BLOODIED: HOW SO-CALLED EXIGENCIES CONTINUE TO ERODE THE FOURTH AMENDMENT

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INTRODUCTION

Since its ratification in 1791, the Fourth Amendment has shielded Americans' persons, homes, and effects from unreasonable intrusions by the State absent a judicially authorized warrant.[1] The Supreme Court has held, and reaffirmed many times, that exceptions to the warrant requirement are "jealously and carefully drawn."[2] Yet, over time, these exceptions have grown in both number and breadth—eroding the rights that the Amendment guarantees to citizens in favor of aggrandizing the power of law enforcement officers. In *Mitchell v. Wisconsin*, a fractured Supreme Court struck "another needless blow"[3] to these protections enshrined in the Constitution.

In *Mitchell*, the State stipulated that the exigent circumstances exception did not apply.[4] Despite this, the plurality relied on it to categorically uphold the withdrawal of blood from an unconscious driver suspected of driving while intoxicated (DWI) as reasonable in almost all cases.[5] Both Petitioner and Respondent briefed and argued only the issues of (a) whether implied consent to a search could exist by operation of law, (b) the general reasonableness of conditions on driving, and (c) search incident to arrest.[6] Both parties agreed that no exigency existed in the facts of this case.[7] Thus, the plurality, relying solely on "self-direction"[8] and "its own freewheeling instincts,"[9] upheld the validity of an invasion of a

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[1] *See* U.S. CONST. amend. IV.

[2] Jones v. United States, 357 U.S. 493, 499 (1958); *see, e.g.*, Georgia v. Randolph, 547 U.S. 103, 109 (2006); Arkansas v. Sanders, 442 U.S. 753, 759 (1979), abrogated on other grounds by California v. Acevedo, 500 U.S. 565 (1991); Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971).

[3] Mitchell v. Wisconsin, 139 S. Ct. 2525, 2551 (2019) (Sotomayor, J., dissenting).

[4] Transcript of Oral Argument at 39, Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019) (No. 18-6210).

[5] *Mitchell*, 139 S. Ct. at 2539.

[6] *See* Brief in Opposition at 7, Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019) (No. 18-6210), 2018 WL 7568874; Reply Brief for the Petitioner at 9, Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019) (No. 18-6210), 2018 WL 7568873.

[7] *Id*.

[8] "[T]he application of the exigent circumstances doctrine in this area poses complex and difficult questions that neither the parties nor the courts below discussed. Rather than proceeding solely by self -direction, I would have dismissed this case as improvidently granted . . . ." *Mitchell*, 139 S. Ct. at 2551 (2019) (Gorsuch, J., dissenting).

[9] "Acting entirely on its own freewheeling instincts—with no briefing or decision below on the question—the plurality permits officers to order a blood draw of an unconscious

person's bodily integrity without any argument from the parties or the lower courts.[10]

"What must police do before ordering a blood draw of a person suspected of drunk driving who has become unconscious? Under the Fourth Amendment, the answer is clear: If there is time, get a warrant."[11] Here, there was time; therefore, the Constitution mandates that the officer should have sought a warrant. Through its reasoning and holding in *Mitchell*, the plurality wrongly departed from the Court's precedent to manufacture an exigency out of thin air. The plurality ignored the question presented by the lower court's ruling, doing a disservice both to the spirit and letter of the Fourth Amendment, and to state courts looking for clarity on the validity of implied consent statutes.

In light of this injurious and misguided decision, this piece first surveys the history of the exigent circumstances exception to the Fourth Amendment. It then discusses the progression of the Supreme Court's application of the exception to cases involving drunk driving and blood draws, including *Mitchell v. Wisconsin*. Finally, it addresses the starkness of the *Mitchell* plurality's disregard of precedent regarding both blood draws and the exigency doctrine, as well as its likely consequences.

