Washington Law Review Online

Volume 94 Article 1

2019

Save Your Breath: A Constitutional Analysis of the Criminal Penalties for Refusing Breathalyzer Tests in the Wake of *Birchfield v. North Dakota*

Kylie Fisher

SAVE YOUR BREATH: A CONSTITUTIONAL ANALYSIS OF THE CRIMINAL PENALTIES FOR REFUSING BREATHALYZER TESTS IN THE WAKE OF *BIRCHFIELD V. NORTH DAKOTA*

Kylie Fisher

Abstract: Statutes that criminally penalize suspected drunk drivers who refuse to submit to testing of their blood alcohol concentration emerged in a number of states as a way to better enforce implied consent statutes that require drivers submit to such testing. In *Birchfield v. North Dakota*, the Supreme Court held that statutes that criminally punish individuals for refusing a blood test were unconstitutional but upheld criminal refusal statutes regarding breath tests. Much of the reasoning in the majority's opinion stemmed from a shallow perception of the invasion that breath tests pose to individual privacy interests. Justice Sotomayor's dissenting opinion noted that where search warrants are reasonably available, a state's governmental interest in collecting evidence and promoting safety is lower than the individual privacy interests at stake. This Comment is about post-*Birchfield* strategies for challenging statutes that criminalize refusal to submit to a breathalyzer test.

This Comment approaches the issue from a novel, bottom-up approach that argues individuals will be most successful in challenging criminal refusal statutes in state courts under a substantive due process framework that implicates state constitutional rights. This Comment also sheds light on the underreported and significant issue of criminally punishing individuals whose language barriers or hearing impairments prevent them from fully understanding the consequences of refusing a breath test. While drunk driving is undoubtedly a severe problem that requires regulation, the goal should be to preserve fundamental liberty interests with viable legal and policy alternatives that can effectively curb drunk driving rates.

INTRODUCTION

Drive sober or get pulled over.[1] Over the years, drunk drivers have taken countless lives,[2] leading states and the federal government to seek out harsher or, at the very least, more thorough regulations in an effort to deter intoxicated individuals from getting behind the wheel.[3] States have a "paramount interest . . . in preserving the safety . . . of public highways."[4] As a result, the government's interest in public road safety has justified a number of exceptions to otherwise foundational constitutional rights in criminal procedure. For example, highway sobriety checkpoint programs aimed at reducing the immediate hazard posed by drunk drivers qualify as a special needs search exception to the Fourth Amendment's warrant requirement.[5] Hit-and-run statutes requiring drivers involved in a car accident to remain at the scene do not violate the Fifth Amendment's core privilege against self-incrimination, in part because the purpose of such statutes is "not intended to facilitate criminal convictions, but to promote the satisfaction of civil liabilities."[6]

Similarly, in an effort to decrease drunk driving, some states have passed statutes that criminally punish those who refuse to submit to a blood or breath test.[7] In *Birchfield v. North Dakota*,[8] the Supreme Court confined the scope of permissible warrantless tests on suspected drunk drivers by holding that breath tests, but *not* blood tests, may be

---

*J.D. Candidate, University of Washington School of Law, Class of 2020. Thank you to Professor Mary D. Fan for inspiring this piece through her fascinating law lectures and for providing such insightful feedback. Additionally, thank you to the *Washington Law Review* editorial staff for their support and suggestions.

1. U.S. DEP'T OF TRANSP., TRAFFIC SAFETY MARKETING, DRIVE SOBER OR GET PULLED OVER CAMPAIGN, https://www.trafficsafetymarketing.gov/get-materials/drunk-driving/drive-sober-or-get-pulled-over [https://perma.cc/G4PQ-QPYT].

2. In 2017 alone, it is estimated that 10,874 fatalities in motor vehicle traffic crashes involved drivers with a blood alcohol concentration of .08 g/dL or higher. *See* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., TRAFFIC SAFETY FACTS 2017, DOT HS 812 630 (2018), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812630 [https://perma.cc/2Z4Y-TB7P].

3. *See e.g.*, FLA. STAT. § 316.193(4)(b)(1) (2019) (stating that any person convicted of drunk driving with a blood-alcohol content of 0.15+ shall be punished by not more than nine months for a first conviction); S.D. CODIFIED LAWS § 32-23-2 (2008) (stating that an individual is convicted of drunk driving for the first time a court may, in its discretion, issue an order requiring 24/7 sobriety testing and attendance at counseling programs).

4. Mackey v. Montrym, 443 U.S. 1, 17 (1979) (noting the paramount interest the Commonwealth of Massachusetts has in preserving highway safety).

5. *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).

6. *See* California v. Byers, 402 U.S. 424, 430 (1971).

7. *See e.g.,* N.D. CENT CODE § 39-08-01(2) (2019); ALASKA STAT. § 28.35.032(f) (2019).

8. 579 U.S. __ , 136 S. Ct. 2160 (2016).

administered pursuant to a lawful arrest.[9] While the majority found warrantless blood tests to be unconstitutional based on their inherent invasion of privacy, it created a categorical exception to the warrant requirement for breath tests incident to arrest based on the negligible intrusion of the breathalyzer,[10] the lack of information a breath test reveals about the suspected driver,[11] and the low likelihood of resulting embarrassment.[12]

In an effort to increase voluntary submission to blood alcohol concentration (BAC) tests, every state has passed some form of implied consent statute requiring drivers to submit to a chemical blood, breath, or urine test if they are suspected of driving under the influence.[13] Currently, thirteen states have enacted some form of criminal sanction for drivers who refuse to consent to a breathalyzer test,[14] hereinafter referred as "criminal refusal statutes." For example, in North Dakota, a driver who refuses to submit to a blood, breath, or urine test to determine their alcohol concentration "is guilty of an offense."[15] Even for first time offenses, the penalty for a DUI in North Dakota is considered a class B misdemeanor punishable by up to "thirty days' imprisonment, a fine of one thousand five hundred dollars, or both."[16] In Alaska, refusal to submit to a chemical test is a class A misdemeanor with a minimum sentence of at least seventy-two hours in jail and fines that increase depending on the number of prior convictions.[17] Other states, such as Washington, take a subtler approach by initially imposing enhanced civil penalties—such as revocation of the driver's license, permit, or privilege to drive for at least one year—in instances where drivers refuse to

9. *Birchfield*, 136 S. Ct. at 2185.

10. *Id.* at 2176.

11. *Id.* at 2177.

12. *Id.*

13. *See* Anne Teigen, CRIMINAL OR ENHANCED CIVIL PENALTIES FOR IMPLIED CONSENT BREATH TEST REFUSAL, NAT'L CONF. OF STATE LEGISLATURES (2018),

http://www.ncsl.org/Portals/1/Documents/transportation/Criminal_or_Ehanced_Civil_penalties_implied_consent_refusal_27135.pdf [http://perma.cc/7ELP-QXMU].

