

THE NEEDLE AND THE DAMAGE DONE:
MITCHELL V. WISCONSIN'S SWEEPING RULE FOR
WARRANTLESS BLOOD DRAWS ON UNCONSCIOUS
DUI SUSPECTS

*Dyllan Taxman**

INTRODUCTION

In a normal year, the annual death toll from drunk driving accidents in the United States will roughly equal the total number of victims of the September 11th terrorist attacks and service members killed in the War on Terror combined.¹ And while every state has enacted increasingly progressive laws to prevent and punish driving under the influence (DUI),² episodes of drunk driving remain consistent year to year and less than one percent of self-reported drunk drivers are arrested.³ Drunken and drugged driving is, both in lay terms and legally speaking,⁴ a compelling public issue. But the Fourth Amendment of the U.S. Constitution does not discriminate based on the social cost of specific criminal activity, or at least it ought not to. That is why the Supreme Court's 2019 plurality opinion in *Mitchell v.*

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* Law Clerk, United States Court of Appeals for the Eighth Circuit; Ensign, United States Navy Reserve; J.D., Georgetown University Law Center; B.A., University of Wisconsin-Madison. The opinions expressed in this Essay are the author's own and do not reflect the views or positions of the United States Courts or United States Navy.

1 Compare DIV. OF UNINTENTIONAL INJURY PREVENTION, CTR. FOR DISEASE CONTROL, POLICY IMPACT: ALCOHOL IMPAIRED DRIVING 3 (2011), <https://www.cdc.gov/motorvehiclesafety/pdf/PolicyImpact-Alcohol-a.pdf>, with *US & Allied Killed*, WATSON INST. INT'L & PUB. AFF., <https://watson.brown.edu/costsofwar/costs/human/military/killed> (last updated Jan. 2020), and Brad Plumer, *Nine Facts About Terrorism in the United States Since 9/11*, WASH. POST (Sept. 11, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/09/11/nine-facts-about-terrorism-in-the-united-states-since-911/>.

2 See NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DEP'T OF TRANSP., ALCOHOL AND HIGHWAY SAFETY: A REVIEW OF THE STATE OF KNOWLEDGE 2, 165–213 (2011), <https://www.nhtsa.gov/staticfiles/nti/pdf/811374.pdf>. Crimes involving driving an automobile under the influence of drugs or alcohol, while given different names across the country, are collectively referred to as DUI in this Essay.

3 See DIV. OF UNINTENTIONAL INJURY PREVENTION, *supra* note 1, at 4.

4 *Mackey v. Montrym*, 443 U.S. 1, 19 (1979).

*Wisconsin*⁵ may have come as a shock to those who study criminal law and procedure.

Six years after rejecting any per se warrant exception for blood draws in DUI investigations, the *Mitchell* plurality blesses virtually all warrantless blood draws on unconscious DUI suspects. This Essay analyzes and critiques the *Mitchell* plurality opinion, examining warrantless blood draw caselaw before 2019 and evaluating *Mitchell* against that precedent. Part I summarizes *Mitchell*. Part II examines *Mitchell* as a departure from precedent and an attempt to create law through the rose-tinted lens of public policy.

I. *MITCHELL v. WISCONSIN*

Mitchell is a watershed DUI exigency case in which the impaired driver was never seen in his car and no party argued for the exigency warrant exception to apply.⁶ Sheboygan police found Gerald Mitchell slurring and stumbling near a lake after receiving a tip that he was driving drunk in his van.⁷ The officers administered a breath test showing Mitchell was past the legal blood alcohol content (BAC) limit and took him to the police station for a more reliable test.⁸

But on the way to the station, Mitchell became unconscious and unable to perform another breath test, leading the officers to take him to the hospital for a blood draw to determine his BAC, which again measured above the legal limit.⁹ The blood draw was administered while Mitchell was still unconscious.¹⁰ Mitchell was charged with DUI and moved to suppress the results of the BAC test as an unreasonable search in violation of the Fourth Amendment.¹¹ For its part, the government prevailed in defending the blood draw in state court, arguing Wisconsin's implied consent law permitted the warrantless search where an unconscious Mitchell had not revoked consent to the blood test under the statute.¹²

Wisconsin's thirty-four-year-old implied consent law deems any Wisconsin motorist in the act of driving as having consented to breath, blood, and urine testing to determine the presence or quantity of alcohol in their blood.¹³ A motorist suspected of DUI can refuse a BAC test and face the suspension of their driver's license.¹⁴ The suspendee is entitled to a hearing in which they may argue the

5 139 S. Ct. 2525 (2019).

