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CONSTITUTIONAL CHALLENGES TO MONTANA'S DRUNK DRIVING LAWS

Kelly M. O'Sullivan

I. INTRODUCTION

In 1983, the Montana Legislature enacted tough new drunk driving laws.¹ Because our culture accepts social drinking and because people drive after drinking, many people who normally would have no contact with the criminal justice system will find themselves charged with the crime of driving under the influence of alcohol [hereinafter DUI]. These people will be accused of a serious crime rather than a minor traffic offense and the penalties are severe.² As more people find themselves facing drunk driving

1. The Legislature enacted MONT. CODE ANN. § 61-8-406 (1983) which states: "It is unlawful and punishable as provided in 61-8-722 for any person to drive or be in actual physical control of a motor vehicle upon the ways of this state open to the public while the alcohol concentration in his blood, breath, or urine is 0.10 or more." This section, commonly called the *per se* statute, imposes a fine of not less than \$100 or more than \$500 and imprisonment of not more than 10 days for the first conviction. It also imposes mandatory alcohol school and suspension of the convicted person's driver's license for six months. MONT. CODE ANN. § 61-8-722 (1983). The DUI statute, MONT. CODE ANN. § 61-8-401(1)(a) (1983) states: "It is unlawful and punishable as provided in 61-8-714 for any person who is under the influence of . . . alcohol to drive or be in actual physical control of a motor vehicle upon the ways of this state open to the public." The penalty section of this statute was amended to add the provisions for mandatory imprisonment. MONT. CODE ANN. § 61-8-714 (1983).

2. Under Montana's implied consent law, refusal to take the chemical test to determine blood alcohol content results in a driver's license suspension for up to three months for a first refusal, and up to one year for a second or subsequent refusal. MONT. CODE ANN. § 61-8-402(5) (1983). A person convicted of DUI faces imprisonment for not less than 24 hours or more than 60 days, and a fine of not less than \$100 or more than \$500. On second conviction, he faces imprisonment of not less than seven days or more than six months, and a fine of \$300 to \$500. On third conviction, he faces imprisonment of not less than 30 days or more than one year and a fine of \$500 to \$1,000. MONT. CODE ANN. § 61-8-714 (1983). In addition, the defendant must complete an alcohol information course approved by the Department of Institutions. *Id.* But those are not the only consequences of a DUI conviction. A person convicted of DUI receives 10 habitual traffic offender points. MONT. CODE ANN. § 61-11-203(2)(d) (1983). The accumulation of 30 points within three years means revocation of the offender's license for three years. MONT. CODE ANN. §§ 61-11-203(2), -211 (1983).

After conviction for DUI one's insurance rates skyrocket. Persons who have insurance with a preferred company that insures good drivers for lower rates will have their insurance cancelled or set up for nonrenewal when the insurance company gets a copy of the police report that shows a ticket for DUI was issued. The insurance companies generally will cancel when they discover the ticket has been issued, regardless of the outcome of the litigation, because they feel the driver was in a situation that places higher risk on them. The ticketed driver must resort to the nonstandard market in order to get insurance. Rates are much higher, because nonstandard companies insure higher-risk drivers. For example, a married man over 40 who insured one vehicle (that was not a high risk vehicle) for full coverage would pay \$240 per year for insurance. If he got one DUI ticket, his insurance rates with a nonstandard company would be \$972 per year. A single male between ages 21 to 24 with one

charges, the DUI laws in Montana will come under increasing attack. Montana's DUI statutes have already faced several constitutional challenges³ and more are to come.

This article examines three separate constitutional issues in Montana's DUI laws. The first issue is whether Montana's DUI laws violate due process because they do not require a specific mental state. It concludes the DUI laws are absolute liability laws which do not violate due process. The second issue is whether the law establishing the presumption of being under the influence of alcohol at a specific blood alcohol content violates due process. It concludes the presumption is constitutional, if the jury is properly instructed. The third issue is whether the DUI law which legislates an exception to Montana Rules of Evidence and admits reports of chemical tests violates the separation of powers doctrine. It con-

DUI ticket would pay \$684 per year for minimum liability coverage. A single male under 21 with one DUI ticket would pay \$804 per year for minimum liability coverage. One DUI ticket will affect insurance coverage for three and one-half to five years after it is issued. Telephone interview with Nancy Reynolds of Chriss Crawford Insurance Agency (April 29, 1985). For people employed by union carriers, one DUI while on duty is grounds for immediate discharge, regardless of length of service or quality of work. Nonunion carriers have the same policy. Telephone interview with Jay Kronberg of Salt Creek Freightways (April 30, 1985).

3. The constitutional challenges to the DUI laws have been quite diverse. *State v. Jackson*, 195 Mont. 185, 637 P.2d 1 (1981), *vacated and remanded sub nom. Montana v. Jackson*, 460 U.S. 1030 (1983), *on remand*, ___ Mont. ___, 672 P.2d 255 (1983), held that the refusal to take the blood alcohol test was testimonial and the refusal could not be admitted into evidence without violating the fifth amendment right against self-incrimination. That decision was vacated by the United States Supreme Court in light of *South Dakota v. Neville*, 459 U.S. 553 (1983). *Montana v. Jackson*, 460 U.S. 1030. *Neville* held that the refusal to take a blood alcohol test was not protected by the fifth amendment privilege against self-incrimination. The United States Supreme Court remanded *Jackson* to determine if the decision rested on adequate and independent state grounds. *Id.* On remand, the Montana Supreme Court held that the decision did not rest on adequate and independent state grounds. *Jackson*, ___ Mont. at ___, 672 P.2d at 258.

The DUI laws have also been challenged on the basis of right to counsel before deciding whether to take the blood alcohol test. *State v. Armfield*, ___ Mont. ___, 693 P.2d 1226 (1984) held that there is no general sixth amendment right to counsel before deciding whether to take the blood alcohol test. For a detailed discussion of *Armfield*, see Note, *State v. Armfield: No Right to Counsel Under Montana's Implied Consent Statute*, 46 MONT. L. REV. 349 (1985).

State v. Bruns, ___ Mont. ___, 691 P.2d 817 (1984) held that a 10 month county jail sentence for three DUI's and one count of driving with a suspended license was not cruel and unusual punishment. The court also held that a sentence of 10 months does not violate the equal protection clause because it was ordered to be served at the county jail where no good time or parole is allowed.

