COMMENTS

CLOSING THE LOOPHOLE: SHEA’S LAW AND DWI BLOOD DRAWS IN NEW YORK STATE UNDER VEHICLE AND TRAFFIC LAW § 1194(4)(A)(1)

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Every year in New York State, drunk drivers are responsible for approximately 9000 accidents and 400 deaths.¹ On July 13, 2010, New York State took another step to reduce this troublesome statistic with the passage of “Shea’s Law.”² This legislation, which amends the New York State Vehicle and Traffic Law, expands the list of medical personnel who can withdraw blood from a drunk driver without a doctor’s supervision,³ and further marks the closing of a “legal loophole which enabled indisputably impaired drivers to evade prosecution.”⁴

The source of this “loophole” was former section 1194(4)(a)(1)(i) of the New York State Vehicle and Traffic Law.⁵ Under the former statute, a DWI blood draw, performed to test a drunk driver’s blood alcohol level, was admissible into evidence only if it was performed

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³ “Advanced emergency medical technicians draw blood all the time without direct supervision from a doctor and this measure simply brings the legal standard for withdrawal of blood in drunken and impaired driving cases into conformity with standard medical practice. Jack Shea’s Law will close a loophole that allowed several guilty individuals to evade justice.” Bill Strengthens Drunk Driving Laws, supra note 1 (quoting Governor David A. Paterson).

⁴ Id.

⁵ N.Y. VEH. & TRAF. L. § 1194(4)(a)(1)(i).
in a certain manner by statutorily.enumerated medical professionals.6 This former statute led to various instances of drunk drivers escaping prosecution because, although blood was drawn in a safe and reasonable manner by a medical professional, the blood draw was not performed specifically according to the statute.7 The best known example of this was People v. Reynolds,8 where former Olympic gold medalist Jack Shea, the name-sake of the new bill,9 was killed by a drunk driver who would completely escape prosecution due to the blood draw.10

Shea’s Law has been pending in the New York State Legislature in various forms since 2006.11 The bill’s recent passage has been lauded as “a commonsense measure,”12 and a “simple and straightforward remedy”13 in New York’s fight against drunk driving.14

The first section of this comment gives the background and history of drunk driving legislation in New York State. The second section tells the story of Jack Shea and other victims of the loophole which existed in former section 1194(4)(a)(1). The third section outlines and analyzes the problems that accompanied former section 1194(4)(a)(1), including both the Court of Appeals interpretation of the statute and the statute’s conflicts with other New York statutes and regulations. The fourth section examines

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6 Id. (as amended by 2010 N.Y. Laws 413–14). Note that for the purposes of this paper, "DWI" refers to both driving while intoxicated by alcohol and driving under the influence of controlled substances.


8 Reynolds, 307 A.D.2d at 391, 762 N.Y.S.2d at 683.

9 Bill Strengthens Drunk Driving Laws, supra note 1.


12 Bill Strengthens Drunk Driving Laws, supra note 1.


14 The passage of Shea’s Law marks a recent push by New York State to strengthen its drunk driving laws. For example, “Leandra’s Law,” effective November 18, 2009, made it a felony to drive drunk with a child in the car, and requires everyone convicted of misdemeanor or felony drunk driving under the law to install and maintain an ignition interlock device in any vehicle they drive. Operating a Motor Vehicle While Under the Influence of Alcohol Act, ch. 496, sec. 1–3, N.Y. VEH. & TRAF. LAW § 1192(2-a)(b), 12(b) (2009).
the public policy behind DWI legislation, and that policy’s impact on judicial decision-making in New York and other states. The final section examines and analyzes the amended section 1194(4)(a)(i) under Shea’s Law.

I. DWI LEGISLATION IN NEW YORK STATE

New York State has a long and distinguished history of developing legislation and programs to improve highway safety, specifically regarding DWI prosecution. The first DWI law in the nation originated in New York State in 1890—section 158 of the former Highway Law—which provided: “No person owning any carriage for the [conveyance] of passengers, running or traveling upon any highway or road, shall employ, or continue in employment, any person to drive such carriage, who is addicted to drunkenness, or to the excessive use of spirituous liquor . . . .”

Additionally, in 1910 the first “modern” DWI statute was passed in New York State, enforcing drunk driving rules against those operating cars with motors. More than a half-century later, New York passed legislation allowing prosecutors to introduce evidence of alcohol in the blood stream for DWIs. This was the first of many chemical testing laws from a legislature that “has clearly expressed its interest in promoting the goal of public safety by enacting legislation providing for compulsory chemical tests to facilitate the prosecution of intoxicated or impaired drivers whose actions result in serious injury or death.”

16 N.Y. HIGH. LAW § 158 (McKinney 1890).
18 Ostrowski, supra note 17, at 22; Operating a Motor Vehicle or Motorcycle While in an Intoxicated Condition Act, ch. 775, 159 N.Y. Sess. Laws 1332 (McKinney). N.Y. VEH. & TRAF. LAW § 70(5) ch. 726, § 1:
   For the purposes of this section (a) evidence that there was, at the time, five-hundredths of one per centum, or less, by weight of alcohol in his blood, is prima facie evidence that the defendant was not in an intoxicated condition; (b) evidence that there was, at the time, more than five-hundredths of one per centum and less than fifteen-hundredths of one per centum by weight of alcohol in his blood is relevant evidence, but it is not to be given prima facie effect in indicating whether or not the defendant was in an intoxicated condition; (c) evidence that there was, at the time, fifteen-hundredths of one per centum, or more, by weight of alcohol in his blood, may be admitted as prima facie evidence that the defendant was in an intoxicated condition.
Perhaps the most visible legislation in New York’s battle against drunk driving was the “STOP-DWI”20 program, introduced in 1981, which made it lucrative for the counties of New York State to engage in and prosecute alcohol-related driving offenses.21 These ongoing efforts have positively impacted the safety of New York’s highways. From 1999 to 2008, fatal crashes, as well as other fatalities on New York’s roadways, have declined by approximately twenty percent.22 The STOP-DWI program has proven especially helpful in reducing alcohol-related motor vehicle crashes.23 However, there is a statewide concern that this progress is flattening, as fatal DWI crashes have begun to account for a significant portion of all the driving fatalities in New York State.24 Statistics show that despite the statewide decrease in the amount of alcohol-related non-fatal injury crashes,25 there has been an increase in the percentage of fatal crashes where alcohol was involved.26 According to the New York State Department of Transportation, between 2004 and 2008, New York State experienced an increase in the number of alcohol-related fatal crashes.27 In 2004, alcohol-related fatal crashes accounted for 24.3% of all fatal crashes in New York State; in 2008, alcohol-related fatal crashes accounted for 30.6% of all fatal crashes—an increase of over 6%.28

Further, a study by the Institute for Traffic Safety Management and Research estimated that there are approximately 85,000 incidents of drinking and driving every day in New York State.29 This is especially problematic for law enforcement, as it is estimated that “[n]ationally in crashes that caused death or serious injury in 2003, only 24 percent of surviving drivers and 66 percent of killed

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20 Special Traffic Options Program for Driving While Intoxicated (STOP-DWI), N.Y. VEH. & TRAF. L. § 1197 (McKinney 2006).
21 See, e.g., N.Y. VEH. & TRAF. LAW § 1197(1)(a) (“Where a county establishes a special traffic options program for driving while intoxicated, pursuant to this section, it shall receive fines and forfeitures collected by any court, judge, magistrate or other officer within that county . . . .”); 8A N.Y. JUR. 2d AUTOS § 936 (2009).
23 Id.
24 Id.
25 From 5327 in 2004 to 4775 in 2008, a 10.4% decrease. Id.
26 From 332 in 2004 to 355 in 2008, a 6.9% increase. Id.
27 Id.
28 Id.
drivers had their blood alcohol content (BAC) tested and available—significantly reducing the ability to know if a driver was intoxicated, and to prosecute individuals driving while intoxicated.

Currently, under New York State’s implied consent law, any person who operates a motor vehicle upon a public highway is “deemed to have given consent to a [blood] test” for the determination of their BAC, whenever they are arrested or taken into custody for DWI. This implied consent legislation was developed by the legislature “as a means to address the scourge of drunk driving and aid in the prosecution of drunk drivers.”

