

Judgment of Abstract Danger in the Crime of “Dwi” Dangerous Driving in China

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Abstract: Since the criminalization of driving while intoxicated (DWI), the number of cases has been rising, which has brought certain pressure on judicial resources. There are different criteria for the judicial organs to determine that a perpetrator commits a “DWI” dangerous driving offense, and there are different judgments in the same case. For the judgment of DWI, the judicial organ should start with the method of substantive interpretation, and only when the standard of “beyond reasonable doubt” is reached can a perpetrator be determined to commit DWI. At objective element level, the judicial organ cannot judge that a perpetrator commits a crime only based on the behavior of the perpetrator that meets the requirement of elements of the crime, the judicial organ should scientifically and reasonably determine the elements of the crime, so as to determine whether a perpetrator commits DWI offense. At the subjective element level, the judicial organ should specifically determine the subjective factors of awareness and will of the perpetrator in combination with objective evidence. At the same time, China should standardize the criteria for determining and incriminating this crime, reduce the phenomenon of different sentences in the same case, and show the direction for the trade-off between efficiency and fairness in judicial practice.

1. Introduction

Generally, the judicial organs follow the principle of legality. As long as the act of a perpetrator conforms to the constitutive elements of the Criminal Law of the People's Republic of China (hereinafter referred to as the “Criminal Law”), it is determined that the crime is established. However, as a typical abstract dangerous crime, it is always controversial that whether the judicial organs are needed to judge the abstract danger of DWI dangerous driving crime; at the same time, there is not a more unified standard based on which the abstract danger in DWI is judged in practice. The confusion in the determination of DWI dangerous driving is prone to resulting in contradictions between legislation and judicial practice, and also prone to causing injustice of judicial decisions. In the initial years of the criminalization of DWI with a typical abstract danger, because it does not take the occurrence of dangerous results as an element of its establishment, the phenomenon of “criminalization of all DWI” is very obvious, and some courts have directly found the perpetrator guilty of dangerous driving based on blood alcohol content alone. This mechanized judicial

determination has led to a large number of cases. As time went on, courts around the world recognized the mechanization of the determination and issued documents to adjust it, so as to create more conditions for the conviction. In judicial practice, the courts have also changed from the initial “uniform criminalization” to conviction and sentencing based on a comprehensive consideration of the perpetrator's degree of harm. But this method of judgment will make the quality of the crime to a certain degree of distortion, which led to the determination of dangerous driving crime tends to specific dangerous offenders.

2. The Dilemma of Judicial Determination

2.1 Limited Judicial Resources Due to the Huge Case Base

From the data displayed in 2022 work report of the Supreme People's Court, it can be seen that the national courts concluded more than 348,000 cases of DWI and other dangerous driving crimes in 2021, with an increase of more than 59,000 cases compared to 2020. It can be seen that since “DWI” was formally included into the range of the criminal law system, the incidence of DWI dangerous driving crimes has been rising, gradually becoming the No.1 crime in China [1]. In today's context of many cases and few people, and in light of the limited judicial resources, some courts' verdicts are too simple in their argumentation process. In the determination of the DWI dangerous driving crime, some courts directly found the perpetrator guilty only according to the formal compliance with its elements, and some of the courts found “dangerous” only in the conclusion of the determination, and did not specifically combine the circumstances of the case to demonstrate how the perpetrator's DWI bring about an abstract danger. While the court verdicts determined through comprehensive analysis in combination with the specific circumstances of the case are mainly concentrated in the second trial proceedings, mostly based on sentencing considerations. Misdemeanor cases cannot be easily equated with simple cases. For a DWI offender with typical abstract danger, some courts should consider how to balance the relationship between efficiency and fairness.