I. HISTORY

A. *The Exigent Circumstances Exception*

In *McDonald v. United States*, the Supreme Court held that without the constitutionally mandated prior approval of a neutral magistrate, a search could be permitted only in "compelling" and "exceptional" circumstances in which "exigencies . . . made that course imperative."[12] In *McDonald*, after being denied a warrant, officers, while surveilling the apartment of an individual suspected of running a lottery, allegedly heard a counting machine whir and searched an apartment building for evidence of the crime.[13] The Supreme Court reversed the defendant's conviction and suppressed the evidence as unlawfully seized because no exigency existed to justify bypassing the warrant requirement.[14]

The Court utilized the same exigency standard to uphold a search in *Warden v. Hayden*. In *Hayden*, the Court held that neither the entry into a home, nor the search for an armed robbery suspect who had run into the home five minutes prior, was unreasonable under the Fourth Amendment.[15] There was no time for the law enforcement officers to

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person in all but the rarest cases, even when there is ample time to obtain a warrant." *Id.* at 2551 (Sotomayor, J., dissenting).

[10] *See id.*

[11] *Id.* at 2541 (2019) (Sotomayor, J., dissenting).

[12] McDonald v. United States, 335 U.S. 451, 456 (1948).

[13] *Id.* at 452–53.

[14] *Id.* at 456.

[15] *See* Warden v. Hayden, 387 U.S. 294, 298 (1967).

obtain a warrant, and the suspect was armed and dangerous.[16] Thus, exigencies that did not exist in *McDonald* were present in *Hayden*.

Years later, in *Minnesota v. Olson*, the Court adopted the following factors to be considered when assessing the applicability of the exigent circumstances exception: (1) "hot pursuit of a fleeing felon," (2) "imminent destruction of evidence," (3) "the need to prevent a suspect's escape," and (4) "the risk of danger to the police or to other persons."[17] Absent hot pursuit, the officers must have "at least probable cause to believe that one or more of the other factors justifying the entry were present" and should consider (5) "the gravity of the crime" and (6) "likelihood that the suspect is armed."[18]

B. *The Blood-Alcohol-Content (BAC) Cases*

In 1966, the Supreme Court first addressed the application of the exigent circumstances exception in cases of blood draws. In *Schmerber v. California*, a law enforcement officer directed a physician to draw blood from a conscious driver who had crashed his car into a tree and was being treated for his injuries.[19] The Court upheld the blood draw as a reasonable search under the exigency exception due to "the [special] facts of the present record."[20] The Court considered three factors to determine whether the blood draw was reasonable under the Fourth Amendment.[21] First, the Court looked at the length of time that elapsed between the crash and the arrest because the driver's rapidly decreasing BAC would have resulted in the destruction of evidence of DWI.[22] Second, the Court decided that the test chosen to determine Mr. Schmerber's BAC was reasonable because it involved no risk, trauma, or pain.[23] Lastly, the Court held that manner by which the blood was drawn was also reasonable, because it was in a hospital setting in accord with prevailing medical practices.[24]

The Court again confronted the exigent circumstances exception in the drunk driving context in *Welsh v. Wisconsin*.[25] In *Welsh*, the Wisconsin Supreme Court affirmed the conviction of a man based on a search pursuant to exigent circumstances.[26] The man was breathalyzed and arrested for drunk driving after he had parked the car, entered his

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[16] *Id.* at 299–300.
[17] Minnesota v. Olson, 495 U.S. 91, 100 (1990).
[18] *Id.*
[19] Schmerber v. California, 384 U.S. 757, 759 (1966).
[20] *Id.* at 772.
[21] *See id.* at 769–72.
[22] *Id.* at 770–71.
[23] *Id.* at 771.
[24] *Id.* at 771–72.
[25] *See* Welsh v. Wisconsin, 466 U.S. 740, 751–54 (1984).
[26] *Id.* at 747–48.

home, and laid naked in bed.[27] The Supreme Court reversed, holding that the "gravity of the underlying offense," determined by its violent nature or potential criminal penalty, is an important factor in the exigency determination, and that a civil traffic infraction is minor in this regard.[28] The Court clarified the holding in *Stanton v. Sims*, stating that *Welsh* was not a "categorical rule" and did not bear on cases that, like *Sims*, also involve the hot pursuit factor in the exigency analysis.[29]

