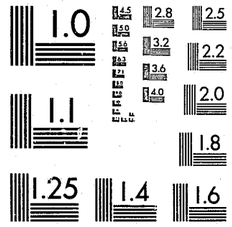


THE DRINKING-DRIVER IN MADISON

A Study of the Problem and the Community's Response

VOLUME II

This report presents the results of an inquiry into the problem of the drinking driver in Madison. It was prepared as part of a larger project designed to experiment with methods for promoting thoughtful consideration within a police agency of community problems to which the police are expected to respond. For this reason, the report is addressed to the Madison Police Department.

This document is identified as volume II. Volume I in the series describes the overall concept of the problem-oriented approach to improving police service, which the larger project was committed to develop. Volume III contains the results of another experimental inquiry that focused on the repeat sexual offender. The final volume in the series, volume IV, reports on the methods employed in conducting the two inquiries and contains reflections on what was learned in the effort to develop the problem-oriented approach.

A collaborative effort of the
MADISON [WIS.] POLICE DEPARTMENT
and the
PROJECT ON DEVELOPMENT OF A PROBLEM-ORIENTED APPROACH TO IMPROVING POLICE SERVICE
at the
Law School, University of Wisconsin--Madison

October 1981
Revised July 1982

Project on Development of a Problem-Oriented Approach to Improving Police Service

Herman Goldstein
Charles E. Susmilch

Research Associates
Courtney L. Marlaire
Michael S. Scott

Student Research Assistants
Luke H. Rettler
Ann E. Kenney

Student Typists
Lisa K. Flentge
Theresa Wilson

Editing and Final Typing
Lucille Hamre

This project was supported under a grant (80-IJ-CX-0041) from the National Institute of Justice of the United States Department of Justice.

July 1, 1982

Note on Revision

This report, originally produced in October 1981, was circulated in the Madison Police Department and among others who originally contributed to it, with a request for comments and corrections. The report was revised on July 1, 1982, to correct several errors and to clarify some language that misled several readers. These changes were relatively minor.

In the intervening period, the statutes relating to intoxicated driving have been revised. The report was not altered to reflect these changes. The analysis of the problem is based on the statutes and police practices that were in effect in October 1981.

Abbreviations Used in This Report

ASAP	Alcohol Safety Action Projects
BAC	Blood Alcohol Concentration or Content
DOT	Department of Transportation (State of Wisconsin)
MAPS	Madison Area Police System (computer information system)
NHTSA	National Highway Traffic Safety Administration
OWI	Operating While Under the Influence of an Intoxicant
PBT	Preliminary Breath Test

Acknowledgments

As part of our effort to determine with some preciseness the community's response to the drinking-driver problem, we interviewed a large number of individuals occupying a wide range of positions and having an equally wide range of experience and perspectives regarding the drinking-driver problem. Included were prosecutors and judges; jailers and treatment personnel; victims and offenders; bartenders and bar patrons. We are indebted to all of these individuals for having given of their time and for the contribution they made to the study.

We are especially indebted to all of the members of the Madison Police Department for their cooperation. A large number of officers provided important information on the drinking-driver problem; shared their experiences and views; provided us with an opportunity to observe contacts with drinking-drivers; and made suggestions for how to improve the department's response in dealing with the problem. Included among these officers were several whose responsibilities and past interest in the problem made their contribution especially valuable:

Inspector Emil S. Thomas
Lieutenant Harold J. Johnson
Sergeant Sylvester Combs
Sergeant Patrick K. Malloy
Officer William J. Meinert
Officer David J. Borland
Officer Michael F. Masterson

In the course of the study, we made special requests of a number of individuals and called on them with some frequency. We are particularly grateful to the following--

for sharing their recognized expertise regarding the drinking-driver problem:

Michael Birkley, executive assistant to State Senator Gary R. Goyke

Julie Hughey, alcohol safety specialist, Division of Highway Safety Coordination, Wisconsin Department of Transportation

James L. Nichols, National Highway Traffic Safety Administration

George W. Northrup, court commissioner, Dane County

Robert H. Tribbey, program development manager, Driver Improvement, Wisconsin Department of Transportation

for facilitating access to data:

Robert G. Birrenkott, sergeant, Traffic Bureau, Madison Police Department

William R. Joachim, supervisor, Accident Data Section, Wisconsin Department of Transportation

Marcella McCallum, Records Section, Madison Police Department

Mary L. Puttkamer, Criminal and Traffic Section, Dane County Clerk of Court's office

Richard G. Shold, public safety coordinator, Madison Area Technical College

Richard A. Wallden, captain, Administrative Services Bureau, Madison Police Department

for preparation of bibliographies and acquiring needed materials:

Sue L. Center, Criminal Justice Reference and Information Center, University of Wisconsin Law School

Marcia Griskavich, Criminal Justice Reference and Information Center, University of Wisconsin Law School

Barbara J. Meyer, Criminal Justice Reference and Information Center, University of Wisconsin Law School

Cordell Klyve, librarian, Wisconsin Department of Transportation

for assistance in researching legal issues:

David E. Schultz, chair, University of Wisconsin Law Extension

Frank J. Remington, University of Wisconsin Law School

Walter J. Dickey, University of Wisconsin Law School

Table of Contents
With Summary of Findings and Recommendations

1

Introduction

This report is the first in a series of reports that will be produced by the project on Development of a Problem-Oriented Approach to Improving Police Service. The project is a collaborative effort of the Madison Police Department and a team of researchers from the University of Wisconsin--Madison.

The ultimate goal of the project is to explore ways in which to develop the capacity of the police nationwide to examine, in a critical fashion, the quality and effectiveness of the service rendered to a community in responding to those specific behavioral problems that the community looks to the police to handle.

To learn more about what will be involved in developing this capacity, a commitment was made within the project to examine two specific problems in the context of a given community and police agency. This report presents the results of the first such examination--a study, conducted from within the Madison Police Department, of the response of the Madison community to the problem of the drinking-driver.

The larger project grows out of a realization that there is little tradition, within policing, for careful examination of the specific problems that--taken together--comprise the police task. This is due, in part, to a widely held view that the police job is ministerial. Police have been conditioned over the years to believe that to question or even reflect on the mandates or procedures under which they operate is not appropriate; that their job is simply to do the best they can to do what is expected of them. But the insights and knowledge we have acquired about police operations in recent years belies this characterization. Police administrators and individual officers not only must make complex decisions in deciding how to handle specific incidents and categories of incidents, but, by virtue of their frontline role in dealing with the problems that arise in a community, acquire information and expertise that can be of great value to the larger community in enabling it to make better informed decisions on how best to deal with these problems.

In recognition of the true character of police operations, the objectives of the larger project are to encourage the police, as part of their professional growth, to develop their capacity to think in a critical way about the problems they must handle daily and the effectiveness of their response to them; to enable

2

the police to analyze parts of their operations more systematically and to use the results of this analysis as a basis for improving their response; and to enable the police to use their knowledge to contribute in a more informed and authoritative fashion to community-wide debates over how best to deal with the array of behavioral problems for which the police are primarily responsible.

Although the quality of police operations in this country has improved dramatically in the past decade, the police field has a long way to go before it can possibly fulfill the kind of role projected for the police here. Much work has to be done to explore ways in which the expertise of police officers can be captured, analyzed, and validated; to assess the nature and utility of the data available in police organizations; to experiment with the application of social science research techniques to analyzing these data; to get a better sense for the type of staff and skills that would be required to give the police this research capacity; and to reach some conclusion as to the feasibility of moving in this direction. This study of the response to drinking-driving in Madison has substantially advanced our knowledge on these various points. What we have learned about the development of a research capacity for police agencies will be the subject of a separate report, to be filed at the end of the project.

The material that follows is the product of our first examination of a problem--a study within the larger study. It reports the results of looking systematically at the problem posed by drinking-drivers in Madison. The first section reports on our efforts to define the problem--to provide an accurate, up-to-date picture of the incidence and costs of the drinking-driver problem in Madison.

The second section is devoted to examining the current response to the problem, which consists--for the most part--of employing the criminal justice system to arrest, prosecute, punish, treat, and educate the drinking-driver.

And in the third and final section, we explore ways in which the police might improve their capacity to deal with the problem.

The problem of the drinking-driver was selected for study primarily because it was the almost unanimous choice of police officers from whom we solicited suggestions. They expressed great concern about the seriousness of the problem, the demands that it makes on police time, and the sense of futility in

3

dealing with it. It also met some of the major criteria established by the research team: the volume of incidents was high enough to afford an opportunity to experiment with some of the proposed research techniques, and the dimensions of the problem are sufficiently similar to that experienced elsewhere so that what we learn from the process of inquiry will be relevant to other jurisdictions.

Although one of the principal guidelines in the project has been to explore problems in an open-ended manner, we restricted our inquiry into the drinking-driver problem in two important respects. First, we excluded the problem created by the driver who is under the influence of a controlled substance. This problem is of growing concern to the police and cannot be easily separated from the problem created by the consumption of alcohol. The same laws apply; the effect on driving behavior may be similar; and the potential for causing harm may be as great. We restricted the inquiry not out of any feeling that the problem is unimportant, but rather out of a desire to make the inquiry manageable. Much of what is said will have implications for responding to the drug-impaired driver as well, but adequately developing this response--especially as it relates to initial detection--will require going beyond this effort.

Second, we did not see ourselves as committed to developing the ultimate response to the drinking-driver problem--to exploring such oft mentioned alternatives, for example, as new types of treatment, the use of antabuse, or the use of sentencing to community service. The study is certainly much more broadly focused than what a lay person would expect would be of interest to the police. We reach out, for example, to determine, with some precision, the consequences of prosecuting drinking-drivers through the criminal justice system, primarily because so much police effort is currently invested in initiating such prosecutions. We also identify briefly, at various points, alternatives that other agencies might appropriately consider. But after exploring these matters, we return--especially in the proposals for improvement--to concerning ourselves primarily with what the police can do to deal more effectively with the problem. This is in keeping with the original objective of the project, which is to work for improvement of the police response to behavioral problems in the community. Whatever insights the police acquire in the process of inquiry that might contribute to a more enlightened response on the part of the larger community and the legislature are a valuable, but secondary product of the effort.

4

The report has been prepared as an internal document addressed to members of the Madison Police Department. The immediate objective, in initially making it available in this form, is to stimulate discussion within the department about the drinking-driver problem and to solicit reactions to the proposals set forth for improving the department's response. Hopefully, sharing the findings of the study in this manner will result in a more informed discussion than would otherwise be possible, and the proposals for new programs will provide a focus for whatever discussions take place.

After an appropriate period for such consideration, the section of the report that contains the proposals for improving the department's response could be amended to reflect whatever conclusions are reached, and the revised document could then be made available to a broader audience as a statement of the Madison Police Department's program for responding to the drinking-driver problem.

5

A Note on Sources of Information and Methodology

The various inquiries that were made to collect the data upon which this report is based are described briefly in the text at each point where the results of these inquiries are initially reported. A more detailed description of these data collection efforts will be included in the final report on the project, since concern with them is more relevant to the findings about the development of a research capacity within a police agency--which will be the subject of the final report. We thought it appropriate, however, to provide a synopsis here of the four different types of data collection that were used so that the reader will have an overall picture of the sources of information upon which the study is based and the methods of inquiry that were used to tap these sources.

The first method was direct observation. The research staff rode with police officers and watched them handle OWI cases; observed persons arrested for OWI as they were brought in for breathalyzer testing; observed follow-up investigations in hospital emergency rooms; watched the processing of OWI cases in the courts; and, in bars and restaurants, watched the interactions between servers and patrons. The observational data collection effort was the least structured of all of the efforts. We generally went into these situations with a rough idea of what we were looking for and came back with a great deal of valuable and oftentimes unanticipated pieces of information.

The second method used interviews extensively to acquire the fullest possible range of views and maximum amount of knowledge regarding the drinking-driver problem and the current response to it. Project staff interviewed police officers, judges, court clerks, staff in the offices of the district attorney and city attorney, persons engaged in the treatment of alcoholics, representatives of insurance firms, clergy, victims of drinking-drivers, survivors of persons who died in accidents caused by alcohol involvement, bar owners, bartenders, waitresses, convicted drinking-drivers, never-apprehended drinking-drivers, and government officials with a responsibility relating to the drinking-driver problem. Interviews were much more focused than observations. Prior to each interview, a list of points to be covered was prepared. But the interviews were usually initiated in an open-ended manner in order to afford respondents maximum opportunity to provide their perspective of the problem, uninfluenced by our predefined interests.

6

A third type of data collection involved culling what was useful from the existing literature on the drinking-driver problem. This literature is huge--thousands of volumes, monographs, journal articles, and reports on research projects. Entrée into this literature was greatly facilitated by contacts that the staff established with researchers for the National Highway Traffic Safety Administration at a regional conference on alcohol and traffic safety held in Eau Claire in February 1981. Given a description of our project, they directed us to some of the most relevant material. Subsequent explorations were structured by preparing a list of questions that we sought to address. This was an extremely useful tactic. Without such a list, it would have been easy to be overwhelmed by the literature.

The fourth form of inquiry--the one to which the greatest amount of time and effort was devoted--involved collection and analysis of records on file with the police, the prosecutor, the coroner, the courts, the jail, the Department of Transportation, and the local Group Dynamics program. Exploration of these data took the form of six ministudies:

(1) All persons arrested for OWI by the Madison Police Department in March 1980 (92 cases) were identified and "tracked" as their cases were processed through the criminal justice system. Using information from various sources, we determined the demographic characteristics of the offender, prior record, characteristics of the offense (accident, BAC level, time of day, day or week, etc.), period of detention, point at which case was resolved, form of disposition, sentence, actions affecting driver's license, and the period of time required for processing.

(2) The reports on each traffic fatality that occurred from 1975 through 1980 were examined to determine the degree of alcohol involvement, the problems in identifying such involvement, the nature and extent of victimization, the charges brought against at-fault drivers, and the disposition of these charges.

(3) All serious injury accidents reported by the Madison Police Department to the Department of Transportation in 1980 in which there was some indication of alcohol involvement were identified. The reports filed on these accidents, plus the reports on a control sample of cases not involving alcohol, were then examined in detail to obtain information parallel to that acquired in the study of fatalities.

(4) The logs maintained by the police department of the results of all breathalyzer tests were examined for selected

7

periods and, combined with data from other sources, were used to help characterize enforcement efforts.

(5) The answers to questionnaires routinely completed by participants in the Group Dynamics program were analyzed along with the answers to a supplemental questionnaire administered at our request. Together, these documents provided information on the activities of drinking-drivers prior to arrest, the event that led to the arrest, and reactions to the arrest experience. In addition, those participants who indicated a willingness to do so were interviewed by telephone.

(6) In order to examine the extent to which jail is used as a sanction for OWI, a jail census was taken on March 19, 1981. The characteristics, past record, and offense of those identified as serving time for OWI or another alcohol related offense were examined.

A summary of these ministudies is presented in the chart on the following page. As will be noted from the entries on the chart, our objective in each ministudy was rather narrowly defined, and the number of cases examined (the size of the sample, where sampling was used) was small. This was in keeping with one of the primary objectives of the overall project, which was to experiment with the use of research techniques that police agencies might have the capacity and resources to use on their own. We found that, while the small size of the samples limited our capacity to reach conclusions that could be generalized, we benefited greatly from the opportunity to probe individual cases in depth. The strengths and weaknesses of the data that are attributable to the limited size of the samples will be discussed in detail in the final report.

Examination of the Records Relating to the Drinking-Driver Problem

Ministudies

Name of Study	No. of Cases	Time Frame	Records Used	Primary Purpose
(1) Court Study or Court Tracking Study	92	March 1980	MPD, prosecutor, court, DOT	to obtain data on what happens to those persons arrested for OWI by the MPD
(2) Fatal Study	63	1975-1980	MPD, coroner, court, DOT	to obtain data on traffic fatalities; i.e., who, what, where, when, etc.
(3) Serious Injury Study	93	1980	MPD, DOT	to obtain data on serious injury traffic accidents to parallel fatality data as closely as possible
(4) BAC Log Study	326	4 months 1980	MPD	to obtain data on OWI enforcement activity
(5) Group Dynamics Study	90	spring and summer 1981	Group Dynamics participants	to obtain data on drinking-driving behavior
(6) Jail Census	177	March 19, 1981	Dane County jail, DOT	to obtain data on the use of incarceration in drinking-driver cases

MPD = Madison Police Department
DOT = Department of Transportation

9

I. THE PROBLEM OF THE DRINKING-DRIVER IN MADISON

All of the steps that society has taken in trying to deal with the drinking-driver are grounded in the belief that, by causing accidents, drinking-drivers pose a threat to their own safety, to the safety of others, and to property. If drinking-drivers did not pose such a threat, society would probably not be concerned with their behavior or be justified in attempting to control them.

Because the threat that drinking-drivers pose is so obvious, we have not summarized in this report all of the research findings that explore the relationship between alcohol usage and accidents.[1] Any moving vehicle is potentially dangerous. If a driver's ability to drive carefully is impaired by the consumption of alcohol or other drugs, the potential danger becomes even greater. This commonsense linkage between alcohol impairment and accidents is sufficient, for our purposes, to establish that a problem exists. But much more information of a different kind is needed if, as in this project, one wishes to examine carefully the nature of the response to the problem by the community and its police.

One type of information we felt we needed was a rough estimate of the costs to the community that are attributable to the drinking-driver. At a time when so many social problems are competing for the attention and limited resources of the community and its police, information on the costs associated with a problem is valuable for use in setting priorities and in allocating resources among competing demands.

Additional information was also needed in order to specify the local dimensions of the problem--for example, to enable the Madison Police Department to describe those who drink and drive, the kinds of accidents in which they become involved, and when and where drinking-driving takes place--and to provide an informed base for critiquing the community's current response to the problem and for selecting from among available alternative responses those that are most likely to be both fair and effective.

We are not the first who have needed such data. While our study is somewhat unique in looking at the problem of the drinking-driver from within a police agency, hundreds of researchers have preceded us in trying to establish more precisely the costs and dimensions of the drinking-driver problem. A massive amount of literature is now available on the topic, much of which reports

10

on efforts to define the problem more precisely. In 1978, the National Highway Traffic Safety Administration published a volume, Alcohol and Highway Safety: A Review of the State of Knowledge, in which it endeavored to synthesize and evaluate the results of all prior research. Following a brief introduction, the document immediately focuses on the difficulties in trying to pin down the costs and dimensions of the drinking-driver problem--difficulties that researchers experience in developing methods of inquiry that produce accurate, reliable results. It then cautions the reader about the major limitations on even the most highly regarded studies on which its findings are based.

Such advice is well taken. Our own experiences in attempting to collect locally some of the most elementary facts made us fully aware of the difficulty in trying to establish the costs and dimensions of the drinking-driver problem. Moreover, as we observed firsthand the investigation of accidents and the processing of drinking-drivers, interviewed officers, and used police-collected data on accidents and OWI cases, we became even more cognizant of the methodological difficulties involved. Our experience has led us to believe that such problems may be even more serious than is currently recognized in the literature.

Against this background, we have chosen to concentrate in this section on setting forth those basic pieces of information that we ourselves have acquired and that we believe have special significance in examining the problem locally. Studies conducted elsewhere are occasionally used for comparative purposes or to fill in knowledge that was not obtainable in our inquiry. The number of cases from which we reached our conclusions (our sample sizes) is often smaller than we would have liked. And at times we rely more heavily on impressions of those operating within the criminal justice system than we would have liked. Mindful as we have become of the pitfalls in trying to pinpoint facts relating to the drinking-driver problem, we attempt, in reporting such information, to be appropriately careful in qualifying what we have to say.

11

A. The Major Costs: Deaths and Injuries

1. Sixty-six persons were killed in traffic accidents in Madison from 1975 through 1980. Of this number, 24 died in accidents in which a driver was judged to be at fault and was determined to be legally intoxicated. In addition, 11 of the 66 persons died in accidents in which one of the drivers, although not legally intoxicated, had been drinking or using drugs. Thus drinking-drivers were at fault in accidents causing 35 deaths or 53 percent of the total number of traffic fatalities.

The 66 traffic-accident deaths in the city of Madison from January 1975 through December 1980 occurred in 63 accidents. Reports on the investigation of these accidents enabled us to place them in the following categories.

Table I-A-1.1

Number of Fatal Accidents and Fatalities by Case Type
(Madison, Wisconsin, Traffic Fatalities 1975-1980)

Case Type	Accidents	Fatalities
At-fault, drinking-driver	27	29
At-fault, not a drinking-driver	29	29
Hit and run	5	6
Not at-fault, drinking-driver	2	2
Total	63	66

A closer examination of this initial classification illustrates some of the difficulties in precisely defining the drinking-driver. In 2 of the 27 accidents in which the driver was both at fault and drinking, a BAC was not obtained on the driver. (One was a juvenile; the other was a corpse that had been badly burned.) Absent a BAC, we could not determine if the level of alcohol

12

impairment justified categorizing the drivers as having been legally intoxicated. In two of the accidents, the drivers tested below the .10 BAC level (.05 and .06) and were charged with a traffic violation rather than OWI. In still another case, the driver was found to be under the influence of an intoxicant other than alcohol. If we held ourselves to the .10 standard and were interested in only those accidents in which the driver was legally intoxicated as a result of having consumed alcohol, these five cases should be taken out of the drinking-driver category, reducing the number of accidents attributable to a drinking-driver to 22 rather than 27.

On the other hand, if we are interested in accidents caused by drinking-drivers without regard to their level of intoxication, we could add to the base group of 27 three of the accidents involving hit-and-run drivers who were known to have been drinking. Since they were not immediately apprehended and tested, it is not possible to categorize them as having been legally intoxicated. Including them would raise the total to 30. And if we broaden our classification to include accidents that simply involved drivers who had been drinking, without regard to either their level of intoxication or whether they were judged to be at fault, thereby including the two accidents in which the drivers were drinking but not at fault, the total would increase to 32.

Thus, even in this relatively small number of well-researched cases, any effort to report a single percentage of accidents attributable to a drinking-driver requires a good deal of hedging, depending on the definition one wants to attach to the classification. One could claim anywhere from 35% (22/63) to 51% (32/63). And the percentage of fatalities attributable to a drinking-driver ranges between 36% (24/66) and 53% (35/66). Rather than argue the merits of various classification schemes, we present the results of all three forms of classifications in table I-A-1.2.

13

Table I-A-1.2

Alternative Estimates of Drinking-Driver Involvement in Traffic Fatalities*

(Madison, Wisconsin, Traffic Fatalities 1975-1980)

	Accidents	Fatalities
Drivers involved who were drinking	32 (51%)	35 (53%)
Drivers involved who were at fault and drinking	30 (48%)	33 (50%)
Drivers involved who were at fault and legally intoxicated	22 (35%)	24 (36%)

* Table entries are the number of cases involving a drinking-driver given the varying definitions of drinking-driver involvement discussed in the text. The percentage figures that follow the numbers represent the percentage that the number is of all fatal accidents or fatalities.

Whatever basis is used for classifying alcohol-related accidents, we believe that the number is understated. Without compulsory testing of all drivers in fatal accidents, some cases are bound to go undetected. This is widely recognized in the experience of other jurisdictions. Some local officers acknowledge that, at various times in the past, the possible alcohol involvement of an at-fault driver in a fatality may not have been adequately pursued.

Recognizing that the initial classification scheme may not perfectly fit every reader's needs (or even ours, for that matter), we nonetheless utilize it throughout the remainder of this report. Table I-A-1.3 presents a breakdown of these cases by the year in which they occurred.

14

Table I-A-1.3

Fatalities by Case Type and Year

(Madison, Wisconsin, Traffic Fatalities 1975-1980)

	At-Fault Drinking-Driver	At-Fault, Not a Drinking-Driver	Hit and Run	Not At-Fault Drinking-Driver	Total
1975					
Number	7	4	1	0	12
% of 1975	58%	33%	8%	-	
% of Type	24%	14%	17%		
1976					
Number	5	9	0	1	15
% of 1976	33%	60%	-	7%	
% of Type	17%	31%	-	50%	
1977					
Number	1	4	1	0	6
% of 1977	17%	67%	17%	-	
% of Type	3%	14%	17%	-	
1978					
Number	2	5	1	0	8
% of 1978	25%	63%	13%	-	
% of Type	7%	17%	17%	-	
1979					
Number	7	3	1	1	12
% of 1979	58%	25%	8%	8%	
% of Type	24%	10%	17%	50%	
1980					
Number	7	4	2	0	13
% of 1980	54%	31%	15%	-	
% of Type	24%	14%	33%	-	
Total	29	29	6	2	66

15

2. In 1980, there were 242 traffic accidents in Madison in which at least one person was seriously injured. In 61 (25%) of these cases, the accident was judged to be caused by a driver who was drinking.

In a second effort to identify the costs associated with drinking drivers, we examined those traffic accidents that occurred in 1980 that resulted in at least one "incapacitating injury." According to a formal Department of Transportation definition, an incapacitating injury is "any injury, other than a fatal, which prevents the injured person from walking, driving, or normally continuing the activities which he was capable of performing prior to the motor vehicle traffic accident." Both the assessment of the seriousness of the injury and the indication of alcohol use or impairment by any of the parties involved in the accident were taken directly from the accident report filed by the investigating officer.

In the 242 accidents Madison reported to the Department of Transportation in 1980 in which at least one incapacitating injury occurred, there were 37 cases (15%) in which the driver was judged, on the basis of a full reading of the officer's report, to have been at fault and was also classified as having been drinking and impaired. An additional 24 cases (10%) involved drivers judged to have been at fault who were classified as drinking but not impaired.

As was the case in our analysis of fatal accidents, the information we obtained as we learned more about these cases enabled us to adjust these figures a little up or down. If, for example, we adhered to a strictly legal definition of impaired (.10 BAC or higher), we would have been forced to drop six of the drivers classified as having been drinking and having been impaired. But on the other hand, two of the drivers classified as having been drinking but not impaired would have to be reclassified as having been impaired since they tested over .10 BAC. Rather than attempt to adjust the data taken from the accident reports to reflect the additional data that were available to us (e.g., BAC levels), we opted to stick with the original classifications.

Once again, we feel compelled to note that the figures resulting from this inquiry probably understate the problem. We know from studies conducted elsewhere that officers consistently underestimate alcohol involvement of drivers on accident forms. This is especially true if the officer had decided not to take enforcement action.

16

3. The person who dies in a fatal accident involving a drinking-driver in Madison is most often the driver himself. The second most likely victim is a passenger of the drinking-driver. In the period from 1975 through 1980, only two persons who were neither an at-fault driver nor a passenger in the at-fault vehicle were killed in an accident clearly attributable to a drinking-driver.

Table I-A-3.1 identifies the victim in the fatal accidents that occurred in Madison between 1975 and 1980 according to whether the victim was a driver, a passenger, or a pedestrian or bicyclist and according to the victim's relationship to the person judged at fault in the accident.

Table I-A-3.1

Who Died by Type of Case

(Madison, Wisconsin, Traffic Fatalities 1975-1980)

	At-Fault Drinking-Driver	At-Fault Not a Drinking-Driver	Hit and Run	Not At-Fault Drinking-Driver
Driver Died				
At fault	18 (62%)	4 (14%)	-	-
Innocent	-	3 (10%)	-	-
Fault not ascertainable	-	-	-	-
Passenger Died				
In at-fault vehicle	9 (31%)	5 (17%)	-	-
In not-at-fault vehicle	1 (3%)	-	1 (17%)	-
Fault not ascertainable	-	-	-	-
Pedestrian or Bicyclist Died				
At fault	-	14* (48%)	-	2 (100%)
Innocent	1 (3%)	1 (3%)	3 (50%)	-
Fault not ascertainable	-	2 (7%)	2 (33%)	-
Total	29	29	6	2

* Includes five cases in which the pedestrian or bicyclist was legally intoxicated.

17

As the table so clearly indicates, drinking-drivers in Madison more often kill themselves (62% of all victims in an accident in which a drinking-driver is at fault) than someone else.

The passenger of a drinking-driver is the second most likely victim. We distinguish passengers in an at-fault vehicle from passengers in the vehicle hit by an intoxicated driver, who we refer to as "innocent" because we assume the former entered the drinking-driver's vehicle on their own volition, knowing that their driver was intoxicated. Using this distinction, totally innocent victims (i.e., those persons obeying the law and not putting themselves at risk) were involved in only two of the drinking-driver cases. One was the passenger in a vehicle hit by a drinking-driver. Another was a pedestrian. Both cases occurred in the 1[illegible] half of 1980, and both received a great deal of publicity.

These data lead us to conclude that, at least in Madison, drinking-drivers might be more aptly compared to suicides than murderers. Such a finding should not be construed as diminishing the seriousness of the drinking-driving problem. The death of one "innocent" person in Madison as the result of a drinking-driver is a matter of concern. Moreover, the loss of lives, whatever the cause, is a matter of community concern. And whether the "suicide" takes another life in the course of taking his own is largely a matter of chance. We believe, rather, that this finding simply indicates that the problem, at least in Madison, is somewhat different from common perceptions of it. One major consequence, we suspect, is that the high percentage of victims (93%) who are in some way responsible for their own deaths works against developi[illegible]g and sustaining long-term efforts to control the drinking-driver.

By contrast, only 31% of the victims in the "at-fault, not a drinking-driver" cases were either at-fault drivers or passengers in the at-fault vehicle. The largest group of victims in this type of case was the negligent nondrivers (48%), consisting of pedestrians and bicyclists. Five of these cases involved a pedestrian or bicyclist who was legally intoxicated (i.e., with a BAC level over .10). Because they were not drivers, these victims do not enter into our statistics on drinking-drivers, but the practice elsewhere of reporting such figures as "alcohol-related traffic fatalities" adds to the confusion in trying to accurately define the drinking-driver problem.

18

4. The percentage of victims in serious injury accidents who are "innocent" is greater than the percentage of "innocent" victims in fatal accidents. But those most often injured remain the at-fault drivers and their passengers.

The data on serious injury accidents (described in II-A-2) were analyzed to determine who gets injured by the drinking-driver. Because in roughly 40% of all accidents in which there are serious injuries, more than one person is injured, this analysis becomes somewhat complex. We devised a scheme that we believe captures how the accidents are categorized by police officers. The first category includes those accidents in which there was at least one innocent victim (either a not-at-fault driver, a passenger of a not-at-fault driver, or a not-at-fault pedestrian or bicyclist). If more than the one person was injured, we nevertheless placed the accident in this category because we believe that the involvement of an innocent victim is likely to dominate thinking, discussion, and action regarding the accident. The second category includes those accidents in which the victim was a passenger in the at-fault vehicle. The third category includes those accidents in which only the at-fault driver was seriously injured.

Using these three categories, we classified the 61 accidents that occurred in 1980 in which the driver was recorded as having been either drinking and impaired or just drinking. In addition, for comparison purposes, we selected from among the other 181 serious injury accidents a random sample of 32 cases, which we refer to in this and subsequent tables as the control group.

The cases in our control group were much more likely than the cases in the two groups of drinking-drivers to involve serious injury to an innocent victim. This difference becomes even more dramatic if we take out of the control sample the five accidents in which the at-fault individual was a pedestrian or bicyclist. If this is done, the at-fault drivers in our control sample injured an innocent victim in 66% of the accidents for which they were responsible. By contrast, the drinking-drivers harm mostly themselves and their passengers.

19

Table I-A-4.1

Who Is Injured by Type of Case

(Madison, Wisconsin, Serious Injury Accidents 1980)

	Control	Drinking--Not Impaired	Drinking--Impaired
At least one innocent victim injured	18 (56%)	8 (33%)	10 (27%)
No innocent victim, at least one passenger injured in at-fault vehicle	1 (3%)	7 (29%)	10 (27%)
Only at-fault individual injured	12* (38%)	9 (38%)	17 (46%)
Cannot establish fault	1 (3%)	-	-
Total	32	24	37

*Includes five cases where the individual deemed responsible for the accident was an injured pedestrian or bicyclist.

20

B. The Incidence of Drinking and Driving

1. The most conservative estimates of the total amount of drinking and driving in Madison are alarming.

The most effective method that has been developed for attempting to measure the total number of drinking-drivers on the road at any one time has been the roadside survey. Such a survey calls for setting up, without advance notice, a roadblock of sorts in which drivers are asked to cooperate in responding to a series of questions and in providing a sample of their breath.[2]

In 1973, the Highway Safety Research Institute conducted a series of roadside surveys across the country for the National Highway Traffic Safety Administration. Randomly stopped were 3,698 motorists at 185 sites in 24 sampling areas in 18 states. All of the surveys were conducted at night and on weekends. Interviews were completed in 3,358 of these stops, and 3,192 of these drivers provided a satisfactory breath sample. The findings: 22.6% of the drivers had been drinking (.02 or higher); 13.5% of all the drivers had been drinking enough to provide an officer with probable cause to believe they were intoxicated (.05 or higher); 5% had been drinking enough to be considered legally impaired (.10 or higher); and 1.4% of all drivers tested were very intoxicated (.15 or higher). [The figures are cumulative, i.e., all of the drivers in the last category were included in the computation of those having a BAC in excess of .02.] The proportion of motorists driving after drinking was found to increase considerably from the beginning to the later survey hours, more than doubling between 10:00 and 11:00 p.m. and 2:00 and 3:00 a.m. There was only a slight difference between Friday and Saturday nights.[3]

From 1970 to 1974, 28 of the 35 ASAPs conducted roadside surveys of nighttime drivers. The resulting data from 77 of these surveys were combined with the data from the 1973 survey into a single computer file. From among the 75,183 drivers in this file, it was established that 6% of weekend and late weekday (after 10:00 p.m.) drivers had a BAC equal to or exceeding .10.[4]

While roadside surveys suffer from some methodological problems, they are, by far, the most effective means currently

21

available for trying to measure the incidence of drinking and driving. They are also very expensive to conduct, however, and it was not within the capacity of this project to conduct such a study in Madison.

Is Madison typical of some of the communities in which such surveys were conducted? Most of the people to whom we put this question argued that one would find more drinking and driving in Madison, citing such factors as the high rate of liquor and beer consumption in the state, the large number of bars per capita, the presence of so many university students, and the substantial number of conferences and conventions hosted in the community.

The inability to establish with any precision the incidence of intoxicated driving is initially disturbing. But the most conservative estimates one can make about the problem, based on data acquired elsewhere and on local impressions, are so overwhelming that one no longer feels the need for exact figures. If, for example, using the results of the roadside surveys, 6% of the drivers on the roadway in this city after 10:00 p.m. on weekends are legally intoxicated, that number--given the traffic in the city after 10:00 p.m.--and the danger they pose are frightening.

Based on the results of the roadside surveys, Professor Robert Borkenstein, widely recognized as one of the most competent researchers on the subject, has estimated that in the typical community of one million population, there will be four million trips in a year by individuals with BACs of .10 or higher.[5] Prorated, his procedure would estimate approximately 680,000 such trips for a city the size of Madison.

Our firsthand observations and interviews with Madison police officers provided a fresh, closer-to-home picture that was unusually poignant, though totally unscientific. When accompanying officers at approximately midnight, it was dramatic to observe the clusters of cars--10, 20, 50, and upwards to 100--parked around each of the premises at which intoxicating beverages are served. There are approximately 300 bars and restaurants licensed to serve beer or beer and liquor in Madison. After midnight, those that are primarily bars appear as an island of activity in a city that is otherwise asleep. The cars parked at midnight have generally been there for some time. It does not follow that each driver is impaired when he or she leaves these establishments at the 1:00 a.m.

22

closing time. But even if only 10% of those who leave between midnight and 1:00 a.m. are legally intoxicated, which we believe to be an extremely low estimate, the number of intoxicated drivers on the streets between 1:00 a.m. and 2:00 a.m. would be alarming.

One of the primary reasons we would have liked to have acquired the results of some roadside surveys would have been to afford officers an opportunity to check out their estimates of the volume of intoxicated driving in some sections of the city at certain times. The estimate of most of the officers we talked to is that the number of drivers with BACs in excess of .10 during the nighttime hours--and especially between midnight and 2:00 a.m.--is as high as 50% of all motorists on the road. Some even placed their estimate at 85 - 90%. While these estimates, without the opportunity for verification, are of no value in quantifying the problem, they are important in what they say about the perception of the problem by police officers. They also indicate that police officers, at least, will not question a local estimate that is based on the 6% figure that resulted from the national roadside surveys. To the contrary, police officers would probably argue that the estimate is unduly conservative.

23

2. Accidents involving drinking-drivers most often occur between the hours of midnight and 3:00 a.m.

Absent an opportunity to determine the number of drinking-drivers on the street, one must look elsewhere for an indication of when drinking-drivers do their driving. We turned to an analysis of accidents resulting in fatalities and serious injuries on the assumption they are the best indicator we have. They certainly produce a more valid picture than would an analysis of arrests since, from what we know about the police activity relating to drinking-drivers, the time when arrests are made is greatly influenced by the availability of police resources.

We turned first to the data on fatal accidents. Table I-B-2.1 compares the time at which the two major types of fatal accidents occurred; i.e., those that involved drinking drivers who were at fault and those in which someone other than a drinking-driver was at fault.

