RETHINKING DUI LAW IN VIRGINIA

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I. INTRODUCTION

Prosecuting the crime of driving under the influence ("DUI") (or driving with a blood alcohol concentration ("BAC") level of at least 0.08)[1] without doing damage to some of our most cherished constitutional principles is oftentimes problematic. To narrow the focus of that wide vein, failing to always require the requisite criminal intent for conviction is the primary consideration of this essay.[2]

The crime of DUI is an intense emotional, political, and constitutional subject. On one side of the debate, we have organized lobby groups, most notably Mothers Against Drunk Driving, that push for ever-harsher drunk driving laws. On the other side, we have the defense bar and those concerned with sacrificing the Constitution in exchange for easier DUI convictions.

Those having lost loved ones at the hands of drunk drivers and those who are simply concerned about the safety of the roadways have every reason to demand stricter drunk driving laws. And

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1. Virginia Code section 18.2-266 also may be violated by driving under the influence of prescription and non-prescription drugs, but the vast majority of cases are alcohol related. *See* VA. CODE ANN. § 18.2-266 (Cum. Supp. 2006).

2. The adverbs "willfully," "intentionally," and/or "recklessly" are conspicuously absent in section 18.2-266, which reads like a simple traffic infraction: "It shall be unlawful for any person to drive or operate any motor vehicle . . . while such person is under the influence of alcohol." *Id*. In *United States v. X-Citement Video, Inc*., 513 U.S. 64, 69 (1994), the Supreme Court of the United States held that "some form of scienter is to be implied in a criminal statute even if not expressed, and . . . a statute is to be construed where fairly possible so as to avoid substantial constitutional questions." The word "scienter" is synonymous with mens rea, meaning culpable state of mind or criminal knowledge. *See* BLACK'S LAW DICTIONARY 1373 (8th ed. 2004). Unfortunately, the traffic courts routinely overlook the essential element of criminal intent.

those who are able to foresee the legal consequences of replacing constitutional protections with quid pro quo measures for the sake of appeasing loud voices have every reason to demand constitutional integrity from the legislature and judiciary.

My position is that the two seemingly polar groups are not natural enemies, and my proposals at the end of this piece seek to satisfy the concerns of both sides. I argue the solution is to enact appropriate criminal driving laws that satisfy both societal and constitutional concerns.

As the demand for safer roadways needs little supporting argument, I turn to the constitutional problem of strict criminal liability law, followed with a brief analysis of criminal intent and strict liability law within the criminal system, some examples of how other states have responded to the inherent tensions, and a few specific thoughts for the legislature to consider.

II. CONTEXT OF ANALYSIS

Strict liability law in "criminal form" expanded immensely in the early twentieth century. Scholars credit the advent of the industrial revolution (whereby the operation of modern machinery presents a ubiquitous danger to the public) for the increase of hybrid strict civil liability cases prosecuted by the state. In 1915, Justice Cardozo noted, "Prosecutions for petty penalties have always constituted in our law a class by themselves. That is true, though the prosecution is criminal in form."[3] When Justice Cardozo spoke of "petty penalties," he referred exclusively to monetary penalties for offenses committed with negligence. A bartender who continues to serve alcohol to an observably impaired patron is an example of such an offense. Traditional strict civil liability law that requires a standard of care owed to an individual also requires a standard of care owed to the public at large: "In the interest of the larger good [a strict liability offense] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."[4]

3. Tenement House Dep't v. McDevitt, 109 N.E. 88, 90 (N.Y. 1915) (citations omitted).

4. United States v. Dotterweich, 320 U.S. 277, 281 (1943).

Fast-forwarding to contemporary criminal jurisprudence, we now encounter substantive, jailable criminal offenses that hinge on strict liability, requiring no culpable intention or finding of recklessness. The existence of substantive criminal offenses by strict liability is largely the result of the increasing number of hybrid offenses coupled with the misinterpretation of an infamous 1952 Supreme Court case.

