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Cover Page Footnote

The author wishes to thank Larry E. Holtz, Adjunct Professor at Widener University School of Law, Wilmington, Delaware, for his assistance with this article. By being the "devil's advocate," disagreeing and engaging in intellectual argument, he helped the author to bring into focus the positions expressed herein. Further, the author wishes to thank his research assistant, BonnieAnn Brill-Keagy, for her invaluable assistance.

THE RUSH TO CONVICT DWI OFFENDERS: THE UNINTENDED UNCONSTITUTIONAL CONSEQUENCES

*E. John Wherry, Jr.**

I. INTRODUCTION

In this country, there is a rush to convict those accused of drinking-and-driving violations. This urgency is fueled by, among other factors, the public attitudes and the proselytizing of public interest groups such as Mothers Against Drunk Driving (MADD) and Students Against Drunk Driving (SADD).[1] At least one court, in a responsive effort to conform the judicial system to a perceived need to streamline and expedite drinking-and-driving prosecutions,[2] has been frustrated by

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1. *See* Martin A. Kotler, *Imposing Punitive Damage Liability On the Intoxicated Driver*, 18 AKRON L. REV. 255, 255 (1984); *see also* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the state's interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion."); Welch v. Wisconsin, 466 U.S. 740, 755 (1984) (Blackmun, J. concurring) (challenging the "national consciousness to face up to — and to do something about — the continuing slaughter upon our nation's highways, a good percentage of which is due to drivers who are drunk or semi-incapacitated because of alcohol or drug ingestion"); Perez v. Campbell, 402 U.S. 637, 657 (1971) (The "slaughter on the highways of this Nation exceeds the death toll of all of our wars."); Breithaupt v. Abram, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways . . . now reaches the astounding figure only heard of on the battlefield."); McLean v. Moran, 963 F.2d 1306, 1307 (9th Cir. 1992) ("We recognize the tremendous toll of death, injury, and grief caused by those who, under the influence of drugs, drive steel juggernauts capable of high speeds and devastating destruction.").

2. In State v. Tischio, 527 A.2d 388 (N.J. 1987), *appeal dismissed*, 484 U.S. 1038 (1988), the New Jersey Supreme Court interpreted recent statutory amendments as evidencing a legislative intention "to streamline the administration of the penal and regulatory laws in this area by eliminating the necessity for expert testimony at trial . . . ." *Id.* at 394. In the court's struggle to "curb the senseless havoc and destruction caused by intoxicated drivers," *id.* at 392, and to deal "with law enforcement efforts designed to curb one of the chief instrumentalities of human catastrophe, the drunk driver," *id.* (quoting State v. Grant, 483 A.2d 411 (N.J. Super. Ct. App. Div. 1984)) the court determined that a "pragmatic" interpretation of recent statutory amendments requires the removal of "obstacles impeding the efficient and successful prosecution of those who drink and drive." *Id.* at 393. According to this court, "one such impediment has been the introduction of conflicting expert testimony at [Driving While Intoxicated (DWI)] trials." *Id.* at 393. Consequently, in any DWI trial, New Jersey courts are instructed to "consistently [seek] to elimi-

the creativity of defense attorneys. This same court has also been frustrated by a perceived failure of the attorney disciplinary system to control the conduct of members of the defense bar.[3] The result of these perceptions has been the creation of intolerable circumstances in which those accused of a drinking-and-driving violation are routinely convicted at much less than the required standard of reasonable doubt.[4]

This Article analyzes the almost schizophrenic development of drinking-and-driving law from the perspectives of substantive law, the law of evidence, and the application of attorney disciplinary law. This analysis will disclose the unintended unconstitutional consequences caused by a confluence of these seemingly unrelated factors.

The union of these factors and the resulting unconstitutional consequences becomes particularly significant given that in 1990 there were 1,810,800 arrests for drinking-and-driving offenses in the United States.[5] A full one-third of those arrested for drinking-and-driving violations were twenty-five to thirty-five years old,[6] the age group most likely to perceive the nuances of protective constitutional concepts.[7] It is important that the populace of the country has confidence in the judicial system. "Nothing can destroy a government more quickly than its failure to observe its own laws . . . ."[8] Once the populace loses confidence in the fairness of adjudicating guilt, confidence is lost in the entire system of government.

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nate the necessity for expert testimony." *Id.* at 394; *see also* State v. Downie, 569 A.2d 242, 251 (N.J.) ("We must construe legislative intent . . . . The legislature wanted drunk drivers off the road. . . . Because of this we . . . continue to reject the admissibility of extrapolation evidence."), *cert. denied*, 498 U.S. 819 (1990); State v. Hammond, 571 A.2d 942, 948 (N.J. 1990) ("Our holdings . . . confirm a clear legislative intent and a strong legislative policy to discourage long trials complicated by pretextual defenses . . . [through the] efficient and vigorous enforcement [of New Jersey's DWI laws].").

It is interesting to note that six justices, instead of the usual seven, decided *State v. Downie* and *State v. Hammond*. Justice Clifford did not participate due to his arrest and conviction for driving while intoxicated. *See Downie*, 569 A.2d 242; *Hammond*, 571 A.2d 942.

3. *See In re* Edson, 530 A.2d 1246, 1250-51 (N.J. 1987); *see also* State v. Garcia, 618 A.2d 326 (N.J. 1993).

4. *See, e.g., In re* Winship, 397 U.S. 358 (1970); McLean v. Moran, 963 F.2d 1306 (9th Cir. 1992).

5. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 432, Table 4.1 (Timothy J. Flanagan & Kathleen Maguire, eds. 1991). This figure does not take into account those drinking drivers killed in motor vehicle accidents and therefore not arrested. It also does not take into account those drinking drivers who are undetected but who are, nonetheless, at risk for prosecution as the detection devices become increasingly more sophisticated and successful.

6. *Id.* In the 25- to 29-year-old age group, 305,300 arrests occurred. *Id.* Although the number of arrests in the 30- to 34-year-old age group was 253,878, this is still a significant figure. *Id.*

7. Nicholas L. Deangelis & Stephen J. Cutler, *Cohort Trends In Attitudes About Law And Order: Who's Leading The Conservative Wave?*, 55 PUB. OPINION Q. 24 (1991).

8. Mapp v. Ohio, 367 U.S. 643, 659 (1961).

Clearly, drinking drivers are a serious societal problem. At least one court has said:

> We do not view offenses arising from the driving of an automobile while intoxicated with benign indulgence. They are serious and deeply affect the safety and welfare of the public. . . . They are not victimless offenses. . . . We firmly endorse the governmental commitment to the eradication of drunk driving as one of the judiciary's own highest priorities.[9]

The focus of this Article will be on the development of New Jersey's drinking-and-driving law for two reasons. First, New Jersey has an Evidence Code almost identical to the Federal Rules of Evidence.[10] Secondly, New Jersey is, perhaps, the most demonstrable example of this intolerable unconstitutional result and the clearest example of a court's response to a perceived failure of the attorney disciplinary system. Similar concerns also exist, to a greater or lesser degree, in every state which has adopted an absolute per se[11] approach to Drinking While Driving (DWI)[12] prosecutions. An effort will be made to demonstrate the similarity of the application of the DWI statutes in the several states in order to emphasize the prevalence of the constitutional concerns that exist nationally.

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9. *In re* Collester, 599 A.2d 1275, 1277-78 (N.J. 1992). There is, however, a respected school of thought that the statistics supporting DWI legislation are skewed in favor of strict enforcement. *See* Nancy H. Mounce & Olga J. Pendleton, *The Relationship Between Blood Alcohol Concentration And Crash Responsibility For Fatally Injured Drivers*, 24 ACCIDENT ANALYSIS & PREVENTION 201 (1992); Richard Zylman, *Mass Arrests For Impaired Driving May Not Prevent Traffic Deaths*, *in* PROCEEDINGS OF THE SIXTH INTERNATIONAL CONFERENCE OF ALCOHOL, DRUGS AND TRAFFIC SAFETY 225 (1973); *see also* State v. D'Agostino, 495 A.2d 915 (N.J. Super. Ct. Law Div. 1984). It is more arguable that the law does not change human conduct but rather reflects the needs and values of individuals within society. DWI laws, therefore, may well be a reflection of society's intolerance to drinking-and-driving and the attendant damage caused thereby, rather than government's realistic attempt to control conduct.

10. *See generally* N.J. R. EVID. An effort will be made to make reference to the former New Jersey Evidence Rules because they are the rule numbers referred to in the cited cases, but reference will also be made to the collateral Federal Evidence Rules.

11. New Jersey became a per se jurisdiction in 1983 by judicial fiat. State v. Downie, 569 A.2d 242 (N.J.), *cert. denied*, 498 U.S. 819 (1990) (citing State v. Tischio, 527 A.2d 388 (1987), *appeal dismissed*, 484 U.S. 1038 (1988)). For a definition of a per se jurisdiction, see *infra* text accompanying notes 20-23.

12. DWI, which is an acronym for "Driving While Intoxicated," is used throughout this Article to refer to both per se and non-per se violations, unless noted otherwise.

II. SUBSTANTIVE LAW OF DRINKING-AND-DRIVING PROSECUTIONS

A. *Elements of a Drinking-and-Driving Prosecution*

The elements of a drinking-and-driving violation are essentially the same in every jurisdiction.[13] Those elements are: (1) operation of a motor vehicle on a highway or trafficway;[14] (2) within the jurisdiction of the court;[15] (3) reasonable and articulable suspicion for this initial inquiry;[16] (4) probable cause for arrest;[17] and (5) operation occurs while under the influence of an intoxicant, narcotic, or hallucinogenic, or with a blood (or in some jurisdictions, a breath) alcohol concentration above a prohibited level.[18] In some jurisdictions, the prosecution must prove that the accused operated a motor vehicle in a condition related to the consumption of alcohol or other prohibited substance, such that the accused's ability to operate the vehicle is adversely affected.[19]

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13. *See generally* U.S. DEP'T OF TRANSP., DIGEST OF STATE ALCOHOL-HIGHWAY SAFETY RELATED LEGISLATION 2-1 to 2-4 (2d ed. 1983) (summary charts of state drinking-and-driving legislation) [hereinafter U.S. DEP'T OF TRANSP.].

14. *See, e.g.*, Melandy v. State, 415 S.E.2d 62 (Ga. Ct. App. 1992); State v. Hines, 478 N.W.2d 888 (Iowa Ct. App. 1991); State v. Allex, 608 A.2d 1 (N.J. Super. Ct. App. Div. 1992); State v. Cole, 591 N.E.2d 1378 (Ohio Hamilton County Mun. 1992); Commonwealth v. Price, 610 A.2d 488 (Pa. Super. Ct. 1992). Even a snowmobile has been determined to be a vehicle. People v. Rogers, 475 N.W.2d 717 (Mich. 1991). Actual movement of a vehicle is not always necessary to prove operation. *See* State v. Sweeney, 192 A.2d 573 (N.J. 1963).

15. Brown v. State, 827 S.W.2d 174 (Ark. Ct. App. 1992); State v. Masat, 479 N.W.2d 131 (Neb. 1992); Reichaert v. State, 830 S.W.2d 348 (Tex. Ct. App. 1992).

16. Hammer v. Gross, 932 F.2d 842 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 582 (interim ed. 1991); State v. Markus, 478 N.W.2d 405 (Iowa Ct. App. 1991); State v. D'Angelo, 605 A.2d 68 (Me. 1992); State v. Ryland, 486 N.W.2d 210 (Neb. 1992); State v. Martinez, 615 A.2d 279 (N.J. Super. Ct. App. Div. 1992); State v. Roth, 827 P.2d 255 (Utah Ct. App. 1992).

17. Mullis v. State, 410 S.E.2d 182 (Ga. Ct. App. 1991); People v. Hawkins, 582 N.E.2d 243 (Ill. Ct. App. 1991); State v. Hunter, 581 N.E.2d 992 (Ind. Ct. App. 1991).

18. Most jurisdictions prohibit operation of a motor vehicle with a blood alcohol concentration (BAC) of 0.10% or higher, weight by volume. *See, e.g.*, CAL. VEH. CODE § 23152(b) (West Supp. 1994); NEV. REV. STAT. § 60,6196 (Supp 1993); N.J. STAT. ANN. § 39:4-50 (West 1990); WASH. REV. CODE ANN. § 46-61-502 (West Supp. 1993); *see also* Davis v. Commonwealth, 381 S.E.2d 11 (Va. Ct. App. 1989). Some jurisdictions prohibit operation of a motor vehicle with a BAC of 0.08% or higher. *See, e.g.*, ME. REV. STAT. ANN. tit. 29, § 1312-B(1)(B) (West 1964 & Supp. 1992); OR. REV. STAT. ANN. § 813.010(1)(a) (Supp. 1992); UTAH CODE ANN. § 41-6-44(1)(a) (1993).

Some states prohibit the operation of a motor vehicle with above a prohibited level of breath alcohol (BrAC). Cooley v. Municipality of Anchorage, 649 P.2d 251, 252 (Alaska Ct. App. 1982); People v. Capporelli, 502 N.E.2d 11, 13 (Ill. Ct. App. 1986); State v. Brayman, 751 P.2d 294 (Wash. 1988); *see also* OKLA. STAT. ANN. tit. 47, § 11-902(A)(1) (West Supp. 1994). In compliance with the Federal Highway funding laws, all states prohibit the operation of a commercial vehicle weighing 20,000 pounds or more with a BAC/BrAC of 0.045% or higher. *See generally* U.S. DEP'T OF TRANSP., *supra* note 13, at charts 2-1 and 2-4.

