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The First Offense Is Just a Ticket? How Culture and Lobbying Shaped Wisconsin's Drunk Driving Law, and What to Do About It

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THE FIRST OFFENSE IS JUST A TICKET? HOW CULTURE AND LOBBYING SHAPED WISCONSIN'S DRUNK DRIVING LAW, AND WHAT TO DO ABOUT IT

Wisconsin is known for, and proud of, its heavy drinking culture. The Badger State also acts as a safe haven for drunk drivers, of which there are many. Most notably, Wisconsin is the only member of the fifty states which does not criminally punish first-time drunk driving offenders. If the Wisconsin legislature has any interest in the public safety of its constituents, then new drunk driving prevention measures must be implemented.

This Comment recommends specific drunk driving prevention measures for Wisconsin, with an understanding of the unique role that drinking has in the state. First, this Comment contextualizes Wisconsin's current drunk driving law by overviewing the state's history of drunk driving legislation. In particular, this Comment explores the lobbying power of the Wisconsin Tavern League and its lengthy influence on Wisconsin politicians. Next, this Comment surveys the current methodologies of drunk driving prevention, including a breakdown of Wisconsin's current law, an overview of how other states regulate drunk driving, and an analysis of the various theories and techniques that are used to deter drunk drivers. Finally, this Comment proposes new measures of drunk driving prevention in Wisconsin that could overcome the Tavern League, pass through the Wisconsin legislature, and finally prioritize the public safety of Wisconsinites.

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I. INTRODUCTION

Wisconsin has a long history of allowing drinkers to sit in the literal and proverbial driver’s seat. The Badger State has one of the least strict drunk driving¹ laws in the United States, primarily because of its extremely relaxed treatment of first-time drunk driving offenders. Most notably, Wisconsin is the only state in the country in which first-time drunk driving is not a criminal offense. To fully understand Wisconsin’s drunk driving law, and to identify feasible improvements, the law must be put into context. Appreciating the creation of Wisconsin’s drunk driving law requires an analysis of Wisconsin culture, politics, and lobbying. Grasping the current existence of Wisconsin’s drunk driving law requires a comprehensive overview of drunk driving enforcement today in Wisconsin and in other U.S. jurisdictions. Only after understanding these components can we discuss a Wisconsin-specific solution, one that may finally pass through the Wisconsin legislature and effectively reduce drunk driving in the state.

II. HISTORY OF DRINKING, AND DRIVING, IN WISCONSIN

In order to change Wisconsin’s drunk driving law, it is crucial to first understand why it is so lenient in the first place. That starts with an analysis of the state’s long-term relationship with drinking, and how that culture of drinking correlates with the drunk driving law.

A. A Culture of Drinking

It is indisputable that alcohol is an integral part of Wisconsin culture. A more difficult question is why alcohol is so important in the Badger State. Many scholars have pointed to Wisconsin’s German heritage as the culprit for the

1. In this Comment, I use the term “drunk driving” for consistency purposes. Drunk driving often conjures the image of somebody stumbling around who can hardly walk or speak. However, it is important to remember that any level of alcohol-impaired driving is dangerous, and that the term “drunk driving” applies to driving with any amount of alcohol in one’s system, not just an amount of alcohol that is over the legal limit.

excessive drinking in Wisconsin.² German immigration to Wisconsin largely ended over one hundred years ago, but 43% of Wisconsinites still claim German ancestry.³ This heritage helps form an identity that University of Wisconsin professor James Leary likens to “‘a reconfiguration of European peasant cultures’ . . . [that created a] statewide loyalty to beer—almost a feeling that if you’re from Wisconsin you should drink it.”⁴

Other scholars have expressed skepticism as to how much blame should be placed on the Germans for Wisconsin’s pervasive culture of drinking. University of St. Thomas German Professor Paul Schons has noted that all Europeans are known for drinking various types of alcohol.⁵ Julia Sherman, coordinator for the Wisconsin Alcohol Policy Project in Wisconsin, calls pointing to German ancestry a “cop out,” noting that New England also has high drinking levels but does not have German heritage, and that it has been many generations since German ancestry impacted cultural activities.⁶

Alternatively, Sherman identifies race as a more likely factor behind Wisconsin’s drinking culture, because the white population has a higher rate of drinkers than other racial groups.⁷ Wisconsin has a population that is 86.6% white, according to the 2020 U.S. census.⁸ Sherman argues that “besides race, there are four main reasons for Wisconsin’s high rates of alcohol consumption.”⁹ She calls them “the four As”: (1) Availability: “Alcohol is literally everywhere. It is sold in far more locations in Wisconsin than in other places”; (2) Affordability: “We have some of the lowest alcohol prices in the country”; (3) Attractiveness: “There is a tremendous amount of alcohol advertising”; (4) Acceptability: “We have very relaxed social norms. There is an expectation that we will all drink.”¹⁰ According to Sherman, these “four As”

2. Galen Druke, *Wisconsin’s Drinking Problem Doesn’t Stem From Cultural Heritage*, *Expert Says*, WIS. PUB. RADIO (Sept. 8, 2014), <https://www.wpr.org/wisconsins-drinking-problem-doesnt-stem-cultural-heritage-expert-says> [<https://perma.cc/F59M-AUN5>].

3. Mark P. Gaber, *The History of Wisconsin’s Alcohol Laws: A Drunk Culture or Lobbyists Drunk with Power?* 11 (Aug. 19, 2009) (unpublished manuscript) <https://citeseerx.ist.psu.edu/pdf/a97dde9218750791184a1c815732b2e618f121c0> [<https://perma.cc/H63N-R9C7>].

4. Rick Romell, *Drinking Deeply Ingrained in Wisconsin’s Culture*, MILWAUKEE J. SENTINEL (Oct. 19, 2008), <http://www.jsonline.com/news/wisconsin/31237904.html> [<https://perma.cc/7AY7-QWGY>].

5. Gaber, *supra* note 3, at 13.

6. Druke, *supra* note 2.

7. *Id.*

8. U.S. CENSUS BUREAU, QUICKFACTS WISCONSIN, <https://www.census.gov/quickfacts/fact/table/WI/PST045221> [<https://perma.cc/6G8N-JXQD>].

9. Druke, *supra* note 2.

10. *Id.*

provide the necessary context as to why Wisconsin is such a heavy drinking state.¹¹

The *Milwaukee Journal Sentinel* has also attempted to identify the core of Wisconsin's heavy drinking. In its 2008 series *Wasted in Wisconsin*, the *Sentinel* cited the state's cold climate, the economic importance of the state's brewing industry, the need for identity, and the relative lack of newcomers to the state as additional explanations.¹² Professor Paul Moberg, a University of Wisconsin Population Health Institute scientist, says that the state's history with alcohol "has to do with Badger pride We've got a long-standing tradition of heavy alcohol use."¹³

One thing is for certain: Wisconsin's reputation as a heavy drinking state is not hyperbole. Wisconsin is consistently a nationwide leader in binge drinking.¹⁴ According to University of Wisconsin Population Health Institute data, forty-one out of the fifty drunkest counties in the United States are located in Wisconsin.¹⁵ In 2013, the Centers for Disease Control and Prevention (CDC) estimated that 65% of Wisconsin adults consume alcohol.¹⁶

Inevitably, a high rate of drinking is likely to lead to a high rate of drunk driving. The Wisconsin Department of Transportation reported that 27,785 people were arrested for Operating While Intoxicated (OWI) in Wisconsin during 2019, including 298 persons who were under eighteen.¹⁷ According to a study by SafeHome.org, there were 437 Driving Under the Influence (DUI) arrests per 100,000 residents in Wisconsin in 2019.¹⁸ Meanwhile, the national average was 287 arrests per 100,000 people.¹⁹ The same study stated that drunk driving results in more arrests than murder, rape, aggravated assault, and

11. *Id.*

12. Romell, *supra* note 4.

13. Julia Bair, *Health Leaders Respond to Drinking Issues*, BADGER HERALD (Apr. 24, 2008), http://badgerherald.com/news/2008/04/24/health_leaders_respo [<https://perma.cc/6CZD-ZM9H>].

14. *Data on Excessive Drinking*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 28, 2022), <https://www.cdc.gov/alcohol/data-stats.htm> [<https://perma.cc/3KGE-BK9K>].

15. Samuel Stebbins, *The 50 Drunkest Counties in America*, 24/7 WALL ST. (Oct. 8, 2021), <https://247wallst.com/special-report/2021/10/08/americas-drunkest-counties/> [<https://perma.cc/N6MF-R8YH>].

16. Amy Jewett, Ruth A. Shults, Tanim Banerjee & Gwen Bergen, *Alcohol-Impaired Driving Among Adults – United States, 2012*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 7, 2015), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6430a2.htm> [<https://perma.cc/F3JU-2CJU>].

17. *Drunk Driving Arrests and Convictions*, WIS. DEP'T TRANSP., <https://wisconsin.dot.gov/Pages/safety/education/drunk-drv/ddarrests.aspx> [<https://perma.cc/9UT7-VJMS>].

18. *Where in the U.S. Are DUIs Most Common?*, SAFEHOME (June 31, 2021), <https://www.safehome.org/resources/dui-statistics/> [<https://perma.cc/WA4Q-7U8Z>].

19. *Id.*

burglary combined, and accounts for 28% of all fatal traffic accidents.²⁰ In 2015, on average one person was killed or injured in an alcohol-related car crash every 2.9 hours in the state of Wisconsin.²¹ According to the Wisconsin Department of Transportation, “[A]lcohol remains the single greatest driver contributing cause of fatal crashes.”²² While drinking may be a source of pride for the state, this data shows that those prideful drinkers get behind the wheel far too frequently, creating dangerous and deadly road conditions for all Wisconsin civilians.

B. The Development of the Drunk Driving Law

The pervasiveness of drinking in Wisconsin was certainly a factor when the first drunk driving laws were enacted across the United States during the 1970s and ‘80s. The early drunk driving laws in Wisconsin classified the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment was possible.²³ This was consistent with Wisconsin’s lenient policies on drinking in general. While most states set their minimum drinking age at twenty-one following Prohibition, Wisconsin’s minimum drinking age was eighteen up until 1985, with the exception of the brief Prohibition period in the 1920s.²⁴ Wisconsin was also the only state during the 1980s to have no minimum drinking age for consumption of beer if a minor was accompanied by his or her parent.²⁵

Wisconsin’s lenient attitude towards drinking went against popular public opinion during that era, leading to negative national attention. The state received nationwide criticism for its “blood border”²⁶ with Illinois, and for its unwillingness to join President Ronald Reagan’s national movement to combat

20. *Id.*

21. *Drunk Driving Crashes, Fatalities and Injuries*, WIS. DEP’T TRANSP., <https://wisconsin.gov/Pages/safety/education/drunk-drv/ddcrash.aspx> [https://perma.cc/MR3V-YE98].

