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THE UNCONSTITUTIONAL PROSECUTION OF CONTROLLED SUBSTANCE METABOLITES UNDER UTAH CODE § 41-6A-517

Joshua C. Snow*

This Article achieves three main goals. First, it explains and explores Utah's per se metabolite laws against the backdrop of the national landscape of metabolite laws. Second, this Article provides a concise explanation regarding the science of drug metabolites. Finally, this Article presents two constitutional challenges to Utah Code section 41-6a-517. The first challenge argues that the statute creates an impermissible status offense in violation of the Eighth Amendment to the U.S. Constitution. The second challenge argues that the statute violates Utah's Uniform Operation of Laws Clause found in the Utah Constitution. This Article concludes by asking Utah state courts and state legislature to examine the validity of Utah Code section 41-6a-517 and ultimately to overturn the statute.

I. INTRODUCTION

Imagine Steve. Steve, a recent graduate of the University of Utah S.J. Quinney College of Law, has never used illegal drugs or been in trouble with the law. But the stress of studying for his looming bar exam has begun to take an emotional toll. Acting on the advice of his less-than-law-abiding friends, Steve purchased a small quantity of marijuana thinking a few “hits” would relieve the anxiety and pressure he was feeling. The following Saturday he locked himself in his bedroom and smoked several marijuana cigarettes. He spent the remainder of Saturday and Sunday alone in his apartment. The immediate effects of the marijuana wore off quickly, but come Monday morning Steve felt relaxed and ready to face another week of studies. Before Steve left for his bar prep class, he decided to clean his car. Steve placed the car key in the ignition, turned on the electrical components of the car, and rolled the driver's side window down. Steve sat down in the driver's seat and began sorting through a pile of papers. As Steve was finishing the sorting, an officer on bike patrol approached Steve's car to ask for directions.

In his incident report, the officer stated he could immediately smell the odor of marijuana in the car. After briefly speaking with Steve, the officer reported he was certain the smell was coming from Steve's person. The officer arrested Steve on suspicion of being in actual physical control of a motor vehicle with a measureable controlled substance in the body in violation of Utah Code section 41-

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6a-517(2). Steve had exhibited no signs of intoxication during the encounter, nor did he engage in any dangerous, threatening, or suspicious behavior. A blood test was performed that revealed a trace presence of a pharmacologically inactive marijuana metabolite—a byproduct of the parent drug made as the human body processes the parent drug—in Steve’s system.

After a quick trial, Steve was convicted as charged based solely on the testimony of the officer and the toxicology report. Steve’s license was suspended for 120 days, he was ordered to pay a fine of \$1,000, he was placed on supervised probation, and, if he violates his probation, he could be placed in jail for up to six months. Also, Steve now bears the stigma of his conviction and must explain the conviction to the Character and Fitness Committee of the Utah Bar Association, his future employer, friends, and family.

This Article examines how, despite the fact that Steve did not engage in any dangerous or threatening behavior that fateful Monday morning, he was successfully prosecuted under Utah Code section 41-6a-517 (Metabolite Statute) and explains why such prosecutions are unconstitutional. The Article first discusses the structure of the Metabolite Statute and what conduct is criminalized by the statute. The Article then wades into the science of metabolites and explains what they are, where they come from, and how they affect the body. Finally, it concludes by identifying why Utah’s Metabolite Statute is constitutionally flawed and why the prosecution of metabolites in the body should be prohibited in Utah.

II. THE STRUCTURE OF UTAH’S METABOLITE STATUTE, UTAH’S OTHER DRUG LAWS, AND NATIONAL PER SE DRUG LAWS

Utah’s Metabolite Statute states, “[A] person may not operate or be in actual physical control¹ of a motor vehicle within [Utah] if the person has *any* measurable controlled substance or metabolite of a controlled substance in the person’s body.”² “A person convicted of a violation of [this section] is guilty of a class B misdemeanor,”³ which is punishable by up to six months in jail and a fine of \$1,000, plus an additional 90% surcharge and \$40 legislative fee, for a maximum total fine of \$1,940.⁴ Additionally, “[t]he Driver License Division shall, if the

¹ Utah courts define “actual physical control” very broadly. *See, e.g.*, *Richfield City v. Walker*, 790 P.2d 87, 93 (Utah Ct. App. 1990) (looking at a multitude of factors to determine whether defendant *could* have been driving a motor vehicle—and not limiting the statutory language to only those people *actually* driving a motor vehicle—to find defendant had “actual physical control” of the vehicle). Although the propriety or legality of such a definition is the subject of frequent debate, this issue will not be addressed in this Article. For the purposes of this Article, it is sufficient to know that individuals can be convicted for being in actual physical control of a vehicle with a controlled substance metabolite in their body without exhibiting dangerous behavior. *See id.*

² UTAH CODE ANN. § 41-6a-517(2) (LexisNexis Supp. 2012) (emphasis added).

³ *Id.* § 41-6a-517(4)(a).

