

Sentencing Drunk Drivers

More offense-related provisions should be incorporated into the sentencing guidelines.

While the actual resulting harm of driving while under the influence is important to take into consideration, the harm that could potentially result from the behavior should also be considered. For example, if a drunk driver operates a vehicle on a busy highway, he should receive a different sentence than a drunk driver operating a vehicle on an empty country road. This sentencing guideline allows judges to take into consideration the risk the driver took when deciding to operate the vehicle. Even though no harm may have resulted from this particular instance of drunk driving, that the driver was willing to operate a vehicle while intoxicated through a school zone on a weekday at three o'clock in the afternoon should be factored into his sentence.

Potential discretionary issues that could arise as a result of more offense-related provisions

One issue with such a provision would be that the parameters are difficult to draft. This would result in judges being granted wide discretion in evaluating the dangerousness or riskiness of the driver's behavior. Though dangerousness or riskiness may be easy to evaluate in theory, in practice it could prove to have a disparate impact on defendants. For example, if it is considered more dangerous to drive in crowded urban streets than quiet country roads, urban-dwelling defendants would receive stricter sentences because, theoretically, they are drinking and driving close to home. This means that certain racial and socioeconomic groups could receive the bulk of harsh sentences, which is certainly problematic.

One way to attempt to combat this issue would be to draft specific guidelines that look outside only the subjective dangerousness of the driver's conduct. The guidelines could look to traffic laws that already exist and incorporate them into the sentencing discretion of the judge. By incorporating traffic laws, the judge does not have to rely on her own understanding of what is more or less dangerous because the legislature has already determined what types of traffic infractions call for higher penalties. By incorporating this element into the guidelines, the specific reason the drunk driver was pulled over

by the police officer becomes relevant in sentencing. Did the driver catch the attention of police because he was driving twenty mph hour above the speed limit? Was it because he was weaving in and out of traffic, almost causing accidents? Was he going over rumble strips? Did he run a red light? The list goes on. Each of these traffic violations carries with it varying levels of penalties. These are the infractions that the judge could consider in evaluating the riskiness of the defendant's behavior while driving drunk. Not only where the offense took place, but how the drunk driving manifested itself in a detectable way becomes relevant in determining the specific sentence a drunk driver should receive. This is doubly beneficial because there are already levels of traffic violations that would help guide a judge in the best way to handle sentencing, and the particular infractions are clearly laid out in a body of law to be consulted by the judge. There is far less judicial discretion in evaluating dangerousness when the legislature has already taken care of the evaluation of those offenses.

The effects of incorporating potential harm into sentencing decisions

The question the judge must answer in determining sentencing is not only “did a harm occur?,” but also “how likely was it that a harm (w?)could have occurred?” It is necessary for a judge to ask this question in a drunk driving context, as opposed to other types of crimes, because drunk driving is such a dangerous activity where a harm is very likely to occur, but still may not occur. Because the number of repeat offenders of this crime is so high, it is necessary to consider the harm that could have resulted from the first offense rather than waiting until actual harm does occur.

While the sentence for potential harm and actual harm would not be the same, increasing the sentence based on the potential harm could help to prevent actual harm from occurring in the future. If a person thinks that he is a particularly safe drunk driver and will not hurt anyone or anything, he may still drive while intoxicated and receive the minimum sentence. However, by allowing judges to consider the potential harm, the confident drunk driver may think twice about driving if he knows he has to drive through high-traffic areas or that he may drive too fast, e.g. These guidelines serve to deter drivers who are overly confident in their abilities to operate a vehicle while intoxicated.

Who among college students has not had an incident while driving home from the bar? Even among people who are not college students, odds are that at one point or another most of us have gotten behind the wheel after drinking a couple of cold ones. Despite the fact that this conduct is frowned upon in society, most of us would not consider ourselves to be criminals, in fact far from it. The majority of people who drink and drive are members that contribute positively to society. Ironically, considering these personal characteristics of the offender at sentencing is perhaps what is causing the drunk driving problem. As a society we want to reduce accidents resulting from drunk driving but we keep giving opportunities to people because they are not criminals in the most common meaning. Thus, we find ourselves in the dilemma of hating the action but not the offender and thus we have the problem as it is today. If society really wants to solve this problem then it is going to have to address two issues. The issues are the lack of mandatory minimum sentences and the persistent practice of considering the characteristics of the offender when it comes to sentencing. Currently, these two issues lure judges (almost in a compulsory fashion) to give out lenient sentences, which in turn are the cause of the problem. A mandatory minimum sentence seems harsh considering the number of productive members of society who have at one point or another engaged in this type of criminal activity. Yet, given the background story of the assignment, I think that the drunk driving problem compels a vote for mandatory minimum sentences and a complete disregard of offender characteristics at the sentencing stage.

