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## Does the End Justify the Means? The Clumsy and Circuitous Logic of Blood Test Admissibility in Criminal Prosecutions in *State v. Cormier*

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CLUMSY AND CIRCUITOUS LOGIC OF BLOOD TEST  
ADMISSIBILITY IN CRIMINAL PROSECUTIONS IN  
*STATE V. CORMIER*

*Kyle T. MacDonald*

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DOES THE END JUSTIFY THE MEANS? THE  
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Kyle T. MacDonald\*

I. INTRODUCTION

In *State v. Cormier*,<sup>1</sup> the Maine Supreme Judicial Court, sitting as the Law Court, was asked to determine whether a Maine statute<sup>2</sup> requiring law enforcement officers to test the blood of all drivers for intoxicants following a fatal motor vehicle collision violates the Fourth Amendment of the United States Constitution<sup>3</sup> when the operation of the statute allows for the admission of those blood test results in a future criminal trial of the driver.<sup>4</sup> In determining that the procedures of title 29-A, section 2522 of the Maine Revised Statutes are not violative of the Fourth Amendment, the Law Court effectively confirmed that the State's interest in obtaining information regarding the intoxication of drivers in fatal collisions<sup>5</sup> without a warrant outweighs the privacy interest of the individual. Further, the Law Court established that those test results are certainly admissible in a criminal proceeding against a driver when the State demonstrates that either before, during, or *after* the administration of the mandatory blood test, information came to light to establish probable cause that the operator involved in the accident was intoxicated.<sup>6</sup> As a result, the *Cormier* court concluded that section 2522 survives constitutional scrutiny.<sup>7</sup>

This case required the Law Court to squarely apply its Fourth Amendment search and seizure jurisprudence to Maine's professedly "unique"<sup>8</sup> statute for the first time.<sup>9</sup> In so doing, the Law Court was forced to wrestle with the contours of the power of law enforcement personnel to conduct individual searches within the bounds of

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1. 2007 ME 112, 928 A.2d 753.

2. ME. REV. STAT. ANN. tit. 29-A, § 2522(1)-(2) (1996 & Supp. 2003).

3. U.S. CONST. amend. IV (The Fourth Amendment of the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . .").

4. ME. REV. STAT. ANN. tit. 29-A, § 2522(3).

5. *Cormier*, 2007 ME 112, ¶ 25, 928 A.2d. at 761.

6. *Id.*

7. *Id.* ¶ 37, 928 A.2d at 763.

8. *Id.* ¶ 16, 928 A.2d at 758.

9. The Law Court was asked to apply its Fourth Amendment search and seizure jurisprudence to section 2522 for the first time following the Supreme Court's decision in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), which refined the application of the special needs exception to the probable cause and warrant requirements. The Law Court had previously upheld the constitutionality of section 2522's predecessor, ME. REV. STAT. ANN. tit. 29, § 1312 (Supp. 1992), in *State v. Roche*, 681 A.2d 472 (Me. 1996).

constitutional purposes. The primary reasoning articulated by the majority in reaching this determination was that if the statutory requirements of the probable cause determination were met, the “built-[in]”<sup>10</sup> protections of Maine’s Fourth Amendment jurisprudence would preclude such a search from being unreasonable.<sup>11</sup> The majority found further support for the constitutionality of section 2522 by reasoning that the State’s interest and “special needs,” separate from the general purpose of law enforcement, justify an exception to the warrant requirement.<sup>12</sup> Conversely, the dissent asserted that the majority had flatly circumvented constitutionality by allowing for “after-the-fact” evidence to establish probable cause and, in so doing, effectively sanctioned an unwarranted intrusion on individual privacy.<sup>13</sup> Thus, a new question emerges: By authorizing warrantless, suspicionless, and nonconsensual searches and seizures of blood following fatal vehicular accidents on the basis of state data collection and after-acquired probable cause evidence, did the Law Court apply the best possible logic to reach its conclusion?

This Note first examines the framework of both federal and state Fourth Amendment jurisprudence, with specific attention given to the carved-out “special needs” exception to the warrant requirement. Part II will also discuss the road to *Cormier* in the Maine courts. Part III outlines the statutory history and legislative intent surrounding the promulgation of section 2522 and briefly explores the rationale underlying its creation. Part IV will discuss the facts and arguments before the Law Court in *Cormier* and the subsequent majority and dissenting opinions. Arguing that the Law Court erred when it sustained the constitutionality of section 2522 on the grounds that it did, Part V of this Note will address the consequences of *Cormier* and how the legislature should amend section 2522 to avoid future constitutional challenges while preserving the legislature’s intent to protect Maine drivers and to collect data to further that purpose. Next, this Note argues that the result of the majority *could* be defensible on other “less clumsy” grounds, and questions why the Law Court took such strenuous yet logically faulty measures to reach its chosen result. Finally, this Note asserts a dual conclusion. First, the faulty reasoning of the *Cormier* court has allowed Maine to slide into unconstitutional territory where probable cause merely plays an inferior role to the State’s true interest in collecting evidence to be used in criminal prosecutions for drunk driving-related crimes. Second, the State arguably *does* have a heightened interest in the public at large by ascribing fault to drunk drivers, which outweighs individual privacy. However, the majority blundered when it failed to execute the most effective reasoning possible.

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10. *Cormier*, 2007 ME 112, ¶ 27, 928 A.2d. at 761

11. *Id.*

12. *Id.* ¶ 36, 928 A.2d at 763.

13. *Id.* ¶¶ 57, 59, 928 A.2d at 769 (Levy, J., dissenting).

## II. AN EXAMINATION OF FEDERAL AND STATE FOURTH AMENDMENT JURISPRUDENCE

### A. Search and Seizure

The Fourth Amendment to the United States Constitution<sup>14</sup> and article I, section 5 of the Maine Constitution<sup>15</sup> were both designed to protect individuals from unreasonable searches and seizures of their persons, houses, papers, and possessions. The phrase “search and seizure” is one of the most recognizable clauses in the United States Constitution. Rather than a blackletter rule of a law, however, the phrase is considered more an expression of a philosophy crafted in reaction to harsh British procedures prior to the Revolution.<sup>16</sup> The clause was written into the Constitution by its drafters who hoped to assure that the State would always respect the “sanctity of the people and the effects they hold dear.”<sup>17</sup>

To determine the reasonableness of a search, the United States Supreme Court formulated a test that balances the level of intrusion against the degree that the search promotes legitimate government interests.<sup>18</sup> Traditionally, a search was considered reasonable if it was executed pursuant to a search warrant that was issued by an independent magistrate upon a showing of probable cause.<sup>19</sup> This warrant procedure was espoused because it allows a disinterested person whose judgment is not swayed by competing law enforcement goals to make the critical decision of whether there is probable cause to search.<sup>20</sup> At the least, a valid warrant declares that there is an acceptable reason for intrusion into one’s privacy, because a disinterested party made a determination that there was probable cause for the intrusion. The purpose of requiring a search warrant and probable cause is to guarantee a substantial probability that the invasions involved in the search will be justified by the discovery of incriminating evidence.<sup>21</sup> As such, warrant requirements are excused only for important and recognized exceptions developed through state and federal case law.

### B. The Special Needs Exception: A Trilogy of Supreme Court Cases

In the process of refining investigatory criminal procedure, the courts developed and recognized a number of exceptions to the warrant requirement. Most exceptions,

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14. U.S. CONST. amend. IV.

15. ME. CONST. art. I, § 5.

16. Ross H. Parr, Note, *Suspicionless Drug Testing and Chandler v. Miller: Is the Supreme Court Making the Right Decisions?*, 7 WM. & MARY BILL RTS. J. 241, 243-44 (1998) (citing STEPHEN A. SALZBURG & DANIEL J. CARPA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 136-362 (5th ed. 1996)).

17. *Id.* at 244.

18. See *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); see also *Skinner v. Ry. Labor Executives Ass’n*, 489 U.S. 602, 619 (1989). But see *New Jersey v. T.L.O.*, 469 U.S. 325, 352 (1985) (Blackmun, J., concurring) (raising concern that the balancing test has become the rule rather than the exception).

19. See *Seventeenth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1986–1987*, 76 GEO. L.J. 521, 534 (1988) [hereinafter *Criminal Procedure*] (citing *T.L.O.*, 469 U.S. at 340).

