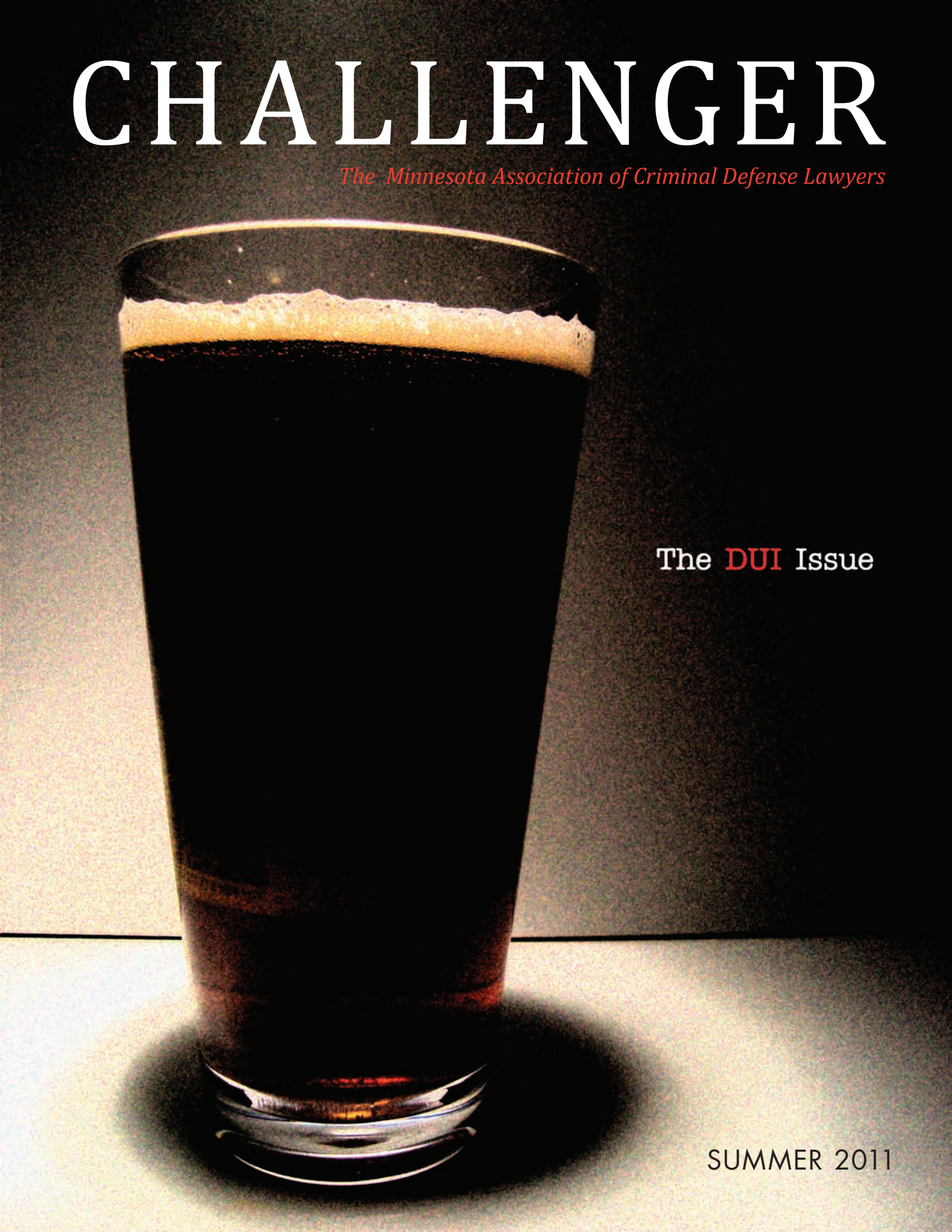
CHALLENGER

The Minnesota Association of Criminal Defense Lawyers



The DUI Issue

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2011 DWI LAW: WHAT DOES YOUR CLIENT DO NOW?

By David Risk and Debbie Lang

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There are substantial changes to DWI laws that take effect July 1, 2011, which every criminal defense practitioner must understand. The new legislation significantly lengthens the driver's license revocation periods applicable to many DWI offenders. It also greatly expands the role played by ignition interlock. Simply put, ignition interlock is a breath alcohol testing device that attaches to a vehicle's ignition switch only allowing a vehicle to be driven when the driver provides a breath sample with an alcohol concentration below .02. Previously, ignition interlock was available for drivers who voluntarily participated in the program. Ignition interlock will now be mandatory in many circumstances in order to have any driving privilege. These changes complicate the late night calls for advice from the allegedly drunken client creating, we believe, an ethical dilemma for the defense attorney.

As a defense attorney, you must first understand the changes that occur beginning July 1, 2011, before determining what to tell a client that calls for advice regarding testing following a DWI arrest. The most significant changes to the statute affect the first time DWI arrestee. Under the old law, a driver that tests between .08 and .19, with no prior DWI convictions or license revocations within the preceding ten years, would be subject to a 90 day license revocation. Said driver was eligible to apply for a limited license (a.k.a. "work permit") following 15 days of hard revocation (no driving at all). Under the new laws, this same group of drivers will now be divided into two categories beginning July 1st—those drivers that test .08-.15 and those that test .16 and above.

Under the new law, the first time offender that tests at .15 or below is treated similarly to the previous law. That person will receive a 90 days revocation and has the choice of either: (1) 15 days of no driving privileges, followed by a limited license for the remaining 75 days; or (2) full driving privileges provided for the 90 day revocation period with the use of ignition interlock. *Minn. Stat. § 171.30, subd. 2(a)(limited license).* The revocation is the same for said driver; however the driver is now given the option of using ignition interlock to avoid the 15 day hard revocation and the restrictions of the limited license.

On the other hand, the first time offender that tests .16 or greater ("twice the legal limit or more") will now receive a one year revocation without any limited license. This is the big change. A first time offender at a .16 under the old law would get a 90 day revocation. Under the new law the revocation is one year.

Minn. Stat. § 169A.52, subd. 4. A first time offender at a .16 under the old law would get a limited license after 15 days. After July 1, 2011 this driver has no eligibility for a limited license at all. The only piece of good news for the .16 or greater driver with the new law is that they may obtain immediate driving privileges with the use of ignition interlock. *Minn. Stat. § 171.306, subd. 4.*

The prior law provided for twice the license revocation when a driver's alcohol concentration was .20 or greater. The prior law also mandated special series license plates (a.k.a. "whiskey plates") for a test result of .20 or greater. The new legislation not only provides for longer revocation periods for offenders having an alcohol concentration of twice the legal limit (.16) or more, it also requires special series license plates for anyone testing at .16 or higher. *Minn. Stat. § 169A.60, subd. 1 (3).* Although under the new law the civil ramifications (driver's license and license plates) increase at .16 or more, criminal enhancement will remain at the current level of .20. See *Minn. Stat. 169A.03, subd. 3.* Accordingly, a first time offender that tests at .16 will have a longer license revocation than the driver at .15 and be required to display special series license plates; however both would be charged with misdemeanor Fourth Degree DWI.

Test refusal after July 1, 2011 will be treated similarly to the way it was treated previously. The first time offender that refuses to test will still be charged with a gross misdemeanor. Under the new law a first time driver that refuses to test will also still receive a one year revocation and is eligible for a limited license after 15 days of hard revocation. Under the new law, however, this driver will also have the option of immediate full driving privileges with the use of ignition interlock. Test refusal for a first time offender continues not to carry a license plate impoundment with the necessity of special series license plates.

Herein lies the ethical dilemma for the late night legal adviser—How does the attorney advise the client who may test at .16 or greater about whether or not to take the test? For example, a driver calls and states that he has no prior offenses and blew .18 on the PBT. If the driver takes the Implied Consent Test the result will likely be "twice the legal limit" or more. Accordingly, the driver would be charged with a misdemeanor (assuming the result is less than .20) and receive a one year revocation of their driver's license, as well as impoundment of their license plates. This driver would have no ability to obtain a work permit and could only obtain driving privileges during the one year revocation with ignition interlock.

The ignition interlock system, as an aside, may cost upwards of $125 per month for the device itself. Other costs associated with the ignition interlock (including showing pre-paid insurance for one year) could push total costs of participation in excess of four or five thousand dollars for one year. Although the statutes declare that ignition interlock is immediately available, the actual process for enrollment is still unclear. At this point waiting times to process ignition interlock applications are currently running approximately four weeks.

