EVIDENCE—DRUNKEN DRIVING—NEW JERSEY SUPREME COURT SENDS A SOBERING SIGNAL TO DRUNKEN DRIVERS—*State v. Tischio*, 107 N.J. 504, 527 A.2d 388 (1987).

Traditionally, political and social movements have encountered resistance from groups championing opposing viewpoints.[1] Such resistance, however, has been notably absent from the current offensive aimed at freeing the roads of the deadly mix of alcohol and automobiles.[2] Consequently, efforts to crackdown on drunken driving have travelled a path free from the opposition which ordinarily slows action and ignites debate. Illustratively, the New Jersey courts and Legislature have narrowed the

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1 *See, e.g.*, E. LARSON, TRIAL AND ERROR, THE AMERICAN CONTROVERSY OVER CREATION AND EVOLUTION 3 (1985) (describing the "popular crusade" against instruction of the theory of evolution); M. WILLEBRANDT, THE INSIDE OF PROHIBITION (1929) (noting that "[n]o political, economic or moral issue has so engrossed and divided all the people of America as the prohibition problem, except the issue of slavery"); Lipset, *Roosevelt and The Protest of the 1930s*, 68 MINN. L. REV. 273, 274 (1983) (indicating that President Roosevelt, in proposing New Deal legislation "faced protest and anti-capitalist sentiment that threatened to undermine the existing political system and create new political parties"); Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1196-97 (1988) (observing opposition to affirmative action programs); Note, *Political Protest and the Illinois Defense of Necessity*, 54 U. CHI. L. REV. 1070-71 (1987) (describing the successful use of the defense of necessity in the anti-apartheid movement); Butterfield, *Anatomy of The Nuclear Protest*, N.Y. Times, July 11, 1982 (Magazine), at 6 (describing the nuclear protest movement as "an extraordinary grass-roots nationwide movement to stop the nuclear arms race"). *See also Forward to Opposition and Political Change*, 40 J. INT'L AFF. 219 (1987). The author stated:

> [I]t seems impossible that opposition could ever *not* exist; there will always be people who are not content with the status quo, who feel that things could and should be better, and who set about to make such changes. . . . [O]pposition can take many forms . . . all of these are expressions of dissatisfaction with the policies of incumbent governments, actions taken by opponents of the ruling regime intent on effecting some type of political change or reform in their countries . . . .

Id. at vii (emphasis in original).

2 *See* Note, *Social Host Held Liable for Serving Liquor to Intoxicated Guest Who Causes Auto Accident Injuring Third Party*, 15 SETON HALL L. REV. 616, 631 (1985) (authored by James B. Clark III) (noting that eliminating drunken driving is "an almost universally accepted goal of modern society"). *See also* Comment, *The Bumper Sticker: The Innovation That Failed*, 22 NEW ENG. L. REV. 643 (1987). The article states:

> As society became aware of the seriousness of the drunken driving problem in the United States, public interest and community groups sprang up across the nation. These groups demanded that something be done to lessen the severity of the drunken-driving problem. They campaigned for legislative reform, and stricter enforcement of the existing drunken driving laws.

Id. at 643 (footnotes omitted).

defenses available to one accused of drunken driving.[3] Most recently the New Jersey Supreme Court in *State v. Tischio*[4] established New Jersey as the first state refusing to recognize the probative value of extrapolation evidence in drunken-driving cases.[5]

On the evening of April 11, 1984, the Metuchen police stopped John Tischio after they allegedly witnessed him driving erratically.[6] Upon approaching the vehicle, an officer detected alcohol on Tischio's breath and observed him staggering.[7] As a result, Tischio was arrested for driving his automobile while under the influence of alcohol.[8] At police headquarters, Tischio was administered two breathalyzer tests.[9] The result of both tests was a blood alcohol reading of 0.11%.[10] The first of these two tests was not administered until approximately one hour after Tischio's initial stop.[11]

After the close of the prosecution's case in the Metuchen

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[3] *Compare* N.J. STAT. ANN. § 39:4-50.1 (West Supp. 1988) (operating a vehicle with 0.10% blood alcohol content is a per se offense) *with* N.J. STAT. ANN. § 39:4-50(a) (West 1954) (breathalyzer reading of 0.15% creates a presumption of intoxication). *See also* Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984) (holding a social host liable for injury inflicted by a driver to whom he or she provided alcohol); Romano v. Kimmelman, 96 N.J. 66, 474 A.2d 1 (1984) (finding particular breathalyzer models to be reliable despite their susceptibility to radio frequencies); State v. Sweeney, 40 N.J. 359, 192 A.2d 573 (1963) (holding that movement of a vehicle is not required to convict a defendant of operating a motor vehicle).

[4] 107 N.J. 504, 527 A.2d 388 (1987), *appeal dismissed*, 108 S. Ct. 768 (1988).

[5] *Id.* at 522, 527 A.2d at 397. Extrapolation is the "process of estimating an unknown number outside the range of known numbers." BLACK'S LAW DICTIONARY 528 (5th ed. 1979). Often in drunken-driving cases, test results taken after a great delay do not accurately reveal the blood alcohol level at the time of driving. Note, *State v. Tischio: Drunk Driving and Due Process Don't Mix*, 40 RUTGERS L. REV. 611 (1988). Thus, extrapolation evidence is used to relate the test results back to the time of driving. *See id.* Prior to *Tischio*, this was the defense strategy used in 90% of drunken-driving cases. Cheever & Bird, *Court Takes Tough View on Breath Test Results*, 120 N.J.L.J. 3 (1987).

[6] *Tischio*, 107 N.J. at 506-07, 527 A.2d at 389.

[7] *Id.* at 507, 527 A.2d at 389. Upon arrest, Tischio admitted to drinking three or four beers prior to driving his automobile. *Id.*

[8] *Id.* Tischio was arrested pursuant to N.J. STAT. ANN. § 39:4-50(a) (West Supp. 1985). *Tischio*, 107 N.J. at 507, 527 A.2d at 389. The statute provides that "[a] person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug . . . shall be subject [to penalties listed]." N.J. STAT. ANN. § 39:4-50(a) (West Supp. 1984).

[9] *Tischio*, 107 N.J. at 507, 527 A.2d at 389.

[10] *Id. See* N.J. STAT. ANN. § 39:4-50(a) (West Supp. 1985). That section sanctions "[a] person who . . . operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood." *Id.*

[11] *Tischio*, 107 N.J. at 507, 527 A.2d at 389. The second test was administered approximately one and one-quarter hours after the initial stop. *Id.*

Municipal Court, the defendant moved for acquittal.[12] Tischio maintained that the state failed to establish that at the time he was driving, his blood alcohol level exceeded the legally permissible limit.[13] Upon the denial of this motion, the defendant introduced expert testimony asserting that the result of the breathalyzer did not accurately reflect his blood alcohol concentration at the time of driving.[14] The expert maintained that a 0.11% reading indicated that one hour earlier, while operating his vehicle, Tischio's blood alcohol level was 0.07%.[15]

Despite this evidence, the municipal court found Tischio guilty of driving with a blood alcohol level in excess of 0.10%.[16] The New Jersey Superior Court, Law Division, reached the same conclusion in a trial de novo.[17] On appeal, the defendant maintained that the state failed to establish an impermissible blood alcohol concentration at the time of actual operation.[18] The appellate division disagreed with the defendant's contentions holding that N.J. Stat. Ann. § 39:4-50(a) required a breathalyzer reading of at least 0.10% *at any time* after driving, so long as no additional alcohol was ingested prior to testing, to warrant conviction.[19] In arriving at this conclusion, the appellate court explained that the defendant's position would allow those who consume alcohol and inevitably reach the prohibited blood alcohol count to "sit as moving time bombs which could not be disarmed because the offending alcohol has not yet been sufficiently concentrated in the blood."[20] Consequently, the appellate division deemed the offered extrapolation evidence irrelevant and affirmed Tischio's conviction.[21] The New Jersey Supreme Court granted certification.[22]

In upholding the conviction, the state supreme court reasoned that when construing statutes that are "not unambiguous," the court must attempt to effectuate the legislative intent of

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12 *Id.*

13 *Id.* The state's evidence consisted of testimony of one of the officers and the results of both breathalyzer tests. *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.* at 507-08, 527 A.2d at 389.