Despite New York State’s established policy of discouraging drunk drivers through enhanced police enforcement and prosecution, an anomaly existed in New York Vehicle and Traffic Law section 1194(4)(a)(1), which led to a few troubling examples of drunk drivers escaping prosecution. Consider the following:

II. THE LOOPOLE

Jack Amos Shea was born on September 7, 1910 in Lake Placid, New York. Mr. Shea grew up to become an accomplished Olympic speed skater, culminating in two gold medals won at the 1932 Winter Games. Mr. Shea spent the majority of his life in Lake Placid, and was instrumental in helping the town organize its bid to host the 1980 Winter Games. Mr. Shea’s son, Jim, and grandson,
Jim Jr., also competed in later Olympic Games.\textsuperscript{37} Sadly, Mr. Shea would never get to see his grandson compete, as the elder Olympian was killed by a drunk driver shortly before the 2002 Winter Olympics.\textsuperscript{38}

On the afternoon of January 21, 2002, the ninety-two-year-old Olympic legend was heading northbound in his 2001 white Cadillac Deville, driving through the sleepy Adirondack town of North Elba on a snow-covered, unplowed road.\textsuperscript{39} At about 4:30 p.m., Mr. Shea noticed a white cargo van ahead driving erratically in the southbound lane.\textsuperscript{40} After unsuccessfully negotiating a turn on the unplowed road, the oncoming van swerved into Mr. Shea’s lane.\textsuperscript{41} In an attempt to avoid a collision, Mr. Shea slowed his car and pulled it towards the right of the road.\textsuperscript{42} The maneuver was in vain—the cargo van slammed head-on into the Olympian’s car.\textsuperscript{43} From the time of his lunch, the driver of the cargo van had ingested “at least five bottles of beer.”\textsuperscript{44}

Mr. Shea and the intoxicated driver were both ambulated to a rural emergency room—the “Lake Placid satellite branch of the Adirondack Medical Center” (“AMC”).\textsuperscript{45} The emergency room consisted of a limited medical staff, often including only one physician’s assistant, one registered nurse, and one advanced emergency medical technician (“AEMT”).\textsuperscript{46} At the time of the accident there was no physician present.\textsuperscript{47} More troublingly, victims from another motor vehicle accident were en route as well: the number of patients would exceed the emergency room’s limited capacity.\textsuperscript{48}

Upon arrival at the emergency room, the medical staff inspected Mr. Shea and the intoxicated driver.\textsuperscript{49} The drunk driver had suffered only minor injuries and, aside from a blood alcohol test,
would not require immediate medical attention. Mr. Shea did not fare as well: shortly after arriving, he suddenly collapsed—requiring the attention of the entire staff.

While the staff fought to save Mr. Shea’s life, a second AEMT arrived at the emergency room. The police officer that accompanied the intoxicated van driver to the emergency room asked the second AEMT to administer a blood draw to determine the van driver’s blood alcohol content. Considering the quickly accumulating backlog of work, and the fact that a blood draw posed “no health risk,” the physician assistant who was supervising the emergency room allowed the AEMT to perform the blood draw as he and the rest of the medical staff battled in vain to save the Mr. Shea’s life. Eventually, a blood sample was taken from the intoxicated driver, revealing a BAC of almost twice the legal limit.

The drunken van driver was prosecuted for, among other offenses, vehicular manslaughter for the death of Jack Shea. However, the charges were dropped. The trial court suppressed the results of the blood draw because the emergency room failed to comply with New York Vehicle and Traffic Law section 1194(4)(a)(1), which states that an AEMT can only perform a DWI blood draw at the direction of and under the supervision of a physician—not a physician’s assistant.

Testimony at the suppression hearing revealed persuasive policy reasons to deny the drunk drivers’ motion to suppress the BAC results. For example, the Director of Emergency Services (“DES”) of AMC testified that the emergency room used a supervising physician assistant, instead of a physician, because it “is extremely cost effective while still providing a high level of care in a very small, rural facility.” Additionally, the DES testified that this practice was used by “at least three other area emergency rooms,” and that “[t]he only real difference between a . . . physician’s assistant . . . and a physician in the state of New York is that

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50 Id. at 2.
51 Id.
52 Id. at 2, 6.
53 Id. at 3.
54 Id.
55 Id. at 2.
56 Id. at 1.
57 Knight, supra note 11.
60 Id.
[physician's assistants] need to be cosigned to show that their orders are all supervised and looked over and patient care is adequate on the chart."61 This cosigning does not happen until after treatment is performed by the physician assistant, and its purpose is to indicate "that the treatment was appropriate and that standard operating procedures were followed."62 Finally, the DES testified that during chaotic situations like the one involving Mr. Shea, "standard hospital procedures must give way to what will give the best chance of survival to the patients being treated."63

The supervising physician assistant also testified at the suppression hearing.64 The physician assistant testified that "there is rarely a physician physically present supervising him in the emergency room,"65 and that he "function[s] as an ER physician' and is 'in charge of the ER.""66 The physician assistant further testified that he ordered the blood draw on the intoxicated van driver "[b]ased on his training and experience, an examination of defendant, as well as a discussion with defendant wherein he consented to the blood draw."67

Regardless, the results of the defendant's blood draw were suppressed.68 This suppression was upheld, albeit with reservations, by an appellate court which noted that:

To the extent that the statute, as written, fails to advance [public policy] objectives, the solution is not for this Court to adopt a strained interpretation of the statute but, rather, for the Legislature to adopt an appropriate amendment thereto. Vehicle and Traffic Law § 1194(4)(a)(1)(i) is wholly unambiguous and must be enforced in accordance with its plain meaning.69

This situation was not an isolated occurrence in New York State. There are numerous other cases that have encountered a similar issue with the language of former section 1194(4)(a)(1).70 In Nassau

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61 Id.
62 Id.
63 Id. at 5.
64 Id.
65 Id.
66 Id. at 6 (quoting the testimony of Physician's Assistant Roy Parker).
67 Id.
69 Id. at 391–92, 762 N.Y.S.2d at 684. (citation omitted).
County, a blood draw performed by an AEMT in an emergency room was also suppressed by a reluctant county court.\textsuperscript{71} The blood draw was performed according to hospital protocol—developed by the hospital’s “Emergency Medicine Committee” (consisting of thirty physicians)—which permitted AEMT’s to perform DWI blood draws.\textsuperscript{72} Despite granting the suppression of the blood draw results, the court noted, “I agree . . . [that the AEMT who drew the blood] is probably more qualified than a registered professional nurse [to draw blood], probably, but that’s not what the statute says.”\textsuperscript{73}

Likewise, in \textit{People v. Griesbeck},\textsuperscript{74} a blood draw was suppressed because it was performed by a medical technologist who was not under the direct supervision of a physician during the draw.\textsuperscript{75} The suppression was upheld even though it was established at the suppression hearing that the medical technologist was certified to draw and test blood for “all intense [sic] purposes”; was supervised by the “Administrator Director of Nursing” during the procedure;\textsuperscript{76} and there was testimony that a physician had authorized the blood draw, but there was no paperwork which showed express authorization of the blood draw.\textsuperscript{77} As the defense attorney noted after the drunk driver’s guilty verdict was overturned, “[a]t some point someone will ask the Legislature to take a look at current medical practice and compare it to [section 1194(4)(a)(1)] . . . . Someone is going to stand up and say that either the statute has to bend or medical practice has to change.”\textsuperscript{78}

