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NARCOTICS ON ILLINOIS'S ROADWAYS: DRUGGED DRIVING'S ILL EFFECTS AFTER MARTIN

Introduction

A University of Illinois student attends a party and smokes marijuana. A month later, he pulls an "all-nighter" to prepare for an exam. On his drive home from the final, he is pulled over because one of his taillights is out. After noticing the student's bloodshot eyes—the result of no sleep and several energy drinks—the officer suspects that the student is under the influence of alcohol and asks him to take a breathalyzer test. The results are negative. Still not satisfied, the officer takes him to the station and conducts a urinary analysis. Trace amounts of marijuana are discovered in the student's system from his ingestion several weeks prior. The student is then charged under Illinois's driving under the influence (DUI) statute, and later convicted, despite there being no evidence of impairment.

If this seems unfair, the feeling is surely compounded when the crime becomes aggravated. Imagine the same hypothetical, except that the student has a passenger and gets into an accident for which he is only partly at fault. Unfortunately, the passenger is killed instantly after a collision at an uncontrolled intersection. At the hospital, the student's urine comes back positive for traces of marijuana. These traces, in addition to the death of the passenger, will lead to an aggravated DUI conviction, a felony in the state of Illinois. The student is likely headed to prison, despite not being remotely affected by the marijuana at the time of the accident.

1. The following two examples are hypotheticals proposed by the author. Of course, several Illinois cases are representative of similar situations. See, e.g., People v. Rodriguez, 926 N.E.2d 390, 391 (Ill. App. Ct. 2009) (affirming a defendant's conviction, despite no proof of impairment, when cocaine metabolites were found only in his urine); People v. Avery, 661 N.E.2d 361, 363, 365 (Ill. App. Ct. 1995) (holding that the State was not required to prove a mental state in connection with defendant's twelve charges of aggravated DUI).


3. See People v. Martin, 955 N.E.2d 1058, 1064–65 (Ill. 2011) ("A driver with controlled substances in his body [commits misdemeanor DUI] simply by driving. When an aggravated DUI charge is based on a violation of that section, [aggravated DUI] requires a causal link only between the physical act of driving and another person's death. In such a case, the central issue at trial will be proximate cause, not impairment."). Here, if the student's driving is found to be a proximate cause of the death, he is guilty of aggravated DUI. Cf. id.


5. Id. § (d)(2)(G).
Recent academics have labeled offenders like the student above as “drugged drivers,” a group that has been increasingly prosecuted in recent decades. Recognizing the need to protect people from the dangerous combination of drug use and vehicle operation, many state legislatures have amended their statutory schemes to punish those who choose to engage in this activity. These statutory schemes are diverse. Some states have adopted systems in which the prosecutor must show that the narcotics actually impaired the defendant at the time of the arrest, while others create a special case for marijuana—similar to the presumption of inebriation in many statutes that proscribe driving while under the influence of alcohol. Other jurisdictions exempt marijuana entirely from their drugged driving statutes. Finally, other states provide that any amount of narcotic found in a defendant’s system constitutes grounds for a DUI citation. Illinois belongs to the final group.

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7. See, e.g., VA. CODE ANN. § 18.2-266 (2009 & Supp. 2012). The pertinent part of Virginia’s statute reads as follows:

It shall be unlawful for any person to drive or operate any motor vehicle, engine or train . . . while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs, to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely.

Id. (emphasis added)

8. See, e.g., NEV. REV. STAT. § 484C.110(3) (2012).

9. See, e.g., MINN. STAT. § 169A.20(7) (2012). The pertinent part of Minnesota’s statute reads as follows:

It is a crime for any person to drive, operate, or be in physical control of any motor vehicle, as defined in section 169A.03, subdivision 15, except for motorboats in operation and off-road recreational vehicles, within this state or on any boundary water of this state when:

. . . .

(7) the person’s body contains any amount of a controlled substance listed in Schedule I or II, or its metabolite, other than marijuana or tetrahydrocannabinols.

Id. (emphasis added).


ing while “there is any amount of a drug, substance, or compound” in a person’s system.\textsuperscript{12}

At various times since its inception, the constitutionality of the Illinois DUI statute, at both the state and federal levels, has come under attack.\textsuperscript{13} The drugged driving prohibition has, however, remained largely untouched.\textsuperscript{14} In a key decision, \textit{People v. Fate}, the Illinois Supreme Court held that the blanket proscription against “any” drug in a driver’s body was constitutional because it bore a rational relationship to the state’s interest in keeping motorists safe and keeping drugged drivers off of the road.\textsuperscript{15} Thus, the first iteration of the above hypothetical would be controlled by the court’s reasoning in \textit{Fate}: technically, the student has committed DUI even though one month has passed since he consumed the marijuana.\textsuperscript{16}

In April 2011, the Illinois Supreme Court elaborated on \textit{Fate’s} reasoning in \textit{People v. Martin}, and held that if a person commits misdemeanor DUI and aggravating factors are present, he commits aggravated DUI.\textsuperscript{17} According to the court, this is true even if there is no evidence that the drugs found in a person’s system affected his driving.\textsuperscript{18} Thus, \textit{Martin} controls the second hypothetical: the student is guilty of aggravated DUI because trace amounts of narcotics were found in his system and someone died in the accident, even though the drug did not affect his driving capabilities in any manner.\textsuperscript{19} Therefore, the driver in the second scenario will be convicted of a felony.\textsuperscript{20}

This Note examines the implications of the court’s holding in \textit{Martin}. Part II begins by detailing the jurisprudential development that guided the \textit{Martin} court, examining both case law and statutory history. Part III analyzes the \textit{Martin} decision itself. In Part IV, this Note argues that, with regard to marijuana, the court’s holding in \textit{Martin} was based on flawed reasoning and rests on questionable constitu-

\begin{thebibliography}{99}
\bibitem{12} Id.
\bibitem{15} \textit{See Fate}, 636 N.E.2d at 550.
\bibitem{16} \textit{Cf. id.}
\bibitem{17} \textit{See Martin}, 955 N.E.2d at 1065.
\bibitem{18} Id. at 1062–63, 1065.
\bibitem{19} \textit{Cf. id.} at 1064–65.
\end{thebibliography}
tional ground, which may lead to arbitrary enforcement. Finally, Part V analyzes how the Martin ruling will impact the state of Illinois.

Essentially, the rationale of the Martin court should not apply to marijuana, even though the court made no exception for this specific substance. This Note advances a reasonable alternative: in order to correct this problem, yet continue to minimize the dangers of drugged driving, the Illinois legislature should adopt a new DUI scheme. An ideal system would treat marijuana differently than other narcotics and differentiate between psychoactive and inactive marijuana components.21 Michigan has implemented a system that provides a good model.22 Adopting this scheme, or one similar to it, would not only lessen the harmful impact of Martin, but would also permit the legislature to increase the precision with which it prevents and punishes the wrong that the DUI statute is aimed at correcting.

II. BACKGROUND

The DUI statute has changed significantly since Illinois adopted it in 1935.23 Specifically, the legislature made it illegal to drive while under the influence of a controlled substance.24 Changes in the statute have been effected by both statutory amendments and judicial interpretation.25

21. The Martin court recognized that drivers like the defendant may not actually be impaired: "Because impairment is not an element of misdemeanor DUI as set forth in section 11-501(a)(1) and section 11-501(a)(6), DUI, or driving . . . may be an inaccurate title for violations of these subsections. Such violations are essentially driving while presumed impaired." Martin, 955 N.E.2d at 1064 n.1.

