

DWI AND THE INSANITY DEFENSE: A REASONED APPROACH

It is as much the duty of the state to protect an insane man from conviction, as it is to prevent a sane man from escaping that result.¹

INTRODUCTION

John Owens served two tours of duty in Vietnam.² He returned from war in 1968 and has not been well since. In 1970, John was diagnosed with post-traumatic stress disorder and has been in and out of treatment at veterans' hospitals for the past twenty-five years. John experiences flashbacks, blackouts, depression, and hypervigilance. All of these symptoms have been extensively documented for the past fifteen years. In order to combat these ailments, psychiatrists have prescribed a battery of drugs for John. Some have been successful; others have not. Perhaps the most alarming ailment that John experiences is a phenomenon called "psychogenic fugue." During these fugue episodes, John enters into a condition of semi-awareness and does not know what he is doing or where he is. During one fugue, John traveled from his home in Vermont to Hartsville, South Carolina. He awoke to find himself standing on a street corner with no money and only the clothes on his back. He had no idea how he had traveled to Hartsville or why he would have done so.

Another fugue episode occurred about one year ago. That episode served as the genesis for this note. John was pulled over by the Vermont State Police for driving erratically. The officers suspected that he was intoxicated. They had him perform a roadside sobriety test and blow into a breathalyzer, both of which he failed. John was aware that he had been driving his car, but he was not aware that he had been drinking. In fact, he did not even know where he was before the police pulled him over. The breathalyzer test showed that John was intoxicated to a level only slightly above the legal limit, not enough to cause memory loss or an alcoholic blackout. The evidence indicates that his unawareness was caused by his mental disorder, rather than his intoxication. John's mental illness caused him to be unaware of the fact that he drank and then drove. He was charged with the crime of driving while intoxicated (DWI), which carries a potential prison term of two years.³ His attorney researched the

1. *State v. Warner*, 91 Vt. 391, 393, 101 A. 149, 150 (1917).

2. Case study is based on a real event. Names and specific facts have been altered to protect confidentiality.

3. VT. STAT. ANN. tit. 23, § 1210(b) (Supp. 1995).

possibility of asserting the insanity defense due to John's mental illness. It was evident that if John had committed almost any other crime in Vermont he would have been able to assert the insanity defense⁴ on his behalf and present evidence concerning his mental illness.⁵ A jury would have the responsibility of weighing the evidence and determining if John was insane at the time of his offense.⁶ Yet, in Vermont, and in many states across the country, it is unclear whether John Owens may be permitted to plead the insanity defense for committing the crime of DWI.

This note will examine the prudence and feasibility of the use of the insanity defense for DWI and DWI predicate crimes⁷ in Vermont. The question has never been addressed by the Vermont Legislature or the Vermont Supreme Court. However, the court is now facing a case on appeal that raises the issue.⁸ Currently, the insanity defense is permitted for DWI crimes in a minority of states.⁹ Another minority of states have ruled that the insanity defense is inapplicable to DWI offenses.¹⁰ The majority of other states, including Vermont, have not yet addressed the issue.¹¹ This note will analyze the interplay between Vermont's DWI and insanity statutes against the backdrop of how other states have addressed the issue.

At this point, because of the current unpopularity of the insanity defense and the fervent national movement to eradicate drunk drivers from our highways, the author wishes to point out what this note is *not* about. This note is not about creating an imaginative legal loophole for mentally competent defendants to exculpate themselves. This note is not about allowing defendants to claim that their severe intoxication caused them to become insane. What this note *does* propose is that mentally ill defendants, such as John Owens, should be able to assert the insanity defense for the offense of DWI, just as they would be able to for other crimes. The availability of the insanity defense to DWI defendants will not serve as a creative excuse for guilty defendants. Rather, the result will be to adhere to a consistent mens rea structure and protect the rights and lives of both mentally ill criminal defendants and the public.

4. VT. STAT. ANN. tit. 13, § 4801 (Supp. 1995).

5. V.R.E. 701 & 703; State v. Smith, 136 Vt. 520, 524, 396 A.2d 126, 128 (1978).

6. VT. STAT. ANN. tit. 13, § 4801.

7. The term DWI predicate crimes will be used to designate third offense DWI, DWI with injury resulting, and DWI with death resulting. VT. STAT. ANN. tit. 23, § 1210 (c)-(f) (Supp. 1995).

8. State v. Brown. Docket No. 699-8-93, WrCr 2/23/94, 20 Vt. B. J. 29-30 (1994). Author's note: John Owens's experience is not related to the *Brown* case.

9. See *infra* Part IV.

10. *Id.*

11. *Id.*

Drunk driving has become the people's crime. Surveys estimate that twenty percent of American drivers, or 33 million people, drive while legally impaired at least once per year.¹² In 1993, there were 1.2 million arrests for drinking and driving offenses in the United States.¹³ Also in 1993, 17,461 people died in traffic accidents involving drivers who had some amount of alcohol in their bloodstream.¹⁴ Another half million individuals are injured annually in alcohol-related accidents.¹⁵ It is estimated that an alcohol-related fatality occurs every twenty-four minutes, and that two of every five Americans will be involved in an alcohol-related accident at some time during their lives.¹⁶ The dollar costs of these accidents is extraordinary, with estimates ranging from \$10 to \$15 billion per year.¹⁷

Sadly, the State of Vermont is not exempt from these frightening statistics. In 1992, forty-one of the ninety-six traffic fatalities that occurred in Vermont involved alcohol.¹⁸ Some estimates calculate that alcohol-related traffic deaths and injuries cost the people of Vermont \$75 million in direct costs, or \$263.9 million when "lost quality of life" costs are included.¹⁹ Vermont received an overall grade of "D+" from Mothers Against Drunk Driving (MADD) as a result of its legislative and enforcement performance regarding DWI.²⁰ To say that drunk driving is a problem of local and national importance is at best an understatement. As the United States Supreme Court recently stated, "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."²¹

12. H. LAURENCE ROSS, *CONFRONTING DRUNK DRIVING* 27 (1992).

13. *A 1994 Summary of Statistics: The Impaired Driving Problem*, MOTHERS AGAINST DRUNK DRIVING ANNUAL REPORT 4 (1994).

14. *Id.* at 1.

15. Kelly Mahon Tullier, Note, *Governmental Liability For Negligent Failure to Detain Drunk Drivers*, 77 CORNELL L. REV. 873, 873 n.2 (1992).

16. *Id.*

17. *Id.*

18. *Rating the States, A Report Card on the Nation's Attention to the Problem of Alcohol and Other Drug-Impaired Driving*, MOTHERS AGAINST DRUNK DRIVING ANNUAL REPORT 62 (1993).

19. The National Highway Traffic Safety Administration (NHTSA) estimates the "direct costs of alcohol-related crashes at \$797,000 per death and \$19,200 per injury; inclusion of non-economic 'lost quality of life' factors raises the estimated costs to \$2,774,000 per fatality and \$68,000 per injury. There are an estimated 53.9 alcohol-related injuries for every alcohol-related fatality. Nearly 30% of the first-year medical costs end up being paid for by tax dollars." *Id.*

20. *Id.*

21. *Michigan v. Sitz*, 496 U.S. 444, 451 (1990). See also *Welch v. Wisconsin*, 466 U.S. 740, 755 (1984) (Blackmun, J., concurring) (challenging the "national consciousness to face up to — and to do something about — the continuing slaughter upon our Nation's highways, a good percentage of which is due to drivers who are drunk or semi-incapacitated because of alcohol or drug ingestion").

The American public is eager to address the drunk driving problem. In the words of Justice Clifford of the New Jersey Supreme Court, the "uncompromising enforcement of laws designed to rid our highways of the scourge of the drunk driver ranks only slightly behind the veneration of motherhood and probably slightly ahead of a robust hankering after apple pie in the hierarchy of values firmly embedded in our culture."²² Unfortunately, such uncompromising enforcement has not been without costs, as state legislatures and courts have increasingly neglected the rights of the defendant in drunk driving cases.²³ The rights of DWI defendants in Vermont are similarly at risk because, due to the legislature's silence and absence of judicial guidance, DWI defendants may not be able to use the insanity defense in response to DWI charges.

The commingling of the insanity defense with the crime of DWI might at first blush seem an overly esoteric marriage. Yet a recent study reports that twenty-three percent of the American population will experience a mental disorder at some point in their lives.²⁴ In addition, the same study indicates that thirty-seven percent of individuals with alcohol abuse problems will, at some time, experience a mental disorder.²⁵ Meanwhile, drunk driving is the most common crime in America,²⁶ making the intersection of DWI and the insanity defense inevitable as well as worthy of analysis.

To determine whether the use of the insanity defense for DWI crimes is feasible and prudent under Vermont law, Part I of this note will discuss the brief history and development of the crime of DWI in this country. Part II will similarly discuss the history and development of the insanity defense and the episodic course it has taken. Part III will attempt to dispel some commonly held misconceptions concerning the use of the insanity defense. Part IV will address the specific issue of the use of the insanity defense for the crime of DWI as it has been addressed in other states, and the three basic approaches the states have taken in their analysis and treatment of the issue. Part V will then focus on Vermont's DWI statute

22. *State v. Tischio*, 527 A.2d 388, 397 (N.J. 1987) (Clifford, J., dissenting).

23. Jennifer L. Pariser, Note, *In Vino Veritas: The Truth About Blood Alcohol Presumptions in State Drunk Driving Law*, 64 N.Y.U. L. REV. 141, 141 (1989). "For example, Judge Becky Titus of Sarasota, Florida has required convicted drunk drivers who hold restricted licenses to advertise that fact by putting bumper stickers on their cars. It has been described as a 'scarlet letter' for drunk driving. The bumper sticker law has been criticized as violative of the eighth amendment, and ineffective." *Id.* at 141 n.4 (citations omitted).

24. Darrell A. Regier, et al., *Comorbidity of Mental Disorders With Alcohol and Other Drug Abuse*, 264 JAMA 2511, 2511 (1990).

25. *Id.*

26. LAWRENCE TAYLOR, *DRUNK DRIVING DEFENSE* 3 (1991).

and the crime's common law history. It will also discuss the criteria the Vermont Supreme Court will consider in deciding whether DWI is a strict liability offense or a crime requiring some level of intent. Although it would be consistent under Vermont law for the Vermont Supreme Court to rule that DWI is a strict liability crime, Part VI proposes that the Vermont Legislature should designate DWI a general intent crime rather than a strict liability crime. This approach better serves the criminal justice system and the well-being of Vermont citizens. Even if the legislature or the court does designate DWI a strict liability crime, part VII proposes that the insanity defense should still be applicable.

