Nebraska Law Review

Volume 97 | Issue 3 Article 6

2019

Is Warrantless Urine Testing Constitutional?—Resaonableness of Warrantless Urine Testing in Cases Involving Driving While Under the Influence of Alcohol or Drugs

Mariah Haffield
University of Nebraska College of Law

Comment*

Is Warrantless Urine Testing Constitutional? —Reasonableness of Warrantless Urine Testing in Cases Involving Driving While Under the Influence of Alcohol or Drugs

TABLE OF CONTENTS

* Mariah Haffield, J.D., University of Nebraska College of Law, 2019. Special thanks to all of the prosecutors that have guided me, encouraged me, and provided me with many experiences, especially to the prosecutors at the Nobles County Attorney's Office in Worthington, Minnesota. I would also like to recognize my parents, Carol and Dwayne Haffield, and my fiancé, Cody Nickel, for their continued support.

I. INTRODUCTION TO WARRANTLESS URINE TESTING

An obviously intoxicated individual enters her vehicle and drives away. Within a mile of her destination, a police officer stops her due to a broken headlight. The officer notices her slurred speech and bloodshot, watery eyes, and also detects the smell of alcohol coming from the vehicle. The driver fails standardized field sobriety tests and provides a preliminary breath test that indicates an alcohol concentration above the legal limit. She is arrested and brought to jail. The driver provides a urine sample. This sample is later tested and confirms she was driving while above the legal limit of intoxication. She is charged with driving while under the influence.

Another police officer stops a vehicle for erratic driving. The officer notices that the driver is grinding his teeth, profusely sweating, has twitching of his face and hands, and is using odd speech patterns. The driver fails standardized field sobriety tests, including one designed to assess if a person is under the influence of a controlled substance. A preliminary breath test indicates an alcohol concentration of 0.00%. Believing the driver to be under the influence of a controlled substance, the officer arrests him. The driver provides a urine sample that is later analyzed in a laboratory. Testing reveals the presence of a controlled substance in the driver's urine. The driver is subsequently charged with driving while under the influence.[1]

These two illustrations are examples of common cases involving driving while under the influence of either drugs or alcohol and pro-

1. These examples come from the author's experience with such cases while working at a county attorney's office for several years.

vide insight into how such cases are initiated by police officers. As seen in these examples, generally a police officer conducts a traffic stop due to poor driving conduct or unlawful vehicle conditions.[2] While interacting with the driver, an officer will develop probable cause to believe the individual is driving while under the influence of drugs or alcohol.[3] After arrest, the driver will be asked to undergo a chemical test to detect the presence of alcohol or drugs, refusal of which is a crime.[4]

Until recently, the Supreme Court of the United States had not considered the constitutionality of warrantless chemical testing under the Fourth Amendment. With these two cases, the Supreme Court has only considered blood testing and breath testing under the emergency exception to the warrant requirement or as a search incident to a valid arrest.[5] While other state courts have considered whether warrantless urine testing is justified under these two doctrines,[6] the Supreme Court has not considered the constitutionality of warrantless urine testing. As noted, although urine testing is not the only type of testing conducted in chemical testing cases, this Comment focuses on the constitutionality of warrantless urine testing.

First, this Comment will address the development of the law as it applies to warrantless blood and breath testing.[7] Then, this Comment will analyze how the emergency exception applies to warrantless urine testing but ultimately decides it should not fall under this doctrine.[8] Next, this Comment will explore the search-incident-to-a-valid-arrest doctrine.[9] The search-incident-to-arrest doctrine is an underde-

2. *See* John B. Lyman, *Goldilocks and the Fourth Amendment: Why the Supreme Court of North Carolina Missed an Opportunity to Get Officer Mistakes of Law "Just Right" in* State v. Hein, 92 N.C. L. REV. 1012, 1014 (2014) ("[F]or traffic stops, a 'reasonable suspicion' that a traffic law has been violated suffices in nearly all jurisdictions . . . .").
3. *See* Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1852–53 (2004).
4. In many states, it is a crime to refuse to submit to a chemical test after a lawful arrest for drunk or drugged driving. Blood, breath, and urine tests are the three types of chemical tests employed by law enforcement officers to test for the presence of alcohol or drugs. *See* Megan Gordon, *Blood and Breath Test—Constitutionality of Warrantless Blood and Breath Tests Incident to DUI Arrest: Impact on Drunk Driving in North Dakota*, 92 N.D. L. REV. 197, 199 n.7 (2016). For a list of states that required an individual to consent to either a blood test, breath test, or urine test, see *id.* As discussed in the remainder of this Comment, warrantless blood testing was found to be unconstitutional, in addition to urine testing in some states.
5. *See* Birchfield v. North Dakota, 136 S. Ct. 2160 (2016); Missouri v. McNeely, 596 U.S. 141 (2013).
6. *See infra* Part III.
7. *See infra* Part II.
8. *See infra* section III.A.
9. *See infra* section III.B.

veloped area in criminal law, with few courts applying the doctrine to any of the three chemical tests. Even fewer courts have addressed how it applies to urine testing.[10] The Minnesota Supreme Court was the first court to consider whether warrantless urine testing is justified as a search incident to a valid arrest.[11] Thus, section III.B analyzes the Minnesota case, *State v. Thompson*.[12] This Comment ultimately concludes that warrantless urine testing should be upheld as a search incident to a valid arrest.[13]

II. DEVELOPMENT OF THE LAW AS IT APPLIES TO CHEMICAL TESTING IN DRUNK AND DRUGGED DRIVING CASES

Under the Fourth Amendment of the U.S. Constitution, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" unless a search warrant has been issued upon probable cause.[14] There are only certain exceptions to the warrant requirement for searches and seizures. One such exception is for exigent circumstances.[15] Courts have considered the exigent circumstances doctrine, also known as the "emergency exception" or the "emergency doctrine," in various scopes.[16] Some courts refer to the "exigent circumstances" exception as a general exception, which includes other warrant exceptions.[17] Other courts, rather than including a variety of exceptions, refer to the "emergency exception" only when there is an immediate threat to a person or property.[18] The Supreme Court has considered the emergency exception doctrine in the latter, by viewing exigent circumstances as those where a police officer conducts a warrantless

10. *See* Order on Motion to Suppress, State v. Wilson, No. CR-2016-638, 2017 WL 2999582 (Me. Super. May 15, 2017); State v. Helm, 901 N.W.2d 57 (N.D. 2017); State v. Thompson, 886 N.W.2d 224 (Minn. 2016), *cert. denied*, 137 S. Ct. 1338 (2017).
11. *See infra* notes 151–152 and accompanying text.
12. *Thompson*, 886 N.W.2d at 224.
13. *See infra* sections III.B. and III.C.
14. U.S. CONST. amend. IV.
15. *See, e.g.*, Michigan v. Fisher, 558 U.S. 45, 47–48 (2009) (finding that law enforcement engaged in "hot pursuit" of a fleeing suspect is an exigency sufficient to justify a warrantless search); Illinois v. McArthur, 531 U.S. 326, 331 (2001) (holding that a warrantless seizure of a person was justified in light of the circumstances during which the person was attempting to destroy hidden contraband); Michigan v. Tyler, 436 U.S. 499, 509–10 (1978) (holding that law enforcement may enter a burning building to put out a fire and investigate its origin without a warrant).
16. John F. Decker, *Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions*, 89 J. CRIM. L. & CRIMINOLOGY 433, 441 (1999).
17. *Id.* at 441–42.
18. *Id.* at 443.

search based on the reasonable belief that "there exists a serious potential for the destruction of evidence of a crime should they take the time to procure a warrant."[19]

Another justified warrantless search is a search incident to a valid arrest.[20] This doctrine allows a police officer to conduct a warrantless search of one who is under a valid custodial arrest.[21] Pursuant to this exception, an officer may conduct the warrantless search without probable cause or a reasonable articulable suspicion of criminal activity.[22] The search may extend to a suspect's person, as well as the area within the suspect's immediate control.[23] This doctrine is not a new justification for warrantless searches but rather, this doctrine has been established for centuries.[24]

A. What Are Blood, Breath, and Urine Tests?

Before the types of tests can be discussed, it is important to have a basic understanding of how alcohol and drugs are metabolized in the body. When a person drinks an alcoholic beverage, the liver processes most of the alcohol.[25] Ethanol, the alcohol found in alcoholic beverages, is absorbed into the bloodstream during the digestive process.[26] A person's alcohol level is thus measured by the weight of the alcohol in a certain volume of blood.[27]

There are differences between the metabolization of alcohol and drugs.[28] For many drugs, there is a two-phase metabolization process

19. *Id.* at 444; *see, e.g.*, Schmerber v. California, 384 U.S. 757 (1996) (holding that a warrantless blood test was justified because the police officer had a reasonable belief that the dissipation of alcohol in the body constituted the destruction of evidence and the extra time it would have taken to procure a warrant would have allowed for a greater destruction of evidence).

20. *See* Kartherine M. McCormack-Traugott, *Overview of the Fourth Amendment*, 80 GEO. L.J. 939, 981 (1992).

21. *Id.*

22. *Id.*

23. *Id.* at 982.

24. *See* Birchfield v. North Dakota, 136 S. Ct. 2160, 2174–75 (2016) ("Well before the Nation's founding, it was recognized that officers carrying out a lawful arrest had the authority to make a warrantless search of the arrestee's person.").

