GETTING DRINKING DRIVERS OFF THE ROAD:
A Perspective Based on a Study of Police Operations

Herman Goldstein

Set forth below is a reflective article by Wisconsin Law Professor Herman Goldstein on a social problem that is receiving a lot of attention, not just in the United States but in many other parts of the world as well: the drinking driver.

We Americans have long looked to the police to handle some of our most complex social problems, and legislatures across the country — hoping to crack down on those who drink, then drive — have ground out a lot of new laws which rely primarily on police enforcement.

Professor Goldstein, known nationally and internationally for his studies of - and insights into - police operations, recently completed an experimental project in collaboration with the Madison Police Department which examined the problem of the drinking driver and the department’s response to it.

Findings of that study, reported here by Professor Goldstein, suggest that primary reliance upon police enforcement isn’t likely to have lasting impact in reducing the incidence of the problem. And experience elsewhere, as he also points out, suggests the same conclusion.

Concerned citizens — legislators included — will gain from an understanding of the findings and insights of Professor Goldstein into the nature of the drinking/driving problem, the limitations of police operations in reacting to and handling the problem, and the special problems resulting from police enforcement of laws meant to get drinking drivers off the road.

But Professor Goldstein — a cheery believer that things can be made to work — has not given up in despair on the problem and points instead to solid gains which can come from realistic understanding and appraisal of the drinking driver problem from the perspective of police operations.

Among the first major difficulties one encounters, from the police perspective, in analyzing the drinking-driver problem, is in getting an accurate picture of the problem. It has become almost standard practice, for example, by way of calling attention to the gravity of drinking and driving, to cite the national statistics that report fifty percent of all accidents resulting in fatalities as having involved someone who was drinking. Our review of police records in Madison for a period of six years produced a similar figure. But our interviews with officers and our observations of police actually handling incidents involving intoxicated drivers on the streets suggest that the figure may be somewhat misleading.

On the one hand, based on the local experience, the oft-cited statistic may underestimate the magnitude of the problem. Determining alcohol involvement, especially in accident situations, is by no means as precise a process as is implied in the use made of the national figures. Consider, for example, what happens at the scene of a serious accident involving one or more fatalities or serious injuries. In the rush to save lives, reroute traffic, perhaps protect others from a downed power line, and calm relatives and friends, the detection of alcohol involvement will most likely get low priority. Unlike those situations in which erratic driving behavior is first observed and a driver is then stopped and his condition scrutinized, police investigating accidents are limited to the observations they can make of the drivers. And in these observations, allowance must be made for lack of stability and coherence that may be due to the shock of the accident. If the driver is seriously injured and is rushed off to a hospital, the investigating officer may have even less to go on.

Without probable cause, an officer cannot order that a driver submit to a blood alcohol test. Recognizing the difficulty in conducting such investigations, the Wisconsin legislature, in 1977, authorized police officers to “request” all drivers involved in an accident resulting in great bodily harm or death to take a blood alcohol test, but the Attorney General subsequently ruled that the officer could not do so without having first made a lawful arrest. The statute has since been repealed.

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The intoxicated condition of one or more of the drivers is of course obvious in many accidents. But even if apparent, a variety of factors may result in the accident being investigated without pursuing alcohol involvement. Officers disagree over how often this occurs, with some contending that they know of no such cases. Those who acknowledge the practice indicate that it is perhaps most common in single car accidents in which the driver is injured, but there is no injury to others or serious property damage to other than the driver's vehicle. As expressed to us, the officers in such cases may conclude that the driver will have suffered enough with his or her injuries, possible permanent disability, damage to the car, increased insurance, and hospital and medical bills. Discretion of this type masks some cases that might otherwise add further to the figures used to underscore the gravity of the problem.

On the other hand, it must constantly be borne in mind that while intoxicated persons ought not to drive, a determination that a driver in an accident had previously consumed alcohol does not mean that the accident would not have occurred if the driver were sober. In our effort to condemn the practice of drinking and driving, we have tended, in our use of statistics, to fuzz-up the distinction between those who are found, because they became involved in an accident, to have been drinking and those who were established as having caused the accident. The oft-cited fifty percent figure includes drivers who were determined to have been drinking, but who may not have been established as at fault for the fatalities that occurred.