18 *See* State v. Tischio, 208 N.J. Super. 343, 346-47, 506 A.2d 14, 15 (App. Div. 1986), *aff'd*, 107 N.J. 504, 527 A.2d 388 (1987), *appeal dismissed*, 108 S. Ct. 768 (1988).

19 *Id.* at 347, 506 A.2d at 16 (emphasis added).

20 *Id.*

21 *See id.* at 347, 506 A.2d at 16.

22 105 N.J. 518, 523 A.2d 163 (1986).

the statute.[23] Consistent with the legislative intent underlying N.J. Stat. Ann. § 39:4-50(a), the court held that a drunken-driving offense may be demonstrated solely by the result of a breathalyzer test administered within a reasonable time after the defendant is stopped.[24] As a result, extrapolation evidence offered to demonstrate a defendant's blood alcohol level while driving is neither required nor allowed.[25]

It was not until the 1930s that drunken driving laws began their development.[26] Early consideration of the offense in New Jersey found courts grappling with labeling the intoxicated driver a disorderly person or a public nuisance.[27] In *State v. Rodgers*, perhaps the earliest drunken-driving case in this country,[28] the defendant drove his automobile down a street and through a saloon window while intoxicated.[29] The court determined that the defendant was guilty of a disorderly person's offense and sentenced him to thirty days in jail.[30]

Since the *Rodgers* decision, drunken-driving laws have changed considerably. In efforts to rid New Jersey highways of the often lethal effects which result from drinking and driving,[31]

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[23] *See Tischio*, 107 N.J. at 510, 527 A.2d at 390-91 (citing Perez v. Pantasote, Inc., 95 N.J. 105, 114, 469 A.2d 22, 27 (1984)).

[24] *Id.* at 522, 527 A.2d at 397.

[25] *Id.*

[26] *See* Kirsch, *Too Drunk to Walk: Legislative Overview*, 105 N.J. LAW. 22 (Nov. 1983). Most were enacted after the repeal of prohibition in 1933. *Id.*

[27] *See, e.g.*, State v. Rodgers, 90 N.J.L. 60, 99 A. 931 (Sup. Ct. 1917), *rev'd*, 91 N.J.L. 212, 102 A. 433 (N.J. 1917).

[28] *See Kirsch*, *supra* note 26, at 22. *See also* State v. Rodgers, 90 N.J.L. 60, 99 A. 931 (Sup. Ct. 1917), *rev'd*, 91 N.J.L. 212, 102 A. 433 (N.J. 1917).

[29] *Rodgers*, 90 N.J.L. at 61-62, 99 A. at 932.

[30] *Rodgers*, 91 N.J.L. at 213, 218, 102 A. at 434, 436.

[31] The statistics compiled by the New Jersey Office of Highway Safety Statistics reflect the following:

MOTOR VEHICLE FATAL ACCIDENTS
1986

County	Total Fatal Accid.	Total Killed	Total Drunken Drivers	Drunken Drivers Killed	Total Killed by DD	Percent Killed by DD
Atlantic	67	70	16	10	16	23%
Bergen	67	74	10	6	12	16%
Burlington	75	87	9	8	10	11%
Camden	77	83	12	7	16	19%
Cape May	19	22	6	3	8	36%
Cumberland	33	36	7	5	9	25%
Essex	78	84	8	5	10	12%
Gloucester	31	38	8	6	9	24%
Hudson	39	44	4*	2	7	16%
Hunterdon	17	18	1	1	1	6%

the courts and legislature have traversed a continued course of tougher laws[32] and frequent arrests.[33] One advancement in this

Mercer	37	39	10	8	11	28%
Middlesex	70	81	18*	15	19	23%
Monmouth	60	63	13	7	13	21%
Morris	45	47	11	8	11	23%
Ocean	58	61	10	6	11	18%
Passaic	34	40	10	8	14	35%
Salem	23	28	3	2	3	11%
Somerset	35	38	9*	4	8	21%
Sussex	21	22	6	4	6	27%
Union	39	42	9	5	10	24%
Warren	21	22	4*	3	3	14%
TOTAL	946	1039	184	123	207	20%

1987

County	Total Fatal Accid.	Total Killed	Total Drunken Drivers	Drunken Drivers Killed	Total Killed by DD	Percent Killed by DD
Atlantic	66	75	15	10	17	23%
Bergen	85	88	16	7	17	19%
Burlington	54	59	12	8	13	22%
Camden	60	73	6	5	6	8%
Cape May	24	26	11*	6	11	42%
Cumberland	32	37	8	3	10	27%
Essex	73	83	15	12	21	25%
Gloucester	35	42	8	8	10	24%
Hudson	33	35	6*	4	6	17%
Hunterdon	13	17	3	3	3	18%
Mercer	32	35	8	5	8	23%
Middlesex	80	90	18	12	20	22%
Monmouth	58	66	13	9	15	23%
Morris	54	52	15*	11	14	27%
Ocean	49	56	11	8	11	20%
Passaic	39	41	9	5	10	24%
Salem	23	25	7	5	7	28%
Somerset	23	23	7	6	7	30%
Sussex	24	25	7	5	7	28%
Union	48	50	13	11	14	28%
Warren	21	25	7	6	7	28%
TOTAL	929	1023	215	149	234	23%

Note: Drunken drivers involved in a fatal accident with A.B.A.C. of 0.10% or higher only

Source: F.A.R.S. and S.P.F.A.I. Unit.

* Indicates that two (2) drunken drivers were involved in one (1) accident. To obtain the number of fatal accidents by drunken drivers, subtract the asterisk (*) from the total drunken drivers column. These figures represent death by motor vehicle within thirty (30) days.

[32] *Compare* N.J. STAT. ANN. § 39:4-50.1 (West 1973) (declaring a blood alcohol concentration of 0.15% to create presumption of intoxication) *with* N.J. STAT. ANN. § 39:4-50(a) (West Supp. 1988) (declaring a blood alcohol concentration of 0.10% a per se offense).

[33] The following DWI arrests were made in New Jersey between 1978 and 1987:

DWI ARRESTS BY COUNTY

County	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
Atlantic	1579	1791	2613	2687	3447	2635	2281	2105	2344	2287
Bergen	1491	1628	1995	2018	3051	3485	2814	2538	2542	2793
Burlington	2008	2052	2569	2591	3323	2847	2449	2316	2861	3120
Camden	1551	1562	2904	2073	2384	2269	2142	2559	3050	2878
Cape May	759	662	711	793	940	943	697	776	920	1160
Cumberland	722	748	1098	982	1175	947	793	848	830	977
Essex	1326	1272	1363	1488	2010	2120	2030	1727	1837	1974
Gloucester	1158	1384	1474	1296	2247	1783	1531	1315	1219	1260
Hudson	646	755	712	825	823	1085	1488	1272	1195	1329
Hunterdon	304	417	514	600	705	674	500	395	472	563
Mercer	858	942	1126	1395	1392	1655	1339	1107	1118	1272
Middlesex	1840	1952	1948	2347	2786	2662	2724	2602	2908	3123
Monmouth	2236	2655	3092	2976	4458	4152	3469	3527	3972	3854
Morris	1316	307	1783	1954	2520	2346	1864	1970	1957	2098
Ocean	1128	1228	1843	1917	3044	3103	2049	1995	2160	2528
Passaic	1034	1175	1151	1273	1513	1818	1941	1771	1792	1703
Salem	488	437	619	676	834	672	637	653	681	711
Somerset	637	767	1072	1073	1491	1675	1243	1191	1265	1509
Sussex	534	622	867	1009	1407	1188	849	709	762	774
Union	816	894	1116	1036	1423	1586	1560	1502	1533	1377
Warren	410	589	837	736	915	717	557	592	647	694
TOTAL	22841	24839	30598	31745	41888	40362	34957	33766	36065	37984

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area is the introduction of chemical analysis to determine levels of intoxication.[34] The use of such analysis is based upon a recognition that every person is adversely affected by the consumption of certain amounts of alcohol.[35] This contention was recognized by early courts[36] and subsequently adopted by the legislature.[37]

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[34] *See* Romano v. Kimmelman, 96 N.J. 66, 474 A.2d 1 (1984). The *Romano* court described the breathalyzer's use of chemical analysis to determine blood alcohol content:

> The instrument is essentially a light balancing device. It contains a light source positioned between two photoelectric cells. Each cell is connected electronically to opposite sides of a current reading meter. When the light is turned on, electric energy is produced by the photoelectric cells which causes a current to flow into the meter. The meter needle will deflect from center one way or the other depending on which current is stronger. The light between the photoelectric cells can be mechanically moved by means of an adjusting knob geared to a finely threaded shaft closer to one cell or to the other. Because photoelectric energy produced by each of the cells varies with the distance from the light, the light can be moved so that the current strength produced by each is equal and opposite. The meter needle is centered indicating zero current flow through it. Between the light and each of the cells is a receptacle for an ampule—a sealed glass container with a solution of potassium dichromate and sulphuric acid. The light thus passes through each of the ampules before striking the photoelectric cell. The solution is a lemon yellow in color. With solutions of the same color the meter needle registers zero current. To conduct a test the seal on one of the ampules is broken and the breath sample is bubbled through that solution. Any alcohol in the breath reacts with the potassium dichromate and effectively fades or lightens the color of the solution. The more alcohol in the breath—the lighter the solution becomes. More light from the source is allowed to strike the photoelectric cell on that side than before; more photoelectric energy is produced; more current results and the meter needle then moves—proportionately to the amount of alcohol in the breath. The source light can then be shifted by use of the threaded screw away from the test ampule and toward the reference ampule. In this fashion the amount of light striking each photoelectric cell can be equalized and the meter needle again brought to zero reading. The distance traveled by the source light on the threaded screw is thus a measure of the alcohol in the breath. By mechanical calibration this distance is read off on a separate scale as a percent of alcohol in the breath.

Id. at 79-80, 474 A.2d at 8.

[35] *See* State v. Johnson, 42 N.J. 146, 165, 199 A.2d 809, 819 (1964).

[36] *See, e.g.*, State v. Hunter, 4 N.J. Super. 531, 68 A.2d 274 (App. Div. 1949), *aff'd*, 12 N.J. Super. 128, 79 A.2d 80 (App. Div. 1951). In *Hunter*, then-Judge Brennan stated, "[s]ettled medical opinion apparently is that any person is unfit to drive when his blood alcohol concentration is at or in excess of fifteen-hundredths of one per cent." *Hunter*, 4 N.J. Super. at 534, 68 A.2d at 275.

[37] *See* N.J. STAT. ANN. § 39:4-50.1 (West 1973). The statute stated that in "any prosecution . . . relating to driving a vehicle while under the influence of intoxicating liquor" a blood alcohol concentration of 0.15% or above creates a presumption of intoxication. *Id.*

In 1951, the state legislature introduced a statutory presumption of intoxication upon a finding of a blood alcohol level of 0.15%.[38]

New Jersey courts considered and ultimately dismissed early challenges to the statute's validity.[39] In *State v. Protokowicz*,[40] the defendant's blood sample revealed a blood alcohol count in excess of 0.15%, triggering the statutory presumption of intoxication pursuant to N.J. Stat. Ann. § 39:4-50.1.[41] Accordingly, he was convicted of operating a vehicle while intoxicated in violation of New Jersey law.[42]

On appeal, the defendant attacked both statutes contending that, when combined, they created a constitutionally prohibited irrebuttable presumption of guilt.[43] In rejecting the defendant's assertion, the court acknowledged that one purpose of N.J. Stat. Ann. § 39:4-50.1 was to alleviate the need for expert testimony.[44] The court noted, however, that the statute did not preclude evidence offered to rebut the presumption of intoxication.[45]

It was not until 1964 that the Supreme Court of New Jersey addressed the statute's validity.[46] In *State v. Johnson*,[47] the defendant was stopped by police 500 feet from where she had been parked.[48] After witnessing her erratic behavior and detecting the odor of alcohol, the police administered a drunkometer test which revealed a blood alcohol reading of 0.18%.[49] Consequently, Johnson was found guilty of violating N.J. Stat. Ann.

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38 Act of April 5, 1951, ch. 24, § 30 1951 N.J. Laws 76 (current version at N.J. STAT. ANN. § 39:4-50.1 (West Supp. 1988)).

39 *See, e.g.*, State v. Protokowicz, 55 N.J. Super. 598, 151 A.2d 396 (App. Div. 1959).

40 55 N.J. Super. 598, 151 A.2d 396 (App. Div. 1959).

41 *See id.* at 600, 151 A.2d at 398.

42 *Id.*, 151 A.2d at 397.

43 *Id.* at 600-01, 151 A.2d at 398. N.J. STAT. ANN. § 39:4-50.1 (West 1954) provided that "[i]f there was at that time 0.15 per centum or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating liquor." *Id. Cf.* N.J. STAT. ANN. § 2C:1-13 (West 1982). The statute declares that "[n]o person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed." *Id.*

44 *See Protokowicz*, 55 N.J. Super. at 602, 151 A.2d at 399.

45 *Id.*

46 State v. Johnson, 42 N.J. 146, 199 A.2d 809 (1964).

47 42 N.J. 146, 199 A.2d 809 (1964).

48 *Id.* at 152-53, 199 A.2d at 812.

49 *Id.* at 153, 199 A.2d at 813. The defendant had difficulty getting out of her car, fumbled with her license, and staggered when she walked. *Id.*

§ 39:4-50.[50]

Upholding the defendant's conviction,[51] the supreme court stated that the drunkometer was an accurate device for measuring levels of intoxication, and therefore, its results were admissible in establishing such intoxication.[52] While recognizing the strength of this presumption, the court specifically held that it was not conclusive.[53]

In 1984, the New Jersey Supreme Court in *Romano v. Kimmelman*[54] examined the reliability of breathalyzer results.[55] Based primarily on the results of Smith and Wesson Breathalyzer tests, the plaintiffs in *Romano* were each charged with driving while intoxicated.[56] Seeking an injunction against the use of such results, the plaintiffs based their positions upon an unreported municipal court determination that the breathalyzer results were unreliable because of the Smith and Wesson models' susceptibility to radio frequencies.[57] Following the appellate division's denial of the sought relief, the supreme court granted certification to address only the issues of reliability and admissibility.[58]

In its decision, the supreme court noted that scientific acceptance and validity did not mandate unanimous agreement as to the value of the technique.[59] Rather, the court determined that a "sufficient scientific basis to produce uniform and reason-

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50 *Id.* at 151, 199 A.2d at 811. The defendant was found guilty of operating a vehicle while intoxicated based upon the results of chemical analysis. *See id.*

51 *See id.* at 176, 199 A.2d at 826.

52 *Id.* at 170-71, 199 A.2d at 822-23 (quoting State v. Miller, 64 N.J. Super. 262, 268, 165 A.2d 829, 832 (App. Div. 1960)).

53 *Id.* at 173, 199 A.2d at 824. The presumption was not held to conclusively sustain the state's burden of proof or to eliminate the right to rebut that case. *Id.*

54 96 N.J. 66, 474 A.2d 1 (1984).

55 Moore, McDermott & Moore, *Validity of the Breathalyzer*, 105 N.J. Law. 31, 31 (Nov. 1983). The breathalyzer has been deemed an accurate devise for determining blood alcohol levels. *Id.* It is the most frequently used method for doing so in this state. *Id.* In charges of a violation of N.J. STAT. ANN. § 39:4-50.1, the introduction into evidence of a blood alcohol reading of 0.10% is conclusive evidence of operating a motor vehicle while intoxicated. *Id.* Smith and Wesson Breathalyzers (models 900 and 900A) were approved for making such determinations by the attorney general. *Id.*

56 *Romano*, 96 N.J. at 74, 474 A.2d at 5.

57 *Id.* At issue in the municipal court's decision was a charge that radio interference effected the performance of the Smith and Wesson Breathalyzers. *Id.* (citing State v. Lopat, (Mun. Ct., April 6, 1983)). In the *Lopat* decision, the court declared that breathalyzers are unreliable and the evidence procured through them inadmissible. *Id.* at 74-76, 474 A.2d at 5-6.

58 *Id.* at 76, 474 A.2d at 6.

