THE NEUTRALIZATION OF SEVERE PENALTIES: SOME TRAFFIC LAW STUDIES

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Between the formal law of statute books and appellate courts and the informal law of routine dispositions intervene a variety of actors, exemplified by policemen and insurance adjusters, some of whom have not traditionally been regarded as "legal" actors. However, one of the most important contributions of sociology to the understanding of law has been the demonstration that the attitudes and values of these actors and the pressures embodied in their roles produce a comprehensible divergence between the prescriptions of the formal law and the regularities exhibited in the informal law (Skolnick, 1966; Ross, 1970). This paper discusses some instances of discrepancy between the formal and informal law when formal penalties are suddenly and greatly increased. Its principal hypothesis is that sharp increases in formal penalties tend to be subverted by contrary adjustments in the behavior of those who apply the law. The data to be presented come from four of my studies on the effectiveness of changing traffic laws. As these studies were not designed to test the present hypothesis, their evidence is indirect, and the presentation is exploratory rather than demonstrative.

The hypothesis is consistent with empirical generalizations by observers of legal institutions as well as with the high-level generalizations of functionalist theory in sociology. An example of the former is James Q. Wilson's (1975: 187) observation on the tendency to legislate mandatory penalties to deter currently fashionable crimes: "No one should assume that any judicial outcome can be made truly 'mandatory'—discretion removed from one place in the criminal justice system tends to reappear elsewhere in it." Functionalist theory's "homeostatic principle" is exemplified by such assertions as "So far as it impinges on institutionalized patterns of action and relationship, therefore, change is never just 'alteration of pattern' but alteration *by the overcoming of resistance*" (Parsons, 1951:491, italics in original).

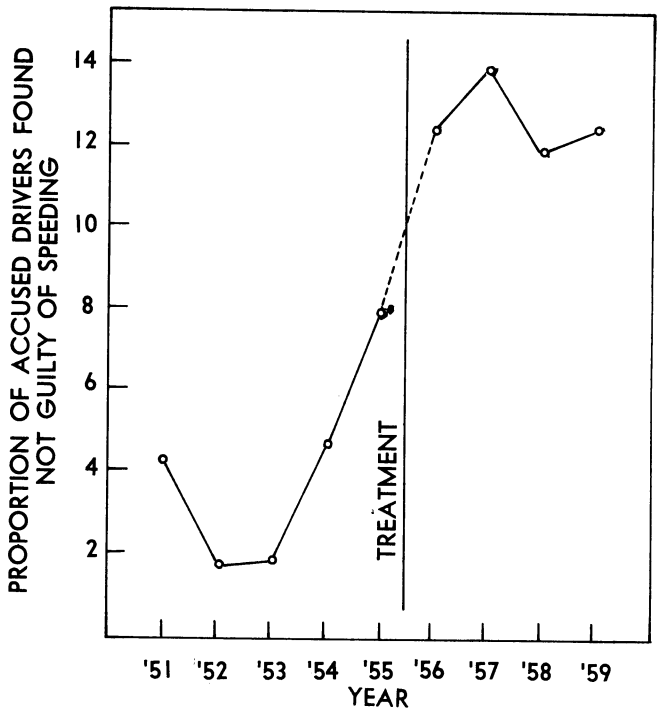
There are a variety of points of discretion in the application of legal sanctions, and the examples to be considered suggest that homeostatic resistance to change may be found at a number of these points. Police may stabilize or reduce the number of arrests for the violation subjected to increased penalties; prosecutors may reduce the number or severity of the charges through plea bargaining; judges and juries may fail to convict the accused or may find reason to mitigate the penalties; and those convicted may find means to avoid the sanctions prescribed. As suggested by Wilson, the attempt to control discretion at one such point may merely result in the shifting of its exercise to another point, much as—to use a slithery analogy—the serpent held by one coil of his body may wriggle more energetically elsewhere.

