LAW AND THE ROAD TOLL: A JURISPRUDE LOOKS AT THE ROAD TOLL

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Annual amendments to the Transport Act have become very much a part of the legislative scene. They provide a great mass of material for editorial and academic pundits and a fertile source of litigation for practitioners. To the jurisprude, the most interesting efforts of the past few years have been those tightening up, for ease of prosecution, the drunken driving and "excess blood alcohol" provisions of the Act[1] and last year's provision empowering regulations for the compulsory wearing of seat belts.[2] The object of the whole programme is to reduce "The Road Toll". The provisions on drunken driving are, obviously enough, aimed at deterring those who drink from driving and thereby causing injury to themselves and others. Strengthening the prosecution's hand, in respect of drinking drivers, proceeds on the soundly-based strategy that a credible deterrent depends heavily upon the likelihood of apprehension and conviction—perhaps more than upon the severity of the potential penalty.[3] The safety belt provision seeks to apply the clearly established fact that belts save lives in crashes.[4]

The discussion that follows is in two parts. The first is inspired by the seat belt legislation. It considers whether society should try to minimize the extent to which its members knock themselves (as opposed to others) around on the roads. I conclude that it should. The second part expresses some doubts about the legal techniques used, in relation both to seat belts and to other aspects of the programme. I suggest that substantial reliance on the criminal law in this area is misguided and that other legal techniques should be explored further. I also enter a plea for social science and technological research.

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1 Transport Amendment Act 1970, ss. 4 and 5; Transport Amendment Act 1971, ss. 9 and 10.

2 Transport Amendment Act (No. 2) 1971, s.7.

3 On this strategy see Middendorff, *The Effectiveness of Punishment, Especially in Relation to Traffic Offences* (1968) 68-73; Cramton, "Driver Behavior and Legal Sanctions: A Study of Deterrence", (1969) 67 Mich. L.R. 420, 438-443.

4 On the utility of seat belts see *Report of the Road Safety Committee*, A.J.H.R., I.17 of 1971 at 7-9 and comments by the Hon. J. B. Gordon, Minister of Transport, [1971] N.Z.P.D. 3825-3826. In the later discussion I refer to the analagous case of helmets for motor cyclists. Some strained American decisions uphold the constitutionality of helmet legislation against due process attack on the basis that helmets protect riders from flying stones and other objects which might cause a loss of control which leads to injury to others. See Note, (1971) 35 Albany L.R. 533, 539-541. For my purposes I am prepared to concede that the purpose of motorcycle helmets is to save the lives of motorcyclists.

I. *Seat Belts, Paternalism and The Public Interest*

I take it as axiomatic that only an anarchist (in the most pejorative sense) would deny the state *some* role in trying to prevent or minimize physical injury caused by some of its members to others, including the injuries on the road. The real argument is about how best to achieve this end. (For example, should we use the criminal law—fines and imprisonment? Should we use the civil law, by requiring careless drivers to pay damages to their victims? Should we use some sort of administrative techniques such as licence revocation or confiscating the keys, or cars, of drunken drivers?) But, when it comes to requiring the individual to look after himself, by requiring a motorcyclist to wear a helmet or a car rider to wear a seat belt, it is not so easy to agree. The catch cry is "individual liberty" and the argument is one which deserves careful consideration. I find myself in the position of favouring individual freedom in relation to literary censorship, marijuana, euthanasia, abortion and the consenting acts of homosexuals, but against it on hard drugs and safety belts. I am unsure about suicide. Is it possible to provide coherent criteria to explain these differing positions or must I descend into "rationalization" to support my "hunches"?[5]

My general starting point is that, *prima facie*, society should not interfere with individual action. This is substantially the starting point for Professor Hart in his exchange with Lord Devlin and I shall have occasion in the course of the argument to refer to that exchange and its progeny.[6] But that debate provides little guidance in the present context. The Hart-Devlin exchange was, of course, sparked off by the Wolfenden Committee's attempt to carve out an area of "private morality" with specific reference to the acts of consenting male homosexuals.[7] A recent commentator[8] has asked the question whether the emphasis on matters sexual has distorted the whole issue. He inquires whether problems of sexual morality are simply problems of morality as applied to the sexual relationship or whether they are problems *sui generis*, because, for example, sexual morality is a very special and in many ways unique area of human concern. I see merit in this point. In part because of the very personal nature of the sexual relationship and in part because of the especially unpleasant side effects of state interference with it—blackmail, snooping, ruination of careers and the general ineffectiveness of the law to other than selective enforcement—the *prima facie* presumption against interfering with the individual is perhaps harder to overcome in this area than in others. But there is another reason why Hart and Devlin do not help us here. The reader will notice that I seldom use the word "morality" in the ensuing discussion. This is not only because, like Professor Hart and John Stuart Mill, I do not accept that immorality

5 Cf. Hutcheson, "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision", (1929) 14 Cornell L.Q. 274; Hampshire, "A New Philosophy of the Just Society", *New York Review of Books*, 24 February 1972, 34.