19. This Article will hereinafter refer to these jurisdictions as "non-per se jurisdictions."

In a per se jurisdiction, it is unlawful to operate a motor vehicle with a BAC/BrAC[20] above the statutorily prohibited level. In a per se jurisdiction, "DWI is an absolute liability offense requiring no culpable mental state."[21] Signs of intoxication, as witnessed by prosecution witnesses, are irrelevant in a prosecution for a per se violation.[22] Most jurisdictions have adopted per se legislation.[23]

Operation, the first element of a drinking-and-driving offense, is rarely at issue in a typical DWI trial because it does not often lend itself to a meaningful factual challenge.[24] Operation is generally easy to establish for various reasons. First, the arresting officer usually observes the operation.[25] The arrest may have resulted from a roadblock[26] or an automobile accident that resulted in police intervention.[27] Additionally, the accused may have admitted operating the motor vehicle

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20. BAC is a shorthand expression for blood alcohol concentration. BrAC is a shorthand expression for breath alcohol concentration. Breath alcohol represents only alcohol which is traceable on an individual's breath. BrAC measurement may or may not be representative of the quantity of alcohol that exists in an individual's blood. *See* State v. Downie, 569 A.2d 242 (N.J.), *cert. denied*, 488 U.S. 819 (1990). A number of factors may skew the results of a breath alcohol test, including: regurgitation, belching, passage of time since last consumption of alcoholic beverage, and use of dental adhesives. *See* State v. Nelson, 399 N.W.2d 629 (Minn. Ct. App. 1987) (eliminating burping or regurgitation defenses, destruction of video tape evidence defense, and simulator solution defense); Harvey M. Cohen & Richard Saferstein, *Mouth Alcohol Denture Adhesives And Breath Alcohol Testing*, 6 Drunk Driving Liquor Liability Reporter 24, 24 (1992); LAWRENCE TAYLOR, DRUNK DRIVING DEFENSE § 6.2.1 (3d ed. 1991).

21. State v. Fogarty, 607 A.2d 624, 628 (N.J. 1992); *see also* State v. Hammond, 571 A.2d 942 (N.J. 1990).

22. *See, e.g.*, Bodah v. District of Columbia Bureau of Motor Vehicles, 377 A.2d 1135 (D.C. 1977); People v. Teschner, 394 N.E.2d 893 (Ill. Ct. App. 1974); State v. Goding, 489 A.2d 579 (N.H. 1985); State v. Pistole, 476 N.E.2d 365 (Ohio Ct. App. 1984); Commonwealth v. Kemble, 605 A.2d 1240 (Pa. Super. Ct. 1992); *but see* McLean v. Moran, 963 F.2d 1306 (9th Cir. 1992) (holding that the Nevada statutory scheme of presumptions in DWI cases was unconstitutional as applied to defendant).

23. *See, e.g.*, CONN. GEN. STAT. ANN. § 14-227a(a)(2) (West Supp. 1993); DEL. CODE ANN. tit. 21, § 4177(b) (1985); MICH. COMP. LAWS ANN. § 257.625 (West Supp. 1993); OKLA. STAT. ANN. tit. 47, § 11-902(A)(1) (West Supp. 1994); W. VA. CODE § 17C-5-2(a)(1)(E) (1991); *see also* ANDRE A. MOENSSENS ET AL., SCIENTIFIC EVIDENCE IN CRIMINAL CASES § 2.08 (3d ed. 1986); Jennifer L. Pariser, *In Vino Veritas: The Truth About Blood Alcohol Presumptions in State Drunk Driving Law*, 64 N.Y.U. L. REV. 141 (1989).

24. For an excellent discussion of the types of circumstances in which defenses related to operation may arise, see TAYLOR, *supra* note 20, § 1.1.1.

25. State v. Schmidt, 825 P.2d 104, 105 (Idaho Ct. App. 1992).

26. *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1989); Delaware v. Prouse, 440 U.S. 648 (1979). For a thorough analysis of the different states' views on the constitutionality of roadblocks, see State v. Kirk, 493 A.2d 738 (N.J. Super. Ct. App. Div. 1986).

27. State v. Johnson, 613 A.2d 1344 (Conn. App. Ct. 1992), *aff'd*, 630 A.2d 1059 (Conn. 1993); State v. Dyal, 478 A.2d 390 (N.J. 1984).

after consuming a controlled substance.[28] Finally, a private citizen may have observed the incident and given consistent testimony.[29]

The second element that the prosecution must prove is that the prohibited activity took place within the jurisdiction of the court. Jurisdiction, like operation, is an element that is seldom contested. The element of jurisdiction is seldom litigated because the issue is easily established. Location within the jurisdiction is easily established through testimony of observation of operation within the jurisdiction, where an accident occurred, or where the operator's vehicle was found.[30] Even if disputed, this element is amenable to factual resolution within the adversarial system by using such things as maps, the court viewing the scene, and judicial notice by the judge.

The third and fourth elements of a drinking-and-driving prosecution are the constitutional foundation for the forensic tests to prove intoxication or a per se violation. An arrest resulting from a reasonable and articulable suspicion for the motor vehicle stop or from police intervention in the driving conduct of the operator, which matures into probable cause to arrest, constitutes the constitutional underpinning for the chemical breath test or other forensic test for blood or breath alcohol.[31]

The last element of a drinking-and-driving prosecution is composed of two separate methods of proving the same violation.[32] The first, a non-per se method of proof, requires that the prosecution prove that the accused was operating a motor vehicle while under the influence of a prohibited substance.[33]

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28. *See* State v. Stiene, 496 A.2d 738 (N.J. Super. Ct. App. Div. 1985); *see also* State v. Morse, 252 A.2d 723 (N.J. 1969).

29. Peterson v. Tipton, 833 P.2d 830, 832 (Colo. Ct. App. 1992), *cert. denied*, 1992 Colo. LEXIS 716 (Colo. Aug. 3, 1992); People v. Glisan, 599 N.E.2d 1337, 1338 (Ill. Ct. App. 1992); State v. Roth, 827 P.2d 255, 256 (Utah Ct. App. 1992).

30. State v. Zachary, 601 So. 2d 27 (La. Ct. App. 1992).

31. Breath tests or other scientific tests to determine BAC/BrAC depend upon a valid arrest as the Fourth Amendment justification for the search and seizure related to that activity. *See* Schmerber v. California, 384 U.S. 757 (1966); People v. Selby, 608 N.E.2d 961 (Ill. Ct. App. 1993). Implied consent statutes generally speak of consent given to test the arrested person's breath. *See, e.g.*, N.J. REV. STAT. ANN. § 39:4-50.2 (West 1990); TEX. REV. CIV. STAT. ANN. § 6701l-5 (West Supp. 1994).

32. Every state provides for dual modes of proof in its statutory scheme for DWI violations. *See generally* MOEMSSENS, *supra* note 23.

33. As well as prohibiting motor vehicle operation while under the influence of alcohol, statutes generally prohibit operation of a motor vehicle while under the influence of other prohibited substances such as narcotics or hallucinogens. *See, e.g.*, ALASKA STAT. § 28.35.30 (Supp. 1993); ARIZ. REV. STAT. ANN. § 28-692 (Supp. 1993); CAL. VEH. CODE § 23153 (West 1985 & Supp. 1994); COLO. REV. STAT. ANN. § 42-4-1202 (West 1990 & Supp. 1993); CONN. GEN. STAT. ANN. § 14-227a (West Supp. 1993); N.J. REV. STAT. ANN. § 39:4-50 (West 1990); *see also* People v. Keith, 7 Cal. Rptr. 613 (Cal. App. Dep't Super. Ct. 1960); Commonwealth v. Wallace, 439 N.E.2d 848 (Mass. App. Ct. 1982).

To establish guilt of an "under the influence"[34] violation, the prosecution routinely presents various methods of proof and types of evidence. The evidence may include witnesses or an arresting officer's observations of the aberrant operation of the vehicle or the operator.[35] Lay opinion is admissible to prove insobriety,[36] at least where alcohol is the prohibited substance.[37] In addition, evidence of performance of balance tests may be considered.[38]

Evidence of BAC as determined by a breath, blood,[39] urine, or saliva test may also be used to create inferences or presumptions of intoxication.[40] The results of breath tests may or may not be relevant in the non-per se prosecution described above.[41] In such a jurisdiction, the test results do not establish a violation, but are merely rebuttable evidence of guilt or innocence.[42] As in all criminal prosecutions, the trier

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34. The term "under the influence" does not mean that the accused was sodden with alcohol or falling down drunk, but rather means that the accused's ability to operate the vehicle was deleteriously affected by the consumption of a prohibited substance. *See* State v. Johnson, 199 A.2d 809, 819-20 (N.J. 1964); *see also* State v. Rogers, 102 A. 433, 435 (N.J. 1917).

35. People v. Sherwood, 555 N.Y.S.2d 464 (N.Y. App. Div. 1990).

36. FED. R. EVID. 701; N.J. R. EVID. 56(1) (1976); *see also* State v. Johnson, 576 A.2d 834, 850-51 (N.J. 1990); State v. Phillips, 517 A.2d 1204, 1210 n.6 (N.J. Super. Ct. App. Div. 1986).

37. Lay opinion testimony is generally not admissible if the substance is a narcotic or a hallucinogen. State v. Jackson, 304 A.2d 565, 566 (N.J. Super. Ct. App. Div. 1973), *cert. denied*, 310 A.2d 468 (N.J. 1973); State v. Tiernan, 302 A.2d 561, 564 (N.J. Super. Ct. App. Div. 1973). *But see* People v. Quinn, 580 N.Y.S.2d 818 (N.Y. Dist. Ct. 1991).

38. State v. Morton, 181 A.2d 785, 787, *aff'd*, 189 A.2d 216 (N.J. 1962). Other observations are relevant, such as the ability to recite the alphabet accurately. State v. Maze, 825 P.2d 1169, 1173 (Kan. Ct. App. 1992).

39. In some jurisdictions, such as Wisconsin, the tests are not only for alcohol in the blood (BAC), but also for alcohol on the breath (BrAC). *See* WIS. STAT. ANN. § 3346.63(1)(b) (West 1991). The reason for using BrAC rather than BAC is to avoid the scientific challenges available resulting from the 2100:1 controversy discussed *infra* note 105. *See* State v. Downie, 569 A.2d 242, 251 (N.J.), *cert. denied*, 498 U.S. 819 (1990). In effect, after *Downie*, New Jersey became a BrAC jurisdiction. *Id.*

40. Typically, a test result of 0.0% to 0.049% BAC/BrAC will give rise to a presumption of sobriety. *See, e.g.*, N.J. REV. STAT. ANN. § 39:4-50 (West 1990); PA. STAT. ANN. tit. 75, § 1547(d)(1) (1977). A test result from 0.05% to 0.099% BAC/BrAC will give rise to no inference or presumption. *See* N.J. REV. STAT. ANN. § 39:4-50 (West 1990); PA. STAT. ANN. tit. 75, § 1547(d)(2) (1977). A test result above 0.10% BAC/BrAC will give rise to a rebuttable presumption or inference of intoxication. *See* N.J. REV. STAT. ANN. § 39:4-50 (West 1990); PA. STAT. ANN. tit. 75, § 1547(d)(3) (1977). A number of jurisdictions have established a rebuttable inference or presumption of intoxication if there is a BAC/BrAC of 0.08%. *See supra* note 18. In many jurisdictions, it is a violation for a juvenile to have any alcohol in the blood. *See, e.g.*, GA. CODE ANN. § 40-5-67.1 (Supp. 1993); N.J. REV. STAT. ANN. § 39:4-50.14 (West 1990); OHIO REV. CODE ANN. § 4511.19 (Anderson 1993); OR. REV. STAT. § 813.300 (Supp. 1992); WIS. STAT. ANN. § 346.23 (West 1991 & Supp. 1993). For an excellent discussion of inferences and presumptions in drinking-and-driving cases, see generally Pariser, *supra* note 23.

41. *See supra* note 39.

42. State v. Ghegan, 517 A.2d 490, 491 (N.J. Super. Ct. App. Div. 1986). *But see* State v. Allex, 608 A.2d 1 (N.J. Super. Ct. App. Div. 1992) (defendant barred from presenting medical testimony based on videotapes of defendant's performance of physical tests after two breathalyzer

of fact must not convict unless the evidence proves guilt beyond a reasonable doubt.[43]

Every state provides penalties for refusal to submit to a forensic test that detects the presence of a prohibited substance.[44] Some states, however, provide for a right of an accused to refuse to take a test for alcohol.[45] In addition, many states provide for an inference to be drawn against an accused if he refuses to submit to the required test. The states presume that the reason for the refusal was that the accused knew he was under the influence and therefore, the incapacity would be disclosed by the test.[46]

To support a finding of intoxication, the prosecution frequently offers testimony concerning observation of the accused's ability to perform psychomotor tests. These witness observations may or may not be consistent with intoxication. These observations may have been recorded on videotape, or may merely be reported to the trier of fact by witnesses.[47]

Much more disturbing are the cases in which the accused is prosecuted for a per se violation. Here, the violation is established when the accused is shown to have had a BAC/BrAC above the proscribed level at the time of the operation of the vehicle or at any reasonable time

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tests administered to defendant yielded 0.14 and 0.15 BAC and recognizing overruling of *Ghegan*).

43. *In re* Winship, 397 U.S. 358 (1970); McLean v. Moran, 963 F.2d 1306 (9th Cir. 1992); State v. Johnson, 199 A.2d 809 (N.J. 1964).

44. *See generally* U.S. DEP'T OF TRANSP., *supra* note 13; *see also* Poe v. Department of Revenue, 859 P.2d 906 (Colo. Ct. App. 1993); Lund v. Hielle, 224 N.W.2d 552 (N.D. 1974); State v. Gately, 498 A.2d 1271 (N.J. Super. Ct. App. Div. 1985); Department of Transp. Bureau of Licensing v. Fellmeth, 528 A.2d 1090 (Pa. Super. Ct. 1987). In BrAC jurisdictions, the test is for the presence of alcohol on the driver's breath. In BAC jurisdictions, the test is for blood alcohol when the prohibited substance is alcohol. The states vary greatly with respect to the specific test that is required and whether the accused is provided with their choice of tests. In New Jersey, the accused is required to submit to chemical breath tests by an approved instrument. *See* State v. Tischio, 527 A.2d 388 (N.J. 1987), *appeal dismissed*, 484 U.S. 1038 (1988). The most commonly used instrument in New Jersey is the Breathalyzer® model 900 or 900A. *Id.*

45. *See, e.g.*, S.D. CODIFIED LAWS § 32-23-10 (1989).

46. Mackey v. Montrym, 443 U.S. 1, 18 (1979); McCann v. State, 588 A.2d 1100 (Del. 1991); State v. Tabisz, 322 A.2d 453 (N.J. Super. Ct. App. Div. 1980).

