LEGISLATIVE PROPOSAL

COMPELLING MEDICAL PERSONNEL TO DRAW BLOOD SAMPLES FROM DWI SUSPECTS

I. Introduction

Drinking and driving remains a primary cause of traffic fatalities and injuries.[1] In New Jersey, the ongoing war against the intoxicated driver is being hampered by some medical professionals who refuse to cooperate when it becomes necessary to withdraw a blood sample to determine the blood alcohol concentration [hereinafter BAC] for evidentiary purposes.

The following hypothetical will serve to exemplify this point. The facts in this hypothetical case are an amalgamation culled from actual drinking driving investigations in New Jersey.[2] It is Friday night in Hypotown, U.S.A. Mr. Drinkemup has just finished working and has decided to stop at the One For The Road Tavern, the local drinking establishment, for dinner and a beer. Mr. Drinkemup remains at the One For The Road after dinner because some of his friends arrived to watch a football game on the big screen television. The game ends at midnight. Mr. Drinkemup finishes his last beer and bids farewell to his friends. It is now 1 a.m. and Mr. Drinkemup, thinking he had consumed only two beers,[3] decides to drive his car home. In reality Mr. Drinkemup was enjoying himself for six to seven hours and is

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[1] NEW JERSEY STATE POLICE FATAL MOTOR VEHICLE ACCIDENT COMPARATIVE DATA REPORT 1991, at 14. Drunken driving was the leading "contributing circumstance" for the years 1987 through 1991. *Id.*

[2] The author's position as a New Jersey State Trooper and Breathalyzer Coordinator, responsible for rebuttal testimony as an expert witness for the State in driving while intoxicated (hereinafter DWI) litigation, has afforded him the insight to understand the scope of this problem. Names of real defendants have been omitted to protect the innocent [hereinafter Personal Experience].

[3] In New Jersey, when a person is arrested for drinking and driving he is usually required to give a breath sample. The breathalyzer procedure requires the police officer to complete an Alcohol Influence Report [hereinafter AIR]. The AIR has two sections, the first being the breathalyzer operational checklist, and the next being a series of questions the police officer asks the suspect. One of the questions listed on the AIR, and often asked by the police officer at the scene of the stop is, "how many drinks have you had?" The most common and predictable response is, "I had two beers".

well over the legal limit of .10% blood alcohol concentration.[4] Shortly after leaving The One For The Road Tavern, Mr. Drinkemup crashes into a phone pole suffering serious injuries.

Due to his injuries, Mr. Drinkemup will be unable to take a breathalyzer test. Police Officer Stopdrunk arrives and notes a strong odor of alcoholic beverage emitting from Mr. Drinkemup. Officer Stopdrunk requests the aid of paramedics to attend to Mr. Drinkemup's injuries. The paramedics stabilize Mr. Drinkemup prior to transporting him to the emergency room.

Generally, in this type of situation, paramedics will promptly start an I.V. line.[5] Prior to administering any fluids through the line, a blood sample will be extracted for medical diagnostic purposes. If a blood sample was not taken at the scene it will be one of the first priorities upon arrival at the emergency room. According to New Jersey's Division of Highway Traffic Safety, in 1990, Cooper Medical Center in Camden reported that 174 of the 662 drivers that entered the center had prosecutable blood alcohol levels.[6] The medical center regulations stipulate that every patient over the age of sixteen is to be given a blood test as a normal practice. Up to this point the DWI case is still very prosecutable.[7]

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[4] N.J. STAT. ANN. § 39:4-50 (West 1990), provides in pertinent part:
A person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of .10% or more by weight of alcohol in the defendant's blood or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit producing drug to operate a motor vehicle owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of .10% or more by weight of alcohol in the defendant's blood, shall be subject: . . .

Id.

[5] Interview with Lisa McCarthy, R.N., M.S.N., former nursing instructor at Ocean County College, Toms River, N.J. and staff nurse in the intensive care unit at Medical Center of Ocean County, Bricktown, N.J. (July 1, 1992).

[6] New Jersey Division of Highway Traffic Safety, Grant Application, Schedule B, I. Problem Statement (1990).

[7] Officer Stopdrunk's case to this point has all the elements needed to prosecute. N.J. STAT. ANN. § 39:4-50 (West 1990) requires operation of a motor vehicle, impairment of the operator, and that the operator's impairment was caused by alcohol or drugs. Officer Stopdrunk has evidence that Mr. Drinkemup operated his vehicle. The strong odor of alcoholic beverage emitting from Mr. Drinkemup is evidence that alcohol is involved. At this posture in the investigation, Officer Stopdrunk is justified to seek the technical evidence necessary for conviction.

The next chronological event occurs when the police officer arrives at the hospital. The vast majority of emergency room personnel[8] welcome the police officer with open arms. Hospital personnel have seen the destructive forces of the drinking driver. Unfortunately, there is a cadre of medical personnel that refuse to acknowledge that police officers are trying to prevent the devastation caused by drunk drivers. Moreover, certain medical personnel openly seek to thwart any attempt by a police officer to obtain a blood sample or the appropriate hospital record. In some cases the emergency room personnel simply refuse to draw the sample when the police officer makes his request.[9] Other times emergency room personnel claim they can only draw the sample with the patient's consent and then tell the patient, in front of the police officer, to refuse his consent. In one extraordinary case, when the police were observed approaching the entrance to the hospital, the personnel in the emergency room locked the door and prevented the officer from even entering the hospital.[10] Some emergency room personnel have been caught trying to contaminate the sample by prepping the arm with alcohol.[11] These unfortunate occurrences seriously hamper the State's ability to prosecute drunken driving cases. These cases differ from the "routine" DWI case[12] in which a police officer observes the operation of the motor vehicle. In these cases, the worse case scenario, an accident, has already occurred. In addition, in all likelihood the suspect was not given any psycho-physi-

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8 For the purposes of this note, "emergency room personnel" refers to doctors, nurses, paramedics, technicians and any other person(s) who are qualified phlebotomists.

9 Personal Experience, *supra* note 2.

10 *Id.* This was an actual occurrence that was told to the author by the investigating police officer.

11 Interview with Ajit Tungare, the head forensic chemist at the New Jersey State Police Laboratory in Little Falls, N.J. Prior to withdrawing blood the arm should be prepped with a non-alcoholic, betadine solution. Rubbing alcohol, however, does not adversely effect the sample because the gas chromatograph that is used to analyze the blood can distinguish between the rubbing alcohol used as a prepping agent and the ethyl alcohol which was imbibed. *Id.*

12 The "routine" drinking driving case, if one exists, is a poorly operated motor vehicle i.e., speeding and/or weaving across the lines. The officer stops the vehicle and approaches the driver. The officer detects an odor of alcoholic beverage. The driver drops his license, has blood shot eyes, a flushed face, and slurred speech. The driver states he has consumed two beers. The driver is asked to perform balance tests and fails. The driver is arrested and subjected to a breathalyzer test.

cal tests due to his injuries. This makes the blood sample a critical piece of evidence to the State in prosecuting an intoxicated driver.

