

## Sentencing Options

### What Goals Are We Trying to Achieve Through Sentencing?

Sanctions that work best balance consistency in sentencing among offenders with the need to tailor punishment and treatment to individual offenders. The primary goals of sanctions are to punish the guilty and deter or prevent the offender from driving while impaired again (specific deterrence), to deter others from driving while impaired (general deterrence), and to provide restitution to victims.<sup>1</sup> These sanctions are based on the assumption that punishment will be effective if it is certain, swift, and appropriately severe. Many of the sanctions listed below provide variety in the severity of punishment; research suggests that *certainty* and *swiftness* of punishment are greater deterrents than severity of punishment.<sup>2</sup>

Secondary goals of sanctions focus on the problem—the offender’s addiction and improvement of life skills—to decrease the incidence of impaired driving, and to improve the safety and general welfare of the community, which is the primary goal of administrative agencies. The treatment model focuses on protecting public safety by attacking directly the root cause of DWI—alcohol and substance abuse. Compliance with treatment is verified by frequent testing for alcohol and drug abuse, close community supervision, and frequent court hearings.

Robert Voas and Deborah Fisher classify court sanctions for DWI offenders into four categories based upon why people drink and drive:<sup>3</sup>

- *Penalties to produce deterrence.* The use of these sanctions (e.g., fines and incarceration) is based on the assumption that drinking and driving occurs because the driver is not motivated to change his or her behavior and perhaps to accept inconveniences (e.g., relying on a designated driver or taxi) to avoid drunk driving. In these cases, punishment (or the threat of punishment) might favorably influence future decision making about drinking and driving.

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<sup>1</sup> See R. B. Voas, “Countermeasures for Reducing Alcohol-Related Crashes,” *Forensic Science Review* 12 (2000): 119-31, and R. Hingson “Prevention of Drinking and Driving,” *Alcohol Health & Research World* 20 (1996): 219-226, for a discussion of the general deterrence effects of various sanctions.

<sup>2</sup> National Highway Traffic Safety Administration and the National Institute on Alcohol Abuse and Alcoholism, *A Guide of Sentencing DUI Offenders* (Washington, D.C.: NHSA and NIAAA, 1996).

<sup>3</sup> R. Voas and D. A. Fisher, “Court Procedures for Handling Intoxicated Drivers,” *Alcohol Research and Health* (Winter 2001) p. 3.

- *Education programs.* These sanctions assume that the driver committed the DWI offense because of a lack of knowledge about the following: drinking-and-driving laws, the effects of alcohol on driving, and ways to avoid drinking and driving. Education programs, together with alcoholism treatment programs, are classified as rehabilitative approaches.
- *Alcoholism treatment programs.* The use of these sanctions is based on the premise that many DWI offenders abuse or are dependent on alcohol and must recover from their uncontrolled pattern of alcohol consumption to avoid impaired driving.
- *Incapacitating sanctions.* These measures, which include license suspension and vehicle actions (e.g., vehicle impoundment), are designed to protect the public (at least for the duration of the sanction) by making it impossible for the offender to drink and drive, regardless of the reason for the original offense.

Voas and Fisher acknowledge that many of the sanctions may fulfill more than one objective. For example, both incarceration and alcohol ignition interlock devices protect the public by eliminating or restricting driving.

Appropriate sanctions need to balance consistency in sentencing with tailoring sanctions and treatment to each individual offender. A judge also needs to select sentencing options ranging from those that deter a defendant's future behavior to those that incapacitate the defendant. Sanctions should be based on evaluations or screenings by qualified professionals, as well as the defendant's prior record and the effects of the defendant's behavior. As a practical matter, judges must take into account the sanctions that are available as well as the costs for the benefits perceived.

### **What Are the Sentencing Options Focused upon Sanctioning the Offender?**

Traditionally, the primary means of deterrence has been to sanction the offender. Punishment may incapacitate the offender while he or she is in custody, make them pay the costs, and ideally instill fear of future punishment to lower the chances of recidivism. Deterrence-based strategies have been called "the most

common means used within the United States to decrease recidivism,” even though deterrence effects are often small.<sup>4</sup>

*Incarceration* involves some form of correctional supervision. Many states have adopted some form of mandatory jail sentences for misdemeanor DWI and prison sentences for felony DWI. Incarceration can be an opportunity to place offenders into residential treatment programs, such as special DWI facilities or weekend intervention programs.<sup>5</sup>

*Fines* may be fixed in amount or based on a portion of the offender’s daily income. Fines have not been well evaluated for their impact on recidivism. They may be effective deterrents if set high enough, but many fines are not collected or can be paid in small increments over a long period of time and, thus, do not place a substantial financial burden on the offender.<sup>6</sup>

*Probation* puts conditions on the freedoms of offenders and is critical to assuring compliance with treatment, education and other sanction programs. Variations include basic supervision probation (monthly visits), unsupervised probation, and individualized restrictions. Here are some of the more promising forms of probation:<sup>7</sup>

- *Intensive Supervision Probation* provides offenders with more contact with probation officers and participation in education and therapeutic programs in the community.<sup>8</sup> It is an intermediate sanction between prison on one hand and regular probation on the other, and may include a variety of control mechanisms, including house arrest and electronic monitoring. Under intensive supervision, offenders retain their freedom but are subject to requirements such as curfews, drug testing, daily contacts, and mandatory community service.<sup>9</sup>

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<sup>4</sup> T. R. Tyler, L. Sherman, H. Strang, G. C. Barnes, and D. Woods, “Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders’ Psychological Mechanisms in the Canberra RISE Drinking-and-Driving Experiment,” *Law and Society Review* 11 (September 2007): 554.