25. Chad Haldeman-Englert & Wanda Taylor, *Ethanol (Blood)*, U. ROCHESTER MED. CTR.: HEALTH ENCYCLOPEDIA, https://www.urmc.rochester.edu/encyclopedia/content.aspx?contenttypeid=167&contentid=ethanol_blood [https://perma.unl.edu/P2GU-BGVV] (last visited Oct. 1, 2018).

26. *Id.*

27. *Drunk Driving*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., https://www.nhtsa.gov/risky-driving/drunk-driving [https://perma.unl.edu/7EP7-T5B6].

28. For a more in-depth discussion of the difference between the metabolization of alcohol and a controlled substance, see subsection III.A.2.

during which drugs are broken-down.[29] Generally, the liver is the main site of drug metabolization.[30] The rate of metabolization for most drugs has a capacity limit.[31] The rate changes depending on the drug concentration and the fraction of the metabolizing enzyme sites that are occupied.[32] The drug metabolites are the by-products detected in forensic toxicology reports.[33]

1. Description of Blood Draws

During a blood draw, a needle is used to obtain a blood sample from a vein located in either the arm or hand.[34] The sample is then tested to determine grams of ethanol per deciliter.[35] Science has determined that 0.08 grams of ethanol per deciliter of blood equals a blood alcohol concentration of 0.08 percent.[36] Drug metabolites are also detectable in a blood sample.[37]

2. Description of Breath Testing

When a person is consuming alcohol, some of the alcohol will also pass from the individual's blood to their breath.[38] During the breath test, the subject is required to take a deep breath and exhale into a tube connected to a breathalyzer machine.[39] The air passes into a chamber where the breath is surveyed by a standardized amount of

29. Jennifer Le, *Drug Metabolism*, MERCK MANUAL, http://www.merckmanuals.com/professional/clinical-pharmacology/pharmacokinetics/drug-metabolism [https://perma.unl.edu/9V3A-W7B5] (last updated Nov. 2017).
30. *Id.*
31. *Id.*
32. *Id.* An example is useful to describe the metabolization rate.

> [I]f 500 mg is present in the body at time zero, after metabolism, 250 mg may be present at 1 h[our] and 125 mg at 2 h[our] (illustrating a half-life of 1 h[our]). However, when most of the enzyme sites are occupied, metabolism occurs at its maximal rate and does not change in proportion to drug concentration; instead, a fixed amount of drug is metabolized per unit time (zero-order kinetics). In this case, if 500 mg is present in the body at time zero, after metabolism, 450 mg may be present at 1 h[our] and 400 mg at 2 h[our] (illustrating a maximal clearance of 50 mg/h and no specific half-life). As drug concentration increases, metabolism shifts from first-order to zero-order kinetics.

Id.
33. *Toxicology Tests & Reports*, DRUGS.COM (Sept. 3, 2014), https://www.drugs.com/article/toxicology-tests.html [https://perma.unl.edu/6YAR-952S].
34. Haldeman-Englert & Taylor, *supra* note 25.
35. *Id.*
36. *Id.*
37. *Toxicology Tests & Reports*, *supra* note 33.
38. Adey Hill, *How Does a Breathalyzer Work?*, FORBES (Oct. 13, 2016), https://www.forbes.com/sites/quora/2016/10/13/how-does-a-breathalyzer-test-work/#2fcd77bf1558 [https://perma.unl.edu/EQ46-5ZMN].
39. *Id.*

infrared radiation.[40] The radiation is absorbed by the ethanol and the machine detects the amount that has been absorbed.[41] Blood alcohol content of 0.08 percent is equal to 35 micrograms of ethanol per 100 ml of breath.[42] A breath test is unable to detect the presence of a controlled substance in a person's body.[43]

3. Description of Urine Testing

After being consumed, alcohol will also dissipate through a person's urine.[44] Drug metabolites will also be passed into a person's urine.[45] Once collected, a urine sample is sent to a toxicology laboratory, where tests will screen for drug metabolites and ethanol.[46] Such tests may include immunoassay, gas chromatography, or gas chromatography/mass spectrometry.[47] An immunoassay is used to initially detect broad drugs groups, like barbiturates or opiates.[48] The more specific gas chromatography/mass spectrometry test is then used as a confirmatory test that will also identify the individual type and quantity of the controlled substance.[49] Direct injection gas chromatography is used to detect the presence of alcohol.[50]

Determining blood alcohol concentration from a urine sample requires a conversion factor.[51] This factor is often cited as between 1.3 and 1.33.[52] The correct conversion factor is disputed in the scientific community.[53] However, in various studies, the urine/blood alcohol

40. *Id.*
41. *Id.*
42. *Id.*
43. *See* Alia Hoyt, *A Breathalyzer for Drugs? We're Not There Yet*, HowStuffWorks (July 7, 2017), https://electronics.howstuffworks.com/gadgets/automotive/breathalyzer-drugs-not-there-yet.htm [https://perma.unl.edu/SMY7-3R5Z]. A study in Sweden attempted to use breath testing to identify controlled substances. *Id.* Although controlled substances were detected, the breath tests could not indicate when the person had last taken the drug, which is an issue in drunk driving cases. *Id.* But "developing an effective drug breathalyzer isn't as simple as tweaking the existing alcohol-detecting models." *Id.* This is due to the difference in metabolization and the vapor pressure of the substance. *Id.* Currently no such breathalyzer has passed federal and state regulations. *See id.*
44. *Ethanol*, Am. Ass'n for Clinical Chemistry, https://labtestsonline.org/understanding/analytes/ethanol/tab/sample/ [https://perma.unl.edu/JVD6-JKQB] (last updated Sept. 30, 2014).
45. Le, *supra* note 29.
46. *Toxicology Tests & Reports*, *supra* note 33. As part of the forensic toxicology testing, there is often an internal review process to ensure the accuracy of the results. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. Paul C. Giannelli et al., Scientific Evidence § 22.03 (5th ed. 2017).
52. *Id.*
53. *Id.*

concentration ratio was cited as being between 2 and 0.8.[54] Another source of potential error is in urinary bladder accumulation.[55] The longer the urine is accumulated in a bladder, the greater the risk of error.[56] One possible solution to this potential error is to collect two urine samples.[57] In doing so, the first sample is to be discarded while the second is analyzed.[58] As with blood testing, the presence of 80 micrograms per deciliter of urine is equal to a blood alcohol concentration level of 0.08 percent.[59]

B. Evolution of the Warrant Requirement for Blood and Breath Testing in Criminal Cases

The Supreme Court has only considered the constitutionality of blood and breath testing in drunk driving cases.[60] The Supreme Court has not considered urine testing in cases involving driving while under the influence of a controlled substance or alcohol. In the context of drunk driving cases, the Supreme Court has evolved from allowing for the dissipation of alcohol to constitute a per se exigent circumstance justifying a warrantless search to only allowing warrantless breath testing in the context of a search incident to a valid arrest.[61]

1. The Dissipation of Alcohol Does Not Constitute an Emergency Exception to the Warrant Requirement

In 1966, in *Schmerber v. California*,[62] the Supreme Court of the United States considered for the first time the constitutionality of warrantless blood testing and exceptions to the warrant requirement in a drunk driving case.[63] In *Schmerber*, the defendant was in an automobile accident and brought to a hospital where a blood sample was drawn.[64] A chemical analysis revealed that the defendant's blood alcohol content was above the legal limit.[65] The defendant appealed his

54. *Id.* For example, in one study, the actual blood alcohol concentration was 0.18%, when the actual concentration amount was 0.11%. *Id.* (citation omitted).
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* (describing that the second urine sample should be collected twenty to thirty minutes after the first sample is collected); *see also Ethanol*, *supra* note 44 (describing the proper practice to better correlate blood alcohol concentration levels and the amount of ethanol found in urine).
59. *Id.*
60. *See* Birchfield v. North Dakota, 136 S. Ct. 2160 (2016); Missouri v. McNeely, 596 U.S. 141 (2013); Schmerber v. California, 384 U.S. 757 (1966).
61. *Compare Schmerber*, 384 U.S. at 770, *with Birchfield*, 136 S. Ct. at 2174.
62. *Schmerber*, 384 U.S. at 757.
63. *Id.*
64. *Id.* at 758.
65. *Id.* at 759.

subsequent conviction, arguing that the blood draw was an unconstitutional search and seizure.[66]

In its analysis of *Schmerber*, the Court first determined that administering blood tests constituted a search of the "person" under the Fourth Amendment of the Constitution.[67] To determine if the search was unconstitutional, the Court considered if the officer was justified based on the circumstances and whether the means and procedure were reasonable.[68] The Court found the facts supported a finding of probable cause to arrest Schmerber.[69] The Court further held the search was constitutional, even though the officer did not obtain a warrant.[70] The Court recognized that the dissipation of alcohol in the body was an exigency because the officer "might reasonably have believed he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'"[71] Thus, the Supreme Court seemingly created a per se exigency exception for drunk driving cases.[72]

Many years after *Schmerber*, the Supreme Court reconsidered the emergency exception for the dissipation of alcohol.[73] In *Missouri v. McNeely*,[74] the Court expressly held that the dissipation of alcohol in an individual's bloodstream does not constitute a per se emergency exception to the warrant requirement for searches and seizures.[75] The defendant, McNeely, was arrested on suspicion of drunk driving and taken to a hospital for a blood test.[76] Officers took a sample of the defendant's blood without his consent.[77] The defendant's blood alcohol concentration was above the legal limit and he was convicted of driving while intoxicated.[78] The defendant challenged his conviction, ar-

