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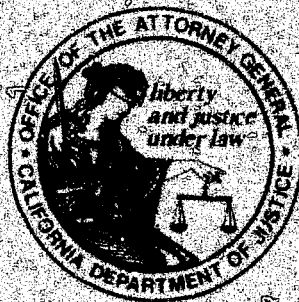
FORUM

THE ORIGINS AND DEVELOPMENT OF PENALTIES FOR DRUNK DRIVERS IN CALIFORNIA

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Michael Laurence received his B.A. from Bates College and his J.D. from the University of California, Davis School of Law. His work includes editing and contributing to Social Control of the Drinking Driver (University of Chicago Press, 1988) with J. Snortum and F. Zimring.

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THE ORIGINS AND DEVELOPMENT OF PENALTIES FOR DRUNK DRIVERS IN CALIFORNIA

Introduction

In the early 1980s, the State of California, amid increasing public concern about the drinking driver, enacted sweeping revisions to its drunk-driving statutes. The changes focused on adjusting both the severity of penalties and the certainty that drunk drivers would be punished if convicted. To achieve these goals, the legislation included provisions to ensure that judges sentence convicted drunk drivers, especially recidivists, to minimum jail terms and fines.

This FORUM, part of a comprehensive historical survey of California drunk-driving legislation, examines a prominent aspect of the current antidrunk-driving strategy — statutorily provided punishment of those convicted for drunk-driving offenses — as it has developed over the past 70 years. This study examines the evolution of the traditional criminal penalties — incarceration and fines — as well as the important quasi-administrative sanction of license suspension in California drunk-driving legislation.¹

The analysis begins with a general overview of the statutory penalties used since the enactment of the first prohibitions against drunk driving and then suggests some general conclusions about this history. The punishment scheme for drunk-driving violations has changed significantly since drunk-driving laws were first formulated. However, there have been some interesting patterns throughout the history of the statutory response to this serious problem in California.

Summary of Findings

Three trends are worthy of special note. First, there has been a growing tendency, especially in the 1980s, toward subdividing drunk driving into punishment categories based on the offender's prior record and the harm the driver has caused. Drunk-driving statutes contain several punishment categories that specify minimum and maximum penalties depending upon the circumstances of the offense — for example, whether the drunk driving resulted in death or bodily injury — and the offender's prior drunk-driving history — whether he or she is a first-time offender or a recidivist. By dividing the range of available punishments in this manner, the Legislature has provided for a hierarchical punishment scheme without significantly altering the lower and upper penalty scales.

Second, over the years California legislation has manifested in different ways a perceived need to designate an appropriately severe penalty for drunk-driving offenses. Policy makers have always maintained that society must punish drunk drivers. In previous years this perception prompted the enactment of statutes with relatively high minimum-punishment levels. The legislation, however, was largely symbolic because judges could, and often did, avoid imposing such minimum sentences by

granting probation or suspending the sentence. In the 1980s, however, the perceived need for severity has translated into statutory provisions requiring judges to impose at least the minimum penalties on offenders, even when probation is granted. With one exception, a person convicted of a drunk-driving offense in California today must serve time in jail and pay a fine.²

The third trend involves the response of the criminal justice system to the various punishment provisions. Over the years, legislative changes in punishment policy, formulated in the abstract, have tended to produce curious results when implemented by prosecutors, juries, and judges. At times, the results have not been entirely consistent with the legislative intent. Thus, these reactions have prompted further legislation, creating a new round of reactions. The struggle to balance severe punishments with the realities of the criminal justice system continues today.

As an example, drunk-driving penalties in the past 70 years have always encountered the problem of "nullification" in individual cases: if the punishment was too high, prosecutors would not charge, juries would not convict, and judges would not sentence drunk drivers. Many changes in the penalty scheme over the past several decades have been induced by this reluctance to impose severe sentences on individual offenders. At times, minimum penalties were decreased in recognition that harsh sanctions thwarted drunk-driving prosecutions and convictions.

As punishment policy shifted its focus in the 1980s from symbolic severity to certainty of punishment, the criminal justice system's reaction also changed. The 1980s legislation reduced government officials' discretion to avoid imposing penalties on drunk drivers. Whether this punitive approach, accompanied by an increased public awareness about alcohol's effect on driving ability, will significantly reduce drunk driving and drunk-driving accidents, injuries, and deaths in the long term remains to be seen. But the legislation is having its intended effect on sentencing practices: drunk-driving offenders are now more likely to serve at least the minimum penalty prescribed by statute than under previous statutes.

The results of the punitive emphasis, however, may contain the seeds for the next round of legislative activity. The trend toward mandatory jail sentences for offenders is beginning to have significant repercussions on the California criminal justice system, notably with respect to jail populations. As institution populations continue to increase, some policy assessments—whether affecting the sentencing of drunk drivers or other offenders—will have to be made. Thus, as in previous years, state policy makers may be required to correct imbalances caused by the criminal justice system's implementation of revisions in the drunk-driving penalty scheme.

I. Evolution of Statutory Drunk-Driving Penalties

The earliest drunk-driving statutes in California recognized that some kinds of drunk driving— for example, drunk driving that results in death or injury— are more harmful than others. Most of the penalty schemes enacted in the past 70 years have attempted to account for such differences by creating separate categories for the different offenses. This FORUM explores drunk-driving penalties for two general categories of offenses: non-aggravated and aggravated drunk driving. Beginning on page 10, Tables 1 and 2 provide non-aggravated and aggravated drunk-driving penalty information for periods that are considered watershed years.

