

Alcohol and Controlling Risks through Nudges

Thom Brooks

thom.brooks@durham.ac.uk

Introduction

Alcohol may have an important place in many societies. It is difficult to imagine our returning to prohibition as a possible future. Nonetheless, it is also the case that the use of alcohol increases risks. Alcohol is a factor in most crimes: or stated differently, many crimes are committed by persons that have consumed alcohol and perhaps engage in crime while under its influence. So alcohol might be considered a kind of double-edged sword. It is something we enjoy when celebrating special achievements, such as a marriage or new job, but yet it is also something that can lead to potentially serious harms. Perhaps alcohol should remain legally permitted. However, the risks its use brings risks may bear on public policy making and reconsider whether its use should be permissible notwithstanding their risks.

This article examines the relation of risks and public policy through the lens of alcohol and crime.¹ Alcohol thus lives a double-life as a fountain of celebration while also a wellspring of potentially serious harms. My focus here is how the associated risks from its use might be managed much better than at present. This issue is approached through considering three different arenas each within the broad remit of English and Welsh criminal law although addressing broader issues of criminal justice more widely. The first area is drunkenness and criminal liability. The second area considers the option of an additional tax on alcohol per unit. The last arena examined is a consideration of whether nudges might be more effect: I argue they can and indicate how this might be achieved.

The article concludes that the criminal law is a crude mechanism for grappling with complex issues of criminal responsibility for any higher risks associated with becoming under the influence. In brief, this legal position is fairly intolerant and this has some advantages in terms of administering justice. Higher taxation through so-called ‘sin taxes’ might also bring further advantages, but there remain serious concerns to address with that policy as well. Perhaps an underexplored area for public policy decision-making is designing better nudges. This is examined and defended below.

Drunkenness and Criminal Liability

Let us begin with the use of the criminal law to address problems of alcohol and the risk of criminal harms. While the criminal law is often a crude mechanism for public policy-making, it largely gets the balance correct on the whole in my judgement. This is not to claim there are no problems and that issue will be considered shortly.

¹ See [redacted] for my earlier views. This piece corrects and expands my previous work on this topic.

Most non-lawyers mistakenly think the law is essentially retributivist. Broadly speaking, this is the view that criminals should be punished to the degree they deserve for the harms they expose or inflict on others (Moore, 1997). One problem with this view is that it assumes a strong connection between desert—understood as a kind of ‘moral responsibility’—and harm. This point is captured by crimes, such as murder, where there is a requirement of specific intent connected to the cause of someone’s death. But how are we to balance the high moral responsibility for a low risk of harm versus a low moral responsibility for a high risk of harm? Retribution lacks clear answers to such cases where these different elements move in contrary directions (Brooks, 2012).

There is a more fundamental problem with the retributivist view of ‘harm’ relevant to our consideration of risk. The kinds of harms that occupy the criminal law are not exclusively moral in nature (Brooks, 2013a). For example, not all crimes require proof of moral responsibility. An illustration is crimes of strict liability, which are the most numerous kind of criminal offence and perhaps breached the most. Strict liability crimes include traffic offences (including illegal parking and speeding) and drug offences (such as heroin possession) where the offence is proven where there is evidence someone, in fact, drove a car beyond a clearly demarcated speed limit or was found to possess an illegal substance. Broader circumstances pertaining to moral decision-making are irrelevant for confirming these offences. So it is irrelevant what a person intended in determining whether that person committed a strict liability offence.²

Nevertheless, retribution has a powerful hold on our popular imagination. This is perhaps not without good reason. There are less numerous, but more serious crimes where moral responsibility can play an important role in helping us determining whether that crime was committed. Murder is one central example where the offence requires for conviction that someone intended his or her victim death or serious harm. Furthermore, an offender’s moral responsibility also relates to our assessing of any potentially harmful risks. So for example arson is a crime with a potentially significant prison sentence for arsonists because arson is no mere mistake, but a purposeful activity and it includes a view to its potentially deadly risk or exposure to serious harm. The common view that criminals should be punished to the degree they deserve for the risk of harms they present to others may be factually untrue, but there remains some basis in fact among the crimes that grab popular headlines most from murder to arson and beyond.