20. See FED. R. CRIM. P. 41(c); *Johnson v. United States*, 333 U.S. 10, 14 (1948).

21. See *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949).

however, require a showing of probable cause before a search is allowed.<sup>22</sup> Courts have been willing to dispense with both the warrant and probable cause requirements when “special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.”<sup>23</sup> The Court fashioned this special needs balancing test because “the traditional requirement of a warrant based on probable cause is not well-suited to searches for purposes as varied as enforcing school discipline, public safety, and administrative efficiency.”<sup>24</sup> However, the special needs searches are not without some limit: they cannot be for criminal law enforcement and subsequent prosecutorial evidentiary purposes.<sup>25</sup> Thus, if the State can articulate a compelling interest that outweighs the individual’s privacy expectations, and the State’s interest is for purposes other than criminal law enforcement, courts may rely upon the special needs exception to affirm the constitutionality of a search. Consequently, some searches are no longer presumed to be unreasonable in the absence of individualized suspicion.<sup>26</sup>

In 1966, the seminal case of *Schmerber v. California*<sup>27</sup> held that a warrant was not required to perform a blood test on a suspected drunk driver when the search was incident to the driver’s arrest.<sup>28</sup> In *Schmerber*, the petitioner had been arrested in the hospital while receiving treatment for injuries he sustained in the accident involving the automobile he had been driving, and a blood test was taken at the direction of a police officer. In upholding the search, the Supreme Court reasoned that “the officer . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened ‘the destruction of evidence.’”<sup>29</sup> As such, the Court found that the exigency of the situation and the governmental interest in combating drunk driving outweighed the individual’s privacy interests.<sup>30</sup> *Schmerber* came to stand for the proposition that a warrantless blood test used to detect a driver’s intoxication would be constitutional so long as there was probable cause to arrest the driver for drunk driving. In other words, collection of blood alcohol evidence was deemed permissible in the name of public safety so long as some simultaneous probable cause existed to indicate that the driver was intoxicated.

As the epidemic of drug and alcohol use escalated to the forefront of the collective American conscience throughout the 1980s, the Supreme Court found occasion to dispense with both the warrant and any type of reasonable suspicion requirement in

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22. *Criminal Procedure*, *supra* note 19, at 538.

23. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

24. SALZBURG & CAPRA, *supra* note 16, at 299.

25. *See id.* (explaining that if officials seek to use this evidence in criminal proceedings, they generally need a warrant or probable cause).

26. *See Skinner v. Ry. Labor Executives Ass’n*, 489 U.S. 602, 624 (1989) (search without suspicion may be reasonable if privacy interests implicated are minimal and important governmental interests would be jeopardized if suspicion required).

27. 384 U.S. 757 (1966).

28. The *Schmerber* Court classified these blood tests as “searches” under the Fourth Amendment. *Id.* at 767. Therefore, because the Fourth Amendment protects against unreasonable searches and seizures, the Constitution limits these searches. *Id.*

29. *Id.* at 770 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)).

30. *Id.* at 769-71.

substance abuse cases. In *Skinner v. Railway Labor Executives' Association*,<sup>31</sup> the Court held that even absent a showing of individualized suspicion, the toxicological testing of railroad employees was constitutional where "special needs" beyond the normal need for law enforcement were implicated.<sup>32</sup> Balancing the interest of the individual against those of the State, the Court held that the toxicological testing constituted a compelling governmental interest that did not unduly infringe upon the justifiable privacy interests of employees.<sup>33</sup> The majority opinion, authored by Justice Kennedy, emphasized two factors in support of its holding. First, because the railroad industry is heavily regulated, railroad employees have a diminished expectation of privacy.<sup>34</sup> Second, because the employees were involved extensively in safety-sensitive tasks, the compelling governmental interest in safety outweighed the individual's interest.<sup>35</sup> Thus, the Court concluded that "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important government interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."<sup>36</sup>

In *Skinner*, the Court declined to address the question of whether it would relax the probable cause requirement when the results of the blood test were going to be used in future criminal prosecution. Thus far, no court has been bold enough to extend the *Skinner* analysis to cover bodily intrusive procedures when such a procedure is used to garner criminal evidence. In this realm, courts have seemingly adhered to the Fourth Amendment's probable cause requirement. However, whether probable cause may be determined before, during, or after the incident spurring criminal prosecution is a constitutional interpretation that varies widely among the states.

The Supreme Court has more recently addressed the doctrine of special needs in *Ferguson v. City of Charleston*,<sup>37</sup> wherein the Court struck down a state hospital's policy of screening pregnant women for the presence of cocaine and subsequently reporting positive results to the police in order to protect the unborn children.<sup>38</sup> The Court departed from its typical practice of analyzing the ultimate goal of a search,<sup>39</sup> and for the first time, overtly considered the immediate purpose of a search.<sup>40</sup> The majority articulated the significant difference between the ultimate goal and the immediate purpose in stating: "While the ultimate goal of the program may well have been to get the women in question

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31. 489 U.S. 602 (1989).

32. *Id.* at 634.

33. *Id.* at 633.

34. *Id.* at 627.

35. *Id.* at 633.

36. *Id.* at 624.

37. 532 U.S. 67 (2001). *Ferguson* was decided twelve years after *Skinner*.

38. *Id.* at 70-73.

39. *Id.* at 86-87 (Kennedy, J., concurring). Prior cases did not distinguish between the immediate purpose and the ultimate goal of a search. However, the Court always considered the ultimate goal of the search in its analysis. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995) (identifying the governmental concern as deterring drug use by school children); *Skinner*, 489 U.S. at 620 (identifying the relevant need as regulating the conduct of railway employees to promote the safety of the traveling public).

40. *Ferguson*, 532 U.S. at 82-83. The threat of law enforcement was "a means to an end." *Id.* at 84. Subsequently, the majority focused on the way in which the defendants achieved their ultimate goal. *Id.*

into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal.”<sup>41</sup> In determining the purpose of the search in *Ferguson*, the Court not only evaluated the context, the specific facts, and all available evidence in the individual case, but also inquired whether the fruits of the search were used in successive criminal prosecutions.<sup>42</sup> The majority appeared overly “[c]oncerned with the extensive involvement of police and prosecutors in the drafting . . . of the hospital’s search policy”<sup>43</sup> in *Ferguson*, and thereby defined the immediate aim of the hospital’s program as the collection of evidence for law enforcement purposes. As a consequence of *Ferguson*, searches with the immediate aim of evidence collection for law enforcement purposes were effectively divorced from special needs protection. The Court’s decision in *Ferguson* appeared to signal the end of liberal applications of the doctrine of special needs, especially when used as justification for law enforcement searches.

In practice, however, this limitation on the special needs exception has largely been circumvented. Prosecutors have continued to use evidence obtained in searches justified by the special needs doctrine in criminal prosecutions.<sup>44</sup> Moreover, the states that have squarely addressed the issue have generally upheld the use of such evidence in criminal prosecutions—Maine is one.

### C. Constitutional Challenges to Section 2522: Maine’s Application of the Special Needs Doctrine

The expanding number of areas in which the Supreme Court has upheld searches and seizures conducted without individualized suspicion has raised eyebrows among state courts. Following the outcomes of *Skinner*, its predecessors,<sup>45</sup> and other cases in its wake,<sup>46</sup> commentators voiced concerns over the erosion of the Fourth Amendment’s protection against unreasonable searches and seizures.<sup>47</sup> Maine, however, has not

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41. *Id.* at 82-83 (citation omitted).

42. *Id.* at 85-86.

43. Joseph S. Dowdy, *Well Isn’t That Special? The Supreme Court’s Immediate Purpose of Restricting the Doctrine of Special Needs* in *Ferguson v. City of Charleston*, 80 N.C. L. REV. 1050, 1051 (2002) (citing *Ferguson*, 532 U.S. at 82-83).

44. *See, e.g.*, *People v. Reyes*, 968 P.2d 445, 451-53 (Cal. 1998) (upholding search of parolee based in part on special needs doctrine and allowing evidence obtained to be used in subsequent prosecution); *State v. J.A.*, 679 So. 2d 316, 320 (Fla. Dist. Ct. App. 1996) (upholding evidence obtained during a random search of a public school student); *State v. Bohling*, 494 N.W.2d 399, 406 (Wis. 1993) (upholding drug and alcohol testing of motorists under arrest for drunk driving when there is a “clear indication” that blood will show evidence of intoxication).

