
John T. Oliver

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In 1979 the Washington Legislature amended the drunk driver statute to prescribe a minimum mandatory one-day jail sentence.\(^1\) This sanction is an inappropriate response to the existing crisis of intoxicated drivers on state roads and highways. It is unlikely that the mandatory jail term will be more than marginally effective as a deterrent to drunk driving; this sanction has not previously proven effective as a deterrent for the offense of driving while intoxicated (DWI).\(^2\) Moreover, the amended statute is likely to create substantial practical problems. By restricting the flexibility of the criminal justice system and increasing the likelihood that offenders will decide to go to trial, the mandatory jail sanction will aggravate the present problem of overloaded court dockets.\(^3\) The new provision will place an additional burden on overcrowded jail facilities.\(^4\) Further, the amended statute limits judicial discretion in sentencing, thus precluding the imposition of penalties that could be more appropriately tailored to individual offenders.\(^5\) Finally, many experts believe that a substantial proportion of DWI offenders are alcoholics,\(^6\) who need to be treated, not

\(^1\) The legislature enacted Sub. H.B. 665 which relates to various aspects of motor vehicle offenses involving alcohol and drugs. 1979 Wash. Laws, ch. 176. Sub. H.B. 665 was signed into law by the Governor on May 14, 1979. The mandatory imprisonment provisions went into effect on January 1, 1980. The relevant provisions have been codified in R.C.W. §§ 46.61.502, .504, .506, .515 (1979). See note 33 infra.

\(^2\) See notes 46–48 and 60–64 and accompanying text infra. As used in this comment, “drunk driving” is the generic term for the actions of those who drive after drinking sufficient quantities of alcohol to significantly impair their ability to drive. Driving while intoxicated (DWI) is used to denote the activity proscribed by statute, Wash. Rev. Code § 46.61.502 (1979).

\(^3\) See notes 76–84 and accompanying text infra (discussion of the anticipated problems of an increased number of contested trials and overloaded court dockets). See notes 85–92 and accompanying text infra (discussion of the expected effect on plea bargaining).

\(^4\) See notes 83–95 and accompanying text infra.

\(^5\) See notes 97–109 and accompanying text infra.

\(^6\) U.S. Dep’t of Transp., 1968 Alcohol and Highway Safety Report 1 (for the H. Comm. on Public Works, 90th Cong., 2d Sess., 1968) [hereinafter cited as Alcohol and Highway Safety Report]. The Department of Health, Education and Welfare observed that “37 percent of DWI arrestees were identified as alcoholics and 48 percent were identified as persons with serious drinking problems [based on multiple criteria].” U.S. Dep’t of Health, Educ. & Welfare, Alcohol and Health 61 (1978) [hereinafter cited as Alcohol and Health]. Some experts have gone further. “[I]n the three years in which I did many DWI examinations . . . , I could find no respondent who was definitely not an alcoholic.” C. Bridge, Alcoholicism and Driving 6 (1972). The King County Prosecutor’s Office estimates that as many as 70% of those arrested for DWI in King County are alcoholics or problem drinkers. Interview with Douglas Whalley, Senior Deputy Prosecutor, King County Prosecutor’s Office, in Seattle, Washington (Nov. 6, 1979) (notes of all interviews cited in this note are on file with Washington Law Review). See The President’s Comm’n on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness 37–39 (1967) (studies of the relationship between alcoholics and drunk driving).

As used in this note, an “alcoholic” is one “who habitually lacks self-control as to the use of alcoholic beverages . . . to the extent that his health is substantially impaired . . . or his social or
A DWI conviction provides an excellent opportunity to encourage problem drinkers to seek treatment. Yet the present statute arbitrarily requires imprisonment of such offenders rather than early, comprehensive treatment. This note critically examines the mandatory imprisonment statute and proposes a more effective solution to the drunk driver crisis.

I. THE NATURE AND SCOPE OF THE CRISIS

Alcohol is the major cause of many highway accidents and fatalities. Half of the fifty thousand deaths on the nation’s roadways each year involve drivers affected by alcohol. The total annual economic cost of alcohol-related traffic accidents exceeds five billion dollars. In 1979 in Washington, a record 1,004 highway deaths were reported. Over half of these accidents involved drivers affected by alcohol.


9. "Alcohol is the single most important factor yet identified in traffic fatalities." Id. at 117.


12. 53.5% of all drivers killed on Washington highways in 1978 had a blood alcohol content (BAC) of 0.10% or higher. Id.

Many experts believe that the alcoholic and other problem drinkers, who make up only a small minority of the driving population, are responsible for a large proportion of the overall problem. Drinking–Driver Report, supra note 9, at 1. See the studies collected in The President’s Commission on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness 38–39 (1967).
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Alcohol has a predictable, progressive, deleterious effect on essential driving skills. Continued drinking impairs integrated reasoning and judgment, then motor processes, then memory and rational behavior. The risk of a traffic accident increases geometrically as the driver's blood alcohol content (BAC) increases. Likewise, the seriousness of the resulting accident tends to increase as the BAC increases.

The problem of responding to the drunk driver phenomenon has been left largely to the criminal justice system. Apprehending, convicting, and sentencing the DWI offender depletes a large proportion of state resources.

"Five million Americans, five percent of the adult population, are alcoholics. The majority of them drive." Blinder & Komblum, supra note 7, at 24.

Even where alcoholism is not directly implicated, heavy drinkers account for a grossly disproportionate share of accidents and fatalities. "[O]ne to four percent of drivers on the road—those with blood alcohol concentrations at or above 100 mg per 100 ml (0.10% by wt)—are accounting for about 30–55 percent of all single vehicle crashes in which drivers are fatally injured." Alcohol and Highway Safety Report, supra note 6, at 13 (emphasis in original). Some studies have shown that 48 to 57% of drivers involved in fatal accidents had "very high concentrations" of alcohol in their blood. Drinking–Driver Report, supra note 9, at 1. See generally National Highway Traffic Safety Administration, Alcohol Safety Countermeasures Program 2–9 (1971) [hereinafter cited as Countermeasures Program].

13. AMA Report, supra note 9, at 27–35 (discussion of the effect of alcohol on the nervous system and on driving ability).