59 *Id.* at 80, 474 A.2d at 9.

ably reliable results" was required.[60] Thus, the court declared that the Smith and Wesson model breathalyzers were sufficiently reliable to determine blood alcohol levels.[61]

The impact of the *Romano* decision is amplified when viewed together with the legislative amendments to the 1951 statute. In 1977, the legislature amended N.J. Stat. Ann. § 39:4-50.1 by reducing the blood alcohol level necessary to prompt the statutory presumption of intoxication.[62] The presumption after that date arose upon a breathalyzer reading of 0.10%.[63] More notably, in 1984 the legislature replaced the presumptory language with an absolute ban on operating a vehicle with a blood alcohol level of at least 0.10%, making such operation a per se offense.[64] Thus, the breathalyzer became the "linchpin" of New Jersey drunken-driving law.[65]

As a result of the newly amended statute, the relevant inquiry shifted from a determination of intoxication to a finding of blood alcohol content.[66] The creation of a new offense sparked constitutional challenges to the statute's validity.[67] One such challenge was drawn in *State v. D'Agostino*.[68]

In *D'Agostino*, the police stopped the defendant after they witnessed his car swerving.[69] The results of two breathalyzer tests revealed blood alcohol readings of 0.18% and 0.19%.[70] After being convicted of violating the state's drunken-driving statute, the defendant attacked the constitutionality of the legislation, contending that the statute was void for vagueness

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60 *Id.*, 474 A.2d at 8 (quoting State v. Hurd, 86 N.J. 525, 536, 432 A.2d 86, 91 (1981)).

61 *Id.* at 82, 474 A.2d at 9.

62 Act of February 4, 1977, ch. 29, 1977 N.J. Laws 102-03 (current version at N.J. STAT. ANN. § 39:4-50.1 (West Supp. 1988)).

63 *Id.* at 102.

64 Act of January 9, 1984, ch. 444, 1983 N.J. Laws 1818-19 (codified at N.J. STAT. ANN. § 39:4-50.1 (West Supp. 1988)).

65 *See* State v. Tischio, 107 N.J. 504, 510, 527 A.2d 388, 391 (1987), *appeal dismissed*, 108 S. Ct. 768 (1988). *See also*, Note, *supra* note 5, at 611. The author notes that "a person may be convicted simply on the basis of a breathalyzer test reading showing a blood alcohol concentration in the proscribed range." *Id.*

66 *See* N.J. STAT. ANN. § 39:4-50(a) (West Supp. 1988). The new statute made operating a vehicle with the prohibited blood alcohol content an offense in itself regardless of the individual extent of intoxication. *Id.*

67 *See, e.g.*, State v. Miller, 220 N.J. Super. 106, 531 A.2d 742 (App. Div. 1985); State v. O'Connor, 220 N.J. Super. 104, 531 A.2d 741 (App. Div. 1984); State v. D'Agostino, 203 N.J. Super. 69, 495 A.2d 915 (Law Div. 1984).

68 203 N.J. Super. 69, 495 A.2d 915 (Law Div. 1984).

69 *Id.* at 71, 495 A.2d at 916-17.

70 *Id.*, 495 A.2d at 917.

and that no rational basis existed for the assertion that a person with a blood alcohol level of 0.10% was a dangerous driver.[71] The court refuted both claims.[72] In doing so, the court noted that the statute provided a clear guideline of the offense[73] and was rooted in a rational legislative determination that a driver with the prohibited blood alcohol concentration was a danger to the roads.[74]

In its decision, the *D'Agostino* majority noted that the plain language of the statute proscribed the offense of *driving* with a blood alcohol level of 0.10%.[75] Noting that the state's new language "could hardly be more lucid," the majority made no attempt to separate the blood alcohol level at the time of testing from the level at the actual time of driving.[76] Additionally, the court stressed that the statute did not free the state from its burden of proving guilt beyond a reasonable doubt.[77] Rather, the majority noted, it will alleviate the necessity for expert testimony at each trial.[78] The court significantly did not state that it would dispense altogether with the need for such testimony.[79]

Addressing the state's burden of proof, the court maintained that the state was required to prove "beyond a reasonable doubt" the blood alcohol level of the defendant at the time of driving.[80] The court noted that because a breathalyzer test will be administered *after driving*, the problem of extrapolation will always arise in determining the defendant's condition at the time of operation.[81] The court held, however, that in light of the high breathalyzer readings, there was no doubt as to the defendant's intoxication.[82]

In *State v. O'Connor*,[83] the appellate division clarified the statute's meaning in response to another challenge to its constitutionality.[84] Appealing his drunken-driving conviction, O'Connor argued that the statute imposed a mandatory presumption of in-

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71 *Id.* at 73-74, 495 A.2d at 917-18.
72 *Id.* at 73-76, 495 A.2d at 917-19.
73 *Id.* at 74, 495 A.2d at 918.
74 *Id.* at 76, 495 A.2d at 919.
75 *Id.* at 71, 495 A.2d at 916.
76 *See id.* at 72, 77, 495 A.2d at 917, 920.
77 *Id.* at 77, 495 A.2d at 920.
78 *Id.*
79 *See id.*
80 *Id.*
81 *See id.*
82 *Id.* at 78, 495 A.2d at 920.
83 220 N.J. Super. 104, 531 A.2d 741 (App. Div. 1984).
84 *See id.* at 105, 531 A.2d at 741.

toxication in violation of due process.[85] The court declared that the argument was "stopped short" by the fact that no presumption was created.[86] Instead, the court maintained that the statute blatantly prohibited the operation of an automobile by any driver with a blood alcohol level of 0.10% or more.[87]

Amidst a heightened awareness of the dangers of drunken-driving, early interpretation of the newly enacted statute remained pragmatic.[88] Rich with rhetoric condemning drunken drivers as "chief instrumentalities of human catastrophe,"[89] the statute's meaning was viewed as plain and unambiguous.[90] The judiciary responded by pointing out that the statute was penal in nature, and therefore, construed it strictly.[91]

In *State v. Kreyer*,[92] the defendant appealed his conviction of operating an automobile while under the influence of alcohol.[93] The defendant urged that although his breathalyzer tests resulted in readings of 0.14% and 0.13%, he was "not under the influence of [alcohol]" and, consequently, did not violate N.J. Stat. Ann. § 39:4-50.[94] The court affirmed the defendant's conviction.[95] Determining that no lack of clarity existed in the statute's wording, the *Kreyer* majority construed N.J. Stat. Ann. § 39:4-50 to "flatly" forbid the operation of an automobile by a driver with a blood alcohol concentration of 0.10% or more.[96]

Operation and intoxication were viewed by courts as two separate acts which must occur together to constitute the offense.[97] In *State v. Rypkema*,[98] the police apprehended the defendant one and one-half hours after he was seen fleeing from

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85 *Id.*

86 *Id.*

87 *Id.*

88 *See, e.g.*, State v. Grant, 196 N.J. Super. 470, 483 A.2d 411 (App. Div. 1984) (upholding drunken-driving conviction against constitutional challenges); State v. D'Agostino, 203 N.J. Super. 69, 495 A.2d 915 (Law Div. 1984) (statute not void for vagueness and did not infringe upon defendant's rights).

89 *Grant*, 196 N.J. Super. at 476, 483 A.2d at 414.

90 *See id.* at 475-76, 483 A.2d at 414.

91 *Id.* at 480, 483 A.2d at 417.

92 201 N.J. Super. 202, 492 A.2d 1088 (App. Div. 1985).

93 *Id.* at 203-04, 492 A.2d at 1088.

94 *Id.* at 204, 492 A.2d at 1088-89.

95 *Id.*, 492 A.2d at 1089.

96 *Id.*

97 *See, e.g.*, State v. Rypkema, 191 N.J. Super. 388, 466 A.2d 1324 (Law Div. 1983). In *Rypkema*, the court noted that "the act of operating a vehicle must be contemporaneous with being under the influence." *Id.* at 393, 466 A.2d at 1326 (citing State v. Prociuk, 145 N.J. Super. 570, 368 A.2d 436 (Law Div. 1976)).