Virginia courts and the appellate courts of other states casually cite *Morissette v. United States*[5] to justify the enforcement of their substantive strict liability criminal offenses. A review of the case reveals that the justification is pressed out of the Court's dictum, and, interestingly, the holding of *Morissette* does not help the substantive strict-criminal-liability cause. The holding is that a criminal conviction (on the code section before the Court, though partially silent regarding intent) will not be upheld without the age-old element of mens rea.[6] The Supreme Court thus reversed the holding of the court of appeals that criminal intent need not be established when it appears that the legislature intended to create a strict liability criminal offense.[7]

In his well-written opinion, Justice Jackson expounds on the history and distinctions between strict liability and mens rea offenses. He makes it clear that the requirement of criminal intent is "no provincial or transient notion."[8] Moreover, the requirement of mens rea "is as universal and persistent in mature systems of law as belief in freedom of the human will . . . and took deep and early root in American soil."[9] On the other hand, the opinion contains language that seemingly leaves the question of criminal intent to the unbridled discretion of the legislature:

> Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static.[10]

5. 342 U.S. 246 (1952).
6. *Id*. at 263.
7. *See* Morissette v. United States, 187 F.2d 427, 429 (6th Cir. 1951).
8. *Morissette*, 342 U.S. at 250.
9. *Id.* at 250–52.
10. *Id.* at 260.

Additionally, the Court cites *United States v. Balint*, which appears to make criminal intent "a question of legislative intent to be construed by the court."[11]

Though the issue in *Balint* appears to involve violations of serious criminal offenses because the defendants were indicted under the 1914 "Narcotic Act" for unlawfully selling derivative opium and coca leaves,[12] the "crimes" at issue were actually violations of a regulatory offense punishable by monetary penalty. Thankfully, the *Balint* Court clarified the context where a legislative intent to not require criminal intent properly lies: "Many instances of [legislative intent] are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*."[13]

Though the Court in *Morissette* was unwilling to draw a precise line between public welfare offenses and mala in se crimes, it does not follow that if the legislature intends to dispense of criminal intent in the drafting of a criminal offense, the enactment is constitutionally sound. The Court's unwillingness to dictate to the states the offenses that may be enforced without mens rea and those requiring criminal intent for conviction does not mean that criminal statutes are subject to the Constitution *except* when criminal intent is the issue. Indeed, the exposition of *Morissette* is consistent with the common law and the Constitution and may be summed up as follows: Under our criminal justice system, mala in se crimes without some form of mens rea cannot exist.[14] Likewise, strict liability offenses are not punishable by imprisonment.

A review of Justice Cardozo's words quoted in *Morissette* reveals the Court's guarded position on the question of mens rea:

> Judge Cardozo . . . pointed out, as a basis for penalizing violations whether intentional or not, that they were punishable only by fine "moderate in amount," but cautiously added that in sustaining the power so to fine unintended violations "we are not to be understood as sustaining to a like length the power to imprison."[15]

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11. *Id.* at 250; United States v. Balint, 258 U.S. 250, 252 (1922).
12. *Balint*, 258 U.S. at 251.
13. *Id.* at 252.
14. *See supra* note 2.
15. *Morissette*, 342 U.S. at 257–58 (quoting People ex rel. Price v. Sheffield Farms-

Though the Virginia appellate courts have not addressed the criminal intent issue in the "driving under the influence" statute, the Supreme Court of Virginia boldly proclaims, in general, that "the legislature may create strict liability offenses as it sees fit, and there is no constitutional requirement that an offense contain a *mens rea* or *scienter element*."[16] That kind of erroneous pronouncement is not limited to Virginia. The states reaching similar conclusions share a misreading of *Morissette* and a failure to distinguish between the types of laws that require the element of mens rea. The distinction, for purposes of criminal intent, does not lie between common-law offenses and contemporary statutory offenses. The enduring doctrine of mens rea is blind to whether a jailable offense was codified years ago from non-statutory common law or recently created by statute.

Practically speaking, no one who argues for DUI to be classified as a strict criminal liability offense believes that it is a malum prohibitum or regulatory offense. Indeed, both sides of the debate agree that drunk driving is a crime of inherent criminal wrongdoing that should, at times, be punished by pain of imprisonment.

