

Once is Enough: "Arresting" New York State's Drunk Driving Recidivism

**A Report to the Legislature with
Analysis and Recommendations**

**A Report to the Legislature by the
Legislative Commission on
Critical Transportation Choices**

**Senator Norman J. Levy
Chairman**

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**ONCE IS ENOUGH: ARRESTING
NEW YORK STATE'S
DRUNK DRIVING RECIDIVISM**

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ANALYSIS AND RECOMMENDATIONS**

NCJRS

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ACQUISITIONS

**A REPORT TO THE LEGISLATURE BY THE
LEGISLATIVE COMMISSION ON
CRITICAL TRANSPORTATION CHOICES**

137352

**U.S. Department of Justice
National Institute of Justice**

**SENATOR NORMAN J. LEVY
CHAIRMAN**

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This report has been prepared by the Senate Majority staff of the Legislative Commission on Critical Transportation Choices. Recommendations made in the report do not necessarily reflect the views of all of the members of the Commission. Assemblyman Michael J. Bragman, Vice Chairman of the Commission, has issued dissenting comments to this report which are available upon request through his office.

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CHAPTER I

RECIDIVISM: A CRITICAL PROBLEM

The New York State Legislature made significant progress during the 1980s in deterring alcohol-impaired driving by enacting laws encouraging coordination of local enforcement and rehabilitation programs and providing tougher sanctions more accurately reflecting the gravity of drunk driving offenses. New York State faces a formidable challenge in the 1990s relative to the intractable problem of the recidivist drunk driving offender who, despite prior conviction, continues to operate a motor vehicle on the roads of the State while under the influence of alcohol.¹

The New York State Legislative Commission on Critical Transportation Choices (LCCTC) long has focused attention on the tragic consequences of drunk and drugged driving by preparing numerous reports to the Legislature and holding

¹ Recidivism denotes a "tendency to relapse into a previous condition or mode of behavior;" especially "relapse into criminal behavior." Webster's Ninth New Collegiate Dictionary (Springfield, Massachusetts: Merriam-Webster, Incorporated, 1983), p. 983.

several public hearings.² In December 1987, LCCTC jointly convened a hearing with the State Senate Transportation Committee and the State Senate Special Task Force on Drunk Driving specifically to explore the issue of drunk driving recidivism.³

In June 1990, the Assembly Transportation Committee issued a preliminary report to the Assembly--Drunk Driving Reform in New York State: A Ten Year Review.⁴ The report outlined legislative and gubernatorial action on the issue during the past ten years and set forth proposals for legislative action.⁵

² See, for example, How Much Tougher Should New York State's Anti-Drunk Driving Laws Be? (Albany: New York State Legislative Commission on Critical Transportation Choices, June 1984) and A Question of Substance: New York State's Drugged Driving Problem (Albany: New York State Legislative Commission on Critical Transportation Choices, June 1989).

³ Official Transcript of the Public Hearing on Drunk Driving Recidivism held by the New York State Legislative Commission on Critical Transportation Choices, the New York State Senate Standing Committee on Transportation, and the New York State Senate Special Task Force on Drunk Driving, New York, New York, December 2, 1987 (Hereinafter referred to as Drunk Driving Recidivism Hearing Transcript).

⁴ Drunk Driving Reform in New York State: A Ten Year Review, A Preliminary Report to the Assembly (Albany: New York State Assembly Transportation Committee, June 1990).

⁵ See Chapter III of this report for information on the Assembly Transportation Committee preliminary report's proposals relative to drunk driving recidivism.

The seriousness of the alcohol problem is indicated by statistics on alcohol consumption. Per capita, Americans consume an average of the equivalent of 591 twelve-ounce cans of beer or 115 bottles (fifths) of wine, or 35 fifths of 80-proof distilled spirits per year. Since one-third of the population abstains, the drinking portion of the populace ingests far more than the per capita average.⁶

In New York State, seventy-five percent of all adults are current drinkers and fifteen percent (1.8 million) of these New Yorkers may be classified as heavy drinkers, averaging more than two drinks each day.⁷ Seven percent of the population of the State consumes more than four drinks per day. Shockingly, seven percent of the population drinks over half of all alcohol consumed in the State.⁸

Adult male New Yorkers are more likely to be drinkers and drink more heavily than their adult female counterparts; eighty percent of adult males compared with sixty-eight percent of adult females are drinkers; and twenty-three

⁶ James B. Jacobs, Drunk Driving--An American Dilemma (Chicago: The University of Chicago Press, 1989), p. xiii.

⁷ Grace M. Barnes and John W. Welte, Alcohol Use and Abuse Among Adults in New York State (Buffalo: Research Institute on Alcoholism, 1988), p. 3.

⁸ Ibid.

percent of adult males compared with six percent of adult female New Yorkers are heavy drinkers.⁹

ALCOHOL AND HIGHWAY SAFETY

Alcohol-impaired driving continues to pose a substantial public health and criminal justice problem.¹⁰ According to the National Highway Traffic Safety Administration's (NHTSA) Fatal Accident Reporting System (FARS), approximately 49.2 percent of all traffic fatalities nationwide in 1989 were alcohol-related.¹¹ FARS gathers data on motor vehicle accidents resulting in the death of a person within thirty days of the accident. In 1989, 45,555 people died in traffic accidents. About 17,849 or 39.2 percent of this group were killed in crashes in which at least one driver or pedestrian was intoxicated; i.e., registered a blood alcohol content (BAC) level of .10 percent or above, the level constituting impairment in most States.

Between 1982 and 1989, an estimated 188,660 people were killed as a result of alcohol-related traffic accidents, an

⁹ Ibid.

¹⁰ Alcoholism Treatment in Criminal Justice (Albany: Governor's Task Force on Alcoholism Treatment in Criminal Justice, October 1986), p. 21.

¹¹ Information supplied by Grace Hazzard of the United States Department of Transportation National Center for Statistics and Analysis, August 20, 1990.

average of one such fatality every twenty-three minutes. Of the 60,398 drivers involved in fatal traffic crashes in 1989, 24.2 percent were intoxicated and 37.2 percent of fatally injured drivers were intoxicated. Despite demonstrable progress, alcohol involvement in traffic fatalities remains intolerably high.

Indeed, to achieve BAC levels exceeding .10 percent requires heavy drinking and there appears to be little doubt that a high percentage of people arrested for drunk driving are heavy drinkers.¹² The most dangerous drunk drivers are believed to be either very heavy drinkers or moderate drinkers on a binge.¹³

Alcohol is a central nervous system depressant.¹⁴ Ingestion of alcohol may cause depression, tension, loss of judgment, industrial and automobile accidents, memory loss, and possibly death. Chronic alcoholism damages the brain, nervous system, liver, and pancreas, and withdrawal symptoms can be life-threatening.¹⁵ If alcohol were a new drug being

¹² Jacobs, Drunk Driving, p. 49.

¹³ Ibid., p. 52.

¹⁴ Richard Seymour and David E. Smith, The Physician's Guide to Psychoactive Drugs (New York: The Haworth Press, Incorporated, 1987), p. 36.

¹⁵ Ibid., pp. 38-39.

considered by the United States Food and Drug Administration, its use probably never would be approved.¹⁶

Alcohol use has been shown to adversely affect driving skills, but another factor may be equally important; viz., the influence of alcohol on emotions and attitudes. "Drunks are knocked down in bars more often because they are belligerent than because their ability to dodge has been impaired."¹⁷ Also, given the established connection between alcohol and suicide, it is plausible that desperation leads to excessive alcohol intake in addition to the converse.¹⁸ Thus, alcohol may induce an array of voluntary as well as involuntary risk-taking behavior.

Alcohol involvement in crashes nationwide is higher on weekends and more prevalent at night. For example, 33.4 percent of drivers involved in weekend fatal accidents in 1989 were intoxicated as compared to 17.6 percent of drivers in weekday crashes. Also, 50.1 percent of drivers involved in fatal crashes between midnight and 6 a.m. in 1989 were intoxicated whereas only 6.2 percent of drivers in fatal accidents occurring between 6 a.m. and 12 p.m. were

¹⁶ Ibid., p. 27, and Sidney Cohen, The Substance Abuse Problems (New York: The Haworth Press, Incorporated, 1981).

¹⁷ Frank A. Haight, "Current Problems in Drinking-Driving: Research and Intervention," Journal of Studies on Alcohol, July 1985, p. 14.

¹⁸ Ibid.

intoxicated.¹⁹ Age is another key factor; in 1989, 34.5 percent of drivers aged twenty-one to twenty-four involved in fatal traffic accidents were intoxicated.²⁰

NEW YORK STATE DATA

In New York State, 735 people were killed and 17,179 injured in 1989 as a result of alcohol-related traffic accidents compared to 750 deaths and 18,805 injuries in 1984.²¹ Moreover, 2,263 people lost their lives in all traffic accidents statewide in 1989 and alcohol was a factor in 32.48 percent of the fatalities. Alcohol-related deaths from traffic crashes in 1984 comprised 35.93 percent of total deaths from traffic accidents.

Convictions for operating a motor vehicle in an intoxicated or impaired condition rose unevenly throughout the decade of the 1980s.²² In 1989, over 60,000 people were convicted of driving while intoxicated (DWI) and for driving while ability impaired (DWAI) by alcohol. As Table I

¹⁹ Information supplied by Grace Hazzard of the United States Department of Transportation National Center for Statistics and Analysis, August 20, 1990.

²⁰ Ibid.

²¹ Information supplied by State of New York Department of Motor Vehicles Senior Research Analyst Steven Paskin, August 29, 1990.

²² Information supplied by State of New York Department of Motor Vehicles Division of Research and Development Assistant Director Malcolm Abrams, August 10, 1990.

indicates, convictions in 1979 numbered 15,152 for DWI and 25,881 for DWAI as compared with 24,017 DWI and 36,097 DWAI convictions in 1989. Convictions in New York State for alcohol-related driving offenses numbered 41,033 in 1979 and 60,114 in 1989, an increase of 46.5 percent. Vehicle miles traveled (VMTs) in New York State rose from 77.8 billion in 1979 to 106.1 billion in 1989.²³ Thus, although VMTs increased by 36.3 percent over this period, convictions for DWI and DWAI increased by an even greater amount--46.5 percent.

License suspensions for refusal to submit to a chemical test to determine BAC level also increased as laws became tougher and enforcement efforts intensified. In 1989, the New York State Department of Motor Vehicles (DMV) processed 9,665 suspensions and 9,207 revocations stemming from chemical test refusals.²⁴ In 1983, the earliest year for which such data are available, suspensions numbered 8,973, and revocations for this reason numbered 8,194.

²³ New York State Statistical Yearbook 1987-88 (Albany: Nelson A. Rockefeller Institute of Government, State University of New York, 1989), p. 486, and Commission Counsel Joanna M. King's telephone interview with State of New York Department of Motor Vehicles Division of Research and Development Assistant Director Malcolm Abrams, August 22, 1990.

²⁴ Information supplied by State of New York Department of Motor Vehicles Division of Research Development Statistician Barry Negri, August 29, 1990.

TABLE I
NEW YORK STATE DWI/DWAI CONVICTIONS
1979-1989

| <u>OFFENSE</u> | <u>1979</u> | <u>1980</u> | <u>1981</u> | <u>1982</u> | <u>1983</u> | <u>1984</u> | <u>1985</u> | <u>1986</u> | <u>1987</u> | <u>1988</u> | <u>1989</u> |
|----------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| DWI | 15,152 | 15,502 | 17,101 | 17,330 | 21,262 | 23,186 | 24,735 | 24,642 | 23,720 | 24,491 | 24,017 |
| DWAI | 25,881 | 27,934 | 30,648 | 34,256 | 37,730 | 38,008 | 37,089 | 34,659 | 34,476 | 36,266 | 36,097 |
| TOTAL | 41,033 | 43,436 | 47,749 | 51,586 | 58,992 | 61,194 | 61,824 | 59,301 | 58,191 | 60,757 | 60,114 |

Source: New York State Department of Motor Vehicles Division of Research and Development, August 10, 1990.

Convictions for unlicensed operation of a motor vehicle following suspension or revocation for an alcohol-related driving offense or chemical test refusal also have increased.²⁵ In 1983, 1,239 people were convicted of operating a motor vehicle while their licenses were suspended or revoked due to an alcohol-related offense. In 1989, 1,104 people were convicted of second degree aggravated unlicensed operation; i.e., operating a motor vehicle during a period of license suspension or revocation due to an alcohol-related offense, up from 852 such convictions in 1986. Convictions for first degree aggravated unlicensed operation--operating a motor vehicle while under the influence of alcohol or drugs during a period of license suspension or revocation for a previous alcohol-related conviction--numbered 670 in 1989, up from 458 in 1986.

RECIDIVISM TRENDS

Caution must be exercised in analyzing data on alcohol-related driving convictions. Computing recidivism trends over an expanded period of time is difficult because DMV discards conviction data more than ten years old.

²⁵ Note: Categorization of these offenses became more precise via 1985 and 1986 amendments to New York Vehicle and Traffic Law. See generally New York Vehicle and Traffic Law §511(2) and (3) (McKinney 1986 and 1990 Supp.).

Table II contains data on the incidence of recidivism for the previous ten years among the 54,916 offenders convicted of an alcohol-related driving offense--either DWI or DWAI--in 1988. An alarming fact emerges--more than one-quarter (26.3 percent) or 14,538 of these offenders had at least one DWI or DWAI conviction in the prior ten years. One person was convicted of drunk driving offenses nine times in that ten year period. As of November 20, 1990, the year 1988 represented the most recent full year for which ten prior years of conviction data for each DWI/DWAI offender convicted in a given year was available.²⁶

Table III presents data for two time periods differing by one year to illustrate DMV's practice of discarding data more than ten years old and its impact on the calculation of recidivism rates. A full ten years of conviction data therefore is unavailable for offenders in each of the years presented.

Specifically, Table III shows that, for 1980-1988, 56,834 people had two alcohol-related convictions; 10,415 had three such convictions; 1,761 had four; 296 had five; forty-three had six; twelve had seven; five had eight; one had nine; and one individual had ten such convictions over the nine year

²⁶ Commission Counsel Joanna M. King's telephone interview with State of New York Department of Motor Vehicles Division of Research and Development Assistant Director Malcolm Abrams, November 20, 1990.

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TABLE II

DRIVERS WITH A DRINKING CONVICTION IN VIOLATION YEAR 1988
NUMBER OF PREVIOUS CONVICTIONS BY PRIOR YEAR INTERVALS
(CONVICTIONS BASED UPON VIOLATION DATE)

| PRIOR1 | FREQUENCY | PERCENT | CUMULATIVE FREQUENCY |
|--------|-----------|---------|----------------------|
| 0 | 52063 | 94.8 | 52063 |
| 1 | 2699 | 4.9 | 54762 |
| 2 | 145 | 0.3 | 54907 |
| 3 | 8 | 0.0 | 54915 |
| 4 | 1 | 0.0 | 54916 |

| PRIOR6 | FREQUENCY | PERCENT | CUMULATIVE FREQUENCY |
|--------|-----------|---------|----------------------|
| 0 | 42928 | 78.2 | 42928 |
| 1 | 9779 | 17.8 | 52707 |
| 2 | 1894 | 3.4 | 54601 |
| 3 | 250 | 0.5 | 54851 |
| 4 | 50 | 0.1 | 54901 |
| 5 | 10 | 0.0 | 54911 |
| 6 | 2 | 0.0 | 54913 |
| 7 | 3 | 0.0 | 54916 |

| PRIOR2 | FREQUENCY | PERCENT | CUMULATIVE FREQUENCY |
|--------|-----------|---------|----------------------|
| 0 | 49719 | 90.5 | 49719 |
| 1 | 4800 | 8.7 | 54519 |
| 2 | 366 | 0.7 | 54885 |
| 3 | 27 | 0.0 | 54912 |
| 4 | 4 | 0.0 | 54916 |

| PRIOR7 | FREQUENCY | PERCENT | CUMULATIVE FREQUENCY |
|--------|-----------|---------|----------------------|
| 0 | 41924 | 76.3 | 41924 |
| 1 | 10300 | 18.8 | 52224 |
| 2 | 2258 | 4.1 | 54482 |
| 3 | 341 | 0.6 | 54823 |
| 4 | 72 | 0.1 | 54895 |
| 5 | 14 | 0.0 | 54909 |
| 6 | 3 | 0.0 | 54912 |
| 7 | 4 | 0.0 | 54916 |

| PRIOR3 | FREQUENCY | PERCENT | CUMULATIVE FREQUENCY |
|--------|-----------|---------|----------------------|
| 0 | 47644 | 86.8 | 47644 |
| 1 | 6525 | 11.9 | 54169 |
| 2 | 688 | 1.3 | 54857 |
| 3 | 49 | 0.1 | 54906 |
| 4 | 10 | 0.0 | 54916 |

| PRIOR8 | FREQUENCY | PERCENT | CUMULATIVE FREQUENCY |
|--------|-----------|---------|----------------------|
| 0 | 41110 | 74.9 | 41110 |
| 1 | 10599 | 19.3 | 51709 |
| 2 | 2609 | 4.8 | 54318 |
| 3 | 480 | 0.9 | 54798 |
| 4 | 89 | 0.2 | 54887 |
| 5 | 18 | 0.0 | 54905 |
| 6 | 7 | 0.0 | 54912 |
| 7 | 2 | 0.0 | 54914 |
| 8 | 1 | 0.0 | 54915 |
| 9 | 1 | 0.0 | 54916 |

| PRIOR4 | FREQUENCY | PERCENT | CUMULATIVE FREQUENCY |
|--------|-----------|---------|----------------------|
| 0 | 45761 | 83.3 | 45761 |
| 1 | 7977 | 14.5 | 53738 |
| 2 | 1053 | 1.9 | 54791 |
| 3 | 107 | 0.2 | 54898 |
| 4 | 15 | 0.0 | 54913 |
| 5 | 2 | 0.0 | 54915 |
| 6 | 1 | 0.0 | 54916 |

| PRIOR9 | FREQUENCY | PERCENT | CUMULATIVE FREQUENCY |
|--------|-----------|---------|----------------------|
| 0 | 40538 | 73.8 | 40538 |
| 1 | 10784 | 19.6 | 51322 |
| 2 | 2868 | 5.2 | 54190 |
| 3 | 573 | 1.0 | 54763 |
| 4 | 122 | 0.2 | 54885 |
| 5 | 19 | 0.0 | 54904 |
| 6 | 7 | 0.0 | 54911 |
| 7 | 3 | 0.0 | 54914 |
| 8 | 1 | 0.0 | 54915 |
| 9 | 1 | 0.0 | 54916 |

| PRIOR5 | FREQUENCY | PERCENT | CUMULATIVE FREQUENCY |
|--------|-----------|---------|----------------------|
| 0 | 44157 | 80.4 | 44157 |
| 1 | 9057 | 16.5 | 53214 |
| 2 | 1491 | 2.7 | 54705 |
| 3 | 172 | 0.3 | 54877 |
| 4 | 31 | 0.1 | 54908 |
| 5 | 5 | 0.0 | 54913 |
| 6 | 2 | 0.0 | 54915 |
| 7 | 1 | 0.0 | 54916 |

| PRIOR10 | FREQUENCY | PERCENT | CUMULATIVE FREQUENCY |
|---------|-----------|---------|----------------------|
| 0 | 40378 | 73.5 | 40378 |
| 1 | 10830 | 19.7 | 51208 |
| 2 | 2936 | 5.3 | 54144 |
| 3 | 600 | 1.1 | 54744 |
| 4 | 137 | 0.2 | 54881 |
| 5 | 23 | 0.0 | 54904 |
| 6 | 6 | 0.0 | 54910 |
| 7 | 4 | 0.0 | 54914 |
| 8 | 1 | 0.0 | 54915 |
| 9 | 1 | 0.0 | 54916 |

Note: Multiple Offenses on Same
Day Excluded

Source: New York Department
of Motor Vehicles License
File, January 1990

TABLE III

DRINKING RELATED CONVICTIONS FOR VIOLATION YEARS 1980-88
A COUNT OF DRIVERS INVOLVED BY NUMBER OF CONVICTIONS

TOTAL CONVICTIONS

| TOTCONV | FREQUENCY | PERCENT | CUMULATIVE FREQUENCY | CUMULATIVE PERCENT |
|---------|-----------|---------|-------------------------|-----------------------|
| 1 | 335520 | 82.9 | 335520 | 82.9 |
| 2 | 56834 | 14.0 | 392354 | 96.9 |
| 3 | 10415 | 2.6 | 402769 | 99.5 |
| 4 | 1761 | 0.4 | 404530 | 99.9 |
| 5 | 296 | 0.1 | 404826 | 100.0 |
| 6 | 43 | 0.0 | 404869 | 100.0 |
| 7 | 12 | 0.0 | 404881 | 100.0 |
| 8 | 5 | 0.0 | 404886 | 100.0 |
| 9 | 1 | 0.0 | 404887 | 100.0 |
| 10 | 1 | 0.0 | 404888 | 100.0 |

DRINKING RELATED CONVICTIONS FOR VIOLATION YEARS 1979-87
A COUNT OF DRIVERS INVOLVED BY NUMBER OF OFFENSES

| TOTCONV | FREQUENCY | PERCENT | CUMULATIVE FREQUENCY | CUMULATIVE PERCENT |
|---------|-----------|---------|-------------------------|-----------------------|
| 1 | 320426 | 81.3 | 320426 | 81.3 |
| 2 | 58417 | 14.8 | 378843 | 96.1 |
| 3 | 12012 | 3.0 | 390855 | 99.2 |
| 4 | 2608 | 0.7 | 393463 | 99.8 |
| 5 | 510 | 0.1 | 393973 | 100.0 |
| 6 | 102 | 0.0 | 394075 | 100.0 |
| 7 | 26 | 0.0 | 394101 | 100.0 |
| 8 | 9 | 0.0 | 394110 | 100.0 |
| 9 | 2 | 0.0 | 394112 | 100.0 |
| 10 | 2 | 0.0 | 394114 | 100.0 |

Note: Multiple Offenses on Same Day Removed

Source: New York State Department of Motor Vehicles
License File, January 23, 1990.

period.²⁷ Thus, Table III indicates a cumulative recidivism rate of 17.1 percent for 1980-1988. An analysis of 1979-1987 reveals an almost identical recidivism rate of 17.2 percent due to DMV's record retention policy.

In calculating the recidivism rate for the nine-year period between 1980 and 1988 shown in Table III, DMV has available only one prior year of data for offenders convicted in 1981, only two prior years of data for offenders convicted in 1982, and so on. Due to such data limitations, the resultant recidivism rate will appear low -- 17.1 percent over a nine-year period. However, when DMV has ten previous years of data for each of the offenders convicted in a given year, as illustrated in Table II for offenders convicted in 1988, the rate of recidivism is more accurate -- 26.3 percent over that ten-year period.

Table IV highlights the problem by presenting data on the basis of three-year periods. Again, the sheer number of multiple DWI/DWAI offenders is shocking. Some drivers convicted of drinking related offenses amassed six or seven such convictions in only three years. For instance, between 1982 and 1984, 13,378 people had two alcohol-related driving offenses; 1,334 had three; 176 had four; twenty-one had five; three had six; and one had seven.

²⁷ Information presented in the following paragraphs is derived from data compiled by the State of New York Department of Motor Vehicles Division of Research and Development Statistician Barry Negri, March 1, 1990.

TABLE IV

DRINKING RELATED CONVICTIONS FOR VIOLATION YEARS 1985-87
A COUNT OF DRIVERS INVOLVED BY NUMBER OF OFFENSES

| TOTAL | FREQUENCY | PERCENT | CUMULATIVE FREQUENCY | CUMULATIVE PERCENT |
|-------|-----------|---------|-------------------------|-----------------------|
| 1 | 143916 | 91.2 | 143916 | 91.2 |
| 2 | 12448 | 7.9 | 156364 | 99.1 |
| 3 | 1220 | 0.8 | 157584 | 99.9 |
| 4 | 154 | 0.1 | 157738 | 100.0 |
| 5 | 19 | 0.0 | 157757 | 100.0 |
| 6 | 2 | 0.0 | 157759 | 100.0 |

DRINKING RELATED CONVICTIONS FOR VIOLATION YEARS 1982-84
A COUNT OF DRIVERS INVOLVED BY NUMBER OF OFFENSES

| TOTAL | FREQUENCY | PERCENT | CUMULATIVE FREQUENCY | CUMULATIVE PERCENT |
|-------|-----------|---------|-------------------------|-----------------------|
| 1 | 147609 | 90.8 | 147609 | 90.8 |
| 2 | 13378 | 8.2 | 160987 | 99.1 |
| 3 | 1334 | 0.8 | 162321 | 99.9 |
| 4 | 176 | 0.1 | 162497 | 100.0 |
| 5 | 21 | 0.0 | 162518 | 100.0 |
| 6 | 3 | 0.0 | 162521 | 100.0 |
| 7 | 1 | 0.0 | 162522 | 100.0 |

DRINKING RELATED CONVICTIONS FOR VIOLATION YEARS 1979-81
A COUNT OF DRIVERS INVOLVED BY NUMBER OF OFFENSES

| TOTAL | FREQUENCY | PERCENT | CUMULATIVE FREQUENCY | CUMULATIVE PERCENT |
|-------|-----------|---------|-------------------------|-----------------------|
| 1 | 107159 | 89.3 | 107159 | 89.3 |
| 2 | 11323 | 9.4 | 118482 | 98.7 |
| 3 | 1338 | 1.1 | 119820 | 99.8 |
| 4 | 199 | 0.2 | 120019 | 100.0 |
| 5 | 22 | 0.0 | 120041 | 100.0 |
| 6 | 9 | 0.0 | 120050 | 100.0 |
| 7 | 1 | 0.0 | 120051 | 100.0 |

Source: New York State Department of Motor Vehicles
License File, June 19, 1988

Table V presents data for 1980-1988 by breaking down convictions and prior convictions into DWI and DWAI categories. For example, in 1988, 4,246 DWI offenders had a prior DWI conviction within the past five years, representing 20.06 percent of total DWI offenders in 1988. Also in 1988, 4,991 DWI offenders had a prior DWAI conviction within the past five years, representing 23.58 percent of total DWI offenders. Of DWAI offenders that year, 469 had a prior DWI and 2,037 had a prior DWAI conviction within the past five years.

The New York State Division of Alcoholism and Alcohol Abuse (DAAA) currently is developing a methodology utilizing a calculation procedure to extend mathematically backwards in time DMV data in order to better approximate rates of drunk driving recidivism.²⁸ DAAA researchers are concerned that DMV figures underreport the extent of the recidivism problem due to the time-limited nature of the data on file; i.e., at any given time only ten years of data are available. The goal of the new calculation procedure is to ensure that the adjusted recidivism rate is unaffected by the time period under study

²⁸ Information in the following paragraphs is derived from Commission Counsel Joanna M. King's meeting with New York State Division of Alcoholism and Alcohol Abuse Office of Criminal Justice Services Associate Deputy Director William R. Williford and Research Scientists John Yu and Dawn Essex, Albany, New York, February 1, 1990.

TABLE V
 DWAI/DWI CONVICTIONS BY YEAR OF VIOLATION
 FIRST VIOLATION VERSUS REPEAT VIOLATION WITHIN FIVE YEAR*
 1980 - 1988

| YEAR | DWI WITH PRIOR DWI | | DWI WITH PRIOR DWAI | | DWAI WITH PRIOR DWI | | DWAI WITH PRIOR DWAI | |
|------|-----------------------|-------|------------------------|-------|------------------------|------|-------------------------|-------|
| | NO | YES | NO | YES | NO | YES | NO | YES |
| 1980 | # 11,773 | 2,634 | 11,623 | 2,784 | 28,305 | 451 | 26,540 | 2,216 |
| | % 81.72 | 18.28 | 80.68 | 19.32 | 98.43 | 1.57 | 92.29 | 7.71 |
| 1981 | # 12,966 | 2,793 | 12,188 | 3,571 | 29,687 | 437 | 27,931 | 2,193 |
| | % 82.28 | 17.72 | 77.34 | 22.66 | 98.55 | 1.45 | 92.72 | 7.28 |
| 1982 | # 14,330 | 3,120 | 13,040 | 4,410 | 35,489 | 413 | 33,541 | 2,361 |
| | % 82.12 | 17.88 | 74.73 | 25.27 | 98.85 | 1.15 | 93.42 | 6.58 |
| 1983 | # 16,581 | 3,472 | 15,233 | 4,820 | 36,678 | 418 | 34,724 | 2,372 |
| | % 82.69 | 17.31 | 75.96 | 24.04 | 98.87 | 1.13 | 93.61 | 6.39 |
| 1984 | # 17,004 | 3,185 | 15,611 | 4,578 | 34,979 | 347 | 33,361 | 1,965 |
| | % 84.22 | 15.78 | 77.32 | 22.68 | 99.02 | 0.98 | 94.44 | 5.56 |
| 1985 | # 17,215 | 3,555 | 15,718 | 5,052 | 33,922 | 380 | 32,245 | 2,057 |
| | % 82.88 | 17.12 | 75.68 | 24.32 | 98.89 | 1.11 | 94.00 | 6.00 |
| 1986 | # 16,905 | 3,808 | 15,820 | 4,893 | 31,994 | 389 | 30,383 | 2,000 |
| | % 81.62 | 18.38 | 76.38 | 23.62 | 98.80 | 1.20 | 93.82 | 6.18 |
| 1987 | # 16,816 | 4,275 | 15,967 | 5,124 | 33,384 | 461 | 31,776 | 2,069 |
| | % 79.73 | 20.27 | 75.71 | 24.29 | 98.64 | 1.36 | 93.89 | 6.11 |
| 1988 | # 16,922 | 4,246 | 16,177 | 4,991 | 33,992 | 469 | 32,776 | 2,037 |
| | % 79.94 | 20.06 | 76.42 | 23.58 | 98.64 | 1.36 | 94.09 | 5.91 |

*Multiple offenses on the same day removed.

Source: New York State Department of Motor Vehicles Division
 of Research and Evaluation, March 9, 1990

since the more years studied, the higher the recidivism rate will be.

As noted, DMV reports an estimated seventeen percent drunk driving recidivism rate over the nine year period between the beginning of 1979 and the end of 1987; DAAA's methodology yields a twenty-eight percent rate for this period. DAAA analyzed a random sample of 15,032 DWI and DWAI offenders and determined that the recidivism rate ranged between twenty-five and thirty-two percent between 1984 and 1988.

DAAA currently is in the second year of a three year research grant from the Governor's Traffic Safety Committee funded by the National Highway Traffic Safety Administration. In addition to ongoing research referenced in part above, DAAA's Office of Criminal Justice Services and Research Institute on Alcoholism have generated crucial scientific data and analyses bearing on recidivism as part of their Problem Drinker Driver Project (PDDP).

Calculation of adjusted recidivism rates is an essential undertaking since DMV's Driver's License File contains data collected through a "dynamic procedure" which "automatically deletes a conviction record more than ten years old."²⁹

²⁹ John Yu, Dawn Essex, and William Williford, "Drinking and Driving Recidivism in New York State: Estimating the Rate of Recidivism with Limited Data," The Problem-Drinker Driver Project Research Note 90-1 (Albany: New York State Division of Alcoholism and Alcohol Abuse, February 1990), p. 1.

Nevertheless, New York State's recordkeeping is more comprehensive than recordkeeping in most states which only retain records for three or five years.³⁰

The gender characteristics of DWI/DWAI offenders over time also were studied.³¹ Although male offenders comprise the overwhelming proportion of recidivistic drunk drivers, the group of male offenders aged twenty and younger accounted for only 6.3 percent of recidivists in 1988 compared with 13.5 percent in 1980, a fifty percent reduction.³² Although on average ninety percent of drunk driving repeat offenders between 1980 and 1988 were male, the female recidivist population is on the rise. At the end of 1988, females accounted for thirteen percent of recidivistic events, up from less than ten percent in 1980.³³

In addition, males were found to repeat offend at much faster rates than females. For offenders convicted during 1985 and succeeding years, however, female recidivism rates

³⁰ Ibid., p. 2.

³¹ John Yu, Dawn Essex, and William Williford, "DWI/DWAI Offenders and Recidivism: An Analysis of Convicted Offenders by Gender," The Problem-Drinker Driver Project Research Note 90-2 (Albany: New York State Division of Alcoholism and Alcohol Abuse, March 1990), pp. 1-2.

³² Ibid.

³³ Ibid.

parallel and in some instances surpass those of male offenders.³⁴

PDDP researchers, in seeking to identify trends and beneficial intervention strategies, have reported, inter alia, on the link between DWI recidivism and other criminal history, the effect of multiple location drinking on problematic drinking driving, and indicators of problem drinking driving and DWI recidivism among young and reckless drivers.

Some PDDP research focused on a sample of 461 drivers referred to the Drinking Driver Evaluation and Treatment Program in Erie County, New York, between 1983 and 1985. Researchers found that young repeat offenders (twenty-five years old and under) were almost twice as apt as young first-time offenders to have a family member with alcohol problems and almost four times as likely to have a family member with a prior DWI.³⁵ Young repeat offenders were twice as likely to have less than a high school education as their first offender counterparts whereas first offenders were twice as likely to have some college education.³⁶

³⁴ Ibid.

³⁵ Thomas H. Nochajski, Brenda A. Miller, and William F. Wieczorek, "Indicators of Problem Drinker-Drivers and DWI Recidivism Among the Young and Reckless," The Problem-Drinker Driver Project Research Note 89-5 (Albany: New York State Division of Alcoholism and Alcohol Abuse, August 1989), pp. 1-2.

³⁶ Ibid., p. 2.