14. *See* ALASKA STAT. § 28.35.032(f) (2019); ARK. CODE ANN. § 5-65-305(a)–(b) (2015); FLA. STAT. § 316.1932(b) (2019); KY. REV. STAT. ANN. § 189A.105(2)(a)(1) (West 2015); ME. STAT tit. 29-A, § 2411(5) (2018); MINN. STAT. § 169A.20(2) (2018); NEB. REV. STAT. §§ 60-6,197.03(5)–(6),(8),(10) (2016); N.D CENT. CODE § 39-08-01(2) (2019); 75 PA. CONS. STAT. §§ 3804(c)(1)–(3) (2018); 31 R.I. GEN. LAWS §§ 31-27-2.1(b)(2)–(5) (2018); VT. STAT. ANN. tit. 23 § 1202(d)(6)(A)–(B) (2018); VA. CODE. ANN. § 18.2-268.3(A)(2) (2019); WASH. REV. CODE §§ 46.61.5055(1)(b)(i)–(ii); (2)(b)(i)–(ii); 3(b)(i)–(ii) (2019).

15. N.D. CENT. CODE § 39-08-01(2) (2019).

16. *Id.* § 39-08-01(3); N.D. CENT. CODE § 12.1-32-01(6) (2019).

17. ALASKA STAT. §§ 28.35.032(f); (g)(1)(A)–(F) (2019).

consent to a BAC test.[18] However, Washington drivers who refuse testing and are nevertheless convicted of driving under the influence will face harsher criminal penalties than an individual who submitted to testing, so long as the test revealed a blood alcohol concentration under 0.15%.[19]

This Comment highlights the different constitutional challenges that have been raised in regard to criminal refusal statutes and ultimately argues that such penalties should be overturned for violating substantive due process rights. Part I of this Comment provides an overview of the *Birchfield* holding and its departure from previous decisions surrounding traditional warrant requirements. Part II addresses the general dismissal, by most courts, of the Fifth Amendment privilege against self-incrimination as an obstacle to refusing breathalyzer tests. Part III looks to the rising due process challenges to criminal refusal statutes in state courts, and more specifically, to the issues state courts face when language barriers or hearing impairments prevent suspected drunk drivers from understanding the criminal consequences of refusing a breath test. Lastly, Part IV advocates for state courts to invalidate criminal refusal statutes for violating substantive due process rights as applied to state constitutional rights to be free from unreasonable searches.

Drunk driving not only threatens public safety, but also economic well-being. A 2010 study noted the economic cost of alcohol-involved motor vehicle crashes cost approximately $236 billion in comprehensive societal costs.[20] This Comment seeks to shift focus from strict punishments that likely do little to curb drunk driving, and, instead, push for increased access to healthcare to tackle chronic alcohol abuse issues before drivers ever get behind the wheel.[21]

---

18. *Compare* WASH. REV. CODE § 46.20.308(2)(a), *with* WASH. REV. CODE § 46.20.308(2)(c) (stating that drivers who submit to testing that then reveals a blood alcohol content above the legal limit only face a license suspension for at least ninety days). Further, a refusal to submit to a chemical test in Washington "is admissible into evidence at a subsequent criminal trial." WASH. REV. CODE § 46.61.517.

19. WASH. REV. CODE § 46.61.5055(1)(b)(i)–(ii) (imposing mandatory imprisonment for anywhere between 200 to 364 days and a fine between $500 to $5,000). Compare to WASH. REV. CODE § 46.61.5055(1)(a)(i)–(ii) (imposing mandatory imprisonment for anywhere between 100 to 364 days and a fine between $350 to $5,000).

20. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., THE ECONOMIC AND SOCIETAL IMPACT OF MOTOR VEHICLE CRASHES 163 (2015), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812013 [https://perma.cc/XS2A-6KY5].

21. For a nuanced discussion on a mental health approach to deterring drunk driving, *see* Mark Feigl, *DWI and the Insanity Defense: A Reasoned Approach*, 20 VT. L. REV. 161 (1995).

I. AN OVERVIEW OF *BIRCHFIELD V. NORTH DAKOTA*: UPHOLDING THE CONSTITUTIONALITY OF WARRANTLESS SEARCHES FOR BREATH TESTS INCIDENT TO ARREST

The Supreme Court has carved out several exceptions to the Fourth Amendment's warrant requirement.[22] These exceptions include searches performed incident to arrest. Pre-*Birchfield*, the search incident to arrest doctrine was incredibly limited. The *Birchfield* decision drastically altered the legal landscape by providing blanket exceptions for breath tests performed incident to lawful arrest.[23] Justice Sotomayor's dissent noted the unprecedented logic employed in the majority's opinion and criticized the majority's casual disregard of core constitutional rights.[24] Specifically, Justice Sotomayor stressed her fear that the *Birchfield* holding would hollow out the once firm search warrant protections inherent in the Fourth Amendment.[25] These fears ultimately proved reasonable as the Supreme Court just recently relied on the *Birchfield* precedent in a tight 5-4 plurality decision that upheld the constitutionality of warrantless blood draws of unconscious individuals suspected of drunk driving.[26] Thus, in many ways, the *Birchfield* decision marks a potentially drastic shift in the interpretation of implied consent and permissible searches under the Fourth Amendment at the federal level.

*A. Pre-*Birchfield*: Search Warrants Required Absent Some Exigency*

To protect individuals from unreasonable searches and seizures, the Fourth Amendment requires a search warrant supported by probable cause, particularly in cases involving "intrusions into the human body," absent some emergency or special need.[27] For instance, the warrantless collection of biological samples from railroad employees is justified based on the government's interest in ensuring the safety of railroad operations.[28] Ordinary law enforcement, however, is not subject to a

22. *See infra* Section I.A.

23. *See id.*

24. *See id.*

25. Birchfield v. North Dakota, _ U.S._, 136 S. Ct. 2160, 2195 (2016) (Sotomayor, J., dissenting in part).

26. *See* Mitchell v. Wisconsin, No. 18-6210, 2019 WL 2619471, at *1 (S. Ct. Jun. 27, 2019).

27. Schmerber v. California, 384 U.S. 757, 770 (1966).

28. Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 621 (1989).

special needs exception.[29] Additionally, the "natural metabolization of alcohol in the bloodstream" does not present a per se exigency that justifies a categorical exception to the search warrant requirement.[30] Rather, the alleged exigency should be determined on a case by case basis under the "totality of the circumstances."[31] In the cases pre-dating *Birchfield*, the Supreme Court had a fairly clear grasp on the need to limit exceptions to the Fourth Amendment's warrant requirement based, primarily, upon the rationale that warrants are not "an inconvenience to be somehow 'weighed' against the claims of police efficiency."[32]

B. Searches Incident to Arrest: Confining the Warrant Requirement's Greatest Loophole

The concept of the search incident to arrest doctrine had not been widely developed in Supreme Court jurisprudence until the latter stages of Prohibition.[33] Then, in 1969, the Court began attempting to define the limits of permissible searches incident to lawful arrest.[34] In *Chimel v. California*, the Court held that, following a lawful arrest, an officer could reasonably search the person arrested in order to remove any weapons or to prevent the concealment or destruction of evidence.[35] The touchstone of the *Chimel* Court's holding included a reasonableness requirement in order to embody the safeguards afforded by the Fourth Amendment "against the evils to which it was a response."[36]

In recent years, Supreme Court decisions, such as *Riley v. California*,[37] began to recognize that rapid advancement in technology led to a further need to define reasonable searches incident to arrest "[a]bsent more precise guidance from the founding era."[38] Thus, modern

---

29. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) (holding that a checkpoint program whose primary purpose was to discover and interdict illegal drugs did not qualify as a special needs exception to the warrant requirement under the Fourth Amendment).

