DWI BLOOD ALCOHOL TESTING: RESPONDING TO A PROPOSAL COMPELLING MEDICAL PERSONNEL TO WITHDRAW BLOOD

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I. Introduction

After reading with great interest the well-written legislative proposal by Trooper Robert R. Wilk,[1] I feel compelled to respond negatively to the suggested legislative proposal.[2] Trooper Wilk writes from the perspective of an active New Jersey State Trooper associated with the State Police Breath Test Unit.[3] His proposal mandates that physicians, nurses and other health care professionals draw blood at the request of a police officer for use in driving while intoxicated (DWI) investigations.[4] If a professional refuses to do so, he or she would be subject to a fine of up to $500 and a term of community service not to exceed ninety days.[5]

By rejecting Trooper Wilk's proposal, I do not suggest that DWI is not an important concern. Certainly, DWI is a serious prob-

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1 Robert R. Wilk, Note, *Compelling Medical Personnel to Draw Blood Samples from DWI Suspects*, 17 SETON HALL LEGIS. J. 329 (1993).

2 *Id.* at 358.

3 *Id.* at 329 n.2. The New Jersey State Police Breath Test Unit is the section of the New Jersey State Police that is responsible for the periodic inspection of all breath test devices in the state and for the training, supervision and accreditation of all breath test device operators. N.J. ADMIN. CODE tit. 13, § 51-1.2 to -1.13 (1993). This author has known and respected Trooper Wilk for fifteen years. The author would not have written this response without Trooper Wilk's consent because of the author's respect for him and his views. Trooper Wilk was provided with each draft of this response to encourage his input because I believe that from scholarly dialogue comes wisdom. Trooper Wilk is a fine police officer. He will be a fine lawyer, but he has formulated his legislative proposal with the myopic view of a policeman.

4 *Id.*

5 *Id.*

lem in New Jersey and in the country as a whole. In 1990, there were 1,810,000 arrests for DWI in the United States.[6] While Trooper Wilk's suggestion that DWI is the leading contributing factor to traffic fatalities[7] is not universally accepted,[8] DWI is certainly a serious societal problem. However, Trooper Wilk's solution to this problem is troublesome.

Trooper Wilk seems to indicate that there is an overwhelming sense of cooperation between hospital emergency room personnel and investigating police officers.[9] This is a disturbing scenario when taken in the context of the expectations of citizens who come into contact with medical personnel.[10] Trooper Wilk finds trouble-

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6 U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 432, tbl. 4.1 (1991). This figure neither includes those drinking drivers killed in motor vehicle accidents nor those who escaped apprehension and prosecution.

7 Wilk, *supra* note 1, at 329 n.1.

8 *Compare* Julian A. Waller, *Epidemiological Issues About Alcohol, Other Drugs and Highway Safety, in* ALCOHOL, DRUG AND TRAFFIC SAFETY PROCEEDINGS OF THE SIXTH INTERNATIONAL CONFERENCE 3-11 (S. Israelstam & S. Lambert eds., 1975) *with* RICHARD SAFERSTEIN, FORENSIC SCIENCES HANDBOOK 593 (1982) *and* Richard Zylman, *Mass Arrests For Impaired Driving May Not Prevent Traffic Deaths, in* ALCOHOL, DRUG AND TRAFFIC SAFETY PROCEEDINGS OF THE SIXTH INTERNATIONAL CONFERENCE 225-37 (S. Israelstam & S. Lambert eds., 1975).

9 Wilk, *supra* note 1, at 331.

10 Most patients have the expectation that their communications with medical personnel will remain confidential. Although the proposed Federal Rules of Evidence and some states have excluded this privilege, New Jersey, following the majority rule, has statutorily maintained such a privilege. *See Developments in the Law - Privileged Communications*, 98 HARV. L. REV. 1501, 1503 n.9 (1985) (stating that 40 states and the District of Columbia have a physician-patient privilege, while only Alabama, Connecticut, Florida, Kentucky, Maryland, Massachusetts, New Mexico, South Carolina, Tennessee and West Virginia do not).

The New Jersey statute specifically protects the physician-patient communication if the patient or the physician reasonably believed that such communication was necessary or helpful to enable the physician to diagnose the patient's condition or to prescribe or render treatment to the patient. N.J. STAT. ANN. § 2A:84A-22.2 (West 1976). Specifically, the statute states:

> Except as otherwise provided in this act, a person, whether or not a party, has a privilege in a civil action or in a prosecution for a crime or violation of the disorderly persons law or for an act of juvenile delinquency to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (a) the communication was a confidential communication between patient and physician, and (b) the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment thereof, and (c) the witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom

some the fact that some medical personnel resist cooperation with the police.[11] However, it appears that the functions to be served by the medical profession are distinctly different from those of the law enforcement profession. In the great scheme of things, the life preservation function of medical personnel is a far more important function than the prosecutorial function of law enforcement. At least one court has recently addressed this issue, albeit in a different context, and found that the involvement of a physician and the paramount concern for the patient's health are the appropriate considerations in the decision of whether to draw blood for forensic purposes.[12] Trooper Wilk's note and proposed legislation do not address the potential for the existence of significant tension between medical concerns and law enforcement concerns. If such tension or conflict exists, the legislative proposal seems to wrongly place control over the important decision into the hands of law enforcement officers.

In Trooper Wilk's proposal, it is unclear whether the "penalty" for non-compliance is civil or quasi-criminal.[13] While there is no provision for incarceration, it appears that the monetary penalties mirror those for a petty disorderly person's offense.[14] The pro-

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> disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent or servant and (d) the claimant is the holder of the privilege or a person authorized to claim the privilege for him.

Id. While the Legislature has relieved physicians of liability for disclosing information in DWI prosecutions and investigations, N.J. STAT. ANN. § 2A:62A-10 (West 1987), this does not change the patient's expectations regarding the confidential nature of his communications with his doctor.

11 Wilk, *supra* note 1, at 331.

12 *See* People v. Ebner, 600 N.Y.S.2d 569 (N.Y. App. Div. 1993) (holding that the statute governing the drawing of blood was violated when a nurse authorized the blood test instead of the doctor because the purpose of the statute is to safeguard the health of the patient).

13 Wilk, *supra* note 1, at 358. Trooper Wilk concludes his note with a proposed bill that states that medical personnel *must* comply with requests by law enforcement officers to draw blood if the specimen will be used for investigating driving while under the influence of alcohol or drugs charges. *Id.* The penalty for refusing to comply is a fine of at least $500 and not greater than $1000 and a maximum of 90 days community service. *Id.*

14 The statute differentiates between a "petty" disorderly person's offense for which the maximum sentence is 30 days and a disorderly person's offense for which the maximum penalty is six months. N.J. STAT. ANN. § 2C:43-8 (West 1982). The

posed statute also calls for a term of community service.[15] This term of community service may not be sufficient to raise the offense to the level higher than a petty offense,[16] however, it does require that the matter be considered at the very least quasi-criminal.[17] Whether criminal or quasi-criminal, an adverse finding could have a devastating effect on the career of a health care professional. It also might have adverse effects upon professional negligence insurance premiums, licensure and employability. Certainly, having those associated with the legal system passing judgment on the ethical and medical decisions of health care professionals is inappropriate and will clearly widen the rift that exists between the two systems at the present time.[18]

II. Blood Test v. Breath Test

Trooper Wilk correctly observes that the scientific method of choice in New Jersey for determining blood alcohol concentration (BAC)[19] is the breathalyzer.[20] This device tests the breath of a sus-

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monetary penalty contemplated by Trooper Wilk consists of the same $500.00 fine, which is the limit in a petty disorderly person's offense. Wilk, *supra* note 1, at 358. *See* N.J. STAT. ANN. § 2C:43-3 (West 1982) (delineating a fine with a $500 limit for a petty disorderly persons offense and a $1,000 fine limit for a disorderly persons offense).