2.2 Judicial Imperfections Lead to Inconsistent Consideration of the Elements of Crime and Quantity

Since judicial interpretations concerning the criteria for determining DWI are not quite clearly formulated in judicial practice, the Supreme People's Court issued and implemented the “Guidance of the Supreme People's Court on Sentencing for Common Crimes (II)” (hereinafter referred to as the “Guidance”) on May 1, 2017, which provides a reference for adjudicators in the conviction and sentencing of DWI. The “Guiding Opinions” points out that judicial officers should not criminalize DWI based on a single element alone, but should consider various aspects of the perpetrator and combine them with specific circumstances to accurately convict and sentence the actor. Consequently, some of the regional judicial departments define the DWI standards in the aspects of non-prosecution, exemptions, and probation mainly through the minutes of meetings and other documents, but this has also resulted in different sentences in the same case, different conviction and sentencing standards in different places. For the standard of non-prosecution, there is a certain discrepancy between the provisions of different regions. For example, it is stipulated in the Handling Options issued by Zhejiang Province that a perpetrator of DWI driving two-wheel or three-wheel motorcycle, with the blood alcohol content of not higher than 160mg/100ml, who does not cause actual consequences for others such as minor injuries and above, cannot be treated as a crime; It is stipulated in the reference standard for non-prosecution in Hunan Province that a perpetrator of DWI driving the motor vehicle, with the blood alcohol content of is not higher than

150mg/100ml, and without the aggravating circumstances provided in this reference standard, cannot be prosecuted relatively. At the same time, some provinces did not introduce local standards, and still follow the past more stringent standards of conviction and sentencing, resulting in the phenomenon of different judgements in the same case in different cities and even different regions in the same province. This will not only cause inequality but also a negative impact on the establishment of the image of the court. Therefore, this requires the Supreme Court and the Supreme People's Procuratorate to introduce a set of perfect judicial interpretations to unify the conviction and sentencing standards for DWI [2]. Furthermore, it also requires judges to make substantial judgments on the behavior of the perpetrators, fair and just in the trial process.

3. The Determination of Abstract Dangerousness in the Dwi Dangerous Driving Crime

3.1 Criteria for Judging Intoxication-Type Abstract Dangerous Offenders

3.1.1 Formal Standard

For the judgment of the danger of abstract dangerous offender, formal theory had a rise. Formal theory believes that the abstract dangerous crime and specific dangerous crime is not the same. For the specific dangerous crime, it needs to conduct the specific judgment of whether the actor's behavior produce the risk of infringement of the legal interests. While as for the abstract dangerous crime, as long as the actor makes the act given in the provisions, the act will produce the abstract danger, that is, the danger of abstract dangerous crime is the reason for the legislation, therefore, it does not need to make a specific judgment of the case. Typically, the formal theory includes, the theory of dangerous motive and the theory of proposed danger. The theory of dangerous motive focuses on the danger of the act, the act of the actor is judged with the general concept as the judge standard, even in a special specific occasion, the judgment of the kind of behavior that has danger will not be changed [3]. The theory of proposed danger believes that the danger of the abstract dangerous crime comes from legal fiction, so the actor's behavior on a variety of occasions comes with a danger. Because this danger is formulated by the law, so the actor's counter-evidence is not allowed. In China's judicial practice, if the actor's behavior meets the condition that the DWI offender drives motor vehicle on the road, it will be considered to have produced the abstract danger of infringing the legal interests. The judge's determination of DWI dangerous driving is often based on the formal theory, so as to determine whether the actor's behavior in line with the provisions of the law. Because this abstract danger comes from legal fiction, it does not need a judge to judge the specific objective actual situation.