The Connecticut Speed Crackdown of 1955. The most extensive data come from my study, with Donald T. Campbell, of the increase in the penalty for speeding introduced into Connecticut by Governor Abraham Ribicoff in 1955 (Campbell and Ross, 1968). The change in penalty was achieved by the Governor by means of the threat not to reappoint judges who failed to punish drivers found guilty of speeding with a 30-day license suspension on the first offence.

According to the contemporary press, the new penalty in Connecticut was considered to be unusually stringent by all concerned. Our analysis of the accident data failed to produce evidence that the change promoted highway safety. However, some other effects were apparent from the same analysis. The number of arrests for speeding fell drastically, from 4377 in the first six months of 1955 to 2735 in the comparable period of 1956. The official explanation for this phenomenon was that drivers were speeding less often but we were tempted to believe that part of the diminution was the result of police failing to make arrests in marginal cases. Our speculation was supported by an otherwise unexplained simultaneous rise in vaguely defined offenses such as "careless driving" which did not carry the mandatory license suspension that accompanied speeding.

We also found that the proportion of drivers accused of speeding who were found not guilty seemed to rise spectacularly in Connecticut at about the time of the crackdown. This is a diagrammed in Figure 1. Unfortunately, this figure is not unambiguous in its message, for increases in not-guilty findings also occurred in 1954 and 1955. However, the 1955-1956 increase is

Figure 1. Percentage of speeding violators judged not guilty in Connecticut.

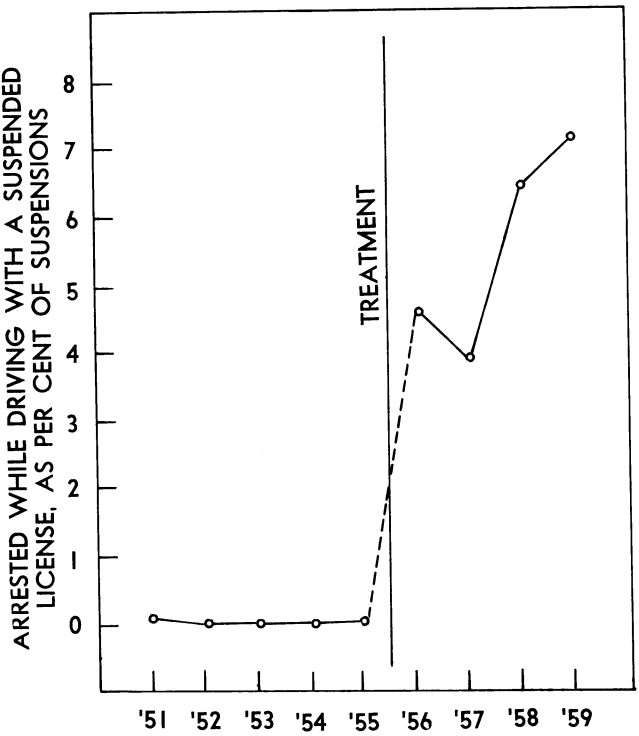


the largest, and accelerates the prior trend, in keeping with the interpretation that judges were reacting to the increase in penalty in that year. If, as we suspect, the population of accused drivers following the crackdown lacked marginal cases through police discretion, the 1955-1956 increase in not-guilty findings becomes more meaningful. Whether because of a harder fight by the defendants or a disposition to leniency on the part of the judges, the increased penalty upon conviction may have made that conviction less likely.

Because the crackdown limited the discretion of judges in sentencing, once the accused was found guilty, we may assume that license suspension was the near-universal penalty in practice. The data in Figure 2, however, indicate that an unintended result of the crackdown was to increase the number of violators of license suspension orders. The guilty were apparently taking their own steps to avoid the prescribed penalties.

