AN EMPIRICAL DESCRIPTION OF ADMINISTRATION OF JUSTICE IN DRUNK DRIVING CASES

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AUTHOR'S NOTE: *This paper is a revised version of one presented to the Conference of North American Judges Association in Tucson, Nov. 16, 1971. The study reported here was conducted under the auspices of the Vermont Department of Mental Health under a grant from the Council on Law Related Studies of Cambridge, Massachusetts.*

This paper is about the administration of justice in drunk driving cases. It is the second in a series (Little, 1971a) stemming from an intensive study of law enforcement and judicial systems in operation. The data reported here were obtained in 1970 and 1971 in a study carried out in the State of Vermont with the purpose of learning about how justice is administered in DWI cases in the context of a known legal framework. The method of the study was to obtain representative samples of DWI offenders and violators of other serious motor vehicle offenses, and trace what happened to them with the police, in the courts and with licensing agencies. The complete chronicle of what happened to each offender was carefully scrutinized, beginning with the time of arrest and ending when the case had been disposed of. The earlier paper contained a number of preliminary descriptive statistics, and this one follows up that background with more detailed analysis.

Before examining these data, however, it may be in order to make a few prefactory remarks about why undertaking such a study is worthwhile. Ultimately, of course, the goal is to find a way to increase the effectiveness of law enforcement and judicial processes in reducing the social costs levied against us by drunk drivers. Although a large fraction of that goal can be expressed as "deterrence," we in this country have recently expanded it to include more general amelioration of life-problems confronting that special segment of DWI offenders made up of alcoholics and other problem drinkers (Little, 1970). In that regard, a DWI apprehension serves as a case finding method for locating the victims of the alcoholism epidemic (Filkins, 1970; Little, 1971b). Once located, the victims can be offered medical and rehabilitative services.

https://doi.org/10.2307/3052925 Published online by Cambridge University Press

A separate, but related, goal is the matter of fair, effective and efficient administration of justice. That is the primary topic of this paper. If a typical citizen is to become entangled in the web of criminal or quasi-criminal justice, odds are that it will be in connection with a motor vehicle offense. Hence, the way justice is dispensed in these cases will have much to do with shaping general conceptions of what the system of justice in this country is really like. All too often citizens come away from tiffs with the law embittered and distrustful; whereas with a little more care on the part of all of us charged with tending the system, a different impression might have been made. I do not know what effect bad impressions have on the deterrent quality of law enforcement and judicial operation, but it is hard to believe that it could be good. Aside from that, before the faults of a system can be eliminated, except by a stroke of luck, the reasons that the faults exist must be understood. For example, it has been traditional lore to say that weak-kneed judges are a prime reason that the legal system is not effective in deterring drunk drivers. No less a public figure than the current head of the National Highway Safety Administration is reported to have repeated that charge as late as summer 1971.[1] The impression gained from the study reported here is that the criticism is too crude and simplistic to describe any faults one might find in Vermont.

The first question to be examined is this: What happens in the judicial process to offenders picked up in violation of motor vehicle laws that outlaw dangerous driving practices? Four offenses were chosen for studying this question. First is the DWI offense which in Vermont had been interpreted to mean operation of a motor vehicle with faculties impaired to the "slightest degree" (*State v. Bradbury*, 1955; *State v. Storrs*, 1932) because of the ingestion of alcohol. Backing up the DWI statute is the Vermont chemical test law[2] that sets the presumptive limit of illegality at 0.10 percent by weight concentration of alcohol in the driver's blood (BAC). The second offense is Careless and Negligent Driving (CN) which outlaws the operation of a motor vehicle in a "careless and negligent manner" or "in a manner to endanger or jeopardize the safety, life or property of a person."[3] The third offense, Careless and Negligent, Accident Resulting (CNA), is merely an unofficial subcategory of CN and is hereafter referred to as CNA. The fourth offense is the heterogeneous group of charges arising out of fatal crashes, and is hereafter referred to as FCO. Putting

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one of these labels on an offender indicates the original offense he was charged with and does not indicate what happened as a result of the charge.

As a matter of interest, the statistics that follow were developed from samples of 234 DWI cases, 124 CN cases, 101 CNA cases, and 18 FCO cases. Each of the first three samples is thought to be more or less randomly selected from the total populations of those offenses occurring in Vermont in 1969 and is believed to be reasonably representative in a statistical sense. Although the fourth sample is too small to draw statistically reliable inferences that could be applied to other populations, it is thought to be exhaustive of Vermont cases arising in 1969.

What disposition was made of these cases in court? Table 1 summarizes the results. Beginning with the 234 DWI cases, one sees that 58.5 percent of the persons originally charged with a DWI offense were eventually convicted on the DWI charge. Of the original DWI offenders, however, only 28.2 percent, or slightly less than half of the final number of DWI convictees, pled guilty or *nolo contendere* at arraignment. This means that 30 percent of the total population of DWI offenders pled "not guilty" at arraignment and were convicted of DWI at a later time. Interestingly enough, not one single DWI conviction resulted from completed trial. All DWI convictions were obtained by pleas.

