Warrantless Blood Tests, Drunk Driving, and “Exigent Circumstances”: Preserving the Liberty Guarantee of the Fourth Amendment While Evolving the Exceptions to the Warrant Requirement

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PREFACE

“The right of the people to be secure in their persons . . . shall not be violated, and no Warrants shall issue, but upon probable cause . . .”¹

In the noble experiment of American freedom, the Fourth Amendment serves as a protection for our system of ordered liberty. The Fourth Amendment is unyielding in requiring governmental agents to obtain a warrant before conducting a search of a citizen or property. A warrant is issued only upon a showing of good cause made before a “neutral and detached magistrate.”² The Fourth Amendment keeps the American people free from insidious or petty governmental intrusions into their homes, their properties or possessions, and most of all, their persons.

Yet as inviolate as the liberty guaranteed by the Fourth Amendment is known to be, it has its exceptions—“[A] warrantless search of the person is reasonable only if it falls within a recognized exception.”³ Over many decades, the Supreme Court has meticulously crafted a parsimonious set of exceptions to the warrant requirement. Grounded upon what the Supreme Court has decreed as “exigent circumstances,” the Justices have further combined these

¹. U.S. CONST. amend. IV.
³. Id.
exceptions by creating a body of limitations based upon both the totality of the circumstances and reasonableness.4

At the confluence of these many facets of Fourth Amendment jurisprudence is a surprising issue: drunk-driving arrests5 and the subsequent warrantless taking of the suspect’s blood sample for testing.6 Decades ago, the Supreme Court held that in proper and strictly delimited circumstances, a warrantless blood test taken in a drunk-driving scenario might pass constitutional muster.7 The Supreme Court continues to wrestle with the boundaries of that exception, as the Justices remain overtly vigilant in confining the exception within the borders erected by the Court over the years.

The Supreme Court recently returned to the issue with another freshly-minted landmark case: Missouri v. McNeely.8 The purpose of this Article is to examine this decision, as well as to compare and contrast it to prior holdings. In doing so, we hope that our analysis and commentary shall ultimately transcend the singular issue of warrantless blood testing in drunk-driving cases, important

4. See infra Part II.
5. It is beyond peradventure that any police action with respect to suspicion of a DWI offense—be it a “stop,” a temporary diversion, or a full blown arrest—is a restraint upon a person’s freedom which constitutes a seizure pursuant to the Fourth Amendment, and so triggers the Amendment’s liberty guarantee. See Cupp v. Murphy, 412 U.S. 291, 297 (1973) (Marshall, J., concurring) (“As we have said before, however, ‘It is quite plain that the Fourth Amendment governs “seizures” of the person which do not eventuate in a trip to the station house and prosecution for crime—“arrests” in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has “seized” that person.’” (quoting Terry v. Ohio, 392 U.S. 1, 16 (1968))).

6. To be sure, your authors do not take the crime of drunk driving and its tragic toll in human life and concomitant suffering lightly. Rather, we link ourselves to the plain-spoken wisdom of Justice Blackmun in Welsh v. Wisconsin, 466 U.S. 740, 755 (1984) (Blackmun, J., concurring), where he righteously declared, “I yield to no one in my profound personal concern about . . . the continued slaughter upon our Nation’s highways, a good percentage of which is due to drivers who are drunk or semi-incapacitated because of alcohol or drug[s].” Id. Yet that is not to say that, while we deplore the menace that drunk driving poses to innocent travelers upon our Nation’s highways and byways, we at the same time can ignore the gravity of the constitutional question presented here.

as that issue might be. It is our sincere desire that this Article’s greatest contribution is its exploration of the Fourth Amendment and the great, essential liberty that it protects. The magnificent edifice that is the Fourth Amendment has four momentous cornerstones, and this Article shall examine each one in turn. Commencing with reasonableness as the first among equals, we shall proceed to exceptions where the destruction of evidence is at stake, then to the totality of the circumstances as the Fourth Amendment’s prevailing metric, and conclude with the final cornerstone of what constitutes “exigent circumstances” that excuse a warrantless search. And finally, thus informed, we can put the modern controversy to the above tests, and share our thoughts as to the future of the liberty guarantee the Fourth Amendment so provides.

I. INTRODUCTION

The freedom we enjoy from unreasonable searches and seizures as guaranteed by the Fourth Amendment is one of our most cherished liberties. Since colonial times, Americans have condemned the amorphous and generalized police prerogative to search and seize what they want, where they want, when they want as an “odious practice.”9 The Fourth Amendment has long been regarded as animating the robust proscriptions against government intrusions.10 The Fourth Amendment’s prohibition against lawless searches has been deemed part of the “very essence” of our constitutional freedom; its liberty guarantee is as significant to our way of life as any of the other hallowed individual rights.11 There is an “American pantheon of noble objectives [for] the protection of our people,” and the Fourth Amendment, with its guarantee of

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9. Ker v. California, 374 U.S. 23, 51 (Brennan, J., dissenting in part); see also District of Columbia v. Heller, 554 U.S. 570, 634–35 (2008) (“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”).
11. Id. at 304.
freedom from unreasonable searches, is a pillar of that magnificent edifice of enshrined liberty.  

The essential thrust of the Fourth Amendment is to forbid searches conducted without the reason and right of law. However, searches conducted pursuant to a warrant are not offensive to the liberty guarantee. “[T]he provisions of the Warrant Clause—a warrant and probable cause—provide the yardstick against which official searches and seizures are to be measured.”

The warrant requirement plays a vital role in maintaining a free society. Justice Jackson explained the necessity of securing a warrant as one of the “fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.”

A warrant is important because it allows a neutral magistrate to determine probable cause. The Supreme Court has consistently preferred the dispassionate, informed, and deliberate evaluations of magistrates to the hurried actions of law enforcement. The Supreme Court has long emphasized that the Fourth Amendment’s aegis of privacy should not be sacrificed for law enforcement expediency. Therefore, if the liberty guarantee is to remain paramount, exceptions to the warrant requirement must be kept rare and be “carefully delineated.”

The Fourth Amendment’s explicit text is often general in nature, as it broadly prohibits unreasonable searches and seizures. The Fourth Amendment protects all: the guilty, the innocent, and

16. See Mincey v. Arizona, 437 U.S. 385, 393 (1978) (“[T]he privacy of a person’s home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.”); Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971) (“The warrant requirement has been a valued part of our constitutional law for decades . . . . It is not an inconvenience to be somehow ‘weighed’ against the claims of police efficiency.”); see also Georgia v. Randolph, 547 U.S. 103, 115 n.5 (2006) (citing Mincey and Coolidge, with approval).
every shade of citizen in between.\textsuperscript{18} To paraphrase the words of Justice Brennan from half a century ago, not every suspect is guilty, and not every guilty person will attempt to eradicate evidence before a warrant can be procured.\textsuperscript{19} But, notwithstanding the Fourth Amendment’s broad sweep, it is not without exceptions. Although the Fourth Amendment is phrased generally, it does not enforce a prohibition against all searches, just searches that are generally deemed unreasonable.\textsuperscript{20}

This Article recognizes the Supreme Court’s attempt to confine Fourth Amendment exceptions to the warrant requirement as a way of ensuring that the requirement does not debase, let alone destroy, the liberty guarantee. But, as Justice Marshall so picturesquely put it, the warrant requirement of the Fourth Amendment is subject to unique and “powerful hydraulic pressures” that lessen its guarantees of liberty.\textsuperscript{21} Those same pressures may later lead to the troublesome expansion of exceptions. These exceptions, while originally intended to be narrowly confined, threaten to swallow the very rule they were created to serve.\textsuperscript{22}

Such exceptions, as delineated by the Supreme Court, place us squarely upon the horns of the current dilemma: when may the overarching protections of the Fourth Amendment be modified or waived altogether? In recent decades, the Supreme Court has handily acknowledged “[a] variety of circumstances [that] may give rise to an exigency sufficient to justify a warrantless search.”\textsuperscript{23} This Article will explore these scenarios in depth.

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\item\textsuperscript{18} Ker v. California, 374 U.S. 23, 32–33 (1963).
\item\textsuperscript{19} Id. at 56 (Brennan, J., concurring in part).
\item\textsuperscript{20} Randolph, 547 U.S. at 125 (2006) (Breyer, J., concurring).
\item\textsuperscript{21} Cupp v. Murphy, 412 U.S. 291, 299 (1973) (Marshall, J., concurring) (quoting Terry v. Ohio, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting)).
\item\textsuperscript{22} Compare id. (Marshall, J., concurring) (“I realize that exceptions to the warrant requirement may be established because of ‘powerful hydraulic pressures . . . that bear heavily on the Court to water down constitutional guarantees,’ and that those same pressures may lead to later expansion of the exceptions beyond the narrow confines of the cases in which they are established.”), with N. Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting) (“[I]mmediate interests exercise a kind of hydraulic pressure” that casts doubts and bends “even well settled principles of law.”).
\item\textsuperscript{23} Missouri v. McNeely, 133 S. Ct. 1552, 1558 (2013); see, e.g., Chimel v. California, 395 U.S. 752, 763 (1969) (explaining that searches incident to arrest
\end{enumerate}
\end{footnotesize}
Specifically, the Justices have given their approbation to some rather prosaic situations where necessity was the reason for proceeding without a warrant, such as the need for police to provide emergency assistance to the occupant of a home, proceed in “hot pursuit” of a fleeing suspect, or enter a burning building to quench the fire and determine the cause of the conflagration. The list of exigencies is nonetheless rather short.

The Court has been careful to point out that “exigencies” do not entail precisely equivalent dangers, whether the danger is to persons, property, or evidence. The Supreme Court has consistently applied the same case-by-case considerations to exigencies that have led to the crafting of unique and delimited exemptions to the Fourth Amendment.

The Supreme Court has held that searches and seizures must be reasonable and that the Fourth Amendment should not be apportioned into distinct categories “by some amorphous balancing test.” The Supreme Court has instead created an overarching

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27. Nearly identical to the objective exigency exception for warrantless searches, but nevertheless parsed out separately by the Supreme Court, is the allowance for searching sans warrant in order to prevent the imminent destruction of evidence. See McNeely, 133 S. Ct. at 1558 (listing examples of possible exigencies sufficient to justify a warrantless search, and then noting “we have also recognized that in some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence”); see also Cupp v. Murphy, 412 U.S. 291, 296 (1973) (holding that a warrantless search limited to a suspect’s fingernails was permissible where it appeared the suspect was attempting to eradicate the evidence that the police were trying to preserve).
28. McNeely, 133 S. Ct. at 1559.
29. See infra Part II (discussing the evolution of the Fourth Amendment exceptions and the four cornerstones of the liberty guarantee).
theme: the *sui generis* measurement of said *reasonableness* of the warrantless search in light of its singular circumstances. For eight decades, the Supreme Court has indefatigably upheld the guiding principle that there is no easy formula for determining “*reasonableness*” in a Fourth Amendment analysis. The Supreme Court, instead, “has continuously emphasized” that “*reasonableness*” is to be measured by making an examination of the totality of the circumstances.

The standard of case-by-case analysis, by definition, excludes the creation of a bright-line rule for this aspect of the Fourth Amendment. As the Supreme Court stated, “the Fourth Amendment does not insist upon bright-line rules.” For the Supreme Court, “no single set of legal rules can capture the ever-changing complexity of human life.” But what is the result of the combination of such flexibility and case-by-case scrutiny? Justice Harlan coyly noted a half-century ago that the Supreme Court’s Fourth Amendment landmarks “are hardly notable for their predictability.”

II. **THE FOURTH AMENDMENT AND WARRANTLESS SEARCHES: ESTABLISHING THE FOUR CORNERSTONES OF THE LIBERTY GUARANTEE PROHIBITING UNREASONABLE SEARCHES AND SEIZURES**

Following the practice of other scholars, this Article presents legal doctrines in trilogies of cases. The history of the law has

32. See infra Part II(A) (discussing “*reasonableness*” as the first and most imperative cornerstone of the liberty guarantee); see also United States v. Rabinowitz, 339 U.S. 56, 63 (1950) (“What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are ‘unreasonable’ searches and, regrettably, in our discipline we have no ready litmus test.”).
34. *Id*.
35. *Id*.
often shown that interrelated triads of precedents combine to form a sturdy legal principle, particularly where a constitutional freedom is involved.\textsuperscript{38} At the outset of this writing, we were tempted to postulate Fourth Amendment precedents as a triad. But upon further reflection, we found not a trio, but rather a quartet of authoritative legal holdings issued by the Supreme Court. As this Article will show, each Supreme Court landmark comprises a corner of the comprehensive legal doctrine here, providing a foursquare construct that neatly shelters the essential principles for guaranteeing the sacred freedoms of the Fourth Amendment in its monolithic walls. This Article proceeds to set out the four corners of the liberty guaranteed by the Fourth Amendment as a way to better understand the current-day doctrine housed therein. Over a span of a half-century or more, the Supreme Court has evolved its jurisprudence for the modern Fourth Amendment with four key cases, what we have entitled the “four cornerstones.” It begins, and in many respects consistently ends, with a pragmatic test of reasonableness when defining the warrantless searches that the Amendment generally prohibits. Yet every sound rule is pragmatic enough to permit sensible exceptions, and a cogent one here is where the destruction of evidence is threatened. The third cornerstone emplaces a test that examines the totality of the circumstances in making such decisions; the final parameter inquires if there are “exigent circumstances,” and if so, asks what they are.

Only after expositing the structure’s four cornerstones can we then best understand what is built upon the foundation, which shall bring us to the modern controversy, and precisely, the \textit{McNeely} case. We analyze this case not merely for its own sake, as significant as that might be, but for what it portends for the Fourth Amendment, not just for the years to come, but for generations to come.
A. The First Cornerstone: Reasonableness as an Imperative for Warrantless Searches

The first cornerstone of the Fourth Amendment’s guarantee for liberty is Ker v. California, a Supreme Court decision published a half-century ago.39 In Ker, the Supreme Court held that warrantless seizures and searches must be reasonable in order to be constitutional under the Fourth Amendment.40 In Ker, officers of the Los Angeles County Sheriff’s Office conducted a lengthy and complex surveillance of a suspected marijuana distributor.41 During the investigation, at least four officers entered George Ker’s apartment.42 The officers testified that their stealthy entry was done “to prevent the destruction of evidence.”43

Upon their nonviolent entry into the apartment, the police encountered Ker sitting in his living room, his wife emerging from the kitchen, and in plain sight, a “brick-shaped package” (of what later tested positive as marijuana) sitting atop the kitchen sink, along with related drug paraphernalia.44 The Kers were arrested and charged with violating California’s controlled substance laws.45 The officers did all the foregoing without first obtaining a warrant.46

39. Ker, 374 U.S. 23 (1963). A major thrust of Ker was its instructions upon what constitutes proper probable cause, as a predicate for lawful searches and seizures. Yet, nearly equal to that dimension of Ker is its teachings upon when and how the threatened destruction of evidence can justify a warrantless search. It is in that latter context that we shall consider and discuss Ker as a landmark.
40. Id. at 32–33.
41. Id. at 25–29. In a scenario reminiscent of the seminal police procedural Dragnet, Justice Clark literally walks us through the investigation, starting with an undercover officer’s purchase of marijuana, leading the officers to the street seller’s connection and then a multi-day surveillance of one Murphy, a known drug dealer, who police then surveilled with Murphy’s suspected supplier, one George Ker. Id. at 25–28. Combining tips from informants that Ker was a major distributor, “tailing the suspect,” and later tracking down Ker to his apartment, id. at 27–29, police finally moved in on Ker. Id. at 28–29.
42. Id. at 28.
43. Id. (footnote omitted).
44. Id. at 28–29.
45. Ker, 374 U.S. at 28–29. While that was the gravamen of the immediate arrest, parenthetically we note that the officers subsequently searched the Kers’ apartment, and found smaller quantities of marijuana elsewhere in the kitchen and atop a bedroom dresser. Additional marijuana was later found in an automobile
The Supreme Court eventually granted certiorari, noting that the case raised constitutional questions as to the legality of the search and seizure.\footnote{47} Writing for the majority, Justice Clark began his analysis with the proposition that the liberty guarantees of the Fourth Amendment were applicable to the states via the Fourteenth Amendment.\footnote{48} Justice Clark emphasized that rigid formulations for the application of the Fourth Amendment are unworkable.\footnote{49} The Supreme Court instead used reasonableness as the standard for distinguishing proper searches and seizures from Fourth Amendment violations.\footnote{50} The Court left the first cut at determining reasonableness under the Fourth Amendment to the trial courts.\footnote{51}

Concerned that valuable evidence could be quickly and easily destroyed, the Supreme Court had to determine if a warrantless police search could be reasonable. Writing for the Court, Justice Clark leaned heavily upon the apparent fact that this was precisely the mindset of the police in these circumstances.\footnote{52}

The officers already believed (undoubtedly by reason of their long and detailed investigation) that Ker was in possession of narcotics, which were susceptible to swift and easy annihilation.\footnote{53} Ker also demonstrated evasive tactics (“eluding [the officers] shortly before the arrest”).\footnote{54} The majority implicitly adopted the officers’ beliefs that Ker was expecting an incursion by law enforcement.\footnote{55} Therefore, the Supreme Court upheld the Kers’ convictions and registered in the name of Diane Ker. Notably, the police search of the rest of the apartment and the vehicle was done sans warrant, the latter even more significant because Diane Ker’s auto was searched a day after the Kers were arrested. \textit{Id.} at 29.

\begin{itemize}
\item \footnote{46} \textit{Ker}, 374 U.S. at 28–29.
\item \footnote{47} \textit{Id.} at 24–25. \textit{Ker} was an early and severe test of the exclusionary rule. \textit{Id.} at 31; see Mapp v. Ohio, 367 U.S. 643, 651–52 (1961) (excluding from trial evidence found in the course of an unconstitutional search).
\item \footnote{48} \textit{Ker}, 374 U.S. at 30 (citing \textit{Mapp}, 367 U.S. at 660).
\item \footnote{49} \textit{Id.} at 33.
\item \footnote{50} \textit{Id.} at 31–32.
\item \footnote{51} \textit{Id.} at 32.
\item \footnote{52} \textit{Id.} at 40–41.
\item \footnote{53} \textit{Id.} at 40.
\item \footnote{54} \textit{Ker}, 374 U.S. at 40.
\item \footnote{55} \textit{Id.} at 40–41.
\end{itemize}
found the Kers’ constitutional rights were not violated in the course of the warrantless search.56

Ker established the fundamental notion that trial courts need to measure the reasonableness of searches and seizures undertaken without a warrant.57 Trial courts must carefully scrutinize all relevant facts and circumstances (and therefore, perforce, avoid artificial and arbitrary postulations of what should be significant to that calculus).58 When there is a reasonable belief on the part of law enforcement that probative evidence is in imminent danger of flight or destruction, a warrantless search can still be excused from its constitutional deficiencies.59

But, the Supreme Court also suggested that the Fourth Amendment stands proudly and equally alongside its peers within the Bill of Rights and subsequent amendments60 as the guardian of a most precious liberty interest: freedom from unreasonable searches and seizures. It must be maintained in high regard so it may guard that freedom robustly. That is Ker’s final and best lesson as a crucial Fourth Amendment landmark.

56. Ker, 374 U.S. at 44. Justice Brennan, who, although concurring in part, id. at 46 (Brennan, J., concurring in part), virulently disagreed with the premise that it was reasonable to believe the Kers might have been attempting to destroy evidence. Id. at 61. Justice Brennan insisted that even “minimal conditions” necessary to invoke said exemption for a warrant were wholly absent in this case. Id. He painstakingly points out that the police took the Kers completely unawares, and “there was absolutely no activity within the apartment” justifying a reasonable notion that the suspects were attempting (or about to attempt) to destroy evidence. Id. Frankly, we think Justice Brennan is right. For all its fulsome explications, it is hard to divine what impeding destruction of evidence persuaded the majority to invoke that exception here.

57. Id. at 32–33.

58. Id. at 33–34.

59. Id. at 37–38.

60. See id. at 32 (stating that the Fourth Amendment’s protection “is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen” (quoting Gouled v. United States, 255 U.S. 298, 304 (1921)) (internal quotation marks omitted)).
B. The Second Cornerstone: When the Clear and Present Danger of the Destruction of Evidence Excuses a Warrantless Search

This Article analyzes the most recent Supreme Court teachings on the role the potential destruction of valuable evidence plays, if any, in excusing a search conducted without a warrant. And to fully understand the Court’s recent decisions, we need to first examine the roots of that wisdom.

In Cupp v. Murphy, the Supreme Court held that if there was a risk that valuable evidence would be destroyed, a warrant was not required to search a person.61 The Court’s holding from some four decades ago is prosaic enough, yet its underlying facts are somewhat dramatic.62 Murphy was questioned subsequent to his wife’s murder;63 during the interrogation, the “police noticed a dark spot on [Murphy’s] finger.”64 Observing that the homicide was committed by strangulation, the officers suspected “the spot might be dried blood,” and the police asked Murphy if they could take scrapings from his fingernails.65 Murphy refused.66 The police proceeded without a warrant.67 The scrapings contained traces of skin and


62. Certainly, we acknowledge the significance of Ker as a necessary precursor with regard to the impact the potential destruction of evidence has in establishing the reasonableness of a warrantless search under nominal Fourth Amendment proscriptions. By way of reminder, Ker was directed far more to the topic of reasonableness in these matters. The issue of destruction of evidence was certainly not merely incidental to the Supreme Court’s teachings in Ker. Yet, in our considered opinion, that element of the controversy was not the absolute focus of the Supreme Court’s promulgations on that occasion. Thus, from our point of view, we respectfully submit Murphy as the second of four cornerstones in devising modern Fourth Amendment doctrine.

