

2009 Center for Alcohol Policy Essay Contest

“State regulation of alcohol is important because ...”

**OUTLIER HABITS ARE HARD TO BREAK: WISCONSIN’S CURRENT CULTURAL
BATTLES TO ADD SOME BITE TO THE STATE’S LENIENT ALCOHOL LAWS**

BY JASON KORANSKY*

“Roll out the barrel, we’ll have a barrel of fun,
Roll out the barrel, we’ve got the blues on the run.
Zing boom tararrel, ring out a song of good cheer,
Now’s the time to roll the barrel, for the gang’s all here.”

–“Beer Barrel Polka”

During games at most major league baseball stadiums, when the seventh-inning stretch comes around, fans rise to their feet and sing “Take Me Out to the Ball Game.”¹ The music sing-along hits a different note, however, at home games for the Milwaukee Brewers. After a rendition of the traditional ode to enjoying a long day at the ballpark, fans in Miller Park launch into the above-quoted “Beer Barrel Polka,”² a song made popular through recordings by the likes of Hank Williams and the Andrews Sisters. The attention shifts from baseball and turns directly to the joys of celebrating with a barrel of beer.

Such a focus on beer should not come as a surprise. After all, the team has the beer moniker “Brewers,” and plays its games in Miller Park, named for the icon of Milwaukee

* J.D. Candidate, May 2010, The John Marshall Law School, Chicago, Illinois. B.S. Journalism, Northwestern University, June 1996. Editor of DownBeat magazine, 1999–2009.

¹ See ANDY STRASBERG, BOB THOMPSON, TIM WILES, *BASEBALL’S GREATEST HIT: THE STORY OF ‘TAKE ME OUT TO THE BALL GAME’* (Hal Leonard 2008).

² *Id.* at 42.

industry, Miller Brewing Company—the last of the city’s beer giants that still exists today.³

When the Brewers played games in the old County Stadium, the team’s mascot, Bernie Brewer—“a character who cheered on the home team from a beer-barreled chalet” according to the team’s official web site—used to slide down from his centerfield perch into a giant beer stein each time a Brewers player hit a home run.⁴ Today, while Bernie Brewer may not slide into a stein of beer, he does lead the festivities in the brewery-named ballpark.

This essay does not focus on baseball, however. Rather, the example of the Milwaukee Brewers illustrates the close relationship and historical roots that Milwaukee, and Wisconsin in general, has with beer. Mention Wisconsin, and to many this conjures up images of cheese, bratwurst, and beer. Entertainment media perpetuate this image. For instance, the namesake characters in popular 1970s and early ’80s television show “Laverne & Shirley” worked as bottlecappers in the fictional Sholtz Brewery in Milwaukee.⁵ This media depiction obviously conveys a stereotype, but this stereotype may not shoot very far off the mark.

One should not view the state’s culture in only a negative light. The state has a rich culture that includes myriad events—from Oktoberfest and beer gardens to football tailgating and fish fries—that bring communities together in social celebrations that often involve alcohol. Plus, most Wisconsinites use alcohol responsibly. However, given the large percentage of the state’s population that drinks, the numbers of people who drink irresponsibly have caused the state significant human and economic damage.

³ See Miller Park | Brewers.com, <http://milwaukee.brewers.mlb.com/mil/ballpark/index.jsp> (last visited Nov. 17, 2009).

⁴ See Bernie Brewer | Brewers.com, http://mlb.mlb.com/mil/fan_forum/bernie_brewer.jsp (last visited Nov. 17, 2009).

⁵ See “Laverne & Shirley” (1976)—Plot Summary, <http://www.imdb.com/title/tt0074016/plotsummary> (last visited Nov. 17, 2009).

Recognizing this problem, in 2008 the *Milwaukee Journal Sentinel* published the five-part investigative series “Wasted in Wisconsin.”⁶ In an editorial that accompanied the first part of the series, *Journal Sentinel* editor Martin Kaiser wrote: “Wisconsin has a problem, and averting our eyes is no longer acceptable. How we as a statewide community address this problem depends first on our understanding of the phenomenon and its consequences, and second on our collective willingness to address painful questions and to demand change.”⁷ Kaiser proceeded to list some “sobering facts” that led the newspaper to publish this series, including that, “Wisconsin has led every state in its percentage of drinkers since at least 1995; . . . led the nation in binge drinking every year since at least 1995; . . . is the only state in the country that treats first-offense drunken driving as a traffic ticket; [and] more than one-third of the people convicted of drunken driving in Wisconsin [in 2007] were repeat offenders.”⁸

The newspaper’s journalistic mission to expose the roots of the state’s drinking issues included interviews with more than 200 people and examinations of more than 200 court documents.⁹ The newspaper looked into the clout that the state’s bar owners have in Wisconsin’s political process, and placed some dollar figures on the impact that drunken driving has on the state’s economy.¹⁰ In addition, the paper put a human face on the tragic effects of the state’s drinking habits, telling the stories of a number of the people killed in drunken-driving accidents in the state.¹¹

The series garnered significant statewide and national attention, and has provoked the state’s lawmakers to change and strengthen some of the state’s lenient drinking laws. Most significantly, the Wisconsin legislature is close to passing a bill that would toughen its drunken-

⁶ See the complete “Wasted in Wisconsin” series on the *Milwaukee Journal Sentinel*’s web site, available at <http://www.jsonline.com/news/30565984.html>.

