Prosecutors Perspective

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A review of research of interest to prosecutors. Published in cooperation with the
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the research, technical assistance and program affiliate of the
National District Attorneys Association.

Editor's Note:

In this issue, *Prosecutors Perspective* confronts the complicated quest for effective criminal justice sanctions for persons who drive under the influence of alcohol or drugs. The large number of people who commit these crimes create dangers to communities and, if arrested, place great stress on the criminal justice system. Furthermore, prosecutors face the legitimate demands of victims and community groups such as Mothers Against Drunk Driving, as well as the pressures from judges who are agitated about heavy caseloads.

Both the National Institute of Justice and the National Highway Traffic Safety Administration have sponsored substantial research to help prosecutors, police, and judges better target their responses to drunk driving. This research examines diversion, jail sentencing, interlock systems, license suspensions, and other actions and devices that might make a real difference.

In addition to the empirical research, some of which is reviewed in *Prosecutors Perspective*, a range of literature is available to help prosecutors try drunk driving cases. For example, prosecutors may find *Apprehending and Prosecuting the Drunk Driver*, by Harvey Cohen and Joseph Green, to be valuable.

Although answers to the question of how to reduce drunk driving vary, a close reading of the research will help prosecutors more efficiently allocate their resources and more effectively reduce drunk driving. In few other areas do criminal justice officials have as much opportunity to use applied research to improve their decisionmaking.

Foreword

The APRI Research Center: An Introduction to the Research Brief Update Program

Since the American Prosecutors Research Institute began publishing *Prosecutors Perspective*, it has provided local prosecutors throughout the United States with illuminating reviews of timely prosecutor-related studies. These articles have covered a wide spectrum of areas representing the cutting edge of local prosecutor issues and concerns. Local prosecutor reviewers have examined recent prosecutor-related research studies and provided perceptive commentary on the implications that the findings of the studies have for prosecutors across the country. All of the studies reviewed in *Prosecutors Perspective* have been studies conducted by agencies or institutions other than APRI. This short article announces a revision to that format. Beginning with the next issue, *Prosecutors Perspective* will also feature research briefs on current empirical research conducted by APRI's Research Center, research developed in direct response to needs expressed by local prosecutors themselves.

In the context of criminal justice research, prosecution-related research studies have been virtually non-existent. A literature review, conducted by APRI's Research Center, of prosecution studies dating from the early 1970s to the present, revealed that for every criminal justice research article concerning local prosecution, there were nine empirical studies concerning local police. The local prosecutor has been relatively ignored by criminologists compared to the amount of effort and funds devoted to studies of other criminal justice system components.

APRI's Research Center is changing this pattern by dedicating resources to identify research topic areas to meet the needs of local prosecutors *and* to expand criminal justice research. The Research Center staff is skilled in survey design and implementation, policy analysis, operations research, and trend analysis, as well as in methods of implementation, process, and impact evaluation. Research staff has conducted studies in prosecutorial decision-making, prosecution-based case tracking systems, the development of prosecutor-directed narcotics task forces, the impact of criminal law revisions, the impact of prosecutor-directed speedy trial programs, and the effectiveness of the prosecution of crimes against the environment.

The Research Center develops research grant proposals to submit to funding agencies, primarily within the U.S. Department of Justice. In the last two fiscal years, the Center has been instrumental in procuring funding for nine research grants totaling over $1 million. Most of the funded projects provide a national perspective of local prosecutor needs and progressive strategies implemented by local prosecutors. These studies concentrate on subjects such as:

- the effective design and development of prosecutor-led, multi-jurisdictional narcotics task forces;
- a national assessment of "best practices" in prosecuting drug offenses in large jurisdictions;

- the evaluation of the local prosecutor's role in the implementation of the national "Weed and Seed" drug control program; and

- the prosecution of environmental crime and of organized crime at the local level.

Other studies include long-term technical assistance projects, such as APRI's national assessment of prosecutor-run asset forfeiture tracking systems and the development of a computerized tracking system for "Weed and Seed" prosecutions. Short-term technical assistance projects — including the assessment of prosecutor-led forgery diversion programs and an analysis of prosecution needs in rural areas — are also conducted.

Upcoming issues of *Prosecutors Perspective* will present results of these projects to increase general knowledge about characteristics of today's prosecutors. More importantly, this knowledge will expand the capabilities of prosecutors in the future. These summaries will highlight information from prosecutors, *nationwide*, on:

- what factors are seen as the most critical in improving the quality and the efficiency of drug offense prosecution;

- what factors are most important in enhancing the role of local prosecutors in community-based programs;

- what actions prosecutors can take to improve the operation of multi-jurisdictional narcotics task forces; and

- how organized crime can be effectively prosecuted on the local level.

Special attention will be paid to environmental crime prosecution research that will *quantitatively* demonstrate how environmental crime prosecutions in one hundred metropolitan jurisdictions have dramatically risen since 1991 and will *qualitatively* portray characteristics of how environmental units are managed in these jurisdictions and the perceived level of support for these units by other local criminal justice components and by the community.