A. *The Problem*

Within the context of the drinking driver, the most objective test for intoxication is harbored within the body of the suspect, and from the moment of ingestion, alcohol is being absorbed and burned off as a result of natural metabolic processes.[13] In New Jersey, the scientific evidence of choice for the prosecution of DWI offenders when alcohol is the suspected source of intoxication is the breathalyzer.[14] Unfortunately, the statistics chillingly indicate that DWI offenders are more likely to be involved in an accident than apprehended by the police.[15] These accidents often cause the suspect to be injured, necessitating his transportation to the hospital. Once the breathalyzer has been eliminated as a possible tool for detecting the blood alcohol concentration level of the suspect, the police must then seek a blood sample. The treating medical personnel determine the BAC of the suspect/patient before administering medication to prevent any possible adverse synergistic drug reactions.[16] The BAC could be established by analyzing the blood, breath, urine, or saliva.[17] The most common and most reliable test in the clinical laboratory setting is the analysis of blood.[18]

If a person is involved in a motor vehicle accident and requires institutional medical treatment, it can be stipulated that a

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[13] Robert Brooks Beauchamp, Note, *Shed Thou No Blood: The Forcible Removal of Blood Samples from Drunk Driving Suspects*, 60 S. CAL. L. REV. 1115 (1987).

[14] State v. Downie, 569 A.2d 242 (N.J. 1990). The court emphasized that the breathalyzer is a practical and reasonably accurate way of fulfilling the Legislature's intent to punish drunk drivers. The court was satisfied that the breathalyzer is a reliable and indispensable tool for law enforcement purposes. The court believed that the Legislature intended the breathalyzer to be a measure of inebriation and not just blood alcohol. The breathalyzer reads alcohol with unimpeachable accuracy. The court ruled that the breathalyzer is unsurpassed in its combined practicality and usefulness, and is the tool the Legislature intended to carry out its will. *Id.* at 251.

[15] *See infra* notes 21-38 and accompanying text.

[16] *See supra* note 5.

[17] Johnathan Barnard, *Proof of Hospital Performed Blood Alcohol Tests in Evidence*, 9 AM. J. TRIAL ADVOC. 43, 44 (1985).

[18] *Id.* at 45.

blood sample will be drawn from the person for alcohol analysis. The problem arises when the investigating police officer seeks a portion of the sample for investigative purposes. In general, the medical community, especially those employed in emergency or trauma centers, overextend themselves to assist police officers in their battle against drinking drivers. A small minority, however, for a variety of reasons, refuse to cooperate.

B. *Statutory Background*

In 1986, New Jersey enacted two statutes pertaining to the drawing of blood samples by medical personnel when requested by law enforcement personnel conducting a DWI investigation.[19] The current statutes relieve medical personnel of civil and criminal liability when operating in this context and permit a notarized report to be submitted in lieu of a court appearance.[20] Nevertheless, because some members of the medical profession still refuse

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19 N.J. STAT. ANN. § 2A:62A-10 (West 1990) and N.J. STAT. ANN. § 2A:62A-11 (West 1990).

20 N.J. STAT. ANN. § 2A:62A-10 (West 1990) reads:

> MEDICAL PERSONNEL AND FACILITIES INVOLVED IN OBTAINING BODILY SUBSTANCE SPECIMENS; IMMUNITY FROM CIVIL OR CRIMINAL LIABILITY:
> When acting in response to a request of a State, county or municipal law enforcement officer, a county prosecutor or his assistant, the Attorney General or his deputy or a State or county medical examiner, any physician, nurse or medical technician who withdraws or otherwise obtains, in a medically accepted manner a specimen of breath, blood, urine or other bodily substance and delivers it to the law enforcement officers specified herein shall be immune from civil or criminal liability for so acting, provided the skill and care exercised is that ordinarily required and exercised by others in the profession. The immunity from civil or criminal liability shall extend to the hospital or other medical facility on whose premises or under whose auspices the specimens are obtained, provided the skill, care and facilities provided are those ordinarily so provided by similar medical facilities.

Id. N.J. STAT. ANN. § 2A:62A-11 (West 1990) reads:

> SPECIMEN TAKEN IN MEDICALLY ACCEPTABLE MANNER; CERTIFICATE; EVIDENCE:
> Any person taking a specimen pursuant to section 1 of this act shall, upon request, furnish to any law enforcement agency a certificate stating that the specimen was taken pursuant to section 1 of this act and in a medically acceptable manner. The certificate shall be signed under oath before a notary public or other person empowered to take oaths and shall be admissible in any proceeding as evidence of the statements contained therein.

Id.

to assist law enforcement officers, the Legislature needs to enact a law compelling their assistance. This note provides legislative proposals designed to improve the use of blood samples in DWI cases and examines the relevant constitutional issues, the common law in New Jersey, and the Legislature's intentions pertaining to DWI related statutes.

II. Driving While Intoxicated Statistics

The rate of intoxicated drivers involved in motor vehicle accidents has risen with the increased popularity of the automobile. In 1939, statistics indicate that at least twenty-five percent of the drivers involved in fatal motor vehicle accidents were intoxicated.[21] In 1955, the figure climbed to fifty percent.[22] The data from 1972 through 1982 indicates that 250,000 lives were lost in alcohol-related crashes at an annual societal cost estimated to be between $21 and $24 billion.[23] Between 1979 and 1980, alcohol was estimated to be responsible for forty-three percent of the fatal accidents and twenty-nine percent of the serious injury accidents.[24] Currently, year after year the figures remain relatively the same. Over 55,000 people are killed on the roadways each year.[25] Nearly half of these fatal accidents involve alcohol.[26] Twenty-five to forty percent of injury accidents involve the use of alcohol.[27] The economic cost to society as a result of alcohol-related accidents is estimated to be $2 billion a year.[28] The chilling facts indicate that there is a one in two chance that the average driver will be involved in an alcohol-related crash in his lifetime.[29] Unfortunately one in ten drivers will be involved in an

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21 Wolfgang Schmidt & Reginald G. Smart, *Drinking-Driving Mortality and Morbidity Statistics, in* ALCOHOL AND TRAFFIC SAFETY 27, 27-28 (May 1963) (U.S. Dept. of Health, Education, and Welfare, Public Health Service, National Institute of Health, Bethesda, Md.)

22 *Id.* at 29-30.

23 *See supra* note 13, at 1116.

24 Stephen G. Thompson, *The Constitutionality of Chemical Test Presumptions of Intoxication In Motor Vehicle Statutes*, 20 SAN DIEGO L. REV. 301, 302 (1983).

25 NATL. HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT. OF TRANSP., DWI LAW ENFORCEMENT TRAINING STUDENT MANUAL 54 (May 1974).

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

alcohol-related crash that either kills him or the drinking driver.[30] In 1990, 43,252 people were arrested for drinking and driving.[31] The carnage caused by driving while intoxicated has been recognized for many years. Indeed, Justice Blackmun even wrote that "the slaughter on the highways of this Nation exceeds the death toll of all our wars."[32] The 1990 demographic statistics of fatal accidents in New Jersey are alarming. According to the New Jersey State Police Fatal Accident Unit, 44,429 people were killed in traffic accidents nationwide.[33] New Jersey suffered 818 fatal accidents killing 888 people; 34.5% of the fatal accidents were alcohol related, 13.7% of the drivers killed were legally intoxicated, and an average of 2.4 persons were killed every day.[34] There were 168 drunken driving related fatal accidents, killing 194 people.[35] Out of the 403 deceased drivers that were tested, 149 tested positive for alcohol for a 37% alcohol factor.[36] One hundred and twelve of the 149 or 72% were at or above .10% BAC.[37] Ninety-eight of the 244, or 40.2%, surviving drivers were tested and 59 or 60.2% were at or above .10% BAC.[38]

III. The Role of Alcohol in Traffic Accidents

The Grand Rapids[39] Study in 1954 was the first, and remains, today the leading source regarding the connection between alcohol and traffic accidents. The Grand Rapids Study's conclusions are categorized by BAC. In the .01% to .04% range, there is no evidence that persons in this range are associated with

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30 *See supra* note 25, at 54.