⁷ Martin Kaiser, *Series Puts Focus on Excessive Drinking*, MILWAUKEE J. SENTINEL, Oct. 19, 2008, at A1.

⁸ *Id.*

⁹ See “Wasted in Wisconsin,” available at <http://www.jsonline.com/news/30565984.html>.

¹⁰ *Id.*

¹¹ *Id.*

driving laws.¹² In addition, a bill has been introduced that would close a loophole in the state's statutes that allows any minor, regardless of age, to drink alcohol in a bar or restaurant as long as a parent, guardian, or spouse of legal drinking age accompanies them and grants the establishment permission to serve the minor.¹³

This essay examines these recent developments in Wisconsin alcohol policy. I demonstrate how the state is attempting to balance its cultural heritage—in which alcohol consumption is deeply ingrained—with the pressing need to change its laws to save its citizens lives. In a federalist system, Wisconsin must assume the responsibility of establishing its own effective alcohol regulations. The state's government had started this work toward creating such laws. But even after these laws are strengthened, they will still not mirror other states' laws, but rather will continue to exhibit indicia of the Badger State's cultural heritage.

I. German Roots, Beer Barons, and a History of Liberal Drinking Laws

When Wisconsin entered the Union on May 29, 1848, as the country's 30th state, the largest percentage of its population consisted of Yankees from New York and New England.¹⁴ The state also had a significant population of Germans, which in the following decades would expand and flourish.¹⁵ Following the Civil War, the demographics of the state experienced a dramatic shift, as large numbers of Germans and Scandinavians immigrated to the state.¹⁶ The 1890 U.S. Census counted 1,686,880 people living in Wisconsin.¹⁷ Only 434,650 of these people

¹² See Patrick Marley, *Drunken Driving Overhaul OK'd by Senate Makes 4th Time a Felony*, MILWAUKEE J. SENTINEL, Nov. 6, 2009, at A1.

¹³ WIS. STAT. ANN. § 125.07 (2009); see also 2009 Wisconsin Senate Bill 30, introduced Feb. 3, 2009 (revising this statute to make the minimum drinking age 18 when accompanied by a consenting parent, guardian, or spouse of legal drinking age).

¹⁴ See JOSEPH A. RANNEY, *TRUSTING NOTHING TO PROVIDENCE: A HISTORY OF WISCONSIN'S LEGAL SYSTEM* 227 (University of Wisconsin Law School 1999).

¹⁵ *Id.*

¹⁶ See RICHARD NELSON CURRENT, *WISCONSIN: A HISTORY* 37 (W.W. Norton & Co. 1977).

¹⁷ *Id.*

were considered “strictly American,” which meant having both of their parents born in the United States.¹⁸ Rather, 519,200 of these people were born in another country, and 726,835 of them, while born in the United States, had either one or two parents who were foreign-born immigrants.¹⁹ Half of the state’s foreign-born citizens had come from Germany, and estimates exist that approximately half of the American-born children of immigrants had parents of German heritage.²⁰ These figures calculate to late-19th century Wisconsin having approximately 40 percent of its population people with German roots, which led to the belief by some that it had become a “German state.”²¹ (Today, approximately 43 percent of the state’s residents claim that they have German heritage.²²)

This German population had an influential role in the state’s liquor regulations.²³ The Germans’ general attitude toward alcohol stood opposite that of the Yankees, who in general supported temperance.²⁴ Beer played a significant part in German culture—especially that of the people from the southern part of the country who were the primary immigrants to Wisconsin—which included beer consumption on Sundays “in conjunction with rest and recreation.”²⁵ The clash in attitudes toward drinking between the Yankees and Germans led to battles over the state’s alcohol laws.²⁶ For example, the state legislature passed a strong pro-temperance law in 1849 that imposed liability on purveyors of alcohol for “social harms” caused by the alcohol they sold.²⁷ In 1850, the legislature bolstered this law by abolishing the power for municipalities to

¹⁸ *Id.*

¹⁹ *Id.* at 37–38.

²⁰ *Id.* at 38.

²¹ *Id.*; see also J.H.A. LACHER, WISCONSIN’S GERMAN ELEMENT (Clearfield 2004) (1925) (offering an overview of Wisconsin’s German heritage).

²² See Rick Romell, *Wasted in Wisconsin: State’s a Party, Until Last Call*, MILWAUKEE J. SENTINEL, Oct. 19, 2008, at A1.

²³ See RANNEY, *supra* note 14, at 230.

²⁴ See *id.*

²⁵ *Id.*

²⁶ *Id.* at 231.

²⁷ *Id.*

license the sale of alcohol and by requiring local authorities to vigorously enforce the 1849 law.²⁸ The state's Germans opposed these laws, and argued that "they undermined the principle of individual responsibility."²⁹ These laws proved almost impossible to enforce, however, and the legislature repealed them in 1851.³⁰ Pro- and anti-temperance groups continued to battle, and a law passed in 1872—called the Graham Law—required every liquor seller to post a \$2,000 bond (a lot of money in 1872) as security for its license.³¹ In addition, the law banned and criminalized drunkenness and the sale of alcohol to minors, and the sellers became liable, as in the 1849 law, for the economic harms done by the person to whom they sold alcohol as a result of that person's drinking.³²

As expected, the anti-temperance Germans opposed this law, and launched court challenges on due process grounds against the bond requirement and civil liability provisions.³³ The court rejected these arguments, but in 1873, the Germans campaigned successfully to remove the legislators who passed the Graham Law.³⁴ With an anti-temperance majority, the legislature in 1874 repealed the Graham Law and replaced it with a law more favorable to alcohol sales and consumption.³⁵ Beer culture had won this battle in the state's cultural history.