Therefore, testing at .16 or higher will cause significant complications to a person's ability to drive for the next year. If, however, the same driver refuses to test they will be charged with a gross misdemeanor and

receive a one year revocation but they would be able to drive with a limited license after 15 days of hard revocation and would avoid special series license plates and the costs of ignition interlock. The dilemma is simply that a first time DWI arrestee who refuses to test will be able to drive back and forth to work after fifteen days. That same person runs a significant risk that they will have no ability to drive at all for one year absent the ignition interlock program if they decide to take the test.

It may seem that twice the legal limit (.16 or more) is a very high test and only the unusual case will reach that high level. In fact, according to the Department of Public Safety's report published in 2010, the average BAC in a DWI arrest in Minnesota among those providing samples since 2001 has varied between .149 and .161. In other words, the average person needing your advice after a DWI arrest is very near twice the legal limit.

It is axiomatic that a lawyer may not counsel a client to intentionally commit a crime. Telling a person to refuse the test is obviously advising them to commit the crime of gross misdemeanor test refusal. Despite this, we have heard from several well respected DWI attorneys in Minnesota that they intend to tell their clients to refuse the test. Although there may be very good reasons to give such advice, it is not ethical. The ethical response is to fully explain to a client the ramifications of testing and refusing to test. Easier said than done of course, especially when one considers that the client is under arrest because there is probable cause to believe that they are impaired. We have reached the conclusion that you must explain to the best of your abilities the ramifications of testing, as well as refusing, but in the end you must advise the client to take the test. Although the civil ramifications of testing at .16 or higher are incredibly steep, the criminal ramifications must trump your advice. A first time refusal is a gross misdemeanor while a first time .16 to .19 is only a misdemeanor.

Although there are significant changes to the revocation periods for repeat offenders, the advice from counsel is not as complicated. The repeat offender's options for obtaining driving privileges are identical for the person who refuses and the person who tests at .16 or above. For a repeat offender, either the driver agrees to use ignition interlock during the revocation period or the driver does not drive. An offender who has a prior qualified impaired driving offense within ten years or has two priors in a lifetime that tests .08-.15 will receive a one year revocation. The driver will be immediately eligible for full driving privileges for the revocation period with the use of ignition interlock. This is the only option available for driving during the revocation period. The same offender that tests .16 or greater, or refuses to submit to testing, will receive a two year revocation of their driving privileges and, again, will be eligible for immediate full driving privileges with the use of ignition interlock. The repeat offender no longer has the option of obtaining a limited license following a hard revocation period. The only option for driving privileges before the expiration of the one or two revocation period will be with the use of ignition interlock.

Under the old law, third time offenders in ten years or fourth in a lifetime receive a one year revocation/ cancellation with no eligibility to obtain a work permit before completion of rehabilitation. Under the new

law, this driver will receive a three year revocation and will be eligible for a limited license immediately with ignition interlock. The driver will be issued a limited license with ignition interlock for one year, followed by full driving privileges with the use of ignition interlock for the remaining two years. The conditions for reinstatement for the cancelled driver remain the same; however the requisite verification will change. Under the new law, the driver must still complete treatment and demonstrate no alcohol or controlled substance use for the cancellation period; however verification of sobriety requires a minimum of three successful years on ignition interlock. See *Minn. Stat. § 169A.55, subd. 4.* The driver no longer will be required to obtain verification letters or provide proof of AA attendance. These conditions will be eliminated due to the use of ignition interlock. As you might expect, the length of the revocation period as well as the minimum time required for the driver to verify abstinence continues to grow depending upon the number of qualified impaired driving incidents.

One beneficial change for drivers resulting from the 2011 legislation is that the life-time restriction of no alcohol or controlled substance possession or use, commonly referred to as the "B-card", will be modified. Beginning July 1, 2011, a driver may petition for removal of the restriction following ten years of compliance with the no use/possession requirement. *Minn. Stat. § 171.09, subd. 3.*

One more piece to the puzzle which, arguably, makes the situation even more confusing is that the legislature left a loophole in the statute for the first time offender who is .16 to .19. Under the new law, *Minnesota Statute § 169A.54, subd.6* , allowing for administrative reduction of the revocation period for certain first time offenders, remains unchanged. The statute reduces the revocation period to 30 days for a first time offender who is over the age of 21 and is not charged with, or revoked for, an incident involving an "aggravating factor" described in section 169A.03, subdivision 3, clause (2) or (3)(.20 or more or having a passenger under the age of 16). This means that under the current language most first time offenders who test under .20 or refuse to test will be able to reduce their revocation period to 30 days if they are convicted of a misdemeanor DWI. A year-long revocation for refusal is reduced to 90 days if there is a conviction for refusal. In an apparent oversight by the legislature, the statute was not changed to distinguish those driver's that test "twice the legal limit" or more. A bill modifying section 169A.54 to remedy the oversight and preclude the administrative reduction for drivers .16 or greater failed to pass during the regular legislative session. As of the writing of this article that bill is still pending for a possible special session or next year's regular session. As written the proposed bill would still allow for a reduction for the first time refusal as well as the person testing .08 to .15, but not the person testing at .16 or higher.

In other words, starting July 1, 2011, there are dramatic changes for the person who tests at .16 or higher. Good luck explaining to the allegedly impaired client what will happen to him or her if they choose to test or refuse. They will likely think you are the one who is drunk.

URINE BIG TROUBLE, MISTER: THE MYRIAD PROBLEMS WITH URINE TESTING.

By Chuck Ramsay & Dan Koewler

If the 1690's were known for anything, they were known for the frightening spectacle of the "Salem Witch Trials." Innocent people were rounded up, presented with irrefutable evidence of their guilt, and compelled to plead guilty. Those who didn't plead guilty faced a trial where the accused stood no chance of contesting the "evidence" against them—spectral evidence (typically a lone witness' observations that proved the accused was a witch) and the use of witch cake (a mix of rye meal and urine that, when utilized by an expert, would reveal whether a person was indeed a witch). The era of the Salem Witch Trials was a time of relentless hysteria, an utter lack of due process, and reliance on absurdly unreliable evidence.

Luckily, those of us living in this new millennium don't have to worry about any repeat of the Salem Witch Trials. We are now a nation of laws, governed by the Constitution. We have well established rules of evidence, and our society is well educated enough to not get caught up in any sort of mass hysteria.

Right?

If we fast forward from the seventeenth century to the twenty-first century, we can find some frightening parallels. Imagine someone charged with a crime based upon two criteria—the observations of a lone witness, and an irrefutable test involving the use of urine. This person isn't just charged with any crime—she's charged with a crime that has been deemed a "scourge" by our highest courts.

Are we still talking about witchcraft? Nope—just your run of the mill DWI prosecution based upon a urine test.

After the Salem Witch Trials concluded, there was significant backlash against a government who had used worthless evidence to convict numerous individuals of crimes they didn't commit. Today, we may actually be witnessing the first stages of the backlash that should result from the use of urine tests in DWI prosecutions. That backlash has taken the form of attacks against the nature of urine tests themselves, the process for obtaining them, and the method of fighting them in court.

Wait, the Cake Was Made of What?

Since at least 1952, Minnesota has utilized the *Frye* test for vetting scientific evidence before it even gets into our courtrooms. Surprisingly, a test that has been applied to everything from polygraphs to DNA testing has never once been used to evaluate urine tests. Think about that—every major scientific body and nearly every government agency have rejected urine testing for alcohol concentration, and yet this evidence has somehow managed to evade scrutiny by an evidentiary test that was specifically designed to respect the opinions of major scientific bodies and government agencies.

That's changing. The Minnesota Supreme Court has accepted review of at least three urine test cases—cases where the defendants were denied their right to a *Frye-Mack* hearing. To date, our Supreme Court (the final arbiter under the F*rye-Mack* test) has not even asked the State to answer two threshold questions regarding urine tests: are they generally accepted in the scientific community (hint: they are not) and do they have the foundational reliability necessary to ensure valid and reliable results (hint: not the way Minnesota conducts tests). Now, on the heels of a nationwide trend towards closer evaluation of all forensic evidence, our Supreme Court has expressed its willingness to scrutinize urine testing. It's no coincidence that once the Courts stopped allowing "witch cake" experts to testify in court that the number of witch trial decreased dramatically—the same situation may soon come to pass with urine-based DWI prosecutions.