15 Wilk, *supra* note 1, at 358.

16 *See* State v. Hamm, 577 A.2d 1259 (N.J. 1990) (holding that in New Jersey a third arrest and prosecution for DWI that would impose penalties of a $1000 fine, 10 years license suspension, up to 90 days of community service, and 180 days detainment or incarceration in a city jail, was not sufficient to raise the offense to a level for which the defendant could request a jury trial). *See also* Blanton v. City of North Las Vegas, 748 P.2d 494 (Nev. 1987).

17 Rodriguez v. Rosenblatt, 277 A.2d 216 (N.J. 1971) (concluding that if jail time is a possibility, counsel should be appointed for an indigent defendant).

18 Because physicians are already protected under N.J. STAT. ANN. § 2A:62A-10 (West 1987) against liability for drawing blood in DWI cases, the effect of Trooper Wilk's proposed legislation would be to force the cooperation of the health care profession against their ethical beliefs. Those who choose not to perform this law enforcement function do so because they feel, probably correctly, that to draw blood for the police violates the physician-patient privilege. *See supra* note 10 and accompanying text.

19 "BAC" refers to blood alcohol concentration. "BrAC" refers to breath alcohol concentration. Breath alcohol represents only that alcohol that is present on an individual's breath, which may or may not be representative of the quantity of alcohol that exists in an individual's blood. Typically, the breath alcohol is multiplied by 2100 to arrive at the blood alcohol concentration. State v. Downie, 569 A.2d 242 (N.J. 1990). However, some have argued that the 2100:1 ratio is inaccurate because people have diverse ratios of breath alcohol in relation to blood alcohol. *Id.* at 242. Therefore, some states have begun to use the BrAC readings alone to counter the argument

pect and uses a partition ratio to determine a suspect's BAC.[21] The New Jersey Supreme Court has determined that the percentage of blood alcohol is the ultimate purpose of breath testing.[22] Additionally, New Jersey is a per se jurisdiction[23] and the offense is proved if the prosecution can show that a defendant had a BAC of .10% or above.[24] Once the breathalyzer has been eliminated as the most appropriate test for determining the alcohol content of the arrested person[25] because of pressing medical concerns or even refusal to take the breathalyzer test,[26] a blood test becomes the preferred method of alcohol detection.[27]

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that the conversion ratio is not 2100:1. For a complete discussion of this issue, *see id. See also* WISC. STAT. ANN. § 346.63(1)(b) (1991 & Supp. 1993); WISC. STAT. ANN. § 885.235(1)(a)(1) (West Supp. 1993).

20 State v. Downie, 569 A.2d 242, 243 (N.J. 1990), *cert. denied*, 498 U.S. 819 (1990) (holding that "breathalyzer testing is a practical and reasonably accurate way of fulfilling the Legislature's intent to punish drunk drivers."). It is interesting to note, however, that Dr. Robert Borkenstein, the inventor of the breathalyzer, testifying in *Downie*, indicated that the breathalyzer was not sufficiently accurate to be used in a per se jurisdiction, but rather was intended to be used as a confirmation of an officer's observations. *State v. Downie*, No. A-167, record at 184-89 (remand hearing on April 27, 1989) (testimony of Dr. Robert Borkenstein) (on file with the author).

21 State v. Downie, 569 A.2d at 246.

22 *Id.* at 248 (citing N.J. STAT. ANN. § 39:4-50.2).

23 *See infra* note 63 for an explanation of a per se jurisdiction.

24 N.J. STAT. ANN. § 39:4-50(a) (West 1990). *See also* State v. Tischio, 527 A.2d 388, 389 (N.J. 1987) (holding that a defendant may be convicted for DWI "when a breathalyzer test that is admissible within a reasonable time after the defendant was actually driving his vehicle reveals a blood-alcohol level of at least 0.10%"). This is in contradistinction to the DWI offense, which requires that a defendant's ability to drive be deleteriously affected by alcohol.

25 A breathalyzer test is considered a search incident to arrest. Therefore, an arrest is a pre-condition for a breath or blood test. *See* State v. Harbatuk, 229 A.2d 820, 822 (N.J. Super. Ct. App. Div. 1967); State v. Swiderski, 226 A.2d 728, 733 (N.J. Super. Ct. App. Div. 1967).

26 New Jersey law states that drivers on public roads consent to the taking of breath samples for the purpose of ascertaining their blood-alcohol levels. N.J. STAT. ANN. § 39:4-50.2 (West 1990). This implied consent allows a police officer to tell a suspect that, if he refuses to consent to a blood test, his arm could be held down and the blood could still be taken. *See* State v. Woomer, 483 A.2d 837, 838 (N.J. Super. Ct. App. Div. 1984) (holding that an officer's statement to this effect was not a threat but an accurate statement of fact). *See also* Schmerber v. California, 384 U.S. 757, 761 (1966) (holding that blood is non-testimonial evidence and that the drawing of blood does not violate the Fifth Amendment privilege against self-incrimination). *But see* N.J. STAT. ANN. § 39:4-50.2(e) (West 1990) (stating that no chemical test may be made and no specimen may be taken forcibly and against the physical resistance of the defendant).

27 *See Schmerber*, 384 U.S. at 771 (stating that blood tests are an extremely effective means of determining the extent to which an individual is under the influence of

It is important to note that hospital blood tests for blood-alcohol concentration are not reported in a forensically acceptable manner. Breath tests use a conversion factor that relates to the usual statutory scheme of whole blood alcohol.[28] Most, if not all, hospital blood analysis test serum blood alcohol as opposed to whole blood alcohol. Therefore, the test results must be divided by 1.16 in order to convert the results into a frame of reference required by the statute.[29] Trooper Wilk's proposed legislation would force doctors to test blood-alcohol of patients without allowing for this differential.

III. The Validity of the Presumptions

Trooper Wilk, citing the Grand Rapids study, indicates that there is no evidence that BAC/breath alcohol concentration (BrAC) readings from 0.01% to 0.04% result in excessive accident involvement.[30] While I agree that is probably true, I nevertheless feel the need to note that if Trooper Wilk's proposal was adopted, the ensuing blood test results could be used to convict those persons who possess a commercial driver's license with only a 0.04% BAC/BrAC.[31]

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alcohol). *But see* Carol A. Roehrenbeck & Raymond W. Russell, *Blood is Thicker Than Water: What you Need to Know to Challenge a Serum Blood Alcohol Result*, 8 CRIM. JUST. 14 (1993).

[28] *See, e.g.*, N.J. STAT. ANN. § 39:4-50 (West 1990). A typical statute will prohibit operation of a vehicle above a proscribed level of alcohol, weight by volume. The judicially noticed ratio of breath alcohol, tested by a breathalyzer, to whole blood alcohol is 2100 to 1 in New Jersey. State v. Downie, 569 A.2d 242 (N.J. 1990).

[29] The New Jersey statute gives a definition for "alcohol concentration" in the context of driver's licenses, particularly in a commercial context. N.J. STAT. ANN. § 39:3-10.11 (West Supp. 1993). There is a statutory difference between the number of grams of alcohol per millimeters of blood: one number (100 milliliters) for blood and a separate number for breath (210 liters). *See id.* This difference is not important in a medical context. It is, however, important in a forensic context. For a more detailed scientific analysis of the conversion formula, see Roehrenbeck & Russell, *supra* note 27, at 18.

[30] Wilk, *supra* note 1, at 336 n.40 (citing ROBERT F. BORKENSTEIN ET AL., THE ROLE OF THE DRINKING DRIVER IN TRAFFIC ACCIDENTS (Alan Dale ed., 1954)).