66. *Id.*
67. *Id.* at 767.
68. *Id.* at 768.
69. *Id.* at 770.
70. *Id.*
71. *Id.* (citing Preston v. United States, 376 U.S. 364, 367 (1964)).
72. *See*, *e.g.*, United States v. Eagle, 498 F.3d 885, 892 (8th Cir. 2007) (quoting *Schmerber* as support for the argument that the dissipation of alcohol in a person's blood constitutes an emergency exception to the warrant requirement); State v. Shriner, 751 N.W.2d 538, 545 (Minn. 2008) (relying on *Schmerber* when determining that in certain criminal cases, the natural dissipation of alcohol "creates [a] single-factor exigent circumstance . . . that will justify the police taking a warrantless, nonconsensual blood draw from a defendant"); State v. Entrekin, 47 P.3d 336, 348 (Haw. 2002) (quoting *Schmerber* to support that exigent circumstances were present because of the natural dissipation of alcohol that justifies warrantless blood draws).
73. Missouri v. McNeely, 596 U.S. 141 (2013).
74. *Id.*
75. *Id.*
76. *Id.* at 145–46.
77. *Id.* at 146.
78. *Id.* at 146–47.

guing that the blood draw violated his Fourth Amendment rights.[79] The Missouri Supreme Court ultimately overturned McNeely's conviction by relying on *Schmerber*.[80] The state court had found that McNeely's arrest was a routine DWI case where no factors, other than the natural dissipation of alcohol, suggested that it was an emergency situation.[81] Absent other circumstances, the court held, a nonconsensual blood test violates an individual's Fourth Amendment rights.[82] Missouri then appealed the case and the United States Supreme Court granted certiorari.

The *McNeely* Court first determined that a warrantless blood test is a search of the person and is only constitutional if a recognized exception applies.[83] The Court was specifically concerned with drawing blood because of its intrusive nature.[84] The Court ultimately determined that the dissipation of alcohol in a suspect's body does not constitute a per se exception to the warrant requirement.[85] To reach this conclusion, the Court reexamined its decision in *Schmerber* and the totality of the case's circumstances to determine if the law enforcement officer faced an emergency.[86] The *McNeely* Court clarified that its holding in *Schmerber* was reasonable because the facts and circumstances in that *particular* case justified an emergency exception.[87] The *McNeely* Court explicitly stated that it was not overturning precedent.[88]

In *McNeely*, the Court acknowledged that the evidence—the percentage of alcohol in the blood—dissipates as the body eliminates alcohol from the system.[89] But the *McNeely* Court declined to depart from

79. *Id.* at 148.
80. *Id.* at 147.
81. *Id.*
82. *Id.*
83. *Id.* at 148. For examples of constitutional warrantless searches, see Michigan v. Fisher, 558 U.S. 45, 47–48 (2009) (finding that law enforcement engaged in "hot pursuit" of a fleeing suspect is an exigency sufficient to justify a warrantless search); Illinois v. McArthur, 531 U.S. 326, 331 (2001) (holding that a warrantless seizure of a person was justified in light of the circumstances during which the person was attempting to destroy hidden contraband); Michigan v. Tyler, 436 U.S. 499, 509–10 (1978) (holding that law enforcement may enter a burning building to put out a fire and investigate its origin without a warrant).
84. *McNeely*, 569 U.S. at 148. Specifically, the Court was concerned because of "the type of search at issue in this case, which involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Id.* (citing Winston v. Lee, 470 U.S. 753, 760 (1973)).
85. *Id.* at 156.
86. *Id.* at 150.
87. *Id.* at 151.
88. *Id.*
89. *Id.* (citing Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 623 (1989); Schmerber v. California, 384 U.S. 757, 770 (1966)).

a case-by-case assessment of exigency.[90] Blood testing is different than true "now or never" situations because the dissipation of blood alcohol content is predictable and gradual.[91] Furthermore, even where law enforcement does not obtain a search warrant, there is a period of delay prior to the blood test that will inevitably result in the destruction of evidence.[92] Additionally, states have established different procedures to expedite the warrant application process, particularly in cases involving routine drunk-driving investigations.[93] Such expedited processes mitigate the destruction of evidence.[94] Thus, the Court found that the dissipation of alcohol in the body *may* support a finding of an exigency based on the specifics of the case, but it does not support a per se rule that the natural dissipation of alcohol will always constitute an emergency exception to the warrant requirement.[95]

2. *The Split Between Blood and Breath Testing as a Search Incident to Arrest*

Three years after *McNeely*, the Court decided *Birchfield v. North Dakota*.[96] *Birchfield* considered breath and blood alcohol testing in the context of a search incident to a valid arrest.[97] A search incident to a valid arrest allows officers to search the arrestee or the area within the control of the arrestee by virtue of a lawful arrest.[98] Thus, a lawful arrest justifies a full search of the person.[99] The Supreme Court upheld the modern form of this categorical rule in *United States v.*

90. *Id.* at 152.
91. *Id.* at 153.
92. *Id.*
93. *Id.* at 154.
94. *Id.*
95. *Id.* at 156. "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." *Id.* at 152.
96. 136 S. Ct. 2160 (2016). *Birchfield* was the consolidation of three cases arising from Minnesota's and North Dakota's implied consent laws. *Id.* at 2170–72. In each of the cases the defendant was arrested for drunk driving. *Id.* Two of the defendants refused to submit to a test. *Id.* One of the defendants was subsequently convicted of test refusal. *Id.* at 2171. The second defendant originally had his charges dismissed in district court on the argument that warrantless breath tests were not permitted under the Fourth Amendment. *Id.* The Minnesota Supreme Court ultimately overruled the dismissal, holding that a warrant was not needed under the doctrine that warrantless searches are valid incident to lawful arrest. *Id.* The third defendant agreed to a blood test and objected to the results under the argument that his consent was insufficiently voluntary. *Id.* at 2172. He was subsequently convicted of a DWI. *Id.*
97. *See generally id.*
98. *Id.* at 2176–77 (citing United States v. Robinson, 414 U.S. 218, 224 (1973)).
99. *Id.* at 2176 (citing *Robinson*, 414 U.S. at 236).

Robinson,[100] which was reaffirmed in *Riley v. California*.[101] In *Riley*, the Supreme Court created a test to apply searches incident to arrest in situations which could not have been envisioned when the Fourth Amendment was adopted.[102] The *Riley* test considers both the degree to which the search intrudes upon a person's privacy and the degree it promotes a legitimate governmental interest.[103] The *Birchfield* Court determined that although the *Riley* test involved cellphone searches, the *Riley* test can be used to determine the constitutionality of warrantless breath and blood tests as searches incident to a valid arrest.[104]

To reach this conclusion, the *Birchfield* Court first considered breath tests in the context of intrusion into a person's privacy.[105] The Court found that the air a human exhales is not part of the body.[106] Thus in terms of physical intrusion, the search is insignificant because the arrestee is merely requested to blow on the mouthpiece of the machine.[107] The procedure is not painful in any way and is akin to using a straw.[108] In terms of privacy concerns, the Court found that because breath tests only collect one piece of information—rather than a range of personal information—there are limited concerns of privacy intrusion.[109] Lastly, the Court considered the potential embarrassment to the individual.[110] The *Birchfield* Court determined that "once placed

100. *Robinson*, 414 U.S. at 235. For an in-depth examination of the modern search-incident-to-a-valid-arrest doctrine, see *Warrantless Searches and Seizures,* 33 GEO L.J. ANN. REV. CRIM. PROC. 38, 60–61 (2004).
101. 134 S. Ct. 2473, 2484–85 (2014).
102. *Birchfield*, 136 S. Ct. at 2176 (citing *Riley,* 134 S. Ct. at 2484–85).
103. *Id.* (citing *Riley,* 134 S. Ct. at 2484).
104. *Id.*
105. *Id.* at 2177.
106. *Id.* ("Humans have never been known to assert a possessory interest in or any emotional attachment to *any* of the air in their lungs. The air that humans exhale is not part of their bodies. Exhalation is a natural process—indeed, one that is necessary for life. Humans cannot hold their breath for more than a few minutes, and all the air that is breathed into a breath analyzing machine, including deep lung air, sooner or later would be exhaled even without the test.").
107. *Id.* The Court considered the intrusiveness of breath testing in light of previous holdings that the intrusion was negligible. *Id.* (citing Maryland v. King, 133 S. Ct. 1958 (2013) (holding that a search involving the collection of DNA by rubbing a swab on the inside of an individual's cheek was a negligible intrusion); Cupp v. Murphy, 412 U.S. 291, 296 (1973) (holding that scraping underneath an individual's fingernails constituted a limited intrusion of the person)).
108. *Birchfield*, 136 S. Ct. at 2176.
109. *Id.* The Court contrasted the information collected by a breathalyzer with information that can be obtained through the DNA swab collection as seen in *King*. *Id.* In *King*, the Court found the DNA collected could provide information on a person's chromosomes and thus a person's genes. *King*, 133 S. Ct. at 1966–67.
110. *Birchfield*, 136 S. Ct. at 2177 (citing Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 625 (1989)). "The act of blowing into a straw is not inherently embarrassing, nor are evidentiary breath tests administered . . . in private at a police station, in a patrol car, or in a mobile testing facility, out of public view." *Id.*

under arrest, the individual's expectation of privacy is necessarily diminished."[111]

