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**THE FOURTH AMENDMENT AND DRIVING WHILE  
INTOXICATED:  
WHEN DOES A POLICE OFFICER NEED A WARRANT?**

*Marra Kassman\**

**I. INTRODUCTION**

Every fifty-three minutes, someone in the United States is killed in a drunk driving-related accident.<sup>1</sup> In 2011 alone, 11,397 people were killed in drunk driving accidents by drivers who had over a .08 blood alcohol concentration (BAC), which is the legal limit in the United States.<sup>2</sup> Many drivers (at least 24% in 2011) refuse to perform a Breathalyzer test upon being pulled over for a suspected drunk driving arrest because they believe that it is an invasion of their right to privacy, they are innocent of the crime, or they simply do not want to be in trouble with the law.<sup>3</sup> Because of the high rate of refusal, all fifty states have adopted implied consent laws, which “require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested

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\*Touro College Jacob D. Fuchsberg Law Center, J.D. Candidate 2018; Marist College, B.A., in Psychology, minor in Pre-Law, 2015. I would like to thank my incredible family for all their support and love throughout this process. I especially want to recognize my parents and my boyfriend for their constant encouragement in all aspects of my life. Finally, I would like to give a special thank you to Professor Sepowitz, my faculty advisor, for always believing in me and helping me mold this paper into what it is today, Professor Shaw for his insight on this topic, and to my editor, Jessica Vogele, for her assistance, advice, mentorship, and friendship.

<sup>1</sup> *About Drunk Driving*, MADD, <http://www.madd.org/drunk-driving/about/> (last visited Feb. 9, 2017).

<sup>2</sup> Lawrence Blincoe et al., *The Economic and Societal Impact of Motor Vehicle Crashes, 2010 (Revised)*, NAT'L HIGHWAY TRAFFIC SAFETY ADMINISTRATION 148 (May 2015), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812013>.

<sup>3</sup> *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2169 (2016); *See also* Namuswe et al., *Breath Test Refusal Rates in the United States-2011 Update*, NAT'L HIGHWAY TRAFFIC SAFETY ADMINISTRATION (Mar. 2014), [http://www.nhtsa.gov/staticfiles/nti/pdf/Breath\\_Test\\_Refusal\\_Rates-811881.pdf](http://www.nhtsa.gov/staticfiles/nti/pdf/Breath_Test_Refusal_Rates-811881.pdf).

or otherwise detained on suspicion of a drunk-driving offense.”<sup>4</sup> Drivers who fail to comply with an implied consent law could face suspension of their driver’s licenses.<sup>5</sup> The issue then becomes whether the implied consent laws “violate the Fourth Amendment’s prohibition against unreasonable searches.”<sup>6</sup>

The Fourth Amendment of the U.S. Constitution protects the right to privacy by requiring law enforcement officers to obtain warrants to search individuals or seize property from individuals.<sup>7</sup>

When the Fourth Amendment was first drafted, the Founders could not possibly have contemplated the technological advances in modern law enforcement, the military, transportation, and communications.<sup>8</sup> The U.S. Supreme Court recently held in *Birchfield v. North Dakota*<sup>9</sup> that the Fourth Amendment allows police officers to perform breath tests without first obtaining a warrant on individuals suspected of Driving-While-Intoxicated (“DWI”).<sup>10</sup> However, the Court also held that the Fourth Amendment requires police officers to obtain a warrant to perform blood tests on individuals suspected of DWIs<sup>11</sup> because blood tests are “more intrusive” than breath tests and could be deemed reasonable by one person but not reasonable to another.<sup>12</sup>

Section II will discuss the history of the Fourth Amendment and its requirements. Section III will set forth the various exceptions to the warrant requirement that are acceptable under the Fourth Amendment. Section IV will analyze the Fourth Amendment’s impact on DWIs. Section V will discuss the Supreme Court’s ruling in *Birchfield* and its effect on searches and seizures under the Fourth Amendment of the U.S. Constitution.<sup>13</sup> Specifically, this section will argue that Justice Sotomayor’s dissenting opinion in *Birchfield* was correct in warning that the Fourth Amendment will lose its meaning

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<sup>4</sup> *Missouri v. McNeely*, 133 S. Ct. 1552, 1566 (2013).

<sup>5</sup> *Birchfield*, 136 S. Ct. at 2169 (2016).

<sup>6</sup> *Id.* at 2167.

<sup>7</sup> *Amend IV Search and Seizure*, NAT’L CONSTITUTION CTR., <http://constitutioncenter.org/interactive-constitution/amendments/amendment-iv> (last visited Feb. 9, 2016).

<sup>8</sup> WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT*, § 1.1(a) (5th ed. 2015).

<sup>9</sup> 136 S. Ct. 2160, 2184 (2016).

<sup>10</sup> *Id.*

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

<sup>12</sup> *Id.* (holding that blood tests can only be performed in DWI cases when the police officer has a warrant).

<sup>13</sup> *Id.* at 2160 (2016); U.S. CONST. amend. IV.

if the Court continues to rule in favor of warrantless searches.<sup>14</sup> Section VI will examine the corrosion of the Fourth Amendment and how its meaning has been diminished over time. Overall, this Note will conclude that the Court's ruling in *Birchfield*<sup>15</sup> has created yet another unnecessary and questionable exception to the Fourth Amendment's warrant requirement. Additionally, the warrant requirement for a blood test, but not for a breath test, is confusing and misleading because both tests are related to DWI stops and both tests involve intrusions into an individual's body.<sup>16</sup>

## II. THE HISTORY OF THE FOURTH AMENDMENT

At the Constitutional Convention in Philadelphia in 1787, where the Constitution was originally ratified, the Constitution did not contain a Bill of Rights,<sup>17</sup> and the Federalists and the Anti-Federalists argued over its necessity.<sup>18</sup> While the Federalists argued that a Bill of Rights was unnecessary "because the people and the states kept any powers not given to the federal government,"<sup>19</sup> the Anti-Federalists, fearing a strong centralized government, argued that a Bill of Rights was crucial to guarantee "that the new government would not trample upon their newly won freedoms."<sup>20</sup> As such, President George Washington appointed James Madison, an Anti-Federalist, to spearhead the writing of the Bill of Rights, which included the Fourth Amendment.<sup>21</sup>

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<sup>14</sup> See *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2187 (2016).

<sup>15</sup> *Id.* at 2160.

<sup>16</sup> *Id.*

<sup>17</sup> LaFave, *supra* note 8.

