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Abstract	· · · ·						

Under current Virginia law, a driver who has been drinking but does not have a BAC of 0.10% will likely not be arrested even if his/her driving ability is visibly impaired. A "driving while alcohol impaired" (DWAI) statute would provide law enforcement personnel with a means of detaining those drivers whose ability to operate a motor vehicle is impaired at BAC levels below 0.10%. This report reviews the scientific evidence of effects of alcohol on driving ability at BAC levels less than 0.10%

It also examines existing DWAI statutes. Eight states and the District of Columbia presently have such statues, which can be grouped into four categories: DWAI as a lesser included offense of DUI, DWAI as a separate offense which applies only to drivers under 21, DWAI as a separate offense for all drivers, and lowering the presumptive BAC level for DUI. This report considers the advantages and disadvantages of each category, including the constitutionality of age-based classifications, and makes recommendations for further study. 1894

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## DRIVING WHILE ALCOHOL IMPAIRED:

A Preliminary Exploration of the Issues and Possible Approaches

by

Patricia Brady Research Assistant

(The opinions, findings, and conclusions expressed in this report are those of the author and not necessarily those of the sponsoring agencies.)

Virginia Transportation Research Council (A Cooperative Organization Sponsored Jointly by the Virginia Department of Transportation and the University of Virginia)

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## DRIVING WHILE ALCOHOL IMPAIRED:

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### INTRODUCTION

In 1988, the Virginia Transportation Research Council was asked to explore the need for a "driving while ability impaired" statute. The intended purpose of such a statute would be the provision of a means of sanctioning drivers whose ability to operate a motor vehicle was impaired by a blood alcohol content (BAC) below the statutory 0.10% BAC. The ability to operate a motor vehicle can, of course, be impaired by many other factors (drugs, disease, etc.). For the purpose of narrowing the focus of this report, the term "driving while ability impaired" has been replaced by "driving while alcohol impaired" (DWAI).

This report assesses the need for such a statute and the issues raised by the various forms such a statute could take. Briefly, DWAI statutes deal with the following areas:

- DWAI is defined at a lower BAC level (e.g., 0.05%) than the standard driving under the influence (DUI) offense (currently 0.10% in Virginia). Although DWAI is treated as an alcoholrelated offense for the purposes of the habitual offender laws, the penalties may be lower because the offense is considered less serious.
- 2) A DWAI offense can operate as an independent offense or only as a "lesser included offense." A lesser included offense is one for which a driver cannot be independently charged or prosecuted but can be convicted of when there is insufficient evidence to sustain the greater charge of DUI.
- Some DWAI statutes are applicable only to drivers under a certain age. Such an approach is often advocated because of the overrepresentation of teenage drivers in alcohol-related crashes.

The current Virginia law against drunken driving makes it illegal per se to drive or operate a motor vehicle when the operator's BAC is greater than or equal to 0.10%, regardless of the alcohol's actual effect on the individual's ability to drive. Although there may be some individuals who are not "under the influence" at that level, the societal interest in quick, uniform prosecution (by replacing subjective proof of an element of the crime with objective proof) outweighs the individual's interest in drinking large amounts of alcohol. Although the per se definition greatly simplifies the burden of proving that a driver was under the influence, it has arguably led to a public perception that driving after drinking moderate amounts of alcohol is safe. Current research and epidemiological studies challenge this belief.

The original determination of the BAC level for a per se DUI offense reflected concern that the limit not be set at too low a level, penalizing those drivers whose performance was unaffected by alcohol at the statutory level of impairment. A DWAI statute would address drivers at the opposite end of the spectrum: those whose ability is significantly impaired before their BAC reaches the statutory limit.