A. Non-Aggravated Drunk-Driving Penalties

The term "non-aggravated" refers to the most common form of drunk driving: a driver who, although impaired by alcohol, avoids being involved in an accident that causes death or bodily injury. The incidence of non-aggravated drunk driving is difficult to measure because, by definition, the term excludes the most serious and most easily identified types of drunk-driving crimes— i.e., those involving fatal or injury accidents. However, most experts believe that for every fatal or injury accident caused by a drunk driver, there are thousands of non-aggravated drunk-driving incidents.³

Despite the current emphasis on a more punitive approach, the *range* of penalties available for punishing non-aggravated drunk driving has been remarkably constant since the 1930s. The upper limit on the penalty scale for non-aggravated drunk driving— those penalties available for a recidivist— has been unchanged since the 1935 Motor Vehicle Act went into effect. The maximum punishment for non-

aggravated drunk driving in 1936 is the same punishment prescribed today: one year imprisonment and a \$1000 fine.⁴

Analyzing the development of the statutory minimum penalty is more complicated. Drunk-driving legislation throughout the 20th century has provided a range of punishments available if a judge decides to impose a sentence. The term "statutory minimum penalty" is misleading because a judge prior to 1982 usually had the power to forgo the minimum sentence by ordering probation or a suspended sentence for the offender. In the absence of a *mandatory* minimum sentencing provision, the actual minimum sentence is zero — no imprisonment term and no fine.

The statutory minimum sentence provision, however, is important because it specified the minimum punishments that must be used if a judge wanted to impose a sentence other than probation or a suspended sentence. In 1936, a judge who desired to sentence a first-time offender to the statutory minimum penalty had to impose a 30-day jail term or a \$50 fine. In 1987, a judge must sentence the first-time offender to four days in the county jail and a \$390 fine. As depicted by Figure 1, the minimum incarceration sentence available for a first-time non-aggravated drunk driver has been set at four levels during this period: from 1924 through 1935, it was 90 days; from 1936 through 1973, it was 30 days; from 1974 through 1981, it was two days; and since 1982, it has been four days.

FIGURE 1
NON-AGGRAVATED DRUNK DRIVING - FIRST OFFENSE
STATUTORY MINIMUM JAIL SENTENCE, 1924-1987

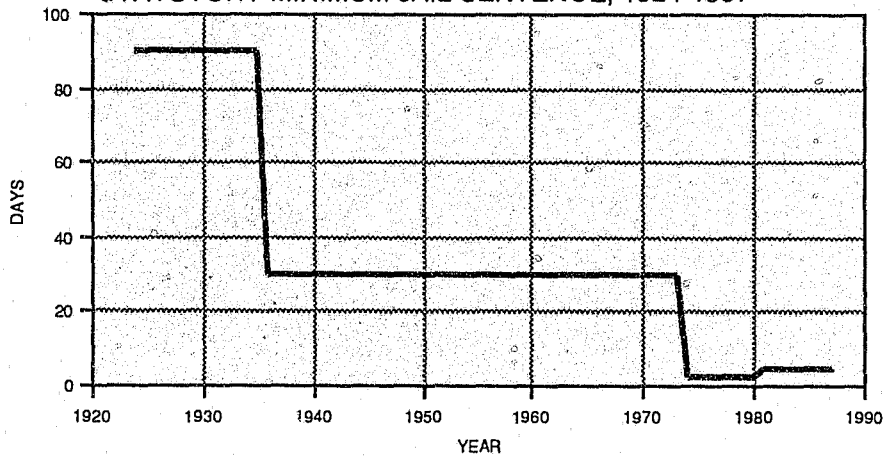
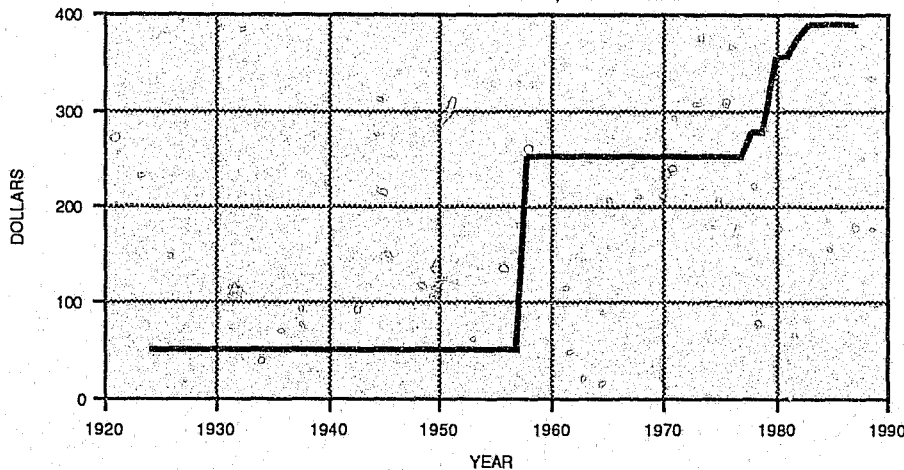


Figure 2 illustrates the development of the statutory minimum fine level. As the figure shows, the minimum fine available for the first-time offender has undergone greater revision: between 1924 and 1957, it was \$50; between 1958 and 1977, it was \$250; during 1978 and 1979, it was \$275; during 1980 and 1981, it was \$355; in 1982, it was \$375; and since 1983, it has been \$390.

FIGURE 2
NON-AGGRAVATED DRUNK DRIVING - FIRST OFFENSE
STATUTORY MINIMUM FINE, 1924-1987



The statutory provisions for fine levels are interesting in that the maximum levels have remained the same since the 1930s, while inflation has increased significantly. Thus, to maintain the maximum fine level (\$1000) in the 1936 statute in 1986 would require raising the maximum fine amount from \$1000 to \$7900.⁵ On the other hand, the minimum fine level has increased from \$50 in 1936 to \$390 in 1987. This increase, although probably not the result of a conscious decision to account for inflationary pressures, adjusts for most of the inflation that has occurred in the past 50 years.