[31] The New Jersey law states that "a person shall not operate a commercial motor vehicle in this State with an alcohol concentration of 0.04% or more, or while under the influence of a controlled substance." N.J. STAT. ANN. § 39:3-10.13 (West Supp. 1993). This statute and others like it are a response to the federal government's mandate that the roads be cleared of drunk drivers. 23 U.S.C.A. § 410(a) (1993). Since there is a presumption of sobriety from 0.01% to 0.04% BAC/BrAC, it seems patently unfair that those who possess a commercial driver's license can be prosecuted at the

IV. Rochin, Schmerber *and Beyond*

A. Rochin

I agree with Trooper Wilk's analysis of *Rochin v. California*.[32] In that case, police officers illegally entered the home and bedroom of a defendant whom they suspected of selling drugs.[33] The officers questioned the defendant about two capsules that were lying on the bedside table.[34] Rochin then ingested these capsules and the officers arrested him, took him to a hospital and had his stomach pumped against his will.[35] The capsules contained morphine and were used as the primary evidence admitted over Rochin's objection, which led to his conviction for possession of morphine.[36] Rochin was sentenced to sixty days imprisonment.[37] The Supreme Court overturned the conviction on the grounds that the conduct of the officers was such that it "shock[ed] the conscience."[38] Justice Frankfurter's opinion in *Rochin* used the Fourteenth Amendment as the basis for overturning the conviction because he found a "general requirement that States in their prosecutions respect certain decencies of civilized conduct."[39]

Clearly, in *Rochin*, the Court's collective conscience was shocked by the invasive procedures used, especially in light of the fact that the invasion began in the defendant's bedroom at the outset of the search.[40] With the advance of medical science and the rush to convict DWI defendants,[41] such a shock to the conscience in the area of DWI prosecutions would probably not exist today. The rush to convict DWI offenders has led to a seeming willingness to subjugate some constitutional rights to affect the perceived need

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statutorily defined level. When one considers the differential between blood-test readings and breath-test readings, these levels could be used to prosecute a person who has consumed little, if any, alcohol.

32 342 U.S. 165 (1952). *See* Wilk, *supra* note 1, at 337-38.

33 342 U.S. at 165.

34 *Id.*

35 *Id.* at 165-66.

36 *Id.* at 166.

37 *Id.*

38 *Id.* at 172.

39 *Id.* at 173.

40 *Id.* at 167.

41 E. John Wherry, Jr., *The Rush to Convict DWI Offenders: The Unintended Unconstitutional Consequences*, 19 U. DAYTON L. REV. (forthcoming 1994).

to eradicate drunken drivers.[42] This would seem to portend a different result if the same methods used by the deputies in *Rochin* were employed in a DWI context.

B. Breithaupt

Trooper Wilk specifically addresses this issue in his discussion of *Breithaupt v. Abram*.[43] While the *Breithaupt* Court found that the drawing of blood by a person skilled at this procedure was not conduct that shocked the conscience,[44] this holding is inapplicable to Trooper Wilk's proposal. *Breithaupt* correctly used the decision in *Rochin* to state that the drawing of blood is not conduct that shocks the conscience.[45] The issue raised by Trooper Wilk's proposal is not whether the blood can be drawn, but whether the seizure of blood without a warrant is conduct that would shock the conscience. Additionally, Trooper Wilk does not question the issue of whether forcing a health care professional to draw blood shocks the conscience. Rather, the proposal makes it mandatory that physicians, nurses and other health care professionals do so against their will or be subject to quasi-criminal penalties.[46]

C. Schmerber

Wilk relies on *Schmerber v. California*[47] in a similar manner.[48] *Schmerber* stands for the proposition that the use of a blood test to determine a defendant's intoxication does not violate the Fifth Amendment privilege against self-incrimination because alcohol levels in the blood constitute non-testimonial evidence.[49] Courts have relied on *Schmerber* to uphold convictions even when a defendant was told that if he refused to give his consent, he could be held down and the blood drawn.[50] However, the issue raised by

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42 *Id.*

43 352 U.S. 432 (1957). *See* Wilk, *supra* note 1, at 338-39.

44 352 U.S. at 437.

45 *Id.*

46 *See* Wilk, *supra* note 1, at 358.

47 384 U.S. 757 (1966).

48 *See* Wilk, *supra* note 1, at 339-40.

49 *See Schmerber*, 384 U.S. at 760-65.

50 *See, e.g.*, State v. Woomer, 483 A.2d 837, 838 (N.J. Super. Ct. App. Div. 1984). In *Woomer*, the defendant was taken to the hospital after a motor vehicle accident. The police officer asked the defendant to give his consent for a blood test. *Id.* at 837. The defendant refused and the officer told him that they could use force and hold his arm

Trooper Wilk is not whether the blood can be taken, but rather whether it must be taken.

Schmerber was perhaps a correct decision thirty years ago, but is no longer supported by firm scientific or legal foundation. An analysis of *Schmerber* reveals that the Fifth Amendment concerns were correctly evaluated: blood tests are non-testimonial and therefore not protected under the Fifth Amendment.[51] The Fourth Amendment concerns, however, are more problematic. The Court in *Schmerber* clearly recognized the Fourth Amendment implications of invading a person's body and extracting bodily fluids for forensic purposes.[52] The Court rationalized that an emergency circumstance existed: the dissipation of alcohol from the body (and therefore the "destruction" of evidence) warranted an exigent circumstance exception to the warrant requirement.[53] That may have been a valid and legal scientific position at the time of the decision in *Schmerber*, however, it is not now.

D. *Extrapolation*

Extrapolation in DWI law is the process by which a known BAC/BrAC at the time of testing is made relevant to the time of operation by the use of scientific formulae.[54] Assuming that the only interest of the government is to convict those with a BAC of 0.10% or higher[55] and that there is a known rate of dissipation[56] of alcohol from the body, it seems a simple matter to determine the

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down to have the blood drawn. *Id.* At that point the defendant agreed to have a blood test. *Id.* The court held that the taking of the blood was proper because the officer's statement was a statement of fact. *Id.* at 838.

51 384 U.S. at 765.

52 *Id.* at 767.

53 *Id.* at 770-71.

54 MOENSSENS, INBAU & STARRS, SCIENTIFIC EVIDENCE IN CRIMINAL CASES § 2.01 (3d ed. 1986); RICHARD SAFERSTEIN, CRIMINALISTICS 248-51 (1990); LAWRENCE TAYLOR, DRUNK DRIVING DEFENSE § 6.02 (1991). There are two scientific formulae that are used to complete this calculation: the Widmark formula and the AMA formula. With certain things being known, such as breath test result, time of breath test, gender, body weight, time of the first drink, time between each drink, time of the last drink, quality of the beverage consumed, food consumed and when that consumption of food took place, the BAC/BrAC can be calculated.

55 N.J. STAT. ANN. § 39:4-50 (West 1990); State v. Tischio, 527 A.2d 388 (N.J. 1987). There has been a trend in recent years to move the BAC percentage from 0.10% to 0.08%. *See, e.g.*, ME. REV. STAT. ANN. tit. 29, § 1312-B(1)(B) (West 1993); OR. REV. STAT. § 813.010(1)(a) (1993); UTAH CODE ANN. § 41-6-44(1)(a)(i) (1993).

56 TAYLOR, *supra* note 54, §§ 6.01 to 6.02.

amount of time available to secure a warrant to permit the drawing of blood upon a showing of probable cause.

Alcohol has no effect upon the ability to operate a motor vehicle until it is absorbed into the blood system and is transmitted by the blood to the brain.[57] Transmission to the brain is almost simultaneous with the absorption into the blood, but the initial absorption into the blood may take from thirty to ninety minutes after ingestion.[58] That same alcohol is eliminated from the blood by various methods such as breath, perspiration and metabolism through the liver[59] at the approximate rate of 0.015% per hour.[60]

The elimination occurs at a much slower rate than does the absorption. Therefore, the alcohol curve is not linear. A BAC/BrAC[61] of 0.10% will only be completely eliminated from the blood system after six and two-thirds hours. If the accused has a BAC/BrAC of 0.15%, the elimination process will take ten hours. Both of the above figures assume that absorption was complete at the time of last operation of the vehicle. If it was not, the window of opportunity to secure a search warrant for relevant evidence is even longer. It follows that there are at least six hours from the time of the last operation of the vehicle to obtain a search warrant or some other type of judicial review to ensure neutrality and probable cause before the elimination of relevant evidence and seizure has occurred. The Supreme Court acknowledged in *Schmerber* that the forcible taking of blood is technically a violation of the Fourth Amendment, but that to do so was permissible under the exigent circumstances exception to that amendment.[62] This slow rate of elimination does not, in light of present technology, present an exigent circumstance as seen by the Court in *Schmerber.*

While alcohol could be eliminated or "destroyed" in a much shorter period of time if the BAC/BrAC at the time of last operation is less than 0.10%, such evidence would not be relevant. If the BAC/BrAC would never be at the 0.10% level, then the evidence

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57 SAFERSTEIN, *supra* note 54, at 248.

