THE DEFINITION OF DRIVING WHILE INTOXICATED

Robert B. Voas, Ph.D., Pacific Institute, Bethesda, Maryland

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1. Reference in rule

Pagell, line 11: "*The terms 'driving while intoxicated' and 'driving under the influence' are both defined by statute to mean driving or being in actual physical control of a motor vehicle* ***while having an alcohol concentration above the legal limit*** *of the State.*"

2. Related reference in statute

Section 1406, paragraph 164(a)(2): "Driving or being in actual physical control of a vehicle while having an alcohol concentration above the permitted limit as established by each State."

3. Background

States typically have two definitions for the offense of impaired driving in their vehicle codes: (1) "*per* se"laws that make it illegal to drive at a BAC higher than the prescribed limit and (2) "*impaired*" laws that make it illegal to drive under the influence of, or while impaired by, alcohol. Conviction under a *per* se law requires that a chemical test be taken to obtain data that establishes the BAC of an offender at the time of arrest. Prosecution under *impaired* laws occurs when an offender refuses to take a breath test, the evidential test was successfully challenged, or there is evidence of impairment at a BAC less than the legal limit. A sizeable proportion of all DWI or DUI drivers are convicted under impaired laws when there is no evidence on the record to show whether they were over or under the state limit.

4. Issue

Read literally, this statement would limit the application of 23 CFR Part 1275 to offenders whose convictions were based on a breath or blood test for BAC. Convictions based on the officer's testimony regarding observations of impairment at the time of arrest would not qualify as "driving while intoxicated" or "driving under the influence." How does the NHTSA plan to deal with this issue?

5. Potential cost of problem

If, in implementing the requirements of TEA-l, states adopt the language in the rule, a large portion of the offenders with two or more DWI or DUI offenses within 5 years will escape classification as repeat offenders because their convictions were based on impaired laws where there was no BAC test results to show that they were over the state BAC limit. Further, since classification as a repeat offender could be avoided by not giving a breath sample, refusal rates for both first and repeat offenders will increase, thus making it more difficult to obtain DWI convictions.

6. Proposed change

Change wording (or interpretation) to read: *"driving or being in actual physical control of a motor vehicle while impaired by alcohol or while having an alcohol concentration* **above** *the legal limit of the State."*

LENGTH OF VEHICLE IMPOUNDMENT

Robert B. Voas, Ph.D., Pacific Institute, Bethesda, Maryland

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1. Reference in rule

   Page16, line 2: "*The regulation does not specify the length of time during which these penalties* [impoundment or immobilization] *must remain in effect, since the statute was silent in that regard.*"

2. Related reference in statute

   Section 1406, paragraph 164(5)(B): "Be subject to the impoundment or immobilization of each of the individual's motor vehicles or the installation of an ignition interlock system on each of the motor vehicles."

3. Background

   Driving-while-intoxicated laws in most states provide that police may impound the vehicle of an individual arrested for this offense to safeguard the vehicle and prevent the offender from driving while intoxicated. The vehicle is normally released the day after the arrest but may remain impounded longer if the offender fails to pick up the vehicle. At least two states (California and Ohio) have laws that impound the vehicle for up to 6 months as a method to follow the rule, which states "To ensure that driver's license suspension sanctions are not to be ignored." NHTSA-funded evaluations of Ohio's and California's impoundment programs have shown that vehicles held for at least a month (California), or up to 6 months (Ohio), do reduce recidivism for repeat DUI and DWS offenders.

4. Issue

   The rule does not provide for any minimum period of impoundment. Therefore, it appears to permit the states without long-term impoundment laws to satisfy this requirement based on the standard procedure of holding the vehicle overnight following a DUI arrest. Does the NHTSA plan to accept such short-term overnight or 1- to 2-day impoundment periods as meeting this requirement?