The Square Peg That Just Won't Fit Into the Round Hole

The Court of Appeals is also getting into the mix. Anyone who has handled a DWI case is familiar with the "single-factory exigency" doctrine recently minted by our Supreme Court. In a nutshell, this doctrine absolves every peace officer from ever needing to obtain a warrant to search a DWI suspect, because their blood alcohol content is "rapidly diminishing." The logic may be a bit tortured, and the questions left unanswered may still loom large (telephonic warrants can issue how quickly?), but the doctrine is the current state of the law in Minnesota…at least, when it comes to blood and breath test cases.

But what about urine tests? Basic understanding of human physiology is all that it takes to know that urine alcohol concentration doesn't "rapidly diminish" over time. Instead, urine alcohol concentration stays largely static, up until the point where the bladder is emptied. This simple yet powerful question—where's the exigency? —recently made it to the Court of Appeals, which struggled so hard to find a solution that the case was remanded for further findings. Here, too, we may be on the cusp of a solution to the myriad of problems that arise from the use of urine tests—urine tests that came from warrantless seizures will just be suppressed.

What's Good for the Goose Is Good for the Gander

But what if urine tests are somehow shoehorned into the "single-factor exigency" doctrine? What if the Supreme Court craftily redesigns the meaning of the phrases "generally accepted" and "foundationally reliable" and these urine tests remain both admissible and unassailable in court? Are we back to holding another round of witch trials?

Maybe not. "Evidence" of witchcraft was not only mind-bogglingly wrong, but (ironically) all but unassailable. Faced with irrefutable evidence, defendants in Salem knew that the result of their trial was a foregone conclusion, namely 1) a conviction, followed quickly by 2) an execution. Urine test trials have been, by and large, the same way for years—the Courts have almost relished the chance to exclude any attempt to present scientific evidence to refute the "scientific" basis of witch cake- I mean, urine test results (whoops!). But the

same Supreme Court that granted review on several *Frye-Mack* cases also granted review on several cases where the defendant was precluded from presenting expert testimony attacking the urine test. In the near future, we could very well see forensic experts once again permitted to testify in court about—surprise!—forensic evidence. The sham urine trials currently being held will be replaced by truly adversarial contests where the defendant has the right to challenge the state's test results with scientific evidence of her own.

In the wake of the Salem Witch Trials, it was men of the cloth and other learned individuals who stood up, made their voices heard, and ensured that another round of tragically unsound trials would never come to pass. Now, over three centuries later, it may well be that our esteemed appellate court justices (spurred on by a tireless defense bar) will fill that role, and put to rest a similar round of trials that are largely divorced from both the Constitution and common-sense.

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OKAY, I'LL APOLOGIZE FOR THEM

By Jeff Ring, Attorney

> *Every truth passes through three stages before it is recognized. In the first it is ridiculed, in the second it is opposed, in the third it is regarded as self-evident.*
>
> *—Schopenauer*

Our statutes allow the State to introduce certain scientific facts, into evidence in a court of law, without any predicate expert testimony that the machine or process used is accurate and reliable. The landmark case of *State v. Dille*, 258 N.W.2d 565 (Minn. 1977), *held* that this is allowed because experts put into place procedures, which, *if followed*, sufficiently justify shifting the burden of proof to the opponent of the scientific result, to suggest why the result is not accurate and reliable. If not followed, foundation is lacking, and the evidence is irrelevant, and inadmissible.

In 1981, our Minnesota Supreme Court famously quoted the words of an "expert' on breath testing. That quote led to an effectively insurmountable barrier to attacking the accuracy and reliability of breath test machines. Case after case rejected attacks on accuracy and reliability, using the same quote, **even in cases where the procedures necessary to ensure reliability were not followed.**[1]

The High Court's original quote was:

> *...if the room air test and the simulator test give the expected result, "this would seem to be **almost incontrovertible proof** not only that the chemicals are proper but that the instrument is in working order. [Emphasis added] State of Minnesota, Department of Public Safety v Habisch, 313 N.W.2d 13 (Minn. 1981)*

The machine they were extolling was the precursor to Minnesota's Intoxilyzer machine—the now-discredited **Breathalyzer**.[2]

For years, the Breathalyzer results were carried into court on a glittering litter of Court endorsed "science", enjoying the imprimatur of appellate certainty, and a caché of infallibility so strong, that trial courts often reacted to an attack on the breath test results as nothing less than lawyers misleading their clients for fees.

[1] A prime example is the procedure of observing the test subject for burping up possible alcohol molecules, skewing the test results. The cases ignore the argument that, even if the reading on the machine is perfect, protecting the integrity of the sample being measured is also a crucial procedure necessary to ensure both accurate and reliable alcohol concentration readings. The Courts continuously reject challenges where the police **have failed to do the necessary observation**, and admit the test into evidence, and shift the burden of proof, ignoring the *Dille* ruling, that all of this is foundationally acceptable only **if** the procedures necessary to ensure reliability have first been followed.

[2] Ironically, we now understand that all an air blank is is a leveling out, or starting point, of zero. Air blank tests do not report ambient alcohol molecules. They just read them, and start there as zero. So the air blank result that reads .000, relied so heavily upon by the expert quoted, and by the Courts, as proof of accuracy and reliability, does not really add to the calculus of how well the machine is performing!

It is a peculiarity of the American mind that it regards any excursion into the truth as an adventure into cynicism.

—H.L. Mencken

In a single, stunning day, Attorney Sam McCloud pulverized any further use of this once-revered machinery by revealing a hitherto unknown warning that had been issued by the Breathalyzer's manufacturer.

One machine can do the work of fifty ordinary men. No machine can do the work of one extraordinary man.

—Elbert Hubbard

Our High Court took notice of this apparent error, of placing the seal of the High Judicial Ring into the Breathalyzer wax, in another landmark case, *Heddan v. Dirkswager*, 336 N.W.2d 54 (Minn. 1983), writing:

On September 10, 1982, Smith & Wesson Corporation, the manufacturer of the Breathalyzer Models 900 and 900A, which are the exclusive breath-testing apparatuses in Minnesota, issued an advisory to all of its customers concerning radio frequency interference (RFI). The advisory informed Smith & Wesson's customers that "continuing investigation now suggests this early series of breath testing instruments may be affected in an unpredictable manner by various frequencies and power levels." This advisory was a culmination of substantial testing by Smith & Wesson and an independent third party.

It was ultimately discovered that test results could be affected, and wrongly reported, by the presence of radio waves in the machine's environment (RFI)—which is a rather large concern in a police station environment. Even the new Intoxilyzer that replaced the Breathalyzer had to build in protection from RFI.

Recall that the false "infallibility" of the Breathalyzer had been pronounced in 1981. Even though the *Heddan* court noted the error in 1983, the holding, (that the accuracy of breath test results is nearly insurmountably proven), nevertheless survived the demise of the Breathalyzer, and was grafted, wholesale, into cases challenging the results of the new, replacement machine—the Intoxilyzer. Without any scientific evaluation at all, the cases continued to assume the now discredited point, that breath tests were unassailable good science.

Along with the continued appellate holdings, (that a properly run Intoxilyzer was nigh on insurmountable proof of an accurate and reliable test result), came the same cynical attitude, that lawyers were, still, just ripping off their clients.[3]

[3] In my own seminar presentations, I have often reminded fellow lawyers, who have been confronted by more and more sophisticated breath testing machines and software, that the Government would be unlikely to be making these attempts at greater accuracy, but for those lawyers, and their dedicated vigilance.

Indeed, the quote of the expert on the Breathalyzer in *Habisch*, later became the bedrock holding of the appellate law of Minnesota, in *Loxtercamp v. Commissioner of Public Safety*, 383 N.W.2d 335 Minn. App. (1986), a case reviewing Intoxilyzer results, not Breathalyzer results.

No longer was it just a quote purporting to espouse that properly run machines, with good air blanks and simulator results, likely assured "proper chemicals" and that "the instrument was in working order". The quote had now become an endorsement of the accuracy and reliability of the test results as well. This has been our inheritance in the case law ever since.

> *"Whoever is careless with the truth in small matters cannot be trusted with important matters."*
> *—Albert Einstein*

After years of effort simply to vet the software of the machine, that was putting people in jail, taking their licenses and livelihoods, and their vehicles, our High Court finally agreed to at least let the defenders look at the machine's software to see if someone other than the State and the manufacturer feels the results deserve the weight they are given in our lives.