30. Missouri v. McNeely, 569 U.S. 141, 145 (2013).

31. *Id.*

32. Riley v. California, 573 U.S. 373, 401 (2014) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971)).

33. Charles E. MacLean, *But, Your Honor, A Cell Phone is not a Cigarette Pack: An Immodest Call for a Return to the* Chimel *Justifications for Cell Phone Memory Searches Incident to Lawful Arrest*, 6 FED. CTS. L. REV. 41, 49 (2012).

34. Chimel v. California, 359 U.S. 752 (1969).

35. *Id.* at 763.

36. *Id.* at 765 (quoting United States v. Rabinowitz, 339 U.S. 56, 83 (1950) (Frankfurter J., dissenting)).

37. Riley v. California, 573 U.S. 373 (2014).

38. *Id.* at 385.

courts typically weigh the degree of the intrusion upon an individual's privacy against the promotion of legitimate governmental interests.[39] In *Riley*, the Supreme Court refused to categorically extend the search incident to arrest doctrine to digital data stored on phones because: (1) cell phone data did not pose a physical threat to officer safety; and (2) concerns of evidence destruction were remote and could be prevented.[40] Furthermore, the Court observed that, "[t]he fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely."[41] By recognizing the gamesmanship utilized by police officers who conduct searches incident to arrest, the Supreme Court precedent pre-*Birchfield* recognized certain situations where privacy interests prevail over police interest in obtaining as much evidence as possible without the burden of first obtaining a valid search warrant.

C. *The* Birchfield *Majority: Lack of Privacy Concerns for Breath Tests Justifies a Categorical Exception to Warrant Requirements Under the Fourth Amendment*

Birchfield was decided in conjunction with two other cases concerning suspected drunk drivers who were forced to either consent to a blood or breath test or risk facing criminal charges.[42] Petitioner Danny Birchfield accidentally drove his car off a highway in North Dakota in October 2013.[43] Upon arrival at the scene, a state trooper observed Birchfield's eyes were bloodshot, his speech was slurred, and he smelled strongly of alcohol.[44] After Birchfield failed several field sobriety tests, the state trooper informed Birchfield of his obligation under North Dakota's implied consent statute to submit to a BAC test and subsequently arrested him when the results of his breath test exceeded the legal limit of 0.08 percent.[45] Once Birchfield was taken to the police station, he refused to let his blood be drawn for more accurate BAC testing and ultimately pled guilty to a misdemeanor violation of refusing

39. *Id.* (citing Wyoming v. Houghton, 526 U.S. 295, 300 (1990)).

40. *Id.* at 373.

41. *Id.* at 392.

42. The other two cases before the *Birchfield* Court were *Beylund v. Levi* and *Bernard v. Minnesota*. The former case also concerned North Dakota's criminal refusal statute and the latter case dealt with Minnesota's criminal refusal statute. *See* Birchfield v. North Dakota, _ U.S._, 136 S. Ct. 2160, 2162–63 (2016).

43. *Id.* at 2170.

44. *Id.*

45. *Id.*

the blood test under North Dakota's criminal refusal statute.[46] His guilty plea was conditional on his argument that "the Fourth Amendment prohibited criminalizing his refusal to submit to [a blood] test."[47] The Supreme Court granted certiorari to decide whether arrested drunk drivers may be penalized for refusing to submit to a warrantless BAC test.[48]

Writing for the majority, Justice Alito held that the Fourth Amendment permits warrantless breath tests incident to arrest, but not warrantless blood tests.[49] Despite longstanding case law that confined the ability of the government to sidestep traditional warrant requirements, the *Birchfield* Court elected to create a blanket exception for breathalyzer tests incident to arrest due, primarily, to the diminished privacy interests associated with breath tests.[50] The basis for this ruling stemmed largely from a formalist view of searches incident to lawful arrest as an "ancient pedigree"[51] that was "always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidence of crime."[52]

The majority likened the invasion of an individual's mouth during a breath test to "blowing up a party balloon."[53] Additionally, the majority concluded that the results of a BAC test reveal very little information as opposed to warrantless DNA swabs that were upheld for identification purposes during booking procedures.[54] Finally, the majority concluded that participation in a breath test does not subject an individual to a great deal of embarrassment.[55] The majority perceived breath tests as a justifiable procedure to be performed as a search incident to lawful arrest and discredited the intrusion into a human orifice as a substantial invasion of privacy because humans voluntarily place straws in their mouths when drinking beverages.[56] Thus, the majority relied on analogies that treated breath tests as casual and simple procedures rather than focus on the weakened dignity that results from requiring an individual

46. *Id.* at 2170–71.
47. *Id.* at 2171.
48. *Id.* at 2172.
49. *Id.* at 2184.
50. *Id.* at 2176–77.
51. *Id.* at 2174.
52. *Id.* at 2175 (quoting Weeks v. United States, 232 U.S. 383, 392 (1914)).
53. *Id.* at 2177.
54. *Id.* (citing Maryland v. King, 569 U.S. 435, 465–66, 1980 (2013)).
55. *Id.*
56. *Id.*

to "blow continuously for 4-15 seconds into a straw-like mouthpiece."[57]

The underlying rule justifying searches incident to arrest is based on a need to prevent an arrestee from grabbing a weapon or destroying evidence.[58] By upholding warrantless breath tests and the state statutes criminalizing refusal to such tests, the majority disregarded the totality of the circumstances approach established in *McNeely*[59] and, instead, created an entirely new justification to searches incident to arrest—the preservation of evidence related to BAC tests.[60] While closing the door on warrantless blood tests, the majority created a massive loophole to core constitutional privacy rights by upholding warrantless breath tests incident to arrest based on unprecedented justifications. This approach has been perceived by some legal scholars as essentially "splitting the baby" in a manner that creates more questions than answers in regard to permissible warrantless searches.[61]

D. Justice Sotomayor's Partial Dissent: A Defense of Warrant Requirements as a Necessary Means to Carrying Out the Fourth Amendment's Promise

Citing the "touchstone of reasonableness" at the heart of the Fourth Amendment, Justice Sotomayor's dissent in *Birchfield* argued that neither warrantless blood or breath tests should be categorically permitted as a search incident to arrest.[62] First, Justice Sotomayor noted that a police officer is not enabled to conduct pat-downs, cheek swabs, or blood and breath BAC tests simply because they have made an arrest.[63] Instead, Supreme Court precedent requires "[e]ach search[] be separately analyzed to determine its reasonableness."[64] In highlighting the touchstone of reasonableness, the dissent recognized that *reasonableness* typically requires officers secure search warrants unless one of a few specific and well established exceptions applies.[65] Among

57. *Id.* at 2176 (citing Brief for Respondent in No. 14-1470, p. 20).

58. Chimel v. California, 395 U.S. 752, 764 (1969).

59. Missouri v. McNeely, 569 U.S. 141, 145 (2013).

60. *Birchfield*, 136 S. Ct. at 2182.

61. Steven Oberman, *Blood or Breath in Birchfield: The Supreme Court Draws a Critical Distinction*, 40 CHAMPION 47, 49 (2016).

