

**WASHINGTON'S IMPAIRED DRIVING LAWS:  
COMPLEXITIES AND CHALLENGES**

Report for the Washington Traffic Safety Commission

Richard D. Van Wagenen

October 2006

## EXECUTIVE SUMMARY

In 2004, an independent assessment of Washington's efforts to reduce impaired driving found that our laws were unnecessarily complex and there was too much local variation in enforcement and the courts. The assessment team also identified specific concerns relating to the "zero tolerance" law for minors, absence of sobriety checkpoints, use of portable breath testing devices, admissibility of breath test results, use of blood tests as an alternative to breath tests, paperwork involved in arrests, deferrals of prosecution, the non-felony status of impaired driving, and the effect of liability risk on probation systems.

This report examines in more detail the concerns identified by the assessment team and others. It is based on review of our laws, interviews with those who participated in the assessment as well as other stakeholders, and observations. It concludes that:

- For many reasons, complexity is inherent in the laws of any state related to impaired driving. Complexities in our laws reflect policy choices made by the Legislature and decisions made by the courts.
- The decentralization of criminal justice in Washington is a historic choice that brings advantages as well as disadvantages for the people of our many communities. Whether there should be less local variation in law enforcement and the courts is a question involving much broader considerations than impaired driving. The lack of state funding for trial courts makes it unrealistic to expect greater uniformity.
- The "zero tolerance" law for minors is properly written but may be used in some cases as a substitute for, rather than a supplement to, the underlying impaired driving laws. Setting a *per se* alcohol level for impaired driving at any age can cause over-reliance on test results in prosecutions.
- Our state Supreme Court's 1988 decision invalidating sobriety checkpoints may not be inconsistent with a carefully designed checkpoint program authorized by state or local law.
- Portable breath testing devices have an appropriate role in determining probable cause for a DUI arrest, and statutory authority is not needed for this use.
- Unnecessary litigation has resulted from overly detailed standards for fixed-location breath test machines. Recent legislation establishing standards for admissibility of breath test evidence, and a state Supreme Court decision upholding the statute, will probably result in more DUI convictions.
- The legal and practical preference for breath testing over blood testing reduces visibility of impaired driving involving drugs other than alcohol.

- Paperwork officers must do in DUI arrests reflects policy choices about use of breath and blood testing to measure impairment, linkage of impaired driving to driver licensing, and others. Warnings officers must give drivers before administering breath or blood tests add complexity to the process and are not constitutionally required.
- Our deferred prosecution statute reflects sound policies, but needs clarification with respect to mental health issues. Various kinds of non-statutory deferral and diversion practices throughout the state reflect resource constraints and local choices about how to handle cases. While some such practices may not be consistent with the intent behind the deferred prosecution and other state laws, attempts to prohibit or regulate them will invite new adaptations. Evaluations of defendants for treatment should include review of their non-traffic criminal histories as well as driving records.
- The 2006 legislation making some impaired driving a felony adds complexity to the law and the enforcement system. The new law may not produce felony convictions without reliable records of prior convictions. It also needs a minor adjustment to clarify how time lines work.
- Liability risk undermines the effectiveness of probation in ensuring compliance with court-ordered conditions and the law itself. This issue goes well beyond the scope of impaired driving.
- Drivers' license suspension hearings neither require police officers' participation nor treat their reports as *prima facie* evidence of all they contain. Courts' authority to prevent collaterally the administrative suspension of impaired drivers' licenses reduces the effectiveness of the suspension policy.
- Reducing first-time DUI from a gross misdemeanor to an infraction might allow law enforcement and prosecutors to focus their resources on repeaters, but might also undercut deterrence among drivers generally. Increasing mandatory sentences would impose additional costs on local governments.
- Statutory simplification for its own sake is unlikely to improve the administration of the DUI laws and could lead to unintended policy consequences. It is unrealistic to expect the Legislature not to enact new DUI laws frequently.
- Locally funded criminal justice systems need additional state resources to implement more effectively the impaired driving policies the state has adopted. Local adaptations to those policies will continue at least as long as local governments are the source of funding.

## I. INTRODUCTION AND BACKGROUND

At the request of the Washington Traffic Safety Commission (WTSC), the National Highway Traffic Safety Administration (NHTSA) funded an independent assessment of Washington State's impaired driving countermeasures program. NHTSA assembled a highly experienced five-member technical assistance team,<sup>1</sup> which met with WTSC staff and other stakeholder representatives in Olympia over a week in October 2004 to hear briefings and review supporting material on a variety of topics related to impaired driving. Topics included responsible service of alcohol, public information and education, alternatives to driving after drinking, employer- and school-based programs, community coalitions, information and record systems, substance abuse treatment, and others. The team spent a day discussing Washington's impaired driving laws and how they are enforced and administered by the criminal justice system and the Department of Licensing.<sup>2</sup>

The team generally praised Washington's efforts to reduce impaired driving, noting that the state's rate of alcohol-related traffic deaths has been below the national average and has decreased in the past decade.<sup>3</sup> However, the team found that the state's legal framework for dealing with impaired driving appeared to be unnecessarily complex and confusing, and that the administration of state laws was not as effective as it could be:

*Many sections [of state statute] have been added and amended over the years with some accretions not consistent with other parts of the law. In addition, court decisions in cases and court rules have produced certain effects impacting the status of the legislative framework around impaired driving. As a result of the passage of time and the normal accretions of law by amendment and courts, the law is confusing and complex and in the eyes of some, contradictory.<sup>4</sup>*

The purpose of the present report is to explore in greater depth the assessment team's findings related to Washington's laws, seeking to identify areas of complexity that do not appear to reflect conscious policy choices, either by the Legislature or by agencies exercising authority to administer the laws. The report is based on review of our impaired

---

<sup>1</sup> The team members were Linda Chezem, a former trial and appellate court judge in Indiana; Robert P. Lillis, a New York research consultant in substance abuse prevention and treatment; Greg Manuel, assistant chief of the California Highway Patrol; Manu G. Shah, a Maryland engineer with experience in highway design and safety; and Larry Wort, a former chief of safety programs for the Illinois Department of Transportation.

<sup>2</sup> National Highway Traffic Safety Administration, *State of Washington: Impaired Driving Assessment*, October 2004 (hereafter cited as "Assessment Report"). Copies of this report are available from the Washington Traffic Safety Commission. The 80-page report includes biographical information on assessment team members, the agenda of briefings it received, its observations and findings, and recommendations for further activity and improvement.

<sup>3</sup> Assessment Report, p. 10. According to the Traffic Safety Commission's Fatal Accident Reporting System, the number of Washington traffic deaths involving a drinking driver declined from 353 in 1996 to 268 (preliminary) in 2005. The rate of alcohol-related fatalities declined in the same period from .72 to .52 (preliminary) per 100 million vehicle miles traveled (VMT). In 2004, Washington had .42 deaths per 100 million VMT in alcohol-related crashes, compared to .59 for the nation as a whole.

<sup>4</sup> Assessment Report, p. 36.

driving statutes and related agency regulations,<sup>5</sup> interviews with one member of the technical assistance team and all the Washington stakeholder representatives who participated in the assessment (as it related to our laws), and further interviews with experts identified by stakeholder organizations.<sup>6</sup> The interviews with those participating in the 2004 assessment were meant to identify, as far as was possible after about 18 months, the specific ideas and facts behind the statements in the Assessment Report. The interviews with other stakeholder designees were meant to identify areas of unnecessary complexity that might not have been identified through the 2004 assessment. Although organizations were asked to designate people with expertise and a perspective beyond their own jurisdictions, those interviewed were not necessarily representative of their counterparts engaged in similar work in other parts of the state. No attempt was made to interview everyone with such expertise, or to gather statistical data beyond already published sources.

This report does not attempt to describe fully either Washington's impaired driving laws<sup>7</sup> or the systems that enforce and administer those laws. It assumes a basic familiarity with statutory terms, law enforcement techniques, and the judicial process. Nor is the report intended to evaluate the wisdom or effectiveness of particular policy choices made by elected officials, or of particular decisions made by the courts. Any opinions, conclusions, or recommendations in the report, express or implied, are those of the author rather than of the Washington Traffic Safety Commission or its staff.

---

<sup>5</sup> The state agencies with administrative rule-making authority in this area are the Department of Licensing and the Washington State Patrol.

<sup>6</sup> Those interviewed are listed in the appendix to this report. The stakeholder groups asked to identify experts for interviewing were the District and Municipal Court Judges Association, Misdemeanor Corrections Association, Washington Association of Criminal Defense Lawyers, Washington Association of Prosecuting Attorneys, Washington Association of Sheriffs and Police Chiefs, and Washington Defender Association. Interviews were also conducted with staff from the Administrative Office of the Courts, Criminal Justice Training Commission, Department of Licensing, Department of Social and Health Services, National Highway Traffic Safety Administration, Washington State Patrol, and WTSC. Those interviewed shared their knowledge and views as experienced individuals rather than representatives of their organizations or employers.

<sup>7</sup> In this report, the term "impaired driving" generally refers to driving a motor vehicle, or being in physical control of such a vehicle, under the influence of alcohol or any other drug. It encompasses the following crimes under Washington law:

- Driving under the influence (DUI) (RCW 46.61.502);
- Physical control of a vehicle under the influence (RCW 46.61.504);
- Vehicular homicide committed while under the influence (RCW 46.61.520(a));
- Vehicular assault committed while under the influence (RCW 46.61.522(b));
- First-degree negligent driving ("neg 1" or "wet neg") (RCW 46.61.5249);
- Reckless driving (RCW 46.61.500) when originally charged as DUI or physical control;
- Reckless endangerment (RCW 9A.36.050) when originally charged as DUI or physical control.

When relevant, specific terms are used instead of the generic "impaired driving" or "DUI." Unless the context requires otherwise, "DUI" also encompasses physical control, and refers to the influence of either alcohol or any other drug.

## II. ISSUES RAISED IN ASSESSMENT REPORT AND INTERVIEWS

The Assessment Report described several concerns about Washington’s DUI laws and their administration. Sections II (A) through (K) below include relevant language from the Assessment Report (in *italics*) and a discussion of the issue. Sections II (L) and (M) discuss issues raised by interviewees rather than the assessment team.

### (A) Complexity of DUI laws

*Many sections [of state statute] have been added and amended over the years with some accretions not consistent with other parts of the law. In addition, court decisions in cases and court rules have produced certain effects impacting the status of the legislative framework around impaired driving. As a result of the passage of time and the normal accretions of law by amendment and courts, the law is confusing and complex and in the eyes of some, contradictory.<sup>8</sup> ... Over the years, the DUI laws have been revised numerous times and their current state has become cumbersome to interpret.<sup>9</sup>*

*There was a report of the need to revisit the statutes and revise for consistency and clarity.<sup>10</sup>*

*The totality of the legal structure and statutes for the offense of impaired driving decreases the clarity and consistency of the statutory framework and message about impaired driving.<sup>11</sup>*

No examples were provided in the report or interviews, and none are apparent, of statutory “accretions” that are “not consistent with other parts of the law,” or of provisions that are “contradictory” to others. Apart from various policy issues, the Assessment Report did not identify any particular statutes needing revision to make them more consistent or clear. Generally the assessment team and interviewees agreed that the laws are too complex, and also had a variety of ideas for policy changes – many of which would add to the complexity.

Complexity is inherent in the legal response to impaired driving, both as formal statute and in the laws’ enforcement and administration, for several inter-connected reasons:

- All statutes are written to describe as precisely as possible the acts they require, permit, or prohibit. Lawmakers try to leave as little as possible for the courts to interpret, so that people can be as certain as possible about how to obey the law. This is especially important for criminal statutes, where the consequences of a prohibited act can include serious personal penalties, and the constitutional rights of individuals are

---

<sup>8</sup> Assessment Report, p. 36.

<sup>9</sup> Assessment Report, p. 42.

<sup>10</sup> Assessment Report, p. 36.

<sup>11</sup> Assessment Report, pp. 36-37.

directly affected. Such precision can reduce readability or clarity – until the reader tries to apply the law to a specific set of perhaps atypical facts.

- Impaired driving laws involve the interaction of two powerful cultural forces – cars and alcohol. Most people who drive also drink, and most people who drink also drive. As a society, we are ambivalent about this interaction, knowing that it is dangerous to drink and then drive, but also knowing that driving is the only practical way most people can get from place to place. The ambivalence complicates laws that seek to prevent and punish driving after drinking but also recognize the need to drive on a day-to-day basis.
- DUI is both a high-profile crime and a common one. Policymakers try to meet public concerns for deterrence, accountability, and retribution, often responding to highly publicized or shocking events. At the same time, DUI is a crime committed by many thousands of people each year, sometimes on a daily basis, seldom detected or causing immediate harm.<sup>12</sup> In this respect it differs from other crimes, like the violent and sex offenses that also provoke public outrage and invite frequent legislation.
- Unlike most defendants charged with other crimes, many DUI defendants have the means to contest charges vigorously.<sup>13</sup> A specialized and sophisticated defense bar has grown up around this crime, nationally as well as in Washington, while less experienced prosecutors typically work in the district and municipal courts that handle DUI cases. Results include delays in resolving cases, frequent plea agreements, frequent appeals, and development of case law unique to this crime.
- The separation of powers in American government produces tension between legislative policymaking and judicial discretion. Much DUI legislation attempts to control and structure the discretion judges have in individual cases. Since impaired driving is very unpopular, both in the abstract and in the high-profile cases that often drive legislation, the policy trend is toward more severe penalties and restrictions. But the judicial branch applies the law to specific facts and people, one case at a time. As policymakers raise the stakes in DUI cases through more precise and prescriptive laws, defendants and their lawyers have more incentive to develop creative ways for courts to achieve case outcomes that appear just, especially in a resource-constrained environment where only a small fraction of cases can ever be tried.<sup>14</sup>
- Impaired driving often results from alcoholism and/or drug addiction, diseases which can and should be treated. At the same time, it is dangerous behavior that can kill in-

---

<sup>12</sup> A Gallup survey, published in 1999, found that between 17 and 27 percent of Americans drive shortly after drinking. A different survey found that between 16 and 19 percent of Washington adults reported having driven under the influence of alcohol within the past year (National Survey of Drug Use and Health, 2002-04).

<sup>13</sup> Self-reported driving under the influence of alcohol in the past year was higher among more educated survey respondents – nearly 18 percent for those with at least some college vs. 9 percent for those who had not completed high school (National Survey of Drug Use and Health, 2004).

<sup>14</sup> Last year 41,872 DUI cases were filed in Washington courts, and trials were held in 1,587 cases, corresponding to 3.8% of filings, according to 2005 caseload data from the Administrative Office of the Courts.

nocent people. Our laws seek to accommodate the needs both to deter and punish the behavior and to treat the disease, goals which do not always appear in harmony. Complexity results from the need to serve both.

- Impaired driving involves a continuum of impairment, from unnoticeable to profound. Precisely when a person is “under the influence” is less inherently obvious than, for example, when one is committing violence or stealing property. To provide objective standards, our laws draw “bright lines” like the .08 *per se* level for blood or breath alcohol content (BAC), requiring scientific measurement. BAC technology is complex, and tests must be administered under careful standards, both to ensure accuracy and to protect drivers’ rights. Scientific and constitutional values both drive toward complex testing protocols that can be subject to both technological and procedural challenges in individual cases.
- As a crime committed by people driving vehicles, DUI involves driver licensing as well as criminal justice. Drivers are licensed in order to ensure a minimum standard of competence and care in handling instruments that can kill people. If impaired driving had no licensing consequences, it would be hard to justify suspending anyone’s license for any kind of driving behavior. But the interplay between the licensing and justice systems complicates cases and the law itself.

The foregoing considerations apply as much in any other state as in Washington. Therefore we would expect other states’ DUI laws to be no simpler than ours, however they may differ in substance. “Complexity” is not readily measured objectively, and no attempt was made to analyze the laws of 49 other states.<sup>15</sup> However, an examination of Oregon and Idaho statutes suggests that they are at least equally complex.<sup>16</sup>

Almost every legislative session brings changes in DUI laws, and many people who administer those laws feel that they change too often. For example, it can be hard to determine which penalties apply to individuals who committed offenses years ago when other provisions were in effect – a common problem in DUI cases where unsuccessful deferrals can revive prosecutions years later. A chart produced by the Administrative Office of the Courts (AOC) identifies eleven separate time periods since 1985, ranging from 7 ½ years to less than six months, in which different penalty provisions were in effect.<sup>17</sup> Because the state and federal Constitutions require that penalties be based on the law in effect when the crime occurred, frequent changes in penalties complicate their application. Yet each change represented a policy decision by the Legislature, often in response to changes in public attitudes, criminal justice practices, or specific case decisions.

---

<sup>15</sup> For a detailed compilation of each state’s DUI laws, see National Highway Traffic Safety Administration, *Digest of Impaired Driving and Selected Beverage Control Laws*, 23<sup>rd</sup> edition (January 2006), <http://www.nhtsa.dot.gov/people/injury/alcohol/ImpairedDrivingBeverageControlDigest.pdf>.