⁴ *See id.* § 51-9-401(1)(b)(i)(C) (LexisNexis 2010); *id.* §§ 76-3-204(2), -301(1)(d) (LexisNexis 2004); *id.* § 78A-7-122(1) (LexisNexis 2009).

person is 21 years of age or older on the date of arrest . . . suspend, for a period of 120 days, the driver license of [the] person convicted.”⁵ For persons younger than twenty-one years old, or with prior convictions, the suspension may be lengthened or the individual’s driver’s license may be revoked for a period of one to two years.⁶

The Metabolite Statute is codified in the same chapter as Utah’s driving under the influence (DUI) statute.⁷ But, the Metabolite Statute explicitly states it applies “[i]n cases not amounting to a violation” of the DUI statute.⁸ Utah’s DUI statute states, in relevant part:

A person may not operate or be in actual physical control of a vehicle within this state if the person is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle.⁹

Analyzing the two statutes together, the Metabolite Statute applies to individuals who have detectable amounts of the controlled substance or its metabolite in their system, but *are not* under the influence of a controlled substance or its metabolite, and the metabolite *does not* make the individuals incapable of safely operating a motor vehicle.¹⁰ In essence, rather than punishing people for dangerous behavior, the Metabolite Statute punishes people for their status¹¹ of having previously used illegal drugs.¹²

Although little information is available regarding the creation and passage of the Metabolite Statute specifically,¹³ valuable insight into the reasoning and logic that created the section can be gleaned from an examination of other states with similar laws. According to a study sponsored by the National Highway Traffic

⁵ *Id.* § 41-6a-517(6)(a) (LexisNexis Supp. 2012).

⁶ *Id.* § 41-6a-517(6)(b) to -517(8).

⁷ *See id.* § 41-6a-502 (LexisNexis 2010).

⁸ *Id.* § 41-6a-517(2) (LexisNexis Supp. 2012).

⁹ *Id.* § 41-6a-502(1)(b) (LexisNexis 2010).

¹⁰ *Compare id.* § 41-6a-517(2) (LexisNexis Supp. 2012) (barring individuals from operating or being in actual physical control of a vehicle if there is any measurable controlled substance or metabolite present in their systems), *with id.* § 41-6a-502(1)(b) (LexisNexis 2010) (prohibiting individuals from operating or being in actual physical control of a vehicle if they are under the influence of alcohol, drugs, or both, that renders them incapable of safely operating a motor vehicle).

¹¹ *See infra* Part IV.

¹² *See State v. Robinson*, 254 P.3d 183, 191–92 (Utah 2011) (“[S]imply having the metabolite of a controlled substance in the body is similar to a ‘status’ of having previously ingested the controlled substance.”).

¹³ The state legislature passed an early version of the statute in the 1980s. *See* UTAH CODE ANN. § 41-6-44.6 (LexisNexis 1998) (recodified as amended at UTAH CODE ANN. § 41-6a-517 (LexisNexis Supp. 2012)). A thorough review of available state records and online legal sources did not provide any information regarding the passing of the specific provision at issue in this Article.

Safety Administration, six other states have statutes similar to Utah's Metabolite Statute.¹⁴ Additionally, twelve other states have some form of law prohibiting individuals from driving with prohibited drugs in their system, but not prohibiting the metabolite of those drugs.¹⁵ Many of the remaining states have laws that focus on actual impairment, rather than on the mere presence of drugs or their metabolites in the system.¹⁶

In support of these zero tolerance statutes, commentators have argued that there is a direct relationship between an unquantifiable amount of illicit drugs or their metabolites in a person's system and the individual's ability to safely operate a motor vehicle.¹⁷ These arguments generally assert that although "there [may be] no meaningful quantification of the relationship of the use of . . . drugs with evidence of impairment," *per se* laws are still necessary to protect safety on the roads because there could be some relationship between the drugs and their metabolites and an individual's ability to operate a motor vehicle safely.¹⁸ Other advocates of these *per se* laws argue that there is a growing problem of what they term "drugged driving."¹⁹ According to these commentators, the easiest and most effective way to combat drugged driving is through a zero-tolerance standard, rather than through a standard requiring evidence of impairment or a quantifiable amount of an active drug in an individual's system.²⁰ Finally, some commentators argue a more pragmatic rationale: "The benefit of a *per se* standard is that prosecutors do not have to meet more complex and difficult to use standards of guilt."²¹

Although these statutes are purportedly designed to make prosecution simpler and more effective by removing the necessity to prove impairment or quantifiable levels of drugs in the system, the statutes are rife with ambiguity and complexity, which weaken their legitimacy and validity. One recent study attempted to test the

¹⁴ J. MICHAEL WALSH, A STATE-BY-STATE ANALYSIS OF LAWS DEALING WITH DRIVING UNDER THE INFLUENCE OF DRUGS 4 (2009) (identifying Arizona, Delaware, Georgia, Indiana, Minnesota, Pennsylvania, and Utah as states with a "zero tolerance" approach).

¹⁵ *See id.* at 3–4 (identifying Illinois, Iowa, Michigan, Rhode Island, Wisconsin, Nevada, Ohio, Virginia, North Carolina, South Dakota, Hawaii, and New York with some form of controlled substance law).

¹⁶ *See id.* (identifying Florida, Hawaii, Indiana, Kentucky, Montana, South Carolina, and Virginia as some of the states that use the standard of impairment to define "under the influence").

¹⁷ *See, e.g.,* Mark F. Lewis & Betty J. Buchan, *The Drugged Driver and the Need for a "Per Se" Law*, 72 FLA. B.J. 32, 37–38 (1998).

¹⁸ *See, e.g., id.* at 36 (discussing a case that applied this reasoning).

¹⁹ *See* THE WALSH GRP., THE FEASIBILITY OF PER SE DRUGGED DRIVING LEGISLATION CONSENSUS REPORT 2 (2002), available at <http://stopdruggeddriving.org/pdfs/FeasibilityofPerSeLawsConsensusReport.pdf>.

²⁰ *Id.* at 4.