3.1.2 Substantial Standard

In the view of formalism theory, whenever an actor commits an act specified in the provisions, it is considered to have created an abstract danger representing the legislative reason. But assuming that in a state without any danger, the punishment of the act has a violation of deontology, and may lead to incompatibility of crime and punishment and the injustice of different sentences in the same case. What's more, this way of judging the act without value lowers the threshold of criminalization and expands the scope of criminal punishment, which leads to the rapid growth of the number of criminals in society and is not conducive to the social stability in the long run. As a result, the substantial theory emerged from the theory of German and Japanese dangerous offenders. In contrast to formal theory, substantial theory focuses on the occurrence of abstract danger in a more concrete way in individual cases. For this, the Japanese scholar Professor Okamoto believes that when an act in "no specific danger, there is no illegality" [4], and he believes that the establishment

of abstract dangerous crime must also “constitute a degree of the wrongful specific danger (or abstract danger)” [5], this interpretation based on the result of worthlessness suggests that the concrete danger of some degree must occur in the abstract dangerous crime. Professor Atsushi Yamaguchi further proposed the concept of “quasi-abstract danger”, that is, the abstract danger of some degree, in other words, the danger of abstract dangerous offenders is lower than that of concrete dangerous offenders, and it is a stage danger separated from concrete danger. Based on this, Professor Atsushi Yamaguchi also advocates that if the actor commits the act regulated by the law, the abstract danger is usually considered to have occurred, but if there is no exception of abstract danger, the establishment of the abstract danger crime should be denied [6]. The author agrees with the views of Professor Atsushi Yamaguchi, at the same time. Combined with the current situation of judicial resources of China's grass-roots courts, the author believes that when the grass-roots judges determine the abstract dangerous crime in individual cases, there is no need to make substantive judgments on all cases as long as it is obvious to meet the criteria for the criminalization of DWI (for example, blood alcohol content has exceeded five times the standard, driving in the expressway, etc.). But once there are special occasions (such as a controversy over the determination of “rural roads” and “over-standard non-motorized vehicles”), a substantive review should be conducted [7]. In China, prosecution is generally exempted from in the occasions where danger is completely excluded in judicial practice. In general, the abstract danger cannot be excluded completely in the case which is in the trial stage. In such cases, it is appropriate for a judge to determine in line with the formal standard. But, from the laws and regulations introduced in recent years, the judicial organs also gradually trend to judge the specific danger of DWI dangerous driving crime in sentencing and determination of DWI dangerous driving crime. There are some conflict between the two inevitably. Therefore, as for whether there are quantitative factors for the act of driving a motor vehicle while intoxicated, it is required to discuss the standards in the determination of the abstract danger under the structure of the civil law system, and to explore the methods of substantive interpretation of abstract danger offenders in China.

3.2 Substantive Interpretation of the Abstract Dangerous Crime of Intoxication

It has been eleven years since the criminalization of DWI, and certain results have been achieved, and the rate of DWI in China has been relatively controlled. However, due to the huge base of drivers in China, the phenomenon of DWI dangerous driving offenses increases instead of decreasing in many places, causing a certain adverse impact on society while guarding traffic road safety. Since the criminalization of DWI, many committee members proposed to add “aggravating circumstances” to limit the DWI dangerous driving crime in the review and consultation session of “Amendment (VIII)”. The purpose is to reduce the pressure on the judiciary and save judicial resources while facilitating the distinction between administrative law and criminal law adjustments to limit the excessive criminalization of DWI; on the other hand, due to the addition of aggravating circumstances to the DWI dangerous driving crime, the DWI dangerous driving offender will be more inclined to be determined as a specific dangerous offender, thus contributing to the better realization of the principle of modesty in criminal law, so that the human rights of drivers while intoxicated are reasonably protected [8]. The author does not agree to limit the scope of DWI dangerous driving offenses in such a manner, DWI offenses identified as abstract dangerous offenders in line with the principle of protection of legal interests, can highlight the positive general preventive effect, reflecting the preventive function of criminal law. If they are determined as the specific dangerous offenders, it will reduce the legislators’ deterrent purposes envisaged for DWI, is also not conducive to strengthening the public’s law-abiding awareness due to the background of China’s strong alcohol culture. The law has a clear definition of DWI of 80mg/100ml of blood

