Research Note

JUDICIAL DISOBEDIENCE OF THE MANDATE TO IMPRISON DRUNK DRIVERS

H. LAURENCE ROSS
JAMES P. FOLEY

We report here the results of two empirical studies of laws mandating a jail term of forty-eight consecutive hours for repeat-offender drunk drivers. In both cases, noncompliance by judges, abetted by other criminal justice system actors, was extensive, and substantial proportions of offenders were not imprisoned as mandated. We explain these findings as evidence of both a disjunction between formal and operative definitions of the behavior in question—drunk driving—and the great difficulty of controlling the discretion of actors in the criminal justice system.

I. INTRODUCTION

Contemporary drunk-driving law offers an interesting insight into the commonly seen disjunction between the prescriptions of formal legal rules and the results of law in action. Most legislation, along with case law and public opinion, embodies the view of the drunk driver as the "killer drunk" who is "morally flawed, heedless of others, and deserving of both moral condemnation and legal punishment" (Gusfield, 1981: 151–52). For organizations such as Mothers Against Drunk Driving (MADD) and their political advocates, drunk driving is, if not literally murderous, clearly criminal in the traditional sense. In contrast, possibly because their daily experience differs, many criminal justice system personnel see drunk drivers as "average, frail, and sometimes delinquent" (ibid., 155) and drunk driving as a "folk crime" (Ross, 1962) that is not inherently different from other traffic offenses. To quote Gusfield (1981: 155) more extensively,

> on the public level of appellate court, of legislatures, and of public officials the crime of drinking-driving is

A grant from the Indiana Governor's Task Force to Reduce Drunk Driving supported research for this paper. Research on New Mexico was sponsored by a grant from the New Mexico Traffic Safety Bureau.

LAW & SOCIETY REVIEW, Volume 21, Number 2 (1987)

> justifiably dealt with as an action demanding more than the response to traffic violations. . . . At the level of the daily acts of courts and police . . . drivers' licenses are seldom suspended or revoked on a first offense, jail sentences are seldom invoked, charges are reduced to lesser offenses in many instances, and the characteristic "punishment" . . . is a fine. . . . A different portrayal of the drinking-driver emerges from the routine legal act than from the public ceremony of official behavior.

This paper discusses two studies of laws reflecting the more serious view of drunk driving. In 1982 federal legislation (Alcohol Traffic Safety Programs Pub. L. 97-364 (1982)) provided monetary inducements for the states to pass a variety of drunk-driving laws. Among the four requirements for a basic grant was the adoption of a law that stipulated a mandatory jail sentence of forty-eight consecutive hours or ten days of community service for drunk drivers found guilty of two offenses within five years. The majority of states, including Indiana (Ind. Code Ann. § 9-11-3-4 (West 1983)) and New Mexico (N.M. Stat. Ann. § 66-8-102E (1984)), passed such statutes. The Indiana law, which became effective in September 1983, requires the repeat offender to serve a jail term of five days (including at least forty-eight consecutive hours) or to complete at least eighty hours of community service. The New Mexico law provides that a repeat offender serve a jail sentence of "not less than forty-eight consecutive hours which shall not be suspended or deferred or taken under advisement." This law, effective on July 1, 1984, does not allow the option of community service. Agencies in both states independently commissioned empirical studies, which we carried out to determine the extent of compliance with their statutes.

II. METHODS

Both studies began with a sample of recidivist drunk drivers appearing in central state records. In New Mexico, these drivers had committed their most recent offense between the inception of the law in July 1984 and the following March. In Indiana, where the law took effect in September 1983, the most recent offense of members of the sample had occurred between January and December 1984. In both studies, the initial lists were screened to assure that those named had been convicted within the previous five years and thus were properly subject to the legal mandate. Because site visits were necessary, data were collected from only certain counties in each state. In New

Mexico, Ross selected the eight counties producing 70 percent of all drunk-driving citations and studied the universe of all 238 repeat offenders. In Indiana, Foley used a representative sample of fifteen counties and chose a subsample of 753 cases in these counties for study.