All of these summaries will be "policy-relevant" to local prosecutors. They will not end with the presentation of findings but will go a significant step further to discuss the implications of findings and how the average prosecutor can apply the research in his/her jurisdiction. The Research Center will also offer insight into the results of "focus group" meetings with local prosecutors to help define future prosecutor-related research issues, emerging technological issues, and the projected direction of federal funding agencies that study the local prosecutor's role. APRI staff anticipates that this information will keep local prosecutors up-to-speed on what prosecution research is going on now, how it can be used, and what types of research studies are on the horizon.

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APRI Director of Research

Can Mandatory Jail Laws Deter Drunk Driving? The Arizona Case

Are DWI Sanctions Effective?

Reviewed by Michael Th. Johnson, County Attorney
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Review of:

H. Laurence Ross, Richard McCleary, and Gary LaFree, "Can Mandatory Jail Laws Deter Drunk Driving? The Arizona Case," *Criminology*, Vol. 81, No. 1, 1990, pp. 156-170.
H. Laurence Ross, "Are DWI Sanctions Effective?" *Alcohol, Drugs and Driving*, Vol. 8, No. 1, 1992, pp. 61-69.

Most people agree that drunk driving poses a serious public safety risk to life and property. They also agree, and in fact demand, that government should "do something" to deter and prevent such antisocial behavior. Consensus deteriorates rapidly, however, when discussion turns to what that "something" should be.

When prosecutors consider enforcement and prosecution policy for changing a specific behavior, their principal concern is whether the objective is well served by the policy. In particular, they would like to know whether the available sanctions, in addition to punishing offenders, will (a) reform the offending individual, (b) incapacitate the offender for some reasonable period of time, (c) deter the individual from committing a similar offense in the future, or (d) deter other potential offenders from engaging in that behavior. In the first article, sociologists H. Laurence Ross, Richard McCleary, and Gary LaFree question whether mandatory jail laws deter drunk driving; in the second article, Ross questions whether other sanctions — and if so, which ones — can be effective deterrents.

The thesis of the two articles is that the increasing harshness of criminal penalties during the last decade has not served to either prevent or effectively deter drunk driving. Furthermore, administrative alternatives to traditional criminal penalties may be more effective deterrents.

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After reviewing data from other states and countries, Ross et al., present their analysis of the effects of Arizona's mandatory jail law for drunk driving, which was enacted in 1982. Their conclusion is that "the law very likely had no important deterrent effect" — not merely because the courts failed to implement the law as intended (judges found ways to use their discretion to not apply such a harsh penalty) but possibly because the general public saw little likelihood of being caught or punished and because the target population

(problem drinkers) is difficult to deter by any means.

In his 1992 article, Ross addresses the effectiveness of DWI sanctions in the context of the four functions of criminal punishments: retribution, reform, incapacitation, and general deterrence. The effectiveness of DWI sanctions as retribution is most difficult to assess. The effectiveness for reform or rehabilitation also is difficult to evaluate, since most educational or therapeutic programs are extremely limited. For the purpose of incapacitation, sanctions such as the suspension or revocation of drivers' licenses are generally effective. Ross then considers the effectiveness of DWI sanctions on general deterrence, the punishment function that prevents the greatest number of offenses by influencing the greatest number of people.

Swift and certain punishment is more effective than the severity of the punishment.

Ross concludes that sanctions can be effective deterrents. However, his research has persuaded him that swift and certain punishment is more effective than the severity of the punishment. He believes that sanctions such as license suspension and revocation, the use of technological devices to prevent driving with an elevated blood-alcohol concentration, and other quickly and easily administered sanctions are more effective than imprisonment.

Prosecutors realize that social change occurs when society is committed to that change. Ross seems to say that since we are still arresting drunk drivers and drunk drivers are still killing themselves and others on our highways, the prosecution policy of the last decade has failed to achieve its goal of behavioral change. However, prosecutors know that prosecution policy in this area as well as others should not be evaluated in isolation. For example, the level of official tolerance for drunk driving has fallen dramatically at the same time that individuals' awareness of the consequences of drinking and driving has increased. Police officers no longer consider "taking the drunk driver home to sleep it off" as a reasonable response, and many more offenders are apprehended at a much lower level of blood alcohol and impairment.

While Ross questions the efficacy of harsh criminal punishments for drunk driving, he does not recommend the abandonment of sanctions. Rather, administrative sanctions may be more effective due to the ease and swiftness of their application. In addition, other measures may be included in the policy arsenal to control drunk driving. Prosecutors need to consider the many opportunities available to them — criminal sanctions, license suspension and revocation, technological devices, treatment and education programs, and others — in tackling the problem of drunk driving.

Incapacitation Alternatives for Repeat DWI Offenders

Reviewed by James M. Catterson, Jr., District Attorney
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Review of:

Stephen M. Simon, "Incapacitation Alternatives for Repeat DWI Offenders," *Alcohol, Drugs and Driving*, Vol. 8, No. 1, 1992, pp. 51-60.

The problem of how to deal with the hard-core drunk driver, the multiple DWI recidivist, continues to be a priority for state legislatures, prosecutors, and judges. An increasingly more knowledgeable and less tolerant public cries out for action, expressing the reasonable presumption that longer jail sentences will save lives. Stephen Simon of the University of Minnesota Law School provides some compelling arguments in favor of the development and use of long-term alternative sentencing programs to reduce DWI recidivism.