TABLE 1: FINAL DISPOSITION OF ORIGINAL CHARGES

	DWI n=234	**CN 124**	**CNA 101**	**FCO* 18**
Convicted Original Charge	58.5%	55.6%	51.4%	50.0%
Original G. or N.C. Pleas	(28.2%)	(46.0%)	(33.7%)	(27.8%)
Convicted Lower Charge	30.7%	31.5%	25.7%	16.6%
Convicted Higher Charge	0.4%	0.8%	0.9%	5.5%
Convicted Other (?)			0.9%	
Acquitted	0.4%			
Mistrial	0.8%			
Dropped or N.P.	7.6%	11.3%	13.8%	22.2%
Dropped or N.P. (Lower Charge)			0.9%	
Pending	1.3%			5.5%
Don't Know		0.8%	5.9%	
Overall Conviction Rate	89.6%	87.9%	78.0%	72.1%

* FCO Convictions:
2 MSL, 7 CNF, 1 LSA, 1 DWI, 1 CNA, 1 VLRF.

Of the sample of original DWI offenders an additional 30.7 percent were convicted on a reduced charge. All of these convictions came after having pled "not guilty" at arraignment and all were obtained without the completion of a trial. As later

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discussion will suggest, this group of cases plus the group of delayed DWI convictions are prime targets in exploring whether legal machinations detract from the concept of fair, efficient and effective administration of justice.

Of the sample of 234 DWI charges, one case ended in an acquittal and two ended in mistrials. Thus, of three trials known to have been conducted as a consequence of 234 DWI apprehensions, none resulted in a conviction. To the extent that this sort of record, which may be expected to recur in many jurisdictions,[4] elicits the "judges and juries are the weak links in the process" arguments, those arguments are not well founded. They completely overlook the facts that 58.5 percent of the apprehended DWI offenders were convicted as charged and 89.2 percent were convicted on either the original or a reduced charge. Expanding the scope of this argument to cover the nation as a whole, one finds, according to the FBI Crime Reports, that DWI cases have a 90 percent overall conviction rate, (FBI, 1969: table 15) which is higher than that of any other reported offense, including drunkenness. Furthermore, DWI offenders suffer a conviction rate *as charged* of 77 percent, which is second only to drunkenness. (Refer to Table 2 for further statistics analyzing this argument.) Hence, although it may be true that the administration of justice in these cases leaves much room for improvement, these facts do not support the proposition that a few more convictions by trial or a few less acquittals is the most serious aspect of the situation.

TABLE 2: DISPOSITION OF PERSON FORMALLY CHARGED BY POLICE IN 1969*

Selected Offenses	Guilty as Charged	Guilty Lesser Offense	Acquitted or Dismissed	Referred to Juvenile Court	Approximate Number of Cases
DWI	77.0%	13.0%	9.2%	0.8%	150,000
Forgery & Counterfeiting	54.1%	9.5%	22.2%	14.2%	12,000
Stolen Property: Buying, Receiving, Passing	36.1%	7.2%	20.1%	36.5%	16,000
Aggravated Assault	36.8%	14.7%	30.7%	17.9%	34,000
Larceny-Theft	42.7%	3.3%	13.6%	40.4%	200,000
Drunkenness	86.2%	0.7%	11.4%	1.6%	806,000
Total of All Offenses**	62.3%	3.2%	15.9%	18.5%	2,403,000

* Statistics represent 2,540 cities with an aggregate population of 66, 155,000. Source: Crime in the United States, Uniform Crime Reports 1969, Table 15.

** The totals are for all offenses reported by the FBI and not of the six selected offenses detailed here.

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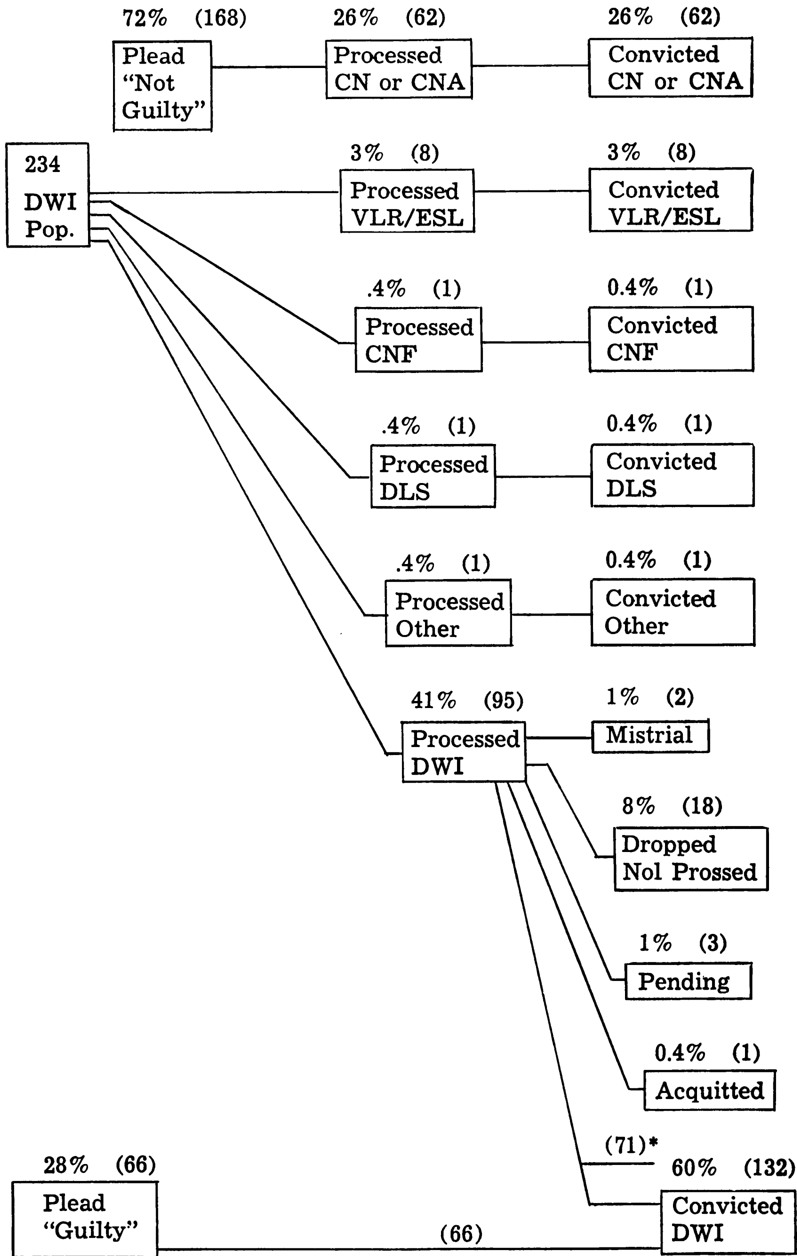
FIGURE 1