62. *Birchfield,* 136 S. Ct. at 2187 (Sotomayor, J., dissenting in part) (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

63. *Id.*

64. *Id.*

65. *Id.* at 2188.

these exceptions are case-by-case exigent circumstances[66] and categorical exceptions, such as searches incident to arrest to either (1) disarm an arrestee who might endanger officer safety, or (2) prevent the destruction of evidence.[67] The dissent then pondered whether, in light of individual privacy interests, a legitimate governmental interest justifies warrantless breath searches under either a case-by-case exception or categorical exception and, ultimately, concluded it does not.[68]

The dissent raised four issues with the legitimate governmental interest in combatting drunk driving. First, the government's interest in protecting the public from drunk drivers is essentially resolved once a suspected drunk driver is taken into custody and no longer poses a threat to other drivers.[69] Second, the government's interest in preventing the destruction of evidence (i.e., the dissipation of alcohol in the blood stream) is minimal considering standard breath tests are usually conducted long after an arrest due to a number of factors, including the need to prevent residual mouth alcohol from inflating test results.[70]

Next, the dissent argued the government's interest in minimizing the cost of gathering evidence is not particularly strong, given that the burden of issuing search warrants would only require judges to issue "fewer than one extra warrant a week," even if refusal rates in North Dakota and Minnesota doubled.[71] Lastly, the dissent dismissed the government's interest in the convenient collection of evidence, noting, "[t]his Court has never said that mere convenience in gathering evidence justifies an exception to the warrant requirement."[72]

By expanding on already well-grounded exceptions to the warrant requirement, the dissent feared that the holding in *Birchfield* would risk hollowing out the value of the Fourth Amendment to the point where it becomes an "empty promise."[73] While breath tests may not constitute a substantial invasion of privacy, the dissent made the simple but effective point that the Court fails to protect individual rights "if exaggerated time pressures, mere convenience in collecting evidence, and the 'burden' . . . of issu[ing] an extra couple of warrants per month are costs

66. *See supra* Section I.A.

67. *See supra* Section I.B.

68. *Birchfield*, 136 S. Ct. at 2191 (Sotomayor, J., dissenting in part).

69. *Id.*

70. *Id.* at 2192.

71. *Id.* at 2193–94.

72. *Id.* at 2194.

73. *Id.* at 2195.

so high as to render reasonable a search without a warrant."[74]

E. Post-Birchfield: Emergencies and Exigency Justify Sidestepping Warrant Requirements

In June 2019, the Supreme Court "returned to the topic . . . addressed twice in recent years: the circumstances under which a police officer may administer a warrantless [BAC] test" to a suspected drunk driver.[75] That case, *Mitchell v. Wisconsin*, drew on the foundation laid in *Birchfield* to ultimately uphold the involuntary and warrantless blood draw of an unconscious individual suspected of drunk driving based on the exigency posed by (1) dissipating BAC evidence, and (2) some other factor creating a "pressing health, safety, or law enforcement need[]" that takes priority over warrant requirements.[76] In *Mitchell*, the plurality noted that an unconscious individual undoubtedly constitutes a medical emergency and would likely result in a blood draw for diagnostic purposes anyway.[77] Thus, in situations where a suspected drunk driver's unconsciousness or stupor prevents police from securing a breath test, the police "may almost always order a warrantless blood test" of the suspect without offending the Fourth Amendment.[78]

Writing again in a dissenting opinion, Justice Sotomayor criticized the plurality opinion's "brand new presumption of exigent circumstances . . . that contravenes this Court's precedent."[79] In particular, the dissent took issue with the plurality's disregard of *McNeely*, a case that explicitly held the dissipation of blood alcohol in the bloodstream would not, on its own, constitute a per se exigency.[80] While unconscious drivers do present additional health concerns, such concerns should not automatically confer exigency, particularly because police likely have even more time to secure a warrant for an unconscious individual due to the need to arrange transportation to a hospital.[81] Where the plurality saw its opinion as "helping to ameliorate the scourge of drunk driving," the dissent saw another "needless blow at the protections guaranteed by

74. *Id.*

75. Mitchell v. Wisconsin, No. 18-6210, 2019 WL 2619471, at *2 (S. Ct. June 27, 2019).

76. *Id.* at *7.

77. *Id.* at *1.

78. *Id.* at *9.

79. *Id.* at *11 (Sotomayor, J. dissenting).

80. *See supra*, Part I.A.

81. *Mitchell*, 2019 WL 2619471 at *17 (Sotomayor, J. dissenting).

the Fourth Amendment."[82] The stark divide among the Supreme Court in *Birchfield* and later in *Mitchell* strongly suggests that the fight for firmer individual privacy protections may be more easily won at the state court level.

II. THE GENERAL VIEW THAT CRIMINALIZING REFUSAL OF BREATH TESTS DOES NOT COMPEL TESTIMONY SO AS TO VIOLATE THE FIFTH AMENDMENT

The *Birchfield* Court disregarded the privacy interests in breathalyzer tests under the Fourth Amendment,[83] but left unanswered whether the criminal sanctions for refusing such tests violates the Fifth Amendment's core privilege against self-incrimination. The Fifth-Amendment requires that no person shall be "compelled in any criminal case to be a witness against himself."[84] Justice Oliver Wendell Holmes observed that the "[p]rohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."[85] The doctrinal structure of the Fifth Amendment privilege against self-incrimination relies on three main elements: compulsion, incrimination, and testimony.[86] Even if an act may provide incriminating evidence, a suspect may still be compelled to perform that act in cases where it is not deemed testimonial.[87]

Both the Supreme Court and lower court decisions provide helpful insights into how the elements of compulsion, incrimination, and testimony are applied to criminal refusal statutes. Federal courts are typically unwilling to recognize criminal refusal statutes as a form of compulsion because drivers are still presented with a choice.[88] Even though blood tests are potentially incriminating, the Supreme Court has held that they are a physical act and, therefore, not testimonial.[89] The

82. *Id.* at *19.

83. Birchfield v. North Dakota, 579 U.S._, 136 S. Ct. 2160 (2016).

84. U.S. CONST. amend V.

85. Holt v. United States, 218 U.S. 245, 252–53 (1910).

86. Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 246 (2004).

87. United States v. Hubbell, 530 U.S. 27, 35 (2000) (citing Holt v. United States, 218 U.S. 245, 252–53 (1910) (putting on a t-shirt, for example, is not a testimonial act)).

88. Burnett v. Municipality of Anchorage, 806 F.2d 1447, 1451 (9th Cir. 1986).

89. Schmerber v. California, 384 U.S. 757, 765 (1966).

Supreme Court also dismissed similar arguments regarding the privilege against self-incrimination where a suspect was required to wear particular clothing in a lineup[90] or supply a handwriting sample.[91] Thus, a Fifth Amendment challenge to breath tests seems circumstantial at best given the Court's treatment of acts that "depend on chemical analysis and on that alone."[92]

A. Criminal Penalties for Refusing a Breathalyzer Are a Matter of Choice

The Supreme Court has held that evidence of a defendant's refusal to submit to a BAC test does not violate their privilege against self-incrimination because the defendant is not initially compelled to comply and has the option to refuse.[93] Even if refusal to comply with a test may lead to criminal sanctions, such as a misdemeanor, the Ninth Circuit has ruled that such penalties are justified based on a need for compliance and are not compulsive.[94] The Ninth Circuit has further reasoned that a choice with criminal consequences is "no more impermissibly coercive than any order to produce physical evidence which is backed with the sanction of criminal contempt."[95]

Implied consent statutes and their subsequent sanctions are considered rationally related to a legitimate state purpose and do not present improper conditions.[96] Such reasoning is based largely on the premise that a suspected drunk driver has two choices. First, the driver may voluntarily submit to the test and gain prompt release and no charges if the evidence is favorable to them. Alternatively, if the evidence is unfavorable, the driver may still challenge the government's use of that evidence by attacking the validity of the arrest.[97] Second, the driver may refuse to take the test and still attack the validity of the arrest.[98] While suspects may find these options unsatisfactory, courts' overarching rationale is that "the criminal process often requires suspects and

90. *See* United States v. Wade, 388 U.S. 218, 221–22 (1967).

