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Protecting Victims of Domestic Abuse from an Overly Rigid Interpretation of the Implied Consent Law—*Axelberg v. Commissioner of Public Safety*

Allira Sharma

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**PROTECTING VICTIMS OF DOMESTIC ABUSE FROM AN
OVERLY RIGID INTERPRETATION OF THE IMPLIED
CONSENT LAW—AXELBERG V. COMMISSIONER
OF PUBLIC SAFETY**

Allira Sharma[†]

I.	INTRODUCTION.....	1623
II.	HISTORY AND CONTENT OF THE IMPLIED CONSENT LAW....	1624
	A. <i>Challenging the Revocation: Administrative and Judicial Hearings</i>	1627
	B. <i>Challenges to Minnesota’s Implied Consent Law</i>	1630
	1. <i>Right to Due Process Not Violated by Lack of Hearing Prior to License Revocation</i>	1631
	2. <i>Arguing that the Statute Is Coercive</i>	1631
	3. <i>Right to Counsel at the Testing Stage of the Implied Consent Process</i>	1632
	C. <i>The History of the Defense of Necessity</i>	1632
III.	THE AXELBERG DECISION	1633
	A. <i>Material Facts of Axelberg</i>	1633
	B. <i>Procedural Posture</i>	1636
	C. <i>The Minnesota Supreme Court’s Decision</i>	1636
IV.	ANALYSIS OF AXELBERG.....	1639
	A. <i>Ms. Axelberg Acted out of Necessity</i>	1639
	B. <i>Minnesota Courts Previously Had Not Foreclosed the Possibility that a Necessity Defense May Be Raised When Appropriate</i>	1640
	C. <i>The Court’s Absurd Interpretation of Legislative Intent</i>	1641
	1. <i>The Court’s Narrow Interpretation of the Scope of Judicial Review Yields an Unreasonable Result</i>	1641

[†] JD Candidate, William Mitchell College of Law, 2017; BA, International Relations, University of California, Davis, 2004. The author would like to thank the dedicated staff and volunteers of Tubman for the opportunity to serve and learn how to be a better advocate. But most importantly, the author would like to thank her family and two children, Chloe and Cameron, for their ardent support.

2015] *AXELBERG V. COMMISSIONER OF PUBLIC SAFETY* 1623

 2. *That the Defense of Necessity May Be Available for Test Refusal but Not for Driving While Impaired Is an Absurd Result*..... 1642

 D. *Courts Have Considered Issues Beyond the Ten Enumerated Questions in the Past*..... 1643

 1. *Dutcher v. Commissioner of Public Safety*..... 1643

 2. *Friedman v. Commissioner of Public Safety* 1644

 E. *The Court Does Not Always Strictly Adhere to the Limits Imposed by Statutory Text* 1644

 F. *Refuting the Majority’s Expressio Unius Interpretation* 1646

 G. *Quasi-Criminal Nature of the Implied Consent Law*..... 1647

V. *WHAT CAN BE DONE GOING FORWARD TO REMEDY THIS PROBLEM?* 1649

 A. *How the Court Should Have Decided Axelberg*..... 1649

 B. *How the Legislature Can Address the Problem*..... 1650

 C. *Allowing the Affirmative Defense of Necessity in Implied Consent Cases Is Good Public Policy*..... 1651

VI. *CONCLUSION* 1653

I. INTRODUCTION

Minnesota’s implied consent law was enacted to prevent the obvious dangers that intoxicated drivers present to the public.¹ However, the implied consent law is based on the underlying assumption that drivers are free to choose whether to drive intoxicated;² but what happens when it turns out that this assumption is flawed because the driver was forced to choose between driving while intoxicated to escape a brutal attacker or staying and risking physical harm?³ The Minnesota Supreme Court

1. See generally OFFICE OF TRAFFIC SAFETY, MINN. DEP’T OF PUB. SAFETY, MINNESOTA IMPAIRED DRIVING FACTS 2013 (2014), available at <https://dps.mn.gov/divisions/ots/reports-statistics/Documents/minnesota-impaired-driving-facts-2013.pdf> (“387 people died in traffic crashes and 81 (21%) were in crashes involving impaired (alcohol concentration of .08% or greater) drivers. . . . 2,300 people suffered injuries in alcohol-related crashes. . . . 25,719 motorists were arrested for DWI One out of every seven licensed Minnesota drivers has at least one DWI.”).

2. See *infra* Part II.

3. See Brief of Minnesota Society for Criminal Justice and Minnesota Ass’n of Criminal Defense Lawyers as Amicus Curiae at 4–5, *Axelberg v. Comm’r of Pub. Safety*, 848 N.W.2d 206 (Minn. 2014) (No. A12-1341), 2013 WL 8633181, at *4–5

recently held in *Axelberg v. Commissioner of Public Safety* that the Minnesota Commissioner of Public Safety has the authority to revoke the driver's license of an intoxicated person who is fleeing from domestic abuse in a motor vehicle.⁴ The court decided that not only does the Commissioner have the right to revoke the driver's license, but the driver cannot even present evidence as to why he or she drove while intoxicated or raise the affirmative defense of necessity during the implied consent hearing.⁵ The court reasoned that because the implied consent law does not explicitly permit the driver to raise the defense,⁶ under the plain meaning of the statute, the court cannot hear the defense, no matter how severe the situation.⁷

This Note begins by exploring the history and elements of the implied consent law in Minnesota.⁸ Then, this Note discusses the facts of *Axelberg*⁹ as well as the court's analysis and decision.¹⁰ This Note argues that the court incorrectly concluded that the affirmative defense of necessity cannot be raised to challenge driver's license revocation in implied consent hearings.¹¹ Finally, this Note concludes by discussing how the court should have decided *Axelberg*, how the legislature can remedy the problem, and the public policy reasons that support amending the implied consent law.¹²

II. HISTORY AND CONTENT OF THE IMPLIED CONSENT LAW

The first implied consent law in Minnesota was enacted in 1961 as a way to incentivize any person exercising control over a motor vehicle to agree to chemical testing to determine the

("No sane individual would ask that an abused woman utterly submit to domestic abuse and take her beating until the abuser decided he was finished. Likewise, fighting back is an absurd option; escalating a fight against a dominant abuser vastly increases the odds of someone—abuser or abused—ending up dead."); *see also Axelberg*, 848 N.W.2d 206.

4. *Axelberg*, 848 N.W.2d 206.

5. *See id.* at 207–08.

6. *See* MINN. STAT. § 169A.53, subdiv. 3 (2014).

7. *See Axelberg*, 848 N.W.2d at 208–09.

8. *See infra* Part II.

9. *See infra* Part III.A.

10. *See infra* Part III.B–C.

11. *See infra* Part IV.

12. *See infra* Part V.

amount of alcohol in his or her system.¹³ The Minnesota implied consent law has undergone many changes since it was enacted, but the basic premise remains: refusal to submit to a chemical test or testing above the legal limit for alcohol concentration results in license revocation.¹⁴ In 1971, it became “a *per se* violation” for an adult with a blood alcohol content of 0.10% or more “to drive, operate, or be in physical control” of a vehicle.¹⁵ Further, Minnesota’s implied consent law is imposed alongside criminal penalties for “driving while impaired” (DWI).¹⁶ Even though these systems are significantly entwined, the Minnesota Supreme Court has determined that because the penalties associated with the implied consent law are not punitive, the implied consent law is civil in nature.¹⁷

The primary purpose of the implied consent law is to promote public safety on roadways by deterring driving while intoxicated.¹⁸

13. See 9A HENRY W. MCCARR & JACK S. NORDBY, MINNESOTA PRACTICE: CRIMINAL LAW AND PROCEDURE § 56:2 (4th ed. 2014).

14. See *id.* Testing became mandatory in 1984 “and the administrative penalty for refusing testing was increased.” *Id.*

15. *Id.* (“This created the symbiotic relationship between the DWI statute and the Implied Consent statute.”).

16. See MINN. STAT. § 169A.01 (2014).

17. See *State v. Hanson*, 543 N.W.2d 84, 85 (Minn. 1996) (“Because civil license revocation pursuant to the implied consent statute can fairly be characterized as remedial, we hold that Minnesota’s statutory scheme of civil license revocation followed by criminal prosecution is constitutional under double jeopardy principles.”); see also MARGY WALLER & MARK ALLEN HUGHES, WORKING FAR FROM HOME: TRANSPORTATION AND WELFARE REFORM IN THE TEN BIG STATES I (1999), available at http://www.progressivepolicy.org/wp-content/uploads/2014/06/1999.08.01-Waller-and-Alan-Hughes_Working-Far-From-Home_Transportation-and-Welfare-Reform-in-the-Ten-Big-States.pdf (“In most cases, the shortest distance between a poor person and a job is along a line driven in a car. Prosperity in America has always been strongly related to *mobility* and poor people work hard for *access* to opportunities.”). See generally Nick Pinto, *Do DWI Laws Work?*, CITYPAGES (June 11, 2010), <http://www.citypages.com/2010-06-09/news/do-dwi-laws-work/> (“But what some people find even more troubling is that the two-track system of parallel criminal and civil penalties appears to be stacked against the poor and indigent. It’s hard to find a lawyer in Minnesota who’ll represent a DWI case for less than \$500. Those who can’t afford a lawyer for their criminal case get assigned a public defender Since the implied consent hearing is civil, if you can’t afford a lawyer, you’ll be going head-to-head with the state with no one to represent you.”).

