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## You Drink, You Drive, You Lose: Or Do You?

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Tina Wescott Cafaro\*

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They stumble. They slur. They get behind the wheel of their car and drive. This is apparently the case for the 159 million people who have self-reported episodes of alcohol impaired driving each year.<sup>1</sup> Of those 159 million motorists, about 1.4 million are arrested for driving a motor vehicle while under the influence of alcohol or narcotics.<sup>2</sup> In 2004, 16,694 people in the United States died in alcohol-related motor vehicle crashes, constituting roughly 39 percent of the 42,636 total traffic

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1. NAT'L CTR FOR INJURY PREVENTION & CONTROL, IMPAIRED DRIVING (2003), <http://www.cdc.gov/ncipc/factsheets/driving.htm> [hereinafter NCIPC].

2. LAWRENCE A. GREENFIELD, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ALCOHOL AND CRIME: AN ANALYSIS OF NATIONAL DATA ON THE PREVALENCE OF ALCOHOL INVOLVEMENT IN CRIME vi, ix (1998), <http://www.ojp.usdoj.gov/bj5/pub/pdf/ac.pdf>. Greenfield states:

Since 1975, the U.S. Department of Transportation, through the National Highway Traffic Safety Administration (NHTSA), has maintained the annual Fatal Accident Reporting System (FARS) which obtains accident-level data on each motor vehicle crash involving a fatality. FARS contracts with State agencies to complete a standardized form on each fatal accident which includes information such as the weather and road conditions, vehicle type, number of passengers and fatalities, the manner of the crash, whether there was a drinking or drug-using driver involved, and the specific measurement of blood alcohol concentration or BAC (grams of alcohol per deciliter of blood).

*Id.*

fatalities.<sup>3</sup> While this number has decreased since its all time high in 1982,<sup>4</sup> statistics show that in the mid-1990s the number of alcohol-related deaths began to rise again.<sup>5</sup> Since then, the percentage of alcohol related crashes has varied only slightly.<sup>6</sup> It is clear that operating a motor vehicle while under the influence of alcohol (“OUI”) remains a widespread crime; a crime that cuts across social, economic, and ethnic lines.<sup>7</sup> As a result of what some have termed an “epidemic,”<sup>8</sup> society is faced with the dilemma of how to curtail motorists from driving after consuming too much alcohol.

In response to an all-time high of OUI related deaths in the early 1980s, the public started clamoring for legislative response. Consequently, federal and state governments enacted stringent OUI laws.<sup>9</sup> However, despite the initial public outcry

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3. NCIPC, *supra* note 1; MADD Online, Statistics <http://madd.org/stats/1112> (last visited Aug. 26, 2006). This number only takes into account the number of deaths where alcohol impaired driving was a factor. It fails to reflect those instances where alcohol is a factor in an accident causing injury, serious or not, or in minor motor vehicle accidents without injury. A more accurate picture is depicted by the statistic that an alcohol related motor vehicle crash occurs every 31 minutes. NCIPC, *supra* note 1.

4. In 1982, 26,173 people died in alcohol related accidents. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., ALCOHOL INVOLVEMENT IN FATAL MOTOR VEHICLE TRAFFIC CRASHES, 2003-1 (2005), <http://www.nrd.nhtsa.dot.gov/pdf/nrd-30/ncsa/rpts/2005/809822.pdf> [hereinafter NHTSA].

5. According to the NHTSA, in 1982 sixty percent of fatal traffic accidents involved alcohol. *Id.* This percentage of alcohol related fatalities declined through the mid 1980s, slightly rose in the late 1980s, remained constant for a short time, then slightly declined through the early and mid 1990s until the late 1990s when it rose again. *Id.* 2003 marked the first decline in alcohol related fatalities since 1999. *Id.*

6. MADD Online, MADD Encouraged by Slight Decrease in Alcohol-Related Traffic Fatalities, <http://www.madd.org/news/9680> (last visited Aug. 26, 2006). Mothers Against Drunk Drivers (MADD), a nonprofit organization committed to lobbying state and federal governments for stricter drunk driving laws and to promoting public awareness campaigns, reports that they are “cautiously optimistic” about NHTSA’s FARS data which estimated a 2.1 percent decrease in alcohol-related traffic fatalities from 2003-2004. *Id.*

7. Alcohol is society’s oldest and most popular legal drug. NARCOTICS EDUCATIONAL FOUNDATION OF AMERICA, ALCOHOL—A POTENT DRUG 1 (2002), <http://cnoa.org/N-02.pdf>. Throughout American history, the use of alcohol has transcended gender, race, and social status. As a result of our love/hate relationship with alcohol, there has been legislative movement. The Eighteenth Amendment, passed in 1919, resulted in the total prohibition of alcohol. In 1933, the Twenty-First Amendment repealed the Eighteenth Amendment. The early 1970s saw the beginning of widespread programs concerning alcohol enforcement which, in the 1980s, culminated in a significant increase in attention to impaired driving enforcement. See DONALD H. NICHOLS & FLEM K. WHITED III, DRINKING/DRIVING LITIGATION: CRIMINAL AND CIVIL § 1:2 (2d ed. 1998).

8. See, e.g., MADD Online, MADD and Past President Millie I. Webb Awarded Fries Prize for Improving Health, <http://madd.org/news/6209> (last visited Sept. 20, 2006).

9. Almost every state in the United States passed stricter OUI laws, including mandatory sentencing. Mothers Against Drunk Driving reports that since 1981, over 1,250 laws have been adopted regarding OUI offenses. See Kelly Mahon Tullier, *Governmental Liability for Negligent Failure to Detain Drunk Drivers*, 7 CORNELL L. REV. 873, 873 n.7 (citing MADD’s History, Oct.

and response, statistics demonstrate that as many people are currently committing this offense as have in the past few decades, and that many of those committing OUI are repeat offenders.<sup>10</sup> Typically, the majority of Americans are not concerned with the problems associated with alcohol impaired driving until a high profile tragedy occurs. Unless a life is lost or someone is severely injured the public seems willing to turn the other cheek regarding people who drink and drive. Although everyone agrees publicly that it is wrong to drink and drive, most people do not consider OUI a serious crime.<sup>11</sup> Because of this attitude, a change in the tactics used to combat this crime is necessary.

This article explores different ways to effectively discourage the crime of alcohol impaired driving.<sup>12</sup> Part I analyzes the trend of utilizing preventive educational measures to counteract societal acceptance of this crime and the shortcomings of relying exclusively on this measure. Part II discusses OUI prevention based on deterrence and the use of stricter penalties, such as mandatory jail sentences, to stop alcohol impaired drivers. This section explores whether the trend of increasing the severity of the punishment for OUI offenses is effective in stopping the crime. This section also discusses the shortcomings of OUI legislation that make deterrence of OUI difficult. Part III explores ways to combat the problem of OUI, including implementing uniform Dram Shop Laws, providing law enforcement with adequate funding to facilitate the apprehension of OUI violators, de-criminalizing first offense OUI, and combining preventive societal measures with legal means aimed at increasing the likelihood of arrest and the certainty of conviction. Ultimately, to properly address this issue, the target of awareness campaigns must shift away from the general public and focus on alcohol serving institutions.

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1990, at 1).

10. See NCIPC, *supra* note 1. See also ALAN CAVAIOLA & CHARLES WUTH, ASSESSMENT AND TREATMENT OF THE DWI OFFENDER 20 (2002) <http://0-www.haworthpress.com.innopac.lib.bcit.ca/store/sampletext/2194.pdf>. (Almost one-third of all offenders arrested for OUI are repeat offenders.)

11. "Of the general driving age public, 97 percent see drinking and driving as a threat to their personal safety, and 66 percent feel it is extremely important to do something to reduce the problem in terms of where tax dollars should be spent. Yet, the occurrence of OUI continues each year." MADD Tennessee, Activism, Victim Services, Education, <http://www.madd.org/stats/1,1056,1789,00.html> (last visited Aug. 26, 2006).

12. Many refer to this conduct as "drunk driving" but this is a misnomer. The term "drunk" typically elicits images of an individual tripping over one's feet, falling down, with extremely slurred speech, on the verge of getting sick and passing out. Under most OUI laws, an individual does not have to be "drunk" to be convicted. One must only have consumed enough alcohol to impair their ability to operate a motor vehicle safely. See, e.g., MASS. GEN. LAWS ch. 90, § 24 (2005). While this clearly includes people who are "drunk," it also includes anyone whose motor skills, reflexes, balance and coordination are negatively affected by the consumption of alcohol. For that reason, I decline to use the term drunk driving and instead refer to it as impaired driving, as this is the conduct that legislation regulates.

## I. PREVENTION THROUGH MANIPULATION OF SOCIETAL ATTITUDES

One way to stop impaired driving is to reduce community tolerance of this crime on a widespread basis. In order to achieve this goal, many advocate taking preventative educational measures<sup>13</sup> that focus on a variety of specific behaviors and target different groups. First, educational efforts encourage a more responsible attitude toward alcohol use by highlighting behavior modification.<sup>14</sup> The most relevant modifications include: limiting any alcohol use, limiting the volume of alcohol consumed, selecting alternate forms of transportation after consuming alcohol, choosing a designated driver, and encouraging peers to intervene actively to prevent others from operating under the influence.<sup>15</sup> Second, educational efforts generally target groups such as those who are under the drinking age<sup>16</sup> in both school and college settings, drinking-age adults, parents, and alcoholics. These groups are targeted through the use of media<sup>17</sup> including television, radio spots, and print ads,<sup>18</sup> as well as through the use of lectures and forums in schools, college campuses, churches, and other civic organizations—including Alcoholics Anonymous meetings.

In reaching out to these groups, advocates are trying to foster a set of values that OUI is wrong not only on a personal level but also on a societal level. The stumbling block here is that many people think that drinking and driving is an entirely personal decision; that each individual has the right to decide whether to accept the risk of

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13. Organizations such as MADD and Students Against Drunk Drivers (SADD) have long been working publicly to prevent the occurrence of this crime. Other groups include The National Beer Wholesalers Association, the Insurance Institute for Highway Safety, the National Highway and Traffic Safety Administration and the Presidential Commission on Drunk Driving.