²¹ *Drugged Driving Laws*, STOP DRUGGED DRIVING, <http://stopdruggeddriving.org/laws.html> (last visited May 20, 2013).

actual effectiveness of these zero-tolerance statutes in making roads safer.²² According to the researchers, states that have instituted a zero-tolerance policy have recorded very little to no information to determine if the statutes are effective.²³ Instead, prosecutors and law enforcement officials rely on anecdotal stories to evaluate the statutes.²⁴ The researchers reported that in general, prosecutors and law enforcement officials felt the statutes were effective at easing the burden of prosecution and conviction, but there was no mention of the ability of these statutes to reduce the actual number of drugged or impaired drivers.²⁵

Another problem undermining the value of per se statutes is the wide variety of ways states prosecute the presence of metabolites in a driver's system. As discussed above, Utah's statute criminalizes the presence of metabolites of any controlled substance.²⁶ By contrast, Minnesota's statute makes it a crime for a person to operate a motor vehicle if "the person's body contains any amount of a controlled substance . . . or its metabolite, other than marijuana or tetrahydrocannabinols."²⁷ Other states require that a certain quantity of any illegal drug metabolite be found in a person's system to sustain a conviction.²⁸

The Utah Code does not contain any other provision punishing an individual for the mere presence of controlled substance metabolites in the body. There are, however, provisions that address the criminality of drug use in relation to the presence of metabolites in an individual's system. For example, *Utah Code Annotated* section 58-37-8(2)(a)(i) makes it a crime "for any person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance."²⁹ In the statute, "[p]ossession' or 'use' means the joint or individual ownership, control, occupancy, holding, retaining, belonging, maintaining, or the application, inhalation, swallowing, injection, or consumption" of a controlled substance.³⁰ According to the Code, "'Consumption' means ingesting or having any measurable amount of a controlled substance in a person's body, but . . . does not include the metabolite of a controlled substance."³¹ The Utah Supreme Court has also found that the mere presence of a measurable amount or the metabolite of a controlled substance is insufficient to show that a defendant used or possessed a controlled substance within the state.³²

²² See JOHN LACEY ET AL., *DRUG PER SE LAWS: A REVIEW OF THEIR USE IN STATES 1* (2010) (studying the laws of twelve states that do not tolerate any amount of prohibited drugs in a driver's system while operating a motor vehicle to assess the effects of per se drug laws).

²³ See *id.* at 2.

²⁴ *Id.*

²⁵ See *id.*

²⁶ See UTAH CODE ANN. § 41-6a-517 (LexisNexis Supp. 2012).

²⁷ MINN. STAT. § 169A.20 subdiv. 1(7) (West Supp. 2010).

²⁸ See OHIO REV. CODE ANN. § 4511.19 (LexisNexis Supp. 2012).

²⁹ UTAH CODE ANN. § 58-37-8(2)(a)(i) (LexisNexis 2012).

³⁰ *Id.* § 58-37-2(1)(ii).

³¹ *Id.* § 58-37-2(1)(c) (emphasis added).

³² *State v. Ireland*, 133 P.3d 396, 402 (Utah 2006).

The question then becomes, what is it about metabolites that result in their different treatment in various code sections within the state and among different states? Why is it that Minnesota lawmakers felt their statute could exempt marijuana metabolites while prosecuting for all other controlled substance metabolites, but Utah lawmakers felt it was appropriate to punish the presence of any controlled substance metabolites in an individual's body? Similarly, why is it that some states do not punish for the presence of metabolites in a driver's system while others require a minimum threshold level?³³ Even more perplexing is why Utah's possession and use statutes explicitly prohibit prosecuting an individual based on the presence of metabolites, but permit prosecuting an individual based on the presence of metabolites if the individual happens to be in actual physical control of a motor vehicle. To understand why metabolites have been given such disparate treatment, this Article will discuss the science of metabolites in the following section.

III. METABOLITES: NO MORE DANGEROUS THAN A HELPING OF VEGEMITE

It seems inane to compare a controlled substance metabolite to the bitter Australian treat Vegemite. The two are drastically different. One is a byproduct of the metabolic process of breaking down a controlled substance, and the other is made from leftover brewer's yeast. But what they do have in common is that, in many cases, the two substances are pharmacologically inactive and do not have any impact on an individual's mental or physical capabilities. This Part explains what metabolites are and where they come from. It also shows how many metabolites do not have any influence on the abilities or capacities of the human body. Finally this Part describes how the presence of controlled substance metabolites in an individual's blood or urine does nothing more than show that an individual had ingested a controlled substance at some prior point.

A. *What are Metabolites?*

"A drug metabolite is a product or substance that comes from (and is chemically different from) a parent drug; it is formed within the human body from the parent drug by the process of biotransformation or metabolism."³⁴ When a drug enters the body it goes through five distinct phases.³⁵ These five stages are (1) absorption, (2) distribution, (3) biotransformation, (4) translocation, and (5)

³³ Virginia's driving while intoxicated statute does not include a metabolite provision, and instead focuses solely on impairment. The word "metabolite" does not appear anywhere in Virginia's code. *See* VA. CODE ANN. § 18.2-266 (2009); *see also* OHIO REV. CODE ANN. § 4511.19 (LexisNexis Supp. 2012) (allowing for prosecution for the presence of metabolites, but only if they exceed a certain threshold level).

³⁴ FRANK ELKOURI & EDNA ASPER ELKOURI, *RESOLVING DRUG ISSUES* 43 (1993).

