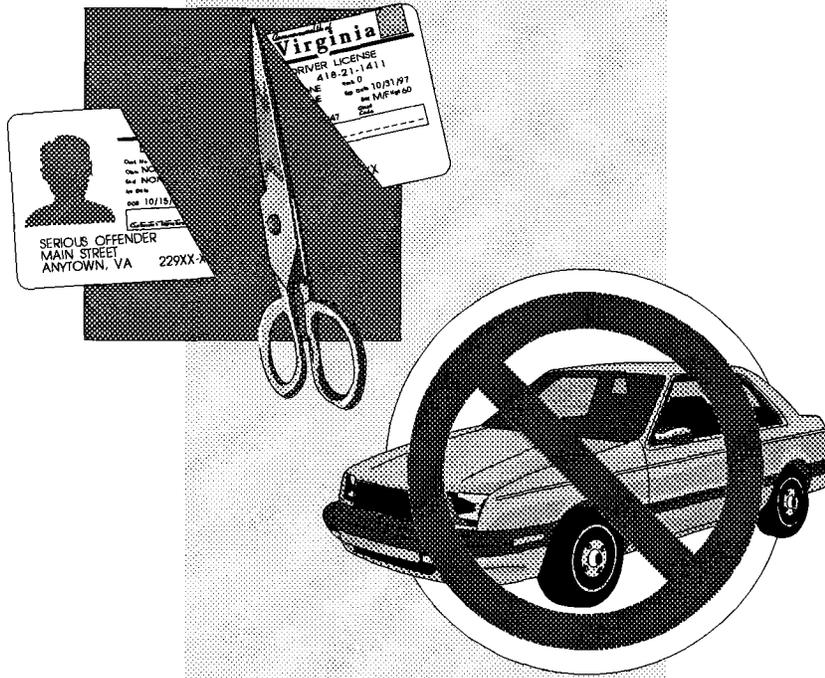


FINAL REPORT

ALTERNATIVES TO TRADITIONAL INCARCERATION FOR SERIOUS TRAFFIC OFFENDERS



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Abstract <p>This study evaluated the possible use of alternatives to traditional incarceration for serious traffic offenders. Traffic offenders pose less of a risk to the public than the rest of the incarcerated population and, if ways can be found to keep them from driving, could be targeted for alternative sanctions.</p> <p>License suspension and revocation appear to decrease recidivism more than do incarceration and treatment, but many suspended drivers continue to drive. The effectiveness of license actions may be increased by vehicle actions such as impoundment, confiscation, and visibly identifying vehicles owned by drivers with suspended or revoked licenses.</p> <p>Ignition interlock devices bar a driver from driving while under the influence. They are more effective at deterring recidivism than are license actions and could be a good candidate for a pilot program.</p> <p>Since studies of treatment programs have found discouraging results, it is recommended that treatment always be accompanied by other punitive actions.</p> <p>Intensive supervision programs and electronic monitoring have been regarded as effective and, if used for offenders who otherwise would be incarcerated, can reduce corrections costs.</p> <p>Community service, although widely used, does not have a research foundation to support or discourage its use.</p> <p>Treatment/work release facilities allow for heightened incapacitation and show promise as an effective deterrent. It is recommended that the Commonwealth look into establishing a pilot program.</p> <p>Because it is judges who impose sanctions, it is recommended that they be informed of the effectiveness and risks associated with the alternatives at their disposal.</p>				

FINAL REPORT

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**Jennifer C. Eilers
Graduate Legal Assistant**

(The opinions, findings, and conclusions expressed in this report are those of the author and not necessarily those of the sponsoring agencies.)

Virginia Transportation Research Council
(A Cooperative Organization Sponsored Jointly by the
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PREFACE

After the completion of this study, the General Assembly passed, and Governor George Allen signed the Omnibus Alcohol Safety Act (the Act). This Act made substantial changes in Virginia's drunk driving agenda. Many of these changes are related to issues discussed in this study. For instance, impoundment of vehicles driven by persons convicted of Driving Under the Influence (DUI), which was recommended in this study, is authorized by the Act. The Act also addresses a procedural issue not touched on in this study. The Act authorizes administrative license suspension and vehicle impoundment for drivers arrested for DUI. Although this author does not believe these procedural changes will affect the analyses of license actions and impoundment discussed in the study, they do present legal questions and concerns that are worthy of analyses. However, due to the timing of the enactment of the act, such legal investigations do not appear in this study.

The Act also imposes an 0.08 blood alcohol concentration (BAC) limit. This change could have an enormous effect on drunk driving enforcement in Virginia. For purposes of this study, a lowering of the BAC limit will probably increase the number of offenders eligible for sanctions, increase the number of multiple and habitual offenders in the system, and could have an impact on the willingness of judges to impose harsh sanctions. In addition, the enforcement of the new BAC limit could affect the burdens currently placed on sanction programs discussed in this study and the reader is advised to keep this in mind.

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EXECUTIVE SUMMARY

Introduction

In 1993, the Virginia Transportation Research Council (VTRC) completed a study of the effectiveness of Virginia's Habitual Offender Act in reducing crashes and convictions among problem drivers. One of the findings of the study was that 1,604 traffic offenders were serving terms of incarceration in Virginia. Due to the high financial costs of incarceration and increasing jail and prison overcrowding, the authors recommended that the Commonwealth examine implementing alternatives to incarceration for some of these offenders. The substantial number of incarcerated traffic offenders, viewed in light of the overcrowding problem, prompted the Virginia Department of Motor Vehicles (DMV) to request a study of alternative sanctions for traffic offenders.

This study evaluated the possible use of various alternatives to traditional incarceration for serious traffic offenders and the potential for alternatives to be effective deterrents to recidivism and to reduce corrections costs. At least 1,017, or 63%, of the incarcerated traffic offenders in the habitual offender study were sentenced due in whole or in part to a conviction of driving under the influence (DUI) of alcohol. Because most literature regarding the sentencing of serious traffic offenders focuses on DUI offenders, this study primarily addressed the use of alternative sanctions for DUI offenders.

Public safety is of immediate concern when releasing convicted offenders back into the community. Although incarceration acts to incapacitate offenders, thus eliminating any possibility of recidivism during the period of incarceration, the reality of limited resources suggests that alternatives must be used for particular classes of offenders. This study found that many serious traffic offenders are prime candidates for alternatives to incarceration. Compared to other jail and prison inmates, traffic offenders are more likely to be employed, to be married, and to have children, which indicates that they have more permanent ties in the community. They are also less likely to have tried or to use drugs other than alcohol and less likely to have a history of committing crimes other than traffic offenses. If ways can be found to keep traffic offenders from driving, they should pose less risk to the public than the rest of the incarcerated population—and thus make up a group that could be targeted for alternative sanctions.

Possible Alternative Sanctions

License Actions

License suspension or revocation is one of the most widely used sanctions for traffic offenders. Several studies have found that convicted DUI offenders

and habitual offenders sanctioned with license actions have lower rates of recidivism than do control groups, even those sentenced to jail or prison. Although true, such offenders can continue to operate motor vehicles, and their infrequent arrests may decrease the deterrent effects of license actions. There is a consensus, however, that such offenders tend to drive less frequently and in a safer manner than before the license action was imposed.

In light of these findings, it is recommended that Virginia's current system be fine tuned to increase the effectiveness of license sanctions. The results of a forthcoming NHTSA report should be reviewed to evaluate whether Virginia should consider impounding vehicle registrations and using license plate stickers to identify vehicles owned by persons with a suspended or revoked license.

Vehicle Actions

Some states other than Virginia authorize courts to confiscate and/or impound the vehicle, registration, or license plates of specified convicted traffic offenders. Vehicle confiscation statutes authorize the state to seize and permanently retain (usually for resale purposes) the motor vehicles of such offenders. Most states that have these laws suffer from underenforcement of and financial loss from the procedure. Vehicle impoundment, on the other hand, involves the temporary taking of an offender's vehicle. States that use impoundment laws have not had the multitude of problems associated with confiscation, but they still suffer financial loss from the endeavor. *However, it is recommended that the Commonwealth consider vehicle impoundment for its specific deterrence value.*

Many states have turned to registration and plate impoundment, which disallows legal operation of the offender's motor vehicle. Problems with this procedure include the fact that some offenders continue to drive the vehicle and innocent family members suffer from the court's actions. In response to these problems, some states place an identifying sticker on the vehicles owned by an offender. Identifying the vehicle is thus made simple, but only operation by the offender is illegal. *It is recommended that Virginia consider combining registration and plate impoundment with license suspensions and revocations to increase the punitive aspects of traffic offender sanctions, reduce the amount of driving by suspended drivers, and highlight the seriousness of the crimes.*

Ignition Interlock

Ignition interlock is a relatively new sanction that requires offenders to attach an electronic device to their motor vehicles. In order to start the vehicle, offenders must blow a breath sample into the interlock device. If a blood alcohol concentration (BAC) is registered above a preset level, usually 0.02% to 0.03%, the vehicle will not start. Studies have shown that interlock users have a lower recidivism rate than do control groups. Resistance to the widespread use of ignition interlock seems to focus on the possibility of user circumvention.

Interlock technology has evolved quickly, however, to support safeguards against most forms of circumvention. Even when users are able to circumvent the system, the device records the sanction violation.

There appear to be no legal difficulties to bar the use of interlock in Virginia, and it is recommended that the Commonwealth seriously consider establishing a pilot program.

Drug and Alcohol Treatment Programs

In Virginia, as in many other states, both drug and alcohol treatment are channeled through Alcohol Safety Action Programs. One study found that participants in Virginia's treatment program had a lower recidivism rate than non-participants. On the other hand, the array of literature evaluating alcohol treatment programs across the country does not show a consensus regarding the rehabilitative effectiveness of treatment for DUI offenders.

In light of these findings, it is recommended that treatment be used but that it always be accompanied by a punitive action to increase the potential for achieving correctional goals.

Variations of Traditional Probation

Traditional probation involves allowing a convicted offender to return to the community under conditions specified by the court. There is little evidence that traditional probation effectively reduces DUI recidivism, but more intensified probation programs, known as intense supervision programs (ISP), may be more suited to monitoring a DUI offender's behavior. Although less costly to the state than incarceration, the merits of using ISP with traffic offenders are unknown.

An even more restrictive form of probation is electronic monitoring (EM). An electronic device allows a probation officer to monitor an offender's presence in his or her residence. Restricting an offender to a residence serves a limited incapacitation purpose to reduce the need for prison beds. Although no studies have focused on traffic offenders serving EM sentences, studies of EM in general have cast a favorable light on the sanction, finding low rates of new offenses during the term of the sanction. Costs of the sanction are generally less than the costs of incarceration, particularly when the participants are required to contribute financially. On the other hand, when a community's EM resources are underused or used for offenders who otherwise would have received lesser sentences, savings attributed to the sanction may be reduced or eliminated.

It is recommended that, if used, ISP and EM should focus only on offenders who would otherwise be incarcerated for the time of probation so that potential savings do not convert to financial losses.

Community Service

Most states give courts the option to sentence traffic offenders to community service. The cost per day for the administration of community service programs is significantly less than the cost of traditional incarceration. However, these savings are lost when an offender is sentenced to perform more hours of community service than he or she would otherwise have served behind bars.

Community service has not received the research attention given to other sanction options; thus, the achievement of sanction goals is not documented to support or discourage its increased use.

Community-Based Institutional Alternatives

The general belief that substance abuse treatment is a necessary ingredient for the rehabilitation of DUI offenders, along with the public demand for strong punishment for such offenders, has led to the establishment of treatment/work release facilities (TWRFs). Like traditional jails and prisons, TWRFs serve to incarcerate offenders; but unlike traditional jails and prisons, TWRFs offer intensive substance abuse programs. Additionally, TWRFs allow many offenders who would otherwise have gone to jail or prison to retain their employment and ties to the community, thus reducing the financial burden on the state and the undesirable effects of prison on the offender. Because these types of facilities are relatively new, few studies on their effectiveness have been performed. The reports available are favorable, finding lower rates of recidivism for TWRF participants than for DUI offenders receiving other treatment or serving terms of incarceration. TWRFs appear to have great potential for achieving multiple correctional goals. Through selective use of privatization and/or the conversion of existing structures, jail and prison spaces would be opened up as traffic offenders are diverted to less expensive facilities.

It is recommended that the Commonwealth look into establishing a pilot TWRF program, taking into consideration the possibility of privatization and the conversion of existing structures in order to reduce costs.

Implementation of Alternatives

The use of alternative sanctions cannot occur without the cooperation of judges. Judges, on the whole, want to preserve public safety while ensuring the punishment and rehabilitation of DUI offenders. Releasing convicted offenders to the community, on its face, appears to clash fundamentally with the preservation of public safety. If judges are unaware or skeptical of the merits of a particular sanction within their discretion, they may be reluctant to break with their own sanctioning traditions.

It is recommended that judges be informed of the effectiveness and risks associated with alternatives already at the courts' disposal. Such efforts should also accompany any legislative changes in alternative sanctions allowed or required.