5. Potential cost of problem

   If states can meet the requirements for impoundment/immobilization, vehicle plate cancellation, or interlock with a simple provision that the vehicle of an arrested driver will be towed and held overnight pending booking and release of the offender, then this provision of Section 1406 of the TEA-21 law will be vindicated. Further, the ability to meet this requirement with what is essentially a standard operating procedure will discourage States from following the lead of Ohio and California and implementing a sanction that has been shown to be effective. Continuing to use only the overnight impoundment is important in terms of facilitating the arrest process, but also has not been shown to have any impact upon DWI recidivism.

6. Proposed change

   Change wording (or interpretation) to state that "*a minimum of* 30 *days of impoundment is required to meet the requirement under 164(5)(B).*"

TIMING OF IMPOUNDMENT ACTION

Robert B. Voas, Ph.D., Pacific Institute, Bethesda, Maryland

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1. Reference in rule

Page14, line 3: "*Section 164 does not specify when a State must impose the impoundment or immobilization of, or installation of an ignition interlock system on, motor vehicles.*"

Page 13, line 12: "*. . . the agencies have determined that this definition will also include the forfeiture or confiscation of a motor vehicle or the revocation* ***or suspension of a motor vehicle license plate or registration.***"

2. Related reference in statute

Section 1406, paragraph 164(5)(B): "Be subject to the impoundment or immobilization of each of the individual's motor vehicles or installation of an ignition interlock system on each of the motor vehicles."

3. Background

The NHTSA funded a national study on the use of impoundment/immobilization, forfeiture, and license plate seizure by the 50 states. That study indicated that these laws were generally ineffective unless the vehicle or its license plate was seized at the time of the original arrest. An attempt to carry out an impoundment order after the trial when a vehicle had already been returned to an offender was considerably more expensive. Usually, the offender would have already disposed of the vehicle and/or the state would have to spend considerably more time to locate the vehicle and take it into custody. While several states have laws providing that vehicle registrations be suspended for the same period as the offenders' driving permits (with the exception of Ohio, which maintains its own police force to find the offender's vehicle and remove the plates), most such laws were ineffective. Although the motor vehicle department could cancel the registration, it could not ensure that the plate was removed from the vehicle to prevent its use.

4. Issue

While the statute is silent on the timing of vehicle seizure for impoundment, immobilization, or license plate seizure, it is clear that such laws are likely to be ineffective unless the vehicle is seized at the time of arrest. Further, NHTSA research has shown that suspension of registration without seizure of the license plates is ineffective. How does NHTSA plan to deal with this issue?

5. Potential cost of problem

As stated in the rule, up to 70% of the suspended offenders continued to drive to some extent. Though there are no available statistics, clearly, if offenders' vehicles retain apparently valid plates, they will continue to operate those vehicles even with a canceled registration. Furthermore, experience clearly shows that when vehicles are returned to offenders following arrest and pending a court trial, most offenders will either transfer their registrations other persons before conviction or sell their vehicles, thereby frustrating an impoundment program.

6. Proposed change

Change wording (or interpretation of vehicle impoundment) to read: "*Only programs that provide for impoundment or seizure of the vehicle plates at the time of arrest will meet the impoundment/immobilization requirement.*"

INCLUSION OF HOUSE ARREST IN THE DEFINITION OF IMPRISONMENT

Robert B. Voas, Ph.D., Pacific Institute, Bethesda, Maryland

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1. Reference in rule

   Page22; line 9: *"Accordingly, the agencies have included house arrests under the definition of 'imprisonment' under the Section 164 program, provided that electronic monitoring is used."*

2. Related reference in statute

   Section 1406, paragraph 164(5)(D): "In the case of the second offense-an assignment of not less than 5 days imprisonment."

3. Background

   The NHTSA sponsored a study of the effectiveness of electronically monitored home confinement in Los Angeles, California. This research indicated that this sanction is effective in reducing recidivism among DUI offenders. However, the mean period of house arrests for the offenders studied was 83 days in the program. The rule apparently uses this study to defend the addition of electronically monitored house arrests that are not mentioned in the statute to the definition of imprisonment. Thus, for the purpose of Section 1406, 164(5)(d), 5 days of house arrest would be accepted as satisfying this retirement.