As these examples show, under former section 1194(4)(a)(1), there was a “conflict between current medical practice and [the] statutory requirement of Physician supervision of blood draws” in New York State.\textsuperscript{79}

\begin{footnotes}
\footnotetext{71}{N.Y. S., INTRODUCER’S MEMORANDUM IN SUPPORT, S.B. 46, 232nd Leg. (2009).}
\footnotetext{72}{Id.}
\footnotetext{73}{Id.}
\footnotetext{74}{People v. Griesbeck, 4 Misc. 3d 1002(A), 791 N.Y.S.2d 872 (Sullivan Cnty. Ct. 2004), aff’d, 17 A.D.3d 717, 793 N.Y.S.2d 227 (App. Div. 3d Dep’t 2004).}
\footnotetext{75}{Id.}
\footnotetext{76}{Id. at *1–2.}
\footnotetext{77}{Id. at *2.}
\footnotetext{78}{N.Y. S., INTRODUCER’S MEMORANDUM IN SUPPORT, S.B. 46, 232nd Leg. (2009).}
\footnotetext{79}{Id.}
\end{footnotes}
III. PROBLEMS UNDER THE FORMER VEHICLE AND TRAFFIC LAW § 1194(4)(A)(1)

The former New York Vehicle and Traffic Law section 1194(4)(a) provided:

At the request of a police officer, the following persons may withdraw blood for the purpose of determining the alcoholic or drug content therein: (i) a physician, a registered professional nurse or a registered physician’s assistant; or (ii) under the supervision and at the direction of a physician: a medical laboratory technician or medical technologist as classified by civil service; a phlebotomist; an advanced emergency medical technician as certified by the department of health; or a medical laboratory technician or medical technologist employed by a clinical laboratory approved under title five of article five of the public health law. This limitation shall not apply to the taking of a urine, saliva or breath specimen.\(^{80}\)

The statute designated two different groups of medical professionals who could perform a blood draw to determine the BAC of a DWI suspect: (1) medical professionals who could perform blood draws “unsupervised,” consisting of physicians, registered professional nurses, or registered physician’s assistants; and (2) medical professionals who could draw blood only “under the supervision and at the direction of a physician,” consisting of medical laboratory technicians or medical technologists, as classified by civil service, phlebotomists, advanced emergency medical technicians certified by the Department of Health, or medical laboratory technicians or medical technologists employed by a clinical laboratory approved by the public health law.\(^{81}\)

The two groups of medical professionals were distinguished by the supervision requirement of the statute, allowing group one to perform blood draws unsupervised, while group two could only draw blood while “under the supervision and at the direction of a physician.”\(^{82}\) Unsupervised blood draws performed by the second group resulted in a blood test that was inadmissible in court.\(^{83}\)

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\(^{81}\) Id.

\(^{82}\) Id.

A. The Court of Appeals’ Interpretation

The New York Court of Appeals held that the supervision requirement of the statute was met so long as the physician had *authorized* the blood draw.84 A physician’s authorization, per the court, served two purposes: first, it “reflects [the physician’s] medical judgment that [the blood draw] will not put the [suspect] at risk”,85 and second, it presumes the physician’s “presence to respond to inquiries and emergencies.”86

1. “Medical Judgment”

Per the New York Court of Appeals, the first safeguard of a physician’s authorization is that it reflects a physician’s “medical judgment” that the drunk driver will not be put in danger by a blood draw.87

Drawing blood is a heavily-regulated procedure in New York State—even when performed by medical personnel. In addition to being previously “regulated” by the former section 1194(4)(a)(1), the blood draw procedure is also regulated by the State Department of Health and the federal government;88 procedural guidelines are also supplemented by a number of medical professional groups.89

Until a recent Emergency Rule Making on April 23, 2010,90 the New York State Department of Health’s (“DOH”) Administrative Rules and Regulations specifically defined who and what was to be

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85 Id. at 478, 517 N.E.2d at 213, 522 N.Y.S.2d at 498 (emphasis added); see Ebner, 195 A.D.2d 1006, 1006, 600 N.Y.S.2d 569, 571 (App. Div. 4th Dep’t, 1993) (mem.) (suppressing a blood sample drawn by a medical laboratory technician who was supervised and authorized by a registered nurse—not a physician).

86 Moser, 70 N.Y.2d at 478, 517 N.E.2d at 213, 522 N.Y.S.2d at 498 (emphasis added).

87 Id.

88 21 C.F.R. § 606.100(b) (2010).

89 Id. § 606.100(d).

90 Department of Health Emergency Rule Making, 32 N.Y. Reg. 12-14 (May 12, 2010). Interestingly, in the Summary of Regulatory Impact Statement, the Department of Health noted that “[t]his amendment . . . [as currently listed] could present a legal conflict with similar provisions in Vehicle and Traffic Law Section 1194(4)(a) and Public Health Law Section 3703.” 32 N.Y. Reg. 13 (May 12, 2010).
used in drawing blood for a BAC analysis. These DOH regulations listed a more expansive group of medical professionals who could perform an unsupervised DWI blood draw as compared to former section 1194(4)(a)(1). Under the old DOH regulations, a physician, a registered professional nurse, a registered physician’s assistant, and a medical laboratory technician or medical technologist (as classified by the civil service) could perform unsupervised blood draws on DWI suspects. The only individuals who had to be supervised when drawing blood were phlebotomists, medical laboratory technicians, and medical technologists.

These DOH regulations further promulgated that the blood sample had to be drawn within two hours from the time of the suspect’s arrest, and that “an aqueous solution of a nonvolatile antiseptic” should sterilize the skin before the blood is drawn—alcohol cannot be used as a skin antiseptic. After sterilization, blood had to be drawn using either a “sterile dry needle into a vacuum container containing a solid anticoagulant”; or a “sterile dry needle and syringe and deposited into a clean container containing a solid anticoagulant, which container shall then be capped or stoppered, and identified.”

In addition to these DOH regulations, the New York State Police Crime Laboratory, through the statewide STOP-DWI program, supplies local law enforcement with kits specifically designed for DWI blood draws. The kit is to be given by the officer to the medical professional drawing the blood. The kit comes complete with the requisite medical supplies, a “Toxicology Submission Form,” as well as “Collection Instructions” for the officer observing

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92. Id. § 59.2 (c)(1)(i).
93. Id. § 59.2 (c)(1)(ii).
94. Id. § 59.2 (c)(1)(iii).
95. Id. § 59.2 (c)(1)(iv).
96. Supervision means “the general supervision of the laboratory director and the personal supervision and direction of a physician.” Id. § 59.2 (c)(1)(v).
97. Id. § 59.2 (c)(1)(v).
98. Id. § 59.2 (c)(2).
99. Id. § 59.2 (c)(3).
100. Id. § 59.2 (c)(4)(i).
101. Id. § 59.2 (c)(4)(ii).
102. N.Y. VEH. & TRAF. LAW § 1194 (McKinney 1996 & Supp. 2010); Litits v. Melton, 57 A.D.2d 1027, 1028, 395 N.Y.S.2d 264, 265–66 (App. Div. 3d Dep’t 1979). The police officer selects the kind of test to be used, and the suspect has the right to have a physician of his own choice give the test at the suspect’s expense. MANUAL FOR POLICE IN THE STATE OF NEW YORK 2–7–4, 7A2(d) (LexisNexis 2007).
the blood draw. The medical professional must use the “tubes, needle and holder supplied with th[e] kit.” The instructions further provide that only twenty milliliters (about 1.35 tablespoons) of blood need to be taken from the suspect. The instructions and kit streamline the ease, length of time, and safety of the interaction between the drunk driver, the police officer, and the medical professional performing the simple blood draw.

In addition to the procedural regulations governing blood draws, the United States Supreme Court has found that blood draws are generally not a dangerous procedure. In Schmerber v. California, the Court found the danger posed by a DWI blood draw to be extremely limited. The Court described DWI blood draws performed in a hospital setting—as they are in New York—as “commonplace,” adding that “the quantity of blood extracted is minimal, and . . . for most people the procedure involves virtually no risk, trauma, or pain.” The Court went on to note that a blood draw is a reasonable practice so long as it is performed according to “accepted medical practices.” Furthermore, the Court does not consider blood tests to “constitute an unduly extensive imposition on an individual’s personal privacy and bodily integrity.”