<sup>5</sup> For a description of these types of special programs, see National Highway Traffic Safety Administration and the National Institute on Alcohol Abuse and Alcoholism, *A Guide to Sentencing DWI Offenders*, 2nd ed. (Washington, DC: National Highway Traffic Safety Administration, 2005). Cited hereafter as *A Guide to Sentencing DWI Offenders*.

<sup>6</sup> Voas and Fisher, *op. cit.* p. 4.

<sup>7</sup> *Ibid.*

<sup>8</sup> Thomson lists six ways in which supervision is intensive: 1) it is extensive with multiple, weekly face-to-face contacts, 2) it is focused on specific behavior regulations governing curfews, drug use, travel, employment and community service, 3) it is ubiquitous with offenders frequently subjected to random drug tests and unannounced curfew checks, 4) it is graduated with offenders proceeded through phases, 5) it is enforced with penalties for noncompliance and new arrests, and 6) it is coordinated. D. Thomson, *Intensive Probation Supervision in Illinois* (Chicago: Center for Research in Law and Justice, 1985).

<sup>9</sup> J.M. Byrne, A. J. Lurigio, and C. Baird, *The Effectiveness of the New Intensive Supervision Programs*, *RESEARCH IN CORRECTIONS series* (September 1989), p. 8.

- *Home Detention* permits offenders to drive to work or court-ordered treatment, but does not permit driving at other times, especially the critical evening and night times when most DWI violations occur.
- *Electronic Home Monitoring-Testing* technologies are used by DWI courts to monitor compliance.<sup>10</sup> Electronic monitoring systems can be active or passive. Active systems provide constant monitoring through a device strapped to the offender which continuously signals a central receiver and records when an offender leaves home, and sometimes notifies a probation officer. Passive systems involve intermittent monitoring voice-recognition and testing devices that can detect alcohol use via telephone. Some jurisdictions require offenders to call in daily and to submit to testing on demand. RoboCUFF, for example, combines speaker-verification software with the Web to simplify the task of court-mandated curfew monitoring.<sup>11</sup>

One new option is the Secure, Continuous, Remote, Alcohol Monitor (SCRAM), which became commercially available in 2003.<sup>12</sup> SCRAM is an automated alcohol-testing ankle bracelet that provides 24-hour monitoring of alcohol consumption and catches tamper attempts that mask drinking. It captures transdermal alcohol readings from continuous samples of vaporous or insensible perspiration collected from the air above the skin.<sup>13</sup> Anti-circumvention features include a tamper clip, an obstruction sensor, a temperature sensor, and communication monitoring to ensure that the bracelet is functioning normally and transmitting information on the designated offender.

The SCRAM bracelet assists with rehabilitation by providing constant monitoring of alcohol consumption, thus providing a constant deterrent to drinking as well as a positive reinforcement to abstinence. It permits offenders to remain employed, to fulfill family obligations, and to remain in treatment.

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<sup>10</sup> *Ibid*, p.18. See also A. K. Schmidt, "Electronic Monitoring of Offenders Increases," *NIJ Reports* (Washington, D.C.: National Institute of Justice, 1989) pp 2-5.

<sup>11</sup> RoboCUFF is a product of AnyTransactions of Decatur, Georgia.

<sup>12</sup> SCRAM is a product of Alcohol Monitoring Systems, Inc. See: [www.alcoholmonitoring.com](http://www.alcoholmonitoring.com).

<sup>13</sup> R. Robertson, W. Vanlaar, and H. Simpson, *Continuous Transdermal Alcohol Monitoring: A Primer for Criminal Justice Professionals* (Ottawa: Traffic Injury Research Foundation, October 2006), p. 2.