Table I-B-2.1

Time of Day by Type of Case

(Madison, Wisconsin, Traffic Fatalities 1975-1980)

	At-Fault Drinking-Driver	At-Fault, Not a Drinking-Driver
5:00 a.m. - 11:59 a.m.	0	7 (24%)
12 noon - 5:59 p.m.	7 (24%)	4 (14%)
6:00 p.m. - 8:59 p.m.	2 (7%)	7 (24%)
9:00 p.m. - 11:59 p.m.	4 (14%)	10 (34%)
12 midnight - 12:59 a.m.	6 (21%)	1 (3%)
1:00 a.m. - 1:59 a.m.	7 (24%)	0
2:00 a.m. - 4:59 a.m.	3 (10%)	0
Total	29	29

24

Sixteen deaths or 55% of all fatalities attributed to a drinking-driver occurred between midnight and 3:00 a.m. (The table shows the time period extending to 4:59 a.m., but all fatal accidents occurred prior to 3:00 a.m.) Only one or 3% of all the fatalities not involving a drinking driver occurred during these same hours.

Second, we turned to the data on serious injury accidents.

Table I-B-2.2

Time of Day by Type of Case

(Madison, Wisconsin, Serious Injury Accidents 1980)

	Control	Drinking Not Impaired	Drinking Impaired
5:00 a.m. - 11:59 a.m.	10 (31%)	1 (4%)	1 (3%)
12 noon - 5:59 p.m.	11 (34%)	1 (4%)	2 (5%)
6:00 p.m. - 8:59 p.m.	3 (9%)	0	2 (5%)
9:00 p.m. - 11:59 p.m.	6 (19%)	8 (33%)	7 (19%)
12 midnight - 12:59 a.m.	0	5 (21%)	11 (30%)
1:00 a.m. - 1:59 a.m.	0	7 (29%)	6 (16%)
2:00 a.m. - 4:59 a.m.	2 (6%)	2 (8%)	8 (21%)
Total	32	24	37

As was true for fatals, those serious injury accidents involving a drinking-driver occurred primarily between midnight and 3:00 a.m. Sixty-two percent of the accidents that involved a drinking and impaired driver occurred during this time period, and another five percent occurred between 3:00 a.m. and 4:59 a.m. Fifty-eight percent of the accidents in which the driver was drinking, but was not considered impaired, occurred between midnight and 3:00 a.m. Using two separate estimation procedures, we estimated that between 77 and 88 percent of all serious injury accidents between midnight and 3:00 a.m. are likely to involve a drinking-driver.[6]

25

This clustering of fatalities and serious injury accidents attributed to at-fault drinking-drivers is important for several reasons. It indicates that there is indeed a time of day when police activities could be profitably directed at the problem of drinking-drivers. It also indicates that during certain hours of the day an officer would have good reason to suspect that a driver in a fatal or serious injury accident had been drinking.

26

3. If one uses alcohol-caused accidents as an indicator, the drinking-driver problem is primarily a weekend phenomenon--but a weekend extending from Thursday night through early Monday morning.

From the operational perspective of the police, Thursday night (or any other night) extends from around 11:00 p.m. to 5:00 a.m. the following morning. This also corresponds to the drinking-drivers' "night"; i.e., if they crash at 1:00 a.m. on Friday morning, the driver, the police, and the public tend to consider the accident as having occurred Thursday night. For this reason, in distributing accidents among the days of the week on which they occurred, we attributed those occurring between the hours of midnight and 4:59 a.m. to the preceding day. The results for the analysis of fatal accidents are presented in table I-B-3.1.

27

Table I-B-3.1

Relationship Between Type of Case and Day Drinking Started*

(Madison, Wisconsin, Traffic Fatalities 1975-1980)

	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Hol	Total
At-fault, drinking driver	9	0	0	0	7	8	4	1	29
% of type	31%	-	-	-	24%	28%	14%	3%	
% of day	69%	-	-	-	64%	50%	67%	100%	
At-fault, not a drinking-driver	4	7	4	5	2	6	1	0	29
% of type	14%	24%	14%	17%	7%	21%	3%	-	
% of day	31%	100%	100%	63%	18%	38%	17%	-	
Hit and Run	0	0	0	2	1	2	1	0	6
% of type	-	-	-	33%	17%	33%	17%	-	
% of day	-	-	-	25%	9%	13%	17%	-	
Not at-fault, drinking-driver	0	0	0	1	1	0	0	0	2
% of type	-	-	-	50%	50%	-	-	-	
% of day	-	-	-	13%	9%	-	-	-	
Day total	13	7	4	8	11	16	6	1	66
% of total	20%	11%	6%	12%	17%	24%	3%	2%	100%

* Day runs from 5:00 a.m. to 4:59 a.m. of the following day.

28

Drinking-driver fatalities occurred almost exclusively on weekends if one broadens this term to include Thursday nights through early Monday morning. One of the more surprising findings is the large number of drinking-driver fatalities on Sunday. Six of these Sunday fatalities occurred between midnight and 2:00 a.m. on a Monday morning. Some of these accidents involved persons finishing up weekend trips. Another relatively surprising finding was the small number of drinking-driver fatalities that occurred on Saturday. In terms of fatalities, it would appear that in Madison, over the last six years, Saturday has been a relatively safe period overall. It is the safest of the "dangerous nights."

The same system for assigning early morning accidents to the preceding day was used in the analysis of the serious injury accidents.

Table I-B-3.2

Day of Week by Type of Case*

(Madison, Wisconsin, Serious Injury Accidents 1980)

	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Total
Control	3	4	6	2	6	8	3	32
	9%	13%	19%	6%	19%	25%	9%	
Drinking--								
Not impaired	5	1	4	1	4	6	3	24
	21%	4%	17%	4%	17%	25%	13%	
Drinking--								
Impaired	6	3	2	6	3	8	9	37
	16%	8%	5%	16%	8%	22%	24%	

* Day runs from 5:00 a.m. to 4:59 a.m. of the following day.

The results shown in table I-B-3.2 are similar to those we found for fatalities; i.e., drinking-driver accidents tend to be a weekend phenomenon. But in the case of those causing serious injuries, the pattern more closely fits the traditional notion of a Friday-night-through-Sunday weekend.

29

C. Characteristics of the Drinking-Driver

Our desire to learn more about the individual who drinks and drives is frustrated by our inability to sample the total drinking-driver population. We can identify the characteristics of drinking-drivers who are judged to be at fault for accidents. And we can identify the characteristics of those who are arrested for OWI. We are left to speculate, however, on the degree to which the characteristics identified for these groups are descriptive of the larger population of drinking-drivers.

1. Seventy-four percent of the drivers judged to be both at fault and intoxicated in accidents causing fatalities were 24 years of age or younger. Fifty-nine percent of the at-fault drinking-drivers causing serious injuries were in this age group.

Table I-C-1.1 presents the age and sex of the 27 drinking-drivers who were classified as being at fault in the fatal accidents that occurred in the past six years in Madison.

Table I-C-1.1

Age by Sex of At-Fault Drinking-Drivers
(Madison, Wisconsin, Traffic Fatalities 1975-1980)

	Male	Female
17 and less	2 (10%)	0
18 - 19	5 (24%)	1 (17%)
20 - 24	8 (38%)	3 (50%)
25 - 29	3 (14%)	0
30 - 39	3 (14%)	2 (33%)
40 - 49	0	0
50 +	0	0
Total	21	6

30

Consistent with national studies, the at-fault drinking-driver in Madison tends to be both young and male. In sharp contrast with the picture that emerges in table I-C-1.1, we found no one under 25 years of age among the nonintoxicated male drivers judged at fault for a fatal accident in the same period. And there were four such drivers who were over sixty.

Analysis of the data on serious injury accidents produces a pattern similar to that of the drinking-driver who caused a fatal accident.

Table I-C-1.2

Age by Sex of At-Fault Drinking-Drivers
(Madison, Wisconsin, Serious Injury Accidents 1980)

	Control		Drinking--Not Impaired		Drinking--Impaired	
	Male	Female	Male	Female	Male	Female
17 and less	3 (17%)	1 (13%)	3 (17%)	0	1 (4%)	0
18 - 19	2 (13%)	0	1 (6%)	2 (33%)	9 (35%)	4 (50%)
20 - 24	2 (13%)	0	2 (13%)	2 (33%)	5 (19%)	3 (38%)
25 - 29	1 (6%)	4 (50%)	6 (38%)	1 (17%)	7 (27%)	1 (13%)
30 - 39	4 (25%)	2 (25%)	2 (13%)	1 (17%)	4 (15%)	0
40 - 49	0	0	2 (13%)	0	0	0
50 +	4 (25%)	1 (13%)	0	0	0	0
Total*	16	8	16	6	26	8

* The sample sizes are reduced due to missing data on at-fault drivers in three control cases, two drinking not incapacitated cases, and three drinking incapacitated cases. In addition, five cases in the control group were attributed to at-fault pedestrians or bicyclists. These cases are not included in this table and subsequent tables.

As presented in table I-C-1.2, 67% of the at-fault drivers in the control sample are male, 73% of the at-fault drivers in the drinking--not impaired sample are males, and 76% of the drinking and impaired drivers are male.

31

The age distributions for the three groups are markedly different. Fifty percent of the at-fault drivers in the control group are thirty and older; the comparable percentages are 26% and 15% respectively for the drinking-driver groups. The eighteen- to nineteen-year-olds, regardless of sex, are especially likely to be found among those identified as impaired at-fault drivers.

Very few drivers under the age of seventeen come to police attention for drinking and driving other than through accidents. In our study of all arrests made in March of 1980, we found only one male under the age of seventeen to have been arrested, and he was involved in an accident. In a review of the records of 329 juveniles (ages seventeen and under) received at the Juvenile Reception Center in the first four months of 1981, only three juveniles were identified as having been charged with OWI--and only one of these charges was brought by the Madison police. In interviews, police officers offered a number of explanations: the tendency of juveniles to do their drinking in groups and to care for each other; the curfew; the different locale in which juveniles drink (i.e., homes and parks rather than bars); and the limited access they have to both alcohol and transportation.

32

2. The vast majority of drinking-drivers who cause accidents are residents of Madison or immediately adjacent areas.

A tabulation of the residences designated on the license of those drivers who were judged to be at fault in accidents that occurred in Madison in 1980 causing serious injuries and who were drinking and impaired or just drinking, revealed that 41 of the 61 drivers (67%) were Madison residents. Of the remainder, 11 (18%) were from a community outside Madison in Dane County. Only 6 (10%) were from elsewhere in the state, and 3 (5%) were from out of state. Caution is required in using these data. A person whose driver's license carries his or her residence as Appleton or Janesville may in fact be residing in Madison. This is especially true of those who are enrolled in the university.

An analysis of addresses of those arrested for OWI as a result of having been involved in an accident (not just a serious injury accident) in March of 1980 revealed that 20 of the 33 drivers (61%) were Madison residents; 9 (27%) resided elsewhere in Dane County; 1 (3%) was from elsewhere in Wisconsin; and 3 (9%) were from out of state. The same concern about using the address indicated on the driver's license as an indication of residence applies to these data.

If, as claimed by some officers, a large percentage of the drinking-drivers on the streets of Madison are out-of-staters who are in the city on business, we are forced to conclude that these drivers are more careful in their driving behavior. And if they are stopped by police, they are not often arrested. In our study of arrests for OWI made in March of 1980, we found only three out-of-state drivers among the 42 persons arrested by officers as a result of investigations they initiated (nonaccident cases).

33

3. The BACs of at-fault drivers in fatal accidents were high, but at least a third of those judged to have been at fault in serious injury accidents tested below .13.

Table I-C-3.1 represents the BAC test results for the 27 drivers who were judged to be at fault in accidents causing fatalities.

Table I-C-3.1

Blood Alcohol Content of
At-Fault Drinking-Drivers by Fatality Involvement
(Madison, Wisconsin, Traffic Fatalities 1975-1980)

	Fatality Is At-Fault Driver	Fatality Is Passenger in At-Fault Vehicle	Two Fatalities: Driver and Passenger	Fatality Is Innocent Victim
00 - .049	0	0	0	0
.05 - .099	0	2	0	0
.10 - .129	1	2	1	0
.13 - .149	0	0	0	0
.15 - .199	4	1	0	0
.20 - .299	8	0	1	2*
.30 +	1	1	0	0
Other intoxicant	1	0	0	0
Not ascertainable	1	1	0	0
Total	16	7	2	2

* One fatality was a passenger in an innocent vehicle; another fatality was a pedestrian.

34

The BAC levels of at-fault drivers tend to be quite high (.15 and above). This is particularly true in those cases in which the at-fault driver died and in the two cases involving innocent victims. This is also the pattern in cases where the fatality was a passenger in an at-fault vehicle.

A somewhat different pattern was found in the analysis of the BACs of incapacitated drivers who were judged to be at fault in the accidents causing serious injuries. BAC levels were recorded for 30 of the 37 drivers. (Among the 7 cases for which there are no BAC levels, 2 cases involved refusals, 1 case involved a hit and run in which the apprehension occurred after the two-hour time limit for testing, and in 4 cases we could find no record of alcohol testing.) The BAC levels for the 30 tested drivers appear in table I-C-3.2.

Table I-C-3.2

Blood Alcohol Content Levels of Impaired At-Fault Drivers
(Madison, Wisconsin, Serious Injury Accidents 1980)

0 and less	1 (3%)
.01 - .049	0
.05 - .099	0
.10 - .129	10 (33%)
.13 - .149	2 (7%)
.15 - .199	7 (23%)
.20 - .299	10 (33%)
.30 +	0
Total	30

The one person who tested negative was suspected of being under the influence of drugs. The most significant fact emerging from this analysis is that 33% of those individuals tested registered a BAC below .13. This contrasts with the drivers in fatal cases, who tended to have BACs over .15.

35

4. Approximately one-third of those impaired drivers who were judged responsible for a serious injury accident in Madison in 1980 had extensive prior records of traffic violations and accidents leading to at least one license action. Detailed examination of their records suggests that their pattern of driving conduct and their failure to respond to sanctions signaled the likelihood of their being involved in an accident having more serious consequences.

What can be said about the prior driving record of those who come to the attention of the police because of their drinking-driver behavior?

To answer this question, we turned first to our data on those drinking-drivers who had caused fatalities. We were handicapped in that some of the cases in our study were over five years old, and the Department of Transportation does not maintain records on drivers for over five years. Moreover, a large percentage of the at-fault drivers killed themselves, and the Department of Transportation removes the records of those who die. We were able to obtain past drivers' records on 16 of the 29 at-fault drivers in our study. Nine of the 16 had neither a previous OWI conviction nor an accident. Five had at least one previous accident, but no OWI conviction. Only 2 had previously been convicted of OWI. These data are valuable only in a negative sense; they indicate that some of the individuals responsible for fatal crashes did not have an extensive prior record of OWI convictions or accidents.

We obtained more complete data on the driving records of those who caused serious injuries in 1980. An analysis of these records is presented in table I-C-4.1.

36

Table I-C-4.1

Prior Records of At-Fault Drivers
(Madison, Wisconsin, Serious Injury Accidents 1980)

	Control	Drinking-- Not Impaired	Drinking-- Impaired
With prior property damage accident[s]	29%	23%	33%
With prior injury accident[s]	8%	9%	6%
With prior OWI conviction[s]	0	14%	14%
With prior license action[s]	8%	9%	31%
With prior OWL, OAS, OAR	4%	9%	26%
With other prior moving violation[s]	50%	59%	54%
Total Number of Driving Records Available for Analysis	24	22	35

It appears initially, from the above table, that the drivers in the two drinking categories had roughly the same type of driving record as those drivers in the control group. But our curiosity was aroused by the higher percentage of drinking and impaired drivers who had prior license actions taken against them and who had previously been convicted for operating without a license, after suspension, or after revocation. Therefore, we examined in detail the records of the drivers whose past driving records placed them in these two categories. We found that a substantial number (31%) of all of the drinking drivers who had caused a serious injury accident, by the time of their accident, not only had accumulated a number of convictions for traffic violations and had been involved in a number of accidents; they also had demonstrated repeatedly a failure to

37

comply with restrictions placed on their driving privileges because of their poor driving record. In other words, the analysis of those drinking and impaired drivers who were responsible for serious injury accidents in Madison in 1980 revealed a core of drivers whose established pattern of irresponsible conduct seemed to lead, inevitably, to an accident involving more serious consequences.

To convey fully the problem that these drivers present, their records are summarized below. These records may start with a reference to a revocation from violations that occurred more than five years ago. Also, since the records include incidents both before and after the accident that brought the driver into our sample, that accident has been underlined to aid in interpreting the records.

The records start five years back from the date on which they were acquired. Although driver records are quite accurate with respect to traffic citation convictions, they are far less accurate with respect to accident involvement. In approximately 25% of the 1980 serious injury cases that we examined, either the accident in question did not show up on the at-fault driver's record or it was misclassified as a property damage accident. The record synopses show many convictions for offenses such as Reckless Driving, Inattentive Driving, or Driving on a Walkway. Absent other information, it is difficult to determine what significance to attach to these. Our own experience and the experience of police officers and prosecutors suggest that such charges often reflect a reduction from an OWI charge. The charge of Operating Without a License (OWL) appears frequently. It is often used to avoid conviction for Operating After Revocation (OAR), which carries a jail sentence of at least five days.

38

Driving Record Synopses of At-Fault Drivers Who Were Impaired at the Time of an Accident Causing Serious Injuries and Who Had at Least One Prior License Action*

(Madison, Wisconsin, Serious Injury Accidents 1980)

Driver A. (22 years old) He had nine driving violation convictions in three and a half years. He was the at-fault driver in an accident in April 1977 for which he was convicted of Failing to Yield Right of Way. Later that year, he was convicted of Passing Illegally. At the beginning of 1978, he was arrested and convicted of OWI for which he was sent to Group Dynamics School. During that next year and a half, he was convicted of Speeding three separate times in three different counties. He was revoked for four months due to his poor driver's record, but soon after that revocation was listed, he was arrested and later convicted of OWL and his second OWI charge. He received a warning letter from the Department of Transportation and was revoked again for five months. In September 1980 he was charged with both an Arterial Violation and his third OWI offense as a result of being at fault in a serious injury accident. As a result of the OWI conviction, he was revoked for one year.

Driver B. (27 years old) His driver's record begins with a two-month suspension as a result of point accumulations. His record was clean for the next fifteen months until he was cited for Passing Illegally in May 1978. While that charge was pending, he was again cited for an Arterial Violation, and later he was involved in a property damage accident. In October, he was suspended for failing to pay a fine and then, in January 1979, was revoked indefinitely as a result of a damage judgment accruing from Negligent Operation of a Motor Vehicle. In August 1979, he was again suspended for failing to comply with the Safety Responsibility Law. His indefinite

* The underlined accident in each synopsis is the accident that brought the driver into our sample.

39

revocation was terminated in September 1979, but two weeks later he had another property damage accident. In March 1980 he was arrested for OWI for having caused a serious injury accident. He was sent to Group Dynamics School, and a warning letter was sent to him. In July, however, he was arrested for Driving on the Wrong Side of the Highway.

Driver C. (34 years old) In one year's time, he was arrested and subsequently convicted of OWI three times. He was revoked for one year after the second offense and then revoked for another year each for Operating After Revocation and for OWI when he was charged a third time. One day after the final revocation period had expired, he caused a serious injury accident and was convicted of Failure to Have Vehicle Under Control, Failure to Report an Accident, and Operating Without a License. Five days after the accident, he was officially reinstated from his previous revocation. Then, in June 1980, while the charges stemming from the accident were still pending, he was arrested again for OWI and he refused to take a breath test. He had not been convicted of the OWI charge as of June 1981, but he was revoked for one year for refusal to take the test.

Driver D. (26 years old) He was convicted of a nonmoving violation at the end of 1977. Between October 1977 and June 1978, he was cited three times for Speeding and suspended once for Failing to Pay a Fine. In June 1979 he was convicted of Driving Over a Sidewalk and, four months later, was convicted of making an Illegal Turn. On May 26, 1980, he was the at-fault driver in a serious injury accident and was charged and convicted of OWI. He was sent to Group Dynamics School, received a warning letter, and then was suspended for 90 days for failing to pay his fine.

Driver E. (26 years old) He was convicted of Operating Without a License in March 1978. While that charge was pending, he was cited for Imprudent Speed and again for OWL. His license was then revoked for nine months. A few days before the revocation period was over, he was cited for an Improper Muffler, but was not charged apparently with Operating After Revocation. In June 1979, he was convicted of Reckless Driving. Once again, he was revoked due to his driver's

40

record--this time for six months. Halfway through the revocation period, he was arrested for Inattentive Driving, but again was not convicted of Operating After Revocation. His license was reinstated in February 1980, but in May 1980 he was arrested for OWI as a result of a serious injury accident. While the OWI charge was pending, he was again arrested for Speeding and for Reckless Driving. He was sent to Group Dynamics School as a result of the OWI conviction, was revoked for one year as a result of point accumulations on his driver's record, and was suspended on two separate occasions for Failure to Pay Fines.

Driver F. (21 years old) He was charged with Operating with an Expired License and Speeding in April 1979. Upon conviction, a warning letter was sent to him. On New Year's Day 1980, he caused a serious injury accident and was convicted of Reckless Driving. His license was revoked for three months due to point accumulations. His license was then reinstated the following April.

Driver G. (21 years old) He was convicted of having Improper Lights in February 1977. He was then suspended for three months because of his poor driver's record. In July 1977, he was arrested for Speeding and for Operating Without a License. While those charges were pending, he was arrested for Operating Without a License. While all three charges were pending, he was arrested for OWI, was convicted on January 11, 1978, and was revoked for three months. Six days after this conviction, he was arrested and charged with Failure to Stop at an Accident and two counts of Failure to Report an Accident. While these charges were pending, he was convicted of the three previously pending charges, and his license was revoked for one year. In September 1978, while the hit-and-run charges were still pending, he was arrested again for OWI and Operating After Revocation. For these offenses, he was revoked for one year on the OWI charge and one year on three counts of OAR. In July 1980, he was the at-fault driver in a serious injury accident, and three months after that he was once again arrested for Failure to Report an Accident.

41

Driver H. (20 years old) He had two Speeding convictions in April 1978. The next month he was involved in a property damage accident. He was suspended for two months as a result of his poor driver's record, but two days after that suspension had terminated, he was arrested for Reckless Driving stemming from a personal injury accident. After an August 1978 conviction for Improper Equipment, he was suspended and then revoked for Operating While Suspended for one year. One month after that revocation began, he was revoked again for nine months due to point accumulations on his driver's record. In July 1980 he was the at-fault driver in a serious injury accident. He was once again suspended in December 1980 for failing to comply with the Safety Responsibility Law.

Driver I. (19 years old) He was convicted for Speeding in August 1979. Two months later, he was arrested for OWI and convicted one month after that. He was revoked for three months as a result of that OWI, but, just over two months into the revocation period, was involved in a serious injury accident resulting in another OWI charge. He was not convicted for Operating After Revocation, but was revoked again for one year on the OWI charge.

Driver J. (23 years old) He was convicted twice in 1977 for Inattentive Driving and was also convicted of three nonmoving violations stemming from one other incident in 1977. At the beginning of 1978, he was convicted of Reckless Driving. After leaving the state and then returning, he was arrested and subsequently convicted of Failure to Stop at an Accident as the result of a serious injury, hit-and-run accident. While that case was pending, he was arrested for Operating Without a License. In March 1980 he was arrested for OWI and later revoked for three months as a result of that conviction. The driver has twice had his license suspended for Failing to Pay Fines.

Driver K. (18 years old) In only three years of driving, he had been convicted of five offenses. He was first convicted of Operating Without a License and one month later was convicted of Violating License Restrictions. He was warned by the Department of Transportation, and his license was suspended for

two months, but a month after the suspension was lifted, he was arrested and later convicted of driving Too Fast for Conditions. He was revoked for two months again because of his poor driver's record. One month after that revocation period was up, he was arrested for OWI and for OWL as the at-fault driver in a serious injury accident. While the charges were still pending, his license was formally reinstated, only to be revoked again for six months on the OWL charge and for three months on the OWI charge. His driver's record now indicates that he needs driver improvement before being relicensed.

The preceding records were presented in detail because we believe such drivers constitute a particularly dangerous subgroup of drinking-drivers. An overall program for dealing with the drinking-driver problem should focus on them. As should already be apparent, based on the material presented up to this point in this study, the magnitude of the drinking-driver problem is such that development of an intelligent community response requires setting some priorities on how a community might best use its limited resources to greatest advantage. The nature of the problem, however, is so diffuse and complex that it is extremely difficult to target pieces of it for special attention. Here, however, we have a group of drivers who have clearly identified themselves, by their own actions, as engaging in conduct that poses the very hazard that is at the heart of all efforts to control the drinking-driver. Their records, prior to the accident that brought them to our attention, in most cases gave clear evidence that they were potentially dangerous to themselves and others. Their subsequent involvement, while intoxicated, in an accident causing serious injuries, confirms that danger. License sanctions, while they might deter others, have obviously had little impact on them. Because we feel the current response to this group of drivers is not effective, we explore, in a subsequent section of this report, some possible alternative ways to deal with them.

42

43

5. Sixty-six percent of those individuals who were arrested by the Madison Police Department for OWI and who entered the Group Dynamics program in a two-month period reported that they did their last drinking in bars or restaurants.

It would be nice to know, with some precision, where those who drove while intoxicated did their last drinking. National studies of this question have produced varied and sometimes conflicting results, influenced in part by whether the studies focused on all drinking-drivers or only drinking-drivers who were arrested and also, of course, on the time of day at which the inquiry was made. As part of the Alcohol Safety Action Projects (ASAP), such data were collected between 1970 and 1974. Seventy-seven of these surveys at 28 sites combined with the results of the 1973 National Roadside Survey yield results from 75,183 drivers. These data have special value in that all drivers stopped were questioned, not simply those who were identified and arrested by the police. Forty-three percent of the drinking-drivers stopped on weekends after 10:00 p.m. had their last drink in a bar, tavern, club, or restaurant. The percentage went up to 55 after 10:00 p.m. on weekdays.[7]

In our survey of those individuals attending the Group Dynamics program over a period of two months, we asked: "Where did you have your last drink before you were stopped?" Sixty-six percent of those individuals who were arrested by the Madison Police Department reported that they did their last drinking in bars or restaurants. This figure must obviously be used with care, since it is possible that police enforcement practices tend to result in the apprehension of more people who did their last drinking in public places than in their home or with friends. And it is possible that the type of individual who attends the Group Dynamics program (mostly first offenders) has a somewhat different drinking pattern than all OWI offenders, especially those who are repeat offenders. National data indicate, however, that "problem drinkers" are even more likely than "social drinkers" to do their drinking in bars.[8] Twenty-nine percent of our respondents indicated that they did their last drinking at home or at the home of a friend. Interestingly the pattern remained the same if we included all of the individuals who completed our survey, regardless of the department that arrested them. In this larger sample, 69 percent of the respondents reported that they did their last drinking in a bar or restaurant; 24 percent reported that they had just left their home or the home of a friend.

What was their destination? Based on the same survey, the vast majority of persons arrested by the Madison police (73%) reported that they were on their way home. Only 5% were on their way to an all-night eatery.

44

D. Other Costs

1. Among those whose lives have been affected directly by an accident caused by a drinking-driver, the costs in physical pain, loss of earning power, anguish, and emotional distress are great and often long lasting.

In an earlier section, we cited the number of lives taken and persons seriously injured as a result of an accident attributed to the excessive drinking of the driver. The effect of each such death and injury extends to family members and close friends.

During the course of our inquiry, we explored in depth the impact that one fatality had on the members of a local family; had limited contact with others who had experienced the loss of a family member; and conferred with a local minister who is called upon by the police to notify families when one of their members has been killed in an accident. In addition, we collected journalistic accounts of the effect that a death caused by a drinking-driver had on family members; listened to survivors testify before the legislature; and reviewed materials detailing the consequences of alcohol-caused accidents produced by groups that have recently been organized in other cities at the initiative of those who have lost a family member in such an accident.

The accounts are very similar. Some efforts have been made nationally to quantify them and set a dollar value on the total costs of the drinking-driver problem.[9] But these efforts remove from the accounts the human suffering associated with the accidents; e.g.:

-the loss of mobility and opportunity to earn a living that a disabling injury may cause for a lifetime;

-the emptiness created in a family by the death of a loved one;

-the redefinition of responsibilities and demands that may result from the need to care for a survivor;

-the lingering anguish in believing that something one might have done could have prevented the tragedy; and

-the monetary costs of caring for a disabled person that are not covered by insurance.

45

The sense of loss is especially acute because the victims are so often young and because the death or serious injury was caused by one who is viewed as having engaged in grossly irresponsible behavior. The latter view is obviously strongest in those cases in which the driver had a prior record of drinking and driving. Where this fact is established, survivors and the relatives of those who are killed or seriously injured are understandably outraged that others who had been alerted to the individual's behavior did not take sufficiently effective action to prevent the person from causing further harm.

Some of the experiences that a family has after a death or injury--relating to prosecution and suit for civil damages--have the potential for being cathartic, but tend instead to compound and prolong their suffering. Whatever feedback we received on the role of the Madison Police Department in relating to victims and the relatives of victims was very positive. Attitudes toward the rest of the criminal justice system, however, for its handling of the case against the responsible driver, were quite negative. Some of this stems from the inevitable conflict between the understandable desire on the part of victims and their kin for revenge or at least redress and the obligation of prosecutors and the courts to ensure due process to the accused.

But some of the negative feeling is obviously due to the lack of sufficient sensitivity on the part of key individuals within the criminal justice system to the importance of keeping survivors and the relatives of victims informed about the progress of an investigation and prosecution, the problems that may be encountered in proving guilt, and the factors that influence sentencing. One parent informed us that everything he learned about the prosecution of the case against the individual responsible for his child's death was what he learned in the local newspaper.

The bringing of a civil suit for damages can be equally frustrating, extending as it usually does over several years (thereby keeping alive the need to rehash the details of the case); requiring a demonstration of economic loss; and, in the absence of such proof, a relatively low limit on the amount that can be recovered.

Finally, survivors and the families of victims are especially vulnerable to reports in the media about accidents involving a drinking-driver. Each such report reawakens mixed feelings of loss, anger, remorse, and, now, sympathy for a new victim and his or her family.

Much of what is said about the victims of drinking-drivers is cast in terms of cases involving totally blameless victims. Such cases provide the clearest examples of situations in which the heavy costs of the drinking-driver problem fall on those who have not done anything on their own to bring on such costs. But, in addition to the deaths and injuries, heavy human costs result as well from those accidents in which the dead or injured person is either the at-fault driver or a passenger of the drinking-driver. Many of the costs are the same. Families must learn to live without a loved one. They must live with the guilt of not having done something to prevent the accident; friends may have to share in the guilt of not having taken preventive action. Acknowledging these costs is important, for otherwise one might conclude that, since so much of the harm caused by drinking-drivers is to themselves and their passengers, the overall drinking-driver problem is of less seriousness to the community.

46

47

2. Awareness of the number of drinking-drivers on the streets during certain hours and knowledge about the consequences of their behavior lead some drivers to restrict their own driving.

In discussing the costs of the drinking-driver problem, we have dwelled on the deaths and injuries that occur as a result of accidents. Another cost, rarely identified, is the effect that knowledge about the presence of drinking-drivers on the streets has on the freedom of citizens to drive. We strongly suspect that a significant number of people do not use their vehicles during certain hours and on certain days because they fear being hit by an intoxicated driver. But to our knowledge, in all of the research done on the problem of the drinking-driver, no one has attempted to determine, with any precision, the extent to which citizens are affected in this manner.

In the course of this study, we have been struck by the large number of individuals with whom we have had contact, because of their responsibilities relating to the drinking-driver or to the consequences of their behavior, who have volunteered to us that their own driving patterns are greatly influenced by their firsthand knowledge of the problem. Police officers told us how defensively they drive in going to and from work at times when they know large numbers of drinking-drivers are on the streets. Some told us, based on their experiences, that they and members of their families simply do not drive during certain hours. Prosecutors stated that their driving patterns have been affected. Surgeons have firsthand knowledge of the consequences of drinking-drivers. A number have told us of their efforts to avoid dangerous routes as they proceed to the hospital to treat the injuries of still another alcohol-caused accident.

We are not certain what significance should be attached to these volunteered comments, but we were impressed by the consistency and force with which they were expressed. It may be that a substantial number of citizens without direct contact with the problem are affected in the same fashion. Whether or not this is so, acquainting the public with the experiences of those who deal with the consequences of drinking-drivers daily (e.g., surgeons, paramedics, nurses, and tow truck operators) may have three potential benefits: it may help mobilize community support for countermeasures; it may deter some individuals from drinking and driving; and, by making nondrinking-drivers more cautious, it may reduce accidents. This latter possible consequence, however, could be of mixed value. It might save lives. But it could increase costs by creating unnecessary fear and restrictions on freedom of movement. We are reluctant to endorse an effort that proposes to deal with the problem b

48

3. Controlling the drinking-driver places a high dollar cost on taxpayers and places other, more subtle burdens on the criminal justice system.

Because OWI cases are one of the most common offenses for which arrests are made, they consume a great deal of time and resources of the criminal justice system. While the number of arrests made daily for OWI is not great, the average proactive arrest requires about two hours to process and may tie up three officers. The OWI accident can tie up many more officers for many hours. Much of the time of the city attorney's office and the district attorney's office is devoted to prosecuting OWI cases. The calendars of judges handling criminal matters appear to be dominated by OWI cases, although, as we point out subsequently, few go to trial. The office of the clerk of courts has many responsibilities relating to the convicted OWI offender that, though routine, are time consuming.

To our knowledge, no one has undertaken in Madison to attempt to estimate the resources currently devoted to controlling the drinking-driver, either through just the criminal justice system or, more broadly, by all agencies including the Department of Transportation. Such an effort was recently made for the state of Minnesota as the basis for a proposal to shift the existing cost of controlling the drinking-driver and the costs of a proposed expansion in enforcement programs from the general taxpayer to those who purchase alcoholic beverages in bars.

The Minnesota researchers estimated the cost of each arrest made by the police at $200; each prosecution at $150; defense by a public defender at $150; an assessment at $50; outpatient care, counseling, and classes when the defendant is unable to pay, $150; in-patient care for those who cannot pay, $750; and jail at $35 a day.[10] In addition, an effort was made to estimate the less direct costs such as those incurred in keeping records on drivers and in processing actions affecting a driver's license. Although we have no real basis for judging how applicable such costs are to Madison, we sense that they are reasonable estimates.

But the government and especially the criminal justice system have other costs that are less tangible, to which one cannot assign a dollar value. While support is growing for viewing Driving While Intoxicated as a serious crime, the large volume of such cases inevitably results in cases being treated routinely. And with routine, they are no longer seen as important and as serious.

49

The adoption of a bureaucratic style becomes most pronounced at the prosecution and adjudication stages where a few people (prosecutors and judges) must handle all such cases in Dane County. The court commissioner, for example, will see several thousand OWI cases each year. Some prosecutors may handle 300 - 500 OWI cases in a year. Under the press of such numbers, it is impossible to give each case individual attention.[11]

50

4. Those who are convicted of OWI suffer substantial financial costs beyond whatever fine may be imposed.

In identifying all dimensions of the drinking-driver problem, one must consider the costs to the offender as well. In addition to facing the possibility of some revocation of driving privileges, a requirement for schooling or treatment, and, in the case of second offenders, the possibility of incarceration, convicted offenders incur substantial financial costs specifically associated with the experience that led to their conviction.

There are, of course, the minimum fine, court costs, and penalty assessment (used for the training of police officers) which has been totaling $117 for the first offender. If an OWI offender opts for Group Dynamics in lieu of revocation, a charge of $50 is made for the program.

Participants in the Group Dynamics program were asked to estimate the costs associated with their conviction. We analyzed the estimates made by those who responded to the two-month survey.

Twenty-nine percent of those individuals who were arrested by the Madison Police Department and were sent to Group Dynamics paid for legal counsel. They claimed to have spent from less than $50 to more than $2,000, with most having spent between $100 and $500. From our study of the processing of all OWI arrests made by the Madison Police Department in March of 1980, we know that only 39% of first offenders obtained private legal counsel. By contrast, 76% of all second and third offenders were represented by a private lawyer. The latter are obviously the more complex cases in which much more is at stake for the offender, resulting in higher legal fees. They are less likely to result in sentencing to the Group Dynamics program. The costs of legal services reported by the Group Dynamics participants, therefore, are likely to represent only a small percentage of total legal costs incurred by those who are charged with OWI.

The Group Dynamics participants also estimated cost incurred for repair to their vehicles and loss of income from their jobs. But because of the manner in which this information was requested (the participants were asked to provide the information as part of the program to educate themselves rather than provide data for research purposes), we have little confidence in the estimates made. For example, whether repair costs were paid directly or covered by insurance was unclear, and we suspect that some respondents did not report damages paid for by insurance companies. Because of such limitations, the data

51

are not presented here. We note, however, that several offenders reported extensive vehicle and medical costs, and at least one individual attributed the loss of his job to the OWI accident.

Persons convicted of OWI are vulnerable to substantial increases in their automobile insurance premiums. Insurance companies apparently have no systematic procedures by which they learn about OWI convictions, but agents are pressured to acquire such information, and they do so in a number of ways. If the OWI citation was the result of an accident, the agent learns about it in reviewing the accident report that must be filed for claim purposes. If a driver applies for an occupational license for restoration of driving privileges, he or she must ask an agent to provide evidence of financial responsibility. In addition, underwriters will occasionally request investigations of drivers whose accident records raise concern. Periodically, companies sample the driving records of those they insure.