Under current Virginia law, there is little chance of prosecution, and even less of conviction, of drivers with a BAC below 0.10%. Currently, in Virginia, a BAC of less than 0.05% creates a legal presumption that the driver was not under the influence of alcohol, whereas a BAC between 0.05% and 0.10% creates no presumption one way or the other but may be considered as other relevant evidence. Va. Code § 18.2-269. Without a legal presumption of influence, it is difficult for the prosecution to prove the charge of DUI beyond a reasonable doubt. With no lesser offense, such as DWAI, the driver with a BAC below 0.10% will probably be released, regardless of his or her driving ability.

The police commonly observe a car being driven erratically and stop the vehicle. Slurred speech, unsteady balance, or an odor of alcohol on the driver's breath gives the police probable cause to administer a breath test to the driver. If the preliminary results are below .10%, the suspect is likely to be released. Advocates of a DWAI statute argue that releasing a driver of patently impaired ability simply because his or her BAC is below 0.10% is contrary to the public interest. Under current law, it is possible to charge such a driver with DUI and prove that influence by evidence other than the breath test results; however, without extraordinary circumstances, police officers will almost always release the suspect because of the perceived unlikelihood of conviction. The police officer (or prosecutor) may also feel that it is unfair to charge such a driver with a crime that results in the same sanction as for a driver whose BAC was much higher. This situation makes it impossible to collect meaningful data on the number of drivers who might be reached with a DWAI statute because without a formal arrest, no record is made of the stop.

A DWAI statute might aid in the enforcement of other statutes. In 1988, Virginia's driving under the influence of drugs (DUID) law went into effect. Va. Code § 18.2-266. This law provides criminal sanctions for those whose driving is affected by drugs or by a combination of drugs and alcohol. Without specially trained drug-detection officers, however, arrest of such offenders can be difficult. Sometimes a police officer believes a suspect to be seriously impaired, but the preliminary breath test result is below 0.10%. If the level were within the range covered by a DWAI statute, the officer would have additional grounds on which to arrest the suspect. If the DUID charge for some reason were not prosecuted, the DWAI charge could still stand. This might make police officers more likely to make DUID/DWAI arrests since the chance of conviction would be higher, justifying the officers' substantial involvement of time.

Some advocates of a DWAI statute feel it would be most beneficial for sanctioning drivers under the age of 21. Because they have less experience with both alcohol and driving, teenagers are considered more likely to have their driving ability impaired at lower levels of alcohol than adults. Some proponents therefore urge a statute aimed only at younger drivers whereas others feel a DWAI statute directed at all drivers will nevertheless have more of an impact on younger drivers.

## METHOD

This report is based on a review of scientific and medical studies on the effects of alcohol on driving performance. Because of the sheer volume of reports in this field, selection was necessary. Most of the literature reviewed was published in 1984 or later and thus reflects knowledge unavailable when Virginia's DUI per se statute was enacted (1984). The authors of research in this field typically condense the earlier literature and comment on how their own findings supplement or contradict earlier reports, so few studies more than ten years old were consulted.

To determine what other states have done in the area of alcoholimpaired statutes, the Digest of State Alcohol-Highway Safety Related Legislation, 6th Edition, was consulted (National Highway Traffic Safety Administration (NHTSA), January 1988). This compilation indicated that eight states plus the District of Columbia have some type of alcohol impairment statute (an offense defined by a BAC level lower than that which defines the main DUI offense for the state). The statutes of these states were read and analyzed for this report, and the legislation of these states form the bases of the possible approaches discussed later. Three states have statutes that apply only to younger drivers. To date, none of these has been challenged on the basis of unequal protection under the law. To determine how courts might rule were such a challenge made, research was done on case law that addresses the general topic of age classifications for other types of driving offenses.