- *DWI Courts*, most based on the drug-court model, were developed by several jurisdictions to deal with the high incidence of crimes committed while under the influence of alcohol, including driving while impaired. Threats of punishment alone are not likely to change the behavior of individuals, and the philosophy of DWI courts is to treat the problem as well as punish the offender. DWI courts were established to protect public safety and to reduce recidivism by attacking the root cause of impaired driving—impairment caused by alcohol and substance abuse. The mission of sobriety and DWI courts is "to make offenders accountable for their actions, bringing about a behavioral change that ends recidivism, stops the abuse of alcohol, and protects the public; to treat the victims of DWI offenders in a fair and just way; and to educate the public as to the benefits of sobriety and DWI Courts for the communities they serve."<sup>14</sup>

Many judges believe that the use of DWI courts should be expanded, allowing experienced judges to use treatment resources and sentence, sanction, or reward offenders with greater consistency.<sup>15</sup> Common characteristics of sobriety and DWI courts include intense alcohol-addiction treatment and heavy court supervision, with jail sentences as a last resort. Compliance with treatment and other court-mandated requirements is verified by frequent alcohol and drug testing, close community supervision, and interaction with the judge in nonadversarial hearings.<sup>16</sup> One of the differences between problem-solving courts and traditional courts is that activities take place after adjudication, "instead of leaving this job to probation departments of community-based organizations or—in all too many cases—to no one at all."<sup>17</sup>

- *Tiered Penalty Systems* consist of increased sanctions for repeat offenses. Tiered penalties are designed so that repeat offenders receive the more severe sanctions while still permitting judges necessary discretion.<sup>18</sup>

Innovative practices, such as staggered sentencing, individually tailored sanctions, and combinations of traditional and alternative sanctions, are also

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<sup>14</sup> J. Tauber and C. W. Huddleston, *DUI/Drug Courts: Defining a National Strategy* (Washington, DC: National Drug Court Institute, 1999).

<sup>15</sup> Robertson, R.D., and Simpson, H.M. *DWI System Improvements for Dealing with Hard Core Drinking Drivers: Sanctioning*. (Ottawa, Ontario: Traffic Injury Research Foundation, 2002). p. 47.

<sup>16</sup> W. Huddleston and R. Wosje, "Promising Sentencing Practice No. 1: DWI Courts," in W. Brunson and P. Knighten (eds.) *Strategies for Addressing the DWI Offender: 10 Promising Sentencing Practices* (Washington, D.C.: National Highway Traffic Safety Administration, 2004) p. 11.

<sup>17</sup> G. Berman and J. Feinblatt, "Problem-Solving Courts: A Brief Primer," *Law and Policy* 23 (2001): 136-37.

<sup>18</sup> R. Robertson and H. M. Simpson, *DWI System Improvements: Stopping the Revolving Door* (Ottawa: Traffic Injury Research Foundation, Nov. 2003), p. 18.

being attempted.<sup>19</sup> Staggered sentencing splits the jail sentence into thirds, with the first being served immediately, after which the offender leaves jail on intensive supervision probation before serving the second segment. If the offender can maintain sobriety, he or she may request a waiver of the next segment of incarceration. This places responsibility for consequences on the offender, who must not only achieve the conditions of probation, but also schedule court motion hearings, and convince the court that lifestyle changes have reduced their chances of recidivism. Any new DWI violation results in revocation of probation and immediate incarceration for the remaining stayed sentence. Any violation of other conditions of probation, which usually include home electronic alcohol monitoring, results in the next segment of incarceration that the court has already ordered the offender to serve.<sup>20</sup>

### **What Are the Sentencing Options Focused upon Incapacitating the Vehicle?**

- *Alcohol Ignition Interlock* devices prevent an impaired driver from operating a vehicle. Thirty-eight states permit the use of these devices in some manner, and at least five states have statewide ignition interlock programs, and other states are being developing such programs.<sup>21</sup> The driver is responsible for the cost of installing and maintaining an ignition interlock device. The national average cost for installation is \$70.00, and for monitoring and calibration the cost is in the range of \$65.00 to \$75.00 per month.<sup>22</sup>

Many judges are unsure of how to categorize ignition interlocks in their sentencing philosophies. As a punitive sanction, it appears too lenient for repeat offenders and too harsh for first offenders.<sup>23</sup> Ignition interlocks, as with all sentencing options, have advantages and disadvantages. An interlock does reduce recidivism for repeat offenders, young drivers, and

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<sup>19</sup> *Hardcore Drunk Driving Judicial Guide* (National Association of State Judicial Educators and the Century Council, 2004) p.35-38.

<sup>20</sup> Judge J. E. Dehn, "Promising Sentencing Practice No. 2: Staggered Sentencing" , in W. Brunson and P. Knighten (eds.) *Strategies for Addressing the DWI Offender: 10 Promising Sentencing Practices* (Washington, D.C.: National Highway Traffic Safety Administration, 2004) p. 20.

<sup>21</sup> Jeanne Mejeur, "Ignition Interlocks: Turn the Key and Blow," 33 *State Legislatures* (December 2007), p. 16.

<sup>22</sup> "Sanctioning and Supervising Impaired Driving Technology Overview: Ignition Interlock Systems," National Commission Against Drunk Driving, available at [http://www.ncadd.com/sanction\\_iis.cfm](http://www.ncadd.com/sanction_iis.cfm).