* The 71 offenders initially pleading "not guilty" and eventually convicted of the DWI charge comprise 74.6% of the offenders processed DWI after entering the N.G. plea, and 42.3% of the entire subpopulation that pled "not guilty."

Completing the disposition of the DWI offenses are 0.4 percent (1 case) that ended with a conviction on a more serious

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charge (CN fatality resulting); 1.3 percent (3 cases) still pending at the time of last checking in summer 1971; and 7.6 percent (18 cases) that were dismissed or *nol prossed.*

Statistics describing the dispositions of CN, CNA and FCO cases are also to be found in Table 1. A general similarity appears in the patterns of dispositions of the various offenses, particularly with respect to convictions on original charge. Note, however, that fewer DWI and FCO offenders plead guilty immediately, probably because of the greater severity of the penalties. Note also that conviction rates (as charged and overall) are higher for DWI charges than any of the other charges and the DWI *nol pross* rate is lowest of the group. Figure 1 displays in detail the disposition of DWI cases.

The *next question* to be addressed is: What is the consequence of being convicted of the offenses in question? Tables 3 through 6 contain data and statistics descriptive of certain convicted populations. Those convicted populations are defined as follows:

DWI-A — The population of offenders originally charged with a DWI offense and ultimately convicted on the DWI charge.

DWI-R — The population of offenders originally charged with a DWI offense and ultimately convicted on a reduced charge, either CN or CNA.

CN-A — The population of offenders originally charged with a CN offense and ultimately convicted on the CN offense.

CNA-A — The population of offenders originally charged with a CNA offense and ultimately convicted of the CNA offense.

CN/CNA-R — The population of offenders initially charged with a CN or CNA offense and ultimately convicted on a VLR (or equivalent) offense. (VLR means "violation of the law of the road" and covers a number of minor traffic law violations in Vermont law.)[5]

Breaking down the populations in this way not only allows for comparisons as to consequences of being convicted of the various offenses, but more importantly, it also allows for comparisons between what happens to offenders charged with DWI and convicted DWI, and offenders charged with DWI but convicted on a reduced charge. Table 3 is illustrative. Each population of convicted offenders is described with respect to age

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TABLE 3: STATISTICS DESCRIPTIVE OF VARIOUS CONVICTED AND EXONERATED

Convicted Population		Age (Years)	BAC	Had Lawyer	Offense to Arraignment (Days)	Arraignment to Disposition (Days)	Offense to Disposition (Days)
DWI-A n=137	Average	36.5	0.225	Yes 56.6%	10.9	37.3	48.2
	Median	34.7	0.219	DK=1(0.7%)	3.0	3.4	19.4
	Mode	23.0	0.210		1.0		1.0
	Minimum	18.0	0.120				
	Maximum	70.0	0.380		94.0	504.0	507.0
	DK=0				DK=2(1.5%)	DK=2(1.5%)	DK=2(1.5%)
DWI-R n=62	Average	36.1	0.162	Yes 91.9%	12.1	80.3	92.2
	Median	35.0	0.143	DK=2(3.2%)	2.6	35.2	57.5
	Mode	20.0	0.190		1.0		2.0
	Minimum	17.0	0.001				
	Maximum	60.0	0.450		87.0	459.0	459.0
	DK=0		DK=35(56.5%)		DK=1(1.6%)	DK=1(1.6%)	DK=1(1.6%)
CN-A n=69	Average	24.9	0.160	Yes 25.0%	17.6	80.1	25.6
	Median	20.5	0.141	DK=1(1.4%)	8.7		11.3
	Mode	17.0	0.120		3.0		4.0
	Minimum	16.0	0.110				1.0
	Maximum	72.0	0.300		2.8	140.0	218.0
	DK=1(1.4%)		DK=63(91.3%)		DK=0	DK=0	DK=0
CNA-A n=52	Average	28.5	0.065	Yes 43.1%	22.1	27.6	49.9
	Median	22.0		DK=1(1.9%)	12.9		17.0
	Mode	21.0	0.050		13.0		13.0
	Minimum	16.0	0.050				2.0
	Maximum	68.0	0.080		142.0	199.0	269.0
	DK=0		DK=50(96.2%)		DK=0	DK=0	DK=0
CN/CNA-R n=74	Average	25.8	17.0		22.9	37.1	60.1
	Median	21.6			12.5	15.5	45.5
	Mode	19.0	17.0		10.0		10.0
	Minimum	16.0	17.0				4.0
	Maximum	70	17.0		130.0	266.0	305.0
	DK=0		DK=73(98.6%)		DK=0	DK=0	DK=0

