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Birchfield v. North Dakota: Why the United States Supreme Court Should Rely on Riley v. California to Hold that Criminalizing a Suspect's Refusal to Consent to a Warrantless Blood Test Violates the Fourth Amendment

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Birchfield v. North Dakota: Why the United States Supreme Court Should Rely on Riley v. California to Hold that Criminalizing a Suspect's Refusal to Consent to a Warrantless Blood Test Violates the Fourth Amendment

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> "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so."[1]

Introduction

In *Birchfield v. North Dakota,*[2] the United States Supreme Court will decide whether North Dakota may *criminalize* the refusal to consent to a warrantless blood test. N.D. Century Code §§ 39-20-1 and 39-08-01 permit and provide in relevant part as follows, respectively:

> A chemical test, or tests, of the individual's ***blood,*** breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-06.2-10.2 if the individual is driving or is in actual physical control of a commercial motor vehicle; or . . . a chemical test, or tests, of the individual's ***blood***, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section.[3]

***

> An individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state who refuses to submit to a chemical test, or tests, required under section . . . is guilty of an offense under this section.[4]

On its face, N.D. Century Code § 39-20-1 authorizes law enforcement to conduct warrantless blood tests in *every* case, regardless of whether law enforcement officers are faced with exigent circumstances, and N.D.

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1. Missouri v. *McNeely,* 133 S. Ct. 1552, 1561 (2013) (citing *McDonald v. United States,* 335 U.S. 451, 456 (1948)) ("We cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the search] imperative.").

2. No. 14-1468, *consolidated with* Bernard v. Minnesota*,* No. 14-1470.

3. N.D. CENT. CODE § 39-20-1 (emphasis added).

4. N.D. CENT. CODE § 39-08-01.

Century Code § 39-08-01 *criminalizes* in *every* case a motorist's refusal to consent to such tests.

In this Article we argue that both provisions violate the Fourth Amendment.[5] First, in violation of *McNeely,* N.D. Century Code §§ 39-20-1 establishes a per se exception to the warrant requirement and forecloses a case-by-case evaluation of whether a warrantless blood test, given the facts of a particular case, is reasonable. Second, N.D. Century Code § 39-20-1 provides law enforcement officers with less intrusive means—breathalyzer and urine tests—to obtain the *same* evidence.[6] Finally, given that technological advances in warrant procurement procedures often give law enforcement ample time to obtain a warrant without risking dissipation in a motorist's blood-alcohol level,[7] there is little, if any, need to conduct a warrantless blood test of every motorist suspected of driving while intoxicated. For these reasons, N.D. Century Code § 39-20-1 fails to pass constitutional muster. Additionally, since the statutory provision upon which the crime for refusal is predicated (N.D. Century Code § 39-20-1) fails to withstand constitutional scrutiny, a refusal to consent under § 39-08-01 is unconstitutional as well.

However, the Court cannot rely solely on *McNeely* in analyzing N.D. Century Code §§ 39-20-1 and 39-08-01 because in *McNeely* the four-member plurality did not address the constitutionality of criminalizing a motorist's refusal to consent, although the plurality suggested that *civil* penalties and inferences of guilt are permissible.[8] Thus, it remains an open question whether *criminal* penalties for refusing warrantless blood tests (or breathalyzer and urine tests) are constitutionally permissible, particularly in contexts, unlike *Birchfield*, where the underlying statute *is* constitutional. This Article posits that the Court's reasoning in *Riley* offers a useful model for answering this question, and that it supports the conclusion that N.D. Century Code § 39-08-01 violates the Fourth Amendment.

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5. *See* 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.

6. *See* N.D. CENT. CODE § 39-20-1 (outlining what the stated statute provides).

7. *See* McNeely, 133 S. Ct. at 1562 (describing how technological advances impact DUI investigations).

8. *See id.* at 1566 (noting that "[s]uch laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution").