22. *Id.*

23. Gaber, *supra* note 3, at 2.

24. *Id.* at 27.

25. *Id.*

26. The Wisconsin-Illinois border, mainly between the metropolitan cities of Milwaukee and Chicago, became known as a “blood border” in the late 1970s and early 1980s, due to the difference in legal drinking ages between the states. Young Illinois civilians between the ages of nineteen and twenty-one, under the drinking age of twenty-one in Illinois but over the drinking age of eighteen in Wisconsin, frequently crossed the border into Wisconsin, a so-called “drinking oasis” for underage youths. During this time, drunk driving crashes in the border areas increased by nearly 400%, leading to the “blood border” distinction. Howard Witt & Robert Enstad, *Wisconsin Jumps on Wagon*, CHI. TRIB. (Apr. 10, 1986), <https://www.chicagotribune.com/news/ct-xpm-1986-04-10-8601260391-story.html> [https://perma.cc/L6WS-U4RE].

drunk driving.²⁷ As part of the United States Supreme Court's 1984 *Welsh v. Wisconsin* decision, Justice Harry Blackmun wrote a separate concurrence to include a "personal observation" in which he publicly admonished Wisconsin for its drunk driving law:

I yield to no one in my profound personal concern about the unwillingness of our national consciousness to face up to—and to do something about—the continuing slaughter upon our Nation's highways, a good percentage of which is due to drivers who are drunk or semi-incapacitated because of alcohol or drug ingestion. . . . And it is amazing to me that one of our great States—one which, by its highway signs, proclaims to be diligent and emphatic in its prosecution of the drunken driver—still classifies driving while intoxicated as a civil violation that allows only a money forfeiture of not more than \$300 so long as it is a first offense. . . . The State, like the indulgent parent, hesitates to discipline the spoiled child very much, even though the child is engaging in an act that is dangerous to others who are law abiding and helpless in the face of the child's act. . . . Our personal convenience still weighs heavily in the balance, and the highway deaths and injuries continue.²⁸

Some in the state led futile attempts to change the law in the '80s and '90s. In 1989, Charles Schudson, then a Milwaukee County Circuit judge, drafted a comprehensive plan to toughen the state's drunk driving laws, which included criminalizing the first offense.²⁹ Then-Wisconsin Governor Tommy Thompson never responded to Schudson's letters, and no state legislator would agree to sponsor his proposal.³⁰ According to Schudson, not considering the first drunk driving offense a crime is an example of "gross and dangerous irresponsibility. Until that is done, nothing else makes much difference at all. Until that is done, we continue to make the wrong moral legal statement, and all other statements are mere rearrangements of the deck chairs on the Titanic."³¹ In 1997, a bill to criminalize first-offense drunk driving was sponsored by former Senator Gary

27. Gaber, *supra* note 3, at 30.

28. *Welsh v. Wisconsin*, 466 U.S. 740, 755–56 (1984) (Blackmun, J., concurring).

29. Gina Barton & Steven Walters, *Wasted in Wisconsin; There's Little Will to Change Law; Criminalizing First-Offense Drunken Driving Would Face Steep Political, Cultural Hurdles*, MILWAUKEE J. SENTINEL (Oct. 25, 2008), <https://www.proquest.com/docview/263778755?accountid=100&forcedol=true> [<https://perma.cc/RB75-HJBK>].

30. *Id.*

31. *Id.*

Drzewiecki (R-Pulaski) and then-Representative Scott Walker (R-Wauwatosa).³² The bill did not get a committee vote.³³

Over ten years later, in 2008, a man named Mark Benson was sentenced in Waukesha County Circuit Court to a jail term for an Operating While Intoxicated (OWI) third offense.³⁴ As was the law at the time, the judge gave Benson two weeks to report to serve his jail sentence.³⁵ Two days later, Benson rear-ended a vehicle stopped at a traffic light, killing the vehicle's driver, her unborn child, and her ten-year-old daughter, while also injuring two other passengers.³⁶ Benson was impaired by prescription drugs when the accident occurred.³⁷ The case generated enormous publicity, revolving around the fact that Benson caused the collision after he had been sentenced for his prior offense but before reporting to serve the sentence.³⁸ Soon thereafter, the *Milwaukee Journal Sentinel* published a series of articles which highlighted the Benson case and advocated for the reform of Wisconsin's impaired driving laws.³⁹ The Benson case and the *Sentinel* series created tremendous public interest in Wisconsin's impaired-driving laws.⁴⁰ The legislature responded by passing 2009 Wisconsin Act 100, which took effect on July 1, 2010 and is current as of today.⁴¹

C. The Tavern League and the Power of Lobbying

As previously discussed, Wisconsin has a drinking culture unlike any other state, and as a result, a high rate of drunk driving deaths.⁴² It might be natural to wonder why the Wisconsin legislature has not combatted this public safety issue with stricter drunk driving laws, seeing as state legislators have an incentive to act in the best interest of their constituents in order to get re-

32. *Id.*

33. *Id.*

34. Andrew Mishlove & Lauren Stuckert, *Wisconsin's New OWI Law*, WIS. LAW. (June 4, 2010), <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=83&Issue=6&ArticleID=2045> [<https://perma.cc/LE3V-KXGX>].

35. *Id.*

36. *Id.*

37. *Id.* In addition to alcohol, the OWI statute in Wisconsin includes impairment from intoxicants such as prescription drugs. Wis. Stat. § 346.63(1)(a) (2019–2020).

38. *Id.*

39. *Id.*; see generally Mark Katches, *Wasted in Wisconsin Behind the Headlines: We Made it Our Mission to Represent the Victims*, MILWAUKEE J. SENTINEL, Oct. 19, 2008, at 2.

40. Mishlove & Stucker, *supra* note 34.

41. *Id.* This Act will be discussed in detail later in the Comment. *Infra* Part III.

42. *Supra* Part II.

elected.⁴³ A primary reason why Wisconsin has such permissive drunk driving laws is the all-powerful Wisconsin Tavern League, without whom the story of drinking and drunk driving in the state would be incomplete.

The Wisconsin Tavern League, a non-profit corporation, holds a place in Wisconsin culture that is unlike any other lobbying organization in the country. The Tavern League was founded in 1935, two years after the end of Prohibition, and represents nearly 5,000 licensed beverage retailers, making it the largest of its kind in the United States.⁴⁴ The Tavern League “is comprised of seventy local leagues representing every county in the state.”⁴⁵ “Any business located in any municipality within the state of Wisconsin which is licensed to sell alcoholic beverages for either on premise consumption or off premise consumption” is eligible to become a member.⁴⁶ Members are required to pay their local dues, and in return receive direct benefits such as lower credit card processing rates, discounted music licensing fees, and worker’s compensation insurance rebates, as well as invitations to attend annual conventions and trade shows.⁴⁷ The Tavern League’s executive positions are decided by a board of directors, which in turn is chosen at group conventions.⁴⁸

Beyond its corporate structure, the Tavern League gains its power from a steadfast commitment to organizing at a grassroots level. The league is deeply engrossed in the business of bars around the state, and in this state, bars are aplenty. Wisconsin has an estimated 3,000 taverns, which employ around 14,000 workers and generate annual sales of nearly \$600 million.⁴⁹ The vast majority of those bars are members of the Tavern League, meaning that thousands of workers see the Tavern League as an advocate for the interests of their local business and their place of employment.⁵⁰

The Tavern League fully embraces this grassroots approach, building relationships with the general public by showing up to local taverns, which are often the social centers of small communities, for fish fries on Fridays, Bloody

43. *Indivisible States: How State Legislatures Work*, INDIVISIBLE, <https://indivisible.org/resource/indivisible-states-how-state-legislatures-work> [https://perma.cc/TVJ5-SMPW].

44. Gaber, *supra* note 3, at 36–37.

45. *Mission*, TAVERN LEAGUE WIS., <https://www.tlw.org/mission/> [https://perma.cc/SL83-4FEE].

46. *About the Tavern League*, TAVERN LEAGUE WIS., <https://www.tlw.org/about/> [https://perma.cc/84WD-6BTP].

47. *Id.*

48. Zach Brooke, *Wisconsin’s Tavern League Works For Their Members, Not Public Health*, MILWAUKEE MAG., Feb. 2021, at 42, 44.

49. Steven Walters & Tom Daykin, *Grass Roots Feed Tavern League’s Political Clout*, MILWAUKEE J. SENTINEL, Oct. 22, 2008, at A.1.

50. *Id.*

Marys on Saturdays, and Packers games on Sundays.⁵¹ The league also sponsors charitable, civic, and patriotic events, all of which create a sense of trust and reliability in the eyes of the general Wisconsin population.⁵² As the Tavern League's former lobbyist Scott Stenger put it: "Ask anybody: 'Who do you trust? Do you trust your local legislator, or your local tavern owner?' I think it's overwhelming. 'I trust my tavern owner. I see them. They are there, a part of the community.'"⁵³

In a state where drinking is as much a part of regular life as a cup of hot coffee in the morning, the organization representing the establishments where that drink is purchased has considerable clout. And when that clout gets used, it happens with efficiency and effectiveness. Every year, hundreds of bar owners and patrons show up in the state capital of Madison to push their agenda, carrying signs and introducing petitions on behalf of the league.⁵⁴ In effect, each of these members becomes a lobbyist themselves, cramming the offices of the State Capitol building and pushing their lawmakers to make decisions that benefit their local taverns.⁵⁵ Furthermore, Tavern League members develop unique personal relationships with legislators, holding fundraising events for Wisconsin politicians in taverns and restaurants with liquor licenses.⁵⁶ As a result, tavern operators have the opportunity to interact with legislators directly inside the business for which they are advocating—a clear advantage over other lobbyists.⁵⁷ As former Wisconsin lawmaker Stephen Freese acknowledged, "[lawmakers] got to know these people really, really well."⁵⁸

The clout of the Tavern League, established at a grassroots level, eliminates the need for big spending. Remarkably, the League only has one registered lobbyist in Madison, while other notable lobbying groups have ten or more.⁵⁹ The league spent just over \$185,000 on lobbying efforts from January 2019 to June 2020—a figure that was surpassed by forty-six lobbyist organizations.⁶⁰ Other groups, such as the teacher's union and the state manufacturers, spend millions of dollars on lobbying.⁶¹

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Brooke, *supra* note 48, at 42.