47. State v. Ghegan, 517 A.2d 490 (N.J. Super. Ct. App. Div. 1986) (overruling recognized by State v. Allex, 608 A.2d 1 (N.J. Super. Ct. App. Div. 1992)); State v. Morton, 181 A.2d 785 (N.J. Super. Ct. App. Div. 1962), *aff'd*, 189 A.2d 216 (N.J. 1963). *But see* State v. Allex, 608 A.2d 1 (N.J. Super. Ct. App. Div. 1992) (holding that observations of an accused were irrelevant in a per se prosecution). The practice of considering the relevant observations is consistent with the intention of the inventor of the Breathalyzer® and other members of the scientific community. *See* Transcript of Proceedings, April 27, 1989, 185-90 (testimony of Robert Borkenstein, Ph.D.), State v. Downie, 569 A.2d 242 (N.J.) (remand hearing), *cert. denied*, 498 U.S. 819 (1990) [hereinafter Borkenstein Transcript] (on file with *The University of Dayton Law Review*). The breath test devices were never intended to be used in a per se jurisdiction. They were intended to confirm the incriminating witness observations of the accused. *Id.*

thereafter.[48] No culpable mental state, even knowledge of consumption or intoxication, is required to convict.[49] A per se violation is a strict liability or status offense for which few, if any, defenses are available.[50]

Professor Paul H. Robinson correctly points out that among the reasons for acceptance of imputed or strict criminal liability is that the "culpability principle may be sacrificed on utilitarian grounds, to other important societal interests. Such a 'nonculpability theory' for imputing required objective and mental elements often supports rules and doctrines governing strict liability, for example."[51] Professor Robinson states that deterrence is a recognized basis for imposition of strict liability.[52] One court has recognized a deterrence rationale to justify the strict liability treatment of DWI offenders, stating "New Jersey has an overriding goal to rid the roads of drunk drivers."[53]

Strict liability, or status, offenses survive constitutional scrutiny only in rare circumstances.[54] In such circumstances, strict liability criminal statutes survive constitutional challenge because the penalty imposed is insignificant when compared to the difficulty or impossibility of proving culpable mental state. Additionally, there is a legitimate government interest to be protected by the criminal statute.[55]

Typically, motor vehicle violations are summary offenses.[56] While motor vehicle violations are not generally tried to a jury,[57] only three states, New Jersey, Nevada, and Utah, consider drinking-and-driving to be a summary offense and preclude the accused from having the matter tried to a jury.[58] However, even New Jersey has recognized that constitutional protection, other than trial by jury, is necessarily accorded to those accused of drinking-and-driving. Courts have found the

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48. *See, e.g.*, Miller v. State, 597 So. 2d 767 (Fla. 1991); *Tischio*, 527 A.2d 388; State v. McMannus, 447 N.W.2d 654 (Wis. 1984).

49. State v. Fogarty, 607 A.2d 624, 628-29 (N.J. 1992); *see* State v. Hammond, 571 A.2d 942 (N.J. 1990).

50. *See, e.g.*, Walker v. State, 420 S.E.2d 17 (Ga. Ct. App. 1992); *Fogarty*, 607 A.2d 624.

51. Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 620-21 (1984).

52. *Id.* at 658.

53. *See Fogarty*, 607 A.2d at 628.

54. *See* ROLLIN M. PERKINS & RONALD M. BOYCE, CRIMINAL LAW, 896-907 (3d ed. 1982).

55. *See generally* Rollin M. Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 IOWA L. REV. 1067 (1983).

56. *See, e.g.*, People v. Teschner, 394 N.E.2d 893 (Ill. App. Ct. 1979); State v. Hammond, 571 A.2d 942 (N.J. 1990).

57. Summary offenses are not generally accorded the benefit of trial by jury. Blanton v. City of North Las Vegas, 489 U.S. 538, 545 n.11 (1989).

58. *See id.*; *see also* State v. Hamm, 577 A.2d 1259 (N.J. 1990).

right to counsel, for example, to be required by both federal and state constitutional guarantees.[59]

A prosecution for a per se violation differs significantly from a prosecution for driving while intoxicated. Intoxication is not at issue in a per se trial. The ability to operate a motor vehicle is irrelevant in a per se prosecution. It is not necessary for the prosecution to prove that the accused's ability to operate a motor vehicle was adversely affected by the consumption of a prohibited substance. Such ability, or lack thereof, is also irrelevant to any defenses that might be raised by the accused.[60] In contrast to a non-per se prosecution, where the presumptions or inferences[61] raised by statute can be rebutted with affirmative evidence,[62] in a per se jurisdiction, the violation occurs with the coexistence of driving and a prohibited level of a proscribed substance in the blood or breath.

Because of the attractiveness of the defense of sobriety, in spite of a presumptively high BAC/BrAC, there was a rush to eliminate that defense and adopt per se legislation.[63] The New Jersey Supreme Court said:

> In our DWI decisions we attempt to eliminate every possibility of pretextual defenses. We have done so not because of any doubts about the veracity of the factual defense offered but because of the potential for pretext. . . . The risk of harshness must be balanced against the damage caused by pretextual defenses — damage to the enforcement of New Jersey's drunk-driving laws. As in prior cases, we conclude that the balance weighs in favor of consistent and strict enforcement.[64]

Thus, New Jersey apparently found justification for the per se rule in the ability to avoid pretextual defenses. The unintentional consequences of the per se rule developed by the courts, when coupled with the problems that were unforeseen, cause this justification to come into question.

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59. *See, e.g.*, State v. Laurick, 575 A.2d 1340 (N.J. 1990); Rodriguez v. Rosenblatt, 277 A.2d 216 (N.J. 1971).

60. *See generally* State v. Howell, 832 P.2d 1144 (Idaho Ct. App. 1992); State v. Fogarty, 607 A.2d 624 (N.J. 1992); Adams v. State, 585 So. 2d 161 (Ala. 1991); *see also Applying Estoppel Principles To Criminal Cases*, 78 YALE L.J. 1046 (1969).

61. *See supra* note 40.

62. State v. Ghegan, 517 A.2d 490 (N.J. Super. Ct. App. Div. 1986) (*overruling recognized by* State v. Allex, 608 A.2d 1 (N.J. Super. Ct. App. Div. 1992)); *see* Lowell W. Bradford, *Drinking Driver Enforcement Problems*, 17 J. CRIM. L. & CRIME 518 (1966).

63. This rush was additionally fueled by 23 U.S.C. § 401 which conditioned the continued receipt of some highway funding upon the adoption of a per se statute prohibiting driving with a 0.10% BAC/BrAC or above. 23 U.S.C. § 401 (1988).

64. *Fogarty*, 607 A.2d at 629.

The "harshness" of the rule, apparently recognized by the New Jersey Supreme Court, is that innocent people will be wrongfully convicted of drinking-and-driving violations. Potentially credible and truthful testimony will be excluded from consideration by the trier of fact. This irrational fear of pretextual defenses results in the failure of this evidence to even be presented at trial and subject to the scrutiny of the trier of fact after being subjected to cross-examination. In criminal and quasi-criminal cases, innocence is often a pretextual defense. In *State v. Downie*,[65] Justice Stein observed in his dissent that "[a]lthough the Court's resourcefulness is doubtless well-motivated, the taint on the judicial process is ineradicable. It is also totally unnecessary. Evidence in the record suggests that a relatively minor adjustment in the partition ratio[66] at which Breathalyzers® are calibrated would eliminate all material overestimates of blood alcohol . . . ."[67] Arguably, the per se rule is not justified because of the lack of an accused to effectively defend himself.

While most jurisdictions provide for two methods of proof of a drinking-and-driving violation (per se violations and driving while intoxicated), typically only one trial takes place. The statutes provide for alternative methods of proof. The trier of fact decides both the issue of sobriety and of BAC/BrAC level.[68] The accused is put in the untenable position of providing inconsistent defenses. The accused may desire to offer evidence of sobriety while not challenging a high BAC/BrAC.[69] The trier of fact is also placed in the untenable position of being authorized to consider evidence for some purposes, but not for others. In spite of the obvious constitutional problems, the combined trial containing two methods of establishing culpability has been determined to be an appropriate method of prosecution, justified by judicial economy.[70]

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65. 569 A.2d 242, 252 (N.J.), *cert. denied*, 498 U.S. 819 (1990).

66. "Partition ratio" refers to blood-to-breath ratio. *Id.* at 242.

67. *Downie*, 569 A.2d at 252 (Stein, J., dissenting) (footnote added).

68. State v. Sisti, 506 A.2d 1307, 1309 (N.J. Super. Ct. App. Div. 1986).

69. The United States Court of Appeals for the Sixth Circuit held that the presumption of intoxication at or above the prohibited BAC/BrAC does not impermissibly shift the burden of proof or persuasion on the intoxication element of the offense of driving while intoxicated to the defendant. Morgan v. Shirley, 958 F.2d 662 (6th Cir. 1992). *Morgan* may appear to be in conflict with McLean v. Moran, 963 F.2d 1306 (9th Cir. 1992), but it is not. In *Morgan*, the defendant was accorded the opportunity to offer evidence to negate the presumption because it was a non-per se prosecution. 958 F.2d at 664. In *McLean*, a per se prosecution, the defendant was precluded from offering evidence to negate intoxication. 963 F.2d at 1309. The trial judge in *McLean* found the evidence of sobriety was irrelevant. *Id.*

70. *See, e.g., Sisti*, 506 A.2d 1307; State v. Grant, 483 A.2d 411 (N.J. Super. Ct. App. Div. 1984).

B. The Breath Test Devices

1. Scientific Reliability

Breath test devices came under strong attack from the defense bar almost simultaneously with the adoption of the per se laws. New Jersey was representative of the challenges to breath test devices. Thirty years ago, in *State v. Johnson*, the New Jersey Supreme Court recognized the Breathalyzer® as a scientifically acceptable instrument to test breath for blood alcohol.[71] The "*Frye* doctrine," which requires that novel scientific evidence must be generally accepted in the scientific community,[72] was applied in making the determination that the results of a Breathalyzer® test would be admissible in trials of alcohol related cases, including DWI prosecutions.[73]

Nothing in *Frye* suggests that there is a prohibition against the proffer of other evidence to be considered (on the issue of reliability or weight to be given to the novel scientific evidence) after the admissibility of the novel evidence has been made.[74] There was no suggestion in *Johnson* that the "*Frye* doctrine" was being modified to preclude the introduction of challenging evidence after admission of Breathalyzer® test result evidence.[75] *Johnson* merely articulated that Breathalyzer® results are novel scientific evidence, and therefore governed by the *Frye* doctrine.[76]

Subsequent to the *Johnson* and *Frye* decisions, the Third Circuit decided *United States v. Downing*.[77] *Downing* established a different standard of admissibility for novel scientific evidence. The court determined evidence of the results of novel scientific tests to be admissible if

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71. 199 A.2d 809 (N.J. 1964). In the early 1950s, Robert Borkenstein, Ph.D., of Indiana University invented the Breathalyzer®. *Downie*, 569 A.2d at 244. Eventually, the production rights became the property of Smith & Wesson Company.

72. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); *see also* United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973). The "*Frye* Doctrine" has recently come under attack as being both too liberal and too strict. The Supreme Court recently revisited the *Frye* doctrine in Daubert v. Merrell Dow Pharmaceutical, 113 S. Ct. 2786 (interim ed. 1993), in which the Court held that the *Frye* standard did not survive the adoption of the Federal Rules of Evidence, Rule 702 in particular. *Id.* at 2793. The *Frye* standard of "general acceptance within the relevant scientific field" was rejected by the Court in *Daubert* because Rule 702 makes no such stipulation and the standard is rather whether the evidence will assist the trier of fact to understand the evidence. *Id.* at 2794. The evidence must also be scientifically valid. *Id.* at 2795. The Court's decision in *Daubert* will extend the admissibility standards as opposed to limiting them.

73. *Johnson*, 199 A.2d at 822.

74. JOHN W. STRONG, MCCORMICK ON EVIDENCE § 203 (4th ed. 1992).

75. *Johnson*, 199 A.2d at 809.

76. When *Johnson* approved the Breathalyzer® for use as evidence in drunk-driving prosecutions, there were no per se laws. In fact, the inventer of the Breathalyzer® is opposed to the use of the device in per se prosecutions. *See* Borkenstein Transcript, *supra* note 47.

77. 753 F.2d 1224 (3d Cir. 1985).

reasonably relied upon by those in the relevant scientific community.[78] Again, in *Downing,* there was no suggestion that evidence contradictory to the proffered novel scientific evidence was inadmissible. *Downing* contemplates, as did *Frye,* that the conflicting evidence would be considered by the trier of fact in determining the weight, if any, to be accorded to the novel scientific evidence.[79] This weighing and balancing approach is the basis of the Rehnquist Court's "totality of the circumstances" conceptual application of the evidence rules articulated in *Bourjaily v. United States.*[80]

In *Romano v. Kimmelman,*[81] the New Jersey courts readdressed the scientific reliability of the Breathalyzer® in response to Smith and Wesson Company's radio frequency interference (RFI) consumer advisory.[82] *Romano,* based upon a fact-finding remand to Judge McGann of the Monmouth County Superior Court, went further than *Frye* or *Downing* contemplated by holding that the Breathalyzer® was a scientifically accurate instrument as a matter of law.[83] In this unusual, but landmark decision, the New Jersey Supreme Court took judicial notice of the scientific reliability of the Breathalyzer®, subject only to certain pre-conditions.[84] The court stated:

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78. *Id.* at 1235. The Supreme Court's holding in *Daubert v. Merrell Dow Pharmaceutical* will likely have the same effect on the holding in *Downing* as it does on the "*Frye* Doctrine." *See supra* note 72.

79. *See generally Downing,* 753 F.2d 1224; Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The purpose of the Federal Rules of Evidence, as explained in Rule 102, is "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102.

80. 483 U.S. 171 (1987). This balancing and weighing is the gravamen of the concept of proof beyond a reasonable doubt.

81. 474 A.2d 1 (N.J. 1984).

82. *Id.* Prior to *Romano,* Durand v. City of Woonsocket, No. 82-4808 (R.I. Super. Ct. Jan. 14, 1983), was decided. The Rhode Island court held that the Breathalyzer® device was not sufficiently reliable to be admissible in DWI prosecutions in that state. *Id. Durand* was an articulation of the threshold determination of noncompliance with the minimum standards of admissibility of evidence, as articulated in *Frye* and *Downing. Id.*

On September 10, 1984, Smith & Wesson issued a consumer advisory warning that the accuracy of the Breathalyzer® could be adversely affected by RFI. RFI is an interference with the accurate functioning of the Breathalyzer® device caused by ambient radio waves from outside sources such as police radios, other radio transmissions, and possibly even fluorescent lights. *Romano* 474 A.2d at 10. Those radio waves apparently adversely affect the galvanometer, which is the device that compares the differences in the quantity of light that passes through the ampoules containing chemicals after breath with alcohol in it has passed through the test ampoules. *Id.* at 8. It is a very crucial part of the testing process. *Id.* The advisory suggested a protocol for determining the existence of RFI and a separate protocol for avoiding the potential adverse effects of RFI. *Id.* at 9.

