Review Essay

The Law and Drunk Driving

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Leonard Evans, *Traffic Safety and the Driver*. New York: Van Nostrand Reinhold, 1991. xiv+404 pp. $54.95. Author and subject indexes.

James B. Jacobs, *Drunk Driving: An American Dilemma*. Chicago: University of Chicago Press, 1988. xxii+259 pp. $12.95 (paper). Notes, bibliography, and index.

Jerome S. Legge, Jr., *Traffic Safety Reform in the United States and Great Britain*. Pittsburgh: University of Pittsburgh Press, 1991. xiv+190 pp. $29.95. Appendix, notes, and index.

R. Jean Wilson and Robert E. Mann, eds., *Drinking and Driving: Advances in Research and Prevention*. New York: Guilford Press, 1990. x+289 pp. $40.00. References with each chapter; index.

In terms of its political salience, drunk driving has been one of the major social problems of the last decade, not only in North America but in most auto-dependent countries, including those of northwest Europe and Australia and New Zealand. These four recent books supply discussions of social policy addressing drunk driving. In particular, they shed light on two general questions that may concern the readers of this journal: What are the capabilities and limitations of law as a tool for addressing social problems? What are the consequences for law of its use for this purpose? Although written from widely varying perspectives, the books demonstrate an emerging consensus on the answers to these questions as well as the development of a problem paradigm that challenges the conventional wisdom about drunk driving.

This review essay will note the extent of drunk driving in America and will discuss the insights of the listed books on the costs and accomplishments of the dominant, deterrent, legal policy directed at reducing the problem. The same works are

then used to identify emerging alternative legal policies whereby drunk driving may be addressed. Finally, brief synopses of the parts of these books addressed to issues other than law and drunk driving will be offered to provide a more complete appreciation of each work.

The Extent of Drunk Driving

Evans writes *Traffic Safety and the Driver* from the viewpoint of a physicist who has been employed for many years at General Motors Research Laboratories. His empirical and quantitative approach furnishes a detailed description of highway crashes in America and the numerous and various factors associated with them, including alcohol-impaired driving. He places the raw data in striking contexts.[1]

Evans shows that alcohol is involved in crash-related fatalities through degradation of driver performance (e.g., the ability to control a vehicle on a curve) and behavior (e.g., the choice of a higher speed) and, in addition, through affecting the ability of the body to survive a given amount of trauma. Using data from the federal Fatal Accident Reporting System (FARS) to estimate reductions in deaths that would occur if all drivers had no alcohol in the blood, he concludes that in the absence of alcohol nearly 50% fewer crash fatalities would occur. More than 20,000 lives would be saved annually in the United States, according to this calculation. This is the highest estimate of the causal role of alcohol in the scientific literature on crashes, more than double that previously estimated with data from Vermont in a report of the National Academy of Sciences (Reed 1981). Although the method can be challenged in detail, few knowledgeable people would disagree with Evans's assertion that "alcohol is . . . by a huge margin, the largest single factor contributing to traffic-crash losses [and] the reductions in traffic crash losses from reducing crashes attributable to alcohol far exceed reductions from any other potential countermeasure" (p. 188).

Deterrence through Law

The attempt to reduce alcohol-related crashes has focused on criminal proscriptions and sanctions. From the utilitarian viewpoint, criminal punishment is justified by the deterrence

[1] For example, in the United States, "almost as many young men die as a result of traffic crashes as die from all other causes combined. . . . Traffic deaths from 1977 through 1988 exceeded all US battle deaths in all wars from the revolutionary war through the Vietnam war" (p. 1). Moreover, for each death there have been about 70 injuries. The monetary cost of U.S. motor vehicle crashes in 1988 is estimated to have been $70 billion.

proposition: People can be dissuaded from committing a prohibited act to the extent they believe that its commission will be swiftly, certainly, and severely punished. However, the empirical literature on deterrence does not demonstrate the efficacy of all three independent variables. In particular, support for the deterrent effectiveness of severity of punishment has been scarce.