The current state of DUI jurisprudence, with its unconstitutional presumptions, lax evidentiary standards, and strict criminal liability either by pronouncement or inference, is the result of starting from the wrong premise. To have any reasonable hope of arriving at sound proposals, this essay is written from the standpoint that a criminal offense requires criminal intent. Beginning elsewhere would be to "radically . . . change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction . . . ."[17]

Slawson-Decker Co., 121 N.E. 474, 476–77 (N.Y. 1918)).

16. Esteban v. Commonwealth, 266 Va. 605, 609, 587 S.E.2d 523, 526 (2003) (citing Maye v. Commonwealth, 213 Va. 48, 49, 189 S.E.2d 350, 351 (1972)); *see Morissette*, 342 U.S. at 256–58. Contrary to the court's ruling in *Esteban*, in the criminal law context, a constitutional requirement of mens reas does exist. The imperative of *X-Citement Video*, *see supra* note 2, requiring scienter of some form to be implied in criminal statutes was completely ignored by the *Esteban* Court. Moreover, reliance upon *Morissette* and *Maye* to displace hundreds of years of common law is misplaced. *Maye* merely stands for the proposition that statutes that are silent with respect to mens rea are not per se unconstitutional "since such requirement will be read into the statute by the court when it appears the legislature implicitly intended that it must be proved." *Maye*, 213 Va. at 49, 189 S.E.2d at 351. No sound constitutional doctrine suggests that the legislature can arbitrarily make mens rea irrelevant in criminal statutes.

17. *Morissette*, 342 U.S. at 263.

III. THE PROBLEM OF CRIMINAL INTENT

Proving a defendant's mens rea in the area of drinking and driving law is not always a black and white matter. The judiciary's automated application of the M'Naghten Rule—that an accused is deemed to have foresight relating to the consequences of his actions—works fine when the accused engages in heavy drinking and then recklessly proceeds to drive an automobile. But in cases where the drinking is moderate and evidence of recklessness is absent, criminal intent should not be presumed instinctively. So long as it remains legal to drive after drinking (as long as one is not under the influence or at a BAC of 0.08), a judgment call must be made by the person intending to drive. Someone who is not appreciably impaired would not necessarily foresee negative consequences in driving any more than one would foresee negative consequences in driving while negligibly impaired by other factors, such as fatigue.

In some circumstances (when BAC level is rising) a judgment call is made after driving has commenced. One of the clearest indications of the judiciary's willingness to overlook the element of criminal intent (or to tacitly impute intent) to sustain DUI convictions may be observed in the development of the law with respect to the "operation of a motor vehicle."[18] Situations sometimes arise where a driver deems herself unimpaired and fine to drive, but, due to alcohol absorption, decides at some point to pull over and park to prevent driving while impaired. One might think that such decisions (to cease driving) should be commended as being in the public interest. One might think that a criminal intent to commit a crime could not be inferred from those facts. The rulings of the Virginia appellate courts, however, would indicate otherwise. Our hypothetical driver must be careful not to park her vehicle at a place that is deemed a "highway."[19] For, if after calling

18. Under Virginia Code section 18.2-266, it is "unlawful" to "drive or operate any motor vehicle" while under the influence of alcohol. VA. CODE ANN. § 18.2-266 (Cum. Supp. 2006). The state of the law is such that if the "driver" activates or engages the vehicle's mechanical devices, (including the ignition and brake lights) regardless of whether the engine is running, he likely will be found to be operating the vehicle, so long as he is in close enough proximity to exercise control. *See* Gravely v. Commonwealth, No. 0430-02-3, 2003 Va. App. LEXIS 19, at *7–9 (Ct. App. Jan. 21, 2003) (unpublished opinion); Keesee v. Commonwealth, 32 Va. App. 263, 527 S.E.2d 473 (Ct. App. 2000); Propst v. Commonwealth, 24 Va. App. 791, 485 S.E.2d 657 (Ct. App. 1997).

