OFFENSE DEFINITION IN WISCONSIN'S IMPAIRED DRIVING STATUTES

THOMAS J. HAMMER*

I. Introduction 166
II. The Offenses and Their Elements 167
A. OMVWI: The General Offense 167
1. The Act: "Drive/Operate" a Motor Vehicle Upon a Highway 168
2. The Condition of the Operator 173
a. "Under the Influence": A Condition of Impairment 173
b. The Chemical Offense: ".10" 181
B. Offenses Involving Death and Great Bodily Harm 183
1. Homicide by Intoxicated User of A Vehicle 185
2. Felony Injury by Intoxicated Use of a Vehicle 192
C. Misdemeanor Injury by Intoxicated Use of a Vehicle 193
D. The "Not a Drop" Law 196
III. Multiple Charge and Conviction Issues in Cases of Impaired Driving 197
A. Multiple Victim Cases 200
B. The "Under the Influence"-".10" Combination of Charges 203
C. The Combination of an OMVWI Charge with a Homicide or Injury Offense 205
D. The Relationship of the Injury Offenses 211
IV. Recommendations and Conclusion 211

* A.B., 1971, Marquette University; J.D., 1975, Marquette University Law School. Assistant Professor, Marquette University Law School. The author gratefully acknowledges the research assistance of Maria Arechaederra and James Marlin in the preparation of this article.

I. INTRODUCTION

Ever since the automobile became commercially available to the public at large, the problem of drinking and driving has posed a major threat to community safety. The hazard has been met by a variety of legislative responses over time, each successively designed in one way or another to grapple more effectively with a problem which prior law had failed to check.

In Wisconsin the legislature first tackled the issue of impaired driving[1] in 1911.[2] Since that time the relevant laws have been subjected to repeated alteration,[3] the most recent overhaul occurring in the 1981-82 legislative session.[4] If history is a learned teacher, its lessons translate into a forecast of continual change in the definition of the substantive impaired driving offenses, the procedural mechanisms for their enforcement and adjudication, and the manner and method of dealing with convicted offenders.[5]

The focus of this article is upon the substantive offense definitions in the complex of Wisconsin's impaired driving statutes. After an initial study of the various relevant laws in Part II, the discussion proceeds in Part III to an analysis of the relationship of the several offenses as it impacts upon multiple charge and conviction issues in cases of impaired driving. Suggested methods of responding to certain critical problems identified in these two sections are posited in Part IV.

---

1. The term "impaired driving" is employed throughout this article in a generic way to connote driving while "under the influence" or while the actor has a blood alcohol concentration equal to or in excess of stated statutory limits. This usage of the term may be contrasted with legislation in other jurisdictions which classifies impaired driving as a lesser offense of driving while intoxicated or while under the influence of intoxicants. *See, e.g.*, COLO. REV. STAT. § 42-4-1202(1)(b) (1984); N.Y. VEH. & TRAF. LAW § 1192(1) (McKinney Supp. 1984-85).

2. The original Wisconsin statute on the subject provided that "no intoxicated person shall operate, ride or drive any automobile, motor cycle or other similar motor vehicle along or upon any public highway of this state." WIS. STAT. § 1636-49 (1911).

3. Former versions of Wisconsin's impaired driving statutes which are significant in the interpretation of the current laws are specifically referred to in the discussion and notes which follow.

4. 1981 Wis. Laws 20, *amended by* 1981 Wis. Laws 184.

5. The flurry of legislative activity which this subject currently generates is evidenced in the present session of the Wisconsin legislature. As of December 1, 1985, the lawmakers had under consideration at least fifteen bills dealing with the subject of impaired driving.

II. THE OFFENSES AND THEIR ELEMENTS

A. OMVWI: The General Offense

The basic offense in Wisconsin's statutory scheme of impaired driving offenses is that of "operating while under the influence of intoxicant or other drug" (OMVWI).[6] On several occasions the Wisconsin Supreme Court has articulated the elements of this offense as being two in number: first, that the defendant drove or operated a motor vehicle, and second, that the defendant was "under the influence" or had a blood alcohol concentration equal to or in excess of the statutory limit at the time of driving or operating.[7] This formulation is suggested by the very language of the OMVWI statute, but it must be supplemented by the requirement that the offense be committed upon a highway or upon premises held out to the public for motor vehicle usage.[8]

---

6. WIS. STAT. § 346.63(1) (1983-84) provides:

(1) No person may drive or operate a motor vehicle while:

(a) Under the influence of an intoxicant or a controlled substance or a combination of an intoxicant and a controlled substance, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or

(b) The person has a blood alcohol concentration of 0.1% or more by weight of alcohol in that person's blood or 0.1 grams or more of alcohol in 210 liters of that person's breath. (c) A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of par. (a) or (b) or both for acts arising out of the same incident or occurrence. If the person is charged with violating both pars. (a) and (b), the offenses shall be joined. If the person is found guilty of both pars. (a) and (b) for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under ss. 343.30(1q) and 343.305. Paragraphs (a) and (b) each require proof of a fact for conviction which the other does not require.

The acronym "OMVWI" is used throughout this article to refer only to the basic offense in the complex of Wisconsin's impaired driving statutes, *i.e.*, operating under the influence of an intoxicant or drug, contrary to WIS. STAT. § 346.63(1) (1983-84). Other similar designations which appear in the cases and in the literature include DUI, DWI, OAWI, and OWI. In no instance is there any reference herein to "drunken driving" terminology because of the distortion which this language visits upon the true nature of the offense.

7. *See* State v. Gaudesi, 112 Wis. 2d 213, 220, 332 N.W.2d 302, 305 (1983); State v. Burkman, 96 Wis. 2d 630, 644, 292 N.W.2d 641, 647-48 (1980); Monroe County v. Kruse, 76 Wis. 2d 126, 131, 250 N.W.2d 375, 377 (1977); City of Milwaukee v. Johnston, 21 Wis. 2d 411, 414, 124 N.W.2d 690, 692 (1963).

8. *See infra* notes 26-30 and accompanying text.

1. The Act: "Drive/Operate" a Motor Vehicle Upon a Highway

The first element of the general OMVWI offense requires the prosecution to establish that the defendant drove or operated a motor vehicle. The "drive/operate" distinction and its accompanying definitions[9] were initially engrafted upon the law in 1977.[10] The statute in effect prior to that time employed the two terms interchangeably to mean "exercising physical control over the vehicle's speed and direction while in motion."[11] This definition survives in the current version of the statute but is limited in applicability to the term "drive."

The "drive" concept in the present law has to date posed little interpretative difficulty.[12] The motion requirement readily identifies the threshold at which "driving" commences.[13] The more difficult issue has been the determination of a similar threshold by which to measure the act of "operating." The concern is one of identifying the minimum conduct which constitutes the statutory requirement of "physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion."[14]

---

9. WIS. STAT. § 346.63(3) (1983-84) provides definitions of the conduct as follows:

(3) In this section:

(a) "Drive" means the exercise of physical control over the speed and direction of a motor vehicle while it is in motion.

(b) "Operate" means the physical manipulation or activation of any of the controls of a motor vehicle necessary to put it in motion.

10. 1977 Wis. Laws 193, § 14.

11. WIS. STAT. § 346.63(4) (1975). The definition included in the 1975 version of the statute was originally enacted in 1968. 1967 Wis. Laws 292, § 49. Prior to the 1968 change the OMVWI statutes variously identified the prohibited conduct in generic terms without codified definitions. *See, e.g.*, WIS. STAT. § 346.63(1) (1965) ("operate"); WIS. STAT. § 85.13 (1955) ("operate"); WIS. STAT. § 343.182 (1925) ("operate, ride or drive").

12. The more common issue has traditionally been one of evidence sufficiency in those cases lacking eyewitness testimony of the defendant's driving or an admission to that effect and in which the prohibited conduct must be proven, if it is to be established at all, with the use of circumstantial evidence. *See, e.g.*, State v. Hall, 271 Wis. 450, 73 N.W.2d 585 (1955).

13. Even before the legislature initiated the practice of providing conduct definitions, the OMVWI offense was understood to commence when the driver set his or her vehicle in motion upon a highway. *See* City of Milwaukee v. Richards, 269 Wis. 570, 577, 69 N.W.2d 445, 448 (1955).

14. A comparison of the definition of "operating" with that of "driving" reveals that the latter is necessarily included within the former. Nonetheless it is desirable for the legislature to have specifically defined the act of "driving." In those cases premised

The most instructive treatment of the "operating" concept thus far has been provided by the Wisconsin Court of Appeals in *County of Milwaukee v. Proegler*.[15] In this case the defendant was found sleeping behind the wheel of his truck which was parked on an emergency ramp of an interstate highway. The engine was running and the transmission shift lever was in the "park" position. The court held that this conduct constituted "operating."[16] It anchored its analysis in the legislative policy of discouraging individuals who are "under the influence" from initially getting behind the wheel. "One who enters a vehicle while intoxicated, and does nothing more than start the engine is as much of a threat to himself and the public as one who actually drives while intoxicated."[17] The statute was held to reach conduct such as Proegler's because "operation" occurs when the engine is started or left on to run.[18] It may also occur when a driver restrains the movement of a vehicle while its engine is running.[19]

While starting the engine or allowing the motor to run may serve as useful benchmarks by which to identify "operation" under the statute, the question remains whether that behavior constitutes the minimum conduct level at which liability attaches.[20] Situations are indeed conceivable in which an impaired driver activates an essential control of the vehicle

---

upon evidence that the defendant actually exercised control over a vehicle in motion, a charge of "driving" furnishes precise notice to the accused regarding the theory of the prosecution. This is not to suggest, however, that notice is deficient or the pleading defective if a "driver" is charged as an "operator" because driving a motor vehicle is encompassed definitionally by the term "operate."

15. 95 Wis. 2d 614, 291 N.W.2d 608 (Ct. App. 1980).

16. The court reached this conclusion even though the defendant was asleep at the time of operation and had no present intent to move the vehicle. An intent to drive is not an element of the OMVWI offense. *Id.* at 628, 291 N.W.2d at 614.

17. *Id.* at 626, 291 N.W.2d at 613. The court specifically recognized the danger that one who starts the engine may thereafter intentionally or accidentally move the vehicle. *Id.*

18. *Id.* at 628-29, 291 N.W.2d at 614.

19. *Id.* at 627-28, 291 N.W.2d at 614.

20. In the vast majority of cases which involve no-movement "operation" of vehicles, the dangerous conduct of the impaired operator is usefully identified in connection with his activation of the motor. *See, e.g.*, Village of Elkhart Lake v. Borzyskowski, 123 Wis. 2d 185, 366 N.W.2d 506 (Ct. App. 1985) (impaired driver seated behind the wheel of a parked vehicle with the engine running held to be an "operator"); State v. Byrtek, No. 83-1716 (Wis. Ct. App. Mar. 7, 1984) (unpublished opinion available on LEXIS, Wisconsin library, Cases file) (impaired driver seated behind the wheel with the engine

under circumstances in which that conduct poses a present danger to public safety even though the engine of the vehicle is not activated.[21] Such conduct would appear to qualify as "operation" under the statutory definition. Accordingly, it is suggested that a more precise formulation of the threshold of "operation" would be conduct which involves starting the vehicle's engine, allowing it to run, *or* activating any control short of engine ignition which might allow the vehicle to move, albeit accidentally.[22]

---

running and the transmission shift lever in "reverse," but involving no movement of the vehicle because it was stuck in the mud, held to constitute "operation").

Like several additional cases cited in the notes which follow, *Byrtek* is an unpublished opinion issued by the Wisconsin Court of Appeals. Such opinions have no precedential value and may not be cited as authority in any Wisconsin court except to support a claim of res judicata, collateral estoppel or law of the case. WIS. STAT. § 809.23(3) (1983-84). Unpublished opinions are referred to in the materials which follow only in those instances in which the decisions contribute some additional insight into the interpretation and application of the impaired driving statutes hereunder consideration.

21. A simple illustration demonstrates the point. The intoxicated individual whose vehicle is parked on a steep incline enters the car, puts the key into the ignition switch, engages the clutch, places the gear shift lever in the "neutral" position and restrains the vehicle from rolling down the incline by activating the brake pedal. Even though the individual has not started the engine, he has nevertheless activated several of the controls necessary to put the vehicle in motion. It is submitted that this conduct is included within the statutory definition of "operating."

22. The practical reality is that in most prosecutions the defendant's conduct rather clearly falls within the "drive/operate" definitions. This is not meant to suggest, however, that the formulation of separate definitions has not had a significant impact upon the OMVWI law.

In the first instance, the enactment of the present definition of "operate" expanded the coverage of the prior statute such that it now reaches certain dangerous conduct which may occur either before the vehicle is put in motion or after it has been moved. Second, the codification of the present definition of "operate" has furthered the interest of the prosecution in admitting the results of chemical tests for intoxication. WIS. STAT. § 885.235(1) (1983-84) allows for the receipt of such test results as proof of the defendant's condition (without expert testimony to establish their probative value) if the test is conducted within three hours of the driving or operation of the vehicle. Prior to the development of the expanded statutory definition of "operate," the calculation of the time period (formerly two hours) commenced at the point at which the evidence demonstrated that the vehicle was last in motion. This posed no problem when a police officer or other witness personally observed the driving. The more difficult situation was that in which the officer discovered the defendant passed out behind the wheel while the engine was running, but could not establish with any precision when the vehicle was last in motion. Under present law, the latter scenario poses no time issue because the officer has actually witnessed an act of "operating" and the three-hour period commences to run from that moment forward. However, even under the current liberal definition of "operating," a calculation problem may nonetheless exist in those cases

In addition to proving that the defendant's conduct constituted "driving" or "operating," the evidence in an OMVWI case must also demonstrate that the accused engaged in that conduct in a "motor vehicle." This term connotes self-propelled devices in, upon or by which persons or property may be transported or drawn upon a highway.[23] Snowmobiles and railroad trains are excluded from coverage[24] as are conveyances which are not self-propelled, such as bicycles and animal-drawn vehicles.[25]

Finally, it should be observed that enforcement of the OMVWI statute is limited to those instances of motor vehicle driving or operation which occur on highways[26] or upon "premises held out to the public for use of their motor vehi-

---

which involve a lapse of time between the last provable act of "driving" or "operating" and the discovery of the driver or operator.

23. WIS. STAT. § 340.01(74) (1983-84) provides: " 'Vehicle' means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except railroad trains. A snowmobile shall not be considered a vehicle except for purposes made specifically applicable by statute."

"To be a vehicle it need not be transporting a person or property at the time. . . , but only that it be capable of such transportation on a highway." Lemon v. Federal Ins. Co., 111 Wis. 2d 563, 567, 331 N.W.2d 379, 381 (1983).

WIS. STAT. § 340.01(35) provides: " 'Motor Vehicle' means a vehicle which is self-propelled, including a trackless trolley bus, except that a snowmobile shall only be considered a motor vehicle for purposes made specifically applicable by statute."

The meaning of "motor vehicle," as suggested in the text accompanying this note, is obtained by synthesizing the two statutory provisions quoted above.

24. *See supra* note 23.

25. "The term 'motor vehicle' is used [in the Vehicle Code] when the purpose is to exclude animal drawn vehicles and vehicles propelled by human power." Wisconsin Legislative Council note to 1957 S.B. 99, § 340.01(35) (1957). On the other hand, the term "vehicle" is used in the Vehicle Code "whereever broad coverage is desired." *Id.* at § 340.01(74).