63. Murphy, 412 U.S. at 292. Murphy’s spouse was murdered by strangulation in her Portland home. There was no sign of a break-in or robbery. Murphy was not living with her at the time. After learning his wife was dead, Murphy traveled to Portland and voluntarily appeared at a police station for questioning, with his attorney present. Id.

64. Id.

65. Id.

66. Id.

67. Id.
blood cells, as well as traces of fabric from the victim’s nightgown.\footnote{Murphy, 412 U.S. at 292.} This incriminating evidence was admitted at trial, the jury convicted Murphy, and the conviction was subsequently upheld.\footnote{Id. at 292–93. The contemporary reader should be mindful of the date of the instant Supreme Court case: 1973, a time long before the era of sophisticated DNA evidence and the like.}

Contending the fingernail scrapings were the fruit of an illegal search, Murphy sought review from the Supreme Court, and the Court ultimately granted certiorari.\footnote{Id. at 293. For sake of clarity, we remind that the local court jury conviction was upheld by a state appellate tribunal, and the Supreme Court denied certiorari on that train of decisions. Id. It was upon Murphy’s plea for habeas that a federal district court first rebuffed him, but then the Ninth Circuit held the fingernail “search” was unconstitutional for want of an actual arrest or exigent circumstances. Id.} Although fingerprinting involves none of the probing into an individual’s private life or thoughts that are the hallmarks of a search or interrogation,\footnote{Id. at 294; see Davis v. Mississippi, 394 U.S. 721, 727 (1969) (noting that “[f]ingerprinting involves none of the probing into an individual’s private life and thoughts that marks an interrogation or search”).} the “search” of Murphy’s fingernails went far beyond mere fingerprinting or any other measurement of outward physical characteristics constantly exposed to public view.\footnote{Murphy, 412 U.S. at 296 (1973). Compare United States v. Dionisio, 410 U.S. 1, 14 (1973) (obtaining a voice exemplar), with United States v. Mara, 410 U.S. 19, 21 (1973) (obtaining handwriting exemplar).} Murphy’s situation implicated the Fourth Amendment right of personal security because of the severe, albeit brief, invasion of his personal being.\footnote{Murphy, 412 U.S. at 295; see Terry v. Ohio, 392 U.S. 1, 24–25 (1968) (noting that “a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security”).}

The Court found that the case fit within an exception for a warrantless search—the police need not obtain a warrant to avoid destruction of evidence.\footnote{Murphy, 412 U.S. at 295–96.} The Court wrote, “[I]t is reasonable for a police officer to expect the arrestee . . . to attempt to destroy any incriminating evidence then in his possession.”\footnote{Id. at 295–96. The Court further demonstrated that the permissible scope of a warrantless search is delimited to the rationale that exempts the search from the ostensible warrant requirement in the first place. Id.} Murphy was
“obviously aware” he was a suspect in his wife’s murder.\textsuperscript{76} His knowledge that he was suspected of the crime supplied a motivation “to destroy what evidence he could”; and once he refused to consent to having his fingernails examined, he furtively put his hands behind his back, then in his pockets, and appeared to attempt to cleanse them of evidence.\textsuperscript{77} In those circumstances, the Justices agreed the police acted properly in their “very limited search necessary to preserve the highly evanescent evidence they found under his fingernails.”\textsuperscript{78} Murphy’s homicide conviction remained undisturbed, and the Court deemed his Fourth Amendment liberty interests unharmed by the warrantless search of his fingernails.\textsuperscript{79} But in a near “throw-away,” Justice Stewart added that, accordingly, the warrantless search must be limited to the area the detainee might conceivably reach.\textsuperscript{80}

Although the Justices explicitly declared their ruling was limited to “the facts of this case,”\textsuperscript{81} the restriction given by the Court in \textit{Murphy} had a twofold effect: first, it neatly cabined this new precedent to its own unique facts; and second, it set the stage for \textit{sui generis} analysis for all Fourth Amendment cases to follow.

Certain observations made by Justice Marshall in his concurring opinion are also noteworthy, as they will supplement our future analysis herein. Retelling how the police saw the dark spot “under Murphy’s thumbnail,” and how their newfound interest alerted Murphy to the wish of the police to inspect his fingernails, Justice Marshall opined that “[a]t that point, there was no way to preserve the status quo” while awaiting a lawful warrant.\textsuperscript{82} Concomitantly, the police had “good reason to believe Murphy might attempt to alter the status quo unless he were prevented from doing so.”\textsuperscript{83} The Justice expressed concern for the preservation of

\begin{footnotesize}
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\item \textsuperscript{76.} \textit{Murphy}, 412 U.S. at 296.
\item \textsuperscript{77.} \textit{Id}.
\item \textsuperscript{78.} \textit{Id}.
\item \textsuperscript{79.} \textit{Id}.
\item \textsuperscript{80.} \textit{Id.} at 295 (citing \textit{Chimel v. California}, 395 U.S 752, 763 (1969)).
\item \textsuperscript{81.} \textit{Id}. at 296.
\item \textsuperscript{82.} \textit{Murphy}, 412 U.S. at 298 (Marshall, J., concurring).
\item \textsuperscript{83.} \textit{Id}.
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\end{footnotesize}
this evidence—clearly part of his rationale in making common cause with the majority.\textsuperscript{84}

Justice Douglas dissented in part.\textsuperscript{85} He argued that the “incriminating evidence found under a suspect’s fingernails” was just as worthy of Fourth Amendment protections against a warrantless seizure as the suspect’s books, papers, effects, and person.\textsuperscript{86} Scraping a man’s fingernails was an invasion of his privacy interest, which should be tolerated only if conducted pursuant to a warrant obtained from a neutral magistrate.\textsuperscript{87} Justice Douglas condemned the precipitous action of the police and stated, “There was time to get a warrant.”\textsuperscript{88} Justice Douglas observed that Murphy could have been detained in such a way as to “preserv[e] the perishable evidence the police sought.”\textsuperscript{89} The Justice made the cogent point that “[a] suspect on the loose could get rid of [evidence]; but a suspect closely detained until a warrant is obtained plainly could not.”\textsuperscript{90}

Justice Douglas was not just concerned with the instant controversy, declaring that “[e]rosions of constitutional guarantees usually start slowly, not in dramatic onsets.”\textsuperscript{91} Notwithstanding these strongly-voiced objections, Justice Douglas’s voice did not carry the day, and \textit{Murphy} stood as decided.

\begin{itemize}
\item \textsuperscript{84} \textit{Murphy}, 412 U.S. at 298 (Marshall, J., concurring); \textit{see also} \textit{id. at 300} (Blackmun, J., concurring) (adding to the characterization of the fingernail evidence as “highly destructible”); \textit{id. at 301} (Douglas, J., dissenting in part) (“[T]he fingernail scrapings . . . might vanish if [Murphy] were free to move about,” thereby creating “exigent circumstances.”); \textit{id. at 302} (noting that any exemption from the Fourth Amendment is intended “to save evidence within that narrow zone from destruction”); \textit{id. at 305} (Brennan, J., dissenting in part) (finding that the police wished to scrape Murphy’s fingernails for “destructible evidence”).
\item \textsuperscript{85} \textit{id. at 301–04} (Douglas, J., dissenting in part).
\item \textsuperscript{86} \textit{id. at 303–04}.
\item \textsuperscript{87} \textit{id. at 304}. Justice Douglas likewise emphasized the undeniable conjoining here between the Fourth and Fifth Amendments. \textit{id. at 303–04}.
\item \textsuperscript{88} \textit{id.}
\item \textsuperscript{89} \textit{id.}
\item \textsuperscript{90} \textit{Murphy}, 412 U.S. at 304 (Douglas, J., dissenting in part).
\item \textsuperscript{91} \textit{id.; see also Boyd v. United States}, 116 U.S. 616, 635 (1886) (observing that unconstitutional practices gain their first toehold via “silent approaches and slight deviations from legal modes of procedure”).
\end{itemize}
It is the ultimate holding of *Murphy* that establishes its preeminence in these matters. The police may conduct a search in limited circumstances, even when lacking a bona fide warrant, in order to prevent the imminent destruction of evidence.92 The rightful aversion to the loss of probative evidence justifies suspending the norm of the liberty guaranteed by the Fourth Amendment on such delimited occasions. In the years since *Murphy* was established as a benchmark, the Supreme Court has not shied away from applying its standards.93 The instances of subsequent validations of a warrantless search, when justified to prevent the imminent destruction of evidence, are legion.94 *Murphy* can be properly characterized as espousing a “totality of the circumstances” test—one of great significance in determining this vital issue. We now turn to the rightful place of this test within the Fourth Amendment’s jurisprudence.

C. The Third Cornerstone: Brigham City v. Stuart and the Advent of the Totality of the Circumstances Test

The third building block of our four Fourth Amendment cornerstones was cast less than a decade ago in *Brigham City v. Stuart*.95 In *Brigham City*, the police department in Brigham City, Utah responded to a complaint of a loud party at a residence.96 Upon arrival, the police saw a fistfight inside the kitchen.97 Adults were holding back a juvenile, who then broke free of their grip and proceeded to strike one of the adults in the face.98 The police saw

94. Seizing an individual without a warrant in order to prevent him from returning to his trailer to destroy hidden contraband was one such proper application of the exception. Illinois v. McArthur, 531 U.S. 326, 331 (2001). In *Georgia v. Randolph*, the suspect was in control of easily disposable evidence. 547 U.S. 103, 116 n.6 (2006). His capability to eradicate probative evidence that could be used to convict him condoned the warrantless search.
96. *Id.* at 400–01.
97. *Id.* at 401.
98. *Id.*
the adult spit blood into the kitchen sink.99 The police stepped to the kitchen’s screen door and announced themselves loudly,100 but no one noticed them. Then the police entered, announced themselves to the occupants (yet again), and broke up the altercation.101 The participants were charged.102 Prior to the trial, the defendants prevailed on a motion to suppress, based upon the claim that the warrantless entry and subsequent search by the police violated the Fourth Amendment.103

Writing for a unanimous Court,104 Chief Justice Roberts framed the issue as whether police may enter a home without a warrant “when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.”105 The Supreme Court held that the police may enter in such emergent circumstances.106

The holding in Brigham City resulted from the “‘basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.’”107 The Supreme Court swiftly added that “reasonableness” is “the ultimate touchstone” of this liberty guarantee108 and the standard imposed by the Fourth Amendment perforce creates certain exceptions to its mandates.109

Here, the Chief Justice catalogued the better known of these exemptions.110 Previously, the Supreme Court condoned warrantless searches when the police entered a premises to fight a fire and investigate its cause,111 when such searches were used to prevent the

99. Brigham City, 547 U.S. at 401.
100. Id.
101. Id.
102. Id.
103. Id.
104. Justice Stevens concurred. Id. at 407 (Stevens, J., concurring).
105. Brigham City, 547 U.S. at 400 (majority opinion) (emphasis added).
106. Id.
107. Id. at 403 (quoting Groh v. Ramirez, 540 U.S. 551, 559 (2004)).
108. Id.
109. Id. at 403–04.
110. See id. at 403 (discussing standards imposed by the Fourth Amendment and noting exceptions).
impending destruction of evidence,112 or when the police were engaged in “hot pursuit” of a fleeing suspect.113

Among the foregoing exceptional circumstances, and relevant to Brigham City, is the emergent situation created by the need for police to assist the injured or persons threatened with injury. Such a crisis obviates the usual norm of requiring a warrant, because the need to protect or preserve life trumps what would otherwise be deemed a violation of constitutional guarantees.114 Part of the controversy pertinent to our subsequent analysis was that the police proffered their subjective state of mind as the proper yardstick for measuring whether a true emergency existed, thereby justifying the warrantless search.115

The unanimous Court heartily rejected that mode of reviewing police action.116 The Court decreed the reasonableness of steps taken by law enforcement must be viewed objectively and a subjective analysis of an officer’s state of mind is decidedly not part of the proper calculus.117

Notably, the Brigham City Court likewise handily rejected the notion that the severity of the charged offense precipitating the warrantless search factors into an exigent-circumstances analysis, as distinguished from a scenario whereby the purported emergency was the alleged need of police to preserve evidence in the form of the arrestee’s blood alcohol level.118 Such was not a sufficient exigency to sustain as valid a warrantless entry into the suspect’s home in that

113. Brigham City, 547 U.S. at 403; see United States v. Santana, 427 U.S. 38, 43 (1976) (holding that “hot pursuit” involves some sort of a chase but “need not be an extended hue and cry in and about (the) public streets”).
114. See also Mincey v. Arizona, 437 U.S. 385, 392–93 (1978) (holding that police responding to an emergency threatening life and limb excuses a warrantless search).
115. Brigham City, 547 U.S. at 404.
116. Id.; see also Ker, 374 U.S. at 63 (Brennan, J., concurring in part) (suggesting that objective standards of inquiry can never be displaced by the subjective judgment of the police in search and seizure cases).
117. Brigham City, 547 U.S. at 404. Indeed, Chief Justice Roberts is ever the pragmatist here; he casts grave doubt on whether a police officer’s subjective state of mind can be “neatly unraveled.” Id. at 404–05.
118. Id. at 405.
case, and it thereby followed that the charged offense had no bearing upon the reasonableness of the warrantless entry at issue here.119

The Justices were just as energetic in likewise rejecting the prosecution’s claim that the severity of the offense the defendant is ultimately charged with somehow influences the determination of the propriety of the warrantless search.120 Referencing its holding from some two decades prior in Welsh v. Wisconsin,121 the Court maintained its stance that the exigencies of a warrantless search are to be measured by the events that transpired at the time of the incursion by the police, without regard for the charges leveled at a later date as against the arrestee.122

The Supreme Court concluded that the officers’ actions, when viewed objectively, were “plainly reasonable” given the totality of the circumstances.123 It was “objectively reasonable” for these law enforcement officers to believe that the adult who was bleeding from the mouth needed help and that “the violence in the kitchen was just beginning.”124 The Fourth Amendment did not mandate that the police restrain themselves until more blood was spilled.125 This represents a further indication that reasonableness is not merely a touchstone, but a pivot upon which this precious liberty interest turns. So concluded Brigham City.

119. Brigham City, 547 U.S. at 405 (distinguishing Welsh v. Wisconsin, 466 U.S. 740, 754 (1984) (holding that a warrantless home arrest of a DWI suspect “cannot be upheld simply because evidence of the [suspect’s] blood-alcohol level might have dissipated while the police obtained a warrant”).
120. Id.
121. Welsh, 466 U.S. at 740.
122. Brigham City, 547 U.S. at 405–06.
123. Id. at 406.
124. Id.
125. Id. The Chief Justice declared police are not like referees in boxing or hockey; they do not need to wait until an altercation is out of hand in order to move in and stop it, id. at 406, once again exhibiting his penchant for sports metaphors. See Roberts: ‘My Job Is to Call Balls and Strikes and Not to Pitch or Bat’, CNN, (Sept. 12, 2005, 4:58 PM), http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/ (“Judges are like umpires. Umpires don’t make the rules; they apply them. . . . But it is a limited role. Nobody ever went to a ball game to see the umpire.”).
D. The Fourth Cornerstone: “Exigent Circumstances” and the Fourth Amendment—The Kentucky v. King Formulation

Kentucky v. King\textsuperscript{126} owes much of its strength to Justice Alito who, writing for the majority,\textsuperscript{127} penned a powerful opening that commenced with the legal principle that “[i]t is well established that ‘exigent circumstances,’ including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant.”\textsuperscript{128} In one sentence, Justice Alito established the controlling nostrum applicable to the case before the Supreme Court.

The issue before the Court was whether exigent circumstances encompass a situation in which law enforcement, by knocking on a door and announcing their presence, causes occupants to attempt to destroy evidence.\textsuperscript{129} The Kentucky Supreme Court found that the exigent circumstances rule did not apply, reasoning that the police “should have foreseen” that their actions would prompt the suspects to destroy the evidence.\textsuperscript{130} But, characteristically, Justice Alito did not mince words, declaring: “We reject this interpretation” of the doctrine made by the tribunal below.\textsuperscript{131}

In King, the police set up a contraband narcotics purchase outside an apartment complex.\textsuperscript{132} Plainclothes Officer Gibbons observed a drug sale, and instructed his uniformed fellows to close in on the apartment complex.\textsuperscript{133} He instructed the officers to move with alacrity, as the suspect was heading toward the breezeway of the apartment building.\textsuperscript{134} But just as the uniformed officers entered the breezeway, “they heard a door shut and detected a very strong

\textsuperscript{126} 131 S. Ct. 1849 (2011).
\textsuperscript{127} Only Justice Ginsburg dissented. Id. at 1864 (Ginsburg, J., dissenting).
\textsuperscript{128} Id. at 1853–54.
\textsuperscript{129} Id. at 1854.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} King, 131 S. Ct. at 1854. Lexington, Kentucky was the point of origin of this actual Supreme Court case. Id. at 1851.
\textsuperscript{133} Id. at 1854.
\textsuperscript{134} Id.
odor of burnt marijuana.”135 At the end of the breezeway, the police were confronted by opposing apartment doors: one on the left, the other on the right.136 They did not know which door the suspect had entered.137

But the officers knew the unmistakable odor of marijuana smoke was coming from the left-side apartment.138 Thus, an officer banged on the door, announced the customary (and constitutional) “[p]olice, police, police” (or utterances to the same effect) and immediately heard sounds of the apartment’s occupant(s) moving things around.139 Therefore, the police “believe[d] that drug-related evidence was about to be destroyed.”140

Motivated to act, the officers announced their imminent entry, performed the classic “kick in the door” maneuver, and found the apartment occupied by Hollis King, King’s girlfriend, and an unnamed “guest” who was smoking marijuana.141 The police inventoried the marijuana found in plain view, and subsequently uncovered crack cocaine, cash, and drug paraphernalia.142 King was charged with trafficking marijuana and a sundry of other related offenses.143

The appeals court affirmed the trial court’s denial of King’s motion to suppress, finding that “[e]xigent circumstances justified the warrantless entry,” and the police had probable cause to investigate the marijuana odor.144 The Kentucky Supreme Court reversed.145 In a somewhat tortured ruling, the Kentucky Supreme

135. King, 131 S. Ct. at 1854.
136. Id.
137. Id. Of minor note, the pursuing uniformed officers did not hear Gibbons’s radioed advice that the suspect had taken refuge in the right-side apartment. Id.
138. Id.
139. Id.
140. Id.
141. King, 131 S. Ct. at 1854. The Court noted King frequented the apartment, although his girlfriend held the lease in her name. Id. at 1854 n.1. Thus, King’s standing to challenge the constitutionality of the search under Fourth Amendment norms was not in controversy. Id.
142. Id. at 1854.
143. Id. at 1855.
144. Id.
145. Id.
Court assumed exigent circumstances existed and propounded a two-prong test, focusing in part on whether the police created the emergency that caused the warrantless search.\textsuperscript{146}

Justice Alito announced the two legal principles that would rule the Supreme Court’s deliberations that day.\textsuperscript{147} The Fourth Amendment’s text “expressly imposes two requirements”: (1) all searches and seizures must be reasonable;\textsuperscript{148} and (2) warrants cannot be issued unless probable cause is established and the scope of the warrant is properly circumscribed.\textsuperscript{149} The Court reaffirmed that the “ultimate touchstone of the Fourth Amendment is reasonableness.”\textsuperscript{150} Once again, the Court declared that reasonableness ruled the day, as the warrant requirement could be subjected to “certain reasonable exceptions.”\textsuperscript{151}

Justice Alito turned to examine the “well-recognized exception” for a warrant when exigent circumstances make the needs of law enforcement so compelling that a warrantless search becomes perforce objectively reasonable, even under Fourth Amendment scrutiny.\textsuperscript{152} Not satisfied by merely noting the existence of said exemption, Justice Alito catalogued some cogent examples of exigent circumstances the Supreme Court had identified over the years that work as effective waivers of Fourth Amendment norms.\textsuperscript{153}

First, the \textit{King} majority noted the exception for rendering emergency aid, in which proceeding \textit{without} a warrant is permissible in order to provide emergency assistance to an injured party or

\begin{itemize}
\item\textsuperscript{146} \textit{King}, 131 S. Ct. at 1855.
\item\textsuperscript{147} \textit{Id.} at 1856.
\item\textsuperscript{148} \textit{Id.}
\item\textsuperscript{149} \textit{Id.}
\item\textsuperscript{150} \textit{Id.}
\item\textsuperscript{151} \textit{Id.}
\item\textsuperscript{152} \textit{King}, 131 S. Ct. at 1856; see \textit{Mincey v. Arizona}, 437 U.S. 385, 393–94 (1978) (“[W]arrants are generally required to search a person’s home or his person unless ‘the exigencies of the situation’ make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.”).
\item\textsuperscript{153} \textit{King}, 131 S. Ct. at 1856. The Supreme Court did so in the context of the premises search at issue in the case at bar. Understanding that inherent limitation, we adopt its exemplars to further our own analysis herein in our respective context of blood testing in DWI cases.
\end{itemize}
protect another from imminent injury. Second, “hot pursuit of a fleeing suspect” generally obviates the Fourth Amendment’s strictures. Third, and highly relevant both to the King Court and the goals of this Article, is the exception grounded upon the need to prevent the imminent destruction of evidence. Under King, it is the reasonableness of the police’s behavior that determines if the exigent circumstances justified the warrantless search. Justice Alito wrote, “Where, as here, the police did not . . . create the exigency . . . warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.”

Justice Alito then proceeded to outline further parameters for the always-evolving warrantless search jurisprudence. He set out to remove misguided obstacles erected by some lower courts, but this only served to further obfuscate Fourth Amendment principles.

Some courts, including the court below in King, insinuated that the judicial review process should evaluate possible bad faith by law enforcement. Again not sparing any niceties, Justice Alito condemned that augmentation as “fundamentally inconsistent” with the Court’s interpretations of the Fourth Amendment’s guarantees of liberty. To inquire into bad faith injects an examination of subjective intent into judicial review, an approach antithetical to the Court’s longstanding commitment to a solely objective analysis of the circumstances surrounding any warrantless search.