61. Walters & Daykin, *supra* note 49.

In fact, the league has such influence in Madison that its officers are sometimes invited inside the very room where legislative decisions are made. In 2013, when the federal government required certain states to put forward a plan to deal with impaired driving, the Tavern League's then-executive director Pete Madland was a member of the Wisconsin Department of Transportation's task force to deliberate on the issue, the only nongovernmental member of the group.⁶² When Wisconsin considered creating a new office to enforce liquor laws, Madland was again a part of the legislative group analyzing the issue.⁶³ Unsurprisingly, the office was never created.⁶⁴

As journalist Zach Brooke put it, the Tavern League's success is rooted in its ability to offer both carrot and stick.⁶⁵ "Wisconsin's well-established fondness for drinking at community watering holes fills a reservoir of goodwill toward the league from both sides of the political aisle. Those politicians who dare to cross the league stand to be denounced in every bar room in their district with few allies to turn to."⁶⁶ Others have expressed skepticism about the Tavern League's true strength, believing that the Tavern League has won the "PR game," and that "lawmakers have foolishly bought into it that the Tavern League has more power than they actually have."⁶⁷ Regardless, the Tavern League's unique position in the lobbying landscape is one that is not replicated anywhere else, and when they push one way or the other, the legislature almost always falls in line.

The Tavern League is known for picking its battles carefully, advocating for legislation that is good for business and fighting against any public measure that is deemed bad for its nearly 5,000 members. More often than not, this results in lobbying efforts that prioritize profits for bar owners over the safety for the general public. Pete Madland recognizes this and seems to embrace it. "The public doesn't pay our wages," he says.⁶⁸ "We take care of our members. We do what they want us to. That's what drives us."⁶⁹

The implementation of this strategy, to prioritize profits of members over the safety of the public, can be seen over multiple decades, through both wins and losses for the Tavern League. In the 1980s, Wisconsin was one of the last states to comply with the federal mandate to change the state's legal drinking

62. Brooke, *supra* note 48, at 42.

63. *Id.*

64. *Id.*

65. *Id.* at 44.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

age from eighteen to twenty-one.⁷⁰ The Tavern League used member strikes, congressional donations, and fear tactics to fight the drinking age change.⁷¹ When the state eventually complied with the federally mandated change (in order to avoid losing federal transportation funding), then-Tavern League president Gill Meisgeier predicted that state taverns would lose millions in sales as a result of the law, and that “drunk driving death rates [would] go up” because “[d]rinkers will go from bars to cars.”⁷² Contrary to this prediction, alcohol-related traffic fatalities fell by 11% nationally, and 13% in Wisconsin, in the years following the increase of the drinking age.⁷³

In the late 1990s and early 2000s, the Tavern League fought hard against a federally mandated reduction from a 0.10% Blood Alcohol Content (BAC) level to a 0.08% BAC level for legally operating a vehicle.⁷⁴ Due to the influence of the league, Wisconsin was one of the last states to comply with the federal mandate, losing federal transportation dollars in the process.⁷⁵ Despite reports by the National Highway Traffic Safety Administration (NHTSA) showing that “virtually everyone” is impaired at a 0.08% BAC level, the Tavern League said that the reduction targeted “social drinkers,” and “would be the death knell for a lot of small taverns.”⁷⁶

Some Tavern League “losses” are due to the pressure of federal spending, like above; others are a result of compromise. In 2008, then-Governor Jim Doyle proposed legislation with strong bipartisan support to ban smoking at bars and restaurants.⁷⁷ It was defeated almost single-handedly by the Tavern League, which organized 1,000 people to come to Madison and lobby legislators to oppose the bill.⁷⁸ When the ban ultimately passed a year later, it was only after the Governor appointed the League’s strongest legislative supporter to his cabinet.⁷⁹

For every hard-fought, high-profile loss relating to drinking laws and safety, there are many lower profile wins for the Tavern League and its members. Wisconsin allows parents to consent to their children being served alcohol at any age.⁸⁰ Additionally, Wisconsin does not allow for sobriety

70. Gaber, *supra* note 3, at 31–35.

71. *Id.*

72. *Id.*

73. *Id.* at 35.

74. *Id.* at 39–42.

75. *Id.* at 41.

76. *Id.* at 39.

77. *Id.* at 38.

78. *See id.* at 38 n.215.

79. *Id.* at 38–39.

80. Wis Stat. § 125.07(1) (2019–2020).

checkpoints on its roads.⁸¹ Furthermore, Wisconsin's "dram shop" rule immunizes any liquor store, restaurant, bar, or social host from liability for drunk driving accidents caused by their patrons and guests, even if a bar or host intentionally continued to provide alcohol to someone who looked intoxicated and had previously announced that they were driving home at the end of the night.⁸² In 2020 alone, the Tavern League successfully opposed bills which would have required ignition interlocks in work vehicles operated by convicted drunk drivers; consolidated intoxicated boating, snowmobile, and ATV laws; and allowed beer delivery and curbside alcohol pickup.⁸³ Some of these victories are highlighted on the Tavern League's website as proud examples of the league's proven and impressive track record in the lobbying sphere.⁸⁴

During the COVID-19 pandemic, the Tavern League again flexed its muscle, this time in the fight against closing bars. On October 6, 2020, with COVID-19 cases on the rise in Wisconsin after a brief downtick, the Wisconsin Department of Health's (DHS) Secretary Andrea Palm released Emergency Order Number Three, which reduced businesses' total occupancy limit to 25% of normal capacity.⁸⁵ The Tavern League, recognizing the impact that such a limit would have on their members, sued Palm, requesting a preliminary injunction.⁸⁶ In its suit, the Tavern League claimed that the DHS did not possess the explicit authority to issue such a statewide order.⁸⁷ In a non-majority decision, the Wisconsin Supreme Court sided with the Tavern League.⁸⁸ The Supreme Court decision limited the Wisconsin government's ability to issue capacity limits on businesses, and was yet another example of the Tavern League's ability to get what they want for their members.⁸⁹

The Tavern League remains the most powerful lobbying group in Madison, but it does not operate unopposed. On the other side of the Tavern League on just about all issues is Mothers Against Drunk Driving (MADD), a non-profit

81. Wis. Stat. § 349.02(2)(a) (2019–2020); *see* County of Jefferson v. Renz, 588 N.W.2d 267 (Wis. Ct. App. 1998); *see also* Brooke, *supra* note 48, at 42.

82. Wis. Stat. § 125.03 (2019–2020).

83. Brooke, *supra* note 48, at 42.

84. *Issues & Wins*, TAVERN LEAGUE WIS., <https://www.tlw.org/issues-wins/> [<https://perma.cc/7QH4-GR4P>].

85. ANNA HENNING & DAVID MOORE, WIS. LEGIS. COUNCIL, CAPACITY LIMITS AFTER *TAVERN LEAGUE V. PALM* (2021), https://docs.legis.wisconsin.gov/misc/lc/issue_briefs/2021/covid_19/ib_tavern_league_ah_dm_2021_04_26 [<https://perma.cc/68B2-CAE2>].

86. *Id.*

87. *Id.*

88. Tavern League of Wisconsin, Inc. v. Palm, 2021 WI 33, ¶ 2, 396 Wis. 2d 434, 439, 957 N.W.2d 261, 264.

89. *Id.*

organization whose mission is to end drunk driving across all fifty states.⁹⁰ Founded in 1980, MADD has been in the fight since the very beginning, lobbying for legislation as well as supporting victims of drunk driving accidents.⁹¹ In Wisconsin, MADD has played a key role in advancing drunk driving reforms, including the recent introduction of new punishments for those who drive drunk with a minor.⁹² However, even the MADD lobbyists in Wisconsin know who holds the ultimate power in the state. Frank Harris, MADD's director of state government affairs, sums it up: "[A]t the end of the day, [the Tavern League] determines what goes forward as relates to [drunk driving] legislation. That's typically not the way the government runs, but it is in Wisconsin."⁹³

III. THE STATE(S) OF DRUNK DRIVING LAWS TODAY

Before looking at drunk driving prevention methods and potential changes to the Wisconsin drunk driving law, it is important to first understand Wisconsin's law as it stands today. Wisconsin Act 100, passed by the legislature in 2009 and implemented in 2010, remains the current law governing drunk driving offenses.⁹⁴ Within this statute, drunk driving is defined through the Operating While Intoxicated (OWI) framework.⁹⁵ The OWI framework identifies various substances that no person may drive or operate a motor vehicle while under the influence of,⁹⁶ including while "the person has a prohibited alcohol concentration."⁹⁷ The volume of alcohol necessary to reach these prohibited Blood Alcohol Concentration (BAC) levels can differ depending on the person's gender, body size, and the type of alcohol.⁹⁸ In Wisconsin, the prohibited BAC level varies based on a tiered system, depending on the number of prior convictions, suspensions, or revocations.⁹⁹ For first, second, and third offenses, the prohibited BAC level is greater than or equal to

90. *Our History*, MOTHERS AGAINST DRUNK DRIVING, madd.org/our-history/ [<https://perma.cc/FA54-PSA3>].

91. *Id.*

92. Brooke, *supra* note 48, at 44; *infra* Part IV.

93. *Id.*

94. Mishlove & Stucker, *supra* note 34.

95. Wis. Stat. § 346.63 (2019–2020). In this section, I use "OWI" to refer to drunk driving offenses. For the purposes of this Comment, "OWI" and "drunk driving" are interchangeable.

96. Wis. Stat. § 346.63(1)(a) (2019–2020).

97. Wis. Stat. § 346.63(1)(b) (2019–2020).

98. *Wisconsin's Drunk Driving Laws and Penalties*, NOLO, <https://dui.drivinglaws.org/wisconsin.php> [<https://perma.cc/NEG7-62JK>].

99. Wis. Stat. § 340.01(46m) (2019–2020).

0.08%, while fourth offenses or higher have a prohibited BAC level of greater than or equal to 0.02%.¹⁰⁰

The penalties for OWI offenses also vary, with increased penalties for repeat offenders, as well as mandatory minimums and maximums for fines along with jail sentences that depend on judicial discretion.¹⁰¹ First-offense OWI in Wisconsin is punishable by a fine of \$150 – \$300, plus revocation of driver's license for six to nine months, but is not a criminal offense.¹⁰² Second-offense OWI is punishable by a fine of \$350 – \$1,100 and a jail sentence between five days and six months, plus revocation of driver's license for twelve to eighteen months.¹⁰³ Second-offense OWI is a criminal misdemeanor, but only if it is within ten years of the prior OWI, or if great bodily harm was caused.¹⁰⁴ For third-offense OWIs, the fine increases to \$600 – \$2,000, along with a mandatory jail sentence between forty-five days and one year as well as driver's license revocation for two to three years.¹⁰⁵ Third and subsequent offenders are subject to immediate incarceration without bail following a judgment of conviction, subject to certain exceptions.¹⁰⁶ Third-offense OWIs are considered criminal misdemeanors.¹⁰⁷

Any OWI fourth or greater offense is considered a felony in Wisconsin.¹⁰⁸ Fourth-offense OWI is classified as a Class H Felony in Wisconsin, with a minimum \$600 fine and sixty-day jail sentence, and maximum \$10,000 fine and six years in prison.¹⁰⁹ Fifth and sixth-offense OWIs are classified as Class G Felonies.¹¹⁰ Seventh, eighth, and ninth-offense OWIs are classified as Class

100. *Id.*

101. *OWI And Related Alcohol and Drug Offense Penalties*, WIS. DEPT. TRANSP. SAFETY & TECH. SERVS. BUREAU (Oct. 14, 2020), <https://wisconsindot.gov/Documents/safety/education/drunk-driv/owi-penchrt.pdf> [<https://perma.cc/DL62-7PJM>].

