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Characteristics of DWI and Related Offense Commitments
to New York State Correctional Facilities 1978 through 1985

At the request of the New York State Division of Probation, this report provides statistics on commitments for Driving While Intoxicated from 1978 to 1985.

The annual number of DWI commitments has risen steadily during this period but remains a minute fraction (less than 1%) of all commitments.

The initial impact of the new DWI related crimes of vehicular manslaughter and vehicular assault is also examined.

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to New York State Correctional Facilities 1978 through 1985

INTRODUCTION

This report is one of a series on characteristics of persons under custody in New York State Department of Correctional Services facilities for driving while intoxicated.¹ In addition, it briefly examines data on the DWI related offenses of criminally negligent homicide while driving under the influence of alcohol, vehicular manslaughter and vehicular assault. The latter two are felony offenses created by statute in 1983.²

PURPOSE

The report was prepared in response to a request from the New York State Division of Probation (NYS DOP) for information on characteristics of inmates committed for "Driving While Intoxicated" and other related offenses (e.g., Criminally Negligent Homicide). The Office of the Director for Criminal Justice has also expressed interest in this area. Furthermore, the Department of Correctional Services is aware of continuing general interest in the "drunk driving" problem. (See for example, National Institute of Justice, "Jailing Drunk Drivers - Impact on the Criminal Justice System", in NIJ Reports, July, 1985, pp. 2-5.)

To provide a framework for interpreting the tabular data on inmate characteristics, it is useful to review the laws pertaining to "operating a motor vehicle while under the influence of an alcoholic beverage" (or DWI as it will be referred to throughout this report).

LAWS PERTAINING TO DRIVING WHILE INTOXICATED AND RELATED OFFENSES

There are several laws under which persons are incarcerated in state facilities in New York State for DWI and related offenses.

Driving While Intoxicated. The laws pertaining to persons convicted of driving while intoxicated will be reviewed first. Conviction upon first offense of (a) driving while intoxicated or (b) driving while ability is impaired by consumption of alcohol is not punishable by imprisonment in a state correctional facility. This is because the relevant law, Section 1192, Part 1 of the New York State Vehicle and Traffic Law defines "driving while impaired" as a "traffic infraction" and "driving while intoxicated" as a misdemeanor. Although convicted misdemeanants can be sentenced to a term of jail in a local facility, it is not possible for misdemeanants to be sentenced to a state correctional facility. The latter receives only convicted felons (i.e., those who can be incarcerated for an indeterminate sentence of at least one year).

The possibility of a prison sentence for driving while intoxicated arises upon a second conviction for DWI within ten years. Under the New York State Vehicle and Traffic Law, Part 5, as of 1975, a person who is convicted of DWI after having been convicted of a prior DWI is guilty of a felony. Therefore, the person may be sentenced to a term of incarceration in a state correctional facility.³ Although the law has been amended several times in the period between 1975 to 1985, none of these amendments affect the status of persons convicted of DWI after a prior DWI conviction within the preceding ten years.

State Commitment Following a DWI Felony Conviction: Discretionary and Not Mandatory. It is important to keep in mind that in the entire period 1978 to the present, the Vehicle and Traffic Law does not mandate a term of incarceration in a state correctional facility upon a second conviction. Sentencing judges, for example, during this period, had the options of imprisonment in a county jail or penitentiary, or a fine, or both imprisonment and a fine.

Because imprisonment in a state correctional facility is not mandatory unless a sentence of at least a year is handed down by the court, only a fraction of persons convicted of DWI a second time would have been remanded to the custody of the New York State Department of Correctional Services. Not surprisingly, the numbers of such cases are very low (see Table 1).

There is another reason why DWI cases have remained a consistently tiny fraction of the overall under custody population. The DWI case can never be treated as a second or predicate felony case on an instant conviction for DWI. Only persons convicted of crimes specifically identified in the Penal Law (Section 70.06) are eligible to be treated as second or predicate felons (see *People of the State of New York v. W.R. Morris*, 86 A.D. 2d 763).