I. THE DEVELOPMENT OF DWI STATUTES IN THE UNITED STATES AND VERMONT

The fight against drunk driving is not new. The history of drunk driving law can be traced back to the pre-automotive period with laws that prohibited the excessive use of alcohol while driving a horse-drawn carriage.²⁷ With the advent of mass-produced automobiles came the first of the modern DWI laws.²⁸ As early as 1910, New York enacted a statute that is surprisingly similar to current DWI laws across the country: "Whoever operates a motor vehicle while in an intoxicated condition shall be guilty of a misdemeanor."²⁹ The early DWI laws stipulated punishments that included license suspensions and jail terms.³⁰ The State of Vermont also had a formal drinking and driving statute as early as 1925.³¹

One of the problems with the early drinking and driving statutes was that it was difficult to prove the required element of intoxication.³² It was not until after World War II and the advent of chemical tests of bodily substances for alcohol that drinking and driving statutes became easier to

27. William J. Ostrowski, *Drunk Driving and Chemical Tests — A Labyrinthine Maze*, 63 N.Y. ST. B.J. 22, 22 (1991). Ostrowski provides an example of an early drunk driving law: "No person owning any carriage for the conveyance [sic] of passengers, running or traveling upon any highway or road, shall employ, or continue in employment, any person to drive such carriage, who is addicted to drunkenness, or to the excessive use of spiritous liquor" *Id.*

28. *Id.*

29. *Id.*

30. ROSS, *supra* note 12, at 42. In 1924, Connecticut was jailing over two hundred drivers per year for drinking and driving. *Id.*

31. See *State v. Tacey*, 102 Vt. 439, 440, 150 A. 68, 68-69 (1930) (citing *Automobiles-Acts 1925*, No. 70, § 87).

32. See *State v. Wright*, 527 A.2d 379, 384 (N.J. 1987).

enforce.³³ The early blood alcohol content (BAC) statutes adhered to the American Medical Association's policy that individuals with BACs of under .05 percent were presumed not to be under the influence of alcohol, while those with a BAC of .15 percent or more were presumed under the influence.³⁴ These presumptions developed by the states allowed juries to presume that specified BAC levels implied intoxication.³⁵ Yet, these presumptions of intoxication standing alone were not enough to prove intoxication beyond a reasonable doubt.³⁶ Other corroborating evidence such as poor performance on a roadside sobriety test, erratic driving, slurred speech, and the odor of alcohol was needed to satisfy the "beyond a reasonable doubt burden of proof."³⁷

Due in large part to pressure from grass roots organizations such as Remove Intoxicated Drivers (RID), Students Against Drunk Driving (SADD), and MADD,³⁸ Congress responded in the early 1980s by enacting legislation that allocated federal funds for alcohol traffic safety programs only to those states that enacted "per se" laws.³⁹ The per se laws define the offense of DWI in terms of the BAC required, not in terms of the individual's intoxication.⁴⁰ Thus, the prosecution need only show that the defendant was driving on a public highway and that she had a BAC above that jurisdiction's prohibited level, commonly .08 to .10 percent, in order to convict someone under the statute.⁴¹ Under the per se laws, whether the defendant was actually under the influence of alcohol is irrelevant.⁴² The defendant's culpability lies only in the fact that her blood contained a prohibited level of alcohol.

The economic pressure from Congress as a result of the enactment of

33. ROSS, *supra* note 12, at 43. Ross states that chemical tests improved the aforementioned process "by permitting the police to request them and the prosecutors to present the results in court as evidence that the driver had attained the prohibited state of drunkenness or impairment." *Id.*

34. *Id.*

35. Pariser, *supra* note 23, at 142.

36. *Id.*

37. *Id.* at 142-43.

38. Tullier, *supra* note 15, at 873. MADD is a nonprofit corporation that currently has over 2.95 million members. *Id.* Their mission is to combat the drunk driving problem by lobbying the state and federal government for strict drinking and driving laws. *Id.*

39. Pariser, *supra* note 23, at 143. "The National Driver Register Act, 23 U.S.C. §§ 401-409 (1982), was designed to reduce the incidence of DWI by providing federal funds for alcohol traffic safety programs only to states that enact per se laws at a BAC of .10%." *Id.* at 143 n.15.

40. *Id.*

41. *Id.*

42. E. John Wherry, Jr., *The Rush To Convict DWI Offenders: The Unintended Unconstitutional Consequences*, 19 U. DAYTON L. REV. 429, 433 (1994).

the National Driver Register Act⁴³ caused almost all of the states, including Vermont,⁴⁴ to enact per se laws⁴⁵ as well as to retain the traditional offense of DWI.⁴⁶ The states retained the traditional DWI offense in order to cover instances where a driver has a BAC below the statutory minimum but is nevertheless judged to be intoxicated because of erratic driving, the odor of alcohol, or other signs of intoxication.⁴⁷ According to MADD data, over 1250 laws have been enacted to fight drunk driving in the United States since 1981.⁴⁸

The per se laws may also have the effect of removing the mens rea element from the crime of DWI. A significant number of jurisdictions have declared that, "DWI is an absolute liability offense requiring no culpable mental state."⁴⁹ Lawrence Taylor, in his treatise *Drunk Driving Defense*, supports this analysis, stating that, "[i]ntent is another aspect of drunk driving that should be clearly understood: None is required. Neither the intent to become intoxicated nor the intent to operate a motor vehicle is necessary to the *corpus* of the crime. Drunk driving is, quite simply, an absolute liability offense."⁵⁰ Many jurisdictions, including Vermont, have not made such an explicit determination concerning the status of their DWI statutes. This restraint is prudent because strict or absolute liability⁵¹ crimes are generally disfavored by courts and commentators in the criminal context.⁵² The designation of an offense as a strict liability crime by a judicial body requires a balancing test that takes into consideration a number of factors,⁵³ which will be discussed in Part V. Furthermore, the designation of DWI as a strict liability crime may have the effect of prohibiting the use of the insanity defense, as it has in at least one state.⁵⁴ Other states reason differently, however, allowing the

43. 23 U.S.C. §§ 401-409 (1988).

44. VT. STAT. ANN. tit. 23, § 1201(a)(1) (Supp. 1995).

45. Pariser, *supra* note 23, at 143-44 n.19.

46. *Id.* at 143-44.

47. *Id.* at 143-44 n.20.

48. Tullier, *supra* note 15, at 873 n.7. H. Laurence Ross reports a more conservative estimate, stating that between 1980 and 1990 over 500 new drunk driving laws were passed in the United States. H. Laurence Ross, *Drinking and Driving: Beyond the Criminal Approach*, 14 ALCOHOL, HEALTH & RES. WORLD 58 (1990).

49. *State v. Fogarty*, 607 A.2d 624, 628 (N.J. 1992).

50. TAYLOR, *supra* note 26, at 7.

51. The MPC Comments state that the terms strict and absolute liability are interchangeable in common usage. MODEL PENAL CODE § 2.05 cmt. 1 (1985).

52. *State v. Audette*, 149 Vt. 218, 220-21, 543 A.2d 1315, 1316-17 (1988).

53. *State v. Searles*, 159 Vt. 525, 528, 621 A.2d 1281, 1283 (1993).

54. *See infra* Part IV.

use of the insanity defense for strict liability crimes.⁵⁵ This dichotomy is based on the different insanity defenses utilized across the country as well as the varied understanding and acceptance of the insanity defense. With this disparity in mind, the note turns to present a brief history and outline of the use of the insanity defense in the United States.

II. HISTORY OF THE INSANITY DEFENSE IN THE UNITED STATES: A CRAZY PATH

The concept that the insane should not be punished for their otherwise criminal acts has been firmly entrenched in Anglo-Saxon law for at least one thousand years.⁵⁶ As early as the late thirteenth century, "complete madness" was an established criminal defense in England.⁵⁷ By 1723, Justice Tracy had elucidated a standard called the "wild beast test," which was applied in English courts throughout the eighteenth century.⁵⁸ The wild beast test provided that, "[i]n order to avail himself of the defense of insanity a man must be totally deprived of his understanding and memory so as not to know what he is doing, no more than an infant, a brute, or a wild beast."⁵⁹ The wild beast test went on to state, "Such a one is never the object of punishment."⁶⁰ The wild beast test was replaced in 1840 by the "irresistible impulse" test which recognized insanity as a defense when a "mental disease prevented the defendant from controlling his or her conduct."⁶¹

Three years later, in 1843, Daniel M'Naghten attempted to assassinate the Prime Minister of England, Sir Robert Peel.⁶² Instead, M'Naghten shot the Prime Minister's private secretary, Sir Edward Drummond.⁶³ This incident changed the breadth of the insanity defense once again.⁶⁴ Unanimous medical testimony determined that Mr. M'Naghten was psychotic, and the court acquitted him by reason of insanity for the

55. *Id.*

56. Jonas Robitscher & Andrew Ky Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9, 10 (1982).

57. Anne C. Gresham, *The Insanity Plea: A Futile Defense for Serial Killers*, 17 LAW & PSYCHOL. REV. 193, 193 (1993).

58. *Id.* at 194.

59. *Id.*

60. Jonas R. Rapoport, *Current Status of the Insanity Plea*, 22 PSYCHIATRIC ANNALS 550, 551 (1992).

61. Gresham, *supra* note 57, at 195.

62. Rapoport, *supra* note 60, at 552.

63. *Id.*

64. *Id.*

attempted assassination of the popular Prime Minister.⁶⁵ The public furor that ensued caused the House of Lords to call upon the fifteen Lords of Justice of the Queen's Bench to rethink and clarify the standard for criminal responsibility involving questions of insanity.⁶⁶ Thus, the famous *M'Naghten* rule was promulgated by justices who were responding to public pressure rather than the motivation to construct a reasoned statutory test.⁶⁷ The *M'Naghten* rule became the fundamental standard for criminal insanity in both England and the United States for the next hundred years.⁶⁸ The *M'Naghten* rule requires that:

at the time of the committing of the act, the party accused was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.⁶⁹

Within a decade, the *M'Naghten* rule was adopted in federal and most state courts of the United States.⁷⁰ Some jurisdictions, reacting to the narrowness of the *M'Naghten* standard, created hybrids, which allowed the irresistible impulse test to supplement the strict *M'Naghten* test.⁷¹ This expansion of the *M'Naghten* test was in response to the criticism that it was too restrictive: it did not excuse those who knew that their conduct was wrong but could not control their actions because of their mental illness.⁷²

In 1954, the trend of expanding the insanity defense beyond the *M'Naghten* rule was furthered by the development of a new test derived by federal judge David Bazelon in the case of *Durham v. United States*.⁷³ The *Durham* rule provided that, "an accused would not be criminally responsible 'if his unlawful act was the product of mental disease or mental defect.'"⁷⁴ The *Durham* test was regarded by the mental health community as a giant step forward because it allowed psychiatrists and psychologists to contribute to the court's understanding of human

65. *Id.*

66. *Id.*

67. MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 81 (1994).

68. Gresham, *supra* note 57, at 195.

69. *Id.*

70. *Id.*

71. *Id.* at 196.

72. *Id.*

73. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

74. PERLIN, *supra* note 67, at 85-86 (quoting *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954)).

behavior.⁷⁵ According to one scholar, the District of Columbia "became a veritable laboratory for consideration of the details of insanity, in its fullest substantive and procedural ramifications."⁷⁶ Unfortunately, the *Durham* test was unpopular with lawyers and judges because it lacked an objective standard and because it failed to provide helpful guidelines.⁷⁷ Critics called the *Durham* test a "non-rule," complaining that it relied too heavily on the testimony of psychiatrists⁷⁸ and that it could ultimately "excuse all disturbed persons from criminal responsibility."⁷⁹

Within seven years, the *Durham* test was explicitly rejected in twenty-two states.⁸⁰ The collapse of the *Durham* test demonstrates the societal and judicial system's distrust of the field of psychiatry and dislike of a test which grants a significant amount of power to the testimony of psychiatrists.⁸¹ According to one federal judge, the trust that the *Durham* test put in the field of psychiatry was so completely different from the "moral feeling of the community" that its demise was inevitable.⁸² The failure of the *Durham* test also highlights a fundamental difference between the psychiatric and legal professions that constantly arises in the debate concerning the insanity defense: psychiatrists feel that a clinical judgment should be paramount, while legal practitioners believe that objective standards, rules, and other linear criteria are most important.⁸³

In 1964, ten years after the collapse of the *Durham* test, the American Law Institute (ALI) organized the Model Penal Code Commission to review the states' outdated criminal codes.⁸⁴ Many of the leading American forensic psychiatrists of the time served on the panel that drafted the latest test for criminal responsibility.⁸⁵ The ALI standard was seen as a compromise between the narrow *M'Naghten* test that lacked a volitional prong and the overly broad *Durham* test.⁸⁶ The ALI standard provided:

75. Rappeport, *supra* note 60, at 553.

76. ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* 83 (1967).

77. PERLIN, *supra* note 67, at 87.

78. *Id.* Jonas Robitscher, speaking on his experiences with the *Durham* rule stated that, "[l]awyers almost universally condemn [the *Durham* rule] because there were no objective standards, and hence any act which a psychiatrist testified was a product of a mental condition could be excused merely on the evidence of the psychiatrist that there was a causal condition." Rappeport, *supra* note 60, at 553.