<sup>18</sup> *Bill of Rights of the United States of America (1791)*, BILL OF RIGHTS INSTITUTE, <https://www.billofrightsinstitute.org/founding-documents/bill-of-rights/> (last visited Feb. 14, 2017).

<sup>19</sup> *Id.*

<sup>20</sup> *The Bill of Rights: A Brief History*, ALCU.ORG, <https://www.aclu.org/other/bill-rights-brief-history> (last visited Oct. 17, 2016).

<sup>21</sup> LaFave, *supra* note 8; U.S. CONST. amend. IV ("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.").

The Fourth Amendment is partly based on English law.<sup>22</sup> The English maxim that “every man’s house is his castle” prevented the King’s sheriff from entering the home.<sup>23</sup> However, the King’s agents could gain entry to the home if proper notice was provided,<sup>24</sup> even though there was no specific formula to provide such notice.<sup>25</sup> For example, in 1757, the Court of the King’s Bench in *Curtis’ Case*<sup>26</sup> instructed officers of the King’s Bench to kick down the door of a residence while trying to serve a warrant for arrest for breach of the peace after “having demanded admittance and giv[ing] due notice of their warrant.”<sup>27</sup> There, the court held that it was enough that the defendant knew the officers were not coming into his home as trespassers but were instead acting in their authority under the law and the King’s orders to enter his residence.<sup>28</sup> Learning from the experiences of the English and understanding the issues of the unclear English search and seizure procedures, the U.S. Founders knew they had to implement a proper warrant procedure for law enforcement officers to gain entry to a person’s home or to seize a person’s property.<sup>29</sup>

The Fourth Amendment also grew out of the experiences of the colonists, who needed protection from the “writs of assistance,” which were “general warrants” allowing for British law enforcement’s entry into smugglers’ homes to remove prohibited goods.<sup>30</sup> Additionally, British law enforcement entered homes and seized items from individuals “for the purpose of enforcing customs, duties, and other revenue-raising measures”<sup>31</sup> under the Sugar Act of 1764 and the Stamp Act.<sup>32</sup> The colonists, furious over these measures, revolted by protesting these taxes as restrictions on their

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<sup>22</sup> *The Fourth Amendment* 1199, GPO, <https://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-5.pdf> (last visited Feb. 17, 2017) (citing 1 B. Schwartz, *The Bill Of Rights: A Documentary History* 199, 205–06 (1971)).

<sup>23</sup> *Id.* (citing 77 Eng. Rep. 194 (K.B. 1604)).

<sup>24</sup> *Id.*

<sup>25</sup> Mark Josephson, Note, *Fourth Amendment—Must Police Knock and Announce Themselves before Kicking in the Door of a House*, 86 J. CRIM. L. & CRIMINOLOGY 1229, 1236–37 (1996).

<sup>26</sup> *Id.* (citing 168 Eng. Rep. 67 (F.B. 1757)).

<sup>27</sup> *Id.* (quoting 168 Eng. Rep. at 68 (F.B. 1757)).

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

<sup>29</sup> *The Fourth Amendment*, *supra* note 22.

<sup>30</sup> *The Fourth Amendment*, *supra* note 22, at 1199.

<sup>31</sup> ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT 23 (2006).

<sup>32</sup> *Id.*

liberty.<sup>33</sup> Ultimately, the use of “general warrants, writs of assistance, and the like to promote collection of government levies” came to a halt when the Bill of Rights was finally added to the Constitution in 1791.<sup>34</sup>

Today, the Fourth Amendment allows for law enforcement officers to obtain a warrant<sup>35</sup> to search a person, item, or place if there is probable cause that criminal activity is taking place.<sup>36</sup> Probable cause requires more than a “mere suspicion” by law enforcement.<sup>37</sup> Since probable cause is not defined within the Fourth Amendment itself, the U.S. Supreme Court in *Illinois v. Gates*<sup>38</sup> defined it as a “totality of the circumstances” that is “not technical” but based on “factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”<sup>39</sup> The Court also defined probable cause in *United States v. Regan*<sup>40</sup> as “the level of suspicion necessary to justify intrusions by the government into a person’s reasonable expectation of privacy.”<sup>41</sup> In other words, probable cause must be justified and is considered under the standard of an ordinary, reasonable person in light of the circumstances presented.

In order to obtain a search warrant, law enforcement officers must explain to a judge or magistrate that there is probable cause to search or seize.<sup>42</sup> Officers do not need to present evidence at this stage of the proceeding, but they must explain why they have probable cause either directly to the judge or magistrate or in the form of an affidavit.<sup>43</sup> They must also describe in detail where the search will be conducted and what items (if any) they plan to seize.<sup>44</sup> However, if time does not allow for the officers to appear in court to

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 32.

<sup>35</sup> *Payton v. N.Y.*, 445 U.S. 573, 586 (1980). (“[I]t is a basic principle of Fourth Amendment law that searches and seizures...without a warrant are presumptively unreasonable.”).

<sup>36</sup> *Id.* at 584-85.

<sup>37</sup> Leonard W. Levy, *Origins of the Fourth Amendment*, 114 POL. SCI. Q., 93 (1999).

<sup>38</sup> 462 U.S. 213, 231 (1983).

<sup>39</sup> *Id.* (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

<sup>40</sup> *United States v. Regan*, 281 F. Supp. 2d 795 (E.D. Va. 2002).

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

<sup>42</sup> FED. R. CRIM. P. 41(d) (1944).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

obtain a warrant, a warrant can instead be issued over the phone.<sup>45</sup> In circumstances where there is no time to obtain even a telephonic warrant, officers may also search or seize in accordance with one of the exceptions permitted under the Fourth Amendment as described below in Section III.<sup>46</sup>

Sometimes, when unlawful searches and seizures occur under the Fourth Amendment, the exclusionary rule will come into play. The exclusionary rule disposes of improperly obtained evidence under a faulty search or seizure under the Fourth Amendment.<sup>47</sup> It is a “judicially created” rule that “safeguard[s] Fourth Amendment rights generally through its deterrent effect”<sup>48</sup> because evidence that is discovered illegally is known as “fruit of the poisonous tree” and will be excluded at trial.<sup>49</sup> For example, in *Weeks v. United States*,<sup>50</sup> the Supreme Court excluded letters and paperwork that were taken from the defendant’s home without a warrant because they were obtained in violation of his constitutional rights.<sup>51</sup> This rule, however, is not automatically applied when a violation of a person’s Fourth Amendment rights occurs<sup>52</sup> and is instead used only when its deterrent effect will “outweigh the cost” of losing the wrongfully obtained evidence.<sup>53</sup> For example, if a “police officer, on a sheer hunch, unconstitutionally searches defendant’s house for evidence of a possible murder” and finds a diary which “names a witness to the murder, who agrees to testify at trial,” that evidence and possible testimony will be excluded because the officer did not have a warrant to enter the house or obtain that diary.<sup>54</sup> The exclusionary rule may result in the possibility that guilty defendants could go free due to a

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<sup>45</sup> *Id.* (complying with FED. R. CRIM. P. 4.1 (2011) which describes telephonic procedures).