22. Michigan prohibits persons from driving while "under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance." MICH. COMP. LAWS § 257.625(1)(a) (2006 & Supp. 2012). However, the Michigan Supreme Court held that all inactive metabolites that are the by-product of marijuana are "not . . . schedule 1 controlled substance[s] under MCL 333.7212 and, therefore, a person cannot be prosecuted under [the DUI statute] for operating a motor vehicle with any amount of [these metabolites] in his or her system." People v. Feezel, 783 N.W.2d 67, 83 (Mich. 2010). Thus, Michigan distinguishes between active and inactive traces of marijuana in a driver's system, and only prosecutes those who are found to have active by-products that could potentially impair their driving capabilities. Id. at 82.


25. See, e.g., id.; Martin, 955 N.E.2d at 1064–65; People v. Fate, 636 N.E.2d 549, 550 (Ill. 1994).
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A. The Gassman Decision

The first case in the decisions leading to Martin was People v. Gassman, decided by the Illinois Appellate Court in 1993.26 In Gassman, the defendant was tried for drugged DUI. The relevant portion of the DUI statute at that time stated that a “person shall not drive or be in actual physical control of any vehicle within this State while... there is any amount of a drug, substance or compound in such person’s blood or urine resulting from the unlawful use or consumption of... a controlled substance.”27

Steven Gassman was pulled over for driving with a defective headlight, but upon observing Gassman’s demeanor and smelling alcohol on his breath, the officer searched his car.28 The search revealed open beer cans, a hash pipe, and a bag of marijuana.29 After arresting him for possession of marijuana, the officer conducted a breathalyzer test that indicated a blood alcohol concentration (BAC) of 0.04.30 Because the officer believed Gassman was more inebriated than this result suggested, his blood and urine were also tested.31 Gassman’s blood tested positive for marijuana.32 Because the statute prohibited the presence of any amount of narcotic in a driver’s bloodstream, Gassman was convicted.33 He immediately appealed, arguing that the statute created an impermissible absolute liability offense.34

The Illinois Appellate Court affirmed the conviction and held that while the statute created an “absolute liability” offense, traffic laws are “regulatory, as opposed to penal” and, thus, “a defendant’s intent, knowledge, or motive is immaterial to the question of guilt. The only intention necessary for liability... is the doing of the act prohib-

27. 625 ILL. COMP. STAT. 5/11-501(a)(5) (1992). The defendant was prosecuted for drugged driving under a different statutory scheme. See ILL. REV. STAT., Ch. 95 1/2, par. 11-501(a)(5) (1990). However, while Illinois recodified its statutory compilation in 1992, see Act effective Sept. 3, 1992, No. 87-1005, 1992 Ill. Laws 2188, the recodification did not effect any substantive changes to the DUI statute.
28. Gassman, 622 N.E.2d at 848.
29. Id.
30. Id. Blood alcohol concentration means “either grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.” 625 ILL. COMP. STAT. 5/11-501.2(a)(5) (2010). This is measured in a percentage. For example, a BAC of 0.20 means that one part in 500 in an individual’s blood is alcohol.
32. Id.
33. Id. at 847.
34. Id. Traffic offenses are often deemed “public welfare offenses,” which, unlike criminal violations, do not always require a mens rea. See Morissette v. United States, 342 U.S. 246, 250–63 (1952).
The most important evidence for the State in Gassman was the testimony of Dr. Jeffrey Benson. In examining his testimony, the court stated:

Although there is a general correlation between the level of cannabis use and impairment, Dr. Benson stressed that the relationship was not simple. He could not say with certainty either that the small amount of cannabinoids in the defendant's blood would impair driving or that such an amount would not impair driving.

For the appellate court, this testimony was dispositive. According to the court, the legislature's intent in passing the drugged DUI statute was to protect the public from drivers under the influence of illegal drugs. The absolute liability prohibition against "any" amount of drugs in a driver's system was made necessary by the difficulty in measuring the effects of various amounts of narcotics on a person's ability to drive, as stated by Dr. Benson.

Finally, because this prohibition was part of the Illinois Vehicle Code, violations of which do not require a mental state, and not a criminal offense, it was constitutionally permissible for the statute to impose absolute liability. Thus, Gassman was guilty of drugged DUI because traces of drugs were found in his body and he was operating a motor vehicle; the State was not required to prove impairment.

B. The Fate Decision

One year later, the Illinois Supreme Court upheld the Gassman decision in People v. Fate. This was the state supreme court's first opportunity to address the issue. On October 10, 1992, defendant Vincent Fate was charged with multiple violations of the Illinois Vehicle Code and the Cannabis Control Act. The State charged and con-
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vicited the defendant under the same DUI statute as the defendant in Gassman.45

On appeal, Fate contended that this statute violated his due process rights under both the Illinois and U.S. Constitutions.46 Much like the defendant in Gassman, Fate argued that because the statute was not "tied to driving impairment," it created an impermissible per se violation.47 The appellate court agreed and held that section 11-501(a)(5) violated the Illinois constitution.48 The court did not find a "sufficient relationship between the evil to be remedied . . . and the legislative enactment."49

Ultimately, the Illinois Supreme Court reversed, upholding the defendant's conviction and declaring that while the statute created a per se violation, it was not unconstitutional.50 The court reasoned that impairment produced by ingesting various narcotics, including marijuana, differed from the impairment produced by ingesting alcohol because the relationship between narcotic ingestion and impairment is unpredictable.51 That is, in measuring the alcoholic content in a defendant's breath or blood, scientific tests had advanced to the point at which a reasonable conclusion could be made that anyone with a certain level of alcohol was presumably impaired.52 In contrast, there are a "vast number of contraband drugs [and] difficulties in measuring the concentration of these drugs with precision."53 In conducting this analysis, the court relied on the Gassman court's analysis of Dr. Benson's testimony verbatim.54

According to the court, these variances made it impossible to uniformly determine the amount of impairment for different levels of drug ingestion.55 Thus, the absolute bar on narcotics was a reasonable

Plaintiff-Appellant at 4, People v. Fate, 636 N.E.2d 549 (Ill. 1994) (No. 75596) (citations omitted).

45. See Fate, 636 N.E.2d at 551; see also 625 ILL. COMP. STAT. 5/11-501(a)(5) (1992).
46. Fate, 636 N.E.2d at 549–50. Specifically, the defendant in Fate alleged that section 11-501(a)(5) was unconstitutional for four reasons: it "failed to require a 'knowing' mens rea; violated due process as an improper exercise of police power; violated equal protection; and was unconstitutionally vague." Brief for Plaintiff-Appellant, supra note 44, at 4–5.
47. Fate, 636 N.E.2d at 550. In other words, the defendant argued that the statute created an absolute liability offense.
49. Id. at 5 (alteration in original) (internal quotation marks omitted).
50. Fate, 636 N.E.2d at 550.
51. Id. at 550–51 (comparing the effects of marijuana to PCP).
52. Fate, 636 N.E.2d at 551. In Illinois, this level is 0.08 percent. 625 ILL. COMP. STAT. 5/11-501(a)(1) (2010).
53. Fate, 636 N.E.2d at 551.
54. Id.
55. Id.
exercise of Illinois’s police power, justified by the legitimate goal of keeping drugged drivers off the road.56

C. A New Statutory Scheme

In 1999, in People v. Cervantes, the Illinois Supreme Court held that Public Act 88-680, which included amendments to the arrangement and penalties of Illinois’s aggravated DUI law, violated the single-subject rule of the Illinois constitution.57 In response, the Illinois legislature re-amended the DUI statute in order to remove any confusion about its validity.58 However, the amendment did not directly affect the drugged driving statute, which essentially remains the same today and provides:

(a) A person shall not drive or be in actual physical control of any vehicle within this State while:

\[\ldots\]

(6) there is any amount of a drug, substance, or compound in the person’s breath, blood, or urine resulting from the unlawful use or consumption of cannabis listed in the Cannabis Control Act, a controlled substance listed in the Illinois Controlled Substances Act, an intoxicating compound listed in the Use of Intoxicating Compounds Act, or methamphetamine as listed in the Methamphetamine Control and Community Protection Act.59

While the Public Act was broken up after Cervantes in order to avoid violation of the single-subject rule, the legislature has changed almost nothing in this specific subsection since 1994, when the Illinois Supreme Court decided Fate.60 It did, however, add to the list of narcotics for which a defendant can be found liable, including all substances listed in the Use of Intoxicating Compounds, and Methamphetamine Control and Community Protection Acts.61 Thus, while the actual

56. Id.
58. See Act effective Apr. 13, 2000, No. 91-692, sec. 20-900, § 11-501, 2000 Ill. Laws 48, 50–53. As to the purpose of this enactment, the general assembly declared, “It is the purpose of this Act to re-enact the provisions of Public Act 88-680 amending the Illinois Vehicle Code, including subsequent amendments. This re-enactment is intended to remove any question as to the validity or content of those provisions.” Id. at 49.
statute addressed by _Fate_ no longer exists, the total ban on any amount of controlled substance in a driver's body remains in effect.62

**D. The Effects of Pomykala**

In 2003, the legislature introduced a new aggravating factor to the DUI statute.63 This factor is implicated whenever a person commits misdemeanor DUI and is involved in a motor vehicle "accident that result[s] in the death of another person."64 The legislature added this aggravating factor to a list of ten others, all of which result in a felony conviction.65

The legislature’s adoption of section 5/11-501(d)(1)(F) closely followed the Illinois Supreme Court’s decision in _People v. Pomykala_.66 In _Pomykala_, the defendant was charged with two counts of reckless homicide after his car crossed the median of a divided highway and struck an oncoming car, killing its two occupants.67 At the time of the accident, the reckless homicide statute—listed in a different part of the Code than the DUI statute—stated that “[i]n cases involving reckless homicide, being under the influence of alcohol or any other drug or drugs at the time of the alleged violation shall be presumed to be evidence of a reckless act unless disproved by evidence to the con-
When the police arrived at the scene of the accident, they conducted a breathalyzer test on the defendant and discovered that he had a BAC of 0.21. The defendant was subsequently charged with reckless homicide and, because he was over the legal limit of alcohol, was presumed to have been acting recklessly. The defendant challenged the statute on the grounds that it created a mandatory presumption of guilt against him.

The Illinois Supreme Court agreed with the defendant and declared that section 5/9-3(b) was unconstitutional because it imposed a mandatory rebuttable presumption of guilt to a criminal offense, which impermissibly shifted the burden to the defendant to disprove recklessness. The court severed the section from the rest of the statute.

In response, the Illinois legislature added an aggravating factor to the DUI law, which proscribed the same activity as the statute that the Illinois Supreme Court held unconstitutional in Pomykala. In fact, the legislature repealed the offending section of the reckless homicide statute, and enacted a new section in the DUI statute in the same legislative act; it seems to have simply shifted the same prohibition to a new place in the Code.

Amidst all of the changes within the Illinois Vehicle Code, and Illinois law generally, one thing seems to have remained the same: the absolute bar on controlled substances in drivers' systems. First, the constitutionality of the drugged driving statute was upheld in Fate. A few years after Fate, the legislature enacted an entirely new statu-

68. 720 ILL. COMP. STAT. 5/9-3(b) (2000).
69. Pomykala, 784 N.E.2d at 786.
70. Id. at 786-87.
71. See id. at 787.
72. Id. at 790 ("A reasonable juror would assume from a reading of the instruction that, once the State established that the defendant was intoxicated, it had proved recklessness, unless the defendant produced sufficient evidence to disprove it.").
73. Id. at 791.
76. See Theodore A. Gottfried & Peter G. Baroni, Presumptions, Inferences, and Strict Liability in Illinois Criminal Law: Preempting the Presumption of Innocence?, 41 J. MARSHALL L. REV. 715, 738 (2008) ("[T]he legislative reaction to Pomykala was to remove the offending presumption in the reckless homicide statute and, in the same bill, add a special sentencing enhancement to the Aggravated DUI statute requiring the same increased penalty in that offense as was attached to the reckless homicide presumption."). The new law has been challenged with little success: the activity is now proscribed within a traffic regulation section, under which presumptions of guilt are often deemed to be constitutionally acceptable. See Morissette v. United States, 342 U.S. 246 (1952).
77. People v. Fate, 636 N.E.2d 549, 550 (Ill. 1994).
tery scheme, but retained the absolute ban.\textsuperscript{78} Then, following \textit{Pomykala}, the legislature simply moved the mandatory presumption of guilt from the criminal code to the vehicle code.\textsuperscript{79} It is within this context that the Illinois Supreme Court was asked to decide the case that is the subject of this Note.\textsuperscript{80}

\section{III. \textit{People v. Martin}}

On December 25, 2004, Aaron Martin was at a bar in Peoria, Illinois.\textsuperscript{81} He left around 10 PM and, on his way home, his vehicle crossed the centerline of the highway and struck an oncoming car.\textsuperscript{82} Both people in the other vehicle were killed and Martin was taken to a nearby hospital.\textsuperscript{83} The police arrested him shortly thereafter and took samples of his urine and blood.\textsuperscript{84} The tests revealed that Martin's blood contained no alcohol or controlled substances.\textsuperscript{85} His urine, however, contained very small traces of methamphetamine.\textsuperscript{86} In addition to the original charges of improper lane usage and driving on the wrong side of the road, Martin was indicted on one count of aggravated DUI.\textsuperscript{87}

The State began its case-in-chief by introducing evidence that Martin's vehicle crossed the centerline at a curve, veered into oncoming traffic, and struck another car.\textsuperscript{88} In addition, the State called Martin's friend, who stated that she had ceased raising money to help Martin pay for his medical bills after she received an anonymous tip informing her that Martin had been using methamphetamines.\textsuperscript{89} She reported confronting Martin about this, stating that Martin confessed to using methamphetamine on prior occasions, but that he was not using it at the time of the accident.\textsuperscript{90} Finally, the State called the forensic scientist who had discovered the presence of methamphetamines in

\begin{thebibliography}{99}
\bibitem{78} 625 ILL. COMP. STAT. 5/11-501 (2010).
\bibitem{79} See \textit{id.} \S (d)(1)(F).
\bibitem{80} \textit{People v. Martin}, 955 N.E.2d 1058, 1059 (Ill. 2011).
\bibitem{81} See \textit{id.}
\bibitem{82} \textit{id.}
\bibitem{83} \textit{id.}
\bibitem{84} \textit{id.} at 1060.
\bibitem{85} \textit{id.}
\bibitem{86} \textit{Martin}, 955 N.E.2d at 1060.
\bibitem{87} \textit{id.}
\bibitem{88} \textit{id.} The State introduced evidence from an eyewitness, an accident reconstructionist, and a forensic pathologist. \textit{id.}
\bibitem{89} \textit{id.}
\bibitem{90} \textit{id.} Specifically, defendant stated, "I have done crystal meth before, but I was not on crystal meth that night." \textit{id.} (internal quotation marks omitted). However, the court noted that "[t]he defendant did not indicate to Graham when he had last used methamphetamine." \textit{id.}
\end{thebibliography}
Martin's body. The expert testified that her tests found no indication that defendant had any amount of narcotics in his blood stream. However, she had discovered trace amounts of methamphetamine in his urine.