³⁵ Kurt M. Dubowski, *Drug-Use Testing: Scientific Perspectives*, 11 NOVA L. REV. 415, 523 (1987).

excretion.³⁶ Absorption refers to the process by which the drug is “ingested, injected or absorbed through mucous membranes or other portals” into the body.³⁷ During the distribution phase, the drug reaches the body’s circulation system and is carried to all of the “tissues and organs of the body, where the free drug can exert effects, or be stored, excreted, and metabolized or otherwise biotransformed, depending upon the organ, tissue and drug.”³⁸ During the distribution phase, some tissues and organs are passive and completely unaffected by the presence of the drug in the system.³⁹ Other organs, however, such as the lungs and liver, “convert the parent drug into chemically different metabolites or biotransformation products, in which forms it can be stored, or eliminated” from the body.⁴⁰

These “metabolites can be pharmacologically inert, or possess activity which is less than, equal to, or greater than the parent drug.”⁴¹ This biotransformation process continues until the entire drug has been eliminated from the body.⁴² The final two stages, translocation and excretion, occur primarily through this metabolic process.⁴³ For example, ethanol is “predominantly disposed of through extensive metabolism in the liver.”⁴⁴ These metabolites are then disposed of through bodily excretions such as urine.⁴⁵

B. What Does It Mean when a Drug Test Reveals the Presence of a Drug Metabolite in an Individual’s System?

Drug testing, whether in urine, blood, or some other bodily excretion, can reveal the presence of both the active drug as well as the inactive metabolites of the parent drug. But what does it mean for a test to come back positive for the presence of a metabolite? A drug test revealing the presence of a metabolite does not indicate intentional drug use,⁴⁶ it does not reveal if the drug was accidentally inhaled or injected, and it does not reveal the quantity or source of the metabolite.⁴⁷ The presence of a metabolite in the body does not always equate with recent absorption either.⁴⁸ The U.S. Supreme Court has recognized that an individual’s

³⁶ *Id.*

³⁷ *Id.* at 524.

³⁸ *Id.* at 524–25.

³⁹ *Id.* at 525.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 523–26.

⁴⁴ *Id.* at 525.

⁴⁵ *Id.*

⁴⁶ *See id.* at 516.

⁴⁷ *See id.*

⁴⁸ *See Commonwealth v. DiPanfilo*, 993 A.2d 1262, 1267 (Pa. Super. Ct. 2012) (recognizing that marijuana metabolites can remain in the body for months and that cocaine metabolites remain in the body for two to four days after use); ELKOURI & ELKOURI, *supra* note 34, at 45.

“pattern of elimination for a given drug cannot be predicted with perfect accuracy.”⁴⁹ Also, the bodily fluid being tested may affect the results of testing for the presence of metabolites in the body.⁵⁰

The rate at which drugs metabolize varies greatly among individuals.⁵¹ For example, marijuana (or its active ingredient THC) is quickly detectable in the blood stream after consumption.⁵² THC is immediately circulated through the body where it is stored in fat tissue.⁵³ The rate at which the body metabolizes a drug varies conditioned upon a host of factors specific to the individual user.⁵⁴ As THC is metabolized, its inactive metabolites are released into the blood stream where, in the average case, they can be detected for a few days up to several weeks.⁵⁵ Also, heavy or chronic use can lengthen the amount of time that metabolites appear in the body.⁵⁶

There is even some evidence indicating that, because marijuana metabolites are easily absorbed by fat cells, the metabolites may become stored in fat tissues of chronic users. The chronic user’s body may release those metabolites at a significantly later period of time, anywhere from months to years, when the individual experiences stress or begins exercising and dieting.⁵⁷ Although such claims are typically relegated to the annals of urban myths, a group of researchers at the University of Sydney, Australia, conducted a study on rats to test the plausibility of these stories.⁵⁸ The researchers concluded that inducing stress or depriving food from rats that had previously been exposed to marijuana triggered an increased level of marijuana metabolites in the body, even when there had been no recent exposure to the drug.⁵⁹ The researchers extrapolated that their results “might help to explain anomalous cases where prior cannabis users, that were

⁴⁹ Nat’l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 658 (1989).

⁵⁰ Skinner v. Ry. Labor Execs.’ Ass’n, 489 U.S. 602, 623 (1989) (recognizing that metabolites of some drugs remain in the urine for a longer period of time than in blood).

⁵¹ See Charles R. Cordova, Jr., Note, *DWI and Drugs: A Look at Per Se Laws for Marijuana*, 7 NEV. L.J. 570, 578–79 (2007).

⁵² *Id.*

⁵³ *Id.* at 579.

⁵⁴ *Id.* at 578–81. Cf. Kimberly S. Keller, *Sobering Up Daubert: Recent Issues Arising in Alcohol-Related Expert Testimony*, 46 S. TEX. L. REV. 111, 124 (2004) (identifying weight, gender, age, mental state, drinking pattern, type of alcohol, amount of alcohol, duration of ingestion, presence of food in the stomach, and the type of food as factors that may affect the metabolic process of alcohol).

⁵⁵ Cordova, *supra* note 51, at 578.

⁵⁶ See FIONA J. COUPER & BARRY K. LOGAN, WASH. STATE PATROL, DRUGS AND HUMAN PERFORMANCE FACT SHEET 9 (2004), available at http://www.nhtsa.gov/people/injury/research/job185drugs/drugs_web.pdf.

⁵⁷ N. Gunasekaran et al., *Reintoxication: The Release of Fat-Stored Δ9-tetrahydrocannabinol (THC) into Blood Is Enhanced by Food Deprivation or ACTH Exposure*, 158 BRIT. J. PHARMACOLOGY 1330, 1330 (2009).