31 STATE OF N.J., UNIFORM CRIME REP. 72 (1990).

32 Perez v. Campbell, 402 U.S. 637, 657 (1971). The appendix of this opinion lists a graph that compares the U.S. war dead to the highway dead. *Id.* at 672. For a comprehensive summation of the Supreme Court's recognition of this disaster, see South Dakota v. Neville, 459 U.S. 553 (1983).

33 NEW JERSEY STATE POLICE FATAL MOTOR VEHICLE ACCIDENT COMPARATIVE DATA REPORT 1990, at 1.

34 *Id.* at 1.

35 *Id.* at 8.

36 *Id.* at 10.

37 *Id.*

38 *Id.* at 10.

39 ROBERT F. BORKENSTEIN ET AL., THE ROLE OF THE DRINKING DRIVER IN TRAFFIC ACCIDENTS (Alan Dale ed., 1954). This study was conducted in Grand Rapids, Michigan. The study concentrated on the relationship between drinking, driving and accidents. *Id.*

excessive accident involvement.[40] In the .04% to .08% range, there is excessive accident involvement.[41] At .06% an driver is two times as likely to cause an accident as a sober driver; at .10% a driver is more than six times as likely to cause an accident, and at .15% the probability jumps to better than twenty-five times as likely.[42] The average BAC of a person arrested for drinking and driving in New Jersey in 1990 was .18%.[43]

The type of accident one is likely to be involved in while intoxicated also coincides with the BAC. The demographics of an accident involving persons with a BAC over .10% indicate that this person is more likely to: 1) be involved in a fatal accident, 2) be the driver not the passenger, 3) be involved in a single vehicle accident, and 4) be presumed responsible for the accident.[44] Alcohol affects all persons differently. It has been proven that impairment exists as soon as alcohol is present in the blood.[45] Between .05% and .08% the chances of crashing and conviction rise dramatically. At this level impairment varies greatly from person to person and could result in prosecution of a person with minimal impairment.[46] At the .08% level, alcohol is the dominant factor of accident causation in all drivers.[47]

Undoubtedly, motor vehicles, alcohol, and drugs will exist in New Jersey for a long time to come. Unfortunately, so will the combined use of the three. In a 1981 opinion survey conducted by *Psychology Today*, 41% of respondents reported they occasionally drove while drunk.[48] In a random survey of drivers stopped

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40 *Id.* at 9.

41 *Id.*

42 *Id.* at 10.

43 These numbers are an average of the BACs of persons arrested by the New Jersey State Police in 1990. *See* Personal Experience, *supra* note 2. The State of California has indicated that, "while the tests focus on the BAC level of 0.10, the average DWI arrest in the State is between 0.17 and 0.18." 49 Fed. Reg. 48,856 (1984).

44 Alex Richman, M.D., M.P.H., *Human Risk Factors in Alcohol Related Crashes*, J. OF STUDIES ON ALCOHOL, ALCOHOL AND HIGHWAY SAFETY 21-31 (June 12-14. 1984) (Proceedings of the North American Conference on Alcohol and Highway Safety held at The Johns Hopkins Medical Institute).

45 Dr. John Harvard, *An International Survey of Legislation on Alcohol and Traffic Safety*, *in* ALCOHOL AND TRAFFIC SAFETY 19 (Dec. 6-10, 1965) (Proceedings of the Fourth International Conference on Alcohol and Traffic Safety).

46 *Id.*

47 *Id.*

48 NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., TRANSP.

at all hours during one week, 12% had been drinking and 2% had a BAC of .10% or more.[49] In numerous surveys of drivers stopped during late evening and early morning weekend hours, approximately 10% had a BAC of .10% or more.[50] In a special study of drivers leaving bars between 9 p.m. and 2 a.m. on Friday and Saturday nights, one in seven had a BAC of .10% or more.[51] The average DWI offender violates the law eighty times a year or once every four or five nights.[52] The odds of being arrested are 1 in 2000.[53]

IV. Constitutional Challenges

A. *History*

As can be expected, the issue of puncturing people's skin to withdraw a blood sample to be used against them in a quasi-criminal proceeding has been challenged on several Constitutional theories. Since 1957 the drawing of blood samples from DWI suspects has been found to be Constitutionally proper.[54] An explanation of several United States Supreme Court cases will be helpful throughout the following analysis.

1. Too Much Force

In *Rochin v. California*, the Supreme Court held that the evidence obtained violated the Due Process Clause of the Fourteenth Amendment.[55] Mr. Rochin was home in his bedroom with his wife.[56] After receiving information that Rochin was selling

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SAFETY INSTITUTE, DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING, PARTICIPANT'S MANUAL, II-1 (1991) [hereinafter PARTICIPANT'S MANUAL].

49 *Id.*

50 *Id. See also* Richard Saferstein, Ph.D., *The Scientific Explanation of Intoxication and the Use of the Breathalyzer*, in 1989 INSTITUTE FOR CONTINUING EDUCATION, THE DRUNK DRIVING CASE, FROM THE MUNICIPAL COURT TO THE SUPREME COURT. Adapting a chart by the U.S. Department of Health, Education and Welfare, Dr. Saferstein concludes that the average 150 lb. male who consumes 5 ounces of 80 proof liquor in one hour will reach a maximum BAC of .10%. *Id.*

51 *See* PARTICIPANT'S MANUAL, *supra* note 48.

52 *Id.*

53 *Id.* at II-4.

54 Rochin v. California, 342 U.S. 165 (1952).

55 *Id.* U.S. CONST. amend. XIV, § 1 provides, "[n]or shall any State deprive any person of life, liberty, or property, without due process of law. . .". For a further explanation of the *Rochin* Due Process analysis see *infra* notes 87-90.

56 *Id.*

drugs, three sheriff's deputies burst into his home and bedroom.[57] The deputies questioned Rochin about two capsules lying on his night table.[58] Mr. Rochin then quickly ingested the capsules.[59] A struggle ensued but the deputies could not dislodge the capsules.[60] Rochin was handcuffed and taken to the hospital.[61] Rochin's stomach was pumped against his will and the capsules were recovered.[62] The Court felt that a serious question was raised concerning the limitations which the Due Process Clause imposes on the conduct of criminal proceedings by the states.[63] The Court then proceeded to analyze and define due process. Justice Frankfurter stated that "due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a 'sense of justice.' "[64]

2. Conduct that Shocks the Conscience

In *Breithaupt v. Abram*,[65] the Supreme Court determined that the petitioner was not deprived of due process of law in violation of the Fourteenth Amendment. The facts of *Breithtaupt* are remarkably similar to the subject of this note. Breithtaupt was operating a motor vehicle and was involved in a collision, killing three people and seriously injuring himself.[66] He was transported to a hospital where a blood sample was extracted to determine the BAC.[67] The blood was taken while Breithaupt was unconscious.[68] Based on the .17% BAC laboratory result, Breithaupt was convicted of involuntary manslaughter.[69] The court enunciated the standards for the future use of blood sam-

57 *Id.*
58 *Id.*
59 *Id.*
60 *Id.*
61 *Rochin*, 342 U.S. at 166.
62 *Id.*
63 *Id.* at 168.
64 *Id.* at 173.
65 352 U.S. 432 (1957).
66 *Id.* at 433.
67 *Id.*
68 *Id.*
69 *Id.*

ples in DWI prosecutions:[70]

> [First], in a state court prosecution for a state crime, the Fourteenth Amendment does not forbid the use of evidence obtained by an unreasonable search and seizure violative of the Fourth Amendment,[71] nor of compelled testimony violative of the Fifth Amendment,[72] even if the evidence in this case were so obtained.[73]
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> [Second], the taking of a blood test by a skilled technician is not "conduct that shocks the conscience," nor such a method of obtaining evidence as offends a "sense of justice."[74]
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> [Finally], the right of the individual to immunity from such invasion of the body as is involved in a properly safeguarded blood test is far outweighed by the value of its deterrent effect due to public realization that the issue of driving while under the influence of alcohol can often by this method be taken out of the confusion of conflicting contentions.[75]

Justice Clark noted, "the rights petitioner claims afford no aid to him for the fruits of the violations, if any, are admissible in the State's prosecution."[76]

3. Testimonial or Communicative

The Court in *Schmerber v. California* upheld the removal of blood evidence over the explicit refusal of a drunk driving suspect.[77] The Court relied on an analysis of the Fourth Amendment to reach this conclusion.[78] Schmerber, who was operating a motor vehicle which struck a tree,[79] was transported to a hospital where a blood sample was taken against his verbal objection.[80] He objected on the advice of counsel.[81] The Court held that

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70 *Breithaupt*, 352 U.S. at 435-38.