With such a large percentage of the state's population being beer drinkers, Wisconsin's brewery industry flourished. In the 1840s, the Germans began to brew their signature lager beer in Wisconsin, and imported from Germany the yeast necessary to make this brew.³⁶ The industry was centered in the state's largest city, Milwaukee, and by 1855 Milwaukee boasted 25

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 232.

³¹ *Id.* at 233.

³² *Id.*

³³ *Id.* at 233–34 (discussing the 1873 Wisconsin Supreme Court cases *State ex rel Henshall v. Ludington* and *Wightman v. Devere*).

³⁴ *Id.* at 234.

³⁵ *Id.*

³⁶ See CURRENT, *supra* note 16, at 89.

breweries, with total annual beer production of approximately 55,000 barrels.³⁷ Beer stood as the city's second-largest manufacturing industry.³⁸ In 1855, Frederick J. Miller emigrated from Germany and settled in Milwaukee, bringing with him the brewing techniques and money necessary to open his own brewery.³⁹ This brewery eventually became the Milwaukee corporate stalwart Miller Brewing Company, and would, along with other prominent names in brewing such as Schlitz, Blatz, Pabst, and Best, become a cornerstone of Milwaukee industry.⁴⁰

The beer industry also brought Milwaukee, and Wisconsin in general, considerable national acclaim, which the industry and the city promoted proudly and vigorously.⁴¹ Pabst, for example, operated hotels and restaurants in Chicago, Minneapolis, San Francisco, and New York.⁴² Milwaukee brands successfully obtained injunctions against non-Milwaukee breweries from labeling their bottles as "Milwaukee beer."⁴³ The city became synonymous with beer, and while brewing stood as the largest industry in Milwaukee during only one year—1889—beer clearly served as its signature industry.⁴⁴ By 1900, the city brewed, per capita, three times as much beer as New York City and five times as much as Chicago and Philadelphia; and the small state of Wisconsin as a whole lagged behind only New York, Pennsylvania, and Illinois in terms of total output of malt liquors.⁴⁵

By 1918, nine major brewers operated in Milwaukee, employing approximately 6,540 people and producing about \$35 million worth of beer annually.⁴⁶ Given the significant role that beer played in Wisconsin's economy (significant brewers outside of Milwaukee included J.

³⁷ TIM JOHN, *THE MILLER BEER BARONS* 25 (Badger Books Inc. 2005).

³⁸ *Id.*

³⁹ *Id.* at 32.

⁴⁰ See CURRENT, *supra* note 16, at 90.

⁴¹ See *id.* (offering a quote from the Milwaukee Chamber of Commerce: "[By 1872, the] relatively small city of Milwaukee had overtaken such great brewing centers as New York, Philadelphia, and St. Louis as the greatest beer exporting center in the nation.").

⁴² *Id.* at 92.

⁴³ *Id.*

⁴⁴ *Id.* at 91–93.

⁴⁵ *Id.* at 90.

⁴⁶ See JOHN, *supra* note 37, at 148.

Leinenkugel in Chippewa Falls and G. Heileman in La Crosse⁴⁷), the onset of Prohibition in 1919 with the enactment of the Eighteenth Amendment to the United States Constitution⁴⁸ wreaked havoc upon the state.⁴⁹ Small breweries closed their doors, and the larger brewers made revenue only through producing products such as nonalcoholic “near beer,” soft drinks, or malt extracts.⁵⁰ As its most profitable product, for example, Miller sold nonalcoholic malt syrup, which besides being used by bakers and pharmaceutical companies, found a market in home-based brewers.⁵¹ Faced with a precipitous decline in tax revenues, the Milwaukee Common Council, by a vote of 29–1, sent a letter to Congress, pleading for it to end Prohibition.⁵²

On March 22, 1933, President Franklin Roosevelt signed a bill that legalized the sale of beer with an alcohol content of 3.2 percent or less.⁵³ This law came into effect on April 7, 1933, and on the night of April 6, “New Beer’s Eve,” crowds congregated at bars and breweries around Wisconsin to await the stroke of midnight, when alcoholic beer could once again be sold and consumed legally.⁵⁴ On April 25, 1933, Wisconsin became the second state in the union to ratify the Twenty-First Amendment to the United States Constitution, which ended Prohibition and placed the regulation of alcohol primarily into states’ hands.⁵⁵ The enactment of the Twenty-First Amendment on December 5, 1933, not only legalized a major element of the state’s culture—drinking beer—it resuscitated an industry.⁵⁶

Given the lobbying strength of Wisconsin brewers and tavern owners, as well as the aforementioned cultural proclivity toward drinking beer, Wisconsin’s post-Prohibition alcohol

⁴⁷ See CURRENT, *supra* note 16, at 93–94.