By way of background, in *Riley* the Court unanimously held that, absent exigent circumstances, warrantless searches of cell phones incident to arrest are unreasonable and therefore violate the Fourth Amendment.[9] The outcome in *Riley* can be traced to *Chimel v. California*,[10] in which the Court held that warrantless searches incident to arrest were permissible to protect officers' safety and prevent arrestees from destroying evidence.[11] As a result, law enforcement officers were permitted to conduct warrantless searches of an arrestee's person and areas within an arrestee's reach.[12] In subsequent cases, however, the Court relied on *Chimel's* bright-line rule to uphold searches that did *not* implicate officer safety and evidence preservation. For example, in *New York v. Belton*,[13] the Court held that law enforcement officers could search a passenger compartment incident to arrest even though the suspect was in police custody and there was no risk that evidence would be destroyed.[14] In *Arizona v. Gant*,[15] the Court also relied on *Chimel* to uphold searches of a passenger compartment if officers reasonably believed that it contained evidence related to the crime of

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9. Riley v. California, 134 S. Ct. 2473, 2495 (2014). By way of background, in *Riley* the Court held that the two justifications underlying searches incident to arrest—protecting officer safety and preserving evidence—did not justify warrantless searches of cell phones absent exigent circumstances. Noting that cell phones have "immense storage capacity" and hold "for many Americans, 'the privacies of life, the Court held, for Fourth Amendment purposes, that cell phones are qualitatively and quantitatively different than searches of finite objects, such as a plastic container or passenger compartment. *See id.* at 2489, 2493–95 (quoting Boyd v. United States, 116 U.S. 616, 625 (1886)). Writing for the majority, Chief Justice Roberts explained:

> First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months.

Id.

10. *See generally* Chimel v. Calfornia, 359 U.S. 752 (1969).
11. *Id.* at 763.
12. *Id.* at 762–63.
13. *See generally* New York. v. Belton, 453 U.S. 454 (1981).
14. *Id.* at 462–63.
15. *See generally* Arizona v. Gant, 556 U.S. 332 (2009).

arrest.[16] The Court's holdings in *Belton* and *Gant* demonstrated that the bright-line rule adopted in *Chimel* had been expanded to such a degree that the original justifications for the search incident to arrest doctrine were little more than an afterthought.

In *Riley,* the Court ended this charade, holding that warrantless cell phone searches did not implicate, and were entirely divorced from, the original justifications underlying the search incident to arrest doctrine. Thus, absent exigent circumstances, law enforcement officers could not search a cell phone without a warrant.[17] In so holding, Court curtailed a decades-old and unprincipled expansion of the search incident to arrest doctrine in which searches of passenger compartments, plastic containers, and other objects were upheld even though officer safety and evidence preservation were not implicated. What's more, the Court reached this result even though arrestees, like citizens operating motor vehicles on public roads, enjoy a *reduced* expectation of privacy.[18]

In *Birchfield*, the Court should apply the same reasoning. Although courts have repeatedly held that the interest in deterring drunk driving supports laws that compel motorists, by virtue of operating a motor vehicle, to *implicitly* consent to field, breathalyzer, and urine tests, and impose *civil* penalties or draw *inferences* of guilt from a motorist's refusal, here North Dakota goes a step further by making the refusal an *independent crime*. To make matters worse, since the underlying statutory provision (N.D. Century Code § 39-20-01) authorizes warrantless blood tests in *every* case, the withholding of consent is *always* an offense, even in cases where such searches ultimately are deemed unreasonable, thus rendering the withholding of consent lawful. Finally, given the availability of breath and urine tests, law enforcement officer have alternative and less intrusive

16. *Id.* at 343.

17. *See* Riley v. California, 134 S. Ct. 2473, 2495 (2014) (stating under what circumstance a law enforcement officer may search a cell phone without a warrant).

18. *See id.* at 2588 ("The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely. Not every search 'is acceptable solely because a person is in custody.'" (quoting Maryland v. King, 133 S. Ct. 1958–79 (2013))); South Dakota v. Opperman, 428 U.S. 364, 379 (1976) (noting that "the traditional expectation of privacy in an automobile is significantly less than the traditional expectation of privacy associated with the home"); Cardwell v. Lewis, 417 U.S. 583, 590 (1974) ("One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view."); *cf.* United States v. Jones, 132 S. Ct. 945, 953–54 (2012) (holding that the use of a GPS tracking device to monitor a motorist's movements for twenty-eight days violated the Fourth Amendment).

means at their disposal to arrest suspects for driving while intoxicated and therefore vindicate the interest in protecting public safety. For these reasons, criminalizing a refusal to consent represents an unprecedented expansion of the implicit consent doctrine in the same way that searches of passenger compartments and plastic containers represented an unprecedented expansion of the search incident to arrest doctrine. Accordingly, N.D. Century Code § 39-08-01 violates the Fourth Amendment.