The discussion in the accompanying text is not meant to imply that the legislature has ignored the problem of the impaired driving of other vehicles which are not within the scope of the OMVWI law. *See, e.g.*, WIS. STAT. § 30.68 (1983-84) (motorboats); *id.* at § 114.09 (aircraft); *id.* at § 350.10(3) (snowmobiles).

26. WIS. STAT. § 340.01(22) (1983-84) provides the relevant definition of "highway":

> "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub.(46).

cles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof."[27] The highway limitation is consistent with the general applicability of the Rules of the Road[28] to offenses occurring upon highways.[29] The expansion of coverage to premises held out for public use of motor vehicles is designed to address the special public safety concerns associated with the OMVWI offense.[30]

See In the Interest of E.J.H., 112 Wis. 2d 439, 334 N.W.2d 77 (1983) (construing the statutory definition of "highway" to include the entire right-of-way).

The definition of "highway" quoted above specifically excludes "private roads and driveways" as those terms are defined in WIS. STAT. § 340.01(46) (1983-84). The latter statute provides:

> "Private road or driveway" is every way or place in private ownership and used for vehicular travel only by the owner and those having express or implied permission from the owner and every road or driveway upon the grounds of public institutions other than those under the jurisdiction of the county board of supervisors.

27. WIS. STAT. § 346.61 (1983-84). The court of appeals has stated as follows:

> Premises may be held out to the public either expressly or impliedly. Premises are expressly held open to the public where the proprietor actually invites members of the public to use the premises. Premises are impliedly held out to the public for the use of their motor vehicles if such premises are ordinarily and regularly used by the public for their motor vehicles. . . .[Section 346.61] requires only that the premises be held out to some class of the public, not all of the public.

State v. Wetchen, No. 82-1925-CR (Wis. Ct. App. Feb. 23, 1983)(unpublished opinion available on LEXIS, Wisconsin library, Cases file). In State v. Biddick, No. 85-0807 (Wis. Ct. App. Aug. 15, 1985) (unpublished opinion available on LEXIS, Wisconsin library, Cases file) an apartment parking lot was held to constitute premises covered by section 346.61. Even though the lot was posted to prohibit parking by nonresidents, such signs did not prohibit the public from driving in or out of the lot to pick up or drop off passengers nor did they prohibit such other common uses for which the invitation to enter was implicit. A similar result was reached in State v. Vail, No. 84-147 (Wis. Ct. App. May 25, 1984) (unpublished opinion available on LEXIS, Wisconsin library, Cases file), wherein the parking lot of a forty-eight unit apartment complex was held to be premises covered by section 346.61. The lot's nature, size and location necessarily implied that residents, guests, invitees, service personnel, delivery persons and others would use the lot. This variety of uses coupled with the absence of any evidence of restricted access by signs or gates led the court to conclude that the premises were held out for public use. *See also* State v. Peterson, No. 83-861 (Wis. Ct. App. Nov. 22, 1983) (unpublished opinion available on LEXIS, Wisconsin library, Cases file) (holding that the roadway of a trailer court was a place held out to the public for motor vehicle usage); Wisconsin Legislative Council note to 1957 S.B. 99, § 346.61 (1957) ("[Section 346.61] will apply in such areas as parking lots, filling stations and loading platforms."); 65 OP. ATT'Y GEN. 45, 46 (1976) (OMVWI law enforceable upon public parking lots under authority of section 346.61).

28. WIS. STAT. ch. 346 (1983-84).

29. *Id.* at § 346.02(1).

30. Wisconsin Legislative Council note to 1957 S.B. 99, § 346.61 (1957).

2. The Condition of the Operator

The second element of the general OMVWI offense concerns the condition of the driver (as opposed to the driver's act). It is expressed alternatively as the condition of being "under the influence"[31] or the status of having a quantifiable chemical concentration of alcohol in the blood or breath which equals or exceeds the statutory limit.[32] These alternative definitions represent dual theories of liability and confront the driver with the possibility of ultimately defending against multiple charges.[33]

a. "Under the Influence": A Condition of Impairment

The OMVWI statute identifies a total of five "influenced" conditions which, if accompanied by the requisite act, may subject a person to prosecution.[34] Three of these conditions are described without a statutory definition of the extent to which the driver must be impaired; the other two are phrased in a manner somewhat descriptive of the condition intended by the legislature.

In the category of conditions identified as to source but unaccompanied by definition as to degree of impairment, one may not drive or operate a motor vehicle if that conduct occurs while "under the influence" of an intoxicant,[35] a con-

---

31. WIS. STAT. § 346.63(1)(a) (1983-84).

32. *Id.* at § 346.63(1)(b).

33. *Id.* at § 346.63(1)(c). *See also infra* notes 168-177 and accompanying text.

34. *See supra* note 6.

35. The Vehicle Code provides no definition of "intoxicant," nor does it specifically import a definition from other statutory sources. In the absence of such, the common and approved usage of nontechnical words and phrases contained in a statute is presumed to be the usage intended by the legislature. State v. Ehlenfeldt, 94 Wis. 2d 347, 356, 288 N.W.2d 786, 790 (1980). The meaning may be established with dictionary definitions. *See,e.g.*, State v. Mauthe, 123 Wis. 2d 288, 298, 366 N.W.2d 871, 876 (1985) (standard Engligh language dictionary employed). One such definition of "intoxicant" is "an agent that intoxicates; especially, an alcoholic beverage." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 686 (1980). The same source thereafter defines "intoxicate" as "[t]o induce, especially by the effect of ingested alcohol, any of a series of progressively deteriorating states ranging from exhilaration to stupefaction." *Id.*

While most intoxicant cases involve those who have consumed traditional alcoholic "spirits" (beer, wine or liquor), the occasional situation presents itself in which the actor has sniffed such substances as model glue to the point of being "under the influence" thereof. Under a liberal definition of the term "intoxicant," which includes but is not

trolled substance,[36] or a combination of an intoxicant and a controlled substance.[37] The precise meaning of "under the influence" is the subject of some contemporary dispute. In *State v. Waalen*,[38] which represents the most recent treatment of the issue, the Wisconsin Court of Appeals held that an instruction which informed the jury that "under the influence of an intoxicant" covers "any abnormal mental or physical conditions which is [*sic*] the result of indulging in any degree in intoxicating liquors, including beer, which tends to deprive one of that clearness of intellect and self-control which one would otherwise possess," fully and fairly stated the test by which the proscribed condition is gauged.[39] The court cast the standard at something less than the "material impairment of ability to

---

limited to traditional alcoholic beverages, the model glue may be deemed an influence source recognized by the OMVWI law.

36. WIS. STAT. § 340.01(9m) (1983-84) incorporates the Uniform Controlled Substances Act, WIS. STAT. ch. 161 (1983-84), definition of "controlled substance" into the Vehicle Code. The term means any "drug, substance or immediate precursor" which is classified in sections 161.14 through 161.22 of the Wisconsin Statutes.

37. This combination provision was added to the general OMVWI statute to clarify what was evidently perceived to be a potential loophole in a predecessor version of the law. The prior statute provided that it was unlawful to drive or operate a motor vehicle "while under the influence of an intoxicant or controlled substance." WIS. STAT. § 346.63(1) (1979-80). Conditions involving the combined use of an intoxicant and a controlled substance had to be resolved by analogy to the principles explicated in City of Waukesha v. Godfrey, 41 Wis. 2d 401, 164 N.W.2d 314 (1969). *See infra* note 55 and accompanying text. If indeed there was a gap in coverage, it was remedied by the specific inclusion of the combination intoxicant-controlled substance provision in section 346.63(1)(a). 1981 Wis. Laws 20, § 1598t.

38. 125 Wis. 2d 272, 274, 371 N.W.2d 401, 402 (Wis. Ct. App. 1985). In an order dated Oct. 8, 1985, the Wisconsin Supreme Court granted a petition to review this decision.

39. The trial court in *Waalen* departed from the uniform jury instruction which informs the jury that "under the influence" means that "the person's ability to safely control his vehicle be materially, that is substantially, impaired." Wis. JI-Criminal 2663 (1982). The quoted standard employed in the pattern instruction is derived from WIS. STAT. § 939.22(42) (1983-84) which provides a definition of "under the influence of an intoxicant" for purposes of Criminal Code offenses as follows:

> "Under the influence of an intoxicant" means that the actor's ability to operate a vehicle or handle a firearm or airgun is materially impaired because of his or her consumption of an alcohol beverage or controlled substance under ch. 161 or both, of any other drug or of an alcohol beverage and any other drug.

See Wis. JI-Criminal 2663 comment 6 (1982).

While this definition necessarily applies to criminal offenses under the provisions of WIS. STAT. § 939.20 (1983-84), its applicability to the general OMVWI statute (a Vehicle Code offense) was rejected by the *Waalen* court: "Proof of a 'material'or 'substantial' impairment in the defendant's ability to drive is therefore not a requirement for

drive" threshold which is applied by legislative mandate to companion offenses codified in the Criminal Code.[40] Its conclusion was ostensibly premised upon a series of Wisconsin appellate opinions holding that the general OMVWI statute does not require proof of appreciable interference in the management of a motor vehicle.[41] The latter authorities, however, more pointedly address the question of whether the operator's condition must be *evidenced* by appreciable interference, *e.g.*, erratic driving, and squarely hold that it does not. Such de-

---

convicting a person of driving under the influence." 125 Wis. 2d at 275, 371 N.W.2d at 403.

The instruction actually given by the trial court in *Waalen* parallels a prior version of the uniform jury instruction defining "under the influence." *Id.* at 274, 371 N.W.2d at 402. The language contained therein, which is quoted in the accompanying text, set the standard of impairment in a manner consistent with that urged by one commentator as the recognized Wisconsin test:

> The Wisconsin Supreme Court, as well as almost all other supreme courts in the country, has defined the term "under the influence of intoxicants" on numerous occasions and has held that the condition covers not only all the well known and easily recognized conditions and the degrees of intoxication but any abnormal mental or physical condition which is the result of indulging, in any degree, in intoxicating liquors and which tends to deprive him of that clearness of intellect and control of himself which he would otherwise possess.

Sullivan, *Driving Under the Influence of Intoxicating Liquor — Proof, Prosecution and Defenses*, 1958 WIS. L. REV. 195, 199. No citation of authority accompanies this passage. However, the author served as appellate counsel in one of the leading cases to address the elements of the general OMVWI offense. City of Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955). His brief for that case cites numerous cases from other jurisdictions which have applied the standard of "under the influence" referred to in his law review article. Brief for Respondent at 24-33, City of Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955). *See, e.g.*, Hasten v. State, 35 Ariz. 427, 280 P. 670 (1929); State v. Rodgers, 91 N.J.L. 212, 102 A. 433 (1917); Commonwealth v. Buoy, 128 Pa. Super. 264, 193 A. 144 (1937). The same standard was also applied by the trial court in the *Richards* case. Brief for Appellant at app. 102-05, City of Milwaukee v. Richards, 269 Wis. 570, 69 N.W.2d 445 (1955).

In City of Fond du Lac v. Hernandez, 42 Wis. 2d 473, 167 N.W.2d 408 (1969), the Wisconsin Supreme Court reviewed jury instructions relative to the definition of "under the influence" which were similar to those given in *Waalen*. In its affirmance of the conviction, the court rejected a contention of the defense that the jury should have been told that the degree of influence "must be such as to affect the defendant's ability to drive with due regard for the safety of others." *Hernandez*, 42 Wis. 2d at 477, 167 N.W.2d at 410.

See also 1 R. ERWIN, DEFENSE OF DRUNK DRIVING CASES § 1.04[2] (3d ed. 1985) (survey of the various interpretations which the courts in other jurisdictions have affixed to "under the influence" terminology).

40. *See* WIS. STAT. § 940.09 (1983-84) (homicide by intoxicated user of vehicle or firearm); *id.* at § 940.25 (injury by intoxicated use of a vehicle).

41. *See, e.g.*, State v. Gaudesi, 112 Wis. 2d 213, 221, 332 N.W.2d 302, 305 (1983); City of Milwaukee v. Richards, 269 Wis. 570, 576-77, 69 N.W.2d 445, 448 (1955).

monstrable interference with the operation and control of the vehicle is not an element of the OMVWI offense,[42] although evidence thereof may certainly be probative of the defendant's impaired condition.[43]

Notwithstanding the authorities relied upon in *Waalen*, a problem of definition remains with reference to identifying with any precision the state of being "under the influence." Most assuredly the phrase connotes a degree of impairment short of outright intoxication.[44] It has also been described as "considerably less" than the degree of intoxication which would render a person incapable of understanding and voluntarily waiving his constitutional rights.[45] While these propositions are instructive in explaining what "under the influence" is not, they are inadequate in clarifying precisely what the condition is.

One resolution of the issue is suggested by referring in the first instance to the statutes defining the evidentiary significance of chemical test results. Section 885.235(1)(c) of the Wisconsin Statutes provides that an analysis showing a person's blood alcohol concentration at 0.10% or more by

---

42. *Richards*, 269 Wis. at 576-77, 69 N.W.2d at 448.

43. *Gaudesi*, 112 Wis. 2d at 221, 332 N.W.2d at 305; State v. Hanson, Nos. 84-1387-CR and 84-1388-CR (Wis. Ct. App. Mar. 18, 1985) (unpublished opinion available on LEXIS, Wisconsin libarary, Cases file); State v. Maki, No. 82-327 (Wis. Ct. App. June 8, 1982) (unpublished opinion available on LEXIS, Wisconsin library, Cases file).

44. The drunken-driving law as originally enacted, and up to 1929, employed the phrase "while intoxicated" to describe a person coming under its provisions. In 1929, the legislature, by ch. 454, Laws of 1929, repealed the old statute and created in its stead sec. 85.13, Stats. In the language of the new statute, a person is prohibited from operating any vehicle upon any highway "while under the influence of intoxicating liquor." This change indicates that the legislature, with increasing awareness of the importance of safety in the operation of dangerous instruments on the highway, extended the prohibitions from persons who would come under the restricted category of absolute intoxication to those persons whose reactions would show that they were merely "under the influence of intoxicating liquor."

Richards, 269 Wis. at 575, 69 N.W.2d at 447-48.

45. State v. Paegelow, 56 Wis. 2d 815, 820, 202 N.W.2d 916, 918 (1973). This proposition is especially significant in those cases in which the prosecution claims that the accused was "under the influence" but was nevertheless capable of understanding and waiving his constitutional rights prior to the making of incriminating statements to the police authorities.

weight[46] is prima facie evidence that the individual is "under the influence of an intoxicant." This statute is expressly applicable in *any* action or proceeding in which it is material to prove that condition.[47] Commenting on a predecessor version of section 885.235, the Wisconsin Supreme Court noted that the provision was enacted in response to the difficulty encountered by the courts in establishing the degree of intoxication prohibited by the OMVWI law and was designed to clarify the meaning of "under the influence."[48]

In the context of Criminal Code offenses involving the causation of death[49] or great bodily harm[50] by driving while "under the influence," that condition is defined as one of material impairment of the ability to operate a vehicle.[51] By application of section 885.235 to these statutes, a chemical test result of 0.10% blood alcohol is prima facie evidence of that degree of intoxication which would constitute such material impairment. But section 885.235 also applies to the OMVWI statute and 0.10% is prima facie evidence of the degree of intoxication which constitutes "under the influence" for the latter offense as well. If identical chemical test results constitute prima facie evidence of the proscribed condition in both contexts, a compelling argument may be made that the legislature intended the meaning of "under the influence" to be equivalent in both contexts.[52] If the latter premise is correct,

---

46. An alternative formulation of the standard is 0.1 grams or more of alcohol in 210 liters of the breath. WIS. STAT. § 885.235(1)(c) (1983-84).

