

LEGISLATIVE STRATEGIES AND THE PREVENTION OF ALCOHOL PROBLEMS

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For some years now, I have been working alongside a legal scholar, Jim Mosher, as he explores the interaction of alcohol issues with legal questions, and in particular the potential of legislative and regulatory strategies for the prevention of alcohol-related problems. As Jim's tasks and work have gradually unfolded, what has struck me most forcibly is the astonishing diversity of ways in which laws, regulations, and their administration can end up impinging on alcohol consumption and consequent problems. Obscure "tax-shelter" provisions in an income-tax code can fuel the transformation of a large grape industry from raisin and table grape to wine grape production. Fear of legal liability can shut down a college student government's effort to prevent drunk driving by providing bus-service to the border of an adjacent state with a lower minimum drinking age. Changes in mental hospital involuntary-commitment procedures, combined with alterations in state fiscal incentives for local government, can result in the disappearance of "alcoholic psychosis" as a medical category. These examples, all from the United States, can be multiplied in every country. In a real sense, nearly every prevention strategy considered in the debates in this book is a legislative strategy: typically, alcohol education in the schools, alcohol tax levels, and environmental controls are all shaped by legislation and regulation.

We shall concentrate here, though, on a relatively small range of potential legislative strategies to reduce alcohol-related problems: those which seek to limit or shape the individual's drinking and/or behaviors associated with the drinking, either directly by influencing the individual drinker or indirectly by influencing those around the drinker. The prototypical examples of laws attempting a direct influence are public drunkenness and drunk driving laws; and of those attempting an indirect influence, alcohol control and "dramshop" (seller's liability) laws. While these by no means exhaust the legislative strategies aimed at influencing drinking and associated behaviors, we shall focus our attention on public drunkenness, drunk driving and alcohol control laws.

We are primarily considering here the public health and public order functions of such laws. But disentangling these purposes or functions from others is not always easy. Susanna Barrows has uncovered conclusive evidence of the use of alcohol control laws in the 1850s and 1870s in France as an instrument of political repression, under the cover of preserving public order. The class biases in the enforcement of public drunkenness laws have long been recognized. "Public health" and "social sanitation", not to mention "maintaining peace and order", are often convenient rubrics for other purposes of the powerful. The fact of these other purposes, however, should not divert us from examining the potential role and power of legislative strategies in the prevention of alcohol-related problems.

PUBLIC DRUNKENNESS LAWS

In the Anglo-American legal tradition, criminal laws penalizing the drunkard and enforced by secular -- rather than ecclesiastical -- courts date back only to the opening of the 17th Century. However, the English law of 1606 was preceded by penalties against drunkenness in ecclesiastical law, criminal laws concerning vagrants and "sturdy beggars" designed to control the labor supply, and legislation designed to discourage tavern-haunting, often by penalizing the tavern-owner. While the 1606 law may have owed something to the growth of Puritan influence in Parliament, it also reflected

the atrophy of the authority of ecclesiastical courts. Its preamble spelled out the aims of the act, which were the prevention of sins as well as crimes, not to mention the improvement of industrial efficiency:

Whereas the loathsome and odious Sin of Drunkenness is of late grown into common Use within this Realm, being the Root and Foundation of many other enormous Sins, as Bloodshed, Stabbing, Murder, Swearing, Fornification, Adultery, and such like, to the great Dishonour of God, and of our Nation, the Overthrow of many good Arts and manual Trades, the Disabling of Divers Workmen, and the general Impoverishing of many good Subjects, abusively wasting the good Creatures of God. ...

The Act, which remained the law of England for 266 years, and profoundly affected later legislation in the United States, made no distinction between public and private drunkenness; in fact, concern at the time was more directed at "inordinate Haunting and Tipling in Inns" than at demeanor on the streets. It was not until 1872 that English law assumed the form in which such legislation is discussed today, of prohibiting only **public** drunkenness.

