PEARS V. STATE: AN IMPROPER APPLICATION OF ALASKA’S CURRENT LAW TO INTOXICATED DRIVERS

I. INTRODUCTION

On the night of October 5, 1981, nineteen-year old Richard Pears, while under the influence of alcohol, drove his truck through a red light, striking an automobile, killing two people, and injuring a third. A jury convicted Pears of second degree murder, the trial judge sentenced him to twenty years in prison, and Alaska’s Third Circuit Court of Appeals unanimously affirmed the verdict. The Alaska Supreme Court, reviewing only the length of Pears’s sentence, found the twenty-year sentence excessive and remanded for resentencing. After a hearing, the trial court sentenced Pears to twenty years in prison with ten years suspended. As the first Alaska appellate court decision involving a murder conviction for an intoxicated driver, Pears v. State represents a significant development in Alaska criminal law.

In 1978, the Alaska legislature revised the state’s Criminal Code. The new Code took effect on January 1, 1980. Under the new Criminal Code a court theoretically could return a murder conviction against an intoxicated driver under one of three provisions: (1) first degree murder, if the defendant intentionally causes death; (2) second degree murder, if the defendant causes death “knowing that [his] . . .

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2. Pears v. State, 698 P.2d 1198 (Alaska 1985). The supreme court’s opinion dealt only with the sentencing issue and did not address the propriety of applying Alaska’s second degree murder statute to Pears. Accordingly, this note will analyze the rationale of the court of appeals’ Pears decision.
4. Id. at 911.
5. There are actually five murder provisions in the new Alaska Criminal Code. Two of these provisions, however, cannot apply to an intoxicated driver. See ALASKA STAT. §§ 11.41.100(a)(2) - 11.41.110(a)(3) (1983) (these provisions concern inducing suicide, and causing death during the commission of one of six felonies, none of which involve intoxicated driving).
6. Id. § 11.41.100. The Alaska Criminal Code defines the term “intentionally” in the following manner:

A person acts “intentionally” with respect to a result described by a provision of law defining an offense when the person’s conscious objective is to cause that result; . . . .
duct is substantially certain to cause death or serious physical injury” (the “Knowledge Provision”); or (3) second degree murder if the defendant “intentionally performs an act that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life” (the “Extreme Indifference Provision”).

Pears was not charged with either first degree murder or second degree murder under the Knowledge Provision; rather, he was both charged with and convicted of second degree murder under the Extreme Indifference Provision.

This note examines the question of whether the Extreme Indifference Provision of the current Alaska Criminal Code permits an Alaska court to return a murder conviction against an intoxicated driver such as Pears, who has neither the intention to kill, nor the knowledge Id. § 11.81.900(a)(1). Therefore, under Alaska law, an intoxicated driver intentionally kills his victim if it was his conscious objective to kill that individual.

The Model Penal Code (MPC) of the American Law Institute was completed in 1962. It has played an important role in the widespread revision of the substantive criminal law of the United States that has taken place in the last twenty years. The MPC provides the foundation upon which the Alaska Criminal Code rests, see Neitzel v. State, 655 P.2d, 325, 327 (Alaska Ct. App. 1982), and therefore its provisions are helpful in interpreting Alaska's criminal law.

The MPC does not define “intent,” but it does provide that a person acts “purposely” if it is his conscious objective to cause a particular result. MODEL PENAL CODE § 2.02(a)(i) (Official Draft 1962). Thus, the MPC supports the conclusion that the Alaska legislature believed that an intoxicated driver intentionally or purposely killed only if it was his conscious objective to kill.

7. ALASKA STAT. § 11.41.110(a)(1) (1983). The Alaska Criminal Code defines the term “knowledge” in the following manner:

A person acts “knowingly” with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists . . . . A person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance . . . .

Id. § 11.81.900(a)(2). An intoxicated driver in Alaska, therefore, has knowledge that his conduct is substantially certain to cause another person’s death or serious physical injury only if he is aware of the substantial certainty of that result or would have been aware but for his intoxicated condition. Thus, an intoxicated driver who has neither the intent nor the desire to kill may still be convicted under the Knowledge Provision if a court finds that he “knew” that his actions would, with substantial certainty, cause another person's death or serious physical injury.


9. Pears, 672 P.2d at 903.

10. Clearly, someone such as Pears, who ran red lights while driving under the influence of alcohol, cannot be held to have had the “conscious objective” to kill, see ALASKA STAT. § 11.81.900(a)(1) (1983), and therefore cannot be convicted of first degree murder in Alaska.

11. This note contends that a defendant like Pears, who ran several red lights before his fatal accident, did not have subjective or objective knowledge that his actions would be substantially certain to cause death or serious physical injury to an-
that his actions are substantially certain to cause another person's death or serious physical injury. [For purposes of this note, drivers

other person, and therefore cannot be convicted under the Knowledge Provision. It is intuitively clear that an intoxicated person, merely by driving a car, is not substantially certain to cause death or serious physical injury. The additional facts that the driver speeds, or runs several red lights cannot make the defendant substantially certain to cause death or serious physical injury to another.

The Alaska legislature does not define the phrase "substantially certain;" the dictionary, however, defines "substantially" as for "all intents and purposes," see 9 THE OXFORD ENGLISH DICTIONARY 56 (1933), and "certain" as "inevitable," see 2 THE OXFORD ENGLISH DICTIONARY 234 (1933). When an intoxicated driver speeds through several red lights, it is not for "all intents and purposes inevitable" that he will kill or severely injure another. Expressing this concept in probabilistic terms supports this contention. Most would agree that the phrase "substantially certain" or the phrase for "all intents and purposes inevitable" requires that there be at least an 80% chance that the result will occur; and almost certainly four out of every five drunk drivers who drive on a given night, even if the group includes only drunk drivers who speed through red lights, do not kill or cause serious physical injury on that night.

Two relevant statistics prove the above contention. Nationally, 2.57 deaths occurred per 100,000,000 miles of driving in 1983. U.S. DEP'T OF TRANSP., MOTOR VEHICLE SAFETY 1983: NATIONAL HIGHWAY TRAFFIC SAFETY #2, at 3 (1983). Assuming that the average length of a trip is ten miles, 2.57 deaths occurred per 10,000,000 motor vehicle trips. Assuming further that none of the victims were themselves intoxicated drivers and that every death occurred in a different accident — obviously invalid assumptions favoring those who believe that Intoxicated Motorists are substantially certain to cause another's death or serious physical injury — there would be 2.57 fatal accidents per 10,000,000 motor vehicle trips. A study conducted in the 1970's demonstrates that an intoxicated driver with a blood alcohol level of .15 is twenty-five times more likely to get into a fatal accident than is a sober driver, and that an intoxicated driver with a .20 blood alcohol level is approximately one hundred times more likely to get into a fatal accident than is the sober driver. U.S. DEP'T OF TRANSP., RURAL COURTS AND HIGHWAY SAFETY 39 (1977). Even assuming that all intoxicated drivers have the higher .20 blood alcohol level, intoxicated drivers would cause deaths in only 257 (.257 x 100) trips out of every 10,000,000 trips they made: they would present only a .00257% risk of causing death each time they drove. There are no figures on how many people are seriously injured in motor vehicle accidents involving a drunk driver. But even assuming that there are twice as many people who are seriously injured as there are people who actually die from accidents with drunk drivers, there would be only a .0075% (.0025% + [2 x .0025]) chance that an intoxicated driver would cause a death or serious physical injury. Even if intoxicated drivers who go through red lights are more likely to cause death or serious physical injury than the totality of intoxicated drivers, they would have to be more than 10,000 times as likely to kill or cause serious physical injury to approach the 80% certainty figure which probably is required by the Knowledge Provision. The 10,000 times figure is derived from .0075% x 10,000 which equals 75%.

The only example the Alaska legislature gives of an act that is substantially certain to kill" is that of an individual who shoots into a crowded room without the specific intent to cause death or serious physical injury. 2 SENATE J. SUPP. NO. 47, at 10 (June 12, 1978). An individual shooting into a crowded room produces a much greater likelihood of death or serious physical injury than an Intoxicated Motorist creates by driving through a red light unaware of whether someone is in the intersection. More plausible examples of intoxicated drivers that are substantially certain to
who lack such intent or knowledge will be referred to as "Intoxicated Motorist(s)." This note focuses, therefore, on such intoxicated drivers to whom the first degree murder statute and the Knowledge Provision of the second degree murder statute are inapplicable, and attempts to shed light on whether the Alaska legislature intended to permit the murder conviction of such defendants under the Extreme Indifference Provision of the second degree murder statute.