In our effort to probe more deeply into local aspects of the drinking driver problem, we gathered detailed data about the 29 persons who died in automobile accidents attributed to drinking-drivers in Madison in the period from 1975 through 1980. We found, somewhat to our surprise, that 18 of these victims were the at-fault drivers themselves. Another nine of the victims were passengers in an at-fault driver's vehicle who we assume entered the vehicle on their own volition, knowing that their driver was intoxicated. Only two victims in the six year period were what we referred to as innocent, in that they were obeying the law when they were hit and were not in any way putting themselves at risk. One was the passenger in a vehicle hit by a drinking driver. The other was a pedestrian.

This finding put the gross national statistics on fatalities in a somewhat different light. If the Madison figures are even a rough reflection of the national experience, we can better understand why the extraordinarily high total of deaths attributed to drinking and driving has not produced the intensity of concern than one would expect. The fatalities to which communities react strongly are those involving an innocent victim. Our tendency to view loss of lives less seriously if the victim bears some degree of responsibility for his or her fate may have had a substantial impact on policies relating to intoxicated drivers in the past.

Increasing the Number of Arrests

Police agencies in recent years have been under growing pressure to increase the number of arrests they make of drinking drivers. The assumption is that at some yet to be determined enforcement level, the increase in arrests will begin to produce a substantial reduction in the number of intoxicated drivers.

The Madison Police Department increased its arrests of intoxicated drivers from 81 in 1968 to a high of 1,250 in 1978, which was among the highest rates per capita in the state. (Unfortunately, we have no way of knowing what the impact has been on the incidence of drinking and driving in Madison.) Numbers of arrests have little meaning unless they are related to the total number of violations in the community. We would have liked, therefore, to find out how many drivers on the streets of Madison at any one time are intoxicated. The most effective method that has been developed for acquiring such data is the roadside survey, a procedure by which a roadblock is set up without advance notice. Drivers are asked to cooperate in responding to a series of questions and by providing a sample of their breath. Cooperation is usually very high. We did not have the resources with which to conduct such a survey in Madison. But we were impressed by the consistent findings of those roadside surveys that were conducted in various types of communities for the National Highway Traffic Safety Administration between 1970 and 1974. With only slight variations from one jurisdiction to another, it was found that six per cent of weekend and late weekday (after 10:00 p.m.) drivers had a blood alcohol concentration (BAC) equal to or exceeding .10, which is now the limit in Wisconsin beyond which driving is illegal.

Our inability to establish with any precision the incidence of intoxicated driving in Madison was initially disappointing. But the most conservative estimates, based on the data acquired elsewhere and on local impressions, were so large, we no longer felt the need for more exact figures. As the police note, for example, if only one of the patrons who, at closing time, drives away from each of the taverns or restaurants serving drinks in Madison has more
than .10 BAC, that in itself would place 300 intoxicated drivers on the streets of the city. The task of the police, it was clear, was overwhelming. This is especially so since the closing time of bars is exactly the time when police departments are busiest with other matters. A decision to arrest an intoxicated driver commits the officer and an assisting officer to from one to two hours of processing. The length of this period has a profound effect on the department’s enforcement activity, especially since the decision of one officer to make an arrest places heavier responsibilities on those who remain in the field and who must cover for the officer out of service.

Even with the continued high rate of enforcement in Madison (and constant expressions of concern from prosecutors and judges about the high volume of such cases), the number of arrests averages out to only 3.5 a day — a miniscule number when related to the total number of drinking drivers on the streets. With so low a probability of interference in so common a pattern of behavior, a substantial number of drivers no doubt justifiably conclude that they have immunity from arrest. But doubling the number of arrests would still only affect a small fraction of the intoxicated drivers on the streets at any one time...

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Against this background, we should weigh carefully recent proposals that the statutory standard for determining intoxication be reduced to .05 BAC. Given the extraordinarily low probability that a driver with .10 will currently be arrested, should legislators increase numerous fold the number of drivers subject to enforcement action? Some legislators may see value in giving legislative endorsement to what is essentially good advice (i.e., don’t drink and drive even if the consumption of alcohol is less than what has previously been prohibited), but the value in sending out such a message must be balanced against the effect the enactment would have in making even more empty the current threat of prosecution.

Controlling Police Discretion

With so big a gap between the number of violations and the number of prosecutions, police officers exercise broad discretion in their contacts with drinking drivers — especially in deciding who from among the hundreds of violators should be arrested. We were surprised, in our study, to find that this was not generally recognized; that prosecutors and judges, for example, were taken aback when informed that the cases they handle represent but a portion of the cases in which an arrest could have been made.

Conscious of the potential for abuse, the Madison Police Department and other police agencies as well have at times attempted to provide guidance to police officers, but such efforts have been hindered by the legal fiction that police have no such discretion.