14. "[T]he relative probabilities of crash involvement and causation increase dramatically as the driver's BAC increases." Alcohol and Health, supra note 6, at 61–62. See Alcohol and Highway Safety Report, supra note 6, at 29. Driving skills deteriorate at even low BAC levels (less than 0.05%). As the concentration increases, the relative probability of a crash increases dramatically. "A person with a .15 percent (BAC), is 25 times more likely to have a collision than an abstainer." Countermeasures Program, supra note 12, at 3–4 (emphasis in original).

Drivers with very high BACs, of course, often avoid accidents and detection by driving extra carefully. Such circumspect drinking drivers, while not particularly dangerous in normal driving situations, are nonetheless impaired when reacting to an emergency situation. C. Bridge, supra note 6, at 40–41.

15. Alcohol and Highway Safety Report, supra note 6, at 31–32, 54–57. See AMA Report, supra note 9, at 35–49 (studies of the effect of alcohol on driving ability).

Drivers arrested for DWI are likely to be seriously intoxicated. "Among drivers arrested for drunken driving, blood alcohol concentrations at and in excess of [0.15%] are the rule, and substantially over half exceed [0.20%]. Concentrations in this remarkably high range are extremely rare among drivers using the roads." Alcohol and Highway Safety Report, supra note 6, at 17. But see Little, Statistical Relationship Between Presumptive Blood Alcohol Concentrations Limits of Illegality and Measured BAC's of Drunk Drivers, 63 J. Crim. L.C. & P.S. 278, 281, 283–84 (1972) (indicating somewhat lower proportions).

A level of 0.20% is twice the generally recognized statutory presumption for intoxication. Traffic Laws Annotated, supra note 7, at 607–08.

To reach a BAC of even 0.10% would require a substantial consumption of alcohol. Although blood alcohol levels depend upon various factors, including body weight, amount and type of food in the stomach, and time between drinking and testing, the primary factor is the amount of alcohol ingested. For example, to attain a BAC of 0.10% two hours after eating, a 160-pound person would have to imbibe seven one-ounce drinks of 86-proof whiskey in one hour. Countermeasures Program, supra note 12, at 4.

criminal justice resources. The total cost to state and local government exceeds five hundred million dollars each year. Arrests for DWI, moreover, have increased dramatically over the past decade. In many jurisdictions, DWI prosecutions are more numerous than prosecutions for any other offense.

The Department of Transportation described this situation as a "crisis demanding a prompt and effective remedy." Prodded by similar demands of the state electorate, the Washington State Legislature was in a position last year to take strong action to confront this problem.

II. LEGISLATIVE RESPONSE

Given the magnitude of the drinking-driver crisis, the Washington Legislature reacted with restraint. No increase was made in the schedule of fines, which had been in effect since 1965. There was no significant change in the provisions governing suspension and revocation of the offender's driver's license. Many of the minimum terms of imprisonment were reduced: the minimum jail term was reduced from five days to one day for a first offense, and from thirty days to seven days for a subsequent offense within five years. In only one major respect were the penalties made more severe. In response to the tendency of judges to refrain from sending DWI offenders to jail, especially for a first offense, the legislature specified that "the jail sentence shall not be suspended or de-

17. See Drinking-Driver Report, supra note 9, at 38-40.
20. "Driving under the influence" is now the single most frequent criminal offense (second only to "all other offenses") reported in the FBI Uniform Crime Report. Id. at 186. An estimated 1,268,700 arrests for DWI were made in the U.S. in 1978. Id.
23. See note 1 supra.
25. It remains "not less than thirty days" for a first conviction, "not less than sixty days" for a second conviction within five years and "revoked" for a third conviction within five years. Wash. Rev. Code § 46.61.515(5) (1979).
26. Wash. Rev. Code §§ 46.61.515(1), (2) (1979). These provisions are encouraging, as they demonstrate the legislature’s concern with both the overcrowding and adverse effects of jail. See notes 76–84 and 93–95 and accompanying text infra.
ferred.”” This directive is modified by the proviso: “unless the judge finds that the imposition of the jail sentence will pose a risk to the defendant’s physical or mental well-being.””

There were two other notable changes. First, the amended statute adopts a per se test for intoxication based on a BAC of 0.10 percent.29 Second, the amended statute provides for mandatory alcohol-abuse education.30 Upon a first conviction for DWI, the offender is obligated to “complete a course at an [approved] alcohol information school.”31 For a subsequent offense within five years, the statute directs the judge to sentence the offender to an additional jail term of not more than 180 days, to be suspended unconditionally upon non-repetition, alcohol treatment, or other appropriate conditions.32

The legislative history behind the statute is scanty.33 There has been a judicially observed policy in Yakima, Washington to impose a minimum mandatory two-day jail term for DWI offenses.34 The proponents of the legislation sought to extend that policy statewide,35 even though the deterrent results in Yakima had proven inconclusive. The Yakima experi-

28. Id. For a first conviction, a minimum of one day must be served. For each subsequent conviction within five years, the entire sentence must be served. All mandatory sentences are subject to the “physical and mental well-being” exception. Id. at §§ 46.61.515(1), (2).
29. R.C.W. §§ 46.61.502, .504, .506 (1979) were amended so that any driver with a BAC of 0.10% or higher would be found guilty of DWI per se.
31. WASH. REV. CODE § 46.61.515(1) (1979). The course content is not defined. It must be “approved by the department of social and health services.”” Id.
32. Id. at § 46.61.515(2).
33. The original H.B. 665 was introduced by State Representatives Chandler, Thompson, Rosbach, Heck, Teutsch, Sherman, Haley, Newhouse, and Fuller on Jan. 29, 1979. See WASHINGTON LEGISLATIVE DIGEST AND HISTORY OF BILLS 693–94 (46th Sess. 1979). Interviews of those involved, in addition to a file maintained by the Washington State Patrol (on file with Washington Law Review), were the only way to determine the rationale behind the enactment.
35. Id.
ence, moreover, has demonstrated that mandatory sentencing has adverse
effects on the criminal justice machinery, especially in terms of over-
loaded court dockets.36

Sponsors of the legislation articulated three goals in enacting this stat-
ute. First, the statute should provide a strong deterrent sanction for those
prone to drink and drive; second, it should operate to increase the like-
lihood of convicting drinking drivers; and third, it should provide for iden-
tification and treatment of alcoholic drivers.37