98 191 N.J. Super. 388, 466 A.2d 1324 (Law Div. 1983).

the scene of an accident.[99] The police then brought the defendant to the hospital, where he was administered two blood tests revealing blood alcohol percentages of 0.153 and 0.155.[100]

The defendant attacked his conviction contending that there existed no proof that he operated his vehicle "*while* under the influence of alcohol."[101] Affirming the defendant's conviction, the court nevertheless held that for a defendant to violate N.J. Stat. Ann. § 39:4-50, he or she must operate his or her automobile while under the influence of alcohol.[102] The court reasoned that the intent behind the statute is clear: "the act of operating a vehicle must be contemporaneous with being under the influence."[103]

Early decisions consistently permitted the use of extrapolation evidence to assert a lower blood alcohol level at the time of driving, yet dismissed assertions that the prosecution was not meeting its burden of proof.[104] In *State v. Miller*[105] the defendant was administered two breathalyzer tests approximately thirty minutes after his arrest.[106] The results of the tests exhibited a 0.11% and 0.12% blood alcohol concentration.[107] An expert testified for the defendant contending that in light of the amount of alcohol the defendant had consumed, the defendant's blood alcohol reading would have been 0.09% at the time of his arrest.[108]

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99 *Id.* at 390, 466 A.2d at 1325.

100 *Id.* at 391, 466 A.2d at 1325-26.

101 *Id.* at 393, 466 A.2d at 1326 (emphasis in original). The defendant also appealed on the ground that the method used to withdraw the blood sample was in error. *Id.* at 391, 466 A.2d at 1326. The defendant contended that those who withdrew the blood should testify, because that was the only way the state could establish that the manner and environment in which the blood was taken was acceptable. *Id.* The court dismissed the argument. *Id.* at 392, 466 A.2d at 1326.

102 *Id.* at 393, 466 A.2d at 1326-27.

103 *Id.*, 466 A.2d at 1326 (citing State v. Prociuk, 145 N.J. Super. 570, 368 A.2d 436 (Law Div. 1976)). The court found, however, that other evidence established the case, such as, the fact that the defendant "reeked" of alcohol, staggered, and admitted to operating the vehicle. *Id.*, 466 A.2d at 1327.

104 *See, e.g.*, State v. Miller, 220 N.J. Super. 106, 531 A.2d 742 (App. Div. 1985); State v. O'Connor, 220 N.J. Super. 104, 531 A.2d 741 (App. Div. 1984). *See* State v. Tischio, 107 N.J. 504, 527 A.2d 388 (1987), *appeal dismissed*, 108 S. Ct. 768 (1988). In his dissenting opinion in *Tischio*, Justice Clifford stated that those states with statutes similar to New Jersey's have "uniformly rejected" the interpretation of the *Tischio* majority. *Id.* at 532, 527 A.2d at 402 (Clifford, J. dissenting). *See also* Cheever & Bird, *supra* note 5, at 3 (stating that New Jersey is now the only state prohibiting the use of extrapolation evidence in prosecutions for driving while intoxicated).

105 220 N.J. Super. 106, 531 A.2d 742 (App. Div. 1985).

106 *Id.* at 107, 531 A.2d at 742-43.

107 *Id.*

108 *Id.* at 108, 531 A.2d at 743. *See also* Cheever & Bird, *supra* note 5, at 25 (noting

In reversing the defendant's conviction, the court found that the expert testimony precluded a finding of "guilt beyond a reasonable doubt."[109] In making this determination, the court noted, as did the court in *D'Agostino*, that N.J. Stat. Ann. § 39:4-50 prohibits *driving* with a blood alcohol concentration of 0.10% or more.[110] Thus, the court returned to the earlier pragmatic and literal interpretation of the state's drunken-driving statute and failed to separate the offense from the actual driving of the automobile.[111]

Similarly, the court in *State v. Ghegan*[112] interpreted N.J. Stat. Ann. § 39:4-50 as creating only a prima facie case of intoxication upon a breathalyzer reading in violation of the statute.[113] In reversing the defendant's conviction, the court found error in the law division's determination that *Kreyer* imposed "strict liability" on one who operates a motor vehicle with a blood alcohol concentration of 0.10% or more.[114] Instead, the majority found that the state drunken-driving statute prescribed no such duty.[115] Furthermore, the court stated that the correct interpretation was limited to a finding that a violative blood alcohol ratio provided the state with a prima facie case.[116] This, the court continued, is without consideration of whether the individual is impaired or able to operate his or her vehicle.[117]

This course of interpretation was continued after both *Ghegan* and the appellate division's decision in *Tischio*.[118] In *State v. Allen*,[119] the defendant was arrested and charged with driving while intoxicated.[120] The results of two breathalyzer tests were

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that extrapolation evidence is the defense strategy in about 90% of drunken-driving cases).

109 *Miller*, 220 N.J. Super. at 109, 531 A.2d at 743.

110 *Id.* at 108, 531 A.2d at 743 (emphasis added). In *D'Agostino*, the court stated that N.J. STAT. ANN. § 39:4-50 "proscribes . . . driving a motor vehicle with a blood alcohol concentration of 0.10% or more." *D'Agostino*, 203 N.J. Super. at 71, 495 A.2d at 916.

111 *Miller*, 220 N.J. Super. at 109, 531 A.2d at 743.

112 213 N.J. Super. 383, 517 A.2d 490 (App. Div. 1986).

113 *Id.* at 385, 517 A.2d at 491.

114 *See id.* at 384-85, 517 A.2d at 491. Specifically, the court stated, "*Kreyer* does not mandate that a 0.10% blood alcohol reading is irrebuttable." *Id.*

115 *See id.* at 385, 517 A.2d at 491.

116 *Id.*

117 *Id.*

118 State v. Tischio, 208 N.J. Super. 343, 506 A.2d 14 (App. Div. 1986), *aff'd*, 107 N.J. 504, 527 A.2d 388 (1987), *appeal dismissed*, 108 S. Ct. 768 (1988).

119 212 N.J. Super. 276, 514 A.2d 879 (Law Div. 1986), *certif. denied*, 107 N.J. 630, 527 A.2d 454 (1987).

120 *Allen*, 212 N.J. Super. at 277, 514 A.2d at 879.

readings of 0.13% and 0.14%.[121] The defendant sought to introduce expert testimony to support his claim that at the time he was driving, his blood alcohol concentration was at a statutorily permissible level.[122]

In making its determination regarding the admissibility of such testimony, the court noted that the defendant would be subject to the appellate division's decision in *Tischio*.[123] Despite this earlier case, the court permitted the introduction of the extrapolation evidence.[124] The *Allen* court interpreted *Tischio* to free the state from an obligation to produce such evidence in order to sustain its burden of proof but not to preclude a defendant's production of such testimony.[125] The court concluded that a contrary opinion could only result from a misreading of the case.[126]

In its analysis, the *Allen* majority stated that the only issue raised by the defendant in *Tischio* was the degree of the state's burden of proof.[127] The court concluded that it was not the obligation of the state to extrapolate the breathalyzer evidence to establish the defendant's blood alcohol concentration at the time of driving.[128] Furthermore, the court noted that the "time bomb" discussion in *Tischio* was merely dicta, and therefore, not controlling.[129] The court then elaborated that the legislative scheme and history of N.J. Stat. Ann. § 39:4-50 weighed heavily against the *Tischio* dicta.[130] The court determined that the entire focus of

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121 *Id.*

122 *Id.*

123 *Id.* The appellate division in *Tischio* deemed extrapolation evidence unnecessary so long as there had been no ingestion of alcohol between the time of driving and the time of testing. State v. Tischio, 208 N.J. Super. 343, 347, 506 A.2d 14, 16 (App. Div. 1986), *aff'd*, 107 N.J. 504, 527 A.2d 388 (1987), *appeal dismissed*, 108 S. Ct. 768 (1988).

124 *Allen*, 212 N.J. Super. at 283, 514 A.2d at 883.

125 *See id.*

126 *See id.* at 278, 514 A.2d at 880.

127 *Id.* at 279, 514 A.2d at 880.