<sup>23</sup> W. Vanlaar as cited in R. Robertson, W. Vanlaar, and H. Simpson, *A Criminal Justice Perspective on Ignition Interlocks* (Ottawa: Traffic Injury Research Foundation, 2005), p. 5.

persons with high BAC levels.<sup>24</sup> The interlock device is not intended to change the behavior of offenders in the long term, but does prevent them from driving particular vehicles while impaired. This allows offenders to maintain their employment and family obligations while maintaining public safety as well. There has been at least one suggestion to make ignition interlocks mandatory equipment for all vehicles.<sup>25</sup>

Some judges find ignition interlocks costly compared to other treatment alternatives, and more important, their use does not mitigate the need for counseling and treatment of impaired drivers. Many judges are surprised to learn that offenders frequently fail to install the ignition interlock, a situation that is easily remedied by making a certificate of installation a condition of sentencing.

- *License Suspension*, which can prohibit all driving or permit driving only for limited purposes, such as commuting to work. Suspended licenses are automatically reinstated at the termination of the suspension.<sup>26</sup> Suspensions can range in duration from brief periods (30 days), to longer periods (1 to 5 years), to permanent suspension, but periods between 12 and 18 months are optimal.<sup>27</sup>
- *Administrative License Revocation (ALR)* authorizes law-enforcement officers to confiscate the license of an impaired driver at the time of arrest, issue a temporary license, and provide information regarding the driver's right to an administrative hearing. It is imposed to protect public safety. ALR tends to be effective because the penalty is swift and certain, and to some offenders severe. Revocation of a driver's license is to some offenders more severe than fines or even incarceration. The downside is that more than half of DWI offenders continue to drive even after their driver's license is suspended or revoked, but perhaps less frequently and in a more cautious manner.<sup>28</sup>
- *Vehicle Impoundment, Forfeiture, and Other Vehicle-Based Sanctions* incapacitate the vehicle, but do not prevent the offender from borrowing, renting, or stealing a different vehicle. Other sanctions include law-enforcement officers in Washington and Oregon placing a "zebra" sticker

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<sup>24</sup> A. Fulkerson, "The Ignition Interlock System: An Evidentiary Tool Becomes a Sentencing Element," *Court Review* 39, no. 4 (Winter 2003): 18-22.

<sup>25</sup> G. T. Neugebauer, "Alcohol Ignition Interlocks: Magic Bullet or Poison Pill," *Pittsburgh Journal of Technology Law and Policy* 2 (2002).

<sup>26</sup> J. L. Nichols and H. L. Ross, "The Effectiveness of Legal Sanctions in Dealing with Drinking Drivers," U. S. Public Health Service, *Report to the Surgeon General* ("Surgeon General's Workshop on Drunk Driving: Background Papers, 1989) p. 94.

<sup>27</sup> See *A Guide to Sentencing DWI Offenders* for a list of studies supporting these findings.

<sup>28</sup> H. L. Ross and P. Gonzales, "Effects of License Revocation on Drunk-Driving Offenders," *Accident Analysis and Prevention* 20 (1988): 379-91.

over the annual portion of the license plate of the offender's vehicle at the time of the stop.<sup>29</sup> Subsequently, any officer could stop these stickered vehicles and request that drivers produce valid licenses.

- *Vehicle Plate* actions have proven effective in alerting law-enforcement officers to cars that are owned by DWI offenders. Special plates, stickers, or numbers are issued for a vehicle owned by a convicted impaired driver and may constitute probable cause for stopping the vehicle. The special plates or stickers permit family members to continue to operate the vehicle that otherwise might have been impounded or had its registration suspended or revoked.

### **What Are the Sentencing Options Focused upon Rehabilitation of the Offender?**

Rehabilitative or “remedial” sanctions attempt to change personal risk factors. These treatment options should be considered in addition to license suspension/revocation, not in place of it.<sup>30</sup>

- *Education programs* provide information on the medical and legal consequences of drinking, including the effect on driving performance, DWI laws, and videos of alcohol-related crashes and injuries. Victim Impact Panels, one-time programs in which victims of DWI crashes or their relatives describe the effects on them, are another form of education. Victim impact panels use an emotional appeal designed to change the attitudes of offenders toward drinking and driving by illustrating the real impact of crashes.<sup>31</sup> Community groups, such as Mothers Against Drunk Driving, are often responsible for organizing the programs and the court staff is responsible for assigning and monitoring the offender's attendance.

In some senses, *restorative justice conferences*, in which offenders meet with the victim in the company of their friends, family, and other interested parties in the presence of a trained facilitator, can also be considered educational. These conferences not only focus on appropriate

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<sup>29</sup> Judge M. G. Witte, “Promising Sentencing Practice No. 4: Vehicle and License Plate Sanctions,” in W. Brunson and P. Knighten (eds.) *Strategies for Addressing the DWI Offender: 10 Promising Sentencing Practices* (Washington, D.C.: National Highway Traffic Safety Administration, 2004) p. 30.

<sup>30</sup> A. Cavaola and C. Wuth, *Assessment and Treatment of the DWI Offender* (Binghamton, NY: Haworth Press, Inc. 2002).