Long periods of incarceration for repeat DWI offenders will have limited effectiveness in saving lives.

Simon notes that the moving force behind tougher DWI statutes and penalties has been the DWI recidivist. Courts and legislatures throughout the nation have been taking an increasingly tougher stance in dealing with the repeat DWI offender, and there has been a cry for greater sentencing authority: longer and, in some cases, mandatory jail sentences; increased fines; and more stringent licensing restrictions and penalties. However, in order for legislative bodies to make decisions about adopting a felony DWI statute or modifying an existing statute, they need information and data about the nature of recidivism and the involvement of recidivists in fatal motor vehicle crashes or collisions. They also need to understand the economic cost factors for weighing the effectiveness of long-term incarceration against long-term, non-custodial sentencing alternatives.

The author utilizes Minnesota's DWI statistics in building his argument for the development of long-term alternative sentencing programs. He states that in 1988, eight percent of all licensed drivers in Minnesota had one or more DWI-related incidents on their record. Of that eight percent, 63 percent had only one such incident, 22 percent had two incidents, and 15 percent had three or more. DWI recidivism apparently had increased in Minnesota between 1980 and

1988, from 29.9 percent to 41.1 percent. Simon attributes this, in part, to the fact that fewer first-time offenders were on the road in 1988 than in 1980. He postulates that greater public awareness, education programs, and enhanced penalties reduced the number of first offenders, increasing the odds that police were picking up the repeaters.

A possible solution to the problem of the hard-core, repeat DWI offender may lie in programs such as the Anoka County (Minnesota) Repeat DWI Offender Program.

Simon uses the Minnesota data to examine the relationship between repeat offenders and fatal crashes. In 1984, 24.6 percent of drinking drivers involved in fatal crashes had one or more prior alcohol incidents on their records; that figure rose to 34.4 percent in 1989. While these statistics might make a compelling argument for the adoption of felony DWI penalties, Simon suggests that these types of statistics must be evaluated in the context of the arrest history of these repeat offenders. For example, for individuals who had been arrested within four years prior to their fatality, only 51 percent had two or more prior alcohol-related arrests at the time of their last arrest prior to fatality. Every drunk driver arrested during each of those four years would have had to be incarcerated for four years in order to have prevented the relatively few fatalities.

In addition, because some jurisdictions require more than two prior convictions before an offender falls into the felony category, such measures as a mandatory four-year prison sentence would not prevent fatalities by repeat offenders who do not have the requisite number of prior convictions to be prosecuted at the felony level. Simon also cites the lack of existing jail and prison space and the cost of building new facilities in reaching his conclusion that long periods of incarceration for repeat DWI offenders will have limited effectiveness in saving lives. Instead, he recommends that alternative sentencing programs be developed, founded on three concepts: 1) that the public be protected by adequate supervision of the offender; 2) that the offender be punished or sanctioned and thereby held accountable for his or her actions; and 3) that treatment and education be provided on a long-term basis.

A percentage of offenders who complete these programs still cannot be reached and will be convicted of DWI again.

The author suggests that a possible solution to the problem of the hard-core, repeat DWI offender may lie in programs such as the Anoka County (Minnesota) Repeat DWI Offender Program. Each stage of this program builds upon the others in working toward the goal of giving the offenders control over their alcohol dependency. Because this program does not involve the long-term use of an overnight facility and because offenders are required to make some payments, the operating costs are considerably less than those of a prison or jail.

Although Simon notes that the Anoka program and other alternative sentencing programs appear to reduce recidivism, he recognizes that a percentage of offenders who complete these programs still cannot be reached and will be convicted of DWI again (7.5 percent of all those who have entered the Anoka program since its inception). In addition, some offenders will opt for a jail sentence at the outset rather than participate in such a program. Clearly, a strong felony-level statute with some teeth in it is needed for these types of offenders.

The author concludes that additional studies should be undertaken of offenders completing alternative sentencing programs such as Anoka. These studies would help legislators, prosecutors, and judges determine whether these types of programs can be an effective tool in decreasing the number of alcohol-related fatalities involving DWI recidivists. Simon's paper is valuable for the prosecutor who, in searching for an effective DWI policy, is questioning the effectiveness of both a "throw-away-the-key" policy and alternative sentencing programs.

Prosecutors and Drunk Driving: Choosing an Effective Role

Reviewed by Michael D. Bradbury, District Attorney
Ventura County (Ventura), California

Review of:

Stephen Goldsmith, "Prosecutors and Drunk Driving: Choosing an Effective Role," *Alcohol, Drugs and Driving*, Vol. 8, No. 1, 1992, pp. 1-15.

The article by Stephen Goldsmith addresses the different missions of prosecutors in combatting drunk driving. In the author's opinion, prosecutors should increase their focus on the need to reduce death and injuries.

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The discussion is focused on legislative reforms in Indiana and their impact on the prosecution of drunk drivers. The results of these legislative changes are relevant to the successful prosecution of drunk drivers in other states across the country. Particular emphasis is placed on the use of *per se* laws that make it illegal to drive with a blood alcohol content above a certain level.