NOTE: DK means "don't know," indicating the number of cases for which measurements were not available. Statistics are based on cases of known values.

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distribution; BAC distribution; distributions of the amount of time elapsed between the commission of the offense and arraignment, and time elapsed between the commission of the offense and final disposition of the case; and whether or not offenders had the aid of legal counsel. Each distribution is described with respect to its average value, its median value (half the cases have values less than the median value and half greater), its modal value (most frequently occurring), its minimum and maximum values.

As an illustration of the information that can be obtained, refer to Table 3. Rows one and two respectively provide a contrast between DWI offenders who were convicted as charged (DWI-A) and DWI offenders who were convicted on a reduced CN/CNA charge (DWI-R) (although some DWI cases ended up as convictions of offenses even less culpable than CN/CNA, they were too few for meaningful comparisons). As to age distributions, the difference, if any, is small and seems unimportant. Both distributions have an average age of slightly greater than 35 years. (Note, however, that offenders charged with non-DWI offenses are younger.) As to BAC distributions, a marked difference emerges. DWI-A convictees in general had much higher BAC (average 0.225 percent) than did DWI-R convictees (average 0.162 percent) and this in part accounts for the reduction to CN/CNA in the latter population. Another factor of apparent importance is that the DWI-R population had more members that had not been given a BAC test than had the DWI-A population. Hence, reasonable inference arises that not having been tested tends to favor a reduced charge. It should be noted, however, that the group of DWI-R offenders that did submit to a BAC test produced BAC statistics well above the 0.10 percent Vermont presumptive limit of illegality.

The third column of Table 3 indicates the percentage of each population that was represented by legal counsel. It can be observed that the amount of lawyer involvement in DWI charges ending up with convictions on a reduced charge (92 percent had lawyers) was much greater than in DWI convictions as charged (only 57 percent had lawyers). This suggests that lawyers are beneficial to DWI clients to the extent of getting charges reduced. Assigning a total attribution of credit to lawyers would be improper, however, because, as has been observed, the DWI-R population has a lower BAC distribution and more instances of no BAC tests than does the DWI-A population. Closer analysis suggests that when an offender scores

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above a relatively high BAC (about 0.20 percent), having a lawyer probably does not prevent a DWI conviction in the great bulk of the cases. Discussions with defense lawyers in Vermont corroborate this; most defense lawyers say they would recommend a guilty plea in the face of a very high BAC test result, absent special defense circumstances. In any event, however, having a lawyer is associated with longer periods of time elapsing while justice is being administered in these cases.

The last two columns of Table 3 describe time elapses in disposing of motor vehicle offenses. With respect to delay between the time the offense is committed and the time the offender is arraigned, no important difference appears between the DWI-A and DWI-R populations. (Observe that non-DWI offenses show greater delays between offense and arraignment. This is probably accounted for by the fact that larger numbers of DWI offenders are arrested and jailed with arraignment following soon after; whereas, after being apprehended, non-DWI offenders are customarily released to be summoned for appearance at a later date.) Important differences in the time elapsed between commission of offense and disposition of the case emerge between the DWI-A and DWI-R populations, however. DWI-R cases show a median elapsed time of 57.5 days, offense to disposition, which is almost triple the median of 19.4 days of the DWI-A cases. These statistics demonstrate clearly that it takes time to negotiate or otherwise obtain a reduced charge. In assessing the importance of a 57.5 days median, it should be recalled that half the cases experience delays longer than the median.

The increased time lag between time of offense and time of disposition in cases resulting in conviction on a reduced charge raises the next question about the administration of justice in these situations: Why the delay?

The data in Table 4 provide important insights into why. Of the offenders convicted on a DWI charge, not a single one received a period of license suspension less than a whole year in duration and slightly more than one-fifth of them received suspensions of two years or more. This is attributable to Vermont's DWI statute that imposes a mandatory one year suspension for a first offense, six years for a second offense, and life suspension for third offense.[6] Although hardship reinstatements are possible after expiration of one-half the suspension period,[7] that grace was accorded to only 3.7 percent (5 cases) of the population of convicted DWI offenders in the sample.