One company informed us that, although they will not cancel a policy on learning of an OWI conviction, they will not renew on expiration of the policy. Nonrenewal extends to all members of the family covered by the policy. Drivers who are not renewed are referred to one of a small number of insurance companies who provide insurance for the high risk driver. The estimated rate for minimum liability coverage (15-30-10) in Madison for a married male over 27 years of age who uses his vehicle to drive to and from work daily (under 15 miles per day) with one OWI conviction would be $62.90 for three months, which is about double the cost if the same person had a good motor vehicle record for the past three years. If the driver is of an age that is more accident prone, has an accumulation of surcharges for accidents, or carries more than the minimum coverage, the costs are obviously much higher. Upon a third conviction, the driver usually must turn to the "assigned risk pool" established under Wisconsin law--an arrangement whereby all of the insurance companies in the state share the responsibility for insuring the highest risk drivers. The charge for such insurance is approximately the same as that obtained from the private high risk insurers--perhaps a little higher.

Under newly enacted amendments to the drinking-driver laws, the costs of an OWI conviction will increase dramatically. The minimum fine for first offenders will increase to $150. Each person convicted of OWI will, in addition, be charged a $150 driver improvement surcharge to be used by the Department of Transportation, the Department of Health and Social Services, and the University of Wisconsin System to defray the costs of administering provisions of the statutes relating to drinking-drivers. Since the new law will require that every person convicted of OWI undergo an alcohol assessment procedure, another $36 (the current Dane County assessment fee) will be

SECTION I

52
Notes

THE PROBLEM OF THE DRINKING-DRIVER IN MADISON

NOTES

1. The literature linking crash risk and alcohol consumption is among the most developed of all of the literature on the drinking-driver. Although the methodology of the reported studies varies a great deal, they all point to a strong relationship between alcohol consumption and crash risk--the greater the consumption, the higher the risk. For succinct reviews of the studies, see National Highway Traffic Safety Administration, United States Department of Transportation, Alcohol and Highway Safety: A Review of the State of the Knowledge, Summary Volume 1978, at 5-19 (Washington, D.C.: USGPO, 1979); Tracy Cameron, "Alcohol and Traffic," in Marc Aaren et al., Alcohol, Casualties and Crime 121-288 (Berkeley, Calif.: Social Research Group, 1978).

2. For a full description of the procedures followed in conducting roadside surveys, see, e.g., A. C. Wolfe, 1973 U.S. National Roadside Breathtesting Survey: Procedures and Results, Interim Report (University of Michigan, Highway Safety Research Institute, 1974); C. M. Stroh, Alcohol and Highway Safety Roadside Surveys of Drinking-Driving Behavior: A Review of the Literature and a Recommended Methodology (Ottawa, Ontario, Canada, Ministry of Transport, Road and Motor Vehicle Traffic Safety Office, 1974).

3. A. C. Wolfe, 1973 U.S. National Roadside Breathtesting Survey, supra note 2, at 28.

4. R. J. Lehman, A. C. Wolfe, and R. D. Kay, A Computer Archive of ASAP Roadside Breathtesting Surveys, Final Report, 1970-1974 (University of Michigan, Highway Safety Research Institute, 1975).

5. Robert F. Borkenstein, A Proposal for Increasing the Effectiveness of ASAP Enforcement Programs (unpublished, October 17, 1972).

6. To make these estimates, it was necessary first to estimate the number of control cases that would have occurred during the midnight to 3:00 a.m. time period if we had analyzed all cases (rather than just a sample) in which no drinking-driver was involved. We used two different procedures. In the first procedure, we multiplied the two cases observed in our control sample by the sampling fraction of 5.5 to arrive at an

SECTION I NOTES

53
Notes

estimate of 11 cases. This estimate was then used to produce the 77% estimate. Since the number of cases involved was small, we realized that our estimate would be subject to substantial sampling error. To determine if this estimate was reasonable, we worked backward from other data to arrive at a second estimate. We took the percentage of all nonfatal injury accidents occurring between midnight and 3:00 a.m. We multiplied this number by the total number of serious injury accidents to arrive at an estimate of the number of serious injury accidents occurring in that time period. Such a procedure makes the unproved assumption that serious injury accidents are distributed across time in the same proportion as all nonfatal accidents. This estimate was then used to generate the 88% estimate.

Because we arrived at roughly the same estimate from two directions, making different assumptions, we are satisfied that our estimate is sufficiently accurate to make the point we wish to make, i.e., that a serious injury accident occurring between midnight and 3:00 a.m. will probably involve a drinking-driver.

7. These percentages were computed from data presented in R. J. Lehman et al., A Computer Archive of ASAP Roadside Breathtesting Surveys, supra note 4, pp. C-82 and C-83, so as to include only those respondents who indicated they had been drinking.

8. This point is discussed in Alcohol and Highway Safety: A Review of the State of the Knowledge, supra note 1, at 29.

9. For an example of such an attempt, see Alcohol and Highway Safety: A Review of the State of the Knowledge, supra note 1, at 14.

10. These are 1980 amended figures included in a 1977 report by the Hennepin County [Minn.] Alcohol Safety Action Project titled One Proposal for Program Financing a Tax on Liquor by the Drink (unpublished).

11. This problem and some proposals for dealing with it are discussed in Robert Force, "The Inadequacy of Drinking-Driver Laws: A Lawyer's View," Proceedings of the 7th International Conference on Alcohol, Drugs and Traffic Safety, pp. 438-461 (Melbourne, 1977).

54

II. THE USE OF THE CRIMINAL JUSTICE SYSTEM AS A RESPONSE TO THE DRINKING-DRIVER IN MADISON

In Wisconsin, as elsewhere, primary dependence has been placed on the criminal justice system in efforts to control the drinking-driver. And as is true with all forms of behavior that we have sought to deal with through the criminal law, our dependence has been based on an assumption about its deterrent value; that driving after drinking would be prevented by the threat of punishment.

In the 1970s, as efforts to reduce the number of drinking-drivers intensified, support grew for other approaches to the problem--for treating those who are alcoholics and drive, for schooling drivers on the effect that alcohol has on one's ability to drive, and for directing educational campaigns not just at offenders, but at the entire community. School and rehabilitation programs, however, were implemented primarily through the use of the criminal justice system. The emphasis remained on enforcement as a way of identifying intoxicated drivers, but with provisions whereby a person arrested for driving while intoxicated was encouraged, under threat of fine, revocation, or jail, to accept treatment or schooling--whichever was considered more appropriate. Thus, although new approaches have been introduced, primary dependence nevertheless continues to be placed on the criminal justice system as a response to the drinking-driver problem.

Wisconsin adopted these new approaches in 1978. (Chapter 193, 1977 Wis. Laws.) Under the legislative scheme, upon conviction for operating a vehicle while under the influence of an intoxicant (OWI), a judge could, with the person's consent, order that an offender be assessed to determine if he or she had an alcohol problem in need of treatment. If the assessors concluded that treatment was warranted, they would develop a rehabilitation plan and submit their recommendations to the court. Treatment, if agreed to and completed, could then be substituted for the 90-day revocation and all but $100 of the fine for first offenders. In the case of second offenders, it could be substituted for all but 90 days of the one-year revocation and all but $250 of the fine. If a judge were to determine that an assessment was not needed (which is most often the case), the offender would be given the option of attending a school (referred to as Group Dynamics) at which the problems associated with drinking and driving are explored. Like treatment, Group Dynamics can be substituted for all but the minimum sanctions.

55

In addition to this major effort to use the criminal justice system as a way of coercing offenders into treatment or schooling, the statute enacted in 1977 made several other important changes in Wisconsin law. Among its major features:

- All drivers were deemed to have consented to tests to determine the presence and quantity of alcohol or controlled substances in their blood (the so-called implied consent provision).

- Police officers, if they had probable cause to believe a person was driving while intoxicated, were authorized to request the person to take a preliminary breath test.

- If a driver refused the request of an officer to take the preliminary breath test or to provide a sample of breath, blood, or urine in the subsequent evidentiary test, the driver was to be charged with a separate offense for having refused the test and was subject to a period of revocation in excess of that specified for OWI.

- A BAC of .10 or higher was made prima facie evidence that a driver was under the influence of an intoxicant, thereby eliminating the need for corroborating evidence.

With the adoption of these provisions and with the development of assessment procedures, Group Dynamics schools, and treatment programs, both the city of Madison and the state of Wisconsin were recognized nationally as being in the forefront in responding to the drinking-driver problem.

In the intervening years, however, the opportunity to substitute school and treatment for punishment has been subject to increasing criticism. As a consequence of this criticism and an effort to deal more firmly with the drinking-driver, in the summer of 1981 the Wisconsin legislature amended the laws relating to drinking and driving. The new penalty structure, which will go into effect May 1, 1982, mandates, among other provisions, suspension in the case of the first offender and a minimum jail sentence of five days for the second offender. There is no opportunity, as is currently the case, to reduce these portions of the sentence through attendance at school or enrollment in a treatment program. [Wis. Stat. §§ 343.30(1q) and 346.65, ch. 20, 1981 Wis. Laws.] But the new statutes recognize education and treatment as elements in the total system for responding to the OWI, requiring that all convicted offenders be assessed. If

56

assessment results in a recommendation for school or treatment, the driver will be required to complete the prescribed program under threat of suspension of the driver's license by the Department of Transportation for failing to do so. [Wis. Stat. §§ 343.30(1q)(c) and 343.305(9)(c), ch. 20, 1981 Wis. Laws.] With the adoption of these provisions, the Wisconsin legislature has given new emphasis to the use of the criminal justice system as the primary means for dealing with the drinking-driver.

In this section, which is divided into two subsections, we examine in detail the use being made of the criminal justice system in responding to the drinking-driver in Madison. In subsection A, we describe, in chronological order, the actual experience and results of processing intoxicated drivers through arrest, prosecution, adjudication, and sentencing. The description, however, is not complete. Because many of the steps are routine, we have chosen to highlight, based on the overall understanding we have acquired, those points that we believe to be most significant to an understanding of how the system works and that have special importance as they relate to proposals for developing a more effective response to the problem. In subsection B, we reflect on the limitations and effectiveness of the system, based primarily on the data presented in subsection A.

All of the data were collected before the legislature acted in July 1981 to amend the statutes relating to the drinking-driver. The changes, most of which become law in May of 1982, will have some effect on practically every one of the stages in the process described and analyzed here. It was initially hoped that the results of this study could be used in critiquing and perhaps influencing the amendments when they were in draft form. But the speed with which they were enacted made that impossible. Although we regret this, we feel that the value of the data collected and analyzed in this section, based on statutory provisions that have now been amended, has not been diminished. From our study of the new legislation and from our more ambitious effort to analyze the use of the criminal law in dealing with the problem of the drinking-driver, we feel that the detailed analysis of current operations points to problems that should be anticipated in implementing the new provisions and identifies problems that are likely to remain--and perhaps grow more aggravated--after the changes go into effect. Most of our references are to existing provisions of the statutes, but we have occasionally inserted a brief description of some of the new provisions--especially where a new provision clearly will eliminate some difficulty currently being experienced.

57

A. The Processing of Cases Through the System

1. Madison police officers are, relatively speaking, already arresting a high volume of persons on a charge of Operating While Intoxicated.

In 1979 (the most recent year for which comparative data are available for Wisconsin cities), Madison police charged 1,203 persons with OWI. This amounts to 691 arrests per 100,000 population. The similar arrest ratio for Milwaukee was 382; Racine, 397; Green Bay, 168; and Kenosha, 371.[1]

The Madison Police Department compares favorably with other police departments across the country also. In a survey of available police statistical reports, the Madison Police Department's arrest rate per 100,000 population was one of the highest. (See table II-A-1.1.) These comparisons are limited in their significance in that they do not reflect such variables as the percentage of citizens who drive, the number of suburban commuters, and the number and jurisdiction of police agencies within the community. Nevertheless, as a rough measure, the data clearly indicate that the Madison Police Department is placing a comparatively high priority on arresting intoxicated drivers.

58

Table II-A-1.1

OWI Arrest Rates
Selected U.S. Jurisdictions--1979

City	Number of OWI Arrests[2]	Population (1978 estimate)	Rate/100,000 Population
Los Angeles, Calif.	35,398	2,787,000	1270
Denver, Colo.	4,929	475,000	1038
Portland, Oreg.	3,679	365,000	1008
MADISON, WIS.	1,203	170,000	708*
Columbus, Ohio	3,264	524,000	623
Washington, D.C.	3,555	671,000	530
Ft. Lauderdale, Fla.	748	149,000	502
St. Louis, Mo.	2,331	504,000	463
Tacoma, Wash.	724	157,000	461
Hollywood, Fla.	469	115,000	408
Cincinnati, Ohio	1,621	399,000	406
Detroit, Mich.	4,875	1,258,000	388
Hialeah, Fla.	468	125,000	374
St. Paul, Minn.	945	263,000	359
St. Petersburg, Fla.	826	231,000	358
Buffalo, N.Y.	981	379,000	259
Akron, Ohio	609	239,000	254
Omaha, Nebr.	816	368,000	222
Cleveland, Ohio	692	595,000	116

* The computation of Madison's arrest rate in this table uses the population estimate drawn from the listing of such estimates for all cities. The 691 per 100,000 rate reported in the text is more accurate.

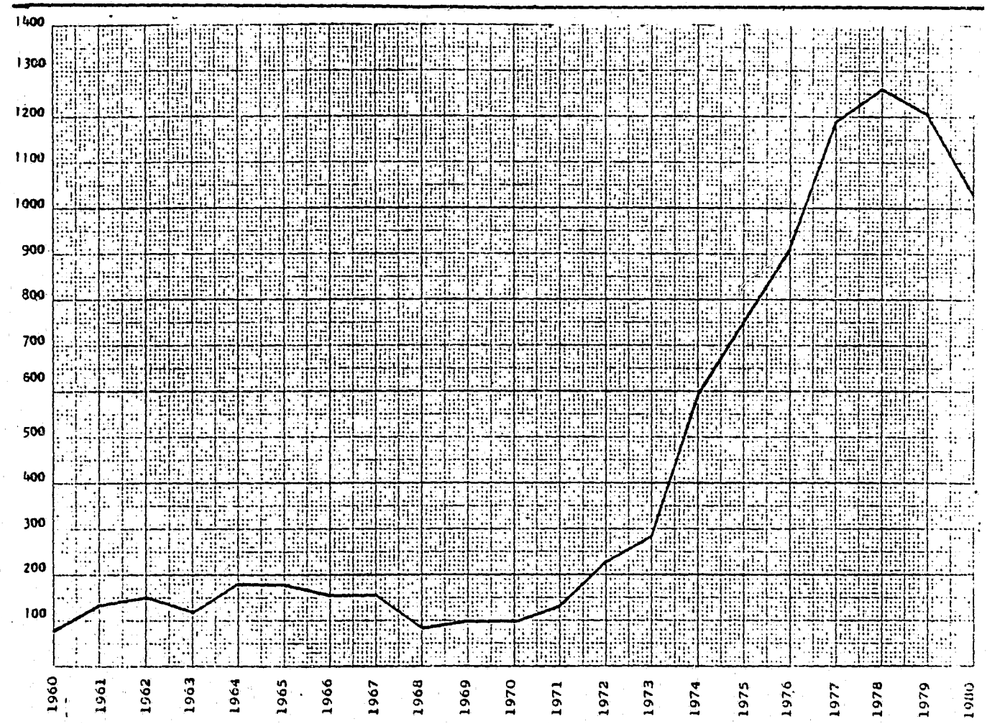
The arrests that are made do not reflect the total enforcement effort of the Madison Police Department. Many drivers are stopped on suspicion of driving while intoxicated, screened in various ways, and released. Practices of officers vary a great deal on the number of such contacts, the methods used in screening, the criteria employed in deciding whether to make an arrest, and the alternatives used to prevent a driver from continuing to drive if the driver appears somewhat impaired but is not arrested. These varied practices will be examined in detail in a later section of this report.

59

2. The number of arrests for OWI climbed dramatically in the 1970s, but has decreased in the past two years.

Figure II-A-2.1

Number of OWI Arrests[3]
Madison, Wisconsin, 1960-1980



In 1968, the department arrested only 81 persons for OWI. The highest number of arrests prior to that was in 1964, when 180 persons were arrested. The dip in the years between 1967 and 1971 was possibly attributable to the amount of police time devoted to the handling of antiwar demonstrations and the tensions that developed between the police and some segments of the community. In 1971, the number of OWI arrests began to climb dramatically, with tremendous increases in each year between 1974 and 1977.

60

In 1977, when the number of arrests climbed beyond 1,000 for the year, Chief Couper was reported in the press to have made this comment to the Police and Fire Commission:

> "I was concerned over the low number of drunk driving arrests for a city this size when I came here (1973), but I've never had to issue a departmental order to enforce this law. There's been no fanfare.
>
> "There has been a real emphasis, a growing grassroots emphasis in the patrol division to do something about drunk driving. And these aren't borderline cases. The officers are getting convictions. These are flagrant abuses."[4]

The number of arrests in Madison peaked in 1978--which was the year when, elsewhere in the state, they began to climb as a result of legislation that, through use of an implied consent provision, required drivers to take BAC tests and made a .10 BAC evidence per se of intoxication. The number of arrests dropped off somewhat in 1979 and again in 1980. Department personnel generally attribute the drop to an increase in demands for police service while the authorized strength of the department remained fixed and the actual number of officers on the street fell below the authorized level due to delays in filling vacant positions.

61

3. When the total number of arrests declines, the decline occurs primarily in proactive arrests.

Police arrests occur, for the most part, under one of two circumstances: (1) proactively, when police take the initiative in stopping a driver after witnessing erratic driving behavior and (2) reactively, when investigating an accident. One would expect the number of arrests in accident cases, in which external factors heavily influence police actions, to remain rather stable; and any fluctuation in the total number of arrests to occur primarily in proactive arrests, which are much more dependent on the availability and initiative of individual officers.

When the volume of arrests dropped off in 1979, the drop occurred primarily in the number of proactive arrests. In March of 1979, for example, 73% of all OWI arrests were proactive. In March of 1980, only 64% were proactive. In 1980, proactive arrests accounted for 57% of all arrests. In the three months with the fewest number of arrests, the percentage of arrests that were proactive fell to between 51% and 53%. An examination of arrest activity for each month of 1980 (presented in table II-A-3.1) indicates some variation in this general pattern.

62

Table II-A-3.1

OWI Arrests by Month and Type of Arrest

(Madison, Wisconsin, OWI Citations 1980)

	Proactive	Reactive/Accident	Total
January	68 (71%)	28 (29%)	96
February	55 (60%)	37 (40%)	92
March	59 (64%)	33 (36%)	92
April	64 (66%)	33 (34%)	97
May	37 (44%)	48 (56%)	85
June	58 (66%)	30 (34%)	88
July	39 (53%)	35 (47%)	74
August	36 (51%)	35 (49%)	71
September	36 (53%)	32 (47%)	68
October	54 (57%)	41 (43%)	95
November	40 (48%)	44 (52%)	84
December	40 (49%)	41 (51%)	81
Total	587 (57%)	436 (43%)	1023

Many factors, such as weather conditions or the reassignment of officers, are likely to influence the balance between proactive and reactive arrests. But from our interviews, it appears that officers attach greater importance to detecting alcohol involvement in accidents than they do to making proactive OWI arrests. The feeling among some officers is that involvement in an accident is a stronger justification for an arrest than simply erratic driving behavior. In two-car accidents, observation by one driver of the intoxicated condition of the other creates pressure on a police officer to take action. If, in fact, an informal department norm places higher priority on arresting for OWI in accident situations than on making proactive arrests, both the total number of citations and the balance between proactive and reactive arrests would obviously be affected.

63

4. Proactive police efforts result in the arrest of drinking-drivers with BAC levels that are almost always above .13.

The BAC levels were obtained for all persons arrested for OWI in a 1980 four-month sample. The results of that inquiry, for proactive arrests, are presented in table II-A-4.1. Ninety-one percent of the tested drinking-drivers were found to have BACs of .13 or higher.

Table II-A-4.1

Arrestee BAC Levels--OWI Proactive Arrests

(Selected Months, Madison, Wisconsin, 1980)

	March	June	Sept	Dec	Total
BAC Level					
Less than .049	1 (2%)	0	0	0	1 (1%)
.05 - .099	1 (2%)	1 (2%)	2 (7%)	0	4 (2%)
.10 - .129	3 (6%)	3 (7%)	2 (7%)	2 (6%)	10 (6%)
.13 - .199	29 (57%)	23 (50%)	15 (50%)	17 (50%)	84 (52%)
.20 +	17 (33%)	19 (41%)	11 (37%)	15 (44%)	62 (39%)
Total tests	51 (100%)	46 (100%)	30 (100%)	34 (100%)	161 (100%)
Refusals	8	12	5	6	31
Total citations	59	58	35*	40	192

* One case in which the record of BAC was not legible is excluded from September.

These findings reflect an informal department norm regarding proactive OWI enforcement. Officers noted that persons who test below the .13 BAC are certainly not exempt from arrest, but that, over the years, the .13 level has become an informal threshold for a "good" proactive arrest. An officer who brings in a driver who tests lower than .13 tends to be somewhat apologetic, but is not ridiculed since it is recognized that many other factors might justify the arrest. An officer who repeatedly brought in persons who tested below .13 BAC, however, would be thought to be either overly concerned with minor offenders or a poor judge of levels of intoxication. One officer described current attitudes in this manner:

64

> [T]here is "social praise" within the department for officers who are good at estimating the degree of intoxication and who will bring in people who read high on the breathalyzer.[5]

Arrest practices, aimed as they are at offenders with a BAC of .13 or above, mirror the policies of the city attorney and district attorney. In first offender cases, the city attorney usually offers a charge reduction to Reckless Driving if the breathalyzer reading is .12 or less. The policy is explained as recognizing the potential for minimal error in the operation of the test equipment. The district attorney's office, in prosecuting repeat offenders, has a policy of no charge reductions in cases with a BAC reading above .13. Indeed the office will not reduce a charge even if the BAC is .05 if they have a provable charge. In cases with a BAC reading between .10 and .13, the district attorney's office will consider a charge reduction if it appears that corroborating evidence may be insufficient to ensure conviction. [Intra-office Memorandum, April 19, 1977.]

Thus, both the informal department norm and the policies of the two prosecutors' offices emphasize enforcement in cases in which the BAC level is above .13.

65

5. The number of arrests made by officers varies a great deal.

In 1980, 151 members of the Madison Police Department made one or more arrests for OWI. Most of the arrests were made by patrol officers, but some were made by patrol supervisors and officers in other divisions. With a total authorized strength of 299 sworn officers in the department at the end of 1980, approximately 50 percent (acknowledging some unfilled positions) of the members of the department initiated an OWI arrest. The actual involvement of police officers in arrest activity was much greater since each arrest requires a second officer to assist and usually a third officer to administer the breathalyzer test.

The number of arrests initiated by the 151 officers is presented in table II-A-5.1.

Table II-A-5.1

Number of OWI Arrests by Number of Officers
Madison, Wisconsin--1980

No. of Arrests	No. of Officers
1 - 4	75
5 - 9	36
10 - 14	22
15 - 19	10
20 - 24	3
25 - 29	4
30 - 34	1

Twenty-five of the 151 officers made all of their OWI arrests as a result of an accident investigation. Twenty-two of these officers made a total of 1 to 4 arrests, and 3 officers made 5 arrests each. In contrast, 12 officers made 18 or more arrests, most of which were the result of proactive activity. The arrests for these most active officers are broken down into proactive and

Table II-A-5.2

Type of Arrest (Proactive or Reactive) for Officers Making Eighteen or More Arrests Madison, Wisconsin--1980

Officer	Proactive	Reactive	Total Arrests
A	23 (74%)	8 (26%)	31
B	17 (61%)	11 (39%)	28
C	18 (67%)	9 (33%)	27
D	19 (76%)	6 (24%)	25
E	22 (88%)	3 (12%)	25
F	13 (54%)	11 (46%)	24
G	13 (57%)	10 (43%)	23
H	15 (71%)	6 (29%)	21
I	10 (53%)	9 (47%)	19
J	13 (72%)	5 (28%)	18
K	16 (89%)	2 (11%)	18
L	11 (61%)	7 (39%)	18
Total	190 (69%)	87 (31%)	277

These 12 officers in table II-A-5.2 made 27% of the department's total OWI arrests in 1980 (277 of 1,023). They made 32% of all proactive OWI arrests (190 of 587 proactive arrests).

The officers who make the largest number of arrests uniformly express a great deal of concern for the drinking-driver problem. In addition, 11 of the 12 officers with 18 or more arrests were assigned to the fourth detail, i.e., the shift when the greatest number of drinking-drivers is thought to be on the streets. The reasons for little or no OWI enforcement, particularly for officers assigned to the fourth detail, are less clear. It may be due to any one of several quite different factors: e.g., a much lower sense of priority, a distaste for contact with intoxicated drivers, empathy for the drinking-driver, a lower overall level of productivity, or the beat to which they are assigned. On the other hand, several persons interviewed speculated that some officers may make OWI arrests to take themselves off the street. It is difficult to sort out these factors, but it is important to bear them in mind in any discussion of the variation in arrest rates among officers and the meaning of that variation.

6. A decision to arrest for OWI currently commits the officer and the assisting officer to from one to two hours of processing. The length of this period has a profound effect on the department's OWI enforcement activity.

What is involved in making an OWI arrest? On stopping a person suspected of OWI, an officer first asks to see the driver's license, observing the manner in which it is produced and being alert for the smell of alcohol. The officer may ask several questions, noting in the replies any slurred speech or lack of coherence associated with intoxication. If the officer's suspicion remains after both questioning and observation, the officer will tell the driver the reason for the stop and request the driver to get out of the car and to through several movements and exercises. Designed to measure reaction time, coordination, and mental capacity, these exercises are collectively referred to as the field sobriety test.[6] (Madison is not currently utilizing portable breath testing equipment for the screening of drivers.) If the officer has not yet decided to make an arrest, he or she will decide as a result of the field sobriety test. If the decision is to arrest, the officer will return to the police vehicle to complete a citation. (Some officers delay completing the citation until later in the process.) By this time, the officer will have obtained the driver's past driving record, which will determine if the individual is to be charged on a city (first OWI offense) or state (second or more OWI offense) charge.

The driver is then notified that he or she is under arrest for OWI and must accompany the officer to the station for a breathalyzer test. The driver's vehicle will be secured at the scene or turned over, with the driver's permission, to others in the car who are deemed to be capable of driving. A second officer will have been summoned to accompany the arrestee. Standard procedure requires that the second officer sit alongside the arrestee during the drive to the station, leaving the second police vehicle secured at the scene (to which the second officer must then be returned). In practice, the second officer usually drives behind the first vehicle, with the interior of the first vehicle lighted so that the movements of the arrestee can be observed.

Occasionally the officer assigned to assist is trained in the use of the breathalyzer, thereby minimizing the number of officers tied up in the processing of the arrestee. But more

68

commonly, a third officer--either in the station or brought in from the field--administers the breathalyzer test. The arresting officer completes several forms, notifies the arrestee of the requirement that a test be taken and of the consequences of refusal, and asks if the arrestee agrees to the test. Depending on the degree of intoxication and the attitude of the arrestee toward the test, a substantial amount of time may be consumed in gaining the cooperation of the arrestee and in explaining the process before the arrestee either refuses the test or submits to it. If there is a refusal or if the test is taken and the results are deemed to warrant prosecution for OWI, the Miranda warnings are given and there is further questioning and completion of arrest and booking forms.

In all, the process currently requires the completion of four forms or five if there is a refusal. If the arrestee then meets the criteria that authorize release without jailing, he or she will be released if there is a lawyer, spouse, relative, or responsible adult in whose custody the arrestee can be placed. Waiting for such individuals to arrive may further delay the process. If not released in this fashion--due to the absence of such an individual or anticipated delay in arrival--the arrestee must be taken upstairs for booking into the Dane County jail.

Officers in Madison estimate that it takes them from one to two hours to complete this process. Our own observation of the process confirms this estimate. In a recent study of the arrest procedures of eight different police departments, it was found that the average processing time was 91 minutes. The agency with the shortest processing time took an average of 58 minutes, and the agency with the longest time took an average of 134 minutes.[7] If the arrest grows out of an accident, as many do, the time of processing must be added to that consumed in investigating the accident, arranging for the care of the injured, clearing wreckage, and restoring normal traffic. In Madison, the length of processing time is influenced most directly by the distance from the arrest to the station; the cooperation of the arrestee in providing information and in deciding whether to submit to the breathalyzer test; and most importantly, the number of people waiting to be booked into the jail. Officers have described cases in which their arrestee was sixth in line to be booked into the jail.

The procedure has been described in detail because it has a profound effect on OWI enforcement activity. For officers, a decision to arrest for OWI means leaving their beat for up to two hours; making themselves unavailable for other unpredictable calls

69

that may be more important, interesting, or challenging; tying up another officer, who may not be equally motivated to work on OWI, for an equal period of time; reducing the amount of backup available to officers in surrounding beats who might be endangered and need assistance; requiring that officers in surrounding beats handle calls that would otherwise be directed to the arresting officer; and if near the end of a shift, possibly requiring overtime work. To the extent that officers respond to urgings that they engage in certain preventive activities while patrolling (e.g., being alert for signs of breakins, suspicious conduct, disorderliness on the street, etc.), an OWI arrest takes time away from such activities.

The impact such factors have on OWI arrest activity is reflected in these notes from our interviews with police officers.

> He claims there is no way to work on the OWI problem at bar time. He himself did not make any arrests at that time. Officers have their own rules about when they let themselves out of service. Before making an OWI arrest, they consider whether there is a buddy who might get hurt because they are out of service.[8]

> Her decision to arrest depends heavily on whether there is much on the street that requires police attention. If she feels that she is very much needed to respond to calls for help and to assist other police officers, she may release a drinking-driver, insisting he or she walk to his or her destination, even though she realizes that the driver may meet the criteria for an arrest.[9]

It was pointed out to us that, for some officers, the time consumed in processing an OWI case may actually be an incentive to make arrests; that this is a way to avoid regular duties and to accumulate overtime pay.

For supervisors and radio dispatchers, an OWI arrest means that officers remaining in the field must be deployed more carefully to ensure adequate coverage of routine calls and possible emergencies.

The length of the process also has its impact on the arrestee. Although not intended as such, we know that the process itself is viewed as part of the sanctions associated with the offense. It is time consuming and disruptive. It curtails the freedom of the individual. And however courteous the officers may be, it is generally recognized as demeaning.

70

Indeed, for some the degradation associated with police processing is viewed, after conviction, as the most negative punitive aspect of the whole experience. The longer it lasts, especially if it includes jail, the greater its impact is likely to be. Because of the uncertainty about the value of criminal prosecution as a deterrent to OWI, we know that some people, including police officers, feel that the length of the process is a plus; that police processing may hold more potential for deterring the offense than full prosecution.

But no one has seriously suggested that the department lend support to a system of summary punishment. To the contrary, the other factors cited create pressures to develop methods by which the time and personnel required for processing can be reduced. In the past, the department sought to achieve this goal by having enough trained officers in the field so that the officer assigned to assist on an OWI arrest could also operate the breathalyzer, but the number of such trained officers has decreased over the years. The recently instituted arrangement whereby some arrestees are released at the police desk, eliminating the need for jail booking, greatly reduces the amount of time consumed on an arrest. Currently, the acquisition of new testing equipment (the intoximeter) is being justified, in part, by the predicted saving in processing time. It is estimated that it will reduce the amount of time consumed in actual testing from approximately 18 minutes to 2 minutes. Moreover, the current necessity of having a second officer administer the breathalyzer to ensure objectivity will be eliminated because the intoximeter is not subject to operator interpretation as is the breathalyzer. Some officers have suggested that additional time could be saved by installing protective partitions in squad cars, thereby eliminating the need for the assistance of a second officer in transporting the arrestee to the police station.

Clearly, efficiency, effectiveness, and a commitment to fair treatment of persons at this critical stage in the process require that a continuing effort be made to reduce the amount of time taken in the processing of OWI arrests.

71

7. The sanction provided for refusal to take a BAC test, although rarely imposed, has nevertheless been achieving the legislature's ultimate objective, which is to facilitate the conviction of those with BAC in excess of .10.

Under the statute enacted in 1977 and in effect at the time of this study, the only justification a driver has for refusing to take a test after being placed under arrest is if the driver believes (1) there was not probable cause for the arrest, (2) the officer did not give proper notice, or (3) the driver could not physically blow into the breathalyzer because of a medical disability. If a driver refuses to submit to the test, the officer must immediately inform the driver that his or her license may be revoked for from six months to one year and that a request can be made for a refusal hearing, on the separate charge of refusing to submit to the test, to be held before the court appearance on the OWI charge. The charge of refusing the test is added to the charge of driving while intoxicated.

If a refusal hearing is requested, it is conducted before the court by the same judges who try OWI cases. After the hearing, the judge may order that no action be taken if one or more of the issues at the hearing are determined favorably to the accused driver; may order optional assessment or attendance at Group Dynamics School; or may revoke the driver's license.

If a driver submitted to the test and is convicted, the driver's license will be revoked for, at the most, three months--and this can be avoided in its entirety through completion of rehabilitation or Group Dynamics. By making the refusal a separate offense and by providing that it lead to a six-month revocation (which can be reduced by three months upon successful completion of rehabilitation or Group Dynamics School), the legislature sought to encourage submission to a test.

In Madison, 18% of the persons arrested for OWI, in a sample of four months of 1980, refused to take a test. A much higher percentage of those charged as second offenders (31%) refused, compared with first offenders (13%).

72

Table II-A-7.1

BAC Refusals by Offender Status

(Selected Months, Madison, Wisconsin, 1980)

	March		June	
	First Offense	Second Offense	First Offense	Second Offense
Refused	9 (13%)	5 (24%)	10 (16%)	9 (36%)
Took test	62 (87%)	16 (76%)	53 (84%)	16 (64%)
Total	71	21	63	25

	September		December		Total	
	First Offense	Second Offense	First Offense	Second Offense	First Offense	Second Offense
Refused	7 (16%)	7 (35%)	5 (8%)	5 (26%)	31 (13%)	26 (31%)
Took test	38 (84%)	13 (65%)	57 (92%)	14 (74%)	210 (87%)	59 (69%)
Total	45	20	62	19	241	85

73

As is true elsewhere in the state, it is the prevailing practice of the district attorney, approved by the Dane County judges and supported by the city attorney, to offer to drop the charge for refusing to take a test in exchange for an agreement not to contest the OWI charge. The offer is almost always accepted. In March of 1980, for example, 11 of the 14 persons who refused a test subsequently agreed to such an exchange. Only three persons requested a refusal hearing. One defendant's claims were not sustained, resulting in the imposition of a six-month revocation. One defendant's claims were sustained, but he was nevertheless convicted of the OWI charge resulting in jail time. The result of the remaining defendant's refusal hearing was not yet available.

Persons who refuse to take a test appear to receive a slightly higher fine than those who do not, but it is not entirely clear if the more severe sanction is exclusively the result of the refusal or of other characteristics of the offender (e.g., past record, use of alcohol) that tend to coincide with the inclination to refuse.

Some Madison police officers would agree with those who have criticized the bargaining arrangement that has evolved for dealing with refusals. They feel strongly that it is an abuse that should be curtailed; that if the practice is not eliminated, it will encourage a greater number of refusals and make enforcement of OWI more difficult. In addition, many officers feel that the refusal is in itself a separate offense (i.e., failing to cooperate) and that such an additional offense should subject to additional sanctions the driver who refuses.

Based on the Madison experience, the person who refuses a test has no basis for bragging that his or her likelihood of conviction is reduced. A decision to refuse has led as directly to a conviction as a decision to submit to a test. One could in fact argue the opposite; that a decision to take the test at least leaves open the possibility of a low BAC result which, in turn, could lead to a decision to drop or reduce the OWI charge.

The district attorney, from a somewhat different perspective, defended the current practice in this manner:

> The purpose of the test, in my opinion, is to give evidence to the state. If the individual does not provide the evidence, the intent of the legislature is that the person be punished for not cooperating. But if the individual subsequently enters a plea of guilty, I see this as correcting the individual's lack of cooperation--giving the state what it wants so that it can achieve the same result.[10]

74

Such a position seems convincing from the perspective of the criminal justice system as a whole. From the perspective of the police, the change of heart by the accused does not erase the failure to cooperate.

In Minnesota, a separate administrative procedure is followed against those who refuse a test. The refusal charge is prosecuted by the Department of Motor Vehicles in the courts. The attorney general's office, which represents the department, nevertheless routinely offers to drop the refusal proceeding if the individual is willing to enter a plea of guilty to the OWI charge prosecuted by local officials. Thus, although the structure in Minnesota for handling refusals differs from that used in Wisconsin, the nature of the bargains appears to be essentially the same.