Martin called a forensic toxicologist as his only witness. This expert testified that it was his opinion that, to a reasonable degree of scientific certainty, "the urine sample of the defendant [did] not contain detectable amounts, realistic amounts of amphetamines." Despite this testimony, the jury found Martin guilty of aggravated DUI and the trial judge sentenced him to six years imprisonment. Martin appealed.

The appellate court reversed Martin's conviction for aggravated DUI and remanded for a sentencing hearing on the lesser charge of misdemeanor DUI. In an unpublished opinion, the court determined that the State had proven beyond a reasonable doubt that Martin had committed misdemeanor DUI by presenting sufficient evidence that methamphetamine, while only in a small amount, was discovered in his urine. However, the court examined the legislative history of the aggravated DUI section under which Martin was charged and determined that the legislature intended that the infraction—the presence of narcotics in a defendant's body—be the proximate cause of the victims' deaths. In other words, the appellate court determined that "the State must draw some relationship between the presence of methamphetamine in Martin's urine while he was operating a motor vehicle . . . and the deaths that resulted from the motor vehicle accident." Thus, according to the appellate court, to obtain a conviction, the State needed to show that the impairment,

91. Id.
92. Martin, 955 N.E.2d at 1060.
93. Id. The court described the forensic scientists' testing process as follows:
   A preliminary screening test indicated that a small amount of "some sort of drug of the amphetamine class" could be present in the samples. [The forensic scientist] then performed a gas chromatography mass spectrometry test, looking for a wide range of drugs. She found nothing significant. She then performed a more specific spectrometry test, looking for drugs in the amphetamine class. That test revealed the presence of methamphetamine, though it did not indicate how much.
94. Id.
95. Id. (internal quotation marks omitted).
96. Id.
97. Id. at 1060.
98. Martin, 955 N.E.2d at 1060.
99. Id. at 1061.
100. Id.
101. Id. (alteration in original) (internal quotation marks omitted).
not merely the fact that the defendant was driving, was a proximate cause of the deaths. Because the State did not prove a causal connection between the trace amounts of methamphetamine and the accident, the appellate court determined that the lower court committed reversible error in convicting Martin of aggravated DUI.

When the State appealed the decision, the Illinois Supreme Court was tasked with deciding "whether the proximate cause requirement of section 11-501(d)(1)(F) means that the State must prove the defendant's drug use, rather than his driving, caused the deaths." Because the statute was unclear as to whether this aggravating factor required proof of impairment or not, the court examined the legislative intent.

The Illinois Supreme Court stated that it had already determined the legislature's intent in Fate, in which it stated that "the statute is intended to keep drug-impaired drivers off of the road." The court then followed its reasoning in Fate:

At the lowest levels of drug ingestion, no one is impaired. At the highest levels, all are impaired. In the vast middle range, however, the tolerance for drugs varies from person to person and drug to drug. In this range, depending on the drug and depending on the person, some will be impaired and some will not be impaired at all.

... The flat prohibition against driving with any amount of a controlled substance in one's system was considered necessary because "there is no standard that one can come up with by which, unlike alcohol in the bloodstream, one can determine whether one is... driving under the influence."

Accordingly, the court upheld the rule espoused in Fate—all persons with any amount of a controlled substance in their system are deemed to be impaired. Furthermore, the court reasoned that the DUI stat-
ute was rationally related to the government's legitimate end and was justified because of the difficulties in measuring the effects of various controlled substances on different people. Thus, the statute was constitutional. The court went on to state that "aggravated DUI is simply misdemeanor DUI with an aggravating factor, which turns the offense into a felony." It explained that while there are six ways to commit DUI in Illinois, two of these presume impairment, rather than requiring proof of actual impairment: the driver is presumed impaired if (1) the driver's BAC is above 0.08 or (2) there are is any amount of controlled substance in his or her system. Therefore, according to the court in Martin, "whether proof of impairment is necessary to sustain a conviction for aggravated DUI under subsection 11-501(d)(1)(F) depends upon whether impairment is an element of the underlying misdemeanor DUI." When the underlying misdemeanor involves the strict liability ban on controlled substances, "section 11-501(d)(1)(F) requires a causal link only between the physical act of driving and another person's death. In such a case, the central issue at trial will be proximate cause, not impairment."

Thus, because a reasonable jury could have found defendant guilty of section 11-501(a)(6)—which does not require proof of impairment—Martin was convicted of a felony simply because his driving was the proximate cause of the victims' deaths. With this holding, the court created the potential for criminal liability on any driver in Illinois with any amount of narcotic, including marijuana, in his system.

IV. Analysis

Martin is troubling for several reasons. Perhaps the most problematic issue is that the rationale underlying the court's decision is flawed; at least with regard to marijuana, the scientific facts presented by the expert are no longer valid. The constitutionality of the legislation is also questionable and has been attacked on several occasions. One particularly compelling argument is that the statute creates an uncon-
stitutional mandatory presumption of guilt for a criminal offense.\textsuperscript{117} Because significant problems exist in both the rationale underlying the DUI statute and the way in which it is implemented, the Illinois legislature should adopt a new statutory scheme that differentiates between marijuana and other drugs, a distinction foreclosed by the \textit{Martin} court's reasoning. Specifically, when a driver's blood is tested and the test determines that the marijuana was not affecting his driving, he should not be charged with DUI. Thus, instead of punishing drivers who have only inactive marijuana remnants in their bodies, the legislature should amend the law so that it only punishes those who are driving while actually "under the influence." Until that time, due to the \textit{Martin} court's flawed reasoning, the state can impose criminal liability on all drivers with remnants of marijuana or any other narcotic in their systems, even when those drivers are not inebriated.

\textsection{A. The Toxicology of Marijuana}

Before analyzing the way in which the \textit{Martin} court misapplied its rationale to marijuana, it is necessary to understand the basic science behind the substance. A brief examination of the chemical properties of marijuana will suffice for the purpose of this Note. The most prevalent psychoactive component in marijuana is delta-9-tetrahydrocannabinol, commonly referred to as "THC."\textsuperscript{118} When a person ingests marijuana through inhaling smoke,\textsuperscript{119} this component enters his or her bloodstream through the lungs, and ultimately affects the brain through "cannabinoid receptors."\textsuperscript{120} As the bloodstream continues to carry THC through the body, the drug gradually breaks down, with a peak level of THC being delivered to the brain within several minutes of ingestion.\textsuperscript{121} However, as the drug continues to circulate within the body, it continually breaks down, or metabolizes, and the active com-

\textsuperscript{117} See \textit{Martin}, 955 N.E.2d at 1064.

\textsuperscript{118} M. A. Huestis, \textit{Cannabis (Marijuana)—Effects on Human Behavior and Performance}, 14 \textit{FORENSIC SCI. REV.} 15, 17 (2002) ("Delta-9-tetrahydrocannabinol (THC), the primary psychoactive analyte, is found in the plant's flowering or fruity tops, leaves, and resin.").\textsuperscript{119} See generally C. Heather Ashton, \textit{Pharmacology and Effects of Cannabis: A Brief Review}, 178 \textit{BRIT. J. PSYCHOL.} 101 (2001) (summarizing recent scientific advances in understanding marijuana, including the prevalence of use, the body's response to ingestion, and the effects of the drug on the brain).

\textsuperscript{120} \textit{Id.} at 18–19 (discussing the "mechanisms of action" of THC, and the authors' work on mapping the "cannabinoid receptors" of the brain).