71 U.S. CONST. amend. IV provides "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ."

72 U.S. CONST. amend. V provides "[n]o person shall be compelled in any criminal case to be a witness against himself. . . ."

73 *Breithaupt*, 352 U.S. at 434.

74 *Id.* at 437.

75 *Id.* at 439-40.

76 *Id.* at 434.

77 384 U.S. 757 (1966).

78 *Id.* at 760.

79 *Id.* at 758.

80 *Id.* at 759.

81 *Id.*

drawing a blood sample from a DWI suspect did not violate the Due Process Clause.[82] The privilege against self-incrimination did not apply to the blood sample because the blood sample was not testimonial or communicative.[83] The defendant's Sixth Amendment right to counsel was not violated because he had no Constitutional right to object to the test.[84] Justice Brennan held:

> the values protected by the Fourth Amendment thus substantially overlap those the Fifth Amendment helps to protect. History and precedent have required that we today reject the claim that the Self-Incrimination Clause of the Fifth Amendment requires the human body in all circumstances to be held inviolate against state expeditions seeking evidence of crime.[85]

B. *Due Process*

The evolution of the Due Process Clause[86] argument as it pertains to drawing blood samples from DWI suspects has resulted in the definition of several standard terms used to determine if there is a violation of due process. In general, a blood test in and of itself is not an intrusion so great as to trigger due process protections.[87] In *Rochin* the Court first explained its responsibility when deciding due process questions. A reviewing court must ascertain if the course of proceedings offend "those canons of decency and fairness."[88] The Court cautioned that the definition of due process is vague, but suggested that a violation should be ascertained by evaluating a balanced order of facts exactly and fairly.[89] The Court made three statements that proved to be the first test of a due process violation. Conduct that "shocks the conscience," offends "a sense of justice" or offends the "community's sense of fair play and decency," would all be considered violations of due process.[90]

In *Breithaupt*, the defendant claimed that drawing blood while he was unconscious violated his due process rights because

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82 *Schmerber*, 384 U.S. at 759-60.
83 *Id.* at 760-65.
84 *Id.* at 765-66.
85 *Id.* at 767.
86 *See supra* note 55.
87 *See supra* note 13, at 1125.
88 *Rochin*, 342 U.S. at 169.
89 *Id.* at 172.
90 *Id.* at 172-73.

it offended a sense of justice.[91] The Court perceived that to shock the conscience, conduct must be "brutal and offensive."[92] The Court did not feel that drawing blood under the protective eye of a physician was brutal or offensive.[93] Clearly this proposed legislation passes this test. Procedurally, drawing blood to determine alcohol concentration has been an investigative tool for more than twenty years.[94] Drawing blood has become so commonplace in today's health conscious society that it can hardly be considered novel or severe. The *Schmerber* Court used a *Breithtaupt* analysis to deny the petitioner's claim of a due process violation.[95] The distinguishable fact between *Breithaupt* and *Schmerber* is that Schmerber refused the blood test on advice of counsel and Breithtaupt was unconscious. The Court declared that "nothing in the circumstances of this case or in supervening events persuades us that this aspect of *Breithaupt* should be overruled."[96] The Court stated in a footnote that there is no difference between oral objection, physical objection, or a physical state that prevents objection.[97]

The New Jersey state courts have also held that drawing blood samples from DWI suspects does not violate the Due Process Clause. In *State v. Macuk*,[98] the defendant was observed sitting on the porch of a house that was adjacent to a vehicle which had run off the road into a ditch.[99] The defendant displayed obvious signs of intoxication and admitted to operating the vehicle.[100] The defendant raised a violation of *Miranda v. Arizona*[101] as the reason why all evidence obtained at headquarters, includ-

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91 *Breithtaupt*, 352 U.S. at 435.

92 *Id.*

93 *Id.* Professor Tribe defines "brutal and offensive behavior" as actions that are "deficient in procedural regularity, that are needlessly severe, that are too novel or that are lacking in a fair measure of reciprocity." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-9, at 1332 (2d ed. 1988).

94 Personal Experience, *supra* note 2. The Supreme Court decided *Schmerber* in 1966. For a substantial period before *Schmerber* and on a continuous basis since, blood samples have been one of the primary tools in investigations of drinking drivers.

95 *Id.* at 759.

96 *Id.* at 760.

97 *Id.* at n.4.

98 268 A.2d 1 (N.J. 1970).

99 *Id.* at 3.

100 *Id.*

101 384 U.S. 436 (1966).

ing the drunkometer results, should be suppressed.[102] The court analyzed the *Miranda* argument by examining the framework of New Jersey's statutes and procedure relating to drunken driving.[103] The court held that a blood test must be given in a medically acceptable manner and environment, and went on to say:

> the latter may be used on any occasion, but will be especially useful where the person is physically unable or has refused to take a breath test. Since such tests, properly undertaken, violate no constitutional safeguard and are permissible as in any other non-testimonial situation and since our statute no longer requires consent in any situation, acquiescence is not legally significant or necessary. There is no legal right or choice to refuse.[104]

In *State v. Mercer*,[105] the defendant was involved in a two-car collision. He was transported to the hospital and a blood sample was drawn.[106] The defendant claimed a due process violation because he was not advised that he had a right to have a similar test by a person of his choosing,[107] and the state did not save a portion of the seized blood sample for his scrutiny.[108] The court held that requiring a defendant to submit to chemical tests of bodily substances to determine BAC did not violate any Constitutional safeguards.[109] The court did not feel that failing to inform the defendant of his right to an independent sample would be shocking to the universal sense of justice.[110] Finally, the court stated that failure of the State to provide the defendant with the remaining blood after analysis, absent bad faith, was insufficient to trigger a due process violation.[111] In *State v. Magai*,[112] it was noted that "the character of the defendant's blood relates to his corporal features, and does not involve any testimonial compulsion prohibited by the Bill of

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102 *Macuk*, 268 A.2d at 8.

103 *Id.* at 9.

104 *Id.* at 8.

105 511 A.2d 1233 (N.J. Super. Ct. App. Div. 1986).

106 *Id.* at 1234.

107 N.J. STAT. ANN. § 39:4-50.2(c) (West 1990) allows for the person tested to be permitted to have such samples taken and chemical tests of his breath, urine, or blood made by a person or physician of his own selection.

108 *Mercer*, 511 A.2d at 1234.

109 *Id.* at 1236.

110 *Id.*

111 *Id.*

112 232 A.2d 477 (N.J. Super. Essex County Ct. 1967).