154. King, 131 S. Ct. at 1856.
155. Id.
156. Id. at 1857 n.3. Parenthetically, the Court opined that preventing the destruction of evidence may also justify exemption from the Fourth Amendment “in other contexts.” See id. (citing Schmerber v. California, 384 U.S. 757, 770–71 (1966); Richards v. Wisconsin, 520 U.S. 385, 395–96 (1997); United States v. Banks, 540 U.S. 31, 37–40 (2003)).
157. Id. at 1858.
158. Id.
159. Id.
161. Id. at 1859.
162. Id.
163. Id. Justice Alito was forceful in declaring that the Justices had never held, aside from some limited instances, that a police officer’s intrinsic
Justice Alito noted this unswerving allegiance to objective measurements, rather than subjective intent, is manifestly clear in the Court’s declarations. Judicial standards for reasonableness “are generally objective,” and contemplating subjective thoughts is anathematic to principled law enforcement procedures.

The Supreme Court’s fundamental declaration was that a warrantless search could be justified on the grounds of exigent circumstances only if “a genuine exigency” did in fact exist. The Court was unequivocal in embracing objective—and solely objective—measurements of police behavior in such circumstances, while making a wholesale rejection of any misbegotten inquiries into the subjective intent of law enforcement actors. King imposed the indelible requirement of reasonability upon all modes of analysis in upholding the liberty guarantee of the Fourth Amendment.

Putting aside momentarily the final landmark case, King represents the chronologically last, and most powerful, proclamation of the Supreme Court on what constitutes “exigent circumstances” in the Fourth Amendment context. Before completely departing from the subject, however, we must digress some three decades to expound upon an oft cited and relevant precedent that the Court has decreed falls within “exigent circumstances” jurisprudence.

Motivations could invalidate objectively reasonable behavior in the Fourth Amendment context. Id. at 1859. Id. at 1859–60. Similarly, King’s subsequent dismantling of lower courts’ surplusages of probable cause vis-à-vis the time to secure a warrant, id. at 1860–61, and inquiries into the norms of police investigative tactics, id. at 1861, is not germane to the instant Article. Thus, we forgo further mention of it here, except to say the majority most assuredly discarded any and all such notions as veering too far from the straightforward objective measurements long favored by the Court for Fourth Amendment analysis.

164. King, 131 S. Ct. at 1859.
165. Id. Seriatim, the King Court next rejected a parameter of reasonable foreseeability upon exigent circumstances, yet another judicial gloss added by the Supreme Court of Kentucky. As this point is pertinent to premise searches in the vein of “knock and announce,” we bypass it here, except to note the United States Supreme Court is unmistakably consistent. It shuns this approach because it eschews objective measurements in favor of reliance upon unpredictable factors.
166. Id. at 1859–60.
167. Id. at 1859.
168. Id. at 1852.
Often assigned to the body of Supreme Court cases exemplifying exigent circumstances is the case *Michigan v. Tyler*.\(^{169}\) This is largely by the Court’s own doing.\(^{170}\)

Tyler was the co-owner of a furniture store located in Oakland County, Michigan.\(^{171}\) Shortly before midnight on a January night in 1970, a fire broke out at the business.\(^{172}\) The local fire department responded.\(^{173}\) By 2:00 A.M., the fire chief arrived and the fire was reduced to nothing more than smoldering embers.\(^{174}\) The chief’s lawful job was to determine the causes of the fire and submit a report.\(^{175}\) Informed by another firefighter that two containers of flammable liquid had been found in Tyler’s store, the chief entered the premises to examine the containers.\(^{176}\) Naturally, the building was filled with smoke and steam, even though the fire was largely extinguished.\(^{177}\)

Suspecting arson, the fire chief contacted the police.\(^{178}\) A detective arrived around 3:30 A.M., with the intent to search the property.\(^{179}\) He was stymied because the continued smoke and steam conditions kept visibility to an unworkable level.\(^{180}\) The fire was finally and completely extinguished by 4:00 A.M., and the fire

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\(^{170}\) After all, in *McNeely*, the Court cites *Tyler* narrowly for its fundamental holding that law enforcement and other public officials do not require a warrant to enter and search a burning building. *Missouri v. McNeely*, 133 S. Ct. 1552, 1559 (2013). Yet the Supreme Court sometimes exhibits a bit of confusion, if not schizophrenia, with regard to just what legal precept *Tyler* represents. In one recent “for instance,” the Court cited to *Tyler* for the minimalist proposition of “imminent destruction to [a] building” as an “exigent circumstance[... justify[ing]] warrantless searches.” *Georgia v. Randolph*, 547 U.S. 103, 116 n.6 (2006).

\(^{171}\) *Tyler*, 436 U.S. at 501.

\(^{172}\) *Id.*

\(^{173}\) *Id.* at 501–02.

\(^{174}\) *Id.* at 501.

\(^{175}\) *Id.*

\(^{176}\) *Id.* at 502.

\(^{177}\) *Tyler*, 436 U.S. at 501–02.

\(^{178}\) *Id.* at 502.

\(^{179}\) *Id.*

\(^{180}\) *Id.*
Notably, the police took the two suspicious containers with them. The Court detailed how law enforcement reentered the premises at various times throughout the next morning and the following month to investigate the suspected arson. None of the intrusions—running the full gamut from extinguishing the blaze to continued entries days and weeks later—were validated by a warrant. This fact was central to Tyler’s petition to the Supreme Court, appealing his conviction for arson in the Michigan courts.

The prosecution argued that the privacy interest protected by the Fourth Amendment is not at all endangered when the proper authorities enter a burned-down building to investigate the cause of a recent fire. “Not persuasive” was the Court’s explicit view of that argument. It is “contrary to common experience,” opined Justice Stewart, to contend that citizens “inevitably have no protect[able] expectations of privacy” in whatever remains of their property post-fire. Postulating that the Fourth Amendment is not immolated by fire, the rest of the prosecution’s argument justifying the warrantless entries “unravel[ed].”

182. *Id.*
183. *Id.* at 502–03. Specifically, at approximately 8:00 a.m. the next day, the fire chief and his assistant returned to the now-empty and gutted building to make an examination. *Id.* at 502. An hour later, the police arrived, conducted a search, and found evidence of arson that they did not see previously in the steam and darkness of the night before. *Id.* The police went so far as to rip up sections of the carpet and collect other evidence indicating the fire was set deliberately. *Id.* On February 16, nearly an entire month later, an officer of the state police arson squad conducted a search, and uncovered evidence of a fuse, an arson trail, and other indicia that the blaze was deliberately set. *Id.* at 503. In addition, he secured further evidence that Tyler had falsified his claims as to his insured losses. *Id.*
184. *Id.* at 502–03.
185. *Id.* at 501. Tyler’s lower court convictions had been reversed, and a new trial ordered by Michigan’s highest state court thereby attenuating the need for further review. *Id.* at 503–04.
186. *Id.* at 504.
188. *Id.* Among other things, Justice Stewart made the point that private property often remains, in whatever condition, on the premises after the fire. *Id.*
189. *Id.*
Justice Stewart noted that arson must be proven—a mere suspicion of the offense is not a proper ground upon which to justify a warrantless search. An official must demonstrate “more than the bare fact that a fire has occurred” in order to secure a warrant for purposes of seeking out its cause. Additionally, magistrates are duty-bound to assure the requested search will be reasonable—an inquiry that demands, among other things, a balancing between the legitimate needs of government and the privacy interest of the property owner.

Therefore, the need for “a more particularized inquiry” by the magistrate is more pronounced. The judge, as a detached and neutral magistrate, fulfills the important function of assuring that the liberty interest guaranteed by the Fourth Amendment is protected, and the search, if one is authorized, is delimited by the bounds of reasonableness.

Applying this rubric to the case, the Supreme Court held that the warrantless searches conducted in *Tyler* violated the Fourth Amendment’s prohibitions against unlawful searches. The Court presumed the warrantless searches could not be justified on the basis of some recognized exemption. Inquiry into whether such an exceptional circumstance applied here to excuse the warrantless search was the next step for the Court.

But the Justices would not defy rationality to hold that firefighters need a warrant to enter a burning building. More to the point, upon such reasonable entry, firefighters may seize evidence of arson found “in plain view.” Using that standard, the

190. *Tyler*, 436 U.S. at 505–06.
191. *Id.* In the same vein, Justice Stewart added that a later conviction cannot be utilized ex post facto to condone a warrantless search and the evidence obtained thereby. *Id.* at 506.
192. *Id.* at 507.
193. *Id.*
194. *Id.*
195. *Id.* at 508.
197. *Id.*
198. *Id.* at 510.
199. *Id.* at 509.
Court ruled that the initial entry of the firefighters into the burning store and the fire chief’s subsequent removal of the two containers of flammable liquid that were found in plain sight did not violate the Fourth Amendment. By the same logic, the following immediate searches came within the same exception, because the Court characterized them as no more than mere extensions of the original search made when the blaze was still fresh. Viewed as a whole, the first set of searches undertaken by officials did not require a warrant.

The entries made more than twenty-four hours after the blaze was extinguished stood in sharp contradistinction to the initial entry. “[C]learly detached from the initial exigency” by the passage of time, these subsequent warrantless searches ran afoul of the Fourth Amendment’s prohibitions against such unsanctioned procedures. With this exquisite parsing of the facts mated to an equally exquisite application of the Fourth Amendment’s prohibitions and concomitant exceptions, the Supreme Court closed its decision.

201. Tyler, 436 U.S. at 509.
202. Id. at 511. Again, skewing heavily toward the precise order of events, Justice Stewart relied upon the fact that darkness, smoke, and steam interrupted the normal progression of the investigation, thus bifurcating it along the timeline so critical to the Court’s opinion. Moreover, “[l]ittle purpose would have been served” by the firefighters standing amongst the ruins of Tyler’s store between the 4:00 a.m. halt of operations to the recommencement of the investigation four hours later. Id. The Court refused to underwrite such a stilted view of the proceedings.
203. Id.
204. Id.
205. Id.
206. Id. at 511–12. Given the parallel inclusion/exclusion of evidence from the now differentiated searches, the Supreme Court affirmed the Michigan Supreme Court’s directive to hold a new trial. Id. at 512. However, Justice White’s mixed view was grounded upon his assertion that the majority offered “no sound basis” for distinguishing the original intrusion from the subsequent reentries. Id. at 515 (White, J., concurring in part and dissenting in part). “The fact that the firemen were willing to leave demonstrates that the exigent circumstances justifying their original warrantless entry” were extinguished along with the fire. Id. Justice White further opined that arson investigators deserve a
The popular belief is that *Tyler* is best categorized as falling within the small, but significant, subset of cases where exigent circumstances exempt warrantless searches from the application of the Fourth Amendment. At one level, a frank appraisal suggests the instant case best fits within that classification. After all, what is more exigent than a fire and the threat it poses to lives and property? However, *Tyler*’s intense factual analysis speaks of a great concern for illuminating the facts of the reasonableness of the multiple incursions made by fire and police officials in these circumstances. The close scrutiny of the facts carries over to the focused analysis of the reasonableness, as a matter of constitutional law, of the actions of the governmental agents. *Tyler* was equally focused on the reasonableness of the officials’ actions as it was on the exigent circumstances of the search. Thus, in our reconsidered view, we respectfully propose that *Tyler* be categorized in equal parts as an exigent circumstances holding and a reasonableness precedent.

The four cornerstones are set, and within this pantheon of constitutional guarantees we find the current controversy that most concerns us. What results at the intersection of all these momentous Fourth Amendment precedents when they act upon the seemingly mundane—yet constitutionally vital—conundrum of warrantless blood tests administered as part of a drunk-driving stop? We begin by returning to the origins of the issue decades ago.

III. *SCHMERBER* AS THE ROOT OF THE MODERN CONTROVERSY

To understand today’s controversy, we must return to its beginnings with the seminal case of *Schmerber v. California*, a Supreme Court decision decided nearly a half-century ago.207 *Schmerber* provided the pivot upon which today’s Fourth Amendment jurisprudence turns with respect to warrantless blood testing.

The preliminary facts of *Schmerber* were so prosaic that the Supreme Court thought that the basics of the factual setting were better and “clear demarcation of the constitutional limits of their authority.” *Id.* at 516.

only worthy of a footnote.\textsuperscript{208} The Court briefly described how Schmerber and a friend had been out for a night of drinking and bowling.\textsuperscript{209} They departed the bowling alley by car at midnight with Schmerber driving.\textsuperscript{210} The car skidded, hit a tree, and both Schmerber and his companion were found injured and taken to a hospital.\textsuperscript{211}

The facts of the arrest took on a greater significance in the Court's analysis. The first police officer arrived on the scene shortly after the collision and smelled alcohol on Schmerber's breath.\textsuperscript{212} The officer later testified that Schmerber gave the appearance of intoxication (i.e., glassy, bloodshot eyes) at that time.\textsuperscript{213} The officer saw Schmerber at the hospital about two hours later, and noticed he still exhibited signs of intoxication.\textsuperscript{214} The officer placed Schmerber under arrest, and informed him of his rights.\textsuperscript{215} "At the direction of [the] police officer," a blood sample was taken from Schmerber.\textsuperscript{216} The Court went to great trouble to point out that "the extraction was made by a physician in a simple, medically acceptable manner in a hospital environment."\textsuperscript{217} The chemical analysis of the blood sample revealed Schmerber had been intoxicated at the time of the accident; thus, he was convicted on the charge of DWI in state court.\textsuperscript{218} Schmerber argued that, since the blood draw was taken

\begin{itemize}
\item \textsuperscript{208} See Schermber, 384 U.S. at 758 n.2 (laying out the factual setting in three concise sentences).
\item \textsuperscript{209} Id.
\item \textsuperscript{210} Id.
\item \textsuperscript{211} Id.
\item \textsuperscript{212} Id. at 768–69.
\item \textsuperscript{213} Id.
\item \textsuperscript{214} Schermber, 384 U.S. at 769.
\item \textsuperscript{215} Id.
\item \textsuperscript{216} Id. at 758.
\item \textsuperscript{217} Id. at 759. We quickly note that this disclosure of the supposedly simple and safe administration of the blood test arose in the context of Schmerber's allegation that his right to due process under the Fifth Amendment was violated by the blood draw, a constitutional issue beyond the scope of our chosen purview here. Id. at 759–60.
\item \textsuperscript{218} Id. at 758–59.
\end{itemize}
despite his refusal, several of his constitutional rights had been violated.219

The Supreme Court first put the liberty interest at issue into perspective.220 Justice Brennan wrote that “[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”221 The assurance of freedom from arbitrary incursions by law enforcement resides at the very core of the liberty guarantee and is vital to the functioning of a free people.222 Thus, “compulsory administration of a blood test . . . plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment,” opined Justice Brennan.223 According to Justice Brennan, the Fourth Amendment’s express provision protecting the security of the citizenry—first in their persons, and thereafter in their houses, papers, and similar possessions—assures its role.224 “It could not reasonably be

219. Schmerber, 384 U.S. at 759. Expanding upon a previously mentioned distinction, the instant Article focuses upon the stature of Schmerber as part of Fourth Amendment jurisprudence. As such, we merely mention he also made significant claims pursuant to the Fifth and Sixth Amendments, which the Supreme Court of course fully addressed, but which we choose not to delve into here. Id. at 759. We note that in the body of Schmerber’s disposition of certain Fifth Amendment allegations, to wit, the arrestee’s claim that his right not to incriminate himself was violated, Justice Brennan places in succinct counterpoise compulsory law enforcement methodologies not constitutionally prohibited, such as fingerprints, photographs, measurements, and lineups, as contrasted to more draconian devices directed to extract things more in the nature of physical evidence, such as a lie detector test. Id. at 764. Justice Brennan distinguishes the latter, and thus implicitly questions the scope of its constitutional protection or, conversely, prohibition, on the grounds that a polygraph and similar law enforcement tools measure bodily reactions, and therefore might be intended to elicit essential testimonial responses. Id.

220. Id. at 766–67.
221. Id. at 767.
222. Id.; see also Wolf v. Colorado, 338 U.S. 25, 27 (1949) (recognizing the protection of privacy as “basic to a free society”).
223. Schmerber, 384 U.S. at 767. Parenthetically, we note the Court’s statement that “the values protected” by the Fourth Amendment “substantially overlap those . . . the Fifth Amendment helps to protect.” Id. This explains in part the brief, subsequent mention by Justice Brennan that if an involuntary blood draw does not implicate the Fifth Amendment, then the Fourth Amendment’s prohibition against warrantless searches is surely at issue. Id.
224. Id.
argued,” declared the Court, that the blood test forced upon Schmerber was beyond the constraints of the Fourth Amendment.225

Justice Brennan made a declaration that cemented Schmerber as a pillar of Fourth Amendment jurisprudence. Finding that the controversy dealt with “intrusions into the human body rather than . . . property relationships or private papers,” the majority proclaimed “we write on a clean slate,” and set forth a critical holding as to the “Fourth Amendment’s proper function.”226 The liberty guaranteed by this Amendment does not constrain all incursions by the government upon the citizenry, but constrains “intrusions which are not justified in the circumstances.”227 The majority posited that the question for the Court concerned the “reasonableness” of the “means and procedures employed” by the police in taking the suspect’s blood when contrasted to the Fourth Amendment’s strictures.228

Justice Brennan factored in immediate dangers such as concealed weapons, or, far more important to the instant analysis, the potential destruction of evidence.229 Yet, Justice Brennan noted that “[w]hatever the validity” of such considerations, “they have little applicability with respect to searches involving intrusions beyond the body’s surface.”230 “The interests in human dignity and privacy

225. Schmerber, 384 U.S. at 767. The Court further concluded that the blood draw at issue here “plainly constitute[d]” a search, and was in fact predicated upon a seizure of that same person, putting the entire procedure squarely within the domain of the Fourth Amendment. Id.

226. Id. at 767–68.

227. Id. at 768 (emphasis added). The Court appended thereto the equal declaration that the Fourth Amendment likewise prohibited governmental intrusions “made in an improper manner.” Id.

228. Id. Equally so was the question of the police’s justification in proceeding with the warrantless and involuntary blood sampling. Id.

229. Id. at 769. Justice Brennan specified evidence “under the direct control of the accused” is at risk of destruction, presumably at the suspect’s own hands. Id.; see United States v. Rabinowitz, 339 U.S. 56, 72 (1950) (Frankfurter, J., dissenting) (holding that police “officers may search and seize not only the things physically on the person arrested, but those within his immediate physical control”). Be assured that later in this Article we shall draw distinctions between evidence truly within the suspect’s direct control, as contrasted to evidence that the accused has little or no direct control over, for example, the metabolization of alcohol in the arrestee’s own bloodstream.

230. Schmerber, 384 U.S. at 769.
which the Fourth Amendment protects forbid any such intrusions on
the mere chance” that probative evidence might be so recovered.231

The Court stated that, when lacking a clear indication that
desired evidence shall be found, “these fundamental human interests
require law officers to suffer the risk that such evidence may
disappear unless there is an immediate search.”232 Thus, the
Schmerber Court made its first allocation of priorities between the
exigencies of law enforcement and the people’s right to protection
from warrantless searches in the form of involuntary bodily
intrusions. The Court found the question was whether the police in
the instant case had the right to adjudge these weighty considerations
themselves or were “required instead to procure a warrant before
proceeding” to the nonconsensual blood test.233

Drawing a comparison to more commonplace searches of
dwellings, where warrants “are ordinarily required” absent an
emergency, the Supreme Court reached a powerful conclusion:
“[N]o less could be required where intrusions into the human body
are concerned.”234 Proceeding from the necessity of first procuring a
warrant, the Schmerber Court gave the judicial branch a vital role in
determining probable cause. To mandate a warrant is to likewise
require that a “neutral and detached magistrate” decide the propriety
and necessity of issuing such a writ, as contrasted to the interested
law officer “engaged in the often competitive enterprise of ferreting
out crime.”235 The Court held that the importance of an impartial
and nonaligned jurist making “informed, detached and deliberate
determinations of the issue” of nonconsensual bodily incursions “is
indisputable and great.”236

Yet, the Schmerber Court was not blind to the viewpoint of
law enforcement. Examining the opposite side of the proverbial
coin, Justice Brennan conceded that the arresting officer in the
instant case “might reasonably have believed that he was confronted
with an emergency” and thereby rationalized that the lapse of time

231. Schermber, 384 U.S. at 769–70.
232. Id. at 770.
233. Id.
234. Id.
235. Id. (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).
236. Id.
required to secure a warrant would pose a threat to the preservation of vital evidence.\textsuperscript{237} Knowingly or otherwise, the Court set the stage for the controversy that continues today. Writing for the Court, Justice Brennan stated, “We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops,” as the body begins to detoxify itself.\textsuperscript{238} Such knowledge was heightened by the facts that Schmerber required transportation to the hospital, the police had to investigate the accident scene, and “there was no time to seek out a magistrate and secure a warrant.”\textsuperscript{239} On the basis of “these special facts,” the \textit{Schmerber} majority concluded that the efforts to secure the blood sample, even over the arrestee’s objection, were “an appropriate incident” to the suspect’s arrest.\textsuperscript{240}

The majority also stated that the typical blood test is substantially free of risk or pain, and at least in this instance, the blood draw was “performed in a reasonable manner,” by a physician in a “hospital environment.”\textsuperscript{241} On its face, the Court’s discussion appears somewhat superfluous. But it is not.\textsuperscript{242} The majority pointed out that, in contradistinction, “We are thus not presented with the serious question which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by \textit{other than medical personnel or in other than a medical environment}.”\textsuperscript{243} Here, the Court distinguished between a blood test administered by police at the stationhouse and a test administered by

\begin{itemize}
\item \textsuperscript{237} \textit{Schmerber}, 384 U.S. at 770.
\item \textsuperscript{238} \textit{Id.}
\item \textsuperscript{239} \textit{Id.} at 770–71.
\item \textsuperscript{240} \textit{Id.} at 771.
\item \textsuperscript{241} \textit{Id.} The Supreme Court declared blood tests as “routine in our everyday life,” as they were then part of entering the military or obtaining a marriage license. \textit{Id.} at 771 n.13. As we shall briefly discuss later, such reasoning makes for an apt comparison to modern America and our conceptualizations of personal liberty.
\item \textsuperscript{242} \textit{Id.} at 771. Every word a court utters, especially the Supreme Court, is significant. \textit{See, e.g.,} United States v. Bell, 524 F.2d 202, 206 (2d Cir. 1975) (utterances of the Supreme Court “must be given considerable weight and can not be ignored”); Lewis v. Sava, 602 F. Supp. 571, 573 (S.D.N.Y. 1984) (lower courts obliged to follow the emanations of the high Court).
\item \textsuperscript{243} \textit{Schmerber}, 384 U.S. at 771–72 (emphasis added).
\end{itemize}
a doctor at a hospital. The Court thus introduced a seemingly minor caveat, anticipating that its tolerance for searches done in such an irregular manner may “invite an unjustified element” of risk and pain to the detainee. And so, some of the seeds of the modern controversy were sewn.

