

A Little Light Pandemic Reading... The Best of the Worst



by
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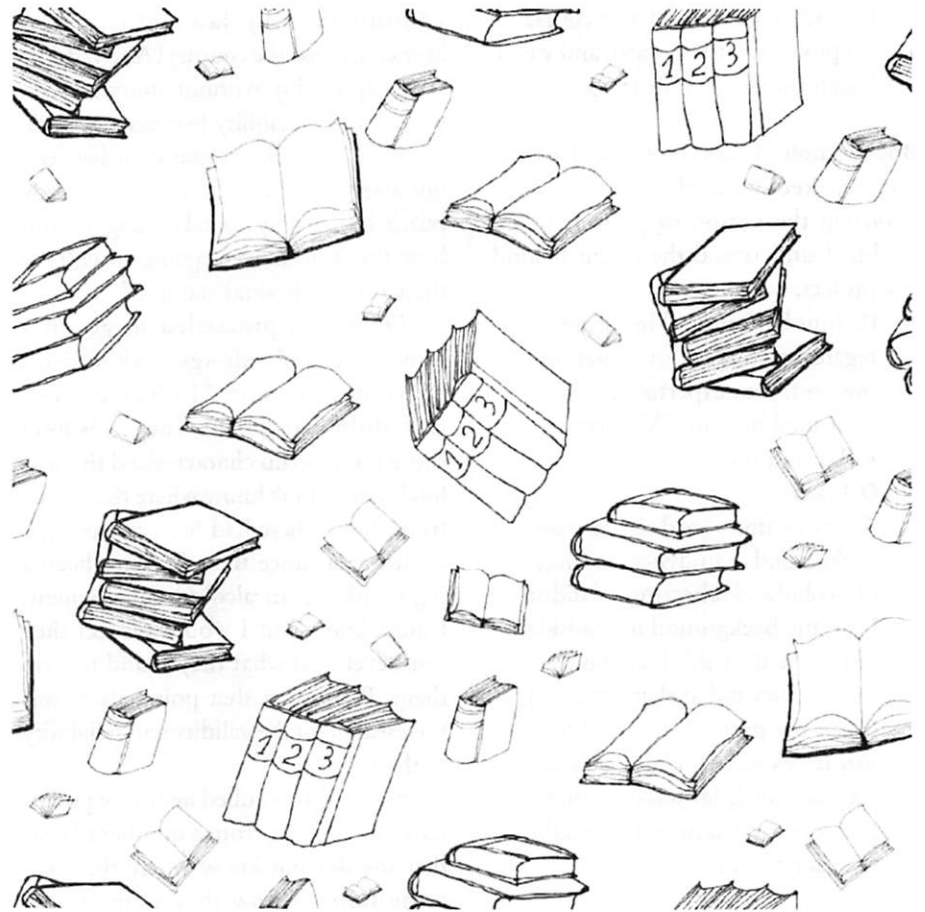
“As long as people will accept
crap, it will be financially
profitable to dispense it.”

– DICK CAVETT

During the pandemic, I had time to do some of the reading that I had always intended to do. For most, that would mean reading a gripping novel or a lengthy biography. For me, especially since the pandemic ensured that the local ice hockey rinks were closed, it meant reading about the history of field sobriety exercises.

Like many of us, I had heard and read a little about the mythical Dr. Marcelline Burns, Ph.D., one of the creators of the {oxymoron alert!!!} “Standardized Field Sobriety Tests” created for the police to use when investigating DUI cases. Like many of us, I initially *thought* (assumed?) that Dr. Burns was a medical doctor and that she had interviewed neurologists, audiologists, otolaryngologists (ear, nose & throat), ophthalmologists, or other doctors in order to determine the best exercises to help police officers in the field to determine impairment (as opposed to say, general lack of coordination). I was wrong.

First, a little about the Godmother of the field sobriety exercises. In the early 1970s, Marcelline Burns was writing her Ph.D. thesis in psychology (yes, she’s a psychologist), in California (insert your own joke here), and she was guided to



the “idea” of researching sobriety tests for her paper by Dr. Herb Moskowitz, her psychology thesis review professor. Burns’ thesis was then sent to the federal government for consideration of creating standardized pre-arrest tools for police officers to use to decide which drivers were impaired, and (it was hoped) to make better arrest decisions.