FINAL REPORT

ALTERNATIVES TO TRADITIONAL INCARCERATION FOR SERIOUS TRAFFIC OFFENDERS

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INTRODUCTION

The Virginia correctional system has recognized an overcrowding problem for nearly a decade.¹ The problem has neither abated nor stabilized in recent years, as Virginia's prisons are presently operating at 123% of capacity despite the recent construction of additional correctional facilities.² The Virginia Commission on Prison and Jail Overcrowding stated in its 1989 report that a rational approach to dealing with the overcrowding problem "is to continue to incarcerate hard-core, dangerous criminals while allowing some other offenders to remain in a community environment under controlled supervision and in corrective programs. This approach represents a cost-effective option for reducing the bedspace shortfall while preserving public safety."³

Some of these "other offenders" may have been identified in a study evaluating the effectiveness of Virginia's Habitual Offender Act,⁴ a statute that mandates license revocation for multiple traffic offenders⁵ and a sentence of incarceration for those habitual offenders convicted of driving in violation of the court-ordered revocation.⁶ This study was initiated by the Virginia Transportation Research Council at the request of the Subcommittee on Habitual Offenders, Advisory Committee to the Commission on VASAP. Among its findings, the study showed that on September 1, 1991, there were between 864 and 1,219 habitual offenders among a total of 1,604 traffic offenders who were incarcerated in Virginia's prisons and jails.⁷ At least 1,017 of these incarcerated traffic offenders were sentenced following a conviction for driving under the influence

¹ *Report of the Commission on Prison and Jail Overcrowding* 22 (1989) [hereinafter *Overcrowding*].

² Telephone interview with Patrick J. Gurney, Manager of Classifications and Records, Virginia Department of Corrections (VDOC) (June 12, 1993).

³ *Overcrowding*, *supra* note 1, at v.

⁴ Cheryl W. Lynn et al., Virginia Transportation Research Council (VTRC), *An Investigation of the Effectiveness of the Virginia Habitual Offender Act* (1993).

⁵ Va. Code Ann. § 46.2-351 (Michie 1989).

⁶ Va. Code Ann. § 46.2-357 (Michie 1989).

⁷ Lynn, *supra* note 4, at 30.

(DUI) or violating a habitual offender license suspension due to one or more DUI convictions.⁸

The authors of the habitual offender study recommended further study into the possibilities of alternative sanctions for habitual offenders.⁹ In light of the current jail and prison overcrowding problem and the fact that a large number of inmates are incarcerated for traffic offenses, the Virginia Department of Motor Vehicles (DMV) requested that an evaluation be made of alternatives to traditional incarceration for serious traffic offenders.

PURPOSE AND SCOPE

As the habitual offender study noted, very few studies have examined programs dealing with habitual offenders.¹⁰ On the other hand, a vast amount of literature exists examining drunk drivers and various forms of sanctions for DUI convictions. Because of the high number of jail and prison inmates incarcerated due to DUI convictions,¹¹ the focus of this study was on sanctions for DUI offenders.

The study sought to answer five specific questions:

1. Are serious traffic offenders good candidates for alternative sanctions?
2. What are the Virginia and federal sentencing guidelines that might affect the imposition of alternative sanctions?
3. What alternative sanctions are currently being used and how effective are they?
4. Is incarceration in a community-based residential facility that includes a treatment program a viable alternative to traditional incarceration?
5. What issues have a direct impact on the implementation of alternative sanctions?

⁸ This figure does not take into consideration 75 of the subjects for whom records were unavailable.

⁹ Lynn, *supra* note 4, at 47.

¹⁰ *Id.* at 5.

¹¹ See text accompanying note 8.

Although many volumes of research were examined to produce this report, this project was by no means a comprehensive study of alternatives. This report was meant to present an overview of the current usage and effectiveness of the various alternatives to incarceration used in Virginia and other jurisdictions. Before any changes in sentencing are implemented, more in-depth analysis may need to be made, especially where Virginia's experience with a particular sanction has not been fully documented.

An additional issue at the forefront of public awareness is the cost of sanctioning drunk driving. This report attempts to address this concern but is constrained by the lack of reliable data. Cost data were available for some sanctions, and these are duly noted in this report. But a comparative analysis of the costs of the various sanctions discussed herein would necessitate a separate comprehensive study.

Implementing dispositional alternatives for offenders who otherwise would have been incarcerated raises several concerns that are addressed in this report. First, substituting an alternative sanction for incarceration allows an offender to remain in the community, possibly presenting a danger to the public. Second, judicial efforts to use alternatives must follow state sentencing guidelines that, in turn, are influenced by federal sentencing guidelines. Finally, alternative sanctions may not have the deterrent or rehabilitative effect of incarceration. This study discusses these concerns in terms of offenders and individual sanctions.

METHODS

This project was carried out using a variety of resources. First, research studies published by state and federal agencies and private research organizations evaluating various criminal sanctions and state laws were reviewed. Second, with regard to sanctions not currently used in Virginia, potential legal obstacles to their implementation were investigated by a review of state and federal statutes and court opinions. Third, telephone calls were made to Virginia officials to gain information relating to the administration of existing laws and sanctions. Fourth, two correctional facilities in Maryland were visited in an effort to learn more about the establishment and administration of treatment/work release facilities for DUI offenders.

RESULTS

Serious Traffic Offenders as Candidates for Alternative Sanctions

In a survey of Virginia judges made by the Department of Planning and Budget, the judges surveyed indicated that they were heavily influenced by the issue of public safety when deciding between incarceration and probation.¹² This concern is also typical of law enforcement personnel and the public. Accordingly, courts tend to impose sanctions other than incarceration only on those criminals who are considered nonviolent and of minimum danger to the public.

Some studies argue that many traffic offenders, particularly those convicted of driving under the influence of alcohol or drugs, are criminally naive and would become hardened, not rehabilitated, by incarceration.¹³ These arguments usually take into consideration the exposure of traffic offenders to the “criminal element”; the potential influence of hard-core criminals on traffic offenders; and the severance of family, work, and community ties.

Jail and prison inmates incarcerated for traffic-related offenses may pose less of a risk to the public than other criminals and are thus good candidates for alternative sanctions.¹⁴ This view appears to be common, as many states include traffic offenders among the groups of offenders eligible for alternative sanctions. In fact, studies have shown that inmates incarcerated for traffic-related offenses are substantially different from the rest of the prison population as a whole.¹⁵ According to the National Highway Traffic Safety Administration (NHTSA), most drunk drivers are low-risk, nonviolent offenders.¹⁶ Demographically, compared to other criminal offenders in prison, those who are incarcerated for traffic-related offenses are older; are more likely to be married, have children, and hold full-time jobs; are less likely to have tried or currently to use drugs other than alcohol; and are less likely to have a history of committing crimes other than traffic offenses.¹⁷ Although some traffic offenders may have a personal background and criminal history that indicate a propensity toward violence, most DUI offenders are not escape-risks and do not present a threat of violence to the community.¹⁸ Given the distinct differences between most traf-

¹² *Overcrowding*, *supra* note 1, at 52.

¹³ *E.g.*, 1 National Highway Traffic Safety Admin. (NHTSA), U.S. Dep’t of Transp., *The Drunk Driver and Jail* 19-22 (1986).

¹⁴ *Id.* at 42.

¹⁵ *See id.* at 19-22; Ralph A. Weisheit & John M. Klofas, AAA Found. for Traffic Safety, *Jailing Traffic and DUI Offenders: Trends for 1972-1983* (1990).

¹⁶ NHTSA, *supra* note 13, at 42.

¹⁷ Weisheit, *supra* note 15, at 23-31.

¹⁸ 1 NHTSA, *supra* note 13, at 3.

fic offenders and other criminals, men and women convicted of traffic-related offenses appear to be prime candidates for the use of alternative sanctions.

Virginia and Federal Sentencing Guidelines for Serious Traffic Offenders

Alternative sanctions for traffic-related offenses are subject to state sentencing guidelines that, in turn, are influenced by federal highway funding guidelines. Although Virginia classifies many traffic-related offenses as Class 2 misdemeanors,¹⁹ Class 1 misdemeanors,²⁰ or Class 6 felonies,²¹ all of which expose offenders to the possibility of incarceration, few traffic-related offenses carry with them a mandatory minimum of incarceration. The Virginia statutes explicitly mandating minimum terms of incarceration for traffic-related offenses are:

1. *Driving Under the Influence:*

- a. a second offense within less than five years of the first offense carries a mandatory minimum sentence of 48 hours of incarceration;
- b. a third offense within less than five years of the first offense carries a mandatory minimum of 30 days of incarceration; and
- c. a third offense within five to ten years of the first offense carries a mandatory minimum of 10 days of incarceration.²²

2. *Driving by an Habitual Offender in violation of adjudication*²³: this offense carries with it a mandatory minimum of 12 months in jail or 1 year in prison unless the driving incident did not endanger life, limb, or property. In addition, if this is the first offense, it carries a 90-day jail or prison sentence, 10 days of which may not be suspended unless an extreme emergency led to the offense.²⁴

¹⁹ For a Class 2 misdemeanor conviction, Virginia courts are authorized to impose confinement in jail for up to 6 months and/or a fine of up to \$1,000. Va. Code Ann. § 18.2-11(b) (Michie Supp. 1993).

²⁰ For a Class 1 misdemeanor conviction, Virginia courts are authorized to impose confinement in jail for up to 12 months and/or a fine of up to \$2,500. Va. Code Ann. § 18.2-11(a) (Michie Supp. 1993).

²¹ For a Class 6 felony conviction, Virginia courts are authorized to impose imprisonment for not less than 1 year or more than 5 years or jail for up to 12 months and/or a fine of up to \$2,500. Va. Code Ann. § 18.2-10(f) (Michie Supp. 1993).

²² Va. Code Ann. § 18.2-270 (Michie 1993); Va. Code Ann. § 18.2-341.28 (Michie 1989).

²³ Adjudicated habitual offenders are drivers whose driving record has been certified by the DMV as qualifying them for habitual offender status and who have appeared in court and have been declared by the court to be habitual offenders. Lynn, *supra* note 4, at 3.

²⁴ Va. Code Ann. § 46.2-357 (Michie Supp. 1993).

Aside from mandatory minimum sentencing guidelines, state statutes offer other, discretionary sanctions for various traffic offenses. Judges are afforded the authority to tailor these sentences to individual offenders.²⁵ If a judge opts for placing an offender on probation rather than imposing other statutory sanctions, that judge has the authority to base probation compliance on “such conditions as the court shall determine.”²⁶ In order to fulfill the sentencing goal of preventing the defendant from continuing the behavior for which he or she was convicted, a sentence will be overturned only if the defendant’s background or the circumstances of the case indicate that the sentence was not reasonably related to securing the rehabilitation of the defendant.²⁷ When applying this standard to the sentencing of traffic offenders, courts must impose sanctions that are related to deterring further motor vehicle violations.

Virginia’s sentencing guidelines are in part influenced by federal guidelines for the receipt of highway funds. In order for a state to comply with 23 U.S.C. §§ 408²⁸ and 410,²⁹ both of which allow federal funding of state traffic safety programs, it must mandate the imposition of either 48 hours of incarceration or 10 days of community service for a second DUI conviction that occurs less than 5 years after the first DUI offense.³⁰ As long as Virginia’s sentencing requirements meet the minimum standards promoted by the federal guidelines, the state may supplement these standards with a wide variety of sanctions without losing federal highway fund eligibility.

Identification and Evaluation of Alternative Sanctions

Although most literature refers to multiple objectives for legal sanctions, including retribution, incapacitation, deterrence, and rehabilitation,³¹ the reasons for imposing sanctions on those who violate the law can be distilled to one main goal: to reduce the number of criminal and socially undesirable acts committed. The methods for achieving this goal distinguish one sanction from another. Some sanctions attempt to isolate convicted offenders from opportunities to commit new crimes (incapacitation). Others attempt to address the underlying reasons for the offender’s original deviance (rehabilitation). Still other sanctions rely strictly on the punitive aspects of harsh penalties, the hope being to outweigh potential benefits to the offender in future violations (deterrence). Last, some sanctions seem to function less as deterrents than as retribu-

²⁵ See Va. Code Ann. § 19.2-299 (Michie 1993).

²⁶ Va. Code Ann. § 19.2-303 (Michie 1993).

²⁷ *Loving v. Commonwealth*, 147 S.E.2d 924, 930-31 (Va. 1966), *rev’d on other grounds*, 388 U.S. 1 (1967).

²⁸ 23 U.S.C. § 408 (1988).

²⁹ 23 U.S.C. § 410 (1988).

³⁰ 23 U.S.C. § 408 (e)(1)(A) (1988); 23 U.S.C. § 410 (d)(6) (1988).

³¹ See, e.g., Fred L. Rush, *Deinstitutional Incapacitation: Home Detention in Pre-Trial and Post-Conviction Contexts*, 13 N. Ky. L. Rev. 375, 390-399 (1987).

utive penalties, with the goal to provide a legally sanctioned mechanism for society to “get back at” those who choose to violate the law.

Whatever the method of deterrence, the effectiveness of a sanction is usually measured by the subsequent reduction (or increase) in the number of incidents of the targeted crime. Most studies cited in this report examined the recidivism rates of convicted offenders to determine a particular sanction’s *specific* deterrent effects. These studies did not take into account *general* deterrence, or how many persons who have never been convicted of the crime were deterred by the threat of the sanction. There is a vast amount of literature addressing general deterrence, but this issue is beyond the scope of this report and will not be discussed.³²

Other issues associated with alternative sanctions are cost-effectiveness and the potential to reduce the problems associated with jail and prison overcrowding. Ideally, an alternative sanction would offer the same or a higher level of reduction in criminal behavior than the traditional sanction and would, at the same time, cost the state less and ease jail and prison overcrowding. The following alternatives are discussed with these principles in mind.