A comparative history of criminal laws concerning drunkenness remains to be written. It is clear, however, that national experiences in this respect are very different. Public drunkenness only became a crime in France in 1873, as part of a repressive crackdown that tended to equate immorality with sedition. Public drunkenness is not a crime in Switzerland. Many nations that formally proscribe public drunkenness do not energetically enforce their laws. Judging by the available literature, it is particularly the Nordic and Eastern European societies, along with what have been called the "Anglomorph" nations, that evince a longstanding and substantial public concern with the control of drunken demeanor, particularly in public places. It is no accident that many of these societies have a strong and traditional cultural association of drunkenness with violence and unpredictable behavior, and that many were strongholds of the temperance movement in the late 19th and early 20th centuries. However, the task of disentangling the historical patterns of interplay between a strong popular movement against drinking, an especial cultural association of drinking with violence and social disruption, and a concern about public drunkenness as a crime **per se**, remains an agenda for future work.

The English Act of 1606 prescribed a fine for tipling, and a stiffer fine for being found drunk; but, then as now, those unable to pay the fine were likely to be confined instead. As urban police forces became more effective in the early nineteenth century, the result was a steady stream of public inebriates through local gaols and workhouses. By the end of the nineteenth century, one can find evidence all over the English-speaking world that those in charge of the processing of public drunkenness in large cities -- the magistrates and the gaol-wardens -- were fed up with what later became called the "revolving door" of the police court and lockup. The "inebriates asylums" of the late nineteenth century were in part a response to these complaints. But a wide-ranging and sustained response to these pleas had to await the post-1945 era of the "welfare state". At first in Eastern Europe, and then in North America and the Nordic countries, there were moves towards the "decriminalization" of public drunkenness, and the substitution of medical or social "sobering-up stations" or "detox facilities". In the U.S., these moves came in the wake of a crescendo of public drunkenness arrests, reflecting another outgrowth of the welfare state: "urban renewal" programs commonly used these arrests as a tool in a war of attrition over possession of the potentially valuable territory occupied by Skid Rows.

There is in fact very little English-language literature directly concerned with the preventive effect of public drunkenness laws with respect to public order. The large numbers of arrests, and the fact that many offenders were arrested repeatedly, were regarded as **prima facie** evidence of the ineffectiveness of public drunkenness laws as either general or specific deterrents. Although even

before the last 15 years there were occasional "natural experiments", when exasperated judges brought the process to a halt by such direct expedients as ordering the destruction of the forms on which public drunkenness arrests were recorded, I know of no U.S. studies of changes in the prevalence of drunken behavior in public in the absence of criminal sanctions. In line with the concerns of the postwar era, when alternatives to arrests for public drunkenness have been evaluated, the formal criteria of success have not been the effect on public order, but rather whether the alternative saves police effort, or whether the clients are more likely to attain permanent sobriety. In contrast, prior to decriminalization in Finland, there was an experimental study of the "preventive effect of fines for drunkenness" -- i.e., of keeping drunks in gaol for a short sentence in lieu of a fine, as opposed to releasing them the next morning. The study showed that the men did not even recognize that they had been treated differently; those released early assumed that they had not been as drunk as they thought. But while this study played a part in the discussions over decriminalization in Finland, Finnish researchers agree that it did not determine events: decriminalization would have occurred in any case, and in fact the study's results were overinterpreted in the political debate.

Thus, while there is by now an extensive -- if often fugitive -- North American literature evaluating the great social experiment in the decriminalization of public drunkenness, very little of it is directly concerned with the question of whether and how in fact the behaviors against which public drunkenness laws are directed may be affected by the existence and enforcement of those laws. Nevertheless, the following tentative conclusions may be offered:

(a) Despite a federal policy in favor of decriminalization since the early 1970s, arrests for public drunkenness remain an important police function in many parts of the U.S., and still account for a substantial proportion of all arrests. Even in states which are considered to have complied with the model "Uniform Act", provisions on compulsory treatment etc. often diverge greatly from the model Act. Though much of the motivation for decriminalization was a concern for the civil liberties of public inebriates (and hence included opposition to long-term compulsory treatment), this agenda has been only partially carried out.

(b) The preferred alternative to public drunkenness arrests, short-term detoxification followed by voluntary treatment, has not worked out as social scientists in the 1960s thought it would: typically only 10-30% of detox clients agree to and go to further treatment. In many places, evaluators have found that those involved in the processing of public drunkenness talk of the "revolving door" having been replaced by the "spinning door". Anecdotally, at least, chronic public inebriates are often reported to spend more total time on the street -- and thus drinking -- than in the old criminal system, to the annoyance of local merchants and police, and to the detriment of the inebriates' physical condition. Very little is known about the effects of decriminalization on the behavior of a group which is much larger than the Skid Row group, but bulks less heavily in the arrest or detox systems -- those who are only sporadically publicly drunk, and who are presumably better candidates for deterrence or treatment.