47. *Id.* at § 885.235(1).

48. 269 Wis. at 576, 69 N.W.2d at 448. The predecessor version of section 885.235 to which the *Richards* court referred was WIS. STAT. § 85.13(2) (1951). The latter provision was initially enacted in 1949. 1949 Wis. Laws 534. It was codified as part of the then-existing general OMVWI law and was applicable upon the trial of any action or proceeding arising out of acts alleged to have been committed by any person arrested for operating a motor vehicle while "under the influence." This chemical test statute was thereafter replaced by WIS. STAT. § 325.235 (1955). *See* 1955 Wis. Laws 510. The replacement statute (like the present section 885.235) was made specifically applicable to *any* action or proceeding in which it was material to prove that an actor was "under the influence." *Id.* An argument may be made that the legislature thereby sought to establish a definition of the condition which would serve as a uniform threshold of impairment throughout the impaired driving statutes.

49. WIS. STAT. § 940.09 (1983-84).

50. *Id.* at § 940.25.

51. *Id.* at § 939.22(42).

52. Although the court of appeals in *Waalen* rejected the applicability of the Criminal Code threshold of impairment to the general OMVWI offense, it did indicate that

then the threshold of "influence," defined in the criminal statutes as material impairment of ability to operate a vehicle, would accordingly be applicable to the general OMVWI offense as well.[53] Under the general OMVWI statute, the "material impairment" definition would then pertain without regard to whether the defendant's condition was caused by the

---

the variance in standards is an "illogical distinction" but left the matter to legislative resolution. *Waalen*, 125 Wis. 2d at 275, 371 N.W.2d at 403.

The Criminal Code definition of "under the influence" emanated from the enactment of that Code in 1955. It is interesting to note that when the Criminal Code Advisory Committee (*see infra* note 107) discussed the Code's definition of the standard of impairment, a motion was made to amend the language of the definition such that it would be applicable to Code offenses as well as to the general OMVWI law. The motion failed to carry but the committee chair, Hon. Gerald J. Boileau, "asked that the minutes show that the consensus of the committee was that there should be uniformity in the definition of the term 'under the influence of an intoxicant' in this code as well as Chapter 85 [Vehicle Code]." Minutes of the Criminal Code Advisory Committee at 7 (July 22, 1955). The committee thereupon directed that this matter be referred to another committee which was working on Vehicle Code revisions. *Id.*

The Wisconsin Legislative Council's Motor Vehicle Laws Committee initially accepted this suggestion from the Criminal Code Advisory Committee and proposed to incorporate the Criminal Code definition of "under the influence" into the general OMVWI statute. *See* Wisconsin Legislative Council Second Preliminary Report of the Motor Vehicle Laws Committee at 80 (Sept. 1956); Minutes of the Motor Vehicle Laws Committee at 10 (May 18-19, 1956). The committee subsequently struck the definition from its report when a disagreement developed as to whether the language would effectuate a change in the meaning of the general OMVWI statute. *See* Wisconsin Legislative Council Supplement to First and Second Preliminary Reports of the Motor Vehicle Laws Committee at 18 (Dec. 1956); Minutes of the Motor Vehicle Laws Committee at 2 (Nov. 8, 1956). No such definition was included in the legislation which was based upon the Council's report and which served as the genesis for the present Vehicle Code. 1957 Wis. Laws 260.

53. This conclusion would pertain to any case without regard to whether the defendant submitted to chemical testing. In the context of this discussion the chemical test statute is significant only because it establishes an equivalency of the "under the influence" definition in the Criminal Code with that in the general OMVWI statute.

The Wisconsin Supreme Court seemed to assume such an equivalency in State v. Caibaiosai, 122 Wis. 2d 587, 363 N.W.2d 574 (1985). Although the meaning of "under the influence" was not the issue in this case, the court in essence characterized the principal difference between the general OMVWI offense as the principal difference between the general OMVWI offense and the Criminal Code homicide by intoxicated user offense as being the causation of death, an element of the latter crime:

> It is negligence per se to operate a motor vehicle while under the influence of intoxicants. Experience has established this conclusion and the legislature has accepted it as a fact in sec. 346.63(1)(a), Stats., and has made such combined activities a Class D felony when the operation of the vehicle results in death in sec. 940.09(1)(a).

Id. at 595, 363 N.W.2d at 578.

ingestion of an intoxicant, a controlled substance or a combination of an intoxicant and a controlled substance.

In addition to these sources of impairment, the statute also prohibits driving or operating while under the influence of any other drug[54] or under the combined influence of an intoxicant and any other drug.[55] In the latter two situations, however, the language of section 346.63(1)(a) itself suggests the degree of influence intended by the legislature. The threshold is cast in terms of being under the influence "to a degree which renders [the driver or operator] incapable of safely driving." The "safe driving" standard[56] applicable to those who have consumed drugs or a combination of an intoxicant and a drug is

---

54. In both the Criminal Code and the Vehicle Code, the term "drug" has the meaning specified therefor in WIS. STAT. § 450.06 (1983-84). *Id.* at §§ 340.01(15mm), 939.22(11). *Id.* at § 450.06 provides:

> The term "drug," as used in this chapter, means:
>
> (1) Articles recognized in the official U.S. Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them, intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in persons or other animals; and
>
> (2) All other articles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in persons or other animals; and
>
> (3) Articles (other than food) intended to affect the structure or any function of the body of persons or other animals; and
>
> (4) Articles intended for use as a component of any articles specified in subs. (1), (2) or (3); but does not include surgical, dental or laboratory instruments, gases, oxygen therapy equipment, X-ray apparatus, or therapeutic lamps, their components, parts or accessories; or equipment, instruments, apparatus, or contrivances used to render such articles effective in medical, surgical or dental treatment; or articles intended for use or consumption in or for mechanical, industrial, manufacturing, or scientific applications or purposes.

55. Provisions relating to driving under the influence of any other drug (a drug other than a controlled substance) or under the combined influence of an intoxicant and any other drug were added to the general OMVWI law by 1983 Wis. Laws 459.

The enactment of a special provision to deal with one who is under the combined influence of an intoxicant and a drug codified a theory of impairment which had previously been developed in the case law. In City of Waukesha v. Godfrey, 41 Wis. 2d 401, 406, 164 N.W.2d 314, 316 (1969), the court indicated that "[a] person who consumes an intoxicant along with medication, does so at his own peril." The court found additional support for this position in language excerpted from Commonwealth v. Rex, 168 Pa. Super. 628, 632, 82 A.2d 315, 317 (1951): "If liquor shares its influence with another influence and is still the activating cause of the condition which the statute denounces it can be truthfully said that the driver was under the influence of liquor." *See also* State v. Nachreiner, Nos. 84-787-CR and 84-788-CR (Wis. Ct. App. Dec. 3, 1984) (unpublished opinion available on LEXIS, Wisconsin library, Cases file).

56. The focus of this standard remains upon the *condition* of the driver. There is no evidence in the statute or in the legislative history that the condition manifest itself in acts of unsafe driving. *See supra* notes 42-43 and accompanying text.

the same as that employed in the Uniform Vehicle Code.[57] The incorporation of this standard for a limited number of influence sources, however, suggests an inquiry relative to the location of this degree of influence on the continuum of impairment. Is it conceptually the same as the "material impairment" standard which is certainly applicable to Criminal Code offenses and arguably applicable to other influenced conditions codified only commas away in the general OMVWI statute,[58] or does it constitute an entirely different degree of impairment?

It is apparent that when these drug and intoxicant-drug combination provisions were added to the law, the purpose was to eliminate perceived loopholes in statutory coverage.[59] The 1984 amendment which effectuated the addition of these influence sources was unaccompanied by any modification of the nonstatutory statement of legislative findings and purpose which was enacted as part of the general overhaul of the impaired driving laws in 1981-82.[60] Among other things, that statement indicates a recognition of the danger to public safety which is posed by the impaired driver and a legislative purpose to maximize highway safety by providing sufficient penalties to deter motor vehicle operation by those who are "intoxicated."[61] The OMVWI penalty statute to which this statement refers is uniform in nature and outlines a range of punishment for driving while in the impaired condition without differentiating among the substances or combinations thereof which generate the condition.[62] If the hazard with which all provisions of section 346.63(1)(a) are designed to cope is the same regardless of the substance involved and if the creation of that hazard is punishable in a uniform way, then it may be argued that the legislature intended the threshold by which the condition of being "under the influence" is defined be uniform throughout the OMVWI law. It makes little sense to apply one standard of impairment when the driver has consumed an intoxicant, a controlled substance or a

57. UNIFORM VEHICLE CODE § 11-902(a)3-4 (Supp. III 1979).
58. *See supra* notes 44-53 and accompanying text.
59. *But see supra* note 55.
60. 1981 Wis. Laws 20, § 2051(13), *amended by* 1981 Wis. Laws 184, § 10.
61. *Id.*
62. WIS. STAT. § 346.65(2) (1983-84).

combination of the two and to apply a qualitatively different standard when the consumption involves a drug or a mixture of a drug and an intoxicant. However, at the present time it remains an open question in Wisconsin whether the safe driving standard has a significance which is different from other degrees of influence.[63]

b. The Chemical Offense: ".10"

The 1981-82 revision of the OMVWI statutes also witnessed Wisconsin joining the growing number of jurisdictions[64] which have expanded their alcohol-related driving laws to include a chemical offense.[65] A basis of liability independent of the "under the influence" provision was thereby created, founded upon driving or operating a motor vehicle with a specified concentration of blood or breath alcohol.[66] In a prosecution premised upon the chemical offense, the issues are twofold: first, whether the defendant drove or operated a motor vehicle upon a highway (or upon premises held out to the public for motor vehicle usage), and second, whether the person had the statutorily identified alcohol content in his blood or breath[67] at the time of driving or operating.[68] Liability at-

63. City of Fond du Lac v. Hernandez, 42 Wis. 2d 473, 167 N.W.2d 408 (1969), discussed at *supra* note 39, was decided prior to the amendment of the general OMVWI statute which incorporated the safe driving standard for limited sources of impairment, such as drugs and the combination of drugs and intoxicants.

The Criminal Code definition of "under the influence" also recognizes drugs and the combination of alcohol and drugs as influence sources. However, it does not modify these sources with any safe driving language. Thus, a uniform standard of impairment exists for all influence sources in the Criminal Code. WIS. STAT. § 939.22(42) (1983-84).

64. *See* 3 R. ERWIN, *supra* note 39, ch. 33A app. (1985) (analysis of the various state versions of "illegal per se" laws).

65. The chemical offense is also known as an "illegal per se law" or as a ".10 absolute law." *Id.* at § 33A.00.

66. WIS. STAT. § 346.63(1)(b) (1983-84).

67. The chemical offense statute refers only to alcohol concentration in the blood or breath. If the case involves the testing of a urine sample, the statutes provide a conversion ratio for correlating urine alcohol concentration with blood alcohol concentration. WIS. STAT. § 885.235(2) (1983-84).

68. *Id.* at § 885.235(3) provides for the admissibility of chemical test evidence if the sample of breath, blood or urine is obtained within three hours of the event to be proved. However, this section does not preclude the receipt of other competent evidence bearing upon the issue of alcohol concentration in the defendant's body at the time of driving or operating. *Id.* at § 885.235(4).

taches to this conduct irrespective of the degree to which the driver's condition or ability to drive is influenced or impaired.

The chemical offense statutes throughout the United States have been subjected to constitutional attack on the ground that they constitute impermissibly vague enactments. Stated more precisely, the challenge has been that the laws are obscure and require persons of common intelligence to speculate as to the point at which their blood alcohol concentration equals or exceeds the statutory limit.[69]

In Wisconsin, this constitutional attack upon the statute was advanced in *State v. Muehlenberg*.[70] In its analysis of the issue, the court of appeals recognized that, as a practical matter, a given individual may have no way of determining with any degree of precision, when his or her blood alcohol level reaches the statutory limit.[71] Nonetheless, it held that one who consumes a significant amount of alcoholic beverages will know "with a fair degree of definiteness"[72] that he or she is in jeopardy of violating the statute. "[A]ny person with common sense will know when consumption is *approaching* a meaningful amount."[73] Accordingly, the court found that the due process requirement of fair warning was satisfied by the .10 law.[74]

The other principal evil inherent in vague statutes is the potential they hold for discriminatory enforcement due to a lack of standards to guide the enforcement and adjudication

---

69. "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolendar v. Lawson, 103 S. Ct. 1855, 1858 (1983). *See also* Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); State v. Popanz, 112 Wis. 2d 166, 172-73, 332 N.W.2d 750, 753-54 (1983).

70. 118 Wis. 2d 502, 347 N.W.2d 914 (Ct. App. 1984).

71. *Id.* at 508, 347 N.W.2d at 916.

72. The "fair degree of definiteness" standard was the test employed by the court in resolving Muehlenberg's attack upon the statute. *Id.* at 508, 347 N.W.2d at 917. *See also* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 11, at 83-89 (1972).

73. *Muehlenberg*, 118 Wis. 2d at 509, 347 N.W.2d at 917.

74. The"lack of fair warning" attack was rejected because the court found that a person can know when consumption of alcohol is significant and approaching a meaningful amount. *Id.* at 508-09, 347 N.W.2d at 917. It is submitted, however, that this analysis of the due process attack in no way imports any kind of subjective mental element into the statute itself.

processes.[75] This attack was also rejected in *Muehlenberg* because the .10 law does indeed provide a precise standard, *i.e.*, 0.10% of alcohol by weight in the blood, by which the police and the courts may be guided in the discharge of their respective responsibilities.[76]

B. Offenses Involving Death and Great Bodily Harm

Two impaired driving offenses are codified among the provisions of the Wisconsin Criminal Code. Homicide by intoxicated user of a motor vehicle[77] proscribes causing the death of another[78] by the operation of a vehicle either while under the influence of an intoxicant or while the driver has a blood alcohol concentration equal to or in excess of the 0.10% statutory limit. The felony injury by intoxicated use of a vehicle statute[79] addresses like behavior but applies when the result is the causation of great bodily harm to another human being. While the structure of these two statutes rather closely paral-

---

75. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972).

76. *Muehlenberg*, 118 Wis. 2d at 507, 347 N.W.2d at 916.

The manner in which the *Muehlenberg* court resolved the void-for-vagueness challenge to the .10 law is consistent with the approach taken by appellate courts in several other jurisdictions which have per se laws. *See, e.g.*, Fuenning v. Superior Court, 139 Ariz. 590, 680 P.2d 121 (1983); Lovell v. State, 283 Ark. 425, 678 S.W.2d 318 (1984); Burg v. Municipal Court, 35 Cal. 3d 257, 673 P.2d 732, 198 Cal. Rptr. 145 (1983), *cert. denied*, 104 S. Ct. 2337 (1984); Roberts v. State, 329 So. 2d 296 (Fla. 1976); Greaves v. State, 528 P.2d 805 (Utah 1974); State v. Franco, 96 Wash. 2d 816, 639 P.2d 1320 (1982).