License Actions

The widespread popularity of license actions is evident from the fact that in Virginia as of July 1993, 664,517 drivers were unlicensed due to suspension or revocation.³³ Courts use license actions to sanction drunk drivers, various other traffic offenders, and drug offenders. Theoretically, license suspension and revocation serve to increase public safety by inhibiting convicted traffic offenders from driving and to impose an inconvenience or punishment on the offender.

Under Virginia’s Habitual Offender Act, a person’s license is revoked for life if he or she is certified by the DMV as a habitual offender and is subsequently adjudicated as a habitual offender by a circuit court.³⁴ One study found that habitual offenders who were certified but not adjudicated, thus retaining their driver’s license, had more subsequent DUI and traffic convictions, more subsequent crashes, and fewer days between certification and their next crash or offense than did adjudicated habitual offenders.³⁵ These results were limited to drivers whose habitual offender status was based on two or

³² NHTSA, *Deterrent Effects of Mandatory License Suspension for DWI Conviction* (1987) [hereinafter *Mandatory License Suspension*].

³³ Laurence Hammack, *There Is No Way We Can Put All These People in Jail*, Roanoke Times and World-News (July 17, 1993) at A1. *J.C. Law v. Commonwealth of Virginia*, 199 S.E. 516 (Va. 1938) recognizes judicial acceptance of the view that driver’s licenses do not constitute an irrevocable privilege and may be withdrawn by state authorities due to abuse by the licensee.

³⁴ See *supra* note 23.

³⁵ Lynn, *supra* note 4, at 30.

fewer DUI convictions. There were no significant differences between the number of subsequent DUI convictions, crashes, or traffic events accumulated by the two groups of drivers (adjudicated habitual offenders and those who had merely been certified) who had three or more DUI convictions.³⁶

A California study covering a 2.5-year period following imposition of sanctions found that among treatment, license suspension, and incarceration, license suspension was the most effective sanction for reducing the subsequent total accident risk (alcohol-related and non-alcohol-related) for first-time DUI offenders.³⁷ Those first offenders who received treatment concurrent with restricted licenses (valid only when driving to and from work and treatment programs) had fewer postconviction DUI-related incidents than first offenders who received only license suspension, jail, treatment and jail, or more intensive treatment and license restriction.³⁸ Offenders who served only jail terms had significantly higher rates of both total accidents and DUI-related incidents.³⁹ For multiple DUI offenders, the study indicated that license actions alone are perhaps not sufficient to achieve specific deterrence. For second offenders, those receiving treatment and restricted licenses had a significantly lower number of DUI incidents than those receiving only suspended licenses.⁴⁰ An earlier study found that DUI offenders with three or more convictions who received revocation had a lower subsequent conviction rate but a higher number of alcohol-related accidents than those who received treatment along with revocation.⁴¹

NHTSA studied the effects of a Wisconsin law that mandated, and actually resulted in, a license suspension of 3 to 6 months for *every* individual convicted of DUI.⁴² The study found that the mandatory license suspension law appeared to have a stronger effect on subsequent driving behavior than did the former law, which made license suspension a discretionary sanction. Prior to the new law, 7.8% of convicted DUI offenders were convicted of a subsequent DUI within 1 year of the initial conviction; on the other hand, only 5.4% of those convicted under the mandatory law were convicted within 1 year.⁴³ The mandatory license suspension also correlated with a longer period of time before the

³⁶ *Id.*

³⁷ Helen N. Tashima et al., California Dep't of Motor Vehicles, *Annual Report of the California DUI Management Information System* 39 (1993).

³⁸ *Id.* DUI-related incidents as defined in this study include alcohol-involved accidents, implied consent suspensions, DUI failure-to-appear notices, and major convictions (primarily DUI but also reckless driving and hit-and-run). *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 42.

⁴¹ Helen N. Tashima & William D. Marelich, California Dep't of Motor Vehicles, *A Comparison of the Relative Effectiveness of Alternative Sanctions for DUI Offenders* 83-84 (1989) [hereinafter *Comparison of Relative Effectiveness*].

⁴² *Mandatory License Suspension*, *supra* note 32. Between May 1982 and December 1985, 100% of convicted DUI offenders lost their license, compared with 45% under the former discretionary law. *Id.* at 5.

⁴³ *Id.* at 51.

re-arrest of those who were recidivists, with the average length under the former law being 180 days before rearrest compared with 203 days under the new law.⁴⁴

One need not look to the studies of effectiveness to realize that the revocation or suspension of a driver's license does not eliminate driving. One in nine drivers involved in fatal crashes nationwide in 1991 were driving with a suspended or revoked license.⁴⁵ The fact is that many unlicensed drivers continue to drive. On the other hand, studies consistently show that license actions, although they do not eliminate driving, at least decrease the amount of driving and/or promote safer driving behavior.⁴⁶

License actions will continue to be widely used sanctions. These sanctions do not create large corrections costs or add to the overcrowding problem. Unfortunately, subsequent enforcement of license actions does not appear to be effective, as reflected by the high number of suspended drivers who continue to drive. Some of the methods used in impoundment procedures, discussed next, could supplement the deterrent effects of license actions.

Vehicle Actions

Most convicted DUI offenders threaten public safety only when they are behind the wheel of a motor vehicle. Accordingly, many sanctions aimed specifically at incapacitating traffic offenders outside of jail and prison focus on motor vehicles and their operation. These sanctions take the form of government seizure of either the vehicle itself or the license plates and/or registration forms.

Vehicle Confiscation/Impoundment

Motor vehicle seizure statutes take one of two forms: confiscation/forfeiture or impoundment. Confiscation refers to the act of government officials seizing and permanently disowning a vehicle from an offender. Impoundment, on the other hand, refers to the procedure of dispossessing an offender of his or her vehicle only temporarily. Confiscation or impoundment of vehicles driven by impaired drivers or drivers without a valid license has been proposed to serve multiple purposes. First, the seizure involves property used in furtherance of illicit activities; thus, seizure removes the object enabling the prohibited activity and prevents future illegal use. Second, seizure may serve as a source of revenue, through the resale of forfeited vehicles, that can subsidize increased enforcement efforts necessary to deal effectively with the underlying illegal behavior. Third, seizure imposes an economic penalty and inconvenience as punishment for illicit conduct and, thus, has a possible deterrent effect.

⁴⁴ *Id.*

⁴⁵ Hammack, *supra* note 33, at A6.

⁴⁶ See *Mandatory License Suspension*, *supra* note 42, at 58 for discussion of studies that led to these conclusions.

Confiscation. In 1989, Virginia repealed a confiscation statute that was typical of confiscation statutes currently in force in other states.⁴⁷ The law required a police officer to seize a vehicle driven by anyone the officer reasonably believed to be driving without a valid license. If a court found the driver to be both unlicensed and the owner of the vehicle, the court could order the forfeiture of the vehicle. In order to protect innocent third parties, the statute required the government to turn over the vehicle to nonoffending true owners or lienholders if they had no knowledge of the illegal use of the vehicle.

Virginia's law enforcement personnel and Commonwealth's attorneys infrequently enforced the confiscation statute. Even when it was used to seize vehicles, the procedure rarely resulted in permanent forfeiture. The under-enforcement was partially due to the impediments to successful confiscation. Statutory provisions that protected innocent parties meant that unless the Commonwealth could prove that the true owner or lienholder knew of the illegal use, confiscation could occur only if the convicted driver owned the vehicle free and clear. Next, when a vehicle was released to a lienholder, the lienholder had no legal recourse but to return the vehicle to the offender.⁴⁸ Many law enforcement personnel and Commonwealth's attorneys thought that permanent confiscation was too harsh a sanction to administer in all qualifying cases.⁴⁹ Additionally, a 1975 study found that the confiscation procedure, from the initial seizure to the subsequent sale of the vehicle, resulted in a net loss of \$105 per vehicle.⁵⁰

As of December 1993, 19 states had confiscation statutes,⁵¹ but no studies examining their effectiveness had been published. After reviewing all of the statutes and their applications, NHTSA found that other states suffer many of the same barriers to successful confiscation as did Virginia. Almost all suffer from underenforcement and administrative difficulties.⁵² Due to the extremely limited number of applications of these laws, NHTSA determined that any evaluation of their effectiveness in reducing repeat offenses of illicit driving and crashes would be impossible.⁵³

On the other hand, the City of Portland, Oregon, implemented a confiscation law that has shown promise after the first year of enforcement. The law

⁴⁷ Va. Code Ann. § 46.1-351.1 (Michie 1972).

⁴⁸ John E. Wetsel, Jr., VTRC, *An Assessment of Virginia's Law Requiring the Forfeiture of Any Vehicle Driven by a Person Under License Suspension or Revocation* 7 (1975). The lienholder could legally keep the vehicle only if the driver was in default of payments. *Id.* at 7.

⁴⁹ *Id.* at 22.

⁵⁰ *Id.* at 29.

⁵¹ Alaska, Arkansas, Arizona, California, Georgia, Maine, Minnesota, Mississippi, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Wisconsin.

⁵² NHTSA, *Assessment of Impoundment and Forfeiture Laws for Drivers Convicted of DWI, Phase I Report: Review of State Laws and Their Application* 52-58 (1992) [hereinafter *Assessment of Impoundment*].

⁵³ *Id.*

provides that lienholders must execute a stipulated judgment promising that the vehicle will not be returned to the offender; in addition, junk vehicles (those worth less than \$500 and thus barred by law from the roads) and vehicles involved in crashes are not confiscated but are returned to the offender.⁵⁴ These provisions help to maintain the objective of the law (taking away an offender's vehicle) while reducing the city's financial risk by eliminating from forfeiture those vehicles that would cost the city huge financial loss. Despite this foresight, the city still experienced a net loss in the program.⁵⁵

Impoundment. Although most states impound the vehicles of persons arrested for DUI until the individual is sober and can show proof of licensure, 10 states (as of December 1993) have extended this concept to enact statutes that allow for long-term impoundment of vehicles driven by drunk drivers or drivers with an invalid license.⁵⁶ Most impoundment statutes require the offender or the owner of the vehicle to pay the cost of towing and storage in order to regain possession of the vehicle. For instance, in Delaware, the owner must pay a \$50 towing fee and \$10 per day of storage.⁵⁷ These costs have contributed to the infrequent use of impoundment in Delaware, as most vehicles impounded are of such low value that it is not worth it to the owner to pay the impoundment costs, thus leaving the costs to the state.⁵⁸ Other programs have experienced similar problems. For example, in Wisconsin, where the average cost of impounding a vehicle is \$508, the average value of an impounded vehicle in 1983 was only \$295.⁵⁹ New Mexico's impoundment statute allows courts to substitute traditional impoundment with the placing of immobilization devices on motor vehicles at the residence of the owner. Although the offender must lease the immobilization device, there are no storage fees. This reduces the cost of the impoundment while creating the same incapacitating effect, as no one can drive the vehicle until the device is removed by a police officer.

Impoundment serves some of the same purposes as does forfeiture but eliminates many of the problems of permanent confiscation procedures. Impoundment also acts as an economic penalty and an inconvenience, but again, not to the extreme degree of forfeiture. Both procedures send a message not only to the suspended driver but also to car owners who lend their vehicles to these drivers. Borrowed vehicles represent a substantial number of the vehicles driven by unlicensed drivers—53.9% of the vehicles seized under the impoundment law in Manitoba, Canada, were owned by someone other than the driver.⁶⁰ Although impoundment statutes in the United States generally release

⁵⁴ *Id.* at 63.

⁵⁵ *Id.* at 64.

⁵⁶ Alaska, California, Delaware, District of Columbia, Minnesota, Montana, New Mexico, Oregon, Utah, and Wisconsin.

⁵⁷ *Assessment of Impoundment*, *supra* note 52, at 48-49.

⁵⁸ *Id.*

⁵⁹ *Id.* at 50.

⁶⁰ *Manitoba's Tough New Law Challenged*, Impact, September 1990, at 1, 1.

vehicles to innocent owners, this courtesy can occur only once, since the owner is on notice from that point on of the arrested driver's status. Again, NHTSA was unable to find any quantitative or objective evidence that any of these laws was effective in reducing recidivism in crash involvement.⁶¹

Legal Issues. Confiscation of motor vehicles for various criminal activities and traffic offenses has withstood many constitutional challenges, remaining a valid exercise of police power. Impoundment, although temporary, still qualifies as "seizure" and must meet the same requirements as confiscation.⁶² Most challenges to seizures claim violations of the Fourteenth Amendment and its guarantee that no state shall "deprive any person of life, liberty, or *property*, without due process of law."⁶³ Procedural due process mandates proper *notice* of the legal action followed by a "meaningful" *hearing*.⁶⁴ The Supreme Court summarized the constitutional requirements of due process as applied to seizure in *Fuentes v. Shevin*.⁶⁵

In *Fuentes*, the complainant was given neither notice nor hearing before the seizure of property. The Court found that notice and a hearing "must be granted at a time when the deprivation can still be prevented" in order to meet the objective of due process, which is to protect the owner's enjoyment of property from "arbitrary encroachment."⁶⁶ Obviously, the requirement of a pre-seizure hearing, if absolute, would strike many current confiscation statutes. The *Fuentes* Court outlined "extraordinary situations" that would permit the seizure of property without prior notice and hearing: (1) the seizure must be directly necessary to promote an important governmental or public interest, (2) there must be a special need for very prompt action, and (3) the government must maintain strict control over the process by ensuring that the application of the statute is performed by a government official and is necessary and justified in each particular circumstance.⁶⁷

The Court clarified "extraordinary circumstances" in *Calero-Toledo v. Pearson Yacht Leasing Co.*⁶⁸ Seizure without a prior hearing is allowable if (1) it fosters the public interest of preventing continued illicit use of property and of enforcing criminal sanctions, (2) postponing seizure could frustrate law enforcement efforts since the property could be destroyed or removed from jurisdiction after notice and before forfeiture, and (3) the seizure is initiated by government

⁶¹ *Assessment of Impoundment*, *supra* note 52, at 18.