State v. Finley, 173 Mont. 162, 566 P.2d 1119 (1977) held that the defendant's privilege against self-incrimination is not violated by a videotape of the defendant's post-arrest actions.

State v. Purdie, ___ Mont. ___, 680 P.2d 576 (1984) held that field sobriety tests commonly given to suspected drunk drivers are not a search protected under the fourth amendment of the federal Constitution or Art. II, § 11 of the Montana Constitution.

cludes the admission of such evidence does violate the separation of powers. However, the chemical test results may still be admissible under existing Montana law.

II. ARE MONTANA'S DUI LAWS ABSOLUTE LIABILITY OFFENSES WHICH VIOLATE THE DUE PROCESS CLAUSE?

A. *Intent Crimes and Public Welfare Offenses: An Introduction*

In English common law, a combination of vicious will and unlawful act⁴ were required to constitute a crime. Blackstone stated that just as an involuntary act deserves no praise, it also deserves no punishment.⁵ The only thing that renders human actions either praiseworthy or culpable is the intent with which they are done.⁶ The English common law concept of crime as a combination of criminal intent and criminal action became a premise of American criminal law.⁷ As states codified common law crimes, courts interpreted statutes which did not mention a specific intent as implicitly requiring intent, because intent was so inherent in the crime no statutory affirmation was needed.⁸

However, with the advent of the Industrial Revolution, increased congestion in cities necessitated a new type of law not based on the intent of the offender.⁹ Health, safety, and traffic regulations evolved to protect society from the harmful acts of others, intentional or not. The criminal justice system was seized upon as a convenient vehicle for enforcing these regulations.¹⁰ These regulations, imposed under the police power of the state, were called public welfare offenses.¹¹ They require no mental state but only the commission of the prohibited act. Therefore, they impose absolute liability.¹² Absolute liability is necessary because in doing the prohibited act, the offender creates a risk of harm to others.¹³ Public welfare offenses reflect a legislative policy decision that the risk of harm created by the violation outweighs the possibility that the offender may have acted innocently. Public welfare offenses are

4. 4 W. BLACKSTONE, COMMENTARIES *21.

5. *Id.*

6. *Id.* at *19-21.

7. "[E]ven a dog distinguishes between being stumbled over and being kicked." O.W. HOLMES, JR., THE COMMON LAW 3 (1881).

8. *Morisette v. United States*, 342 U.S. 246, 252 (1952).

9. *Id.* at 253-54.

10. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 69 (1933).

11. *Id.* at 56.

12. *Id.* at 78.

13. *Id.* at 68.

generally distinguished from crimes because violations have small penalties, and little effect on the offender's reputation.¹⁴

B. Montana's DUI Laws

Montana prohibits drunk driving under two separate statutes. One statute, commonly called the DUI law, states that any person who is under the influence of alcohol and driving or in actual physical control of a motor vehicle upon the ways of the state open to the public is guilty of DUI.¹⁵ Another statute, generally called the per se law, declares it to be a violation if a person is driving while the alcohol concentration in his blood, breath, or urine is 0.10% or more.¹⁶ Neither of these statutes explicitly requires any particular mental state.

In interpreting the DUI laws, courts may imply a mental state. Section 45-2-103(1) of the Montana Code Annotated declares a person is not guilty of an offense, other than an absolute liability offense, unless he acts knowingly, purposely, or negligently with respect to each element of the crime.¹⁷ The Commission Comments state as a general rule that a mental state should be implied by the courts.¹⁸ A few courts in other states have implied mental states in their DUI laws.¹⁹

On the other hand, the DUI laws could be interpreted as absolute liability offenses. Section 45-2-104 of the Montana Code Annotated states that a person may be absolutely liable for an offense only if: the statute defining the offense clearly indicates a legisla-

14. Although strict liability offenses are supposed to have relatively small penalties, the courts have upheld some rather large penalties. The United States Supreme Court upheld a conviction for the sale of a substance containing narcotics as an absolute liability offense which had a maximum penalty of five years in prison or a \$2,000 fine or both. *United States v. Balint*, 258 U.S. 250 (1922) (discussed in Sayre, *supra* note 10, at 80-81). The Montana Supreme Court upheld two convictions of sedition, an absolute liability offense, that carried a maximum penalty of 20 years imprisonment. *State v. Smith*, 57 Mont. 563, 190 P. 107 (1920); *State v. Kahn*, 56 Mont. 108, 182 P. 107 (1919).

15. MONT. CODE ANN. § 61-8-401(1)(a) (1983).

16. MONT. CODE ANN. § 61-8-406 (1983).

17. MONT. CODE ANN. § 45-2-103(1) (1983).

18. MONT. CODE ANN. § 45-2-104 commission comments (1983).

19. *Morgan v. Municipality of Anchorage*, 643 P.2d 691 (Alaska 1982); *Commonwealth v. Wallace*, 14 Mass. App. Ct. 358, 439 N.E.2d 848 (1982); *Kaiser v. Suburban Transp. Sys.*, 65 Wash. 2d 461, 398 P.2d 14, *modified for typographical errors*, 401 P.2d 350 (1965). In the comments to the MODEL PENAL CODE, the drafters caution against the expectation that an explicit statement of absolute liability appear in the law. Many laws have already been construed to involve absolute liability where no explicit statement of intent exists. The drafters state that either a settled interpretation or an explicit statement in the statute should suffice. Whether or not a statute constitutes an absolute liability crime is a judgment deliberately left to the courts. MODEL PENAL CODE § 2.05 comment (Tentative Draft No. 4 1955).

tive purpose to impose absolute liability, and the offense is punishable by a fine not exceeding \$500.²⁰ There is no clear legislative statement in the DUI laws that they are designed to impose absolute liability. However, another traffic regulation statute declares: "[i]t is unlawful and, unless otherwise declared in this chapter [on traffic regulation] with respect to particular offenses, it is a misdemeanor for any person to do any act forbidden or fail to perform any act required in this chapter."²¹ Granted, this is somewhat less than a clear legislative statement, but it could be interpreted as requiring only the doing of a forbidden act in order to impose absolute liability for traffic offenses.²² If the DUI laws are interpreted as absolute liability crimes, then the mandatory jail time for DUI cannot stand. Section 45-2-104 of the Montana Code Annotated limits the punishment for an absolute liability offense to a \$500 fine.²³