At first glance the Extreme Indifference Provision seems applicable to Intoxicated Motorists, such as Pears, who voluntarily drink before driving. A closer examination, however, reveals that the Extreme Indifference Provision should not be applied to Intoxicated Motorists. The Pears result is indefensible in light of the legislative history of the state's new Criminal Code, the language of several other Alaska statutes, prior Alaska holdings, and the position the majority of states take on the issue of Intoxicated Motorists, which provide in-

12. This note does not discuss the issue of whether Alaska courts may convict an intoxicated driver of murder where the defendant intentionally killed his victim. Certainly, the courts could convict an individual in such a circumstance. Alaska's first degree murder statute covers any person who "with intent to cause the death of another person . . . causes the death of any person." ALASKA STAT. § 11.41.100 (1983). The likelihood of an intoxicated driver being found guilty of first degree murder nevertheless is remote. ALASKA STAT. § 11.81.630 (1983) provides in part: "[E]vidence that the defendant was intoxicated may be offered whenever it is relevant to negate an element of the offense that requires that the defendant intentionally cause a result." One could imagine, however, a case where an intoxicated driver did intentionally kill his victim, such as where the defendant, who planned to kill his victim before becoming intoxicated, ultimately ran him over with his car after becoming intoxicated.

13. This note also does not focus on the question of whether Alaska courts may return a murder conviction for an intoxicated driver who had knowledge that his actions were substantially certain to cause serious injury or kill another individual. Once again, the Criminal Code clearly provides the answer, and once again the answer is in the affirmative. The Knowledge Provision of § 11.41.110(a)(1) provides: "[A] person commits the crime of murder in the second degree if . . . knowing that the conduct is substantially certain to cause death or serious physical injury to another person, the person causes the death of any person."

In addition, an Alaska court should, under the Knowledge Provision, return a murder conviction despite the intoxicated driver's lack of actual knowledge that his actions were substantially certain to cause another's death or serious physical injury if it was the driver's intoxicated condition that caused his lack of knowledge. See ALASKA STAT. § 11.81.900(a)(2); see also supra note 7. A court should reach this result if a hypothetical sober passenger of the driver — an objective observer — would have been aware that the defendant's actions would, with substantial certainty, cause serious physical injury or death to another person. An intoxicated driver who speeds down the wrong side of the highway at rush hour, for example, should be convicted of murder even if he subjectively is unaware that his actions were substantially certain to cause death or serious physical injury — as long as it was the motorist's intoxicated condition that caused his unawareness of the substantial certainty of the result.
sight into the meaning of the Alaska's legislature's failure to explicitly resolve the issue.

Part II of this note first examines Alaska's common law treatment of intoxicated drivers who cause fatal accidents, and then examines Alaska's current homicide statutes, focusing on the relevant legislative history of these statutes. Part III compares Alaska's approach to deaths caused by intoxicated drivers with the statutes and case law of other states. Part IV analyzes the Pears decision, concluding that it is not supported by either the legislative history of the relevant Alaska statutes, prior holdings of Alaska courts, or case law in the majority of the other states. Part V suggests how the legislature might deal with the problem of "drunk driving" without resorting to murder convictions for such defendants, while at the same time informing the courts and the public exactly what punishment is intended for intoxicated drivers who cause deaths. This note proposes that the legislature clarify the punishment by enacting special vehicle homicide legislation dealing specifically with the problem of motor vehicle deaths and intoxicated drivers. This legislative reform would be particularly appropriate in light of the current confused state of Alaska law regarding intoxicated drivers.14

II. PRE-1980 ALASKA CRIMINAL LAW AND THE RELEVANT LEGISLATIVE HISTORY OF THE NEW ALASKA CRIMINAL CODE

A. Pre-1980 Alaska Homicide Statutes and the Courts' Application of These Statutes to Motor Vehicle Deaths Caused by Intoxicated Drivers

The legislative history of the new Alaska Criminal Code does not refer to intoxicated drivers who kill. Consequently, it is inferrable that the legislature tacitly approved of the courts' pre-1980 handling of cases involving Intoxicated Motorists. The pre-1980 case law, therefore, may provide insight as to the legislature's intent regarding the new Criminal Code's application to Intoxicated Motorists.

A murder conviction under the old Criminal Code required a showing that the defendant "purposely and maliciously kill[ed] an-
other,15 and deaths caused by intoxicated drivers were usually treated
as manslaughter,16 criminally negligent homicide,17 or reckless driv-
ing.18 Offenders convicted under these statutes were sentenced to
prison terms that were rarely as severe as Pears's ten-year sentence.19

Under the old Code, courts did not consider homicides commit-
ted by intoxicated drivers to warrant murder convictions despite the
often egregious actions of the defendants. In Lupro v. State,20 for ex-
ample, the intoxicated defendant drove his van through severe rain
and wind at speeds much greater than the other traffic and made er-
ratic stops and starts. Although the power was out in much of the
city, the defendant was traveling with his lights off when his van
struck and killed a pedestrian.21 The defendant Lupro then left the
scene rather than staying to aid his victim.22 Despite this outrageous
behavior, Lupro was convicted only of negligent homicide and failure

15. Former ALASKA STAT. § 11.15.030 (repealed 1980) provided:
Second degree murder. Except as provided in §§ 10 and 20 of this chapter,
a person who purposely and maliciously kills another is guilty of murder in
the second degree, and shall be sentenced to imprisonment for a term of not
less than 15 years to life.
Code defines manslaughter as follows:
Manslaughter. (a) A person commits the crime of manslaughter if the person
(1) intentionally, knowingly, or recklessly causes the death of another
person under circumstances not amounting to murder in the first or second
degree; or
(2) intentionally aids another person to commit suicide.
(b) Manslaughter is a Class A felony.
ALASKA STAT. § 11.41.120 (1983).
Code defines criminally negligent homicide as follows:
Criminally negligent homicide. (a) A person commits the crime of crim-
inally negligent homicide if, with criminal negligence, the person causes the
death of another person.
(b) Criminally negligent homicide is a Class C felony.
ALASKA STAT. § 11.41.130 (1983).
Criminal Code defines reckless driving as follows:
Reckless driving. (a) A person who drives a motor vehicle in the state in a
manner which creates a substantial and unjustifiable risk of harm to a person
or to property is guilty of reckless driving. A substantial and unjustifiable
risk is a risk of such a nature and degree that the conscious disregard of it or
a failure to perceive it constitutes a gross deviation from the standard of
conduct that a reasonable person would observe in the situation.
19. See Pears, 672 P.2d at 911 n.4.
20. 603 P.2d 468 (Alaska 1979) (affirming Lupro's conviction for negligent homi-
cide and failure to render assistance to a person injured in an accident).
21. Id. at 471.
22. Id.
to render assistance to a person injured in an accident. The trial court sentenced Lupro to 1000 hours of community service and a suspended prison term.\textsuperscript{23}

In \textit{Huckaby v. State},\textsuperscript{24} the defendant, with a blood alcohol level of at least \textit{.17}, drove at an excessive speed and lost control of his pickup truck, causing the truck to veer off the road and overturn, killing three passengers.\textsuperscript{25} The appellate court noted that "Huckaby's driving was about as reckless as it could have been for the entire time he drove" on the occasion of the accident.\textsuperscript{26} Huckaby received one year in prison for his reckless driving conviction.\textsuperscript{27}

In several Alaska cases decided before \textit{Pears} involving deaths caused by intoxicated drivers, the defendants had exhibited alcohol-related problems before their accidents, and often had accumulated prior driving while intoxicated ("DWI") convictions.\textsuperscript{28} The courts sentencing those defendants often mentioned the prior DWI offenses

\textsuperscript{23} \textit{See} State v. Lupro, 630 P.2d 18, 19 (Alaska Ct. App. 1981) (state's appeal from Lupro's successful motion for reduction of sentence). The appellate court disapproved of the sentence and stated that it believed Lupro should be sentenced to at least one year in prison. \textit{Id.} at 21 n.8. The court of appeals recognized that it did not have the authority to increase Lupro's sentence, because only the state and not the defendant had appealed the length of the sentence. \textit{See} ALASKA STAT. § 12.55.120(10) (1984). The court of appeals therefore reversed and remanded to the lower court for resentencing.


\textsuperscript{25} \textit{Id.} at 975-76. The blood alcohol level represents the percentage of alcohol by weight in the blood. In Alaska, a person who has a blood alcohol level of \textit{.10} or higher is guilty of driving while intoxicated [hereinafter "DWI"]. ALASKA STAT. § 28.35.030(a)(2) (1984).

\textsuperscript{26} 632 P.2d at 976.

\textsuperscript{27} \textit{Id.} The court implied that it considered the one-year sentence severe but warranted under the circumstances. \textit{See also} Godwin, 554 P.2d at 455 (characterizing a ten year manslaughter sentence with five years suspended as "certainly . . . severe" for an intoxicated defendant who killed a motorcyclist while trying to pass a car on an upward grade in a no passing zone).