We visited all courts and detention facilities in the selected counties to verify the disposition of the identified cases. These visits met with a variety of problems. First, although the cooperation of the courts and jails was good in general, in New Mexico's largest county we were denied direct access to the jail records and had to rely instead on the figures calculated by the jail's clerks under our instructions. This resulted in a less motivated search for troublesome data, such as misspelled names and transposed birthdates. Some otherwise retrievable cases may therefore have been lost. Second, in both states records were inadequately maintained at some locations. For instance, certain counties immediately filed closed cases in inaccessible dead storage; in other places records were filed according to eccentric criteria that would not occur to outsiders (for example, whether fines had been paid). We generally resolved these problems with the assistance of local personnel. One New Mexico county, contrary to statute, kept no jail records at all, and in both states we found jurisdictions with jail records showing only the dates and not the hours of entry and exit.

We attempted to locate cases in both court and jail files that involved a repeat offender who had been sentenced to and experienced the legislatively mandated penalties. Because of the collection problems noted above, cases without proof of sentence and service were treated as examples of noncompliance, and thus our estimates are conservative. We categorized any case that could not be found in court files or that was inadequately described in the files as not complying with the mandate. This procedure probably led to some overestimation of the departure from the legislative prescription. However, to have done otherwise would have involved errors by overestimating compliance.

Jail files were much more imprecise than court files. To illustrate, although we could accept a record of a sentence of "two days" in the New Mexico court records as proof of compliance, we could not accept a jail record that merely showed a prisoner's entry on January 21 and release on January 23 because of the likelihood that the person had served a term of less than forty-eight hours. We did, however, accept as evidence of compliance entry on January 21 and release on January 24, in addition to forty-eight-hour periods defined by time

of day in the records. Because of the practice in Indiana of reducing the length of a sentence for a prisoner's "good time," we counted only those sentences of five days, not served on weekends only, as compliant.

III. RESULTS

In New Mexico, we divided the 238 cases into four groups:

1. Sentence and confinement complied with the mandate (106 cases, or 45 percent).
2. Sentence complied with the mandate but no proof that the sentence was served (60 cases, or 25 percent).
3. Sentence totally suspended (24 cases, or 10 percent).
4. No jail sentence (48 cases, or 20 percent).

Overall, fewer than half of those convicted of a repeat drunk-driving offense could be shown to have received the mandated treatment. The sentence conformed to the mandate in an additional 25 percent of the cases, and some of these defendants doubtless also received the mandated confinement, but this cannot be proven because of insufficient information in the jail records. However, in 30 percent of the cases the judges blatantly failed to give the mandated sentence. Somewhere between 30 percent and 55 percent of the convicted drunk-driving recidivists in New Mexico escaped the mandated sentence of forty-eight consecutive hours in jail.

In Indiana, we statistically weighted each county's contribution to the total to estimate statewide compliance with the mandatory sentence. Based on this analysis of the 753 cases we estimate that 64 percent of defendants served at least forty-eight consecutive hours in jail and that an additional 6 percent did at least eighty hours of community service. Thus 70 percent of those convicted could be shown to have received legally mandated treatment, compared to only 45 percent in New Mexico. The considerably higher compliance rate in Indiana is only partially explained by the community service provision in the state's law. Some of the difference may also be a consequence of better recordkeeping in Indiana's county offices. However, 14 percent of the Indiana repeat offenders neither served time in jail nor performed any community service, and the remaining defendants served or worked less than the mandated time.

IV. DISCUSSION

Divergences between prescriptions and outcomes appear at two points in the process of punishing recidivist drunk drivers—at the sentencing stage and in the jail experience. The

former, which may be the more interesting because it involves higher-level personnel with more direct obligations to legal doctrine, will be discussed first.

How do judges avoid prescribing specific, legislatively mandated sentences? Consideration of the two empirical investigations suggests the following answers, among others.