77. WIS. STAT. § 940.09 (1983-84) provides in pertinent part:

> (1) Any person who does either of the following under par. (a) or (b) is guilty of a Class D felony:
>
> (a) Causes the death of another by the operation or handling of a vehicle, firearm or airgun and while under the influence of an intoxicant;
>
> (b) Causes the death of another by the operation or handling of a vehicle, firearm or airgun while the person has a blood alcohol concentration of 0.1% or more by weight of alcohol in that person's blood or 0.1 grams or more of alcohol in 210 liters of that person's breath.

78. It may be observed that the result element of section 940.09 is phrased in terms of causing the "death of another." This language is different from that employed in other Wisconsin homicide statutes which describe the result element in terms of causing the "death of another human being." For Criminal Code purposes a "human being" is defined as one who has been born alive. WIS. STAT. § 939.22(16) (1983-84). By employing "death of another" language did the legislature intend the result element of the homicide by intoxicated user statute to be broader than that of the other homicide laws so as to include causing the death of certain unborn fetuses? The likelihood is that the difference in terminology is the result of a drafting error.

79. WIS. STAT. § 940.25 (1983-84) provides in pertinent part:

lels that of the general OMVWI statute and while, at first glance, the former may appear to be but aggravated forms of the latter, there are a variety of subtle differences which operate to distinguish the Criminal Code offenses from the general OMVWI offense.

First, the homicide and felony injury crimes are enforceable without regard to whether the driver's conduct occurred upon a highway or upon premises held out to the public for motor vehicle usage.[80] The State of Wisconsin asserts its jurisdiction over these offenses to the same extent that it asserts criminal jurisdiction generally.[81]

Second, the degree of intoxication which constitutes the condition of "under the influence" for purposes of the Criminal Code offenses is statutorily defined as the material impairment of one's ability to operate a vehicle.[82] This standard applies whether the source of the influence be an alcohol beverage,[83] a controlled substance, a combination of alcohol and a controlled substance, a drug, or a combination of alcohol and a drug.[84]

Third, the homicide statute describes the prohibited act in terms of "operation or handling" of a vehicle; the felony injury statute employs only "operation" language. This conduct terminology is not accompanied by legislative definition as is

---

(1) Any person who does either of the following under par. (a) or (b) is guilty of a Class E felony:

(a) Causes great bodily harm to another human being by the operation of a vehicle while under the influence of an intoxicant;

(b) Causes great bodily harm to another human being by the operation of a vehicle while the person has a blood alcohol concentration of 0.1% or more by weight of alcohol in that person's blood or 0.1 grams or more of alcohol in 210 liters of that person's breath.

80. See *supra* notes 26-30 and accompanying text for an analysis of the highway limitation which is applicable to the general OMVWI offense.

81. *See* WIS. STAT. § 939.03 (1983-84).

82. *Id.* at § 939.22(42). This method of identifying the threshold of impairment by definition of a standard should be compared with the lack of a statutorily established standard in the general OMVWI offense. *See supra* notes 35-53 and accompanying text.

83. It should be noted that WIS. STAT. § 939.22(42) (1983-84) makes specific reference to "alcohol" beverages as an influence source but does not contain the "intoxicant" terminology of the general OMVWI offense. *See supra* note 39.

84. WIS. STAT. § 939.22(42) (1983-84). It should also be observed that this definition provision does not employ safe driving terminology for drug and combination alcohol-drug influences in the manner which the OMVWI statute does. *See supra* notes 56-63 and accompanying text.

the case with the OMVWI law.[85] If the broad meaning of "operate" is imported from the general OMVWI statute, it would connote the physical manipulation or activation of any of the controls of the vehicle necessary to put it in motion, but would not require that the vehicle actually be in motion.[86] This interpretation is permissible under principles of statutory construction[87] and is recommended in the interest of promoting desirable uniformity among the several statutes dealing with like subject matter.[88]

Finally, the homicide and felony injury statutes are distinguishable from OMVWI on the basis of the conveyances to which the statutes apply. The definition of the term "vehicle" for purposes of the Criminal Code[89] is substantially broader than the "motor vehicle" formulation applicable to the Vehicle Code OMVWI offense.[90]

1. Homicide by Intoxicated User of a Vehicle

The crime of homicide by intoxicated user of a vehicle, as presently defined, was enacted as part of the 1981-82 legisla-

---

85. WIS. STAT. § 346.63(3) (1983-84) (precise definition of the terms "drive" and "operate" for purposes of the OMVWI law).

86. *See supra* notes 15-22 and accompanying text.

87. The homicide and felony injury statutes are *in pari materia* with the general OMVWI statute and they may be construed together. *See, e.g.*, State v. Wachsmuth, 73 Wis. 2d 318, 325-26, 243 N.W.2d 410, 414-15 (1976); W. LAFAVE & A. SCOTT, *supra* note 72, § 10, at 78. This method of statutory construction seems especially appropriate in view of the fact that all of these impaired driving statutes emanated from one legislative package. *See* 1981 Wis. Laws 20, *amended by* 1981 Wis. Laws 184. This is also the approach utilized by the Wisconsin Criminal Jury Instructions Committee in the uniform instructions for the homicide and felony injury offenses. Wis. JI-Criminal 1185, 1186, 1262, 1263 (1982).

88. Because the homicide and felony injury statutes involve the causation of specified harm, they are typically invoked in accident cases in which the evidence shows that the actor's vehicle was actually in motion. This is not invariably the case, however. Consider the situation in which an intoxicated driver is passed out behind the wheel while the engine is running. The vehicle is in a traffic lane at a location just over the crest of a hill. The vehicle is struck by an innocent driver who had no warning of the danger and who is killed in the ensuing impact. If the broad OMVWI definition of "operation" is utilized, it may be concluded that the intoxicated driver caused the death by the "operation" of his vehicle.

89. WIS. STAT. § 939.22(44) (1983-84) provides the Criminal Code definition of "vehicle" as follows: " 'Vehicle' means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air."

90. *See supra* notes 23-25 and accompanying text.

tive package which reformulated Wisconsin's impaired driving statutes.[91] Minor revisions since that time have for the most part been cosmetic and have not altered the structure of the crime's essential elements.[92]

In *State v. Caibaiosai*[93] the Wisconsin Supreme Court identified the three elements of the present homicide statute: (1) causing the death of another, (2) by the operation of a vehicle, (3) while under the influence of an intoxicant or with a concentration of blood alcohol equal to or exceeding the statutory 0.10% limit.[94] This configuration of the elements has generated debate regarding the causation aspects of the crime and the need to identify in a precise way the relationship which must exist between the driver's conduct and condition on one hand, and the death of the victim on the other. Some insight into the present definition of this relationship may be gleaned from an examination of the approach to this crime which the legislature has taken in the past.

The elements of the current homicide law closely parallel those of one of its predecessors. Section 340.271 of the 1953 Statutes prohibited what was termed "negligent homicide," an offense which among its provisions imposed liability upon "any person who by the operation of any vehicle while under the influence of alcoholic beverages or narcotic drugs should cause the death of another."[95] The statute was interpreted as consisting of two essential elements: (1) that the driver of the

---

91. 1981 Wis. Laws 20, § 1817g, *amended by* 1981 Wis. Laws 184, § 7 and 1981 Wis. Laws 314, § 137.

92. Language in the statute relating to the various sources of influence has been removed such that the meaning of "under the influence of an intoxicant" and the identification of the statutorily cognizable sources of influence must now be gleaned from the general definitional statement in WIS. STAT. § 939.22(42) (1983-84), which is applicable to the section 940.09 homicide offense. *See* 1983 Wis. Laws 459, § 25-26.

93. 122 Wis. 2d 587, 363 N.W.2d 574 (1985).

94. *Id.* at 593, 363 N.W.2d at 577. This formulation of the elements is consistent with that employed in the pattern jury instruction for the crime. *See* Wis. JI-Criminal 1185-86 (1982).

95. The text of WIS. STAT. § 340.271(1) (1953) provided in pertinent part:

> Any person who by operation of any vehicle while under the influence of alcoholic beverages or narcotic drugs shall cause the death of another shall be deemed guilty of negligent homicide and upon conviction thereof shall be punished by imprisonment in the state prison not more than 5 years nor less than one year, or by imprisonment in the county jail not more than one year, or by fine of not more than $2,500, or by both such fine and imprisonment.

vehicle was under the influence of alcoholic beverages, and (2) that the driver caused the death of another while operating the vehicle.[96] In response to the argument that the law required evidence that the operation of the vehicle was so affected by the intoxication of the driver that it resulted in the victim's death, the Wisconsin Supreme Court held that driving while intoxicated gave rise to an assumption that a causal relationship existed between the intoxication and the death.[97] "[T]o require that facts be shown to prove that defendant's operation of the car was so affected by his intoxication that the accident would not have happened if he had been sober, would be to impose an impossible burden on the state in the prosecution of such a case."[98] Contemporary commentary indicated that the crime did not require proof of a causal connection between the intoxication and the death.[99]

During the Criminal Code revision process of the 1950's the Wisconsin Legislative Council proposed a formulation of the homicide by intoxicated user offense which was essentially the same as the prior statute: liability would have attached to whomever "while under the influence of an intoxicant so operates a vehicle . . . as to cause the death of another human being."[100] The offense as submitted would have been comprised of three elements: (1) operation of a vehicle, (2) in such a manner as to cause the death of another, (3) while the driver

---

96. State v. Peckham, 263 Wis. 239, 242, 56 N.W.2d 835, 836 (1953).

97. State v. Resler, 262 Wis. 285, 290, 55 N.W.2d 35, 38 (1952).

98. *Id.* A similarly difficult burden is placed upon the defendant who wishes to proffer an affirmative defense under present law. *See infra* notes 118-22 and accompanying text.

99. V WISCONSIN LEGISLATIVE COUNCIL JUDICIARY COMMITTEE REPORT ON THE CRIMINAL CODE, at 65 (1953).

100. The full text submitted in 1953 by the Judiciary Committee of the Legislative Council provided as follows:

> 340.06 Homicide By Intoxicated User Of Vehicle Or Firearm. (1) Whoever while under the influence of an intoxicant so operates a vehicle or handles a firearm as to cause the death of another human being may be fined not more than $1000 or imprisoned not more than 2 years or both.
>
> (2) The actor has a defense if it appears by a preponderance of the evidence that the accident causing death would have been unavoidable even if he had not been under the influence of an intoxicant. Proof by a preponderance of evidence means that the trier of the fact must be persuaded that it is more probable than not that the death would have occurred even if the actor had not been under the influence of an intoxicant.

Id. at 64.

was "under the influence."[101] In addition to this substantive definition of the crime, the suggested legislation would also have codified an affirmative defense to liability. The nature of the defense required demonstrating, by a preponderance of the evidence, that the accident causing death would have been unavoidable even if the driver had not been under the influence of an intoxicant.[102]

The Council's published comments to the suggested revision indicate that the offense definition was a restatement of the prior statute,[103] that it provided for a form of strict liability,[104] and that it did not mandate affirmative proof of a causal connection between the driver's intoxication and the victim's death.[105] The proposed affirmative defense was described as a narrowing of the prior statute so as to relieve the defendant of liability in the unavoidable accident situation in which even a person with normal, "uninfluenced" reactive ability could not have avoided the collision.[106]

The homicide statute ultimately enacted in 1955 as part of a new Wisconsin Criminal Code was substantially different from that suggested in 1953 by the Legislative Council.[107] It

---

101. *Id.*

102. An earlier proposed formulation of the affirmative defense would have relieved the intoxicated driver of liability if the driver proved by a preponderance of the evidence "that the death would have resulted even if he had been exercising due care and even if he had not been under the influence of an intoxicant." VII WISCONSIN LEGISLATIVE COUNCIL JUDICIARY COMMITTEE REPORT ON THE CRIMINAL CODE, at 61 (1950).

103. V JUDICIARY COMMITTEE REPORT, *supra* note 99, at 65.

104. Strict liability can be justified on two grounds: (1) the fact that the causal relation between the intoxication and the death is in many cases difficult or impossible to prove; and (2) the fact that such causal relation will, as a matter of fact, be present in the great majority of cases even though it is impossible to prove.

Id. at 64. These comments do not reflect an intent to relieve the state of proving a causal relationship between the defendant's conduct and the victim's death. Rather, the proposed statute continued the tradition of not requiring proof of a causal link between the *intoxication* and the death.

105. *Id.*

106. *Id.* at 64-65. The illustrative fact pattern provided in the Legislative Council's commentary is the classic "dart out" scenario. *Id.*

107. The 1953 version of the statute, quoted at *supra* note 100, was actually passed by the legislature as part of a new complete code of criminal law. 1953 Wis. Laws 623. However, the effective date of the new code was delayed until 1955 because the legislature inserted a condition requiring that the code be reenacted during its 1955 session. 1953 Wis. Laws 623, § 282. In the interim, a Criminal Code Advisory Committee studied the code and ultimately reported out a new bill which, with some minor amend-

conditioned liability upon proof that the actor caused the death of another by the negligent operation of the vehicle and while under the influence of an intoxicant. It specifically required evidence of causal negligence *in addition to* operation while under the influence.[108] The element structure of the offense and the proofs associated therewith[109] hence became significantly more complex than it had been under prior law.[110] The prosecution was required to shoulder the additional burden of demonstrating some type of causal negligence in addition to proving operation while under the influence of an intoxicant.

The substantive nature of the crime of homicide by intoxicated user as promulgated in 1955 survived until the 1981-82 revision of the state's impaired driving statutes. The repeal of section 940.09 of the 1979 Wisconsin Statutes and the creation of a new version of the statute reflect a return to history on the part of the legislature. The substantive offense in its present format is closely analogous to the 1953 version of section 340.271,[111] and the codification of a special affirmative defense to liability represents an approach originally recommended by the Legislative Council over thirty years ago.[112]

---

ments, was passed by the legislature with an effective date of July 1, 1956. 1955 Wis. Laws 696. The homicide by intoxicated user statute finally enacted by the 1955 legislature was the product of the Advisory Committee. *See* Minutes of the Criminal Code Advisory Committee (Mar. 20, 1954, April 29, 1954, and May 4, 1955). A brief history of the development of the Wisconsin Criminal Code is recalled in Platz, *The Criminal Code*, 1956 WIS. L. REV. 350, 350-53.

108. WIS. STAT. § 940.09 (1955) provided in full:

> Whoever by the negligent operation of handling of a vehicle, firearm or airgun and while under the influence of an intoxicant causes the death of another may be fined not more than $2500 or imprisoned not more than 5 years or both. No person shall be convicted under this section except upon proof of causal negligence in addition to such operation or handling while under the influence of an intoxicant.

109. The elements structure of section 940.09 was detailed by the Wisconsin Supreme Court in Bennett v. State, 54 Wis. 2d 727, 730, 196 N.W.2d 704, 705 (1972):

> To warrant a conviction under this section the evidence must be established to the requisite degree of proof: (1) That the defendant was the operator of a vehicle involved; (2) that he was negligent in such operation; (3) that he was under the influence of an intoxicant at the time of the accident; (4) that the accident caused the death of another person; and (5) that his negligence was a cause of the accident and resulting death.