6 Hart, *Law, Liberty and Morality* (1963) (hereinafter *Hart*); Devlin, *The Enforcement of Morals* (1965) (hereinafter *Devlin*). In this review see McElrea, "The Legal Enforcement of Non-Utilitarian Morality", (1967) 1 Otago L.R. 198. A good anthology, with a useful bibliography, is Wasserstrom ed., *Morality and the Law* (1971).

7 *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd. 247, 1957) para. 62.

8 Wasserstrom, *op. cit.* n.6 at 6-7.

"as such" ought to be a crime.[9] More important than this, I do not think that we are concerned with a problem about enforcing morality. It is not realistic to speak of a moral rule along the lines "thou shalt not knock thyself about on the road". We just do not think that way. The cleric or the philosopher might claim that there is a moral duty not to harm others on the road. He might even go so far as to say that there is a moral duty not to harm oneself there. However, the man in the street does not go so far. Even if he would concede a moral duty not to harm others on the road, which I doubt, I do not think that he would accept that there is a moral obligation to preserve himself against the effects of his own lack of foresight and care in that arena. Perhaps the point should be made a little less strongly: while we are "sorry" about road deaths we find it hard to condemn the *conduct* that brings about that result. In society's eyes, death and injury on the roads do not involve "immoral" or "criminal" acts. I have noted elsewhere[10] how we all abhor drunken driving but cheer when lawyers and the courts find loopholes in the legislation by nitpicking interpretations. Our ambivalent attitude, which dislikes the consequences but stops short of condemning too strongly the conduct which leads up to them, comes out in a curious way in respect of road accidents causing death. Because of the serious consequences of a piece of driving that might, absent injury, attract a fine of $25 for careless driving, we contemplate the imposition of a much more considerable penalty for careless or negligent driving causing death. Nevertheless, because of the lack of strong moral feelings, we stop short of calling it manslaughter like other negligent homicides.[11] On what theory of punishment, in terms of the degree of fault (moral or legal) involved in each case, should we treat the defendant unlucky enough to hit someone more severely? Retribution? We, of course, impose lesser penalties for attempts at crime. Is there an analogy between careless driving and attempted murder which entitles them both to a lesser penalty than careless driving causing death and murder? Even if there is, why do we countenance such a disparity between the typical penalty imposed for careless driving causing death and that imposed for manslaughter?[12] The disparity is a monument to the fact that juries, expressing community morality, will not convict car drivers of manslaughter. So, increasing the penalty to symbolize our abhorrence of death on the road, is no answer. The sanction would simply cease to be applied. This "respectability"[13] of substandard driving (or its results) is both the reason why the Hart/Devlin discussion of enforcing morality is little help in the present context and the key to the difficulty of any major breakthrough by the criminal law in this area. At the very least, a criminal law maker must face the fact that his efforts will not be supported by more than minimal community pressures for conformity.

The best case I know for the general principle of noninterference

9 *Hart* at 4.

10 "Transport Amendment Act 1970", (1972) 4 N.Z.U.L.R. 414. And see Ross, "Traffic Law Violations—A Folk Crime", *Social Problems,* Winter 1961, 231.

11 As Mr Cameron points out, to symbolize the gravity we often use the police as prosecutor rather than the Transport Department: Cameron, "Some Consequences of an Overextended Criminal Law", in Clark ed., *Essays on Criminal Law in New Zealand* (1971) 147, 155. Even so, I do not think that we regard even "serious" motoring offences as "real" crime.

12 On these disparities see Cameron, *op. cit.* n.11 at 156-158.

13 The term is borrowed from Cramton, *op. cit.* n.3 at 427.

is that made by John Stuart Mill. After presenting his case for liberty of thought and discussion Mill goes on, in Chapter 3 of *On Liberty,* to argue that:

> [T]he same reasons which show that opinion should be free, prove also that [a person] should be allowed, without molestation, to carry his opinions into practice at his own cost. That mankind are not infallible; that their truths, for the most part, are only half truths; that unity of opinion, unless resulting from the fullest and freest comparison of opposite opinions, is not desirable, and diversity not an evil, but a good, until mankind are much more capable than at present of recognizing all signs of the truth, are principles applicable to men's modes of action, not less than to their opinions. As it is useful that while mankind are imperfect there should be different opinions, so it is that there should be different experiments of living; that free scope should be given to varieties of character, short of injuries to others; and that the worth of different modes of life should be proved practically when anyone thinks fit to try them.[14]

There is, I think, no serious dispute about this base value. The real difficulties concern when the presumption against noninterference can be overcome. Mill's answer, based on a distinction between "self-regarding" actions and those which affect others, is, again, well-known and highly persuasive. But it needs substantial modification, if not rejection, in the context of the welfare state. His proposition was that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number . . . is to prevent harm to others".[15] As Mr Parkin[16] has pointed out, a somewhat better statement of Mill's own position is that made in his essay on liberty that "the individual is not accountable to society for his actions, in so far as these concern the interests of no other person but himself".[17] However stated, the proposition contains some open-textured terms—"harm", "interests"—which render it quite possible in particular cases that reasonable people can apply the same principle with opposite results.