First, adjudication and sentencing may take place in ignorance of prior offenses. Prior records may be unavailable to the courts or, more likely, may not be routinely consulted. For example, municipal courts in Indiana did not have jurisdiction over second-offense drunk-driving cases, although between 5 percent and 10 percent of such cases were in fact decided in these courts. These courts did not normally check drivers' histories, even in their own records, and all cases were tried on the assumption that the defendant was a first offender. Although some courts in both states had computerized records systems and in both states a central records file was available to law enforcement officials, these sources may not have been checked in routine cases, even though such consultation was required by law.

Second, the judges interpreted the mandate to exclude various kind of cases. For example, some Indiana judges believed that jail was mandatory only for those whose prior drunk-driving conviction had been classified as a felony. Certain New Mexico judges explained that they were barred from administering an augmented penalty, such as jail, in a second offense when the defendant could not be proved to have been represented or to have intelligently waived his right of counsel in the prior conviction. Others felt that the prior conviction had to have been under state, rather than municipal law. These were not frivolous excuses; the judges could point to supportive case law. It was also argued, with less merit, that if the prosecution failed to mention the prior offense it need not be taken into account.

Third, some judges apparently just disregarded statutory strictures. The requirement that no sentence could be entirely suspended was blatantly overlooked in 10 percent of all New Mexico cases. The Indiana statute's provision that no "good time" could be credited against the length of a sentence was likewise widely flouted, with some courts actually stating on the jail commitment papers that such credit could be earned. Judges engaged in these practices without fear of correction, as far as we could determine.

Additional noncompliance with the laws appeared at the confinement stage. Although both statutes described the

mandatory jail penalty in hours rather than days, in practice these definitions appear to have been transformed so that the forty-eight hours was not taken literally. Jailers sometimes seem to have equated spending part of a day in jail with serving an entire day—indeed, this is generally mandated in Indiana law—so that remaining in jail for a few hours that spanned a midnight and thus included parts of two days was regarded as complying with a forty-eight-hour requirement. Furthermore, jail keepers in both states frequently did not interpret the hours of confinement strictly, releasing prisoners sentenced to "two days," for example, after thirty, forty, forty-five, or forty-seven hours. This was often the case for the "weekend guests" of Indiana jails. Such practices were either condoned or not noticed by the referring courts.

We have reviewed how the criminal justice systems in these two states avoided applying the apparently firm mandates of the drunk-driving laws in question; the remaining issue is why they did so. Unfortunately, because neither of us anticipated the extent of the noncompliance, we did not plan systematic interviews with the personnel in question. We did visit with judges as occasion permitted. Evidence from these informal meetings suggests that a principal motive for shielding a substantial number of recidivist drunk drivers from mandatory imprisonment lies in the view of justice system personnel that drunk driving is not the serious matter the statute presumes. The everyday experience of police, prosecutors, and judges undermines the image of the drunk driver as the "killer drunk." The typical defendant appears without having caused any harm but merely being detected weaving down the highway at midnight on Saturday. Sometimes an upstanding member of the community, with character witnesses attesting to his moral fiber and his wife and children sobbing in the back of the courtroom, the defendant may appear poorly matched with the penalty (Ross, 1976). Moreover, judges resent the law's intrusions on their traditional discretion. Severe, mandated penalties such as license revocation on the first offense (often accomplished administratively rather than judicially) and jail terms on the second constitute an unsubtle rebuke to the experiences and even the competence of the judiciary. Beyond these factors, judges acting as administrators may seek to avoid the cost of jail sentences. For example, one New Mexico county had no jail of its own, the facility having been closed by state inspectors. To comply with the legislative mandate, the county would have had to ferry recidivist drunk drivers to and from jails in adjacent counties, with the taxpayers of the referring county

being forced to bear the costs of the round trips of about one hundred miles and the prisoners' food and lodging in the receiving jail. It is perhaps unsurprising that no drunk-driving offenders were sent to jail from this county.

