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Judicial Report on the Adjudication and Sanctioning of Hard-Core Drinking Drivers

Robyn D. Robertson and Herb M. Simpson

Impaired driving is the most frequently committed crime in America. It has been an issue of debate and concern for the judiciary, as courtrooms across the country hear cases involving a majority of the 1.4 million annual DWI arrests. Since the early 1980s, concerned citizens have lobbied for and won considerable changes to the way these cases are approached from a public-policy perspective, often resulting in legislative initiatives and changes in criminal practice. Until now, however, little comprehensive research has been conducted on the implications of these system-wide changes for criminal justice professionals.

In December 2002, the Traffic Injury Research Foundation—an independent road safety institute—released a report concerning the adjudication of DWI cases and the sanctioning of hard-core drinking drivers.[1] Its findings were based on the views, insights, and opinions of more than 1,000 judges across the country. The report is part of a multiyear research initiative designed to improve the efficiency and effectiveness of the criminal justice system by highlighting key problems in each segment of the system and recommending practical, cost-effective solutions. Two earlier reports addressed problems in the detection and apprehension of hard-core drinking drivers,[2] and the prosecution of these offenders.[3] The foundation recently released the final report in July 2003, which addressed monitoring by probation and parole.[4]

In addition to funding provided by a charitable contribution from the Anheuser-Busch Companies, Inc., the involvement and participation of several thousand criminal justice professionals across the United States—representing law enforcement officers, prosecutors, judges, and probation and parole officers—made this unique initiative possible. By identifying key problems and recommending practical solutions derived from prior research and validated by the experiences of thousands of professionals participating in the study, the initiative underscores the need for systemic improvements. As a starting point, this series of reports serves as a valuable sourcebook. It provides direction to criminal justice and traffic safety professionals at national and state levels. It also guides agencies in addressing concerns and in strategically reviewing existing policies.

This research has received considerable support, cooperation, and interest from a wide variety of individuals as well as key national agencies. These groups include the Highway Safety Committee of the International Association of Chiefs of Police, the National Traffic Law Center of the American Prosecutors' Research Institute, the National District Attorneys Association, the National Association of Prosecutor Coordinators, the Conference of State Court Administrators, the American Judges Association, the National Judicial College, the National Center for State Courts, the American Probation and Parole Association, and the National Criminal Justice Association.

HISTORY OF THE PROBLEM

Significant reductions in impaired driving occurred during the 1980s and early 1990s. However, these declines stagnated in the mid-1990s. Today, approximately 40% of highway fatalities are still alcohol related. The recent increase in the number of alcohol-related fatalities reported by the National Highway Traffic Safety Administration in 2000 and 2002 indi-

Footnotes

1. Robyn D. Robertson & Herb M. Simpson, *DWI System Improvements for Hard Core Drinking Drivers: Sanctioning*, Traffic Injury Research Found. (2002), *available at http://www.trafficinjuryresearch.com/publications/PDF_publications/Sanctioning_Report.pdf*.

   Departments or agencies attempting to address any of these issues are encouraged to consult the study report. It contains extensive and detailed information on the problems identified and numerous examples, references, and contacts that agencies can draw upon for guidance. State-specific information can also be obtained, when available, upon request to TIRF. Copies of full reports and executive summaries for the enforcement, prosecution, and sanctioning phases can be accessed at www.trafficinjuryresearch.com or by contacting Barbara Koppe toll-free at 877-238-5235 or barbarak@trafficinjuryresearch.com.
2. Herb M. Simpson & Robyn D. Robertson, *DWI System Improvements for Hard Core Drinking Drivers: Enforcement*, Traffic Injury Research Found. (2001), *available at* http://www.trafficinjuryresearch.com/publications/PDF_publications/EnforcementReport.pdf.
3. Robyn D. Robertson & Herb M. Simpson, *DWI System Improvements for Hard Core Drinking Drivers: Prosecution*, Traffic Injury Research Found. (2002), *available at* http://www.trafficinjuryresearch.com/publications/PDF_publications/Prosecution_Report.pdf.
4. Robyn D. Robertson & Herb M. Simpson, *DWI System Improvements for Hard Core Drinking Drivers: Monitoring*, Traffic Injury Research Found. (2003), *available at* http://www.trafficinjuryresearch.com/publications/PDF_publications/Monitoring_Report.pdf.

cates that progress is now being eroded.[5]

The high-risk group of drinking drivers—referred to variously as hard-core drunk drivers, chronic drunk drivers, persistent drinking drivers, or drivers with high blood alcohol concentrations (BACs)—account for a large portion of the problem. Virtually all major government and not-for-profit agencies in the United States declared this dangerous group of offenders a national priority.

