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The Minimum Drinking Age for Young People: An Observation

Michael P. Rosenthal*

I. Introduction

Since the early 1970's, there has been much controversy over the appropriate minimum drinking age¹ for young people. This article discusses historical developments and background materials and concludes that the minimum drinking age of twenty-one, which is now the law in almost all states, is preferable to the eighteen- and nineteen-year old drinking laws that obtained in the early 1970's.² Simply, the risks of harm presented by alcohol use at ages eighteen, nineteen, and twenty outweigh the benefits of lawful use at these ages.

II. Historical Background³

A. *The Colonial Period*

There is conflict among scholarly sources about whether the colonial period was characterized by heavy but controlled drinking or by moderation.⁴ By no stretch of the imagination, however, was the colonial period dry;⁵ on the other hand, it was not particularly characterized by drunkenness.⁶ Strong social standards laid down by the

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1. The minimum legal drinking age is the age below which a person cannot purchase, consume, or possess alcohol, and below which the sale of alcohol is forbidden.

2. Principles of fair disclosure require me to state that I am the father of an eighteen year old daughter.

3. This section draws heavily on Mosher, *The History of Youthful Drinking Laws: Implications for Current Policy*, in H. WECHSLER, *MINIMUM DRINKING AGE LAWS*, ch. 2 (1980) [hereinafter Mosher], and on J. GUSFIELD, *SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT* (1963) [hereinafter GUSFIELD]. In addition, some sub-headings in this section are derived from the subheadings in the historical section of Mosher.

4. Compare Mosher, *supra* note 3, at 12, with GUSFIELD, *supra* note 3, at 37.

5. Mosher, *supra* note 3, at 12.

6. GUSFIELD, *supra* note 3, at 37; J.A. KROUT, *THE ORIGINS OF PROHIBITION* 1-30 (1925) [hereinafter KROUT].

colonial aristocracy kept the public from drunkenness.⁷

No matter how one labels the drinking habits of Colonial America, colonists considered alcohol as an "essential"⁸ part of life. It was used daily in homes, inns, and taverns.⁹ The tavern itself was "a focal point of community life, a place for political decisions, recreation, and entertainment, and the tavernkeeper was a respected community leader."¹⁰

Children, as well as adults, drank in Colonial America. According to one study, parents taught their children to drink when they were young, sometimes even when they were babies.¹¹ Adults also encouraged adolescents to openly experiment with adult drinking behaviors.¹² For example, twelve-year old boys often entered taverns to drink, and "fathers would even escort their sons, proud that their offspring could participate in this manly activity."¹³

In addition, students drank heavily at colleges, and colleges encouraged drinking by supplying alcohol to students.¹⁴ One commentator noted that the laws of this period reflected a "general acceptance or even encouragement of youthful drinking."¹⁵ Many regulations of the liquor trade were passed during this period, but very few of them dealt with drinking by the young.¹⁶ Those that did addressed special problems¹⁷ and did not deal with general prohibitions on youthful drinking.

B. *The Immediate Post-Revolutionary Period to Prohibition*

The use of alcohol changed after the Revolutionary War and during the nineteenth century. The pattern of the colonial period included drinking daily, but not to drunkenness.¹⁸ As time went on, however, this pattern became less common.¹⁹ It was replaced by reg-

7. GUSFIELD, *supra* note 3, at 37.

8. Levine, *Colonial and Nineteenth Century American Thought About Liquor as a Cause of Crime and Accidents*, at 5-8 (paper delivered at the Annual Meeting of the Society for Social Problems, Sept. 1977) (as cited in Mosher, *supra* note 3, at 12). See also KROUT, *supra* note 6, at 1 ("... [u]se of alcoholic beverages was not only beneficial, but also necessary.").

9. Mosher, *supra* note 3, at 12.

10. *Id.* See also GUSFIELD, *supra* note 3, at 37; KROUT, *supra* note 6, at 44.

11. W. RORABAUGH, *THE ALCOHOLIC REPUBLIC: AN AMERICAN TRADITION* 14 (1979) [hereinafter RORABAUGH].

12. Mosher, *supra* note 3, at 12.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. Mosher, *supra* note 3, at 12-13.

18. *Id.* at 14. See also GUSFIELD, *supra* note 3, at 37; KROUT, *supra* note 6, at 1-25.