<sup>16</sup> Chapters 811-813, Oregon Revised Statutes; sections 18-8001-8008, Idaho Code. There are many similarities and differences among these states’ laws and Washington’s. This report does not attempt to compare them in detail, or to identify similarities and differences in how they are administered in the three states (or in different parts of each state).

<sup>17</sup> See <http://www.courts.wa.gov/newsinfo/content/duigrid/DUIHISTwith2005changes.pdf>. This does not include the changes enacted in 2006 which take effect in July 2007.

The DUI laws include many policy choices reflecting both the public’s concern about impaired driving and its recognition that driving is a near-essential activity for adults. For example, our laws:

- Authorize breath or blood tests when drivers are arrested for DUI, but allow drivers to refuse those tests;
- Require suspending impaired drivers’ licenses, but authorize restricted licenses to participate in approved activities like work, school, or treatment;
- Prescribe minimum sentences and license suspension for DUI, but allow deferred prosecutions to encourage substance abuse treatment, and define other crimes to which offenders can plead guilty without mandatory jail time or license sanction.

### **(B) Local variations in law and practice**

*The local ordinances that are permitted by the state for DUI add an additional layer of complexity.*<sup>18</sup>

*The question of how the statutes are applied, how the prosecutors prosecute, and how the judges judge are all answered by “it depends on where you are in the state.” The variation within the State of Washington makes it difficult to understand and describe how the systems work in a clear and meaningful fashion.*<sup>19</sup>

*The statutes and current practices do not allow consistency in the adjudication of impaired driving (including youthful offender) cases, and the imposition of effective and appropriate sanctions.*<sup>20</sup>

The autonomy Washington’s Constitution and laws give to its many types of local government entities, including counties, cities, and special purpose districts, reflects our state’s historic choice to diffuse power and keep decision-making as local as possible.<sup>21</sup> Whether this choice is necessary or wise is a legitimate and important question, involving far more issues than how the DUI laws are administered. But state statutes prohibit local ordinances from varying from state law with respect to DUI and related violations,<sup>22</sup> or

<sup>18</sup> Assessment Report, p. 36.

<sup>19</sup> Assessment Report, p. 37.

<sup>20</sup> Assessment Report, p. 52.

<sup>21</sup> The state Constitution recognizes the 39 counties that existed in 1889 as “legal subdivisions of the state” (Const. art. 11, sec. 1), authorizes incorporation of cities by majority vote of residents (Const. art. 11, sec. 10), and authorizes any county or city to “make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws” (Const. art. 11, sec. 11). The state Supreme Court has held that this power is “as ample within its limits as that possessed by the Legislature itself. It requires no legislative sanction for its exercise so long as the subject matter is local, and the regulation reasonable and consistent with the general laws” (*Hass v. Kirkland*, 78 Wn.2d 929 at 932 (1971), quoting *Detamore v. Hindley*, 83 Wash. 322 at 326 (1915)).

<sup>22</sup> RCW 48.08.020 and 46.08.030 declare that the provisions of Title 46 (covering vehicle and traffic laws, including DUI) “shall be applicable and uniform” throughout the state and on all drivers, except where state law expressly allows local variations. In 1995, when state law established a breath alcohol level of .10 as the *per se* standard for DUI, the state Supreme Court invalidated a Seattle ordinance establishing a .08

from imposing criminal penalties that differ from those in state law.<sup>23</sup> At least 200 of Washington's 281 cities, and 16 of its 39 counties, have adopted the Model Traffic Ordinance promulgated by the state Department of Licensing, which is identical to state statutes.<sup>24</sup> Others have enacted ordinances that incorporate state laws by reference, or contain identical language, though they use different section numbering systems. The Assessment Report and interviewees did not identify any local ordinances that were inconsistent with state DUI laws, and it is unlikely that any exist.

But uniformity in the language of state and local laws does not mean uniformity in the ways they are enforced and administered throughout the state. All judges and prosecuting attorneys are locally chosen in Washington, either by election or by appointment by elected city officials.<sup>25</sup> Equally important, Washington relies almost entirely on local governments to fund and operate our law enforcement agencies and courts. The Washington State Patrol plays a leading role in DUI enforcement across the state, including funding for breath test instruments and laboratory services, as well as the daily work of state troopers. But those arrested for DUI, whether by a trooper or a local officer, are charged in courts that are almost entirely funded by local governments.<sup>26</sup>

Public funds are never as plentiful as public expectations of what government can and should do. This problem has been especially acute for Washington's counties and cities in recent years. It is not surprising that court systems have adapted differently to the funding constraints they increasingly face, or that those adaptations reflect local values and priorities. A 1999 federal study found that no state provided a smaller percentage of trial court funding than Washington.<sup>27</sup> The state pays half the salaries and all employee benefits of judges, and the Legislature provided a small amount of additional funding in

---

standard, because it violated the "uniformity" requirements of those statutes (*Seattle v. Williams*, 128 Wn.2d 341).

<sup>23</sup> RCW 35.21.163 and 35.21.165. See also RCW 35.20.030.

<sup>24</sup> Chapter 308-330 WAC. The MTO incorporates by reference the sections of the Revised Code of Washington (RCW) dealing with impaired driving as well as other traffic violations. RCW 46.90.010 authorizes DOL to adopt the MTO (in consultation with the State Patrol and the Traffic Safety Commission), and provides that any amendment to the MTO is deemed to amend any local ordinance that adopts the MTO by reference.

<sup>25</sup> All county district court judges and prosecuting attorneys are elected. Some municipal court judges are elected, but others are appointed by elected city officials. Most city attorneys, who prosecute in some municipal courts, are appointed by elected city officials. Some cities contract with elected county prosecutors to prosecute crimes in municipal courts.

<sup>26</sup> State law establishes district courts at the county level, and allows cities either to establish their own municipal courts or to contract with their counties for district court services (see RCW 39.34.180). These "courts of limited jurisdiction" can hear cases involving misdemeanors and gross misdemeanors, but not felonies. If a city has a municipal court, drivers arrested by city police are charged there, under city ordinance. Drivers arrested by other law enforcement agencies (*e.g.* State Patrol, sheriff's department, port police), even if within a city's boundaries, are charged in county district court. The superior courts have statewide trial-level jurisdiction over all crimes, and hear appeals from district and municipal courts. Superior courts have not normally handled DUI trials, but they will when the new law making some repeat DUIs felonies takes effect in 2007 (see section II(J) below). Like the limited-jurisdiction courts, superior courts' funding comes almost entirely from the counties where they are located rather than the state.

<sup>27</sup> *State and Local Government Burden of Total Direct Expenditure on Judicial and Legal Services, Fiscal Year 1999*, Bureau of Justice Statistics, U.S. Department of Justice.

2005.<sup>28</sup> But local governments still pay by far the greatest share of trial court costs.<sup>29</sup> In addition, the state provides no ongoing funding to operate county or city jails, many of which are severely overcrowded.<sup>30</sup> Unless the state takes on a much greater role in funding trial courts and jails, it is unrealistic to expect greater uniformity in the way DUI cases are actually handled.

**(C) “Zero tolerance” law for minors and *per se* laws for all ages**

*The state law ... includes zero tolerance for underage drivers, making it illegal “per se” for persons under age 21 to drive and has the limit set at 0.02 or greater. Those who are working with youth think that 0.02 sends the wrong message or, in their words, “a little bit won’t hurt.”*<sup>31</sup>

The .02 standard for breath or blood alcohol content (BAC) in drivers under 21 is also used in the model “Millennium DUI Prevention Act” proposed by the National Committee on Uniform Traffic Laws and Ordinances,<sup>32</sup> and in 36 states besides Washington.<sup>33</sup> It reflects an allowance for a possible margin of error in breath testing equipment, and the fact that very low BAC levels can be caused by mouthwash or other substances.

It is true that establishing a quantity above zero as a violation threshold may imply that “a little bit won’t hurt.” This is equally true of the .08 threshold applied to drivers of all ages – except that a .08 BAC clearly involves more than “a little bit” of drinking. Law enforcement officers sometimes have to explain to citizens, including friends at social gatherings, that it is not “OK” to drink before driving as long as one does not exceed .08. The ubiquitous signs on Washington’s roads, “.08% Alcohol Limit,” may suggest to some that they can safely drink up to this level. In fact, impairment becomes obvious and dangerous well below a .08 BAC level.

Some drivers under 21 are charged and convicted under the “zero tolerance” law making it a misdemeanor for someone under 21 to drive with .02 or higher BAC,<sup>34</sup> rather than under the separate DUI law.<sup>35</sup> But the DUI law applies to anyone, regardless of age, who was actually impaired. A “zero tolerance” conviction carries no mandatory jail time,

---

<sup>28</sup> About \$5 million a year for indigent defense services and for district and municipal court judges’ salaries and benefits.

<sup>29</sup> According to the State Auditor’s Office, cities and counties spent \$486 million from their own general funds in 2004 on trial courts, including prosecution and defense services, and \$293 million on jails and corrections programs. This was 71% more for courts and 102% more for corrections than in 1994.

<sup>30</sup> The state provided construction funding, but not operating funds, for many jails in the 1970s. Most jails now have populations far exceeding their original capacity. To relieve prison overcrowding, the state rents jail beds from a few counties, which have built capacity beyond their current needs. Local governments also rent beds from each other, sometimes requiring transfer of inmates across the state.

<sup>31</sup> Assessment Report, p. 37.

<sup>32</sup> Available at [www.ncutlo.org/1999dwi.htm](http://www.ncutlo.org/1999dwi.htm). See section 108.

<sup>33</sup> Eleven other states’ laws specify .00 as the threshold for minors; two others specify .01.

<sup>34</sup> RCW 46.61.503.

<sup>35</sup> RCW 46.61.502, making it a gross misdemeanor for anyone to drive with .08 or higher BAC, or while otherwise under the influence of alcohol or drugs.

does not count as a “prior offense” in sentencing subsequent DUIs, and does not result in suspending the driver’s license. Thus it provides less accountability for a minor who was in fact impaired. Charging minors with DUI when impairment can be proved, and with violating “zero tolerance” only when impairment cannot be proved, would do more than reducing the threshold to zero to “send the message” the assessment team prefers.

The *per se* statute, making it a crime for anyone to drive at or above a defined BAC level, was enacted in the 1980s to facilitate enforcement of the DUI laws by making it unnecessary to prove actual impairment if the driver’s BAC exceeded the threshold.<sup>36</sup> It has resulted in reliance on breath testing, rather than officers’ observations, to prove guilt in many cases. When test results are successfully challenged, and officers have not taken the careful steps necessary to document the impairment they observed, not enough evidence may remain to support a conviction.

But DUI arrests involve much more paperwork for officers than most other non-felonies.<sup>37</sup> Officers may not always take the time to document their observations fully because they expect that prosecutors will agree to reduced charges or deferrals in low-BAC cases. In the negotiations that inevitably occur in most DUI cases, prosecutors and defense attorneys often focus on the BAC as one of the main criteria, if not the only one, of “what the case is worth.” Other things being equal, the higher the BAC, the less likely the prosecutor is to reduce charges or the defense attorney is to contest the evidence.<sup>38</sup> When BAC levels so influence negotiations on case outcomes, officers may not be motivated to do the extra work of documenting other evidence of drivers’ impairment.

Thus the *per se* law, an intended “simplification,” may have complicated enforcement over time by increasing the importance of BAC testing in case outcomes.<sup>39</sup> However, a .08 *per se* law has become a requirement for significant federal funding of highway construction programs, so the issue is unlikely to reappear at the state level.<sup>40</sup>

#### (D) Sobriety checkpoints

*Law enforcement is prohibited by the [state Supreme] Court’s decision to conduct sobriety checkpoints, in which vehicles are stopped on a nondiscriminatory basis to determine whether operators are driving while impaired by alcohol or other drugs.*<sup>41</sup> *Sobriety*

<sup>36</sup> RCW 46.61.502(1)(a). The threshold was originally .15, then reduced to .10, then reduced in 1998 to .08.

<sup>37</sup> See discussion of paperwork issues in section II(H) below.

<sup>38</sup> One possible plea bargain is to DUI at a BAC below .15, when the actual test result was .15 or higher, allowing the defendant to avoid the additional penalties for BAC at or above .15. Such agreements occur; how often is not known. See discussion of their effects on driver license suspension in section II(L)(2) below.

<sup>39</sup> See discussion of admissibility of BAC test results in section II(F) below.

<sup>40</sup> The Transportation Appropriations Act for federal fiscal year 2001 amended 23 USC sec. 163 to require withholding up to eight percent of annual federal highway construction funding from states that do not make driving with .08 or higher BAC a *per se* crime. Washington could lose up to \$24 million annually if not in compliance.

<sup>41</sup> Assessment Report, p. 37.

*checkpoints have proven to be an effective tool for law enforcement officers across the nation in reducing the incidence of impaired driving. Although federal courts have ruled that sobriety checkpoints are legal, the Washington State courts have ruled them to be unconstitutional under the State Constitution.*<sup>42</sup>

The state Constitution provides that “no person shall be disturbed in his private affairs, or his home invaded, without authority of law.”<sup>43</sup> While this provision resembles the Fourth Amendment to the U.S. Constitution,<sup>44</sup> our courts have found that it provides a greater protection of individual privacy than the Fourth Amendment. Generally, the state Supreme Court has held that a search or seizure is not valid unless it is authorized by a warrant, or falls within a few narrow exceptions to the warrant requirement.<sup>45</sup> In 1988, the state Supreme Court prohibited the Seattle Police Department from operating a checkpoint program in which all drivers were stopped, at predetermined times and places based on data involving impaired driving, and those showing signs of impairment were arrested for DUI. Less than one percent of the stops resulted in DUI arrests.<sup>46</sup>

Noting that both the state and federal courts had recognized a privacy interest in one’s vehicle, Justice Utter’s majority opinion held that “because sobriety checkpoints involve seizures, they are valid only if there is ‘authority of law.’”<sup>47</sup> Since checkpoints did not fall within any of the exceptions the Court had recognized to the warrant requirement, the majority found that “no argument has been presented to this court that would bring the checkpoint program within any possible interpretation of the constitutionally required ‘authority of law.’ The Seattle sobriety checkpoint program therefore violated petitioners’ rights under article I, section 7.”<sup>48</sup>

In a concurring opinion, Justice Dolliver suggested that Seattle’s checkpoint program should have been overturned only because it had not been authorized by a properly written state or local law. “A sobriety checkpoint program, properly authorized by statute or ordinance, could be designed which would violate neither Const. art. I, 7, nor the Fourth Amendment,”<sup>49</sup> he wrote for himself and two other justices. To be valid, he suggested, a checkpoint program should be based on a statute balancing the state’s interest in reducing impaired driving with the individual’s interest in privacy, taking into consideration the amount of discretion allowed to officers at the checkpoints, the location of checkpoints, advance notice to approaching drivers, safety of the checkpoints, notice to the public at

---

<sup>42</sup> Assessment Report, p. 42.

<sup>43</sup> Const. Art. I, sec. 7.

<sup>44</sup> “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...” U.S. Const. Amend. IV.

<sup>45</sup> *State v. Gunwall*, 106 Wn.2d 54 (1986); *State v. Stroud*, 106 Wn.2d 144 (1986); *State v. Myrick*, 102 Wn.2d 506 (1984), and numerous other cases. When the state’s Constitution was adopted by a convention in 1889, the delegates considered and rejected language identical to the Fourth Amendment, choosing instead the language that remains in the Constitution.

<sup>46</sup> *Seattle v. Mesiani*, 110 Wn.2d 454 (1988).

<sup>47</sup> *Mesiani*, 110 Wn.2d at 457.

<sup>48</sup> *Mesiani*, 110 Wn.2d at 458.

<sup>49</sup> Concurring opinion in *Mesiani*, 110 Wn.2d at 460.

large, how long drivers are stopped, how thorough the program's guidelines are, and how vehicles are chosen to be stopped.<sup>50</sup>

Justice Dolliver's opinion sought to provide guidance, based on decisions of the federal courts and other states as they existed in 1988, for a possible state or local law authorizing checkpoints. Since then, the U.S. Supreme Court has upheld sobriety checkpoints.<sup>51</sup> It is therefore possible that a state statute or local ordinance consistent with the U.S. Supreme Court's decision would provide the "authority of law" that the Seattle checkpoint program clearly lacked when the state Supreme Court overturned it in 1988.

It is less than likely that the state Supreme Court would uphold even the most carefully designed state or local law authorizing sobriety checkpoints, because its decisions so far have required either a warrant or a specific exception unrelated to checkpoints.<sup>52</sup> But the Court has not considered a case involving a statute or ordinance authorizing checkpoints. No such law authorized Seattle's checkpoint program in 1988, and it can be argued, consistent with Justice Dolliver's concurrence, that the *Mesiani* case does not preclude upholding such a law.<sup>53</sup> Checkpoints offer enough enforcement potential<sup>54</sup> to warrant considering carefully drafted legislation authorizing them.<sup>55</sup>

---

<sup>50</sup> Concurring opinion in *Mesiani*, 110 Wn.2d at 463.