At bottom, North Dakota is attempting to achieve through legislation what it could not accomplish under the Fourth Amendment. Specifically, by authorizing warrantless blood tests in *every* case, North Dakota is attempting to evade the holding in *McNeely,* which requires a case-by-case evaluation of the constitutionality of warrantless searches. Additionally, North Dakota seeks to *criminalize* a suspect's refusal to submit to such test, even though, in some cases, that refusal will be lawful if the search itself is unreasonable. As in *Riley,* the Court in *Birchfield* can put an abrupt end to this practice by holding that law enforcement may not perform warrantless blood tests *unless* officers are faced with *truly* exigent circumstances. In the absence of exigent circumstances, the message to states that seek to force motorists, under threat of criminal prosecution, to undergo warrantless blood tests should be simple—get a warrant.[19] Part II examines N.D. Century Code § 39-20-01 and explains why it should be invalidated. Part III discusses N.D. Century Code § 39-08-01 and, analogizing to *Riley,* argues that it exceeds law enforcement investigatory authority under the implied consent doctrine and thus violates the Fourth Amendment.

II. Laws Authorizing Warrantless Blood Tests Regardless of the Circumstances, Are Unreasonable and Therefore Violate the Fourth Amendment

Reasonableness is the touchstone of Fourth Amendment analysis.[20] Whether a search is unreasonable "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure

19. *See* Missouri v. McNeely, 133 S. Ct. 1552, 1563 (2013) (holding that "adopting the State's per se approach . . . might well diminish the incentive for jurisdictions 'to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement'") (citation omitted).

20. *See Riley*, 134 S. Ct. at 2482 ("As the text makes clear, 'the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006))).

itself," and entails "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[21] Moreover, given "the fact-specific nature of the reasonableness inquiry," the Court "evaluate[s] each case of alleged exigency based on its own facts and circumstances."[22] As the Court noted in *McNeely,* "[n]umerous police actions are judged based on fact-intensive, totality of the circumstances analyses rather than according to categorical rules, including in situations that are more likely to require police officers to make difficult split-second judgments."[23] Against this backdrop, at least one court has held that "a warrantless blood test, performed without consent, is *presumptively* unreasonable unless the state actors involved had probable cause and exigent circumstances sufficient to justify it."[24]

As set forth below, by its clear terms, N.D. Century Code § 39-20-1 creates a per se exception to the warrant requirement, thus precluding the fact-intensive, case-by-case reasonableness analysis required of searches in particular contexts. In addition, N.D. Century Code § 39-20-1 provides law enforcement officers with alternative and less intrusive means by which to establish probable cause that a motorist is intoxicated.

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21. Skinner v. Railway Lab. Execs. Ass'n*,* 489 U.S. 602, 619 (1989) (quoting Delaware v. Prouse, 440 U.S. 648, 656 (1979)); *see* Samson v. California*,* 547 U.S. 843, 848 (2006) ("[W]e 'examin[e] the totality of the circumstances' to determine whether a search is reasonable within the meaning of the Fourth Amendment." (quoting United States v. Knights, 534 U.S 112, 118 (2006)) (internal quotation marks omitted))).

22. *McNeely,* 133 S. Ct. at 1559 (quoting Go–Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931)), *abrogated by* Arizona v. Gant*,* 556 U.S. 332 (2009); *see* Riley v. California, 134 S. Ct. 2473, 2494 (2014) (noting "the exigent circumstances exception *requires* a court to examine whether an emergency justified a warrantless search in each particular case") (emphasis added); *Brigham City,* 547 U.S. at 406 (noting that officers' entry into a home to provide emergency assistance was "plainly reasonable under the circumstances"); Illinois v. McArthur*,* 531 U.S. 326, 331 (2001) (concluding that a warrantless seizure of a person to prevent him from returning to his trailer to destroy hidden contraband was reasonable "[i]n the circumstances of the case before us" due to exigency); *see generally* Ohio v. Robinette, 519 U.S. 33, 39 (1996).