<sup>46</sup> *See infra* Section III.

<sup>47</sup> *Exclusionary Rule*, LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/exclusionary\\_rule](https://www.law.cornell.edu/wex/exclusionary_rule) (last visited Feb. 18, 2017).

<sup>48</sup> *Herring v. United States*, 555 U.S. 135, 140 (2009) (citing *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

<sup>49</sup> *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

<sup>50</sup> 232 U.S. 383, 395 (1914). In this case, the police asked a neighbor where the defendant left his spare key to his Kansas City, Missouri home, found the spare key, and entered the defendant’s home without a warrant. While inside, the police searched the home and seized various papers.

<sup>51</sup> *Id.* at 398.

<sup>52</sup> *Id.* at 392.

<sup>53</sup> *United States v. Janis*, 428 U.S. 433, 453-54 (1976).

<sup>54</sup> JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE VOLUME 1: INVESTIGATION 383 (5<sup>th</sup> ed. 2010).

faulty search or seizure.<sup>55</sup> Therefore, law enforcement officers need to proceed with caution and should obtain proper warrants to ensure that the evidence they collect will not be excluded at trial.

### III. EXCEPTIONS TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT

Even though the Constitution is the law of the land, there are seven main exceptions to the Fourth Amendment rule that a law enforcement officer must first obtain a warrant before searching or seizing someone's person or property.<sup>56</sup> These seven exceptions are: 1) the search is incident to a lawful arrest; 2) consent; 3) plain view; 4) turning over an item to the police voluntarily; 5) search of a car that could easily be moved; 6) search of an impounded vehicle in police custody; and 7) the presence of exigent circumstances.<sup>57</sup> Other common warrantless searches include searches of luggage and persons at airports, border control searches, and stop and frisks,<sup>58</sup> which are permissible for security purposes.<sup>59</sup> All of these exceptions are judicially created to ensure that the law and individual rights are balanced against unreasonable searches and seizures.<sup>60</sup>

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<sup>55</sup> *Herring v. United States*, 555 U.S. 135, 141 (2009).

<sup>56</sup> See *Investigations: Seven exceptions to the search warrant rule*, LAWOFFICER.COM, <http://lawofficer.com/2008/05/investigations-seven-exceptions-to-the-search-warrant-rule/> (last visited Sept. 19, 2016).

<sup>57</sup> *Id.*; *United States v. Robinson*, 414 U.S. 218, 218 (1973) (holding that “[i]n the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.”); *Horton v. California*, 496 U.S. 128, 128 (1990) (holding that the Fourth Amendment “does not prohibit the warrantless seizure of evidence in plain view even though the discovery of the evidence was not inadvertent. Although inadvertence is a characteristic of most legitimate plain-view seizures, it is not a necessary condition.”); *S. Dakota v. Opperman*, 428 U.S. 364, 364 (1976) (holding that an inventory search of a car that was impounded by police did not violate the Fourth Amendment); *Carroll v. United States*, 267 U.S. 132, 149 (1925) (holding that since a vehicle is moveable and defendant can drive away and destroy evidence, an officer can search the vehicle without a warrant to ensure that evidence will not be destroyed).

<sup>58</sup> *Search and Seizure: The Meaning of the Fourth Amendment Today*, SOCIALSTUDIES.ORG, <http://www.socialstudies.org/system/files/publications/se/6105/610507.html> (last visited Oct. 17, 2016).

<sup>59</sup> Jack Doyle, *Airport luggage spies: How officials are rummaging through your bags without telling you*, DAILY MAIL, <http://www.dailymail.co.uk/news/article-2596433/Airport-luggage-spies-How-officials-rummaging-bags-without-telling-you.html> (last updated April 3, 2014).

<sup>60</sup> *Search and Seizure: The Meaning of the Fourth Amendment Today*, *supra* note 58.

However, the Supreme Court cautions that exceptions to the warrant requirement are few and far between “and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.”<sup>61</sup> Exceptions to the warrant requirement of the Fourth Amendment should only be applied when an officer reasonably believes that time does not allow for a warrant or that obtaining a warrant would substantially interfere with the investigation at hand. This is because warrantless searches and seizures are considered per se unreasonable unless one of the accepted exceptions applies.<sup>62</sup>

One of the most noteworthy exceptions to the warrant requirement is exigency, which occurs when the “needs of law enforcement are so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.”<sup>63</sup> A compelling reason for officers to enter a home, for example, is where there is a high likelihood that the residents will escape or resist arrest.<sup>64</sup> In all cases involving exigent circumstances, officers must have a reasonable belief that there is an emergency situation at hand.<sup>65</sup> Reasonableness requires only “sufficient probability, not certainty” under the Fourth Amendment.<sup>66</sup>

Additionally, officers can conduct a warrantless search when they have probable cause and reasonably believe that inaction could result in the destruction of evidence.<sup>67</sup> For example, the Supreme Court in *Stacey v. Emery*<sup>68</sup> held that “if the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been committed, it is sufficient.”<sup>69</sup> In this case, Emery, a supervisor at the Internal Revenue Service, seized a bottle of whiskey that belonged to Stacey, an employee of the IRS.<sup>70</sup> The Court agreed with Emery that this

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<sup>61</sup> *United States v. Caraballo*, 831 F.3d 95, 103 (2d Cir. Aug. 1, 2016) (quoting *Harris v. O’Hare*, 770 F.3d 224, 234 (2d Cir. 2014)).

<sup>62</sup> *Scope of the Amendment*, JUSTIA US LAW, <http://law.justia.com/constitution/us/amendment-04/02-scope-of-the-amendment.html> (last visited Mar. 12, 2017).

<sup>63</sup> *Mincey v. Arizona*, 437 U.S. 385, 394 (1978).