75

8. Most persons arrested for OWI spend some time in jail between arrest and arraignment.

When discussed in the public forum, a strong argument is often made for increased jailing of those who drink and drive. As will be noted later, relatively few persons who are convicted of OWI--in Madison and elsewhere--are sentenced to jail. In thinking about incarceration as part of the sentence for driving while intoxicated, we tend to overlook the fact that the majority of persons arrested for OWI do spend time behind bars--albeit for a very short period of time. Some of the factors that determine whether the arrestee is booked into the jail were discussed above. Given the policies and practices in effect at the time, table II-A-8.1 shows the length of prearraignment incarceration of those persons arrested for OWI in March of 1980.

Table II-A-8.1

Jail Time Between Arrest and Arraignment by Offender Status

(Madison, Wisconsin, OWI Arrestees--March 1980)

Time in Jail	First Offenders	Second + Offenders	Total
No jail	21 (30%)	0	21 (23%)
Less than .5 hrs.	7 (10%)	4 (19%)	11 (12%)
.5 - 1.5 hrs.	20 (28%)	4 (19%)	24 (26%)
1.5 - 4 hrs.	1 (1%)	0	1 (1%)
4 - 7 hrs.	11 (15%)	7 (33%)	18 (20%)
7 - 12 hrs.	9 (13%)	3 (14%)	12 (13%)
12 - 24 hrs.	0	0	0
24 - 48 hrs.	0	1 (5%)	1 (1%)
48 - 72 hrs.	1 (1%)	0	1 (1%)
72 + hrs.	0	1 (5%)	1 (1%)
Unknown	1 (1%)	1 (5%)	2 (2%)
Total	71 (100%)	21 (100%)	92 (100%)

CONTINUED

1 OF 3

76

Because of jail overcrowding and the desire to reduce the amount of time required of each police officer in processing, the department has attempted, since January 1980, to maximize the number of first offenders released directly from the police station. In March 1981, 38 percent of the first offenders were released without being booked into the jail.

We have the impression that prearraignment jailing significantly affects some persons who go through the process. We have only anecdotal evidence to support this impression and are uncertain as to the specific nature of the effect, especially as it relates to future OWI conduct. As best we can understand the phenomenon, the experience of being jailed jars arrestees, who may remain somewhat blase through the earlier police processing, into realizing the seriousness of their conduct. Suddenly they realize that the police have been authorized by the community to place them behind bars. Having made this observation, we note again that the current policy of the department is to reduce to a minimum the need for prearraignment detention.

77

9. Once arrest occurs, the decision to charge is fairly routine in proactive, first-offender OWI cases. Repeat offenders, however, are not routinely charged as repeat offenders if the earlier cases against them are still pending, thus creating the potential that those whose conduct most warrants intervention will not be dealt with effectively.

In contrast with the broad discretion exercised in the decisions leading up to arrest, the processing of a proactive OWI case, once arrest occurs, proceeds rather automatically. If a check of the arrestee's driver's record indicates a prior conviction for OWI within the past five years, the arrestee is charged with a state charge.[11] If not convicted of OWI in the past five years, the driver is charged as a first offender under the city ordinance.[12] The state charge is also recorded on the citation in city cases. but it is automatically dropped unless it is subsequently discovered that the offender did have a prior OWI conviction. If a Madison officer happens to arrest a person for OWI on a roadway outside the city limits, the driver is charged, even as a first offender, with the state charge. The case of a first offender charged in this manner, however, is processed through the district attorney's office and the courts as part of the civil rather than criminal docket--the same procedure used for first offenders arrested by the state patrol.

Cases involving a city charge are not reviewed by the city attorney's office prior to arraignment. Since late 1979, however, a written complaint has been required in all state criminal cases. This has resulted in a two-tier screening of all charges involving second offenders. The assistant district attorney assigned to issuing complaints reviews these cases. Prior to this review, they are reviewed by a detective whose job is to represent the department in presenting cases to the district attorney's office. Only one or two OWI cases will be dismissed or reduced in a typical month as a result of this new screening, but the number of contacts the screening officer has had with arresting officers makes it clear that the review has resulted in more careful preparation of cases.

A major problem currently is that the computer-produced driver's record, on which the officer depends for deciding on the charge, does not reveal if individuals have other charges pending against them that have not yet been adjudicated. If the offender's license was posted as bail when first arrested, the receipt for the license that the offender presents to the arresting officer might prompt an inquiry to determine if other OWI charges are pending. Routine processing of the arrest through

78

the Madison department might bring pending OWI arrests in Madison to the attention of officers, but present procedures do not guarantee this. And it is very unlikely that arrests made elsewhere in the state for OWI will become known. But even if known, information about other OWI charges that are pending cannot be used to upgrade the charge, because charging a person as a second offender requires a prior conviction.

Thus, a person charged, but not yet tried, for two or more OWI offenses--especially if the charges originate in different jurisdictions--may avoid becoming subject to the more serious sanctions established for repeat offenders. If the other OWI charges become known, some judges contend that, with conviction for the first offense, the second charge should be amended upward to reflect the prior conviction. Others, however, contend that such processing would be faulted, since the individual, at the time he committed the second, third, or subsequent offense, was not formally on notice--absent a conviction on the first offense--that he or she was subject to an increased sanction. For this reason, some judges accept a simultaneous plea to two or more accumulated charges--all as city offenses. (For a new development on this point, see State v. Banks, 105 Wis.2d 32, 313 N.W.2d 67 (1981), in which the Wisconsin Supreme Court held that the criminal penalties are applicable on a second offense even if the second offense was committed prior to conviction on the first offense.)

The most serious consequence of this complication is that the current system is rather inept in dealing with the individuals who go on a "binge" and, in a short period of a few days, weeks, or months, drive in an increasingly dangerous and irresponsible manner. They may come to the attention of several police officers in one or more police agencies, but the slowness with which each charge is processed--even under the best of conditions--prevents them from being singled out for attention. There currently appears to be no way in which to intervene in such a predictable pattern of driving while intoxicated as it increases rapidly, from day to day, in its seriousness and the potential danger it poses to the community.

The problem created by not making systematically available to the police the information regarding pending cases is dramatically illustrated by the complex case of a third-time offender from our March 1980 court sample.

This individual was first convicted of OWI on November 14, 1975. He was next arrested for OWI on October 26, 1979, and was charged as a repeat offender

79

because his driver's record indicated the 1975 conviction. Before this case could be resolved, he was arrested a third time for OWI on March 20, 1980, and again charged as a repeat offender. Both the second charge (November 1979) and the third charge (March 1980) were resolved together on November 5, 1980, and the defendant was sentenced under the penalty structure for third-time offenders. Up to that point, the system operated as intended.

The problem began when, on November 14, 1980 (just nine days after conviction and sentencing), the defendant was arrested a fourth time for OWI. (This was possible because the defendant was not taken immediately to jail after being sentenced, but rather was told to report to jail at a later date.) On this occasion, the defendant was not charged as a repeat offender again as would be expected, but instead was charged as a first offender. This happened because of several technicalities.

The arrest on November 14, 1980, was exactly five years to the day after the defendant's first arrest. The record of the first arrest was therefore no longer on his driver's record. Because of the short period of time between the November 5 convictions and the November 14 arrest, records of those convictions had not yet been processed from the court to the Department of Transportation and therefore did not show up on the driver's record check made on November 14. Thus, the offender's record revealed no OWI convictions.

The defendant has not been heard from since November 14, 1980. He failed to show up to serve the jail time he owed for his third conviction. A warrant for his arrest was issued on December 4, 1980. Neither did he show up for his court appearance for his fourth arrest. The court merely entered a default judgment against him and imposed a $200 fine and a ninety-day revocation--which is a standard sentence for first offenders who do not appear in court.[13]

80

10. The charging decision in cases growing out of accidents is much more complex than is generally acknowledged.

Officers repeatedly told us that when compared to proactive arrest practices, which they readily acknowledge to be uneven, the arrest decision in accident cases involving alcohol is much more clear-cut and uniform. Some even claimed that one rarely will find discretion exercised in these cases. This creates the impression that the decision as to the charge in accident cases is also fairly routine--devoid of discretionary judgments.

That the officers should make such claims is understandable. So much discretion is exercised in proactive activity that the decision-making associated with accident cases appears, relatively speaking, to be much more controlled. In reality, however, as we noted earlier in the discussion of accidents resulting in a fatality or a serious injury, the determination of whether a driver is at fault and whether an arrest should be made is quite complex. As a consequence, whereas the charge in proactive cases is reviewed only if the violator is a second offender and is rarely changed prior to arraignment, the prosecutor plays a much more active role in cases growing out of accidents. This is because there is need, in such cases, to ensure that available evidence compensates for the absence of the firsthand observations of driving behavior on which the prosecution of proactive arrests so heavily depends; to reconstruct the driving behavior that led to the accident in order to sort out who was at fault and what contribution alcohol involvement may have had in the accident; and to select from among several charges that may be appropriate.

The more serious the consequences of the accident (death or injuries), the greater is the degree of involvement of the prosecutor. All fatalities are subject to review; the assistant district attorney on call at the time of an accident is expected to be consulted. In serious injury cases, the investigating police officers confer with their supervisors in deciding on the charge. They might, through their supervisors, confer with the assistant district attorney on call. The arrangements for easy access to legal advice, however, may not be as beneficial as initially appears, since the assistant district attorney who happens to be on duty may have no prior experience in the handling of such cases.

For the prosecutor, one of the more difficult problems in bringing a prosecution for homicide or injury by intoxicated use of a motor vehicle has been the need to prove causal negligence

81

in addition to proving operation or handling of the vehicle while under the influence of an intoxicant. The legislature, in legislation enacted in the summer of 1981 relating to the drinking-driver, eliminated the requirement of proving causal negligence, providing instead that the person so charged has a defense to the charge if the trier of fact can be persuaded by a preponderance of the evidence that the accident that caused the death or injury would have been unavoidable even if the defendant had not been intoxicated. The intent of the legislature was to facilitate prosecutions by reducing the current burden on the prosecution to prove the causal connection between the defendant's intoxicated condition and the death or injury of a victim.

The charges brought in the past in cases in which the at-fault driver was judged to have been drinking are obviously of special interest and are analyzed in a subsequent section where the outcome of such cases is also presented. (See II-A-20.)

82

11. An extraordinarily high percentage of the arrests for OWI lead to a plea of no contest or to default on the OWI charge. An acquittal is rare.

In our in-depth study of all arrests made for OWI in March 1980, we found that 88% of the persons charged with OWI were convicted of that charge (see table II-A-11.1)--by entering a plea of no contest, by entering a plea of guilty, through entry by the court of a default judgment (usually for failure to appear in court), or by pleading guilty in exchange for dismissal of one or more concurrent charges. As for the balance, 2% of the cases have not yet been resolved, 8% resulted in acceptance of a plea to a reduced charge, and the charge was dropped in only 2% of the cases. None of the arrests in our sample led to an acquittal.

Table II-A-11.1

Type of Resolution by Offender Status
(Madison, Wisconsin, OWI Arrestees, March 1980)

	First Offenders	Second Offenders	Third Offenders	Total
Plea No Contest	52 (74%)	14 (74%)	2 (100%)	68 (74%)
Default Judgment	9 (13%)	0	0	9 (10%)
Plea in Exchange for Dismissal of Concurrent Charge	2 (3%)	1 (5%)	0	3 (3%)
Plea Guilty	0	1 (5%)	0	1 (1%)
Charge Dropped	0	2 (11%)	0	2 (2%)
Plea to Reduced Charge	7 (10%)	0	0	7 (8%)
Not Yet Resolved*	1 (1%)	1(5%)	0	2 (2%)
Total	71	19	2	92

* As of 5/21/81.

83

The high rate of convictions appears to be due to three major factors: (1) the quality of the case presented in the written report by the arresting officer, which is often shown to the defendant or the attorney; (2) .10 BAC is evidence per se of intoxication; and (3) the attractiveness, for the defendants, of disposing of the charges against them without suffering incarceration or loss of license.

Thus, OWI cases do not differ much, one from the other, in the ultimate result of the adjudicatory process. A defendant is not likely to contest the charge. But as will be noted below, there is great variation in the length of the process leading to an acknowledgment of guilt.

84

12. The few cases in which the OWI charge was reduced to a lesser charge involved first offenders with low BACs who were represented by counsel.

Information on the seven cases from the March 1980 sample in which the OWI charge was subsequently reduced (8% of the March arrests) is presented in table II-A-12.1.

Table II-A-12.1

Charge Reductions
(Madison, Wisconsin, OWI Arrestees, March 1980)

Case Number	Proactive or Reactive	Driver BAC	Legal Representation	Charge on Which Convicted
7	R	.10	Atty.	Reckless Driving
29	P	.00	Atty.	Reckless Driving
37	P	.12	Atty.	Reckless Driving
40	R	.01	Atty.	Reckless Driving
51	R	.11	Atty.	Reckless Driving
65	P	.06	Atty.	Deviating from Traffic Lane
72	R	.16	Atty.	Reckless Driving

Several patterns emerge from table II-A-12.1. All of the cases involved first offenders. In all but one of the cases, the BAC was below .13. (The exception, #72, involved an out-of-stater. All parties agreed that the charge would be reduced if the defendant underwent treatment for one year.) Attorneys obviously play an important role in these cases. In the March 1980 sample, 12 arrestees tested below .13 BAC. All 12 were first offenders. Six of these, listed in table II-A-12.1, represented by an attorney, were convicted of a reduced charge. The other six were convicted of OWI. Only one of these individuals, a juvenile, was represented by an attorney. Based on this very limited sample, it appears that, in cases with a BAC below .13, representation by an attorney spells the difference between conviction on the original OWI charge and conviction on a lesser charge.

85

13. Only a small percentage of OWI arrests made by the Madison Police Department go to trial. The vast majority of the cases are resolved at arraignment or pretrial conference without the testimony of police officers. Court processing of OWI cases therefore requires minimum investment of police time.

At the outset of the study, a great deal of concern was expressed regarding the amount of police time consumed in the trial of OWI cases. The data presented in table II-A-13.1 address this concern and our interest in determining the stage at which cases were disposed of in the courts.

Table II-A-13.1

Point of Resolution by Offender Status
(Madison, Wisconsin, OWI Arrestees, March 1980)

	First Offenders	Second Offenders	Third Offenders	Total
Initial Appearance	30 (42%)	2 (11%)	0	32 (35%)
Pretrial (judge or commissioner)	32 (45%)	10 (53%)	0	42 (46%)
Refusal Hearing	0	3 (16%)	0	3 (3%)
Final Conference	1 (1%)	2 (11%)	1 (50%)	4 (4%)
Other (Prior to Trial)	2 (3%)	1 (5%)	1 (50%)	4 (4%)
Trial Before Judge*	5 (7%)	0	0	5 (5%)
Jury Trial	0	0	0	0
Not Yet Resolved**	1 (1%)	1 (5%)	0	2 (2%)
Total	71	19	2	92

* Each of these cases was resolved before a judge, but no evidence was introduced. In other words, formal trials were not actually held.
** As of 5/31/81.

86

We were surprised to find that none of the arrests made in March of 1980 went to trial. (Two cases are still pending.) Based on our interviews with police officers, prosecutors, and judges, the March experience is not uncommon. Officers who make the largest number of arrests for OWI reported that their cases rarely go to trial. A jury trial is even less frequent. The city attorney's office, referring only to first offense cases, estimates that approximately ten jury trials are scheduled in a year, but many of these cases are settled prior to the date of trial.

Police officers are represented at the initial appearance by the department's court officer. They rarely attend pretrial conferences, which typically involve the court commissioner or a judge, a representative of the city attorney's or district attorney's office, and the defendant and his or her attorney if counsel has been retained. If a trial is scheduled in a case in which the results of the breathalyzer are to be admitted, four officers may be required to appear: the arresting officer, the assisting officer, the officer who gave the breathalyzer test, and the officer who services the breathalyzer and can testify on its accuracy. Both the city attorney's office and the district attorney's office attempt to minimize the amount of time that officers will be required to spend in court by informing the officers of the time at which trial is scheduled and by notifying them if a late decision on the part of the defendant to plead guilty will eliminate the need for their presence.

87

14. Rather than proceed to trial, defense counsel, when employed, have taken as their primary objective the mitigation of some of the consequences of conviction. This is generally achieved by delaying disposition of the case.

The feeling is prevalent among the defense bar in Madison, reflected too in what we have learned of defense practices elsewhere, that an OWI charge--even with .10 BAC constituting evidence per se of intoxication--is vulnerable to challenge in many ways. An endless number of points can be questioned in the processing of the case, from the manner in which the field sobriety test was given to the technical aspects of the breathalyzer operation. If an accident brought the driver to police attention, additional questions can be raised about the accident and the relationship to the OWI charge. The lawyer need not prove that his client had not been drinking. He need only create in the mind of the judge or jury a reasonable doubt as to guilt.

But pursuing such a defense requires time on the part of an attorney and may require the testimony of an expert on chemical testing or accident reconstruction--all of which will cost the defendant a substantial amount of money. The cost is simply out of proportion to the consequences of conviction in most cases, with the result that an elaborate defense is rarely pursued in cases growing out of arrests made by the Madison Police Department. As one defense counsel put it:

> [T]he norm that has been established for the handling of OWI cases without trial is so strong that if an attorney, in an isolated case, insists on trial, the attorney gets the impression from the judges that he is not on the "home team."[14]

Who challenges an OWI prosecution? Primarily those who face the possibility of being sentenced to jail and those who face revocation of their driver's license, especially if their livelihood depends on it. But beyond this, some will hire an attorney to fight the charge because (1) they want to retain their "get-out-of-jail-free card"--the opportunity to commit the offense once, comfortable in the knowledge that they will not subject themselves to jailing; (2) they want to avoid an increase in their insurance costs; or (3) they simply resent being convicted solely on the basis of their BAC, convinced that they were nevertheless able to drive safely.

88

Having noted the manner in which OWI cases are disposed of in the courts, clearly the challenge of a prosecution for an OWI arrest made in Madison does not usually take the form of a full-scale defense at trial with the expectation that the trial will result in an acquittal. The challenge, instead, takes the form of tactics (such as submission of motions, scheduling expert testimony, requests for continuances) that delay disposition, with the objective of mitigating some of the consequences of eventual conviction.

What can be achieved through delay under the law and policies in effect at the time of our study?

-- If revoked within the past year, a driver who faces both conviction and revocation may be made eligible for an occupational license, upon conviction, if conviction on the new charge can be delayed until one year after the end of the prior revocation.

-- If the defendant faces loss of license, not as a result of the OWI charge alone, but as a result of an accumulation of points for other traffic offenses, delay may result in enough of a reduction in accumulated points to preserve the license even with the addition of the points assigned to an OWI conviction.

-- If the defendant has a record of alcoholism, delay may enable the defendant to get a job, voluntarily enter a treatment program, and establish a record of sobriety, thereby increasing the likelihood of more favorable treatment at sentencing.

-- If it appears likely that the defendant may continue to drive while intoxicated, delay will result in a second offense being prosecuted as a first offense, with the likelihood that the cases can eventually be consolidated and charges in the subsequent cases dropped in exchange for a plea of guilty to the first charge.

The data on the length of time between arraignment and final resolution of an OWI case are presented in table II-A-14.1. In fairness, it should be noted that the prosecution probably contributes to the total period of delay in that countermeasures have not been adopted to press for disposition when delay seems likely.

89

Table II-A-14.1

Duration Between Arraignment and
Final Resolution by Offender Status

(Madison, Wisconsin, OWI Arrestees, March 1980)

	First Offenders	Second Offenders	Third Offenders	Total
Resolved at arraignment	29 (41%)	2 (11%)	0	31 (34%)
1 - 45 days	22 (31%)	2 (11%)	0	24 (26%)
46 - 95 days	10 (14%)	7 (36%)	0	17 (18%)
96 - 180 days	5 (7%)	4 (21%)	0	9 (10%)
181 - 365 days	4 (6%)	3 (16%)	1 (50%)	8 (9%)
365 + days	0	0	1 (50%)	1 (1%)
Not resolved*	1 (1%)	1 (5%)	0	2 (2%)
Total	71	19	2	92

* As of 5/31/81.

The second offender, who faces possible jail time and revocation of license, is obviously more likely to delay disposition in order to seek counsel and explore whatever alternatives may be available. And this is even more true of third offenders who face a mandatory thirty-day jail term. Not unexpectedly, one of the two persons in the March 1980 sample who were charged as third offenders was among those whose cases were still pending when the data were originally collected. His case was eventually resolved fourteen months from the date of arrest. The other third offender's case was resolved in seven months, but in conjunction with resolution of his second OWI charge, which occurred twelve months earlier.

90

15. Sentences are imposed by the courts in a fairly set pattern.

The current penalty provisions for OWI (enacted in 1977, but scheduled to be replaced in 1982) provide courts with a great deal of flexibility in sentencing, with the exception of the third offender for whom a minimum of thirty days in jail is mandated. For reference purposes, they are summarized here.

Legislative Provisions for Sentencing OWI Offenders

First Offense in Five Years
$100-500 forfeiture (compliance with an order for treatment or to attend Group Dynamics may be substituted for all but the first $100 of forfeiture)
AND
90 days to 6 months revocation of license (compliance with an order for treatment or to attend Group Dynamics may be substituted for all or part of revocation)

Second Offense in Five Years
$250 - 1,000 fine and 5 days to 6 months in jail (compliance with an order for treatment or to attend Group Dynamics may be substituted for all but the first $250 of fine and all or part of jail)
AND
one year revocation (compliance with an order for treatment or to attend Group Dynamics may be substituted for not more than the last 9 months of revocation)

Third Offense in Five Years
$500 - 2,000 fine and 30 days to one year in jail
AND
same action regarding license as for second offenders

In the 81 cases from among those initiated in March 1980 in which there was a conviction for OWI, the courts used the full range of alternatives available to them. The various combinations of fines, required Group Dynamics attendance, assessment, license revocation, and jail terms are set forth in table II-A-15.1, along with an indication of the frequency with which each combination was used.

91

Table II-A-15.1

Original Sentences by Offender Status

(Madison, Wisconsin, OWI Arrestees, March 1980)

Original Sentence	No. of Cases	Comments
FIRST OFFENDERS		
Group Dynamics School + $117 fine	22	
Group Dynamics School + $128 fine	13	
Group Dynamics School + $145 fine	9	
Group Dynamics School + $172 fine	1	
Group Dynamics School + $205 fine	1	
Revocation (90 days) + $117 fine	1	Defendant from out of state.
Revocation (90 days) + $128 fine	1	Some indication that defendant left state.
Revocation (90 days) + $145 fine	4	All have either concurrent or pending charges.
Revocation (90 days) + $205 fine	6	All either have lengthy records, are from out of state, or have concurrent or pending charges or both
Assessment (resulting in either Group Dynamics School or treatment) + $117 fine	3	
Private treatment + $145 fine	2	
TOTAL FIRST OFFENDERS	63	

92

Original Sentence	No. of Cases	Comments
SECOND OFFENDERS		
Assessment (resulting in 90-day revocation and treatment [in lieu of jail and last 9 months of revocation]) + $284 fine	9	4 got occupational licenses
Assessment (resulting in 90-day revocation and Group Dynamics School [in lieu of jail and last 9 months of revocation]) + $284 fine	2	2 got occupational licenses
Assessment (resulting in 90-day revocation and 5 days jail [because of recommendation against treatment]) + $284 fine	1	
One-year revocation + 5 days jail + $284 fine (no assessment)	4	2 got occupational licenses Factors contributing to severity of sentence include serious concurrent charges, failure to appear in court, lengthy records, or refusal to submit to test.
TOTAL SECOND OFFENDERS CONVICTED	16	
THIRD OFFENDERS		
One-year revocation + 30 days jail + $550 or $569 fine	2	
TOTAL THIRD OFFENDERS CONVICTED	2	

93

At the time of initial sentencing, the minimal variations in the severity of sentence usually reflect the court's recognition of prior traffic offenses or the refusal of the defendant to provide a breath sample. The district attorney's office sometimes recommends, as part of a plea bargain, that the person who refused to submit to a test receive a slightly more severe fine than that imposed on the individual who is cooperative from the outset. Some judges accept the recommendation. (We found only one defendant who was convicted on a refusal charge. He was revoked for an additional six months.)

94

16. A high percentage of defendants do not comply with the conditions of their sentences, requiring follow-up action by the court.

If forfeitures or fines are assessed, offenders have up to 60 days, if requested, to make payment. Those who accept the opportunity to attend the Group Dynamics program have up to 72 hours in which to enroll. And if convicted OWI offenders agree to enter the Group Dynamics program or to participate in a treatment program, they obviously assume responsibility for attendance.

Of the 81 persons sentenced for OWI in our March 198(sample, 22 individuals--over one fourth--failed to comply with one or more conditions of their sentence. Table II-A-17.1 presents data on the condition the person failed to fulfill and the subsequent action taken by the court.

Because revocation is the primary sanction against those who fail to pay their fine or fail to complete Group Dynamics or treatment, we believe that the frequency with which offenders default and opt in favor of revocation says something about how offenders perceive the consequences of revocation--a point explored more fully below. Another possible explanation for failure to complete a rehabilitation plan is that the driver is unaware, at the time of sentencing, that his or her license may be revoked anyway because of point accumulation. When notified to this effect, the driver may drop out of a program that was initially seen as a way of avoiding revocation.

95

Table II-A-16.1

Failures to Comply with Court Order by Offender Status

(Madison, Wisconsin, OWI Arrestees, March 1980)

Original Sentence	Court Order Not Fulfilled	Amended Sentence	No. of Cases
FIRST OFFENDERS			
Group Dynamics School + $117 fine	failed to complete GDS	90-day revocation	3
Group Dynamics School + $117 fine	failed to pay fine, failed to complete GDS	120-day suspension, 90-day revocation	1
Group Dynamics School + $128 fine	failed to complete GDS	90-day revocation	2
Group Dynamics School + $128 fine	failed to complete GDS, failed to pay fine	90-day revocation, 90-day suspension	1
Group Dynamics School + $145	failed to pay fine	90-day suspension	1
Revocation (90 days) + $128 fine	failed to pay fine	90-day suspension	1
Revocation (90 days) + $145 fine	failed to pay fine	90-day suspension	1
Revocation (90 days) + $205 fine	failed to pay fine	bench warrant issued	2
Revocation (90 days) + $205 fine	failed to pay fine	90-day suspension	1
Revocation (180 days) + $205 fine	failed to pay fine, failed to appear in court	90-day suspension, 30-day suspension	1
Treatment + $145 fine	failed to complete treatment	180-day revocation (2 OWIs)	1
TOTAL FIRST OFFENDERS			15

96

Original Sentence	Court Order Not Fulfilled	Amended Sentence	No. of Cases
SECOND OFFENDERS			
Revocation (90 days) + $284 fine + treatment	failed to pay fine	60-day suspension	1
Revocation (90 days) + $284 fine + treatment	failed to complete treatment	5 days jail, 365 days revocation	1
Revocation (90 days) + $289 fine + 5 days jail	failed to pay fine	10 days jail	1
Revocation (365 days) + $284 fine + 5 days jail	failed to appear in court	30-day suspension	1
Revocation (365 days) + $284 fine + 5 days jail	failed to pay fine	30-day suspension, bench warrant issued	1
Revocation (365 days) + $284 fine + 5 days jail	failed to pay fine	90-day suspension, 5 days jail	1
$284 fine + 5 days jail		5 days jail	1
TOTAL SECOND OFFENDERS			6
THIRD OFFENDERS			
Revocation (365 days) + $550 fine + 30 days jail	failed to show for jail	bench warrant issued	1
TOTAL THIRD OFFENDERS			1

97

17. As a response to the drinking-driver, the use of jail is, with few exceptions, reserved for those who are blatant in their contempt of a court order, who have been convicted three or more times for OWI, or who are judged responsible for having caused a serious injury or a fatality.

Who goes to jail for driving while intoxicated? We acquired answers to this question from two quite different perspectives.

From following through on our March 1980 sample of OWI arrests, we found that 9 of the 81 individuals who were convicted and sentenced for OWI were sentenced to some time in jail as a result of their conviction. One person was a first offender. The jail time he served for a different offense was accepted in lieu of the fine for the OWI charge. Two people were third offenders. Both were sentenced to the mandatory thirty days in jail. One of them failed to show up to serve his jail sentence, and a warrant is currently out for his arrest.

The remaining six persons who served jail time were second offenders. Four of them were sentenced to five days in jail as part of their initial sentence. (Two were given additional jail time for failure to pay their fines.) The remaining two second offenders were both initially sent to assessment. As for one of these persons, assessment claimed that treatment would not be beneficial, and the defendant was therefore given a five-day jail sentence plus an additional ten days in jail for failure to pay his fine. The other person who was sent to assessment was offered a treatment program in lieu of jail, but he refused to attend the program, so he too was sentenced to five days in jail.

Our second set of answers came from a census we took of the Dane County jail on March 19, 1981, which obviously included cases originating in all of Dane County--not just Madison. Of the 177 persons in custody on that date, 20 were in jail for OWI or for homicide or injury by intoxicated use of a vehicle. And of this number, one was awaiting trial and another awaiting arraignment. The remaining 18 persons were charged as indicated in table II-A-17.1. The table also indicates the number of times each person was convicted for OWI in the past five years.

As a way of relating the picture that emerges from the jail census to the more limited picture for the city of Madison, we determined which agency made the arrests resulting in incarceration. Only three of the eighteen cases originated in Madison.

98

Table II-A-17.1

Persons in Dane County Jail for OWI or Related Charge
by Charge Type and Number of Prior OWI Convictions

(Dane County Jail Survey, March 19, 1981)

Charge*	Prior OWI Convictions** 0	1	2	3	4	5	Total
OWI		1	5***	2***	1		9
OWI and Operating After Revocation			1	1		1	3
OWI and other		2					2
Homicide by Intoxicated Use of a Vehicle	1	1		1			3
Homicide and Injury by Intoxicated Use of a Vehicle			1***				1
Total	1	4	7	4	1	1	18

* All persons were incarcerated as a result of a conviction; 17 persons were serving sentences; one person was awaiting sentencing for Homicide and Injury by Intoxicated Use of a Motor Vehicle.

** OWI convictions in past five-year period, current conviction excluded.

*** Includes cases originating in Madison.

Although the legislature has provided a mandatory sentence of at least thirty days in jail for third offenders, Dane County judges usually offer recidivists, who through the assessment procedure are determined to have serious alcohol problems, the option of subjecting themselves to thirty days of inpatient treatment. Use of this option is dependent upon the defendant's ability to pay the substantial charge for this treatment. The practice, defended by judges as a more sensible response than jail to the problem of the alcoholic who repeatedly drives, has been informally supported by the district attorney's office and has not been challenged by others.

99

Further information on the use made of incarceration in the sentencing of drinking-drivers is included in the material in section II-A-20 analyzing sentences imposed on at-fault drinking-drivers in serious injury and fatal accidents.

100

18. Revocation of driving privileges is somewhat of a "paper tiger." Those who are convicted of OWI and whose licenses are revoked can, by meeting several minimal conditions, easily acquire an occupational license that enables them to meet their essential driving needs. If they choose to drive without a license and are detected, punishment tends to be light.

Who gets revoked? Of the 81 persons convicted of OWI in our study of March 1980 arrests, we found that the offender's driver's license was revoked in 39 of the cases. (See table II-A-18.1.) All sixteen of the second offenders who were convicted of OWI were revoked, as were both of the third offenders.

Table II-A-18.1

Suspensions and Revocations: Number, Length/Type, and Possible Contributing Factors by Offender Status

(Madison, Wisconsin, OWI Arrestees, March 1980)

No. of Cases	Length/Type	Factors Possibly Leading to Revocation or Suspension or Both
FIRST OFFENDERS		
12	90-day revocation	Failure to appear in court, live out of county, lengthy driving record, concurrent charges, failure to complete Group Dynamics School
4	90-day revocation + 90-day suspension	Default judgment, failure to complete Group Dynamics School, failure to pay fine
1	90-day suspension	Failure to pay fine
2	180-day revocation	Conviction on refusal charge, live out of state, multiple OWI charges, failure to complete treatment
1	90-day revocation + 120-day suspension	Failure to complete Group Dynamics School, failure to pay fine
1	180-day revocation + 90-day suspension + 30-day suspension	Failure to appear in court three times, failure to pay fine, failure to appear

101

No. of Cases	Length/Type	Possible Factors Leading to Revocation or Suspension or Both
SECOND OFFENDERS		
10	90-day revocation	Statutory minimum
2	365-day revocation	Concurrent charges, failure to accept treatment, multiple OWI convictions
2	365-day revocation + 30-day suspension	Failure to appear, failure to pay fine
1	90-day revocation + 90-day suspension	Statutory minimum, failure to pay fine (2 counts)
1	365-day revocation + 90 day suspension	Concurrent charges, failure to pay fine
THIRD OFFENDERS		
2	365-day revocation	Statutory minimum

Under the law in effect at the time of the study, persons who are convicted of OWI and whose driver's licenses, as a consequence, have been revoked, may apply to the court for an occupational license to do whatever driving is necessary in connection with their occupation. (Wis. Stat. § 343.10 (1979-1980)) The court is authorized to issue a license good for thirty days, provided fifteen days have elapsed since conviction and the person files papers with the court giving proof of financial responsibility. The court's order must set forth restrictions as to the hours of the day (not to exceed twelve), the type of occupation, and the routes of travel. The Department of Transportation is then authorized to issue an occupational license for the total period of revocation.

A resident of Madison desiring an occupational license applies to the deputy clerk for the Criminal and Traffic Division of the Dane County clerk of courts' office. Some individuals applying for an occupational license have a lawyer prepare their

102

petition, but a driver can achieve the same result by signing a standard petition available in the deputy clerk's office. The deputy clerk has blanket authorization from the judges to issue occupational licenses to all who apply, provided the statutory conditions are met and no unusual privileges are being sought. The petitioner's claim regarding prior revocations is not checked until the application is reviewed by the Department of Transportation. A full twelve hours of travel each day are usually authorized, with the hours split so that they are not used up during periods in which the individuals would normally be at their place of employment. A lay person may feel that this has become a thinly disguised way of providing authorization for much travel that is not job-related, but those in charge of the procedure contend that drivers who are challenged are obligated to demonstrate the connection between their driving and the recorded purpose for which the license was issued. Routes of travel are not set forth on the licenses issued in Dane County. The liberal policy of the court in approving occupational licenses reflects the judges' desire to limit the effect of a conviction on the driver and the driver's family that would result from loss of a job and loss of income. The policy of not inquiring as to need, given the availability of mass transit, and granting maximum hours for travel not specifically related to job needs, lends support to the contention that what the courts take away with their right hand, through revocation, they immediately give back, with their left hand, in the form of an occupational license.

It is extremely difficult to establish precisely the number of occupational licenses issued. The deputy clerk of courts estimates that between 80 and 90 percent of those who are revoked obtain occupational licenses. We checked the records of the clerk of courts' office and the Department of Transportation on the 39 drivers in our March 1980 sample who were revoked. We found a record of an occupational license having been issued to only nine persons. All but one of them was a second offender. The first offender had been revoked for 90 days for failure to complete private treatment. Of the eight second offenders, six were revoked for 90 days and two for 365 days.

Convicted drivers may be reluctant to apply for an occupational license because doing so requires that they obtain proof of financial responsibility from their insurance company. A request for such proof puts the insurance company on notice about the OWI conviction, which will almost always result in a decision on its part not to renew the insurance or to increase the premium substantially.

Whether the thirty drivers who chose not to apply for an occupational license desisted from driving or continued to drive

103

without a license is unknown. That they did not obtain an occupational license, given the ease with which one is available, is somewhat mystifying, contributing to our suspicion that a significant segment of the population is not deterred from driving for lack of a license.

What happens if a person is charged with operating a vehicle after revocation or suspension? Existing Wisconsin statutes covering operating a vehicle after revocation (Wis. Stat. §343.44 (1979-1980)), in addition to establishing fines, provide a mandatory jail sentence of five days for the first offense in a period of five years, five days for the second, five days for the third, ninety days for the fourth, and six months for the fifth. This reflects a relatively recent change from a penalty scheme of ten days for the first offense, thirty days for the second, sixty days for the third, ninety days for the fourth, and six months for the fifth offense. The change was enacted to allow judges greater flexibility in sentencing. Such flexibility was deemed necessary after the switch to the 55 mile-an-hour speed limit, which resulted in an increase in speeding convictions and revocations.

Even with the less severe mandatory sentence, the sanctions for driving after revocation are very loosely implemented. Unlike OWI charges, which are rarely reduced in Dane County, the OAR charge (operating after revocation) is often reduced to OWL (operating without a license), which does not require jail time. The explanation for reducing the charge may be that the individual, at the time of the offense or, more commonly, by the time set for trial, has become eligible for reinstatement. Although the result of these practices seriously undermines the meaning of revocation and, in particular, the consequences of an OWI conviction, it is understandable why the practices have developed, given the large number of cases involving driving after revocation and the crowded condition of the Dane County jail.

Legislation enacted in July 1981 eliminates the mandatory jail term for first offenders. It retains, however, a mandatory jail sentence of ten days for the person convicted of OAR for the second time if the revocation was imposed as a result of conviction for OWI or one of several other serious offenses.

104

19. The legislature's intention to use the Group Dynamics program as a vehicle for identifying and arranging for further treatment of problem drinkers is not being fully realized in Madison.