<sup>51</sup> *Michigan State Police v. Sitz*, 496 U.S. 444 (1990). The U.S. Supreme Court found that Michigan's checkpoint program met a three-part balancing test it had previously prescribed for "seizures" that fell short of arrest and were not based on individualized suspicion (*Brown v. Texas*, 443 U.S. 47 (1979)). The *Brown* test requires consideration of the importance of the state's interest in reducing impaired driving, the degree to which stopping motorists at checkpoints advances that interest, and the magnitude of the intrusion on individual motorists' privacy.

<sup>52</sup> The exceptions are searches incident to arrest, inventory searches after impoundment, evidence in plain view, suspicion-based investigative stops, consent, and exigent circumstances. None would apply to checkpoints where every vehicle is stopped, however briefly, to check the driver for signs of impairment. For a discussion of related issues in the context of ferry passenger screening, see Perkins, "Capsized by the Constitution," 79 *Washington Law Review* 725 (2004).

<sup>53</sup> Washington courts have addressed the statutory issue only obliquely. In *State v. White*, 97 Wn.2d 92 (1982), the Supreme Court invalidated (on vagueness grounds) a "stop and identify" statute requiring citizens to provide information "lawfully required" of an individual by a "public servant," and, under Article I, section 7, excluded a confession obtained under the statute's authority, even when the initial stop was based on reasonable suspicion. In *State v. Thorp*, 71 Wn.App. 175 (1993), the Court of Appeals invalidated a suspicionless stop to check a truck for a permit, under a county ordinance authorizing any peace officer to stop and search any vehicle carrying over five pounds of cedar. Citing both *Mesiani* and the Fourth Amendment, the appeals court invalidated the ordinance to the extent that it purported to authorize a roving stop not based on individualized suspicion. But that ordinance was much broader than any sobriety checkpoint law should be. In *State v. Ladson*, 138 Wn.2d 343 (1999), the Supreme Court invalidated a pretext-based traffic stop, citing *Mesiani* to mean that "the warrant requirement is especially important under...the Washington Constitution as it is the warrant which provides the 'authority of law' referenced therein." However, no language in the *Mesiani* opinion itself says that a warrant is the only possible "authority of law" for a seizure. In *State v. Walker*, No. 76743-2 (July 13, 2006), the Supreme Court upheld a statute authorizing warrantless arrests based on probable cause for certain misdemeanors, noting that "it is the probable cause requirement in such statutes that makes them constitutional." By its nature, a sobriety checkpoint stops all drivers, regardless of probable cause, however briefly.

<sup>54</sup> Although only a small percentage of drivers stopped at checkpoints may show evidence of impairment, a well-publicized checkpoint program can deter impaired driving. A year-long, statewide checkpoint program in Tennessee resulted in DUI arrests of about half of one percent of the 145,000 drivers stopped at 882 checkpoints, but an estimated 20% reduction in alcohol-related fatal crashes (Lacey, Jones, and Smith,

### (E) Portable breath testing devices

*There is no statute to authorize the use by law enforcement of passive alcohol sensors to improve detection of alcohol in drivers.*<sup>56</sup>

Passive alcohol sensors, also known as portable breath test or preliminary breath test (PBT) instruments, are hand-held devices that detect alcohol in the breath of a person who has been drinking recently. There is no statute authorizing law enforcement officers to use them, but there is no prohibition against them, and in fact officers often use them as part of the process of determining probable cause for a DUI arrest and subsequent test on a more accurate instrument. Commonly, an officer observes a traffic violation or suspicious driving pattern, stops the driver, notes slurred speech or other signs of intoxication, smells alcohol, performs a Standard Field Sobriety Test,<sup>57</sup> and confirms the presence of alcohol with a PBT.<sup>58</sup> Courts generally accept a sequence like this as probable cause to arrest for DUI.<sup>59</sup>

The PBTs now authorized in Washington help officers detect recent alcohol consumption, but do not provide accurate enough readings of breath alcohol content to support a *per se* DUI conviction based on BAC alone.<sup>60</sup> Therefore they cannot reliably substitute

*Evaluation of Checkpoint Tennessee*, National Highway Traffic Safety Administration, 1999, available at <http://www.nhtsa.dot.gov/people/injury/research/ChkTenn/ChkptTN.html>). Checkpoints may involve large commitments of police manpower, but can be run effectively with fewer officers (see *Low-Staffing Sobriety Checkpoints*, National Highway Traffic Safety Administration, [http://www.nhtsa.dot.gov/people/injury/enforce/LowStaffing\\_Checkpoints/index.htm](http://www.nhtsa.dot.gov/people/injury/enforce/LowStaffing_Checkpoints/index.htm)).

<sup>55</sup> Checkpoints appear to be constitutionally permitted in 39 states. Five of these states also authorize them by statute. Hawaii, Nevada, and North Carolina allow law enforcement agencies to conduct them on their own authority (Hawaii Rev. Stat. 291E-19 and 20; Nevada Rev. Stat. 484-359; North Carolina Gen. Stat. 20-16.3A). New Hampshire and Utah require prior approval of a magistrate (New Hampshire Rev. Stat. Ann. 265:1-a; Utah Code Ann. 77-23-101-105). The Insurance Institute for Highway Safety has compiled a summary of state checkpoint laws and court decisions, available at [http://www.iihs.org/laws/state\\_laws/pdf/checkpoints.pdf](http://www.iihs.org/laws/state_laws/pdf/checkpoints.pdf).

<sup>56</sup> Assessment Report, p. 37.

<sup>57</sup> The Standard Field Sobriety Test (SFST) is a protocol involving observation of the driver moving his eyes (horizontal gaze nystagmus), walking heel to toe, and standing on one leg. It may be supplemented by other tests like reciting the alphabet and touching finger to nose. These tests are also widely used, and generally accepted by courts to establish probable cause, though not formally recognized in statute. Not all judges accept the horizontal gaze nystagmus test as evidence of actual impairment (as distinct from mere consumption of alcohol or drugs) to support a DUI conviction.

<sup>58</sup> After a driver has shown signs of impairment through the SFST and/or other behavior, a zero or low PBT reading may trigger concerns about drugs other than alcohol. See discussion of blood testing in section II(G) below.

<sup>59</sup> In 1996, the state Supreme Court held that PBTs could not provide evidence of impairment because they had not been approved by the state toxicologist as required by law (*State v. Smith*, 130 Wn.2d 215 (1996)). In 1999, the toxicologist issued rules approving breath alcohol screening devices to help officers form probable cause that a driver has committed an offense involving alcohol consumption, and specified test protocols and certification requirements for those qualified to perform tests (WAC 448-15-010-060).

<sup>60</sup> RCW 46.61.502(1)(a), RCW 46.61.504(1)(a).

for the more precise instruments in fixed locations that report levels of breath alcohol with high accuracy.<sup>61</sup> There is no apparent need for a statute authorizing their use.

### (F) Admissibility of breath test results

*While the statute authorizes law enforcement to obtain more than one chemical test from an operator suspected of impaired driving, the existing section of the statute has some inherent conflicts which may or may not be alleviated by [RCW 46.20.308, the implied consent statute authorizing BAC testing, as amended by SHB 3055 of 2004, adopting standards for admissibility of test results].*<sup>62</sup>

State law directs the state toxicologist, an employee of the Washington State Patrol, to regulate breath and blood testing of drivers arrested for DUI.<sup>63</sup> His regulatory authority includes approval of testing methods, examining individuals' competence to perform tests, and issuing permits to them. Most state and local law enforcement officers are trained and authorized by the State Patrol to perform breath testing. Breath testing consists of two separate tests, within two hours after driving and following an observation period of at least 15 minutes.

The toxicologist has approved the use of a particular type of machine, the BAC Verifier DataMaster or DataMaster CDM, for DUI breath tests.<sup>64</sup> The DataMaster measures alcohol content by passing a breath sample and infrared light through a liquid solution. To ensure accuracy, the machine includes a simulator, in which a pre-measured solution of alcohol and water is maintained at a known temperature. Between the first and second test of a DUI suspect, the DataMaster performs an "external standard test" using this simulator, in order to confirm the machine's accuracy and calibration. Before testing, the operator must verify that the temperature of the simulator solution is 34 degrees (Centigrade), plus or minus three tenths of a degree, using a thermometer attached to the machine.<sup>65</sup> Before October 2004, a State Patrol rule required that each such thermometer "be certified on an annual basis to have an accuracy of within plus or minus 0.1 degree centigrade...using a reference thermometer traceable to standards maintained by the National Institute of Standards and Testing [NIST]."<sup>66</sup>

---

<sup>61</sup> Interview with Dr. Barry Logan, director, Forensic Laboratory Services Bureau, Washington State Patrol, April 12, 2006.

<sup>62</sup> Assessment Report, p. 38.

<sup>63</sup> RCW 46.61.506(3). The state toxicologist is the director of the State Patrol's Forensic Laboratory Services Bureau.

<sup>64</sup> WAC 448-16-020. The term "DataMaster" will be used for both variants of this machine. The term "breathalyzer" refers to a previously approved machine, but is often used generically. The State Patrol's *DataMaster Operator Information Manual*, available at <http://www.breathtest.wsp.wa.gov/SupportDocs/Guides/DataMaster%20Operator%20Information%20Manual%20Revision%2010-2000.pdf>, includes a description of the scientific principles behind DataMaster breath testing, and the specific procedures to perform and document a valid test.

<sup>65</sup> Former chapter 448-13 WAC.

<sup>66</sup> Former WAC 448-13-035. The agency is actually the National Institute of Standards and Technology.

Several years ago, some DUI defendants appealed their convictions, challenging the admission into evidence of DataMaster breath test results, on the grounds that the thermometers used to verify simulator solution temperatures were not “traceable” to a NIST reference thermometer. The thermometers used in Washington’s 200 DataMasters were calibrated to others, which had in turn been calibrated to a NIST thermometer. However, in 2004 the state Supreme Court found that the term “traceable” has a specific scientific meaning, defined by NIST regulations to require documentation of the margin of error of an unbroken chain of comparisons. Since such documentation had not been maintained for Washington’s DataMaster simulator thermometers, the court found that they were not “traceable” to NIST standards. This meant that the State Patrol had not followed its own rules, invalidating the results of breath tests made on the machines.<sup>67</sup>

This decision affected thousands of then-pending DUI cases. Significantly, there was no challenge to the accuracy of the tests themselves. Instead, the results were invalidated because the testing had not conformed to the State Patrol’s rule requiring “traceability” of the thermometers used to help ensure that the machines were working properly.<sup>68</sup> After the decision, the State Patrol obtained documentation of the traceability of its simulator thermometers to the NIST standard.

However, earlier in 2004, before the Supreme Court’s decision was issued, the Legislature enacted a bill intended to ensure the admissibility of properly conducted breath test results in future cases.<sup>69</sup> This legislation made a breath test admissible in court<sup>70</sup> if the prosecution produced *prima facie* evidence that specified standards were met, including standards involving the temperature of the simulator solution.<sup>71</sup> In effect, the Legislature incorporated into statute some of the standards that had been in the rules of the state toxicologist.<sup>72</sup> The new law allowed a defendant to challenge the test’s reliability or accuracy, but specified that such challenges could apply only to how much weight the jury (or judge in a bench trial) should give the test results in deciding whether the defendant is guilty or not guilty.<sup>73</sup>

---

<sup>67</sup> *City of Seattle v. Clark-Munoz*, 152 Wn.2d 39 (2004).

<sup>68</sup> RCW 46.61.506(3) requires that analysis of breath be “performed according to methods approved by the state toxicologist” in order “to be considered valid” under the DUI laws.

<sup>69</sup> Chapter 68, laws of 2004 (SHB 3055), taking effect June 10, 2004. The Supreme Court heard argument on the *Clark-Munoz* case on March 23, 2004, after the bill had been signed into law, and issued its unanimous decision on July 1 of that year. The case was based on the law in effect before the 2004 legislation.

<sup>70</sup> The new law also made such evidence admissible in Department of Licensing hearings on suspension of drivers’ licenses after refusing a BAC test or taking the test and showing .08 or higher BAC. See section II(L) below.

<sup>71</sup> The legislation defined “*prima facie* evidence” as “evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved,” assuming the truth of the evidence “and all reasonable inferences from it in a light most favorable to the prosecution...” (RCW 46.61.506(4)(b) as amended by chapter 68, laws of 2004 (SHB 3055)). This definition tracks one used by the state Supreme Court in *State v. Smith*, 115 Wn.2d 775 at 782 (1990).

<sup>72</sup> The State Patrol has amended its regulations to remove the standards the Legislature had now incorporated into statute, and the NIST traceability language that had generated the litigation. While the Patrol has documented its thermometers’ traceability to NIST, this documentation is no longer a formal requirement for breath tests to be considered valid.

<sup>73</sup> RCW 46.61.506(4)(c) as amended by chapter 68, laws of 2004 (SHB 3055).

To many trial judges, this new statute appeared to violate the constitutional principle of separation of legislative and judicial powers. While the legislative branch enacts substantive laws for society as a whole, even creating some courts and defining their jurisdiction, the judicial branch generally determines the procedures by which it will carry out its functions. The state Supreme Court has adopted formal rules of evidence that structure trial judges' discretion to determine what evidence is relevant, and when relevant evidence may be excluded as unduly misleading or prejudicial.<sup>74</sup> Another concern about the 2004 law was whether it created a presumption that unconstitutionally shifts the burden of proof from the state to the defendant, once a breath test showing impairment has been admitted into evidence.

Some judges held the 2004 law unconstitutional and refused to admit breath test evidence offered under it, while others admitted such evidence. One of the latter cases was appealed to the state Supreme Court, which upheld the legislation in October 2006.<sup>75</sup> The Court found that "the adoption of the rules of evidence is a legislatively delegated power of the judiciary. Therefore, rules of evidence may be promulgated by both the legislative and judicial branches."<sup>76</sup> It noted that the 2004 law essentially codifies breath test admissibility requirements that the Court had itself adopted many years earlier.<sup>77</sup> Because the statute does not absolutely require admission of test results, but only makes them "admissible" if specified foundational requirements are met, the Court found that "the statute is permissive, not mandatory, and can be harmonized with the rules of evidence."<sup>78</sup> This means that defendants' attorneys may argue in some cases that breath test results should be excluded as unduly prejudicial,<sup>79</sup> or as not helpful,<sup>80</sup> despite meeting the foundational requirements. But it appears that such arguments will have less effect on the admission of evidence than they may have on the weight judges and juries give to it, consistent with

---

<sup>74</sup> See Evidence Rules 401-403.

<sup>75</sup> *City of Fircrest v. Jensen*, No. 76738-6, filed October 5, 2006. Justice Charles Johnson wrote the plurality opinion for four justices, Justice Owens wrote a concurring opinion for three justices, and Justice Sanders dissented. On the issues of separation of powers and due process, the plurality and concurring opinions did not differ, so the effective majority on those issues was eight to one. The case also involved a third issue – whether the Legislature had violated Article II, section 19 of the Washington Constitution by enacting a bill that contains more than one subject or fails to describe its subject in its title. The Court upheld the legislation against this challenge as well. If it had not, the Legislature could have corrected the problem, for future cases, by enacting the same language in multiple bills with more appropriate titles.

<sup>76</sup> *Fircrest* at p. 11. RCW 2.04.190 authorizes the Supreme Court "to prescribe...the forms of writs and all other process,...of taking and obtaining evidence;...and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings...."

<sup>77</sup> *State v. Baker*, 56 Wn.2d 846 (1960). In this case, the court required the admission of breath test results if there was a *prima facie* showing that the machine was properly checked and working, the correct chemicals were used in the proper proportions, the driver had not eaten or drunk within 15 minutes before the test and had nothing in his mouth during the test, and the test was given properly by a qualified person.

<sup>78</sup> *Fircrest* at p. 17.

<sup>79</sup> Evidence Rule 403 allows a trial court to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The party seeking to exclude the evidence has the burden of showing that it is unduly prejudicial, and the fact that it may give an advantage to the other party does not meet that burden (*Carson v. Fine*, 123 Wn.2d 206 (1994)).

<sup>80</sup> Evidence Rule 702 allows admission of scientific evidence, including expert opinion, if it will "assist the trier of fact to understand the evidence or to determine a fact in issue."

the intent of the 2004 legislation. The Court also rejected the due-process challenge to the statute, holding that it does not prevent a defendant from introducing evidence that the test was unreliable or inaccurate.<sup>81</sup>

It would be premature, not to say naïve, to assume that the 2006 decision upholding the 2004 legislation has ended the controversy about the use of breath test evidence in DUI cases. Other issues will undoubtedly arise, but it appears that the Supreme Court has addressed the assessment team’s concerns about the legislation. It is also worth noting that, in this case, the Legislature may have simplified the issues in DUI trials, without overstepping its constitutional role, by enacting more detailed statutory language.