C. DUI Laws in Other States

Many other states impose absolute liability for DUI and per se offenses.²⁴ Illinois held its DUI laws²⁵ to be absolute liability of-

20. MONT. CODE ANN. § 45-2-104 (1983).

21. MONT. CODE ANN. § 61-8-104 (1983).

22. MONT. CODE ANN. § 61-8-104 (1983) is identical to UNIFORM VEHICLE CODE § 11-102 (National Committee on Uniform Traffic Laws and Ordinances 1968). In the 1979 supplement to the Uniform Traffic Laws, the committee recommended that if states wish to provide that minor traffic offenses are not misdemeanors, the word "violation" should be used in place of the word "misdemeanor." The committee also recommended two options be inserted in the statute: (1) Section 11-808 (which prohibits racing on a highway), § 11-901 (which prohibits driving under the influence), § 11-903 (which prohibits vehicular homicide), and § 11-904 (which prohibits fleeing or attempting to elude a police officer) as misdemeanors; and (2) all other sections in the chapter on traffic regulations as infractions. UNIFORM VEHICLE CODE § 11-102 (National Committee on Uniform Traffic Laws and Ordinances, Supplement III, 1979). The recommended penalty for an infraction is: for a first conviction a fine of up to \$200, for a second conviction within one year a fine of up to \$300, for a third conviction within one year a fine of up to \$500. *Id.* at § 17-101.1. This system of traffic infractions and penalties up to a \$500 fine would bring the traffic code within the limits set by MONT. CODE ANN. § 45-2-104 (1983). Undoubtedly, this change would help clarify Montana law, but it would exempt the DUI statutes from the infraction system and ignore the issue of mental state.

23. MONT. CODE ANN. § 45-2-104 (1983). *See City of Missoula v. Shea*, ___ Mont. ___, 661 P.2d 410 (1983). *Shea* used this statute to strike a parking ordinance penalty of up to 90 days in jail and a \$300 fine.

24. *State v. Lujan*, 139 Ariz. 236, 677 P.2d 1344 (1984) (per se statute, which prohibited driving with a blood alcohol level of 0.10% or more, imposed absolute liability which did not violate due process because the punishment was relatively light); *State v. Thompson*, 138 Ariz. 341, 674 P.2d 895 (1983) (DUI is an absolute liability crime); *People v. Woodward*, 143 Cal. App. 3d Supp. 1, 192 Cal. Rptr. 229 (1983) (per se law was strict liability crime); *Bodoh v. District of Columbia Bureau of Motor Vehicle Servs.*, 377 A.2d 1135 (D.C. 1977) (defendant absolutely liable for DUI where he had consumed a prescription drug and a small amount of alcohol, without knowledge of the consequences); *People v. Ziltz*, 98 Ill.

fenses in *People v. Teschner*.²⁶ Like Montana, Illinois follows the general rule that mental state is implied in crimes that lack a specific mental state.²⁷ Illinois statutes, too, declare absolute liability to be an exception found only when clear legislative intent is shown.²⁸ The Illinois Appellate Court refused to imply a mental state in its DUI laws, reasoning that requiring a mental state would raise the possibility of an involuntary intoxication defense to the crime of DUI and thus inadequately protect the citizens of Illinois from drunk drivers.²⁹ The court found a clear legislative purpose to impose absolute liability in the language of the Illinois DUI statute. "The fact that a person charged with [DUI] is or has been entitled to use such drug under the laws of this State does not constitute a defense against any charge of [DUI]."³⁰ The court also relied on the general rule in Illinois, that as to motor vehicle offenses, intent, motive, and knowledge are immaterial to the ques-

2d 38, 455 N.E.2d 70 (1983) (per se statute imposed absolute liability); *People v. Teschner*, 76 Ill. App. 3d 124, 394 N.E.2d 893 (1979) (DUI statute imposed absolute liability); *State v. West*, 416 A.2d 5 (Me. 1980) (defendant's lack of knowledge of the effects of mixing her tranquilizer and alcohol held to be irrelevant because DUI was an absolute liability crime); *People v. Schmidt*, 127 Misc. 2d 102, 478 N.Y.S.2d 482 (1984) (per se law was strict liability crime); *State v. Grimsley*, 3 Ohio App. 3d 265, 444 N.E.2d 1071 (1982) (defendant's split personality was not a defense to DUI, rather DUI is an absolute liability crime); *Commonwealth v. Mikulan*, ___ Pa. ___, 470 A.2d 1339 (1983) (per se law was strict liability crime).

25. The DUI law in Illinois is substantially similar to Montana's: "A person shall not drive or be in actual physical control of any vehicle within this state while: . . . under the influence of alcohol." ILL. ANN. STAT. ch. 95-½, § 11-501(a)(2) (Smith-Hurd 1985).

26. 76 Ill. App. 3d at 127, 394 N.E.2d at 895.

27. ILL. ANN. STAT. ch. 38, § 4-3 (Smith-Hurd 1971) states: "A person is not guilty of an offense, other than an offense which involves absolute liability, unless, with respect to each element described by the statute defining the offense he acts while having one of the mental states described in Sections 4-4 through 4-7." Sections 4-4 through 4-7 are the code sections which define mental states: § 4-4 defines intent, § 4-5 defines knowledge, § 4-6 defines recklessness, § 4-7 defines negligence. ILL. ANN. STAT. ch. 38, § 4-3 was the source for MONT. CODE ANN. § 45-2-103. MONT. CODE ANN. § 45-2-103 commission comments (1983).

28. ILL. ANN. STAT. ch. 38, § 4-9 states:

A person may be guilty of an offense without having, as to each element thereof, one of the mental states described in Sections 4-4 through 4-7 if the offense is a misdemeanor which is not punishable by incarceration or by a fine exceeding \$500, or the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described.

This statute was the source of MONT. CODE ANN. § 45-2-104. MONT. CODE ANN. § 45-2-104 commission comments (1983).

29. 76 Ill. App. 3d at 126, 394 N.E.2d at 895.