The books reviewed here offer new materials concerning the possibility of deterring drunk driving. In chapter 5 of the Wilson and Mann volume, Canadian psychologist Evelyn Vingilis presents the most recent review of the evaluation research literature. She notes that Scandinavian-type laws (defining drunk driving in terms of blood-alcohol concentrations rather than in terms of behavioral impairment) and enforcement campaigns have often been accompanied by reductions in measures of drunk driving, presumably because of the public impression of increased certainty of punishment, but that the reductions tend over time to return to previous levels as the perceived certainty of punishment declines with experience. Evidence concerning the deterrent effect of perceived severity is at best inconsistent, and there is virtually no evidence available concerning the effect of increased perceived swiftness of punishment. She shows that deterrence expectations are based on a variety of assumptions, some of which are either unverifiable or are verifiably false. Her conclusion is the same as James Nichols and I reached a few years ago (Nichols & Ross 1990) and, as noted by Vingilis, the same as was reached in 1808 by Samuel Romilly: "The chief deterrent to crime is not barbarity of punishment but certainty of conviction." Indeed, given the lack of effect for sanction severity on drunk driving, Vingilis cautions that "all we can safely say is that impaired driving sanctions apparently have some deterrent effect on some individuals under some circumstances" (p. 108).

In *Traffic Safety Reform in the United States and Great Britain,* Jerome Legge, a professor of political science at the University of Georgia, paints a somewhat more optimistic picture. He presents new evidence supporting the effectiveness of criminal sanctions in reducing drunk driving. Legge applies interrupted time-series analysis to a variety of traffic safety interventions, including two important deterrence-based measures focusing on increasing both the certainty and severity of penalties enacted in New York and California in the early 1980s.[2] The

[2] Both measures consisted of packages of statutes. In New York, the statutes are known collectively as the Special Traffic Options Programs against Driving While Intoxicated (STOP-DWI). Provisions include immediate and automatic suspension of the driver's license for a second conviction of DWI within three years; minimum fines of $250 or $350, with steep increases in penalties for repeated offenses; and mandatory jail for driving when the license has been taken for prior DUI. The California laws criminalized driving with more than 0.10% BAC, removing the opportunity to plead

method uses the pre-intervention series as a control for the post-intervention experience, and is best suited for studying interventions that are expected to have an immediate effect. This is the usual expectation for well-publicized deterrent laws. Legge finds evidence of long-range, even permanent, effects of these laws on surrogate measures of drunk driving such as single-vehicle nighttime crashes. The graphs provided show that both sets of laws were passed during periods of sharply declining fatalities, suggesting the existence of plausible alternative explanations for continued improvements. However, Legge's interpretation is bolstered by comparisons with crash data less likely to be associated with alcohol, such as daytime crashes.

The potential for effective deterrence-based drunk-driving laws is also indicated by the experience of the state of New South Wales, Australia, utilizing random breath testing. Australian psychologist Ross Homel's chapter 7 in the Wilson and Mann volume reports this experience along with studies in other states, most using more limited and less effective law enforcement. The introduction of random breath testing in New South Wales was associated with a significant and apparently permanent decline in alcohol-related crash fatalities. Similar results are reputed to have been attained in Tasmania which, like New South Wales, adopted random breath testing "boots and all," investing heavily in police patrol along with publicity. In New South Wales, a million breath tests are administered each year in a population of about three million drivers. In contrast, the other states, including Victoria which adopted random breath testing earlier and served as a model for New South Wales, have failed to achieve such results.