In the wake of *per se* laws established throughout the nation, Goldsmith notes two goals regarding the administration of breath tests: 1) to encourage drivers to agree to take breath tests; and 2) to reduce the technical objections to the admission of breath test results. The article notes that substantial progress has been made toward the first goal as a result of administrative driver's license sanctions adopted in Indiana. The imposition of a longer driver's license suspension period for drivers who refuse to provide a chemical test is intended to encourage arrestees to provide such a test.

In California, before the passage of its administrative license suspension law, license suspension or revocation occurred only as a result of a conviction for a crime or a refusal to submit to a chemical test following an arrest for driving under the influence. In other words, it was primarily judicial rather than administrative in nature. This often resulted in significant delays between the date of the crime and attendant license penalties. During this delay, it was not uncommon for these individuals to reoffend. Concern about problems such as those in California, along with the promise of federal highway safety funds for states that implement administrative license

suspension laws (Drunk Driving Prevention Act of 1988, 23 U.S.C. section 410), inspired states to adopt these laws. A recent study sponsored by the National Institute on Alcohol Abuse and Alcoholism indicates that the implementation of administrative suspension laws reduces drunk driving auto deaths by nine percent a year.[1]

The author notes that the certainty of adverse license consequences is more successful than discretionary sanctions in deterring drunk drivers. He states that the general deterrent effect of administrative license penalties is exemplified by a 10-to-15 percent reduction in nighttime or alcohol-related fatal crashes following the imposition of a significant number of license suspensions. However, the author emphasizes that courts and prosecutors often are reluctant to seek increased suspension periods and often dismiss driving-while-suspended violations as part of the plea bargaining process. In this respect, the article brings home the point that driver's license sanctions are meaningless if prosecutors and courts are unwilling to penalize persons who drive when their license is suspended or revoked.

The certainty of adverse license consequences is more successful than discretionary sanctions in deterring drunk drivers.

Although the article mentions an increase in the number of chemical test refusals subsequent to the adoption of Indiana's administrative penalty program, the author concludes that there is no well-researched explanation for this increase. A likely explanation, however, is that repeat offenders realize that the chemical test result was the factor primarily responsible for their previous convictions. By refusing, they increase the likelihood of escaping conviction. Moreover, administrative license penalties are meaningless to the repeat offender who has no license to suspend or revoke. As such, repeat offenders often perceive that it is in their interest to refuse to submit to a chemical test despite the existence of laws mandating driver's license sanctions for such refusal.

Following the discussion of administrative penalties, the article focuses on the second goal surrounding the administration of breath tests: to reduce the number of technical objections to the admission of breath test results. Several problems plague the use of breath test results. First, since the chemical test in a driving-under-the-influence case is taken approximately one hour after the last time of driving, the process of retrograde extrapolation often is employed to estimate a suspect's blood alcohol content at the last time of driving. Some courts have held that before a suspect can be convicted of the *per se* offense, the prosecution must prove the suspect's blood alcohol content at the last time of driving. This problem has been remedied in states such as Indiana that have enacted legislation creating a rebuttable presumption that the suspect had the same blood alcohol content at the time of driving as he or she did when the chemical test was administered.

A second problem concerning the use of breath tests is the foundation for the admissibility of chemical test results. Before the prosecution can admit the results of a chemical test, evidence must be introduced demonstrating that the instrument (intoxilyzer) was in proper working order and that the operator was qualified to conduct the test. This obstacle traditionally has been addressed by the process of time-consuming witness testimony. This problem was obviated by the enactment of a statute in Indiana allowing the prosecution to use certified records from the Indiana Department of Toxicology to establish that the instrument was in proper working order and that the operator was qualified to conduct the test.

Prosecutors should help increase the apprehension of apprehension.

The author notes additional changes in the law in Indiana. For example, a new statute allows police officers to require an additional chemical test if the suspect appears to be under the influence of a drug or has a blood alcohol content close to the *per se* limit. Since drugs other than alcohol cannot be detected by a breath test, this change in the law is essential to the successful prosecution of a person driving under the influence of a drug, other than alcohol, who chose a breath test. By allowing for a second chemical test if a person has a blood alcohol content close to the *per se* limit, the prosecution is able to determine whether the suspect has a rising blood alcohol

content, i.e., whether his or her blood alcohol is higher when tested than at the last time of driving. The so-called "rising blood alcohol defense" is the most common defense raised in a driving-under-the-influence case. By comparing the results of two chemical tests taken at different times, it often can be determined whether the suspect's blood alcohol content was rising or falling at the last time of driving.

The article fails to mention one of the most troubling technical problems regarding the use of breath test results: partition or conversion ratio variance. Most states base their *per se* law on blood alcohol content.[2] Since most suspects arrested for driving under the influence choose a breath rather than a blood test, the breath test result must be converted into a blood alcohol value in order to determine whether the suspect exceeded the *per se* alcohol limit. Also, a number of factors, such as body temperature and illness, may affect a person's actual partition ratio and therefore cause the breath test to give an inaccurate depiction of the person's true blood alcohol content.[3] To remedy this problem, many states have adopted a breath alcohol offense in addition to a blood alcohol offense. This change in the law allows a person to be prosecuted for driving with a breath alcohol content of .08 percent or greater without having to convert the reading to a blood alcohol content. Partition ratio evidence that is fraught with reasonable doubt is no longer relevant to a trial based on a breath alcohol crime.