It is not a mere after-the-fact rationalization to say that all we were trying to do was find out if this thing really works well enough to be allowed have such an impact on so many lives. Even after some setback in the final ruling of the source code litigation, there remain myriad software and hardware concerns about the Intoxilyzer, as yet to be litigated, or which were not addressed in the litigation that has taken place.[4]

But as any good journalist would cry, **"You buried the lead!"**

I am not writing today to recite the serious issues, about hardware and software, that still remain from the source code litigation, or about the accuracy and reliability of the test results from this machine.

I am writing a Requiem to a special class of folk, who have suffered an injustice that even the source code litigation endorsed as a problem; one which may have led to false convictions, and license losses, and vehicles forfeitures—not for failing the test —but for having the machine pronounce that they refused to blow hard enough.

These are the so-called "refusal by behavior" drivers; labeled "refusers" by a machine we now know errs in that determination.

And no one has stepped forward on behalf of the State to apologize to the many people wrongly accused and convicted of malingering on the test, when, indeed, they did not.

[4] And this diligence has once again rid the State of a machine. The Intoxilyzer is being replaced by another Company's machine this year.

These people were smugly mocked in court. Lawyers for the State successfully argued to the Judges and juries that these people did not blow hard on purpose, and that any child could do this. Police arrogantly swore that they knew this was so because otherwise the machine would have accepted the sample. Those police were wrong. Those attorneys were mocking the innocent. These were people who cooperated, yet were branded non-cooperative.[5]

All defense lawyers have had clients sitting in their offices, in tears, insisting they blew as hard as they could, even to the point of hyperventilating, while the officer shouted: ***"Blow harder! Blow harder! You aren't even trying. My six-year-old daughter can blow harder than that. Etc."***

That is, in fact, what Intoxilyzer operators are actually trained to do. We now know that the machine can inform them that the sample is deficient, even in cases where a sufficient sample was given at one point, but, because of revelations learned before and during the source code litigation, the machine could not report the cooperative, successful, sample.

Not only that, there is a cure for this software problem, still sitting on the shelf, that was long ago provided to Minnesota by the manufacturer, but was never installed, so as not to tarnish the caché of infallibility this machine enjoys in the case law.

> *"Who can protest an injustice but does not is an accomplice to the act".*
>
> *—The Talmud*

> *"The world is a dangerous place. Not because of the people who are evil, but because of the people who don't do anything about it."*
>
> *—Einstein*

For years we lawyers had to sit and wonder, as the tearful client appeared sincere when insisting he or she blew as hard as possible. Who, after all, is most likely to blow that hard, but the falsely accused malingerer?

Then, in another stunning revelation from one lawyer's diligence, Charles Ramsey came across an e-mail in the Bureau of Criminal Apprehension (BCA), revealing, for the first time, that the Bureau had run human tests that revealed the latest software was not doing the job the specifications required! This was back in 2006!

[5] The lay reader may also be stunned to learn that a first time offender, who refuses testing, is automatically charged with a Gross Misdemeanor, though, had the test result been obtained below .20, they would only have been charged with a misdemeanor. This means that by the machine labeling them refusers, they suffer being held in jail on the night of arrest, three times the fine, four times the loss of license time, three times the duration of probation after conviction, and they no longer can defend themselves by bringing proof that they were not driving under the influence. All the State has to show is that they refused the test! DWI is now irrelevant. The crime is simply refusal to submit to the test! The State need not prove impairment beyond a reasonable doubt anymore. The crime was committed at the stationhouse.

Though a sustained breath of 1.1 liters, at a strong enough pressure, was supposed to be deemed a sufficient sample, the machine actually was requiring a greater volume than the specs ordered, if people blew harder, and some, who blew tremendously hard, had their samples completely rejected.

Yet all the machine did was report "Keep Blowing", signifying to the officer/operator that a sufficient sample had not been given.

Later, police would swear in Court that the person did not try, and that the volume shown on the report proves this. But that report shows only the last volume, not the successful, earlier one, that was not accepted.

That's right. Ironically, what actually caused these people to be falsely accused of refusing, was the BCA training to yell: "Keep Blowing—Blow Harder—Blow Harder!" which the "experts" and their police pupils so cavalierly espoused in Court as gospel.

In the source code litigation it was determined not only that this was so, but also that the machine was now taking more time to figure "slope" and could "miss" a sufficient sample, and fail to report it, indeed, erroneously label it deficient![6]

In the ruling in the source code litigation, presided over by the Hon. Jerome Abrams, his Honor noted that one BCA expert found this potential for failing to report cooperative, sufficient samples "a concern" rather than a problem, and admitted the software fix was not used **so as not to exacerbate the source code litigation.**

Another BCA expert, the one who discovered the two causes of labeling sufficient samples as deficient samples, and of not notifying the operator of the sufficient sample, admitted the BCA did not fix the problem because the Attorney General's office was slowing them down on this.[7]

Judge Abrams wrote:

> *…it appears the BCA was aware from the fall of 2006 onward that a change in the source code was made that caused, under some circumstances, previously acceptable breath samples to be rejected. This software, version 240, continues to be used with knowledge of this problem, and without change or correction by the BCA.*

[6] Slope detection is ostensibly to determine whether mouth alcohol is improperly being measured instead of lung alcohol. A change in the software as to how slope was determined made it possible for sufficient samples to go unaccepted, because the slope determination was now taking longer, and was not yet complete when the subject blew the proper sample. Police would have no idea a sufficient sample had been given. This is the fix in the software that the Intoxilyzer manufacturer, upon learning of the problem, long ago sent us, and which Minnesota refused to install.

[7] He first denied knowing a fix was sent by the manufacturer to correct the problem, but his memory was "refreshed" on cross examination, and then he even remembered the reasons why they did not install the repair software, to alleviate false reports of refusals. "The Attorney General was slowing them down."

The Court's Order deems those refusals inadmissible without additional, admissible, circumstantial evidence of refusal.

It is to those who suffered the accusation, the mocking in court, the many, many consequences, and often, even the skepticism of their own lawyers, to whom I have written this Requiem.

It is on their behalf that I say to all the State's lawyers and police who, in Court, smugly accused and cast aspersions on the character of these people over the years—people who were protesting their innocence, which in many cases was real—shame on you. Who among you did this, and now sit at home with the knowledge that the fellow or the lady was telling the truth? What have you done about it?

It is to those people who suffered that I say: "I'm sorry."

Don't expect an apology from the very agents who suppressed the available software that could avoid this injustice, knowing this was happening.

Some drivers were malingering. Some played games with the test. Some malingered, but eventually cooperated when scolded.

And some blew in good faith from the get go, so hard, they tired.

It is to you, too little too late, that I promise, as a sage once put it:

To Protect God's Children Who Have Fallen Short Of Perfection From The Wrath Of Those Who Are Certain They Have Attained It.

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Practice Tips: Receiving Phone Calls From Jail

Were you aware that it is a crime for a jail to charge you or your clients to call you? For those practitioners in private practice, every time you write that check to Correctional Billing or any other company providing such services, you may want to think twice.

Minnesota Statute 481.10 makes it a misdemeanor offense for a local or state correctional facility to deny inmates access to free, private telephone access for the purposes of consultation with an attorney. In addition, the statute provides for a $100 civil penalty to the person aggrieved. The only exception is in cases were imminent danger of escape or injury exists.

So, before you sign that check, consider contacting the jail and billing company and letting them know their actions constitute a crime.

Eric Nelson, *Attorney*

SLEEPING IT OFF IN THE CAR: STATE V. FLECK AND THE CONTINUED IMPORT OF SWALLOWING ONE'S KEYS.

By Adam T. Johnson

The guilty one is not he who commits the sin, but the one who causes the darkness.

—Victor Hugo

To one not versed in the hackneyed drudgery that is the DWI law morass, the proposition that a person can be convicted of driving while impaired for hiccupping the night away in the driver‟s seat of a parked and non-running but otherwise operable car borders on the absurd. It is counter-intuitive that a person should commit a crime by leaving the house and passing out in the family Ford (or Chevy—the author is impartial). Nonsensically, this is precisely the conduct that is, and has been, proscribed by Minnesota law for decades.

