Changing Lanes: The Criminalization of Refusal in DUI Laws

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"It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." – Justice Felix Frankfurter[1]

INTRODUCTION

On October 10, 2013, Mr. Danny Birchfield drove himself into a ditch in a central North Dakota county.[2] Upon arrival, the responding highway patrolman, believing that Mr. Birchfield was intoxicated, requested that Mr. Birchfield submit to a field sobriety test.[3] After failing the test, Mr. Birchfield consented to, and subsequently failed, a

1. United States v. Rabinowitz, 339 U.S. 56, 68 (1950).

2. State v. Birchfield, 858 N.W.2d 302, 304 (N.D. 2015).

3. *Id*. A field sobriety test is used by police officers to assess the sobriety of a driver. These tests include tasks such as asking an individual to walk in a straight line or to touch their nose. *See* Mike Martindale, *Roadside Sobreity Tests Lose Legal Teeth,* THE DETROIT NEWS, (March 1, 2015), http://www.detroitnews.com/story/news/local/michigan/2015/03/01/field-sobriety-test-lose-legal-teeth/24241467/ [https:perma.cc/H8CB-Y8VB].

preliminary breath test.[4] Since Mr. Birchfield failed both of these tests, the patrolman placed him under arrest and read him the implied consent advisory.[5]

The implied consent advisory read to Mr. Birchfield was substantially similar to the agreement that every American driver makes with his or her state in exchange for his or her driver's license, with one major caveat—refusal to comply would automatically trigger guilt to a misdemeanor criminal offense.[6] Specifically, the North Dakota implied consent statute provides that if a driver is lawfully arrested by an officer who has probable cause to believe that the driver is driving under the influence, then that driver must agree to take a chemical test of their blood, breath, or urine solely for the purpose of determining blood alcohol content ("BAC").[7] Ultimately, North Dakota's law, like that in fifty other states, means that the driver has agreed that "cooperation with BAC testing was a condition of the privilege of driving on state roads and that the privilege would be rescinded if a suspected drunk driver refused to honor that condition."[8] If the driver refuses a chemical drug test, he or she may face remedial or regulatory penalties such as the loss of his or her driver's license.[9] Additionally, and perhaps more importantly, prosecutors may use a driver's failure to consent as proof of the driver's guilt at his or her criminal trial.[10]

The slew of penalties authorized by traditional implied consent laws, those that predate the latest statutory innovation, has been viewed as successful in decreasing drunk driving fatalities and were endorsed by the Court in *McNeely*.[11] In upholding traffic safety laws

4. *Birchfield*, 858 N.W.2d at 304 (The preliminary breath test revealed a .254 percent alcohol concentration). A preliminary breath test is a breathalyzer administered on the scene and is not admissible as proof the DUI, but does provide probable cause. Typically, a second more accurate breath test is administered back at the station. *See* What Is a Preliminary Breath Test, http://freedmvpracticetests.com/what-is-a-preliminary-breath-test.

5. *Birchfield*, 858 N.W.2d at 304.

6. Implied Consent, J RANK, http://law.jrank.org/pages/7507/Implied-Consent.html [https://perma.cc/84BN-QE35] (last visited Feb. 28, 2016) (citing Elizabeth M. Fuller, *Implied Consent Statutes: What is Refusal*, Am. J. Trial Advoc. 9 (Spring 1986)). Implied consent laws did not take their modern form until the early 1980s when Students Against Drunk Driving (SADD) and Mothers Against Drunk Driving (MADD) fought for more stringent DUI laws and penalties.

7. *See* N.D. Century Code 39-20-01.

8. R. DONIGAN, CHEMICAL TESTS AND THE LAW 2 (1966).

9. *Id.*; *see also* Taryn A. Locke, Note, *Don't Hold Your Breath: Kansas's Criminal Refusal Law Is on a Collision Course with the U.S. Constitution*, 52 Washburn L.J. 289 (2012) (reviewing previous Kansas statute which provided that defendant can have his or her license privileges revoked for one year upon a first refusal).

10. *See* DONIGAN *supra* note 8 at 2; *see also* History of Drunk Driving, MADD, http://www.madd.org/drunk-driving/about/history.html [https://perma.cc/H59Y-4KWU] (last visited Feb. 28, 2016).

11. *See* Locke *supra* note 9 (sustaining implied consent statutes against Fourth, Fifth, and Fourteenth Amendment challenges).

such as these, the Supreme Court often points to the high rate of fatalities caused by irresponsible driving.[12]

Traditional implied consent laws have been successful in deterring drunk driving. However, thirteen states—including North Dakota—have expanded implied consent laws to include more punitive measures.[13] These laws, which I refer to as "aggressive implied consent laws" or "criminalization statutes," go beyond the traditional scheme presented in a vast majority of states." In their newest iterations, these aggressive implied consent laws make refusal to comply with a chemical test either a misdemeanor or a felony.[14] Undoubtedly, states passed more aggressive implied consent laws at least in part at the behest of prosecutors; prosecutors viewed the increased penalties as an opportunity to close a "loophole."[15] Prosecutor's believed a "loophole"

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12. South Dakota v. Neville, 459 U.S. 553, 558 (1983) (citing Breithaupt v. Abram, 352 U.S. 432, 439 (1957)) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"); Mackey v. Montrym, 443 U.S. 1, 17–19 (1979) (recognizing the "compelling interest in highway safety"); Tate v. Short, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); Perez v. Campbell, 402 U.S. 637, 657, 672 (1971) (Blackmun, J. concurring) (footnote omitted) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars").

13. State v. Ryce, 303 Kan. 899 (2016).

14. *See, e.g.*, N.D. CODE § 39-08-01 (2015) ("A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply: . . . e. That individual refuses to submit to any of the following: . . . . (2) A chemical test, or tests, of the individual's blood, breath, or urine at the direction of a law enforcement officer under section 39-20-01; . . . 2. An individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state who refuses to submit to a chemical test, or tests, required under section . . . 39-20-01 . . . is guilty of an offense under this section."); *see also* MINN. STAT. § 169A.20 (2009); KAN. STAT. ANN. § 8-1025 (2012) ("Refusing to submit to a test to determine the presence of alcohol or drugs; penalties**.** (a) Refusing to submit to a test to determine the presence of alcohol or drugs is refusing to submit to or complete a test or tests deemed consented to under subsection (a) of K.S.A. 8-1001 . . . (b)(1) Refusing to submit to a test to determine the presence of alcohol or drugs is: (A) On a first conviction a class A, nonperson misdemeanor. The person convicted shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than $1,250 nor more than $1,750. The person convicted shall serve at least five consecutive days' imprisonment before the person is granted probation, suspension or reduction of sentence or parole or is otherwise released. . . . (C) on a second conviction a nonperson felony if the person has a prior conviction which occurred within the preceding 10 years, not including any period of incarceration. The person convicted shall be sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than $1,750 nor more than $2,500. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days' imprisonment.").