19. Mosher, *supra* note 3, at 14.

ular heavy drinking bouts that included frequent drunkenness.²⁰ In the last years of the eighteenth century and the first two decades of the nineteenth century, drunkenness became the norm.²¹ Heavy drinkers who drank to drunkenness generally were members of the lower and middle classes.²² Before the Revolution, the strict standards of the colonial aristocracy controlled their drinking.²³ After the war, however, the power of the aristocracy weakened²⁴ and it could no longer enforce the old norm.²⁵ Nevertheless, the aristocracy attacked the new drinking habits (including drunkenness) and began the temperance movement in an attempt to maintain some of its power, leadership, and prestige.²⁶ Although the aristocracy began the temperance movement, this movement became important in American life only as it became dominated by the lower and middle classes.²⁷

There is not a great deal of evidence on the drinking patterns of young people after the Revolutionary war,²⁸ but it appears that at least some minors changed their drinking habits. "[The] post-Revolutionary generation of students indulged in unprecedented lusty drinking,"²⁹ and there was very heavy drinking along the frontier where men worked as trappers, miners, cowboys, and soldiers—all trades begun at early ages.³⁰

As young people began to drink heavily, pressure on them to moderate or cease drinking arose. Colleges tried to restrict student drinking,³¹ and legislation was enacted later that prohibited sellers of alcohol from selling or giving it to minors.³² No state, however, made it a crime for minors to drink.³³ Society viewed the minors as innocent victims, not persons at fault.

20. GUSFIELD, *supra* note 3, at 38-40; Mosher, *supra* note 3, at 14.

21. GUSFIELD, *supra* note 3, at 36-44.

22. *Id. passim*.

23. See *supra* note 6.

24. GUSFIELD, *supra* note 3, at 37-39. The weakening of the aristocracy was partly due to changes wrought by the war itself. *Id.* at 38.

25. *Id.*

26. *Id.* at 5-6, 36-44.

27. *Id.* at 44. When temperance pressure came from the aristocracy, it came from outside the group involved with drinking; when it came from the middle and lower classes, it came from within the groups involved with drinking, *i.e.*, it was indigenous.

28. Mosher, *supra* note 3, at 14.

29. RORABAUGH, *supra* note 11, at 139.

30. Mosher, *supra* note 3, at 14-15.

31. RORABAUGH, *supra* note 11, at 139.

32. Mosher, *supra* note 3, at 16.

33. *Id.* After prohibition, however, a substantial majority of the states made possession, consumption, and purchase of alcohol offenses. In all probability, they did this for deterrent and educational reasons.

There was probably a special reason why states enacted legislation banning sales to minors. One commentator, relying on a study by Marks,³⁴ believes that stricter controls against children's drinking "coincided with a major shift in societal attitudes toward adolescence."³⁵

As Marks discusses . . . the state increasingly dictated the fates of the family and young people after 1870. Child-labor laws, compulsory-education laws, and juvenile courts, which had the power to restrict or terminate parental rights if neglect or abuse was established, became common throughout the country. These had the effect of extending childhood to a later age and of restricting the rights of children and parents to determine the child's destiny

Thus, the change in youthful-drinking laws, which became pronounced during the 1880's, can be viewed as one aspect of the state's intervention into the parent-child relationship. Young adults' participation in the state's economy became restricted . . . and adolescence became synonymous with "incompetency." . . . The state began treating sixteen- to twenty-year olds with the same legal constraints as those imposed on preadolescents.³⁶

C. *Prohibition and Immediate Post-Prohibition*

During state and national prohibition, bans on sales to minors were, of course, unnecessary, but regulations again became necessary after prohibition was repealed in 1933. The twenty-first amendment left the control of alcohol to the states.³⁷ Almost all states that legalized beverage alcohol prescribed a minimum drinking age of twenty-one.³⁸ New York, then the most populous state, was an exception; it chose a minimum drinking age of eighteen.³⁹

D. *The Vietnam Period to the Present*

There was no significant quarrel with the twenty-one-year minimum drinking age until the early 1970's. At that time, a large number of states switched to minimum drinking ages below twenty-one⁴⁰

34. Marks, *Detours on the Road to Maturity: A View of the Legal Conception of Growing Up and Letting Go*, 39 LAW AND CONTEMP. PROBS. 78, 85-88 (1975).

35. Mosher, *supra* note 3, at 16.

36. *Id.* at 16-17.

37. U.S. CONST. amend. XXI, § 2.

38. Mosher, *supra* note 3, at 21-22.

39. *Id.* at 22.

40. Comment, *The Politics and Consequences of the New Drinking Age Law*, 13 FLA.

and also lowered their ages of majority.⁴¹ While a number of factors were involved, the primary cause for this switch was the Vietnam War and the youth culture that developed largely as a result of the war. Young men under the age of twenty-one were drafted and killed in Vietnam, but they were legally minors and did not have the rights and privileges of adults. They could not vote; they could not drink; but they could serve and fall in battle.⁴²

To the extent the Vietnam War was responsible for lowering the age of majority in general and the minimum drinking age in particular in a large number of states, it should be realized that the changes were for reasons somewhat different than the reasons an age of majority is usually lowered or raised. Normally, a change is based on society's view of the age that should be considered the age of responsible decision-making or competency. When states lowered the age of majority and the minimum drinking age because boys were serving and dying in the War, however, they did so because society felt it was *unfair* to have them serve and die and yet not have the rights and privileges of adults. The states did not inquire whether the boys were mature enough to vote or to handle liquor; they just deemed the treatment to be unfair.