This past year, in *State of Minnesota v. Daryl Fleck*, the Minnesota Supreme Court recently reaffirmed the broad encompassment that is the "physical control" species of the DWI statute, affirming a conviction where the defendant was found asleep in his parked car in an assigned residential parking stall with the driver‟s door open, keys in the center console, no devices of the vehicle in operation, and where the evidence showed that the vehicle had not recently been operated.[1] While the ultimate holding of the Court was less than groundbreaking under existing precedent, the opinion serves as a reminder of the generous reading accorded the statute, and more interestingly, entices practical (and academic) observations on just what is "physical control" and the contrary. Broader yet, the penning of *Fleck* invites discussion on the very propriety of charges made under the "physical control" specimen, and whether that language is, at bottom, fair. It is the position of this article that the "physical control" convention casts a shadow that is too comprehensive, and that reform is eminently in need.[2]

Convictions premised on a finding of "physical control" are necessarily arrived at by an examination of the specific facts in attendance in any given case. That plain reality will remain unaltered no matter what definition is given those words, and the author would be in error to presume otherwise. Nuance is nuance, and the facts are to be litigated for a fee: there is no overcoming that artful achievement of ravenous barristers. Yet despite the stretching of words, there is undeniably a proximal and temporal line dividing what is and what is not "physical control". It is the project of this article to elucidate the practical understanding of those words, the justifications for that understanding, and to propose why the modern conception of "physical control" is less about cause-in-fact DWI prosecutions, and more about DWI deterrence—and ultimately the unfair penalization of the ability to act rather than the act itself.

The Current Statute

The provisions of Chapter 169A that set forth the elements and criminalize the driving of a motor vehicle while impaired are housed at Minn. Stat. § 169A.20.[3] Subdivision one of that section provides, in pertinent part, that "[i]t is a crime for any person to drive, operate, or be in physical control of any motor vehicle [while impaired, &c.]."[4] That provision directs what degree of human volition is necessary to actualize criminal liability.[5] "Drive" and "operate" are straight forward enough, and those terms have been accorded scant construction by the courts.[6] It is the "physical control" extract that has been the impetus for so much lawyering.

As the beginning to this piece intimates, the courts have wrestled over the proper meaning of the terminology that is the centerpiece of this article. *Fleck* was anything but innovative. Rather, it was a reiteration of precedent that culminated in an excessively reaching definition of what it is to commit a driving while impaired crime.

State of Minnesota v. Daryl Fleck

At 11:30 p.m. on June 11, 2007, police responded to a call from a concerned citizen who had witnessed an unconscious man in a vehicle in the parking lot of her apartment complex.[7] The man was in the driver‟s seat of the vehicle with the door open. Upon arrival, officers found the man—Daryl Fleck—asleep behind the wheel of his vehicle, which was legally parked in an assigned space at the apartment building where he lived. After being awakened by the officers, Mr. Fleck admitted to drinking 10 to 12 beers, but denied driving the vehicle. He first told the officers that he had come to the car to retrieve something but later expressed that he had come out to sit in the car.[8] Three empty beer cans [I prefer to imagine it was Carlsberg Vintage] were found under a blanket on the passenger‟s seat. The officers concluded that the vehicle had not recently been driven because the vehicle was "cold to the touch," the lights were not on, and it did not appear that the vehicle had been running. The officers did, however, notice a set of ignition keys in the vehicle‟s center console. Officers also noticed those circumstances that are the usual accoutrements of their adventures: bloodshot and watery eyes, slurred speech, poor balance, disheveled look, scents of alcohol, &c. Subsequent testing of Mr. Fleck revealed a blood alcohol concentration of 0.18.

The record indicated that on the night of his arrest, Mr. Fleck informed one of the officers that the vehicle was operable, although there was nothing in the record indicating that the officers independently verified that fact. Shortly before Mr. Fleck's trial, one of the officers attempted to start the vehicle with the keys found in the center console the night of Mr. Fleck's arrest. While the key turned in the ignition, the vehicle would not start. At a subsequent trial, a jury found Mr. Fleck guilty of DWI.

Mr. Fleck appealed, arguing that the evidence was insufficient to support his convictions for DWI. The Minnesota Court of Appeals, and subsequently the Minnesota Supreme Court, affirmed the convictions.[9]

The decisions reached by the appellate courts were premised on a line of cases reaching back to 1981,10 and it was by analogues to those cases that the appellate courts eventually affirmed Mr. Fleck‟s convictions.[11]

On appeal, Mr. Fleck cited to the facts underlying *State v. Pazderski*[12] as identical to the facts of his case.[13] In *Pazderski,* the facts were substantially as follows: On May 4, 1983, the defendant drove to two neighborhood taverns and had some drinks.[14] He returned home around midnight, and parked his car on an apron adjacent to a detached garage next to his home that was co-occupied by his girlfriend. Mr. Pazderski exited his car, walked to the back door of the house, and took a couple of steps inside with the intention of going to sleep. As he was a few steps inside the home, he thought it best to avoid a potential argument with his girlfriend (which, as a member of Pazderski‟s sex, the author deems a reasonable measure) and decided to return to the car to sleep there for the night. He locked the back door to the house, returned to the car, and fell asleep in the front seat.

A few hours later, Mr. Pazderski‟s girlfriend awoke and from a window observed her boyfriend‟s parked car. However, she could not locate him and out of a concern for his whereabouts, called the police. At approximately 3:00 a.m., an officer arrived and located Mr. Pazderski in the front seat of the vehicle with his head over toward the passenger side. The car was not running, the keys were not in the ignition, and there was no evidence that the car had been driven in recent history. Further, and as found by the court that decided *Pazderski,* there were no facts in the record that supported any inference other than that Mr. Pazderski had been soundly sleeping and had the intention of sleeping the rest of the night in his car. A subsequent breath test revealed an alcohol concentration of .17, and Mr. Pazderski was later convicted for being in physical control of a motor vehicle in violation of the DWI laws. On appeal, the Court of Appeals reversed the conviction, opining that "[b]eing in the front seat alone, without more, is insufficient to uphold [the] conviction."

In deciding *Fleck*, the Court of Appeals distinguished the facts of Daryl Fleck‟s case with those of *Pazderski*, holding "that the overall situation of Fleck is distinguishable from that of Pazderski" and that the evidence was otherwise sufficient to support the convictions.[15] A scrutiny of the two cases yields substantially similar factual scenarios.[16] The master-stroke against Mr. Fleck appears to have been his possession of the ignition key.

On review, the Minnesota Supreme Court guaranteed Mr. Fleck‟s convictions.[17] There, the court sermonized on the purposes underlying the offense of being in physical control while under the influence of alcohol, as "to deter intoxicated persons from getting into vehicles except as passengers and to act as a preventive measure to „enable the drunken driver to be apprehended before he strikes.‟" (There is something about this wording that invariably conjures up imagery of the "drunken driver" as some mischievous rattlesnake waiting in the bush, keys jingling like a tail in warning). At any rate, Mr. Fleck stands today a convicted man.

Origins of "Physical Control"

"Physical control" was considered by an appellate authority for the first time in the 1970s. On October 26, 1978, the Glencoe Police Department received a call that about six miles outside of town, a man was lying underneath his vehicle parked on the shoulder of the county highway.[18] On arriving, officers located the vehicle and found a man asleep in the front driver‟s seat and leaning against the steering wheel. Officers thought that the motor to the pickup was running, but were unable to testify with any degree of certainty regarding the matter. The key, however, was in the ignition. The man—identified as David Juncewski—failed a number of field sobriety tests and a preliminary screening test. At the sheriff‟s office, Mr. Juncewski refused to submit to chemical testing for intoxication.

Mr. Juncewski‟s case eventually found its way to the state‟s highest court. There, the court was confronted with a matter of first impression in its task to discern the legislative intent behind the words "physical control".[19] The court‟s eventual decision was the product of traditional devices of statutory construction, public policy analysis, and the importation of law and policy from other states. Of special significance, the court noted that less than two months before Juncewski‟s arrest, the DWI law was amended to modify the requirement that a driver be in "actual physical control" by removing the term "actual" from the statute .[20] The court viewed that alteration as a move by the "Minnesota Legislature…to cover the broadest possible range of conduct…." "By eliminating one qualifying adjective," said the court, "the legislature intended that the statute be given the broadest possible effect."

Since the holding in *Juncewski*, a plethora of like cases have come and gone—the outcome in each depending on the idiosyncratic circumstances in play. The common thread observed, and the touchstone of culpability, has ultimately been the vehicle‟s operability and the facility of a person to put the vehicle into motion at the public peril.[21] As aforementioned, this article is not intended as an exhaustive telling of "physical control" cases, but rather, is focused on the policy basis of current "physical control" doctrine and the overall legitimacy of that doctrine within the interests of justice.

