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DWI RELATED COMMITMENTS

1978 - 1990

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EXECUTIVE SUMMARY

This report has been prepared in response to the continuing interest of the public and the Legislature in the of persons committed for driving while intoxicated (DWI) and other automobile related felonies. The report examines selected characteristics of DWI and DWI related felony offense commitments from 1978 through 1990.

Some of the findings of this study are:

1. There have been increases in the number of DWI-2nd offense commitments every year since 1978. The number of DWI-2nd offense commitments has risen from 15 in 1978 to 217 in 1990. They still constitute less than one percent of the commitments to New York State prisons for 1990.
2. The number of offenders committed to the Department of Correctional Services in a given year for DWI-related offenses reached an all-time high of 47 in 1990. Unlike DWI commitments, no discernible pattern in the number of annual commitments for DWI-related offenses has emerged.
3. DWI or related offenders are much more likely to be white; committed from rural upstate counties; and older than non-DWI commitments.

**CHARACTERISTICS OF DWI AND RELATED OFFENSE COMMITMENTS
TO NEW YORK STATE CORRECTIONAL FACILITIES 1978 THROUGH 1990**

INTRODUCTION

This report is the sixth of a series on characteristics of persons under custody in New York State Department of Correctional Services' facilities for driving while intoxicated (DWI)^{1/}. To provide a framework for interpreting the tabular data on inmate characteristics, it is useful to review the laws pertaining to "operating a motor vehicle while under the influence of an alcoholic beverage". Therefore, an appendix has been added to this report that provides this review.

This report briefly examines data on DWI as well as the DWI related offenses of criminally negligent homicide while driving under the influence of alcohol, vehicular manslaughter, and vehicular assault. The latter two are felony offenses created by statute in 1983^{2/}.

PURPOSE

The report was prepared because of continuing interest in the "drunk driving" problem in the Legislature and public at large. The Department is frequently asked about the characteristics of persons committed for these offenses.

GROWTH IN DWI COMMITMENTS: 1978 THROUGH 1990

A total of 977 persons were committed in the period 1978 through 1990 to the Department of Correctional Services (DOCS) for DWI. There has been a steady growth in the annual number of DWI commitments during this period. However, while commitments for this offense have grown, they represent less than one percent of the 173,327 persons committed to DOCS for the period. Additionally, the commitments in any year have yet to equal one percent of the given year's new court commitments) (Refer to Table 1 on page 10).

The number of convictions for DWI and driving while alcohol impaired were 2,055 in 1990 in New York State.^{3/} This figure is much higher than the commitments were to state correctional facilities because the law does not require a sentence of imprisonment in a state correctional facility upon a second conviction for driving while intoxicated or alcohol impaired.

FLUCTUATION IN DWI - RELATED COMMITMENTS: 1984-1990

Commitment data for the seven years 1984-1990 shows that there was no consistent pattern from year to year in the number of persons committed for vehicular manslaughter under the 1983 statutes (see Table 2). However, a three-year moving average of vehicular manslaughter commitments showed that they have stabilized between 18 and 20 such commitments since 1987 after rising in the first 3 years the law was in effect.

A similar pattern of fluctuation from year to year prevails in the vehicular assault commitments. However, a three-year moving average suggests that there was a stable rate of between 4 and 5 cases until the 1988 - 1990 period when it jumped to 8. These numbers are so low, however, that not too much importance can be imputed to the increase.

**CHARACTERISTICS OF PERSONS COMMITTED FOR DWI AND RELATED OFFENSES
COMPARED TO PERSONS COMMITTED FOR ALL OTHER OFFENSES IN 1990.**

GENDER

Males predominate among the DWI and related offenders committed in 1990. Females represent less than 4% of the DWI and DWI related offenders, a proportion comparable to their representation among non DWI or related felony commitments to DOCS in 1990 (7%) (see Table 3).

ETHNICITY

More than three-quarters (78%) of the persons committed in 1990 for DWI and related offenses were White compared to only 14% of the non-DWI or related felony offenders committed in 1990. Blacks were 10% of DWI offenders compared to 52% of non-DWI related. Hispanics were also 10% of DWI offenders compared to 34% of non-DWI related offenders.

AGE

DWI and related offenders are older on average than non-DWI related offenders. Whereas DWI and related offenders committed in 1990 were 34.7 years of age at commitment, non-DWI related were 28.2 years old on average. The median age of DWI and related offenders was 32.5 years versus 27.0 years for the non-DWI related.