Most officers candidly acknowledge that discretion is exercised, that each officer employs somewhat different criteria, and that irrelevant considerations sometimes affect the decisions that are made. At the most general level, discretion is reflected in the fact that some officers, because they view the drinking driver problem seriously, make large number of arrests; others make none. The latter may not view the conduct as serious, or may simply dislike dealing with intoxicated persons.

One of the critical discretionary points, we determined, was in deciding whether or not to stop a suspected driver. Driving behavior was the most common criterion, but the officer may be influenced against involvement by such concerns as the pressure of other police business or nearness to the end of a shift. After stopping a driver and concluding that the driver is intoxicated, the judgment as to whether an arrest is to be made was based on such factors as the likelihood the individual will test well over legal limits; the attitude and cooperation of the offender; and the likelihood that the individual will drive again if not taken into custody. But some officers also consider the offender’s past driving record; the offender’s honesty in acknowledging past convictions; and the proximity of the individual to his or her home.

Our interviews and field observations indicated that police officers have, over the years, developed a
substantial repertoire of alternatives to arrest: having the driver walk home; having one of the other individuals in the stopped vehicle take over the driving, providing he or she is not also impaired; calling a cab for the driver and securing the vehicle; escorting the driver home; insisting that the driver take time out to eat; or removing the ignition key and either hiding it in the vehicle where it is not easily accessible, or depositing it at some point with information left with the driver as to where it can be retrieved. While there is an obvious element of unfairness in being selected out for such "favored" treatment, it was apparent to us — as it has been to police officers — that such an informal action taken against a particular offender under some limited conditions may indeed be the most effective way in which to deter similar behavior on the part of that particular offender in the future.

In response to current concerns, legislatures throughout the country have been moving rapidly to increase sanctions for those convicted of drinking and driving, including mandatory jail sentences for second offenders, increased monetary fines, and immediate loss of license upon conviction. Congress has made the availability of certain funds for increasing highway safety available to the states conditioned on their adopting more severe sanctions. A proposal recently made by a Presidential Commission would make the much larger grants for highway construction also conditioned on enactment of more severe penalties. All of this is so despite the fact that there is no evidence that programs based on severe penalties have been effective, over the long term, in reducing the incidence of drinking and driving. But one of the main reasons we lack any such hard evidence is that in the past, programs carrying heavy sanctions have not worked; they have not been implemented in their entirety or maintained over a sufficiently long period of time to afford an opportunity to measure their effect ...

Since it seems inevitable that police will continue to be required to exercise broad discretion in the handling of intoxicated drivers, good sense in the running of a police agency requires that steps be taken, through training and the development of policies, to increase to a maximum the likelihood that it will be exercised in ways that are fair and uniform, and that contribute toward reducing the drinking-driver problem. But movement in this direction has been seriously impeded by the unsettled state of the law relating to the liability of police officers if, having knowledge that an individual was driving while intoxicated, they choose not to arrest. The periodic messages that reach the police through successful tort actions in which officers are held to a standard of full enforcement of the law makes it impossible for police administrators to deal openly and constructively with the broad range of discretion which police officers must inevitably exercise in this area.

**Increasing Sanctions**

The basic question is whether the criminal justice system has the capacity to treat more severely an offense of such high volume ...

Madison's experience in processing large numbers
of drunk driving arrests was instructive. To learn what happened to them, we tracked each of the 92 arrests made by Madison police in March of 1980. It is important to note that these arrests were made prior to the most recent changes in the statutes that increased the sanctions for driving while intoxicated. The statute then in effect, which had been enacted in 1977, was intended to increase the number of arrests by reducing the severity of punishment. First offenders were charged with a city ordinance violation. Offenders were given the opportunity to enter educational and treatment programs. The threat of harsher sanctions (fines, jail and revocation) was used to coerce participation in these programs.

With these opportunities to avoid loss of license and incarceration, 90% of the persons charged with driving while intoxicated pled guilty or no contest to the original charge. In 8% of the cases, a plea was accepted to a reduced charge. Only 2% of the cases were dropped. No trials were held. Included in these 92 cases were 19 second offenders and two third offenders who faced heavier sanctions. Observers identified two other factors that contributed to these results: the high quality of the cases presented in the written reports by arresting officers, which were often shown to the defendant or defense counsel; and the fact that .10 BAC was evidence per se of intoxication.