45. *See, e.g.*, *Griffin v. Wisconsin*, 482 U.S. 868 (1987) (holding that weapons found incidentally and in plain view while at probationer’s home during warrantless search were admissible in criminal proceeding); *New York v. Burger*, 482 U.S. 691 (1987) (holding that evidence found from a warrantless search of automobile junkyard was admissible); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that evidence found from a warrantless search of student’s locker at school was admissible).

46. *See, e.g.*, *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989) (holding that the special needs doctrine justifies State drug testing in certain circumstances, so long as the testing is reasonable under a balancing test that weighs the State interest against the intrusion on individual privacy).

47. *See, e.g.*, Jon M. Ripans, Comment, *Michigan Department of State Police v. Sitz: Sober Reflections on How the Supreme Court has Blurred the Law of Suspicionless Searches*, 25 GA. L. REV. 199, 224-25 (1990).



attempted to halt this trend. While the Law Court has noted that it is well settled in Maine that “a search conducted without a warrant issued upon probable cause is per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions,”<sup>48</sup> it has not narrowly interpreted those exceptions. Following the Supreme Court’s holding in *Skinner*, Maine courts have responded by liberally construing, and consequently validating, the constitutionality of Maine’s mandatory blood testing statute<sup>49</sup> following a fatal motor vehicle collision.

The Law Court was first asked to consider the impact of *Skinner* on the constitutionality of Maine’s mandatory blood test law in *State v. Bento*.<sup>50</sup> Scott Bento was involved in an accident in which the passenger in his car was killed.<sup>51</sup> After the accident, a police officer met with both drivers in the local hospital and administered breath tests.<sup>52</sup> When those breath test results were offered against him in a future criminal prosecution,<sup>53</sup> Bento filed a motion to suppress the evidence on the grounds that the police lacked the requisite probable cause to believe he was under the influence at the time the test was conducted, and no such probable cause existed.<sup>54</sup> The Law Court handily dismissed this argument by deferring to the intent of the legislature to provide for the admission of blood-alcohol tests if probable cause could be established by any information discovered “up to the time admission was sought.”<sup>55</sup> In so doing, the Law Court held that Maine’s statute may not be construed to require that probable cause of intoxication be established *prior* to a driver’s submitting to a blood test.<sup>56</sup> Further, the Law Court stated that the statute only required that probable cause be established *at the trial* in order for the test results to be admissible.<sup>57</sup> The fact that an officer may later find evidence of alcohol use is significant, for the Law Court avoided the opportunity to establish a clear standard of what this after-acquired evidence should be to fulfill the probable cause requirement.<sup>58</sup> In crafting its holding in *Bento*, the Law Court effectively ignored the warning tolls of the Fourth Amendment bell.

Several years later in *State v. Roche*,<sup>59</sup> the Law Court again rejected a challenge to the constitutionality of requiring a blood-alcohol test in the absence of probable cause in a case involving a vehicular death. Wayne Roche, a professional truck driver,

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48. *State v. Kremen*, 2000 ME 117, ¶ 7, 754 A.2d 964, 967 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)) (quotations and citations omitted).

49. ME. REV. STAT. ANN. tit. 29, § 1312 (Supp. 1992) *replaced by* ME. REV. STAT. ANN. tit. 29-A, § 2522 (1996).

50. 600 A.2d 1094 (Me. 1991).

51. *Id.* at 1095.

52. *Id.*

53. *Id.* Bento was charged with aggravated OUI and reckless conduct with the use of a dangerous weapon. *Id.*

54. *Id.*

55. *Id.* at 1096. The Law Court stated, “The court must ascertain that probable cause . . . exists. The statute does not require, by its terms, that the court determine whether probable cause *existed* at some prior time (i.e., at the time of arrest or the time the test was conducted).” *Id.*

56. *Id.*

57. *Id.* (emphasis added)

58. The Law Court’s only guidance was: “Under this standard, probable cause to believe a defendant was operating under the influence exists if there is reason to believe that his mental or physical faculties are impaired by the consumption of alcohol.” *Id.* at 1096-97.

59. 681 A.2d 472 (Me. 1996).

overturned his log-hauling trailer on the side of the highway and in so doing fatally crushed a Department of Transportation worker.<sup>60</sup> Roche was taken to a local hospital following the accident, and upon arrival was administered a blood test by an officer of the Farmington Police Department.<sup>61</sup> The lower court admitted both the results of the blood test and, as probable cause independent of the blood test result, statements given by Roche to an investigating officer a few weeks after the accident.<sup>62</sup> On appeal, Roche argued that while exigent circumstances existed in the blood-alcohol testing situation, probable cause must simultaneously exist in order to administer the test.<sup>63</sup> Rejecting Roche's argument, the Law Court noted that *Skinner* permitted blood tests in specialized circumstances without probable cause or on "less than individualized suspicion."<sup>64</sup> The justification used by the Law Court mirrored that of the Supreme Court in *Skinner*,<sup>65</sup> which was the special needs exception to probable cause:

The justification for the search is linked to the gravity of the accident as well as the evanescent nature of evidence of intoxication and the deterrent effect on drunk driving of immediate investigations of fatal accidents. The State, in effect, conditions the privilege of driving on every driver's willingness to submit to a test, if, and only if, he or she is involved in a fatal or near fatal accident . . . . We believe *Skinner* confirms the permissibility of such a scheme.<sup>66</sup>

Despite its holding, the Law Court recognized that other most other state courts have treated similar statutes more restrictively in light of *Skinner* when applied to highway fatalities.<sup>67</sup> At the least, the Law Court revealed its awareness of the fact that Maine remains in the distinct minority of states that allows for after-the-fact probable cause to satisfy the constitutional requirement. Regardless, the Law Court dismissed the prospect of requiring a simultaneous, independent determination of probable cause to use blood test results following a fatal accident in a future criminal prosecution of the driver.<sup>68</sup> The relatively few subsequent cases in which this issue has been raised have consistently been decided in line with the Court's holdings in *Bento* and *Roche*.<sup>69</sup> Accordingly, under Maine law, the *Bento* and *Roche* decisions clearly answered the question of whether a blood test can be taken following a fatal accident and subsequently used as evidence in the absence of a warrant, simultaneous determination of probable cause, or consent solidly in the affirmative.

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60. *Id.* at 473.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 474 (citing *Skinner*, 489 U.S. 602 (1989)).

65. The Law Court also secondarily relied upon the Supreme Court's holding in *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990). *Id.* at 475.

66. *Id.* at 474.

67. *Id.* at 475.

68. *Id.*

69. *See, e.g.*, *State v. Bradley*, 658 A.2d 236, 238 (Me. 1995) (holding that blood tests were admissible against a Maine driver where probable cause was alone established by a "strong smell of alcohol on his breath"); *State v. Chase*, 2001 ME 168, 785 A.2d 702; *State v. Alley*, 2004 ME 10, 841 A.2d 803.

## III. AN EXAMINATION OF MAINE'S MANDATORY BLOOD TESTING LAW

Maine's original statute authorizing a routine blood test in circumstances where there was neither probable cause nor individualized suspicion to believe the driver was intoxicated was passed in 1992.<sup>70</sup> This statute came to life as part of a drastic overhaul of the Motor Vehicles Title of the Maine Code that occurred in the next legislative year.<sup>71</sup> In an effort to increase the enforcement of Maine's drunk driving laws, the legislature sought to broaden the class of drivers who could be tested for intoxicants to test drivers who had been involved in an accident which caused another person's death. Section 2522 outlines the basic structure and procedure of the mandatory blood testing process while setting forth the framework for admissibility of those test results in a future proceeding. In both the original and amended versions of the statute, the first subsection of section 2522 sets forth the requirement of chemical testing in a fatal accident:

1. Mandatory Submission to test. If there is probable cause to believe that death has occurred or will occur as a result of an accident, an operator of a motor vehicle involved in the motor vehicle accident shall submit to a chemical test . . . to determine blood-alcohol level or drug concentration in the same manner as for OUI.<sup>72</sup>

According to section 2522(1), if the motor vehicle accident resulted in a fatality or the likelihood of a fatality, the driver of the motor vehicle must submit to a chemical test. Even if the driver is the person who died at the scene, the testing is mandated nonetheless.<sup>73</sup> In its original form, however, the statute did not specifically mandate the investigating law enforcement officer to take a blood test of the driver of the motor vehicle who caused the deadly accident. Instead, the officer could opt for a breath test or another chemical assessment in lieu of a blood test if deemed appropriate.<sup>74</sup> Not until 2003 did the legislature require that the law enforcement officer administer a blood test on the driver following such an accident. The sponsor of the legislation, Representative David Bowles, articulated a need for blood tests in lieu of breath tests due to "chaotic" accident scenes and the need to determine a driver's blood-alcohol or drug content "quickly and accurately."<sup>75</sup> The second subsection of section 2522

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70. ME. REV. STAT. ANN. tit. 29, § 1312 (Supp. 1992). This title has since been repealed and replaced by P.L. 1993, ch. 683, § A-2 (effective Jan. 1, 1995), which has since been amended by P.L. 2003, ch. 565, § 1 (effective July 30, 2004) (codified at ME. REV. STAT. ANN. tit. 29-A, § 2522 (Supp. 2007)).