The persons convicted of felonies who are incarcerated as second or predicate felony offenders are a substantial percentage (almost half) of the under custody population in New York State correctional facilities. These second felony offenders have to be sentenced to prison unless they qualify for probation under the limited set of exceptions to the mandatory prison sentencing requirements.⁴ Not only do second felony offenders generally have to be sentenced to prison, they also have to serve at least half the maximum term to which they have been sentenced before they become eligible for parole. This has meant that they are kept longer than first felony offenders thus increasing the population under custody. However, DWI cases in the period 1978 to 1985, regardless of prior felony convictions, generally have received minimum sentences of only a year or a year and a half and maximum sentences of not more than four years.⁵

DWI Related Offenses. In addition to DWI itself, there are some other offenses that are regarded as "DWI related." These offenses are felonies that arise out of operating a motor vehicle while impaired or intoxicated and thereby injuring or killing other persons.

Criminally Negligent Homicide Involving DWI. Until 1983, the laws of New York did not specify any crime of assault or homicide that was specifically related to motor vehicles. Persons who killed others while driving under the influence of an alcoholic beverage were often handled as offenders under Section 125.10 of the Penal Law which covered "criminally negligent homicide". This crime, a Class E felony, has been committed under law when a person's death has been caused by a perpetrator unaware of the risk of death inherent in the action leading to death.

Persons guilty of criminally negligent homicide are those whom the court finds had no intent and no understanding that the act might lead to a death although the action taken, e.g., driving while intoxicated, is "likely to cause death".

Criminally negligent homicide under New York State Law is an act by an offender that demonstrates a lesser degree of intent on the offender's part than recklessness.⁶ The latter occurs when the court finds that the person knew the risks of his behavior but chose to ignore them. If the court found that the defendant had such knowledge at the time the act occurred, the court could find the defendant guilty of the charge of manslaughter, a more serious felony than criminally negligent homicide.

Enactment of New DWI Related Crimes in 1983. The deaths on the State's and nation's highways over the past several years (an estimated 50 thousand fatalities every year nationally, and approximately three-quarters of a million injuries nationally in automobile accidents every year) influenced the New York Legislature in 1983 to stiffen the laws regarding injuries and deaths that occurred as a result of DWI.⁷ Two changes were made to the Penal Code in that year.

Vehicular Manslaughter. One of these changes created a new crime of Vehicular Manslaughter. As suggested by the title, this crime is a more serious felony (Class D) than criminally negligent homicide (Class E). The new crime, Section 125.12 of the Penal Code, is "a crime of criminally negligent homicide (Penal Law Section 125.10)" that has been committed when the

"...guilty person operated a vehicle
in violation of subdivision two, three,
or four of Section 1192 of the Vehicle
and Traffic law..."

The definition of the crime is noteworthy in a legal sense because Manslaughter, as indicated earlier in People v. Lamphear, implies knowledge that an act could cause death and conscious disregard of the proscribed risk. Such recklessness is not criminal negligence since the latter is not conscious disregard of a known risk. What the new law seems to be saying is that anyone operating a motor vehicle in New York State while in an intoxicated condition is presumed to have known the risk and to have consciously disregarded it.

Vehicular Assault. In addition to the crime of vehicular manslaughter, the Legislature in 1983 also created a crime of vehicular assault (Section 120.03 of the Penal Code). This crime is a Class E felony. The crime is defined as having been committed when the guilty person has operated a motor vehicle in violation of subdivision two, three, or four of Section 1192 of the Vehicle and Traffic Law and "with criminal negligence...causes physical injury to another person".

Prior to September 1, 1983 when the new law went into effect, persons who injured others while driving in an intoxicated condition in New York State were prosecuted under Section 120.00 of the Penal Code for Assault 3rd. This is a "crime of criminally negligent assault that is committed when the guilty person has caused physical injury to another by means of a...dangerous instrument". (For purposes of the law, an automobile is a "dangerous instrument" when it is used to cause injury or death.)

