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**How effective is non-custodial sentencing in achieving compliance
with road traffic law?**

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Introduction

As we are all aware, the vast majority of road traffic offences – if known and processed - result in one particular type of non-custodial sentence, the fine, but there is also an increasing emphasis on community sentences which involve drug and alcohol treatment requirements for certain road traffic offences. Within that context we have been asked to review what we know about the effectiveness of non-custodial sanctions generally but specifically in relation to road traffic offences. This has proved to be a surprisingly difficult task for various reasons.

First of course – road traffic law is an area of law with diverse offences – ranging from parking offences through ‘bad driving’ to drink/drug driving offences¹ - and different types of offenders. We shall see that – in relation to compliance the devil is often in the detail and so we should not be trying to generalise across the whole range but in the time allowed that is inevitable.

Secondly, another fundamental issue is that there is a conflict of sentencing aims in English law. Court-imposed fines are calculated within a retributivist framework of justice - you get what you deserve - and the deprivation of liberty within community penalties should also be proportionate to the seriousness of the offending. However, ‘effectiveness’ - reducing offending – is derived from the other main justification for

¹ See the CPS website for traffic offences at http://www.cps.gov.uk/legal/p_to_r/road_traffic_offences/

punishment – utilitarianism. So retribution currently competes with deterrence, public protection, rehabilitation and reparation (s142 CJA 2003) although, notwithstanding the current focus on rehabilitation in government policy, it is deterrence which receives most attention.

Thirdly, we do know that research comparing reoffending rates after custodial and non-custodial penalties suggests that the latter are more effective but the difference is not always huge. For example, Kershaw (1999) found that 58% of sentenced prisoners discharged from custody in 1995 were reconvicted of a standard list offence within 2 years. This compared with a figure of 56% for those offenders who had commenced a community penalty. More recently a longitudinal study - *Surveying Prisoner Crime Reduction* - found that that probation supervision was more effective than a custodial sentence of less than a year in reducing one-year reoffending rates (Ministry of Justice 2010a). However, the extent to which non-custodial sentences are found to be more effective at reducing re-offending varies and probably depends on the research design – what variables are controlled for, for example, or what post-punishment time-scale is used and what offences are picked up.

With these caveats we are first going to review the general literature on deterrence to outline the difficulties and point out the need to concentrate on specific aspects of process as well as punishment which might improve both general and individual deterrence. Then we will consider whether road traffic offences are inherently different from other offences such that deterrence research may not be fully applicable. We will then consider whether it might be more effective in terms of compliance to focus on punishment as a means of rehabilitation than deterrence.

Deterrence

Deterrence is, of course, a well-established justification of punishment, developed in the late 18th century by Beccaria (1767) and Bentham (1789). It is based on the idea that individuals seek pleasure and avoid pain and so uses the fear of punishment to

control/reduce criminal behaviour. However, deterrence is a far more problematic issue than many members of the public think. The assumption of the public, the media, the government and those who sentence offenders is that people ARE deterred by punishment and that more punishment will deter more effectively. But research casts doubt on the assumption that all individuals are deterrable and, whilst public and political discussions often further assume that it is the level or severity of punishment which is crucial, this may not be the main issue: we need to consider other dimensions of deterrence as well.

So we will try to unravel some of those complexities and first need to get a few terms clear.

Deterrence may be **individual, that is, special** - or **general**. Most discussions of unlawful driving have focused on the deterrent effect of penalties on the individual offender but general deterrence, the effect on the wider public, is also important if only in considering the cost-effectiveness of measures.

Deterrence may also be **primary** or **marginal**. Primary deterrence is the deterrent effect resulting from punishment where a behaviour was previously unpunished. Marginal deterrence refers to changes in behaviour resulting from variations in the level of punishment, for actions already subject to sanctions, rather than dealing with the effect of punishment for previously unpunished actions.

Most importantly for deterrence theorists, deterrence may also be **perceptual** - here we are focusing on the awareness of the likelihood of being punished, or of the nature, type or extent of punishment. It sounds obvious but research studies – and I'm sure also the professional experience of some of you - show that offenders underestimate the chance of conviction and are surprised they have been caught or punished. A low estimate of risk may, of course, mean a higher probability of offending. It is also clearly very difficult for a particular punishment or level of punishment to deter if the public are unaware of its existence and we certainly cannot assume a universal understanding of sentencing

guidelines and the potential severity of punishment, despite the efforts of the Sentencing Council now publicise their work and guidelines. We also cannot assume that people have uniform perceptions across the processes of detection, prosecution and punishment as to what is likely to happen: a study on deterrence and gun crime in Alaska showed ‘people assign different probabilities to each stage of the criminal justice process’ (Myrstol 2004).