The research on alcohol and risks of harm provide us with a clear and mostly consistent picture. For example, several studies have established links between crime and alcohol consumption (Popovici, Homer, Fanf, & French, 2012). This is explored in various ways. Both violent and non-violent crimes are linked with the density of local businesses offering alcoholic products for sale (Toomey et. al., 2012a, 2012b). This is also true for domestic violence (Livingstone 2011). The evidence suggests that we can expect that where there is a higher density of businesses selling alcoholic products then we should find a higher number

² It should be noted to avoid any doubt that the proliferation of strict liability offences is not unique to English and Welsh law, but likewise true in the Republic of Ireland, all US state jurisdictions and many others as well.

of criminal offences. There is also evidence supporting a more specific link between binge drinking and sexual assault where the presence of the former is connected with a greater risk of the latter (Abbey, 2002; Franklin 2011; Mouilso, Fischer, & Calhoun, 2012; Rothman, Reyes, Johnson, & LaValley, 2012). We examine approaches to addressing this link between alcohol consumption and criminal risks beyond the criminal law in the sections below. Our focus here is on the criminal law.

In England and Wales, criminal offences have three different standards of relevant intent. The first we have already considered are crimes of strict liability where no intent by the accused need be proven to confirm her conviction for that crime. So the bare fact that a car was driven by that person above the clearly demarcated speed limit is necessary and sufficient to secure conviction for this crime. Strict liability crimes are the majority of offences found in the criminal law.

Other offences are divided roughly into crimes of specific or basic intent. Crimes requiring proof of fault, or *mens rea*, are at least crimes of basic intent. So a person can be convicted of wounding or inflicting grievous bodily harm through the bare fact that this person was responsible for causing such harm to another.³ This is an example of a crime of basic intent. A crime of specific intent is where a more narrow and particular intention is required to prove the offence. An illustration is wounding, or causing grievous bodily harm with intent to do grievous bodily harm.⁴ This crime is different in kind because it rests not on the bare fact that the accused *caused* harm, but that he *intended* to cause the harm which transpired. This difference is captured by the fact that crimes of basic intent often have lower maximum tariffs than crimes of specific intent. So causing grievous bodily harm to another (without specific intent) does have a less punitive maximum sentence than causing grievous bodily harm with an intent to do so. These different offence types possess different possible outcomes. It could be argued one reason for this difference is the fact of a specific intent to do harm to others makes the activity of greater potential harmful risk in keeping with a broadly retributivist perspective.

The consumption of alcohol is relevant here because it can affect convictions for offences. Intoxication can negate specific intent, but not always. That someone is drunk and engages in harmful conduct under the influence of drugs or alcohol can mean this person receives a conviction for inflicting grievous bodily harm, but not intending to do so. However, if this person possessed the intent to cause harm to another prior to intoxication, his being intoxicated would not negate the specific intent he has: intoxication can be a barrier to creating *new* specific intents, but it need not *erase* existing specific intents already possessed.⁵

The wider point here is that *voluntary* intoxication is no defence to convictions for crimes. However, this can be a mitigating factor when determining sentencing and other criminal justice outcomes. Being under the influence is no legal excuse for engaging in criminal

³ See s20 of the Offences Against the Person Act 1861.

⁴ See s18 of the Offences Against the Person Act 1861.

⁵ *Kingston* [1995] 2 AC 355, [1994] 3 WLR 519.

activity in general. This may run counter to popular perceptions about retribution and moral responsibility. It might be asked: how can someone be fully responsible for their actions when under the influence of drugs and alcohol?

The law's answer is that we hold others to account for the exposure or imposition of harmful risks with only narrow exceptions. It is *because* intoxication is so often present in criminal cases that it can play little, if any, factor in confirming convictions and generally only relevant for sentencing.