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#### DISCUSSION

## History

Virginia had an alcohol impairment statute in the past. Va. Code § 18.1-56.1, repealed 1972. Before there was a per se offense of drunken driving, a BAC of 0.15% created a presumption that the accused was under the influence; a BAC between 0.10% and 0.15% created a presumption that the ability of the accused was impaired. The offense of driving while impaired operated as a "lesser included offense." The Supreme Court of Virginia interpreted the legislative intent of the statute to be that "no arrest, prosecution, or conviction would emanate from an original charge of impaired driving, independent of and separate from a charge of driving under the influence." Bass v. Commonwealth, 209 Va. 422, 426, 164 S.E.2d 667, 670 (1968). Under this scheme, the offense was used as an object of plea bargaining; many drivers originally charged with DUI, which at the time carried a mandatory 12-month license revocation, pleaded guilty instead to driving while impaired. When the presumptive level for influence was lowered from 0.15% to 0.10% (1972 Va. Acts 757), the "impaired" statute was rendered obsolete.

Plea bargaining to lesser charges was abolished for drunken driving offenses in 1982. 1982 Va. Acts 301. The climate of public opinion had changed, favoring more convictions under the "drunk driving" label. Because there was a range of sanctions that courts could impose, there was little incentive for bargaining in advance of the trial.

There is now some precedent in Virginia for sanctions against driving with a BAC lower than 0.10%. The federal Commercial Motor Vehicle Safety Act of 1986 (P.L. 99-570) required that, in order not to have federal funds withheld, states enact and enforce a law that deemed drivers of commercial vehicles to be under the influence of alcohol if their BAC was greater than 0.04%. In its 1989 session, the General Assembly passed a law relating generally to licensing and regulation of commercial motor vehicle drivers. 1989 Va. Acts 705. Although "driving under the influence" is still defined at the 0.10% BAC level under this bill, driving a commercial motor vehicle with a BAC of 0.04% or higher is a Class III misdemeanor, punishable with a fine up to \$500 and prohibition from driving a commercial motor vehicle for one year. This misdemeanor is a lesser included offense of the crime of driving a commercial motor vehicle while under the influence.

Although 0.10% is the most common level for per se offenses in the United States, legal definitions of drunken driving vary. In Oregon, Utah, Canada, Denmark, and Austria, drivers with a BAC of 0.08% are charged and prosecuted with DUI, per se. Other jurisdictions have even lower levels: Norway and Sweden use the 0.05% level and Czechoslovakia uses 0.03%. In Virginia, drivers who are stopped and register a BAC at these levels will almost certainly be released.

## Scientific Data on the Effects of Alcohol

Scientific research has confirmed that individuals vary widely in their capacity to tolerate alcohol. "Biologic variability among humans produces substantial differences in alcohol influences and alcohol tolerance, making virtually useless any attempt to fix a 'safe' drinking level for drivers" (American Medical Association, Council on Scientific Affairs, 1986, p. 522). A 0.10% per se offense for DUI was adopted by Virginia, and other states, partially as a result of scientific studies showing significant impairment of almost all drivers at that level. Why are groups like the American Medical Association (Hotchkiss, 1988) now calling for lowering the BAC to 0.05%? Is there scientific evidence to support such a change?

Scientific studies of alcohol's effects can be grouped into two categories: those that seek to determine the level at which almost all subjects are affected, and those that seek to determine the level at which a significant number of subjects are impaired. The former studies are best used when per se levels are to be established, whereas the latter group should be used when levels for legal presumptions or for DWAI statutes are to be set. Most of the research of the past 10 years falls into the latter category.

Although there are many studies in this field, there are also problems with comparisons across studies, as well as application of the results to legislative solutions. In some studies, BACs are measured, whereas in others they are estimated from the amount of alcohol ingested, time, body weight and gender of the subject. Second, because of financial constraints, researchers typically choose one or two dosages to monitor, rather than studying effects at all dosage levels beginning at Therefore, the effects at lower levels are less often studied, zero. particularly after impairment has been found at the preselected level. Third, laboratory experiments measure BACs directly before or after the experimental task, whereas in actual traffic situations, it is not uncommon for an hour or more to elapse between the arrest and the BAC test. Because BACs decline at a rate of 0.015% to 0.02% per hour, this discrepancy needs to be considered in transposing laboratory results to legal limits (Personke, Damron and Cipra, 1984). Finally, laboratory studies tend to be done in university settings, and the findings may not be suitable for generalization beyond the sample of young, comparatively well-educated drinkers.