For judges, hard-core drinking drivers pose a significant threat because their alcohol tolerance and persistent behavior make them more difficult to sanction effectively and deter from drinking and driving. Moreover, their familiarity with the justice system allows them to manipulate the system's weaknesses and exploit its loopholes to avoid the appropriate sanction or conviction altogether. Of greater concern is the inability of courts to identify repeat DWI offenders, which is, in part, attributable to system-wide inconsistencies.

STUDY APPROACH

The project began with an extensive literature review to identify problems in the adjudication and sanctioning of repeat offenders. From this research, a list of priority problems was created and used as the basis for discussion in workshops in five states (Arizona, Connecticut, Illinois, Massachusetts, and New York). These workshops involved 22 limited and general jurisdiction judges, as well as some with specialized DWI caseloads, from 19 court jurisdictions. The goal of these workshops was to prioritize key problems identified in the research literature, gain further understanding of the magnitude and implications of these problems, and identify practical, cost-effective solutions supported by judges.

The results from the workshops were used to construct a nationwide survey to confirm the findings against a wider population and to obtain further information about such things as the frequency with which various problems are encountered. With the cooperation and assistance of the Conference of State Court Administrators, 900 judges from limited and general jurisdiction courts in 44 states were surveyed, making this one of the largest judicial surveys completed on DWI adjudication.

STUDY FINDINGS

The monitoring of offenders to ensure compliance with court-ordered sanctions and the highly technical and scientific evidence associated with DWI cases were identified by judges as primary concerns. They also reported that overlapping legal issues and the unprecedented growth in DWI legislation has made an already complicated system even more complex. In order of priority, judges nationwide identified the following problems:

1. Sentence monitoring;
2. Evidentiary issues;
3. Caseload;
4. Motions and continuances;
5. Failure to appear;
6. Records;
7. Sentencing disparity;
8. Mandatory minimum sentences; and
9. Juries.

In the remaining sections of this article, we present a detailed look at these top nine problems in terms of their magnitude, scope, consequences, and solutions.

Study findings indicate that many repeat offenders routinely fail to comply with the terms and conditions of their sentence, either in whole or in part.

1. Sentence Monitoring

The public often assumes that once a judge bangs the gavel and imposes a sentence it is the end of the story—the offender complies with the terms and conditions of his or her sentence. However, judges report that noncompliance is common. Some of the participating judges estimate that, in their jurisdictions, 40% of offenders never even report to the probation office—meaning that some of the terms and conditions of sentences never even begin. This phenomenon, however, should not be surprising considering that monitoring is a complex, demanding, and under-resourced task undertaken by multiple agencies.

Generally, several agencies share the responsibility for monitoring offender compliance—probation officers, various treatment and service providers, prosecutors, and courts. Probation officers are usually responsible for day-to-day physical monitoring of offenders, except in lower courts, where probation services are frequently nonexistent. Although probation practices vary from state to state, probation generally includes direct contact with offenders as well as gathering information from related agencies and service providers. In some states, officers regularly summarize this information, forwarding it to the appropriate judge for review and action. In other states, officers only produce reports after violations have occurred. In jurisdictions without probation services, judges are often required to ensure compliance.

In every jurisdiction, irrespective of its particular approach, judges possess the ultimate authority to ensure compliance. However, the inability to verify whether an offender completed his or her sentence makes it difficult for judges to effectively use their authority. Almost half of judges (48%) considered the lack of resources as a significant factor contributing to this problem. Other factors include heavy caseloads (43%), the lack of communication (31%), and inconsistent or delayed reporting (23%).

Study findings indicate that many repeat offenders routinely fail to comply with the terms and conditions of their sentence, either in whole or in part. Participating judges estimated that nationally approximately one-third of repeat offenders are returned to court for failure to comply with sanctions. Although this gives little indication of how often noncompliance by offenders is undetected, other findings suggest this

5. Press Release, U.S. Department of Transportation, DOT Releases Preliminary Estimates of 2001 Highway Fatalities (April 22, 2002).

Judges also indicated strong support for the expansion of problem-solving courts dealing with DWI issues.

behavior may be quite prevalent. For example, in Washington, judges ranked the monitoring of offenders as a relatively small concern. There, judges believed they were better able to identify noncompliant offenders—estimating that 45% of these offenders were returned to court. This suggests that noncompliance may be more prevalent in some jurisdictions than is currently estimated by judges, given the lower percentage nationally for offenders returned to court for noncompliance.