It is often forgotten that while Mill regarded harm to others, or to their interests, as a *necessary* condition of intervention, he did not treat it as a *sufficient* one. There may be countervailing considerations arising from "the special expediency of the case: either because it is a kind of case in which he is on the whole likely to act better, when left to his own discretion, than when controlled in any way in which the society have it in their power to control him; or because the attempt to exercise control would produce other evils, greater than those which it would prevent."[18] While Mill gave no specific examples of what he had in mind, I suspect that, notwithstanding the interests of others in family solidarity, he would regard laws punishing adultery and most of the provisions of "Gill's Bill" of 1971 as utterly misconceived. Again, there are certain interests which society need not protect. No one need be protected from the "harm" of being defeated in a competitive examination or failing to succeed in a crowded profession.[19]

14 Mill, *On Liberty,* in *Utilitarianism, Liberty and Representative Government* (Everyman edition 1964) (hereinafter *Mill*) at 114-115.
15 *Ibid.,* 72-73.
16 "Limitations of Criminal Law", in Clark ed., *op. cit.* n.11, 28, 35. See also Rees, "A Re-reading of Mill On Liberty", in Radcliff ed., *Limits of Liberty: Studies of Mill's On Liberty* (1966) 87.
17 *Mill,* 149.
18 *Ibid.,* 74.
19 *Ibid.,* 150. See also Parkin, *op. cit.,* 43-44.

How would Mill come out on the prevention of injurious actions on the road? Clearly, he would accept that society *may* and indeed *should* interfere to prevent harm to the interests (life and limb) of *others* on the road. None of his limits on the general principles permitting interference seem to apply here. I discuss later the societal and legal techniques that Mill might have in mind. For present purposes, I assume that he would advocate the use of the criminal law for this purpose of preventing death or injury to others. But where would he come out on crash helmets and safety belts? It is in an area such as this that the difficulties of distinguishing "self-regarding" action from those which affect others are most acute. Mill himself was well aware that no man is an island.[20] Some motorcyclists who splatter their brains out on the road for lack of a helmet and some passengers who make their last journey through the windshield of a car for lack of a belt will be unmarried, friendless, orphans whose passing affects no one. Others will have doting parents who will sorely grieve at the loss, or hoards of dependants who will be bereft of a breadwinner. My hunch is that Mill would come out in favour of compulsion in some at least of the latter circumstances, but not the former. In his chapter on "Applications" he argues that drunkenness, " . . . in ordinary cases, is not a fit subject for legislative interference" but he does advocate interference in the case of persons known in the past to be dangerous when drunk.[21] Further, "idleness, except in a person receiving support from the public, or except when it constitutes a breach of contract, cannot without tyranny be made a subject of legal punishment; but if, either from idleness or from any other avoidable cause, a man fails to perform his legal duties to others, as for instance to support his children, it is no tyranny to force him to fulfil that obligation".[22] Thus, I think he would at least acknowledge the right of the state to try to enforce a duty on the family man to take safety precautions. It may be that he would go even further and say that the lonely bachelor is not being merely self-regarding in failing to look after himself. If he does not succeed in killing himself, he will require the assistance of publicly-funded hospitals, nurses and doctors. If he is permanently injured, he may become a continuing charge on the public purse. This general trend of argument could be bolstered by positing a duty to society to preserve oneself in order to develop into a useful citizen. Such an argument would perhaps be congenial to Mill in the light of his discussion favouring compulsory education, although that discussion is based rather on the duty of the state to provide opportunities for the individual to develop himself than on a duty of the individual to take advantage of those opportunities.[23] However, the general afterglow[24] I get from reading Mill is that he would not go quite that far. If this is true, the result of the Mill position would be a silly one so far as trying to enforce the law was concerned.

20 *Ibid.*, 132-133, 136-138.
21 *Ibid.*, 153.
22 *Ibid.*
23 *Ibid.*, 160-163.
24 And note especially the discussion *ibid.*, 138-139 which includes the puzzling sentence: "If grown persons are to be punished for not taking proper care of themselves, I would rather it were for their own sake, than under pretence of preventing them from impairing their capacity of rendering society benefits which society does not pretend it has a right to exact." What are these non-exactable benefits? Was Mill toying with some idea of paternalism or did he merely regard it as the lesser of two undesirables? Cf. *Hart* 31.

In practice, it would be extremely difficult to enforce the law against family men but not against bachelors.