The first goal was to be attained by implementing the mandatory jail
scheme, described by its proponents as a "positive and meaningful deter-
rent."38 Although little evidence was available to support the argument
that such a sanction would be effective, the prevailing attitude among
legislators was that it was "well worth a try." 39 The legislature sought to
effect the second goal by redefining the offense of DWI to consist of driv-
ing with a BAC of 0.10 percent or higher. This per se measure was ap-
pealing both because of the ease with which blood alcohol levels are mea-
sured and because of the close connection between BAC, intoxication,
and impaired driving.40 Such a law has been enacted in twelve other
states41 and many foreign jurisdictions42 and is part of the Uniform Vehi-

36. Interviews with Staff Attorneys at the Yakima County Prosecutor's Office (Dec. 14, 1979).
Although there is no statistical evidence available, those senior officials in charge of the
DWI-control program believe there is a positive trend developing in alcohol-related accidents and
deaths in Yakima. They believe that the stiff two-day mandatory jail sentence, combined with a great
emphasis on changing public attitudes (radio advertising, billboards, posters, a speaker program, and
other publicity), has significantly reduced the drunk driver problem in Yakima County. At the same
time, they admit there has been a "noticeable increase" in contested trials, jury trials, and appeals.
Interview with Michael W. Lynch and Jeffrey Sullivan, Deputy Prosecutors, Yakima County Prose-
cutor's Office (Feb. 13, 1980). Mr. Sullivan testified during the legislature's hearings on the bill,
relating both the positive and negative experiences with the sanction. Id.

37. See Letter from Chandler, supra note 22, at 1-2; interview with State Representative Delores

38. Letter from Captain G. B. Tellevik, Criminal Justice Services, Washington State Patrol, to

39. Interview with Teutsch, supra note 37; Letter from Chandler, supra note 22, at 2.

40. See note 29 supra and notes 41-43 infra.

41. Per se intoxication statutes have been enacted in the following states: Delaware, Del. Code
Ann. tit. 11, § 3505 (1979); Florida, Fla. Stat. Ann. § 322.262(2)(c) (West 1975); Minnesota,
§ 262-A:63 (1977); New York, N.Y. Veh. & Traf. Law § 1192(2) (McKinney 1976); North Caro-
Dakota, S.D. Compiled Laws Ann. § 32-23-1(1) (1976); Utah, Utah Code Ann. § 41-6-44.2 (Supp.
fic Law 176 (1974); E. Kearney, Differences Among Traffic Laws in the United States 11 (reprint of
7 Traffic Laws Commentary No. 3 (1978)) (discussions of the per se intoxication laws).

42. E.g., West Germany, § 24a StVGB (1974). See H. Pressendanz, Strafgesetzbuch 810–14
(1975).
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cle Code. To achieve the third goal, the treatment of alcoholic drivers, the legislature modified the process by which the drinking driver is referred to alcohol abuse training after the first offense and encouraged to obtain treatment following subsequent offenses. There is reason to believe, however, that these new DWI provisions, especially mandatory jail terms, will not prove more than marginally effective in achieving these goals.

III. ANTICIPATED DETERRENT RESULTS

Deterring specified antisocial conduct is the fundamental purpose of any criminal statute. Unless the prospect of serving a mandatory, albeit brief, jail term acts to alter the antisocial conduct of the potential DWI—one who drives after heavy drinking—no advantage will accrue from the existence of the deterrent sanction. For the deterrent scheme to be effective, then, the potential drunk driver must be both aware of the existence of the sanction and susceptible to its deterrent effect.

Mandatory jail sentences have rarely been used in the drinking-driver context. The most fundamental reason, undoubtedly, is that such schemes simply have not worked. In the few jurisdictions where en-

See also Ross, The Scandinavian Myth: The Effectiveness of Drinking-and-Driving Legislation in Sweden and Norway, 4 J. LEGAL STUDIES 285, 286–90 (1975) (discussion of the "world's first" per se drinking and driving laws enacted in Scandinavia in the 1930's and 40's).

43. UNIFORM VEHICLE CODE § 11–902(a). See TRAFFIC LAWS ANNOTATED, supra note 7, at 607–08 (discussion of per se laws).

44. R.C.W. §§ 46.61.515(1) and (2) provide that every first-time offender attend an approved "alcohol information school" while second offenders may participate in a more intensive treatment program in lieu of 180-day maximum period of imprisonment. WASH. REV. CODE §§ 46.61.515(1), (2) (1979). These are clearly steps in the right direction. This note maintains, however, that diagnosis and treatment should commence after the first offense. See Little, Challenges to Humanitarian Legal Approaches for Eliminating the Hazards of Drunk Alcoholic Drivers, 4 GA. L. REV. 251 (1970).

On the other hand, some experts believe that a first DWI conviction is a relatively poor indicator of alcoholism compared to a second conviction. Interview with Robert F. Franzen, Head Alcohol Abuse Counselor, Burlington Northern Railroad, in Bellevue, Washington (Jan. 16, 1980). But a first conviction for DWI does indicate that a primary diagnosis is in order. Id.


46. Prior to Washington, North Carolina was the only state to have a mandatory jail sentence for DWI. N.C. GEN. STAT. § 20–179(a) (1978). (First offenders, for example, were subject to a fine and a minimum thirty-day sentence.) The Idaho Supreme Court struck down a similar statute as an unconstitutional limitation on judicial discretion in State v. McCoy, 94 Idaho 236, 486 P.2d 247 (1971) (Idaho law mandated a minimum ten-day sentence). 1970 Idaho Sess. Laws, ch. 264, § 2, at 701. See note 48 infra (discussion of mandatory jail sentences for DWI).

