent circumstances exception, not consent.<sup>174</sup> For example, the Minnesota Court of Appeals explained in 2012 that, "When the requirements of probable cause and exigent circumstances are met, consent is not constitutionally necessary."<sup>175</sup> In *Commonwealth of Pennsylvania v. Kohl*, the Pennsylvania Supreme Court acknowledged that the government does have a "compelling interest" in combating drunk driving.<sup>176</sup> Nevertheless, the court held that "[t]he protections afforded to individuals under the Pennsylvania Constitution may not be diminished . . . by the Commonwealth's vigilance in promoting that interest."<sup>177</sup> *Kohl* raises the following question: how else can the government combat drunk driving?

One approach is to have a device installed in every motorist's car which would measure the driver's BAC and prevent the car from starting if the BAC was above the legal limit. The National Transportation Safety Board (NTSB) has encouraged the development of DADSS—driver alcohol detection system for safety—an in-vehicle technology that aims to unobtrusively check the BAC of all drivers, through either touch or breath.<sup>178</sup> Although the NTSB acknowledged that the technology was

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<sup>169</sup> Paul Cassel, *Paul Cassell: Cop who Arrested Nurse was Wrong, but the Law is Complicated*, THE SALT LAKE TRIBUNE (Sept. 1, 2017), <http://www.sltrib.com/opinion/commentary/2017/09/01/paul-cassel-cop-who-arrested-nurse-was-wrong-but-the-law-is-complicated/>.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Clark, *supra* note 33, at 106.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* (quoting *State v. Wiseman*, 816 N.W.2d 689, 694 (Minn. Ct. App. 2012)).

<sup>176</sup> 615 A.2d 308, 316 (Pa. 1992).

<sup>177</sup> *Id.*

<sup>178</sup> Mike M. Ahlers, *NTSB Looks to Technology to End Drunken Driving in the U.S.*, CNN, Dec. 11, 2012, <http://www.cnn.com/2012/12/11/us/ntsb-drunken-driving/>.

years away from perfecting, the board remains optimistic that this development could one day virtually end drunk driving.<sup>179</sup>

Seventeen states already require motorists who have previously been convicted of drunk driving to have an ignition interlock device installed in their cars, which prevents a car's engine from starting until a breath sample is analyzed.<sup>180</sup> The NTSB recommends that all fifty states require ignition interlock devices for any driver previously convicted of a DUI even once.<sup>181</sup> One of the problems with this approach is that the public views such devices as burdensome and intrusive. Furthermore, requiring all motorists, including those with no prior criminal record, to have such devices installed would raise serious constitutional concerns.

Ride-sharing services such as Uber and Lyft may also help reduce the number of drunk driving accidents. Since Uber began operating in New York City in May 2011, drunk driving accidents have decreased by 25 to 35 percent.<sup>182</sup> Other studies, however, have not replicated these results, at least in part because appreciably more people drive than use ride-sharing services.<sup>183</sup> Still, greater use of ride-sharing services in the future should positively correlate with fewer people drinking and driving.<sup>184</sup>

Yet another, perhaps more long-term approach to combat the dangers of drunk driving, is to invest in the concept of self-driving cars. Several prominent companies, including Google, Apple, Tesla, and General Motors, have already begun developing and testing such vehicles.<sup>185</sup> Although the prospect of widely-available self-driving cars is certainly exciting, the technology is years away from being made publically available. Although self-driving cars could theoretically eliminate drunk driving in the distant future, they will likely also create novel liabilities for manufacturers, owners, and operators of such vehicles.<sup>186</sup>

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Jessica Lynn Peck, *New York City Drunk Driving After Uber* 19 (CUNY Graduate CTR. Ph.D. Program in ECON. Working Paper Series, Paper No. 13, 2017), <http://wfs.gc.cuny.edu/Economics/RePEc/cgc/wpaper/CUNYGC-WP013.pdf>.

<sup>183</sup> See Jacey Fortin, *Does Uber Really Prevent Drunken Driving? It Depends on the Study*, N.Y. TIMES, Apr. 7, 2017, <https://www.nytimes.com/2017/04/07/business/uber-drunk-driving-prevention.html>.

<sup>184</sup> See *id.*

<sup>185</sup> Heather Smith, *Are self-driving cars legal? And if so, can I drive home drunk in one?*, GRIST, Jan. 15, 2016, <http://grist.org/business-technology/are-self-driving-cars-legal-and-if-so-can-i-drive-home-drunk-in-one/>.

<sup>186</sup> See Joe Manna, *How Autonomous Vehicles Can Help Reduce Drunk Driving*, LOCAL MOTORS, (2016), <https://launchforth.io/blog/post/how-autonomous-vehicles-can-help-reduce-drunk-driving/1998/>.

## CONCLUSION

*Birchfield v. North Dakota* is a landmark decision that will influence criminal procedure jurisprudence for years to come. *Birchfield* drew a distinction between the level of intrusiveness inherent in a breath test versus a blood test, upholding warrantless searches incident to a DUI arrest involving the former, but not the latter. In addition, the Court ruled that criminal penalties for refusing to consent to a blood draw were unconstitutional, but such penalties were an acceptable punishment for motorists who refused to undergo a breath test. Because *Birchfield* failed to establish a clear rule regarding the permissible scope of implied consent laws, the Court will plausibly revisit them in the future.

Although the full impact of *Birchfield* cannot be predicted, it will likely be at most a minimal hindrance to the states' ability to effectively combat drunk driving. Police departments will likely rely more on breath tests, which will incentivize the development of cheaper and more accurate breathalyzer machines. Police will continue to largely rely on consent to conduct various warrantless searches, including both blood draws and breath tests. In summary, the majority's decision in *Birchfield* was a compromise, and one that will unlikely satisfy either side of the debate. Drunk driving remains as serious a concern as before *Birchfield* was decided. More than ten thousand people lost their lives as a result of drunk driving in 2016.<sup>187</sup> New technology, rather than new or stricter laws, may provide the best hope to curtail the tragic consequences of drunk driving in the future.

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<sup>187</sup> NHTSA, *supra* note 4.