91. *See* United States v. Dionisio, 410 U.S. 1, 7 (1973).

92. *Schmerber*, 384 U.S. at 765.

93. South Dakota v. Neville, 459 U.S. 553, 562 (1983).

94. *See* Deering v. Brown, 839 F.2d 539, 543 (9th Cir. 1988).

95. *Id.*

96. *See* Burnett v. Municipality of Anchorage, 806 F.2d 1447, 1451 (9th Cir. 1986).

97. *See id.*

98. *See id.*

defendants to make difficult choices."[99] Based on this rationale, courts are generally unwilling to find that implied consent statutes with criminal penalties compel individuals to submit to a BAC test and, thus, do not violate the Fifth Amendment.[100]

B. Breath Tests, While Potentially Incriminating, Are a Bodily Function and, Thus, Not Considered Testimonial

The Fifth Amendment protects testimonial evidence that may potentially be self-incriminating, but does not protect real or physical evidence.[101] In particular, the "communication must itself, explicitly or implicitly, relate a factual assertion or disclose information."[102] Thus, there is an overwhelming consensus that bodily functions and acts are generally not testimonial.[103] The act of exhaling into a breathalyzer does not, by itself, invoke a factual assertion. Rather, information is only disclosed once the test determines the BAC based on the contents of the suspect's breath.[104] Because BAC test evidence is not testimonial and does not relate to some communicative act or writing by the suspect, it is considered admissible on privilege grounds.[105]

Even under a more expansive view of what types of things should be deemed testimonial, breath tests still seem unlikely to qualify. Dissenting in *Doe*, Justice Stevens suggested that while an individual may be "forced to surrender a key to a strongbox containing incriminating documents" he should not be "compelled to reveal the combination to his wall safe."[106] Since the act of breathing is involuntary and does not compel an individual to reveal the contents of his mind, it is likely more akin to a key in a strongbox than a numerical safe combination. As a result, breath tests will consistently fail to qualify under the privilege against self-incrimination based on both the majority and minority approach in existing case law.

---

99. South Dakota v. Neville, 459 U.S. 553, 564 (1983).

100. *See, e.g.*, *id.* at 562; Deering v. Brown, 839 F.2d 539, 543 (9th Cir. 1988).

101. Schmerber v. California, 384 U.S. 757, 764 (1966).

102. Doe v. United States, 487 U.S. 201, 210 (1988).

103. *See, e.g.*, *Schmerber*, 384 U.S. at 765 (holding that blood is not testimonial); Pennsylvania v. Muniz, 496 U.S. 582, 592 (1990) (slurring of speech and evidence of a lack of coordination during a field sobriety test is not testimonial).

104. *See* Francis X. Bellotti, The Preparation and Trial of a Drunken Driving Case Involving a Breathalyzer, 1 NAT'L J. CRIM. DEF. 131, 137–38 (1975).

105. *See Schmerber*, 384 U.S. at 765.

106. *Doe*, 487 U.S. at 219 (Stevens, J., dissenting).

III. GRADUAL ACCEPTANCE AT THE STATE LEVEL THAT CRIMINAL PENALTIES FOR REFUSING BREATH TESTS VIOLATE DUE PROCESS

The constitutionality of criminal refusal statutes is consistently upheld in both Fourth[107] and Fifth[108] Amendment contexts. However, continued acceptance of such laws will likely depend on how courts analyze them under the substantive due process framework of the Fourteenth Amendment. Under the incorporation doctrine, the Fourth Amendment's protection against unreasonable searches and seizures is enforceable against states and must be upheld in both federal and state courts.[109] Thus, the Due Process Clause of the Fourteenth Amendment is an important safeguard against governmental interference with core individual rights. Under substantive due process, the government may not infringe upon "certain 'fundamental' liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest."[110]

At least a couple state courts recognize that while drunk driving undoubtedly poses a serious hazard, criminal refusal statutes are too broad to serve compelling state interests in deterring future drunk drivers or maintaining public safety.[111] Furthermore, recent trends suggest state courts are willing to expand upon federal constitutional rights where state constitutional rights are stronger. Such trends can prove particularly imperative for individuals who may not even understand the criminal penalties they face by exercising their right to refusal, due to hearing impairments or language barriers. Thus, both implied consent and criminal refusal statutes are likely best tackled with a due process litigation strategy, at least at the state level.

A. Under a Strict Scrutiny Microscope, Criminal Refusal Statutes May Lack a Compelling Interest Narrowly Tailored to the Protection of Fundamental Rights

In *State v. Ryce*,[112] the Kansas Supreme Court became the first state to strike down criminal refusal statutes as a substantive due process

107. *See supra* Section I.C.

108. *See supra* Section II.A–B.

109. Mapp v. Ohio, 367 U.S. 643, 650–53 (1961).

110. Reno v. Flores, 507 U.S. 292, 302 (1993).

111. State v. Ryce, 368 P.3d 342, 378–80 (Kan. 2016); State v. Yong Shik Wong, 372 P.3d 1065, 1081–82 (Haw. 2015).

112. *Ryce,* 368 P.3d at 342.

violation.[113] In a sprawling forty-two page opinion, the Court reasoned that criminal punishment of a driver's withdrawal of consent "infringes on fundamental rights arising under the Fourth Amendment."[114] The background and facts in *Ryce* were quite similar to those in *Birchfield*, wherein the petitioner, Ryce, was pulled over for erratic driving and subjected to field sobriety tests after the officer noticed that Ryce's eyes were bloodshot and that he smelled strongly of alcohol.[115] Ryce was arrested and transported to jail where he was informed that refusal to submit to a breath test would result in suspension of his license and criminal charges.[116] Despite these warnings, Ryce refused to submit to a breath test.[117]

Ryce was charged with a nonperson felony[118] of refusing to submit to BAC testing.[119] He moved to dismiss the refusal charge, stating that Kansas's criminal refusal statute violated his right to be free from unreasonable searches under both the Fourth Amendment and Section 15 of the Kansas Constitution Bill of Rights.[120] Additionally, Ryce argued the statute violated his right to substantive due process under the Fourteenth Amendment.[121] The State of Kansas argued that such criminal penalties merely punished drivers for obstructing law enforcement and that Ryce had no constitutional right to refuse to submit to testing.[122]

The majority dismissed the State's argument and held that breath tests do still receive Fourth Amendment protections despite the reduced privacy interests for drivers.[123] In doing so, the Court noted that implied consent statutes do not mean that a driver loses their reasonable expectation of privacy in bodily integrity by merely taking the wheel of a vehicle after drinking.[124] The main obstacle to Ryce's Fourth

113. *Id.* at 378–80.

114. *Id.* at 347.