Another factor may have contributed to legislation reducing the minimum drinking age. In the late 1960's and early 1970's, American attitudes toward adolescence became less paternalistic and moved toward increased autonomy.⁴³ This movement is illustrated in the United States Supreme Court's treatment of the juvenile justice system in the line of cases beginning with *In re Gault* in 1967.⁴⁴ In these cases, the Court heavily criticized the paternalistic concept of the juvenile courts and the way in which they dealt with youths.⁴⁵

As a result of these factors, twenty-nine states lowered their minimum legal drinking age, generally from twenty-one to eighteen, during the early 1970's.⁴⁶ Studies showed that lowering the mini-

ST. U. L. REV. 847, 847-48 (1985).

41. 43 C.J.S. *Infants* § 3, nn. 37, 38 (1978 and Supp. 1987).

42. Douglass, *The Legal Drinking Age and Traffic Casualties: A Special Case of Changing Alcohol Availability in a Public Health Context*, H. WECHSLER, *MINIMUM DRINKING AGE LAWS* 93, ch. 6 (1980).

In addition, the War in Vietnam was probably the major cause of the adoption of the twenty-sixth amendment to the Constitution in 1971. The twenty-sixth amendment gave eighteen-year olds the right to vote in national elections.

43. Mosher, *supra* note 3, at 28-29.

44. *See, e.g.*, *In re Gault*, 387 U.S. 1 (1967). *See also* *In re Winship*, 397 U.S. 358 (1970); *Breed v. Jones*, 421 U.S. 519 (1975).

45. *See, e.g.*, *In re Gault*, 387 U.S. 1 (*passim*) (1967).

46. Comment, *The Politics and Consequences of the New Drinking Age Law*, 13 FLA. ST. U. L. REV. 847 (1985).

imum drinking age brought with it an increase in *fatal* accidents,⁴⁷ although the validity of the data is controversial.⁴⁸ Regretfully, however, the studies "leave some question as to the amount of the increase."⁴⁹

An increasing number of states reacted to these statistics and once again *raised* their minimum drinking ages (in the great majority of cases to twenty-one) in the late 1970's and early 1980's.⁵⁰ More studies followed, and again there was controversy about the validity of the data.⁵¹ This time the great majority of the soundly-designed studies found that raising the drinking age decreased fatal accidents.⁵² A major evaluative study recently prepared by the General Accounting Office concluded:

With regard only to *driver fatal crash involvements* statistically significant crash reductions were generally found for the

47. See, e.g., *infra* note 91-92.

48. Mosher, *supra* note 3, at 11.

49. Defining the Alcohol-Crash Problem, Nat'l Highway Traffic Safety Administration (U.S. Dep't of Transportation), Alcohol and Highway Safety 1984: A Review of the State of the Knowledge 7, 31 (1985) [hereinafter Defining the Alcohol-Crash Problem].

50. DuMouchel, Williams & Zador, *Raising the Alcohol Purchase Age: Its Effects on Fatal Motor Vehicle Crashes in Twenty-Six States*, 16 J. LEGAL STUD. 249, 249-50 (1987); Williams, Zador, Harris & Karpf, *The Effect of Raising the Legal Minimum Drinking Age on Involvement in Fatal Crashes*, 12 J. LEGAL STUD. 169 (1983).

51. *National Minimum Drinking Age Law, Hearing Before the Subcomm. on Investigations and Oversight of the Comm. on Public Works and Transportation*, 99th Cong., 2d Sess. 4-7 (testimony of Eleanor Chelimsky, Director, Program Evaluation and Methodology Division, General Accounting Office) (1986) [hereinafter 1986 Hearing].

In 1984, Congress enacted legislation under which it withheld federal highway funds from any state that did not raise its minimum drinking age to twenty-one by a certain date. See *infra* notes 58-59. After the enactment of the legislation, the House Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation asked the General Accounting Office (GAO) to "critically examine the soundness of existing studies dealing with minimum drinking age laws . . ." 1986 Hearing, *supra*, at 1-2 (Remarks of Subcommittee Chairman Oberstar). The GAO reported the results of its study at a hearing of the subcommittee held on September 18, 1986.