128 *Id.*

129 *Id.* The appellate court in *Tischio* stated that extrapolation of evidence produces an anomalous result. State v. Tischio, 208 N.J. Super. 343, 347, 506 A.2d 14, 16 (App. Div. 1986), *aff'd*, 107 N.J. 504, 527 A.2d 388 (1987), *appeal dismissed*, 108 S. Ct. 768 (1988). Noting that the ingestion of alcohol causes the blood alcohol ratio to increase, the court declared that those who have ingested enough alcohol sit as "moving time bombs." *Id.*

130 *Allen*, 212 N.J. Super. at 281, 514 A.2d at 881-82. The court noted that prior to the statute's 1983 amendment, N.J. STAT. ANN. § 39:4-50.1 created a presumption of intoxication "[i]f there was *at that* time [a blood alcohol concentration of] 0.10%," thus referring to the time of operation. *Allen*, 212 N.J. Super. at 281, 514 A.2d at 882 (emphasis in original). Additionally, the preamble to the statute, presently reads, "[i]n any prosecution . . . relating to *driving a vehicle* while under the

New Jersey's drunken-driving law is on the time of driving.[131]

In *State v. Tischio*,[132] however, the New Jersey Supreme Court rejected the *Allen* court's analysis. In his consideration of the appellate division's decision in *Tischio*, Justice Handler was faced with determining at what point breathalyzer readings become relevant.[133] The supreme court maintained that N.J. Stat. Ann. § 39:4-50 requires a breathalyzer to be given within a reasonable time following actual operation.[134]

The *Tischio* majority began its analysis with a consideration of the literal interpretation of N.J. Stat. Ann. § 39:4-50.[135] The statute, the majority explained, involved two elements: the prohibited blood alcohol concentration and the operation of a vehicle.[136] Concluding that a literal reading dictates that both elements occur together, the court nevertheless stated that such a reading is contrary to public policy and would frustrate the surrounding legislative intent.[137] To corroborate this conclusion, the court indicated that the statute specifically contemplates the use of a breathalyzer test to determine blood alcohol content.[138] Since the test could never coincide with the actual time of driving, the court held that the statute either contemplated that the breathalyzer results alone were satisfactory or that further evidence was necessary to relate these findings back to the time of

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influence." *Id.* (quoting N.J. STAT. ANN. § 39:4-50.1 (West Supp. 1985) (emphasis in original)). Also, the court noted that the present reading of N.J. STAT. ANN. § 39:4-50.1 paragraphs one and two both contain the words "at that time," referring again to the time of driving. *Id.* (quoting N.J. STAT. ANN. § 39:50.1 (West Supp. 1985)). The court also pointed to the "straightforward language" of N.J. STAT. ANN. § 39:4-50(a) looking not to the time of testing, but rather to the time of driving. *Allen*, 212 N.J. Super. at 282, 514 A.2d at 882. The *Allen* court stated that if the time of testing was to become "all-important" the following questions would be raised: "How much discretion should police have in this regard? What is the right of an accused to a speedy test, or the opposite?. Can the police give successive tests until a 0.10% reading is obtained? What due process questions are raised?" *Id.* at 283, 514 A.2d at 883.

131 *Id.* at 282, 514 A.2d at 882.

132 107 N.J. 504, 522, 527 A.2d 388, 397 (1987), *appeal dismissed*, 108 S. Ct. 768 (1988).

133 *Tischio*, 107 N.J. at 504, 527 A.2d at 388.

134 *Id.*

135 *Id.* at 509, 527 A.2d at 390.

136 *Id.*

137 *See id.* Additional considerations enumerated by the court which weighed against such a reading included the fact that the statute was ambiguous and that a literal reading was contrary to the overall legislative scheme of New Jersey's drunken-driving law. *Id.*

138 *Id.* at 510, 527 A.2d at 390-91.

driving.[139]

To make such a determination, the majority declared that the surrounding legislative intent must be ascertained.[140] Notwithstanding the statute's penal nature,[141] the court found that the legislative intent indicated "special objectives" requiring a flexible interpretation of the drunken-driving statute.[142] Based upon these considerations, the court concluded that the purpose behind the statute was to cure the ills spread by the drunken driver[143] and thus held that a flexible and pragmatic approach was mandated.[144]

The majority identified that the underlying goal of the statute was to eliminate the drunken driver from the state's roadways.[145] The court found that to effectuate this goal, both the courts and legislature have run a consistent course toward minimizing the need for expert testimony at drunken-driving trials.[146] To support this contention the majority cited the statute's history, beginning with the presumption of intoxication first created by the 1951 legislature.[147]

The court explained that in 1951, N.J. Stat. Ann. § 39:4-50 was amended to include a presumption of intoxication upon the finding of a blood alcohol level of 0.15%.[148] The majority noted

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139 *Id.*, 527 A.2d at 391. The majority stated, "[i]t is settled that the most important factor in construing a statute is the intent of the legislature." *Id.* (citing Perez v. Pantasote, Inc., 95 N.J. 105, 114, 469 A.2d 22, 27 (1984)).

140 *See id.* at 510-11, 527 A.2d at 391.

141 *Id.* at 511, 527 A.2d at 391. The court recognized that a penal statute should be construed strictly. *Id.* (citing State v. Grant, 196 N.J. Super. 470, 480-81, 483 A.2d 411, 417 (App. Div. 1984)). The court also noted, however, that even with a case involving a criminal statute, the goal is to determine the legislative intent. *Id.* (quoting State v. Provenzano, 34 N.J. 318, 322, 169 A.2d 135, 137-38 (1961)). Thus, the court concluded they are to be given a meaning which is consistent with the obvious intention and the law's purpose. *Id.* (quoting State v. Brown, 22 N.J. 405, 415, 126 A.2d 161, 166 (1956)).

142 *Id.* at 512, 527 A.2d at 392.

143 *Id.*

144 *Id.* The majority explained further that they were never hesitant to apply such a broad approach if to do otherwise would frustrate the legislative intent. *Id.* at 513, 527 A.2d at 392. To illustrate this point, the court cited a number of cases which gave a broad meaning to the word operation as used in the statute. *Id.* at 513-14, 527 A.2d at 392-93 (citing State v. Mulcahy, 107 N.J. 467, 527 A.2d 368 (1987) (defendant sitting in car about to put the keys into the ignition operated vehicle for purposes of N.J. STAT. ANN. § 39:4-50); State v. Sweeney, 40 N.J. 359, 192 A.2d 573 (1963) (holding that operation does not require movement of a vehicle)).

145 *Id.* at 514, 527 A.2d at 393.

146 *Id.*

147 *Id.* at 515, 527 A.2d at 393.

148 *Id.*

that although this statute did not altogether dispense with the need for expert testimony, it remained its main objective.[149] This, the *Tischio* majority analyzed, in conjunction with the 1983 amendment, clearly expressed an intention to rely on breathalyzer results in the development of this area of New Jersey law.[150]

The majority observed that in determining blood alcohol levels, courts have consistently sought to alleviate the need for expert testimony.[151] Additionally, the majority elaborated that the scheme of the state's drunken-driving law indicates that the admission of extrapolation evidence was not contemplated.[152] Moreover, the court maintained that the constant minimization of the need for such evidence dictated a finding that such evidence frustrates the legal scheme of drunken-driving law in New Jersey.[153]

In support of its opinion, the majority next addressed the evolution of the present statute.[154] The court recognized that the statute, as originally proposed, dictated that a finding of a 0.10% blood alcohol ratio within four hours after driving constituted the offense.[155] The majority dismissed the defendant's argument that the proposal was indicative of a legislative intent to look to the actual time of driving.[156] Justice Handler observed that the deletion of the four-hour period supports the exclusion of extrapolation evidence.[157] Thus, the majority held that the statute calls for a breathalyzer test to be administered "within a

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149 *See id.*

150 *Id.* at 516, 527 A.2d at 394. Section 39:4-50(a) after the 1983 amendment and as currently enacted states, in pertinent part, that "[a] person who operates a motor vehicle . . . with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood . . . shall be subject [to the penalties listed]." N.J. STAT. ANN. § 39:4-50(a) (West Supp. 1988).

151 *Tischio*, 107 N.J. at 517, 527 A.2d at 394-95 (citing State v. Johnson, 42 N.J. 146, 199 A.2d 809 (1964)).

152 *Id.* at 518, 527 A.2d at 395.

153 *Id.*

154 *Id.*

155 *Id.* The original proposal provided:

> A person charged under . . . this section whose blood alcohol concentration is 0.10% or more by weight as shown by a chemical analysis of a blood, breath, urine or other bodily substance sample taken within four hours of the alleged offense shall be guilty of [operating a motor vehicle while under the influence of intoxicating liquor].

Id.

156 *Id.* at 518-19, 527 A.2d at 395.