23. *McNeely,* 133 S. Ct. at 1564.

24. Marshall v. Columbia Lea Regional Hosp*.,* 345 F.3d 1157, 1172 (10th Cir. 2003) (emphasis added). The Court's decision in *South Dakota v. Neville*, in which it held that warrantless blood searches do not violate the Fifth Amendment Privilege Against Self-Incrimination, is inapposite. 459 U.S. 553 (1983). First, *Neville* addressed the constitutionality of warrantless blood tests in an entirely different context. Second, in *Neville,* law enforcement did not have alternative and less intrusive means at their disposal (breathalyzer and urine tests) by which to determine if a motorist is driving under the influence of alcohol.

A. N.D. Century Code § 39-20-01 Impermissibly Establishes a Per Se Exception to the Warrant Requirement

In a variety of contexts, the Court has refused to adopt a per se exception to the warrant requirement.[25] In *McNeely,* a four-member plurality of the Court specifically rejected the state's attempt to create such an exception.[26] Writing for the plurality, Justice Sotomayor held that the natural dissipation of alcohol in the blood—the most common reason given to justify warrantless blood tests—does not support a per se exigency exception.[27] Furthermore, the fact that "some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test," is only "a reason to decide each case on its facts . . . not to accept the "considerable overgeneralization" that a per se rule would reflect."[28] For example, in situations where "the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer," there could be no "plausible justification for an exception to the warrant requirement."[29] As such, "[w]hile the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake."[30]

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25. *See, e.g.*, Richards v. Wisconsin, 520 U.S. 385, 391–96 (1997) (rejecting a per se exception to the knock-and-announce requirement for felony drug investigations based on presumed exigency, and requiring instead evaluation of police conduct "in a particular case"); McDonald v. United States, 335 U.S. 451, 456 (1948) (holding that "[w]e cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the search] imperative").

26. *See McNeely*, 133 S. Ct. at 1564 ("While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake.").

27. *See id.* at 1563, 1568 (holding that "the natural dissipation of alcohol in the bloodstream does not constitute an exigency in *every case* sufficient to justify conducting a blood test without a warrant" and that "whether a warrantless blood test of a drunk-driving suspect is reasonable "must be determined case by case based on the totality of the circumstances").

28. *Id.* at 1555 (quoting *Richards*, 520 U.S. at 393).

29. *Id.* at 1561.

30. *Id.* at 1564.

In addition, evaluating the reasonableness of warrantless blood tests on a case-by-case basis is consistent with the practices of many states. Several states, for example, "lift restrictions on nonconsensual blood testing if law enforcement officers first obtain a search warrant or similar court order."[31] In addition, "a majority of States either place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal (often limiting testing to cases involving an accident resulting in death or serious bodily injury) or prohibit nonconsensual blood tests altogether."[32] For these reasons, the portion of N.D. Century Code § 39-20-01 authorizing warrantless and nonconsensual blood tests cannot withstand constitutional scrutiny. Of course, this is not to say warrantless blood tests will *never* be permissible, or that dissipation of blood alcohol level will *never* be a permissible basis upon which to conduct such a test. It is to say, however, that their lawfulness should be evaluated on a case-by-case basis to determine if they comport with Fourth Amendment requirements.[33]

B. Law Enforcement Officers Have Less Intrusive Means at their Disposal to Determine if a Motorist is Driving While Intoxicated

Since N.D. Century Code § 39-20-01 authorizes law enforcement officers to perform less intrusive tests (breathalyzer and urine) to establish probable cause that a motorist is driving while intoxicated, there is little, if any, need to subject *every* motorist to a warrantless blood test. In *Nelson v. City of Irvine*,[34] the Ninth Circuit invalidated a strikingly similar law permitting warrantless tests of a motorist's blood, breath, or urine.[35] In so holding, the Ninth Circuit explained that "[w]hen a DUI arrestee consents to undergo a breath or urine test, the government has available to it an effective alternative to a blood test as a means of obtaining the same evidence."[36] Furthermore, "breath and urine tests are equally

31. Missouri v. McNeely, 133 S. Ct. 1552, 1566 (2013).

32. *Id.*

33. *See id.* at 1559 (holding that "[w]e apply this 'finely tuned approach' to Fourth Amendment reasonableness in this context because the police action at issue lacks 'the traditional justification that . . . a warrant . . . provides'") (quoting Atwater v. Lago Vista, 532 U.S. 318, 347 n.16 (2016)).