The legislature intended the Group Dynamics program to serve as a screening device for persons with serious alcohol problems. If it was discovered during schooling that an individual had a serious alcohol problem, instructors were to file a report to the court, recommending that the individual be assessed. Upon receiving such a report, the court, with the person's consent, was to arrange for an alcohol assessment and the development of a rehabilitation plan. (Wis. Stat. § 343.30 (1q) (1979-1980)) Such reports are routinely forwarded to Dane County judges. But with one exception, the judges feel that they are without authority to order assessment after having sentenced a person to Group Dynamics. They argue that as long as convicted offenders successfully complete the Group Dynamics portion of their sentence, they have fulfilled the condition of their original sentence, and it would be inappropriate to reopen their case and impose an additional requirement. For this reason, the recommendations are routinely ignored.

Aware of the judges' position, the Wisconsin Department of Transportation reviews all reports filed on individuals who complete Group Dynamics. Those reports that carry a recommendation for assessment are reviewed more carefully, and some of these drivers are ordered in for an interview by a Department of Transportation driving analyst. The analyst, using the authority of the department to reexamine licensed drivers (Wis. Stat. § 343.16 (2) (1979-1980)), may order the individual to undergo assessment. If the person refuses, the department may cancel the license until the person complies.

105

20. In recent years, when an accident caused by a drinking-driver has resulted in a fatality, increased use has been made of the charge of homicide by intoxicated use of a vehicle. In serious injury cases, most of the drivers judged to have been at fault have been charged and convicted of OWI.

Of all of the fatal accidents classified as drinking-driver cases in the period from 1975 to 1980, only nine at-fault drivers survived the crash and were subject to sanctions. Of these nine drivers, seven were responsible for the death of a passenger in their own vehicle, and two were responsible for the death of an innocent victim. For several reasons, the data on sanctions in these cases must be used with the utmost care. Four of the accidents occurred in 1975 and 1976, which required searching in records that were five or six years old at the time of our study. Over this time period, both police and prosecution policies with regard to such cases have changed. Legislation regarding OWI has also changed. Because of these factors, we have not attempted to summarize the data, but have opted to describe briefly (in table II-A-20.1) each case in chronological order and to supply several pieces of information regarding factors that may have been important in the sanctioning decisions.

Clearly, there are too few cases, each case with its own peculiar circumstances, to draw any solid conclusions regarding sanctions in OWI fatality cases. In the five cases prior to 1979, one resulted in a four-year prison sentence, one did not result in any kind of charges (either traffic or criminal), and three cases resulted in fines. We do not attribute the sanctioning results of these cases to leniency on the part of either the police or the prosecution. Such cases tend to be very "messy" from a legal standpoint. Several cases involved low level BACs, and one involved a juvenile. All involved fatalities who, we assume, elected of their own free will to be passengers of an intoxicated driver. Three of the more recent cases, dating back to December 1979, are still pending. In each of these cases, the charge was homicide by intoxicated use of a motor vehicle--a charge used only once prior to 1979. In the fourth recent case, the driver, with a chronic history of OWI, received a five-year maximum sentence for homicide by intoxicated use of a motor vehicle.

106

Table II-A-20.1

Drivers Vulnerable to Criminal Prosecution in OWI Cases

(Madison, Wisconsin, Traffic Fatalities, 1975-1980)

Case No.	Date	Facts of Case	Charge	Sentence
1	May 1975	Person killed was a passenger in the at-fault vehicle. Four other cars in accident, and other innocent persons injured. Driver had poor driving record including other recent OWIs.	Homicide by intoxicated use of a motor vehicle	4 years Waupun
2	June 1975	Person killed was a passenger in an at-fault vehicle. At-fault driver's BAC was .05. Both drivers involved in accident had been drinking.	No charges found in records	
3	Jan. 1976	Person killed was sister of at-fault juvenile. No evidence of blood test, although at-fault driver admitted drinking and using nonprescription drugs.	Five traffic citations	$178 total fines
4	Sept. 1976	Fatality was passenger in at-fault vehicle. Driver's BAC was .11.	Homicide by negligent use of a motor vehicle	$509
5	Aug. 1978	Fatality was passenger in motorcycle-fixed object accident. Driver tested at .06.	Failure to have control and operating on expired license	Dismissed and $64
6	Dec. 1979	Fatality was passenger in at-fault vehicle. At-fault driver tested at .188.	Homicide by intoxicated use of motor vehicle	Pending

107

Case No.	Date	Facts of Case	Charge	Sentence
7	Aug. 1980	Fatality was passenger in at-fault vehicle. Driver in at-fault vehicle tested at .12. Driver of second vehicle was charged with OWI.	Homicide by intoxicated use of motor vehicle	Pending
8	Sept. 1980	At-fault driver tested at .25. Killed innocent pedestrian and injured other pedestrian. At-fault driver had extreme OWI history.	Homicide by intoxicated use and injury by intoxicated use	5 years Waupun
9	Oct. 1980	At-fault driver tested at .286. Killed innocent passenger of second vehicle.	Homicide by intoxicated use of motor vehicle	Pending

In cases growing out of accidents causing serious injuries, a clearer pattern of sanctioning emerges. In our study of serious injury accidents that occurred in 1980, we found 37 drivers who were judged by the police to have been drinking and impaired. A citation was issued in all but two of these cases. More than one citation was issued to 12 of the remaining 35.

Only two of these drivers were charged with causing injury by intoxicated use of a motor vehicle, but the charge was subsequently reduced in both cases to OWI. Twenty-eight of the drivers (80%) were initially charged with OWI. The remaining five were charged with one of a number of less serious traffic offenses.

One of the two drivers originally charged with causing injury by intoxicated use of a vehicle was convicted of OWI; the OWI charge against the other is still pending. All but three of the drivers initially charged with OWI were convicted of the charge, with sentences that were similar to those given to offenders in our March 1980 sample. (See section II-A-15.)

108

B. The Effectiveness and Limitations of the System

In the preceding section, we described and analyzed the use made of the criminal justice system in responding to the problem of the drinking-driver in Madison. The overall impact of the description and analysis may be somewhat misleading, for despite our efforts to be precise and objective, the very framework of the analysis may create the impression that we accept some common assumptions about the value and effectiveness of the criminal justice system.

One might think, for example, that the community would benefit if more drinking-drivers were arrested and convicted; if more drivers actually suffered the loss of their driver's license; if more offenders were sent to jail; if more people successfully completed Group Dynamics; and if more of the individuals who have serious alcohol problems were identified and coerced into treatment. If these things were accomplished, more people would be fined, revoked, jailed, educated, and treated, but it does not necessarily follow that the number of drinking-drivers would be reduced, that those who have been convicted would not repeat their behavior, and that fewer accidents would be caused by intoxicated drivers. The ultimate objective is not to respond to the behavior in and of itself, but rather to do so in a way that reduces the magnitude of the problem that the behavior creates for the community.

Our existing policies in the use of the criminal justice system as a response to the drinking-driver are based on the eternal hope that affecting the behavior will eventually affect the problem; that doing more of the same will bring us closer to reducing both the incidence and consequences of intoxicated driving. At any one time, different interests (e.g., police, prosecutors, treatment agencies) place different priorities on the different elements in existing programs. The balance in support for jail over treatment, for example, may differ from time to time. But the choice for new emphasis--perhaps in response to an especially tragic accident--is almost always picked from among responses that have been tried in the past through the use of the criminal justice system.

If we had hard evidence of the value of jail, or revocation, or school, or treatment, it would make sense for the Madison Police Department and others concerned with the drinking-driver problem to support the more effective alternative over others, relating its known value to the specific needs of the community. It would be worth fighting for support for the alternative--among the citizenry and with the city council and legislature.

109

Given the long experience we have had in the use of the criminal justice system, it is reasonable to expect that we have such evidence. But incredible as it may seem, especially after the recent expenditure of 88 million dollars on experimentation and research under the Alcohol Safety Action Projects sponsored by the United States Department of Transportation, little hard evidence exists to support one alternative over another. Volumes have been written, numerous summaries prepared, and several syntheses of the rapidly growing literature on the drinking-driver problem now exist. We have sifted through this mass of material, only to find that the conclusions of studies designed to measure the effectiveness of new programs are almost all negative. Here are some examples:

> Programs based on severe penalties have not been shown to be effective over the long term in any jurisdictions and have not been found to be workable in the U.S.[15]

> To date, only one large-scale alcohol-safety program, the British Road Safety Act of 1967, has clearly been shown to have reduced crash losses involving drinking-drivers--and the effects of that program were transitory.[16]

> Education and treatment programs for convicted drinking drivers appear to have little effect in modifying the subsequent behavior of persons exposed to them, as measured by subsequent re-arrest records.[17]

Some of these conclusions obviously reflect the intractable nature of the problem we are trying to affect; others may simply reflect the difficulty in measuring effectiveness. We are not going to attempt to summarize or analyze the results of all of the research projects that have contributed to the terse conclusions set forth above. That job has already been done quite well in the several syntheses, and we direct those who are interested in reviewing the supporting data to them.[18]

The Scandinavian experience does warrant some elaboration here, because it is so often cited as a model that we in the United States should adopt. Although Sweden, Norway, Finland, and Denmark do have stricter drinking and driving laws than the United States, there is no solid evidence that these laws have successfully reduced the incidence of OWI in these countries.[19] This is not to say that the laws are ineffective; only that the evidence and arguments given to support their deterrent value are somewhat misleading. One must take note of fundamental differences in cultural attitudes toward the use of alcohol in the Scandinavian countries, the strength of the temperance

110

movements, and, in particular, the strong negative attitude toward drinking and driving. Their stiff laws are more likely a reflection of how seriously Scandinavians view drinking and driving than an indication of how their intolerance of drinking and driving was achieved. Because of the widespread popular support for their laws, Scandinavian policy-makers have been reluctant to subject their deterrent value to rigorous testing. There is, nevertheless, potential for learning from the Scandinavian experience, but it is wrong to credit the Scandinavian laws with achieving results that existing laws in this country have failed to achieve.

What about the local scene? What do we know about the effectiveness of the various efforts that have been made here in Madison to deal with the drinking-driver? To have attempted to answer this question definitively would have required much more time and resources than we had available to us. Moreover, the results of any retrospective study might not have much worth. To measure effectiveness precisely, it is essential that certain data be collected before the period under study, that measurements be taken during the period, and that various external factors that might influence the results be controlled or at least considered.

We think it appropriate, however, to make some observations regarding the relationship locally between OWI enforcement activity and accidents attributed to drinking-drivers. As shown in figure II-A-2.1, the number of OWI citations issued by the Madison Police Department increased dramatically from 1974 to 1978. The number of fatalities attributed to drinking-drivers decreased to their lowest number in 1977 and 1978. (See table I-A-3.1.) And from departmental data, we know that the number of nonfatal alcohol-related accidents also dropped slightly in 1977 and 1978. This decrease in fatalities and nonfatal accidents when enforcement peaked is a strong invitation to put the rigorous standards of evaluative research aside and claim, on commonsense grounds, success for the dramatic increase in enforcement. The temptation increases because, when enforcement activity dropped slightly in 1979 and 1980, the number of both fatalities and nonfatal accidents involving drinking-drivers increased.

Numerous problems exist in trying to reach any conclusions based solely on these figures: with such small numbers, the drop in fatalities and accidents may have been merely a result of chance; definitions and classification schemes changed over the years; numerous other developments, like the statewide debate that led to the legislation on drinking and driving in 1977, may

111

have affected driving behavior. These are but a few examples of the problems in interpreting the figures. But suppose we were to accept, for discussion purposes, the commonsense claim that the increase in enforcement reduced both fatalities and accidents. The return to the prior level of both fatalities and nonfatal accidents in 1979 and 1980, while experiencing only a slight decline in enforcement, is then disturbing. It suggests, somewhat like the British studies, that whatever deterrent effect was achieved was transitory. It raises the possibility that the decline in accidents may have been due more to the perceived risk of arrest, generated by the substantial publicity that accompanied the increases in enforcement, than to the actual arrests and convictions themselves. And most importantly for our purposes, it poses the hard question of whether the Madison Police Department would be prepared, under any circumstances, to commit itself to an annual increase in the volume of arrests, with no indication of when merely sustaining a given volume would permanently reduce alcohol-caused accidents.

Contemplating the possibility of an indeterminate commitment to more and more enforcement compels a more realistic assessment of the potential in using the criminal justice system as the principal vehicle through which the police are supposed to handle the drinking-driver problem. We feel that it is incumbent upon the police to raise some basic concerns about the effectiveness of using the criminal justice system and to acknowledge some of its inherent limitations. The points that we have chosen to highlight in this section are self-evident, for the most part, but need to be impressed upon those who formulate policies relating to the drinking-driver problem.

112

1. The number of drinking-drivers is vastly disproportionate to the capacity of the police, under the best of circumstances, to deal with them. Substantial increases in arrests are of little consequence when related to the magnitude of the problem.

In section I-B-1, we described efforts to establish the incidence of impaired driving in a given community. As a result of these efforts, we know that the incidence is extraordinarily high. Impaired driving is not an unusual phenomenon; it is common in our society. It is so common that even if current levels of enforcement were multiplied several fold, they would touch only a small percentage of the persons involved.

The National Highway Traffic Safety Administration estimates that only one in every 500 to 2,000 impaired drivers is arrested in any one night.[20] A rough estimate based on the 1980 arrest activity in Madison is that one in every 660 drivers with over .10 BAC is arrested.[21]

Many patrol officers we talked to during our study would argue that the chances of being arrested are even lower than one out of 660. For example, one officer estimated that approximately 90 percent of the drivers on the streets in his beat between 12:30 and 1:30 a.m. are legally intoxicated. This same officer made seven OWI arrests in 1980, five of them in accident cases.

Professor Robert Force captures the problem succinctly:

> [D]rinking-driving laws are violated on a scale hugely disproportionate to the number of arrests. In other words, only comparatively few violators are apprehended. Deterrence is lacking because the fear of arrest is non-existent or too insubstantial to affect either drinking or driving behavior. . . . Admittedly, the number of arrests has increased by substantial percentages over previous years under the impetus of special programs . . . . Even these additional arrests represent such a small fraction of drinking drivers on the roads at any one time that they become inconsequential in terms of affecting drinking and driving behavior.[22]

With so low a probability of interference in a pattern of drinking and driving, it is assumed that a substantial number of drinking-drivers conclude that they have immunity from arrest.

113

And because of the difficulties police officers experience in checking on alcohol involvement in accidents, even involvement in an accident may not result in formal intervention. Thus, the chance is great that a person may drive on many occasions over the years in Madison, while intoxicated, without being arrested.

114

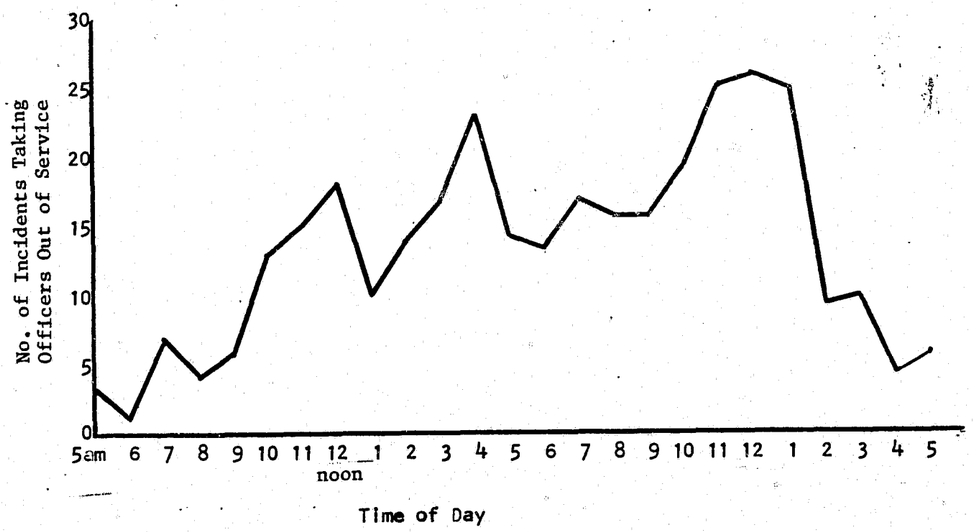
2. The incidence of OWI is highest when the police are busiest with other matters.

From the data presented earlier, we know that accidents involving drinking-drivers in Madison most often occur between midnight and 3:00 a.m. (See section I-B-2.) We have also assumed that the incidence of accidents caused by intoxicated drivers is a valid indicator of the incidence of drinking and driving.

Although the Madison Police Department routinely compiles a number of reports to aid in the management of the department, its computer has not yet been programmed to produce hourly work-load statistics. The computer does, however, produce a daily log of all incidents to which a police officer is dispatched, as well as all incidents that a police officer encounters that take him or her out of service (including the making of an arrest). A graph of this log for Friday, June 19, 1981, indicates a pattern that experienced officers confirm is typical.

Figure II-B-2.1

Number of Incidents Taking Officers Out of Service
By Time of Day for Friday, June 19, 1981 (5:00 a.m. - 5:00 a.m.)



Note: The three proactive OWI arrests that were entered in the log for June 19 were subtracted from the work-load figures so that we have a more accurate indication of the work load that competes with the need for proactive police activity relating to OWI.

115

The total number of incidents for any single hour may seem small, but when one considers that one incident can take a substantial amount of time and that--at the busiest hour--only about twenty-five officers are on the streets to respond to calls, the extent to which officers are preoccupied with requests for service becomes clear. At 1:30 a.m. on June 19, the date for which figure II-B-2.1 is drawn, the department had a backlog of ten nonemergency calls and only one officer available for dispatch.

Uniformly, police officers reported to us that they are very busy handling other calls at exactly those times when they believe the greatest number of intoxicated drivers are on the streets. This impression is confirmed by comparing the hourly distribution of drinking-driver accidents and police work load. What the police officers are saying is not simply that they are occupied during these hours--investigating burglaries, handling domestic quarrels, transporting public inebriates, handling noise complaints, and responding to fights in taverns--but also that the potential of a heavy and possibly hazardous work load deters them from initiating proactive OWI arrests. Each such arrest removes at least two, possibly three, officers from the street for one to two hours, leaving the remaining officers even busier and more vulnerable.

116

3. Police officers exercise broad discretion in deciding whether to arrest an intoxicated driver. Absent guidance, this discretion is based on the informal individual criteria of police officers. It follows that each police officer has the potential for influencing the fairness and effectiveness with which the community deals with the drinking-driver problem.

Although in recent years police officers' exercise of broad discretion in deciding whether to arrest has been recognized, the impression remains strong in many quarters that police do not exercise such discretion and that, if they do, it is improper. We expected a substantial percentage of the citizenry to have this impression, but in our study we were surprised to find that prosecutors and judges, who are so close to police operations, were taken aback when informed that the cases they handle represent but a portion of the cases in which an arrest could have been made. And we were surprised also to find police officers who firmly maintain that no discretion is exercised if it appears likely that the driver will register over .13 or if the driver was involved in an accident. These reactions and descriptions of police practice by individuals involved in the enforcement of the OWI laws make it clear, when related to our observations and interviews, that the myth of full enforcement remains strong, and the significance of the discretion exercised by the police in the handling of drinking-drivers is therefore not adequately recognized.

Officers must ignore some offenses; they must exercise discretion in deciding whether to arrest. The Madison department does not have a written policy providing guidance to officers in making these determinations. Several efforts were made in the past to produce such a policy, but the difficulties encountered, understandable in the light of this study, resulted in their being abandoned. Training for the handling of intoxicated drivers has, in recent years, been limited to recruits. The officer providing the training in this area openly discusses the existence and need for discretion, but finds it awkward to provide specific guidance in the absence of departmental acknowledgment of the propriety of exercising discretion.

Most officers candidly acknowledge that discretion is exercised and that individual officers develop their own criteria for its use. It follows that some officers give high priority to OWI enforcement activity; others give it a low priority. Some officers ignore the intoxicated driver because they dislike dealing with

117

such offenders; simply do not see such conduct as serious; or have an alcohol problem of their own that results in their occasionally drinking and driving, and they therefore empathize with the driver. As one officer noted:

> There is no question that some police officers look the other way when they see a drunk driver. There is something to be said about not getting involved; if one doesn't stop the individual, there are no reports to be filled out; no paper work; and no need to account for some of the problems that arise in the processing of a drunk driver.[23]

Officers identified a wide variety of factors that influence them in deciding whether to stop a suspect vehicle; e.g.,

- the volume of other police business
- the seriousness of the driver's traffic violations and driving behavior
- the nearness to the end of a shift
- the avoidance of less desirable work

And officers identified additional factors that, after they have stopped a driver and concluded that the driver is intoxicated, influence their final judgment whether to arrest; e.g.,

- the attitude and cooperation of the offender
- the offender's past driving record
- the offender's honesty in acknowledging past convictions
- a desire to accumulate some overtime
- the likelihood the individual will test well over legal limits
- the proximity of the individual to his or her home
- the likelihood that the individual will drive again if not taken into custody

How all of these considerations come together, in the minds of different police officers, is illustrated in the following excerpts from notes on interviews with a cross-section of police officers:

1

> As an example of a situation in which he would opt for not arresting the driver, the officer cited a case of a woman who was summoned to her child's school because her child had become ill. She was behind the wheel not because she wanted to be, but because she suddenly found that she had to bring her child home.[24]

118

2

The officer states that she makes her decision whether or not to arrest after having first talked to the driver. If the person is "decent," she may offer the individual a ride home, call a taxi, or have him walk. . . . If an individual is told to walk or to get something to eat and is found returning to the car, she would definitely arrest.[25]

3

After closing hours, he says it's an easy matter to arrest a drunk driver. But given the high volume of such drivers, he feels his primary responsibility is to zero in on the dangerously drunk driver--the driver who is all over the road. The drunk driver who is "functioning" simply doesn't get a high priority.[26]

4

The only cases in which he will take a driver home or to a restaurant or suggest he obtain some coffee are those in which he feels the individual would not test sufficiently high on the breathalyzer. He nevertheless is afraid to have the individual on the road. To take the individual into custody, he feels, would be a waste of time.[27]

As revealed in these quoted paragraphs, a number of informal alternatives are employed in lieu of arrest in order to prevent an intoxicated person from continuing to drive. Among those identified:

- have the driver walk home
- have one of the other individuals in the stopped vehicle take over the driving, provided he or she is not also impaired
- call a cab for the driver and secure the vehicle
- escort the driver home with his or her car
- insist that the driver take time out to eat
- remove the ignition key and either hide it in the vehicle, where it is not easily accessible, or deposit it at some point with information left with the driver as to where it can be picked up

119

Discretion is exercised also in accident cases. Based on our study of all accidents resulting in serious injuries in 1980, we know, for example, that at least one of the drivers in thirty-seven of the accidents was recorded on the accident report by the investigating officer as having been drinking and as having been impaired at the time of the accident. But an OWI citation was issued in only thirty of these cases.

We know too that officers are reluctant to arrest the driver in single-car accidents who injures himself and seriously damages or demolishes his car, but does not injure others:

> In the "solo case," in which no one is "infringed upon," and the driver, for example, must undergo surgery, the police aren't likely to hang the individual with the charge of driving while intoxicated. The feeling is that the driver will have suffered enough through the injuries, the damage to the car, the increased insurance, and the hospital and other medical bills. The feeling is that the driver didn't hurt anybody and is already paying through the nose.[28]

These observations clearly show that the manner in which the police exercise their discretion has a profound effect on the value of the criminal justice system as a response to the drinking-driver problem. Police officers may use their authority in ways that have potential for deterring the drinking-driver and preventing accidents. But, under the pressure of the job and absent guidance, their authority may be used in ways that are self-serving, are unrelated to achieving greater effectiveness, or contribute to unequal treatment.

120

4. The capacity of the criminal justice system to handle OWI cases is dependent upon accommodations in the use of the system that have been acceptable to both defendants and the state. The equilibrium can be easily upset, however, by the insistence of a significant number of defendants to make full formal use of the system or by a change in legislative provisions that makes the consequences of conviction more severe.

The prosecution, through the criminal justice system, of those charged with driving while intoxicated--which is increasingly recognized as the most serious of common crimes--presents a special dilemma because of the sheer number of such cases. The more a community tries to take action against those who drink and drive, the more cases it must process. And the more it does to define the offense as serious by increasing sanctions, with the potential that a convicted person will suffer severe consequences, the more important it is to ensure that the safeguards within the system, designed to ensure due process, are available.

Like any system or organization, the criminal justice system can handle only a certain amount of work, especially if the number of prosecutors and judges remains fixed. The work load within the system is determined not only by the number of cases, but also by their complexity. When sanctions are made more severe and due process safeguards, as a result, are more frequently invoked, the complexity of individual cases increases dramatically.

Pressures on the criminal justice system become most acute if one attempts to increase both the number of arrests and the severity of sanctions at the same time (or if one attempts to increase arrests where sanctions are already severe). To avoid these pressures, the trend over the past several years has been to reduce the severity of punishment in favor of large increases in enforcement. The reduction has taken the form of affording offenders the opportunity to enter educational and treatment programs. The threat of the harsher sanctions of fines, jail, and revocation was used to coerce participation in these programs.

Under Wisconsin law in effect at the time of this study, the capacity of Dane County's criminal justice system to handle large numbers of OWI cases had been increased substantially because of the option offenders were given to participate in the Group Dynamics program or in treatment in lieu of increased fines, revocation, or jail. Those who accept this option place little demand on the system. The same statute that authorized this option in 1977 also authorized the police to charge a person

121

who had not been convicted of OWI in the past five years with violation of a city ordinance that is in conformity with the state statute, thereby making the first offense a civil matter. Decriminalization of the first offense was intended, in part, to reduce the likelihood that cases would be contested--thereby further increasing the capacity of the system to handle them. But in actual practice, calling the first offense civil does not significantly reduce the procedural steps through which a case can be taken.

In Madison, as elsewhere in the state, police, prosecutors, judges, and defense counsel have gone beyond the statutes to develop additional accommodations to handle the large volume of cases. The most common accommodation elsewhere, however, of routinely accepting pleas to a lesser charge in OWI cases, has not been employed by the Dane County district attorney or the Madison city attorney. But the following accommodations have been made: (1) offenders with less than .13 BAC are rarely arrested; (2) the charge against those who are arrested with less than a .13 BAC is frequently reduced; (3) concurrent charges are often dropped in exchange for a plea of guilty to the OWI charge; (4) the charge for refusing to submit to a BAC test is automatically dropped in exchange for a plea of guilty to the OWI charge; (5) convicted offenders are routinely provided maximum time in which to pay their fines; (6) an occupational license is automatically issued to those whose license is revoked, provided the minimum statutory standards are met; (7) inpatient treatment is commonly substituted for the thirty days of jail time mandated by the legislature for third offenders; and (8) the trial of difficult cases is commonly postponed with the hope that some intervening developments will facilitate disposition without trial.

These accommodations produce a delicate balance--an equilibrium of sorts--that meets the needs of both defendants and the state. So long as the consequences of conviction are not that severe for the defendant, the fully contested case is rare. As evidenced by the data presented earlier, the cases most likely to go through all of the steps in the system are those in which the defendant faces the most severe sanctions.

Defense counsel play a most crucial role in maintaining this balance. Under our adversary system, their sole duty is to protect the client--guilty or innocent. And as has often been pointed out, in this capacity they owe no duty whatsoever to help society solve problems like the drinking-driver. If, collectively, defense counsel chose to so do, they could create a tremendous

122

backlog in the courts by insisting on full trials. One defense attorney described the situation in this manner:

> The city attorney and district attorney are simply the beneficiaries of a consensus that has been reached that the current system will not be seriously challenged. And because very few people go to trial and almost everybody is convicted on OWI, the city and state can cite this cumulative experience over and over again as a weapon in convincing those new to the system that they should not contest the charge against them. But if defense counsel were to press for trial in an increased number of cases and obtain some acquittals, the prosecution's weapon would be weakened.[29]

This assumes, of course, that defense counsel could obtain acquittals. The legislative provision that .10 or more BAC is evidence per se that a driver was under the influence has made the defense of an OWI charge more difficult. But defense counsel claim that if they have the time to work on a case, OWI charges are subject to challenge on numerous procedural grounds.[30] Professor Force, analyzing the situation nationwide, confirms this locally held belief:

> [A]s one myth is shattered the lawyer simply reaches into his grab bag of reference works for another. The lawyer is not trying in most cases to prove that his client had not been drinking, but rather to create a reasonable doubt as to guilt in the mind of the decision-maker.
>
> Legislation has succeeded in changing the nature of the drinking driving offense and the manner of proof, yet it has continued to classify the offense as a crime. The lawyer is then able to use in drinking-driving cases the same technique he uses in other criminal cases. For example, in providing the chemical tests, legislation usually specifies procedural requirements as prerequisites to their use as evidence in court. The lawyer is at home in the realm of procedure. Contentions as to whether the specified procedures were followed allow cases to be deflected away from the substantive issues, such as did the defendant violate the statute, and allows the attorney to focus attention on such issues as whether the defendant was properly arrested, whether he was properly warned of his rights, whether the officer administering the test had received proper training, whether proper steps in administering the test were followed, whether all of the necessary pieces of paper were introduced into evidence, and so on.[31]

123

And if defense counsel cannot win on procedural grounds, they believe that, if a case is carefully prepared and tried before a jury, the jury will acquit. One defense counsel described the following tactic as standard procedure.

> [I]f we go to trial, we place heavy dependence on getting the jury to see our client as a person for whom they have great sympathy--identifying him or her as their uncle or aunt, their father or mother, or as themselves in a similar plight.[32]

Examples are often cited, but there is limited research that supports the optimism of defense counsel that juries will acquit.[33] Very few jury trials are held in OWI cases in Madison in the course of a year. Impressions as to the outcome of these cases differ a great deal, and unfortunately statistics are not maintained in such a way as to determine which impressions are correct.

In a move to stiffen the penalties relating to OWI, the Wisconsin legislature, in July of 1981, eliminated school and rehabilitation as an option by which the severity of punishment could be reduced. The legislature provided that all first offenders must be suspended for a minimum of ninety days and that second offenders must be sentenced to jail for a minimum of five days. It remains to be seen if these and related changes will increase demands for trials. As for the first offenders, the threat of suspension is mitigated somewhat by an accompanying provision that will make occupational licenses more readily available.

The experience nationwide suggests strongly that the equilibrium existing in Madison will be upset by the increased sanctions provided for in the new legislation. Several studies of efforts to implement more severe sanctions for the OWI offender indicate that the more severe the penalty, the less the probability that it will be imposed.[34] The National Highway Traffic Safety Administration summarizes the experiences in this fashion:

> As severity of penalty increases:
>
> Prosecutors are:
> - required to spend more time in preparing and presenting the case,
> - more likely to accept plea bargaining.
>
> Courts are:
> - more likely to have large backlogs,
> - more likely to accept plea bargaining,
> - less likely to convict,
> - less likely to impose sentence even if mandatory.

124

Defendants are: more likely to plead innocent,
more likely to hire lawyers,
more likely to demand jury trials.

Police officers are: less likely to arrest,
required to put more time in preparing case and appearing in court.[35]

Still another possible consequence of increasing sanctions is greater inequity in the system. As sanctions are increased, persons who can afford legal counsel will be more highly motivated to engage an attorney. And persons who cannot afford counsel will turn, with increasing frequency, to the public defender. Although we have no way of knowing how great the demand for public defender services will be when the new legislation goes into effect, we do know that, in Dane County and throughout Wisconsin, public defender resources are seriously strained already, limiting the time that can be devoted to any single case. In addition, a great number of defendants among those charged with OWI will not qualify for publicly supported defense counsel, but cannot afford a private attorney. We see the new legislation, therefore, as leading to the increased use of legal counsel, with the potential that lack of needed funds will create greater inequality in the disposition of cases. On a small scale, this consequence is already being realized in the case of those defendants who are found to have less than a .13 BAC. As pointed out in section II-A-12, those who hired private attorneys had their charges reduced; those who did not were convicted of the OWI charge.[36]

125

5. Increasing the severity of sanctions for driving while intoxicated may satisfy the citizens' need to express their view of the seriousness of intoxicated driving and to provide for what they consider to be appropriate retribution. But in the implementation of these sanctions, the intended effect is greatly softened, reflecting the continuing ambivalence of the community in its attitude toward those who both drink and drive.

As we have seen, a major factor that contributes to eroding the impact of legislatively prescribed sanctions for intoxicated driving is the pressure that develops within the criminal justice system to process quickly and efficiently the large number of arrests that are made. But what if the resources of the criminal justice system were vastly expanded or if the power of defense counsel to bog down the system was somehow curtailed? Would the legislative sanctions then be imposed more rigidly?

Legislatures, when they enact severe penalties, usually are reacting to specific incidents of intoxicated driving in which a driver with a prior record of convictions and often with a record of other behavior that demonstrates gross irresponsibility kills or injures an innocent person. Their reaction reflects public opinion. As Ross notes:

> [O]pinion polls that find drinking and driving to be regarded as a serious offense are probably tapping attitudes that relate to the image of a grossly intoxicated driver who injures and kills as a result of his intoxication.[37]

But as noted in the Alcohol Safety Action Projects studies:

> This, however, is not a picture of the drinking driver who reaches the courts. As judges and prosecutors discover that they are dealing with regular citizens who have jobs, families, and a future, they begin to regard the legislated penalties as too severe. Juries agree: they see the offender as a person like themselves. They are unwilling to see him suffer "too much" . . . .[38]

Sympathy for and identification with the drinking-driver is another major factor that, along with the pressures of volume and the threats of defense counsel, contributes to eroding the impact of legislative enactments. Several factors are all interrelated, so that the action of a prosecutor or judge in a given case is not easily traceable to any one of them.

126

If legislatively enacted sanctions are negated, and the overwhelming evidence is that some of them are, why should the legislature act at all? Legislation does have symbolic value; it sets forth the position of the state regarding intoxicated driving. For example, even though a revoked driver operates a car with an occupational license or drives without a license, the state is on record as having formally withdrawn the motorist's regular driving privilege. And even if a treatment program does not effectively treat, the requirement that convicted offenders participate in a program may have value as a mild sanction. What is troubling is that, despite all of the evidence to the contrary, some legislators believe that increasing sanctions will have more than symbolic value; that the sanctions will be carried out and will have the desired effect. And to the extent that citizens accept this claim, they too are misled.

127

6. The criminal justice system, although generally viewed as most appropriate for dealing with serious offenders, has great difficulty in dealing with the most troublesome of the OWI cases.

Implicit in the observation that the criminal justice system is cumbersome when it must handle the large volume of fairly routine OWI cases is the assumption that it is more appropriate and more effective in responding to the most serious OWI cases. Our interviews with police, prosecutors, and judges, however, indicate just the opposite; that those cases involving individuals who repeatedly drive while intoxicated are dealt with least effectively.

One type of serious offender, identified earlier, is the so-called "binge" driver--who continues to drive as his or her capacity to drive grows steadily worse in a short period of time. Statistically, the likelihood of more than one police intervention is not great. But even if binge drivers are arrested several times, the criminal justice system does not currently operate with sufficient speed to incapacitate them as the potential danger posed by their driving rapidly escalates.

Another type of serious offender is the chronic alcoholic who continues to drive. Such offenders may have a family and a job. Jail is not likely to change their long-term behavior. Some mental health counselors feel jail may actually complicate the conditions contributing to the alcoholism. Jail does result in loss of income and may possibly result in loss of the job. Judges handling such cases could define their role narrowly and simply impose a fine and jail sentence and revoke the offender's license. But if judges desire a longer-term solution--one that reduces the danger that such persons pose to the community after serving their sentence--the current legislative options are not adequate. This is one reason why the prosecutor's office and the judges have improvised an arrangement whereby a multiple offender who agrees to enter an inpatient alcohol treatment program can substitute participation in the program, day for day, for jail time. This reasoning also lies behind another informal arrangement whereby a multiple offender is provided with out-patient treatment under the close supervision of an alcoholic rehabilitation counselor. Under this arrangement, successful completion of a program that involves participation in Alcoholics Anonymous results in the eventual suspension of the sentence.

SECTION II

THE USE OF THE CRIMINAL JUSTICE SYSTEM AS A RESPONSE TO THE DRINKING-DRIVER IN MADISON

128
Notes

NOTES

1. Wisconsin Crime Information Bureau, Department of Justice, Wisconsin Criminal Justice Information, Crime and Arrests--1979, table 27, pp. T60-T89 (1980).

2. These data were compiled from reports filed by the individual police agencies.

3. Madison [Wis.] Police Department Annual Report--1980, p. 69.

4. "City Drunk Driver Arrests Soar," Wisconsin State Journal (20 May 1977).

5. Interview 5.5.5.

6. The field sobriety test, as used by the Madison Police Department, consists of combinations of some of the following five "tests." To test balance, drivers may be asked to tilt their head back with arms outstretched and feet together. In the same starting position, drivers may be asked to touch their nose with their index finger, with eyes closed. The drivers may be asked to walk, heel to toe, along an imaginary straight line. (Some officers ask that they turn around and return.) The drivers may be asked to pick up a small object from the ground (e.g., a coin). Or the drivers may be asked to recite something (usually the alphabet). The first three tests are probably the most commonly used.

7. Leland G. Summers, R. Glen Ridgeway, and Douglas H. Harris, Arrest Procedures for Driving While Intoxicated, Final Report, p. 35 (National Highway Traffic Safety Administration, 1980).