157 *Id.* at 519, 527 A.2d at 396.

reasonable time" after operation.[158]

Lastly, the majority justified its holding by stating that public policy considerations support such an interpretation.[159] The court declared that those who drive with a blood alcohol ratio of 0.10% or more threaten not only themselves, but all those who use New Jersey roads.[160] The court further observed that prosecution of these drivers should not depend solely upon the time and circumstances in which they are stopped by the police.[161] Borrowing the appellate division's "time-bomb" analogy, the court reasoned that the law should not encourage the drunken driver to race quickly home before his or her blood alcohol level reaches a prohibitive peak.[162]

Finding unpersuasive the defendant's contention that those apprehended prior to reaching the prohibited 0.10% blood alcohol level could still be prosecuted under N.J. Stat. Ann. § 39:4-50(a), the majority ruled that such an argument ignores the legislature's reliance on the breathalyzer test.[163] Undoubtedly, the court found, that a person who has consumed a prohibited amount of alcohol may not possess sufficient symptoms to permit a finding of intoxication.[164] The essential point, in the court's opinion, was that "somewhere 'down the road' disaster may result."[165]

The *Tischio* majority found equally unpersuasive the defend-

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158 *Id. But see* Cheever & Bird, *supra* note 5, at 25. The article states that the co-sponsor of the amendment disagrees with the court's reading. *Id.* The article noted:

> But the co-sponsor of the 1983 amendment disagrees with the [c]ourt's interpretation and says the lawmakers' primary concern was the time of operation of the vehicle, not the time of the breath test. "I don't think anyone foresaw where such extrapolation testimony would be irrelevant and inadmissible," says Assembly Minority Leader Alan J. Karcher.

Id.

159 *Tischio*, 107 N.J. at 519, 527 A.2d at 396.

160 *Id.*

161 *Id.*

162 *Id.* at 519-20, 527 A.2d at 396 (quoting State v. Tischio, 208 N.J. Super. 343, 347, 506 A.2d 14, 16 (App. Div. 1986), *aff'd*, 107 N.J. 504, 527 A.2d 388 (1987), *appeal dismissed*, 108 S. Ct. 768 (1988)). The appellate division likened the driver who has not fully ingested the alcohol consumed to a moving time bomb. State v. Tischio, 208 N.J. Super. 343, 347, 506 A.2d 14, 16 (1986), *aff'd*, 107 N.J. 504, 527 A.2d 388 (1987), *appeal dismissed*, 108 S. Ct. 768 (1988).

163 *Tischio*, 107 N.J. at 520, 527 A.2d at 396. The defendant asserted that the individual could still be prosecuted for driving while under the influence of alcohol. *Id.*

164 *See id.* at 520-21, 527 A.2d at 396.

165 *Id.* at 521, 527 A.2d at 396.

ant's contention that a person who has arrived home safely can still be convicted, even if at home for an hour.[166] The court rejected this argument finding it to be "far-fetched."[167] Additionally, the majority dismissed the defendant's assertion that the court's finding would encourage repeated testing until the prohibited reading is obtained.[168] This possibility, the court stated, was prevented by requiring the test to be administered "within a reasonable time after arrest."[169]

In his dissenting opinion, Justice Clifford accused the majority of undertaking a legislative role and enacting "wholesome social policy."[170] Reminding the majority of its appropriate judicial function, Justice Clifford stated that the majority's view would have been given his support had they been members of the legislature.[171] Moreover, the justice asserted that the majority opinion stepped away from interpretation and moved closer to creation.[172] Justice Clifford criticized the majority for taking liberties with legislative history and for dismissing the opinion of the state's attorney general.[173] He maintained that a just reading of the statute indicated that "the critical time for determining" a drunken-driving offense is the time in which a defendant operates a vehicle.[174]

Agreeing with a portion of the appellate division's holding, the dissent stated that it is not the burden of the state to relate the breathalyzer tests back to the time of driving.[175] Justice Clif-

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166 *Id.*, 527 A.2d at 396-97.

167 *Id.*, 527 A.2d at 397.

168 *Id.*

169 *Id.*

170 *See id.* at 522, 527 A.2d at 397 (Clifford, J., dissenting). Justice Clifford, in his dissent, explained that law enforcement geared against the drunken driver, "ranks only slightly behind the veneration of motherhood and probably slightly ahead of a robust hankering after apple pie in the hierarchy of values firmly embedded in our culture." *Id.*

171 *Id.*

172 *Id.*

173 *Id.* at 523, 527 A.2d at 397-98 (Clifford, J., dissenting). The Attorney General argued that it should not be the burden of the state to extrapolate evidence to the time of driving, yet conceded that the efficacy of breathalyzer results can be defeated by the use of extrapolation evidence. *Id.* at 532-33, 527 A.2d at 403 (Clifford, J., dissenting).

174 *Id.* at 523, 527 A.2d at 397 (Clifford, J., dissenting).

175 *Id.* at 524, 527 A.2d at 398 (Clifford, J., dissenting). At the appellate level, both parties conceded that extrapolation of evidence was probative and argued instead the issue of who had the burden of extrapolating evidence to prove the defendant's blood alcohol level at the time of driving. State v. Tischio, 208 N.J. Super. 343, 506 A.2d 14 (1986), *aff'd*, 107 N.J. 504, 527 A.2d 388 (1987), *appeal dismissed*, 108 S. Ct. 768 (1988)).

ford viewed the problem to lie in the lower court's proposal that the breathalyzer test alone, given at any time, sufficed to establish the offense.[176] Justice Clifford declared that the opinion failed to define exactly what constitutes the offense.[177]

Justice Clifford maintained that the majority, in denying the probative value of extrapolation evidence, deemed the offense to be committed when the breathalyzer test yielded a violative blood alcohol count.[178] Recognizing that criminal statutes must be strictly construed, the justice posited that the offense is the *operation* of a motor vehicle by a driver with a blood alcohol level in excess of the statutorily permissible limit.[179] Furthermore, Justice Clifford charged that the statute is neither unclear nor ambiguous and that it plainly prescribes the offense.[180]

Justice Clifford noted that the majority's decision is not a reaction to, as they maintain, the statute's ambiguity, but rather a reflection of their concern that a literal reading makes enforcement difficult.[181] The justice maintained that this need not be so.[182] Instead, he suggested that the 0.10% breathalyzer result serve as prima facie evidence of drunken-driving so long as the test is given within a reasonable time after arrest.[183] As a consequence, the dissent argued that extrapolation evidence in contradiction of test results should be permitted.[184] Justice Clifford explained that any other ruling denies that the offense is indeed operating a vehicle with the prohibited blood alcohol concentration.[185]

Stating that what the legislature contemplated is clear, the dissent next outlined the language of the statute in order to support its contentions.[186] Noting that a statute is to be viewed as a whole, Justice Clifford pointed to the pre-1983 statute which described the offense as *driving a vehicle* while under the influence of alcohol.[187] Additionally, Justice Clifford reasoned that the three

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176 *Tischio*, 107 N.J. at 524, 527 A.2d at 398 (Clifford, J., dissenting).
177 *Id.* at 525, 527 A.2d 398-99 (Clifford, J., dissenting).
178 *Id.*, 527 A.2d at 399 (Clifford, J., dissenting).
179 *Id.* (emphasis in original) (citing State v. Maguire, 84 N.J. 508, 514, 423 A.2d 294, 297 (1980); State v. Grant, 196 N.J. Super. 470, 480-81, 483 A.2d 411, 417 (App. Div. 1984)).
180 *Id.* at 526, 527 A.2d at 399 (Clifford, J., dissenting).
181 *See id.*
182 *Id.*
183 *Id.*
184 *See id.*
185 *See id.* at 527-28, 527 A.2d at 400 (Clifford, J., dissenting).
186 *Id.* (citing N.J. STAT. ANN. § 39:4-50.1 (West 1973)).
187 *Id.* at 528, 527 A.2d at 400 (Clifford, J., dissenting) (emphasis added).

subsections of N.J. Stat. Ann. § 39:4-50.1 prior to 1983 clearly referred to the time of operation.[188] Noting the 1983 deletion of subsection three, Justice Clifford nevertheless maintained that there was no indication of a legislative intent to shift the focus to the time of testing.[189] In contrast, the justice elaborated that the entire statute is directed toward a defendant who operates a motor vehicle.[190] Justice Clifford stated that the majority's view would produce an anomalous result.[191] With subsections one and two of the 1983 statute still in effect, Justice Clifford concluded that the majority's opinion would result in one part of the statute referring to the time of driving and another to the time of testing.[192] This result, the justice declared, is contrary to the general rule "that a word or phrase should have the same meaning throughout the statute in the absence of a clear indication to the contrary."[193]

Furthermore, Justice Clifford relied on the statute's legislative history in support of his position.[194] The justice noted that the Assembly Committee Statement which was attached to the 1983 amendment contained nothing in regard to the pivotal time of the offense.[195] Thus, the dissent inferred that the legislature, in absence of statements to the contrary, intended the time of driving to remain critical.[196] Justice Clifford referred to the fact that as originally proposed, the amendment contained a provision which stated that a person violated the state's drunken-driving statute if a breathalyzer test given within four hours after driving revealed a prohibited blood alcohol concentration.[197] Such a statute, he continued, would have embraced the majority's conclusions but the legislature specifically resisted such a result.[198]

In conclusion, Justice Clifford conjured no support for the majority's position.[199] Rather, the justice held that consistent

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188 *Id.*

189 *Id.*

190 *Id.*

191 *See id.* at 528-29, 527 A.2d at 400-01 (Clifford, J., dissenting).