Rights."[113] The common law clearly indicates that this legislation will not "shock the conscience" or offend a "sense of justice" or the "community's sense of fair play and decency."

C. *Search and Seizure*

The Fourth Amendment prohibits unreasonable searches and seizures.[114] In *Breithaupt* Justice Clark defined "unreasonable" in terms of the right of the individual versus the interests of society.[115] He wrote:

> [A]s against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road.[116]

In *Schmerber*, the Court emphatically stated that "the security of one's privacy against arbitrary intrusion by the police" as being "at the core of the Fourth Amendment" and "basic to a free society."[117] The *Schmerber* Court laid the foundation for any future analysis of an implied violation of the Fourth Amendment. The Fourth Amendment prohibits only unreasonable intrusions.[118] The questions to be addressed are whether the police were justified in seeking the blood and whether the extraction was performed in a reasonable manner.[119]

In general, the State has the right to a post-arrest search for weapons and/or to seize the fruits of the crime.[120] This right requires that there be an immediate danger of concealed weapons or a destruction of evidence within the direct control of the accused.[121]

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113 *Id.* at 479. This defendant provided a breath sample. The court relied on the language in *Schmerber* to dispel any constitutional challenges raised by the defendant. *Id.*

114 *See supra* note 71.

115 *Breithaupt*, 352 U.S. at 439.

116 *Id.*

117 *Schmerber*, 384 U.S. at 767.

118 *Id.* at 768.

119 *Id.*

120 *Id.* at 769.

121 *Id.* Professor Tribe strongly warns of the dangers of invading the body but acknowledges the need for the state to proceed when confronted with an emergency. *See* TRIBE, *supra* note 93, at 1332, where it states:

In the context of searches below the body's surface, there must be more than a chance that the desired evidence will be obtained.[122] A search warrant is required unless the arresting officer is confronted with an emergency, in which the delay could cause the evidence to be destroyed.[123] The Court in *Schmerber* noted that the body metabolizes blood at a constant rate and that the delays already caused by processing the accident scene and delivering the accused to the hospital made the warrantless intrusion into the body reasonable.[124] The Court next considered the reasonableness of the test. The Court expanded Justice Clark's previously stated opinion of blood samples stating, "the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain."[125]

The Court in *Graham v. Connor*[126] established that all claims of excessive force by police officers should be analyzed under the Fourth Amendment's objective reasonableness test as opposed to the Due Process Clause.[127] The facts of *Graham* indicate that the petitioner, while seeking orange juice for his diabetic condition, acted in such a way as to arouse the suspicions of a police officer.[128] The officer stopped Graham and detained him in order to investigate what occurred.[129] While he was detained, Graham suffered

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> A note of warning is in order with respect to the initial criterion of procedural regularity: even the most awful tortures, it must be remembered, can be cloaked with such clockwork logic that many become persuaded of their perverse justice. Turning square corners, then, must never become a substitute for respecting the humanity of each individual. It should be even clearer that, when an individual's bodily integrity is at stake, a determination that the state has indeed accorded procedurally adequate protection should not be made lightly. Since bodily invasions cannot be as readily remedied after the fact (through damage awards) as can at least some deprivations of property, it ought to follow, in particular, that the state, absent a clear emergency, must precede any deliberate invasion by an adversary hearing, even if only an informal one. "The infliction of physical pain is final and irreparable; it cannot be undone in a subsequent proceeding."

Id.

122 *Schmerber*, 384 U.S. at 770.

123 *Id.*

124 *Id.* at 770-71.

125 *Id.* at 771.

126 490 U.S. 386 (1989).

127 *Id.*

128 *Id.* at 388.

129 *Id.* at 389.

several injuries.[130] As a result, Graham brought a 42 U.S.C. § 1983 cause of action against the police officers involved.[131] The Court once again pointed out that the standard of conduct to judge the actions of the police officers is the "reasonable person" standard.[132] A Fourth Amendment analysis requires a careful balancing of the intrusion on the individual and countervailing governmental interests.[133] Arrest and/or investigatory stops may be permissible, as well as the use of some force or coercion to effect same.[134] To properly apply the Fourth Amendment to these situations, each case should be examined on its own merits.[135] The severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest should all be considered[136] when dealing with application of the Fourth Amendment.

In *Hammer v. Gross*,[137] the court developed a five-part test to determine if excessive force was used to withdraw blood from a DWI suspect.[138] Hammer was arrested for drinking and driving.[139] When Hammer refused a breath test, he was transported to the hospital, where he was handcuffed to a chair.[140] Upon seeing the technologist, Hammer physically resisted the blood sample.[141] The arresting officer, after wrestling with Hammer, finally succeeded in restraining him so that the sample could be withdrawn.[142] The court considered the fact that Hammer actively resisted the withdrawal, the severity of the charge, whether Hammer posed an immediate threat to the safety of the officer or others, whether the police refused to honor Hammer's request of a different form of testing, and the necessity for the blood sample to ascertain if the forced extraction of blood was objectively reasonable in light of the facts and

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130 *Id.* at 390.
131 *Graham*, 490 U.S. at 386.
132 *Id.* at 396.
133 *Id.*
134 *Id.*
135 *Id.* at 395.
136 *Graham*, 490 U.S. at 386.
137 932 F.2d 842 (9th Cir. 1991).
138 *Id.* at 847.
139 *Id.* at 844.
140 *Id.*
141 *Id.*
142 *Hammer*, 932 F.2d. at 844.

circumstances as they developed.[143]

A number of New Jersey cases have considered the issue of "reasonable under the circumstances." In *State v. Woomer*,[144] the defendant was involved in an accident. He was transported to the hospital and asked to sign a "consent to draw blood" form.[145] After refusing to sign the form, the police advised him that they could hold his arm down and take the blood.[146] The defendant then cooperated without the necessity for force.[147] The court did not consider the officers' warnings to be a threat but rather an accurate statement of fact.[148]

In *State v. McMaster*,[149] the medical acceptability of the test was challenged because the request was made by a police officer and not by a licensed physician, and the analysis was completed by a biochemist and not by a physician.[150] The court rejected both of these arguments stating that these procedures are reasonable if they protect the life and health of the individual.[151]

In *State v. Konzelman*,[152] the defendant was transported to a New York hospital after having an accident in New Jersey.[153] The defendant moved to have the blood test results suppressed because the blood was drawn according to New Jersey procedures rather than New York procedures, and the blood was taken without his consent.[154] The court rejected these arguments because the defendant was brought to the New York hospital for his own safety.[155] The offense and arrest occurred in New Jersey, and the police did not need consent because the suspect could have been restrained in a medically acceptable manner as could any other uncooperative patient.[156]

The use of force and consent was also raised in *State v. Horst-*

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143 *Id.* at 846-47.
144 483 A.2d 837 (N.J. Super. Ct. App. Div. 1984).
145 *Id.*
146 *Id.*
147 *Id.*
148 *Id.* at 838.
149 288 A.2d 583 (N.J. Super. Ct. App. Div. 1972).
150 *Id.* at 584.
151 *Id.*
152 498 A.2d 1301 (N.J. Super. Ct. Law Div. 1985).
153 *Id.* at 1302.
154 *Id.*
155 *Id.* at 1303-04.
156 *Id.*

mann.[157] Once the withdrawal is justifiable, there is no constitutional proscription despite the lack of consent, nor does the fact that force was used prohibit the use of the blood sample as long as the force was essential and no more than reasonable.[158] In *State v. Gillespie*,[159] the court held police can reasonably force an examination of a person believed to be intoxicated even with the absence of a technical foundation for an arrest because the examination is justified as an emergency measure to insure the State against loss of evidence.[160] In another instance, a police officer was found to have acted reasonably when he obtained a blood sample from a second hospital after the first hospital refused to draw the sample.[161] Another set of facts indicate that a driver, after running off a road and striking a concrete abutment, was transported to the hospital.[162] The defendant was semi-conscious and consented by grunting and being propped up so that he could sign a consent form.[163] The defendant moved for suppression of the evidence because the arrest was without a warrant, and he did not give a rational consent.[164] Both arguments were rejected by the court.[165] Blood samples obtained as a result of this proposed legislation will not be unreasonable seizures in violation of the Fourth Amendment.