18. *State, Dep’t of Highways v. Halvorson*, 288 Minn. 424, 425, 181 N.W.2d 473, 474 (1970).

The implied consent law: (a) requires the driver take a test to determine if he or she is under the influence of alcohol or a controlled substance;¹⁹ (b) imposes penalties for refusal to take a chemical test;²⁰ (c) permits the arresting officer to compel testing if the officer “has probable cause to believe the person has violated the criminal vehicular homicide and injury laws”;²¹ and (d) affords the driver “the right to consult with an attorney,” so long as consultation does not “unreasonably delay administration of the test.”²²

The implied consent law applies to all people who “drive, operate, or [exercise] physical control of any motor vehicle.”²³ “Physical control” includes much more conduct than simply driving under the influence,²⁴ and the question of what constitutes “physical control” continues to be an issue for courts.²⁵ Minnesota courts have found that operability of the vehicle is not necessary to find physical control.²⁶ In particular, courts have interpreted “physical control” to include sleeping in your car,²⁷ wandering around your vehicle,²⁸ switching places with the driver,²⁹ or sitting inside an immobile vehicle.³⁰ However, it seems that there are limits

19. MINN. STAT. § 169A.51, subdiv. 2(a)(1).

20. *Id.* § 169A.51, subdiv. 2(a)(2).

21. *Id.* § 169A.51, subdiv. 2(a)(3).

22. *Id.* § 169A.51, subdiv. 2(a)(4).

23. *Id.* § 169A.20, subdiv. 1; *see also id.* § 169A.51, subdiv. 1(a).

24. *See State v. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010) (“The term ‘physical control’ is more comprehensive than either the term to ‘drive’ or to ‘operate.’” (citing *State v. Harris*, 295 Minn. 38, 43, 202 N.W.2d 878, 881 (1972))).

25. *See id.* at 237 (finding that a person sleeping in the driver’s seat is in physical control of the motor vehicle); *see also State v. Starfield*, 481 N.W.2d 834, 839 (Minn. 1992) (holding that intent to drive is not an element needed to establish physical control).

26. *Starfield*, 481 N.W.2d at 838–39 (finding that the driver was in physical control of the vehicle even though the vehicle was stuck in a snow-filled ditch because she was in close proximity of the operating controls of the vehicle).

27. *Ledin v. Comm’r of Pub. Safety*, 393 N.W.2d 433, 434 (Minn. Ct. App. 1986) (holding that revocation was proper when an intoxicated person was discovered sleeping in a car parked on the street).

28. *State v. Woodward*, 408 N.W.2d 927, 928 (Minn. Ct. App. 1987) (finding that the driver was in physical control of the vehicle when she was discovered standing at the rear of her car).

29. *State v. Prior*, 356 N.W.2d 754, 755 (Minn. Ct. App. 1984) (holding that the driver was in physical control of the vehicle after he switched places with the other person in the car after they stopped in a parking lot).

30. *See Starfield*, 481 N.W.2d at 838 (stuck in snow-filled ditch); *Abeln v.*

when determining what constitutes physical control over a vehicle. The Minnesota Court of Appeals determined that a person sleeping in the front seat of the vehicle in the driveway was not in physical control when the car occupant had left his house to avoid a domestic quarrel.³¹ Yet, this decision was limited to criminal DWI cases.³²

Under the implied consent law, a test to determine alcohol concentration may be required when an officer has probable cause to believe that the person was driving under the influence.³³ When determining whether the person has been driving under the influence, the officer must establish a temporal connection between the act of driving and the person's intoxication.³⁴ The officer often does this by asking how long ago the vehicle was driven or by asking the driver if he or she has consumed any alcohol before or while driving.³⁵

A. *Challenging the Revocation: Administrative and Judicial Hearings*

The process of revocation begins when the commissioner receives a certification from a police officer stating that the driver either refused the chemical test or submitted to a chemical test for the presence of alcohol and the test results indicated an alcohol concentration of 0.08% or higher.³⁶ Revocation becomes effective at the time the police officer or Commissioner of Public Safety provides notice to the driver and an order of the intent to revoke

Comm'r of Pub. Safety, 413 N.W.2d 546, 547 (Minn. Ct. App. 1987) (dead battery); *Woodward*, 408 N.W.2d at 927 (flat tire).

31. See *State v. Pazderski*, 352 N.W.2d 85, 86 (Minn. Ct. App. 1984).

32. *Id.* at 87; see, e.g., *State v. Hage*, 595 N.W.2d 200, 207 (Minn. 1999) (holding that the driver was able to raise the defense of necessity against a criminal charge of DWI).

33. MINN. STAT. § 169A.51, subdiv. 1(b) (2014). Additionally, one of the four factors listed in subdivision 1(b) has to be present in addition to probable cause for the alcohol test to be required. *Id.*

34. See *Eggersgluss v. Comm'r of Pub. Safety*, 393 N.W.2d 183, 185 (Minn. 1986); *Bohlig v. Comm'r of Pub. Safety*, 379 N.W.2d 714, 716 (Minn. Ct. App. 1986).

35. See *Lovato v. Comm'r of Pub. Safety*, No. A09-0143, 2009 WL 2928646, at *3 (Minn. Ct. App. Sept. 15, 2009) (holding that there was a temporal connection between the drinking and driving where the vehicle was parked and the driver admitted that she had been drinking).

36. MINN. STAT. § 169A.52, subdivs. 1, 4.

the driver's license is received.³⁷ The driver is issued a seven-day temporary license if he or she had valid driving privileges at the time of revocation.³⁸

There is a two-prong system for challenging the revocation.³⁹ The driver may seek administrative and judicial review of the license revocation for test failure or refusal under the implied consent law.⁴⁰ The administrative and judicial review proceedings are separate and not outcome-determinative.⁴¹ The administrative review can be requested in writing any time during the revocation period.⁴² The decision of the administrative review hearing is final and is not subject to judicial review.⁴³ The administrative reviewer may consider evidence regarding why the license was revoked but also "any other material information" to determine whether "sufficient cause exists" for revocation.⁴⁴

The petition for judicial review must be filed in the county where the alleged offense occurred within thirty days after the notice and order of revocation.⁴⁵ The petition must state "with specificity" the reasons why the driver is seeking rescission of the revocation.⁴⁶ The purpose is to inform both the Commissioner and the court of what is at issue so that time and money are not wasted on undisputed matters.⁴⁷ If the driver challenges the revocation,⁴⁸

37. *Id.* § 169A.52, subdiv. 6. *But see* H.R. 1305, 86th Leg., Reg. Sess. (Minn. 2009). This bill would have delayed license revocation and other administrative penalties for drivers suspected of driving under the influence until a conviction or guilty plea. *See id.* It was most likely opposed because politicians suspected it would weaken DWI deterrence by allowing continued driving after arrest.

38. MINN. STAT. § 169A.52, subdiv. 7(c).

39. *Id.* § 169A.53, subdivs. 1–2.

40. *Id.*

41. *See Rancour v. Comm'r of Pub. Safety*, 355 N.W.2d 462, 464 (Minn. Ct. App. 1984) ("[T]he administrative review . . . and the judicial review . . . are separate and unrelated proceedings.").

42. MINN. STAT. § 169A.53, subdiv. 1. The Commissioner will review the evidence and reports, render an administrative decision, and provide notice of that decision within fifteen days. *Id.*

43. *See Kleven v. Comm'r of Pub. Safety*, 399 N.W.2d 153, 155 (Minn. Ct. App. 1987) (holding that administrative review proceedings of license revocation under the implied consent law are not reviewable).

44. MINN. STAT. § 169A.53, subdiv. 1.

45. *Id.* § 169A.53, subdiv. 2.

46. *Id.* § 169A.53, subdiv. 2(b)(3).

47. *Palbicki v. Comm'r of Pub. Safety*, 347 N.W.2d 512, 515 (Minn. Ct. App. 1984).

the district court is then required to hold an implied consent hearing.⁴⁹

Judicial reviews and implied consent hearings are conducted according to the Minnesota Rules of Civil Procedure.⁵⁰ Discovery is mandatory but limited to the following information: notice of revocation, the chemical test record, the peace officer's certificate, and disclosure of potential witnesses.⁵¹ Additionally, the constitutional protections of presumption of innocence and the requirement of proof beyond a reasonable doubt are not applied to the implied consent hearings because the court has held that such hearings are civil in nature.⁵² Finally, the burden of proof is on the Commissioner to make a prima facie case by a preponderance of the evidence.⁵³

Under Minnesota Statute section 169A.53, the scope of the issues for the implied consent hearing are framed as questions to determine whether (1) there was probable cause for the arrest;⁵⁴ (2) the person was lawfully arrested;⁵⁵ (3) the person was involved in a traffic accident;⁵⁶ (4) the person refused to take the preliminary screening test;⁵⁷ (5) the screening test indicated an alcohol concentration of 0.08% or more;⁵⁸ (6) the implied consent advisory warning was administered properly;⁵⁹ (7) the person

48. See Kristi Nielsen, *Implied Consent*, in MINNESOTA DWI DESKBOOK § 2.1 (3d ed. 2013) ("Approximately fifteen percent of drivers whose driver's licenses are revoked under the implied consent law challenge their revocations.")

49. MINN. STAT. § 169A.53, subdvs. 2-3; see also *Bell v. Burson*, 402 U.S. 535, 539 (1971) ("Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.")