If Mill is not conclusive, are there any other ways in which the *prima facie* presumption against noninterference might be overcome? One possibility is the notion of paternalism, the idea that the state may interfere to save people from their own folly. To Mill, of course, the notion of paternalism was anathema.[25] Directly following his formulation of the "only purpose for which power can rightfully be exercised over any member of a civilized community against his will", he made the emphatic pronouncement that: "He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right".[26] As Gerald Dworkin has explained,[27] Mill saw the value of choice, the autonomy and freedom of the person, in absolute terms. He was not prepared to make a balancing calculation with this value, such as might have been expected of one with utilitarian leanings, even in situations where a particular choice must inevitably lead to disaster. Some of his followers are prepared to withdraw from this absolute position. In his attack on Lord Devlin, Professor Hart argues that paternalism, rather than the enforcement of morality, is the justification for the rule that consent of the victim "is not a defence to a charge of murder or a deliberate assault."[28] To this extent he is prepared to accept a "modification"[29] of Mill who, especially in relation to his discussion on the supply of drugs, "carried his protests against paternalism to lengths that now appear to us fantastic".[30] Mill, in Hart's view, had endowed the human being "with too much of the psychology of a middle-aged man whose desires are relatively fixed . . . who knows what he wants and what gives him satisfaction or happiness . . . ."[31] As I understand it, the Hart position is that Mill's absolute value has a shaky factual foundation. Free choice is not always capable of being exercised rationally. Professor Hart limits his discussion of paternalism to the cases (assault, euthanasia, drugs) where one person is prevented from consenting to potential harm inflicted by another. Professor Dworkin, in his discussion of paternalism,[32] makes the factual case in relation to the wearing of seat belts, which he regards as a distinct situation where the actor is being protected solely from his own activity. He suggests that there are two distinct types of person against whom we might wish to enforce a seat belt requirement. The first is the one who knows all the statistical data but insists that the inconvenience associated with fastening the belt outweighs the possible risks. Dworkin suggests that such a weighing is inevitably irrational: "Given his life plans, which we are assuming are those of the average person, his interests and commitments already undertaken, I think it is safe to

25 But cf. n.24.
26 *Mill* 73.
27 "Paternalism", in Wasserstrom ed., *Morality and the Law* (1971) 107, 113-118.
28 *Hart* 31. Both *Hart* and *Devlin* at 6 over-state the case on assault. It is only in respect of "aggravated" assaults that consent is no defence: *R.* v. *Donovan* [1934] 2 K.B. 498.
29 *Hart* 33. There is force, subject to what is said in n.24 *supra*, to *Devlin's* point (at 132) that this "tears the heart out of [Mill's] doctrine."
30 *Hart* 32.
31 *Ibid.*, 33.
32 *Op. cit.* n.27 esp. at 121-126.

predict that we can find inconsistencies in his calculation at some point."[33] Second, there is the person who makes the calculation intellectually and agrees that he should wear the belt, but then ignores it in his actions. "[A]lthough I know in some intellectual sense what the probabilities and risks are I do not fully appreciate them in an emotionally genuine manner."[34] Dworkin finds it easier to justify paternal intervention in relation to the second class of person because that type of case is one "in which it preserves and enhances for the individual his ability to rationally consider and carry out his own decisions."[35] That is, Mill's ultimate value of the autonomy and freedom of the person is really being helped. By keeping the individual alive to choose another day we are merely helping him to achieve his own real preferences and desires. I doubt that it is possible to distinguish the two cases. But if it is, the difficulty I have with it is much the same as I had with the justification based on Mill's other-regarding actions. It seems to cover some, but not all, possible seat belt wearers. And, as a justification for the application of the criminal law, it therefore seems unworkable—even if one could accept that the state should be permitted to decide for an individual what his own best interests are, or how they should be achieved.

I turn then, to a final justification, one which seems to me to be convincing and which does not require making distinctions between different classes of people who don't wear seat belts.

In an attempt to find a middle ground in the Hart/Devlin series which avoids the practical difficulties of applying Mill's analysis, Mr Parkin has suggested that where the Wolfenden Committee went wrong was in its attempt to demarcate public from private morality. "What is needed is not a distinction between private and public morality, but between private and public *interests* in morality."[36] His view is that "society may intervene, through the agency of the criminal law, when a course of behaviour does or would tend to damage the public interest."[37] The Parkin argument was directed to the question whether immorality should be punished by the criminal law. As I have said earlier, it is hard to characterise the safety belt case in terms of morality. But the public interest framework does seem appropriate here and I hope its originator will consent to my use of it. The specific public interest involved is that of preventing injured motorists and passengers (or their dependants) from becoming a drain on the resources of the state. Of course, one who seeks to use the public interest exception does, as here, shoulder the burden of proving, with the aid of factual data, that the public interest would be served in a manner not inconsistent with the basic value of the diverse society. Thus, in the present state of knowledge of the effectiveness of safety belts and helmets, letting people kill or maim themselves on the road hardly seems to involve, in Mill's words,[38] "useful" "experiments of living". Nor does it contribute to efforts to

33 *Ibid.*, 121.
34 *Ibid.*
35 *Ibid.*, 125.
36 Parkin, *op. cit.* n.16 at 41-42.
37 *Ibid.*, 43. The whole notion of "public interest", as that term is used in the present context, merits further study. A good starting point is Bodenheimer, "Prolegomena to a Theory of the Public Interest" in Friedrich ed., *Nomos* V. *The Public Interest* (1962) 205.
38 *Mill, supra,* n.14.

test "practically" the "worth of different modes of life".[39] All it does is provide a pool of candidates for public support.