192 *Id.* at 529, 527 A.2d at 401 (Clifford, J., dissenting).

193 *Id.* at 529-30, 527 A.2d at 401 (Clifford, J., dissenting) (quoting Perez v. Pantasote, Inc., 95 N.J. 105, 116, 469 A.2d 22, 28 (1984)).

194 *See id.*

195 *Id.*

196 *Id.*

197 *Id.*

198 *See id.* at 530, 527 A.2d at 401 (Clifford, J., dissenting).

199 *Id.* at 532-33, 527 A.2d at 403 (Clifford, J., dissenting).

with the Attorney General's view, test results given within a reasonable time produce prima facie evidence of the offense.[200] Additionally, the justice contended that a defendant should be permitted to produce extrapolation evidence as to his or her blood alcohol ratio at the time of driving.[201]

Perhaps the impact of the *Tischio* decision is greatest when viewed together with the sweeping changes in the state's drunken-driving law, beginning with the 1951 creation of a presumption of intoxication.[202] Alone, each step in the process appears reasonably related to achieving a legitimate state end. Together, these changes effectively not only remove the state's burden of proof in a penal matter, but deprive the defendant of the right to defend himself or herself in regard to the offense.[203] *Tischio* is the end of a road upon which the lawmakers and interpreters have moved in their zeal to respond to the outcry of condemnation caused by the scourge of the drunken driver.

Particularly troubling is that in the process the distinction between the lawmakers and the law interpreters became somewhat murky. The *Tischio* court did not adequately support its contention that the statute was neither plain nor unambiguous. To say, as they did, that the surrounding circumstances make the statute ambiguous does not bypass the fact that the wording itself is indeed clear—clearly forbidding *operation* with the prohibited blood alcohol ratio. It appears that the *Tischio* court had a particular result in mind and crafted the law to reach this end.

As noted in both the *Tischio* dissent[204] and the *Allen* decision,[205] N.J. Stat. Ann. § 39:4-50 has, in the past, pointed to the time of *operation* as the critical time-frame for drunken driving of-

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200 *Id.*

201 *Id.* at 533, 527 A.2d at 403 (Clifford, J., dissenting). Justice Clifford also demanded respect for the state's chief law enforcement officer who conceded that extrapolation evidence could rebut the state's prima facie case. *Id.*

202 *See* N.J. STAT. ANN. § 30:4-50.1 (West 1954) (creating a presumption of intoxication upon a finding of a blood alcohol ratio of 0.15%); N.J. STAT. ANN. § 39:4-50.1 (West Supp. 1978) (raising the presumption to 0.10%); N.J. STAT. ANN. § 39:4-50 (West Supp. 1985) (making the operation of a vehicle with a 0.10% blood alcohol level an offense in itself).

203 N.J. STAT. ANN. § 2C:1-13 (West 1982) declaring, "[n]o person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed." *Id.*

204 *See Tischio*, 107 N.J. at 522-33, 527 A.2d at 397-403 (Clifford, J., dissenting).

205 State v. Allen, 212 N.J. Super. 276, 514 A.2d 879 (Law Div. 1986) *certif. denied*, 107 N.J. 630, 527 A.2d 454 (1987).

fenses.[206] In its present form, all other areas of the statute refer to the time of operation in defining the particular offense.[207] Thus, the majority creates an exception within the statute that focuses the offense of driving with a blood alcohol level of 0.10% at the time of *testing*. This result is somewhat illogical. Additionally, it refutes the basic premise that a statute's provision should be construed with reference to the whole.[208]

Equally confusing is the majority's reliance on New Jersey precedent. The *Tischio* majority failed to note its deviation from prior case law on drunken driving. Instead, the court claimed that prior law supported its decision when in fact, *Tischio* is the first case in New Jersey to totally deny the probative value of extrapolation evidence in drunken-driving cases. The majority frequently used dicta of earlier cases to bolster its position[209] but failed to state that these same courts consistently ruled that extrapolation evidence remained probative.

The court also chose to leave open questions raised by its holding. In its zest to rule that the time of testing is the crucial point, the majority failed to make an attempt to define what a "reasonable" time is. The *Tischio* holding tosses out a vague concept but fails to support this idea with clear guidelines. Similarly, the court failed to state whether repeated testing in search of a prohibited blood alcohol level is permissible or if the method of testing must also be reasonable.

As a consequence, the rights of the defendants in drunken-driving cases appear to have become subordinated to the cause of eliminating the intoxicated driver from the state's roadways. The *Tischio* court sidesteps the fact that drunken driving is a crim-

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206 *See* N.J. STAT. ANN. § 39:4-50.1 (West 1973) (stating that each presumption arises *at that time*, referring to operation of the vehicle).

207 *See* N.J. STAT. ANN. § 39:4-50.1 (West 1973) (describing time of operation as dispositive); N.J. STAT. ANN. § 39:4-50(a) (West Supp. 1988) (referring to the time of operation as determinative).

208 *See, e.g.*, State v. Brown, 22 N.J. 405, 126 A.2d 161 (1956). The court in *Brown* explained that:

> [T]he sense of a law is to be gathered from its object and the nature of the subject matter, the contextual setting, and the statutes *in pari materia*. . . . A statute is to be construed as a whole with reference to the system of which it is a part. . . . This principle is essential to give unity to the laws, and to connect them in a symmetrical system. . . . The import of any word or phrase is to be gleaned from the context and statutes *in pari materia*.

Id. at 415, 126 A.2d at 166 (emphasis in original) (citations omitted).

209 *Tischio*, 107 N.J. at 512, 527 A.2d at 392 (citing State v. D'Agostino, 203 N.J. Super. 69, 72, 495 A.2d 915, 917 (Law Div. 1984)).

inal offense[210] and effectively strips the accused drunken driver of rights afforded to an accused murderer. The end result is that in New Jersey there are no longer defenses to the crime of drunken driving.[211]

It must be noted that the goal the court sought to attain is a noble one. Yet, in our system, there can be no exchanges. We cannot forfeit the constitutional rights of the individual to achieve a legitimate goal. Nor can a statute be misconstrued to support this noble end. Instead the system confines the courts to the boundaries created by prior case law and legislative enactments. Thus, as a result of the *Tischio* decision, our safer roadways may have been paved with the rubble of individual liberties.

Marybeth Scriven

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210 *See* N.J. STAT. ANN. § 39:4-50 (West Supp. 1988) which states in pertinent part:

> A person who operates a motor vehicle while under the influence of intoxicating liquor, . . . or operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood . . . shall be subject:
>
> (1) For the first offense, to a fine of not less than $250.00 nor more than $400.00 and a period of detainment of not less than 12 hours nor more than 48 hours spent during two consecutive days . . . a term of imprisonment of not more than 30 days and shall forthwith forfeit his right to operate a motor vehicle over the highways of this [s]tate for a period of not less than six months nor more than one year.

Id. See also Tischio, 107 N.J. at 511, 527 A.2d at 391 (noting the penal nature of the statute).

211 *See* Cheever & Bird, *supra* note 5, at 5 (stating that *Tischio* deprives defendants of the defense strategy used in 90% of drunken-driving cases).