The GAO identified eighty-two evaluative studies. Forty-nine of these examined the effects of an increase in the drinking age. These were screened for serious methodological problems. Twenty-eight were discarded for methodological problems, leaving twenty-one for evaluation. 1986 Hearing (Chelimsky Testimony), *supra*, at 5. According to the GAO, the evaluation synthesis it completed for the Subcommittee was, to the best of its knowledge, ". . . the first comprehensive effort to systematically array, analytically compare and bring together in one place the findings of minimum age evaluations to see what they can tell us in their aggregate." *Id.*

Material in the statements and testimony of other witnesses participating in the 1986 hearing (including a spokesman for a segment of the alcohol industry) suggests that all interested persons are not about to readily acquiesce in the conclusions of the General Accounting Office. *Id.* at *passim*.

52. 1986 Hearing (Chelimsky Testimony), *supra* note 51, at 27. The bulk of the well-designed studies on fatalities dealt with fatal accidents in which drivers were killed, rather than with "total fatalities" in accidents. "Total fatalities" look at the deaths of drivers, passengers, pedestrians, and drivers and passengers of other vehicles. The latter statistics appear to be more important.

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affected group. All four of the soundly-designed national level studies we reviewed reported reductions that ranged from five percent to twenty-eight percent. Similar results were reported for soundly-designed evaluations conducted at the state level. Four of the five states that evaluated a law's impact on measures of *driver fatal crashes* found statistically significant reductions that were attributable to raising the drinking age.⁵³

The General Accounting Office concluded that it could not "estimate the size of the traffic accident reduction that individual States might expect to see after enacting a minimum drinking age law."⁵⁴ It stated: "[w]hat we do know is that, in general, States can expect reductions, but the magnitude of the reduction will depend on the particular outcome measured and on the characteristics—geographic or demographic or cultural—of the individual State."⁵⁵

With public concern about drunken driving mounting,⁵⁶ President Reagan created the Presidential Commission on Drunken Driving,⁵⁷ which recommended that the states raise their minimum drinking ages to twenty-one.⁵⁸ One year after this recommendation was made, however, only four of the twenty-three states that still had minimum drinking ages below twenty-one had raised their minimum ages.⁵⁹ It appeared that the Commission's recommendation was not enough.⁶⁰ Congress then "encouraged" states to raise their minimum drinking ages by withholding money from states that did not do so. In 1984, Congress amended the Surface Transportation Assistance Act of 1982.⁶¹ Under the 1984 Act, the Secretary of

53. *Id.*

54. 1986 Hearing (Chelimsky Testimony), *supra* note 51, at 5.

55. *Id.* In addition, the bulk of the soundly-designed studies found that raising the drinking age significantly decreased accidents involving driver fatalities and injuries. 1986 Hearing, (Chelimsky Testimony), *supra* note 51, at 26-27.

Further, when the Vietnam War ended, it was probably easier for states to raise the minimum drinking age since there was no longer any colorably valid claim of unfairness. Men were no longer being asked to serve and die; therefore, it was not unfair to say they could not drink.

56. Comment, *supra* note 45.

57. Establishing Presidential Commission on Drunk Driving, 47 Fed. Reg. 4,311 (Apr. 14, 1982).

58. Presidential Commission on Drunk Driving, Final Report 10 (1983).

59. 1984 Cong. Rec. S8209 (statement of Sen. Lautenberg) (daily ed. June 26, 1984).

It is likely that a major reason for this is because the most important studies that linked raising the minimum drinking age to decreased fatalities had not been undertaken or completed. Hence, they could not yet have impact.

60. Amici Curiae Brief of U.S. Senator Frank R. Lautenberg and Mothers Against Drunk Driving (MADD), at 6-7, South Dakota v. Dole, No. 86-260, Oct. Term 1986 (U.S. Sup. Ct.) [hereinafter MADD brief].

61. Act of July 17, 1984, Pub. L. No. 98-363, §§ 6-7, 98 Stat. 435, 437-39 (codified at 23 U.S.C. § 158).

Transportation is required to withhold a percentage of a state's otherwise allocable federal highway funds if the state does not establish a minimum age of twenty-one for "the purchase or public possession" of alcoholic beverages.⁶² The Act was so successful that in December of 1986 President Reagan announced that, while when he signed it "fewer than half the states had a 21 year old minimum drinking age, . . . today all but seven do."⁶³

South Dakota was one of the few states that chose not to comply with the 1984 federal Act. The deviation was small (it permitted persons 19 years of age or older to purchase 3.2 beer),⁶⁴ but deviate it did. South Dakota sued in federal court⁶⁵ seeking a declaratory judgment that the 1984 federal Act violates both constitutional limits on governmental exercise of the spending power and the twenty-first amendment to the constitution. After losing in the lower courts,⁶⁶ South Dakota sought appeal to the Supreme Court.⁶⁷ The Court granted certiorari and held that, even if Congress might not have the power to directly impose a national minimum drinking age (a question not decided by the Court), the federal act was a valid exercise of Congress' spending power.⁶⁸

III. For a Twenty-One-Year Old Minimum Drinking Age

This section considers whether a twenty-one-year old minimum drinking age is preferable to a lower minimum drinking age. It concludes that the twenty-one-year old age is preferable.⁶⁹

62. *Id.* at 437. In 1986, the provisions pertaining to the minimum drinking age law were amended. 23 U.S.C. § 158(a). However, these amendments do not affect the matters that involve us.