<sup>64</sup> *United States v. McConney*, 728 F.2d 1195, 1206 (9th Cir. 1984).

<sup>65</sup> *Johnson v. United States*, 333 U.S. 10, 15 (1948).

<sup>66</sup> *Hill v. California*, 401 U.S. 797, 804 (1971).

<sup>67</sup> *Missouri v. McNeely*, 133 S. Ct. 1552, 1575 (2013) (Thomas, J., dissenting).

<sup>68</sup> 97 U.S. 642 (1878).

<sup>69</sup> *Id.* at 645.

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

was a proper seizure because Emery was an officer who seized the bottle as part of his assigned duties, and Stacey could have easily disposed of it.<sup>71</sup> The Court further explained that malice is not an element of probable cause.<sup>72</sup>

#### IV. THE FOURTH AMENDMENT AND DWIS

The Fourth Amendment is applicable in cases when an individual is stopped by the police for alleged intoxication.<sup>73</sup> Drivers may face criminal penalties, such as jail time, fines, driver's license suspension, driver's license revocation, or interlock device installments, if they refuse breath or blood tests after being pulled over by law enforcement.<sup>74</sup> For example, New York's implied consent law states that drivers who fail to submit to chemical tests have their license suspended for one year and must pay a mandatory fine of \$500 to the state.<sup>75</sup> However, Arizona, which has the strictest DWI laws in the country, requires that first time DWI offenders have an interlock device installed in their cars and pay a mandatory minimum fine of \$1,250. Additionally, courts in Arizona have the discretion to require community service, suspend driver's licenses for one year, and impose jail time up to ten days for first time offenders.<sup>76</sup>

A driver who submits to a roadside Breathalyzer test may still be criminally charged if the BAC exceeds the legal limit of 0.08%.<sup>77</sup> For example, a driver who has a BAC of 0.16% or higher in North Dakota, which is double the legal limit, must spend two nights in jail in addition to a suspension of the driver's license and a payment of a \$750 fine.<sup>78</sup> In New York, a driver who has a BAC of .18% or higher

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

<sup>72</sup> *Emery*, 97 U.S. at 645.

<sup>73</sup> *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2163 (2016).

<sup>74</sup> Betsy Simmons Hannibal, *DUI: Refusal to Take a Field Test, or Blood, Breath or Urine Test*, DRIVING LAWS BY NOLO, <http://dui.drivinglaws.org/resources/dui-refusal-blood-breath-urine-test.htm#> (last visited Oct. 17, 2016).

<sup>75</sup> *DMV Penalties for Alcohol or Drug-Related Violations*, DMV.NY.GOV, <https://dmv.ny.gov/tickets/penalties-alcohol-or-drug-related-violations> (last visited Oct. 17, 2016).

<sup>76</sup> Alina Comoreanu, *Strictest and Most Lenient States on DUI*, WALLETHUB (Aug. 10, 2016), <https://wallethub.com/edu/dui-penalties-by-state/13549/>.

<sup>77</sup> N.D. CENT. CODE ANN. § 39-08-01(1)(a) (2003).

<sup>78</sup> N.D. CENT. CODE ANN. § 39-08-01(5)(a)(2) (2013).

must pay a mandatory fine ranging from \$1,000-\$2,000 dollars and can spend up to one year in jail.<sup>79</sup>

The Supreme Court held in *Schmerber v. California*<sup>80</sup> that “compelled intrusions into the body for blood to be analyzed for alcohol content,” as well as the use of one’s breath in a Breathalyzer test, fall within the confines of a search of one’s “person” under the language of the Fourth Amendment.<sup>81</sup> Here, officers who responded to a car accident smelled alcohol on the driver’s breath and noted that his eyes appeared “bloodshot, watery...[and] glassy.”<sup>82</sup> While the driver refused to submit to a blood test, the police officers nonetheless believed that a blood test had to be performed immediately because there were exigent circumstances<sup>83</sup> that did not allow time for the officers to first obtain a warrant.<sup>84</sup> The Court agreed, concluding that “the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to the driver’s arrest”<sup>85</sup> 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. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant.<sup>86</sup>

The officers believed that without performing an immediate blood test, the driver’s blood alcohol levels could decrease over time and would therefore interfere with their investigation of the driver.<sup>87</sup> As such, the officers in this case did not perform an unreasonable search because exigent circumstances were present, qualifying as an exception to the warrant requirement under the Fourth Amendment.<sup>88</sup>

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<sup>79</sup> *DMV Penalties for Alcohol or Drug-Related Violations*, *supra* note 75.

<sup>80</sup> 384 U.S. 757 (1996).

<sup>81</sup> *Id.* at 768; *see also* *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 616 (1989).

<sup>82</sup> *Schmerber*, 384 U.S. at 768.

<sup>83</sup> *Id.* at 759.

<sup>84</sup> *Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

<sup>85</sup> *Schmerber*, 384 U.S. at 771.

<sup>86</sup> *Id.* at 770–71; *see also* *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 623 (1989) (“The burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.”).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

Besides the Fourth Amendment, DWI stops are also associated with implied consent laws. New Jersey was the first state to enact DWI laws in 1906,<sup>89</sup> which required not an exact percent of BAC but instead only outward manifestations, such as slurred speech and imbalance, to deem a driver to be intoxicated behind the wheel of a vehicle.<sup>90</sup> Implied consent laws, which provide that all “motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense,”<sup>91</sup> were not widely enacted across the country until decades later in 1953 when New York<sup>92</sup> introduced the first implied consent law to “induce persons suspected of drunk driving to take a chemical test.”<sup>93</sup> Essentially, New York’s implied consent law today states that when people use the roadways, they agree to follow the law and not drink and drive, and if for some reason they do drink and drive, they understand that there will be consequences for their actions.<sup>94</sup> Implied consent laws are related to a driver’s loss of expectation of privacy while on the road<sup>95</sup> and were enacted due to “the need to determine a driver’s blood alcohol content.”<sup>96</sup> The Court held in *United States v. Knotts*<sup>97</sup> that “a person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”<sup>98</sup> In other words, drivers on the roads of any state must comply with that particular state’s implied consent laws because they forfeited their expectation of privacy as soon as they entered the roadways.<sup>99</sup>

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<sup>89</sup> *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2167 (2016).

<sup>90</sup> *Id.*

<sup>91</sup> *Missouri v. McNeely*, 133 S. Ct. 1552, 1566 (2013).

<sup>92</sup> *Birchfield*, 136 S. Ct. at 2169.