110. *See supra* notes 95-98 and accompanying text.

111. *See supra* notes 95-98 and accompanying text.

112. *See infra* notes 118-22 and accompanying text.

Substantively, the homicide statute no longer requires the prosecution to establish causal negligence in addition to driving "under the influence". The supreme court in *Caibaiosai* directly addressed the causation aspect of the present law and the relationship which the conduct and condition of the driver must have to the death of the victim. Identifying the act of driving and the condition of being "under the influence" as inseparable components of the "conduct" of the crime, the court concluded that the offense is proven if a causal connection is shown to exist between that conduct and the death.[113]

The court held that the current statute "does not include as an element of the crime a direct causal connection between the fact of defendant's intoxication, conceptualized as an isolated act, and the victim's death."[114]

> Under this statute there is an inherently dangerous activity in which it is reasonably foreseeable that driving while intoxicated may result in the death of an individual. The legislature has determined this activity so inherently dangerous that proof of it need not require causal connection between the defendant's intoxication and the death.[115]

Accordingly, in a homicide by intoxicated user prosecution, the state must prove that the defendant's conduct, *i.e.*, driving while "under the influence" or with a chemical concentration of blood alcohol equal to or in excess of the statutory limit, was a substantial factor in producing the victim's death.[116] The interpretation of the statute in *Caibaiosai* in no way relieves the state of proving causation as an element of the crime.[117] It does firmly establish, however, that no *specific*

---

113. *Caibaiosai*, 122 Wis. 2d at 593-94, 363 N.W.2d at 577.

114. *Id.* at 594, 363 N.W.2d at 577.

115. *Id.* at 594, 363 N.W.2d at 577-78.

116. When causation of a specified harm is an element of a crime, the state must prove beyond a reasonable doubt that the defendant's conduct was a "substantial factor" in producing that harm. State v. Serebin, 119 Wis. 2d 837, 846-47, 350 N.W.2d 65, 71 (1984); Hart v. State, 75 Wis. 2d 371, 397, 249 N.W.2d 810, 822 (1977); Cranmore v. State, 85 Wis. 2d 722, 775, 271 N.W.2d 402, 428 (Ct. App. 1978).

117. The court characterized driving while "under the influence" as negligence per se. *Caibaiosai*, 122 Wis. 2d at 595, 363 N.W.2d at 578. It also made reference to the principles of strict liability. *Id.* However, under either theory, the evidence must still establish a causal connection between the "negligent" conduct or the conduct to which strict liability attaches and the victim's death. *Id.* at 608, 363 N.W.2d at 584 (Abrahamson, J., dissenting).

causal link need be established between the intoxication and the death of the victim.

The reach of the statute, as interpreted in *Caibaiosai*, is tempered in some measure by the statutorily provided affirmative defense. If the defendant can show by a preponderance of the evidence that the death would have occurred even if he had not been "under the influence," liability for the homicide may be avoided. The inclusion of this defense parallels the approach suggested by the Legislative Council in 1953.[118] At that time, the Council thought it was fair to provide for such a defense if the defendant's intoxication played no role in causing the death.[119]

The thrust of the affirmative defense in the present law appears to be similarly motivated, although it will have to be reconciled with the construction of the substantive offense provided in *Caibaiosai*. The court there interpreted the defense as being operational when there is an "intervening cause" between the defendant's conduct, i.e., driving "while under the influence," and the victim's death.[120] This construction goes beyond the language of the statute[121] by including both the impaired condition *and* the operation of the vehicle as relevant ingredients in the formula for determining whether the defendant should be relieved of liability.[122]

---

118. *See supra* notes 100-02 and accompanying text.

119. V JUDICIARY COMMITTEE REPORT, *supra* note 99, at 64.

120. *Caibaiosai*, 122 Wis. 2d at 596, 363 N.W.2d at 578.

121. WIS. STAT. § 940.09(2) (1983-84) expressly provides that the affirmative defense is operational only if the defendant establishes by a preponderance of the evidence that the death would have occurred even if he had not been "under the influence" or did not have a blood alcohol concentration equal to or in excess of the statutory limit.

122. *See Caibaiosai*, 122 Wis. 2d at 605 n.3, 363 N.W.2d at 583 n.3 (Abrahamson, J., dissenting). The *Caibaiosai* majority rejected the defendant's position that the affirmative defense is operational when the evidence shows that the defendant's conduct, as a matter separate and distinct from his intoxication, caused the victim's death. *Id.* at 600, 363 N.W.2d at 580-81. The impact of this interpretation, which is consistent with the court's construction of the substantive offense but inconsistent with the language of the affirmative defense, is to effectively restrict the operation of the defense. Application of the defense is limited to those situations in which the conduct of the defendant is not a substantial factor in producing the death, but some extraneous agent or force does constitute such a substantial factor.

In dissent Justice Abrahamson criticized the *Caibaiosai* majority for failing to explain the circumstances in which the affirmative defense would be operational. *Id.* at 605 n.3, 363 N.W.2d at 583 n.3. (Abrahamson, J., dissenting). She further lamented that the majority's interpretation would allow the following drivers to be convicted of

2. Felony Injury by Intoxicated Use of a Vehicle

The felony offense of injury by intoxicated use of a vehicle[123] was originally enacted in 1977.[124] In its initial form the law prohibited the causation of great bodily harm to another by the negligent operation of a vehicle while under the influence of an intoxicant.[125] The statute was designed to fill a void in the structure of impaired driving offenses involving death or injury. Prior to its enactment, any such prohibited conduct resulting in an injury of whatever magnitude was punishable only as a misdemeanor.[126] The new law responded to this inadequacy by providing penalties at the felony level when the actor's conduct caused "great bodily harm," the misdemeanor offense remaining in effect and applicable when the injury was not as serious.

---

homicide by intoxicated user of vehicle: (1) the driver under the influence of an intoxicant who kills a child who darts into the path of the driver's vehicle from between parked cars; (2) the driver under the influence of an intoxicant who is stopped at a red light and is rear-ended by another vehicle, the driver's passenger being killed in the accident; (3) the driver under the influence of an intoxicant who stops at a red light and who proceeds through the intersection after the light turns green whereupon the driver's vehicle is struck by another motorist and the driver's passenger is killed; and (4) the driver under the influence of an intoxicant who loses control of his motorcycle when it skids on an oil slick and whose passenger is thereupon killed when she hits a tree. *Id.* at 603-04, 363 N.W.2d at 582.

It is submitted that in each of these scenarios the jury would have to be instructed about criminal causation, the substantial factor test and the principle that there may be more than one substantial factor which produces a death. Its task would thereafter be similar to that which it is called upon to perform in other "cause in issue" criminal cases. If the jury finds that the defendant's conduct (driving "under the influence") under all of the circumstances was a substantial factor which produced the death, a verdict of guilty is proper. On the other hand, if it finds that the defendant's conduct was not a substantial factor in producing the death but that an extraneous factor, *e.g.*, that the rear-ending driver or the darting child was the substantial factor causing the death, then defendant should be acquitted of the homicide charge.

123. WIS. STAT. § 940.25 (1983-84). See *supra* note 79 for the text of the statute.

124. 1977 Wis. Laws 193, § 16, *amended by* 1977 Wis. Laws 272, § 88.

125. The full text of WIS. STAT. § 940.25 (1977) provided: "Whoever causes great bodily harm to another human being by the negligent operation of a vehicle while under the influence of an intoxicant is guilty of a Class E felony."

126. WIS. STAT. § 346.65(2)(1977) provided a penalty at the misdemeanor level for causing injury by the negligent operation of a vehicle while under the influence of an intoxicant.

The felony injury statute was completely revamped in the 1981-82 revisions of the impaired driving laws.[127] The creation of a new statute during that legislative process was necessary in order to achieve symmetry between the design of this law and that of its companion homicide, misdemeanor injury and general OMVWI offenses.

The current felony injury statute is distinguishable from the homicide law only by the degree of harm caused by the actor.[128] Accordingly, the interpretation of the conduct element and its relationship to the resulting harm which the supreme court provided in the homicide context would be equally applicable here.[129] If the actor drives while in the impaired condition and such conduct thereby causes great bodily harm to another, the actor commits the felony injury offense. The affirmative defense to criminal liability, as interpreted in the homicide context, is also available to the driver charged with the felony injury violation.[130]

C. *Misdemeanor Injury by Intoxicated Use of a Vehicle*

A specific provision of the general OMVWI statute addresses the situation in which one drives or operates a motor vehicle while "under the influence" or with a chemical concentration of blood alcohol equal to or exceeding 0.10% by weight and thereby causes injury to another.[131] The substan-

---

127. 1981 Wis. Laws 20, § 1817r, *amended by* 1981 Wis. Laws 184, § 8. Minor revisions since the 1981-82 changes have been for the most part cosmetic. *See* 1983 Wis. Laws 459, § 27.

128. The result (injury) element of section 940.25 is phrased in terms of "great bodily harm." This type of injury is defined at WIS. STAT. § 939.22(14) (1983-84): " 'Great bodily harm' means bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury."

129. *See supra* notes 113-17 and accompanying text.

130. WIS. STAT. § 940.25(2) (1983-84). *See supra* notes 118-122 and accompanying text.

131. WIS. STAT. § 346.63(2)(a)(1983-84) provides in pertinent part:

> It is unlawful for any person to cause injury to another person by the operation of a vehicle while:
>
> 1. Under the influence of an intoxicant or a controlled substance or a combination of an intoxicant and a controlled substance, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or

tive provisions of this misdemeanor offense[132] were revised during the 1981-82 legislative sessions such that its organization of elements roughly parallels those of the homicide, felony injury and the general OMVWI offenses.[133] Important differences between the misdemeanor injury offense and its companion homicide and felony injury crimes nonetheless exist as do some variations between misdemeanor injury and the general OMVWI offenses.

When compared to the other crimes involving death or bodily injury, the misdemeanor offense is distinguishable principally on the basis of the degree of harm inflicted. Only "injury" is required in the misdemeanor statute whereas death or "great bodily harm" is required respectively by the homicide or felony injury law. The Vehicle Code provides no definition of "injury" which is specifically applicable to the misdemeanor offense. In the absence of such a definition, the common and approved usage of a nontechnical term is presumed to be the usage intended by the legislature.[134] Dictionary definitions of "injury" appear to parallel the meaning of "bodily harm" as that term is used in the Criminal Code[135] and generally indicate that the term connotes physical pain, illness or impairment of physical condition.[136]

---

under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or

2. The person has a blood alcohol concentration of 0.1% or more by weight of alcohol in that person's blood or 0.1 grams or more of alcohol in 210 liters of that person's breath.

132. A section 346.63(2)(a) violation is punishable by a maximum possible period of incarceration of one year in the county jail. WIS. STAT. § 346.65(3)(1983-84). Because of the stated maximum length and place of imprisonment, the offense is classified as a misdemeanor. *See id.* at §§ 939.60, 973.02.

133. 1981 Wis. Laws 20, § 1598t, *amended by* 1981 Wis. Laws 184, § 3. Since the 1981-82 session of the legislature, sections 346.63(2)(a)1 and (b) have been amended to include drugs and the combination of intoxicants and drugs as cognizable sources of impairment. 1983 Wis. Laws 459, § 12.

134. State v. Ehlenfeldt, 94 Wis. 2d 347, 356, 288 N.W.2d 786, 790 (1980).

135. WIS. STAT. § 939.22(4) (1983-84) defines "bodily harm" to mean "physical pain or injury, illness, or any impairment of physical condition."

136. The Wisconsin Court of Appeals has approved the use of dictionary definitions to define "injury" in the context of this statute. State v. Winter, No. 84-2232-CR (Wis. Ct. App. May 6, 1985) (unpublished opinion available on LEXIS, Wisconsin libarary, Cases file). In *Winter*, the trial court employed a general WEBSTER'S DICTIONARY definition ("injury" defined to mean "physical harm or damage to a person") and a law dictionary definition ("injury" defined as "physical pain, illness or any impairment of physical condition") to instruct the jury. The appellate court rejected the defense

The difference in degree of harm aside, the misdemeanor injury statute tracks its homicide and felony injury counterparts rather closely. It prohibits the causation of injury by operation of a vehicle while "under the influence" or with a concentration of blood alcohol equal to or in excess of the statutory 0.10% limit.[137] The causal relationship between the actor's conduct (driving "under the influence"/".10") and the resulting injury should also be the same as that identified in the homicide context.[138] These statutes were enacted together and their identical language ought to be similarly construed.[139] Likewise, the defendant in a misdemeanor injury prosecution has available the same affirmative defense which is available in the homicide and felony injury contexts.[140]

Nonetheless, some important differences emerge between the misdemeanor violation in the Vehicle Code and the homicide and felony injury offenses in the Criminal Code. First, the misdemeanor statute is enforceable only with reference to vehicle operation which occurs upon highways or upon premises held out to the public for motor vehicle usage.[141] Second, the standard by which the condition of "under the influence" is gauged, while identical with that employed in the general OMVWI context,[142] may be conceptually different from that employed by the Criminal Code offenses.[143] Third, the influ-

---

argument that the more stringent definition of injury which is applied in the "hit and run" statute should also be applied to the misdemeanor injury law. *Cf.* WIS. STAT. § 346.70(1)(1983-84) (defining "injury" in "hit and run" cases as "injury to a person of a physical nature resulting in death or the need of first aid or attention by a physician or surgeon, whether or not first aid or. medical or surgical treatment was actually received").

137. *See supra* note 131.

138. *See supra* notes 113-17 and accompanying text.

139. *See supra* note 87.

140. WIS. STAT. § 346.63(2)(b) (1983-84) provides:

> [T]he actor has a defense if it appears by a preponderance of the evidence that the injury would have occurred even if the actor had not been under the influence of an intoxicant or a controlled substance or a combination thereof, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving or did not have a blood alcohol concentration described under par. (a)2.

141. *See supra* notes 26-30 and accompanying text.

142. *Compare* WIS. STAT. § 346.63(1)(a) (1983-84) *with id.* at § 346.63(2)(a)1.

143. In State v. Waalen, 125 Wis. 2d 272, 274, 371 N.W.2d 401, 402 (Ct. App. 1985), the court of appeals set forth a definition of "under the influence" as something

ence described as "intoxicant" in the misdemeanor statute is at variance with the "alcohol" limitation used in the Criminal Code definition of "under the influence of an intoxicant."[144] Finally, the misdemeanor statute employs the term "vehicle" which, in Vehicle Code usage, has a meaning which differs from that ascribed to it in the Criminal Code.[145]

When the misdemeanor injury statute is compared and contrasted with the general OMVWI offense, several similarities and only a few differences surface. Both statutes proscribe operation while "under the influence," a standard which is couched in identical language in both provisions. Both laws also contain a chemical offense. The principal distinctions between the two are found in the result (bodily injury) to which the misdemeanor offense is directed and in the difference in conveyances to which the statutes apply.[146]

D. The "Not a Drop" Law

The most recent addition to Wisconsin's compendium of impaired driving statutes is the so-called "not a drop" law.[147] Under penalty of suspension of the operating privilege,[148] no

---

less than the "material impairment" standard applied to the criminal offenses. *See supra* notes 38-40 and accompanying text.

144. *See supra* note 83 and accompanying text.

145. *Compare* WIS. STAT. § 340.01(74) (1983-84) *with id.* at § 939.22(44) at *supra* note 89.