⁴⁸ U.S. CONST. amend. XVIII.

⁴⁹ See CURRENT, *supra* note 16, at 93.

⁵⁰ *Id.*

⁵¹ See JOHN, *supra* note 37, at 162.

⁵² See *id.* at 148–49.

⁵³ *Id.* at 214.

⁵⁴ See CURRENT, *supra* note 16, at 93.

⁵⁵ U.S. CONST. amend. XXI.

⁵⁶ See JOHN, *supra* note 35, at 216–17.

laws have been some of the most lenient of any state in the country.⁵⁷ Traffic accident statistics over the years have shown the danger that this culture has posed on the state's roads, an example being that 60 percent of all fatal traffic accidents in the state in 1967 involved a drunk driver.⁵⁸ The 1984 United States Supreme Court case *Welsh v. Wisconsin* offers a stark judicial rebuke of the state's alcohol laws.⁵⁹ The case involved the police conducting a warrantless search of the home of a man suspected of drunken driving.⁶⁰ After receiving reports that Welsh had been driving erratically, the police found his car abandoned by the road.⁶¹ Upon learning that Welsh lived close to where they found the car, the police went to his house, entered without a warrant or Welsh's consent, and arrested Welsh for drunken driving.⁶²

Under Wisconsin law at the time, a person could receive a maximum \$300 fine and was not subject to any jail time or any other penalty for his first drunken-driving offense.⁶³ Welsh, therefore, contended that the police's nighttime warrantless search violated the Fourth Amendment of the United States Constitution (applicable to the states through the Fourteenth Amendment) because, in the absence of exigent circumstances, the police could not enter his home and arrest him based upon a nonjailable civil offense.⁶⁴ The Supreme Court agreed with him that the warrantless search and subsequent arrest violated Welsh's Fourth Amendment rights, and vacated the Wisconsin Supreme Court's decision to the contrary.⁶⁵

⁵⁷ See, e.g., WIS. STAT. ANN. § 346.65(2) (2009) (providing only a ticket for a driver's first operating while intoxicated offense).

⁵⁸ See Patricia A. Nelson & Jeffrey T. Roethel, *Driving Under the Influence of Alcohol: A Wisconsin Study*, 1970 WIS. L. REV. 495, 495 (1970) (detailing the state's drunken statistics as well as the methods that the state used to test the alcohol level in suspected drunken drivers).

⁵⁹ 466 U.S. 740 (1984).

⁶⁰ *Id.* at 742–43.

⁶¹ *Id.* at 742.

⁶² *Id.* at 742–43.

⁶³ *Id.* at 746.

⁶⁴ *Id.* at 747–48.

⁶⁵ *Id.* at 754.

In a concurring opinion, Justice Blackmun pulled no punches when he took Wisconsin to task for having such lenient drunken-driving laws.⁶⁶ He wrote:

[I]t is amazing to me that one of our great States—one which, by its highway signs, proclaims to be diligent and emphatic in its prosecution of the drunken driver—still classifies driving while intoxicated as a *civil* violation that allows only a money forfeiture of not more than \$300 so long as it is a *first* offense. The State, like the indulgent parent, hesitates to discipline the spoiled child very much, even though the child is engaging in an act that is dangerous to others who are law abiding and helpless in the face of the child's act. Our personal convenience still weighs heavily in the balance, and the highway deaths and injuries continue. But if Wisconsin and other States choose by legislation thus to regulate their penalty structure, there is, unfortunately, nothing in the United States Constitution that says they may not do so.⁶⁷

None other than the U.S. Supreme Court had taken aim at Wisconsin for the seemingly turned-shoulder stance the state had taken toward drunken driving.⁶⁸

In 1987, shortly after the Court decided *Welsh*, Wisconsin faced more federal pressure to change another one of its drinking laws: move its minimum drinking age from 19 to 21 or risk losing federal highway funds.⁶⁹ In 1982, President Ronald Reagan established the Presidential Commission on Drunk Driving, which had as one of its goals a reduction in the number of young people driving drunk.⁷⁰ Many states at the time had a minimum drinking age of 18 or 19.⁷¹ Under intense lobbying by groups such as Mothers Against Drunk Driving, the Republican President, contrary to his staunch states' rights stance, eventually backed legislation, passed by Congress in 1986, that required every state to raise its drinking age to 21 by 1987 or risk losing five percent of the federal highway funds allocated to the state.⁷²

⁶⁶ *Id.* at 755–56.

⁶⁷ *Id.* (emphasis in original) (internal citations omitted).

⁶⁸ *Id.*

⁶⁹ See Mary Pat Treuhart, *Lowering the Bar: Rethinking Underage Drinking*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 303, 308–09 (2006).

⁷⁰ *Id.* at 308.

⁷¹ *Id.*

⁷² 23 U.S.C. § 158(a)(2) (2006).