58 *Id.* at 249.

59 *Id.* at 250.

60 *Id.* at 251. *But 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, 1141 n.95 (1987).

61 *See supra* note 19 for the definitions of BAC and BrAC.

62 384 U.S. 757, 767 (1966).

eliminated would not be relevant to the per se[63] violation.[64] If the elimination of the evidence was only part of the alcohol contained in the suspect's body, the alcohol discovered by a blood test taken as the result of a warrant can easily be used to extrapolate the BAC/BrAC back to the time of operation. For example, a blood test showing a 0.05% BAC, taken four hours after last operation of the vehicle, would be relevant to prove that the driver had more than a 0.10% BAC at the time of operation of the vehicle. The prosecution could, therefore, prove that the driver had been above the legal limit while driving.

However, retrograde extrapolation[65] has been determined to be unavailable as a defense in New Jersey[66] in a very controversial and often criticized decision.[67] This prohibition on the use of retrograde extrapolation was based upon a determination that New

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63 Per se jurisdictions are those where the DWI offense may be proved by two methods. The first is for the accused to have been under the influence of alcohol to such an extent that his behavior can be observed by a police officer and that officer can testify that the accused was acting drunk (bloodshot eyes, slurred speech, inability to balance, etc.). The other method of proof in a per se jurisdiction is to show that the accused had a BAC/BrAC of 0.10% or above. The offense occurs when the blood alcohol concentration reaches a certain level, not when the accused becomes incapacitated from the consumption of alcohol. *See, e.g.*, N.J. STAT. ANN. § 39:4-50 (West 1990).

64 Admittedly, this will not be true for commercial drivers license prosecutions where the offense occurs at 0.04% or for offenders under the legal drinking age where the violation occurs at 0.01%. *See* N.J. STAT. ANN. § 39:3-10.13 (West Supp. 1993) (stating that "a person shall not operate a commercial motor vehicle in this State with an alcohol concentration of 0.04% or more, or while under the influence of a controlled substance."); N.J. STAT. ANN. § 39:4-50.14 (West Supp. 1993) (providing that an individual under the legal drinking age who operates a vehicle with a BAC of 0.01% or higher but under 0.10%, forfeits his license or is prohibited from obtaining a license for a period of 30 to 90 days, must perform community service for 15 to 30 days and must attend an alcohol education program). The desirability of those prosecutions is for another article. The number of prosecutions for commercial drivers license offenses or underage drinking-driving violations are so few and almost de minimis when involving non-breathalyzers as to not require a rethinking of the concerns expressed in this paper.

65 Retrograde extrapolation is the process of relating the BAC/BrAC at the time of testing back to the time of operation. Although it is impossible without successive tests to determine whether the driver is in the absorptive phase or the elimination phase, most states presume that the defendant's BAC is decreasing. *See* Jennifer L. Pariser, *In Vino Veritas: The Truth About Blood Alcohol in State Drunk Driving Prosecutions*, 64 N.Y.U. L. REV. 141, 152 (1989).

66 State v. Tischio, 527 A.2d 388 (N.J. 1987).

67 TAYLOR, *supra* note 54, § 6.01; Timothy A. Shafer, Note, *Drunk Driving and Due Process Don't Mix*, 40 RUTGERS L. REV. 611 (1988).

Jersey's drinking-driving statute prohibited the operation of a motor vehicle by a person with above a 0.10% BAC/BrAC at the time of operation or at any reasonable time thereafter. Therefore, extrapolation by the defense would not lead to any relevant evidence.[68] Basically, it is unimportant in New Jersey whether a person would have been home and off the road at the time that person's BAC/BrAC reached the proscribed level. If a person has breathalyzer results of over 0.10% BrAC, he is guilty of the per se violation. It does not matter in New Jersey that the person may have been in the absorptive phase of alcohol processing and could therefore have been under the legal limit at the time of operation.

Of course, extrapolation would become relevant if used by the prosecution to translate the forensic results of a later-drawn blood sample into a meaningful BAC/BrAC figure for presentation at trial. In *State v. Oriole*,[69] the court recognized that retrograde extrapolation was often a useful and relevant tool for the presentation of valid scientific evidence in a criminal case, as distinguished from the non-criminal DWI case.[70]

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68 In a prior article, I have attributed different motives to and causes for the court's decision in *Tischio*. Wherry, *supra* note 41. For the purposes of this response to Trooper Wilk, I will take the court at its word.

69 587 A.2d 142 (N.J. Super. Ct. Law Div. 1990).

70 Once again, the issue arises as to whether drunk driving should be considered a criminal or a non-criminal offense. New Jersey is one of only three states (the others being Nevada and Utah) that consider DWI such a "minor" offense that no trial by jury is required. The typical DWI statute provides for large fines, suspension of driver's license, and, on repeat offenses, jail time. *See, e.g.*, N.J. STAT. ANN. § 39:4-50 (West 1990) (delineating the penalties for a first offense as a fine ranging between $250 to $400, six months to one year license suspension and at the court's discretion, a maximum term of imprisonment of 30 days; for a second offense as a fine ranging between $500 to $1000, 30 days community service, two year license suspension and imprisonment for a term between two and 90 days; and for a third or subsequent offense as a $1000 fine, imprisonment for 180 days and 10 year loss of license). *Oriole* was a case about a drunk driver, but the charge was aggravated assault. *Oriole*, 581 A.2d at 142. The issue presented to the court in that case was whether the New Jersey Supreme Court's ruling in *Tischio*, which prohibited the use of retrograde extrapolation as a defense in DWI cases, should be held to ban the use of retrograde extrapolation under any circumstances. The *Oriole* court held that it was proper for the prosecution to use retrograde extrapolation to prove that a defendant was guilty in a criminal case. *Id.* at 142. It would not, however, be permissible for the same defendant to use retrograde extrapolation as a defense in a DWI prosecution stemming from the same incident. Charges of death by auto and DWI may be separated in New Jersey so that a jury is trying the death by auto and a judge is trying the DWI. The same evidence is presented, but the jury may consider evidence of retrograde extrapolation

E. *Application of Extrapolation to* Schmerber

A necessary consideration in determining whether a sufficient emergency exists to find an exception to the warrant requirement is the length of time necessary to obtain a search warrant, balanced against the likelihood of the destruction of evidence.[71] The availability of telephone search warrants[72] has increased greatly in the almost thirty years since *Schmerber* was decided. Perhaps, in 1966, six hours was insufficient time to secure a search warrant because there was no provision for telephone search warrants. Today, however, two hours is more than sufficient to secure a routine search warrant.

Presently, we have immediate telephone restraining orders in domestic violence matters.[73] No more time would be required for an officer to obtain a telephone search warrant authorizing the drawing of blood in a DWI investigation if probable cause existed than it would take the same officer to obtain a domestic restraining order.

The legal principles underlying *Schmerber* are still very sound. However, the pragmatic application of those principles to the current state of science and technology justifies a re-examination of the continued viability of the decision itself. While there may be no due process or Fifth Amendment prohibition against non-consensual blood drawing in DWI cases, there continues to be a serious Fourth Amendment consideration.

In addition, in 1966 when *Schmerber* was decided, a blood test was considered to be a minimal invasion and not particularly traumatic.[74] Today, however, the epidemic spread of the HIV virus[75] has serious implications on statutorily mandated blood testing of DWI suspects. With the spread of AIDS rising in exponential proportions, Trooper Wilk's proposal not only forces health care pro-

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while the judge may not. *See* State v. Calvacca, 489 A.2d 1199 (N.J. Super. Ct. App. Div. 1985).

71 Schmerber v. California, 384 U.S. 757, 771 (1966).

72 *See* State v. Valencia, 459 A.2d 1149 (N.J. 1983); N.J. CT. R. 3:5-3(b).