\textsuperscript{121} \textit{Id.} at 21–22 (stating that the highest levels of THC discovered in the blood's plasma occurred on average around nine minutes after ingestion).
ponent of THC breaks into "metabolites," which are simply byproducts of this process.\(^\text{122}\)

One of these byproducts is called 11-nor-9-carboxy-delta-9-tetrahydrocannabinol (THCCOOH) and constitutes the most prevalent substance that remains after the body eliminates the active component of the THC.\(^\text{123}\) While other metabolites also exist, and while some of these are pharmacologically active, due to the significant and prolonged research on marijuana, scientists have determined which of these affect the brain, and which do not and are thus inactive.\(^\text{124}\) THCCOOH itself, like several other metabolites, has no pharmacological effect on a person, though it can remain in the body long after the active THC has been removed.\(^\text{125}\)

Urinalysis most often searches for the presence of inactive metabolites like THCCOOH, not for THC itself.\(^\text{126}\) But because THCCOOH is inactive, urinalysis reveals only that the tested person has ingested cannabis at some point in the recent past; it does not give any information about one's impairment level.\(^\text{127}\) Blood tests, however, are able to differentiate proportional levels of THC, THCCOOH, and other metabolites.\(^\text{128}\) For up to several hours after ingestion, the ratio of active to inactive drug circulating within the body is in flux, and the amount of impairment cannot be determined via blood analysis.\(^\text{129}\) However, these tests are able to determine when all of the THC is

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122. Id. at 16-24.
123. Id. at 22 ("The inactive THCCOOH metabolite and its glucuronide conjugate have been identified as the major end products of biotransformation in most species, including man.").
124. For a summary of the major metabolites, see Ashton, supra note 118, at 103 tbl.1.
125. Huestis, supra note 118, at 22 ("The time course of detection of THCCOOH is much longer than . . . that of THC."); see also People v. Derror, 715 N.W.2d 822, 826 (Mich. 2006).
127. See P. Swann, Road Safety Dep't, VicRoads, The Real Risk of Being Killed When Driving Whilst Impaired by Cannabis (2000), available at http://www.nefn.org/pdf/The\%20Real\%20Risk\%20Of\%20Being\%20Killed\%20When\%20Driving\%20Whilst\%20Impaired.pdf ("Australian studies of drivers killed have only identified drivers who were cannabis users by measuring [THCCOOH], which can remain detectable in body fluids weeks after cannabis use [although] impairment after cannabis use only persists for hours . . . ").
128. See Huestis, supra note 118, at 23 (describing the concentrations of several marijuana components in plasma at different points after ingestion).
129. See id. at 31 (stating that certain proportions of THC concentration in blood cannot be related to a measurable level of impairment).
broken down, and the only remaining components are inactive. At this point, the user is no longer impaired. Therefore, determining impairment is difficult, but possible. More importantly, scientists cannot determine whether a person is currently impaired by testing his urine. Using only urinalysis, they can neither predict levels of impairment based on the amount consumed, nor determine the level of impairment when active marijuana components are in the user’s body. In contrast, blood tests are able to reveal when all of the active THC has broken down, and when only inactive components remain. Thus, the use of blood tests can indicate when the user is no longer impaired.

B. The Martin Court's Flawed Rationale Regarding Marijuana

The Martin court’s rationale, upon which it upheld the absolute liability imposition of the DUI statute, was not sound with regard to marijuana. The court upheld the absolute ban on the presence of narcotics in a driver’s system because, unlike alcohol, various drugs have unknown effects on drivers, making the development of a standard by which to judge impairment impossible. This analysis, while perhaps true for many drugs, should not be applied to marijuana.

As described above, no test can predict the level of impairment after a person ingests a certain amount of marijuana, especially when taken in combination with another drug or alcohol. However, in the special case of marijuana, scientists can certainly differentiate between active and inactive marijuana remnants in a person’s body. When blood tests show that the remnants of the psychoactive component in marijuana are wholly inactive, the person who ingested it is conclusively not impaired. That is, for marijuana, a usable standard does exist: when all of the components remaining in a person’s blood stream are inactive, a driver is not impaired and should not be subject to a DUI. Conversely, if any of the components are still active, because levels of impairment cannot be conclusively determined, they

130. See id. at 22 (stating that “the concentration of the inactive THCCOOH metabolite predominated from as early as one hour after dosing,” and discussing how THC and other active metabolites gradually decreased over time).

131. See id.

132. See People v. Martin, 955 N.E.2d 1058 (Ill. 2011); People v. Fate, 636 N.E.2d 549 (Ill. 1994).


134. See People v. Feezel, 783 N.W.2d 67, 82 (Mich. 2010) (“11-carboxy-THC itself has no known pharmacological effect on the body.” (internal quotation marks omitted)).
could be "driving under the influence," and liability is appropriate. This standard is certainly viable, and already exists in other states.\textsuperscript{135}

Of course, the defendant in\textit{Martin} was convicted due to the presence of methamphetamine, not marijuana.\textsuperscript{136} His conviction may have been entirely appropriate for this drug. But, the ramifications for\textit{Martin} exceed the guilt of this single defendant: any driver in Illinois with \textit{any} amount of narcotics, including marijuana, in his system, is subject to not only DUI, but aggravated DUI if aggravating factors are present.\textsuperscript{137} Because the court failed to recognize the distinctions between marijuana and other drugs, its reasoning in\textit{Martin} is incomplete. Accordingly, the Illinois legislature should rework the drugged DUI statute in order to accommodate current scientific methods of marijuana detection.

\textbf{C. The Illinois Statute Creates an Unconstitutional Presumption of Guilt}

Even if one accepts the reasoning relied upon in\textit{Martin}, the court also failed to consider that the DUI statute may create an unconstitutional presumption of guilt. "A presumption is a legal device that permits or requires the fact-finder to assume the existence of an ultimate fact, after certain predicate or basic facts have been established."\textsuperscript{138} It may be either permissive or mandatory.\textsuperscript{139} "A permissive presumption allows, but does not require, the fact-finder to infer the existence of the ultimate or presumed fact upon proof of the predicate fact."\textsuperscript{140} A mandatory presumption requires the fact-finder to accept the fact.\textsuperscript{141} The U.S. Supreme Court has held that mandatory conclusive presumptions concerning criminal allegations are unconstitutional because they conflict with the presumption of innocence.\textsuperscript{142} The Illinois judiciary has taken this protection one step further, holding that even mandatory rebuttable presumptions that shift the burden of production to the defendant are unconstitutional.\textsuperscript{143} "Thus, under Illinois

\begin{footnotes}
\item[136] Martin, 955 N.E.2d at 1060. Note, however, that the defendant in\textit{Fate} had marijuana in his system.\textit{Fate}, 636 N.E.2d 549, 550 (Ill. 1994).
\item[137] Martin, 955 N.E.2d at 1060.
\item[138] People v. Pomykala, 784 N.E.2d 784, 787 (Ill. 2003).
\item[139] Id.
\item[140] Id.
\item[141] See People v. Watts, 692 N.E.2d 315, 320 (Ill. 1998).
\item[143] Watts, 692 N.E.2d at 322–23.
\end{footnotes}
law, all mandatory presumptions in criminal cases are . . . now considered to be per se unconstitutional.\textsuperscript{144}