Jail for drunk drivers in Chicago. In another administrative action, a mandatory seven-day jail sentence for driving while intoxicated was prescribed by the Supervising Judge of Chicago's Traffic Court at Christmas of 1970. The claimed success of this

Figure 2. Arrested while driving with a suspended license, as percent of suspensions, Connecticut



threat in reducing fatalities produced a continuation of the policy into the first six months of 1971. Again, analysis failed to produce scientifically acceptable evidence of effectiveness of the legal change in achieving its goal of fewer fatalities, but changes could be detected in the operation of the system (Robertson, Rich and Ross, 1973). Although the threat was made in universal terms, the jail sentence was in fact seldom applied. Chicago police arrested more than 1100 drivers each month for drinking and driving during the period in question, but the total number of 7-day jail sentences for all traffic offenses for the first six months of 1971 was only 557. This did represent an increase over the 357 such sentences given in the comparable months of the preceding year, but the obvious inference is that despite enormous publicity the judges were not applying the sanction at the threatened level. One course of action producing this effect was signaled by a small increase in findings of not guilty, but we believe that the principal explanation lies in judges failing to sentence the guilty drivers as prescribed by administrative fiat.

The Denver Court study. Departure from prescribed sanctions on the part of judges was also noted in an experimental

study of various treatments for drinking-and-driving offenders in Denver (Ross and Blumenthal, 1974). An agreement was reached between the Presiding Judge of the County Court and researchers at the University of Denver (at the request of the former) whereby penalties would be alternated during arbitrary time periods between a fine, probation, and a clinical or educational program, in order to determine the comparative effectiveness of each. Although the trial judges were parties to the agreement and faithfully promised adherence, they compromised the study by substituting the defendants' preferred treatment, a fine, for the other scheduled treatments in a large proportion of cases. The data are presented in Table 1, which shows that the proportion of broken judicial promises was negligible when a fine was prescribed, but it was nearly a third in the case of probation and more than half in the clinical-educational case, the latter being most disliked by the defendants. Judges' defections were much more numerous where a lawyer was present than for unrepresented defendants, but even among the latter the judges frequently avoided what were regarded as harsh penalties.

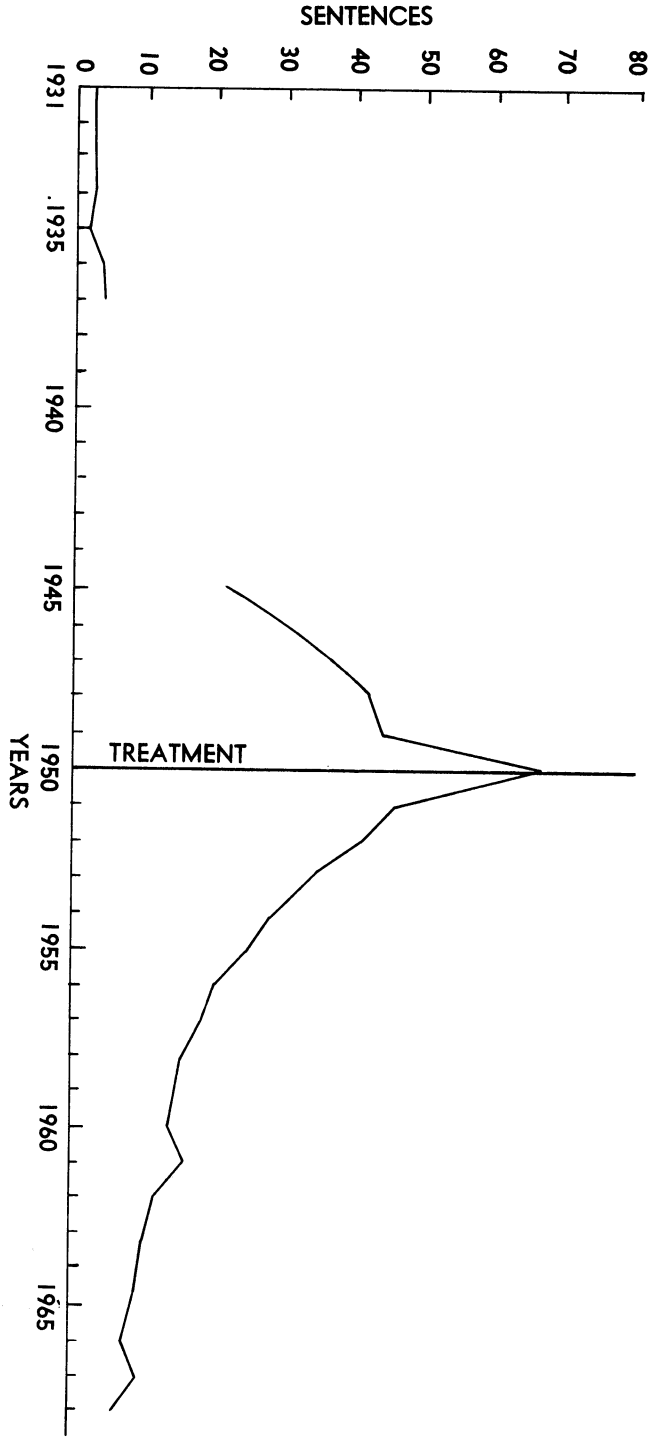
TABLE 1. Sanctions administered to drivers found guilty of DUI in Denver Court experiment.