(c) The new non-police pick-up services for drunks inadvertently discovered a substantial number of chronic drunkenness cases in medical need of detox services, but falling outside the traditional police concern only with drunkenness that was public. This suggests that a concern only with public drunkenness -- whether from a criminal or a non-criminal perspective -- is an inefficient way of deterring or dealing with the acute medical complications of heavy drinking.

(d) The experience of the last 15 years suggests that American culture as a whole remains unwilling to tolerate public drunkenness -- i.e., to decriminalize it and simply accept it as part of the urban street scene. Moral concerns about the government furthering a drinking habit have cut short most experiments with municipal "wet hotels", which attempt a pragmatic solution to the problem of public drinking by moving it inside. The concern over public drunkenness is not acute in the general

population (surveys in urban areas suggest that householders in general are more concerned about beer cans and wine bottles in their front yard than about public drunkenness), but it is acute among small merchants, who rightly fear that their customers will dislike stepping over sleeping drunks on their doorsteps, and among the new middle-class "gentrifiers" moving back into the core cities. Both of these groups are politically potent in local government. Disturbance of the peace by public drunkenness is very much a "grassroots" issue, and local communities (which tend to perceive public drunks as "outsiders") are always trying, as they have been since colonial times, to figure out constitutional ways to get them to "move on down the line".

(e) In California, at least, public drunkenness arrest figures began to fall in the 1960s, before decriminalization became a national policy. Several factors could account for this: a decline in urban renewal "Skid Row removal" projects; a decline in Skid Row populations; a decline in civic and police concern with public drunkenness as a crime; a decline in public drunkenness as a behavior. There is scattered evidence supporting each of the first three factors, and no evidence at all concerning the fourth. But, as noted above, there remains a substantial level of public concern with public drinking and drunkenness, and the forms in which decriminalization has been tried have not satisfied that concern. The recent report of the International Study of Alcohol Control Experiences predicted that the current combination of increasing concerns about alcohol problems, the increased acceptance of alcohol in everyday life, and the fiscal crisis of the welfare state may bring renewed tendencies "towards punitive and disciplinary control of individual deviant drinkers". This prediction has already been borne out for public drunkenness in California, with passage of a 1981 law potentially increasing the criminal penalties for public drunkenness.

(f) On their face, public drunkenness laws do not seem likely to be highly effective in terms of general deterrence. Unlike drunk driving laws, they include no clear standard of behavior concerning what constitutes an infraction. One of the curiosities of Anglo-American law is the refusal of judges or legislatures to spell out what is meant by being "drunk". For public drunkenness laws to be an effective deterrent, this unclear standard presumably has to be kept clearly in mind by the potential lawbreaker through an evening of drinking and deciding where to go next. Though it is possible that this partly reflects a greater effectiveness as a deterrent in other subpopulations, the population segments to which public drunkenness laws are most commonly applied have the least stake in society and thus the least motivation to be deterred by threat of arrest. The high rate of recidivism does not give us confidence in their specific deterrent effect, and lends support to sociological arguments that they are an instrument of "secondary deviance" which helps to define and create a subculture of repeat offenders.

On the other hand, it is clear from the U.S. evaluations that the alternative of detoxification and voluntary treatment, while often more humane than the drunk tank, is no more effective -- and perhaps less effective -- in preventing offenses to public order due to drunkenness. For that matter, it is not clear whether offering competing alternatives to public drinking, such as "wet hotels", will in fact reduce public drunkenness.

For a society which really seriously wants to reduce public drunkenness, however, there does seem to be an effective answer, at least in the short term. Studies of alcohol distribution strikes in Nordic countries suggest that public drunkenness -- as a behavior, not just as a criminal statistic -- can be dramatically affected in the short term by changes in the availability of alcohol. Even though the overall level of alcohol consumption in such circumstances is often only slightly affected, several studies show public drunkenness -- and alcohol-related violence -- dropping dramatically when normal distribution channels were disrupted or shut off. Such studies strongly challenge the comfortable assumption in the American literature that consumption by late-stage alcoholics will be little affected by control of availability, and lend retrospective credence to earlier studies such as Carter's and Shadwell's

accounts of the effect of control measures on public drunkenness in Britain in the First World War. The historical record suggests that such effects can only be extended over the longer term in times of national crisis or in conjunction with a substantial mass anti-alcohol movement.