73 *See* N.J. STAT. ANN. § 2C:25-28(g) (West Supp. 1993) (granting the court the power to order emergent relief if the plaintiff is in danger of domestic violence). *See also* N.J. STAT. ANN. § 2C:25-24(a) (West Supp. 1993).

74 *Schmerber*, 384 U.S. at 771.

75 *Charting the Spread of AIDS*, SCI. NEWS, July 31, 1993, at 68. The Centers for Disease Control logged 47,095 cases of AIDS in 1992. This figure represents a 3.5% increase over the figures for 1991. *Id.*

fessionals to violate a perceived ethical duty, but also requires them to risk their lives by taking blood from a resisting patient. This risk may be part of the reason that some professionals are resisting an officer's orders to draw blood, especially if there is no medical purpose for the test. Regardless of claims that it is impossible to contract the AIDS virus by giving blood, it is possible that the drawing of blood could result in the health care professional sticking themselves with an infected needle and contracting the disease. It is still the perception of many that *any* intrusion of the body poses some danger of getting the disease.[76]

V. The Skinner *Issue*

Perhaps more on point to the proposed legislation is the decision of the Supreme Court in *Skinner v. Railway Labor Executives' Ass'n.*[77] The Court in *Skinner* reaffirmed the *Schmerber* rationale, however, it did not consider the continued viability of the *Schmerber* reasoning from a technological perspective, but simply assumed that the factual assumptions were still valid. *Skinner* involved the blood and urine testing of railroad employees.[78] The Court in *Skinner* was willing to tolerate blood testing without a particularized need because of the strong governmental interest in protecting the public safety and in deterring those responsible for the operation of the railroad equipment from doing so while under the influence of alcohol or drugs.[79]

While *Skinner* may seem analogous to the proposed legislation

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[76] Because *Schmerber* only requires that the blood be drawn in a medically acceptable manner and not necessarily by a medical doctor or nurse, it seems to make more sense to train and certify police personnel as paramedics to allow them to draw blood from a suspect for forensic purposes. We already train and certify police personnel as breath test operators. *See* N.J. ADMIN. CODE tit. 13, §§ 51-1.2 to -1.13 (1993). While such training and certification has been seriously questioned, the use of police officers rather than medical personnel would eliminate any resistance from the medical community and would ameliorate the problem suggested by Trooper Wilk. *See* State v. McMaster, 288 A.2d 583, 584 (N.J. Super. Ct. App. Div. 1972) (citing Schmerber v. California, 384 U.S. 757, 771-72 (1966)) (questioning the constitutionality of a medical test performed outside of a medical environment). The serious risks of the spread of the AIDS infection recognized in Snyder v. Mekhjian, will surely result in concern and resistance by law enforcement. 593 A.2d 318 (N.J. 1991). However, that expected resistance, whether objectively reasonable or not, fails to justify placing medical personnel at the same level of risk to accomplish a law enforcement function.

[77] 489 U.S. 602 (1989).

[78] *Id.* at 606.

[79] *Id.* at 606-20.

offered by Trooper Wilk at first glance, it is distinctly opposite. The *Skinner* scheme was administrative in nature, conducted by the employer or its agents, and distinctly non-criminal in nature.[80] The information secured by the blood or urine tests in *Skinner* was required to be preserved for independent testing by the accused.[81] However, no such safeguard is contemplated in the proposed legislation and the stated purpose of Trooper Wilk's proposal is for use in a quasi-criminal prosecution.

The Court in *Skinner* clearly recognized the exigent circumstances first addressed in *Schmerber*. It also recognized that the circumstances surrounding the investigation of train accidents were extremely complex and might last for days before the responsible party was identified.[82] The identification of the responsible party may be difficult because of the complex nature of the investigation in determining the cause of the accident before focusing upon the individual responsible for that cause. Under those circumstances, the *Schmerber* rationale becomes more tenable. Such rationale, however, is not applicable in the DWI circumstance. *Skinner* anticipated the drawing of blood from many to preserve evidence until a determination has been made as to the focus of the investigation.[83] In contrast, in a DWI context, a specific suspect has already been determined.

Additionally, *Skinner* recognized a consent for the blood tests founded in the employment relationship as a basis for the blood test invasion.[84] In contrast, New Jersey only has an implied consent statute that acts to authorize the required breath tests.[85] Although, some jurisdictions require blood, urine or saliva tests,[86] New Jersey does not.[87] Therefore, there is no consensual foundation for the proposed legislation that would authorize the physician to commit the necessary battery to draw the blood sample. Wilk's proposal

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80 *Id.* at 620-21.

81 *Id.* at 611.

82 *Id.* at 631.

83 *Id.* at 623.

84 *Id.* at 627-28.

85 N.J. STAT. ANN. § 39:4-50.2 (West 1990). *See also* State v. Tabiz, 322 A.2d 453 (N.J. Super. Ct. App. Div. 1980).

86 *See, e.g.*, DEL. CODE ANN. tit. 21, § 2740 (1993) (requiring blood, urine and saliva tests).

87 New Jersey's implied consent statute states that motorists give consent for the taking of breath, but not blood. N.J. STAT. ANN. § 39:4-50.2 (West 1990).

needs to add an implied consent for the drawing of blood; a change which is easily made, but not desirable. *Skinner* recognized the vast difference in the degree of intrusion among breath tests and blood or urine tests.[88]

Trooper Wilk correctly expresses the avowed intent and policy of the New Jersey Supreme Court and of the lower courts to eradicate drunk driving and all of the evils that flow from that conduct.[89] The mere fact that a government or a court has a strong desire to curb certain conduct, in this case DWI, does not necessarily mean that constitutional considerations must be sacrificed. Constitutional safeguards transcend the desire for expedient administration of quasi-criminal laws.[90]

VI. The Physician/Patient Privilege

A. *Introduction*

The physician/patient privilege is the most troublesome aspect of the legislative proposal suggested by Trooper Wilk. It is unimportant whether the privilege exists, because the privilege is perceived to exist by most people.[91] Our society favors various privileges that foster complete, accurate and candid communications between those being served and various professionals.[92] New Jersey

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88 489 U.S. at 626.

89 Wilk, *supra* note 1, at 349-50. Trooper Wilk is correct that the New Jersey Supreme Court has found a legislative intent to punish drinking drivers. *See* State v. Tischio, 527 A.2d 388 (N.J. 1987). *But see* Wherry, *supra* note 41.

90 McLean v. Moran, 963 F.2d 1306 (9th Cir. 1992); Morgan v. Shirley, 958 F.2d 662 (6th Cir. 1992); Wherry, *supra* note 41. It is more than arguable that the law does not change or effectively control human behavior, but rather reflects the needs and values of the individuals within society. *See generally* LARRY D. BARNETT, LEGAL CONSTRUCT, SOCIAL CONCEPT (1993). However, the mere reflection of society's wishes does not justify ignoring constitutional protections. There are less constitutionally offensive methods of accomplishing that responsiveness to perceived societal demands. *See, e.g.*, Martin A. Kotler, *Imposing Punitive Damage Liability to the Intoxicated Driver*, 18 AKRON L. REV. 255 (1984) (noting that the solutions to curb drinking and driving include: modifying law enforcement techniques to aid in the apprehension of drinking drivers; imposing harsh criminal penalties against violators; creating educational programs; and assessing punitive or exemplary damages against the intoxicated driver in civil cases). For example, the Bankruptcy Code does not allow a person who has sustained liability to another because of driving while intoxicated to discharge that debt in bankruptcy. 11 U.S.C. § 523(a)(9) (1993).

91 *See supra* note 10.