6 *See generally id.*

7 *Id.* at 2532.

8 *Id.* This is standard procedure, as a station-administered breath test with a more sophisticated device provides better evidence in a subsequent indictment and trial. *See id.*

9 *Id.*

10 *See id.*

11 *Id.*

12 *See id.*

13 *See* WIS. STAT. ANN. § 343.305(2) (West 2019).

14 *Id.* § 343.305(9)(a).

investigating officer lacked probable cause to request a BAC test.¹⁵ A series of U.S. Supreme Court cases have consistently upheld this form of summary civil penalty for failure to submit to a BAC test against constitutional challenge.¹⁶

The Wisconsin Supreme Court affirmed Mitchell's conviction, holding that (1) by driving on Wisconsin roads and giving police probable cause to suspect Mitchell had a prohibited BAC, he voluntarily consented to a blood draw per the implied consent statute, and (2) Mitchell voluntarily forfeited the opportunity to withdraw consent by drinking to the point of unconsciousness.¹⁷ The implied consent statute creates a presumption that an unconscious motorist has not withdrawn consent.¹⁸ Examining the totality of the circumstances—particularly Mitchell's self-induced extreme drunkenness rendering a verbal withdrawal or another form of BAC testing impossible—the Wisconsin Supreme Court found the statute's presumption was not unreasonable under the Fourth Amendment.¹⁹

Mitchell petitioned the U.S. Supreme Court to review his case, again arguing the warrantless blood draw was an unreasonable search in violation of the Fourth Amendment.²⁰ The U.S. Supreme Court granted certiorari. Wisconsin again argued in support of the implied consent statute, maintaining that the circumstances of the case did not warrant applying the exigency exception to the warrant requirement.²¹ But as the legal world waited for the U.S. Supreme Court to determine whether implied consent laws permitted warrantless blood draws on unconscious DUI suspects, four Justices saw a different justification for the search.²²

Justice Alito's plurality opinion boldly proclaims that, absent extraordinary circumstances, a DUI suspect's unconsciousness *always* creates an emergency excusing law enforcement from obtaining a warrant.²³ In *Missouri v. McNeely*, the Supreme Court found that the dissipation of alcohol in blood is not sufficient to create an exigency negating the need for a warrant to conduct a blood draw.²⁴ Instead, the totality of the circumstances surrounding a DUI investigation must demonstrate that "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless [blood draw] is objectively reasonable under the Fourth Amendment."²⁵ The *Mitchell* plurality accurately describes policing drunk

15 *Id.* § 343.305(9)(a)(5)(a). Suspended motorists have other potential defenses, but the issues in a revocation hearing are very limited.

16 *See, e.g.,* *South Dakota v. Neville*, 459 U.S. 553, 563–64 (1983) (holding refusal to submit to BAC test can be used in subsequent criminal trial); *Mackey v. Montrym*, 443 U.S. 1, 18–19 (1979) (finding no due process violation where driver was arrested on probable cause); *Schmerber v. California*, 384 U.S. 757, 765 (1966) (holding no violation of right against self-incrimination).

17 *See* *State v. Mitchell*, 914 N.W.2d 151, 167 (Wis. 2018).

18 *See* WIS. STAT. ANN. § 343.305(3)(b) (West 2019).

19 *Mitchell*, 914 N.W.2d at 165.

20 Petition for a Writ of Certiorari at 5, *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019) (No. 18-6210).

21 Brief of the Respondent at 52, *Mitchell*, 139 S. Ct. 2525.

22 *See Mitchell*, 139 S. Ct. at 2534–37 (2019).

23 *See id.* at 2539.

24 *Missouri v. McNeely*, 569 U.S. 141, 165 (2013) (plurality opinion).