Assault 3rd is a misdemeanor whereas, as stated above, vehicular assault is a felony. Thus, the effect of creating a category of vehicular assault was to increase the penalty for causing injury while operating a vehicle under the influence of an intoxicating beverage.

CHARACTERISTICS OF PERSONS COMMITTED TO DEPARTMENT OF CORRECTIONAL SERVICES FACILITIES FOR DWI: 1978 THROUGH 1985

In this section, the main findings of the survey are presented. The results presented are only for DWI cases since too few cases for the other related offenses are available for statistical study and comparison.

The analysis is based on a complete cohort of persons committed to the Department for DWI in the period 1978 through 1985.

GROWTH IN DWI COMMITMENTS: 1978 THROUGH 1985

A total of 243 persons were committed in the period 1978 through 1985 to the Department of Correctional Services for DWI. There was a steady growth in the annual number of DWI commitments during that period. While these commitments have grown, they represent less than 1% of the over 80,000 persons committed to DOCS during the above period.

TABLE 1. New Commitments for Driving While Intoxicated (DWI) Commitment Years (1978-1985) Compared with All Offenses And Reporting DWI Percentage of Total New Commitments

	<u>Year of Commitment</u>								
<u>Offense</u>	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>Total</u>
All Offenses	7232	7595	7959	10,303	10,406	12,536	12,247	12,420	80,698
DWI	15	9	12	23	29	41	47	67	243
Percent	0.207%	0.118%	0.151%	0.223%	0.279%	0.327%	0.383%	0.539%	0.301%

This low number of commitments to the State's correctional facilities seems to be a consequence of the fact that (a) judges have considerable discretion in sentencing DWI felony cases with prior DWI convictions (sentences of a fine, a term in county jails, or a combination of those two sanctions can be imposed by a sentencing magistrate), and (b) DWI cases can only be sentenced to a New York State correctional facility for a second or subsequent DWI conviction.

SEX

Table 2 shows the sex distribution of commitments for DWI to State correctional facilities in the time interval 1978 to 1985. Of the 243 DWI commitments in that interval, four were female. This is less than two percent (1.64%) of the total number of DWI commitments.

TABLE 2. New Commitments for Driving While Intoxicated (DWI)
Showing Year of Commitment (1978-1985) Classified by Sex of DWI Inmate

	<u>Year of Commitment</u>								
DWI	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>Total</u>
Male	15	9	12	22	28	40	47	66	239
Female	0	0	0	1	1	1	0	1	4
Total	15	9	12	23	29	41	47	67	243

AGE

Table 3 shows the age distribution of DWI commitments. In the period 1978 to 1985, only one person under 20 received a sentence to a state correctional facility for DWI. In view of the media attention to drunk driving by youths, this may seem quite surprising. In considering this finding, however, it should be noted that an offender cannot be sentenced to a state correctional facility for DWI on a first DWI offense which reduces the likelihood that younger offenders will be incarcerated in a state correctional facility for this crime.

TABLE 3. New Commitments for Driving While Intoxicated (DWI)
Showing Year of Commitment (1978-1985) Classified by Age Upon Admission

<u>Age</u>	<u>Year of Commitment</u>								<u>Total</u>
	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	
16-18 years	0	0	0	0	0	0	0	0	0
19-20 years	0	0	0	1	0	0	0	0	1
21-24 years	1	0	2	4	3	2	4	5	21
25-29 years	0	0	0	7	5	4	11	9	36
30-34 years	4	1	3	4	3	12	8	14	49
35-39 years	4	3	3	0	5	8	7	14	44
40-44 years	5	4	1	2	3	4	8	8	35
45-49 years	0	0	3	2	2	5	2	8	22
50-64 years	1	1	0	3	7	6	7	9	34
Over 65 years	0	0	0	0	1	0	0	0	1
Total	15	9	12	23	29	41	47	67	243

The distribution shows that DWI commitments are rather evenly distributed between the ages of 25 and 65 years old at the time of commitment. This is a greater dispersion in age than is typical of the overall inmate population--most of whom are under 35 years of age at commitment.