alcohol, coupled with the fact that the deterrent effect of administrative punishment on the huge number of drunk drivers is getting lower and lower, therefore, there is no excuse for DWI to be punished by criminal law for the purpose of prevention, which is stricter than administrative punishment. And according to Professor Chu Huaizhi, China is moving towards the “strict-but-not-harsh” road of modernization of criminal law. The modesty of criminal law is not only the modesty of crime but also contains the modesty of punishment. DWI dangerous driving is a typical misdemeanor, and the rate of immunity from prosecution and probation rate gradually increased in practice. In summary, it can be seen that it is not the best choice for limit the DWI of motor vehicles on the road to determine such crime as the specific dangerous crime [9]. Criminal law has a certain stability. In the face of some defects in the law, as well as the application of abstract law to specific cases, criminal law can make a reasonable interpretation of it in the premise of infrequent amendments [10]. In the interpretation of the constituent elements, the substantive interpretation requires to judge from the substance whether the constituent elements contain the illegality and culpability worthy of criminal punishment, or to judge whether there is a reasonableness and necessity of punishment [11]. The author believes that, in judging the abstract danger of abstract dangerous offenders, the four elements of the crime should be combined with the general theory of China to determine the elements of its composition through the substantive interpretation from the objective aspects of the crime to the subjective aspects.

4. Judgment Method of Danger of Dwi Dangerous Driving Crime

In China's criminal law theory, the punishment of criminal behavior is often based on the analysis of the elements of the composition, “DWI” behavior often occurs. From the traditional theory, where the behavior of the perpetrator is consistent with the elements of the composition, the crime is established. Although this approach is in line with the formal judgment standards, it will often expand the application of criminal law. Therefore, in the judgment of it’s danger, a certain restrictions must be conducted by means of substantive interpretation. The author believes that the DWI dangerous driving crime should also be analyzed from the perspective of its objective elements and subjective danger. Objectively, the author believes that the criteria for the determination of intoxication should be more scientific, while determining whether the act of the perpetrator occurs in the field of public transportation combining the legal interests to be protected by the DWI dangerous driving crime; subjectively, from a liability perspective, the subjective responsibility determination judged based on the intentional and illegal awareness should be explored.

4.1 Determination of the Objective Elements

4.1.1 Determination of “Intoxication”

Intoxication is the national standard for determining the perpetrator's intoxication in China's judicial practice, it is judged based on the standard of the blood alcohol content of 80mg/100ml in “Opinions”. Generally speaking, judges determine whether the perpetrator is intoxicated only based on the standard of the alcohol content. Some views oppose this way of judgment, believing that taking alcohol content as the only judgment basis is against the modern science of evidence. If it is to determine that it belongs to DWI only according to the blood test result of the alcohol content of more than 80mg/100ml, it will undoubtedly violate the principle of “presumption of innocence” principle and of “suspicion in favor of the accused”. Because of the differences between individuals in drinking, for instance, there may be individuals who are “heavyweight” and those who are “light weight”, a series of professional scientific methods can be used such as breath and saliva alcohol

testing, post-drinking dynamic balance ability testing, plain view nystagmus testing and simulated driving testing to prove that the perpetrator is “intoxicated” [12]. Some argue that it is possible to examine whether the perpetrator is “unable to drive safely” by reference to an extraterritorial law [13]. The author believes that the conflict between such views and practice lies mainly in the trade-off between the legal values of “justice” and “efficiency”, but even if other factors can be referred to determine whether the perpetrator is intoxicated, the blood alcohol test result is still an important basis for determination. In order to prevent the expansion of the application of criminal law, it is necessary to scientifically adjust the standards of judicial adjudication and to appropriately raise the blood alcohol content threshold on the basis of the current “national standard for intoxication” when determining the judicial standards for DWI. In Germany, for example, the blood alcohol content threshold for absolutely unsafe driving was 1.5‰ and the safety factor was 0.5‰ in the early days, and from 1966 to 1990, the threshold was 1.3‰ and the safety factor was 0.2‰. Now the German Supreme Court has determined that the threshold is 1.1‰ and the safety factor is 0.1‰. These adjustments are driven not only by the laws of natural science, but also by the scientific nature of the normative evaluation of criminal law, meeting “the requirements of the scientific nature of the normative evaluation of criminal law, the necessity of criminal law intervention, and the propriety of criminal policy” [14].