50. MINN. STAT. § 169A.53, subd. 2.

51. *Id.*

52. *State, Dep't of Highways v. Halvorson*, 288 Minn. 424, 431, 181 N.W.2d 473, 477 (1970).

53. *King v. Comm'r of Pub. Safety*, 366 N.W.2d 613, 615 (Minn. Ct. App. 1985) (citing *Halvorson*, 288 Minn. at 424, 181 N.W.2d at 473).

54. MINN. STAT. § 169A.53, subd. 3(b)(1).

55. *Id.* § 169A.53, subd. 3(b)(2).

56. *Id.* § 169A.53, subd. 3(b)(3).

57. *Id.* § 169A.53, subd. 3(b)(4).

58. *Id.* § 169A.53, subd. 3(b)(5).

59. *Id.* § 169A.53, subd. 3(b)(6).

refused the test;⁶⁰ (8) the test indicated the presence of an alcohol concentration of 0.08% or more of any controlled substance in Schedule I or II, other than marijuana;⁶¹ (9) the test showed an alcohol concentration of 0.04% or more when driving a commercial vehicle;⁶² and (10) the testing method was valid and reliable.⁶³ The evidence that can be considered at the judicial hearing is more constrained than the evidence that may be considered during the administrative hearing.⁶⁴

It is notable that Minnesota courts have recognized additional issues that can be broadly interpreted as part of the scope of implied consent hearings.⁶⁵ Courts have permitted evidence to be introduced regarding whether a driver was actually driving, operating, or in physical control of a motor vehicle.⁶⁶ Courts have heard whether a license can be revoked when the driver became intoxicated after driving and getting into a vehicle collision but before taking a chemical test.⁶⁷ And lastly, courts have heard whether a driver was so incapacitated that he or she was incapable of test refusal.⁶⁸

B. Challenges to Minnesota's Implied Consent Law

The history of the implied consent law in Minnesota has been riddled with challenges such as harsher administrative sanctions, criminal penalties, more relaxed constitutional safeguards, and the

60. *Id.* § 169A.53, subdiv. 3(b)(7).

61. *Id.* § 169A.53, subdiv. 3(b)(8).

62. *Id.* § 169A.53, subdiv. 3(b)(9).

63. *Id.* § 169A.53, subdiv. 3(b)(10).

64. *Id.* § 169A.53, subdivs. 1–2; *see also* *Axelberg v. Comm'r of Pub. Safety*, 848 N.W.2d 206, 215 (Minn. 2014) (Lillehaug, J., dissenting) (“It is troubling that, under the majority’s reading, the statute gives an administrative reviewer authority to do justice, while the judiciary cannot.”).

65. *See* 31 DOUGLAS HAZELTON, MINNESOTA PRACTICE: MINNESOTA DWI HANDBOOK § 2:31 (2014–2015 ed.).

66. *See* *Roberts v. Comm'r of Pub. Safety*, 371 N.W.2d 605, 606 (Minn. Ct. App. 1985) (finding that a sleeping, intoxicated person in the front seat is not in physical control of the vehicle when the driver had no knowledge that he was placed in his car and his car was inoperable).

67. *See* *Dutcher v. Comm'r of Pub. Safety*, 406 N.W.2d 333, 336 (Minn. Ct. App. 1987) (reasoning that post-accident consumption of alcohol is an affirmative defense that can be used during an implied consent hearing).

68. *See* *Thornton v. Comm'r of Pub. Safety*, 384 N.W.2d 606, 608 (Minn. Ct. App. 1986) (holding that a driver was capable of making a reasoned test refusal).

quest for more DWI arrests.⁶⁹ The following issues highlight the confusion created by Minnesota's statutory system of parallel criminal and civil penalties for test refusal and testing above the legal limit. Moreover, the challenges to the implied consent law illustrate the changing and elusive nature of this area of law.

1. *Right to Due Process Not Violated by Lack of Hearing Prior to License Revocation*

Revocation a driver's license is a procedure that is subject to the Due Process Clause of the Fourteenth Amendment.⁷⁰ However, the due process requirements applicable to driver's license revocations are "flexible."⁷¹ In *Dixon v. Love*, the United States Supreme Court weighed the state's interest in road safety against the need for a full evidentiary hearing prior to an administrative revocation of the license.⁷² The Court determined that procedural due process does not require a full evidentiary hearing prior to revocation of a license where the opportunity for a hearing is provided later.⁷³ The Minnesota Supreme Court decided similarly on several occasions that a pre-hearing license revocation does not violate procedural due process.⁷⁴

2. *Arguing that the Statute Is Coercive*

Minnesota courts have rejected the idea that the implied consent law is coercive because it impermissibly extracts consent by

69. See *infra* Part II.B.1–2; see also 1 PATRICK T. BARONE & JOHN A. TARANTINO, DEFENDING DRINKING DRIVERS § 100 (2d ed. 30th rev. 1986) ("Grass roots lobbying efforts have resulted in stiffer penalties, relaxed constitutional safeguards and attitude reformation in the legislatures and the judiciary.").

70. See *Bell v. Burson*, 402 U.S. 535, 543 (1971).

71. *Goldsworthy v. State, Dep't of Pub. Safety*, 268 N.W.2d 46, 48 (Minn. 1978).

72. *Dixon v. Love*, 431 U.S. 105, 114 (1977) ("Far more substantial than the administrative burden, however, is the important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard.").

73. *Id.* at 115.

74. See *Davis v. Comm'r of Pub. Safety*, 517 N.W.2d 901, 904–05 (Minn. 1994) (holding that the length of revocation prior to the hearing is reasonable, the hardship relief is generally available after the waiting period, administrative review is available, and that there is an interest in protecting the safety of the public), *superseded by statute*, MINN. STAT. § 169A.51, subdiv. 2 (2004), *as recognized in State v. Melde*, 725 N.W.2d 99, 106 (Minn. 2006); see also *State, Dep't of Pub. Safety v. Juncewski*, 308 N.W.2d 316, 318 (Minn. 1981).

threatening criminal penalties for test refusal.⁷⁵ After the implied consent statute was amended to make test refusal a crime, the Minnesota Supreme Court determined that the possibility of criminal charges do not compel drivers to refuse the test but, rather, encourages them to submit to the test.⁷⁶ Recently in *State v. Brooks*, the Minnesota Supreme Court determined that because the driver was read the implied consent advisory,⁷⁷ the officer made it clear that the driver had a choice of whether to submit to testing.⁷⁸

3. *Right to Counsel at the Testing Stage of the Implied Consent Process*

In *Friedman v. Commissioner of Public Safety*, the Minnesota Supreme Court held that the Minnesota Constitution gives a driver a limited right to consult with an attorney before deciding whether to submit to chemical testing for blood alcohol concentration.⁷⁹ This holding highlights the confusion between the civil and criminal aspects of the implied consent process, because typically the right to consult an attorney is permitted only for criminal offenses.⁸⁰

C. *The History of the Defense of Necessity*

“The defense of necessity is a narrow one, but it is deeply rooted in our legal system” and is a valid common-law defense in both criminal cases and civil tort actions.⁸¹ Necessity is commonly known as the “choice of evils” defense, where conduct that is otherwise banned is justified in order to prevent something worse from happening.⁸² Necessity can be used as a defense only if:

75. See *State v. Mellett*, 642 N.W.2d 779, 783–85 (Minn. Ct. App. 2012).

76. See *McDonnell v. Comm’r of Pub. Safety*, 473 N.W.2d 848, 855–56 (Minn. 1991) (holding that the refusal statute is not impermissibly coercive).

77. MINN. STAT. § 169A.51, subdiv. 2 (2014).

78. 838 N.W.2d 563, 569 (Minn. 2013).

79. 473 N.W.2d 828, 837 (Minn. 1991).

80. *Id.*; see also *Maietta v. Comm’r of Pub. Safety*, 663 N.W.2d 595, 600 (Minn. Ct. App. 2003) (finding that a driver cannot claim ineffective assistance of counsel because implied consent hearings are civil in nature); 9A MCCARR & NORDBY, *supra* note 13, § 56:70.

81. *Axelberg v. Comm’r of Pub. Safety*, 848 N.W.2d 206, 214 (Minn. 2014) (Lillehaug, J., dissenting) (citing *State v. Johnson*, 289 Minn. 196, 200–02, 183 N.W.2d 541, 544–45 (1971)).

82. 9 MCCARR & NORDBY, *supra* note 13, § 47:21.

“(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 harm.”⁸³ The defense can be used “only in emergency situations where the peril is instant, overwhelming, and leaves no alternative but the conduct in question.”⁸⁴ The defense cannot be used when the emergency could have been avoided by taking precautions or if the person placed themselves in the position simply because it was more convenient.⁸⁵ Minnesota recognizes necessity as a defense against the criminal charge of DWI when the driver is forced by specific circumstances to drive while intoxicated.⁸⁶

III. THE AXELBERG DECISION

A. *Material Facts of Axelberg*

On Memorial Day weekend in 2011, Jennifer Marie Axelberg (Ms. Axelberg) and her husband Jason Axelberg (Mr. Axelberg) traveled to Mr. Axelberg’s parents’ remote lake cabin in Kanabec County, Minnesota.⁸⁷ On Monday, they walked to Fish Lake Resort to have drinks at the resort’s tavern.⁸⁸ At some point, the Axelbergs began arguing.⁸⁹ According to Mr. Axelberg, Ms. Axelberg did not provoke the argument.⁹⁰ The couple walked back to the cabin later

83. *State v. Rein*, 477 N.W.2d 716, 717 (Minn. Ct. App. 1991) (citing *United States v. Seward*, 687 F.2d 1270, 1270 (10th Cir. 1982)). In addition to the three elements listed, necessity also requires that “the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendant’s breach of the law.” *Id.* (quoting *Seward*, 687 F.2d at 1275).