PDDP researchers also explored "self-report" data relative to heavy drinking behavior among young adults and problem drinker drivers, concluding that heavy drinkers aged sixteen to twenty-four were five times more apt to drive under the influence of alcohol than other drinkers. Although heavy drinkers made up less than three percent of the sample, they accounted for twenty-five percent of self-reported alcohol-involved driving incidents.³⁷

Relative to multiple location drinking, PDDP researchers confirmed that people consuming alcohol at multiple locations were more problematic than those consuming alcohol at one location since the former group engaged in more driving after drinking; the multi-location group reported being drunk twice as often as single location drinkers in the month prior to DWI arrest and exhibited more severe alcohol-related problems.³⁸

Prior history of crimes not involving drinking and driving also was found to be related to higher risk for DWI recidivism. Interestingly, individuals with prior criminal history but no prior DWI arrests were more likely to

³⁷ John Yu and William R. Williford, "The Young Adult Heavy Drinker: Toward Profiling the Young Adult Problem Drinker Driver," The Problem-Drinker Driver Project Research Note 89-7 (Albany: New York State Division of Alcoholism and Alcohol Abuse, November 1989), pp. 1-2.

³⁸ William F. Wieczorek, Brenda A. Miller, and Thomas H. Nochajski, "Multiple Location Drinking: A Marker of Problematic Drinking Drivers," The Problem-Drinker Driver Project Research Note 89-4 (Albany: New York State Division of Alcoholism and Alcohol Abuse, July 1989), pp. 1-2.

experience subsequent drunk driving arrests than those with prior DWIs alone.³⁹ Over a two year follow-up period, sixteen percent of the sample of problem drinkers under study were rearrested for DWI. Researchers concluded that criminal history serves as an important criterion to identify probable DWI recidivists and may evidence a need for differing intervention across subgroups of offenders.

Although the "actual rate of recidivism cannot be determined in any general sense because it is inextricably tied" to the length of the follow up period and of record retention in a given state, researchers have attempted to correlate alcohol consumption levels and other characteristics to gain a clearer picture of recidivistic populations.⁴⁰

The relative risk of crash involvement increases steadily as driver BAC levels rise regardless of driver age or gender.⁴¹ The probability of accident involvement among people with BACs between .05 and .09 percent is at least nine

³⁹ Thomas H. Nochajski, Brenda A. Miller, and William F. Wieczorek, "Criminal History and DWI Recidivism," The Problem-Drinker Driver Project Research Note 89-2 (Albany: New York State Division of Alcoholism and Alcohol Abuse, April 1989), pp. 1-2.

⁴⁰ M.W. Perrine, Raymond C. Peck, and James C. Fell, "Epidemiologic Perspectives on Drunk Driving," Surgeon General's Workshop on Drunk Driving Background Papers (Washington, D.C.: United States Department of Health and Human Services, December 14-16, 1988), p. 56.

⁴¹ Paul L. Zador, Alcohol-Related Relative Risk of Fatal Driver Injuries in Relation to Driver Age and Sex (Arlington, Virginia: Insurance Institute For Highway Safety, April 1989).

times greater than for people at zero BAC across all age groups.⁴²

Although BAC levels provide a reliable measure of the presence of alcohol in the body, they do not measure behavioral impairment for all individuals, especially at low levels.⁴³ Legal BAC limits have been set at degrees which correlate BAC and impairment levels for most individuals in order to reduce the possibility of accidents and attendant property damage, injuries, and death.⁴⁴

Most people take the smooth operation of the highway transportation system for granted and seldom consider the "extraordinary interpersonal trust" on which the system depends.⁴⁵ Responsible driving behavior should be a major obligation of each individual.⁴⁶

In general, drivers apprehended for DWI are older as a group than drivers involved in collisions or those detected in roadside surveys.⁴⁷ The latter rely on self-report data from

⁴² Ibid.

⁴³ Roberta G. Ferrence and Paul C. Whitehead, "Studies of Driver Impairment and Alcohol-Related Collisions" in Smart, et al., eds., Research Advances in Alcohol and Drug Problems (New York: Plenum Press, 1983), p. 228.

⁴⁴ Ibid.

⁴⁵ Jacobs, Drunk Driving, p. 16.

⁴⁶ Ibid.

⁴⁷ Ferrence and Whitehead, "Studies of Driver Impairment," pp. 228 and 248.

drivers volunteering participation in BAC testing at roadside. Apprehended drivers include a greater proportion of males, divorced or separated persons, and people from lower socioeconomic levels than either of the other two groups. They also are heavier drinkers and have the highest BACs, often averaging close to .20 percent.⁴⁸

Although there is a demonstrable association between elevated BACs and increased risk of both erratic driving and collisions, the extent of alcohol's role as a causal factor in these occurrences remains unclear for a number of reasons. Determining causation of a given accident is not always possible, especially for single-vehicle crashes. It also is difficult to separate out the effects of factors which may converge to result in an accident such as other drug usage, fatigue, stress, anger, or inattention. If a driver had been drinking prior to an accident, it may be unwarranted to presume that he was intoxicated or that he caused the crash.⁴⁹ Moreover, even assuming a driver's intoxication and causation of an accident does not ensure a causal connection between the alcohol consumption and the accident.⁵⁰

In addition, alcohol's role in traffic accidents appears to vary according to the severity of the crash. Fatal

⁴⁸ Ibid., p. 248.

⁴⁹ Jacobs, Drunk Driving, p. 30.

⁵⁰ Ibid.

accidents tend to involve drunk drivers; in particular, these accidents are more apt to involve driving at night, male drivers, and single-vehicle crashes.⁵¹

Despite methodological and empirical problems relative to the issue of causation, over-involvement of alcohol in traffic crashes is undeniable.⁵² In 1987, the average BAC of drinking drivers involved in fatal accidents was .16 percent, substantially above the legal limit of .10 percent in most States.⁵³ A driver with a BAC of .16 percent is twenty-five to thirty times more likely to crash than a sober driver.⁵⁴

In New York State, the average BAC for drivers arrested for DWI--although not necessarily involved in a crash--was .16 percent in 1988 and .15 percent in 1989.⁵⁵

Despite aforementioned gaps in knowledge, continued investigation of the correlation between driver impairment at certain BAC levels and risk for alcohol-related crashes will greatly enhance the prospect for developing effective drunk

⁵¹ Ibid., p. 31.

⁵² James C. Fell and Carl E. Nash, "The Nature of the Alcohol Problem in U.S. Fatal Crashes," Health Education Quarterly, Fall 1989, pp. 335-43.

⁵³ Ibid., p. 338.

⁵⁴ Ibid.

⁵⁵ Information is derived from a letter to Commission Counsel Joanna M. King from New York State Division of State Police Traffic Section Major Raymond G. Dutcher dated March 12, 1990.

driving countermeasures.⁵⁶

A promising strategy for expanding the drunk driving knowledge base involves mandating BAC testing of drivers involved in traffic accidents.⁵⁷ The scope of such a mandate could be broad or limited. For example, the President of the College of American Pathologists has urged mandatory BAC testing for all drivers involved in single- or multiple-vehicle accidents resulting in injury or death.⁵⁸

BAC tests should be administered as soon as possible following an accident since the BAC reading becomes less meaningful as alcohol is metabolized over time.⁵⁹ Recording of these BAC levels may yield "a true picture of the alcohol-related carnage on our highways."⁶⁰

In drunk driving cases, New York State law provides that chemical tests to determine BAC must be performed within two hours of either arrest or a breath test revealing the presence

⁵⁶ Ferrence and Whitehead, "Studies of Driver Impairment," p. 258.

⁵⁷ Barbara Chapman, "Pathologists Say Alcohol Factor Greater than Suspected in Motor Vehicle Accidents," Pathologist, March 1985, pp. 21-24.

⁵⁸ Herbert Derman, "From the President's Desk," Pathologist, March 1985, p. 6.

⁵⁹ Chapman, "Pathologists Say Alcohol Factor Greater," p. 23.

⁶⁰ Ibid.

of alcohol.⁶¹

Despite the breadth of literature on alcohol and traffic safety, the basic question of how many traffic fatalities are attributable to alcohol still has not been answered satisfactorily. A recent study performed by Leonard Evans sought to remedy this situation. To approximate the fraction of traffic fatalities attributable to alcohol use, the Evans study combined 1987 FARS data from twenty-six states recording BAC levels for over eighty-four percent of fatally injured drivers with estimates of alcohol's effects on crash risk.⁶² The study employed a mathematical calculation procedure utilizing the observed distribution of alcohol among fatally injured drivers and estimating how many of these drivers would not have been killed if all drivers had been alcohol-free.

Eliminating alcohol use was found to reduce driver deaths by (1) 55.2 percent in single-vehicle crashes, (2) 45.0 percent in two-vehicle crashes, and (3) 43.8 percent in three-vehicle crashes. Overall, 49.0 percent of fatalities would be prevented in the twenty-six States by removing alcohol as a factor. Moreover, the study estimated

⁶¹ New York Vehicle and Traffic Law, §1194(2)(a) (McKinney 1990 Supp.).

⁶² Information in the following paragraphs is derived from Leonard Evans, "The Fraction of Traffic Fatalities Attributable to Alcohol," March 3, 1989, to be published in Accident Analysis and Prevention, December, 1990.

elimination of alcohol would reduce national traffic fatalities by 46.7 percent.

By factoring in the confidence level attendant to this result, the Evans study concluded that the percent of fatalities that would have been prevented by eliminating alcohol was 47+/-4 percent for 1987, a reduction of 20,000 to 24,000 fatalities nationwide annually.

Importantly, the fact that alcohol is involved in almost fifty percent of traffic fatalities nationwide does not, in and of itself, mean that nearly fifty percent of fatalities is attributable to alcohol. Nonetheless, such a conclusion is "remarkably insightful" when data correlating crash risk and alcohol use are added to BAC information to address questions of causation.

VICTIM ADVOCACY

Public tolerance for drunk driving decreased considerably during the 1980s due in large part to the victim advocacy efforts of grass roots activist groups such as Remove Intoxicated Drivers (RID) and Mothers Against Drunk Driving (MADD).⁶³ RID was founded in December, 1979, by Doris Aiken

⁶³ Mark Wolfson, "The Citizens' Movement Against Drunken Driving and the Prevention of Risky Driving: A Preliminary Assessment," Alcohol, Drugs, and Driving, January-March 1989, p. 73.

in Schenectady, New York, following a tragic accident in which two children were killed by a drunk driver.⁶⁴

The impetus for MADD's creation flowed directly from the hit-and-run killing of a young girl by a recidivist drunk driver who, at the time of the offense, had been out of jail on bail for two days relative to another hit-and-run drunk driving crash and who previously had been involved in three alcohol-related accidents and had two prior drunk driving convictions.⁶⁵

A major goal of these and other advocacy groups is to encourage enactment and vigorous enforcement of laws relative to drinking and driving.⁶⁶ Enhancing public awareness of the gravity and pervasiveness of drunk driving is another key focus. However, unlike prohibitionist movements, the anti-drunk driving campaign decries alcohol use in tandem with motor vehicle operation, thereby indicting irresponsible behavior.⁶⁷ The victims' movement has played an important

⁶⁴ Peggy Mann, Arrive Alive (New York: McGraw-Hill Book Company, 1985), p. 108.

⁶⁵ Ibid., p. 104.

⁶⁶ Ibid., p. 76.

⁶⁷ Frank J. Weed "Grass-Roots Activism and the Drunk Driving Issue: A Survey of MADD Chapters," Law and Policy, July 1987, p. 275.

role in stigmatizing drunk driving as a serious crime.⁶⁸

STATE POLICE

The State of New York Division of State Police (DSP) has intensified its efforts to enforce laws relative to drinking and driving. DWI arrests by State Police officers have climbed from 14,178 in 1983 to 17,831 DWI arrests in 1989.⁶⁹ State Police also have utilized sobriety checkpoints and saturation patrols to deter further alcohol-impaired driving; the former involves stationary enforcement scheduled at unannounced times and locations while the latter increases the number of patrol vehicles in a particular area for purposes of DWI/AI enforcement.⁷⁰ Pursuant to DSP's Sobriety Checkpoint Program, 47,941 vehicles were stopped in 1988, resulting in 538 DWI arrests; and 49,820 vehicles were stopped in 1989, resulting in 562 DWI arrests.⁷¹

⁶⁸ Denis Foley, "The Coerced Alcoholic: On Felons, Throw-aways, and Others" in Aaron Rosenblatt, ed., For Their Own Good? Essays on Coercive Kindness (Albany: Nelson A. Rockefeller Institute of Government, State University of New York, 1988), p. 130.

⁶⁹ Commission Counsel Joanna M. King telephone interview with State of New York Division of State Police Director of Traffic Major Raymond G. Dutcher, September 27, 1990.

⁷⁰ Letter to Commission Counsel Joanna M. King from State of New York Division of State Police Director of Traffic Major Raymond G. Dutcher, dated February 5, 1990.

⁷¹ Ibid.

On June 26, 1990, an important Division of State Police initiative became operational -- the nation's first toll-free, multiple answering point telephone number, 1-800-CURB-DWI, which allows motorists to alert police of suspected drunk drivers.⁷² Utilization of new technology enables telephone calls to be routed electronically to the State Police dispatch station--usually a State Police troop or zone headquarters--nearest to the location at which the drunk driver last was seen. Currently, all New York State counties are using the program except the five New York City-area counties--Bronx, Kings, New York, Queens, and Richmond--which have not yet chosen to participate.

ANTI-DRUG ABUSE COUNCIL

The Governor's Statewide Anti-Drug Abuse Council (ADAC) was created by executive order in 1989 and was given a broad charge to coordinate State agency efforts relative to every aspect of drug and alcohol enforcement, treatment, prevention, and education.⁷³ ADAC members include the Lieutenant Governor and the heads of the Departments of Health and Education, and Divisions of Substance Abuse Services, Criminal Justice

⁷² Commission Counsel Joanna M. King's telephone interview with New York State Division of State Police Traffic Section Major Raymond G. Dutcher, August 15, 1990.

⁷³ Executive Order No. 120, New York State Register, February 22, 1989, pp. 97-98.

Services, and Alcoholism and Alcohol Abuse. A comprehensive strategy report for the State was issued by ADAC on November 27, 1989.⁷⁴

Recognizing that alcohol is a drug and that alcohol abuse exacts a tremendous toll in motor vehicle accidents and economic losses, ADAC advanced recommendations pertaining to the myriad alcohol and other drug issues.⁷⁵ Relative to alcohol-and drug-impaired driving, ADAC made three important recommendations: (1) expansion of highway safety training efforts and increased coordination among police, prosecutors, defense attorneys, and judges; (2) enhancement of State and local enforcement of laws against operation of automobiles, boats, and other vehicles while under the influence of alcohol or drugs; and (3) implementation of mandatory alcoholism screening and evaluation of all convicted drunk drivers.⁷⁶ Screening particularly is vital since appropriate intervention and treatment should be afforded first offenders who are problem drinkers to forestall their becoming recidivistic drunk drivers.⁷⁷

⁷⁴ State of New York Anti-Drug Abuse Strategy Report
(Albany: Governor's Statewide Anti-Drug Abuse Council, 1989).

⁷⁵ Ibid., p. 1.

⁷⁶ Ibid., pp. 56-57.

⁷⁷ Ibid., p. 57.

FEDERAL INCENTIVE GRANTS

Congress has enacted statutes providing financial incentives for State Legislatures to enact certain countermeasures to drunk driving. The Alcohol Traffic Safety Program Act of 1982 includes a two-tier incentive grant system for States which have in place or adopt and implement programs prescribed by statute.⁷⁸

To qualify for a basic grant, a State must enact and implement laws providing (1) for prompt license suspension for not less than ninety days for a first drunk driving offense or chemical test refusal, and not less than one year for repeat offenses or refusals; (2) for a mandatory sentence--not subject to suspension or probation--of not less than forty-eight consecutive hours imprisonment or not less than ten days community service for anyone convicted of DWI more than once in five years; (3) that operating a motor vehicle with a BAC of .10 percent or greater constitutes driving while intoxicated; and (4) for increased efforts or resources dedicated to enforcement of alcohol-related driving offenses and increased efforts to inform the public of such

⁷⁸ Alcohol Traffic Safety Program Act of 1982, 96 Stat. 1738, 23 U.S.C. §408. See also 23 CFR §1309.

enforcement.⁷⁹

The second tier of the grant system details supplemental grant eligibility for States meeting the foregoing four criteria which implement a license suspension system in which average time from date of arrest to suspension does not exceed forty-five days and which adopt eight of twenty-two enumerated requirements.⁸⁰ Among the additional requirements are coordination of state alcohol highway safety programs and use of roadside sobriety checks as part of a comprehensive alcohol safety enforcement effort.⁸¹

The Drunk Driving Prevention Act of 1988 authorized two new categories of drunk driving incentive grants. Basic grant eligibility includes an expedited driver's license suspension or revocation system--an individual charged with DWI must have his license suspended or revoked within fifteen days after arrest, or within thirty days if the State demonstrates extenuating circumstances--and a self-sustaining drunk driving prevention program under which fines and surcharges collected for DWI offenses are returned to communities with

⁷⁹ Ibid., 96 Stat. 1738, 23 U.S.C. §408(e)(1)(A)-(D).

Note: Currently, New York State has not enacted the first two basic grant requirements despite legislative efforts to do so, but has enacted the third and fourth basic grant requirements.

⁸⁰ Ibid., 96 Stat. 1738, 23 U.S.C. §408(e)(2) and (f).

⁸¹ Ibid., 96 Stat. 1738, 23 U.S.C. §408(f).

comprehensive DWI prevention programs.⁸² Federal rules effective January 12, 1990, established the manner in which States may certify eligibility and demonstrate compliance.⁸³

In addition to federal legislation proffering monetary inducements to States enacting particular drunk driving measures, Congress enacted the Alcoholic Beverage Labeling Act of 1988 mandating conspicuous labels on alcoholic beverage containers warning of risks of birth defects attendant to alcohol consumption during pregnancy and cautioning that "consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems."⁸⁴ Thus, enactment of federal laws relative to alcoholic beverage labeling and alcohol incentive grants evince a strong commitment at the federal level to continuing efforts to combat drunk driving.

Although New York State has not enacted all laws enumerated as prerequisites to federal incentive grants, it has made commendable progress vis-a-vis drunk driving and, in some areas, leads the nation in innovative and effective countermeasures.⁸⁵ For example, the State's Special Traffic

⁸² Drunk Driving Prevention Act of 1988, 102 Stat. 4521, 23 U.S.C. §410.

⁸³ 23 CFR §1313 (1990).

⁸⁴ Alcoholic Beverage Labeling Act of 1988, 102 Stat. 4521, 27 U.S.C. §204.

⁸⁵ See Chapter III of this report for more detailed information New York State laws.

Options Program for Driving While Intoxicated (STOP-DWI) establishing financially self-sufficient local programs throughout the State to combat drunk driving, provides a model for other states and is discussed in greater detail in Chapter III of this report.⁸⁶

SUMMARY

This chapter describes the alcohol and highway safety problem with emphasis upon New York State, traces recidivism trends, and presents information on DWI countermeasures and federal incentive grants encouraging States to initiate specific types of action to combat drunk driving.

Chapter II focuses upon punishment options for individuals convicted of DWI and DWAI.

⁸⁶ Testimony of National Highway Traffic Safety Administration Traffic Safety Programs Associate Administrator George Reagle, Transcript of the Hearing Before the United States Senate Committee on Environment and Public Works on the Drunk Driving Prevention Act of 1988, June 29, 1988, p. 41.

CHAPTER II
PUNISHMENT OPTIONS

Intense debate concerning public policy initiatives aimed at reducing drunk driving recidivism has become common. Quelling this debate patently lies beyond the scope of this report, but acknowledgement of issues raised thereby informs the decisionmaking process relative to punishment options.

WHAT PUNISHMENT DO RECIDIVISTS DESERVE?

Penal systems generally impose harsher punishment on recidivists than on first offenders. If commission of prior offenses properly has bearing on the degree of deserved punishment, the response of the legal system must encompass the gravity of the instant offense as well as the extent of criminal history.¹ This response can focus primarily on "risk"--the dangerousness of the offender in terms of recidivism potential--or on "desert"--punishment proportionate to the blameworthiness of the criminal conduct.

¹ Andrew von Hirsch, Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals (New Brunswick, New Jersey: Rutgers University Press, 1985), pp. 36, 77, and 91.

Sentencing offenders based on a predictive rationale of risk or dangerousness may be tantamount to eschewing "equity to achieve limited and ill-verified preventive gains."²

Premising punishment on culpability is appealing since offenders thereby are recognized as autonomous individuals responsible for their conduct.

A just and efficient sentencing system should include a range of punishments and not merely a choice between imprisonment and probation. A variety of intermediate punishments, along with appropriate treatment conditions should be part of a comprehensive, integrated system of sentencing and punishment.³

TREATMENT

Most anti-drunk driving programs attempt to rehabilitate offenders by reforming aberrational drinking driving behavior. The majority of people arrested for drunk driving are problem drinkers; light drinkers do not often exceed proscribed blood

² Ibid., p. 172-73.

³ Norval Morris and Michael Tonry, Between Prison and Probation--Intermediate Punishments in a Rational Sentencing System (New York: Oxford University Press, 1990), p. 38.

alcohol content (BAC) levels.⁴ In New York State, recent research undertaken by the New York State Division of Alcoholism and Alcohol Abuse (DAAA) and the Research Institute on Alcoholism (RIA) found that sixty-two percent of first-time driving while intoxicated (DWI) offenders and eighty-four percent of repeat offenders under study were alcohol-dependent.⁵ Problem drinkers are a "notoriously intractable treatment group" often intent on denying alcohol problems; DWI enforcement may provide strong incentives for offenders to enroll in and complete courses of treatment.⁶

Although experts do not agree on the advisability of DWI laws which coerce offenders into treatment, drunk driving arrests are the main source of referrals for alcoholism treatment.⁷

Ironically, requiring treatment for certain drunk driving offenders is viewed variously as overly harsh punishment or overly weak punishment. Relative to the former view, Stanton

⁴ James B. Jacobs, Drunk Driving--An American Dilemma (Chicago: The University of Chicago Press, 1989), p. 181, and Alcoholism Treatment in Criminal Justice (Albany: Governor's Task Force on Alcoholism Treatment in Criminal Justice, October 1986), p. 22.

⁵ Comments of Research Institute on Alcoholism Deputy Director Brenda Miller at a forum on Problem Drinker Drivers, Albany, New York, February 26, 1990. Notes taken by Commission Counsel Joanna M. King.

⁶ Jacobs, Drunk Driving, pp. 181-82.

⁷ Stanton Peele, Diseasing of America--Addiction Treatment Out of Control (Lexington, Massachusetts: D.C. Heath and Company, 1989), p. 50.

Peele noted that DWI offenders in many States are forced to undergo treatment and to abstain from alcohol use for periods ranging from months to years in order to retain driving privileges or, in some cases, to stay out of jail.⁸ The treatment mandate imposed by a court forces offenders to modify their behavior well beyond punishments meted out which do not include a treatment component.⁹

STUDIES OF DWI DRIVERS

Many offenders have problematic relationships with alcohol; thus, some form of treatment as punishment may be warranted to avert future drinking and driving. The question therefore arises as to how effective treatment programs have been in deterring recidivism.

Attempting to answer this question is a formidable task due to the fact that the concept of treatment often is ill-defined in the literature, and the substance and form of treatment programs may vary substantially.¹⁰ In general, the treatment process should include several phases--

⁸ Ibid., p. 221-22. See Chapter IV of this report for more information.

⁹ Ibid.

¹⁰ Patricia Yancey Martin and Kathy L. Pilkenton, "Mandatory Treatment in the Welfare State: Research Issues" in Aaron Rosenblatt, ed., For Their Own Good? Essays on Coercive Kindness (Albany: Nelson A. Rockefeller Institute of Government, State University of New York, 1988), p. 32.

identification and referral, entry assessment, ongoing treatment, transitions after treatment, and consideration of external factors such as family support.¹¹ A recent report by the Governor's Statewide Anti-Drug Abuse Council reviewed the alcoholism treatment literature and concluded that treatment is effective and cost saving.¹² A previous review reached similarly positive conclusions and warned that a flexible program of criminal justice alcoholism treatment is essential if New York State is to reduce crime and ensure safer communities.¹³

Many difficulties inherent in assessing alcoholism treatment effectiveness stem from lack of comparability among studies attempting to evaluate a given treatment program either in addition to or in lieu of other sanctions.

A review of a sample of convicted drunk drivers in Erie County, New York, revealed that, of 1,055 offenders referred for alcohol evaluation in 1981, 70 percent were assessed as having an alcohol problem and were recommended for

¹¹ The Case for Drug and Alcohol Abuse Treatment (Albany: New York State Anti-Drug Abuse Council, March 1990), p. 21.

¹² Ibid., pp. 21-24.

¹³ Denis Foley, "The Coerced Alcoholic: On Felons, Throw-aways, and Others" in Rosenblatt, ed., For Their Own Good? Essays on Coercive Kindness, p. 138.

treatment.¹⁴ Seventy-four percent of these referrals successfully completed the treatment program. This study stressed the need for programs to provide differential assessment and treatment according to the severity of the offender's alcohol problem.¹⁵

A second study addressed the relationship between coercing problem drinkers into treatment and the outcome of treatment, concluding that the element of coercion in referrals rendered a successful treatment outcome considerably more likely than strictly voluntary self-referral.¹⁶ In addition, coercion was most effective when penalties for noncompliance, such as license revocation, were more certain as opposed to more severe.¹⁷

The effectiveness of deferred prosecution for DWI in Washington State was explored in a study of 2,194 drivers

¹⁴ Richard Washousky, "An Alcoholism Outpatient Treatment Program for Alcoholics Convicted of DWI" in Denis Foley, ed., STOP DWI--Successful Community Responses to Drunk Driving (Lexington, Massachusetts: D.C. Heath and Company, 1986), pp. 78-79.

¹⁵ Ibid., p. 80.

¹⁶ Roger G. Dunham and Armand L. Mauss, "Reluctant Referrals: The Effectiveness of Legal Coercion in Outpatient Treatment for Problem Drinkers," Journal of Drug Issues, Winter 1982, pp. 7 and 17-18.

¹⁷ Ibid., p. 18.

charged with DWI in 1976.¹⁸ Deferred prosecution culminated in dismissal of DWI charges for offenders who satisfactorily completed a treatment program and were not convicted of a subsequent drunk driving offense within two years. The control group did not participate in treatment, but received the customary fine and license sanction whereas the deferred prosecution group avoided these sanctions.¹⁹

The two groups differed in average age and extent of prior alcohol-related driving violations. That is, the type of driver selected to participate in the treatment program was not representative of typical DWI offenders. Treatment group offenders were older, tended to be male, and had worse records for alcohol-related violations.²⁰ This group subsequently accumulated significantly more alcohol-related violations in the three year follow-up period. Researchers concluded that the deferred prosecution program did not reduce recidivism compared with other legal sanctions and queried whether current alcohol treatment approaches provide adequate intervention to deter drinking and driving.²¹

¹⁸ Philip M. Salzberg and Carl L. Klingberg, "The Effectiveness of Deferred Prosecution for Driving While Intoxicated," Journal of Studies on Alcohol, 1983, pp. 299-306.

¹⁹ Ibid., p. 301-02.

²⁰ Ibid., p. 303.

²¹ Ibid., p. 306.

A third study tracked the progress of DWI offenders in Shelby County, Tennessee, from September 1976 to the end of 1980, designating the first two years for offender intake and the remaining two years for follow-up study.²² The 4,126 DWI offenders were classified either as social or problem drinkers and were assigned randomly to four groups in order of severity--control, education/therapy, probation supervision, and supervision plus education/therapy.²³ The control group had no interaction with the legal system. The education/therapy group assigned social drinkers and problem drinkers to a ten-hour alcohol-safety course; the latter also were assigned to eight one and one-half hour group therapy sessions. The probation supervision group was required to report to probation counselors once a month for thirty minutes for a one-year period. The supervision plus education/therapy group combined the requisites described above for each of the other groups.

Overall, no significant differences were found among the four groups. Among social drinkers, the control group had the lowest rearrest rate. Relative to problem drinkers, the probation supervision group had the lowest rearrest rate. Possible explanations for the failure of these treatment

²² Robert T. Holden, "Rehabilitative Sanctions for Drunk Driving: An Experimental Evaluation," Journal of Research in Crime and Delinquency, January 1983, pp. 55-72.

²³ Ibid., pp. 58-59.

programs were (1) the programs were inappropriate for the project participants, (2) many participants committed drunk driving offenses as part of a general pattern of criminal deviance, and (3) treatment programs may have been too weak to affect recidivism.²⁴ Each criticism often may be leveled fairly against other research efforts, particularly when intervention procedures do not classify offenders adequately.

Promising criteria used to delineate social and problem drinkers within DWI offender populations include BAC at the time of arrest, scores on validated screening tests, prior violations, and prior rehabilitation program participation.²⁵ An analysis of treatment decisions for convicted drunk drivers in Erie County, New York, revealed BAC at time of arrest and high Mortimer-Filkins scores were the two best discriminating variables relative to treatment decisions.²⁶

Of 2,061 offenders evaluated, 71.3 percent were recommended for further treatment; this group was more apt to evidence health, family, vocational, social, and educational difficulties. The average BAC at time of arrest for the

²⁴ Ibid., p. 69.

²⁵ Brenda A. Miller, Robert Whitney, and Richard Washousky, "The Decision to Recommend Alcoholism Treatment for DWI Offenders," American Journal of Drug and Alcohol Abuse, Vol. 10, No. 3, 1984, pp. 447-59.

²⁶ Ibid., pp. 447-49. The Mortimer-Filkins test is an alcohol problem evaluation instrument including a questionnaire and an interview.

recommended-for treatment group was .204 percent, double the legal limit.²⁷

For drivers scoring in the medium to low range on the Mortimer-Filkins screening instrument, additional data must be evaluated to diagnose alcohol problems properly and refer offenders accordingly. Driving records or more subjective criteria may prove important indicia of problem drinking behavior.²⁸

The same research team conducted another study analyzing the extent of alcohol problems among a sample of 461 DWI offenders referred for evaluation in Erie County, New York.²⁹ Only four percent of the offenders reported no problems with alcohol beyond the instant drunk driving violation and over one-half of the sample was diagnosed as alcohol abusers.³⁰ The study revealed that "persons with more serious alcohol-related problems contribute to the drinking/driving problem more substantially."³¹ The researchers hypothesized that persons diagnosed as alcohol-dependent, the most severe

²⁷ Ibid., pp. 450-53.

²⁸ Ibid., p. 457.

²⁹ Brenda A. Miller, Robert Whitney, and Richard Washousky, "Alcoholism Diagnoses for Convicted Drinking Drivers Referred for Alcoholism Evaluation," Alcoholism--Clinical and Experimental Research, November/December 1986, pp. 651-56.

³⁰ Ibid., p. 655.

³¹ Ibid., p. 656.

category, present higher risks for recidivism given the significantly greater number of times they reported drinking large quantities of alcohol and driving.³²

Although rehabilitating offenders is an important goal, the possibility of failure should not be discounted. State-sponsored treatment efforts may not be able to change the values and habits of recalcitrant individuals lacking the necessary motivation.³³

Clearly, a significant number of DWI offenders have a demonstrable need for some type of intervention services relative to treatment for alcohol problems. There exists a need for individual treatment programs to document their experiences carefully and to demonstrate their efficacy vis-a-vis stated goals. Various studies have attempted to explore the viability of different approaches. Many studies concluding that a given treatment course is ineffective suffer from serious methodological difficulties. Some evaluations are inconclusive due to nonrepresentative samples, unavailability of valid comparison groups, or inadequate follow-up periods.

³² Ibid.

³³ Von Hirsch, Past or Future Crimes, pp. 5 and 173.

ADMINISTRATIVE PER SE LICENSE SUSPENSION

Administrative license suspension, commonly known as administrative per se, refers to laws under which persons arrested for alcohol-related driving violations are subject to immediate administrative, rather than judicial, license suspension or revocation.³⁴ Administrative per se laws provide for license suspension pending prosecution, i.e., pre-conviction.

Most administrative per se laws authorize a police officer to seize a driver's license upon arrest for driving under the influence of alcohol when the offender either fails or refuses to submit to a breath test.³⁵ Police generally view administrative per se laws as positively affecting enforcement since their efforts yield swift, certain license suspension.³⁶ Absent administrative per se legislation, the imposition of license sanctions usually is within the

³⁴ Paul L. Zador, Adrian K. Lund, Michele Fields, and Karen Weinberg, Fatal Crash Involvement and Laws Against Alcohol-Impaired Driving (Washington, D.C.: Insurance Institute for Highway Safety, 1988), p. 4, and Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocations (Washington, D.C.: National Transportation Safety Board, 1984), p. 11 (Hereinafter referred to as NTSB, Deterrence of Drunk Driving).

³⁵ Zador, et al., Fatal Crash Involvement, p. 5.

³⁶ Patricia F. Waller, "Licensing and Other Controls of the Drinking Driver," Journal of Studies on Alcohol, July 1985, p. 155.

discretion of the judge at the time of sentencing.³⁷ Under administrative per se, the offender receives a notice at the time of arrest which serves as a temporary driver's license.³⁸ The notice details the method by which an offender can request an administrative hearing or review of the licensing action.³⁹ Offenders generally must request a hearing within a week to ten days after receiving the notice.⁴⁰

Twenty-nine states and the District of Columbia have enacted administrative per se license suspension laws; New York State is not among them.⁴¹ However, New York State provides for license suspension pending prosecution in certain circumstances.⁴² States with administrative per se laws typically set the proscribed BAC level at which automatic license suspension occurs at .10 percent and above.

37 James L. Nichols and H. Laurence Ross, "The Effectiveness of Legal Sanctions in Dealing with Drinking Drivers," Surgeon General's Workshop on Drunk Driving Background Papers (Washington, D.C.; United States Department of Health and Human Services, December 14-16, 1988), p. 105.

38 NTSB, Deterrence of Drunk Driving, p. 12.

39 Ibid.

40 Zador, et al., Fatal Crash Involvement, p. 5.

41 Information is derived from Commission Research Assistant Tracey Suess' telephone interview with National Highway Traffic Safety Administration Office of Alcohol and State Programs Highway Safety Specialist Steven Hatos, April 30, 1990.