Linked to this, then, is certainty – how likely is it that the person considering offending will be detected and punished? In addition research has focused on the **celerity** of punishment – how quickly the punishment will be delivered, on the **mode** or type of punishment, and also on the **type of offender** – factors affecting propensity to offend: e.g. age, gender, past criminal history, and the **type of offence**, e.g. property, violence, sexual offenders.

These will be briefly considered as well as problems of interpretation of the evidence.

1. Certainty

A key element of any crime reduction strategy is for public awareness of the certainty of a punishment to be conveyed, for example, that there will be zero tolerance of certain behaviours and rigorous imposition of appropriate penalties. If individuals know they cannot get caught, they may be more likely to engage in criminal behaviour. A review of research on deterrence from the late 70s to the late 90s by von Hirsch (1999) and also more recent studies suggest that increasing the certainty of punishment does indeed increase the deterrent effect. Intervention and subsequent sanctions need to be certain to be effective.

Two studies of the policing of domestic violence - Sherman’s 1983 study in Minneapolis and Hanmer’s 1999 study in Killingbeck, West Yorkshire, did find that police intervention reduced reoffending. Conversely, police strikes and reduced policing levels have been associated with increases in crime. The introduction of the breathalyser in the UK did correlate with a decline in road accidents (Ross 1973). If people know they are

being observed this may affect behaviour, for example if parking illegally, and drivers drive more carefully if they notice a police car behind them. Research by Gill and Loveday (2003) involving interviews with prisoners regarding the use of CCTV also suggests that those who have been caught by cameras see them as more of a threat. In a promising study in North Carolina reported by Kennedy in 2009, drug dealers were told there was sufficient information on them for an arrest warrant to be advised of the consequences of arrest. The result was a collapse in the drugs market in the area.

This is why perceptual deterrence is so important. We already know from the British Crime Survey and other studies that the public is often misinformed or underestimates sentencing levels. So if they are also unaware of the chances of being caught, the deterrent effect of changes will be negated. Awareness of certainty may be enhanced by a strong police presence or media campaign. Awareness of the subjective probability of conviction, however, may depend on an individual's circumstances, status, access to lawyer/advice etc.

2. Severity

Research on severity and crime rates endorses our earlier comment that severity is less important than certainty. This may be due to there being less public awareness of the severity of punishments but research suggests this is not the answer. In the USA the crime rate has fallen in states with harsh sentences and without harsh sentences. An Australian study by Weatherburn and Moffat (2011) considered the effects of *high* fines on drink driving offenders but found no specific increased deterrent effect.

3. Mode/Type of Punishment

This is an important issue relevant to discussion of road safety today but, again, the situation is not clear although we do know that clamping deters illegal parking more than fines and drivers are more fearful of disqualification than fines.

4. Type of Offender

There may be differences between offenders in impulsivity, or circumstances, if they have nothing to lose; also between older and younger offenders. As we know, in many, but not all studies, young offenders showed higher reoffending rates and men higher than women, although this may vary with the type of offence and other factors.

There are also variations in reoffending according to type of offence committed, so reoffending rates for burglary and theft are high. Generally younger persistent offenders are least likely to refrain from reoffending because of the risk of being caught. The *Surveying Crime Reduction* study found that reconviction rates are higher for prisoners who had experienced violence as a child in the home, or were excluded from school, or were polydrug users (Ministry of Justice 2010b). On road safety issues, there are indications that older drivers and women are more aware of road safety. Claire Corbett's (2006) study found that women were more affected by speed cameras than men.

5. Celerity

The celerity – or swiftness of punishment after being caught offending has received less research attention and much has related to the death penalty which is not relevant to the UK. Yet fixed penalty notices have been introduced at least partly for this purpose as a current government website on PNDs notes.² A 1994 study did look at celerity and severity in relation to drunk-driving in New York and found that when license withdrawal was mandatory an increase in fines did significantly reduce re-offending but only found 'some effect' after a swift imposition of fines (Yu 1994). Similarly in the North Carolina study of threatened arrests and prosecutions of drug dealers discussed by Kennedy (2009), the dealers were told they would be arrested and punished on a specific date in the very near future and that did appear to have an effect.

Do recent traffic offence based studies tell us anything different?