In addition to relying on the traditional criminal punishments, the statutes have also used the quasi-administrative sanction of license suspension and revocation. These license suspension provisions have been revised substantially over the years. Responsibility for suspending the offender's driver's license has alternated between the sentencing judge and the Department of Motor Vehicles. Over the years, statutes have provided for discretionary suspension by the judge or the Department as well as mandatory suspension provisions. The current statutes provide for some judicial discretion within a framework specifying that the Department suspend a driver's license for a fixed time period.

The period of the suspension has varied from a minimum of zero to a maximum of four years in the case of some repeat offenders. The current statutes provide that a first-time offender's license must be suspended for six months unless the court grants probation. In such a case, the Department of Motor Vehicles must issue a restricted license for 90 days, which permits the offender to drive for employment purposes and to and from a treatment program.⁶

The most notable characteristic of drunk-driving policy making is the evolution of statutory provisions that address the recidivist. Drunk-driving legislation since 1936 has provided increased penalties for offenders who had been previously convicted of drunk driving. For many years, the statutes differentiated only between the first-time offender and the second- or subsequent-offense drunk driver: the statutes provided different incarceration and fine levels for these two categories of offenders between 1936 and 1982. Only with the legislation of the early 1980s have different incarceration and fine levels been recognized for third and even fourth offenses.⁷

Another aspect of the recidivist provisions' development is the statutory definition of a recidivist. Between 1936 and 1963, statutes provided that persons convicted of a second drunk-driving offense should be punished more harshly than first offenders, but they did not specify that the second offense must occur within a specified length of time after the first offense. Between 1964 and 1973, the recidivist provision was narrowed by requiring that the initial conviction occur within the seven years immediately prior to the present conviction. Since 1974, the statutes have used a five-year time frame for determining recidivism for all non-aggravated drunk-driving categories.

B. Aggravated Drunk-Driving Penalties

The aggravated form of drunk-driving crime is defined in California as drunk driving that results in the death of or bodily injury to a person other than the offender. Drunk-driving legislation has always provided a substantially greater penalty — usually a felony-level prison sentence — for this offense.

Despite the prominent media attention on the role of alcohol in accidents, the number of aggravated drunk-driving arrests pales in comparison to non-aggravated drunk-driving arrests. In 1986, felony drunk-driving arrests comprised only two percent of all drunk-driving arrests (7,755 felony arrests of adults compared to 334,902 misdemeanor arrests of adults).⁸ Even this measure, however, greatly underestimates the disparity between the actual incidence of the two types of drunk driving because of the ease with which non-aggravated drunk drivers can avoid detection.

Aggravated drunk-driving-penalty provisions have undergone less revision over the years than the penalties for non-aggravated drunk driving. Some of the reasons for this may be the relative infrequency of aggravated drunk driving compared to non-aggravated drunk driving and the lesser difficulty in enforcing drunk-driving laws when there has been a fatality or injury. Thus, the penalties for aggravated drunk driving started out more severe than those for non-aggravated drunk driving and have remained severe, because there has been less need to reduce that severity.

As with penalties for non-aggravated drunk driving, the penalty ranges for aggravated drunk driving have remained relatively stable throughout most of this time period. For example, the maximum

punishment for drunk driving that results in bodily injury — five years imprisonment and a \$5000 fine — remained the same between 1936 and 1977.⁹ The maximum punishment changed in 1977 with the implementation of determinate sentencing in California to three years imprisonment and a \$5000 fine. The current maximum is four years imprisonment and a \$5000 fine, which may be imposed on an aggravated drunk driver who had two or more prior convictions. A drunk driver who causes death but does not qualify for punishment under the murder statutes, however, may be sentenced for up to ten years in prison.

The statutory minimum penalties for aggravated drunk driving have fluctuated less over the years than those for non-aggravated drunk driving. For example, the minimum incarceration term for a first-time offender whose drunk driving results in injury has been set at 90 days since 1936. The minimum fine level for the same offender was \$200 in 1936 and \$390 in 1987.

Like the fine levels for non-aggravated drunk driving, these fine levels have not kept pace with inflationary pressures: to account for inflation, the minimum fine level would have to be over \$1580 and the maximum fine level over \$39,560. It should be stressed, however, that until recently, minimum fine levels did *not* reflect the actual minimum sentencing practices. Thus, if statistics were available, they would probably show that actual imposition of fines has kept pace with, or exceeded, inflation.

Similarly, license suspension periods have been constant: since 1936, the period of license suspension for a first-time aggravated drunk-driving conviction has been one year. For a second offense, statutes from 1957 to 1979 provided for permanent license revocation. Since 1982, the period has been three years.

The move toward subdividing aggravated drunk driving has occurred at a much slower pace than that for non-aggravated drunk driving. Legislation did not provide a separate category of incarceration and fine levels for second offenders until 1982.¹⁰

II. Perspectives on Drunk-Driving Punishment Policy

Legislative activity in the past 70 years has focused primarily on changing the punishment policy toward non-aggravated drunk driving. This type of drunk-driving offense has been the object of far more revisions in penalties and sentencing restrictions than aggravated drunk driving. And this pattern probably will continue; drunk driving that results in an injury or death has always been severely punished. The three issues discussed in this section, although relevant to all drunk-driving offenses, primarily concern legislation affecting non-aggravated drunk-driving punishments.

A. Systemic Pressure Toward Subdividing the Offense

A significant difference between drunk-driving penalties of the 1930s and those of the 1980s is the statutory subdivision of drunk-driving offenses and offenders. Subdividing the offense has involved distinguishing between the types of social harms associated with the conduct. For example, drunk driving has been divided into drunk driving that results in death of another, drunk driving that results in bodily injury to another, and all other drunk driving. Further subdivision has involved using characteristics of the offender — prior drunk-driving convictions — to determine the range of punishments available.