84. *State v. Johnson*, 289 Minn. 196, 199, 183 N.W.2d 541, 543 (1971).

85. *Id.*

86. *See State v. Hage*, 595 N.W.2d 200, 202, 207 (Minn. 1999).

87. Appellant’s Brief, Addendum & Appendix at 3, *Axelberg v. Comm’r of Pub. Safety*, 831 N.W.2d 682 (Minn. Ct. App. 2013) (No. A12-1341), 2012 WL 8453648, at *3.

88. *Id.*

89. *Id.*

90. *Id.* This fact is important for the defense of necessity but also demonstrates the ingrained belief that victims of domestic violence are to blame if they could have provoked the attack with words. Laurie Kratky Dore, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO ST. L.J. 665, 687 n.95 (1995) (“As recognized by one court: ‘Some popular misconceptions about battered women include the beliefs that they are masochistic and actually enjoy their beatings, that they purposely provoke their

in the night without conflict, but their argument started again after they arrived at the cabin.⁹¹ The Axelbergs were intoxicated from the drinks consumed at Fish Lake Resort.⁹² Ms. Axelberg was leaning against their car, which was parked in the driveway outside the cabin, while the argument continued.⁹³ Mr. Axelberg stood between the cabin and the car.⁹⁴ The argument became physical when “Mr. Axelberg pushed [Ms. Axelberg] in the chest and hit her in the head twice.”⁹⁵

Ms. Axelberg’s options were limited because Mr. Axelberg was blocking her path to retreat into the cabin.⁹⁶ She did not want to leave the property by foot because the road was unfamiliar and unlit; she also thought that her husband would catch up to her if she ran down the road.⁹⁷ Ms. Axelberg did not seek help from the neighbors because there were few other cabins in the area and she was not familiar with any of the inhabitants.⁹⁸ Lastly, Ms. Axelberg was unable to call the police because Mr. Axelberg had taken her cell phone, and there was no landline in the cabin.⁹⁹

After considering all these options, Ms. Axelberg decided to seek refuge in the car.¹⁰⁰ She locked all the doors to stop any further attacks from Mr. Axelberg.¹⁰¹ Ms. Axelberg “testified [that] she intended to use the car only as a barrier to her husband and not to drive away from the scene.”¹⁰² However, Mr. Axelberg jumped on the hood of the car and punched the windshield so hard “that he spidered the glass.”¹⁰³ Ms. Axelberg testified that she feared he would break the windshield and would be able to reach

husbands into violent behavior, and, most critically, that women who remain in battering relationships are free to leave their abusers at any time.” (quoting *State v. Kelly*, 478 A.2d 364, 370 (N.J. 1984)).

91. Appellant’s Brief, Addendum & Appendix, *supra* note 87, at 3.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 4.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 4–5.

101. *Id.*

102. *Axelberg v. Comm’r of Pub. Safety*, No. 33-CV-11-292, 2012 WL 8527893, at *2 (Minn. Dist. Ct. July 3, 2012), *aff’d*, 831 N.W.2d 682 (Minn. Ct. App. 2013), *aff’d*, 848 N.W.2d 206 (Minn. 2014).

103. *Id.*

her, so she started the car and backed out of the driveway.¹⁰⁴ Mr. Axelberg jumped off the car but continued to shout and run after Ms. Axelberg.¹⁰⁵ Ms. Axelberg remembered the route to Fish Lake Resort and decided to drive nine-tenths of a mile back to the resort.¹⁰⁶ Mr. Axelberg started walking to the resort in pursuit of Ms. Axelberg.¹⁰⁷ Ms. Axelberg arrived at the resort, parked, and remained in the car because she was “not sure what to do.”¹⁰⁸ Mr. Axelberg arrived at the resort soon after Ms. Axelberg and continued to act aggressively.¹⁰⁹ A third party observed the fight and called the police.¹¹⁰

Kanabec County Deputy Justin Frisch arrived at the resort around 2:28 a.m.¹¹¹ He observed the vehicle, Ms. Axelberg, Mr. Axelberg, and the third party in the parking lot.¹¹² Deputy Frisch spoke with the Axelbergs and learned that there was an argument and that Ms. Axelberg had fled to the resort in the car.¹¹³ Subsequently, Mr. Axelberg was charged with domestic assault and disorderly conduct,¹¹⁴ and Ms. Axelberg was arrested for driving while under the influence of alcohol.¹¹⁵ Ms. “Axelberg was asked to take a chemical test for the presence of alcohol.”¹¹⁶ She agreed to take the urine test, which showed an alcohol concentration of 0.16.¹¹⁷

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* “Deputy Frisch does not recall whether [Ms. Axelberg] was in the vehicle at this time.” *Id.*

113. *Id.*

114. *Id.* Mr. Axelberg pleaded guilty to both counts of domestic assault and disorderly conduct. *Id.* at *2 n.1.

115. *Id.* at *2.

116. *Axelberg v. Comm’r of Pub. Safety*, 848 N.W.2d 206, 207 (Minn. 2014).

117. *Id.* (citing MINN. STAT. § 169A.52, subdiv. 2(1) (2012)) (outlining elements of the crime with which Ms. Axelberg was charged).

B. *Procedural Posture*

The Commissioner of Public Safety revoked Ms. Axelberg's driver's license¹¹⁸ pursuant to Minnesota Statute section 169A.52, subdivision 4.¹¹⁹ Ms. "Axelberg sought judicial review of her [license] revocation."¹²⁰ At the implied consent hearing, Ms. Axelberg argued that her license should not be revoked "because she acted out of necessity to protect herself from her" husband.¹²¹ The district court sustained the revocation of her driving privileges; the court held that necessity is not an affirmative defense that drivers may raise at an implied consent hearing.¹²² Ms. Axelberg appealed the decision and the court of appeals affirmed the district court's decision.¹²³ The Minnesota Supreme Court granted her petition for certiorari.¹²⁴

C. *The Minnesota Supreme Court's Decision*

After granting review, the Minnesota Supreme Court framed the issue as whether the necessity defense was included in the issues that may be raised at the implied consent hearing pursuant to Minnesota Statute section 169A.53, subdivision 3.¹²⁵ The Court determined that this was a matter of statutory interpretation that it would review *de novo*.¹²⁶ The court decided that the defense of necessity was not explicitly included in the list of issues that may be

118. Appellant's Brief, Addendum & Appendix, *supra* note 87, at 1. Ms. Axelberg "received a notice of revocation of her driver's license" on July 25, 2011, which was therefore effective on August 4, 2011. *Id.*

119. *Axelberg*, 848 N.W.2d at 207; see MINN. STAT. § 169A.52, subdiv. 4 (2014).

120. *Axelberg*, 848 N.W.2d at 207; see also MINN. STAT. § 169A.53, subdiv. 2. Ms. Axelberg filed her Implied Consent Petition on August 10, 2011. Appellant's Brief, Addendum & Appendix, *supra* note 87, at 1.

121. *Axelberg*, 848 N.W.2d at 207.

122. *Axelberg v. Comm'r of Pub. Safety*, No. 33-CV-11-292, 2012 WL 8527893, at *3-6 (Minn. Dist. Ct. July 3, 2012) (citing *Weierke v. Comm'r of Pub. Safety*, 578 N.W.2d 815, 816 (Minn. Ct. App. 1998)) ("[I]t has not been explicitly determined that the defense is available in implied-consent cases."), *aff'd*, 831 N.W.2d 682 (Minn. Ct. App. 2013), *aff'd*, 848 N.W.2d 206.

123. *Axelberg*, 831 N.W.2d at 687. "A divided court of appeals affirmed" the district court's holding that "necessity is not an affirmative defense that drivers may raise to challenge a civil license revocation." *Axelberg*, 848 N.W.2d at 207.

124. Appellant's Brief & Appendix at 1, *Axelberg*, 848 N.W.2d 206 (No. A12-1341), 2013 WL 8633179, at *1. Certiorari was granted on August 20, 2013. *Id.*

125. *Axelberg*, 848 N.W.2d at 206.

126. *Id.* at 208.

raised during implied consent hearing under Minnesota Statute section 169A.53¹²⁷ and that the legislature intended to “limit” the implied consent hearings to only those issues in Minnesota Statute section 169A.53.¹²⁸ The court then used the dictionary definition of “limited”¹²⁹ to show the “common and approved usage” of the word dictates that the issues are restricted to those on the list.¹³⁰

The court concluded that the legislature’s intent was not ambiguous, even if the statute provided “an affirmative defense for the petitioner to prove that, at the time of the refusal, the petitioner’s refusal to permit the test was based on reasonable grounds.”¹³¹ Based on the canon of construction, *expressio unius*, codified in Minnesota Statute section 645.19,¹³² the court determined that because the legislature included one affirmative defense, they did so with the intent to exclude all other possible defenses.¹³³ Further, the court concluded that the affirmative defense of necessity was not listed in the ten issues that drivers may raise at the hearing, whereas the reasonableness of the refusal was within the scope of the permissible issues.¹³⁴ The court reasoned that the rules of statutory interpretation did not allow for reading other affirmative defenses into the statute.¹³⁵ The court expressed a fear that if it held an affirmative defense of necessity was available under the statute, it would “allow for innumerable other affirmative defenses to be offered at implied consent hearings.”¹³⁶

127. *Id.*; see also MINN. STAT. § 169A.53, subdiv. 3(b) (2014) (“The scope of the hearing is limited to the issues in clauses (1) to (10).”).