In regards to blood tests, the *Birchfield* Court considered the holdings of *Skinner* and *McNeely*.[112] Blood draws are a compelled physical intrusion into an individual's skin and veins, and they extract a part of the body.[113] The Court acknowledged that while people voluntarily submit to taking blood samples for medical purposes and blood draws often involve little pain, it is a process few people enjoy.[114] Additionally, drawing blood samples raises privacy concerns beyond those present with breath testing.[115] Blood samples can be preserved and information can be extracted beyond blood alcohol concentration.[116]

Finally, the Court considered the state and federal governments' interest in preserving the safety of public roads.[117] Drunk driving is the leading cause of traffic injuries and fatalities.[118] The Court recognized that 9,967 fatalities occurred in 2014 due to drunk driving.[119] For these reasons, the Court found that the searches further a legitimate public interest of deterring drunk driving.[120] The Court concluded that because breath tests have a limited impact on privacy interests and a legitimate government interest is furthered, breath tests were held to constitute valid searches incident to a lawful arrest.[121] Blood tests, on the other hand, do not constitute a search incident to a valid arrest because these tests are invasive.[122] The Court noted that its holding on blood tests was made in light of the availability of less-invasive breath tests.[123]

---

111. *Id.* (citing *King*, 133 S. Ct. at 1977).
112. *Id.* at 2178 (citing *Skinner*, 489 U.S. at 625; Missouri v. McNeely, 596 U.S. 141 (2013)).
113. *Id.* (citing *Skinner*, 489 U.S. at 625; *McNeely*, 596 U.S. at 141).
114. *Id.* (citing *McNeely*, 596 U.S. at 141).
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* (citing *Traffic Safety Facts, 2014 Data*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (May 2016), https://lplpllc.com/wp-content/uploads/2016/05/Traffic-fact-sheet.pdf [https://perma.unl.edu/96CC-J4UQ]).
120. *Id.* at 2178–79.
121. *Id.* at 2184. The Court also made this determination on the fact that the effectiveness of breath tests was not disputed. *Id.* It also acknowledged that a breath test may be ineffective if an arrest attempts to prevent accurate readings by deliberately not providing accurate samples. *Id.* at 2185. This concern was dismissed, however, because such conduct qualifies as a test refusal under implied consent statutes. *Id.*
122. *Id.*
123. *Id.* The *Birchfield* Court acknowledged some of the benefits that blood testing has over breath testing. *Id.* at 2184–85. For example, a blood test can be administered to a person who is unconscious or unable to take a breath test due to intoxication or injuries. *Id.* Another advantage is the ability for blood tests to be able to detect other substances able to impair a driver. *Id.* at 2184. Both arguments were dis-

3. The Oregon and Wisconsin Appellate Courts Have Held the Natural Metabolization of a Controlled Substance Justifies Warrantless Testing as an Emergency Exception

The Supreme Court has never considered urine testing in the context of any exceptions to the warrant requirement in criminal cases. However, two states have considered whether the natural metabolization of a controlled substance justifies a warrantless search of the person.[124] The Oregon Court of Appeals is the only state court to explicitly rule that an emergency exception justifies a warrantless urine search.[125] On the other hand, the Wisconsin Court of Appeals considered whether a warrantless blood test is justified by the metabolization of a controlled substance in the case *County of Milwaukee v. Shah*.[126] Although this Comment analyzes the exigency doctrine in light of urine testing, the reasoning in *Shah* is still relevant to this analysis.

---

missed because a law enforcement officer can still apply for a search warrant. *Id.* Finally, blood can be withdrawn from an individual who is unwilling to consent to the blood draw. *Id.* This too was dismissed because many states prefer not to use blood tests for this purpose. *Id.*

124. Prior to *McNeely*, many state courts had considered whether the dissipation of alcohol constituted an emergency exception and thus justifying warrantless searches of the person. The distinction between pre- and post-*McNeely* decisions is important because a majority of the courts made no distinction between the dissipation of alcohol and controlled substance in the blood stream. *See*, *e.g.*, State v. Steimel, 921 A.2d 378, 385 (N.H. 2007); Holloman v. State, 820 So. 2d 52, 55 (Miss. Ct. App. 2002); State v. Baldwin, 37 P.3d 1220, 1224–25 (Wash. Ct. App. 2001); State v. Hanson, 588 N.W.2d 885, 892–93 (S.D. 1999), *overruled in part by* State v. Fierro, 853 N.W.2d 235, 245–46 (S.D. 2014); State v. Strong, 493 N.W.2d 834, 837 (Iowa 1992). These cases have either been expressly overruled by the jurisdictions' highest courts or implicitly as *McNeely* expressly declined to create a per se exigency exception for the dissipation of alcohol. *See* Missouri v. McNeely, 596 U.S. 141 (2013). Therefore, pre-*McNeely* cases finding that such an emergency exception for the dissipation of a controlled substance are not considered in this Comment.

125. Few other jurisdictions have specifically considered the emergency exception doctrine in the context of urine testing and the metabolization of a controlled substance since *McNeely*. *See, e.g.,* Byars v. State, 336 P.3d 939, 942 (Nev. 2014) ("[T]he natural dissipation of marijuana in the blood stream does not constitute a per se exigent circumstance justifying a warrantless search."). Other courts have reviewed instances of defendants consuming controlled substances and then challenging the validity of a warrantless urine test. Although each defendant argued the exigent circumstances doctrine, the courts in those cases did not explicitly base their decision on the metabolization of a controlled substance. *See, e.g.*, People v. Eubanks, 2017 IL App (1st) 142837, appeal pending (Sept. Term 2018); State v. Wieboldt, 320 P.3d 597 (Or. Ct. App. 2014).

126. Cty. of Milwaukee v. Shah, No. 2015AP1581, WL 2016 4275582 (Wis. Ct. App. Aug. 16, 2016).

The Oregon Court of Appeals first considered warrantless urine tests in the case *State v. McMullen*.[127] In *McMullen*, the defendant submitted to a warrantless urine test.[128] Toxicology reports indicated the presence of several controlled substances, including cocaine, morphine, and Oxycodone.[129] The court held that the exigent circumstances—the metabolization of drugs—justified the warrantless search.[130] To reach this conclusion, the court found that the officer had probable cause to believe the defendant had consumed a controlled substance that could rapidly metabolize in a person's body.[131] The *McMullen* court also found it is unreasonable to require a police officer to identify the exact substance that a defendant ingested.[132] Thus, the court found "exigent circumstances exist as to justify obtaining a sample without a warrant."[133]

After the *McNeely* Court's ruling, the Oregon Court of Appeals again considered the emergency exception in *State v. Raymond*.[134] Although the court never explicitly upheld the *McMullen* ruling in light of the *McNeely* ruling, the court indicated its support of *McMullen*.[135] Ultimately, the *Raymond* court remanded the case, stating that the record was underdeveloped after the *McNeely* ruling.[136]

---

127. 279 P.3d 367 (Or. Ct. App. 2012).

128. *Id.* at 368.

129. *Id.*

130. *Id.* at 370.

131. *Id.*

132. *Id.* ("Once police have probable cause to believe that evidence of a controlled substance will be in a suspect's urine, the exact identity of the substance is of no consequence in determining whether exigent circumstances exist. That is so because we cannot reasonably expect police officers, even drug recognition experts, to be able to determine which controlled substance, alone or in combination, is causing a person to act in such a way as to indicate intoxication.").

133. *Id.*

134. 360 P.3d 734, 736 (Or. Ct. App. 2015).

135. *Id.* at 740.

> Here, as in . . . *McMullen* . . . there was probable cause to believe that a "controlled substance other than alcohol would be present in defendant's urine," and the state adduced proof that at least one controlled substance dissipates rapidly in urine after it is consumed. Specifically, in this case, [the police officer] believed that defendant was under the influence of a central nervous system stimulant, and the record establishes that cocaine, a central nervous system stimulant, has a "short detection time" and may be "eliminated from the urine" within "several hours or up to 12 hours" of consumption. That proof established the predicate exigency.

Id. The *Raymond* court also indicated that it would not address the State's second contention that the warrantless urine test is justified as a search incident to a valid arrest because of their "dispositive conclusion that exigent circumstances justified the search . . . ." *Id.* at 738 n.6.

136. *Id.* at 742.

The Wisconsin Court of Appeals had a similar analysis in *County of Milwaukee v. Shah*.[137] The court found that a controlled substance constitutes an exigent circumstance due to the metabolization of the drugs and the difficulty in detecting a controlled substance.[138]

III. ANALYSIS OF THE EMERGENCY EXCEPTION AND A SEARCH INCIDENT TO ARREST AS IT APPLIES TO WARRANTLESS URINE TESTING

A. Analysis of Warrantless Urine Tests Under the Emergency Exception Doctrine

There is a difference between the metabolization of alcohol and a controlled substance. Regardless of the type of alcoholic drink that is consumed, the human body metabolizes ethanol at a relatively steady rate.[139] The *McNeely* court noted that the percentage of alcohol in a person's blood will decrease at a rate between 0.015% and 0.02% per hour.[140] The exact metabolization rate will depend on individual characteristics, such as weight and gender.[141] Thus, any type of an alcoholic drink will result in sobriety[142] at roughly the same time.[143]

137. *See generally* Cty. of Milwaukee v. Shah, No. 2015AP1581, WL 2016 4275582 (Wis. Ct. App. Aug. 16, 2016). It is important to note that the *Shah* case is an unpublished decision by the Wisconsin Court of Appeals. The *Shah* case indicates that the opinion will not be published according to Wisconsin law. WIS. STAT. ANN. § 809.23(1)(b)(4) (West 2017). Under this statute, opinions are not published when "[t]he decision is by one court of appeals judge" rather than by a three-judge panel. § 809.23(1)(b)(4). Any unpublished opinion is not considered binding precedent or authority but may be cited for persuasive value. §§ 809.23(3)(a)–(b). Although not binding in the state of Wisconsin, this case still presents an interesting argument and perspective on how different courts are considering the metabolization of controlled substances and the emergency exception to the warrant requirement. *See Shah*, 2016 WL 4275582, at *1.