### **(G) Use of blood testing**

*The state statute for driving while impaired by alcohol or other drugs ... treats both offenses with similar consequences. The other drugs are on the radar screen, but the detection and prosecution could benefit from statutory enhancement encouraging the use of blood testing when appropriate.*<sup>82</sup>

#### **(1) Cases involving drugs other than alcohol**

“Driving under the influence” carries the same penalties whether the “influence” is from alcohol or from any other prescription or non-prescription drug.<sup>83</sup> The law provides for testing of alcohol or drug content in the driver’s breath or blood (BAC) based on probable cause to believe the driver is under the influence of either.<sup>84</sup> However, drugs other than alcohol are generally not detectable in a person’s breath, so blood testing is used to quantify reliably their presence in the body after recent consumption. It is more invasive than breath testing, and taking blood samples requires training and credentialing that law enforcement officers ordinarily do not have.<sup>85</sup> The law allows blood testing only when the driver cannot provide a breath sample or is being treated in a health care facility, or when the officer believes the driver is under the influence of a drug other than alcohol.<sup>86</sup> About 90% of BAC testing is of breath and the rest is of blood.

For cases involving only alcohol, there are good reasons to prefer breath testing to blood testing – it is less invasive, can usually be performed sooner after the arrest, and can be performed by a trained officer rather than a health professional. However, it does not detect drugs other than alcohol. A recent study by the Washington State Patrol found wide-

---

<sup>81</sup> *Fircrest* at p. 18.

<sup>82</sup> Assessment Report, p. 37.

<sup>83</sup> RCW 46.61.5055.

<sup>84</sup> RCW 46.20.308(1).

<sup>85</sup> RCW 46.61.506(5) allows only specified types of professionals, primarily in the health care field, to draw blood for BAC testing purposes in DUI cases.

<sup>86</sup> RCW 46.20.308(2) and (3).

spread presence of both alcohol and other drugs among drivers suspected of vehicular homicide or assault.<sup>87</sup>

More blood testing, either additionally or alternatively to breath testing, would improve measurement of drugs other than alcohol in drivers' bodies. This would increase the likelihood of convictions where drivers have been taking other drugs, either alone or with alcohol. However, a *per se* impairment level for other drugs, analogous to .08 for alcohol, would be difficult to justify or defend scientifically, because there is much greater variation among both people and drugs in metabolization rates and tolerance buildup.<sup>88</sup> This means that the gain in accuracy of measuring actual impairment might not justify the cost of additional blood testing and sample storage.<sup>89</sup>

Another way to address impaired drivers' use of drugs other than alcohol would be to prohibit driving while any illegal controlled substance is present in the blood. The element of the crime would not be actual impairment, but the rather consumption before driving of a drug whose possession is already illegal, analogous to the current "zero tolerance" policy for minors driving with alcohol in their systems. Enforcement would fall most heavily on those whose driving behavior brought them to officers' attention, as it does under current law. Saliva testing technology could play a role like that of portable breath testing in establishing probable cause to perform a blood test. To protect those whose drugs are prescribed and who drive safely after taking them, such a change in law could apply only to drugs in schedules I or II under the Uniform Controlled Substances Act.<sup>90</sup> Twelve other states<sup>91</sup> have adopted similar laws, and the Washington Legislature may consider such a bill in 2007.

## **(2) Cases involving alcohol only**

Even where there is no apparent reason to suspect use of drugs other than alcohol, blood testing might be a desirable alternative, given the controversy over admissibility of breath test results (see section II(F) above). Some judges and juries might give greater weight to blood testing than to breath testing, even in alcohol-only cases. However, in such cases blood testing is now allowed only when the driver cannot provide a breath sample (*e.g.* is unconscious) or is being treated at a health facility (*e.g.* after a crash).<sup>92</sup> Allowing blood

---

<sup>87</sup> Out of 700 cases, one third showed the presence of both alcohol and other drugs, and another sixth showed presence of other drugs but not alcohol. Of 392 cases where the alcohol level was .08 or higher, other drugs were present in nearly half. Since these tests were performed after crashes, the results may not represent impaired drivers who are not involved in crashes. Logan, Barry K. and Barnes, Laurie, "Combined Drug and Alcohol Use in Drivers Suspected of Vehicular Assault and Homicide," Washington State Toxicology Laboratory, Forensic Laboratory Services Bureau, Washington State Patrol.

<sup>88</sup> Interview with Dr. Barry Logan, Washington State Patrol Forensic Laboratories Bureau, April 12, 2006.

<sup>89</sup> Part of the cost would be associated with having blood tests performed by properly credentialed staff, using proper procedures to prevent infection, subject to regulation by the Department of Health.

<sup>90</sup> RCW 69.50.204 and .206. Commonly abused Schedule I and II drugs include heroin, cocaine, methamphetamine, and marijuana.

<sup>91</sup> Arizona, Georgia, Illinois, Indiana, Iowa, Michigan, Minnesota, Pennsylvania, Rhode Island, South Dakota, Utah, Wisconsin.

<sup>92</sup> RCW 46.20.308(2).

testing in other alcohol-only cases would let law enforcement agencies choose which method to use, and take into account how their courts view breath test evidence.

Under current law, DUI blood draws may be performed only by a physician, nurse, or other specified health professional (typically a nurse).<sup>93</sup> More frequent use of blood testing would increase workload for staff of health facilities like emergency rooms and clinics – not only to draw blood samples, but also to testify in court when necessary. There are valid health and safety reasons to allow only trained professionals to draw blood, but they are not related to the reliability of evidence in DUI cases. Legislation requiring that DUI blood samples be drawn in licensed or certified health facilities, in the presence of the officer ordering the test, would ensure that properly trained professionals draw the samples, but would relieve them of the need to testify in a subsequent court hearing. The officer who observed the blood draw could provide any needed chain-of-custody testimony. Another approach would be to train some officers in phlebotomy, following a model developed in Arizona.<sup>94</sup>

## (H) DUI arrest process

*Law enforcement officers expressed concern over the amount of paperwork required to process a driver arrested for DUI. Recently, the State Patrol revised its DUI arrest form to streamline the report process.*<sup>95</sup>

### (1) Time and paperwork

A typical DUI arrest now involves six pages of forms prepared by the State Patrol for use by law enforcement agencies. The forms document the observations that caused the officer to stop the driver, the results of field sobriety testing, the *Miranda* warnings that apply to any arrest, separate warnings that apply to BAC testing (see below), the driver's agreement or refusal to be tested, results of a breath test if given, actual or attempted contact with an attorney if requested, and the driver's statements. A separate page documents blood testing if given. Another page notifies a driver with .08 or higher BAC that the Department of Licensing will suspend his license, subject to the right to a hearing.

If the officer has the driver's car towed,<sup>96</sup> books the driver into jail, or takes other actions, additional paperwork may be required.<sup>97</sup> DUI arrests involve more documentation than

---

<sup>93</sup> RCW 46.61.506(5). RCW 46.61.508 relieves such professionals of liability as a result of drawing blood at an officer's direction for a DUI blood test, as long as they used proper procedures and reasonable care.

<sup>94</sup> The Arizona Department of Public Safety began training troopers as phlebotomists in 1995. The 40-hour training course is now offered at three community colleges to officers and employees in 38 law enforcement agencies, with over 100 certified phlebotomists statewide. See <http://www.azdps.gov/safety/impaireddriving/phlebotomy/default.asp>. Any such program in Washington would require legislation amending RCW 46.61.506(5), as well as funding.

<sup>95</sup> Assessment Report, p. 42.

<sup>96</sup> This may be authorized by local law or State Patrol rule if the driver is arrested for DUI or driving while license suspended (RCW 46.55.113(1)). Generally impoundment involves considerable paperwork and expense, often to no avail because the car is titled to someone other than the driver.

most other non-felonies, primarily because they involve breath or blood testing. Since testing provides objective evidence of impairment, it is probably worth the paperwork and time it requires of officers. But the over-reliance on testing discussed in section II(C) above may result in part from officers' reluctance to take the time (or difficulty in finding the time) to document fully both their observations of impairment and the test procedure. And, as discussed above, their incentive to do this paperwork may be undermined by the perception that BAC levels will disproportionately drive negotiations toward the case's outcome in court.

## (2) Implied consent warnings

Although not solely a "paperwork" issue, among officers' frustrations in the DUI arrest process is the content of warnings they must give drivers before administering BAC tests. The "implied consent" law declares that "any person who operates a motor vehicle in this state is deemed to have given consent ... to a test or tests of his or her breath or blood" when arrested with reasonable grounds to believe the person was driving while impaired.<sup>98</sup> Refusing to take the test means a one-year suspension of the driver's license, but taking the test can produce evidence against the driver in both a license suspension and a criminal prosecution.<sup>99</sup> The U.S. and Washington Supreme Courts have both upheld BAC testing of drivers arrested for DUI against constitutional challenges.<sup>100</sup>

Since there is no constitutional right to refuse a BAC test, the state Supreme Court has held that the choice our statute gives drivers to refuse a test is "a matter of legislative grace."<sup>101</sup> The statute requires officers to warn drivers, "in substantially the following language," that:

“(a) If the driver refuses to take the test, the driver’s license, permit, or privilege to drive will be revoked or denied for at least one year; and

“(b) If the driver refuses to take the test, the driver’s refusal to take the test may be used in a criminal trial; and

---

<sup>97</sup> Officers commonly refer to a three-hour DUI arrest, testing, and booking process. Much of this time can be spent in travel, especially in rural areas, rather than paperwork. Thorough field sobriety testing can take up to half an hour. BAC testing requires a 15-minute observation period before the first test is administered, and a second confirmatory test. Local officers sometimes ask state troopers to handle DUI cases after the initial stop, for reasons that include the troopers' expertise, the desire to free local officers for other duties, and the desire to avoid county-imposed jail booking fees. A local officer who is the only law enforcement presence in a rural area might choose to drive an impaired driver home with a warning rather than take the time to arrest him for DUI and drive him to a breath test location.

<sup>98</sup> RCW 46.20.308(1). The implied consent law was initially adopted by the voters (Initiative 242) in 1968, and the Legislature has since amended it 23 times.

<sup>99</sup> While RCW 46.61.517 states that refusal to take the test can be admitted in evidence in a criminal case, the state Supreme Court has held that refusal is admissible only to rebut a defendant's challenge to police credibility or procedures (*State v. Zwicker*, 105 Wn.2d 228 (1986)).

<sup>100</sup> In *Schmerber v. California*, 384 U.S. 757 (1966), the U.S. Supreme Court held that the Fifth Amendment to the U.S. Constitution, protecting against self-incrimination, applies to statements or communications rather than physical evidence. In *State v. Moore*, 79 Wn.2d 51 (1971), the Washington Supreme Court reached the same conclusion regarding Article I, section 9 of the state Constitution, which is worded similarly. Both cases involved BAC testing of drivers.

<sup>101</sup> *State v. Zwicker*, 105 Wn.2d 228 at 242 (1986).

“(c) If the driver submits to the test and the test is administered, the driver’s license, permit, or privilege to drive will be suspended, revoked, or denied for at least ninety days if the driver is age twenty-one or over and the test indicates the alcohol concentration of the driver’s breath or blood is 0.08 or more, or if the driver is under age twenty-one and the test indicates the alcohol concentration of the driver’s breath or blood is 0.02 or more, or if the driver is under age twenty-one and the driver is in violation of RCW 46.61.502 [DUI] or 46.61.504 [physical control].”<sup>102</sup>

This language is hard for even a sober reader to understand, much less someone hearing it in a stressful situation after drinking. Yet an officer’s attempt to simplify or rephrase the warning may support a challenge to its adequacy, and thus either to the BAC evidence the test produces or to the license suspension a refusal produces. The Legislature added the reference to “substantially the following language” only in 2004,<sup>103</sup> responding to challenges to the precise wording and even punctuation of warnings.

Generally the courts have found that the warnings are meant to allow a driver “to make a knowing and intelligent decision whether to submit to an evidentiary breath test.”<sup>104</sup> How knowingly or intelligently a driver can make such a decision under the conditions of a DUI arrest is questionable, but the courts have deferred to the policy judgment of the voters and Legislature that prescribed warnings must be given.<sup>105</sup> This policy judgment seems to express ambivalence about drinking and driving, and a sense of fairness toward drivers.<sup>106</sup>

The Legislature could simplify the prescribed warnings and require that exactly those words be read to arrested drivers, or could repeal the requirement that warnings be given.<sup>107</sup> Making test refusal a separate crime, with consecutive sentencing, could motivate more arrestees to be tested, but would involve additional jail costs for those convicted.<sup>108</sup> Another alternative policy would give the arrestee a choice between a volun-

<sup>102</sup> RCW 46.20.308(2). The last clause of subsection (c) refers to those under 21 convicted of DUI, but not those over 21 so convicted. Trial courts have held in some cases that the omission of a reference to a driver over 21 convicted of DUI may have misled such a driver into believing such a conviction will not result in a license suspension, and therefore into consenting to the test. But an officer’s attempts to clarify at the time of arrest could also risk confusing an arrestee, resulting in exclusion of either a refusal or a test result as evidence.

<sup>103</sup> Section 2, chapter 68, laws of 2004.

<sup>104</sup> *State v. Whitman County District Court*, 105 Wn.2d 278 at 283 (1986). See also, for example, *State v. Bartels*, 112 Wn.2d 882 (1989); *State v. Bostrom*, 127 Wn.2d 580 (1995); *Pattison v. Department of Licensing*, 112 Wn.App. 670 (2002); *Jury v. Department of Licensing*, 114 Wn.App. 726 (2002).

<sup>105</sup> The warnings are effective enough that about two in eleven Washington drivers refuse the test (17.9% in 2001, around the midpoint among states’ refusal rates) (National Highway Traffic Safety Administration, *Breath Test Refusals in DWI Enforcement*, 2005, available at <http://www.nhtsa.dot.gov/people/injury/research/BreathTestRefusal/pages/index.htm>).

<sup>106</sup> The warning and right to refuse were part of the original enactment by the voters as Initiative 242, so any ambivalence they imply is not confined to the Legislature.

<sup>107</sup> Drivers would still be entitled to the *Miranda* warnings about self-incriminating statements and the right to counsel, which apply to all arrests (*Miranda v. Arizona*, 384 U.S. 436 (1966)).

<sup>108</sup> Eight states impose criminal sanctions for test refusal – Alaska, California (if subsequently convicted of DUI), Indiana, Minnesota, New Jersey, Nebraska, Ohio, and Vermont (with a prior DUI conviction) (National Highway Traffic Safety Administration, *Breath Test Refusals in DWI Enforcement*, see footnote 105 above).

tary breath test and an involuntary blood test, providing physical evidence in all cases but risking violent confrontations in health facilities.<sup>109</sup>

Before enacting any changes in this area, legislators should consider carefully the views of law enforcement officers who must interact with arrested drivers. Obviously they have to discuss BAC testing with drivers in some way. Drivers are likely to have questions about the consequences of testing or refusal, and some may physically resist mandatory testing. Officers who must handle such a variety of situations should have a strong voice in any policies that apply to them. However, they may disagree among themselves about how best to ensure that as many DUI arrestees as possible are tested.

### (I) Deferrals of prosecution

*While there is a deferred prosecution statute, it is more of a hybrid statute providing for court monitoring while avoiding the imposition of any criminal penalty. It is more accurately described as a decriminalization statute, and in 2003, 8,111 cases were handled by this mechanism. However, there is a non formal deferred prosecution called “prosecutor’s deferral” that occurred in 3,492 cases. The concern here is that the process is not subject to oversight by the court or other public office and appears to be arbitrary. The high number of dismissals, 4,690, reported when the charge was dismissed without conditions or found not guilty is really a most alarming statistic, considering the number of deferrals, statutory or informal. This means that the actual adjudication rate is low and is not deemed a high priority.<sup>110</sup>*

*It is clear that there is a very mixed message given by the deferred prosecution statute as the prosecutors and municipal attorneys have increased their use of a non-statutory deferred process within their offices.<sup>111</sup>*

*A final statutory provision that was repeatedly highlighted in the presentations is RCW 10.05.020 [authorizing deferred prosecution for treatment of alcohol, drug, or mental problems]. The statute allows impaired drivers to substitute treatment in lieu of accountability. One presenter noted the increase of the use of mental problems as a reason for deferring prosecution for impaired driving. One conclusion is that the application and process of the statute is changing from the original legislative intent.<sup>112</sup>*

#### (1) Value of deferred prosecution

<sup>109</sup> Officers may now obtain search warrants for breath or blood testing (RCW 46.20.308(1)), but this may not be practical when *per se* DUI is based on BAC within two hours after driving (RCW 46.61.502(1)(a)).