Public Policy of "Physical Control"

Public policy "seeks to protect society from serious breaches in the social fabric which threaten grave harm to persons or property."[22] In 2008 alone, Minnesota roads were host to 30,653 DWI offenses, down from the 33,236 the year previous.[23] Unavoidably, those numbers represent a serious public safety issue, and the policy of the DWI law is obvious enough: to protect life, limb and property from destruction. In an effort to deter potential impaired drivers, the legislature has incorporated a significant amount of non-driving conduct within the environ of "drunk driving". According to their wont, the courts have abetted that legislative intent.[24]

As the unprecedented technological advances of the twentieth century blossomed, laws relating to intoxicating liquors necessarily expanded. On September 3, 1849 the first session of the Legislative Assembly of the Territory of Minnesota was convened.[25] On November 1 of that year, the Assembly adjourned after passing the first laws of the Territory.[26] Then, laws related to the public health and welfare contained only one alcohol-related section, making it a crime to adulterate liquor for the purpose of sale.[27] The terms "automobile" and "motor vehicle" first crept into the Minnesota laws in 1903.[28] Shortly thereafter, the legislature saw fit to proscribe the operation of the new machines by persons under the influence of intoxicating liquors: in 1911, the legislature provided that "[w]hosoever operates a motor-vehicle while in an intoxicated condition, shall be guilty of a misdemeanor."[29] It appeared those horseless carriages created a public safety risk.

At first, laws relating to impaired driving were far from the web they are today. By contrast, the 2010 statutes and administrative rules related to drunk driving and licensing defy tallying, and are so numerous and complex that even the most skilled practitioner has a scar on his or history by having misapprehended them at least once in open court. But such is our post- modern civilization; an increasingly complex society requires increasingly complex regulation. Reflected in that catacomb of legalese is an appropriate balancing of the public welfare and individual rights and interests—or so we should think.

Long before the Minnesota Supreme Court decided *Juncewski*, the courts had recognized that laws prohibiting a person from driving a car while intoxicated are "remedial" in nature, and consequently, are to be "liberally interpreted in favor of the public interest and against the private interests of the drivers involved."[30] Thus, when the legislature amended "actual physical control" to "physical control", it was observed that the legislature intended to give the statute the "broadest possible effect" and "cover the broadest possible range of conduct".[31] The primary justification for such a construction was the statute‟s consequent deterrent effect.[32] In short, the expanded reading of the relevant statutory terms was aimed at deterring a drunken individual from entering a vehicle except as a passenger, regardless of any intention or motivation to put the vehicle in motion or even turn the engine over. The expansive reading of "physical control" is problematic, and extravagantly antagonistic to the interests of the individual. Legislative reform is needed.

The Nuisance of "Physical Control"

If the only objective of Chapter 169A is to promote the public welfare, then the current construction given "physical control" is probably too *restrictive*. However there are other interests at stake. If even rarely discussed, important rights and privileges are enjoyed by intoxicated persons.[33] If this were not the case, then the legislature could as quickly prohibit driving by any person who has ever taken a single nip—a no-drop policy as advocated for by unmentionable harping lobbyists and *amici*. Our law-makers have chosen no such course; there is respect for our allowances to enjoy a bumper as free men and women, and if the alcohol content of our blood is suitable, to drive home to our sleep-numbers.[34] The puzzle then, is one of line-drawing, or stated differently: taking in the private and public interests, what conduct is appropriate for proscription and what is not (or at least warranting of lesser punishment)?

As stated previously, it is the purpose of the "physical control" specimen to deter an intoxicated person from entering a car except as a passenger. The consequence is that a great deal of non-dangerous non-driving conduct is treated no differently than dangerous driving. As inequitable as it is, a person who enters a vehicle on his driveway with the intention of sleeping, who engages the emergency brake, tucks the key safely under the floor mat, reclines the seat, and passes out, is as culpable as the lunatic who hastens down the wrong side of the interstate highway at top speeds. All other things being equal, these persons are charged with the same offense.[35] At the time of this writing, a first time DWI offense is a misdemeanor and is punishable by a maximum 90 days in the county or a $1,000 fine or both.[36] In addition to jail and a fine, the person‟s driver‟s license is subject to a 90-day revocation period.[37] Again, these sanctions accrue to the intoxicated driver and intoxicated sleeper equally. This reality represents a grave inequity in the law‟s application and punitive impositions. The bountiful reach of "physical control" is to blame.

Snyder v. Comm'r of Pub. Safety serves as an exceedingly equivocating example of the "physical control" rascality. There, the Minnesota Court of Appeals refused to affirm a conviction premised on "physical control". The facts of the case are as follows.

On September 2, 2006, Jason Snyder attended a wedding reception, was engaged in an altercation with some other guests, and the police were contacted.[38] When police arrived, Mr. Snyder, his wife and two of their friends were walking toward a vehicle parked in a lot adjoining the reception location. Wright County Deputy Sheriff Jeremy Wirkkula approached the group, and as he approached, he observed Mr. Snyder unlock the driver‟s side door, open the door, place his right foot inside the passenger compartment, while his left hand was on the driver‟s side door holding the keys. The group noticed Deputy Wirkkula approaching, and Mr. Snyder thereupon turned around, quitted the compartment and began walking toward the deputy‟s squad. As Mr. Snyder walked toward the squad, he tossed the keys to his wife. Mr. Snyder was arrested for a DWI offense and his license was revoked under the implied consent law.[39] The district court found that Mr. Snyder had been in physical control of the vehicle and upheld the revocation of his driver‟s license (after all, hadn't he been caught before he "struck"?).

On review, the Minnesota Court of Appeals reversed.[40] The court recognized that in certain circumstances, the overall situation has indicated that a defendant was in "physical control" of a vehicle even when located without the passenger compartment.[41] The critical divide, noted the court, is between the person who is merely in a position where they could start the vehicle "without too much difficulty" and the person who "has or is about to take some action that makes the motor vehicle a source of danger to themselves, to others, or to property."[42] If that distinction doesn‟t present a significant degree of analytical smog, I don‟t know what does.

The holding in *Snyder,* while aligned with the spirit advocated for in this article, is troubling. In support of its holding, the Minnesota Court of Appeals made the statement that "no attendant or aggravating circumstances

indicate that [Snyder] had or would operate the vehicle while intoxicated, as he was not alone with his vehicle on the side of the road, nor had he entered his vehicle or inserted his key into the ignition." Moreover, the court emphasized that "[Snyder] handed his keys to a third party before getting into the car, ending the prospects for his driving or taking control of the vehicle."[43] Yet these findings overlook the very conduct that the broad reading of "physical control" is supposed to guard against. Very clearly, Mr. Snyder was entering the vehicle as a driver, keys in hand.[44] He was not entering the vehicle as a passenger, and every indicia of evidence indicated he was in "physical control" as that term was understood by past decisions. It was only because of an interruption by law enforcement that Mr. Snyder did not complete his entry of the vehicle‟s compartment, and his "relinquishment" of the keys was only made whilst en route to a deputy‟s squad and after he had nearly entered the vehicle with the keys.

The trouble with the "physical control" class of cases should be apparent. On the one hand, Daryl Fleck‟s stands convicted of a DWI crime, while Jason Snyder literally walks away.

There was no evidence in either case that adduced any man had in fact *driven* a vehicle any more than the other. While this is a product of the intensity given the specific facts of individual cases it underscores much of the folly that is the "physical control" byproduct.

It is fundamental to the criminal justice system that punishment is rendered for conduct that *in fact* occurs. This is as true for inchoate offenses as it is for completed offenses. The proscription is always directed at the *conduct in fact*, whether it is the commission of conduct that proximately causes a given result or the intent and preparation to accomplish the same. The fundamental flaw of the "physical control" premise arises from its failure to distinguish between what actually occurs and what *may occur.* In innumerable other circumstances, we allow people to engage in activity that has the potential to turn dangerous but is otherwise lawful. The DWI context should be no different. At the very least, the sanctions for much of the conduct that is now considered "physical control" should be lessened from those for actual *driving* while impaired.

Scrapping "Physical Control"

It‟s high time to put the "driving" back in drunk driving.[45] Treating an intoxicated dreaming man and an intoxicated driving man equally is a gross miscarriage of justice. The prohibition on intoxicated driving arose from the destruction of life, limb and property at the hands of drunk drivers. It did not arise from the innocent conduct of men and women making pillows of their whiskey bottles in their front drivers‟ seats. To group them all as the same nest of villains is not only overly simplistic, it unfairly punishes conduct that is overly attenuated from that which actually menaces the public welfare. To be sure, a person could intend to take a rest only to inadvertently put the vehicle into motion. That is a potential outcome anytime a person enters a vehicle in an intoxicated condition. The injustice results in the imposition of DWI sanctions when no driving conduct manifests. A reformation of the DWI statutes would dispose of this injustice while sustaining the public policy of keeping drunks out of the traffic lanes.