25 *Id.* at 148–49 (quoting *Kentucky v. King*, 563 U.S. 452, 460 (2011)).

driving as a “vital public interest” on which laws and policies limiting permitted BAC on the roads have a significant impact.²⁶ This demands effective and admissible BAC testing, which the plurality—again, accurately—acknowledges requires blood draws when a suspect cannot give a breath sample.²⁷

Determining that this “compelling interest” creates a “compelling need” to blood test a DUI suspect who cannot provide a breath sample, the plurality declares a warrantless blood draw on an unconscious driver meets the first prong of *McNeely*.²⁸ But for a constitutional warrantless search pursuant to the exigency exception, there must also be “no time to secure a warrant.”²⁹ *Schmerber v. California* established that a car accident can create an emergency situation where police may be required to attend to medical and traffic safety concerns and do not have time to obtain a warrant.³⁰ The *Mitchell* plurality holds that an unconscious DUI suspect always presents an emergency equivalent to the car accident in *Schmerber*, finding that a driver’s unconsciousness

is *itself* a medical emergency. It means that the suspect will have to be rushed to the hospital or similar facility not just for the blood test itself but for urgent medical care. Police can reasonably anticipate that such a driver might require monitoring, positioning, and support on the way to the hospital; that his blood may be drawn anyway, for diagnostic purposes, immediately on arrival; and that immediate medical treatment could delay (or otherwise distort the results of) a blood draw conducted later, upon receipt of a warrant, thus reducing its evidentiary value.³¹

Not only do unconscious drivers create a *Schmerber*-type emergency, Justice Alito continues, but they actually create a “*more acute*” exigency than car wrecks.³² Because a driver so drunk as to lose consciousness is particularly likely to crash and create the type of exigency from *Schmerber*, the plurality believes the likelihood of a traffic accident is an added factor in favor of exigency in all unconscious-driver cases.³³ Neither would the Court be convinced by *Mitchell*’s argument that technological advances now permit officers to easily obtain a warrant en route to a hospital, a point Wisconsin conceded in admitting police had time to secure a warrant in the case.³⁴ Instead, the plurality found that “forcing police to put off other tasks for even a relatively short period of time may have terrible collateral costs.”³⁵

26 *Mitchell*, 139 S. Ct. at 2535.

27 *See id.* at 2535–37.

28 *See id.*

29 *McNeely*, 569 U.S. at 149 (quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978)).

30 *See* 384 U.S. 757, 770–71 (1966).

31 *Mitchell*, 139 S. Ct. at 2537–38 (footnotes omitted).

32 *Id.* at 2538.

33 *Id.*

34 *See id.* at 2538–39; *id.* at 2541 (Sotomayor, J., dissenting).

35 *Id.* at 2539 (plurality opinion).

II. WHY *MITCHELL* GETS IT WRONG

A. “Compelling Need”

The plurality’s finding that the “compelling need” to effectively combat DUI meets the first requirement from *McNeely* is a gross misstatement of the law. *Mitchell* bases its “compelling need” discussion entirely on public policy, engaging in a lengthy recitation of the social costs of drunk driving and the need for effective BAC testing to mitigate against them. But that is simply not what *McNeely* and other exigency cases require. The Fourth Amendment’s protections do not diminish in the face of social needs, and courts should decline to craft exceptions to the warrant requirement based on “fear mongering” and a desire to eradicate specific criminal behavior, no matter how enticing it may be from a policy perspective.³⁶ Instead, a “compelling need” must arise from the actual emergency in a specific investigation, determined under the totality of the circumstances.

McNeely’s “compelling need” prong does not simply refer to particular criminal behavior creating a compelling public interest in investigation and prosecution, as the *Mitchell* plurality would have readers believe. Rather, police may conduct a warrantless search only when “exigencies of the situation make the needs of law enforcement so compelling that a warrantless [blood draw] is objectively reasonable under the Fourth Amendment.”³⁷ The “compelling need” refers to the *exigencies of the situation*, not the general need to effectively police a specific crime. *Mitchell*’s analysis distorts that element. The plurality begins by describing a “compelling interest” in combatting drunk driving, then shifts, with no further explanation or support, to describing the same policy factors as creating a “compelling need” for a warrantless search.³⁸ While a reader would be hard pressed to disagree with Justice Alito’s description of the “vital public interest” in eliminating DUI, a “compelling interest” in eliminating a class of criminal behavior is simply not the same as particular exigent circumstances in a case creating a “compelling need” to search without a warrant.