Given the limited risk posed to suspects, and the amount of regulation in New York State, it would seem that a blood draw performed on a DWI suspect does not require much medical judgment; or perhaps the “medical judgment” safeguard of the People v. Moser holding was an overly conservative finding by the Court of Appeals. As case law has subsequently noted, “[b]lood drawn for [DWI] purposes is not aimed at enabling medical personnel to make a medical determination. Rather the blood draw is intended to provide the evidence necessary to make a legal determination—namely, whether a suspect’s blood alcohol content

103 New York State Police Crime Lab. Toxicology Submission Form, Form LAB-1 (Rev. 1/05), N.Y. State Police (Jan. 2005) (on file with author).
104 Id.
105 Id.
107 Id. at 771.
108 Id.; see also Breithaupt v. Abram, 352 U.S. 432, 436 (1957) (“The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors.”).
109 Schmerber, at 771.
exceeds a legislatively imposed limit.”112 Further, as the New York Appellate Division, Second Department, recently noted,113 a simple blood draw, before being tested, “neither communicates nor renders observable any information about a patient upon which treatment can be based or a diagnosis made.”114 A DWI blood draw is exclusively for the purpose of collecting evidence “which begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system.”115

Finally, DWI blood draws are the most probative evidence of intoxication, and “courts and juries should not be denied probative evidence unless it was procured in violation of the rights of the accused.”116

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115 State v. Taylor, 531 A.2d 157, 161 (Conn. App. 1987) (quoting Schmerber v. California, 384 U.S. 757, 770); see also People v. Whelan, 165 A.D.2d 313, 318, 567 N.Y.S.2d 817, 820 (App. Div. 2d Dep’t 1991) (“Moreover, due to the very nature of the test (i.e. to detect the presence of alcohol in the blood), the element of time was highly significant, for the longer it took to obtain the blood sample, the greater the likelihood that the percentage of alcohol in the blood would diminish.”).

116 State v. Engesser, 661 N.W.2d 739, 748 n.3 (S.D. 2003) (quoting United States v. Chapel, 55 F.3d 1416, 1418 (9th Cir. 1995)). Please note that a suspect’s constitutional protections are beyond the scope of this paper. In any event, DWI blood draws have passed constitutional muster under both the Fourth and Fifth Amendment. Under the Fourth Amendment, “it is well-established that limited intrusions upon personal liberty and bodily integrity to advance investigative needs . . . may be predicated upon particularized and individualized suspicion of criminal conduct.” United States v. Owens, No. 06-CR-72A, 2006 WL 3725547, at *8 (W.D.N.Y. Dec. 15, 2006). Further, “the Fourth Amendment’s proper function is to constrain, not against all intrusions as such, but against intrusions that are not justified in the circumstances, or which are made in an improper manner.” Id. (citing Schmerber v. California, 384 U.S. 757, 767–68 (1966)). See also People v. Bowers, 716 P.2d 471, 473 (Colo. 1986) (“Neither the constitutional prohibition against unlawful searches and seizures nor the constitutional privilege against self-incrimination prevents a police officer from requiring the driver of a motor vehicle to submit to a chemical test of breath or blood when the driver has been validly arrested for drunk driving.”) (citing People v. Duemig, 620 P.2d 240, 243 (Colo. 1980), cert. denied, 451 U.S. 971, 101 S. Ct. 2048 (1981))). Further, DWI blood tests do not offend the Fifth Amendment protection against self-incrimination. See Schmerber, 384 U.S. at 761 (noting that the Fifth Amendment “protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood . . . [does] not involve compulsion to these ends.” (footnote omitted)); People v. Kates, 53 N.Y.2d 591, 594, 428 N.E.2d 852, 854, 444 N.Y.S.2d 446, 448 (1981) (“Taking a driver’s blood for alcohol analysis does not call for testimonial compulsion prohibited by the Fifth Amendment.”).
2. “Presence and Ability to Respond”

The second safeguard of a physician’s authorization, per the New York Court of Appeals, was the presumption of a physician’s “presence to respond to inquiries and emergencies.”\textsuperscript{117} This is still an uncertain standard that implies that a physician must provide some sort of supervision for DWI blood draws; however, the Court of Appeals and New York case law has not determined just how much supervision suffices to satisfy section 1194(4)(a)(1).

The Court of Appeals held that this supervision does not need to be constant.\textsuperscript{118} In Moser, the Court opined that there is no requirement of personal presence and supervision by the physician who authorizes a blood draw under former section 1194(4)(a)(1).\textsuperscript{119} Regardless, New York courts strictly construed former section 1194(4)(a)(1).\textsuperscript{120} In People v. Pickard,\textsuperscript{121} a county court overturned a DWI conviction because, although the prosecutor argued “an attending physician supervised all activities within the emergency room”\textsuperscript{122} where the blood was drawn, there was insufficient evidence that the physician had authorized the blood draw.\textsuperscript{123} Similarly, in People v. Griesbeck,\textsuperscript{124} a county court suppressed a blood draw because the otherwise qualified medical technologist was not under the direct supervision of a physician during the draw—despite the fact that the technologist was being supervised by a director of nursing during the blood draw and had testified, under oath, that a physician had authorized the blood draw.\textsuperscript{125}

This strict construction of the supervision safeguard undermines New York public policy. New York State began licensing physician


\textsuperscript{118} Id. at 477–78, 517 N.E.2d at 212, 522 N.Y.S.3d at 497.

\textsuperscript{119} The court relied on 1969 N.Y. Laws 669, § 1, a previous amendment to N.Y. VEH. & TRAF. L. § 1194(4)(a), which enlarged the group of medical professionals who could perform the blood test to include lab technicians. The reasons for this amendment, per the court, were “the obvious purposes of making blood alcohol and drug content tests easier to obtain and relieving the burden on those already entitled to perform the procedure.” Id. at 478, 517 N.E.2d at 213, 522 N.Y.S.2d at 498; see also People v. Butcher, 38 A.D.3d 942, 944, 830 N.Y.S.2d 844, 845 (App. Div. 3d Dep’t 2007) (“[T]here [is] no need for the supervising physician to put aside her other duties to observe the phlebotomist perform the procedure.”).


\textsuperscript{121} People v. Pickard, 180 Misc. 2d 942, 691 N.Y.S.2d 884, 885 (Sup. Ct. Chautauqua Cnty. 1999).

\textsuperscript{122} Id.

\textsuperscript{123} Id.


\textsuperscript{125} Id. at *1–2, *4.
assistants because of "the shortage of physicians and the need for the provision of health services that otherwise would be unavailable in many areas of the state." New York's legislature has noted that there is a shortage of physicians in certain areas of New York State who can provide the supervision required under section 1194(4)(a)(1), yet courts in New York continued to require strict compliance with section 1194(4)(a)(1).

B. Conflicts in the Law

Another troubling aspect of the former section 1194(4)(a)(1) was its incongruity with the regular practice of blood draws in the medical community. As Eleanor Abel of the State University of New York's Upstate Medical University noted in a letter to Governor Paterson, "New York courts have misinterpreted statutes that lack an explicit reference to [physician assistants] as prohibiting them from performing a medical function even if it is fully within a [physician assistant's] scope of practice."