² See: <http://www.homeoffice.gov.uk/police/penalty-notices/>

Dr Easton has given a review but you may be concerned that road traffic offences are different and that research specifically focusing on whether drivers can be deterred may show different results. The answer is yes and no!

I have selected 3 pieces of research to dip in to. First a Scottish report - *The Deterrent Effect of Enforcement in Road Safety: Research Findings*, (1999) TSO – focused on enforcement and, therefore, certainty. One conclusion - which mirrors many other research findings on deterrence was that “The research has found that the influences on drivers' compliance with traffic law are many and complex. The deterrent effect of enforcement depends on the type of driving offence and the public's attitude towards the severity of that offence.” I will come back to that last point. It also noted that “More generally, the research has tended to reaffirm the findings of previous research”. The report goes on to list findings, including that people do consider the cost and benefits of complying with the law but also that in relation to bad driving the driver over-estimates his ability to anticipate and control dangerous situations.

The report also refers to perceptions:

‘There is a belief that **moderate speeding** is tolerated by enforcement agencies, and that speeding in general has an associated low risk, either of getting caught or being involved in an accident. This finding points to the need to increase both the perception of risk by the driver and awareness of the real risks associated with speeding.’

However it notes more effective deterrence in relation to drink-driving.

“In terms of the other, non-speeding, offences considered in the research strong deterrent effects were identified with the penalties for drunk driving. Regardless of whether respondents had been penalised for drunk driving in the past, none considered drunk driving something they would do. The motivation for avoiding drunk driving varied, with previous offenders wishing to avoid the physical and social isolation associated with losing their licence, while non-offenders are more strongly motivated by the messages of risk -both of prosecution and accidents - promoted by mass, media campaigns.”

If we move to a more recent piece of research but done in Australia we find the following conclusions from Freeman and colleagues in relation to drug driving. That research used sample of nearly 900 with average age of 30 and cannabis was the most commonly consumed drug. That concluded as follows:

‘Analysis of the collected data revealed that approximately 20% of participants reported drug driving at least once in the last six months. Overall, there was considerable variability in respondent’s perceptions regarding the certainty, severity and swiftness of legal sanctions, although the largest proportion of the sample did not consider such sanctions to be certain, severe, or swift. In regards to predicting those who intended to drug driving again in the future, a combination of perceptual and behavioural based factors were associated with such intentions. However, a closer examination revealed that behaviours, rather than perceptions, proved to have a greater level of influence on the current sample’s future intentions to offend.’

‘Behaviour’ in that last sentence refers to patterns of drug driving in the recent past as well as the frequency of actual drug consumption behaviours. That makes it much less likely that anything can be done to achieve compliance via the certainty or severity of punishment.

The authors go on to spell this out:

‘In relation to past offending behaviours, similar with previous road safety research that has focused on drink driving (e.g., Freeman et al., 2006), past behaviour remains an efficient predictor of future behaviour. To a further extent, it may yet be found that drug driving while avoiding detection (e.g., punishment avoidance) may have a powerful influence on further offending behaviour, and research has found such evidence with other road safety concerns such as drink driving (Freeman & Watson, 2006; Piquero & Paternoster; 1998). To some extent,

habitual or regular behaviours may counteract (or negate) the deterrent impact of proposed countermeasures, as committing an offence and avoiding apprehension is likely to be a strong reinforcer to engage in further offending behaviour among some groups.’ (p.15)

The third piece of research I want to mention – done by Weatherburn and Moffat – is also Australian. It focused on drink driving and specifically the effect of having a higher level of fines. I recommend you to the British Journal of Criminology article as it also has a review of other research projects. This research found - with sample of 12,000 cases - **no** significant effect of giving higher rather than lower fines. It therefore asked why this might be so, It focused on the fact that offenders appeared to have a low perceived risk of apprehension but realised this also begged the question as to why. They suggested it might be dependent on the number of times the driver has been stopped by police after drinking but that further depended on how many time the offender had previously been undetected. The offender – even if successfully convicted could succumb to the ‘gambler’s fallacy’ of assuming that statistically being caught was unlikely to happen again.

Interpreting the research findings

So does deterrence work? As you can see from our brief review the only general answer can be that we are not sure. The research has covered all the aspects of deterrence we have mentioned and also a wide range of offences but - as we have seen - there are problems with drawing conclusions from the available research.