DRUNK DRIVING LAWS

In contrast to public drunkenness legislation, the history of drunk driving legislation is both short and relatively well documented cross-nationally. H. Laurence Ross' recent review, Deterrence of the Drinking Driver: An International Survey, provides a handy compendium of the available knowledge. Some concern over drunk driving was shown in many countries quite early in the century, and was expressed in what Ross terms "classical" legislation against driving "under the influence" or "while intoxicated". The problem with such legislation, as with laws on public drunkenness, was that it did not offer either the motorist or enforcement agencies a predictable standard of behavior which violated the law. Increased concern as traffic grew in the interwar period, combined with the technological innovation of blood-alcohol measurement, made possible a new kind of law, first adopted in Norway in 1936, in which the presence of a given level of alcohol in the blood became a crime **per se**. In most places within the last 20 years, such laws were gradually adopted not only in other Scandinavian and in "Anglomorph" nations, but also in French- and German-speaking parts of Europe. (The most stringent European laws are in Eastern Europe, but little is known of their effectiveness in the rather different traffic situation there.)

Cumulatively, this and other changes in the law tended to increase the certainty and the severity of punishment for drunk driving, and sometimes also the celerity. In Ross' view, the changes thus represent a crucial test of the general deterrence model of the effect of criminal laws. It might be added that the population involved in drinking-driving should be more susceptible than the population committing most crimes to deterrent effects, since drunk driving is almost unique among reported crimes in involving large numbers of "respectable" offenders with much to lose from a conviction. Certainly, we would expect the deterrent effects to be greater in this population than in, say, a Skid Row population.

Ross concludes that there is evidence in each of the countries from which data is available that the introduction of "Scandinavian-type" laws did have a deterrent effect on drinking-driving behavior. "In many cases experience has shown that a convincing increase in threatened punishment from drinking and driving has been followed by notable and measurable declines in associated crashes. However, an equally important lesson for the policymaker is that in no case does the accomplishment of deterrence seem to have been permanent. ... Subsequent events have revealed a gradual return of the drinking-driving problems to the level of a pre-existing trend". Typically, the **perceived** threat of being apprehended initially increased much more than the **actual** threat did, and drivers eventually realized this. A greatly increased actual level of deterrence would not only impinge on protected individual rights in many nations but would require very considerable increases in social resources devoted to traffic control.

In agreement with other writers in the drunk driving literature, then, Ross concludes that, while further developments in legal deterrence are "feasible and promising" as a strategy of prevention, greater reductions in drunk driving casualties may be attained by working "for a safer environment for drunks to drive in (sturdier cars, safe highways)". Ross comments that "one of the general lessons from the social scientific study of law is that effects are much easier to obtain from laws directed at a small, controllable number of organizational entities than from laws directed to masses of individuals. Desegregation in housing is obtained by edicts directed to housing developers and authorities; taxes are most easily collected through withholding by bureaucratic employers; schools enforce the inoculation

of children; and seat belts are installed in vehicles because of rules directed at manufacturers (but lose their efficacy in part because individual-centered rules are needed to guarantee their use). Safety efforts achievable through manipulation of the vehicle or the road form the object of this most efficacious type of law".

ALCOHOL CONTROL LAWS

The comments by Ross just quoted provide a good introduction to a discussion of alcohol control laws, since most alcohol control laws are directed at those in the business of making alcohol available, and not at the ultimate consumer. While they are backed by the criminal law as a last resort, they thus operate primarily at the level of economic threats and incentives.

Where the state does not itself manage the distribution of alcohol, it licenses others to do so, on condition that they comply with a set of legislative and regulatory conditions. The threat of loss of livelihood involved is often a stronger threat and one more cheaply carried out than serious criminal penalties, and thus is a potentially very powerful instrument of the state. But by the same token, those affected by such controls are often better organized and positioned than are the mass of individual voters or consumers to defend themselves from state action in a pluralistic political order. In the absence of strong public sentiment, state regulatory powers tend thus to be a ratchet mechanism, wound in only one direction -- in the direction of gradually looser controls -- by the vested interests the state has licensed.