8. Interview 5.13.1.

9. Interview 4.30.2.

10. Interview 3.2.3.

11. Wis. Stat. § 346.63 (1).

SECTION II NOTES

129
Notes

12. Madison [Wis.] City Ordinance 12.64 (1)(A).

13. Case #54, Court Tracking Study.

14. Interview 4.6.3.

15. National Highway Traffic Safety Administration, Alcohol and Traffic Safety Workbook (NHTSA 1980-81 Workshop Series on Alcohol & Occupant Restraint).

16. National Highway Traffic Safety Administration, United States Department of Transportation, Alcohol and Highway Safety: A Review of the State of the Knowledge, Summary Volume 1978, at 66 (Washington, D.C.: USGPO, 1979).

17. James L. Nichols, Vernon S. Ellingstad, and Raymond E. Reis Jr., "The Effectiveness of Education and Treatment Programs for Drinking Drivers: A Decade of Evaluation," at 13-14 (a paper presented at the 8th International Conference on Alcohol, Drugs and Traffic Safety, Stockholm, Sweden, June 1980).

18. On the effectiveness of sanctions, see National Highway Traffic Safety Administration, Final Report of the National Highway Safety Advisory Committee on Alcohol Safety Adjudication (1974); and H. Laurence Ross, The Neutralization of Severe Penalties: Some Traffic Law Studies, 10 Law and Society Review 463 (1976).

For a review of the literature on the effectiveness of a variety of alternatives in dealing with the alcohol-crash problem, see Alcohol and Highway Safety: A Review of the State of the Knowledge, supra note 16, at 35-55.

Several empirical studies have found little or no differences in the effect of a variety of sanction and treatment alternatives. See, for example, O. R. Didenko, A. W. McEachern, R. M. Berger, and S. Pollack, Drinking Driver and Traffic Safety Project, Final Report, vol. 1 (NHTSA, 1972); and M. Blumenthal and H. L. Ross, "Judicial Discretion in Drinking-Driving Cases: An Empirical Study of Influences and Consequences," Proceedings of the 6th International Conference on Alcohol, Drugs and Traffic Safety (Toronto, 1975).

With regard to the effectiveness of treatment and education programs implemented in ASAP, see especially James Nichols, "The Effectiveness of ASAP Education and Rehabilitation Programs," Proceedings of the 7th International Conference on Alcohol, Drugs and Traffic Safety, pp. 23-28 (Melbourne, 1977).

SECTION II NOTES

130
Notes

19. For a succinct critique of the effectiveness of these laws on deterring the drinking-driver, see H. Laurence Ross, Deterrence of the Drinking Driver: An International Survey (draft report to NHTSA, n.d.).

20. Alcohol and Traffic Safety Workbook, supra note 15, at 2-6. Note especially the graph, presented at the end of section 2 in the workbook, on the proportion of drivers with BACs over .10 who are arrested.

21. We arrived at this figure by using Borkenstein's formula for estimating the number of incapacitated trips per 100,000 population and divided this number by the 1,029 OWI arrests in Madison in 1980. (See section I-B-1.) [Robert F. Borkenstein, A Proposal for Increasing the Effectiveness of ASAP Enforcement Programs (unpublished, October 17, 1972).]

22. Robert Force, "The Inadequacy of Drinking-Driver Laws: A Lawyer's View," Proceedings of the 7th International Conference on Alcohol, Drugs and Traffic Safety, p. 442 (Melbourne, 1977).

For an excellent summary of more elaborate studies that analyze the probability that an intoxicated driver will be arrested, see H. Laurence Ross, Deterrence of the Drinking Driver, supra note 19, at 90-93.

23. Interview 2.9.2.

24. Interview 2.9.2.

25. Interview 4.30.2.

26. Interview 5.5.1.

27. Interview 5.13.2.

28. Interview 2.9.6.

29. Interview 4.6.3.

30. For examples of the endless array of procedural questions that can be pursued by defense counsel, see Richard E. Erwin, Defense of Drunk Driving Cases: Criminal-Civil, 3d ed. (N.Y.: Matthew Bender, 1980).

SECTION II NOTES

131
Notes

31. Robert Force, "The Inadequacy of Drinking-Driver Laws," supra note 22, at 440.

32. Interview 5.6.4.

33. H. Laurence Ross, Deterrence of the Drinking Driver, supra note 19, at 95-96, citing J. King and M. Tipperman, Offense of Driving While Intoxicated: The Development of Statutes and Case Law in New York, 3 Hofstra Law Review 541-604 (1975).

34. See National Highway Traffic Safety Administration, Final Report of the National Highway Safety Advisory Committee on Alcohol Safety Adjudication, supra note 18; H. Laurence Ross, The Neutralization of Severe Penalties, supra note 18; and N. Shover, J. W. Gurley, and W. B. Bankston, Response of the Criminal Justice System to Legislation Providing More Severe Threatened Sanctions, 14 Criminology 483-500 (1977). For an analysis of judicial accommodations to the changes instigated as part of ASAP, see National Highway Traffic Safety Administration, Executive Summary of Five Alcohol Safety Action Projects' Judicial Systems (1978).

35. Mandatory Jail Sentences, tables 6 and 7 (article prepared for the Alcohol and Traffic Safety NHTSA Workshop Series on Alcohol & Occupant Restraint, 1980-81).

36. Similar findings resulted from the analysis of the Washtenaw County, Michigan, experience under ASAP. In 1971-72, three of four persons charged with Michigan's equivalent of OWI who had lawyers had their charges reduced to "driving while impaired." In contrast, two of three without counsel were convicted of the original charge. See Cheryl D. Clark, Analysis of Washtenaw County Alcohol Safety Action Program Judicial, Referral and Diagnostic Activity, p. 11 (final report, Highway Safety Research Institute, University of Michigan, 1973).

37. H. Laurence Ross, Deterrence of the Drinking Driver, supra note 19, at 95, citing H. Grasmich and D. Green, Legal Punishment, Social Disapproval, and Internalization as Inhibitors of Illegal Behavior, 71 Journal of Criminal Law and Criminology 325-335 (1980).

38. National Highway Traffic Safety Administration, Results of National Alcohol Safety Action Projects, p. 1 (1979).

132

III. PROPOSALS FOR INCREASING THE EFFECTIVENESS OF THE POLICE RESPONSE TO THE DRINKING-DRIVER PROBLEM IN MADISON

What is the most responsible and intelligent position for the Madison Police Department regarding the problem created by the drinking-driver? What should the department do to improve its effectiveness in dealing with the problem? What should it advocate in the community and before the legislature?

Clearly the citizens of Madison now look to the police department, the district attorney, and the courts as having the primary responsibility for dealing with the problem. Because the department has in fact played so central a role, personnel within the department have a wealth of experience and knowledge about drinking-drivers--their characteristics, their behavior, and the difficulty in trying to control them. It follows that the department is in an excellent position to develop and recommend programs to improve current responses. It follows too that if the initiatives of the department are based on firmly established facts and are carefully developed, they are likely to be given serious consideration by the community.

In thinking through and proposing new alternatives, the department has an obligation to be both realistic and pragmatic. This requires, as a minimum, recognizing

- the local dimensions of the problem as set out in detail in section I;
- the experience in the use of the criminal justice system, as described in section II-A;
- the limitations on the effectiveness of the criminal justice system, as described in section II-B;
- the relatively advanced nature of Wisconsin's response to the problem when compared with other jurisdictions;
- there are no readily available programs elsewhere, proved in their effectiveness, that need only be implemented here;
- the need for innovation, experimentation, and doubtless some risk-taking as well in developing new responses;

133

- that legislation, although setting the basic legal framework for dealing with the intoxicated driver, creates some conflicts that must be resolved and gaps that must be filled, requiring a good deal of administrative decision-making; and

- there is room to work for improvement within the perimeters of existing legislative policies; that where feasible, it is preferable to work for improvement within these limits, with the potential for establishing a basis for subsequent legislative action, rather than await further legislative action.

With these considerations in mind, we propose that the department concentrate its resources on development of the following five programs:

(A) increasing dramatically the number of contacts with drivers suspected of being intoxicated;

(B) improving the ability of the police to determine the extent to which alcohol is a contributing factor in traffic accidents;

(C) monitoring those drivers whose behavior poses a continuing and possibly increasing danger to themselves and the community;

(D) increasing control over the dispensing of intoxicating beverages to those who subsequently drive; and

(E) intensifying efforts to educate the community regarding the drinking-driver problem.

Each of these programs is described in detail in this section. In the descriptions, we have sought to set out clearly the objectives in proposing the program, the supporting rationale, and the steps that must be taken to put the program into effect.

134

A. Increase Dramatically the Number of Contacts with Drivers Suspected of Being Intoxicated.

It is proposed that the Madison Police Department undertake a program to increase the number of contacts with drinking-drivers and to alter the nature of these contacts so that each has a greater potential impact. Contacts are presently limited both in their number and in the use made of them. The department arrested 1,028 persons for OWI in 1980--a substantial number that ranks the department high among other police agencies and that presents a large work load for the prosecutors and the courts. But this means that the department arrested an average of only three persons a day, which is a minuscule number when related to the total number of drinking-drivers. We know from our interviews and observations that officers stop many more drivers who they suspect are intoxicated than they arrest. But the practice, as previously described, is uneven between officers and, because it lacks formal endorsement, is carried out with an air of questionable legality and propriety. The practice is not a part of the department's formal response to the drinking-driver problem, and whatever value such contacts may have is totally dependent on the initiative of individual officers.

The proposed field contact system is not intended to reduce the current level of arrest activity. To the contrary, for the proposed system to work, the department must maintain its current arrest levels. The likelihood of arrest should not be reduced. Actually, increased contacts with drivers will identify a greater number of individuals whose condition warrants arrest, thereby potentially increasing the total number of arrests.

Arrest is a serious intervention in the life of a citizen. It is disruptive, denies freedom, and possibly leads to the imposition of sanctions. When an arrest is made, due process demands certain procedures which are often cumbersome and almost always time-consuming. We found Madison police officers to be both aware and respectful of the need for due process protections in making arrests. When the intervention of an officer in a citizen's life is less than that associated with an arrest, the need for collecting information, gathering evidence, warning as to the individual's rights, and making a detailed record of these various steps is also reduced. A police officer, if properly trained, can use a range of alternatives, less intrusive than arrest, in responding to the problem of the drinking-driver without in any way violating the driver's constitutional rights. And the alternatives may require no more than from ten minutes

to half an hour, depending on which is chosen. Thus, a system of field contacts would meet the need for a simpler and more efficient way of augmenting existing efforts to impact on the drinking-driver. In addition, because the system is less formal, it would allow an officer to terminate a contact quickly if a competing demand should arise--an option usually precluded when an arrest is made.

In proposing a field contact system, we are suggesting that the department make available to the patrol officer a wider range of responses; that the officer have a greater number of options than simply choosing between arresting and not arresting an offender. This requires that the department recognize the legality, propriety, and value of contacts resulting in other than arrest. (The specific nature of these actions will be described in detail below.)

1. Objectives of a Field Contact Program.

A well-developed field contact program has the potential for achieving several distinct objectives.

First and foremost, it would encourage the police to intervene in driving conduct that is potentially dangerous. A police contact, if it results in stopping an intoxicated driver from continuing to drive, terminates, at least temporarily, a potentially dangerous situation. As is true in handling a fight, the highest priority and most immediate objective of the police should be to stop a life-threatening situation. Only after this is accomplished is the officer justified in turning his or her attention to deciding whether to take further action that might impact on future behavior. If the police, for a variety of reasons, are not able to arrest all of those drivers they believe to be intoxicated, they have--as a minimal obligation--a responsibility to attempt to prevent such drivers from continuing to drive. The officer who insists that a driver relinquish the wheel to others in a car, or insists the driver leave his car and take a cab home, or actually escorts the driver home, has, at a minimum, eliminated the likelihood that the individual will cause damage, injury, or death in the hours immediately after the intervention. Few activities performed by the police have an outcome that is so clear-cut and of such great value.

An increase in contacts increases the risk for drinking-drivers that they will be screened by the police and increases the deterrent value flowing from this risk. As previously noted,

135

making an OWI arrest can tie up an officer for from one to two hours and, in addition, require the time of a backup officer and the officer administering the breathalyzer test. Although no precise estimate can be made without actually experimenting with a field contact procedure, we feel confident that from six to ten contacts can be made with the combined resources expended on a single arrest. Moreover, an officer has the added benefit of much greater control over the allocation of his or her time.

Such a dramatic increase in the risk of being stopped and identified may accomplish the deterrent effect hoped for--but never achieved--in the programs aimed at increasing the number of arrests. The deterrence we refer to may flow either from the increase in the risk of being stopped or from the stop itself. For some offenders, the inconvenience, embarrassment, and warning associated with a stop may be sufficient to break a pattern of otherwise unchallenged driving while intoxicated.

Each police contact, conducted openly and with adequate training, could afford a unique opportunity for the police to convey information about the dangers of drinking and driving to those engaged in such conduct. Most educational efforts aimed at reducing the incidence of impaired driving have a shotgun character to them. They are broad and unfocused. Messages are aimed at a large audience (e.g., spot announcements on television) with the hope that they will reach some drivers for whom they have special relevance. By contrast, when a police officer is face-to-face with a driver who has been drinking and when the officer can confront the driver with evidence of the effect that an intoxicant may have had on his or her driving behavior, the message is directed to the person to whom it is especially relevant. For some persons, the vulnerability of the offender and the authority of the officer combine to increase the likelihood that information and warnings delivered under such conditions will be effective.

Finally, an expanded program of field contacts is bound to increase substantially the likelihood that the most incapacitated drivers and those who repeatedly drink and drive will be identified and brought into the network for the most appropriate disposition. As was noted earlier, given the limited number of contacts under prevailing practices, there is an excellent chance that a person may repeatedly drive while intoxicated for years in Madison without any intervention. A program of increased field contacts will most assuredly identify more individuals whose condition and driving behavior warrant arrest. And if we are correct in postulating that some drivers account for a disproportionate percentage of the total number of trips made by intoxicated

136

137

drivers, it follows, based on statistical chance, that these individuals will come to police attention more frequently.

2. Additional Rationale.

In setting forth the above objectives, we have described some of the major arguments in support of a program of increased field contact. However, a number of other considerations lend additional support to the proposal.

By giving officers a range of alternatives for handling drinking-drivers, a program of increased field contacts would take some of the emphasis off the current concern with the measured BAC level. Police officers ought to be encouraged to stop, check out, and take actions against drivers based on the driving behavior rather than on a guess as to the driver's BAC level. Knowing that they are not limited to making an arrest when contemplating a stop should eliminate premature concern with BAC.

Our interviews and observations led us to conclude that the importance currently attached to BAC levels in the prosecution of an OWI case has distorted some aspects of police activities relating to the drinking-driver. Because a relatively small percentage of all intoxicated drivers is singled out for arrest and because so much effort is consumed in making an arrest, officers quite naturally like to reserve arrest for those cases in which they expect the driver will have a high BAC. This not only serves to affirm their judgment that they have zeroed in on a serious case; it also maximizes the likelihood that arrest will result in a conviction. But as is true of many areas in which a scientific measure becomes available, concern about meeting certain standards may draw attention away from the original goal--which is to identify and do something about drinking-drivers. Some cases came to our attention in which officers concluded the drivers were "bombed" but, because they were young and inexperienced drinkers, for example, the officers concluded that they would not test high on the breathalyzer and therefore decided not to arrest.

The emphasis placed on using BAC levels as a measure of seriousness--justifying arrest and prosecution--has also drawn attention away from the danger posed by those who are less intoxicated. The likelihood that a driver with a BAC between .10 and .13 will become involved in an accident is much greater than has been widely assumed. One need only cite the research

138

used nationally over the past several decades to support legislation establishing .10 BAC as warranting prosecution for OWI.[1]

In Madison, we found that from among the 32 tested drivers who were drinking and impaired and who were involved in accidents causing serious injuries in 1980, 10 or 31% had a BAC between .09 and .13. Of the 27 tested drivers in our March 1980 sample who were arrested for OWI because of their involvement in accidents, 7 or 26% were found to have a BAC of less than .13. Because of the practices that reduce the likelihood that any record will be made of alcohol involvement if it is below .13, these local figures probably understate the extent to which individuals with a BAC below .13 get involved in accidents.

As a result of our field observations and our interviews with police officers, we grew concerned about motorists who drive with a BAC of between .10 and .13. Accident investigations that we observed and accounts by police officers of accidents that were noteworthy in their minds because of the effect of alcohol often involved drivers with a BAC between .10 and .13. Although individuals in this BAC range appeared responsible for a substantial percentage of accidents, the proactive enforcement practices of the department, as reflected in arrests, are clearly aimed at motorists with a much higher BAC level. We recognize, of course, that an informal system of field contacts is already operating in the department and that some drivers with lower BAC levels are already being handled by alternative methods that we believe are both proper and a good use of police resources. Formal establishment of a field contact system affords the opportunity to deal in this same fashion with many more drivers with a low BAC.

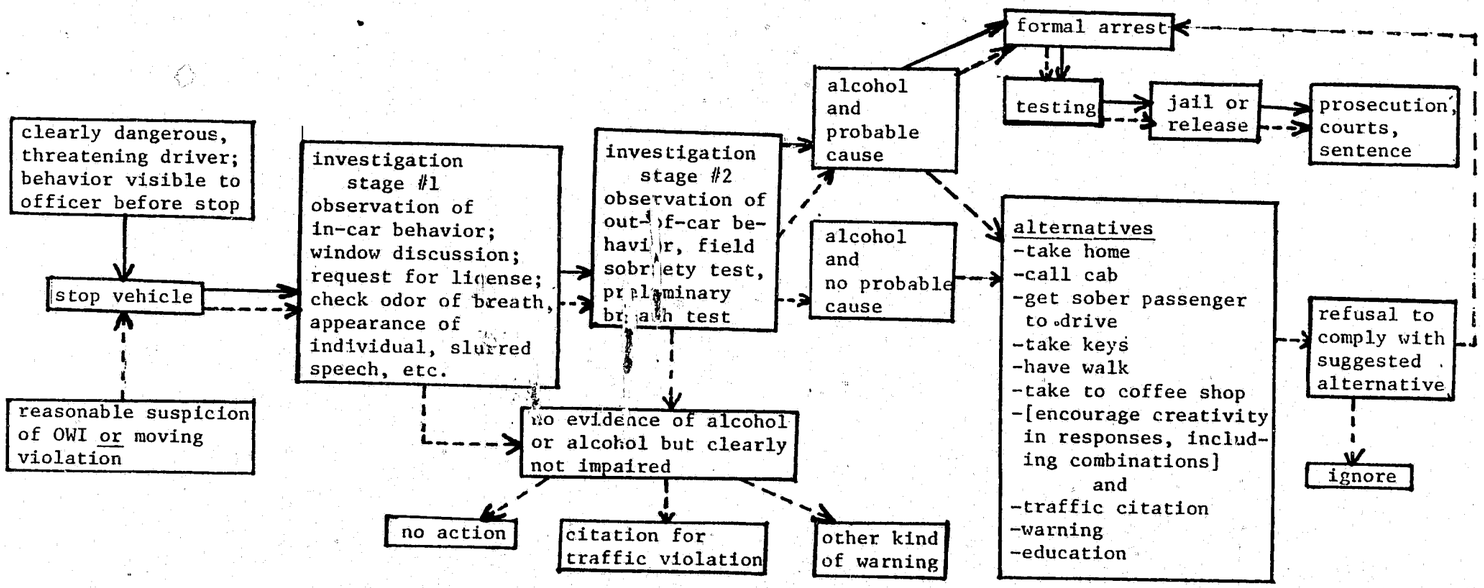
3. Major Elements of the System.

Figure III-A-3.1 on the following page identifies the major steps in a comprehensive system of field contact and shows the relationship between these steps and the various decisions that a police officer must make. This diagram, except for some minor embellishments, portrays what a number of Madison police officers are already doing. The substance of what is proposed is not new; rather, the novelty is in giving visibility to a procedure that has been in use, giving it official status, and urging that more police officers make use of it.

a. The Initial Stop. An initial stop is made under two somewhat different conditions. The first is when an officer is

Figure III-A-3.1

Proposed System of Field Contacts



Straightforward processing of an OWI arrest when it is clear from the outset that an arrest is in order.

Steps and choices in a proposed system of field contacts when the initial basis for a stop does not always justify or compel arrest.

140

certain, on viewing clearly outrageous driving behavior, that the driver is intoxicated. One officer described such cases as where a driver is "all over the road." We would include here driving on the wrong side of the road, extreme weaving from one side to the other, and driving off the road. In such situations, we would expect an officer to proceed from the outset with the expectation an arrest is to be made, using the subsequent investigative stages primarily to confirm what he or she has already concluded. This calls for going through the OWI arrest procedure in a straightforward manner, indicated by the solid line on figure III-A-3.1.

The second, more common situation involves less exaggerated driving behavior. The officer is alerted to the possibility that a driver is intoxicated, but must check out, through further investigation, other possible explanations for the driving behavior (e.g., inattentive driving, sleepiness, or simply poor driving).

Most of the initial indicators of intoxicated driving are traffic violations. Police officers have the authority--some would argue even the obligation--to stop motorists who violate traffic laws. But officers are quite properly trained not to use a stop for a traffic violation as a pretense for investigating some other form of criminal contact. As a consequence, many officers feel using regular traffic enforcement as a way of dealing with the drinking-driver problem is somehow improper--bordering on harassment. There is, however, a major difference in using regular traffic enforcement to get at intoxicated drivers, as compared to its use, for example, as a way to get at narcotic peddlers, burglars, or robbery suspects. Unlike these latter forms of conduct, the offense of driving while intoxicated is inextricably linked with driving behavior and the violation of other laws governing the operation of a motor vehicle. The potential for abuse and unequal enforcement arises only if officers, rather than limit themselves to reacting to obvious violations such as ignoring a traffic signal, stop and cite motorists for violations that the department does not normally enforce.

What about those situations in which there is no traffic violation, but visual cues suggest the driver is intoxicated? Police officers have the authority to stop temporarily and question a person if they have reasonable suspicion that the person is committing, is about to commit, or has committed a crime. (Wis. Stat. § 968.24) As the department's manual explains, the officer must have more than a hunch, but need not have probable cause.[2]

141

Some might argue that because the first OWI offense carries no more than a forfeiture as a penalty, OWI is not a crime within the meaning of that term as defined by statute and that the stopping and questioning authority therefore is not applicable. It is, however, arguable that the legislative assertion that police officers can stop and question on reasonable suspicion that a crime has been committed is not an assertion that the stopping and questioning authority cannot be applied in other circumstances. Moreover, an officer has no way of knowing, in advance, whether the driver has been convicted of OWI in the past five years. If previously convicted, the new offense is a crime because it carries the potential of a fine and jail sentence. The authority to stop is dependent on the penalty that could be imposed rather than on the penalty that is imposed.

Although we therefore feel officers currently have ample basis to stop a driver when they have resonable grounds to suspect the driver is OWI, the slight ambiguity that exists could be eliminated if the legislature were to adopt a provision similar to that enacted for the Department of National Resources that authorizes its enforcement officers to stop temporarily and question a person their officers reasonably suspect is committing, is about to commit, or has committed a violation of any law that their officers are authorized to enforce, or administrative regulations adopted under them. (Wis. Stat. § 23.58)

Considerable work has been done to aid the police in determining before a stop the chances that a nighttime driver has a BAC of .10 or greater. A sophisticated OWI detection guide is now available to police agencies from the National Highway Traffic Safety Administration.[3] The guide is based on a two-phase research project.

In the first phase, the researchers produced a preliminary listing of visual cues potentially useful in predicting whether a driver is intoxicated. Trained observers then accompanied police officers on patrol. They observed 643 instances of driving behavior and vehicle actions that deviated from normal. In each instance, the patrol officer stopped the vehicle and measured the BAC of the driver through use of a carefully calibrated portable breath tester. In statistical analysis, the researchers then focused on the 23 most common cues, which accounted for 92% of all of the incidents observed during the study. Then, based on correlations between the cues and BAC test results, probability values were assigned to each cue to aid officers in discriminating between the actions of an intoxicated driver (over .10 BAC) and those of a sober driver.

142

In the second phase of the project, the cues and their assigned values were employed by police officers in 4,600 patrol stops in several cities, with the officers again testing the BAC of the drivers stopped. An analysis of the correlation between the cues and the BACs was used to validate and refine the detection guide produced in the first phase of the study.

The final cues and their probability values are listed on the following pages. The study concluded, for example, that the probability is 65 out of 100 that a vehicle straddling the center or lane marker is being driven by a driver who has a BAC in excess of .10. By contrast, there is a probability of only 30 in 100 that a nighttime driver with both headlights off is intoxicated. The complete version of the guide provides instructions for calculating probability estimates when multiple cues are observed simultaneously.

OWI Detection Guide[4]

Visual Cue	Chances in 100 of Nighttime Driver With BAC Equal to or Greater Than .10
Turning with wide radius. During a turn, the radius defined by the distance between the turning vehicle and the center of the turn is greater than normal.	65
Straddling center or lane marker. The vehicle is moving straight ahead with the center or lane marker between the left-hand and right-hand wheels.	65
Appearing to be drunk. This cue is actually one or more of a set of indicators related to the personal behavior or appearance of the driver. Examples of specific indicators might include: tightly gripping the steering wheel, face close to the windshield, eye fixation, slouching in the seat, gesturing erratically or obscenely, drinking in the vehicle, driver's head protruding from vehicle.	60
Almost striking object or vehicle. The observed vehicle almost strikes a stationary object or another moving vehicle. Examples include: passing abnormally close to a sign, wall, building, or other object; passing abnormally close to another moving vehicle; and causing another vehicle to maneuver to avoid collision.	60
Weaving. Weaving occurs when the vehicle alternately moves toward one side of the roadway and then the other, creating a zig-zag course. The pattern of lateral movement is relatively regular as one steering correction is closely followed by another.	60
Driving on other than designated roadway. The vehicle is observed being driven on other than the roadway designated for traffic movement. Examples include driving: at the edge of the roadway, on the shoulder, off the roadway entirely, and straight through turn-only lanes or areas.	55
Swerving. A swerve is an abrupt turn away from a generally straight course. Swerving might occur directly after a period of drifting when the driver discovers the approach of traffic in an oncoming lane or discovers that the vehicle is going off the road; swerving might also occur as an abrupt turn is executed to return the vehicle to the traffic lane.	55

Visual Cue	Chances in 100 of Nighttime Driver With BAC Equal to or Greater Than .10
Slow speed (more than 10 mph below limit). The observed vehicle is being driven at a speed that is more than 10 mph below the limit.	50
Stopping (without cause) in traffic lane. The critical element in this cue is that there is no observable justification for the vehicle to stop in the traffic lane; the stop is not caused by traffic conditions, traffic signals, an emergency situation, or related circumstances. Intoxicated drivers might stop in lane when their capability to interpret information and make decisions becomes severely impaired. As a consequence, stopping (without cause) in the traffic lane is likely to occur at intersections or other decision points.	50
Following too closely. The vehicle is observed following another vehicle while not maintaining the legal minimum separation.	50
Drifting. Drifting is a straight-line movement of the vehicle at a slight angle to the roadway. As the driver approaches a marker or boundary (lane marker, center line, edge of the roadway), the direction of drift might change. Drifting might be observed within a single lane, onto the shoulder, or from lane to lane.	50
Tires on center or lane marker. The left-hand set of tires of the observed vehicle is consistently on the center line or either set of tires is consistently on the lane marker.	45
Braking erratically. The driver of the observed vehicle is braking unnecessarily frequently, maintaining pressure on the brake pedal ("riding the brakes"), or braking in an uneven or jerky manner.	45
Driving into opposing or crossing traffic. The vehicle is observed heading into opposing or crossing traffic under one or more of the following circumstances: driving in the opposing lane, driving the wrong way on a one-way street, backing into traffic, failing to yield right-of-way.	45
Signaling inconsistent with driving actions. A number of possibilities exist for the driver's signaling to be inconsistent with the associated driving actions. This cue occurs	40

145

Visual Cue	Chances in 100 of Nighttime Driver With BAC Equal to or Greater Than .10
when inconsistencies such as the following are observed: failing to signal a turn or lane change, signaling opposite to the turn or lane change executed, signaling constantly with no accompanying driving action, and driving with four-way hazard flashers on.	
Slow response to traffic signals. The observed vehicle exhibits a longer than normal response to a change in traffic signal; for example, the driver remains stopped at the intersection for an abnormally long period of time after the traffic signal has turned green.	40
Stopping inappropriately (other than in traffic lane). The observed vehicle stops at an inappropriate location or under inappropriate conditions, other than in the traffic lane. Examples include stopping: in a prohibited zone, at a crosswalk, far short of an intersection, on a walkway, across lanes, for a green traffic signal, or for a flashing yellow traffic signal.	35
Turning abruptly or illegally. The driver executes any turn that is abnormally abrupt or illegal. Specific examples include turning: with excessive speed, sharply from the wrong lane, a U illegally, and outside the designated turn lane.	35
Accelerating or decelerating rapidly. This cue encompasses any acceleration or deceleration that is significantly more rapid than that required by the traffic conditions. Rapid acceleration might be accompanied by breaking traction; rapid deceleration might be accompanied by an abrupt stop. Also a vehicle might alternately accelerate and decelerate rapidly.	30
Headlights off. The observed vehicle is being driven with both headlights off during a period when the use of headlights is required.	30

146

Although the criteria emanating from this study are not, in our opinion, as "scientific" as the instructions for their use suggest, they reflect the result of a great deal of careful effort and are far superior to the results of similar efforts to articulate "reasonable suspicion" or "probable cause" as applied to other conduct with which the police must deal. We do not envision patrol officers calculating probabilities and in mechanical fashion then determining whether to stop a driver. The guide rather can serve as a training aid, especially for new officers, and as a way of encouraging all officers to think about driving behavior they observe and its relationship to the offense of OWI. We therefore believe that careful use of the detection guide would contribute significantly to improving the quality of the police decision to stop on suspicion of OWI.

Under current practice, officers are expected to inform the dispatcher when they make an OWI stop. This results in the immediate dispatch of a backup officer. The practice has the effect of seriously limiting OWI related stops. It assumes that the officer, before conducting an investigation, has decided to make an OWI arrest. This is an appropriate assumption in the first kind of situation, described earlier, where it is apparent before conducting an investigation that the driver is intoxicated. But in situations in which the officer makes a stop based only on suspicion, the investigating officer may not want to impose on a second officer and may prefer to make an individual judgment without having to explain his or her actions to a fellow officer. The current policy, when not ignored, has the effect of inhibiting officers and stifling their initiative in making field contacts. It should be revised as it relates to the need for expanding the field contact program.

b. The Investigation. The investigation immediately following the initial stop in a field contact program consists of two stages. The first stage involves minimum intervention. While the driver remains seated in the car, the officer typically asks to see the driver's license and requests some basic information. The officer is alert to slurred speech, disorientation, physical signs of incapacitation, and the odor of alcohol. The field contact scheme anticipates that when officers find no significant alcohol involvement, they will terminate their contact at this stage--explaining to the driver why he or she was stopped and either take no further action, issue a citation for the traffic offense that may have prompted the stop, or warn the driver to avoid the driving conduct that led to the stop.

If the first stage of the investigation confirms or strengthens the officer's belief that the individual is intoxicated, the officer will go to the second stage, as is current practice. This involves requesting the driver to step out of the car, observing his or her balance, administering the standard field sobriety tests, and checking the suspect's driving record.

The use of drivers' records warrants special attention. Police officers currently overwhelmingly believe that checking a driver's record is improper until after the officer determines objectively that an arrest is to be made for the conduct just witnessed. Officers repeatedly assert that they check on a driver's record only after they decide to arrest--and then only to determine if the person is to be charged as a first offender or multiple offender. This reflects a commendable commitment to fairness and is, in some respects, to be admired. One of the expressed concerns is that a routine check of a record prior to the decision to arrest would have a "labeling effect"; that the individual with a record of prior convictions would be more often subject to arrest, whereas the person without convictions would be "given a break"--although both individuals violate to the same degree. This assumes, of course, that the record becomes the dominant factor in deciding whether an arrest should be made, which is not likely and ought to be consciously avoided.

The important point here is that it is not "illegal," as some officers claim, to inquire about an individual's driving record prior to deciding whether to make an arrest. Courts have repeatedly held that prior convictions and arrests are an appropriate consideration in determining whether probable cause exists to arrest, provided, of course, that the record is relevant to the offense the person is currently suspected of committing (type of offense, period of time).[5]

The issue is not whether it is legal for officers to check on the driving record in the course of an investigation, but rather what use is to be made of such information. Although it can be used to help establish probable cause, an officer is not likely to need the information for this purpose, given the weight of other evidence usually available. The more important use, it appears, is in helping the officer to determine if, when probable cause exists, an arrest should be made or if some other form of action should be taken. Is it proper for the police to use the record of past driving offense convictions for this purpose? In other areas, as for example in the handling of spousal abuse, the

police have been under considerable pressure from the public in recent years to make increased use of records of convictions, arrests, and even complaints so that an officer, confronted with a new allegation, can make a better decision on how to respond.

Strong arguments can be cited to support the position that the public's interest demands that the police concern themselves with the prior driving record of an individual they stop on suspicion of driving while intoxicated. As reflected in the analysis of the current response to the drinking-driver, set forth in section II, one of the most serious problems the community currently confronts is that some drivers are uninterrupted as they launch themselves on an increasingly dangerous pattern of drinking and driving. A police officer might deal with such an individual without knowing that the driver had been arrested for OWI several times in the past and had been stopped and warned on other occasions. Current procedures for recording police contacts are not sufficiently systematic to notify police officers that what they are seeing, in a given contact, may be a part of a larger pattern. The department is authorized to acquire and maintain information on convictions, arrests, and contacts, but the only information currently used by officers who must deal with the drinking-driver is the Department of Transportation's driver records. These records are often incomplete as to accidents, do not list pending charges, and may not be up-to-date as to convictions. And as noted, the propriety of using even these limited data is currently being seriously questioned.

In this proposal relating to field contacts, and in subsequent proposals, we advocate strongly that officers, as a matter of policy, consider past driving records in making the crucial decisions relating to the handling of drinking-drivers. We recommend, too, that the department equip itself so that officers can do so. This will require developing appropriate records systems. It will also require developing guidance for personnel on the weight to be attached to the data that are made available. Because of the sensitive nature of the issue and the strong feelings expressed about it within the department, those developing a policy would benefit--especially in working through the details--from extensive consultation with officers at the operating level.

c. <u>The Probable Cause Decision</u>. After the second stage investigation, officers must decide if they have sufficient grounds to arrest. But in a program of field contacts, a conclusion in the affirmative need not necessarily lead to an arrest.

And a negative conclusion need not result in total dismissal of the case.

For all of the reasons set forth earlier, an officer ought not to be required to make an arrest if, based on a careful weighing of all of the factors present, the officer decides that some other form of action may be more appropriate and, most importantly, more effective. To encourage such discretion by an officer may strike some as violative of the ministerial function expected of police; it certainly conflicts with widely held views of the objective manner in which the law is enforced. But in reality, such discretion is now being exercised all the time; police officers tell us that at certain times up to 90 percent of the drivers they see on the road are, in their opinion, in violation of the OWI statutes. We know that the police simply cannot arrest all drivers who are in violation of the OWI statutes, and what is proposed here is that the department acknowledge this reality, recognize the need for discretion, and move on to try to improve the quality of the decisions that police officers must make.

If probable cause exists, an officer, in opting for an alternative to arrest, is clearly on solid ground in informing the individual that, if the individual does not comply with the alternative, an arrest can still be made. This is an important factor, for example, in dissuading an intoxicated driver from continuing to drive. The practice of warning individuals that there are adequate grounds to charge them with an offense, but affording them the opportunity to end their offensive behavior under threat of actual arrest and prosecution, is well established not only in policing, but in the enforcement of laws relating to taxes, the environment, the regulation of business, organized labor activity, and the professions. However, the criteria used in determining whether to arrest must not simply be those of the individual police officer, but must be formulated at the highest level of the police department and be carefully justified. And a concerted effort must be made to have police officers use the criteria in making their decisions.

If the officer determines that there is no basis for making an arrest (i.e., no probable cause), the officer may still take some action. The officer may urge compliance with one or more of the alternatives to arrest. If the driver does not comply with the suggested alternative, however, the officer may not--absent additional evidence--then arrest. The officer must simply ignore the situation, as must be done under current procedures.

d. The Alternatives to Arrest. The alternatives to arrest fall into two general categories: (1) a cluster of actions to be used to deal with the immediate situation--the need to stop an impaired individual from continuing to drive and (2) a cluster of actions to be used in an effort to influence the driver's conduct in the future. In the typical situation calling for the use of alternatives, the officer will probably take two actions--one selected from each cluster.

Some of the alternatives in the first cluster are: taking the driver home; summoning a relative or taxicab to transport the driver home; arranging for one of the sober passengers to drive; having the driver surrender the keys by locking them in the car, leaving them with the officer, or placing them in an envelope addressed to their home; requiring the individual to walk; or encouraging the driver to take time out from driving to go to a restaurant or check into a motel. The choice from these or any other more creative responses obviously depends on a variety of factors. Safety concerns for a lone driver who is intoxicated, for example, preclude simply separating the driver from his or her car (especially on a busy street or highway). In addition to holding the keys, the officers may want to arrange for custody of the driver by a responsible party. The option of taking the individual home, for example, will depend on the distance from home.