83. *Romano,* 474 A.2d at 11.

84. *Id.* No opportunity was provided for the presentation of contradictory evidence on the issue of reliability. *Id.* at 6. Such contradictory evidence was precluded. "One man's word is no

> Practically every new scientific discovery has its detractors and unbelievers, but neither unanimity of opinion nor universal infallibility is required for judicial notice for generally recognized matters. Once the showing has been made, courts will take judicial notice of the given instruments reliability and will admit in evidence the tests from the instrument *without requiring further proof.*[85]

Thus, the court found it unnecessary to listen to evidence contrary to the finding of the Breathalyzer's® reliability.[86]

In *Romano*, the court recognized a few preconditions to the admissibility of the Breathalyzer® based upon judicial notice.[87] The model 900A was susceptible to the potential effects of RFI, yet the model 900 was generally not susceptible to the same effects.[88] If the device used was the model 900A, then the proponent of the Breathalyzer® results as evidence must establish that two breath tests were conducted.[89] The results of these two tests must not differ from each other by more than 0.01 percent BAC/BrAC.[90] If there was only one test, or if the two tests differed from each other by more than 0.01 percent BAC/BrAC, then the proponent must establish that he complied with the Smith & Wesson testing protocol or with the testing protocol that was used by the New Jersey State Police on the date of the *Romano* decision.[91] These protocols are intended to establish that the device in question was not susceptible to RFI or, if it was, that the appropriate precautions were taken to insure that there was no RFI.

Perhaps the most distressing aspect of the admissibility of Breathalyzer® test results is the position taken by the court in *Romano*.

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man's word[.] We should quietly hear from both sides." Eilers v. District of Columbia, 583 A.2d 677, 678 (D.C. 1990) (citing Goethe).

85. *Romano*, 474 A.2d at 9 (citing State v. Johnson, 199 A.2d 809 (N.J. 1964)) (emphasis added).

86. This judicial notice of the Breathalyzer's® reliability was binding on the inferior state courts. *See, e.g.*, State v. McGinley, 550 A.2d 1305 (N.J. Super. Ct. Law Div. 1988).

87. *See generally Romano*, 474 A.2d 1. These preconditions are established at an intratrial hearing, in which the rules of evidence are not applicable. *See* State v. Cardone, 368 A.2d 952 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 379 A.2d 234 (N.J. 1977); *see generally* John M. McGuire & Charles S. S. Epstein, *Rules Of Evidence In Preliminary Controversies As To Admissibility*, 36 YALE L.J. 1101 (1927). For further discussion of the evidential problems, see *infra* notes 223-51 and accompanying text.

88. *See Romano*, 474 A.2d at 11.

89. *Id.* at 12.

90. *Id.*

91. *Id.* at 12-13. The difference between the model 900 and the model 900A Breathalyzers® is that the model 900A has a self-timing device, which the model 900 does not, and the galvanometers are different. *Id.* at 11 n.5. Apparently, the difference in quality of galvanometers is responsible for the RFI. *Id.* Retrofitting the model 900A devices by changing the galvanometers is an obvious and inexpensive solution to the RFI problem, but for inexplicable reasons, authorities have not done so.

The scientific reliability of the Breathalyzer® was not a triable issue of fact. The weight to be accorded to the Breathalyzer® test results was likewise not within the province of the trier of fact.[92] The taking of judicial notice of scientific tests and their reliability is not a common practice, but does seem to have a place in the law of evidence.[93] The concept often results in a dogmatic theology. It is suggested that the better approach is the pragmatic approach of leaving the issues of relevance and weight to the trier of fact.[94]

Breath test devices test breath for alcohol. That result must be made relevant to alcohol in the blood in those jurisdictions that prohibit the operation of a motor vehicle by persons with above a proscribed level of blood alcohol. Breath alcohol has no relevance to sobriety. Only alcohol in the brain affects a person's ability to function.[95] Alcohol is transported to the brain by the circulatory system almost simultaneously with its entry into the blood.[96] Testing for alcohol in the brain of a living human being poses a great risk of fatality.[97] The testing for alcohol in the blood is a sufficiently accurate reflection of alcohol in the brain for forensic purposes.[98] Breath test devices test air from the lowest portion of the lungs, known as alveolar air or end expiratory breath.[99] This breath is believed to have the most reliable relationship to blood alcohol.[100]

The scientific reliability of breath test instruments was again challenged in *State v. McGinley*.[101] The trial court in *McGinley* precluded the defendant from offering into evidence testimony that Breathalyzer® test results were based upon an incorrect assumption that there is a constant relationship of 2100:1 between the amount of alcohol in the breath and alcohol in the blood.[102] The trial court excluded the evi-

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92. *See generally Romano*, 474 A.2d 1.

93. STRONG, *supra* note 74, § 330; *see* Hamman v. State, 565 A.2d 924 (Del. Super. Ct. 1989); FED. R. EVID. 201; N.J. R. EVID. 19 (1976).

94. STRONG, *supra* note 74, § 330; *see* FED. R. EVID. 201; N.J. R. EVID. 19 (1976); Hamman v. State, 565 A.2d 924 (Del. Super. Ct. 1989).

95. State v. Downie, 569 A.2d 242, 245 (N.J.), *cert. denied*, 498 U.S. 819 (1990).

96. *Id.*

97. *Id.* at 246.

98. *Id.*

99. *Id.*

100. *Id.*

101. 550 A.2d 1305 (N.J. Super. Ct. Law Div. 1988), *overruled by* State v. Downie, 569 A.2d 242 (N.J.), *cert. denied*, 498 U.S. 819 (1990).

102. *Id.* at 1309-10. The Breathalyzer® is not the only test that is based upon the incorrect assumption that there is a constant relationship of 2100:1 between the amount of alcohol in the breath and alcohol in the blood. All breath tests are based upon the same incorrect assumption. *See generally* A.W. Jones et al., *A Historical And Experimental Study Of Breath/Blood Alcohol Ratio, in Proceedings Of The Sixth International Conference On Alcohol, Drugs, and Traffic Safety* 509 (1975); A.W. Jones et al., *Measuring Ethanol In Blood And Breath For Legal Pur-*

dence based upon the mandate of the New Jersey Supreme Court in *Romano* that trial courts were not permitted to question the scientific reliability of the Breathalyzer® device.[103]

After hearing undisputed testimony concerning the flawed scientific foundation of the blood-to-breath ratio of the Breathalyzer®[104] at the trial de novo on the record,[105] Superior Court, Law Division Judge Martin Haines ruled that the defendant could not be legally precluded from the presenting scientific testimony which addresses the proper weight to be given to Breathalyzer® test results.[106] Judge Haines, in deciding *McGinley* within the constriction of *Romano*, reasoned that the scientific information about blood-to-breath ratio was unavailable at the time of the decision in *Romano*.[107] Therefore, the issue was an exception to the *Romano* prohibition against challenges to the scientific reliability of the Breathalyzer® device.[108] The state did not appeal *McGinley* because there was no dispute of facts and because the decision was the only rational decision that could have been rendered on the undisputed facts.[109] The decision was, however, short-lived because it was inconsistent with the yet-to-be-revealed agenda for managing DWI litigation.[110]

In *State v. Downie*,[111] the opportunity to revisit *McGinley* was orchestrated by the prosecution, with a record more to their liking. At issue was the trial court's ability to consider the scientific reliability of

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poses: Variability Between Laboratories And Between Breath Test Instruments, 38 CLINICAL CHEMISTRY 743 (1992).

103. *McGinley*, 550 A.2d at 1306.

104. Uncontested testimony was presented that the foremost scientist in the field of breath test research, Oklahoma State Professor, Dr. Kurt Dubowski, reported in scientific literature that the assumption that there was a ratio of 2100:1 of alcohol in the blood to alcohol on the breath was an error. *McGinley*, 550 A.2d at 1308. Evidence showed that the ratio was in fact an average of approximately 2375:1, but that it varied from 1100:1 to 3200:1. *Id.* at 1306. Dr. Dubowski's research suggested that for 14% of the population, breath test results could be in error by as much as 55%. *Id.* The defense witness, Dr. Tindall of the New Jersey State Police Forensic Laboratory, confirmed the reports of the Dubowski research and did not substantially disagree with the Dubowski findings. *Id.* at 1311-12.

105. New Jersey Court Rule 3:23-8 provides for appeals from summary courts to the Superior Court, Law Division in the county where the summary court is located. N.J. CT. R. 3:23-8. That appeal is to be a trial de novo, on the record below. *Id.*

106. *Id.*; *see* T.A.A. Alobaidi et al., *Significance Of Variations In Blood: Breath Partition Coefficient of Alcohol*, 2 BRIT. MED. J. 1479, 1481 (1976).

107. *McGinley*, 550 A.2d at 1307.

108. In fact, the scientific information concerning blood-to-breath ratio was available long before the decision in *Romano*. The specific blood-to-breath ratio challenge was not, however, presented or at issue in *Romano*.

109. *Id.* at 1309.

110. *See infra* note 111-20 and accompanying text.

111. 569 A.2d 242 (N.J.), *cert. denied*, 488 U.S. 819 (1990). *Downie* was an interlocutory appeal of consolidated cases to the New Jersey Supreme Court. *Id.*

breath test devices, at least insofar as the 2100:1 blood-to-breath ratio was concerned.[112] This issue was identical to one issue not appealed in *McGinley*. The New Jersey Supreme Court remanded *Downie* to the same Law Division Judge who made the findings of fact supporting the decision in *Romano v. Kimmelman*.[113]

At the remand hearing in *Downie*, virtually every credible expert in the field of blood-to-breath ratio and breath test devices testified.[114] The facts presented clearly established that there were a number of factors that could adversely affect the blood-to-breath ratio in a given person at a given time.[115] Accordingly, the court held: "In converting at a ratio of 1 to 2100 the breath-alcohol concentration present in a person's blood, the breathalyzer® reading is not scientifically accurate."[116] The lower court further found that "[c]alculated blood-breath ratios are worthless for forensic purposes. They are subject to so many variables as to be unusable . . . ."[117] Those variables include gender, body temperature, hormonal changes, hematocrit level,[118] temperature of the breath test device, medications, and a plethora of other factors.[119]

Because the factors affecting the blood-to-breath ratio can and do change by the hour in a given individual, there is no reasonable method available to determine an individual's blood-to-breath ratio retrospectively.[120] The only method to determine blood-to-breath ratio is to test blood alcohol and breath alcohol simultaneously. Of course, if that is done, the breath test serves no forensic purpose because the more reliable blood test is available for use.

The decision in *Downie* never specifically addressed the trial courts' authority to consider the admissibility of novel scientific evidence after the New Jersey Supreme Court has taken judicial notice of the scientific reliability of a particular device. Contrary to the commonly accepted scientific concerns relating to the accuracy of breath test devices generally, and the Breathalyzer® specifically, the decision did seem to close the door forever to future scientific challenges to the Breathalyzer® method of breath alcohol testing.

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112. *See id.*
113. 474 A.2d 1 (N.J. 1984).
114. *Downie*, 569 A.2d 242.
115. *Id.* at 248.
116. *Id.* at 244.
117. *Id.*
118. Hematocrit refers to the ratio of the volume of blood cells to the total volume of blood, expressed as a percentage. *Id.* at 248.
119. Borkenstein Transcript, *supra* note 47, at 1-194.
120. *See, e.g.*, People v. McDonald, 254 Cal. Rptr. 384 (Cal. Ct. App. 1988); State v. Burling, 400 N.W.2d 872 (Neb. 1987); *Downie*, 569 A.2d 242.

The decision in *Downie* was ill-advised in several respects. The statutory language[121] made abundantly clear that the standard for conviction for a DWI or per se violation was a blood alcohol standard. The court, however, judicially created a breath alcohol standard. As the dissent noted, "[a]t the same time, the Court disregards not only the unmistakably plain statutory language, but also its own opinions that have repeatedly and considerably characterized the statutory violation in terms of a prohibited amount of alcohol in the *blood*."[122] The dissent thus clearly recognized the imprudent holding of the majority in *Downie*.

At the remand hearing in *Downie*, the evidence was undisputed that, in the absorptive stage,[123] there was no ascertainable blood-to-breath ratio.[124] The court made the same incorrect "time bomb" assumption that had been made in *State v. Tischio*.[125] In both cases it was assumed that the operation of a motor vehicle will not be concluded during the absorptive stage. In fact, most alcohol consumption probably concludes rather close to one's home. Social affairs and tavern drinking are probably within one half hour of home, the minimum time for absorption.[126] Most driving commences shortly after last consumption.[127] Empirical data suggests that BAC/BrAC levels will vary greatly between the time of last drinking in social settings and the time of apprehension for a drinking-and-driving violation.[128]

It is inappropriate for arresting police officers to give an immediate breath test to an accused. For a brief period of time, consumed alcohol will remain in the mouth. Mouth alcohol will give an inordinately high breath test device reading if it has not dissipated.[129] Conventional scientific wisdom recognizes that mouth alcohol will completely dissipate within twenty minutes after consumption.[130] While this may seem to

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121. N.J. STAT. ANN. § 39:4-50 (West 1990).

122. *Downie*, 569 A.2d at 252. (Stein, J., dissenting) (emphasis added).

123. The absorptive stage is the period of time after the consumption of alcohol before the alcohol has been absorbed into the blood. Once the alcohol is absorbed, the BAC reaches its peak. The absorptive phase depends on a number of variables. *Id.* at 245-46.

124. This fact was ignored by the court in *Downie*, but the record of the proceedings is uncontradicted in that regard. Borkenstein Transcript, *supra* note 47, at 1-194.

125. 527 A.2d 388 (N.J. 1987), *appeal dismissed*, 484 U.S. 1038 (1988).

126. *See* Pariser, *supra* note 23, at 151; *see also supra* note 123.

127. *See* Pariser, *supra* note 23, at 150.