The Justices found no violation of the Fourth Amendment in the specific circumstances of this suspect’s involuntary blood draw. But, the majority made explicit that it based its ruling “only on the facts of the present record.” The Court identified this limitation because “[t]he integrity of an individual’s person is a cherished value of our society.” To forestall misunderstanding, the Schmerber Court explained that the liberties guaranteed by the Constitution do not necessarily forbid the states from making minor incursions into an individual’s body under stringently limited conditions. Such a circumscribed ruling “in no way” condones more substantial “intrusions under other conditions.”

Schmerber has few, if any, notable direct offspring. Rather, until McNeely, Schmerber was regarded as a quiescent landmark, with one exception: Skinner v. Railway Labor Executives’ Ass’n. Skinner can rightly be viewed as an aberration in the Supreme Court’s carefully crafted Fourth Amendment jurisprudence because it displays a laxity towards upholding the liberty interest guaranteed by the constitutional proviso. Yet, a cursory examination of a few pertinent factors surrounding this precedent helps to explain the decision.

Federal authorities were concerned that engineers and operators of the nation’s railways might be endangering the public by operating trains while under the influence of drugs or alcohol. To combat this concern, authorities promulgated extensive regulations

244. Schermber, 384 U.S. at 772 (including other medical professionals in similar medical settings).
245. Id.
246. Id.
247. Id.
248. Id. (emphasis added).
249. Id. at 771–72.
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using random blood, breath, and urine tests. In order to maintain the element of surprise, all for the public good, of course, the tests were to be administered under the most invasive of conditions, fundamentally ignoring any regard for privacy. The tests were to be conducted without a warrant, thus positioning Skinner as the intermediary between Schmerber and the present-day controversy.

Writing for the Court, Justice Kennedy’s explanation was plainspoken enough in relating why the majority viewed Skinner’s rigorous regimen of drug testing with approbation: “This governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, . . . [and] also ‘require[s] and justif[ies] the exercise of supervision.’” As further justification, Skinner posits that “such intrusions [as these blood tests] are defined narrowly and specifically in the regulations that authorize them, and doubtless are well known to covered employees.” Indeed, “the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety.”

Having disposed of privacy concerns, Skinner proceeded to draw a direct line to Schmerber. First, the Court stated that “alcohol and other drugs are eliminated from the bloodstream at a constant rate and blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event [(i.e., a railway accident)] occurred must be obtained as soon as possible.”

253. Id. at 611.
254. Id. at 610–12.
255. Id. at 621 (first alteration added) (citation omitted). As an aside, one can only wonder about this submission to pervasive governmental authority penned by Justice Kennedy in Skinner, in sharp contradistinction to the same Justice in the twenty-first century (as his ascent to the role of the so-called “swing vote” has apparently ignited a pronounced libertarian streak disfavoring such governmental meddling in personal privacy). See, e.g., United States v. Windsor, 133 S. Ct. 2675 (2013) (holding the Defense of Marriage Act unconstitutional as violative of the Fifth Amendment).
256. Skinner, 489 U.S. at 622.
257. Id. at 627.
258. Id. at 623 (citation omitted).
Skinner characterized Schmerber as validating such bodily intrusions when warrantless blood draws are performed in a reasonable manner by a physician (or suitable medical professional) in a hospital.  

The Court declared the slight invasiveness of a routine blood test “is not significant” and noted that its own holding in Schmerber “confirmed society’s judgment that blood tests do not constitute an unduly extensive imposition on an individual’s privacy and bodily integrity.”

Skinner does not end there, however. Its abrupt and harsh result is ameliorated, at least in part, by the dissent robustly defending the freedom at stake. Authored by Justice Marshall, and joined by Justice Brennan, the dissent warned, “Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great.”

Informed by the past, Justice Marshall continued, “History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure.” Decrying the majority’s actions that day as “shortsighted” in permitting “basic constitutional rights to fall prey to momentary emergencies,” the dissent remonstrated that “when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.”

Refusing to bend the Fourth Amendment’s guarantees, Justice Marshall declared the Warrant Clause “is not so easily

259. Skinner, 489 U.S. at 625.
261. Id. at 635. In a companion case decided the same day, National Treasury Employees Union v. Von Raab, Justice Scalia echoed this sentiment in his dissent, declaring, “the impairment of individual liberties cannot be the means of making a point.” 489 U.S. 656, 687 (1989) (Scalia, J., dissenting).
262. Skinner, 489 U.S. at 635 (citing Korematsu v. United States, 323 U.S. 214 (1944)).
excised” from the pantheon of our freedoms.\textsuperscript{264} He warned that dispensing with a constitutional requirement because it was deemed impracticable is to indulge in an elusive process.\textsuperscript{265} By neglecting to uphold the strictures of the Warrant Clause, the Fourth Amendment’s “overarching command” that searches and seizures be “reasonable” is rendered “virtually devoid of meaning, subject to whatever content shifting judicial majorities, concerned about the problems of the day, choose to give to that supple term.”\textsuperscript{266}

In a parenthetical, Justice Marshall pointed out that the Supreme Court in \textit{Schmerber} found the blood test therein was permissible only \textit{after} ruling that the bodily intrusion fell within the exigent circumstances exception and that probable cause was found to exist.\textsuperscript{267} Having thus contrasted the exigent circumstances of \textit{Schmerber} to the emergent needs of the government as proffered by the \textit{Skinner} majority, Justice Marshall responded with a counter-interpretation. Justice Marshall disagreed that the heavy regulation of the railroad industry utterly “eclipses workers’ rights under the Fourth Amendment,”\textsuperscript{268} insisting rather that “constitutional rights have their consequences, and one is that efforts to maximize the public welfare, \textit{no matter how well intentioned}, must \textit{always} be pursued within constitutional boundaries.”\textsuperscript{269}

The dissent in \textit{Skinner} also struck broader themes. Speaking to an alternative vision of a nation where the constitutional guarantee was momentarily suspended to serve this public need, Justice Marshall envisioned that “[w]ere the police freed from the

\textsuperscript{264} \textit{Skinner}, 489 U.S. at 637.

\textsuperscript{265} \textit{Id}.

\textsuperscript{266} \textit{Id.}; \textit{see id.} at 636 (“[H]ighly intrusive searches . . . [must] be based on probable cause, not on the evanescent cost-benefit calculations of agencies or judges.”); \textit{see also} Crawford v. Washington, 541 U.S. 36, 63, 67–68 (2004) (noting that “[b]y replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design” and run the risk that “[s]ome courts [will] wind up attaching the same significance to opposite facts” due to the “amorphous” tendency of such balancing tests).

\textsuperscript{267} \textit{Skinner}, 489 U.S. at 645 n.7.

\textsuperscript{268} \textit{Id.} at 648.

\textsuperscript{269} \textit{Id.} at 650 (emphasis added); \textit{see also id.} at 641 (acknowledging that while concern for public safety “is laudable[, a] cavalier disregard for the text of the Constitution is not”).
constraints of the Fourth Amendment for just one day . . . the resulting convictions and incarcerations would probably prevent thousands of fatalities” linked to substance abuse.270 But, refusing to yield to the majority’s vision of a safer America, Justice Marshall countered that “[o]ur refusal to tolerate this specter reflects our shared belief that even beneficent governmental power—whether exercised to save money, save lives, or make the trains run on time—must always yield to a resolute loyalty to constitutional safeguards.”271 In response to the acquiescence of the Court to the warrantless blood tests in *Skinner*, the dissent implored that “[t]he Constitution demands no less loyalty here.”272

Therefore, *Skinner*’s ultimate redemption is in its robust dissent. The dissent warns of the slippery slope the Court treads. It is the dissenting voice of *Skinner* that cherishes the freedom from warrantless searches that the Fourth Amendment provides. The tale of *Schmerber* and its limited progeny, most notably *Skinner*, ends with a great portent for the future.

IV. **McNEELY**: A CONFIRMATION OF THE TOTALITY OF THE CIRCUMSTANCES TEST

We have seen *Schmerber* and its implications, standing alongside many other Supreme Court landmarks. In *Missouri v. McNeely*, the Court resisted the call of some to diminish the requirement for a warrant in blood-testing cases.273 In that case, after Tyler McNeely was observed driving his truck in excess of the speed limit and weaving across the centerline, Missouri highway patrol pulled him over.274


271. Id. (quoting Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973)) (internal quotation marks omitted); see also Sabino, BAYLOR, supra note 38, at 349 (analyzing Justice Scalia’s opinion in *Crawford* and *Melendez-Diaz* and Justice Ginsburg’s opinion in *Bullcoming*, and stating that “[i]t is a simple thing, really—public policy rarely, if ever, overcomes the Constitution, nor should it”).


273. 133 S. Ct. 1552, 1568 (2013) (holding that dissipation of alcohol does not per se constitute exigent circumstances).

274. Id. at 1556.
The police officer noted that McNeely presented the typical signs of intoxication: bloodshot eyes, slurred speech, wobbly on his feet, and the smell of liquor on his breath. McNeely freely admitted that he had been at a bar and had “a couple of beers.” As related by the Court, McNeely then “performed poorly” on a set of field sobriety tests. McNeely declined to submit to a portable breathalyzer test, and the officer placed him under arrest.

On the drive to the station house, McNeely told the officer he would continue to refuse to provide a breath sample. Upon hearing this, the officer diverted to a nearby hospital for purposes of having McNeely’s blood tested. The officer explained to McNeely that, pursuant to state law, McNeely’s refusal to submit to a blood test could mean an immediate revocation of his driver’s license and his refusal could be used against him in court. McNeely remained steadfast in his refusal to consent to a blood test.

Nonetheless, the police officer directed a hospital technician to take a blood sample from the unwilling McNeely. Subsequent testing revealed that McNeely’s blood alcohol concentration (BAC) was nearly twice the legal limit.

At his trial for driving while intoxicated (DWI), McNeely sought to suppress the results of the blood test. Undoubtedly, McNeely was highly motivated to exclude the BAC test, since he already had two prior DWI convictions, thus, pursuant to Missouri law, he faced a felony conviction and up to four years in jail.

276. *Id.* at 1556.
277. *Id.* at 1556–57.
278. *Id.*
279. *Id.* at 1557.
280. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*
The trial judge granted McNeely’s motion to suppress, ruling that the blood test, conducted without consent and without a warrant, violated McNeely’s Fourth Amendment rights. The Missouri Supreme Court affirmed, declaring that McNeely’s situation presented a routine DWI test, and that the warrantless search, undertaken in the form of the involuntary blood test, could not be justified. An appeal to the Supreme Court followed.

Writing for the Court, Justice Sotomayor noted that review was granted to resolve a split of authority on the question of “whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency” that excuses the lack of a warrant for an involuntary blood sample taken during a drunk-driving investigation.

In the opening of McNeely, Justice Sotomayor explained that the conflict had its roots in the 1966 landmark decision of Schmerber v. California. Justice Sotomayor set out that the reasoning behind upholding warrantless blood testing in the context of a DWI arrest is driven by a law enforcement officer’s legitimate concern that she is confronted with such an emergency that the destruction of vital evidence is threatened. The exact question placed before the Court in McNeely was “whether the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment’s warrant requirement for nonconsensual blood testing in all drunk-driving cases.” The Supreme Court held that “it does not,” and consistent with Fourth

288. McNeely, 133 S. Ct. at 1557.
289. Id.; State v. McNeely, 358 S.W.3d 65, 67 (Mo. 2012) (per curiam).
290. McNeely, 133 S. Ct. at 1558.
291. Id. at 1556. Justice Sotomayor announced the judgment of the Supreme Court, and authored the controlling opinion. The main parts of McNeely were joined by Justices Scalia, Ginsburg, and Kagan. Id. This Article highlights the specific portions of Justice Sotomayor’s opinion that Justices Scalia, Ginsburg, and Kagan joined. Id.
292. Id. at 1558 (emphasis omitted). The Supreme Court granted certiorari in order to resolve the split of authority on the issue of whether dissipation of alcohol alone creates an exigent circumstance; the Court listed six state court decisions as relevant cases. Id. at 1558 n.2.
294. McNeely, 133 S. Ct. at 1559–60 (citing Schmerber, 384 U.S. at 770).
295. Id. at 1556 (emphasis omitted).
Amendment doctrine, any so-called exigency must be determined *sui generis* “based on the totality of the circumstances” presented to the trial court.\footnote{296. *McNeely*, 133 S. Ct. at 1556.}

The Court commenced its analysis by reviewing the relevant pillars of the Fourth Amendment’s mandate that searches must only be conducted pursuant to a warrant.\footnote{297. *Id.* at 1558.} The appropriate starting point was an exegesis of the liberty guarantee itself, which provides that “[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.”\footnote{298. *Id.* (quoting U.S. CONST. amend. IV).} The Supreme Court’s jurisprudence holding “that a warrantless search of the person is reasonable *only if it falls within a recognized exception*”\footnote{299. *Id.* (emphasis added) (citing *U.S. v. Robinson*, 414 U.S. 218, 224 (1973)).} was pivotal to the Court’s deliberations.

Justice Sotomayor readily determined that this benchmark applies to the compulsory physical intrusion of a blood test, as found in *McNeely*: “Such an invasion of bodily integrity implicates an individual’s ‘most personal and deep-rooted expectations of individual privacy.’”\footnote{300. *Id.* at 1558 (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)); see also *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 616 (1989) (noting our “society’s concern for the security of one’s person” makes it obvious that a physical intrusion infringes upon an individual’s expectation of privacy).} But, the Court did concede that even a cornerstone freedom such as the Fourth Amendment has exceptions.\footnote{301. *McNeely*, 133 S. Ct. at 1558.} One well-known exception is the emergency presented when the needs of law enforcement overwhelm the usual distaste for a warrantless search.\footnote{302. *Id.*; see also *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (explaining that the necessity of preventing the suspect from destroying drug evidence is overcome by the warrant requirement); *Michigan v. Fisher*, 558 U.S. 45, 47–48 (2009) (reasoning that the need to provide emergency assistance to an occupant overcame the need for a warrant before entering the home); *Michigan v. Tyler*, 436 U.S. 499, 509–10 (1978) (describing a situation where the necessity of}
Justice Sotomayor then set about the crucial task of describing the Court’s methodology in such cases: “To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances.”

The Court characterized this approach as a precision instrument, wielded to evaluate reasonableness in the Fourth Amendment context, because the police in such circumstances act without the benefit of a judicial warrant. “Absent that established justification,” each and every purported police emergency should be evaluated upon its own specific facts and circumstances.

The McNeely Court noted that Schmerber was a prime illustration of the efficacy of a fact-specific inquiry. The fact-based analysis undertaken in Schmerber inquired as to the time needed to bring the injured suspect to the hospital, the time expended to investigate the accident, and conversely, the lack of time to seek out a magistrate and obtain a warrant. Ultimately, the Schmerber Court concluded that the diminishment of the accused’s blood alcohol level threatened the loss of valuable evidence, and thereby, constituted an emergency exempt from normal Fourth Amendment procedures.

In McNeely, Justice Sotomayor underscored that the precedent set by Schmerber was one mandating a case-by-case analysis whenever a potential Fourth Amendment violation occurs. Nonetheless, the State pursued the transformation of this case-by-case analysis into a per se rule for blood testing in

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304. McNeely, 133 S. Ct. at 1559 (citing cases).
305. See id. (“We apply this ‘finely tuned approach’ to Fourth Amendment reasonableness in this context because the police action at issue lacks ‘the traditional justification that . . . a warrant . . . provides.’” (quoting Atwater v. Lago Vista, 532 U.S. 318, 347 n.16 (2001))).
306. Id.
307. Id. (citing Schmerber v. California, 384 U.S. 757, 758 (1966)).
308. Id. at 1560.
309. Id.
310. McNeely, 133 S. Ct. at 1560.
drunk-driving cases.  

The prosecution apparently sought this per se rule “because BAC evidence is inherently evanescent.”  

The very nature of blood chemistry and its variability creates exigent circumstances justifying a warrantless search.  

The State conceded that, the arresting officer still needed probable cause, and the blood test still needed to be conducted in a reasonable manner.  

But, assuming these obstacles were surmounted, the State sought a declaration that it was “categorically reasonable for law enforcement to obtain the blood sample without a warrant.”

Justice Sotomayor found no reason to dispute the truism “that as a result of the human body’s natural metabolic processes, the alcohol level in a person’s blood begins to dissipate once the alcohol is fully absorbed and continues to decline until the alcohol is eliminated.”  

Yet, Justice Sotomayor made sure to note that the Court was not overly concerned with the exactitudes of science: “Regardless of the exact elimination rate,” she posited, “it is sufficient for our purposes to note that because an individual’s alcohol level gradually declines . . . a significant delay in [BAC] testing will negatively affect . . . results.”  

Certainly, the Court alluded to that decades ago in Schmerber; these scientific truths animated the Court’s holding at that time.  

However, this was insufficient to move the Court in McNeely. Justice Sotomayor was most resolute, declaring, “[b]ut it does not follow that we should depart from careful case-by-case assessment of exigency” and adopt a new per se test, as propounded by the State.  

It has long been the law that before drawing a blood sample for testing, the Fourth Amendment mandates police officers to obtain a warrant when they can reasonably do so without “significantly undermining the efficacy of the search.”

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311. McNeely, 133 S. Ct. at 1560.  
312. Id.  
313. Id.  
314. Id.  
315. Id.  
316. Id.  
317. McNeely, 133 S. Ct. at 1561.  
318. Id.  
319. Id.  
320. Id. (citing McDonald v. U.S., 335 U.S. 451, 456 (1948)).
Evincing a clear understanding of the difficulties law enforcement officers confront in such circumstances, Justice Sotomayor confirmed that the Court does “not doubt that some circumstances will make obtaining a warrant impractical.”321 These circumstances will “support an exigency justifying a properly conducted warrantless blood test.”322 Such reasoning is a powerful argument against—not for—converting to a categorical rule that would reflect considerable overgeneralizations.323

The McNeely Court drew a critical distinction that helped define its views on warrantless searches in the context of taking blood for BAC testing, as contrasted with other Fourth Amendment situations. Justice Sotomayor noted that blood testing differs in crucial respects from other destruction-of-evidence cases: the latter scenarios are comprised of “cases in which the police are truly confronted with a ‘now or never’ situation.”324 Justice Sotomayor opined that the need to draw blood for BAC testing stands in sharp contrast to circumstances where the suspect “has control over easily disposable evidence.”325 In an alleged DWI case, evidence of alcohol in the bloodstream dissipates “over time in a gradual and relatively predictable manner.”326 Furthermore, blood is not taken in the field. In such cases, the suspected DWI driver is normally transported to a hospital where a trained medical professional can draw the blood sample.327 Therefore, there is an inherent delay

321. McNeely, 133 S. Ct. at 1561.
322. Id.
323. Id.; see also Richards v. Wisconsin, 520 U.S. 385, 393 (1997) (“First, the exception contains considerable overgeneralization. For example, while drug investigation frequently does pose special risks to officer safety and the preservation of evidence, not every drug investigation will pose these risks to a substantial degree.”).
324. McNeely, 133 S. Ct. at 1561; see also Roaden v. Kentucky, 413 U.S. 496, 505 (1973) (“Where there are exigent circumstances in which police action literally must be ‘now or never’ to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation.”).
325. McNeely, 133 S. Ct. at 1561; see also Georgia v. Randolph, 547 U.S. 103, 116 n.6 (2006) (noting that in cases where “the objecting tenant cannot be incapacitated from destroying easily disposable evidence during the time required to get a warrant,” the exigency exception to the warrant requirement will apply).
326. McNeely, 133 S. Ct. at 1561.
327. Id.
between the time of the arrest and the time of the testing, regardless of the need to obtain a warrant.\textsuperscript{328} Such a reality “undermines” the prosecution’s call in \textit{McNeely} to promulgate a “categorical exception” to the Fourth Amendment’s normal requirements.\textsuperscript{329}

The \textit{McNeely} opinion presented the following scenario as an example: A police officer takes steps to secure a warrant while another officer is transporting a suspect to a hospital. “[T]he warrant process will not significantly increase the delay before the blood test is conducted” because of the passage of time inherent in simultaneous transportation while the warrant is being pursued.\textsuperscript{330} Justice Sotomayor found “no plausible justification” for a per se exception to the Fourth Amendment in such circumstances.\textsuperscript{331}

Furthermore, the Court found that the prosecution’s quest for a categorical exception for warrantless searches involving BAC tests likewise failed to take into account the progress made in the last five decades in faster processing of warrant applications in cases such as suspected DWI.\textsuperscript{332} For instance, in the federal arena, magistrate judges may entertain telephone applications for a warrant.\textsuperscript{333} “States

\begin{itemize}
\item \textsuperscript{328} \textit{McNeely}, 133 S. Ct. at 1561.
\item \textsuperscript{329} \textit{Id.}
\item \textsuperscript{330} \textit{Id.}
\item \textsuperscript{331} \textit{Id.}
\item \textsuperscript{332} \textit{Id.} at 1561–62.
\item \textsuperscript{333} \textit{Id.} at 1562; see \textit{FED. R. CRIM. P. 4.1(a)}, which provides: “(a) IN GENERAL. A magistrate judge may consider information communicated by telephone or other reliable electronic means when reviewing a complaint or deciding whether to issue a warrant or summons.” \textit{FED. R. CRIM. P. 4.1(a)}. Further on, the same rule requires duplicate warrants, as follows: “The applicant must prepare a proposed duplicate original of a complaint, warrant, or summons, and must read or otherwise transmit its contents verbatim to the judge.” \textit{Id.} at 4.1(b)(3). Justifying the modernization of Rule 4.1, the Advisory Committee Notes explain the recent amendment in this manner:

\begin{quote}
New Rule 4.1 brings together in one rule the procedures for using a telephone or other reliable electronic means for reviewing complaints and applying for and issuing warrants and summonses. In drafting Rule 4.1, the Committee recognized that \textit{modern technological developments have improved access to judicial officers, thereby reducing the necessity of government action without prior judicial approval}. Rule 4.1 prescribes uniform procedures and ensures an accurate record.
\end{quote}
have also innovated” their warrant application processes.334 States have proven adept at utilizing all the modern appurtenances such as e-mail and videoconferencing, going well beyond the telephone available when Schmerber was decided in 1966.335 These technological breakthroughs are enhanced by more fundamental

\[\ldots\] Successful experience using electronic applications for search warrants under Rule 41, combined with increased access to reliable electronic communication, support the extension of these procedures to arrest warrants, complaints, and summonses.