According to New York law, a physician assistant is legally able to perform anything his supervising physician is able to do—including supervising DWI blood draws. However, former section 1194(4)(a)(1) permitted only physicians to supervise blood draws from a DWI suspect. Therefore, a physician assistant—despite having the statutory authority to supervise a DWI blood draw under New York law—was previously unable to supervise a blood draw from a DWI suspect, or the blood sample would be suppressed under former section 1194(4)(a)(1). Instead, the physician assistant either had to find a physician from whom to obtain authorization, find a registered nurse to perform the blood draw, or perform the
blood draw on his or her own.\textsuperscript{133}

Giving physicians the sole authority to supervise a blood draw was further contrary to the 1971 legislation which gave statutory recognition to physician assistants.\textsuperscript{134} The legislation, which amended the Education Law as well as the Public Health Law, had the express purpose of “provid[ing] for the registration of physician’s associates and specialist’s assistants ... to permit medical services to be given to persons not receiving them ... and whose qualifications will assure the health needs of patients are met properly.”\textsuperscript{135} This legislation was meant to address “[t]he existing shortage of physicians” in New York State.\textsuperscript{136} The legislature went on to note that “[p]hysical limitations on the number of patients a physician can personally attend make the use of persons qualified to assist the physician in the provision of medical care essential if such care is to be uniformly available to all of the people of the state.”\textsuperscript{137}

\textbf{C. Public Health Law § 3703}

Curiously, in response to the conflict between the former section 1194(4)(a)(1) and the Education Law, the legislature amended the Public Health Law in 2006.\textsuperscript{138} The amendment added a second subsection to Public Health Law section 3703—allowing registered physician assistants and certified nurse practitioners, in addition to physicians, to supervise others conducting blood tests from DWI suspects.\textsuperscript{139} The amendment received overwhelming support from various governmental sponsors and public interest groups.\textsuperscript{140} For example, the State Education Department supported the bill because “registered physician assistants and certified nurse practitioners ... are qualified to supervise and direct the withdrawing of blood.”\textsuperscript{141} Alithia Rolon, Associate Director of the

\textsuperscript{133} \textit{Id.} at *3–4.
\textsuperscript{134} “It appears that the Legislature inadvertently failed to amend VTL § 1194(4), enacted in 1969, to add physician assistants to the list of individuals who could supervise the drawing of blood by a medical technician when Education Law § 6452(1) was added in 1971.” \textit{Id.} at *4 n.4.
\textsuperscript{135} N.Y. PUR. HEALTH LAW § 3700 (McKinney 1971).
\textsuperscript{136} 1971 N.Y. Laws 1135, §1.
\textsuperscript{137} \textit{Id.}
\textsuperscript{139} \textit{Id.}
Nurses Advocacy and Information Program, further commented that “[e]xpanding those authorized to supervise blood withdrawal is essential in gathering evidence against drunk drivers so that they can be prosecuted.”142

Nevertheless, this was seen as a somewhat peculiar, and ultimately useless, legislative development—amending the Public Health Law instead of just directly amending former section 1194(4)(a)(1), which still held that only physicians may authorize a blood draw for a DWI suspect. This did not go unnoticed by supporters of the amendment. Glenn Valle, Counsel to the Division of the State Police, noted that he was “puzzled . . . as to why the drafters chose to extend the authority of nurse practitioners in this manner, rather than directly amending [section] 1194(4)(a)(2) which details the other practitioners granted this authorization.”143 Dennis Whalen, Executive Deputy Commissioner of the New York State Department of Health, bluntly commented that “[t]his legislation is legally defective unless [section 1194(4)(a)] is also amended to allow for blood testing for alcohol and drug content under the supervision of a physician’s assistant or nurse practitioner.”144

IV. PUBLIC POLICY UNDERLYING DWI LEGISLATION

Given the various problems with former section 1194(4)(a)(1), it is helpful to examine the policy behind DWI legislation in New York and elsewhere in the United States. Additionally, it is important to see how this policy can affect the judicial interpretation of DWI statutes in both New York and other states.

A. DWI Blood Draws in Other States

In New York, the underlying policy behind DWI legislation is “fostering the goals of law enforcement while maintaining certain procedural safeguards that balance the State’s interest in obtaining

the necessary evidence against the constitutional rights of the individual.” 145

Other states have a public policy analogous to New York’s, favoring the admissibility of chemical tests that are necessary to prosecute drunk drivers as long as the suspect’s safety is generally accounted for. However, these states have historically been more lenient than New York in the application of their blood draw statutes.

For example, in People v. Esayan, 146 a California appellate court upheld a blood draw taken by a phlebotomist—who was not fully qualified by state law to perform blood draws—because there was no showing that “the manner of drawing the blood was unsanitary, or subjected the suspect to any unusual pain or indignity.” 147 The court relied on the strong policy interests of effectively enforcing the law against drunk drivers, and found that “[b]lood tests are an accepted, safe method of reliably obtaining evidence.” 148

Likewise, Arizona courts have given their DWI blood draw statute a broad reading. The relevant Arizona statute allows for a physician, registered nurse, or “qualified person” to perform DWI blood draws. 149 Courts in Arizona have found that the “qualified persons” language contained in the statute may include police

145 People v. Elysee, 49 A.D.3d 33, 45, 847 N.Y.S.2d 654, 663 (App. Div. 2d Dept 2007) (“The courts of this State also have long and repeatedly acknowledged the strong interest this State has in removing intoxicated drivers from its highways.”).
146 People v. Esayan, 5 Cal. Rptr. 3d 542, 547 (Cal. App. 4th 2003). The applicable California DWI blood draw statute reads:
(a) Notwithstanding any other provision of law, only a licensed physician and surgeon, registered nurse, licensed vocational nurse, duly licensed clinical laboratory scientist or clinical laboratory technician’ certificate pursuant to Section 1246 of the Business and Professions Code, unlicensed laboratory personnel regulated pursuant to Sections 1242, 1242.5, and 1246 of the Business and Professions Code, or certified paramedic acting at the request of a peace officer may withdraw blood for the purpose of determining the alcoholic content therein. This limitation does not apply to the taking of breath specimens. An emergency call for paramedic services takes precedence over a peace officer’s request for a paramedic to withdraw blood for determining its alcoholic content. A certified paramedic shall not withdraw blood for this purpose unless authorized by his or her employer to do so.
CAL. VEH. CODE § 23158(a) (West Supp. 2010).
147 Esayan, 5 Cal. Rptr. 3d at 550.
148 Id. at 549.
149 ARIZ. REV. STAT. ANN. § 28-1388(A) (2004) (“If blood is drawn under § 28-1321, only a physician, a registered nurse or another qualified person may withdraw blood for the purpose of determining the alcohol concentration or drug content in the blood. The qualifications of the individual withdrawing the blood and the method used to withdraw the blood are not foundational prerequisites for the admissibility of a blood alcohol content determination made pursuant to this subsection.”).
officers who have completed phlebotomy training. In *State v. May*, Arizona's appellate division found a police deputy to be a "qualified person" under the statute because he had attended a weeklong course in phlebotomy and had completed approximately 150 to 200 blood draws before the one at issue. This was despite the fact that the deputy had performed the blood draw while he and the suspect stood at the back of the police car—a procedure the court noted was a "slightly higher" risk, but nonetheless acceptable.

South Dakota has also given its statute a broad reading. In *State v. Sickler*, South Dakota found a drunk driver’s blood sample was drawn in a reasonable, medically-approved manner when it was performed in the poorly lit "drunk tank" of a county jail. During the procedure, the suspect was physically restrained by a deputy sheriff, while another deputy, who was a licensed practical nurse, performed the DWI blood draw. The deputy who performed the draw later testified that this was the first blood sample he had ever withdrawn for BAC testing, and that although the deputy had some previous medical training, he "kind of taught [himself]" to perform blood draws.

Similarly, in *State v. Daggett*, a Wisconsin court upheld the admissibility of a blood draw taken in a jail room, which, "although not a sterile environment," was acceptable to the court because there was no showing of any heightened risk to the safety or health

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152 *Id., 112 P.3d at 42.*
153 *Id. at 41–42.*
154 S.D. CODIFIED LAWS § 32-23-14 (2010) ("Only a physician, laboratory technician, registered nurse, physician's assistant, phlebotomist, licensed practical nurse, medical technician, medical technologist, or other person authorized pursuant to a certification, license, or training may withdraw blood for the purpose of determining the alcoholic content therein. This limitation does not apply to the taking of a breath or other bodily substance specimen. Such authorized persons, acting on the presumption of consent in § 32-23-10, and any hospital or facility employing such persons, are not liable and may not be held to pay damages to the party from whom the blood sample is withdrawn, if the withdrawal is administered with usual and ordinary care. No person authorized to withdraw blood under this section may be required or forced to withdraw blood for the purposes outlined in this chapter, unless required pursuant to a written agreement.").
156 *Id. at 73.*
157 *Id.*
158 *Id. at 73 n.2.*
159 *Id. at 75. (Henderson, J., dissenting).*
160 *State v. Daggett, 640 N.W.2d 546, 551 (Wis. Ct. App. 2001), cert. denied, 643 N.W.2d 96 (Wis. 2002).*
of the defendant.161

B. Blood Draw Statutes and "Substantial Compliance"

Originally, strict statutory compliance was required when applying a DWI statute.162 However, in light of the strong policy reasons for prosecuting drunk drivers, there has been an emerging tendency by other states to deny the suppression of chemical test results as long as there is "substantial compliance" with the relevant statute.163 The degree of compliance required is a common issue which often arises, especially with chemical tests, as states frequently pass laws which provide specific guidelines on the performance of chemical tests.