First, it was pointed out that tougher laws seem to have an influence in the decline of deaths resulting from drunk driving. However, despite these tougher

laws, about one third of drunk driving offenses and accidents come from repeat offenders¹. Tougher laws have been proposed in two similar ways that have very different outcomes. The two proposals are those that increase the maximum sentences available to a judge and those that would impose a mandatory minimum sentence. To choose one, we would have to know what the source of the drunk driving problem is. However, it is not very clear where the problem is coming from. It seems that there are two possibilities, (1) judges are being too lenient when it comes to sentencing drunk driving offenders; or (2) judges are being forced to be lenient by low maximum sentences. In order for the problem to be solved by increasing the maximum sentence we would have to determine that the problem is arising out of the second possibility. Otherwise, an increase in the maximum would be of no use. A lenient judge would simply ignore the increase in the maximum range and continue giving lenient sentences. If a lenient judge is not forced to give a certain sentence, then the problem will continue to come up again and again. Given all the discussions about sentencing reform in this area, it seems that the problem comes from the discretion afforded to judges and not from the sentencing statutes themselves. A mandatory minimum sentence would address this problem of lenient judges. If a legislature establishes minimum sentences of what they deem is appropriate for a drunk driving offense then they no longer would have to be concerned about judicial discretion. Society would be guaranteed a minimum punishment. Even with the most lenient of judges presiding over a sentencing hearing, society would be assured that the offender will get what society deems to

¹ See class blog.

be the least the offender deserves. Further, if in fact we do have a majority of lenient judges, a mandatory minimum would also solve any disparity issues because the judges would constantly seek to give the minimum to everybody.

Second, drunk driving is a problem that is widespread across all sectors of society. The reality is that no matter the nationality or social status, drunk driving will occur. In fact, a consideration of offender characteristics only increases the risk for disparity when it comes to sentencing. For those reasons offender characteristics should not matter. Drunk driving has become such a recurring problem that at this point the goal is to prevent further conduct rather than to punish the individual offender. Because of this goal, offender characteristics should play a very small role, if any at all. Even the criminal history of the particular offender should be placed off limits of judicial consideration when sentencing the particular offender. This is not to say that prior drunk driving offenses are not relevant when it comes to sentencing the offender. How prior offenses affect the sentencing analysis should be an issue for legislative consideration and not an issue to be taken into account by the judge. Let Congress decide what previous offenses will do to increase a sentence range and let Congress decide what offenses should be relevant. Let the criminal history decide what sentencing range the sentencing judge has to work with and then let the judge look into the specifics of the actual offense to determine the sentence.

Driving Under the Influence: An argument for structured sentencing

Public outcry regarding DUI sentencing centers on ineffective deterrence and incapacitation. To a significant extent, driving under the influence is socially and legally acceptable. Structured sentencing forces a change in this perception, even if sentences are lighter than what most judges would hand out under an indeterminate scheme. I believe creating *penalties* that the public is readily aware of will go a long way in reducing the number of drunk drivers on the road. Emphasis should be placed on deterring would-be offenders and incapacitating repeat offenders.

The Supreme Court's mixed messages have contributed to the ineffectiveness of DUI sentencing. The court in *Booker* undermines the purpose of sentencing guidelines, to reduce disparity, by arguing that making guidelines optional will accomplish the same goal. The court in *Kimbrough* goes a step further by disregarding a congressional policy choice not to alter certain sentencing guidelines. With each having their own bias, legislatures and judges alike are left to wonder whether determinant sentencing or judicial discretion best reduces disparity.

I believe that the answer is neither. Judges across the country are currently sentencing habitual DUI offenders to inadequate terms based on both statutory maximums and mitigating discretionary factors. Opposite strategies debated by the Supreme Court are producing the same results. Legislatures and judges are both afraid to get tougher on DUIs. A concern for disparity has affected the adequacy of DUI sentencing. The lower sentences are across the board, the less chance there is for claims of gross disparity. Disparities are particularly sensitive regarding the driver's BAC and extent of injury caused to others. Determinant sentencing is bound to lead to "cliffs," as a small variation in BAC can lead to a strikingly different punishment. Meanwhile, discretion will lead to "value judgments," as the weight of physical and emotional injury is highly subjective for a conduct offense.