Homel offers stringent cautions for those who would hope to duplicate the New South Wales experience elsewhere:

> Nothing in the Australian literature encourages the belief that roadblocks or sobriety checkpoints, without the use of full random breath testing, are capable of delivering a substantial and sustained reduction in alcohol-related casualty crashes . . . . In addition, however, the Australian literature suggests equally as strongly that full random testing is also not capable of achieving long-term reductions in casualties unless it is rigorously enforced and extensively advertised. (P. 192)

Homel suggests that the apparent success of New South Wales in deterring drunk driving was made possible in part because of the absence of U.S.-style citizens' groups like Mothers against Drunk Driving. The concerns of these groups with apprehending and punishing law violators could have distracted attention from influencing the behavior of the far greater

lack of impairment; they included restrictions on plea bargaining in alcohol-related cases and introduced jail or license suspension along with increased fines as mandatory penalties (with exceptions).

number of drivers who at the moment are *not* violating the drunk-driving law. Homel believes that the ability of the New South Wales law to deter drunk driving requires large numbers of police contacts with nonviolators and benefits from moderate rather than severe penalties for the violators: "Imprisonment is unnecessary, costly, and counterproductive" (p. 193).

This new literature, in sum, provides evidence that under some circumstances it may be possible to achieve important and lasting reductions of drunk driving through the deterrence mechanism. However, as revealed in the experience of the remaining Australian states, these circumstances—which include very large investments in and tolerance of police intrusiveness—are rarely achieved. Moreover, since the deterrent mechanism is independent of and indifferent to the causes of the problem it addresses, whether drunk driving, street crime, or running in school hallways, the wellsprings of the motivation to engage in the prohibited behavior are left largely untouched. The problem thus tends to recur and its control through the deterrent mechanism requires constant vigilance.[3]

James Jacobs is both a sociologist at New York University and a lawyer. His book raises additional questions about the role of criminal sanctions in preventing drunk driving. It discusses, among other things, some of the consequences of attempting to deter drunk driving for the integrity of criminal law itself. His basic thesis is that drunk driving "fits very uneasily into the law of crimes" (p. 64). The behavior in question appears to be much closer to that which is usually the subject of administrative regulation rather than of criminal prohibitions, and indeed drunk driving is virtually the only traffic offense that is treated as a serious crime.

Jacobs argues that traditional standards of criminal jurisprudence, such as the doctrine surrounding *mens rea* and *actus reus*, are attenuated in the case of drunk driving: "What might at first appear as a simple, straightforward definition of prohibited conduct is riddled with unresolved ambiguities and even constitutional tensions" (p.65). In its classical version, driving while drunk, intoxicated, or impaired—the definition of the prohibited behavior is extremely vague. In its more recent "illegal per se" form—referring to driving with more than a specified blood-alcohol concentration, both the actual dangerousness of the behavior and the driver's subjective culpability are

[3] There is a line of thought, prominent in Scandinavian criminology (for instance, Andenaes 1974) and adopted by Evans, which posits that the threat of criminally punishing behavior may in the long run result in changes in the mores that produce the problematic behavior. Although the hypothesis is not implausible, evidence in its favor is unlikely ever to be convincing because so many things, many of which might cause a moral change, happen in the long run. This line of thought may rationalize some policies that otherwise seem fruitless, but the hypothesis is not scientific because it cannot be disproven.

rendered irrelevant to the decision on punishment worthiness of the behavior.

Jacobs sees drunk-driving control as creating strains on criminal procedure as well as substance. It threatens traditional civil liberties in the areas of unreasonable search and seizure, coerced testimony, and deprivation of a meaningful right to counsel. A particular concern for him is sobriety checkpoints, in which passing motorists are stopped and briefly interviewed to determine whether they may have been drinking. Writing prior to the 1991 case of *Michigan Department of State Police v. Sitz*, in which the U.S. Supreme Court approved these checkpoints in principle (provided they are done in ways that are safe and discourage arbitrary selection of motorists), Jacobs describes them (p. 94) as a

> striking departure from the traditional balance between state power and individual autonomy . . . . That this police practice appears "logical," "necessary," and "appropriate" reflects both the current salience of drunk driving as a social problem and the tendency to consider drunk driving in the context of traffic offenses in which fundamental rights and liberties do not seem to be threatened.[4]