The statutory fabric of Chapter 169A is a carefully woven afghan of interconnectivity. In other words, it has many working parts.[46] In other words, it is quite boring. A disturbance to one component will likely have implications for other, unforeseen sections. Generally speaking, Minnesota‟s DWI laws are sound; they are in accord with the wisdom and policy of other states. Attempts at legislative reform must proceed cautiously, and regard must be owned for the acumen of current law.

This commentary is for scrapping altogether the "physical control" subsidiary of the statute and retaining the "drive" and "operate" terminology to combat drunk driving. A precision operation and removal of the "physical control" tumor is nothing overwhelming or earth shattering. The drunk driving laws will still be enforced.

Necessarily, the extinction of "physical control" will restrict the application of criminal DWI laws to a reduced field of conduct. Yet much of the conduct that rests between a latent presence in a vehicle and patent operation or driving may still be proscribed. In Wisconsin, the statute criminalizing drunk driving includes only the words "drive" and "operate".[47] Wisconsin law further defines those terms: "‟Drive‟ means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion."[48] "‟Operate‟ means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion."[49] Similar to Minnesota, a person in Wisconsin may be prosecuted for idly sitting in a running vehicle while intoxicated.[50] However, it is unlikely that a person in Wisconsin can be convicted for sitting in a non-running vehicle while intoxicated, even if the keys are in the ignition, absent some evidence that the vehicle had been driven or moved from point A to point B.[51] Accordingly, it is likely that Daryl Fleck would not have been convicted of a driving while impaired crime had he been found in his vehicle in Wisconsin.

Although Wisconsin OWI laws cast too great a net—and recent case law indicates expansion of the definition of "operate"—the Wisconsin statutes evidence a step in the right direction. The absence of an all-encompassing "physical control" catch-all would be reflective of a legislative bearing for a more exacting—and responsible—comprehension of what it is to *drive while impaired*. Wisconsin offers a good start. The first step in Minnesota should be to exact "physical control" wherever it exists from the statute and define the remaining terms "drive" and "operate" as they are defined under Wisconsin law. The resulting judicial construction of terminology clearly defined by the legislature would work to circumscribe the vastly over-reaching definition of drunk driving currently in place.

From the facts available, Daryl Fleck presented no danger to the welfare of his community. This is not to say that his conduct represents the hallmark of responsibility; he very well *could* have driven. However, the outcome of his case represents a glaring example of the injustices served by criminal laws too broadly construed and applied. At present, a vast range of conduct is prohibited under the same tent. It is high time for an appreciation by the statutes that the conduct within that range is not equal: some is graver than others. The docile gentleman passed out in the family minivan with a key in his back pocket is far removed from the roguery of the young coxcombing buck in his Mercedes coupe bounding out of the parking garage

near What-d"ya-call-it night club after ingesting uncommon amounts of spiced rum, tequila, Sillery wine, or what have you. The law should acknowledge this plain contrast. The removal of "physical control" from the DWI statutes would serve to reduce the aforementioned inequities, and would provide the DWI laws with the refinement they now find wanting.

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[1]*State of Minnesota v. Daryl Fleck*, 777, N.W.2d 233 (Minn.2010).

[2]This commentary is limited to the crime of DWI pursuant to Minn. Stat. § 169A.20, Subd. 1 (motor vehicle), and the "physical control" language of that section. This piece does not concern itself with the prohibited operation of other machines beyond the definition of "motor vehicle". See Minn. Stat. § 169A.03, Subd. 15 (defining "motor vehicle").

[3]Minn. Stat. § 169A.20, Subd. 1(1)–(7).

[4]Minn. Stat. § 169A.20, Subd. 1. "Motor vehicle" is defined at Minn. Stat. § 169A.03, Subd. 15 as "every vehicle that is self-propelled and every vehicle that is propelled by electric power obtained from overhead trolley wires. The term includes motorboats in operation and off-road recreational vehicles, but does not include a vehicle moved solely by human power." To the gentleman who argued with me at a rout in St. Paul some years ago, you will see sir, that your bicycle is **NOT** a motor vehicle.

[5]Minn. Stat. § 169A.20, Subd. 1.

[6]The Minnesota Supreme Court has expressed that the term "physical control" is more comprehensive than either the term to "drive" or to "operate". *State v. Harris*, 202 N.W.2d 878 (Minn.1972), When *Harris* was decided, the DWI laws contained the "actual physical control" terminology, and the issue in that case was whether Mr. Harris had been "operating" a motor vehicle within the purview of Minn. Stat. § 169.123 (Repealed by Laws 2000, c. 478, art. 2, § 8, par. (a)). See also *State v. Cormican*, 195 N.W.2d 586 (Minn.1972). In *Cormican*, the Minnesota Supreme Court reversed a DWI conviction where the defendant was found intoxicated in his vehicle on the shoulder of the road with the motor running and the lights on because it could not be said that the defendant had "operated" the vehicle (the defendant had not been charged with being in "actual physical control" in violation of the statutes).

[7]*Fleck*, 777 N.W.2d at 233.

[8]*State v. Fleck*, 763 N.W.2d 39, 40 (Minn.App.2009).

[9]See *Fleck*, 763 N.W.2d 39; Fleck, Supreme Court.

[10]In 1981, the Minnesota Supreme Court decided *State v. Juncewski*, 308 N.W.2d 316 (Minn.1981), noting that at that time, neither the Minnesota Legislature nor the Minnesota judiciary had defined when a person is in "physical control" of an automobile.

[11]Specifically, the appellate courts cited to *Juncewski; State v. Pazderski*, 352 N.W.2d 85 (Minn.App.1984); *State v. Woodward*, 408 N.W.2d 927 (Minn. App.1987); *State v. Starfield*, 481 N.W.2d 834 (Minn.1992); and *Shane v. Comm'r of Pub. Safety*, 587 N.W.2d 639 (Minn.1998) in disposing of Mr. Fleck's case.

[12]*State v. Pazderski*, 352 N.W.2d 85 (Minn.App.1984).

[13]*Fleck*, 763 N.W.2d at 41.

[14]*Pazderski,* 352 N.W.2d at 86.

[15]*Fleck*, 763 N.W.2d at 42.

[16]For the purposes of this commentary, factual observations are made from those facts that the Court of Appeals chose to include in their decisions.

[17]Dear reader, you are not surprised are you? I told you in the beginning that the court affirmed. You were put on sufficient notice for the blow.

[18]*Juncewski*, 308 N.W.2d at 318.

[19]*Id.* at 319 ("Neither the legislature nor this court defined when a person is in 'physical control' of an automobile.").

[20]*Id.* (referring to Act of Apr. 5, 1978, ch. 727, § 9, 1978 Minn.Laws 799, 799) (then-current version at Minn. Stat. § 169.121, Subd. 1 (1980)).

[21]Although operability is not an element of the offense. See State v. Moe, 498 N.W.2d 755 (Minn.App.1993).

[22]*State v. Stone*, 572 N.W.2d 725, 730 (Minn.1997).

[23]Bureau of Criminal Apprehension Minnesota Justice Information Services, Minnesota Dep't of Pub. Safety, Uniform Crime Report (2008); Bureau of Criminal Apprehension Minnesota Justice Information Services, Dep't of Pub. Safety, Uniform Crime Report (2007). These numbers also include offenses of driving, operating, or being in physical control of a motor vehicle under the influence of an illegal controlled substance. As aforementioned, this commentary is concerned only with the operation of a motor vehicle as defined by Minn. Stat. § 169A.03, Subd. 15.

[24]See e.g. *Juncewski*, 308 N.W.2d 316.

[25]Act of Nov. 1, 1849, 1849 Territory of Minn. Laws (placing laws from Wisconsin in force in the Minnesota territory).

[26]Act of Nov. 1, 1849, 1849 Territory of Minn. Laws.

[27]Act of Nov. 1, 1849, ch. 56, sec. 2, 1849 Territory of Minn. Laws.

[28]Act of Apr. 21, 1903, ch. 356, 1903 Minn. Laws. Chapter 356 of the 1903 laws was entitled: *An Act regulating automobiles, motor vehicles or motor cycles on public roads, highways and streets within the State of Minnesota* and made it a misdemeanor to travel faster than eight miles per hour in a "thickly settled or business portion of any city or village" and faster than 25 miles per hour on "any public highway, road or street…" It is unknown how a policeman could distinguish a vehicle at four and five miles per hour.