47. See note 48 infra. "[P]assing laws is not an effective approach if public opinion does not support the law... [One study revealed that] the harshness of the penalty per se did not appear to be associated with the effectiveness of the sentence." Waller, supra note 8, at 131–32. See Note, Deterring the Drinking Driver: Treatment vs. Punishment, 7 U.C.L.A.-ALASKA L. REV. 244, 251–53
acted, mandatory jail sentences have reduced neither the number of deaths nor the destruction caused by drunk drivers.\textsuperscript{48} There are at least three other reasons which might explain why such sanctions have not often been enacted. First, the trial judge can impose a tailored sentence more likely to deter the particular offender than a blanket sanction mandated by the legislature.\textsuperscript{49} Second, heavy drinkers do not always weigh the consequences of their actions intelligently, especially after drinking.\textsuperscript{50} Third, there are other deterrent measures available which are more effective and less counterproductive.\textsuperscript{51}

In amending the drunk driver statute, the Washington Legislature was concerned with the unwillingness of trial judges to impose jail sentences on DWI offenders.\textsuperscript{52} The proponents argued that if the decision to impose this penalty was removed from the province of the judiciary and made mandatory statewide, the deterrent effect of the sanction would increase.\textsuperscript{53} Once aware of the serious consequences, the drinker would think twice before driving.

\begin{thebibliography}{99}
\item 48. Sweden, Denmark, Finland, and Norway have had the combination of the per se conviction and mandatory prison sentences for over four decades. Ross, \textit{supra} note 42, at 288–90. The mandatory minimum sentence in Norway is 21 days. \textit{id.} at 288. Yet despite the widespread belief that such an approach works, the "Scandinavian Myth," there is no evidence that these laws have had any substantial effect on the drinking-driver problem. \textit{id.} at 285–86.
\item 50. For example, even though most DWI convictions today result in suspension of the offender’s driver’s license, with a concomitant jail sentence if the offender is subsequently caught driving, a significant proportion of problem drinkers continue to drive while their licenses are suspended. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, \textit{supra} note 21, at II–73. See \textit{Alcohol and Highway Safety Report}, \textit{supra} note 6, at 56.
\item 51. See notes 105–115 and accompanying text infra.
\item 52. Interview with Teutsch, \textit{supra} note 37; interview with Whalley, \textit{supra} note 6; see interview with District Court Judge Filis Otto, Pierce County District Court, in Seattle (Oct. 19, 1979).
\item 53. Letter from Chandler, \textit{supra} note 22; interview with Teutsch, \textit{supra} note 37; letter from Tellevik, \textit{supra} note 38.
\end{thebibliography}
In spite of its enticing simplicity, this argument is inadequate. It overlooks the key role judges play in punishing criminal activity while trying to rehabilitate the offender. Judges are generally as concerned with the DWI crisis as are legislators. But judges are also, through training and experience, more aware than the legislature of the limitations and disadvantages of all types of criminal sanctions. Judges know that jail sentences, mandatory or not, are not necessarily effective deterrents.

The argument also overlooks an inherent advantage judges have over legislators. Judges may hold the threat of a jail sentence over the offender to encourage—in effect, to coerce—him or her to take remedial action to correct the underlying problem. By the time the DWI offender stands before the judge, primary deterrence has failed. The judge is then properly concerned with dealing with the person's individual problems and seeking to deter his or her future criminal conduct. Flexibility is essential to mold a just and effective response. By handcuffing the judiciary to a minimum sentence scheme, the legislature has largely negated this important advantage.

A mandatory sanction, moreover, is likely to deter only the responsible drinker who does not pose a serious problem, rather than the problem drinker or alcoholic. Ingestion of enough alcohol to adversely affect

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58. "According to the highly respected [Chief Judge] David Bazelon, . . . the very essence of the ideal of justice is to permit judges to apply individualized justice to offenders." Crime and Punishment in America 182 (J. Buncher ed. 1978)(footnote omitted).

59. One disturbing aspect of the amended DWI statute is its reflection of the legislature’s disenchantment with the way judges are performing the critical task of sentencing. It may even presage a view that the legislature considers itself better able to mandate sentences for other offenses. Concern has been expressed regarding the arbitrary sentencing procedures mandated in other legislation. Interview with District Court Judge Otto, supra note 52. See Wash. Rev. Code §§ 13.40.010–.400 (1979)(Juvenile Justice Act of 1977).


60. "[C]hronic alcoholics lack the requisite control over their drinking practices to be deterred by threats that presume a capacity for rational deliberation concerning alternative courses of action." Little, supra note 44, at 252. See C. Bridge, supra note 6, at 71–72. See also note 48 supra.

On the other hand, a low level of alcohol consumption typical of the non-DWI drinker will neither raise his BAC to a significantly high level nor markedly affect his ability to drive. Countermeasures
one's ability to drive will adversely affect judgment as well. Beyond the point of intoxication, the drinker loses much of his or her ability to rationally deliberate alternate courses of action. At that point, the existence of potential criminal sanctions is unlikely to compel a decision not to drive while drunk, particularly where the perceived possibility of getting caught is low. That the threat of a mandatory jail sentence is unlikely to affect the choice is evidenced by the large number of DWI offenders, estimated to be as high as eighty percent, who continue to drive after having their licenses suspended or revoked, despite the threat of heavy jail sentences for such a violation.

A more effective deterrent measure, missing from the present legislation, is increased police capacity to detect drunk drivers on the highway. Increased police presence during late night hours, particularly in areas of high incidence of DWI offenses, is effective because the perceived possibility of arrest is markedly increased. Any such measure, of course, requires legislative action to provide the substantial additional funds and manpower needed.

The amended DWI statute also fails to provide for a means to inform the potential DWI offender of the new sanction or to educate the public of the dangers of drinking and driving. Imposing a strong punishment...
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without advising citizens that it will be used will achieve little. Before any sanction will be effective, it is essential that public attitudes about drinking and driving be dramatically changed. Yet the legislature has not earmarked funds for publicizing either the nature of the problem or the mandatory sanction, apparently relying upon the mass media and word of mouth to inform the public of the new legislative approach to the crisis.

IV. PRACTICAL PROBLEMS WITH MANDATORY JAIL TERMS

Traditionally, most convictions for traffic offenses involving alcohol have not resulted in jail terms. Fines, loss of driving privileges, legal costs, higher insurance premiums, and other direct and indirect sanctions have been adopted instead. Where jail sentences were prescribed for the crime of DWI or the lesser included offense of being in "actual physical control of a vehicle while intoxicated," the sentences were usually suspended. Even those twice convicted of DWI have often escaped imprisonment.