Recognizing that more persons drive drunk than are actually apprehended, the author suggests that prosecutors focus more on general rather than specific deterrence. Certainty of punishment is more important than severity of punishment as a deterrent. Advertising the effects of "new tough penalties" deters drunk driving more than does the "softer" message of preventing injuries to others. As the author states, "Prosecutors should help increase the apprehension of apprehension."

Notes

[1] Francis, David R., "A Winnable War on Drunk Driving," *Christian Science Monitor*, January 10, 1992.

[2] Polin, David J.D., "Challenges to Use of Breath Tests for Drunk Drivers Based on Claim That Partition or Conversion Ratio Between Measured Breath Alcohol and Actual Blood Alcohol is Inaccurate," 90 *ALR* 4th 155,160.

[3] *Ibid.*

Reduction in Drunk Driving as a Response to Increased Threats of Shame, Embarrassment, and Legal Sanctions

Reviewed by Michael D. Schrunk, District Attorney
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Review of:

Harold G. Grasmick, Robert J. Bursik, Jr., and Bruce J. Arneklev, "Reduction in Drunk Driving as a Response to Increased Threats of Shame, Embarrassment, and Legal Sanctions," *Criminology*, Vol. 31, No. 1, February 1993, pp. 41-67.

Successful policies and strategies that serve to deter drunk driving have a ready audience in American prosecutors. However, the theories that form the underpinnings of the policies must be rigorously explored and tested and, ultimately, accepted by the community. The authors of "Reduction in Drunk Driving as a Response to Increased Threats of Shame, Embarrassment, and Legal Sanctions" begin this process by exploring the roles, if any, that are played by shame, embarrassment, and legal sanctions in deterring drunk driving.

Law enforcement officials and policymakers are familiar with the rhetoric of general deterrence. Punishment in the form of probation and imprisonment is a staple of the criminal justice system. These punishments are believed to be deterrents to potential offenders, although their deterrent value is difficult to measure.

The authors of this article being reviewed state that factors largely considered moral in nature (shame and embarrassment) may interact with a utilitarian factor (threat of legal sanctions) in producing a reduction in drunk driving. They define shame as a self-imposed sanction that occurs when people violate norms that they themselves have embraced. Embarrassment, they explain, is externally imposed upon an individual by others whose opinions the individual values and who have become aware of the violation. These two factors are related to remorse, and prosecutors certainly have seen the role that it can play in a sentencing hearing.

The increased threat of shame and its relatively strong deterrent effect appear to be the primary source of reduction in drunk driving.

Policies directed at controlling drunk driving have been moving in the direction of increased severity of legal sanctions. In many instances, legislative initiatives have been coupled with community anti-drunk-driving campaigns. However, researchers have had limited success in empirically linking the work of community coalitions with reductions in alcohol-

related automobile fatalities. In their study, Grasmick et al., explore the relationship among legislative changes, changing community standards, and reduction in drunk driving in Oklahoma City between 1982 and 1990.

Though the tendency has been to look toward legal sanctions as the major deterrent, other factors can serve as additional tools.

During that period of eight years in Oklahoma City, several changes had occurred: anti-drunk-driving campaigns had become popular both nationally and locally; the Oklahoma state legislature had enacted a highly publicized *per se* law that authorized an arresting officer to seize the license of a driver whose blood alcohol level was at least 10 percent; and Oklahoma City Police Department statistics indicated a reduction in drunk driving during that period. Using self-report data from Oklahoma City residents, gathered by the University of Oklahoma's Department of Sociology in 1982 and 1990, the researchers attempted to assess residents' perceptions of the threats of legal sanctions, shame, and embarrassment as possible explanatory factors in both the deterrence and actual reduction of drunk driving. The surveys included questions for measuring the perceived certainty as well as severity of each of the three "punishments."

Analysis of the self-report data revealed that:

- the 1990 respondents were less likely than the 1982 respondents to intend to drink and drive in the future;
- 1990 respondents were less likely than the 1982 respondents to have driven while drunk during the previous five years;
- despite nearly a decade of new legislation, the 1990 respondents did not perceive a higher certainty of legal punishment than did the 1982 respondents;
- perceived severity of legal sanctions did increase from 1982 to 1990;
- changes in the perceived threat (the product of perceived severity and perceived certainty) of legal sanctions contributed to little of the actual reduction in drunk driving from 1982 to 1990;
- the perceived certainty and severity of shame for drunk driving increased significantly from 1982 to 1990 and;
- the perceived certainty, but not severity, of embarrassment for drunk driving increased significantly.

While the authors conclude that "[t]he increased threat of shame and its relatively strong deterrent effect appear to be the primary source of reduction in drunk driving," they acknowledge that it is not possible to separate the effects of legislative changes from those of the moral crusade during the 1980s. However, they believe that the "strategy for linking morality and utility can be a useful heuristic for . . . public policy."