⁵⁸ See *id.*

⁵⁹ *Id.* at 1336.

exposed to extreme stress or had undergone intensive weight loss, tested positive for THC a long time after they had refrained from cannabis use.”⁶⁰

In sum, the presence of a metabolite in the body does not necessarily equate with present intoxication.⁶¹ In fact, the presence of a metabolite does not even equate with recent ingestion.⁶² Further, the presence of a metabolite cannot demonstrate the method or amount of ingestion.⁶³ The only relevant information that a metabolite reveals is that at some prior time, an individual was exposed to the chemical compound that metabolized into the present metabolite.⁶⁴ It is for these reasons that states have struggled to formulate a consistent policy for handling metabolites in drivers’ systems. The only remaining question is whether Utah can punish drivers for having the inactive metabolite of a controlled substance in their bodies while being in actual physical control of motor vehicles.

IV. UTAH CANNOT PUNISH AN INDIVIDUAL FOR THE PRESENCE OF METABOLITES IN THE BODY BECAUSE DOING SO WOULD BE AN IMPERMISSIBLE STATUS OFFENSE

Although states have a great deal of power and discretion in punishing individuals for drug use and possession, there are limits to that power. This Part argues that punishing an individual for the presence of metabolites in the body is an impermissible status offense in violation of the U.S. Constitution.

A. The State May Punish an Individual for Using Drugs

It has long been recognized that

[t]here can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs. . . . The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question.⁶⁵

Accordingly, Utah’s statutes that punish the *use* or *possession* of controlled substances are not, on their face, constitutionally defective.⁶⁶

The Utah Supreme Court recently reviewed the constitutionality of the state’s statutes governing the possession or consumption of controlled substances.⁶⁷ In

⁶⁰ *Id.*

⁶¹ COUPER & LOGAN, *supra* note 56, at 9.

⁶² *See id.*

⁶³ *Id.*

⁶⁴ *Id.* at 8–9.

⁶⁵ *Robinson v. California*, 370 U.S. 660, 664 (1962) (quoting *Whipple v. Martinson*, 256 U.S. 41, 45 (1921)).

⁶⁶ *See State v. Robinson*, 254 P.3d 183, 193 (Utah 2011).

State v. Robinson,⁶⁸ the defendant was arrested for driving under the influence.⁶⁹ The results of a blood test revealed the presence of active methamphetamine in the defendant's body.⁷⁰ Based on the results of the test, the State charged the defendant with the possession or use of a controlled substance for having a measurable amount of a controlled substance in his system.⁷¹ Following his conviction, the defendant challenged the constitutionality of the possession or consumption statutes.⁷² Recognizing the State's inherent power to regulate the sale and use of controlled substances, the court rejected the defendant's due process, equal protection, and cruel and unusual punishment arguments.⁷³ Finally, the court rejected the defendant's argument under *Robinson v. California*⁷⁴ that the statute was punishing his status as a drug user rather than punishing his drug use.⁷⁵ The court found that because the statute was punishing him based on the measurable amount of the active controlled substance found in his body, the statute was punishing him for his use of the drug, not for his status.⁷⁶ Because the defendant still had active methamphetamine in his system, the court found he still had a measurable amount of a controlled substance and was still using the drug.⁷⁷ But, the court did say, in dictum, that "simply having the metabolite of a controlled substance in the body is similar to a 'status' of having previously ingested the controlled substance. Thus, if Utah's measureable amount provision criminalized the presence of metabolites in a person's body, [the defendant]'s argument might have merit."⁷⁸ According to the court,

the "use" of a controlled substance clearly begins at ingestion, [and] that "use" continues until the user is no longer under the influence of the drug. In other words, use stops and a user is no longer under the influence of drugs when the user no longer has a measurable amount of the drug in his or her body.⁷⁹

Accordingly, it remains permissible for a state to punish individuals while they are still using the drug.⁸⁰ But, when a statute punishes an individual for the presence of a pharmacologically inactive drug metabolite in the body, the statute is prosecuting

⁶⁷ See *id.* at 184.

⁶⁸ 254 P.3d 183.

⁶⁹ *Id.* at 185.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 186–90.

⁷⁴ 370 U.S. 660 (1961).

⁷⁵ *Robinson*, 254 P.3d at 190–92.

⁷⁶ *Id.* at 191.

⁷⁷ *Id.*

⁷⁸ *Id.* at 191–92.

⁷⁹ *Id.* at 191 (emphasis omitted).

⁸⁰ See *id.*

the individual's status as a previous drug user, and not the individual's actual use.⁸¹ This is bolstered by the fact that a drug metabolite is chemically different from the actual drug and is typically pharmacologically inactive—having no effect on the individual.⁸² The metabolic process has removed the controlled substance from the body and the individual is no longer using the controlled substance.⁸³ This then raises the question of whether a state can punish individuals for their status as previous drug users, proven only by the presence of an inactive drug metabolite in the individuals' systems.