128. *Axelberg*, 848 N.W.2d at 208–09.

129. *Id.* at 208 (“The word ‘limited’ means ‘[c]onfined or restricted within certain limits.’” (quoting THE AMERICAN HERITAGE DICTIONARY 1019 (5th ed. 2011))).

130. *Id.* at 209.

131. *Id.* (citing MINN. STAT. § 169A.53, subdiv. 3(c) (2012)).

132. MINN. STAT. § 645.19 (2014) (codifying *expressio unius*); BLACK’S LAW DICTIONARY 710 (9th ed. 2009) (defining *expressio unius est exclusio alterius* as “[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative”).

133. See *Axelberg*, 848 N.W.2d at 210.

134. *Id.* at 209 (“[W]hether the refusal was ‘reasonable’ is within the scope of the issue listed in clause (7): whether the person refused to permit the test.”); see also MINN. STAT. § 169A.53, subdiv. 3(b) (7).

135. *Axelberg*, 848 N.W.2d at 210 (“[T]he legislature intends the entire statute to be effective and certain.” (quoting MINN. STAT. § 645.17(2) (2012))).

136. *Id.*

The court maintained that the common law defense of necessity did not apply to the implied consent law.¹³⁷ The court argued that the legislature intended to preclude drivers from raising the common law defense of necessity by explicitly omitting it from the statute.¹³⁸ Additionally, the court stated that the implied consent law was a “complete system of law” that supersedes the application of prior statutory and common law.¹³⁹

The court disagreed with Ms. Axelberg’s argument that because the implied consent law has been described as “quasi-criminal,”¹⁴⁰ common law defenses available in criminal cases should also apply to implied consent cases.¹⁴¹ The court decided that “the criminal proceedings for DWI serve to punish the driver,”¹⁴² whereas the civil proceedings “protect public safety on the highway.”¹⁴³ Thus, in holding that the common law defenses are not applicable, the court effectively rebutted the presumption that implied consent proceedings are quasi-criminal in nature.¹⁴⁴

Lastly, the court stated that the concerns regarding forcing victims of domestic abuse to choose between license revocation and personal safety should be directed to the legislature.¹⁴⁵ The court acknowledged the competing policy considerations of preventing domestic abuse and protecting the public from impaired drivers.¹⁴⁶ The court reasoned that the question before the court was the statutory interpretation of the implied consent law, so the only policy concern that should be addressed is the risk to public safety from impaired drivers.¹⁴⁷

137. *Id.*

138. *Id.* (“We have long presumed that statutes are consistent with the common law, and if a statute abrogates the common law, the abrogation must be by express wording or necessary implication.” (quoting *Brekke v. THM Biomedical, Inc.*, 683 N.W.2d 771, 776 (Minn. 2004))).

139. *Id.* at 211.

140. *See* *Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 832 (Minn. 1991); *Prideaux v. State, Dep’t of Pub. Safety*, 310 Minn. 405, 411, 247 N.W.2d 385, 389 (1976), *abrogated on other grounds by* *Friedman*, 473 N.W.2d at 832.

141. *Axelberg*, 848 N.W.2d at 211.

142. *Id.* at 212 (citing MINN. STAT. §§ 169A.20–.285 (2014)).

143. *Axelberg*, 848 N.W.2d at 212 (quoting *Goldsworthy v. State, Dep’t of Pub. Safety*, 268 N.W.2d 46, 49 (Minn. 1978)).

144. *Id.*

145. *Id.* (“[W]e must read this state’s laws as they are, not as some argue they should be.”).

146. *Id.*

147. *Id.* at 212–13 (refusing to prioritize a policy of protecting victims of

The court released its four to three decision concluding that the affirmative defense of necessity cannot be raised during an implied consent hearing based on the reasons listed above.¹⁴⁸ The decision included three strongly worded dissents from Justices Lillehaug, Wright, and Page.¹⁴⁹

IV. ANALYSIS OF AXELBERG

A. Ms. Axelberg Acted out of Necessity

First, Ms. Axelberg's experiences the night of the incident certainly suggest that she acted out of necessity and should be entitled to relief. After Mr. Axelberg shoved and hit Ms. Axelberg in the head twice, she sought refuge in her vehicle by locking all the doors.¹⁵⁰ Mr. Axelberg continued to threaten her by jumping on the car and pounding on the windshield until it shattered.¹⁵¹ These facts show that Ms. Axelberg faced risk of imminent harm.¹⁵² Ms. Axelberg was unable to out-run Mr. Axelberg; nor could she seek refuge with neighbors because she was unfamiliar with the area.¹⁵³ Ms. Axelberg had no logical alternative other than to start the vehicle and drive a short distance to the nearest public location. The conduct of driving was the direct result of Ms. Axelberg's attempt to avoid imminent harm; she was escaping a violent attacker.¹⁵⁴ Her conduct was the lesser of two evils when she acted to avoid death or serious injury.¹⁵⁵ Thus, she acted out of necessity.

domestic abuse over the focus of the legislation).

148. *Id.* at 213.

149. *See id.* at 213–17 (Lillehaug, J., dissenting); *id.* at 217–20 (Wright, J., dissenting); *id.* at 220–24 (Page, J., dissenting).

150. Appellant's Brief & Appendix, *supra* note 124, at 5–6.

151. *Id.* at 6.

152. *See* BLACK'S LAW DICTIONARY 750 (6th ed. 1990) (defining "imminent" as "[s]omething which is threatening to happen at once," "something to happen upon the instant.").

153. *See* Appellant's Brief & Appendix, *supra* note 124, at 5.

154. *Id.* at 6.

155. *See* United States v. Bailey, 444 U.S. 394, 410 (1980) ("[T]he defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils.").

B. Minnesota Courts Previously Had Not Foreclosed the Possibility that a Necessity Defense May Be Raised When Appropriate

The Minnesota Court of Appeals has heard several implied consent cases that raised the defense of necessity. In *Frohn v. Commissioner of Public Safety*, the court determined that the defense was “unavailable” to the specific driver due to his conduct.¹⁵⁶ The issue was framed as whether the defense was available to the driver, not whether the defense could be raised under the implied consent statute, permitting the inference that the defense could be available when the elements are met.¹⁵⁷ If the defense was not available, it is unclear why the court analyzed whether the elements of necessity were met in the case.¹⁵⁸

Next, in *Weierke v. Commissioner of Public Safety*, the court of appeals determined that the record did not demonstrate that the driver had no other options than to drive while intoxicated, and accordingly, the necessity defense could not be raised.¹⁵⁹ However, in *Weierke*, the court asserted that “it has not been determined that the necessity defense [was] available in implied consent cases.”¹⁶⁰ Nevertheless, *Weierke* still did not foreclose the possibility that the defense could be asserted.

In *Solorz v. Commissioner of Public Safety*, the court reasoned that as an “error-correcting court,” it could not create a defense within

156. No. C1-94-1250, 1995 WL 34821, at *1 (Minn. Ct. App. Jan. 31, 1995) (holding that the defense of necessity cannot be asserted with the following facts: appellant-driver was drinking at a bar when he had an altercation with bar management and a patron; he was chased to his vehicle and the pursuer pounded on his window; he then drove away to escape before the window broke).

157. *Id.* at *2 (“We conclude that appellant has not met the elements necessary to establish the necessity defense in *this* case. Although appellant’s conduct may appear reasonable, he had alternatives other than driving his car for six or eight miles while intoxicated. Additionally, appellant’s own disruptive and belligerent conduct necessitated his removal from the bar . . . appellant must nevertheless take responsibility for putting himself in a dangerous position.” (emphasis added)).

158. *Id.* at *1 n.1 (“Traditionally . . . proceedings have been considered essentially civil in nature. This view began to change in *Prideaux v. State*, when the supreme court questioned the validity of the ‘civil’ label of the license revocation proceedings. The criminal nature of implied consent proceedings was reinforced in *Friedman v. Commissioner of Pub. Safety*. Thus, an argument can be made that the necessity defense should be available in implied consent proceedings.” (citations omitted)).

159. 578 N.W.2d 815, 816 (Minn. Ct. App. 1998).

160. *Id.*

the implied consent law.¹⁶¹ In its opinion, the court noted that “the task of extending existing law falls to the supreme court or the legislature.”¹⁶²

The *Frohn*, *Weierke*, and *Solorz* cases support the argument that the *Axelberg* court had the discretion to hold that the defense of necessity applied, or at the very least, that application of the defense was a possibility.

C. *The Court’s Absurd Interpretation of Legislative Intent*

The majority’s interpretation of Minnesota Statute section 169A.53,¹⁶³ which precludes the defense of necessity, creates an unreasonable result.¹⁶⁴ Minnesota Statute section 645.17 dictates that “the legislature does not intend a result that is absurd, impossible of execution, or unreasonable.”¹⁶⁵ The court has an obligation to go beyond the plain language of the statute if a literal interpretation “leads to absurd results or unreasonable results.”¹⁶⁶ Furthermore, the consequences of a particular statutory interpretation are relevant for determining legislative intent.¹⁶⁷ Here, revoking the license of someone who was fleeing from imminent harm was an unreasonable result that could have been avoided if the court had held that the affirmative defense of necessity is relevant to implied consent proceedings.