Although only recently has the subdivision of drunk driving expanded exponentially, the process of subdivision began with the enactment of the 1935 California Vehicle Code. The 1935 Code distinguished between drunk driving that resulted in death or bodily injury and all other types of drunk driving. The 1935 Code also introduced heightened penalties for recidivists. Differential treatment based on the harm involved and the status of the offender (prior convictions) continues to be the most important determinant of the penalties imposed for drunk-driving convictions.

Subdivision of drunk driving has increased significantly in recent years. From 1936 until 1977, there were four categories of drunk-driving penalties: drunk driving that resulted in bodily injury, drunk driving that resulted in death, non-aggravated drunk driving by a first-time offender, and non-aggravated

drunk driving by a recidivist. Since January 1, 1987, there have been 12 separate punishment categories: four non-aggravated drunk-driving categories, based on the number of prior convictions; three drunk-driving categories involving bodily injury; three categories of sentence enhancement based on the number of injured victims (which arguably could be counted as nine separate categories — three separate enhancement categories for each felony drunk-driving category); and two drunk-driving categories involving death.

The effectiveness of the proliferation of different categories of offenses and offenders remains to be seen. Twelve categories seem to be beyond the differential punishment justification of any criminal justice jurisprudence. For differential treatment of offenders to be effective — at least with respect to deterrence — potential offenders must be aware that they will be treated differently should they be convicted of subsequent offenses. At some point, the limits to this scheme will be reached. Certainly, the appearance of additional categories will contribute little to solving the drunk-driving problem, primarily because potential offenders may be unaware of, or less affected by, the incremental additional penalties for a fifth or sixth offense.¹¹

B. Legislating Severe Punishments

A recurring theme throughout California drunk-driving policy making has been the legislative emphasis on increasing the severity of punishment in order to decrease drunk-driving behavior. For most of this century, this emphasis resulted in statutes prescribing symbolically harsh minimum and maximum incarceration and fine levels. Today, the demand for severity has shifted toward requiring judges to sentence offenders to certain minimum penalties.

One of the most prominent aspects of the drunk-driving strategy in the early 1980s was adoption of provisions, regarded as innovations, that compelled judges to impose the minimum imprisonment term and fine on offenders, regardless of whether they were placed on probation. Earlier statutes had contained provisions requiring judges to impose minimum sentences for certain recidivists. However, the current limitations on judicial discretion are unique in California drunk-driving policy making history because they require mandatory sentencing for all types of offenses and offenders.

Legislation first required a mandatory minimum sentence for drunk-driving offenders in 1957. The 1957 amendments to the California Vehicle Code set the penalty for a second or subsequent conviction for violating the non-aggravated drunk-driving provision at imprisonment of five days to one year and a fine of \$250 to \$1000.¹² Although this represented a decrease in the minimum incarceration term, it was accompanied by a provision that precluded a sentencing court from granting probation or a suspended sentence for a second or subsequent offense. Thus, a repeat offender would have to serve at least five days in jail and be fined \$250. This mandatory minimum penalty for second or subsequent offenders continued until 1973 when the incarceration term was reduced from five days to 48 hours.

In 1977, the Legislature enacted differential minimum mandatory penalties for second or subsequent offenders depending upon the type of prior conviction. If the person had been previously convicted of non-aggravated drunk driving, the minimum incarceration term remained at 48 hours; if the person had been previously convicted of aggravated drunk driving, however, the minimum incarceration term was increased to five days.¹³

In the 1970s, aggravated drunk-driving provisions included similar restrictions on judicial discretion to avoid minimum sentences by placing an offender on probation. In 1978, anyone convicted of aggravated drunk driving who had a prior non-aggravated drunk-driving conviction had to serve at least five days in jail and pay at least a \$250 fine. If the prior conviction was for aggravated drunk driving, the offender had to be imprisoned for 90 days to one year and pay a \$2500-\$5000 fine.¹⁴

Despite these earlier provisions, it was not until the 1980s that the legislation provided mandatory minimum penalties for all convicted drunk-driving offenders. The revisions were particularly concerned with non-aggravated drunk driving. The 1981 amendments placed substantial conditions on the court's power to order probation for non-aggravated drunk-driving convictions:

- First-time offenders must complete an alcohol or drug treatment program and either (1) serve at least 48 hours in the county jail and pay at least a \$375 fine or (2) pay at least a \$375 fine and have their licenses restricted for 90 days.¹⁵

- Second-time offenders must either (1) be confined for ten days to one year and pay a \$375-\$1000 fine; or (2) be confined for two days to one year and pay a \$375-\$1000 fine and have restricted licenses for one year and successfully participate for one year in treatment programs.¹⁶
- Third-time offenders must be confined for 120 days to one year and pay a \$375-\$1000 fine, and, if the person had not already done so, complete at least a one-year treatment program.¹⁷

Legislation enacted in 1983 provided that an offender who was convicted of a drunk-driving offense for the fourth time must be confined for at least 180 days and be fined at least \$390.¹⁸

The current legislation also contains provisions designed to limit prosecutorial discretion. Part of the problem in enforcing drunk-driving laws in the 1980s has been perceived to be plea bargaining: the reduction of the drunk-driving charge to a reckless-driving charge in exchange for a guilty plea. The legislation enacted in 1981 provided that any reckless-driving conviction that replaces a drunk-driving charge in which the driver has consumed any alcohol will qualify as a prior offense should the driver be later convicted of drunk driving.¹⁹

The perceived need for society to appear harsh with drunk drivers has been prevalent since drunk-driving prohibitions were first adopted in 1911. For the first 40-odd years of drunk-driving policy making, this translated into seemingly severe sentencing ranges. But since the late 1950s for aggravated drunk driving and during the 1980s for all drunk-driving offenses, the need for severity has taken a new course — actual imposition of minimum terms.