30. *Id.* at 127, 394 N.E.2d at 895. The Illinois Legislature recently modified the wording of the quoted statute, but the meaning has not been substantially changed. ILL. ANN. STAT. ch. 95-½, § 11-501(b) (Smith-Hurd 1985). MONT. CODE ANN. § 61-8-401(2) (1983) states: "The fact that any person charged with [DUI] is or has been entitled to use alcohol or such a drug under the laws of this state does not constitute a defense against any charge of [DUI]."

tion of guilt: "The only intention necessary for liability for violating the automobile laws is the doing of the act prohibited."³¹

D. Policy Reasons for the Imposition of Absolute Liability for DUI

Many policy considerations mandate that traffic regulations, including the DUI laws, should be considered absolute liability offenses. Traffic regulations belong to the class of regulatory offenses that first established the absolute liability doctrine.³² Absolute liability offenses focus on the need to regulate behavior that causes the risk of harm to others, regardless of the actor's intent. The theory behind absolute liability crimes is that the need to provide uniform efficient regulation of risk-causing behavior outweighs the need for an individual determination of mental state. "It is needless to point out that, swamped with such appalling inundations of cases of petty violations, the lower criminal courts would be physically unable to examine the subjective intent of each defendant, even were such determination desirable."³³

In motor vehicle regulations especially, intent is irrelevant since the doing of the prohibited act, running through a stop sign for instance, causes the same risk of harm to others regardless of whether the motorist did not see the sign, could not stop, or intentionally drove through the stop sign. The same is true of the DUI laws; even though the drunk driver does not intend harm to society, he creates the risk of harm by drinking and driving.

When intent is implied in the DUI laws, a plethora of problems arises. Intent must be applied to each element of the crime.³⁴ DUI consists of two elements: actual physical control of a motor vehicle, and being under the influence of alcohol or drugs.³⁵ If intent were implied, it would require the defendant to have knowledge that he was under the influence. One court rejected this approach because it may allow a defendant to claim "his intentional consumption of alcohol impaired his ability to know he was intoxicated."³⁶ Alternatively, courts may require a defendant's knowledge of having been drinking and knowledge of being in actual physical control of a motor vehicle. But a knowledge of having been drinking is not necessarily sufficient to sustain a conviction

31. 76 Ill. App. 3d at 125, 394 N.E.2d at 894.

32. Sayre, *supra* note 10, at 73.

33. *Id.* at 69.

34. MONT. CODE ANN. § 45-2-103(1) (1983).

35. 37 Op. Att'y Gen. 120 (1978).

36. *Morgan v. Municipality of Anchorage*, 643 P.2d at 692.

for being under the influence. One can drink a small amount without being under the influence. This fact is recognized by Montana law under which a person is presumed not to be under the influence if the alcohol concentration in his blood, breath, or urine is 0.05% or less.³⁷

The implication of intent as an element of DUI opens the door for the defense of involuntariness. Several courts have held that where a defendant takes a prescription drug without knowledge of its harmful side effects, he cannot be charged with DUI since this innocent mistake of fact negates intent and establishes the driver's innocence.³⁸ Yet, a driver taking prescription medication is potentially as harmful as a drunk driver. Since they create the same risk of harm, they should be treated as any other drunk driver. Therefore, in view of the case law and policy arguments in favor of making DUI an absolute liability offense, the courts should declare DUI to be an absolute liability offense, and in keeping with the statutory limitation lower the maximum penalty to a \$500 fine.

E. If Montana's DUI Laws Were Interpreted as Absolute Liability Offenses Would They Violate Due Process?

The United States Supreme Court has generally upheld regulatory measures which impose absolute liability as valid exercises of the state's police power.³⁹ Regulatory measures, however, must also meet the due process requirement of fairness. In *Lambert v. California*,⁴⁰ the Court struck down a Los Angeles strict liability ordinance which required convicted persons to register with the police as violative of due process. Despite a strong dissent, the Court held that due process prohibited absolute liability for a wholly passive failure to register where knowledge of the duty to register was not shown.⁴¹ *Lambert* can be distinguished from Montana's DUI laws in several ways. The conduct in *Lambert* was wholly passive, while DUI is not. In *Lambert* the defendant was ignorant of the registration law, while the DUI laws have been highly publicized. Finally, the failure to register in *Lambert* did

37. MONT. CODE ANN. § 61-8-401(3)(a) (1983).

38. *Commonwealth v. Wallace*, 14 Mass. App. Ct. 358, 439 N.E.2d 848 (1982); *People v. Koch*, 250 A.D. 623, 294 N.Y.S. 987 (1937); *Kaiser v. Suburban Transp. Sys.*, 65 Wash. 2d 461, 398 P.2d 14, modified for typographical errors, 401 P.2d 350 (1965).

39. *United States v. Behrman*, 258 U.S. 280 (1922) (upheld conviction for sale of a narcotic drug without a prescription); *United States v. Balint*, 258 U.S. 250 (1922) (upheld conviction for sale of narcotics); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910) (upheld conviction for cutting timber on state lands without a valid permit).

40. 355 U.S. 225 (1957).

41. *Id.*

not cause a risk of harm to anyone, whereas DUI does.

In conclusion, if Montana's DUI laws were interpreted as absolute liability crimes, they would be held to comport with due process.

III. DOES MONTANA'S "UNDER THE INFLUENCE" PRESUMPTION VIOLATE DUE PROCESS?

A. *Types of Presumptions*

The DUI law in Montana utilizes several presumptions. If the defendant's alcohol concentration is 0.05% or less, he is presumed not to be under the influence. If the alcohol concentration is between 0.05% and 0.10% no presumption arises. If the alcohol concentration is 0.10% or more, the defendant is presumed to be under the influence.⁴²

These presumptions must comply with the constitutional requirements set down by the Supreme Court in *In Re Winship*,⁴³ which held that due process requires the prosecution in a criminal case to prove beyond a reasonable doubt every material fact necessary to constitute the elements of the offense.⁴⁴ Presumptions have caused problems in the criminal context because, when a defendant is convicted on the basis of a presumption, the prosecution does not need to prove every fact necessary to constitute every element of the crime, but rather proves the basic facts and then utilizes a presumption to establish the existence of the ultimate fact.⁴⁵ This conflicts with the presumption of innocence which guarantees the defendant the constitutional right to "sit on his hands" and force the prosecution to prove each element of the crime charged.⁴⁶ To examine how presumptions may be used in the DUI laws, one must understand the two types of rebuttable presumptions and their functions.