Some of the difficulty stems from the methodological problems in setting up experiments and isolating the causal effect of punishment. It is for example, hard to suspend a penalty or substantially increase severity for experimental purposes to test a deterrent effect and there would be problems of legitimacy. So if statistics show a decline in re-offending, we cannot necessarily infer that it was the penalty which affected the decision not to reoffend: there could be other factors or intervening variables. There may also be local

variations in law enforcement and national changes in sentencing policy which skew the figures.

There are other problems in interpreting results. For example, high rates of reoffending do not necessarily invalidate the deterrent effect of punishment, because the level of crime may be lower than it would have been without the punishment. Also offenders may re-offend but commit offences less frequently or commit less serious offences. On the other hand lower rates may simply mean that more people have not got caught or have become more secretive in response to more active policing.

Individuals might be initially deterred by a change in the severity of punishment but over time this deterrent effect may 'decay', especially if they are not caught. There are also problems in assuming the rational calculation of costs of offending if rationality is not universal, which is why reasoning skills are an important element of offending behaviour programmes. However, for large gains, such as those resulting from project crime, risks may be deemed worth taking. Again certainty of punishment may be more important than severity. Weatherburn and Moffat (2011:790) also draw attention to similar specific problems re the existence of unknown or uncontrolled for variables in drink-driving offences: 'As with so much of the general literature on specific deterrence ... studies of the specific deterrent effect of higher fines on drink-driving are often vulnerable to omitted variable bias'.

So the research suggests that deterrence may work on some people, even if it deters fewer offenders and potential offenders than we would like. However, deterrence may work on enough offenders to make policies based on deterrence justifiable. Even in crimes which seem to be influenced by emotions and passion, rational calculations may have a role to play. Wilson (1985) argues that, even at times of heightened emotions people, engage in calculations: for example, in a pub brawl, assailants may not hit the toughest looking person.

Are road traffic offences special?

Deterrence depends on all the factors we have reviewed and it is clear that what people think and expect is crucial but there is also a fundamental compliance issue in relation to the perceived wrongfulness of traffic offending and that is bound up with the nature of the most common punishment for such offences – fines. Fines have an ambivalent position in the mind of the public who often do not perceive fines to be a ‘real’ punishment perhaps because it is the designated penalty for categories of offence which some sections of the population do not regard as ‘really’ criminal. Parking offences and regulatory offences like those in relation to TV licences might come into this category and, for some people, other motoring offences, such as speeding, as well as health and safety infractions, are also not thought of as morally ‘wrong’. And perhaps our use of the word ‘compliance’ reinforces these connections.

So we get firms of solicitors specialising in ‘saving’ the motorist from a conviction or loss of licence, in a way, perhaps, that we might not find specialists in avoiding conviction for burglary. Further, where citizens do not regard an offence as really criminal, they do not perceive the outcome as a punishment but rationalise it instead as a tax—a morally neutral nuisance which is the occasional result of choosing not to obey what are deemed as non-criminal regulations. And – perceived as a tax – avoidance is the aim. This is clearly of importance regarding the potential consequences of imposing fines for road traffic offences and affects our interpretation of research as to what does generally deter or not. Weatherburn and Moffat (2011) suggest that, for example, the cost of getting oneself home when drunk may weigh more heavily than the cost of the fine. That affects the level of the fine necessary to deter – if it does – and suggests other approaches.

Factors which constrain offenders are often quirky – with young offenders it has in some studies been shown to be the fact that their mum or granny would find out, for professional adults it can be publicity in the local press - and the Australian drug driving research found that approximately half of the sample reported that they would be concerned about their friends’ views of their drug driving behaviour (Freeman et al 2010) - but that will not constrain unless there is a level of certainly of apprehension and prosecution.

But of course punishment is only one factor in offending/reoffending. And if the deterrence gap between custody and noncustodial penalties is not great, then cost-benefit analysis would suggest that keeping individuals in work, housing etc in the community may be more efficient. So there is the very large question of community sentences and whether they achieve compliance by rehabilitation.