Laboratory studies initially examined particular activities believed to be necessary for driving. These include tracking a moving object and locating objects in peripheral fields of vision; the effect of alcohol on these discrete functions has been measured. The activities selected for study are judgment calls by the researchers, and how closely these tasks match actual driving requirements can be challenged. In reviewing studies of such discrete functions as judgment of velocity, perception of dangerous objects in normal traffic situations, and darkness/brightness adaptation, Personke, Damron and Cipra (1984) found that "alcohol effects at low BAC levels are either not evident, or in some cases, even beneficial. However, by doses around the 0.08% BAC level, decrement appears in all, or almost all subjects" (p. 13).

Driving, particularly in emergency situations, requires performance of more than one task at a time. Research has therefore increasingly focused on divided-attention tasks and concurrent performance. These typically show statistically significant impairment at BACs much lower than 0.10%. Hamilton and Copeman (1970, cited in Moskowitz, 1973) found alcohol impairment at the 0.017% level on divided-attention tasks. Moskowitz studied 12 subjects at precisely measured low dosages of alcohol, subjecting them to divided-attention tasks. He found 10 of the 12 subjects impaired by 0.041% BAC, and all of the subjects impaired by .083% BAC (Moskowitz, 1973). His conclusion was that not only is the ability to perform concurrent tasks impaired by low doses of alcohol, but the ability to process information simultaneously may itself be significantly impaired by alcohol.

Moskowitz and Robinson (1988) compiled data from more than 175 studies dealing with alcohol's effect on driving performance. They concluded that there is sufficient evidence "to demonstrate that BAC's of 0.05% and more produce impairment of the major components of driver performance" (p. 67). They further noted that some studies have reported impairment below 0.04% BAC. Of the more than 175 studies reviewed by them, more than 60 documented some form of impairment at 0.05% BAC, more than 100 at 0.07% BAC, and 130 at 0.09% BAC. The remaining 45 studies did not indicate impairment until 0.10% BAC or higher. The authors' conclusion was that "the weight of existing empirical evidence is considered sufficient to scientifically justify the setting of legal BAC limits at 0.05% or lower" (p. 67).

At least one group of researchers took the position that there was sufficient data to establish that "the negative effects of alcohol begin with the first drink, not when a person is legally drunk" (Blaschke, Dennis, & Creasey, 1987, p. 37). The policy judgment that must be made is what level of impairment justifies favoring society's interest in safer highways over the individual's desire to drink and drive. The argument for retaining the 0.10% BAC level as the only definition of drunk driving is that it is the level at which society can be certain that any driver is a danger on the highway. The argument for having an additional offense at a lower BAC level is that those who are impaired at a BAC below the current legal limit should be sanctioned and discouraged from driving. Proponents argue that society's interest should predominate since there is rarely any need for someone to drive after drinking.

## Epidemiological Data

Laboratory studies of alcohol's effects provide only one component of the data necessary for policy formulation. Also relevant is the extent of the problem in actual situations, i.e., the number of drivers operating at various BAC levels. Unfortunately, this number can never be accurately determined. Those drivers whose ability is impaired at a BAC below 0.10% may be stopped by police, but they are typically released. Drivers with a BAC below 0.10% thus are not included in any data collection system, unless they are in an accident that results in a fatality.

The Fatal Accident Reporting System maintains data on all traffic accidents that result in a fatality. Unfortunately, not all states require blood-alcohol testing of drivers in such accidents. Of all drivers involved in fatal crashes in 1987, the BAC results are known in only 40% of the cases (NHTSA, April 1988). Of fatally injured drivers for whom BAC results are known, 8,448 drivers registered zero, while 7,666 had a BAC of 0.10% or higher; 1,810 had a BAC of 0.01% to 0.10% (NHTSA, April 1988). Because automobile accidents can occur for reasons having nothing to do with alcohol, some of these crashes may have been caused by other In those states that do not require BAC testing for all traffic factors. fatalities, whether a test is done depends on the judgment of the police officer at the scene; consequently, the above figures may be overly conservative in showing the number of fatally injured drivers with a low Officers may be more likely to suspect alcohol involvement and BAC. therefore order the test when the alcohol consumption was greater. It is possible that many fatally injured drivers with a low BAC are never tested; the size of this group will never be known until BAC tests are required of all fatally injured drivers in all states.