C. Tensions Between Penalty Severity and Criminal Justice System Efficiency

The general trend in punishment strategies for the drunk driver since 1935 has been a balancing of dual concerns: the perceived need for a severe sanction against drunk driving and the recognition that many offenders will not be punished when the penalty is too high. How the criminal justice system reacts to changes in punishment policy is an important concern for policy makers, both in terms of effectiveness of proposals and as a determinant of future legislation.

The history of drunk-driving-penalty policy in California reveals a pattern of systemic reactions to legislation that significantly moderates the intended goals of the legislation. There is no reason to suspect that the 1980s legislation is immune to this systemic reaction pattern. Rather than ignoring problems encountered with implementing changes in punishment strategies, policy makers should begin to examine the criminal justice system to discern these problems and to develop corrective policies.

As explored in the previous section, early statutes contained rather severe penalty ranges for drunk driving. These harsh penalties, however, proved to be largely symbolic. With the availability of plea bargaining and probation or suspended sentences, these penalty ranges were not translated into actual sentencing patterns. The situation produced an interesting result: the need for appearing "tough" on drunk driving was fulfilled by the harsh penalty structure, while systemic pressures prevented imposition of "unduly harsh" penalties on individual offenders.

The two major reductions in the statutory minimum jail sentence available for non-aggravated drunk driving occurred because of the criminal justice system's reaction to the higher minimum penalties (i.e., from 90 days to 30 days in 1936 and from 30 days to two days in 1974). The reduction from 90 days to 30 days resulted from the Legislature's acknowledgment that the higher sentence on offenders was not being imposed: the reduction in the minimum sentence, it was said, was necessitated by the fact "that juries failed to convict when penalties were unduly severe and offenders escaped without any punishment whatever."²⁰ The recognition that even 30 days incarceration thwarted effective enforcement prompted the reduction of the minimum to two days in 1974.

The 1981 amendments have resulted in longer adjudication periods for drunk-driving offenses: guilty pleas have decreased, while defendant requests for attorney representation and jury trials have

increased.²¹ The number of convicted drunk drivers sentenced to jail terms has increased significantly: a survey of the Alameda County court system found that the proportion of drunk-driving offenders sentenced to jail quadrupled from 1980-1981 to 1983-1984.²²

Similarly, in Los Angeles County, the legislation resulted in greater arrests and charges for drunk driving, but these gains were accompanied by a 10.5 percent decrease in guilty pleas, a significant increase in jury trial requests, and a 10 percent decrease in convictions.²³

The effect of severe sanctions on conviction rates is not unique to California. When the State of Washington enacted a one-day mandatory minimum jail sentence for first-time offenders,

“findings of guilty decreased from 80 to 60%. Deferred prosecutions increased from 1.5% of charges to 12%. The rate of jury trials more than doubled. Failure of defendants to appear for trial rose from 6 to 14%. Although those found guilty were nearly universally sent to jail, the criminal justice system in its entirety became distorted so as to free a large proportion of the accused.”²⁴

Similarly, when Arizona instituted a one-day minimum jail sentence for drunk drivers, Phoenix experienced a one-third decrease in convictions and a doubling of dismissals.²⁵ Moreover, Norma Phillips, National Director of Mothers Against Drunk Driving (MADD), claims that “the continuing reluctance of judges to impose harsh jail sentences for much of the failure of the new [drunk-driving] laws across the country.”²⁶

Mandatory jailing of all drunk drivers — even for a few days — is having serious implications for correctional facilities. According to a 1986 jail survey conducted by the California Board of Corrections, jails in the state were operating at 44 percent over their capacity, and convicted drunk drivers comprised 12 percent of the average daily population of jails statewide as of June 1986.²⁷

The problems encountered with minimum jail sentences for drunk-driving offenses extend beyond overcrowding per se. In previous years, drunk drivers were sentenced to serve their jail terms on weekends, thus enabling them to maintain their current employment during the work week.²⁸ However, with increased overcrowding, this is no longer an option for many counties.

Another problem is that often drunk drivers are unnecessarily housed in expensive facilities: the 1986 jail survey found that 41 percent of drunk drivers were housed in maximum or medium security facilities; 45 percent were housed in minimum security facilities; and only 14 percent were on work furlough programs (regular employment during working hours, while in a custodial setting at night).

Conclusions and Implications

Although much of the public concern over the drunk-driving problem in the 1980s has focused on increasing the severity of punishment for offenders, the resulting legislation displays little innovation in the penalty framework. For the most part, the changes reflect the continuation of themes developed in previous years. And there is good reason for this: there is little room for innovation with respect to levels of traditional punishment.

Moreover, the systemic pressures that have existed throughout this century will remain in the 1990s. There will always be the tension between the perceived need for a severe sanction and the realities of the criminal justice system case processing needs. The projections of high jail populations in the coming years and overcrowding of facilities may lead us to reassess either the mandatory application of the minimum sentence or the length of the sentence. The innovations of the future, like the innovations of the past, will likely be reactive to conditions created by current reforms.