1. *The Court’s Narrow Interpretation of the Scope of Judicial Review Yields an Unreasonable Result*

The scope of the implied consent hearing is guided by Minnesota Statute section 169A.53.¹⁶⁸ The statute provides that the hearing is limited to the issues listed in clauses (1) to (10), which are phrased in the form of questions.¹⁶⁹ As Justice Lillehaug pointed

161. No. A12-0006, 2012 WL 3023425, at *2 (Minn. Ct. App. July 23, 2012) (citing *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. Ct. App. 1987)).

162. *Id.*

163. See *Axelberg v. Comm’r of Pub. Safety*, 848 N.W.2d 206, 208–09 (Minn. 2014).

164. See Brief of Minnesota Society for Criminal Justice and Minnesota Ass’n of Criminal Defense Lawyers as Amicus Curiae, *supra* note 3, at *15.

165. *Id.* (citing MINN. STAT. § 645.17(1) (2012)).

166. *Wegener v. Comm’r of Revenue*, 505 N.W.2d 612, 617 (Minn. 1993).

167. See MINN. STAT. § 645.16(6) (2014).

168. *Id.* § 169A.53, subdiv. 3(b); see also *supra* Part II.A.

169. MINN. STAT. § 169A.53, subdiv. 3(b).

out in his dissent, the scope does not simply provide that the hearing is restricted to answering questions.¹⁷⁰ Arguably, the emphasis of the scope is on the *issues* that are enumerated.¹⁷¹ It follows then that the issues within the scope of the hearing are: “probable cause; driving, operation, and physical control of the vehicle; the arrest; test taking or refusal; and test results.”¹⁷² Here, the facts surrounding Ms. Axelberg’s choice to drive while intoxicated are within the scope of the enumerated issues as such a discussion would have addressed the issues of driving, operating, and being in physical control of the vehicle, in addition to her defense for that conduct. The purpose of providing a scope of issues for the hearing is to create an efficient and timely process; however, too narrow an interpretation of the hearing’s scope creates an absurd result, and the scope should be permitted to include more than simply a yes or no answer to the listed questions.

2. *That the Defense of Necessity May Be Available for Test Refusal but Not for Driving While Impaired Is an Absurd Result*

The court’s holding in *Axelberg* created a disconnect between the defenses available for test refusal and those available during implied consent hearings. Affirmative defenses are allowed by statute to determine whether a driver had reasonable grounds for refusing to take a chemical test.¹⁷³ Examples of reasonable grounds for test refusal include: where an officer’s request for the driver to take a test is confusing and misleading,¹⁷⁴ where failure to provide samples resulted from a physical inability,¹⁷⁵ and where the driver

170. *Axelberg v. Comm’r of Pub. Safety*, 848 N.W.2d 206, 214 (Minn. 2014) (Lillehaug, J., dissenting).

171. *Id.*

172. *Id.*

173. MINN. STAT. § 169A.53, subdiv. 3(c) (“It is an affirmative defense for the petitioner to prove that, at the time of the refusal, the petitioner’s refusal to permit the test was based upon reasonable grounds.”).

174. *See State, Dep’t of Highways v. Beckley*, 291 Minn. 483, 485–87, 192 N.W.2d 441, 444–45 (1971) (finding that the driver had reasonable grounds to refuse the test because the officer failed to clarify the rights and obligations under the implied consent statute). *But see Johnson v. Comm’r of Pub. Safety*, 375 N.W.2d 99, 102–03 (Minn. Ct. App. 1985) (finding that test refusal was not reasonable where a driver was too intoxicated to understand his rights and obligations).

175. *See Aunan v. Comm’r of Pub. Safety*, 361 N.W.2d 907, 909 (Minn. Ct. App. 1985) (holding that the trial court must determine if the “failure to provide

intends to plead guilty to the criminal charge of DWI.¹⁷⁶ Under this “reasonable grounds” standard, it is possible that necessity could be a viable affirmative defense for test refusal.

This, too, creates an unreasonable result because it entices drivers who can claim a defense of necessity to refuse the test. “The obvious and intended effect of the implied-consent law is to coerce the driver suspected of driving under the influence into ‘consenting’ to chemical testing”¹⁷⁷ Allowing affirmative defenses only for test refusal would frustrate the purpose of the implied consent law, which is to encourage consent to the test.¹⁷⁸ Hence, it creates an absurd result to allow affirmative defenses only for test refusal and not for testing above the alcohol concentration limit.

D. Courts Have Considered Issues Beyond the Ten Enumerated Questions in the Past

The following cases illustrate how, historically, Minnesota courts have broadly interpreted the scope of implied consent hearings, permitting the consideration of issues other than those enumerated in Minnesota statute 169A.53. These cases support the argument that the supreme court should have considered the affirmative defense of necessity in *Axelberg*.

1. Dutcher v. Commissioner of Public Safety

The affirmative defense of post-accident alcohol consumption is not one of the issues expressly permitted to be heard during the implied consent hearing; however, the defense was recognized in *Dutcher v. Commissioner of Public Safety*.¹⁷⁹ The court of appeals reasoned that it was simply good policy because it did not want to punish someone who was not drinking at the time the car accident occurred.¹⁸⁰ Similarly, in *Axelberg*, it is not good public policy to

two breath samples resulted from . . . physical inability”).

176. *See State, Dep’t of Highways v. Schlieff*, 289 Minn. 461, 463, 185 N.W.2d 274, 276 (1971).

177. *Prideaux v. State, Dep’t of Pub. Safety*, 310 Minn. 405, 409, 247 N.W.2d 385, 388 (1976), *abrogated on other grounds by Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 832 (Minn. 1991).

178. *See id.*

179. 406 N.W.2d 333, 336 (Minn. Ct. App. 1987).

180. *Id.*

deny the affirmative defense of necessity simply because it is not enumerated in the statute.

2. Friedman v. Commissioner of Public Safety

The “civil” label of license revocation under the implied consent law is not enough to extinguish certain constitutional safeguards, such as consulting with an attorney prior to taking a chemical test for alcohol concentration.¹⁸¹ Therefore, constitutional issues are recognized as defenses even though they are not listed in the ten enumerated issues in Minnesota Statute section 169A.53. In *Friedman v. Commissioner of Public Safety*, the supreme court relied on article I, section 6 of the Minnesota Constitution to determine that a driver has a constitutional right to consult with counsel because the testing decision is a “critical stage” in a DWI proceeding.¹⁸²

E. *The Court Does Not Always Strictly Adhere to the Limits Imposed by Statutory Text*

The Minnesota Supreme Court recently decided in *State v. Ali* that mandatory life without the possibility of release (LWOR) sentences for juveniles are unconstitutional when the sentences are imposed without a judge or jury having the opportunity to consider mitigating circumstances.¹⁸³ The court reversed the imposition of a mandatory sentence of LWOR even though the sentence is expressly *permitted* by the legislature in the statutory text.¹⁸⁴ The majority determined that its decision will “effectuat[e] the legislative policy” even if that policy is not yet written in the statute.¹⁸⁵

The court tried to distinguish *Axelberg* from *Ali* on the basis that in *Ali* “the Legislature has not yet expressed its policy preference,” whereas in *Axelberg*, the public policy is clear, and “it is the prerogative of the Legislature, not the judiciary, to determine

181. *Friedman*, 473 N.W.2d at 834.

182. *Id.* at 837.

183. 855 N.W.2d 235, 256–57 (Minn. 2014).

184. *Id.* at 253 (discussing *Miller v. Alabama*, 132 S. Ct. 2455 (2012)) (finding that mandatory LWOR sentences are unconstitutional under *Miller v. Alabama*, even though Minnesota statutes currently allow for mandatory LWOR sentences and the legislature has not changed the statutes).

185. *Id.* at 256 (alteration in original) (quoting *State v. Chauvin*, 723 N.W.2d 20, 27 (Minn. 2006)).

what constitutes sound public policy and to make the statutory revisions necessary to reflect that policy determination.”¹⁸⁶ However, in *Ali*, the legislature arguably clearly expressed its policy preference for mandatory LWOR sentences in the statutory language.¹⁸⁷ Additionally, the legislature had been alerted to the LWOR problem by *Miller v. Alabama* and had not yet changed the statute in response. Conversely, in *Axelberg*, the legislature did not explicitly prohibit using the defense of necessity to escape domestic violence; the policy preference is far from clear.¹⁸⁸ The defense of necessity is a common-law defense that has not been addressed by the Minnesota legislature but continues to be used as an affirmative defense in the courts. The court’s argument in *Axelberg* that it would be “pure judicial will”¹⁸⁹ if the court effectuated the necessity defense was, in reality, the court’s exercise of judicial restraint with respect to an unpopular issue.

The court improperly differentiated between *Ali* and *Axelberg*. At issue in *Axelberg* were two policy concerns: safety on the roads and advocating for victims of domestic violence.¹⁹⁰ The legislature has expressed its interest in protecting victims of domestic violence; however, the court failed to give sufficient weight to that policy concern, employing its rhetoric of strict statutory adherence.¹⁹¹ Notwithstanding the conflicting policies, *Axelberg* was more a question of the application of a defense “deeply rooted in our jurisprudence.”¹⁹² It is unlikely that the legislature intended to prevent people facing assault, murder, or rape from hiding in their cars, or, in the most desperate situations, driving away from their

186. *Id.* at 266 (Page, J., concurring in part, dissenting in part).

187. *Id.* at 256 (majority opinion).