D. *The Privilege Against Self Incrimination*

The drawing of blood samples from DWI suspects does not violate the Fifth Amendment's[166] privilege against self incrimination. Traditionally, the five-part exclusionary rule would protect an individual's privilege against self incrimination.[167] As early as

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157 No. A-691-79, slip op. at 1-2 (N.J. Super. Ct. App. Div. 1980).

158 *Id.* at 2.

159 State v. Gillespie, 241 A.2d 239, (N.J. Super. Ct. App. Div. 1967), *cert. denied*, 239 A.2d 662 (N.J. 1968).

160 *Id.*

161 State. v. Burns, 388 A.2d 987 (N.J. Super. Ct. App. Div. 1978).

162 State. v. Tolbert, 241 A.2d 865, 866 (N.J. Super. Middlesex County Ct. 1968).

163 *Id.*

164 *Id.* at 866-67.

165 *Id.* at 867-69.

166 *See supra* note 72.

167 Weeks v. U.S., 232 U.S. 383, 391-92 (1914). Mapp. v. Ohio, 367 U.S. 643 (1961). The Court made the exclusionary rule applicable to the States. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 9.11, at 423 (2d ed. 1987), provides "[t]he rule allows '(1) natural persons (2) to prohibit the introduction in a criminal proceeding (3) of self-incriminating disclosures (4) that were obtained through "compulsion" by the state and (5) that are testimonial in nature.' "

1910, the United States Supreme Court held that this privilege only prohibits compulsion of communications and not physical evidence.[168]

In 1966, two United States Supreme Court cases were decided that defined the privilege against self incrimination. The first arose from a compelled confession to murder.[169] *Miranda* stands for the notion that once a suspect is deprived of his freedom, he may not be interrogated unless he is advised of his constitutional rights.[170] Later that year the Court decided *Schmerber*. The Court decided the precise status of compelled blood samples from DWI suspects. The Court held that a state is only prohibited from compelling evidence that is testimonial or "communicative in nature."[171] If the evidence obtained does not compel the suspect to testify in any way, the evidence does not violate the privilege.[172]

In *South Dakota v. Neville*,[173] the defendant averred that his refusal to submit to the blood test was inadmissible because it compelled him to be a witness against himself. The Court once again upheld the drawing of blood samples. A lawful request for blood cannot also be coerced, therefore the privilege offers no protection.[174] This proposed legislation will not violate the Fifth Amendment because it does not compel one to testify against oneself.

E. *Right To Counsel*

The Sixth Amendment states that in all criminal prosecu-

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168 Holt v. United States, 218 U.S. 245, 252-53 (1910).

169 *Miranda*, 384 U.S. at 436.

170 *Id.* at 444-45. "Constitutional rights" refer to: the right to remain silent and refuse to answer any questions, anything you say may be used against you, the right to consult with an attorney at any time and have him present before and during questioning, if you cannot afford an attorney one will be provided if you so desire prior to any questioning, a decision to waive the rights is not final. *Id.*

171 *Schmerber*, 384 U.S. at 764.

172 *See also* Escobedo v. Illinois, 378 U.S. 478 (1964); United States v. Wade, 388 U.S. 218 (1967).

173 459 U.S. 553 (1983).

174 *Id.* at 563. The New Jersey courts have also concluded that only testimonial or communicative evidence is protected. State v. Magai, 232 A.2d 477 (N.J. Super. Essex County Ct. 1967), State v. Gillespie, 241 A.2d 239 (N.J. Super. Ct. App. Div. 1967), State v. Macuk, 268 A.2d 1 (N.J. 1970), State v. Burns, 388 A.2d 987 (N.J. Super. Ct. App. Div. 1978).

tions the accused shall enjoy the assistance of counsel for his defense.[175] In *Schmerber,* the Court quickly dismissed this attack on the withdrawal of blood reasoning that because the defendant has no constitutional right to prevent the drawing of the blood there is no need to have counsel present to protect one's rights.[176]

The right to counsel issue was explored in more detail in *United States v. Wade.*[177] The facts of *Wade* indicate that the plaintiff was placed in a lineup without notice to his attorney.[178] *Wade* stresses the need for counsel at critical stages of the prosecution.[179] *Wade* offers as a test, "whether potential substantial prejudice to the defendant's rights" will occur if counsel is not present.[180] The drawing of blood for alcohol analysis is certainly a critical stage of the process, however, because the suspect cannot refuse and force is permitted, the presence of counsel at this stage could be of little benefit.[181]

V. Legislative Intent

The New Jersey Legislature has clearly indicated their intent to defeat drinking and driving. The court, in *State v. Tischio,*[182] noted that the primary purpose behind New Jersey's drunk-driving statute is to curb the senseless havoc and destruction caused by intoxicated drivers.[183] The New Jersey courts have on many occasions interpreted the Legislature's intentions. The New Jersey Supreme Court stated "we firmly endorse the governmental commitment to the eradication of drunk driving as one of the judiciary's own highest priorities."[184] "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

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175 U.S. CONST. amend. VI.
176 *Schmerber,* 384 U.S. at 765-66.
177 388 U.S. 218, 223-27 (1966).
178 *Id.* at 218.
179 *Id.* at 225.
180 *Id.* at 227.
181 State v. Macuk, 268 A.2d 1, 8 (N.J. 1970). The State of New Jersey has held that "there can be no violation of the right to counsel in alcohol test situations." *Id.*
182 527 A.2d 388 (N.J. 1987).
183 *Id.* at 392.
184 In The Matter of Judge Donald G. Collester, Jr., A Judge of the Superior Court, 599 A.2d 1275, 1277-78 (N.J. 1992).

and welfare of the public. They are not victimless offenses."[185] The court in *Tischio* held that the overall scheme of the drinking and driving laws indicates that the primary intent of the Legislature is to expunge intoxicated drivers from the roads.[186] The Legislature has consistently tried to streamline the implementation of the drinking-driving statute and to remove the obstacles impeding the efficient and successful prosecution of those who drink and drive.[187] In *State v. Macuk*, the court summed up its feelings on the State's prosecution of drinking drivers:

> [T]he upshot of our statutory provisions and their history and the holdings of the United States Supreme Court is this. There is clear legal right to require a motor vehicle operator, arrested on probable cause for driving "under the influence" or "while impaired" to submit to a chemical test of bodily substances to determine the amount of alcohol in his blood or, for that matter to a physical coordination test. A breath test must, of course, be administered in accordance with the requirements of *N.J.S.A.* 39:4-50.2 and a blood test in a medically acceptable manner and environment. The latter may be used on any occasion, but will be especially useful where the person is physically unable, or has refused to take a breath test. Since such tests, properly undertaken, violate no constitutional safeguard and are permissible as in any other non-testimonial situation and since our statute no longer requires consent in any situation, acquiescence is not legally significant or necessary.[188]

When searching for the true intention of the law, it is not the words, but the internal sense of the law that controls.[189] In 1971, New Jersey amended its drinking-driving statute.[190] The new statute provided New Jersey with one of the most stringent drinking-driving laws in the country. Governor Byrne's statement on signing the law noted "these laws will update the State's motor vehicle regulations and will provide a basis for improving safety on our highways."[191] In the statement of the bill relieving medical personnel

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185 In The Matter of Michael R. Connor, A Judge of the Superior Court, 589 A.2d 1347, 1348-49 (N.J. 1991).
186 *Tischio*, 527 A.2d at 393.
187 *Id.* at 395.
188 *Macuk*, 268 A.2d at 8.
189 Wollen v. Borough of Fort Lee, 142 A.2d 881 (N.J. 1958).
190 L. 1977, c. 29, S1423 (codified at N.J. STAT. ANN. § 39:4-50 (West 1990)).
191 *Id.*

from criminal and civil liability and providing for the use of a notarized statement in lieu of testimony regarding the drawing of blood, the Legislature clearly indicated their position on the drinking-driving problem.[192] The New Jersey Legislature wants medical personnel to assist police officers in defeating drinking and driving.