14. See NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING: PARTICIPANT MANUAL II-6 (2002) [hereinafter NHTSA MANUAL].

15. Another behavioral modification includes not riding with drivers who are impaired. However, this only creates a "passive" situation where impaired driving is not stopped and only the safety of a potential passenger is protected.

16. Drinking age laws varied from state to state after the repeal of Prohibition in 1932. In 1984, Congress passed the National Minimum Drinking Age Act, 23 U.S.C. §158 (2006). The purpose of the Act was to push each state toward enacting a minimum legal age of 21 to purchase alcohol. 23 U.S.C. § 158(a)(1). Each state was required to have the 21 age requirement prior to 1986, as a condition of receiving federal highway construction funds. *Id.* As a result of this act, all fifty states now have a drinking age of 21. Each state prohibits both the purchase and public possession of alcoholic beverages for those less than 21 years old. See, e.g., 1986 Haw. Sess. Laws 804 (temporarily raising the minimum drinking age to 21 years), amended by 1992 Haw. Sess. Laws 549 (making permanent the minimum drinking age to 21 years).

17. The information disseminated in this manner is well-known to the general public. Just look to the popular and memorable campaigns of "Friends don't let friends drive drunk" and "You Drink, You Drive, You Lose."

18. See MADD Online, Public Service Announcements (PSAs), <http://www.madd.org/news/0,156,7898,00.html> (last visited Aug. 26, 2006) (examples of television, radio and print ads).

driving after drinking.<sup>19</sup> In order to dispel this dangerous and dated notion, the focus must be directed to two areas: that no one has the right to endanger the life and well-being of others by drinking and driving, and that no one has the right to impose the economic burden on others as a result of injuries caused while OUI.<sup>20</sup> Of these automobile accidents, approximately thirty percent are alcohol-related, adding up to \$45 billion in related costs each year.<sup>21</sup> The CDC estimates that the cost of alcohol-related crashes in the United States is about \$51 billion each year.<sup>22</sup>

With continued educational programs, it is fair to expect that today's children will have a different attitude toward drinking and driving than their parents.<sup>23</sup> To see how preventative programs can be successful one need only look at the campaign designed to stop people from smoking. Previous generations smoked cigarettes without regard to the health implications. After years of educational and preventative programs, the prevalence of cigarette smoking among U.S. adults decreased from 42.4 percent in 1965 to 21.6 percent in 2003.<sup>24</sup> The proliferation of "Thank You for Not Smoking" signs and the enforcement of smoke-free work-place policies as well as smoke-free bars and restaurants are testaments to society's change in attitude regarding the behavior of smoking.<sup>25</sup>

Another useful example of how a preventative campaign can change public behavior is the campaign to encourage the use of seat belts while driving in automobiles. Automobiles have contained seat belts since the 1950s; however, until the early 1980s, only 14 percent of adults used a seat belt.<sup>26</sup> As states began to pass

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19. NHTSA MANUAL, *supra* note 14, at II-6.

20. *Id.*

21. MARGARET C. JASPER, DRUNK DRIVING LAW 3-4 (1999). The costs associated with automobile accidents each year are vast: \$150 billion, including \$19 billion in medical care and emergency expenses; \$42 billion in lost productivity; \$52 billion in property damage; and \$37 billion in miscellaneous crash-related costs. *Id.*

22. *See* NCIPC, *supra* note 1.

23. *See* NHTSA MANUAL, *supra* note 14, at II-7.

24. *Compare* Center for Disease Control, Cigarette Smoking Among Young Adults—United States, 1992, and Changes in the Definition of Current Cigarette Smoking, <http://www.cdc.gov/mmwr/preview/mmwrhtml/00033250.htm> (last visited Aug. 25, 2006); *with* Center for Disease Control, Cigarette Smoking Among Adults—United States, 2003, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6520a3.htm> (last visited Aug. 26, 2006).

25. The correlation between smoking and health issues played a large role in deterring individuals from smoking. Educating the public to these serious health risks and the likelihood of becoming ill was paramount in curtailing the use of cigarettes. In the same fashion, it is not only vital to educate the public about the risks of OUI, it is necessary to focus on the likelihood of getting caught and punished.

26. THOMAS MICHAEL KOWALICK, PROACTIVE USE OF HIGHWAY RECORDED DATA VIA AN EVENT DATA RECORDER (EDR) TO ACHIEVE NATIONWIDE SEAT BELT USAGE IN THE 90<sup>TH</sup> PERCENTILE BY 2002 (1999), [http://www.nts.gov/events/symp\\_rec/proceedings/authors/kowalick.htm](http://www.nts.gov/events/symp_rec/proceedings/authors/kowalick.htm) (providing a brief history of seat belt usage in the United States).

seat belt laws, the usage rate increased.<sup>27</sup> Through the use of legislation, law enforcement, and publicity (intended to be both educational and intimidating), the compliance rate increased to as high as 82 percent usage by June 2005.<sup>28</sup> Many believe that public awareness initiatives such as President Clinton's Buckle Up America Campaign, the National Highway Traffic Safety Administration ("NHTSA"), and the Air Bag & Safety Belt Campaign of "Click It or Ticket" are at least partially responsible for increasing seat belt use.<sup>29</sup>

Finally, the HIV/AIDS prevention programs are examples of successful awareness campaigns. Programs such as peer outreach for gay men, street outreach for injection-drug users, education programs for youth in and out of school, and faith-based initiatives in African-American communities have all been credited with the successful reduction of the disease.<sup>30</sup> Since HIV/AIDS awareness campaigns began, the rate of new infections has dropped significantly. At the height of the epidemic in the late 1980s, the rate of new infections in the U.S. was over 150,000 per year.<sup>31</sup> This number decreased significantly to 40,000 new infections in 2001.<sup>32</sup> However, the success of the HIV/AIDS prevention campaigns, like many public health initiatives, has taken time, and the campaign has yet to reduce transmission of the virus to an acceptable level.<sup>33</sup>

27. In 1987, 31 states passed mandatory seat belt laws, and the rate of usage increased to 42 percent. As more states passed these laws, the rate continued to increase. In 1998, the national seat belt use rate was 68 percent. By 1999, forty-nine states and the District of Columbia had enacted seat belt laws (New Hampshire being the only state with a limited seat belt law). *Id.* Since that time, the rate has increased to 82 percent in 2005. See DONNA GLASSBRENNER, SAFETY BELT USE IN 2004—OVERALL RESULTS (2004), <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/RNotes/2004/809783.pdf>; DONNA GLASSBRENNER, SAFETY BELT USE IN 2005—DEMOGRAPHIC RESULTS (2005), <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/RNotes/2005/809969.pdf>.

28. DONNA GLASSBRENNER, SAFETY BELT USE IN 2005—OVERALL RESULTS (2005), <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/RNotes/2005/809-932/images/809932.pdf>.

29. See News Release, National Safety Council, Click It or Ticket Mobilization May 25 – May 31, 2005 (2004), available at <http://www.nsc.org/airbag.htm>.

30. Ctr. for Disease Control, HIV Prevention: Now More than Ever, <http://www.cdc.gov/hiv/pubs/brochure/prevention.htm> (last visited Aug. 25, 2006) (timeline explaining the rate of HIV/AIDS infection and programs implemented to stop the spread of the disease).

31. *Id.*

32. *Id.*

33. The AIDS/HIV prevention campaigns began in 1983, just a few years after the epidemic began. The National Institute of Health (NIH) provides a timeline that cites the commencement of a published informal newsletter in August 1983 as a first step towards public awareness. This newsletter continued until articles discussing AIDS began to be published in mainstream journals. In Their Own Words: NIH Researchers Recall the Early Years of AIDS, Timeline, 1981-1988, <http://aidshistory.nih.gov/timeline/index.html> (last visited Aug. 26, 2006). Additionally, the CDC provides a timeline which points to March 4, 1983 as the date when the CDC, FDA and NIH provided initial prevention recommendations regarding how to prevent sexual, drug-related, and

Unfortunately, the success of the HIV/AIDS awareness campaign, and other similar preventative education initiatives like it, can come with a downside known as “message burnout.”<sup>34</sup> This happens when the flood of prevention messages desensitizes the targeted group. This can be seen when you look at the impact of perceived consequences of contracting HIV/AIDS on infection rates. After 20 years of successful public awareness and health education regarding HIV/AIDS, some argue that the general public and those who are HIV-positive are knowledgeable but also tired of hearing about the importance of practicing safer sex.<sup>35</sup> Among older gay/bisexual men who have matured during the height of the epidemic in the 1980s and early 1990s, prevention message burnout may facilitate the abandonment of safer sexual practices.<sup>36</sup> Moreover, among younger gay/bisexual men, who were not present during these early years and who have not seen their friends die in large numbers since the rate of infection decreased, taking the advice to practice safer sex may not seem a high priority.<sup>37</sup>

In addition to the possibility of “message burnout,” another concern of relying solely on preventive educational measures to combat OUI is that this strategy will take a substantial amount of time. Ultimately, until a significant majority of society views OUI as a negative behavior that cannot be tolerated or condoned, the public’s behavior will not sufficiently change. Unfortunately, such a significant change in societal attitudes about impaired driving will take years, if not generations to be effective. Working against future generation’s attitudinal changes regarding alcohol use is the notion that consuming alcohol is now and has always been an integral part of our society.<sup>38</sup> As adults continue to drink alcohol in the presence of children, even when done modestly and responsibly, a confusing message is sent that desensitizes our youth to the issues that arise out of alcohol consumption. Because of this, preventative education campaigns cannot be the centerpiece of a program designed to combat OUI, but instead, should be used as a supplement to more traditional methods of deterrence.

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occupational transmission. The CDC’s timeline also shows the preventative programs to have taken a dramatic effect by 1990, when the new infection rate began to stabilize at 40,000. *See* Ctr. for Disease Control, Milestones in the US HIV Epidemic, <http://www.cdc.gov/nchstp/od/mmwr/timeline%20rev2.pdf> (last visited Aug. 26, 2006).

34. MAYOR’S AIDS LEADERSHIP COUNCIL, HIV AND AIDS IN LOS ANGELES: 21<sup>ST</sup> CENTURY CHALLENGES AND APPROACHES 27 (2003), <http://www.lacity.org/dod/aids/documents/2003>.