As well as providing a sensible result on seat belts, the public interest standard supplies a rational criterion for distinguishing between the various positions I suggested earlier that I support. That is, it checks out with what I think are the right results in relation to social interference with homosexuality (no public interest served), marijuana (the same, as no harm proven)[40] and hard drugs (prohibition justified when there is clear evidence that they reduce the individual's capacity and make him a potential charge on the state)[41] and abortion (no public interest served).[42] Suicide is a hard one to fit into any analysis. Is it more, or less, difficult to justify preventing people from killing themselves deliberately (suicide) than from doing so thoughtlessly or carelessly (not wearing seat belts)? Mill, I suppose, would have extended his notion of permitting different "experiments in living" to include the actions of those who rationally choose to die. I think the logic of the public interest argument goes the other way, for substantially the same reasons as it does on safety belts and hard drugs. Nevertheless, I suggest that the institution of the criminal law is inappropriate, for practical reasons, in preventing suicide.[43] At all events I am prepared to rest my case for a legislative attempt to foster seat-belt wearing on the public interest argument.[44]

II. *Techniques*

Assuming that a case had been made for social intervention, we tend to think immediately of the criminal law as the instrument to do it. It has taken us a long time to appreciate fully that there are limits to the load that the criminal law will bear. John Stuart Mill saw the point, although he did not pursue it, when he said that "for such actions as are prejudicial to the interests of others, the individual is accountable, and may be subjected either to *social or to legal punishment* . . . "[45] A side effect of the Hart-Devlin controversy has been to concentrate

39 *Ibid.*

40 See e.g., Kaplan, *Marijuana—The New Prohibition* (1970) Chapter V. It may be possible to make a (weak) case for intervention to protect the young and to maintain the quality of the product. As with alcohol, the case would not support an effort at suppression by a massive commitment of the resources of the criminal law.

41 See e.g., *The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Narcotics and Drug Abuse* (1967).

42 The answer *might* be different in a time of under population, given some overwhelming public need for all the births possible.

43 My analysis is consistent with the result arrived at in the Crimes Act 1961 which abolished the offence of attempted suicide but nevertheless provided, in s.41, that "Every person is justified in using such force as may be necessary in order to prevent the commission of suicide. . . . " See also *infra* n.53. And note the use of the criminal law against those who assist another to commit suicide: Crimes Act 1961, s. 179.

44 Some lower New York courts have upheld motorcycle helmet legislation on the basis that, by wearing helmets, riders might be prevented from becoming a charge on the public. See Note, Albany L.R., *op. cit.* n.4 at 545. The author of that Note asks whether the same argument applies to cigarette smoking. I think that it does. The hard question is what technique should be used to reduce smoking. I doubt that the criminal law is appropriate.

45 *Mill* 149-150. And see quotation above n.18 *supra.*

attention on *whether* the state should interfere rather than on the often more difficult question of *how* that interference should take place.

Too little has been written about what a large variety of social ordering techniques the arsenal of the law in fact provides. Attempts to deal with death and injury on the road already make use of a large number of these techniques and I suspect that, at this stage, the most fruitful lines of progress are likely to be those other than the criminal law. A recent pioneering essay by Professor Robert Summers, entitled, "The Technique Element in Law",[46] suggests that an adequate theory of the law as a social technique must provide an independent place for five basic techniques: the grievance-remedial technique; the penal technique; the administrative-regulatory technique; the public benefit conferral technique; the private arranging technique.[47] In order "to discharge a given social function" society may use any one, a combination or a variant of these techniques.[49] At present we use a combination of all of them in relation to road accidents and recent developments indicate some interesting changes in the mix. Thus, the present tort law system for dealing with road injuries is a grievance-remedial technique. Its main achievement is to provide some compensation for some of those injured. The evidence is pretty clear, particularly in a context like ours in New Zealand where the defendant is compulsorily insured, that the possibility of tort liability is little or no deterrent of unsafe driving.[49] Dissatisfaction with the performance of tort law in providing adequate compensation is why the system is being eliminated over most of the personal injury area under the Accident Compensation Bill which gives effect to the Woodhouse Report.[50] The Bill will presumably be enacted later this year. This, of course, represents a shift to the use of a public benefit conferral technique. The purposes of the Bill, in addition to compensation, include these important ones: "(a) to promote general safety with a view to preventing accidents and minimizing injury; (b) to promote the rehabilitation of . . . every person who, in New Zealand, suffers personal injury by a motor vehicle accident, so as to seek to restore all such . . . persons to the fullest physical, mental, social, vocational, and economic usefulness of which they are capable."[51] The penal technique is, of course, the one we currently use the most in relation to traffic regulations and I shall return to it in a moment. Licensing of drivers, following a test of some sort, is an example of the administrative-regulatory technique. The provision in last year's amendment, for the issue of a "provisional licence"[52] following a written and oral examination before a person may begin to take driver's lessons, is a recent attempt to manipulate this type of technique. The private arrang-

46 (1971) 59 Calif. L.R. 733. See also Kelsen, "The Law as a Specific Social Technique", (1941) 9 U. Chi. L.R. 75.

47 *Ibid.* 736. My discussion in the text should make clear the differences between the categories but the whole Summers article merits careful attention.

48 *Ibid.*, 746.