**FED. R. CRIM. P. 4.1 advisory committee’s note** (emphasis added). We find significant, and thus choose to emphasize, the Article’s explicit recognition of “improved access” to the all important neutral and detached magistrate, and the even more forceful declaration that bringing the Rule fully into the current day is purposed to “reduce[e] the necessity of government action without prior judicial approval.” *Id.* In our combined experience, rarely have we seen an innocuous rule advisory note so clearly embody a plethora of Supreme Court doctrine.

334. *McNeely*, 133 S. Ct. at 1562. The Supreme Court has long allowed, and even encouraged, the several States to take the lead and promulgate their own pragmatic rules and procedures to stay within the confines of the Fourth Amendment’s permissive zone of police action. *See, e.g.*, Ker v. California, 374 U.S. 23, 34 (1963) (“The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet ‘the practical demands of effective criminal investigation and law enforcement’ in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures . . . .”). Such encouragement of independent, albeit constitutionally respectful, action is an obvious recognition of the diverse needs and capabilities of the individual states, as they seek to stay on the right side of this important liberty guarantee. *See id.* (explaining that without derogating constitutional proscriptions, varying conditions and circumstances amongst the States must be recognized); *see also id.* at 45 (Harlan, J., concurring) (“[T]he States, with their differing law enforcement problems, should not be put in a constitutional strait jacket.”); *cf.* Bullcoming v. New Mexico, 131 S. Ct. 2705, 2725 (2011) (Kennedy, J., dissenting) (noting that the States are at liberty to assess and experiment with statutes and procedures directed toward the preservation of guaranteed liberties).

335. *McNeely*, 133 S. Ct. at 1562. According to a detailed analysis by the Court, “[w]ell over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means.” *Id.* In a footnote, the opinion provides an exhaustive list of states and their respective statutes. *Id.* at 1562 n.4. Curiously, Missouri, the jurisdiction in question here, actually operates under a statutory prohibition against warrant applications made orally, via facsimile or by other electronic means. *Id.* This explains a great deal of how the instant case developed.
innovations in arrest procedures, such as streamlined warrant applications in prosaic DWI investigations.\textsuperscript{336} The \textit{McNeely} Court paused to deliver a frank assessment: “We by no means claim that telecommunications innovations have, will, or should eliminate all delay from the warrant-application process.”\textsuperscript{337} Warrants consume valuable time in the process of application and judicial review.\textsuperscript{338} All the modern conveniences of the twenty-first century will not obviate the requisite formalities imperative to due process.\textsuperscript{339} Even the most cutting-edge telecommunication devices cannot guarantee that a magistrate, state or federal, can be quickly brought to the other end of the line.\textsuperscript{340}

“But technological developments,” which expedite the securing of a necessary warrant “and do so without undermining the neutral magistrate judge’s essential role as a check on police discretion,” are a material component in the judicial calculus of measuring a purported emergency justifying a warrantless search.\textsuperscript{341} That is particularly true in DWI cases, where the BAC evidence is lost “gradually and relatively predictably.”\textsuperscript{342}

Certainly, the Court was not oblivious to “important countervailing concerns” where the timeliness of a BAC test is at issue.\textsuperscript{343} Competent experts can work backward in performing a blood alcohol analysis, but the longer the delay in administering the blood test, the more suspect the results become.\textsuperscript{344} The \textit{McNeely} plurality acknowledged that this could be reason enough to find exigent circumstances that justify the drawing of blood without a warrant, further implying that such justification might be warranted.

\begin{footnotes}
\item[336.] \textit{McNeely}, 133 S. Ct. at 1562.
\item[337.] \textit{Id}.
\item[338.] \textit{Id}.
\item[339.] \textit{Id}. The Court cites the federal rule of preparing a duplicate warrant before contacting a magistrate judge. \textit{Id}. (citing FED. R. CRIM. P. 4.1(b)(3)).
\item[340.] \textit{Id}.
\item[341.] \textit{Id}. at 1563.
\item[342.] \textit{Id}. at 1563. In a related footnote, the Court noted that in the lower court proceedings, the officer who detained McNeely easily acknowledged that a warrant application especially purposed for drunk-driving investigations was readily available, and implicitly, in widespread use in his jurisdiction. \textit{Id}. at 1563 n.5. Again, this factoid provides an interesting subtext.
\item[343.] \textit{Id}. at 1563.
\item[344.] \textit{Id}.
\end{footnotes}
if other delaying factors were present. Nevertheless, the Court ruled that the adoption of a per se exception as urged by the State “would improperly ignore the current and future technological developments” in procuring warrants, which might ameliorate the delay of tardy blood draws, thereby diminishing their efficacy. Moreover, a facile per se exception for warrantless BAC testing in DWI cases would chill any incentive for jurisdictions to re-examine and upgrade their warrant application process to more efficacious procedures that better balance the legitimate ends of law enforcement with the liberty interests guaranteed by the Fourth Amendment.

Concluding this portion of the McNeely landmark decision, Justice Sotomayor declared that “[i]n short, while the natural dissipation of alcohol in the blood may support a finding of exigency . . . it does not do so categorically.” The sui generis inquiry established many years before in Schmerber stood unbowed and unbroken, and thus, the reasonableness of a warrantless blood test of a DWI arrestee “must [still] be determined case by case based on the totality of the circumstances.” Justice Sotomayor then disposed of the remaining arguments in support of a per se exigency rule for warrantless blood tests, finding them unpersuasive.

First, the State, accompanied by various amici and even the federal government, argued against a case-by-case rule because it would purportedly leave law enforcement with too little guidance for making decisions on whether the procurement of a warrant was an unavoidable precursor to taking blood samples in such cases. Admittedly, bright-line rules are usually desirable in such instances. But, the Court struck down this argument, stating, “[T]he Fourth Amendment will not tolerate adoption of an overly

345. McNeely, 133 S. Ct. at 1563.
346. Id.
347. Id.
348. Id. (emphasis added).
349. Id.
350. Id. at 1564–68.
351. McNeely, 133 S. Ct. at 1564 (noting that the Chief Justice and the dissent also voiced the same concern).
352. Id.
broad categorical approach.\textsuperscript{353} The requirement for a warrant cannot be diluted in a context such as this “where significant privacy interests are at stake.”\textsuperscript{354}

Moreover, this style of \textit{sui generis} inquiry is “hardly unique within [the Court’s] Fourth Amendment jurisprudence.”\textsuperscript{355} The judicial branch often tests the propriety of police actions via factually intense, totality of the circumstances analyses.\textsuperscript{356} In sharp contradistinction, categorical rules are often eschewed where significant liberty interests are at stake, even “in situations that are more likely to require police officers to make difficult split-second judgments.”\textsuperscript{357} Therefore, the plurality saw “no valid substitute for careful case-by-case evaluation[s] of reasonableness here.”\textsuperscript{358}

Second, the Court addressed the contention that drawing blood from a drunk-driving suspect somehow implicates a markedly lesser privacy interest.\textsuperscript{359} Justice Sotomayor strongly disagreed:

\begin{quotation}
353. \textit{McNeely}, 133 S. Ct. at 1564.
354. \textit{Id}.
355. \textit{Id}.
356. \textit{Id}.
357. \textit{Id}.
358. \textit{Id} (emphasis added) (footnote omitted). The plurality at this juncture disposed of the dissent’s lament that police officers will be hindered in evaluating the totality of the circumstances under this approach because they ordinarily lack knowledge of all relevant facts at the time an arrest is made. \textit{Id}. The plurality was unmoved by this concern, countering that law enforcement officers are presumably familiar with the mechanics and time components of procuring a warrant in their own jurisdiction. \textit{Id} at 1564 n.7. Thus, the Court put forth its expectation that the police can make rational judgments about whether or not seeking a warrant “would produce unacceptable delay under the circumstances.” \textit{Id}. And, in an important nod to the needs of law enforcement, the Court made clear that jurists sitting in review of police actions should view the actions from the perspective of a reasonable police officer on the scene, and thereby reject the harshness of 20/20 hindsight. \textit{Id}; see also \textit{Ryburn v. Huff}, 132 S. Ct. 987, 992 (2012) (per curiam) (“But we have instructed that reasonableness ‘must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight’ . . .” (quoting \textit{Graham v. Connor}, 490 U.S. 396–97 (1989))).
359. \textit{McNeely}, 133 S. Ct. at 1564. How might Justice Jackson have responded to such rationalizing by the authorities? He might well repeat his admonition that “[t]his method of law enforcement displays a shocking lack of all sense of proportion.” \textit{McDonald v. United States}, 335 U.S. 451, 459 (1948) (Jackson, J., concurring) (severely restricting exigent circumstances justifying a warrantless entry into the home) (quoted with approval by \textit{Welsh v. Wisconsin},}
\end{quotation}
“[T]he fact that people are accorded less privacy” when driving because of compelling governmental interests “does not diminish a motorist’s privacy interest” to the point of law enforcement having virtual carte blanche to indulge in bodily invasions.\footnote{466 U.S. 740, 751 (1984) (noting that warrantless entry into the home for purposes of making a relatively minor arrest for DWI cannot be justified)).} A modern blood test, administered by competent medical personnel, is far less traumatic than other physical intrusions the Court has declared unreasonable\footnote{360. \textit{McNeely}, 133 S. Ct. at 1565 (internal quotation marks omitted); \textit{see} \textit{California v. Carney}, 471 U.S. 386, 392 (1985) (recognizing that the “public . . . is accorded less privacy in its automobiles because of this compelling governmental need for regulation”).}—hence the Court’s general approbation of blood tests as reasonable under \textit{appropriate} circumstances.\footnote{361. \textit{Id.} 133 S. Ct. at 1565.} But that is a far cry from the situation presented in \textit{McNeely}; the Court indicated that it had “never retreated” from its “recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests.”\footnote{362. \textit{Id.} (emphasis added).}

Finally, the \textit{McNeely} plurality disposed of the assertion propounded by the State and its amici that conducting BAC testing with alacrity and certainty is “vital” to the “compelling governmental interest” in thwarting drunk driving, and that this interest was dispositive.\footnote{363. \textit{Id.}} Justice Sotomayor recognized that no rational person could seriously dispute the danger of drunk driving, and thus, there is a governmental interest in eradicating it.\footnote{364. \textit{Id.} The Court took care to highlight the point that it is statutorily illegal in all fifty states and the District of Columbia to operate a motor vehicle while sustaining a blood alcohol level in excess of 0.08 percent, in addition to the general baseline prohibition against driving while under the influence. \textit{Id.} The Court also noted how this universal standard for DWI came about via federal regulation tying federal highway grants to the adoption of a 0.08 BAC marker. \textit{Id.} at 1565 n.8 (citing, \textit{inter alia}, 23 U.S.C. § 163(a) (2012)).} Certainly, no one on the Court disagreed.\footnote{365. \textit{Id.} at 1565.} Yet, notwithstanding “the general importance of the government’s interest in this area,” such a concern “does not
justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case.”367 The Court was unmoved from its established case law mandating a totality of the circumstances test when reviewing the propriety of warrantless searches in DWI cases.368

Justice Sotomayor also pointed to the “broad range of legal tools” already in use to combat drunk driving and obtain the blood samples necessary to those enforcement efforts, that do not require reliance on warrantless blood testing.369 A major example of these existing methods is the nationwide adoption of implied consent laws: individuals operating a motor vehicle in any of the fifty states automatically consent to a BAC test if arrested or even detained upon suspicion of DWI.370 “Such laws impose significant consequences when a motorist withdraws [this] consent,” including suspension of the suspect’s driver’s license; further, the majority of jurisdictions count the suspect’s refusal to submit to a blood test as admissable evidence in a subsequent criminal prosecution.371

Next, the Court found it persuasive that the majority of states “place significant restrictions” upon law enforcement’s rights to draw a blood sample over a suspect’s refusal.372 Some jurisdictions “prohibit nonconsensual blood tests altogether,”373 and among the


368. *Id.* at 1566. Justice Sotomayor’s fortitude here in adhering to established precedent, over the pleas of prosecutors decrying a parade of horribles, is reminiscent of the steadfastness of Justices Scalia and Ginsburg in defense of the Confrontation Clause, where the former declared in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009), that “the sky will not fall after today’s decision”—a sentiment echoed soon thereafter in like fashion by the latter in *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2719 (2011). See Sabino, BAYLOR, *supra* note 38, at 279, 290 (discussing *Bullcoming*’s rejection that the sky would fall if the Confrontation Clause was enforced).


370. *Id.*

371. *Id.*; see also *South Dakota v. Neville*, 459 U.S. 553, 563–64 (1983) (noting that the adverse inference thereby legislated does not violate the Fifth Amendment right against self-incrimination).


373. *Id.* (footnote omitted). As point in fact, the Supreme Court discloses in a lengthy footnote statutory examples of such laws from thirty-two states ranging far and wide across America. *Id.* at 1566 n.9.
states with such statutory provisions, several waive these restrictions on involuntary blood testing if the police first procure a proper search warrant.\footnote{\textit{McNeely}, 133 S. Ct. at 1567; \textit{cf.} Sabino, \textit{BAYLOR}, supra note 38, at 280 (analyzing Bullcoming \textit{v. New Mexico}, 131 S. Ct. 2705 (2011), and detailing how, after a DWI suspect refused to submit to a breathalyzer test, the police exercised their statutory prerogative to obtain a warrant, and thereafter sample the suspect’s blood for a DWI violation).}

The Court concluded that there was “no evidence indicating that restrictions on nonconsensual blood testing have compromised drunk-driving enforcement efforts in the States that have them.”\footnote{\textit{Id.}}\footnote{\textit{Id.}}\footnote{\textit{Id.}}\footnote{\textit{Id.}}\footnote{\textit{Id.}} Empirical studies, while confirming the obvious fact that “warrants do impose administrative burdens,” nevertheless suggest that nonconsensual blood tests, when conducted by means of a warrant, “can reduce breath-test-refusal rates and improve law enforcement’s ability to recover BAC evidence.”\footnote{\textit{Id.}} These widespread state-level obstacles to nonconsensual blood testing buttress the Court’s prevailing “recognition that compelled blood draws implicate a significant privacy interest.”\footnote{\textit{Id.}} Additionally, they demonstrate that the Court’s steadfastness in its preferred form of analysis for measuring the exigencies behind a warrantless BAC testing “will not severely hamper effective law enforcement.”\footnote{\textit{Id.}} (citation omitted) (internal quotation marks omitted).

Finally, the \textit{McNeely} Court turned to the last major component of its opinion: in essence, it matched the scientific realities of biochemistry with the constitutional mandates of the Fourth Amendment. As previously mentioned, Justice Sotomayor considered the prosecution’s argument that the natural metabolization of alcohol by the human body “creates an exigent circumstance in every case” and found it unpersuasive.\footnote{\textit{Id.}} Additionally, the Court found that the State failed to argue exigent circumstances in \textit{this} particular case, with the exigency grounded upon the assertion that a warrant could not have been obtained...
within a reasonable time. The Court noted that the record below was bereft of testimony indicating that the police “faced an emergency or unusual delay in securing a warrant.” To the contrary, the arresting officer testified “that he made no effort to obtain a search warrant . . . even though he was ‘sure’ a prosecuting attorney was on call” and a magistrate was available. The police officer also readily admitted to prior instances where he had no difficulty in obtaining a warrant before pursuing an involuntary blood test.

As Justice Sotomayor summarized, the officer proceeded with this warrantless intrusion simply because he did not believe it was “legally necessary to obtain a warrant.” Consequently, the trial court concluded that no emergency existed, and noted that both a prosecutor and a judge were available, even at that time of night, to respectively argue for and conceivably authorize a warrant before the suspect’s blood was drawn for testing.

Reviewing the procedural posture of the case, the plurality noted that the Supreme Court of Missouri held: (1) that the dissipation of alcohol in the bloodstream does not establish a per se exigency, and (2) in any event, the prosecution did not establish that there were exigent circumstances. Only the first ruling was before the Supreme Court for review. The gravamen of the prosecution’s argument was that a drunk-driving suspect who refuses to submit to a BAC test after being arrested “is always subject to a nonconsensual blood test without any precondition for a warrant.” Justice Sotomayor’s response was succinct: “That is incorrect.”

380. McNeely, 133 S. Ct. at 1567.
381. Id.
382. Id.
383. Id.
384. Id.
385. Id. In an aside, Justice Sotomayor duly noted that the court below did not explore the normal time component for obtaining a warrant in such circumstances. “The minimal evidence presented on this point was not uniform.” Id. at 1567 n.11.
386. McNeely, 133 S. Ct. at 1568.
387. Id.
388. Id.
389. Id.
However, the Court reasoned that, notwithstanding the state court’s reference to the instant controversy as a “routine DWI case,” the routine nature of a drunk-driving stop does not necessarily mean that exigency will always be lacking in these cases and that a warrant will always be required. Even mundane traffic stops can implicate other considerations that affect exigency, such as warrant request procedures, the availability of a magistrate, and other similar considerations. “[T]he practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence” are relevant to determining if a warrantless search is reasonable. And these critical facts “will no doubt vary depending upon the circumstances in the case.”

Clearly significant to the Court’s analysis was the fact that the instant case was argued “on the broad proposition” that DWI cases always entail a per se exigency. The prosecution’s narrow focus did not accommodate a more fulsome “analytic framework . . . of all the relevant factors” that must be accounted for in determining the propriety of conducting a warrantless search. Justice Sotomayor pointed out that the metabolization of alcohol in the bloodstream is but one of the factors that can be considered in deciding whether a warrant is required in a specific case. Given the unfortunate truth that DWI arrests are all too common across the U.S., there is “[n]o doubt . . . cases will arise when anticipated delays in obtaining a warrant will justify a blood test without judicial authorization.” Notwithstanding the Court’s comment that “in every case the law must be concerned that evidence is being destroyed,” the Court appears to have determined that this concern is merely one of many factors that should be contemplated in a more holistic approach.

390. McNeely, 133 S. Ct. at 1568.
391. Id.
392. Id.
393. Id.
394. Id.
395. Id.
396. McNeely, 133 S. Ct. at 1568.
397. Id.
398. Id.
Yet, notwithstanding that precautionary note, the plurality in *McNeely* ultimately found that such inquiries “ought not to be pursued” when the vital question was not properly placed before the Court for review.\(^3\)\(^9\)\(^9\) Thus, in rejecting the prosecution’s sole allegation of error by the state courts, the Supreme Court confirmed the correctness of the judgment made by the lower tribunal.\(^4\)\(^0\)\(^0\)

Concluding for the plurality, Justice Sotomayor again declared the Court’s view that “the natural dissipation of alcohol in the bloodstream does not constitute an exigency” in all DWI arrests sufficient to condone a warrantless search via a nonconsensual blood test.\(^4\)\(^1\)\(^1\) Thus, *McNeely* pronounced the Court’s continued fidelity to a case-by-case analysis by measuring the emergencies that purportedly justify warrantless searches against the guarantees of liberty found in the Fourth Amendment.\(^4\)\(^2\) And so, the precious freedom protected by that sacrosanct amendment emerged victorious.