B. The State May Not Criminalize an Individual's Drug User Status

Although a state may criminalize drug use, it may not criminalize an individual's status as a drug user. On occasion, states have attempted to define crimes not in terms of acts, but in states of being or statuses.⁸⁴ Some historical statutes "have made it a crime *to be* a vagrant, a common prostitute, a common drunkard, a common gambler, or a beggar."⁸⁵ It was not until 1962, however, that the U.S. Supreme Court questioned the validity of these status crimes.⁸⁶ In *Robinson v. California*, the State of California had made it a crime for an individual to "be addicted to the use of narcotics."⁸⁷ In overturning the California statute, the U.S. Supreme Court found that the statute "is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration Rather, we deal with a statute which makes the 'status' of narcotic addiction a criminal offense."⁸⁸ The Court continued by recognizing that a drug addiction can be considered a disease and to punish the status of that disease would be to inflict a cruel and unusual punishment upon the individual.⁸⁹

Unfortunately, the Court did not clarify how far its holding would extend or whether only a limited number of statuses, such as diseases and mental conditions, were covered by the holding.⁹⁰ Although the *Robinson* opinion left much to be desired, "there is general consensus that the Court declared . . . that statutes that make 'status' a crime are unconstitutional because they inflict cruel and unusual punishment."⁹¹

⁸¹ *See id.* at 191–92.

⁸² *See* Dubowski, *supra* note 35, at 525.

⁸³ *Id.*

⁸⁴ LARRY CHARLES BERKSON, *THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT* 97 (1975).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ 370 U.S. 660, 660 (1962).

⁸⁸ *Id.* at 666.

⁸⁹ *Id.* at 666–67.

⁹⁰ BERKSON, *supra* note 84, at 98–99.

⁹¹ *Id.* at 99.

The Supreme Court attempted to clarify its holding several years later, in *Powell v. Texas*.⁹² There, the Court stated,

The entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus.⁹³

With *Powell*, the focus has shifted away from the individual and towards the requirement that the individual must have committed some act or exhibited some behavior that society has an interest in preventing.⁹⁴

Other courts have had the opportunity to expand the *Robinson* holding beyond the context of California's statute against narcotic addiction.⁹⁵ For example, in *Parker v. Municipal Judge*,⁹⁶ the Nevada Supreme Court invalidated a law that made it a crime to be a "disorderly person."⁹⁷ According to the statute, a disorderly person was one who had the physical ability to work, had no visible means of support, and was in a public place.⁹⁸ The court held that because the statute was punishing an individual's status of being out of work and in a public place, without having committed any act, the statute was unconstitutional.⁹⁹

Similarly, laws that prohibit an individual from operating a motor vehicle with the presence of a drug metabolite in the body are prohibited status crimes.¹⁰⁰ According to one commentator discussing the application of per se statutes to marijuana metabolites,

While most drug metabolites will remain in the blood for only a short time, marijuana can be detected for weeks after the narcotic effect has worn off. This contributes to punishing status as a user, not protecting safety, a premise that was expressly found to be unconstitutional by the Supreme Court.¹⁰¹

⁹² 392 U.S. 514 (1968).

⁹³ *Id.* at 533.

⁹⁴ *See id.*

⁹⁵ BERKSON, *supra* note 84, at 101–07.

⁹⁶ 427 P.2d 642 (Nev. 1967).

⁹⁷ *Id.* at 643–44.

⁹⁸ *Id.* at 643.

⁹⁹ *Id.* at 643–44.

¹⁰⁰ *See* Mark Hansen, *Drugged State: Ohio Pushes for Tough Laws for Drivers, Critics Question Impairment Issue*, 91 A.B.A. J. 12, 14 (2005).

¹⁰¹ Aaron J. Marcus, *Are the Roads a Safer Place Because Drug Offenders Aren't on Them?: An Analysis of Punishing Drug Offenders with License Suspensions*, 13 KAN. J.L. & PUB. POL'Y 557, 574 (2004).

In essence, punishing individuals for having a metabolite in the body fails to further any legitimate goal, such as ensuring safety on the roads, because there is no correlation between pharmacologically inactive metabolites and dangerous driving. Instead, it is only punishing individuals for their status as a prior drug user.¹⁰² Further, the presence of a metabolite alone cannot prove that an individual knowingly engaged in any illegal behavior because metabolites do not reveal whether a drug was consumed intentionally.¹⁰³

Some may argue that Utah's Metabolite Statute is not punishing individuals for their status as prior drug users, but for the act of being in control of a motor vehicle while a metabolite is still in the body. For example, in *Arizona v. Hammonds*,¹⁰⁴ an Arizona court considered a constitutional challenge to Arizona's metabolite statute.¹⁰⁵ There, the court noted that the "presence of an inactive and nonimpairing metabolite of an illicit drug in a driver's urine does not necessarily mean that there is no active component of that drug present in the driver's blood."¹⁰⁶ According to the court's argument, it is appropriate for a state to punish an individual for driving a motor vehicle with the metabolite in the body because the metabolite may be the only way to establish that the individual was operating a motor vehicle with drugs in the system.¹⁰⁷ The court seemed particularly concerned with the speed with which the metabolic process may break down drugs, making it nearly impossible in some instances for the state to prove that an individual was operating a motor vehicle with the active drug in the system.¹⁰⁸

This reasoning is flawed, however, because it highlights the problems with prosecuting individuals for having a drug metabolite in their system. Because there is no way of knowing when, how, or where the metabolite entered the body, the state cannot prove that an individual was operating a motor vehicle with the active controlled substance in the body.¹⁰⁹ Likewise, unless a urine or blood sample reveals the presence of the active controlled substance in the body, absent additional evidence, there is no proof that the individual was under the influence of the controlled substance while operating the motor vehicle.¹¹⁰ All that the metabolite reveals is that at some prior time the individual had an active controlled substance in the body.¹¹¹ Despite attempting to draw attention to the fact that the individual chose to operate a motor vehicle, the statute still punishes an individual for a status as a drug user, and not for any actual harm posed to the individual or society.

¹⁰² *Id.*

¹⁰³ *See* Dubowski, *supra* note 35, at 516.