There has been pressure for community sentences - particularly with drug or alcohol treatment requirements in relation to drink-driving offences. We needed another hour to even review the material here but quotations from two reports give a flavour of the current state of knowledge:

‘Individuals who received residential drug treatment have been shown to be 45 per cent less likely to reoffend after release than comparable individuals receiving prison sentences (Matrix 2007).’ (Howard League 2011)

‘Evidence is limited in identifying the effectiveness of interventions for specific client groups in Scotland and internationally’ (Malloch (2011: 32)

‘Those who complete an order or intervention have lower reconviction rates than those who do not. ... [but] In Scotland, there is evidence to suggest that Drug Courts and DTTOs have some level of effectiveness’ (ibid: 36)

There are also the drink driving courses which have been on offer for some time³ and the Department of transport website gives this information:

³ See: Johnson, C. and Hardman, J. (2010) *Professional Skills for Delivering the Drink-Drive Rehabilitation (DDR) Scheme: Analysis of DDR Training Provider Organisations’ Interview Findings*, Road Safety Web Publication No. 13. Department for Transport: London. [Interviews with providers – re KPIs]; Presentation by Sir Peter North in Dublin in April of this year: http://www.rsa.ie/Documents/Seminars/Recidivist%20Behaviour/Presentations/Sir_Peter_North_Presentation.pdf; C Inwood, G Buckle, M Keigan, R Borrill (2007) *Extended monitoring of drink-drive rehabilitation courses: Final Report*. TRL Report No 662. – concluded it was effective in reducing reconvictions.

Summary of the Scheme

- ◆ If convicted of a drink drive offence you may be offered the opportunity to attend a rehabilitation course
- ◆ It is for you to decide whether to accept this offer
- ◆ You will be required to pay for the course
- ◆ If you satisfactorily complete the course your period of disqualification will be reduced by up to a quarter
- ◆ The court will decide whether to offer you a place on a rehabilitation course, and, if so, by how much the period of disqualification will be reduced.

We also looked at research on desistance from offending and, in particular, *Desistance Research and Offender Management, Report 03/2010*, Glasgow, Scottish Centre for Crime and Justice Research. This excellent review of research re rehabilitation approaches (McNeill and Weaver 2010) has no mention of any traffic offenders except in one footnote⁴ but some of their conclusions are still relevant:

Criticising the general approach illustrated by the diagram on p.21 the report notes:

‘A number of complicating factors have emerged in the practical experiences of this general approach and in the evaluation research which has sought to account for the sometimes limited impact of such programmes. First of all, researchers have learned – not only through desistance research but from programmes research too – that more attention needs to be paid to the offender’s motivation and to the impact of his or her social context on the outcomes of the intervention (Farrall, 2002). Secondly, it is now well understood that there is more to effective programmes than designing them well; they need to be run well; that requires the

⁴ It is important to note that some people who commit very serious offences may not evidence any kind of ‘criminal identity’; for example, someone with no previous record who is convicted of causing death by dangerous driving, or someone who is involved in a serious assault in very particular circumstances, may well retain a very conventional (‘law-abiding’) sense of self’ (fn3, p.5). Other reports we looked at say they have not included offenders with traffic violations.

right organisational arrangements, the right staff skills and the right qualities of relationships between offenders and probation staff – both within programmes and beyond them (Raynor, 2004a, 2004b, 2008)’ (McNeill and Weaver 2010: 22).

Conclusions

Despite the problems of interpretation highlighted above, we can at the very least say that - for the deterrent effect to work, the key issue is perceptual deterrence: people must be informed about chance of being detected and what punishment they are likely to receive. Punishment and threats of punishment need to be targeted specifically to particular groups of offenders to avoid unnecessary costs. However the traffic law compliance studies also suggest that behavioural factors are important.

But there is the overarching issue that road traffic offences do need to be viewed more clearly by the public as offences. There needs to be more education of the effects of speeding for example – that a child can be killed if you drive over 30 mph but has a chance at less than that – or of illegal parking - can make life very difficult for the elderly and parents with prams and pushchairs and could lead to a serious accident. Health and safety offences are being upgraded in sentencing terms. Fines can be much higher etc and reflect new thinking about the wrongfulness of employers whose inaction leads to death and serious injury.⁵ Fine could be higher for road traffic offences, not because they will always deter – they won’t – but because they will help to give a message about the wrongfulness of such offending.

⁵ See also research on competition law offences: Office of Fair Trading (2009) *An assessment of discretionary penalties regimes, Final report*, OFT1132 - The purpose of this study is to assess the deterrent power of the UK penalties in relation to infringements of competition law: ‘First, when we examine fines in markets of similar size, expected UK fines are around 65 per cent lower than the EC fines. Second, when we apply the UK’s fining guidelines to a case study we find the UK would be 76 per cent below the fine estimated from current EC guidelines and 50-75 per cent below the fine estimated from current US guidelines’ (p.6). See especially the chart on p. 8: 1.1 *Comparison of deterrence effect of fining regimes across jurisdictions*.

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