Feeling this monetary pressure as Congress flexed its spending power, the Wisconsin legislature passed a law that, on December 8, 1986, moved the state's minimum drinking age from 19 to 21.⁷³ (From 1839—before Wisconsin became a state—until early 1985, the state's minimum drinking age had actually been 18.⁷⁴) This new law, however, had a couple of catches in it.⁷⁵ For example, people age 19 or 20 at the time of the law's enactment could still legally purchase and drink alcohol.⁷⁶ In addition, those under the legal drinking age could drink at licensed public facilities as long as a parent, guardian, or spouse of legal drinking age accompanied them and provided the licensed establishment consent to serve the minor.⁷⁷ So, while this new law allowed Wisconsin to receive its highway funds, the state retained its status as having some of the nation's most lenient alcohol laws. Times may be changing, however. Recently, the people and government of Wisconsin appear to have started a process of coming to terms with some of the social and economic consequences that this lenient attitude toward alcohol has had on the state. The state's outlier alcohol laws may soon reflect this awakening.

II. Milwaukee Newspaper Takes Aim at State's Lenient Drinking Laws

The first story in the *Milwaukee Journal Sentinel's* "Wasted in Wisconsin" series laid forth some stark facts concerning what the newspaper perceived as the state's overarching alcohol problem.⁷⁸ The story had a blunt lead: "Beer for beer and shot for shot, when all 50 states belly up to the bar, few can hold their own with Wisconsin. Binge drinking—we're No. 1. Percentage of drinkers in the population—No. 1. Driving under the influence—No. 1."⁷⁹ The

⁷³ See Robert Enstad, *Wisconsin Corking Under-21 Drinkers*, CHI. TRIB., Dec. 6, 1986, at C4.

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See WIS. STAT. ANN. § 125.07 (2009).

⁷⁸ Rick Romell, *Wasted in Wisconsin: State's a Party, Until Last Call*, MILWAUKEE J. SENTINEL, Oct. 19, 2008, at A1.⁷⁹ *Id.*

story proceeded to detail how approximately 1,250 Wisconsin residents die each year on account of alcohol, and that the state has three times more bars per capita than the U.S. average.⁸⁰ This story traced some of this drinking culture back to the state's German roots, and offered reasons why this culture, despite the passing of generations, persists today. "[W]e evolved to be exquisitely attuned to getting along with the group, giving us the tendency to conform—whether for good or for ill," said Peter Glick, psychology professor at Lawrence University in Appleton, Wis., in the story. "So when there is an established heavy-drinking norm, it will tend to perpetuate because there is lots of social tolerance and reward for drinking."⁸¹

Subsequent stories in the "Wasted in Wisconsin series" focused on the low percentage of the state's five-time operating-while-intoxicated (OWI) offenders who went to prison (43 percent from 1999 to 2006)⁸²; the \$365,000 tab (\$240,000 of which came from the tax dollars or insurance companies) attributed to one man's drunken driving⁸³; the clout that Wisconsin tavern owners have in shaping the state's alcohol laws (such as the group's influence in the state levying its extremely low \$2 per barrel tax on beer and the maintenance of 0.10 as the minimum blood alcohol concentration for an OWI offense for years, until the state changed its laws to 0.08 in 2003 under threats to lose some of its federal highway funds)⁸⁴; and stories about some of the drunken-driving fatalities that occurred on one stretch of highway over a five-year period.⁸⁵

As the state's largest-circulation and most influential newspaper, the *Journal Sentinel* has the ability to communicate with the entire state. With the "Wasted in Wisconsin" series, it set

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Gina Barton & Ben Poston, *Most Felony Drunken Drivers Avoid Prison*, MILWAUKEE J. SENTINEL, Oct. 20, 2008, at A1.

⁸³ Gina Barton, *One Drunken Driver's Tab: \$365,000*, MILWAUKEE J. SENTINEL, Oct. 21, 2008, at A1.

⁸⁴ Steve Walters & Tom Daykin, *Grass Roots Feed Tavern League's Political Clout*, MILWAUKEE J. SENTINEL, Oct. 22, 2008, at A1.

⁸⁵ Rick Romell & Grant Smith, *Alcohol and Death Collide on Highway 41*, MILWAUKEE J. SENTINEL, Oct. 23, 2008, at A1 (detailing the 37 deaths attributed to drunken driving from 2003 to 2007 on this highway that runs north to south in the eastern part of the state).

forth to educate Wisconsin citizens about the consequences of the state's drinking culture. It basically offered a lecture about taking responsibility to curb some of the behavior that has led to the state ranking among the top in the United States in many alcohol-related drinking, injury, and fatality statistics each year. But rather than merely citing statistics, the newspaper placed a human face on the heavy toll that the state pays for its drinking.⁸⁶ As a means to accomplish this goal, in addition to the original five-part series, the paper published a story for 72 straight days that each day focused on a different drinking-and-driving victim in a different Wisconsin county.⁸⁷ The paper also created a "Straight Talk" page on its web site as a resource for parents and teachers to inform children about the effects of drinking,⁸⁸ and produced a CD-ROM of the entire "Wasted in Wisconsin" series as an educational tool. Finally, an editorial on the final day of the main five-part series placed a call to action to the state's legislators.⁸⁹ It demanded that they, among other actions, increase the penalties for drunken driving; eliminate the loophole in the minimum drinking age that allows a minor, regardless of age, to drink at a bar when accompanied by a consenting parent, guardian, or spouse; allow state troopers and local law enforcement to set up roadside sobriety checkpoints; and increase taxes on alcohol.⁹⁰

This call to action did not fall upon deaf ears. The following sections of this paper will show that the state's lawmakers are crafting new laws to regulate the sale and consumption of alcohol in Wisconsin that comport with some of the demands laid forth by the newspaper.