Contrary to these prohibitions, the addition of certain aggravating factors to the drugged DUI statute creates a mandatory presumption of guilt and, in fact, was enacted simply to circumvent these constitutional problems. The drugged DUI subsection was enacted in direct response to \textit{People v. Pomykala}, which held that it was unconstitutional for a person to be presumed inebriated for the criminal offense of reckless driving.\textsuperscript{145} The legislature, reacting swiftly to the \textit{Pomykala} ruling, removed the unconstitutional reckless homicide statute and enacted a new aggravated DUI section, which is applicable to accidents in which death occurs, only a year after the \textit{Pomykala} decision.\textsuperscript{146} Theodore Gottfried and Peter Baroni, writing about the history of expanding presumptions in Illinois, recently commented on \textit{Pomykala} and the legislature's reaction:

The legislative reaction to \textit{Pomykala} was to remove the offending presumption in the reckless homicide statute and, in the same bill, add a special sentencing enhancement to the Aggravated DUI statute requiring the same increased penalty in that offense as was attached to the reckless homicide presumption. This change effectively circumvented the ruling of the Illinois Supreme Court in \textit{Pomykala} by adding the offending penalty enhancement to the strict liability offense of Aggravated DUI, effectively removing the prosecutions [sic] obligation to prove recklessness in order to get the enhanced sentence.\textsuperscript{147}

In doing so, the Illinois legislature made the exact same conduct that was at issue in \textit{Pomykala}—being involved in an accident that led to a person's death while driving under the influence—a strict liability offense under the DUI statute.\textsuperscript{148}

Simply moving the law to a new place in the Code, however, did not cure the statute's constitutional failures. A mandatory presumption of guilt still exists: if the State establishes that the defendant has any amount of narcotic in his system and that his driving at least partly caused a fatal accident, he is irrefutably presumed guilty of aggravated DUI.\textsuperscript{149} In other words, the presence of narcotics makes a defendant guilty of "driving under the influence" without proof that he was in-

\textsuperscript{144} Pomykala, 784 N.E.2d at 788.
\textsuperscript{147} Gottfried & Baroni, supra note 78, 738.
\textsuperscript{148} See id. at 737–38.
\textsuperscript{149} See id.
briated at the time of the accident, or that his inebriation caused the accident. Further, and perhaps even worse, a defendant is not offered the opportunity to rebut the presumption of impairment.150

The statute at issue in Martin creates a mandatory presumption of guilt, and while it is true that it is listed as a traffic offense in the Code, it is no less a criminal statute in nature than the unconstitutional reckless homicide statute.151 This presumption of guilt is especially egregious in two situations. First, a defendant is irrefutably guilty even when she can prove that the drugs were not affecting her at all at the time in question.152 Second, she is still guilty of aggravated DUI, even when she can conclusively prove that the drugs were not the cause of the fatal accident; indeed, even when the evidence shows that her driving was only one of the proximate causes of the accident.153 Therefore, the Illinois DUI statute is unconstitutional because it imposes a mandatory presumption of guilt on sober drivers simply because they have inactive marijuana metabolites in their bodies.

D. Other Constitutional Problems with the Statute

Several other complaints have been raised concerning the DUI statute. First, the statute operates on a strict-liability basis despite a statutory ban prohibiting this type of legislation. Illinois statutory law prohibits the imposition of strict liability unless the prohibition carries a small penalty—a fine less than $1000—or the legislature has displayed a clear intent to impose strict liability.154 Aggravated DUI carries a felony sentence, which means that a clear legislative intent would be required to justify the imposition of strict liability. While the Fate and Martin courts did not directly address this issue, the best argument for finding a clear intent to impose strict liability is the statutory language prohibiting "any" amount of drug being found in a driver's system.155

However, aside from this single word, there is nothing in the statutory language that clearly evidences the legislature's intent to impose

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150. See People v. Martin, 955 N.E.2d 1058, 1064–65 (Ill. 2011).
152. This was arguably the case in Martin. See Martin, 955 N.E.2d at 1060.
153. Cf. id.
154. 720 ILL. COMP. STAT. 5/4-9 (2010). The full text of the statute reads:

A person may be guilty of an offense without having, as to each element thereof, one of the mental states described in Sections 4-4 through 4-7 if the offense is a misdemeanor which is not punishable by incarceration or by a fine exceeding $1,000, or the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described.

Id.

liability without proving a culpable mental state. Nor does the legislature use words that clearly remove a court's obligation to determine causation—for example, whether the influence of the drug ingestion caused a fatal accident. In other words, "any" is ambiguous and does not evidence a clear legislative intent to impose absolute liability.

Furthermore, an examination of the legislative history does not reveal a clear intent to impose strict liability. Sponsored by Senator David Barkhausen, the addition of the drugged driving law prohibition came by way of amendment to the existing statute. Discussion of the proposal was brought to the senate floor on May 25, 1989. It appears that some Illinois senators were concerned that the amendment would impose strict liability. Senator Barkhausen responded to some of the concerns raised, stating that the reason the amendment did not impose liability based on a minimum amount of ingestion was that no standard existed that could measure the resulting amount of inebriation. However, he never spoke about any intent to eliminate a mens rea component or a proximate cause analysis. Based on the language of the statute and this legislative history, to argue that the legislature "clearly" intended to make the statute apply on a strict-liability basis seems far-fetched.

A second reason that the statute has been attacked is because it may be unconstitutionally vague. Statutes are unconstitutionally vague when the legislature does not include language giving minimal guidelines to police, allowing them to conduct a "standardless sweep" based on their own biases and predilections.

This is especially problematic with regard to marijuana, which can remain in a person's blood for eighteen hours and in a person's urine for four weeks after ingestion. Therefore, under the current statutory scheme, it is a crime for a defendant to drive even after any possible

156. See id. Arguably, if either of these intents were "clear," the appellate court in Martin would not have held to the contrary. See Martin, 955 N.E.2d at 1060.

157. Id.

158. Id.


160. See id.

161. Id. at 21–22 (statement of Sen. Marovitz) ("You call for no connection between the performance of that automobile and the ingestion of the drugs. I think this amendment is not well thought out . . . .").

162. See id. at 23 (statement of Sen. Barkhausen). Again, this reasoning is flawed with regard to marijuana. See id.

163. See id.

impairment has dissipated. A driver that has ingested marijuana weeks prior to driving is at constant risk of being subject to a “standardless sweep.” Furthermore, the DUI statute gives no guidelines as to its enforcement.\textsuperscript{165} That is, in enforcing the drugged driver statute, a police officer could simply have a hunch, or act on a “whim,” in choosing whom to investigate.\textsuperscript{166} Worse, the officer could do so on a discriminatory or veiled racial basis, and choose to harass groups that he or she does not like by stopping them on a pretextual basis.\textsuperscript{167}

Third, as the appellate court held in \textit{Fate},\textsuperscript{168} these statutes do not bear a rational relationship to the state’s goal of keeping drugged drivers off of the road.\textsuperscript{169} The drugged driving statute does not differentiate between narcotics or between active and inactive traces of narcotics in a defendant’s system.\textsuperscript{170} Therefore, it is irrational to charge a person with DUI—especially aggravated DUI—if she ingested marijuana days or weeks ago and then chose to drive when she was completely sober.\textsuperscript{171} Arresting entirely sober drivers for DUI is not rationally related to the state’s goal of keeping impaired drivers off of the roadways.