The law does make an exception for *involuntary* intoxication, but such cases can be rare and there are a number of conditions (Brooks 2015). For example, someone *is* involuntarily intoxicated if he is intoxicated unknowingly, but not if he is knowingly consuming an intoxicating substance. So a person is involuntarily intoxicated if they think they are drinking pure orange juice when it is, in fact, spiked with vodka. But this person is *not* involuntarily intoxicated if they think they are drinking beer when it is, in fact, spiked with vodka or whiskey. When a person is, in law, involuntarily intoxicated, this can provide evidence to help establish a full defence, such as automatism (Law Commission, 2009). Note that a person is not involuntarily intoxicated in law every time he or she is intoxicated unknowingly, such as where a known alcoholic product has been spiked to make it more potent.

Alcohol is demonstrated to have links with risks, such as higher risks of criminal offences. The criminal law allows only a narrow exception for cases of involuntary intoxication. Otherwise, drunkenness is no excuse and persons under or not under the influence can both be held criminally liable for all strict liability and basic intent offences.

Reducing Risks through Higher Taxation

A second option for reducing risks is so-called 'sin taxes'. Or, more specifically, an additional or higher tax on all alcoholic products. The argument is that higher prices will lead to less demand as scarce resources are spent on goods other than alcoholic products. There is evidence that such efforts can improve public health. One study found raising the price of alcoholic products by 6% led to reduced injury deaths by 4.5% (Cook and Durrance, 2013). Another study found 1% increase in the cost of alcoholic products led to an increase of nearly 6.5 days where no alcohol is consumed (Byrnes, et. al., 2013). The evidence is clear: higher prices will lead to less consumption and less consumption will lead to fewer alcohol-related problems. So is higher taxation the answer? The answer may not be so conclusive.

The taxation of alcohol is usually defended as a tax on per unit of alcohol in a product. The effect is to increase the cost of alcoholic products with a greater impact on products with higher units of alcohol. So a bottle of wine (about 9 units) would face a much higher cost increase than a pint of weak ale (2 units) (NHS, 2013). Adding a tax of £1 per unit would increase the average cost of a bottle of wine from about £5 to £14 and increase the average cost of a pint of ale from about £3 to £5.

An increase in the price of alcoholic products per unit could be an effective policy solution if the use of certain alcoholic products were strongly linked with criminality. But there is no such established link between the higher the units of alcohol in a particular alcoholic product and risk of criminal activity. In the absence of more specific information, increasing the price of units can be a crude device for driving down alcohol consumption overall. But a more effective policy aiming to reduce risks and criminal activity might more clearly target those products most associated with the problem to be tackled. And it is likely true that those products most affected, such as a bottle of single-malt whisky, might be less associated with criminal behaviour linked with alcohol use than products with fewer units.

If we accept that the more units of alcohol a person has consumed and so the more likely he is to engage in criminal activity, then what should be our policy? It would appear that ensuring individuals consumed less units would contribute to less criminal activity. But that's only at the *macro* level looking across individual activity as a whole without looking more carefully at their particular behaviours. What we require is a more specific link between *types* of products and *crimes*. The point is that it may be more effective to target the potential risks from using specific products to better pinpoint improvements to addressing criminal activity. The issue is not only that alcohol is consumed as different alcoholic products may expose individuals to different risks than others independently of their alcoholic strength. There is a need to better identify links at the *micro* level between product types and criminal offence types. So perhaps less alcohol consumption at a macro level can lead to improvements in public health for many individuals, this remains a crude mechanism for addressing the different risks from different products. Or stated differently: perhaps improvements in public health and criminal justice policy at a *macro* level can be achieved by a blanket imposition of higher taxes per unit because this help cause less consumptions of units across the population. This mistakes the problem as higher unit consumption *in general* where the problem might be the consumption of *specific product types* in particular.