There are two types of rebuttable presumptions:⁴⁷ burden of

42. MONT. CODE ANN. § 61-8-401(3) (1983).

43. 397 U.S. 358 (1970).

44. *Id.* at 364.

45. For a review of presumptions in general see Graham, *Evidence and Trial Advocacy Workshop—Presumptions—More Than You Ever Wanted To Know and Yet Were Too Disinterested to Ask*, 17 CRIM. L. BULL. 431 (1981); Laughlin, *In Support of the Thayer Theory of Presumption*, 52 MICH. L. REV. 195 (1953); Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931). For an excellent article that examines presumptions in relation to DUI laws see Thompson, *The Constitutionality of Chemical Test Presumptions of Intoxication In Motor Vehicle Statutes*, 20 SAN DIEGO L. REV. 301 (1983).

46. *United States v. Gainey*, 380 U.S. 63 (1965); *Coffin v. United States*, 156 U.S. 432 (1894).

47. There are two other types of presumptions: conclusive presumptions and permissive

proof shifting presumptions⁴⁸ and burden of production shifting presumptions.⁴⁹ Burden of proof shifting rebuttable presumptions force the defendant to overcome the presumption by introducing some quantum of evidence, generally a preponderance.⁵⁰ Burden of proof shifting presumptions have been found to be unconstitutional in criminal cases because they allow the state to shift the burden of proof to the defendant.⁵¹ In criminal cases, the state must prove beyond a reasonable doubt every element of the offense charged.⁵² Burden of production shifting rebuttable presumptions require the defendant to introduce *some* evidence to rebut the presumption, but the requisite amount of evidence needed to rebut varies.⁵³ Burden of production shifting presumptions are constitutional. If the presumption is the prosecution's sole evidence and the jury is not free to reject the presumption, the underlying fact proved must be sufficient to support the inference of guilt beyond a reasonable doubt. If the jury is free to reject the presumption or if it is not the sole evidence of the crime, the ultimate fact must be more likely than not to flow from the basic facts.⁵⁴

B. *Presumptions in Montana*

Montana law utilizes a rebuttable presumption that a person with an alcohol concentration of 0.10% or more is under the influence.⁵⁵ In order for the rebuttable presumption to be constitutional the jury clearly must be instructed that the presumption is rebuttable and that it may be rebutted by the production of some evidence. In addition, if the trier of fact must decide in accordance

presumptions. Conclusive presumptions are mandatory. MONT. R. EVID. 301(b)(1) (1977). The defendant may not overcome a contrary conclusive presumption by introducing evidence, and the jury has no discretion in its application. *Id.*; Thompson, *supra* note 45, at 306. Conclusive presumptions are unconstitutional in the criminal context because they allow the state to rely on a rule of law to prove guilt beyond a reasonable doubt. *Sandstrom v. Montana*, 442 U.S. 510 (1979). Permissive presumptions are commonly known as inferences. An inference places no burden on the defendant. *County Court of Ulster County v. Allen*, 442 U.S. 140, 157 (1979). Inferences are constitutional because they are entirely within the discretion of the factfinder and have no effect on the burden of proof. *Id.*

48. Thompson, *supra* note 45, at 306-07.

49. *Id.*

50. MONT. R. EVID. 301(b)(2) (1977).

51. *Sandstrom*, 442 U.S. 510.

52. *Sandstrom* relied on *Patterson v. New York*, which held that "a state must prove every ingredient of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the defendant." *Patterson*, 432 U.S. 197, 215 (1977).

53. Thompson, *supra* note 45, at 306-07.

54. *Ulster County*, 442 U.S. at 164-67.

55. MONT. CODE ANN. § 61-8-401(3)(c) (1983).

with the presumption, and it is the sole evidence of the crime, it is necessary that the underlying fact proved be sufficient to support the inference beyond a reasonable doubt. Otherwise, a mere rational connection must exist.⁵⁶ If the jury were properly instructed there should be no constitutional problem in using a rebuttable burden of production shifting presumption in the DUI laws.

The Montana Supreme Court's decision in *City of Missoula v. Shea*,⁵⁷ however, may preclude the use of rebuttable presumptions altogether. Shea was convicted in Municipal Court of a number of parking ordinance violations. One of the issues in *Shea* was the presumption in the Missoula city parking ordinances that the registered owner of the vehicle parked it. The court looked to a three-part test developed by the Washington Supreme Court to determine the constitutionality of criminal presumptions: (1) a presumption may shift the burden of production of evidence to the defendant, but it may not operate to relieve the prosecution of its burden of persuasion beyond a reasonable doubt on any element of the crime; (2) a presumed fact must follow from the basic fact beyond a reasonable doubt; and (3) the trier of fact must know the presumption allows, but does not require it, to infer the presumed fact from the basic fact.⁵⁸ The court used the three-part Washington test as a guide in reviewing the constitutionality of the presumption that the registered owner parked the vehicle. In applying the Washington test, the court cited Rule 301(b)(2) of the Montana Rules of Evidence which defines a rebuttable presumption. "A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption."⁵⁹ The court in *Shea* held that the challenged presumption violated due process by shifting the burden of proof to the defendant⁶⁰ since the trier of fact was not free to accept or reject the presumption.

The application of Rule 301(b)(2) to presumptions in criminal cases causes serious problems in Montana law. Rule 301(b)(2) defines all rebuttable presumptions as burden of proof shifting presumptions.⁶¹ Burden of proof shifting presumptions have been un-

56. *Ulster County*, 442 U.S. at 165; Thompson, *supra* note 45, at 311-12.

57. ___ Mont. ___, 661 P.2d 410 (1983).

58. *Id.* at ___, 661 P.2d at 413 (citing *State v. Roberts*, 88 Wash. 2d 337, 562 P.2d 1259 (1977)).

59. MONT. R. EVID. 301(b)(2) (1977). Rebuttable presumptions are called disputable presumptions in Montana.

60. *Shea*, ___ Mont. at ___, 661 P.2d at 414.