⁶² *Fuentes v. Shevin*, 407 U.S. 67, 85 (1972) (citing *Shiadaach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Bell v. Burson*, 402 U.S. 535 (1971)).

⁶³ U.S. Const. amend. XIV (emphasis added).

⁶⁴ *Fuentes v. Shevin*, 407 U.S. at 80 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (emphasis added).

⁶⁵ *Fuentes*, 407 U.S. at 67.

⁶⁶ *Id.* at 81.

⁶⁷ *Id.* at 91.

⁶⁸ *Calero-Toledo v. Pearson Yacht Leasing Co.*, 410 U.S. 663 (1974).

officials.⁶⁹ The Court upheld the forfeiture laws because such statutes promoted the public interests by furthering the objectives of the underlying law (in this case, narcotics laws) by preventing continued use of the property for illegal purposes and by imposing a financial penalty, thus rendering the activity unprofitable.⁷⁰

Virginia Supreme Court decisions have paralleled those of the U.S. Supreme Court. In Virginia, “it is settled that the legislature has ample power to provide for the forfeiture of property employed in defiance of the State.”⁷¹ These decisions validate confiscation statutes provided that the constitutional requirements are met. A vehicle driven by a person without a valid license or while under the influence certainly qualifies as property “employed in defiance of the State,”⁷² and confiscation of such property prevents its continued illicit use.

Impoundment of Plates and Registration

A less severe alternative to vehicle impoundment that would serve many of the same objectives while reducing costs is the impoundment of an offender’s license plates and/or vehicle registration. At least 15 states currently authorize plate or registration impoundment.⁷³ In 1988, Virginia repealed a statute that allowed for the suspension of registration certificates and plates of all vehicles registered to any person whose driver’s license had been suspended or revoked.⁷⁴ Under this law, the DMV could issue an order for the driver to return a vehicle registration form when a driver’s license was revoked or suspended. Failure to respond to this order could result in the court issuing a warrant. However, these warrants were rarely issued by Virginia courts,⁷⁵ perhaps because of the administrative paperwork. Because of the lack of enforcement, the impending threat of further penalties for not responding to an order to surrender registration was diluted since drivers suffered these penalties only if they were stopped for committing some other traffic offense and the police officer discovered the outstanding order. In order to ameliorate similar difficulties, the state of Ohio established the Field Motor Vehicles Enforcement Investigators, whose job focus is to seek out drivers who fail to comply with court orders such as those to surrender vehicle registration or plates.⁷⁶

⁶⁹ *Id.* at 679.

⁷⁰ *Id.* at 686-87.

⁷¹ *Commonwealth v. One 1970, 2 Dr. H.T. Lincoln Automobile*, 186 S.E.2d 279, 280 (Va. 1972) (quoting *Quidley v. Commonwealth*, 59 S.E.2d 52, 57 (Va. 1950)).

⁷² *Lincoln Automobile*, 186 S.E.2d at 280-82.

⁷³ Arkansas, Delaware, Iowa, Indiana, Maine, Maryland, Michigan, Minnesota, New Hampshire, New York, North Dakota, Ohio, Oregon, South Dakota, and Wyoming.

⁷⁴ Va. Code Ann. § 46.1-418 (Michie 1986).

⁷⁵ *Assessment of Impoundment*, *supra* note 52, at 20.

⁷⁶ *Id.* at 21-22.

Upon surrender of the vehicle registration or plates, an individual may not legally drive the affected vehicle on the roads. Although this is the precise objective of this sanction, it does present some concerns. First, rendering a vehicle inoperable punishes not only the driver/offender but may also punish innocent family members. Minnesota, Ohio, and Iowa impoundment statutes have provisions that allow an offender's family to apply for "family plates," which are easily identifiable by color or plate number. These plates allow innocent family members to drive the vehicle while alerting police officers that an illegal driver may be driving the vehicle. The Iowa statute explicitly states that the use of the special plates constitutes "implied consent" by the family for an officer to stop the vehicle at any time to ensure that the driver is properly licensed. The absence of such language in other statutes has raised unanswered questions of whether the presence of the plates creates probable cause to stop a vehicle. As a consequence, officers in Minnesota and Ohio generally stop these vehicles only when there is other evidence of wrongdoing (for instance, if the vehicle is observed exiting a bar's parking lot at closing time).⁷⁷ Neither Minnesota's nor Ohio's statute is enforced often, and Iowa's statute is too recently enacted to determine enforcement rates.⁷⁸

A second concern associated with the impoundment of registration or plates is that it merely adds to the legal severity of continued illegal driving rather than removing the opportunity altogether. The use of family plates is one response to this problem. Another innovative strategy is the use of black and white, or "Zebra striped," stickers that, when placed over the normal registration sticker on a license plate, indicate that the vehicle has been barred from being driven by the owner due to the his or her traffic violations. The two states that use these stickers, Washington and Oregon, enacted the laws with the intent that officers would stop *any* vehicle displaying a Zebra sticker. The use of these stickers has been frequent enough for NHTSA to state that these two programs were the only vehicle-related confiscation programs for which they could perform a reliable evaluation study.⁷⁹ In 1990 alone, 31,000 stickers were issued in Oregon.⁸⁰ At least 25% of these were issued for driving with a suspended license that resulted from a DUI.⁸¹ With the knowledge that a police officer *will* pull over a vehicle displaying a Zebra sticker, illegal drivers should be deterred from driving the marked vehicles. There was near unanimity among Oregon Highway Patrol officers that they *always* stopped a vehicle displaying a Zebra sticker.⁸² NHTSA's forthcoming evaluation of the two programs should offer valuable insight into the potential for expanded use of this type of enforce-

⁷⁷ *Assessment of Impoundment*, *supra* note 52, at 24.

⁷⁸ *Id.* at 24, 26.

⁷⁹ *Id.* at 18.

⁸⁰ *Id.* at 31.

⁸¹ *Id.* at 33.

⁸² *Id.* at 36.

ment tool. The NHTSA study of the effectiveness of Zebra stickers has not been completed. A publication date had not been set as of April 1994.

Impounding plates and registration would offer several advantages over vehicle impoundment and would simplify procedures: administration, storage of impounded items, and disposal of unclaimed articles would present far less of a financial burden on the state, and the court proceedings would be more efficient than those for forfeiture.⁸³ The streamlined and less costly administration of such a statute, along with its seemingly less harsh penalty, should overcome officer, prosecutor, and judicial resistance to impoundment statutes and result in more consistent and regular imposition.

Scarlet Letter Sanctions

“Scarlet letter” sanctions are used by some judges to publicly identify DUI offenders and limit their driving. Scarlet letter sanctions for DUI offenses have usually involved requiring convicted DUI offenders to place specially designed license plates or bright bumper stickers on their cars to alert other drivers and law enforcement officers that the driver has been convicted of DUI. In return for placing the plate or sticker on their cars, the offenders may receive a restricted license, allowing them to drive only for business reasons. Although both family plates and scarlet letter sanctions provide visual identification of motor vehicles associated with convicted DUI offenders, there are significant differences between the two sanctions. Family plates may be acquired in cases of traffic offenses other than DUI, whereas scarlet letter sanctions are exclusive to DUI offenses. Additionally, family plates are intended to indicate that only a family member, not the traffic offender, is driving the car. Although this may not always be the case, this indication, along with the application of family plates to cases not involving DUI offenses, may mean that family plates would be much less inflammatory to a strongly anti-drunk driving public.

In Florida, some judges have required first-time DUI offenders to affix bumper stickers reading “CONVICTED D.U.I.—RESTRICTED LICENSE” to their vehicles.⁸⁴ When challenged in court, this probation condition was upheld as constitutional by the Florida District Court of Appeals, and the appeal was denied by the Florida Supreme Court.⁸⁵ Constitutional challenges focus mainly on the First Amendment right to free speech and the Eighth Amendment proscription against cruel and unusual punishment. The *Goldschmitt* court denied the First Amendment violation claim because the bumper sticker did not represent an ideological statement promoted by the state and the message served as

⁸³ Wetsel, *supra* note 48, at 41.

⁸⁴ *Goldschmitt v. State*, 490 So.2d 123, 124 (Fla. App. 2 Dist. 1986) *appeal denied*, 496 So.2d 142 (Fla. 1986). *See also*, *Lindsay v. State*, 606 So.2d 652 (Fla. App. 4 Dist. 1992) (finding that requirement that convicted DUI offender publish his name, photo, and caption “DUI-Convicted” did not violate the probationer’s constitutional rights).

⁸⁵ *Goldschmitt*, 490 So.2d at 124.

penance and a warning to other potential wrongdoers.⁸⁶ The claimed violation of the Eighth Amendment was denied because the bumper stickers were not sufficiently unacceptable to contemporary society to be considered cruel and unusual.⁸⁷

Scarlet letter sanctions should have a high deterrent value because of the conspicuous and easily detected plates/bumper stickers. The use of scarlet letter sanctions is almost exclusively judge-specific, with only a few judges in a few jurisdictions implementing them on a regular basis. As a consequence, there have been no research studies published that examine the relative effectiveness of this sanction.

Ignition Interlock

Although the idea for an electronic device that would prohibit the operation of a motor vehicle by an intoxicated driver dates back to the 1960s, it was not until recently that technology allowed for devices reliable enough to assure lawmakers and law enforcement personnel that the use of such “ignition interlock” devices would not compromise public safety.

An ignition interlock device consists of a breath test unit, an electronic control box, and electrical connections from the device to the ignition. The breath test unit contains a sensor that detects alcohol in a driver’s breath. The unit’s electrical response to the presence of alcohol is converted by the electronic control box into a blood alcohol concentration (BAC). If the BAC exceeds a pre-set limit, usually from 0.02% to 0.03%, the electronic control sends signals through the electrical connections to lock the ignition, thus rendering the vehicle inoperable. Each device also has a memory function that records the date and BAC of each attempted start and any incidents of successful interlock bypasses.

Interlock programs include service checks, required usually once every 60 days. A check serves two functions: (1) to re-calibrate and maintain the device to ensure accuracy, and (2) to retrieve information stored in the device’s memory to ensure probation compliance. An interlock device can be programmed to “lock out” the ignition if an offender fails to have a required service check.

Circumvention

The incapacitating effect of interlock is limited to situations in which the offender attempts to drive an interlock-equipped vehicle. Obviously, an interlock sanction does not prevent alcohol-impaired driving of other vehicles. Aside from this reality, the greatest cause of concern to courts and the public regard-

⁸⁶ *Id.* at 125.

⁸⁷ *Id.* at 125-26.

ing interlock use is user circumvention. However, evolving technology has allowed manufacturers to develop countercircumvention features to prevent many attempted and successful bypasses.

Pressure and temperature sensors prevent attempts to substitute the breath sample with air from an artificial source. Requiring the driver to hum while giving the breath sample also ensures the authenticity of the sample. To prevent a driver from successfully starting his or her car and then letting it idle while the driver leaves to drink alcohol, interlock devices can either turn off the car after a specified time of idling or require “rolling retests,” which require that additional breath samples be given periodically after a successful start in order for the vehicle to continue to operate. Other circumvention attempts include electrical bypass, disconnection of the device, or push starting. Although such a successful bypass would allow the driver to start the vehicle, the interlock’s memory feature can record these circumvention incidents to alert probation officers of the violations. Technology is not yet available to allow the device to detect when someone other than the driver supplies the breath sample.

The fear of interlock circumvention is not unfounded. Studies show that 15%⁸⁸ to 27%⁸⁹ of interlock users make attempts to bypass. One study found that of users who attempted to bypass, 60% were successful.⁹⁰ However, one must not look at bypass statistics and immediately dismiss interlock devices as ineffective. Courts impose license actions far more frequently than interlock sanctions, thus allowing the offender to return to the community with *no* direct method of guarding against subsequent alcohol-impaired driving. Although interlock programs condone continued driving by convicted DUI offenders, the interlock device itself directly deters impaired driving, an effect that cannot be realized by mere license actions.

Effectiveness

In 1989, the Virginia House of Delegates mandated a study by the DMV to evaluate then new ignition interlock technology and research studies.⁹¹ Due to the novelty of the system and lack of conclusive research studies, the authors of the study recommended that any legislative action concerning interlock use in Virginia be postponed pending the release of final studies from other states.⁹² Since the publication of the Virginia report in 1990, several studies have been completed or are underway. And as of January 1993, at least 22 states

⁸⁸ Robert H. Linnell & Sallie J. Mook, AAA Found. for Traffic Safety, *Ignition Interlock Devices: An Assessment of Their Application to Reduce DUI* 34 (1991).