49 U.S. Department of Transportation Study of "The Deterrent Effect of Automobile Liability Insurance" in *Motor Vehicle Crash Losses and Their Compensation in the United States* (1971) 53-57.

50 Bill No. 146-I of 1971. The Bill is discussed carefully in Palmer and Lemons, "Beyond Keeton and O'Connell: The New Zealand Compensation Scheme", forthcoming in the Ill. L.F.

51 *Ibid.*, C1.4. Note also this clause as an example of a legislative determination that there is a "public interest" in private accidents.

52 Transport Amendment Act 1971, s.3.

ing technique is a typical "facilitative"[53] use of the law whereby it permits such things as contracts or wills to be made. Legislative efforts to foster private defensive driving courses are an example of this technique in action.[54]

Limitations of the Criminal Technique

The effectiveness of the criminal law as a social ordering technique is a subject receiving increasing attention.[55] Our main object in using it in relation to traffic accidents is to deter potential offenders and perhaps to rehabilitate convicted ones. It is helpful in discussing deterrence to distinguish between general deterrence, that is of the population in general, and special deterrence, that is of the future activities of those who have been caught up in the criminal process.[56] General deterrence appears to function in various different ways although we are very short of hard data on how effective these ways are:

> First, the existence of a legal command has a moral and educative influence. Many persons want to do what is right, and they are obedient and respectful of the law even when they disagree with its provisions. Second, other persons who are less responsive to moral suasion may be deterred because of *fear* of the consequences of disobedience. . . . A third and final effect, particularly important in the field of highway safety, rests upon the notion that fear and moral influence, especially if instilled at an early age, may create unconscious inhibitions that make lawful and desired behaviour *habitual* behavior.[57]

The habituative and educative effects of the criminal process merit a lot more study. A plausible picture can be drawn of the criminal process as an ongoing morality play, one of the functions of which, with the aid of the news media, is to inculcate and reinforce community rules and values.[58] I believe, in fact, that in many areas, the educative and habituative effects of the criminal law are its most significant ones. Take safety belts. The 1971 Report of the Road Safety Committee[58a] notes

53 Cf. Hart, *The Concept of Law* (1961) Chapter III. Section 41 of the Crimes Act (*supra* n.43) *facilitates* private and public action (by policemen and doctors) but does not *command* it. It exemplifies the private arranging technique.

54 *Report of the Road Safety Committee, op. cit.* n.4 at 13-15.

55 Packer, *The Limits of the Criminal Sanction* (1968) is the classic general cost/benefit analysis of the criminal law. See also Kaplan, *op. cit.* n.40, for a specific use of such an analysis.

56 Cramton, *op. cit.* n.3 at 421-429. See also Andenaes, "The General Preventive Effects of Punishment", (1966) 114 U.Pa. L.R. 949; Andenaes, "Does Punishment Deter Crime?" (1968) 11 Crim. L.Q. 76; Zimring, *Perspectives on Deterrence* (1971); Morris and Hawkins, *The Honest Politician's Guide to Crime Control* (1970) 253-262.

57 Cramton, *op. cit.* n. 3 at 426. Emphasis in original. On the crying need for more empirical research in this area see references in n.56 *supra* and Hawkins, "Punishment and Deterrence: The Educative, Moralizing and Habituative Effects" [1969] Wisc.L.R. 550. One of the few empirical studies of law and the learning process is Underhill Moore and Callahan, *Law and Learning Theory: A Study in Legal Control* (1943) and its findings are utterly abstruse. In earlier writings, such as his article, "The General Preventive Effects of Punishment", *op. cit.* n.56, Professor Andenaes, the most-quoted writer in this area, confined the term "deterrence" to the fear effect of punishment and used the word "prevention" to encompass fear, education and habituation. As he does in more recent writings, I follow the popular, if less clear, usage.

58 See Professor Morton's CBC talks published as *The Function of Criminal Law in 1962.*

58a *Op. cit.* n.4 at 7.

that legislation making the wearing of belts compulsory was "effected" in Victoria in December 1970. It then goes on to refer to a preliminary report by the Royal Australasian College of Surgeons in Melbourne to the effect that the wearing rate of safety belts in Victoria increased two and one half times in 1971 compared with the rate in 1970. For the first quarter of 1971 spinal injuries resulting from crashes were reduced by 36% and total road traffic casualties in this period were approximately 12½% fewer than the average of the previous two years for the same quarter. The Road Safety Committee seemed to posit a simple cause/effect relationship between the legislation and the fall in numbers. The figures would, of course, be more meaningful if we knew more about other possible variables. For example: What educational programme accompanied the legislation? Was this a period during which the number of cars equipped with safety belts was substantially increased (e.g. by an inspection campaign, perhaps accompanied by the extension of a requirement to place belts in older cars)? And of course there is the further question of how lasting the effect will be. Will the wearing of belts diminish over time? Even so, I suspect that the existence of some cause/effect relationship is probably true. I think, also, that the fear of punishment is not likely to be a substantial factor in this process. After all, the danger of enforcement is not a great one. Observing whether motorcyclists are wearing safety helmets is easy enough. But the authorities are obviously not going to stop a large random selection of cars to check for seat belt violations. The motoring public would complain too vociferously. Enforcement, presumably, takes place primarily against those involved in accidents and those stopped by a traffic officer for something else. This seems such a small proportion of non-wearers as to make deterrence through the fear of prosecution rather a remote possibility. On the other hand, the idea of the seat belt legislation as educative makes considerable sense. A legislative determination that not wearing belts is both dangerous and illegal provides the springboard for a massive propaganda campaign on the advantages of belts. The involvement of the legislature in this way may well be more effective than simply an educative programme run by the Transport Department. This educative effect will perhaps be more striking in a close-knit, literate, society like Australia or New Zealand where the message will reach the bulk of the population.[59] It will not be as effective in a less developed society or in a context like the United States where the message is likely to come diffused through a plethora of federal, state and local authorities. There are, of course, dangers in using the legislature to drive home factual decisions about what is good or bad for people. Much of the breakdown in law enforcement and respect for law in the United States, which many fear is resulting from violations of the mari-