138. *Shah*, 2016 WL 4275582, at *9. Even though "some controlled substances may be detectible in a person's blood long enough for a warrant to be obtained, there is no way for an officer to know whether that time exists when making an arrest for operating while under the influence of a controlled substance." *Id.* The court also based its decision on the fact that an officer cannot be certain when the drug was consumed nor the dissipation rate of every type of controlled substance. *Id.* at *9–10.

139. Missouri v. McNeely, 569 U.S. 141, 152 (2013) (citing *Stripp Forensic and Clinical Issues in Alcohol Analysis*, *in* FORENSIC CHEMISTRY HANDBOOK 435, 437–41 (L. Kobilinsky ed., 2012)). For further discussion on the rate of the dissipation of alcohol, see L. Anderson, *Drug Testing FAQs*, DRUGS.COM (May 1, 2017), https://www.drugs.com/article/drug-testing.html [https://perma.unl.edu/2VTV-M4FV].

140. *McNeely*, 569 U.S. at 152.

141. *Id.*

142. A person is determined to be sober when that person's blood alcohol concentration is at 0.00%. *See Drunk Driving*, *supra* note 27.

143. Although the *type* of alcohol that is consumed will not affect the sobriety rate, the *amount* of that type of alcohol will. This distinction is important as a standard

Alcohol's relatively steady decrease in the body contrasts with the variety of drug metabolization rates.[144] For example, methamphetamine is often metabolized twice as fast as marijuana.[145] Not only do different drug families metabolize at different rates, but each controlled substance within a family will also have different rates.[146] For instance, in the opiates family, morphine will metabolize about 1.5 times faster than methadone.[147] Individual drug metabolization is also affected by other factors, such as genetic factors, coexisting disorders, and the interaction with other drugs present in a person's system.[148] To further add to this concern, police officers do not know which controlled substance a driver has consumed.[149]

Based on these facts alone, the metabolization of a controlled substance likely demands a per se exception. However, the Oregon and Wisconsin courts failed to note an important difference between alcohol and drugs that explain why metabolization should not fall under the emergency exception.[150] Many drugs can be detected in a person's urine much longer than alcohol.[151] Alcohol is generally detectible in a person's urine up to twelve hours after initial consumption.[152] This is significantly shorter than many drugs, such as methamphetamine, which can be detected up to two days after consumption.[153] Marijuana has an even longer detection time—a single use can be detected up to seven days after initial consumption while chronic use can be detected in a person's urine two months or longer.[154]

---

drink in the United States has about 14 grams of pure alcohol. *How Long Do Drugs Stay in Your System?*, OAKS TREATMENT, http://theoakstreatment.com/drug-addiction/long-drugs-stay-system/ [https://perma.unl.edu/A3N7-G6LK] (citation omitted) [hereinafter *How Long?*]. There are 14 grams of pure alcohol in 12 ounces of beer, 5 ounces of wine, or 1.5 ounces of 80-proof liquor. *Id.* Thus, drinking 12 ounces of beer will dissipate and result in sobriety at roughly same amount as 5 ounces of wine. *See id.* On the other hand, a person who drinks 36 ounces of beer (or three beers) will take longer to reach sobriety than a person who drinks only 5 ounces of wine (or one glass of wine). *See id.*

144. *Compare id.*, *with* Anderson, *supra* note 139.

145. *How Long?*, *supra* note 143.

146. *See generally id.*

147. *Id.*

148. Le, *supra* note 29.

149. State v. McMullen, 279 P.3d 367, 370 (Or. Ct. App. 2012). Even if a driver informs the officer of what drug he had consumed, this information may not be reliable. *See, e.g.*, United States v. Edmo, 140 F.3d 1289, 1291 (9th Cir. 1998) (explaining that the driver told officers he had ingested methamphetamine and cocaine, but a urine test revealed the presence of marijuana).

150. *See generally* Cty. of Milwaukee v. Shah, No. 2015AP1581, 2016 WL 4275582 (Wis. Ct. App. Aug. 16, 2016); *McMullen*, 279 P.3d at 367.

151. *See generally* Anderson, *supra* note 139; *How Long?*, *supra* note 143.

152. Anderson, *supra* note 139.

153. *Id.*

154. *Id.*

The longer detection period for a controlled substance fails to create the "now or never" situation necessary to constitute a per se exception.[155] As noted in *McNeely*, it will invariably take some time before a urine sample can be obtained, regardless of whether a warrant is procured.[156] Furthermore, although warrant procurement may take some time, jurisdictions have stream-lined the process and reduced the waiting period.[157] Examples of potential ways to shorten the warrant process include containing certain oath or affirmation wording in electronic warrant applications.[158] Another option is to use an electronic signature to satisfy the signature requirement of a warrant.[159] With such stream-lined warrant procedures, the concern that evidence will be destroyed is lessened.

Moreover, a per se rule that allows warrantless urine testing to be applied in certain situations and not in others may cause difficulties in applying the exception. It is not uncommon for an individual to be suspected of being under the influence of both a controlled substance and alcohol.[160] In such a case, the police officer would probably not know if the emergency exception applies because the metabolization of drugs constitutes an exigent circumstance but the metabolization of alcohol does not. The officer would be faced with further questions if the preliminary breath test indicates that the individual is under the legal limit for intoxication. The officer's determination may change if the preliminary breath test indicates that the individual is over the legal limit.

Additional questions and considerations may arise if the driver admits to consuming a large quantity of drugs but only a small number of beers. This conclusion may also differ if the driver admits to consuming many beers but only taking a small quantity of drugs. The officer may further wonder if the dissipation of alcohol is even a concern if the driver has a controlled substance in her system. These questions posed by the officer demonstrate the difficulty in applying a per se emergency exception. Consequentially, the concerns that underline the emergency exception are not present, and the difficulty in

155. Missouri v. McNeely, 596 U.S. 141, 153 (2013).

156. *Id.*

157. *Id.* at 154.

158. Andrew H. Bean, *Swearing by New Technology: Strengthening the Fourth Amendment by Utilizing Modern Warrant Technology While Satisfying the Oath or Affirmation Clause*, 2014 BYU. L. REV. 927, 944 (2014).

159. *Id.* at 947. For further examples on how to satisfy warrant requirements and thus stream-line the warrant process, see *id.*

160. Gregory T. Seiders, *Call in the Experts: The Drug Recognition Expert Protocol and Its Role in Effectively Prosecuting Drugged Drivers*, 26 WIDENER L.J. 229, 230 (2017) (citing *DrugFacts: Drugged Driving*, NAT'L INST. ON DRUG ABUSE (June 2016), http://www.drugabuse.gov/publications/drugfacts/drugged-driving [https://perma.unl.edu/D78H-WUWP]).

applying the rule lends to the conclusion that warrantless urine testing cannot be upheld under this doctrine.

B. *State v. Thompson*'s Application of the *Birchfield* Test to Urine Testing and an Analysis of the *Thompson* Holding

In *Minnesota v. Thompson*, the Supreme Court of Minnesota was the first court to consider the application of the *Birchfield* test to urine testing.[161] Since then, only Maine, South Dakota, North Dakota, and Nebraska[162] have considered if a urine test is a valid search incident to arrest under the *Birchfield* test. Like *Thompson*, Maine, South Dakota, and North Dakota concluded that a warrantless urine test is not a search incident to a valid arrest.[163] Because the highest appellate courts of these three states relied on *Thompson* in their analysis[164] and mirrored the *Thompson* reasoning, this section focuses on the *Thompson* case.

---

161. State v. Thompson, 886 N.W.2d 224 (Minn. 2016), *cert. denied*, 137 S. Ct. 1338 (2017). Interestingly, *Thompson* was decided less than four months after the Supreme Court issued its ruling in *Birchfield*. *See id.*; *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016).

162. As of January 1, 2019, only these four states considered this specific application. This is not to say that other states have not applied the *Birchfield* ruling on breath tests or blood tests. The lack of states who have analyzed urine testing under *Birchfield* is not surprising considering that the *Birchfield* ruling has been on the books for two and a half years. *See* State v. Wilson, No. CR-2016-638, 2017 WL 2999582 (Me. Super. May 15, 2017); *Birchfield*, 136 S. Ct. at 2160.