¹⁰⁴ 968 P.2d 601 (Ariz. Ct. App. 1998).

¹⁰⁵ *Id.* at 603–05.

¹⁰⁶ *Id.* at 604.

¹⁰⁷ *See id.*

¹⁰⁸ *Id.*

¹⁰⁹ COUPER & LOGAN, *supra* note 56, at 8–9.

¹¹⁰ *See id.*

¹¹¹ *See id.*

Because the statute is focused solely on punishing individuals for their status as drug users and not for any specific activity or act, the statute must be considered an unconstitutional status offense. But even if Utah courts find that the statute is not an impermissible status offense, the statute may still be struck down on equal protection grounds. The following Part shows how Utah's Metabolite Statute violates Utah's equivalent of the federal Equal Protection Clause.

V. BY MAKING EXCEPTIONS FOR LEGAL USE, UTAH'S METABOLITE STATUTE VIOLATES UTAH'S UNIFORM OPERATIONS OF LAWS CLAUSE

Utah's Constitution requires that "[a]ll laws of a general nature shall have uniform operation."¹¹² To determine whether a statute violates this requirement, the court analyzes (1) whether the statute creates any classifications, (2) whether the classifications impose any disparate treatment on persons similarly situated, and (3) if there is disparate treatment, whether "the legislature had any reasonable objective that warrants the disparity."¹¹³ If the classification does not involve a suspect class or a fundamental right, the court will engage in a rational basis review of the legislature's objective in creating the section.¹¹⁴ "The essence of the uniform operation of laws principle is that 'legislative classifications resulting in differing treatment for different persons must be based on actual differences that are reasonably related to the legitimate purposes of the legislation.'"¹¹⁵ The first two questions, requiring a classification and disparate treatment, must be answered

¹¹² UTAH CONST. art. I, § 24. Although the Utah uniform operation of laws clause appears to be the equivalent of the U.S. Constitution's Fourteenth Amendment Equal Protection Clause, the two clauses can create very different results. *Lee v. Gaufin*, 867 P.2d 572, 577 (Utah 1993).

Utah's uniform operation of laws provision establishes different requirements than does the federal Equal Protection Clause. The most important of these requirements, for the present analysis, is the requirement that "[f]or a law to be constitutional under [the provision], it is not enough that it be uniform on its face. What is critical is that the operation of the law be uniform. A law does not operate uniformly if 'persons similarly situated' are not 'treated similarly'"

State v. Mohi, 901 P.2d 991, 997 (Utah 1995) (alterations in original). Utah courts have asserted that the standard under Utah's uniform operation of laws clause is "at least as exacting, and in some circumstances, more rigorous than the standard applied under the federal constitution." *Whitmer v. City of Lindon*, 943 P.2d 226, 230 (Utah 1997) (quoting *Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884, 889 (Utah 1988)). For this reason, this Article only analyzes the Metabolite Statute under the Utah standard instead of the federal constitutional standard as well.

¹¹³ *See State v. Drej*, 233 P.3d 476, 487 (Utah 2010) (quoting *State v. Schofield*, 63 P.3d 667, 671 (Utah 2002)).

¹¹⁴ *See Merril v. Utah Labor Comm'n*, 223 P.3d 1089, 1093 (Utah 2009).

¹¹⁵ *Id.* at 1092 (quoting *Ryan v. Gold Cross Servs., Inc.*, 903 P.2d 423, 426 (Utah 1995)).

in the affirmative before the court will consider the third.¹¹⁶ The next Section discusses these three questions in the context of the Metabolite Statute.

A. Utah's Metabolite Statute Creates Classifications That Result in Disparate Treatment

First, the metabolite statute creates classifications. The statute distinguishes between individuals by creating an affirmative defense to prosecution for those who have been given a prescription or legal authorization to use the controlled substance.¹¹⁷ Second, the statute imposes disparate treatment on persons similarly situated. Two individuals with metabolites and no active drug in their system after ingesting the same controlled substance—one legally with a prescription and the other illegally—will be treated differently if they are subsequently stopped while in actual physical control of a motor vehicle. The individual who has a prescription will escape legal liability, but the individual without a prescription may face prosecution and the attendant consequences if convicted. Because the statute makes classifications and those classifications result in disparate treatment, the court must then consider whether “the legislature had any reasonable objective that [would] warrant[] the disparity” under a rational basis review.¹¹⁸

B. Utah's Metabolite Statute Fails Rational Basis Review

The first step in evaluating a statute under rational basis review is to determine if the classification is reasonable.¹¹⁹ A court, in evaluating the reasonableness of a classification should consider,

- (1) if there is a greater burden on one class as opposed to another without a reason;
- (2) if the statute results in unfair discrimination;
- (3) if the statute creates a classification that is arbitrary or unreasonable; or
- (4) if the statute singles out similarly situated people or groups without justification.¹²⁰

With regard to the Metabolite Statute, the classification fails this test. First, there is a greater burden on those individuals without a prescription as compared to those with a prescription without reason. Presumably, the statute was enacted for safety reasons to prevent individuals with metabolites in their system from driving on the

¹¹⁶ *See id.*

¹¹⁷ *See* UTAH CODE ANN. § 41-6a-517(3)(b) (LexisNexis Supp. 2012) (setting forth an affirmative defense for prescription drugs); *id.* § 41-6a-517(3)(c) (establishing an affirmative defense for those drugs “otherwise legally ingested”).

¹¹⁸ *See Drej*, 233 P.3d at 487 (internal quotations omitted) (quoting *State v. Schofield*, 63 P.3d 667, 671 (Utah 2002)).