VI. Objections to this Proposal

A. *The Doctor-Patient Privilege*

The medical personnel opposed to this proposal will aver that their actions and the blood they draw are protected by the doctor-patient privilege. The general rationale for this privilege is that it is vital to the treatment process that the patient feel se-

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192 L. 1986, c. 189 § 1, 2 (codified at N.J. STAT. ANN. § 2A:62A-10 (West 1990)), provides in part:

> When individuals taken into custody for driving while intoxicated or death by auto refuse or are unable to provide breath samples for testing to determine blood alcohol content, police officers frequently seek the assistance of medical personnel. These personnel are often reluctant to take specimens out of a concern that the subject may institute civil or criminal charges for assault. Without their cooperation, valuable time is lost and any future prosecution is jeopardized. The willingness of medical professionals to cooperate with law enforcement officers will be increased if they are assured of immunity from nuisance suits. Section 1 of this bill would create limited immunity for medical personnel who take breath, blood, or urine samples at the request of law enforcement officers.
>
> Section 2 of this bill would permit the introduction of documentary evidence attesting to the manner and circumstances under which a breath, blood, or urine specimen was taken. This recognizes the policy that doctors, nurses and other professionals should not be taken away from other important responsibilities for the purposes of testifying to what is nothing more than a foundation for the eventual admission into evidence of the results of the analysis of the specimen. If the results of the analysis, the critical issue in a prosecution, may be put into evidence by means of a laboratory report, N.J. R. EVID. 63 (13), State v. Martorelli, 346 A.2d 430 (N.J. 1975), certif. denied 69 N.J. 445 (1976), there is no sound reason for requiring live testimony on a threshold issue. As an element of the preliminary inquiry into the ultimate admissibility of test results, the circumstances surrounding the initial taking of the specimen should not be subject to the usual restrictions of the Rules of Evidence. *See* N.J. R. EVID. 8 (1), State v. Cardone, 368 A.2d 952 (N.J. Super. 1976), certif. denied, 75 N.J. 3 (1977). In order to avoid the potential unnecessary disruption of medical facilities' operations, section 2 explicitly applies the principle.

Id.

cure to disclose even the most private issues to his doctor.[193] Some states, as well as the proposed Federal Rules of Evidence, were opposed to a general doctor-patient privilege.[194] In 1974, the Revised Uniform Rules retained a doctor-patient privilege in consideration of the special area of the psychotherapist-patient relationship.[195] In New Jersey, a physician is barred from disclosing confidential communications with his patient.[196] Privilege can be defined as a particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens.[197] The privilege in the doctor-patient context generally prohibits communications made by the patient to the doctor from being admitted into evidence.[198]

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193 EDWARD W. CLEARLY, MCCORMICK ON EVIDENCE § 98, at 244 (3d ed. 1984).

194 *Id.* at 245.

195 *Id.* at 245. REV. UNIF. R. EVID. 503 reads in part:

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, his physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

Id.

196 N.J. STAT. ANN. § 2A:84A-22.2 (West 1990), provides:

Except as otherwise provided in this act, a person, whether or not a party, has a privilege in a civil action or in prosecution for a crime or violation of the disorderly persons law or for an act of juvenile delinquency to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (a) the communication was a confidential communication between patient and physician, and (b) the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefore, and (c) the witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician's duty of nondisclosure by the physician or his agent or servant and (d) the claimant is the holder of the privilege or a person authorized to claim the privilege for him.

Id.

197 BLACK'S LAW DICTIONARY 1197 (6th ed. 1990).

198 GRAHAM C. LILLY, INTRODUCTION TO THE LAWS OF EVIDENCE. § 9.10, at 419 (2d ed. 1987).

In New Jersey, all attempts at asserting the doctor-patient privilege in the context of a DWI prosecution have failed. On April 6, 1979, Peter Dyal was operating his Porsche.[199] He lost control on a curve and flipped the car over.[200] As a result of this accident, Jan Kane was killed.[201] Dyal was transported to the hospital where his injuries were treated, a blood sample was drawn, and he was released.[202] The blood indicated that his BAC was .161%.[203] Two days after Miss Kane's demise, two of her coworkers contacted police to supply information on the alcohol consumed by Dyal on the night of the accident.[204] This information led police to subpoena the hospital blood test results and charge Dyal with death by auto.[205] Dyal contended these results were protected by the doctor-patient privilege.[206]

The court balanced the benefit of the privilege against the clear public policy to rid the highways of drunken drivers.[207] The court criticized the privilege because of its nature to deleteriously affect the truth-seeking process.[208] The court made several findings that are invaluable to any analysis of this topic. There is no statutory doctor-patient privilege when police have probable cause to believe a person is intoxicated and seek a blood test.[209] If a blood sample is drawn for diagnostic purposes, no useful purpose would be served by requiring police to seek a second sample for investigative purposes.[210] Because of the rapid elimination of alcohol from the body, police should not be obliged to obtain a search warrant prior to obtaining a blood sample from a uncooperative DWI suspect.[211] Police will not be deprived of the blood test merely because they were not present when the blood was drawn.[212] The confidentiality of the patient's interests are

199 State v. Dyal, 478 A.2d 390, 392 (N.J. 1984).
200 *Id.* at 392.
201 *Id.*
202 *Id.*
203 *Id.*
204 *Dyal*, 478 A.2d at 392.
205 *Id.* at 393.
206 *Id.*
207 *Id.* at 394.
208 *Id.*
209 *Dyal*, 478 A.2d at 395.
210 *Id.* at 395.
211 *Id.*
212 *Id.*

protected by requiring the police officer to establish a reasonable basis for believing that the suspect was intoxicated while driving.[213] The case was remanded to the trial court to determine if the police officer's basis for the test results was reasonable.[214]

On December 11, 1988, Marilyn Bodtman crossed the center line and sideswiped a car, then continued on, and struck another vehicle head-on.[215] The following day the emergency room nurse contacted the investigating officer to advise him that Miss Bodtman's BAC was .24%.[216] The investigating officer then subpoenaed the hospital records.[217] Bodtman invoked the doctor-patient privilege to suppress the results.[218] The case was remanded to the Law Division to establish a factual record of the investigating officer's objective facts of Bodtman's intoxication before the nurse's revelations.[219]

On November 17, 1986, Linda Schreiber was seriously injured in a one-car accident.[220] Due to her injuries, no questioning was conducted.[221] Twenty-nine days later, the emergency room physician phoned police and advised them that Schreiber's BAC was .26%.[222] A summons was then issued for driving while intoxicated.[223] The trial court convicted Schreiber.[224] The appellate court reversed, holding that the blood test results violated the doctor-patient privilege.[225] The New Jersey Supreme Court ruled the doctor-patient privilege should be strictly construed; therefore, it does not apply to prosecutions of the motor vehicle laws.[226] The court's opinion was built upon its prior holding that

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213 *Id.* at 396.