		Scheduled Sanctions		
		Fine (N=166)	Probation (N=157)	Therapy (N=164)
Sanctions received	Fine	95%	32%	41%
	Probation	5	68	12
	Class or Clinic	1	0	47
	TOTAL	100%	100%	100%

The Finnish drinking-and-driving legislation of 1950. A statute greatly increasing the maximum severity of prison sentences for drinking and driving was passed by the Finnish Parliament in 1950. The maximum penalty had previously been two years in prison. Henceforth it became four years, with the possibility of six years if the offence produced serious bodily injury and seven years if it caused death. The potential punishment for drinking and driving was thus raised 250 percent at one stroke.

My analysis of the Finnish legislation (Ross, 1975: 303-308) again found no evidence for effectiveness of severe penalties in lowering crash or fatality rates. Previously unpublished data did, however, reveal the interesting fact that the *increase* in the maximum penalty was accompanied by a *decrease* in the number of long sentences meted out be Finnish courts in cases of drinking and driving. This phenomenon is documented in Figure 3. Also,

Figure 3. Prison sentences of 6 months or more per 10,000 registered vehicles, 1931-1968. Finland (1938-1944 omitted)



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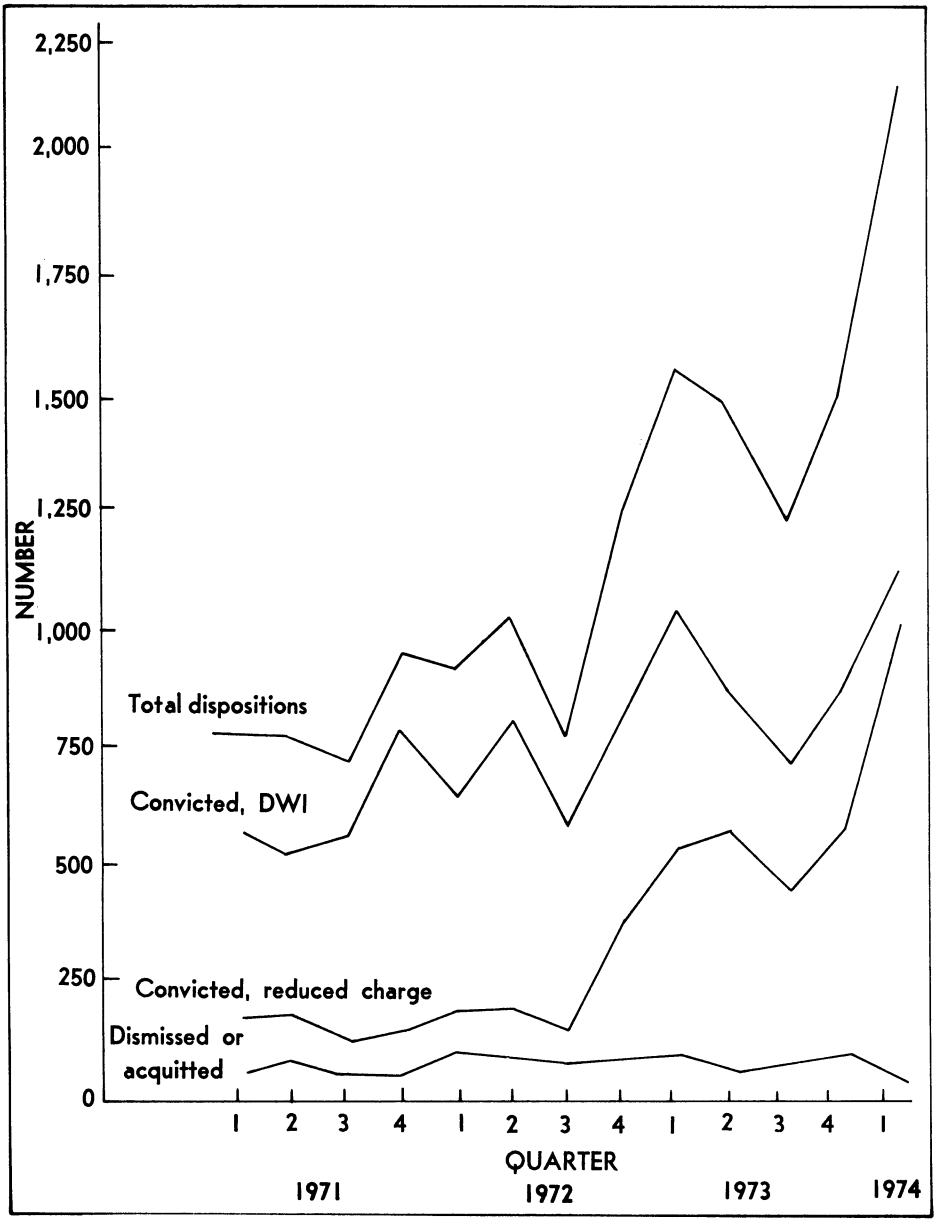
following 1950, prosecutions for drinking and driving followed a declining trend. The legislature's apparent intent to increase penalization of drinking-and-driving offences was not only moderated but was in some manner actually reversed in the operation of the system of police, prosecutors, and courts.

Other studies. Some studies of increased arrests for drinking and driving have shown outcomes similar to those noted above

Figure 4. Court dispositions of driving-while-intoxicated charges in Hennepin County, Minnesota.



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in cases of increased penalties. The U.S. Department of Transportation's Alcohol Safety Action Programs aimed to increase arrests. Figure 4, from the ASAP evaluation report (U.S. Department of Transportation, 1975) shows the experience of the Hennepin County, Minnesota, ASAP. The program was in fact able to effect a manifold increase in the arrest rate without affecting dismissals or acquittals, but plea-bargaining apparently reduced the consequences of these arrests for a very large proportion of arrested drivers. Likewise, a study in progress by Marc Galanter and associates at the State University of New York at Buffalo, shows "skyrocketing" arrests by State Police for drinking and driving, yet only a very slow rise in convictions for the offence charged and a steep rise in convictions for lesser offences.