115. *Id.*

116. *Id.*

117. *Id*

118. Pre-*Ryce*, the Kansas criminal refusal statute only applied where a DUI suspect previously refused to submit to testing or had been previously convicted of a DUI offense. Third and subsequent offenses for refusing to submit to testing under the statute were "classified as nonperson felonies and a conviction result[ed] in mandatory imprisonment." *Id.* at 349.

119. *Id.* at 347.

120. *Id.*

121. *Id.*

122. *Id.* at 348.

123. *Id.* at 352.

124. *Id.*

Amendment claims was that, though he was seized, the seizure was not the source of his complaint and his refusal to submit to testing meant he was not searched either.[125] Thus, Ryce's claims were deemed to rest on rights "*flowing* from the Fourth Amendment."[126] Nevertheless, the *Ryce* Court ultimately decided Ryce's claim could be analyzed under a substantive due process framework because his Fourth Amendment right to be free from unreasonable searches and seizures was exercised by withdrawing his implied consent to take a breath test, thus invoking a substantive liberty interest in the right of refusal.[127]

In recognizing a potential due process violation, the *Ryce* Court held that the highest level of scrutiny, strict scrutiny, should apply to criminal refusal statutes as they implicate the fundamental right to be free from unreasonable searches and seizures.[128] To survive strict scrutiny, the Court noted that Kansas's criminal refusal statute should be narrowly tailored to serve a compelling state interest.[129] While the *Ryce* Court recognized the state of Kansas did have compelling interests in serving criminal justice, encouraging public safety, and protecting officers on the scene,[130] the Court ultimately reasoned the criminal refusal statute was "impermissibly broad" and the compelling interests could be achieved through more constitutional means.[131]

Paramount to the *Ryce* Court's holding was the fact that warrants are "capable of achieving the same goals [of reducing refusal rates and improving the ability to recover BAC evidence] as those targeted by the test refusal statute."[132] Furthermore, the Court held that civil penalties for refusal, such as revocation of the suspect's driver's license, are likely just as successful in satisfying the compelling interest of keeping certain drivers off the road for a time.[133] Thus, the holding by the *Ryce* Court closely paralleled Justice Sotomayor's dissent in *Birchfield* by advocating for what it considered to be the equally viable alternative of a search warrant in order to preserve fundamental rights under the Fourth Amendment.[134]

---

125. *Id.* at 371.

126. *Id.* (emphasis in original).

127. *Id.*

128. *Id.* at 376.

129. *Id.* at 377.

130. *Id.* at 378.

131. *Id.* at 380.

132. *Id.* at 378.

133. *Id.* at 379.

134. *See supra* Section I.D.

Notably, because the *Birchfield* decision came down one year after *Ryce*, it would likely reverse *Ryce* on the issue of invalidating criminal refusal statutes where a breath test is performed incident to arrest.[135] Nevertheless, the due process argument still holds weight in overturning criminal refusal statutes where refusal is made before a lawful arrest has occurred. Furthermore, the *Ryce* Court applied a strict scrutiny test to hold criminal refusal statutes unconstitutional under section 15 of the Kansas Constitution Bill of Rights.[136] Thus, state courts are not bound by the *Birchfield* decision to the extent that their state constitutions incorporate a right to be free from unreasonable searches and seizures. So long as *Birchfield* remains good law, post-arrest warrantless BAC tests are likely to remain permissible. The *Ryce* decision is significant insofar as it provides individuals in state courts with a potential due process argument to overturn the criminal sanctions surrounding their refusal to submit to BAC tests on state constitutional grounds.

B. Recent Trends in State Courts Recognize Their Power to Expand Pre-Established Rights Under the U.S. Constitution

In the past few decades, courts have held that state constitutional rights may enhance civil liberties guaranteed in the U.S. Constitution.[137] For example, the Supreme Court of Hawai'i interpreted its own constitutional rights regarding due process and protection from unreasonable searches to warrant even greater protection than those guaranteed under the U.S. Constitution during a search incident to arrest.[138] This recognition of greater protection under Hawai'i's version of the Fourth Amendment led the Supreme Court of Hawai'i to refuse to recognize an exception to the warrant requirement (including searches incident to arrest) absent valid consent in *State v. Yong Shik Won*.[139] Immediately following this decision, the Hawai'i Legislature repealed its statute criminalizing refusal to submit to a breath test.[140]

Similar to the decision in *Ryce*, the holding in *Yong Shik Won* was decided prior to the Supreme Court's holding in *Birchfield*. Hawai'i's

---

135. *See Ryce*, 368 P.3d at 376.

136. *Id.* at 380.

137. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986).

138. State v. Kaluna, 520 P.2d 51, 58 (Haw. 1974).

139. 372 P.3d 1065 (Haw. 2015) (ruling that the trial court erred by not suppressing the evidence of defendant's breath test when valid consent was not given).

140. 2016 Haw. Sess. Laws 21.

intermediate court of appeals addressed this issue recently in a 2018 case, noting that the *Yong Shik Won* Court based its holding on an interpretation of *state* constitutional protections from unreasonable searches and seizures and, accordingly, "the Hawai'i Supreme Court is free to give broader protection under the Hawai'i Constitution than given by the United States Constitution."[141] Thus, the appellate court held that individuals have a state constitutional right to refuse to submit to a BAC test and cannot be criminally convicted for invoking their right to refuse.[142] An essential part of the court's reasoning was that "[i]t is manifestly coercive to present a person with a 'choice' that requires surrender of the constitutional right to refuse a search in order to preserve the right to not be arrested for conduct in compliance with the constitution."[143] The recent opinions of the Kansas and Hawai'i state courts recognize the importance of preserving privacy and liberty interests, leaving the door open for other states to follow suit and protect the individual liberties of their respective citizens where federal courts are otherwise unwilling.

C. The Implications of Failing to Understand the Potential Consequences of Refusing a Breath Test for Hearing-Impaired and Non-English-Speaking Individuals

Perhaps one of the harshest realities of implied consent laws occurs when suspected drunk drivers are unable, because of some sort of hearing impairment or limited English vocabulary, to fully understand either the civil or criminal consequences of refusing to submit to a BAC test. Generally speaking, courts are unsympathetic to the argument that officers should ensure a driver understands the implied consent notice for BAC testing.[144] In *Commonwealth v. Mordan*,[145] the Pennsylvania Superior Court held, "a deaf motorist is not entitled to a sign language

141. State v. Wilson, 413 P.3d 363, 370 (Haw. Ct. App. 2018) (citing State v. Viglielmo, 95 P.3d 952, 966 (Haw. 2004)), *aff'd* SCWC-15-0000682, 2019 WL 2537681 (Haw. Jun. 20, 2019).

142. *Id.*

143. *Id.* at 367.

144. *See*, *e.g.*, Furcal-Peguero v. State, 566 S.E.2d 320, 324 (Ga. Ct. App. 2002) (holding a Spanish-speaking defendant arrested for DUI consented to chemical test under implied consent law); Yokoyama v. Commissioner of Public Safety, 356 N.W.2d 830, 831 (Minn. Ct. App. 1984) (motorist who spoke Japanese and did not understand English did not have a statutory right to have the implied consent advisory read to him in Japanese); Martinez v. Peterson, 322 N.W.2d 386, 388 (Neb. 1982) (holding that, for purposes of understanding implied consent, the only understanding required by a driver is an understanding that he or she has been asked to take a test; failure to understand the consequences of refusal or to make a reasonable judgment is not a valid defense).