In *Missouri v. McNeely*, the Court was asked to address whether *Schmerber*'s BAC exigency extended per se to all arrests of drunk drivers.[30] The issue presented was whether the natural dissipation of alcohol in the bloodstream qualified as destruction of evidence.[31] In declining to create a new rule, the Court said it would not "depart from careful case-by-case assessment" and held that when a warrant can be reasonably obtained before having a blood sample drawn, "the Fourth Amendment mandates that [the officer] do[es] so."[32] In a follow-on case, *Birchfield v. North Dakota*, the Court applied *McNeely* to the implied consent laws[33] passed in all fifty states, holding that these laws were invalid inasmuch as they provided for criminal—as opposed to civil—penalties for refusal or withdrawal of consent to BAC testing.[34] The Court also held that the search incident to arrest (SITA) exception to the warrant requirement only allows officers to conduct breathalyzer tests because blood tests are invasive and unreasonable in SITA cases.[35]

C. *Mitchell v. Wisconsin*

Just three years after *Birchfield*, the Court reversed course and expanded the application of the exigent circumstances exception to blood draws in drunk driving cases. In *Mitchell v. Wisconsin*, Mr. Mitchell was reported to have been severely inebriated when he was driving a van. Officers found him near a lake, stumbling and slurring his words, and arrested him for DWI.[36] After conducting a preliminary breathalyzer test, the officers attempted to take Mr. Mitchell to the police station for a standard evidentiary breathalyzer test.[37] In a holding cell at the station,

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[27] *Id.* at 742–43.
[28] *Id.* at 754–55.
[29] Stanton v. Sims, 571 U.S. 3, 9 (2013).
[30] Missouri v. McNeely, 569 U.S. 141, 142 (2013).
[31] *Id.*
[32] *Id.* at 152.
[33] *See, e.g.*, Mich. Comp. Laws § 257.625c(1) (2019) ("[a] person who operates a vehicle upon a public highway . . . within this state is considered to have given consent to chemical tests of his or her blood, breath, or urine for the purpose of determining the amount of alcohol . . . in his or her blood or urine or the amount of alcohol in his or her breath . . . .").
[34] Birchfield v. North Dakota, 136 S. Ct. 2160, 2165 (2016).
[35] *Id.* at 2186.
[36] Mitchell v. Wisconsin, 139 S. Ct. 2525, 2532 (2019).
[37] *Id.* at 2534.

Mr. Mitchell began to fall unconscious, prompting officers to take him to a nearby hospital for a blood test.[38] Officers did not attempt to secure a warrant.[39] An officer read aloud the standard statement informing Wisconsin drivers that they are legally permitted to refuse a BAC test.[40] The officer, hearing no response from the incapacitated Mr. Mitchell, instructed hospital staff to perform the blood draw and test it for BAC.[41]

Mr. Mitchell moved to suppress the blood sample for violating the Fourth Amendment, the motion was denied by the trial court, and a jury convicted him of DWI.[42] While a majority of the Wisconsin Supreme Court affirmed the conviction, the justices could not agree on a rationale.[43] A four-justice plurality of the Supreme Court of the United States held that the exigent circumstances exception generally permits a blood test when a driver suspected of DWI is unconscious.[44]

II. "ANOTHER NEEDLESS BLOW" TO THE FOURTH AMENDMENT

The Fourth Amendment's protections against unreasonable searches and seizures are undermined by law enforcement and lower courts often enough to send a steady stream of cases to the circuit courts. When such a violation is upheld at the appellate level, all that remains is the high court, which stands as the last defense of a citizen's privacy interests. It is this fact that makes cases like *Mitchell* devastating. Mr. Mitchell, regardless of whether he drove while intoxicated, was subjected to a warrantless, nonconsensual physical intrusion of his body while he was unconscious—all at the discretion of a single law enforcement officer. The Framers could not have imagined that such an intrusion would be permitted by the text or the spirit of the Fourth Amendment,[45] yet the Supreme Court assented to its supposed reasonableness.

In *Mitchell*, the Court split four ways on the application of the exigency doctrine to the facts of the case.[46] The plurality, per Justice Alito, held that the exigent circumstances exception to Fourth Amendment's

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[38] *Id.* at 2532.
[39] *Id.* at 2542 (Sotomayor, J., dissenting).
[40] *Id.* at 2532.
[41] *Id.*
[42] *Id.*
[43] State v. Mitchell, 914 N.W.2d 151, 169 (Wis. 2018) (Kelly, J., concurring), *vacated and remanded*, 139 S. Ct. 2525 (2019).
[44] *See generally id.* at 2525–28.
[45] *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 400 (1974) ("[T]he framers . . . . feared what a powerful central government might bring, not only to the jeopardy of the states but to the terror of the individual."); Renée McDonald Hutchins, *Tied Up in* Knotts*? GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409, 444 (2007) ("The Fourth Amendment, at its core, regulates police conduct. It erects a wall between a free society and overzealous police action--a line of defense implemented by the framers to protect individuals from the tyranny of the police state.").
[46] *See generally* Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019).