71. Title 29 was replaced with 29-A in 1993.

72. ME. REV. STAT. ANN. tit. 29-A, § 2522(1) (1996).

73. *See id.* § 2522(1)-(2) (Supp. 2007).

74. *See* ME. REV. STAT. ANN. tit. 29-A, § 2522(2) (1996). The 1996 codification of section 2522(2) simply reads as follows: "The investigating law enforcement officer shall cause a test to be administered as soon as practicable following the accident as provided in section 2521." *Id.*

75. *Cormier*, 2007 ME 112, ¶ 22, 928 A.2d. at 760 (citing Testimony of Rep. David Bowles on L.D. 1803 before the Joint Standing Comm. on Criminal Justice & Pub. Safety 1-2 (Jan. 28, 2004)). He further stated:

The first law enforcement officer responding to an accident scene is typically faced with a series of immediate, possibly life saving decisions. . . . One of the officer's responsibilities is deciding if a fatality has occurred or is likely to occur as a result of the accident. A second priority is trying to determine if a surviving driver appears to be impaired either by alcohol or drug consumption and administering an appropriate test to make this determination. This is often not an easy determination particularly in the case of drivers impaired by drug consumption, both legal and illegal. Additionally, the surviving driver

currently provides:

2. Administration of test. The investigating law enforcement officer shall cause a blood test to be administered to the operator of the motor vehicle as soon as practicable following the accident and may also cause a breath test or another chemical test to be administered if the officer determines appropriate. The operator shall submit to and complete all tests administered.<sup>76</sup>

Practically speaking, the investigating law enforcement officer must take a blood test of the driver as soon as possible following the accident.<sup>77</sup> The blood testing has typically occurred after the driver has been transported to the hospital.<sup>78</sup>

In addition, and most importantly, the statute also provides that the results of the aforementioned driver blood tests are admissible at trial in certain circumstances:

3. Admissibility of test results. The result of a test is admissible at trial if the court, after reviewing all the evidence, whether gathered prior to, during or after the test, is satisfied that probable cause exists, independent of the test result, to believe that the operator was under the influence of intoxicants at the time of the accident.<sup>79</sup>

According to section 2522(3), the blood test results taken in accordance with sections 2522(1) and (2) are admissible at trial if the court determines that evidence gathered prior to, during, or after the test demonstrates probable cause independent of the test result that the driver was intoxicated at the time of the accident.<sup>80</sup> The legislature tailored the statute to allow admission of those results in the absence of a warrant, consent, or simultaneous determination of probable cause only when the State demonstrates probable cause to believe that the accident has resulted, or will result, in a fatality.<sup>81</sup> In essence, Maine's statute requires the court to find probable cause in order for the test results to be admissible; however, the requisite probable cause can be obtained after the test—and neither the legislature nor a court has articulated any post-test timeframe under which probable cause evidence must be obtained. Further, section 2522(3) has not been amended since its original enactment in 1992.<sup>82</sup>

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may, because of the severity of his or her injuries, be unavailable for interview for hours and perhaps days following the accident. During this time, facts may come to light in the form of witnesses or forensic evidence that point to a driver's use of substances which may have played a contributing role in causing the accident.

*Id.* (quoting Testimony of Rep. David Bowles on L.D. 1803 before the Joint Standing Comm. on Criminal Justice & Pub. Safety 1-2 (Jan. 28, 2004)).

76. ME. REV. STAT. ANN. tit. 29-A, § 2522(2) (Supp. 2007).

77. *See id.*

78. *See, e.g.,* State v. Roche, 681 A.2d 472, 473 (Me. 1996) (the driver was taken to a local hospital for examination, whereupon a blood test was ordered by a police officer); State v. Bento, 600 A.2d 1094, 1095 (Me. 1991) (the driver was administered a breath test in the waiting area of the Mt. Desert Hospital's emergency room); State v. Chase, 2001 ME 168, ¶ 3, 785 A.2d 702, 704 (a nurse at the hospital took a blood sample of the driver at the direction of the officer).

79. ME. REV. STAT. ANN. tit. 29-A, § 2522(3) (1992).

80. *Id.*

81. *Cormier*, 2007 ME 112, ¶ 24, 928 A.2d at 760 (citing ME. REV. STAT. ANN. tit., 29-A § 2522(1) (2006)).

82. *Compare* P.L. 1993, ch. 683, § 2522(3) with ME. REV. STAT. ANN. tit. 29-A, § 2522(3) (2006).

Together, the three subsections of section 2522 reflect the intent of the Maine Legislature to enact standards for drivers and law enforcement officers in the face of an accident in which there is probable cause to believe a death has occurred or will occur.<sup>83</sup> The legislature has responded by “narrowly tailoring”<sup>84</sup> section 2522 to allow for the test to be conducted and subsequently admitted at trial due to the “gravity of the accident” and the “evanescent nature of the evidence of intoxication.”<sup>85</sup> Faced with the statistics of drunk driving, it appears as though the legislature came up with a compromise between a citizen’s right to privacy and the community’s right to be safe on the roads.

IV. *STATE V. CORMIER*: THE CONSTITUTIONALITY OF BLOOD TEST  
ADMISSIBILITY ABSENT WARRANT, CONSENT, OR A SIMULTANEOUS  
DETERMINATION OF PROBABLE CAUSE

A. *Factual Background and Procedural History*

On the afternoon of May 11, 2003, Richard Cormier was driving a car on Route 85 in Raymond when he was involved in a head-on collision.<sup>86</sup> Two occupants of the other car, Hazen Spearin and Blanche Spearin, died as a result of that collision.<sup>87</sup> At the scene of the accident, the police and paramedics did not smell alcohol on Cormier or observe anything that would indicate that he was under the influence of alcohol.<sup>88</sup> Cormier was transported to a hospital in Portland by ambulance.<sup>89</sup> Likewise, the lieutenant accompanying Cormier in the back of the ambulance found no evidence of alcohol consumption during the ride to the hospital.<sup>90</sup> Without obtaining Cormier’s consent, the detective informed Cormier that he was there to obtain a blood sample for the purpose of testing for the presence of alcohol or drugs, and a phlebotomist for the State was called to the hospital to draw Cormier’s blood.<sup>91</sup> During the blood draw, and upon inquiry, Cormier told the detective that he had consumed one alcoholic drink earlier in the day.<sup>92</sup>

The blood sample was sent to the Maine Department of Human Services Health and Environmental Testing Laboratory, which prepared a report dated May 19, 2003, indicating that a chemical analysis of the blood sample showed a .08%<sup>93</sup> blood-alcohol content.<sup>94</sup> Initially, Cormier was not charged with the commission of a crime. Thirteen

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83. *Cormier*, 2007 ME 112, ¶ 8, 928 A.2d at 756.

84. *Id.* ¶ 24, 928 A.2d at 760.

85. *Id.* (citing *State v. Roche*, 681 A.2d at 474).

86. *State v. Cormier*, No. CRIM. A. CR-04-1307, 2005 WL 2725100, at \*1 (Me. Super. Ct. Cumb. Cty., June 3, 2005) (Fritzsche, J.).

87. *Id.*

88. *Cormier*, 2007 ME 112, ¶ 3, 928 A.2d at 755.

89. *Id.*

90. *Cormier*, 2005 WL 2725100, at \*3.

91. *Cormier*, 2007 ME 112, ¶ 4, 928 A.2d at 755.