<sup>110</sup> Assessment Report, p. 52. The figures for 2003 quoted here do not correspond to currently published AOC data (see footnote 116 below). They may have been preliminary when the Report was prepared in October 2004. Additionally, the assessment team counted dismissals as separate from deferrals, when in fact most dismissals were the result of successful deferrals granted in prior years. This misunderstanding left the team with the incorrect impression that a high percentage of DUI cases are simply dismissed without conditions.

<sup>111</sup> Assessment Report, p. 36.

<sup>112</sup> Assessment Report, p. 39.

The deferred prosecution statute, chapter 10.05 RCW, establishes a process for diverting DUI defendants to substance abuse treatment, with the court receiving progress reports and retaining jurisdiction. Defendants who qualify participate in treatment for two years, and if another three years pass with no new drug- or alcohol-related offenses, the original charge is dismissed.<sup>113</sup> However, the deferred prosecution still counts as a “prior offense” in determining the penalty for any subsequent DUI conviction.<sup>114</sup>

The assessment team’s characterization of this program as “decriminalization” is inaccurate. A defendant who fails to meet court-ordered conditions is convicted of the original charge, having stipulated to the facts in the police report as a condition of the deferral. Even after a successful completion and dismissal, a deferred prosecution counts as a conviction in sentencing any future DUI. Various kinds of deferrals and diversions are common in criminal cases, especially non-felonies, throughout the U.S. They respond to the need to balance accountability, effective interventions like treatment, and the limited resources available to try cases and incarcerate those convicted.

Similarly, many judges, prosecutors, law enforcement professionals, and others would disagree with the team’s value judgment that court-ordered and court-monitored treatment does not constitute “accountability.” Effective substance abuse treatment is more demanding than spending a night in jail and paying a few hundred dollars in penalties. But, for those who are addicted to alcohol or other drugs, it offers more promise of changing behavior than criminal sanctions alone. Whether jail and fines are the only valid form of “accountability” is a policy question, perhaps even a philosophical one. But, if reducing future impaired driving is a policy goal, treatment is likely to be more effective than jail and fines for those with the disease of chemical dependence.

## **(2) Non-statutory deferrals**

The statutory deferrals authorized in chapter 10.05 RCW are not the only way DUI cases are diverted. For many years, prosecutors and courts in many counties and cities have also used less formal mechanisms, which may be called “stipulated orders of continuance,” or “prosecutor’s deferrals,” or “pretrial diversion agreements,” or “intensive supervision agreements,” or something else. Generally they involve a joint request from the prosecution and defense, approved by the court, to postpone further proceedings in a case for a year or longer, conditioned on the defendant’s stipulating to the facts in the police report, participating in treatment, and meeting other requirements. Successful completion of such a program leads either to dismissal of the charge or to a plea of guilty to a lesser charge, depending on local practice and the circumstances of the case. Failure to complete the program results in conviction on the original DUI charge.

Local practices vary, but such informal diversions are available in many jurisdictions for DUI defendants without prior offenses, high alcohol levels, or other aggravating factors. They may also be used in cases where problems with the evidence could result in a dis-

---

<sup>113</sup> RCW 10.05.120.

<sup>114</sup> RCW 46.61.5055(12)(a)(vii).

missal or acquittal, and the prosecutor wants to achieve a more positive outcome such as treatment. Another reason they occur is that many prosecutors, defense lawyers, and judges believe it is unfair to provide a deferral for addicted defendants, even repeaters, but not for non-addicted first offenders.

Clallam and Spokane County district courts have “DUI court” programs that directly engage defendants with the court over long periods of treatment and monitoring, similar to the “drug courts” that operate in this and other states. The defendant returns to court on a regular basis (biweekly in Spokane) for the judge to assess progress. Successful completion results in a plea to a reduced charge,<sup>115</sup> failure in a DUI conviction. Spokane County’s DUI court, funded in part by a grant from the Traffic Safety Commission, focuses on hard-core repeaters, including some who failed in previous deferred prosecutions, in order to get the greatest return in reduced recidivism on the large investment it makes in each case.

While non-statutory diversion is legal and long-standing, it can be seen as inconsistent with the intent behind the deferred prosecution statute. However, legislation aimed at prohibiting such practices would probably be ineffective. Judges often continue DUI and other cases for many reasons. There is no way to prevent a prosecutor and defense counsel from requesting a continuance jointly, or agreeing to a plea bargain, and judges would seldom deny a continuance or refuse to enter a guilty plea based on a voluntary agreement. Legislation prohibiting or limiting continuances, or restricting guilty pleas to reduced charges, could face constitutional challenges. Moreover, lawyers and judges would probably develop other informal mechanisms, perhaps less visible to the public and Legislature, to achieve the same ends.

Like the plea bargaining that produces most convictions throughout the U.S., diversions respond to the resource limitations that make trials impossible in most cases. They also respond to the need of both sides for a measure of certainty about the case’s outcome. Sometimes a jury trial is the only way to resolve a case, because the stakes are so high and the differences between the parties so great, but it is a roll of the dice for both sides. It should be no surprise that most cases are resolved, sooner or later, by some kind of agreement. What matters is that such agreements be fair, recognize the underlying facts, and reflect policies or principles that apply consistently at least within the community. Legislation cannot achieve those goals, in individual cases, as effectively as the courts.

In 1998, the Legislature limited defendants to one statutory deferred prosecution in a lifetime (not necessarily for the first offense), and lengthened from two years to five the time that must pass without a violation before the charge can be dismissed. Statistics from the

---

<sup>115</sup> The charge “reduction” in Spokane County is expected to be to DUI, but at one penalty level lower than the defendant would otherwise receive, *e.g.* a third or subsequent offender would plead and be sentenced as if to the second offense. The plea will still count as a “prior offense” if the defendant is sentenced for a future DUI.

Administrative Office of the Courts show that informal diversions have increased since the limit on formal deferrals took effect in 1999.<sup>116</sup>

### (3) “Donation” programs

Some non-statutory diversions include a defendant’s agreement to donate money to a nonprofit organization that seeks to reduce impaired driving or achieve some other worthwhile goal. If such an agreement becomes a condition required by the court to continue the case, it may be inconsistent with statutes directing how payments imposed by courts are to be distributed.<sup>117</sup> A 2005 opinion by the Supreme Court’s Ethics Advisory Committee discourages judges from involvement in requiring such payments. While not addressing the legality of such agreements, the opinion notes judges’ obligations to follow the law and to act in a way that “promotes public confidence in the integrity and impartiality of the judiciary.”<sup>118</sup>

At least one prosecutor’s office, after discussions with judges in its county, responded to this ethical issue by including the donation in a separate agreement between the defendant and prosecutor that was not part of the agreement approved by the judge. The judge-approved agreement included conditions like treatment, payment of court and supervision costs, and stipulation to the facts, and referenced the separate agreement to donate, but did not include that requirement. Thus, at least in theory, the court was not “imposing” the payment in possible violation of statute. More recently, the prosecutor’s office has dropped the donation from the diversion program altogether.

Whether or not the use of a separate agreement adequately insulates the judge from involvement in requiring a charitable contribution, there are good reasons the judge should review any proposed diversion. First, judicial approval can help prevent arbitrary practices or favoritism that could occur without it.<sup>119</sup> Second, judicial approval can help rein-

---

<sup>116</sup> Statutory deferred prosecutions decreased from 10,188 (26% of filings) in 1998 to 6,215 (15% of filings) by 2005, while non-statutory deferrals increased from 1,431 (4% of filings) in 1998 to 3,335 (8% of filings) in 2005. However, combining these deferrals shows a decrease from 11,619 (30% of filings) in 1998 to 9,550 (24% of filings) in 2004. See Administrative Office of the Courts, “Courts of Limited Jurisdiction Annual Tables, available at [http://www.courts.wa.gov/caseload/?fa=caseload.display\\_subfolders&folderID=clj&subFolderID=ann&fileID=dsp\\_caseload\\_clj\\_ann](http://www.courts.wa.gov/caseload/?fa=caseload.display_subfolders&folderID=clj&subFolderID=ann&fileID=dsp_caseload_clj_ann).

<sup>117</sup> RCW 3.50.100 requires that “all fees, costs, fines, forfeitures, and other money imposed by any municipal court...shall be collected by the court clerk” and certain portions sent to the state Treasurer. RCW 3.62.090 requires courts to collect a “public safety and education assessment,” as an addition to “any fines, forfeitures, or penalties assessed,” and prohibits courts from suspending or waiving the assessment.

<sup>118</sup> State of Washington, Supreme Court Ethics Advisory Committee, Opinion 04-05, September 21, 2005, available at [http://www.courts.wa.gov/programs\\_orgs/pos\\_ethics/?fa=pos\\_ethics.dispopin&mode=0405](http://www.courts.wa.gov/programs_orgs/pos_ethics/?fa=pos_ethics.dispopin&mode=0405). The committee consists of trial and appellate judges and the Administrator for the Courts, but does not include any justices of the Supreme Court.

<sup>119</sup> According to press reports, defendants in Kennewick Municipal Court “have gotten their cases dismissed or charges reduced in exchange for contributing to a charity selected by the prosecutor” and about \$18,000 defendants gave to lawyers for this purpose is missing. The FBI and Washington State Bar Association are investigating, and the Bar Association is expected to issue an ethical opinion about the practice (*Seattle Times*, April 14, 2006). It appears that this practice involved one or more city prosecutors reducing or dismissing charges in return for donations and nothing else, without judges’ knowledge of the *quid pro*

force the defendant's willingness to comply over time, and make it easier to prosecute if the defendant violates the agreement. Given the value of judicial involvement in pretrial diversions, whether formal or informal, and the legal and ethical issues involved in requiring payments not authorized by statute, it seems questionable to include such payments in diversion agreements. Legislation will probably be introduced in 2007 to restrict the use of donations as a condition of pretrial or plea agreements.<sup>120</sup>

#### **(4) Deferrals based on "mental problems"**

The deferred prosecution statute requires the defendant to allege that the crime "is the result of or caused by alcoholism, drug addiction, or mental problems for which the person is in need of treatment," and to provide an evaluation by a state-approved alcohol or drug treatment program, "or by an approved mental health center if the petition alleges a mental problem."<sup>121</sup> The statute refers to other laws that specify requirements for certification of alcohol and drug treatment programs to ensure the quality of treatment.<sup>122</sup> It also specifies the components of alcoholism treatment that must be part of a deferred prosecution program.<sup>123</sup> However, for "mental problems" the statute refers only to "an approved mental health center," and includes no specifics on the content of treatment.

Stakeholder interviews confirmed the assessment team's impression that "mental problems" are being used more often as a basis for deferred prosecution petitions. Lacking specific criteria, it appears that courts sometimes grant such petitions without requiring treatment that is directed at the impaired driving behavior. The benchbook AOC prepared for judges handling DUI cases notes this issue and recommends that treatment for "mental problems" in such cases last at least two years (as the statute requires for alcoholism) and include a substance abuse component.<sup>124</sup>

There is little evidence that mental illness, by itself, contributes to risky driving behavior,<sup>125</sup> and there is no such crime as "driving while mentally ill." It is likely that most DUI defendants granted deferred prosecution based on "mental problems" have a co-

---

*quo* (*Tri-City Herald*, April 14 and 20, 2006). Kennewick contracts with Benton County District Court to provide municipal court services.

<sup>120</sup> *Tri-City Herald*, May 20, 2006.

<sup>121</sup> RCW 10.05.020(1).

<sup>122</sup> Chapter 70.96A RCW for alcohol treatment, chapter 71.24 RCW for other drug treatment.

<sup>123</sup> RCW 10.05.150.

<sup>124</sup> Administrative Office of the Courts, *DUI Judge's Bench Book*, September 2004, p. 79. The recommendation referred to is a "Best Practice Recommendation" by Judge Charles Delaurenti of King County District Court.

<sup>125</sup> It is widely believed that some people with mental illness use alcohol or drugs to "self-medicate," but there is little support in the research literature for the idea that a mentally ill person would drive while impaired independently of a co-occurring substance abuse disorder. See Khantzian, E.J., "The Self-Medication Hypothesis of Substance Use Disorders: A Reconsideration and Recent Applications," *Harvard Review of Psychiatry*, 1997 Jan-Feb, 4(5), pp. 231-44; Frances, R.J., "The Wrath of Grapes Versus the Self-Medication Hypothesis," *Harvard Review of Psychiatry*, 197 Jan-Feb, 4(5), pp. 287-89; Mueser, K.T., *et al*, "Dual Diagnosis: A Review of Etiological Theories," *Addiction Behavior*, 1998 Nov-Dec, 23(6), pp. 717-34; Castaneda, R. *et al*, "Empirical Assessment of the Self-Medication Hypothesis Among Dually Diagnosed Inpatients," *Comprehensive Psychiatry*, 1994 May-Jun, 35(3), pp. 180-84.

occurring substance abuse disorder. If this condition is not treated, the risk of future impaired driving will not be effectively addressed, even if treatment improves mental health. Several judges, lawyers, probation officers, and treatment professionals are working to develop proposed legislation requiring more specific content for “mental health deferred prosecutions,” to be introduced in the 2007 legislative session. At a minimum, it would be helpful to require that any deferred prosecution for impaired driving include a chemical dependency assessment and, if indicated, a treatment component.<sup>126</sup>

### **(5) Assessments for deferrals and post-conviction treatment**

The basic purpose of both statutory and non-statutory deferral programs, as well as the treatment requirements for those convicted of DUI,<sup>127</sup> is to use the coercive authority of the criminal justice system to motivate defendants with alcohol and other drug problems to receive needed treatment. To be effective, treatment referrals must be appropriate to defendants’ individual needs. Treatment programs themselves must meet state standards for certification,<sup>128</sup> and professionals assessing DUI defendants’ chemical dependency and treatment needs must consider and address their alcohol or drug history, past treatment, criminal and driving records, BAC level at arrest, and other information. This information must come from a face-to-face interview with the defendant, plus a review of the abstract of his driving record maintained by the Department of Licensing (DOL).<sup>129</sup> Apart from the driving record and any reported BAC or other drug level, there is no requirement to look beyond the defendant’s own self-reporting. This means an evaluator may not know any more about a defendant’s criminal record or drug involvement (such as a history of drug or other non-traffic convictions) than the defendant chooses to reveal. Evaluations also need not include urinalysis results indicating whether the defendant has alcohol or other drugs in his body at the time of the evaluation. Such information gaps can contribute to failure to diagnose chemical dependence, or referral to a type of treatment that is less likely to be effective.

For several years, the Legislature has considered but not enacted legislation to help close that information gap. A bill introduced in 2005 required that all assessments, where the initial finding was other than chemical dependence, include the defendant’s non-traffic criminal history (from statewide court records) and a drug screen urinalysis. These additional requirements applied to assessments of anyone arrested for DUI.<sup>130</sup> The bill was narrowed to limit these requirements to assessments for deferred prosecutions and post-

---

<sup>126</sup> Deferred prosecutions based on “mental problems” should not be disallowed altogether, because they may be appropriate for some crimes not involving impaired driving. The issue is not whether mental illness is ever an appropriate basis for a deferral, but whether a deferral for impaired driving should ever fail to address the intoxication that is a necessary element of the crime.

<sup>127</sup> RCW 46.61.5056.

<sup>128</sup> RCW 10.05.150, RCW 46.61.5056, RCW 70.96A.090. The Division of Alcohol and Substance Abuse, Department of Social and Health Services, certifies “approved treatment programs” that receive public funds and/or serve court-referred defendants. Such programs must meet detailed standards related to staff qualifications, course of treatment, and reporting (chapter 388-805 WAC). The Department of Health also certifies “chemical dependency professionals” who work in treatment programs (chapter 18.205 RCW).

<sup>129</sup> WAC 388-805-310, WAC 388-805-815.

<sup>130</sup> House Bill 1200.

conviction treatment referrals, so that they would no longer apply to assessments under any kind of non-statutory deferral program like those described in section II(I)(2) above, but was not finally enacted.<sup>131</sup> Considering the defendant's full criminal history seems as important for non-statutory deferrals as for other cases. Enacting this kind of legislation would help improve the effectiveness of the existing statutory and non-statutory mechanisms to steer DUI defendants into appropriate treatment and other services.

Judges in King County have recently notified treatment providers that they will accept only evaluations that include a review of the police report and the defendant's criminal history, plus the results of a urinalysis test administered at the initial appointment. They have agreed to obtain criminal history records and police reports for this purpose on receipt of a defendant's consent to release of information.<sup>132</sup> This policy appears to apply to evaluations as part of non-statutory deferrals as well as other cases, and to all evaluations, not just those where the initial finding is other than chemical dependence. How effective this policy will be remains to be seen, but it is an example of courts acting affirmatively to improve the quality of information they receive, and of decisions they make, without awaiting legislation.