145. 615 A.2d 102 (Pa. Super. 1992).

interpreter prior to submission to a breathalyzer test so that defendant can make an informed choice as to whether to take the test."[146] Even where some courts recognize the need for a certified interpreter to explain implied consent to hearing-impaired individuals, many courts still refuse to extend such a requirement to non-native English speakers under an Equal Protection analysis.[147]

A minority of states do recognize the injustice of particular convictions for refusal of implied consent statutes where language barriers pose an issue.[148] Additionally, at least one state court was willing to find a due process violation where police objectively misled the defendant regarding the criminal consequence of refusing a breath test.[149] These cases serve as indicators that, even in states where criminal refusal statutes are upheld, courts may still recognize that individuals are entitled to at least understand the implications of such laws.

At the federal level, both the Fourth and Fourteenth Amendments prohibit both implicit and explicit coercion of consent.[150] Thus, where a subject of a search is not in custody and the state seeks a search based on consent, the state must demonstrate that consent was given voluntarily and not as a result of duress or coercion.[151] While officers may legally threaten criminal penalties against individuals who refuse to consent to BAC tests, it seems readily apparent that any consent provided following such a threat is the result of duress or coercion. This reasoning led the Supreme Court of Iowa to recognize that "a driver's consent to testing may be considered involuntary, and therefore, invalid, if it is coerced or if the driver is not reasonably informed of the consequences of refusal to submit to the test."[152] In reaching this conclusion, the Court reasoned that the primary purpose of Iowa's implied consent statute is to advise accused drivers of the consequences of submitting to or failing the chemical test,[153] thus indicating that officers should make reasonable

146. *Id.* at 103.

147. Rodriguez v. State, 565 S.E.2d 458, 461 (Ga. 2002) (holding that hearing-impaired persons and individuals who do not speak English are not similarly situated so state laws requiring interpreters to assist hearing-impaired persons do not discriminate against non-English-speaking persons).

148. State v. Marquez, 998 A.2d 421, 433–34 (N.J. 2010) (holding an officer must inform a driver of the consequences of refusal to submit to a breath test in a language the driver speaks or understands).

149. Rask v. State, 404 P.3d 1236, 1240 (Alaska Ct. App. 2017).

150. Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).

151. *Id.* at 248.

152. State v. Garcia, 756 N.W.2d 216, 220 (Iowa 2008).

153. *Id.* at 222.

efforts to convey the implied consent warnings to drivers.[154]

In states such as Nebraska, however, implied consent statutes have been read to require only that a driver understands they are being asked to take a test, not the consequences of refusing the test.[155] Nevertheless, the Supreme Court of Nebraska was unwilling to adopt a bright-line rule that would prevent individuals from asserting insufficient English language skills as a reason for failing to comprehend an officer's request that they submit to a chemical test.[156] Thus, even in a state such as Nebraska where the consequences of refusing a breath test need not be fully comprehended by a suspected drunk driver, the driver's consent to chemical testing still requires at least a basic understanding of what exactly is being requested of them in the first place.[157]

IV. THE BOTTOM LINE: CRIMINAL REFUSAL STATUTES VIOLATE CORE CONSTITUTIONAL RIGHTS

While the *Birchfield* decision is unlikely to be reversed any time soon, individuals who take issue with the criminal refusal statute in their state should not be dissuaded from seeking relief from state courts. Specifically, individuals who invoke their state constitutional right to be free from unreasonable searches may argue that criminal refusal statutes violate their fundamental rights under a substantive due process framework. Thus, such arguments should be made based on the unique reasoning applied in the *Ryce* decision. An alternative approach may also exist for individuals to enhance their rights under a state's implied consent statute when they lack the hearing or language capabilities to substantially understand what implied consent even means. Furthermore, the policy arguments justifying criminal refusal statutes for their deterrent effect overestimate the impact such sanctions actually have on refusal rates, especially when considering impulse issues associated with chronic alcoholics from a public health perspective.

A. Jumping through Hoops: How States can Embrace the Ryce Court's Approach to Avoid the Obstacles Created by the Birchfield Majority

Though currently thirteen states have some form of criminal sanction

154. *Id.*

155. Martinez v. Peterson, 322 N.W.2d 386, 388 (Neb. 1982).

156. *Id.*

157. *Id.* at 389.

for refusing to submit to a breath test,[158] there are five states—Alaska, [159] Nebraska,[160] North Dakota,[161] Pennsylvania,[162] and Vermont[163]—whose statutes closely mirror the penalties declared unconstitutional by the *Ryce* Court. Unlike the Supreme Court, the *Ryce* Court held that breath tests did constitute a "search" sufficient to invoke Fourth Amendment protections and that criminal refusal statutes were not narrowly tailored to allow such a violation of constitutional rights.[164] Imperative to this holding, though, is the fact that the *Ryce* Court held such statutes to be a violation of Kansas's *state* constitutional rights from unreasonable searches and seizures.[165] Thus, so long as states with existing harsh criminal refusal statutes recognize a right to be free from unreasonable searches and seizures, similar challenges can be raised under a strict scrutiny framework.[166]

The five states at issue all recognize a right to be free from unreasonable searches and seizures in their respective state constitutions.[167] To the extent state courts are willing to embrace their power to protect individual rights beyond the bare minimum standard set forth in the *Birchfield* decision, criminal refusal statutes could easily be read to violate core state constitutional rights against unreasonable searches and seizures. Thus, the eradication of criminal refusal statutes hangs in the balance of the five remaining states who promise the right to be free from unreasonable searches and, yet, criminally punish their

158. *See supra* note 14.

159. *See* ALASKA STAT. §§ 28.35.032(f)–(g), (o) (2012) (establishing that first-time refusal is a class A misdemeanor requiring at least 3 days imprisonment at a private residence by electronic monitoring).

160. *See* NEB. REV. STAT. § 60-6, 197 (2012); § 60-6,197.03 (2016) (establishing that a conviction for breath-test refusal constitutes a class W misdemeanor, which requires the driver apply for an ignition interlock and for a fourth or subsequent offense, at least 180 days of imprisonment).

161. *See* N.D. CENT. CODE § 39-08-01 (2019) (stating that a first-time refusal constitutes a class B misdemeanor that includes a $500 fine and mandatory addiction evaluation; where BAC is at least 0.16, the penalty includes a $750 fine and at least two days' imprisonment).

162. *See* 75 PA. CONS. STAT. § 3804(c)(1) (2018) (stating that a first-time refusal requires at least three days' imprisonment, a fine of $1,000–$5,000, and attendance of an alcohol highway safety school).

163. *See* VT. STAT. ANN. tit. 23, § 1202(d)(6)(A)–(B) (2017) (establishing that a person may be charged with a crime for refusal if that person was (a) previously convicted of a DUI or (b) involved in an accident resulting in serious bodily injury).

164. State v. Ryce, 368 P.3d 342, 380 (Kan. 2016).

165. *Id.*

166. *Id.* at 377 (applying strict scrutiny "[b]ecause a fundamental right is involved").