19. The "implied consent law" means that anyone who drives on a "highway" consents to having his breath tested and blood drawn when probable cause for DUI exists. *See* VA.

for a ride, she waits in the driver's seat with the radio on and the engine off, she might be engaging in "drunk driving." While the suspect is "operating the vehicle" on a highway, even in her sleep, the rise in her BAC may be used against her to sustain a conviction. Regardless of the counter-intuitiveness of finding criminal intent in such circumstances, convictions of the sort are upheld in Virginia.[20]

In order to violate a criminal law, the intent to do something or to omit something against the law must be present; intent is the gravamen of our criminal justice system.[21] When one intentionally acts, the mens rea attaches and if the specific commission or omission happens to be illegal, barring legal excuse or justification, the law is violated. Ignorance of the law is no excuse. Even if I claim to not know that stealing is wrong and I walk into a 7-Eleven, place a candy bar in my pocket, walk out of the store without paying for it, and eat the confection while walking home, I have broken the law.

In contemporary criminal driving jurisprudence (and in other areas of modern criminal law) we may observe the increasing tendency of allowing strict liability to morph into intent.[22] Acting recklessly with a conscious disregard for others has always been enough to supply the requisite criminal intent for conviction of a

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CODE ANN. § 18.2-268.2 (Cum. Supp. 2006); *see also* Furman v. Call, 234 Va. 437, 440–41, 362 S.E.2d 709, 711 (1987) (holding that an office condominium parking lot was a "highway"); Mitchell v. Commonwealth, 26 Va. App. 27, 34, 492 S.E.2d 839, 842 (Ct. App. 1997) (holding that a private roadway was indeed a highway for implied consent purposes).

20. In *Floyd v. Commonwealth*, the defendant was found to have operated a motor vehicle after following the instruction of a police office who asked her to try to start the disabled vehicle. *See* No. 0568-01-2, 2002 Va. App. LEXIS 440, at *2–3 (Ct. App. July 30, 2002) (unpublished decision). Other than her attempt to start the vehicle (which did not start), no evidence existed to show the defendant had operated the vehicle. Although counsel for the defendant argued that Floyd did not operate the vehicle by merely attempting to start it, no argument was raised concerning the apparent lack of criminal intent to drive (or operate) under the influence in the context of Floyd's compliance with the officer's request.

21. In *Morissette*, the Supreme Court noted:

> As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission [of criminal intent] did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation.

Morissette, 342 U.S. at 252.

22. Practically, of course, contemporary jurisprudence simply replaces the requirement of a culpable intent for absolute criminal liability.

jailable offense.[23] Certainly, criminal intent may be inferred from reckless behavior, but recklessness should never be inferred from strict liability law.

If while driving on a Virginia highway my speedometer needle reaches 75 in a 55 mph zone, I may be found guilty of a class one misdemeanor and permissibly sentenced to twelve months in jail. It is reckless driving without the city or state having to prove actual recklessness.[24] Let's say I truly did not know my needle reached 75. Let's say I knew I was in violation of the strict liability traffic regulation of speeding but had no idea that my speed reached 75 for a brief moment, thus making my actions criminal.[25] Let's say my eyes were on the road and there were no cars (other than the hidden police cruiser) within two miles. After seeing the blue lights, I looked down and saw my speed at 70.

This is quite distinguishable from the 7-Eleven hypothetical. By merely egressing the store's threshold without paying for the item, a bit of intent may be inferred—that of intending to permanently deprive the store of the candy bar. But critically important

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23. Whether labeled as criminal negligence, gross negligence, or recklessness, the terms must involve an "act done willfully . . . the known effect of which, under the circumstances, must be to endanger life [or to break the specific law]." United States v. Freeman, 25 F. Cas. 1208, 1211 (C.C.D. Mass. 1827) (No. 15,162). The key words are "the known effect." As Justice Holmes stated, "[A] deed is not done with intent to produce a consequence unless that consequence is the aim of the deed." Abrams v. United States, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting). The Court in *Morissette* notes:

> The unanimity with which [the states] have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "wilfulness," "*scienter*," to denote guilty knowledge, or "*mens rea*," to signify an evil purpose or mental culpability.

Morissette, 342 U.S. at 252.

24. Virginia Code section 46.2-862 states, in relevant part: "A person shall be guilty of reckless driving who drives a motor vehicle on the highways in the Commonwealth (i) at a speed of twenty miles per hour or more in excess of the applicable maximum speed limit . . . ." VA. CODE ANN. § 46.2-862 (Supp. 2006). Incidentally, section 46.2-852 states: "Irrespective of the maximum speeds permitted by law, any person who drives a vehicle on any highway recklessly or at a speed or in a manner so as to endanger the life, limb, or property of any person shall be guilty of reckless driving." VA. CODE ANN. § 46.2-862 (Repl. Vol. 2005).