42 See Chapter III of this report for more detailed information.

The deterrent efficacy of a sanction depends in part on the "perceived certainty, severity, and swiftness or celerity of punishment in the event of a violation of the law."⁴³ Studies conducted by H. Laurence Ross reveal that the certainty and swiftness of sanctions have a greater deterrent effect than the severity of sanctions.⁴⁴

According to a review undertaken by the National Transportation Safety Board (NTSB), administrative per se results in the perception among highway users that arrest, conviction, and sanction imposition will accompany alcohol-related driving occurrences; consequently drivers are less apt to drive after drinking.⁴⁵ In addition, loss of license generally is viewed by the public as a severe sanction.⁴⁶ The National Highway Traffic Safety Administration (NHTSA) conducted research on the deterrent effect of administrative per se and concluded certainty of license suspension is essential in reducing recidivism.⁴⁷

⁴³ NTSB, Deterrence of Drunk Driving, p. 4.

⁴⁴ H. Laurence Ross, Deterring the Drinking Driver (Lexington, Massachusetts: D.C. Heath and Company, 1984), p. 9.

⁴⁵ NTSB, Deterrence of Drunk Driving, p. 4.

⁴⁶ Waller, "Licensing and Other Controls," p. 154.

⁴⁷ R.D. Blomberg, D.F. Preusser, and R.G. Ulmer, Deterrent Effects of Mandatory License Suspension for DWI Conviction (Washington, D.C.: National Highway Traffic Safety Administration, 1987), p.i.

The administrative license revocation occurs independent of the outcome of the criminal charge.⁴⁸ The administrative hearing has a narrow scope and may address whether the police officer had probable cause to make the arrest or to request submission to a breath test, whether a test was refused, or whether test results met or exceeded the specified BAC level.⁴⁹ Thus, unless the hearing determines that the police officer lacked probable cause to require a chemical test or that the test procedure was improper, the administrative license suspension will take place.⁵⁰

Critics of administrative per se legislation charge that such laws are ineffectual because a majority of DWI offenders continue to drive during the period of license suspension.⁵¹ However, there is evidence that drivers under license suspension have significantly lower rates of rearrest for DWI and alcohol-related crash involvement.⁵² In addition, offenders continuing to drive during license suspension

⁴⁸ Zador, et al., Fatal Crash Involvement, p. 4.

⁴⁹ NTSB, Deterrence of Drunk Driving, p. 12.

⁵⁰ Waller, "Licensing and Other Controls," p. 154.

⁵¹ Robert B. Voas and John H. Lacey, "Issues in the Enforcement of Impaired Driving Laws in the United States," Surgeon General's Workshop on Drunk Driving Background Papers (Washington, D.C.: United States Department of Health and Human Services, December 14-16, 1988), p. 152.

⁵² Ibid.

periods usually drive less often, shorter distances, and more safely.⁵³

Some critics misapprehend the status of a driver's license by terming it a right of the holder. However, possession of a driver's license is more akin to a privilege issued administratively and subject to administrative suspension or revocation. Administrative license suspension permits prompt withdrawal of driving privileges from arrested individuals failing or refusing to take a BAC test; the actual adjudication of a drunk driving charge and subsequent license withdrawal process upon conviction otherwise could span months.⁵⁴

Another criticism of administrative per se legislation involves the claim that license suspension or revocation often results in job loss for the offender.⁵⁵ A study conducted by researchers at Mississippi State University refuted this criticism, concluding that driver's license suspension had little effect on employment stability of alcohol-related driving offenders.⁵⁶ In the driver sample under study the

⁵³ Ibid; and Jacobs, Drunk Driving, pp. 151-52.

⁵⁴ Carol Brierly Golin, "Arresting the DUI Epedemic," Pathologist, March 1985, p. 48.

⁵⁵ Elisabeth Wells-Parker and Pamela J. Cosby, Impact of Driver's License Suspension on Employment Stability of Drunken Drivers (Starkville: Mississippi State University, June 1987), p. 1.

⁵⁶ Ibid., p. 8.

prevalence of problem drinking among drivers was found to be a key factor affecting employment stability.⁵⁷ "Decisionmakers must weigh the relatively slight chance of negative impact on employment of individual offenders against the possibility that uniform suspension will result in reduced accidents, injuries, and fatalities."⁵⁸

Researchers at the Insurance Institute for Highway Safety studied the effect of administrative per se, concluding that such laws significantly contribute to a decline in fatal crash involvement, especially during hours when most fatalities occur--evening, late night, and early morning.⁵⁹ Administrative per se laws were associated with an eleven percent decline in fatal crashes during hours of highest alcohol involvement.⁶⁰ Nationwide, the proportion of the population covered by administrative per se laws increased from three to nineteen percent between 1982 and 1984; between 1981 and 1985 the number of drivers involved in fatal crashes during hours of highest alcohol involvement decreased from approximately 9,800 to 7,300.⁶¹

⁵⁷ Ibid., p. 12.

⁵⁸ Ibid.

⁵⁹ Zador, et al., Fatal Crash Involvement, p. 17.

⁶⁰ Ibid., p. 12.

⁶¹ Ibid.

Research conducted by H. Laurence Ross in New Mexico included three telephone surveys of randomly-selected drivers in Bernalillo County immediately prior to, two months after, and thirteen months after enactment of the State's administrative per se law.⁶² The surveys conducted during this time period revealed "no longlasting change in the proportion of drivers admitting to driving after drinking."⁶³ Ross' study indicated that the law's effectiveness appeared to have been diminished due to a lack of publicity about the new law and the law's complex procedural requirements which proved unpopular with many police officers.⁶⁴ However, the administrative per se license suspension law achieved a deterrent effect, at least in its first twenty months; prior to the law's enactment, sixty-six percent of drivers and pedestrians involved in fatal crashes had illegal BACs compared with fifty-six percent subsequent to enactment, a decline of ten percent.⁶⁵

License suspension or revocation is considered to be the "single most effective sanction for reducing subsequent

⁶² H. Laurence Ross, "Administrative License Revocation in New Mexico: An Evaluation," Law and Policy, January 1987, p. 12.

⁶³ Ibid., p. 13.

⁶⁴ Ibid., p. 5.

⁶⁵ Ibid., pp. 13-14.

traffic offenses and accidents."⁶⁶ Administering this important sanction immediately upon commission of the offense enhances DWI deterrence since the time between offense and punishment thereby is reduced.⁶⁷ License suspension has been shown to have a significant effect in stemming recidivism.⁶⁸ Factors enhancing the efficacy of license suspension for reducing recidivism include increasing the certainty of application, disallowing remedial programs in lieu of license sanctions, and ensuring reasonable suspension length.⁶⁹

Superintendent of State Police Thomas Constantine, in testimony submitted to the Legislative Commission of Critical Transportation Choices for its public hearing on drunk driving recidivism, urged enactment of an administrative per se law, noting both its effectiveness in combatting recidivism and its

⁶⁶ Voas and Lacey, "Issues in Enforcement," p. 152.

⁶⁷ Ibid., p. 151.

⁶⁸ Nichols and Ross, "The Effectiveness of Legal Sanctions," pp. 102-03. See also Robert E. Hagen, "The Efficacy of Licensing Controls as a Countermeasure for Multiple DUI Offenders," Journal of Safety Research, Fall 1987, p. 116.

⁶⁹ Ibid., p. 105.

utility for accessing additional federal funds.⁷⁰

Nationwide, a broad coalition of public and private organizations has been forged in support of administrative per se legislation, including National Transportation Safety Board, National Commission Against Drunk Driving, National Highway Traffic Safety Administration, Federal Highway Administration, Mothers Against Drunk Driving, Students Against Drunk Driving, Remove Intoxicated Drivers, National Safety Council, American Trucking Associations, Insurance Institute for Highway Safety, Highway Users Federation for Safety and Mobility, and National Coalition to Prevent Impaired Driving, among others.⁷¹

INCARCERATION AND ALTERNATIVES THERETO

Preventing drunk driving offenders from operating motor vehicles may be achieved through a variety of means, including the imposition of jail or prison sentences or various

⁷⁰ Testimony of Superintendent of State Police Thomas A. Constantine, Official Transcript of the Public Hearing on Drunk Driving Recidivism held by the New York State Legislative Commission on Critical Transportation Choices, the New York State Senate Standing Committee on Transportation, and the New York State Senate Special Task Force on Drunk Driving, New York, New York, December 2, 1987, Exhibit 1, p. 2. (Hereinafter referred to as Drunk Driving Recidivism Hearing Transcript).

⁷¹ Information provided by National Transportation Safety Board State and Local Liaison Stephen Blackistone, October 15, 1990.

alternatives to incarceration such as jail/treatment, community service, home detention, or ignition interlock programs. There is no consensus of opinion on the appropriateness of incarceration as a sanction across different types of drunk driving offenses. A number of experts believe that confinement in correctional facilities is expensive and counterproductive and should be invoked only for offenders who cannot be supervised safely or effectively in less restrictive and less costly programs.⁷² Yet, for egregious drunk driving incidents or repeat offenses, significant jail terms indeed may be appropriate.⁷³

The efficacy of the jail sanction is difficult to ascertain since it rarely has been applied consistently to drunk drivers.⁷⁴ A study undertaken by the National Institute of Justice described the experiences with mandatory confinement of four jurisdictions in the States of Washington,

⁷² NHTSA, The Drunk Driver and Jail--Alternatives to Jail (Washington, D.C.: National Highway Traffic Safety Administration, January, 1986), p. vii).

⁷³ Jacobs, Drunk Driving, p. 159.

⁷⁴ NHTSA, The Drunk Driver and Jail -- Alternatives to Jail, p. vii. See also H. Laurence Ross and James P. Foley, "Judicial Disobedience of the Mandate to Imprison Drunk Drivers," Law and Society Review, 1987, pp. 315-23.

Tennessee, Ohio, and Minnesota.⁷⁵

Findings included increased court workloads and severe strains on correctional and probation services. In addition, more defendants contested their arrests and conviction rates varied among jurisdictions. Researchers warned that implementation of enhanced confinement programs invariably requires additional resources, including funding, personnel, and facilities.

A recent review of research on the impact of confinement on recidivism yielded little support for the traditional imprisonment sanction.⁷⁶ However, confinement in special facilities with alcoholism screening and treatment components tends to positively affect recidivism.⁷⁷

Community service programs also may be instituted, typically as a condition of probation.⁷⁸ Such programs may be beneficial in many ways including saving taxpayers the cost of

⁷⁵ Information is derived from Jailing Drunk Drivers: Impact on the Criminal Justice System (Washington, D.C.: National Institute of Justice, May 1985).

⁷⁶ Nichols and Ross, "The Effectiveness of Legal Sanctions," pp. 96-97.

⁷⁷ Ibid.

⁷⁸ Community Service Restitution Programs for Alcohol Related Traffic Offenders (Washington, D.C.: National Highway Traffic Safety Administration, December 1985), p. 1.

incarceration, enabling offenders to make restitution to the community, and educating offenders about drunk driving.⁷⁹

Electronic home monitoring (EHM) presents an alternative to jail by confining the offender to his home. EHM monitoring is cost-effective; an offender sentenced to an electronic home detention program lives at home, continues to work, and often receives treatment.⁸⁰ A transmitter is attached to the offender to verify that he or she is at home or at work.⁸¹ EHM requires the offender to remain at home at night when most alcohol-related traffic accidents occur thereby increasing public safety.⁸² Reducing drinking opportunities for the repeat offender also may support treatment objectives.⁸³

The ignition interlock device currently is being used as an alternative to jail for drunk driving offenders.⁸⁴ Devices

⁷⁹ Ibid. See also NHTSA, The Drunk Driver and Jail -- Alternatives to Jail, p. 14.

⁸⁰ Robert B. Voas, "Emerging Technologies for Controlling the Drunk Driver" in Michael B. Laurence, John R. Snortum, and Franklin E. Zimring, eds., Social Control of the Drinking Driver (Chicago: The University of Chicago Press, 1988), pp. 363-64.

⁸¹ Ibid., p. 363.

⁸² Ibid., p. 364.

⁸³ Ibid.

⁸⁴ Written Testimony Submitted by Guardian Interlock Systems, Incorporated, Drunk Driving Recidivism Hearing Transcript, exhibit 2, p. 1.

usually are installed as a condition of probation.⁸⁵ Before an offender can start a vehicle equipped with an ignition interlock device, he or she must breathe into a breath analyzer attached to the vehicle's ignition.⁸⁶ A BAC reading exceeding the pre-set calibration level will prevent the vehicle from starting.⁸⁷ The ignition interlock device enables an offender to continue to work, and to attend needed medical treatment or therapy and probation appointments.⁸⁸ The device is aimed at reducing recidivism by ensuring that the offender will not continue to drive while under the influence of alcohol.⁸⁹

It may be misleading to label many of these options "alternatives to incarceration."⁹⁰ In Between Prison and Probation, Norval Morris and Michael Tonry suggested replacing this term with "intermediate punishments" to cover an array of options, including intensive probation, substantial fines, community service, EHM, and other residential or treatment

⁸⁵ Charles Gridley, "Ignition Interlock--Another Attempt to Reduce DWI," Issues in Focus (Albany: New York State Senate Research Service), April 3, 1989, p. 1.

⁸⁶ Ibid., p. 4.

⁸⁷ Ibid., p. 2.

⁸⁸ New York Laws of 1988, Chap. 713, and New York Vehicle and Traffic Law, §1198(3)(b) (McKinney 1990 Supp.).

⁸⁹ Gridley, "Ignition Interlock," p. 7.

⁹⁰ Information is derived from Morris and Tonry, Between Prison and Probation, pp. 4-8 and 205.

programs. These punishments are not properly termed incarceration alternatives because most felonies are not and never were punished routinely by imprisonment. "Alternative" also implies that these measures are substitutes for real punishment. In addition, use of intermediate punishments may not mitigate prison overcrowding problems because they may be invoked for offenders who would not otherwise have been sentenced to a jail or prison term. Morris and Tonry advocate punishments more severe than probation and less severe than protracted imprisonment.

Importantly, the authors maintain intermediate punishments should not function in isolation, but should be and often are combined with other punishments in order to better address the diversity of individual offenders and to protect the public in general. Intermediate punishments meaningfully address the dispute between those advocating enhanced jail terms and those decrying the excessive cost and doubtful efficacy of such solutions.

SUMMARY

This chapter describes studies of DWI drivers and reviews various punishment options including treatment programs, administrative per se license suspension, incarceration, and alternatives to incarceration.

Chapter III examines in detail New York State's efforts to mitigate the recidivism problem.

CHAPTER III

NEW YORK STATE'S APPROACH TO RECIDIVISM

The New York State Legislature has enacted a multitude of laws to combat drunk driving involving substantial civil and criminal penalties, license sanctions, and plea bargaining restrictions. Drunk driving laws are primarily enumerated in the Vehicle and Traffic Law and the Penal Law, but relevant provisions also are found in the Criminal Procedure Law. As noted in Chapter I, the development of drunk driving law reform during the 1980s in New York State previously has been documented exhaustively.¹

DRUNK DRIVING LAWS

Driving while ability impaired (DWAI) by alcohol is a traffic infraction for which a blood alcohol content (BAC) level between .05 and .07 percent is relevant evidence of impairment and a BAC between .07 and .10 percent provides prima facie

¹ See, for example, Drunk Driving Reform in New York State 1980-1984--Strategy, Results, and Recommendations (Albany: Assembly Transportation Committee and Assembly Subcommittee on Drunk Driving, May 1984), and How Much Tougher Should New York State's Anti-Drunk Driving Laws Be? (Albany: Legislative Commission on Critical Transportation Choices, October 1985).

evidence of impairment.² Driving While Intoxicated (DWI) is a misdemeanor for which a BAC of .10 percent or above is "illegal per se."³

Plea bargaining--i.e., entering a guilty plea to a lesser offense in satisfaction of a charge--out of alcohol-related offenses is not allowed for a DWI charge unless available evidence indicates that the original charge was not warranted and the court must include in the record the basis of the disposition.⁴ A defendant charged with DWAI is not precluded from pleading to a non-alcohol offense.

CHEMICAL TEST REFUSAL

Anyone operating a motor vehicle in the State is deemed to have consented impliedly to submit to a chemical test of his blood, breath, saliva, or urine to determine BAC.⁵ Refusal to submit to a chemical test under the implied consent provision is admissible into evidence. As of 1990, a first offense results in a mandatory driver's license revocation for at least six months and a civil penalty of \$200, an increase from \$100; a second or subsequent refusal within five years--or first refusal

² New York Vehicle and Traffic Law, §§1192(1) and 1195(2)(b) and (c) (McKinney 1990 Supp.).

³ Ibid., §1192(2) and (3). Subsequent offenses constitute felonies.

⁴ Ibid., §1192(8).

⁵ Ibid., §1194(2)(a).

when the offender has had a previous alcohol-involved driving conviction within five years--results in mandatory license revocation for at least one year and a civil penalty of \$500, an increase from \$250.⁶

In refusal cases, the driver's license also may be suspended at arraignment pending final determination if the police officer submits a sworn written report.⁷

FINE UPON CONVICTION

DWAI is punishable by a mandatory fine of \$250 to \$350 for a first offense, \$350 to \$500 for a second offense within 5 years, and \$500 to \$1,500 for third and subsequent offenses.⁸

DWI results in a mandatory fine of \$350 to \$500 for a first offense which constitutes a misdemeanor.⁹ Second and subsequent DWI offenses within 10 years constitute Class E felonies and carry a mandatory fine of \$500 to \$5,000.¹⁰

⁶ Ibid., §1194(2)(d) and (f). See New York Laws of 1990, Chap. 190, to be codified at New York Vehicle and Traffic Law, §1194(2)(d)(2).

⁷ Ibid., §1195(2)(b).

⁸ Ibid., §1193(1)(a).

⁹ Ibid., §1193(1)(b).

¹⁰ Ibid., §1193(1)(c).

IMPRISONMENT TERM UPON CONVICTION

Although alcohol-related driving offenses do not carry mandatory minimum imprisonment terms, judges may in their discretion impose a jail term and, in some cases, a prison term.

DWAI is punishable by imprisonment not exceeding fifteen days for a first offense, thirty days for a second offense within five years, and ninety days for third and any subsequent alcohol-involved offenses within ten years.¹¹

DWI is punishable by a term of imprisonment not exceeding one year for a first offense or four years for second and subsequent offenses.¹²

LICENSE SANCTION UPON CONVICTION

DWAI results in a ninety day driver's license suspension for a first offense and a minimum six month revocation if the offender has been convicted of any alcohol-related driving offense within the previous five years.¹³

DWI occasions a minimum six month license revocation for a first offense and a minimum one year revocation for a second or subsequent DWI offense within ten years.¹⁴

¹¹ Ibid., §1193(1)(a).

¹² Ibid., §1193(1)(c) and New York Penal Law, §§66.10 and 70.00 (McKinney 1987).

¹³ New York Vehicle and Traffic Law, §1193(2)(a) and (b).

¹⁴ Ibid., §1193(2).

License sanctions are mandatory, but vehicle registrations also may be revoked.¹⁵ Permanent license revocation occurs if the offender has two DWI convictions in cases in which personal injury has resulted from each offense.¹⁶ Permanent license disqualification from operating certain motor vehicles also is authorized by statute.

License sanctions generally are imposed by the court upon conviction for the charged offense and either take effect at sentencing or twenty days thereafter if the judge so orders.¹⁷ However, license suspension pending prosecution for an alcohol-related driving violation is mandated in certain cases--when the defendant also is charged with vehicular assault, vehicular manslaughter, or criminally negligent homicide arising out of the same offense, or has been convicted of an alcohol-related traffic offense within the previous five years.¹⁸ This suspension pending prosecution is court-ordered and occurs no later than twenty days after the offender's first court appearance or at the conclusion of all proceedings requisite to arraignment.¹⁹

¹⁵ Ibid., §1193(2)(c). See §510 for additional information on suspension, revocation, and reissuance of licenses and registrations.

¹⁶ Ibid., §1193(2)(e)(3).

¹⁷ Ibid., §1193(2)(d)(McKinney 1990 Supp.).

¹⁸ Ibid., §1193(2)(e)(1).

¹⁹ Ibid., §1193(2)(e)(1)(b).

Bills have been introduced in the New York State Legislature to establish administrative per se license suspension, but have not been enacted.²⁰ During the 1990 Session, Senate 5102, sponsored by Senator Norman J. Levy, would institute mandatory license suspension pending prosecution for drivers operating a motor vehicle with a BAC of .10 percent or more. Several organizations in New York State have issued memoranda supporting enactment of an administrative per se law, including New York State Mothers Against Drunk Driving, Remove Intoxicated Drivers, the Medical Society of New York State, and the Erie County STOP-DWI program.²¹

AGGRAVATED UNLICENSED OPERATION

State law also treats seriously motor vehicle operation during license suspension or revocation periods. Aggravated unlicensed operation (AUO) in the second degree applies when a person operates a motor vehicle during a period of license suspension or revocation imposed for an alcohol-related driving offense. Second degree AUO is a misdemeanor punishable both by a mandatory fine of \$500 to \$1,000 and imprisonment not to

²⁰ See Chapter II of this report for a detailed discussion of the administrative per se license suspension option.

²¹ See Memoranda in Support issued by: New York State Mothers Against Drunk Drivers on June 28, 1990; Remove Intoxicated Drivers on February 1, 1989; the Medical Society of New York State on May 26, 1988; and the Erie County STOP-DWI Program on June 26, 1990.

exceed 180 days.²² First degree AVO applies when a person operates a motor vehicle while under the influence of alcohol or drugs during a license suspension or revocation period imposed for an alcohol-related driving offense. AVO in the first degree is a class E felony punishable by a mandatory fine of \$500 to \$5,000 and imprisonment for up to four years.²³

As of November, 1990, a judge may sentence first and second degree AVO offenders to a split sentence of incarceration followed by probation.²⁴ Previously, a judge could impose incarceration or probation, but not both.

SPECIAL VEHICLES AND OFFENSES

Enhanced penalties also are authorized when a person in an impaired or intoxicated condition transports hazardous materials, operates certain commercial motor vehicles, or causes the injury or death of another person.

VEHICULAR ASSAULT AND MANSLAUGHTER

The crimes of vehicular assault and vehicular manslaughter apply to persons driving while intoxicated whose criminal

²² New York Vehicle and Traffic Law, §511(2)(a)(iii)
(McKinney 1990 Supp.).

²³ Ibid., §511(3)(a)(ii).

²⁴ New York Laws of 1990, Chap. 786 and New York Vehicle Traffic Law, §§511(2)(b) and (3)(b).

negligence causes the serious physical injury (vehicular assault) or death (vehicular manslaughter) of another person.²⁵ Criminal negligence denotes a failure to perceive an unjustifiable risk with respect to a particular result or circumstance as described statutorily. The risk must be of such degree and nature as to make failure to perceive it a "gross deviation from the standard of care that a reasonable person would observe in the situation."²⁶

Vehicular assault in the second degree occurs when a person operating a motor vehicle in violation of the DWI laws and in a criminally negligent manner causes serious physical injury to another person.²⁷ This crime is a class E felony punishable by a term of imprisonment not exceeding 4 years and a fine not exceeding \$5,000.²⁸ Vehicular assault in the first degree involves commission of the lesser included offense of second degree vehicular assault while knowing or having reason to know that one's driver's license is suspended or revoked based upon a prior chemical test refusal or alcohol-related driving conviction.²⁹ First degree vehicular assault, a class D felony,

²⁵ New York Penal Law, §§120.03, 120.04, 125.12, and 125.13 (McKinney 1987).

²⁶ Ibid., §15.05.

²⁷ Ibid., §120.03.

²⁸ Ibid., and §§70.00(2)(e) and 80.00(1)(a).

²⁹ Ibid., §120.04.

is punishable by a term of incarceration not exceeding seven years and a fine not exceeding \$5,000.³⁰

Vehicular manslaughter in the second degree denotes a Class D felony involving the death of another person based on the offender's criminally negligent action while violating the DWI laws; the offender faces a fine of not more than \$5,000 and a term of imprisonment not to exceed seven years.³¹ Vehicular manslaughter in the first degree constitutes a Class C felony and occurs when a driver commits the lesser included offense of vehicular manslaughter in the second degree and causes the death of another person while operating a motor vehicle during a license suspension or revocation period which was due either to an alcohol-related driving offense or refusal to submit to a chemical test. This offense carries a jail term not to exceed fifteen years and a fine of not more than \$5,000.³² Mandatory license revocation periods for the above offenses are at least six months.³³

COMMERCIAL MOTOR VEHICLES

Under current law, operation of enumerated commercial motor vehicles--such as trucks over 18,000 pounds, taxicabs, buses,

³⁰ Ibid., and §§70.00(2)(d) and 80.00(1)(a).

³¹ Ibid., §§70.00(2)(d), 80.00(1)(a), and 125.12.

³² Ibid., §§70.00(2)(c), 80.00(1)(a), and 125.13.

³³ New York Vehicle and Traffic Law, §510(6) (McKinney 1990 Supp.).

and school buses--while impaired or intoxicated is a misdemeanor punishable by a mandatory fine of \$500 to \$1,500, or imprisonment for not more than one year, or both, and a minimum one year license revocation for a first offense.³⁴ A subsequent offense within 10 years is a class E felony punishable by a mandatory fine of \$1,000 to \$5,000, or imprisonment for not more than 4 years, or both; a minimum one year license revocation; and disqualification from operating commercial motor vehicles for at least five years.³⁵

A violation of 1192(1), DWAI, while operating a motor vehicle weighing in excess of 18,000 pounds containing flammable gas, radioactive materials, or explosives is a misdemeanor punishable by a fine of not less than \$500 or more than \$1,500, imprisonment for not more than one year, or both.³⁶ Previously, these penalties applied to a DWI conviction involving the transportation of hazardous materials.

A violation of §1192(2), (3), or (4), DWI, under the above circumstances constitutes a class E felony punishable by a fine of not less than \$1,000 or more than \$5,000, imprisonment for not more than four years, or both.³⁷ Thus, a DWI conviction

³⁴ Ibid., §1193(1)(d) and (d)(2) (McKinney: 1990 Supp.).

³⁵ Ibid., §1193(1)(d)(3) and New York Penal Law, §§70.00 and 70.15 (McKinney: 1987 and 1990 Supp.).

³⁶ New York Laws of 1990, Chap. 173, §27(3) to be codified at New York Vehicle and Traffic Law, §1193(1)(d).

³⁷ Ibid.

involving hazardous materials transportation is elevated to felony status.

During its 1990 session, the New York State Legislature enacted a comprehensive law regarding commercial motor vehicle operation and licensure; Senate 7950-A sponsored by Senator Norman J. Levy, and Assembly 11007, sponsored by Assemblyman Michael Bragman, became Chapter 173 of the Laws of 1990.³⁸ A key impetus for this new law was provided by recent changes in federal law. Congress enacted the Commercial Motor Vehicle Safety Act of 1986 requiring that, by April 1, 1992, a commercial motor vehicle driver hold a single driver's license, known as a Commercial Driver's License (CDL).³⁹ Final rules were issued by the Federal Highway Administration on October 4, 1988, mandating CDL revocation upon conviction for driving a commercial motor vehicle with a BAC of .04 percent or more or while intoxicated or impaired by alcohol or other drugs.⁴⁰

New York State's new law amends existing law in several important ways. Commercial motor vehicles are defined to include any motor vehicle weighing in excess of 26,000 pounds, buses, school buses, any motor vehicle designed to transport

³⁸ New York Laws of 1990, Chap. 173, amending various sections of New York Vehicle and Traffic Law, New York Transportation Law, and New York Penal Law.

³⁹ Commercial Motor Vehicle Safety Act of 1986, 100 Stat. 3207, 49 USC 12006 (1986).

⁴⁰ 49 CFR 383 (1988).

fifteen or more passengers, and any size motor vehicle transporting hazardous materials.⁴¹

Two new provisions were added to Vehicle and Traffic Law §1192 creating two new per se DWAI categories for commercial motor vehicle operations; per se-level I denotes a BAC of .04 percent or more but not more than .07 percent [§1192(5)], and per se-level II denotes a BAC of more than .07 percent but less than .10 percent [§1192(6)].⁴² Per se-level I is a traffic infraction punishable by the same fines and jail sentences as DWAI for operation of any motor vehicle.⁴³ Per se-level II constitutes a misdemeanor punishable by a fine of not less than \$500 or more than \$1,500, imprisonment for not more than 180 days, or both.⁴⁴ A person convicted of per se-level II--with one previous conviction for DWI, DWAI or per se-level II [§§1192(1)-(4) or (6)] within ten years--is guilty of a misdemeanor as described above. However, a person convicted of a per se-level II offense twice within five years of a conviction at the misdemeanor level for DWI, DWAI, or per se-level II [§§1192(1)-(4) or (6)] is guilty of a class E felony

⁴¹ New York Laws of 1990, Chap. 173, §39, to be codified at New York Vehicle and Traffic Law, §501-a.

⁴² New York Laws of 1990, Chap. 173, §62(5) and (6), to be codified at New York Vehicle and Traffic Law, §1192(5)-(11).

⁴³ New York Laws of 1990, Chap. 173, §64(2), to be codified at New York Vehicle and Traffic Law, §1193(1)(d)(2).

⁴⁴ Ibid.

punishable by a fine of not less than \$1,000 or more than \$5,000, up to four years imprisonment, or both.⁴⁵

While there are no restrictions on plea bargaining from a per se-level I charge, a driver charged with per se-level II may only plead to another alcohol-related driving offense.⁴⁶

The 1990 revisions also provide that the driver's license sanction applicable to a first offense of operation of a commercial motor vehicle while impaired or intoxicated shall be a mandatory one year revocation period. If the holder of the driver's license was operating a motor vehicle transporting hazardous materials at the time of the offense, such revocation is for a mandatory three year period.⁴⁷ Under prior law, the mandatory minimum revocation period would be for one year in any case.⁴⁸

Permanent disqualification from holding a CDL occurs when an individual operating a commercial motor vehicle while in an impaired or intoxicated condition previously has had, in conjunction with commercial motor vehicle operation:

- o a finding of refusal to submit to a chemical test;

⁴⁵ New York Laws of 1990, Chap. 173, §64(3), to be codified at New York Vehicle and Traffic Law, §1193(1)(d)(3).

⁴⁶ New York Laws of 1990, Chap 173, §63(10), to be codified at New York Vehicle and Traffic Law, §1192(10).

⁴⁷ New York Laws of 1990, Chap. 173, §65(5) to be codified at New York Vehicle and Traffic Law, §1193(2)(b).

⁴⁸ New York Vehicle and Traffic Law, §1193(2)(b)(4) (McKinney: 1990 Supp.).

o a conviction for any subdivision of §1192, i.e., impaired or intoxicated operation;

o a conviction for any felony involving a commercial motor vehicle; or

o a conviction for leaving the scene of an accident resulting in death or personal injury without reporting the accident.⁴⁹

The Commissioner of Motor Vehicles may waive this disqualification after a period of ten years if:

o during this ten year period, the individual has not been found to have refused a chemical test; or been convicted of any subdivision of §1192, leaving the scene of an accident resulting in death or personal injury, or any felony involving the use of a commercial motor vehicle;

o the individual is not in need of drug and/or alcohol treatment or has satisfactorily completed a prescribed course of treatment; and

o the individual is granted a certificate of relief from disabilities.⁵⁰

Upon a third finding of refusal and/or conviction of any offense requiring permanent CDL revocation, the Commissioner may not waive the permanent disqualification under any

⁴⁹ New York Laws of 1990, Chap. 173, §70(3)(b), to be codified at New York Vehicle and Traffic Law, §1193(2)(e)(3).

⁵⁰ Ibid.

circumstances.⁵¹ Conditional licenses issued to persons convicted of any subdivision of §1192 may not be valid for the operation of a commercial motor vehicle.⁵²

The 1990 amendments also expanded the definitions of the crimes of vehicular assault and vehicular manslaughter. A person may be found guilty of second degree vehicular assault, a class E felony, if with criminal negligence and in violation of §1192(1)--DWAI--he or she operates a motor vehicle weighing more than 18,000 pounds containing flammable gas, radioactive materials, or explosives and such materials cause serious physical injury to another person.⁵³ Similarly, a person commits second degree vehicular manslaughter, a class D felony when the above circumstances apply and the death of another person is caused thereby.⁵⁴

The provisions of the new law relative to motor vehicles weighing in excess of 18,000 pounds and carrying flammable gas, radioactive materials, or explosives became effective August 19, 1990. CDL provisions will become effective April 1, 1992.⁵⁵

⁵¹ Ibid.

⁵² New York Laws of 1990, Chap. 173, §73, to be codified at New York Vehicle and Traffic Law, §1196(7)(g).

⁵³ New York Laws of 1990, Chap. 173, §81, to be codified at New York Penal Law, §120.03.

⁵⁴ New York Laws of 1990, Chap. 173, §82, to be codified at New York Penal Law, §125.12.

⁵⁵ New York Laws of 1990, Chap. 173, §88.

UNDERAGE DRUNK DRIVING

The New York State Legislature has enacted several important laws aimed at deterring underage drunk driving. Individuals under age twenty-one committing an alcohol-related driving offense, including a refusal to submit to an implied consent chemical test to determine BAC level, receive enhanced driver's license revocation periods compared to drivers over age twenty-one. A first such offense yields a driver's license revocation for at least one year as opposed to a six-month minimum for drivers over age twenty-one.⁵⁶ Individuals under twenty-one years of age with a previous alcohol-related driving offense receive a driver's license revocation for one year or until the offender reaches the age of twenty-one, whichever period is longer.⁵⁷

Effective April 1, 1990, every driver's license or renewal issued to a person under the age of twenty-one must bear a prominent imprint with the statement "Under 21 Years of Age."⁵⁸

Another recent amendment to New York law provides for a separate offense prohibiting alcohol possession with intent to consume among persons under twenty-one; such an offense is a

⁵⁶ New York Vehicle and Traffic Law, §1193(2)(5).