35. *Id.*

36. *Id.*

37. *Id.* *See also* discussion *infra* Part II (regarding the diminishment of the perceived consequences as a result of new anti-retroviral medications).

38. *See* NICHOLS & WHITED, *supra* note 7, at § 1:2.



## II. PREVENTION THROUGH THE USE OF TRADITIONAL DETERRENCE

Rather than focus on prevention based on education, deterrence is the process of discouraging certain behavior by creating fear of arrest and punishment.<sup>39</sup> Deterrence is broken into two categories: specific and general. “Specific deterrence” is directed toward the individual and focuses on inflicting punishment to discourage that person from engaging in the same criminal behavior again.<sup>40</sup> It is meant to persuade a specific violator that there is indeed something to fear as a result of being caught, and to emphasize that if there is a next time, the punishment will be even more severe. “General deterrence” is directed toward the public at large<sup>41</sup> and is intended to serve as a message to members of society that committing a certain act will not be tolerated and that such behavior has consequences.

In order for deterrence strategies to be effective, an individual must know and understand the potential consequences of his or her action. Under this theory, it is argued that when an individual knows and understands the risks associated with a particular undesirable act, they will then perform an analysis and weigh the risks of getting caught and punished against their perceived benefit from the wrongdoing.<sup>42</sup> When an individual realizes that the risk outweighs the benefit, they will be persuaded or deterred from engaging in the criminal conduct.<sup>43</sup>

Traditional criminal law deterrence theory asserts that an individual’s perception of the punishment meted out for engaging in a particular behavior has a substantial impact on deterring that individual’s conduct.<sup>44</sup> Those advocating under this theory argue that deterrence can be achieved through the enactment of stricter penalties, and the legislature has responded to these demands.<sup>45</sup> In the framework of OUI, the first

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39. See CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (1764). See also BLACK’S LAW DICTIONARY 481 (8th ed. 2004).

40. *Id.*

41. *Id.*

42. See FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 1 (1973).

43. This utilitarian view is at the root of the justification for the use of criminal punishment. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 38 (J.H. Burns & H.L.A. Hart eds., 1982) (1789); JOHN STUART MILL, UTILITARIANISM 8 (Longmans, Green, & Co. 1907) (1863); ZIMRING & HAWKINS, *supra* note 42, at 1.

44. Tracey Meares, et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171-73 (2004) (“The traditional analysis simply turns on whether the penalty is set at an appropriate level to optimize deterrence—balancing the cost of the activity against the cost of enforcement”) (citing NICHOLAS N. KITTRIE & ELYCE H. ZENOFF, SANCTIONS, SENTENCING, AND CORRECTIONS: LAW, POLICY AND PRACTICE 15 (1981) (“[S]ociety hopes to deter wrongdoing by posing specific punishments . . . with the expectation that the punishment will have a double effect: both convincing the lawbreaker not to repeat his transgression and, at the same time, serving as a ‘cautionary tale,’ a warning deterrent to other members of society.”).

45. See ZIMRING & HAWKINS, *supra* note 42, at 18-19.

laws criminalizing this action were enacted soon after the invention of the motor vehicle.<sup>46</sup> Since that time, states have increased the severity of sanctions, most coming about in the 1980s as a result of the Presidential Commission on Drunk Driving and citizen organizations such as Mothers Against Drunk Driving (“MADD”). Responding to pressure about the increase in occurrence of OUI, 47 states have adopted some form of mandatory minimum sentences for OUI drivers, typically for subsequent offenders.<sup>47</sup> A first time OUI offender generally receives probation, a fine, some form of alcohol counseling and some form of driver’s education schooling.<sup>48</sup> In addition to these punishments, virtually every state either suspends or revokes an individual’s right to operate a motor vehicle upon conviction for a first OUI offense.<sup>49</sup> Other penalties include confiscation of the vehicle’s license plates,<sup>50</sup> requiring ignition interlock devices,<sup>51</sup> and vehicle forfeiture.<sup>52</sup> Yet, even with these varying punishments, the crime of OUI continues to occur in large numbers.<sup>53</sup>

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46. See JAMES JACOBS, *DRUNK DRIVING: AN AMERICAN DILEMMA* 57 (1989). See also Jeffrey Robert Connolly, *Maas v. Department of Commerce and Regulation: Why Can't South Dakota Curb Repeat Offenses of Driving Under the Influence?*, 50 S.D. L. REV. 352, 357 n.48 (2005) (“Drinking and driving has been regulated in South Dakota nearly as long as driving itself. South Dakota’s first drunk driving law, passed in 1913, simply prohibited driving while “under the influence of liquor.”) (citing 1913 S.D. Sess. Laws ch. 277 § 1 (“This law was approved on March 3, 1913, and stated, ‘It shall be unlawful for any person to operate or attempt to operate any automobile or other motor vehicle in this state while such person is under the influence of liquor.’”)).

47. The three states that do not impose mandatory minimum sentences for OUI convictions are Mississippi, New York, and South Dakota. See JASPER, *supra* note 21, at 140-41.

48. GALE GROUP, *NATIONAL SURVEY OF STATE LAWS* 129 (Richard A. Leiter ed., 4th ed. 2003).

49. See *id.* (surveying the way each state sanctions OUI); see generally JASPER, *supra* note 21.

50. Fourteen states confiscate license plates: Arizona, Indiana, Iowa, Maine, Minnesota, New Hampshire, New York, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Virginia and Wyoming. See JASPER, *supra* note 21, at 123-25.

51. An ignition interlock is a device that has a breath tester that drivers blow into to measure their blood alcohol level, and which, if alcohol is detected, prevents the vehicle from starting. *Id.* at 151. Thirty seven states have such laws: Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin. *Id.* at 127-29.

52. Twenty-two states have vehicle confiscation laws: Alaska, Arizona, Arkansas, California, Georgia, Louisiana, Maine, Minnesota, Mississippi, Montana, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Washington, and Wisconsin. *Id.* at 131-33.

53. See *supra* notes 2-3 and accompanying text.

There is widespread debate regarding the validity of the belief that criminal punishment actually deters one's behavior.<sup>54</sup> While most agree that the general existence of a criminal justice system that punishes individuals for committing crime does help to deter criminal conduct,<sup>55</sup> some argue the only benefit of this system is in the form of a general warning to potential criminals, and that potential punishment has little to no bearing on the outcome of any individual's decision to violate the law.<sup>56</sup> Relying on a social science analysis, many commentators have concluded that criminal law does not deter because numerous likely offenders are not aware of the law or its consequences if broken.<sup>57</sup> Furthermore, even if they are aware of the consequences, they will likely weigh the benefit<sup>58</sup> of their committing the offense against the cost of getting caught and commit the crime anyway.<sup>59</sup> Others, relying on social influence factors, argue that criminal law does not deter when individuals "perceive that criminal activity is widespread."<sup>60</sup> This argument recognizes that when a certain criminal activity is widespread, individuals "are likely to infer that the risk of being caught for a crime is low" and "might also conclude that relatively little stigma or reputational cost attaches to being a criminal. . . ."<sup>61</sup> This appears especially true in terms of the crime of OUI. The general public seems unwilling to

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54. Scholarship on the deterrence theory and its validity is plentiful. In this article I do not attempt to repeat the analysis engaged in by the plethora of criminal scholars. Instead, I analyze the deterrence theory as it applies specifically to OUI law. For a discussion of the effectiveness of assigning punishment to criminal behavior as an effort to deter crime, *see generally* Daniel S. Nagin, *Criminal Deterrence Research At The Outset Of The Twenty-First Century*, 23 CRIME & JUST. 1 (1998); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L. J. 949 (2003); Tracey Meares et al., *supra* note 44, at 1171-72 (questioning the use of traditional deterrence theory and suggesting that a modern deterrence analysis must be used that incorporates substitution effects, decision framing, educational impact of laws, social control and perceived legitimacy); Steven Klepper & Daniel Nagin, *The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited*, 27 CRIMINOLOGY 721 (1989); Anthony N. Doobs & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143 (2003).

55. *See* PANEL ON RESEARCH ON DETERRENT AND INCAPACITATIVE EFFECTS, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 19 (Alfred Blumstein et al. eds., 1978); Nagin, *supra* note 54, at 1; Robinson & Darley, *supra* note 54, at 950.

56. Robinson & Darley, *supra* note 54, at 951.

57. *See id.* at 953; Meares et al., *supra* note 44, at 1182.

58. In terms of committing the crime of OUI, the benefit to the offender is a matter of personal convenience in terms of mobility.

59. Robinson & Darley, *supra* note 54, at 953.

60. Kahan, *supra* note 54, at 350 (defining social influence as "how individual's perceptions of each others' values, beliefs, and behavior affect their conduct, including their decisions to engage in crime.").

61. *Id.*

stigmatize someone as a criminal for consuming too much alcohol and operating a motor vehicle.

Another argument in opposition to the enactment of stricter penalties for crimes committed is that increasing the severity of the punishment may reduce the deterrent effect by actually lessening the certainty of the law's application.<sup>62</sup> Opponents of stricter penalties claim when "states adopt more severe laws, police grow more reluctant to arrest, prosecutors to charge, juries to convict, and judges to punish. As a result, such reforms do nothing to reduce the incidence of these offenses."<sup>63</sup> In addition, the administration of the law gets thwarted as "mandatory minimum sentences can be circumvented by plea bargains or selective prosecution."<sup>64</sup>

While the debate regarding the validity of deterrence based criminal justice systems continue, our system has yet to replace deterrence theory with any viable alternative. Instead, when these stricter penalties do not curb the problem, many believe the answer is to strengthen the severity of the penalty.<sup>65</sup> This narrow approach, that stricter penalties are the answer, places focus on the end result and fails to take into consideration the importance of two primary requirements: being caught and being convicted. To make deterrence meaningful, the driving public must fear being caught and convicted, not just fear the potential punishment.<sup>66</sup>

Emphasizing not just stricter sentences, but also improving the public's awareness of the increased likelihood of being caught and convicted is a logical next step in addressing the problem of OUI. Such a change in emphasis should cause a greater deterrent affect because there is a direct correlation between the certainty of being caught and individuals deciding against criminal behavior.<sup>67</sup> If enough of the public believes they will be caught if they drink and drive, at least some of them will stop engaging in this behavior. Initially, when the public is made aware of new, stricter penalties for a crime, the number of people willing to take the chance and engage in the activity falls.<sup>68</sup> After stringent legislation is passed, criminal behavior is

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62. Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607-08 (2000).