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TABLE 4: LICENSE SUSPENSIONS OF CONVICTED POPULATIONS BY PERIOD OF SUSPENSIONS

Convicted Population	None	10-12 Days	30 Days	60 Days	90 Days	120-150 Days	180 Days	One Year	Two Years (1½ Yrs.)	Six Years	Life	Indefinite	None: Clerical Error	None: Already Suspended	Re-exam
DWI-A n=116 DK=21	0	0	0	0	0	0	0	79.3% (92)	1.7% (2)	16.4% (19)	0.9% (1)	1.8% (2)	0	0	0
DWI-R n=44 DK=18 (29%)	11.4% (5)	13.7% (6)	9.1% (4)	34.1% (15)	0	0	18.2% (8)	2.3% (1)	0	0	0	4.5% (2)	2.3% (1)	4.5% (2)	0
CN-A n=68 DK=1 (1.4%)	13.2% (9)	55.9% (38)	19.1% (13)	4.4% (3)	1.5% (1)	0	0	0	0	0	0	4.4% (3)	1.5% (1)	0	0
CNA-A n=52 DK=0	25.0% (13)	44.2% (23)	15.4% (8)	3.8% (2)	3.8% (2)	0	7.7% (4)	0	0	0	0	0	0	0	0
CN/CNA-R n=67 DK=9	40.3% (27)	50.8% (34)	4.5% (3)	1.5% (1)	0	0	0	0	0	0	0	1.5% (1)	0	0	1.5% (1)
VLR FR. DWI DK=4 n=4	25.0% (1)	25.0% (1)	0	25.0% (1)	0	0	0	0	0	0	0	0	0	0	25.0% (1)

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Although DWI offenders who are convicted on a lesser charge do not in general get off without any period of license suspension, the duration is much shorter. Those few cases showing six month suspensions almost certainly resulted from the offenders' having refused to submit to a BAC test, thereby triggering the automatic implied consent suspension of six months duration.[8]

By contrast to the rigid application of the suspension law, let us now examine the application of other penalties. Descriptions of the sentences and fines imposed in these cases are shown in Tables 5 and 6 respectively. Despite the fact that Vermont law allows for imprisonment for a period up to two years for a first DWI conviction,[9] sentences, even short ones, are seldom imposed and are almost always suspended *in toto*. Very few DWI offenders actually serve any time after conviction (5 of 137 convictees), and only 1 of the convicted offenders from the non-DWI populations actually served any time. In substance, imprisonment as a penalty for motor vehicle offenses has been excised from the law, leaving only fines as criminal penalties and license suspensions as an administrative penalty. Between these two, there can be no doubt that the latter is the more dreaded. Vermont judges, prosecutors, defense lawyers, and policemen all agree that the mandatory one year license suspension is the consequence that apprehended DWI offenders and their lawyers struggle so hard to avoid.

TABLE 5: SENTENCES

		Period of Sentence						
Convicted Population	None	1-10 Days	11-30 Days	31-60 Days	61-90 Days	91-180 Days	181-366 Days	More Than a Year
DWI-A n=137	73.0% (100)	1.5% (2)	10.9% (15)	8.8% (12)	3.6% (5)	0	1.5% (2)	0.7% (1)
DWI-R n=62 DK=0	88.7% (55)	1.6% (1)	4.8% (3)	1.6% (1)	3.2% (2)	0	0	0
CN-A n=69 DK=0	91.3% (63)	1.4% (1)	4.3% (3)	1.4% (1)	0	1.4% (1)	0	0
CNA-A n=51 DK=1 (1.9%)	84.3% (43)	0	7.8% (4)	5.9% (3)	2.0% (1)	0	0	0
CN/CNA-R n=73 DK=3	98.6% (72)	0	1.4% (1)	0	0	0	0	0
VLR from DWI	100.% (8)	0	0	0	0	0	0	0

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TABLE 6: FINES

	Amount of Fine												
Convicted Population	**None**	**Up to $25**	**$26-$50**	**$51-$100**	**$101-$150**	**$151-$200**	**$201-$300**	**$301 Up**	**Average**	**Median**	**Mode**	**Minimum**	**Maximum**
DWI-A n=137 DK=0	4.4% (6)	0.7% (1)	1.5% (2)	2.2% (3)	10.2% (4)	59.9% (82)	16.1% (22)	5.1% (7)	$107	$100	$100	0	$270
DWI-R from DWI n=62 DK=20	1.6% (1)	1.6% (1)	0	61.3% (38)	17.7% (11)	12.9% (8)	3.2% (2)	1.6% (1)	$ 67	$ 52	$ 50	0	$300
CN-A n=69 DK=0	1.4% (1)	0	4.3% (3)	66.7% (46)	4.3% (3)	14.5% (10)	7.2% (5)	1.4% (1)	$ 59	$ 46	$ 50	0	$226
CNA-A n=52 DK=0	1.9% (1)	0	11.5% (6)	51.9% (27)	15.4% (8)	7.7% (4)	38.0% (2)	7.7% (4)					
CN/CNA-R from CN/CNA n=73	0	5.5% (4)	35.6% (26)	54.8% (40)	2.7% (2)	0	1.04%	0	$ 33	$ 30	$ 25	$ 15	$150
VLR from DWI n=8	0	12.5% (1)	37.5% (3)	50.0% (4)	0	0	0	0					

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Vermont, perhaps more than most eastern states, at least, can be an unfriendly place unless one has ready access to the use of a private motor vehicle.