⁸⁹ Delbert S. Elliot & Barbara J. Morse, *In-Vehicle BAC Test Devices as a Deterrent to DUI* 19 (1993).

⁹⁰ *Id.* at 7.

⁹¹ H.R.J. Res. 378 (1989 Session).

⁹² Cole B. Wilson & Charles B. Stoke, VTRC, *Motor Vehicle Ignition Interlocks: In-Vehicle Devices That Monitor Alcohol Levels of Motor Vehicle Operators* 21 (1990).

authorized or required courts to impose interlock use as a condition of probation.⁹³

In 1986, California became the first state to offer ignition interlock requirements as a sanction for DUI offenders. A 32-month evaluation compared the recidivism rate (measured by subsequent DUI convictions) of DUI offenders sentenced to install interlock systems with that of a matched comparison group without the interlock condition. The recidivism rate was 29.1% lower for the interlock group than for the control group, resulting in a 28% reduction in the projected number of subsequent convictions for the interlock users.⁹⁴ The findings also indicated that the interlock system may be a more effective deterrent for older drivers, who may be attempting to correct a drinking problem.⁹⁵ Additionally, the authors found a similar, though less strong, trend when comparing offenders who had prior DUI convictions with those who were first-time offenders.⁹⁶

The authors of the California study noted that due to research limitations they had come to no “definitive scientific conclusions about whether ignition interlock can significantly reduce the numbers of drunk drivers on California roads.”⁹⁷ Despite the limitations of the California study, the findings were generally positive, leading the researchers to recommend further development and use of ignition interlock as a DUI sanction.⁹⁸ In July 1993, a new law became effective in California requiring ignition interlock for all multiple-DUI offenders.

A more recent report studied DUI offenders in Ohio who received either license suspension or ignition interlock sanctions.⁹⁹ This study examined the rate of subsequent DUI convictions for offenders during the term of the sanction (short term) and during the 2 years following removal of the sanction (long term). The study found interlock users avoided subsequent convictions at a statistically significant higher rate than suspended drivers.¹⁰⁰ Following removal of sanctions, however, there were no statistically significant differences

⁹³ States authorizing ignition interlock include California, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Nevada, New York, North Dakota, Ohio, Oklahoma, Oregon, Tennessee, Texas, Washington, West Virginia, and Wisconsin.

⁹⁴ EMT Group, Inc., *Evaluation of the California Ignition Interlock Pilot Program for DUI Offenders 92-94* (1990).

⁹⁵ *Id.* at 97. The relative difference between the interlock group and the comparison group or subsequent convictions was substantially larger (-43.9%) for offenders 30 or more years of age than for younger offenders (-3.8%). *Id.*

⁹⁶ *Id.* The relative difference in subsequent conviction rates between interlock and comparison groups was -47.4% for those with prior convictions and -18.6% for those with no prior convictions. *Id.*

⁹⁷ *Id.* at vi. The authors noted that the program did not allow for random assignment of sanctions, there was no assurance of matching for all variables, there was a small number of subsequent DUI convictions, and the time at risk for the subjects was relatively short. *Id.* at 94-95.

⁹⁸ *Id.* at 108.

⁹⁹ Elliot, *supra* note 89.

¹⁰⁰ *Id.* at 4.

in the long-term effects of the two sanctions, with the recidivism rates being similar.¹⁰¹

Legal Issues

There are concerns over the legal implications of using ignition interlock as a condition of probation. These concerns include (1) tort liability, (2) product liability, and (3) equal access.

Tort liability concerns arise from the possibility that DUI offenders may injure third parties or themselves while driving during a probationary period involving an interlock requirement. In order to prevent liability in a situation involving the failure of a device to perform adequately, the state can require the interlock manufacturer to indemnify the state for any damages paid as a result of lawsuits relating to interlock devices.¹⁰² The state can also require interlock manufacturers to carry product liability insurance for protection against interlock failure. For example, one interlock manufacturer carries \$5 million in product liability insurance.¹⁰³

The expense involved with interlock devices may give rise to challenges under equal access for indigent offenders. A probationer required to install an interlock device must rent the device and pay for installation, maintenance/repairs, and re-calibration checks, at a cost of \$600 to \$700 per year.¹⁰⁴ Accordingly, some states have established equal access funds to subsidize interlock use by drivers who cannot afford the devices. These funds can be supported by increased DUI fines or increased fees for those drivers who can afford the device. In Cumberland County, Pennsylvania, the fund consists of 5% of the income from the installation and maintenance of interlock devices.¹⁰⁵ Despite the concern of expense and equal access, however, the Cumberland County fund and a similar fund in Oregon have been underutilized.¹⁰⁶ Other courts hold the view that the cost of interlock is less than the amount of money spent on alcoholic beverages by many DUI offenders and is a small price to pay to retain the right to drive.¹⁰⁷

Implementation

An interlock program requires efficient and well-monitored implementation in order to be effective. One flaw in the California interlock program was

¹⁰¹ *Id.* at 10.

¹⁰² Wilson, *supra* note 92, at 16.

¹⁰³ Interview with Jonathan H. Muller, Executive Marketing Director of Interlock Group, in Charlottesville, Va. (September 9, 1993).

¹⁰⁴ Linnell, *supra* note 88, at 10.

¹⁰⁵ *Id.* at 12.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 30-31.

ineffective monitoring of interlock use. A large number of offenders never even had the device installed.¹⁰⁸ Adequate oversight of installation and swift sanctions for failure to install should surmount this problem. In addition, the 60-day calibration records must be relayed promptly to the government agency monitoring the interlock program in order for the agency to impose appropriate sanctions for offenders who have violated their conditions of probation.

Another obstacle to efficient implementation in California involved the use of other sanctions in addition to the courts' use of ignition interlock. In California, many judges have struggled with a mandatory interlock statute to be used in conjunction with license revocation. Because judges regarded this double sanction as sending the wrong message to the offender ("You can't drive, but if you do, you must pass a breath-alcohol test."), many took advantage of a loophole in the mandatory interlock statute to ignore the requirement.

The widespread implementation of ignition interlock programs across the United States is evident. NHTSA has presented a notice of model specifications for performance and testing of interlock devices with the purpose of "encourag[ing] a degree of consistency among the States while at the same time provid[ing] sufficient flexibility for the States to address their individual needs of legislative requirements."¹⁰⁹ Interlock requirements appear to offer a relatively inexpensive sanction that could rehabilitate offenders as well as deter future drunk driving. Although interlock requirements alone would probably not be used as a substitution for jail or prison, a successful program would decrease the need for the incarceration of future offenders.

Drug and Alcohol Treatment Programs

One researcher posited that although the scientific literature does not show a consensus on the issue, probably less than 50% of convicted first-time DUI offenders are considered problem drinkers.¹¹⁰ As the number of a driver's DUI convictions rises, however, chances increase dramatically that the offender has a drinking problem. As alcoholism is generally considered to be a disease, the obvious question arises—How can the disease be cured? Using treatment programs in an attempt to deal with the drunk driving problem is widespread. A good illustration of the treatment movement is supplied by the federal government, which in 1970 funded 35 Alcohol Safety Action Programs (ASAPs), one of which was in Fairfax County, Virginia. The purpose of these ASAPs was to supplement or replace traditional sanctions such as license suspension and revocation with mandated treatment with the intention of reducing the drinking problems underlying drinking and driving.

¹⁰⁸ *Id.* at 24.

¹⁰⁹ Model Specification for Breath Alcohol Ignition Interlock Devices (BAIID's), 57 Fed. Reg. 11772 (1992).

¹¹⁰ *E.g.*, H.A. Siegal, *Intervention and the Drinking Driver: A Novel Program and Its Evaluation*, in *Alcohol, Drugs, and Traffic Safety* 1215, 1220 (Sidney Kaye & Gilbert W. Meier eds., 1985).

The ASAPs use a holistic approach, combining enforcement, judicial, rehabilitative, educational, and informational methods of DUI countermeasures with an objective of “reduc[ing] threats to transportation safety caused by the use of alcohol and other drugs.”¹¹¹ The rehabilitative aspects of the ASAPs are of primary interest because of the widespread prominence of and reliance upon treatment programs. In Virginia, although first-time DUI offenders are eligible for jail sentences, judges usually sentence them to 30 days plus a fine, all to be suspended if the offender receives probation including treatment in a Virginia ASAP.¹¹²

The idea behind the ASAPs emphasizes community involvement in tailoring programs to community needs; thus, local ASAP programs can differ. Treatment programs do have a general structure, however. DUI offenders are initially diagnosed as “social” or “problem” drinkers. The level of seriousness of a participant’s drinking behavior, along with individual characteristics as noted by ASAP probation staff, dictates the subsequent treatment program. All participants receive education and some self-assessment counseling. Problem drinkers are more likely to receive individual counseling and referrals for extended rehabilitation programs.

One study evaluated Virginia ASAPs to determine their elements of failure and success.¹¹³ The study found a three-to-one difference between DUI recidivism by non-ASAP versus ASAP participants over a 2-year period.¹¹⁴ These generally positive findings were accompanied by an assortment of observations regarding the individual characteristics of participants and their likelihood of recidivism. Female ASAP participants tended not to repeat the offense during the first year following treatment¹¹⁵; participants with higher levels of education had lower recidivism rates (particularly college graduates, who showed *no* recidivism)¹¹⁶; very young (under 20) and very old (over 60) participants had higher recidivism rates.¹¹⁷

A study in California compared the effectiveness of license suspension to the effectiveness of alcohol treatment (non-ASAP) on multiple-DUI offenders over a 4-year period.¹¹⁸ Treatment did not live up to expectations, as offenders who received treatment showed 70% more non-alcohol related traffic convic-

¹¹¹ Commission on the Virginia Alcohol Safety Action Program, *Biannual Report Fiscal Years 1991-1992* 6 (1993).

¹¹² Interview with Jim Phipps, Director of the Roanoke Valley ASAP, in Charlottesville, Va. (June 1993).

¹¹³ David S. Anderson, *A Multidimensional Assessment of Virginia’s Alcohol Safety Action Program* (1983) (dissertation, Virginia Polytechnic Institute and State University).

¹¹⁴ *Id.* at 145-147.

¹¹⁵ *Id.* at 62.

¹¹⁶ *Id.* at 165.

¹¹⁷ *Id.*

¹¹⁸ 2 Daniel D. Sadler & M.W. Perrine, California Dep’t of Motor Vehicles, *An Evaluation of the California Drunk Driving Countermeasure System* (1984).

tions than those who received either 12-month suspensions or 3-year revocations.¹¹⁹ On the other hand, there were no statistically significant differences between the two groups' involvement in alcohol-related accidents.¹²⁰

The continued problems of drunk driving indicate that criminal sanctions alone are not sufficient. Whether or not treatment programs can serve to increase the deterrence of drunk driving is debatable.¹²¹ Although one study indicated that ASAPs had positive effects on some participants, the literature also demonstrated that evaluations of various treatment programs have led to conclusions covering the spectrum from encouraging positive effectiveness to drastically disappointing ineffectiveness.¹²²

The effectiveness of treatment programs seems to rely quite unpredictably on the characteristics of the program participant. Despite the arbitrary nature of treatment effects, the positive results shown by some programs, along with public belief in the efficacy of such programs, have led to the establishment and continuance of rehabilitation programs as DUI sanctions in every state. The costs of the many treatment programs available in Virginia were not obtained for this report.

Variations of Traditional Probation

The simplest formulation of sentencing options enumerates two choices: incarceration and probation. Almost all other sanctions can be considered to be conditions of probation, the violation of which will result in revocation of probation status. Probation is "the most widely used correctional disposition in the United States."¹²³ Probation legislation is intended to serve the state's interests of preserving peace and order and reforming criminals into independent and productive members of society.¹²⁴ Probation sentences are intended to allow the criminal to return to the community, subject to appropriate restrictions and requirements and under the supervision of a probation officer. Unfortunately, the wide use of probation has diminished most of its incapacitating effect because probation officers are saddled with caseloads of up to 200 probationers per officer.¹²⁵ With such imposing caseloads, probation officers cannot make frequent checks on each probationer or adequately verify a probationer's employment, community service, or participation in court-ordered treatment.

¹¹⁹ *Id.* at 9.

¹²⁰ *Id.* at 14.

¹²¹ See *id.* for an example of a study that found that alcohol rehabilitation programs did not have a significant impact on DUI recidivism. But see Siegal, *supra* note 110, for a more optimistic view of the effects of treatment programs.

¹²² See Anderson, *supra* note 113, at 29-48 for a discussion of the multitude of studies evaluating alcohol treatment programs.

¹²³ 2 NHTSA, *supra* note 13, at 1.

¹²⁴ *Slayton v. Commonwealth*, 38 S.E.2d 479, 483 (Va. 1946); *Wilborn v. Saunders*, 195 S.E. 723, 726 (Va. 1938).

¹²⁵ 2 NHTSA, *supra* note 13, at 21.

Nor can an overburdened officer pose a threat significant enough to effectively inhibit recidivism. According to NHTSA, studies have shown little evidence that traditional probation is effective in reducing recidivism among convicted DUI offenders.¹²⁶

Efforts to reform traditional probation in order to keep some criminals out of jail or prison while maintaining public safety and promoting the rehabilitation of probationers have led to the implementation of stricter, more incapacitating forms of probation, such as intensive supervision programs (ISP) and electronic monitoring (EM).