68. Social acceptance of the drinking-driver is a major obstacle to successful deterrence. "[T]he public's indifferent attitude or lack of commitment to the drinking-driver problem is an impediment to its solution. Most people believe that drinking and driving is unacceptable only when it results in an accident . . . [T]he public looks upon convicted drinking-drivers as otherwise law abiding citizens who unfortunately got caught. . . ." DRINKING-DRIVER REPORT, supra note 9, at 36.

69. To be successful in reducing the number of drunk drivers, there must be a marked change in attitude on the part of the drinking public. Id. at 35-37. In Yakima, any success in deterrence has been primarily due to the emphasis given to publicizing the problem of drunk drivers as a major threat to the community. Interview with Lynch and Sullivan, supra note 36.

In contrast to the extensive radio advertising, billboards, and other publicity used in Yakima, word of mouth is the primary means by which the present statutory sanction is expected to be publicized. The Senior Deputy Prosecutor in King County expects little public awareness of the mandatory sentence for a period of six months to a year, until drinking-drivers hear of a neighbor or friend going to jail for DWI. Interview with Whalley, supra note 6. Newspapers can also be expected to give notice of the new sanction, at least to those persons who read the editorial pages. E.g., Seattle Times, Jan. 4, 1980, at A12, col. 1.


71. "‘Actual physical control’ of a vehicle implies the present physical ability of one in a position to control it . . .” E. FISHER & R. REEDER, VEHICLE TRAFFIC LAW 174 (1974). For example, one found asleep in his or her car, with head and arms resting on the steering wheel, while the motor is running is in actual physical control of the vehicle. Id.

Prior to the 1979 amendments to the drunk driver statute, DWI and "actual physical control" were treated differently with regard to sentencing. Under the present statute, they are identical in all respects. See WASH. REV. CODE §§ 46.61.502, .504, .506, .515 (1979).

72. Interview with St. Clair, supra note 34.

73. Id. Interview with Whalley, supra note 6.
Under the statute as now amended, judges have only limited discretion to suspend or defer the jail sentence. Because of the per se test for intoxication and the mandatory minimum sentence, judges will in most cases have no choice but to convict and sentence offenders to jail. Although there are ways to circumvent the statute, the mandatory jail provision will undoubtedly result in practical problems as DWI offenders seek to avoid jail.

A. Increased Number of Contested Trials and the Resultant Overloading of Criminal Court Dockets

The first and most serious problem associated with the mandatory sentence is the potential overloading of the criminal justice system. The mandatory jail sanction is likely to lead to highly congested court dockets.

74. To suspend or defer the sentence, there must be a finding that the jail sentence will risk the defendant's "physical or mental well-being." Wash. Rev. Code §§ 46.61.515(1), (2) (1979). See note 75 infra (problems in obtaining such a finding).

75. There are three predictable ways in which a DWI offender may avoid imprisonment, in addition to plea bargaining and winning on the merits. First, persons stopped for DWI may not be cited for that offense. The police officer, aware of the mandatory jail sanction, might cite someone with a BAC of 0.08%, 0.10%, or even higher for a lesser offense or none at all. Whether it is wise to replace judicial discretion with the discretion of the officer in the field is questionable. See J. Little, supra note 16, at 191. This has not been a significant problem in the first two months of the operation of the sanction. Some police officers, in fact, are now more willing to cite offenders for DWI, because of the ease of proof under the per se intoxication rule. Interview with Douglas Whalley, Senior Deputy Prosecutor, King County Prosecutor's Office, in Seattle, Washington (Feb. 11, 1980).

The second method of avoidance is built into the statute itself. Since few would argue that jail improves one's "physical or mental well-being," Wash. Rev. Code §§ 46.61.515(1), (2) (1979), one can easily visualize DWI defense specialists retaining a doctor or psychiatrist to examine each defendant and prepare the necessary medical evaluation. In counties where the overcrowding of court dockets or jails are particular problems, or where judges are not disposed to sentence offenders to jail, such practices may become commonplace, and findings of harm to physical or mental well-being routinely made. Interview with St. Clair, supra note 34. Insofar as the jail term would be replaced with a sanction more appropriate to the circumstances of the case (e.g., treatment), the effect of the loophole is salutary. But establishing a fact predicate for such a judicial finding is likely to be expensive, and therefore not readily available to everyone. One district court judge indicated that she will demand in-court expert testimony before reaching such a finding. Interview with Otto, supra note 52.

To require such expert testimony will dramatically increase costs to a defendant intent on avoiding time in jail.

A third possibility is the "deferred prosecution" statute. Wash. Rev. Code §§ 10.05.010-.130 (1979). Under the terms of this statute, a prosecution may be deferred while the defendant is referred to an alcohol treatment facility. Id. at § 10.05.030. If treatment is reported to be successful, charges may be dropped. Id. at § 10.05.120. Note that it is the prosecution that is being deferred, not the sentencing. The latter is proscribed by the amended statute. Wash. Rev. Code § 46.61.515(1) (1979). This procedure is likely to become popular to avoid imprisonment for DWI. To the extent that the offender has a bona fide alcohol problem and undergoes effective treatment under court supervision, the goals of identification and treatment of problem drinkers are achieved. If past practice under the statute is any guide, however, the procedural device will be used to circumvent the jail sanction with
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because of an increased number of contested trials, de novo jury trials, and appeals.\textsuperscript{76}

This result is largely due to the increased amount at stake to the defendant. Until fairly recently, the penalty for first-offense drunk driving was likely to be a moderate fine.\textsuperscript{77} Faced with minimal sanctions, DWI offenders usually appeared \emph{pro se}, admitted their guilt, and accepted the sentence imposed by the judge.\textsuperscript{78} Given the present mandatory jail sentence in Washington, many more DWI defendants can be expected to join the trend toward hiring counsel, defending on the merits, and appealing convictions.\textsuperscript{79} It is not difficult to predict the grave effect this trend will have on the day-to-day operations of the criminal courts.\textsuperscript{80} Most county prosecutors view this threat of overcrowded court dockets with concern. Criminal courts are already overflowing,\textsuperscript{81} and DWI cases often constitute the largest category of cases filed.\textsuperscript{82} A much higher number of contested trial proceedings may overwhelm the system.\textsuperscript{83}