25. Non-misdemeanor traffic infractions, of course, are strict liability offenses, not requiring the element of criminal intent (i.e., not requiring that a defendant act "knowingly" or "willfully" to be found guilty).

is the fact that I knew that I took the candy.[26] That which is inferred flows from the willful and intentional wrong act of taking the candy.

So long as driving after drinking is not illegal, there are times when I may drive after drinking without any knowledge of doing something criminal. [27]

It is not illegal to drink. It is not illegal to drive after drinking. It is illegal to drive under the influence. It is illegal to drive when your BAC is 0.08 or higher. In the context of committing and proving the criminal offense, how does one always know when he is either under the influence of alcohol or at a 0.08 BAC? And how does the Commonwealth prove beyond a reasonable doubt that one drove with the requisite criminal intent when the suspect's actions are accompanied with no evidence of recklessness (i.e., when the driving and mannerisms of the suspect prior to and after the traffic stop are otherwise unimpeachable)?

Say the suspect was pulled over for expired tags and regardless of perfect driving and coherent and polite speech, the suspect nevertheless "fails" the field tests and subsequently blows a 0.08. Regarding intent in that scenario, strict liability bootstraps recklessness, which provides the criminal intent. A criminal conviction means that one is held to a standard of strict liability for driving after drinking regardless of actual knowledge or recklessness.

Or let us say that after some heavy drinking and riding home as a passenger, a woman falls asleep at two o'clock in the morning. She wakes up at 7:00 a.m. feeling groggy, but with no impairing effects of alcohol. She leaves her house and proceeds to drive to the 7-Eleven to get a pack of cigarettes and a cup of coffee. After pulling her over for speeding and detecting an odor of alcohol, the officer asks whether she had been drinking and she answers in the affirmative, explaining the circumstances. After failing

26. Some proponents of the current DUI system argue that one always "knows" when one drives a motor vehicle and, therefore, the element of criminal intent is satisfied. The distinction, of course, is that it is always illegal to take another's property without having a legal interest, but it is not always illegal to drive an automobile; nor is it always illegal to drive after drinking.

27. The subjectivity of being "under the influence" ought to be apparent when we remember that the legal presumption of being under the influence was once a BAC of 0.15, then 0.10, and finally 0.08.

field sobriety tests, she is taken to the station where she refuses the breath test. Based upon an officer's boilerplate testimony at trial of the suspect being disheveled in appearance and unsteady on her feet, having bloodshot eyes and a flushed face, coupled with her inability to keep one leg in the air for the prescribed time-period without dropping it or swaying, she realistically could be convicted of DUI in Virginia without any indicia of criminal intent or evidence of recklessness.

Though all constitutional protections should apply equally to DUI cases, public policy, it seems, often trumps the Constitution in the legislative halls and in the traffic tribunals. The law says it is illegal to drive under the influence or with a BAC of 0.08 and then sets out to yield to the policy of making convictions ever-easier by ignoring the essential element of criminal intent (or recklessness) and by relaxing evidentiary standards of proof.[28] Public policy effectively says that if you intend to drive after drinking, you have the requisite intent to be found guilty of DUI if it turns out that you cannot satisfactorily pass subjective field sobriety tests or produce a breath reading under 0.08. In many instances, strict liability indeed prevails substantively in our criminal justice system.[29]

28. The federal government's National Highway Traffic Safety Administration ("NHTSA") has spent thousands of dollars to develop "standardized" field sobriety tests that purportedly yield a specific probability of intoxication percentage based upon a specific number of indicators and clues observed for each of the three approved tests. Even granting that a foundation for field test reliability may be laid using the government reports hearsay exception and that field sobriety testing research is admissible, judicial conclusions are routinely drawn without the necessary information offered into evidence from the government's research. For example, arresting officers routinely provide the courts with no more than a statement that certain tests were performed and how the accused performed. For example, an officer might testify that he conducted the "walk and turn" test and the suspect missed (making) heel to toe (contact) on steps three and seven and raised his arms for balance on steps four and six. Without evidence of how the NHTSA training manual requires the field officer to instruct the accused prior to commencing the test; without evidence of the conditions, e.g., the lighting, age, weight, and/or health of the suspect, required for reliability; without evidence of how many indicators of impairment each test has; without evidence of how many clues are required for each test to trigger the probable cause percentage number; and without evidence of what the probable cause percentage number is, the court is left entirely to speculation to connect the dots for probable cause and, oftentimes, for conviction.