146. *Compare id.* § 340.01(35) *with id.* at 340.01(74).

The Wisconsin Criminal Jury Instructions Committee has assumed that the use of the term "vehicle" (as opposed to "motor vehicle") in section 346.63(2) was intentional on the part of the legislature and justified by the fact that offenses involving injury are considered to be more serious than those involving a general OMVWI violation. Wis. JI-Criminal 2661 comment 1 (1982).

147. WIS. STAT. § 346.63(2m), *amended by* 1985 Wis. Laws 32 provides in pertinent part:

> If a person has not attained the legal drinking age, as defined in s. 125.02(8m), the person may not drive or operate a motor vehicle while he or she has a blood alcohol concentration of more than 0.0% but not more than 0.1% by weight of alcohol in the person's blood or more than 0.0 grams but not more than 0.1 grams of alcohol in 210 liters of that person's breath. The only penalty for violation of this subsection is suspension of a person's operating privilege under s. 343.30(1p).

148. WIS. STAT. § 343.30(1p) (1983-84) mandates a three month suspension of operating privileges upon conviction of a section 346.63(2m) violation. No other penalty is provided for the offense. *See also id.* at § 343.305 (9)(em), *created by* 1985 Wis. Laws 32, § 1.

person who has yet to attain the legal drinking age[149] may drive or operate a motor vehicle upon a highway (or upon premises held out to the public for motor vehicle usage) if that person's blood alcohol concentration is greater than 0.0% by weight but less than 0.10%.

If the driver's blood alcohol concentration equals or exceeds 0.10%, the driver may of course be subject to a general OMVWI charge of driving while "under the influence" and/or driving in violation of the 0.10% chemical offense.[150] Even if the chemical test result is lower than 0.10%, an "under the influence" prosecution may nonetheless be possible under appropriate factual circumstances.[151]

III. MULTIPLE CHARGE AND CONVICTION ISSUES IN CASES OF IMPAIRED DRIVING

The complex of Wisconsin's impaired driving statutes, as outlined above, presents several issues relative to charging,[152] convicting and ultimately sentencing a defendant on multiple charges which may have arisen from one act of driving while

149. The "legal drinking age" in Wisconsin is statutorily set at 19 years of age. WIS. STAT. § 125.02(8m) (1983-84). The original absolute sobriety session law, 1983 Wis. Laws 74, § 26x, was amended to reflect that its provisions were not applicable to any person who had attained the age of eighteen years as of the law's effective date, July 1, 1984. 1983 Wis. Laws 521.

150. Homicide or injury prosecutions may also be commenced if the actor's conduct causes the harm specified by these statutes.

151. A prosecution of the driver with a blood alcohol level below .10% might be commenced if other indicia of impairment evidence a condition of being "under the influence." In such cases the evidentiary status of the blood alcohol test is governed by the chemical test statute. *See* WIS. STAT. §§ 885.235(1)(a)-(b) (1983-84).

152. Certain limitations on prosecutor discretion were enacted as part of the 1981-82 revisions of the impaired driving statutes. A district attorney or municipal prosecutor who wishes to dismiss or amend any impaired driving offense must make application to the court stating the reasons for any such proposal. The court may approve the application of the prosecutor only if it finds that such amendment or dismissal would be consistent with the public interest in deterring driving while "under the influence." WIS. STAT. § 345.20(2)(c) (1983-84) (restriction applicable in OMVWI traffic forfeiture actions); *id.* at § 967.055 (restriction applicable to cases of criminal OMVWI, homicide by intoxicated user of vehicle, felony injury by intoxicated use of vehicle and misdemeanor injury by driving "under the influence," as well as to section 343.305 "implied consent" law violations). These provisions are consistent with the codified expression of legislative intent to encourage vigorous prosecution of impaired driving offenses. *Id.* at § 967.055(1). *But see* State v. Brooks, 113 Wis. 2d 347, 335 N.W.2d 354 (1983) (upholding trial court's discretionary decision to dismiss an implied consent charge upon the defendant's plea of guilty to a companion OMVWI charge arising out of the same

impaired. The application of the substantive law to situations involving multiple victims or the alleged violation of multiple

incident). A bill which proposes to statutorily overrule *Brooks* has been introduced in the Wisconsin Legislature. 1985 S.B. 299.

In a sense, the statutory provisions limiting prosecutor discretion to dismiss or amend impaired driving offenses are consistent with the case law indicating that prosecutorial discretion to terminate a pending prosecution is subject to the independent authority of the trial court to grant or refuse a motion to dismiss "in the public interest." State v. Kenyon, 85 Wis. 2d 36, 42-45, 270 N.W.2d 160, 162-64 (1978); Guinther v. City of Milwaukee, 217 Wis. 334, 339, 258 N.W. 865, 867 (1935). *See also* State v. Braunsdorf, 98 Wis. 2d 569, 573-74, 297 N.W.2d 808, 810 (1980).

The impact of sections 345.20(2)(c) and 967.055 does not affect the initial charging decision of the prosecutor. The broad discretion with which the government's attorney is generally imbued at the charging stage is also applicable in cases of impaired driving. *See generally Braunsdorf*, 98 Wis. 2d at 572, 297 N.W.2d at 260 ("Prosecutors enjoy largely unfeterred discretion in the initiation of criminal proceedings."); State *ex rel.* Kurkierewicz v. Cannon, 42 Wis. 2d 368, 378, 166 N.W.2d 255, 260 (1969) ("It is clear that in his functions as a prosecutor he has great discretion in determining whether or not to prosecute.").

In the exercise of this discretion the prosecutor is of course bound by standards of professional responsibility. *See, e.g.*, State v. Karpinski, 92 Wis. 2d 599, 608-10, 285 N.W.2d 729, 734-36 (1979); Thompson v. State, 61 Wis. 2d 325, 328-31, 212 N.W.2d 109, 111-12 (1973).

offense provisions poses problems of both constitutional[153] and statutory[154] concern.

---

153. The principal constitutional issue in the multiple charge context is one of double jeopardy. The Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The double jeopardy provision of the fifth amendment has been held applicable to the states through the due process clause of the fourteenth amendment to the United States Constitution. Benton v. Maryland, 395 U.S. 784 (1969).

The Wisconsin Constitution provides: "No person may be held to answer for a criminal offense without due process of law, and no person for the same offense may be put twice in jeopardy of punishment, nor may be compelled in any criminal case to be a witness against himself or herself." WIS. CONST. art. I, § 8(1).

The Wisconsin Supreme Court has held that the state and federal double jeopardy protections are "identical in scope and purpose." Day v. State, 76 Wis. 2d 588, 591, 251 N.W.2d 811, 812-13 (1977), *cert. denied*, 434 U.S. 848 (1977); State v. Calhoun, 67 Wis. 2d 204, 220, 226 N.W.2d 504, 512 (1975). The Wisconsin appellate courts have accordingly accepted, where applicable, the double jeopardy decisions of the United States Supreme Court as governing the interpretation of the double jeopardy provision of the state constitution. State v. Rabe, 96 Wis. 2d 48, 61 n.7, 291 N.W.2d 809, 815 n.7 (1980); Harrell v. State, 88 Wis. 2d 546, 554, 277 N.W.2d 462, 464 (Ct. App. 1979). *But see* State v. Kramsvogel, 124 Wis. 2d 101, 128-30, 369 N.W.2d 145, 158-59 (1985) (Bablitch, J., dissenting).

The double jeopardy clause of the United States Constitution has been construed to afford several protections to the accused: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

154. Several statutory provisions also guide the analysis of multiple charge, conviction and sentencing issues:

WIS. STAT. § 939.65 (1983-84) provides: "If an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions." "This section states a rule of pleading, and does not purport to state the limitations on multiple sentences for the same act or the limitations on multiple convictions and subsequent prosecutions for the same act which may be included in the constitutional double jeopardy rule." V JUDICIARY COMMITTEE REPORT, *supra* note 99, at 52. The provision makes clear that there may be prosecution under multiple sections of the Criminal Code for the same conduct. *Id. See also* Remington & Joseph, *Charging, Convicting and Sentencing The Multiple Criminal Offender,* 1961 WIS. L. REV. 528, 530-531. The Wisconsin Supreme Court has also indicated that under section 939.65 the same act may form the basis for a crime punishable under more than one statutory provision. *Karpinski,* 92 Wis. 2d at 611, 285 N.W.2d at 736 (1979). "We do not construe the section [939.65] to mean the same crime, but different crimes having some similar elements but not having identical elements." *Id.* at 611 n.14, 285 N.W.2d at 736 n.14.

WIS. STAT. § 939.66 (1983-84) provides in pertinent part:

> Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following:
>
> (1) A crime which does not require proof of any fact in addition to those which must be proved for the crime charged.

A. Multiple Victim Cases

In some cases a single act of driving while "under the influence" causes multiple deaths and/or injuries to multiple persons. The issue then becomes whether the driver is subject to multiple charges and sentences for each person killed or injured.

In *State v. Rabe*,[155] the Wisconsin Supreme Court was confronted with the legal propriety of charging multiple homicide offenses for deaths arising out of a single incident of impaired driving. The accused was alleged to have been driving while "under the influence," to have driven through a stop sign, and to have caused the deaths of four persons in the ensuing accident. In the criminal information, the defendant was charged with four homicide offenses contrary to the homicide by intoxicated user statute then in effect.[156] The accused claimed that this four-count information was multiplicitous[157] and thereby offended the protections afforded to him

---

This subsection of section 939.66 states the general test for whether a particular crime is statutorily included within another. *See infra* notes 188-89 and accompanying text.

WIS. STAT. § 939.71 (1983-84) provides:

> If an act forms the basis for a crime punishable under more than one statutory provision of this state or under a statutory provision of this state and the laws of another jurisdiction, a conviction or acquittal on the merits under one provision bars a subsequent prosecution under the other provision unless each provision requires proof of a fact for conviction which the other does not require.

Section 939.71 operates to place a limitation on successive prosecutions when there has been a previous conviction or acquittal *on the merits* for the same offense. It does not address successive prosecutions when the previous litigation dealt with different conduct by the defendant. Remington & Joseph, *supra* note 154, at 556. This section is designed to prevent the harassment of the accused with subsequent prosecution for the same crime without regard to whether the prior adjudication on the merits occurred under the laws of Wisconsin or under the laws of another jurisdiction. V JUDICIARY COMMITTEE REPORT, *supra* note 99, at 55.

The test for determining whether an adjudication on the merits under one statute bars a subsequent prosecution for the same conduct under another is identical to the test used generally in the identification of lesser included crimes under section 939.66(1): the offenses are the same unless each requires proof of a fact for conviction which the other does not. *See* State v. Gordon, 111 Wis. 2d 133, 140-41, 330 N.W.2d 564, 567 (1983); State v. Elbaum, 54 Wis. 2d 213, 218, 194 N.W.2d 660, 663 (1972). *See also* Schroeder v. State, 222 Wis. 251, 260-61, 267 N.W. 899, 903 (1936).

155. 96 Wis. 2d 48, 291 N.W.2d 809 (1980).

156. WIS. STAT. § 940.09 (1977).

157. "Multiplicity arises where the defendant is charged in more than one count for a single offense." *Rabe*, 96 Wis. 2d at 61, 291 N.W.2d at 815. The allegation in *Rabe*

by the double jeopardy provisions of the federal and state constitutions.[158]

In evaluating this claim of multiplicitous charging by the prosecutor, the court employed a two-pronged test to determine whether each death gave rise to a separate count of homicide. In the first instance the issue was a double jeopardy inquiry as to whether the four charged offenses were identical in law and in fact.[159] Because the several counts involved violations of the same statute and were hence identical in law, the focus of the analysis shifted to the determination of factual identity among the charges. The court held that each homicide count required proof of additional facts which the others did not, *i.e.*, the identity of the victim named in the particular count as well as the causal relationship between the defendant's conduct and the death of that particular victim.[160] This factual dissimilarity among the several counts led the court to resolve the double jeopardy aspects of the multiplicity attack against the defendant.

The other prong of multiplicity analysis involves a determination of the legislature's intended "allowable unit of prosecution."[161] In the instance of homicide by intoxicated user of a vehicle, the *Rabe* court found that the statute unambiguously manifested a legislative intent to allow a separate prosecution for each death. The gravamen of the offense under the statute then in existence was held to be more than just negligent operation while "under the influence"; it involved proof of a causal relationship between that conduct and the death of each victim.[162] Further, the court found that the placement of the offense in the chapter of the Criminal Code defining crimes against life and bodily security constituted additional evidence that the legislature intended in the homicide by in-

---

was that the prosecution had, in effect, fractionalized but a single offense into four separate homicide charges.

158. *See supra* note 153.

159. *Rabe*, 96 Wis. 2d at 63, 291 N.W.2d at 816.

160. *Id.* at 66, 291 N.W.2d at 818. "In accord with the great weight of authority, we hold that, where the crime is against persons rather than property, there are, as a general rule, as many offenses as individuals affected." *Id.* at 68, 291 N.W.2d at 818. *See also* Austin v. State, 86 Wis. 2d 213, 223, 271 N.W.2d 668, 672 (1978).

161. *See* Blenski v. State, 73 Wis. 2d 685, 694, 245 N.W. 2d 906, 911 (1976).

162. *Rabe*, 96 Wis. 2d at 72-73, 291 N.W.2d at 821.

toxicated user statute to protect lives and to permit a separate charge for each life taken in violation thereof.[163]

The homicide statute under scrutiny in *Rabe* was subsequently repealed and then recreated in its present form. It is submitted, however, that a prosecution involving multiple homicide charges arising out of a single act of driving "under the influence" brought under present law ought to survive a multiplicity attack when the analytical framework of the *Rabe* decision is applied thereto.[164] With reference to the double jeopardy prong of the analysis, each count of homicide continues to require proof of additional facts which the others do not. The state continues to shoulder a burden of establishing the separate identity of each victim and a causal relationship between the conduct of the accused and the death of each victim.

Application of the legislative intent test to identify the allowable unit of prosecution also seems to compel a result consistent with *Rabe*.[165] The graveman of the charge under present law continues to be something more than just driving "under the influence"; there must be proof of the aforementioned causal connection with reference to each death. Further, in the 1981-82 revision process, the legislature maintained the placement of this homicide offense among the other crimes affecting life and bodily security.[166]

---

163. *Id.* at 73-74, 291 N.W.2d at 821. The court pointed out, however, that its holding did not mean that in every case of multiple deaths the prosecutor would necessarily issue multiple counts or that the trial court would necessarily impose maximum consecutive sentences. "By legally recognizing the right to charge multiple offenses under sec. 940.09 where multiple deaths occur, prosecutorial and judicial discretion can be exercised in a manner consistent with the context of the particular prosecution." *Id.* at 76-77, 291 N.W.2d at 823. *Rabe* did not involve judicial review of the appropriateness of the exercise of prosecutorial discretion.

164. *See supra* notes 159-63 and accompanying text. Of course, the analysis here varies slightly from that articulated in *Rabe* because present law does not require proof of negligence in addition to driving "under the influence."

165. *See supra* notes 161-63 and accompanying text.

166. There is certainly no indication that the legislature intended to statutorily overrule *Rabe* when it subsequently revamped the impaired driving statutes. If anything, its intent was to strengthen the law and to promote vigorous prosecution thereunder. *See* 1981 Wis. Laws 20, § 2051(13) (nonstatutory transportation provision), *amended by* 1981 Wis. Laws 184, § 10.