79. *Frigillana v. United States*, 307 F.2d 665, 668 (D.C. Cir. 1962).

80. PERLIN, *supra* note 67, at 88.

81. *Id.* at 88-89. See also Rappeport, *supra* note 60, at 553.

82. PERLIN, *supra* note 67, at 89.

83. Rappeport, *supra* note 60, at 553.

84. *Id.* See Gresham, *supra* note 57, at 196.

85. Rappeport, *supra* note 60, at 553.

86. Gresham, *supra* note 57, at 196.

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law. . . . [T]he terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.⁸⁷

The ALI test, used by Vermont,⁸⁸ has two prongs. The first is the cognitive prong, representing the capacity of the defendant to appreciate the criminality of the act.⁸⁹ The second is the volitional prong, which allows the defendant to be exculpated if he appreciates the criminality of his act but cannot conform his behavior to the law's requirements due to his mental illness.⁹⁰ The ALI test received generally favorable reviews and was adopted by over half of the states.⁹¹ Furthermore, the ALI test was adopted by all but one of the federal circuits.⁹²

The ALI test remained the law in the federal courts until 1984.⁹³ Then, in October of 1984, the insanity defense was once again altered in response to the acquittal of John Hinckley by reason of insanity for the attempted assassination of then-President Reagan.⁹⁴ The public outrage and congressional response to Mr. Hinckley's acquittal was analogous to that surrounding M'Naghten's acquittal more than a hundred years earlier.⁹⁵ Once again a country's highest lawmaking body responded to the public's perception of inappropriate leniency towards mentally ill criminal defendants.⁹⁶ Congress responded by enacting the Insanity Defense Reform Act of 1984,⁹⁷ which became the first federal codification of the insanity defense.⁹⁸ The new federal test provided:

87. MODEL PENAL CODE § 4.01(1)-(2) (1985).

88. VT. STAT. ANN. tit. 13, § 4801 (Supp. 1995).

89. Rapoport, *supra* note 60, at 553.

90. *Id.*

91. PERLIN, *supra* note 67, at 90 n.88.

92. *Id.*

93. Gresham, *supra* note 57, at 197.

94. *Id.*

95. Rapoport, *supra* note 60, at 552. See also PERLIN, *supra* note 67, at 14-15.

96. "Members of Congress responded quickly to the public's outpouring of outrage by introducing 26 separate pieces of legislation designed to limit, modify, severely shrink or abolish the insanity defense" PERLIN, *supra* note 67, at 17.

97. 18 U.S.C. § 17 (1988).

98. Gresham, *supra* note 57, at 197. The Reagan Administration initially called for the complete abolition of the insanity defense but retreated from this position in the face of strong opposition from concerned professional organizations and trade associations. PERLIN, *supra* note 67, at 25.

It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.⁹⁹

The most drastic change of the new legislation was that it removed the volitional prong of the ALI test.¹⁰⁰ By removing the volitional prong, a defendant could no longer be found not guilty by reason of insanity (NGRI) if he appreciated the criminality of his act, yet, due to his mental illness, could not conform his conduct to the requirements of the law.¹⁰¹ The new test also had the effect of placing the burden of proving insanity on the defense. This approach was contrary to the previous federal standard that required the state to prove sanity beyond a reasonable doubt.¹⁰² In one sweeping action, Congress discarded the reasoned ALI test and adopted a stricter version of the *M'Naghten* rule by mandating that mental disease must qualify as "severe" in order to be the basis of a finding of NGRI.¹⁰³ The Insanity Defense Reform Act, which closely paralleled the moral sentiment of the public, had the effect of returning the standard for the treatment of the mentally ill to the time of *M'Naghten*.¹⁰⁴ In the years following the Hinckley acquittal,

[t]wo-thirds of all states reevaluated the [insanity] defense; as a result, twelve states adopted the guilty but mentally ill (GBMI) test, seven narrowed the substantive test, sixteen shifted the burden of proof, and twenty-five tightened release provisions in the cases of those defendants found to be NGRI. Three states adopted legislation that purported to abolish the defense, but actually retained a mens rea exception.¹⁰⁵

This synopsis of the insanity defense illustrates a general ambivalence,

99. 18 U.S.C. § 17.

100. PERLIN, *supra* note 67, at 25-26.

101. Gresham, *supra* note 57, at 197.

102. In 1895, the Supreme Court held that the defendant has the burden of raising the insanity defense issue, but once this is done, the burden of persuasion then shifts to the prosecution to prove the defendant's sanity beyond a reasonable doubt. *Davis v. United States*, 160 U.S. 469, 485-87 (1895). One effect of the Insanity Defense Reform Act was "the shifting of the burden of proof from the prosecution to the defense," in effect eviscerating the 89-year-old *Davis* rule. RITA J. SIMON & DAVID E. AARONSON, *THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA* 58-59 (1988).

103. PERLIN, *supra* note 67, at 25.

104. *Id.*

105. *Id.* at 27.

distrust, and episodic approach to the insanity defense by the American legal system. As one commentator writes, the "insanity defense jurisprudence tends to define itself through reaction to scandalous, sensational, hysteria-creating or outrageous cases."¹⁰⁶ This reactionary approach is exacerbated by a number of commonly held misconceptions about the insanity defense.¹⁰⁷ These misconceptions need to be addressed, particularly in the context of proposing the insanity defense for the rage-inspiring crime of drunk driving.

III. COMMON MISCONCEPTIONS ABOUT THE INSANITY DEFENSE

There are a number of erroneous assumptions about the insanity defense. The first misconception is that the insanity defense is overused.¹⁰⁸ During the congressional debate on the Insanity Defense Reform Act, following the acquittal of John Hinckley, former United States Attorney Rudolf Giuliani testified that defendants are found not guilty by reason of insanity "quite frequently."¹⁰⁹ At the time of Giuliani's testimony, it was well established that in a typical urban area the insanity defense was successful in one-twentieth of one percent of all cases.¹¹⁰ Current studies indicate that the insanity defense is used in approximately one percent of all felony cases, and only one quarter of the cases in which the insanity defense is raised result in acquittal.¹¹¹ In Vermont, only six out of 17,201 felony charges between 1986 and 1992 resulted in findings of NGRI (.034 percent).¹¹² These studies indicate that the insanity defense is raised infrequently, and when it is, it is rarely successful.

Another misconception about the insanity defense is that it is used by wealthy defendants to escape harsh criminal penalties. During congressional hearings, Senators Larry Pressler and Orrin Hatch called the insanity defense "a rich man's defense."¹¹³ This notion is dispelled by a 1990 study that showed "NGRI defendants tend to have lower occupational and educational levels than the general population."¹¹⁴

Another common belief is that defendants who successfully use the insanity defense are quickly released from custody or spend less time

106. *Id.* at 14.

107. *Id.* at 107.

108. *Id.* at 108.

109. *Id.* at 21.

110. *Id.* at 21-22.

111. *Id.* at 108.

112. R. Scott Babe, *The Insanity Defense: Myths and Misconceptions*, 3 BRATTLEBORO RETREAT PSYCHIATRY REV. (March 1994).

113. PERLIN, *supra* note 67, at 18.

114. Babe, *supra* note 112.

incarcerated than do defendants convicted of the same offense. A comprehensive California study reported, however, that only one percent of insanity acquittees were released directly following their NGRI verdict.¹¹⁵ Another four percent were placed on conditional release, but the remaining ninety-five percent were hospitalized.¹¹⁶ Furthermore, the studies demonstrate that NGRI acquittees spend almost twice as much time in custody as sane defendants convicted of similar charges.¹¹⁷ One study showed that defendants found NGRI for non-violent crimes were confined for periods over nine times as long as sane defendants convicted of similar crimes.¹¹⁸ In addition, a Maryland study found that once released, NGRI acquittees had a lower rearrest rate than a similarly sized group of released mentally competent convicts.¹¹⁹

Perhaps the most common and loudly voiced misconception concerning the insanity defense is that defendants using it are somehow being insincere or "faking" their mental illness in the hopes of exculpation.¹²⁰ During congressional hearings, Senator Strom Thurmond blasted the insanity defense for "exonerating a defendant who obviously planned and knew exactly what he was doing."¹²¹ Once again, recent studies contradict this long-held prejudice. In one jurisdiction, 115 of the 141 individuals found NGRI in an eight-year period were unquestionably schizophrenic.¹²² Furthermore, "in only three [of the 141] cases was the diagnostician unwilling or unable to specify the nature of the patient's mental illness."¹²³ Finally, the majority of studies show that most NGRI defendants have documented histories of prior psychiatric hospitalizations,¹²⁴ lending support for the proposition that NGRI defendants are not faking their mental illnesses.

The insanity defense is unpopular and misunderstood. These biases are compounded by the differing and changing tests that various jurisdictions use. While the current trend is to limit or even abolish the insanity defense, it is still viable in some form in forty-seven states as well as in the federal

115. PERLIN, *supra* note 67, at 110.

116. *Id.*

117. *Id.*

118. *Id.* at 110-11.

119. Babe, *supra* note 112. The study reported that 65% of 127 male NGRI's were rearrested within a 17-year period. The study also showed a rearrest rate of 75% for a similarly sized group of released convicts. *Id.*

120. PERLIN, *supra* note 67, at 111.

121. *Id.* at 18. Senator Dan Quayle stated that the insanity defense pampered criminals and gave them the right to kill with impunity. *Id.*

122. *Id.* at 111.

123. *Id.*

124. *Id.*

courts.

IV. A SURVEY OF STATE HOLDINGS REGARDING THE AVAILABILITY OF THE INSANITY DEFENSE FOR DWI

Significant variation exists in how particular states view drunk driving and its relation to the insanity defense. There are three major approaches used by different states. First, some states hold that DWI is a strict liability crime to which the insanity defense is *applicable*. The leading case in this category, and the case which includes the most comprehensive analysis on the issue of insanity and DWI, is the Oregon case of *State v. Olmstead*.¹²⁵ Another notable case allowing the use of the insanity defense for DWI is *Tollefson v. State*, in which a Florida court held that the insanity defense could be applied to the strict liability crime of DUI-manslaughter.¹²⁶

The second approach is that DWI is a strict liability crime, and the insanity defense is *inapplicable*. This is the approach taken by Texas, as illustrated in *Beasley v. State*.¹²⁷ In *Beasley*, the Texas Court of Appeals stated, "Because proof of a culpable mental state is not required to convict a defendant of driving while intoxicated, insanity cannot be a defense to such a charge."¹²⁸

Third, the legislatures or courts of some states have designated DWI a strict liability crime but have not determined whether the insanity defense may be used. For example, the New Jersey Supreme Court stated, "driving under the influence has generally been considered an absolute liability offense requiring no culpable mental state, including knowledge of one's intoxication."¹²⁹ Illinois reached a similar conclusion, holding that "[t]he

125. *State v. Olmstead*, 800 P.2d 277 (Or. 1990). For a discussion of this case, see John M. Colemi, Note, *State v. Olmstead and the Defense of Guilty But Insane*, 29 WILLAMETTE L. REV. 829 (1993). Analysis of the *Olmstead* case is provided in Part VII.

126. *Tollefson v. State*, 525 So. 2d 957 (Fla. Dist. Ct. App. 1988). See also *State v. Evans*, 720 P.2d 962, 962 (Ariz. Ct. App. 1986), in which the court demonstrated a willingness to allow application of the insanity defense to the crime of driving under the influence of intoxicating liquor without discussing the strict liability issue. The Arizona Supreme Court had previously held that DWI does not require proof of a culpable mental state. *State v. Williams*, 698 P.2d 732, 734 (Ariz. 1985). Similarly, the Michigan Court of Appeals allowed the insanity defense for DWI without addressing the strict liability issue. *People v. Chapman*, 418 N.W.2d 658, 659 (Mich. Ct. App. 1987).