<sup>31</sup> Judge G. Donat, “Promising Sentencing Practice No. 7: Victim Impact Panels,” in W. Brunson and P. Knighten (eds.) *Strategies for Addressing the DWI Offender: 10 Promising Sentencing Practices* (Washington, D.C.: National Highway Traffic Safety Administration, 2004) p. 41.

punishment for past behavior, but also encourage offenders to take personal responsibility for their actions in the future. Although popular in Australia, clear evidence is lacking that these conference lower the DWI recidivism rate.<sup>32</sup>

- *Treatment programs* are more extensive and intensive than education and counseling. They can vary widely from outpatient-counseling sessions all the way up to long-term inpatient programs conducted in hospitals and clinics.<sup>33</sup>
- *Medications* can be used to help offenders maintain sobriety while attempting to change the behavioral patterns leading to alcohol abuse. Some courts use Antabuse (disulfiram) or Naltraxone as treatment, although it is usually recommended that drug therapy be combined with psychosocial therapies for the most benefit<sup>34</sup> Naltrexone (ReVia) is a non-addictive medication that suppresses the craving for alcohol. Antabuse, is a medication that produces unpleasant side effects when a person drinks alcohol while taking the drug.<sup>35</sup>
- *Alcoholics Anonymous*, and its 12-step program, has been a primary aid to recovery. For DWI offenders, this approach may be most effective in hospital or correctional settings where attendance can be monitored.<sup>36</sup>

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<sup>32</sup> Tyler et al., *op. cit* , 553-585, at 577.

<sup>33</sup> Voas and Fisher, *op. cit* p. 5.

<sup>34</sup> S. O'Malley, "Naltrexone and Alcoholism Treatment," U. S. Department of Health and Human Services, *Treatment Improvement Protocol Series 28*, (1998) p. xv.

<sup>35</sup> Judge S. E. Benson and Gregory Lynch, "Promising Sentencing Practice No. 9: Drug Therapy," in W. Brunson and P. Knighten (eds.) *Strategies for Addressing the DWI Offender: 10 Promising Sentencing Practices* (Washington, D.C.: National Highway Traffic Safety Administration, 2004) p. 51.

<sup>36</sup> B. S. McCrady and W. R. Miller (eds.), *Research on Alcoholics Anonymous: Opportunities and Alternatives* (New Brunswick, NJ: Rutgers Center of Alcohol Studies, 1993).

## Which Sentencing Options Work Best for Impaired Driving?

Research is needed on the extent to which these sentencing options are used and with what effect. A survey of Michigan judges found that the most frequently used sanctions for repeat offenders were driver's license suspension (91.9 percent), probation (88.8 percent), fines (85.2 percent), outpatient counseling (83.3 percent), support groups (78.3 percent), mandatory jail (78.1 percent), and monitoring by testing for alcohol (77.1 percent).<sup>37</sup> In a survey of the American Judges Association, monitoring by testing for alcohol, intensive supervision probation, and support groups, such as Alcoholics Anonymous, were perceived to be most effective, along with mandatory jail time. Judges perceived suspended sentences and community service as least effective.

A meta-analysis of 200 evaluations revealed that education alone can be effective with first-time offenders with low-blood-alcohol content. For first-time offenders with high-blood-alcohol content, education combined with counseling is effective.<sup>38</sup> Community service and incarceration do not reduce recidivism for repeat offenders, unless combined with intensive supervision probation.<sup>39</sup> Administrative seizure of driver's license plates, ignition interlocks, and vehicle impoundment have had the potential to reduce recidivism by half, while those sanctions are in effect.<sup>40</sup> Driver's license suspension and treatment together seems to be more effective than either used alone.<sup>41</sup> Overall, a combination of treatment and sanctions appear to be the most effective way of dealing with repeat offenders.<sup>42</sup> Availability of the latest research on the effectiveness of sanctions would greatly benefit sentencing decisions and lead to greater consistency and lower recidivism rates.

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<sup>37</sup> M. L. Breer, A. Schwartz, A. Schillo, and D. Savage, "How Judges Respond to Drunk Drivers," *Judicature* 87 (September-October, 2003): 73.

<sup>38</sup> E. Wells-Parker, R. Bangert-Drowns, J. Allegrezza, R. McMillen, and M. Williams, "Final Results from a Meta-analysis of Remedial Interventions with Drink/Drive Offenders," *Addictions* 90 (1995): 907-26.

<sup>39</sup> G. R. Wheeler and R. V. Hissong, "Effects of Criminal Sanctions on Drunk Drivers: Beyond Incarceration," *Crime and Delinquency* 34 (1988): 29-42; R. K. Jones, C. Wiliszowski, and J. H. Lacey, *Evaluation of Alternative Programs for Repeat DWI Offenders* (Washington, DC: National Highway Traffic Safety Administration, 1996).

<sup>40</sup> K. H. Beck, W. J. Rauch, and E. A. Baker, *The Effects of Alcohol Ignition Interlock License Restrictions on Multiple Alcohol Offenders: A Randomized Trial in Maryland* (Arlington, VA: Insurance Institute for Highway Safety, 1997); National Highway Traffic Safety Administration, *State Legislative Fact Sheet* (Washington, DC: National Highway Traffic Safety Administration, 1996).