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* A Class G Felony has a minimum jail sentence of 1 year and a maximum jail sentence of 10 years. Fines for Class G Felonies are between \$1,200 and \$50,000. *Id.*

F Felonies.¹¹¹ Tenth-offense OWIs, and any number higher, is a Class E Felony.¹¹²

There are certain circumstances beyond just the number of prior OWIs which also carry harsher penalties. The 2009 legislation created a new misdemeanor classification for first-offense OWIs in which a minor, a person under age sixteen, is present in the car at the time of the offense.¹¹³ This type of first-offense OWI exposes first-time offenders to the same punishment as second-time offenders.¹¹⁴ For any OWI offense in which a minor is present in the vehicle, the minimum and maximum fines as well as jail time double.¹¹⁵ Additionally, OWIs which cause injury are Class H felonies if they occur during a second or subsequent OWI offense.¹¹⁶ Furthermore, excessive BAC levels can double, triple, or quadruple the amount of fines for OWI offenders.¹¹⁷

The Wisconsin legislature has created some alternative methods of punishment in addition to, and sometimes instead of, the mandatory minimum and maximum fines and jail sentences for OWI offenders. For some OWI convictions, including second-offense OWI, the judge is permitted to order the offender to perform community service work in lieu of, or in addition to, part or all of the penalty mandated for that offense.¹¹⁸ The judge may also give reduced jail time to offenders who complete an alcohol or drug treatment program, or the judge may suspend the jail term if probation is ordered.¹¹⁹

In a variety of situations, OWI offenders in Wisconsin are required to equip their vehicles with ignition interlock devices (IIDs) if they are allowed to resume driving, either under an occupational license or after their driver's license has been recouped.¹²⁰ IIDs require an individual to pass a breathalyzer test before and during the operation of a vehicle, and prevent the engine from starting or continuing if the individual's BAC level is higher than the device's

111. *Id.* Class F Felonies have a minimum jail sentence of 3 years and a maximum jail sentence of 12.5 years. There is no minimum fine for a Class F Felony, but the maximum fine amount is \$50,000. *Id.*

112. *Id.* Class E Felonies have jail sentences between 4 and 15 years. There is no minimum fine amount, but the maximum amount increases to \$100,000. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*; see also Mark Hitt, *Current OWI/DUI Laws in Wisconsin 2021*, O'FLAHERTY LAW, <https://www.oflaherty-law.com/learn-about-law/current-owi-dui-laws-in-wisconsin-2021> [https://perma.cc/TAL5-TMH6].

116. WIS. DEPT. TRANSP. SAFETY & TECH. SERVS. BUREAU, *supra* note 101.

117. *Id.*; see also Hitt, *supra* note 115.

118. Hitt, *supra* note 115; NOLO, *supra* note 98.

119. NOLO, *supra* note 98.

120. WIS. DEPT. TRANSP. SAFETY & TECH. SERVS. BUREAU, *supra* note 101. IIDs will be discussed in detail later in this Comment. *Infra* Part IV.

programmable allowance.¹²¹ In Wisconsin, IID installation is mandatory in vehicles owned or driven by anyone convicted of second and subsequent OWI-related offenses, or first-time offenders who were driving with a BAC of 0.15% or higher at the time of the offense.¹²² Removing, tampering with, or failing to install court-ordered IIDs is a misdemeanor offense that also extends the period offenders must keep IIDs installed in their vehicles.¹²³

The Wisconsin OWI law as it pertains to drunk driving offenses is undoubtedly constructed with an eye towards harsher punishment for repeat drunk driving offenders. Certain changes in the law, including the removal of lower penalties for offenders with BAC levels between 0.08% and 0.099%, the addition of criminal penalties for drunken driving with minors present, and the requirement of IID installation for repeat drunken drivers and first-time offenders with extreme BAC levels, show some initiative by the Wisconsin legislature to implement measures not only of harsher punishment but also of prevention and of recovery. It is clear that multiple repeat drunk driving offenders in Wisconsin will face punishment at a level of severity that recognizes the heinous nature of the crime committed.

However, the current law still leaves much to be desired. First-time drunk driving offenders avoid criminal liability under the normal parameters of the law, as do second-time offenders with ten years between offenses.¹²⁴ Sobriety checkpoints are still disallowed statewide.¹²⁵ The lawmakers, unsurprisingly, did not raise the beer tax or implement third-party liability for dram shops in 2009.¹²⁶ First-time offenders can apply for an occupational license, which allows for driving to meet work requirements, immediately after getting charged.¹²⁷ The current drunk driving law does not account for the unique position that drinking holds in Wisconsin's cultural identity, as well as the numerous opportunities for drinking and driving that exist due to the prevalence of taverns across the state. Thus, the law enacted in 2009 should be viewed not as a finish line, but as a starting point. As Lisa Maroney, a spokeswoman for

121. John McCurley, *Ignition Interlock Devices: Costs and Requirements*, NOLO, <https://dui.drivinglaws.org/interlock.php> [perma.cc/34LY-KEBE].

122. WIS. DEPT. TRANSP. SAFETY & TECH. SERVS. BUREAU, *supra* note 101.

123. Mishlove & Stucker, *supra* note 34.

124. WIS. DEPT. TRANSP. SAFETY & TECH. SERVS. BUREAU, *supra* note 101.

125. Brooke, *supra* note 48, at 42.

126. Patrick Marley & Lee Bergquist, *Legislature Passes Tougher DUI laws; Doyle to Sign Measure*, MILWAUKEE J. SENTINEL (Dec. 16, 2009), <https://archive.jsonline.com/news/wisconsin/79437627.html/> [https://perma.cc/529C-Q8PW].

127. WIS. DEPT. TRANSP. SAFETY & TECH. SERVS. BUREAU, *supra* note 101.

All-Wisconsin Alcohol Risk Education, said of the bill at the time of its enactment: “It’s an important first step, but much more needs to be done.”¹²⁸

The drunk driving laws of other states help to put Wisconsin’s current drunk driving law in perspective. The federal government mandates the permissible BAC level at 0.08%, known as the ‘per se’ limit, and all fifty states meet this requirement.¹²⁹ Beyond this federal mandate, there is great variation among the fifty states as to how drunk driving is prohibited and punished. According to a study conducted in 2017, Wisconsin ranked thirty-seventh in strictness among the fifty states.¹³⁰ This ranking would likely be even lower if not for the state’s harsh treatment of drunk driving offenders committing their fourth or greater offense. Most states have similar types of enhanced punishment for repeat offenders, and for offenders with excessively high BAC levels.¹³¹ All but six states have the authority to automatically suspend the license of someone arrested for drunk driving.¹³² Forty-four states have some sort of IID requirement for offenders to equip their vehicles, with thirty-four states making IIDs available for first-time offenders.¹³³ The average jail time for first-time offenders is one day, while the average jail time for repeat-offenders is twenty-one days.¹³⁴ Thirty-seven states have some sort of mandatory alcohol-abuse treatment after a drunk driving conviction.¹³⁵

Utah and Arizona are often considered the strictest states for punishing drunk driving offenders.¹³⁶ Arizona is strictest in its treatment of first-time drunk driving offenders, who face a mandatory minimum of \$1,250 in fines, up to a ten-day jail sentence, suspension of license for up to 360 days, and possible community service.¹³⁷ In addition, installation of an IID is required for first-time offenders in Arizona for a period of one year.¹³⁸ Utah, on the other hand,

128. Marley, *supra* note 126.

129. Ryan Russman, *History of DUI Laws*, RUSSMAN LAW, <https://www.russmanlaw.com/blog/dwi/news/history-of-dui-laws> [<https://perma.cc/LB22-JLKT>].

130. Alina Comoreanu, *Strictest and Most Lenient States on DUI*, WALLETHUB (Aug. 10, 2017), <https://wallethub.com/edu/dui-penalties-by-state/13549> [<https://perma.cc/Y2BJ-GUN3>].

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *See id.*; *see also Driving Under the Influence: Do Strict DUI Laws Really Work?*, DRIVERSD.COM (Oct. 6, 2020), <https://driversd.com/trending/driving-under-influence-do-strict-dui-laws-really-work> [<https://perma.cc/BY6C-NJSN>].

137. *Arizona’s DUI laws, Penalties: What You Need to Know*, AZCENTRAL (May 22, 2015), <https://www.azcentral.com/story/news/local/arizona/2015/05/22/arizona-dui-laws/27781089/> [<https://perma.cc/DG7U-6J2Q>].

138. *Id.*

is the only state which has modified the federally-mandated BAC limit of 0.08%.¹³⁹ In Utah, the legal BAC limit is 0.05%, which is lowest in the nation.¹⁴⁰ The intention behind lowering the legal BAC limit is to reduce the amount of car accidents due to any amount of drinking.¹⁴¹ There is evidence that supports this decision: a 0.02% BAC level causes a decline in visual functions and the ability to perform two tasks at once; a 0.05% BAC level may cause slower response rates, reduced coordination, and difficulty tracking moving objects; and a 0.08% BAC level may lead to short-term memory loss, decreased concentration, and weakened perception.¹⁴² Utah's law is a reminder that, while drunk driving may be defined as a 0.08% BAC level nationwide, alcohol consumption can impair driving functions far before the legal limit is reached.

Other states are not so strict in their treatment of drunk drivers. New Jersey's drunk driving law is most comparable to Wisconsin's, with strict punishments for repeat offenders in a similar tiered system.¹⁴³ However, New Jersey has stricter treatment of first-time drunk driving offenders than Wisconsin, including criminal punishment, potential IID installation, and mandatory class completion.¹⁴⁴ For comparison, South Dakota is often considered the least strict state for punishing drunk driving offenders.¹⁴⁵ This is because South Dakota does not have mandatory minimum jail sentences for first- or second-time drunk driving offenders, and has no IID installation requirements.¹⁴⁶ Perhaps not coincidentally, South Dakota also had the number one fatality rate for alcohol-related crashes between 1995 and 2013 in the United States (22.4 fatalities for every 100,000 residents).¹⁴⁷

139. UTAH CODE ANN. § 41-6a-502.5 (West 2021); *see also* Casey Leins, *Utah to Implement Strictest Drunk Driving Law in the Nation*, U.S. NEWS (Dec. 17, 2018), <https://www.usnews.com/news/best-states/articles/2018-12-17/utah-readies-strictest-drunk-driving-law-in-the-nation> [<https://perma.cc/MK3L-EFS2>]; Kaitlin Brehaut, *Utah's New Law Against Drinking and Driving*, LOMA LINDA UNIV. HEALTH (June 6, 2019), <https://ihpl.llu.edu/blog/utah-s-new-law-against-drinking-and-driving> [<https://perma.cc/4WSF-GWS8>].