Perhaps in light of the problems associated with the former section 1194(4)(a)(1), substantial compliance did not go unnoticed in the New York courts. Consider the dissent filed by Justice Lawton of the Appellate Division, Fourth Department, in People v. Olmstead.164 At issue in that case was the admissibility of a blood sample drawn by a medical laboratory technician who was being supervised by a registered nurse, instead of a physician, as required by former section 1194(4)(a)(1). The majority suppressed the blood draw, reversing the trial court.165 Justice Lawton, however, agreed

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161 Id. at 550–51. The Wisconsin DWI blood draw statute reads:
Blood may be withdrawn from the person arrested for violation of s. 346.63(1), (2), (2m), (5) or (6) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, or a local ordinance in conformity with s. 346.63(1), (2m) or (5), or as provided in sub. (3)(am) or (b) to determine the presence or quantity of alcohol, a controlled substance, a controlled substance analog or any other drug, or any combination of alcohol, controlled substance, controlled substance analog and any other drug in the blood only by a physician, registered nurse, medical technologist, physician assistant or person acting under the direction of a physician.

WISC. STAT. § 343.305(5)(b) (Supp. 2009).


165 Id. at 837, 649 N.Y.S.2d at 623. Cf. State v. Merry, 191 P.3d 428, 431–32 (Mont. 2008) (Licensed practical nurse who drew driver's blood while subject to the offsite supervision and direction of on-call registered nurse was "acting under the supervision and direction of a
with the trial court, which found that the draw was performed in “substantial compliance” with section 1194(4)(a)(1). Lawton reasoned that the blood draw was acceptable because it was supervised by a registered nurse who was “insuring both [the] safety and accuracy [of the procedure]”—facts which address both of the concerns expressed by the New York Court of Appeals in its Moser holding.

Further, in the Appellate Division, Third Department case of People v. Steinhilber, at issue was the admissibility of a blood draw performed by a surgical resident who had passed his boards, but was not a licensed physician at the time he drew the suspect’s blood. Relying on legislative history, and the fact the resident “was practicing medicine under the umbrella of an attending physician,” the court reasoned the resident was “a ‘physician’ generally,” and therefore the blood draw fulfilled the requirements of former section 1194(4)(a)(1).

Other states with statutes similar to former section 1194(4)(a)(1) have been more lenient, when compared to New York, in allowing substantial compliance with their DWI blood draw statutes. Florida courts prefer substantial compliance, evidenced by the examination by the Supreme Court of Florida of a similar statute in Robertson v. State. In that case, the court denied a motion to suppress a blood test performed by an “unauthorized” medical professional. The courts holding focused on the “purpose” of DWI implied consent laws: (1) assurances that the blood test provides “reliable scientific evidence”; and (2) the protection of the suspect’s health. As both of these purposes were addressed, the blood test was found to be admissible by the court, which noted that so long as the blood draw

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166 Olmstead, 233 A.D.2d at 837, 649 N.Y.S.2d at 625 (Lawton, J., dissenting).
167 Id.
170 Id. at 959, 852 N.Y.S.2d at 439.
171 Id.
172 Id.
174 Robertson v. State, 604 So.2d 783 (Fla. 1992) (Note that the defendant sought suppression in this case because of the person who tested the blood—not who drew the blood.).
175 Robertson, 604 So.2d at 788.
176 Id. at 789.
procedure substantially complied with the guidelines of the statute, there was a presumption of admissibility.\textsuperscript{177}

Wisconsin courts have similarly applied substantial compliance. Wisconsin’s blood draw statute\textsuperscript{178}—which is similarly structured to the former section 1194(4)(a)(1)—also creates two groups of medical personnel who may perform blood draws: a (slightly larger) first group that may draw blood unsupervised, and a second group which must be “acting under the direction of a physician.”\textsuperscript{179}

In \textit{State v. Penzkofer},\textsuperscript{180} a Wisconsin court denied the suppression of a DWI blood draw, despite the draw being performed by an unsupervised laboratory assistant.\textsuperscript{181} The defendant argued that the blood results needed to be suppressed unless a physician gave express authorization for every draw.\textsuperscript{182} The court was unpersuaded and reasoned there were no grounds for suppression because hospital laboratories—including the personnel who work in them—were subject to “detailed and stringent standards in almost every aspect of their facilities and services.”\textsuperscript{183} Ultimately, these standards met both “the legislatures concern for . . . reliable and accurate results,”\textsuperscript{184} as well as “[the suspect’s] concern for safety.”\textsuperscript{185} The court went on to note that there could also be compliance with the statute even if the physician was not present and did not give express authorization to each blood draw: “the legislature could have chosen to require the test to be taken by or taken in the presence of a physician, but did not. Absent such a requirement, there is no discernable safeguard in a requirement for an individual directive in each case.”\textsuperscript{186}

Similarly, Michigan courts have applied substantial compliance. Under the Michigan statute,\textsuperscript{187} blood draws are performed

\textsuperscript{177} Id. at 791.
\textsuperscript{178} WISC. STAT. ANN. 343.305(5)(b) (2010).
\textsuperscript{179} Id.
\textsuperscript{180} State v. Penzkofer, 516 N.W.2d 774 (Wis. 1994).
\textsuperscript{181} Id. at 775.
\textsuperscript{182} Id. at 775–76; see also State v. Morgan, No. 2008AP2142-CR, 2009 WL 1544453, at *1 (Wis. App. Jun. 4, 2009).
\textsuperscript{183} Penzkofer, 516 N.W.2d at 776.
\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} MICH. COMP. LAWS ANN. § 257.625a(6)(c) (2006) ("A sample or specimen of urine or breath shall be taken and collected in a reasonable manner. Only a licensed physician, or an individual operating under the delegation of a licensed physician under section 16215 of the public health code, 1978 PA 388, MCL 333.16215, qualified to withdraw blood and acting in a medical environment, may withdraw blood at a peace officer's request to determine the amount of alcohol or presence of a controlled substance or both in the person's blood, as
exclusively by either a licensed physician or "an individual operating under the delegation of a licensed physician." In People v. Callon, a Michigan court allowed a DWI blood draw performed by a medical technician into evidence, despite there being no physician ordering him to withdraw the blood. The court reasoned that although there was no express command by a physician, the "delegation" requirement of the statute can be given a broad reading because the statute requires no direct supervision, "nor does the statute require that a licensed physician specifically delegate an individual to draw blood in each individual [DWI] case."

Minnesota has also recognized substantial compliance with its blood draw statute. Minnesota courts have reasoned that due to the remedial nature of DWI statutes, they should be "liberally interpreted in favor of the public interest and against the private interests of the drivers involved." Therefore, blood draws are admissible as long as they comply with the legislature's intent "to ensure the competency of the person withdrawing the blood and to protect the defendant's health."

In Olson v. Commissioner of Public Safety, Minnesota's Court of Appeals affirmed the admissibility of a blood draw performed by a phlebotomist—a position which was, at that time, not designated by the relevant Minnesota statute. The court reasoned that the

provided in this subsection. Liability for a crime or civil damages predicated on the act of withdrawing or analyzing blood and related procedures does not attach to a licensed physician or individual operating under the delegation of a licensed physician who withdraws or analyzes blood or assists in the withdrawal or analysis in accordance with this act unless the withdrawal or analysis is performed in a negligent manner.

188 Id.
190 Id. at 509.
191 Id. at 510–11.
192 The Minnesota statute, unlike the current and former section 1194(4)(a)(1), creates one group of authorized personnel who can draw blood from a DWI suspect:
Only a physician, medical technician, emergency medical technician-paramedic, registered nurse, medical technologist, medical laboratory technician, phlebotomist, or laboratory assistant acting at the request of a peace officer may withdraw blood for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or a hazardous substance.