Yet, a lone voice spoke out in dissent in *McNeely*: the voice of Justice Thomas.\(^4\)\(^3\) Justice Thomas began by stating, “[b]ecause the body’s natural metabolization of alcohol inevitably destroys evidence” of a potential DWI crime, that in and of itself constitutes an emergency.\(^4\)\(^4\) Therefore, a blood draw taken without a warrant would not violate the Fourth Amendment prohibition against such an intrusion.\(^4\)\(^5\) Justice Thomas correctly prefaced his analysis with a cogent review of Fourth Amendment precedent.\(^4\)\(^6\) Some of the key aspects of his opinion included his observations regarding the established exceptions to the warrant requirement when exigent circumstances prevail, as well as a significant reference to reasonableness as the ultimate touchstone in deciding whether the guarantee of liberty could be set aside.\(^4\)\(^7\) Again, the manner in

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400. *Id.*
401. *Id.*
402. *Id.*
403. *Id.* at 1574 (Thomas, J., dissenting).
404. *Id.*
406. See *id.* at 1574–75 (reviewing Fourth Amendment precedent with respect to the requirement of warrants and the exigency exception).
407. *Id.* at 1575.
which Justice Thomas closed this introductory material—by emphasizing the role the imminent destruction of evidence plays in this analytical process—is noteworthy.\footnote{408}

One of Justice Thomas’s first points was that “[o]nce police arrest a suspect for drunk driving, each passing minute eliminates probative evidence of the crime.”\footnote{409} He next catalogued various scientific facts in support of that truism.\footnote{410} As Justice Thomas pointed out, this state of affairs is not unknown to the Supreme Court.\footnote{411} According to Justice Thomas, because the Court in \textit{Schmerber} validated blood draws as highly efficacious procedures that are not overly destructive or intrusive, the Court held that the natural dissipation of alcohol in the blood “constitutes an exigency” permitting a warrantless blood test.\footnote{412} Furthermore, Justice Thomas contended that the parties in the instant case, the plurality, and the holding of \textit{Schmerber} “acknowledged” that there is inarguably a “rapid destruction” of BAC evidence once a DWI stop is made.\footnote{413} An indication that this irreparable loss of critical evidence occurs in “every situation where police have probable cause to arrest a drunk driver.”\footnote{414} The fact that this evidence can easily be destroyed unavoidably “implicates the exigent-circumstances doctrine.”\footnote{415}

Justice Thomas declared that the \textit{McNeely} case presented exigent circumstances in line with similar situations where the Court found that a warrantless search was permissible.\footnote{416} The destruction of evidence that informed the Court’s suspension of the liberty guarantee in past cases was replicated here because of the body’s
natural metabolization of alcohol in the bloodstream. Justice Thomas was unrelenting in his observation that “once police have probable cause to believe [a] driver is drunk” an exigency exists, and “[i]t naturally follows that police may conduct a search” without a warrant.

Determined to persuade, even as the lone dissenter, Justice Thomas outlined an intriguing hypothetical: Police observe a solitary individual burning large bundles, which they have probable cause to believe are marijuana. Logic dictates that because the suspect is acting alone, there is plenty of time in which to seek and obtain a warrant while the supposed contraband burns. “But it is clear that the officers need not sit idly by and watch the destruction of evidence while they wait for a warrant.” According to Justice Thomas, the mere fact that the ongoing destruction of this evidence “will take time . . . and that some evidence may remain by the time the officers secure a warrant are not relevant to the exigency” determination. The exigency exists, and that is all that matters. Thus, it would be “entirely reasonable” to immediately launch a warrantless search, given the impending destruction of valuable evidence. Furthermore, Justice Thomas classified this scenario in his hypothetical as one “involving classic exigent circumstances.”

418. *Id.*
419. *Id.* Implicitly, this is not medical marijuana. *See* Gonzalez v. Raich, 545 U.S. 1 (2005) (holding that Congress has the authority to prohibit local cultivation and use of marijuana in compliance with California’s law regarding medical marijuana).
421. *Id.*
422. *Id.*
423. *Id.* Justice Thomas further noted that the “ever-diminishing” pile of burning marijuana would undeniably impact the crime charged and the length of the possible sentence. *Id.* (citing 21 U.S.C. § 841(b)(1)(D) (2010)) (providing a lesser penalty for possession of under fifty grams of marijuana). Section 841(b)(1)(D) provides for, inter alia, imprisonment of no more than five years for unlawful possession of less than 50 kilograms of marijuana, as contrasted to Section 841(b)(1)(A) of the same statute, demanding at least a ten-year prison sentence for possession of 1,000 or more kilograms of that same controlled substance. 21 U.S.C. §§ 841(b)(1)(A), (D).
425. *Id.* (emphasis added).
Justice Thomas then compared his “classic” warrantless search justification, as just outlined, and the everyday DWI arrest: “Just because it will take time for the evidence to be completely destroyed” does not expunge the exigency.426 Justice Thomas linked this perceived emergency with the prevailing policy and standards penalizing drunk driving.427 He noted that “the level of intoxication directly bears on [the] enforcement” of federal laws encouraging a national standard for punishing drunk driving.428 And, providing the final link in his chain of reasoning, Justice Thomas refused to believe that the liberty interest guaranteed by the Fourth Amendment in any fashion “requires officers to allow evidence essential to enforcement of drunk-driving laws to be destroyed while they wait for a warrant to issue.”429

Justice Thomas next proceeded to dissect what he contended was the fatal flaw in the plurality’s decision. “[T]he Court elides the certainty of evidence destruction in drunk-driving cases and focuses primarily on the time necessary for destruction.”430 To view the matter that way converts the issue from one of determining the existence of exigent circumstances “into a question about the amount of evidentiary destruction” law enforcement must tolerate before they are freed from the warrant requirement.431 Compelling such an inquiry is inconsistent with the true emergency confronting the police in such circumstances—“the uncontested destruction” of BAC evidence due to the natural act of metabolization.432 Almost as an afterthought, Justice Thomas further complained that this totality of the circumstances nostrum “will be difficult to administer,” which has always been a matter of particular concern in defining the reach of the Fourth Amendment.433

427. *Id.* Here, Justice Thomas devotes a fair amount of text to elaborating on the conditioning of federal highway funds upon the States falling into line with BAC levels established by federal regulation as constituting driving under the influence. *Id.* at 1576–77.
428. *Id.*
429. *Id.* at 1577.
430. *Id.*
431. *Id.*
433. *Id.*
Indeed, in his dissent, Justice Thomas went so far as to chide the plurality opinion as reflecting “nothing more than a vague notion” that, absent inordinate delay, all shall be well in the majority of DWI stops.\textsuperscript{434} He appeared particularly troubled by the plurality’s reliance upon the supposed gradual and predictable degradation of BAC evidence.\textsuperscript{435} Justice Thomas countered this position, asserting that “hard percentage lines [in BAC levels] have meaningful legal consequences in the drunk-driving context.”\textsuperscript{436} In Justice Thomas’s estimation, the mere happenstance that police officers could recover some BAC evidence of intoxication before its annihilation “is simply not relevant to the exigency inquiry.”\textsuperscript{437} Justice Thomas expounded upon what he clearly believed was the central theme of the Court’s holding. He declared that the plurality found that absent extraordinary circumstances, “some destruction of evidence is acceptable.”\textsuperscript{438} Such a notion, Justice Thomas postulated, “must rest on the assumption that whatever evidence remains once a warrant is obtained will be sufficient to prosecute the [DWI] suspect.”\textsuperscript{439} And that assumption, he proclaimed, “is clearly wrong.”\textsuperscript{440} The wide disparity in levels of intoxication amongst detainees, the variables in metabolic rates, and other differences “will vary widely from case to case.”\textsuperscript{441} Even small delays can impact the probative value of blood test results, especially for “borderline” arrestees teetering on the edge of legal intoxication and those “whose BAC is near a statutory threshold that triggers a more serious offense.”\textsuperscript{442} Such was Justice Thomas’s criticism of the plurality, based upon the unavoidable variability among DWI suspects.

In a similar vein, he criticized the controlling opinion for not adequately considering the obvious disparities in the time necessary to obtain a warrant.\textsuperscript{443} When it comes to estimating the time

\textsuperscript{434} McNeely, 133 S. Ct. at 1577 (Thomas, J., dissenting).
\textsuperscript{435} Id.
\textsuperscript{436} Id.
\textsuperscript{437} Id.
\textsuperscript{438} Id.
\textsuperscript{439} Id.
\textsuperscript{440} Id.
\textsuperscript{441} Id.
\textsuperscript{442} Id.
\textsuperscript{443} Id.
required to secure a warrant, Justice Thomas pointed out, “there is no reason to believe it will [be done] in a predictable fashion.”

Next, Justice Thomas turned to reconciling the plurality’s holding in *McNeely* with the real world. In that regard, he made it clear that he found the Court’s reasoning deficient and did not mince words in stating his view: “[T]he Court nowhere explains how an officer in the field is to apply the facts-and-circumstances test it adopts.”

Justice Thomas expounded upon his criticism in two major ways. First, police on the scene do not have the facts necessary to make an assessment of how much BAC evidence is dissipating with the passage of time. Put another way, officers in the field cannot calculate the point of no return for BAC evidence, after which they shall be left with too little evidence to make a case. Justice Thomas makes a very cogent and basically irrefutable point regarding DWI stops—the police “never know how intoxicated a suspect is at the time of arrest.” If they did have such prescience, then “there would be no need for testing.”

Second, Justice Thomas set forth the similar problem of police lacking knowledge concerning the following: (1) how long it will take to “roust a magistrate from his bed”; (2) how much time it will take to reach a medical facility; or (3) the elapsed time to obtain a blood sample once there. Each of these problems were of great importance to Justice Thomas and shaped his view of what the standard should be in these cases: “The Court should not adopt a rule that requires police to guess” whether there is enough time to obtain

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445. *Id.*
446. *Id.*
447. *Id.*
448. *Id.*
449. *Id.*
450. *McNeely*, 133 S. Ct. at 1577 (Thomas, J., dissenting). Here, Justice Thomas quotes a passage from a state court decision, expounding upon the many unknowns that confront officers in the real world of DWI stops, and how, pursuant to a totality of the circumstances test, law enforcement would be compelled to speculate on all of these numerous factors in order to predict the probative value of whatever BAC evidence they can finally recover. *Id.* at 1577–78 (quoting State v. Shriner, 751 N.W.2d 538, 549 (Minn. 2008)).
a warrant before valuable evidence becomes irretrievable.\textsuperscript{451} Once again, Justice Thomas predicated his caution upon the lack of “reliable information” available to police at the time of the typical drunk-driving arrest, a deficiency that forestalls law enforcement from accurately judging such diverse and complicated variables.\textsuperscript{452}

Justice Thomas concluded his dissent by reaffirming the central thesis of his opposing view. The instant case, he reminded, “demonstrates the uncertainty officers face with regard to the delay caused by obtaining a warrant.”\textsuperscript{453} As Justice Thomas noted in \textit{McNeely}, the police undeniably had probable cause to believe the suspect was, in fact, drunk.\textsuperscript{454} Yet, the arresting officer had no way to quantify how drunk McNeely was; ergo, the officer had no basis for determining how quickly vital probative evidence, in the form of a blood draw, would disappear forever.\textsuperscript{455} This brought Justice Thomas to his ultimate conclusion: “A rule that requires officers (and ultimately courts) to balance transportation delays, hospital availability, and access to magistrates is not a workable rule” for deciding the constitutionality of a warrantless search in DWI cases.\textsuperscript{456}

\begin{itemize}
  \item 451. \textit{McNeely}, 133 S. Ct. at 1578 (Thomas, J., dissenting).
  \item 452. \textit{Id.} (footnote omitted). Justice Thomas voices the related concern that the Court’s ruling herein will force prosecutors to make risky calculations as to a defendant’s blood alcohol level at the time of the arrest for reason of these less-than-timely blood samples. \textit{Id.} at 1578 n.2. Justice Thomas foresaw this as “devolv[ing] into a battle of the experts” at trial, even in routine DWI cases, as adversaries contended over what Justice Thomas harshly characterized as “stale evidence.” \textit{Id.} The Justice decried such an outcome as unnecessary and unwanted, and refused to condone an environment where law enforcement, confronted by the inevitability of degrading evidence, would relinquish collecting the most accurate BAC evidence available merely because they might be able to employ an expert witness to opine on “less persuasive evidence to approximate what they lost.” \textit{Id.}
  \item 453. \textit{Id.} at 1578.
  \item 454. \textit{Id.}
  \item 455. \textit{Id.} The dissent discusses a few facts regarding varying testimony concerning the time it would typically take to obtain a warrant in the jurisdiction where the suspect was apprehended. \textit{Id.} Yet even Justice Thomas found that “this factual tiff is beside the point.” \textit{Id.} This “spotty evidence,” said Justice Thomas, only served to underscore that delays in securing warrants are both “unpredictable and potentially lengthy.” \textit{Id.}
  \item 456. \textit{Id.} We find this postulation by Justice Thomas extremely intriguing. On the one hand, he is eschewing a balancing test in these circumstances as infirm
When nature “inevitably destroy[s] the evidence with every passing minute,” the exigency is a very real one, making it imperative to draw blood for a BAC testing as soon as possible.\(^{457}\) Justice Thomas thus closed his dissent from the plurality’s chosen path of a totality of the circumstances test, and carved out his strong preference for a per se exigent circumstances rubric in such circumstances.\(^{458}\)

V. A POSTSCRIPT: MARYLAND V. KING AND THE FUTURE OF THE FOURTH AMENDMENT

Our discussion of this crucial topic would not be complete without some discussion of the Supreme Court’s other, better known, landmark Fourth Amendment case, which was issued roughly two
months after McNeely was published—Maryland v. King.\textsuperscript{459} We need only supply a brief analysis of Maryland to satisfy its limited, yet nevertheless vital, relevance to this Article. In Maryland, the Supreme Court found that, where there was a valid arrest supported by probable cause, the Fourth Amendment’s expectation of privacy was “not offended by the minor intrusion of a brief swab of [the] cheeks” in order to obtain a DNA sample.\textsuperscript{460} That factual and legal predicate suffices to properly make our point regarding the liberty guarantee of the Fourth Amendment and the place of warrantless blood tests when tested against that freedom.

There are at least three key caveats to our inclusion of Maryland at this juncture. First, Maryland is not strictly on point with McNeely. The cases are quite distinguishable on a number of grounds; however, Maryland does address suspicion-less searches under the Fourth Amendment.\textsuperscript{461} Second, Maryland was wholly centered upon a “search” conducted via a DNA sample, which was taken through a mouth swab.\textsuperscript{462} We cannot begin to address either the science or the law of DNA evidence sampling and matching in the context of criminal proceedings. Yet, it is not necessary because a cogent discussion of a warrantless blood draw in the context of a DWI arrest does not require delving into the constitutionality of DNA testing via mouth swabs as part of a Fourth Amendment critique. However, we briefly note that, notwithstanding the many differences between oral swabbing and drawing blood, these bodily intrusions maintain several similarities. The third and final caveat is that we do not need to delve into Maryland in order to make a comparison that lands on all fours with McNeely—we are not drawing a straight line from Maryland to McNeely. In truth, we have very little interest in Maryland’s majority opinion, or its impact as a broad precedent.

The scope of our discussion of Maryland is limited to Justice Scalia’s dissent. Admittedly, Justice Scalia did not author the plurality opinion in McNeely; he simply signed on to Justice

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461. \textit{Id.}
\end{footnotesize}
Sotomayor’s authorship.463 Yet, the roots of that joinder can be seen in the strong libertarian streak he put on full display in Maryland and in his zealous and powerful defense of the sanctity of the freedoms guaranteed by the Fourth Amendment.464 Put another way, Justice Scalia’s dissent in Maryland greatly informs us of not only his views of the Fourth Amendment, but also of the genesis of the McNeely plurality and those who championed it.

First, and highly apropos to the central issue of McNeely, Justice Scalia utilized blood tests as a point of reference in Maryland.465 He included certain blood tests within the category of “special needs” searches—searches not linked to serving the general needs of law enforcement, but rather justified by concerns distinct from normal law enforcement, such as public safety.466 This would include, perforce, random drug tests, conducted via blood analysis, of railroad employees—the goal being to assure public safety.467

Next, the Maryland dissent clarified the proper role of a search incident to an arrest.468 The objectives of such a search must be to secure either evidence that is easily destroyed or evidence that is relevant to the crime upon which the arrest is grounded.469 BAC evidence, such as the evidence at issue in McNeely, might well fit under the former, and undoubtedly falls under the latter as well. Justice Scalia effectively cabins the rationales for an appropriate search in such circumstances. Here, we see the rationale behind

463. McNeely, 133 S. Ct. at 1556 (plurality opinion).
464. See Maryland, 133 S. Ct. at 1980 (Scalia, J., dissenting) (“The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth Amendment.”); see also id. at 1989 (“Today’s judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane . . . . Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.”).
465. Id. at 1981.
466. Id.
468. Id. at 1982.
469. Id.
Justice Scalia’s reasoning as articulated in *Maryland*, which is applicable to *McNeely* and other cases that make up Fourth Amendment jurisprudence. He emphasized the weightiness of privacy concerns when bodily intrusions are at stake.\(^{470}\) Justice Scalia further noted that “persons” are the first protected sphere ordained in the Fourth Amendment, ahead of homes, property, papers, and such.\(^{471}\)

In *Maryland*, the dissent was unmoved by the majority’s “haste[] to clarify” that its ruling did not condone invasive surgery upon arrestees or warrantless searches of their homes.\(^{472}\) But the *Maryland* dissent clearly was not appeased by this concession: “That the Court feels the need to disclaim these consequences is as damning a criticism of its suspicionless-search regime as any I can muster.”\(^{473}\) We see here a commonality between the two new landmark decisions of *McNeely* and *Maryland*—remarkably similar not only because of their closeness in time, but also because of their discussions regarding powerful concerns over intrusions upon the person and the concomitant potential violation of their Fourth Amendment liberty guarantees.\(^{474}\)

At the end of his powerful dissent in *Maryland*, Justice Scalia posits a most apt allegory. In closing his opinion with opposition to

\(^{470}\) *Maryland*, 133 S. Ct. at 1982 (Scalia, J., dissenting).

\(^{471}\) *Id.* at 1981.

\(^{472}\) *Id.* at 1982.

\(^{473}\) *Id.*

\(^{474}\) See *supra* Parts IV–V (discussing *McNeely* and *Maryland*). The *Maryland* dissent further informs us as to the distinguishing factors between a bodily invasion, such as the DNA sampling there, when sharply contrasted to non-intrusive observables. *Maryland*, 133 S. Ct. at 1986–87 (Scalia, J., dissenting). Taking a DNA sample is not the same as taking a person’s photograph because the latter is not a search at all, neither practically speaking nor pursuant to the Fourth Amendment. *Id.; see also* Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013) (noting that the “simple baseline” for a search under the Fourth Amendment is the government’s physical intrusion in persons, houses, papers, or effects in order to obtain information); *Katz v. United States*, 389 U.S. 347, 351 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”). Justice Scalia also differentiates bodily measurements (height, weight, etc.) and fingerprinting from the bodily intrusion of a DNA search. *Maryland*, 133 S. Ct. at 1986–87 (Scalia, J., dissenting).
the DNA search, he declared, “I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.”475 Can any American of this age doubt that the Founding Fathers would not have given a warrantless blood sample any more freely than they would have surrendered to a mouth swab or similar bodily intrusion? And if that is credible, what is left of the Fourth Amendment in America today?

*Maryland* is not directly on point with *McNeely* or the Fourth Amendment jurisprudence on warrantless blood tests. Nevertheless, its powerful dissent provides both a crucial lesson on the sanctity of the liberty guaranteed by the Fourth Amendment and a fitting reminder that the Founding Fathers would not have relinquished it so easily.

VI. ANALYSIS AND COMMENTARY

In the preceding pages, we have set forth the pantheon that comprises the Supreme Court’s leading jurisprudence on the Fourth Amendment. Notwithstanding the fact that we have sprinkled our observations at relevant points throughout, it is now incumbent upon us to pull together our broader thesis for a more cogent presentation. In the earlier segments of this Article, we relied heavily upon the metaphor of a great edifice founded upon not one, but four prodigious cornerstones. As our discussion of the cases above shows, these pillars were emplaced by the Court to provide a solid fortress for the important liberty interest guaranteed by the Fourth Amendment.

A. Ker’s Reasonableness Requirement

The first cornerstone was provided through *Ker v. California* and its mantra of reasonableness.476 Certainly, *Ker* did not write upon a blank slate. Rather, its teachings are grounded upon the long-held tradition of rationality that guides any analysis of Fourth

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476. See supra Part II(A) (disscusing *Ker v. California*, 374 U.S. 23 (1963), and its emphasis on the reasonableness requirement).
Amendment norms.\footnote{477} Ker stands as iteration from the modern era\footnote{478} of Fourth Amendment jurisprudence, expositing the essential quality of reasonableness that permeates any articulation of the Fourth Amendment’s standards.\footnote{479} Indeed, Ker is significant, not just as the bellwether of reasonableness in the current era, but because its theme of rationality resonates throughout this modern era of Fourth Amendment landmarks. Ker had to come first in our discussion of the four cornerstones; its imposition of rational thought into the calculus of Fourth Amendment decision-making was a vital imperative to protect the liberty guarantee. Ker does much more than set its imprimatur of reasonableness upon the interpretation of this constitutional freedom; it excludes dogmatic rules, harsh formalisms, and confining rigidity.\footnote{480}

It is crucial to the preservation of the liberty interest guaranteed by the Fourth Amendment to define it with the cool grace of dispassionate analysis. Ker serves that lofty goal, and serves it well, by mandating that reasonableness shall always be first and foremost in the deliberations of the judiciary when this precious freedom is under review—or even under siege.\footnote{481} The reasonableness of Ker makes a magnificent arc throughout the jurisprudence we have described above. We see it occupy a place of high honor in this progression, and rightly so. The Supreme Court has never strayed far from this first great marker of Fourth Amendment freedom. Indeed, it can be said that in laying down the

\footnote{477. See Ker, 374 U.S. at 33 ("This Court[] [has a] long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application . . . ."); Maryland, 133 S. Ct. at 1989 (Scalia, J., dissenting) ("This [Supreme] Court does not base its judgments on senseless distinctions.").}

\footnote{478. The “modern era” of Fourth Amendment jurisprudence was elaborated upon by Chief Judge Kozinski in United States v. Kincade, 379 F.3d 813, 874 (9th Cir. 2004) (Kozinski, J., dissenting).}

\footnote{479. See Maryland, 133 S. Ct. at 1970 ("[T]he touchstone of the Fourth Amendment is reasonableness . . . ." (quoting Samson v. California, 547 U.S. 843, 855 n.4 (2006)) (internal quotation marks omitted)).}

\footnote{480. See supra Part II(A) (discussing the majority’s rejection of a rigid formulation of reasonableness); see also Maryland, 133 S. Ct. at 1989 (Scalia, J., dissenting) ("At the end of the day, logic will out.").}

\footnote{481. See supra Part II(A) (demonstrating Ker’s emphasis on reasonableness).}
remaining three cornerstones, the Court sighted down the lines from Ker. All of the subsequent guideposts were filtered in great part through the test for reasonableness imposed by Ker.