127. *Beasley v. State*, 810 S.W.2d 838 (Tex. Ct. App. 1991). See also *State v. Pistole*, 476 N.E.2d 365, 366 (Ohio Ct. App. 1984) (holding that DWI is a strict liability crime); *State v. Ungerer*, 621 N.E.2d 893, 894 (Ohio Ct. App. 1993) (holding that the insanity defense could not be used for DWI because of the fact that Ohio's traffic regulations specifically banned the use of the insanity defense).

128. *Beasley*, 810 S.W.2d at 841. *Beasley* is discussed in Part VI.

129. *State v. Hammond*, 571 A.2d 942, 946 (N.J. 1990). See also *State v. Fogarty*, 607 A.2d 624, 628 (N.J. 1992).

obvious legislative intent . . . was to impose strict liability on drivers found to be impaired by an alcohol concentrate of 0.10% or above."¹³⁰ Similarly, the Colorado Legislature has made drunk drivers strictly liable for injuries they inflict by explicitly stating in its statute that, "[i]f a person operates or drives a motor vehicle while under the influence of any drug or intoxicant and such conduct is the proximate cause of the death of another, he commits vehicular homicide. *This is a strict liability crime.*"¹³¹

Vermont's treatment of the applicability of the insanity defense to DWI falls outside of these three categories. Vermont has not explicitly designated DWI as a strict liability crime. To determine whether Vermont should characterize its DWI statute as a strict liability crime, it is necessary to examine Vermont's DWI statute and the Vermont Supreme Court's approach to interpreting statutes which do not include a mens rea designation.

V. VERMONT'S DWI STATUTE: SHOULD IT BE A STRICT LIABILITY CRIME?

For the State of Vermont to convict a defendant of DWI, the State must prove three elements: 1) the defendant operated, attempted to operate, or was in actual physical control of a vehicle; 2) the defendant was on a public highway; and 3) the defendant's blood alcohol concentration is .08 percent or more, or the defendant is under the influence of intoxicating liquor.¹³² This offense carries a possible prison term of two years.¹³³ The noteworthy omission in this criminal statute is that there is no mention of the level of intent or mens rea required for the commission of the offense.¹³⁴

130. *People v. Ziltz*, 455 N.E.2d 70, 72 (Ill. 1983). Other cases in which courts have declared DWI a strict liability crime include: *Bodoh v. District of Columbia Bureau of Motor Vehicle Serv.*, 377 A.2d 1135, 1137 (D.C. 1977); *City of Wichita v. Hull*, 724 P.2d 699, 702 (Kan. Ct. App. 1986); *State v. Cardin*, 523 A.2d 105, 106 (N.H. 1987); *State v. Tang*, 878 P.2d 487, 491 (Wash. Ct. App. 1994).

131. COLO. REV. STAT. § 18-3-106(1)(b)(I) (Supp. 1994) (emphasis added). See *State v. Rostad*, 669 P.2d 126, 128-30 (Colo. 1983) (discussing the statute).

132. VT. STAT. ANN. tit. 23, § 1201 (Supp. 1995).

133. VT. STAT. ANN. tit. 23, § 1210(b) (Supp. 1995). Other DWI-related crimes carry even stiffer penalties. See, e.g., VT. STAT. ANN. tit. 23, § 1210(c) (Supp. 1995) (DWI-second offense, possible imprisonment of up to two years, \$1500 fine or both with a mandatory jail sentence of forty-eight hours that may not be suspended or deferred); VT. STAT. ANN. tit. 23, § 1210(d) (Supp. 1995) (DWI-third offense, possible imprisonment of up to five years, \$2500 fine or both); VT. STAT. ANN. tit. 23, § 1210(f) (Supp. 1995) (driving while intoxicated injury resulting, felony with prison term of one to fifteen years, \$5000 fine or both); VT. STAT. ANN. tit. 23, § 1210(e) (Supp. 1995) (driving while intoxicated death resulting, felony with prison term of one to fifteen years, \$10,000 fine or both).

134. Unfortunately, unlike the Model Penal Code (MPC), there is currently no comprehensive approach to the subject of mens rea in the Vermont criminal statutes. Barry Jeffery Stern, *Revising Vermont's Criminal Code*, 12 VT. L. REV. 307, 312 (1987). The Vermont criminal code has been described as a "mixed bag" with some statutes dating back to the early nineteenth century. 1 WILLIAM

In such a situation, where the legislature has remained silent, it becomes the duty of the Vermont judiciary to determine whether a certain minimum mens rea is nevertheless required for a defendant to be culpable of the offense.¹³⁵

A. Vermont's Treatment of Statutes That are Silent Concerning Mens Rea

The Vermont Supreme Court's treatment of statutes that are silent concerning mens rea "has not been free from ambiguity."¹³⁶ The court's baseline stance is that, "[w]hen the Legislature is silent as to the mens rea required for a particular offense, this Court will not simply assume that the statute creates a strict liability offense, but will try to determine the intent of the Legislature."¹³⁷ Acting on this pronouncement, the court has implied a mental element in a number of offenses even though the statutes were silent as to mens rea.¹³⁸ Such a presumption against a finding of strict liability is seen in *State v. Hanson*, in which the court stated that, "[u]nless expressly provided otherwise by the legislature . . . a crime is composed of an act and an intent."¹³⁹ In addition, in *State v. Doucette*, the court cited with approval the seminal United States Supreme Court decision, *Morissette v. United States*, which opines that, "[t]he contention that an injury can amount to a crime only when inflicted by intention . . . is as universal and persistent in mature systems of law as belief in freedom of the human will and consequent

A. NELSON, VERMONT CRIMINAL PRACTICE § 1.02 (1993). Some criminal statutes are based on the language of the MPC. *Id.* Despite Vermont's acceptance of certain provisions of the MPC (including the insanity defense), the Vermont Legislature has not enacted an overall acceptance of the MPC. *Id.* The most notable ramification of not fully embracing the guidelines of the MPC is that Vermont is left with at least 26 undefined terms which designate the mens rea requirement of various crimes. Stern, *supra*, at 312, 313. See, e.g., VT. STAT. ANN. tit. 13, § 2013 (Supp. 1995) (requiring mens rea of "knowingly and designedly"); VT. STAT. ANN. tit. 13, § 2701 (1974) (requiring "malicious intent"). In contrast, the MPC provides four explicitly defined mens rea levels. MODEL PENAL CODE § 2.02(2) (1985). "[A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." *Id.*

135. *State v. Searles*, 159 Vt. 525, 527, 621 A.2d 1281, 1283 (1993).

136. Stern, *supra* note 134, at 313.

137. *State v. Audette*, 149 Vt. 218, 221, 543 A.2d 1315, 1317 (1988).

138. *Searles*, 159 Vt. at 527, 621 A.2d at 1282 (citing *State v. Day*, 150 Vt. 119, 122, 549 A.2d 1061, 1064 (1988); *State v. Audette*, 149 Vt. 218, 222, 543 A.2d 1315, 1317 (1988); *State v. Hanson*, 141 Vt. 228, 232, 446 A.2d 372, 374 (1982); *State v. Graves*, 140 Vt. 202, 205, 436 A.2d 755, 757 (1981); *State v. Sidway*, 139 Vt. 480, 484, 431 A.2d 1237, 1239 (1981)).

139. *Hanson*, 141 Vt. at 232, 446 A.2d at 374. See also *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978). "[T]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Id.* (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)).

ability and duty of the normal individual to choose between good and evil."¹⁴⁰ Following the analysis of *Hanson* and *Doucette*, it appears likely that the Vermont Supreme Court would introduce an intent requirement into Vermont's silent DWI statute. Other conflicting decisions dictate, however, that *Hanson* and *Doucette* are not the end of the inquiry.

For example, in *State v. Kerr*, the court "refus[ed] to add an element of scienter to the plain language of the statute prohibiting the carrying of a weapon while committing a felony."¹⁴¹ The court held that to read a knowledge element into the crime "would constitute judicial legislation . . ."¹⁴² Furthermore, in the recent decision of *State v. Searles*, which involved the crime of statutory rape, the court held that the defendant's knowledge of the victim's age is *not* an implicit element of sexual assault on a minor.¹⁴³ The court, in finding that statutory rape is a strict liability crime, noted that "defining crimes is generally a task for the legislature."¹⁴⁴ The court went on to state:

Silence about a mental element in the statutory definition of a crime requires this Court to determine whether the Legislature nevertheless intended to include one. This Court will not imply a mental requirement, however, "when the statutory language cuts against such a result and the policy behind the statute would be defeated."¹⁴⁵

The court then outlined the balancing test to apply when determining whether a statute is intended to impose strict liability. The factors considered include: "[t]he severity of the punishment; the seriousness of the harm to the public; the defendant's opportunity to ascertain the true facts; the difficulty of prosecution if intent is required; and the number of prosecutions expected."¹⁴⁶ The *Searles* opinion also adds to the inquiry the common-law history and the tradition of the offense.¹⁴⁷ *Searles* provides the latest view of how the Vermont Supreme Court intends to deal with a silent mens rea

140. *State v. Doucette*, 143 Vt. 573, 580-81, 470 A.2d 676, 681 (1983) (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

141. *Day*, 150 Vt. at 122, 549 A.2d at 1064 (discussing *State v. Kerr*, 143 Vt. 597, 470 A.2d 670 (1983)).

142. *State v. Kerr*, 143 Vt. 597, 605, 470 A.2d 670, 674 (1983).

143. *Searles*, 159 Vt. at 529, 621 A.2d at 1283.

144. *Id.* at 527, 621 A.2d at 1283.

145. *Id.* 159 Vt. at 527, 621 A.2d at 1283 (citations omitted) (quoting *State v. Roy*, 151 Vt. 17, 25, 557 A.2d 884, 889 (1989)).

146. *Id.* at 528, 621 A.2d at 1283.

147. *Id.* at 527, 621 A.2d at 1283.

statute, and it appears likely that the court will follow *Searles*'s lead when determining whether DWI is to be deemed a strict liability crime.

B. Examination of the DWI Statute Under the *Searles* Factors

Under the guidelines set forth in *Searles*, the Vermont Supreme Court will likely determine that DWI was intended by the legislature to be a strict liability crime.

The first factor to consider when determining if a silent statute is intended to impose strict liability under the *Searles* criteria is the history and tradition of the offense.¹⁴⁸ As early as 1933, the Vermont Supreme Court held that no question of intent is involved in determining whether an intoxicated individual "operated" a motor vehicle within the meaning of the applicable statute.¹⁴⁹ This reasoning was upheld in 1945, in *State v. Hedding*, the latest Vermont Supreme Court case to speak directly to the issue of intent for DWI.¹⁵⁰ The court in *Hedding* stated that, "since the statute prohibits one under the influence of intoxicating liquor from operating a motor vehicle, no question of intent is involved."¹⁵¹ Although this determination was made over fifty years ago, the elemental aspects and sentencing parameters of the DWI statute have not changed substantially since then. At the time of *Hedding*, an individual convicted of DWI could be fined up to \$500 and imprisoned not more than two years, or both.¹⁵² Subsequent convictions carried mandatory jail sentences of at least two months but were not longer than two years.¹⁵³ The penalties are substantially similar today.¹⁵⁴ Thus, it is probable that *Hedding*'s holding, that intent is not a part of DWI, is still applicable today. The court will likely be reluctant to overturn its decision in *Hedding*, and will give it great weight in the *Searles* balancing test.

The other *Searles* factors that weigh in favor of a strict liability designation include the seriousness of the harm to the public and the number of prosecutions expected. The seriousness of the harm to the public due to drunk driving is undisputed. It is estimated that forty-three percent of Vermont's ninety-six traffic fatalities in 1992 involved alcohol.¹⁵⁵ The state's

148. *Id.* See also *State v. Stanislaw*, 153 Vt. 517, 522, 573 A.2d 286, 289 (1990). "To decide whether the legislature intended to impose strict criminal liability, turn first to the common law"
." *Id.*

149. *State v. Storrs*, 105 Vt. 180, 183, 163 A. 560, 562 (1933).