Alaska's DWI statute states in part:

(a) A person commits the crime of driving while intoxicated if the person operates or drives a motor vehicle or operates an aircraft or a watercraft (1) while under the influence of intoxicating liquor, or any controlled substance listed in [ALASKA STAT. § ] 11.71.140 - 11.71.190;

(2) when, as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.10 percent or more by weight of alcohol in the person's blood or 100 milligrams or more of alcohol per 100 milliliters of blood, or when there is 0.10 grams or more of alcohol per 210 liters of the person's breath; or

(3) while the person is under the combined influence of intoxicating liquor and another substance.

as a relevant factor in setting the appropriate sentence. In *Rosendahl v. State*, the defendant had two DWI convictions prior to his arrest and a subsequent conviction for negligent homicide. The trial court noted: "[W]hen someone goes about operating a motor vehicle over a substantial period of time — by that the court means on numerous occasions under the influence — they're going to get in substantial trouble." In *Sandvick v. State*, the court held a negligent homicide sentence of twenty years with eight years suspended to be not clearly mistaken "in light of Sandvick's long involvement with alcohol, his extensive record of prior convictions for the offense of operating a motor vehicle while intoxicated, and the circumstances of the negligent homicide."

The Alaska Supreme Court has also indicated that it will consider subsequent DWI convictions in upholding sentences of drunk drivers. In *Gullard v. State*, the court sustained an intoxicated driver's ten-year manslaughter sentence, emphasizing that two violations of the DWI statute had occurred after the accident that led to the manslaughter conviction.

Conversely, at least one Alaska court has considered the lack of prior DWI offenses in sentencing a defendant whose drunk driving caused the death of another. The *Lupro* court noted that one reason for its light sentence was that Lupro had no prior DWI convictions.

In sum, Alaska courts have shown an unwillingness to impose harsh sentences on Intoxicated Motorists. In addition, in past decisions the courts have heavily weighed defendants' previous, and even subsequent, drunk driving convictions during sentencing. In contrast, Pears received a ten-year sentence even though he had no prior DWI

29. 591 P.2d at 539. The *Rosendahl* court upheld a ten-year sentence for negligent homicide against the intoxicated defendant. The defendant struck and killed a thirty-year old mother of two children while she was walking on the sidewalk, and failed to stop to aid his victim. In the three and one-half years prior to the incident, the defendant had had five speeding convictions as well as his two DWI convictions.

30. *Id.* at 540.


32. *Id.* at 25. The defendant had a twenty-year history of alcohol problems including two convictions for public intoxication, six convictions for DWI, and two additional pending charges of DWI at the time he hit and killed a fifteen-year old girl who was riding her bicycle. *Id.* at 25.


34. *Id.* at 93-94. See also *Layland*, 549 P.2d at 1183-84, in which the court upheld an eight-year sentence for manslaughter imposed upon an intoxicated driver who killed one person and severely injured two others. The sentence was influenced by the defendant's previous DWI conviction and his arrest subsequent to the fatal accident for driving while intoxicated.

35. *Lupro*, 630 P.2d at 19, 20 n.6. The appellate court disapproved of the sentence in *Lupro*, but the sentence it preferred was also not severe. *See supra* note 23.
convictions.\textsuperscript{36} This disparity cannot be attributed to the changes in the Criminal Code as of 1980. The cases referred to above continue to apply to Alaska's current treatment of the Intoxicated Motorist even though they precede the implementation of the Code. The Alaska legislature must have known the position Alaska courts were taking toward Intoxicated Motorists. Given the emotion surrounding the issue of "drunk driving," it is unlikely the Alaska legislature would have made such a radical change in the law regarding Intoxicated Motorists without extensive debate. Yet the revised Criminal Code is silent in regard to Intoxicated Motorists. This indicates that the Alaska legislature likely did not want Intoxicated Motorists who cause the death of another to be convicted of murder. \textit{Pears}, therefore, represents a substantial change in the judicial treatment of Intoxicated Motorists—a change not supported by the legislative history of the Criminal Code revision.

B. Legislative History of the New Criminal Code

The Alaska legislature did not state categorically that deaths caused by Intoxicated Motorists can or cannot be punished as second degree murder.\textsuperscript{37} Intoxicated Motorists cannot be prosecuted under either section 11.41.110(a)(1), the Knowledge Provision,\textsuperscript{38} or section 11.41.110(a)(3), covering death in the course of enumerated crimes.\textsuperscript{39} The issue thus becomes whether the legislature intended for the Extreme Indifference Provision, section 11.41.110(a)(2), to apply to Intoxicated Motorists. The legislative history of the second degree murder provision indicates that the legislature did not intend such killings to be prosecuted under the Extreme Indifference Provision.

An examination of the legislative history of Alaska's statute reveals two examples of conduct that the legislature believed demonstrated the extreme indifference to human life referred to in section 11.41.110(a)(2). The legislature stated that a person should be convicted of second degree murder if he caused a death either by shooting through a tent under circumstances in which he did not know whether a person was inside or by persuading the victim to play a game of Russian roulette.\textsuperscript{40} Only the first of these examples supports the con-

\textsuperscript{36} \textit{Pears}, 672 P.2d at 911.
\textsuperscript{37} See \textit{ALAsKA STAT.} § 11.41.110(a)(1)-(a)(3) (1983) and discussion \textit{supra} notes 5-13 and accompanying text.
\textsuperscript{38} The drivers could not be prosecuted under § 11.41.110(a)(1) because the "substantially certain" language involves "knowledge," which the Intoxicated Motorist—as that term is used in this note—is presumed not to have. See \textit{supra} note 11.
\textsuperscript{39} The motorist could not be convicted under § 11.41.110(a)(3) because driving while intoxicated is a misdemeanor; this section is concerned only with persons who have caused a death in furtherance of or in flight from a specified group of felonies.
\textsuperscript{40} 2 \textit{SENATE J. SUPP.} No. 47, at 10 (June 12, 1978).
tention that Intoxicated Motorists should be convicted of murder. Arguably, the act of shooting through a tent without regard for whether a person is inside is analogous to driving while intoxicated through a red light, unaware that another car is in the intersection. Each involves an act that evidences recklessness, either to a person in the tent or a person in the intersection. However, the magnitude of the risk is greater, and the social utility less, in the case of shooting into a tent than driving through a red light into an intersection, whether or not the driver is intoxicated. These two factors — social utility and magnitude of risk — are two of four factors set out by the Alaska Court of Appeals in *Neitzel v. State* for use in determining whether conduct should constitute murder, manslaughter, or reckless homicide under the Criminal Code. *Neitzel* did not involve a situation in which the defendant was unaware that someone might be shot. The court nevertheless stated that shooting at someone is itself "devoid of social utility" whereas driving an automobile has some social utility even when the driver is intoxicated. The *Neitzel* court further stated that the magnitude of the risk created by an intoxicated person's driving is not nearly as great as that created by one person shooting at another. While *Neitzel* does not negate the analogy between the legislature's first example of extreme indifference and Intoxicated Motorists' conduct, it does suggest that Alaska courts view shooting a gun and driving while intoxicated to present risks of different magnitudes.

A comparison between an Intoxicated Motorist and the legislature's second example of extreme indifference, the person who persuades another to play Russian roulette, strongly supports the argument that a drunk driver's actions do not fall within the second degree murder statute. There is absolutely no utility in playing Russian roulette; the defendant knows that there is a one out of two chance he will kill or severely injure the person he has persuaded to play. The Intoxicated Motorist, on the other hand, cannot know that his actions may create nearly that high a probability of causing death.

The Model Penal Code ("MPC") provides additional evidence of the Alaska legislature's lack of intention to convict Intoxicated Motorists of murder. The MPC, which serves as the foundation of the Alaska Criminal Code, provides the following five examples of actions demonstrating such an extreme disregard for human life as to

42. The other two factors are "the actor's knowledge of the risk" and "any precautions the actor takes to minimize the risk." *Id.* at 336-37.
43. *Id.* at 337.
44. *Id.*
45. *See supra* note 11.
46. *See Neitzel*, 655 P.2d at 327.
constitute murder: (1) causing the death of a person whom the defendant persuaded to play Russian roulette; (2) causing the death of a person whom the defendant claims he was trying to shoot over; (3) killing someone by firing several shots into a home the defendant knew to be occupied; (4) shooting into a moving automobile; (5) throwing a heavy beer glass at a woman carrying a lighted oil lamp. The MPC's five examples are drawn from actual cases, yet the MPC drafters did not include any of the myriad of cases involving deaths caused by intoxicated drivers as an example of extreme indifference to human life. Of the six different examples of acts that constitute "extreme indifference" murder given by the Alaska legislature and the MPC commentary, five involve shooting a gun and none involves a situation where the instrument of death is an automobile. The only example that did not involve a shooting — the example of a defendant who threw a beer glass at a woman carrying a lighted lamp — borders on intentional murder and certainly is an example of a situation in which the defendant knows his action is likely to cause death or serious injury.