For example, in Missouri v. McNeely, the Supreme Court strictly imposed reasonableness as a vital element in its analysis.\(^{482}\) In doing so, it subtly reaffirmed the Ker proclamation of reasonableness as a Fourth Amendment touchstone. Today, the Fourth Amendment is safeguarded within a great edifice; the liberty interest it guarantees is preserved primarily by the pantheon’s four cornerstones. Reasonableness, as required by Ker, is the first of such cornerstones protecting the Fourth Amendment, and is the bedrock of this analysis.

B. The Destruction-of-Evidence Doctrine as a Check on Warrantless Searches

The second cornerstone differs from the others because it is more in the nature of an exception. Whereas the other three components of Fourth Amendment jurisprudence work to preserve the liberty interest guaranteed by this constitutional provision, the exemption for warrantless searches that are conducted when the destruction of evidence is threatened temporarily sets itself against the norms of the Fourth Amendment. But, even the most libertarian among us should not disapprove of the destruction-of-evidence exception simply because it occasionally suspends the nominal prohibition against warrantless searches. When properly viewed, this exception forms part of the protective screen of the Fourth Amendment, precisely because it confines warrantless searches to a narrow zone in which they are valid. The destruction-of-evidence doctrine does not so much condone police intrusions without a warrant as it effectively cabins them to only exceptional circumstances. Put one way, the destruction-of-evidence exemption for warrantless searches is not an escape hatch for unsanctioned incursions into person or property. Rather, it is a formidable wall

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482. See Missouri v. McNeely, 133 S. Ct. 1552, 1564 (2013) (“[W]e see no valid substitute for careful case-by-case evaluation of reasonableness here.”); see also supra Part IV (discussing McNeely).
that cordons off such exceptional behavior and keeps close watch upon it from the ramparts of the Fourth Amendment.

This is not to say, continuing the stockade metaphor, that the Supreme Court has erected those walls without incident. Indeed, the construction of these barriers has been fitful at times, and has required repairs and reinforcements here and there along the fence line.

The landmark case of Cupp v. Murphy exemplifies these difficulties. Certainly, Murphy can be summarized as a straightforward case where the destruction-of-evidence precept effectively stopped a criminal from eradicating crucial evidence of the heinous crime of murdering his own spouse.483 This view is facially correct, but it misses the point. One cannot minimize the discordant voices found in Murphy.484 On the one hand, it appears the Justices as a group had little difficulty with the theory behind the destruction-of-evidence exception.485 On the other, that postulation provides that the doctrine takes hold when evidence is unequivocally at risk—where the suspect has control, and conversely, law enforcement does not—and there is no time for standard procedures.486

However, a closer look at Murphy demonstrates that it was in the application of the exception that the Justices were in disharmony.

483. See Cupp v. Murphy, 412 U.S. 291, 296 (1973) (holding that “[o]n the facts of this case, considering the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the ready destructibility of the evidence, we cannot say that this search violated the Fourth and Fourteenth Amendments”) (emphasis added).

484. See id. at 301 (Douglas, J., dissenting in part); id. at 305 (Brennan, J., dissenting in part) (disagreeing with the majority on whether the case should be remanded to state court to “decide in the first instance whether there was probable cause to arrest or search”).

485. See, e.g., id. at 295 (“We believe this search was constitutionally permissible . . . . [A] long line of cases recogniz[e] an exception to the warrant requirement when a search is incident to a valid arrest. The basis for this exception is that when an arrest is made, it is reasonable for a police officer to expect the arrestee to . . . destroy any incriminating evidence then in his possession.”); id. at 301 (Douglas, J., dissenting in part) (“I agree with the Court that exigent circumstances existed making it likely that fingernail scrapings of suspect Murphy might vanish . . ..”).

486. Id. at 295; id. at 301 (Douglas, J., dissenting in part).
Note the criticisms of Justice Douglas, who questioned if law enforcement could have not pursued alternatives, specifically to retake control of the situation, and averted any possible destruction of potentially valuable evidence.\footnote{See Murphy, 412 U.S. at 301–02 (discussing the fact that police could have obtained a warrant but decided not to, and Murphy was not arrested until a month after Murphy’s fingernails were scraped).} The twofold benefit of such preemptive action would have preserved the infamous blood dot under the suspect’s fingernail and given the police time to secure a lawful warrant in order to conduct an intrusive—but legal—search of Murphy’s person.

When examined from all perspectives, it is readily apparent that \textit{Murphy} raises important questions as to what constitutes imminent destruction of evidence,\footnote{See \textit{id.} at 295–96 (discussing Murphy’s possible destruction of any evidence).} the degree of control exercised by either the detainee or the police (one to the exclusion of the other),\footnote{See \textit{id.} at 295 (explaining that the rationale behind the search-incident-to-arrest exception to warrantless searches is based on the fact that the suspect might attempt to destroy incriminating evidence, and therefore, this exception is “limited to the area into which an arrestee might reach”—e.g., the area over which the suspect has control (quoting Chimel v. California, 395 U.S. 752, 763 (1969)) (internal quotation marks omitted)); \textit{id.} at 302 (Douglas, J., dissenting) (“That exception is designed to protect the officer against assaults through weapons within easy reach of the accused or to save evidence within that narrow zone from destruction.” (citation omitted)).} and the pursuit, active or foregone, of alternative action before charging down the track of a warrantless search.\footnote{\textit{Id.} (“However, this is a case where a warrant might have been sought but was not.”).} There is much to learn from Justice Douglas’s dissent, precisely because his analysis calls for a closer inspection of these permutations before an exemption to the warrant requirement is granted.\footnote{\textit{Id.} at 301–04.} Moreover, it is that kind of healthy skepticism of the destruction-of-evidence exception that led in a more or less straight line to \textit{McNeely} and its current postulation about normal metabolization acting as a destructive agent upon a DWI suspect’s blood alcohol content.\footnote{See supra Part IV (discussing \textit{McNeely}).} It is imperative to consider \textit{Murphy} as an essential touchstone for our
analysis in these matters and distinguish its prevailing conditions from McNeely and similar cases yet to come.

The Supreme Court rarely utilizes the term “evanescent” in this body of Fourth Amendment jurisprudence.493 Murphy494 is one of the rare instances, along with McNeely,495 where it employs the term. But, there are fundamental differences in the Court’s application of the term “evanescent.” In Murphy, the Court viewed the dot of blood that was found under the suspect’s fingernail as evanescent because the detainee could so easily access and eradicate it (which he was apparently attempting to do).496 In sharp contrast, an individual detained upon suspicion of DWI can neither easily control nor tinker with her blood alcohol content.

Thus, the evanescence of a BAC level awaiting a warrant for testing cannot be readily equated with easily destroyed evidence concealed under an arrestee’s fingernails. The so-called evanescence of alcohol in the human bloodstream is of a completely different order entirely. Superficial evidence connotes obvious control and ease of tampering by the suspect, whereas a BAC level embodies an internal functioning of the suspect’s metabolization that is well outside her reach, yet alone her dominion. In making this observation, we can easily reconcile the propriety of the warrantless search in Murphy (given the detainee’s access and control) as compared to the constitutional abridgement decried in McNeely, precisely because both of the aforementioned elements of access and control were beyond the suspect’s power. The Schmerber v. California Court’s “evanescent” classification of the detainee’s BAC level loses steam when placed in this light. Put another way,

493. See, e.g., Murphy, 412 U.S. at 296 (“The rationale of Chimel, in these circumstances, justified the police in subjecting him to the very limited search necessary to preserve the highly evanescent evidence they found under his fingernails.”).

494. Id.

495. Missouri v. McNeely, 133 S. Ct. 1552, 1560 (2013) (“The State contends that whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessarily exist because BAC evidence is inherently evanescent.” (emphasis added)).

496. Murphy, 412 U.S. at 296 (noting that the suspect “put his hands behind his back and appeared to rub them together” and “put his hands in his pockets, and a ‘metallic sound, such as keys or change rattling’ was heard”).
evanescence, destructibility, call it what you will, takes on vastly different connotations depending on the physical context. When properly examined through the prism of reasonableness (as dictated by Ker, among others), these salient distinctions come into focus in the light of the Fourth Amendment.497

Additionally, Murphy can be further distinguished because the warrantless search entailed scraping the suspect’s fingernails.498 Clearly, any reasonable assessment would categorize such a procedure as external in nature, far closer to outside “observables,” as that term is used in Fourth Amendment nomenclature.499 Yet a blood draw is, by definition, intrusive, invasive, and wholly inapposite to the type of exterior measurements the Supreme Court has long decreed fall outside the warrant requirement.500 Murphy entailed an inspection of the arrestee’s outward epidermis and was done without a per se invasion of his body,501 while McNeely’s warrantless blood test literally punctured that same skin level—and much more.502 With such stark distinctions, is it any wonder that the Supreme Court has utilized sui generis review, shaped to the utmost by a rubric of reasonableness, and concluded in such divergent results?

We thus square the Supreme Court’s holdings on these most obvious of grounds: Evidence that can be reached and controlled by a suspect can be destroyed. It is, therefore, evanescent within the Court’s teachings justifying warrantless searches. In contradistinction, a BAC is beyond the reach, let alone the control, of the detainee. In a striking similarity, law enforcement also cannot

498. Murphy, 412 U.S. at 292.
500. Compare McNeely, 133 S. Ct. at 1565 (explaining in the context of blood draws that “any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests” and requires a warrant or exigent circumstances), with Skinner v. Ry. Labor Execs.’ Ass’n, 489 U.S. 602, 625 (1989) (distinguishing Schmerber v. California, 384 U.S. 757 (1966), and holding that the slight invasiveness of routine blood tests was not significant).
501. See Murphy, 412 U.S. at 292 (Murphy’s fingernails were scraped).
502. McNeely, 133 S. Ct. at 1557.
reach the detainee’s BAC without employing invasive procedures. That, by itself, justifies the insistence for first procuring a warrant, as the Court demanded in *McNeely*.\(^{503}\)

Next, we alluded to the difficulties inherent in *Murphy*’s application. We do not only speak of the present day and this cornerstone’s ramifications for blood testing as debated in *McNeely*, but also the Supreme Court’s prior conflicts in this area as well. We find *Michigan v. Tyler* controversial in this regard. At first blush, *Tyler* simply holds that officials may enter a burning building without a warrant in order to save evidence from destruction.\(^{504}\) And the Supreme Court has quoted *Tyler* for that very pedestrian maxim.\(^{505}\) *Tyler* breaks down police activity on a far more detailed level, differentiating subtle levels of the danger of the destruction of evidence. When properly applied, *Tyler* asks, “Has the danger of destruction to evidence passed?”\(^{506}\) If said danger still overshadows the scene or the suspect, then the warrantless search can be justified under *Murphy*.\(^{507}\) But if the danger has passed, searching without a warrant violates the Fourth Amendment.\(^{508}\) We find this is the oft-overlooked and underestimated lesson of *Tyler*, one that is a necessary refinement of *Murphy*’s baseline precedent.

Some might say the burning building scenario in *Tyler* is inapposite to the metabolizing alcohol situation in *McNeely*. We agree in part. The fire department can most likely stop a building from burning. Metabolization, however, cannot be stopped or even

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\(^{503}\) *McNeely*, 133 S. Ct. at 1556 (holding that the Fourth Amendment requires a warrant or exigent circumstances for a blood draw).


\(^{505}\) *McNeely*, 133 S. Ct. at 1570.

\(^{506}\) *Tyler*, 436 U.S. at 510 (“Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction. . . . For these reasons, officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished.”).


\(^{508}\) *Tyler*, 436 U.S. at 511 (“[E]ntry to fight a fire requires no warrant, and . . . once in the building, officials may remain there for a reasonable time to investigate . . . . Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches.”).
decelerated (at least as far as we mere unscientific lawyers know). But that is not the point. The metabolization of alcohol is fairly well understood by modern science, and more often than not, metabolization proceeds along predictable pathways. In contradistinction, fire is far more random, and the scope and timing of such wanton destruction is not so easily foretold. A fire is unpredictable, uncontrolled destruction. A diminishing blood alcohol level proceeds far more slowly and with decent predictability. This is proven by science, and was relied upon by the Supreme Court in McNeely.

A suspect can sponge away bloodstains, burn incriminating clothing, and toss a murder weapon into the river. The same suspect cannot alter her bodily metabolism. This can especially be gainsaid of a DWI detainee, precisely because she is, more likely than not, impaired by the alcohol, and thereby diminished in rational thought.

509. There is the old wives’ tale, of course, that consuming copious amounts of water or coffee will lower BAC. Whether this stands up to scientific truth is questionable. Nat’l Inst. on Alcohol Abuse & Alcoholism, Alcohol Metabolism: An Update, 72 Alcohol Alert 2 (2007), available at http://pubs.niaaa.nih.gov/publications/AA72/AA72.pdf (noting that the body can only metabolize a certain amount of alcohol at a time, and this amount depends upon many factors, including liver size and body mass). The sensible and constitutional response is this: If law enforcement is concerned, then it can deny liquids to a detained individual during such detention, and thus denies the detainee of any opportunity to artificially fudge a BAC test conducted after a warrant is obtained. And, for the record, such denial of liquid “refreshment” does not necessarily trigger a countervailing Eighth Amendment issue of cruel and unusual punishment.

510. See id. (discussing the way certain factors affect the rate at which alcohol metabolizes in the blood streams of different individuals).

511. Alcohol in the human bloodstream is metabolized as a function of the liver, which involves two enzymes: alcohol dehydrogenase (ADH), and aldehyde dehydrogenase (ALDH). Id. at 1. “Regardless of how much [alcohol] a person consumes, the body can only metabolize a certain amount of alcohol every hour.” Id. at 2. Perforce, no amount of human tinkering, by ingesting food, coffee or water can change that. Id. And once again, proof that the manipulation of BAC levels is an internal, biochemical function well beyond the power of any human being, let alone a restrained DWI suspect. See id. at 5 (citing various studies).

512. Id. at 1.

513. See Missouri v. McNeely, 133 S. Ct. 1552, 1568 (2013) (holding that although the natural metabolization of alcohol in the bloodstream can result in a loss of evidence, it does not in itself constitute an exigency).
In moving to close this segment of our analysis, permit us to reinforce the essential points. First, Murphy validates the warrantless search when the destruction of evidence is imminent. But Murphy also raises the further questions of the specifics of the perceived threat by asking if the sought-after evidence is in the suspect’s power and if there were alternative options for the police to diminish the exigency before finally resorting to a warrantless search.

Second, Tyler and the other discordant progeny of Murphy do not merely ask—they demand—to know, in effect, “Is the building still on fire?” If yes, then a warrantless intrusion can probably be justified. But if the flames are quenched, it is a near certainty that the Fourth Amendment has been violated. Indeed, the factual circumstances and legal precepts of Murphy and Tyler have powerful ramifications; in essence, they debunk the concerns raised by Justice Thomas’s dissent in McNeely. In opposing the end ruling of McNeely, Justice Thomas places great stock in his perceptions of the threat of the destruction of evidence. We respectfully submit that those misgivings are sorely misplaced.

As sketched out above, fires, as in Tyler, and deliberate actions of suspects, as in Murphy, pose imminent and permanent threats of the loss of probative evidence. Yet, the intrinsic nature of these threats concerns the immediacy and potential control by the suspect (or lack of control by law enforcement). Tyler posits the first: the very imminent threat of destruction by the wanton and irreversible natural force of fire. Murphy poses the second: the

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515. See supra Part II(B) (discussing Murphy).
516. See supra Part IV (detailing Justice Thomas’s dissent in McNeely).
517. See Michigan v. Tyler, 436 U.S. 499, 510 (1978) (discussing the destruction-of-evidence exception to the warrant requirement); Murphy, 412 U.S. at 296 (same).
518. See Tyler, 436 U.S. at 510 (explaining that a warrantless entry into a burning building is justified through the exigency exception—one of the reasons being that “[i]mmediate investigation may also be necessary to preserve evidence from intentional or accidental destruction”).
suspect has control of his person—thus, the evidence—and the police lack control in equal measure.519 We respectfully suggest that McNeely, and similar cases, present a drastically different situation. As the Supreme Court took pains to point out in McNeely, blood alcohol levels do not vanish immediately; notwithstanding variations in individuals’ metabolic processes, and inherent imperfections in measuring the same, the dissipation of alcohol in the bloodstream is a measurable process that can be calculated with a fair degree of precision.520 Furthermore, it can also be calculated fairly well by working backwards—certainly a less desired methodology, yet nonetheless workable.521 This cuts decisively against Justice Thomas’s adherence to what is essentially an “all or nothing” approach. Justice Thomas holds an apparently strong view that the warrant requirement must be suspended immediately in order to preserve all evidence of the detainee’s BAC level.522 Unfortunately, this view does not comport with the reality that metabolization is a gradual, time-consuming process, capable of measurement, calculation, and eventual quantification.523 Accordingly, we respectfully find Justice Thomas’s perception of the fragility of BAC evidence inaccurate, and his requirements for its instantaneous preservation too draconian, especially when contrasted with the liberty guarantee of the Fourth Amendment.

Put another way, we cannot yield to the parade of horribles forecast in the McNeely dissent for the preservation of BAC evidence unless the Fourth Amendment is waived on these occasions. Rather,

519. See Murphy, 412 U.S. at 296 (holding that the suspect could have destroyed the evidence under his fingernails, and this justified the officers’ action of scraping his fingernails without a warrant).
520. See Missouri v. McNeely, 133 S. Ct. 1552, 1555 (2013) (“BAC evidence [from a drunk-driving suspect] naturally dissipates over time in a gradual and relatively predictable manner.”).
521. See id. at 1563 (“While experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense, longer intervals may raise questions about the accuracy of the calculation.”).
522. See supra Part IV (discussing Justice Thomas’s dissent in McNeely).
523. See McNeely, 133 S. Ct. at 1560 (“Testimony before the trial court in this case indicated that the percentage of alcohol in an individual’s blood typically decreases by approximately 0.015 percent to 0.02 percent per hour once the alcohol has been fully absorbed.”).
we shudder at the thought of the hellish prospect of warrantless invasions of bodily integrity, commencing with the mundane of involuntary blood tests in DWI cases and proceeding to who knows where, should Justice Thomas’s view ever prevail.

Lastly, in justification of the theorem offered above, we take comfort in the fact that we do not stand alone. For example, in *McNeely*, Justice Sotomayor distinguished *McNeely* from other destruction-of-evidence cases in which the “suspect has control over easily disposable evidence.” In *McNeely*, the suspect could no more control his internal metabolism rate than he could control the tides. Ironically, even in *Schmerber* this thought resonated with Justice Brennan, who emphasized the significance of the possible destruction of evidence *within* the suspect’s direct control. Likewise, Justice Sotomayor puts in sharp counterpoise the divergent situations found in the other great Fourth Amendment precedents discussed herein where suspects did enjoy access and control to vital evidence—a danger the typical arrestee in a DWI stop does not present. Thus, access and control, or lack thereof, are the apparent and appropriate bellwethers in *McNeely* and like cases, and therefore play an important role in determining if the Fourth Amendment is honored or put to the side.

We also find ourselves proceeding in company with Justice Ginsburg in *Kentucky v. King*. Justice Ginsburg’s dissent in *King* took note of the very real danger of the immediate destruction of probative evidence when illegal drugs were the evidence at issue. Justice Ginsburg recognized that such contraband could be burned, flushed down a toilet, etc. That situation is markedly different from one in which the internal metabolism of a DWI detainee, who poses no such imminent nor controllable threat to the probative

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526. See *McNeely*, 133 S. Ct. at 1561 (comparing *McNeely* with other destruction-of-evidence cases such as *Murphy*, where the suspect had control over the evidence).
527. See *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (“[T]he need ‘to prevent the imminent destruction of evidence’ has long been recognized as a sufficient justification for a warrantless search.” (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006))).
528. *Id.* at 1857.
evidence stored inside her body, is at issue. Given the lack of such immediacy, it is no wonder that Justice Ginsburg joined her fellow Justices to form the plurality in McNeely.529 Moreover, in her dissent in King, Justice Ginsburg stressed the “now or never” aspect of preserving vital evidence when reviewing the propriety of warrantless searches.530 Again, given that the blood alcohol level of the suspect in McNeely lacked that element of irretrievability, it is of little wonder that Justice Ginsburg took the side disapproving of the violation of the Fourth Amendment found therein. Justice Ginsburg is clearly of the view that this “now or never” question as to the preservation of evidence is a litmus test that can be highly determinative in preserving or waiving the vital freedom guaranteed by the Fourth Amendment.531

So, to conclude our discussion of the second cornerstone, we can readily see how Murphy, Tyler, and King, among others, whether in the majority opinion or via a dissenting voice, inform and guide McNeely and act toward the preservation of the Fourth Amendment.