150. *State v. Hedding*, 114 Vt. 212, 42 A.2d 438 (1945).

151. *Id.* at 215-16, 42 A.2d at 440.

152. 1935-36 Vt. Laws 9.

153. *Id.*

154. See *supra* note 133 and accompanying text.

155. MADD ANNUAL REPORT, *supra* note 18, at 62.

interest in eradicating this loss of life is high and it is likely that the court will weigh this consideration heavily.

Similarly, the number of prosecutions expected is also likely to weigh in favor of strict liability designation. In 1993, there were 3,744 arraignments for drunk driving in Vermont, making it one of the most common crimes in the state.¹⁵⁶ Under the *Searles* test, the frequency of DWI offenses makes it a candidate for strict liability.

A final *Searles* factor that might be interpreted by the court as indicative that strict liability is appropriate is the difficulty for the prosecution if intent is required. The prosecution would argue that forcing the State to prove that a defendant intended to drink and drive would be onerous and would stifle its law enforcement efforts. Such an argument has merit and the court will likely give it significant weight.¹⁵⁷

The one factor that weighs against a strict liability classification for DWI is the severity of the punishment for DWI offenses. DWI carries a possible sentence of up to two years, while DWI predicate crimes carry penalties of up to fifteen years.¹⁵⁸ The effect of such punishments on the *Searles* analysis is unclear because the Vermont Supreme Court has not been entirely consistent about the weight it affords severity of punishment in the strict liability calculus. In *State v. Audette*, the court stated:

To decide whether the Legislature meant to impose liability without fault, or, in the alternative, meant to require fault, we consider a number of factors, *the most important of which is the severity of the punishment provided for the crime*. "The greater the possible punishment, the more likely some fault is required; and, conversely, the lighter the possible punishment, the more likely the legislature meant to impose liability without fault." "Most crimes are not strict liability offenses and most commentators have argued that the legislature should never use strict liability for crimes carrying a sentence of imprisonment"¹⁵⁹

Such a stance seems to suggest that since DWI carries a possible prison term, it should not be designated a strict liability crime. Yet, as demonstrated in the 1993 *Searles* decision, which involved a possible prison sentence of twenty years for the crime of statutory rape, the court has not allowed the

156. Telephone Interview with Joan Owen, Vermont Center for Justice Research (Feb. 20, 1995).

157. This argument is discussed in Part VI.

158. See *supra* note 133 and accompanying text.

159. *Audette*, 149 Vt. at 222, 543 A.2d at 1317 (citations omitted) (emphasis added) (quoting WAYNE R. LAFAYE & AUSTIN W. SCOTT, *SUBSTANTIVE CRIMINAL LAW* § 3.8(a) (1986), and *State v. Strong*, 294 N.W.2d 319, 320 (Minn. 1980)).

severity of punishment by itself to outweigh the other pro-strict liability considerations. The *Searles* decision, unlike *Audette*, gave a great deal of weight to case law treatment and public harm concerns. Given that *Searles* is the current last word, the Vermont Supreme Court will likely hold that, taken in the aggregate, the case law history (*Hedding*), the concern for public safety (forty-one lives lost in 1992), and the difficulty and number of DWI prosecutions (3,744 arraignments in 1993) outweigh the severity of punishment argument. Thus, it is probable that the Vermont Supreme Court will rule that DWI is a strict liability offense.

VI. THE CRIMINAL JUSTICE SYSTEM AND THE PEOPLE OF VERMONT WILL BE BETTER SERVED IF THE VERMONT LEGISLATURE DESIGNATES DWI A GENERAL INTENT CRIME

Although the Vermont Supreme Court will likely rule that DWI is a strict liability offense, the interests of Vermont would be better served if the Vermont Legislature were to designate DWI a general intent crime requiring a mens rea of "recklessly" rather than a strict liability offense.

This viewpoint is supported by three arguments. First, strict liability is generally inappropriate in the criminal context.¹⁶⁰ Second, DWI, which carries possible felony-level punishment, does not fit well into the traditional category of strict liability crimes. Finally, the legislative intent of DWI statutes — to save lives — is best served by declaring DWI a general intent crime rather than one of strict liability.

A. *Strict Liability is Disfavored in the Criminal Context*

As many commentators have noted, strict liability designation is generally inappropriate in the criminal context because:

to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal

160. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 248 (2d ed. 1986).

sanction is inappropriate in the absence of *mens rea*.¹⁶¹

The United States Supreme Court recently expressed similar concerns about strict liability in criminal cases, stating in dicta that felony crimes may be incompatible with the concept of strict liability offenses.¹⁶² Furthermore, the Model Penal Code (MPC), in the redactors' own words, makes a "frontal attack on absolute or strict liability . . . whenever the offense carries the possibility of criminal conviction, for which a sentence of probation or imprisonment may be imposed," as is the case for DWI.¹⁶³ The MPC permits strict liability only for offenses which constitute "violations."¹⁶⁴ The MPC defines violations as offenses that may be punished only by a fine, forfeiture, or other civil penalty, and may not give rise to any disability or legal disadvantage based on conviction for a criminal offense.¹⁶⁵ Thus, under the MPC rationale, the crime of DWI could not by definition be considered a strict liability violation because it carries a possible jail sentence.

The Vermont Legislature should adhere to the MPC structure which requires one of four explicit levels of *mens rea*. Under the MPC an individual is not guilty of an offense unless he acted purposely,¹⁶⁶ knowingly,¹⁶⁷ recklessly,¹⁶⁸ or negligently¹⁶⁹ with respect to each material

161. *Id.* (quoting Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 109).

162. *Staples v. United States*, 114 S. Ct. 1793, 1804 (1994).

163. MODEL PENAL CODE § 2.05 cmt. 1 (1985).

164. *Id.*

165. MODEL PENAL CODE § 1.04(5) (1985).

166. The Model Penal Code provides:

Purposely. A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

MODEL PENAL CODE § 2.02(2)(a) (1985).

167. *Knowingly.* A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

Id. at § 2.02(2)(b).

168. *Recklessly.* A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross

element of the crime.¹⁷⁰ As discussed above, the MPC structure does not permit an offense carrying a jail sentence, such as Vermont's DWI statute, to be a strict liability crime.

Accordingly, the Vermont Legislature should designate a mens rea for DWI and DWI predicate crimes. Such a designation would have the advantage of removing DWI from the disfavored classification of strict liability. Moreover, it would adhere to the cohesive mens rea structure of the MPC.

The mens rea designated by the legislature for DWI and DWI predicate crimes should be "recklessly." The highest levels of culpability in the MPC scheme, "purposely" and "knowingly," are inappropriate due to the large number of DWI prosecutions and the increased difficulty of proving such a high level of culpability.¹⁷¹ The lowest level of culpability, negligently, is also undesirable because it would not allow for the stiffer penalties and moral blameworthiness¹⁷² that society is demanding for DWI crimes.¹⁷³ The remaining mens rea designation, recklessly, is the appropriate choice because it serves as a compromise between the above concerns.

Some may contend that the designation of DWI as a general intent crime with a required mens rea of recklessness would impede prosecutors in their enforcement of DWI crimes. This argument was anticipated and addressed by the redactors of the MPC. Specifically, under the MPC, a defendant may not use his self-induced intoxication as an excuse to claim that he was not conscious of the fact that he was creating an unjustifiable risk.¹⁷⁴ Such a claim is expressly negated by section 2.08(2) of the MPC, which mandates that, "[w]hen recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he

deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
Id. at § 2.02(2)(c).

169. *Negligently.* A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Id. at 2.02(2)(d).

170. *Id.* at § 2.02(1).

171. See *supra* notes 156-57 and accompanying text.

172. See, e.g., *Armenia v. Dugger*, 867 F.2d 1370, 1376 (11th Cir. 1989) (noting the state's contention that DWI is an act which is "inherently bad and not excusable"); *State v. Goding*, 489 A.2d 579, 580-81 (N.H. 1985) (declaring that, "driving while intoxicated is a deplorable act which shows wanton disregard for the rights of others to safely use our highways").

173. See *Pariser*, *supra* note 23, at 141 nn.3, 4.

174. MODEL PENAL CODE § 2.08(2) (1985).

would have been aware had he been sober, such unawareness is immaterial.¹⁷⁵ The Vermont Supreme Court, in *State v. Galvin*, cited with approval section 2.08(2) in ruling that intoxication may not be used to negate recklessness.¹⁷⁶ The MPC commentary reveals the reasoning behind prohibiting the use of voluntary intoxication to negate recklessness:

[A]wareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that it is not unfair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk.¹⁷⁷

The drafters of the MPC believe that the actor's moral culpability (his recklessness) lies in the conduct of getting drunk.¹⁷⁸ This reasoning establishes that the prosecution can prove the mens rea of recklessly in a DWI case by simply demonstrating that the defendant was voluntarily intoxicated while he was driving. This is easily accomplished through Vermont's per se DWI law, which dictates that a defendant with a .08 BAC is per se intoxicated.¹⁷⁹ Therefore, a mens rea of recklessly is compatible with Vermont's DWI law. Thus, the designation of DWI as a general intent crime requiring a mens rea of recklessly would not impede conviction of DWI offenders. In addition, the mens rea of recklessly is preferable to a strict liability designation because recklessly adheres to the comprehensive structure of the MPC¹⁸⁰ while strict liability does not.¹⁸¹ Finally, recklessly is also accepted in the criminal context,¹⁸² while strict liability is generally disfavored.¹⁸³

B. The Stiff Penalties of DWI Make it Inappropriate for Strict Liability

The second reason the legislature should designate DWI a general intent crime is because, unlike other offenses traditionally categorized as strict liability crimes, DWI and DWI predicate crimes carry stiff penalties.

175. *Id.*

176. *State v. Galvin*, 147 Vt. 215, 216, 514 A.2d 705, 707 (1986).

177. MODEL PENAL CODE § 2.08 explanatory note (1985).

178. *Id.*

179. VT. STAT. ANN. tit. 23, § 1201(a)(1) (Supp. 1995).

180. MODEL PENAL CODE § 2.02(1) (1985).

181. *See supra* note 163 and accompanying text.

182. MODEL PENAL CODE § 2.02(1).

183. *See supra* note 161 and accompanying text.

Currently, DWII (driving while intoxicated, injury resulting)¹⁸⁴ and DWIF (driving while intoxicated, death resulting)¹⁸⁵ have possible jail sentences of up to fifteen years. A defendant convicted of his third DWI offense is labeled a felon and faces up to five years in prison.¹⁸⁶

The Vermont Supreme Court has ruled that crimes carrying lengthy penalties are not appropriate for designation as strict liability crimes. In *State v. Audette* the court stated that when determining whether a crime should be designated as one of strict liability, the most important factor to consider was the "severity of punishment provided for the crime."¹⁸⁷

Similarly, the Massachusetts Court of Appeals considered the severity of the penalty when determining that the offense of driving while impaired should not be a strict liability crime.¹⁸⁸ The court stated that, "[w]here the offense permits the imposition of a severe penalty, here as much as two years' imprisonment, 'it would take unusually clear legislative language to lead us to the view that knowledge is not required for a conviction . . .'"¹⁸⁹

The United States Supreme Court recently confronted an analogous severity-of-punishment issue. In *Staples v. United States*, the Court was asked to determine if failure to register a weapon under a federal machine gun registration statute was a strict liability crime.¹⁹⁰ The statute was silent about whether the defendant was required to know that his unregistered weapon was an automatic rifle rather than a single-firing rifle.¹⁹¹ The Court held that the statute did require the government to prove the mens rea element.¹⁹² One of the primary factors the Court examined in determining whether the statute constituted a strict liability offense was the severity of the punishment involved.¹⁹³ The statute in question carried a possible penalty of up to ten years.¹⁹⁴ The Court reiterated its long-held position that crimes appropriate for designation as strict liability commonly have penalties that are "relatively

184. VT. STAT. ANN. tit. 23, § 1210(f) (Supp. 1995).

185. *Id.* at 1210(e).