Intensive Supervision Programs

Although ISP can be tailored to fit individual probationers, the programs in use across the country share common characteristics.¹²⁷ The most important aspect of ISP is the small caseload, generally 20 to 24 probationers, assigned to each probation officer.¹²⁸ These lighter caseloads allow courts to require more officer/probationer contact and monitoring of court-ordered treatment and other probation conditions. Accordingly, ISP may require multiple contacts each week between officer and probationer; for instance, a program established in Massachusetts in 1985 requires 10 such visits per month.¹²⁹ In Virginia, on the other hand, a sentence of ISP requires merely one personal contact per week between officer and probationer for a portion, at least 3 months, of the ISP term; this frequency is reduced to two personal contacts per month for the remainder of the term.¹³⁰ Courts often require regular verification of employment and drug and alcohol testing. When compared to the minimal supervision of traditional probation programs, the increased monitoring of ISP participants and their activities certainly provides a heightened level of community protection. In fact, sentencing an offender to ISP for 1 year instead of to a jail term of 90 days could offer extended protection for the public against the dangerous actions of the offenders.

The potential for increased safety and efficiency with the use of ISP may encourage judges to consider such probation for some offenders who might otherwise go to jail or prison. This is particularly likely for those offenders whose

¹²⁶ *Id.* at 22.

¹²⁷ States using ISP include Arizona, California, Connecticut, Florida, Georgia, Illinois, Massachusetts, New Jersey, New York, North Carolina, Texas, and Washington.

¹²⁸ VDOC, *Intensive Supervision Program (ISP): Client Characteristics & Supervision Outcomes—A Caseload Comparison* 1 (1991).

¹²⁹ Baird, Byrne & Lurigio, *The Effectiveness of the New Intensive Supervision Programs*, 2 *Research in Corrections*, Sept. 1989, at 33, cited in Alexander M. Esteves, Note, *Changing of the Guard: The Future of Confinement Alternatives in Massachusetts*, 17 *Criminal and Civil Confinement* 133, 148 (1991).

¹³⁰ VDOC, *supra* note 128, at 1. Virginia's ISP consists of two phases of supervision: Phase I, lasting at least the first 3 months, requires weekly personal contacts between the client and the officer; Phase II, lasting the remainder of the ISP term, requires two personal contacts per month.

histories indicate that although they do not belong in secure correctional facilities, sentencing them to traditional probation could compromise public safety. On the other hand, the Virginia Commission on Jail and Prison Overcrowding predicted that increased use of ISP for offenders who would otherwise have gone to jail or prison will likely increase the rate of violations.¹³¹ The Commission predicted, however, that even with this increase, there would be a net reduction in the need for prison beds.¹³²

The Virginia Department of Corrections examined data from FY 89 and FY 90 concerning parolees and probationers who were terminated from their ISP sentences.¹³³ Of the clients terminated from ISP in FY 89, almost 38.7% were terminated as “successful,” meaning either reassignment to regular supervision or discharge, with 8.9% of all terminations due to transfer or “other,” not unsuccessful, reasons.¹³⁴ In FY 90, the number of successful terminations had risen to 43.2% of all terminations, with 11.2% of all terminations due to transfer or “other,” not unsuccessful, reasons.¹³⁵ Participants who were not terminated successfully were so disposed due to conviction of new crimes, technical rule violations, or absconsion.¹³⁶

ISP operates at substantially lower costs per offender per day than does incarceration. Whereas in FY 92 it cost \$16,525 to incarcerate one offender for 1 year in Virginia, it cost only \$1,240 to place that offender on ISP.¹³⁷ Obviously, incarceration offers higher degrees of incapacitation and punishment than does ISP. Because of these differences, courts attempt to equalize the sanctions by imposing ISP sentences that are longer than the incarceration term that would typically be imposed in the particular circumstance. Although the cost *per day* of ISP is substantially less than that of incarceration, substituting incarceration with longer ISP sentences reduces the savings potential of ISP. NHTSA suggested that ISP may not be appropriate for first-time offenders who would receive jail sentences of only 2 or 3 days, whereas ISP would be more cost-efficient for multiple offenders who would traditionally receive longer sentences.¹³⁸

Electronic Monitoring

With the advent of EM technology in 1988, home detention was thrust into the spotlight as an alternative to incarceration. The primary impetus

¹³¹ *Overcrowding, supra* note 1, at 52.

¹³² *Id.* at 52.

¹³³ VDOC, *supra* note 128.

¹³⁴ *Id.* at 19.

¹³⁵ *Id.* at 37.

¹³⁶ *Id.* at 4.

¹³⁷ Figures are based on a \$45.27 cost per day for incarceration and \$3.40 for ISP. Susan B. Williams, H.J.R. 631: Intermediate Sanctions, Study Goals/Objectives 5 (1993).

¹³⁸ 2 NHTSA, *supra* note 13, at 22.

behind the rapid growth of EM use has been prison and jail overcrowding. EM offers judges a sentence option that may not create as great a financial burden on the state as incarceration and does not subject certain offenders to the harsh atmosphere of prisons and jails; yet this option also places greater restrictions on an offender than does probation and marks the severity of the crime more so than would probation.

EM is a flexible probationary tool, allowing judges to fashion individualized programs as necessary. As a condition of probation, EM is often used as one of multiple sanctions along with rehabilitation programs and community service. An EM program itself can be molded to fit special offender needs. A court can require that an offender never leave his or her home; that the offender leave his or her home only for employment, treatment, and religious commitments; or that an offender adhere to a nighttime and/or weekend curfew.

Virginia's Program. The Virginia Department of Corrections owns 110 EM devices and will soon be acquiring 15 new devices for a program in Fairfax County.¹³⁹ The Virginia Code grants some discretion to courts, sheriffs, and administrators of local or regional jails to determine eligibility for EM placement.¹⁴⁰ In practice, all counties with EM programs have as requirements for eligibility that participation in the program be voluntary, the offender be free of detainers and pending charges, the offender be employed, and the offender's home have telephone service.¹⁴¹ Additional eligibility requirements vary from county to county and include satisfactory behavior during incarceration, positive motivation, absence of prior EM revocations, a suitable home/job environment, and a minimum time to serve (30 to 90 days, depending on the county).¹⁴² Prior histories of escape, violent offenses, and drug distribution can exclude an offender from consideration for an EM program, as can current offenses that are violent or sex- or drug-related.¹⁴³ Of the 373 participants in Virginia EM programs between 1986 and 1990, 87 were convicted of DUI, 20 were driving on a suspended/revoked license, and 16 were driving after being adjudicated as a habitual offender.¹⁴⁴ In all, 137, or 36.7%, were traffic offenders.¹⁴⁵

A variety of EM systems are used in Virginia. "Passive" systems can involve several procedures. Random computer-generated telephone calls to the participant's home serve to monitor the offender by requiring the offender (1) to

¹³⁹ Telephone interview with Andrew Molloy, Special Programs Manager, VDOC (July 13, 1993). Several sheriffs' departments across Virginia have purchased additional EM devices. *Id.*

¹⁴⁰ Va. Code Ann. § 53.1-131.2 (Michie 1988).

¹⁴¹ John R. Kuplinski, Virginia Dep't of Criminal Justice Services, *Electronic Offender Monitoring in Virginia: Evaluation Report* 16 (1990).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 28.

¹⁴⁵ *Id.*

insert a nonremovable ankle or wrist band into a verifier attached to the offender's telephone line and respond verbally for further verification, or (2) to respond verbally and/or physically in front of a visual monitor that transmits a picture of the offender to the program office.¹⁴⁶ The in-residence equipment may also include breath testers to detect the use of alcohol. A higher level of surveillance is afforded by frequent telephone calls from probation officers and random visits to the offender's home and work sites. "Active," or "continuous signalling," systems maintain constant communication between a transmitter worn by an offender and a receiving unit attached to the offender's telephone lines. Broken communication results in the receiving unit notifying the central computer of a violation. The third type of EM system, "hybrid" systems, use both active and passive techniques. Although operating mainly in an active mode, hybrid systems also use passive techniques when the continuous communication link is broken.

Although Virginia's monitoring programs differ from county to county, there is a general procedure: computers make many calls daily to the offender's home; the offender must make a weekly office visit to a probation officer; program staff make personal telephone calls daily or weekly; and staff make unannounced visits to the offender's home and job site.¹⁴⁷ Virginia EM programs also always include drug and/or alcohol testing.¹⁴⁸

Costs. The average cost per EM participant per day in Virginia ranges from \$9.25 to \$29.22, depending on the county and the program.¹⁴⁹ The Department of Criminal Justice Services noted that although some of the daily average operating costs are artificially deflated due to unavailable estimates for some items, programs that purchase their equipment will realize significant decreases in operating costs over the years.¹⁵⁰ Program costs would decrease with increased use of dormant equipment. For instance, the \$16.82 per day cost in Chesterfield County would drop to \$10.10 if the number of offenders in a daily caseload increased from 9 to 15.¹⁵¹ Although Virginia's prisons are operating at 123% of capacity, only 65% of the Department of Correction's EM devices are in use on a given day.¹⁵² In 1992, the Richmond sheriff's office owned 50 electronic detention devices, but only 12 were being used.¹⁵³

¹⁴⁶ *Id.* at 11.

¹⁴⁷ *Id.* at 19. Chesterfield is an exception in that the EM program does not include job site visits. *Id.*

¹⁴⁸ *Id.* at 21.

¹⁴⁹ *Id.* at 48. This cost includes equipment, personnel, installation, and drug/alcohol testing. *Id.* Operating costs are significantly lower, \$3.75 to \$20.69. *Id.* at 50.

¹⁵⁰ *Id.* at 50.

¹⁵¹ *Id.* at 50-51. And there would still be 6 dormant monitors. *Id.*

¹⁵² Telephone interview with Andrew Molloy, *supra* note 139.

¹⁵³ G. Hickey, *Winston Still Fights Losing Battle to Reduce Crowding at City Jail*, Richmond News Leader, April 30, 1992, at 24.

A study of Arizona's EM program came to similar cost conclusions. Although in the first year of implementation, EM costs (\$55) were higher per offender per day than incarceration costs (\$44.30), if the program were used to capacity, EM costs would drop to \$11.50 per offender per day, resulting in substantial savings over incarceration.¹⁵⁴

In order to determine the actual savings potential of EM over incarceration, one must consider differences in sentence lengths as well as per day operating costs. EM terms are typically longer than incarceration terms for similar offenses, with some courts using a substitution rate of 3 days of EM for 1 day of traditional incarceration.¹⁵⁵ Longer EM terms reduce, in some cases eliminate, savings potentials of the alternative sanction. In efforts to reduce costs of EM placement, Virginia EM programs require participants to contribute to the costs of the program.¹⁵⁶ According to a 1993 report, the 10 EM programs in Virginia studied during FY 91 saw a savings of \$834,620 from placing offenders under EM instead of incarceration.¹⁵⁷ Actual savings are difficult to ascertain because fees charged to offenders were not included in the analysis, additional staff may add costs, and some offenders may be placed on EM even when they would otherwise not have received terms of incarceration. Although EM will not eliminate correctional expenditures for EM participants, it can definitely help to reduce jail and prison overcrowding when used for offenders who would otherwise have been incarcerated.

Effectiveness. Probably the greatest concern about EM is the potential for further illegal activities caused by allowing convicted offenders to return to the community. Evolving technology has corrected some of the early problems with EM devices, curtailing circumvention attempts and successes. Strict screening procedures of EM candidates can reduce the risk of EM participants escaping and committing new crimes. Despite these countermeasures, the fact remains that EM involves releasing criminals into the community without the security offered by incarceration to prevent them from committing new crimes. BI Incorporated, the EM manufacturer that supplies the Virginia Department of Corrections and many other state and federal EM programs, admits that "any

¹⁵⁴ Dennis J. Palumbo, Arizona Dep't of Corrections, *Home Arrest in Arizona* 31 (1990).

¹⁵⁵ Palm Beach County, Florida, courts use this ratio for required mandatory sentences for offenders convicted of a second DUI. Annesley K. Schmidt, *Electronic Monitors*, Fed. Probation, June 1986, at 56, 57.

¹⁵⁶ Kuplinski, *supra* note 141, at 21.

¹⁵⁷ Virginia Dep't of Planning and Budget (VDPB), *Study of Electronic Monitoring Programs for Offenders* 8 (1993).

system can be beaten.”¹⁵⁸ And in fact, some offenders serving EM sentences do escape.¹⁵⁹

Fears of escape and commission of new offenses may be overstated. Although the percentages of so-called successful completions of EM sentences vary widely among states, the national average of EM failures is less than 15%.¹⁶⁰ In Virginia, the success rate is somewhat higher, with a 1990 study reporting 89.9% of offenders placed under EM completing their terms successfully¹⁶¹ and a 1993 study reporting 87.4% successful completions.¹⁶² According to the 1990 study, of the 37 offenders who were removed from the EM program, 2 had committed new offenses, 1 had attempted escape, and the remainder had violated various rules and regulations of the EM program (technical violations).¹⁶³ The 1993 study reported similar results, with only 3.8% of EM failures due to new offenses.¹⁶⁴ Other states have shown similar results.