The actions in the second cluster, directed at the future behavior of the driver, are primarily designed to educate. Having gotten the attention of the driver by making the stop, the officer has the opportunity to make several points. The driver can be notified about the costs of operating while intoxicated: the risk of death or injury, the likelihood of conviction, the nature of the sentence that is usually imposed, the potential loss of driving privileges, and possible increased insurance costs. Specific and detailed information should be provided to the officers for this purpose. Under appropriate circumstances, the driver can also be given information regarding community resources for the treatment of alcoholism. A verbal presentation can take only a few minutes and have a lasting impact. Some officers are already very effective in making such presentations. Written materials to be given to the driver could be prepared that restate and expand on the same points. For some drivers, reading such material the following day may achieve what the officer's presentation may have failed to achieve.[6]

151

4. Concerns About Liability.

In advocating that the police sometimes not arrest even though probable cause exists, the question inevitably arises whether the police incur liability for harm or damage suffered by third parties that may be caused by a released driver who, against police instructions, resumes driving. The question is not, unfortunately, completely settled. A strong line of cases do hold that police are not liable in such situations; that the protective duty of the police is one that the officer owes to the public generally, not to particular individuals, and that failure to arrest accordingly creates no liability on the part of the officer to one who is injured or whose property is damaged by the lawbreaker's conduct.[7] In those cases in which intoxicated drivers have caused injuries to others after police had probable cause to arrest them, the courts have negated the existence of any "special duty" owed by the police, and the presence of a special duty is an indispensable factor in establishing liability.

A similar question arises regarding the responsibility of the police to a stopped driver, as distinguished from those who are the victims of intoxicated drivers. When police stop a driver and have probable cause to arrest for OWI, but take some alternative action to terminate the driving (which the driver then ignores, resuming his driving), have the police, by reason of their stop, created a special relationship that will result in a specific duty owed to the driver? Surely the driver would not argue for his arrest at the initial stop. But after injuries have occurred, can the driver claim that the police should have arrested him at the initial stop and that their failure to arrest results in a breach of their duty to protect the driver? To our knowledge, a claim such as this has never been litigated. The establishment of a special duty to protect is unlikely, but should the driver succeed in proving such a claim, any effort to recover damages would probably fail on the basis of one of several legal doctrines. A claim by the driver could be offset by the claim that the driver has assumed any risk of danger caused by his own intoxicated condition. In the extremely rare case where an officer would be held liable, any recovery of damages would be substantially reduced, if not eliminated entirely, by the legal doctrine of comparative negligence. As a last resort the court might, by the "unclean hands" doctrine, hold that no person should be allowed to profit from his own wrong. (In a related matter, the California Court of Appeals recently held that a city must face trial on the liability of its police in handling an OWI incident in which the driver was arrested, but the police failed

152

to remove the keys from the car although the passengers were in an obviously intoxicated condition. One of the passengers then drove the car away, and it was involved in a fatal accident. Green v. City of Livermore, 29 Criminal Law Reporter 2099 (1981).)

5. Implementation.

The department can move toward implementation of a field contact system in two stages. The first includes those changes that are essential to lend support to such a program, but that are minimal in cost and do not require legislative action or the approval of other agencies or officials. If the first stage produces results that are satisfactory to both the department and the community, the program can be further developed and refined in a second stage through some additional measures that might require supplemental funding or a change in legislative provisions.

a. Some Essential Steps.

i. A written policy. As a guideline for officers and as a way of articulating the program to the community, the supporting rationale and various steps identified above should be cast in the form of a department policy similar to those that have been developed with regard to other sensitive aspects of the department's operations. In addition, it might be possible, as a result of further exploration with experienced officers, to identify more specific factors that ought to be considered in selecting from among alternative forms of action. But it should be emphasized that additional detail is used to provide more specific guidance and ought not be presented in a way that curtails the decisions that officers inevitably have to make on their own within the broader definitions of discretion that are set forth.

ii. Training. Some minimal training will be required to develop internal understanding and support for the program. This might be accomplished in a series of roll call sessions. The department's approved written policy would serve as a basis for the sessions, augmented by some commercially produced audio-visual materials that can be adapted for department use and videotapings specially prepared to present the local program. A full opportunity must be provided for discussion of the program with supervisory officers who are fully acquainted with it and committed to its potential value.

iii. Managerial support. During the study, we found an unusual amount of strong support among rank-and-file officers

153

for dealing more effectively with the drinking-driver problem. A large percentage of officers, in our opinion, is very committed to the importance of this aspect of their work. Some are even outraged by the failure of the community to deal with the problem more aggressively. We were told repeatedly that the making of an OWI arrest was looked upon--except for the burden it created--as a commendable piece of police action. Clearly there is a substantial reservoir of support for an expanded program specifically designed to respond to the drinking-driver problem.

Tapping this reservoir would be a first step. Training and the issuance of a written policy--both with the clear endorsement of management--should also encourage implementation. But beyond these steps, continued indication is needed that the efforts of rank-and-file officers to implement the program will be looked on favorably by their immediate superiors and the higher managerial ranks of the department. There are no simple methods by which this can be achieved. The program must be grounded on a strong belief permeating the department that the program is sound and warrants a high priority, and this must be evidenced in all the daily interrelationships that supervisory officers have with their subordinates.

iv. Feedback on arrest actions. One important element in lending managerial support to that part of a field contact program that continues to call for arrest is to provide officers more systematically with feedback on what happens to those individuals who are arrested. Because officers rarely appear in court in OWI cases, they do not know what happens to the arrests that they make. We found that a number of officers incorrectly assume that their arrest actions were negated by either a reduction of charges or an acquittal. The department receives a computer printout each month that lists each OWI arrest, the arresting officer, and the status and disposition of the case. This information could relatively easily be made available to officers, either by posting the latest disposition sheets or by programming the computer to produce a printout that would give each officer the status and disposition of cases for which he or she was responsible. (Some problems with the accuracy of the printout would first have to be corrected. The current system shows a number of resolved cases as still pending.)

One of the most basic desires, in any line of human endeavor, is to want to know what happens to something that one has initiated. Given the importance of the judgments an officer makes in an OWI arrest, it would seem especially important that an officer be informed of the results of review by the prosecutor and judge. The lack of arrangements to meet this need in current operating procedures unnecessarily frustrates this natural curiosity, denying officers feedback that has the potential for being both instructive and rewarding.

154

v. Recording the field contact. Two factors argue for making some record of all field contacts: the desirability of giving credit to officers who work hard and the desirability of sharing knowledge about the field contact with other police officers who might subsequently contact the same motorist under similar conditions.

To share such information with other officers would require the filing of a form. The information from the form could then be entered into the Computer Assisted Retrieval segment of the existing Madison Area Police System--just as other suspect data are now entered. This would enable an officer who has stopped an individual as part of the field contact program to learn if the individual has recently been stopped for similar driving conduct and the nature of the action taken. The availability of such information, while not essential, would be highly desirable in a field contact program. Without it, a driver engaged in a pattern of driving and drinking may be dealt with as if he has never before been stopped by the police, even though his consistent behavior has resulted in other officers stopping the individual and utilizing one or more of the suggested alternatives to arrest. (It is recognized that a number of problems would have to be worked out in using the existing computer system for this purpose--especially concerns regarding the confidentiality of certain records--which concerns have precluded the department from placing arrest data in this system.)

A proposal for creating still another reporting form makes police officers wince and, to the extent that it contributes to building a file on individuals, raises complex issues of privacy and fairness in the use of the information. This is, therefore, one of the details on which we are anxious to elicit further reactions from department personnel and other interested parties.

b. Some Additional Steps that Might Be Taken in the Future.

i. Additional field personnel during the periods when the most drinking-drivers are on the streets. A program of field contact should make it much more feasible for police officers, even during their busiest hours, to do something about the drinking-driver. The amount of time required would be much less than that involved in making an arrest. A contact, once initiated, need not be continued. The officer may terminate the process if other demands are more pressing. But as noted earlier, currently

155

on some nights all officers, at least in some sections of the city, are fully occupied. Calls are backlogged. And this condition occurs when the greatest number of drinking-drivers is on the streets.

The most obvious response to this problem is to place additional officers on the street at these hours, free of the responsibility to respond to regular calls, with the specific purpose of increasing the number of contacts with intoxicated drivers. This was a major element in the Alcohol Safety Action Projects, resulting in dramatic increases in arrest rates.

But if arrests are the only objective, the value of such a program is questionable for the reasons set forth earlier. The number of arrests must necessarily be small because of the time consumed in processing, and much of their value is dependent upon what happens in their subsequent processing through the criminal justice system. To our knowledge, no experiment has been conducted in the use of additional officers to participate in a program of field contacts that has the broader objectives set forth in section III-A-1.

ii. Increased use of preliminary breath testing. The overall reaction to the use of preliminary breath testing equipment (PBT) in Madison, first introduced in 1977, has been negative. The PBTs that were used were apparently not calibrated with sufficient frequency, resulting in unreliable readings that destroyed the officers' confidence in them. Because officers were told that the PBT could be used only if they had probable cause, they saw no need to use it since, with probable cause, they had all that was required to make an arrest. Officers reported a further complication: some citizens tested with a PBT subsequently refused the more important evidentiary test at headquarters; they did not understand why they should be required to take two tests.

In the new legislation, the authority of the police to require that a driver take a PBT, as part of the implied consent provisions, has been eliminated. An officer may request a driver to take a PBT before deciding to arrest, but there is no penalty for refusal. (Wis. Stat. § 343.303, ch. 20, 1981 Wis. Laws.)

Two uses could be made of the PBT in a fully developed field contact program. Officers might find the PBT helpful in selecting from among the various alternatives to arrest. Effective use might also be made of the PBT for educational purposes--enabling officers to show cooperating drivers an indication of

156

their intoxicated state. Whether the department ought to invest in the equipment for these limited purposes is heavily dependent on the cost and the availability of a model that is reliable and requires a minimum amount of maintenance.

iii. A legislative basis for a program of field contacts. It has been argued that the program of field contacts that has been outlined can be implemented within the framework of existing legislation. But if the overall program produces results that are satisfactory to the police and the community, it might nevertheless be desirable to amend existing legislation as a way of lending legislative support to its more detailed provisions. Such amendments might provide for the following:

- acknowledge, as a matter of legislative policy, that the legislature desires to use the law not only to prosecute, educate, and treat the drinking-driver, but also to stop the drinking-driver from driving;

- acknowledge that the volume of drinking and driving makes it impossible for the police to arrest all of those who violate the law;

- make explicit that the police have authority to use alternatives to arrest, with a requirement that the police spell out their policies in using these alternatives; and

- provide police with immunity from liability for false imprisonment when they opt for using an alternative, similar to what the legislature has done in authorizing the police to take an intoxicated person home or to a detoxification facility in lieu of arrest.

It may also prove desirable for legislatures to give the police the additional alternative of charging a driver with the lesser offense of driving while impaired. This would have the advantage of enabling the police to take an enforcement action that recognizes the presence of alcohol, but that requires less evidence and carries less severe sanctions for the offender. In the several states where drivers can be charged with this lesser offense, however, the tendency is to use it almost exclusively as a charge to which regular OWI cases are reduced in exchange for a plea of guilty.

The ultimate legislative response might incorporate some of the elements in a proposal advanced by Professor Robert Force,

157

who has been one of the most thoughtful commentators on the use of the law to control the drinking-driver. He argues for a system of control that treats the problem as a regulatory matter rather than a crime, thereby overcoming some of the complexities in the use of the criminal justice system.[8] As part of his proposal, he urges legislatures to define the presence of alcohol as an aggravating factor in a regular traffic offense. He would like them to enact a new series of traffic offenses that would be the common offenses, with the presence of alcohol constituting an additional element of the offense. Thus an officer would be authorized, for example, to charge a driver with "failure to obey a traffic signal--aggravated by alcohol."

The concept is relevant to this discussion in that the legislature would thereby be providing police with an alternative to the traditional OWI arrest. The proposal would enable the officer to take an enforcement action, but it would result in the issuance of a citation rather than a physical detention. The process for adjudicating the case would be similar to that now followed for traffic offenses such as speeding. Police would be given authority to prevent the driver from resuming operation of the vehicle. The proposal would also authorize a police agency to adopt regulations that would authorize them to take the driver home, allow a sober person to drive, or, under some conditions, take the driver into custody.

A major problem with the proposal is that the continued need for administering the breathalyzer test makes the efficiency of the system dependent on the availability of accurate testing equipment in the field.

158

B. Improve the Ability of the Police to Determine the Extent to Which Alcohol Is a Contributing Factor in Traffic Accidents.

The research supporting this study--especially our review of studies conducted elsewhere--leads us to conclude that insufficient attention has been given to the relationship between the quality of investigation of traffic accidents and the overall response of a police agency to the drinking-driver problem. As a result of our analysis of this relationship, it is proposed that the Madison department take the initiative to improve several aspects of traffic accident investigation that have an important bearing on the quality of the department's response to the drinking-driver problem.

The need for improvement relates most directly to the responsibility the police have to collect as much information as possible to establish the relationship, in any given accident, between the accident and alcohol consumption. Current procedures not only fail to provide police with adequate support in fulfilling this function; they force judgments to be made under extremely difficult conditions, often before all relevant information is available. This places an undue burden on the police and creates the potential for unfairness in the ultimate assessment of responsibility for causing an accident and the role played by alcohol in causing the accident.

1. The Difficulties Inherent in Investigating Alcohol Involvement in Traffic Accidents.

In the preceding discussions of field contacts, the primary emphasis is on equipping police officers to recognize and intervene in conduct that could be dangerous--that might lead to an accident. But when an accident occurs, the police function is radically different and incredibly more complex. In handling an accident, the police have not one, but several functions; and the quality of their response will be judged quite differently depending on who is making the judgment and what function is given the highest priority.

After protecting the site by effective placement of warning signals, the primary responsibility of the police at the scene of an accident is to care for the injured. The second responsibility is to control traffic to minimize the danger to others. The third involves initiating an investigation in order to identify the

159

factors that led to the accident. Establishing the role played by alcohol impairment in causing the accident is part of this investigation.

The final responsibility of the police in accident cases involves the initiation of prosecutions for violations uncovered as a result of the investigation. The violations may or may not be directly related to the cause of the accident. For example, one of the drivers may have been driving without a license or may have an unregistered vehicle. It is also possible, but not common, for one of the drivers to be charged with OWI even though the OWI offense did not, in the officer's mind, contribute to the occurrence of the accident.

All of these responsibilities are important, but clearly the first two responsibilities must be fulfilled before an officer can even consider initiating an investigation. Time spent completing the first two functions may detract from the capacity of the police to conduct an investigation successfully. Any officer who has had the experience of arriving at the scene of a serious accident--and almost all have--is familiar with some of the conditions that contribute to the confusion and difficulty in meeting the first two responsibilities: people may be panicky, hysterical, or in need of immediate care; many onlookers may be present; a fire may have broken out or the potential for a fire or explosion may be present; debris may be scattered about. Under these conditions, an officer must gradually move from a helping role to that of an impartial party whose objective is to collect the facts that will make possible the best judgment about how the accident occurred.

In the officer's role as investigator, he or she confronts several complicating factors and special conditions in pursuing the degree of alcohol involvement and its likely contribution to the accident:

- Unlike proactive efforts, the investigating officer will not have seen the driving conduct of the driver[s] prior to the accident.

- Some early indicators of alcohol involvement (slurring of speech, lack of stability, confusion) may also result from having been involved in an accident.

- It is often difficult to talk with the involved drivers and their passengers if they are in an agitated state, have been injured, or have been moved to hospitals; one or more may be unconscious.

160

- Several officers may be involved in the investigation, making coordination difficult.

- A BAC test may be <u>required</u> only if the officer has evidence to support an arrest on a felony charge and may be <u>requested</u> only if the officer has evidence to support an arrest for OWI; in either case, the test must be administered within two hours (extended to three hours by the new legislation).

- An intoxicated driver is not necessarily the at-fault driver. Sober drivers have accidents and sometimes hit a car containing an intoxicated driver.

- The number of intoxicated drivers on the road at certain times of the day makes it likely that both parties in a two-car accident are intoxicated to some degree.

These factors sometimes make extremely difficult the job of establishing the effect that alcohol involvement had in causing an accident. And our review of national studies and our local studies indicate that the failure of police officers to fully explore alcohol involvement in some accidents is a result of the complexity of doing so fairly.

In addition to the comments made to us by police officers about the difficulty in establishing the role of alcohol impairment in accidents, miscellaneous bits of information we encountered suggest that present practices fail to identify fully the role played by alcohol impairment in accidents:

- in our reading of accident reports in which drinking or impairment often was acknowledged, but enforcement action had not been taken;

- in the reported reluctance to charge in single-car accidents in which no one other than the driver was injured;

- in the reports of fatal accidents in which it was noted that the not-at-fault driver had consumed some intoxicants, but in which there was no indication that a test was administered;

- in the accounts given us by officers about cases in which alcohol involvement was not pursued until a nurse, supervisor, or other officer suggested that taking a BAC was justified; and the driver tested as legally intoxicated;

161

- in the data we have from other jurisdictions that indicate, based on subsequent testing, that police consistently underestimate alcohol involvement of drivers on accident forms requiring such an estimate.[9]

The concerns expressed by police are echoed by those who review the results of police investigations: judges, prosecutors, and representatives of the insurance industry. Yet, although all of these individuals acknowledge the difficulty in acquiring the evidence and pinpointing responsibility in accidents involving alcohol, no one seems to have the responsibility for doing something about the problem--for determining how serious it is, whether something should be done about it, and, if so, what should be done. Thus, for example, the insurance industry, which one might assume has a monetary interest in improving the quality of investigations, is apparently resigned to police investigations often being inadequate. As one industry spokesperson told us, they simply assume that the monetary consequences even out over a period of time; that the company that must pay a large claim because of an incomplete investigation will subsequently be the benefactor when the burden resulting from an inadequate investigation falls on another company.

But accident victims cannot afford to let things even out over time. If police officers miss or fail to explore adequately the role of alcohol impairment in the first few hours following an accident, the opportunity to do so is lost forever. The victim's right to a fair accounting is in the investigating officer's hands. Because fairness is so important an element in the quality of the police response, the police field generally has a responsibility to take the initiative in working to improve the investigation of alcohol involvement in traffic accidents. The Madison department has the opportunity to exert leadership among police agencies in doing so.

2. A Program for Improving the Department's Response to Alcohol-Related Traffic Accidents.

a. Development of Guidelines for Investigations. With the infinite variety of conditions that can exist at the scene of an accident, developing a detailed procedure for conducting investigations with the expectation that it will be followed in "lockstep" fashion is neither feasible nor desirable. However, a checklist can be developed of matters to which attention should be given. Such a checklist already exists in the minds of experienced officers and is communicated--in one form or another--in recruit

162

training. The challenge is in reviewing the existing guidance and the advice that experienced officers can provide to ensure that they address some of the concerns raised in this study and represent the best possible collective judgment as to how officers should proceed to investigate. The end result of this process should then be made systematically available to all officers in the form of a departmental policy. Also the policy should make clear who is primarily responsible for each of the important decisions that must be made. Such a set of guidelines can best be carried out with the involvement of officers who have the most detailed knowledge and experience in investigating accidents.

b. Development of an OWI Detection Guide for Accident Cases. Although our literature search uncovered a substantial amount of work to assist police in their proactive efforts to identify OWI offenders, culminating in the detection guide included in section III-A-3a, we found no comparable effort to provide police with a detection guide in accident cases. The scarcity of clues, when compared to those found in proactive situations, makes development of such a guide extremely difficult. But the scarcity of clues makes it all the more important that whatever advice can be generated be communicated to police officers. Highest priority should therefore be given to attempting to produce, for use in accident cases, the best possible equivalent of the previously cited detection guide.

The guide developed for proactive work may be helpful in getting started. Sometimes a specific form of driving behavior--such as following too closely, driving into opposing or crossing traffic, or driving on other than the designated roadway--obviously accounted for an accident. The probabilities that a driver who committed such a violation was legally intoxicated are the same in an accident situation as they are if the behavior was actually observed. One can also draw some conclusions from the accident itself. In the proactive guide, a 60 percent probability is assigned to observing a vehicle "almost striking an object or vehicle." This research finding and our own findings in this study on the time distribution of accidents involving impaired drivers would provide some solid clues for helping officers judge whether to pursue alcohol involvement in any given accident. Between the hours of midnight and 3:00 a.m.--especially on weekends--the frequency of accidents causing injuries involving a drinking-driver is so great that the burden on an officer might more appropriately require justification for a decision not to pursue alcohol involvement.

163

We feel that the development of a detection guide for accidents, like the general policy relating to accident investigations, can best be achieved by a small group of experienced officers.

c. Clarification of Elements Needed for Charging and Convicting of Causing Injury or Great Bodily Harm by Intoxicated Use of a Motor Vehicle. A great deal of confusion has existed with respect to the requirements for bringing and sustaining a charge of causing injury or great bodily harm by the intoxicated use of a motor vehicle. The new legislation due to go into effect in May of 1982 will relieve the prosecutor of having to prove "causal negligence" in such cases. This change removes what has generally been perceived as the major impediment in obtaining convictions. In serious injury accidents, the injury-by-intoxicated-use charge was used only twice in the course of a year, and in both cases the charge was eventually reduced to OWI.

The department should request a clear policy statement from the district attorney's office regarding the elements necessary for bringing prosecutions under the new statute. Such a policy not only would be useful to police officers, but also would be of great assistance to "on call" assistant district attorneys who are consulted in the earliest stages of investigating such cases. In addition, the department should be more aggressive in using this charge. This recommendation is based on the great harm and suffering that victims in such cases often endure. For some victims, it has been argued, death would be preferable to the permanent disabilities suffered. In Madison, the more serious charge of homicide by intoxicated use of a motor vehicle is aggressively pursued, and convictions are obtained. There appears to be no rationale for not pursuing the injury-by-intoxicated-use charge with equal vigor and, ultimately, with equal success.

d. Education of Emergency Medical Staff Regarding Their Role and the Police Role with Regard to OWI Enforcement. Most of the personnel staffing the emergency rooms of local hospitals were found to be understanding of the role of the police officer in accident cases and readily assist the officers when they have the legal authority to obtain a blood sample. In several cases, the initial impetus to undertake an OWI investigation came from a nurse, doctor, or paramedic who observed behavior or smelled intoxicants not noted by the officer.

On the other hand, we heard of some instances in which medical personnel were unaware of the relevant laws and

164

obstructed an officer's investigation of OWI. The potential for misunderstandings always exists in situations where the turnover of staff is rapid--as is true for emergency room staff.

Some efforts have been made to deal with this problem in the past. Specific complaints have led to the department's social services coordinator meeting with hospital officials to clarify the police responsibility and the role of medical personnel. The potential for misunderstanding could be minimized by an exchange of memoranda between the police department and the hospitals. Such memoranda could be incorporated into the manual of procedures of each emergency room. The department might also make a standing offer to participate in the training of new emergency room personnel.

e. Work on Development of a Legal Rationale for the Universal Testing of Drivers in Serious Injury and Fatal Accidents. The Wisconsin Task Force on Alcohol, Drug Abuse, Highway and Public Safety recommended legislation in 1976 that would "require blood testing of all pedestrians and drivers or operators of all boats, water craft, vehicles, snowmobiles or bicycles involved in a fatal accident regardless of survival, age, injury or death."[10] The consensus of the task force was that more comprehensive testing of operators regardless of age or survival was essential to obtain a more complete view of the effects of alcohol and other drug abuse upon fatal crashes.

In the 1977 statute that grew out of the work of the task force, the legislature went beyond the recommendation in one respect, extending it to accidents involving great bodily harm, but narrowed it to drivers:

> A law enforcement officer shall request any person who was the operator of a motor vehicle involved in an accident resulting in great bodily harm or death to any person to take a test . . . .
> Wis. Stat. § 343.305 (2)(am) (197[illegible])

"Request" carried more weight than may initially appear because, as part of the implied consent provisions of the statute, refusal would lead to a separate charge.

A subsequent attorney general's opinion, however, held that officers could request a blood alcohol test only when they had probable cause to make an arrest for operating while intoxicated.[11] The opinion had the practical effect of negating the legislature's efforts to provide for universal testing of drivers under the specified conditions. The most recent revision

165

of the OWI statutes repeals Wis. Stat. § 343.305 (2)(am), marking a retreat from the earlier position in favor of universal testing. Examination of the status of the law and current practice in other jurisdictions identified as having universal testing revealed experiences similar to that of Wisconsin. An authorizing statute is on the books, but drivers are not always tested due to formal interpretations that have limited use of the statute or because of concern for its constitutionality.

If state legislatures have authorized universal testing of drivers in accidents causing death or serious injury, the provision has most often been intended primarily to provide more accurate and complete statistical information on the cause of accidents. The statute authorizing the testing sometimes makes it explicit that the results, unless obtained under some other authority, are not admissible in other proceedings.[12]

The preceding analysis of the complexity of investigating alcohol-related accidents draws attention to a quite different need--the need to know the BAC level of all of those involved in an accident causing serious injury or death in order to aid in establishing more precisely and fairly the cause of an accident, whether criminal charges should be brought, and, if so, what the nature of the charge should be. In the critical period immediately following a fatal or serious injury accident, the police collect various pieces of information. Part of the information made available to the police is the BAC level of those who have died, since the testing of a person who dies within six hours of an accident is mandatory by statute. (Wis. Stat. § 346.71)

BAC information can also be obtained on a driver who is unconscious or otherwise not capable of withholding consent, provided the officer has probable cause to arrest the person for OWI. (Wis. Stat. § 343.305 (2)(c)) Thus, a police officer may know the BAC of some parties involved in the accident (those who were dead or unconscious) but not know the BAC of a driver or pedestrian who survived, was conscious, and refused to take a test, and who the officer did not yet have sufficient grounds to charge with a felony. Given the difficulty of identifying and sorting out the factors that may have contributed to an accident in order to establish fault--which is a major responsibility of the police--the chance of obtaining a distorted picture of what occurred is increased significantly if BAC data are available for some, but not all, of the persons involved.

How might this problem be remedied? Under present law, there are essentially four bases for obtaining a blood test

166

of those drivers involved in an accident. (1) If a driver is conscious and can understand what he or she is doing, the driver can consent to a test. (2) If arrested for OWI, the driver can be asked to take a test under the "implied consent" provisions of the statute under threat of penalty for unreasonable refusal. (3) With probable cause, application can be made for a search warrant to seize a sample of blood or breath, but time constraints make this extremely difficult. (4) If probable cause exists to arrest the driver for a felony, the search that an officer is authorized to make subsequent to such an arrest may include "seizure" of a blood or breath sample.

Police have often been informally urged to make greater use of the last provision when dealing with those situations for which they might otherwise lack authority; i.e., to charge a person with a felony (causing great bodily harm or death by intoxicated use of a vehicle) to provide a legal basis for taking a blood sample. The clear implication when such advice is given is that the police should stretch the facts in a given case to justify a felony charge. The advice is a classic example of police being urged to distort their authority in order to fulfill their responsibility--which is to acquire the information needed to reach a fair conclusion in their investigation.

The problem, we believe, is of sufficient importance to warrant further exploration. As part of this study, we invested considerable effort in exploring whether one can develop a legal rationale to support what appears to be sound public policy--universal testing of all parties involved in an accident causing a death or serious bodily injury. We explored, in particular, the theory that seizures (in this case, tests) that are conducted according to "neutral and objective criteria" do not require full-blown probable cause as a justification. Some recent court cases have suggested that the stopping and questioning of individuals that then led to a search producing evidence of a crime might be justified if conducted according to an administrative plan or policy that incorporates neutral objective criteria.[13]

With the information we have about the relationship between alcohol involvement and accidents, it would be relatively easy to cite evidence that would strongly support arguments for a policy of testing <u>all</u> drivers involved in fatal or serious injury accidents--especially during certain hours of the day. But we recognize that unlike a stop, which is viewed as a minor interference with one's freedom, the taking of a blood sample

167

involves an actual intrusion into a person's body. Such searches have traditionally received the greatest scrutiny from the courts and have required the greatest justification. It is highly unlikely, therefore, that courts would be prepared at this time in the development of the concept to support its application to compulsory BAC testing, absent probable cause to arrest, despite the persuasive evidence one could cite to justify a policy of testing all persons involved in a fatal or serious injury accident.

Nevertheless we feel that the Madison department should continue to be concerned with this problem. Until it is solved, the victims of a drinking-driver may be treated unfairly and the police remain vulnerable to allegations that they have not adequately investigated an accident. This type of problem should be kept before the community--especially before the legislature. It is the type of difficult issue that will be ignored unless the police play a leadership role.

168

C. Monitor Those Drivers Whose Behavior Poses a Continuing and Possibly Increasing Danger to Themselves and the Community.

Certain individuals repeatedly drive while intoxicated and continue to do so after various efforts to intervene have been made by the police, the courts, and treatment personnel. It is proposed that the Madison Police Department establish a program in which an effort is made to identify such drivers, to initiate contacts with them, and to maintain some degree of surveillance over their driving activities. In addition, it is proposed that the Madison Police Department work closely with the district attorney and the judiciary to establish a program that would greatly accelerate the processing of individuals who are repeat offenders.

1. The Need to Focus Preventive Efforts on Specific Drivers.

As noted previously (see section II-B-6), the existing response to OWI is least effective in dealing with those troublesome drivers who, with or without license, repeatedly drive while intoxicated. Such individuals either do not fear the consequences of their actions or are incapable of controlling their own behavior. Periodically, one of these individuals will become involved in an accident, causing a fatality or injury, and the individual's repeated drinking and driving will be brought to public attention. The community understandably wonders why something more effective was not done to curb the individual's dangerous conduct before it resulted in injuries or deaths. This type of case gives impetus to demands for legislative "crackdowns" on drinking-drivers.

Under the current department response, such individuals do not get any special attention from the police except for being charged as repeat offenders when appropriate. They are dealt with in routine fashion when they occasionally fall into the net that the police maintain for apprehending drinking-drivers. Similarly, the prosecutor's office and the judiciary tend to handle cases routinely. Sometimes a chronic alcoholic will be afforded an opportunity to obtain medical treatment, but the criteria by which individuals are selected for such treatment are not clear, nor is the effectiveness of this alternative known.

The officers assigned to investigating hit-and-run accidents are among those who learn about the problem drivers. At times, a member of the hit-and-run unit will--perhaps out of frustration--

CONTINUED

2 OF 3

169

write up the driving record of an individual and submit it to the Driver Improvement Section of the Division of Motor Vehicles for review. This usually results in the individual being called in for a consultation. The filing of such reports, dependent on the initiative of individual officers, is the closest that the Madison Police Department currently comes to dealing proactively with drivers who regularly drink and drive.

What would it take to adopt a proactive, offender-oriented approach to dealing with the most troublesome of the city's drinking-drivers? Proactive offender-oriented programs have been developed in many jurisdictions. These programs are often directed at offenders, such as burglars and auto thieves, who pose a less life-endangering threat than does the recurrent drinking-driver. Our suggestions for dealing with the recurrent drinking-driver borrow from these efforts to deal with chronic offenders.

2. Major Elements in a Program for Monitoring the Recurrent Offender.

a. Identifying the Recurrent Drinking-Drivers. Although Madison has no formal system for identifying potentially dangerous drinking-drivers, officers do identify such individuals informally. These individuals are often the subject of "locker room" and "coffee break" conversation. An officer may predict that "it is only a matter of time" before certain individuals will become involved in an accident that will seriously injure or kill themselves or others. But, as is true of any informal system for the exchange of information, it is by no means complete, and some of the information may not be valid. In addition, what an officer should do with the information acquired in this fashion is never clear.

Several problems arise with the more formal information systems that can be tapped. The driving records available from the Department of Transportation are intended for use after a stop has been made. To make use of the information from this file in a proactive manner, one would have to arrange to pull from the file the names of those drivers whose records meet the criteria that identify them as warranting special attention. And this information would have to be organized not only by driver, but by vehicle type and license registration, since one driver may have access to several vehicles. An additional problem is that this file records only convictions. Since prosecuting a second, third, or more offense can take up to a

170

year, identifying the individual who is on a "binge" is not possible from this record alone. Recent changes in the statutes relating to OWI will require the Department of Transportation to maintain records of OWI arrests as well, but the record of an arrest will not be made available to police departments as part of the information provided in response to a request for a driver's check.

As reluctant as we are to create additional paper work for officers, an appropriate file that is designed to aid in the enforcement effort will have to be built before the police response to a problem such as the drinking-driver can be improved. Much of the data currently collected by the police is designed to fill other than enforcement needs. For example, much of the material collected on the reports filed on accidents is intended to fill the needs of traffic engineers and highway safety planners--not the enforcement needs of the department.

Minimally, the department could maintain its own small, informal file of recurrent offenders who have come to their attention. Officers could be urged to identify individuals whose record ought to be reviewed to determine if they warrant entry in the file. The records of drivers arrested for the second time for OWI could be reviewed to determine if they should be entered. Obviously, a file built through these less formal means would not be comprehensive, but would nevertheless be an improvement over anything currently available.

Beyond such a minimal system, the department has a choice of a number of other possible systems, varying in their complexity and comprehensiveness. The ultimate system would be county-wide. Clearly the drinking-driver problem, more than numerous other problems that the Madison police must handle, requires county-wide coordination. The movement of residents between the city and the rest of the county in their work, recreation, and especially their alcohol-involved socializing is obvious. Moreover, the district attorney and the judiciary who handle cases from the entire county should know about all violations in the county--not just in Madison.

The ultimate system would maintain data not only on convictions, but on contacts and arrests as well. To compile such a file, arrangements could be made to periodically obtain a computer-produced listing from the Department of Transportation of those local drivers whose pattern of convictions and accidents makes them likely candidates for special police attention.

171

If the recommendations relating to the earlier proposal for a field contact system are adopted, and the Madison Area Police System (which has county-wide potential) is employed to maintain the records needed to support the program, the names of those individuals who have most frequently been subject to contact could be drawn from this file. Since neither the Department of Transportation files nor MAPS would provide arrest data, a separate program would have to be designed to pull into the file information on those who come to police attention through arrest. Obviously, careful attention would have to be given to developing the criteria that determine when a driver's record should be brought into the file. And criteria would have to be established for automatic purging as well. We recognize--especially with regard to the most comprehensive system--that considerable effort would be required initially in setting it up. Doing so, however, is clearly within the current information processing capacities of the Madison Police Department. Its potential for improving the police response, moreover, suggests that it may be as valuable as--if not more valuable than--some of the information systems already in use.

b. Pinpointing Responsibility. Depending on the information system selected, individuals with various skills may initially be required to set up the system. Once established, however, a single individual must be given responsibility for maintaining the system. This same officer should also be responsible for coordinating department contacts with drivers identified through the system. Just as some departments have found it useful to designate one person to acquire maximum knowledge about professional burglars, robbers, or auto thieves, so it would be desirable to designate one person to be responsible for knowing as much as possible about those individuals who appear to be the most serious drinking-driver violators. This same individual should be designated as responsible for developing the other aspects of the monitoring program as well.

c. Contacts with Potentially Dangerous Drivers. Using the information it acquires, the department should establish a program of contact with the most troublesome drinking-drivers. This proposal is based on an unproved but strongly held assumption that a police contact with a citizen, initiated by the department itself rather than on the request or complaint of another, is an effective but underused method of deterring some forms of conduct.

The first contact might be no more than a letter expressing concern about the evidence the department has that the individual

172

has, on more than one occasion, been drinking and driving. It might simply draw attention to the danger and potential consequences of such conduct. If the driver lives within the city, the second contact might be a visit to the individual's home by the officer on the beat, in which the driver's accumulated record is reviewed and some of the points covered in the letter are explained in greater detail. A third form of contact might request the driver to appear at the offices of the police department for a meeting. Aside from conveying information and offering whatever help may be appropriate, the objective in these contacts should be to make clear that, because of the individual's demonstrated conduct, the department, and especially the officer on the beat, is taking an interest in the individual.

Mere mention of surveillance as an investigative method to be employed in dealing with the drinking-driver alarms many people. Observation by police officers of persons leaving bars at closing time is periodically criticized as an unfair form of policing and is commonly characterized, incorrectly, as constituting "entrapment." This attitude obviously reflects the larger problem we experience as a result of the tendency of a substantial segment of our society to set apart from other types of criminal conduct the offense of drinking and driving. The same citizen who would urge the police to spend hours in hiding to apprehend a shoplifter or a petty burglar might vociferously object to the practice of officers positioning themselves so that they can observe drinking-drivers whose conduct poses a more serious threat to unsuspecting citizens.

The limited proposal here is that the department systematically provide officers with as much accurate information about such individuals as possible, with the hope that their conduct can be observed and an arrest made.[14] An example of such a case might be an individual with an extensive prior record of drinking and driving whose license has been restored, but who is reported by relatives or neighbors to have resumed his drinking and driving; or an individual with an extensive past record who is currently revoked, but continuing to both drink and drive. From the police perspective, failing to organize some form of surveillance in such cases would seem as irresponsible as failing to alert officers on patrol to the importance of stopping and checking an individual with a record of convictions for armed robbery who is currently reported to be armed and prowling about the community.