A comparison between the tentative draft of the Alaska murder statute and the statute as actually enacted provides further support for the view that the legislature did not intend to convict Intoxicated Motorists under the second degree murder statute. The tentative draft provided for a murder conviction when a person "recklessly causes the death of another . . . under circumstances manifesting an extreme indifference to the value of human life." By contrast, the final enacted version allows a murder conviction only for one who "intentionally performs an act that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life." By raising the required mental state from recklessness

48. There are actually a total of seven examples given by the Alaska legislature and the MPC commentary, but both of these sources list persuading another to play Russian roulette as an example of "extreme indifference" murder.
49. "Extreme indifference" murder will be used to refer to an act that constitutes murder because it causes the death of another, and because it indicates that the defendant exhibited an extreme indifference toward human life.
50. The comparison of examples to infer legislative intent is a valid technique of statutory construction. The Neitzel court noted that the common way to distinguish between two related concepts was to give examples. 655 P.2d at 338 n.4. Significantly, that court also noted that most of the examples given of conduct that exhibits "extreme indifference to human life" were similar to Neitzel's conduct. Neitzel shot at his girlfriend from close range several times, allegedly attempting to scare her, but ultimately killing her.
52. Alaska Stat. § 11.41.110(a)(2) (emphasis added).
to intention, the legislature indicated a general desire to circumscribe rather than expand the category of actions that could be punished as murder. The Utah Supreme Court has specifically construed a similar change by the legislature of Utah to preclude a finding of second degree murder against an intoxicated driver who unintentionally caused a death.53

A further indication of the type of conduct that the Alaska legislature intended to constitute extreme indifference to human life may be derived from a comparison of the Extreme Indifference Provision, section 11.41.110(a)(2), to section 11.41.110(a)(1). The legislature stated that conduct which subsection 11.41.110(a)(2) would label as "exhibiting extreme indifference to the value of human life" "is very similar to the [conduct within the] 'substantially certain' clause in subsection (a)(1)."54 The example the legislature provides of an act that falls within the confines of section 11.41.110(a)(1) is shooting into a crowded room without a specific intent to cause death or serious physical injury.55 It is very hard to understand how one could believe that driving a car while intoxicated through a red light is very similar to shooting into a crowded room. In the former, death is unlikely to occur;56 in the latter, it is a virtual certainty.

Several other Alaska statutes help to indicate the legislature's view of the level of culpability of the drunk driver. The culpability of intoxicated drivers who kill seems to fit more accurately within the definitions of culpability in the assault statutes than in those of the homicide statutes. Alaska Statute section 11.41.210(a)(3), as it existed when the Criminal Code revision took effect, stated that "a person commits the crime of assault in the second degree if . . . he recklessly causes serious physical injury to another person by use of a dangerous instrument."57 The Criminal Code defines "reckless" conduct as follows:

A person acts "recklessly" with respect to a result or to a circumstance . . . when he is aware of and consciously disregards a sub-

53. The Utah legislature removed the word "reckless" from its murder statute. See State v. Bindrup, 655 P.2d 674, 675-76 (Utah 1982). See infra text accompanying notes 74-76 for a full discussion of this matter.
54. 2 SENATE J. SUPP. NO. 47, at 10 (June 12, 1978). Subsection 11.41.110(a)(1) describes conduct that is substantially certain to cause death or physical injury:

(a) A person commits the crime of murder in the second degree if (1) with intent to cause serious physical injury to another person or knowing that the conduct is substantially certain to cause death or serious physical injury to another person, the person causes the death of any person.

55. Id.
56. See supra note 11.
57. ALASKA STAT. § 11.41.210(a)(3) (1980) (amended 1982). The 1982 amendment to this statute moved section (a)(3) to section (a)(2), changed the word "he" to "that person," and deleted the words "by means of a dangerous instrument."
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stansl and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk.\(^5\)

The legislative description of recklessness appears logically and intuitively applicable to the act of driving while intoxicated. Driving while intoxicated appears to constitute a gross deviation from the standard of conduct that a reasonable person would observe. Moreover, the legislature has clearly demonstrated its agreement with this characterization of drunk drivers. The Senate Report on the 1978 revisions indicates the legislature's intention to sweep DWI drivers who cause serious injury within the assault provision:

Subsection (a)(3) covers the reckless causing of serious physical injury by means of a dangerous instrument. As an intoxicated person acts recklessly ([Alaska Statute section] 11.81.900(a)(3)) and because an automobile can be a dangerous instrument ([Alaska Statute section] 11.81.900(b)(11)), it is expected that this subsection will be used to prosecute drunk drivers who seriously injure their victims.\(^5\)

Although the assault statute does not apply to cases in which a death is caused, the legislative history of section 11.41.210(a)(3) reveals that the legislature viewed the intoxicated driver’s mental state as “recklessness.”\(^6\) It is thus unlikely that the legislature, absent a specific statement to the contrary, intended to define the culpability standard for drunk drivers differently when a death results. Alaska courts faced with the task of determining which of the categories defined in the general homicide statutes is appropriate for the conviction of Intoxicated Motorists may, therefore, find their answer in the legislative history of section 11.41.210(a)(3).

III. STATUTORY LAW AND CASE LAW OF OTHER STATES

A comparison of Alaska law with that of other states suggests that Alaska’s legislature did not intend that the Intoxicated Motorist who causes the death of another receive a murder conviction when it enacted the Extreme Indifference Provision in 1980. First, the vast majority of states do not convict such persons of murder. The Alaska legislature did not explicitly indicate that death caused by Intoxicated

59. 2 SENATE J. SUPP. NO. 47, at 16 (June 12, 1978).
60. Id.
Motorists would constitute murder, and given the emotion that surrounds the issue of drunk driving it is unlikely that the legislature implicitly intended that Alaska join the minority. Second, the trend, if such a trend exists, has been away from allowing murder convictions for Intoxicated Motorists. Third, of the states with statutes very similar to Alaska's Extreme Indifference Provision, only one has ever used such a provision to convict an Intoxicated Motorist. Fourth, a comparison of the Alaska murder provisions with the statutes in other states that currently will convict the Intoxicated Motorist of murder reveals some stark differences. Finally, in comparison with those states that will convict such motorists, Alaska's treatment of DWI offenders is among the most lenient, at least in terms of the length of prison terms imposed upon DWI offenders. It is thus likely that the legislature intended that Alaska also treat Intoxicated Motorists in a manner less harsh than the severe position of the minority.

A. A Minority of States Have Convicted an Intoxicated Motorist of Murder

The vast majority of states have never sustained a murder conviction against an Intoxicated Motorist. Automobiles have been ubiquitous for more than fifty years; it is thus not unreasonable to assume that each state has brought to trial a defendant who caused the death of one or more people under egregious circumstances while driving in an impaired condition. Yet, in only ten states other than Alaska, namely, Alabama, California, Georgia, Kentucky, North Carolina, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Texas, has an Intoxicated Motorist received a murder conviction.\textsuperscript{61} Furthermore, only thirteen states have homicide statutes that expressly preclude a court from finding a defendant such as Pears guilty of murder.\textsuperscript{62} Excluding Alaska, therefore, in thirty-six states, no statute

\textsuperscript{61} See infra notes 82-83 and accompanying text. The Texas legislature repealed the murder statute under which intoxicated drivers were convicted and enacted a new murder statute that precludes the possibility of any such murder conviction in the future. See Tex. Penal Code Ann. § 19.02 (Vernon 1974). Under the current murder statute, a person can be convicted of murder only if he intentionally killed or committed the act with knowledge that he would kill, or killed while committing one of a specified group of felonies. \textit{Id.}

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expressly precludes courts from convicting an intoxicated driver of murder and in only ten of these states has a court convicted an intoxicated driver of second degree murder.

B. The Trend with Respect to DWI Murder Convictions

_Pears_ is not part of a nationwide trend toward convicting intoxicated drivers who unintentionally and unknowingly kill. In fact, in the twenty years prior to _Pears_, not a single state had joined the minority of states that would convict an Intoxicated Motorist of murder. Two state supreme courts have recently confronted for the first time the issue of whether an Intoxicated Motorist could be convicted of murder, and in both instances the courts reversed the murder convictions.\(^6\) In _Essex v. Commonwealth_,\(^6\) an intoxicated driver had passed several cars in a no passing zone, swerved side to side for six miles, and finally, while driving in the lane of oncoming traffic, hit another car killing three people. The court held that the necessary elements for murder could not be proved beyond a reasonable doubt where the defendant was an Intoxicated Motorist.\(^6\) The Virginia Supreme Court suggested in _Essex_ that it would draw the line and convict a driver of murder if the person "deliberately drives a car into a crowd of people at a high speed, not intending to kill or injure any particular person, but rather seeking the perverse thrill of terrifying them and causing them to scatter."\(^6\)

If there is any trend at all on the issue, it appears to be toward fewer murder convictions for Intoxicated Motorists. Texas repealed the statute under which it had previously convicted intoxicated drivers of murder, and the state's current murder statute apparently precludes a court from returning a murder conviction against an Intoxicated Motorist.\(^6\) North Carolina has not convicted an Intoxicated Motorist of murder since 1925\(^6\) and Georgia has not convicted such a person


\(^{64}\) 228 Va. 273, 322 S.E.2d 216 (1984). Virginia uses the common law definition of murder. See VA. CODE § 18.2-32 (1982); see also infra note 91.