Not only are justice system personnel motivated in several ways to avoid the mandated penalty, but those responsible for the mandate are not in a good position to enforce it. One might initially wonder whether the state legislators, enacting legislation demanded by the federal government as a condition for receiving subsidies, care terribly whether its provisions are carried out. Beyond this, the machinery for controlling the judiciary seems, on the basis of current cases, to be oriented toward preventing venal, self-serving conduct such as accepting bribes or entertaining conflicts of interest, rather than principled deviance of the kind seen here. The bodies that supervise the judiciary—the Judicial Standards Commission in New Mexico and the Indiana Judicial Qualification Commission—are understaffed and do not systematically monitor judicial behavior. Actions stem from complaints, usually from people like prosecutors who are intimately familiar with events within the justice system. Studies of the police (Chevigny, 1969; Lee and Visano, 1981) reveal that self-interested corruption may be considerably easier to identify and control than deviance in the interest of the organizational goal. So too, here, violation of the legislative mandate may be not only hard to detect but also difficult to prosecute. It may be defended in principle as being in the interests of equity and justice. As one New Mexico judge said in an interview when discussing mandatory license sanctions, "The law was a response to MADD and other pressure groups. The legislature got stampeded. The courts have to resist these pressures."

Jailers are even farther removed than judges from surveillance by those who would have mandatory penalties applied. Records kept by sheriffs and other officials in these states varied from computerized data bases to dime-store notebooks; in one New Mexico county, no records were kept at all! Few demands seem to be placed on these systems, and their stewards are consequently responsible to no one. Since no protest will be heard from prematurely released defendants, the application of the law's sentence can be and is mitigated with impunity.

One might question whether the judicial noncompliance noted here is fundamentally different from that observed in regard to mandated sentences generally. As our studies are limited, we are not in a position to offer an empirically based answer. However, the monopolization of drunk-driving politics by

a social movement with a deterrent and retributive program seems likely to present judges with especially poignant dilemmas. The prescription of jail for drunk drivers accords with the "killer drunk" image, whereas, as noted above, the defendants are usually people who were caught driving erratically but had not injured anything or anyone. Perhaps judges intuit that although the relative risk of an accident is much greater for the driver impaired by alcohol than for the sober driver, the absolute risk is very small. (One can calculate that there is only one alcohol-involved death for every 330,000 miles driven by drunk drivers in the United States.) The disjunction between the mandate and the sense of equity may thus produce more noncompliance with the drunk-driving laws than with most other such statutes.

We must also consider whether the noncompliance demonstrated here is a lasting or a temporary phenomenon. A second study in progress in Indiana is finding less noncompliance than in the first year, which is consistent with the hypothesis that judicial adaptation to the legislative mandate may be gradual. It is possible that a legislative declaration of a problem definition will eventually lead to adjustments in the views of others. This is the "moral educational" aspect of general prevention proposed by some Scandinavian criminologists (Andenaes, 1974). The question cannot be confidently answered with present information, but a scenario involving renewed legislative declarations along with increased pressure by the anti-drunk-driving movement on nonconforming judges could lead to substantial compliance over time. However, the strong institutionalization of drinking and driving in American society and the generally cyclical nature of movements addressing social problems could result in these laws becoming dead letters. The answer will come with more time and more research.

REFERENCES

ANDENAES, Johannes (1974) *Punishment and Deterrence.* Ann Arbor: University of Michigan Press.

CHEVIGNY, Paul (1969) *Police Power: Police Abuses in New York City.* New York: Random House.

GUSFIELD, Joseph R. (1981) *The Culture of Public Problems: Drinking-Driving and the Symbolic Order.* Chicago: University of Chicago Press.

LEE, John A., and Livy A. VISANO (1981) "Official Deviance in the Legal System," in H. L. Ross (ed.), *Law and Deviance.* Beverly Hills: Sage.

ROSS, H. Laurence (1976) "The Neutralization of Severe Penalties: Some Traffic Law Studies," 10 *Law & Society Review* 403.

——— (1962) "Traffic Law Violation: A Folk Crime," 8 *Social Problems* 231.

STATUTES CITED

Alcohol Traffic Safety Programs Pub. L. 97-364 (1982).
Ind. Code Ann. § 9-11-3-4 (West 1983).
N.M. Stat. Ann. 66-8-102E (1984).