186. *Id.* at 1210(d).

187. *Audette*, 149 Vt. at 222, 543 A.2d at 1318. The court went on to state that, "[t]he greater the possible punishment, the more likely some fault is required; and conversely, the lighter the possible punishment, the more likely the legislature meant to impose liability without fault." *Id.* (quoting WAYNE R. LAFAYE & AUSTIN W. SCOTT, *SUBSTANTIVE CRIMINAL LAW* § 3.8(a) (1986)). See also *State v. Stanislaw*, 153 Vt. 517, 523-24, 573 A.2d 286, 290 (1990).

188. *Commonwealth v. Wallace*, 439 N.E.2d 848, 852 (Mass. App. Ct. 1982).

189. *Id.* (quoting *Commonwealth v. Buckley*, 238 N.E.2d 335, 343 (1968)).

190. *Staples*, 114 S. Ct. at 1796.

191. *Id.* at 1797.

192. *Id.* at 1804.

193. "Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*." *Id.* at 1802.

194. *Id.*

small, and conviction does no grave damage to an offender's reputation."¹⁹⁵ According to the Court, the offense's ten year prison sentence and its classification as a felony¹⁹⁶ contributed to the Court's finding that the statute should not be interpreted to create a strict liability offense.¹⁹⁷

Adhering to the Court's analysis in *Staples*, offenses that have similar or greater possible jail sentences than those at issue in *Staples*, such as DWII and DWIF, should also not be strict liability crimes.

This is not to say that the issue of possible imprisonment is dispositive to the strict liability determination; it is merely one of the factors to be weighed. As noted above, the Vermont Supreme Court in *Searles* held that sex with a minor is a strict liability crime, and this offense carries a possible penalty of up to twenty years imprisonment.¹⁹⁸ Yet, in *Searles*, the severity of the punishment was counterbalanced by the importance of the policy underpinning the statute: protecting the well-being of minors and preventing their exploitation.¹⁹⁹

Such a counterbalancing public policy argument also exists with regard to the offense of DWI. Some may assert that the public policy behind punishing DWI crimes is so strong that it warrants a strict liability designation, despite the stiff penalties. While noteworthy, this argument is flawed. It raises the third and final point as to why DWI should not be designated a strict liability crime.

195. *Id.* at 1803 (quoting *Morrisette v. United States*, 342 U.S. 246, 256 (1952)).

196. The Court, commenting on the effect on a defendant's reputation of being labeled a felon, adds that "'felony' . . . is 'as bad a word as you can give to man or thing.'" *Id.* (quoting *Morrisette v. United States*, 342 U.S. 246, 260 (1952)).

197. *Id.* at 1803-04.

198. *State v. Searles*, 159 Vt. 525, 528, 621 A.2d 1281, 1283 (1993); VT. STAT. ANN. tit. 13, § 3252(a)(3)-(4) (Supp. 1995).

199. *Id.*

C. A Strict Liability Designation Contravenes the Intent of DWI Legislation

DWI statutes are created to save human lives.²⁰⁰ Yet, a strict liability designation has a real chance of thwarting this worthy goal. As noted, in Texas the designation of DWI as a strict liability crime has created a wall which prevents the use of the insanity defense.²⁰¹ The likelihood of the insanity defense being viable is decreased if a crime is classified as strict liability. If the insanity defense is not available to a mentally ill DWI defendant, he may face the same punishments as a mentally competent offender. The mentally ill individual may lose his license,²⁰² be fined,²⁰³ be sentenced to imprisonment,²⁰⁴ or undergo mandatory alcohol counseling.²⁰⁵ Although the purpose of such punishment may be to provide a deterrent to drunk driving and therefore save lives, these conventional punishments are meaningless to mentally ill defendants and do not have the desired effect.²⁰⁶

200. *State v. Bromley*, 117 Vt. 228, 230, 88 A.2d 833, 835 (1952). The objective of DWI statutes "is the protection of the public from injury to person or property by persons operating or attempting to operate motor vehicles while under the influence of intoxicating liquor or drugs on our highways. . . ." *Id.*

201. *Beasley v. State*, 810 S.W.2d 838, 841 (Tex. Ct. App. 1991).

202. VT. STAT. ANN. tit. 23, § 1206 (1987). See also VT. STAT. ANN. tit. 23, § 1208 (Supp. 1995).

203. VT. STAT. ANN. tit. 23, § 1210 (Supp. 1995).

204. *Id.*

205. VT. STAT. ANN. tit. 23, § 1209a (Supp. 1995).

206. The comments to Model Penal Code § 4.01 provide:

The most widely recognized objectives of punishment are deterrence, incapacitation of the offender, reform or rehabilitation, and retribution. With respect to each of these objectives, imposing punishment in cases in which the Model Code standard relieves the defendant of responsibility would be pointless or counter-productive.

Deterrence, as a matter of definition, involves discouraging potential offenders from the commission of crimes by the threat of punishment. This objective is not furthered by the imposition of criminal penalties on persons who, as a result of mental disease or defect, are incapable of any significant realization that their conduct is of such a nature as to merit punishment, or who are substantially incapable of refraining from criminal conduct notwithstanding an awareness of the possibility of punishment.

Incapacitation involves isolating or restraining an offender in such a way as to prevent his commission of further offenses against the general public. While acquittal on grounds of irresponsibility does preclude accomplishment of this objective through imprisonment, an adequate substitute is provided . . . [by] the commitment of a person so acquitted and precludes his release in the absence of a determination by the court that he no longer poses a danger to himself or others.

Reform or rehabilitation involves changing the character or outlook of the offender in such a way as to reduce or eliminate his disposition to commit

By definition, a legally insane person does not know what he is doing is criminal or cannot stop himself from doing a criminal act.²⁰⁷ If such is the case, taking a license from a mentally ill person will not deter him from repeating the act of DWI, which he did not appreciate as criminal in the first place.²⁰⁸ Incarceration of the mentally ill defendant will, of course, temporarily prevent him from re-offending but will not provide the same deterrent effect that it would for a sane defendant.²⁰⁹ Traditional DWI deterrents will be ineffectual against a defendant who truly does not appreciate the criminality of drinking and driving.²¹⁰

Instead of punishments and deterrents that do little to influence the conduct of a mentally ill defendant, the mentally ill DWI offender requires the type of specialized psychiatric treatment that would be available if he was found not guilty by reason of insanity.²¹¹ In fact, this type of treatment has proven relatively effective.²¹² Defendants found not guilty by reason of insanity and who have received psychiatric treatment have a lower recidivism rate than do sane defendants who have committed similar crimes.²¹³ Such lower recidivism rates would presumably apply to the mentally ill DWI defendant as well. Rather than inflicting meaningless punishment on a

further crimes. This objective is not furthered through the criminal punishment of persons irresponsible under the Model Code standard, unless it is supposed that incarceration in a correctional institution is more likely to improve the condition of a person suffering from serious mental illness than confinement in a mental institution.

Retribution is generally understood as the principle that the severity of punishment should be proportioned to the moral blameworthiness of the offender. Insofar as retribution is accepted as a positive basis of punishment, it is not furthered by the punishment of persons who are irresponsible under the Model Penal Code test, since a person who lacks substantial capacity to appreciate the forbidden nature of his conduct or to conform to the law's requirements cannot be regarded as morally blameworthy in any significant sense.

MODEL PENAL CODE § 4.01 cmt. 3 n.12 (1985) (citations omitted).

207. See VT. STAT. ANN. tit. 13, § 4801 (Supp. 1995).

208. MODEL PENAL CODE § 4.01 cmt. 3 n.12 (1985) (citations omitted). See also Geeta Anand, *Accused Woman Says She'll Drink and Drive*, BOSTON GLOBE, Jan. 11, 1995, at 17. A woman was arrested for her 25% DWI violation. She had served two prison terms but said that the experience has not discouraged her from drinking and driving. *Id.* The woman is quoted as saying, "I really don't think I'm a danger," despite recently injuring someone in a prior DWI episode. *Id.* The woman went on to say that nothing could persuade her to stay off the road after drinking. *Id.*

209. MODEL PENAL CODE § 4.01 cmt. 3 n.12.

210. *Id.*

211. VT. STAT. ANN. tit. 13, §§ 4820, 4822 (Supp. 1995).

212. Babe, *supra* note 112. A Maryland study reported that 65% of 127 male NGRI defendants were rearrested within a 17-year period. In comparison, the study showed a rearrest rate of 75% for a similarly sized group of released mentally competent convicts. *Id.*

213. *Id.*

mentally ill DWI offender, psychiatric treatment is the most effective way to keep the offender from repeatedly committing DWI offenses.

For a mentally ill DWI defendant to receive the state-provided psychiatric treatment that would be available to him if he committed other crimes, the insanity defense must be available for the crime of DWI. As the Texas case illustrates, designation of DWI as a strict liability crime decreases the chances that a mentally ill defendant will be able to assert the insanity defense.²¹⁴ If the use of the insanity defense is prohibited, the effect will be to allow mentally ill drivers back on the streets without proper treatment and safeguards, endangering themselves and the public. Such a result flies in the face of the intent of DWI legislation, which is to protect human life. The likelihood that the insanity defense will be permitted increases if DWI is not deemed a strict liability crime. Thus, the public policy of saving lives and protecting society is best served by not declaring DWI a strict liability crime and instead designating it a general intent crime requiring a mens rea of recklessness.

Although it may be consistent with precedent for the Vermont Supreme Court to declare DWI a strict liability crime, Vermont would be better served if the legislature designated DWI and DWI predicate offenses as general intent crimes with a requisite mens rea of recklessness. This designation would avoid disfavored strict liability and also has the advantage of conforming to the cohesive mens rea structure of the MPC, which Vermont has shown a willingness to accept.²¹⁵ Moreover, continuing to categorize DWI as a strict liability crime is inconsistent with traditional strict liability designations because of the stiff penalties and moral blameworthiness associated with DWI. Most importantly, the avoidance of a strict liability designation best serves the purpose of DWI legislation by keeping mentally ill offenders from repeating their DWI offenses.

VII. MAY THE INSANITY DEFENSE BE USED FOR THE OFFENSE OF DWI IF IT IS DESIGNATED A STRICT LIABILITY CRIME OR A GENERAL INTENT CRIME?

A. *Strict Liability Designation*

After the Vermont Legislature or the Vermont Supreme Court designates DWI as either a strict liability crime or a general intent crime, the next inquiry becomes whether the insanity defense may be used for either or both of these designations.

214. See *infra* note 270 and accompanying text.

215. See *supra* note 134.

This inquiry must begin by examining Vermont's insanity statute. The insanity defense in Vermont is essentially the MPC test.²¹⁶ The statute provides:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks adequate capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

(2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct. The terms "mental disease or defect" shall include congenital and traumatic mental conditions as well as disease.

(b) The defendant shall have the burden of proof in establishing insanity as an affirmative defense by a preponderance of the evidence.²¹⁷

The tenets of statutory construction dictate that, when interpreting a statute, the court must first look to the plain meaning of the statutory language.²¹⁸ It is apparent from the language of Vermont's insanity statute that the legislature did not explicitly exclude strict liability crimes from consideration. The plain language of the statute makes no mention of intent, nor does it make reference to the existence or nonexistence of any *mens rea*. A second tenet of statutory interpretation requires that the court view any ambiguity in the light most favorable to the defendant.²¹⁹ This suggests that the statute's silence should be interpreted to allow for the use of the insanity defense regardless of whether the crime is designated one of strict liability or general intent.