In general, epidemiological studies show that the higher the BAC of a driver, the greater the likelihood he or she will be involved in a crash. The studies differ in determining the magnitude of the likelihood, particularly at very low doses of alcohol. One of the earliest epidemiological studies, frequently cited in the literature, is the Grand Rapids study done by Borkenstein in 1964 (cited in Personke, Damron and Cipra, 1984). Borkenstein computed a relative probability of having an accident, with 1 being the probability of a driver with a BAC of 0.00% having an accident. He found that the probability rose to 2 at a BAC of 0.05%, to 4 at 0.08%, and to 7 at 0.10%. His study is perhaps best known for the "Grand Rapids dip," showing a lower probability of accidents at a BAC of 0.03%. This finding has been challenged in recent years by several researchers. Personke, Damron and Cipra (1984) noted that there was no significant difference in the accident rates between 0.00% and 0.08% in Borkenstein's data, suggesting that the dip was a product of chance. Moskowitz, Burns, and Williams (1985) challenged the dip on empirical grounds. Under tightly controlled low dosages of alcohol, impairment of divided-attention and information-processing tasks was apparent at the lowest doses of alcohol, increasing steadily with increasing BACs. Measuring performance at BACs as low as 0.015%, they concluded that the trend of increasing probability was unambiguous, but they could not predict the degree of impairment at any given BAC level.

Several studies have attempted to correlate accident probability with BAC level at different ages and/or driving experience. Although only a low percentage of the BACs of all drivers is known, the data on variations distributed by age reveal the same pattern year after year, reflecting an underlying pattern (Blood alcohol concentrations, 1983). Persons 16 to 24 years of age comprise only 20% of the licensed drivers in the country and account for less than 20% of the total vehicle miles traveled, yet they are involved in 42% of all alcohol-related fatal crashes. Teenagers, specifically, drive less than 6% of the total vehicle miles but account for 15% of alcohol-related fatal crashes (National Institute on Alcohol Abuse and Alcoholism, 1985). Alcoholrelated highway deaths are the leading cause of death for Americans 16 to 19 years of age (Presidential Commission, 1983), accounting for 23% of all the deaths in this age group (National Institute on Alcohol Abuse and Alcoholism, 1985).

Several studies have shown that at any given BAC level, younger drivers are more likely to be involved in accidents than older drivers (Moskowitz, 1973). Drivers under the age of 20 are more inexperienced with alcohol and also with driving itself, so it is difficult to ascertain how much of their increased accident rate is solely attributable to the effects of alcohol. Charlesworth and South (1984) examined BAC levels and age, holding years of driving experience constant. Their conclusion was that "proportionally more young accidentinvolved drivers had higher BAC's than older drivers and that lack of experience was not responsible for this finding" (Charlesworth & South, 1984, p. 28). Another way of stating the relationship between age and alcohol's effects is that for the general population, a BAC of even 0.05% doubles the probability of having an accident (Blaschke, Dennis, & Creasey, 1987). For young drivers, however, this BAC increases the probability of an accident by a factor of three (National Institute on Alcohol Abuse and Alcoholism, 1985; Moskowitz & Robinson, 1988).

The epidemiological data provide little guidance in terms of how many drivers are on the road with a BAC below 0.10%. This is largely a

function of the lack of a reporting system covering all drivers, or even all drivers in accidents. The data do indicate strongly that, compared with older drivers, younger drivers experience alcohol and driving in a significantly different way, leading to their overrepresentation in fatal accidents.