The inadequate monitoring of sentences has considerable consequences. Despite the development of sentences and strategies that are truly effective, these sanctions will not achieve their intended goal of changing offender behavior if offenders can successfully avoid participation and their non-compliance goes undetected. Furthermore, past experience with the justice system makes offenders savvy. They quickly learn that programs can be avoided without detection and this means that public safety is not protected as offenders continue to drink and drive with no substantial change in offending behavior.

A series of practical recommendations have been identified by judges to improve the monitoring of repeat offenders. Judges agree that the flow of information to judges needs to be streamlined and centralized through probation and parole officers so that monitoring by diverse agencies is synthesized and coordinated, and opportunities to file "petitions to revoke" are not overlooked. Depending on the jurisdiction, various agencies involved in the monitoring process (*e.g.*, treatment providers) may currently report directly and independently to the court, compounding the paperwork problem. Consequently, judges may have to review several reports from various agencies about one offender, complicating the monitoring process. Judges agree that forwarding this information to probation and summarizing it in a single report would facilitate the monitoring process. Also, relatively small changes to the reporting process, such as "flagging" reports of noncompliance, would enable judges to quickly identify cases requiring attention and action.

Consistent and frequent contact with offenders and better communication among the professionals involved (*e.g.*, judges, probation officers, and treatment providers) can significantly improve its effectiveness. Timely decision making and subsequent notification are essential to ensure that responsibilities are fulfilled. Judges acknowledge that this will require a concerted effort and immense cooperation from all agencies and will be difficult to accomplish under current caseloads and resource constraints. However, the benefits that will accrue make it an endeavor worth pursuing.

Judges also indicated strong support for the expansion of problem-solving courts dealing with DWI issues. Judges acknowledge these specialized courts increase opportunities for close supervision and offender accountability by streamlining the reporting process and centralizing the reporting effort into a single management information system with frequent progress reports to the judge. Despite some concerns that have been raised with regard to diverting resources from traditional courts to support specialized caseloads, and the potential conflict with constitutional principles,[6] there is strong belief in the efficacy of these courts.[7]

2. Evidentiary Issues

Judges expressed assorted concerns regarding the quality and quantity of evidence that is gathered and presented in DWI cases. Previous reports clearly illustrate the complexity of this multifaceted issue, particularly regarding the statutory requirements governing investigations and the subsequent collection of evidence.[8] Evidence that is not properly collected, documented, or presented in court significantly reduces the effectiveness of DWI adjudication.

It is imperative that police officers adhere to proper procedures and statutory requirements when evidence is collected and documented. Errors or omissions compromise the value of the evidence and can effectively limit what judges may consider at trial. Unfortunately, due to the dynamic nature of the arrest environment, a lack of training, and complicated statutory requirements, errors are not uncommon in DWI arrests. The presentation of evidence is also critical and judges report that inexperienced prosecutors may often overlook key evidence because of their unfamiliarity with DWI prosecutions and defense tactics. As evidence of this, more than one-third of judges believe that prosecutors do not have the same knowledge and expertise about DWI and related evidentiary issues as many defense attorneys, particularly those in private practice.

Regardless of the expertise of attorneys and potential failings at other phases of the system, judges must adhere to strict rules of evidence and procedure when adjudicating these cases, which limits their decision making to the consideration of specific facts. Judges may be obliged to dismiss charges in cases with evidentiary problems. They estimated that, nationwide, one in six repeat-offender cases is dismissed for these reasons. Evidentiary problems may also result in judges accepting "inequitable" plea agreements, excluding evidence or attributing it a lesser weight, or imposing a reduced sentence.

Judges are also concerned about the ability of defendants to refuse the evidentiary BAC test. These refusals impede the col-

6. *See* Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationalism, and Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous,* 29 FORDHAM URBAN L.J. 2063 (2002).
7. *See generally* Ralph K. Jones & John H. Lacey, *State of Knowledge of Alcohol-Impaired Driving: Research on Repeat DWI Offenders* (2000), *available at* http://www.nhtsa.dot.gov/people/injury/research/pub/dwioffend.pdf; Ann L. Keith, *Specialized and Problem-Solving Courts Trend in 2002: DUI Courts* (2002), *available at* http://www.ncsconline.org/WC/Publications/KIS_SePro_Trends02DUI_Pub.pdf; Judge Jeff Tauber, *DUI/Drug Courts: Defining a National Strategy* (1999), *available at* http://www.ndci.org/dui.pdf.
8. Simpson & Robertson, *supra* note 2; Robertson & Simpson, *supra* note 3.

lection of important evidence and can result in offenders avoiding a conviction in many instances. It has been established that BAC evidence is frequently the most compelling evidence and is often the only direct evidence of impairment.[9] Without this critical evidence, convictions are much more difficult to obtain because much of the other evidence is subjective in nature and open to opposing interpretations. Some judges view refusal as a direct violation of the implied consent laws and believe that permitting defendants to refuse only serves to further encourage this behavior, which compromises the safety of the driving public.