128. Pariser, *supra* note 23, at 150.

129. The inordinately high reading will result because the breath test device cannot discriminate between breath alcohol and end expiratory breath alcohol. *See* State v. Burling, 400 N.W.2d 872, 876 (Neb. 1987). It will therefore multiply the breath that it measures by 2100, assuming that breath to be the end expiratory breath that the device was designed to test. *Id.*

130. State v. Downie, 569 A.2d 242, 244 (N.J.), *cert. denied*, 498 U.S. 819 (1990). Residual mouth alcohol can contribute to elevate breath-alcohol test results. One potential source of extraordinary mouth alcohol retention is denture adhesives. These materials may

indicate that the breath test will probably be taken in the post-absorptive phase, that conclusion is not universally true.[131] The twenty-minute observation time takes place simultaneously with the investigation by the officer immediately following the stop and the arrest and transportation to the police station for breath testing.[132]

The *Downie* court was in error in determining that the incidence of breath testing was rare in the absorptive stage. Regardless of the court's finding that the absorptive phase was not relevant, it went on to recognize that the 2100:1 blood-to-breath ratio was incorrect.[133] The ratio was determined to be closer to 2300:1, but varied from 1706:1 to 3063:1.[134] In fact, the court found that, in spite of substantial evidence of much greater variations, for 2.3 percent of the population, the Breathalyzer® would overestimate the blood alcohol level in the post-absorptive stage.[135] Even with the recognition that 2.3 percent of the population could be wrongfully convicted of a per se violation, judicial notice was again taken of the scientific reliability of the Breathalyzer®. Again, the court foreclosed the possibility of a factual attack by the defense on the scientific underpinning of the accuracy of the breath test device.[136]

In deciding *Downie*, based upon the findings of fact at the remand hearing, the court ignored the testimony of the inventor of the Breathalyzer®, Dr. Robert Borkenstein. Dr. Borkenstein testified that the device was never intended to be used in a per se jurisdiction because of its lack of reliability.[137] It was, rather, to be used only to confirm the observations of the arresting police officer.[138] Testifying as to

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cause alcohol to persist in the mouth even after the 15-20 minute dissipation period. Moreover, the release of alcohol from denture adhesives may be fairly constant over a period of time, such that two breath tests, taken a few minutes apart may show agreement and therefore may not suggest, to the operator the possible contribution of mouth alcohol to the test results.

Cohen & Saferstein, *supra* note 20, at 24.

131. *See, e.g.*, Vermont v. Dumont, 499 A.2d 787 (Vt. 1985).

132. *See, e.g.*, State v. Thompson, 814 P.2d 393 (Haw. 1991); State v. Lessar, 805 P.2d 730 (Or. Ct. App. 1991); *see also* State v. Nelson, 399 N.W.2d 629 (Minn. Ct. App. 1987) (noting that the Minnesota Bureau of Criminal Apprehension checklist recommends a 15- to 20-minute period of observation prior to conducting a breath test to allow for elimination of alcohol from the mouth and nasal passages).

133. *Downie*, 560 A.2d at 245.

134. *Id.* Actually, the testimony at the trial was that the blood-to-breath ratio could vary from 1100:1 to 4000:1. *See generally* Borkenstein Transcript, *supra* note 47.

135. *Downie*, 560 A.2d at 248.

136. *Id.* at 251; *but see* State v. Vega, 465 N.E.2d 1303 (Ohio 1984) (defendant may not make general attack on reliability of breath tests but may show there was something wrong with the test performed on him and that the results were erroneous).

137. Borkenstein Transcript, *supra* note 47, at 184-89.

138. Borkenstein Transcript, *supra* note 47, at 184-89.

his opposition of the Breathalyzer's® use in per se jurisdictions, Dr. Borkenstein said, "it places too much stress on the machine which was never intended by the scientists in the field."[139] The scientific literature continues to contain many references to the ongoing debate over the scientific reliability of the various breath test devices for forensic purposes.[140]

All mechanical and scientific devices have some degree of tolerance within which they are accurate. Breath test devices are no exception. The Breathalyzer®, for example, has a recognized tolerance of plus or minus 0.01 percent BAC/BrAC.[141] Accordingly, all test results should be reduced by 0.01 percent for forensic purposes. In *State v. Lentini*,[142] the court determined, in spite of a silent legislative history, that the legislature must have considered this tolerance in creating the per se offense.[143] The court, therefore, held that a defense based on the machine's tolerance for error was incompatible with the New Jersey scheme for DWI prosecutions and the defendant was not permitted to present this defense to the trier of fact.[144]

The net effect of *Johnson, Downie*, and *Lentini* was to foreclose scientific attacks on the Breathalyzer®. The lower courts in New Jersey were required to take judicial notice of the scientific reliability of the Breathalyzer®. More significantly, they were required to exclude any contradictory evidence on the reliability of, or the weight to be accorded to, the Breathalyzer®, in spite of compelling scientific literature to the contrary.

2. Retrograde Extrapolation

A per se drinking-and-driving statute prohibits the operation of a motor vehicle while at or above the proscribed BAC/BrAC.[145] Of necessity, the breath test is conducted at some point in time after operation of the motor vehicle has ceased.[146] Accordingly, the breath test will provide evidence of BAC/BrAC at the time of breath testing, as opposed to the time of last operation of the vehicle. Scientific formulae exist for converting breath test results from the time of testing to the

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139. Borkenstein Transcript, *supra* note 47, at 187.

140. *See, e.g.*, J. Mack Cowen et al., *Apparent Alcohol Concentrations From Interfering Chemicals And The Intoxilyzer*, 35 J. FORENSIC SCI. 797 (1990).

141. State v. Lentini, 573 A.2d 464, 467 n.3 (N.J. Super. Ct. App. Div. 1990).

142. 573 A.2d 464.

143. *Id.* at 467.

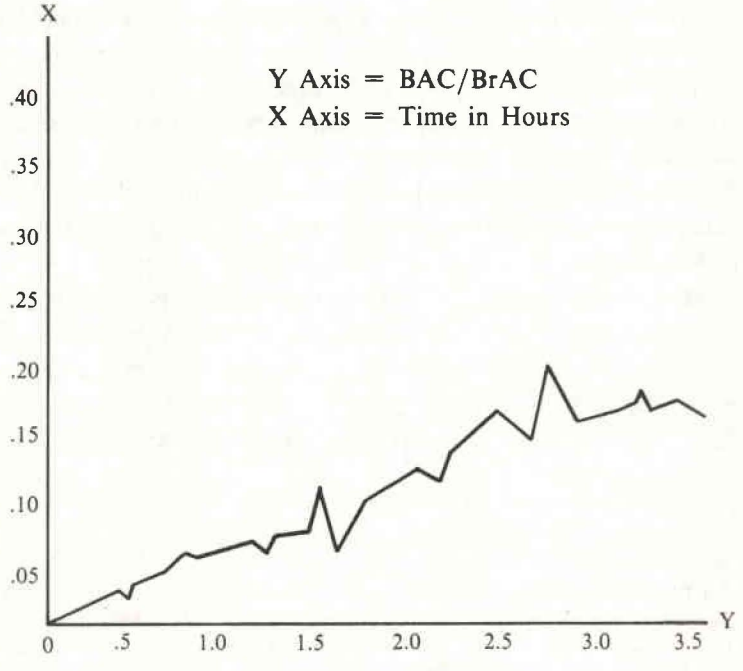
144. *Id.*

145. *See, e.g.*, N.J. STAT. ANN. § 39:4-50 (West 1990); *see also supra* note 20-23 and accompanying text (discussing per se jurisdiction).

146. Ransford v. District of Columbia, 583 A.2d 186, 188 (D.C. 1990).

time of last operation of the motor vehicle.[147] The use of these formulae to relate back the BAC/BrAC from the time of testing to the time of last operation is known as retrograde extrapolation.[148]

There has been criticism regarding the use of retrograde extrapolation. If there is only one breath test, it is impossible to determine reliably whether the subject is in the absorptive stage, the plateau stage, or the elimination stage of alcohol processing.[149] This criticism is flawed when directed to the forensic setting because almost all jurisdictions require replication of test results.[150] Replication of test results, regardless of when the replication takes place, does not eliminate all doubt about a subject's position on the alcohol absorption/plateau/elimination curve because the blood alcohol curve is not linear. The blood alcohol curve contains peaks and valleys. A blood alcohol curve, in a typical subject, might look something like the following graph.



147. With certain things being known, two rather simple formulae (the Widmark Formula and the AMA Formula) are able to calculate the BAC/BrAC at some prior time (the time of the last operation of the vehicle). RICHARD SAFERSTEIN, CRIMINALISTICS 248-51 (4th ed. 1990); TAYLOR, *supra* note 20, § 6.02. The factors to be considered include: breath test result, time of breath test, gender, body weight, time of the first drink, the time between each drink, the time of the last drink, the quality of the beverage consumed (the percentage of alcohol in the beverage), the quantity of the beverage consumed, the food consumed, and when that consumption of food took place. SAFERSTEIN, *supra*; TAYLOR, *supra* note 20, § 6.02.

148. TAYLOR, *supra* note 20, § 6.02.

149. Pariser, *supra* note 23, at 152-53.

150. Romano v. Kimmelman, 474 A.2d 1, 12 (N.J. 1984).

Successive readings of 0.10 percent BAC/BrAC and 0.09 percent BAC/BrAC does not necessarily mean that the blood alcohol level is declining. It may well be indicative of the fact that the readings are recording only a peak and a valley on the absorptive or plateau portion of the alcohol curve. The trier of fact should be free to determine the weight to be given to evidence of retrograde extrapolation in order to determine the degree of intoxication of an accused at the time of the last operation of the motor vehicle. When the absorption equals elimination, there will be a period of time during which the blood alcohol curve will plateau. Successive breath tests during that time will reveal nothing about whether the accused is in the absorptive stage or the elimination stage on the alcohol curve.[151]

Jennifer L. Pariser, in her otherwise excellent note,[152] suggests that retrograde extrapolation is most often used by the prosecution to the prejudice of the accused.[153] Presenting expert witnesses to extrapolate in routine cases, however, is too expensive and inconvenient for the prosecution. Therefore, most jurisdictions relieve the prosecution of that burden.[154] Practically, it is the accused who will wish to present retrograde extrapolation evidence in order to rebut the presumptions or inferences of intoxication created by statute or in a per se jurisdiction.[155] This distinction makes all the more consequential Ms. Pariser's correct conclusion that the current scheme of per se prosecutions is unconstitutional.[156]

The New Jersey Supreme Court considered the issue of the placement of the burden of proof of the BAC/BrAC at the time of last operation of the motor vehicle in *State v. Tischio*.[157] It is logical for the burden to be placed on the prosecution. The prosecution has the burden of proving every element of an offense beyond a reasonable doubt.[158]

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151. TAYLOR, *supra* note 20, § 6.02.

152. *See generally* Pariser, *supra* note 23.

153. *See* Pariser, *supra* note 23, at 153.

154. Ransford v. District of Columbia, 583 A.2d 186, 190-91 (D.C. 1990). There are a few jurisdictions that have not relieved the prosecution from their burden of relating back the BAC/BrAC to the time of last operation of the motor vehicle or which create a time within which the relation back will be assumed. *See, e.g.*, Desmond v. Superior Court, 779 P.2d 1261 (Ariz. 1989); City of Newark v. Lucas, 532 N.E.2d 130 (Ohio 1988); Commonwealth v. Jarman, 601 A.2d 1229 (Pa. 1992); State v. Ludwig, 434 N.W.2d 594 (S.D. 1989); McCafferty v. State, 748 S.W.2d 489 (Tex. Ct. App. 1988); *see also* Tim Breggen, *Recent Decision: Commonwealth v. Jarman*, 31 DUQ. L. REV. 361 (1993).

155. State v. Tischio, 527 A.2d 388, 390 (N.J. 1987), *appeal dismissed*, 484 U.S. 1038 (1988).

156. *See generally* Pariser, *supra* note 23.

157. 527 A.2d 388.

158. *See, e.g.*, Jackson v. Virginia, 433 U.S. 307 (1979); Sandstrom v. Montana, 442 U.S. 510 (1979); *In re* Winship, 397 U.S. 358 (1970); Morrissette v. United States, 342 U.S. 246 (1952).

deterrent value to satisfy the New Jersey Supreme Court, with respect to potential pretextual defenses.

The pending *Edson* case arguably had a substantial influence on the *Tischio* decision. Until recently, it could be argued that the apparent lack of confidence in the defense bar was a mere coincidence. The New Jersey Supreme Court's lack of confidence in its ability to control the conduct of the bar became abundantly clear, however, in *State v. Garcia*.[177]

In *Garcia*, the court relied on the New Jersey equivalent to Federal Rule of Evidence (FRE) 501.[178] The *Garcia* court held that it was appropriate to exclude defense counsel from an *in camera*[179] hearing to determine the propriety of disclosing a hidden surveillance location.[180] The reason for the decision to exclude defense counsel from the hearing was a concern that some members of the defense bar were not worthy of trust to keep secret the surveillance location.[181] If there was ever a question about the appalling lack of respect that the New Jersey Supreme Court was willing to give members of the defense bar, it was now answered.[182]

It seems that the New Jersey Supreme Court in *Garcia* found a distinction between the prosecution and defense attorneys with respect to the degree of risk involved with disclosure. To be sure, motivations

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177. 618 A.2d 326 (N.J. 1993).

178. N.J. R. EVID. 34 (1976).

179. *See* FED. R. EVID. 104(a); N.J. R. EVID. 8(1) (1976).

180. *Garcia*, 618 A.2d at 328. Typically, a hidden surveillance location is a home or other privately owned building that is used by police to observe criminal activity. Frequently, these locations are in "high crime" areas. At trial or in discovery, the prosecution is often reluctant to divulge the surveillance location because of its use in ongoing investigations or because of the risk of retaliation against the owner of the property. *Id.* at 330. The defense, on the other hand, routinely wants to learn of the location for the alleged purpose of using the information in cross-examination with respect to the ability to observe. *Id.* at 333. Confrontation Clause implications become the constitutional foundation for the defense arguments.

Generally, courts hold an *in camera* hearing to determine whether or not the actual location will be sufficiently useful in cross-examination to require disclosure. *Id.* at 332. Defense counsel may or may not be present at the hearing. *Id.* at 332-34. If the court orders disclosure, the prosecution is left with the choice of dismissing the prosecution or complying with the disclosure order. *Id.*

181. *Id.* at 332.

182. The court stated:

> Although we know that most defense attorneys will scrupulously honor an order of confidentiality, we must guard against the indiscretion of the few who may not. We cannot know who will violate the rule of confidentiality, until the forbidden disclosure occurs—too late for the victim of reprisal. The fact that a defense attorney who violates such an order would face sanctions would come as scant consolation to the victims. Reluctant as we are to exclude defense counsel, we are even more reluctant to risk the consequences of "loose talk."