[29]Act of April 20, 1911, ch. 365, sec. 21.

[30]*Juncewski*, 308 N.W.2d at 319 (citing *Goldsworthy v. State*, 268 N.W.2d 46 (1978); State v. Mulvihill, 227 N.W.2d 813 (Minn.1975); State v. Beckey, 192 N.W.2d 441 (Minn.1971); *State v. Halvorson*, 181 N.W.2d 473 (Minn.1970)).

[31]*Juncewski*, 308 N.W.2d at 319.

[32]*Id.* (citing *Ghylin*, 250 N.W.2d 252).

[33]Certainly there is agreement that a man's right to free speech does not diminish when he partakes of the bottled lightning?

[34]You mean to tell me dear reader that you do not have one? You simply must, or so I am told.

[35]See Minn. Stat. §§ 169A.27 (misdemeanor fourth-degree DWI); 169A.26 (gross misdemeanor third-degree DWI); 169A.25 (gross misdemeanor second-degree DWI); 169A.25 (felony first-degree DWI).

[36]Minn. Stat. § 169A.27; Minn. Stat. § 609.02, Subd. 3. These sanctions assume the absence of any "aggravating factors" that would enhance the offense to a gross misdemeanor crime. See Minn. Stat. § 169A.03, Subd. 3 (enumerating "aggravating factors" as (1) a qualified prior impaired driving incident within the ten years immediately preceding the current offense; (2) having an alcohol concentration of 0.20 or more as measured at the time, or within two hours of the time, of the offense; and (3) having a child under the age of 16 in the motor vehicle at the time of the offense if the child is more than 36 months younger than the offender).

[37]Minn. Stat. § 169A.52, Subd. 4(1). If a person is under the age of 21, then the revocation is for a period of six months. Section 169A.52, Subd. 4(2). For a person with a qualified prior impaired driving incident, the revocation is for a period of 180 days. Section 169A.52, Subd. 4(3). An alcohol concentration of 0.20 or more doubles the applicable revocation period.

[38]*Snyder v. Comm'r of Pub. Safety*, 744 N.W.2d 19, 21 (Minn.App.2008).

[39]*Id.* The Implied Consent Law is housed at Minn. Stat. §§ 169A.50 - 169A.53.

[40]*Snyder*, 744 N.W.2d 19.

[41]*Id.* (citing *Woodward*, 408 N.W.2d at 927-28).

[42]*Id.* (quoting *Starfield*, 481 N.W.2d

[43]*Id.* (going so far as to commend Snyder for the relinquishment of control).

[44]See *Thurmer,* 348 N.W.2d 776 (expressing the public policy of a broad "physical control" definition as deterring drunken individuals from entering vehicles except as passengers).

[45]This is by no means advocacy for such adventures.

[46]And why shouldn't it? Many legislators are lawyers, and they're used to being paid by the number and diversity of their interminable words. Chapter 169A has 78 sections, many of which contain lengthy subdivisions.

[47]Wis. Stat. § 346.63(1).

[48]Wis. Stat. § 346.63(3)(a).

[49]Wis. Stat. § 346.63(3)(b).

[50]See e.g. *County of Milwaukee v. Proegler*, 291 N.W.2d 608 (Wis.App.1980) ("operation of a vehicle occurs either when a defendant starts the motor and/or leaves it running"). In *Proegler*, the defendant was found sleeping behind the steering wheel of a vehicle parked on the side of the road. The keys were in the ignition and the motor was running. Id. at 618.

[51]See e.g. *Village of Cross Plains v. Haanstad*, 709 N.W.2d 447 (Wis.2006) (expressing that if the defendant was guilty, she was guilty of no more than "sitting while intoxicated" which is not a crime). See also *State v. Mertes*, 762 N.W.2d 813 (Wis.App.2008); *In re Bingham*, No. 2009AP1294, 2009 WL 4807001 (Wis.App. Dec. 9, 2009).

SOMETIMES YOU JUST GOTTA DRIVE

By David Valentini and John Lucas

The Necessity Defense in Implied Consent Proceedings

Some states colorfully call it the "choice of evils". It is the commission of a crime in order to prevent a greater harm. So which is more important—the hypothetical or the actual prevention of harm? That is the question at the heart of the use of "necessity" as a defense in an implied consent hearing. The whole point of DWI laws is the prevention of hypothetical harm. The law of "necessity" deals with actual, imminent, grave danger. Legally and morally, the possible loss of life or limb cannot trump the thwarting of actual injury or death.

Minnesota appellate courts have not explicitly determined that the defense of necessity is legally available in an implied consent case. They also have never ruled that it is **not** available.

The criminal defense of necessity is grounded in a social policy: "[I]f the harm which will result from compliance with the law is greater than that which will result from violation of it."[1] Some early examples where the necessity defense was applied include: a police officer violating speed laws in following a fleeing criminal; an ambulance driver violating speed laws in driving to the hospital with an emergency patient; a prisoner escaping from prison to avoid a fire he did not set; a ship's captain violating an embargo law when forced by a storm to take refuge in port in order to save the lives of those on board; and a doctor violating a law forbidding abortions in the interest of the health of a young sexual assault victim.[2]

In the criminal context, the defense of necessity exists when: 1) there is no legal alternative to breaking the law; 2) the harm to be prevented is imminent; and 3) there is a direct, causal connection between breaking the law and preventing the harm.[3] In Minnesota, Driving While Impaired cases raising the necessity defense have rarely been successful. In fact, even getting the instruction has been an uphill battle. Driving a heart attack victim to the hospital was not sufficient to earn the jury instruction in *State v. Brodie*.[4] Escaping from active violence was not sufficient in *State v. Hage*[5] *and other unpublished decisions*.[6] The focus was on the defendant's failure to make a prima facie case, primarily failing to make a convincing case that no alternatives existed to drunken driving.

The implied consent arena has produced a number of "riding two horses" decisions. The appellate courts in the 1990s have ruled that no use of necessity in implied consent has ever been specifically authorized by law, but if it does exist, the standard was not met in the particular case.[7] But more recently, in *State v. Victorsen*[8] the Court of Appeals made a strong statement about the quasi-criminal nature of implied consent. The Court acknowledged the strong collateral consequences that sometimes are more onerous than the criminal sanctions. The court noted that the "legal landscape" has been transformed and that the differences between the implied consent proceeding and the criminal prosecution "have blurred considerably".[9] The Court also

considered penalty enhancements and judicial economy concerns in viewing the relationship between the two proceedings as "symbiotic" and the differences as a "fictional construct".[10]

So why should a motorist be prevented from being impacted with a license revocation in a case where the defense of necessity could be raised in a DWI criminal case for the same conduct? Such a defense is made available in non-criminal contexts, such as Minnesota's various Good Samaritan laws.[11] It is often stated that implied consent laws "are liberally interpreted in favor of the public interest" but are there not, in some unique cases, a higher public interest? Certainly the motorist carries a high burden of proof. But, at the very least, this decision should be made by a judge and not automatically refused, without review, in every case by the Department of Public Safety. It is an abuse of power to unilaterally punish people who are forced to make the choice of the "lesser evil".

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[1] Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* §5.4(a) at 630-632 (West 1986)

[2] *Id.*

[3] *State v. Rein*, 477 N.W.2d 716 (Minn. App. 1991)

[4] 532 N.W.2d 557 (Minn. 1995)

[5] 595 N.W.2d 200 (Minn. 1999)

[6] *e.g., State v. Atha*, A08-2174 (Minn. App. November 17, 2009)

[7] *Weierke v. Commissioner of Public Safety*, 578 N.W.2d 815 (Minn. App. 1998); *Brueggemeier v. Commissioner of Public Safety*, C4-98-1803 (Minn. App. April 27, 1999), *unpublished decision*; *But see Frohn v. Commissioner of Public Safety*, C1-94-1250 (Minn. App. January 31, 1995), *unpublished decision*. Wherein the commissioner failed to argue that necessity was unavailable and the Court reasoned that "an argument can be made that the necessity defense should be available in implied consent proceedings."

[8] 627 N. W. 2d 655, 661 (Minn. App. 2001)

[9] *Id.* at 661

[10] *Id.* at 661-662

[11] Minn. Stat. §§604A.01; 611A.51; 169.342

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