140. *Id.*

141. *Id.*

142. *Id.*

143. N.J. REV. STAT. § 39:4-50 (2019); *see also* Richard Cowen, *NJ to Impose New Penalties for Drunken Driving Starting Dec. 1: What You Need to Know*, N. JERSEY (Nov. 27, 2019), <https://www.northjersey.com/story/news/2019/11/27/nj-new-drunk-driving-law-take-effect-dec-1-heres-what-know/4275332002/> [<https://perma.cc/35RN-A52F>].

144. *Id.*

145. *E.g.*, Comoreanu, *supra* note 130.

146. *See* S.D. CODIFIED LAWS § 32-23-2 (2022); S.D. CODIFIED LAWS § 32-23-3 (2022).

147. DRIVERSD.COM, *supra* note 136.

IV. METHODS OF DRUNK DRIVING PREVENTION

When looking at the letter of the drunk driving laws across the fifty states, including Wisconsin, it is helpful to not only understand the laws being implemented but also the various crime prevention methods behind those laws. All methods used by the states have a common goal: To stop drunk driving. However, some methods are more effective than others at achieving that goal.

A. Criminal Deterrence Theory

The most common form of drunk driving prevention in the law is criminal deterrence.¹⁴⁸ Most states focus on deterrence methods in order to prevent recidivism (that is, to prevent repeat offenders).¹⁴⁹ Rooted in economic theory, criminal deterrence is the process of discouraging certain behavior by creating fear of arrest or punishment.¹⁵⁰ Deterrence can be general, directed towards the public at large and showing members of society that committing a certain act will not be tolerated, or specific, directed towards an individual who may offend less due to a punishment they have already received.¹⁵¹

There is much academic debate on the effectiveness of deterrence in preventing drunk driving.¹⁵² The rationale of the criminalization of drunk driving as a deterrence method relies on the individual knowing and understanding the potential consequences of his or her actions, which presupposes that humans are rational beings who are knowledgeable regarding harmful behaviors and deterred by fear of negative consequences.¹⁵³ This utilitarian view of criminal punishment assumes that when an individual realizes that the risk outweighs the benefits of a certain act, they will be persuaded or deterred from engaging in the criminal conduct in question.¹⁵⁴

148. See Faye S. Taxman & Alex Piquero, *On Preventing Drunk Driving Recidivism: An Examination of Rehabilitation and Punishment Approaches*, 26 J. CRIM. JUST. 129, 131 (1998); Sandra C. Lapham & Michael Todd, *Do Deterrence and Social-Control Theories Predict Driving after Drinking 15 years after a DWI Conviction?*, 45 ACCIDENT ANALYSIS & PREVENTION 142, 142 (2011); Tina Wescott Cafaro, *You Drink, You Drive, You Lose: Or Do You?*, 42 GONZ. L. REV. 1, 8–9 (2006); Andrew M. Harper, *Drunk Driving: Existing Programs Fail to Stop the Problem* 8 (Jan. 2019) (unpublished seminar paper) (on file with author).

149. Taxman & Piquero, *supra* note 148.

150. Donald S. Kenkel, *Drinking, Driving, and Deterrence: The Effectiveness and Social Costs of Alternative Policies*, 36 J. L. & ECON. 877, 879–80 (1993).

151. Cafaro, *supra* note 148, at 8.

152. For more on the theory and effectiveness of deterrence methods in preventing drunk driving, see generally H. LAURENCE ROSS, *DETERRING THE DRINKING DRIVER: LEGAL POLICY AND SOCIAL CONTROL* (1984), James B. Jacobs, *The Law and Criminology of Drunk Driving*, 10 CRIME & JUST. 171 (1988), and Taxman & Piquero, *supra* note 148.

153. Lapham & Todd, *supra* note 148, at 142.

154. Cafaro, *supra* note 148, at 8, 8 n.43.

Many state legislatures, including Wisconsin's, recognize this utilitarian view in regards to drunk driving, and implement harsher punishments for repeat drunk driving offenses, increasing the risk of drinking and driving multiple times in hopes that those risks will outweigh any perceived benefits.¹⁵⁵

Advocates for a deterrence-based system believe that stricter penalties set at an appropriate level force the individual to balance the cost of the activity against the cost of enforcement, and thus deter the individual from acting.¹⁵⁶ Statistically speaking, harsher punishments have been found to reduce alcohol-related crash fatalities. According to a study in 2018 conducted by JAMA Internal Medicine, more restrictive state policies were associated with reduced individual-level odds of alcohol involvement in a crash fatality, and these results were consistent among demographics.¹⁵⁷ Furthermore, certain states have been uniquely successful in utilizing criminal deterrence as a drunk driving prevention method. In Arizona, the strict drunk driving law is credited for a decrease in drunk driving arrests by about 10%, as fewer drunk drivers on the roads has led to fewer arrests.¹⁵⁸

However, critics of a deterrence-based system argue that the only benefit of traditional deterrence is to provide a general warning to potential criminals, and that potential punishment has little to no bearing on whether an individual violates the law.¹⁵⁹ For one, numerous likely offenders are not aware of the law or its consequences if broken.¹⁶⁰ Additionally, a cost-benefit analysis of drunk driving as perceived by the individual might weigh in favor of operating a motor vehicle.¹⁶¹ The perceived benefit of drunk driving is personal convenience and mobility.¹⁶² The cost, as it pertains to most individuals, is getting caught, and the financial and personal burden that getting caught entails.¹⁶³ Since drunk

155. *Id.* at 8–9, n.47; *see also* Taxman & Piquero, *supra* note 148.

156. Cafaro, *supra* note 148 at 8–9.

157. Timothy S. Naimi, Ziming Xuan, Vishnudas Sarda, Scott E. Hadland, Marlene C. Lira, Monica H. Swahn, Robert B. Voas & Timothy C. Heeren, *Association of State Alcohol Policies with Alcohol-Related Motor Vehicle Crash Fatalities Among US Adults*, 178 JAMA INTERNAL MED. 894, 900 (2018). According to the study, a 10% increase in the restrictiveness of state alcohol policies is associated with 10% reduced odds that a crash fatality was alcohol related. The study concluded that strengthening alcohol policies could reduce alcohol-related crash fatalities. *Id.* at 898.

158. Howard Fischer, *Report: Arizona Strictest in Nation in Punishing Drunk Drivers*, ARIZ. CAP. TIMES (June 17, 2015), <https://azcapitoltimes.com/news/2015/06/17/report-arizona-strictest-in-nation-in-punishing-drunk-drivers/> [<https://perma.cc/F555-69N7>].

159. Cafaro, *supra* note 148, at 10.

160. *Id.*

161. *Id.*

162. *Id.* at 10 n.58.

163. *Id.* at 10.

driving is so widespread, the chances of getting caught are generally low.¹⁶⁴ According to the NHTSA, for every one arrested drunk driver, between 500 and 2,000 drunk driving violations are committed.¹⁶⁵ Thus, the average drunk driving offender may have little to fear when weighing the likelihood of getting caught against the personal convenience of mobility.¹⁶⁶

Of course, the costs associated with getting caught are not the only costs of drunk driving. The NHTSA estimates that drunk driving costs the United States \$44 billion each year, including the economic costs of lost productivity, emergency medical services, property damage, and legal expenses.¹⁶⁷ There is also an obvious human cost of drunk driving, as data shows that every ninety seconds a person is injured in a drunk driving crash, and every fifty-two minutes a person is killed from a crash relating to drunk driving.¹⁶⁸ However, an individual is unlikely to consider all of these statistics before getting behind the wheel after a few drinks at the bar. For criminal deterrence to be effective, there must not only be a substantial punishment, but also a significant threat of being punished at all.

B. Social Deterrence and Alternative Measures of Drunk Driving Prevention

In recent years, the effectiveness of the criminalization of drunk driving in preventing recidivism has been called into question.¹⁶⁹ This is part of a greater societal movement to encourage measures focused on recovery and rehabilitation, rather than capital punishment, to achieve the same goal.¹⁷⁰ One reason for this movement is criticism of incarceration in the United States, as jails and prisons have issues with cost, over-crowdedness, and low effectiveness in preventing repeat offenses.¹⁷¹ Individuals who return to the

164. *Id.*

165. *Id.* at 12.

166. *Id.*

167. U.S. DEP'T TRANSP. NAT'L HIGHWAY TRAFFIC & SAFETY ADMIN., 2019 DATA: ALCOHOL-IMPAIRED DRIVING (2021) <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/813120> [<https://perma.cc/Y77R-FQZJ>].

168. *Id.* For more nationwide statistics on the human toll of drunk driving, see *Statistics*, MOTHERS AGAINST DRUNK DRIVING, madd.org/statistics [<https://perma.cc/4BY4-52D6>].

169. Taxman & Piquero, *supra* note 148, at 131–32; *see also* Benjamin Hansen, *Punishment and Deterrence: Evidence from Drunk Driving*, 105 AM. ECON. REV. 1581, 1581–82 (2015).

170. *See* Brandon K. Applegate, Francis T. Cullen, Shannon M. Barton, Pamela J. Richards, Lonn Lanza-Kaduce & Bruce G. Link, *Public Support for Drunk-Driving Countermeasures: Social Policy for Saving Lives*, CRIME & DELINQUENCY 171, 174 (1995); Cafaro, *supra* note 148, at 4.

171. JUSTIN W. PATCHIN & GARY N. KEVELES, ALTERNATIVES TO INCARCERATION: AN EVIDENCE-BASED RESEARCH REVIEW (2004) (presented at the Northwest Wisconsin Criminal Justice Management Conference).

community after being incarcerated can be worse off than when they entered.¹⁷² Thus, instead of simply incarcerating all drunk drivers, many states implement alternative countermeasures in order to prevent drunk driving, including social deterrence, drinking-oriented policies, and rehabilitation.