In California, 80% to 85% of EM participants completed the program successfully, with most of the failures attributed to technical offenses, such as drug or alcohol use, rather than the commission of new crimes.¹⁶⁵

In Arizona, 65.5% completed the program,¹⁶⁶ with most failures due to failure to pay fees or obey curfew or the use of drugs or alcohol.¹⁶⁷ Only 3% of the failures could be attributed to new criminal charges.¹⁶⁸

¹⁵⁸ *To Receive Testimony on, and Investigate the Electronic Monitoring/Home Confinement Program Administered by the Dep't of Corrections and the Intensive Supervision Program Administered by the Administrative Office of the Courts* 74, New Jersey Senate Law and Public Safety Committee (April 21, 1992) (statement by Jock Waldo, Regional Representative, BI Inc.).

¹⁵⁹ Fears of EM circumvention were realized in New Jersey in April 1992 when Tony Palmer, a convicted drug dealer serving the end of his prison term under EM, slipped off his ankle bracelet, walked away from his home undetected, and shot and killed a 19-year-old male. Criticism of New Jersey's EM program grew when it was discovered that Palmer had been tampering with his device for several months. See, e.g., David Gibson, *Maker Defends Ankle Monitor*, Record (New Jersey), April 10, 1992, at B1. Incidents such as this have occurred in many states, causing legislatures to re-examine the use of EM programs.

¹⁶⁰ Joan Petersilia, *A Man's Home Is His Prison*, Criminal Justice, Winter 1988, 17, 41.

¹⁶¹ Kuplinski, *supra* note 141, at 58.

¹⁶² VDPB, *supra* note 157, at 8.

¹⁶³ Kuplinski, *supra* note 141, at 58.

¹⁶⁴ VDPB, *supra* note 157, at 8.

¹⁶⁵ Barbara Farley, California Dep't of Justice, *The Use and Effectiveness of Electronic Monitoring Programs: An Update* 7 (1989).

¹⁶⁶ Palumbo, *supra* note 154, at 26.

¹⁶⁷ *Id.* at 27.

¹⁶⁸ *Id.*

In New Jersey, 15% of EM participants failed to complete the program due to program violations or administrative reasons, whereas less than 2% of the participants failed due to the commission of new crimes.¹⁶⁹

In comparison, a Bureau of Justice study found that 43% of all convicted offenders placed on traditional probation were rearrested within 3 years, *while still on probation*, for committing a felony or for violating the terms of their probation.¹⁷⁰ The completion differences between EM participants and probationers may be explained by the increased supervision afforded EM participants. No studies have focused on the success of traffic offenders who have been placed under EM supervision.

Community Service

Most states give courts the option to sentence traffic offenders to community service.¹⁷¹ Sentences range from 24 hours (for a first DUI conviction in Utah) to 90 days (for a third DUI conviction in New Jersey). Community service requires the offender to sacrifice his or her time, labor, and even money, while also allowing the community to receive benefits from the performance of sanctions. In some cases, community service can serve the probationary goal of reforming criminals by reminding them of their crimes and their impact on the community and requiring offenders to actually make amends to the community.

The cost per day for the administration of community service programs is significantly less than the cost of traditional incarceration. However, these savings are lost when an offender is sentenced to perform more hours of community service than he or she would otherwise have served behind bars. For example, if the cost of community service were \$10 per day, 1 day of community service would cost less than 1 day of incarceration, which costs \$26. However, 10 days of community service would cost \$100, whereas a 2- or 3-day jail term would cost \$52 to \$78.¹⁷² On the other hand, these dollar amounts do not take into account the benefit to the community. Some communities, when making cost-benefit analyses of community service, take into consideration the hours worked by the offender and the minimum wage equivalent of that work; this consideration justifies the community service option from a financial standpoint.¹⁷³

¹⁶⁹ *To Receive Testimony on, and Investigate the Electronic Monitoring/Home Confinement Program Administered by the Department of Corrections and the Intensive Supervision Program Administered by the Administrative Office of the Courts* 14, New Jersey Senate Law and Public Safety Committee (April 21, 1992) (statement of William H. Fauver).

¹⁷⁰ Bureau of Justice Statistics, U.S. Dep't of Justice, *1990 Sourcebook of Criminal Justice Statistics* 87 (Kathleen Maguire & Timothy J. Flanagan eds., 1991).

¹⁷¹ Virginia courts have authorization to impose sanctions of community service from Va. Code Ann. § 19.2-305 (Michie Supp. 1993).

¹⁷² 2 NHTSA, *supra* note 13, at 11.

¹⁷³ *Id.*

Community service has not received the research attention given to other sanction options. Thus, the achievement of sanction goals is not documented to support or discourage its increased use.

Community-Based Institutional Alternatives

It is generally believed that DUI offenders, particularly the large population of whom are considered problem drinkers,¹⁷⁴ need special treatment for prevention of future alcohol-related offenses. Because existing state and local facilities are not capable of offering these extensive treatment services, incarcerating DUI offenders may not serve the correctional goals of rehabilitation and deterrence. On the other hand, most DUI offenders who are sentenced to serve jail or prison time are repeat offenders¹⁷⁵ who have demonstrated a propensity to violate the law and threaten public safety. “The hope that the sinner will sin no more, that he will be rehabilitated, does not compel the conclusion that he is relieved of the obligation to do penance for his past offenses.”¹⁷⁶

Recently, several states have designed correctional facilities specifically for the incarceration of persons convicted of DUI. Grouping DUI offenders in one facility allows for specialized alcohol and substance abuse treatment programs. In addition, special facilities may serve to prevent DUI offenders from being “morally corrupted by association with hardened criminals frequently found in the jails.”¹⁷⁷ Federal circuit courts have decided both for and against classifying time spent in community corrections facilities as “incarceration” under federal sentencing guidelines.¹⁷⁸

In Virginia, time served in state residential community facilities, including work release centers, does qualify as incarceration. In fact, a Virginia court may place a person convicted of an offense related to alcohol abuse in a state-sanctioned alcohol treatment facility for the maximum term of imprisonment specified for the conviction or a period of time not to exceed 90 days, whichever is less.

¹⁷⁴ See Directorate of Addictions, Prince George’s County Health Dep’t, *Prince George’s County DWI Facility Five Year Report* 25 (1991) (88% of residents were considered to have alcoholism, with another 8% having the potential for alcoholism).

¹⁷⁵ See *id.* at 25 (93% of residents had two or more DWI/DUI convictions at the time of admission).

¹⁷⁶ *Lindsay v. State*, 606 So.2d 652, 656 (Fla. App. Dist. 1992).

¹⁷⁷ *Richardson v. Commonwealth*, 109 S.E. 460, 462 (Va. 1921).

¹⁷⁸ See *United States v. Latimer*, 991 F.2d 1509 (9th Cir. 1993) (community treatment center not incarceration for purposes of career offender provisions of sentencing guidelines); *but see United States v. Rasco*, 963 F.2d 132 (6th Cir. 1992) (detention in halfway house or community treatment center is a “sentence of incarceration” under criminal history Sentencing Guidelines), *cert. denied*, — U.S. —, 113 S. Ct. 238 (1992).

Maryland

Maryland is a pioneer in the use of special facilities for DUI offenders. Several counties in Maryland have established or are planning to establish TWRFs targeting DUI offenders.¹⁷⁹

In 1985, Prince George's County (PGC) implemented a "dual agency" approach to the DUI problem, combining incarceration and substance abuse treatment, through the cooperation of the Department of Corrections and the County Health Department. In 1992, Calvert County established the Calvert County Treatment Facility (CCTF), a TWRF modeled after the PGC center, privatizing management of the work release program, treatment programs, and fee collections.

In Maryland, a person facing a second or third DUI conviction can expect to receive a 33-day sentence of incarceration. After taking into consideration early release for good time served (which is almost always the case), the DUI offender will serve a 28-day term. Accordingly, the facilities incorporate a 28-day alcohol treatment program. The treatment program during the period of incarceration focuses on diagnosing the offender's problems and tailoring referral plans for postrelease treatment.

The treatment program is much like the ASAPs described previously, including education and assessment to inform the inmates of the general effects of alcohol and drunk driving as well as their particular impact on the particular offender. This is accomplished through group discussions, individual counseling, family counseling, Alcoholics Anonymous meetings, victim impact panels, and many other presentations. At the end of the 28 days, counselors make recommendations for follow-up treatment. These recommendations are considered conditions of probation along with weekly contacts with probation officers and random drug/alcohol tests; failure to participate in the recommended community treatment is a violation of probation and results in probation revocation and subsequent incarceration in jail or prison. Program directors at both the PGC facility and the CCTF are satisfied that this Damoclean sword of incarceration succeeds in keeping facility inmates in postrelease treatment programs.

Just as treatment is a vital element of the Maryland programs, so too are the discipline and incapacitation associated with incarceration. A correctional facility can have maximum, medium, or minimum security. Higher security levels are necessary for inmates who pose risks of violence and escape, whereas lower security levels are most appropriate for convicts who are considered less dangerous. NHTSA recommended minimum security facilities for the incarceration of DUI offenders whose history did not include acts of violence that would

¹⁷⁹ All information regarding the two Maryland facilities, other than the study findings, was obtained from facility administrators during site visits in July 1993.

indicate a risk to the public.¹⁸⁰ In fact, placing an offender in a level of confinement greater than that required to meet the convict's needs has been considered by courts to be unconstitutionally "cruel and unusual."¹⁸¹

The Maryland TWRFs adhere to these views of appropriate incarceration environments for DUI offenders. Inmates are allowed to leave the buildings only if they are on work release status. Discipline is similar to that of a jail, with "lights out" and "lock downs" at night. Inmates sleep in rooms with 8 to 10 beds. They are allowed visitors once a week and then only if the visitors take part in group alcohol counseling activities. Because of the nonviolent nature of the inmates and their low risk of escape, however, security staff is minimal (two officers on duty at the PGC facility; one at the CCTF).

Another punitive aspect of the TWRFs is the requirement that all inmates pay part of the costs of their incarceration. Inmates in the PGC facility pay \$36 per day, or about half of the county's cost; inmates in the CCTF pay \$45 per day out of the actual cost of nearly \$60. Most of the inmates make monthly installments on 1-year payment plans; some have insurance coverage. None of the facility administrators was concerned with collection difficulties; in fact, administrators at both the PGC facility and the CCTF believed that the payment programs were saving the government money over the costs of traditional incarceration. In its first 19 months of operation of the CCTF, 48% of assessed fees had been collected. This amounted to \$360,729 as compared to the \$862,687 cost of operation for the same period.

Courts can sentence any nonviolent offender to serve time in PGC's 100-bed facility, but the county reserves 60 beds specifically for those convicted of DUI. Over 90% of the DUI offenders sentenced to the facility have been convicted of more than one DUI, and most of these have three or more DUI convictions. Although it once had a waiting list, the DUI program no longer operates at full capacity. Reasons cited for this include the existence of the CCTF as an alternative site and the decrease in DUI arrests statewide. Nor does the CCTF operate to its capacity of 40 beds, instead averaging around 30 beds filled on any given day. Noting the overall decrease in DUI arrests as a contributing factor, facility administrators add their belief that the disparity between capacity and actual residence is partly due to the need to inform judges about the need for and efficacy of treatment for many DUI offenders.

Several studies have evaluated the effectiveness of the PGC facility through examinations of recidivism rates. Findings from these studies include:

- The length of the treatment period is inversely related to the number of probation violators. For example, 17% of offenders who had 28 days of

¹⁸⁰ 3 NHTSA, *supra* note 13, at 4.

¹⁸¹ *Ramos v. Lamm*, 485 F. Supp. 122 (D. Colo. 1979).

treatment violated probation, compared to 33% of those who had only 7 days of treatment.¹⁸²

- Multiple-DUI offenders who do not receive a sentence to the facility and subsequent probation have 50% more recidivism over 2 years than those who complete the program.¹⁸³
- Whereas 35% of the DUI offenders who underwent alternative public treatment programs were convicted of a subsequent DUI, only 8% who completed the DUI facility program were subsequently convicted.¹⁸⁴
- The impact on recidivism appears to be greater for first-time offenders than for multiple offenders.¹⁸⁵
- The treatment program's impact on recidivism is greatest during the first year following the conviction for first-time and multiple offenders but is statistically significant during the second year only for first-time offenders.¹⁸⁶

Because of its recent establishment, the CCTF has conducted only an informal recidivism study. The first 200 residents showed a 28% recidivism rate.¹⁸⁷ The facility director notes that the recidivism rate may be higher for CCTF residents than for PGC facility residents because of a stricter, more intense post-treatment program for PGC DUI offenders.

Massachusetts

The Longwood Treatment Center in Massachusetts is a nonsecure facility with discipline similar to that of a typical jail. The program is much like that of the Maryland facilities, with detoxification, counseling, and educational programs. Offenders who attended the facility had a recidivism rate of approximately 6%, compared to a statewide rate of 25% and a rate of 19% for multiple offenders assigned to low-security institutions without treatment facilities.¹⁸⁸

¹⁸² Directorate of Addictions, *supra* note 175, at 12.

¹⁸³ R.B. Voas & A.S. Tippetts, *Evaluation of Treatment and Monitoring Programs for Drunken Drivers*, J. Traffic Med. 1990, 15, 22.

¹⁸⁴ Directorate of Addictions, *supra* note 175, at 13.

¹⁸⁵ Voas, *supra* note 183, at 22.