warrant requirement almost always permits a warrantless blood draw where a DWI suspect is unconscious.[47] Justice Thomas concurred in the judgment, but would have instead overruled *McNeely* and created a broad per se rule that *always* permits a blood draw whenever a person is suspected of DWI, regardless of whether they are unconscious.[48] In accordance with the "*Marks* rule,"[49] the narrower decision of the plurality stands as the *Mitchell* Court's holding. Justice Sotomayor, joined by Justices Ginsburg and Kagan, dissented, and would have held that exigent circumstances could not have been present because the officer had time to get a warrant.[50] Dissenting separately, Justice Gorsuch would have dismissed the writ of certiorari as improvidently granted, rather than decide the exigency issue that was not argued by the State or decided by the state courts.[51]

Drawing blood is an inherently invasive process, and the Supreme Court has

> long recognized that a 'compelled intrusio[n] into the body for blood to be analyzed for alcohol content' must be deemed a Fourth Amendment search . . . [and i]n light of our society's concern for the security of one's person, it is obvious that this physical intrusion, penetrating beneath the skin, infringes a [reasonable] expectation of privacy.[52]

Furthermore, the "ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the . . . privacy interests."[53] Beyond just providing law enforcement with evidence of potential criminality though BAC analysis, the blood draw "places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract [additional personal] information."[54]

In *Mitchell*, the Court faced a trial record that clearly indicated that there was time for officers to request a warrant, and that both parties agreed that the exigent circumstances exception was inapplicable. Yet, the Court crafted a rule allowing warrantless blood tests on all unconscious drivers with an impossibly narrow—if at all existent—exception for those defendants who can prove that (i) a hospital would not have drawn their

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[47] *Id.* at 2534.
[48] *Id.* at 2539 (Thomas, J., concurring).
[49] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976)).
[50] *Mitchell*, 139 S. Ct. at 2542 (Sotomayor, J., dissenting).
[51] *Id.* at 2551 (Gorsuch, J., dissenting).
[52] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616 (1989).
[53] *Id.*
[54] Birchfield v. North Dakota, 136 S. Ct. 2160, 2178 (2016).

blood absent law enforcement direction, *and* (ii) reasonable officers[55] would not have believed requesting a warrant would interfere with other pressing needs.[56] In departing from precedent by applying the exigent circumstances exception outside actual emergency situations, the Court broadened the reach and discretion of law enforcement beyond that which is necessary to ensure public safety.

Notwithstanding rare departures like *Mitchell*, the Court has historically avoided making blanket exceptions to the warrant requirement or broadly expanding those that already whittle away at the Fourth Amendment. In *McNeely*, Missouri and its allied amici, including the United States, "express[ed] concern that a case-by-case approach to exigency will not provide adequate guidance to law enforcement officers" as to when drawing the blood of a DWI suspect is reasonable absent a judicially-authorized warrant.[57] Despite this pressure, the Court declined to adopt such a rule, adding that "the Fourth Amendment w[ould] not tolerate the adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake."[58] Though he would later join the *Mitchell* plurality, Chief Justice Roberts partially concurred in *McNeely*, opining that "[t]he natural dissipation of alcohol in the bloodstream . . . would qualify as an exigent circumstance, except that there may be time to secure a warrant before blood can be drawn. If there is, an officer must seek a warrant."[59] In spite of this agreement on the Court, the *Mitchell* plurality reversed course by crafting a categorical rule that ignores whether the time constraints in a particular case permit a warrant application.