So it was a bit of a surprise to me when I read a 1999 deposition that Dr. Burns provided to lawyer Bruce Kapsack in California about her work. See *Examination Under Oath of Marcelline Burns*, April 17, 1998 By Bruce Kapsack. Perhaps it is best if I leave it

to her statements to best describe how insane this all is [and let it be noted that the emphasis and highlights from her deposition testimony are mine and not the good doctor’s]:

A. In 1975, the National Highway Traffic Safety Administration, NHTSA, realizes that the – this is my understanding of what went to the request for proposals [RFP]. They recognize that the average blood alcohol concentration of arrest nationwide was a 0.17 percent BAC... that the national highway traffic safety administration actually funded

several research contracts, but the RFP that we responded to specifically to develop a battery of tests that police officers could use at roadside that would help them to make the correct decision so that it is a competitive bidding process.

Our bid, both the technical proposal which outlines how to expect to do it, what your expertise is, so forth, and the course proposal won that award, and we began the research in 1975.

Bobby's note: Okay. Not who I would have tasked with this job if I was choosing the person or persons to do so, but I understand the intent behind the project.

Q. Your background information regarding your ability to get into this area, your expertise, et cetera, is covered in your CV, correct?

A. Yes and no.

Q. Okay.

A. At that time, I had several years' background in studying the effects of alcohol and other drugs. I didn't have any background in roadside tests, nor do I think anybody in this country did at that time ... I began the project with the literature reviewed to find out what the state of knowledge was concerning that topic at that time that was the first thing I did.

Again. Not my preferred person to perform the work, especially because she had absolutely no experience with field sobriety tests—but here is where it really goes off the rails:

A: The second thing I did was [I] went around various [law enforcement] places in the United States and rode with DUI teams, special enforcement teams to actually determine what it was that they were doing.

Then finally, we compiled a fairly long list of tests, I think that there were on the order of 15 to 20 that we thought *might*

work.... We ended with six that we *believed* had *some* merit, and then conducted the first laboratory study with those.

Yes. You heard that right. She pared the list down to "15 or 20 that they thought *might* work" and that they "believed had some merit." Interestingly, she found that there were almost 100 different sobriety exercises that were being haphazardly administered by law enforcement agencies across the country! As Dr. Burns stated (probably without irony), "there was a lot of variability between agencies, even between officers and even between one arrest and the next.... So I was really puzzled about why nobody thought about how the officers were going to enforce these [drunk driving] statutes."

Dr. Burns proceeded to go on a number of ride-alongs with various police departments. "I observed tests that didn't make the cut. ...Where those tests—you characterized them as folklorist. I don't know where they came from. Since there had been no research in this area, since there had not been a big emphasis on alcohol enforcement, I don't know, but I would suspect they just developed what they found to help them. Because at that point, there was no research on the validity and reliability of these things."

So Dr. Burns culled her list of potential field exercises from a number of tests that she did not know where they had come from or how they were created in the first place. Huh. Probably not a strong starting place for her to begin from, but what do I know?

Another interesting statement was made here. As you know, the FSTs use a numerical point by the numbers scoring system. Up to six points for the HGN, four for the Romberg balance, eight for the walk-and-turn, four for the one-leg-stand and four for the finger-to-nose. Why? Because "in research, numbers are what make the decisions, not your subjective evaluations."

The initial field study, which was conducted in a controlled setting at a police station, involved "as I recall,

[only] about 15 to 20 people for drinking sessions." When the very basis of the NHTSA guidelines were discussed, Dr. Burns was surprisingly candid. "[W]e did a field study. *Not* a good field study, *not* big enough. There were a lot of things that we didn't like about it, and [we] reported [to NHTSA] that we didn't like it because there weren't funds to do it."

So, a bad field study of all of the crazy ideas that police officers had used over the millennia were what we got. And this was the basis for the field sobriety exercises that are still used today? Perhaps it should have concerned Dr. Burns a bit more than it did, especially considering the fact that the officers in that initial, controlled study "*made a lot of false alarms. That is, they said, this person is above .10 when, in fact, they weren't.*"

Speechless. Really. I am just...

One of the things lost over the years has been the fact that strict compliance with the administration and interpretation of the exercises was a requirement for determining their accuracy. When asked by Mr. Kapsack "how important" a factor standardization of the administration of the exercises were, Burns responded, "[w]ell, if the tests are going to have meaning as objective measures, they *have to* be administered in a standardized way." As she noted, "[s]tandardized' means [that] everybody is going to do it the same way every time... [i]f you don't give them the instructions properly, you don't tell them to leave their arms at their side, count their steps out loud, take nine steps, et cetera, those are critical because the nature of the task requires them to assume the stance on the line, to stand in that position while they're given instructions, and the ability to understand and follow the instructions is part of the test. So if they [the officers] don't do that, that's important. And then whether or not the results have as much meaning as you would like them to become problematic... [t]he instructions, as they're written, are written for a reason."