<sup>93</sup> *Id.*

<sup>94</sup> *Implied Consent Refusal Impact*, U.S. DEP’T OF TRANSP. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN. (Sept. 1991), <https://ntl.bts.gov/lib/25000/25800/25898/DOT-HS-807-765.pdf>.

<sup>95</sup> *United States v. Knotts*, 460 U.S. 276, 281 (1983).

<sup>96</sup> Steven Oberman, *Blood or Breath in Birchfield: The Supreme Court Draws A Critical Distinction*, 40 CHAMPION 47, 47 (2016).

<sup>97</sup> *United States v. Knotts*, 460 U.S. 276 (1983).

<sup>98</sup> *Id.* at 281.

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

## V. BIRCHFIELD CASE

The Supreme Court held in *Birchfield*, in a 5-3 decision, that a warrant must be obtained prior to drawing someone's blood in a DWI case,<sup>100</sup> consolidating three separate lower court cases into one ruling.<sup>101</sup> Even though the defendant in each case refused either a blood or breath test, they were all nonetheless arrested for driving while intoxicated<sup>102</sup> and argued that the Fourth Amendment required a warrant in each of their circumstances.<sup>103</sup> The Supreme Court distinguished between breath tests and blood tests and held that because a blood test is more intrusive than a Breathalyzer test, a warrant is required for a blood test of a DWI offender.<sup>104</sup>

In the first lower court case, Danny Birchfield ("Birchfield") drove his car off the road in North Dakota in October 2013.<sup>105</sup> A trooper witnessed Birchfield attempting to back out of a ditch off the side of the highway, and upon approaching him to investigate what happened, the trooper smelled a strong odor of alcohol.<sup>106</sup> The officer asked Birchfield if he would consent to a "roadside breath test" and Birchfield complied.<sup>107</sup> This breath test indicated that Birchfield's BAC was 0.254%, "more than three times the legal limit of 0.08%."<sup>108</sup> However, because Birchfield later refused a blood test, he was then charged with a class B misdemeanor under a North Dakota statute for his refusal to submit to this chemical testing.<sup>109</sup> Birchfield argued that the North Dakota statute charging him with this misdemeanor<sup>110</sup> was unconstitutional under the Fourth Amendment of the U.S. Constitution because the officers did not have a warrant to administer a blood test, which led him to believe he was not required to give his blood at all.<sup>111</sup> The North Dakota

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<sup>100</sup> *Birchfield*, 136 S. Ct. at 2185.

<sup>101</sup> *Id.* at 2170.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 2167.

<sup>104</sup> *Id.* at 2184.

<sup>105</sup> *Birchfield*, 136 S. Ct at 2170.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*; N.D. CENT. CODE ANN. § 39-08-01(1)(a) (2003) (stating that individuals cannot operate vehicles with an alcohol concentration of .08%).

<sup>109</sup> *Birchfield*, 136 S. Ct. at 2170.

<sup>110</sup> *Id.*

<sup>111</sup> *State v. Birchfield*, 858 N.W.2d 302, 303 (N.D. 2015).

Supreme Court disagreed, holding that the statute did not violate Birchfield's Fourth Amendment rights because the police officer had probable cause to believe that Birchfield was intoxicated and that Birchfield did not comply with implied consent laws.<sup>112</sup> Therefore, he was required by state law to submit to blood testing or else face criminal penalties.<sup>113</sup>

The U.S. Supreme Court reversed the North Dakota Supreme Court's decision, holding that a warrantless blood test is unconstitutional because it is intrusive upon a person's body<sup>114</sup> and as such, the "search [Birchfield] refused cannot be justified as a search incident to his arrest or on the basis of implied consent."<sup>115</sup> While the Court listed various advantages of blood tests, such as their capacity to reveal other illegal substances in a driver's system that could have impaired him at the time of arrest,<sup>116</sup> the Court ultimately reasoned that the intrusive nature of blood tests outweighs their benefit.<sup>117</sup> Therefore, a warrant is required to draw blood.<sup>118</sup>

In the second lower court case, William Robert Bernard, Jr. ("Bernard") was arrested for driving while intoxicated after the Minnesota police found him in his underwear and smelling of alcohol with two other men attempting to tow a boat out of the Mississippi River with his pick-up truck.<sup>119</sup> Bernard admitted to drinking that night but denied driving the pick-up truck, even though the police found him with the keys to the pick-up truck in his hand.<sup>120</sup> Bernard also refused field sobriety testing at the scene and later refused a breath test at the police station after he was arrested.<sup>121</sup> Due to this double refusal, officers charged him with refusal in the first degree, which carried up to a three-year prison sentence, because "he had four prior impaired-driving convictions" at the time of this particular arrest.<sup>122</sup> Bernard argued that the Minnesota refusal law was

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<sup>112</sup> *Id.* at 309-10.

<sup>113</sup> *Id.*

<sup>114</sup> *Birchfield*, 136 S. Ct. at 2187.

<sup>115</sup> *Id.* at 2165.

<sup>116</sup> *Id.* at 2184.

<sup>117</sup> *Id.* at 2185.

<sup>118</sup> *Id.*

<sup>119</sup> *Birchfield*, 136 S. Ct. at 2171.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

unconstitutional under the Fourth Amendment.<sup>123</sup> The Minnesota trial court dismissed the charges, thereby agreeing with Bernard that requiring a warrantless breath test is prohibited under the Fourth Amendment.<sup>124</sup> However, the Minnesota Court of Appeals reversed and the Minnesota Supreme Court affirmed, holding that the police did not need a warrant to perform a breath test on a suspected drunk driver such as Bernard.<sup>125</sup>

Unlike in *Birchfield*'s case, the Supreme Court upheld Bernard's charges because the Court ruled that the Fourth Amendment did not require a warrant for a breath test.<sup>126</sup> Specifically, the Court held that "the Fourth Amendment did not require officers to obtain a warrant prior to demanding the test, and Bernard had no right to refuse it" because a search warrant is not required when the test was administered incident to an arrest for drunk driving.<sup>127</sup> A warrant is not required incident to arrest because "the state is justifiably concerned that evidence [the BAC level] may be lost" over time.<sup>128</sup> Therefore, Bernard's criminal prosecution was constitutional.