15. *See generally* Tony Rizzo, *Kansas DUI law that makes test refusal a crime is ruled unconstitutional*, KANSAS CITY STAR (Feb. 26, 2016) http://www.kansascity.com/news/local/crime/article62645617.html [https://perma.cc/TFS9-J7QA] (quoting a DUI expert who found the refusal statute had "often been used "'as a hammer'" to induce people to plead guilty to DUI to avoid being charged with the additional crime of refusing a test"); Rob Low, *Kansas Makes Refusing Alcohol Test Illegal*, FOX 4 KC (May 30, 2012),

existed, because it was more difficult to prosecute drivers who refused to take the chemical test, even though they were allowed to introduce the refusal as evidence of guilt. However, in addition to making it easier to prosecute defendants who refuse, these more stringent statutes give prosecutors an opportunity to essentially double prosecute the crime of driving while under the influence by charging the defendant both for refusing the chemical test and for driving while under the influence.[16] For example, an officer can request that a suspect comply with a warrantless chemical test, and a refusal will automatically trigger *at least* a misdemeanor violation of the criminalization statute. Next, an officer can request—and almost certainly will receive—a warrant to execute a chemical drug test, which the suspect will likely fail.[17] In this case, the prosecutor can show at trial that the suspect failed to comply with a warrantless chemical test in violation of the aggressive implied consent law *and* subsequently failed chemical testing, which is strong evidence of driving while under the influence.[18] Even if the officer is unable to obtain a failed chemical test, a prosecutor can use refusal as evidence of guilt of the DUI charge.[19]

As he sat in the rear of the patrol car, Mr. Birchfield was read a version of the aggressive implied consent law.[20] He refused to consent

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http://fox4kc.com/2012/05/30/kansas-makes-refusing-blood-alcohol-test-illegal/ [https://perma.cc/NVT6-B5MJ] (quoting Johnson County District Attorney Steve Howe saying, "Criminalizing the refusal to take a breath or blood alcohol test will hold the professional drunks accountable for their actions while creating a safer environment for Kansans," and "it takes away the incentive not to follow the law, not to do the right thing and it helps keep our streets safe"); Michael Jamison, *Drunks weave around rules: Multiple offenders realize it pays not to take Breathalyzer test*, MISSOULIAN (Jan. 10, 2010) http://missoulian.com/news/local/drunks-weave-around-rules-multiple-offenders-realize-it-pays-not/article_6fb82b0a-fdb0-11de-b601-001cc4c002e0.html (quoting Jim Smith, on behalf of the Montana County Attorneys Association, supporting the criminalization of refusing saying, "It's the biggest loophole out there, and it's the No. 1 thing we can change if we want to get serious about drinking and driving," and "[t]he position is, the penalty for refusing the test ought to be the same as the penalty for a DUI offense"); *see also Ryce*, 303 Kan. at 958 ("the stated goals . . . were to 'assure highway safety by changing behavior by DUI offenders as early as possible [ ] and provide significant restrictions on personal liberty at some level of frequency and quantity of offenses' ") (reporting that the minutes from the legislative committee show that the reasons for adopting the criminalization statute are: "(1) to deter test refusals because refusals allow offenders to evade prosecution and punishment, which means no addiction evaluation occurs, no treatment can be ordered, and the offender is not deterred from reoffending; (2) to hold DUI offenders accountable; and (3) to reduce the resources currently expended in order to prosecute DUI cases where a defendant refused testing").

16. *See generally* Kansas v. Wilson, Case No. 13-CR-1900 (D. Shawnee 2014), http://issuu.com/tcj5/docs/skm_454e15092412500?e=15618686/30277281 [https://perma.cc/GMA6-L7YX].

17. *Id*. Importantly, the Court in McNeely acknowledged that in most cases time sensitivity is not an issue.

18. *Id*.

19. *Id.*

20. *Birchfield*, 858 N.W. 2d at 304.

to the testing anyway, and he was subsequently charged with a class B misdemeanor in violation of N.D.C.C. § 39-08-01.[21] The Supreme Court agreed to hear Mr. Birchfield's challenge that the charge for failure to consent was a violation of his Fourth Amendment rights.[22] However, the Court failed to address the Fifth Amendment issue analyzed in this Comment.

In this Comment, Part I will review the Supreme Court's ruling in *Birchfield*. While I think Sotomayor's partial dissent is correct, the remainder of this Comment will focus on the application of the Fifth Amendment to new, more aggressive implied consent laws. Part II will review the Fifth Amendment's application to prior iterations of DUI laws. Part III applies existing Fifth Amendment precedent to these aggressive implied consent statutes and explains why a straightforward application of this precedent counsels in favor of finding these statutes unconstitutional.

I. *BIRCHFIELD*: A REVIEW

Like the Supreme Court's previous decisions upholding the constitutionality of DUI laws, the Court began its decision in *Birchfield* by focusing on the death and property damage caused by drunk drivers.[23] Interestingly, the Court appears to undersell the penalties available to prosecutors in the states that do not criminalize refusal—mentioning only the ability to suspend or revoke a driver's license. The Court does not address the ability of prosecutors to seek an inference of guilt for refusal to take a breathalyzer.

Next, the Court reviewed the efficacy of breath test machines or breathalyzers. The opinion reported that the machines are "very reliable," because they must be approved by the National Highway Traffic Safety Administration and must produce accurate and reproducible test results.[24] The Court noted that the use of a breathalyzer requires the compliance of the person being tested, because "deep breath," or air obtained from the lower portion of the lungs, is required for an accurate reading.[25] Justice Alito, writing for the majority, downplayed the amount of time the process takes by noting that it only takes "a few minutes from start to finish."[26] However, this time estimate does not account for the necessity of multiple

21. *Id.*
22. *Id.*
23. Birchfield v. North Dakota, 136 S. Ct. 2160, 2168 (2016).
24. *Id.*
25. *Id.*
26. *Id.*

readings and the lengthy warm-up and calibration time required to get the machine operational.[27] Additionally, almost all breathalyzer examinations are completed at the police station, because the preliminary roadside breath test is inadmissible in court.[28]

Since previous DUI offenders face increased penalties for subsequent DUIs, these laws may actually incentivize prior offenders to refuse testing, because the penalty that they face for refusal is less harsh than the penalty they face for another DUI conviction.[29] These incentives, the Court reasoned, led to a refusal rate that averaged around twenty percent of drivers requested to submit to BAC testing.[30] Interestingly, the Court does not discuss the conviction rate of drivers who refuse. While the drivers may think it is in their best interests to refuse, we have no knowledge of the actual relative payoffs.

Ultimately, the Court determined that the question was whether criminal law may ordinarily "compel a motorist to submit to the taking of a blood sample or to a breath test" without a warrant authorizing such conduct.[31] If a warrant is not required, the Court reasoned, then a refusal should still be viewed in the same light as obstructing the execution of a valid search warrant.[32] This is because a refusal to comply would be obstruction of a valid investigation—an investigation that does not require a warrant. In this case, the issue would be whether the warrantless searches at issue were reasonable.[33] However, the Court does not grapple with the issue that a search has not actually occurred.

First, the Court found that while exigency could provide the basis of a warrantless search, it could not provide a *per se* basis for a warrantless search, because "the natural dissipation of alcohol from the bloodstream does not always constitute an exigency."[34]

Second, the Court looked at whether the warrantless search could be justified pursuant to the search-incident-to-arrest doctrine.[35] Mr. Birchfield and the defendants in the two other cases consolidated for Supreme Court review had each either been searched or told that

27. *Id.* at 2192 (Sotomayor, J., dissenting).

28. *Id.* Road side breath tests are administered in order to assist the officer in determining whether a legally admissible breath test needs to be administered. The breath tests that are administered back at the police station are substantially more accurate than those given at the road side, which is why they are admissible in court.

29. *Birchfield*, 136 S. Ct. at 2169.