Alternatives to traditional jail incarceration for non-aggravated drunk drivers seem to be the most likely candidates for policy review. There are currently some programs scattered throughout the state designed to address the problem caused by the influx of drunk drivers sentenced to jail. Penal Code §4024.2 permits counties to establish work-in-lieu-of-jail programs to ease overcrowding. The counties that have

these programs place minimum-risk offenders—predominantly drunk drivers—on county work details or projects for eight to ten hours of work in exchange for one day of jail. Work furlough programs are also designed to reduce the need to house individuals. Under work furlough the individual works at his or her normal occupation during the day and returns to the facility at night. Residential treatment facilities for those suffering from alcohol abuse and the use of house arrest also could be expanded. The State is currently experimenting with electronic devices that prevent offenders from operating their cars when they have any alcohol in their blood.²⁹

An alternative that has had some success in other areas, and which may be profitably explored in California, is community restitution. This is a program by which offenders provide volunteer services to non-profit or government agencies rather than serve jail terms. Offenders, in a sense, “pay back” society for the harm inflicted by providing useful service to the community. Some form of community restitution—used in conjunction with current approaches—may provide an innovative approach to the drunk-driving problem, as well as adjust for some of the systemic pressures caused by previous measures.³⁰

The major difficulty in formulating alternatives to incarceration is fulfilling the need for penal severity with non-incarcerative sanctions, both from the perspective of the offender and the society at large. Alternatives that result in a loss of deterrence or a public perception that government is “soft” on drunk driving are not viable alternatives. However, findings from other states and from pilot projects demonstrate that promising results are available with many different alternative schemes.



DATA TABLES

Table 1 shows the statutory sentencing ranges available for punishing non-aggravated drunk drivers in effect on January 1 of eight different years.³¹ The years depicted represent watershed years — either the years immediately preceding or after major changes in penalties.

**TABLE 1
NON-AGGRAVATED DRUNK-DRIVING PENALTIES**

	Imprisonment	Fine	License suspension
1930			
First and any subsequent offense	90 days-3 years	\$200-\$5000	6 months
1936			
First offense.....	30 days-6 months	\$50-\$500	None-6 months
Second offense.....	90 days-1 year	\$200-\$1000	None-6 months
1958			
First offense.....	30 days-6 months	\$250-\$500	None-6 months ^a
Second offense.....	5 days-1 year	\$250-\$1000	1 year
Third offense.....	b	b	3 years
1966			
First offense.....	30 days-6 months	\$250-\$500	6 months ^c
Second offense.....	5 days-1 year	\$250-\$1000	1 year
Third offense.....	b	b	3 years
1974			
First offense.....	48 hours-6 months	\$250-\$500	6 months
Second offense.....	48 hours-1 year	\$250-\$1000	1 year
Third offense.....	b	b	3 years
1982			
First offense.....	4 days-6 months	\$375-\$500	6 months ^d
Second offense.....	90 days-1 year	\$375-\$1000	1 year ^d
Third offense.....	120 days-1 year	\$375-\$1000	3 years
1984			
First offense.....	4 days-6 months	\$390-\$500	6 months ^d
Second offense.....	90 days-1 year	\$390-\$1000	1 year ^d
Third offense.....	120 days-1 year	\$390-\$1000	3 years
Fourth offense.....	180 days-1 year	\$390-\$1000	4 years
1987			
First offense.....	4 days-6 months	\$390-\$1000	6 months ^d
Second offense.....	90 days-1 year	\$390-\$1000	18 months ^d
Third offense.....	120 days-1 year	\$390-\$1000	3 years
Fourth offense.....	180 days-1 year	\$390-\$1000	4 years

^aDiscretionary judicial sentence: if judge makes no recommendation or does not impose judicial license suspension, Department required to suspend for 90 days.

^bNone specified by statute.

^cMandatory Department suspension unless court suspends license (for up to six months) or recommends no suspension.

^dUnless court grants probation; in cases of probation, restricted license is issued.

Table 2 illustrates the statutory penalties provided for aggravated drunk driving for selected years from 1930 through 1987. This table includes penalties established for drunk driving that results in a death as well as the penalties for drunk driving that results in an injury.³²

TABLE 2
AGGRAVATED DRUNK-DRIVING PENALTIES

	Imprisonment	Fine	License suspension
1930			
Aggravated drunk-driving penalties			
First and any subsequent offense	90 days-3 years	\$200-\$5000	1 year
1936a			
Aggravated (bodily injury) drunk-driving penalties			
First and any subsequent offense	90 days-5 years	\$200-\$5000	1 year ^b
1936a			
Aggravated (death) drunk-driving penalties			
First and any subsequent offense	None-5 years	None-\$5000	1 year
1958a			
Aggravated (bodily injury) drunk-driving penalties			
First offense.....	90 days-5 years	\$250-\$5000	1 year
Second offense.....	c	c	Permanent
1966a			
Aggravated (bodily injury) drunk-driving penalties			
First offense.....	90 days-5 years	\$250-\$5000	1 year
Second offense.....	c	c	Permanent
1977d			
Aggravated (bodily injury) drunk-driving penalties			
First offense.....	90 days-1 year in jail; 16 months, 2 years, or 3 years in prison	\$250-\$5000	1 year
Second offense.....	c	c	Permanent
1982d			
Aggravated (bodily injury and death) drunk-driving penalties			
First offense.....	90 days-1 year in jail; 16 months, 2 years, or 3 years in prison	\$375-\$1000	1 year
Second offense.....	120 days-1 year in jail; 16 months, 2 years, or 3 years in prison	\$375-\$5000	3 years
Third offense.....	2, 3, or 4 years in prison	\$1000-\$5000	5 years
1984de			
Aggravated (bodily injury) drunk-driving penalties			
First offense.....	90 days-1 year in jail; 16 months, 2 years, or 3 years in prison	\$390-\$1000	1 year
Second offense.....	120 days-1 year in jail; 16 months, 2 years, or 3 years in prison	\$390-\$5000	3 years
Third offense.....	2, 3, or 4 years in prison	\$1015-\$5000	5 years
1984de			
Aggravated (death) drunk-driving penalties			
Non-gross negligence.....	16 months, 2 years, or 3 years in prison		1 year
Gross negligence.....	4, 6, or 8 years in prison		1 year
1987f			
Aggravated (bodily injury) drunk-driving penalties			
First offense.....	90 days-1 year in jail; 16 months, 2 years, or 3 years in prison	\$390-\$1000	1 year
Second offense.....	120 days-1 year in jail; 16 months, 2 years, or 3 years in prison	\$390-\$5000	3 years
Third offense.....	2, 3, or 4 years in prison	\$1015-\$5000	5 years
1987f			
Aggravated (death) drunk-driving penalties			
Non-gross negligence.....	Up to 1 year in jail; 16 months, 2 years, or 4 years in prison		1, 3, 5 years ^g
Gross negligence.....	4, 6, or 10 years in prison		1, 3, 5 years ^g