In the third lower court case, Steve Michael Beylund ("Beylund"), unlike the other defendants, consented to a blood test after he was arrested for driving while impaired in North Dakota because the police told him that this test was required by law.<sup>129</sup> Here, the police witnessed Beylund hit a stop sign while attempting to pull into a driveway.<sup>130</sup> When the officer approached the vehicle, he found an empty wine glass, smelled alcohol coming from inside the vehicle, and noticed that Beylund was unsteady on his feet when he got out of the car to perform field sobriety tests.<sup>131</sup> His consented-to blood test revealed that he had a BAC of 0.25% (more than three times the legal limit of 0.08%).<sup>132</sup> After a hearing before the Department of Transportation, where the arresting officer testified

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<sup>123</sup> *Id.*

<sup>124</sup> *Birchfield*, 136 S. Ct. at 2171.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 2186.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 2165. This holding is consistent with the Court's ruling in *Schmerber v. California*. *Schmerber v. California*, 384 U.S. 757, 771 (1996).

<sup>129</sup> *Birchfield*, 136 S. Ct. at 2186.

<sup>130</sup> *Beylund v. Levi*, 859 N.W.2d 403, 406 (N.D. 2016).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

that he reasonably believed that Beylund was intoxicated, Beylund's driver's license was suspended for two years.<sup>133</sup> Beylund argued that taking the blood test without a warrant, even with his consent, violated his constitutional rights under the Fourth Amendment because he was coerced into submitting to the blood test by the police officers who told him that refusal itself was still considered to be a crime.<sup>134</sup> Beylund appealed his case to the North Dakota Supreme Court, which upheld the lower court's decision.<sup>135</sup>

The U.S. Supreme Court again held that an officer must first obtain a search warrant in order to perform a blood test on a suspected drunk driver.<sup>136</sup> Because voluntariness of consent to a search must be "determined from the totality of all the circumstances," the Court remanded this case to the lower court to determine if Beylund was wrongfully coerced into consenting to the test.<sup>137</sup> The Court relied on its 1973 decision in *Schneckloth v. Bustamonte*,<sup>138</sup> in which it held that when a police officer attempts to justify a warrantless search on the basis of consent, "the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied."<sup>139</sup> It clarified that:

Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.<sup>140</sup>

Not all nine justices agreed that the holding in *Birchfield* case was proper.<sup>141</sup> Justice Thomas in his partial dissent argued that "both warrantless breath and blood tests are constitutional"<sup>142</sup> because he believed that exigency is present when the body's "natural

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<sup>133</sup> *Id.*

<sup>134</sup> *Birchfield*, 136 S. Ct. at 2172.

<sup>135</sup> *Id.* at 2186.

<sup>136</sup> *Id.* at 2184.

<sup>137</sup> *Id.* at 2186; *Schneckloth v. Bustamonte*, 412 U.S. 218, 218 (1973).

<sup>138</sup> *Bustamonte*, 412 U.S. at 218 (1973).

<sup>139</sup> *Id.* at 248.

<sup>140</sup> *Id.*

<sup>141</sup> *Birchfield*, 136 S. Ct. at 2198 (Thomas, J., concurring).

<sup>142</sup> *Id.*

metabolism” will start to break down the alcohol in the blood almost immediately and destroy the evidence of the crime unless an urgent breath or blood test is taken.<sup>143</sup> Additionally, he believed that the warrant requirements for blood and breath tests should bypass the warrant requirement of the Fourth Amendment because the Court’s “hairsplitting [between blood and breath tests] ma[de] little sense.”<sup>144</sup>

Justice Sotomayor, with whom Justice Ginsburg joined, dissented from the majority opinion, arguing that law enforcement officers are required to obtain a warrants for *both* breath tests and blood tests during a DWI traffic stop.<sup>145</sup> Justice Sotomayor believed that the exceptions to the warrant requirement should be limited, especially in cases involving DWIs,<sup>146</sup> because “if the Court continues down this road, the Fourth Amendment’s warrant requirement will become nothing more than a suggestion.”<sup>147</sup> She also asserted that the Fourth Amendment’s warrant requirement, particularly pertaining to DWI cases, should be upheld to prevent weakening of its effect on society and the criminal justice system as a whole and argued that it is not impracticable for law enforcement officers to secure a warrant before administering a breath test to a driver.<sup>148</sup>

Justice Sotomayor also noted that there are various delays built into the breath and blood test process in order to give law enforcement officers time to obtain warrants in accordance with the Fourth Amendment.<sup>149</sup> She first clarified that DWI stops are different from those portrayed in the movies and on TV because drivers, in real life, are not pulled over and then immediately forced to submit to Breathalyzer tests on the side of the road.<sup>150</sup> The “standard evidentiary breath test” actually used is typically given after the driver has been arrested and taken back to the police station where officers can use more reliable and accurate machinery rather

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<sup>143</sup> *Id.* (quoting *Missouri v. McNeely*, 133 S. Ct. 1552, 1576 (2013)).

<sup>144</sup> *Id.* at 2197. Justices Sotomayor and Ginsburg agreed with Justice Thomas that blood and breath tests should be treated alike. However, Justices Sotomayor and Ginsburg argued that both tests should require warrants under the Fourth Amendment, whereas Justice Thomas argued that both tests should not require warrants.

<sup>145</sup> *Id.* at 2187 (Sotomayor, J., dissenting).

<sup>146</sup> *Birchfield*, 136 S. Ct. at 2187.

<sup>147</sup> *Id.* at 2196.

<sup>148</sup> *Id.* at 2191.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 2192.

than when the driver is first pulled over.<sup>151</sup> This creates a great delay in discovering whether the driver was driving while intoxicated, especially if the driver's BAC level is right at the .08 mark, and the alcohol could leave his system before he arrives at the police station.<sup>152</sup> Additionally, some states require the driver to be given a fifteen to twenty minute window for "residual mouth alcohol" to wear off.<sup>153</sup> Residual mouth alcohol is alcohol that is still present in the mouth and can possibly lead to an increased BAC reading when a breath test is performed.<sup>154</sup> There are other states that require a suspected drunk driver be given a period of time to contact a lawyer before taking a breath test.<sup>155</sup> Finally, instances may arise in which it can take up to a half hour for a breath test machine to "warm up" if it is not already on when the driver arrives at the police station.<sup>156</sup> In the case involving defendant Birchfield, the officers had a two-hour window to obtain a warrant from a judge between pulling over the driver for a suspected DWI and actually administering the breath test.<sup>157</sup> Justice Sotomayor, in pointing to all of these various delays, argued that law enforcement officers have adequate time to obtain proper warrants for breath tests in accordance with the Fourth Amendment.<sup>158</sup>

Justice Sotomayor also argued that the refusal rate in today's society is so low that obtaining a warrant rarely ever needs to happen in the first place.<sup>159</sup> In North Dakota, for example, only 21% of drivers refuse breath tests, while the refusal rate in Minnesota is even less—only 12%.<sup>160</sup> Even if the refusal rates in each of these states doubled, the judges and magistrates in those states would only have to issue one extra warrant per week for DWI-related cases.<sup>161</sup>

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<sup>151</sup> *Birchfield*, 136 S. Ct. at 2192. The majority neither discussed nor disputed Justice Sotomayor's information here.