Sanctions other than criminal and administrative penalties exist, of course, but they are harder to measure and tabulate. One cannot easily estimate losses in community respect, familial respect and self-respect that are suffered as a consequence of a DWI conviction, particularly for a first offender. Nor can one easily measure pecuniary losses flowing from not having use of a car. (Part of the Vermont project involves attempting to assess these losses by directly asking offenders about them. So far, practical difficulties in obtaining information have not been overcome.) Furthermore, a secondary consequence of a DWI conviction which is often overlooked in examining consequences is that it can impose rather severe financial losses. In Vermont, as in most states, a DWI conviction throws the offender under the requirements of the financial responsibility law.[10] In short, this means that the convicted offender, once his driving privileges are restored, must thereafter maintain financial security to pay for any future crashes he may cause. Most often, of course, security is satisfied by obtaining liability insurance.[11] Insurance companies use this situation to place the insured person into high risk brackets, meaning high insurance rates. As a result of DWI conviction, insurance costs may shoot up by a factor of two or there or more and hold up there for at least three years. In sum, the added costs can range from several hundred dollars to a thousand dollars or more over the three year period.[12] Adding this additional cost to a lawyer's fee of $150 to $500[13] in a typical case and to a fine of $100 more or less (Table 6) produces a substantial sum, amounting to an out-of-pocket disaster for many offenders. Beating down the charge to CN cuts back on these costs drastically.

Of all the components of the law enforcement, judicial and administrative system that an offender ushers himself into upon being apprehended on a DWI offense in Vermont, the one that appears to operate with the greatest consistency and internal integrity is the Licensing Division of the Department of Motor Vehicles. Except in very infrequent cases when clerical snafus intervene, convicted DWI offenders suffer a one year suspension — period! — and offenders who refuse to submit to a BAC test suffer a six month implied consent suspension — period! Moreover, hardship reinstatements are issued only when a genuine, indisputable hardship is present; a substantial inconvenience definitely will not suffice.

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In applying the law as written, the commissioner of Motor Vehicles and his deputies can be justifiably proud of their operation. But in this situation, conscientious adherence to the suspension law tends to produce ironical consequences throughout the remainder of the system. A fairly sound theory of what happens may be propounded as follows. The American public is not yet willing to equate the culpability of the DWI offender with the severity of the penalties provided by law, including Vermont's one year suspension. At least, sizable numbers of judges, prosecutors, defense lawyers, and policemen believe that the public will not accept that equation. Hence, despite the fact that the law provides for them, prison sentences are almost never imposed in DWI cases,[14] and fines usually fall well below the possible maximum. Therefore, judicious sentencing practices by and large lead to public acceptance of the penalties actually meted out. But the inflexibility of the Vermont license suspension law throws a snag into the system. The only practical flexibility available in suspensions is in discharging the offender altogether or in reducing the charge. In Vermont the former occurs relatively infrequently (8 percent) but the latter is commonplace (30 percent). Moreover, if the judicial process has evolved this sort of discretionary outlet, one may reasonably guess that law enforcement systems similarly function in the field. Although finding out how often obviously drunk drivers are apprehended and then charged with a lesser offense is virtually impossible, interviews with Vermont police officers suggest that this sort of enforcement discretion is exercised, but probably not as a general practice.[15]

The mere fact that any given offender is convicted on a CN charge rather than on DWI is probably not important from a larger perspective. But when the system for administering justice becomes geared to produce that result in a large number of cases, the goal of fair, effective and efficient administration of justice suffers in a number of ways. One example is the fact that naive offenders, particularly first offenders, are more likely to be prejudiced because many of them simply plead guilty; whereas experienced offenders get a lawyer and relief. As a corollary to that, many guilty offenders, and some in flagrantly bad cases, are able to beat the system by refusing to submit to a BAC test and then employing a lawyer who is able to bargain for a reduced charge. Moreover, the process of delay, which is almost always involved in obtaining a reduced charge, places an unnecessary burden on the resources of courts, prosecutors, police and trial lawyers. Members of each group

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many times could put their energies to better use. And furthermore, conviction on a lesser charge frequently distorts the traditional theory of criminal culpability. The CN offense is not a lesser included offense of DWI, for example, and in many DWI cases the elements of the CN offense do not appear. Consequently, convicting the DWI offender on a CN charge is frequently an aberration. From a theoretical point of view, the proper alternatives might be either "guilty" to DWI or "not guilty."

What can be done to correct the deficiencies in the system? Putting aside the very real possibility of doing nothing important, one can suggest corrective actions that might be taken on three different levels. In evaluating these suggestions, one should keep in mind that they spring from a rather intensive study of a situation existing in a single more or less homogeneous jurisdiction operating within a known legal framework. Other jurisdictions might have different social mores and would certainly have different laws. Therefore, what Vermont needs or could tolerate may not fit either the needs or tolerance of other places. Despite that disclaimer of being universal cures to common ailments, however, the following proposals should prove worthy of consideration in most states.