⁸⁶ See Mark Katches, *Behind the Headlines: We Made it Our Mission to Represent the Victims*, MILWAUKEE J. SENTINEL, Oct. 19, 2008, at A2.

⁸⁷ *See id.*

⁸⁸ Straight Talk, Milwaukee Journal Sentinel, <http://www.jsonline.com/news/36457334.html> (last visited Nov. 17, 2009).

⁸⁹ Editorial, *Time to Stop Enabling Tragedy*, MILWAUKEE J. SENTINEL, Oct. 23, 2008, at A1.

⁹⁰ *Id.*

III. More Than a Ticket—Creating Drunken Driving Deterrence

Those who do not recognize the negative consequences that the demise of the newspaper may have on American society must examine the impact of the *Journal Sentinel's* “Wasted in Wisconsin” series. Besides offering Wisconsin citizens an objective report on the consequences of the state’s alcohol policies, “Wasted in Wisconsin” provoked the state’s lawmakers to take action to amend the state’s drunken-driving laws.

Like every state in the United States, Wisconsin has laws that make operating a vehicle while under the influence of alcohol or drugs illegal.⁹¹ In addition, similar to other states, Wisconsin has established 0.08 as the minimum blood alcohol concentration it considers as being an intoxicated level.⁹² The penalties that the state imposes upon drivers convicted of operating a vehicle while intoxicated, however, veer significantly away from those found in other states.⁹³ A first-time OWI offender in Wisconsin receives only a ticket and a maximum fine of \$300.⁹⁴ A person convicted of a similar offense in neighboring Illinois, for example, would be guilty of a Class A misdemeanor, with a possible one year in jail, fine up to \$2,500, and license suspension for up to one year.⁹⁵ In California, the driver would lose his license for six months, face up to six months in jail, and be liable for a fine up to \$1,000.⁹⁶

The National Highway Traffic Safety Administration (NHTSA) keeps state-by-state statistics of all traffic accidents in the United States.⁹⁷ One of the numerous categories of accidents available from the NHTSA is “Alcohol-Impaired Driving Fatalities.”⁹⁸ On its web site,

⁹¹ WIS. STAT. ANN. § 346.63 (2009).

⁹² *Id.* at § 340.01(46m).

⁹³ *Id.* at 346.65(2).

⁹⁴ *Id.*

⁹⁵ 625 ILL. COMP. STAT. ANN. 5/11-501(c)(1) (2009).

⁹⁶ CAL. VEH. CODE § 13352(a) (2009).

⁹⁷ See State Motor Vehicle Crash Statistics, <http://www-nrd.nhtsa.dot.gov/departments/nrd-30/ncsa/STSI/USA%20WEB%20REPORT.HTM> (last visited Nov. 17, 2009) (offering U.S. traffic accident statistics).

⁹⁸ *Id.*

the NHTSA offers statistics, for each state, of the ratio of OWI-related fatalities in the state's overall traffic crash fatalities.⁹⁹ In comparing the percentage of traffic fatalities related to OWI accidents in Wisconsin to the same numbers in its neighboring Illinois and Minnesota from 2004–08—as well as the entire United States—Wisconsin consistently has a higher percentage of OWI fatalities.¹⁰⁰ (The numbers from 2008, however, offer a welcome anomaly—a lower percentage than Illinois and less than three percent more than the U.S. average.) The chart below shows a five-year comparison of these OWI fatality numbers.

Ratio of OWI Crash Fatalities to Overall Crash Fatalities--2004–08¹⁰¹

Year	State	Total fatalities in all crashes	Alcohol-impaired crash fatalities	Percentage of OWI fatalities
2004	Wisconsin	792	297	37.5%
	Illinois	1,355	475	35.1%
	Minnesota	567	156	27.5%
	U.S. combined	42,836	13,099	30.6%
2005	Wisconsin	815	322	39.5%
	Illinois	1,363	458	33.6%
	Minnesota	559	163	29.2%
	U.S. combined	43,510	13,582	31.2%
2006	Wisconsin	724	307	42.4%
	Illinois	1,254	446	35.6%
	Minnesota	494	149	30.2%
	U.S. combined	42,708	13,491	31.6%
2007	Wisconsin	756	314	41.5%
	Illinois	1,248	439	35.2%
	Minnesota	510	173	33.9%
	U.S. combined	41,259	13,041	31.6%
2008	Wisconsin	605	208	34.4%
	Illinois	1,043	362	34.7%
	Minnesota	456	135	29.6%
	U.S. combined	37,261	11,773	31.6%

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (offering the data included in this chart).