\textbf{B. Effects on Plea Bargaining}

Before the amended drunk driver statute took effect, prosecutors in DWI cases often accepted uncontested guilty pleas to lesser included offenses. The 1979 amendments hamper this salutary\textsuperscript{84} practice in two

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\item no assurances of long-term rehabilitation. The primary defect is the lack of an effective, systematic follow-up to insure that the treatment program has been completed. Interview with Franzen, \textit{supra} note 44.
\item See note 79 infra. See also Walling, \textit{supra} note 8, at 131 (regarding the tendency of DWI offenders to opt for a de novo jury trial where the judge has imposed a jail sentence).
\item 1 R. ERWIN, \textbf{DEFENSE OF DRUNK DRIVING CASES} iii (3d ed. 1977).
\item \textit{Id.} at iv.
\item The King County Prosecutor's Office, for example, foresees a great increase in the number of not-guilty pleas, jury trials, de novo superior court trials, and appeals. Interview with Whalley, \textit{supra} note 6. Such has been the experience in Yakima, Washington, where two days of jail has been a mandatory sanction for the past two years. See notes 34-36 \textit{supra}. A "noticeable increase" has been experienced in each of those categories, creating a significant strain on the system. Interview with Lynch and Sullivan, \textit{supra} note 36.
\item See note 88 and accompanying text infra.
\item \textit{DRINKING--DRIVER REPORT}, \textit{supra} note 9, at 40.
\item See note 20 \textit{supra}.
\item There is at present a backlog of over 12,000 criminal cases statewide. At the end of 1979, there were 425 new DWI-related cases each month. Depending on the county, delays in obtaining trial dates vary from three months to over a year. At present about 25% of the DWI cases decided at trial are appealed. Presentation by St. Clair, Defense Attorney, Mount Vernon, Washington, at the Washington Trial Lawyer Ass'n Seminar, in Seattle, Washington (Oct. 19, 1979). The incidence of appeals of DWI convictions will undoubtedly increase, largely because of the mandatory imprisonment sanction. \textit{Id.}
\item The United States Supreme Court has held that plea bargaining—the granting of concessions to those willing to plead guilty—is consistent with the Constitution as well as the administrative and
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ways. First, the prospect of a large number of DWI trials, at least without substantial relief in additional funding and personnel, may force the prosecutor into an unacceptably weak plea bargaining position. Second, under the prior DWI statute, "actual physical control" was the lesser included offense to which defendants typically could plead in exchange for a lesser sentence. Under the new law, however, DWI and actual physical control have identical sentences. Assuming that provident guilty pleas are a boon to the efficient and fair operation of the criminal justice system, they should be encouraged. But unless there is a quid pro quo available, defense attorneys will advise their clients to submit their cause to the trier of fact, placing the burden of proof on the prosecutor and, consequently, tying up the courts.

Under the present DWI statute, there is little that the prosecutor can offer a defendant to elicit a guilty plea. Faced with an overloaded court docket, overcrowded jails, and an understaffed prosecutor's office, many prosecutors or judges may be inclined to drop the more serious DWI charge and substitute a less serious one, such as negligent driving. Such a measure circumvents and promotes disrespect for the law and frustrates the intent of the legislature. Moreover, it may fail to identify the rehabilitative goals of the criminal justice system. Brady v. United States, 397 U.S. 742, 751–753 (1970).

[The state may] extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

Id. at 753. Washington has a detailed rule governing plea bargaining agreements. WASH. CR. R. 4.2.

1 See WASH. REV. CODE § 46.61.504 (1979). See also note 71 supra (discussion of "actual physical control").


86. See note 84 supra.

87. Historically, about 90% of all criminal defendants plead guilty, a statistical premise upon which our present court system is based. The consequences to our system of even a small reduction of guilty pleas, for example, from 90% to 80%, would be tremendous. It would double the demand for prosecutorial and judicial manpower and facilities. Address by Chief Justice Warren Burger, American Bar Ass'n Annual Convention (Aug. 10, 1970), reported in N.Y. Times, Aug. 11, 1970. at 24, col. 4.


89. Interview with St. Clair, supra note 34. See WASH. REV. CODE § 46.61.525 (1979) (negligent driving statute).

90. There are numerous discretionary devices—ranging from acquittal of the guilty to reduction of the charge—by which the judge, if that is his purpose, can frustrate the effect of a mandatory sentence. The only alternative in many instances is imposition of a sentence which under the circumstances of the case is much too harsh. Neither emasculating the statute nor acquiescing in an injustice is to be commended. Both effectively and understandably breed disrespect for the system.

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AMERICAN BAR ASS'N PROJECT, supra note 49, at 55–56.
offender as a problem drinker and defeat efforts to encourage alcoholic drivers to participate in effective treatment programs.\(^\text{92}\)

**C. Aggravation of Overcrowded County Jail Facilities**

By creating a large number of new inmates, mandatory jail sentences will place an additional strain on an already overcrowded jail system.\(^\text{93}\) The legislature recognized this potential problem and called for a study of the "impact" on county jail facilities in the amended statute.\(^\text{94}\) But not only is there a problem in the absolute number of offenders to be maintained, there is also a problem with the integration of DWI offenders with those in jail on more serious charges. Many fear that the DWI offender will be subjected to verbal and physical abuse by other inmates while in jail, even if he or she only receives a one-day sentence.\(^\text{95}\) Segregation of DWI inmates from those jailed for other offenses would solve this problem, but would greatly increase the administrative burden and might require construction of new facilities.\(^\text{96}\)

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\(^{92}\) The proposal recommended in this comment would provide the prosecutor, judge, and defense counsel with the necessary bargaining flexibility within the ambit of the DWI statute. See notes 116-118 and accompanying text infra.

\(^{93}\) Overcrowding in county jails is at present intolerable, partially as a result of jailing DWI offenders. Eastside Journal-American (published in Bellevue, Washington), Apr. 8, 1980, at A2, col. 5. More than 25 suicide attempts occurred in the King County jail in the first three months of 1980. Id. Although that jail has a capacity of 650, the jail population recently exceeded 1100 persons. Seattle Times, Apr. 10, 1980, at A12, col. 1. King County Executive John Spellman called for moving all DWI offenders out of the county jail to help relieve grossly overcrowded conditions. Id.