34. *See generally* Nelson v. City of Irvine, 143 F. 3d 1196 (9th Cir. 1998).

35. *See id.* at 1207–08 (outlining an instance in which the 9th Circuit invalidated a law permitting the testing of a motorist's blood, breath, or urine without a warrant).

36. *Id.* at 1201.

effective as a blood test in determining whether a suspect has violated the DUI law."[37]

Although equally effective, breath and urine tests are far less intrusive than blood tests. In *Skinner,* the Court stated:

> Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment. Further, breath tests reveal the level of alcohol in the employee's bloodstream and nothing more . . . *[B]reath tests reveal no other facts in which the employee has a substantial privacy interest.*[38]

The *Riley* Court recognized that a cell phone, unlike a passenger compartment or plastic container, "collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record."[39] Additionally, in *McNeely,* the four-member plurality emphasized that "[s]tates have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws."[40] For example, "all 50 States have adopted implied consent laws that require 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."[41]

At bottom, *McNeely* and *Nelson* stand for the proposition that when law enforcement officers have alternative means available to establish probable cause that a suspect was operating a motor vehicle while intoxicated, there is no need to conduct a warrantless, nonconsensual, and far more intrusive search (i.e., a blood test).[42] For this reason, "[n]o matter

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37. *Id.*

38. Brower v. Cnty. of Inyo, 489 U.S. 593, 625 (1989) (emphasis added).

39. Riley v. California, 134 S. Ct. 2473, 2489 (2014).

40. Missouri v. McNeely, 133 S. Ct. 1552, 1566 (2013).

41. *Id.*

42. *See, e.g.*, Nelson v. City of Irvine, 143 F. 3d 1196, 1202 (9th Cir. 1998) ("Consent to a breathalyzer test may very well have reduced to insignificance the defendants' need to extract [defendant's] blood.") (quoting Hammer v. Gross, 932 F.2d 842, 846 (9th Cir. 1991). Additionally, in *McNeely* the Court has identified various circumstances where an exigency renders it impractical to obtain a warrant. *See, e.g.*, United States v. Santana, 427 U.S. 38, 42–43 (1976) (finding law enforcement were in "hot pursuit" of a fleeing suspect); *see* Michigan v. Tyler, 436 U.S. 499, 509–10 (1978) (entering a burning building to put out a fire and investigate its cause). Exigencies are also based on the need to prevent the imminent destruction of evidence. *See, e.g. generally*, Cupp v. Murphy, 412 U.S. 291, 296 (1973); Ker v. California, 374 U.S. 23, 40–41 (1963) (plurality opinion). As the Court held in *McNeely,* those circumstances are not present where law enforcement takes a

how serious the offense, the availability of an equally effective, consensual method of obtaining the evidence conclusively renders use of the nonconsensual method unreasonable."[43] Put simply, absent a compelling *need* to administer a warrantless blood test, there can be no exigency.[44] For these reasons, warrantless blood tests, like warrantless cell phone searches, should be prohibited unless law enforcement officers are faced with exigent circumstances.

III. The Criminalization of a Motorist's Refusal to Consent to a Warrantless Blood Test Violates the Fourth Amendment

Given that N.D. Century Code § 39-20-01 fails to withstanding constitutional scrutiny under the Fourth Amendment, the Court should hold that a suspect's refusal to consent under N.D. Century Code § 39-08-01 likewise violates the Fourth Amendment. In so holding, the Court should analogize to *Riley* and conclude that warrantless blood tests constitute an unprecedented expansion of the implied consent doctrine.