As implied above, state control over the drink-seller generally predates state control over the drinker. In medieval England, state control over the sale of alcohol began primarily in the form of price fixing statutes, enforced after 1330 by the provision that violators should not be permitted to reopen until they had "the King's Licence". Acts of 1552 and 1553 gave local justices of the peace power to select and require bonds of those keeping alehouses and wine shops. By these Acts, the retailers were made responsible for the behavior that they permitted among their customers. In America as in Britain, the subsequent history of alcohol control measures, to the extent they were maintained, remained until well into the nineteenth century a matter for local consideration, oriented primarily around controlling disruptive behavior or idleness associated with taverns. The British history included two periods when licensing was effectively abolished for at least part of the retail trade (1690-1743 and 1830-1869); both experiments seem to have produced a disastrous increase in heavy drinking, curtailed only with great difficulty.

In the functional sense of state regulation of alcohol trades, alcohol control thus has a lengthy history -- extending, in fact, back to some of the first laws of which there are written records. But in the last century "alcohol control" took on an added level of meaning, in terms of a general strategy for managing and reducing the public health and order problems associated with drinking. As a self-conscious strategy, alcohol control emerged in reaction to and as an alternative to the strategy of prohibition -- both at the local level (local control vs. local option) and at national levels (state or national prohibition vs. state and national control systems).

To a large extent, this self-conscious strategy of alcohol control initially took the form of a strategy of local or state monopoly over at least part of the alcohol trade. But even the most thoroughgoing monopoly systems did not monopolize all parts and levels of the trade, and the concept of alcohol control came to include the older and alternative strategy of state licensing of private and cooperative enterprises.

The concept of a state monopoly over psychoactive drugs was by no means new in the nineteenth century. The old regimes all over Europe had copied the Venetian state monopoly on tobacco as the most lucrative way of organizing tobacco revenues (these monopolies have survived all

subsequent revolutions and changes in government in such countries as France and Austria). But these older monopolies had been primarily motivated by the state's need for revenue. When the town of Gothenburg in Sweden installed a municipal monopoly of alcohol sales in 1864, the primary motivation was the prevention of alcohol-related problems.

The idea of a municipal or county alcohol monopoly spread all over the Nordic and English-speaking world in the succeeding decades, surfacing in such far-flung forms as municipal beer-halls in southern Africa and the "community hotel" in Renmark, South Australia. A number of communities in U.S. Southern states adopted a municipal "dispensary system", beginning in 1891. By that time, the alternative of a monopoly organized at the state or national level had emerged: Switzerland set up a Federal Alcohol Monopoly on spirits in 1885; the first U.S. state monopoly system was set up in South Carolina by Ben Tillman in 1893. The British cabinet came within one vote of nationalizing the beer industry during the First World War, but in the event a state monopoly was installed only in two shipyard areas in Britain.

Like many such schemes, Tillman's dispensary system had been explicitly adopted as an alternative to statewide Prohibition. The idea of at least a partial state monopoly thus reemerged as a potential alternative as dissatisfaction grew with the national and provincial prohibitions installed in Nordic and North American countries in the 1910s and 1920s. An influential study commissioned by John D. Rockefeller recommended the system for the U.S. State alcohol monopoly systems were set up in all Canadian provinces, in Finland, Sweden and Norway, and in 19 U.S. states. Other American states adopted the alternative of a highly-regulated and relatively coherent license system, governed by an Alcoholic Beverage Control (ABC) code.

In their broad outlines, these systems installed at the repeal of the various national prohibitions remain intact today. However, the International Study of Alcohol Control Experiences, which included three study sites -- Finland, Ontario and California -- which had experienced prohibition and four -- Switzerland, the Netherlands, Poland and Ireland -- which had not, found that in all of the study sites there had been a gradual erosion of alcohol controls in the 30 years after 1945, with the most far-reaching changes occurring in the two sites -- Finland and Ontario -- which had had the most stringent alcohol control systems. In places like California, while the form of an alcohol control system remains, encrusted by now with a baroque superstructure of special exceptions, in its functioning the system is primarily concerned with adjudicating between competing interests in the alcohol trades. There are some signs in many countries of a halt in the late 1970s to the "ratchet-mechanism" of further liberalizations. There are even some minor increases in control, including raising of minimum drinking ages in the U.S. and Canada, shortened opening hours in Finland, Norway and Alaska, and requirements that alcohol be physically separated from other commodities in stores in Ireland and Switzerland. But in terms of net effect, the availability of alcohol has been considerably increased in most industrialized nations in the last 30 years.