It is surprising that the federal Act requires a sanction on "purchase" and "public possession" without requiring a sanction on sale or distribution. Every state bans sales to minors. *See, e.g.*, CAL. BUS. & PROF. CODE § 25658(a) (West 1985); CONN. GEN. STAT. ANN. § 30-86 (West Supp. 1987); DEL. CODE ANN. tit. 4, § 904 (1985). Most states ban consumption, purchase and/or possession by minors. *See infra* note 101. Before prohibition, states had banned only sale and not consumption of alcohol by minors. *See supra* note 32. A better case can be made for banning sale and distribution than for consumption. A ban on the sale and distribution of alcohol is likely to provide the bulk of any deterrent effect on consumption by underage persons.

63. National Drunk and Drugged Driving Awareness Week, Remarks on Signing Proclamation 5591, 22 Weekly Comp. Pres. Doc. 1650 (Dec. 15, 1986). As of approximately January 1, 1988 only one state (Wyoming) had a minimum age of less than twenty-one.

64. S.D. CODIFIED LAWS ANN. § 35-6-27 (1986).

65. *South Dakota v. Dole*, 107 S. Ct. 2793, 2795 (1987).

66. *South Dakota v. Dole*, 791 F.2d 628 (8th Cir. 1986).

67. *South Dakota*, 107 S. Ct. at 2795.

68. *Id.* at 2795-96.

69. Of course, the enactment of the 1984 federal Act and the decision in *South Dakota v. Dole*, 107 S. Ct. 2795 (1987), mean the twenty-one-year old drinking age is law in all but the most financially independent states. Whether it should be the law, however, is a different

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The reason for prohibiting conduct is to prevent the harm or risk of harm associated with the conduct. Alcohol presents a number of harms. Despite the fact that it is one of the most popular intoxicants in the world (and the most preferred in the United States), alcohol is in many ways quite a dangerous drug. It can cause or contribute to a number of dangers to physical and mental health such as cirrhosis of the liver,⁷⁰ alcoholism,⁷¹ and precipitation of aggressive behavior.⁷² It is alcohol's relationship with the automobile, however, that is given as the reason for a twenty-one-year old minimum drinking age. The relationship has resulted in fatal crashes, crashes causing bodily injury, and in crashes causing property damage.⁷³

The number of accidents involving drunken driving is quite high. These accidents account for more than one-half of the 45,000 deaths in the United States caused by traffic accidents each year.⁷⁴ The effect of mixing driving and alcohol is even stronger on the young. Alcohol-related traffic deaths are the number one killer of fifteen to twenty-four-year olds,⁷⁵ and they account for approximately fifty percent of all teenage deaths.⁷⁶ In addition, sixteen- to twenty-four-year old drivers represent twenty percent of licensed drivers in the United States and less than twenty percent of total miles driven, yet they account for forty-two percent of all fatal alcohol-related accidents.⁷⁷ Further, because of drunken driving, the life expectancy of teenagers has remained constant for the last twenty years even though the life expectancy of every other age group has improved during this period.⁷⁸ Young drivers who drink are highly dangerous to themselves, as well as to everyone else.

question.

70. Interview with Carlton K. Erickson, Professor, College of Pharmacy, University of Texas at Austin (Aug. 31, 1987).

71. L. GOODMAN & A. GILMAN, *THE PHARMACOLOGICAL BASIS OF THERAPEUTICS*, ch. 23 (7th ed. 1985).

72. *Id.*

73. Defining the Alcohol-Crash Problem, *supra* note 49, at 13.

74. 1984 Cong. Rec. 5, 8207 (daily ed. June 26, 1984) (statement of Senator Danforth) (cited in MADD brief, *supra* note 60, at 3).

75. National Center for Health Statistics, Public Health Service, US DHHS *Health, United States, 1980*, Pub. No. (PHS) B1-1232, December 1980 (as reported in Amicus Curiae Brief of National Council on Alcoholism in South Dakota v. Dole, No. 86-260, Oct. term 1986 (U.S. Sup. Ct.), at 19, n.23 [hereinafter NCA brief]).