#### **(6) Study of deferrals**

In 2005 the Legislature directed the Traffic Safety Commission to contract with the Washington State Institute for Public Policy to study the deferred prosecution program. The Institute's study focuses on whether the program helps to reduce DUI recidivism, and what impact the changes that took effect in 1999 may have had. It includes defendants whose prosecutions were deferred informally, under the various mechanisms discussed in section II(I)(2) above, as well as those participating in the formal program established under chapter 10.05 RCW. The report of the study's findings, expected in December 2006, may help policymakers determine what changes, if any, may be needed in state law. It may also help judges and attorneys improve their choices of which cases should be deferred, either formally or informally, under what conditions, and with what monitoring and accountability mechanisms. While the report will not distinguish among the various kinds of non-statutory diversions used in different courts, it will distinguish between statutory and non-statutory mechanisms,<sup>133</sup> and the underlying data should allow courts to compare the effectiveness of their non-statutory systems with those of other courts that have other characteristics.

#### **(J) DUI as a felony**

*The statute for high blood alcohol concentration (BAC) (e.g. 0.16 or greater), with enhanced sanctions above the standard impaired driving offense is somewhat misleading,*

---

<sup>131</sup> Substitute House Bill 1200.

<sup>132</sup> Letter dated July 5, 2006 to treatment providers from presiding judges of King County District Court and municipal courts of Seattle, Renton, Kent, Tukwila, Black Diamond, Federal Way, Des Moines, Lake Forest Park, Enumclaw, SeaTac, Kirkland, Maple Valley, Pacific, Bothell, Auburn, and Algona.

<sup>133</sup> Interview with Dr. Robert Barnoski, Washington State Institute for Public Policy, May 23, 2006.

*as is the statute for repeat offenders, with increasing sanctions for each subsequent offense. The misleading part is that the most severe DUI, regardless of how many or how high the BAC, remains no more than a gross misdemeanor and in the courts of limited jurisdiction.*<sup>134</sup>

Washington statutes prescribe escalating minimum penalties for high-BAC and repeat DUI offenses, but leave the maximum penalty at a year in jail and/or \$5,000 fine, as with other gross misdemeanors. Minimum penalties “top out” at the third offense.<sup>135</sup> However, in 2006 the Legislature passed a bill to make the fifth DUI within ten years, or the first DUI after a prior conviction of vehicular homicide or assault while under the influence, a class C felony with a presumptive sentence range of 22-29 months.<sup>136</sup> Like other felonies, these DUIs will be prosecuted in the superior courts. The new law responds to the assessment team’s concern about leaving all DUIs at the gross misdemeanor level, but also adds to the complexity of our DUI laws. The new felony DUI law will not take effect until July 1, 2007,<sup>137</sup> allowing the Legislature to address any related issues that might come to its attention.

The most important such issue appears to be the absence of fingerprint-based records of non-felony convictions, without which prosecutors may not be able to prove beyond a reasonable doubt that a defendant is the same person who was convicted of (or had prosecution deferred for) the “prior offenses” that the Legislature has made an element of felony DUI. Felony judgment and sentence documents include the defendant’s fingerprints, but fingerprinting is not required for DUI or other non-felonies unless a defendant is booked into jail. This means that many prosecutions will be difficult or impossible for a number of years, even if the Legislature acts in 2007 to require fingerprinting of defendants convicted of DUI or other listed “prior offenses,” or getting deferred prosecutions based on such offenses.

Another such issue is how the new law defines “prior offenses within ten years” for the purpose of determining when a DUI becomes a felony. The new law applies the same definition of “prior offense” as in current law for non-felony DUI,<sup>138</sup> but does not define “within ten years.” This matters because the current-law definition of “within seven years,” used to determine minimum sentences, measures the interval between the arrest

---

<sup>134</sup> Assessment Report, p. 37.

<sup>135</sup> RCW 46.61.5055(3).

<sup>136</sup> Chapter 73, laws of 2006. Under existing felony sentencing law (chapter 9.94A RCW), sixth and subsequent DUIs will receive longer standard sentences.

<sup>137</sup> It will apply to qualifying DUIs committed on or after that date. It will not apply to sentences imposed after that date for crimes committed before it, because the Legislature may not increase the possible punishment for a crime that has already been committed (U.S. Const. art. I sec. 10, Washington State Const. art. I sec. 23).

<sup>138</sup> RCW 46.61.5055(12)(a). It includes convictions of DUI; physical control; vehicular homicide or assault committed while under the influence; first-degree negligent driving, reckless driving, or reckless endangerment (when originally charged as DUI, physical control, or vehicular homicide or assault); and equivalent local ordinances or out-of-state laws. It also includes deferred prosecutions granted for DUI, physical control, or first-degree negligent driving originally charged as DUI, physical control, or vehicular homicide or assault.

for the current offense and that for any “prior offense.”<sup>139</sup> In contrast, corresponding time periods used in felony sentencing law generally run from the end of confinement for a prior crime to the commission of the new crime.<sup>140</sup> The Legislature probably meant to measure “within ten years” from arrest to arrest, as “within seven years” is measured in current law, but not all trial courts may interpret it that way. The appellate courts will eventually resolve the ambiguity if necessary, but the Legislature could clarify its intent.

### (K) Probation liability

*Finally, the probation officers are compelled to take far too many decisions back to the judges. The management of scarce resources is driven by litigation fear and fiscal constraints of the local governmental units.*<sup>141</sup>

State law requires that a court sentencing a DUI defendant to serve less than one year in jail also suspend a jail sentence for the remainder of the year. The court must impose conditions of probation that include not driving without a license, not driving with a BAC of .08 or higher, and not refusing a breath or blood test when properly requested. It further authorizes the court to require installation of an interlock device, alcohol or drug treatment, supervised probation, or any other appropriate condition.<sup>142</sup> This means that virtually all those convicted of DUI are placed on probation for at least some period, since very few receive the one-year maximum jail sentence. A state Supreme Court rule authorizes, but does not require, district and municipal courts to establish probation departments, staffed by probation officers and clerks.<sup>143</sup>

Since 1992, the state Supreme Court has decided a series of cases holding state and local governments liable to victims of new crimes committed by offenders on probation or parole if there was negligence in the supervision of the offenders, based on the theory that a parole or probation officer has “control” over the actions of an offender.<sup>144</sup> Washington is the only state with such a strict liability standard for offender supervision, and no limit

---

<sup>139</sup> RCW 46.61.5055(12)(b).

<sup>140</sup> RCW 9.94A.525(2). This provision of the Sentencing Reform Act, known as the “washout” feature, prohibits counting certain prior convictions in calculating certain felony sentences after certain time intervals.

<sup>141</sup> Assessment Report, p. 52.

<sup>142</sup> RCW 46.61.5055(9)(a).

<sup>143</sup> ARLJ 11, adopted in 2001. The Legislature required the adoption of such a rule in RCW 10.64.120, which also authorizes courts to levy monthly assessments on offenders to help pay the cost of probation services. Under the court rule, probation officers, with college degrees and other qualifications, are to conduct pre-sentence investigations, recommend sentences to the courts, assess probationers’ risk of reoffending, supervise them though face to face contact, oversee other agencies’ treatment services to probationers, and perform other duties. Probation clerks, with high school diplomas and other qualifications, are to monitor and report to the court on probationers’ compliance with sentence conditions and treatment obligations, but not ordinarily to recommend sentences or have direct contact with offenders. See also RCW 35.20.230, requiring the Seattle Municipal Court to appoint a director of probation to supervise probation officers.

<sup>144</sup> *Taggart v. State*, 118 Wn.2d 195 (1992), *Bishop v. Miche*, 137 Wn.2d 518 (1999), and *Hertog v. City of Seattle*, 138 Wn.2d 265 (1999), are the leading cases.

on the amount of monetary damages a victim may recover. One of the consequences has been a growing reluctance to place, or retain, offenders on the caseloads of local probation departments. Some jurisdictions have eliminated probation departments in order to avoid potential liability.

It is not unusual for offenders on probation to miss appointments with probation officers, occasionally relapse into substance abuse, or otherwise fall short of strict compliance with all conditions. Probation officers can work with such offenders to improve their compliance, sometimes by addressing underlying problems like transportation or employment. But any evidence of an offender's non-compliance might support a claim of negligent supervision if he commits a subsequent crime, so probation officers have an incentive to report even minor violations to the court rather than dealing with them directly.

Courts themselves are immune from liability for the decisions judges make, such as whether or not to revoke or modify conditions of probation. Probation officers and local government officials have believed that reporting violations to the court relieves the probation officer, and the local government employing him, from liability for any future misconduct of the offender. However, it also breaks contact between the officer and the offender, who may or may not appear at a revocation hearing. It may result in loss of all contact until the offender is arrested on a warrant or for a new crime.<sup>145</sup>

Supervision and monitoring by a probation officer is probably the best way for a court to ensure that any defendant, whether diverted or convicted, is complying with its orders and conditions. But courts are foregoing the monitoring and supervision probation officers can provide in order to reduce the liability risk for cities and counties – even though foregoing probation services might, in fact, increase the actual risk of new crimes. Local governments and state agencies responsible for offender supervision have sought legislation bringing Washington's liability standards closer into line with those of other states, and this issue will doubtless return to the Legislature's attention in 2007.

---

<sup>145</sup> A recent unpublished decision by the Court of Appeals, Division II, suggests that judicial immunity may not protect local governments from liability even when violations are reported to the court. In *Benskin v. City of Fife*, No. 31523-8 (October 2005), the court held that probation functions are not entitled to judicial immunity even though officers are employed by the court, because their work itself is administrative in nature. The court found that Fife's probation department had a duty to supervise a multiple DUI offender who had violated probation conditions and who, three days before his scheduled revocation hearing, killed someone while driving drunk. The decision is on appeal to the state Supreme Court. Fife's Municipal Court employs one probation officer. In 2005 the court entered 57 DUI convictions and 23 deferred prosecutions, all requiring probation services for five years. Another 59 defendants had DUI charges reduced to lesser offenses, many of them presumably also candidates for probation. The court also handles domestic violence and other crimes.

### (L) Driver license suspension

As a serious traffic offense, DUI involves licensing as well as criminal sanctions. The assessment team reviewed the laws requiring suspension<sup>146</sup> of impaired drivers' licenses, and did not identify problems or recommend changes. However, interviewees working in both the licensing and criminal justice systems expressed concerns about the interaction between those systems in impaired driving cases.

Impaired drivers face license suspension at two points after being arrested – as an administrative action of the Department of Licensing (DOL), and after conviction in court:

- An administrative suspension is based on either refusing a BAC test when arrested or having a BAC of .08 or higher.<sup>147</sup> It lasts from 90 days to two years, depending on whether the driver refused the test and whether there has been a prior such incident.<sup>148</sup> It takes effect 30 days after the arrest, unless the driver requests a DOL hearing (see below).<sup>149</sup> This administrative suspension is independent of whether the driver is convicted or even charged in court, except that the suspension is stayed if the driver seeks and receives a deferred prosecution.<sup>150</sup>
- A post-conviction suspension is based on conviction of DUI.<sup>151</sup> The license is suspended for a period between 90 days and four years, depending on the number of

---

<sup>146</sup> A driver's license is "suspended" when it is invalidated for less than one year, and thereafter until "reinstatement" (RCW 46.04.580). It is "revoked" when it is invalidated for a year or longer, and thereafter until "reissue" (RCW 46.04.480). It is "denied" when a driver who has not had a Washington license cannot obtain one until he meets specified conditions. In this report, the term "suspend" or "suspension" covers any of these actions. Apart from duration, the main difference between suspension and revocation is that a suspended driver's license will be "reinstated" when the driver has met specified conditions, while a driver whose license was revoked must requalify as if he had not been licensed before.

<sup>147</sup> RCW 46.20.308(6) and (7). If the driver is under age 21, a BAC reading of .02 or higher triggers suspension.

<sup>148</sup> RCW 46.20.3101. Refusing a test produces a longer suspension period than having a .08 or higher BAC, creating a disincentive to refuse. For a driver under age 21 who has previously refused a test or shown .02 or higher BAC, the suspension is for two years or until age 21, whichever is longer.

<sup>149</sup> RCW 46.20.308(8).

<sup>150</sup> No stay is available if the driver refused a BAC test. If the driver notifies DOL that he will seek deferred prosecution under chapter 10.05 RCW, whether or not he has been charged in court, the suspension is stayed for up to 150 days after charges are filed or two years after the arrest, whichever is later. If the court grants deferred prosecution, the stay continues as long as the driver meets the program conditions, but suspension resumes if he fails to complete the program successfully (RCW 46.20.308(10)).

<sup>151</sup> RCW 46.61.5055(7), RCW 46.20.270. The latter statute defines "conviction" to include a bail forfeiture, but not a statutory deferred prosecution under chapter 10.05 RCW. The suspension is stayed if the defendant files a notice of appeal of the conviction, or seeks a DOL administrative review. In 2004, the state Supreme Court held that DOL could not suspend the licenses of drivers who had failed to respond to traffic citations, even though the courts themselves had supplied the information about such failures, without providing due process as required by the federal Constitution (*City of Redmond v. Moore*, 151 Wn.2d 664). In 2005, at DOL's request, the Legislature authorized an "administrative review" process for any mandatory suspension, including one based on a conviction, in which the only issues are the driver's identity and the accuracy of information furnished by the court (chapter 288, laws of 2005 (HB 1854)). Shortly after that law took effect, the Supreme Court held that the Constitution did not require such a hearing or review if the suspension was based on a conviction, distinguishing convictions from cases where the driver

prior offenses, whether the driver refused a BAC test, and what alcohol level such a test showed.<sup>152</sup> A conviction of reckless driving, a charge commonly used in DUI plea bargaining, results in a 30-day license suspension.<sup>153</sup>

DOL's administrative license suspension often takes effect before any criminal DUI case is resolved, so a driver may have completed the suspension before being convicted, or even charged, in the criminal case. This means he can resume driving while the charge is pending, and then lose his license again, months or even years later, after a DUI conviction based on the same conduct. In 2004, the Legislature required DOL to give drivers credit on any administrative or post-conviction suspension for time already spent in suspended status based on the same incident – a step which may have simplified time calculations for drivers but has complicated them for the agency.<sup>154</sup> However, drivers who have completed a suspension, and then face another one after conviction, can perceive the two suspensions as “double punishment.”

Whether administrative or conviction-based, suspending impaired drivers' licenses serves several policy goals:

- To get his license reinstated after a suspension, a driver must provide DOL with a statement of financial responsibility issued by a liability insurer.<sup>155</sup> Getting such a statement means informing the insurer about the DUI arrest and/or conviction, which is likely to produce an increase in the driver's premiums. Thus suspension contributes to deterrence, as well as lower premiums for sober drivers, by allocating more of the cost of crashes to those whose impaired driving makes them likelier.
- License reinstatement also requires a \$150 “reissue fee,” most of whose proceeds are used to help local governments meet the costs of DUI enforcement.<sup>156</sup> Such a reinstated license must be a “probationary” license, costing an additional \$50, for the next five years.<sup>157</sup> A probationary license tells law enforcement officers that the license

---

had failed to respond to a citation (*City of Redmond v. Bagby*, No. 73249-3, August 2005). Because the 2005 law requires it, DOL continues to make such reviews available after convictions, though few drivers request them.

<sup>152</sup> RCW 46.61.5055(7). This conviction-based suspension does not apply to those convicted of driving with a BAC of .02 or higher while under age 21 (RCW 46.61.503). This means that a minor who could be convicted of DUI can avoid license suspension by pleading guilty to a “zero tolerance” violation. See section II(C) above for further discussion of this issue.

<sup>153</sup> RCW 46.61.500(2).

<sup>154</sup> RCW 46.20.3101(4) and 46.61.5055(7) as amended by chapter 95, laws of 2004 (SHB 2660). The Legislature did not extend this “credit for time served” principle to those convicted of reckless driving, where the post-conviction suspension is only 30 days.

<sup>155</sup> RCW 46.20.311(1)(b).

<sup>156</sup> RCW 46.20.311(1)(e)(ii) and (2)(b)(ii), RCW 46.68.041, RCW 46.68.260. In the 2005-07 biennium, counties and cities will receive about \$3.2 million from these fees, or about \$38 per DUI case (Secs. 802 and 803, chapter 518, laws of 2005; AOC caseload data for 2004). The funds are earmarked for local cost increases attributable to various DUI-related state laws enacted in 1998, but are distributed to local governments based on a more general formula involving population and crime rates.

<sup>157</sup> RCW 46.20.355, RCW 46.61.5055(8).

has previously been suspended for DUI.<sup>158</sup> Thus suspension contributes to enforcement of the traffic laws, both financially and through the information the probationary license conveys.

- All drivers convicted of DUI must have an evaluation by an approved alcoholism agency and complete either an eight-hour “alcohol information school” or a more intensive treatment program.<sup>159</sup> To get his license reinstated, the driver must show proof of having completed such a program.<sup>160</sup> Additionally, a driver convicted of DUI (if based on alcohol consumption) may resume driving only in a vehicle equipped with an ignition interlock device, for a period between one and ten years, depending on the number of prior convictions.<sup>161</sup> License reinstatement requires proof that an interlock has been installed, and the license is suspended anew if the interlock provider reports that the device is no longer installed or working.<sup>162</sup> Thus suspension contributes to the goals of alcohol awareness, treatment, and sobriety.
- After a waiting period,<sup>163</sup> a suspended driver may obtain a “temporary restricted license” allowing driving for such purposes as work, education or job training, alcohol or drug treatment, court-ordered community service, and health care,<sup>164</sup> following pre-approved routes at pre-approved times,<sup>165</sup> and using an interlock device.<sup>166</sup> The availability of such restricted licenses helps prevent drivers from losing jobs or leaving school, and helps them participate in treatment and other positive activities.