Social deterrence expands the concept of deterrence to encompass social influences, including informal sanctions such as public perception.¹⁷³ Social deterrence attempts to prevent drunk driving through redefining the issue as social, rather than criminal.¹⁷⁴ As H. Lawrence Ross observed in 1992:

The social causes of drunk driving in America lie in a conjunction of institutions. American society combines a near-total commitment to private automobile transportation with a positive evaluation of drinking in recreational situations. Conventional and conforming behavior in these areas implies the likelihood of people driving while impaired by alcohol. . . . Drunk driving can thus be seen as a routine, expected aspect of American life, supported by prevailing norms and institutions.¹⁷⁵

Recognizing the intersection of the normalness of drinking with the regularity of driving helps not only to understand the drunk driving problem in Wisconsin and elsewhere, but also to realize that simply catching and punishing offenders is insufficient. Identifying the problem as social also promotes various countermeasures. The federal funding of public advertisements against drunk driving is a social deterrence countermeasure, as is the funding of anti-drunk driving groups such as MADD.¹⁷⁶ Mandatory educational programs about the harms of drunk driving are another form of social deterrence.¹⁷⁷ In Arizona, lawmakers combine a strict drunk driving law with a social deterrence measure titled the “know your limits” program, which includes a postcard designed to tell people how many drinks it takes to reach the legal BAC limit of 0.08% as well as the penalties for getting caught.¹⁷⁸

Social deterrence also encourages safety policies for all drinkers and all drivers, not only those who drink and drive.¹⁷⁹ These policies can include

172. *Id.*

173. Lapham & Todd, *supra* note 148, at 142–43.

174. Applegate, *supra* note 170.

175. *Id.* (quoting LAURENCE H. ROSS, *CONFRONTING DRUNK DRIVING: SOCIAL POLICY FOR SAVING LIVES* (1992)).

176. *See* Cafaro, *supra* note 148, at 4 n.13; *see also* Wendy J. Hamilton, *Mothers Against Drunk Driving – MADD in the USA*, *BMJ: INJURY PREVENTION*, no. 6, 2000, at 90 <https://injuryprevention.bmj.com/content/6/2/90> [<https://perma.cc/UT43-JLSE>].

177. *See* Cafaro, *supra* note 148, at 4.

178. Fischer, *supra* note 158.

179. Applegate, *supra* note 170, at 174–75.

reduced speed limits, raised minimum license ages, and certain drinking-oriented policies discussed later.¹⁸⁰ Social deterrence policies recognize that drunk driving needs to be prevented, not just punished.¹⁸¹ However, some of these policies can have limited political appeal because they increase inconveniences on the innocent—those who do not drink and drive—and they do not always satisfy the public’s considerable desire to punish drunk drivers, especially those who cause fatalities.¹⁸²

Drinking-oriented, or alcohol-control, policies differ from social deterrence methods in that they reduce drunk driving by targeting the drinking itself.¹⁸³ The logic of these policies is clear: If less people are drinking, then less people will be drinking and driving.¹⁸⁴ Drinking-oriented policies can include increasing the full price of alcohol, instituting open container laws, raising taxes on alcohol purchases, and raising the minimum legal drinking age.¹⁸⁵ Third-party dram shop liability is also considered a drinking-oriented policy, because it seeks to address the issue at the drinking stage, not only the driving stage.¹⁸⁶ Many drinking-oriented policies are recommended by the Guide to Community Preventive Services as effective methods of reducing drunk driving.¹⁸⁷ For example, according to the Community Preventive Services Task Force, dram shop liability is associated with a median reduction of about 6% in alcohol-related motor vehicle fatalities.¹⁸⁸

180. *Id.*

181. *Id.*

182. *Id.* at 175.

183. Naimi, *supra* note 157.

184. See generally Joel W. Grube & Kathryn Stewart, *Preventing Impaired Driving Using Alcohol Policy*, J. TRAFFIC INJ. PREV., Sept. 2004, at 199, <https://pubmed.ncbi.nlm.nih.gov/15276920/> [<https://perma.cc/8NR5-723K>].

185. Yung-Hsiang Ying, Chin-Chih Wu & Koyin Chang, *The Effectiveness of Drinking and Driving Policies for Different Alcohol-Related Fatalities: A Quantile Regression Analysis*, INT. J. ENVIRON. RES. PUB. HEALTH, Oct. 2013, at 4631–33 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3823314/> [<https://perma.cc/ZLU5-6MSD>]. Ying, Wu, and Chang analyzed the different effects that various drinking-oriented policies have on drinking and driving fatality rates. They concluded that different drinking-oriented measures should be adopted to target the specific conditions in various regions: measures emphasizing habits and attitudes (“preemptive regulations” to prevent drinking and driving) in areas with low fatality rates, and measures emphasizing safety (“ex-post regulations” after alcohol has been consumed) in areas with high fatality rates. *Id.* at 4636, 4640.

186. See *Preventing Excessive Alcohol Consumption: Dram Shop Liability*, COMM. PREVENT. SERV. TASK FORCE (Sept. 24, 2013), <https://www.thecommunityguide.org/sites/default/files/assets/Alcohol-Dram-Shop.pdf> [<https://perma.cc/29ZQ-GEGG>].

187. *Motor Vehicle Injury*, THE COMMUNITY GUIDE, <https://www.thecommunityguide.org/topic/motor-vehicle-injury> [<https://perma.cc/AYZ5-C5WP>].

188. COMM. PREVENT. SERV. TASK FORCE, *supra* note 186.

Rehabilitation measures, on the other hand, focus on methods besides punishment to prevent recidivism among drunk driving offenders. Rehabilitation for those who have already committed a drunk driving offense can include attending a victims panel, taking an alcohol abuse assessment, or receiving alcohol treatment.¹⁸⁹ Counseling, education, and treatment can be combined with close monitoring and milder punishments such as sanctions or license revocation.¹⁹⁰ The rationale behind rehabilitation measures is that targeting alcoholism and reducing future alcohol consumption will help prevent future opportunities for drunk driving, while targeting the emotions of the individual might help them consider the external cost of drunk driving.¹⁹¹

It is difficult to make general statements about the effectiveness of rehabilitation programs, given the wide variation of programs that exist and the difficulty in quantifying their successes, but there is some evidence as to their ability to prevent recidivism in drunk drivers.¹⁹² According to a Maryland study conducted in 1998, rehabilitation sentences can reduce the likelihood of recidivism more than punishment sentences.¹⁹³ The study found that offenders receiving alcohol education had a 22% lower risk of recidivism than those without alcohol education, and that offenders receiving alcohol treatment had a 17% lower risk of recidivism than offenders without alcohol treatment.¹⁹⁴

C. The Expanding Role of IIDs in Drunk Driving Prevention

Alternative countermeasures serve to supplement the traditional methods implemented by states to prevent drunk driving. There are other more formal prevention strategies that states use as well, in addition to criminalization. Some of these formal methods used by states include high sanctions and fines, sobriety checkpoints, courts specific to drunk driving, increased visibility, and offender monitoring.¹⁹⁵ Recently, IIDs have become an additional formal method of drunk driving prevention and have proven to be extremely effective.

189. U.S. DEP'T TRANSP. NAT'L HIGHWAY TRAFFIC & SAFETY ADMIN., TRAFFIC TECH: COUNTERMEASURES THAT WORK – ALCOHOL-IMPAIRED DRIVING (2021).

190. *Id.*

191. Taxman & Piquero, *supra* note 148, at 130.

192. *Id.*

193. *Id.* at 139–40.

194. *Id.* at 136.

195. U.S. DEP'T TRANSP. NAT'L HIGHWAY TRAFFIC & SAFETY ADMIN., *supra* note 189. This Section focuses on the effectiveness of IIDs. For more information on various other formal measures of drunk driving prevention, see generally Jacobs, *supra* note 152. In addition to an expanded use of IIDs, both the CDC and MADD advocate for increased visibility enforcement and the expanded use of sobriety checkpoints as effective drunk driving prevention measures. *Policy Impact: Alcohol Impaired Driving*, NAT'L CTR. FOR INJ. PREVENTION & CONTROL (Feb. 2011),

MADD defines an alcohol ignition interlock as “a device about the size of a cell phone that is wired into the ignition system of a vehicle.”¹⁹⁶ Typically located on the vehicle’s dashboard, the driver must breathe into the device and satisfy the preset BAC level in order for the car engine to start.¹⁹⁷ The device often also includes a running retest feature, which requires a driver to provide breath tests at regular intervals in order to prevent drivers from simply asking a sober friend to start the car.¹⁹⁸ If a driver fails a running retest, the vehicle’s horn will honk or the lights will flash to alert law enforcement.¹⁹⁹

In Wisconsin, IIDs are required for repeat drunk driving offenders, as well as first-time offenders who have an extreme BAC level over 0.15%, for a minimum of one year.²⁰⁰ However, other states have taken it a step further, requiring IID installation for *all* drunk driving offenders, including those who have just been caught for the first time.²⁰¹ Currently, thirty-four states and Washington, D.C., require IID installation for all offenders.²⁰² States such as New York, Arizona, Louisiana, and others have implemented this IID policy as a zero-tolerance approach to drunk driving.²⁰³ IIDs are considered a zero-tolerance method of drunk driving prevention because they remove any rationalization element from the picture.²⁰⁴ Instead of relying on the decision-making ability of the drunk driver, IIDs intervene to preclude the driver from even starting the vehicle if their BAC level is higher than the prescribed limit.²⁰⁵

The hardline approach of mandatory IID installation for all drunk driving offenders has proven to be effective at curbing drunk driving. The CDC has found reductions in repeat drunk driving offenses of about two-thirds due to IIDs.²⁰⁶ One study found that “evidence spanning nearly ten years . . . in the

<https://www.cdc.gov/motorvehiclesafety/pdf/policyimpact-alcohol-a.pdf> [perma.cc/UBP3-EVGQ]; *2019 Report to the Nation*, MOTHERS AGAINST DRUNK DRIVING (2019), RTTN 2019_KK_1.29_No Crops.pdf [<https://perma.cc/D6YS-RGLC>]. For an analysis of the effectiveness of sobriety checkpoints, drunk driving-specific courts, increased visibility, and offender monitoring, see Harper, *supra* note 148.

196. *Sober to Start*, MOTHERS AGAINST DRUNK DRIVING, <https://madd.org/ignition-interlocks/> [perma.cc/2HQD-L9WZ].

197. Joseph Marutollo, *No Second Chances: Leandra’s Law and Mandatory Alcohol Ignition Interlocks for First-Time Drunk Driving Offenders*, 30 PACE L. REV. 1090, 1091 (2010).

198. *Id.* at 1092.

199. *Id.*

200. NOLO, *supra* note 98.

201. MOTHERS AGAINST DRUNK DRIVING, *supra* note 196.

202. *Id.*

203. *Id.*; Marutollo, *supra* note 197, at 1095.

204. *See* Marutollo, *supra* note 197, at 1095–96.