76. 1984 Cong. Rec. § 3207 (statement of the Presiding Officer) (cited in MADD brief, *supra* note 60, at 4) (daily ed. June 26, 1984).

77. NCA brief, *supra* note 76, at 19 (relying on U.S. Dep't of Transp., Fatal Accident Reporting System, 1982, DOT Pub. No. (PHS) 806-556 (1984[h])).

78. 1985 Cong. Rec. 5, 9429 (statement of Sen. Lautenberg) (as reported in MADD brief, *supra* note 60, at 4) (daily ed. July 11, 1985).

One interesting study measured the fatal auto accidents involving alcohol for each 100,000,000 vehicle miles travelled.⁷⁹ Teenage drivers had the highest alcohol-involved fatal accident rate of any age group—a rate of approximately 4.5 per 100,000,000 vehicle miles⁸⁰ compared to 3.38 for twenty-year olds,⁸¹ 4.08 for twenty-one-year olds,⁸² 3.10 for twenty-two to twenty-four-year olds⁸³ and 1.50 for twenty-five- to forty-four-year olds.⁸⁴ The rates for persons in their early twenties, while less than those for teenagers, are still quite substantial and strongly implicate the involvement of drivers in this group in fatal accidents involving alcohol. The study showed that eighteen-, nineteen-, and twenty-year olds had alcohol-involvement fatal-accident rates very close to the rates of the sixteen- and seventeen-year olds.⁸⁵ Assuming the validity of these figures, it is hard to justify treating eighteen-, nineteen-, and twenty-year olds differently than sixteen- and seventeen-year olds.

Surprisingly, the youngest drivers are less likely to drink before or during driving than older drivers.⁸⁶ Despite this, it appears that the “crash risk” of young drivers is higher after they drink than it is for drivers from other age groups.⁸⁷ A recent study stated that “[t]he presumed reason for the higher alcohol crash risk faced by younger drivers is their relative inexperience with driving after drinking.”⁸⁸ It is believed that “alcohol has a greater effect on light or inexperienced drinkers.”⁸⁹ This study adds, however, that there is little behavioral data on the differential effects of age to support this view.⁹⁰ The fact that teenagers (and young adults) are more likely to be risk-takers and to believe they are immortal also contributes to this crash risk.

It is reasonably clear that the twenty-one year old drinking age saves lives,⁹¹ but it is not clear how many lives it saves.⁹² There have,

79. Defining the Alcohol-Crash Problem, *supra* note 49, at 30, Table 3-10.

80. *Id.* at 29, 30, Table 3-10. Sixteen- to seventeen-year olds had an alcohol-involved fatal accident rate of 4.58 per 100,000 vehicle miles; eighteen-year olds rated 4.61 and nineteen-year olds rated 4.44 per 100,000 vehicle miles. *Id.* at 30, Table 3-10.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 30-31.

87. *Id.* at 31.

88. *Id.*

89. *Id.* at 39.

90. *Id.* at 31.

91. See *supra* notes 50 & 51 and *infra* notes 90-92.

92. Defining the Alcohol-Crash Problem, *supra* note 49, at 31.

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however, been various estimates and studies on the topic. One study undertaken by the National Highway Traffic Safety Administration investigated fatal crashes in thirteen states. Raising the minimum drinking age had a positive effect in ten of the thirteen states. The investigators estimated that fatal crashes involving alcohol-impaired drivers were reduced by thirteen percent. They also estimated that raising the minimum drinking age to twenty-one nationally would save approximately 550 lives each year.⁹³

A study conducted by the Insurance Institute for Highway Safety measured the effects of raising the minimum drinking age in the twenty-six states that had done so between 1975 and 1984. The researchers estimated that, as a result of the increasing drinking age, "nighttime driver fatal crash involvements" decreased by thirteen percent.⁹⁴

Another study examined nine states that raised the minimum drinking age between September 1, 1976, and January 1, 1980. It estimated that "each year there could be about 730 fewer young drivers involved in nighttime fatal crashes if in all states the drinking age for all alcoholic beverages was raised to twenty-one."⁹⁵ It also estimated that any state which raises its minimum drinking age "can expect the nighttime fatal crashes of drivers of the affected age groups to drop by about twenty-eight percent."⁹⁶

Even making allowances for defects and questions of certainty in the data, the minimum drinking age should be set at twenty-one. There is very little question that the twenty-one-year old minimum drinking age saves lives,⁹⁷ and even the lowest reliable estimate of

93. R. ARNOLD, EFFECT OF RAISING THE LEGAL DRINKING AGE ON DRIVER INVOLVEMENT IN FATAL CRASHES: THE EXPERIENCE OF THIRTEEN STATES (Nat'l Highway Traffic Safety Admin., Nat'l Center for Statistics and Analysis, U.S. Dep't of Transportation (as reported in Amicus Curiae Brief of Insurance Institute for Highway Safety in *South Dakota v. Dole*, 107 S. Ct. 2795 (1987), at 5 n.8) (1985)) [hereinafter Insurance Institute brief]. This was one of the studies that the General Accounting Office considered properly designed in its evaluative study. 1986 Hearing (Chelimsky Statement), *supra* note 51, at 10.