This research reminds prosecutors that they need to be aware of all the potential tools available to them to assist communities in solving public safety problems. Though the tendency has been to look toward legal sanctions as the major deterrent, this suggests that other factors can serve as additional tools. Prosecutors need to continue their work with interested groups and individuals who can help keep a community informed about the legal, social, and moral consequences of violating community standards.

Driving Under the Influence: The Impact of Legislative Reform on Court Sentencing Practices

Effects of Criminal Sanctions on Drunk Drivers: Beyond Incarceration

The Gunther Special: Deterrence and the DUI Offender

Reviewed by Edwin L. Miller, Jr., District Attorney
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Review of:

Rodney Kingsnorth and Michael Jungsten, "Driving Under the Influence: The Impact of Legislative Reform on Court Sentencing Practices," *Crime & Delinquency*, Vol. 34, No. 1, January 1988, pp. 3-28.
Gerald R. Wheeler and Rodney V. Hissong, "Effects of Criminal Sanctions on Drunk Drivers: Beyond Incarceration," *Crime & Delinquency*, Vol. 34, No. 1, January 1988, pp. 29-42.
Rodney F. Kingsnorth, "The Gunther Special: Deterrence and the DUI Offender," *Criminal Justice and Behavior*, Vol. 18, No. 3, September 1991, pp. 251-266.

Drunk drivers leave a wake of pain and death on the streets and highways of a nation that has become highly intolerant of what once was regarded as an easily forgivable offense. Laws have been changed, sentencing practices have been altered, and new programs have been developed. All are designed to enhance public safety by punishing and, to the extent possible, reforming offenders.

None of the three sanctions that were utilized — including jail — was superior to the others in deterring recidivism of drunk drivers.

The authors of the three papers being reviewed here conducted studies to try to assess either the general or the specific deterrent effects of several types of sanctions for drunk driving:
1) legislative reforms, including reduction in plea bargaining and implementation of a harsh penalty structure; 2) fines, probation, and jail sentences; and
3) a "deterrence-through-fright" program for youthful DUI offenders. The overall conclusion of the three studies' researchers is that none of these sanctioning approaches seems to deter either first-time offenders or repeat DUI offenders.

In the first study, Rodney Kingsnorth and Michael Jungsten examine the effects of 1982 legislative reforms in California. The amendments to the Vehicle Code sections included redefining the relationship between blood alcohol content (BAC) and criminal liability, placing greater constraints on the plea-bargaining process, and introducing a harsher penalty structure. The researchers followed 2,091 DUI defendants in Sacramento County for the years 1980-1984, collecting both pre- and post-reform data.

The authors conclude that because DUI reform legislation was grounded in false assumptions about court sentencing practices — that too many DUIs were being plea-bargained to reckless driving and that penalties were not severe enough — its impact contradicted expectations. For example, the reforms

added a *per se* statute, making a 0.10 percent BAC (the legal limit at the time) a crime in itself. The legislature believed that this new law would decrease the number of DUI trials in a congested court system. The study indicates that in Sacramento County, after a brief decline, trial rates quickly escalated to pre-reform levels. This escalation is explained by the difficulty that prosecutors had in sustaining the burden of proof, due to the problem of "back-calculating" the BAC level at the time of driving.The authors also find little impact of the harsher penalty structure, since similar sentencing practices were already being utilized before the legislative action.

In their study, Gerald Wheeler and Rodney Hissong examine the effects of various sanctions — jail, probation, and fines — on DWI recidivism. They randomly selected 20 percent of DWI offenders in Harris County (Houston, Texas) who were arrested during January 1984 and were subsequently convicted. They followed these subjects for three years, using Survival Time Analysis to measure both time to failure and absence of failure. At the time of the study, new Texas law had been adopted that abolished deferred adjudication and required mandatory jail time for offenders not given probation.

Advocates of mandatory jail laws believe that alternative sanctions such as probation and fines have failed to modify the behavior of convicted drunk drivers. The authors of the Texas study conclude that none of the three sanctions that were utilized — including jail — was superior to the others in deterring recidivism of drunk drivers. For this reviewer, their conclusion is not compelling.

The study showed that only eight percent of first offenders sentenced to jail reoffended, compared to 11 percent of those granted probation and 14 percent of those fined. Among repeat offenders, recidivism rates were 25 percent for those jailed, 10 percent for probationers, and 19 percent for those fined. Jailing seems less effective for the chronic offender but, contrary to the authors' conclusion, DWI history does seem to play a role in recidivism.

Fright programs have no deterrent effect other than a marginal impact upon the length of time before reoffense.

The Texas researchers advocate creation of incentives for DWI offenders to seek education and counseling, suggesting that the high costs of incarceration would be better spent trying to solve the underlying drinking problem of the defendant. Crucial to their thesis is the researchers' belief that drunk driving is not a criminal act. It is, they say, a substance abuse problem that will not be cured by a brief jail experience. While the study may not show that jail sentences are an overwhelming success in deterring drunk drivers, for prosecutors and an aroused public, punishment is still a sought-after goal.

In the third article under review, Rodney Kingsnorth examines the impact of a "deterrence-through-fright" program on the future behavior of youthful first-time DUI offenders. Named after its author, Sacramento County Superior Court Judge Jeffrey Gunther, the Gunther Special requires these young DUI offenders to view bodies of victims of alcohol-related accidents in the morgue, spend a Saturday night in a hospital emergency room, receive counseling, and write a 1,000-word essay reflecting on their experiences.