92 *See, e.g.*, N.J. STAT. ANN. § 2A:84A-20 (West 1976) (protecting the attorney/client relationship); N.J. STAT. ANN. § 2A:84A-23 (West 1976) (priest/penitent privi-

has statutorily recognized the physician/patient privilege[93] for almost all purposes except drinking and driving related offenses. The New Jersey Supreme Court has found that this privilege does not exist in the narrow circumstances of motor vehicle violations.[94]

B. Dyal

In *State v. Dyal*,[95] the New Jersey Supreme Court allowed an inroad into the physician/patient privilege in criminal cases under certain limited circumstances. In *Dyal*, the defendant was charged with death-by-auto after he lost control of the car he was driving and his passenger was fatally injured.[96] Dyal was transported to a hospital where a blood sample was drawn that showed a serum alcohol reading of 0.161%.[97] At the time of the accident, the responding officer did not detect the odor of alcohol on the defendant. In fact, after he saw to the transport of Dyal and his passenger, the officer returned to the scene of the accident to place flares on the road and to question a witness.[98] It was not until four days later, upon a report by two of the deceased's coworkers that revealed alcohol consumption by the defendant, that the officer obtained a subpoena and received the results of the blood test that had been performed on the defendant.[99] The serum blood alcohol was converted to a BAC reading of 0.12%[100] and the defendant was charged with a violation of N.J. STAT. ANN. § 39:4-50, operating a motor vehicle while under the influence of alcohol[101] and subsequently charged with death-by-auto in violation of N.J. STAT. ANN. § 2A:113-9.[102] The trial court denied the defendant's motion to suppress the evidence as violative of the phy-

lege); N.J. STAT. ANN. § 2A:84A-22.15 (West Supp. 1993) (victim's counselor privilege); N.J. STAT. ANN. § 45:14B-28 (West Supp. 1993) (psychologist/patient privilege); N.J. STAT. ANN. § 2A:84A-22.2 (West 1976) (protecting the physician/patient relationship in all cases except DWI).

93 N.J. STAT. ANN. § 2A:84A-22.2 (West 1976).

94 State v. Schreiber, 585 A.2d 945 (N.J. 1991).

95 478 A.2d 390 (N.J. 1984).

96 *Id.* at 392-93.

97 *Id.* at 392.

98 *Id.*

99 *Id.*

100 *Id.* at 393. The serum blood test value must be divided by 1.16. *See supra* note 29 and accompanying text.

101 478 A.2d at 393.

102 *Id.*

sician/patient privilege and the defendant was convicted of the charges.[103] The appellate division reversed the conviction because of the violation of the physician/patient privilege.[104]

The New Jersey Supreme Court overruled the appellate division and held that to obtain the results of a blood test protected by the physician/patient privilege, the police should apply to a municipal court judge for a subpoena duces tecum. If the police could show that they had a reasonable basis to believe that the defendant was operating a motor vehicle while under the influence of alcohol, the judge could issue the subpoena.[105] The basis for the decision was that in balancing the privilege with "the clear public policy of this State . . . to rid the highways of drunken drivers," the privilege was not as important as the interests of public safety.[106] The court held that one of the important considerations in obtaining access to blood test results pertaining to criminal investigations was the existence of probable cause as determined by a neutral and detached judicial officer.[107]

Whether *Dyal* was an appropriate decision from a societal perspective, the court recognized that the privacy interest in communication between a patient and the patient's physician was an important interest to be protected by the law.[108] That important interest was to be invaded only after a high level of scrutiny by the courts, in their dual role as a buffer between police and citizens and as a protector of individual rights. Based upon that court's analysis, the conviction of Peter Dyal was reversed and the matter remanded to the trial court.[109]

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103 *Id.*

104 *Id.*

105 *Id.* at 391.

106 *Id.* at 394.

107 *Id.* at 395.

108 *Id.* at 394.

109 This author was the attorney for Peter Dyal on remand. On remand, prior to an examination of the issue of probable cause and compliance by the police with the conditions established by the New Jersey Supreme Court, the case was sentence bargained to ensure that the defendant would not face potential incarceration, a sentence bargain that was not available prior to the original trial. The pragmatic interests of the defendant took precedence over the need to further litigate the issue and clarify the law. In that context, *Dyal* is in actuality an unfinished case.

C. Bodtman

In *State v. Bodtman*,[110] the court readdressed the issue of the standard to be applied when an application is made for a subpoena for medical records in connection with an alcohol-related violation. In *Bodtman*, the defendant was injured when her car crossed the dividing line and sideswiped one car before colliding head-on with a second car.[111] She was transported to the hospital where she was treated for her injuries.[112] The next day, an emergency room nurse called the police and informed them that a blood test had showed Ms. Bodtman's BAC to be 0.24%.[113] The investigating officer then applied for a subpoena duces tecum, as recommended in *Dyal*.[114] A municipal court judge granted the officer's request and the records were turned over. A motion to suppress the evidence was granted in part by the court.[115] The appellate division reversed and remanded the case to the law division so that an adequate factual determination could be made.[116] Its conclusion was "that less than probable cause is required for the issuance of a *Dyal* subpoena . . . ."[117] However, *Bodtman* did not change the fact that the privilege was to be protected absent scrutiny by a neutral judge.

Strangely, both *Dyal* and *Bodtman* did not require a search warrant, but rather opted for a new document, a subpoena based upon a finding of either probable cause or reasonable basis.[118] New Jersey created a new privacy invasion (a subpoena) with a new standard of scrutiny (reasonable basis).[119] Equally strange, the

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110 570 A.2d 1003 (N.J. Super. Ct. App. Div. 1990).

111 *Id.* at 1004.

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.* at 1005.

116 *Id.* at 1012.

117 *Id.* at 1007.

118 *Dyal* arguably requires probable cause to be found by the judge sitting in the location where the hospital is located. 478 A.2d 390, 396 (N.J. 1984). *Bodtman* appears to interpret *Dyal* to require only that the prosecution make a showing of reasonable basis. 570 A.2d at 1012.

119 *Bodtman* actually lowers the standard set forth in *Dyal*. *Dyal* states specifically that "[g]iven the protection accorded blood test results by the statutory privilege, we believe that a subpoena for records of those tests should be treated as the functional equivalent of a search warrant." 478 A.2d at 396. Although the standard used for the issuance of a search warrant is probable cause, the *Dyal* court remanded the matter with the instructions that the lower court should determine "whether sufficient objective facts support the conclusion that the police had a reasonable basis to believe that

court clearly creates a new and unusual use of a subpoena. Subpoenas are ordinarily used to compel the attendance of a person or thing at a "proceeding."[120] A police investigation is not a "proceeding" in the usual meaning of that word. Of necessity, in a DWI case, at the time appropriate for a blood test authorization, no complaint has been filed because the investigating officers do not have sufficient probable cause to institute the prosecution absent the information from the protected blood test.[121]

D. Schreiber

State v. Schreiber[122] presented an even more unusual factual scenario and resulted in another unusual New Jersey Supreme Court decision eroding defendants' rights and protections in the DWI arena. A comprehensive examination of the facts of *Schreiber* is necessary to fully address the effect of the legislation proposed by Trooper Wilk.[123]

After her one-car accident, Ms. Schreiber was removed from the scene of the accident by local emergency personnel simultaneously with the arrival of the police.[124] The police interviewed a wit-

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defendant was intoxicated at the time of the accident." *Id.* at 397. The *Bodtman* court used this language to interpret *Dyal* as requiring something less than probable cause for the issuance of the subpoena. 570 A.2d at 1007. The *Bodtman* court also relied upon State v. Hall, 461 A.2d 1155 (N.J. 1983), *cert. denied*, 464 U.S. 1008 (1983). *Hall* required a "reasonable and well-grounded basis to believe" the facts presented for the subpoena. *Id.* at 1160. The *Bodtman* court felt that *Dyal* required less, due to the absence of the phrase "well-grounded." 570 A.2d at 1007. The court also stated in a footnote that there may be an issue as to whether the physician/patient privilege even applies to a DWI case. 570 A.2d at 1009 n.7. The court noted: "[t]hus, if the statute is to be construed strictly, it does not by its language apply to a prosecution for a violation of the motor vehicle laws which, although *quasi*-criminal, are not a prosecution for a crime." *Id.*

120 A "proceeding" is defined as "the succession of events constituting the process by which judicial action is invoked and utilized." BARRON'S LAW DICTIONARY 377 (3d ed. 1991)

121 *See* State v. Coccomo, 427 A.2d 131 (N.J. Super. Ct. Law Div. 1980) (holding that a police officer must have a reasonable and articulable belief that the driver was intoxicated).

122 585 A.2d 945 (N.J. 1991).