30. *Id.*

31. *Id.* at 2172.

32. *Id.*

33. *Id.* at 2173.

34. *Id.* at 2174.

35. *Birchfield*, 136 S. Ct. at 2174.

they were required to submit to testing after being arrested for driving while under the influence.[36] The search incident to arrest doctrine allows an officer who carries out a lawful arrest to execute a warrantless search of an arrestee's person.[37] The underlying rationale for the doctrine is that it protects officer safety, by preventing an arrestee from obtaining a weapon, and prevents the destruction of evidence.[38] Here, it is doubtful that either of these motivations for the doctrine was implicated. Alcohol in the blood stream does not threaten the safety of an officer, nor is the evidence in any meaningful sense within the control of the arrestee's person.

Undoubtedly, it is for this reason that Justice Alito claims that "the permissibility of such searches . . . does not depend on whether a search of a particular arrestee is likely to protect officer safety or evidence."[39] The doctrine "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect."[40] This reasoning fails to grapple with the reality that, as a class, persons suspected of DUI present neither of the threats undergirding the rationale for the search-incident-to-arrest doctrine. Even when the Court acknowledges the lack of control of the arrestee, it merely summarily states that the natural dissipation of evidence is captured by the doctrine's fear of evidence destruction. But, this analysis seems to undermine *McNeely*'s ruling that exigency is not supported by natural dissipation.[41]

At their core, both the search incident to arrest and exigent circumstance exceptions are concerned with a potential loss of evidence. In DUI cases, the search is reaching inside the body of the arrestee to find evidence that can neither be consciously destroyed nor threaten the safety of an officer. The situation is distinguishable from even *Robinson*, where an individual determination about the permissibility of a search was found to require a review of each time an officer searched a person's body and found a package on them.[42] In *Robinson*, a police officer's search of a crumpled cigarette box on the suspect's persons was found compliant with the Fourth Amendment after the officer felt that it did not contain cigarettes.[43] Breathalyzers and blood

36. *Id.*
37. *Id.*
38. *Id.* at 2175.
39. *Id.* at 2176.
40. *Id.*
41. Missouri v. McNeely, 133 S. Ct. 1552, 1563 (2013).
42. United States v. Robinson, 414 U.S. 218 (1973).
43. *Id.*

drug tests present a much more uniform situation that lends itself more easily to a *per se* rule. Nonetheless, the Court held that the "mere 'fact of the lawful arrest' justifies 'a full search of the person.' "[44]

After determining that the search incident to arrest exception could be applied to drug tests, the Court was left to decide whether the exception's promotion of legitimate governmental interests outweighed the degree to which it intrudes upon an individual's privacy.[45] Here, the Court split its analysis between breath tests and blood tests.[46]

Reviewing breath tests, the Court, citing *Skinner*, found that the tests do not "implicat[e] significant privacy concerns."[47] Privacy concerns are minimal, because the physical intrusion "is almost negligible" and requires no piercing of the skin and little inconvenience.[48] The Court highlighted this fact by noting that the testing only requires an arrestee to blow on a straw-like mouthpiece for four to fifteen seconds.[49] Further, the Court found that individuals do not have "a possessory interest in or any emotional attachment to any of the air [deep aveolar or otherwise] in their lungs."[50] And, the air in the lungs would be exhaled regardless of any testing.[51] The Court also relied on its ruling in *Maryland v. King* that swabbing the inside of a person's cheek for a DNA sample was a "negligible" intrusion.[52] Additionally, breath tests, unlike DNA swabs, can only reveal the amount of alcohol in the person's system.[53] Finally, the Court stated that breath tests are not an experience that is likely to increase the embarrassment stemming from an arrest.[54]

Conversely, blood tests compromise privacy interests to a significantly greater extent.[55] Blood tests " 'require piercing the skin' and extracting a part of the subject's body."[56] While the process does not involve much pain or risk, it is significantly more intrusive than blowing into a straw for a short period of time.[57] Additionally, unlike

44. *Birchfield*, 136 S. Ct. at 2176.
45. *Id.*
46. *Id.*
47. *Id.*; *see also Maryland v. King*, 133 S. Ct. 1958, 1969 (2013).
48. *Birchfield*, 136 S. Ct. at 2176.
49. *Id.*
50. *Id.* at 2177.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Birchfield*, 136 S. Ct. at 2177.
55. *Id.* at 2178.
56. *Id.*
57. *Id.*

breath tests, information can be extracted from blood at a later date that goes beyond the presence or absence of alcohol.[58]

Again, Justice Alito returned to the perverse effects alcohol consumption has on traffic fatalities and injuries.[59] Thus, the government had a legitimate interest in passing refusal laws because the government has a "[p]aramount interest . . . in preserving the safety of . . . public highways."[60] While the Court acknowledged Justice Sotomayor's claim that as soon as a driver is arrested the driver's threat to safety is neutralized, it maintained that there remains a compelling interest in effectively deterring drunk driving.[61] The Court believed the admonitions of the government that license suspension alone is unlikely to dissuade recidivists and those well over the limit from refusing.[62]

The Court continued by expounding on the burden of issuing warrants in DUI cases. It noted that North Dakota has eighty-two judges spread across eight judicial districts and has nearly seven thousand drunk driving arrests each year.[63] Justice Alito explained that this is a heavy burden on judges to issue warrants at all hours.[64] However, as Justice Sotomayor adeptly noted, even if every one of these drivers refused a test, each judge would only have to issue less than two warrants a week.[65]

Finally, the Court found that requiring the issuance of a warrant would provide little protection, because the magistrate would be in a poor position to question the officer's statement of facts that lead the officer to arrest the driver.[66] Further, the magistrate would not in any meaningful sense be limiting the scope of the search, because he or she would always be simply authorizing a BAC test of the arrestee.[67]

Ultimately, the Court found, applying its balancing test, that blood tests could only be administered pursuant to a warrant but that breath tests were not entitled to any such protection.[68]

In her partial dissent, Justice Sotomayor reiterated the importance the Constitution has placed on requiring that the government obtain a warrant.[69] Thus, the question to her was "whether

58. *Id.*
59. *Id.*
60. *Birchfield*, 136 S. Ct. at 2177.
61. *Id.* at 2179.
62. *Id.*
63. *Id.* at 2180-2181.
64. *Id.*
65. *Id.* at 2187 (Sotomayor, J., dissenting).
66. *Birchfield*, 136 S. Ct. at 2189.
67. *Id.*
68. *Id.* at 2185–86.
69. *Id.* at 2187.

the burden of obtaining a warrant is likely to frustrate the 'governmental purpose behind the search.' "[70] That meant the question was whether the government's interest, like the ability to search cellphones in *Riley v. California*, is extended in a meaningful way through the application of the search-incident-to-arrest doctrine to BAC testing, whether through blood or breath.[71] Rather than a categorical exception, the state's interest "is adequately addressed by a case-by-case exception."[72] First, as soon as a driver is arrested he or she no longer presents a threat to the public.[73] Second, up to two hours often pass before police administer a reliable breathalyzer. Members of the Court itself have recognized these "substantial delays" can offer plenty of time for the police to obtain a warrant.[74] Additionally, this long lead-time significantly undermines the evidence destruction justification upon which Justice Alito haphazardly relies in his majority opinion. Justice Sotomayor reiterated that efficiency by itself is insufficient to justify a *per se* exception to the warrant requirement and that the State has other tools at its disposal, such as criminalizing refusal after a warrant has been issued.[75]

By narrowing its focus to only the Fourth Amendment question in *Birchfield*, the Court missed an opportunity to apply the Fifth Amendment right against self-incrimination. Therefore, the Fifth Amendment remains a sword that defendants can use to challenge the legality of aggressive implied consent laws.