94. DuMouchel, Williams & Zador, *Raising the Alcohol Purchase Age: Its Effect on Fatal Motor Crashes in 26 States*, 16 J. LEGAL STUD. 249, at 251-54 (1987). The GAO also deemed this study to be properly designed. 1986 Hearing (Chelimsky Testimony), *supra* note 51, at 10.

95. Williams, Zador, Harris & Karpf, *The Effect of Raising the Legal Minimum Drinking Age on Involvement in Fatal Crashes*, 12 J. LEGAL STUD. 169, 179 (1983). The GAO also found this study properly designed. 1986 Hearing (Chelimsky Testimony), *supra* note 51, at 11.

96. *Id.*

97. In addition to saving the lives of eighteen- to twenty-year olds, it is possible that the twenty-one-year old minimum drinking age may deter more high school and junior high school students from using alcohol than the eighteen-year old minimum. This is known as the "spillover effect." Bonnie, *Discouraging Unhealthy Personal Choices Through Government Regulation: Some Thoughts About the Minimum Drinking Age*, H. WECHSLER, MINIMUM DRINK-

lives saved is a *substantial* number. In addition, a higher minimum drinking age reduces personal injuries, some of which may be very serious.⁹⁸

To the extent the author has any doubt about whether the drinking age should be set at twenty-one, he personally resolves it by pointing to the special value he attaches to the lives, bodies, and spirit of the young (a value others undoubtedly share).⁹⁹ When the concern is something as important as death or injury by drunken-driving,¹⁰⁰ society should not afford autonomy¹⁰¹ to eighteen- to twenty-year olds, but should rather be more paternalistic.¹⁰² The alcohol-crash-record of persons in this age group is relatively high compared to other age groups. Its members have not shown that they can be treated like adults in alcohol-related decisions and they have not shown themselves to be responsible. This viewpoint is not a decree of paternalism for life, however. Whether warranted or not, eighteen- to twenty-year olds will be allowed to drink at age twenty-one.¹⁰³ Their autonomy is being deferred, not denied.

ING AGE LAWS, ch. 3 at 39, 47 (1980) [hereinafter Bonnie]. On the other hand, the GAO study, "found little evidence to suggest that an increase in the legal drinking age has an effect on the involvement of sixteen- and seventeen-year old drivers in alcohol-related accidents." 1986 Hearing (Chelimsky Testimony), *supra* note 51, at 33. It added, however, that "[c]aution in interpreting these results . . . is warranted." *Id.*

98. There are many personal injury accidents resulting from the use of alcohol. One source estimates that in 1980, 520,000 or 18% of all personal injury accidents involved alcohol. Defining the Alcohol-Crash Problem, *supra* note 49, at 38. The incidence of alcohol is higher in more serious accidents involving fatality or serious injury than in accidents that involve only minor injury or property damage. *Id.* at 12.

99. Opinions differ as to whether the number of lives saved nationally by the twenty-one-year old minimum drinking age is large enough to warrant it. Here too the author resolves the question by pointing to the value of the young.

100. Moreover, the risks of death and injury presented by drunken driving are not merely risks of harm to self; they are risks of harm to others. There may well be a greater interest in preventing innocent parties from suffering death or injury than in protecting the principal actor from killing or injuring himself.

101. For example, autonomy to use alcohol for recreation or intoxication.

102. One secondary reason for lowering the minimum drinking age in the early 1970s resulted from society's less paternalistic view of adolescents. See *supra* notes 42-44 and accompanying text. The general move to *raise* the minimum drinking age shows a return to paternalism under certain circumstances. It shows a return to paternalism when considerations of unfairness no longer apply and when life and limb are at stake. *Id.* Considerations of paternalism might not be given as much weight when different or no countervailing considerations are involved.

103. Ages of majority, competency or capacity are almost always arbitrary, although a state may make a rule providing that a person who is individually determined to be mature for a particular purpose might do something an immature person might not.

Because the involvement in fatal accidents of persons aged twenty-one to twenty-four is quite high, a case can be made for deferring lawful drinking until twenty-five. This suggestion, however, is not practical.