---

<sup>158</sup> While convictions of DUI and related offenses are part of the driver’s record available to insurers, a license’s probationary status is not (RCW 46.20.355(5)).

<sup>159</sup> RCW 46.61.5056.

<sup>160</sup> RCW 46.20.311(1)(c).

<sup>161</sup> RCW 46.20.720(2). The interlock requirement does not apply to employer-owned vehicles driven as a job requirement (but see footnote 160 below). The device is to be calibrated to prevent the vehicle from starting when the driver’s breath sample shows .025 or higher BAC.

<sup>162</sup> RCW 46.20.311(1)(c). No interlock is required while the driver’s license is suspended and no temporary restricted license has been issued, because the driver is not supposed to be driving at all. However, many people continue to drive with suspended licenses.

<sup>163</sup> RCW 46.20.391(1)(a) sets a 30-day waiting period for post-conviction suspensions. For administrative suspensions, RCW 46.20.391(1)(c) authorizes DOL to provide waiting periods by rule, taking account of federal requirements related to state eligibility for transportation or highway safety funding. Federal legislation to establish such “hard suspension” periods is pending. DOL’s current waiting periods are 30 days for those with excessive BAC (.08 or above for adults, .02 or above for minors) once in the past seven years, 90 days for those who refused a breath test once in the past seven years, and one year for all other administrative suspensions (WAC 308-104-100).

<sup>164</sup> RCW 46.20.391, RCW 46.20.394. A temporary restricted license is not available if the driver has been convicted of vehicular assault or homicide in the past seven years. Before 2004, “occupational licenses” were available for fewer purposes, and only to drivers with excessive BAC (.08 or above for adults, .02 or above for minors) for the first time within seven years. In 2004, the Legislature renamed the temporary license, broadened the activities for which it could be issued, and made it available to breath test refusals and those with excessive BAC more than once in seven years (sec. 7, chapter 95, laws of 2004).

<sup>165</sup> RCW 46.20.394.

<sup>166</sup> This interlock requirement applies even to employer-owned vehicles driven as a job requirement. Under the statute requiring use of an interlock after reinstatement of a regular driver’s license, there is an exception for such employer-owned vehicles (RCW 46.20.720(2)). Legislation to extend the exception to those with temporary restricted licenses, who do not own their own vehicles, was considered but not passed in 2005 (SB 5645).

- One reason the Legislature added administrative suspension to conviction-based suspension in 1998 was to separate the licensing function from the outcome of the criminal case. License consequences can be important in plea bargaining, and the Legislature wanted to increase the likelihood that suspension would actually occur. However, the fact that a suspension has already occurred may make prosecutors and courts readier to agree to pleas that do not involve a second suspension.<sup>167</sup> In addition, as discussed below, courts can prevent administrative suspensions by suppressing evidence.

### (1) Administrative suspension of licenses

Once a driver's license has been earned, the courts have considered it a property right, whose suspension requires due process of law.<sup>168</sup> For that reason, drivers arrested for DUI have a right to a DOL hearing before suspension can take effect.<sup>169</sup> A driver may obtain a hearing by requesting one within 30 days of arrest and paying a \$200 fee (waived if indigent). He may appeal an adverse hearing decision to superior court, but the appeal is limited to issues of law, based on facts supported by "substantial evidence" in the hearing record. An appeal does not stay a license suspension unless the superior court finds that the driver is likely to prevail and will suffer "irreparable injury" without a stay.<sup>170</sup>

DOL hearings are intended to be less formal and less protective of drivers than criminal proceedings. They involve only the driver's license, not his liberty, and the burden of proof is "preponderance of the evidence," not "beyond a reasonable doubt." While a driver may have an attorney (about 80% do), he must pay the attorney himself. DOL hearing officers need not be lawyers (though most are), hearings are normally conducted by telephone, and police officers do not testify unless subpoenaed by the driver. Police reports are *prima facie* evidence that the officer had reasonable grounds to believe the driver was impaired and gave the required warnings about breath testing.<sup>171</sup>

However, police reports are not *prima facie* evidence of other facts they include, such as the basis for stopping the driver or his refusal to take the test. This may not have been the

---

<sup>167</sup> Convictions of first-degree negligent driving and reckless endangerment count as "prior offenses" in sentencing subsequent DUIs, but do not result in license suspension or mandatory jail time. First-degree negligent driving (known informally as "wet neg") consists of driving in a way that is both negligent and likely to endanger a person or property, while exhibiting the effects of having consumed alcohol or an illegal drug (RCW 46.61.5249). Reckless endangerment consists of recklessly engaging in conduct that creates a substantial risk of death or serious injury to another person (RCW 9A.36.050); it can be used in plea bargaining to avoid the additional ignition interlock requirements that apply to DUIs where the driver had passengers under age 16 (RCW 46.61.5055(4)). As noted above, a minor convicted of driving with .02 or higher BAC (RCW 46.61.503, also known as "zero tolerance") does not face license suspension or mandatory jail time, nor is the crime counted as a "prior offense" in sentencing any subsequent DUI.

<sup>168</sup> *Dixon v. Love*, 431 U.S. 105 (1977).

<sup>169</sup> RCW 46.20.308(8). The arresting officer must inform the driver of this right (RCW 46.20.308(6)(b)). Officers provide drivers with DOL hearing request forms.

<sup>170</sup> RCW 46.20.308(9).

<sup>171</sup> RCW 46.20.308(8).

Legislature’s intent when it required administrative license suspension in 1998, but the statute makes police reports *prima facie* evidence only “that the officer had reasonable grounds to believe the person had been driving...while under the influence...and that the officer complied with the requirements of this section [RCW 46.20.308].” Officers’ reports also include information not related to the officer’s compliance with that section – the reason for stopping the driver (*e.g.* a traffic violation or suspicious driving pattern), the BAC test reading or driver’s test refusal, the officer’s qualification to administer a breath test, and other relevant facts. If the Legislature’s intent is to make the police report *prima facie* evidence of all the facts it alleges, the statute should so provide.<sup>172</sup>

About 25% of drivers facing administrative license suspension request a hearing, and the hearing officer upholds the suspension in about 80% of those cases – in other words, 95% of administrative suspensions take effect. Reasons for dismissing the remaining 5% include inadequate documentation of officers’ “reasonable basis” to stop and/or arrest the driver,<sup>173</sup> illegibility of documents,<sup>174</sup> failure of the officer to appear (*i.e.* be available by phone) when subpoenaed,<sup>175</sup> and suppression of evidence by the court handling the criminal case (see below).<sup>176</sup>

An administrative suspension is stayed when a driver seeks, or plans to seek, deferred prosecution under chapter 10.05 RCW.<sup>177</sup> Although most DUI charges are filed within days after the arrest, charging delays of a year or longer have been common in King County District Court, where more than 12% of the state’s DUI filings occur.<sup>178</sup> Legislation enacted in 2005 enables drivers to stay their administrative license suspensions, for up to two years, by notifying DOL that they intend to seek deferred prosecution if and

---

<sup>172</sup> The 2004 legislation making breath test results admissible (SHB 3055, see discussion in section II(F) above) applies to DOL hearings as well as criminal cases, but not to blood test results. Unlike many courts, DOL followed the 2004 legislation as soon as it became effective, because the separation-of-powers issue it raised did not apply to the executive branch.

<sup>173</sup> Sometimes officers fax to DOL the “checklist” portions of their reports before completing the narrative portions, and DOL may not be able to match the narratives correctly with the documents previously sent, leaving hearing officers without evidence contradicting drivers’ versions of events.

<sup>174</sup> Some of the older DataMaster printers do not produce a clear fax image, so that “.08” may look like “.06” or even “.00.”

<sup>175</sup> Early in the implementation of administrative license suspensions, hearings could be scheduled without regard to officers’ work and leave schedules, resulting in frequent “no shows” and dismissals. This problem has diminished as DOL has received officers’ schedules before setting hearing dates. For a driver seeking dismissal of a suspension, subpoenaing the officer can be a gamble – non-appearance will mean dismissal, but the officer’s testimony may be more effective than his written reports.

<sup>176</sup> DOL provides requesting law enforcement agencies with information about the reasons for dismissing suspensions that followed their DUI arrests. In a typical month (April 2006), 25% of dismissals were based on court rulings making evidence inadmissible, 23% due to lack of probable cause or other legal defects, and 51% due to “mechanical issues” with police reports, like boxes not checked, illegibility, or pages missing.

<sup>177</sup> RCW 46.20.308(10)(a).

<sup>178</sup> Administrative Office of the Courts, “Courts of Limited Jurisdiction: 2005 Annual Caseload Report,” available at [http://www.courts.wa.gov/caseload/clj/ann/2005/annualtbls05\\_wo\\_staffing.pdf](http://www.courts.wa.gov/caseload/clj/ann/2005/annualtbls05_wo_staffing.pdf). King County filing delays have been substantially reduced in 2006, but 45% of the DUI arraignments held in the South Division of King County District Court on August 3, 2006 were in cases where the arrest had occurred at least three months earlier.

when charges are filed against them.<sup>179</sup> Deferred prosecution is a useful program, but the 2005 legislation combined with charging delays in King County to give drivers with .08 or higher BAC, rather than DOL or the courts, greater control over the timing of DOL's suspension process.

## (2) Collateral estoppel by trial courts

Theoretically, DOL's administrative license suspension process is separate from the criminal case that results from the same driving incident. However, DOL is bound by any ruling of the court on evidentiary and other issues. Thus, if the judge excludes evidence of a BAC test refusal or test results because of procedural flaws, or finds that the officer lacked probable cause for the arrest, then DOL cannot suspend the license. This doctrine, known as collateral estoppel, applies when a court has made a ruling before DOL's suspension hearing.<sup>180</sup> Not surprisingly, though, DOL hearing officers' rulings do not bind the courts.<sup>181</sup>

Collateral estoppel (also known as issue preclusion) is a long-standing judicial doctrine intended to avoid duplicative arguments, repetitive litigation, and inconsistent results. It applies when two separate proceedings involve the same parties, facts, and legal issues, and "application of the doctrine does not work an injustice."<sup>182</sup> Collateral estoppel encourages some drivers to seek delay in administrative license suspension until courts have ruled in their favor on evidentiary issues.<sup>183</sup> Courts sometimes issue "orders of suppression" of key evidence in connection with plea agreements. If an administrative suspension has not yet become final, a court order suppressing the evidence will prevent it from taking effect. If administrative suspension has occurred, and the driver is convicted of DUI, such an order cannot prevent the conviction-based suspension entirely<sup>184</sup> but can shorten its duration by months or years.<sup>185</sup>

<sup>179</sup> Chapter 269, Laws of 2005. The previous limit on such a stay was 90 days.

<sup>180</sup> *Thompson v. Department of Licensing*, 138 Wn.2d 783 (1999).

<sup>181</sup> *State v. Vasquez*, 148 Wn.2d 303 (2002). In this case, the state Supreme Court held that a DOL hearing officer's finding of insufficient probable cause for arrest did not preclude a judge, in a subsequent criminal trial, from finding that probable cause had been sufficient. The Court noted that DOL hearings are expedited, evidence rules are relaxed, officers do not testify unless subpoenaed, and the hearings have a fundamentally different purpose from criminal trials. In this case, the DOL hearing officer relied on a police officer's written report while the court heard extensive testimony from the officer.

<sup>182</sup> *Thompson v. Department of Licensing* at 790. In this case, the state Supreme Court required DOL to acquiesce in what it acknowledged had been an erroneous trial court ruling that breath test warnings had been invalid. The court found, consistent with previous decisions, that DOL and "the state," as represented by the Clark County Prosecutor's office, were "in privity" with each other as "parties" to both the agency and criminal proceedings. It also held that the "injustice" prong of collateral estoppel analysis is procedural rather than substantive, *i.e.* the trial court's ruling, even though erroneous, governs in DOL's subsequent hearing because "the state" did not appeal it.

<sup>183</sup> Since public defenders do not represent drivers in DOL hearings, delays in the administrative suspension process work mainly to the advantage of drivers with private counsel.

<sup>184</sup> To prevent such a suspension, the plea must be to a charge other than DUI, such as first-degree negligent driving.

<sup>185</sup> For example, a first DUI conviction (within seven years) with BAC at or above .15 produces a one-year suspension, but suppressing the actual BAC reduces the suspension period to 90 days. A first conviction

Having chosen to vary the duration of conviction-based suspensions by whether drivers refuse BAC tests and what levels they show if tested, the Legislature has effectively left those issues to the courts, rather than DOL. But administrative suspensions are among the ways the legislative and executive branches, exercising their police power to protect public safety on the roads, seek to reduce impaired driving. Administrative suspension is a constitutionally valid policy that most states have adopted.<sup>186</sup> Drivers' due process rights are protected through DOL hearings and appeals to the superior and appellate courts. Legislation to restrict or prohibit the application of collateral estoppel to administrative license suspension would probably face a constitutional challenge based on separation of powers.<sup>187</sup> Any such legislation would affect, at most, about one percent of arrested impaired drivers.<sup>188</sup>

### (M) DUI sentences

As discussed in section II(A) above, the history of DUI legislation has been mostly one of escalating consequences to impaired drivers – conviction based on *per se* BAC levels, mandatory jail terms, alcohol education or treatment requirements, administrative license suspension, ignition interlock requirements, and so on. Responding to public concerns that arise from high-profile but atypical cases, policymakers seek to “toughen” criminal penalties and other consequences for first and subsequent offenders. But harsher penalties motivate some drivers to contest both license suspensions and criminal prosecutions vigorously and creatively, using every opportunity the law provides to avoid even a first-time DUI conviction.

---

where the driver refused the test produces a two-year suspension, but suppressing the refusal reduces the suspension to 90 days. See RCW 46.61.5055(7).

<sup>186</sup> As of January 2006, 41 states suspended drivers' licenses administratively for BAC readings at or above .08, and their laws have been upheld by state and federal courts against double-jeopardy and due-process challenges. See National Highway Traffic Safety Administration, “Traffic Safety Facts: Laws: Administrative License Revocation,” January 2006,

<http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/Rulemaking/Articles/Associated%20Files/05%20Admin%20Lic%20Rev.pdf>. See also a compilation from the Insurance Institute for Highway Safety at [http://www.iihs.org/laws/state\\_laws/dui.html](http://www.iihs.org/laws/state_laws/dui.html).

<sup>187</sup> Collateral estoppel is not based on statute, but is a long-standing doctrine developed by the courts over many years of case law. (*Corpus Juris Secundum*, Judgments, sec. 779). It is unquestionably useful to prevent duplicative litigation and forum-shopping. (For a thorough discussion of the doctrine and its purposes, see Tegland, *Civil Procedure*, Washington Practice Series, secs. 35.20-.51.) But in driver licensing, its application depends on the assumption that local prosecutors and the Department of Licensing are “in privity” as “the state.” An alternate view is that DOL has separate driver quality control functions and responsibilities that criminal prosecutors do not share. The state Supreme Court has recognized a strong public policy interest in the application of collateral estoppel between courts and administrative hearings (*e.g.* *Christensen v. Grant County Hospital District No. 1*, 152 Wn.2d 299 (2004)), and the Legislature is the principal policymaking body in state government.

<sup>188</sup> DOL hearing officers dismiss about 5% of all suspensions (20% of those going to hearing). About 25% of those dismissals are based on court orders suppressing evidence (April 2006 report from DOL). Therefore it appears that collateral estoppel prevents about 1% of all administrative suspensions.

The assessment team did not raise this issue, but some of those interviewed for this report, including some in the law enforcement community, felt that the DUI laws might be easier to enforce and administer if the first offense were a traffic infraction instead of a gross misdemeanor. Infractions are not subject to jail sentences, so proof is by a preponderance of the evidence, there is no right to publicly funded counsel, and there is no right to a jury trial.<sup>189</sup> First offenders might be less likely to contest DUI charges if penalties were less severe. The first-time infraction could still be taken into account in penalizing a second or subsequent offense, perhaps more severely than under current law. Police, prosecutors, and courts could concentrate more effectively on the repeat offenders who present a greater danger to the public.<sup>190</sup>

Other interviewees felt that first-time DUI defendants would be just as likely to contest an infraction as a crime, if only to protect themselves against the consequences of a possible second offense in the future. They also believed that decriminalizing first-time DUI would reduce whatever deterrent value today's criminal penalties have. Most drivers are probably unfamiliar with specific DUI penalties unless they, or someone they know, have been arrested. But decriminalizing could send an inappropriate signal about the acceptability of impaired driving – no small consideration after decades of progress in our culture toward sober driving.