In U.S. discussions of alcoholic beverage control, it has often been fashionable to decry the incredible complexity of the ABC system in its current form, to point to the inconsistencies from one place to another in legal provisions, and simply to assert the ineffectiveness of alcohol control laws as a strategy of prevention. There is always a strong temptation to conclude that a longstanding law is ineffective, since its failures will tend to be apparent while its successes remain hidden. But the only true test of the effectiveness of laws is to watch what happens when they change.

In recent years, evidence has been building up from a variety of sources that, given the right circumstances, controls on alcohol availability can be surprisingly effective, both in altering the level and patterning of alcohol consumption and in affecting the incidence of alcohol-related problems. The relaxations of control in Finland were followed by a considerable increase in alcohol consumption and

in alcohol-related problems; lowering the drinking age in U.S. states in most cases produced an increase in teenage drunk-driving casualties; interrupted time-series analyses with Nordic data show a temporal association between increases in alcohol consumption and increases in the rate of violent crimes. In the other direction, a series of "strike studies" in Finland, Norway, Sweden, Poland, Australia and Canada have shown that temporary reductions in the supply of alcohol have often produced surprisingly strong reductions in alcohol-related problems.

Cumulatively, these studies make clear that in some circumstances alcohol control measures have an effect on consumption and alcohol-related problems separate from any effects of cultural or other factors. But any practical application of this general finding must take into account the particularities of cultural patterns and change. Short-term changes as in a strike period are not necessarily the same as long-term changes. General principles of social justice or equity were often involved in the liberalizations of control that occurred in the postwar period, and there is little sign in any industrialized country of a really substantial shift towards a restrictive control system. In technical terms, alcohol controls may be a potentially powerful preventive tool, but decisions on whether and how the tool is to be employed are properly decisions for the political process.

Two conclusions which could be drawn from the alcohol control studies also apply more generally to studies of legislative approaches to prevention. Classic legal-impact study designs are designed to measure the effect of a discrete legal change, irrespective of its environment. But the effectiveness of a particular legal change is often dependent on the environment in which it occurs: an isolated change may be much less effective than the same change occurring in a supportive environment of related changes. Both in research and in designing prevention strategies, attention must be paid to the whole system of law and custom in which the changes occur.

Secondly, in gauging the effect of alcohol controls and other legal measures, it is important to pay attention not only to the face value of the laws involved, but also to different cultural traditions of the meaning of legislative action. It is my impression that Nordic and perhaps British researchers have often been puzzled by the attention that Gusfield and other American social scientists have directed to the symbolic dimensions of law. There is a symbolic aspect to lawmaking in all societies, but it seems that American legislators are more likely than Nordic legislators to give primacy to the symbolic dimension. Unlike some American laws, a Scandinavian law means what it says, even if it also has other meanings. In the field of alcohol controls, the U.S. is by no means at an extreme in terms of symbolic and unenforced legislation. A recent study for the Pan American Health Organization has uncovered a rich archaeology of forgotten alcohol control laws in Central American republics.

As I have implied in the course of this discussion, the recent history of legislative approaches to the prevention of alcohol problems in industrialized countries is marked by inconsistency: there has been a heavy reliance on criminal law approaches to drunk driving, while legal and regulatory approaches tend to have been deemphasized in the fields of public drunkenness and alcohol controls. In terms of the most effective possible strategies for reducing the level of alcohol-related problems, what is needed is a convergent approach involving a variety of mutually reinforcing strategies. There are limits to what can be accomplished with legislative strategies; on the other hand, legislative and regulatory approaches will be an important component of any effective integrated policy. Laws and regulations that are directed not at persuading or threatening the alcohol consumer, but rather at influencing the fact and environment of consumption and preventing untoward consequences, will play a crucial part in such a policy.