29. In Virginia, strict liability in the context of DUI prevails implicitly. The appellate courts of some states have proclaimed that driving while under the influence of alcohol or drugs is an "absolute liability" offense. *See, e.g.*, City of Wichita v. Hull, 724 P.2d 699, 702 (Kan. Ct. App. 1986). The Kansas courts, unsurprisingly, rely upon *Morissette* to support their rulings. In at least one context of Virginia DUI prosecution, the requirement of intent is tacitly imputed to defendants rather than ignored. In federal prosecution of Vir-

IV. STRICT LIABILITY'S PLACE IN CRIMINAL LAW

Strict liability has a place in criminal law, but it must always be ancillary to a substantive crime. The earlier mentioned reckless driving by speed illustration is an example of just the opposite—strict liability by speed alone, without actual knowledge, is presently the substantive crime. To be constitutional, however, the crime of reckless driving (with knowledge and recklessness) must be proven first, and then the strict liability element of certain speeds (with or without actual knowledge) may enhance punishment.[30] That is the constitutional scheme we see with the age-old crime of larceny. The crime of larceny is committed by taking an item with intent and the (strict liability) dollar value of the item (with or without having knowledge of the item's value) merely determines how the offense is classified (misdemeanor or felony) and structured for punishment. The same reasoning should apply to other strict liability crimes such as the crime of consensual, statutory rape. Presently, the minor's age is imputed to secure a conviction even if the accused reasonably believed that the minor was nineteen. The solution for that strict liability evidentiary dilemma is the same as with all others. The strict liability element of age must be tied to a substantive crime, in this case fornication.[31] Strict liability then becomes ancillary to a substantive, intent-based crime. The crime is committed regardless of age and the age of the minor simply classifies the offense for purposes of punishment.

In order to restore judicial integrity to the offense of DUI, the constitutional scheme of due process must likewise be set in order. The strict liability cart should not go before the substantive ox of a mala in se criminal offense.

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ginia Code section 18.2.266, the United States Attorney's Office of the Eastern District of Virginia adds language of scienter in its "Criminal Information." The federal prosecutor routinely charges that the accused did knowingly and unlawfully operate a motor vehicle while under the influence of alcohol or at a BAC of at least 0.08.

30. Alternatively, the legislature could make it a crime to knowingly drive at seventy-five miles per hour on the highway and call it something other than reckless driving.

31. Whether the Commonwealth generally prosecutes the crime of fornication is irrelevant. Once the law is amended to make age an element of ancillary strict liability, a prosecutor's office could adopt the policy of prosecuting those types of fornication cases that have minors as victims.

V. THE TREND IN DRINKING AND DRIVING LAW

The State of Arizona attempted to solve some of the DUI problems by enacting legislation that makes it illegal for a driver to be "impaired to the slightest degree" by alcohol or drugs.[32] Colorado law creates a "permissible inference that the defendant's ability to operate a vehicle was impaired by the consumption of alcohol [when the defendant's BAC] was in excess of 0.05 . . . ."[33]

With regard to the faulty presumption that the BAC test result at the police station accurately reflects the actual BAC level when the suspect was driving, Arizona, Colorado, and other states have enacted legislation making it a crime to have a BAC level at a 0.08 while driving—or within two hours *after* driving.[34] These solutions may be ostensibly helpful, but when it comes to requiring criminal intent for a criminal conviction they do not solve the constitutional problems. The reasoning of the "impairment to the slightest degree" law is that, before and during driving, one might not *know* that he is unable to pass field and breathe tests, but he ought to know when he is impaired to the slightest degree. The problem, of course, is that alcohol affects people differently and many times a suspect may not know that he is impaired by alcohol.[35] Other reasons for impairment, like fatigue, illness, disease, stress, emotion, or distractions, might reasonably form the suspect's *knowledge* of his *negligible* deficiency.