Judges have also expressed reservations about their ability to evaluate important evidence and make informed rulings on evidentiary motions. Many admit that their knowledge of certain scientific or technical evidence is limited. Eighty-six percent reported having insufficient knowledge about the science surrounding blood partition ratios; 75% reported having insufficient knowledge about the process of retrograde extrapolation of BACs; 65% reported having insufficient knowledge about accident reconstruction techniques; 48% reported being insufficiently knowledgeable about the accuracy of different types of BAC analysis; and 37% reported having inadequate knowledge about horizontal gaze nystagmus testing. Limited knowledge of these issues makes it more difficult for judges to evaluate adequately evidentiary motions filed by counsel or testimony provided by expert witnesses in court. However, even judges who possess considerable knowledge of these scientific issues and arguments are at a disadvantage if they rarely adjudicate DWI cases because the use and interpretation of scientific evidence is constantly evolving, which makes it difficult for them to remain current on these issues.

Furthermore, complex scientific arguments regarding the interpretation of evidence are more likely to occur in DWI cases involving serious bodily injury or death, making the consequences of insufficient knowledge even more significant. The problem can be further exacerbated by the fact that, in some states, lower court judges, particularly those presiding in municipal courts, are not attorneys. The lack of legal training may impede the ability of these judges to interpret technical and scientific evidence according to the applicable rules of evidence.

Judges proposed two key solutions to resolve the evidentiary problems identified in the adjudication process. They consistently endorsed more and continuing judicial education on DWI evidentiary issues in light of its highly technical and constantly evolving nature. DWI cases are some of the most difficult to adjudicate. Like homicides and sexual assaults, DWI cases involve complex and technical evidentiary issues. Although many specialized courses are available,[10] caseloads and resources often compromise opportunities for judicial participation.

Judges proposed two key solutions to resolve the evidentiary problems identified in the adjudication process.

A majority of judges recommend using legislation to address the persistent problem of offenders refusing an evidentiary breath test. Such legislation can ensure that vital BAC evidence is more consistently available. More than half of judges (55%) believe that criminalizing test refusal will have considerable benefits. Currently, only 11 states have taken the step to either criminalize refusals or make it a sentencing enhancement (Arkansas, California, Florida, Indiana, Minnesota, Nebraska, New Jersey, New York, Ohio, Rhode Island, Vermont), but this alternative is becoming more popular. Judges also recommend a variety of other legislative options, including increasing penalties to remove the current benefits of refusing (40%), admitting evidence of refusal in court (33%), and permitting forced blood draws (27%) when defendants refuse.

These approaches have already demonstrated success in some states. For example, in California, where officers can proceed with forced blood draws and test refusal is a sentencing enhancement, test refusal rates are less that 5%. This is less than the national refusal rate of 20%, and is substantially less than some states where refusal rates exceed 50%.[11]

As another option, judges support the reduction of the strict and burdensome statutory requirements for DWI investigations and arrests to simplify procedures so that evidence is not weakened or excluded due to technicalities. Certain features of problem-solving courts, such as highly experienced court officers, can also be valuable to address evidentiary issues since these officers are in many instances better able to evaluate and effectively adjudicate technical issues.[12]

3. Caseload

The "three-minute rule" is becoming more commonplace in courtrooms across the country, with some judges reporting that they process (through arraignments, pretrial hearings, and sentencing) as many as 200 cases a day. Three minutes is often all the time a judge may have to review a case before accepting a plea or imposing sentence. Although there are no national statistics that accurately quantify the number of DWI cases processed through the courts, it can be assumed that the large majority of the 1.4 million DWI annual arrests[13] end up in a courtroom. It is estimated that DWI cases comprise 10% of the

9. Simpson & Robertson, *supra* note 2.
10. The National Judicial College has implemented a course for new judges entitled "DUI Primer for Judges" beginning November 2003. For information see http://www.judges.org. The National Center for State Courts is also in the process of developing a DWI curriculum that can be used at the national and state levels. For information see http://www.ncsconline.org. The National Association of State Judicial Educators is currently developing a web-based learning program. For information see http://www.nasje.unm.edu.
11. Robertson & Simpson, *supra* note 3; Ralph K. Jones et al., *Implied Consent Refusal Impact*, Nat'l Highway Traffic Safety Admin. (1991).
12. Keith, *supra* note 7.
13. Federal Bureau of Investigation, *Uniform Crime Reports: Crime in the United States* (2000), *at* http://www.fbi.gov/ucr/cius_00/contents.pdf.