The same concerns that pervaded the reasoning of the *McNeely* Court were discounted by the *Mitchell* plurality. In *Mitchell*, the Court relied on *Schmerber* to equate the "special fact[]"[60] of Mr. Schmerber's accident that justified a blood draw with Mr. Mitchell's unconsciousness.[61] This reasoning is misguided for many reasons, but first and foremost, for the sleight-of-hand it attempts to effect on the reader. The Court insists both that *Mitchell* and *Schmerber* are effectively "just the same,"[62] and that the question as to whether Mr. Mitchell's case *does not* involve exigent circumstances is left open to be determined on remand.[63] The plurality goes on to craft a rule for this category of cases—exactly what the

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[55] The Supreme Court has fashioned a "reasonable [police] officer" standard and "cautioned against the '20/20 vision of hindsight' in favor of deference to the[ir] judgment" and decisions on the scene. Saucier v. Katz, 533 U.S. 194, 205 (2001) (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)).
[56] Mitchell v. Wisconsin, 139 S. Ct. 2525, 2539 (2019).
[57] Missouri v. McNeely, 569 U.S. 141, 158 (2013).
[58] *Id.*
[59] *Id.* at 167 (Roberts, C.J., concurring in part).
[60] Schmerber v. California, 384 U.S. 757, 771 (1966).
[61] *Mitchell*, 139 S. Ct. at 2537.
[62] *Id.* at 2533.
[63] *Id.* at 2534.

Schmerber Court refused to do when it endorsed a case-by-case, fact-specific inquiry into the reasonableness of an exigency.[64] Per *Mitchell*, when law enforcement officers encounter an unconscious driver, "the exigent-circumstances rule almost always permits a blood test without a warrant."[65] The only "possibility" that remains to escape this rule of general applicability is an "unusual case" in which a defendant shows that "his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties."[66]

The *Mitchell* Court held that "[u]nder the exigent circumstances exception, a warrantless search is allowed when there is compelling need for official action and no time to secure a warrant."[67] *Schmerber*, unlike *McNeely*, involved a car accident and injuries that took time to investigate and treat, and the arrest itself took place two hours after the officer's initial arrival at the scene.[68] In the totality of those specific circumstances, the Court found that an exigency existed.[69] However, in *Mitchell*, just as in *McNeely*, the State did not argue that there was a lack of time or that an unreasonable delay would result from seeking a warrant.[70] The officer completed a field breathalyzer test, and Mr. Mitchell only became unconscious an hour *after* his arrest for DWI.[71] The *Mitchell* plurality insists that Mr. Mitchell's unconsciousness while in police custody was a sufficient emergency to forgo the warrant requirement. However, the officer admitted, and the State conceded, that there was time for a warrant to be granted before the blood draw was done on Mr. Mitchell, yet he affirmatively chose not to.[72]

Finally, the *McNeely* Court rejected the argument that the lack of a *per se* rule would undermine the administration of the state's interest in preventing drunk driving. Indeed, the same totality-of-the-circumstances test *McNeely* applied to the warrant requirement and blood draws exists, for example, for the knock-and-announce rule and felony drug investigations, despite the high potential for removal or destruction of evidence.[73] The State's request for a bright-line rule easing the burden on

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[64] *Schmerber*, 384 U.S. at 771.
[65] Mitchell v. Wisconsin, 139 S. Ct. 2525, 2531 (2019).
[66] *Id.* at 2539.
[67] *Id.* at 2534 (quoting *McNeely*, 569 U.S. at 149) (internal quotation marks omitted).
[68] *Schmerber*, 384 U.S. at 768–69.
[69] *Id.* at 770–71.
[70] Transcript of Oral Argument at 39, Mitchell v. Wisconsin, 139 S. Ct. 2525 (2019) (No. 18-6210).
[71] *Id.* at 2532.
[72] *Id.* at 2545 (Sotomayor, J., dissenting).
[73] The Supreme Court rejected a *per se* exigent circumstance exception to the knock-and-announce rule for all felony drug investigations, even though there is a general likelihood that contraband will be moved, disposed of, or used expeditiously. *See* Missouri v. McNeely, 569 U.S. 141, 149–50 (2013) (citing Richards v. Wisconsin, 520 U.S. 385, 391–96 (1997)). The Court instead opted to require law enforcement officers to judge the circumstances in the particular case at hand. "If a *per se* exception were

law enforcement was denied in *McNeely*,[74] yet, it is this same rule of convenience that the *Mitchell* Court adopts. Following *Mitchell*, a law enforcement officer is permitted to command a hospital to pierce the skin of an unconscious individual, without giving him or her an opportunity to consent, under the guise of an "exigent circumstance" *even though* there is time to get a warrant.