<sup>41</sup> R. B. Voas and D. A. Fisher, "Court Procedures for Handling Intoxicated Drivers," *Alcohol, Drugs, and Driving* 25 (2001): 32-42.

<sup>42</sup> Research by D. B. LeClair, L. Felici, and E. Klozbier (1987), reported in M. L. Breer, A. Schwartz, and B. A. Schillo, "How Judges Respond to Drunk Drivers," *Judicature* 87 (2003): 73.

A recent study conducted in Australia recommends that intervention be determined by risk of recidivism as well as by the particular needs of the offender.<sup>43</sup> Low-risk offenders should receive a basic level of intervention as needed, which may include recommendations for community-based or local government programs and perhaps restitution, while medium- to higher-risk offenders should receive more intensive service responses. This approach obviously requires a good instrument to assess the risk of recidivism based upon offender characteristics and details of the offense.

The *Guide to Sentencing DWI Offenders* summarizes the effectiveness of various sentencing options:

## DWI Sentencing Checklist

The table below summarizes the evidence concerning various DWI sentencing options that are discussed in detail in the text of this guide.<sup>44</sup>

**Comment [N1]:** Do you mean "ibid." here (I take it you're referring to the source in note 30.)

OFFENDER	SANCTION	EFFECTIVENESS	COMMENT
<b>FIRST CONVICTION</b>	<b>LICENSING</b>		
	Suspension/revocation (≥90 days; 30 days hard)	Reduces alcohol-related fatalities 6%-19% (administrative license revocation)	One study showed it does not cause employment problems.
	<b>VEHICLE ACTIONS (FOR VERY HIGH BACs)</b>		
	Impoundment/immobilization	Reduces recidivism by 40%-70%.	Immobilization may be more cost-effective.

<sup>43</sup> Courts and Programs Development Unit, Department of Justice, "Policy Framework to Consolidate and Extend Problem-Solving Courts and Approaches," Victoria, Australia, March 2006, p. 30.

<sup>44</sup> *Op. cit.*, pp. 20-21.

	Alcohol ignition interlocks	Effective while on vehicle.	Breath test failures in first few weeks are best predictor of recidivism.
	License plate impoundment	Shown to be effective in MN.	More cost-efficient than impoundment.
<b>ASSESSMENT AND REHABILITATION</b>			
	Treatment as appropriate to problem	Reduces recidivism by 7%-9%.	Should be paid by the offender when possible.
<b>SENTENCING OPTIONS</b>			
	Electronic monitoring home confinement	Effective alternative to jail. Reduces recidivism by 33%.	Can be self-sufficient if paid by the offender.
	Fines	No studies of effectiveness found.	Sometimes used to pay for programs.
<b>MULTIPLE CONVICTIONS (Repeat Offender)</b>	<b>LICENSING</b>		
	Suspension/revocation (≥ 1 year) 30-90 days hard Remaining days on restricted license/work permit	No studies found on the effects of license suspension on repeat offenders. General deterrent effect of 6%-19%.	Studies indicate 50%-70% of offenders continue to drive to some extent.
	<b>VEHICLE ACTIONS</b>		

Impoundment/immobilization	Reduces recidivism by 40%-70%.	Immobilization may be more cost-effective.
Alcohol ignition interlocks	Reduces recidivism while on vehicle.	Breath test failures in first few weeks are best predictor of recidivism.
License plate impoundment	Shown to reduce recidivism in MN.	More cost-efficient than impoundment.
<b>ASSESSMENT AND REHABILITATION</b>		
Mandatory assessment of drinking problem and mandatory treatment	Reduces recidivism by 7%-9%.	Should be paid by the offender when possible.
<b>SENTENCING OPTIONS</b>		
Electronic monitoring and home confinement	Reduces recidivism by 33%.	Can be self-sufficient if paid by the offender.
Intensive supervision probation	Reduces recidivism by 50%.	Should be at least partially funded by the offender.
Special DWI facilities	Reduces recidivism by 75%.	
Day reporting center	Integrates offender back into society.	More cost-effective than jail.
Fines, reinstatement fees	No studies on	Helps pay for costs of

		effectiveness found.	other sanctions.
	DWI court (e.g., frequent contact with judge; intensive supervision probation; treatment; random alcohol/drug testing; lifestyle changes; positive reinforcement)	Some courts reporting reductions in recidivism by 50% or greater.	Multiple funding sources available. NHTSA and the Bureau of Justice Assistance have a joint evaluation underway.