123 This author was the attorney for Linda Schreiber through the trial level. Following that, this author's law firm continued with the representation of Ms. Schreiber following the author's retirement from the practice and his entry into academia. Because of the author's desire and obligation not to violate the privilege that exists between him and Ms. Schreiber and because of an honest respect for her privacy interests, certain facts will not be completely disclosed herein.

124 585 A.2d at 946.

ness to the accident but were unable to interview the accused because of her injuries.[125] Schreiber's injuries were very numerous and severe. She was treated as an inpatient for twenty-nine days. Once her treating physician was satisfied that her injuries were sufficiently healed, he prepared to discharge her medically. The physician, however, placed certain conditions on her release that she was not willing to accept. She discharged herself against physician's orders to be with her family for the upcoming holidays.

For whatever his reasons, on that twenty-ninth day the doctor notified the Hopewell Township Police of the hospital blood test results (0.26% BAC), which had been taken and used solely for medical purposes.[126] At that point in time, the police had no probable cause (or even reasonable basis) to apply for a *Dyal* subpoena.[127] The treating physician clearly violated the reasonable expectations of privacy that Schreiber subjectively expected and that would have been objectively and reasonably expected by anyone.

The Hopewell Township Police applied for a *Dyal* subpoena and their request was granted based upon the telephone call from the physician.[128] The records were provided and Schreiber was charged with DWI within the applicable statute of limitations.[129] A motion was filed in the trial court for the suppression of the evidence supplied by the physician and hospital on the basis of a violation of the physician/patient privilege.[130] That motion was denied.[131] The quasi-criminal case proceeded through the courts, resulting in Ms. Schreiber's conviction based upon the medical

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125 *Id.*

126 *Id.* Coincidentally, New Jersey has a thirty-day statute of limitations for DWI offenses. N.J. STAT. ANN. § 39:5-3 (West 1990).

127 As of the date of the phone call to the local police, *Bodtman* had not yet been decided. The legal community was following the clear language of *Dyal* requiring probable cause for the issuance of a subpoena duces tecum. State v. Dyal, 478 A.2d 395 (N.J. 1984).

128 585 A.2d at 946.

129 *See* N.J. STAT. ANN. § 39:5-3.

130 *See* N.J. CT. R. 3:5-7. Not only were the records of the blood-alcohol test results of Linda Schreiber supplied to the local prosecutor, but her entire medical record was provided. This circumstance was clearly not authorized by the subpoena under *Dyal* or *Bodtman*, no matter how liberal a reading is given to that document or to either of those cases. This is an example of the other abuses that will be occasioned by the continued availability of blood test results for drinking drivers and would be exacerbated by Trooper Wilk's legislative proposal.

131 585 A.2d at 946.

records. Simultaneously, a civil action was filed against the treating physician and the hospital.[132] That suit alleged, inter alia, a violation of the physician/patient privilege.[133]

The New Jersey Supreme Court decided that the physician/patient privilege was a creature of statute, not of common law.[134] The statute in question[135] provides for a physician/patient privilege in all criminal, civil and juvenile cases.[136] *Dyal*[137] was a criminal case. The original erosion of the privilege was fashioned in a case clearly covered by the statutorily created protection. Because the court had previously decided that motor vehicle cases were not criminal[138] but rather quasi-criminal,[139] the court found that the legislative intent was to exclude motor vehicle offenses from the protections afforded by the statute.[140]

Perhaps with an awareness of the pending civil litigation, the New Jersey Supreme Court in *Schreiber* recognized a physician's ethical obligation to not reveal a patient's confidences and acknowledged potential civil liability to the physician for such a revelation.[141] It is anomalous that the court would find no privilege existing in the law, but would find a civil cause of action for a violation of the same privilege. The onus was placed upon the physician to determine whether to sacrifice personal assets if that phy-

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132 Schreiber v. Princeton Medical Center & Dr. Davidson, No. 88-3116 (N.J. Super. Ct. Law Div. filed July 21, 1988). *See infra* note 142.

133 *Id.*

134 585 A.2d at 947.

135 N.J. STAT. ANN. § 2A:84A-22.2 (West 1976).

136 *Id.*

137 478 A.2d 390 (N.J. 1984).

138 New Jersey is one of only three states that do not afford DWI prosecutions the full protection of law; they are not considered sufficiently serious as to afford all criminal rights. *See* State v. Hamm, 577 A.2d 1259 (N.J. 1990). *See also* Blanton v. City of North Las Vegas, 748 P.2d 494 (Nev. 1987).

139 585 A.2d at 947. *See also* State v. Macuk, 268 A.2d 1, 6-9 (N.J. 1970) (stating that a prosecution for a motor vehicle violation is not a "criminal violation" and holding that the Miranda warnings are inapplicable to all motor vehicle violations).

140 585 A.2d at 947. The decision in *Dyal* had about the same logic in legislative interpretation as did State v. Tischio, 527 A.2d 388 (N.J. 1987). It was just another example of the court's inappropriate judicial legislation in their rush to convict DWI offenders. Wherry, *supra* note 41. A logical extension of the *Schreiber* opinion is that the lawyer/client or even priest/penitent privilege must yield to the court's need to eradicate DWI.

141 585 A.2d at 949.

sician decides to reveal "unprotected" patient confidences.[142]

E. Tarasoff *or Not*

There was no *Tarasoff*[143] issue presented in *Schreiber* because there was no articulated threat against any identifiable individual. *Tarasoff* was a case where a psychotherapist had knowledge that his patient was likely to harm a specific individual and took no action to avoid that danger. The court found that the psychotherapist had a responsibility to use reasonable care to protect another if he determined that his patient may present a serious danger to an identifiable victim.[144]

The perceived danger in a DWI case is general in nature. In any event, *Tarasoff* is irrelevant to the issue discussed in Trooper Wilk's legislative proposal because *Tarasoff* was not the basis of any DWI decision. It is also inconceivable to envision a factual scenario where the *Tarasoff* concerns would exist in the context of a DWI case.

F. *Basic Problems with Wilk's Proposal*

Two significant problems with Trooper Wilk's legislative proposal now become glaringly apparent: first, society's historical need for a secure and private relationship with one's physician; and second, the tension that will result from the extra-judicial, police-caused compulsion for physicians to reveal patients' confidences at the risk of losing their personal assets or the risk of quasi-criminal prosecution. This is a true Hobson's choice. The historical basis for the physician/patient privilege is found in the need for complete and candid disclosure by the patient of all relevant information needed by the physician to treat that patient.[145] The overriding societal need to ensure the sanctity of the relationship between a physician and a patient to ensure the health, continued life and proper treatment of a patient is well-founded in natural law[146] and medical ethics.[147] It is beyond the right of the Legisla-

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142 Following the New Jersey Supreme Court's decision in *Schreiber* regarding the DWI issue, the civil case settled.

143 Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976).

144 *Id.* at 334.

145 *Schreiber*, 585 A.2d at 949.

146 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 72, at 268-70 (4th ed. 1992). McCormick states that "[t]heir warrant is the protection of interests and relationships

ture to interfere with such a moral imperative.

VII. The Physician's Perspective

Even recognizing the terrible havoc caused by drunken drivers on our highways,[148] individual rights cannot be sacrificed to the "cause of the moment." If citizenry loses respect for its government, anarchy will result.[149] Consider a well-informed individual returning home from dinner with friends, being involved in an unfortunate accident and being transported to a local hospital for necessary emergency treatment. Consider further the doctor telling the patient that the drawing of blood is necessary to make medical decisions regarding the patient's care. The patient then asks the doctor whether the results of the blood test will remain confidential; perhaps because he is concerned about sexually transmitted disease, the appearance of alcohol from the wine that the patient had consumed with dinner or the marijuana cigarette that the patient had smoked a week before. The doctor (pursuant to current law and under Trooper Wilk's proposal) will be forced to answer that the test results will remain confidential, unless the police request them.

Consider the invasion into the physician/patient relationship when that same physician approaches the patient and says, "Excuse

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which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice." *Id.* (citing State v. 62.9647 Acres of Land in New Castle Hundred, 193 A.2d 799 (Del. Super. Ct. 1963) ("These goals are promoted in furtherance of a well-organized, peaceful society, which in turn is considered necessary for human survival.")).