A. Riley *Provides the Framework Upon Which to Invalidate N.D. Cent. Code. § 39-08-01*

The parallels between *Riley* and *Birchfield* are striking and the analysis articulated by the Court in *Riley* offers an elegant model for both conducting the necessary balancing of privacy rights and public safety, while also providing clear guidance to law enforcement in handling DWI investigations. The link with *Riley* and the rule it articulates is a logical one and allows the Court to hold that that the original justifications underlying the implied consent doctrine—deterring drunk driving and protecting public safety—do not support a wholesale exception for warrantless blood test and certainly not the criminalization of a refusal to consent to such tests. As in

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warrantless and nonconsensual blood test of a motorist suspected of driving while intoxicated.

43. *See Hammer*, 932 F.2d at 852 (Kozinski, J., concurring) (noting that, "[i]f the suspect requests a breath or urine test and it will do the job just as well, it must be used in lieu of a blood test-even where the suspected crime is murder in the first degree").

44. *See, e.g.*, Kentucky v. King, 131 S. Ct. 1849, 1856 (2011) (noting that exigent circumstances are present "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment").

Riley, where the Court held that the search incident to arrest doctrine did not permit law enforcement to conduct warrantless searches irrespective of threats to officer safety or the need to preserve evidence, the implied consent doctrine should not be construed to mean that officers can *always* conduct warrantless blood tests regardless of the *need* to obtain evidence of intoxication. Indeed, in *Riley* the Court was cognizant that the holdings in *Belton* and *Gant* had rendered searches incident to arrest nearly limitless and, in response, established categorical limits to protect an arrestees' admittedly reduced privacy rights. Importantly, warrantless cell phone searches not only failed to implicate officer safety and evidence preservation, but they constituted a far more severe infringement on personal privacy rights.[45] Of course, the Court did *not* hold that warrantless cell phone searches were *never* justified, but it *did* adopt a case-by-case balancing test that carefully weighed the necessity of such searches with an arrestee's privacy rights.

Although implied consent laws were not at issue in *Riley,* the Court's reasoning, as well as the rule adopted, should be applied to warrantless blood tests. Unlike breathalyzer or urine tests, which can accurately ascertain a motorist's blood alcohol level, warrantless blood tests, like cell phone searches, are far more intrusive *and* have the potential to reveal information in which a motorist has a substantial and objectively reasonable expectation of privacy (e.g., the presence of prescription drugs). Furthermore, just as arrestees retain significant privacy interests in the contents of a cell phone despite having a *reduced* expectation of privacy on public roadways, motorists also retain a substantial privacy interest in their bodily integrity, particularly where alternative search methods are available to ensure that law enforcement's interest in deterring drunk driving is not hindered.[46] In fact, as the *McNeely* Court noted, "we never retreated . . .

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45. *See* Riley v. California, 134 S. Ct. 2473, 2490 (2014). Justice Roberts stated as follows:

> [T]here is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception. According to one poll, nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower.

46. *See* Missouri v. McNeely, 133 S. Ct. 1552, 1565 (2013) ("[T]he fact that people are "accorded less privacy in . . . automobiles because of th[e] compelling governmental need for regulation . . . does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin." (quoting California v. Carney, 471 U.S. 386, 392 (1985))).

from our recognition that use of th[e] compelling governmental need for regulation . . . does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin."[47] To hold otherwise would give law enforcement nearly unbridled authority to conduct unnecessary and unreasonable searches despite having alternative—and less invasive—means by which to procure the same evidence.

The table below summarizes the parallels between the search incident to arrest and implied consent doctrines.

Doctrine	Original Justifications	Permissible Searches	Impermissible expansions
Search Incident to Arrest	Officer safety and evidence preservation	Limited searches of the arrestee's person and wingspan	Warrantless searches of cell phones
Implied Consent	Deterring drunk driving and protecting public safety	Breathalyzer, urine, and field sobriety tests; inference of guilt when motorists refuse such tests	Warrantless blood tests

B. A Case-By-Case Evaluation of Warrantless Blood Testing Will Provide Guidance to Law Enforcement Officers and Protect Motorists' Privacy Rights

Evaluating the reasonableness of warrantless blood tests on a case-by-case basis will appropriately balance the need of law enforcement to protect the public with a suspect's privacy interest. To begin with, law enforcement officers will continue to have at their disposal a number of tools, such as field, breath, and urine tests, to establish probable cause that a suspect is driving while intoxicated. Thus, law enforcement will not be hindered in its ongoing efforts to protect public safety and deter drunk driving. As the

47. *Id.*; *see* Winston v. Lee, 470 U.S. 753, 760 (1985) (holding that "invasions of bodily integrity" implicate an individual's "most personal and deeply-rooted expectations of privacy").