While none of these arguments have gained traction within the Illinois Supreme Court, the appellate courts have deemed some of them persuasive, as evidenced by their holdings in \textit{Fate} and \textit{Martin}.\textsuperscript{172}

\textbf{E. The Michigan Scheme: A Reasonable Alternative}

To cure these problems, the Illinois DUI statute needs to be amended. The legislature should adopt a statute that differentiates between active and inactive components in marijuana. The Michigan scheme already successfully makes this distinction. At first blush, the

\begin{itemize}
\item \textsuperscript{165} See 625 ILL. COMP. STAT. 5/11-501 (2010).
\item \textsuperscript{166} People v. Feezel, 783 N.W.2d 67, 84 (Mich. 2010).
\item \textsuperscript{167} Unfortunately, this type of action is not barred unless it is explicitly motivated by race. See \textit{Whren v. United States}, 517 U.S. 806, 813 (1996) (“[T]he Constitution prohibits selective enforcement of the law based on considerations such as race [but] [s]ubjective intentions play no role in ordinary, probable cause Fourth Amendment analysis.”). One could easily imagine situations with regard to the DUI in which, because of the lack of guidelines, the officer enforces the DUI law pretextually. This is precisely the type of activity the Court feared in \textit{Kolender}. See \textit{Kolender}, 461 U.S. at 357–58.
\item \textsuperscript{168} See People v. Fate, 636 N.E.2d 549, 550 (Ill. 1994).
\item \textsuperscript{169} See, e.g., People v. Derror, 715 N.W.2d 822, 846 (Mich. 2006) (Cavanaugh, J., dissenting), overruled by People v. Feezel, 783 N.W.2d 67, 81 (Mich. 2010).
\item \textsuperscript{170} See 625 ILL. COMP. STAT. 5/11-501 (2010).
\item \textsuperscript{171} See \textit{Derror}, 715 N.W.2d at 846 (Cavanaugh, J., dissenting) (“There is no rational reason to charge a person who inhaled marijuana two weeks ago and who now decides to drive to the store to pick up a gallon of milk.”).
\item \textsuperscript{172} See People v. Martin, 955 N.E.2d 1058, 1065 (Ill. 2011); \textit{Fate}, 636 N.E.2d at 551.
\end{itemize}
Michigan drugged driving statute is similar to that of Illinois. In the recent case of *People v. Feezel*, however, the Michigan Supreme Court held that while the statute prohibited the presence of any amount of certain controlled substances in a driver's body, the metabolite 11-carboxy-THC did not constitute a controlled substance for the purposes of the Operation of a Vehicle While Intoxicated (OWI) statute. This holding effectively creates an exemption from the OWI statute for inactive marijuana metabolites, as is recommended by this Note.

In *Feezel*, the Michigan Supreme Court revisited its 2006 decision, *People v. Derror*. The *Derror* court, much like the Illinois Supreme Court in *Fate* and *Martin*, held that the presence of any amount of drug, whether active or not, was adequate for a DUI conviction. This ruling also involved the court's interpretation of Michigan's OWI statute, which prohibited driving while "any amount" of a controlled substance is in a person's body. The *Derror* court, over a vigorous dissent, held that 11-carboxy-THC and other inactive by-products of narcotics were derivatives of schedule 1 controlled substances and that the State need only prove the presence of any of these in any amount in a driver's body to obtain an OWI conviction.

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176. See id. at 71.
177. See People v. Derror, 715 N.W.2d 822, 831 (Mich. 2006).
178. MICH. COMP. LAWS § 257.625(8) (2006). The statute in pertinent part states:

A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her body any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code . . . .

Id. (emphasis added).
179. Derror, 715 N.W.2d at 830–31. In doing so, the court examined the definition of marijuana according to the Michigan code:

"Marihuana" means all parts of the plant Cannabis sativa L., growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination.

MICH. COMP. LAWS § 333.7106(3) (2006). The *Derror* court defined "derivative" as "a chemical substance related structurally to another substance and theoretically derivable from it." *Derror*, 715 N.W.2d at 828 (internal quotation marks omitted). Applying this definition, the court concluded that 11-carboxy-THC was included in the statute because the compound is structurally related to THC. See id. at 830–33.
The Feezel court disagreed. First, the court held that 11-carboxy-THC was not a controlled substance. The court recognized that "the purpose of banning marijuana was to ban the euphoric effects produced by THC," but noted that 11-carboxy-THC has no pharmacological effect. Thus, the Feezel court viewed itself as bringing Michigan law in line with federal law.

Additionally, the court examined a set of statutory factors that helped determine whether or not a substance should be classified as a schedule 1 controlled substance, which would make its presence in a driver’s system illegal. None of these factors applied to 11-carboxy-THC because it had no pharmacological effect, was not habit forming, and did not lead to dependence. For these reasons, the court held that "a person cannot be prosecuted under [the OWI statute] for operating a motor vehicle with any amount of 11-carboxy-THC in his or her system." Thus, while the Michigan OWI statute, on its face, does not differentiate between active and inactive pharmacological components of marijuana, the Feezel court did.

The Illinois legislature should pursue one of two different courses. First, it could amend the DUI statute itself. The statute currently prohibits any amount of any type of narcotic from being in a driver’s system. The legislature could simply amend the statute to read "any pharmacologically active" drug, substance, or compound. That is, an entirely sober person could not be prosecuted for DUI weeks after ingesting marijuana when he is pulled over on the whim of a police officer. This approach goes further than the Michigan scheme because

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180. Feezel, 783 N.W.2d at 83.
181. Id. at 82.
182. Cf. id.
183. Id. These factors included:
   (a) The actual or relative potential for abuse.
   (b) The scientific evidence of its pharmacological effect, if known.
   (c) The state of current scientific knowledge regarding the substance.
   (d) The history and current pattern of abuse.
   (e) The scope, duration, and significance of abuse.
   (f) The risk to the public health.
   (g) The potential of the substance to produce psychic or physiological dependence liability.
   (h) Whether the substance is an immediate precursor of a substance already controlled under this article.

Id. (citing Mich. Comp. Laws § 333.7202).
184. Feezel, 783 N.W.2d at 82.
185. Id. at 83.
it would exempt all inactive metabolites instead of those strictly related to marijuana.\(^{187}\)

Alternatively, the legislature could make a special exception for marijuana, just as the Feezel court did. This may be desirable because the by-products of marijuana use can remain in a person’s body much longer than many other drugs.\(^{188}\) This longevity makes someone who ingests marijuana an especially vulnerable target for an unjust DUI conviction. This may also be more appropriate because of the ease with which the tests can determine whether or not the remnants of marijuana in a person’s system are active or inactive, which may not be feasible for other drugs. The legislature could accomplish this goal by explicitly defining 11-carboxy-THC as not being a drug, substance, or compound under the DUI statute.

Regardless of the method that the legislature chooses,\(^{189}\) a scheme that differentiates between active and inactive marijuana components in a driver’s system is preferable to the current law. Revising the statute would not only cure the constitutional problems, but also allow the legislature to cure the flawed reasoning of Fate and Martin. Finally, and perhaps most importantly, the legislature has a chance to create a statute that would not punish sober defendants for being “under the influence.”

V. IMPACT

Martin was decided in the midst of an active debate in the legal arena about narcotics, especially marijuana. Several states have already decriminalized the possession of various amounts of marijuana\(^ {190}\) and others have legalized medical marijuana.\(^ {191}\) While no

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\(^{188}\) See Huestis, supra note 118, at 22.

\(^{189}\) Everything recommended above refers to legislative action. While it is possible that Illinois’s judiciary could also take action, the Martin decision seemed to be a step in the opposite direction. Thus, legislative action appears to be the best and most realistic solution to this problem.