I am sure that this is the reason that the initial NHTSA manuals wrote:

IT IS NECESSARY TO EMPHA-

SIZETHIS VALIDATION APPLIES ONLY WHEN: THE TESTS ARE ADMINISTERED IN THE PRESCRIBED, STANDARDIZED MANNER; THE STANDARDIZED CLUES ARE USED TO ASSESS THE SUSPECT'S PERFORMANCE; AND THE STANDARDIZED CRITERIA ARE EMPLOYED TO INTERPRET THAT PERFORMANCE. IF ANYONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED.

NHTSA's *DWI Detection and Standardized Field Sobriety Testing Participant Manual* ("Participant Manual") (2002) at VIII-19 (emphasis and capitalization as originally supplied). And see Cole and Nowaczyk, "Field Sobriety Tests: Are They Designed For Failure?", *Perceptual and Motor Skills*, 1994, 79, 99-104.

Beginning with the release of their 2004 manual, this language was curiously removed from all NHTSA training manuals. See NHTSA DWI Manuals. This led me to wonder why something that was so important for them to post in the original manuals in bold and all capital letters would be eliminated from consideration entirely. Of course, it was because defense lawyers were pointing this out in court when the officers deviated from these guidelines. And, as it turns out, the person whose concerns were the very basis for the inclusion of this language was not consulted about the removal of this important language.

When asked if she had been asked to review NHTSA's FST training manuals "before it was placed into mass publication to make sure that they didn't change any of the things that you had told them

along the way", Dr. Burns stated, "yes and no. The first manual was sent to me, and I reviewed it, and there was at least one thing in the manual which I thought was an error and advised them of it. It was subsequently changed. [Bobby's note: unfortunately, Mr. Kapsack and his associate did not ask her what the mistake that NHTSA subsequently changed was. We can only wonder. I doubt that anyone wrote letters of apology to any of the people who were erroneously arrested based upon this error.] But there have been subsequent editions, and I'm not sure that I have reviewed all of... [them,] certainly not prior to release. I may have eventually obtained a copy of all of them, but I didn't review them."

Why would Dr. Burns not have reviewed NHTSA's manuals to see if they were correct, since they were based on her work? Dr. Burns noted "you have to understand when you're nonprofit research, *you only do what somebody pays you to do. You don't have the luxury of doing anything else.*"

Stunning. Really, stunning. To those erroneously arrested, given a criminal record and imprisoned based upon these tests, please understand that the researchers did not have the luxury of giving a damn. And it does not end there.

When ask by Mr. Kapsack's associate if the "conclusions from [the] first study, more or less, remained the same," Dr. Burns noted, "NHTSA developed scoring; I didn't." But what about her earlier statement that "in research, numbers are what make the decisions, not your subjective evaluations"?

Perhaps it was her mission that was the problem. When asked about these tests and how they could be used to determine if someone could safely operate a vehicle, Dr. Burns noted that, "they are not tests of driving. They are

tests of sobriety.... The officer is not charged with making a decision about driving skills at roadside. He couldn't.... What he is charged with doing is making a judgment about their sobriety or [the] *presence* of alcohol or impairment by alcohol, if you will."

While Dr. Burns believed that the HGN test as administered by police officers was "a pretty good test and predictor [of impairment]," medical doctors seem to disagree. For those doctors' training and practicing in the ophthalmology field, Duane's Clinical Ophthalmology is the bible, their Gray's Anatomy. So, what do they think of the HGN test as a field sobriety test? Not much, actually. "Unfortunately, that alcohol can produce horizontal gaze-evoked nystagmus has led to a 'roadside sobriety' test conducted by law-enforcement officers. Nystagmus as an indicator of alcohol intoxication is fraught with *extraordinary* pitfalls; many normal individuals have physiologic end-point nystagmus; small doses of tranquilizers that wouldn't interfere with driving ability can produce nystagmus, nystagmus may be congenital or consequent to structural neurologic disease; and often a neuro- or sophisticated oculographer is required to determine whether nystagmus is pathologic." Duane's Clinical Ophthalmology, chapter 11, at 2 (Updated July 1, 2013) (emphasis added).

Okay then. Now, where is that copy of that book written by Mike Eruzione, *The Making of a Miracle: The Untold Story of the Captain of the 1980 Gold-Medal Winning US Olympic Hockey Team*? At least I know that story has a happy ending.

That is just my opinion. I could be wrong (just ask my wife). Stay safe! Stay healthy! Stay sane! 🏠

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F·L·O·R·I·D·A DEFENDER

Volume 33 No. 2

A Publication of the Florida Association of Criminal Defense Lawyers

Summer 2021



IN MEMORIAM
**Pat
McGuinness**