205. MOTHERS AGAINST DRUNK DRIVING, *supra* note 196.

206. *Id.*

United States and Canada point toward 40-95% reductions in recidivism . . . relative to . . . matched groups of offenders who are simply suspended.”²⁰⁷ Studies in Arkansas, Maryland, and Ohio have all found significant reductions in recidivism by multiple offenders who installed IIDs on their vehicles.²⁰⁸ The NHTSA also identifies IIDs as a strategy proven to reduce recidivism for drunk driving.²⁰⁹

Perhaps the strongest evidence that IIDs are an effective method of drunk driving prevention comes from New Mexico, which was the first state to mandate that first-time drunk driving offenders install an IID on their vehicles.²¹⁰ According to Governor Bill Richardson, research showed that in 2006, one year after the law was passed, “ignition interlocks prevented some 63,000 alcohol-involved driving events.”²¹¹ MADD found that New Mexico experienced a 25% drop in alcohol-related fatalities that first year, and by 2008, the Pacific Institute of Research and Evaluation found a reduction in drunk driving recidivism of over 60% in the state.²¹²

Despite their proven success, IID mandates are not a perfect solution. Typically, states trust that the individual offender will install the device on their own vehicles, and require the individual to pay for the device.²¹³ This can lead to a logistical challenge, as not all offenders can be trusted to conduct their own installation, especially when that installation comes with a financial burden. In addition, IIDs may have some loophole solutions for particularly creative drivers. Right here in Wisconsin, a six-time drunk driver was able to use a balloon attached to the interlock and an air compressor plugged into the cigarette lighter to start his car and drive drunk.²¹⁴

Even with their flaws, IIDs are widely regarded as a crucial method in the future of controlling and preventing drunk driving.²¹⁵ Some have proposed more expanded uses of IIDs, such as insurance premium breaks for any citizen

207. Marutollo, *supra* note 197, at 1097.

208. *Id.* In Arkansas, those with IIDs were less than half as likely to have a subsequent conviction within three years. Andrew Fulkerson, *The Ignition Interlock System: An Evidentiary Tool Becomes a Sentencing Element*, AM. J. DRUG & ALCOHOL ABUSE, Winter 2003, at 21 <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1126&context=ajacourtreview> [<https://perma.cc/M9NS-EGFG>]. In Maryland, researchers found statistically significant reductions in recidivism by multiple offenders with IIDs. *Id.* In Ohio, recidivism rates were three times higher for offenders who received a license suspension, compared to an IID. *Id.*

209. U.S. DEP’T TRANSP. NAT’L HIGHWAY TRAFFIC & SAFETY ADMIN., *supra* note 189.

210. Marutollo, *supra* note 197, at 1098.

211. *Id.* at 1099.

212. *Id.*

213. *See, e.g.*, N.M. STAT. ANN. § 66-8-102 (2005).

214. Marutollo, *supra* note 197, at 1107.

215. *See* MOTHERS AGAINST DRUNK DRIVING, *supra* note 195.

who voluntarily installs an IID in their vehicle.²¹⁶ Others have advocated for a universal use of IIDs, mandated by the federal government.²¹⁷ A universal mandate of self-installed IIDs would, undoubtedly, lead to multiple civil liberty challenges, and may be unlikely to ever reach a congressional vote.²¹⁸ While a necessary inconvenience for those with a record of drunk driving, requiring all citizens to breathe into a tube every time they drive a vehicle would likely be too great of an inconvenience for the public at large.²¹⁹

However, new technology presents reason for optimism in the world of widespread IIDs and convenience. A public-private effort between the Automotive Coalition for Traffic Safety and the NHTSA, known as the Driver Alcohol Detection System for Safety (DADSS), has developed a technology which has the potential to revolutionize how drunk driving is prevented in the United States.²²⁰ The DADSS technology has two potential methods of detection: A breath system which measures alcohol as a driver breathes normally while sitting in the driver's seat, and a touch-based system which measures blood alcohol levels under the skin and can be placed in accessible locations such as the start button or steering wheel.²²¹ Importantly, the new technology developed by DADSS removes some of the major inconveniences present in current IID devices, including cost and difficulty of use.²²² This new technology is already being tested by private companies, as well as on commercial and public vehicles, in Virginia, and has been heralded as a success.²²³ The DADSS website states that the technology will be available for widespread commercial use between 2024 (for the breath system) and 2025 (for the touch system).²²⁴ According to a study by the Insurance Institute for Highway Safety, DADSS technology has the potential to save more than 9,000

216. Marutollo, *supra* note 197, at 1106.

217. *Id.*

218. *Id.*

219. *Id.*

220. Fredrick Kunkle, *Coming Soon: If You're Not Sober, You Won't Be Able to Start the Car*, WASH. POST (Apr. 6, 2019), <https://www.washingtonpost.com/transportation/2019/04/06/coming-soon-if-youre-not-sober-you-wont-be-able-start-car/> [<https://perma.cc/V2SF-UVUE>].

221. *Id.*

222. *Id.*

223. *Id.*; *The Next Phase of Driven to Protect in Virginia*, DRIVER ALCOHOL DETECTION SYS. FOR SAFETY, <https://dadss.org/news/updates/the-next-phase-of-driven-to-protect-in-virginia> [<https://perma.cc/QV28-JF2Y>].

224. *Frequently Asked Questions*, DRIVER ALCOHOL DETECTION SYS. FOR SAFETY, www.dadss.org/faq [<https://perma.cc/EXK2-5HNC>].

lives each year if widely deployed on consumer vehicles across the country.²²⁵ The development of this new technology, along with recent federal legislation,²²⁶ signal that IIDs are likely to become even more common as a drunk driving prevention method in the near future.

V. A NEW DRUNK DRIVING LAW FOR WISCONSIN

After reviewing the history of Wisconsin's drunk driving law and analyzing the state of drunk driving enforcement today, we now look to improve Wisconsin's drunk driving law, keeping in mind the unique position that drinking holds in the state.

A. Dealing with First-Time Drunk Driving Offenders

Wisconsin's drunk driving law is most lenient in its treatment of first-time offenders, who are able to continue driving after a small fine payment and a short license revocation.²²⁷ In order to more effectively curb drunk driving in Wisconsin, and to make the roads safer for all, the Wisconsin OWI law must change how it treats first-time drunk driving offenders.

Inside the Wisconsin State Capitol building, there is an overly prevalent mindset that first-offense drunk driving is a mere mistake, and that first-time offenders have simply had a little too much to drink on one occasion.²²⁸ State Senator Van Wanggaard, chairman of the Wisconsin Senate Judiciary Committee and former police officer, summarized the mindset succinctly: "Do we want to destroy people's lives with a notation on their record that's going to keep their opportunities down to nothing because they made one mistake? . . . It's not about punishing that person that made that poor choice. It's about directing them to make good choices."²²⁹

225. *Alcohol-Detection Systems Could Prevent More Than a Fourth of U.S. Road Fatalities*, INS. INST. FOR HIGHWAY SAFETY (July 23, 2020), <https://www.iihs.org/news/detail/alcohol-detection-systems-could-prevent-more-than-a-fourth-of-u-s-road-fatalities> [<https://perma.cc/KJD9-L6UA>].

226. Since the drafting of this Comment, Congress has passed legislation which mandates that drunk driving prevention technology must be installed in all new vehicles starting as early as 2026. Hope Yen & Tom Krisher, *Congress Mandates New Car Technology to Stop Drunken Driving*, ASSOCIATED PRESS (Nov. 9, 2021), <https://apnews.com/article/coronavirus-pandemic-joe-biden-technology-business-health-068ee87392b0cca1444053b854a514dd> [<https://perma.cc/63YR-LRPF>]. The mandate will go into effect after the Department of Transportation assesses the best form of technology to install in vehicles. *Id.*

227. *Supra* Part III.

228. *Supra* Part II.

229. Todd Richmond, *Criminalizing 1st-time DUIs is a Tough Sell in Wisconsin*, CHI. TRIB. (Jan. 13, 2019), <https://www.chicagotribune.com/nation-world/ct-wisconsin-criminal-dui-20190113-story.html> [<https://perma.cc/EJB6-CYQ5>].

This one-time mistake theory is completely misguided. MADD estimates that first-time drunk driving offenders nationwide drive under the influence of alcohol an average of *eighty* times before their first arrest, while others estimate that a person can drive drunk upwards of 200 times before being arrested once.²³⁰ Researcher William J. Rauch calls this behavior “learning” to drink and drive.²³¹ Furthermore, there is consistent evidence that alcohol use and drunk driving are positively associated with one another.²³² As previously discussed, 65% of the adult population in Wisconsin is estimated to consume alcohol,²³³ an integral part of the state’s culture.²³⁴ Additionally, first-time offenders are often close to twice the legal BAC limit (0.16% BAC), which is close in mean BAC to repeat offenders when caught (0.18% BAC).²³⁵ This means that first-offense drunk drivers are rarely acting any differently than repeat offenders.²³⁶ First-time offenders are also likely to have a problem with alcohol, as a three-year study assessed over 80% of first-time offenders as problem drinkers or alcoholics, rather than merely social drinkers.²³⁷ Other studies have shown between 70% and 80% of drunk driving offenders have a history of alcohol-abuse.²³⁸ Finally, drunk driving offenders are likely to continue driving drunk unless they are stopped.²³⁹ In 2009, “an estimated 1.4 million arrests were made for driving under the influence,” which is “less than 1% of the 147 million self-reported episodes of alcohol-impaired driving among U.S. adults each year.”²⁴⁰

This evidence overwhelmingly indicates that first-time drunk driving offenders often have a behavioral tendency to drink and drive, contrary to the perception that they made a mere mistake or just had one too many drinks. Therefore, first-time drunk driving offenders in Wisconsin must be treated with

230. MOTHERS AGAINST DRUNK DRIVING, *supra* note 168; William J. Rauch, Paul L. Zador, Eileen M. Ahlin, Jan M. Howard, Kevin C. Frissell & G. Doug Duncan, *Risk of Alcohol-Impaired Driving Recidivism Among First Offenders and Multiple Offenders*, 100 AM. J. PUB. HEALTH 919, 919 (2010).

231. Janet Dewey-Kollen & Angela Downes, *Shattering Misconceptions About First Time Drunk Driving Offenders*, PROSECUTOR: J. NAT. DIST. ATT’YS. ASS’N., Jan. 2008, at 14, <https://go.gale.com/ps/i.do?id=GALE%7CA186516773&sid=googleScholar&v=2.1&it=r&linkaccess=abs&iissn=00276383&p=AONE&sw=w&userGroupName=anon%7Ec8d0419a> [https://perma.cc/D8F6-R6HB].

232. Jewett, *supra* note 16.

233. *Id.*

234. *See supra* Part II.