\(^{65}\) Id. at —, 322 S.E.2d at 222.

\(^{66}\) Id. at —, 322 S.E.2d at 220.

\(^{67}\) See supra note 57.

\(^{68}\) The last North Carolina decision upholding an Intoxicated Motorist's murder conviction was State v. Trott, 190 N.C. 674, 130 S.E. 627 (1925). See infra note 82 and accompanying text.
since 1966. Additionally, the last Kentucky case in which an intoxicated driver was convicted of murder was decided in 1968, and that case has never been followed.

C. Other States' Interpretations of Extreme Indifference or Similar Provisions

Evaluating the homicide statutes of the other forty-nine states makes more apparent the impropriety of convicting an Intoxicated Motorist of murder under Alaska's criminal statutes. Among the thirty-six states whose homicide statutes do not expressly preclude a murder conviction for an intoxicated driver, ten states have enacted provisions essentially identical to Alaska's second degree murder statute. Only one of these ten states — Oklahoma — has ever convicted an Intoxicated Motorist of murder under the part of its murder statute that is similar to Alaska's Extreme Indifference Provision, and in the last forty years, Oklahoma courts have convicted no one under that provision.

69. The last such conviction in Georgia was in Woods v. State, 222 Ga. 321, 149 S.E.2d 674 (1966).

70. See Hamilton v. Commonwealth, 560 S.W.2d 539 (Ky. 1977).

71. These ten states are Florida, Maine, Minnesota, Mississippi, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wisconsin. Only North Dakota has a statute that uses the precise phrase that the Alaska statute uses, "extreme indifference to the value of human life," to define one type of murder. See N.D. CENT. CODE § 12.1-16-.01 (Supp. 1983). In the other nine states actions that either show a depraved mind regardless of human life or actions that show a depraved indifference to human life are murder. See FLA. STAT. ANN. § 782.04 (West Supp. 1984); ME. REV. STAT. ANN. tit. 17A, § 201(B) (1983); MINN. STAT. ANN. § 609.195 (West 1964); MISS. CODE ANN. § 97-3-19 (Cum. Supp. 1983); N.M. Stat. Ann. § 30-2-1 (1984); OKLA. STAT. ANN. tit. 21, § 701.8 (West 1983); S.D. CODIFIED LAWS ANN. § 22-16-7 (Supp. 1984); UTAH CODE ANN. § 76-5-203 (Supp. 1983); WIS. STAT. ANN. § 940.02 (West 1982). The Alaska legislature has given no indication that these standards are any different than the "extreme indifference to human life" standard employed by the Alaska legislature. In fact, the Alaska Court of Appeals in Neitzel v. State, 655 P.2d 325, 336 (Alaska Ct. App. 1982), noted that Alaska's extreme indifference standard reflects the common law requirement that the conduct evidenced a "depraved heart regardless of human life." There is no reason to believe that depraved heart and depraved mind have different meanings.

It may be argued that Kentucky's murder statute is also substantially similar to the statutes of the ten states cited above, but there is one crucial difference. The Kentucky statute explicitly states that a person can be convicted of second degree murder for an unintentional automobile homicide. See KY. REV. STAT. ANN. § 507.020 (Baldwin 1984).

72. See Ware v. State, 47 Okla. Crim. 434, 288 P. 374 (1930). The defendant was convicted under the part of the statute that requires that the defendant's conduct show a depraved mind regardless of human life. See OKLA. STAT. ANN. tit. 21, § 705 (West 1983).

Intoxicated drivers in Oklahoma who have unintentionally and unknowingly killed have been convicted of murder within the last forty years under the felony mur-
The states that have murder statutes similar to Alaska's have had ample opportunities to convict an Intoxicated Motorist of murder. In a South Dakota case, for example, an intoxicated driver drove down side streets at night at well over the speed limit, forcing a pickup truck off the road. In an ensuing police chase, the driver turned his car lights off, hit a police car, and ran through a red light. Finally, the defendant struck another car, killing that car's driver. The defendant was charged with manslaughter.\(^7\)

The Utah Supreme Court rejected the notion that an intoxicated driver — who had driven through three red lights and admitted that he was aware of the risk occasioned by his conduct — was guilty of second degree murder.\(^7\) That court reversed the second degree murder conviction because of the Utah legislature's amendments to Utah's second degree murder statute. Utah originally allowed a court to convict a defendant of second degree murder if the defendant, while "acting under circumstances evidencing a depraved indifference to human life . . . recklessly engaged in conduct which create[d] a grave risk of death to another and thereby cause[d] the death of another . . . ."\(^7\)

The court held that the legislature's deletion of the word "recklessly" removed the reckless DWI defendant from the ambit of the murder statute.\(^7\) The Alaska legislature made an alteration similar to the one undertaken in Utah between the tentative draft of the revised Criminal Code and the version of the new Code that was enacted. Still, the Alaska courts have not noted the change.\(^7\)

While the Wisconsin Supreme Court in *Montgomery v. State*\(^7\) upheld a murder conviction against an intoxicated driver where the defendant did not have a premeditated design to kill, more recent Wis-
consin cases suggest that a murder conviction can be sustained only where the defendant was practically certain that death would result from his actions. For example, the Wisconsin Supreme Court reversed a murder conviction in Wagner v. State, where an intoxicated driver drove down the main street of a town at 11:00 p.m., striking and killing a pedestrian. The court strongly suggested that it would find the state of mind necessary to support a murder conviction only if it was apparent that the driver saw or should have seen the people he hit. Distinguishing Wagner from the earlier Montgomery case, which convicted an intoxicated driver of second degree murder, the court stated:

In Montgomery, . . . the defendant turned into the lane of travel where the victims were standing. He did so despite the fact that other occupants of his vehicle saw the victims and warned him that he would thereby kill people in the street. Although the defendant had been warned of the existence of the victims in the street, presumably in time to avoid them, he continued on in their direction ultimately striking them down . . . . In the instant case, neither the defendant, nor the occupants of his vehicle, saw the victim in the road prior to striking him . . . . [T]here was no testimony that the defendant was forewarned of the victim's presence in the street.

D. Comparison of Alaska to States That Have Convicted Intoxicated Drivers of Murder

Of the ten states, other than Alaska, that have convicted Intoxicated Motorists of murder, eight may still convict such motorists. The second degree murder statutes in each of these states, however, differ significantly from Alaska's provision. This suggests that the Alaska legislature could not have intended Alaska's second degree

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79. 76 Wis.2d 30, 250 N.W.2d 331 (1977). State v. Cooper, 117 Wis.2d 30, 344 N.W.2d 194 (Wis. Ct. App. 1983), where the defendant, who drove through a red light at 50 miles per hour while intoxicated and killed the driver of a car crossing the intersection from the other direction, was not even charged with murder, provides further evidence of Wisconsin's movement away from Intoxicated Motorist murder convictions.

80. Wagner, 76 Wis.2d at 44, 250 N.W.2d at 339.

81. Id. at 43-44, 250 N.W.2d at 339 (citations omitted).

82. See supra text accompanying note 61. Texas has repealed the statute under which it convicted intoxicated drivers of murder, and the current Texas homicide statutes preclude a murder conviction for an Intoxicated Motorist. See TEX. PENAL CODE ANN. § 19.02 (Vernon 1974). Similarly, North Carolina last convicted an Intoxicated Motorist in 1925, Trott, 190 N.C. 674, 130 S.E. 627 (1925), and the state's recent enactment of a new vehicular homicide statute appears to preclude the possibility of any such murder conviction in the future. Under North Carolina's new vehicular homicide statute a person commits "felony death by vehicle if he unintentionally causes the death of another person while engaged in the offense of impaired driving." N.C. GEN. STAT. § 20-141.4 (1984).
murder statute to produce the same result as the statutes in these eight states.

Two of the states, Kentucky and Tennessee, clearly indicate in their homicide statutes that a drunk driver can be convicted of murder. The Alaska legislature, in contrast, did not expressly state in its homicide statutes that an Intoxicated Motorist can receive a murder conviction.

Oklahoma’s homicide statutes provide notice to the public, albeit in a slightly less direct fashion than the statutes of Kentucky and Tennessee, that an intoxicated driver who unintentionally and unknowingly kills may under certain circumstances receive a murder conviction. In Oklahoma, any death caused during the perpetration of a felony constitutes murder, and a second DWI conviction is a felony. An intoxicated driver, therefore, who unintentionally causes the death of another and who has a previous DWI conviction may be convicted of murder. Alaska does not have such a sweeping felony murder statute; moreover, a DWI conviction in Alaska is not a felony regardless of the number of prior convictions. A DWI conviction, therefore, can never trigger the operation of Alaska’s felony murder statute.