¹¹⁹ *Merrill*, 223 P.3d at 1093.

¹²⁰ *Id.*

road.¹²¹ Assuming, arguendo, that metabolites in an individual's system are dangerous, the presence of metabolites in the system of an individual with a prescription will be just as dangerous as a metabolite in the system of an individual without a prescription. There is no reason for the greater burden—that is, the threat of prosecution—placed on those without a prescription.

Second, the statute results in unfair discrimination. Without any justification for the disparate treatment in the Metabolite Statute, the discrimination is inherently unfair.

Third, the statute creates a classification that is arbitrary or unreasonable. It is almost axiomatic to say that metabolites react in an individual's body in a manner that has no relationship to the external fact of whether the individual has a prescription or legal authorization to use the medication. If a metabolite is dangerous, it will be dangerous whether the user has a prescription or not. Accordingly, the classification at issue here is either arbitrary in that there is no justification, or unreasonable as it is merely a disguise by the state legislature to create a status offense to punish drug users. Because there is no legitimate justification to allow individuals with prescriptions to be in control of motor vehicles with metabolites in their system while criminalizing individuals without prescriptions, the statute is unreasonable and fails rational basis review.

Although the statute fails rational basis review, it is informative to complete the analysis under Utah's uniform operation of laws test. The second part of the test is to determine whether "the legislature has a legitimate objective in creating the classification."¹²² The court does not, "however, 'accept any conceivable reason for the legislation. . . . Rather, [the court] judge[s] such enactments on the basis of reasonable or actual legislative purposes.'"¹²³

In the Metabolite Statute, there appears to be no legitimate objective in creating the classification. The presumed objective in enacting the statute was to make Utah's roads safer.¹²⁴ If it is dangerous for an individual to operate a motor vehicle with a controlled substance metabolite in the body, it will be dangerous regardless of whether the individual has a prescription. It would be unreasonable to say that the state would be willing to allow a certain set of allegedly dangerous drivers to operate on the roads, while prohibiting another set of equally dangerous drivers. It is illustrative that Utah's DUI law does not make a similar exception allowing individuals with a prescription to control a motor vehicle while under the influence of a controlled substance.¹²⁵ This lack of distinction is for the obvious reason that an individual under the influence of a drug, whether legally or illegally consumed, is dangerous. Without a reasonable and legitimate purpose, the statute fails rational basis review under Utah's uniform operation of laws requirement.

¹²¹ See *State v. Robinson*, 254 P.3d 183, 191 (Utah 2011) (recognizing that the consumption of a drug "is most hazardous to the user and those around him").

¹²² *Merrill*, 223 P.3d at 1094.

¹²³ *Id.* (quoting *Blue Cross & Blue Shield v. State*, 779 P.2d 634, 637 (Utah 1989)).

¹²⁴ See *Lewis & Buchan*, *supra* note 17, at 36.

¹²⁵ See UTAH CODE ANN. § 41-6a-502 (LexisNexis 2010).

This line of reasoning has been recognized by other jurisdictions. The Georgia Supreme Court, in *Love v. Georgia*,¹²⁶ found that a similar provision in the Georgia code violated the state's version of the uniform operation clause.¹²⁷ At issue in *Love* was a statute similar to Utah's statute.¹²⁸ On appeal the defendant attacked the State's interest in prohibiting drivers from operating a motor vehicle with a controlled substance metabolite in their body by focusing on the exceptions, or affirmative defenses, carved out by the Georgia General Assembly.¹²⁹ The defendant argued, and the court agreed, that

the statute allows a person with metabolites of legally-used [controlled substances] in his body fluids to be convicted of driving with [controlled substances] in his system only if it is established that he was "rendered incapable of driving safely" while a person with metabolites of illegally-used [controlled substances] can be found guilty of driving with [controlled substances] in his system without evidence of impairment.¹³⁰

The court recognized that there is no difference in the effects of legally used controlled substances and illegally used controlled substances.¹³¹ Because there is no difference in how the controlled substances affect the body, the classification, made by the Georgia General Assembly between legal users and illegal users was arbitrary.¹³² In light of the fact that the classification was arbitrary, the court found that the classification could not be supported by the purported state interest to protect the safety of the roads and struck down the statute on equal protection grounds.¹³³

Similarly, Utah's Metabolite Statute is constitutionally defective because it violates Utah's uniform operation of laws clause. Because the law impermissibly distinguishes between similarly situated persons without any reasonable justification, the statute is constitutionally defective and must be overturned.

VI. CONCLUSION

The Utah legislature and courts need to evaluate the constitutionality of Utah's Metabolite Statute. As it presently stands, the statute impermissibly punishes an individual's status as a past drug user and fails to punish any direct act the individual may have committed. Because status offenses are unconstitutional, the statute must be overturned. Further, the statute impermissibly classifies and disparately impacts similarly situated individuals. Because there is no reasonable

¹²⁶ 517 S.E.2d 53 (Ga. 1999)

¹²⁷ *See id.* at 57.

¹²⁸ *Id.* at 55–56.

¹²⁹ *Id.* at 56–57.

¹³⁰ *Id.* at 57.

¹³¹ *Id.*

¹³² *See id.*

¹³³ *Id.*

justification for this disparate treatment, the statute must be found in violation of Utah's uniform operation of laws clause and overturned. Although the Utah legislature is free to prosecute individuals for actual drug use or possession, the State may not use the Metabolite Statute as an end-run around the constitutional protections provided to the citizens of Utah.