235. Dewey-Kollen & Downes, *supra* note 231, at 14–15.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. NAT’L CTR. FOR INJ. PREVENTION & CONTROL, *supra* note 195.

a level of severity that is more akin to the treatment of repeat offenders. In Wisconsin, the question then becomes what drunk driving prevention methods might make it through the Wisconsin legislature, past the Tavern League, and into statutory law.

The first potential answer is for the Wisconsin legislature to pass a law which criminalizes first-offense drunk driving. As previously discussed, the criminalization of first-offense drunk driving has been met with harsh opposition in years past.²⁴¹ As recently as 2019, a measure to make first-offense drunk driving a misdemeanor, backed by Republican state Representatives Jim Ott and Alberta Darling as well as Democratic Governor Tony Evers, failed, just as it did in 2013 and in previous years as well.²⁴² Frank Harris believes that it would take legislative leadership to change their mindset in order for criminalization to occur.²⁴³ “It depends on if the Tavern League would allow them to do it.”²⁴⁴

Criminalization of drunk driving would not be too harsh of a penalty for drunk drivers who may be driving drunk for the eightieth time. However, it would be unwise to conduct this analysis of Wisconsin politics, lobbying, and culture, only to conclude that criminalizing first-time drunk driving offenses in Wisconsin is the most realistic solution. I introduce criminalization first to present it as a meritorious option in the context of first-time drunk driving offenders, even if it is not a feasible one in the Badger State. Likewise, certain drinking-oriented policies such as third-party dram shop liability and raising the alcohol tax are unlikely to ever be successful so long as the Tavern League holds power, even if they might help to reduce drunk driving.²⁴⁵ Instead, Wisconsin should implement a combination of the following drunk driving

241. *Supra* Part II.

242. Richmond, *supra* note 229.

243. Wisconsin Democracy Campaign, *Tavern League Still Has Clout in Capitol*, URBAN MILWAUKEE (Jan. 16, 2019), <https://urbanmilwaukee.com/2019/01/16/campaign-cash-tavern-league-still-has-clout-in-capitol/> [<https://perma.cc/WMY7-FYJL>].

244. *Id.*

245. When the drunk driving law was passed in 2009, State Representative Terese Berceau said that lawmakers “don’t have the backbone” to also raise taxes on beer, wine, or liquor. Marley & Bergquist, *supra* note 126. A 2013 *Wisconsin Law Review* Comment called into question the immunizing Dram Shop Act and proposed a new law which would hold licensed drinking establishments liable, in proportion to their fault, for damages caused by visibly intoxicated individuals who were provided alcohol by said establishment. In the context of this Comment, I have chosen not to analyze this immunity further, given the unlikelihood of it passing so long as the Tavern League exists. For more on dram shop liability as a potential drunk driving prevention measure, see generally Michael W. Weigel, Comment, *How Wisconsin Got It Wrong: Reevaluating Dram Shop Liability*, 2013 WIS. L. REV. 237 (2013).

prevention measures as Wisconsin-oriented solutions to the drinking and driving dilemma.

B. Proposing New Measures to Prevent Drunk Driving in Wisconsin

First, Wisconsin should institute harsher sanctions for first-time drunk driving offenders. The new statute should increase fines to a minimum of \$600 and a maximum of \$2,000, which is the current fine value for third-time offenders. Wisconsin should also increase the time of license revocation to a minimum of twelve and a maximum of eighteen months. If first-offense drunk driving is to remain decriminalized, the fines and sanctions associated with the offense need to be set at an appropriate level to compensate for that lack of punishment. These harsher penalties have the potential to increase the likelihood of deterrence for repeat offenders, without the burden of a criminal record and without the consequences and questionable effectiveness of a jail sentence. Increased fines and sanctions would increase the likelihood that potential drunk drivers might, under a cost-benefit analysis, consider other options of transportation before driving themselves.

Second, Wisconsin should increase government investments in alternative countermeasures of drunk driving prevention, including social deterrence and rehabilitation. The Wisconsin Department of Transportation should increase their budget allocation to drunk driving education resources, such as annual postcards educating the public on the alcohol content of various drinks factoring in body mass index, how many drinks for each person will result in a BAC level of 0.08% or above, and the penalties that come with an OWI conviction. The Wisconsin Department of Transportation should also invest additional resources into rehabilitation measures, such as victim panels and alcohol treatment centers, and should allow for court-ordered rehabilitation paid for by the State. The more educated Wisconsin civilians are of their alcohol consumption, and the more aware they are of the potential consequences of their actions, the more likely they will be to make the appropriate rational decision when deciding whether to drink and drive.

Third, Wisconsin must require IID installation for first-time offenders, joining the thirty-four states and Washington, D.C., which already do so. The new statute should provide that IIDs are installed in the vehicle of the first-time offender for one year, and the Wisconsin government should pay for the installation to avoid any additional financial burden on individual offenders. The installation of IIDs for first-time drunk driving offenders is proven to be effective in reducing both drunk driving arrests and deaths involving drunk

drivers.²⁴⁶ In addition, setting the BAC level at 0.08% in order for the car engine to start should have bipartisan support, as it circumvents the pleas of the Tavern League and the Wisconsin legislature to avoid punishing those who have only had a couple drinks. Furthermore, IID installation avoids the personal ramifications caused by having a misdemeanor on one's permanent criminal record. Nobody in the state of Wisconsin with a recent drunk driving offense should be able to start their car if they are over the legal limit, and mandatory installation of IIDs for first-time drunk driving offenders would ensure that they cannot do so.

Fourth, and perhaps most importantly, Wisconsin should announce that it will be the first state to require commercial use of DADSS breath technology in all consumer vehicles when the technology is ready in 2024. Instead of changing Wisconsin's culture of drinking, which is integral to the state's identity, the DADSS technology is a fix adapted to the state's unique characteristics. The use of this technology would also position Wisconsin as a pioneering force in road and driver safety. As Justice Louis Brandeis famously stated:

It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.²⁴⁷

Wisconsin has an opportunity to serve as an important laboratory for the rest of the country to emulate, and it should take advantage. Like Utah's lowering of the BAC limit, and like Arizona's treatment of first-time drunk driving offenders, Wisconsin can serve as a leader in drunk driving enforcement, which would be a radical change from past policies.

Surely, there will be critics who argue that the inconvenience of commercially used IIDs will be too high, that people will be stranded and won't be able to get home if their car won't start, or that this technology will infringe on civil liberties. Those critics can be quickly refuted. The DADSS breath system's ease of use makes the IID process as simple as sitting and breathing, which of course is already done by all drivers and would be unlikely to inconvenience anyone or infringe upon any civil liberties. Additionally, with the modern prevalence of alternative transportation methods such as Uber and Lyft as well as the ease of obtaining a designated driver, those who are over the

246. See Marutollo, *supra* note 197; U.S. DEP'T TRANSP. NAT'L HIGHWAY TRAFFIC & SAFETY ADMIN., *supra* note 189; MOTHERS AGAINST DRUNK DRIVING, *supra* note 196; see also Hoag Levins, *Study Confirms In-Car Breathalyzers Reduce DUI Deaths*, PENN LEON. DAV. INST. HEALTH ECON. (May 30, 2016), <https://ldi.upenn.edu/our-work/research-updates/study-confirms-in-car-breathalyzers-reduce-dui-deaths/> [<https://perma.cc/WF7G-KJ7E>].

247. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

legal BAC limit have plenty of opportunities to transport home if their car is unable to start due to this technology and can prepare accordingly for a night out. Frankly, the question should not be whether it will be an inconvenience, but whether we should allow anyone over the legal BAC limit to have the opportunity to operate a vehicle. It should not be controversial to answer that question with a strong and emphatic N-O. Wisconsin ranks as the most dangerous state for drunk driving in the nation.²⁴⁸ Furthermore, the COVID-19 pandemic has increased crashes and driving deaths, as 2020 saw an increase in the number of deaths on the road from drunk driving, speeding, and unsafe driving.²⁴⁹ Compared to 2019, 2020 saw a 7.2% increase in crash deaths due to impaired driving, 22% of which were on local streets and roads that were more frequented due to the pandemic.²⁵⁰ With drivers less safe than ever before, Wisconsin can take an important step in making the roads safer by utilizing the DADSS breath technology.

Last but not least, it is far past time that Wisconsin state representatives cease to bend to the will of the Tavern League. While more of a theoretical solution than a statutory one, the power of the Tavern League over the state legislature has never served the citizens of Wisconsin in a healthy way. If the Tavern League's recent bouts with public health mandates during the COVID-19 pandemic are indicative of anything, it is that the Tavern League works for the best interest of their members, not for the health and safety of the citizens of Wisconsin. With much of their influence coming from the sheer power of members and relationships, not from financial contributions, the Tavern League is a stoppable force. The lawmakers in Madison must put health and safety ahead of profit and power and start standing up to the Tavern League.

VI. CONCLUSION

Alcohol consumption is an integral part of Wisconsin's culture. What should not be so integral to the state is the ability to drink, drive, and get away with it. Since the early days of drunk driving enforcement, Wisconsin has received criticism for its treatment of drunk drivers. It is time for the state to transition from the admonishing words of Justice Blackmun in *Welsh v. Wisconsin*²⁵¹ to the guiding muse described by Justice Brandeis in *New State*

248. Laura Berry, *Most Dangerous States for Drunk Driving (Ranked)*, CAR INS. COMPARISON, <https://www.carinsurancecomparison.com/most-dangerous-states-for-drunk-driving/> [https://perma.cc/TUX6-HU2F].

249. *2020 Fatality Data Show Increased Traffic Fatalities During Pandemic*, NAT'L HIGHWAY & TRAFFIC SAFETY ADMIN. (June 3, 2021), <https://www.nhtsa.gov/press-releases/2020-fatality-data-show-increased-traffic-fatalities-during-pandemic> [https://perma.cc/TJ9E-YFHYY].

250. *Id.*

251. 466 U.S. 740, 755–56 (1984).

Ice Co. v. Liebmann.²⁵² Wisconsin has a chance to serve not as an object of ridicule for other states, but rather as a laboratory for emulation by those same states. Wisconsin's drunk driving law needs to be proactive, not just reactive. It needs to prevent crashes, not just punish repeat convicts. It needs to deter drivers from drinking and driving the first time, not just the second, third, fourth, or eightieth time. Roads are the rare place where individual drivers must rely on one another for their personal safety. It is past time for lawmakers in Wisconsin to conquer their fears of the Tavern League and to pass a law that is hard on those who drink and drive, even if it is their first time getting caught. The drunk driving prevention measures proposed in this Comment have the potential to save countless lives of Wisconsin citizens, while also enabling the Wisconsin legislature to take a stand against the Tavern League and their overpowering influence. From the perspective of a Wisconsin resident who values his personal health and safety, that's a win-win.

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252. 285 U.S. at 311 (Brandeis, J., dissenting).

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