61. MONT. R. EVID. 301(b)(2).

constitutional in the criminal context since *United States v. Sandstrom*.⁶² The Court in *Sandstrom* held that the state must prove every element of an offense beyond a reasonable doubt.⁶³ Rule 301, however, has never been changed to reflect the *Sandstrom* decision. With the resurrection of Rule 301 and its application to criminal cases, the Montana Supreme Court raised the possibility that all presumptions in criminal cases could be struck down as violative of due process. All that would be left in Montana would be inferences.⁶⁴

Striking the presumptions in the DUI laws could have serious consequences. The Federal Highway Safety Act⁶⁵ requires states to enact statutes on implied consent and presumptive levels of intoxication in order to receive federal highway funds.⁶⁶ It would indeed be unfortunate if Rule 301 were used to strike rebuttable presumptions in Montana since the problem lies, not with Montana's DUI laws, but with Rule 301(b)(2).

In conclusion, the rebuttable presumption that a person with an alcohol concentration of 0.10% or more is under the influence is constitutional, if the jury is properly instructed. The jury must be instructed that the presumption is rebuttable by the production of some evidence. Generally, the ultimate fact must be more likely than not to flow from the basic facts. But if the jury must accept the presumption, and it is the sole evidence of the crime, the facts proved by the state must be sufficient to support beyond a reasonable doubt the inference of guilt.⁶⁷ However, if the Montana Supreme Court extends the holding of *Shea* to the DUI laws, the rebuttable presumptions in the DUI laws would be unconstitutional.

IV. DOES THE DUI LAW WHICH LEGISLATES AN EXCEPTION TO THE MONTANA RULES OF EVIDENCE VIOLATE THE SEPARATION OF POWERS?

A. Introduction

Prior to the adoption of the Rules of Evidence, chemical test

62. 442 U.S. at 524.

63. *Id.* at 520-21.

64. It should be noted that the inference used in *Sandstrom* continues to be used in Montana, but the jury is clearly instructed that they may infer a person intends the ordinary consequences of his acts. *State v. Bad Horse Jr.*, 185 Mont. 507, 519, 605 P.2d 1113, 1119 (1980); *State v. Coleman*, 185 Mont. 299, 393, 605 P.2d 1000, 1051, cert. denied, 446 U.S. 970 (1979); *State v. Williams*, 185 Mont. 140, 155, 604 P.2d 1224, 1232 (1979).

65. 23 U.S.C. § 402 (1982) (Supp. 1985).

66. Highway Safety Program Standard No. 8, 23 C.F.R. § 1204.4 (1985). See generally Thompson, *supra* note 45, at 317.

67. *Ulster County*, 442 U.S. at 164-67; Thompson, *supra* note 45, at 301.

reports were admissible in Montana under the public records exception to the hearsay rule.⁶⁸ But that changed with the adoption of the Rules of Evidence. The commission comments to the Montana Rules of Evidence state that chemists' reports are no longer admissible under the public records exception.⁶⁹ Yet Montana's DUI laws legislate the admissibility of chemical alcohol test reports.⁷⁰ In Montana, the Supreme Court, not the Legislature, establishes rules of evidence and procedure.⁷¹ The Legislature violated the separation of powers doctrine by enacting a law that conflicts with the rules of evidence.⁷² Section 61-8-404(1)(b) of the Montana Code Annotated, which admits chemical test reports, should be struck down.

B. *The Public Records Exception to the Hearsay Rule*

The hearsay rule excludes out-of-court statements offered into evidence to prove the truth of the matter asserted.⁷³ Hearsay is excluded because it is less reliable than live testimony.⁷⁴ The relia-

68. *State v. Snider*, 168 Mont. 220, 541 P.2d 1204 (1975) upheld the admission of a state chemist's report analyzing a substance as marijuana under the Uniform Official Reports as Evidence Act. MONT. REV. CODE § 93-901-1 (1947) (superseded 1977) was the Uniform Official Reports as Evidence Act: "Written reports or findings of fact made by officers of this state, on a matter within the scope of their duty as defined by statute, shall, in so far as relevant, be admitted as evidence of the matters stated therein."

69. MONT. R. EVID. 803(8) commission comments. The commission comments expressly state that *Snider* is overruled.

70. MONT. CODE ANN. § 61-8-404(1)(b) (1983) states:

(b) a report of the facts and results of any chemical test of a person's blood, breath, or urine administered under 61-8-402 is admissible in evidence if:

(i) the breath analysis report was prepared and verified by the person who performed the test or the blood or urine test was a laboratory analysis and the analysis was done in a laboratory operated by the department of justice or by any other laboratory or facility certified or exempt from certification under the rules of the department; and

(ii) the report was prepared in accordance with any applicable rules of the department; and

(iii) if the test was on a blood sample, the person withdrawing the blood must have been competent to do so under 61-8-405(1).

71. MONT. CONST. art. VII, § 2(3) provides: "[The supreme court] may make rules governing appellate procedure, practice and procedure for all other courts . . ."

72. *Coate v. Omholt*, ___ Mont. ___, 662 P.2d 591 (1983) held that the Montana Supreme Court has authority to adopt rules of procedure subject only to legislative veto. Once a legislative veto is exercised, however, the Legislature is not empowered to enact laws to fill the void.

73. C. McCORMICK, EVIDENCE § 246 (2d ed. 1972). MONT. R. EVID. 802 is the hearsay rule: "Hearsay is not admissible except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state."

74. The four risks traditionally associated with hearsay are: ambiguity, false testimony, failure of memory, and misperception. 4 D. LOUISELL & C. MUELLER, EVIDENCE § 413 (1980).

bility of live testimony is due to the fact it is given under oath, in person, and subject to cross-examination.⁷⁵ But due to the burden of producing live testimony, there are a number of exceptions in the hearsay rule.

One of those exceptions is the public records exception. The public records exception admits public agency records kept as a regular course of activity pursuant to a duty imposed by law.⁷⁶ Public records are admitted as an exception to the hearsay rule due to necessity and the reliability of the records.⁷⁷ The public records exception is necessary in two ways. First, it allows the introduction of evidence without calling the public official.⁷⁸ If public officials were required to introduce all public documents, they would spend all their time in court. Second, if the statement is a routine matter, the public official often does not remember it.⁷⁹ Thus the written record gives a more accurate reflection of the event than the official could give. Public records are reliable in several ways. First, the records are part of a habit of routine record-keeping.⁸⁰ Second, they are made at or near the time of the event when no motive for misrepresentation exists.⁸¹ Third, they are made pursuant to duty imposed by law.⁸²

C. *Montana's Public Records Exception*

Prior to the adoption of the Montana Rules of Evidence,

75. 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 800-16 (1984).