163. *See generally Wilson*, 2017 WL 2999582, at *17 ("Based on its examination of *Birchfield*, and the reasoning of the Minnesota Supreme Court in *Thompson*, the court is persuaded that if the United States Supreme Court and/or the Maine Law Court were to directly address the issue, they would hold that the warrantless taking of a urine sample would not be permitted under the 4th Amendment as a search incident to arrest, absent exigent circumstances or consent."); State v. Helm, 901 N.W.2d 57, 63 (N.D. 2017) ("Rather, on this record, we agree with the rationale of the Minnesota Supreme Court in *Thompson* and conclude that urine tests under the Department's form for submission of urine and the arresting officer's protocol are like blood tests under *Birchfield*. We conclude a warrantless urine test is *not* a reasonable search incident to a valid arrest of a suspected impaired driver and the driver cannot be prosecuted for refusing to submit to an unconstitutional warrantless urine test incident to arrest."); State v. Hi Tar Lar, 908 N.W.2d 181, 187–88 (S.D. 2018) ("[L]aw enforcement must secure a warrant prior to obtaining a urine sample from an arrestee . . . . Other courts have similarly held." (citing *State v. Thompson*, 886 N.W.2d 244, 233 (Minn. 2016)). In *State v. Toland*, the lower Nebraska court found that a warrantless urine test falls under the search incident to arrest exception. No. A-17-1139, 2018 WL 4896908, at *2–3 (Neb. Ct. App. Oct. 9, 2018). The Nebraska Court of Appeals ultimately did not determine whether urine testing is an exception to the warrant requirement because the court found the urine test was admissible under the good faith exception. *Id.* at *4. The court did not look to *Thompson* in making its determination. *See id.*

164. *Wilson*, 2017 WL 2999582, at *12–19; *Helm*, 901 N.W.2d at 58–63.

The facts of *Thompson* mirror other similar cases.[165] Thompson was initially stopped for poor driving conduct but, after he failed standardized field sobriety tests, he was arrested for driving while impaired.[166] At the county jail, Thompson refused to submit to either a blood or urine test.[167] Under Minnesota's implied consent laws, it is a crime to refuse to submit to a chemical test for intoxication, which included urine tests.[168] He was subsequently convicted of a test refusal.[169]

In its decision, the Minnesota Supreme Court adopted the *Birchfield* test concerning whether a warrantless search is a search incident to a valid arrest.[170] First, the court found that there was a limited physical intrusion in urine testing.[171] Next, the court determined that urine tests are comparable to blood tests and thus raise the same privacy concerns as those addressed in *Birchfield*.[172] Finally, the court found that "urine testing involves a much greater privacy invasion in

165. *Compare Thompson*, 886 N.W.2d at 226, *with* Missouri v. McNeely, 596 U.S. 141, 145–46 (2013), *and* State v. McMullen, 279 P.3d 367, 368 (Or. Ct. App. 2012).

166. *Thompson*, 886 N.W.2d at 226.

167. *Id.* at 227. The Minnesota Supreme Court adopted the *Birchfield* holding as it applies to blood testing and held that "[a] warrantless blood test may not be administered as a search incident to a lawful arrest of a suspected drunk driver." *Id.* at 229.

168. *Id.* at 227; *see also* MINN. STAT. ANN. § 169A.20, subd. 2 (West 2016) ("It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license) . . . ."). The most recent version of the statute has been changed to reflect the court's ruling in *Thompson*. *See* Act of May 11, 2017, ch. 83, sec. 3, § 169A.03(2), 2017 Minn. Sess. Law Serv. 1, 5–6 (West). Now, a person can only be charged with a crime for refusing to submit to a breath test or a chemical test "of a person's blood or urine *as required by a search warrant* . . . ." MINN. STAT. ANN. § 169A.20, subd. 2 (West 2018) (emphasis added).

169. *Thompson*, 886 N.W.2d at 227.

170. *Id.* at 229–30.

171. The court found that "urine tests do not implicate many of the physical intrusion concerns the Court discusses in *Birchfield*'s analysis of blood tests." *Id.* at 230. This determination was based on the lack of intrusion under a person's skin and the fact that "urine is arguably 'not part of [the human] bod[y],' given that urination is a 'natural process' that would occur 'sooner or later . . . even without the test.'" *Id.* (citing Birchfield v. North Dakota, 136 S. Ct. 2160, 2176–77 (2016) (changes in original).

172. *Id.* at 231. In reaching this conclusion, the court found that a urine test reveals personal information about an individual, such as disorders, pregnancy, diabetes, or epilepsy. *Id.* (citing Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 617 (1989)). The court noted this was an important difference from breath tests, which can only reveal an individual's blood-alcohol concentration. *Id.* (citing *Birchfield*, 136 S. Ct. at 2177). Finally, the court cautioned that even if law enforcement officers are "prohibited from using the collected urine samples for purposes other than alcohol concentration testing, 'the potential [for abuse] remains and [the test] may result in anxiety for the person tested.'" *Id.* (citing *Birchfield*, 136 S. Ct. at 2178).

terms of embarrassment."[173] The court balanced these three factors against the State's need to conduct a urine test to prevent drunk driving.[174] The need to conduct the test was then balanced against the availability of less invasive, alternative testing.[175] The *Thompson* court acknowledged that the state has a "great need" for alcohol concentration testing.[176] However, it ultimately determined that urine testing was unreasonable because of the availability of other less invasive tests.[177] Because of the intrusion upon an individual's privacy and the availability of less invasive procedures, the *Thompson* court held that warrantless urine testing is not justified as a search incident to a valid arrest.[178]

1. Incorrect Application of the Reasonableness Standard

There were two major flaws in the Minnesota Supreme Court's reasoning in *Thompson*—the court incorrectly applied the reasonableness standard to urine testing and improperly considered the embarrassment prong.

The *Thompson* court stated that in *Birchfield*, the "government interest in obtaining alcohol concentration readings through warrantless blood tests was *diminished*" due to the availability of less invasive alternative tests.[179] The *Birchfield* Court did not find that the reasonableness factor diminished the government's interest in obtaining alcohol concentration readings.[180] Rather, the *Birchfield* Court found that this factor must generally weigh against the constitutionality of the warrantless search.[181]

The *Thompson* court further stated that breath tests "will serve the State's interest in deterring drunk driving and preserving high-

173. *Id.* at 232. The court noted that the search involves "performing a personal and private bodily function 'in full view' before law enforcement . . . ." *Id.* This was contrasted to the fact that this bodily activity is often described by euphemisms and traditionally performed away from public observation. *Id.* at 231 (quoting *Skinner*, 489 U.S. at 617). Finally, the court compared the extent to which blood and breath testing causes embarrassment to the arrestee. *Id.* at 232. In comparing these two tests to urine testing, the court noted neither search involved "performing a private bodily function in front of law enforcement . . . ." *Id.*

174. *Id.*

175. *Id.* at 232–33. The *Thompson* court noted that warrantless breath testing, justified as a search incident to a valid arrest, serves the state's interest in "deterring drunk driving and preserving highway safety." *Id.* The *Thompson* court relied on the Supreme Court's decision in *Birchfield* in reaching this conclusion. *Id.* (citing *Birchfield*, 136 S. Ct. 2184).

176. *Id.* at 233.

177. *Id.*

178. *Id.*

179. *Id.* at 232–33 (emphasis added) (citing *Birchfield*, 136 S. Ct. at 2184).

180. *See Birchfield*, 136 S. Ct. at 2184–85.

181. *See id.*

way safety,"[182] implying that the state has a diminished interest in warrantless urine testing. This distinction is important because it incorrectly skews the finding against the government when considering the overall application of the balancing test. Thus, in light of *Thompson*'s double application of the availability of breath testing and a finding that the government's interest is diminished because of the existence of breath testing, the Minnesota court over-extends the reasonableness application.

Furthermore, the *Thompson* court twice applied the availability of a less invasive breath test against the government.[183] Such an application is incorrect under *Birchfield*.[184] The *Birchfield* Court indicated that the availability of the less invasive breath test creates a presumption against reasonableness that can be rebutted if there is a "satisfactory justification" for the blood test.[185] But once the unreasonableness presumption was established, the Court did not then weigh it against the government's interest a second time.[186] In *Thompson*, however, the court found that the "availability of an alternative test [breath testing] impacts the reasonableness of urine tests . . . ."[187] The court held that breath tests "will serve the State's interest in deterring drunk driving and preserving highway safety."[188] The court not only implied that the availability of breath testing dimin-

182. *Thompson*, 886 N.W.2d at 233.

183. *See id.* at 232–33.

184. *See Birchfield*, 136 S. Ct. at 2184.

185. *See id.* Although the Court did not expressly state a rebuttable presumption exists against unreasonableness, the entire reasoning indicates this is the natural interpretation:

> Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant. Neither respondents nor their *amici* dispute the effectiveness of breath tests in measuring BAC . . . . One advantage of blood tests is their ability to detect not just alcohol but also other substances that can impair a driver's ability to operate a car safely . . . . A blood test also requires less driver participation than a breath test . . . . It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be. A breath test may also be ineffective if an arrestee deliberately attempts to prevent an accurate reading by failing to blow into the tube for the requisite length of time or with the necessary force. But courts have held that such conduct qualifies as a refusal to undergo testing, . . . and it may be prosecuted as such.

Id. at 2184–85 (citations omitted).

186. *See id.*

187. *Thompson*, 886 N.W.2d at 233.

188. *Id.*

ished the government's interest in urine testing within the balance, but it also held that the availability of breath testing weighed against reasonableness in general. This second application unfairly weighs breath testing against the government for a second time.