194 Olson, 513 N.W.2d at 493.
195 Id.
196 Id. ("Only a physician, medical technician, physician's trained mobile intensive care paramedic, registered nurse, medical technologist or laboratory assistant acting at the request of a peace officer may withdraw blood for the purpose of determining the presence of
blood draw was admissible because the phlebotomist had followed the established procedure of the blood draw, and was also experienced enough under the state's standards to comply with the legislative intent. 197 The court emphasized that although it was not adding “phlebotomist” ad hoc to the statute, the facts showed that a phlebotomist could be considered a type of “laboratory assistant”—an occupation which was recognized by the statute.198 The court further noted that

it would not seem “pragmatic, then, for a court to impose a higher standard for phlebotomists than that standard imposed by the health care industry. If hospitals, physicians and other medical people, all who bear heavy responsibility for the lives and health of those in their care, see fit to trust [a phlebotomist] to follow correct medical procedures, it makes little sense for courts to find her untrained and unqualified.”199

The above Minnesota quotation accurately reflects the statutory disconnect apparent in former section 1194(4)(a)(1). New York’s medical community routinely allows trained individuals to draw blood without the direction and supervision of a physician, yet former section 1194(4)(a)(1) did not.200

V. CLOSING THE LOOPOLE: JACK SHEA’S LAW

On July 13, 2010—nearly nine years after Mr. Shea’s death201—legislation was passed in New York State which finally amends former section 1194(4)(a)(1). The statute reads:

(1) At the request of a police officer, the following persons may withdraw blood for the purpose of determining the alcoholic or drug content therein: (i) a physician, a registered professional nurse, a registered physician assistant, a certified nurse practitioner, or an advanced emergency medical technician as certified by the department of health;

alcohol . . .” (quoting MINN. STAT. ANN. § 169.123(3)(a) (repealed 2000) (emphasis added)).
197 Olson, 513 N.W.2d at 492–93.
198 Id. at 493. See State v. Pearson, 633 N.W.2d 81, 84 (Minn. Ct. App. 2001) (“While the term ‘medical laboratory assistant’ is not included in the statute, a medical laboratory assistant can be considered a specialized type of laboratory assistant.”); Bortnem v. Comm’r of Public Safety, 610 N.W.2d 703, 706 (Minn. Ct. App. 2000) (holding that a paramedic was not within the categories listed in the statute).
199 Olson, 513 N.W.2d at 494 (quoting People v. Randle, 538 N.E.2d 1253, 1255 (Ill. App. Ct. 5th Dist. 1989)).
201 Jack Shea Biography, supra note 34.
or (ii) under the supervision and at the direction of a physician, registered physician assistant or certified nurse practitioner acting within his or her lawful scope of practice, or upon the express consent of the person eighteen years of age or older from whom such blood is to be withdrawn: a clinical laboratory technician or clinical laboratory technologist licensed pursuant to article one hundred sixty-five of the education law; a phlebotomist; or a medical laboratory technician or medical technologist employed by a clinical laboratory approved under title five of article five of the public health law. This limitation shall not apply to the taking of a urine, saliva or breath specimen.\textsuperscript{202}

The new law resembles the earlier statute in terms of designating two different groups of medical professionals who may perform a blood draw to determine the BAC of a DWI suspect. The first group is authorized to perform unsupervised blood draws on DWI suspects, and consists of physicians, registered professional nurses, registered physician's assistants, certified nurse practitioners, and AEMTs.\textsuperscript{203} The second group, on the other hand, may perform blood draws on DWI suspects only when under the supervision, and at the direction of, a supervisor designated by the statute.\textsuperscript{204}

The second group actually consists of two subsets of medical professionals: (a) "supervisors," or medical professionals who may supervise and direct the blood draw, consisting of physicians, registered physician's assistants, or certified nurse practitioners; and (b) "supervisees," or medical professionals who may only draw blood under supervision of a professional ("supervisor") listed in group (a), or with the express consent of the suspect.\textsuperscript{205} Group (b) consists of clinical laboratory technicians, clinical laboratory technologists, phlebotomists, medical laboratory technicians, or medical technologists employed by an approved clinical laboratory.\textsuperscript{206}

Most importantly, Shea's Law makes three major changes: first, it expands the list of medical professionals authorized to draw blood unsupervised; second, it expands the list of "supervisors" who may authorize a DWI blood draw; and third, it allows DWI suspects to

\textsuperscript{\textit{202}} 2010 N.Y. Sess. Laws 413–14 (to be codified as amended at N.Y. VEH. & TRAF. L. § 1194(4)(a)(ii)).

\textsuperscript{\textit{203}} \textit{Id.}

\textsuperscript{\textit{204}} \textit{Id.}

\textsuperscript{\textit{205}} \textit{Id.}

\textsuperscript{\textit{206}} \textit{Id.}
consent to their blood being drawn unsupervised by a medical professional who would otherwise need to be supervised under the statute.

A. Expanded Class of Unsupervised Medical Professionals

Shea's Law expands the class of medical professionals who may perform an unsupervised blood draw with the addition of two medical professionals: certified nurse practitioners ("CNPs") and AEMTs.\(^{207}\)

The addition of CNPs to the list of persons who may perform unsupervised blood draws is a common sense change. In New York State, a CNP must be licensed as a registered professional nurse, and meet the educational standards established by the commissioner of education.\(^{208}\) CNPs further have the statutory authority to enter into practice agreements with physicians as long as the services provided by the CNP are performed according to both the written agreement of the physician and written practice protocols\(^{209}\)—meaning that CNPs often perform the same tasks as physicians.\(^{210}\)

The addition of AEMTs to the list of persons who may perform unsupervised blood draws is also a positive change; however, not extending this to emergency medical technicians ("EMT") leaves open the possibility that some DWI blood draws will still be suppressed.

In New York State, an AEMT is defined as "an [EMT] who has satisfactorily completed an advance course of training approved by the state council under regulations pursuant to section three thousand two of [the Public Health Law]."\(^{211}\) On the other hand, an EMT is defined as "an individual who meets the minimum requirements established by regulations pursuant to section three thousand two of [the Public Health Law] and who is responsible for administration or supervision of initial emergency medical care and

\(^{207}\) Id.

\(^{208}\) N.Y. EDUC. LAW §§ 6902(1), 6910 (McKinney 2010); see also N.Y. COMP. CODES R. & REGS. tit. 8, § 52.12 (2009).

\(^{209}\) N.Y. EDUC. LAW § 6902(3)(a).

\(^{210}\) Further, CNPs may prescribe and order regimens for: administering immunizations; treating anaphylaxis; administering purified protein derivative tests; and administering tests to determine the presence of the human immunodeficiency virus. N.Y. EDUC. LAW § 6909(4) (McKinney 2001).

transportation of sick or injured persons.” Despite a statutory difference between AEMTs and EMTs, in practice there is not an obvious difference to non-medical professionals, including police officers who order the DWI blood draws.

This inconspicuous difference becomes more problematic when considering the number of AEMTs and EMTs registered in New York State. According to the Department of Health, in New York State there are more than three times as many EMTs (36,994) as compared to AEMTs (9825).

Further, the New York State minimum staffing standards for the majority of ambulance services requires only an EMT—and not an AEMT—to be on staff when responding to a call, leaving the potential that in some instances, a police officer could accidentally request that an EMT, and not an AEMT, perform a blood draw on a DWI suspect.

**B. Expanded Class of Supervisors**

The second contribution of Shea’s Law—expanding the supervision power from physician-only to both PAs and CNPs—is arguably the most important. Originally, a physician was the only person allowed to supervise a blood draw; however, Shea’s Law now permits for both PAs and CNPs—in addition to physicians—to act as eligible blood draw supervisors. This was a common sense addition, as both PAs and CNPs were already given statutory authority to supervise DWI blood draws under the Public Health Law.

