

# SENTENCING ALTERNATIVES FOR DRUG AND ALCOHOL OFFENDERS

Some thoughts on youthful and not so youthful drinking drivers, and other miscellaneous 'miscreants'

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## INTRODUCTION

The dangers posed by the drinking driver hardly need restatement. Suffice it to say that in my own state of South Australia, a person is at least ten times more likely to die in a road accident than to become the victim of wilful homicide. Recent figures suggest that alcohol contributes to nearly one in three fatal road accidents.<sup>1</sup> The problem, then, remains one of serious social significance.

At the risk of pouring some old wine into a new bottle, the following pages will review some of the more common solutions to the problem at hand. A postscript will then touch briefly upon a number of other issues relating to drug enforcement. The following discussion is not intended to result in any clear-cut solutions, but rather to stimulate some rethinking of questions.

## SOME SENTENCING CRITERIA

Among the various criteria which might be used in the selection of possible sentencing options are three which deserve especial consideration; cost, symmetry of impact, and unintended consequences, or "second-order" effects. These will be reviewed briefly, then incorporated into a discussion of current and potential sentencing alternatives.

## COST

Some punishments are more expensive to inflict than others, and the choice of punishments is often constrained by economic considerations. This is hardly earthshaking news. What remains the landmark work on the economics of punishment, published forty years ago, draws richly from the experience of the last three centuries of European history to suggest that the type and intensity of punishments imposed are a function of economic imperatives.<sup>2</sup> Cost considerations have become more salient than ever, as we enter what may well be a prolonged period of economic contraction and fiscal austerity.

## SYMMETRY OF IMPACT

No person who engages in the activity of sentencing can express surprise at the statement that all defendants are not alike. People on the receiving end of a criminal sentence differ to the extent that an identical penalty may impose very different burdens on two offenders. Take a most obvious example, the monetary fine. Hundreds of years ago, Grotius observed that a fine weighs more heavily on a poor man than upon his more affluent counterpart.<sup>3</sup> As will be suggested below, revocation of driving privileges can also bear disproportionately on some persons, depending upon geographic setting and mode of livelihood.

## UNINTENDED CONSEQUENCES

Punishment does not occur in a social vacuum. Among the considerations often ignored by the punishing agent are what

might be called "second order effects". Thus, a person who is fined or imprisoned may have dependants who, though quite innocent of wrong-doing, are forced to bear significant emotional and financial hardship. It is ironic that a system of punishment may produce just the opposite of what it intends: Think, for example, of a very callous, anti-social person who is indifferent to the suffering and hardships of family and friends. That person will actually be punished **less** by imprisonment than the counterpart who worries about all the consequences of his or her crime (and punishment) on others.

## SENTENCING ALTERNATIVES

### Imprisonment

Let us now review a number of sentencing alternatives, to see how they satisfy these three criteria. It has become increasingly fashionable to subject the drink-driving offender (or at least the recidivist drink-driving offender) to a short term of imprisonment. The primary justification for such penalties lies in their presumed individual and general deterrent effects. The use of incarceration to deal with the drinking driver is by no means a uniquely Australian phenomenon. Indeed, the Nordic countries, whose systems of justice are generally regarded as the world's most humane and progressive, began imprisoning drinking drivers nearly three decades ago.

Whether such a penalty constitutes a deterrent threat over and above that which attends such non-custodial alternatives as a fine, loss of licence, or even high visibility police patrols is problematic.<sup>4</sup> This is particularly significant in light of the cost of imprisonment. If imprisonment accomplishes nothing more, at drastically greater cost to the taxpayer, than one or more non-custodial alternatives, its continued use becomes difficult to justify.

Moreover, imprisonment is experienced with disproportionate severity by certain types of persons. It can place great strains on family life, and may lead to loss of employment. And, as was suggested above, family members who are emotionally or financially dependent upon an offender are also punished by imprisonment.

To be sure, these various disadvantages can be minimised through reliance upon such semi-custodial alternatives as weekend detention and work release.<sup>5</sup> The fact that they can not be eliminated, however, suggests that governments would be wise to invest in further research on deterrence. A variety of policy experiments should be undertaken, and their results used to determine if imprisonment is indeed a necessary strategy.<sup>6</sup>

### Suspension or revocation of driving privileges

Suspension or revocation of drivers licence is a penalty which may be imposed at relatively low cost; assuring compliance, however, is another matter. Random licence

checks, as do random breath tests, strike many as being a bit Orwellian. In addition they pose a significant threat to police-public relations. The likelihood of detecting non-compliance in the general course of traffic enforcement must be regarded as quite low. For this reason, "backup penalties", those attending the offence of driving without a valid licence, would have to be extremely severe.

In any event, burdens imposed by the suspension or revocation of driving privileges do not fall equally on all offenders. Contrast the plight of the lorry driver who loses her licence with that of the office worker who resides within walking distance from work. Suspension or revocation thus imposes a disproportionately severe burden on the individual who is economically dependent on driving.

All else equal, loss of licence constitutes a more severe penalty for country residents than for inhabitants in densely populated urban areas well served by public transportation.

Among the alternatives which have been adopted to lessen the asymmetry of impact is the conditional or periodic suspension of a licence. Individuals so sentenced might be forbidden to operate non-commercial vehicles, or any vehicle outside of normal working hours. The task of detecting non-compliance, however, remains burdensome.

One may imagine undesirable unintended consequences attending this form of penalty as well. Relevant others who may depend upon the offender, such as children or the elderly, could conceivably suffer serious inconvenience.

#### **Monetary fines**

The monetary fine appears at the outset to be a desirable sentencing alternative, for unlike other penalties, it has the capacity to generate revenue.