The *Mitchell* officer made the decision—reserved for a "neutral and detached magistrate"[75] by the U.S. Constitution—of his own accord and with solely his own permission, to forgo a warrant and instead order a blood test, even when there was ample time to request a warrant. This fact alone—the absence of a true exigency impeding the acquisition of a warrant—should control Mr. Mitchell's case and require the suppression of the blood sample. However, the Court masterfully avoids this logical result by sidestepping the facts of this case, creating a new categorical rule. The easily met elements[76] of the plurality's blanket rule will undoubtedly result in the upholding of any blood draw on an unconscious DWI suspect. Instead of deciding whether Mr. Mitchell fit within the framework, the Court remanded the case to have the lower court apply the rule (i.e. deny suppression of the blood draw evidence, given Mr. Mitchell was both suspected of a DWI offense and unconscious), and then feigned ignorance as to whether his case fell into the rule. The semblance of Fourth Amendment safeguards that *McNeely* reaffirmed has been diluted, if not decimated, by "almost always"[77] allowing searches in an unconscious person's bloodstream as a result of *Mitchell*.

CONCLUSION

The genius of the Fourth Amendment lies in its ability to constrain and prevent abuse by the sovereign attempting to exercise its power to

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allowed for each category of criminal investigation that included a considerable-albeit hypothetical-risk [of] destruction of evidence, the knock-and-announce element of the Fourth Amendment's reasonableness requirement would be meaningless." Richards, 520 U.S. at 394. The warrant requirement demands a higher level of justification than the knock-and-announce rule—probable cause—and thus necessitates similar consideration of the totality-of-the-circumstances, even when there is a general likelihood of the dissipation of BAC.

[74] "The State . . . express[es] concern that a case-by-case approach to exigency will not provide adequate guidance to law enforcement officers deciding whether to conduct a blood test of a drunk-driving suspect without a warrant . . . . [T]he desire for a bright line rule is understandable. . . . [However,] a case-by-case approach is hardly unique within our Fourth Amendment jurisprudence." Missouri v. McNeely, 569 U.S. 141, 158 (2013).

[75] Johnson v. United States, 333 U.S. 10, 14 (1948).

[76] "Thus, exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious, so *Schmerber* controls: With such suspects, too, a warrantless blood draw is lawful." Mitchell v. Wisconsin, 139 S. Ct. 2525, 2537 (2019).

[77] *Id.* at 2539.

charge, try, and incarcerate a member of the citizenry.[78] On its face, a warrantless blood draw—piercing the skin, seizing a sample of blood containing untold private information, and searching it for contraband—flies in the face of the constitutional protection from unreasonable searches and seizures. As Justice Marshall opined, "the Framers would be appalled by the vision of mass governmental intrusions upon the integrity of the human body that the [Court] allows to become reality."[79] *Mitchell* dramatically departs from Supreme Court precedent, allowing broader discretion to law enforcement and flipping the constitutional presumption of unreasonableness for warrantless searches on its head.

The question puzzling the Wisconsin Supreme Court—whether implied consent to a search and seizure of blood from a driver can exist by operation of law—remains unanswered. By creating a categorical rule of exigency for unconscious drivers suspected of DWI, despite the issue not being briefed, asserted, or arguably presented, the Court tips the scales further against potential defendants. The rule also leaves significant room for manipulation, creating a perverse incentive for law enforcement officers to wait until drunk drivers inevitably fall unconscious, avoid the troublesome warrant requirement, and get rewarded with a very accurate blood draw that ensures a verdict of guilt. After *Mitchell*, it is clear that the State's interest in convictions reigns supreme over the privacy protections mandated by the Constitution. What other lasting damage is done as a result of that door opening wider remains to be seen.[80]

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[78] "[H]istorical evidence . . . demonstrates that the Framers believed that the orderly and formal processes associated with specific warrants, including the judicial assessment of whether there was adequate cause for the intrusion [mandated by the Fourth Amendment], provided the best means of preventing violations of the security of [a] person . . . . In particular, the Framers thought that magistrates were more capable than ordinary officers of making sound decisions as to whether a search was justified." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 577 (1999).

[79] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 655 (1989) (Marshall, J., dissenting).

[80] "[U]ltimately, today's decision will reduce the privacy all citizens may enjoy, for, as Justice Holmes understood, *principles of law, once bent, do not snap back easily*." *Id.* (emphasis added).