aThe 1935 amendments to the California Vehicle Code removed fatal accidents from the coverage of the felony drunk-driving provision. From 1936 to 1972 drunk driving that resulted in another's death was covered by Penal Code §367e.

bMandatory revocation for at least one year.

cNone specified by statute.

dIn 1977 the Legislature amended the felony drunk-driving provision in the California Vehicle Code to include drunk driving that results in death.

eIn 1983 the Legislature removed fatal accidents from the coverage of the California Vehicle Code. Felony drunk-driving provisions applied only to bodily injury accidents; accidents resulting in death were governed by Penal Code §192 and §193.

fIn 1986, the Legislature added Penal Code §191.5 to cover drunk driving that results in death, in addition to provisions contained in Penal Code §§192, 193.

gSame suspension provisions as those provided for aggravated (bodily injury) drunk driving.

ENDNOTES

1. The primary focus of the FORUM is the legislatively prescribed penalties for drunk driving. This FORUM does not discuss more general criminal statutes that encompass behavior beyond drunk driving, but which could be used to prosecute drunk drivers — for example, general provisions that punish murder, manslaughter, and assault. Although these statutes have always been available for prosecuting drunk drivers, they have been rarely used for this purpose.
2. The sole exception is in the case of a first-time offender convicted of drunk driving that does not result in death or injury who receives probation. In such a case, a judge has the option of imposing one of the following sets of conditions as part of the probation: either (1) confinement for 48 hours to six months in jail and a \$390-\$1000 fine or (2) pay a \$390-\$1000 fine and have license restricted for 90 days. Only with the latter set of conditions can an offender avoid serving some time in jail. California Vehicle Code §23161.
3. Statistical data on the frequency of drunk driving are lacking. For example, statistics have been collected indicating that being under the influence of alcohol and/or drugs was the primary collision factor in 34 percent of the fatal accidents in 1985. California Highway Patrol, 1985 Annual Report of Fatal and Injury Motor Vehicle Traffic Accidents, 46 (Sacramento: State Printing Office 1986). Moreover, in 1986 there were over 342,000 misdemeanor and felony arrests of adults for drunk driving. Data obtained by special request from the California Bureau of Criminal Statistics and Special Services. However, these data do not reveal how many drunk-driving incidents occur; the number of drunk-driving incidents that go undetected are probably quite high because they do not involve an accident, or the driver does not happen to encounter a police officer.
4. This penalty refers to the maximum punishment that can be applied to recidivist drunk drivers.
5. Using 1967 dollars as a base (\$1 = \$1), in 1936 a dollar was worth \$2.41 (in 1967 dollars); in 1986 a dollar was worth 30¢ (in 1967 dollars). U.S. Dept. of Commerce: Historical Statistics of the United States: Colonial Times to 1970, Washington, D.C. Government Printing Office, 1975; Statistical Abstract of the United States - Government Printing Office, 1986.
6. California Vehicle Code §§13352, 13352.5.
7. Although the legislation did not provide for differing incarceration and fine levels for recidivists with more than one prior conviction, provisions regarding license suspension and revocation did distinguish between a second and a third offense as early as 1941. In that year the Legislature enacted California Vehicle Code §269.1, which prohibited the Department of Motor Vehicles from issuing or renewing a license to anyone who had three drunk-driving convictions. 1941 Stat. ch. 1139 (effective September 13, 1941).
8. Data obtained by special request from the California Bureau of Criminal Statistics and Special Services, 1986. Felony arrests correspond to this FORUM's "aggravated drunk-driving" arrests, and misdemeanor arrests correspond to "non-aggravated drunk-driving" arrests.
9. The maximum punishment refers to felony drunk driving involving death, but which is not punishable under murder or non-vehicular manslaughter statutes.
10. Legislation enacted in 1977, however, limited the judicial power to grant probation in cases of a second offense. Under the statute, if a judge granted probation to an aggravated drunk-driving offender who had a prior drunk-driving conviction, as a condition to the probation, the offender must serve at least five days in jail and pay at least a \$250 fine. California Vehicle Code §23101 (codifying 1977 Stat. ch. 592, effective January 1, 1978).
11. The theoretical underpinnings of deterrence and crime control policies have been surveyed and developed in Franklin Zimring's and Gordon Hawkins's seminal work Deterrence: The Legal Threat in Crime Control (Chicago: University of Chicago Press 1973). Several authors have used deterrence theory to examine the effect of changes in drunk-driving laws on individual behavior. See, for example, H.L. Ross, Detering the Drinking Driver (Lexington, Mass.: D.C. Heath & Co. rev. ed. 1984); Snortum, "Deterrence of Alcohol-Impaired Driving: An Effect in Search of a Cause," in Laurence, M., Snortum, J., Zimring, F., Social Control of the Drinking Driver (Chicago: University of Chicago Press 1988).