With numbers such as these in mind, and the *Journal Sentinel's* stories bringing local, regional, and national attention to the state's lenient drunken-driving laws,¹⁰² the Wisconsin Assembly and Senate both passed bills in 2009 that would increase the penalties for those convicted of OWI offenses. On September 17, 2009, the Wisconsin Assembly unanimously passed a bill that would, among other provisions, make a driver's first OWI offense a misdemeanor if a driver 16 or under was a passenger in the car; require repeat OWI offenders and first-time OWI offenders with a blood alcohol concentration of 0.15 or higher to have an ignition interlock on their car for one year; make a fourth OWI a felony—rather than the fifth—if it occurs within five years of the previous offense; and establish mandatory minimum penalties for all OWI offenses.¹⁰³ Rep. Josh Zepnick, whose sister died in a 1990 car crash caused by a drunken driver, told the *Journal Sentinel* of the compromise that the Assembly tried to reach between tougher laws and the state's culture with this bill: "We're trying to strike a balance between prevention, treatment and rehabilitation, and justifiable and fair punishment."¹⁰⁴

The state Senate followed the Assembly's lead, and passed, unanimously as well, a nearly identical bill on November 5, 2009.¹⁰⁵ Now, the Assembly and Senate must work out the minor differences in their respective bills to pass a piece of legislation for Gov. Jim Doyle to sign.¹⁰⁶ The legislature most likely will pass this new law in late 2009 or early 2010.¹⁰⁷ To help cover the costs of this bill, the legislature would raise the state's liquor taxes.¹⁰⁸ While applauding the lawmakers' efforts, the state's Mothers Against Drunk Driving (MADD) chapter does not

¹⁰² See, e.g., David Kesmodel, *Wisconsin Sours on Lenient Drunken-Driving Laws*, WALL ST. J., June 19, 2009, at A3.

¹⁰³ See Stacy Forster, *Assembly Gets Tougher on Drunken Driving*, MILWAUKEE J. SENTINEL, Sept. 18, 2009, at A1.

¹⁰⁴ *Id.*

¹⁰⁵ See Patrick Marley, *Drunken Driving Overhaul OK'd by Senate Makes 4th Time a Felony*, MILWAUKEE J. SENTINEL, Nov. 6, 2009, at A1.

¹⁰⁶ *Id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

believe that this legislation goes far enough to create effective deterrents to drinking and driving.¹⁰⁹ Neither does the *Journal Sentinel*.¹¹⁰ Both MADD and the paper believe that the state still needs to criminalize a first OWI offense to at least a misdemeanor and allow police to set up roadside sobriety checkpoints, and MADD believes that the state should require ignition interlocks for all offenders.¹¹¹ Despite these perceived shortcomings, this law will almost assuredly go into effect in 2010, creating harsher penalties for OWI offenders in Wisconsin through legislation that reflects that state's overall attitude toward the use of alcohol.

IV. 'Mom, May I Have a Beer?'

One can only imagine the bewilderment that readers of *The New York Times* had when they picked up their November 16, 2008, papers and read about a peculiar quirk in Wisconsin's drinking laws.¹¹² Reporting from Edgerton, a small town in the southern portion of Wisconsin, the *New York Times* writer opened his story with an interview with Mike Whaley, who owns a bar named Wile-e's.¹¹³ "If they're 15, 16, 17, it's fine if they want to sit down and have a few beers," Mr. Whaley said in the story.¹¹⁴ Either Mr. Whaley had flaunted breaking the law, given that the state's minimum drinking age, as stated above, is 21, or there was a catch.

There was a catch.

The story turned the national spotlight on the fact that Wisconsin drinking laws allow a minor in a bar, restaurant, or other licensed facility—if accompanied by a parent, guardian, or spouse of legal drinking age who consents to the establishment serving the minor alcohol—may

¹⁰⁹ *See id.*

¹¹⁰ *See* Editorial, *Much Needed Reform*, Milwaukee J. SENTINEL, Nov. 6, 2009.

¹¹¹ *See id.*; Marley, *supra* note 105.

¹¹² Dirk Johnson, *Where the Beer Flows Easy, Calls to Sober Up*, N.Y. TIMES, Nov. 16, 2008, at A16.

¹¹³ *Id.*

¹¹⁴ *Id.*

legally drink at the establishment.¹¹⁵ A bartender can use his or her discretion whether to serve the minor, but, as shown in the story in *The New York Times*, bars do pour drinks for minors, sometimes those not even old enough to obtain a driver's license.¹¹⁶ The state's laws appear to reflect the philosophy that a parent or guardian serves as the best arbiter to decide how their children should interact with alcohol in public. Basically, the law says that parents can supervise their children's drinking, and that a bar—and alcohol in general—rather than being taboo, is simply part of family life, even for those who do not yet drink. In *The New York Times* story, for example, Mr. Whaley offered the scene at his bar on Green Bay Packers game days.¹¹⁷ “[A] buddy of mine will come to the bar with his 2-year-old, his 8-year-old and his 10-year-old,” Mr. Whaley said. “He might get a little drunk. But his wife just has a few cocktails. It’s no big deal. Everybody has a good time.”¹¹⁸

These good times may lead to more than family bonding, however. While a provable direct correlation does not exist between the laws that allow parent-accompanied minors to drink in bars and the number of young Wisconsinites who drink, the law appears to reflect and perpetuate the permissive attitude that the state has toward alcohol consumption by minors. Statistics show that the state's minors drink a lot more than minors in other states.¹¹⁹ According to All-Wisconsin Alcohol Risk Education (AWARE), a University of Wisconsin Health coalition established “to improve the health and safety of Wisconsin residents in the fight against alcohol abuse,” the state had the highest percentage of alcohol use among its minors (49 percent) than

¹¹⁵ WIS. STAT. ANN. § 125.07 (2009).