Id.

are quite different between prosecutors and defense lawyers. However, prosecutors and defense lawyers take the very same oath when they are admitted to the bar.[183] Each group is subject to the same rules of professional responsibility.[184] Often prosecutors become defense lawyers and vice versa. Clearly, the message sent by *Garcia* is that the New Jersey Supreme Court finds a greater respect for the orders of the court and greater responsiveness to ethical concerns in the members of the prosecution bar than it finds in the members of the defense bar. The court bases its determination on a perceived ineffectiveness of the lawyer disciplinary system to prospectively control the members of the defense bar. The deterrent effect of the criminal law to prevent legal misconduct seems to be ignored; yet it is just that deterrent effect which is designed to control the conduct of society in general.[185]

Analogous to the surveillance cases are informant cases. Those accused of crimes often seek to discover the identity of confidential informants who are a foundation of the prosecution's case. The government is often unwilling to disclose the informant's identity, in recognition of the need to encourage citizens to cooperate with law enforcement without fear of reprisal.[186] Recognizing the legitimate government interest in protecting the anonymity of a confidential informant, courts have been reluctant to require disclosure of the identity of confidential informants.[187]

As with surveillance locations revelations, a balancing test was found to be appropriate in cases involving confidential informants. An informant's identity will generally not be protected when the informant "is an active participant in the crime for which the defendant is prosecuted."[188] Moreover, "where a defense of entrapment seems reasonably plausible"[189] the informant's identity will generally not be protected.

In both the surveillance location and confidential informant situations, the courts have both recognized and articulated a potential adverse impact on an accused's Due Process and Confrontation Clause protections.[190] In each of these circumstances, the courts weigh the re-

183. N.J. R. CT., rule 1:27-3.

184. N.J. R. PROFESSIONAL CONDUCT, 1.1-8.5.

185. *See, e.g.*, OLIVER WENDALL HOLMES, JR., THE COMMON LAW AND OTHER WRITINGS 46 (1881) ("The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may continue to be believed.").

186. *See, e.g.*, Roviaro v. United States, 353 U.S. 53 (1957).

187. *See, e.g.*, Smith v. Illinois, 390 U.S. 129 (1968); State v. Milligan, 365 A.2d 914 (N.J. 1976); N.J. R. EVID. 36 (1976).

188. *Milligan*, 365 A.2d at 919.

189. *Id.* at 920; *see* State v. Dolce, 197 A.2d 185, 192-93 (N.J. 1964).

190. State v. Garcia, 618 A.2d 326, 331 (N.J. 1993).

alistic utility of the information sought against the interests of society and the realistic potential for harm.[191] American courts have historically reposed in trial judges the faith that they have the ability to seek out the truth, identify and reject pretextual claims, protect the rights of the accused and, at the same time, respect legitimate governmental concerns for confidentiality.[192] That same faith that rests with the trial bench is not deemed by the New Jersey Supreme Court to be adequate to protect society from a wrongful acquittal in a DWI case resulting from the presentation of pretextual defenses of retrograde extrapolation or 2100:1.

There are three generally accepted goals of an attorney discipline system, which are: deterrence, retribution, and incapacitation.[193] One court has recognized that "[m]any matters must be considered" in determining appropriate discipline.[194] The court continued:

> These include the nature of the offense, the deterrence of similar future misconduct by others, maintenance of the reputation of the bar as a whole, protection of the public and clients, the expression of condemnation by society on moral grounds of prohibited conduct, and justice to the respondent, considering all the circumstances and his present or future fitness to continue in the practice of law.[195]

The disbarment of Edson seemingly accomplished all of these goals.

Edson was not prosecuted criminally, but his disbarment was the functional equivalent of the imposition of criminal penalties. The United States Supreme Court recognizes the attorney's misconduct to be quasi-criminal and disbarment as a penalty.[196] The New Jersey Supreme Court is obviously concerned that the penalty of disbarment is insufficient to control the ethical conduct of members of the defense bar. The court acknowledged that the ease of fabricating a pretextual defense and the realistic unlikelihood of detection was such that the potential for wrong was too great. The court was not satisfied that a balancing of interests to be protected, as in surveillance location or informant identity cases, was an adequate safeguard in DWI cases.

With the confluence of *Romano*, *Downie*, *Tischio*, *Lentini*, *Edson*, and *Garcia*, the prosecution need only prove the operation of a vehicle,

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191. *Id.*

192. *See id.*

193. State *ex rel.* Neb. State Bar Ass'n v. Cook, 232 N.W.2d 120, 130 (Neb. 1975).

194. *Id.*

195. *Id.* Moreover, the elimination of the alleged pretextual defenses was unnecessary to protect society.

196. *See, e.g., In re* Ruffalo, 390 U.S. 544 (1968). While disbarment is a penalty, Double Jeopardy protections do not preclude criminal prosecutions. *See In re* Callahan, 358 A.2d 469, 472 (N.J. 1976).

within the jurisdiction, with a breath test result above a prohibited level, within a reasonable time of last operation, and with no intervening drinking to establish guilt. A defendant might argue that it was only a prima facie case because there were still available defenses, such as sobriety, duress, entrapment, quasi-entrapment, lack of culpable mental state, or mistake. This argument, however, is not viable because the New Jersey Supreme Court had not yet finished its agenda of eliminating defenses to DWI violations.

The other defenses were subsequently eliminated by the Court. *State v. Hammond*[197] eliminated the defenses of mistake or lack of culpable mental state.[198] In *Hammond*, a defendant was convicted after drinking what he thought was nonalcoholic punch, only to learn after his arrest for DWI that the punch had been "spiked."[199] The New Jersey court held that lack of a culpable mental state was not a viable defense.[200] The decision was not that the trier of fact could reject the defense after considering it and applying all the usual tests of credibility, but it was, rather, that the defense could not even be considered by the trial judge.[201] The only reasonable explanation for the *Hammond* decision was that the court, as in *Tischio's* examination of retrograde extrapolation, thought the defense was too amenable to pretext.

Often the conduct of the accused while at the police station prior to or during the breath testing is videotaped for presentation at trial. The videotape of the accused performing psychophysical tests, or simply functioning, was often later considered by the trier of fact on the issue of sobriety.[202]

In *State v. Ghegan*,[203] the trial court held that a "0.10% blood alcohol reading is irrebuttable."[204] The accused in *Ghegan* had a 0.25 percent BAC/BrAC reading, but that evidence was countered by the testimony of a well-qualified defense expert who offered unrebutted evidence that the observations of the accused on videotape were scientifically inconsistent with the 0.25 percent BAC/BrAC reading, but were

197. 571 A.2d 942 (N.J. 1990).

198. *Id.* at 948. Other states have also eliminated those defenses. *See, e.g.*, Commonwealth v. Griscom, 600 A.2d 996 (Pa. Super. Ct. 1991); *see also* State v. Nelson, 399 N.W.2d 629 (Minn. Ct. App. 1987) (eliminating burping or regurgitation defense and destruction of videotape evidence defenses as well as simulator solution defense).

199. *Hammond*, 571 A.2d at 943.

200. *Id.*

201. *Id.* at 948.

202. *See* State v. Ghegan, 517 A.2d 490 (N.J. Super. Ct. App. Div. 1986); State v. Morton, 181 A.2d 785 (N.J. Super. Ct. App. Div. 1962), *aff'd*, 189 A.2d 216 (N.J. 1963). *But see* State v. Allex, 608 A.2d 1 (N.J. Super. Ct. App. Div. 1992) (recognizing overruling of *Ghegan*).

203. 517 A.2d 490.

204. *Id.* at 491.

consistent with a BAC/BrAC reading of 0.05 percent.[205] Accordingly, the intermediate appellate court remanded the case to the trial court to consider the testimony of the defense expert in making a decision, which the trial court had refused to do in the original trial.[206] *Ghegan* was a well-reasoned decision because it recognized that the breath test results were merely evidence. Thus, the trier of fact was required to consider all competent evidence and give appropriate weight to that evidence when considering guilt, beyond a reasonable doubt.[207] The decision's ramifications, however, were to be short lived.

A scant six years later, the New Jersey courts eliminated another defense deemed to be too potentially pretextual for use in DWI prosecutions. In *State v. Allex*,[208] the *Ghegan* defense was determined to have been effectively overruled by *Tischio* and *Downie*, although neither of those cases mentioned *Ghegan*. In *Allex*, the court went even further than suggesting that *Ghegan* had been effectively overruled when it opined: "intoxication objectively determined by a breathalyzer test coupled with the operation of a motor vehicle constitutes the offense of drunk driving . . . . As a corollary of this rule, evidence of subjective intoxication is eliminated."[209] The *Allex* court upheld the prohibition against allowing a medical expert to testify on the issue of sobriety, for the purposes of contradicting the results of the Breathalyzer® test. The court also totally ignored the original intent of the inventor of the Breathalyzer® device.[210]

More recently, the New Jersey Supreme Court in *State v. Fogarty* eliminated the defenses of entrapment, quasi-entrapment, and duress in DWI prosecutions.[211] The rationale expressed in *Fogarty* was "to discourage long trials complicated by pretextual defenses."[212] In *Fogarty*, the accused was directed by a police officer to drive his vehicle away from the scene of a fight in a parking lot. After resisting by informing the police officer that he had a "designated driver," the accused was again directed by the police officer to drive his vehicle away from the

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205. *Id.*

206. *Id.*

207. *See, e.g., In re* Winship, 397 U.S. 358 (1970); McLean v. Moran, 963 F.2d 1306 (9th Cir. 1992).

208. 608 A.2d 1 (N.J. Super. Ct. App. Div. 1992).

209. *Id.* at 1 (citations omitted).

210. *See supra* text accompanying note 47.

211. 607 A.2d 624 (N.J. 1992); *see also* Adams v. State, 585 So. 2d 161 (Ala. 1991).

212. *Fogarty*, 607 A.2d at 628-29. The logical inference to be drawn from the language of *Fogarty* is that the court was concerned that the defense of sobriety (and therefore innocence) is too potentially pretextual of a defense to allow for presentation to a trier of fact for resolution.

area. Complying with the officer's request, the accused drove into a police car in the parking lot and was arrested for DWI.[213]

At trial, the accused attempted to offer the defenses of entrapment, quasi-entrapment, and duress.[214] The defenses were not permitted to be raised as being too potentially pretextual.[215] Other jurisdictions have eliminated similar defenses such as necessity[216] and entrapment.[217] Although those other jurisdictions do not specifically articulate their rationale to be a concern about potentially pretextual defenses, it is clear from the developing pattern that the agenda is the same.

For the first time in *Fogarty*, the *Edson* influence on *Tischio* and *Downie* became abundantly clear. The agenda of the New Jersey Supreme Court included: streamlining drinking-and-driving prosecutions by eliminating scientific defenses, no matter how valid; shortening trials, no matter how that interfered with the fairness of those trials; and eliminating any defense that might be successful and difficult to avoid, even if true.

Fogarty displays a shocking lack of confidence in the efficacy of the disciplinary system in dealing with ethical violations by members of the bar. The *Fogarty* court seeks to deter lawyers who are tempted to suggest the presentation of perjured defense testimony. The court's method is to eliminate defenses that might cause difficulties but are, in the court's opinion, above the ability of the trial court bench to evaluate.[218] *Fogarty* displays a gross lack of respect and confidence in the bench's ability to discern pretextual defenses and make appropriate decisions on credibility.

This lack of respect and confidence that this one court has displayed in its trial courts and disciplinary system has "trickled down" to intermediate appellate courts in the management of pretrial discovery and scheduling. Discovery of information that might be exculpatory has been, if not eliminated, at least severely restricted.[219] This is especially

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213. *Id.* at 626.

214. *Id.*

215. *Id.* at 629.

216. *See, e.g.*, State v. Riedl, 807 P.2d 697, 700 (Kan. Ct. App. 1991); State v. Wyatt, 800 S.W.2d 480, 481 (Mo. Ct. App. 1990).

217. Adams v. State, 585 So. 2d 161, 163 (Ala. 1991).

218. In New Jersey, DWI trials are not tried to a jury. State v. Hamm, 577 A.2d 1259, 1261 (N.J. 1990). In addition to New Jersey, only Nevada and Utah do not provide jury trials in DWI prosecutions. *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 540 (1989); *see also* UTAH CODE ANN. § 41-6-44(1)(a) (1988). Jury trials have been denied in some federal enclaves pursuant to administrative regulations. United States v. Nachtigal, 113 S. Ct. 1072 (interim ed. 1993).

219. New Jersey had full discovery in criminal and quasi-criminal cases, pursuant to New Jersey Supreme Court Rule 3:13-3 as made applicable to municipal courts by Rule 7:4-2. Discov-

true in cases where the requested discovery seems to be a prelude to potentially pretextual defenses.[220]

Artificial devices have been created for the rapid disposition of DWI cases. Cases that are not finally disposed of within sixty days from the date of the charge are deemed to be in non-compliance with management directives.[221] The sixty-day management directive emanated from the same Supreme Court which had eliminated potentially pretextual defenses.[222] When this intolerable circumstance is combined with the New Jersey Evidence Rules that have developed on an independent and unrelated course, unconstitutional consequences result. An examination of the relevant evidential development is appropriate to this analysis.

IV. Evidentiary Considerations

In most DWI cases, the only realistic issue is the blood/breath alcohol level.[223] The method of proving the blood or breath test results is governed by Rules of Evidence.[224] One court has stated the approach a trial judge must take in dealing with admissibility of evidence: whenever the admissibility of evidence is stated in the Rules of Evidence to be subject to a condition and the fulfillment of the condition is in issue, the matter is to be determined by the judge.[225] In the court's determination, the Rules of Evidence shall not apply except for Rule 4 (FRE 104) or a valid claim of privilege.[226] "This provision is not contained in the Uniform Rules of Evidence from which [the New Jersey] Rules of Evidence were sculptured and was unique among evidence codes in this

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ery, which had been complete and full as recognized in State v. Tull, 560 A.2d 1331, 1346 (N.J. Super. Ct. Law Div. 1989), has become increasingly restricted. State v. Young, 577 A.2d 520, 523 (N.J. Super. Ct. App. Div. 1990); State v. Maure, 573 A.2d 186, 195 (N.J. Super. Ct. App. Div. 1990); State v. Ford, 572 A.2d 640, 645 (N.J. Super. Ct. App. Div. 1990).

220. A myriad of problems are presented by this restriction of discovery because of the inability of counsel to make proffers of proof to preserve issues for appeal.

221. Renee Winkler, *Circuit Riding Judge Widens Route to Service 87 Towns*, N.J. Law., June 28, 1993, at 1 (Camden County's presiding municipal court judge now has responsibility for 87 towns). One of the reasons cited was the speedy prosecution of drunk driving violations. *Id.* The time restrictions are especially troublesome when one considers that almost all municipal courts have part-time judges and prosecutors. Some courts have sessions as infrequently as once each month.