Some county prosecutors have adopted a practice of renting space in hotels or motels in which to "imprison" those sentenced to jail under this statute, contending that there is insufficient space in local facilities. Interview with St. Clair, supra note 34. It is estimated that King County will require a complete new facility to cope with the dual problems of increasing numbers and segregation of regular and DWI inmates. Interview with Whalley, supra note 6.

\(^{94}\) The legislature was well aware of the potential adverse effects of the new sentencing provisions on "county jail conditions and bed space, the cost impact of the provisions upon local and state governments, and the existence of alternative facilities to which individuals sentenced under this section may be committed." Wash. Rev. Code § 46.61.515(7) (1979). However, no additional funds were provided beyond the $10,000 allocated to conduct the impact study itself. 1979 Wash. Laws, ch. 176, §9, at 1486.

\(^{95}\) The legislature's concern with the problems necessitating the segregation of inmates, including the likelihood of verbal and physical abuse, was explained by State Representative Delores Teutsch. She suggested that this problem may require a complete reevaluation of the statute. Interview with Teutsch, supra note 37.

\(^{96}\) See Seattle Times, Apr. 10, 1980, at A12, col. 1 (costs of moving DWI offenders from jail to alternative facilities).
D. Limitation on Judicial Discretion

Mandatory minimum jail sentences restrict the judge’s discretion to fit the punishment to the offender and the offense. Judges naturally resent any statute which restricts their discretion to modify sentences. The judiciary guards the “inherent” common law power of judges to suspend sentences.97 In some states, the concern has reached constitutional dimensions.98 While the constitutional question is beyond the scope of this note, the practical argument which lies behind it is relevant.

Traditionally, the judge has had power to exercise discretion in sentencing an offender.99 This power was appropriately granted because of the judge’s knowledge and experience of human nature and the efficacy of various sanctions, and the unique position he or she has to absorb all facts involving the defendant and the prohibited act.100 The sentencing proceedings reflected societal confidence in the judge’s determination of how best to punish and rehabilitate the offender.101

Judges realize that jail sentences carry with them various disadvantages to all concerned. To the government, jail is expensive: the annual cost of facilities, personnel, and administration is significant.102 Society is burdened by the removal of a potentially productive member for the duration of the sentence. But the greatest disadvantage is that incarceration is repugnant, and often psychologically harmful, to the individual imprisoned.103 Therefore, unless the deterrent or rehabilitative effects outweigh the disadvantages to government, society, and the individual, judges are loath to sentence DWI offenders to jail.104 Retention of judicial discretion maintains the advantages of allowing judges to engage in this balancing process.

97. The inherent power of the court to suspend or defer sentences is discussed in Annot., 73 A.L.R.3d 474 (1976). See note 58 supra (discussion of individualized justice).
98. Annot., supra note 97, at 503–04. Compare State v. McCoy, 94 Idaho 236, 486 P.2d 247 (1971) (statute requiring mandatory imprisonment for DWI held to be unconstitutional infringement on the common law right of judges to suspend sentences) with In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979) (similar DWI statute held to be within the constitutional power of the legislature). See note 46 supra (citing statutes).
99. “The single most pervasive principle arising from the totality of rules on sentencing is that which affords wide latitude to the discretion of the trial judge.” A. Campbell, Law of Sentencing 222 (1978).
100. See J. Burns & J. Mattina, Sentencing 1–5 (1978); Ringold, supra note 54, at 638–41 (role of the trial judge in sentencing and factors to be considered).
104. American Bar Ass'n Comm. on the Traffic Court Program, Standards for Traffic Justice
Mandatory imprisonment is not the answer to the present crisis. It has not proven effective as a deterrent to drunk driving.\textsuperscript{10} It brings with it various countervailing considerations.\textsuperscript{106} On balance, the disadvantages of the sanction outweigh its marginal deterrent effect. With these deficiencies in mind, the following alternative solution is proposed.

V. RECOMMENDED ALTERNATIVE

Any appropriate statutory response to the complex criminal phenomenon of drunk driving must contain provisions which satisfy the three goals identified by the legislature in enacting the present statute.\textsuperscript{107} First, there must be a spectrum of strong deterrent sanctions to impose on those who break the law. Second, there must be a flexible, workable structure which increases the likelihood of convicting those guilty of drunk driving, with the least possible adverse effect on the criminal justice system. Third, the statute must provide for early diagnosis and treatment of the problem drinker.

A. Proposed Deterrent Sanctions

The primary emphasis of any criminal statute must be on deterring the defined antisocial conduct.\textsuperscript{108} A wide range of stiff and innovative sanctions must be available for application by trial judges to punish those who commit the offense.\textsuperscript{109} The present statute focuses on mandatory jail sentences. But while imprisonment should be retained as one of the available

\textsuperscript{8--10 (1975). See Sentencing, supra note 100, at 5 (discussion of factors to be weighed in sentencing); notes 54--55 supra.  
105. See notes 46--48 and 60--64 and accompanying text supra.  
106. See notes 75--104 and accompanying text supra (practical problems with mandatory jail terms).  
107. See note 37 and accompanying text supra.  
108. See note 45 supra.  
109. These sanctions should include the traditional ones available under the present statute: jail terms, stiff fines, and license suspensions and revocations. The judge should be granted great latitude to impose a tailored set of these sanctions. The National Committee on Uniform Traffic Laws recommends "harsh penalties" to deter persons who drive when they are drunk. The Committee maintains that such penalties can be effective in deterring non-alcoholics. Traffic Laws Annotated, supra note 7, at 621, 645. There is a significant group of persons who drive drunk even though they are not problem drinkers, particularly teenagers just learning how to drive and just starting to drink. Countermeasures Program, supra note 12, at 5. While it is improper to punish for the status of alcoholic or the disease of alcoholism, it is appropriate to punish affirmative, criminal actions committed while under the influence of alcohol. Powell v. Texas, 392 U.S. 514, 532 (1968).  
The judge should, in addition, have other less conventional sanctions available. There are a number of innovative approaches which could be taken, including public service work requirements, advising the press of persons arrested for or convicted of drunk driving, and alternate work programs in lieu of imprisonment. See Hornaday, supra note 17. See generally Little, supra note 44.}
sanctions, even for a first offense, it should be imposed only when the trial judge deems it appropriate under all the circumstances.\textsuperscript{110}