<sup>152</sup> *Id.*

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

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* (Sotomayor, J., dissenting).

<sup>156</sup> *Birchfield*, 136 S. Ct. at 2192. For example, in North Dakota, the Intoxilyzer 8000 machine takes a half hour to initialize before use.

<sup>157</sup> *Id.* (citing N.D. CENT. CODE ANN. § 39-20-04.1(1) (2008)).

<sup>158</sup> *Id.*

<sup>159</sup> *Birchfield*, 136 S. Ct. at 2193; *see infra* Section III (stating that consent is an exception to the warrant requirement).

<sup>160</sup> *Id.* In 2011, California had the lowest breath test refusal rate of 4%. On the other end of the spectrum, Florida had a refusal rate of 82%. *Namuswe ET AL.*, *supra* note 3.

<sup>161</sup> *Birchfield*, 136 S. Ct. at 2194.

Essentially, Justice Sotomayor pointed out that the judicial system would not be overrun with warrant requests by simply adding one more warrant per week to a judge's already busy calendar.<sup>162</sup>

Finally, Justice Sotomayor argued that once a driver is arrested for suspected drunk driving, that driver is taken off the street and no longer poses a threat to other drivers on the road.<sup>163</sup> Therefore, even if it takes some time to obtain a warrant, at least the government's interest in "protecting the public" from dangerous drunk drivers is already satisfied.<sup>164</sup> The majority specifically responded to this point by arguing that the government's interest reaches beyond protecting the public from this particular driver but also deters drivers from drinking and then getting behind the wheel in the first place.<sup>165</sup> In fact, law enforcement officers frequently set up sobriety checkpoints on the roadside to deter drivers from drinking and driving.<sup>166</sup>

## VI. SLIPPERY SLOPE

As Justice Sotomayor stated in her persuasive dissent, if the Court continues to gloss over its requirements, the Fourth Amendment will become "an empty promise of protecting citizens from unreasonable searches."<sup>167</sup> She argued that the Fourth Amendment will become a mere suggestion and could eventually become obsolete.<sup>168</sup> Justice Sotomayor dissented on another Fourth Amendment issue in 2016 in *Utah v. Strieff*,<sup>169</sup> which was decided less than two weeks before *Birchfield*.<sup>170</sup> In *Strieff*, the defendant, Edward Strieff, was standing outside of his home in Salt Lake City when an officer stopped him, asked him some questions, and ran his license through a police database system.<sup>171</sup> After checking his

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<sup>162</sup> *Id.* (stating that the Supreme Court has never held that convenience of the courts is an exception to the warrant requirement under the Fourth Amendment).

<sup>163</sup> *Id.* at 2191.

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

<sup>165</sup> *Id.* at 2178.

<sup>166</sup> Michael F. Lotito, Comment, *Unsteady on Its Feet: Sobriety Checkpoint Reasonableness*, 67 WASH. & LEE L. REV. 735, 757 (2010).

<sup>167</sup> *Birchfield*, 136 S. Ct. at 2195.

<sup>168</sup> *Id.* at 2196.

<sup>169</sup> 136 S. Ct. 2056 (2016).

<sup>170</sup> *Birchfield*, 136 S. Ct. at 2160.

<sup>171</sup> *Strieff*, 136 S. Ct. at 2059.

license, he discovered that Strieff had a “small traffic warrant” outstanding in the system.<sup>172</sup> The officer then searched Strieff’s person and found methamphetamine in his pocket.<sup>173</sup> Strieff filed suit and the Utah Supreme Court held that the drugs were discovered based on an illegal search under the Fourth Amendment.<sup>174</sup> However, the Supreme Court reversed because the seizure was permissible due to the officer’s discovery of the outstanding warrant, which “attenuated the connection between the unlawful stop” and the drugs seized during the incident to arrest search.<sup>175</sup> Justice Sotomayor dissented in this case arguing that an outstanding traffic ticket, or other small infraction, does not open the door for officers to search a person for no reason.<sup>176</sup>

Furthermore, in her dissent in *Strieff*, Justice Sotomayor argued that “the mere existence of a warrant not only gives an officer legal cause to arrest and search a person, it also forgives an officer who, with no knowledge of the warrant at all, unlawfully stops that person on a whim or hunch.”<sup>177</sup> She reasoned that “two wrongs do not make a right” and that charging an individual for a crime while violating that individual’s Fourth Amendment rights was unacceptable.<sup>178</sup> Justice Sotomayor also argued that the exclusionary rule should have protected the illegally obtained evidence from being used against the defendant,<sup>179</sup> whereas in *Birchfield*, she argued that the seizure never should have occurred and thus did not make an exclusionary rule argument at all.<sup>180</sup> Similar to her arguments in *Strieff*, Justice Sotomayor contended in *Birchfield* that the majority’s ruling diminished the integrity of the Fourth Amendment.<sup>181</sup>

Furthermore, Justice Thomas in his partial dissent in *Birchfield* argued that when the Court draws an “arbitrary line in the sand” between blood and breath tests in a DWI stop, it uses a case-

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<sup>172</sup> *Id.* at 2065.

<sup>173</sup> *Id.*

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

<sup>175</sup> *Id.* at 2064.

<sup>176</sup> *Strieff*, 136 S. Ct. at 2064.

<sup>177</sup> *Id.* at 2067.

<sup>178</sup> *Id.* at 2065.

<sup>179</sup> *Id.* at 2064. The exclusionary rule would have prevented the illegally obtained objects from being used against the defendant; essentially those objects would have been thrown out, as if the police never found them.

<sup>180</sup> *See generally Birchfield*, 136 S. Ct. at 2187.