McNeely plurality explained, "[w]e are aware of no evidence indicating that restrictions on nonconsensual blood testing have compromised drunk-driving enforcement efforts in the States that have them."[48] In fact, "field studies in States that permit nonconsensual blood testing pursuant to a warrant have suggested that, although warrants do impose administrative burdens, their use can reduce breath-test-refusal rates and improve law enforcement's ability to recover BAC evidence."[49]

Second, technological advances substantially increase the likelihood that officers will have sufficient time to procure a warrant before blood alcohol levels begin to dissipate. As the Court noted in *McNeely*, "a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing."[50] In addition, "jurisdictions have found other ways to streamline the warrant process, such as by using standard-form warrant applications for drunk-driving investigations."[51] Thus, adopting a per se exigency exception would disregard "the current and future technological developments in warrant procedures."[52] Furthermore, a case-by-case approach will incentivize law enforcement to carefully consider whether the circumstances justify dispensing with the warrant requirement, rather than give law enforcement freewheeling authority to take a suspect's blood at any time—and for whatever reason.[53]

Third, a case-by-case approach will enable officers to take warrantless blood samples where they are faced with a *true* exigency.[54] To say that such exigencies *may* occur, however, does not mean that they always *will* occur. Without evaluating each case on its merits, the likelihood that citizens' will

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48. *Id.* at 1567.

49. *Id.* at 1566–67 (citing Bullcoming v. New Mexico, 131 S. Ct. 2705, 2710–11 (2011); NHTSA, *Use of Warrants for Breath Test Refusal: Case Studies* 36–38 (No. 810852, Oct. 2007)).

50. *Id.* at 1562.

51. *Id.*

52. *Id.* at 1563 (quoting State v. Rodriguez, 156 P.3d 771, 779 (Utah 2007)).

53. *See id.* (noting that a per se rule "might well diminish the incentive for jurisdictions to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement").

54. *See id.* (explaining that "longer intervals may raise questions about the accuracy of the calculation," such that exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process).

suffer substantial—and unreasonable—infringements on their privacy would increase, even though the benefit to law enforcement and the public, particularly given the availability of breath, urine, and field sobriety tests, would not. This is precisely what would result from a per se exigency exception to the warrant requirement, and precisely why the portion of N.D. Century Code § 39-20-01 authorizing law enforcement to conduct warrantless and nonconsensual blood tests fails to pass constitutional muster.

Conclusion

Although the interest in deterring drunk driving and protecting the public cannot be overstated, the importance of protecting privacy rights is far too often understated. In an era where technological advancements enable law enforcement to investigate criminal activity in a manner the Founders could not possibly foresee, few would doubt that the benefits of technology also bring grave threats to individual and collective liberty. However, as courts struggle to balance privacy rights with the investigatory powers that new technology enables, they must not overlook the more conventional threats to privacy, as present in *Birchfield,* that often lurk under the Fourth Amendment radar. States cannot—and should not—be allowed to weaken privacy protections through laws, such as N.D. Century Code §§ 39-20-1 and 39-08-01, compelling motorists, under threat of criminal prosecution, to consent to warrantless blood tests that, at least in some cases, are neither necessary nor reasonable. If N.D. Century Code §§ 39-20-1 and 39-08-01 are upheld, the Court will send a message that states can circumvent the Fourth Amendment with legislation that admittedly achieves worthy policy objectives, yet does so at the expense of core constitutional protections. In *Riley,* the Court's decision recognized this fact, and implicit in its holding was the admonition that the objective of serving the public good, such as by deterring drunk driving, must not be achieved through procedures that make the public less free and the Constitution less relevant.