⁵⁷ Ibid., §1193(2)(6).

⁵⁸ Ibid., §504(1).

violation punishable by a fine of fifty dollars.⁵⁹ In addition, presentation of false identification by a person under twenty-one for the purpose of purchasing or attempting to purchase alcoholic beverages is a violation punishable by a fine not exceeding \$100 and/or a period of community service not exceeding 30 hours.⁶⁰

During the 1990 session of the New York State Legislature, a bill was introduced to establish a Youthful Drunk Driver Visitation Program. Senate 7646-A, sponsored by Senator Norman J. Levy, and Assembly 10462-A, sponsored by Assemblywoman Elizabeth Connelly, was patterned after California's program.⁶¹ The 1990 Illinois State Legislature enacted a similar law, effective January 1, 1991.⁶² Under the New York State bill, persons under age twenty-one convicted of an alcohol-related driving offense may be sentenced to participate in the Program as a condition of probation or prior to sentencing. The court may order participants to visit a trauma facility or emergency room under certain circumstances, a facility which treats alcoholic persons, or a coroner's office so that they may observe the devastating aftermath of drunk driving incidents.

⁵⁹ New York Alcoholic Beverage Control Law, §65-c (McKinney: 1990 Supp.).

⁶⁰ Ibid., §65-b.

⁶¹ See Chapter IV of this report for more information.

⁶² Illinois Laws of 1990, Public Act 86-1242.

PLEA BARGAINING IN NEW YORK STATE

Convictions for first-time DWI are classified misdemeanors and repeat offenses within ten years are felonies.⁶³ Although plea bargaining practices vary from county to county, first-time offenders charged with DWI generally are allowed to plea to DWAI, but recidivist DWI offenders are seldom allowed to plea to DWAI.⁶⁴ However, a felony DWI charge could be reduced to a misdemeanor DWI, and a misdemeanor DWI charge to DWAI, particularly absent aggravating circumstances. As noted previously, a person charged with DWAI may plead to a non-alcohol offense. Limiting plea bargaining to alcohol-related driving offenses for the more serious alcohol-related driving charges accomplishes several goals, including better identification of alcohol-related recidivists, imposition of license restrictions, and enhanced screening of offenders for treatment of problem drinking.⁶⁵

Police agencies and courts in New York State are obligated to report DWI arrest, disposition, and sentencing information to

⁶³ New York Vehicle and Traffic Law, §1193 (McKinney: 1990 Supp.).

⁶⁴ Drunk Driving Reform in New York State 1980-1984-- Strategy, Results, and Recommendations (Albany: Assembly Transportation Committee and Assembly Subcommittee on Drunk Driving, May 1984), p. 12.

⁶⁵ Ibid., p. 10. See also New York Laws of 1980, Chap. 806, and New York Vehicle and Traffic Law, §1192(8) (McKinney 1990 Supp.).

the New York State Division of Criminal Justice Services (DCJS) which is responsible for data collection and statistical analysis.⁶⁶

Tables VI and VII depict statewide arrest, prosecution, disposition, and sentencing data from 1980 to 1989 for misdemeanor DWI and felony DWI charges, respectively.⁶⁷ Although arrest data presented are complete through 1989, not all arrests have yet been disposed of and/or reported to DCJS. For example, Table VI indicates 55.4 percent of 1989 misdemeanor DWI arrests were missing dispositions and 23.9 percent of 1988 misdemeanor DWI arrests were missing dispositions as of May 22, 1990, the time of data tabulation. Table VII reveals a similar situation for felony DWI arrest disposition.

Although 1988 disposition figures are preliminary, they are sufficiently illustrative of statewide adjudicatory practices since, on average, sixteen percent of misdemeanor DWI arrests were missing dispositions for each of the previous seven years (see Table VI).

As Table VI indicates, from 1980 to 1989, arrests for misdemeanor DWI have increased by 42 percent from 40,786

⁶⁶ New York Criminal Procedure Law, §§160.10, 160.20, and 160.30 (McKinney 1981 and 1990 Supp.), and New York Executive Law, §§837 and 837-a (McKinney 1982 and 1990 Supp.).

⁶⁷ Information in the following paragraphs is derived from data compiled by New York State Division of Criminal Justice Services Bureau of Statistical Services, May 22, 1990.

TABLE VI

New York State Misdemeanor DWI Arrests and Dispositions
1980 - 1989

| DISPOSITIONS | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | 1986 | 1987 | 1988 | 1989 |
|--|---------------|---------------|---------------|---------------|----------------|---------------|---------------|----------------|----------------|----------------|
| TOTAL ARRESTS | 40786 | 43080 | 52387 | 57152 | 61250 | 59832 | 55261 | 56484 | 57979 | 58029 |
| NO DISPOSITION ON FILE X MISSING DISPOSITIONS | 6584 16.1% | 7233 16.8% | 6634 12.7% | 8020 14.0% | 10258 16.7% | 9613 16.1% | 9256 16.5% | 10613 18.8% | 13873 23.9% | 32152 55.4% |
| NOT PROSECUTED | 44 | 37 | 68 | 24 | 51 | 34 | 32 | 23 | 18 | 11 |
| PROSECUTED | 24158 | 35810 | 45705 | 49108 | 50941 | 50185 | 46673 | 45848 | 44088 | 25866 |
| PROSECUTED, LOWER COURT | 33398 | 36832 | 44363 | 47299 | 48911 | 47924 | 44503 | 43902 | 42281 | 25019 |
| DISMISSED | 2665 | 2462 | 3116 | 3250 | 3096 | 2871 | 2837 | 2967 | 2664 | 1598 |
| ACQUITTED | 104 | 81 | 130 | 168 | 183 | 177 | 174 | 123 | 94 | 59 |
| CONVICTED | 30496 | 32172 | 41009 | 43766 | 45490 | 44720 | 41356 | 40657 | 39378 | 23315 |
| PRISON | 1 | 1 | 2 | 4 | 3 | 9 | 1 | 6 | 3 | 1 |
| JAIL | 796 | 845 | 1323 | 1613 | 1809 | 3085 | 5859 | 6394 | 5207 | 3470 |
| TIME SERVED | 82 | 81 | 146 | 158 | 209 | 205 | 211 | 214 | 166 | 94 |
| JAIL AND PROBATION | 187 | 247 | 319 | 395 | 456 | 476 | 719 | 1281 | 1170 | 517 |
| PROBATION | 1102 | 1333 | 1294 | 1327 | 1008 | 232 | 220 | 234 | 202 | 88 |
| PROBATION AND FINE | 170 | 358 | 705 | 641 | 1401 | 2405 | 2061 | 1883 | 1761 | 944 |
| FINE | 5691 | 6683 | 12390 | 13521 | 11822 | 9688 | 8872 | 8468 | 8254 | 4395 |
| FINE AND CONDITIONAL DISCHARGE | 2337 | 3580 | 13844 | 10882 | 4951 | 3755 | 2791 | 2382 | 2507 | 1578 |
| FINE AND LICENSE SUSPENDED | 2786 | 3094 | 8346 | 12810 | 20643 | 21939 | 19491 | 19079 | 19348 | 11332 |
| CONDITIONAL DISCHARGE | 16210 | 14985 | 797 | 717 | 565 | 567 | 469 | 426 | 432 | 207 |
| UNCONDITIONAL DISCHARGE | 185 | 155 | 308 | 288 | 335 | 345 | 263 | 129 | 115 | 42 |
| OTHER/UNKNOWN | 949 | 810 | 1535 | 1410 | 2288 | 2014 | 379 | 161 | 213 | 647 |
| X YOUTHFUL OFFENDERS | 1.5% | 1.4% | 1.4% | 1.2% | 1.0% | 0.7% | 0.7% | 0.6% | 0.6% | 0.4% |
| OTHER DISPOSITION | 133 | 117 | 108 | 115 | 142 | 156 | 156 | 155 | 145 | 67 |
| PROSECUTED, UPPER COURT | 756 | 968 | 1332 | 1782 | 1984 | 2228 | 2142 | 1921 | 1786 | 838 |
| DISMISSED | 31 | 29 | 43 | 41 | 36 | 26 | 34 | 27 | 32 | 34 |
| ACQUITTED | 8 | 6 | 13 | 8 | 18 | 6 | 12 | 7 | 2 | 4 |
| CONVICTED | 710 | 923 | 1266 | 1726 | 1913 | 2176 | 2080 | 1879 | 1720 | 762 |
| PRISON | 33 | 55 | 49 | 53 | 80 | 113 | 101 | 99 | 105 | 61 |
| JAIL | 126 | 163 | 132 | 123 | 254 | 348 | 352 | 288 | 264 | 109 |
| TIME SERVED | 0 | 1 | 3 | 1 | 7 | 6 | 10 | 12 | 9 | 6 |
| JAIL AND PROBATION | 113 | 196 | 284 | 336 | 514 | 599 | 586 | 533 | 427 | 165 |
| PROBATION | 333 | 362 | 356 | 403 | 398 | 199 | 197 | 170 | 116 | 48 |
| PROBATION AND FINE | 15 | 46 | 161 | 159 | 216 | 666 | 637 | 622 | 614 | 282 |
| FINE | 12 | 21 | 25 | 53 | 31 | 40 | 30 | 34 | 26 | 16 |
| FINE AND CONDITIONAL DISCHARGE | 7 | 11 | 44 | 41 | 23 | 38 | 24 | 24 | 12 | 6 |
| FINE AND LICENSE SUSPENDED | 10 | 21 | 113 | 325 | 96 | 88 | 109 | 86 | 135 | 67 |
| CONDITIONAL DISCHARGE | 52 | 29 | 14 | 30 | 27 | 25 | 21 | 9 | 8 | 1 |
| UNCONDITIONAL DISCHARGE | 1 | 3 | 3 | 4 | 1 | 1 | 2 | 0 | 2 | 1 |
| OTHER/UNKNOWN | 8 | 15 | 82 | 198 | 66 | 53 | 11 | 2 | 2 | 0 |
| X YOUTHFUL OFFENDERS | 1.3% | 1.0% | 0.8% | 0.8% | 0.5% | 0.1% | 0.6% | 0.6% | 0.2% | 0.7% |
| OTHER DISPOSITION | 7 | 10 | 10 | 7 | 17 | 20 | 16 | 8 | 32 | 38 |
| PROSECUTED, UNKNOWN COURT RESENTENCE (MISSING CONVICTION) | 0 4 | 0 10 | 0 10 | 0 27 | 0 46 | 0 33 | 0 28 | 0 25 | 0 21 | 0 9 |
| CONVICTION RATE (% OF ALL ARRESTS) | 76.5% | 76.8% | 80.7% | 79.6% | 77.4% | 78.4% | 77.6% | 75.3% | 70.9% | 41.5% |
| CONVICTION RATE (% OF ALL DISPOSED) | 91.2% | 92.3% | 92.4% | 92.6% | 93.0% | 93.4% | 93.0% | 92.7% | 93.2% | 93.0% |
| X OF CONVICTION: | | | | | | | | | | |
| TO FELONIES | 1.7% | 2.1% | 2.0% | 1.9% | 3.0% | 3.4% | 3.8% | 3.5% | 3.1% | 2.2% |
| TO MISDEMEANORS | 35.4% | 36.2% | 32.5% | 34.9% | 36.8% | 37.5% | 37.0% | 36.1% | 42.2% | 61.3% |
| TO LESSER OFFENSES | 62.9% | 61.7% | 65.5% | 63.3% | 60.2% | 59.1% | 59.2% | 60.4% | 54.7% | 36.5% |

Source: New York State Division of Criminal Justice Services
Bureau of Statistical Services, May 22, 1990.

TABLE VII

New York State Felony DWI Arrests and Dispositions
1980 - 1989

| DISPOSITIONS | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | 1986 | 1987 | 1988 | 1989 |
|--|--------------|--------------|--------------|--------------|--------------|--------------|--------------|--------------|---------------|---------------|
| TOTAL ARRESTS | 1993 | 2208 | 3185 | 3749 | 3032 | 3069 | 3578 | 3739 | 4155 | 4264 |
| NO DISPOSITION ON FILE % MISSING DISPOSITIONS | 355 17.8% | 360 16.3% | 406 12.7% | 465 12.4% | 357 11.8% | 357 11.6% | 402 11.2% | 680 18.2% | 1063 25.6% | 2692 63.1% |
| NOT PROSECUTED | 5 | 8 | 9 | 5 | 12 | 7 | 12 | 12 | 11 | 7 |
| PROSECUTED | 1633 | 1840 | 2770 | 3279 | 2663 | 2705 | 3164 | 3047 | 3081 | 1565 |
| PROSECUTED, LOWER COURT | 1041 | 1058 | 1678 | 1756 | 1156 | 1077 | 1254 | 1232 | 1324 | 718 |
| DISMISSED | 115 | 139 | 218 | 211 | 93 | 105 | 109 | 136 | 202 | 200 |
| ACQUITTED | 2 | 1 | 8 | 3 | 0 | 2 | 3 | 1 | 3 | 1 |
| CONVICTED | 919 | 912 | 1443 | 1531 | 1055 | 963 | 1133 | 1088 | 1111 | 509 |
| PRISON | 2 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 2 | 0 |
| JAIL | 61 | 79 | 130 | 140 | 102 | 79 | 90 | 115 | 114 | 72 |
| TIME SERVED | 7 | 6 | 7 | 11 | 13 | 6 | 8 | 8 | 8 | 10 |
| JAIL AND PROBATION | 24 | 39 | 64 | 64 | 50 | 40 | 70 | 77 | 92 | 47 |
| PROBATION | 146 | 153 | 143 | 156 | 112 | 18 | 24 | 17 | 22 | 11 |
| PROBATION AND FINE | 27 | 40 | 118 | 133 | 147 | 244 | 285 | 322 | 273 | 119 |
| FINE | 198 | 214 | 456 | 456 | 202 | 162 | 185 | 154 | 172 | 81 |
| FINE AND CONDITIONAL DISCHARGE | 44 | 64 | 225 | 178 | 54 | 50 | 39 | 27 | 30 | 23 |
| FINE AND LICENSE SUSPENDED | 129 | 122 | 227 | 330 | 334 | 336 | 409 | 353 | 380 | 133 |
| CONDITIONAL DISCHARGE | 264 | 166 | 26 | 27 | 10 | 8 | 11 | 9 | 9 | 6 |
| UNCONDITIONAL DISCHARGE | 2 | 5 | 7 | 8 | 3 | 5 | 2 | 3 | 2 | 0 |
| OTHER/UNKNOWN | 15 | 24 | 37 | 28 | 28 | 15 | 12 | 5 | 7 | 7 |
| % YOUTHFUL OFFENDERS | 0.4% | 0.4% | 0.3% | 0.1% | 0.2% | 0.1% | 0.1% | 0.0% | 0.5% | 0.2% |
| OTHER DISPOSITION | 5 | 6 | 9 | 11 | 8 | 7 | 9 | 7 | 8 | 8 |
| PROSECUTED, UPPER COURT | 592 | 780 | 1089 | 1518 | 1503 | 1626 | 1905 | 1810 | 1754 | 846 |
| DISMISSED | 20 | 28 | 28 | 28 | 16 | 28 | 26 | 17 | 20 | 15 |
| ACQUITTED | 4 | 2 | 9 | 12 | 8 | 4 | 18 | 8 | 4 | 2 |
| CONVICTED | 561 | 739 | 1042 | 1466 | 1464 | 1567 | 1830 | 1779 | 1682 | 734 |
| PRISON | 10 | 18 | 25 | 49 | 25 | 41 | 73 | 66 | 95 | 48 |
| JAIL | 70 | 111 | 111 | 148 | 158 | 206 | 274 | 250 | 219 | 93 |
| TIME SERVED | 0 | 1 | 2 | 3 | 4 | 7 | 8 | 18 | 17 | 12 |
| JAIL AND PROBATION | 93 | 154 | 284 | 397 | 415 | 470 | 538 | 516 | 517 | 212 |
| PROBATION | 296 | 353 | 365 | 505 | 320 | 101 | 102 | 78 | 42 | 14 |
| PROBATION AND FINE | 19 | 32 | 127 | 192 | 414 | 659 | 740 | 767 | 708 | 332 |
| FINE | 6 | 7 | 20 | 20 | 21 | 20 | 22 | 23 | 17 | 3 |
| FINE AND CONDITIONAL DISCHARGE | 12 | 7 | 16 | 17 | 3 | 6 | 7 | 11 | 8 | 1 |
| FINE AND LICENSE SUSPENDED | 8 | 17 | 76 | 100 | 68 | 39 | 53 | 36 | 50 | 19 |
| CONDITIONAL DISCHARGE | 38 | 26 | 7 | 13 | 10 | 7 | 7 | 8 | 7 | 0 |
| UNCONDITIONAL DISCHARGE | 2 | 4 | 2 | 1 | 3 | 0 | 1 | 1 | 0 | 0 |
| OTHER/UNKNOWN | 7 | 9 | 7 | 21 | 23 | 11 | 6 | 5 | 2 | 0 |
| % YOUTHFUL OFFENDERS | 0.0% | 0.3% | 0.2% | 0.1% | 0.1% | 0.1% | 0.0% | 0.0% | 0.1% | 0.0% |
| OTHER DISPOSITION | 7 | 11 | 10 | 12 | 15 | 27 | 31 | 6 | 48 | 95 |
| PROSECUTED, UNKNOWN COURT RESENTENCE (MISSING CONVICTION) | 0 0 | 0 2 | 0 3 | 0 5 | 0 4 | 0 2 | 0 5 | 0 5 | 0 3 | 0 1 |
| CONVICTION RATE (% OF ALL ARRESTS) | 74.3% | 74.8% | 78.0% | 79.9% | 83.1% | 82.4% | 82.8% | 76.7% | 67.2% | 29.2% |
| CONVICTION RATE (% OF ALL DISPOSED) | 90.4% | 89.3% | 89.4% | 91.3% | 94.2% | 93.3% | 93.3% | 93.7% | 90.3% | 79.1% |
| % OF CONVICTION: | | | | | | | | | | |
| TO FELONIES | 31.1% | 38.3% | 34.0% | 37.9% | 47.9% | 50.8% | 54.2% | 53.4% | 51.4% | 51.2% |
| TO MISDEMEANORS | 53.4% | 48.6% | 51.3% | 49.2% | 44.4% | 42.1% | 39.2% | 39.7% | 43.0% | 44.6% |
| TO LESSER OFFENSES | 15.5% | 13.1% | 14.6% | 12.9% | 7.7% | 7.1% | 6.6% | 6.9% | 5.5% | 4.3% |

Source: New York State Division of Criminal Justice Services
Bureau of Statistical Services, May 22, 1990.

arrests in 1980 to 58,029 arrests in 1989. Table VII shows that felony DWI arrests statewide for the same time period jumped 114 percent from 1,993 in 1980 to 4,264 in 1989. Arrest activity peaked in 1984 for misdemeanor DWI arrests (61,250) but reached its zenith in 1989 for felony DWI charges (4,264). This phenomenon is particularly important because felony DWI generally means repeat DWI.

Disposition of DWI offenses has changed markedly between 1980 and 1988, reflecting tougher treatment of DWI cases. In 1980, only 31.3 percent of felony DWI arrests yielded convictions at the felony level while 53.4 percent were pled down to misdemeanors, and 15.5 percent were pled to lesser offenses. By 1988, 51.4 percent of felony DWI arrests yielded convictions at the felony level, 43.0 percent were pled down to misdemeanors, and only 5.5 percent were pled to lesser offenses (See Table VII).

In addition, a greater percentage of original misdemeanor DWI arrests were upgraded to felony DWI arrests, thereby resulting in more convictions at the felony level. Charges may be upgraded in this manner if investigation subsequent to arrest and prior to disposition reveals an individual has had one or more prior DWI convictions. For instance, as Table VI reveals, 3.1 percent of misdemeanor DWI arrests in 1988 resulted in felony convictions compared with 1.7 percent in 1980.

Tables VI and VII also illustrate statewide sentencing trends over the decade of the 1980s.⁶⁸ For example, offenders arrested for misdemeanor DWI were nearly four times more apt to receive a sentence inclusive of jail or jail and probation in 1988 (12.49 percent) than in 1980 (3.20 percent). Misdemeanor DWI arrestees were six-and-one-half times less likely to receive probation alone in 1988 (0.55 percent) than in 1980 (3.52 percent). Imposition of a sentence comprised of probation and a fine was nine times more likely for individuals arrested for misdemeanor DWI in 1988 (4.10 percent) than in 1980 (0.45 percent). A sentence of jail and probation was two-and-one-half times more likely in 1988 (17.14 percent) than in 1980 (7.17 percent).

Felony DWI arrestees were two times more likely to be sentenced to jail or to jail in conjunction with probation in 1988 (23.27 percent) than in 1980 (12.79 percent). Such offenders were fourteen-and-one-half times less apt to receive probation alone in 1988 (1.54 percent) than in 1980 (14.25 percent). Imposition of a sentence comprised of probation and a fine was ten times more likely in 1988 (23.61 percent) than in 1980 (18.5 percent). Moreover, the likelihood that a sentence of jail and probation will be imposed increased by

⁶⁸ Tables VI and VII separate data by lower court (justice and town court) and upper court (county court). For the following two paragraphs, data from lower and upper courts have been combined. Percentages reflect sentence imposition as a proportion of arrests as opposed to convictions.

two-thirds between 1980 (32.36 percent) and 1988 (48.42 percent).

DWI-RELATED STATE CORRECTIONAL COMMITMENTS

Commitments to New York State correctional facilities for DWI and DWI-related offenses, such as vehicular manslaughter and vehicular assault, have grown steadily since 1978.⁶⁹ A total of 434 persons was committed to State facilities between 1978 and 1987 and, despite annual growth, these commitments account for less than one percent of those committed to the New York State Department of Correctional Services (DOCS) during this period.⁷⁰ In 1988, DOCS received an additional 145 such commitments and, in 1989, 176 new commitments.⁷¹

The low number of DWI and DWI-related DOCS commitments appears to result from broad judicial discretion in sentencing DWI felony cases with prior DWI convictions and the fact that DWI cases only may be sentenced to a DOCS facility for a second

⁶⁹ Robert L. Fisher, DWI Related Commitments: 1978-1987 (Albany: New York State Department of Correctional Services Division of Program Planning, Research, and Evaluation, January 1988).

⁷⁰ Ibid., p. 4.

⁷¹ Information is derived from a letter to Commission Counsel Joanna M. King from New York State Department of Correctional Services Director of Program Planning, Research, and Evaluation Henry C. Donnelly, February 28, 1990.

or subsequent DWI conviction.⁷² An offender only may be sentenced to an imprisonment term in a State correctional facility for a felony--an offense carrying a term of more than one year; a felony DWI occurs upon second or subsequent DWI conviction with ten years. Judges may sentence felony DWI cases to incarceration in a state facility but are not mandated to do so.⁷³

JAIL AND PRISON OVERCROWDING

New York State's correctional system underwent tremendous population growth during the 1980s. DOCS facilities are responsible for offenders sentenced to an incarceration period in excess of one year.⁷⁴ The inmate population in DOCS facilities increased by over 138 percent between December 31, 1980 and December 31, 1989--from 21,548 inmates to 51,232 inmates.⁷⁵ This phenomenal growth rate over a nine-year period stands in stark contrast to the slight twelve percent increase experienced in the two decades between 1960 and 1980; DOCS

⁷² Fisher, DWI-Related Commitments, p. 5.

⁷³ Ibid., p. 6.

⁷⁴ 1988 Data Compendium (Albany: New York State Commission of Correction, July 1989), p. 8.

⁷⁵ Information excludes detainees and is obtained from New York State Department of Correctional Services, February 15, 1990.

facilities housed 19,213 inmates at the end of 1960 and 21,548 inmates at the end of 1980.⁷⁶

Local correctional facilities also experienced substantial population increases. These facilities house arraigned offenders awaiting further judicial action and offenders sentenced to incarceration for less than one year.⁷⁷ Design capacity denotes the number of inmates a given facility is built to hold whereas census refers to the number of inmates for which a jurisdiction bears legal responsibility.

In 1983, DOCS' census comprised 118 percent of design capacity. From 1983 to 1988, DOCS experienced an increase in capacity of fifty-three percent--as a result of prison building and/or expansion--and a forty-four percent increase in census. During the same period, local correctional facilities underwent an eighty-one percent census jump and a thirty percent design capacity increase.

During 1988, DOCS' daily population averaged ninety-five percent of census whereas the daily population in local correctional facilities averaged ninety-eight percent of census. Regardless of design capacity, correctional facilities must be able to house inmates committed to their custody; therefore, inmates may not actually be housed in their assigned system on a

⁷⁶ Ibid.

⁷⁷ The following information is derived from 1988 Data Compendium (Albany: New York State Commission of Correction, July 1989), pp. 8-18.

given day but may be boarded out to other facilities, hospitals, courts, or given some form of temporary release.

Judges' inclination to invoke the imprisonment sanction--at least for certain drunk driving offenses--may be affected by the serious overcrowding problems facing DOCS and local correctional facilities.

ANOMALIES IN THE LAW RELATIVE TO DWI/DWAI

DWI cases are not amenable to treatment under predicate felony statutes since only offenders convicted of crimes enumerated in the New York Penal Law are eligible for second or predicate felony status and DWI offenses are set forth in the Vehicle and Traffic Law.⁷⁸ Predicate felons receive a mandatory minimum term of imprisonment and must serve a minimum of one-half of the maximum term imposed; lifetime probation may be an alternative to imprisonment in narrow circumstances.⁷⁹

AGGRAVATED DWI

A second anomaly in the law involves its failure to adequately distinguish among drunk driving offenders based upon the degree of recklessness evinced in particular cases. In

⁷⁸ Ibid. See also New York Penal Law, §70.06 (McKinney 1987).

⁷⁹ New York Penal Law, §70.06 (McKinney 1987).

Drunk Driving--An American Dilemma, James B. Jacobs noted that drunk drivers present a continuum of culpability and questioned whether the law should be amended to punish more severely aggravated, as opposed to run-of-the-mill, drunk driving.⁸⁰ New York State law elevates sanctions when alcohol-impaired drivers kill or seriously injure other people and, to a limited extent, when they commit multiple offenses, but there is a middle ground which has been unaddressed. While many States, including New York, have enacted lesser included forms of DWI such as DWAI, none has formulated an aggravated DWI offense to cover offenders (1) registering exceptionally high BACs, (2) drinking while driving, or (3) driving recklessly or at an excessive speed. These offenses arguably are more egregious than those involving failure of a breathalyzer test but evincing no other endangering behavior.

Sweden defines an aggravated form of drunk driving for motor vehicle operators with BACs above .15 percent. Jacobs maintained that, in light of the American proclivity for grading criminal offenses by degree of seriousness, it behooves jurisdictions to punish the most dangerous and culpable offenders with conviction for aggravated DWI punishable by a broad range of sanctions, such as longer license revocation

⁸⁰ Information in the following paragraphs is derived from James B. Jacobs, Drunk Driving--An American Dilemma (Chicago: The University of Chicago Press, 1989), pp. 76-83.

periods, and elevated fines, among others. Recidivists thereafter could be subject to even tougher penalties.

LICENSE RESTORATION

License restoration is the sole province of the Commissioner of Motor Vehicles.⁸¹ Following the expiration of a statutory license suspension period, the license automatically is reinstated. The Statute outlines minimum periods of driver's license revocation; the Commissioner of Motor Vehicles in her discretion has promulgated regulations providing longer revocation periods for recidivists. However, the Commissioner's license restoration decision following a revocation only may constitute a refusal of driving privileges or a full grant of unrestricted licensure.⁸²

Commissioner of Motor Vehicles Patricia Adduci, testifying at the Drunk Driving Recidivism Hearing, urged enactment of a law providing greater flexibility in relicensing multiple offenders by authorizing issuance of a probationary license to offenders whose licenses were revoked for alcohol-related driving offenses upon expiration of the statutorily and/or

⁸¹ New York Vehicle and Traffic Law, §510(5) (1990 Supp.).

⁸² Ibid., §510(6).

administratively imposed minimum period of revocation.⁸³

Currently, probationary licenses may be issued when a person first receives a driver's license. The license is probationary for six months and is subject to suspension or revocation if the holder is convicted of a traffic violation during the probationary period.⁸⁴

DMV regulations specify safety factors to be considered and the relative weight to be assigned each factor by the Commissioner of Motor Vehicles or an authorized agent in making relicensure decisions.⁸⁵ Factors include prior convictions for alcohol-related driving offenses, speeding, reckless driving, leaving the scene of an accident resulting in personal injury, or other moving violations.

The Commissioner's regulations restrict relicensure for individuals committing two or more alcohol-related incidents in ten years by requiring a showing of a rehabilitative effort.⁸⁶ An acceptable "rehabilitative effort" consists of referral to an

⁸³ Testimony of Commissioner of Motor Vehicles Patricia Adduci, Official Transcript of the Public Hearing on Drunk Driving Recidivism held by the New York State Legislative Commission on Critical Transportation Choices, the New York State Senate Standing Committee on Transportation, and the New York State Senate Special Task Force on Drunk Driving, New York, New York, December 2, 1987, pp. 15 and 18. (Hereinafter referred to as Drunk Driving Recidivism Hearing Transcript).

⁸⁴ New York Vehicle and Traffic Law, §§501(4) and 510(b) (McKinney: 1986 and 1990 Supp.).

⁸⁵ 15 NYCRR Part 136.

⁸⁶ Ibid.

authorized agency for alcohol or drug abuse evaluation and satisfactory participation in any recommended course of treatment for a period of time sufficient to indicate that the individual no longer constitutes a danger to other highway users.⁸⁷ Yet, upon receipt of satisfactory evidence of rehabilitative effort, the Commissioner still has only two options--restoration of full driving privileges or none. Greater flexibility in relicensure patently is needed. Senate 3172, sponsored by Senator Norman J. Levy, and Assembly 4849, sponsored by Assemblyman Michael Bragman, would expand use of probationary licenses accordingly.

ANOMALIES IN THE LAW RELATIVE TO DWAI

The Vehicle and Traffic Law envisions plea bargaining enabling the court to accept a guilty plea to a lesser offense than the one charged in satisfaction of such charge; as previously noted, there is a statutory limitation on the practice of plea bargaining in cases involving DWI prohibiting disposition out of an alcohol-related offense.⁸⁸ Therefore, a New York State court could entertain a guilty plea for DWAI from a DWI charge but not a plea for reckless driving since the latter has no alcohol component.

⁸⁷ Ibid., §136.1(b)(4).

⁸⁸ New York Vehicle and Traffic Law, §1192(8) (McKinney 1990 Supp.).

However, DWAI is defined as a traffic infraction and multiple DWAI offenses do not rise to the level of a misdemeanor or felony despite repeat offending.⁸⁹ Only a conviction for DWI will trigger harsher treatment for subsequent DWAI offenses.⁹⁰

In addition, the Criminal Procedure Law provides that commission of a subsequent offense other than a traffic infraction is a ground for revocation of a sentence either of probation or conditional discharge.⁹¹ However, DWAI by itself does not provide grounds for revocation since DWAI is classified as a traffic infraction. Therefore, absent special probation conditions such as abstinence, a DWAI conviction alone will not revoke a sentence of probation previously instituted for a DWI offense.⁹²

COUNTERMEASURE PROGRAMS

New York State has an enviable system for partial self-funding of DWI countermeasure programs.⁹³ The two most

⁸⁹ Ibid., §1193(1).

⁹⁰ Ibid.

⁹¹ New York Criminal Procedure Law, §410.10(2) (McKinney 1983).

⁹² Commission Counsel Joanna M. King's telephone interview with New York State Division of Probation and Correctional Alternatives Probation Program Consultant Patricia A. Butler, April 6, 1990.

⁹³ Testimony of National Highway Traffic Safety Administration Region 2 Alcohol Program Coordinator Thomas Louizou, Drunk Driving Recidivism Hearing Transcript, p. 59.

important programs are STOP-DWI and DDP.

STOP-DWI

Special Traffic Options Program for Driving While Intoxicated (STOP-DWI) was created by the 1981 State Legislature.⁹⁴ Unprecedented in the nation, the program provides a statewide, virtually financially self-sustaining alcohol and highway safety effort.⁹⁵

STOP-DWI programs are overseen by the Commissioner of Motor Vehicles and are administered at the County level; mandatory minimum fines from alcohol-related driving convictions are deposited in a specially designated DWI program account and redistributed proportionally to the counties based upon fine collection levels to be used for their individual plans.⁹⁶

Each County appoints a STOP-DWI Coordinator whose duties include program development and implementation as well as coordination among agencies involved in alcohol and highway

⁹⁴ New York Laws of 1981, Chap. 910, and New York Vehicle and Traffic Law, §1197 (McKinney 1990 Supp.).

⁹⁵ Institute for Traffic Safety Management and Research, An Evaluation of the New York State Stop-DWI Program 1982-1986 (Albany: Nelson A. Rockefeller College of Public Affairs and Policy, State University of New York, February 1988), p. 1 (Hereinafter referred to as ITSMR, STOP-DWI Evaluation).

⁹⁶ James L. Nichols and H. Laurence Ross, "The Effectiveness of Legal Sanctions in Dealing with Drinking Drivers," Surgeon General's Workshop on Drunk Driving Background Papers (Washington, D.C.: United States Department of Health and Human Services, December 14-16, 1988), p. 107.

safety efforts.⁹⁷ Fines are returned to the counties in which the violations occurred and are spent on a wide variety of countermeasures in areas such as enforcement, prosecution, adjudication, probation, rehabilitation, education, public information, evaluation, and administration.⁹⁸

County Coordinators must submit an annual report to the Commissioner of Motor Vehicles enumerating, inter alia, arrests and dispositions, total fine monies returned to the County, and distribution of such monies.⁹⁹

DRINKING DRIVER PROGRAM

As noted, part of the State's approach to the drinking driver problem involves alcohol education of the convicted drunk driver. The State Department of Motor Vehicles' Alcohol and Drug Rehabilitation Program, commonly known as the Drinking Driver Program (DDP), was established in 1975.¹⁰⁰

DDP participation is voluntary and most offenders convicted of DWI or DWAI are eligible.¹⁰¹ DDP consists of sixteen hours

⁹⁷ New York Vehicle and Traffic Law, §1197; (McKinney 1990 Supp.) and ITSMR, STOP-DWI Evaluation, p. 1.