Although the scope of this FORUM prevents a sustained inquiry into the debate surrounding the deterrent effects of severe sanctions for drunk driving, suffice it to say that the effectiveness of a deterrence model has its sharp critics. A recent study conducted by Professor Ralph Hingson of the Boston University School of Public Health concluded that the recent "increased drunk driving penalties, even when coupled with judicial

measures to increase convictions, did not initiate sustained drunk driving and fatal crash reductions." Los Angeles Times, May 27, 1987, part V, at 2. Part of the problem is that the more severe laws "failed to persuade motorists that they stood any real increased risk of being caught if they drove while intoxicated. Id.

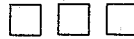
Moreover, there are special concerns in applying a deterrence model to a graduated punishment approach to drunk driving. The success of a graduated approach to address the special problems of fifth- and sixth-time offenders requires that these offenders will accurately weigh the additional costs (penalties) associated with an illegal activity that they have already committed on several previous occasions. In this respect, the multi-offense actor differs significantly from that of the first-time offender, and thus traditional deterrence assumptions may not apply. At the very least, before any effectiveness claims about the success of such an approach can be made, research must be conducted to determine if the marginal increase in penalties associated with a fifth or sixth offense has an effect on the individual who has already been apprehended and convicted of several offenses. The graduated penalty approach assumes that individuals will be cognizant of the greater penalties when undertaking activities that may result in the imposition of those additional penalties. Thus far, this researcher has found no studies that have examined the awareness of the different penalty schemes in place for multiple offenders.

12. California Vehicle Code §502(c) (codifying 1957 Stat. ch. 532, effective September 11, 1957).
13. California Vehicle Code §23101 (codifying 1977 Stat. ch. 592, effective January 1, 1978).
14. California Vehicle Code §23101(d) (codifying 1977 Stat. ch. 592, effective January 1, 1978).
15. California Vehicle Code §23161.
16. California Vehicle Code §23166.
17. California Vehicle Code §23171.
18. California Vehicle Code §23176.
19. California Vehicle Code §23103.5 (codifying 1981 Stat. ch. 941, effective January 1, 1982).
20. California Assembly Interim Committee on Motor Vehicle Laws, Report, 6 (Sacramento: California State Printing Office 1937).
21. DUI Adjudication Evaluation Project, Final Report: The Impact and Consequences of the 1982 Law on Drunk Driving Adjudication (Oakland: Office of Court Services September 1985).
22. Id. at 68.
23. See Los Angeles County Municipal Courts Planning and Research, The 1982 Driving Under the Influence Law and the Los Angeles County Municipal Court (Los Angeles: L.A. County 1983); see also Gropper, B., Martorama, C., Mock, L., O'Connor, M., and Travers, W., The Impacts of Mandatory Confinement for Drunk Driving on Criminal Justice Operations (Washington, D.C.: DOT 1983).
24. Ross, "Deterring Drunken Driving: An Analysis of Current Efforts," Journal of Studies on Alcohol Supp. No. 10, at 122, 124 (July 1985).
25. Id. at 124-25.
26. Los Angeles Times, May 27, 1987, part V, at 2.
27. California Board of Corrections, The State of the Jails in California Report #3: Impact of Convicted Drunk Drivers on Local Detention Systems, 2 (Sacramento: Board of Corrections 1986).
28. Legislation enabling judges to sentence offenders during non-working periods was enacted in 1973. California Vehicle Code §23102(h) (codifying 1973 Stat. ch. 1128, effective January 1, 1974).
29. Electronic monitoring entails the installation of a device onto the offender's car that would require either breathing into a testing apparatus to detect alcohol or the completion of a manual dexterity test before the car may be started. The experiment, currently being conducted in several California locations, was sponsored in an effort to prevent the offender from operating his or her vehicle after consuming alcohol. See Voas,

"Emerging Technologies for Controlling the Drunk Driver," in Laurence, M., Snortum, J., and Zimring, F., eds. Social Control of the Drinking Driver ch. 13 (Chicago: University of Chicago Press 1988).

30. A thorough review of the literature concerning community restitution programs and their effectiveness was recently conducted by the National Highway Traffic Safety Administration. National Highway Traffic Safety Administration (1985). Community Service Restitution Programs for Alcohol-Related Traffic Offenders, 3 volumes (1985) (DOT HS 806766 through DOT HS 806768). The study's conclusion was that community service programs "offer a low-cost, innovative and promising direction for the future." *Id.* at 2.
31. Drunk-driving statutes prior to 1935 were early attempts to locate a proper range of penalties for those convicted of drunk driving. The original statutes prohibiting drunk driving appeared as part of the Penal Code in 1911. For drunk driving that resulted in death or bodily injury (felony drunk driving), the punishment was up to five years imprisonment and/or a \$500 fine. Penal Code §367e. The punishment for non-felony drunk-driving offenses (simple drunk driving) was incarceration in the county jail for up to one year. Penal Code §367d. The Motor Vehicle Act of 1919 set the penalty for simple drunk driving at six months imprisonment or a \$500-\$5000 fine. The Motor Vehicle Act of 1923 consolidated all drunk-driving offenses and provided that any conviction was punishable by 90 days to three years imprisonment or a \$200-\$5000 fine. This legislative format remained in effect until the enactment of the Vehicle Code of 1935.
32. The penalties prescribed for drunk driving that results in a death have at times been included with penalties for drunk driving that results in an injury. But for most of this history, such penalties have been incorporated as part of the vehicular manslaughter punishments in the Penal Code.

Between 1936 and 1972, the Legislature provided for penalties for such drunk driving in the Penal Code. Between 1972 and 1977, however, the Legislature made no special provision for such drunk driving; instead, a drunk driver who causes the death of another could be prosecuted under the general vehicular manslaughter provisions. In 1977, the Legislature combined both aspects of aggravated drunk driving into the California Vehicle Code, only to remove death once again in 1983.



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