92. *Id.*

93. See ME. REV. STAT. ANN. tit. 29-A, § 2411(1-A)(A)(2) (Supp. 2007). In Maine, a person commits a criminal OUI (“Operating Under the Influence”) if that person operates a motor vehicle while having a blood-alcohol content of .08% or more. *Id.*

94. *Cormier*, 2005 WL 2725100, at \*1.

months after the accident, however, Cormier was charged, after indictment by a grand jury, with two counts of manslaughter,<sup>95</sup> one count of aggravated assault,<sup>96</sup> one count of aggravated OUI,<sup>97</sup> and one count of reckless conduct with a dangerous weapon.<sup>98</sup> Subsequently, Cormier moved to suppress the results of the blood test in the Superior Court.<sup>99</sup> His primary argument was that the State could not constitutionally take a blood sample from him absent probable cause, as neither of the responding officers found any evidence of alcohol consumption after speaking with Cormier at the scene.<sup>100</sup>

On March 28, 2005, a hearing was held in the Superior Court on Cormier's motion to suppress, and a decision was later issued granting Cormier's motion.<sup>101</sup> While the court acknowledged that the law regarding mandatory testing in cases involving death serves a "noble understandable purpose"<sup>102</sup> and that the prior Supreme Court holding in *Skinner* confirmed the permissibility of that scheme, the more recent case of *Ferguson*<sup>103</sup> required Maine courts to reexamine the constitutionality of section 2522.<sup>104</sup> The Superior Court analogized the facts of Cormier's case to those in *Ferguson* and highlighted the impropriety of the State's law enforcement interest by stating, "In *Ferguson* the police were actively involved. In our case the police were even more extensively involved."<sup>105</sup> Consequently, in granting Cormier's motion to suppress the results of the blood test, the Superior Court held that the blood test evidence was gathered for the improper purpose of law enforcement evidence and thus violative of the Fourth Amendment in light of the Court's more recent holding in *Ferguson*. The State appealed this decision to the Law Court.

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95. *Cormier*, 2007 ME 112, ¶ 5, 928 A.2d at 755 (citing ME. REV. STAT. ANN. tit. 17-A, § 203(1)(A) (2006)).

96. *Id.* (citing ME. REV. STAT. ANN. tit. 17-A, § 208(1)(B), (2) (2006)).

97. *Id.* (citing ME. REV. STAT. ANN. tit. 29-A, § 241(6) (Supp. 2003)).

98. *Id.* ¶ 5, 928 A.2d at 756 (citing ME. REV. STAT. ANN. tit. 17-A, §§ 211, 1252(4) (1983 & Supp. 2003)). The incident occurred before the repeal of ME. REV. STAT. ANN. tit. 29-A, § 241(6) (Supp. 2003). See P.L. 2003, ch. 452, § Q-83 (effective July 1, 2004).

99. *Cormier*, 2005 WL 2725100, at \*2. "By motion dated October 12, 2004, Cormier moved to suppress all evidence related to the taking of his blood and the results of the blood alcohol test performed on him on May 11, 2003, and to suppress all . . . statements made by him regarding the consumption of alcohol on the day of the accident." Brief of Appellee at 1, *State v. Cormier*, No. CUM-05-354 (Me. Sup. Ct. Aug. 14, 2007).

100. *Cormier*, 2005 WL 2725100, at \*3.

101. Brief of Appellee, *supra* note 99, at 1.

102. *Cormier*, 2005 WL 2725100, at \*4.

103. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

104. See *Cormier*, 2005 WL 2725100, at \*4.

105. *Id.* Moreover, the court further compared the facts in *Ferguson* to the case at hand:

Justice Stevens stated for the majority, in terms that are applicable to our case,

"Given the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to face [sic] women into treatment, and given the extensive involvement of law enforcement officials at every state of the policy, this case does not fit within the closely guarded category of 'special needs.'"

*Id.* (quoting *Ferguson*, 532 U.S. at 84).

*B. Arguments to the Law Court*

On appeal to the Law Court, the State claimed that section 2522, as applied in this case, was constitutional under the Fourth Amendment.<sup>106</sup> The State argued that because section 2522 is part of a “comprehensive legislative scheme to regulate licensed motor vehicle drivers within the State of Maine”<sup>107</sup> reasonable Fourth Amendment intrusions are allowed under the *Skinner* logic as they further the “compelling governmental interest of public safety”<sup>108</sup> while “minimally intruding on drivers’ privacy interests.”<sup>109</sup> According to the State, the public safety concern of removing impaired drivers from the roads is the compelling government interest “at the heart of section 2522”<sup>110</sup> while criminal prosecution of those drivers is “only a secondary goal of [the statute].”<sup>111</sup> Hence, the State argued that the non-law enforcement purpose still falls within the “special needs” exception to warrantless, suspicionless search even as refined by *Ferguson*.<sup>112</sup> The State concluded that the mandated blood test required by section 2522 is a reasonable search under the Fourth Amendment in light of the compelling governmental interest of public safety.<sup>113</sup>

In response, Cormier argued that section 2522, as applied in the present case, is primarily a tool of law enforcement and does not fall within the special needs exception of constitutionally permissible suspicionless searches.<sup>114</sup> Cormier claimed that the *Ferguson* decision expanded the constitutional backdrop upon which *Roche* was decided in holding that warrantless drug tests conducted for criminal investigatory purposes were unconstitutional.<sup>115</sup> Accordingly, Cormier argued that the immediate objective of section 2522 was the “generation and preservation of evidence for potential criminal prosecutions” and thus was no longer constitutionally permissible under *Ferguson*.<sup>116</sup> He claimed that this was evidenced by the blood sample collection at the direction of the police, the testing of the sample at a state lab, and the subsequent turnover of the results to the District Attorney’s Office—while the “civil administrative mechanism of data collection” was absent.<sup>117</sup> Cormier concluded that because section 2522 is “primarily and most immediately a tool of law enforcement” and does not fit within the “closely guarded category of constitutionally permissible suspicionless searches,” Cormier’s Fourth Amendment rights were violated.<sup>118</sup>

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106. Brief of Appellant at 11, *State v. Cormier*, No. CUM-05-354 (Me. Sup. Ct. Aug. 14, 2007).

107. *Id.* at 12.

108. *Id.* at 13.

109. *Id.*

110. *Id.*

111. *Id.* at 15.

112. *Id.* at 14.

113. *Id.*

114. Brief of Appellee, *supra* note 99, at 4.

115. *Id.* at 11.

116. *Id.* at 12.

117. *Id.* at 18. While Cormier does not specify what exactly the “civil administrative mechanism” of data collection would be, it can be inferred from context that he intended it to be a state policy research and development center or a state agency bestowed with a mandate to collect and review such data.

118. *Id.* at 11.

*C. Decision of the Law Court*

A majority of the Law Court rejected Cormier's assertion that his Fourth Amendment rights were violated, thereby upholding the constitutionality of section 2522.<sup>119</sup> In so doing, the majority advanced two major arguments in support of the statute's constitutionality. First, the majority upheld the statutory provision primarily on the basis of the State's "compelling need"<sup>120</sup> to collect data, and then found further support for its constitutionality in the inevitable discovery rule and the exigent circumstances exception to the warrant requirement. In reaching this conclusion, Chief Justice Saufley, writing for the majority, first examined the statutory context for mandating blood testing in fatal accidents. The court reasoned that section 2522 reflected the legislature's recognition of "the need for more complete information about the involvement of alcohol in serious and fatal accidents."<sup>121</sup> Further, the court stated that the mandatory testing "adds to the State's body of knowledge regarding the effects of driving in Maine while under the influence . . . and allows the Legislature to be more informed as it shapes policy."<sup>122</sup>

The Law Court then examined whether the "unique nature" of section 2522 violated the Fourth Amendment and addressed the inevitable discovery and exigent circumstances exceptions to a warrantless, suspicionless search. Recognizing that a search authorized by section 2522 "does not fall neatly into either of these exceptions,"<sup>123</sup> the majority stated that the Maine Legislature nonetheless recognized the exigent circumstances of a fatal collision site and "codified a narrow and distinct application of the inevitable discovery exception" due to the gravity of the accident.<sup>124</sup> Accordingly, the majority found that the legislature provided sufficient Fourth Amendment "protections for drivers"<sup>125</sup> in crafting section 2522, and admission of the test results is constitutional so long as the State meets those protection requirements.<sup>126</sup>

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119. *Cormier*, 2007 ME 112, ¶ 2, 928 A.2d at 755.

120. *Id.* ¶ 36, 928 A.2d at 763.

121. *Id.* ¶ 8, 928 A.2d at 756.

122. *Id.* ¶ 8, 928 A.2d at 757.

123. *Id.* ¶ 18, 928 A.2d at 758. The Law Court explained,

The inevitable discovery exception is usually understood to apply to evidence that would have been found later, through other legitimate means . . . . The exigent circumstances exception is ordinarily applicable to a search conducted after determining the existence of probable cause but before a warrant can be obtained.

