

Introduction

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INTRODUCTION

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In the past ten years, few areas of law have received as much attention by legislatures, courts and the general public as the law governing the operation of motor vehicles while intoxicated (OWI). Due to the efforts of interest groups such as Mothers Against Drunk Driving (MADD) and pervasive media coverage of the issue, we have evolved from a society which considered most drunk driving incidents to be aberrations in the lives of "social drinkers" to a society incensed at the staggering personal and economic losses resulting from drivers who have had "one too many." According to statistics from the National Highway Traffic Safety Administration, "[i]n excess of 50 percent of all drivers killed each year have blood alcohol concentrations (BACs) higher than the legally recognized limit, 0.10 percent."¹ An average 25,000 Americans per year lose their lives in alcohol-related traffic accidents and more than 650,000 are injured. Conservative estimates place the annual economic loss from these accidents at \$24 billion for actual damages alone.²

State legislatures have responded to this problem by enacting a broad array of laws directed at both punishing and treating intoxicated drivers, as well as deterring others from

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1. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEP'T OF TRANSPORTATION, DIGEST OF STATE ALCOHOL-HIGHWAY SAFETY RELATED LEGISLATION iii (2d ed. 1983).

2. *Id.*

drinking and driving.³ Among the most significant of these laws are:

1. Establishing a specific BAC as a per se OWI violation.
2. Imposing a mandatory jail sentence on OWI first offenders.
3. Prohibiting the court from accepting plea bargains on OWI offenses under any circumstances or restricting the court's discretion to accept plea bargains.
4. Permitting the immediate administrative suspension or revocation of a driver's operating privilege for refusing to take a chemical test under an implied consent law or for having a certain BAC. The Wisconsin Legislature is currently considering legislation to require administrative revocation under such circumstances.
5. Increasing penalties and licensing sanctions for OWI and for refusing to take a chemical test, especially for repeat offenders and OWI offenders who cause death or injury. Wisconsin did this in 1981.
6. Establishing mandatory assessment of OWI violators for alcohol-related problems and requiring treatment programs for those who are assessed to have such problems. Again, Wisconsin incorporated this feature into its laws in 1981.

3. Wisconsin's OWI laws were extensively revised by 1981 Wis. Laws 20. The appellate courts in Wisconsin have consistently upheld the constitutionality of various changes made by 1981 Wis. Laws 20.

In *State v. Caibatosai*, 122 Wis. 2d 587, 363 N.W.2d 574 (1985), the Wisconsin Supreme Court held that the provision in Chapter 20 creating an affirmative defense for a defendant tried for causing the death of another by OWI does not invade the defendant's right against self-incrimination guaranteed by the fifth amendment to the United States Constitution.

In *State v. Muehlenberg*, 118 Wis. 2d 502, 508, 347 N.W.2d 914, 917 (Ct. App. 1984), the court of appeals held that the provision in Chapter 20 creating a per se violation for driving with a BAC of 0.10% or more was not unconstitutionally void for vagueness since persons of common intelligence could, with a fair degree of definiteness, know when they are in danger of violating that provision.

In *State v. Bohacheff*, 114 Wis. 2d 402, 338 N.W.2d 466 (1983), the Wisconsin Supreme Court held that the provision in Chapter 20 permitting an OWI defendant to be charged with both driving under the influence and for having a BAC of 0.10% or more did not violate the federal or state constitutional guarantees against double jeopardy because the legislature intended prosecution for both offenses to terminate in one conviction for both charges.

7. Raising the legal drinking age and enacting specific legislation relating to underage drivers who drink.

8. Imposing civil liability on sellers and, in some states, social hosts who negligently furnish alcoholic beverages to persons who cause injury to third persons as a result of consumption of the beverages. Recently, the Wisconsin Legislature passed, and the Governor signed, dram shop legislation which codified two recent Wisconsin Supreme Court decisions. Essentially, the bill extends liability to anyone who dispenses alcohol to a person under the legal drinking age if the dispenser knew or should have known the recipient was under age.⁴

9. Expanding prohibitions against having open containers of intoxicants in the passenger area of a motor vehicle and imposing stronger penalties for such violations.

Wisconsin has also provided for the use of new, more reliable intoximeters with which to conduct chemical tests for OWI. This equipment, and many of the educational, diagnostic and treatment programs designed to prevent OWI, are financed by a surcharge which persons convicted of OWI must pay. Again, this has been a feature of Wisconsin law since 1981.