4. Issue

   The statute requires a minimum of 5 days imprisonment. The rule states that house arrest (with electronic monitoring) is included under the definition of imprisonment. Does the NHTSA plan to accept state programs that involve only 5 days of house arrest?

5. Potential cost of problem

   House arrest, while possibly involving some embarrassment with family members, is a much milder sanction than being placed in the local jail for 5 days or being required to perform 30 days of community service. A 5-day requirement to stay home at night is equivalent to grounding a teenager. It is a significantly lower penalty than the 2- to 3-day jail sentence many states require of first offenders. If the multiple offender is given a choice between 5 days in county jail, 30 days of community service, or staying home and watching television for 5 nights, there can be little doubt what choice offenders will make. Research suggests that to be effective, house arrest must continue for approximately 3 months. The short 5-day period on house arrest is not economical for potential service providers. Thus, the substitution on a day-for-day basis of house arrest compared to jail time is likely to result in the unavailability of house arrest as a jail alternative.

6. Proposed change

   A change in wording (or interpretation) should state that: *"An electronically monitored house arrest can be substituted for imprisonment based on a minimum sentence of a 90-day house arrest."*

TREATMENT REQUIREMENTS FOR MULTIPLE OFFENDERS

Robert B. Voas, Ph.D., Pacific Institute, Bethesda, Maryland

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1. Reference in rule

Page20, line 4: *"To qualify under this criterion, the State law must make it mandatory for the repeat intoxicated driver to undergo an assessment' but the law need not impose any particular treatment (or any treatment at all)."*

2. Related reference in statute

Section **1406,** paragraph **164(5)(C):** "Receive an assessment of the individual's degree of abuse of alcohol and treatment as appropriate."

3. Background

Screening or assessing DUI offenders to determine the level of their drinking problem can be an important method to help ensure that individuals who require treatment receive it and that the treatment regiment prescribed is appropriate to the their needs. Assessing or screening is most appropriate for first offenders where some individuals may not have a drinking problem and, therefore, do not require extensive treatment. It is generally agreed, however, that repeat offenders are, almost without exception, likely to have an alcoholic or behavioral problem requiring treatment. Thus, to find out which treatment is needed, assessment becomes less important for the repeat offender. It is primarily a tool used by treatment providers to help them decide what type of program is most appropriate for the offender. There is no evidence that assessment itself has any impact upon recidivism. Thus, the value of assessment is entirely dependent on the offender receiving the treatment.

4. Issue

Subsection C of the statute seems to indicate that assessment with appropriate treatment is mandatory. The rule contains a parenthetical statement that the State is not required to provide "any treatment at all." Clearly, neither the statute nor the rule should specify the type of treatment provided since this should vary with the nature of each case. Nonetheless, it is apparently important to ensure that treatment appropriate to the assessment is required for all offenders. Will the NHTSA require that States not only provide the resources necessary to treat all offenders, but also require that the offender receive the treatment specified by the assessment?

5. Potential cost of problem

Assessment is a relatively short process that cannot be expected to have a significant affect on drinking and driving for which there is no evidence of its impact on DWI recidivism. If courts are free to decide whether an offender must complete a treatment program determined to be appropriate by the assessment (which, in many cases, could be lengthy-up to 6 months to **1** year), then this element of the sanction could be subjected to plea bargaining. Further, it is important that the court maintain control over an offender during treatment to ensure completion of the program. If the court does not have a State mandate to insist upon treatment and enforce it through its probation powers, then experience suggests that many offenders will not complete the treatment.

6. Proposed change

Change wording (or interpretation) to delete *"or any treatment at all"* and provide that the State must make it mandatory for repeat intoxicated drivers to undergo an assessment and the appropriate treatment as specified by the assessment.