C. Brigham City’s Totality of the Circumstances

The third cornerstone is the totality of the circumstances test, as expounded upon by Brigham City v. Stuart.532 Brigham City’s paramount goal is to protect the precious freedom from warrantless searches, and concomitantly compel law enforcement to first obtain a lawful warrant before intruding upon the persons and property of citizens.533 It does so by mandating a sweeping examination of all relevant circumstances and conditions leading up to (and possibly

529. See McNeely, 133 S. Ct. at 1556. Justice Ginsburg joined in the opinion of the Court, which was announced by Justice Sotomayor. Id.
530. King, 131 S. Ct. at 1865 (Ginsburg, J., dissenting).
531. See id. (“To fit within this [emergency, or exigency] exception, police action literally must be [taken] now or never to preserve the evidence of the crime.” (second alteration in original) (quoting Roaden v. Kentucky, 413 U.S. 496, 595 (1973)) (internal quotation marks omitted)).
532. See supra Part II(C) (discussing Brigham City v. Stuart, 547 U.S. 398 (2006), in depth).
533. See Brigham City, 547 U.S. at 403 (noting that warrantless searches are presumptively unreasonable and any exception to the warrant requirement must be “so compelling that the warrantless search is objectively reasonable” (quoting Mincey v. Arizona, 437 U.S. 385, 393–94 (1978))).
justifying, to be sure) a warrantless search. Part of the elegance of the *Brigham City* totality of the circumstances requirement is in what it does not mandate. It does not set artificial conditions. It does not arbitrarily truncate inquiry. *Brigham City* does not prioritize particular examined items, nor does it skew the analysis by assigning greater weight to some factors as opposed to others. *Brigham City* lives up to the name we have given to its test. “Totality” means exactly that in practice: nothing left behind or forgotten. It is a broad-sweeping, all-encompassing inquiry. “Circumstances,” large, small, and in between, are all included in the calculus. Put simply, take it all in, and leave nothing out.

Comprehensive to the point of exhausting? Possibly. But the alternative cannot be suffered, for any mode of exclusion would be at the cost of the liberty interest assured by the Fourth Amendment. Moreover, it permits the lower courts the flexibility to adapt to distinguishable factual scenarios, to shifting technologies, even to modifications in modern expectations of privacy, and significantly, to how such privacy is maintained in an ever-changing world. The value of this ability to evolve cannot be underestimated, for it maximizes the power of the judiciary to safeguard our freedoms from usurpation by the other branches of government, particularly the executive (be it federal, state, or local).

*Brigham City* may chronologically follow *Ker* but it represents a natural evolution from all prior precedents (including *Ker*). A totality of the circumstances test is the only just result from an inquiry grounded first and foremost upon reasonableness. Since *Ker*, the Court has continually and vigorously reaffirmed that alleged violations of the Fourth Amendment are to be weighted on a scale of reasonableness. What could be more reasonable than an examination that comprehensively looks to all relevant circumstances? We respectfully submit it could not be otherwise.

534. Compare *Brigham City*, 547 U.S. at 404 (holding that an action is reasonable under the Fourth Amendment “as long as the circumstances, viewed objectively, justify [the] action” (alteration in original) (citation omitted) (internal quotation marks omitted)), with *Ker* v. California, 374 U.S. 23, 33 (1963) (holding that the reasonableness of a search is a substantive determination to be made by the trial court from the facts and circumstances of the case in the light of the “fundamental” criteria laid down by the Fourth Amendment).

535. See supra Part II(A) (discussing *Ker*’s focus on reasonableness).
Therefore, a totality of the circumstances test is the necessary, logical, and just outcome of the reasonableness standard of Fourth Amendment inquiry.

The totality of circumstances test likewise fits neatly with the destruction-of-evidence exception validating warrantless searches.536 As we have seen above, an allegation of an emergent situation justifying an exception to the norms of the Fourth Amendment demands, by necessity, a thorough examination of all pertinent facts.537 Hence, the totality of the circumstances test espoused in *Brigham City* is the only mode of analysis capable of properly measuring whether the purported emergency of the destruction of evidence truly exists or is an artifice of guileful police.538 As before, we must ask if the metaphorical building is still on fire.539 Only a totality of the circumstances test can assure us that the emergency is real, and an exemption to the nominal prohibition against warrantless searches is rightly granted.

**D. King’s Exigent Circumstances**

Our fourth and final cornerstone is *Kentucky v. King*. Chronologically, it is the last building block set in place; logically, it also represents the final step in erecting this pantheon of Fourth Amendment jurisprudence. In truth, *King* is more an accumulation of judicial interpretation than a landmark striking out on its own. *King* is the rightful progeny of the reasonableness standard set forth

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536. See, e.g., Missouri v. McNeely, 133 S. Ct. 1552, 1570 (2013) (noting that the Court bases its decision on the totality of the circumstances when reviewing exigent circumstances exceptions, such as the imminent destruction of evidence); *King*, 131 S. Ct. at 1856–57 (discussing the destruction-of-evidence exception to the warrant requirement—falling under the more general exigent circumstances exception).

537. See supra Part IV (discussing *McNeely* and its rejection of a per se exception for warrantless blood draws in drunk-driving cases as well as its adherence to a case-by-case determination of reasonableness).

538. See supra Part II(C) (discussing *Brigham City* and the totality of the circumstances test in depth).

539. See supra notes 171–80 (discussing *Tyler* and the burning building).
in *Ker* long ago.\(^{540}\) It acknowledges, and is a refinement upon, the doctrine of excusing a warrantless search when the destruction of probative evidence is imminent, as established in *Murphy*.\(^ {541}\) And it operates under the auspices of the totality of the circumstances test, as propounded in *Brigham City*.\(^ {542}\)

As for the latter, *King* is particularly effective because it elaborates upon exigent circumstances as a subset of the totality of the circumstances, which *Brigham City* demands be examined as a whole when the Fourth Amendment is at risk.\(^ {543}\) Here we see a confluence with the three earlier cornerstones: *King*'s exigent circumstances (inclusive of *Murphy*'s emergency of the threatened destruction of evidence),\(^ {544}\) tested under *Brigham City*'s totality of the circumstances test,\(^ {545}\) and all the above done pursuant to the guiding axiom of reasonableness promulgated in *Ker*.\(^ {546}\)

*King* incorporates the global set of exigencies of burning buildings, fleeing suspects, and similar misadventures. It carefully balances the tense realities of the arrest scenario and the needs of law enforcement against the prohibitions of the Fourth Amendment, the prerequisites of obtaining a warrant, and the overarching need to keep the people secure from unjustified intrusions upon their persons.

\(^{540}\) See *King*, 131 S. Ct. at 1856 (The “ultimate touchstone of the Fourth Amendment is reasonableness.” (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)) (internal quotation marks omitted)).

\(^{541}\) See id. (recognizing that the “imminent destruction of evidence” is sufficient justification for a warrantless search and discussing this exception in the context of potential police-created exigencies).

\(^{542}\) See id. at 1859 (“Our cases have repeatedly rejected a subjective approach, asking only whether the circumstances viewed objectively, justify the action.” (quoting *Brigham City*, 547 U.S. at 403) (internal quotation marks omitted)).

\(^{543}\) Id.

\(^{544}\) See supra note 527 and accompanying text (discussing *King*'s recognition that exigent circumstances, particularly the imminent destruction of probative evidence, may excuse a warrantless search).

\(^{545}\) See supra notes 540–41 and accompanying text (highlighting *King*'s use of *Brigham City* to reject a subjective approach in favor of an objective approach of justifying police exigency).

\(^{546}\) See supra note 535 and accompanying text; see also supra note 534 (comparing the evolution of “reasonableness” from *Ker* to *Brigham City*).
or into their properties.\textsuperscript{547} Additionally, \textit{King} is admirable because it recognizes that the exception of exigent circumstances is a somewhat fluid concept. And we say “somewhat,” because exigency, if reduced to an amorphous notion, would lend itself too easily to abuse by aggressive police tactics. \textit{King} forestalls such an unhinging of exigent circumstances from a solid footing. It firmly grounds itself in the catalog of exigencies identified in earlier precedents, yet it leaves available some latitude to permit the conceptualization of exigent circumstances to evolve as the courts encounter differing case-by-case scenarios. Most importantly, \textit{King} accomplishes this while still abiding by the all-important mantra of reasonableness that is so imperative in Fourth Amendment adjudications.\textsuperscript{548}

In her dissent, Justice Ginsburg takes umbrage at the ultimate outcome in \textit{King}, in part because she viewed the controlling opinion as failing to prevent warrantless incursions into the home—a goal most dear to the Fourth Amendment.\textsuperscript{549} Notwithstanding the overall efficacy of \textit{King}, we applaud Justice Ginsburg’s concern and turn it to our purposes as follows: just as the Fourth Amendment safeguards our homes from warrantless intrusions by the sovereign, the liberty guarantee can do no less to protect the human body from the same evil.

In sum, \textit{King} fittingly refines the contours of exigencies that might excuse a warrantless search. It does not bestow upon law enforcement the license to create such circumstances in violation of the liberty interest guaranteed by the Fourth Amendment.\textsuperscript{550} At the same time, however, it does not render application of the

\textsuperscript{547} See supra notes 540–42 (outlining \textit{King}’s objective, totality of circumstances approach to justifying police action, exigencies, and reasonableness under the Fourth Amendment).

\textsuperscript{548} See supra Part II(A) (discussing \textit{Ker}’s focus on reasonableness).

\textsuperscript{549} Kentucky v. King, 131 S. Ct. 1849, 1865 (2011) (Ginsburg, J., dissenting) (“In no quarter does the Fourth Amendment apply with greater force than in our homes, our most private space . . . . Home intrusions . . . are indeed ‘the chief evil against which . . . the Fourth Amendment is directed.’” (quoting Payton v. New York, 445 U.S. 573, 583 (1980))).

\textsuperscript{550} See id. at 1858 (“Where . . . the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable . . . .”) (emphasis added)).
constitutional freedom irrational by blinding the Fourth Amendment to the real need for justifiable exemptions from its otherwise broad protections.

E. McNeely’s Incorporation of the Four Cornerstones

We have now analyzed the cornerstones of the Fourth Amendment. Before discussing McNeely, we must take due cognizance of Schmerber, the case which fomented this controversy in the first instance. After all, McNeely and the current state of the Fourth Amendment would not exist were it not for Schmerber. But as much as McNeely owes its very existence to Schmerber,551 there is not much to discuss concerning the latter.

Notably, the Supreme Court treaded lightly in Schmerber, holding that the natural metabolization of alcohol in the bloodstream does represent destruction of probative evidence of a kind that could qualify as destruction of evidence—an emergency that would therefore excuse a warrantless search.552 This was a straightforward holding, but one that left open more questions than it answered. The Schmerber Court made no quantifications or qualifications of exceptions of the liberty guarantee. It did not further define the contours of this finding of exemption from Fourth Amendment norms, nor did it dispense of any bold rubrics with regard to assuring the vitality of the freedom safeguarded by the Amendment.

In short, Schmerber left open the fundamental question and set the stage for the long awaited and necessary arrival of McNeely. In doing so, it allowed for the growth of Fourth Amendment jurisprudence surrounding it in the years between Schmerber and McNeely.

Certainly, we are not saying Schmerber was wrongly decided. It was the right decision for its time, reflecting the Fourth Amendment jurisprudence of its day. In many respects, it was necessary for the law to germinate around Schmerber and to set more

551. Missouri v. McNeely, 133 S. Ct. 1552, 1556–58 (2013) (noting that the issue before the Court, “whether the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment’s warrant requirement for nonconsensual blood testing in all drunk-driving cases” was left open by the Court in Schmerber).
of these cornerstones into place before McNeely could be rightfully decided. Schmerber represented the unrefined thinking of the Court at that time, a prosaic solution to a narrow question put to the Justices at an earlier time in the evolution of Fourth Amendment jurisprudence. With the passage of years, we see zealous prosecutors and government officials (albeit with the best intentions), intentionally or otherwise, seek to usurp the Fourth Amendment. The prosecution in McNeely is one such example—the prosecution and its like-minded allies in the law enforcement community contended that BAC testing exceeds the scope of the liberty guarantee. Yet others, precisely the Court in McNeely, seek to sensibly cabin Schmerber, in order to preserve the liberty interest guaranteed by the Fourth Amendment. Thus, recognizing Schmerber for its achievement and its concurrent limitations, we can now intelligently proceed to McNeely.

McNeely is best understood when presented as but a part of the vast mosaic of Fourth Amendment jurisprudence we have already discussed herein. In truth, McNeely addressed a rather narrow question as to what current Fourth Amendment doctrine does not exclude from the warrant requirement. It steadfastly refused to expand the exigent circumstances exemption to the naturally occurring blood chemistry process that every police officer encounters when making a DWI arrest.

But McNeely represents so much more. It is a true incorporation of all the precepts of the four cornerstones we have discussed throughout this Article. Yes, the Supreme Court in McNeely maintained its stance that the natural metabolization of alcohol in the blood is not an exigent circumstance justifying a warrantless search. Certainly in doing so, the Justices kept close

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553. McNeely, 133 S. Ct. at 1560 (“The State contends that whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessarily exist because BAC evidence is inherently evanescent. As a result, the State claims that so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain the blood sample without a warrant.”).

554. Id. at 1561 (noting that “[t]he State’s proposed per se rule . . . fails to account for advances in the 47 years since Schmerber was decided”).

555. Id. at 1568.
watch upon the doctrine, and in their vigilance, rebuffed any attempt to expand the boundaries of permissible warrantless searches. The Court, once more, limited the situations exempt from Fourth Amendment protocols.556 But in doing so, McNeely rightfully takes its place in the constitutional pantheon. It exemplifies what truly qualifies as the emergent destruction of evidence, which in turn, grants a reprieve from the nominal warrant requirement of the Fourth Amendment. By calling upon a plethora of circumstances from past cases, the Court aptly demonstrated what are emergencies and what are not,557 and refined the standard, thereby preserving the liberty interest safeguarded from unjustified intrusions that might be otherwise inflicted upon the citizenry.

Next, McNeely confirms the vitality of the totality of the circumstances test.558 Note well the great care exercised by the plurality to parse the many nuances of what transpired in McNeely, specifically with regard to DWI cases.559

The McNeely Court scrutinized the numerous permutations in making a DWI arrest and seeking to draw blood for a BAC test. Proper emphasis was placed upon the transportation of the suspect to a medical facility, the availability of a magistrate, and the capability of applying for and obtaining a lawful warrant authorizing the blood draw, among other things. McNeely properly considered the time factors of each of these actions and the propriety of the police procedures involved. Only then did it move towards a final judgment as to whether the Fourth Amendment’s prohibition against warrantless searches may be waived in the particular instance.

556. McNeely, 133 S. Ct. at 1568.
557. See id. at 1561 (citing McDonald v. United States, 335 U.S. 451, 456 (1948)) (finding no exigent circumstance where police could obtain a warrant before taking a blood sample without undermining the efficacy of the search); see also Georgia v. Randolph, 547 U.S. 103, 116 n.6 (2006) (finding exigent circumstances justifying immediate action on the police’s part where the suspect could not be prevented from destroying evidence of cocaine if the police pursued a warrant); Roaden v. Kentucky, 413 U.S. 496, 505 (1973) (finding no exigent circumstances requiring police to preserve evidence where the obscene film was regularly shown); Cupp v. Murphy, 412 U.S. 291, 296 (1973) (finding exigent circumstances where the suspect could easily wash physical evidence of the murder of his wife from under his fingernails).
558. McNeely, 133 S. Ct. at 1556.
559. Id. at 1568.
McNeely epitomizes the rightful choice of *sui generis* analysis in these Fourth Amendment cases. While McNeely’s precepts will have broad application, it represents a singular focus upon the facts before the Court. Future cases will ultimately turn upon the Justices analyzing the facts of the case before them, and no other.

McNeely is not merely recognition, but also reaffirmation, of the guiding principle that Fourth Amendment decision-making, by the special nature of the liberty interest it protects, demands case-by-case analysis. McNeely correctly maintains the cogent line of reasoning advocating *sui generis* review; the wide disparity almost always found in Fourth Amendment controversies mandates individualized consideration of the matter-at-hand to fully preserve the precious freedom guaranteed by the Amendment. We find it would be consistent with, and not the least bit antithetical to, the Supreme Court’s Fourth Amendment jurisprudence to date for the Justices to maintain the *sui generis* rule reaffirmed in McNeely as the constitutionally valid mode of reviewing warrantless blood tests in DWI cases.

The same can be said for the Court’s continued rejection of calls to reclassify the natural metabolization of the alcohol in a suspect’s blood as a per se “exigent circumstance,” which obviates the requirement of first procuring a warrant before administering a BAC test. Refusing to expand the boundaries of what constitutes an “exigent circumstance” preserves fidelity to what the Court originally fashioned and intended as a jealously and carefully drawn exemption to the nominal workings of the Fourth Amendment.\(^{560}\)

That is why we find, at the end of the day, the postulations of McNeely to be wholly consistent with the great landmarks that preceded it, and a most worthy successor to its forebears as a stalwart defender of the precious freedom guaranteed by the Fourth Amendment.

\(^{560}\) See Randolph, 547 U.S. at 109 (citing one “jealously and carefully drawn” exception).
VII. OUR CODA

Before coming to the formal conclusion of this Article, we are compelled to make the following pungent comments. Considering this great controversy, it is tempting to say in colloquial terms, “so what” to the rights of DWI suspects. After all, maintaining this in the terms of the commonplace, would not the vast majority of Americans reply: “I don’t drive drunk; drunk drivers are a menace to the rest of us, and not worth protecting; so, I don’t care”? Maybe so, since there is more than a germ of truth in that point of view. Yet, is that the position we should nevertheless adopt? As a free people, should we slouch towards such a cavalier attitude regarding the curtailment of our basic freedoms?

In a similar vein (no pun intended), is it not equally true that the plea of some government agents for permission to conduct warrantless blood tests is but a modest request made by a sovereign simply motivated by nothing more sinister than a good faith desire to rid our highways of the sometimes-fatal bane of drunk drivers? Again, maybe so.

Yet, let us pause and contemplate the words of Justice Brandeis, who presciently warned that “[e]xperience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent.”⁵⁶¹ We should heed the Justice’s words that “[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”⁵⁶² Justice Brandeis shared this wisdom in the context of one of his greatest declarations of American freedom: The right to be let alone is the one right most valued by civilized men.⁵⁶³ Words we should never forget, even when considering seemingly inconsequential drunk-driving arrests and subsequent BAC tests.

Rather than contemplating the present issue narrowly in the company of the rightful abhorrence of drunk driving, is it not better to consider it as a question of an intrusion upon our own persons?

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⁵⁶¹ Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).
⁵⁶³ Id.
Indeed, is it not necessary to view what is before us through the prism of the Fourth Amendment’s essential prohibition against warrantless bodily invasions by the government? In a society that so robustly guards the privacy interest in one’s own home, can we honestly do any less to vigorously enforce the protection of the Fourth Amendment when it comes to our physical persons?

Current Fourth Amendment jurisprudence “[n]ot only . . . reflect[s] today’s values by giving effect to people’s reasonable expectations of privacy, [it] also shape[s] future values by changing our experience and altering what we come to expect from our government.” That, we respectfully suggest, is the larger and vastly more important issue. If we are outraged when “the sanctity and privacy of the home” is invaded without a warrant, can we, as a free people, be any less inflamed when the unsanctioned incursion is into our very bloodstream, no matter how brief or relatively painless that intrusion might be?

Because the very essence of the prime question put forth by McNeely is the government’s ability to do precisely that, our history, our cases, and our Constitution demand a powerful and protective reaction if we are to preserve the freedom guaranteed by the Fourth Amendment.

VIII. CONCLUSION

In the events leading up to the present day, we have witnessed the Supreme Court wrestle with a number of issues in its efforts to uphold the liberty guarantee of the Fourth Amendment. Pertinent to this Article, we have seen the Supreme Court fashion an

564. See Wilson v. Layne, 526 U.S. 603, 610 (1999) (noting the “centuries-old principle” of respect for the privacy of one’s home); Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring) (noting that the home is the center of our private lives); Miller v. United States, 357 U.S. 301, 307 (1958) (noting that the whole of American history reflects “the ancient adage” that a man’s home is his castle); see also Randolph, 547 U.S. at 115 (citing all of the above).


exception to the warrant requirement for exigent circumstances, yet nevertheless compartmentalize that rare exemption within sturdy walls constructed of, inter alia, *sui generis* inquiry, the totality of the circumstances test, and (simultaneously undergirding, but yet paramount to all) the test of reasonableness.

In drawing this Article to a close, we do so knowing full well that this is not the end of the Supreme Court’s jurisprudence on this subject. There will be new landmarks, no doubt refining the totality of the circumstances rubric for warrantless blood tests, possibly even a wholesale replacement of the current standard (although we doubt it). And there shall be other, newer decisions on warrantless searches and the Fourth Amendment generally, yet which, while not precisely on point, shall nevertheless inform us as to the future direction of this specific standard for the necessity or the abrogation of the warrant requirement for blood draws in DWI cases.

In anticipation of this future, it is imperative for us as a free people to maintain a zealous fidelity to the freedom so guaranteed by this constitutional amendment. Steadfast vigilance is required to assure ourselves and future generations of Americans that the great and imposing Fourth Amendment does not decline into a “frail protection indeed.”

But whatever the future holds, and wherever *McNeely* and its progeny lead us, we stand fast in our belief, and fervent in our hope, that one truth concerning the liberty interest guaranteed by “our unchanging Constitution” will remain unshakeable in the years to come. We find the best and most memorable expression of that in Justice Scalia’s declaration in *Maryland v. King*, thusly:

“The Fourth Amendment must prevail.”

567. *See, e.g.*, Riley v. California, 134 S. Ct. 2473, 2480 (2014) (evaluating a warrantless search of the data contained within a suspect’s cell phone).
568. *Von Raab*, 489 U.S. at 684 (Scalia, J., dissenting).
569. *Randolph*, 547 U.S. at 144 (Scalia, J., dissenting).