76. MONT. R. EVID. 803(8) is the public records exception:

To the extent not otherwise provided in this paragraph, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the government in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; and (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

77. 5 J. WIGMORE, EVIDENCE § 1420 (1974).

78. *Id.* at § 1631; *Wong Wing Foo v. McGrath*, 196 F.2d 120 (9th Cir. 1952).

79. MONT. R. EVID. 803(8) commission comments (1977) (quoting the Advisory Committee's Note to Federal Rule 803(8), 56 F.R.D. 183, 311 (1972)).

80. *Id.*

81. 5 J. WIGMORE, EVIDENCE §§ 1526-27.

82. Wigmore states that official honor may not be what it ought to be, but at least insofar as the law of evidence is concerned, it is a "fiction we can hardly afford . . . openly to repudiate." *Id.* at § 1632.

chemists' reports were admissible in Montana. In *State v. Snider*,⁸³ the court held the written report of a substance analysis by a chemist at the state crime laboratory admissible as a statutory exception to the hearsay rule pursuant to the Uniform Official Reports as Evidence Act [Evidence Act].⁸⁴ The Evidence Act allowed the admission of reports made by officers of the state on matters within the scope of their duties, without requiring the presence of the officers to verify their reports or to be cross-examined.⁸⁵

The Montana Rules of Evidence changed the public records exception to the hearsay rule. Montana's current public records exception to the hearsay rule states the general exception for admissibility of public records but then lists a number of statements which are not admissible.⁸⁶ Excluded are investigative reports and factual findings offered by the government in a criminal case.⁸⁷ This excludes the type of written report admitted as evidence in the *Snider* case. Lest any doubts should remain, the commission comments to the Montana Rules of Evidence state that the *Snider* case is overruled by the adoption of the Rules of Evidence.⁸⁸ Thus, under the Rules of Evidence, chemists' reports offered as an exception to the hearsay rule by the government in a criminal case are inadmissible. Montana's DUI laws, however, legislate just such an exception.⁸⁹ Section 61-8-404(1)(b) of the Montana Code Annotated allows chemical test reports into evidence, without the testimony of the chemist who performed the tests.⁹⁰

83. 168 Mont. 220, 541 P.2d 1204 (1975).

84. MONT. REV. CODE § 93-901-1 (1947) (superseded 1977). For the text of the Evidence Act see *supra* note 68.

85. *Id.*

86. MONT. R. EVID. 803(8) (1983). For the text of the public records exception see *supra* note 76.

87. *Id.*

88. MONT. R. EVID. 803(8) commission comments. It is unclear what weight should be given to the commission comments which overrule *Snider*. In *State v. Nelson*, 172 Mont. 65, 560 P.2d 897 (1977), the court interpreted the Evidence Act to exclude a written police report which detailed information the officer had received from a confidential informant and how the information was used in an arrest. In dicta, the court stated that *Snider* had already held that the written reports of results of chemical testing were admissible under the Evidence Act. *Id.* at 901. The *Nelson* case was decided on February 24, 1977, between the time the Rules of Evidence were adopted and their effective date. It is unclear what, if any, conclusions are to be drawn from the *Nelson* decision. It is a case decided under the old rules, but it may indicate the court is unwilling to follow the commission comments in overruling *Snider*.

89. MONT. CODE ANN. § 61-8-404(1)(b) (1983).

90. For the text of the statute see *supra* note 70.

D. Separation of Powers

Section 2(3) of article VII of the Montana Constitution gives the supreme court the power to make rules governing practice and procedure for all courts.⁹¹ The rules promulgated by the supreme court may be disapproved by the legislature in either of the two legislative sessions that follow the rules' promulgation.⁹² The Montana Supreme Court adopted the Rules of Evidence on December 29, 1976, effective July 1, 1977.⁹³ The Legislature could have disapproved the Rules of Evidence during either the 1979 or 1981 legislative session, but did not. Section 61-8-404(1)(b) of the Montana Code Annotated was not enacted until 1983, after the time for legislative disapproval had passed. The Legislature, in enacting section 61-8-404(1)(b), encroached on the rulemaking authority of the Montana Supreme Court.⁹⁴ This legislative exception to the Rules of Evidence should be struck down as violative of the separation of powers.

E. Consequences of Finding Section 61-8-404(1)(b) of the Montana Code Annotated Unconstitutional

Section 61-8-404(1)(b) of the Montana Code Annotated allows three types of reports into evidence: breath test reports, blood test reports, and urine test reports.⁹⁵ If section 61-8-404(1)(b) were found unconstitutional, the alcohol test reports would have to be admitted, if at all, under the public records exception to the hearsay rule. The public records exception states the general rule that statements of a public official made in the course of regularly conducted activities pursuant to duty imposed by law are admissible.⁹⁶ The rule then lists exceptions which are not admissible: investigative reports by police and other law enforcement personnel and factual findings offered by the government in a criminal case.⁹⁷ These reports are excluded due to the inherent untrustworthiness of records prepared by the government in anticipation of litigation when there exists the motive and opportunity for bias.⁹⁸

91. See *supra* note 71; *Coate*, ___ Mont. at ___, 662 P.2d at 600.

92. "Rules of procedure shall be subject to disapproval by the legislature in either of the two sessions following promulgation." MONT. CONST. art. VII, § 2(3).

93. Sup. Ct. Ord. 12729 (1976).

94. See also *Coate*, ___ Mont. at ___, 662 P.2d at 591.

95. MONT. CODE ANN. § 61-8-404(1)(b) (1983).

96. MONT. R. EVID. 803(8) (1977).

97. *Id.*

98. Comments on MONT. R. EVID. 803(8) (1977) by Professor William F. Crowley, University of Montana School of Law, to his 1984 evidence class (Mar. 24, 1984).

By implication, the types of statements that should be admitted under the general rule are those with substantial guarantees of trustworthiness. Statements which lack guarantees of trustworthiness should be excluded. Thus, the public records exception requires a distinction between untrustworthy or evaluative lab reports and trustworthy or routine lab reports.