167. *See* ALASKA CONST. art. 1, § 14; N.D. CONST. art. 1, § 8; NEB. CONST. art 1, § 7; PA. CONST. art. 1, § 8; VT. CONST. Chapter 1, art. 11.

own citizens when they invoke such a right. Since state courts are free to interpret the state constitutional right to be free from unreasonable searches and seizures in a more protective manner, criminal refusal statutes can be analyzed under the same strict scrutiny standard employed by the *Ryce* Court.

To overcome a strict scrutiny test in federal court, the government interest in violating a constitutional right must be "necessary and narrowly tailored to serve a compelling governmental interest."[168] States such as Alaska and North Dakota have applied a strict scrutiny test when a state law would violate a state constitutional right.[169] The *Ryce* Court held that criminal refusal statutes are not necessary to further the state's compelling interest in promoting criminal justice, encouraging public safety, and protecting officer safety.[170] Its reasoning stemmed largely from the fact that "civil penalties for refusing a test already coerce a suspect's cooperation and contemporaneous consent."[171]

States with criminal refusal statutes claim that refusal rates for requested BAC testing will not decrease so long as penalties for failing the BAC test are less severe than the penalties for refusing the test.[172] Notably though, states that impose criminal penalties for refusing BAC tests, such as North Dakota, Kentucky, and Florida, all saw an increase in the average mean percentage of refusals occurring between 2005 and 2011.[173] In fact, Florida had the most sizeable increase of all fifty states with a 42% overall increase in mean refusal rate from 2005 to 2011.[174] While more research is certainly warranted, it would appear at first glance that criminal refusal statutes may not significantly influence a driver's decision to refuse or consent to a BAC test. Thus, if state courts in Alaska, North Dakota, Nebraska, Pennsylvania, and Vermont are willing to recognize that civil penalties such as license revocation can just as effectively promote state interests in public safety, then they must

168. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 929 (1992) (citing Griswold v. Connecticut, 381 U.S. 479, 485 (1965)).

169. *See, e.g.*, Planned Parenthood of the Great Nw. v. State, 375 P.3d 1122, 1138 (Alaska 2016) (applying strict scrutiny test to a law burdening a fundamental right to privacy); *In re* P.F., 744 N.W.2d 724, 731 (N.D. 2008) (applying strict scrutiny standard to an infringement of a fundamental right unless it promotes a compelling governmental interest and is necessary to further that interest).

170. State v. Ryce, 368 P.3d 342, 380 (Kan. 2016).

171. *Id.* at 379–80.

172. U.S. DEP'T OF TRANSP., BREATH TEST REFUSAL RATES IN THE UNITED STATES – 2011 UPDATE, 4 (2014), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/breath_test_refusal_rates-811881.pdf [https://perma.cc/6Z3Z-C6T7].

173. *Id.* at 3.

174. *Id.*

also recognize that criminal refusal statutes are not narrowly tailored enough to survive a substantive due process challenge.

B. Another Avenue to Explore in the Realm of Due Process: Failure to Understand Criminal Consequences Due to Language or Hearing Impairments

It is unclear whether or not state courts will be motivated to embrace the logic employed by the *Ryce* Court invalidating criminal refusal statutes on due process grounds. Nevertheless, a further avenue of relief may still exist for non-native English speakers and hearing-impaired individuals. Criminal refusal statutes are unreasonable, especially as applied to individuals unable to understand the concept of implied consent and the criminal consequences of refusal due to insufficient English language skills or a hearing impairment.[175]

North Dakota's criminal refusal statute "does not apply to an individual unless the individual *has been advised* of the consequences of refusing a chemical test consistent with the Constitution of the United States and the Constitution of North Dakota."[176] Thus, certain groups of people such as non-native English speakers and hearing-impaired individuals should contend that they were not properly informed by police officers who do not provide any method of interpretation. Even if state courts contend that their criminal refusal statutes do not require drivers to actually understand the ramifications for refusing, as was held by the Nebraska Supreme Court,[177] it can still be argued that a driver failed to understand an officer's general request that they submit to testing. In extreme cases, individuals may even be able to argue that an officer compelled them to submit to testing, despite their failure to understand what was being requested of them. Furthermore, individuals may find success by arguing that criminal refusal statutes are so coercive as to invalidate any subsequent consent.[178] Thus, search warrants would again serve as the most viable alternative in cases where consent cannot be given voluntarily.

---

175. *See generally* Andrew Dodemaide, Note, *No Entiendo: State v. Marquez, Language Barriers, and Drunk Driving*, 9 RUTGERS J. L. & PUB. POL'Y 624 (2012).

176. N.D. CENT CODE § 39-08-01(f) (2019) (emphasis added).

177. Martinez v. Peterson, 322 N.W.2d 386, 388 (Neb. 1982).

178. *See* State v. Wilson, 413 P.3d 363, 370 (Haw. Ct. App. 2018), *aff'd* SCWC-15-0000682, 2019 WL 2537681 (Haw. June 20, 2019).

C. Advocating for Health Services as a More Effective Means of Curbing Drunk Driving Rates

This Comment does not intend to suggest that legislative efforts to deter drunk driving should be eliminated. However, if the government's goal is to prevent drunk driving, a better solution would seek to tackle the root of the problem: chronic alcoholism. Drivers with a BAC of 0.08 or higher who are involved in fatal crashes are 4.5 times more likely to have prior convictions for a DUI than drivers involved in fatal crashes with no alcohol in their system.[179] One major issue with chronic alcoholics is that they are more likely to take safety risks and act impulsively.[180] Thus, the deterrence-driven methods of criminalizing refusal to submit to a test before a suspect has even been arrested seems ill-fitting. While there is still no magical cure to preventing alcohol abuse, the most successful treatment strategies often involve behavioral therapy approaches that match the needs of an individual.[181] Through increased access to healthcare, more individuals may begin to combat their struggle with alcoholism, thus creating a longer-lasting solution to highway safety.

CONCLUSION

In the wake of *Birchfield*,[182] and, more recently, *Mitchell*,[183] the Fourth Amendment's search warrant requirement risks substantial erosion under the mentality that the needs of the many outweigh the needs of the few. While such a view may be justified in certain circumstances, it risks hollowing out core individual rights meant to guard against significant invasions of privacy and basic dignity. Under a due process framework, statutes that criminally penalize refusal to submit to breath tests should be more narrowly tailored to effectively curb drunk driving without stripping individuals of their liberty interests. So long as officers are allowed to sidestep warrant requirements and essentially compel individuals to submit to a breath test to avoid additional criminal punishments, criminal refusal statutes will continue

---

179. U.S. DEP'T OF TRANSP., DRUNK DRIVING, https://www.nhtsa.gov/risky-driving/drunk-driving#alcohol-abuse-and-cost-5091[https://perma.cc/RDM7-ZQBM].

180. Drugs, Alcohol, and Tobacco: Learning About Addictive Behavior, 1 (Rosalyn Carson-Dewitt ed., vol. 1, 2002).

181. *Id.* at 61.

182. 579 U.S.__, 136 S. Ct. 2160 (2016).

183. No. 18-6210, 2019 WL 2619471 (S. Ct. June 27, 2019).

"to chill the assertion of constitutional rights by penalizing those who choose to exercise them."[184] The Constitution demands more in the face of protecting our most basic rights.

184. State v. Ryce, 368 P.3d 342, 376 (Kan. 2016) (quoting United States v. Jackson, 390 U.S. 570, 581–82 (1968)).