2. Incorrect Application of the Embarrassment Prong

The *Thompson* court also incorrectly considered the third privacy prong, embarrassment, by failing to understand the urine collection instruction and not considering pertinent Supreme Court precedent. *Thompson* referenced Urine Collection Kit Instructions from the Minnesota Bureau of Criminal Apprehension.[189] The court stated that "[w]hen an arrestee submits to a urine test on suspicion of drunk driving, the arrestee must urinate, on command, 'in full view' of the arresting officer, who must witness the arrestee 'void directly into the bottle.'"[190] The instructions do say that "[s]teps 1 through 7 must be performed in full view of subject and witness."[191] This instruction applies to the *police officer's* actions and not the *arrestee's* action. Furthermore, step two instructs the police officer to "[h]and bottle to [arrestee] and instruct [arrestee] to void directly into the bottle and fill to top."[192] It then instructs the officer to "[h]ave the [arrestee] hand [the] filled urine bottle directly to [the officer]."[193] The note to step two instructs that the '[a]rresting officer or the witness must be present when [arrestee] voids directly into bottle."[194]

It is clear from this complete reading that the arrestee need not urinate "in full view" of the arresting officer; rather, the arresting officer must only be "present" during the sample collection. This could mean that the arresting officer only needs to be within an earshot of the arrestee or that the officer be in the same room with the arrestee. This does not necessarily mean that the officer must directly watch the arrestee while he urinates. These examples present a much different story than what the *Thompson* court presented; these examples are less embarrassing for the arrestee.

A less embarrassing process is also important in light of three Supreme Court cases. The first case considers the procedure by which

189. *Id.* at 231–32 (citing BUREAU OF CRIMINAL APPREHENSION FORENSIC SCI. LAB, URINE COLLECTION KIT INSTRUCTIONS FOR ARRESTING OFFICER (2011), https://dps.mn.gov/divisions/bca/bca-divisions/forensic-science/Documents/Urine%20Specimen%20Collection%20Instructions.pdf [https://perma.unl.edu/XP2L-6M76]).

190. *Id.* (citing BUREAU OF CRIMINAL APPREHENSION FORENSIC SCI. LAB, *supra* note 189).

191. BUREAU OF CRIMINAL APPREHENSION FORENSIC SCI. LAB, *supra* note 189.

192. *Id.*

193. *Id.*

194. *Id.*

student athletes are urine tested for drugs.[195] The following occurs during the process:

> [M]ale students produce samples at a urinal along a wall. They remain fully clothed and are only observed from behind, if at all. Female students produce samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering. These conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily. Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible.[196]

This process is consistent with the Bureau of Criminal Apprehension instructions, which only require the presence of a police officer.[197]

The next two Supreme Court cases involve inmate privacy. The Court has explicitly held that convicted inmates have a lower expectation of privacy than the general public.[198] Likewise, those who are arrested for a crime and will be brought to jail have a lower expectation of privacy than the general public.[199] Although these cases address convicted inmates, their holdings are illustrative of how a balance can be struck between privacy and state interests. In *Bell v. Wolfish*, the Court considered the visual body-cavity inspections of convicted prisoners.[200] The purpose of the inspections was to check for concealed contraband, such as money, drugs, and weapons.[201] Although the *Bell* Court did not specifically consider the warrantless search under the search-incident-to-arrest doctrine, it applied a balancing test similar to the test in *Birchfield*.[202] The Court indicated that it does "not underestimate the degree to which these searches may invade the per-

195. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 648–49 (1996).

196. *Id.* at 658.

197. BUREAU OF CRIMINAL APPREHENSION FORENSIC SCI. LAB, *supra* note 189.

198. Hudson v. Palmer, 468 U.S. 517, 525–26 (1984). *See generally* Darlene C. Goring, *Fourth Amendment—Prison Cells, Is There a Right to Privacy*, 75 CRIM. L. & CRIMINOLOGY 609 (1984); Anne E. Craige, *Prisoner Drug Testing Under the Fourth Amendment*, 27 B.C. L. Rev. 898 (1986).

199. Riley v. California, 134 S. Ct. 2473, 2488 (2014) ("The search incident to arrest exception rests not only on the heightened government interests at stake in a volatile arrest situation, but also on an arrestee's reduced privacy interests upon being taken into police custody.").

200. 441 U.S. 520, 528–30 (1979).

201. *Id.* at 558.

202. *Id.* at 559. The *Bell* Court determined,

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Id. at 559 (citations omitted). This test almost exactly mirrors the balancing test applied in *Birchfield*. *See* Birchfield v. North Dakota, 136 S. Ct. 2160, 2175–85 (2016).

sonal privacy of inmates."[203] It also noted the possibility for a security guard to conduct this search in an abusive manner.[204] Despite these concerns, the Court concluded that such visual body-cavity inspections can be conducted on "less than probable cause."[205]

The final Supreme Court case that should have been taken into consideration is *Florence v. Board of Chosen Freeholders*.[206] In *Florence*, inmates were subjected to a full-body search before being admitted into a detention center and a correctional facility.[207] The inmates had to remove their clothing while an officer looked for markings, wounds, and contraband.[208] Officers looked at inmates' various body parts during the search, such as the ears, nose, mouth, arms, and armpits.[209]

The petitioner also alleged that "he was required to lift his genitals, turn around, and cough in a squatting position as part of the process."[210] Because the case involved jail supervision, the jail's policies and procedures enjoyed deference unless "substantial evidence" demonstrated the officers' response to the situation was exaggerated.[211] Although *Florence* applied a different standard, the case is still instructive because the Court ultimately held that, even assuming the facts in favor of the petitioner, the procedure "struck a reasonable balance between inmate privacy" and the needs of the correctional facility and detention center.[212]

C. Should the Urine Test Fall Under the Search-Incident-to-a-Valid-Arrest Doctrine?: A Reconsideration of the *Birchfield* Test in the Context of Urine Testing

This section will reexamine the *Birchfield* test in light of these new considerations. Urine testing will be considered based on "the degree to which it intrudes upon an individual's privacy and . . . the degree to which it is needed for the promotion of legitimate governmental interests."[213] The reasonableness of the intrusion will also be viewed "in light of the availability of the less invasive alternative . . . ."[214]

203. *Bell*, 441 U.S. at 560.
204. *Id.*
205. *Id.*
206. 566 U.S. 318 (2012).
207. *Id.* at 324.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 328 (citing Block v. Rutherford, 468 U.S. 576, 584–85 (1984)).
212. *Id.* at 339.
213. Birchfield v. North Dakota, 136 S. Ct. 2160, 2176 (2016) (quoting Riley v. California, 134 S. Ct. 2473, 2484 (2014)).
214. *Id.* at 2184.

To assess an individual's privacy interest in a warrantless urine test, three factors must be considered: physical intrusion, the potential disclosure of personal information, and embarrassment.[215] Urine testing does not involve any sort of physical intrusion.[216] The test does not require a piercing of the skin or extraction of bodily fluid.[217] Furthermore, urination is a "natural process," occurring "sooner or later . . . even without the test."[218] Because of the lack of physical intrusion, this factor does not raise any privacy concerns.

Urine testing, however, can reveal information about various medical conditions.[219] For example, urine tests can reveal a wide range of disorders, such as pregnancy, diabetes, or epilepsy.[220] This, as noted by the *Birchfield* Court, could "result in anxiety for the person tested" and raise individual privacy concerns.[221] The Supreme Court noted that this anxiety may remain even if law enforcement agencies are precluded from using a urine test for purposes other than blood alcohol concentration.[222] This concern in *Birchfield* contrasts with *Maryland v. King*, where the Court held a warrantless DNA swab was constitutional.[223] In *King*, the Court considered the privacy interest based on the possibility of revealing personal information outside of its intended purpose.[224] Despite these disclosure concerns, the Court acknowledged that "a 'statutory or regulatory duty to avoid unwarranted disclosures generally allays . . . privacy concerns.'"[225] These two contradictory holdings do not determine whether the capacity for urine testing to reveal personal information raises privacy concerns. Thus, this factor weighs neither for nor against urine testing falling under the search-incident-to-arrest doctrine.

Finally, urine tests may not be any more embarrassing than conditions found in public bathrooms which have a "negligible" effect on

215. *Id.* at 2176–77.
216. State v. Thompson, 886 N.W.2d 224, 230 (Minn. 2016), *cert. denied*, 137 S. Ct. 1338 (2017).
217. *Id.*
218. *Birchfield*, 136 S. Ct. at 2177.
219. Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 617 (1989).
220. *Id.*
221. *Birchfield*, 136 S. Ct. at 2178.
222. *Id.*
223. Maryland v. King, 569 U.S. 435, 464–65 (2013).
224. *Id.*
225. *Id.* (quoting NASA v. Nelson, 562 U.S. 134, 155 (2011)). In *Nelson*, the Supreme Court considered various forms used by NASA during their hiring process. *Nelson*, 562 U.S. at 139–40. These forms included questions about illegal drug use, treatment or counseling received, and previous criminal history. *Id.* at 139–42. Concerns were raised that this personal information could be disclosed in violation of the Privacy Act because such violations had been disclosed via data breaches. *Id.* at 158. Despite these concerns, the Court ultimately held that the forms did not violate an individual's right to informational privacy. *Id.* at 159.

privacy interests.[226] It is important to compare the "public bathroom procedure" to the arguably more embarrassing searches upheld by the Supreme Court.[227] The searches in *Florence* and *Bell* subjected naked inmates to visual inspections by law enforcement.[228] Urine testing, on the other hand, would only require arrestees to urinate while an officer listened.[229] The contrast between these two searches demonstrates the relatively small compromise of privacy interests during a urine test. A final consideration is the ability for states to set stricter standards. If a state is concerned that the "public restroom procedure" is still too embarrassing, each state can set stricter procedural standards. Because of the negligible embarrassment concerns, this factor balances in favor of justifying warrantless urine testing as a search incident to a valid arrest.