Alabama has a statute allowing murder convictions based on reckless conduct that shows a depraved mind. The standard in Alabama is similar to that included in the tentative draft of Alaska’s murder statute, but Alaska rejected that standard when it enacted its new Criminal Code.

California, Georgia, Pennsylvania, and South Carolina, the four other states that have in the past and might still convict an Intoxicated Motorist of murder, use the common law definition of murder.

84. OKLA. STAT. ANN. tit. 21, § 701.8 (West 1983).
87. ALASKA STAT. § 11.41.110(a)(3) (1983) (The only crimes for which the felony murder statute will be invoked in Alaska are arson in the first degree, kidnapping, sexual assault in the first or second degree, and robbery in any degree.).
88. See ALASKA STAT. § 28.35.030(b) (1984).
89. ALA. CODE § 13A-6-2(a)(2) (1982).
90. See supra text accompanying notes 51-52.
91. Under the common law, murder is defined as the unlawful killing of a human being with malice aforethought. This malice aforethought can be express or implied. R. PERKINS, CRIMINAL LAW § 1, at 34 (2d ed. 1969). See CAL. PENAL CODE §§ 187-189 (West Cum. Supp. 1984); GA. CODE ANN. § 16-5-1 (1984); PA. STAT. ANN. tit. 18, § 2502(c) (Purdon 1983); S.C. CODE ANN. § 16-3-10 (Law. Co-op. 1976). In two of these four states, Pennsylvania and Georgia, it appears that an intoxicated driver will be convicted of murder only in the most extreme cases. In Commonwealth v.
Alaska has, however, expressly rejected the common law definition of murder.\(^9\)

A comparison of Alaska's DWI statute with those of other states offers another indication that the Alaska legislature did not intend for Intoxicated Motorists to receive murder convictions. In several other states, either the second\(^9\) or third\(^9\) DWI conviction is a felony. In Alaska, to the contrary, DWI remains a misdemeanor regardless of the number of prior convictions.\(^9\) Furthermore, among the states that will convict an intoxicated driver of murder, Alaska has the shortest period of incarceration for repeat DWI offenders.\(^9\) The Alaska DWI statute provides for a minimum sentence of only twenty days in jail for someone with one prior DWI conviction, and a minimum punishment of thirty days in prison for someone with two or more prior DWI convictions.\(^9\) In comparison, Tennessee has a 45-day minimum sentence for the second offense and a 120-day minimum for the third offense,\(^9\) and South Carolina has a 3-year minimum for the third offense and a five-year minimum for the fifth offense.\(^9\) In light of the Alaska legislature's lenient treatment of DWI offenders,
therefore, it is unlikely that the legislature wanted Alaska to join the minority of states that convict Intoxicated Motorists of murder.

E. Summary

The foregoing comparison of the relevant homicide statutes and case law in other states with those of Alaska provides strong evidence that the Pears court misinterpreted the legislature's intent in enacting the new Criminal Code when the court upheld Pears's murder conviction. Most states have never sustained a murder conviction for an Intoxicated Motorist. Those few states that have convicted an intoxicated driver of murder either have murder statutes that expressly provide such a penalty for an Intoxicated Motorist or they have homicide statutes that not only differ from the Alaska murder statutes, but contain language similar to language the Alaska legislature considered and then rejected. Of those states with murder statutes that strongly resemble the Alaska murder statutes, only Oklahoma has ever convicted an Intoxicated Motorist of murder, and the last murder conviction under the relevant Oklahoma statutory provision occurred more than forty years ago. There is no trend toward greater use of second degree murder statutes to punish intoxicated drivers. In fact, there may be the beginnings of a trend in the opposite direction.

According to the Alaska legislature, the culpability underlying DWI offenses does not warrant a felony conviction — not even in the case of persistent offenders. Unlike the legislatures of several other states, the Alaska legislature gave no indication that deaths caused by Intoxicated Motorists would constitute murder. Furthermore, Alaska's murder statutes, as illuminated by their legislative history, do not support such a reading. In light of all these factors, the Alaska Court of Appeals should have concluded that the legislature did not intend a second degree murder conviction for Pears or any other Intoxicated Motorist.

IV. THE PEAR'S CASE

A. The Facts

On October 5, 1981, an intoxicated driver, Richard Pears, ran a red light and crashed into a car that was in the intersection, killing the driver and one passenger of the other car and severely injuring another passenger. Pears's own passenger, whom he dropped off before the accident, had told him that his driving scared her. As Pears walked to his truck, two policemen had warned him that he should not drive.

100. See supra notes 51, 52, 90, 92, and accompanying text.
Pears, ignoring the warning, drove through several stop signs and traffic signals before the fatal collision. Nineteen-year old Pears had no previous criminal record, nor had he been convicted of alcohol-related driving offenses. A jury nevertheless convicted him of second degree murder and a judge sentenced him to twenty years in prison. The Alaska Court of Appeals for the Third Circuit upheld Pears's conviction. The Alaska Supreme Court found Pears's sentence excessive and remanded for resentencing.

B. Problems with the Pears Court's Reasoning

The court of appeals in Pears rejected the defendant's argument that the legislature did not intend that motor vehicle homicides caused by intoxicated drivers would be treated as murders, noting that the "legislature has not indicated that no motor vehicle homicide could be charged as second degree murder." The court ignored the fact that the same logic can also cut in the opposite direction: neither has the legislature indicated that a murder charge would be appropriate in cases such as Pears. The latter interpretation of a legislature's silence is preferred by many other states. Among the thirty-five states that currently have murder statutes that neither clearly preclude nor expressly permit a murder conviction of an Intoxicated Motorist, only seven states other than Alaska have ever convicted an intoxicated driver of murder. In the last twenty years, no state except Alaska has convicted an intoxicated driver of murder when considering the issue as a matter of first impression.

The Pears court implied that its verdict was in accord with the

102. Id. at 905. See supra note 29.
103. 672 P.2d at 905.
105. Id. at 906.
106. Id. The legislature intended that some motor vehicle homicide defendants could be charged with murder — such as where the defendant intended to cause the death of the other person, or where the defendant knowingly caused the death of a person. These situations are not relevant to Pears or this note and it must be assumed that the court meant that the legislature did not intend to preclude all deaths unintentionally and unknowingly caused by an intoxicated driver from constituting second degree murder.
107. The number 35 is derived from the sum of 13 (the number of states that have statutes expressly precluding a murder conviction for an Intoxicated Motorist), see supra note 61, and two (the number of states whose statutes expressly provide for such a murder conviction), see supra note 82 and accompanying text, subtracted from 50 (the total number of states).
108. Ten states other than Alaska have convicted an Intoxicated Motorist of murder. See supra text accompanying note 61. Two of those states, however, Kentucky and Tennessee, have statutes that expressly provide for such a conviction, see supra note 83 and accompanying text, and one state, Texas, currently has a murder statute that expressly precludes such a conviction, see supra note 61.
case law in most states: "It has been generally recognized that the mere fact that a motor vehicle has been the instrumentality of death does not preclude a murder charge where the evidence also discloses the requisite elements of murder."109 Interpreted literally, the above statement is, of course, correct. Every state would convict a defendant for murder who intentionally killed another in cold blood, where the murder weapon was an automobile. The statement, however, is irrelevant to the issue in the Pears case. The relevant issue was not whether an automobile can be a murder weapon, but rather whether an Intoxicated Motorist could be convicted of murder under the Extreme Indifference Provision.