63. *Id.*

64. Nagin, *supra* note 54, at 6.

65. See JACOBS, *supra* note 46, at 106.

66. H. LAURENCE ROSS, *DETERRING THE DRINKING DRIVER: LEGAL POLICY AND SOCIAL CONTROL* xvii (Lexington Books 1982). Ross believes that it is not the severity of the punishment that deters, but the swiftness and certainty of that punishment that deters. "Changes in the law promising increased certainty or combined certainty of punishment reduce the amount of drinking and driving." *Id.* at 102-03. "Innovations confined to manipulation of the severity of the legal punishment, without a concomitant change in its certainty, produce no effect on the apparent incidence of drinking and driving or its aftermath in crashes." *Id.* at 103.

67. *Id.* at 102-03.

68. Criminologist H. Laurence Ross conducted a study on the impact of the British Road Safety Act and concluded that the maximum deterrent impact on an individual's behavior occurred just prior to and right after the enactment of a new law primarily because publicity and public

likely to slow and remain that way until the public learns through experience that the likelihood of being caught, convicted and punished (regardless of the severity of the punishment) is low.<sup>69</sup> At that point, criminal behavior will increase again.<sup>70</sup> OUI laws in the United States have demonstrated this. After the legislature in all 50 states enacted new OUI laws in the 1980s, the statistics on OUI show a sharp drop in the offense.<sup>71</sup> However, after a period of time, the number of OUI incidents rose to its prior level.<sup>72</sup>

It is clear that the likelihood of getting caught plays an integral part in an individual's decision to risk driving after consuming too much alcohol.<sup>73</sup> The question remains, how many people who drive after consuming too much alcohol must be arrested in order to convince the public that there is a real risk of arrest for OUI? According to the NHTSA,

several programs have demonstrated that significant deterrence can be achieved by arresting one OUI violator for every 400 OUI violations committed. Currently, however, for every OUI violator arrested, there are between 500 and 2,000 OUI violations committed. When the chances of being arrested are one in two thousand, the average OUI violator really has little to fear.<sup>74</sup>

In addition, when an individual is caught but there is little likelihood that their arrest will result in a conviction, the violator has even less to fear.

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concern are usually at their highest at this time. See H. Laurence Ross, *Law, Science, and Accidents: The British Road Safety Act of 1967*, 2 J. LEGAL STUD. 1, 3 (1973); see also Geoffrey Neri, *Sticky Fingers or Sticky Norms? Unauthorized Music Downloading and Unsettled Social Norms*, 93 GEO. L. J. 733, 753-54 (discussing how initial publicity about "new get tough, law enforcement measures leads to exaggerated estimates of the risk of getting caught and punished, and subsequently to a lull in lawbreaking conduct." But, after a few months, experience taught that the risk of being caught was much lower than initial estimation and the conduct returned to the same level).

69. Neri, *supra* note 68, at 753-54.

70. *Id.*

71. See NHTSA, *supra* note 4, at 1.

72. *Id.*

73. See ROSS *supra* note 66, at 102-03.

74. NHTSA MANUAL, *supra* note 14, at II-1.

In a 1975 study conducted in Fort Lauderdale, Florida, only 22 percent of traffic violators who were stopped with BACs between .10 and .20 were arrested for DWI. The remainder was cited for other violations, even though they were legally impaired. In this study the breath tests were administered to the violators by researchers after the police had completed their investigations. The officers failed to detect 78 percent of the DWI violators they investigated. The implication of the study, and of other similar studies, is that for every DWI violator actually arrested for DWI, three others are contacted by police officers, but are not arrested for DWI. It is clear that significant improvement in the arrest rate could be achieved if officers were more skilled at DWI detection.

*Id.* at II-2.

How individuals weigh the consequences of their actions has a significant impact on their determination of whether or not to engage in a particular behavior, even if the outcome could be deadly. The HIV/AIDS epidemic demonstrates that when people perceive the consequences of their actions as minor, they are more likely to engage in the behavior.<sup>75</sup> New medications, such as highly active anti-retroviral therapy, provide a false sense of security to some individuals who no longer see contracting HIV/AIDS as a death sentence and are now more likely to engage in risky behavior.<sup>76</sup> This, coupled with message burnout, has likely caused the number of people contracting HIV to increase.<sup>77</sup> Likewise, individuals who see the likelihood of being caught, convicted and punished for driving under the influence as unlikely, will probably continue to engage in this behavior. Additionally, the very nature of OUI poses an obstacle regarding perception of consequences because the effect of alcohol may make some offenders lack the self restraint and willpower needed to keep from getting behind the wheel of a car and driving.<sup>78</sup> This lack of willpower coupled with the perception that the chance of getting caught is low conceivably increases the occurrence of the crime.<sup>79</sup>

Making the public aware that they are likely to be caught is no easy task. However, the more difficult task may actually be getting a judge or jury to convict an individual for committing this crime. In order to convict, you must have a fact finder who is willing to do so. One obstacle in obtaining such a conviction is that the public tends to think “many of the people in alcohol related offenses typically are moderate drinkers like most of themselves.”<sup>80</sup> The general public does not appreciate that “those involved in crashes after drinking typically have consumed exceptionally large amounts of alcohol.”<sup>81</sup> Nor do they appreciate that not everyone arrested for OUI is a light to moderate drinker. As a result, when deciding an offender’s guilt or innocence they employ a “but for the grace of God go I” rationale and believe it is unreasonable to penalize offenders unduly.<sup>82</sup> These beliefs are reinforced by the fact that a majority of adult Americans do occasionally drive after some drinking.<sup>83</sup>

In addition to confronting and overcoming the perceptions held by prospective jurors, prosecutors must contend with statutes that fail to capitalize on deterrent producing sanctions and a judiciary that has, in some states, made rulings that

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75. MAYOR’S AIDS LEADERSHIP COUNCIL, *supra* note 34, at 27.

76. *Id.*

77. *Id.*

78. *See infra* notes 113-16 and accompanying text.

79. *See* THE GALLUP ORGANIZATION, NAT’L SURVEY OF DRINKING & DRIVING ATTITUDES & BEHAVIORS: 1999 53 (2000).

80. ROSS, *supra* note 66, at xiii.

81. *Id.* at xiv.

82. *Id.* at xiii-xiv.

83. *See* Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning In Ferguson v. City of Charleston*, 9 DUKE J. GENDER L. POL’Y 1, 67 (2002).

prohibit the introduction of evidence useful for obtaining a conviction.<sup>84</sup> Watered down versions of anti-OUI legislation and the rulings of some courts regarding the inadmissibility of breath and field sobriety test refusal evidence, make the certainty of a conviction less probable.

Massachusetts is one such jurisdiction where OUI laws have been historically lax and where the certainty of conviction and punishment is suspect. Only recently has the Massachusetts legislature passed Melanie's Law, a bill aimed at fighting alcohol impaired driving.<sup>85</sup> In its original design, the bill was meant to "crack down" on all OUI offenders, in particular those who refused to take the breath test, repeat offenders, and those who are under the age of 21.<sup>86</sup> One of the proposed changes to Massachusetts OUI law was an increase to the administrative consequence of an operator's loss of license for refusing to submit to a breath test from 180 days to one year for a first offense and a lifetime suspension for refusing a breath test on a second or subsequent offense.<sup>87</sup> Another proposed change to the OUI law was an

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84. See, e.g., *Opinion of the Justices to the Senate*, 591 N.E.2d 1073, 1077-78 (Mass. 1992) (holding a statute making admissible evidence of a refusal to take a breath test unconstitutional). See also *Commonwealth v. Blais*, 701 N.E.2d 314, 317-18 (Mass. 1998); *Commonwealth v. McGrail*, 647 N.E.2d 712, 714-15 (Mass. 1995); *Commonwealth v. Grenier*, 695 N.E.2d 1075, 1076-78 (Mass. App. 1998); *Commonwealth v. Davidson*, 545 N.E.2d 55, 56-57 (Mass. App. 1989) (Although a driver is under legal obligation to submit to field sobriety tests, a refusal to do so may not be used as evidence against the driver at trial).

85. 2005 Mass. Acts ch. 122. Melanie's Law was named after a 13 year old girl who was killed after being hit by a repeat OUI offender. H.B. 4099, 184th Sess. (Mass. 2005).

86. H.B. 4099, 184th Sess. (Mass. 2005).

87. H.J. 691, 184th Sess. (Mass. 2005); *but cf.* MASS. GEN. LAWS ch. 90 § 24(1)(f)(1) (2005). Currently providing:

the police officer shall: (i) immediately, on behalf of the registrar, take custody of such person's license or right to operate issued by the Commonwealth; (ii) provide to each person who refuses such test, on behalf of the registrar, a written notification of suspension in a format approved by the registrar; and (iii) impound the vehicle being driven by the operator and arrange for the vehicle to be impounded for a period of 12 hours after the operator's refusal, with the costs for the towing, storage and maintenance of the vehicle to be borne by the operator. The police officer before whom such refusal was made shall, within 24 hours, prepare a report of such refusal. Each report shall be made in a format approved by the registrar and shall be made under the penalties of perjury by the police officer before whom such refusal was made. Each report shall set forth the grounds for the officer's belief that the person arrested had been operating a motor vehicle on a way or place while under the influence of intoxicating liquor, and shall state that such person had refused to submit to a chemical test or analysis when requested by the officer to do so, such refusal having been witnessed by another person other than the defendant. Each report shall identify the police officer who requested the chemical test or analysis and the other person witnessing the refusal. Each report shall be sent forthwith to the registrar along with a copy of the notice of intent to suspend in a form, including electronic or otherwise, that the registrar deems appropriate. A license or right to operate which has been confiscated pursuant to this subparagraph shall be forwarded to the registrar

administrative license suspension of one year for refusing to take roadside field sobriety tests.<sup>88</sup> A third proposed change was an increase in the penalty for driving with a license suspended for an OUI conviction from a 60 day to a 90 day mandatory jail sentence.<sup>89</sup> Unfortunately, the final version of the law was watered down, particularly in the area of breath test and field sobriety test refusals.<sup>90</sup>

Instead of increasing the administrative loss of license for refusing to take a breath test from 180 days to one year for a first offense, Melanie's law left intact the 180 day penalty.<sup>91</sup> The legislation completely ignored the issue of creating a penalty for refusing to submit to a field sobriety test. In addition, the legislature missed the chance to reconsider an important issue concerning what happens when an individual's license is administratively suspended for failure to take the breath test and during that suspension period the individual is brought to trial for OUI and is found not guilty. Under the current system, as soon as the individual is found not

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forthwith. The report shall constitute prima facie evidence of the facts set forth therein at any administrative hearing regarding the suspension specified in this section.