Currently, China's judicial determination has different standards of conviction and sentencing about the blood alcohol content around the country, and there are often different sentences in the same case. Therefore, a unified standard of conviction and sentencing should be scientifically formulated to ensure fairness. The author advocates the establishment of a threshold of “absolutely unsafe driving” by referring to the German Criminal Code, and when it is lower than this threshold, a judge should allow the perpetrator to disprove that his behavior is not unsafe driving. In such circumstances, other scientific methods can be combined with for reference and exercising his discretion to determine whether he/she is in “intoxication”. Specific situation should be comprehensively considered to determine where the evidences are in mutual corroboration and whether it can reach the degree of “beyond reasonable doubt”. However, when the result of the perpetrator is higher than or equal to this specific threshold, a judge can determine that the perpetrator is “intoxicated” rely solely on the blood alcohol content test result.

4.1.2 Determination of “Road”

For road, it can be outlined as a place for public passage in general. The author agrees with the “Road Traffic Safety Law” as the basis for the determination of reference to determination. From the evolution of the “Road Traffic Safety Law”, the “road” was determined as “the place for the passage of vehicles, pedestrians” in the regulations in 1998, and then was expanded to be determined as “the place for public passage”. Subsequently, the “place in the jurisdiction of the unit, where the passage of social motor vehicles is allowed” was included into the scope of the road, so as to protect the rights and interests of victims and perpetrators and to maintain the traffic order of the road.

That whether the road has “public attributes” is the leading standard for determination of “road” in the judicial determination of DWI dangerous driving. From the collection of judicial cases, in judicial practice, the controversy over the determination of road is mainly focused on the determination of a DWI offender driving in the road in the unit jurisdiction. In terms of the community, if the condition that vehicles visiting a community is only specific reasons, such as business, or family relations, it will indicates that the a small and specific range of objects are allowed to access to the community without contain public attributes; if visiting vehicles after paying a certain fee or registration plate number will be able to enter and exit, then the access conditions to such community has no specific identity, allowing social vehicles to access to the

community and even it does not differ with public parking lots. It can be determined to contain public attributes [15]. Therefore, in the determination of a road, the concept of “public safety” can be referred to define the public attributes of the road. In case of the controversy in the process of determination, a judge should use the the specific evidence to determine whether a road on which a DWI offender drives will endanger the personal rights and public & private property of unspecified or most people, so as to make a fair decision.

4.1.3 Determination of “a Motor Vehicle”

For a motor vehicle and a non-motorized vehicle, the “Road Traffic Safety Law” makes a clear distinction. However, the definition of an over-standard electric bicycle is still relatively vague. Thus from the perspective of the cases, the conflict in the determination of a motor vehicle mainly focuses on the definition of “over-standard electric bicycle”, which has led to many different judgments in the same case due to the divergence of views in practice. Some courts hold that the reason why an over-standard electric bicycle is a motor vehicle is that it is a non-motor vehicle, and its danger is so high that it should be regulated by criminal law [16]. The opposite view is that China has a large number of electric bicycles, with large proportion of over-standard electric bicycles. If it is considered a motor vehicle, the cost of managing electric vehicles will inevitably increase while expanding the scope of criminalization, which is not conducive to social stability factors [17].