REGION OF COMMITMENT

Table 4 shows the region of commitment for DWI 2nd offenders received by DOCS during the period 1978-1990, inclusive. Overwhelmingly, these cases came from Upstate counties rather than the Downstate region of New York City and its suburbs. In fact, New York City judges in this entire interval of thirteen years did not begin committing persons for DWI-2nd offenses to DOCS until 1983. The suburban judges began committing persons to DOCS for DWI-2nd offenses in 1981. Only in 1985 did DOCS receive more commitments for DWI from Metropolitan New York City than from the balance of the State.

It is notable that the county of Orange in 1990 committed 18 cases to DOCS for DWI, notwithstanding the fact that in 1980 it had no cities of 50,000 or greater population and is still mostly nonurbanized (see Table 4A).

Text Footnotes

1/ The other reports in this series are: Russell, Susan and Macdonald, Donald G. (1980), "Persons Committed for Driving While Intoxicated or Criminally Negligent Homicide Involving Driving While Intoxicated, 1978", Albany, NYSDOCS; Macdonald, Donald G. (1980), "New Court Commitments in 1979 for Driving While Intoxicated or Criminally Negligent Homicide Involving Driving While Intoxicated", Albany, NYS DOCS; Macdonald, Donald, G. (1982), "Persons Committed for Driving While Intoxicated or Criminally Negligent Homicide Involving Driving While Intoxicated, 1980." Albany, NYSDOCS; Fisher, Robert L. (1986), "Characteristics of DWI and Related Offense Commitments to New York State Correctional Facilities 1978 through 1986" Albany, NYSDOCS; Fisher, Robert, L. (1988) "DWI Related Commitments, 1978-1987", Albany NYSDOCS.

2/ See discussion of the laws governing operation of a motor vehicle while under the influence of an intoxicating beverage in Section 2 (Infra). Note that alcohol is not the only intoxicant since the entire text of the Vehicle and Traffic Law, Section 1192 (5) (McKinney's 1986) also includes various narcotic and other controlled substances as intoxicants for purposes of the law. This report ignores these other intoxicants to keep the presentation simple. However, the totality of the law is relevant in all sentencing decisions.

3/ Based on numerical data furnished by Division of Criminal Justice Services.

APPENDIX

LAWS PERTAINING TO DRIVING WHILE INTOXICATED AND RELATED OFFENSES

There are several sections of Article 1192 which provide a penalty of incarceration in correctional facilities in New York State for DWI and related offenses.

Driving While Intoxicated. The laws pertaining to persons convicted of driving while intoxicated will be reviewed first. Conviction upon first offense of (a) driving while intoxicated or (b) driving while ability is impaired by consumption of alcohol is not punishable by imprisonment in a state correctional facility. This is because the relevant law, Section 1192, Part 1 of the New York State Vehicle and Traffic Law defines "driving while impaired" as a "traffic infraction" and "driving while intoxicated" as a misdemeanor. Although convicted misdemeanants can be sentenced to a term of jail in a local facility, it is not possible for misdemeanants to be sentenced to a state correctional facility. The latter receives only convicted felons (i.e., those who can be incarcerated for an indeterminate sentence of at least one year).

The possibility of a prison sentence for driving while intoxicated arises upon a second conviction for DWI within ten years. Under the New York State Vehicle and Traffic Law, Part 5, as of 1975, a person who is convicted of DWI after having been convicted of a prior DWI is guilty of a felony. Therefore, the person may be sentenced to a term of incarceration in a state correctional facility^{1/}. Although the law has been amended several times in the period between 1975 to 1987, none of these amendments affect the status of persons convicted of DWI after a prior DWI conviction within the preceding ten years.

State Commitment Following a DWI Felony Conviction: Discretionary and Not Mandatory. It is important to keep in mind that in the entire period 1978 to the present, the Vehicle and Traffic Law does not mandate a term of incarceration in a state correctional facility upon a second conviction. Sentencing judges, for example, during this period, had the options of imprisonment in a county jail or penitentiary, or a fine, or both imprisonment and a fine.

Because imprisonment in a state correctional facility is not mandatory unless a sentence of at least a year is handed down by the court, only a fraction of persons convicted of DWI a second time would have been remanded to the custody of the New York State Department of Correctional Services. Not surprisingly, the numbers of such cases are very low (see Table 1).

Moreover, the DWI case can never be treated as a second or predicate felony case on an instant conviction for DWI. Only persons convicted of crimes specifically identified in the Penal Law (Section 70.06) are eligible to be treated as second or predicate felons. See People v. W.R. Morris, 86 A.D. 2d 763, 448 N.Y.S. 2d 82 (1982).

The persons convicted of felonies who are incarcerated as second or predicate felony offenders are almost half of the under custody population in New York State correctional facilities. These second felony offenders have to be sentenced to prison unless they qualify for probation under the limited set of exceptions to the mandatory prison sentencing requirements 2/. Not only do second felony offenders generally have to be sentenced to prison, they also have to serve at least half the maximum term to which they have been sentenced before they become eligible for parole. This has meant that they are kept longer than first felony offenders thus increasing the population under custody. However, DWI cases in the period 1978 to 1987, regardless of prior felony convictions, generally have received minimum sentences of one month or less and maximum sentences of not more than four years 3/.