In recent years, there has been a growing recognition of the distinction between evaluative and routine lab reports. Evaluative reports are those which contain hearsay from witnesses, opinions, and subjective judgments by the investigator.⁹⁹ Evaluative police records and reports have generally been excluded because of their inherent unreliability.¹⁰⁰ The unreliability of these reports stems from the adversarial nature of the reports prepared in anticipation of litigation, and the opportunity and motive for bias that exists in making subjective evaluations.¹⁰¹ Montana has traditionally excluded evaluative reports other than lab reports despite attempts to admit them under the Evidence Act.¹⁰² The Montana Supreme Court has repeatedly held unsworn evaluative reports inadmissible.¹⁰³

This doctrine should be expanded to include highly evaluative laboratory tests as well.¹⁰⁴ Evaluative lab reports can be unreliable either because of their subjective content and adversarial circumstances in their preparation or because of the reliance on hearsay data to do the tests.¹⁰⁵ When the reliability of an evaluative lab test is an issue, the report should not be admitted as part of the public records exception to the hearsay rule. Rather, the report should be excluded as an exception to the public records rule. This would force the chemist to testify at trial and allow for cross-exam-

99. Alexander, *The Hearsay Exception for Public Records in Federal Criminal Trials*, 47 ALB. L. REV. 699 (1983); Imwinkelried, *The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants*, 30 HASTINGS L.J. 621 (1979).

100. Alexander, *supra* note 99, at 712.

101. *Id.* at 710.

102. Montana has never allowed evaluative/investigative type reports to be admitted into evidence either as official records or as business records. *In re Swan*, 173 Mont. 311, 567 P.2d 898 (1977); *Nelson*, 172 Mont. at 65, 560 P.2d at 897; *Pessl v. Bridger Bowl*, 164 Mont. 389, 524 P.2d 1101 (1974); *Richardson v. Farmers Union Oil Co.*, 131 Mont. 535, 312 P.2d 134 (1957).

103. *Swan*, 173 Mont. at 314, 567 P.2d at 900; *Nelson*, 172 Mont. at 72, 560 P.2d at 901; *Richardson*, 131 Mont. at 553, 312 P.2d at 144.

104. Laboratory reports can be either evaluative or routine, depending on the nature of the test. Evaluative lab tests are ones which contain subjective judgments by the scientist, such as polygraph interpretations. Routine tests, such as fingerprint identification, allow no subjective judgments. Alexander, *supra* note 99, at 727; Imwinkelried, *supra* note 99, at 638-39.

105. Alexander, *supra* note 99, at 724.

ination on the suspect areas of reliability.¹⁰⁶

Objective or routine lab reports allow no opportunity for subjectivity because they consist merely of mathematical or chemical procedures.¹⁰⁷ These reports admit of no opportunity for bias. Thus, their reliability is quite high. A number of courts have recognized these reports as being objective fact or routine, with little room for error.¹⁰⁸ Like evaluative tests, routine tests are performed in preparation for litigation, but routine tests do not allow for the possibility of bias. They are intrinsically neutral, and yield findings that may help the prosecution. Yet they may also yield findings that will force the prosecution to dismiss charges.¹⁰⁹

The three types of lab reports being discussed here—blood alcohol reports, urine alcohol reports, and breath alcohol reports—should all be admitted as routine lab reports. Both blood and urine alcohol tests use gas chromatography.¹¹⁰ The testing includes a mathematical calculation to determine the presence of alcohol.¹¹¹ The tests cannot be altered by subjective judgments of the scientists who perform them.¹¹² Breath tests can be performed using other methods, but they too consist of a mathematical calculation of the presence of alcohol in the breath.¹¹³ They also cannot be altered by any subjective judgments of the operator of the machine.¹¹⁴

Other courts have not yet decided if blood alcohol or urine alcohol tests should be considered routine. However, Alaska recognized the breathalyzer test as a routine test in *Byrne v. State*.¹¹⁵ In *Byrne* the defendant argued that the trial court incorrectly admitted the breathalyzer packet¹¹⁶ under Alaska's public records exception to the hearsay rule, which is substantially similar to Mon-

106. Imwinkelried, *supra* note 99, at 645.

107. Alexander, *supra* note 99, at 727-28.

108. See, e.g., *Kay v. United States*, 255 F.2d 476, 480 (4th Cir.), *cert. denied*, 358 U.S. 825 (1958); *State v. Kreck*, 86 Wash. 2d 112, 119-21, 542 P.2d 782, 785-88 (1975); *People v. Porter*, 46 A.D.2d 307, 311-13, 362 N.Y.S.2d 249, 255-56 (1974).

109. Imwinkelried, *supra* note 99, at 629.

110. Interview with Jim Hutchison and Rick Morehead, Missoula Crime Laboratory (June 14, 1985).

111. Gas chromatography can identify the presence and amounts of specific types of alcohol. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. 654 P.2d 795 (Alaska 1982).

116. The breathalyzer packet consisted of a number of documents that certified the breathalyzer machine was working properly. *State v. Huggins*, 659 P.2d 613, 614 (Alaska 1982).

tana's.¹¹⁷ The court held that before a report fell within the sections barring admission of the evidence, the person making the report would have to be able to "foresee its use in litigation and use this knowledge to manipulate the ultimate decision in the litigation."¹¹⁸ The court stated that a state employee could not tamper with the results or findings in a breathalyzer packet in time to affect a specific prosecution; thus, the results of the breathalyzer exam were admissible.

In conclusion, the DUI law which allows the admission of chemical test reports as an exception to the Montana Rules of Evidence is unconstitutional as a violation of the separation of powers. But if the Montana Supreme Court adopts the evaluative/routine test distinction, breath, blood, and urine alcohol test results would still be admissible under Montana law.

V. CONCLUSION

This article has examined three separate areas of constitutional concern. The first area was whether the DUI laws are absolute liability laws, and if so, do they violate due process. While the DUI laws are absolute liability laws, which require that the penalty be reduced to a maximum of a \$500 fine, the DUI laws do not otherwise violate due process. The second area examined was whether a rebuttable presumption of being under the influence violates due process. The presumption does not, as long as the jury is properly instructed. The third area examined was whether section 61-8-404(1)(b) of the Montana Code Annotated is constitutional as violates the separation of powers doctrine. It does, but if the court adopts the evaluative/routine test distinction, breath, blood, and urine alcohol test reports should still be admissible in Montana.

117. Montana adopted the Uniform Rule 803(8). 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 803-273 (1984). Alaska did also, but added "of this subdivision" and a notification requirement. *Id.* at 803-274.

118. *Byrne*, 654 P.2d at 797.