Evans, in contrast, defends not only sobriety checkpoints but also Australian-style random breath testing, which differs in that any driver may be stopped and breath-tested without regard to the police officer's developing suspicion of an individual's having consumed alcohol. His defense rests not only on random breath testing's apparent deterrent effectiveness but also on the finding of enormous popular support for random breath testing in New South Wales. Indeed, only slightly less support has been found in a recent Gallup Organization survey (1991) in the United States. However, civil libertarians along with Jacobs will not accept popularity as a basis for defining the limits of liberties.[5]

Toward a New Understanding

Policy aimed at reducing drunk driving has until quite recently been almost exclusively centered on deterrence through law. The books under review accept this fact. They differ in their appraisal of the degree to which the policy succeeds in achieving important and lasting reductions in drunk driving. Homel is perhaps the greatest believer in the potential for deterrence, and he has the best evidence for it, both in the work

[4] The Supreme Court reasoned that the intrusiveness of checkpoints was outweighed by the benefits of their deterrent effectiveness.

[5] Such writers as Ray Mack (1956) and Samuel Stouffer (1955) long ago demonstrated that opinion surveys would find majority opposition to all the important provisions of the Bill of Rights.

reviewed here and in other writings (for example, Homel 1988), although he cautions concerning its feasibility in other jurisdictions. Legge and Evans also see accomplishment and promise in deterrence, although not as exclusive policy. Safety researchers Robert Voas and John Lacey, in chapter 6 of the Wilson and Mann volume, review recent enforcement campaigns in the United States and conclude that although the criminal law is no panacea, it may set the stage for changes in public attitudes that can affect the risky lifestyles associated with much drunk driving. Vingilis's review of the prior literature, however, gives reason for caution in endorsing the deterrent approach, especially to the extent that it emphasizes severe penalties.

Interestingly, both Evans and Voas and Lacey credit the anti-drunk-driving citizens' movement as a positive force in obtaining enactment and enforcement of deterrent laws, while Homel finds their program, with its emphasis on apprehending and severely punishing the law violators, likely to impede effective prevention of drunk driving. Finally, Jacobs warns that although deterrence may be feasible, the costs of criminal policy, in terms not only of resources but also of infringements on principles of justice and civil liberties, must be weighed in the balance before this policy is endorsed.

Although all the writers endorse deterrent policy to some extent, they agree that more attention must be paid to the underlying institutional causes of drunk driving and to policies other than deterrence. Evans, for instance, concludes that "further progress in reducing harm will have to focus on broader interventions than the traditional one aiming almost exclusively at the drinking driver" (p. 213). He follows this statement with the mention of two "laws" which might guide such policy. The first is: "Decreased consumption of alcohol leads to decreased traffic deaths and injuries." The second is that "alcohol consumption is decreased by: [i]ncreasing its price; [d]ecreasing its availability; [and d]ecreasing its advertising" (p. 214). The Wilson and Mann volume contains an impressive summary and endorsement of this availability thesis by Robert Mann, one of the editors and a staff member at the Addiction Research Foundation of Ontario, and Lise Anglin, also a Foundation researcher. Legge finds evidence of reductions in casualties as a consequence of nondeterrent policies such as mandatory seat-belt-wearing legislation in the United Kingdom and raising the drinking age in Michigan. Even Voas and Lacey, strong believers in "chemistry-based" enforcement of drunk-driving laws, including massive breath testing of drivers, acknowledge that the high prevalence of drunk driving in the United States "may have more to do with the relative availability and low cost of alcohol, on the one hand, and high cost of public transporta-

tion, on the other, than with the status of drunk driving enforcement programs" (p. 151).