214 *Dyal*, 478 A.2d at 397.

215 State v. Bodtman, 570 A.2d 1003, 1004 (N.J. Super. Ct. App. Div. 1990).

216 *Id.*

217 *Id.*

218 *Id.* at 1005.

219 *Id.* at 1012.

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

221 *Id.* at 946.

222 *Id.*

223 *Id.*

224 *Id.*

225 *Schreiber*, 585 A.2d at 946. See also State v. Fogarty, A-24 (N.J. June 8, 1992), which states, "[h]owever, we have uniformly recognized that motor vehicle violations, including violations of the DWI statute, are not offenses under New Jersey's Criminal Code."

226 *Id.* at 947.

motor vehicle violations are not crimes.[227]

Drunk driving is also not a disorderly persons offense.[228] The Court recognized the ethical duty of doctors.[229] The Court warned officers not to coerce hesitant doctors without justification.[230] Police cannot be expected to ignore voluntary information placed before them.[231] The doctor-patient privilege can be tolerated within the great public concern against drinking and driving so that the confidentiality of statements made to treating physicians does not place a law enforcement burden on them.[232] But, if a physician chooses to voluntarily assist police in the investigation of drinking drivers, the privilege will not be a bar.[233]

The debate over the doctor-patient privilege in DWI cases puts the patient's confidentiality rights at odds with the societal concerns of drinking and driving. The pro-privilege team will aver that the privilege is crucial to treating the patient. If a patient suspects that the doctor is going to contact police or send the blood sample to the police, he might be tempted to prolong or desist from treatment all together. On the other hand, the societal concerns are clearly indicated in the statistics above. This issue becomes a matter of choice. The suspect chose to drink. The suspect chose to drive. The suspect had an accident probably because he/she was unable to make the mental choices required to safely operate a motor vehicle. If the suspect chooses not to seek medical attention or cooperate with the physician, it is by choice. Society must then choose if it is better to protect the suspect's privacy rights or to protect the rights of the countless victims of the drinking driver. This question, when put to even the staunchest supporter of privilege, would have to be answered in the affirmative for the latter.

VII. Conclusion

In New Jersey, the law prohibits a person from operating a

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227 *Id.*
228 *Id.* at 947-48.
229 *Id.* at 949.
230 *Schreiber*, 585 A.2d at 949.
231 *Id.*
232 *Id.*
233 *Id.*

vehicle with a BAC of .10% or more.[234] In DWI investigations, where the breathalyzer cannot be used to determine the BAC, a blood sample is the next alternative. To obtain this evidence, police officers must rely on medical personnel for assistance. The police must have a reasonable belief that the suspect violated the DWI statute and acted reasonably when procuring the blood sample. Reasonable activity is any action that is "fair, proper, just, moderate, or suitable under the circumstances."[235] In 1986, the Legislature only perceived liability and court appearance as the obstacles to complete cooperation. Unfortunately, even the legislatively granted safeguards were not enough for all medical personnel. The Legislature should take the next logical step and enact legislation that can be easily interpreted by all medical personnel. The legislation should require medical personnel, at the request of a police officer investigating a DWI offense, to draw a blood sample for evidentiary purposes and deliver the sample to the officer. This legislation would end any questions as to the Legislature's intentions. All medical personnel would then be

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234 N.J. STAT. ANN.§ 39:4-50 (a) (West 1990) states:

A person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of .10% or more by weight of alcohol in the defendant's blood or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit producing drug to operate a motor vehicle owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of ,10% or more by weight of alcohol in the defendant's blood, shall be subject: . . . .

Id.

235 BLACK'S LAW DICTIONARY 1265 (6th ed. 1990) defines "reasonable" as:

fit and appropriate to the end in view. Having the faculty of reason; rational; governed by reason; under the influence of reason; agreeable to reason. Thinking, speaking, or acting according to the dictates of reason. not immoderate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable.

Reasonable and probable cause. Such grounds as justify any one in suspecting another of a crime, and placing him in custody thereon. It is a suspicion founded upon circumstances sufficiently strong to warrant reasonable man in belief that charge is true.

Reasonable belief. "reasonable belief" or "probable cause" to make an arrest without a warrant exists when facts and circumstances within the arresting officer's knowledge, and of which he had reasonably trustworthy information, are sufficient in themselves to justify a man of average caution in belief that charge is true.

Id.

compelled to assist police officers in their battle against drinking drivers. This legislation would greatly reduce the number of intoxicated drivers who escape prosecution after causing the ultimate tragedy of the drunk driver, an accident. As clearly indicated by this paper, there is no constitutional prohibition against drawing blood from DWI suspects. The New Jersey common law strongly favors the use of blood samples in DWI prosecutions.[236] There is no doctor-patient privilege afforded to the motor vehicle operator who is intoxicated. One can only hope and pray that someday the great pain, suffering, grief, cost and litigation caused by drunk drivers will be a bad memory.

Robert R. Wilk

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236 In addition to the New Jersey cases stated above, the following cases also indicate the New Jersey court's acceptance of blood samples in DWI cases. State v. Figueroa, 515 A.2d 242, 243-44 (N.J. Super. Ct. App. Div. 1986) stating "we are satisfied that N.J. STAT. ANN. 2A:84A-22.5 is intended to remove obstacles which might stand in the way of. . . . preventing in advance or reducing the number of preventable motor vehicle accidents." *Id.*; State v. Kaye, 423 A.2d 1002, 1005 (N.J. Super. Ct. App. Div. 1980) which provided "we are convinced that the consumption of the blood sample during the testing procedure by the State Police Laboratory did not deny him of due process." *Id.*; State v. Rypkema, 466 A. 2d 1324, 1326 (N.J. Super. Ct. Law Div. 1983) noting "without some scintilla of evidence that could place the chemical integrity of the blood sample in doubt, proof that such sample was obtained in a hospital and by qualified medical personnel will suffice to establish the requirement that the blood was withdrawn in a medically acceptable manner and environment" *Id.*; State v. Weber, 532 A. 2d 733, 735 (N.J. Super. Ct. App. Div. 1987) stating "[t]he suspect requested a independent blood sample from the hospital. The hospital refused without police orders and the police did not so order. We find no duty under N.J. STAT. ANN. 39:4-50 *et. seq.* for the police authorities to arrange for such tests". *Id.*

Appendix

PROPOSED LEGISLATION
ASSEMBLY NO. 1234

STATE OF NEW JERSEY

INTRODUCED MAY 1, 1992

By Assemblyman Joe Sober

An Act requiring certain medical personnel to withdraw a blood sample, when requested by an police officer, from a patient suspected of driving under the influence of alcohol or drugs.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Any physician, nurse, or medical technician shall withdraw or otherwise obtain in a medically acceptable manner, a specimen of breath, blood, urine, or other bodily substance and deliver same to any State, county or municipal law enforcement officer, a county prosecutor or his assistant, the Attorney General or his deputy or a state or county medical examiner who has requested the specimen for the purpose of investigating the charge of driving under the influence of alcohol or drugs.
2. This request must be complied with whether or not the suspect consents to the drawing.
3. The penalty for violating this act will be a fine of no less than $500.00 and no more than $1000.00 and up to 90 days community service.
4. This act shall take effect immediately.

STATEMENT

This bill further clarifies the Legislature's intent to stop the death and destruction caused by intoxicated drivers on our highways.