⁹⁸ ITSMR, STOP-DWI Evaluation, p. 16.

⁹⁹ New York Vehicle and Traffic Law, §1197(4)(b) (McKinney 1990 Supp.).

¹⁰⁰ New York Laws of 1975, Chap. 291, and New York Vehicle and Traffic Law, §1196 (McKinney 1990 Supp.).

¹⁰¹ Alcohol and Drug Rehabilitation Program 1989 Annual Report (Albany: New York State Department of Motor Vehicles, 1990).

of classroom instruction over a seven-week period to educate social drinkers and to identify and refer for treatment individuals with serious alcohol problems. The decision whether to refer participants for further evaluation is based upon a matrix of problem substance abuse driver screening indicators.¹⁰² Factors include scores on alcohol screening tests, previous drunk driving incidents or arrests, consistency of information reported in class, and BAC level. In 1989, the BAC level for which referral is automatic was lowered from .20 percent to .18 percent; this high BAC alone is considered nearly certain evidence of a problem.

The main incentive for DDP completion is issuance of a conditional license. Eligibility for a conditional license while participating in the DDP recently has changed. Generally, persons convicted of DWI or DWAI may attend DDP and thereby obtain a conditional license. Motorists are ineligible for program participation and therefore conditional licensure if they have participated in DDP within the past five years or if they had a previous alcohol-involved driving conviction within the past five years and chose not to participate in DDP.¹⁰³ Thus, participation generally is limited to first-time offenders.

¹⁰² Information supplied by New York State Department of Motor Vehicles Senior Driver Improvement Analyst David H. McGirr, August 31, 1990.

¹⁰³ New York Vehicle and Traffic Law, §1196(4).

A conditional license only is valid for prescribed use, such as driving to and from work, school, DDP, court, and probation activities, among enumerated others.¹⁰⁴

The particular conditions included on a given offender's license are based on the legitimate needs of the motorist. The conditional license is subject to revocation for operation outside the stated conditions.

Motorists participating in DDP may be deemed ineligible for conditional licenses for any of the following reasons:

- o prior conviction for vehicular manslaughter, vehicular assault, or criminally negligent homicide,
- o involvement in a fatal accident as a result of a DWI/DWAI incident,
- o lack of a renewable New York State driver's license,
- o conviction for another offense requiring mandatory driver's license suspension or revocation arising out of the same incident,
- o two or more previous license suspensions or revocations in the past three years,
- o a prior license suspension or revocation is still in effect,
- o a driving record indicating that the person would pose an unusual or immediate risk to highway safety,

¹⁰⁴ Ibid., §1196(7), and 15 NYCRR §134.9.

o the individual is subject to a condition of probation prohibiting application for driving privileges.¹⁰⁵

The motorist will receive an unconditional license upon satisfactory completion of an approved rehabilitation program, or upon expiration of the term of suspension, whichever occurs first.¹⁰⁶

A 1989 law created a separate offense providing that a holder of a conditional license operating a motor vehicle in violation of conditional license requirements is guilty of a traffic infraction punishable by a fine of not less than \$200 or more than \$500 or by imprisonment for not more than fifteen days or both.¹⁰⁷

By the end of 1989, several trends became apparent, including continuing declines in enrollment and conditional license eligibility and increases in referrals for evaluation.¹⁰⁸ In 1989, over 17,000 people or twenty eight percent of those convicted were ineligible for DDP. Only forty-nine percent of eligible motorists enrolled in DDP representing a decline of 2,500 motorists between 1988 and 1989.

105 15 NYCRR §134.7.

106 Ibid., §§134.6 and 134.10.

107 New York Laws of 1989, Chap. 420, and New York Vehicle and Traffic Law, §1196(7)(f) (McKinney 1990 Supp.).

108 Alcohol and Drug Rehabilitation Program 1989 Annual Report (Albany: New York State Department of Motor Vehicles, 1990).

In previous years, the enrollment rate for eligible motorists was as high as sixty five percent. Of the DDP participants in 1989, 12,000 individuals or forty-seven percent of DDP participants were referred for further evaluation, the highest such number and rate since the program began.

Program fees also were adjusted. As of May 1990, participants must pay a maximum \$125 fee, up from \$95, to the agency conducting the DDP and a \$75 fee, up from \$50, to the DMV for administrative costs attendant to issuance of a conditional license. The program re-entry fee for drop-outs--instituted in early 1989--may be a maximum of \$50.

An evaluation of DDP's effectiveness in reducing recidivism recently was completed by the Institute for Traffic Safety Management and Research at the behest of DMV.¹⁰⁹ The Institute analyzed reconviction rates for drivers convicted of DWI or DWAI between 1982 and 1986 who either successfully completed DDP or, though eligible to participate, elected not to enroll in DDP. The former group, known for study purposes as DDP drivers, were less likely to be reconvicted than the latter group, termed non-enrolled drivers.

For instance, two percent of DDP drivers as opposed to four percent of non-enrolled drivers were reconvicted within the

¹⁰⁹ The following information is derived from The Institute for Traffic Safety Management and Research, Evaluation of the New York State Drinking Driver Program (Albany: State University of New York Nelson A. Rockefeller College of Public Affairs and Policy, April 1990).

first year following their convictions. Within two years, the reconviction rate for DDP drivers was seven percent compared to nine percent among non-enrolled drivers. Within four years, fifteen percent of DDP drivers were reconvicted compared to nineteen percent of the non-enrolled group.

EMERGENCY RESPONSE COST RECOVERY

Expenditure of substantial police, fire, and/or emergency services may be necessitated by an individual's violation of drunk driving laws. Assembly 3860-B, introduced by Assemblyman Maurice Hinchey, and Senate 2627-B, introduced by Senator Eugene Levy, would follow the lead taken by California and New Hampshire authorizing courts to assess against a drunk driving offender the reasonable cost incurred by a public agency in responding to an emergency caused by a drunk driving incident.¹¹⁰ Assessment of costs would not exceed \$1,000 per violation.

PROBATION

The New York State Division of Probation and Correctional Alternatives (DPCA) has been affected severely by the alcohol-impaired driving problem. The DWI probation workload

¹¹⁰ See Chapter IV of this report for more information on these laws in California and New Hampshire.

increased 242 percent between 1981 and 1989.¹¹¹ From 1983 to 1987, DWI overwhelmingly represented the largest single crime category on probation throughout the State with the exception of New York City.¹¹² In 1988 and 1989, DWI was second only to drugs as a probation category throughout the State.¹¹³

As of December 31, 1989, DWI offenders accounted for seventeen percent of active probation cases statewide.¹¹⁴ In 1988, the last full year for which DPCA has rearrest data, 11.0 percent of the 28,164 DWI probationers supervised were rearrested.¹¹⁵ Of the 11.0 percent rearrested, 33.6 percent or 1,041 represented new DWI offenses while approximately 63.6 percent or 1,971 represented offenses other than DWI.¹¹⁶ Rearrest data have not changed appreciably between 1982 and 1988.¹¹⁷

111 Commission Research Assistant Mark J. McGrath's telephone interview with New York State Division of Probation and Correctional Alternatives Probation Programmer Frank Herlihy, September 27, 1990.

112 Data provided by New York State Division of Probation and Correctional Alternatives Alcohol and Substance Abuse Unit Probation Consultant Stephen Powers, July 2, 1990.

113 Ibid.

114 Ibid.

115 1988 DWI Rearrest Data (Albany: New York State Division of Probation and Correctional Alternatives, July 21, 1989), pp. 1-2.

116 Ibid.

117 Ibid.

Tables VIII and IX include data for 1984-1988 relative to the number of probation cases on hand at the beginning of each year, number of cases sentenced, number of DWI cases rearrested, rearrests as a percent of total supervised, number of DWI cases closed due to new convictions, and new conviction case closings as a percent of total supervised.¹¹⁸

As Table IX illustrates, the number of probation cases statewide for alcohol-related driving offenses increased by 62 percent from 16,887 in 1984 to 27,376 in 1988. The DWI caseload increase is significant. As Table VIII illustrates, total statewide probation cases for any offense increased by 32 percent over this period from 119,228 cases in 1984 to 158,408 cases in 1988.

Chart I reveals the progression of DWI rearrests among the DWI probation caseload from 701 DWI rearrests in 1984 to 916 DWI rearrests in 1988. DWI rearrests in 1988 accounted for 34.8 percent of all rearrests for DWI probationers. Of total rearrestees that year, 94.7 percent were male and 84.4 percent were white. In addition, 65.7 percent were between the ages of 21 and 35 at the time of rearrest. Specifically, 18.6 percent were between 21 and 25; 28.1 percent were between 26 and 30; and 19.0 percent were between 31 and 35.

¹¹⁸ Information in the following paragraphs is derived from data supplied by New York State Division of Probation and Correctional Alternatives Senior Program Analyst James E. Creighton, January 18 and 24, 1990.

TABLE VIII

**All Probation Cases
State of New York
1984 - 1988**

| | 1984 | 1985 | 1986 | 1987 | 1988 |
|------------------------|---------|---------|---------|---------|---------|
| On Hand 1/1 | 80,968 | 88,887 | 99,183 | 103,594 | 112,461 |
| Sentenced In Year | 38,260 | 40,267 | 42,291 | 44,420 | 45,947 |
| Total Supervised | 119,228 | 129,154 | 141,474 | 148,014 | 158,408 |
| | | | | | |
| Total Rearrested | 28,991 | 32,162 | 35,156 | 38,128 | 41,739 |
| Percent Rearrested | 24.3% | 24.9% | 24.8% | 25.8% | 26.3% |
| | | | | | |
| Closed New Conviction | 2,846 | 2,943 | 3,601 | 3,801 | 4,591 |
| Percent New Conviction | 2.4% | 2.3% | 2.5% | 2.6% | 2.9% |

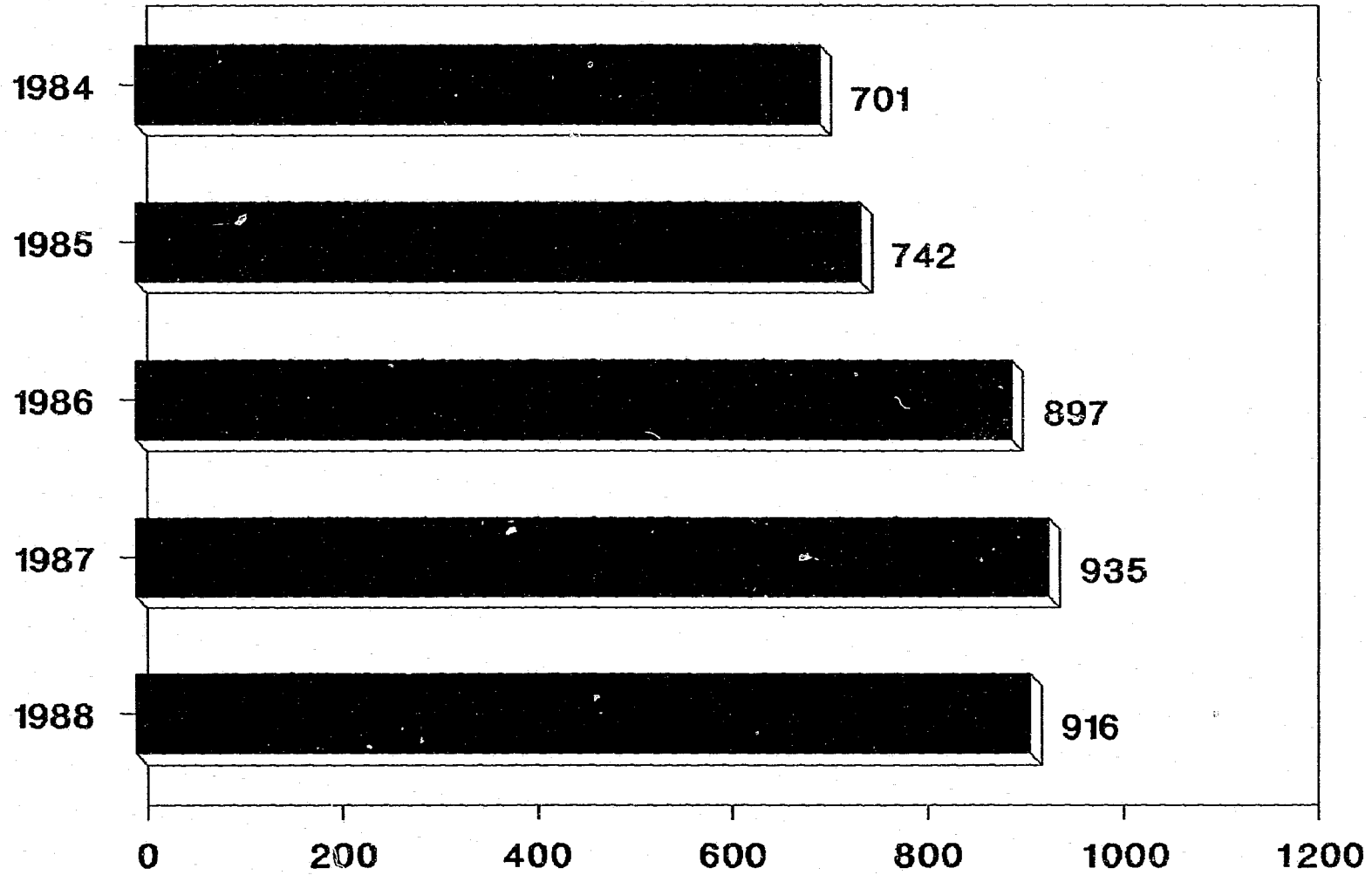
TABLE IX

**Section 1192 Offenses
State of New York
1984 - 1988**

| | 1984 | 1985 | 1986 | 1987 | 1988 |
|------------------------|--------|--------|--------|--------|--------|
| On Hand 1/1 | 10,659 | 12,827 | 16,025 | 17,490 | 19,057 |
| Sentenced in Year | 6,228 | 7,546 | 7,910 | 8,024 | 8,319 |
| Total Supervised | 16,887 | 20,373 | 23,935 | 25,514 | 27,376 |
| | | | | | |
| Total Rearrested | 1,538 | 1,820 | 2,197 | 2,416 | 2,619 |
| Percent Rearrested | 9.1% | 8.9% | 9.2% | 9.5% | 9.6% |
| | | | | | |
| Closed New Conviction | 187 | 181 | 272 | 320 | 348 |
| Percent New Conviction | 1.1% | 0.9% | 1.1% | 1.3% | 1.3% |

Source: New York State Division of Probation and Correctional Alternatives Research and Planning Unit, January 22, 1990

CHART I
DWI PROBATION CASES REARRESTED FOR DWI
STATE OF NEW YORK
1984 - 1988



Source: New York State Division of Probation and Correctional Alternatives Research and Planning Unit, January 22, 1990.

These figures may be contrasted with 1984 rearrest data. DWI rearrests in 1984 accounted for 45.5 percent of total DWI probationer rearrests. Of total rearrestees that year, 95.0 percent were male and 87.3 percent were white; and 61.3 percent were between the ages of 21 and 35 at rearrest. Specifically, 23.4 percent were between 21 and 25; 21.4 percent were between 26 and 30; and 16.5 percent were between 31 and 35.

Since approximately fifty percent of repeat DWI offenders on probation also have been involved in other criminal activities, antisocial behavior clearly plays a role in the DWI recidivism dilemma.¹¹⁹

Immature and irresponsible drivers pose a great danger on the highways; some drivers are antisocial and, in keeping with their defiant attitude toward the law, take tremendous risks perhaps to illustrate their daring and bravado or simply because they are alienated and angry individuals.¹²⁰ Similarly, it is not uncommon for such people to be involved in other forms of criminality.¹²¹

119 Testimony of New York State Division of Probation and Correctional Alternatives Alcohol Program Unit Probation Coordinator Stephen Powers, Drunk Driving Recidivism Hearing Transcript, p. 148; see also Thomas H. Nochajski, Brenda A. Miller, and William F. Wiczorek, "Criminal History and DWI Recidivism" The Problem-Drinker Driver Project Research Note 89-2 (Albany: New York State Division of Alcoholism and Alcohol Abuse, April 1989).

120 Jacobs, Drunk Driving, p. 23.

121 Ibid.

INTENSIVE PROBATION SUPERVISION

Treatment and other rehabilitative programs increasingly are used as a condition of probation.¹²² The Onondaga County Probation Department has developed a program of intensive probation supervision tailored to the DWI offender.¹²³ While first-time DWAI offenders do not receive probation, misdemeanor DWI offenders are sentenced to three years' probation and felony DWI offenders receive five year probationary terms.¹²⁴ The average release time for DWI offenders is one-half the sentence and depends on full compliance with probation conditions, including consistent passing of random urine and breath tests to ensure abstinence.¹²⁵

Onondaga County's program boasts a DWI rearrest rate approximately one-half the statewide average.¹²⁶ The program consists of preconviction evaluation, mandatory education, intensive supervision, and mandatory treatment.¹²⁷ For

122 Ibid., p. 189.

123 Testimony of Onondaga County Probation Department Commissioner E. Robert Czaplicki, Drunk Driving Recidivism Hearing Transcript, p. 100 (Hereinafter referred to as "Czaplicki Testimony").

124 Commission Research Assistant Tracey Sues's telephone interview with Onondaga County Probation Department Commissioner E. Robert Czaplicki, January 8, 1990 (Hereinafter referred to as "Czaplicki Interview").

125 Ibid.

126 "Czaplicki Testimony," p. 99.

127 Ibid., p. 100.

instance, probation officers make unannounced visits to probationers' homes and bar checks of probationers' known hangouts, and monitor their progress with outside treatment agencies.¹²⁸ In addition, Onondaga County Probation Department's control over relicensing recommendations is a condition of probation. Violators of probation either go to jail or to a residential program housed in the Syracuse Rescue Mission; the latter provides vocational and alcohol treatment services.¹²⁹

The Onondaga County Probation Department also has formed two highly effective specialized DWI units to handle the growth in the DWI probationer population; between 1983 and 1989, the number of DWI cases under supervision jumped fifty-three percent and DWI supervision presently accounts for one-third of the total County supervision population.¹³⁰ The characteristics of typical DWI offenders also have changed over this period. Polydrug abuse and prior DWI and other criminal history are common attributes of supervised offenders, necessitating more intensive and longer supervision.

The two DWI units--comprised of sixteen probation officers and two supervisors--provide intensive supervision beyond

¹²⁸ Ibid., p. 102.

¹²⁹ "Czaplicki Interview."

¹³⁰ Information is derived from 1989 Probation Annual Report (Syracuse: Onondaga County Probation Department, January 19, 1990), pp. 49-50 and 54-56.

traditional workday hours. Probation conditions are enforced rigorously and probationers are tested randomly and frequently for drug and alcohol use.

The importance of enhanced supervision cannot be stressed enough. Utilizing flextime, probation officers diligently ensure compliance with conditions of probation by working late evenings, early mornings, weekends, and holidays. Hundreds of violations have been detected through these efforts. Violations lead to incarceration or treatment plan changes to improve behavior. Onondaga County Probation Department's intensive supervision initiative provides a community-based alternative to incarceration which profoundly enhances public safety.

In Onondaga County, all DWI probationers must participate in treatment programs. Individual needs determine the type and duration of treatment required. Treatment is a top priority since the County Probation Department seeks demonstrable rehabilitation to ensure that offenders do not continue to pose a threat to the community.¹³¹

SCREENING

A promising strategy for reducing recidivism involves screening individuals who have committed alcohol-impaired driving offenses for possible alcohol abuse problems and

¹³¹ "Czaplicki Testimony," p. 105.

referring for counseling and/or treatment any offenders exhibiting problem drinking symptomology.

EARLY SCREENING PROGRAM

In recognition of the potentially ameliorative effects on the drunk driving dilemma of screening offenders for drinking problems, the Governor's Traffic Safety Committee (GTSC) provided funding to New York State Division of Alcoholism and Alcohol Abuse (DAAA) to develop the Early Screening Program (ESP).¹³² Its goal is to facilitate an assessment of offenders' drinking problems as early in the legal intervention process as possible in order to identify problem drinking drivers, make appropriate recommendations to the courts based on comprehensive evaluations, and expedite entry into alcoholism treatment services where indicated.

Presently, screening--a process of early identification of problem drinking behavior--exists at three distinct levels for drinking driver offenders: law enforcement, probation, and DDP.

At the initial law enforcement level, submission to the breathalyzer provides a BAC reading which is a determinant of the severity of the charge. Second, offenders placed on probation undergo a pre-sentence investigation (PSI) consisting of an indepth evaluation. PSI results may lead to

¹³² Information in the following paragraphs is derived from Williford, et al., Early Screening Program Resource Guide, pp. 3, 5, 9-10, and 17.

recommendations for formal evaluation at an alcoholism treatment agency and subsequently for mandated treatment as a condition of probation. Finally, offenders who are eligible for and opt to attend DDP are screened for problematic drinking behavior and are referred for further treatment if indicated.

It is possible for offenders in need of treatment to escape detection given the structure of the current system; offenders who are not sentenced to probation or who do not choose to attend DDP likely will not receive an evaluation for alcohol problems. Addition of ESP to the process can obviate this difficulty by greatly enhancing identification and referral of problem drinking drivers.

Due to the fact that problem drinkers widely are considered to be "at risk" for repeat drunk driving offenses as well as alcohol-related crashes, implementation of ESP would benefit not only the individual but also the community and other drivers.

ESP employs three criteria in evaluating drunk driving offenders--BAC, prior traffic offenses, and circumstances at the arrest scene. Problem drinking is suggested either by a BAC of .20 at time of arrest, or a BAC of .15 in conjunction with (1) one or more prior alcohol-related arrest(s) or previous alcohol-related contact with medical, social, or community agencies; (2) employment, marital, or other problems associated with alcohol use; or (3) a positive score on a reliable screening instrument. Prior commission of reckless driving offenses may provide further indication of problem drinking. Other circumstances

also may bear on a finding of problem drinking such as time of day upon arrest.

Screening program personnel carefully synthesize all information gathered. Should the investigation yield a finding of problem drinking, a recommendation will be made to the court either for further evaluation or treatment. Ultimately, ESP is aimed at preventing the reentry into the criminal justice system of problem drinking drivers.

Currently, judges do not systematically receive an assessment of defendants' drinking and legal behavior.¹³³ A PSI and report are required for a felony charge but not for a misdemeanor unless the court orders a sentence of probation or of imprisonment in excess of 90 days.¹³⁴

As noted, Onondaga County screens all probationers for alcohol problems; drinking driving offenders placed on probation have misdemeanor and felony DWI records. Nassau County's screening program is not tied to probation; its target groups are DWAI and DWI offenders and use of the program fully is within the discretion of individual judges.

¹³³ Testimony of New York State Division of Probation and Correctional Alternatives Alcohol Program Unit Probation Consultant Stephen Powers, Drunk Driving Recidivism Hearing Transcript, p. 50.

¹³⁴ New York Criminal Procedure Law, §390.20 (McKinney 1983).

NASSAU COUNTY PROBATION ALCOHOL SCREENING SERVICE

The Nassau County Probation Department, in an effort to reduce DWI recidivism, developed an innovative early intervention approach known as the Probation Alcohol Screening Service (PASS) Program.¹³⁵ The PASS Program has been operational since August 1986, with the exception of a four month hiatus in 1988 due to staffing difficulties.¹³⁶ PASS has evaluated 4,478 first-time offenders through August, 1990. A total of 678 program participants have completed successfully recommended treatment programs and numerous others have attended education programs.¹³⁷

The primary purpose of the PASS Program is to address possible alcohol treatment needs of first-time DWI and DWAI offenders in order to lessen the probability of recidivism.¹³⁸ Initially, all offenders referred to the program are screened to determine the existence of an alcohol abuse problem; offenders identified as having such problems thereafter are evaluated by treatment professionals to determine the precise nature of each

135 Letter from Senior Probation Officer Jane D'Amico to Commission Counsel Janis R. Veeder, December 14, 1989 (Hereinafter referred to as "D'Amico letter").

136 Ibid.

137 Commission Counsel Joanna M. King's telephone interview with Senior Probation Officer in Charge of the PASS Unit Inez Lerner, September 19, 1990 (Hereinafter referred to as "Lerner Interview").

138 Probation Alcohol Screening Service (PASS) Procedures Manual (Mineola, New York: Nassau County Probation Department, August 1986), pp. 2, 5-6, and 8-10.

offender's treatment needs. Screening usually takes place directly following arraignment or as soon thereafter as possible.¹³⁹

Mandatory referral for alcohol evaluation is occasioned by the presence of any of the following indicators:

- (1) BAC of .18 percent or greater
- (2) an accident involving personal injury related to the instant offense
- (3) positive responses to three or more specified questions on the Program's alcohol questionnaire.¹⁴⁰

Should none of the above factors be present, the referral decision is based on an amalgam of factors including prior alcohol-related history, BAC at time of arrest, driving record, and verbal and written responses to questions.¹⁴¹

If the evaluation does not reveal a need for treatment, a recommendation so noting will be forwarded to the court along with a suggestion for voluntary participation in an alcohol education program, such as the Department of Motor Vehicles' DDP.

Should the evaluation indicate a need for treatment, the PASS report to the court either will recommend conditional discharge with treatment as directed by the County Probation

139 Ibid.

140 "Lerner Interview."

141 Probation Alcohol Screening Service (PASS) Procedures Manual.

Department or make no specific sentencing recommendation due to the defendant's legal history.¹⁴² Once the court imposes a conditional discharge sentence including a treatment component, PASS refers the defendant to an appropriate treatment program and PASS personnel thereafter closely monitor the participant's progress. Failure to comply with treatment mandates will result in notification to the court of a violation of conditional discharge.¹⁴³ For most cases, the recommended treatment will be outpatient, but inpatient detoxification may be necessary for cases involving more serious alcohol problems.

As of September 1, 1990, 648 offenders were being monitored by PASS while participating in treatment programs or were awaiting final court disposition.¹⁴⁴ Although there are more than twenty District Court judges who utilize the PASS program, the Senior Probation Officer in charge of the PASS Unit Inez Lerner believes there is a pressing need for legislation instituting a mandatory referral process to effectuate screening of all first-time offenders.¹⁴⁵

142 Ibid.

143 See also New York Criminal Procedure Law, §410.30 (McKinney 1983).

144 "Lerner Interview."

145 Ibid.

PROPOSED SCREENING and TREATMENT LEGISLATION

There currently is a bill before the New York State Legislature providing, inter alia, for evaluation of repeat offenders and certain first offenders for alcohol addiction and mandating treatment in appropriate cases. Companion bills, Assembly 224-A and Senate 5444-A, are sponsored by Assemblyman John Brian Murtaugh and Senator Thomas W. Libous, respectively.

The bill amends New York Vehicle and Traffic Law by requiring any person whose license has been revoked for an alcohol-related driving offense when the person has had another such offense within the previous five years to show evidence of a rehabilitative effort as a condition for driver's license reinstatement. Rehabilitative effort involves evaluation by an approved agency or individual and documentation that the offender either was not in need of or has completed successfully a prescribed treatment agenda.

In addition, the measure would add a provision to law mandating courts to order formal alcoholism evaluations at the arraignment of persons charged with (1) committing a second alcohol-related driving offense, (2) operating a motor vehicle with a BAC in excess of .20 percent, (3) refusing to submit to a chemical test, or (4) committing an alcohol-related offense and the court determines circumstances warrant evaluation.

A section of this bill authorizes inclusion of a treatment requirement as a condition of a sentence. The court would be free to hold the plea in abeyance pending evidence of

defendant's successful completion of an approved treatment program.

Assembly 11074-A, sponsored by Assemblyman Michael Bragman, and Senate 8984-A, sponsored by Senator Thomas Libous, would establish a program entitled Help Ensure Abusers Receive Treatment and Supervision (HEARTS). The measure would establish a grant pool by increasing the mandatory surcharge on alcohol-related offenses in the Vehicle and Traffic Law and depositing the overage into a special account. Grants would be awarded to programs for identification, assessment, treatment, and/or supervision of DWI offenders in need of such services. A special Drinking Driving Advisory Board would be formed to disburse grant monies.

The screening and treatment initiatives referenced above were cited as integral proposals to advance drunk driving reform in New York State by the Assembly Transportation Committee in its June 1990 preliminary report to the Assembly.¹⁴⁶

ALTERNATIVES TO INCARCERATION

Innovative alternative to incarceration programs with residential treatment components are operational in Yaphank,

¹⁴⁶ Drunk Driving Reform in New York State: A 10 Year Review, A Preliminary Report to the Assembly (Albany: New York State Assembly Transportation Committee, June 1990), pp. 28 and 30 (Hereinafter referred to as Assembly Transportation Committee, Drunk Driving Reform).

Altamont, and Syracuse, New York. These alternative to incarceration programs hold great promise for dealing with chronic recidivist drunk drivers since the incarceration component punishes recalcitrant offenders while the treatment component addresses alcohol-related problems; the combination may provide the wherewithal to rehabilitate the offender.¹⁴⁷

SUFFOLK COUNTY DWI JAIL ALTERNATIVES PROGRAM

Designed to reduce jail overcrowding and recidivism among chronic DWI offenders, the Suffolk County DWI Jail Alternatives Program has two main components: (1) the DWI Jail Alternatives Facility, also known as the Suffolk County Alternative Facility (SCAF); and (2) intensive Probation Alcohol Treatment (PAT) supervision.¹⁴⁸ The former is operated under the jurisdiction of the Suffolk County Sheriff whereas the latter is under the aegis of the Suffolk County Probation Department.¹⁴⁹ This integrated model, operational since 1985, is a variation of the PAT approach which has operated continuously in Suffolk County

¹⁴⁷ Nichols and Ross, "The Effectiveness of Legal Sanctions", p. 102.

¹⁴⁸ James J. Golbin, Salvatore D. Trotto, and William A. Stewart, Statistical Summary of the Planning and Evaluation Study of the Suffolk County DWI Jail Alternatives Program: Forty-Five Month Update (Yaphank, New York: Suffolk County Probation Department, September 1989), p. 1.

¹⁴⁹ Ibid.

since 1979. SCAF and PAT together represent a "cooperative interdisciplinatory correctional/treatment approach."¹⁵⁰

The conjoint program currently is administered by Suffolk County Drug and Alcohol Abuse Services, the Probation Department, and the Sheriff's Office.¹⁵¹ Approximately two-thirds of the funding for SCAF comes from Suffolk County STOP-DWI while the remaining one-third of the funding is provided by the State of New York Division of Probation and Correctional Alternatives (DPCA) through their alternatives to incarceration grant program.¹⁵² Supplemental direct funding for program operation also comes from the Suffolk County budget.¹⁵³ Originally funded by GTSC, PAT now receives funding from DPCA, Suffolk County STOP-DWI, and Suffolk County Probation Department.¹⁵⁴

The DWI Jail Alternatives Program is geared toward the most serious drunk driving offender population; i.e., defendants sentenced to terms of jail and probation due to their recidivist

150 Ibid.

151 Commission Counsel Joanna M. King's telephone interview with Suffolk County Probation Department Chief Planner James J. Golbin, January 31, 1990. (Hereinafter referred to as "Golbin Interview").

152 Testimony of Suffolk County Probation Department Director of Training Burke J. Samson, Drunk Driving Recidivism Hearing Transcript, p. 141 (Hereinafter referred to as "Samson Testimony").

153 Golbin, et al., Statistical Summary 1989, p. 2.

154 "Golbin Interview."

behavior.¹⁵⁵ Offenders receive a split sentence between SCAF in Yaphank, New York, and intensive PAT supervision for the remainder of the sentence.¹⁵⁶ Participants usually receive a sentence of sixty days to six months in SCAF, followed by a three or five year probation term.¹⁵⁷ On average, offenders spend between eighty and ninety days in SCAF.¹⁵⁸

SCAF is a 24-hour facility which operates in three distinct phases: orientation, denial group treatment, and early recovery treatment.¹⁵⁹ Individuals with three or more prior DWI convictions, a high Mortimer-Filkins score, a high BAC level, and a "history of failure" in other traditional DWI supervision and treatment settings make up the target population for the Program.¹⁶⁰

The PAT component of the Program consists of intensive supervision, frequent testing for alcohol use, immediately

155 James J. Golbin, Salvatore D. Trotto, and Ray D'Augusta, Planning and Evaluation Study of the Suffolk County DWI Jail Alternatives Program: Twenty-Four Month Report (Yaphank, New York: Suffolk County Probation Department, April 1988), p. 1.

156 Golbin, et al., Statistical Summary 1989, p. 4.

157 "Samson Testimony", p. 142.

158 "Golbin Interview."

159 Golbin, et al., Statistical Summary 1989, pp. 6-7.

160 Ibid., p. 9.

accessible treatment services, and group counseling for offenders and significant others.¹⁶¹

While all offenders who complete their prescribed term at SCAF progress immediately to the intensive PAT supervision stage, many other offenders are sentenced directly into PAT.¹⁶² SCAF currently is operating at its full, thirty-bed capacity.¹⁶³

An integral part of the DWI Jail Alternatives Program has been ongoing evaluation of its efficacy in reducing recidivism.¹⁶⁴ The most recent evaluative report compared the characteristics and progress of 120 male, split sentence probationers accepted into SCAF between December, 1985 and September, 1987 with a control group of 106 similarly situated DWI offenders who received a split jail/probation sentence in 1985.

No statistically significant differences were found between the SCAF and control populations with regard to age, marital status, ethnic origin, educational level, alcohol and drug dependency, BAC level for current offense, Mortimer-Filkins score, or prior legal history. However, a statistically

161 Probation Alcohol Treatment (PAT) Program Tenth Anniversary Fact Sheet (Yaphank, New York: Suffolk County Probation Department, September 1989), p. 1.