I believe that structured sentencing is the only way to achieve adequacy for DUI punishment. Leniency is understandable for a culture that places such a high value on the liberty of automotive transportation and the post-prohibition right to consume alcohol. It is also understandable because of the wildly different outcomes that the same illegal conduct can produce. The timing of this suggestion coincides with the rapid retreat of the war on drugs, where many structured sentences have been deemed unjustly harsh.

Structured sentencing will take more drunk drivers off of the road. Drunk individuals will be less likely to get behind the wheel when they no longer have the potential to receive overt leniency in court. Drunk drivers take two risks: that they will not get caught and that they will not be adequately punished. Structured sentencing eliminates one of those calculated risks, deterring the conduct altogether. Mandating driver's license revocations for repeat offenders is not a radical proposition. It contributes to deterrence and incapacitates someone that is highly likely to continue their pattern of behavior. Individuals that can afford a car, insurance, and gasoline can afford to make arraignments for an alternative means of transportation when drivers no longer have a license. Revocation of the privilege to drive is far more lenient than jail time. It is also a more relevant punishment for DUI offenders.

In conclusion, structured sentencing provides predictable punishment as a firm response to someone that commits the unpredictable crime of DUI.

Class Reflection on Drunk Driving

“Education is important, but we’re to the point where almost everyone knows they shouldn’t drink and drive. The people who are still doing it are choosing to do it. The most effective way to deal with them is to arrest them.” - David Kelly. In the past few weeks, the class discussion has centered on drinking and driving. Can we radically reduce the harms of drunk driving by imposing harsher sentences and laws? As stated in an article written by Gary Biller, president of the national motorist association, “to minimize the devastating effects of drunk driving, society should concentrate on keeping people with high BAC levels and repeat offenders off the road.”¹ So how do we keep these people off the road? I do not think that the answer lies in imposing stricter laws. For example, if the current law requires drivers not to drive with a BAC over the limit of 0.08, and there still have been over 10,000 drunk driving fatalities in the last couple of years², then what effect would lowering the limit to 0.05 have? The new limit in itself would not prevent lethal accidents any more than the current limit does. If anything, lowering the BAC level would increase drunk driving violations by incriminating social drinkers that may not have operated their vehicle unsafely, but were simply found to have been “legally impaired.”³

I think that the focus must be placed on how to properly punish first time drunk drivers in order to prevent them from becoming repeat offenders. Thus, I believe that the sentencing structure for drunk driving should be based on specific deterrence. The National Highway Traffic Safety Administration reviewed and compiled data that indicated nearly one third of all DUI

¹ <http://www.usnews.com/opinion/articles/2014/02/19/theres-no-safety-benefit-to-lowering-blood-alcohol-content-levels>.

² <http://responsibility.org/drunken-driving/drunken-driving-fatalities-national-statistics>

³ *Id.*

arrests and convictions involved repeat drunken driving offenders.⁴ Additionally, the NHTSA also uncovered that a person with a prior OVI had 4.1 times the risk of being involved in a fatal car accident than others. These chances increased with every additional OVI arrest.⁵ With statistics like these, our society should focus on how to physically prevent a particular offender from getting into a car drunk again or accessing alcohol.

I propose that for a first time offense OVI a judge must impose a jail sentence from anywhere between a minimum range of 30 days to a maximum of 5 years in jail. I think mandatory jail time serves a retributivist principle. To encourage specific deterrence, I propose that following the defendant's release from jail, the defendant must be required to install ignition interlock systems on every vehicle registered in their name by a court imposed deadline. The ignition interlock system should be required on all of the defendant's vehicles for a period between 1-5 years. If the defendant fails to have the system installed on all of his vehicles, and has not filed a timely motion with the court for an extension, then I think that the defendant should have his or her license revoked for 1 year. Of course, the year revocation would not eliminate the requirement for the defendant to have the system installed once the defendant got his license reinstated.

I think that other creative solutions to physically prevent first offenders from driving might include placing "boots" on the registered vehicles of those individuals who have had their license suspended. Another possible deterrence method might be to place a "liquor hold" on the offender's license. All establishments require ID. Thus, the establishment would not be legally able to serve alcohol to any individual with a "liquor hold" on their ID. In order for this to work,

⁴ <http://www.drunkdrivingstats.org/repeatdrunkdrivingoffenders.html>

⁵ *Id.*

an offender would have to turn in their original state ID to the court or state licensure agency and receive a new temporary ID with a symbol to indicate the “liquor hold.”