[J]udges have been inspired to find more creative ways to limit frivolous motions without assuming a "hard-line" approach.

criminal calendars of lower courts. In some states, percentages are as high as 40%.[14] This provides some indication of the volume of cases facing judges each year.

Caseloads are impacted not only by the total number of DWI cases, but also by the manner in which they are processed, or the amount of work involved. For example, some methods (*e.g.*, plea agreements) are more expedient and lead to resolution with minimal time and resources, whereas others (*e.g.*, jury trials) can remain on dockets for more than a year, contributing to caseload volume and creating backlogs. Cases that go to trial demand considerable time and attention, thereby reducing the judge's time to hear and process other cases. Over a fourth of judges indicated that heavy caseloads detract from the adjudication process by limiting the amount of time they have to thoroughly review cases before ruling. Despite judicial estimates that only 16% of all DWI cases result in a trial, two-thirds of judges reported that trial cases more often involve repeat offenders who have learned that system-wide problems significantly contribute to their chances for acquittal.

Insufficient time to review a case can result in inappropriate outcomes because judges may lack opportunities to review important evidence adequately and weigh it accordingly. This not only detracts from the deterrent effect of sanctioning but can also allow repeat offenders to avoid identification. Unfortunately, considerable pressure exists in most courtrooms to keep the flow of cases moving in a timely manner, and judges are often unable to review case files and records consistently to identify those hard-core offender cases that should receive greater attention. Heavy caseloads also limit opportunities for judicial education because judges are unable to get away from their heavy dockets. This in turn compounds existing evidentiary problems by making it more difficult for judges to acquire the technical expertise needed to adjudicate these cases.

Although 43% of judges agree that hiring more judges would alleviate caseload issues, most understand that this is unlikely to occur because of serious budgetary deficits. As a more realistic alternative, there is considerable support for the enhanced use of problem-solving courts and specialized DWI caseloads. Judges and prosecutors with specialized expertise facilitate more efficient and effective processing of cases and improve outcomes, despite the fact that typically more time may be spent with each offender. Judges believe these courts are better equipped to manage the volume of impaired driving cases because professionals rapidly develop familiarity with complex evidentiary issues, repeat offenders, and the use and availability of various alternative sanctions. In effect, these professionals can manage cases more efficiently than multiple judges sitting in traditional courts.

4. Motions and Continuances

Judges are accustomed to adjudicating a wide variety of motions, which are frequently supported by memoranda and other documents referencing relevant precedents. Motions have considerable implications for how a trial will proceed as well as its outcome. Not surprisingly, judges acknowledge that these motions can often be used in a "frivolous" manner both to complicate and to delay proceedings. Moreover, they are frequently used in cases involving repeat offenders or those involving serious injury or death.

Although evidentiary motions contribute to the fundamental fairness of the trial process by both balancing and limiting the evidence that may be considered, the overuse of motions can create an abuse of process by burdening opposing counsel with paperwork and placing considerable demands on a judge's time and court resources. More than one-third (34%) of judges in our survey reported that their ability to adhere to "case processing" guidelines (typically ranging from three to six months) is constrained by excessive motions. Furthermore, excessive motions increase processing delays that can ultimately result in unwarranted dismissals and acquittals, increased caseloads, and wasted resources. For this reason, it has been acknowledged that there is a need to restrict the excessive use of motions and continuances.

In response to this problem, some judges suggest strict adherence to case-processing guidelines, which limits the amount of time to resolve each case. Many judges are becoming proactive in this regard by making it clear to counsel that limited time is permitted to hear motions. They have also placed clear limits on the granting of continuances. Other judges have been inspired to find more creative ways to limit frivolous motions without assuming a "hard-line" approach. For example, Judge James Dehn of the 10th Judicial District of Minnesota has pioneered a program that requires the defendant to participate in pretrial home alcohol testing in lieu of maximum bail. Failure to test or a positive test results in the immediate arrest of the defendant. This program has proven to be an effective pretrial tool to decrease delays resulting from frivolous motions and continuances because many defendants do not stay sober while their case is pending. Independent research conducted by the Minnesota House of Representatives Research Department concluded that multiple benefits are associated with this program.[15]