A. *Costs of the Twenty-One-Year Old Minimum Drinking Age*

Despite all this, it would still be appropriate to espouse a minimum drinking age lower than twenty-one if the social and financial costs of the twenty-one-year old age exceeded the benefits gained from it. It does not, however, appear that the costs of the twenty-one-year old drinking age are especially great. The historical evidence does not suggest any profound enforcement problems or serious abuse in enforcement. To the extent the minimum age law is directed against sales or distributions to eighteen- to twenty-year olds, the law does not result in inordinate costs. While owners of clubs and bars in college towns and neighborhoods may have to close because business suffers, the potential saving to life and limb certainly outweighs these costs. To the extent that compliance with the regulatory system by legitimate sellers adds to the cost of doing business, regulatory laws commonly have this effect.

To the extent some are worried about treating the young consumer as a criminal, a state sanction on the consumer need not be a full criminal offense that carries with it the possibility of a jail term, a criminal record, and other indicia of criminality. A number of states treat possession of small quantities of marijuana, whether by adults or minors, as an "infraction" or a "violation," with consequences much like a traffic offense.¹⁰⁴ While this approach has not been used significantly to deal with possession of alcohol by minors,¹⁰⁵ it is a viable alternative to current sanctions.

B. *Sanctions*

The minimum drinking age may be enforced by a sanction on sale and distribution or on such consumption offenses as possession.¹⁰⁶ Full criminal sanctions against possession, such as misdemeanor treatment with the possibility of a jail term, are not needed, however. It is questionable whether eighteen- to twenty-year olds are

104. Bonnie, *supra* note 97, at 48-54. See also Rosenthal, *Partial Prohibition of Non-Medical Use of Mind-Altering Drugs, Proposals for Change*, 16 HOUSTON L. REV. 603, 610-11, 626 (1979).

105. Possession of alcohol by minors is not an offense in a relatively small number of states. For example, in Maine, Massachusetts and New York it is not a punishable offense. In the majority of states, however, it is either a jailable or fineable misdemeanor or other minor criminal offense. See, e.g., ALA. CODE § 28-1-5 (1986) (fine and/or jail); HAWAII REV. STAT. § 281-101.5(b), (d) (1985) (fine and/or jail); WASH. REV. CODE ANN. §§ 66.44.270, 66.44.290, 66.44.291 (West 1985) (fine and/or jail); CAL. BUS. & PROF. CODE § 25658(b) (West 1985) (fine and/or community service); CONN. GEN. STAT. ANN. § 30-89 (West Supp. 1987) (fine); MICH. STAT. ANN. § 18.1004(2) (1987) (first offense — fine; second and third offenses — fine or participation in substance abuse prevention program).

106. See *supra* note 62.

deterred from purchasing or using alcohol by a possession law. At these ages, alcohol is a real part of so many of their lives, and they are subject to peer pressure. In addition, the implicit statement made by a law that will allow them to drink in a year or two, but not when they are eighteen to twenty, constitutes a mixed message.

It seems clear that the law against sale and distribution to minors provides most of the deterrence from the minimum drinking age. While some sellers violate the law, most recognize that they work in a regulated industry and that violating the law will interfere with their livelihoods. With so much of the deterrent effect of the minimum drinking age coming from the law against distribution and so little from the law against consumption, full criminalization of consumption offenses appears to be overkill.

Since sanctions on possession are not likely to have a substantial deterrent or educational effect, one could reasonably take the view that no sanctions should be imposed. Society is concerned with matters as serious as the risk of death and personal injury, however, and some kind of sanction on possession should be maintained. Thus, a middle of the road position, such as treating possession as an infraction with consequences much like a traffic violation, is desirable. This sanction would be available for deterrent, educational, and symbolic effects.¹⁰⁷ At the same time, this treatment will spare the accused from a criminal record and other indicia of criminality.

IV. Conclusion

After the repeal of national prohibition, all states prohibited minors from consuming alcohol. Nearly all states barred persons under twenty-one from consumption. In the early 1970's, a large number of states, responding to the view that it was unfair to let young men serve and die in Vietnam and not let them drink, lowered their minimum drinking ages to eighteen or nineteen. Unfortunately, this resulted in increased fatalities in the eighteen- to twenty-year age group. To deal with this problem, the states (with federal prodding) again raised their minimum drinking ages to twenty-one. As a result, highway fatalities and injuries involving eighteen- to twenty-year olds have decreased.

The twenty-one-year old minimum drinking age is better than lower minimum drinking ages because it saves the lives, bodies, and

107. Infraction treatment might also be used to force a person to attend an educational program. Further, infraction treatment could be accompanied by increased auto insurance rates for violators.

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spirit of young people. The performance of younger persons with alcohol and driving is very poor and does not warrant giving them autonomy to drink before their twenty-first birthdays. Even then, society can only hope that they will behave responsibly.