188. *Axelberg v. Comm’r of Pub. Safety*, 848 N.W.2d 206, 217 (Minn. 2014) (Lillehaug, J., dissenting) (“Moreover, the necessity defense is not a mere policy preference; it is a legal concept deeply rooted in our jurisprudence.”). “If there is any ‘pure judicial will’ being exercised in [*Axelberg*], it might be the majority’s interpretation of this statute without regard to its ‘application to an existing situation.’” *Id.* (quoting MINN. STAT. § 645.16 (2012)).

189. *Id.* at 212 (majority opinion).

190. *Axelberg*, 848 N.W.2d at 212 (“This case therefore could be cast in terms of competing policy considerations, with policies aimed at protecting victims of domestic abuse competing with policies aimed at protecting victims of impaired drivers.”)

191. *Id.* (“This public policy concern [personal safety of victims of domestic abuse] should be directed to the Legislature because we must read this state’s laws as they are, not as some argue they should be.”).

192. *Id.* at 217 (Lillehaug, J., dissenting).

attacker. The court in *Axelberg* could have read the statute more broadly to include a defense of necessity, but it chose not to. The court in *Ali* determined that “remanding . . . will not infringe on the Legislature’s unique power to define the punishment for crimes.”¹⁹³ Similarly, if the court in *Axelberg* found that the defense of necessity was available, it would not have infringed upon the legislature’s power to define crimes or encourage test consent. Nor would it “impair the commissioner’s ability to process implied consent cases because the necessity defense is so rare and so difficult to prevail on.”¹⁹⁴

F. Refuting the Majority’s Espressio Unius Interpretation

It is unreasonable to interpret the absence of an explicit reference to “necessity” as a bar to the defense being used in implied consent hearings. The majority in *Axelberg* asserts that since the statute mentions *an* affirmative defense of proving that the test refusal was based on reasonable grounds, all other affirmative defenses are prohibited.¹⁹⁵ Justice Lillehaug raised the argument that the legislature chose to use the definite article “an” instead of the limiting definite article “the.”¹⁹⁶ He argued that if the legislature intended to limit the affirmative defenses to only this one, it could have easily done so by the use of: “*the only* affirmative defense,” “*the one* affirmative defense,” or simply “*the* affirmative defense.”¹⁹⁷

Moreover, it is unlikely that the legislature intended that the affirmative defense be available for proof of reasonable test refusal but not for test failure.¹⁹⁸ It is also unlikely that the legislature intended for the affirmative defense to be available during administrative but not judicial review.¹⁹⁹ This interpretation creates inconsistencies within the statutory framework. As Justice Wright pointed out, the legislature’s purpose in enacting this statute was to

193. *State v. Ali*, 855 N.W.2d 235, 256 (Minn. 2014).

194. Appellant’s Brief & Appendix, *supra* note 124, at 16.

195. *See Axelberg*, 848 N.W.2d at 209.

196. *Id.* at 215.

197. *Id.*

198. *See id.* at 218 (Wright, J., dissenting).

199. Compare MINN. STAT. § 169A.53, subdiv. 1 (2014) (explaining the applicability of the affirmative defense for administrative review), *with id.* § 169A.53, subdiv. 2 (explaining the applicability of the affirmative defense for judicial review).

criminalize test refusal.²⁰⁰ But the majority's decision promotes refusal of the chemical test for drivers in similar circumstances to *Axelberg* in order to invoke the necessity defense.²⁰¹

G. *Quasi-Criminal Nature of the Implied Consent Law*

Courts have distinguished prosecutions for DWI and implied consent proceedings on the basis that one is criminal and one is civil.²⁰² Procedurally, implied consent hearings may be civil, but the hearings are held at the same time and stem from the same facts and conduct as the criminal hearings for DWI.²⁰³ Minnesota courts have recognized the affirmative defense of necessity in the criminal charge of DWI.²⁰⁴ Additionally, "the emergency operation of any vehicle when avoiding imminent danger" creates an exception for the crime of reckless driving.²⁰⁵ So, why would this exception not extend to implied consent proceedings?

The court has recognized that driver's license revocations are "necessarily and inextricably intertwined with an undeniably criminal proceeding."²⁰⁶ In *Friedman*, the court said that the implied consent hearings are "quasi-criminal" and, on that basis, provided a limited right to counsel that has typically been reserved for criminal defendants.²⁰⁷ However, although the court has recognized the quasi-criminal nature of the implied consent proceeding, it

200. *Axelberg*, 848 N.W.2d at 218.

201. *Id.*

202. *Prideaux v. State*, Dep't of Pub. Safety, 310 Minn. 405, 410, 247 N.W.2d 385, 389 (1976) ("Only after the driver makes his decision regarding the test does the proceeding divide clearly into its civil and criminal aspects . . ."), *abrogated on other grounds* by *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 832 (Minn. 1991).

203. *Id.* at 410, 247 N.W.2d at 388–89 ("The license revocation proceeding thus becomes an arm of the prosecutor in his attempt to gather evidence against the accused for use in criminal prosecution. Moreover, it is used as a means of obtaining evidence [a]t the time of arrest or detention for suspicion [o]f driving under the influence." (alterations in original)). Although *Prideaux* was overruled, the language regarding the hybrid nature of implied consent hearings remains valid.

204. *State v. Hage*, 595 N.W.2d 200, 201, 207 (Minn. 1999) (holding that a necessity instruction is appropriate in a criminal case where the defendant asserted that she hid in a car from her abusive boyfriend).

205. MINN. STAT. § 169.13, subdiv. 3(b)(2) (2014).

206. *Prideaux*, 310 Minn. at 409, 247 N.W.2d at 388.

207. *See Friedman*, 473 N.W.2d at 832, 835.

refused to also recognize the traditional protections provided in criminal matters,²⁰⁸ such as allowing common-law defenses. Even if the application of the necessity defense has only been applied in criminal and civil tort cases, the legislature allowed room for the court to recognize the defense of necessity in implied consent hearings when appropriate.²⁰⁹

Although implied consent hearings are “civil” in nature,²¹⁰ the penalties imposed are arguably just as harsh as the criminal DWI sanctions.²¹¹ The revocation of a driver’s license may have the effect of taking away a person’s ability to earn a living, which can be just as devastating as fines or imprisonment.²¹² The result of losing a

208. See *Ascher v. Comm’r of Pub. Safety*, 519 N.W.2d 183, 184, 186–87 (Minn. 1994) (holding that evidence of alcohol-impaired driving obtained from an unconstitutional sobriety-check roadblock could not be used at an implied consent proceeding).

209. See *Axelberg v. Comm’r of Pub. Safety*, 848 N.W.2d 206, 215 (Minn. 2014) (Lillehaug, J., dissenting).

210. See *id.* at 214 (quoting MINN. STAT. § 169A.53, subdiv. 3(a) (2012)).

211. See *Prideaux*, 310 Minn. at 410, 247 N.W.2d at 389 (arguing that the loss of a driver’s license can be devastating); see also MINN. DEP’T OF PUB. SAFETY, DRIVER’S LICENSE DWI ADMINISTRATIVE SANCTIONS INITIATIVE: SUMMARY REPORT 3 (2011), available at <https://dps.mn.gov/divisions/ots/educational-materials/Documents/DWI-Administrative-Sanctions-Report.pdf>.

The removal of a license after a DWI could hamper one’s ability to get to work, treatment, [Alcoholics Anonymous] groups, therapy and court appearances—the very things associated with compliance, responsibility and sobriety Based on the number of “Driving after Withdrawal” violations issued, many people continue to drive illegally after their license had been revoked or cancelled. Often these individuals are also driving without insurance. Illegal driving is not just a Minnesota problem. Nationally it is estimated that at least 70 percent of people continue driving even after their license has been revoked or cancelled.

Id.

212. See *Mackey v. Montrym*, 443 U.S. 1, 30 (1979) (“Even a day’s loss of a driver’s license can inflict grave injury upon a person who depends upon an automobile for continued employment in his job.”); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (“Once licenses are issued, as in petitioner’s case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involved state action that adjudicates important interests of the licensees.”); see also Lee A. Bjorndal, *Mower County License Return Program: Breaking the Cycle of Revocations*, BENCH & B. MINN., Feb. 2001, at 26 (“A driver’s license is an absolute necessity for most Minnesotans. We need our driver’s license to get to work, to transport children, and to travel. In many communities, there is no public transportation. Businesses are often near the outskirts of town and not within

driver's license may lead to additional offenses:²¹³ driving after suspension,²¹⁴ driving after revocation,²¹⁵ and driving after cancellation.²¹⁶ Furthermore, the Commissioner of Public Safety can use prior convictions as reasons to lengthen license revocation.²¹⁷ Finally, criminal DWI penalties can be enhanced by prior license revocations.²¹⁸ Criminal proceedings and implied consent proceedings are undeniably intertwined, and those who want to establish an affirmative defense for either proceeding should be afforded the opportunity.

V. WHAT CAN BE DONE GOING FORWARD TO REMEDY THIS PROBLEM?

A. *How the Court Should Have Decided Axelberg*

The Minnesota Supreme Court should have held that the necessity defense may be raised in implied consent hearings. First, the court should have concluded that the interpretation of the issues enumerated in the implied consent statute extend more broadly to include affirmative defenses related to the proceeding.²¹⁹ This would be consistent with the legislature's express intent to

walking distance."); *Means of Transportation to Work by Selected Characteristics 2011–2013 American Community Survey 3-Year Estimates*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_3YR_S0802&prodType=table (last visited Apr. 27, 2015) (showing that approximately eighty-two percent of employees in Minnesota drive alone or carpool to work).