Given the cases it cited following the above quotation,110 however, the court of appeals apparently believed that states "generally recognize" that the use of an automobile — as opposed to a gun or a knife — as the instrument of death does not allow an Intoxicated Motorist to escape a murder conviction. If this was in fact the court's belief, the court simply was incorrect. At most, nine other states could be said to "recognize" the possibility that an Intoxicated Motorist could be convicted of murder; a minimum of forty states do not "generally recognize" such a principle.111

The cases cited by the Pears court do not add much strength to its position, as only four of the seven states whose cases the court cited would have convicted Pears of murder.112 Moreover, the murder statutes in two of those four states specifically state that an unintentional automobile killing can be murder.113 In the three other states whose cases the court cited, Pears almost certainly would not have been convicted of murder. Two of these states, New York and Oregon, have never convicted an Intoxicated Motorist of murder;114 the other state,
Wisconsin, has convicted an intoxicated driver of murder only where the defendant clearly saw his victim in time to stop and thus had knowledge that he was going to kill if he did not act to prevent it.\textsuperscript{115}

C. The \textit{Pears} Court's Misplaced Reliance on \textit{Neitzel v. State}

The \textit{Pears} court relied on the Alaska Court of Appeals' decision in \textit{Neitzel v. State}\textsuperscript{116} to support its opinion, but \textit{Neitzel} does more to strengthen Pears's argument than it does to help the government's case.\textsuperscript{117} In \textit{Neitzel}, the defendant was convicted of second degree murder under the Extreme Indifference Provision of the Alaska murder statutes.\textsuperscript{118} Neitzel, who was intoxicated at the time, purposely fired a number of shots at his girlfriend, who was sitting on the ground, apparently in an attempt to frighten her.\textsuperscript{119} Several of the shots struck the ground within an inch of the victim before the fatal shot hit her in the head.\textsuperscript{120} The \textit{Neitzel} court gave a strong indication of its views on the proper treatment of automobile homicide cases involving intoxicated drivers:

\begin{quote}
To determine whether a defendant is guilty [of murder or manslaughter] the jury must consider the nature and gravity of the risk, including the harm to be foreseen and the likelihood that it will occur . . . . \textit{[T]he significant distinction [between murder and manslaughter] is} in the likelihood that a death will result from the defendant's act. Where the defendant's act has limited social utility, a very slight though significant and avoidable risk of death may make him guilty of manslaughter if his act causes death. Driving an automobile has some social utility although substantially reduced when the driver is intoxicated. The odds that a legally intoxicated person driving home after the bars close will hit and kill or seriously injure someone may be as low as one chance in a thousand and still qualify for manslaughter. Where murder is charged, however, an act must create a \textit{much} greater risk that death or serious physical injury will result.\textsuperscript{121}
\end{quote}

The \textit{Neitzel} court also gave examples of conduct constituting extreme indifference to human life. These examples consisted of shooting into a home, room, train, or automobile, where others are known

\begin{footnotes}
\item[115] The court also cited Wagner v. State, 76 Wis.2d 30, 250 N.W.2d 331 (1977). For a discussion of Wagner, see supra notes 79-81 and accompanying text.
\item[116] 655 P.2d 325 (Alaska Ct. App. 1982).
\item[117] \textit{Neitzel} does provide some support for the \textit{Pears} court's opinion in that the \textit{Neitzel} court stated that the difference between manslaughter and second degree murder was one of degree and was a question for the jury. \textit{Id.} at 335-38.
\item[118] \textit{Id.} at 326.
\item[119] \textit{Id.}
\item[120] \textit{Id.}
\item[121] \textit{Id.} at 337 (emphasis added).
\end{footnotes}
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to be or might be, with complete disregard of the consequences. These examples actually support Pears's argument that his conduct did not rise to the level of extreme indifference to human life. Pears's actions exhibited greater utility and less risk than the acts in any of the examples.

D. The Pears Court Provides No Guidance for Future Decisions

The definitional language used by the Alaska legislature creates a substantial difference between the crime of murder and the crime of manslaughter. Manslaughter carries a maximum penalty of twenty years whereas a person convicted of second degree murder can receive a sentence of up to ninety-nine years in prison. With the exception of felony murder, the legislature defines a person as a murderer only if that person caused a death while intending to kill, or with knowledge that his conduct was substantially certain to cause death, or under circumstances in which his conduct showed an extreme indifference to human life. The only Alaska case prior to Pears in which the actor's conduct was held to have constituted extreme indifference to human life under section 11.41.110(a)(2) was Neitzel. Thus, before Pears, there seemed to be a clear distinction between murder and manslaughter — a murderer (1) killed in the course of committing one of six felonies, (2) killed intentionally, (3) killed knowing that his conduct was substantially certain to cause death, or (4) killed while committing an act of no utility that was likely to cause a death and that generally involved the use of a gun. The Pears court has now blurred the distinction between manslaughter and murder not only where intoxicated drivers are involved but for

122. Id. at 327. The court took the examples it cited from R. Perkins, Criminal Law § 1, at 36 (2d ed. 1969).
123. Alaska Stat. § 11.41.120 (1983); id. § 12.55.125 (1984). Even though Pears received a ten-year sentence, and the maximum penalty for manslaughter in Alaska is twenty years, there are several significant reasons for determining whether Intoxicated Motorists can receive a murder conviction in Alaska. First, in Page v. State, 657 P.2d at 855. As this "typical" sentence exceeds the maximum possible manslaughter sentence, it is fair to infer that second degree murder sentences will generally involve longer prison terms than manslaughter sentences. Second, there is undoubtedly a greater stigma to be borne by a defendant who receives a murder conviction rather than a manslaughter conviction.
125. Id. § 11.41.100-.110 (1983).
126. 655 P.2d at 325.
128. Id. § 11.41.100.
129. Id. § 11.41.110(a)(3).
130. See supra notes 40-50, 116-22 and accompanying text.
homicide cases in general. The Pears court's expansion of the murder statute opens the door for other Alaska courts to extend the reach of the murder statute by further expanding the concept of extreme indifference murder. Through such action the Alaska courts could eviscerate the Alaska manslaughter statute — a statute that the Alaska courts can only apply after it has been determined that all of the murder statutes are inapplicable. As a result of this evisceration, defendants in Alaska could be stigmatized as murderers and given sentences of up to ninety-nine years for conduct intended by the legislature to constitute manslaughter and not murder. A court is not the proper body to alter the murder/manslaughter distinction; any reformation of the distinction should require a mandate from the legislature.

E. The Difference in Culpability Between Pears and a Murderer in Alaska

When one compares Pears's conduct to conduct defined by the Alaska legislature and courts to be extreme indifference murder — persuading another to play Russian roulette, or shooting into a tent, home, room, automobile, or train, oblivious of the consequences, or firing several shots directly at a girlfriend intending to frighten her — it becomes clear that Pears's conduct does not rise to the level of extreme indifference to human life. None of the examples given by the Alaska legislature or by the Alaska courts prior to Pears is similar to the conduct of an Intoxicated Motorist. Pears's conduct simply did not exhibit the same degree of culpability as the conduct listed in the

131. The manslaughter statute provides in relevant part:

A person commits the crime of manslaughter if the person . . . intentionally, knowingly, or recklessly causes the death of another person under circumstances not amounting to murder in the first or second degree . . . .


132. The Alaska Supreme Court's review of Pears's sentence, Pears v. State, 698 P.2d 1198 (Alaska 1985), further contributes to the blurring of the distinction between murder and manslaughter. In deciding whether Pears's sentence was excessive, the court declined to compare his sentence with prior second degree murder sentences, electing instead to look to prior manslaughter sentences for guidance. Id. at 1202-03.

133. These are the examples the Alaska legislature gave of extreme indifference to human life. See supra text accompanying note 40.

134. These are the examples of extreme indifference to human life provided in Perkins's treatise on criminal law, see supra note 122, as cited in Neitzel, 655 P.2d at 327.

135. 655 P.2d at 326-27 (facts from which the Neitzel court held the convicted defendants to have demonstrated extreme indifference to human life).

136. The only other examples of conduct that constitutes extreme indifference to human life were given by the Alaska legislature in the Senate Journal. These were some of the examples the Neitzel court had taken from the Model Penal Code. All of these examples are distinguishable from Pears's conduct. See supra text accompanying notes 46-50, 122.
examples given by the legislature and by the Neitzel court. Perkins, in his treatise on criminal law, clearly noted the difference:

[A] motorist who attempts to pass another car on a “blind curve” may be acting with such criminal negligence that if he causes the death of another in a resulting traffic accident he will be guilty of manslaughter. And such a motorist may be creating fully as great a human hazard as one who shoots into a house or train “just for kicks,” who is guilty of murder if loss of life results. The difference is that in the act of the shooter there is an element of viciousness — an extreme indifference to the value of human life — that is not found in the act of the motorist.137

Pears’s conduct resembles the conduct of passing someone on a blind curve in several ways. Both involve: (1) driving, (2) violating a driving law, (3) driving in an area in which a car coming from another direction would have the right of way, (4) lack of knowledge of whether a car is in one’s path, and (5) unintentionally and unknowingly killing.138 Pears’s conduct is certainly more similar to passing on a blind curve than to shooting into a house “just for kicks,” a highly sadistic act that involves the use of a gun and has absolutely no social utility.

Drunk driving is a controversial and emotional subject. Many people, and probably some jurors, will view the trial of a drunk driver who kills as pitting the innocent, sober, deceased victim against the culpable, intoxicated, living defendant. The jurors may wish to convict the driver of the harshest penalty the law allows. In Pears, this desire may especially have been present because the driver was a nineteen-year old man with no wife or child, whereas the victims were the wife and daughter of a corrections officer139 and the daughter’s young friend. The court must not allow the murder conviction of a person whose actions did not constitute extreme indifference to human life. In failing to instruct the jury that it could not find Pears guilty of murder, the court in Pears allowed such a conviction.

137. R. Perkins, supra note 122 at 37. Other states have impliedly recognized this difference in culpability as evidenced by the fact that thirty-nine states have never convicted an intoxicated driver of murder if the driver unintentionally and unknowingly killed his victim.