DWI Related Offenses. Additionally, there are other offenses that are regarded as "DWI related." These offenses are felonies that arise out of operating a motor vehicle while impaired or intoxicated and thereby injuring or killing other persons.

Criminally Negligent Homicide Involving DWI. Until 1983, the laws of New York did not specify any crime of assault or homicide that was specifically related to motor vehicles. Persons who killed others while driving under the influence of an alcoholic beverage were often handled as offenders under Section 125.10 of the Penal Law which covered "criminally negligent homicide". This crime, a Class E felony, has been committed under law when a person's death has been caused by a perpetrator unaware of the risk of death inherent in the action leading to death.

Persons guilty of criminally negligent homicide are those whom the court finds had no intent and no understanding that the act might lead to a death although the action taken, e.g., driving while intoxicated, is "likely to cause death".

Criminally negligent homicide under New York State Law is an act by an offender that demonstrates a lesser degree of intent on the offender's part than recklessness 4/. The latter occurs when the court finds that the person knew the risks of his behavior but chose to ignore them. If the court found that the defendant had such knowledge at the time the act occurred, the court could find the defendant guilty of the charge of manslaughter, a more serious felony than criminally negligent homicide.

Enactment of New DWI Related Crimes in 1983. An estimated 25 thousand fatalities and three-quarters of a million injuries nationally in automobile accidents every year influenced the New York Legislature in 1983 to stiffen the laws regarding injuries and deaths that occurred as a result of DWI 5/. The Penal Code was amended to include the new crimes of vehicular manslaughter and vehicular assault.

Vehicular Manslaughter. As suggested by the title, this crime is a more serious felony (Class D) than criminally negligent homicide (Class E). The new crime, Section 125.12 of the Penal Code, is "a crime of criminally negligent homicide (Penal Law Section 125.10)" that has been committed when the "...guilty person operated a vehicle in violation of subdivision two, three, or four of Section 1192 of the Vehicle and Traffic Law...".

The definition of the crime is noteworthy in a legal sense because Manslaughter, as indicated earlier in People v. Lamphear, implies knowledge that an act could cause death and conscious disregard of the proscribed risk. Such recklessness is not criminal negligence since the latter is not conscious disregard of a known risk. What the new law seems to be saying is that anyone operating a motor vehicle in New York State while in an intoxicated condition is presumed to have known the risk and to have consciously disregarded it.

Vehicular Assault. This crime (Section 120.03 of the Penal Code) is a Class E felony. The crime is defined as having been committed when the guilty person has operated a motor vehicle in violation of subdivision two, three, or four of Section 1192 of the Vehicle and Traffic Law and "with criminal negligence...causes physical injury to another person".

Prior to September 1, 1983 when the new law went into effect, persons who injured others while driving in an intoxicated condition in New York State were prosecuted under Section 120.00 of the Penal Code for Assault 3rd. This is a "crime of criminally negligent assault that is committed when the guilty person has caused physical injury to another by means of a...dangerous instrument". (For purposes of the law, an automobile is a "dangerous instrument" when it is used to cause injury or death.)

Assault 3rd is a misdemeanor whereas, as stated above, vehicular assault is a felony. Thus, the effect of creating a category of vehicular assault was to increase the penalty for causing injury while operating a vehicle under the influence of an intoxicating beverage.

Appendix Footnotes

1/ "Whoever operates a motor vehicle or motorcycle while in an intoxicated condition after having been convicted of operating a motor vehicle while in an intoxicated condition...shall be guilty of a felony...Section 1192, Vehicle and Traffic Law)". Although DWI can be a felony, a second felony conviction for DWI does not cause the Second or Predicate Felony Laws to be applied. See People v. W.R. Morris, 86 A.D. 2d 763, 448 NYS 2d 82 (1982).

2/ For a brief discussion of the laws governing "probation eligibilty" of a felony offenders in New York State, see New York State Department of Correctional Services, (Fisher, Robert L., 1985) "A Sample Study of Characteristics of Probation Eligible Commitments from New York City"; Author, pp.1-4. Also see the references cited therein.

3/ The law requires sentences of imprisonment or fine or both. Maximum sentences of four years are permitted by the felony sentencing laws for "E" felonies. Currently (1988) minimum sentences may not exceed one third of the maximum because second felony offender status cannot be applied. However, in part of the time interval examined, the sentencing laws of 1977 were applicable. Under the 1977 laws, minimums, if not set by the court, were set by the Parole Board which has the authority to set minimums at "no less than one third of the maximum" and up to the conditional release date.