¹⁸⁶ *Id.*

¹⁸⁷ Written correspondence from Carol Porto, Director, CCTF (April 5, 1994).

¹⁸⁸ Daniel P. Le Clair et al., Massachusetts Dep't of Correction, *The Use of Prison Confinement for the Treatment of Multiple Drunken Driver Offenders: A Process Evaluation of the Longwood Treatment Center 4-7* (Executive Summary, 1987).

Costs

Establishing TWRFs offers the potential to reduce state correctional expenditures for both construction and operation costs. Due to the additional structural requirements necessary for elevated security, the minimum security required by TWRFs results in construction costs significantly less than those for more secure buildings. TWRFs are also especially suited for already existing structures that can be converted to fit correctional needs. The practice of converting buildings for incarceration purposes has grown in frequency as another way to reduce initial costs of construction. This strategy works best for minimum security facilities because of the strict structural considerations necessary for secure buildings. Many localities and states have converted hotels, schools, military barracks, and hospitals to serve correctional needs. An added advantage of conversion is that unless the facility is in a residential neighborhood, there is not likely to be as much public opposition as arises when a new facility is built.¹⁸⁹ One drawback of conversion is that older buildings may lead to greater maintenance costs than would be required for a new facility.¹⁹⁰

The bulk of costs for a correctional facility come not from initial construction but from subsequent personnel and operating costs.¹⁹¹ Minimum security facilities require fewer staff; costs are further reduced as less vandalism and violence result in reduced maintenance and furnishing costs.¹⁹² Despite these cost savings, many work release centers have higher operating costs than average jails because of the vast amount of services offered. For instance, the Montgomery County Pre-Release Center in Rockville, Maryland, offers intensive services including psychological assessment, education, alcohol and drug treatment, counseling, life skills training, and referral to community service agencies along with many other programs.¹⁹³ Due in part to these services, the Montgomery County center costs the state more per inmate per day than the average jail—despite inmate contribution.¹⁹⁴ The costs of these services may be alleviated by relying on community volunteer agencies for treatment, education, and counseling services.

Work release allows inmates to retain their employment status, support their dependents, pay taxes, pay victim restitution and court fines, and maintain their ties to the community. In addition, employment facilitates the payment of fees that are usually mandated by the courts to cover or offset the cost of incarceration. Housing low-risk inmates in secure facilities is neither necessary nor cost-efficient. Although special facilities are not a panacea for the DUI problem, they may offer a cost-effective way to reduce jail and prison overcrowding while providing for more effective rehabilitation of DUI offenders.

¹⁸⁹ 3 NHTSA, *supra* note 13, at 29.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 3.

¹⁹² *Id.* at 13.

¹⁹³ *Id.* at 21.

¹⁹⁴ *Id.*

Another option to reduce costs is to use private correctional facilities. Of 1.4 million adult inmates nationwide, only 30,000 beds are privately operated.¹⁹⁵ These ventures have often proven unsuccessful but offer many advantages if they succeed.¹⁹⁶ Privately run facilities allow the state to pay for the detention of offenders on a per inmate per day basis, eliminating the startup costs and responsibility of finding and procuring a site.

The privatization of correctional services and facilities is an increasingly popular way of dealing with the high costs and overcrowding of government-run correctional facilities. Contracting private organizations for services in the correctional system is already widespread. Forty-one states currently use private business for correctional services such as medical and mental health services.¹⁹⁷ Although the costs of privatization will vary according to region and area of private sector involvement, various evaluations have estimated the cost savings to be 5% to 15%.¹⁹⁸

Implementation of Alternatives

Sanctions are most effective when they are imposed swiftly, consistently, and with appropriate severity. Efforts to implement sanctions do not end with legislation authorizing sentencing options. Judicial discretion determines, in large part, the frequency and severity of specific sentence options. Virginia allows for court- or defendant-ordered presentencing reports to be performed by probation officers so “the court may determine the appropriate sentence to be imposed.”¹⁹⁹ Due to the authority given judges in individualizing sentences for similar offenses, efforts to improve the effectiveness of sanctions must include a focus on judicial concerns.

A 1985 survey examined the attitudes of judges from several states concerning DUI laws.²⁰⁰ The data offer a rare insight into the sentencer’s perspective of the usefulness and merit of various sanctions. It is important to note, however, that the authors themselves stated that the judges surveyed were randomly selected from six states but did not represent a statistically random sam-

¹⁹⁵ Tim W. Ferguson, *Public Safety Poses Danger to Taxpayers*, Wall St. J., June 22, 1993, at A15 (citing University of Florida Prof. Charles Taylor).

¹⁹⁶ Bruce Potter, *Assembly Weighing Pros, Cons of Private, For-profit Prisons*, Richmond News Leader, Feb. 11, 1991, at 1 (after a private management company took over a local jail from public authorities, state code violations at the jail decreased).

¹⁹⁷ Dana C. Joel, *The Privatization of Secure Adult Prisons: Issues and Evidence*, in *Privatizing Correctional Institutions* 53, 56 (Gary W. Bowman et al. eds., 1993).

¹⁹⁸ E.g., Charles W. Thomas & Charles H. Logan, *The Development, Present Status, and Future Potential of Correctional Privatization in America*, in *Privatizing Correctional Institutions* 213, 230 (Gary W. Bowman et al. eds., 1993).

¹⁹⁹ Va. Code Ann. § 19.2-299 (Michie Supp. 1993).

²⁰⁰ T.A. Cowan et al., *How Judges View Drunk Driving Laws: A Survey*, Judges’ J., Fall 1985, at 4.

ple of all judges.²⁰¹ In addition, the survey did not reflect actual behaviors; rather, the study focused on expressed opinions.

In general, the judges surveyed were in favor of strong DUI laws and, in fact, believed current laws to be too lenient.²⁰² They also believed that current sanctions overlooked rehabilitation and deterrence while overstressing retribution.²⁰³ When asked which sanctions were most appropriate or useful for first offenders and for multiple offenders, the judges most strongly advocated rehabilitation, license actions, and fines for first-time offenders.²⁰⁴ They showed a strong consensus in believing license actions, rehabilitation, mandatory (though not discretionary) jail sentences, and fines were appropriate for multiple-DUI offenders.

The surveyed judges' actual sentencing behaviors may be influenced by some of their concerns related to the effectiveness of various sanctions. They expressed concern that they did not know which rehabilitation programs had the highest rate of success, which dispositions showed the greatest effectiveness, and whether jail sentences, when imposed, were even served.²⁰⁵

In a separate study, Virginia judges indicated that they were heavily influenced by the issue of public safety when making their decisions of whether to impose incarceration or probation.²⁰⁶ They further noted the importance of family counseling, substance abuse treatment, and job training to an effective probation program.²⁰⁷

Other investigators have discussed the obstacles that must be overcome in order for judges to feel confident about using alternatives to incarceration.²⁰⁸ Among the strategies recommended to facilitate their use are (1) informing

²⁰¹ *Id.* at 8. The researcher chose the six states for various reasons: (1) Wisconsin, Georgia, Pennsylvania, and Colorado were chosen for their geographical diversity; (2) California was chosen because it was the most populous state and was considered to be a "bellwether for national trends"; and (3) Maryland was chosen because of its apparently stringent DUI laws. *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 8-9.

²⁰⁴ The results of the survey were as follows: Most Appropriate Dispositions for Typical Offenders (% of Judges):

<u>Disposition</u>	<u>First Offenders</u>	<u>Repeat Offenders</u>
Rehabilitative Programs	69	64
License Suspension/Revocation	69	88
Discretionary Jail Sentence	46	29
Mandatory Jail Sentence	20	74
Fines	71	71
Driver's Education	45	24

²⁰⁵ *Id.* at 9.

²⁰⁶ *Overcrowding, supra* note 1, at 52.

²⁰⁷ *Id.*

²⁰⁸ D.J. Freed & B. Mahoney, *Between Prison and Probation*, Judges' J., Winter 1990, at 6.

judges about the jurisdiction's alternative resources, (2) increasing the judges' knowledge of offenders' backgrounds, and (3) increasing the information given to judges regarding current technology and reviews of various sanctions, their effectiveness, and the consequences for violation of restrictions.²⁰⁹

CONCLUSIONS

Clearly, the overcrowded state of Virginia's jails and prisons means that not all persons who violate the law can be incarcerated. The inevitable necessity of allowing some offenders to receive sanctions other than incarceration prompts justified public fears of releasing dangerous criminals to the community. Because there is simply not enough space in correctional facilities for all convicted criminals, there must be a method for determining which offenders should receive alternative sanctions in lieu of incarceration. Many traffic offenders seem to be prime candidates for these alternatives. Of course, all offenders considered for alternative sanctions must be carefully screened. Serious traffic offenders who have a history of violence or who have repeatedly shown no positive response to alternative sanctions should probably not be considered for alternative sanctions. Even so, there are sanctions that have demonstrated promise in their effectiveness at reducing recidivism and correctional costs. But for this promise to be realized, judges must be aware of their availability and the information they need to use them effectively.

RECOMMENDATIONS

With the escalating problems of crime and prison overcrowding, the Commonwealth should consider the use of alternative sanctions for nonviolent traffic offenders. Such offenders are valid candidates for alternative sanctions, and several sanctions may prove to be appropriate remedies. Accordingly, the Commonwealth may wish to consider the following:

1. *License actions.* Compared to other sanctions such as jail or alcohol treatment, license actions have been shown to be correlated with lower recidivism rates and alcohol-related accidents for many convicted traffic offenders, particularly when coupled with alcohol treatment and when imposed upon first- and second-time offenders. However, fine tuning the current system could increase the effectiveness of these sanctions. The infrequent subsequent arrests of drivers who continue to drive on suspended or revoked licenses con-

²⁰⁹ *Id.* at 42-43.

tribute to decreased deterrent effects. The Zebra sticker program appears to be a promising solution to this problem. It is recommended that Virginia wait for the release of the upcoming NHTSA study of the sticker program in order to evaluate the potential for a similar program in Virginia.

2. *Vehicle actions.* Although Virginia has had less than satisfactory experiences with confiscation sanctions, procedural adjustments in other states may offer new life to confiscation in Virginia. The Commonwealth should consider the alternative of vehicle impoundment for its specific deterrence and punitive value. This alternative, particularly if enforced by the use of immobilization devices, would bypass the financial drawbacks of forfeiture and could be more attractive to judges. The Commonwealth should also re-examine the laws authorizing registration suspension. Introducing this sanction, along with license plate suspension, used in conjunction with license actions, should increase the punitive aspects of traffic offender sanctions, reduce the amount of driving by suspended drivers, and highlight the seriousness of the crimes.

3. *Ignition interlock.* Ignition interlock programs have demonstrated a capability, through proper implementation, to be an effective specific deterrent for many offenders. Interlock requirements appear to be an inexpensive sanction that could rehabilitate as well as deter future drunk driving. Although the use of an interlock technology alone probably would not be used as a substitution for incarceration, a successful rehabilitation program using interlock as an element of probation could decrease the need for the incarceration of future offenders. In addition, an interlock device acts to directly prevent intoxicated driving, whereas license actions, usually violated, offer no direct check on drunk driving. Thus, the Commonwealth should seriously consider establishing a pilot program.

4. *Drug and alcohol treatment programs.* Substance abuse treatment enjoys wide public and law enforcement support despite its debatable deterrent and/or rehabilitative effects. The indication that treatment does help some offenders supports its continued use, especially in conjunction with an offender's financial contributions to offset the cost. Because treatment programs have not shown definitive success in the areas of deterrence and punishment, the sanction should always be accompanied by a punitive sanction to increase the potential for achieving correctional goals.

5. *Variations of traditional probation.* Increased supervision of convicted criminals who do not receive jail sentences is appealing in that it enhances public safety and appears to reduce recidivism rates. Across the board increases in the use of intensive supervision programs (ISP) and electronic monitoring (EM) would, however, significantly inflate corrections costs. In order to decrease the costs of corrections while maintaining an acceptable level of public safety, ISP and EM must focus on offenders who otherwise would have earned jail or prison sentences but who meet strict qualifications to prevent freeing dangerous con-

victs. Additionally, in order to ensure that these sanctions do not elevate costs, term lengths should be limited so that the financial savings do not convert into comparative losses. In addition, such disposed probationers should be required to contribute to the costs of their sanction.

6. *Community service.* Community service has not received the research attention given to other sanction options. Thus, the achievement of sanction goals is not documented to support or discourage its increased use.

7. *Community-based institutional alternatives.* Treatment/work release facilities appear to have great potential for achieving multiple correctional goals. Through selective use of privatization and/or the conversion of existing structures, jail and prison spaces could be opened up as traffic offenders are diverted to less expensive facilities. The Commonwealth should look into establishing a pilot program for these facilities, taking into consideration the possibility of privatization and the conversion of existing structures in order to reduce cost.

The use of alternative sanctions cannot occur without the cooperation of judges. Judges, on the whole, want to preserve public safety while ensuring the punishment and rehabilitation of DUI offenders. Releasing convicted offenders to the community, on its face, appears to clash fundamentally with the preservation of public safety. If judges are unaware or skeptical of the merits of a particular sanction within their discretion, they may be reluctant to break with their own sanctioning traditions. Therefore, it is recommended that judges be informed of the effectiveness and risks associated with alternatives already at the courts' disposal. Such efforts should also accompany any legislative changes in alternative sanctions allowed or required.