The privacy considerations must be weighed against the government's interest in obtaining urine samples.[230] Both the states and federal governments "have a 'paramount interest . . . in preserving the safety of . . . public highways.'"[231] As noted by the *Birchfield* Court, alcohol consumption results in many traffic fatalities and injuries—9,967 fatalities occurred in 2014 due to drunk driving.[232] As with drunk driving, reports indicate that a significant number of individuals drive while under the influence of a controlled substance.[233] According to a survey by the Substance Abuse and Mental Health Services Administration, 293,000 people aged sixteen and older reported driving under the influence of select illicit drugs in 2016.[234] It is difficult to accurately determine how many crashes are caused by controlled substances for various reasons, including the fact that law enforcement usually does not test for drugs if the driver has an illegal

226. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 658 (1996). See *supra* notes 195–197 and accompanying text for further discussion on appropriate procedures that would lead to little embarrassment.

227. For the discussion of visual cavity and full body searches, see *supra* notes 198–212 and accompanying text.

228. Florence v. Bd. of Chosen Freeholders, 566 U.S. 318 (2012); Bell v. Wolfish, 441 U.S. 520 (1979).

229. *See supra* notes 194–197 and accompanying text.

230. Birchfield v. North Dakota, 136 S. Ct. 2160, 2176 (2016).

231. *Id.* at 2178 (quoting Mackey v. Montrym, 443 U.S. 1, 17 (1979)).

232. *Id.* (citing *Traffic Safety Facts, 2014 Data*, *supra* note 119).

233. CTR. FOR BEHAVIORAL HEALTH STATISTICS AND QUALITY, RESULTS FROM THE 2016 NATIONAL SURVEY ON DRUG USE AND HEALTH: DETAILED TABLES, tbl6.85C (Sept. 7, 2017), https://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs-2016/NSDUH-DetTabs-2016.pdf [https://perma.unl.edu/M2J2-VAVJ].

234. *Id.* "Selected illicit drugs included the use of marijuana, cocaine (including crack), heroin, hallucinogens, inhalants, or methamphetamine." *Id.* According to the National Institute on Drug Abuse, "illicit" means the "*use of illegal drugs, including marijuana according to federal law, and misuse of prescription drugs.*" *DrugFacts: Drugged Driving*, *supra* note 160.

blood alcohol content level.[235] A 2009 study estimated that about 3,950 fatally injured drivers tested positive for a controlled substance.[236] This represented 18% of all fatally injured drivers.[237] From the above facts, it is clear that the government has a "paramount interest"[238] in preserving the safety of public roads against both drunk and drugged driving.

Finally, the reasonableness of the urine test must be weighed against the availability of the less-invasive breath testing.[239] One such reasonableness consideration is the accuracy of urine testing.[240] As noted above, there are concerns as to how accurate urine testing can be for alcohol concentration determinations.[241] There is not the same concern for inaccuracy in drug testing because of the second confirmatory test.[242]

Second, as noted above, breath tests cannot detect the presence of drugs.[243] This is important because the other alternative to detecting the presence of controlled substances is through blood draws.[244] Law enforcement still has the option to apply for a search warrant, as the Supreme Court noted in *Birchfield*.[245] This can be done if "there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not."[246] Although it is true that in most situations an officer is likely to have sufficient time to obtain a search warrant, it is unlikely that a police officer will be able to rely on the metabolization of drugs to justify an exigent circumstance.[247] Thus, if warrantless urine testing is held to be unconstitutional, officers will always be required to secure a search warrant before an individual can be tested for the presence of a controlled substance but will not be required to

235. *DrugFacts: Drugged Driving*, *supra* note 160.

236. Seiders, *supra* note 160 (citing *Driving While Impaired—Alcohol and Drugs*, NAT'L COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE, INC., https://www.ncadd.org/about-addiction/addiction-update/driving-while-impaired-alcohol-and-drugs [https://perma.unl.edu/PK9J-23VQ]).

237. *Id.*

238. Birchfield v. North Dakota, 136 S. Ct. 2160, 2178 (2016) (quoting *Mackey v. Montrym*, 443 U.S. 1, 17 (1979)).

239. *Id.* at 2184–85. The government's interest should not be diminished because of the availability of breath tests. *See supra* notes 179–188 and accompanying text.

240. *See Birchfield*, 136 S. Ct. at 2184–85.

241. *See supra* notes 51–59 and accompanying text.

242. *See* Cathryn Jo Rosen, *The Fourth Amendment Implications of Urine Testing for Evidence of Drug Use in Probation*, 55 BROOK. L. REV. 1159, 1166–69 (1990).

243. *See supra* note 43.

244. For a description of blood draws, see *supra* subsection II.A.1.

245. *Birchfield*, 136 S. Ct. at 2184 (2016).

246. *Id.*

247. For an analysis that the metabolization of a controlled substance does not constitute an exigent circumstance, see *supra* section III.A.

secure a search warrant before an individual can be tested for the presence of alcohol.

Finally, the *Birchfield* Court considered the level of participation required to conduct the test.[248] Urine testing requires the individual's participation because a urine sample cannot be extracted from one who forcibly resists, is incapacitated, or is deliberately attempting to prevent an accurate sample collection.[249] Because urine testing requires more invasive participation from the individual than breath testing,[250] this factor weighs against a finding of reasonableness in light of available, less-invasive breath tests.

Thus, two factors—concerns for urine testing accuracy and the greater level of participation involved in urine testing—may weigh against urine testing being reasonable in light of available, less-invasive breath tests. Nevertheless, when these two factors are weighed against the inability of breath tests to detect controlled substances, urine testing appears to be reasonable on balance.

Considering all of the above factors, privacy concerns do not outweigh the government's paramount interest in preventing drunken and drugged driving, thereby protecting our country's roadways. Thus, warrantless urine testing is justified as a search incident to a valid arrest.

IV. CONCLUSION

The constitutionality of warrantless urine testing has not been considered by the Supreme Court of the United States. Nevertheless, some state courts have addressed warrantless urine testing under the emergency exception.[251] Courts in Wisconsin and Oregon have held that a urine test falls under the emergency exception because of the metabolization of a controlled substance.[252] A closer examination of this exception, however, leads to a different conclusion.[253] It is true that different drugs metabolize in the body at different

248. *Birchfield*, 136 S. Ct. at 2184–85.

249. It is necessary to recognize that a urine sample can be forcibly obtained via catherization. Use of a catheter would rise to the same level of physical intrusion as a blood test. *See* State v. Hi Ta Lar, 908 N.W.2d 181, 186 n.3 (S.D. 2018). Due to this level of physical intrusion, the use of a *catheter* to obtain a urine sample should require a warrant but not the collection of a urine sample absent physical intrusion.

250. *See supra* subsection II.A.3.

251. *See supra* section III.A.

252. *See* Cty. of Milwaukee v. Shah, No. 2015AP1581, 2016 WL 4275582 (Wis. Ct. App. Aug. 16, 2016); State v. McMullen, 279 P.3d 367 (Or. Ct. App. 2012); *see also supra* subsection II.A.3 (explaining why State v. Raymond, 360 P.3d 734 (Or. Ct. App. 2015), implied that the Oregon Appellate Court was reaffirming its decision in *McMullen* and how the analysis in *Shah*, 2016 WL 4275582 applies to urine testing even though it concerned blood testing).

253. *See supra* section III.A.

rates.[254] However, drugs can be detected in a person's urine for a considerable length of time,[255] and many jurisdictions have stream-lined the warrant application process.[256] These two factors negate the concern that generally justifies an emergency exception—the time it would take to procure a warrant results in the serious potential for the destruction of evidence. Consequently, a warrantless urine test is not justified under the emergency exception because the metabolization of drugs does not constitute an exigent circumstance.

Only five state courts have considered warrantless urine tests as a search incident to a valid arrest.[257] The first was the Minnesota Supreme Court in *State v. Thompson*.[258] The court erred in its reasoning.[259] Because of these errors, the Minnesota Supreme Court incorrectly concluded that a warrantless urine test is not a search incident to a valid arrest.

A warrantless urine test is a reasonable search incident to a valid arrest.[260] Although urine samples do have the capacity to reveal personal information, the Supreme Court has previously held that statutory or regulatory duties prohibiting the disclosure of personal information will alleviate privacy concerns.[261] In addition, the embarrassment prong does not weigh towards excluding urine testing as a search incident to arrest.[262] There are testing procedures that only produce a "negligible" compromise of privacy interests.[263] Moreover, the government has a paramount interest in prosecuting, preventing, and protecting against drunken or drugged driving via urine testing.[264] The reasonableness of urine testing is not lessened by the availability of breath tests.[265] Rather, because urine tests can also detect the presence and amount of a controlled substance in addition to alcohol,[266] urine testing is reasonable in light of the government's paramount interests. Therefore, warrantless urine testing is justified as a search incident to a valid arrest because the government's reasonable interests in conducting the test outweigh any compromise of the individual's privacy interests.

254. *See* notes 139–147 and accompanying text.
255. *See How Long Do Drugs Stay in Your System?*, *supra* note 143.
256. *See supra* notes 157–159 and accompanying text.
257. *See supra* section III.B.
258. 886 N.W.2d 224 (Minn. 2016), *cert. denied*, 137 S. Ct. 1338 (2017).
259. *See supra* subsection III.B.2.
260. *See supra* section III.C.
261. *See* Maryland v. King, 569 U.S. 435, 465 (2013).
262. *See* section III.C; *see also supra* notes 195–197, 226–229 and accompanying text for further discussion on appropriate procedures that lead to little embarrassment.
263. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 658–59 (1996).
264. *See supra* notes 230–238 and accompanying text.
265. *See* supra subsection III.B.1.
266. *See supra* section III.A.