The first proposal relates to the goal of convincing ourselves and the public that the DWI offense is culpable enough to justify using available penalties. (In Vermont that means continuing the one year suspension. Whether or not to retain such a rigid suspension system is an issue not to be addressed here.) This suggests a massive public education effort, and as a starting point, a proposal made at the 1971 Advanced Traffic Court Seminar will be repeated (Little, 1971a). The proposal calls for legislation requiring publication of data relating BAC to increased risks of crashes; publication of data relating alcohol consumption to presumptive blood alcohol concentration limits of illegality; and publication of data describing penalties assessed against convicted DWI offenders. The proposal would require that this information be printed on all labels attached to alcohol beverage containers (bottles and cans), all sacks used in packaging alcoholic beverages, and all napkins used in serving the beverages in public.[16] (The National Safety Council picked up this idea with the possible view of adopting policy concerning it, but has yet to announce action taken.)[17]

A second level of action would be to modify existing law to correct specific deficiencies in current application. For exam-

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ple, the practice of dragging out DWI cases either as an intentional defense tactic or merely in favor of devoting time to more pressing business may occur in many jurisdictions. One way to dissuade the practice would be to make it costly to the offender. To that end a second proposal, also first made at the ABA seminar, would utilize the demonstrated aversion to license suspension as a tool for eliminating the delays that presently occur in administering justice in DWI cases. The proposal calls for the surrender of the offender's driving license at arraignment. At that time he would be entitled to a hearing patterned after the implied consent suspension hearing recommended by the Uniform Vehicle Code and enacted into law in many states.[18] If the arresting officer had a reasonable basis for making the DWI arrest, the offender's license would remain suspended until the case was disposed of. If not, the license would be restored, pending disposition of the case.

This procedure would represent a major departure from typical practice, which retains the validity of the offender's license until he has been convicted. The *old* procedure encourages the drawing out of cases with the hope that the prosecutor's cases will deteriorate with the passage of time. By contrast, the proposed procedure should encourage offenders to seek early case disposition. The proposal also calls for voiding the pre-adjudication suspension if the trial is delayed by the state or the court longer than a designated number of business days. If a delay longer than that should occur and if it were not attributable to the offender, then he would get his license back while awaiting trial.

A third level of action would be to increase the sting of penalties imposed in hopes of increasing deterrence. As a general proposition, merely making DWI penalties harsher might be expected to be counter-productive, at least until the public has become more fully informed and alarmed about the DWI offense. Tougher penalties *per se* would most likely lead to further distortion in law enforcement and judicial operations with further degradation of the quality of justice. Nevertheless, for those who want more rigorous penalties, two proposals may be offered. The first, which is not original with this writer, was also mentioned in ABA seminar. It calls for utilizing work-release sentencing as a general DWI penalty. For example, the routine DWI penalty for a first offender might be 10 consecutive days in jail to be served during the offender's non-working hours, including nights and weekends. If the work-release

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terms were intentionally violated, the work-release sentence would convert automatically into a regular jail sentence of the same duration.

Work-release sentencing would drastically change offender's nonemployment routines while allowing them to continue their employment. Thus, the spectre of depriving wives and children of financial support would no longer dissuade judges from using jail terms as DWI penalties. If used regularly and wisely, work-release sentencing might become an important deterrent to drunk driving with respect to major segments of the population. In passing, it should be noted that work-release sentencing would not supplant rehabilitative programs needed for treating problem drinkers and alcoholics.

Regarding penalties, a new proposal may be submitted. Its purpose is to remove some of the innocuousness from the practice of driving while drinking that is created by the following facts describing how we live in our society: first, most drivers drink; second, most drinkers drive; and third, most drinkers sometimes drive after drinking without suffering ill consequences (Casper and Mozersky, 1968). From this milieu derives the relatively benign culpability of DWI offenders. In short, driving after drinking is a socially acceptable practice in American culture. Amost everybody does it.

The perceived culpability of the DWI offense might be raised appreciably by shifting legal focus from a socially acceptable behavior to one that everyone sees as undesirable. At present the focus is on "driving while intoxicated," and some persons are advocating a shift to an even more innocuous behavior, that is, "driving with BAC above 0.10 percent."[19] From the public's present view, this will be an even less culpable offense. As an alternative, this proposal calls for shifting the outlawed behavior to a more culpable level. This proposal calls for creating a new offense called quite simply, "having a crash in a motor vehicle while driving under the influence of intoxicants." The new law would incorporate existing BAC limits of illegality, but would modify the implied consent provisions of the law to require BAC testing under pain of a license suspension as a consequence of being involved in a crash on a public road. In many states existing DWI penalties would be severe enough for the new offense, and, if the new law is successful, should be applied with more vigor than they ever have been. Perhaps degrees of the offense would develop[20] with more severe penalties being available for crashes involving

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personal injuries and fatalities, no matter which vehicle the injured or killed person happened to be in.[21] A secondary part of the new law would be to reduce penalties for traditional DWI offenders to a level of severity about on a parity or slightly higher than careless and negligent or reckless driving.

The foregoing ideas were generated in large part as a consequence of the Vermont project. Some of them may be worth further consideration. Certainly, the "having a crash in a motor vehicle while driving under the influence of intoxicants" is fraught with the possibility of unexplored legal and practical ramifications that could affect its usefulness. Therefore, at this point the proposal is made almost in a rhetorical sense for the purpose of gaining close examination of whether it can be refined into a meritorious concept for reaching the goal of fair, effective and efficient administration of justice while serving as as effective deterrent to drunk driving.