213. Bjorndal, *supra* note 212 ("[P]eople are able to drive legally and not get involved in a downward spiral of one driver's license offense after another."); U.S. CENSUS BUREAU, *COMMUTING IN THE UNITED STATES: 2009*, at 18 (2011), *available at* <http://www.census.gov/prod/2011pubs/acs-15.pdf> (demonstrating that "[c]ommuting in the United States is dominated by private automobile travel, as is evidenced by the large proportion (86.1 percent) of workers 16 years and over who commuted by car, truck, or van in 2009").

214. MINN. STAT. § 171.24, subdiv. 1 (2014).

215. *Id.* § 171.24, subdiv. 2.

216. *Id.* § 171.24, subdiv. 3.

217. *See id.* § 169A.54, subdiv. 1.

218. *Id.* §§ 169A.03, subdiv. 21(a)(1), 169A.24, subdiv. 1(1); *see also* State v. Omwega, 769 N.W.2d 291, 293–94 (Minn. Ct. App. 2009) (holding that using prior implied consent license revocations to enhance a misdemeanor DWI charge is constitutional where a driver was provided notice of the revocation and the process for challenging it).

219. *See supra* Part IV.C–D.

prevent unreasonable results.²²⁰ The court has shown that it has the power to go beyond strict statutory interpretation when the circumstances warrant doing so.²²¹ Next, the court should have examined the quasi-criminal nature of implied consent proceedings to determine that the consequences of license revocation are as severe as fines and imprisonment, especially when taking independence away from a person facing domestic violence.²²² Lastly, the court should not have turned a blind eye to its fundamental function of administering justice,²²³ particularly given the extreme facts presented by the *Axelberg* case.

B. How the Legislature Can Address the Problem

Since the Minnesota Supreme Court has foreclosed the possibility of the use of the defense of necessity for test failure in judicial implied consent hearings, a possible solution is to encourage the legislature to amend the language of Minnesota Statute section 169A.53. There is pending legislation that clarifies the scope of the implied consent hearing and would allow for the affirmative defense of necessity to be used in judicial implied consent hearings.²²⁴ The proposed change to Minnesota Statute section 169A.53 would delete language that only allows affirmative defenses for reasonable test refusal during judicial hearings and adds language permitting all the affirmative defenses allowed in criminal DWI proceedings.²²⁵ These defenses include: when the driver consumed alcohol after the violation but before the alcohol concentration test; using prescription drugs according to the prescription while operating a vehicle; reasonable test refusal; and “[i]f proven by a preponderance of the evidence, . . . [when] the defendant’s conduct was a result of necessity.”²²⁶ It also creates a requirement that notice must be given to the Commissioner seven days prior to the hearing if an affirmative defense will be raised.²²⁷ The proposed legislation aligns the criminal prosecutions and

220. See *supra* Part IV.C.

221. See *supra* Part IV.D.

222. See *supra* Part IV.G.

223. See, e.g., *In re* Petition for Integration of the Bar of Minn., 216 Minn. 195, 199, 12 N.W.2d 515, 518 (1943).

224. S.F. 1073, 89th Leg., Reg. Sess. (Minn. 2015).

225. *Id.*

226. *Id.*

227. *Id.*

implied consent hearings, addressing concerns that implied consent hearings are “quasi-criminal” in nature and should be treated as such.

C. Allowing the Affirmative Defense of Necessity in Implied Consent Cases Is Good Public Policy

At its core, the affirmative defense of necessity is based on good public policy. “In essence it reflects a determination that if, in defining the offense, the legislature had foreseen the circumstances faced by the defendant, it would have created an exception.”²²⁸ As *Axelberg* makes clear, the legislature did not weigh the competing values of driving while intoxicated to escape a violent attacker with keeping the roads clear of impaired drivers. If it had, Minnesota Statute section 169A.53 would likely have included such circumstances in its enumerated issues.

The court adopted a view that denies complete protection to victims who seek refuge in their vehicles and to those escaping a violent encounter.²²⁹ A domestic abuse victim’s loss of a driver’s license “may deprive [him or her] of financial independence, treatment and counseling services, transportation for [his or her] children, and the only reliable means of escape in the next emergency.”²³⁰

Implied consent law should not be interpreted in a manner that is contrary to the legislature’s efforts to protect victims of domestic abuse²³¹ in response to the prevalence of domestic violence in our society.²³² Minnesota district courts handled 27,288

228. *State v. Tate*, 505 A.2d 941, 946 (N.J. 1986).

229. *See Axelberg v. Comm’r of Pub. Safety*, 848 N.W.2d 206 (Minn. 2014).

230. *Id.* at 216 (Lillehaug, J., dissenting).

231. *See* MINN. STAT. § 518B.01, subdivs. 1–23 (2014). The Domestic Abuse Act became effective on May 25, 1979. Act of May 25, 1979, ch. 214, 1979 Minn. Laws 214, 414–17; *see* MINN. STAT. ch. 5B (allowing victims of violence to establish designated addresses in all public matters to prevent harm from being located through the “Safe at Home” program).

232. *See* MINN. COAL. FOR BATTERED WOMEN, 2013 ANNUAL FEMICIDE REPORT 7 (2013) (“At least 38 Minnesotans were killed due to violence from a current or former intimate partner.”); *see also Minnesota Injury Data Access System (MIDAS)—Hospital Data*, MINN. DEP’T HEALTH, <http://www.health.state.mn.us/injury/midas/ub92/index.cfm> (last visited May 4, 2015) (select “Minnesota Regions” and “State of Minnesota” as the Region/County; then “Battering/maltreatment” and “Rape” as the Mechanism/Cause; and then “Compare Genders” as the Gender). In 2013, 1328 patients received treatment for injuries in hospitals in Minnesota related to

domestic violence cases in 2011.²³³ A 2010 National Intimate Partner and Sexual Violence Survey by the Centers for Disease Control and Prevention (CDC) estimates that 684,000 Minnesota women will be subjected to “[p]revalence of [r]ape, [p]hysical [v]iolence, and/or [s]talking by an [i]ntimate [p]artner” during their lifetime.²³⁴ The Minnesota Coalition for Battered Women reports that at least twenty-five women died from domestic violence in Minnesota during 2013.²³⁵ This is consistent with national pervasiveness of domestic violence; the CDC reported that “[a]pproximately 1.3 million women and 835,000 men are physically assaulted by an intimate partner annually in the United States.”²³⁶ “The study makes it clear that violence against women . . . should be classified as a major public health and criminal justice concern in the United States.”²³⁷ The implied consent law should not be interpreted in a manner that re-victimizes people affected by domestic violence.

One concern is that permitting necessity as an affirmative defense might allow for false claims of abuse when a driver is accused of driving while intoxicated, which would impair the Commissioner of Public Safety’s ability to quickly process cases.²³⁸ However, necessity is rarely used and it is difficult to prove.²³⁹

[O]nce in a great while a . . . case comes along that presents facts so bizarre and remote from the public

battery and rape (958 battering/maltreatment and 370 rapes). *Id.* Eighty-two percent of the battery/maltreatment patients were women. *Id.*

233. MINN. JUDICIAL BRANCH, REPORT TO THE COMMUNITY: THE 2011 ANNUAL REPORT OF THE MINNESOTA JUDICIAL BRANCH 17–19 (2011), *available at* http://www.mncourts.gov/Documents/0/Public/Court_Information_Office/AR_11_Final2.pdf (including 2853 felony domestic assault cases; 2863 gross misdemeanor domestic assault cases; 10,607 misdemeanor domestic assault cases; and 10,965 domestic abuse filings).

234. *The National Intimate Partner and Sexual Violence Survey (NISVS)*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/violenceprevention/nisvs/state_tables_74.html (last updated Nov. 14, 2014).

235. MINN. COAL. FOR BATTERED WOMEN, *supra* note 232, at 7.

236. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP’T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, at iv (2000), *available at* www.ncjrs.gov/pdffiles1/nij/183781.pdf.

237. *Id.* at v.

238. *Axelberg v. Comm’r of Pub. Safety*, 831 N.W.2d 682, 690 (Minn. Ct. App. 2013) (Chutich, J., dissent), *aff’d*, 848 N.W.2d 206 (Minn. 2014).

239. *Id.*

policy underlying the law that even a Court as committed as this one to the strict enforcement of the drunk-driving statutes can pause to make certain that no injustice has been done.²⁴⁰

Axelberg is such a case.

VI. CONCLUSION

Undoubtedly, impaired driving is a valid concern for our society, but the interpretation of laws should not neglect the importance of preventing unreasonable results by disallowing valid affirmative defenses. The court held that the statute at issue in *Axelberg* addresses only a policy aimed at protecting the public from impaired drivers and therefore did not require an analysis into the policy interest of protecting victims of domestic violence.²⁴¹ The inclusion of the affirmative defense of necessity is at the heart of a policy that protects all citizens of Minnesota. The implied consent law implies that the driver has a choice as to whether or not to get into a vehicle or drive while intoxicated. In this case, there was no reasonable choice or alternative in order to escape a violent attack. To not apply the defense of necessity in these circumstances was to allow an injustice.

240. *State v. Fogarty*, 607 A.2d 624, 632 (N.J. 1992) (Stein, J., dissenting).

241. *Axelberg*, 848 N.W.2d at 212–213.