II. SAYING NO TO THE NEEDLE OR STRAW: THE COURT'S APPLICATION OF THE FIFTH AMENDMENT IN CHEMICAL TESTING

The Court has had the opportunity to consider the application of the Fifth Amendment to DUI cases on two occasions: first, in *Schmerber v. California* and again in *Neville v. South Dakota*. In both of these cases, the Court rejected the defendant's Fifth Amendment arguments.

In *Schmerber v. California*, the Supreme Court outlined the necessary analysis for determining whether a state has violated a suspect's Fifth Amendment rights in the context of chemical testing.[76] In *Schmerber*, the prosecution charged Armando Schmerber with driving while under the influence of alcohol, and he was convicted based

70. *Id.*
71. *Id.* at 2190.
72. *Birchfield*, 136 S. Ct. at 2191.
73. *Id.*
74. *Id.*
75. *Id.* at 2192.
76. Schmerber v. California, 384 U.S. 757 (1996).

on a positive blood sample drawn, without consent or a warrant, at the behest of a police officer.[77] Schmerber challenged the admission of the blood sample at his trial as a violation of his Fifth Amendment right against self-incrimination.[78] Refusing to find a violation, the Court held that a defendant is protected "only from being compelled to testify against himself, or to otherwise provide the State with evidence of a testimonial or communicative nature."[79] Schmerber did not meet that requirement, because providing a blood sample did not qualify as testimony. While the Court did not sustain the Defendant's claim, the Court broadly defined "testimonial" or "communicative" acts to include acts like nods and headshakes.[80]

First, the Court found that a defendant's privilege against self-incrimination is implicated, but not necessarily violated, when a chemical test is administered without a warrant over a defendant's objection.[81] The Court recognized that failing to construe the privilege broadly subverts the adversarial system by allowing the state to collect evidence from a defendant outside of "its own independent labors."[82] Applying a narrower definition of privilege makes the defendant an active participant in the state's investigation against his or her will. By contrast, in a typical investigation, the police must collect evidence using their own faculties.

Next, the Court rejected an extension of *Miranda*, which would have protected Schmerber from a warrantless collection of his blood.[83] *Miranda*, broadly construed, could require the state to collect its evidence without the assistance of the defendant or at least require police to expressly provide the defendant with the option of not cooperating. However, the Court chose not to construe *Miranda* in this way.[84] Rather, it focused on whether the State's conduct violated the core of the Fifth Amendment right against self-incrimination.[85] To answer this question, the Court turned to the history of the scope of the privilege.[86] Here, the Court relied heavily on *Holt v. United States*,[87] in

77. *Id*. at 759.
78. *Id*. at 760.
79. *Id*. at 761.
80. *Id*. at 763 n.7 (rejecting Wigmore's narrow view of testimonial disclosures, which would only protect the defendant's right against admissions from his "own lips" and would otherwise take the place of other evidence).
81. *Id*. at 761.
82. *Schmerber*, 384 U.S. at 761.
83. *Id.* at 763.
84. *Id.*
85. *Id*.
86. *Id*. at 762.
87. Holt v. United States, 218 U.S. 245 (1910).

which the Court found that a defendant's privilege against self-incrimination was not violated when he was compelled to put on a blouse that was allegedly worn during the commission of the crime, because the prohibition on compelling testimony does not exclude the body as evidence. The Court reasoned that such an extension of privilege would prevent the jury from considering the defendant's personal appearance in determining guilt—a clearly ludicrous proposition.[88] Based on this holding, the Court in *Schmerber* concluded that the scope of Fifth Amendment protections is limited to situations when the state obtains evidence against a defendant "through 'the cruel, simple expedient of compelling it from his own mouth.' "[89] A defendant must be allowed to choose not to speak: "the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' "[90]

The Court also had to define whether the conduct in *Schmerber* constituted a communication, because the definition of communication determines the outer bounds of what the Fifth Amendment protects. The court held that compulsion that makes a suspect the source of "real or physical evidence" does not violate the Fifth Amendment's protection from self-incrimination.[91] Thus, chemical testing is neither testimonial nor "evidence relating to some communicative act or writing by the petitioner," because it is only providing physical evidence—blood[92]

Subsequently, in *South Dakota v. Neville*, the Court addressed whether admitting a defendant's refusal to submit to a blood-alcohol test into evidence or imposing strict administrative penalties for a refusal violated the defendant's right against self-incrimination.[93] The South Dakota statutory scheme at issue in the case, like all original implied consent laws, declared that a defendant's refusal to comply with a blood-alcohol test "may be admissible into evidence at the trial."[94] Additionally, it stated that refusal may carry regulatory penalties, including the loss of driving privileges, after a hearing.[95] Specifically, any individual who operates a motor vehicle on South Dakota roads is deemed to have consented to a chemical test to determine "the alcoholic content of their blood if [he or she is] arrested for driving while

88. *Id*. at 763.
89. *Id*.
90. *Id*.
91. *Id.*
92. *Id*.
93. 499 U.S. 533 (1983).
94. *Id*. at 556.
95. *Id*. at 560.

intoxicated."[96] South Dakota implemented its implied consent laws to regulate and deter driving under the influence.[97] Importantly, the Court found that South Dakota had adopted its implied consent law partly in an effort to avoid violent confrontations between the police and motorists.[98] In order to effectuate its goal, "the South Dakota statute does not authorize officers to administer a chemical test against a suspect's will, nor does it prevent a suspect from exercising his right to refuse."[99]

Mason Henry Neville, the defendant, alleged that the statute undermined his Fifth Amendment right against self-incrimination.[100] While the use of regulatory penalties was "unquestionably legitimate," according to the *Neville* Court, the constitutionality of using a defendant's refusal against him at trial was less certain.[101] The Court surveyed state court holdings and determined that most courts found there was no Fifth Amendment violation.[102] The Court paid particular attention to Justice Traynor's famous California opinion that concluded "refusal to submit [was] a physical act rather than [communicative] and for [that] reason [was] not protected by [Fifth Amendment] privilege."[103] Justice Traynor also found that evidence of refusal to take a chemical test was analogous to "other circumstantial evidence of consciousness of guilt, such as escape from custody and suppression of evidence."[104]

Although the Court agreed with Justice Traynor's holding, the Court refused to apply Justice Traynor's reasoning, which rested its distinction on the differences between "real or physical evidence, on the one hand and communications or testimony, on the other."[105] The Court found this distinction untenable in light of the varying responses a defendant may have to an officer's request—from complete silence to an outright verbal rejection of the request.[106]

Instead, the Court rested its holding on a finding that no "impermissible coercion" occurs when a defendant refuses to comply with a test.[107] Although the state allows a defendant to choose between

96. *Id*. at 559.
97. *Id*.
98. *Id*.
99. *Neville*, 499 U.S. at 599.
100. *Id*.
101. *Id*.
102. *Id*.
103. *Id*. (citing People v. Sudduth, 65 Cal. 2d. 543 (1966)).
104. *Id*. at 560–61 (citing People v. Ellis, 65 Cal. 2d. 529 (1966)).
105. *Neville*, 499 U.S. at 561.
106. *Id*.
107. *Id*.