REGION OF COMMITMENT

Table 4 shows the region of commitment for DWI cases committed to DOCS in the period 1978 to 1985. Overwhelmingly, these cases came from the "upstate" part of New York rather than the "downstate" area (New York City and suburbs). In fact, New York City judges in this interval did not commit anyone to DOCS custody for DWI until 1983. The suburban New York City judges committed DWI cases to DOCS beginning in 1981. In 1985, however, commitments from downstate counties outnumbered those for upstate counties. If this shift continues, the region of commitment for DWI may possibly come to more closely resemble that for most other offenses in the future.

TABLE 4. New Commitments for Driving While Intoxicated (DWI) Showing Year of Commitment (1978-1985) Classified by Region of the State from which Received

<u>Region</u>	<u>Year of Commitment</u>								
	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	<u>Total</u>
Upstate Counties	15	9	12	19	24	27	37	31	174
New York City & Suburban New York <u>1/</u>	0	0	0	4	5	14 <u>a/</u>	10 <u>b/</u>	36 <u>c/</u>	69
Total	15	9	12	23	29	41	47	67	243

1/ Includes Bronx, Kings, New York, Queens, Richmond (all NYC Counties) and Nassau, Rockland, Suffolk, Westchester Counties

a/ One person was sentenced to prison from New York County; all the other cases (13) came from suburban New York.

b/ One person was sentenced to prison from New York County and one from Queens County. The other eight came from suburban New York.

c/ Eight persons were sentenced for DWI in Kings County, two in New York, one in Queens, one in Richmond, and three in the Bronx. In 1985, for the first time in the period under study, commitments from downstate for DWI outnumbered commitments from upstate.

MINIMUM AND MAXIMUM SENTENCE

The data in Tables 5 and 6 show that sentences for DWI have been relatively brief. Minimums, when specified, were for a year to a year and a half while maximums never exceeded four years. The large number of "unspecified minimums" (39 of 243 cases) in the period prior to 1983 reflect practice under earlier law. Judges under earlier law did not have to specify a minimum sentence for certain kinds of offenses. The New York State practice in cases of that type (i.e, unspecified minimum) was to schedule the offender for a special meeting with the Parole Board within nine months of his commitment. That Board would then set a date of parole eligibility at this special meeting. This would, in effect, constitute the minimum sentence to be served by the offender.

TABLE 5. New Commitments for Driving While Intoxicated (DWI)
Showing Year of Commitment (1978-1985) Classified by Minimum Sentence

<u>Minimum Sentence</u>	<u>Year of Commitment</u>								<u>Total</u>
	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	
12 to 17 months	1	0	1	17	26	39	45	67	196
18 to 23 months	0	0	1	1	0	2	2	0	6
24 to 35 months	1	0	0	1	0	0	0	0	2
Unspecified Minimum	13	9	10	4	3	0	0	0	39
Total	15	9	12	23	29	41	47	67	243

TABLE 6. New Commitments for Driving While Intoxicated (DWI)
Showing Year of Commitment (1978-1985) Classified by Maximum Sentence

<u>Maximum Sentence</u>	<u>Year of Commitment</u>								<u>Total</u>
	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>	<u>1984</u>	<u>1985</u>	
36 months	8	8	10	15	21	32	35	45	174
42 months	-	-	-	-	-	-	-	1	1
48 months	7	1	2	8	8	9	12	21	68
Total	15	9	12	23	29	41	47	67	243

DWI Related Felonies: Criminally Negligent Homicide Involving DWI, Vehicular Manslaughter, and Vehicular Assault. Data for 1984 and 1985 was reviewed to determine the number of persons committed for the above listed offenses. In 1984, five persons committed for criminally negligent homicides were intoxicated motorists convicted of killing others. Two persons were committed in 1984 for vehicular manslaughter and one was convicted of vehicular assault.