88. H. J. 689, 184th Sess. (Mass. 2005).

89. S.B. 2218, 184th Sess. (Mass. 2005). A weakened version of these proposals included increasing the administrative loss of license consequence for refusing to submit to a breath test from six months to one year only for those who have a prior conviction for OUI or who have refused to take the test once before and for those who are under the age of twenty-one. Thus, increasing the penalty from six months to five years for those with two prior convictions or breath test refusals, and increasing the penalty from six months to a lifetime suspension for those with three or more convictions or breath test refusals. *Id.*

90. *See* MASS. GEN. LAWS ch. 90 § 24(1)(f)(1) (2005). The bill did include some stricter provisions regarding driving while under the influence of alcohol with a child under 14 in the car, knowingly loaning a car to someone who is drunk, and manslaughter by drunk driving. *See generally*, 2005 Mass. Acts ch. 122. It also requires that individuals with more than one impaired driving conviction install an ignition interlock device on their vehicle as a condition of having their license reinstated. *Id.* This device prevents the vehicle from operating if the blood alcohol content is above .02. In addition, an offender's vehicle may also be forfeited for persons with three previous convictions if they own the vehicle they are driving. *Id.* Finally, it provided that the prosecution can prove a subsequent offense by using court and probation documents that are self-authenticating, thereby obviating the need for live testimony from witnesses such as the prior arresting officer, records clerks, and probation officers. *Id.*

91. MASS. GEN. LAWS ch. 90, § 24(1)(f)(1) (2005). Some legislators stated that the proposed penalty for refusing the breath test was too harsh and would punish people who were ultimately acquitted of OUI. Scott S. Greenberger, *Lawmakers Toughen Drunken Driving Bill*, BOSTON GLOBE, Oct. 28, 2005, [http://www.boston.com/news/local/massachusetts/articles/2005/10/28/lawmakers\\_toughen\\_drunken\\_driving\\_bill](http://www.boston.com/news/local/massachusetts/articles/2005/10/28/lawmakers_toughen_drunken_driving_bill). This argument fails to take into consideration that the suspension is for refusing the breath test, not a punishment for operating under the influence of alcohol. The sanctions imposed under Melanie's Law for refusing to take a breath test are: 180 day loss of license for a first offense, 3 year loss of license for a second offense, 5 year loss of license for a third offense, and lifetime loss of license for a fourth offense. MASS. GEN. LAWS ch. 90 § 24 (1)(f)(1) (2005).



guilty, that person is entitled to an immediate reinstatement of his license.<sup>92</sup> The bill did not capitalize on this opportunity to deny that reinstatement and failed to recognize that the suspension is not punishment for the alleged OUI, but instead is an administrative consequence for failing to take the breath test.

Suspending an individual's license for refusing to take the breath test is entirely appropriate, as operating a motor vehicle is a privilege that is regulated by the state.<sup>93</sup> Massachusetts is an implied consent state where, under Massachusetts General Laws, all operators of motor vehicles are deemed to have consented to a breath test if suspected of OUI simply by virtue of driving a car.<sup>94</sup> This statute provides "[w]hoever operates a motor vehicle upon any way . . . shall be deemed to have consented to submit to a chemical test or analysis of his breath or blood in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor . . . ."<sup>95</sup> The Massachusetts Supreme Judicial Court stated that a mandatory administrative license suspension for OUI was "a reasonable sanction primarily designed to promote public safety."<sup>96</sup> The Court went on to hold "that Massachusetts may suspend a license pursuant to c. 90, § 24(1)(f)(1), and later bring criminal charges under c. 90, § 24(1)(a)(1), without running afoul of the double jeopardy clause of the United States Constitution or Massachusetts common or statutory law."<sup>97</sup> It is clear that there is no right to refuse to take a breath test. If you refuse, your license is suspended.<sup>98</sup> Unfortunately, the current administrative suspension does not act as a deterrent because there is no certainty of its continued application. If an individual goes to trial and is found not guilty, the system tells the offender that it was acceptable to refuse to take the test. This defeats the purpose of the statute and thwarts any attempt at deterrence. While Melanie's Law marks the toughest stance Massachusetts has ever taken on alcohol impaired driving, and the

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92. MASS. GEN. LAWS ch. 90 § 24 (1)(f)(1) (2005). This section provides:

[T]he defendant may immediately, upon the entry of a not guilty finding or dismissal of all charges under this section, section 24G, section 24L, or section 13 1/2 of chapter 265, and in the absence of any other alcohol related charges pending against said defendant, apply for and be immediately granted a hearing before the court which took final action on the charges for the purpose of requesting the restoration of said license. At said hearing, there shall be a rebuttable presumption that said license be restored, unless the commonwealth shall establish, by a fair preponderance of the evidence, that restoration of said license would likely endanger the public safety.

93. See *Roberto v. Dep't of Pub. Util.*, 160 N.E. 321, 322 (Mass. 1928) (having a driver's license is "a privilege" that is "neither a contract nor property, and its revocation deprived the petitioner of no vested right"); *Luk v. Commonwealth*, 658 N.E. 2d 664, 669-70 (Mass. 1995) ("one's right to operate a motor vehicle is a privilege voluntarily granted.").

94. MASS. GEN. LAWS ch. 90 § 24(1)(f)(1) (2005).

95. *Id.*

96. *Luk*, 658 N.E. 2d at 673.

97. *Id.*

98. *Id.* at 670-71.

passing of this law is a step in the right direction, it is by no means a guaranty that alcohol impaired driving will diminish in Massachusetts.<sup>99</sup> Without the certainty of consequences for acts such as refusing a breath test and field sobriety tests, the impact is reduced.

The same can be said with respect to the impact of state court decisions on the certainty of conviction. In Massachusetts, when an individual refuses to take a breath test or to perform standardized field sobriety tests, the prosecution is not allowed to inform the finder of fact that the defendant refused.<sup>100</sup> While this may not seem significant to some, it is bound to have an impact on a jury's decision of innocence or guilt.<sup>101</sup> OUI is a well known crime. It is fair to say that the public knows that breath test machines are used after an individual is arrested for OUI to determine how much alcohol the individual consumed.<sup>102</sup> It is also fair to say that they expect to hear the results of such a test or an explanation as to the absence of test results during an OUI trial. What the public does not know is that the prosecution is barred from introducing the defendant's refusal to take the breath test, which may leave jurors to speculate over the absence of this evidence.<sup>103</sup> Some jurors may believe that the absence of breath test evidence signifies that the police officer did not afford the defendant the opportunity to take the test or that the police officer did not think the defendant was overly intoxicated and did not bother to offer the test.<sup>104</sup> A remedy to a court's decision precluding the prosecution from introducing this evidence may be to mandate that the judge give a limiting instruction admonishing the jury that they are not to think about or otherwise consider the fact that no evidence was offered concerning a breath test.<sup>105</sup> This may help improve the certainty of conviction and thus help produce a greater deterrent effect on motorists.

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99. Some have speculated that the failure of the law to address the concerns raised in this section stem from the fact that many of the members of the House of Representatives are attorneys who have a significant practice defending individuals charged with OUI. Greenberger, *supra* note 91; Justin Graeber, *Melanie's Bill Becomes Melanie's Law*, HANSON EXPRESS, November 2, 2005, [http://www.hansonexpress.com/article\\_163.shtml](http://www.hansonexpress.com/article_163.shtml).

100. See cases cited *supra* note 84.

101. See *Commonwealth v. Downs*, 758 N.E.2d 1062, 1064 n.1 (Mass. 2001) (stating that "jurors had made it clear to him in other cases through questions during their deliberations or after their verdicts that they had engaged in speculation about the absence of breathalyzer evidence.").

102. *Id.* at 1065 (explaining that the court could not "close [their] eyes to the fact that there is wide-spread public information and common knowledge about breathalyzer testing.").

103. *Id.* at 1064.

104. *Id.* at 1065 (stating "[t]o instruct the jury without any reference whatsoever to breathalyzer testing could well lead to distinct prejudice to a defendant."). "The absence of some form of an instruction could also cause conjecture or speculation resulting in unfairness to the Commonwealth, e.g., the police didn't offer the breathalyzer to a defendant or perhaps the breathalyzer was not in working order." *Id.* at 1065 n.2.

105. In *Downs*, the court discussed the use of limiting instructions in OUI breath test refusal cases and held that such an instruction would be appropriate. *Id.* at 1063-65.

## III. STRATEGY TO COMBAT OUI

With all these considerations in mind, it is time to employ a comprehensive strategy to stop the continuing problem of OUI. While the current public awareness campaigns are important and useful, they have not been successful at stopping OUI.<sup>106</sup> It is time to shift the focus regarding who these campaigns are targeting. First, the campaigns need to target the establishments that serve alcohol to prospective drivers.<sup>107</sup> These places must be made to understand and appreciate that impaired driving is a problem that can be curtailed with more responsible actions on their behalf. Alcohol vendors must recognize that the action of serving an individual up to and past the point of intoxication creates a significant risk to the public and potentially grave consequences in terms of their liability. To drive this message home, all states must impose Dram Shop Laws.<sup>108</sup> Next, states must ensure that their law enforcement officers are properly equipped to enforce the OUI laws. For that to happen, there has to be adequate funding allocated to law enforcement to enhance their front line defense against offenders, thereby increasing the likelihood of offenders getting caught. Finally, states must enact policies that increase the certainty of conviction and punishment of offenders after being apprehended for OUI.<sup>109</sup> At least one commentator argues that decriminalizing a first offense OUI where there is no injury will serve that end.<sup>110</sup> However, this strategy fails to take into consideration the impact this message sends to the public and is not a viable option. Other, more effective policies include legislation that allows prosecutors to prove subsequent offenses through the use of court documents, enhancing the penalty for driving while one's license is suspended for OUI, as well as handing down penalties that are creative and actually discourage an individual from operating under the influence of alcohol.<sup>111</sup>

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106. GALLUP ORGANIZATION, *supra* note 79, at 10. *See also* GREENFIELD *supra* note 2, at ix.