59 On the legislation as an educative tool, note these remarks by Dr Martyn Finlay in [1971] N.Z.P.D. 3820: [I]t would be a wise move if we . . . allowed a substantial period of time to go by, running into months, during which, as a rule, there should be no prosecutions for failure to observe the requirement. When a traffic officer did detect a failure to comply with the requirement it would be his duty to stop the person concerned, notify him of the requirement, and warn him; but until a general sense of obligation permeates the community, I think we would probably be making the . . . mistake . . . of engendering resentment if we were to proceed in too headlong a fashion and enforce the law by prosecution." See also the similar remarks by the Minister, *ibid.*, 4561. The relationship of law and communication is thoughtfully considered in Zimring, *op. cit.* n.56 at 56-65.

juana laws, comes about because of a feeling that the legislature has just not told the truth. Be that as it may, I think that the best way to justify the use of the criminal law as the social technique to enforce safety belt wearing is on the educative argument.[60]

All sorts of doubts have been expressed about the efficacy of special deterrence in relation to road accidents. A recent careful study[61] suggests that we are really trying to get compliance by two different groups of people: those who *won't* conform and those who *can't* conform. The first group have much in common with the general criminal population who commit non-traffic violations against person and property. They are often the same people. Their traffic behaviour is of a piece with their general antisocial attitude. Perhaps a lot of the people who drive while disqualified are in this group. The criminal process has had little success in dealing with such people in relation to other offences and it appears to be having little success in relation to traffic offences. The "can't conform" group may include a big chunk of those involved in alcohol-related accidents. A serious alcohol problem is perhaps symptomatic of inability to cope in numerous other ways—including an inability to heed exhortations not to drive after consuming alcohol. Then again, the "can't" group includes recently licensed drivers whose skills take some time to develop, the aged, or those with health problems undiagnosed by present testing methods. Fines, the typical way of penalizing breaches of the traffic laws may not have much effect on them. I admit to some scepticism about the size of the "can't" group and accept the usual "free will" justifications for threatening deliberate or negligently dangerous conduct with punishment.[62] Nevertheless, the fact of the matter is that what scientific data we have suggests that a significant proportion of road accidents are inevitable, in the sense that they are unavoidable by encouraging drivers to do better either by education or threats of punishment. At the moment, we just do not know how to achieve this encouragement on a sufficiently grand scale.

Some Policy Implications

I have tried to show two things. First, that we have gone about as far as we can by relying on the criminal law. Second, we suffer from a dearth of adequate social science and technological data.[63] Assuming that

60 The educative effect is probably most significant when an area of activity is first subjected to the criminal law. Screw-tightening legislation, such as that against drunken drivers in the first blood alcohol legislation and its subsequent refinements, seems to rely heavily on the fear effects of more certain enforcement. Andenaes, "Deterrence and Specific Offences", (1971) 38 U.Chi. L.R. 537, 549 rates lowly the effect of the publicity campaign as compared with the fear generated by the undoubtedly successful British blood alcohol legislation of 1967.

61 Klein and Waller, *Causation, Culpability and Deterrence in Highway Crashes* (1970) (Department of Transportation Automobile Insurance and Compensation Study) 130-134.

62 See Hart, *Punishment and Responsibility* (1968). On deterring negligence, see Fletcher, "The Theory of Criminal Negligence: A Comparative Analysis", (1971) 119 U.Pa. L.R. 401. For an empirical study of the effects of special deterrence in relation to parking, see Chambliss, "The Deterrent Influence of Punishment", (1966) 12 *Crime and Delinquency* 70.