## Why Are the Sentencing Disparities Among Judges?

### *Disparities in Sentencing*

Sentencing disparity is the imposition of different sentences on similar offenders who have committed similar offenses. Disparity in sentencing is not the result of capricious behavior by the judiciary. Sentencing disparity occurs because within the vast number of judges involved in sentencing DWI offenders, judges may not be uniformly familiar with the benefits of different sentencing options, programs may not be uniformly available in all jurisdictions, and offenders may have different capabilities for paying program costs.<sup>45</sup>

Sentencing disparity results in some offenders not receiving appropriate sanctions. More than half (54 percent) of the law enforcement officers in the Traffic Injury Research Foundation survey reported they do not believe the penalties imposed by judges reflect the severity of the offense.<sup>46</sup> One illustration shows the problems caused by repeat offenders who continue to drive even when their driver's license is revoked.

This disparity reduces the potential for behavioral change and increases the likelihood of recidivism. Further, the inconsistent application of penalties creates a public perception of unequal justice. Most important, disparity permits and encourages offenders to manipulate the system to obtain lesser sentences

<sup>45</sup> Robertson and Simpson, *op. cit.*

<sup>46</sup> *Id.*

through practices such as “judge-shopping,” which is reported to occur either occasionally or often.<sup>47</sup>

The causes of sentencing disparity may be understandable, but it makes monitoring more complicated. The range of sentences that can be imposed on a DWI offender, despite a similarity in offender backgrounds and circumstances, is extremely broad. Offenders who are aware of the disparity may be less willing to comply with penalties perceived to be unfair. Disparity can also detract from the deterrent effect of sentences and reduce the potential for behavioral change.

To select an appropriate sentence, the judge needs access to information about the offender, a scientific assessment or evaluation, the available treatment alternatives, and knowledge about the effectiveness of various sanctions as well as the quality of services provided by local treatment agencies.<sup>48</sup>

### **Should Sentencing Options Depend upon Screening Offenders?**

The assessment of all convicted DWI offenders for alcohol problems is an expensive proposition. Ensuring that assessments are conducted can be a major task, depending upon the number of treatment providers available in the jurisdiction.

The judge is not a therapist, but does need to know the range of treatment options available and the practices that support each of the treatment approaches. All courts, including problem-solving courts and specialized DWI courts, must work with treatment providers to answer the following questions:

- How are priorities for treatment services determined?
- Are existing services available equally to individuals in court who need them?
- Are there any standardized protocols and risk-assessment inventories used to identify service needs and placement?
- Are the qualifications of the individuals involved in identifying service needs appropriate for the populations and problems they are expected to evaluate?
- Do recommended service plans address the specific needs of individual clients?
- What efforts are made to ensure services are culturally sensitive?

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<sup>47</sup> *Id.*

<sup>48</sup> M. R. McAdam, “The Judge’s Role in Reducing the Incidence of Impaired Driving,” conference address, American Judges Association Annual Educational Conference, Montreal, 2003.

- Who monitors delivery of services and tracks client progress?<sup>49</sup>

Screening is the use of easily and inexpensively administered tests and procedures in an attempt to establish the presence/absence of alcohol-use disorder (AUD), drug-use disorder, and recidivism risk. Another purpose of screening in some jurisdictions is to recommend appropriate sanctions that may reduce recidivism of individual offenders.<sup>50</sup>

- All DWI offenders entering the court should be screened for alcohol and other drugs.
- When screening indicates the need for assessment, trained officials should conduct the assessment. To avoid conflict of interest, assessment and treatment referral should be conducted by an agency not associated with any treatment program. Judges, prosecutors, probation officers, and other justice system staff should have general knowledge about screening, assessment, and other issues surrounding alcohol- and drug-abuse treatment. The court should seek information about locally available agencies and the quality of the services they provide.
- The best-rated instruments for DWI screening are the MacAndrew Scale of the Minnesota Multiphasic Personality Inventory and the Alcohol Use Inventory,<sup>51</sup> which were demonstrated to determine concurrent alcohol-use disorder.<sup>51</sup> However, none of these instruments evaluate drug-use disorders or other domains considered important in screening offenders. As these assessment tools have been evaluated in offender samples from only one state, further research is recommended to determine their usefulness in geographically and ethnically diverse populations. Two widely used screening instruments in the judicial system—the DRI and SALCE/NEEDS—have not been sufficiently validated; therefore, there is an urgent need to evaluate them. The Mortimer Filkins and the Michigan Alcoholism Screening Test, together with the DRI, are the tests used most widely in the court system, despite the lack of published evidence that they are useful with the DWI population. None of these instruments meet the stringent criteria for predictive validity that are an accepted standard in medical practice. The screening methods developed to date cannot accurately predict who will recidivate and who will not.

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<sup>49</sup> These questions are taken from P. Casey and W. E. Hewitt, *Court Responses to Individuals in Need of Services: Promising Components of a Service Coordination Strategy for Courts* (Williamsburg, VA: National Center for State Courts, 2001), pp. 17-18.

<sup>50</sup> I. Chang, C. Gregory, and S. C. Lapham, *Review of Screening Instruments and Procedures for Evaluating DWI Offenders* (Washington, DC: AAA Foundation for Traffic Safety, 2002).