222. *See supra* notes 197-220.

223. In DWI cases, the operation of the vehicle and the jurisdiction of the court are rarely at issue. *See supra* notes 24-30 and accompanying text.

224. State v. Cardone, 368 A.2d 952, 955 (N.J. Super. Ct. App. Div. 1976), *cert. denied*, 379 A.2d 234 (N.J. 1977).

225. *Id.*

226. *Id.*; State v. Dohme, 550 A.2d 1232 (N.J. Super. Ct. App. Div. 1988); *see also* McGuire & Epstein, *supra* note 87; Stephen A. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 Stan. L. Rev. 270 (1975).

country prior to the adoption of the Federal Rules of Evidence containing an identical provision."[227] "However, proof of a condition for admissibility of other evidence need not satisfy regular rules of evidence."[228]

In *State v. Cardone*,[229] New Jersey subtly expanded the utilization of its Rule 8(1), and blazed a trail that was soon to be followed by others. *Cardone* was a case in which an operator of a vehicle was charged with violating the legal speed limit. The issue was the admissibility of the preconditional evidence necessary as a foundation for the admissibility of the speed testing device reading.[230] Expanding New Jersey Evidence Rule 8(1), the equivalent of Federal Rule of Evidence 104(a) (FRE 104(a)), the court held that the rules of evidence did not apply to the preconditional evidence that established the proper operation of the speed testing device.[231]

Similarly, use of FRE 104(a) has been held to be the appropriate method for establishing preconditional evidence necessary for the admissibility of breath test device readings.[232] As a result, the breath test results are admitted into evidence without regard for the reliability protections afforded by the rules of evidence.

Hearsay documents are offered into evidence to establish the proper operating condition of the particular breath test device and the proper titration of the chemicals used in Breathalyzer® devices.[233] Likewise, hearsay documents are admitted into evidence to prove the proper training of the operator of the breath test device.[234]

A subtle difference exists in the application of FRE 104(a) in jurisdictions that do not provide for trial by jury for drinking-and-driving cases, such as New Jersey.[235] At a jury trial, because the issues to be determined at a hearing on the admissibility of preconditional evidence are legal issues, they are heard by a judge, out of the presence of the jury. At a bench trial, because the trier of law and fact are the same person, the judge makes the determination of both legal admissibility and weight to be applied. As a practical matter, at a bench trial, the advocates move in and out of a FRE 104(a) hearing almost without notice.

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227. *Cardone*, 368 A.2d at 953 (referring to Federal Rule of Evidence 104(a)).
228. *Id.*
229. 368 A.2d 952, 957 (N.J. Super. Ct. App. Div. 1976).
230. *Id.* at 953.
231. *Id.*
232. State v. Dohme, 550 A.2d 1232, 1235 (N.J. Super. Ct. App. Div. 1988).
233. *Id.*; State v. Ernst, 553 A.2d 356, 357 (N.J. Super. Ct. App. Div. 1989); State v. Ettore, 548 A.2d 1134, 1138 (N.J. Super. Ct. App. Div. 1988).
234. N.J. ADMIN. CODE tit. 13, § 13:51-1.7; *Ernst*, 553 A.2d at 357.
235. State v. Hamm, 577 A.2d 1259, 1268 (N.J. 1990).

It must be assumed that the New Jersey Supreme Court was acutely aware of this unique situation when they decided *Tischio*, *Downie*, *Hammond*, *Fogarty*, and their progeny. By eliminating issues as a matter of law, the trier of fact is precluded from hearing the issues at preconditional hearings. Therefore, the trier of fact is not likely to be persuaded that reasonable doubt exists.

The standard for the admissibility of preconditional evidence is below the reasonable doubt standard.[236] Preconditional evidence in DWI cases is received by the jury only if its reliability is established at the "clear and convincing" standard.[237] There may be unfortunate circumstances where the jury is not permitted to consider contradictory evidence on the issue of admissibility, and the trier of fact is not permitted to hear relevant evidence as to the weight to be given to the evidence. In such cases, the result is that the decision on guilt is made without regard to "reasonable doubt."

Frighteningly, courts are beginning to find that the whole is greater than the sum of its parts in the context of hearings to establish preconditional facts. In *State v. Sugar*,[238] the court held that preconditional evidence received into evidence at the level of "preponderance of the believable evidence" standard resulted in the proving of the operative fact by the "clear and convincing" standard.[239] "The state need only present facts or elements — proving such fact or element by preponderance of the evidence — that in combination clearly and convincingly establish the ultimate fact . . . ."[240] Thus, the *Sugar* decision allows a defendant to be convicted upon evidence that is established by a preponderance of the evidence — a level significantly below the "beyond a reasonable doubt" or "clear and convincing" standards.

The result of the FRE 104(a) hearing in an absolute per se DWI prosecution, in light of the *Sugar* decision, is that the potentially unreliable breath test is admitted into evidence at less than the reasonable doubt standard. If the result of this breath test is above the prohibited level, the defendant is precluded from presenting any rebuttal evidence except on the issue of operation or jurisdiction.[241] In addition, the defendant is precluded from offering any evidence on the issue of the weight to be conferred on the evidence by the trier of fact. The trier of fact has been stripped of any discretion and must find the defendant guilty of a per se violation. Thus, guilt beyond a reasonable doubt is

236. State v. Sugar, 527 A.2d 1377, 1379 (N.J. 1987).
237. Romano v. Kimmelman, 474 A.2d 1 (N.J. 1984); *see also Sugar*, 527 A.2d at 1379.
238. 527 A.2d 1377 (N.J. Super. Ct. App. Div. 1987).
239. *Id.* at 1380.
240. *Id.*
241. *Romano*, 474 A.2d at 16.

established by bootstrap evidence, introduced at less than the reasonable doubt standard, pursuant to the rule in *Sugar*.[242]

The prosecution is able to prove the per se DWI offense with the admission into evidence of a breath alcohol level of above the statutorily prohibited level. That level is not rebuttable by a defense presentation of evidence that the accused was not under the influence of a prohibited substance because that is irrelevant in a per se prosecution. The accused is not permitted to challenge the weight to be accorded to the breath alcohol test result by retrograde extrapolation,[243] improper blood-to-breath partition ratio,[244] or lack of culpable mental state.[245]

Once the elements of operation and jurisdiction are established at the ordinary level of scrutiny, all of the other evidence necessary for conviction of a per se violation is considered at a FRE 104(a) hearing. At the conclusion of the preconditional hearing, the accused is precluded from offering any defense. A defendant desiring to testify or call a witness might well be challenged to make a proffer of proof. The court will preclude any proffer of sobriety, lack of culpable mental state, breath test machine tolerance, retrograde extrapolation, entrapment, quasi-entrapment, duress, weight to be accorded to breath-test device results, blood-to-breath partition ratio, and scientific unreliability of the testing instrument.[246] Testimony with respect to all of these potential defenses will also be precluded at the FRE 104(a) hearing.[247]

New Jersey is a clear example of an articulated and unarticulated desire to "streamline the implementation of these laws and to remove obstacles impeding the efficient and successful prosecution of those who drink and drive."[248] However, due to the perceived strong public policy and desire to convict DWI offenders, New Jersey has completely viti-

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242. At least one court has held that breath test results are admissible without preconditional foundation evidence. State v. Brown, 414 S.E.2d 505 (Ga. Ct. App. 1991).

243. *See, e.g.*, State v. Tischio, 527 A.2d 388 (N.J. 1987), *appeal dismissed*, 484 U.S. 1038 (1988).

244. *See, e.g.*, State v. Downie, 569 A.2d 242 (N.J.), *cert. denied*, 498 U.S. 819 (1990).

245. *See, e.g.*, State v. Fogarty, 607 A.2d 624 (N.J. 1992).

246. *See, e.g., id.* at 630-31; *Downie*, 569 A.2d 242; *Tischio*, 527 A.2d 388; State v. Allex, 608 A.2d 1 (N.J. Super. Ct. App. 1992); State v. Lentini, 573 A.2d 464 (N.J. Super. Ct. App. 1990); State v. Cardone, 368 A.2d 952, 954 (N.J. Super. Ct. App. 1976), *cert. denied*, 379 A.2d 234 (1977).

247. Although technically still available, defenses such as belching, regurgitation, or challenges to the "reasonable time" requirements are seldom offered and, when they are, they are seldom successful. *See Fogarty*, 607 A.2d at 630-31; *Cardone*, 368 A.2d at 954; *see also Downie*, 569 A.2d 242; *Tischio*, 527 A.2d 388; *Allex*, 608 A.2d 1; *Lentini*, 573 A.2d 464.

248. *Tischio*, 527 A.2d at 393-94. "One such impediment has been the introduction of conflicting expert testimony at trials . . . . The vast majority of statutory revisions in this area have been directed towards minimizing, if not eliminating, the necessity of this kind of evidence. . . . The Court has consistently sought to eliminate the necessity of expert testimony." *Id.*; *see In re* Collester, 599 A.2d 1275, 1278 (N.J. 1992) ("We firmly endorse the governmental commitment

ated an accused's right to defend.[249] The New Jersey courts have done everything possible to "enforce strictly the strong legislative policy to impose swift and certain punishment"[250] on DWI offenders by eliminating "every possibility of pretextual defenses,"[251] at the expense of the accused's ability to adequately defend himself.

V. NEVADA'S STATUTORY SCHEME COMPARED

Nevada legislatively created an almost identical DWI scheme to that created by the New Jersey judiciary.[252] In *McLean v. Moran*,[253] the Ninth Circuit recently examined the constitutionality of Nevada's application of its DWI law. The Nevada statute "created a presumption that individuals with 0.10% or more by weight of alcohol in their blood, as demonstrated by a test, has no less than that amount of alcohol in their blood at the time of the alleged violation of driving under the influence of alcohol (DUI)."[254]

At the *McLean* trial, a criminalist, testifying for the prosecution, opined that Ms. McLean had a 0.16 percent BAC/BrAC at the time that she was tested, thirty to forty-five minutes after last operation of the vehicle.[255] The criminalist testified that it was not possible to extrapolate a BAC/BrAC taken thirty to forty-five minutes after the time of last operation of a motor vehicle to the BAC/BrAC at the time of last operation because the information necessary to perform that calculation was not available to the prosecution, but solely within the knowledge of the accused.[256]

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to the eradication of drunk driving as one of the judiciary's own highest priorities."); *see also* State v. Hammond, 571 A.2d 942 (N.J. 1990). The court in *Hammond* stated:

> [I]nvoluntary intoxication defense do[es] not apply to a defendant charged with operating a motor vehicle under the influence of intoxicating liquor. . . . To allow such a defense (as involuntary intoxication) to a charge of driving while intoxicated . . . would result in inadequate protection to the public from the dangers of intoxicated drivers and . . . would surely frustrate the efficient and vigorous enforcement of our laws against driving while intoxicated.

Id. at 948.

249. The *Hammond* court tried to justify this elimination of most defenses by saying "due to the comparative lack of severity of penalties for DWI, certain constitutional rights do not apply to DWI proceedings. . . . A clear legislative intent and a strong public policy exist discouraging long trials complicated by pretextual defenses." *Id.*

250. *Fogarty*, 607 A.2d at 632 (Stein, J., dissenting).

251. *Id.* at 629.

252. NEV. REV. STAT. § 484.381(1) (1991).

253. 963 F.2d 1306 (9th Cir. 1992).

254. *Id.* at 1307.

255. *Id.*

256. The factors necessary to perform the calculation include body weight, time of consumption of alcoholic beverages, alcohol content of beverage, nature and kind of food consumed, and time of consumption. *Id.*

Ms. McLean was convicted because of the presumption found in the Nevada statute that the BAC/BrAC of 0.16 percent was the BAC/BrAC at the time of last operation. After a consideration of both the scientific and legal aspects of the Nevada statutorily-created presumption, the Ninth Circuit Court of Appeals held that the statutory scheme, as applied to Ms. McLean, was unconstitutional.[257]

In disallowing the Nevada statutory presumption, the Ninth Circuit found it unnecessary to decide whether the statute created a conclusive presumption or rebuttable presumption.[258] The court decided that regardless of which type of presumption was created by Nevada, it was an unconstitutional violation of the accused's Due Process rights.[259] Specifically, the presumption impermissibly shifted the burden of proof of an element of the offense to the accused.[260]

There are some important similarities between Nevada's prosecutions, as evidenced by *McLean*, and New Jersey prosecutions for DWI. In both jurisdictions, the accused is not afforded the protections of trial by jury.[261] The Nevada presumption is the functional equivalent of the judicially created conclusive presumption created in *State v. Tischio*.[262] The similarities, however, end there. Nevada law did not preclude Ms. McLean from offering evidence of machine intolerance, blood-to-breath ratio, radio frequency interference, entrapment, quasi-entrapment, duress, or lack of culpable mental state. It is unclear whether or not she would have been precluded from offering defense evidence of retrograde extrapolation. In any event, none of those defenses were offered.

Even in spite of the ability of Ms. Mclean to offer *some* defenses, the conviction was reversed. New Jersey would have precluded each of those defenses. The Ninth Circuit found the Nevada presumption scheme to be unconstitutional. Surely the same result would follow from an impartial examination of the New Jersey scheme.

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257. *Id.*

258. *Id.* at 1310.

259. *Id.* The court recognized that Nevada made all presumptions permissive rebuttable presumptions. *Id.* Even in recognition of that attempt to conform constitutionally, the court determined that the application of the presumption, in the context of a per se DWI case, resulted in either a conclusive or mandatory presumption. *Id.* Either class of presumption was constitutionally intolerable. *Id.*

260. *Id.*

261. *Compare* Blanton v. City of North Las Vegas, 489 U.S. 538 (1989) *with* State v. Hamm, 577 A.2d 1259 (N.J. 1990).

262. 527 A.2d 388 (N.J. 1987).

VI. SOLUTIONS

Maintaining the status quo is clearly unacceptable.[263] A change in FRE 104(a), to require that preconditional evidence be admitted only upon proof beyond a reasonable doubt in strict liability offenses is not a workable solution. This change in the rule would not satisfy the constitutional concerns caused by shifting or eliminating the burden of proof and would add yet another layer of inquiry and complexity that FRE 104(a) was meant to avoid.