138. Three features distinguish Pears’s conduct from that of one who passes on a blind curve: Pears was warned not to drive, Pears was intoxicated at the time he was driving, and Pears apparently went through several red lights. Nevertheless, Pears’s intoxication at the time of the accident should not elevate his conduct to the level of extreme indifference to human life. As the Maryland Court of Appeals noted in Blackwell v. State, 34 Md. App. 547, 554, 369 A.2d 153, 158 (1977), “While there may be deprived persons who persistently drink, it does not follow that those who drink are implicitly depraved.”

V. A LEGISLATIVE ALTERNATIVE: VEHICULAR HOMICIDE STATUTES

The Alaska trial court and court of appeals in *Pears* should not be criticized too harshly for misinterpreting the legislature’s intent on the issue of whether Intoxicated Motorists could be convicted of second degree murder. The legislature failed to give the courts a clear indication of the appropriate punishment for Intoxicated Motorists. Alaska remains one of only seven states making no express statutory provision for deaths caused by automobile drivers.140

The provisions of vehicular homicide statutes in the forty-three states that have such laws are not uniform.141 Several states’ vehicular homicide statutes, for example, require a showing of reckless disregard for the safety of others in order to sustain a vehicular homicide charge;142 other statutes condition conviction upon proof of criminal negligence;143 other states apply their vehicular homicide statutes upon proof of either gross negligence or the defendant’s intoxication;144 and still other states have statutes that are invoked whenever the defendant who caused a death was operating a motor vehicle unlawfully.145 Still, each of these forty-three legislatures has guided the courts of its state in determining the appropriate treatment of automobile deaths in general and the punishments for those responsible for such deaths. A legislature’s enactment of a vehicular homicide statute generally provides a clear indication of that legislature’s view concerning murder convictions for intoxicated drivers.146 Alaska’s legislature should take the opportunity to make its own clear policy statement on the appropriateness of a murder conviction for a drunk driver who kills.

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140. The other six states are Iowa, Mississippi, Montana, Oregon, Texas, and Virginia. See supra note 61.
141. The states also do not place vehicular homicide statutes in the same position in regulatory codes. Twenty-seven of the states include their vehicular homicide statutes in their criminal codes, while the other sixteen states place automobile death statutes in the motor vehicle section of their code.

[i]The Legislature in enacting Section 388 [the manslaughter by automobile statute] to punish persons who cause the death of another “as the result of the driving, operation or control of an automobile... in a grossly negligent manner,” intended to treat all unintended homicides thereby resulting in the same way...
The Alaska legislature should enact two vehicular homicide statutes. The first statute, which could be captioned "vehicular homicide in the first degree," would cover persons who cause a death while driving recklessly, or while intoxicated. The offense would be categorized as a Class A felony, and thus the defendant could receive a maximum sentence of twenty years in prison, but if the defendant had no prior felony convictions he most likely would receive a five-year sentence. The other vehicular homicide statute, which could be captioned "vehicular homicide in the second degree," would cover persons who could not be guilty of vehicular homicide in the first degree, but who nonetheless caused a death while operating a motor vehicle in a negligent manner. This offense would be considered a Class C felony and it would carry with it a maximum sentence of five years, but with the likelihood that a first-time felon would receive a prison sentence of one year or less.

The legislative history of the proposed acts should clearly instruct courts to invoke one of these two statutes whenever a motorist, whose actions do not fall within the coverage of either the first degree murder statute or the Knowledge Provision of the second degree murder statute, causes a death while operating a vehicle unlawfully. The legislative history should clearly indicate that courts should invoke the second degree murder statute only in the case of an automobile driver who actually sees his victims or otherwise knows or should know that he is substantially certain to kill or to cause serious physical injury. Furthermore, the legislative history should make it clear that courts should not invoke the reckless driving statute when an intoxicated driver is responsible for the death of another.

Enactment of the vehicular homicide statutes would yield several important improvements. First, the new statutes would provide the Alaska courts with needed guidance concerning the legislature's intentions on the issue of automobile homicide. The Alaska courts would no longer be saddled with the difficult, case-by-case task of categorizing vehicular homicides as reckless operation, negligent homicide, manslaughter, or second degree murder. Instead, once

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147. Thus, it would cover those people who caused a death while driving in violation of either ALASKA STAT. § 28.35.040 (1984) (reckless driving), or ALASKA STAT. § 28.35.030 (1984) (operating a vehicle, aircraft, or watercraft while intoxicated).
148. See ALASKA STAT. § 12.55.125(c) (1984). Five years is the presumptive term of imprisonment for a first felony offender convicted of a Class A felony.
149. Id. § 12.55.125(e).
150. Id. § 28.35.040.
151. Id.
152. Id. § 11.41.130 (1983).
153. Id. § 11.41.120.
154. Id. § 11.41.110.
the state showed that a defendant acted unlawfully, but that he did not intentionally kill or kill with knowledge that death or serious injury was substantially certain to result, he would be guilty of vehicular homicide. The issue of whether the defendant was guilty of first or second degree vehicular homicide would turn on whether or not the defendant was either driving recklessly or driving while impaired by alcohol or drugs at the time of the accident. Once offenders were so categorized, the court would be in a position to compare each individual defendant's conduct with that of others in the same category to determine the proper sentence, producing consistent sentences among defendants with similar degrees of culpability.\textsuperscript{155}

Second, the vehicular homicide statutes would also provide the public with more useful notice of the law regarding intoxicated drivers and automobile homicides. At present, most people probably have little idea whether a particular automobile homicide would constitute reckless driving, negligent homicide, manslaughter, or murder. The vehicular homicide statutes would greatly simplify public understanding and jury instructions. The public would have to learn only that a driver who kills someone while driving unlawfully has committed vehicular homicide either in the first degree or the second degree, depending on whether the driver was intoxicated, using drugs, or driving recklessly.

Third, the enactment of such statutes would announce to the public that the legislature considers homicide by vehicle to be a serious offense, worthy of separate attention in the Criminal Code. Moreover, by clearly delineating the definition and punishment of motor vehicle deaths caused by intoxicated, reckless, or negligent drivers, the legislature would further demonstrate the state's strong condemnation of reckless and intoxicated driving.

Finally, the proposed statutes and the accompanying legislative history should preclude a court from allowing a jury to convict an intoxicated driver of murder unless the court believes that the reasonable juror could conclude beyond a reasonable doubt that the intoxicated driver intended to kill or that the driver knew or should have known that he was substantially certain to cause serious physical injury or death. Thus, in a particularly tragic case such as \textit{Pears}, the jury will not have the opportunity to convict an individual of murder — a conviction unsupported by either the intent of the legislature in Alaska or the law in the vast majority of states.

In addition to enacting the vehicular homicide provision proposed above, the legislature should also increase the punishment for

\textsuperscript{155} When making its sentencing determination the court would consider factors such as prior DWI or reckless driving convictions, the egregious nature of the defendant's conduct, and the actions of the defendant after the accident.
repeat DWI offenders. The current statute provides a minimum sentence of twenty days for the second DWI offense, increasing to thirty days for the third and subsequent offenses. Many states have greater minimum sentences for repeat DWI offenders than does Alaska. Amending the DWI statute to increase the minimum sentences to forty-five days for a second conviction and to one hundred and twenty days for a third or subsequent conviction, in conjunction with the enactment of the vehicular homicide statutes, would express a strong state commitment to punish intoxicated motorists harshly while obviating the need for Alaska courts to resort to an extremely strained construction of the state’s murder statutes in order to deal with the problem of Intoxicated Motorists.

VI. CONCLUSION

Prior to the enactment of the revised Criminal Code in Alaska, Intoxicated Motorists could not have been convicted of murder; they were charged instead with either reckless driving, negligent homicide, or, at most, manslaughter. Under the new Criminal Code, the applicability of the second degree murder statute to an intoxicated driver who unintentionally and unknowingly kills is unclear. However, when the legislative history of the second degree murder statute is examined and compared with other Alaska statutes that give guidance in this area and with similar murder statutes of other states, it becomes clear that the legislature did not intend the courts to allow a jury to hand down a murder conviction for an Intoxicated Motorist. Unfortunately for Richard Pears, the court in his case concluded otherwise. The Pears court, noting that the legislature did not expressly declare that Pears’s actions could not constitute murder, allowed a jury to convict Pears of second degree murder. Pears ultimately received a ten-year prison sentence despite the fact that he had no previous criminal record or prior alcohol-related traffic offenses.

To prevent harsh sentences like the one given in Pears and to clarify the legislature’s intent in this area, two vehicular homicide statutes should be enacted — one to cover conduct like Pears’s and another to cover cases involving deaths caused by negligent or unlawful conduct while operating a vehicle. The legislature should also increase the penalty for repeat DWI offenders. These actions would provide the courts with guidance as to how the legislature wants them to handle automobile homicide cases and will also strongly condemn drunk driving by making its consequences extremely severe.

Alan Fishel