## The Constitutionality of Age Classifications

The 14th Amendment to the U.S. Constitution prohibits states from taking any action that denies to any person equal protection under the law. DWAI laws directed at a special age group might conceivably violate this constitutional protection. To date, no one has challenged the constitutionality of such a law; in the event someone does, it is likely that courts would uphold such a statute. Claims of equal protection are evaluated under "strict scrutiny" only if the class involved is "suspect" (historically treated in a discriminatory fashion and/or based on an immutable characteristic) or if the right involved is "fundamental" (e.g., voting). When strict scrutiny is not appropriate, legislation is reviewed for constitutionality under the "rational basis" standard. To pass this scrutiny, the legislation need only be rationally designed to achieve some legitimate state goal.

The epidemiological evidence regarding teenagers and drunken driving is probably sufficient to justify statutes aimed at them. A state law limiting driver's licenses to those age 16 or over has been upheld, the court reasoning that young people are not a suspect class and a license to drive is not a fundamental right. Berberian v. Pettit, 374 A.2d 791 (R.I. 1977). Protection of other motorists and pedestrians on the road has been held to be a legitimate state goal. Sedlacek v. Ahrens, 165 In the interests of public safety, Mont. 479, 530 P.2d 424 (1974). courts have upheld statutes restricting driver's licenses to those 16 and State ex rel. Oleson v. Graunke, 119 Neb. 440, 229 N.W. 329 over. (1930). A court upheld a statute revoking younger drivers' licenses for 8 points (for infractions), whereas those of drivers over 21 years were not revoked until 12 points, when statistics showed that younger age groups had 70% more accidents than their proportionate share, and 81% more accidents involving injury. Lopez v. Motor Vehicle Division, 189 Colo. 123, 538 P.2d 446 (1975).

Thus, a DWAI statute aimed exclusively at younger drivers would probably withstand an equal protection challenge. Several states already have such statutes (see below). Some Canadian and Australian provinces have also enacted measures aimed specifically at teenaged drivers (Williams, 1985; Western Australia Police Department, 1984). One justification offered for such statutes was the deterrent effect, but some studies have shown that such effects tend to be short-lived (Ross, 1981).

#### What Other States Have Done

Eight states and the District of Columbia have statutes prohibiting driving while alcohol-impaired. These statutes provide a means of sanctioning a driver whose BAC is below the statutory level required for DUI yet whose driving ability is impaired. The sanctions provided range from Colorado's mandatory sentence of 2 to 180 days plus mandatory public service of 24 to 48 hours to Connecticut's labeling the offense an infraction and leaving the fine and sentence, if any, to the discretion of the judge. Between these two extremes, Michigan, Oklahoma, New York, and the District of Columbia have lower fines than for a DUI offense, and the BAC level is, by definition, lower than for a DUI conviction. These statutes thus provide a means to sanction a driver whose alcohol consumption has impaired his or her ability to drive, notwithstanding the BAC level falls below a predetermined state limit for "intoxicated." Table 1 shows the provisions of the various DWAI statutes.

Maine, North Carolina, and Rhode Island have alcohol-related statutes that apply to younger drivers only. Because these statutes involve BACs below the legal limit for "under the influence" or "while intoxicated," they are considered here as DWAI laws, regardless of the language used in the statute. In Rhode Island, drivers under the age of 18 who operate a motor vehicle while having a BAC of 0.04% or more face a \$150 fine and a 6-month license suspension. In Maine, drivers under the age of 21 face a 1-year license suspension for operating a motor vehicle with a BAC of 0.02% or higher; this is an administrative suspension and is carried out without a judicial hearing. In North Carolina, any alcohol in the blood or breath of a driver under age 18 can result in license suspension of 90 days or until age 18, whichever is longer.