107. I include in this category any licensed outlet such as a bar, tavern, or restaurant as well as any organization that serves alcohol.

108. Dram shop liability laws hold those who serve alcohol to patrons responsible for any harm that intoxicated or underage patrons cause to other people (or, in some cases, to themselves). NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., PREVENTING OVER-CONSUMPTION OF ALCOHOL- SALES TO THE INTOXICATED AND "HAPPY HOUR" (DRINK SPECIAL) LAWS 4-5 (2005), [www.nhtsa.dot.gov/people/injury/alcohol/PIREWeb/images/2240PIERFINAL.pdf](http://www.nhtsa.dot.gov/people/injury/alcohol/PIREWeb/images/2240PIERFINAL.pdf) [hereinafter NHTSA HAPPY HOUR LAWS]. These laws are established at the state level through common law, legislation, or both. *Id.* at 6-7. The purpose of these laws is to provide an incentive for owners of alcohol establishments to train their employees in responsible beverage service. *Id.* at 2.

109. *See supra* notes 66-105 and accompanying text.

110. Ross, *supra* note 66, at 110.

111. *See* discussion *infra* Part III.C.

*A. Promoting OUI Awareness Among Alcohol Serving Institutions*

It seems clear that people know about the risks associated with impaired driving and sincerely want something to be done to make the roads safer.<sup>112</sup> The stumbling block is that most people do not appreciate the risk they create when they consume alcohol and drive; they do not consider themselves as “one of those people who drive drunk.” Yet upwards of 159 million people admit that they have operated a motor vehicle while under the influence of alcohol.<sup>113</sup> Part of the problem is that most people do not set out to drink and drive.<sup>114</sup> It is only after they consume alcohol and lose their inhibitions and their ability to think and reason clearly that the poor decision to drive impaired is made.<sup>115</sup> People can be told countless times to have a designated driver or call for a ride home, but once an individual reaches the point where they should not be driving, often times it is too late for them to exercise caution. This is where shifting the focus to alcohol serving establishments can serve a valuable function.

As there are serious drawbacks to relying solely upon educational programs targeting the general public, attention must be turned to other areas that contribute to the occurrence of OUI. The alcohol serving industry is one such area. Presently, there is no real deterrent for this industry—which thrives on serving large amounts of alcohol—to stop pushing alcohol on consumers. The current status of selling alcohol without regard to limits is not a mere matter of ignorance on behalf of management and wait staff, but is a calculated effort to increase revenue. If more of these establishments understood the risks and implications of their actions in continuing to serve alcohol to an individual up to and past the point of intoxication, they would make a concerted effort to stop doing so.<sup>116</sup> These establishments know that under

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112. The Gallup Organization reports that “[t]he driving age public sees drinking and driving as a serious problem that needs to be dealt with. Virtually all (97%) see drinking and driving by others as a threat to their own personal safety and that of their family, and nearly three-quarters (73%) feel reducing drinking and driving is extremely important in terms of where tax dollars should be spent.” GALLUP ORGANIZATION, *supra* note 79, at ii.

113. See NCIPC, *supra* note 1.

114. NHTSA Deputy Administrator Jacqueline Glassman asserts, “[m]any people don’t intend to drive while impaired. They just find themselves at the end of the night having had too much to drink, and without a sober designated driver. Unfortunately, too many of these drivers convince themselves and their friends that they’re all right, because they’re just ‘buzzed.’” News Release, Ad Council, U.S. Dep’t of Transp. and Ad Council with Support from (State) Dep’t of Transp. Expand Focus of Drunk Driving Campaign to “Buzzed Driving” for Holidays, (2005), available at [http://www.nhtsa.dot.gov/people/injury/alcohol/StopImpaired/planners/Buzzed\\_Planner/Buzz\\_Swiss\\_CheeseRelease.doc](http://www.nhtsa.dot.gov/people/injury/alcohol/StopImpaired/planners/Buzzed_Planner/Buzz_Swiss_CheeseRelease.doc)

115. For an analysis of the effect alcohol has on an individual, see NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., DRIVER CHARACTERISTICS AND IMPAIRMENT AT VARIOUS BACs (2000), [http://www.nhtsa.dot.gov/people/injury/research/pub/impaired\\_driving/BAC/index.html](http://www.nhtsa.dot.gov/people/injury/research/pub/impaired_driving/BAC/index.html).

116. NHTSA HAPPY HOUR LAWS, *supra* note 108, at 4-5.

existing licensing schemes and enforcement, the likelihood of being held responsible for an alcohol related accident is low. “Reductions in budgets, decreasing available personnel, the absence of public and governmental support, and difficulties coordinating efforts with local law enforcement are some of the problems that affect enforcement of over-consumption policies.”<sup>117</sup> While most states have Dram Shop Laws,<sup>118</sup> there is no uniformity in their drafting or application. Most notably, states have varying levels of proof on liability standards, on who can be held responsible and on what types of penalties can be imposed on violators.<sup>119</sup> Some of these statutes require evidence that the alcohol server acted negligently, while others require proof of either actual knowledge that the patron was intoxicated or recklessness on the part of the server.<sup>120</sup> Statutes also vary in terms of who can be held liable for over-serving alcohol to individuals. While most statutes appear to apply to both commercial and non-commercial servers, some of the statutory language is unclear and may be read to apply only to commercial establishments.<sup>121</sup> In terms of penalties, some statutes make a violation criminal, while others handle a violation as a civil matter.<sup>122</sup> Penalties typically range from suspension or revocation of liquor licenses to monetary fines or imprisonment.<sup>123</sup> This lack of uniformity makes ineffective what could otherwise be a very successful tool in combating OUI.

One way to remedy pervasive weaknesses in the impact of Dram Shop Laws is to create and implement a National Dram Shop Act that sets in place uniform standards of liability, uniform definitions of who can be held liable, and uniform penalties. A federally mandated state by state law that holds both commercial and non-commercial servers civilly liable under a negligence standard will reduce the frequency with which individuals are over-served alcohol. The law must apply to both commercial and non-commercial alcohol servers in order to address all those that contribute to the dangers posed by OUI drivers. A negligence standard will encourage the education of alcohol servers on how to detect an intoxicated individual and will encourage vigilance in policing themselves regarding how much alcohol is provided to patrons. A civil standard would be most effective because it can be enforced administratively.<sup>124</sup> Offenses would be resolved more quickly and

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117. *Id.* at 8.

118. The NHTSA reports that 47 states have some form of statutes prohibiting sales and service of alcohol to intoxicated people. However, these statutes are not uniform in their terms and application. *See id.* at 6.

119. *Id.*

120. *Id.*

121. *Id.* at 7.

122. *Id.*

123. *Id.*

124. *Id.*

prosecutions would be more successful under the civil “preponderance of the evidence” standard.<sup>125</sup>

The federal government can encourage the enactment of such a law in the individual states through the use of its spending power, similar to how it encouraged states to increase their minimum drinking age to twenty-one and to adopt a per se .08 BAC impairment level.<sup>126</sup> Increasing and improving Dram Shop Laws and holding servers liable will force a more cautious exercise of judgment in how much to serve an individual and encourage alcohol serving establishments to have both management and wait staff educated in recognizing the symptoms of intoxication.<sup>127</sup> Additionally, stricter liability laws may discourage popular happy hour and low price drink promotions that encourage individuals to over-drink.<sup>128</sup> It will also have the added bonus of encouraging “designated driver” or “dial-a-ride” type programs within these establishments. Only when a business that serves alcohol fully grasps the consequences of over-serving someone and allowing them to drive it will be more careful serving alcohol. Implementation of standardized Dram Shop Laws should lower the risk of alcohol related injuries.<sup>129</sup>

### B. Increasing the Certainty of Apprehension

It is clear that the probability of getting caught plays an integral role in an individual’s decision to risk driving after consuming too much alcohol.<sup>130</sup> Therefore, a system that enhances the likelihood of apprehending drivers who are OUI must be uniformly implemented. Law enforcement officers must consistently arrest a

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125. *Id.*

126. Regarding raising the drinking age to 21, *see supra* note 16. *See* 23 U.S.C. §163 (2000) (enacted to encourage states to lower the legal BAC level from .10 to .08). As part of the government’s spending power, the law allowed the

government to withhold 2 percent from federal highway funds, starting in 2004, if states did not comply with the federal mandate. Each subsequent year, until 2007, an additional 2 percent will be withheld from states that are not in compliance. Therefore, any state that does not pass legislation to lower the BAC to 0.08 will have 8 percent of their state’s federal funding withheld in 2007, and each subsequent fiscal year thereafter.

Christopher O’Neill, *Legislating Under the Influence: Are Federal Highway Incentives Enough To Induce State Legislatures to Pass a 0.08 Blood Alcohol Concentration Standard?* 28 SETON HALL LEGIS. J. 415, 416 (2004).

127. NHTSA HAPPY HOUR LAWS, *supra* note 108, at 4-5.

128. *Id.*

129. In 1983, a dram shop liability law suit was brought in Texas. As a result, the state saw 6.5% fewer single vehicle nighttime injury crashes and an additional 5.3% decrease occurred after another suit was filed in 1984. *See* Alexander C. Wagenaar & Harold D. Holder, *Effects of Alcoholic Beverage Server Liability on Traffic Crash Injuries*, 15 ALCOHOLISM: CLINICAL AND EXPERIMENTAL RESEARCH 942, 946 (1991).