This agreement strikes me as representing a general shift in policy discussion away from what may be termed the dominant paradigm to what I call the challenging paradigm for understanding drunk driving (Ross 1992). In the dominant paradigm, which has determined most of our current policies, drunk driving is seen as no more and no less than criminal behavior in which irresponsible drunks kill and injure innocent victims. In this paradigm, the behavior is best dealt with by the criminal justice system, which gives the villains their deserved punishment while simultaneously preventing further drunk driving by deterring others. In the challenging paradigm, drunk driving is understood as the predictable product of general acceptance of drinking as a leisure activity along with general dependence on the private automobile for all transportation. It acknowledges that in most cases the villains—drunk drivers—and the victims—those killed in alcohol-related crashes—are the same people. It views the problem primarily as a matter of public health, preventing injury and death, rather than a criminal matter focusing on punishing the guilty, and it looks to policies beyond deterrence, including reducing overall alcohol consumption, increasing the use of alternatives to the private automobile for transportation, and providing safer cars and roads and better medical care for trauma so that fewer occasions of impairment will result in death and injury.[6]

What is the fate of deterrence in the challenging paradigm? Judging by the authors reviewed, and by the reviewer himself, it is not to be abandoned, but should share a place in a broadly based package of policies that also look to alcohol consumption, transportation use, and general traffic safety. However, it is not clear that deterrent goals are best served by making drunk driving a criminal offense, especially in cases where the driver's blood-alcohol concentration is marginal and there is no evidence of actual dangerous behavior. The U.S. criminal justice system is hard pressed to handle nearly two million criminal arrests for drunk driving every year. Even more so than with standard street crimes, the processing of this caseload depends on routine guilty pleas, often induced by plea bargains or deferred prosecution techniques that subvert the promise of severe punishment which citizen activist groups have extracted from politicians. Existing detention facilities are almost universally unable to support the mandatory jail sentences for drunk drivers that have been enacted in some form in every state. Further, even if one does not share Jacobs's

[6] Perhaps the landmark in acceptance of this view in policy discussion has been the report of the Surgeon General's Workshop on Drunk Driving (Office of the Surgeon General 1989).

deep concern about the strains produced by using the criminal law to control drunk driving, most people will admit that the criminal justice system is a costly as well as an inefficient way to handle social problems in general.

Jacobs addresses these conditions with a policy recommendation I find appropriate and appealing: Replace the crime of drunk driving with a comparable administrative infraction except in cases of actual dangerous behavior or extraordinary riskiness as demonstrated by highly elevated blood-alcohol concentrations. He argues that this would make drunk-driving regulation like all other traffic laws, which are designed to control routine deviance with routine punishment and are unconstrained by the procedural guarantees required in criminal law because of its heavier penalties and concern for matters of guilt and morality. The proposed procedure would be like that prevailing in Wisconsin, where a first offense is considered a traffic infraction rather than a criminal misdemeanor and the punishment does not include incarceration. It would also acknowledge the extensive research evidence of deterrent effectiveness for administrative license revocation schemes as compared with the paucity of evidence for effectiveness of jail (Ross 1991). In Jacobs's words:

> When drunk driving is defined as an administrative infraction, the following consequences result: First, the police have even greater leeway in conducting investigations. They can conduct breath tests whenever a stop is made, just as they now check for a valid driver's license, vehicle registration, and proof of insurance. Drivers with prohibited [blood-alcohol concentrations] can immediately be removed from the road, their licenses immediately suspended, and their vehicles impounded. Due process would only demand an administrative hearing. There would be no right to a jury trial, assigned counsel, or proof-beyond-a-reasonable-doubt standard of proof. None of the jurisprudential tensions that flow from defining drunk driving as a crime would arise. (P. 63)