complying with the test or not, that does not end the inquiry.[108] The Court instead relied on the "cruel trilemma" test. This test reasons as follows: telling a defendant at trial to testify does not, under an extreme view, compel the defendant to incriminate himself. He could submit to self-accusation or testify falsely (risking perjury) or decline to testify (risking contempt).[109] However, this would clearly be a Fifth Amendment violation. Therefore, any testimony "obtained when the proffered alternative was to submit to a test so *painful*, dangerous, or *severe* . . . that almost inevitably a person would prefer 'confession' " would violate a defendant's rights.[110] In *Neville*, the defendant's refusal to comply with the testing did not trigger as severe or painful a choice as that postulated by the cruel trilemma. A defendant's refusal did not automatically trigger guilt of a crime. In fact, the only automatic penalty, the loss of his or her driver's license, was only administrative in nature. Additionally, the administrative penalty was the loss of a privilege rather than a right. Thus, the Court found that a state could legitimately impose a negative inference for refusal to comply with the test.[111]

III. ANYTHING YOU DON'T SAY CAN AND WILL BE USED AGAINST YOU: VIOLATING THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION

Although the Court upheld criminalization of refusal statutes in the face of a Fourth Amendment challenge in Birchfield, application of the Fifth Amendment provides an alternative basis for striking down these statutes. Interestingly, the breadth of one lower court opinion demonstrates some indication of its strong discomfort with not requiring a warrant to use breathalyzers in the absence of consent.[112] Therefore, some state supreme courts may opt to read their state constitutions as providing a greater degree of Fourth Amendment

108. *Id*. at 562.

109. *Id*. at 563.

110. *Id*. (emphasis added).

111. *Neville*, 499 U.S. at 563.

112. In a sprawling eighty-six page opinion, the Kansas Supreme Court struck down the state criminalization statute as a violation of the suspect's due process rights. Although, the United States Supreme Court has cautioned against expanding substantive due process rights, the Kansas Supreme Court nonetheless elected to do so. It found, applying the test from *Washington v. Glucksberg*, 521 U.S. 702 (1997), that that the right to refuse testing is "deeply rooted" in our nation's history and is "implicit in the concept of ordered liberty." Having found that a fundamental liberty is at stake, the court applied strict scrutiny to strike down the law. *See generally* State v. Ryce, 303 Kan. 899 (2016). Interestingly, the Kansas court does not address *Obergefell v. Hodges'*, 135 S. Ct. 2584 (2015), effect on substantive due process. Additionally, the court's expansive opinion demonstrates the difficulty in applying the Fourth Amendment to criminalization statutes.

protection. However, ruling on Fifth Amendment grounds is an alternative available to state trial courts and would allow state courts to avoid any divergence in Fourth Amendment jurisprudence. Ultimately, if the Supreme Court ruled on Fifth Amendment grounds, traditional implied consent laws would remain intact. At the same time, aggressive implied consent laws aimed at criminalizing refusal would fall. In so doing, the Supreme Court would allow states to maintain longstanding implied consent rules while protecting the public's right against self incrimination.

After *Neville*, a state may create various regulatory penalties, such as suspending the defendant's license or imposing a negative inference about a defendant's culpability, without violating an individual's Fifth Amendment right against self-incrimination.[113] However, states have gone beyond the broad tools allowed by *McNeely* and implemented implied consent laws that make it a criminal offense *by itself* to refuse to comply with a warrantless breathalyzer test.[114] The Supreme Court has provided that "no person shall be compelled; in any criminal case; to be a witness; against himself."[115] Thus, when Mr. Birchfield, sitting in the rear of the patrol car, refused to comply with a warrantless breathalyzer test, his Fifth Amendment right against self-incrimination was violated, because (1) Mr. Birchfield was compelled to testify against himself; (2) his response to the implied consent warning was incriminating; (3) the penalties stemming from this response were punitive in nature; and (4) his response was testimonial. Each of these four factors must be present to find that a right against self-incrimination is violated. Below, I discuss in detail why each is present in Mr. Birchfield's case. Then, I briefly explain why the unconstitutional conditions doctrine prevents state governments from conditioning the issuance of driver's licenses on an agreement to abide by aggressive consent laws. Finally, I briefly address some practical concerns.

A. Compulsion

Whether Mr. Birchfield was compelled to testify against himself depends on whether his statement, verbalizing his refusal to take the test, was made knowingly and voluntarily.[116] The Court could determine that Mr. Birchfield's testimony was compelled in response to

113. *Neville*, 459 U.S. at 553.

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

115. CHARLES WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 321 (6th ed. 2015).

116. Garner v. United States, 424 U.S. 648 (1976).

a "custodial interrogation" or under a less exacting standard that looks at the totality of the circumstances.[117]

A custodial interrogation occurs when a person is subject to questioning by a law enforcement officer and is "deprived of his freedom of action in any significant way."[118] The Supreme Court has further explained that an individual is deprived of his freedom if "a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave."[119] Under the implied consent law read to Mr. Birchfield, he was required to either submit to the warrantless breathalyzer test or be found guilty of either a misdemeanor or felony; it is more than reasonable that he would have felt he was not at liberty to leave. Further, in *Kansas v. Wilson*, a Kansas district court reasoned that unlike a normal traffic stop, a suspect's answer in response to a request to submit to a warrantless search implicated criminal liability, thus shifting the interrogation from noncustodial to custodial.[120] In the cases previously considered by the Supreme Court, *Schmerber* and *Neville*, the defendants' answers to the police officer's question did not automatically give rise to criminal liability.[121] For example, in *Neville* answering no to the police officer only led to an inference to guilt.[122] Thus, the distinction between a stop in a state with an aggressive implied consent laws and one with a traditional implied consent law becomes clear if one considers what would have occurred differently in Mr. Birchfield's case had he been pulled over for a normal traffic stop. The officer, seeing Mr. Birchfield's bloodshot eyes, may have asked if

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117. United States v. Washington, 431 U.S. 181 (1977).

118. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

119. Thompson v. Keohane, 516 U.S. 99, 112 (1995); *see also* Yarborough v. Alvarado, 541 U.S. 652 (2004) (clarifying that the test is not subjective and thus does not take into account individuating factors).

120. Kansas v. Wilson, Case No. 13-CR-1900 (D. Shawnee 2014), http://issuu.com/tcj5/docs/skm_454e15092412500?e=15618686/30277281 [https://perma.cc/GMA6-L7YX] (holding that responding to the questioning becomes communicative evidence rather than "real evidence"); *see also* Kansas v. Gray, Case No. 2014TR 5423 (D. Shawnee 2015), http://issuu.com/tcj5/docs/skm_454e15092412490?e=15618686/30277258 [http://perma.cc/KV2W-W55Q] (adopting the reasoning of Wilson). This analysis comports with *Berkemer v. McCarty* where the Court determined that *Miranda* rights extend to custodial interrogations involving minor traffic offenses. While a suspect is often not considered to be in custody during a typical traffic stop, this is not true of DUI stops where criminalization statutes have been enacted. Here, it is unlikely that the driver will be released after a short investigation, and the penalties make the situation significantly more coercive than a normal traffic stop. *See generally* Berkemer v. McCarty, 468 U.S. 420 (1984). *Compare* Schmerber v. California, 384 U.S. 757, 757 (1996) (holding that privilege only does not extend to chemical tests because that is "real or physical evidence"). *But see State v. Smith*, 2014 ND 152 (2014) (finding that there was no coercion because under the totality of the circumstances the suspect was not coerced and that the question of coercion begins before the suspect is taken into custody).