130. *See* ROSS, *supra* note 66, at 102-03.

sufficient number of violators to convince the general public that if they continue to drive while impaired they will get caught sooner rather than later.<sup>131</sup> Achieving this means allocating resources to law enforcement agencies. In times where budgetary constraints are vast, and limited resources have been stretched thin, many are unwilling to earmark money for this cause.<sup>132</sup> For that reason, states must create self-sustaining funds to finance OUI enforcement efforts. These funds should consist of OUI offender-generated fees and fines as well as other assessments including alcoholic beverage taxes. Using these funds to supplement budgets will enable cities, towns and states to hire and better train law enforcement officers, to fund overtime details, and to purchase equipment needed to detect and preserve evidence of impairment.

In order to increase the likelihood of apprehension, officers must be trained to recognize an impaired driver from visible cues and symptoms of intoxication. This means not only recognizing readily apparent symptoms such as odor of alcohol, red/glassy eyes and slurred speech, but also making observations of an individual's ability to follow directions as well as an individual's coordination and motor skills while performing standardized field sobriety test.<sup>133</sup> Currently, "[t]he average law enforcement officer receives eight hours of training on impaired driving, yet the [NHTSA] and the National Criminal Justice Association recommend at least 40 hours of academy training on impaired driving."<sup>134</sup>

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131. *Id.*

132. NHTSA HAPPY HOUR LAWS, *supra* note 108, at 8.

133. Field Sobriety Tests are divided attention tests that require an individual to concentrate on mental and physical tasks at the same time. They are used to evaluate an individual's ability to listen to and follow simple instructions as well as to evaluate an individual's coordination and motor skills. The NHTSA determined that three such tests, when administered properly, are very accurate in determining if an individual is under the influence of alcohol. Nat'l Highway Traffic Safety Admin., Development of a Standardized Field Sobriety Test, [http://www.nhtsa.dot.gov/people/injury/alcohol/sfst/appendix\\_a.htm](http://www.nhtsa.dot.gov/people/injury/alcohol/sfst/appendix_a.htm) (last visited Dec. 29, 2005). Those three standardized field sobriety test are the One Leg Stand Test, the 9 Step Walk and Turn Test, and the Horizontal Gaze Nystagmus Test. *Id.* In the one leg stand test, the driver is asked to put both hands at his side and lift one leg for 30 seconds while counting out loud. *Id.* In the walk and turn test, the driver is asked to place one foot in front of another, in a heel to toe fashion, again with his hands at his sides, and walk in a straight line for 9 steps while counting out loud. The driver then turns in a specific manner and walks back 9 steps. While an individual is performing the one leg stand and the walk and turn test, the officer looks for "clues" to determine whether the driver successfully completes the tests. *Id.* The horizontal gaze nystagmus test involves looking at the driver's eyes. The officer asks the driver to stand still and follow a pen with only his eyes while the officer slowly moves the pen from left to right approximately 12 inches in front of the driver's face. While the driver performs the test, the officer is looking for a "nystagmus," an involuntary movement of the eye. *Id.*

134. MADD Online, MADD, Calls for Greater Use of Frequent, High-Visibility Law Enforcement to Prevent Drunk Driving, <http://madd.org/news/9318> (last visited December 29, 2005).

In addition to training, there must be a sufficient number of officers patrolling the roads to ensure high visibility, to identify the offenders, and to implement the programs necessary to combat OUI. Two of the most common OUI enforcement programs are sobriety checkpoints and saturation patrols that target high crime areas such as entertainment districts. Sobriety checkpoints are an integral and effective tool in stopping OUI.<sup>135</sup> In *Michigan v. Sitz*, the Supreme Court ruled that sobriety checkpoints are constitutional since the compelling state interest in curtailing OUI—and thus saving lives—outweighed the slight inconvenience caused by the checkpoints.<sup>136</sup> However, even after this decision, there are several states that do not allow sobriety checkpoints.<sup>137</sup> Without that tool, law enforcement has to look for alternative means of portraying a high visibility. To that end, states that prohibit sobriety checkpoints often make use of saturation patrols.<sup>138</sup> Saturation patrols place a large amount of law enforcement officers in a concentrated area to increase visibility and thus deter driving members of the public from OUI.<sup>139</sup> When these saturation patrols are widely used and broadly publicized, they deliver a “strong message that alcohol impaired drivers will be detected and arrested.”<sup>140</sup> Unfortunately, as budgetary constraints limit the amount of law enforcement officers

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135. The CDC conducted a study on the effectiveness of sobriety checkpoints and found that crashes thought to involve alcohol dropped a median of twenty percent, and fatal crashes dropped twenty-three percent following the implementation of such checkpoints. GUIDE TO COMMUNITY PREVENTIVE SERVICES, EFFECTIVENESS OF SOBRIETY CHECKPOINTS FOR PREVENTING ALCOHOL-INVOLVED CRASHES 1 (2002), <http://www.thecommunityguide.org/mvoi/movoi-alc-sobr-chckpts.pdf>.

136. *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

137. See, e.g., *Sitz v. Dep’t of State Police*, 744 N.W. 2d 209, 224-25 (Mich. 1993) (holding sobriety checkpoints violated the Michigan constitution); *State v. Henderson*, 756 P.2d 1057, 1063 (Id. 1988) (holding that sobriety checkpoints violate the Idaho Constitution); *Mesiani v. City of Seattle*, 755 P.2d 775, 778 (Wash. 1988) (holding that sobriety checkpoints violate Washington’s constitution). However, in many states where sobriety checkpoints are permitted, the focus has shifted to whether the checkpoints are properly implemented and administered. See *Village of Plainfield v. Anderson*, 709 N.E.2d 976, 979 (Ill. App. Ct. 1999) (holding that the administrative process regarding sobriety checkpoints satisfied the Illinois constitution); *State v. Superior Court, County of Cochise*, 718 P.2d 171, 176 (Ariz. 1986) (holding that “roadside sobriety tests that do not involve long delay or unreasonable intrusion, although searches under the fourth amendment, may be justified by an officer’s reasonable suspicion . . . that the driver is intoxicated”). Moreover, if the Court finds the administration of the checkpoint was not done properly, then any evidence obtained during the checkpoint encounter will be suppressed. See *State v. Gerchoffer*, 763 N.E. 2d 960, 971 (Ind. 2002) (“In light of the . . . high level of officer discretion and the very weak link between the public danger posed by OWI and the objectives, location and timing of the checkpoint, the State did not meet its burden to show that this roadblock was constitutionally reasonable. . . . therefore [the trial court] correctly suppressed the” evidence obtained from the checkpoint.).

138. MADD Online, *Sobriety Checkpoints: A Law Enforcement Perspective*, <http://madd.org/news/1269> (last visited Sept. 6, 2006).

139. *Id.*

140. *Id.*



who are available to patrol, the use of saturation patrols is not as widespread as is necessary to have a meaningful deterrent effect. In order to improve this method of deterrence, funding assistance is crucial. Since alcohol related traffic accidents cost the public an estimated \$45 to \$50 billion each year, the allocation of monies to law enforcement to combat this crime is justifiable.<sup>141</sup>

In addition to allocating funds for hiring, training and overtime details, resources must also be allotted to ensure that law enforcement has the equipment necessary to combat the crime. These tools include passive alcohol sensors<sup>142</sup> ("PAS"), portable or preliminary breath test machines<sup>143</sup> ("PBT"), and cameras mounted on police cruisers. The PAS is a relatively inexpensive, small, hand-held analytical device used to qualitatively measure the presence or absence of alcohol in the air surrounding an individual.<sup>144</sup> Unlike traditional breath test machines, the PAS does not measure the quantity of alcohol on an individual's breath.<sup>145</sup> Therefore, the PAS can be used by law enforcement officers while speaking with the operator of a motor vehicle to help detect if the operator consumed alcohol.<sup>146</sup> While use of such a device does not prove impairment, it may turn a routine traffic stop into an investigation for OUI and effectively get impaired drivers off the roads. The portable breath test machines can be used during a traffic stop to give a quantitative measure of alcohol consumed by an individual.<sup>147</sup> Portable breath tests machines are invaluable tools because often times a PBT reading is the only quantitative result an officer can obtain. This is because many individuals will agree to take the PBT during the initial traffic stop for an OUI investigation; however, after an arrest and transport to the police station where they are read their rights and booked, the individual is more likely to become noncompliant and refuse the breath test. By administering the PBT in the field,

141. See NCIPC, *supra* note 1.

142. The PAS "utilize[s] fuel cell technology to detect alcohol. A fuel cell is a porous disk containing a solution that oxidizes ethanol into carbon dioxide and water, while releasing electrons. The electrons are present in proportion to the amount of ethanol present, allowing the fuel cell to perform as a linear sensing device. . . . [The PAS] utilizes either a pump or a fan to draw a sample breath containing ambient air into the device for analysis." WISC. DEP'T OF TRANSP., PASSIVE ALCOHOL SENSORS: A STUDY FOCUSING ON THEIR USE, PERFORMANCE, EFFECTIVENESS, AND POLICY IMPLICATIONS FOR TRAFFIC ENFORCEMENT 14 (2002), <http://www.dot.state.wi.us/library/publications/topic/safety/pascomplete.pdf>.

143. A portable breath test is a small, inexpensive, battery operated hand held device that uses fuel cell technology to measure the amount of alcohol within a human. An individual blows into the device which introduces a sample of lung air into a specialized fuel cell. The combination of alcohol and the fuel cell creates a chemical reaction that produces electrons. The number of electrons produced is then displayed on the unit. See Martin Judnich, *An Analysis of the Portable Breath Test: Montana Court Says Hand-Held Device Works OK – But Does It?* 31 *Mont. Lawyer* 18, 18 (2005).

144. WISC. DEP'T OF TRANSP., *supra* note 142, at 14.

145. *Id.* at 14-15.

146. *Id.* at 17.

147. *Id.* at 15.

officers are gaining valuable information that may not be available if postponed until after the suspect is arrested.

Along the same line, if police vehicles are equipped with cameras, law enforcement officers could document valuable evidence depicting how the intoxicated driver operated the motor vehicle, the driver's demeanor and behavior during the stop, and the driver's performance during field sobriety tests. Armed with the correct equipment, law enforcement officers will be better able to apprehend and convict people who are OUI.