173

d. Communication with Division of Motor Vehicles. The officer in charge of monitoring problem drinking-drivers should be encouraged to communicate information on such drivers to the Division of Motor Vehicles, as has been done in the past. A more formal arrangement should be developed with the division so that its efforts and those of the Madison department will be coordinated to make the most of whatever contacts are made with drivers and to ensure consistency in the warnings given and the actions taken.

e. Communication with the District Attorney and the Judiciary. At the time an individual is charged with OWI or any other alcohol-related traffic charge, the department must be equipped to present a complete record on those individuals whose past record indicates that they are among the more serious OWI violators. As was previously noted, under present procedures an intoxicated driver might be processed as a first offender because current record-keeping procedures do not routinely reveal whether other OWI charges may be pending against the individual. (See section II-A-9.) Given the small number of OWI arrests made daily, it would be relatively simple to check these through whatever file is established on repeat offenders to ensure that: (1) consideration is given to bringing a state charge; (2) the assistant district attorney knows about the prior record of the individual and any other pending charges; and (3) the record is made available to the judge both at initial arraignment, to assist the judge in setting bail, and at all subsequent stages in adjudication of the case. Special care must be taken to ensure that the record is kept up to date.

The police department should obviously coordinate with the district attorney's office its approach to the more troublesome OWI offender. If agreement is reached on the merits of focusing on the recurrent offender and on the general approach for doing so, it would be preferable from the perspective of the police--drawing on the experience of the special offender programs launched elsewhere--if the district attorney could be persuaded to arrange to have all OWI cases involving offenders who meet the previously agreed upon criteria assigned to a single assistant in the office. This would greatly facilitate communication between the police and the district attorney's office regarding the cases and increase the potential for achieving the objectives in any joint program that is adopted. High among these objectives should be a speedy trial.

Such an arrangement would also concentrate in one place knowledge and expertise about the options available for dealing

174

most aggravated cases. Some of these options are extremely limited in their use. They might be appropriately applicable to no more than one or two cases a year. But given the shortage of effective responses, it is important that they be used when appropriate. Some of these alternatives are discussed in sections f, g, h, and i below.

f. Use of the Habitual Traffic Offender Statute. Existing legislation, which went into effect in August 1980, provides some special authority for dealing with the habitual traffic offender. The legislation was designed to deal with drivers who "by their conduct and record have demonstrated indifference for the safety and welfare of others and their disrespect for the laws, courts and administrative agencies of this state." (Wis. Stat. § 351.01 (2)) The law provides a five-year revocation of the offender's driving privilege. If persons who are declared habitual offenders operate a motor vehicle, they are subject to a fine of up to $1,000 and to a jail sentence of up to ninety days.

Under the statute, the Department of Transportation is required to notify the district attorney of the county in which the person resides when the person's record of conviction falls within the definition of a habitual traffic offender. Such an offender is defined as one who has twelve or more convictions of any moving violations or four or more convictions of the most serious offenses, including OWI. Upon certification of the record to the local district attorney, prosecution takes place through the local courts. Our understanding is that statewide the records of approximately fifty drivers have been certified to district attorneys as eligible for treatment as habitual offenders, but that only two drivers have been subsequently revoked for the five-year period.[15] Although the statute applies to a limited number of individuals, its use should be encouraged in these cases as one of the few additional methods available for dealing with the most irresponsible drivers.

g. The Possibility of Involuntary Commitment for the Treatment of Alcoholism. In 1975, the Wisconsin legislature adopted the Alcoholism and Intoxication Treatment Act (Wis. Stat. § 51.45) which established a comprehensive program and detailed procedures for dealing with those who suffer from alcoholism. One of the major features of the act was the decriminalization of public intoxication. The act is the basis for the current police practice of taking public inebriates into protective custody and transporting them to the Detoxification Center, rather than subjecting them to arrest.

175

The major objective of the act is to encourage individuals with alcohol dependence to volunteer for treatment. But for acute cases, in which the obvious need is for not only treatment, but also care and custody, the act authorizes involuntary commitments. A person may be committed to the custody of the 51.42 Board by the circuit court upon petition of three adults, each of whom has personal knowledge of the conduct and condition of the individual (Wis. Stat. § 51.45 (13)). Alcoholics, however, are rarely committed under this involuntary commitment procedure in Dane County. One of the primary reasons is that, even though an individual's health may be impaired, one of the four conditions petitioners must prove--that the conduct of the individual is dangerous to himself or others--cannot be established convincingly.

It is ironic that so little consideration has been given to using the involuntary commitment proceeding as a way of intervening in the most acute cases of alcoholics who drink and drive. A demonstrated pattern of driving when under the influence of intoxicants is probably the most convincing evidence one could produce of the potential danger that alcoholics create for themselves and others. Some consideration has been given--by judges, prosecutors, and court personnel--to the use of the commitment procedure as an alternative to a criminal prosecution. But if a person is already charged with OWI, the act of agreeing to a civil commitment would result in the commitment no longer being involuntary. The criminal prosecution will in effect have been used to coerce a voluntary commitment. And if the commitment is voluntary, the person cannot be held in custody if he or she chooses to leave.

Independent of a criminal proceeding, however, the district attorney or the police could petition for an involuntary commitment. Given the dilemma that the police occasionally confront in the most aggravated cases, it would seem, on the surface, appropriate and straightforward for them to resort to this admittedly extraordinary procedure. Based on their firsthand knowledge of the dangerous conduct and the related factors that justify commitment, the police would be accomplishing the commendable dual objectives of safeguarding the community and arranging for the treatment of one who very much needs treatment.

The option is not, however, as available and as potentially effective as the statutory provisions suggest. Although the state has established all of the procedures for involuntary commitments, it has not yet established a locked-facility treatment program. Commitment, moreover, is limited to 30 days, but there are provisions for recommitment for two additional 90-day

176

periods. And, absent a program, we know little about the value and effectiveness of the treatment that can be provided. These concerns, plus the rather cumbersome commitment procedure, would most likely dissuade officers from giving serious consideration to this alternative. But more studied examination by policy-makers at the state level of the problem posed by the most serious and dangerous of our drinking-driver population may well lead to the conclusion that efforts should be made to activate the program that the legislature obviously contemplated in establishing the involuntary commitment procedure. Making use of this procedure may be the most appropriate, effective, humane, and, in the end, least costly way of dealing with the most aggravated cases of offenders who repeatedly drink and drive.

h. The Impounding of Vehicles. Under the new legislation enacted in the summer of 1981, courts are authorized to impound a vehicle owned by an individual who drives the vehicle after revocation or suspension. (Wis. Stat. § 343.44 (4), ch. 20, 1981 Wis. Laws) The court determines the manner and period of impoundment. When used along with other sanctions and alternatives, impoundment could be an effective method of impressing some repeat offenders with the seriousness of their conduct and would certainly curtail easy continued access to a vehicle.

Of course, this new grant of authority, like the authority cited in the two preceding sections (f and g), has limited application. The revoked drinking-driver who continues to drive might use another person's vehicle or have his or her own vehicle registered in another person's name. Relatives and friends, however, may not be as willing as some assume to expose themselves to the range of problems that can arise from lending a car to a chronic offender or allowing their name to be used in registering such a person's vehicle.

If a revoked OWI offender is again charged with OWI and his or her car is subject to impoundment, the police, in their contacts with the prosecutor and the courts relating to the case, should press vigorously to have the vehicle impounded--just as they would try to take custody of weapons used in other violent offenses.

i. Endorsing Legislation that Would Enable a Judge, in Addition to Imposing a Minimum Jail Term, to Use Probation to Maintain Extended Control Over the Repeat Offender. Several studies have been conducted in recent years of Wisconsin legislative provisions for sentencing for all crimes. The legislature,

177

moreover, has just considered and acted on proposals for changing the sentencing structure for OWI offenders. (The most recent changes and some of the problems they present for the police are discussed in sections II-B-4 and 5.) As a result of this study, which looks at sentencing only to the extent that it is of concern to the police, we have identified one need that has not, to our knowledge, been given adequate attention in prior studies. A court, in its sentencing of the repeat OWI offender, should have the authority to impose more stringent controls over an offender--beyond revocation of driving privileges--that extend over a longer period of time. Such a provision would increase the potential for dealing more effectively with the most troublesome offenders--those for whom, as we have pointed out, the current system is least effective.

Under current provisions, the driver convicted of three OWI offenses within a five-year period must be sentenced to jail for a minimum of thirty days and can be sentenced for a term of up to one year. This provision is unchanged in the latest revision of the statute. As previously noted, such offenders in Dane County are often afforded the option of entering in-patient treatment in lieu of serving the minimum mandatory jail term of thirty days. In these cases, and in the cases in which the thirty-day jail term is imposed, concern is almost always expressed about the likelihood of recurrent drinking-driving conduct after the treatment or jail sentence is completed. Especially in the case of offenders sentenced to jail, the feeling among those working within the criminal justice system is that punishment alone will not end the behavior.

As a result, various arrangements have been made over the years--by judges, prosecutors, defense counsel, and treatment personnel--to try to get at the underlying problem more effectively. These efforts have had three characteristics in common: they extend over a substantial period of time; they set down certain conditions that the offender must meet, such as participation in Alcoholics Anonymous; and they coerce compliance by keeping open the criminal charges and the threat of a more severe penalty. The value that people operating within the system have seen in these informal arrangements suggests that changes ought to be made in existing legislation to make it possible to achieve the same results in a more forthright manner.

Having studied the problem of the drinking-driver from the police perspective and having focused on the specific problem of serious violators, it appears that the most appropriate sentence for such offenders might be a short jail term (5 to

178

30 days) followed by an extended period of tight supervision in the community. From the police perspective, it would be desirable, for example, for a third-time OWI offender to be placed on probation for up to two years, with the condition that the first thirty days be served in the county jail (or in inpatient treatment, as is now often the case). The judge, in imposing the conditions of probation, also should require attendance in a program such as Alcoholics Anonymous. If persons knowledgeable in the treatment of alcoholism concur, it might be feasible in some cases to require, as a condition of probation, that the offender be placed on antabuse.

This arrangement for a longer period of direct supervision over the most serious violators--so much more meaningful than mere revocation of driving privileges--could be achieved in one of two ways. One of the recommendations common to the recent studies of sentencing is that judges be authorized to give an offender a split sentence; that is, a period in jail followed by a period on probation. Adoption of this recommendation would meet the need identified here. Or the need could be met by altering the language in the new OWI statute, which mandates imprisonment, so that the language would be consistent with the penalty provisions of most criminal statutes--thereby giving the judge the alternative of imposing probation under section 973.09 (2a) of the statutes. A judge could then require, as a condition of probation, that the offender serve the first thirty days of probation in jail.

179

D. Increased Control Over the Dispensing of Intoxicating Beverages to Those Who Subsequently Drive.

Because a high percentage of drivers charged with OWI consumed their last drinks in a bar, the Madison Police Department should establish a program to elicit greater cooperation from bar owners and operators in preventing intoxicated persons from driving. And, if operators knowingly and consistently overserve patrons, procedures should be established that will hold such licensees accountable.

1. Background.

As noted earlier (see section I-C-5), a high percentage of drinking-drivers did their last drinking in premises licensed for the sale of intoxicating beverages. Sixty-six percent of those individuals attending the Group Dynamics program as a result of a Madison OWI conviction reported that they had their last drink at a bar or restaurant. We also asked in the Group Dynamics survey if anyone had tried to keep them from driving. Of the few people who claimed that somebody did try to stop them from driving, not a single person mentioned a bartender, waiter, or waitress.

A great deal of consideration has been given, over the years, to holding bar owners and bartenders more responsible for the subsequent behavior of patrons who become intoxicated on their premises. The underlying thesis as it relates to all alcohol abusers was nicely summarized in the 1979 study by the Wisconsin Department of Health and Social Services in Alcoholic Beverage Abuse and Control: Issues and Discussion:

> The characteristics and drinking patterns of chronic alcohol abusers indicated that licensees as a group are in frequent contact with a substantial segment of this population and consequently are in a better position to protect these individuals and society from one another than are the members of other groups. Future formal social policies may use the potential for intervention in these relationships to affect reductions in excessive consumption and the consequences of the abusive behaviors of this population.[16]

180

Nationwide, many different programs and techniques have been employed over the years to elicit a greater degree of responsibility from licensees to control consumption, ranging from threats of civil suit and criminal prosecution to mild appeals for cooperation.

The most commonly cited example of control efforts is the old dram shop act that enabled citizens to sue a licensee for damage caused by an intoxicated person who had been served in the licensee's premises. In states that have such a law, it has always been difficult to prove the relationship between the actions of the licensee and the subsequent behavior of the patron. Wisconsin does not have a dram shop act, and on two recent occasions (but by a margin of only one vote), the Wisconsin Supreme Court has refused to hold the licensee negligent when it was alleged that the licensee served liquor to a person known to be intoxicated and when that person's intoxicated state was alleged to be a substantial factor in causing harm to a third party.[17] The strength of the dissent in both cases suggests that the immunity now enjoyed by Wisconsin tavern owners is tenuous.

But even if a dram-shop provision is adopted by the legislature, or if dispensers are made more liable by court decision, establishing liability can be extremely difficult. Moreover, this may result in making liable servers of intoxicating beverages other than those in licensed premises--such as the host at a private party. The reaction to such an extension of liability in California led to legislative action in 1978 limiting dram-shop liability to the serving of minors.[18]

Although the Wisconsin legislature is now silent on the civil liability of licensees, it does provide that a licensee is criminally liable for selling or even giving liquor to a person who is "intoxicated or bordering on the state of intoxication." (Wis. Stat. § 176.30 (1)) Conviction could result in a penalty of not less than $100 nor more than $500 or imprisonment not to exceed sixty days or both.

Two actions, taken by the Madison City Council within the past year relating to the sale of intoxicating beverages, are designed, in part, as responses to the problem of the drinking-driver. In early 1981, the council adopted an ordinance requiring that all operators and managers (including bartenders) of class A and class B premises complete an approved alcohol awareness training program as a condition of holding their license. The course, which will require between six and twelve hours, is to cover, among other things, information on the laws relating to

181

licensed premises and the serving of alcohol; methods of intervening with customers; and, specifically, the refusal of more alcohol to those already intoxicated. In the first sixty months of the program, 4,000 persons will probably go through the training. The contract for operating the program has been awarded to the Madison Area Technical College. The second action was the adoption by the council of an ordinance prohibiting sale of carry-out beer after 9:00 p.m.--intended to treat beer sales in the same manner as other intoxicants and to curb unplanned drinking.

Some Madison bartenders participated several years ago in a regional program for bartenders that was part of a statewide experiment by the Department of Transportation's Office for Highway Safety. The new program builds on that early effort.

2. Proposed Program.

Because the control of bars is so difficult, it is proposed that the Madison Police Department place primary emphasis on trying to elicit a higher degree of cooperation from operators; that the limited police resources available to initiate enforcement actions be reserved for the investigation of those bars identified as contributing disproportionately to the drinking-driver problem.

a. Strong Support for the Recently Established "Bartenders' School." This recently enacted program affords the Madison department a unique opportunity to communicate directly with those who have tremendous potential for reducing the incidence of drinking and driving. A member of the department was assigned to participate in the instruction program, but this was a temporary assignment until the MATC staff was fully trained. Consideration ought to be given to having an officer participate on a regular basis. This could be one of the most important investments the department could make in trying to deal with the drinking-driver problem. To ensure the maximum return on the investment, the officer should be enabled to speak with authority and clarity about the policies of the police department vis-a-vis licensed premises. The officer should be in a position to tell owners, operators, and those who dispense beverages how their cooperation can contribute to curtailing the drinking-driver problem, what is expected from them, their legal responsibilities, and the possible consequences of their failure to do so. The officer's position would be reinforced if, coincident with his efforts, the recommendations outlined below are adopted and implemented.

182

b. Continual Work Over a Prolonged Period of Time to Encourage a Cooperative Effort by Bars in Preventing Intoxicated Driving. Police officers were very skeptical about the value of establishing a program aimed at eliciting the cooperation of bar owners and operators in preventing drinking and driving. Many officers told us that the bar owners' monetary desire in "pushing drinks" precludes them from taking an interest in the condition or future behavior of those they serve. But at the same time, officers acknowledged that some bars have a reputation for being much more effective in curtailing sale to intoxicated persons than do others, thereby recognizing that some bars do currently suppress pure monetary interests in concern about their responsibility to the law, the community, and the patron. Like all such problems, the maximum effort of the police department is not likely to gain 100 percent cooperation. But with little having been done in the past, the department has the opportunity, going beyond the bartenders' school, to develop additional efforts to raise the level of concern; to at least increase the number of individuals in the business of dispensing alcoholic beverages who recognize the importance of their job as it relates to the drinking-driver problem.

Of what might such a program consist? At the most elementary level, the department, working with owners, could furnish bars with materials addressed to their customers, such as charts showing the relationship between consumption and impairment, table signs, and decals that convey information and remind patrons of the dangers and risks involved in intoxicated driving. Further, the department ought to encourage, whenever feasible, the sale of food along with intoxicating beverages. And on a still more ambitious plane, the department could work with cooperative bar owners to make arrangements, as a feature of their operations, for the transportation of those who ought not to drive on their own and for the securing of their vehicles. The experience that Madison has had for the past several years in offering free bus service on New Year's Eve should be instructive in this regard.

c. Investigating the Practices of Bars that Are Suspected of Overserving Intoxicated Persons. The police department cannot regularly check all of the approximately 300 premises licensed to serve intoxicating beverages in Madison to determine if they are violating the law by serving already intoxicated persons. On the other hand, the department ought not to remain blind to indicators that some premises repeatedly serve to excess. These indicators, to the extent that they are available, can be used to zero in on the most likely violators. Such selective targeting

is commonly used in some aspects of policing and other types of enforcement--more often at the state and federal level. Thus, for example, without sufficient resources to audit everyone's tax return, the Internal Revenue Service uses various indicators to select for audit those persons who are most likely to file fraudulent claims.

The California Department of Alcohol Beverage Control initiated such a program relating to drinking-drivers on an experimental basis in the late 1970s. Police officers were instructed to ask those arrested where they had been drinking. The first time an establishment was identified, a "warning letter" was sent. A second identification resulted in an invitation to a training program. And a third (or a refusal to attend the training program) resulted in an enforcement action by the department. A total of 766 establishments were invited to attend a training session during the experiment. Failure to attend or a subsequent identification resulted in an investigation in 386 or 50 percent of these cases. The investigation resulted in an arrest or citation for serving minors, intoxicated persons, etc., in 110 cases.[19]

A somewhat similar proposal was outlined in the 1979 study of the Department of Health and Social Services:

> Local governments may also encourage or direct law enforcement agencies to attempt to determine the point of last consumption by drivers tested at .10 percent BAC or above. Upon determining that the blood alcohol level of a person arrested for OMVWI exceeds the legal limit for intoxication (.10% BAC) and obtaining testimonial evidence from competent witnesses that the person had last purchased and consumed alcohol in a licensed establishment, a complaint and order to show cause could be issued to the licensee, as provided under s. 176.11 Wis. Stats.[20]

We think it is inappropriate to warn a licensee or to require training, such as was done in the California program, based on the unverified reports of allegedly intoxicated persons. And we anticipate that bringing orders to show cause why a license should not be suspended would be a rather cumbersome procedure--one to be reserved for extraordinary circumstances. But the information obtained from questioning those arrested could be used by the department to initiate its own observations of those premises identified as most likely to serve intoxicated persons who subsequently drive. It also could be considered along with other reports in the annual review of licenses.

To implement a program locally, indicators of frequent violation must first be obtained. An effort should be made, in processing each person arrested for OWI, to determine where the driver had his or her last drink. This could simply be added as a standard question to the series of questions now addressed to arrested persons in the course of booking them. Officers reported that many arrestees volunteer such information in the earliest stages of their investigation, and they felt that those who initially refuse would be willing to respond before the completion of their processing.

The collected information could be compiled quarterly and evaluated. Consideration would have to be given to factors such as an establishment's volume of sales and any unusual conditions that the establishment might confront in monitoring sales. Conceivably a large-volume establishment that is mentioned five times could be rigorously monitoring patrons, but a small-volume establishment mentioned five times could actually be encouraging drinking to excess. Evaluation of the quarterly data should make it possible to identify ten to fifteen establishments that warrant attention.

Departmental investigators could be sent to observe firsthand the serving practices employed by the establishments. Several different conditions might account for overserving, each of which may require a different remedy. Investigators might, for example, find that overserving results from a "happy hour" that extends for too long. Calling this to the owner's attention might achieve a quick voluntary reduction in the hours. Or overserving may result from some structural problem in the establishment that prevents those serving drinks from observing the behavior of all of the patrons, but that can be easily remedied. Simple notification and discussion with the owner may improve the situation. When deliberate overserving clearly occurs, the responsible parties should be charged and prosecuted.

Regardless of the actions taken, the department, through its representative, should make the results of its investigations available to the city council's Alcohol License Review Committee for its consideration in its overall review of the operations of a licensee. According to the department's representative on the committee, it would appreciate receiving this kind of information.

185

E. Intensify Efforts to Educate the Community Regarding the Drinking-Driver Problem.

As an important element in the community's response to the problem of the drinking-driver, it is recommended that the Madison Police Department assume the responsibility for developing a program to educate the citizenry on the responsible use of intoxicants and the possible consequences of driving after consuming an excessive amount of alcohol.

1. Background.

To urge that police invest resources in trying to educate the community about the perils of intoxicated driving will strike many as being neither novel nor likely to have much impact. Information and education programs are now rather routinely tacked on any overall proposal for dealing more effectively with a community problem. Moreover, programs designed to educate the community about intoxicated driving have too often reflected a great deal of naiveté about the nature of the drinking-driving problem; they have been hortatory and simplistic. Some of the most highly publicized efforts have leaned heavily on slogans.

In retrospect, the broad appeal--"If you drink, don't drive"--was predictably not likely to have much impact in a society in which the vast majority of citizens drink and, of these, a high percentage do drive. The threat that "Drinking Drivers Go to Jail" is not likely to have much impact, because hardly anybody goes to jail. And the current slogan that drivers see on entering this state, "Wisconsin Arrests Drunk Drivers," overstates the situation, since only a minuscule percentage of those who drink and drive are arrested. These slogans are so patently misleading that they raise questions about the credibility of whatever else is said about the capacity of government to respond to the drinking-driver problem.

But information and education efforts, in recent years, have become much more sophisticated--and clearer in the goals they seek to achieve. A major portion of the expenditures for Alcohol Safety Action Projects was devoted to developing public information campaigns. Efforts to measure the results showed much more awareness of the drinking-driving problem and more knowledge about blood alcohol concentration and legal limits, but no significant change in the pattern of alcohol-involved traffic accidents.[21]

186

In undertaking more responsibility for an information and education program, the Madison department ought not to define its goal narrowly as reducing alcohol-involved accidents; the objective, rather, must be more long range--using hard facts to contribute toward development within the community of "voluntary social norms which make driving after too much drink just plain socially unacceptable."[22]

Such an ambitious goal may seem so unrealistic as to be meaningless. And yet we have recently witnessed, within a relatively short span of time, dramatic changes in such well-established norms as those relating to sex roles, marriage, the environment, energy, and smoking. It is just plain socially unacceptable in many communities today, for example, for a person to smoke in an area in which smoking is prohibited. We are beginning to see some of the same forces that contributed to redefining these norms appear as they relate to the drinking-driver problem. The liquor industry, like the energy suppliers who now urge conservation rather than consumption, is increasingly assuming responsibility for promoting responsible drinking. And citizen advocacy groups, which we will describe in more detail, are working in various ways for greater public awareness of the problem. It remains to be seen if these efforts will be fads or will gain in momentum.

To our knowledge, no one in the Madison community is currently responsible for promoting a greater concern for the drinking-driver problem. At the state level, the Highway Safety Coordination office in the Department of Transportation promotes educational programs. The department is mandated to do more under the legislation enacted in the summer of 1981. (Wis. Stat. § 346.637, ch. 20, 1981 Wis. Laws) The Group Dynamics program operated by the Madison Area Technical College is addressed exclusively to those who have been convicted of OWI. Private groups, like the Wisconsin Division of the American Automobile Association, in their promotion of highway safety, sponsor educational programs throughout the state. The problem of driving under the influence of alcohol or other drugs is covered, in varying degrees, in the driver education programs in the schools. But no one agency or person is currently responsible for filling the gaps between these programs or informally coordinating what is being done.

2. Proposed Program.

With a modest reallocation of current resources, the Madison department can take a leadership role in promoting greater concern

187

about the drinking-driver problem. And it would be natural for the department to do so because the community looks to the department, along with the prosecutor and the courts, as responsible for dealing with the problem. Moreover, what the department does in the way of education may be among the more effective responses that it can make.

a. Development of a Carefully Thought-Through Approach that Has Credibility and Is Integrated with Other Department Efforts. Whatever the department does must be based on a sound foundation that recognizes the complexity of the drinking-driver problem and what has been learned in efforts to reduce its magnitude. The program must obviously push beyond simply exhorting people not to drink and drive. The most recent work of the National Highway Traffic Safety Administration questions the value of placing all of the emphasis on "responsible" drinking. NHTSA currently holds out the most hope for an approach that advocates intervention to prevent the person who is inclined to drink and drive from doing so.

Information that becomes available on the incidence of drinking and driving can be used to target educational efforts to reach those who are most likely to drive after using excessive amounts of alcohol. Conveying information about the consequences of intoxicated driving can be greatly facilitated, and made far more effective, if it is based on hard data, such as has been collected in this study, about what happens locally: e.g., numbers of fatalities and injuries, costs to victims, costs to offenders, numbers and immediate consequences of arrest, rate of convictions, nature of sentences. In addition, the message that the department can take to the community would be much stronger if the other four programs that have been outlined (to increase dramatically the number of field contacts, to investigate accidents more thoroughly, to monitor the serious violator, and to identify bars that may be irresponsible in serving drinks) are implemented. This would make it clear that the department is concerned and doing something about the drinking-driver problem.

b. Designating an Officer as Having Primary Responsibility. Currently, no one within the Madison department has the responsibility to promote information and education programs on the drinking-driver. Efforts are limited to those made by the two officers assigned as public safety officers, and their efforts are limited to covering the topic in defensive driving courses for city employees, new recruits, and experienced officers who participate in in-service training. The two officers cover the topic also as part of broader coverage in their appearances in

188

the schools. If a request is received for someone to speak on the problem, any one of a number of officers with varying degrees of experience in responding to alcohol abuse, drug abuse, youth problems, and traffic-related matters will be assigned.

An officer assigned to the Special Operations Section of the department has undertaken, within the past year, independent of this study, to develop a proposal to establish a program to provide information and instruction on responsible drinking and driving. His memorandum identifies some of the elements that might be included in a more comprehensive, long-range program.[23]

One officer could, in a relatively short time, put together a sophisticated educational program. This is possible, in large measure, because of the numerous prepackaged educational programs that have been skillfully developed by various organizations elsewhere and that are readily available. They are designed for different audiences: high school students, junior high school students, and even for students in kindergarten through the elementary grades. Special programs are available for university students, senior adult groups, and various other groupings of adults. At a time when developing and producing educational materials is so costly, having such a wide range of materials to choose from is a luxury for those who are initiating new programs.

c. Conveying Information to Local Mass Media. Local media have demonstrated a great deal of interest in the drinking-driver problem. Some of the most effective deterrent efforts in the past may well have been the news stories and special programs on the police department's handling of OWI cases. Citizens with little tolerance for slogans, specially staged campaigns, billboards, pamphlets, or neighborhood meetings nevertheless read the newspapers, listen to the radio, and watch television.

In the next six to eight months, both public and press interest in the OWI problem will probably increase again due to the implementation of the new OWI statutes in May of 1982. This affords an opportunity for the department to convey important information to the community about the problem. But aside from this predictable peak in interest, the department should periodically take the initiative in encouraging news stories about the OWI problem. It should publicize enforcement efforts, And it should call attention to alcohol involvement in car accidents. Except for the unusual case, accidents are currently reported in the local press without reference to the intoxicated condition of the driver. If the department waits

189

for the press to ask the right questions, the right questions may never be asked. Keeping the drinking-driver problem before the public is but another example of how the department can deal with the problem in a more proactive fashion.

d. Promoting Citizen Action Regarding the Problem. One of the most potentially effective methods for affecting community norms regarding drinking and driving is the recent movement to organize local citizens concerned about the problem. Three such groups have developed: PARKIT (Prevent Alcohol-Related Killings and Injuries in Tompkins County) in New York State; MADD (Mothers Against Drunk Drivers) which originated in California and is now a national organization with twenty-five local chapters; and RID (Remove Intoxicated Drivers) which has several chapters in New York State. Members of each group were motivated to organize by the deaths of persons in their communities in accidents caused by a drinking-driver. The objectives of each group are similar. Those of RID, for example, are:

1) To educate ourselves and the public about the ways that our present laws and regulations work, or fail, to protect the public from death and injury due to drunken drivers.

2) To raise the consciousness of public officials--judges, officers, prosecutors, and administrators--regarding their duties and opportunities to deal responsibly and constructively with this urgent public safety problem.

3) To aid the victims of drunken driving and their families.

4) To encourage the development and lobby for passage of more effective laws dealing with the alcoholic driver.[24]

Those who have worked with the members of these groups have observed that, although strong emotional factors brought them into existence, these factors have not blinded their members to the complexity of the problem. As members of the organizations have learned more about the nature of the problem and what is known about the effectiveness of current responses, they have become an increasingly responsible voice for the soundest policy decisions one can currently make, given our state of knowledge.

190

It is too early to tell what form community organization may take as the movement spreads. But clearly the Madison department, in its efforts to raise the community's consciousness about the drinking-driver problem, would be greatly aided if supported by a community group, just as the department has benefited from the formation of groups concerned with such problems as sexual assault, spousal abuse, and runaway youngsters.

SECTION III

PROPOSALS FOR INCREASING THE EFFECTIVENESS OF THE POLICE RESPONSE TO THE DRINKING-DRIVER PROBLEM IN MADISON

191
Notes

NOTES

1. The literature uniformly reports: (1) crash risk increases as BAC levels increase and (2) the percentage of crashes attributable to alcohol increases as the severity of crashes increases. Thus, very high BAC levels are associated with the most serious accidents. But this literature also reports that the increased risk of crash begins to rise precipitously at BAC levels of .08 to .10. For an extensive review of the research that examines crash risk as a function of BAC, see Tracy Cameron, "Alcohol and Traffic," in Marc Aaren et al., Alcohol, Casualties and Crime 129-183 (Berkeley, Calif.: Social Research Group, 1978).

See also Paul M. Hurst, "Estimating the Effectiveness of Blood Alcohol Limits," in Alcohol, Drugs and Driving (Perrine ed., NHTSA Technical Report, 1974). Hurst, in attempting to ascertain the probability of involvement in fatal crashes at different BAC levels, sets the probability of involvement at a BAC level of zero as "one" and, with adjustments for gross methodological differences, computes the probability of BAC levels based on the findings of alcohol-crash studies. For example, using M. W. Perrine, J. A. Waller, and L. S. Harris, Alcohol and Highway Safety: Behavioral and Medical Aspects (final report, Project ABETS, DOT/NHTSA, University of Vermont, 1971); and R. F. Borkenstein, R. F. Crowther, R. P. Shumate, W. B. Ziel, and R. Zylman, The Role of the Drinking Driver in Traffic Accidents (Indiana University, 1964), he estimates the following probabilities: "at about .08 or .10 the chances of involvement are about four times as great as zero. At .12 the chance has soared in one study to at least 13 times as great as at zero and in the other to 22." (See NHTSA, Alcohol and Traffic Safety Workbook, p. 1-17, figure 11 (NHTSA 1980-81 Workshop Series on Alcohol & Occupant Restraint).

2. Madison Police Department, Manual of Policy, Regulations and Procedures, 4.202.1 B (March 21, 1975).

3. NHTSA, Visual Detection of Driving While Intoxicated: An Explanation of the DWI Detection Guide (pamphlet, 1981).

SECTION III NOTES

192
Notes

4. For a more detailed description of the research on which the detection guide is based, see Douglas H. Harris, James B. Howlett, and R. Glen Ridgeway, Visual Detection of Driving While Intoxicated--Project Interim Report: Identification of Visual Cues and Development of Detection Methods (final report, 1979).

5. For a full discussion of the issue and supporting cases, see Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, vol. 1, pp. 470-472 (St. Paul, Minn.: West Publ. Co., 1978).

6. It has also been suggested that a follow-up letter might be sent to the driver, possibly signed by the officer who initiated the stop. Such a follow-up procedure could be established with minimum demands on an officer's time if a computer program is developed to prepare such letters. But a number of questions have been raised about both the propriety and effectiveness of the procedure.

7. Massengill v. Yuma County, 456 P.2d 376 (Ariz. 1969); Evett v. City of Inverness, 224 S.2d 365 (Fla. 1969); Evers v. Westerberg, 329 N.Y.S.2d 615 (1972); Ivicevic v. City of Glendale, 549 P.2d 240 (Ariz. App. 1976). For an overall analysis of the broader issues, see Note, Police Liability for Negligent Failure to Prevent Crime, 94 Harvard Law Review 821 (1981). For a recent case reasserting the need to establish a special duty, see Warren v. District of Columbia, 30 Criminal Law Reporter 2281 (1981).

8. Robert Force, "The Inadequacy of Drinking-Driver Laws: A Lawyer's View," Proceedings of the 7th International Conference on Alcohol, Drugs and Traffic Safety, p. 43 (Melbourne, 1977).

9. See Lyle D. Filkins, Cheryl D. Clark, Charles A. Rosenblatt, William Carlson, Margaret W. Kerlan, and Hinda Manson, Alcohol Abuse and Traffic Safety: A Study of Fatalities, DWI Offenders, Alcoholics, and Court-Related Treatment Approaches, p. 64 (Highway Safety Research Institute, U. of Mich., 1970). H. Laurence Ross [Deterrence of the Drinking Driver: An International Survey (draft report to NHTSA, n.d.)] p. 11, reports that error in judging alcohol involvement by police is so great as to render these data virtually worthless.

10. Alcohol, Drug Abuse/Highway and Public Safety Task Force, Report to the Wisconsin Council on Alcohol and Other Drug Abuse, p. 70 (1976).

11. 67 Wis. Op. Att'y Gen. 314 (1978).

193
Notes

SECTION III NOTES

12. The Idaho statutes (§ 49-1016), for example, specify that results of the blood test on fatal drivers are to be used for statistical purposes only, and the sample must not be identified with the name of the deceased. For a discussion of this issue, see NHTSA, Alcohol and Traffic Safety Workbook, p. 7-17 (NHTSA 1980-81 Workshop Series on Alcohol & Occupant Restraint).

13. The "neutral and objective" criteria concept was first expressed in cases involving administrative or inspection searches. In the context of such searches, neutral and objective criteria have been used to justify the issuance of a warrant without a showing of probable cause as traditionally required for a search leading to evidence to be used in a criminal case. See Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967). More relevant, for our purposes, is the suggestion in Brown v. Texas, 443 U.S. 47, 51 (1979), a criminal case involving a stop by police officers, that an administrative plan or policy that is based on neutral, objective criteria might furnish a sufficient check on the arbitrary exercise of police authority so that an officer need not satisfy a standard of reasonable suspicion in each individual case. See Delaware v. Prouse, 440 U.S. 648 (1979), for exploration of the concept as it applies to the stopping of drivers for license checks. The concept suggested in Brown v. Texas is most fully explored in a series of border search cases: Almedia-Sanchez v. United States, 413 U.S. 266 (1973); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

14. A variety of methods can be used to disseminate such information to beat officers. For an interesting description of the use being made of videotape equipment to identify major offenders, including OWIs, to individual beat officers, see Arthur F. Fairbanks and Joe N. Smith Jr., Major Offender File, The Police Chief, p. 32 (Sept. 1981).

15. Interview 9.11.1.

16. Wisconsin Bureau of Alcohol and Other Drug Abuse, Alcoholic Beverage Abuse & Control: Issues & Discussion, p. 37 (report to the Wisconsin Council on Alcohol and Other Drug Abuse, 1979).

17. See Garcia v. Hargrove, 46 Wis.2d 724, 176 N.W.2d 566 (1970); Olsen v. Copeland, 90 Wis.2d 483, 280 N.W.2d 178 (1979).

194
Notes

SECTION III NOTES

18. James F. Mosher, Dram Shop Liability and the Prevention of Alcohol-Related Problems, 40 Journal of Studies on Alcohol 773 (1979).

19. James F. Mosher and Lawrence M. Wallach, The DUI Project: A Description of an Experimental Program to Address Drinking-Driving Problems (report from the California Department of Alcohol Beverage Control, 1979).

20. Alcoholic Beverage Abuse & Control, supra note 16, at 79.

21. Fred B. Benjamin, Alcohol, Drugs and Traffic Safety: Where Do We Go From Here, p. 38 (Springfield, Ill.: Charles C. Thomas, 1980).

22. NHTSA, Results of National Alcohol Safety Action Projects, p. 79 (Wash., D.C.: USGPO, 1979).

23. Madison [Wis.] Police Department interdepartmental memorandum from Michael F. Masterson to Robert E. Peterson (12 August 1981).

24. Introductory form letter mailed by RID to judges prior to RID's court observations and investigations.

195
List of
Tables

Tables

196
List of
Tables

END