In 1982, Western Australia lowered the acceptable BAC for probationary drivers to 0.02% at a time when the standard drunk driving offense for all drivers in that province was a BAC level of 0.08%. Probationary drivers are those licensed less than 12 months; 78% of these were under 21 years of age. The introduction of the 0.02% offense was accompanied by other changes in drunken driving legislation for younger drivers, all justified by the relative lack of driving experience in this age group. The Committee that recommended the changes commented: "The driving task is itself sufficiently complex during the learning and gaining experience period without the added complication of coping with alcohol" (Western Australia Police Department, 1984, p. 1). After the legislation, there was a reduction in accident involvement for drivers under age 18, but it was not statistically significant at the 0.05 level.

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## Table 1

State	BAC level*	Sentence**	Fine	Other Sanctions				
Colorado	.0510	2–180 days (mandatory)	\$100-500	Public service of 24-48 hours (mand.).				
Conn.	.0710	Not a criminal offense.	Discretion of court.	None specified.				
D.C.	.05 (prima fac:	30 days or less ie)	\$300 or less	None specified.				
Maine	.02 per se (applies on to drivers under age 2	nly 21)		1-year license suspension.				
Mich.	.0710	90 days or less	\$300 or less	License suspension: 90 days-1 year; public service 12 days; mandatory screening for treatment; ig- nition interlock device may be ordered.				
N.Y.	.0507 (relevant) .0710 (prima faci	15 days or less ie)	\$250 or less .	None specified.				
N. Car.	Any alcohol (applies or to provisio licenses, a drivers age	l nly onal and 2 16-18)		License suspension: 90 days, or until age 18, whichever is longer.				
Okla.	.0510 (relevant)	6 mos or less	\$100-500	License suspension of 6 mos for 2nd, subsequent offenses.				
R.I.	.0410 (applies or to driver u age 18.)	nly under	\$150, or community service	License suspension: 6 mos, plus completion of driving course. Court may also order treatment.				

## STATES WITH ALCOHOL-IMPAIRED STATUTES

\* operates as a presumption of impairment, unless otherwise noted. \*\* refers to sentence for first offense.

## CONCLUSIONS AND RECOMMENDATIONS

## Need for a DWAI Statute

Recent research of the effects of alcohol appears to confirm that the ability to operate a motor vehicle is affected in many people before their BAC reaches 0.10%. Although some researchers, and some state legislatures, feel confident that almost all drivers are substantially impaired at a BAC of 0.08%, others feel that the data are inconclusive as to the exact level at which all drivers are impaired. Therefore, it seems inappropriate to enact a per se law effective at a very low BAC level. There is, however, adequate evidence to support the idea that some drivers are impaired at comparatively low BAC levels. If Virginia wishes to reach those drivers, either to sanction them for unsafe driving, or to place them in VASAP programs for treatment, a DWAI statute should be enacted.

If one accepts the scientific conclusions that the precise starting point of alcohol's effects either cannot be determined or begin with the first drink and increase continuously thereafter, then legislation should not imply that there is a safe level of alcohol consumption, which the per se law does. Under this view, society's interest in safe highways outweighs the individual's interest in driving with any amount of alcohol in the bloodstream. There is some popular support for this notion, expressed in the phrase "Drinking and driving don't mix." The growth of "designated driver" programs at bars, encouraging one patron within a group to drink no alcohol at all, indicates a public recognition that it is desirable and possible to make other arrangements for transportation after drinking.

## Possible Legislative Approaches

If a DWAI statute is to be enacted, there are a variety of forms it could take. The approaches listed below are all viable alternatives, based on the available evidence and examples from other states.

1. A DWAI offense that operates only as a lesser included offense. In addition to the current DUI per se offense, this offense would sanction any driver at the 0.05% (or lower) BAC level, but a driver could not be independently arrested or prosecuted. It would be useful in prosecuting those cases where the police reasonably believe the driver was alcohol-impaired, yet the blood or breath test registers below the legal minimum. Rather than just dismissing the DUI charges, it would be possible to charge the driver with the lesser offense of DWAI. Given the past experience with "lesser included offenses," such a statute would need to be carefully drafted to avoid misuse as a means of avoiding more serious charges. The advantage of such a statute would be economy of police and judicial resources: with a lesser included offense, fewer cases would need to be dismissed for insufficient evidence.