That analysis is wholly inconsistent with traditionally excepted exigent circumstances. For example, police may enter a burning building without a warrant to put out a fire and investigate its cause.³⁹ The compelling need in such a case derives from the nature of the specific circumstances—the fire and its inherent capacity to injure a building’s inhabitants and destroy evidence—not a compelling public interest in investigating arson generally. Similarly, the compelling need to conduct a warrantless blood draw on an unconscious driver must arise from the exigencies of the particular circumstance, not the general need to perform BAC tests on an entire class of DUI suspects in all cases. Indeed, this is why *McNeely*

³⁶ See *id.* at 2548 (Sotomayor, J., dissenting).

³⁷ *Missouri v. McNeely*, 569 U.S. 141, 148–49 (2013) (plurality opinion) (quoting *Kentucky v. King*, 563 U.S. 452, 460 (2011)).

³⁸ See *Mitchell*, 139 S. Ct. at 2536–37.

³⁹ *Michigan v. Tyler*, 436 U.S. 499, 509 (1978).

specifically mandates that the reasonableness of a warrantless blood draw is determined by the circumstances in the particular case.⁴⁰

If there is a “compelling need” justifying an exigency-excepted search whenever a DUI suspect cannot give a breath test, then why stop at unconscious suspects? The plurality’s justification opens the floodgates to an Orwellian “parade of horrors.” The analysis is equally persuasive for a suspect who merely withdraws consent to a breath test. Such a warrantless search would be entirely consistent with *Mitchell*’s rationale that there is a compelling need to blood test DUI suspects who cannot provide a breath sample. It would also fly in the face of the Supreme Court’s precedent emphasizing increased Fourth Amendment protections against warrantless blood draws compared to breath tests⁴¹ and upholding implied consent laws because they provide only civil penalties for withdrawing consent.⁴² The plurality’s line of reasoning should also allow police to enter a DUI suspect’s home without a warrant upon probable cause that they drove drunk. The public interest in arresting such a suspect is equally compelling, and administering a breath test pursuant to implied consent laws equally impossible. Entering the home is no greater a Fourth Amendment intrusion than conducting a medical procedure on an unconscious and unwilling citizen. Absent a specific emergency, it is hard to believe our Constitution would permit the former. Incredibly, it now permits the latter.

B. “No Time to Secure a Warrant”

A compelling need is an insufficient basis to blood test an unconscious DUI suspect without a warrant. The Supreme Court’s precedent in *McNeely* requires that an officer has no time to secure a warrant. The *Mitchell* plurality’s analysis reaches to find that there is never time to secure a warrant when an unconscious driver must be taken to the hospital. *Schmerber* defined the circumstances under which officers lack time to secure a warrant, and the *Mitchell* plurality misconstrues its requirement by inexplicably erasing a predicate condition. The plurality goes on to shore up its position by alleging an additional exigency factor when a DUI subject is unconscious—the likelihood of a traffic accident—which belies its untenable conclusion and departure from precedent.

Any time an unconscious driver is suspected of DUI, *Mitchell* declares police are confronted with a medical emergency eliminating the need for a warrant. This is a misconstruction of *Schmerber*’s limited holding that the circumstances in *that* case, where police were responding to a traffic accident, presented pressing concerns that could reasonably take priority over obtaining a warrant. The *Mitchell* plurality inexplicably interprets *Schmerber* as creating a per se rule permitting a warrantless blood draw in all but the most routine DUI investigations. It simply ignores *Schmerber*’s limited applicability based on circumstances surrounding a particular

40 *McNeely*, 569 U.S. at 149.

41 *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184 (2016).

42 *Id.* at 2185 (citing *McNeely*, 569 U.S. at 159; *South Dakota v. Neville*, 459 U.S. 553, 560 (1983)).

investigation. Expanding *Schmerber* to permit warrantless blood draws without a totality-of-the-circumstances analysis or even similar circumstances to that case, i.e., a traffic accident, is particularly troubling given that *Schmerber* was decided in 1966, before police had the ability to obtain warrants en route to a hospital using a mobile phone. In fact, Wisconsin conceded that police could have obtained a warrant before drawing Gerald Mitchell's blood. Yet, despite this admission, the *Mitchell* plurality assures readers that police could not reasonably have obtained a warrant simply because they needed to take Mitchell to a hospital.