In 1985, two persons were committed for criminally negligent homicide that was DWI related. Twelve (12) persons were incarcerated in New York State correctional facilities for vehicular manslaughter and six for vehicular assault.

CONCLUSION

This study of commitments of DWI persons to New York State correctional facilities from 1979 to 1985 has shown a continuing growth. However, commitments for DWI and related offenses constitute a tiny fraction (less than half of one percent) of new commitments over the period examined.

This study found that during this period the persons committed for DWI were (1) overwhelmingly male and (2) generally committed from an upstate jurisdiction rather than from the New York City metropolitan area. This may be changing since 1985 downstate commitments were greater than upstate commitments.

Preliminary data on commitments under the new (1983) vehicular manslaughter and vehicular assault statutes show a noteworthy increase in 1985 as compared to 1984. In 1984, three commitments were received under these laws. In 1985, 18 offenders were received.

1. The other reports in this series are: Russell, Susan and Macdonald, Donald (1980). "Persons Committed for Driving While Intoxicated or Criminally Negligent Homicide Involving Driving While Intoxicated, 1978," Albany, NYSDOCS; Macdonald, Donald G. (1980). "New Commitments in 1979 For Driving While Intoxicated or Criminally Negligent Homicide Involving Driving While Intoxicated," Albany, NYSDOCS; Macdonald, Donald G. (1982). "Persons Committed for Driving While Intoxicated or Criminally Negligent Homicide Involving Driving While Intoxicated," 1980, Albany, NYSDOCS.

2. See discussion of the laws governing operation of a motor vehicle while under the influence of an intoxicating beverage in Section 2 (Infra). Note that alcohol is not the only intoxicant since the entire text of the Vehicle and Traffic Law Section 1192 also includes various narcotic and other controlled substances as intoxicants for purposes of the law. This report ignores these other intoxicants to keep the presentation simple. However, the totality of the law is relevant in all sentencing decisions.

3. Whoever operates a motor vehicle or motorcycle while in an intoxicated condition after having been convicted of operating a motor vehicle while in an intoxicated condition...shall be guilty of a felony...(Section 1192, Vehicle and Traffic Law). Although DWI can be a felony, a second felony conviction for DWI does not cause the Second or Predicate Felony Laws to be applied. See People of the State of New York v. W.R. Morris, 86 A.D. 2nd 763.

4. For a brief discussion of the laws governing "probation eligibility" of felony offenders in New York State, see New York State Department of Correctional Services, (Robert L. Fisher 1985) "A Sample Study of Characteristics of Probation Eligible Commitments from New York City;" Author, pp. 1-4. Also see the references cited therein.

5. The law requires sentences of imprisonment or fine or both. Maximum sentences of four years are permitted by the felony sentencing laws for "E" felonies.

6. People v. Lamphear, 1970. 35 A.D. 2nd, 305, 316 NYS 2nd 113, summarizes the point: Reckless motorist is aware of the proscribed risk and consciously disregards it, while the criminally negligent motorist is not aware of the risk created and, hence, cannot be guilty of consciously disregarding it; accordingly, criminal negligence imparts a lower degree of criminality than "recklessness".

7. "In a 2 year period, 50,000 Americans die as a result of drunk driving--almost as many Americans lives as were lost in the entire 10 years of the Vietnam War. Conservative estimates place the annual economic loss from drunk driving accidents at \$21 billion to \$24 billion for property damage alone". (NIJ Reports, p. 2); also see NYSDOCS (Donald G. Macdonald 1982) "Persons Committed for Driving While Intoxicated ..." Author, p. 3.