FOOTNOTES

1 Douglas Toms, administrator of the National Highway Safety Administration, is quoted as having made the following statement: "The Judiciary is the Achilles' tendon. You're not going to get enforcement if you keep losing in court. That is now our big challenge. We want to lay down some rules for judges. The American Bar Association doesn't like it, but the heck with them. We've got to make some headway. We want some guidelines so that people do not continually get off the hook for drunk driving." Information Bulletin Traffic Safety Association of Macomb County (Michigan) (July 2, 1971). W.Y. Howell, Director, D.O.T. Office of Alcohol Countermeasures Traffic Safety Programs, put it more succinctly: "The court system at present is a weak link in the chain. . . ." (undated statement, summer, 1971).

2 23 V.S.A. § 1204 (Supp. 1971).

3 23 V.S.A. § 1181.

4 The University of Michigan Highway Safety Research Institute is collecting comparative data in Washtenaw County, Michigan, courts. Although the study is not complete, a not grossly dissimilar pattern in dispositions appears to be emerging.

5 T. 23; Subchapter 2 V.S.A.

6 23 V.S.A. § 1206 (Supp. 1971); 23 V.S.A. § 1208 (Supp. 1971).

7 23 V.S.A. § 1209 (Supp. 1971).

8 23 V.S.A. § 1205 (Supp. 1971).

9 And a fine of not more than $500, 23 V.S.A. § 1210(a) (Supp. 1971).

10 23 V.S.A. § 801.

11 Proof of security satisfactory to the Commission of Motor Vehicles is required and may be satisfied by liability insurance or bond. 23 V.S.A. § 804. Conversations with representatives of the commissioner suggest that insurance is the most frequently used mode.

12 Letter dated August 25, 1970 from Vermont Department of Banking and Insurance details costs in several hypothetical situations, fully justifying the figures mentioned.

13 These figures were compiled in a survey of a sample of Vermont lawyers who handle DWI cases. The average Vermont fee appears to be about $300.

14 A recent experiment in a Chicago court purports to show that jail sentences can be routinely imposed and that doing so is associated with reduced traffic losses (Field, 1971). This work has yet to be subjected to critical examination in the literature.

15 A sample of Vermont police officers was interviewed for the purpose of

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obtaining information about enforcement attitudes and practices. Each officer was asked how many of the ten CN or VLR offenders he had arrested did the officer believe had been drinking to the extent that the offender would have tested 0.10% or higher, if he had been tested. The aggregate of the replies produced the following distribution:

None — 25 (41.0%)
One — 11 (18.0%)
Two — 15 (24.6%)
Three — 5 (8.2%)
Four or more — 5 (8.2%)

These data suggest that the policemen do occasionally exercise discretion in not charging DWI despite the fact that the situation would apparently support it.

[16] One criticism leveled against this proposal is that it would not prevent a drinker from drinking after he has made up his mind to purchase an alcoholic beverage. This misses the point of the proposal, however, which is not to affect anyone's behavior when he is about to drink. Instead, the intention is to increase the knowledge of "reasonable men," including especially judges and jurors, about the subject, so as to undercut the "there but for the grace of God go I" mentality that hinders enforcement of existing laws. Also, it aims at increasing extra-legal social pressures opposing the practice of driving after drinking more than can be tolerated on the basis of newly created "common knowledge." In short, the point of the proposal is to start modifying general social attitudes rather than attempting to affect a particular drinker's behavior at a given time.

[17] The NSC finally urged the liquor industry to label containers with the warning that "excessive drinking can impair driving ability." A liquor industry spokesman ridiculed the NSC proposal as "simplistic." The Highway Loss Reduction Status Report, Vol. 8, No. 4, February, 1973. Based on the rationale expressed in note 16, I too believe the proposal to be simplistic.

[18] Uniform Vehicle Code § 6-205.1 (d); see also, 23 V.S.A. § 1205 (Supp. 1971) which requires only "that the officer had sufficient reason to believe that the respondent was so operating [while intoxicated], attempting to operate, or in actual physical possession of a motor vehicle" in order to invoke an implied consent suspension of six months. Although this article dose not undertake to examine the constitutionality of preadjudication license suspension, it can be noted that recent U.S. Supreme Court decisions suggest that a permissible procedure can be developed to satisfy procedural due process. *Jennings v. Mahoney* (1971); *Bell v. Burson* (1971). The hearing prescribed herein is intended to provide that protection.

[19] This proposal is presently under consideration by the U.S. Department of Transportation for recommendation to the states. Unpublished D.O.T. working draft, Nov. 15, 1971.

[20] At present the DWI offense carries potential for a more severe penalty (up to $2000 fine and up to five years imprisonment, 23 V.S.A. § 1210 (b) (Supp. 1971) than does a non-crash DWI conviction. Moreover, the Vermont "system" has created a similar distinction in fact between CN and CNA cases (see Tables 5 and 6) although no legal distinction exists.

[21] One reviewer of the "having a crash proposal" suggests that it will be "hard to sell" because no showing of cause or negligence is required. It might prove necessary to modify the proposal because of that, but the point should not be yielded easily, because doing so could create problems of proof that would kill the proposal. The "hard to sell" argument is exactly what we are working against in DWI cases. At present, the effects of DWI behavior might be completely harmless — no crash is needed; yet, the offender is guilty if he was driving while intoxicated. Driving is the behavior being controlled. We do not ask whether the offender was driving negligently nor whether the drinking caused him to drive. The "having a crash" proposal merely supplants an innocuous behavior (to drive) with a more culpable behavior (to crash). The principle is well established in existing DWI laws.

CASES

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