*Id.* ¶ 18, 928 A.2d at 758-59.

124. *Id.* ¶ 19, 928 A.2d at 759. Thus, the majority stated that "the statute requires the test in this limited situation because of 'the gravity of the accident' and the 'evanescent nature of evidence of intoxication.'" *Id.* ¶ 23, 928 A.2d at 760 (quoting *State v. Roche*, 681 A.2d 472, 474 (Me. 1996)).

125. *Id.* ¶ 24, 928 A.2d at 760. The results of mandatory drug and blood-alcohol testing will be admissible in a criminal proceeding against a driver without violating the Fourth Amendment only when the State:

(1) presents evidence gathered after the fact demonstrating that, but for the exigencies at the scene of the collision, probable cause for the test would have been discovered; and (2) the test would have been administered based on the probable cause established by this independent lawfully obtained information.

*Id.* ¶ 26, 928 A.2d at 761 (citing ME. REV. STAT. ANN. tit. 17-A, § 2522(3) (Supp. 2007)).

126. *Id.* ¶ 27, 928 A.2d at 761.



While the majority remarked that the “analysis could end there,”<sup>127</sup> it went on to address the applicability of the special needs exception as defined by *Skinner* and *Ferguson*. In balancing the State’s “special need” to obtain information about driver intoxication against the privacy interests of drivers, the Law Court found that the State’s special needs, “separate from the general purpose of law enforcement, justify an exception to the warrant requirement in these circumstances.”<sup>128</sup> Moreover, the Law Court rejected Cormier’s argument that the statute’s primary purpose was one of law enforcement and instead found that the statute reflected a “joint concern with that of gathering information for policy development,”<sup>129</sup> which thereby distinguished the facts of *Cormier* from those of *Ferguson*. The majority also distinguished *Ferguson* on the grounds that section 2522 requires evidence of probable cause even though that evidence “may be obtained after the administration of the test,” while the hospital policy in *Ferguson* did not.<sup>130</sup> As such, the *Cormier* court declared section 2522 constitutional because the warrantless, nonconsensual, and suspicionless search of a person in the form of a mandatory blood test is reasonable and falls within the special needs exception—even after *Ferguson*.

#### D. The Dissent

Justice Levy, joined by Justice Calkins, attacked the majority holding that section 2522 survives constitutional scrutiny. Remarking that the majority’s rationalizations of section 2522 “have no support in either fact or law,”<sup>131</sup> the dissent balked at the majority’s primary arguments of the State’s “compelling need” to collect data and that the search authorized by the provision falls within one of the enumerated exceptions to the warrant requirement.<sup>132</sup> First, Justice Levy asserted that since the Law Court decided *Roche* in 1996, the Supreme Court’s refinement of the issue of warrantless, nonconsensual searches in *Ferguson* makes the *Cormier* facts “insufficient to sustain the searches under the Fourth Amendment’s special needs exception . . . .”<sup>133</sup> With *Ferguson* in mind, Justice Levy was particularly concerned with the majority’s attempt to couch the justification of the law in data collection while the “primary practical purpose of the law is to gather and preserve evidence to be used in prosecutions against those believed to have been operating under the influence of intoxicants or drugs.”<sup>134</sup> He found it likely that the legislature intended for the focus of section 2522 to be one of law enforcement, pointing to written testimony of the Co-Chairperson of the Maine

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127. *Id.* ¶ 28, 928 A.2d at 761.

128. *Id.* ¶ 36, 928 A.2d at 763.

129. *Id.* ¶ 35, 928 A.2d at 763.

130. *Id.* ¶ 38, 928 A.2d at 764.

131. *Id.* ¶ 40, 928 A.2d at 764 (Levy, J., dissenting).

132. *Id.* ¶ 40, 928 A.2d at 764.

133. *Id.* ¶ 49, 928 A.2d at 767. He stated, “By distinguishing *Ferguson* and relying instead on the law of *Skinner*, the majority returns to the time before such limits were placed on the special needs exception.” *Id.* ¶ 46, 928 A.2d at 766.

134. *Id.* ¶ 50, 928 A.2d at 767. Justice Levy found support for this argument as follows: “[W]hen the State lab conducts testing on blood samples gathered as a result of this statutory authorization, copies of the results of those tests are forwarded directly to the District Attorney’s office and the investigating law enforcement officer, in addition to the Department of Motor Vehicles.” *Id.* ¶ 50, 928 A.2d at 767 (citation omitted).

Highway Safety Commission, who stated, “It is crucial to the prosecution of vehicular manslaughter cases that blood alcohol levels of the drivers be available as pertinent evidence.”<sup>135</sup>

The dissent also criticized the majority’s application of the exigent circumstances and inevitable discovery rules to section 2522. Rejecting the majority’s assertion that the inevitable discovery rule is a valid basis to admit the test results of the blood sample where no simultaneous probable cause exists, Justice Levy quipped at the “lack of any authority supporting the majority’s expansive reformulation”<sup>136</sup> of the rules. He then compared Maine to other jurisdictions that have ruled on the constitutionality of similar searches, stating that such searches are upheld “only if they are based on no less than a reasonable suspicion to believe the defendant was intoxicated *at the time* of the administration of the test.”<sup>137</sup> With a reproachful tone, Justice Levy stressed that the majority’s holding in this case “leads the law into new, uncharted territory in which probable cause—a cornerstone of the Fourth Amendment—plays a secondary, after-the-fact role.”<sup>138</sup>

#### V. UNCONSTITUTIONAL REASONING WITH A CONSTITUTIONALLY-DEFENSIBLE RESULT

##### A. *Critique and Consequences of Cormier*

As the dissent in *Cormier* contended, the majority acutely erred when it sustained the constitutionality of section 2522 on the basis of a combination of the exigent circumstances and inevitable discovery exceptions to the warrant requirement.<sup>139</sup> Certainly, as Justice Levy noted, the court has stepped into territory where only a handful of states remain<sup>140</sup> by upholding the constitutionality of *ex post facto* probable cause to justify an earlier warrantless, suspicionless, and nonconsensual search. In

135. *Id.* ¶ 51, 928 A.2d at 767 (citing *An Act to Strengthen Drunk Driving Laws: Hearing on L.D. 2395 Before the Joint Standing Committee on Legal Affairs* (1988) (testimony of Albert L. Godfrey, Sr., Maine Highway Safety Comm.)).

136. *Id.* ¶ 56, 928 A.2d at 768. He disapprovingly stated that the majority “cites no support for the notion that courts applying the exception [of exigency] have disposed of the requirement of probable cause.” *Id.* ¶ 57, 928 A.2d at 769.

137. *Id.* ¶ 56, 928 A.2d at 768 (emphasis added).

138. *Id.* ¶ 59, 928 A.2d at 769.

139. As noted by Justice Levy in his dissenting opinion, the majority seemed to adopt a unique theory to sustain section 2522’s constitutionality: the combined inevitable discovery-exigent circumstances exception. *Id.* ¶ 58, 928 A.2d at 769. Notably, this argument was not raised by the State on appeal.

140. Other courts that have ruled on the constitutionality of similar searches have upheld those searches only if they are based on *no less than a reasonable suspicion* to believe the defendant was intoxicated at the time the test was administered. *See generally* United States v. Chapel, 55 F.3d 1416 (9th Cir. 1995); State v. Steimel, 921 A.2d 378 (N.H. 2007); Commonwealth v. Kohl, 615 A.2d 308 (Pa. 1992); People v. Duemig, 620 P.2d 240 (Colo. 1980); State v. Aguirre, 295 N.W.2d 79 (Minn. 1980); State v. Heintz, 594 P.2d 385 (Or. 1979); State v. Dewey, 272 N.W.2d 355 (Minn. 1978); State v. Graham, 278 So. 2d 78 (La. 1973); People v. Fielder, 485 P.2d 725 (Colo. 1971); State v. Kuljis, 422 P.2d 480 (Wash. 1967); People v. Lukach, 635 N.E.2d 1053 (Ill. 1994); State v. Curtis, 680 P.2d 1383 (Idaho 1984); State v. Williams, 610 P.2d 111 (Kan. 1980); State v. Bentley, 286 N.W.2d 153 (Wis. Ct. App. 1979); People v. Superior Court of Kern County, 493 P.2d 1145 (Cal. 1972); State v. Davis, 226 A.2d 865 (N.H. 1967); State v. Wolf, 164 A.2d 865 (Del. 1960); State v. Towry, 210 A.2d 455 (Conn. Super. Ct. 1965).