> The legislature has created sec. 940.09(1)(a), Stats., in a continuing effort to keep drivers who are under the influence of intoxicants off the highway. It reflects the public's attitude and belief that such drivers are a sinister hazard per se

The *Rabe* approach to analyzing multiplicity issues in homicide cases and the court's decision upholding the filing of multiple charges would also appear to be applicable if multiple persons sustain injuries caused by the defendant's conduct of driving while "under the influence." The requirement of additional factual proofs for each victim injured, the similarities between the homicide statute on one hand and the felony and misdemeanor injury statutes on the other, as well as the general rule that there are as many offenses as victims when the crime involved is one against persons, all operate to support the position that multiple charges are also allowable in injury cases involving more than one victim.[167]

B. The "Under the Influence" — ".10" Combination of Charges

With the exception of the "not a drop" law,[168] each of the substantive offenses analyzed in the preceding discussion identifies multiple theories of driver liability. The conduct in which one may not engage and from which serious consequences may follow, if death or injury is caused, is statutorily defined as operating *either* while "under the influence" or with a chemical concentration of blood alcohol equal to or in excess of the .10% threshold. If the prosecution has evidence in support of both conditions of impairment, special procedural provisions of the relevant statutes become operational.[169]

These provisions permit the prosecutor to file multiple counts alleging in the first instance that the operator drove while "under the influence" and, in a second count, that the

---

and if death results from such operation, defendants may be properly found guilty of the class D felony.

State v. Caibaiosai, 122 Wis. 2d 587, 601, 363 N.W.2d 574, 581 (1985).

167. The argument that the legislature intends to allow multiple counts when there are multiple victims of crimes against the person is slightly less compelling with reference to the misdemeanor injury statute. The latter offense is not codified among the Criminal Code's "Crimes Against Life and Bodily Security," but instead has been placed in the Vehicle Code. It is submitted, however, that this does not defeat the conclusion in the accompanying text because location of the statute, while relevant, is not of itself dispositive of the issue. *Rabe*, 96 Wis. 2d at 73, 291 N.W.2d at 821. The other components of the analysis support the position permitting the filing of multiple charges in the misdemeanor context.

168. *See supra* notes 147-49 and accompanying text.

169. *See* WIS. STAT. §§ 346.63(1)(c), (2)(a)3 940.09(1)(c), 940.25(1)(c) (1983-84).

driver violated the 0.10% chemical offense.[170] If a decision is made to file dual charges, the statutes mandate joinder of the offenses for trial. While separate determinations of liability would thereafter have to be made by the trier of fact, verdicts of guilty on both offenses result in but one conviction for the purposes of sentencing.[171]

The duality of charges made available by the statutes has been subjected to double jeopardy attack; the claim is that the filing of two charges violates a constitutional protection against the imposition of multiple punishments for the same offense.[172] Although the statutes permit but one conviction for sentencing purposes, the argument has been made that a conviction on both statutory bases of liability subjects the defendant to multiple collateral consequences, such as the stigma associated with multiple convictions, the use of multiple prior convictions at a subsequent sentencing proceeding, and the possibility of impeachment with multiple prior convictions should the defendant testify in some future matter.[173] The issue was resolved by the Wisconsin Supreme Court in *State v. Bohacheff*,[174] wherein it held that the legislature intended that the dual theories of liability give rise to but one conviction *for all purposes*, even if a guilty verdict is returned on both counts.[175] Support for this position was found in the singularity of purpose to which each of the impaired statutes is directed, in the inappropriateness of imposing multiple punishments when the actor has committed one offense but has done so in two ways, and in the evident legislative purpose to

---

170. "The duality of prosecution theories] represents a new approach to the serious problem of drinking and driving. It was apparently intended to make it easier for the state to convict a defendant for drinking and driving by broadening the bases for liability." State v. Bohacheff, 114 Wis. 2d 402, 414, 338 N.W.2d 466, 472 (1983).

171. The action which is taken against the operator's license upon conviction is treated at WIS. STAT. § 343.30(1q) (1983-84).

172. *See supra* note 153. Because of the mandatory joinder provisions requiring that both theories of liability be tried together, the only double jeopardy protection which pertains is that prohibiting multiple punishments for the same offense.

173. *Bohacheff*, 114 Wis. 2d at 409, 338 N.W.2d at 469-70.

174. 114 Wis. 2d 402, 338 N.W.2d 466 (1983).

175. *Id.* at 413, 338 N.W.2d at 471-72. Because the court found that dual theory prosecutions generate but one conviction if the prosecution prevails on both counts, it was unnecessary to reach the state's alternative argument that the federal double jeopardy clause would not be violated by the imposition of separate punishments for each count. *Id.* at 408 n.6, 338 N.W.2d at 469 n.6.

facilitate prosecution which motivated the dual theory approach.[176]

The *Bohacheff* case involved a criminal prosecution wherein dual theories of liability were alleged under the felony injury by intoxicated use of a vehicle statute. Because this law was one of a series of impaired driving statutes enacted together in the 1981-82 revision process and because each of the substantive offenses contains virtually identical language relative to the availability of dual prosecution theories giving rise to but a single sentence, it is submitted that the *Bohacheff* conclusion rejecting the double jeopardy attack and holding that dual guilty verdicts give rise to but one conviction for all purposes is also applicable to the homicide, misdemeanor injury and the general OMVWI statutes.[177]

C. *The Combination of an OMVWI Charge with a Homicide or Injury Offense*

The intoxicated driver whose conduct subjects him to prosecution for homicide, felony injury or misdemeanor injury may, by that very same conduct, also violate the general OMVWI law.[178] The issue then arises whether he may thereafter be prosecuted, convicted and sentenced for the death or injury offense as well as for the OMVWI violation.

---

176. *Id.* at 414-17, 338 N.W.2d at 472-73.

177. In a series of unpublished opinions the Wisconsin Court of Appeals has held *Bohacheff* to be applicable to several of the impaired driving statutes. *See* In the Interest of T.L.R., No. 83-1586-LV (Wis. Ct. App. Dec. 6, 1984) (unpublished opinion available on LEXIS, Wisconsin library, Cases file) (*Bohacheff* applicable to homicide by intoxicated user statute); State v. Haendel, No. 83-385-CR (Wis. Ct. App. Oct. 20, 1983) (unpublished opinion available on LEXIS, Wisconsin library, Cases file) (*Bohacheff* applicable to *criminal* prosecutions under the general OMVWI law). *See also* County of Ozaukee v. Berg, Nos. 84-1175 and 84-1208 (Wis. Ct. App. June 19, 1985) (unpublished opinion available on LEXIS, Wisconsin library, Cases file) (declining to apply the double jeopardy clause to dual theory OMVWI prosecutions which are *civil* in nature); City of Muskego v. Stengel, No. 84-1139 (Wis. Ct. App. Mar. 13, 1985) (unpublished opinion available on LEXIS, Wisconsin library, Cases file) (prosecution of both *civil* OMVWI offense and *civil* ".10" offense not barred by double jeopardy principles).

178. The commission of a homicide or injury offense by impaired driving does not invariably involve a violation of the general OMVWI law, although it usually does. *See infra* note 190 and accompanying text.

In one context the resolution of this issue has been clearly determined. If the OMVWI offense is *civil* in nature,[179] double jeopardy principles do not prohibit prosecution of both the criminal homicide or injury offense and the civil traffic OMVWI violation. The Wisconsin appellate courts have consistently interpreted the relevant double jeopardy doctrine to protect against two attempted *criminal* prosecutions for the same offense.[180] That doctrine is not offended when the multiple prosecutions consist of a mixture of a criminal proceding (homicide, felony injury or misdemeanor injury by intoxicated use of a vehicle) and a civil proceeding resulting in a remedial penalty (civil OMVWI).[181]

If the general OMVWI offense is *criminal* in nature,[182] it appears in the first instance that Wisconsin procedural statutes permit the *filing* of a criminal OMVWI charge in addition to a homicide or injury charge.[183] As a general rule, an act punishable under more than one provision of the statutes may be prosecuted under any or all such provisions.[184] This rule of pleading, however, does not resolve the multiplicity issue of whether such multiple charges impermissibly fractionalize a single offense into several counts.

---

179. WIS. STAT. § 346.65(2) (1983-84) establishes the penalty structure for the general OMVWI offense. The first violation of the statute, or a municipal ordinance in conformity therewith, is punishable only by imposition of a money forfeiture. The Wisconsin appellate courts have consistently characterized this as a *civil* offense, the penalty for which is remedial in nature. State v. Folk, 117 Wis. 2d 42, 47, 342 N.W.2d 761, 764 (Wis. Ct. App. 1983); State v. Schulz, 100 Wis. 2d 329, 330-31, 302 N.W.2d 59, 60-61 (Wis. Ct. App. 1981); State v. Albright, 98 Wis. 2d 663, 672-73, 298 N.W.2d 196, 202 (Wis. Ct. App. 1980). *See also* WIS. STAT. § 939.12 (1983-84) (conduct punishable only by a forfeiture not a crime). Second and subsequent violations of the general OMVWI law within the time limits established by statute are *criminal* in nature, *i.e.*, punishable by both a fine and imprisonment. *Id.* at § 346.65(2). Crime is defined as conduct prohibited by state law and punishable by fine or imprisonment or both. *Id.* at § 939.12.

180. *See, e.g.*, State v. Kramsvogel, 124 Wis. 2d 101, 108-09, 369 N.W.2d 145, 148 (1985); *Schulz*, 100 Wis. 2d at 330, 302 N.W.2d at 60.

181. *Folk*, 117 Wis. 2d at 47, 342 N.W.2d at 763-64; *Schulz*, 100 Wis. 2d at 330-32, 302 N.W.2d at 60-61. Both of these cases involved a civil OMVWI prosecution in addition to a homicide by intoxicated user prosecution. The rationale of the cases compels a similar result when a civil OMVWI violation is prosecuted in addition to a felony or misdemeanor injury by intoxicated user of vehicle charge.

182. *See supra* note 179.

183. WIS. STAT. § 939.65 (1983-84). This provision is applicable without regard to whether all charged offenses are codified within the Criminal Code. WIS. STAT. § 939.20 (1983-84).

184. WIS. STAT. § 939.65 (1983-84).

An initial consideration in the analysis of the problem is whether the multiple offenses are the "same" for double jeopardy purposes.[185] The standard test by which legislative intent is gauged and by which this assessment is made involves a determination of whether each offense requires proof of a fact for conviction which the other does not.[186] If this standard of dissimilarity is satisfied, then the crimes are considered sufficiently distinguishable to support separate convictions and punishments.[187]

Traditional double jeopardy analysis presumptively permits multiple convictions and punishments unless the "additional fact" test discussed above mandates a conclusion that the charges are identical or that they occupy a greater inclusive-lesser included crime relationship. If the offenses are identical in law and in fact or if one offense is statutorily included within the other, the accused may not be convicted of both, in the absence of a clear indication of legislative intent to the contrary.[188]

---

185. This approach of initially analyzing the "sameness" of the offenses before considering legislative intent as to the allowable unit of prosecution tracks the method currently employed by the Wisconsin Supreme Court. *See* State v. Tappa, No. 84-131-CR, slip op. at 7-8 (Dec. 19, 1985). In response to the emerging primacy of legislative intent in relevant double jeopardy analysis, the United States Supreme Court currently approaches these issues in the opposite order. *See* Garrett v. United States, 105 S. Ct. 2407, 2411-20 (1985).

186. *See* Brown v. Ohio, 432 U.S. 161, 166 (1977); Blockburger v. United States, 284 U.S. 299, 304 (1932); State v. Gordon, 111 Wis. 2d 133, 140-41, 330 N.W.2d 564, 567 (1983); State v. Ramirez, 83 Wis. 2d 150, 153-56, 265 N.W.2d 274, 276-77 (1978); Schroeder v. State, 222 Wis. 251, 260-61, 267 N.W. 899, 903 (1936); *see also* WIS. STAT. §§ 939.66(1), 939.71 (1983-84).

The "additional fact" or "additional element" test is designed to identify whether multiple convictions were intended by the legislature. Whalen v. United States, 445 U.S. 684, 691 (1980); *Gordon*, 111 Wis. 2d at 140-42, 330 N.W.2d at 567-68.

In Wisconsin the test for double jeopardy identification of "same offenses" has also been phrased in terms of whether the two offenses are the same in law and in fact. *Ramirez*, 83 Wis. 2d at 154, 265 N.W.2d at 276; State v. Van Meter, 72 Wis. 2d 754, 757-58, 242 N.W.2d 206, 208 (1976).

187. *Brown*, 432 U.S. at 166.

188. If the offenses are the same in law and in fact, they are the "same offense" for double jeopardy purposes. State v. Stevens, 123 Wis. 2d 303, 320-23, 367 N.W.2d 788, 797-98 (1985). If they occupy a relationship of greater inclusive-lesser included crimes, they are also the "same offense" for double jeopardy purposes because the lesser offense requires no proof beyond that required for conviction on the greater inclusive crime. *Id.* In the latter context, WIS. STAT. § 939.66(1) (1983-84) specifically prohibits multiple convictions in language clearly indicative of legislative intent. The test embodied in

If a criminal OMVWI count is attached to a homicide, felony injury, or misdemeanor injury by intoxicated use of vehicle charge, the position may be advanced that the multiple offenses are not the same in law and in fact and that the homicide and injury crimes are not greater inclusive offenses of criminal OMVWI. Applying the strict "elements only" approach in the identification of lesser included offenses to which the Wisconsin Supreme Court has repeatedly demonstrated its firm commitment,[189] it may be concluded that each offense requires proof of a fact for conviction which the other does not, that criminal OMVWI is not *statutorily* included within the homicide or injury offenses, and that it is entirely possible to commit homicide, felony injury, or misdemeanor injury by intoxicated use of a vehicle without simultaneously committing criminal OMVWI.[190] Accordingly, in the single

---

this statute for determining whether one crime is included within another is the "additional fact" inquiry discussed in the accompanying text.

189. This court is committed to the "elements only" analysis of whether one offense is included within another. The test focuses not on the peculiar factual nature of a given defendant's criminal activity, but on whether the lesser offense is statutorily within the greater. . . . Stated in other words, an offense is a "lesser included" one only if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those which must be proved for the "greater" offense. . . . Conversely, an offense is not a lesser-included one if it contains an additional statutory element. This court has stated this test often and clearly. . . . In *Randolph*, the court additionally capsulized the rule by the formulation that "for one crime to be included in another it must be 'utterly impossible' to commit the greater without committing the lesser.

Hagenkord v. State, 100 Wis. 2d 452, 481, 302 N.W.2d 421, 436 (1981) (citations omitted). *See also* State v. Richards, 123 Wis. 2d 1, 5-7, 365 N.W.2d 7, 9 (1985). For the United States Supreme Court's treatment of this issue see United States v. Woodward, 105 S. Ct. 611 (1985) (*per curiam*); Thigpen v. Roberts, 104 S. Ct. 2916, 2922-23 (1984) (Rehnquist, J., dissenting); Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975).

190. A few examples demonstrate the point. If the actor's conduct of driving while impaired causes the death of another and the incident occurs on property not open to the public for motor vehicle usage, the driver is liable for felony homicide, but the driver has not committed the general OMVWI offense because the latter has no applicability on purely private property. *See supra* notes 26-30 and accompanying text.