Interpreting *Schmerber* to obviate the warrant requirement whenever police may need to take a suspect to a hospital is wholly inconsistent with precedent. Indeed, in *McNeely*, police drew blood from a very conscious McNeely *at a hospital*, merely because he refused a breath test.⁴³ But the totality of the circumstances in that case did not demonstrate that police lacked time to secure a warrant, showing a hospital trip does not by itself preclude obtaining a warrant. Depending on policy, some jurisdictions might always require a suspect to be taken to a hospital for a blood draw, regardless of any medical emergency. Given *McNeely*'s rejection of hospitalization as sufficient ground for exigency and *Schmerber*'s limited holding that a traffic accident can create circumstances giving police no time to secure a warrant, the *Mitchell* court's holding is wholly unsupported.

Perhaps recognizing that a hospital visit alone has been declared insufficient to create an exigency, the plurality attempts to liken all DUI investigations of unconscious suspects to the situation in *Schmerber*. Because a driver so drunk as to become unconscious is particularly likely to cause a traffic accident, *Mitchell* argues, circumstances similar to those creating a *Schmerber*-type exigency will be common when a DUI suspect is unconscious. This justification strains credulity. Mitchell was not involved in a traffic accident. Police did not even arrest him in his vehicle. Any time an unconscious driver *actually* creates a traffic accident, police will be justified under *Schmerber* to conduct a warrantless blood draw if the circumstances make obtaining a warrant unreasonable. Permitting warrantless blood draws on unconscious DUI suspects who do not cause traffic accidents because the Platonic-ideal unconscious suspect is, in a vacuum, likely to cause one is faulty logic. Take an example based on a similar justification: (1) police have probable cause to believe a suspect unlawfully possesses controlled substances; (2) the suspect owns a car; (3) car-owning suspects are more likely to transport drugs in their cars; and (4) police may search a vehicle without a warrant when they have probable cause to believe the car contains evidence of a crime.⁴⁴ Under *Mitchell*'s logic, police should be able to search the suspect without a warrant pursuant to the automobile exception, even if the suspect never stepped in their vehicle, simply because it was likely that other suspects like them would. Because the suspect belongs to a class likely to potentially fall within a warrant exception under other circumstances, *Mitchell*'s logic would permit a warrantless search based on that speculation. This type of assumptive, cart-

43 *McNeely*, 569 U.S. at 145–46.

44 *See* *Carroll v. United States*, 267 U.S. 132, 149 (1925).

before-the-horse application of warrant exceptions does not pass constitutional muster.

CONCLUSION

Police may conduct a warrantless blood draw when the exigencies of a particular situation create a compelling need and there is no time to secure a warrant.⁴⁵ The Supreme Court has found that such an exigency may, depending on the circumstances, arise in the course of investigating DUI causing a serious traffic accident where police are confronted with health and safety concerns.⁴⁶ In *Mitchell*, a plurality of Justices greatly extended these holdings to permit warrantless blood draws in nearly all DUI investigations where a suspect is unconscious.

Without support, the *Mitchell* plurality replaces exigency-created compelling need with a compelling interest in combating certain criminal activity. Under this interpretation, the government need not determine that exigent circumstances compel a warrantless search if the criminal activity being investigated is particularly onerous. The plurality strips its precedent of the requirement to evaluate the specific circumstances and crafts a new and overbroad warrant exception for an entire class of suspects. Six years after the Supreme Court found by implication that a hospital visit was insufficient to excuse the warrant requirement in *McNeely*, the plurality finds all unconscious DUI suspects are subject to warrantless blood draws solely because they need to be taken to the hospital. The plurality's post hoc justification that unconscious suspects are more likely to cause traffic accidents assumes too much, proves illogical, and only emphasizes how unnecessary its expansive holding truly is.

Benjamin Franklin famously wrote: "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety."⁴⁷ As American drivers and pedestrians, we should be comforted by evolutions in the law keeping us and those we love safe from dangerous criminal activity. As American citizens enjoying the freedoms our Constitution provides, we should be alarmed when the liberties we hold most dear are compromised.

45 See *McNeely*, 569 U.S. at 148–49.

46 See *Schmerber v. California*, 384 U.S. 757, 770–71 (1966).

47 Pennsylvania Assembly: Reply to the Governor (Nov. 11, 1755), in 6 THE PAPERS OF BENJAMIN FRANKLIN 238, 242 (Leonard W. Labaree ed., 1963)