<sup>51</sup> *Id.*

Available screening instruments are only partially successful in predicting recidivism. Even the best screening instruments have disadvantages.<sup>52</sup>

*Screening Recommendations Summary:*

- DWI researchers must determine what constitutes effectiveness in a screening program to guide the creation and evaluation of this and the next generation of DWI-screening instruments.
- When making treatment disposition decisions, evaluators should augment data from self-report instruments and face-to-face interviews with externally valid sources of information. These should include offenders' court criminal/traffic records, arrest and pre-interview breath-alcohol-testing results, and possibly other biochemical tests to help identify those who are more likely to be highly defensive and underreport their involvement with alcohol or other drugs.
- DWI assessments should include disorders beyond AUD, and in particular drug use, using biochemical tests.
- Researchers should consider the very modest impact of treatment on mitigating impaired-driving behavior. Practitioners should collaborate with criminal-justice professionals and researchers to design and evaluate innovative programs that combine treatment strategies with sanctions and monitoring.
- DWI researchers and practitioners should initiate a dialogue regarding whether, because of their inherent limitation, self-report screening assessments provide sufficient information for appropriate triage to selective interventions. If so, the field needs to determine the appropriate balance between achieving maximum positive and negative predictive validity.
- DWI researchers, practitioners, and those who select screening instruments should be informed regarding the normative data from which these instruments are derived.

The results of assessment and recommendations for treatment should be made available to the judge and prosecutor before sentencing. Judges and prosecutors should be familiar with the treatment providers in their jurisdictions and use their authority to advocate for the development of supplemental services and programs as needed.

### **What Are Best Practices in Sentencing?**

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<sup>52</sup> *Id.*

The Utah Sentencing Commission lists the following best practices in DWI sentencing:<sup>53</sup>

- **General Sentencing.** Before imposing sentence, judges should be aware of the BAC and the criminal history of the offender and should review the incident report.
- **Incarceration.** When a judge chooses to impose a jail sentence of 48 hours, the order should specifically state “48 hours” in jail rather than “two days” in jail. Additionally, ordering that this jail time be served when the jails are less crowded will increase the chances of the defendant serving the entire 48 hours. Judges should strongly consider jail sentences of six months for chronic offenders who are not sentenced to prison.
- **Probation.** The effectiveness of probation in preventing DUI recidivism depends, in large part, on the conditions imposed and the level of supervision associated with the probation. Some conditions of probation may provide a mechanism for controlling the offender’s behavior while other interventions, such as education and treatment, take place.
  - ✧ Whenever possible, DUI probationers should be supervised.
- **Electronic Monitoring.** Electronic monitoring is as effective as and less expensive than incarceration. Factors significantly related to success for those utilizing electronic monitoring include attendance at treatment and steady employment.
- **Ignition Interlock.** Ignition interlock can be an effective DUI control mechanism to be used while other interventions, such as education and treatment, are taking place.
  - ✧ Responding to interlock failures can help prevent additional DUI offenses.
- **Fines.** If the purpose of the fine is to punish the offender, full payment of fines in a timely manner should be emphasized. However, if the purpose of the fine is to encourage the offender to fulfill other court-ordered obligations, the practices of crediting fines for compliance with these obligations and extending the payment period should not be discounted.
- **Compensatory Work Service.** Judges who choose to order compensatory work service should require service that provides some benefit to the community or service that helps reduce instances of driving under the influence by the defendant or by other people.

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<sup>53</sup> Mike Haddon, Gary Franchina, and Ron Gordon, *DUI Best Sentencing Practices Guidebook* (Salt Lake City: Utah Sentencing Commission), chapter 3.

- **Screening and Assessment.** Whenever possible, the local substance abuse authority should perform the screening and assessment and a separate licensed treatment provider should provide the education and treatment.
- **Education and Treatment.** Controlling behavior while the offender is undergoing treatment is critical to successful recidivism reduction. Control can be in the form of supervised probation, electronic monitoring, ignition interlock, or license actions. This control must be maintained during the six to 18 months that are required to treat the DUI offender.
  - ⌘ The court should not order a particular education course or a particular treatment modality. Rather, the court should order that the offender receive a screening by a licensed treatment provider and participate in any assessment, education, and/or treatment recommended by the treatment provider.
- **License and Vehicle Actions.** License suspensions must last at least three months to be effective in reducing recidivism and the optimal suspension period for recidivism reduction is 12 to 18 months.
- **Victim Impact Panels.** Victim Impact Panels may be effective for first-time DUI offenders, but should never replace other sanctions and interventions.

One recommendation from a criminal-justice summit on impaired driving was to develop guidelines for penalties, particularly for repeat DWI offenders. Guidelines do not mean mandatory minimum sentencing, which was deemed the “worst thing for DWI” because it removes discretion from judges and tends to increase the use of jury trials.<sup>54</sup>

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<sup>54</sup> National Criminal Justice Association, *Criminal Justice Summit on Impaired Driving: Final Report* (Washington, DC: National Criminal Justice Association, June 2003), pp. 16, 22.