Further, each offense requires proof of a fact for conviction which the other does not. Homicide, of course, mandates proof of death caused by the defendant's conduct. Criminal OMVWI requires proof of operation upon a highway or upon premises held out to the public for motor vehicle usage.

In another scenario the actor drives a bicycle upon a highway while "under the influence" and the actor's conduct causes injury to another. Under these facts the actor has committed the misdemeanor injury by intoxicated use offense. This statute applies to the operation of "vehicles," a term of art which includes conveyances which are not self-propelled. *See supra* note 25. However, the actor has not committed a general

trial situation, the present offense definitions of these crimes appear to allow multiple convictions and punishments in a manner which is consistent with the defendant's double jeopardy protections.

Double jeopardy doctrine and relevant statutes also appear to permit multiple successive trials for a homicide or injury offense as well as for a criminal OMVWI offense. The same "additional fact" test is used to determine whether the offenses are sufficiently distinguishable to allow successive prosecutions.[191] If the first trial results in a conviction, double jeopardy principles permit a second prosecution because the offenses are not the "same" in double jeopardy law. However, if the earlier of the two prosecutions results in an acquittal, a second trial may be banned by the doctrine of collateral estoppel even if the two offenses are not the "same" for double jeopardy purposes.[192]

The discussion of the multiplicity issue relative to charging criminal OMVWI in addition to homicide or injury offense has thus far been limited to the double jeopardy aspects of the problem. The other prong of multiplicity analysis is focused upon the legislature's intended allowable unit of prosecution when such multiple violations emanate from a single incident of impaired driving.

Strong arguments yielding contrary conclusions suggest the need for legislative clarification relative to the intended prosecution unit. Support for multiple charges and punishments may be found within the very definitions of the offenses. Because criminal OMVWI on the one hand and the homicide and injury offenses on the other each require proof of a fact for conviction which the other does not, the statutes proscribe

---

OMVWI offense because the latter statute applies only to the driving or operation of "motor vehicles," a class of conveyances limited by definition to those which are self-propelled. *See supra* note 25.

191. *Gordon*, 111 Wis. 2d at 140-42, 330 N.W.2d at 567-68; *Rabe*, 96 Wis. 2d at 64 n.8, 291 N.W.2d at 817 n.8; *Van Meter*, 72 Wis. 2d at 758, 242 N.W.2d at 208.

192. The doctrine of collateral estoppel is embodied within the federal double jeopardy clause and operates to prohibit relitigation of facts which have already been established against the government. *See* Ashe v. Swenson, 397 U.S. 436 (1970); *Kramsvogel*, 124 Wis. 2d at 122, 369 N.W.2d at 155.

If, for example, it were clear that the jury in the first trial found that the defendant was not the driver, the state is collaterally estopped from proceeding to a second trial on the companion charge in which this matter would be in issue again.

separate offenses to which attends a presumption of legislative intent to allow multiple punishments.[193] Further evidence of this intent may be found in the placement of the several offenses in separate statutory provisions and, in some instances, in entirely different codes.[194]

However, it may be submitted that all of the impaired driving offenses are targeted at the same dangerous behavior,[195] that the nature of the proscribed conduct is essentially the same,[196] that the offenses are distinguishable principally on the basis of harm inflicted, and that it would accordingly be inappropriate to assess the variety of penalties attached to each of the multiple offenses when they all arise out of a single incident.[197]

The comparable strength of these two contrary positions relative to the unit of prosecution issue ought to command legislative attention to the problem. While the current structure of the statutes leads to the conclusion that criminal

193. State v. Haskins, No. 85-759-CR (Wis. Ct. App. Nov. 6, 1985) (unpublished opinion available on LEXIS, Wisconsin library, Cases file).

This presumption may be overcome if there is a clear indication of contrary legislative intent. Missouri v. Hunter, 459 U.S. 359, 367 (1983). In Wisconsin the legislature has spoken to the point in a general way by prohibiting multiple prosecutions and the imposition of multiple punishments unless each of the several offenses is sufficiently distinguishable as determined by the application of the additional fact test. *Gordon*, 111 Wis. 2d at 140-42, 330 N.W.2d at 567-68. *See also* WIS. STAT. §§ 939.66(1), 939.71 (1983-84). The element structure of criminal OMVWI as devised by the legislature is sufficiently distinguishable from that of the homicide and injury offenses to yield the conclusion that the lawmakers intended to allow multiple convictions and punishments. It may also be observed that in the penalty section attached to the general OMVWI offense, the legislature appears to recognize the possibility that multiple convictions may arise from a single incident of impaired driving. WIS. STAT. §§ 346.65 (2)(b)-(c) (1983-84).

194. *See Rabe*, 96 Wis. 2d at 73, 291 N.W.2d at 821. The court therein appeared to recognize a divergence in legislative purpose when it placed some impaired driving crimes in the Criminal Code's chapter of offenses involving life and bodily security and located others in the Vehicle Code. The former action indicates an intent to protect lives and the latter reflects a purpose to deter impaired individuals from driving. *Id.* This method of placement may be urged in support of the conclusion that a criminal OMVWI charge (Vehicle Code offense) may be pressed in addition to a homicide or felony injury offense (Criminal Code violation), but it makes the argument in support of the permissibility of linking a criminal OMVWI charge with a misdemeanor injury offense (both Vehicle Code violations) less compelling.

195. *See Woodward*, 105 S. Ct. at 613; Ablernaz v. United States, 450 U.S. 333 (1981).

196. *See* Manson v. State, 101 Wis. 2d 413, 422, 304 N.W.2d 729, 734 (1981).

197. *See id.*

OMVWI is not a lesser included offense of the homicide and injury crimes,[198] it remains unclear whether it may be prosecuted in addition to those more serious offenses.

D. The Relationship of the Injury Offenses

The felony and misdemeanor injury by intoxicated use of a vehicle offenses are distinguishable principally by the degree of bodily harm suffered by the victim of the actor's conduct.[199] However, under the present formulation of these two offenses, the misdemeanor crime does not appear to be statutorily included within the felony injury law. Again, applying the strict "elements only" test,[200] it is entirely possible to commit the crime of felony injury without also committing the misdemeanor injury offense by the same conduct.[201] Accordingly, in a felony injury prosecution in which the dispute focuses at least in part upon whether the injuries suffered constitute "great bodily harm" (the felony standard), it would be impermissible to submit to the jury the option of finding the defendant guilty of a misdemeanor injury violation (which requires only "injury") because the latter offense is not statutorily included within the former.

IV. RECOMMENDATIONS AND CONCLUSION

The configuration of offenses in Wisconsin's scheme of impaired driving statutes reflects a legislative purpose to deal in a comprehensive manner with a dangerous problem and the harm which it visits upon others. However, when the various offense definitions are critically examined, several suggestions emerge which, if implemented, would promote desirable clar-

198. *See supra* notes 188-190 and accompanying text.

199. *See supra* notes 134-36 and accompanying text.

200. *See supra* note 189 and accompanying text.

201. The scenario of impaired driving causing injury which occurs on purely private property not open to the public for motor vehicle usage demonstrates the position that it is entirely possible to commit the felony injury offense without simultaneously violating the misdemeanor injury law. The intoxicated driver who causes great bodily harm while driving on purely private property commits the felony injury offense. This driver does not, however, offend the misdemeanor injury statute because the latter provision is limited in enforceability to highway driving or driving which occurs on private property open to the public for motor vehicle usage. WIS. STAT. § 346.61 (1983-84). *See also supra* notes 26-30 and accompanying text.

ity, uniformity and simplicity among statutes designed to address the same fundamental problem.

First, there ought to be a uniform definition of the degree of impairment which constitutes the condition of being "under the influence." If the court of appeals was correct in the *Waalen* case,[202] it may be concluded that Wisconsin law presently contains three different standards of impairment: (1) "material impairment of ability to operate a vehicle," which is applicable to the homicide and felony injury offense;[203] (2) any abnormal mental or physical condition in which one is deprived of that clearness of intellect and self-control which he or she would otherwise possess, which the court of appeals indicated is the standard applicable to the general OMVWI offense and, by implication, to the misdemeanor injury statute, if the source of influence is an intoxicant, a controlled substance, or a combination of the two;[204] and (3) "under the influence to a degree which renders [the driver or operator] incapable of safely driving," which is applicable to the general OMVWI and misdemeanor injury statutes if the source of the influence is a drug or a combination of an intoxicant and a drug.[205] If the hypothesis is sound that each of the impaired driving statutes is designed to respond to a common hazard and that the principal distinction among the offenses is one which is measured by the degree of harm inflicted by the prohibited conduct, then it is urged that the threshold of impairment beyond which one may not drive or operate a vehicle ought to be the same.[206] A uniform definition of the "under the influence" condition should be applicable throughout the entire scheme of impaired driving offenses

202. *See supra* notes 38-40 and accompanying text.

203. *See supra* note 82 and accompanying text.

204. *See supra* notes 38-40 and accompanying text.

205. *See supra* notes 54-55 and accompanying text.

206. If a preference may be expressed, it is for the standard approved for the general OMVWI offense by the court of appeals in State v. Waalen, 125 Wis. 2d 272, 371 N.W.2d 401 (Ct. App. 1985). Indulgence in any of the various sources of influence or a combination thereof which deprives the driver of the clarity of intellect and self-control which otherwise would be possessed constitutes a test which the jury is capable of understanding and applying. It also eliminates the risk of jury confusion inherent in the "material impairment of ability to drive" and "incapable of safely driving" tests. In the latter instances the trier of fact may become confused by the very definition of the standard and mistakenly believe that the impaired condition must be *evidenced* by impaired

(except, of course, in the "not a drop" law) and throughout the entire range of the statutorily recognized sources of influence. A standardized approach would achieve the same symmetry in the "under the influence" theory of liability that now exists among the various offenses in the ".10" theory of liability.

Second, the statutorily recognized sources of influence ought to be made uniform throughout the impaired driving statutes. A variance now exists between the classification of influences employed in the Criminal Code and that utilized in the Vehicle Code.[207] Again, desirable symmetry would be achieved by a designation of influence sources which would be applicable throughout the system of relevant offenses.

Third, the precise definitions of "drive" and "operate," which are codified in the general OMVWI and misdemeanor injury statutes, ought to be incorporated in the homicide and felony injury laws. The latter statutes employ "operation or handling"[208] and "operation"[209] language, respectively, and do so without the benefit of definition. This statutory silence raises the issue whether the broad meaning of "operate" employed in the Vehicle Code[210] is also applicable to the homicide and felony injury offenses. Earlier discussion suggested that death or great bodily harm may indeed be caused by conduct which involves manipulation of the controls of a motor vehicle necessary to put it in motion (the OMVWI definition of "operate")[211] but which does not involve actual movement of the impaired driver's vehicle at the time of the accident. If the Vehicle Code definition of "operate" is incorporated into the relevant Criminal Code offenses, then the causation of

---

or unsafe operation. The standard suggested is essentially the same as that employed in several jurisdictions. *See* 1 R. ERWIN, *supra* note 39, § 1.04[2][a].

If the Wisconsin Supreme Court reverses the court of appeals in *Waalen* and holds that the threshold of "influence" is uniform throughout the impaired driving statutes and is in fact the Criminal Code's "material impairment of ability to drive" standard, then the establishment of the lesser threshold recommended above would require legislative action.

207. The Criminal Code classification system employs "alcohol" language whereas the Vehicle Code uses the term "intoxicant." The position has been taken that the latter term is arguably broader than the former. *See supra* note 35.

208. *See supra* note 77.

209. *See supra* note 79.

210. *See supra* notes 14-22 and accompanying text.

211. *See supra* note 88.

death or great bodily harm by impaired "operation" would clearly (and desirably) be prosecutable as homicide or felony injury.

Fourth, the legislature ought to consider revising the language in which it has couched the affirmative defense to liability in the homicide and injury statutes. Assuming that it wishes to preserve the interpretation of the defense as developed in *Caibaiosai*,[212] a change in the terminology of the defense could promote clarity and incorporate the gloss of judicial interpretation which has been applied to the existing formulation.[213] If the true thrust of the defense is one which relieves the defendant of liability when there is an extraneous force which is the substantial factor causing the victim's death or injury,[214] and if both the driving and the impaired condition of the defendant must be figured into the causation formula as well as into the application of the affirmative defense, then perhaps the structure of the defense initially proposed by the Legislative Council in 1950 ought to be reconsidered. The latter formulation provided a defense "if the actor proves by a preponderance of the evidence that the death would have resulted even if he had been exercising due care *and* even if he had not been under the influence of an intoxicant."[215] It is submitted that this method of phrasing the defense would facilitate the identification of those situations in which it is operational.

Fifth, attention ought to be given to the unit of prosecution which is allowable when a single act of impaired driving constitutes both a criminal OMVWI violation as well as a homicide or injury by intoxicated use of vehicle offense. The structure of the several statutes seems to allow the prosecution of multiple criminal charges in this context as well as the imposition of multiple punishments when traditional double jeopardy analysis is applied to the problem.[216] However, the key issue of the legislatively intended allowable unit of prose-

212. *See supra* notes 118-22 and accompanying text.

213. There is a variance between the language of the defense and the interpretation which has been accorded to it. *See supra* notes 120-22 and accompanying text.

214. *See supra* note 120 and accompanying text.

215. VII JUDICIARY COMMITTEE REPORT, *supra* note 102, at 61 (emphasis supplied).

216. *See supra* notes 185-91 and accompanying text.

cution is subject to contrary resolutions each supported by strong arguments.[217] It would indeed be preferable for the legislature to pointedly address the problem rather than leaving its ultimate determination to presumptions and other methods of discerning legislative intent.

Finally, the misdemeanor injury statute should be repealed and recreated as part of the Criminal Code with a Class A misdemeanor designation.[218] This would promote two desirable results: (1) it would make the misdemeanor injury statute enforceable without regard to whether the actor's driving or operating occurred on a highway or upon private premises held out to the public for motor vehicle usage,[219] and (2) it would clearly establish the misdemeanor injury offense as a lesser included crime of felony injury and thereby allow for its submission to the jury when there is a legitimate dispute as to whether the defendant's conduct caused the "great bodily harm" required for a felony conviction.[220]

The current system of impaired driving offenses in Wisconsin constitutes the state's most comprehensive legislative package to date in its unending endeavor to formulate offense definitions in a clear and precise way. A critical study of these definitions, however, suggests a present need for greater clarity and precision. The recommendations advanced in this discussion are intended to promote these goals.

---

217. *See supra* notes 193-98 and accompanying text.

218. The Class A misdemeanor designation would make the maximum penalty a fine not to exceed $10,000, or imprisonment not to exceed nine months, or both. WIS. STAT. § 939.51(3)(a) (1983-84). This classification would properly locate the misdemeanor injury statute in the continuum of the homicide and injury offenses. Homicide by intoxicated user of a vehicle is a Class D felony and felony injury is a Class E felony. In Wisconsin's scheme of penalties, the Class A misdemeanors are directly below the Class E felonies.

219. *See supra* note 141 and accompanying text. The misdemeanor injury offense ought to be enforceable to the same extent as the homicide and felony injury crimes. The highway limitation upon this offense serves no legitimate purpose.

220. *See supra* notes 200-01 and accompanying text.