- 2. A DWAI offense that applies only to drivers under the age of <u>21</u>. As discussed above, several states in this country and Australia have enacted such measures in the hope of reducing the number of alcohol-related fatalities among teenagers. To survive constitutional challenges, the purpose of such a statute would need to be explicitly stated, as well as buttressed by statistics. Sadly, such data are abundantly available. Those states that have such laws all use license suspension as a sanction. If the goal of such a statute is deterrence, the loss of license may be a more effective way to reach young drivers than fines or sentences. Courtordered attendance at VASAP might also be required.
- 3. Altering the presumptions of the current DUI law, so that a BAC of 0.05% to 0.10% creates a presumption that the driver was under the influence. Technically, this would not be a DWAI statute but would provide a means of sanctioning some drivers who currently escape criminal liability. This would mean that prosecutions could proceed under either the per se or presumptive approach to establishing "under the influence." Individual police officers could charge those whose breath test result registered below the per se level, yet whom they believed to be nevertheless under the influence. The main disadvantage to this approach would be that if the number of these cases was very large, the courts and the police would have to revert to the time-consuming process of proof that the per se law was designed to avoid. Because the offenders would be charged with DUI, the fines and sanctions of those with a low BAC could equal those of drivers with a high BAC. Some find that troubling. whereas others feel it accounts for individual variation in capacity to tolerate alcohol. The main advantage of this approach would be political: it would probably be the easiest to implement since it would be the least disruptive of the current system.
- 4. <u>A DWAI offense defined at 0.05% BAC or lower</u>. Fines and license suspension would be less than for DUI (0.10%), but the offense would count as an alcohol-related traffic offense for the purpose of sentencing in later convictions. This offense would be independent of DUI: drivers could be arrested

and prosecuted below the 0.10% BAC level. The advantage would be that all impaired drivers could be sanctioned, whether their BAC was above or below 0.10%; one concern is that such charges might be employed in a discriminatory manner. The police may be likely to press charges against a 21-year-old single male with a BAC of 0.075% and release others with that BAC level because the former is perceived as part of a high-risk group. This is a valid concern with any law: without 100% enforcement, there is always the danger of discrimination in prosecutorial discretion. Unless such discrimination is invidious, the courts traditionally excuse it.

### Recommendations for Further Study

In order to select the type of DWAI statute most appropriate for Virginia, a number of policy considerations need to be addressed. The answers to these questions are beyond the scope of this paper, but the general issues are outlined below.

- Effect on police resources. A DWAI statute would, by definition, increase the number of drivers who cc\_ld be arrested and charged for an alcohol-related offense. Each arrest and booking takes a considerable amount of a police officer's time that is in addition to testifying in court for those cases which go to trial. This use of police time needs to be balanced against the possible gain in safety from removing impaired drivers from the road, and the possible rise in police morale for being able to charge those drivers they now release. As discussed above, there are no data available on the number of drivers that would be affected by such a statute.
- 2. Effect on VASAP programs. One of the goals of proponents of DWAI statutes is early identification of persons with developing alcohol problems. Several states with DWAI statutes mandate court-ordered treatment for first-time offenders. Under Virginia law, the cost of VASAP treatment is the responsibility of the offender (Va. Code § 18.2-271.1) but the impact of additional referrals on other aspects of VASAP programs needs to be considered. Input should be sought from VASAP officials about the number of referrals they could handle and whether new programs would need to be developed to serve this population.
- 3. Costs to the state. Without data on the number of impaired drivers, it is difficult to project the cost of enacting such a statute. At a minimum, a DWAI statute would produce increased police activity and increased VASAP referrals. If arrests were made, there would be revenue from fines, but it is unlikely that it would be sufficient to cover the cost of the arrests.

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