162 "Golbin Interview."

163 Ibid.

164 Information in the following paragraphs is derived from Golbin, et al., Statistical Summary 1989, pp. 2, 4, and 10-18.

significant difference between the groups was found relative to employment status; 80.8 percent of SCAF clients were gainfully employed at the time of arrest compared to 52.8 percent employment among the members of the control group.

After an average follow-up period of almost two years upon release from SCAF or jail, the DWI rearrest rate for the SCAF population was 10.8 percent whereas the DWI rearrest rate for the control group was 24.5 percent.

While these preliminary results are encouraging indeed, it is important to stress that SCAF began with day treatment in December, 1985 and expanded to its current status as a twenty-four-hour residential facility in February, 1987.¹⁶⁵ The first cohort--i.e., the 120 SCAF participants referenced above--represent the first wave of participants in the integrated program and will continue to be monitored by Program staff.¹⁶⁶ If extant results continue over longer follow-up periods, the Program's effectiveness will be demonstrated amply.¹⁶⁷

¹⁶⁵ See also Kathleen Kerr, "DWI Counseling Praised: Repeat Arrests Drop for those in Suffolk Programs, Study Shows," Newsday (Melville, New York), February 3, 1989, p. C6.

¹⁶⁶ "Golbin Interview."

¹⁶⁷ Golbin, et al. Statistical Summary 1989, p. 5.

Currently, PAT programs are operational in four counties in New York State--Suffolk, Ulster, Dutchess, and Rensselaer.¹⁶⁸ However, no other County has the "intensive treatment model being pioneered in Suffolk County."¹⁶⁹

For the chronic recidivists participating in the full program, treatment services during SCAF confinement are greatly enhanced by intensive follow-up care including alcohol therapy and probation supervision upon release for three or five additional years.¹⁷⁰

THE REVEREND PETER G. YOUNG REHABILITATION CENTER

In Altamont, New York, the Reverend Peter G. Young Rehabilitation Center also provides alcohol treatment within an alternative to incarceration program.¹⁷¹ Originally known as Altamont House, the program began in April 1985 and was designed to replicate the typical jail-bound population. Therefore, DWI offenders account for an estimated fifteen percent of the

168 Commission Counsel Joanna M. King's telephone interview with New York State Division of Probation and Correctional Alternatives Probation Alcohol Unit Chief Francis D. Herlihy, February 6, 1990.

169 Lois Utley, "Suffolk County Program Treats Chronic DWI Offenders in Jail," The Times Union (Albany, New York), June 24, 1988, p. A13.

170 "Golbin Interview."

171 Information is derived from Commission Counsel Joanna M. King's telephone interview with DPCA Alternatives to Incarceration Bureau Correctional Alternatives Representative Richard McDonald, February 2, 1990.

Center's current twenty-six-bed capacity. This alternative to incarceration program applies only to individuals who otherwise would have served thirty days or more in jail.

The program is DAAA-licensed and provides residential treatment services for twenty-eight days. The Center is funded jointly by DPCA and Medicaid-generated revenues. Program participants generally are drawn from nearby Albany, Rensselaer, Saratoga, and Schenectady counties.

Typically, participants have had three or more prior DWI convictions as well as a history of non-DWI criminal behavior. Individuals exhibiting violence or serious psychological disorders are ineligible. Program participation usually is mandated as either a condition of probation or as part of a conditional discharge.

Beginning in 1989, successful completion of residential treatment at the Center must be followed by monitored aftercare involving halfway houses or outpatient services; aftercare typically lasts at least six months. Failure to successfully complete the residential treatment program requirements results in the court remanding the individual to jail.

VIOLATION OF PROBATION PROGRAM--SYRACUSE, NEW YORK

Another Alternative To Incarceration (ATI) Program, similar to Altamont's, is a violation of probation program in Syracuse, New York. This residential program, located in the Syracuse Rescue Mission, is used in lieu of jail for all types of

offenders with alcohol or drug abuse problems.¹⁷² Offenders normally serve a term at the Rescue Mission between three and six months.¹⁷³

This state-funded alternative to incarceration program has three major benefits: saving jail space and therefore money at local correctional or state facilities, affording rehabilitation services to the probationers, and allowing participants to retain employment.¹⁷⁴

Upon completing the residential phase, these probationers must attend a three month after-care component followed by resumption of regular supervision.¹⁷⁵

Another ATI involves house arrest or home detention with manual or electronic monitoring of compliance.

ELECTRONIC HOME MONITORING

A recent development among incarceration alternatives is electronic home monitoring (EHM). Most agencies employing an electronic home detention program (EHDP) do so primarily to

172 "Czaplicki Interview."

173 Ibid.

174 Czaplicki Testimony, p. 108.

175 Ibid., p. 109.

relieve jail and prison overcrowding and attendant costs.¹⁷⁶ Allowing offenders to continue to work and support themselves and their families is a key benefit of EHM.¹⁷⁷ EHM provides a sentencing option more restrictive than probation yet less confining than jail or prison.¹⁷⁸ Several specialized populations, including DWI offenders, have been identified as candidates for effective EHM supervision.¹⁷⁹ EHM presents a propitious sentencing option for the DWI offender.

EHM systems currently available and in use in New York State have three components: (1) a central computer located at a probation or correctional office; (2) a receiver unit located in the offender's home; and (3) a transmitter device worn by the offender.¹⁸⁰ The receiver relays the transmitter device signal to a central monitoring station where the computer registers interruptions in the signal and prints a report that alerts correction or probation officials that the offender may have

176 Bette Arey, Electronically Monitored Home Confinement: A New Alternative to Imprisonment (Madison: Wisconsin Legislative Reference Bureau, December 1988), p. 3.

177 Troy Armstrong, Gary Reiner, and Joel L. Phillips, Electronic Monitoring Programs--An Overview (Sacramento: EMT Group, Incorporated, April 1987), p. 8.

178 Louis J. Trombini II, Electronic Home Monitoring Program (Lyons, New York: Wayne County Probation Department, 1989), p. 1.

179 Armstrong, et al., Electronic Monitoring Programs, p. 3.

180 Rolando V. Del Carmen and Joseph B. Vaughn, "Legal Issues in the Use of Electronic Surveillance in Probation," Federal Probation, June 1986, p. 60.

violated probation requirements by leaving his or her residence at an unauthorized time.¹⁸¹ Some computers are staffed and monitored twenty-four hours a day while others rely on review of night and weekend reports undertaken on the next business day.¹⁸²

There are three basic types of monitoring systems. First, continuously signaling or active devices monitor the presence of an offender at a particular location.¹⁸³ A transmitter attached to the offender's body sends short range signals to a receiver and the offender must stay within range for the electronic impulse to be received.¹⁸⁴

Second, programmed contact or passive devices use a variety of methods to contact the offender periodically to verify his presence.¹⁸⁵ Since passive systems also must be able to identify whether the person responding is in fact the offender, such systems involve visual monitoring with video equipment, voice verification, requiring the offender to punch a number

181 Arey, Electronically Monitored Home Confinement, p. 2.

182 Testimony of Director Edmund B. Wutzer, New York State Division of Probation and Correctional Alternatives, Transcript of Public Hearing before the Assembly Standing Committee on Correction and Assembly Standing Committee on Codes on the Role of Electronic Supervision in the Criminal Justice System, Albany, New York, May 19, 1989, p. 4 (Hereinafter referred to as The Role of Electronic Supervision Hearing Transcript).

183 Arey, Electronically Monitored Home Confinement, p. 2.

184 Armstrong, et al., Electronic Monitoring Programs, p. 1.

185 Arey, Electronically Monitored Home Confinement, p. 2.

code into a touchtone telephone while wearing a special wrist watch, or requiring the offender to insert his wrist bracelet into a verifier box attached to a telephone.¹⁸⁶

Third, dual systems combine features of both active and passive systems.¹⁸⁷

EHM may be used in conjunction with work release, pre-trial release, house arrest, and as a condition of parole or probation.¹⁸⁸ Offenders eligible for EHM usually are non-violent.¹⁸⁹ Use of EHM largely has been confined to adult males.¹⁹⁰ In 1988, women constituted 12.7 percent of monitored offenders nationwide.¹⁹¹ Most referrals to an EHDP come from judges but district attorneys and probation departments also have referred offenders.¹⁹² Eligibility criteria for EHM programs involve type of criminal offense, type and length of sentence, special offender status, conditions of the court order, risk classification, and state of health.¹⁹³

186 Ibid.

187 Ibid., p. 3.

188 Armstrong, et al., Electronic Monitoring Programs. p. 13.

189 Trombino, Electronic Home Monitoring Programs, p. 3.

190 Armstrong, et al., Electronic Monitoring Programs, p. 4.

191 Annesley K. Schmidt, "Electronic Monitoring of Offenders Increases," NIJ Reports, January/February 1989, p. 3.

192 Armstrong, et al., Electronic Monitoring Programs, p. 15.

193 Ibid., p. 18.

Renting or leasing EHM equipment presents cost saving options for state and local governments utilizing EHDPs since technology is changing and improving rapidly.¹⁹⁴ Some EHDPs collect an "offender fee" which completely or partially defrays electronic monitoring costs.¹⁹⁵ Guardian Technologies, Incorporated, for example, leases its EHM unit for four dollars per day and offers twenty-four-hour monitoring services for an additional two dollars per day.¹⁹⁶

Initial findings indicate that electronic monitoring program costs are lower than traditional incarceration costs.¹⁹⁷ For example, in Onondaga County, New York, the cost of an intensive supervision EHDP is about \$7,500 per person for one year while the cost of jail is between \$24,000 and \$30,000 per person for one year. Currently, half of Onondaga County Probation Department's thirty-five EHM units are used for DWI offenders.¹⁹⁸

194 The Role of Electronic Supervision Hearing Transcript,
p. 10.

195 Armstrong, et al., Electronic Monitoring Programs, p. 21.

196 Commission Research Assistant Mark J. McGrath's telephone interview with Guardian Technologies, Incorporated Manager of Program Development Richard Freund, July 2, 1990.

197 Armstrong, et al., Electronic Monitoring Programs, p. 22.

198 Information is derived from Commission Research Assistant Tracey Suess' telephone interview with Onondaga County Probation Department Commissioner E. Robert Czaplicki, March 5, 1990.

Problems arising with the equipment may decrease EHDP's effectiveness. First, power surges or power outages may interrupt signal transmission resulting in a false negative reading on the computer at the central monitoring station.¹⁹⁹ Placement of metal objects between the transmitter and the receiver in an offender's home also may interrupt transmission.²⁰⁰ Another problem arises from the device's dependence on the use of telephone lines. If local service is poor, the signal may not be transmitted.²⁰¹ Also, a busy signal does not ensure the offender is at home.²⁰²

According to a National Institute of Justice survey, as of 1988, thirty-three States had EHDPs, under which a total of 2,300 offenders had been supervised.²⁰³ Nationwide, over twenty-five percent of monitored offenders were charged with major traffic offenses. At least seventy-one percent of this group were sentenced to participate in an EHDP due to an alcohol-related traffic offense. Some existing EHDPs have expanded and others have been established since the survey was completed.

¹⁹⁹ Armstrong, et al., Electronic Monitoring Programs, p. 7.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Schmidt, "Electronic Monitoring Increases," p. 3.

EHM IN NEW YORK STATE

In 1987, funds were included in the DPCA Intensive Supervision Program appropriation to establish and test demonstration projects in Erie and Suffolk counties in 1988.²⁰⁴

Premised on the positive experience with these demonstration projects, other New York State counties have implemented EHDPs. As of March 5, 1990, sixteen counties had home detention programs.²⁰⁵ Fifteen counties reported using electronic monitoring, two counties employed manual monitoring programs, and seven counties used both electronic and manual monitoring of home detention offenders. Five counties had active systems, four had passive systems, and six had dual systems. Twelve counties allow the program to be used for DWI and drug cases. In 1988, 171 of the 334 alcohol-related driving cases were assigned to an EHM program in participating counties. Home detention provides a viable option for counties that have problems with jail overcrowding and alcohol-related offenses.

Additional innovations are being pioneered by two counties to determine whether the monitored offender is drinking while

²⁰⁴ Testimony of Director Edmund B. Wutzer, New York State Division of Probation and Correctional Alternatives, The Role of Electronic Supervision Hearing Transcript, p. 2 (Hereinafter referred to as "Wutzer Testimony").

²⁰⁵ Information is derived from Commission Research Assistant Tracey Suess' telephone interviews with New York State County Probation Departments' Officials, January 11, 1990, March 2, 1990, and March 5, 1990.

confined to his home. A voice verification device is used in Steuben County to alert the probation officer if the offender has been drinking. If an offender has been drinking and his words become slurred, the offender's voice print will change.²⁰⁶ In Genesee County, an Alcosensor measures the offender's BAC and the reading is transmitted to the central computer.²⁰⁷

Electronic monitoring usually is a special condition of probation imposed by a judge. Most counties have no minimum or maximum term for the electronic monitoring portions of sentences.²⁰⁸

Analogizing from experience with other sanctions, DPCA Director Edmund B. Wutzer warned that it may be counterproductive and unnecessarily costly to place an offender under home detention for longer than six months. Additional research is needed to determine whether extended periods of home incarceration improve EHM effectiveness in light of resultant cost increases.²⁰⁹

206 Information is derived from Commission Research Assistant Tracey Suess' telephone interview with Steuben County Director of Probation Ralph Schnell, January 11, 1990.

207 Information is derived from Commission Research Assistant Tracey Suess' telephone interview with Genesee County Director of Probation Gary Clark, February 9, 1990.

208 Thomas Mitchell, "Status Report on Electronic Monitoring in New York State," an unpublished report prepared by New York State Division of Probation and Correctional Alternatives, February 7, 1989, p. 4.

209 "Wutzer Testimony," p. 9.

EHDPS in New York State typically involve jail-bound offenders who are felons or misdemeanants.²¹⁰ The vast majority of EHDP participants are under a curfew type schedule only permitting travel to and from work, school, and treatment.²¹¹ Very few individuals have violated the conditions of their electronic monitoring sentence.²¹²

Indeed, DPCA Director Edmund B. Wutzer maintained that "electronically monitored home confinement, if rigorously enforced, represents the most restrictive alternative sanction currently available."²¹³

An effective EHM sentence must include frequent contacts by probation officers and counselors.²¹⁴ Without such intervention, house arrest would have little potential to reduce recidivism.²¹⁵ The programs involve different models and have had few failures to date, but the number of participants has been small since EHM is a relatively new innovation.²¹⁶ More research--involving larger offender pools and longer evaluation

²¹⁰ Mitchell, "Status Report," p. 5.

²¹¹ Ibid., p. 4.

²¹² Ibid.

²¹³ "Wutzer Testimony," p. 3.

²¹⁴ Ibid., p. 7.

²¹⁵ Ibid.

²¹⁶ Mitchell, "Status Report," p. 1.

periods--is needed to yield a more definitive assessment of program effectiveness.

IGNITION INTERLOCK DEVICES

The ignition interlock or in-vehicle alcohol test (IVAT) device currently is being used as a sanction in DWI recidivism cases. The device is designed not to replace but to supplement rehabilitative treatment measures or other punitive sanctions.²¹⁷ Its purpose is to ensure the offender does not continue to drive while under the influence of alcohol.

Generally, offenders are responsible for the cost of installation and servicing of the device. The Guardian Interlock System currently costs \$50 per month to lease or \$595 to buy.²¹⁸

Before a person can start an IVAT equipped vehicle, he or she must breathe into a breath analyzer attached to the vehicle's ignition.²¹⁹ A micro-computer determines the driver's BAC.²²⁰ If the BAC level exceeds the pre-set calibration level,

²¹⁷ Written testimony submitted by Guardian Interlock Systems, Incorporated, Drunk Driving Recidivism Hearing Transcript, exhibit 2, p. 1 (Hereinafter referred to as "Guardian Testimony").

²¹⁸ Commission Research Assistant Mark J. McGrath's telephone interview with Guardian Technologies, Incorporated Program Development Manager Richard Freund, July 2, 1990.

²¹⁹ "Guardian Testimony," p. 2.

²²⁰ Ibid., p. 4.

the automobile will not start.²²¹ A National Highway Traffic Safety Administration report found that IVAT devices are accurate at identifying BACs greater than or equal to .04 percent under laboratory conditions.²²²

The device is commercially available from manufacturers such as Guardian Technologies, Incorporated, Denver, Colorado; Safety Interlock, Carmel, California; and Breath Test USA, San Luis Obispo, California.²²³ Each company's device contains at least one anti-circumvention feature which contributes to accuracy.

There are five main types of anti-circumvention features in use. First, pressure and temperature requirements check the air entering the device to determine that the air is at the same temperature and pressure as human breath.²²⁴ Second, the Coordinated Breath Pulse Access feature requires the driver to blow into the breath analyzer a short series of "breath pulses." If the correct code is not delivered within three attempts, the vehicle will not start.²²⁵ Third, the "memo-minder" prevents the driver from starting the vehicle if the offender fails to

221 Ibid., p. 2.

222 James F. Frank, Research Notes-Further Laboratory Testing of In-Vehicle Alcohol Test Devices (Washington, D.C.: National Highway Traffic Safety Administration, November 1988), p. 1.

223 Ibid.

224 Ibid., p. 3.

225 Ibid., p. 2.

attend his or her appointments for periodic checks ensuring the good working condition of the device.²²⁶ Fourth, the "guard-link" immobilizes the vehicle if the device has been tampered with.²²⁷ A number of devices contain a "retest-feature"; i.e., if a driver has a BAC between .01 and .03 percent, he or she must pull over and retest after twenty minutes of driving. Should the driver fail to retest, the vehicle's horn will blow intermittently.²²⁸

These anti-circumvention features contribute to the prevention of device tampering, but none was found to be completely effective.²²⁹ Motivated individuals, with pre-planning and some knowledge, can fool the devices tested.²³⁰ Two strategies for fooling the sensors are the use of non-alcohol, bogus breath samples and processed filtered alcoholic air samples.²³¹ A bogus breath sample may be obtained by using materials easily purchased or found around the home--a mylar plastic bag, a rubber toy balloon, or a plastic grocery store bag.²³² Bogus air samples may be warmed up by body heat,

²²⁶ Lee Robins, "New Features Enhance Benefits of Guardian Interlock," Interlock Technology News, Summer 1987, p. 4.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Frank, Further Laboratory Testing, p. 17.

²³⁰ Ibid., p. 18.

²³¹ Ibid., p. 5.

²³² Ibid.

wooden matches, or a hair dryer in order to fool temperature sensors.²³³ A styrofoam coffee cup and warm water or a cylindrical, paper tube packed with absorbent material may be used to filter out alcohol when an IVAT user breathes into the device.²³⁴

NEW YORK'S IGNITION INTERLOCK PILOT PROGRAM

Driving while intoxicated is the most common offense of probationers in New York State and recidivists are not deterred easily from continuing to drink and drive.²³⁵ Twenty to fifty percent of all drunken drivers will become repeat offenders within three years of their first conviction.²³⁶

A New York State law, effective April 1989, established a two year Ignition Interlock pilot program.²³⁷ The program's purpose is to analyze the effectiveness of the device as a part of the courts' sentencing and probation options in six counties--Albany, Erie, Monroe, Nassau, Onondaga, and Suffolk.²³⁸

233 Ibid.

234 Ibid., p. 6.

235 Testimony of Monroe County Probation Department Director Robert J. Dunning, Drunk Driving Recidivism Hearing Transcript, p. 2.

236 "Guardian Testimony," p. 2.

237 New York Laws of 1988, Chap. 713, and New York Vehicle and Traffic Law, §1198 (McKinney 1990 Supp.).

238 Ibid., §1198(1).

The device may be installed after the offender has satisfied a mandatory license revocation period.²³⁹ A post-revocational conditional license is issued to the probationee by the New York State Department of Motor Vehicles upon recommendation of the sentencing court.²⁴⁰ The conditional license may be used to travel to and from work, an accredited school, court-ordered probation activities, Motor Vehicle offices, and needed medical treatment. The offender also may operate a motor vehicle during hours of employment if conditions of employment so require.²⁴¹

Proof of compliance must be given to the court and the restriction must be noted by the Commissioner of Motor Vehicles on the operating record of the person required to use the device.²⁴² The cost of installing the device must be paid by the offender.²⁴³ The law declares the following actions to be misdemeanors--tampering with the device, knowingly equipping an offender with a vehicle that does not contain an IVAT device, and soliciting another person to blow into the device.²⁴⁴ The

239 Ibid., §1198(3)(a).

240 Ibid.

241 Ibid., §1198(3)(b).

242 Ibid., §1198(4)(b).

243 Ibid., §1198(4)(c).

244 Ibid., §1198(10).

law sunsets on July 1, 1992, absent additional legislative action.²⁴⁵

On December 20, 1989, the State Commissioner of Health promulgated amended standards of certification for ignition interlock devices to be used in New York State.²⁴⁶ Devices must meet standards for accuracy and security, data collection and recording, tamper detection, retesting, and operation in a range of environmental conditions.²⁴⁷

According to Edward Dwyer, New York State Department of Motor Vehicles Coordinator for the Ignition Interlock project, start-up of the New York State pilot program has been delayed due to stringent requirements imposed by the New York State Department of Health upon companies interested in providing devices within New York State--Guardian Interlock, Denver, Colorado; and Breath Test USA, San Luis Obispo, California. Manufacturers currently are updating their equipment to meet these strict standards and the delay will result in a more effective, high quality device.

Due to this delay, the start up and end dates for the program will have to be adjusted. No new tentative target dates

²⁴⁵ Ibid., §1198.

²⁴⁶ These rules will be codified at 10 NYCRR Part 59.

²⁴⁷ Ibid.; the standards will be codified at §59.11(b).

have been set.²⁴⁸

Ignition interlock bills also were introduced in the 1990 session of the New York State Legislature. Assembly 11941, introduced by Assemblyman Michael Bragman and others, and Senate 9057, introduced by the Senate Committee on Rules, would amend the Vehicle and Traffic Law to authorize interim certification of ignition interlock devices in order to accelerate commencement of the pilot project and extend the program's sunset date to July, 1994 to accommodate the delay.

Senate 2730-A, introduced by Senator Norman J. Levy, and Assembly 3984-A, introduced by Assemblywoman Helene Weinstein, would amend the Vehicle and Traffic Law and the Education Law to enable school districts purchasing ignition interlock devices for use in old and new school buses to receive state aid for the purchase of these devices.

Assembly 11912, introduced by the Assembly Committee on Rules at the request of Assemblyman Michael Bragman, would authorize the Commissioner of Motor Vehicles to study the technological feasibility of developing a performance-based, as opposed to substance-based interlock device.²⁴⁹ Such' a device would address the problem of polydrug abuse by offenders since

²⁴⁸ Information is derived from Commission Counsel Joanna M. King's telephone interview with New York State Department of Motor Vehicles Ignition Interlock Project Coordinator Edward Dwyer, June 25, 1990.

²⁴⁹ See Assembly Transportation Committee, Drunk Driving Reform, p. 32.

it would measure decrement in psychomotor performance regardless of the particular substance(s) causing impairment.

The interlock innovation provides the best technological strategy to date for preventing drinkers from driving. Although it is too early to fully evaluate the devices' effectiveness, ignition interlock is an important sentencing option for convicted drunk drivers.²⁵⁰

DWI VICTIMS' IMPACT PANELS

A new sentencing option has become available which enables relatives and friends of people killed by drunk drivers to convey their tragic experiences to convicted drunk drivers.²⁵¹

In New York State, three counties--Albany, Genesee, and Orange--have DWI Victims' Impact Panels. Albany County STOP-DWI and Remove Intoxicated Drivers (RID), for example, have convened panels in the Capital District four times beginning in August 1989.²⁵² The purpose of the panels is to make DWI offenders aware of the potentially devastating consequences of their

250 Jacobs, Drunk Driving, pp. 171-72.

251 Greater Capital District Remove Intoxicated Drivers (RID) Newsletter, September/October 1989, p. 1.

252 Letter to Commission Counsel Joanna M. King from Albany County STOP-DWI Panel Coordinator Marjorie Huth and RID Panel Coordinator Betty Martin dated August 27, 1990.

behavior to forestall future drunk driving incidents.²⁵³ Defendants sentenced to panel attendance usually have between one and three DWI convictions and some have had as many as nine convictions.²⁵⁴

At present, this sentencing option is utilized on an ad hoc, very limited basis in the State. Assembly 8597-C, sponsored by the Rules Committee at the request of Assemblyman Robert K. Sweeney, and Senate 7254-B, sponsored by Senator Norman J. Levy, became Chapter 714 of the Laws of 1990. The new law, effective November 1990, adds victims' impact panel attendance to the litany of available sanctions courts statewide are authorized to impose upon conviction of an alcohol-related driving offense.²⁵⁵

SUMMARY

New York State laws authorize a wide variety of responses upon conviction for alcohol-related driving offenses, including license suspension, civil penalties, education, treatment, probation supervision, and jail time.

²⁵³ Commission Research Assistant Tracey Suess' telephone interview with Albany County Assistant District Attorney Cheryl Coleman, January 19, 1990.

²⁵⁴ Ibid.

²⁵⁵ New York Laws of 1990, Chap. 714, to be codified at New York Vehicle and Traffic Law, §1193(f).

Several anomalies are contained in laws relative to DWI and DWAI, including the absence of provision for treatment under predicate felony statutes of DWI cases since only offenders convicted of crimes enumerated in the Penal Law are eligible for second or predicate felony status.

New York State countermeasures include the Special Traffic Options Program for Driving While Intoxicated and the Drinking Driver Program. The successful apprehension of intoxicated drivers has created a problem for County Probation Departments across the State and led to the development of new supervision programs. In addition, several innovative alternatives to incarceration have been developed.

Chapter IV highlights innovative approaches to reducing recidivistic drunk driving undertaken by other states.

CHAPTER IV

RECIDIVISM APPROACHES AND STUDIES IN OTHER STATES

A review of innovative approaches to deterring recidivistic drunk driving and studies of their effectiveness in other States can provide information that the State of New York can employ in developing more effective countermeasures to combat this critical transportation safety problem.

RECIDIVISM STUDIES

Indepth recidivism studies recently were undertaken in the States of Massachusetts, Minnesota, Maryland, and Pennsylvania.

MASSACHUSETTS

In 1982, the Massachusetts General Court (State Legislature) enacted a comprehensive law increasing fines and license revocation periods for first-time and repeat driving under the influence of liquor (DUIL) offenders.¹ A report issued by the Massachusetts Office of the Commissioner of Probation, examined drunk driving in Massachusetts during a four

¹ Massachusetts Acts of 1982, Chap. 373, and Massachusetts General Laws Annotated, Chap. 90, §24 (West: 1989).

year period after the new tougher DUIL laws were enacted.² The report is based on a random sample of 1,153 individuals arraigned during July 1984, January 1985, July 1985, and January 1986.

A portion of the study is devoted solely to the scope and nature of DUIL recidivism within the state of Massachusetts. The study's findings on recidivism are as follows:

- o One-third of the DUIL offenders previously had been arraigned for a DUIL offense.
- o A positive relationship appeared to exist between prior DUIL and prior criminal arraignments for the repeat DUIL offender.
- o Twenty-one percent of the DUIL offenders in the study had been convicted of a DUIL offense within the past six years.
- o Repeat offenders tend to be chronic offenders. Of those with no prior conviction, ten percent were reconvicted compared to a twenty percent rate for those with one prior conviction, and a twenty-six percent rate for those with two or more prior convictions.
- o Analysis suggested a positive relationship between chronic DUIL offenders and alcohol abuse.

² The following information is derived from Carmen A. Cicchetti and Louise A. Enos, Driving Under the Influence of Liquor: An Analysis Four Years After Chapter 373 (Boston: Massachusetts Office of the Commissioner of Probation, 1987), pp. 22-25.

- o Most repeat offenses occurred within six months to a year of the first offense. Fifty-four percent of those arraigned for a subsequent DUIL offense in this study were re-arraigned within six months, and eighty-one percent were re-arraigned within one year.

MINNESOTA

In February 1986, the Minnesota Criminal Justice System DWI Task Force issued a report based upon a study of all known drivers eligible for a driver's license who had driver's license records available through the National Highway Traffic Safety Administration Fatal Accident Reporting System for the year 1984.³

The results of the study showed:

- o Drinking drivers comprised thirty-four percent of all drivers involved in fatal accidents in 1984.
- o Drinking drivers with a prior DWI-related license revocation since 1976 account for eight percent of all drivers involved in fatal accidents and twenty-five percent of the drinking driver population.
- o One-third of the recidivists had two or more alcohol-related license revocations on their driving record.

³ Ray R. Lewis, Estimated of DWI Recidivism in Minnesota Fatal Crashes (Minneapolis: Minnesota Criminal Justice System DWI Task Force, February 1986), pp. 5-8.

- o Twenty-seven percent of the recidivists were driving without a valid license at the time of the fatal accident.

In January 1990, a second study evaluating recidivism trends in Minnesota was published by the Minnesota Office of Traffic Safety.⁴ The population under study included the 3,127,029 people holding Minnesota driver's licenses as of December 1988.

Highlights from this report include:

- o In December 1988, 247,711 or eight percent of licensed drivers had one or more DWI violations on their records.
- o Of the 247,111, twenty-two percent or 54,931 individuals were arrested twice; and fifteen percent or 36,885 individuals were arrested three or more times.
- o In early 1980, the recidivism rate was 29.9 percent; by 1988, the rate rose unevenly to 44.4 percent.
- o The data supported the widespread view that the DWI problem increasingly involves groups of problem drinker repeat offenders.

MARYLAND

In 1988, a study was undertaken to examine the effectiveness of sentencing dispositions and practices in

⁴ Information is derived from Alan Rodgers, DWI Recidivism Summary Using the Vanhon Database on DWI Offenders (St. Paul: Minnesota Office of Traffic Safety), January 30, 1990.

criminal cases involving driving while intoxicated or under the influence of alcohol. The study was conducted by the National Center for State Courts (NCSC) from September, 1988 to the fall of 1989.⁵ NCSC employed a sample of approximately 2,000 DWI/DUI offenders for each of the years 1985 through 1987 (6,000 cases), and tracked them through June 1989 using Maryland Motor Vehicles Administration driver histories to determine if any of the offenders sampled had subsequent convictions for DWI/DUI violations.

The major findings of the NCSC study were:

- o Almost twenty percent of all convicted offenders, including those with a prior probation before judgment, had subsequent convictions for DWI/DUI, ranging from about twenty percent in 1985 to about twelve percent for the 1987 sample group.
- o Defendants with one or more prior convictions consistently had higher recidivism rates than those with no prior convictions. Those with no prior convictions were reconvicted at a rate of 13.8 percent, compared to a recidivism rate of 18.6 percent for offenders with one or more prior offenses.
- o None of the twenty-five defendants sent to the Prince George's County DWI facility during 1987 had subsequent

⁵ Information is derived from DWI/DUI Sentencing Evaluation, Maryland District Court: Final Report (Williamsburg, Virginia: National Center for State Courts, January 1990), pp. 5-19.

convictions through June 1989. The Prince George's County DWI Detention Center is a sixty bed facility that treats problem drinkers and repeat offenders. This zero recidivism rate compares to a twelve percent recidivism rate for all types of sentences during 1987.

- o Of twenty-five cases sentenced to install an ignition interlock device, only two individuals were reconvicted, yielding a recidivism rate of eight percent.
- o The length of any jail sentence had no positive effect on recidivism; in fact, longer sentences were positively related to higher recidivism rates.
- o Non-jail sentences appeared to be as effective or more effective than jail sentences in preventing repeat offenses.

PENNSYLVANIA

In October 1988, the Pennsylvania Commission on Crime and Delinquency released a report analyzing the State's progress in reducing the incidence of drunk driving since 1982.⁶ The repeat offender analysis involved a study of subsequent convictions through 1987 for the 27,049 DUI offenders convicted in 1984. The results from this study are as follows:

⁶ Information is derived from Pennsylvania Commission on Crime and Delinquency, "The Effort to Reduce Drunken Driving in Pennsylvania: The Effects on the Criminal Justice System and Highway Safety," The Justice Analyst, October 1988, pp. 6-7.

- o Of those whose first offense occurred in 1984, 11.5 percent had a subsequent conviction.
- o Of those with one prior offense before 1984, 20.3 percent had a subsequent conviction.
- o For those with more than one prior offense before 1984, 26.9 percent had a subsequent conviction.
- o In 1987, the number of repeat DUI offenders accounted for 18.2 percent of the total number of DUI offenders convicted compared to a rate of 8.5 percent in 1980. The study pointed out that increased enforcement has been a factor in the steady increase in the percentage of repeat offenders.
- o Of the 29,646 offenders evaluated through the Alcohol Highway Safety Program in 1987, 53.4 percent were rated as severe problem drinkers and 29.6 percent were considered moderate problem drinkers. Thus, 83.0 percent were evaluated as having moderate to severe drinking problems.

RECIDIVISM STATISTICS

In Florida, the number of repeat offenders decreased twenty-one percent from 1988 to 1989. In 1988, there were 11,513 repeat DUI offenders compared to 9,483 recidivists in 1989. Even so, the recidivism rates for these two years remained relatively constant due to a corresponding decrease in

convictions. The recidivism rate was approximately twenty-one percent in 1988 and nineteen percent in 1989.⁷

In New Jersey, the repeat offender rate was approximately twenty percent in 1988; fifteen percent were second time offenders, and the remaining five percent had three or more convictions on their record.⁸

In Illinois, the recidivism rate increased four percent from 1986 to 1989. The recidivism rate for 1986 was twenty-two percent, increasing gradually to twenty-six percent in 1989.⁹

In 1989, the recidivism rate in North Carolina was approximately twenty-two percent. Of 49,982 total DWI convictions, 10,901 were for repeat offenses.¹⁰

In Oregon, DUII convictions have fallen steadily since 1984. In 1988, there were 9,085 convictions compared to 12,515 convictions in 1984. The percent of convictions for a second or

⁷ Commission Research Assistant Mark J. McGrath's telephone interview with Florida Transportation Department Statistics Coordinator David Corbin, June 15, 1990.