Although the Vermont Supreme Court has not addressed the issue of whether the insanity defense may be used for a strict liability crime, other courts and commentators have. LaFave and Scott state that, "the insanity defense is broader than the *mens rea* concept, as evidenced by the fact that the defense would in theory even be available in a prosecution for a strict liability crime which required no proof of the defendant's mental state."²²⁰ Theory became practice when the Oregon Supreme Court accepted this rationale and

216. *State v. Smith*, 136 Vt. 520, 523, 396 A.2d 126, 127 (1978). "The language of 13 V.S.A. § 4801 derives from a formulation recommended by the American Law Institute." *Id.*

217. VT. STAT. ANN. tit. 13, § 4801 (Supp. 1995).

218. *State v. International Collection Serv. Inc.*, 156 Vt. 540, 542, 594 A.2d 426, 428 (1991).

219. *State v. Roy*, 151 Vt. 17, 25, 557 A.2d 884, 889 (1989).

220. LAFAVE, *supra* note 160, at 306.

held that a DWI defendant could assert an MPC-based insanity defense²²¹ despite the designation of DWI as a strict liability crime.²²² The Oregon Supreme Court, in *State v. Olmstead*, expressed its agreement with LaFave and Scott, stating:

The concepts of culpable mental state and insanity are distinct. Culpable mental state is an element of a crime that the state must prove. Insanity is an affirmative defense that a defendant must prove to avoid criminal responsibility. Proving the requisite culpable mental state for a crime does not relieve the state from responding to an insanity claim from a defendant. That the state may not need to prove a culpable mental state does not, it seems to me, mean that a defendant cannot show that she was insane. That the state may be relieved of its burden of proving that a defendant acted diligently, recklessly, knowingly or intentionally, has nothing to do with whether she is able by reason of mental disease or defect to conform her conduct to the requirements of the law. The two are not antitheses.²²³

This point of view has long been supported by the United States Supreme Court. In 1952, the Court held in *Leland v. Oregon* that the insanity defense is to be viewed as separate and distinct from asserting the state's inability to prove mens rea.²²⁴ More recently, Justice Rehnquist noted that in *Leland*

221. The Oregon statute is a "guilty but insane" test, but is expressly modeled on the MPC section 4.01 test. *State v. Olmstead*, 800 P.2d 277, 282 (Or. 1990). The substantive test is essentially identical to the MPC formulation, with the one deviation being the substitution of the word "substantial" for "adequate." The Oregon statute states:

A person is guilty except for insanity, if as a result of mental disease or defect at the time of engaging in criminal conduct, the person lacks substantial capacity either to appreciate the criminality of the conduct or to conform their conduct to the requirements of the law.

OR. REV. STAT. § 161.295 (1993). Although the Oregon statute is labeled a guilty but insane test, it is similar not only in substantive form to the MPC test but is similar in the disposition of the defendant upon a determination that he is mentally ill. Under the Oregon test, a defendant who is found guilty but insane is subject to confinement and supervision by the Psychiatric Security Review Board, just as he or she would be under the MPC test. *Olmstead*, 800 P.2d at 282. MODEL PENAL CODE § 4.08 (1985) ("[w]hen a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the Court shall order him to be committed to the custody of the Commissioner of Mental Hygiene to be placed in an appropriate institution for custody, care and treatment").

222. *Olmstead*, 800 P.2d. at 286.

223. *Id.* at 283 (quoting *State v. Maguire*, 717 P.2d 226, 230 (Or. Ct. App. 1986) (Warden, J., dissenting)).

224. *Leland v. Oregon*, 343 U.S. 790, 795-96 (1952); *Barrett v. State*, 772 P.2d 559, 563 (Alaska Ct. App. 1989); *State v. Patterson*, 740 P.2d 944, 945 (Alaska 1987); *Hart v. State*, 702 P.2d 651, 656, 659 n.10 (Alaska Ct. App. 1985).

[t]he issue of insanity as a defense to a criminal charge was considered by the jury only after it had found that all elements of the offense, including the *mens rea*, if any, required by state law, had been proved beyond a reasonable doubt. Although . . . evidence relevant to insanity as defined by state law may also be relevant to whether the required *mens rea* was present, the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime.²²⁵

This dictum demonstrates that, in the words of one court, "the insanity defense operates independently of the mental element of an offense."²²⁶

In agreement, the MPC comments state that the MPC insanity defense (on which the Oregon and Vermont statutes are modeled) is not based on the notion that the defendant is incapable of forming the intent to commit the prohibited act.²²⁷ Instead, as the plain language of section 4.01 dictates, the factors involved in a section 4.01 insanity defense relate to the defendant's inability to appreciate the wrongfulness or criminality of his act. The comments to section 2.05 confirm that general defenses are available even in the case of a strict liability offense.²²⁸

The United States Congress also seems to take the view that the insanity defense is available for all crimes. The federal statute provides that insanity is "an affirmative defense to a prosecution under *any* federal statute."²²⁹ Recent federal case law instructs that this statute should be construed in the defendant's favor.²³⁰ Therefore, a federal court would allow the defense to be used for all federal crimes including those imposing strict

225. *Mullaney v. Wilbur*, 421 U.S. 684, 705-06 (1975) (Rehnquist, J., concurring) (citations omitted).

226. *State v. Curry*, 543 N.E.2d 1228, 1230 (Ohio 1989).

227. *Commercial Standard Ins. Co. v. Marin*, 488 S.W.2d 861, 868 n.2 (Tex. Ct. App. 1972) (citing MODEL PENAL CODE § 4.01 cmt. (Tentative Draft No. 4) (1955)).

228. MODEL PENAL CODE § 2.05 cmt. 2 (1985). The MPC comments further state that most recent state criminal codes "that contain provisions on strict liability make clear that most general defenses are not eliminated." *Id.* See also *State v. Shotton*, 142 Vt. 558, 562, 458 A.2d 1105, 1107 (1983) (allowing the affirmative defense of necessity to be used for DWI); *State v. Fogarty*, 607 A.2d 624, 627 (N.J. 1992) (holding that a defendant charged with the strict liability crime of DWI "does not forfeit all constitutional and common-law defenses").

229. 18 U.S.C. § 17 (1988) (emphasis added).

It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

Id.

230. *United States v. Denny-Shaffer*, 2 F.3d 999, 1014-15 (10th Cir. 1993).

liability. As courts and commentators state, the elements of the insanity defense — i.e., the inability of the defendant to appreciate the criminality of his act — are distinct from the mens rea element of a given crime.²³¹ Thus, the insanity defense is applicable regardless of whether intent is an element of the crime or not.²³² In sum, the insanity defense is available even for a strict liability offense.²³³

This viewpoint, held by the Oregon Supreme Court, commentators such as LaFave and Scott, and the redactors of the MPC, is also supported by a growing number of other jurisdictions that have addressed the issue. The Supreme Court of Florida held that DWI-manslaughter is a strict liability crime, but that it was error not to allow the use of the insanity defense.²³⁴ The Florida court stated that, “[i]t is axiomatic that a defendant is entitled to a jury instruction on the theory of his defense.”²³⁵ In addition, the Supreme Court of Colorado stated that, “an insane person is absolved of responsibility for all crimes, including those that do not require proof of a mens rea element.”²³⁶ Similarly, the Court of Appeals of Ohio held:

[T]he incapacity to know the wrongfulness of one's conduct requires only proof that the accused lacked the mental capacity to know that the act was wrongful, whether or not culpability was required for guilt, and that the incapacity to conform one's conduct to the requirements of law is equivalent to involuntariness. This suggests that the insanity defense is applicable against an offense of strict criminal liability.²³⁷

Other state courts have not adopted this analysis.²³⁸ In *Beasley v. State*, the Texas Court of Appeals stated, “Because proof of a culpable mental state is not required to convict a defendant of driving while intoxicated, insanity cannot be a defense to such a charge.”²³⁹ Such a holding raises questions about how courts could have such diametrically opposed viewpoints on the same issue.

231. See *supra* note 226 and accompanying text. See also LAFAVE, *supra* note 160, at 305-06.

232. See LAFAVE, *supra* note 160, at 305-06.

233. *Id.*

234. *Tollefson v. State*, 525 So. 2d 957, 961 (Fla. Dist. Ct. App. 1988).

235. *Id.* (quoting *Palmes v. State*, 397 So. 2d 648, 652 (Fla. 1981)).

236. *People v. Low*, 732 P.2d 622, 629-30 (Colo. 1987).

237. *State v. Grimsley*, 444 N.E.2d. 1071, 1076 n.7 (Ohio Ct. App. 1982). *But see State v. Ungerer*, 621 N.E.2d 893, 894 (Ohio Ct. App. 1993), in which the Ohio Court held that the insanity defense could not be used for DWI because of the fact that Ohio's traffic regulations specifically barred the use of the insanity defense. *Id.*

238. See *supra* Part IV.

239. *Beasley v. State*, 810 S.W.2d 838, 841 (Tex. Ct. App. 1991).

The answer lies in the confusion regarding the two different paradigms in which mental illness may serve to exculpate a defendant. The first paradigm in which a defendant's mental abnormality may be relevant to his culpability focuses on whether the defendant's mental defect serves to negate the mens rea that is a required element of the crime.²⁴⁰ Such a paradigm is known by a number of different terms, including "diminished capacity,"²⁴¹ "partial responsibility,"²⁴² "diminished responsibility,"²⁴³ "partial insanity,"²⁴⁴ and "impaired mental condition."²⁴⁵ A great deal of confusion and ambiguity surrounds the use of these terms by various courts.²⁴⁶ For the sake of clarity, this note will refer to an analysis which takes into account a defendant's mental disease or defect for the purpose of negating certain elements of mens rea as the negative/mens rea paradigm. Under this model, the defendant may be exonerated not because of his mental disease per se, but rather because the prosecution cannot prove that the defendant possessed the requisite mens rea. The classic example is the defendant who, because of his mental disease, believed that he was squeezing a lemon when in fact he was strangling his victim.²⁴⁷ In such a case, the prosecution has the duty of proving intent, i.e., that the defendant knew he was strangling a human being. If the defendant truly believed that he was squeezing a lemon, the prosecution will fail because it has not satisfied the mens rea element — proving the defendant intended to kill a human being.²⁴⁸ The defendant's mental illness precluded him from forming the requisite intent. Such an analysis is not an insanity defense at all, but rather an analysis that hinges on the defendant's lack of the required mens rea due to his mental illness or defect.²⁴⁹

In contrast, the second way a defendant's mental illness may be

240. MODEL PENAL CODE § 4.02 (1985).

241. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 319 (1987).

242. LAFAVE, *supra* note 160, at 368.

243. *Id.*

244. *Id.*

245. *Low*, 732 P.2d at 631.

246. Joshua Dressler, in his discussion of the doctrine of diminished capacity, states: "Probably no phrase in the field of criminal law defenses causes more confusion than that of 'diminished capacity.'" The term has been used and misused by courts and commentators alike to describe different concepts, neither one of which is adequately characterized by it. One commentator has aptly depicted the state of affairs in this field as "undiminished confusion in diminished capacity." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 319 (1987) (quoting Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984)).

247. *Messier*, 145 Vt. at 628, 497 A.2d at 743. See also MODEL PENAL CODE § 4.01 cmt. (Tent. Draft No. 4) (1955).

248. *Messier*, 145 Vt. at 628, 497 A.2d at 743.

249. *Olmstead*, 800 P.2d at 282; *United States v. Pohlott*, 827 F.2d 889, 897 (3d Cir. 1987).

relevant to his culpability focuses not on mens rea but on the defendant's ability to appreciate the criminality or wrongfulness of his actions. This analysis, which this note will call the insanity/excuse paradigm, is the traditional model for the insanity defense which is codified in the MPC as well as in Vermont's statutory law.²⁵⁰ Such a defense does not hinge on a failure to possess the required mens rea, but rather acts as a moral and legal excuse for conduct the defendant did not appreciate as criminal because of his mental illness.²⁵¹ For example, a defendant may claim that a mental disease caused him to believe that his homicidal act was commanded by God. This defendant may be exonerated under an insanity/excuse paradigm because he did not appreciate the criminality of his act. But this individual would not be successful under the above mentioned negative/mens rea defense, because the defendant possessed the requisite intent to kill another human being. In fact, that was his explicit and direct intention.