\(^{191}\) According to a not-for-profit website that has been monitoring this trend, there are currently eighteen states that have some form of medical marijuana program, in addition to the District of Columbia. See 18 Legal Medical Marijuana States and D.C.: Laws, Fees, and Possession Limits, ProCon (last updated Jan. 7, 2013, 1:42 P.M.), http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881; see also Compassionate Use of Medical Cannabis Pilot Program Act, S.B. 1381, 96th Gen. Assembly, Reg. Sess. (Ill. 2011) (“Although federal law currently prohibits any use of cannabis except under very limited circumstances, Alaska, California,
legislation has been passed to that effect in Illinois, there have been significant efforts in the Illinois legislature to legalize medical marijuana.\textsuperscript{192} The ruling in \textit{Martin} is at direct odds with this emerging attitude: they cannot coexist.

The Illinois legislature first considered the Compassionate Use of Medical Cannabis Pilot Program Act in 2008, and has amended this bill several times.\textsuperscript{193} The bill, as it was intended, would have made several significant changes to the Illinois law with regard to marijuana use. First, and at direct odds with the hardline opposition to drug use embodied by the \textit{Martin} court, the bill specifically stated, "Modern medical research has discovered beneficial uses for marijuana in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions."\textsuperscript{194} Furthermore, because the vast majority of prosecutions for marijuana possession occur under state law, "changing state law [would] have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use cannabis."\textsuperscript{195}

For these reasons, the bill essentially provided that a person, after being diagnosed by a physician as having a debilitating medical condition, would receive an identification card from the Department of Public Health, which would permit her to legally possess marijuana.\textsuperscript{196} It would also have amended the Cannabis Control Act to allow for these changes.\textsuperscript{197} With regard to DUI law, the bill stated, "Nothing in this Act shall be construed to prevent the arrest or prosecution of a registered qualifying patient for reckless driving or driving under the influence of cannabis."\textsuperscript{198}

Here, the conflict with \textit{Martin} is obvious. If the Compassionate Use of Medical Marijuana Act—or its equivalent—ever passes in Illinois, the \textit{Martin} decision forces those being treated with marijuana for chronic, debilitating diseases to make a choice.\textsuperscript{199} They must either

\begin{footnotesize}

\textsuperscript{193} Id. at 36.

\textsuperscript{194} Id. at 1.

\textsuperscript{195} Id. at 1–2.

\textsuperscript{196} Id. at 9.

\textsuperscript{197} Id. at 36.


\textsuperscript{199} See Alison Mack & Janet Joy, Marijuana as Medicine? The Science Beyond the Controversy 75 (2000).
\end{footnotesize}
forego the relief of their pain, or give up driving indefinitely, thereby seriously disrupting their work and social lives. In other words, even if those patients chose only to drive after the influence of marijuana had entirely subsided, they would risk being prosecuted for DUI for an indeterminate period after their legal ingestion. If this ingestion occurred on a somewhat regular basis, marijuana remnants would constantly be in their system, and it would be impossible for those people to drive legally. This would be unjust.

Such a blanket ban on driving is not even imposed on those suffering from seizures or dementia. When releasing the Driver Fitness Medical Guidelines, the National Highway and Traffic Safety Administration (NHTSA) stated, “It is understood that drivers should be allowed to continue to drive as long as possible provided there is a reasonable expectation that they can safely operate a vehicle. Only when an individual poses an imminent threat to public safety should their driving privilege be withdrawn or restricted.” Of course, these are only guidelines. However, NHTSA crafted these guidelines to prevent the absolute ban on driving for those suffering from diabetes, dementia, sleep apnea, seizures, and other debilitating medical conditions, and instead stated that “[e]ach case will require individual assessment.” It is clear that those who might legally use medical marijuana, and then drive days or weeks later, represent no imminent threat to public safety by driving. In fact, it could be argued that these drivers are likely safer drivers than those suffering from seizures and dementia. Nonetheless, as the law stands after Martin, even those patients that had legally ingested medical marijuana would likely be prevented from driving in a way unlike any other group of drivers.

While the Compassionate Use of Medical Cannabis Pilot Program Act (Compassionate Use Act) was defeated by a mere four votes in the Illinois senate in January 2011, there appears to be some popular support to either renew the vote or create an entirely new bill for

201. Id. at iii.
202. Id.
203. Id. at 54.
the legalization of medical marijuana. While the bill did not pass, it was certainly close, and the mere fact that it was considered represents a clear shift from the zero-tolerance policies of the 1970s and the so-called "War on Drugs."

In addition to the medical marijuana legislation, in July 2012, Mayor Rahm Emmanuel and the City Council of Chicago signed a city ordinance that decriminalized possession of marijuana in small amounts. The new ordinance makes the possession of fifteen grams or less of marijuana a fine-only offense. This has been part of a growing nationwide trend toward decriminalization, which is only gaining momentum. Neither the legislature nor the city council altered the DUI law as a result of this new ordinance. The tension between the absolute prohibition on drugs in drivers' systems and the decriminalization of their possession of small amounts is clear. It seems that the current DUI statute and the emerging acceptance of marijuana in small amounts are pulling in opposite directions, and the legislature should respond accordingly.

In order to maintain the legitimacy of the DUI law in Illinois, the Illinois legislature must be responsive to its constituency's evolving attitudes. This may entail enacting a statute similar to the Compassionate Use Act or modifying the definitions of the existing statutes in order to mitigate the ill-effects of Martin.

VI. Conclusion

Aaron Martin was convicted for aggravated DUI not based on evidence of impairment, but solely on a presumption of guilt that attached to the presence of narcotic metabolites in his body. The

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206. For a complete discussion on the effects, and arguably failure, of the aggressive prosecution and lengthy punishment policies of the War on Drugs, see William F. Buckley et al., The War on Drugs Is Lost, in BUSTED: STONED COWBOYS, NARCO-LORDS AND WASHINGTON'S WAR ON DRUGS 197, 198-209 (Mike Gray ed., 2002) (explaining the high cost of the war on drugs in terms of dollars, court time, and police time, with little success, and no foreseeable end).


208. See Mack, Pot Tickets, supra note 207.

prosecution did not offer any evidence of a culpable mental state at his trial. Furthermore, the State failed to offer proof of a causal relationship between the effect of his prior drug use and the unfortunate accident that occurred. Despite these apparent shortcomings, Martin was sentenced to six years in prison.

The per se drugged DUI statute in Illinois, brought into effect by the Fate and Martin decisions, creates an unconstitutional presumption of guilt—a defendant is presumed guilty for his or her prior act of ingesting drugs, even if he or she is conclusively not impaired when driving. And, to make the error more egregious, this presumption is not rebuttable; the statute operates on an absolute-liability basis. Furthermore, the reasoning relied upon by the Martin court is flawed because there are now scientific tests that demonstrate how long drug metabolites can remain in a person’s body after impairment has ceased—at least with regard to marijuana. The Illinois courts and legislature have made a mistake by creating a scheme that punishes those who have strictly inactive drug components in their system.

The Illinois legislature now has the opportunity to remedy this mistake. There are several options available to achieve this goal, but the best strategy is to adopt a more rational statutory scheme that exempts marijuana because it differs from other drugs, both in our scientific understanding of it, and in the significant period of time that detectable inactive components remain in person’s system after ingestion. This would also leave room for growth for the emerging trend of decriminalization of this drug, and for the possible adoption of a statutory medical marijuana program. Michigan and several other states have already adopted statutory schemes aimed at avoiding the precise problems described in this Note.

Until the legislature takes action, any person who has used marijuana within the detectable time period will be at constant risk of being charged with DUI. And, if an aggravating factor is present, this person will be sent to prison upon conviction—even though they were not “driving under the influence” of anything. Thus, the University of Illinois student hypothesized above will spend every day in prison for several years because he smoked marijuana a month before he got behind the wheel. This is unfair and unacceptable: the legislature should limit the harm caused by Martin by adopting a new statutory scheme.

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