The evaluation research literature suggests that a major flaw in the deterrent threat is the actual improbability of apprehension and punishment of any kind for drunk drivers. Not only are just a tiny minority of offenders arrested, but conviction and therefore punishment of those arrested is generally slow and uncertain. In contrast, under the best administrative license revocation laws punishment in the form of taking a drunk driver's license is immediate or nearly so, and some experience suggests that by lifting police morale it is possible to increase law enforcement activity and thus raise the actual probability of apprehension (Ross 1991). If this, along with fines and fees, were the sole punishment for routine drunk driving, libertarian opposition to enforcement in the form of

sobriety checkpoints would be of less concern. The criminal courts would be free to devote more time and attention to the more serious cases involving extreme riskiness or actual harm, having sloughed off the mass of routine cases to the administrative process. Deterrence thinking would predict a decline in drunk driving on the highways due to the increased certainty and swiftness of the legal threat.

Such is the power of the dominant paradigm today that this proposal may seem unrealistic. However, I believe that the tide has turned, and that this and similar proposals currently have a chance of at least limited adoption. One possibility is that, in a trade-off with dominant paradigm interests demanding a reduction of the tolerated blood-alcohol concentration, those persons with concentrations between the old and new limits might have their cases treated administratively. This would present an opportunity to test the new system and to probe expectations of problems and costs.

No one can deny, certainly after reading Evans, that drunk driving has a claim to be an important social problem in America. Few would doubt that law presents important opportunities to reduce the deaths and injuries connected with drunk driving. However, the literature reviewed here raises considerable doubt concerning the efficiency and effectiveness of relying exclusively on deterrence-based policy. These books together mark both the position of contemporary thinking about drunk-driving policy and a shift toward a more sophisticated view of the problem than has prevailed in recent years.

Concluding Remarks

Because among the books reviewed here only Jacobs's is exclusively concerned with law and drunk driving, I wish to add in closing some brief description of the balance of the remaining books. These other contents may add to their appeal to various readers.

Evans is concerned with traffic safety overall, including reducing the damage that is *not* related to alcohol. Alcohol plays a much smaller role in crashes that result in injuries rather than death and only a minor role in crashes that cause property damage. However, these two categories of crashes, while perhaps less tragic than the fatal ones, are extremely costly and demand attention as social problems. Although he is an engineer and cognizant of the progress that vehicle and highway technology have produced, Evans believes that most of the potential of technology for reducing crashes has already been realized and that behavior change offers the greatest unexploited opportunities for crash reduction today. I find him excessively optimistic concerning the ease of changing human behavior—

and the effectiveness of passing laws[7]—but he argues his case well, and his chapter, "How You Can Reduce Your Risk," should be of great practical value to the reader.

Legge demonstrates the crash-reducing effectiveness of laws relating not only to drunk driving but to other factors in traffic safety. His book shows that it is possible to use law to control drunk driving through avenues other than deterrence, such as raising the minimum drinking age. It also demonstrates the importance of laws addressing factors like providing and using technology capable of moderating energy release in crashes, for example, seat-belt restraints. The book's effect is somewhat compromised by occasional apparent negations in one place of positive findings elsewhere. Legge attempts to explain and rationalize the differences, but at times the argument seems strained and ad hoc. The best explanation in general may be that the context of legal interventions is important in predicting their effectiveness. This matter is often overlooked by policymakers.

The Wilson and Mann book is highly eclectic and extremely difficult to review as an entity. The chapters I mentioned above are of excellent quality and relevance. Several others attempt to distinguish the characteristics of individuals who engage in impaired driving from those who do not and to evaluate individual-centered prevention and treatment programs. To this reviewer, much of that writing is based on an invalid distinction between good and bad drivers, deviants and normals, sheep and goats. Moreover, since individual prevention and treatment can only be applied to those who have been labeled as problematic (that is, have accumulated records of drunk-driving violations), and the great majority of alcohol-related fatalities involve drivers without such records, even highly effective preventive and treatment programs—if such there be—must be regarded as having only marginal potential for reducing deaths due to drunk driving.

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[7] Consider, for example, his unsupported and empirically false assertion that "merchants strictly enforce age limits three years above that defining legal adulthood" (p. 209).

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