⁸ Commission Research Assistant Mark J. McGrath's telephone interview with New Jersey Highway Safety Department Deputy Director William Hayes, June 15, 1990.

⁹ Commission Research Assistant Mark J. McGrath's telephone interview with Illinois Secretary of State Driver Services Department Research and Analysis Manager Carole Arterberry, June 16, 1990.

¹⁰ Commission Research Assistant Mark M. McGrath's telephone interview with North Carolina Department of Motor Vehicles Statistics Analyst William Mitchell, June 16, 1990.

subsequent DUII has similarly declined from 38.8 percent in 1983 to 28.9 percent in 1988.¹¹

The DUI recidivism rate has been increasing in Ohio from 1986 to 1988. In 1986, the recidivism rate was 27.6 percent; in 1987 the rate rose to 31.3 percent; and in 1988, it reached 31.8 percent of all DUI convictions in Ohio.¹²

Another State that has shown an increase in its recidivism rate from 1986 to 1988 is California. In 1986, the recidivism rate for DUI was 33.1 percent; in 1987, it rose to 37.2 percent, and increased to 37.8 percent in 1988.¹³

In Virginia, the recidivism rate rose ten percent between 1984 and 1989. In 1984, the recidivism rate was 20.2 percent, rising to 24.2 percent in 1986. By the end of 1989, the recidivism rate had risen steadily to a rate of 30.2 percent.¹⁴

¹¹ DUII Control System Performance Measures for Oregon Counties 1983-88 (Salem: Oregon Traffic Safety Commission, 1989), pp. 1-2.

¹² Annual Report and Crash Facts (Columbus: Ohio Department of Highway Safety, November 1987, November 1988, and December 1989).

¹³ DUI Factsheet (Sacramento: California Department of Motor Vehicles, October 1989).

¹⁴ Information is supplied by Virginia Department of Motor Vehicles Transportation Safety Planning and Evaluation Supervisor David L. Mosley, June 25, 1990.

PLEA BARGAINING RESTRICTIONS

Several States restrict prosecutorial use of plea bargains in DWI cases. For instance, plea bargains in California are allowed, but the court must formally set forth the reasons a charge either is dismissed or reduced to a lesser offense.¹⁵ A previous offense for drunk driving purposes includes not only convictions for driving under the influence (DUI) or vehicular homicide, but also guilty or nolo contendere (no contest) pleas to reckless driving instead of drunk driving.¹⁶

In Utah, a magistrate in a DUI case is precluded from granting a diversion, i.e., suspension of proceedings prior to conviction on condition of participation in a rehabilitation program.¹⁷ Should a defendant plead guilty or nolo contendere to a reckless driving charge in place of DUI, the prosecution must state for the record whether alcohol or drugs were involved in the pleaded offense.¹⁸

Illinois disallows a defendant from obtaining deferred judgment and attendant supervision placement if within five years the defendant had (1) been convicted of DWI, (2) pled

¹⁵ California Vehicle Code, §23212 (West: 1985).

¹⁶ Ibid., §§23103.5(c) and 34103 (1990 cum. supp.).

¹⁷ Utah Code Annotated, §§77-2-2 and 77-2-9 (Michie: 1990).

¹⁸ Ibid., §41-6-44(10) (Michie: 1990 cum. supp.).

guilty to or stipulated facts supporting the conviction of a DWI charge, or (3) received supervision for a prior DWI.¹⁹

In Maryland, probation before judgment may not be granted for any second or subsequent alcohol-related driving offense within five years.²⁰

Pennsylvania prohibits acceptance of a defendant into Accelerated Rehabilitation Disposition (ARD) if: (1) the defendant was convicted of DWI or accepted ARD in connection with a DWI charge within the previous seven years; (2) the present offense was in violation of the habitual offender statute; or (3) any person other than the defendant was killed or seriously injured.²¹

Florida only prohibits plea bargaining in cases in which a defendant's BAC level is .20 percent or more or for a vehicular manslaughter or homicide offense.²²

While North Carolina's laws do not preclude plea bargains, prosecutors are required to explain any reduction or dismissal of a DWI charge.²³

¹⁹ Illinois Annotated Statutes, Chap. 38 §1005-6-1(c) and (d) (Smith-Hurd: 1990 cum. supp.).

²⁰ Annotated Code of Maryland, Art. 27, §641(a)(2) (Michie: 1988).

²¹ Pennsylvania Statutes Annotated, Title 75, §1552 (West: 1990 cum. supp.).

²² Florida Statutes Annotated, §316.656 (West: 1990).

²³ General Statutes of North Carolina, §20-138.4 (Michie: November 1989).

FINES

Several States impose harsh fines for drunk driving violations, often enabling courts to impose special assessments and to order restitution to victims. Enhanced sanctions generally apply in cases involving personal injury or death of another person resulting from defendant's alcohol-impaired operation of a motor vehicle. Habitual offender statutes have been enacted in a number of States and mandatory adjudication or minimum penalties apply in certain circumstances. However, comparison among States' penalties for recidivists is made difficult by the varying time periods defining recidivistic behavior.

Seventeen States have mandatory minimum fines for DWI offenses.²⁴ For instance, Maine provides a mandatory minimum fine of \$300 for a first offense; \$500 for a second offense within six years; and \$750 for a third offense within six years.²⁵ Pennsylvania prescribes a mandatory minimum fine of

²⁴ Digest of State Alcohol-Highway Safety Related Legislation (Washington, D.C.: National Highway Traffic Safety Administration, 1990), p. 2-5.

²⁵ Maine Revised Statutes Annotated, Title 29, §1312-B (West: 1989 cum. supp.).

\$300 whereas Ohio's mandatory minimum is \$250.²⁶ California's mandated base fine is \$390.²⁷

Fine ranges also vary from State to State. California delineates among non-injury-related and injury-related offenses. Fines range from \$390 to \$1,000 for non-injury-related offenses, but may be as high as \$5,000 for injury-related offenses.²⁸

Some states specify a maximum fine. For example, Oregon authorizes a fine not exceeding \$2,500 and Maine caps fines for DWI offenses at \$1,000.²⁹ Utah provides that fines for first and subsequent non-injury-related DUI offenses may not exceed \$1,000 and fines for injury-related offenses may not exceed \$2,500.³⁰

In Minnesota, substantial fines are authorized by statute. A driver refusing to submit to a chemical test who has had a previous license revocation--either once in five years or twice in ten years--by reason of refusal, an administrative per se violation, DWI offense, or vehicular homicide conviction incurs

²⁶ Pennsylvania Statutes Annotated, Title 75, §3731(e) (West: 1990 cum. supp.), and Ohio Laws of 1990, File 229, S.B. 131.

²⁷ California Vehicle Code, §23152 (West: 1990 cum. supp.).

²⁸ Ibid.

²⁹ Oregon Revised Statutes, §161.635 (1)(a) (Oregon Legislative Assembly Legislative Counsel Committee: 1989), and Maine Revised Statutes Annotated, Title 29, §1312-B (West: 1989 cum. supp.).

³⁰ Utah Code Annotated, §§41-6-44 (Michie: 1990 cum. supp) and 76-3-301 (Michie: 1990).

a fine not to exceed \$3,000.³¹ Upon conviction for DWI, a fine not exceeding \$700 may be levied for a first offense and not exceeding \$3,000 for a second offense within five years and subsequent offenses within ten years.³² If a DWI defendant negligently caused injury to another person thereby, a fine not exceeding \$10,000 is authorized.³³ DWI-related homicide carries a fine not to exceed \$20,000.³⁴

Fines for first and second DWI offenses in Illinois may not exceed \$1000; for subsequent offenses, including those involving accidents causing great bodily harm, permanent disability, disfigurement, or death, the fine may not exceed \$10,000.³⁵

In Florida, DWI is punishable by a fine between \$250 and \$500 for a first offense, \$500 and \$1,000 for a second offense, \$1,000 and \$2,500 for a third offense, and not more than \$5,000 for fourth and subsequent offenses.³⁶ Aggravating factors may also yield the imposition of higher fines.

³¹ Minnesota Statutes Annotated, §§169.121(1)(a) and (3)(c) (West: 1990 cum. supp.) and 609.03(2) (West: 1987).

³² Ibid., §169.121(3)(a) (West: 1990 cum. supp.).

³³ Ibid.

³⁴ Ibid., §609.21 (1) and (3) (West: 1990 cum. supp.).

³⁵ Illinois Annotated Statutes, Chap. 38, §1005-9-1(a) (1) and (2) (Smith-Hurd: 1990).

³⁶ Florida Statutes Annotated, §316.193 (West: 1990).

DRIVING WHILE LICENSE SUSPENDED

Driving while a license is suspended for an underlying DWI-related offense usually is punishable by substantial fines. California provides imposition of a fine between \$300 and \$1,000 for a first offense and between \$500 and \$2,000 for second and subsequent offenses within five years.³⁷ Such an offense is punishable under Oregon law by a fine not to exceed \$100,000.³⁸

Maine makes such an offense punishable by a mandatory fine of \$350 to \$2,500.³⁹ Utah also provides a \$2,500 limit on fines in such cases, but sets the mandatory minimum fine at \$1,000.⁴⁰ In Massachusetts, driving during a license suspension period imposed for a DWI-related offense carries a fine between \$1,000 and \$10,000.⁴¹ Illinois law provides that a first offense is punishable by a fine not exceeding \$1,000 and that subsequent offenses carry a fine not exceeding \$10,000.⁴²

³⁷ California Vehicle Code, §14601.2(g) (West: 1990 cum. supp.).

³⁸ Oregon Revised Statutes, §161.625 (Oregon Legislative Assembly Legislative Counsel Committee: 1989).

³⁹ Maine Revised Statutes Annotated, Title 29, §2184 (West: 1989 cum. supp.).

⁴⁰ Utah Code Annotated, §76-3-301 (Michie: 1990).

⁴¹ Massachusetts General Laws Annotated, Chap. 90, §23 (West: 1989).

⁴² Illinois Annotated Statutes, Chap. 38, §1005-9-1(a)(1) and (2) (Smith-Hurd: 1990 cum. supp.).

SURCHARGES

Special assessments often are authorized by statute in addition to the fine imposed for a given alcohol-related driving violation. California mandates that DUI offenders pay an assessment not exceeding fifty dollars for the funding of alcohol abuse prevention and education programs.⁴³ As in most States, courts also may order direct compensation by a defendant to any victim(s) or require payment into a Victim's Assistance Fund.⁴⁴

An offender in California may be held liable up to \$1,000 for the cost of a public agency's emergency response resulting from the negligent operation of a motor vehicle while under the influence of alcohol or drugs. This law does not require a conviction for DUI as a condition of liability.⁴⁵

Effective January 1, 1991, New Hampshire also will have a law authorizing recovery by a public agency of emergency response expenses in connection with drunk driving offenses. The law defines public agency as "the state or any of its political subdivisions which provides police, firefighting, emergency medical, ambulance, or other emergency services."⁴⁶

⁴³ California Vehicle Code, §23196(a) (West: 1990 cum. supp.).

⁴⁴ Ibid., §23191(a); California Government Code, §13967 (West: 1990 Supp.); and California Penal Code, §1203.1 (West: 1990 cum. supp.).

⁴⁵ Ibid., California Government Code, §53150 (West: 1990 cum. supp.).

⁴⁶ New Hampshire Laws of 1990, Chap. 138.

An individual's liability thereunder may not exceed \$10,000 for any single public agency response incident.

Oregon provides for an additional \$220 fee to fund intoxicated driver programs and police training. A special assessment of forty dollars also may be imposed by the court to fund victims' assistance programs, although indigent persons are exempt from this assessment.⁴⁷

The State of Utah has made unique use of special assessments in DUI cases. A court is required to impose a special fine, in addition to regular fines, between \$50 and \$200 for first offenders and \$1,000 for second and subsequent offenders.⁴⁸ This special fine funds alcohol education and treatment programs.

In addition, a court must impose other assessments which fully compensate agencies for the costs of treating DWI defendants.⁴⁹ Violators also are required to pay a \$100 fee into the Crime Victims' Reparations Trust Fund in addition to a 25 percent surcharge levied on all DUI and DUI-related fines for this purpose.⁵⁰

⁴⁷ Oregon Revised Statutes, §§147.259(1), 813.020(1)(a), and 813.030 (Oregon Legislative Assembly Legislative Counsel Committee: 1989).

⁴⁸ Utah Code Annotated, §62A-8-302 (Michie: 1990 Supp.).

⁴⁹ Ibid., §62A-8-302(2).

⁵⁰ Ibid., §§41-25-1 (Michie: 1988) and 63-63a-4(3) (Michie: 1990 supp.).

New Jersey provides that DWI offenders must pay an \$80 fee toward the Alcohol Education and Enforcement Fund and a \$100 surcharge for a drunk driving enforcement fund.⁵¹ DWI offenders also must pay insurance surcharges as follows: not less than \$1,000 for first and second offenses and not less than \$1,500 for a third offense within three years.⁵² Since this surcharge must be paid annually for three years, first and second offenders pay at least \$3,000 and a third offense carries a minimum insurance surcharge of \$4,500. At most, ten percent of the funds collected go to the Department of Motor Vehicles; the remainder is remitted to the New Jersey Automobile Full Insurance Underwriting Association.

In Florida, a \$100 assessment must accompany any DWI fine imposed. Half of the assessment is earmarked for the Department of Law Enforcement's Administrative Trust Fund, one-quarter for the Emergency Medical Services Trust Fund, and one-quarter for the Impaired Drivers and Speeders Trust Fund.⁵³ In addition to any other license reinstatement fee, a special fee of \$105 must

⁵¹ New Jersey Statutes Annotated, §39:4-50(b) (West: 1990 cum. supp.).

⁵² Ibid., §17:29A-35(b)(2) (West: 1990 cum. supp.).

⁵³ Florida Statutes Annotated, §§316.193(6) (West: 1990) and 960.25 (West: 1990 cum. supp.).

be paid into the Accident Reports Trust Fund by persons convicted of a DWI offense or a violation of the administrative per se law.⁵⁴

AGGRAVATING FACTORS

Some States explicitly authorize consideration of aggravating factors which may enhance sanctions. In Texas, for example, if a drunk driving offender possessed an open container of alcohol at the time of the offense, minimum and maximum fines for: (1) first offenses are increased by \$100, (2) second offenses are increased by \$200, and (3) subsequent offenses are increased by \$400. If another person suffers bodily injury as a result of defendant's actions, the minimum and maximum fines are increased by \$500.⁵⁵

Florida law provides that attendant special conditions increase penalties in drunk driving cases: (1) property damage or personal injury (a fine not exceeding \$1,000), (2) serious bodily injury to another (a fine not exceeding \$5,000), (3) death of another (a fine not exceeding \$10,000), or (4) a BAC reading of .20 percent or more--resulting in a doubling of the fine ranges, including the minimum and maximum levels.⁵⁶

⁵⁴ Ibid., §322.12(2).

⁵⁵ Texas Civil Statutes, Art. 6701L-1(f) (Vernon: 1990 cum. supp.).

⁵⁶ Florida Statutes Annotated, §§316.193(4) (West: 1990) and 775.083 (West: 1990 cum. supp.).

North Carolina has a complex, unique system for weighing statutorily enumerated aggravating and mitigating circumstances to determine whether enhanced penalties should be imposed. Judges in alcohol-impaired driving cases must hold a sentencing hearing upon conviction to determine the effect of any aggravating or mitigating factors on the level of punishment to be imposed.⁵⁷

Judges must impose a "level 1" punishment, which includes a fine of not more than \$2,000, if two or more of the following grossly aggravating factors apply: (1) a single conviction for an offense involving impaired driving within the previous seven years; (2) at the time of the instant offense, the offender was driving while his license was revoked for a prior impaired driving offense; or (3) defendant's impaired driving caused serious injury to another person.⁵⁸ If only one of the above factors was present, a judge must impose a "level 2" punishment which includes a fine not exceeding \$1,000.⁵⁹

Additional aggravating factors must be weighed in light of the seriousness evidenced by the circumstances:

- o gross impairment while driving or a BAC of .20 percent or more within a relevant time thereafter,
- o especially reckless or dangerous driving,

⁵⁷ General Statutes of North Carolina, §20-179 (Michie: November 1989).

⁵⁸ Ibid., §20-179(c).

⁵⁹ Ibid.

- o negligent driving leading to an accident causing property damage in excess of \$500 or causing personal injury,
- o driving while license suspended,
- o two or more prior convictions within five years not involving impaired driving or one or more convictions involving impaired driving within seven years,
- o a speeding conviction while fleeing or attempting to elude apprehension,
- o a conviction for speeding at least thirty miles per hour above the limit,
- o passing a stopped school bus, and
- o any other factor that aggravates the seriousness of the offense.⁶⁰

A judge also must determine and weigh mitigating factors:

- o slight impairment of defendant's faculties resulting solely from alcohol and a BAC not exceeding .11 percent,
- o slight impairment of defendant's faculties solely from alcohol, with no chemical analysis having been available to the defendant,
- o driving was safe and lawful except for the impairment of defendant's faculties,
- o safe driving record,
- o impairment of defendant's faculties was caused primarily by a lawfully prescribed drug for an existing medical

⁶⁰ Ibid., §20-179(d).

condition and the amount taken was within the prescribed dosage,

- o defendant's voluntary submission to an assessment and, voluntary participation in recommended treatment, if any, and
- o any other factor that mitigates the seriousness of the offense.⁶¹

Expressly excluded as a mitigating factor is the claim that the driver was suffering from alcoholism, drug addiction, diminished capacity, or mental disease or defect.⁶²

Utah also provides for consideration of aggravating or mitigating factors. There is a recommended fine schedule--reviewed annually by the Judicial Council--incorporating criteria for determining aggravating and mitigating circumstances and guidelines for enhancing or reducing the fine accordingly.⁶³

Mandatory minimum penalties apply to all repeat offenders and even to first offenders under certain circumstances within Maine's alcohol-related driving laws:

- o defendant registers a BAC of .15 percent or more,

⁶¹ Ibid., §20-179(e).

⁶² Ibid., §20-179(f).

⁶³ Utah Code Annotated, §76-3-301.5 (Michie: 1990).

- o defendant was driving in excess of the speed limit by thirty miles per hour or more and was operating the vehicle under the influence or with a BAC of .08 percent or more,
- o defendant eluded or attempted to elude an officer while operating under the influence or with a BAC of .08 percent or more, or
- o defendant failed to submit to a chemical test.⁶⁴

REHABILITATION

States' requirements for alcohol education and treatment vary widely and are often related to license suspension periods or are used in conjunction with or in lieu of imprisonment. Most States provide first offenders with an opportunity to obtain restricted driving privileges in order to attend alcohol education or treatment programs.

In Maine, a first offender may receive a restricted license after two-thirds of the license suspension period has passed, but only if the offender satisfactorily has completed an education/treatment course. This restricted license authorizes the defendant to drive to his place of employment or to an

⁶⁴ Maine Revised Statutes Annotated, Title 29, §§1312-B(2) (B), (C), and (D) (West: 1989 cum. supp.).

alcohol education/treatment program.⁶⁵ Any offender may be granted a temporary restricted license to be used only for attending an education/treatment course.⁶⁶

Courts are obligated to order repeat offenders to participate in the "alcohol and other drug education, evaluation and treatment program for multiple offenders" administered by the State Department of Human Services. This requirement may be waived only if the defendant has enrolled in a residential treatment program.⁶⁷

New Jersey mandates treatment for first offenders in an intoxicated driver resource center for twelve to forty-eight hours.⁶⁸ Second offenders may serve their imprisonment term--between forty-eight consecutive hours and ninety days--in an intoxicated driver resource center. Third offenders may serve their imprisonment term--not less than 180 days--in an inpatient rehabilitation center.

Texas law provides that alcohol education may be required as a condition of probation for recidivists and for first offenders found to be alcohol dependent following a pre-sentence

⁶⁵ Ibid., Title 29, §1312-D(2) and (3) (West: 1989 cum. supp.).

⁶⁶ Ibid., Title 29, §1312-D(4).

⁶⁷ Ibid., Title 29, §1312-(B)(2)(D-1).

⁶⁸ New Jersey Statutes Annotated, §39:4-50 (West: 1990 cum. supp.).

investigation evaluation.⁶⁹ A restricted use license may be issued for employment or treatment purposes.⁷⁰

Similarly, North Carolina allows treatment to be required as a condition of probation and a court may determine that a term of imprisonment imposed as a probation condition should be served in an inpatient treatment facility.⁷¹

In Massachusetts, a first offender may opt for a one-year probation conditioned on attendance at approved treatment or rehabilitation programs. The court may order payment of a \$400 fee for placement in such a program. Second offenders may, in lieu of imprisonment, serve a minimum of fourteen days in a residential alcohol treatment program and receive a two-year probation placement.⁷²

Florida's law is unequivocal; a substance abuse/alcohol treatment program is required for all DWI offenders. Successful completion is a condition of license reinstatement for defendants convicted of two DWI offenses in five years or three offenses in ten years.⁷³ Offenders may also be required to

⁶⁹ Texas Civil Statutes, Code of Criminal Procedure, Art. 42.12, §13(f) (Vernon: 1990 cum. supp.).

⁷⁰ Ibid.

⁷¹ General Statutes of North Carolina, §§20-179.1 and 29-179(k) (Michie: November 1989).

⁷² Massachusetts General Laws Annotated, Chap. 90, §24 (West: 1989).

⁷³ Florida Statutes Annotated, §§316.193(5), 322.291, and 322.03 (West: 1990).

complete a driver training course prior to license reinstatement.⁷⁴

In Minnesota, treatment at an approved facility may result in a stay in imposition of a fine or jail sentence but will not affect a license revocation period.⁷⁵

Ohio law allows an alcohol treatment requirement to be imposed in lieu of a jail term if a defendant, upon evaluation, is determined to be an alcoholic or is suffering from acute intoxication; the period of confinement may not be less than three days or more than the maximum imprisonment term.⁷⁶

Attendance at a driver improvement or alcohol education program may be required for restoration of driving privileges in Maryland for DUI or DWI offenders.⁷⁷ In general, alcohol education or treatment is mandated as a condition of probation.⁷⁸

Pennsylvania's approach to rehabilitation is multi-faceted. Acceptance into an Accelerated Rehabilitation Disposition (ARD) program is disallowed if the offender had a conviction or ARD enrollment within the previous seven years, if the present

⁷⁴ Ibid., §322.291.

⁷⁵ Minnesota Statutes Annotated, §169.121(5) (West: 1990 cum. supp.) and §609.135(1) (West: 1987).

⁷⁶ Ohio Revised Code Annotated, §2935.33 (Anderson: 1989 cum. supp.).

⁷⁷ Maryland Transportation Code, §16-212 (Michie: 1987).

⁷⁸ Ibid., and Art. 27, §639(b) (Michie: 1988).

offense was in violation of the habitual offender statute, or if a person other than the defendant was seriously injured or killed.⁷⁹ Counseling or treatment is required for up to two years.

All DWI offenders in Pennsylvania are required to complete successfully an authorized alcohol highway safety class. In addition, a court may order participation in outpatient rehabilitation services for up to two years. Offenders found to be chronic alcohol abusers "representing a demonstrated and serious threat" may be committed to inpatient treatment at a State Department of Health-approved center.⁸⁰

In Virginia, courts may order alcohol education and/or treatment for any drunk driving offender in addition to restricting driving privileges. However, third offenders evaluated as dependent on alcohol at the time of the offense regain licensure after five years only if they demonstrate that they no longer are addicted to alcohol or drugs and their operation of a motor vehicle would not be a threat to public safety.⁸¹

A 1990 New Hampshire law requires successful completion of an approved impaired driver intervention program as a condition

⁷⁹ Pennsylvania Statutes Annotated, Title 75, §1552 (West: 1990 cum. supp.).

⁸⁰ Ibid., Title 75, §1548.

⁸¹ Code of Virginia Annotated, §§18.2-271 (Michie: 1989 Supp.) and 46.2-391(c) (Michie: 1989).

of license restoration for all alcohol-related driving offenders.⁸²

In California, DUI offenders usually are required to attend alcohol education/rehabilitation programs as a condition of probation.⁸³ First offenders may have to take a six-, nine-, or twelve-month course whereas subsequent offenders must complete an eighteen-month program.

Lastly, Utah magistrates must order all individuals convicted of drunk driving to attend either an education or treatment program.⁸⁴

VICTIMS' IMPACT PANELS

As noted in Chapter III, DWI Victims' Impact Panels represent a creative sentencing option allowing family and friends of people killed by drunk drivers to relate their experiences to a group of convicted drunk drivers.

MADD chapters or other victims groups usually select a panel of three to seven victims to speak briefly about the drunk driving crashes in which they were injured or in which a loved

⁸² New Hampshire Laws of 1990, Chap. 219, §8.

⁸³ California Vehicle Code, §§23161 and 13352 (West: 1990 cum. supp.).

⁸⁴ Utah Code Annotated, §41-6-44(4) (Michie: 1990 cum. supp.).

one was killed and what it has meant to them.⁸⁵ The purpose of the panels is to make the offender aware of the potentially dangerous consequences of drunk driving in order to prevent future drunk driving incidents.

The potential audience at these panel meetings may consist of convicted DWI offenders, friends of offenders, driver's education students, court officers, and people enrolled in alcohol and/or drug rehabilitation programs.⁸⁶ Offenders are sentenced to these panels as a part of their overall DWI sentencing, and their attendance is monitored by a probation officer or some other court official.⁸⁷

The first victims' impact panel was established in King County, Washington, in September 1985 by County Judge David Admire and Shirley Anderson, a county court employee, whose son was killed by a drunk driver.⁸⁸ Many judges, court administrators, and victims' groups subsequently implemented victims' impact panels throughout the nation.

As of February 22, 1990, thirty-four States had in place one or more panels.⁸⁹ Programs are being introduced in an

⁸⁵ Janice Harris Lord, Victim Impact Panels--A Creative Sentencing Opportunity (Hurst, Texas: MADD National Office, 1989), p. 4.

⁸⁶ Ibid., p. 10.

⁸⁷ Ibid., p. 4.

⁸⁸ Ibid., p. 2.

⁸⁹ Information supplied by MADD National Office, June, 1990.

additional seven States--Georgia, Iowa, Kentucky, Mississippi, Pennsylvania, Tennessee, and Virginia.⁹⁰ Delaware currently is considering a bill to implement the panels statewide.⁹¹ In addition, Oregon, which has panels established in certain counties, requires persons convicted of DUII to attend a panel if one is offered in the county of conviction.⁹² Most state programs are self-funded; however, persons convicted of DUII in Oregon must pay a five dollar fee to cover panel expenses.⁹³

The State of Utah's policy relative to the use of victims' impact panels is incorporated in statutory form--panels assist individuals convicted of driving under the influence of intoxicating liquor or drugs (DUI) "to gain a full understanding of the severity of their offense."⁹⁴

Recent studies on victims' impact panels and their effects on recidivism have shown promising results. A King County, Washington, study showed the recidivism rate for participants in the first year of the program to be .01 percent.⁹⁵ An evaluation of the Washington County, Oregon, Victims' Panel for

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Lord, Victim Impact Panels, p. 16.

⁹³ Ibid.

⁹⁴ Utah Code Annotated, §62A-8-301 (Michie: 1989).

⁹⁵ Linda Hetrick O'Laughlin, Drunk Driving-The Effects of the Clackamas County DUII Victims Impact Panel on Recidivism Rates (Oregon City, Oregon: Clackamas County MADD, 1990), p. 21.

Intoxicated Drivers also showed promising results. The evaluation took place between April 1987 and April 1989 and ninety drivers who attended the panel were selected to take part.

Within this twenty-four month period, only eight of the ninety drivers were re-arrested for DUI, or 8.8 percent of the sample group.⁹⁶ This rate is low in light of the Oregon Motor Vehicles Division report that an estimated 42.0 percent of the people in Washington County have had a prior DUII arrest.⁹⁷

A third and more comprehensive study was conducted in Clackamas County, Oregon, by the Clackamas County MADD Chapter. This study compared the recidivism rates of 741 people convicted of DUII prior to creation of the panel to 534 offenders who attended the County's victims' impact panel. The study was conducted over a one year period from July 1986 to August 1987 for the first group and between November 1988 to October 1989 for the second group.⁹⁸

The study found that the pre-panel group had a recidivism rate three times higher than that of the panel group.⁹⁹ A long term follow-up study is being planned.

⁹⁶ Carole Satterfield-McLeod, An Evaluation of the Washington County Victim Panel for Intoxicated Drivers (Beaverton, Oregon: Washington County Sheriff's Department, April 1989), p. 1.

⁹⁷ Ibid.

⁹⁸ O'Laughlin, Drunk Driving, p. 32.

⁹⁹ Ibid.

These three studies, though conducted over necessarily limited time spans, show the positive results that victims' impact panels have had on reducing recidivism rates. Victims' impact panels are a promising countermeasure in the fight against drunk driving.

LICENSE SANCTIONS

As noted in Chapter II, license sanctions are among the most effective deterrents to drunk driving.¹⁰⁰ One-half of the States provide for a mandatory period of license suspension for first offenders and forty-five States do so for repeat offenders.¹⁰¹ License sanctions may be applied post-conviction and, in States having administrative per se laws, pre-conviction as well.

For instance, California authorizes administrative license suspension for offenders with a BAC of .10 percent or more even though DUI is proscribed at .08 percent BAC or more.¹⁰² The California Department of Motor Vehicles is empowered to suspend the license upon receipt of the officer's sworn statement. For

¹⁰⁰ See also Programs to Reduce Alcohol and other Drug-Impaired Driving (Washington, D.C.: Highway Users Federation, April 1990), p. 5.

¹⁰¹ Digest of State Alcohol-Highway Safety Related Legislation (Washington, D.C.: National Highway Traffic Safety Administration, 1990), p. 2-5.

¹⁰² California Vehicle Code, §§13353.2 et. seq. and 23152(b) (West: 1990 cum. supp.).

a first violation, administrative license suspension is for four months, thirty days of which are mandatory. After expiration of the mandatory period, offenders may receive a restricted use license only for attending an alcohol education or treatment program. Successful completion thereof and expiration of sixty days from issuance of restricted privileges enable an offender to apply for unrestricted driving privileges.¹⁰³

If an offender has refused to submit to a chemical test, his license will be suspended for six months upon a first offense and for one year if the refusal occurred within seven years of a prior alcohol-related driving offense.

Second and subsequent alcohol-related driving violations within seven years incur a mandatory administrative license suspension of one year.¹⁰⁴ Administrative and other license sanctions run concurrently.¹⁰⁵ Post-conviction license sanctions are classified by whether injury is caused thereby and the number of previous offenses. Non-injury-related DUI offenses carry license suspensions for six months and eighteen months for first and second offenses respectively; and license revocations of three years and four years for third, and fourth and subsequent offenses, respectively.¹⁰⁶ Injury-related DUI

103 Ibid.

104 Ibid., §13353.4.

105 Ibid., §13353.3(c).

106 Ibid., §§23161 and 23171.

offenses carry the following license sanctions: (1) mandatory one year suspension for first offense, (2) three year revocation for second offense, and (3) mandatory five year revocation for third and subsequent offenses.¹⁰⁷

Restricted driving privileges generally are available to a second non-injury-related DUI offender thirty days after the defendant agrees to participate in an alcohol rehabilitation program provided the defendant has not participated in such a program within the previous four years.¹⁰⁸

Maine's pre-conviction administrative license sanctions cover the same periods as post-conviction and apply at a BAC of .08 percent or above as follows: (1) ninety day suspension, sixty days of which is mandatory for a first offense; (2) mandatory one year suspension for a second offense within six years, and (3) mandatory two year suspension for subsequent offenses within six years.¹⁰⁹

A "work restricted license" may be issued if the offender has not within six years had a DWI conviction, administrative per se suspension, or chemical test refusal.¹¹⁰

At the time of license reinstatement, conditional licenses may be issued to offenders convicted of a DWI or administrative per

¹⁰⁷ Ibid., §§13352 and 13352.5.

¹⁰⁸ Ibid., §§13352(a)(3) and 13352.5(a) and (c).

¹⁰⁹ Maine Revised Statutes Annotated, Title 29, §§1312-B and -D and 2241(1) (West: 1989 cum. supp.).

¹¹⁰ Ibid., Title 29, §1311-A.

se violation. Following a first such conviction, an offender may not operate a motor vehicle after having consumed any alcohol for one year from reinstatement. For second and subsequent such convictions within six years, the abstinence condition applies for six years from the license reinstatement date.¹¹¹

The State of Oregon authorizes pre-conviction administrative license suspension--for offenders with a BAC of .08 percent or more--for ninety days, thirty days of which are mandatory for a first offense, and for a mandatory one year suspension if there has been a prior suspension for chemical test refusal, administrative per se violation, or alcohol-related driving conviction.¹¹² Post-conviction sanctions include license suspension for one year for first offenses and for three years for second and subsequent offenses.¹¹³

Restricted hardship licenses may be issued after expiration of the mandatory minimum suspension periods.¹¹⁴ However, such a license may only be issued to a second or subsequent offender upon examination to determine whether the offender is a problem

¹¹¹ Ibid., Title 29, §1312-D(11).

¹¹² Oregon Revised Statutes, §§813.100, 813.420, 813.430, and 813.520 (Oregon Legislative Assembly Legislative Counsel Committee: 1989).

¹¹³ Ibid., §§809.420(2) and 813.400(2).

¹¹⁴ Ibid., §§813.520(2), (4), and (8).

drinker. If the defendant is found not to be a problem drinker, he must enroll in an alcohol education program. If the defendant, upon evaluation, is determined to be a problem drinker, he must enroll in a rehabilitation program.¹¹⁵ Enrollment in either type of program is prerequisite to license reinstatement.