5. Failure to Appear

Failing to appear for arraignment, trial, or sentencing is not uncommon for offenders seeking to avoid prosecution, conviction, or sanctioning. The prevalence of this behavior, which ranges from 10% to 30%, is often linked to the presence of surrounding borders with other states or counties. Nominal penalties and the difficulties associated with apprehending offenders once they have left the immediate jurisdiction encourage this behavior. Judges report that a lack of reciprocity exists among some neighboring jurisdictions and that war-

14. Interview with James Dehn, Judge, 10th Judicial District of Minnesota (2002).
15. Jim Cleary, *Staggered Sentencing for Repeat DWI Offenders: An Innovative Approach to Reducing Recidivism*, Minn. H.R. Research Dep't (2003), *available at* http://www.house.leg.state.mn.us/hrd/pubs/stagsent.pdf.

rants from other jurisdictions may be routinely ignored. Many district attorneys are also loath to initiate extradition proceedings for misdemeanor defendants because of competing priorities and fiscal restraints. Consequently, offenders are rarely returned to court and sanctioned for either the original DWI charge or the subsequent charge of failure to appear.

A majority of judges agree that failing to appear is more common among hard-core repeat offenders, who go to considerable lengths to avoid conviction. Savvy offenders know that police are unable to locate defendants quickly and that warrants are routinely purged from record systems in many states, allowing offenders to avoid prosecution and conviction. In addition, permanent records are rarely kept of an offender's failure to appear; therefore, there is no record of his or her propensity to fail to appear, leaving subsequent judges with no knowledge of this behavior.

More than one-third of judges (40%) strongly endorse making bond a condition of the arrest warrant issued for failure to appear. However, if constitutional considerations preclude the advance imposition of bond, at a minimum, instructions not to release the offender on recognizance should be clearly stated on the warrant to inform the arraigning judge of the offender's propensity for this behavior. One-quarter of judges recommend custody for offenders who have a predisposition for this behavior to ensure their appearance at trial. However, this is not always practicable in light of overcrowding issues that exist in many jurisdictions.[16] Yet efforts should be made to ensure custody, considering current rates of recidivism among this population.

6. Records

Current and accurate information is critical to judicial decision making. Judges rely on records in almost every stage of adjudication. Poor records impede the effectiveness of critical decisions at the pretrial, trial, and sentencing stages because judges often rely exclusively on the information contained in important records. The omission of prior convictions or sentences imposed in relation to specific charges makes it difficult for judges to determine the fairness of plea agreements. Knowledge of prior convictions is imperative to determine eligibility for diversion programs or whether elevated penalties are appropriate. Presentence reports often contain the most comprehensive information and assist the judge in identifying an appropriate sentence. However, these reports are not consistently available in many jurisdictions because of a lack of probation services.

Records—including driving and criminal history records, alcohol evaluations, and presentence reports—are maintained by different agencies, for different time periods. It has also been widely recognized that records, particularly criminal history and driver abstracts, vary in terms of the accuracy of information they contain. Inefficient access to relevant information further impedes decision making and the effective adjudication of these offenses.

Savvy offenders know that police are unable to locate defendants quickly and that warrants are routinely purged . . . .

Limited information may also result in offenders avoiding identification as a repeat offender, allowing them to avoid harsher sanctions typically imposed for repeat offenses. According to judges, repeat offenders with prior convictions in a different jurisdiction will typically plead guilty to new charges immediately in an attempt to resolve a case before their repeat offender status is discovered.

Currently, almost half of judges (44%) rely upon the National Driver Register (NDR) as an effective tool for identifying prior convictions. The information contained in this database is derived from reports forwarded from the licensing agencies of every state. However, the ability of state repositories to maintain accurate records is largely dependent on their ability to collect and enter pertinent information from multiple agencies (*e.g.*, police, courts) in real time. In some jurisdictions, it may take more than six months for arrests and convictions to be recorded. In other jurisdictions, convictions may be omitted entirely. Although the NDR database expedites the record-searching process, judges support the continued effort to improve the timeliness and quality of its information.

Judges also agree that state licensing agencies should produce standardized driver abstracts that are similar in content and structure to facilitate their review and admission in court proceedings. More than a third of the judges surveyed agreed that standardized driver abstracts are the best method to improve the utility of driving records and the sanctioning of hard-core drinking drivers.