Similar to the "Scared Straight" program of the 1970s, which sent delinquents to visit prisons for a day, versions of the Gunther Special have been implemented throughout the United States. Despite the support and praise that the Gunther Special program has received from the courts, the media, and groups such as Mothers Against Drunk Driving, Kingsnorth concludes from his research that fright programs have no deterrent effect other than a marginal impact upon the length of time before reoffense. Prosecutors may still recommend such programs, howewever, as a coordinated and inexpensive way to shock some alcohol abusers into staying off the road.

Either the implication or direct recommendation of the authors of these three papers is that counseling and treatment are likely to be more effective than harsh criminal penalties in reducing the destruction caused by drunk drivers. While the authors present research results that challenge the effectiveness of specific reforms and programs, they provide no evidence that the rehabilitation approach is more effective.

Strategies for Courts to Cope with the Caseload Pressures of Drug Cases

Reviewed by Peter S. Gilchrist, III, District Attorney
26th Prosecutorial District (Charlotte), North Carolina

Review of:

Barbara E. Smith, Robert C. Davis, and Sharon R. Goretsky, "Strategies for Courts to Cope with the Caseload Pressures of Drug Cases: Executive Summary" (Chicago, Illinois: American Bar Association, November 1991).

Metropolitan courts across the country have been overwhelmed with drug sales and possession cases as prosecutors also struggle to deal with the volume. The American Bar Association Criminal Justice Section sponsored a study by the State Justice Institute of four large courts that had implemented special approaches to dealing with large volumes of drug cases. The four courts were selected because they had chosen one of the following three basic approaches:
1) establishing specialized courtrooms for drug cases; 2) applying sound case management principles to drug cases; or
3) emphasizing drug treatment over punishment.

Faster processing of drug cases is possible using sound management strategies, even without segregating drug cases.

The study collected from each site data from at least 100 cases in each of four categories: narcotics cases before the reform, narcotics cases after the reform, nondrug cases before the reform, and nondrug cases after the reform. Using the data from each case sampled, the researchers developed a measure of time to disposition and two measures of recidivism — whether the defendant was arrested on a felony drug charge within one year of the original arrest date or whether the defendant was rearrested on a nondrug felony charge.

The following four courts were selected for the study:

Cook County (Chicago) Circuit Court. Specialized night drug court begins at 4:00 p.m., Monday through Friday. Forty-eight percent of all drug cases are assigned to this court. Median time to disposition for drug cases has decreased from 245 days to 69 days. The removal of drug cases from other courts has also resulted in a reduction in processing time for nondrug felonies from 215 days to 170 days. The reduction in processing time was accompanied by a reduction in sentence lengths. The prison terms for drug offenders dropped 20 percent, and the number of probation sentences increased by the same amount. The average length of the proba-

tion term decreased from 900 days to 510 days for drug cases.

Segregating drug cases and incorporating sound management techniques helps speed their disposition.

Dade County (Miami) Circuit Court. The drug court was designed to divert first-time offenders to treatment. Offenders are monitored by the sentencing judge rather than by a probation officer and usually are retained in the program even after violations. To qualify for the program, the defendant may have no prior felony conviction, must be charged only with possession (not sales), and must request treatment. Only about 15 percent of those referred to the drug court were accepted.

The cost for treatment is $700 per year, compared to $17,000 for housing an inmate in the local jail for one year. If the offender successfully completes the drug program, the charges are dismissed and the defendant may request that the record be sealed and, six weeks later, expunged. Less than half of those accepted into the program successfully complete it. The median number of days to disposition has risen from 49 to 366 days for those cases processed in the drug court. This court program resulted in no statistically significant reduction in recidivism.

Milwaukee Circuit Court. The Speedy Trial Project was implemented because violent felony filings increased 50 percent and felony drug filings increased 33 percent between 1988 and 1990. Two new courts were created with state and local funds to attempt to bring drug cases to trial within 90 days of charging. Judges must set firm trial dates and attorneys may not wait until just before trial to begin plea negotiations. The core of the new program is the Pretrial Scheduling Order, which directs reciprocal discovery within 10 days and provides for an omnibus motion hearing two weeks before the trial date. The hearing is designed to dispose of all motions and to take pleas. The Scheduling Order is signed by the judge, prosecutor, and defense counsel at the defendant's first appearance in the trial court. Sanctions are set out in the order for failure to comply with its terms.

The results of the Speedy Trial Project have been significant. The median days to disposition have dropped from 253 to 117 days. An analysis of the sentences imposed in the drug courts reveals no significant change in either the length or types of sentences. Also, the median processing time for nondrug felonies decreased from 196 to 154 days.