With respect to making it illegal to produce a 0.08 BAC within two hours *after* driving, the flawed presumption of relating the BAC back to the driving time-frame is eliminated. Yet in reference to criminal intent, we may mark even more substantive strict liability, not less.

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32. *See* ARIZ. REV. STAT. ANN. § 28-1381(A)(1) (2006).

33. *See* COLO. REV. STAT. § 42-4-1301(6)(a)(II) (2006). Similar to Arizona, in Colorado it is illegal to drive while ability impaired ("DWAI") and/or to drive under the influence ("DUI"). *Id*. § 42-4-1301(f), (g). A BAC of 0.08 gives rise to the "permissible inference" that a defendant was under the influence of alcohol. *Id*. § 42-4-1301(6)(a)(III). Virginia Code section 18.2-269 contains Virginia's presumptions. An accused having a BAC under 0.05 is presumed to have not been under the influence; between 0.05 and 0.07 no presumption exists either way; and at 0.08 the accused is presumed to have been under the influence. The last presumption is irrelevant inasmuch as an accused is affirmatively in violation of Code section 18.2-266 with a BAC of 0.08. VA. CODE ANN. § 18.2-269 (Cum. Supp. 2007).

34. *See*, *e.g*., ARIZ. REV. STAT. ANN. § 28-1381(A)(2); COLO. REV. STAT. § 42-4-1301 (2)(a).

35. Indeed, one person with a 0.08 BAC may be stumbling drunk while another's motor skills and cognitive abilities are not measurably influenced at the same alcohol level.

VI. SOME PROPOSED SOLUTIONS

Rather than gravitating toward the Arizona and Colorado models of ratcheting up the current system, and arguably making convictions even more unconstitutional, a new system should be implemented. The answer is not to continue to impute criminal intent from strict liability (no matter how the law is packaged or justified), nor to relax evidentiary burdens of proof. The tacit policy of substantive strict liability for driving after drinking when those acts are not a per se crime will never find sound constitutional approval.

To be intellectually honest and constitutionally faithful, either driving after drinking needs to be criminalized or criminal intent needs to be required for conviction of DUI.

A novel approach would be to criminalize driving after drinking. One proposal would be for the creation of a new intent-based offense of driving after drinking ("DAD") with other offenses by ancillary strict liability—e.g., driving after drinking while under the influence, etc. Like going from petty to grand larceny, the additional elements would still have to be proved beyond a reasonable doubt, but the underlying element of criminal intent would be established. Taking property with intent to deprive its owner provides the mens rea for all larceny offenses and, likewise, the intent to drive after drinking would provide the mens rea for all DAD offenses.

The substantive offense of driving after drinking might best be classified as a lower-grade misdemeanor. At the traffic stop or police encounter, admission of drinking by the driver or odor of alcohol (technically, the ingredients in the alcohol) detected by the officer could trigger a mandatory Alco-Sensor unit field breath test (currently the field test is voluntary).[36] A reading of 0.08 or

36. The DAD statute might provide that it shall be unlawful to willfully drive an automobile (within a specified time period) after consuming alcohol. A reading of 0.05 on the officer's portable Alco-Sensor unit could create a rebuttable presumption that the suspect drove within the proscribed time frame. Making the field breath test by the handheld device mandatory would make probable cause arrest for DAD/DUI easier and more objective, circumventing the need for field sobriety tests. Even with all the due criticism of the Intoxilyzer Model 5000 aside (e.g., the machine's assumption of the same breath temperature of all suspects, the machine's margin of error, etc.), field sobriety tests far exceed the machine in subjectivity, especially in light of the fact that most DUI suspects are not filmed at the roadside, which means the court relies solely on the officer's testimony for probable cause and, many times, for conviction. The types of field tests used, instructions

higher or other sufficient evidence could establish probable cause for arrest for DAD/DUI; otherwise the suspect might receive a summons for simple DAD. Under this proposed system, fewer grey areas would exist with respect to criminal intent. Also, there would be actual knowledge of drinking and subsequent driving.