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

by-case test to determine what is and what is not too intrusive on a person's Fourth Amendment rights, creating confusion in the judicial system.<sup>182</sup> Both Justices Sotomayor and Thomas asserted that the Court's Fourth Amendment holdings are inconsistent, thereby weakening the meaning of the Fourth Amendment.<sup>183</sup>

Justices Thomas and Sotomayor are not alone in warning about the erosion of the Fourth Amendment. In 2011, Justice Ginsburg dissented to the majority's ruling in *Kentucky v. King*.<sup>184</sup> In that case, the Court held that the police can knock down the door of a residence if they believe that evidence is in the process of being destroyed inside the home.<sup>185</sup> However, Justice Ginsburg argued that the majority armed "the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases."<sup>186</sup> Instead of presenting evidence to a neutral magistrate, the police "may now knock, listen, and then break the door down, even if they had ample time to obtain a warrant."<sup>187</sup> Justice Ginsburg's argument pertaining to timing is consistent with Justice Sotomayor's dissent in *Birchfield*.<sup>188</sup> Justice Sotomayor argued that the arrest process during a DWI stop is intentionally detailed and time consuming so that officers have ample time to obtain a proper warrant.<sup>189</sup>

Every dissenting justice in *Birchfield* agreed that the majority was wrong in holding that warrants are required for some DWI tests but not for others.<sup>190</sup> The outcome of *Birchfield* weakens the integrity and meaning of the Fourth Amendment and creates confusion not only in the judicial system but also to individual police officers.<sup>191</sup> The Fourth Amendment has many established exceptions to its warrant requirement and does not need another added exception for DWI purposes. All DWI cases should be treated the same, and since the Court ruled that warrants are required for blood tests, then they should also be required for breath tests.

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<sup>182</sup> *Id.* at 2198.

<sup>183</sup> *Id.*

<sup>184</sup> 563 U.S. 452, 473 (2011).

<sup>185</sup> *Id.* at 472.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Birchfield*, 136 S. Ct. at 2195 (Sotomayor, J., dissenting).

<sup>189</sup> *See Birchfield*, 136 S. Ct. at 2192 (Sotomayor, J., dissenting).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 2198.

## VII. CONCLUSION

The Fourth Amendment's purpose is to protect individuals from unreasonable searches and seizures and require warrants to be used in all circumstances unless there is an applicable exception.<sup>192</sup> However, the Supreme Court in *Birchfield* held that performing a breath test on a suspected drunk driver without a warrant is acceptable<sup>193</sup> due to exigent circumstances.<sup>194</sup> Conversely, the Court held that a warrant is still required for blood test purposes because it is more invasive than a breath test.<sup>195</sup> By holding this way, the Court carved out a new exception to the warrant requirement under the Fourth Amendment. As the list of exceptions to the warrant requirement is already a lengthy one, by adding the exception that a breath test does not require a warrant because it is not as invasive as a blood test, the Fourth Amendment is further losing its meaning and purpose. The exceptions to the Fourth Amendment seem to have "gobbled up the rule."<sup>196</sup>

The holding in *Birchfield* is a shocking one, and the dissenters had the stronger and more appealing arguments.<sup>197</sup> Justice Sotomayor believed one of the reasons why the Court held that warrants were not required for breath tests was due to the administrative inconvenience it would place on judges across the country.<sup>198</sup> If her belief was correct, then the majority had no legal basis for this argument because the Court has never held that "mere convenience" is an exception to the Fourth Amendment's warrant requirement.<sup>199</sup> If the Court continues to hold this way in future cases, the Fourth Amendment will become obsolete.

The dissenting Justices in *Birchfield* are not alone in their stance that the Fourth Amendment will continue to be downplayed by both law enforcement officials and the justice system if the Court continues to send mixed messages about the Fourth Amendment warrant requirement, as other Justices have voiced their opinions in

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<sup>192</sup> U.S. CONST. amend. IV.

<sup>193</sup> *Birchfield*, 136 S. Ct. at 2162.

<sup>194</sup> *Id.* at 2173.

<sup>195</sup> *Id.* at 2184.

<sup>196</sup> JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE VOLUME 1: INVESTIGATION 163 (5<sup>th</sup> ed. 2010).

<sup>197</sup> See *Birchfield*, 136 S. Ct. at 2187 (Sotomayor, J., dissenting).

<sup>198</sup> *Id.* at 2194.

<sup>199</sup> *Id.*

past decisions as well.<sup>200</sup> Overall, however, the majority of the Court believes that the Fourth Amendment is fluid in nature and can be manipulated as the Court sees fit.<sup>201</sup> Even though the Constitution is a living document, it does not mean that the Court can dismiss parts of it whenever it wants.<sup>202</sup> The Court needs to balance the Constitution's malleable terms as well as preserving its meaning and history that the Framers intended in order to maintain the Constitution's history and integrity.

Because of *Birchfield*, the states are now "tasked with implementing creative and effective solutions to the ongoing issue of drunk driving while remaining within the bounds of the Constitution."<sup>203</sup> This means that police officers not only need to be informed of the changes in the law requiring a warrant for a blood test related to a DWI but also need to be better trained on the matter as a whole.<sup>204</sup> As such, *Birchfield* has a powerful impact on police officers, judges, and drivers across the United States.<sup>205</sup> The next time individuals get behind the wheel, they should know not to drink and drive, and if they do, they should remember that the officer inquiring into their sobriety needs a warrant to get a blood sample, but no warrant for a breath test.<sup>206</sup>

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<sup>200</sup> See *Kentucky v. King*, 563 U.S. 452 (2011) (Ginsburg, J., dissenting).

<sup>201</sup> See generally *Birchfield*, 136 S. Ct. at 2163.

<sup>202</sup> See generally David A. Strauss, *The Living Constitution*, THE UNIVERSITY OF CHICAGO LAW SCHOOL, <http://www.law.uchicago.edu/alumni/magazine/fall10/strauss> (last visited Feb. 20, 2017).

<sup>203</sup> Megan Gordon, Comment, *Blood and Breath Tests-Constitutional Law: Constitutionality of Warrantless Blood and Breath Tests Incident to DUI Arrest: Impact on Drunk Driving in North Dakota Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), 92 N.D. L. REV. 197, 210 (2016).

<sup>204</sup> See generally Michael P. Rellahan & Ginger Rae Dunbar, *Police in Pennsylvania, Region Adjust to New DUI Rules*, THE DELAWARE COUNTY DAILY TIMES (Jul. 3, 2016), <http://www.delcotimes.com/article/DC/20160703/NEWS/160709908>.

<sup>205</sup> *Id.*

<sup>206</sup> *Birchfield*, 136 S. Ct. 2163 (2016).