Statistics indicate that the changes in Wisconsin's OWI laws have had positive effects. In 1980, drunk drivers caused 413 fatalities, constituting forty-two percent of the highway fatalities; in 1981, they caused 411 fatalities or forty-four percent of traffic deaths. In 1983, the first full year during which the revisions were in effect, drunk drivers caused 272 deaths, representing thirty-seven percent of the total; in 1984, the number was 282 deaths, only thirty-four percent.

Other figures show that conviction and punishment is more certain under the revised law. For example, the conviction rate for OWI under the old law was seventy-eight percent, now it is eighty-seven percent. The number of revocations and suspensions for OWI has increased 147% from 1981 to 1984.

Across the nation and in Wisconsin, the revision of OWI laws and the continuing effort to decrease OWI violations

4. See 1985 Wis. Laws 47.

have raised numerous public policy issues, including the following:

1. If OWI offenders, especially first offenders, are subject to jail terms, will the courts, public defender systems, jails and probation services be able to meet the heavy demands imposed on them? This is of particular relevance in Wisconsin where a first offense OWI is currently a civil forfeiture action which may be prosecuted in municipal court. There has been at least some legislative interest in making the first offense a criminal offense subject to a jail term.

2. At what point are a defendant's constitutional rights to due process violated by statutory schemes creating per se violations or prompt administrative revocation of driving privileges? What about sobriety checkpoints and a person's right to be free from unreasonable searches and seizures? Courts which have grappled with these issues have generally found state schemes to be constitutionally acceptable, but the differing provisions and procedures in the various states make a definitive answer to these issues impossible.

3. To what degree should social hosts be held responsible for the acts of an intoxicated guest who kills or injures a third person? Should liability attach only where the guest is underage or visibly intoxicated at the time the alcoholic beverages are served? Should there be a "cap" on damages recoverable from a seller or social host? If liability is imposed, will sellers and social hosts be able to obtain insurance to cover potential claims? As mentioned, the Wisconsin Legislature recently acted on this issue and limited liability to those who dispense to an underage person when they knew or should have known they were dispensing to an under-age person. Wisconsin law covers any dispenser, including social hosts.

4. Which of these tougher sanctions are actually effective in reducing alcohol-related traffic accidents? If a sanction is only marginally effective, are the burdens the sanction places on the offender, the offender's family and the judicial and correctional systems warranted? At least one study has concluded that harsh criminal penalties for OWI are not an effective deterrent and that states should emphasize enforcement and prompt imposition of penalties rather than increas-

ing the severity of penalties.⁵ Other studies have shown that license revocation or suspension is the most effective sanction for reducing drunk driving.⁶

In the future, legislatures may be faced with increasing pressures to, among other things, lower the BAC level for per se violations and to impose more substantial penalties and license sanctions on OWI offenders. Recent federal legislation providing millions of dollars in incentive grants for states meeting certain prescribed criteria will add to that pressure.⁷

Whatever the changes, the United States will still be considered lenient toward drunk drivers in comparison to other countries. A recent article notes the following penalties for OWI in selected countries:

1. Malaya: The driver is jailed and, if married, his or her spouse is too.

2. Norway: For a first offense (0.05% BAC is the legal limit), "[t]hree weeks in jail at hard labor, one year loss of license." If a second offense occurs within five years, the violator's license is revoked for life.

3. Finland and Switzerland: "[J]ail for one year at hard labor."

4. U.S.S.R.: "License revoked for life."

5. Bulgaria: "A second conviction results in execution."⁸

Obviously, it is neither necessary, nor constitutionally permissible, to punish OWI offenders to the extent that some of these other countries do. However, subjecting drunk drivers to serious sanctions and requiring drivers with alcohol-based problems to obtain necessary counseling has significant impact on the number of OWI-related accidents on our highways. The articles that comprise this issue of the *Marquette Law Review* explore the state of the law governing drunk driving in Wisconsin and throughout the nation. The basic issue that pervades each of this issue's articles is to what extent the dif-

5. See H. L. ROSS, *DETERRING DRINKING DRIVERS: LEGAL POLICY AND SOCIAL CONTROL* (1982).

6. See, e.g., Hagen, *The Efficacy of Licensing Controls as a Countermeasure for Multiple DUI Offenders*, 10 J. OF SAFETY RESEARCH 115-22 (1978).

7. For example, federal highway monies will be conditioned on the imposition of a 21 year old minimum drinking age. 23 U.S.C. § 408 (1982).

8. *How They Handle Drunk Drivers In Other Countries*, 84 WIS. MED. J. 49 (1985).

ferent legislatures of this country do and will restrict access to alcohol, an important component in American social life, in an effort to further reduce the incidence of drunk driving.