Beyond traffic law violations, with their peculiarities in representing the criminal law, it has been noted by various observers that harsh formal penalties are seldom applied in action. One example is the fact that the relatively frequent death sentences meted out in Great Britain in the late 18th and early 19th centuries were seldom executed. Tobias (1968:200) states: "Most people thought the death penalty tended to promote crime, believing that it did not deter the criminal, who regarded it as a risk of the calling and accepted it as a soldier accepted the risk of death in battle, but that it did deter the prosecutor, magistrate, jury and judge, who were tempted to strain the law to avoid the risk of what was felt to be an unjust penalty." He notes that the Statistical Branch of the Home Office, in an 1841 memorandum, pointed out that the ratio of convictions to charges fell in the years after a death sentence was carried out for a crime, and that this ratio grew when Britain abolished capital punishment. A similar belief has been cited by conservative, punishment-oriented, legislators in support of moves to reduce penalties for the use of marijuana. (Galliher, McCartney and Baum, 1974.)

Discussion. The evidence from four diverse studies of increased penalties for traffic offences suggests that where the discretion of actors is relatively broad there occurs a mitigation or even an annulment of the increase. Compatible findings can be cited from observations of related issues in traffic and in general criminal law. Speculation may be offered concerning the mechanisms that produce this effect.

First, penalties exceeding established and accepted levels of severity may conflict with norms of fairness. This is especially likely when the penalty is increased beyond the level that fits current notions of the relative seriousness of the offence in an

effort to realize greater general deterrence, as in most of the cases described. Moreover, legal actors can readily rationalize discretionary departures from a given standard by the doctrine of equity, which legitimizes individualized and deviant treatments for "exceptional" cases, which may in fact become routine (Ross and Blumenthal, 1975).

Second, legal actors respond to pressures from others on whom they depend for routine functioning. In this way the expectations of individual parties, even if they are criminal defendants, can become effective demands, spreading throughout the system. As Wilson notes (1975:179):

> . . . . the more severe the penalty, the more unlikely that it will be imposed. To ensure a conviction, avoid an expensive trial, reduce the chances of reversal on appeal, and give expression to their own views of benevolence, prosecutors and judges will try to get a guilty plea, and all they can offer in return is a lesser sentence. The more severe the sentence, the greater the bargaining power of the accused, and the greater the likelihood that he will be charged with a lesser offence. Extremely long mandatory minimum sentences do not always strengthen the hand of society; they often strengthen the hand of the criminal instead.

In conclusion, although the data presented in this paper are largely indirect, they support a theoretical and practical view of the legal system as embodying a homeostatic principle or law of inertia when confronting the introduction of severe penalties. The system minimizes the change through the exercise of discretion by various legal actors, apparently to satisfy the actors' values and to minimize pressures upon them from other participants in the system. Comparable consequences might be predicted for a sudden and severe lowering of penalties from an accepted standard, for example with the decriminalization of some kinds of immoral behavior. In support of this prediction can be cited pilot observations by my students and associates concerning the 1972 decriminalization of homosexual behavior in Colorado, which show that local police activity directed against homosexuals (e.g., for soliciting) remained high despite the decriminalization at the state level.

All but one of the four instances of severe penalties for traffic law violations cited here were put into effect in an effort to deter dangerous behavior, and deterrence is probably a goal for many other instances of sharply increased severity of punishment. In all cases studied, the actual punishment of offenders increased much less than might have been expected, and in the Finnish case actual punishment even decreased. Although such action may possibly increase the general perception of punish-

ment for the offence and thus achieve a deterrent effect (Geerken and Gove, 1975), it is also possible that experience will subvert the credibility of the threat. In none of the studies cited could any deterrent effect of increased penalties be proved, so they cannot enlighten the question at hand. However, in my study of the British Road Safety Act of 1967, which found a strong deterrent effect for an increase in the apparent certainty of punishment, the gap between the threat and actuality appeared to produce learning which undermined the deterrent effect of the legislation over time (Ross, 1973). The studies described here do suggest that if levels of actual punishment are to rise as intended, it may be necessary for the law-giver simultaneously to limit the discretion of legal actors and reduce their ability to resist the initiated change. Bearing in mind the complexity of the legal system and the manifold points of discretion, this is no simple order. If it is to inflict the mandated punishment, the legal serpent may have to be grasped on every coil.

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