deciding *Cormier*, the Law Court seriously blundered when it opted not to strike down section 2522 on the basis that after-acquired probable cause to justify a warrantless search and seizure is facially unconstitutional. By allowing such clumsy probable cause to satisfy the constitutional requirement, the court sanctioned unjustly-obtained evidence to be admitted against the defendant. While conducting a breath, blood, or urine test on a driver involved in an automobile accident resulting in death may be reasonable in light of the seriousness and the magnitude of the drunk driving problem in Maine,<sup>141</sup> the state's interest cannot warrant a suspicionless government intrusion under the guise of "policy development."<sup>142</sup> Further, requiring simultaneous probable cause to accompany the nonconsensual, warrantless and suspicionless search authorized by section 2522 would by no means render Maine an outsider. Other state courts have found the special needs exception inadequate to support the type of search authorized by section 2522.<sup>143</sup>

Although Part II of this Note addressed the special needs exception to the warrant and probable cause requirements under the Fourth Amendment, it bears repeating that the Supreme Court has held that the doctrine may be used only when the State has some special need *beyond* normal law enforcement activity.<sup>144</sup> Additionally, the Supreme Court's recent "immediate purpose" inquiry set forth in *Ferguson* was a strong signal to curtail liberal applications of the doctrine. Thus, the Supreme Court's own interpretation of special needs emphasizes that the exception is applicable only when the State has some need that extends *beyond* criminal prosecution of drug laws. However, the emergent problem in applying the special needs doctrine is plainly apparent from the holding in *Cormier*—the majority attempted to cloak the purpose of section 2522 under "data collection" and "policy development" to circumvent scrutiny under the special needs analysis. If the concept of "special needs" is to remain a viable exception to just search and seizure, the Law Court should have squarely addressed the facts in front of it and struck down the provision to avoid the "end run around the probable cause requirement."<sup>145</sup> To sustain the constitutionality of statutes like section 2522 on such thinly veiled grounds will serve only to weaken general Fourth Amendment protections going forward. As the next section argues, the majority ignored much better grounds to justify such a search.

As addressed in Part III of this Note, section 2522 did not always mandate the use of a blood test at the scene of a fatality. In its original form, the officer could opt for a breath test or another chemical assessment in lieu of a blood test if deemed

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141. The *Cormier* majority acknowledged a drunk driving problem in Maine by acknowledging "the State's interest in gathering information to assist in addressing the problem of intoxicated driving . . ." *Cormier*, 2007 ME 112, ¶ 36, 928 A.2d at 736. Undoubtedly, the magnitude of the drunk driving problem nation-wide has spawned voluminous writings and marshaled numerous efforts to combat the issue. See, e.g., WAYNE R. LAFAVRE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.8(d) (2nd ed., West Pub. Co. 1987).

142. *Id.* ¶ 35, 928 A.2d at 763.

143. See generally *Cooper v. State*, 587 S.E.2d 605 (Ga. 2003); *McDuff v. State*, 763 So.2d 850 (Miss. 2000); *King v. Ryan*, 607 N.E.2d 154 (Ill. 1992), *superseded by statute*, 625 ILL. COMP. STAT. 5/11-501.6 (West 1994), *as recognized in* *Fink v. Ryan*, 673 N.E.2d 281 (Ill. 1996); *Commonwealth v. Kohl*, 615 A.2d 308 (Pa. 1992); *Hannoy v. State*, 789 N.E.2d 977 (Ind. Ct. App. 2003).

144. See *Chandler v. Miller*, 520 U.S. 305, 311 (1997).

145. *Cormier*, 2007 ME 112, ¶ 57, 928 A.2d at 769 (Levy, J., dissenting).

appropriate.<sup>146</sup> Not until 2003 did the Maine Legislature require that the law enforcement officer administer a blood test on the driver following such an accident. The sponsor of the legislation articulated a need for blood tests in lieu of breath tests due to “chaotic” accident scenes and the need to determine a driver’s blood-alcohol or drug content “quickly and accurately.”<sup>147</sup> However, the unstated purpose of requiring a blood test is that such tests provide much more accurate and reliable data compared to its predecessors;<sup>148</sup> thus, in comparison, blood tests are iron-clad sources of evidence in a future criminal prosecution of the driver. Accordingly, the statutory change to section 2522 in 2003 lends further support to the notion that the Maine Legislature’s true intent in creating section 2522 was one of law enforcement.

As emphasized by the dissent, the exigent circumstance exception to the warrant requirement has been construed by Maine courts to apply when “there is adequate probable cause for the seizure and insufficient time for the police to obtain a warrant.”<sup>149</sup> As such, probable cause must exist simultaneously to when the search or seizure is conducted in order to be constitutional. The *Cormier* court explained, “The exigent circumstances exception is *ordinarily* applicable to a search conducted after determining the existence of probable cause,”<sup>150</sup> yet it did not cite any authority to support the notion that courts applying the exception have indeed disposed of the probable cause requirement. Consequently, the result in *Cormier* affects any driver arrested for negligent use of a vehicle after an accident in which there is probable cause to believe a person is killed. For example, if a police officer has probable cause to believe that a Maine citizen caused an accident that may have resulted in death, the law enforcement officer may search inside that driver’s body by drawing blood with no suspicion whatsoever that his driving was impaired by alcohol. The police officer need not even suspect legal intoxication. *Cormier* demonstrates that the evidence required at the time of the search is nonexistent. There is absolutely no evidence in the *Cormier* record to support a finding of probable cause to believe that at the time of this accident Cormier was under the influence of an intoxicant. In fact, the record is to the contrary and would instead support a finding that he was not under the influence of any intoxicant at all. There was no erratic driving reported, there was no observation of slurred speech or glassy eyes, and there was no observation of the odor of alcohol by the responding officers and ambulance personnel. In fact, no probable cause to believe Cormier was intoxicated would have been obtained at all had he not mentioned during the blood draw that had had consumed one alcoholic drink during the day.<sup>151</sup>

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146. ME. REV. STAT. ANN. tit. 29-A, § 2522(2) (1996). The 1996 codification of section 2522(2) simply read as follows: “The investigating law enforcement officer shall cause a test to be administered as soon as practicable following the accident as provided in section 2521.” *Id.*

147. See Testimony of Rep. David Bowles, *supra* note 75.

148. See 49 Fed. Reg. 24252-01 (June 12, 1984) (to be codified at 49 C.F.R. pt. 218, 225) (stating that blood may be primarily relied upon because it is “the only available body fluid . . . that can provide a clear indication not only of the presence of alcohol and drugs but also their current impairment effects”); *State v. Reavely*, 164 P.3d 890, 892 (Mont. 2007) (“We have never held that a court or jury may assume, as a matter of law, that a [breath test] result is a reliable representation of a defendant’s BAC within any particular degree of accuracy.”).

149. *State v. Alley*, 2004 ME 10, ¶ 15, 841 A.2d 803, 808.

150. *Cormier*, 2007 ME 112, ¶ 18, 928 A.2d. at 759 (emphasis added).

151. *Id.* ¶ 4, 928 A.2d. at 755.

Pragmatically, many individuals like Cormier may not realize that their after-the-fact statements given to investigating officers may be used as probable cause to allow for the admission of their test results in a future proceeding. In fact, statements made by the operator charged with a criminal offense *up to and including* time of that particular trial may be used as probable cause. The *Roche* case presented a similar defendant who was interviewed weeks after the accident at his home by an investigating officer whose subsequent statements were used to establish probable cause. Had those defendants been aware that any post-accident statements made up to and including the time of trial were likely to be used to establish probable cause (that was otherwise lacking at the time of the accident), perhaps they would rethink answering those questions without an attorney present. A parallel argument could be made that police officers and investigators may not always be able to easily interpret the requirements of the Fourth Amendment. It is said that application of the probable cause standard is not “perfectly predictable; there will always be some room for mistake, even among well-trained officers acting in good faith.”<sup>152</sup> Thus, a discordance between police officers and defendants on the requirements of probable cause may further restrict the constitutional rights of individuals facing admission of post-accident blood test results in a criminal prosecution.