121. *Schmerber*, 384 U.S. at 757; South Dakota v. Neville, 459 U.S. 533, 533 (1983).

122. *Neville*, 459 U.S. at 553.

Mr. Birchfield had any drugs in the car. Even if Mr. Birchfield answered affirmatively, his "yes" to the officer's question would not by itself constitute a crime. In the case of the criminal defendant with drugs, the state would be required to prove that the defendant possessed drugs and his admission would be evidence that those drugs are his or her drugs. This is distinguishable from the defendant who refuses a chemical test in an aggressive implied consent state where the state must only prove that the defendant said "no" to a chemical test. The answer of "no" alone causes the offense. This focus on criminally punishing a suspect's refusal to comply with a warrantless test distinguishes these criminalization statutes from the statutes contemplated by *Schmerber* and *Neville*.[123] In *Neville* and *Schmerber*, the Court properly focuses on whether a state can compel chemical, non-testimonial evidence, not whether a state can directly punish a testimonial response to an officer's question.[124]

A custodial interrogation, which is "inherently coercive" in nature, requires that a suspect be given special protections.[125] Most importantly in this context, the defendant must be notified of his right to remain silent and any waiver of that right must be made "voluntarily and intelligently."[126] In fact, Mr. Birchfield was read his *Miranda* rights.[127] However, the goal of the State's implied consent statute is anathema to *Miranda* rights. In fact, the implied consent warning read to Mr. Birchfield expressly contemplated silence and warned him that such silence is presumed to be noncompliance with the officer's directives. Thus, had Mr. Birchfield exercised his *Miranda* right to silence, he would have been in violation of the statute. A statute making silence alone a crime cannot exist within the sphere of custodial interrogations.

However, even if the Supreme Court rejects the Kansas district court's analysis and finds these roadside stops noncustodial under the criminalization statute, Mr. Birchfield's testimony remains impermissibly compelled, because the defendant is given no real option but to acquiesce to the search. Although a defendant may choose between two options, if that choice is only theoretical, a defendant's testimony may still be compelled.[128] In determining whether a state has acted impermissibly, the Court often applies the "cruel trilemma" test—

123. *Schmerber*, 384 U.S. at 757; *Neville*, 459 U.S. at 553.

124. *Schmerber*, 384 U.S. at 757; *Neville*, 459 U.S. at 553.

125. Miranda v. Arizona, 384 U.S. 436, 444 (1966); *see also* WHITEBREAD & SLOBOGIN, *supra* note 115.

126. *Miranda*, 384 U.S. at 436.

127. Birchfield v. North Dakota, 136 S. Ct. 2160, 2170 (2016).

128. *Schmerber*, 384 U.S. at 757.

is the suspect forced to choose between self-accusation, testifying falsely (risking perjury), or declining to testify (risking contempt).[129] Mr. Birchfield's choice, involving only two of the three options, implicates the same concerns as the classic trilemma. Mr. Birchfield must decide between submitting to a warrantless chemical test and suffering automatic criminal penalties for refusal.[130] That is no choice at all. Further, *Schmerber*'s holding that the "means of obtaining testimony cannot be so *painful* [. . .] or severe that person would 'almost inevitably' prefer 'confession' " strengthens the conclusion that Mr. Birchfield's options were impermissible.[131]

Mr. Birchfield's choice may even be worse than the choice presented by the cruel trilemma, because he is presented with one choice that can lead to, in effect, double liability. If Mr. Birchfield agrees to take a warrantless breathalyzer test, he can at most be charged with driving while under the influence. However, if Mr. Birchfield decides to refuse the warrantless breathalyzer test, he can be charged both for his refusal *and* for the underlying DUI charge. This is distinguishable from the situation in traditional implied consent states where the implied consent violation only assists in convicting the driver of DUI. Additionally, the officer has a disincentive to seek out a warrant prior to asking for consent, because the officer can hope for a refusal as a means of getting an additional charge. In addition, the stacking effect in most states for a violation of both the underlying offense and the refusal can lead to significantly harsher penalties.[132] For example, a misdemeanor DUI can be turned into a felony if there are two convictions stemming from the DUI—one for refusal and the other for the DUI itself.

The state may also argue that a defendant's refusal is an illegitimate interference with an investigation. However, this argument proves too much, because it is difficult to imagine how this logic does not justify forcing a defendant to reveal how many drinks they have had. Also, unlike other search contexts where a defendant may refuse, this statute provides an incentive for the officer to essentially double prosecute the same underlying conduct. This is doubly so here where the criminalization of refusal is meant to make refusal an equal offense to that of a DUI itself.[133]

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129. *Schmerber*, 384 U.S. at 757; *see also* Brogan v. United States, 522 U.S. 398 (1998).

130. Refusal is established either by the defendant actively refusing or construed through the defendant's silence.

131. *Schmerber*, 384 U.S. at 757 (emphasis added).

132. For example, a misdemeanor can be converted into a felony.

133. This is unlike prosecutions for obstruction of justice, which are separate and apart from any potential underlying offense.

Brogan v. United States counsels in favor of finding that criminalization statutes are coercive.[134] In *Brogan*, the Court considered 18 U.S.C. § 1001, which penalizes a false statement to federal investigators by an up to a ten thousand dollar fine and five years in prison.[135] Justice Scalia, writing for the majority, found that there was no need for an "exculpatory no" carve-out, because he found it implausible that suspects would not realize that they could remain silent.[136] Thus, when confronted with questioning by a federal investigator, an individual would face no trilemma, because he or she can feasibly remain silent.[137] However, unlike the defendant in *Brogan*, a rational defendant in Mr. Birchfield's shoes would never refuse to comply with a warrantless chemical test request, because unlike Brogan, Mr. Birchfield's silence will be construed as refusal.[138]

B. Incrimination

In order to trigger a violation of a defendant's right against self-incrimination, the information must be used in a "criminal proceeding."[139] In *Chavez v. Martinez*, the Court held that the suspect's Fifth Amendment rights were not violated when the suspect made incriminating statements to a police officer after he requested that he not be questioned until after he received medical treatment and the officer denied his request.[140] Although the statements were incriminating, they were never used against the defendant in criminal proceedings.[141] Despite this narrow interpretation of the Fifth Amendment, the right is equally applicable to a suspect who "*refuses* to answer questions when the answers may be used in a criminal proceeding."[142] Thus, Fifth Amendment protections would extend to Mr. Birchfield had he decided to remain silent in the back of the patrol car, as long as that silence was later introduced against him. This is distinguishable from prior cases that allow pre-*Miranda* silence to be used in proving guilt. This is exemplified by the finding in *Neville* that silence can be construed as a refusal to consent to a breathalyzer

134. *Brogan*, 522 U.S. at 398.

135. *Id*.

136. *Id*. The "exculpatory no" carve-out was created by lower courts and provided that an individual could not be charged with violating the statute if they falsely answered no to a federal investigators questions.

137. *Id*.

138. See *infra* Part III-F (text discussing potential for double liability).

139. WHITEBREAD & SLOBOGIN, *supra* note 115, at 334.

140. 459 U.S. 553 (1983).

141. *Id*.