This reveals a second type of taxation. Recall the first type is to increase the costs of alcoholic products in relation to their alcoholic strengths by a tax per unit. This one-size-fits-all approach fails to address the very different effects and potential risks that different products might have independently of their alcoholic strength. The second type is to increase costs, to reduce availability, of specific types of products.

Suppose one product (*a*) has twice the alcoholic strength in a serving than a second product (*b*). Should *a* be taxed higher than *b*? One reply is yes so that macro levels of alcoholic consumption are reduced. And perhaps this is the easiest, if more crude, way of delivering an important public good. But a second reply is no and perhaps the situation should be reversed. This is because consumers of *b* are far more likely to engage in riskier behaviour and criminal activity. So the reduction of alcohol-related risks and crime might be more effective on targeting those alcoholic products more associated with crime. Perhaps there would be fewer offenders if less units were consumed, but it matters which units *of what* are consumed if we are to more effectively contribute to targeting this problem.

This is not deny more philosophical issues about the moral justification and desirability of minimum pricing through higher taxes on units of alcohol or particular kinds of alcoholic products (Saunders 2013). For example, one significant disadvantage of taxation approaches in this area is their *effects* assume a *standardized person*. Or, in other words, this policy assumes we, the citizens affected, occupy a substantively similar position in relation to each other. In truth, there may be significant inequality whereby higher prices for consumable goods we all enjoy will become no less difficult for some to consume and effectively banned for those with less expenditure money. Reducing consumption of certain (or all) products might disproportionately affect the lifestyles and/or pursuit of preferred leisure activities by some demographics than others. Crime is not only linked with alcohol use and so perhaps additional justification is warranted for policies that might contribute to a wider public good for all (*e.g.*, less crime) by increasing burdens on some and not all.

Nudges – the Future?

Richard Thaler and Cass Sunstein (2008) have made popular the idea of so-called ‘nudges’ exposing the public policy implications of behavioural economics.⁶ Thaler and Sunstein consider a range of policy proposals for improving public health, individual wealth and personal happiness that have attracted much interest and not inconsiderable controversy (Saint-Paul, 2011). Their work has led to significant interest and policy innovations on both sides of the Atlantic. Nevertheless, one area that remains relatively underexplored are the ways through which risky, and potentially criminal, behaviour could be better managed through the use of nudges.

One illustration by Thaler and Sunstein of a nudge to reduce alcohol consumption is what they call ‘socializing nondrinking’ (2008: 73). They focus on the case study of binge drinking by university students. Surveys consistently report a significant problem of such behaviour and its effects across campuses. One nudge is to communicate that such behaviour is non-standard and exceptional. So an illustration would be to advertise that the average student drinks only a few units of alcohol per week, for example. The idea is that new students can become socialized into risky, binge-drinking behaviour where they perceive such activities are normal and common. We can provide a nudge by correcting this information and helping them realize that what is normal and common is very different from the perceptions new students may have acquired from fictional movies about campus life. If students knew more about how other students really are, then binge-drinking would be seen as more exceptional and might occur much less often. We can tackle binge-drinking effectively by helping students gain more accurate information to permit more informed decision-making. By improving information about choices, we can improve the choices made and so reduce binge-drinking without other interventionist policies.

But there are other nudges we can employ to help reduce alcohol consumption we will briefly survey now. One option is to support new regulations concerning advertising in line with the

⁶ See Brooks (2013b).

policy to tackle binge-drinking at university campuses. There have been great strides in helping communicate the problems of drink driving in recent years and similar efforts can and should be fed into informing the public that drinking is a right that comes with responsibilities.