The author believes that the scope of whether or not an over-standard electric bicycle is a motor vehicle should be specifically determined in judicial adjudication. From the definition of a non-motorized vehicle, if the maximum speed, empty vehicle mass, and dimensions of an electric bicycle do not comply with the relevant national standards, it will be not considered as a non-motorized vehicle. But this does not mean that if there is an item over-standard, it will be directly determined to be a motor vehicle. If the vehicle driven by the actor while intoxicated only exceeds the national standard at the top speed, and the other are the same as the ordinary electric bicycle, and the driver drives at the normal speed, such vehicle should not be determined as a motor vehicle. For an over-standard electric bicycle with various indicators seriously exceeded the standard, or meeting the technical conditions of motorcycles, it can be determined as a motor vehicle. If a vehicle will be determined to be a motor vehicle once it has one or more indicators exceeding the standard, it will bring about a problem that the actor may not be aware that the product he or she bought is a motor vehicle. So why should it be determined to be a dangerous driving offense if the actor has no aware of violation of law? In recent years, China have made more and more efforts to regulate the production and consumption of electric bicycles, and to promote the law on over-standard electric bicycles.

4.1.4 Determination of “Driving”

For driving, there is no definition in the judicial interpretation. But in judicial practice, there are often disputes over “moving vehicle in short distance”. From the screened results of the perpetrators exempting from punishment in case search, it was found that judges generally determined moving vehicle in short distance as driving. But because the perpetrators drove a short distance with slow speed, not causing serious consequences, therefore, it is regarded as minor case without large subjective malice. Driving can be broadly understood that an actor starts the motor vehicle and travels a certain distance, therefore, it is appropriate for a judge to determine moving vehicle in short distance as driving. However, when judging the elements of the DWI dangerous driving crime, a judge cannot determine the actual behavior similar to the description in the law provisions to be an constitutive element only based on the literary content, but also should specifically consider

whether it violates the normative purpose of criminal law, whether it has the danger of infringement of the legal interests, whether its danger of infringement of the legal interests reaches the criminal law punishable degree, all of which are required to be judged. The author believes that the short-distance DWI vehicle-moving behavior with slow speed, not causing serious consequences cannot be determined as a DWI dangerous driving crime, because the danger is not enough to reach the criminal law punishable degree, in order to stabilize the substance of the constitutive elements [14].

4.2 Determination of the Subjective Elements

For the subjective guilt of DWI dangerous driving crime, there is a certain debate in the academic community. The author agrees with point of view that a DWI perpetrator is subjectively intentional, that is, the perpetrator knows that DWI may be out of control and produce the actual danger to road safety, but the perpetrator let this dangerous state occur [18]. If the subjective guilt of the DWI dangerous driving crime is determined to be negligence, the punishment of negligence of the abstract dangerous crime is easy to cause the expansion of the scope of punishment and lead to an imbalance of crime and punishment. For example, the negligent arson of a perpetrator is not a crime, and obviously it is not reasonable that negligent DWI will be punished. Furthermore, if the subjective guilt of this crime is a negligence, it will also limit the freedom of action of the national people [19]. From the selected cases, the author believes that, in the judicial adjudication, the subjective guilt of the perpetrator will generally be determined as being intentional by use of objective evidence. Consequently, a judge needs to consider the cognitive and volitional factors of the DWI dangerous driving crime when determining the subjective guilt of the perpetrator.