142. *See* WHITEBREAD & SLOBOGIN, *supra* note 115 (emphasis added).

examination and then that refusal can be used as an inference of guilt during a DUI trial.[143] Here, the person's silence by itself is guilt of a crime. Importantly, *Lefkowitz v. Turley* made it clear that a defendant has the right to refuse to answer questions, "formal or informal, where the answers might incriminate him in future criminal proceedings."[144]

Whether a suspect agrees, or responds at all, to an officer's request to take a chemical test will have implications for whether the statement is considered incriminating. If a suspect agrees to a chemical test, it is unlikely that that response will be found incriminating: his or her answer is neither dispositive nor helpful in establishing a criminal act—it simply allows the suspect to be tested by the officer. On the other hand, if the suspect refuses the test, or remains silent in face of the officer's request, that act is dispositive of the criminal offense of refusal.[145] This is probably the strongest and simplest example of an incriminating "admission." Importantly, this admission occurs regardless of whether the defendant remains silent or actively refuses the test, because the statute provides that silence will be construed as refusal. In essence, silence provides the same proof of a violation as saying no to the officer's request.

However, a finding that the statute is constitutional as applied to defendants who consent to a search, because their testimony is not incriminating, is untenable.[146] First, if a stop that leads to a suspicion of drinking and driving is deemed a custodial stop, a police officer will be required to read a defendant his *Miranda* rights, thereby undermining the part of the statute that informs the defendant that his silence will be construed as a refusal, which in turn is a crime. The

143. South Dakota v. Neville, 459 U.S. 533, 533 (1983).

144. 414 U.S. 70 (1973)).

145. Kansas v. Wilson, Case No. 13-CR-1900 (D. Shawnee 2014), http://issuu.com/tcj5/docs/skm_454e15092412500?e=15618686/30277281 [https://perma.cc/GMA6-L7YX].

146. After *United States v. Salerno*, facial challenges to legislative acts are extremely difficult and a challenger must show that "no set of circumstances exists under which the Act would be valid." *See* United States v. Salerno, 481 U.S. 739, 745 (1987). However, *Los Angeles v. Patel* held, at least in the Fourth Amendment context, "that the scope of circumstances we examine is determined and limited by application of the statute—we do not consider the entire universe of possible scenarios, we must instead look to the circumstances actually affected by the challenged statute." *See* State v. Ryce, 303 Kan. 899, 913 (2016) (citing Los Angeles v. Patel, 135 S. Ct. 2443 (2015)). Although refusal to cooperate, shown through a verbal refusal, could constitute an alternative criminal violation (such as interfering with an investigation), that is not sufficient to sustain the statute. Finally, *Planned Parenthood of Southeast Pennsylvania v. Casey* indicates that the "proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *See* Planned Parenthood of Southeast Pennsylvania v. Casey, 505 U.S. 833, 894 (1992). This indicates that the Court should strike down the law as facially unconstitutional despite the fact the statute may be unconstitutional only as applied to those who say no.

statute must give way to *Miranda's* dictates. Second, even if these stops are ruled to be noncustodial, if the statute is ruled unconstitutional as applied to those who remain silent or verbally refuse to submit to a test, a defendant who refuses would be placed in a better position than a suspect that consents. A defendant who refused a search could not be prosecuted as having violated the statute, because it is unconstitutional as applied to him or her. Additionally, this defendant might avoid chemical testing. Thus, if the statute is unconstitutional as applied to those individuals, then no reading of the statute could retain the criminalization scheme's broad purpose.

C. Punitive Penalties

In order to find a Fifth Amendment violation, the Court also needs to determine whether the proceeding in question is criminal in nature. To answer this question, courts have used a purpose-based test—determining whether a faced sanction is "punitive."[147] Thus, the Court must analyze not whether a defendant loses his or her liberty, but whether the purpose of the proceeding is to punish.[148] In classifying a statute as punitive, the Court often looks at the focus of the statute.[149] Such focus-based analysis led the Court in *Allen v. Illinois* to determine that the civil commitment of sexually violent predators was not punitive, because the State's goals were related to rehabilitation rather than to deterrence or retribution.[150] The Court determined that the State's goal was permissible by analyzing the legislative history of the statute.[151] Applying the same analysis to criminalization statutes reveals their punitive aims. Laudatory statements made by prosecutors about their newfound ability to punish refusal as harshly as a DUI compels this conclusion.[152]

Therefore, a suspect who refuses to comply with an officer's warrantless chemical test has provided incriminating evidence that will be used against him or her in a criminal proceeding.[153]

147. See WHITEBREAD & SLOBOGIN, *supra* note 115, at 334.

148. *Id.*

149. Allen v. Illinois, 478 U.S. 364 (1986).

150. *Id.*

151. *Id.*

152. *See* DONIGAN, *supra* note 8 (discussing reactions to the implementation or proposed implementation of criminalization statutes).

153. Kansas v. Wilson, Case No. 13-CR-1900 (D. Shawnee 2014), http://issuu.com/tcj5/docs/skm_454e15092412500?e=15618686/30277281 [https://perma.cc/GMA6-L7YX].

D. Testimonial Evidence

Finally, the Fifth Amendment's right against self-incrimination extends its protections only to testimonial evidence.[154] The Court has provided wide latitude to states in compelling non-testimonial evidence, such as: a voice example, a handwriting sample, and forcing a defendant to wear a blouse.[155] In *Schmerber*, the Court found dispositive the fact that the defendant did not have to participate, except to the extent that he consented to taking of his blood as evidence.[156] In *Pennsylvania v. Muniz*, the State brought forth evidence that the Defendant provided "slurred and unresponsive answers to a series of booking questions about [the defendant's] height, weight and so on" in order to secure a conviction for driving while under the influence of alcohol.[157] The Court held that the "physical inability to articulate words in a clear manner" was non-testimonial in nature.[158] However, the Court found that *Miranda* protected the defendant's response to the question of when his sixth birthday occurred, since it was testimonial in nature.[159] Writing for the majority, Justice Brennan concluded that the police's questioning of the defendant created a "cruel trilemma" of choosing between "truth, falsity, or silence."[160]

State criminalization statutes transform a defendant's words from non-testimonial to testimonial in nature. When Mr. Birchfield refused to take a breathalyzer test, he verbally admitted that he was guilty of refusal, a criminal offense.[161] Unlike the defendant in *Schmerber*, Mr. Birchfield's words are testimonial—he has become an active participant in providing evidence. Mr. Birchfield's verbal response by itself proves his unlawfulness. Thus, Mr. Birchfield's refusal is testimonial even under the more strenuous *Wigmore* standard that requires a defendant's response be vocalized and in direct response to a crime.[162]

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154. *See* WHITEBREAD & SLOBOGIN, *supra* note 115.

155. *Id.*

156. *Id.*

157. *See id.* (citing Pennsylvania v. Muniz, 496 U.S. 582 (1990)).

158. *Id.*

159. *Id.*

160. WHITEBREAD & SLOBOGIN, *supra* note 115.

161. Kansas v. Wilson, Case No. 13-CR-1900 (D. Shawnee 2014), http://issuu.com/tcj5/docs/skm_454e15092412500?e=15618686/30277281 [https://perma.cc/GMA6-L7YX].

162. Because the implied consent law statutorily reconstructs silence into a no, it is arguable that silence may satisfy the more rigorous *Wigmore* standard. However, *Schmerber* has extended testimony far beyond the narrow *Wigmore* standard. JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE (3d ed. 1940).