But even under a statute that was not considered as carrying severe penalties, police, prosecutors, judges and defense counsel developed additional accommodations in order to handle the large volume of cases. The most commonly reported accommodation in other areas of the state—that of routinely accepting pleas to a lesser charge—was not used by either the Dane County district attorney or Madison's city attorney. But our field observations of police activities and probes elsewhere in the system revealed numerous other accommodations that were used in order to "make the system work." Offenders with less than .13 BAC were rarely arrested in the first instance. The charge against those arrested with less than a .13 was frequently reduced. In exchange for a guilty plea, concurrent charges were often dropped and the charge for refusing to submit to a BAC test was automatically dropped. Convicted offenders who lacked the funds with which to pay their fines were routinely allowed liberal periods in which to make payment. When licenses were revoked, an occupational license was routinely issued so long as minimum statutory standards were met. Third offenders were permitted to undergo inpatient treatment as a substitute for serving the legislatively mandated thirty day jail sentence. Finally, the trial of difficult cases was commonly postponed with the hope that some intervening development would facilitate disposition without trial.

What our inquiry revealed, then, was a delicately balanced equilibrium that served the interest of both defendants and the state and that had been arrived at over a period of time through cooperative arrangements among prosecutors, judges and defense counsel. Like the discretion exercised by the police, the results are rather mixed, with some indications of unfairness and lack of faithfulness to legislative intent, but also with some evidence that the ultimate objective of reducing the incidence of drinking and driving may have been well served.

With the passage of time since the enactment in 1981 of more severe sanctions, it is now possible to make probes similar to that which we conducted in order to determine the new "configuration"; to establish what accommodations have developed in response to the new statute. No doubt the picture that will emerge will differ from one jurisdiction to another. Hopefully, several such inquiries will soon be under way.

While we do not yet know with any preciseness how faithfully the detailed provisions of the newly enacted statute have been implemented, claims have already been made for its effectiveness in reducing drinking and driving. Strangely, those making the claims may be right, but we are unlikely to know

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with any certainty. We do know that accidents caused by drinking drivers have decreased in some jurisdictions after all of the publicity associated with the enactment of laws relating to intoxicated drivers, but returned to their previous level as limitations on enforcement became apparent. The most often cited example is the large-scale alcohol-safety program launched in Britain in 1967. The combination of publicity associated with initial enactment of their Road Safety Act and the subsequent legal wrangling in its implementation created an impression among drivers that there was a real chance that they would be caught, charged and convicted. The law was credited— to the extent one can be precise about such measurements— with having reduced crash losses involving drinking-drivers. But alcohol-related casualties and deaths began to rise gradually as drivers recognized that certainty of apprehension and punishment under the law had been grossly overestimated.

The number of accidents attributed to drinking drivers is now down in Wisconsin and in other states as well. But so are the number of accidents involving sober drivers. In addition, other changes— such as the reduction in the speed limit and the reduction,
during some periods, in the amount of miles driven due to fuel shortages and the economy — make it extraordinarily difficult to interpret our experience; *i.e.*, to determine with any preciseness how much of the reduction is due to the publicity associated with the threat of more severe sanctions, if not the actual implementation of those sanctions.

The often cited Scandinavian experience is of limited relevance. Although Sweden, Norway, Finland, and Denmark do have stricter drinking and driving laws than the United States, there is no solid evidence that these laws can be credited with having reduced the incidence of drinking and driving in these countries. Their stiff laws have been on the books for a long time and are more a reflection of how seriously Scandinavians view drinking and driving. This is not to say that the laws are ineffective; only that the evidence and arguments given to support their deterrent value are somewhat misleading.

One must take note of fundamental differences in cultural attitudes toward the use of alcohol in the Scandinavian countries, the strength of the temperance movements, and, in particular, the strong negative attitude toward drinking and driving.

What I find most relevant in the Scandinavian experience is that they have not depended so heavily on arrests and prosecutions to control drinking and driving, but use their laws in a more limited way to backup and underscore self-controls. If there is a single point that emerged most clearly from our inquiries, it is that we are currently depending much too heavily on arrest and prosecution as the primary method for altering the habits of drinking drivers. The criminal justice system simply cannot carry so heavy a burden. That is why we should welcome, in the current wave of concern about intoxicated drivers, the exploration of other alternatives — from technical devices placed on cars to changes in road construction; from greater controls on those who dispense alcohol to more immediate revocation of licenses. But ultimately, the major value of all of these measures will be in the contribution that they — along with legislative enactments — make toward strengthening the norm that says, quite simply, it is socially unacceptable to both drink and drive.

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