4.2.1 Cognitive Factors

The cognitive factor refers to the result of the actor knowing that his or her behavior will cause harm to society in a broad sense. For DWI dangerous driving, first of all, the perpetrator should realize that he or she is driving a motor vehicle on the road under the premise of intoxication, the perpetrator should really realize that he or she is in a state of “intoxication”, and it is impossible for the perpetrator to accurately recognize whether his or her blood alcohol content exceeds the standard of 80ml/100ml. The author believes that the “parallel evaluation of the field of regular people to which the actor belongs” should be applied to judge whether the actor is in intoxicated before driving and whether he or she recognizes that he or she is in a state of intoxication when starting the motor vehicle [20]. For example, when the actor drinks food or drugs containing alcohol and does not recognize the illegality of his behavior. Such a situation cannot be determined to be intentional, and the perpetrator can prove his innocence with this evidence. For example, if the perpetrator drank the night before and drove early in the morning after overnight, if his or her mouth contains alcohol and he or she is not conscious, the perpetrator will be able to know that he or she is in a state of intoxication and has the knowledge of illegality, therefore, the perpetrator can be determined as DWI dangerous driving. On the contrary, if the perpetrator drinks a lot of alcohol and his body metabolizes alcohol fast, and after drinking overnight, he or she is “refreshed”, so he or she does not have illegal knowledge at the moment. Secondly, the actor should realize that he or she drives a motor vehicle on the road, If the actor is aware that he or she is drunk when he or she starts the motor vehicle and does not intend to drive, and because of the negligence, the perpetrator has driven a certain distance, the perpetrator does not recognize that he is driving. In this situation, it is not appropriate to determine the perpetrator to commit DWI. For the perpetrator who recognizes whether the vehicle he or she is driving is a “motor vehicle”, there is no shortage of perpetrators who abuse the knowledge of illegality to circumvent the law [20]. The author believes

that a judge needs to use objective evidence combined with objective elements to make specific judgments and carry out investigation and verification when necessary. For example, the determination of over-standard electric bicycles should be carried out with comprehensive evidences, because the perpetrator's over-standard electric bicycle does not in the state of seriously over-standard and the perpetrator does not know it is a motor vehicle. However, for the seriously over-standard electric bicycle, the perpetrator's knowledge of illegality can be rejected.

Secondly, the perpetrator should also recognize that his or her behavior will bring about an abstract danger to the legal interests protected by the crime of dangerous driving. This paper is based on the position of the quasi-abstract dangerous crime described by the author. If a DWI perpetrator drives in the desert where there is no one, and he or she can not recognize that his or her behavior will cause abstract danger to road safety, this situation should not be considered to be intentional. In practice, for the reason proposed by the actor that he or she did not recognize the abstract danger produced by driving while intoxicated on residential roads, parking lots, or rural roads to traffic safety, the judge generally judges the public attribute of the road to infer whether the actor recognized the danger. The author believes that this method of judgment is not inappropriate.

4.2.2 Volitional Factors

The volitional factors of criminal intent contain hope and indulgence. The author believes that the volitional factor of this crime is an indulgence, the drivers while intoxicated generally also do not want to produce harm to traffic road safety when driving a motor vehicle, most of these drivers readily believe that they can avoid and indulge in this result [21]. If the perpetrator knows that DWI may cause actual danger to road safety due to his DWI out of control, but hopes that this result occurs, the subjective malice of the perpetrator in this case is great, an imminent high risk will be also caused to public safety. Therefore, it is more appropriate to make a severe punishment according to the “crime of endangering public safety by dangerous means”.

5. Conclusions

Since the criminalization of DWI eleven years ago, the number of cases is still rising, although it is a misdemeanor, the accompanying effect of criminal punishment for the perpetrators is serious in consequences, and it will affect their families, while the large number of criminals generated in society is not conducive to social stability. In this paper, the author does not think the criminalization of DWI should be abolished. On the contrary, according to the effect of China's current criminalization of DWI and the positive trend of expansion of China's criminal law [22], the author is very supportive of this crime, and hopes that serious DWI behavior should be severely punished, so as to ensure the orderly and stable public transport safety. However, the author hope that the legislation about this crime should be improved gradually, and the standards of judicial practice should be standardized to avoid the injustice of different judgments in the same case. Judges in the face of controversy should do substantive judgments rather than determining this crime simply based on the phenomenon that the perpetrator's superficial behavior meets the constitutive elements of the crime, and the argument should be clear and rigorous to make people convincing. Therefore, it is still worth discussing and debating how to balance efficiency and fairness in the determination of this crime.

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