E. Unconstitutional Conditions Doctrine

The unconstitutional conditions doctrine prevents the government from granting a driver's license on the condition that the grantee surrenders his or her Fifth Amendment right against self-incrimination.[163] Justice Alito hinted at this in *Birchfield* when the Court refused to impute a waiver to warrantless searches—rights cannot be subject to such a broad waiver.[164] Importantly, these conditions may not be imposed even if the government could withhold the benefit from the beneficiary altogether, as is undoubtedly true in the context of driving.[165] Courts analyzing the issue often hinge their analysis on four factors: "the nature of the right affected, the degree of infringement of the right, the nature of the benefit offered, and the strength and nature of the state's interest in conditioning the benefit."[166]

In *State v. Okken*, the Arizona Court of Appeals determined that the State's criminalization statute did not violate the unconstitutional conditions doctrine.[167] In reaching that determination, the court concluded that there was a strong state interest in regulating intoxicated drivers, and that there was a close "nexus between that interest and the administrative penalties prescribed by [the criminalization statute]."[168] Further, the court reasoned that the penalties were narrowly tailored to prevent intoxicated drivers from avoiding liability.[169]

The *Okken* court's opinion is contrary to precedent. First, it is doubtful that the penalties are in fact administrative.[170] Applying the purpose-based test from *Allen*, the penalties seem punitive in nature—

163. Amelkin v. McClure, 330 F.3d 822, 827–828 (6th Cir. 2003) (quoting Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989)); *see also* Koontz v. St. Johns River Water Management District, 133 S. Ct. 2586 (2013) (finding that the unconstitutional conditions doctrine protects constitutional right by preventing the government from coercing people into giving them up); State v. Quinn, 178 P.3d 1190 (Ariz. App. 2008) (citing Frost v. Railroad Commission of California, 271 U.S. 583 (1926)) ("[W]ithin the limits of the Constitution, the State cannot condition [the defendant]'s driving privilege on the surrender of her constitutional right not to have evidence admitted against her in a criminal prosecution that was taken from her without a consent and in the absence of probable cause.").

164. Birchfield v. North Dakota, 136 S. Ct. 2160, 2186 (2016).

165. Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

166. State v. Okken, 346 P.3d 485, 492 (Ariz. App. 2015) (citing Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144, 151 (1968)).

167. *Id.*

168. *Id*. (citing the damage done by drunk driving).

169. *Id*.

170. *See supra* note 15 (providing prosecutors' discussion that the penalties for refusal are necessary to *punish* refusal as harshly as a DUI itself). It is doubtful that anyone would recognize DUI punishments themselves as merely regulatory in nature.

they were passed to *punish* a suspect who refuses to submit to a chemical test equally as harshly as a suspect who fails that chemical test.[171] Second, this is a fundamental violation of the Fifth Amendment. As announced in *Schmerber* and *Neville*, a state may not infringe on a suspect's right against self-incrimination.[172] The right against self-incrimination is so sacrosanct that the Court refuses to apply even a reasonableness test to its application. Finally, it is clear after *McNeely* that the State cannot condition the benefit of driving on the acquiescence of all right of refusal—to do so would be to read *McNeely* off the books.[173]

F. Practical Concerns

In previous cases, the Court has provided states with a wide degree of discretion when combating driving while under the influence. However, several states have exceeded this latitude by placing severe constraints on the ability of a driver to exercise his or her Fifth Amendment right against self-incrimination. Unlike automatic remedial measures such as suspension of a driver's license, these statutes have teeth—violation of the statute alone can label a defendant a felon for life.

Undoubtedly, a conviction is easier when the suspect agrees to a warrantless test; however, this is not sufficient to reject well-established constitutional principles.[174] The Court in *McNeely* expressly acknowledged the importance of protecting constitutional rights when it held that the important state interest in road safety could not, by itself, overcome the warrant requirement.[175] As with the exercise of all constitutional rights, a suspect is generally placed in a better position when he or she exercises those rights than when he or she does not. Much to the chagrin of prosecutors, this is not a reason to reject an application of the Constitution. To hold the Fifth Amendment applicable in the context of criminalization statutes does not require an

171. A defendant refusal could also lead to a felony charge, which has the tendency to gravely besmirch. Whether a conviction has the tendency to gravely besmirch has been used by the Court to indicate that a penalty is not regulatory in nature.

172. Schmerber v. California, 384 U.S. 757, 757 (1996); South Dakota v. Neville, 459 U.S. 533, 533 (1983).

173. Petition for a Writ of Certiorari, Birchfield v. North Dakota, 136 S. Ct. 2160, 2186 (2016) No. 14-1468.

174. Martin v. Kansas Department of Revenue, 285 Kan. 625, 647–48 (Rosen, J., dissenting) ("I am extremely mindful of the paramount public objective of removing intoxicated drivers from our public roads and highways; however, achievement of this goal should not be at the expense of protections guaranteed by our Constitution.").

175. Missouri v. McNeely, 133 S. Ct. 1552, 1566 (2013) (finding that states had been remarkably effective deploying the tools they had to decrease drunk-driving).

extension of *Miranda*'s complex values, but rather a direct application of the Fifth Amendment's core text.

Furthermore, the development and use of criminalization statutes conflicts with the approved aims of the burden-shifting presumptions in *Neville*. In *Neville*, the Court emphasized that the value of civil penalties is that they allow officers to enforce the State's legitimate anti-intoxicated driving prerogative without forcing a blood draw.[176] The purpose, the Court reasoned, was in large part to ensure officer safety.[177] However, the new criminalization statutes incentivize officers to perform blood tests on individuals who refuse a breathalyzer test. In the case of refusal, an officer has no reason not to seek a warrant and test the arrestee, because a test will increase the likelihood of obtaining two convictions. Thus, stricter penalties and the opportunity to double charge disconcertingly incentivize officers to always test.

CONCLUSION

Aggressive implied consent statutes are perhaps the most egregious codified violations of Fifth Amendment protections against self-incrimination of recent memory. Importantly, striking these laws down on Fifth Amendment grounds leaves the framework of *Neville* and *Schmerber* undisturbed.

Aggressive implied consent statutes are distinguishable from the statutes at issue in *Schmerber* and *Neville*, because refusal to consent is in and of itself testimonial to the suspect's violation of the criminalization statute. Unlike the blood evidence in *Schmerber* or the choice to consent in *Neville*, the criminalization statute exists separately from (albeit in the universe of) driving while under the influence penalization. Criminalization statutes are violations of the Fifth Amendment if the suspect refuses to consent. However, the statute cannot possibly retain its purpose and simultaneously distinguish between affirmative and negative responses to pass constitutional muster. Refusal statutes therefore violate the Fifth Amendment.

Without undermining the legitimate state interest in enforcing DUI laws, this Comment has addressed Fifth Amendment concerns that are paramount in analyzing refusal statutes. It does not deny the importance or constitutionality of other deterrent penalties of refusing a breathalyzer test, such as losing a license or a negative inference against the suspect at trial but highlights the unique nature of

176. *Neville*, 459 U.S. at 553.
177. *Id.*

criminalization statutes and the Catch-22 they create for suspects. Ultimately, this Comment highlights that one of the biggest shortcomings of the Supreme Court's decision in *Birchfield* was the grounds for the decision. In future cases, lower courts and the Supreme Court should strike down criminalization statutes under the Fifth Amendment.

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