147 The New Jersey statute protects the physician/patient privilege, in all cases except DWI, because the New Jersey Legislature obviously felt that this privilege was important enough to merit continued protection. *See* N.J. STAT. ANN. § 2A:84A-22.2. As discussed by Trooper Wilk, the Federal Rules of Evidence do not protect this relationship. Wilk, *supra* note 1, at 352. It is obvious that the Legislature has made a conscious choice to maintain the privilege. It is the judiciary in New Jersey that has determined legislative intent to take stronger steps to eradicate drunk drivers. *See* State v. Schreiber, 585 A.2d 945 (N.J. 1991).

148 For the sake of argument, Trooper Wilk's reliance on the figures released by the National Highway Traffic Safety Administration will be accepted as valid. *See* Wilk, *supra* note 1, at 334. These figures indicate that of the 55,000 people killed each year on the nation's highways, alcohol is responsible for more than half of those deaths. *Id.*

149 The Supreme Court has observed that "[n]othing can destroy a government more quickly than its failure to observe its own laws . . . ." Mapp v. Ohio, 367 U.S. 643, 659 (1961).

me, but I'll have to interrupt the things that I am doing to help heal you because Trooper Wilk is here and requires that I draw a blood sample from you.[150] I don't want to do it, but if I don't he will arrest me." Consider also the effect of such a conversation on the decision by the patient to continue with medical supervision and treatment. Consider the effect of the proposed legislation on decisions made at the scene of the accident by an injured motorist to seek medical treatment.

For a physician who takes seriously the ethical prohibition of revealing a patient's confidences, or who simply wishes not to place personal assets at risk, the choice is very limited under Wilk's proposal when confronted by a police officer who requests the drawing of blood. That physician may either violate personal ethical beliefs and risk possible peer or civil discipline, or face governmental prosecution for refusal to obey the officer. Must each emergency room doctor have a lawyer on hand to render advice in every case?

Additionally, who is going to pay the costs of increased malpractice insurance that will have to be carried by the physicians due to potential suits by patients? Who will pay for the potential increased danger of infection to the doctor that could result from drawing blood from an unruly patient attempting to resist (perhaps correctly) the involuntary taking of blood?

Rather than adopting Trooper Wilk's proposed legislation, it is suggested that the New Jersey Legislature amend the physician/patient privilege statute[151] to specifically include motor vehicle violations, as was obviously the real intent of the Legislature in the original statute. More than enough information is available to police from medical personnel in DWI cases as the result of *Dyal*[152] and *Bodtman*.[153]

VIII. Congressional Policy

While there is an overriding public policy to free the highways

150 Trooper Wilk's proposal does not even give the physician or the patient the protection of a neutral judicial review. The proposal simply requires medical personnel to draw blood if requested by a police officer. Wilk, *supra* note 1, at 356-57.

151 N.J. STAT. ANN. § 2A:84A-22.2 (West 1976).

152 478 A.2d 390 (N.J. 1984).

153 570 A.2d 1003 (N.J. Super. Ct. App. Div. 1990).

of drunken drivers,[154] there are countervailing congressional policies that reflect a real concern about the privacy within the health care institutions. These overriding policy concerns portend poorly for legislation such as that proposed by Trooper Wilk. A federal statute specifically and severely limits the disclosure of any information relating to, inter alia, the treatment of any person for substance abuse.[155] The relevant exception to the prohibition of the release of such information is conditioned upon the issuance of a subpoena by a court of competent jurisdiction, after that court balances the public interest and need for disclosure against the injury to the patient and/or to the physician/patient relationship.[156] There is a specific prohibition against the use of any such information to "initiate or substantiate any criminal charge."[157]

Admittedly, the cited statute applies only to institutions that benefit from federal funds.[158] As a practical matter, that encompasses virtually every hospital likely to be the subject of a police request to draw blood for forensic purposes. The issue exists as to whether the patient is being treated for alcohol abuse. The operation of a motor vehicle while intoxicated clearly involves the abuse of alcohol. The physician needs to know the level of intoxication to treat other illnesses or injuries and therefore must "manage" the condition of insobriety.

Whether or not the cited statute was intended to apply to circumstances such as blood test results in a DWI prosecution, it clearly does. The fact is that Congress determined that confidentiality in alcohol cases was a sufficiently significant interest to justify legislation to ensure and protect the confidentiality in these cases. A state statute, such as the one proposed by Trooper Wilk, would require the commission of federal criminal conduct and would also authorize conduct that would jeopardize continued federal funding to the hospital in question.

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154 *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) (noting the indisputable nature of the problem of drunk driving).

155 42 U.S.C. § 290dd-2 (1993).

156 *Id.* § 290dd-2(b)(2)(C).

157 *Id.* § 290dd-2(c). The statute has exceptions for certain specific charges such as child abuse. *Id.* § 290dd-2(e).

158 *Id.* § 290dd-2(a).

IX. Conclusion

Recognizing the statutory right of a defendant to have an independent blood, breath or urine test,[159] and the duty of the government to not affirmatively interfere with that right and for the government to have in place a written, affirmative policy of noninterference[160] with that legislatively created right, any statutory proposal for ensuring physician cooperation must contain a similar provision for a *pro se* defendant or defense lawyer. The New Jersey State Police Breath Test Unit is the only qualified agency to certify breath test operators.[161] However, they refuse to allow anyone other than a police officer or Ph.D. scientist to take the course.[162] Effectively, therefore, if the proposed statute does not allow defendants and defense lawyers to demand that alcohol tests be performed, the statutory rights of the defendants to an independent test are a governmentally created impossibility.

Trooper Wilk's proposal, as written, would erode the rights of DWI defendants to a greater extent than is tolerable under the current state of statutory law in New Jersey. Even assuming that the legislative intent exists as the judiciary has found,[163] Trooper Wilk's proposal violates the most basic expectations of citizens: the right of privacy, with no form of judicial review contemplated by the proposed legislation. Is the request of a police officer, perhaps one who is tired after a long patrol, sufficient to override the Fourth Amendment rights of citizens to be secure against bodily invasions?

Schmerber[164] acknowledged that the drawing of blood was a violation of the Fourth Amendment, but assumed that an exigent circumstance existed for the drawing of blood.[165] In New Jersey,

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159 *See* N.J. STAT. ANN. § 39:4-50.2(c) (West 1990).

160 State v. Nicastro, 527 A.2d 492, 495 (N.J. Super. Ct. Law Div. 1986).

161 *See* N.J. ADMIN. CODE tit. 13, §§ 51-1.4 to -2.1(a) (1992).

162 This author has personally had an emergency room physician refuse to take a blood sample from a death by auto suspect after the police conducted a breath test because the request did not come from the police. In addition, this author has requested that the New Jersey State Police Breath Test Unit allow him to take the breath test operator certification course, at his cost, with his own breathalyzer, to be a certified breath test operator so that he could conduct independent tests. That request was denied.

163 *See* State v. Tischio, 527 A.2d 388, 392 (N.J. 1987).

164 Schmerber v. California, 384 U.S 757 (1966).

165 *Id.* at 770.

Dyal[166] and *Bodtman*[167] contemplated some sort of judicial process that would protect the rights of the defendant while still protecting the rights of the public. The court in *Schreiber*[168] recognized that the doctor in volunteering the information to the police may have violated his ethical duty to the patient by the breach of the physician/patient relationship.[169]

Trooper Wilk's proposal, although well-intentioned, is woefully insufficient to protect the rights of an accused in a DWI case. With all of the affronts to an accused's constitutional rights that have been offered by the New Jersey Judiciary,[170] this proposal represents another blow to the constitutional integrity in a DWI context.

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166 State v. Dyal, 478 A.2d 390 (N.J. 1984).
167 State v. Bodtman, 570 A.2d 1003 (N.J. Super. Ct. App. Div. 1990).
168 State v. Schreiber, 585 A.2d 945 (N.J. 1991).
169 *Id.* at 949.
170 Wherry, *supra* note 41.