¹¹⁶ See Johnson, *supra* note 112.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See AWARE: All-Wisconsin Alcohol Risk Education, <http://www.uwhealth.org/aware/aware-all-wisconsin-alcohol-risk-education/13951> (last visited Nov. 17, 2009).

any other state in 2007.¹²⁰ In addition, in 2006 the state had the highest rates of any state of overall alcohol consumption and heavy alcohol consumption, as well as binge drinking.¹²¹

AWARE has targeted educating minors about alcohol and preventing them from drinking as keys to rectifying the state's alcohol problems as shown through these "staggering statistics."¹²² The coalition has backed two bills currently pending in both the Wisconsin Assembly and Senate that change the law that allows a 12-year-old to drink in a bar. Assembly Bill 106¹²³ and Senate Bill 30¹²⁴ are short pieces of legislation. The bills simply take out the language in section 125.07 of the Wisconsin Statutes that allow any minor to drink in a licensed establishment as long as they are accompanied by a consenting, of-age parent, guardian, or spouse and replace it with a minimum age of 18.¹²⁵ Under the revised law, college-age and military-eligible children would still be able to drink at bars with their parents' or spouse's supervision and consent.

In a statement made when the Senate bill passed a vote in the Senate Committee on Children and Families on October 7, 2009 (the Assembly bill passed its committee vote on October 27), Sen. Judy Robson, the bill's co-sponsor, offered numerous reasons why she introduced this legislation: "Teenagers who begin drinking before age 15 are four times more likely to develop alcohol dependence during their lifetime than those who started drinking at age 21 or older. Teenage brains are still developing and can be negatively affected by alcohol. We should be working to discourage underage drinking, and that is what this bill does."¹²⁶

¹²⁰ *See id.*

¹²¹ *See id.*

¹²² *See id.*

¹²³ 2009 Wisconsin Assembly Bill 106, introduced Mar. 4, 2009

¹²⁴ 2009 Wisconsin Senate Bill 30, introduced Feb. 3, 2009.

¹²⁵ *Id.*

¹²⁶ *See* Press Release, Senate Committee OK's Youth Drinking Bill (October 7, 2009) (available at <http://www.legis.wi.gov/senate/sen15/news/Press/2009/pr2009-043.asp>).

Pressure from the state's largest university through AWARE, as well as the media pressure from the likes of the *Journal Sentinel* and *The New York Times*, appears to have spurred the state's lawmakers into action. While at the time of this paper's writing neither the Assembly nor the Senate bill had passed a full vote (after which the two chambers would have to reconcile their bills), the prospects of passage appear promising, given that the bills have the support of the Tavern League of Wisconsin, Wisconsin Association of Local Health Departments and Boards, Wisconsin Chiefs of Police Association, the Wisconsin Medical Society, and the Wisconsin Public Health Association.¹²⁷ Limiting minors' public alcohol consumption in such a manner marks another part of what appears to be a cultural movement in the state to change some of the factors that lead to its high incidence of underage and heavy drinking, as well as drunken driving.

V. Wisconsin Crafts its Own Solutions to Regulate its Alcohol Problems

Our federalist system allows each state in the Union to establish its own laws concerning the sale, distribution, consumption, and other areas relating to alcohol. A state's alcohol laws reflect its culture, social mores, ethics, economics, and history. Non-arbitrary reasons usually exist why one state may levy heavy taxes on alcohol, while another, such as Wisconsin with its beer brewing legacy, has low liquor and beer taxes. Likewise, the penalties that the one state may impose on its citizens for drunken driving may pale in comparison to those in another state. These laws, as well, reflect a state's priorities in deterring and punishing drunken driving; and these priorities may be lessened by a long cultural history of public drinking, such as that which exists in Wisconsin.

The people of Wisconsin, however, received a sobering wake-up call when the *Milwaukee Journal Sentinel* published its "Wasted in Wisconsin" series in 2008. The federal

¹²⁷ *Id.*

government's National Survey on Drug Use and Health had already made clear before this series that more people in the state drive drunk and are likely to die in a drunken-driving accident than any place else in the country.¹²⁸ The newspaper, however, brought to light some of the state's unknown and unquantified human and economic costs attributed to alcohol use. When these matters came to light, the state's government went to action. If passed, Wisconsin's new OWI laws will bolster its penalties for drunken driving; and the law closing the loophole that allows minors to drink in bars should help reduce alcohol consumption among kids.

These laws, however, will still be lenient compared to those in other states, including its neighbors such as Illinois, Minnesota, and Michigan. If Justice Blackmun were still alive and on the Supreme Court, he would perhaps scold Wisconsin once again for its drunken-driving laws in a manner similar to his concurring opinion in *Welsh v. Wisconsin* if presented the opportunity.¹²⁹ Wisconsin, however, has to craft its laws to meet the overall needs of its citizens, which includes taking into account the state's cultural and economic histories that have deep-rooted ties to alcohol. The 21st Amendment to the United States Constitution gives the state this obligation,¹³⁰ and with this responsibility, Wisconsin is making efforts to answer, as the *Journal Sentinel* explained, the "painful questions" it confronts concerning its citizens' alcohol use.

¹²⁸ See Johnson, *supra* note 112.

¹²⁹ 466 U.S. 740, 755–56 (1984).

¹³⁰ U.S. CONST. amend XXI, § 2.