Utah also provides for strict license sanctions relative to alcohol-impaired driving offenses. Chemical test refusal occasions a mandatory administrative license revocation of one year.¹¹⁶ A driver registering a BAC of .08 percent or more, or affording reasonable grounds that a DWI violation has occurred, is subject to a ninety-day pre-conviction administrative license suspension for a first offense and a 120-day suspension for second and subsequent offenses.¹¹⁷ This differential provides incentive to submit to a chemical test. Post-conviction license sanctions include a mandatory ninety-day suspension for a first offense, and a mandatory one year revocation for subsequent offenses within five years.¹¹⁸

Effective October 1, 1990, Florida's pre-conviction administrative per se law provides a six month suspension for a first offense, of which thirty days are mandatory; and a

¹¹⁵ Ibid., §813.500.

¹¹⁶ Utah Code Annotated, §41-6-44.10(2)(b) (Michie: 1990 cum. supp.).

¹¹⁷ Ibid., §§41-2-127, 41-2-129, and 41-2-130.

¹¹⁸ Ibid., and §41-6-44(9).

mandatory one-year suspension for subsequent offenses.¹¹⁹ License sanctions which may be imposed subsequent to a conviction include revocation: (1) for a minimum of 180 days and a maximum of one year for a first, non-injury-related drunk driving offense; (2) for not less than three years for a first offense involving bodily injury or property damage; (3) for not less than five years for second offenses of any type within five years; (4) for not less than ten years for all third offenses within ten years; and (5) permanently for all fourth offenses.¹²⁰

Some States also impose license reinstatement fees to cover administrative costs and act as deterrents. Ohio's comprehensive 1990 law, for example, imposes new fees for license reinstatement and creates a fund from a portion of such fees for treatment of indigent alcohol-related driving offenders. Offenders with one previous operating a motor vehicle while intoxicated (OMVI) conviction must pay \$150 for license reinstatement.¹²¹ The reinstatement fee for a violator with two previous OMVI convictions within five years is \$200 and an offender with three or more prior OMVI convictions must pay \$250.

¹¹⁹ Florida Statutes Annotated, §§316.193 (West: 1990), 322.2615, 322.271, and 322.28 (West: 1990 cum. supp.) See Florida Laws of 1989, Chap. 89-525.

¹²⁰ Ibid.

¹²¹ Ohio Laws of 1990, File 229, S. 131.

LOWERING THE BAC LEVEL TO .08 PERCENT

To date, four States--Oregon, Utah, Maine, and California--have lowered the BAC threshold triggering the application of criminal sanctions in alcohol-related driving offenses from the .10 percent level still in effect in most states to .08 percent.¹²²

A fifth state--Vermont--has created a special civil offense using the .08 percent BAC standard, but retained the .10 percent level for the imposition of criminal penalties.¹²³ Vermont law provides that operating a motor vehicle with a BAC of .08 percent or more is a traffic violation punishable by a penalty of not more than \$175.¹²⁴ Vermont's criminal drunk driving statute prohibits motor vehicle operation while having a BAC of .10 percent or more, under the influence of intoxicating liquor or any other drug to a degree which renders the person incapable of driving safely.¹²⁵ This offense is punishable by a fine not exceeding \$750 or imprisonment not exceeding one year or both

¹²² Oregon Revised Statutes, §813.300(2) (Oregon Legislative Assembly Legislative Counsel Committee: 1989); Utah Code Annotated, §41-6-44(1)(a) (Michie: 1990 cum. supp.); Maine Revised Statutes Annotated, Title 29, §1312-B(1)(B) (West: 1989 cum. supp.); and California Vehicle Code, §23152(b) (West: 1990 cum. supp.).

¹²³ Vermont Statutes Annotated, Title 23, §§1201(a) and 1214 (Equity: 1989 supp.).

¹²⁴ Ibid., Title 23, §1214.

¹²⁵ Ibid., Title 23, §1201(a).

for a first offense; and increasing for second offenses within five years and third offenses within fifteen years.¹²⁶ Several other States, including New York State, have recently considered lowering the BAC limit accordingly.¹²⁷

Critics of the .08 percent limit, including some lawyers who defend drunk drivers and certain researchers, warn that its adoption will crowd court calendars without having a counterbalancing deterrent effect on drunk driving.¹²⁸ However, in States that have enacted a .08 percent law, these negative predictions have not materialized.

Among organizations voicing strong support for California's adoption of a .08 percent limit were the National Safety Council, Mothers Against Drunk Driving, the American College of Emergency Physicians, the National Committee on Uniform Traffic Laws and Ordinances, and the Association for the Advancement of Automotive Medicine.¹²⁹ The American Medical Association also registered strong support, but urged that the California State Legislature lower the BAC level even further by making .05 percent the illegal per se BAC level for driving under the influence.

126 Ibid., Title 23, §1201(b), (c), and (d).

127 Amy Dockser Marcus, "Some States Lower Blood-Alcohol Limits for Drivers, Generating Controversy," The Wall Street Journal, January 26, 1990, p. B1.

128 Ibid.

129 Information supplied by California Office of Traffic Safety Legislative Analyst Nancy Lynch, June 25, 1990.

California has encountered positive results since the .08 percent limit became law in January, 1990. The California Highway Patrol reported that arrests involving "breath tests only" increased to 62,328 during the period January through May 1990, compared to 55,511 for the same period in 1989. In addition, of the 62,328 such arrests between January and May, 1990, 7.5 percent or 4,682 registered a BAC of .08 percent or .09 percent.¹³⁰

Oregon, which has had the .08 percent level since 1983, experienced a decrease in alcohol-related fatalities from 50.9 percent of all fatalities in 1983 to 45.3 percent in 1988.¹³¹ Furthermore, arrests over the last five years have increased steadily. Oregon State Police Lieutenant James Stevenson believes that both trends may be attributable largely to the .08 percent BAC limit.¹³²

Since enactment of the .08 percent law in 1988, Maine also has experienced positive results. In 1985, alcohol-related traffic fatalities accounted for 53.8 percent of total highway

¹³⁰ Information derived from Commission Research Assistant Mark J. McGrath's telephone interview with California Highway Patrol Public Affairs Director Alice Huffaker, August 10, 1990.

¹³¹ DUII Control System Performance Measures for Oregon Counties, 1983-1988 (Portland: Oregon Traffic Safety Commission, 1989), p. 1.

¹³² Information derived from Commission Research Assistant Mark J. McGrath's telephone interview with Oregon State Police Department Lieutenant James Stevenson, August 10, 1990.

fatalities; the percentage of alcohol-related fatalities thereafter decreased steadily and, by the end of 1989, had dropped to thirty percent of all highway fatalities.¹³³ Drunk driving arrests in Maine increased from 9,464 in 1985 to 11,951 in 1989.¹³⁴

Most recently, the National Commission Against Drunk Driving (NCADD) Board recommended that all states enact laws establishing an illegal per se limit of .08 percent, noting that alcohol concentrations exceeding this level "pose an unacceptable threat to highway safety."¹³⁵

Though preliminary, the results of adopting the .08 percent standard have been positive.

SPECIAL PROVISIONS FOR UNDERAGE DRUNK DRIVING

Varying penalties may apply for alcohol-related driving offenses depending upon the age of the offender. In an effort to deter young drivers from drinking and driving, several States lowered proscribed BAC levels or otherwise provided enhanced penalties for underage offenders.

133 Data provided by the Maine Bureau of Safety, June, 1990.

134 Data provided by the Maine Division of Motor Vehicles, June, 1990.

135 "Board Approves Lower BAC Level," Newsnotes (Washington, D.C.: National Commission Against Drunk Driving), Winter/Spring 1990, p. 1.

In California, it is unlawful for a person under age eighteen to operate a motor vehicle with a BAC of .05 percent or more; those eighteen and over are held to a .08 percent BAC threshold.¹³⁶ Violation of the .05 percent standard is an infraction punishable by requiring either completion of an alcohol education program or a community service program with an alcohol education component. However, should a person under age eighteen also violate the regular DUI laws, participation in an alcohol education or rehabilitation program becomes an additional requisite; failure to complete such programs will result in license suspension or revocation until defendant shows proof of compliance or reaches age twenty-one.¹³⁷

Persons under age eighteen convicted of DUI receive license revocations until age eighteen or for one year, whichever period is longer.¹³⁸ Individuals between the ages of thirteen and twenty found guilty of DUI also may be subject to a one year license suspension.¹³⁹ In addition, individuals convicted of a first DUI offense in a juvenile court must complete either an alcohol or drug education program.¹⁴⁰

¹³⁶ California Vehicle Code, §§23140, 23142, and 23152(b) (West: 1990 cum. supp.).

¹³⁷ Ibid., and §23144.

¹³⁸ Ibid., §13352.3.

¹³⁹ Ibid., §13202.5.

¹⁴⁰ Ibid., §23154.

DUI first offenders under age twenty-one may, as a condition of probation, participate in a visitation program at an emergency medical care facility, coroner's office, or an alcoholism treatment center.¹⁴¹ This Youthful Drunk Driver Visitation Program, enacted in 1987, enables the court to order program participation in addition to any other term and condition of probation required or authorized by law.¹⁴² The court must require that the defendant not drink any alcoholic beverage before reaching the age of twenty-one.¹⁴³

On September 5, 1990, the Governor of Illinois signed into law a similar measure establishing a Youthful Intoxicated Drivers' Visitation Program; the law becomes effective January 1, 1991.¹⁴⁴

In the State of Oregon, among individuals under age eighteen, any amount of alcohol in their blood constitutes driving under the influence of intoxicants (DUII).¹⁴⁵ The offender's license is suspended until he or she becomes age eighteen or otherwise becomes eligible for license reinstatement--i.e., Oregon allows issuance of an emergency

141 Ibid., §§23145.5 and 23145.8.

142 Ibid., §23145.5. See California Laws of 1987, Chap. 166.

143 Ibid.

144 Illinois Laws of 1990, Public Act 86-1242, to be codified at Illinois Statutes Annotated, Chap. 95 1/2 A, §11-501.7.

145 Oregon Revised Statutes, §813.300(3) (Oregon Legislative Assembly Legislative Counsel Committee: 1989).

driver's license to offenders between fourteen and seventeen in order to attend educational institutions, notwithstanding contrary provisions of law.¹⁴⁶

Maine proscribes operation of a motor vehicle by persons under age twenty-one having a BAC of .02 percent or more or refusing a chemical test for the first time; such offenders receive one year license suspensions, but hardship licenses may be available.¹⁴⁷

Illinois mandates a minimum license revocation period of one year for people under the age of twenty-one convicted of DWI, followed by an additional year of restricted driving privileges.¹⁴⁸

In Maryland, drivers under age twenty-one must have a ".02 BAC license restriction" placed on their licenses prohibiting operation of a motor vehicle with a BAC of .02 percent or more.¹⁴⁹ Violation of this license restriction leads to a license suspension not exceeding one year or a revocation period

¹⁴⁶ Ibid., §§807.230, 809.420, and 813.400.

¹⁴⁷ Maine Revised Statutes Annotated, Title 29, §2241-G(B) and (C) (West: 1989 cum. supp.).

¹⁴⁸ Smith/Hurd Illinois Annotated Statutes, Chap. 95 1/2, §6-205(d) (West: 1990 cum. supp.).

¹⁴⁹ Maryland Transportation Code, §16-113(b)(1) (Michie: 1988).

based upon the number of previous revocations.¹⁵⁰ Such violation also is punishable by a fine not to exceed \$500.¹⁵¹

North Carolina law makes it illegal for provisional licensees, i.e., persons between the ages of sixteen and eighteen, to operate a motor vehicle with any alcohol in their body.¹⁵² Chemical test refusal triggers a mandatory administrative license revocation for forty-five days or until the offender reaches the age of eighteen, whichever is longer.¹⁵³ This revocation applies in addition to and runs concurrently with any other license revocations. Such revocation periods treat differently provisional licensees' violation of DWI laws depending on whether the BAC was above or below .10 percent, the regular DWI threshold. If an individual between the ages of sixteen and eighteen is convicted of driving with a BAC less than .10 percent, his license will be revoked for forty-five days or until he reaches age eighteen, whichever is longer.¹⁵⁴ For provisional licensees having a BAC in excess of .10 percent, this revocation will be imposed in addition to

150 Ibid., §§16-113(e) and 16-208.

151 Ibid., §§27-101(b) and 27-102.

152 General Statutes of North Carolina, §20-138.3 (Michie: November 1989).

153 Ibid., §20-13.2.

154 Ibid., §20-138.3.

the regular DWI offense revocation as determined by number of previous offenses.¹⁵⁵

INCARCERATION AND ALTERNATIVES

Many States have enacted mandatory minimum terms of imprisonment for drunk driving recidivists, in part in an effort to meet federal incentive grant eligibility requisites.¹⁵⁶ For example, forty-five states have such laws for second offenders and forty-two states do so for third offenders.¹⁵⁷ Difficulties encountered in some of the states with such laws are numerous, including inconsistent application of law, severe overburdening of judicial, correctional and probation services, and jail and prison overcrowding in general.¹⁵⁸ Nevertheless, the need to incapacitate certain offenders remains paramount.

Several states have implemented unusual approaches to incarceration relative to alcohol-related driving offenses. Maine imposes mandatory minimum jail terms for first offenders whose violations evidence certain aggravating factors:

¹⁵⁵ Ibid., and §§20-13.2, 20-17, 20-19, and 20-179.

¹⁵⁶ See Chapter I of this report for detailed information on federal incentive grants.

¹⁵⁷ Digest of State Alcohol-Highway Safety Related Legislation (Washington, D.C.: National Highway Traffic Safety Administration, 1990), p. 2-5.

¹⁵⁸ See Chapter II of this report for additional information on mandatory incarceration and attendant problems.

registering a BAC of .15 percent or more, driving 30 miles per hour or more over the speed limit while under the influence or with a BAC of .08 percent or more; eluding a police officer while driving under the influence or with a BAC of .08 percent or more; or refusing to submit to a chemical test.¹⁵⁹

COMMUNITY SERVICE

A number of states also require defendants to participate in community service, often in lieu of imprisonment. For instance, Oregon requires that recidivists serve ten days of community service or forty-eight consecutive hours of inpatient treatment in lieu of incarceration.¹⁶⁰

Utah makes extensive use of community service in lieu of imprisonment. First-offenders must serve at least twenty-four hours and possibly as much as fifty hours. Second offenders within 5 years serve a minimum of eighty and up to 240 hours; and subsequent offenders within 5 years receive a mandatory sentence of 240 hours and may be required to serve as much as 720 hours.¹⁶¹

New Jersey requires defendants with a second offense within ten years to complete thirty hours of community service in

¹⁵⁹ Maine Revised Statutes Annotated, Title 29, §1312-(B)(2) (B) (West: 1989 cum. supp.).

¹⁶⁰ Oregon Revised Statutes, §§137.129 and 813.020(2) (Oregon Legislative Assembly Legislative Counsel Committee: 1989).

¹⁶¹ Utah Code Annotated, §§41-6-44 (Michie: 1990 cum. supp.) and 76-3-204 (Michie: 1990).

addition to the minimum incarceration period of forty-eight hours.¹⁶² For third and subsequent offenses within ten years, defendants are precluded from performing more than ninety days of community service as an alternative to imprisonment; the remaining ninety days of a minimum 180 day sentence of imprisonment must be served in a correctional facility.¹⁶³

IGNITION INTERLOCK DEVICES

Hamilton County, Ohio, was one of the first counties in the United States to adopt an ignition interlock program as a drunk driving sentencing option. In July 1987, the Hamilton County Court initiated a longitudinal study to assess the overall effectiveness of ignition interlock as a deterrent to drunk driving recidivism.¹⁶⁴

Researchers from the Institute of Behavioral Science at the University of Colorado recently completed a comprehensive thirty month status report on the five-year Hamilton County Drinking and Driving Study. The report tracked 358 individuals convicted of driving under the influence. One-half of these offenders

162 New Jersey Statutes Annotated, §39:4-50 (West: 1990 cum. supp.).

163 Ibid.

164 Barbara J. Morse and Delbert S. Elliot, Hamilton County Drinking and Driving Study: 30 Month Report (Boulder: University of Colorado Institute of Behavioral Science, February 1990), p. 1.

comprised the experimental group who had ignition interlock devices installed in their motor vehicles. The remaining 179 offenders made up the control group and received license suspensions.¹⁶⁵

The two groups were paired and matched according to similar personal characteristics, arrest histories, and other DUI risk factors. Such risk factors include problem drinker status, number of non-DUI alcohol/drug related arrests, and number of prior DUI arrests.¹⁶⁶ Eligible subjects included offenders with a BAC .20 percent or higher at arrest, offenders with DUI convictions within the previous ten years, and persons refusing to take a test to determine BAC.¹⁶⁷

The study found that short term re-arrest rates for DUI indicate that ignition interlock devices installed in the vehicles of DUI offenders significantly reduced the likelihood of repeat DUI arrests compared to license suspension. After a follow up period of thirty months, the re-arrest rate for the control group--receiving license suspension alone--was 9.8 percent compared to 3.4 percent for the experimental group --subject to the interlock requirement--reflecting a 65.0 percent reduction.¹⁶⁸ Thus, individuals sentenced to the

¹⁶⁵ "Cars Can Reverse Drunk Drivers," Traffic Safety, May/June 1990, p. 1.

¹⁶⁶ Morse and Elliot, Hamilton County Study, p. 19.

¹⁶⁷ Ibid., p. 11.

¹⁶⁸ Ibid., p. 23.

interlock requirement were three times less likely to be re-arrested for DUI than those receiving license suspension.

The interlock group experienced fewer arrests for other traffic violations as well. The control group showed an arrest rate of 16.1 percent for driving under suspension and driving without a license violations compared to a 1.5 percent rate for interlock users, a 91.0 percent reduction.¹⁶⁹

Results of a questionnaire completed by study participants further validated the deterrent capability of ignition interlock devices. Among the interlock group participants, eighty-two percent responded that the interlock system was very successful at preventing them from drinking and driving.¹⁷⁰ In addition, sixty-eight percent indicated that the interlock had been very effective in changing their drinking and driving habits in general.¹⁷¹

The researchers also found that the circumvention rate of the interlock device was considerably lower than that of the license suspension sanction. Response to the questionnaire relative to circumvention revealed that ten percent of the experimental group circumvented the interlock compared to a

169 Ibid., p. 24.

170 Ibid., p. 27.

171 Ibid.

seventy percent circumvention rate for those receiving license suspension.¹⁷²

The results of this status report are encouraging and help to illustrate the ignition interlock device's value as a potential deterrent to repeat DUI arrests. The long term results of this five year study will provide important information on the effectiveness of the ignition interlock device.

A two-year interlock study was conducted in Cumberland County, Pennsylvania, commencing in October 1987. Officials of the Cumberland County, Pennsylvania Accelerated Rehabilitation Disposition (ARD) Program, a probationary program primarily for first-time DUI offenders that incorporates ignition interlock, recently concluded the study on interlock effectiveness. This joint interlock/ARD program began in October 1987 for DUI offenders with a BAC of .10 percent or more.¹⁷³

The Cumberland County study involved 291 persons using interlock as a requirement for license reinstatement. The results of the study show that the interlock device has been extremely successful in deterring DUI recidivism. The finding revealed a two year recidivism rate of only 1.37 percent for the participants in the program.¹⁷⁴

172 Ibid.

173 "Cars Can Reverse Drunk Drivers," Traffic Safety, May/June 1990, p. 2.

174 Ibid.

Legislation relating to ignition interlock devices has been enacted in sixteen States and twelve additional States have authorized pilot ignition interlock programs, including California, Ohio, Oregon, and Texas.¹⁷⁵ Legislation also has been proposed in many other states.

Grounds for imposition of an interlock requirement vary from state to state. In July 1988, Iowa enacted legislation allowing judges to grant a multiple operating while under the influence of alcohol or drugs (OWI) offender a restricted work permit conditional upon the operation of an interlock equipped vehicle.¹⁷⁶ This law creates a unique incentive for recidivists to participate in the ignition interlock program.

In September 1989, Oregon incorporated an interesting approach to the use of interlock technology for driving under the influence of intoxicants (DUII) sanctions. The Oregon State Legislature enacted a law that requires individuals convicted of DUII, after completion of a mandatory license suspension period, to install an approved ignition interlock device for a period of six months as a condition of reinstatement or face an additional six month license suspension.¹⁷⁷

175 Ignition Interlock Report (Cincinnati: Guardian Technologies, Incorporated, Winter 1989-90), p. 3.

176 Iowa Acts of 1988, Chap. 1168 and Iowa Code Annotated, §321J.4 (West: 1990 cum. supp.).

177 Oregon Laws of 1989, Chap. 576, and Oregon Revised Statutes, §813.520 (Oregon Legislative Assembly Legislative Counsel Committee, 1989).

Although this pilot project has been in effect for only a short period of time and covers only eleven counties, this law represents an innovative way to incorporate interlock technology.¹⁷⁸ By combining its use with license reinstatement, and as a DUII sanction, Oregon has found effective uses for ignition interlock devices in both judicial and administrative applications.

THE CALIFORNIA EXPERIENCE

California enacted the nation's first interlock law and has had a pilot ignition interlock program in place since 1987.¹⁷⁹ Judges in four counties--Alameda, San Diego, Santa Clara, and Sonoma--imposed the interlock requirement in cases both of first and multiple driving under the influence (DUI) offenders.

The EMT Group, an independent research firm, conducted a thirty-two month evaluation of California's pilot program and issued a final report in March 1990.¹⁸⁰ The evaluation tracked 584 DUI probationers who had an IVAT device installed in their

178 Ignition Interlock Report, (Cincinnati: Guardian Technologies, Incorporated, Winter 1989-90, p. 3.

179 Information is derived from Commission Research Assistant Tracey Suess' telephone interview with State of California Office of Traffic Safety Alcohol Drug Manager Marilyn Sabin, March 2, 1990.

180 Information is derived from The EMT Group, Incorporated Evaluation of the California Ignition Interlock Pilot Program for DUI Offenders: Final Report (Sacramento: California Department of Alcohol and Drug Programs and California Office of Traffic Safety, March 7, 1990), pp. 94, 103-06, and 109.

vehicles and a control group of 506 DUI probationers not sentenced to use the device. Provisional results for the four pilot counties indicated a 3.9 percent recidivism rate for interlock probationers compared with a 5.5 percent recidivism rate for the control group. Although this reduction in recidivism is encouraging, it is not statistically significant. Researchers warned against proclaiming definitive success due to the small number of recidivistic events, brief follow up period, and non-random selection methods.

Nonetheless, the EMT Group concluded the positive results warranted continued use and evaluation of the interlock option. The California Office of Traffic Safety has extended this study of pilot probationers for two years of follow up.

SUMMARY

The review of innovative approaches taken by other states to ameliorate the problem of drunk driving recidivism profitably may be considered by New York State in improving countermeasures to combat this serious public safety problem.

Chapter V presents the Commission's recommendations for deterring recidivistic drunk driving in the State of New York.

CHAPTER V

RECIDIVISM RECOMMENDATIONS

Based upon the analysis of the recidivism problem contained in this report, the Legislative Commission on Critical Transportation Choices offers the following recommendations for changes in State law:

1. Authorize administrative per se license suspension which currently is authorized by twenty-nine States and the District of Columbia. Current license suspension pending prosecution provisions of New York Vehicle and Traffic Law §1193 whereby the court suspends an offender's driver's license at arraignment should be expanded to include first time offenders charged with DWI who register a BAC of .10 percent or greater. Additionally, the procedure for license suspension pending prosecution should be amended to provide that if the arresting officer chooses to serve upon the offender an appearance ticket pursuant to §150.20 of the Criminal Procedure Law and therefore release the offender from custody prior to his or her arraignment or appearance before a judge, the arresting officer shall take the offender's driver's license. If the issuance of such an appearance ticket is conditioned upon a deposit of pre-arraignment bail pursuant to §150.30 of the Criminal Procedure Law then the desk officer in charge who fixes the pre-arraignment bail shall take the offender's driver's license. In the event the DWI offender's

license is seized by the arresting officer or desk officer, such officer shall issue a temporary driver's license valid for twenty days, and serve upon the offender a notice of suspension which clearly specifies the grounds for suspension, the effective date of the suspension, and an explanation of the administrative hearing procedure available to the offender.

2. Should the Legislature enact a law lowering the BAC standard for DWI from .10 percent to .08 percent or lower, the administrative per se license suspension procedure should apply at the .08 or lower threshold, and be self-adjusting.

3. Mandate a screening evaluation for alcoholism and/or drug abuse of every person convicted of any alcohol-related driving offense more than once in any ten year period.

4. Enact a law mandating a screening evaluation for alcoholism and/or drug abuse of all first-time DWI offenders who register a BAC level greater than .18 percent.

5. The Department of Motor Vehicles in conjunction with the Division of Alcoholism and Alcohol Abuse and the Division of Substance Abuse Services should conduct a census of credentialed agencies and providers currently authorized to conduct such screening services. If the census indicates that there are insufficient numbers of qualified personnel, the Department of Motor Vehicles should submit to the State Legislature a detailed

plan to achieve personnel levels necessary to comply with the mandate.

6. New York State should join California, Utah, Oregon, and Maine in lowering the DWI per se intoxication BAC level. Vehicle and Traffic Law §1192(2) should be amended to lower the proscribed DWI per se BAC level from .10 percent to .08 percent.

7. New York State should join the nine states which have lowered the per se intoxication BAC level variously for youthful drivers under the ages of twenty-one, nineteen, and eighteen. Vehicle and Traffic Law §1192(2) should be amended to provide a per se intoxication BAC level of .04 percent for drivers under the age of twenty-one.

8. Enact a mandatory sentence, subject neither to suspension nor probation, of not less than forty-eight consecutive hours imprisonment for anyone convicted of DWI or DWAI more than once in ten years.

9a. Amend Vehicle and Traffic Law §§1192 and 1193 to provide increased and escalating mandatory minimum fines and driver's license revocation periods for second and subsequent DWI offenses. A second DWI conviction within ten years should be made punishable by a mandatory minimum fine of \$2,500 and a minimum driver's license revocation period of two years; a third or subsequent DWI conviction within ten years should be made

punishable by a minimum fine of \$5,000 and a permanent driver's license revocation.

b. In the event of permanent driver's license revocation, the Commissioner of Motor Vehicles at her discretion may, after a period of ten years, issue a probationary driver's license; however, such license will be permanently probationary.

10a. Amend Vehicle and Traffic Law §1193 to add a new paragraph entitled "Driving While Ability Impaired; Misdemeanor Offenses." The provision will provide that anyone operating a motor vehicle in violation of §1192(1) (DWAI) after having been convicted of DWAI twice within a ten year period or having been convicted of DWI within the preceding ten years shall be guilty of a misdemeanor punishable by a mandatory one year license revocation period and a fine of not less than \$500 nor more than \$1,500, and/or imprisonment of up to one year.

b. Conviction for a DWAI misdemeanor shall serve as a predicate offense thereby making a subsequent DWI offense within ten years a felony.

11. Require judges at sentencing to consider the existence of aggravating factors attendant to an alcohol-related driving offense when setting fines and determining appropriate license revocation periods. This approach is similar to the system

established by North Carolina. Examples of aggravating factors include:

- o A BAC reading of .20 percent or more,
- o drinking while driving,
- o excessive speed--in excess of twenty-five miles per hour above the speed limit,
- o especially reckless or dangerous driving,
- o attempting to elude apprehension,
- o passing a stopped school bus,
- o any other factor that aggravates the seriousness of the offense.

12. Amend Vehicle and Traffic Law §1192(8) to prohibit plea bargaining from DWI to DWAI for offenders convicted of any alcohol-related driving offense more than once in ten years. This section also should be amended to preclude plea bargaining from DWAI to a non-alcohol offense for offenders convicted of any alcohol-related driving offense within the prior ten years.

13. Amend Criminal Procedure Law §170.55 to prohibit a court from ordering disposition of any alcohol-related driving charge by adjournment in contemplation of dismissal (ACOD). The effect of an ACOD is to nullify the arrest and prosecution, thereby impeding identification of the individual as having had a prior alcohol-related driving arrest.

14. Amend Vehicle and Traffic Law §511 to increase penalties for first and second degree aggravated unlicensed operation (AUO) of a motor vehicle. Second degree AUO (a misdemeanor) applies when a person operates a motor vehicle during a period of license suspension or revocation imposed for an alcohol-related driving offense. First degree AUO (a felony) applies when a person operates a motor vehicle while under the influence of alcohol or drugs during a license suspension or revocation period imposed for an alcohol-related driving offense. Penalties should be amended as follows:

o Second degree AUO (Misdemeanor)

-increase mandatory minimum fine from \$500 to \$750 (maximum fine is \$1,000).

-increase maximum term of imprisonment from 180 days to one year.

o First degree AUO (Felony)

-increase mandatory minimum fine from \$500 to \$2,500 (maximum fine is \$5,000).

-retain maximum term of imprisonment at 4 years.

15. Amend Vehicle and Traffic Law §1194(3)(b) to mandate BAC testing for any driver involved in a fatal accident upon reasonable cause to believe the driver has committed a DWI or DWAI violation. Mandatory BAC testing also shall apply upon reasonable cause to believe the driver has committed a DWI or DWAI violation when:

(a) the driver is operating a school bus carrying children and is involved in an accident resulting in death of or any injury to a child, or

(b) the driver is operating a commercial motor vehicle weighing in excess of 18,000 pounds and is involved in an accident resulting in death of or serious physical injury to another person.

16. Amend Penal Law §70.06 to include DWI cases under predicate felony sentencing statutes. At present, only offenders convicted of crimes enumerated in the Penal Law are eligible for second or predicate felony status; DWI offenses are excluded since they are set forth in the Vehicle and Traffic Law. Predicate felons receive a mandatory minimum term of imprisonment and must serve a minimum of one-half of the maximum term imposed; lifetime probation may be an alternative to imprisonment in narrow circumstances.

17. Amend Criminal Procedure Law §410.10(2) to include the commission of a DWAI offense subsequent to imposition of a sentence of probation or conditional discharge as grounds for revocation of such sentence. Under current law, commission of a subsequent offense other than a traffic infraction provides grounds for revocation of the sentence, but DWAI is classified as a traffic infraction. Therefore, absent special probation conditions, a DWAI conviction alone will not revoke a sentence

of probation or conditional discharge previously instituted for a DWI offense.

18. Establish a youthful drunk driver visitation program enabling a court to order DWI or DWAI offenders under the age of twenty-one to visit a facility which treats persons in the terminal stages of alcoholism or drug abuse or a country coroner's office or hospital emergency room to observe victims of motor vehicle accidents involving drunk drivers. Program participation may be ordered by the court as a condition of probation or prior to sentencing. The program is patterned after California's law which has been in effect since 1987 and Illinois' law which established a similar program effective January 1, 1991.

19. Amend New York Vehicle and Traffic Law §§501(4) and 1193(2)(c) to authorize the Commissioner of Motor Vehicles to issue, for a reasonable amount of time, probationary licenses following the expiration of minimum DWI license revocation periods.

20. Amend Vehicle and Traffic Law §1192 to authorize judges in their discretion to assess against persons convicted of DWI or DWAI the reasonable costs of police, fire, and emergency services necessitated thereby; assessment of costs shall not exceed \$2,500 per violation. The court shall, upon the application of the offender, review the offender's financial

ability to pay any portion of the assessment in excess of \$1,000. In making such review, the court shall allow the offender to present evidence of financial hardship establishing the inability to pay any or all of the amount of the assessment in excess of \$1,000. Subsequent to the completion of the review, the court may modify the assessment to be paid, provided that no such modification shall reduce the assessment to be paid below the amount of \$1,000. California and New Hampshire have enacted emergency cost recovery laws.

21. Amend Vehicle and Traffic Law §1198 to authorize interim certification of ignition interlock devices by the Commissioner of Health in order to accelerate commencement of the pilot project and extend the program's sunset date to July, 1994 to accommodate the delay.

22. Amend Vehicle and Traffic Law §600 to increase existing penalties for leaving the scene of an incident resulting in personal injury, serious personal injury, or death of another person.

Penalties for leaving the scene of an incident resulting in personal injury:

o First violation, currently a class B misdemeanor, should be upgraded to a class A misdemeanor.

-Mandatory fine of \$250-\$500 should be increased to \$500-\$1,000.

-Imprisonment term not exceeding three months should

be increased to a term not exceeding one year.

o Subsequent violation, currently a class A misdemeanor, should be upgraded to a class E felony.

-Mandatory fine of \$500-\$1,000 should be increased to \$2,500-\$5,000.

-Imprisonment term not exceeding one year should be increased to a term not exceeding four years.

Penalties for leaving the scene of an incident resulting in serious personal injury or death:

o First violation, currently a class E felony, should be upgraded to a class D felony.

-Imprisonment term not exceeding four years should be increased to a term not exceeding seven years.

o Subsequent violation, currently a class E felony, should be upgraded to a class D felony.

-Mandatory fine of \$500-\$5,000 should be increased to a mandatory fine of \$5,000.

The Commission also recommends:

23. The Alternatives to Incarceration Bureau (ATI) of the New York State Division of Probation and Correctional Alternatives should aggressively encourage local governments to establish or provide additional specialized DWI jail treatment facilities, electronic home monitoring, intensive probation supervision, and

other alternatives to incarceration in order to provide sentencing judges with additional options. Counties and/or STOP-DWI programs should submit annually to ATI reports detailing the status of any current programs utilizing such options or plans to do so. Ongoing programs utilizing such options should be continually monitored and results should be reported to ATI. Marshalling such data, ATI should report to the State Legislature on an annual basis the precise nature and extent of alternatives to incarceration for DWI in use throughout New York State. ATI also should develop an information repository to provide informational and technical assistance to local governments initiating and/or expanding upon the aforementioned options.

24. New York State should assist counties seeking to implement innovative alternatives to incarceration for DWI offenders such as the Suffolk County DWI Jail Alternatives Program which includes an alcohol abuse treatment component.

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