The above examples illustrate the two different paradigms into which a defendant's mental illness may fit in calculating his culpability. Although the paradigms may sometimes overlap,²⁵² the analysis used to determine if one or the other is applicable must remain distinct.²⁵³ The negative/mens rea analysis focuses on whether the defendant acted with the requisite mens rea. This analysis asks, Did the defendant act purposely? Did he act knowingly? Was it his intent to commit the act? In contrast, the insanity/excuse paradigm asks, Did the defendant understand that his actions were criminal or wrong? The same separation of analyses must also be applied when examining whether the two paradigms are applicable to a strict liability crime.

The Oregon case of *State v. Olmstead* serves as an excellent model to help unravel confusion that surrounds the use of the two paradigms for a strict liability crime.²⁵⁴ The differing analyses account for the incompatible holdings of the Texas Court of Appeals in *Beasley* and the Oregon Supreme Court in *Olmstead*.²⁵⁵ The *Olmstead* decision is particularly illuminating because Oregon provides the two paradigms in its statutory law, and both paradigms are derived from the MPC.²⁵⁶

The first paradigm, negative/mens rea, which is taken directly from section 4.02 of the MPC, provides: "Evidence that the actor suffered from a

250. MODEL PENAL CODE § 4.01; VT. STAT. ANN. tit. 13, § 4801 (Supp. 1995).

251. Michael S. Moore, *Legal Conceptions of Mental Illness*, in *CONTROVERSIES IN CRIMINAL LAW* 125, 126 (Michael J. Gorr & Sterling Harwood eds., 1992).

252. *Messier*, 145 Vt. at 628, 497 A.2d at 743. "This overlap between the insanity defense and the mental elements of crime has already been recognized by this Court." *Id.*

253. *Barrett v. State*, 772 P.2d 559, 563 (Alaska Ct. App. 1989).

254. *Olmstead*, 800 P.2d at 281-83.

255. *Id.*

256. *Id.* at 281-82.

mental disease or defect is admissible whenever it is relevant to the issue of whether the actor did or did not have the intent which is an element of the crime."²⁵⁷ As discussed above, under this type of negative/mens rea statute, a defendant is relieved of liability if he can show that his mental illness negates the required intent/mens rea. But if a crime has no intent element and is therefore a strict liability crime, then evidence bearing on a defendant's ability or inability to form intent is immaterial.²⁵⁸ Thus, if DWI is designated a strict liability crime, evidence of mental illness is not admissible under a negative/mens rea paradigm.²⁵⁹ It is crucial to note that this analysis by the Oregon Supreme Court is applicable only to a negative/mens rea paradigm.²⁶⁰ As the Colorado Supreme Court emphasizes, "the [negative/mens rea paradigm] is separate and distinct from the defense of insanity."²⁶¹

The second paradigm, insanity/excuse, requires a different analysis. The insanity/excuse model follows the substantive test provided in the MPC and Vermont's insanity defense.²⁶² As discussed above, the Oregon Supreme Court,²⁶³ the United States Supreme Court,²⁶⁴ and LaFave and Scott²⁶⁵ stress that the issue of a defendant's mens rea is distinct from the question of whether the defendant could appreciate the criminality or wrongfulness of his conduct. Under such an insanity/excuse paradigm, the issue of whether or not a crime has a required mental element has no bearing on whether the defendant could not appreciate the criminality of the act. Thus, as the Oregon Supreme Court ruled, the insanity/excuse paradigm is applicable to the strict liability crime of DWI.²⁶⁶

The error that the Texas Court of Appeals made in *Beasley* is that it mistakenly applied the analysis of the negative/mens rea paradigm to an insanity/excuse paradigm.²⁶⁷ The test the court used in that case is a modified ALI test²⁶⁸ which states, "It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease

257. OR. REV. STAT. § 161.300 (1993).

258. *Olmstead*, 800 P.2d at 281.

259. *Id.*

260. *Id.*

261. *Low*, 732 P.2d at 631.

262. OR. REV. STAT. § 161.295 (1993). See *supra* note 232 and accompanying text.

263. See *supra* notes 221-23 and accompanying text.

264. See *supra* note 225 and accompanying text.

265. See *supra* note 220 and accompanying text.

266. *Olmstead*, 800 P.2d at 283.

267. *Beasley*, 810 S.W.2d at 841.

268. Michelle Midal Gee, Annotation, *Modern Status of Test of Criminal Responsibility — State Cases*, 9 A.L.R. 4th 526, Supp. 51 (1981 & Supp. 1994).

or defect, did not know that his conduct was wrong."²⁶⁹ The court held that this test was inapplicable to DWI, stating that, "[b]ecause proof of a culpable mental state is not required to convict a defendant of driving while intoxicated, insanity cannot be a defense to such a charge."²⁷⁰ Such an analysis would be appropriate under the negative/mens rea paradigm because if DWI is a strict liability crime requiring no intent, then evidence of a defendant's inability to form intent is logically immaterial. Such an analysis, however, is inappropriate for the insanity/excuse test that the court is applying. The issue of whether the defendant knew that his conduct was wrong is distinct from the issue of the prosecution not having the burden of proving mens rea.²⁷¹ Under such a statute, the court should consider the mens rea requirements of the offense as entirely separate from the insanity analysis.²⁷² This would allow for the use of the insanity defense regardless of whether the offense is designated strict liability.²⁷³

If the Vermont Supreme Court designates DWI a strict liability crime, the court should adopt the reasoning of the Oregon Supreme Court and allow the use of the insanity defense despite the strict liability designation. The court has demonstrated a recognition of the difference in analysis between the negative/mens rea and insanity/excuse paradigms.²⁷⁴ In *State v. Messier*, the court noted that, "[e]vidence offered by a defendant to prove such a mental disease or defect may or may not also operate to disprove the existence of mental states . . . which might be essential elements of the crime."²⁷⁵ Such reasoning demonstrates that Vermont (like Oregon) accepts and differentiates between the two distinct paradigms for examining whether a defendant with a mental illness may be relieved of criminal liability. This awareness suggests that the court will not mistakenly apply a negative/mens rea analysis to the insanity/excuse statute used in Vermont.²⁷⁶ In addition, the fact that the Vermont Supreme Court expressly differentiates between the two paradigms indicates that, when faced with the decision as to whether the paradigms apply

269. TEX. PENAL CODE ANN. § 8.01 (West 1974 & Supp. 1991).

270. *Beasley*, 810 S.W.2d at 841.

271. The confusion of the two paradigms experienced in the *Beasley* case was also evident in *State v. Curry*. *State v. Curry*, 543 N.E.2d 1228 (Ohio 1989). In *Curry*, the Supreme Court of Ohio admonished the prosecution for failing to distinguish between the two different analyses. *Id.* at 1280. The court stated that the prosecution appeared to confuse the insanity defense with the negative/mens rea analysis when the state argued that, "the insanity defense is limited to offenses of which intent is an element." *Id.* The court went on to correct the prosecution's analysis by adding that, "the insanity defense operates independently of the mental element of an offense." *Id.*

272. LAFAYE, *supra* note 159, at 306; *Leland v. Oregon*, 343 U.S. 790, 795 (1952).

273. *Olmstead*, 800 P.2d at 283.

274. *Messier*, 145 Vt. at 628, 497 A.2d at 743.

275. *Id.*

276. VT. STAT. ANN. tit. 13, § 4801 (Supp. 1995).

to strict liability crimes, the court will recognize that different analyses must be applied.²⁷⁷ Thus, the Vermont Supreme Court should adhere to the analysis of the Oregon Supreme Court and the United States Supreme Court and rule that application of Vermont's insanity statute is distinct from the mens rea inquiry. If the court follows such an analysis, the insanity defense should be applicable to DWI regardless of the mens rea designation.²⁷⁸

B. General Intent Designation

The final analysis addresses the issue of whether Vermont's insanity statute is applicable if the Vermont Legislature or the Vermont Supreme Court designates DWI a general intent crime. Again, there is no Vermont Supreme Court decision that directly addresses the issue. However, the above analysis that allows an insanity/excuse paradigm to be used for strict liability crimes means that the insanity defense may be used for general and specific intent crimes as well. The inquiry into whether a defendant is criminally insane is a different inquiry than whether the defendant possessed the mens rea required for the crime.²⁷⁹ Thus, whether a crime is one of specific intent, general intent, or strict liability is irrelevant to the applicability of the insanity defense.²⁸⁰ Regardless of the legislature's or court's designation of DWI as a strict liability or general intent crime, the insanity defense is still applicable.²⁸¹

Allowing the insanity defense for strict liability and general intent crimes is sound not only from the doctrinal approach but from a public safety stance as well. As discussed in Part IV, permitting use of the insanity defense promotes the intent of DWI laws: to keep dangerous intoxicated drivers off the roads.²⁸² The traditional DWI punishments are ineffective against mentally ill offenders,²⁸³ and if used, will allow improperly treated and unreformed DWI defendants back on the highways to endanger themselves and the public.²⁸⁴ In contrast, permitting the insanity defense for DWI funnels these

277. *Id.*

278. *Olmstead*, 800 P.2d at 283.

279. *See supra* note 226 and accompanying text.

280. *See LAFAVE, supra* note 160, at 305-06.

281. *See People v. Spires*, 537 N.E.2d 1010, 1012 (Ill. App. Ct. 1989) (insanity defense available for the general intent crime of rape); *United States v. Owens*, 854 F.2d 432, 434 (11th Cir. 1988) (insanity defense available for the general intent crime of unlawful possession of firearm); *Curry*, 543 N.E.2d at 1231 (insanity defense available for general intent crime of negligent vehicular homicide).

282. *State v. Bromley*, 117 Vt. 228, 230, 88 A.2d 833, 835 (1952).

283. *See supra* note 206 and accompanying text.

284. *Id.*

mentally ill offenders into a mental health facility that has a better chance of providing them with productive treatment. Thus, highway safety is enhanced by allowing the insanity defense to be used for DWI, regardless of the mens rea required for the commission of the crime. In sum, the insanity defense should be allowed for DWI despite a strict liability designation because 1) courts and commentators agree that the insanity defense is applicable to strict liability crimes; and 2) the legislative intent of DWI statutes is furthered by allowing for the use of the insanity defense.

CONCLUSION

Over 17,000 people die each year from accidents caused by drunk drivers. A significant portion of the accidents are caused by individuals who are mentally ill. Our national consciousness no longer tolerates a lenient stance toward DWI offenders. This note, by proposing the use of the insanity defense for DWI, does not advocate a permissive approach to DWI offenders. Rather, this note proposes using a reasoned approach to analyze a crime and a defense that many feel are unworthy of such consideration.

DWI is a serious crime. The Vermont Legislature should designate a specific mens rea level for DWI as it has for other serious crimes carrying significant jail sentences. The effect of a designated mens rea requirement would be to conform to the reasoned practice of the Model Penal Code, which requires some level of intent for every crime. The Vermont Legislature or Supreme Court may, however, determine that the people of Vermont are best served if DWI is designated a strict liability crime. Such a designation should still treat DWI as a serious offense and give possible defenses a reasoned analysis. If such an analysis is applied, it is apparent that the insanity defense is applicable to strict liability crimes because the inquiry about mens rea and the ability to appreciate criminality are distinct.

This note started with a question: If John Owens can assert the insanity defense for murder, why can he not assert it for DWI? Many answer by saying that DWI is a strict liability crime or that the insanity defense should not be allowed for a crime as common as DWI. Such answers are insufficient and have the effect of treating DWI as an insignificant offense. This negates the gains in recent years of recognizing DWI as a deadly and blameworthy crime. John Owens was involved in a dangerous situation when he drove his car that night last year. Yet, John Owens's actions were those

of a man who was legally insane, not those of a criminal. Accordingly, he needs help, not punishment. Allowing John Owens to utilize the insanity defense for the crime of DWI would allow him to get help, and protect the citizens of Vermont by properly addressing the problems of a potentially dangerous driver.

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