Another suggestion was to increase minimum DUI sentences, aligning them with those for first-degree driving while the license is suspended (DWLS 1). A driver with three or more specified serious traffic violations (including DUI), or 20 or more less serious violations, within five years is designated a “habitual traffic offender” and his license is suspended for seven years.<sup>191</sup> If he drives during that period, he is subject to a mandatory ten-day minimum jail term on the first conviction, a 90-day minimum on the second, and a 180-day minimum on the third.<sup>192</sup> These minimum terms are higher than for DUI itself,<sup>193</sup> but they apply to driving after losing a license for multiple DUIs or other serious offense patterns. While the driving itself is a crime even if done safely, such a driver is unlikely to be stopped unless he is violating some other traffic law. Such a penalty escalation would raise the stakes much higher in court, making DUI convictions much harder to obtain. Additionally, the cost of ten-day jail terms for first offenders would fall heav-

---

<sup>189</sup> RCW 46.63.080 and .090.

<sup>190</sup> Federal highway funding is affected if a state does not impose specified sanctions, including jail, for second and subsequent DUI convictions. Washington law meets these standards. Reducing the first DUI to an infraction would not affect the state's funding status under current federal law. See <http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/Planning%20Evaluation%20&%20Budget/Programs%20&%20Grants/Associated%20Files/164FAQ.pdf>.

<sup>191</sup> RCW 46.65.020 and .060.

<sup>192</sup> RCW 46.20.342(1)(a). These are the penalties for first-degree driving while license suspended. If a DUI conviction results from the same incident, the minimum for DWLS 1 is 90 days.

<sup>193</sup> The corresponding minimum sentences for DUI are 24 hours on the first conviction, 30 days on the second, and 90 on the third, if the BAC level is below .15. For those at or above .15, or who refused the test, the minimum sentences are two days on the first conviction, 45 on the second, and 120 on the third. RCW 46.61.5055(1), (2), and (3).

ily on local governments. As of 2000, no other state required more than two days in jail as a minimum sentence for the first DUI conviction.<sup>194</sup>

---

<sup>194</sup> National Commission Against Drunk Driving, “Digest of State Alcohol-Highway Safety Related Legislation,” 18<sup>th</sup> edition, as of January 2000. See [http://www.iihs.org/laws/state\\_laws/dui.html](http://www.iihs.org/laws/state_laws/dui.html). While this information is dated, it is unlikely that any state has quintupled its first-DUI minimum sentence in the past six years.

### III. CONCLUSIONS

One of the major recommendations in the Assessment Report was to:

*Form a legislative study committee to examine, consider, and recommend a complete statutory scheme that provides impaired driving laws that are sound, rigorous, and easy to enforce and administer.*<sup>195</sup>

Such an effort would be very challenging, reopening many policy choices that have been made over several decades, offering a chance to examine funding issues, and perhaps resulting in new statutes that are not only clearer and simpler but also easier to enforce and administer. However, such an effort would be unlikely to produce major changes in policies that have evolved over those decades in response to public concerns, fiscal realities, constitutional requirements, and operational needs. Certainly the Legislature would be the only effective sponsor for such a comprehensive review of our laws.

In the absence of such a comprehensive review, policymakers could consider three ways to address impaired driving issues in the next few years:

#### **(1) Simplification of impaired driving laws**

For the reasons discussed in Section II(A) above, complexity is inherent in laws dealing with impaired driving. However, a systematic effort to simplify our statutes, without enacting substantive policy changes, is worth discussing. Three suggestions have been made to make the DUI laws easier to understand, and make it easier to locate specific items:

- Some code sections – for example, RCW 46.20.308 and 46.61.5055 – have become very lengthy after repeated additions.<sup>196</sup> Over-long sections can be broken up by turning existing subsections into full sections, although correcting cross-references throughout the code can add many pages to legislation. In recent years the Legislature has enacted bills to reorganize key sections of the Sentencing Reform Act,<sup>197</sup> and to reformat the definitions of hundreds of crimes.<sup>198</sup> Any such legislation should include a preamble expressing clearly the Legislature’s intent not to change the substance of existing law, in order to ensure that courts will not read substantive intent into minor changes in wording or syntax.<sup>199</sup> And the value of such non-substantive

<sup>195</sup> Assessment Report, p. 39.

<sup>196</sup> RCW 46.20.308 has been amended 26 times since enactment by initiative in 1968. RCW 46.61.5055 has been amended 16 times since 1995.

<sup>197</sup> Chapter 28, laws of 2000.

<sup>198</sup> Chapter 53, laws of 2003. This 318-page bill, requested by the Administrative Office of the Courts, clearly labeled every crime as a class A, B, or C felony, gross misdemeanor, or misdemeanor, and provided a specific section or subsection reference to every degree and other variant of each crime, in order to permit precise citations (codes) in electronic data systems for use by the courts and criminal justice agencies.

<sup>199</sup> See RCW 9.94A.015, the preamble to chapter 28, laws of 2000. It expresses the Legislature’s intent to adopt “clarifying amendments to make the [sentencing reform] act easier to use and understand,” and in-

rewriting is easy to over-estimate. Practitioners who work regularly with the laws become familiar with them, and might prefer not to have to relocate provisions. Those who do not work regularly with these laws might not find reorganizing them helpful.

- The structure of mandatory minimum DUI sentences, codified in RCW 46.61.5055, lends itself to a “grid” presentation, since it varies by the number of “prior offenses” and the driver’s BAC level. The section could incorporate a grid format, like that for felony sentences in RCW 9.94A.510.<sup>200</sup> However, the Administrative Office of the Courts has designed such a grid and makes it available to judges, practitioners, and the public.<sup>201</sup> Adding it to the code would introduce potential inconsistencies with other provisions.
- Some of those interviewed suggested that all the impaired driving statutes should be collected “in one place” in the code, instead of spread among different chapters. For example, the substantive laws prohibiting impaired driving are in chapter 46.61 RCW, the “rules of the road” that include all other traffic violations. So are the laws dealing with evidence and penalties in such cases. The laws affecting impaired drivers’ licenses are in chapter 46.20, which covers driver licensing generally. The deferred prosecution system is established in chapter 10.05, part of a code title that deals with proceedings in the courts.<sup>202</sup> Each of these chapters deals with broader topics than impaired driving, and a chapter dedicated to impaired driving could help clarify just what can happen when someone commits this crime. But creating a “DUI chapter” in the code means either duplicating or cross-referencing more general provisions related to licensing, other traffic violations, and other topics. Extensive cross-referencing requires accessing the chapters described above anyway. Duplication runs the risk of developing inconsistencies, whether intended or not, with other provisions, thereby complicating both the code and the work of practitioners who must deal with more than DUI issues.

On balance, the idea of DUI law “simplification” for its own sake seems to have more pitfalls than advantages. Courts traditionally assume that the Legislature means something substantive when it changes terminology or uses different words to describe something, although a statutory disclaimer can be effective. The energy and effort required to

---

cludes a disclaimer of substantive intent: “The legislature does not intend chapter 28, laws of 2000 to make, and no provision of chapter 28, laws of 2000 shall be construed as making, a substantive change in the sentencing reform act.” (Few practitioners would agree that the SRA has been any “easier to use and understand” since 2000.) See also section 1 of chapter 53, laws of 2003: “The legislature intends by this act to reorganize criminal provisions throughout the Revised Code of Washington to clarify and simplify the identification and referencing of crimes. It is not intended that this act effectuate any substantive change to any criminal provision in the Revised Code of Washington.”

<sup>200</sup> The “felony grid” actually includes RCW 9.94A.515 as well, and in 2002 the Legislature created a separate grid for drug felonies in RCW 9.94A.517 and 9.94A.518. Felony sentencing provides no example of either simplicity or retrievability of any value for DUI.

<sup>201</sup> Available at <http://www.courts.wa.gov/newsinfo/content/duigrid/DUIGrid05.pdf>. A “historical” grid, showing the penalty structures applicable for DUIs committed in the past, is at <http://www.courts.wa.gov/newsinfo/content/duigrid/DUIHISTwith2005changes.pdf>.

<sup>202</sup> While most deferred prosecutions occur in DUI cases, they are available in many other non-felony cases as well.

“simplify” the DUI laws, without changing their substance, would probably be better spent dealing with the substantive issues that inevitably arise anyway.

## **(2) “Moratorium” on DUI legislation**

Some of those interviewed expressed the wish that the Legislature would leave the DUI statutes unchanged for at least a few years, giving practitioners a chance to work with them and giving the policies they embody a chance to work without constant alteration. Most of those desiring a “moratorium” either had supported recent changes or wanted to make exceptions for particular proposals they felt should be enacted soon. They generally acknowledged that their desire was unrealistic.

The rapid pace of change can complicate the work of practitioners in any field, and can create special difficulties in criminal justice, where punishment depends on the date of the crime yet cases can take years to complete.<sup>203</sup> After enacting major legislation, policymakers sometimes try not to revisit those issues for a few years, especially when elections have not changed overall policy direction. But elected officials cannot bind their successors, and the pressure to “improve” DUI laws comes continuously from stakeholders and constituents.

## **(3) Substantive policy issues**

Section II of this report discusses several issues for possible legislation. Any such legislation would be controversial, and much of it would be costly, especially if intended to be effective. People concerned about the public interest, including the universal interest in reducing impaired driving, will have sincere differences of opinion about all of these issues. However, it may be helpful to suggest some steps policymakers could take to reduce impaired driving through our legal and licensing system.<sup>204</sup>

The most useful step is also the most difficult – improving funding of DUI enforcement, adjudication, and licensing sanctions. The wisest and best policies can be only as effective as the people, organizations, and systems that implement them. Courts should have the capacity to try more DUI cases, prosecutors should have the staff to file charges promptly and the experience to match the best defense lawyers, officers should have the time and training to gather and fully document evidence, jails should have room for the offenders who need confinement, and treatment should be available to all who need but cannot afford it. After decades of state-level policymaking with minimal new state fund-

---

<sup>203</sup> The federal and state constitutions prohibit *ex post facto* laws that increase the possible punishment for a crime which has already been committed (U.S. Const. Art. I sec. 10, Washington State Const. Art. I sec. 23).

<sup>204</sup> Cultural change is probably more responsible for reducing impaired driving in recent decades than any particular change in law. But the cultural impact of laws should not be underestimated. One of the important reasons driving after drinking has become less socially acceptable in the U.S. is the enactment – and enforcement – of more serious sanctions for those caught doing so. The facts that many impaired drivers escape detection, and that some of those detected still avoid the most serious sanctions, do not detract from the overall success story.

ing, it may be time to try putting more public resources behind policies the public supports.

While the assessment team’s concern about local variations was somewhat misplaced,<sup>205</sup> it is true that locally funded prosecutors and courts are likely to adapt to local funding constraints, as well as other aspects of local practice, in DUI and other cases. Statewide restraints on pretrial diversion or plea bargaining will invite adaptation or evasion unless accompanied by funding to make them credible and effective.<sup>206</sup>

Some of the legislation discussed in the report would help make existing policies work more effectively. Restricting the use of deferred prosecution based on “mental problems” in DUI cases would help keep this useful program from losing effectiveness.<sup>207</sup> Requiring that impaired drivers’ chemical dependency assessments include review of their non-traffic criminal histories would similarly improve the focus of deferral systems, both statutory and non-statutory.<sup>208</sup> Restricting the use of “donations” in deferral programs would improve the programs’ integrity.<sup>209</sup> Requiring that fingerprints of convicted impaired drivers be entered in the State Patrol’s database would help ensure that the new felony law produces actual felony convictions in the future.<sup>210</sup> Clarifying timelines in the felony DUI law could prevent litigation.<sup>211</sup> Making police officers’ written reports *prima facie* evidence of all they contain for purposes of DOL administrative suspension hearings would be consistent with the existing policy not to require officers’ presence at the hearings.<sup>212</sup>

Other policy issues discussed in the report – sobriety checkpoints, *per se* violation for any quantity of Schedule I or II drugs, expanded use of blood testing, warnings before BAC testing, probation liability standards, collateral estoppel of administrative license suspensions, decriminalizing or increasing sentences for first-time DUIs – would represent substantial changes in policy direction. They would involve costs, and possible savings, requiring careful study and full debate.

#### **(4) Conclusion**

Laws and public policies influence people’s behavior, though not always as much as policymakers might hope. Washington’s DUI laws, widely considered among the strict-

---

<sup>205</sup> For example, local ordinances do not really “add an additional layer of complexity” as the team feared (Assessment Report, p. 36). See (II)(B) above.

<sup>206</sup> See discussion of deferrals in section II(I) above. Oregon has a statute prohibiting reductions or dismissals of DUI charges except under a specified diversion program (ORS 813.170). But funding for most Oregon trial courts comes from the state.

<sup>207</sup> See discussion in section II(I)(4) above.

<sup>208</sup> See discussion in section II(I)(5) above.

<sup>209</sup> See discussion in section II(I)(3) above.

<sup>210</sup> See discussion in section II(J) above.

<sup>211</sup> See discussion in section II(J) above.

<sup>212</sup> See discussion in section II(L)(1) above. Requiring officers to attend DOL suspension hearings, even by telephone, when not requested by the driver, would reduce officers’ availability for other duties and/or produce a high dismissal rate as they failed to “appear.”

est in the nation, have been accompanied by declining DUI rates, which suggests that they are at least not damaging efforts to reduce impaired driving. Statutory “simplification” for its own sake is not likely to be useful, and expecting the Legislature to stop passing DUI bills is unrealistic. Additional resources for law enforcement, criminal justice, and treatment, and legislation to improve the effectiveness of existing policies, would help make our roads safer still.

**APPENDIX: LIST OF PERSONS INTERVIEWED**

- Jay Ames, Assistant Public Defender, Spokane County
- Glenn Baldwin, Division of Alcohol and Substance Abuse, Department of Social and Health Services
- Robert Barnoski, Senior Research Associate, Washington State Institute for Public Policy
- Rick Bart, Sheriff, Snohomish County
- Gina Beretta, Program Manager, Washington Traffic Safety Commission
- Doug Blair, Division Administrator, Criminal Justice Training Commission
- Bill A. Bowman, Attorney, Fox Bowman Duarte, Bellevue
- Geoffrey Burg, Attorney, Law Offices of Geoffrey Burg, Seattle
- Mary Pat Casey, Hearings Officer Manager, Department of Licensing, Seattle
- Linda Chezem, Professor, Purdue University and former Judge, Indiana Court of Appeals
- Alex S. Chun, Deputy Prosecuting Attorney, Thurston County
- Douglas Cowan, Attorney, Cowan Smith Kirk Gaston Law Firm, Kirkland
- Charles J. Delaurenti II, Judge, King County District Court
- Judith Eiler, Judge, King County District Court
- Moses Garcia, Assistant City Attorney, City of Seattle
- Rod Gullberg, Sergeant, Forensic Laboratory Services Bureau, Washington State Patrol
- Douglas Haake, Administrative Office of the Courts
- Jeffrey J. Jahns, Chief Deputy Prosecuting Attorney, Kitsap County
- Steven D. Johnson, Sergeant, Field Operations Bureau, Washington State Patrol
- Kathy Knox, Assistant Public Defender, City of Spokane
- Barry K. Logan, Director, Forensic Laboratory Services Bureau, Washington State Patrol
- Pamela B. Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys
- Doron Maniece, Administrator, Driver Responsibility Unit, Department of Licensing
- Pat Mason, Senior Legal Consultant, Municipal Research and Services Center
- Vickie McDougall, Criminal Justice Program Training Manager, Department of Licensing
- Jim McNew, Hearings Officer Manager, Department of Licensing, Spokane
- Julie Mitchell, Administrator, Lakeside Milam Recovery Centers, Kirkland
- John Moffat, Regional Administrator, National Highway Traffic Safety Administration
- Margaret E. Nave, Senior Deputy Prosecuting Attorney, King County
- Craig Nelson, Administrator, Driver Services Hearings/Interviews Unit, Department of Licensing
- Penny Nerup, Program Manager, Washington Traffic Safety Commission
- Dick Nuse, Program Manager (retired), Washington Traffic Safety Commission
- Mike Padden, Judge, Spokane County District Court

- Monica Petersen-Smith, Program Manager, Washington Traffic Safety Commission
- W. Daniel Phillips, Judge, Kitsap County District Court
- Lori Provoe, Hearings Officer Manager, Department of Licensing, Lacey
- Robin Reichert, Lieutenant, Forensic Laboratory Services Bureau, Washington State Patrol
- Victoria Seitz, Judge, King County District Court
- Linda Shaw, Corrections Manager, Corrections and Community Service, Clark County
- Conrad Thompson, Probation Officer (retired), Snohomish County
- Jon Tunheim, Chief Deputy Prosecuting Attorney, Thurston County
- Fred Walser, Chief, Police Department, City of Sultan
- Mary C. Wolney, Attorney, Mary C. Wolney, P.S., Seattle