Philadelphia Court of Common Pleas. Philadelphia instituted an Expedited Drug Case Management Program to deal with a large backlog of felony cases. The strategy was to focus on a variety of felony cases, not just drug cases, using Differentiated Case Management (DCM) techniques. DCM generally requires early screening of cases and classifying cases based upon complexity and priority. The theory is that cases are then supervised closely by judges to assure that parties know what action is expected to occur at each scheduled court date. Delay-reduction techniques are developed and incorporated to accelerate case processing. Philadelphia classified cases into four tracks: cases designed for early disposition at arraignment, cases in which the defendant is in custody, cases in which the defendant is in custody with multiple charges, and cases in which the defendant is out of jail on bail or personal recognizance. Later, a fifth track for major felonies such as rape or robbery was added. Each track has separate schedules and expectations for times for pleas, motions, and pretrial conferences.

Drug cases can be given special priority without slighting the disposition of nondrug cases.

The system requires cooperation of the judge, probation office, court administrator, defense attorney, and prosecutor. The judge enforces the expectations that each party will meet specified deadlines. In Philadelphia, DCM reduced median processing time from 294 to 158 days. The changes also decreased the jail sentences of drug offenders from a mean of 1,167 days to 903 days, but did not affect significantly nondrug jail sentences.

Based upon the sites chosen, the researchers conclude that: 1) faster processing of drug cases is possible using sound management strategies, even without segregating drug cases; 2) segregating drug cases and incorporating sound management techniques helps speed their

disposition; 3) more lenient sentences often are associated with quicker dispositions; 4) drug cases can be given special priority without slighting the disposition of nondrug cases; and 5) drug treatment as an effective means to reduce recidivism was not demonstrated by this study.

The researchers stress that their limited data and other factors such as police arrest policies, prosecutor charging practices, and public pressure for harsher sentences could have affected their results. They also conclude with two observations about the four court programs that are important to prosecutors. First, there was strong commitment among key leadership. Second, all of the sites required additional resources.

With the exception of Miami's treatment-in-lieu-of-punishment program, the programs studied suggest that a variety of methods may be used to speed up the dispositions of all cases. However, courts (like many other institutions) are resistant to change; the process is often difficult and painful for those trying to implement it. The prosecutor is frequently the one who first recognizes the need for change and has the authority and position of leadership to initiate the change. The variety of techniques available is encouraging.

American Prosecutors Research Institute

As the research, program and technical assistance affiliate of the National District Attorneys Association, the American Prosecutors Research Institute (APRI) is committed to being the leading source of national expertise in the prosecution function and to facilitating improvements and innovations in local prosecution. In pursuit of this mission, APRI has established programs providing a variety of services to state and local prosecutors.

National Center for Prosecution of Child Abuse

Established in 1986, the National Center has published a manual, *Investigation and Prosecution of Child Abuse*, covering all aspects of investigating and prosecuting child abuse cases. A monthly newsletter, *Update*, provides information concerning emerging issues affecting child abuse cases and descriptions of effective prosecution techniques in these cases. The National Center sponsors training for child abuse prosecutors, and staff members are available to participate in local, statewide or regional training events. Through an extensive resource library and an automated legal database, Center staff can provide recent caselaw decisions, technical advice for prosecutors or other information to assist prosecutors in preparing cases for court.

National Drug Prosecution Center

In 1987, APRI was awarded a grant from the U.S. Department of Justice, Bureau of Justice Assistance to establish the National Drug Prosecution Center. The mission of the Center is to train prosecutors to more effectively investigate and prosecute drug cases, to identify and document specific approaches to drug prosecution which can be implemented in local jurisdictions, and to develop model legislation to bring drug laws up to date. The philosophy and policy of the National Drug Prosecution Center is derived in large measure from the NDAA Drug Control Committee, a select committee of district attorneys established by the NDAA Board of Directors. These front-line prosecutors and other trial court prosecutors give the Center's products a unique perspective combining legal analysis with insight that comes from handling drug cases day-to-day.

National Environmental Crime Prosecution Center

The goals of APRI's National Environmental Crime Prosecution Center include collecting and disseminating model statutes; assisting state and local prosecutors in developing and implementing new policies and practices; developing a resource collection and national statistics base; developing and disseminating training packages and publications to assist prosecutors in making the best use of laws currently available; and conducting research concerning environmental crime trends, characteristics, and prosecution methods to promote more proactive enforcement approaches.

Research Center

APRI has developed a research and evaluation center dedicated to the empirical study of many aspects of prosecution. The research center has personnel skilled in survey design and implementation, organizational analysis, and crime trend analysis as well as in methods of program evaluation. Research staff has experience in conducting studies in prosecutorial decision-making, prosecution-based case tracking systems, the development of prosecutor-directed narcotics task forces, the impact of criminal law revision, the impact of prosecutor-directed speedy trial programs, and the effectiveness of the prosecution of crimes against the environment.

National Traffic Law Center

The National Traffic Law Center (NTLC) was created in cooperation with the National Highway Traffic Safety Administration (NHTSA) and is designed to benefit every prosecutor, judge, and law enforcement official who handles highway safety matters. In addition, the Center facilitates and develops training for prosecutors and provides support to NHTSA programs to enhance the prosecution and adjudication of traffic safety offenses. The NTLC identifies and catalogs statutory and technical material relating to traffic cases, publishes periodic newsletters, has established a list of local prosecutors with specialized expertise to provide technical assistance to their colleagues, and has established an information center to respond to requests from local prosecutors and the judiciary.

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