### *C. Increasing the Likelihood of Conviction and Punishment*

As of August 2005, all fifty states passed a law stating that anyone who operates a motor vehicle with a blood alcohol content ("BAC") at or above .08 has per se committed the offense of impaired driving.<sup>148</sup> While this is an important step to increasing the likelihood of conviction, it only helps when an individual charged with OUI agrees to take a breath test. Another step some states have taken to increase the likelihood of conviction involves allowing prosecutors to introduce certified copies of court records, motor vehicle registry records, department of corrections documents, or probation documents as evidence that demonstrates a defendant has a previous conviction for OUI.<sup>149</sup> By allowing the prosecution to prove a subsequent offense through the use of these documents and by not requiring live testimony, the chances of conviction increase. Unfortunately, other legislation and court decisions decrease the likelihood of conviction and punishment for OUI offenders.<sup>150</sup> Because of this, some argue that the best way to create a swifter, more certain consequence for impaired driving is through decriminalizing the offense.

H. Laurence Ross suggests that by decriminalizing OUI, at least for an individual's first offense, and having the offense adjudicated by an administrative agency, such as the department of motor vehicles, the probability of conviction will increase, as will the celerity of punishment.<sup>151</sup> By treating OUI as a traffic violation akin to speeding, Ross asserts that "it would place the routine violation in a fitting legal category . . . [with] one of the current law's major problems [being] its treatment of drivers as criminals when they are not believed by the public to warrant this designation."<sup>152</sup> Decriminalizing OUI will likely increase the speed in which an OUI charge is resolved as the case would not have to flow through an already overburdened criminal justice system. Instead, it would be handled by a leaner, faster administrative agency.<sup>153</sup> Additionally, the probability an individual charged with

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148. MADD Online, *supra* note 6.

149. *See, e.g.*, MASS GEN. LAWS ch. 90 § 24D (2005).

150. *See supra* notes 84-86.

151. ROSS, *supra* note 66, at 110.

152. *Id.*

153. *Id.*

OUI will be convicted is greater in a civil context because the standard of proof would require only a preponderance of evidence, not proof beyond a reasonable doubt as required in the criminal system.<sup>154</sup> Finally, at civil hearings, evidence of an individual's refusal to take a breath test or field sobriety tests would be admissible to show consciousness of guilt. After a decision of culpability is made, the administrative agency would then sanction the offender through a number of punishments, exclusive of imprisonment and probation.

While decriminalizing OUI may seem to alleviate many of the problems the prosecution faces in terms of getting a conviction, its main weakness is that it sends a symbolic message to the public that alcohol impaired driving is nothing more than a minor traffic offense or routine violation. Even if decriminalization applies only to first offenses where there are no injuries, it has the effect of portraying to the public that they are allowed one "get out of jail free card." If they get caught OUI but are lucky enough not to have hurt or killed anyone, they get a break. However, if it is a first offense and an accident is involved, then it will be taken seriously and will be treated as a criminal matter. Such a message desensitizes the public and allows them to justify taking the risk of engaging in irresponsible drinking and driving. That may consequently result in an increased occurrence of OUI.

Another downside of decriminalizing OUI is in enforcement of the sanctions placed on the offender. In a criminal case, if an offender is placed on probation with conditional terms that he not operate a motor vehicle, attend driver's education classes, attend Alcoholics Anonymous meetings, or any other conditions, and he fails to comply with those terms and conditions, a violation of probation hearing will be instituted.<sup>155</sup> While on probation, an individual has a strong incentive to comply with the sentence, whereas an administrative sentence does not promote compliance. This may be remedied by making failure to comply with administrative sanctions a criminal offense. For example, if an individual is caught operating a motor vehicle while his license is suspended for OUI, he could be criminally charged with a conviction resulting in the imposition of a mandatory jail sentence.

It is clear that, whether OUI is treated civilly or criminally, one of the most difficult challenges is finding the correct combination of sanctions to reduce the high recidivism rate in this country.<sup>156</sup> Currently, almost one-third of all offenders arrested for OUI are repeat offenders.<sup>157</sup> This means that the punishment imposed for committing this offense must be designed with particular attention to specifically deterring the individual offender more than deterring society in general.<sup>158</sup> Traditional measures of sentencing include jail, probation, Alcoholics Anonymous

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154. NHTSA HAPPY HOUR LAWS, *supra* note 108, at 7.

155. *See, e.g.*, MASS. GEN. LAWS ch. 90 § 24(1)(a)(4) (2005).

156. CAVAIOLA & WUTH, *supra* note 10, at 129.

157. *Id.* at 125.

158. *See* MADD Online, Sentence Structure, <http://madd.org/news/4263> (last visited Sept. 4, 2006).

meetings, substance abuse treatment, random drug and breath tests, loss of driver's license, fines, and driver's education school.<sup>159</sup> In addition, attendance at victim impact panels,<sup>160</sup> mandatory installation of ignition interlock devices,<sup>161</sup> confiscation or forfeiture of the offender's car, and electronic monitoring are also becoming increasingly common.

Despite these measures, recidivism rates continue to remain high, indicating that these traditional sentences are not working.<sup>162</sup> As rates continue to increase<sup>163</sup> judges nationwide are employing innovative sanctions and programs designed to deter offenders from recommitting the same offense. Some have termed this non-traditional approach as "hybrid" or "scarlet letter" sentencing.<sup>164</sup> This type of punishment is meant to cause public humiliation and shock, thus deterring crime by causing changes in the offender's behavior.<sup>165</sup> Some examples of scarlet letter sentences include requiring offenders to do the following: carry a placard identifying themselves as a "drunk driver"; place a fluorescent orange bumper sticker on their car identifying themselves as a convicted OUI driver; wear a fluorescent bracelet identifying themselves as a convicted OUI driver; carry a special license marked with colorful "OUI" letters identifying themselves as a repeat offender; erect and maintain markers at the site of an OUI accident to honor victims; and give their own vehicle to the victim until the victim's car was repaired.<sup>166</sup>

Those opposed to these alternative sentences assert that scarlet letter penalties "represent a reversion to barbarism" and are "uncivilized."<sup>167</sup> They maintain society long ago determined that public shaming and humiliation was an inhumane and ineffective method of deterring crime and that this remains true today.<sup>168</sup> Others oppose these sentences expressing concern that "renegade judges will abuse their

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159. *Id.*

160. A victim impact panel is where a group of victims of alcohol-related accidents and/or their families meet and discuss the affect the crime of OUI has had on them.

161. *See supra* note 51.

162. *See* MADD Online, *supra* note 158.

163. *Id.*

164. *See id.*; *see also* Barbara Clare Morton, *Bringing Skeletons Out of the Closet and Into the Light—Scarlet Letter Sentencing Can Meet the Goal of Probation in Modern American Because it Deprives Offenders of Privacy*, 35 SUFFOLK U.L. REV. 97, 97 (2001).

165. MADD Online, *supra* note 158.

166. Morton, *supra* note 164, at 116-18 n.160-61 (discussing unique punishments handed down by three different judges in OUI cases). *See also* MADD Online, *supra* note 158.

167. Morton, *supra* note 164, at 100 (citing Leonore H. Tavill, *Scarlet Letter Punishment: Yesterday's Outlawed Penalty is Today's Probation Condition*, 36 CLEV. ST. L. REV. 613, 643 (1988) (declaring humiliation attendant in scarlet letter sentences "uncivilized"); Julie Deardorff, *For Shame: Courts Using Humiliation as Punishment*, THE SALT LAKE TRIBUNE, Apr. 23, 2000, at A11 (noting some believe contemporary scarlet letter sentencing barbaric)).

168. Leonore H. Tavill, *Scarlet Letter Punishment: Yesterday's Outlawed Penalty is Today's Probation Condition*, 36 CLEV. ST. L. REV. 613, 653 (1988).

discretion if allowed to impose these unconventional penalties.”<sup>169</sup> In practice, because offenders on probation do not benefit from the same constitutional liberty as other citizens, and because judges are routinely afforded broad discretion in imposing punishment, courts customarily consider most of these non-traditional sentences constitutional as long as they directly relate to the purpose of probation and do not rise to extreme levels.<sup>170</sup> Additionally, the public appears to be willing to embrace the implementation of shaming sentences if it is demonstrated that they are really effective.<sup>171</sup>

#### IV. CONCLUSION

Deaths, injuries and property damage caused by impaired drivers are preventable crimes, not accidents. Current efforts to deter individuals from operating under the influence of alcohol are not producing satisfactory results. The public's unwillingness to label OUI offenders as criminals, uneven application of laws, and a court system that still treats OUI offenses as accidents, all contribute to the continuation of this dangerous behavior. To stimulate reductions in the occurrence of OUI, a uniform Dram Shop Act must be implemented in every state. This law ought to increasingly focus on holding responsible both commercial and non-commercial establishments that negligently provide alcohol to impaired individuals. Additionally, law enforcement agencies must be adequately staffed, funded and properly equipped to apprehend impaired drivers. To that end, states should establish offender-generated, self-sustaining funds to finance these efforts. Furthermore, legislatures must enact laws that impose negative consequences on motorists who refuse to take a breath test or field sobriety test. It is imperative that such a refusal result in a substantial loss of license that remains in effect even if the underlying OUI is resolved. To help reduce the recidivism rate, subsequent offenders must be compelled to install in their vehicle, at their own expense, an ignition interlock device. Finally, sentences must be crafted that carry more than the imaginary sting of jail time to deter an offender from committing the offense. In order to truly stop impaired driving, “You Drink, You Drive, You Lose” must be more than a threat—it must be a promise.

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169. Morton, *supra* note 164, at 100 n.13.

170. *Id.* at 118.

171. Dan M. Kahan, *What Do Alternative Sanctions Mean?* 63 U. CHI. L. REV. 591, 637 (1996) (“Public opinion studies suggest that the public is prepared to endorse such penalties with enthusiasm, provided it can be shown that they really work.”) (citing JOHN DOBLE, *CRIME AND PUNISHMENT: THE PUBLIC'S VIEW* 39-40 (1987); Jonathan Alter & Pat Wingert, *The Return of Shame*, NEWSWEEK 21, 24 (Feb 6, 1995) (finding majority support use of shaming penalties for certain offenses but are skeptical about effectiveness)).