A second option is to reconsider where alcoholic products can be placed in shops. Thaler and Sunstein (2008: 1-2) note that children can make more healthy choices about what to eat by rearranging their options at a cafeteria. Healthier foods should be placed at the front, at eye-level and easy to reach while less healthy foods should be placed towards the end of the queue and made less accessible. Similarly, alcoholic products can be placed not at eye-level and more difficult to access, such as behind a cashier. This does not deny anyone access to alcoholic products if they are legally entitled to consume them, but it can be a nudge against making such a choice. Recall that nudges are about preserving (or increasing) our choices while shaping what is called the choice architecture—understood generally as the context within which we make choices—to influence the choices we make without forcing anyone to make choices they do not want. Rearranging where alcohol is available maintains the number of choices available to individuals while altering the context within which these choices are made. As it is possible to ‘nudge’ people into healthier eating by rearranging the place of healthy versus less healthy options, we might likewise achieve similar results through reorganising the place of alcoholic beverages in shops.

A third option concerns individual sales transactions involving alcoholic products. Many of us today purchase products using debit or credit cards. Cashiers have machines where we insert our cards and then sign or enter a pin code to make a transaction. These can be reconfigured so that purchases of alcoholic products might trigger a new screen requiring confirmation before the purchase is approved, such as asking customers if they are aware they are purchasing an alcoholic product or perhaps a general warning about the recommended maximum number of units to be consumed in a week.

A fourth option is improved labelling that more clearly identify potential public health issues and risks. At present, such labelling can take the form of a warning to pregnant women about the effects of drinking too much alcohol. However, such effects are more widespread than this and can affect both genders in these further ways such as liver disease. The greater awareness of risks through such an information campaign can make more salient the potential risks to health and lead to better informed and less risky choices.

A final fifth option is shaping awareness about potential risks through advertising through public displays and advertisements alcohol-related facts, such as the numbers of persons convicted of driving under the influence during the past year or the cost to a local doctor’s surgery and/or hospital of treating alcohol-related health problems. These would also help the public make more informed choices about consuming alcohol in light of relevant risks. Thaler and Sunstein note the major benefits of the ‘Don’t Mess with Texas’ poster campaign encouraging Texans to avoid dumping litter on the roadside by appealing to their sense of local pride. Our local conditions and context matter. My fifth option is about putting facts in a local context. This would not lead to less consumer choice, but better choice. Individuals

should be able to purchase and consumer alcoholic products, but they benefit—and the public benefits—through a more responsible consumption.

The costs of these regulations to consumers and companies trading in alcoholic products would be negligible, but the benefits to public health and wider policy could be considerable—and without a focus on reducing consumption, but rather improving how alcoholic products are consumed. We can provide effective nudges that can reduce consumption without reducing consumer choice.

Conclusion

This article examines alcohol and public policy through the dimension of risks and criminal justice. While alcohol occupies a central place in ‘our’ celebrations in the West, alcohol has similar dominating place in the harms endured by too many through criminal activities. The issue concerns drawing lines about how a more satisfactory balance of risks might be struck.

This issue has been approached here through several angles. The first is the criminal law. We have seen that the criminal law is a crude instrument making few exceptions. A second angle considered is taxation. We have seen this is often operationalized through a higher tax per unit to help cut consumption and contribute to benefit improvements to public health and reducing crime. But this is a fairly crude measure as well often aimed at *macro* level activity where a more effective policy should target alcohol consumption at the *micro* level, such as targeting particular kinds of products most associated with problematic behaviours.

The final consideration is the use of so-called nudges. However else elusive, there are underexplored ways through which risky, and potentially criminal, behaviour could be better managed through the use of nudges. If we wish to reduce overuse without limiting supply, then several options are raised such as new regulations concerning advertising, the place of alcoholic products in shops, individual sales transactions involving alcoholic products and improved labelling. The costs of these regulations to consumers and companies trading in alcoholic products would be negligible, but the benefits to public health and wider policy could be considerable—and without a focus on reducing consumption, but rather improving how alcoholic products are consumed.

In conclusion, the argument is not that we should endorse a nudge-only approach to alcohol and public policy, but that nudges could and should play a much greater role than they do in improving public policy in this area in concert with existing policy concerning criminal law and taxation. Together, the risks of alcohol consumption can be better managed if only we more willing—and perhaps also *more imaginative*—about how we might provide nudges and reduce risks.

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