4/ People v. Lamphear, 35 A.D. 2d 305, 307, NYS 2d 113, 115 (1970) summarizes the point: "Reckless motorist is aware of the proscribed risk and consciously disregards it, while the criminally negligent motorist is not aware of the risk created and, hence, cannot be guilty of consciously disregarding it; accordingly, criminal negligence imparts a lower degree of criminality than recklessness".

5/ In 1982 NIJ Reports stated, "In a 2 year period, 50,000 Americans die as a result of drunk driving--almost as many Americans lives as were lost in the entire 10 years of the Vietnam War. Conservative estimates place the annual economic loss from drunk driving accidents at \$21 billion to \$24 billion for property damage alone". (NIJ Reports, 1982, p.2); also see NYSDOCS (Macdonald, Donald, G., 1982) "Persons Committed for Driving While Intoxicated..." Author, p.3.

TABLE 1. NEW COMMITMENTS FOR DRIVING WHILE INTOXICATED (DWI)
 COMMITMENT YEARS (1978 - 1990) COMPARED WITH ALL OFFENSES
 AND REPORTING DWI PERCENTAGE OF TOTAL NEW COMMITMENTS

	Year of Commitment													TOTAL
	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	
New Commitments	7,232	7,595	7,959	10,303	10,406	12,536	12,247	12,420	14,834	15,705	17,374	21,518	23,098	173,227
DWI Commitment	15	9	12	23	29	41	47	67	93	98	146	180	217	977
PERCENT	0.207%	0.118%	0.151%	0.223%	0.279%	0.327%	0.384%	0.539%	0.627%	0.624%	0.840%	0.837%	0.939%	0.564%

TABLE 2. NEW COMMITMENTS SHOWING TYPES OF
RELATED FELONIES FOR WHICH COMMITTED

	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>	<u>1990</u>	<u>TOTAL</u>
Vehicular Mans.	2	12	23	21	17	15	23	113
Vehicular Assault	1	6	5	1	9	4	13	39
Criminally Negligent Homicide Involving Intoxicated Driver Defendant	5	2	8	12	12	11	11	61
<hr/>								
TOTAL	8	20	36	34	38	30	47	213

TABLE 3. CHARACTERISTICS OF DWI AND RELATED FELONY OFFENDERS COMMITTED IN 1990 COMPARED TO OTHER OFFENDERS COMMITTED IN 1990

	<u>DWI AND RELATED FELONIES</u>		<u>ALL OTHER FELONIES</u>	
	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>
A. SEX				
Male	254	96.2	21,178	92.7
Female	10	3.8	1,673	7.3
B. ETHNICITY				
White	205	77.7	3,058	13.5
Black	25	9.5	11,682	51.5
Hispanic	25	9.5	7,727	34.0
Other	4	1.5	229	1.0
Unknown	5	1.9		
C. AGE				
Average		34.7		28.2
Median		32.5		27.0

TABLE 4. NEW COMMITMENTS FOR DRIVING WHILE INTOXICATED (DWI)
 SHOWING YEAR OF COMMITMENT (1978 - 1990)
 CLASSIFIED BY REGION OF THE STATE FROM WHICH RECEIVED

<u>REGION</u>	<u>Year of Commitment</u>												<u>TOTAL</u>	
	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>1986</u>	<u>1987</u>	<u>1988</u>	<u>1989</u>		<u>1990</u>
Upstate Counties	15	9	12	19	24	27	37	31	61	72	104	130	165	706
New York City and Suburban New York ¹	0	0	0	4	5	14	10	36	32	26	41	46	52	266
TOTAL	15	9	12	23	29	41	47	67	93	98	145	176	217	972

¹Includes Bronx, Kings, New York, Queens, Richmond (all NYC Counties) and Nassau, Rockland, Suffolk and Westchester Counties.

TABLE 4A COMMITMENTS BY REGION IN 1990

New York City	<u>8</u>
Bronx	2
Kings	--
New York	2
Queens	4
Richmond	--
Suburban New York City	<u>44</u>
Nassau	31
Rockland	--
Suffolk	12
Westchester	1
Upstate Counties Containing Cities of at least 50,000 Inhabitants ¹	<u>54</u>
Albany	23
Broome	3
Erie	5
Monroe	8
Oneida	6
Onondaga	4
Rensselaer	2
Schenectady	3
Other Upstate Counties ²	<u>111</u>
Cayuga	6
Livingston	--
Ontario	8
Orange	18
Steuben	5
Sullivan	7
Ulster	6
All Others	61
TOTAL	<hr/> 217

¹Based on 1980 Census of Population

²Only counties with at least 5 commitments each are listed individually in this category.