Making driving after drinking illegal sounds like a simple solution, but some complex difficulties remain. First, although the public apparently is in favor of ever-tougher DUI laws, I am not sure that the citizenry is ready to make driving after drinking illegal. The proposal is wrought with practical problems, like being unable to legally drive after dinner accompanied by a glass of wine. Another potential problem, though highly exceptional, would be a suspect who drives after the proscribed time period but produces a BAC over the set minimum. In that instance, criminal intent would seem to be absent. Even with that glitch in the system, however, less criminal intent problems would arise than with the current system.[37]

Alternatively, and perhaps preferably, the second proposal for the criminal intent problem would be to simply require criminal intent or evidence of recklessness for DUI convictions.[38] Under this proposal, the offense of DUI should be classified as a felony (even for a first offense). If the public is willing to have an offense on the books which carries a maximum sentence of twenty years in prison for stealing an item that is worth $200.00,[39] certainly the offense of willfully or recklessly driving while intoxicated could, and perhaps should, be classified as a serious felony.

This second proposal would mean that accident-DUI-cases caused by the fault of defendants under the influence would con-

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to suspects, and evaluation of suspects' performance of sobriety testing certainly vary among officers. What is detected as a strong odor of alcohol to one officer may be a moderate odor to another. What appears to be a failed test to one officer may appear to be fine to another. The breath machine at the station is at least objectively neutral, having no apparent conflict of interest in needing to justify its probable-cause decision for arrest to the court.

37. The offense of DAD could be classified as a strict liability traffic infraction (punishable by fine only), but the problem of criminal intent inevitably would arise when one reaches the arbitrary BAC level, making the offense a criminal violation.

38. Language of intent should be added to the offense: e.g., "It shall be unlawful for anyone to willfully or recklessly drive a motor vehicle while under the influence of alcohol. An alcohol concentration percentage of 0.08 shall constitute a presumption of being under the influence. Violation of this section shall constitute a class [ ] felony."

39. *See* VA. CODE ANN. § 18.2-95 (Repl. Vol. 2004 & Cum. Supp. 2007) (defining grand larceny).

stitute serious felony offenses.[40] Drivers pulled over by the police with evidence of reckless driving also would be charged with the felony offense. Even when driving is not noticeably reckless, but a suspect is grossly intoxicated to the point of lacking speech and motor skills (incoherence and pronounced stumbling) at the traffic stop, a finding of recklessness also would find evidentiary support. For those drivers stopped without sufficient evidence of intent (lack of admission of feeling intoxicated or lack of testimony from others having heard incriminating words of the suspect) or recklessness, the law certainly could prevent further driving. A strict liability regulation could say that suspects lawfully stopped by the police who produce over a 0.05 BAC on the Alco-Sensor would be prohibited from re-commencing driving.[41] The vehicle would have to be driven by someone else or impounded.

Of the two proposed systems, the second is the more *legally* and *practically* sound, and both sides of the DUI debate may find satisfaction under its constitutional ceiling (which would extend quite high with regard to punishment). Drunk driving would be discouraged by virtue of making the offense a felony. In the case where a defendant is driving under the influence with criminal intent or recklessness, she may be punished accordingly. By establishing the necessary mens rea, issues of imputing criminal intent from strict liability would dissipate. The Arizona law of holding one liable for yielding a 0.08 BAC two hours after driving only makes constitutional sense when mens rea already exists.

My advocacy is not for the above proposals; my concern is to see the criminal justice system restored in the area of drinking and driving. I realize that any number of proposals could work to restore the system. The legislature must determine the specifics. The importance of the proposed reform lies not in the specifics, however, but in honoring the overarching principles of our constitutional system of criminal law.

40. Once mens rea is established by admission or recklessness, arbitrary BAC levels could enhance punishment by strict liability.

41. The field Alco-Sensor test could become a mandatory test when an admission of drinking or an odor of alcohol is detected. Without an admission (of feeling intoxicated or drinking an excessive amount of alcohol) or evidence of recklessness to establish criminal intent, instances could occur where drivers produce a reading over 0.08 on the Alco-Sensor and are not charged, but are prohibited from further driving.