It has been suggested that requiring at least two breath tests is a desirable solution to the problem because it would enable the trier of fact to determine if an accused was in an absorptive or elimination phase of the alcohol curve.[264] The *McLean* court recognized that Nevada made all presumptions permissive rebuttable presumptions. Even in recognition of that attempt to conform constitutionally, the court determined that the application of the presumption, in the context of a per se DWI case, resulted in either a conclusive or mandatory presumption. Either class of presumption was constitutionally intolerable. Allegedly, this solution would have an impact on both blood-to-breath partition ratio questions and retrograde extrapolation.[265]

The two-test solution, however, standing alone, is unworkable because two tests do not necessarily provide the needed facts to determine a particular person's position on the alcohol curve. The trials will, in spite of two tests, still be burdened with the necessity of expert witnesses for the purposes of interpreting the blood alcohol curve and conducting the necessary calculations to make the readings relevant. Two equal readings establish nothing. They simply mean that the absorptive, plateau, and elimination stages are not ascertainable.[266] Readings that differ from one another by 0.01 percent may only mean that, within the alcohol curve, a peak and valley were reflected.[267] This is not necessarily indicative of either absorption or elimination. Two tests that differ one from the other by more than 0.01 percent may be indicative of a trend in the alcohol curve, but more realistically, these readings may reflect a defective breath test device.[268]

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263. *See, e.g., McLean*, 963 F.2d 1306.

264. Many jurisdictions require two breath tests, just as New Jersey does. *See, e.g.*, State v. Downie, 569 A.2d 242 (N.J.), *cert. denied*, 498 U.S. 819 (1990); Romano v. Kimmelman, 474 A.2d 1 (N.J. 1984); Commonwealth Dep't of Transp. v. McFarren, 525 A.2d 1185 (Pa. 1987); *see also* TAYLOR, *supra* note 20, § 1.71.

265. Pariser, *supra* note 23, at 179.

266. Pariser, *supra* note 23, at 179.

267. Pariser, *supra* note 23, at 179.

268. *Romano*, 474 A.2d at 12.

The use of preliminary breath test devices (PBT's),[269] used in conjunction with a later breath test, seems to be an attractive method of providing the necessary information to the prosecution for the purpose of establishing the BAC/BrAC at the time of operation of the vehicle. Such devices might also be useful to the prosecution in rebutting evidence offered by the defense, if the PBT results are inconsistent with those BAC/BrAC readings.

Most jurisdictions have held that PBT's do not satisfy the *Frye/Downing* reliability tests for admissibility.[270] It is yet to be determined what effect the recent decision in *Daubert v. Merrell Dow Pharmaceutical*[271] will have on the admissibility of PBT's. Those jurisdictions that allow for the use of PBT's permit the admissibility only on the issue of probable cause for arrest, and not on the issue of substantive guilt.[272] All of the constitutional and societal impediments to the use of scientifically unreliable tests are applicable to a factual determination of guilt aided by the use of these instruments.

Revising DWI statutes to eliminate criminal sanctions and create a statutory scheme of civil offenses with civil penalties, including loss of driving privileges, would seem to eliminate constitutional concerns. The imposition of "civil" penalties, including monetary sanctions and loss of driving privileges, is often used to enforce implied consent laws.[273]

Assuming that the current severe DWI penalties, including jail sentences, are responsive to societal demands, such a decriminalization would probably evoke a public outcry against such trivialization of the offense. Additionally, severe civil penalties might well result in a determination that criminal constitutional rights were triggered.[274]

Science can offer a partial, but nonetheless meaningful, solution to the dilemma. Breath tests at the scene of the DWI arrest seem to offer a viable means of greatly reducing prosecutions caused by retrograde extrapolation. Appropriate protocols would need to be adopted to insure against the testing of mouth alcohol that has not dissipated.[275] This is

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269. PBT's are usually small, hand held, portable breath test devices.

270. *See, e.g.*, State v. Braun, 495 N.W.2d 735, 738-39 (Iowa 1993); State v. Zell, 491 N.W.2d 196, 197 (Iowa Ct. App. 1992); City of Fargo v. Ruether, 490 N.W.2d 481, 483 (N.D. 1992).

271. 113 S. Ct. 2786 (interim ed. 1993). It is probable that PBT's will be allowed into evidence under *Daubert* because the rationale of the ruling seems to be that the inquiry into admissibility should focus on the methodology rather than the possible conclusions. *See id.*

272. *See, e.g.*, People v. Leahy, 17 Cal. Rptr. 2d 359 (Cal. App. Dep't Super. Ct. 1992); Foster v. State, 420 S.E.2d 78 (Ga. Ct. App. 1992); Manley v. State, 424 S.E.2d 818 (Ga. Ct. App. 1992).

273. *See, e.g.*, N.J. STAT. ANN. § 39:4-50.2 (West 1990).

274. *See* Blanton v. City of North Las Vegas, 489 U.S. 538, 595 n.12 (1989).

275. *See, e.g.*, State v. Thompson, 814 P.2d 393 (Haw. 1991); State v. Fraley, 601 N.E.2d 108 (Ohio Ct. App. 1991); State v. Lessar, 805 P.2d 730 (Or. Ct. App. 1991); *see also* State v.

not an insurmountable problem. Simply requiring the officer to observe the subject for fifteen minutes prior to first testing would eliminate most problems of residual mouth alcohol. Clearly, by the time of the second on-site test, all residual mouth alcohol would be dissipated. A comparison of the second test to the first would provide reliable information concerning the existence of residual mouth alcohol and would provide meaningful information concerning location of the suspect on the alcohol curve.

New scientific studies confirm that on-site alcohol testing is increasingly realistic, at minimal cost. Inexpensive, alcohol sensitive saliva strips have been reported to have a surprisingly high reliability rate when compared to Breathalyzer® tests administered simultaneously.[276]

With the implementation of on-site breath testing, retrograde extrapolation would still be a constitutionally available defense, but the window of opportunity for pretextual factual presentations would be greatly reduced. Pretextual defenses of retrograde extrapolation would only exist at a reasonably low level of blood alcohol because of the relatively slow rate of the absorptive process. The first test would take place within approximately fifteen minutes of the last operation of the vehicle. The time necessary for full absorption is thirty to ninety minutes.[277] Using on-site breath testing would render unnecessary the *Tischio* "time bomb" type of rationale and cause DWI cases to be much more constitutionally palatable.

On-site breath testing, however, has been criticized as being impractical.[278] The author respectfully disagrees. The Breathalyzer® device was invented and designed to be usable both at the police station and in police vehicles. They are not too fragile to be used on-site.[279]

On-site testing also reduces the potential for other defenses that have been criticized by the courts. Questions concerning machine tolerance are minimized by corroborative testimony of arresting officers who simultaneously administered the breath test. This testimony describing simultaneous observation also minimizes concerns about the blood-to-breath partition ratio, for the same reasons. It is just this type of comparison that was intended by the inventor of the Breathalyzer® to tem-

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Nelson, 399 N.W.2d 629 (Minn. Ct. App. 1987) (noting that the Minnesota Bureau of Criminal Apprehension checklist recommends a 15- to 20-minute period of observation prior to conducting a breath test to allow for elimination of alcohol from the mouth and nasal passages).

276. Marsha E. Bates et al., *The Correspondence Between Saliva and Breath Estimates of Blood Alcohol Concentration; Advantages and Limitations of The Saliva Method*, 54 J. STUDIES ON ALCOHOL 17, 20 (1993).

277. See *supra* note 123 for a definition of absorptive stage.

278. Pariser, *supra* note 23, at 174-75.

279. ROBERT F. BORKENSTEIN, BREATHALYZER MANUAL OF INSTRUCTIONS 30 (1959).

per his concerns about the machine's reliability for use in per se jurisdictions.[280]

On-site testing has other benefits. Innocent people whose BAC/BrAC is below the prohibited level would be detained for a much shorter period of time, thus minimizing interference with their freedom. The arresting officer would be returned to patrol in a much shorter period of time. The need for PBT's would be eliminated with the attendant financial savings that might well be channeled into the retrofitting of police patrol vehicles with breath test devices. Not all police vehicles would need to be equipped with breath test devices. Equipped vehicles could easily be dispatched to the scene of a suspected DWI stop. The response time would cause no realistic problem because that time would be simultaneous with the observation time necessary to insure the dissipation of mouth alcohol.

It is not the province of the courts, nor would it be appropriate for the courts, to command on-site testing. "Experts in police science might disagree over which method is preferable as an ideal."[281] Surely the courts can have a significant impact on the enforcement community by being less concerned with convictions based upon the procedures adopted by law enforcement and more concerned with the protection of individual liberties. The choice would remain with law enforcement. "The choice among such reasonable alternatives remains with the government officials who have a unique understanding of and a responsibility for, limited public resources, including a finite number of police officers."[282] Law enforcement will respond to judicial guidance by modification of law enforcement procedures to conform to principles of law.

The on-site solution would not resolve the court-perceived problem of confidence in the defense bar's ethics nor the ability of the lawyer disciplinary system to control the conduct of the bar. Whether or not they are accurate, these concerns do exist.[283] Resolution of lawyer disciplinary concerns should not to be resolved by a cavalier disregard of the client's constitutional rights or by interfering with a defendant's right to receive a fair trial. If the tension between the Constitution and the super-efficient administration of criminal charges is to be resolved in favor of constitutional fairness, defenses going to culpable mental state must be acknowledged for DWI as they are for most violations.

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280. *See supra* note 47.

281. Michigan Dep't of State Police v. Sitz, 110 S. Ct. 2481, 2487 (1990).

282. *Id.*

283. *In re* Edson, 530 A.2d 1246 (N.J. 1987); State v. Garcia, 618 A.2d 326 (N.J. 1993); *see supra* notes 164-96 and accompanying text.

Mandatory continuing legal education (CLE) imposed on members of the bar on issues of attorney professional responsibility would improve awareness among the bar and be a first step in improving public confidence in the bar. Pennsylvania has adopted such a mandatory CLE requirement.[284] New Jersey has a mandatory CLE requirement only for certified trial lawyers.[285] New Jersey does not presently require an ethics component to their mandatory CLE requirement.

Assuming that the concern about control of lawyer conduct in suborning perjury and disclosure of information learned in *in camera* proceedings can well be controlled with legislation, increasing criminal penalties for violations by members of the bar above those penalties provided for nonlawyers could have a real impact upon attorney conduct.[286] This increase in deterrent effect could allay the judiciary's fears of pretextual defenses suggested by members of the bar.

Even if such a legislative scheme proved to be less than completely successful, it would alleviate the concern about the public perception of the profession's dedication to policing itself. A new criminal law scheme of controlling lawyer conduct would not be an inappropriate corollary of a mandatory CLE requirement on professional responsibility.

VII. CONCLUSION

A constitutionally intolerable strict liability quasi-criminal violation has been created in New Jersey in a paranoid judicial response to a perceived failure of the lawyer disciplinary system. The decisions display a shocking lack of confidence in the municipal court bench. Typically, the penalties imposed for DWI prosecutions are much greater than those permitted in other strict liability offenses.[287] Whether called a strict liability offense, a conclusive presumption, or a mandatory rebuttable presumption, the result is the same, unconstitutionality.[288] While three states treat DWI as sufficiently petty to preclude the right

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284. *See* PA. CONTINUING LEGAL EDUC. BD. REGS. § 3.

285. N.J. SUP. CT. R. 1:39-2(d).

286. Examples of such penalties to be imposed on attorneys include mandatory jail sentences or mandatory disbarment. Mandatory jail sentences have been justified for weapons violations, N.J. STAT. ANN. § C:43-6(c) (West Supp. 1993), and for certain narcotics offenses. *See* N.J. STAT. ANN. § C:35-7 (West Supp. 1993) (providing for enhanced penalties for selling narcotics to minors); N.J. STAT. ANN. § C:35-5 (West Supp. 1993) (providing for enhanced penalties and minimum sentencing requirements for possession of large quantities of narcotics). Mandatory disbarment has been justified in cases of trust account violations by lawyers. *See, e.g., In re* Wilson, 131 A.2d 750 (N.J. 1957).

287. *Compare* N.J. STAT. ANN. § 39:4-50 (West 1990) (speeding) *with* N.J. STAT. ANN. § 2C:33-13 (West Supp. 1993) (smoking in public).

288. *See, e.g., In re* Winship, 397 U.S. 358 (1970); McLean v. Moran, 963 F.2d 1306 (9th Cir. 1992).

to trial by jury,[289] the mere declaration of pettiness does not eliminate the entitlement to other constitutional protections.

New Jersey courts, like Nevada's legislature, have created an unconstitutional strict liability offense, where the proof of the operative fact is not rebuttable and is proved at less than a reasonable doubt level. When the law provides for a strict liability offense in DWI cases, a judge could conceivably have an honest and reasonable doubt as to the guilt of a defendant, based upon the inconsistency between the BAC/BrAC and the other credible evidence, such as a videotape, and still be compelled to convict. This result may have been unintended. Additionally, it may be based on the admirable motives of protecting public safety, reinforcing public confidence in the bench and bar, and the elimination of lengthy, complicated trials. The lack of intention and the presence of laudable motives, however, are surely insufficient for those wrongfully convicted of DWI. Unintended or not, laudable or not, such a result cannot be constitutionally tolerated.[290]

Justice and public confidence in the system of justice come at a cost. Prior to *Tischio*, *Lentini*, *Downie*, *Edson*, *Hammond*, and *Fogarty*, there was no articulated public lack of confidence in the New Jersey system of justice. Likewise, there was no public outcry for reformation of the New Jersey lawyer disciplinary system. Even if there were such an outcry, the Constitution will not tolerate the stripping of the trier of fact of his responsibility to weigh and evaluate evidence and to convict only on proof beyond a reasonable doubt. The intolerable circumstance that exists in New Jersey and Nevada, and that exists at least in part in all jurisdictions that employ an absolute per se scheme for DWI prosecutions can be remedied by any one of several modifications to the existing scheme.

The courts have spoken loudly and clearly that unethical conduct in DWI cases will not be tolerated.[291] Just as loudly and clearly, the courts have spoken that constitutional rights may not be sacrificed to the goal of streamlining DWI prosecutions.[292] "One man's word is no man's word. We should quietly hear from both sides."[293]

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289. *See supra* note 58 and accompanying text.
290. *See, e.g., Winship*, 397 U.S. 358; *McLean*, 963 F.2d 1306.
291. *See In re* Edson, 530 A.2d 1246 (N.J. 1987).
292. *See, e.g., McLean*, 963 F.2d 1306.
293. Eilers v. District Court, 583 A.2d 677, 678 (D.C. 1990) (citing Goethe).