Additionally, as noted above, in New York physician’s assistants were already legally able to perform anything their supervising physicians are able to do, including the supervision of

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212 N.Y. PUB. HEALTH LAW § 3001(6); see also N.Y. COMP. CODES R. & REGS. tit. 10, § 800.3(m)-(o).
214 N.Y. PUB. HEALTH LAW § 3005-a (McKinney 2007); 65 N.Y. JUR. 2D Hospitals § 125 (2001).
215 See 1971 N.Y. Laws 1135 § 1 (“The demand for physician services far exceeds the capability of the present number of physicians to supply them. Physical limitations on the number of patients a physician can personally attend make the use of persons qualified to assist the physician in the provision of medical care essential if such care is to be uniformly available to all of the people of the state.”).
216 N.Y. PUB. HEALTH LAW § 3703(2) (McKinney Supp. 2010). See also supra Part III.C.
217 See discussion supra Part III.B.
blood draws.\textsuperscript{218} "In other words, if a physician assistant is practicing under the supervision\textsuperscript{219} of [a] ... physician, he is able to do everything that the ... physician would be able to do."\textsuperscript{220} By explicitly granting PAs the authority to supervise a blood draw, the state corrects the "misinterpretation" New York courts have given to "statutes that lack an explicit reference to PAs ... even if [the medical function] is fully within a PAs scope of practice."\textsuperscript{221}

Similarly, CNPs are also able to enter into practice agreements with physicians whereby the physician essentially delegates his work to the CNP—subject to the scope of the agreement, written practice protocols, and periodic reviews by the physician.\textsuperscript{222} Further, the additions of CNPs as blood draw supervisors makes sense because under the Shea's Law amendment, they are now able to perform a blood draw unsupervised themselves.\textsuperscript{223}

C. Addition of Express Consent

Under Shea's Law, a DWI suspect may also give express consent to an unsupervised blood draw by a medical professional who ordinarily would require supervision.\textsuperscript{224} It is important to note that the statute requires that a suspect give express consent to the blood draw. The requirement of the express consent provision serves as a check on power—giving DWI suspects the option to expressly choose whether an "unsupervised" blood draw can be performed on them by a medical professional—instead of perhaps allowing the police to infer the consent of the suspect.

As mentioned above, New York State has an implied consent law under which any person who operates a motor vehicle on a public highway is deemed to have given consent to a DWI blood draw whenever they are arrested or taken into custody for DWI.\textsuperscript{225}

\textsuperscript{218} \textsc{N.Y. Educ. Law} § 6542(1) (McKinney 2010).

\textsuperscript{219} "Supervision shall be continuous but shall not be construed as necessarily requiring the physical presence of the supervising physician at the time and place where such services are performed." N.Y. Educ. Law § 6542(3).


\textsuperscript{222} N.Y. Educ. Law § 6902(3)(a) (McKinney 2001).

\textsuperscript{223} N.Y. Veh. & Traf. Law § 1194(4)(a)(i) (as amended by 2010 N.Y. Sess. Laws 413–14 (McKinney)).

\textsuperscript{224} Id.

Additionally, section 1194 is recognized as an “implied consent statute.” Therefore, when “a person is unconscious or appears to be unconscious, he is deemed to have impliedly consented to a chemical [i.e., blood] test.” This means that ordinarily, “[i]n the case of an unconscious individual, a chemical test can be administered since he is deemed to have given his consent when he used the highway. It is not necessary that a person be given the opportunity to revoke his consent.”

However, Shea’s Law avoids the potential problem of the state abusing the implied consent of a DWI suspect by requiring the suspect’s express consent. This consent provision gives a statutory endorsement to courts who have been willing to find that the results of DWI blood tests are admissible when it can be shown that the defendant was coherent and fully capable of answering questions, and there is no showing of coercion, illegal conduct, or deception by the police.

Additionally, this provision overrules part of the Appellate Division, Third Department’s holding in People v. Miller which held that “[i]f blood is not drawn in accordance with [former section 1194(4)(a)(1)], even if defendant has consented to the withdrawal of his blood, the results of the blood test must be suppressed.”

Finally, by requiring express consent, the Legislature avoids another possible Equal Protection challenge against Shea’s Law.

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229 Ellis, 190 Misc. 2d at 105, 737 N.Y.S.2d at 238.
233 Id. at 708, 793 N.Y.S.2d at 232.
234 Note that the Court of Appeals has already addressed Equal Protection issues in Kates, 53 N.Y.2d at 596, 428 N.E.2d at 854–55, 444 N.Y.S.2d at 448–49 ("The distinction drawn between the conscious driver and the unconscious or incapacitated driver does not offend the equal protection clause. It was reasonable for the Legislature, concerned with avoiding potentially violent conflicts between the police and drivers arrested for intoxication, to provide that the police must request the driver's consent, advise him of the consequences of..."
Had Shea’s Law merely required a DWI suspect’s “consent,” it would have created two distinct classes of drivers—conscious and unconscious—where the former would be able to decline consenting to a blood test, and the latter would be forced to submit to a blood draw.

VI. CONCLUSION

Realistically and statistically, no single law is going to stop drunk driving forever, and it would be unrealistic to think that Shea’s Law will act as a panacea to New York’s drunk driving problem. However, that should not suggest that DWI legislation is a fool’s errand: studies illustrate that the overall effect of tougher state policies on drunk driving is a significant reduction in not only drunk driving, but drunkenness in general. Studies have further shown that “the probability of punishment”—regardless of what that punishment will be—is an “important deterrent [in DWIs].”

Shea’s Law will help ensure a higher probability of punishment for drunk drivers. As State Senator Martin Malavé Dilan noted, Shea’s Law will give “law enforcement the ability to facilitate an essential component to field sobriety testing. Having immediate access to these blood samples is critical to determining guilt or innocence in cases where drunk driving is suspected.”

Shea’s Law further closes an important loophole in New York’s battle against drunk driving. The loophole created by former section 1194(4)(a)(1) was very real and very obvious to any competent DWI defense attorney in New York. Below are two excerpts from practice guides authored by leading DWI defense attorneys in New York:

Remember, whenever you [the defense attorney] are dealing

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refusal and honor his wishes if he decides to refuse, but to dispense with these requirements when the driver is unconscious or otherwise incapacitated to the point where he poses no threat. Indeed there is a rational basis for distinguishing between the driver who is capable of making a choice and the driver who is unable to do so. Thus, denying the unconscious driver the right to refuse a blood test does not violate his right to equal protection.”


236 See supra notes 1, 22–33 and accompanying text.


239 Bill Strengthens Drunk Driving Laws, supra note 1.
with blood, it is imperative to get a copy of the complete hospital record. The record may not only contain any hospital consents that have been signed by [your] client, but may also shed light on just who actually drew and authorized the withdrawal of the blood.240

In an accident where the defendant is being taken to a hospital, police officers will frequently ask an EMT to withdraw blood from the defendant. This is particularly the case when they see that the EMTs are setting up an IV. Always check the qualifications of the person who drew the blood. This is a critical issue which can result in the suppression of the test result.241

The passage of Shea’s Law represents another important step in “the evolution of the relevant body of law [in New York State] governing the obtaining of blood samples to be used in the prosecution of cases involving a motorist suspected or charged with driving while intoxicated or impaired.”242 After all, “[c]learly, it has been the goal of the [New York State] Legislature to facilitate, not impede, the prosecution of cases involving serious car accidents caused by impaired or intoxicated drivers.”243

Drunk driving “is a deterrable offense that ends lots of innocent lives unnecessarily.”244 As Mr. Shea’s son, Jim, noted at the bill’s passage ceremony in July 2010: “I’m a little bit frustrated [that the bill took so long to pass], but I’m so happy because I know what this is going to mean to others that might get involved in the position our family was in.”245 Former section 1194(4)(a)(1) obstructed New York State’s ability to prosecute drunk drivers; and in terrible cases like Mr. Shea’s, former section 1194(4)(a)(i) obstructed justice.

240 EDWARD LOUIS FIANDACH, NEW YORK DRIVING WHILE INTOXICATED 681 (2d ed. 2004).
243 Id. at 42, 847 N.Y.S.2d at 662–63.
245 Knight, supra note 11.