When no warrant is obtained, the decision whether the officer has probable cause to suspect that a driver is under the influence of alcohol is made by the officer herself, either before, at the time of, or after the accident, rather than by an impartial judicial officer. Requiring a warrant—and thus probable cause, by extension—to search an individual’s blood ensures that the decision is made by a magistrate or judge. As discussed, courts may dispense with the warrant requirement due to the ephemeral nature of alcohol in the blood, invoking the exigent circumstances exception to the warrant requirement. Nonetheless, expedited procedures for obtaining warrants demonstrate that this requirement should not be disregarded in such circumstances.<sup>153</sup>

The crumbling of the probable cause requirement in *Cormier* threatens Fourth Amendment protections in other contexts as well. In the recent Wisconsin case of *State v. Simmons*,<sup>154</sup> the State of Wisconsin argued that the probable cause requirement should no longer pertain to strip searches; instead, the lower “reasonable suspicion” threshold should be applied. While the Wisconsin Court of Appeals declined the State’s invitation to apply a lower standard, the fact that the Wisconsin court attempted to dispense with the requirement indicates that states have become headstrong in applying the “special needs” exception. As an additional consideration, the erosion of Fourth Amendment protections may ultimately affect the testing of suspects for AIDS. In *Barlow v. Ground*,<sup>155</sup> the plaintiff was arrested after a dispute with police officers during a gay pride march.<sup>156</sup> After he bit two of the officers, he was forced to have a blood sample taken, which was subsequently tested for AIDS.<sup>157</sup> Arguably, the only

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152. William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 906 (1991).

153. See Robert Brooks Beauchamp, Note, “*Shed Thou No Blood*”: *The Forcible Removal of Blood Samples from Drunk Driving Suspects*, 60 S. CAL. L. REV. 1115, 1139 (1987).

154. No. 90-2699-CR, 1992 Wisc.App. LEXIS 26 (Wis. Ct. App. Jan. 22, 1992).

155. 943 F.2d 1132 (9th Cir. 1991).

156. *Id.* at 1134.

157. *Id.*

basis for AIDS testing was that the plaintiff was participating in a gay pride march. The Ninth Circuit held that taking an arrested individual's blood sample without a warrant in order to test him for AIDS amounted to a violation of the Fourth Amendment.<sup>158</sup> The Court of Appeals reasoned that the information in the blood was not evanescent and obtaining a warrant "could neither compound the dangers nor aggravate the medical consequences," hence neither *Schmerber* nor the exigent circumstances exception applied.<sup>159</sup> Thus, because the warrantless search did not fall under a specifically established and well-delineated exception, the police search performed on Barlow was *per se* unreasonable.<sup>160</sup> Applying *Barlow* analogously, Barlow, like Cormier, had been arrested, and the police searched Barlow's blood without a warrant or probable cause. If, after *Cormier*, Maine courts continue to dilute the warrant requirement and probable cause, a search like that in *Barlow* may be upheld.

Lastly, the Maine Legislature should amend section 2522 amid such constitutional concerns. A defective statute such as section 2522 should not have the power to supersede article I, section 5 of Maine's Constitution. In light of *Ferguson*, the legislature should scrutinize the immediate purpose of section 2522 and eliminate any clear links to law enforcement in order to remain in compliance with the requirements of the Constitution. To accomplish this, the legislature should consider amending the statute<sup>161</sup> to permit the previously allowed breath test or other chemical test in lieu of a mandatory blood test to be administered at the officer's discretion. In essence, the legislature should revert back to the 1996 codification of the statute; in so doing, the legislature would alleviate the obvious law enforcement evidentiary purpose. Most importantly, and as Justice Levy would argue, the legislature should amend the statute to prohibit after-the-fact probable cause to justify an earlier, warrantless, suspicionless, and nonconsensual search. To authorize searches based on such clumsily determined probable cause renders the statute facially unconstitutional.

#### B. Same Result, Better Logic: Skinner Could Have Carried the Day

As argued by the previous section, after-acquired evidence and "data collection" alone should not justify a *Cormier*-type search. However, at the core there exists a viable argument that the State's compelling interest outweighs the minimal intrusion of a blood test on an individual's privacy interest. The majority certainly notes the

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158. *Id.* at 1137-39. In articulating why the warrantless search was *per se* unreasonable, the court wrote: Even if Barlow was infected with HIV, it is highly unlikely that he could transmit the virus by biting. Moreover, even if such transmission were a realistic possibility, the officers could not decrease or increase the risk to their health by forcing an immediate nonconsensual blood test. . . . It makes no difference to the officers' health whether Barlow was tested immediately, without a warrant, or a short time later pursuant to a warrant. The crux of the exigent circumstances exception is that the officer or others may be harmed if the officer does not act immediately. In this case, the delay caused by waiting to obtain a warrant could not have caused or compounded any harm. Therefore, the exigent circumstances exception does not apply.

*Id.* at 1139.

159. *Id.*

160. *Id.*

161. See ME. REV. STAT. ANN. tit. 29-A, §2522(2) (Supp. 2007).

balancing of State and individual interests,<sup>162</sup> and even acknowledges that the State's special needs outweigh the privacy of individual drivers, yet seems too timid to extend the *Skinner* logic fully to this case. It felt the need to go further. Inasmuch as it relied on "data collection"<sup>163</sup> and "inevitable discovery"<sup>164</sup> grounds instead of a *Skinner* analysis alone, the majority left its analysis vulnerable to attack.

The majority misplaces the "special need" in cloaking it as data collection for policy development<sup>165</sup> instead of the extraordinary governmental need to address public safety and ascribe fault to drunk drivers. The more recent special needs case of *Ferguson* was effectively distinguished from the special needs in *Cormier*, so why did the Law Court stop there? The Law Court could have effectively argued that the Maine statute was analogous *enough* to the regulations at issue in *Skinner* to justify blood test administration and subsequent admissibility for protection of the public interest *alone*, so long as probable cause evidence was ascertained. Contrary to Justice Levy's assertion, since the State retains the right to regulate motor vehicles, drivers do in fact share a diminished expectation of privacy upon the issuance of a driver's license. In accepting a license to drive a car, drivers must abide by State-controlled motor vehicle laws, or be subject to administrative or criminal punishment should they choose to disregard it. In *Michigan v. Sitz*,<sup>166</sup> the Supreme Court held constitutional a Michigan sobriety checkpoint program where searches were conducted without individualized suspicion.<sup>167</sup> In justifying the result, the Court noted that the balance of the State's interest in preventing drunk driving and the degree of the intrusion upon the drivers weighed in favor of the constitutionality of the program.<sup>168</sup> A logical inference of this conclusion is that drivers submit to a diminished expectation of privacy upon acceptance of a driver's license if sobriety may be checked randomly, without any suspicion or probable cause whatsoever. In sum, the State undoubtedly has a compelling interest in assigning fault where it is due, which in turn has the tangible benefit of protecting the general public from criminally-intoxicated drivers. This should have been the basis of the *Cormier* court's analysis.

## VI. CONCLUSION

Undoubtedly, Maine has a compelling interest in protecting its citizens from the dangers posed by drunk drivers. The subsequent criminalization of such conduct and the stringent punishments imposed for violation of the laws prohibiting the conduct are, accordingly, permissive legislative responses to promote the State's interest. However, the protections afforded to Maine's citizens under the Constitution should not be diminished unless the State can solidly justify its own compelling interest in protection of its citizens from drunk drivers. But, no matter how compelling the State's interest, there must be a logical nexus between an invasion of privacy and securing drunk

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162. *Cormier*, 2007 ME 112, ¶ 31, 928 A.2d at 762.

163. *Id.* ¶¶ 8, 35, 928 A.2d at 756-57, 763.

164. *Id.* ¶¶ 19-23, 928 A.2d at 759-60.

165. *Id.* ¶ 35, 928 A.2d at 763.

166. 496 U.S. 444 (1990).

167. *Id.* at 455.

168. *Id.*

driving evidence to justify departure from the probable cause requirements of the Fourth Amendment. The Law Court simply ignored the strong cue from the Supreme Court to curtail weak state “data collection” excuses to cover the true purpose of law enforcement. A familiar old adage counsels that the “ends must justify the means.” In *Cormier*, however, the “means” of probable cause should be more substantial than a mere after-the-fact statement given to the officer in the absence of counsel. Under Maine’s current mandatory blood testing scheme, which permits admission of those tests at a future criminal prosecution of a driver based on clumsy, after-the-fact probable cause, the ends simply cannot be justified by such meager means. In the face of such weak logic, the Law Court would have been on much more solid ground had it extended *Skinner*’s reasoning in justifying its result.