It is not, however, without its disadvantages. The first of these, of course, is asymmetry of impact, for the earlier contentions of Grotius, noted above, are still valid.

One way to overcome the problem of unequal burden is to levy fines in proportion to one's income, as if done through the day fine system in Sweden.<sup>7</sup>

The most efficient administration of such a scheme requires that the sentencing authority have access to the defendant's tax records, which, in Australia, would require significant changes in Federal law.

It should also be noted that even fines imposed in proportion to one's income may bear more heavily on the poor. The loss of 1% of one's income is likely to be experienced as a more severe sanction by an individual on the dole and without savings than by a company director, even if the latter's contribution, in absolute terms, is a hundredfold greater.

The question of second order effects is another troublesome aspect of the monetary fine, for if the defendant is supporting anyone else, they too must share the burdens of financial constraint. Once again, those living close to the poverty line may be expected to suffer most, regardless of the proportionality of a fine.

#### **Community Service Orders**

One of the more attractive alternatives, and one which has yet to be accorded sufficient attention, is the Community Service Order.<sup>8</sup> In brief the Community Service Order requires that the individual perform periodic service of a socially beneficial nature without remuneration. This could, for example, involve sweeping floors at a police station, visiting patients at a repatriation hospital, or performing some other useful task which, for ethical reasons, should not displace other members of the work force.

Community Service Orders require more than minimal supervision, however, and the requisite administrative overhead is likely to be costly. For this reason, such a penalty is best imposed in combination with a revenue generating

alternative — preferably fine proportionate to the offender's income.

One of the most desirable qualities of the Community Service Order is its restitutive dimension. In addition, it can be administered with a flexibility which will serve to minimise asymmetry of impact and second order effects.

#### **ALTERNATIVES TO SENTENCING**

No one would seriously argue that sentencing policies alone are sufficient to influence human behaviour. Whilst the press and the public traffic in gross over-simplifications, a few informed individuals recognise that the phenomenon of deterrence is one of great complexity. All too rarely is any consideration accorded pre-emptive strategies of prevention.

Technology exists at present to permit the production and marketing of pocket-sized breath testing devices. Hardly a panacea, to be sure, but the ability to determine one's own blood alcohol content would sensitise many to the risks at hand, and may persuade some to seek alternative means of transport.

Yet another preventive alternative, already technologically feasible, would incorporate a breath testing device in an automobile's ignition system. A test would be required in order to activate the ignition; should the operator's blood alcohol content exceed the prescribed limit, the automobile would simply not start.

In addition Governments could implement a whole range of incentives to encourage alternatives to driving whilst intoxicated. Land use regulations can be modified to discourage the building of large car parks adjacent to or in the vicinity of hotels. Public transportation systems and taxi drivers can be further subsidised to provide increased services at "closing time". Publicans could be granted tax credits which encourage them to purchase and operate mini buses for the benefit of their patrons.

#### **CONCLUSION**

In sum, there is no single sentence appropriate for all drinking drivers. Further research on deterrence is needed in order to assess the utility of imprisonment. Meanwhile, the community service order and fine proportionate to income appear to be more flexible and just alternatives.

And finally, the criminal justice system must not be viewed as the only solution. Society's response to drinking drivers should be a multiple offensive.

#### **POSTSCRIPT: ON DRUGS AND ALCOHOL IN GENERAL**

With regard to the offence of public drunkenness, there is little that can be added to the contributions made by Norval Morris and Gordon Hawkins a decade ago.<sup>9</sup> A number of overseas jurisdictions now respond to public drunkenness as a medical and not as a criminal matter. South Australia and New South Wales are about to follow suit. Today, and to a much greater extent than a decade ago, police in every Australian jurisdiction have more important tasks at hand than arresting public inebriates.

The issue of sentencing alternatives for drug offenders has recently been the subject of exhaustive research by the South Australian Royal Commission into the Non-Medical Use of Drugs.<sup>12</sup> The work of the Commission can hardly be improved upon, least of all in the scope of this modest paper. One proposal raised by the Commission merits brief mention here: the establishment of screening panels. These panels would conduct an initial review of each drug charge, then decide whether formal criminal proceedings should continue, or alternatively, whether the case should be directed to a program of therapy or some other non-criminal disposition. Rigorous prosecution of minor drug offences may well generate undesirable "second order effects"; the stig-

matisation which can result from one's being labelled as a criminal may well lead to a life of more serious crime.

In any event, the Final Report of the Royal Commission deserves the attention of all concerned citizens. In addition, further research on patterns of drug use and on the consequences (both intended and unintended) of drug enforcement are prerequisite to the formulation of sound public policy.

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3. H. Grotius, **De Jure Belli et Pacis**. (Cambridge: Cambridge University Press, 1853) II 20:33.
4. R. Tomasic, **Deterrence and the Drinking Driver** (Sydney: The Law Foundation of New South Wales 1977) Ch.2; H.L. Ross, "The

Scandinavian Myth: The Effectiveness of Drinking and Driving Legislation in Sweden and Norway" **The Journal of Legal Studies IV : 2** (June 1975), 285-310.

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7. Australian Law Reform Commission, **Sentencing: Reform Options**. (Sydney: The Law Reform Commission, 1979) pp.69-80.
8. *Ibid.*, pp.88-102; Victoria, Sentencing Alternatives Committee, *op. cit.* pp.21-56; see also J.A. Seymour, "Restitution and Reparation" **The A.C.P.C. Forum** Vol. 1, No. 3 (1978) pp.7-10.
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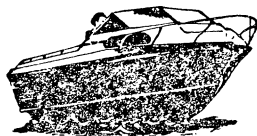


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