7. Sentencing Disparity

Uniformity in sentencing is quite difficult to achieve despite the best efforts of the judiciary, particularly when an enormous number of judges are involved in the adjudication of these cases. Disparity frequently occurs because offenders possess diverse individual characteristics and judges are required to consider a wide range of aggravating and mitigating factors, including the seriousness of the offense, any injuries or fatalities, prior convictions, probation recommendations, alcohol evaluations, treatment history, social stability, and family issues.[17]

Even after accounting for these factors, however, real disparities still exist. Judges are often limited in what sanctions they can impose because of fiscal constraints. Indeed, more than 65% of judges reported that these concerns impact sentencing decisions. Furthermore, judges vary in their confidence with available sanctions, personal experience, the avail-

16. For a report on jail overcrowding see Mark A. Cunniff, *Jail Crowding: Understanding Jail Population Dynamics*, Nat'l Inst. of Corr., U.S. Dep't of Justice (2002), *available at* http://nicic.org/pubs/2002/017209.pdf.

17. Don M. Gottfredson, *Effects of Judges' Sentencing Decisions*, Nat'l Inst. of Justice (1999), *available at* http://www.ncjrs.org/pdffiles1/nij/178889.pdf.

[E]xisting research substantiates the belief that incarceration is not as effective as previously believed.

ability of sanctioning options, and the resources required to support sanction alternatives.

Regardless of the reason it occurs, disparity in sentencing can result in inappropriate sanctions and reduce the likelihood of behavior change—*i.e.*, offenders will be more likely to recidivate. More importantly, disparity often leads to "judge-shopping," where offenders seek to have their case adjudicated by a judge who is perceived to be more lenient. Defendants familiar with the system quickly learn what "standard" penalties individual judges impose in DWI cases and will attempt to mitigate their punishment to the extent possible. Nearly half (46%) of judges report that judge-shopping occurs occasionally or often.

To reduce sentencing disparity, judges need a greater familiarity with the "what works" literature that evaluates the effectiveness of various sanctioning methods. Improved access to this scientific literature will enable judges to develop a more uniform body of knowledge to draw upon when making sentencing decisions. A majority of judges (80%) agree that brief summaries containing scientific evaluations of the effectiveness of various sanctions would be advantageous in making effective sentencing decisions. This uniformity of knowledge could also lead to reductions in disparity and lower recidivism rates.

Many judges (74%) agree that the development and implementation of tiered penalties in states where they do not currently exist could reduce disparity. Tiered penalties specify a reasonable range of penalties that may be ordered, while still accommodating discretionary decision making based on individual circumstances. With a tiered system, judges will also be able to impose more appropriate penalties for repeat offenders than are currently possible in some states.

8. Mandatory Minimum Sentences

Mandatory minimum sentences stipulate the nature and level of sanctions that are to be imposed for certain offenses. Although the intention of these sentences was to bring consistency and uniformity to sentencing, judges believe that, in some instances, minimums may have had the opposite effect. There is some evidence that minimums detract from the effectiveness of sentencing when mandated sanctions are either inappropriate or inapplicable. For example, it is not unusual for some repeat offenders to be excluded from minimums because of certain policies and requirements. Moreover, loopholes in penalty legislation make them confusing to apply and judges must often resort to subjective interpretations to determine their application. Also, regardless of the decision made by the sentencing judge, there may be limited resources to carry out the sentence.

The composition and structure of mandatory minimum sentences can compromise their effectiveness in a variety of ways. The most notable example involves mandatory incarceration for brief periods. Unfortunately, many jurisdictions suffer from jail overcrowding so many offenders are never required to serve their sentences. This is just one example of the many "unfunded mandates" that judges cannot enforce. Ignition interlocks are often mandatory for repeat offenses but there may be no service provider available to install this device, making compliance impossible. Many jurisdictions report long waiting times for admission to treatment programs, and those offenders with a history of violence (due to alcohol or drugs) are often ineligible. Driving suspensions or revocations can also be circumvented in jurisdictions where "hardship" licenses are available or the lack of alternative means of transportation make noncompliance inevitable.

The legislation mandating these minimums may also be sufficiently vague to result in the inconsistent interpretation of legislative requirements, meaning that minimums may not be uniformly applied. One judge succinctly described the problem, stating, "I have no problem with mandatory minimums, but I have a hard time figuring out when they apply."[18]

Unfortunately, the provisions contained in mandatory minimum sentences are often not reflective of the current state of knowledge regarding sanction effectiveness, and do not accommodate jurisdictional considerations, the policies of respective sanctioning programs, or budgetary constraints. Perhaps of greatest concern is that a lack of resources leads to the inconsistent use of minimums and erodes the certainty of appropriate punishment. This reduces the likelihood that sanctions will produce the desired behavior change or deter recidivism. It also undermines public confidence in the system.

Judges recommend the review and enhancement of mandatory minimums to include more alternative and creative sentencing options. A more progressive attitude toward sanctioning has evolved among the judiciary and existing research substantiates the belief that incarceration is not as effective as previously believed.[19] Programs including greater supervision for persistent offenders and access to meaningful treatment are recommended by judges as well as other innovative programs that demonstrate significant reductions in recidivism.