63 The suggestion by Mr Bailey M.P. of a "permanent Commission on road safety" [1970] N.Z.P.D. 3827, deserves careful consideration. For a provocative discussion of the dearth by a traffic engineer, see Leeming, *Road Accidents: Prevent or Punish* (1969).

we are serious about lessening road deaths, the breakthrough will come with increased reliance on administrative-regulatory and public-benefit conferral techniques[64] backed by careful research. For example, excessive concentration on the criminal law diverts attention from the message that Ralph Nader has been trying to get across—the part played by vehicle design both in causing crashes and maximizing injury when crashes occur.[65] Requiring manufacturers of cars to install safety belts was essentially an administrative-regulatory technique which was easily enforceable against the manufacturers and with the aid of the six monthly inspection of vehicles. It did not guarantee use of the belts. I doubt that the criminal law will, although its educative effects might achieve marginal progress. Why not follow the United States Government's trend towards forcing the development of safety devices, such as an air bag, which operate without passenger co-operation?[66] Again, we need to re-examine our driver licensing procedures. Would better testing procedures help, or would these efforts largely be thwarted by unsuccessful applicants driving without a licence anyway? Is the problem of the unlicensed driver intractable? Anyone who has defended a traffic case knows that drivers fear the loss of their licence much more than the monetary penalty. But we also know that 14% of those whose licences are cancelled are subsequently convicted for driving while disqualified. Obviously, the 14% is the tip of the iceberg. Should we try to enforce licence revocation by impounding the cars of drivers whose licence is cancelled, or would this be too intolerable a burden on their families? Is the Lower Hutt Magistrate who, unlike his Wellington brethren, consistently declines to cancel licences for careless use of a motor vehicle, doing the sensible thing in simply refusing to issue edicts which will be consistently flouted? More research on this issue may lead us to the conclusion that it is pointless trying to use licence revocation and that we should concentrate our efforts elsewhere.[67] How about the following as a method to deal with the drunken driver?

> Traffic officers would stop and check random samples of drivers on a scientific basis. If a breath test shows a blood-level concentration above 0.08% the driver would be considered dangerous and driven home in a police car. If the driver's car was not a traffic hazard in its existing location, it would be left there; otherwise it would be impounded. When the driver sobered up the next morning he would face the inconvenience of retrieving his car. Instances of violation would be reported to state licensing officials and noted on the driver's record. If caught three or more times, the licensing officials would require him to report for treatment as a "problem drinker" or face losing his licence. The system would operate completely without criminal penalties.[68]

In this example, as well as engaging in administrative activity, the police or traffic authorities would be acting also as a public service agency. What of other public benefit conferral techniques? Surely there are highway improvements that would help—the best way to eliminate

64 On the use of these techniques rather than the criminal law to deal with public drunkenness and vagrancy, see Nimmer, *Two Million Unnecessary Arrests* (1971); Curry, *Vagrancy* (unpublished LL.M. thesis, V.U.W. 1971).

65 Nader, *Unsafe at Any Speed* (1965); O'Connell and Myers, *Safety Last* (1966).

66 Experiments are proceeding with seat belts that activate an audible warning if not attached when the ignition is turned on.

67 For some thought on what might be done, see Samuels, "The Motoring Offender: What Can We Do About Him?" [1969] Crim. L.R. 129, 133-136.

68 Cramton *op. cit.* n.3 at 443.

level crossing accidents is to eliminate level crossings. In what other ways does this obvious point hold good? The more cars kept off the road, the fewer crashes—a massive programme of investment in public transport could prove not only to be ecologically sound but also lessen road deaths. For a start, how about free buses from the pub at closing time?

More research is needed on driver education programmes, both for young drivers, and for those sent to them as part of a penalty upon conviction. American research suggests that the main effect of training programmes for teenage drivers is to get young and inexperienced people on to the road earlier than they might otherwise.[69] Driver improvement programmes seem to be of questionable value[70] especially where drivers have negative feelings brought about by being channelled into them as part of a penalty for a traffic offence.[71] If it can be shown that these programmes work, it may be that the private arranging technique—encouraging Rotary's Defensive Driving Council rather than the Transport Department's own courses—will prove to be more effective.

A final thought. There is United States evidence that there is no necessary connection between all, or any, driving offences and crashes.[72] Are there any offences that are particularly related to crashes other than drunken driving and the catchalls, driving in a dangerous manner and careless driving? Is speeding dangerous? Should we eliminate some offences from the law in order to keep the mark of illegality only for the important ones? It is possible to view the current style of collecting parking and speeding fines as a step in this direction. Certainly the hoard of cases that must be processed in any Magistrates Court on traffic day leads to a mass production that only brings the criminal process into contempt. Should we conclude that only the "serious" cases should go to court? Perhaps we should decide that many more offences do not kill—that they are not "serious"—and get them out of the courts in order to use society's more solemn procedures where they may have some chance of influencing events.[73]

69 Klein and Waller, *op. cit.* n.61 at 19.
70 *Ibid.*, 156-158
71 Cramton, *op. cit.* n.3 at 447-448. For this reason it may have been a mistake in one of last year's amendments to the Transport Act to permit Magistrates to require attendance at Defensive Driving courses as part of a penalty.
72 Klein and Waller, *op. cit.* n. 61 at 62-64.
73 There are some perceptive suggestions along these lines in Elliott and Street, *Road Accidents* (1968) Chapter V. See also Morton, *op. cit.* n.58 at 49: "It is time the curtain came down on a morality play based on the Highway Traffic Act, given in the Toronto courts a total of 207,502 ineffective performances in the year 1959."