Judges also recommend a legislative review to update and clarify existing legislation in order to promote and encourage greater consistency in the use of mandated sanctions. The vague language currently used in many statutes is of particular concern because it requires judges to rely on subjective and conflicting interpretations. Any new legislation or language revisions should be sufficiently precise to close loopholes and prevent the circumvention of penalties. Perhaps most important is the recommendation that appropriate resources be allocated to ensure that programs and facilities will be able to accommodate sentenced offenders. Mandated sanctions are meaningless if there are no facilities or service providers to deliver programs.

18. Survey Responses from Judges Attending the Minnesota Annual Judges Conference, Bloomington Marriot, Bloomington, Minnesota (Dec. 9, 1999).

19. Norval Morris & Michael Tonry, Between Prison and Probation: Intermediate Punishment in a Rational Sentencing System (1990).

9. Juries

A final issue of concern to judges involves the availability of jury trials in DWI cases. Judges report that repeat offenders are more likely to elect a jury trial, particularly in cases involving serious injury or death, because of the potential for extended incarceration. Aside from delaying a case several months (due to the time it takes to reach trial on the jury docket and impanel suitable jurors), offenders making this election also benefit from lower conviction rates insofar as DWI jury trials result in fewer convictions than jury trials involving other criminal cases—60% and 75%, respectively.

A primary concern with jury elections is that jurors are often unable to evaluate critical and scientific evidence based on legal rules and are more likely to reach inappropriate verdicts. It is the experience of many judges that juries tend to make assumptions about the evidence that are incorrect. Oftentimes, the prosecution has no recourse to correct these errors. Also, despite the dramatic change in social attitudes toward impaired driving that has been achieved in the past two decades, offenders occasionally benefit from the sympathetic mind-set of jurors.

Permitting offenders to elect jury trials, particularly for misdemeanor offenses, impedes the effectiveness of the justice system. Not only do jury elections permit offenders to avoid sanctioning, but the lack of consequences does little to deter impaired driving or change problem behavior. These trials also tend to exacerbate caseloads and waste scarce court resources.

As a solution to this problem, a majority of judges (75%) agree that evidence of test refusal should be admissible at trial in an effort to balance current inequities in the process. A limited number of judges (only 25%) believe that jurors should be made aware of prior convictions as well. The inclusion of this critical evidence would permit juries a more accurate depiction of important facts and circumstances with which to weigh evidence, and likely result in the rendering of more appropriate verdicts. Finally, it has been suggested that jury trials be eliminated as an option for lesser or misdemeanor offenses in order to streamline processing and reduce caseloads.

SUMMARY

Our series of reports clearly demonstrates how the unprecedented growth in DWI legislation in the past two decades has resulted in a complex and cumbersome system. At each phase, criminal justice professionals operate amidst a myriad of competing priorities and conflicting interests. Police officers strive to establish probable cause, whereas prosecutors must prove their cases beyond a reasonable doubt. Judges can only admit evidence that meets rigorous standards and must become experts in a wide variety of scientific areas. Despite these problems, the system does work, with an average of 1.4 million offenders being arrested annually. Much needed legislation has been drafted, implemented, and is already in place in a majority of states. Now, politicians should turn their attention to ensuring that important policies and programs achieve their intent and make the system work more efficiently and effectively. If we are to change problem behavior and protect public safety, we must ensure that guilty offenders are apprehended, prosecuted, convicted, sanctioned, and monitored.

Dedicated professionals across the country have provided the information needed to redress existing flaws in the form of practical and cost-effective recommendations. Criminal justice agencies and associations need to take action to ensure that these recommendations are carried forwarded and implemented in a meaningful fashion. Only then will we see the type of reductions in alcohol-related fatalities that occurred in the 1980s.

On a positive note, many agencies and associations are now modifying existing training programs, developing new curricula, and reexamining current policies and practices to identify ways they can collaborate to close loopholes and improve the efficiency and effectiveness of the system. A key ingredient in achieving this goal is the development of cooperative initiatives to improve communication and share information. Key stakeholders from government, criminal justice, and highway safety arenas are encouraged to become involved in the process of reviewing current practices at a state level and determining where problems exist and what improvements can be made.

Increasing efforts to raise awareness and promote educational initiatives should be a primary concern. The success of these efforts can be enhanced through greater communication and information-sharing among stakeholders. Most importantly, all of the agencies that have a vested interest in achieving reductions should participate in the review process to ensure that outcomes will produce results in the form of reductions in alcohol-related fatalities.

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