Additional deterrence should be achieved by markedly increasing the fine schedule.\textsuperscript{111} This is especially appropriate because fines for DWI have not been increased since 1965.\textsuperscript{112} The statute should also permit the judge to limit the offender's driving privileges short of outright suspension or revocation, something not possible under the present statute.\textsuperscript{113} To achieve the deterrent advantages of uniformity without placing judges in a legislative straightjacket, the legislature should direct the preparation of nonbinding, statewide sentencing guidelines.\textsuperscript{114} Finally, the legislature should provide the funding necessary for law enforcement agencies to substantially increase their capacity to detect drunk drivers on the highway, and to inform the public of the nature of the DWI problem and the stiff sanctions which may be imposed upon offenders.\textsuperscript{115}

\textbf{B. Proposed Statutory Structure}

This proposal would retain the substantive crime of DWI, including the per se intoxication test. To facilitate plea negotiations, however, some modifications of the present statutory scheme are required.

\textsuperscript{110} See note 104 supra.

\textsuperscript{111} Higher fines could contribute significantly to deterrence, especially if widely publicized and strictly enforced. West Germany, for example, has very high fines for DWI (up to $1700 for each offense) in addition to loss of driving privileges. H. Preisendanz, Strafgesetzbuch 810-11 (1975). In Sweden, the fines run as high as 10\% of the offender's annual income. Waller, supra note 8, at 134-35. In both countries, the fines are proportional to the income of the defendant, so as to avoid a regressive effect. The result has proven to be effective deterrence, largely because the stiff sanctions are well-known and consistently imposed. Id. A complete fine schedule for all fifty states is contained in Traffic Laws Annotated, supra note 7, at 622-23.

\textsuperscript{112} See note 24 supra.

\textsuperscript{113} Placing restrictions on the driving privilege is one of the most effective, and certainly the most appropriate, sanctions for drunk driving. Waller, supra note 7, at 132-33. Since most drunk driving occurs between 9:00 PM and 6:00 AM, Alcohol and Highway Safety Report, supra note 6, at 35-41, a limitation on driving during those hours would be nearly as effective as a complete ban. Waller, supra note 7 at 132-33. Judges should approve job-related driving permits readily. Id. at 132. Since complete suspension or revocation of one's driving privilege can lead to serious economic and social consequences, including loss of employment, such tailored sanctions would be least likely to interfere with the offender's employment and family life. Id. at 132-33. The continuity and stability of job and family promotes treatment and rehabilitation. See Homaday, supra note 18, at 237-38. See generally A. Smith & L. Berlin, Treating the Criminal Offender 262-70 (1974).

\textsuperscript{114} J. Little, supra note 16, at 184-85. The legislature should also provide for regular judicial training in sentencing alternatives. \textit{Id.} See Comment, Sentencing Study, 52 Wash. L. Rev. 103. 117-19 (1976) (sentencing guidelines as an alternative to unfettered judicial discretion).

Since judicial discretion is an essential part of our criminal justice system, the ultimate power for setting individual sentences must remain in the hands of the judiciary. See notes 97-104 and accompanying text supra.

\textsuperscript{115} See notes 66-69 and accompanying text supra.

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The legislature should define two separate categories of DWI—"Reckless DWI" and "Simple DWI." Both categories should proscribe driving or being in actual physical control of a motor vehicle while intoxicated. "Reckless DWI" would have significantly more stringent penalty provisions than "Simple DWI," the lesser included offense. By citing drinking drivers whenever appropriate for the more serious offense, prosecutors, judges, and defense attorneys would have the necessary flexibility to negotiate for guilty pleas within the ambit of the general DWI statute. This would reduce the problem of overloaded court dockets by reducing the number of contested trials and appeals. It would, moreover, involve the defendant in the sentencing process. The court and the offender would be able to focus on future rehabilitation rather than on past mistakes.

C. Treatment for the Problem Drinker

The criminal justice system is in a unique position to identify the need for and supervise treatment of the problem drinker. To achieve the dual advantages of making highways less dangerous and attaining long term rehabilitation of a significant number of problem drinkers, two major changes are needed in the present statutory framework. First, provision must be made for a diagnostic screening process upon conviction for the

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116. The definitions of the offenses would be the same as DWI under the present statute, including the per se intoxication provision, except that "Reckless DWI" would require the additional element of "wilful or wanton disregard for the safety of persons or property." See WASH. REV. CODE § 46.61.500 (1979).

117. The police officer would cite the offender for the more serious offense, as long as all the elements of the offense have been committed.

118. See Blinder & Kornblum, supra note 7, at 26 (necessity of flexible response). See generally, C. BRIDGE, supra note 6 (uniqueness of problem drinkers).

119. See sources cited in notes 126 and 130, 131 infra.

The statutory structure should also include the per se test for intoxication, defined as a BAC of 0.10% or higher. This would increase the likelihood of conviction by providing an objective, reasonably scientific standard enabling the government to more easily meet its burden of proof without sacrificing fairness. This per se test, of course, is an integral part of the recent statutory change. WASH. REV. CODE §§ 46.61.502(1), .504(1), .506 (1979). See generally Comment, Breath Alcohol Analysis: Can it Withstand Modern Scientific Scrutiny?, 5 N. Ky. L. REV. 207 (1978) and sources cited therein. See notes 41–43 and accompanying text supra.

first DWI offense. Second, there must be a comprehensive, effective, properly funded program for those in need of treatment for problem drinking.121

The statute currently provides for alcohol information school for first offenders.122 Only after the DWI offender has committed a subsequent violation within a five-year period is the judge granted additional authority to suspend a 180-day jail sentence conditioned upon alcohol treatment or other appropriate condition.123

The recommended proposal would permit the judge to order a diagnostic examination after the first offense to determine whether the DWI offender would benefit from treatment for alcohol or drug abuse. This proposal is similar to the method outlined in the Uniform Vehicle Code124 and now in effect in some jurisdictions.125 The judge would then have discretion to sentence offenders to sanctions appropriate for the offense, which might include substantial fines, jail terms, and restrictions on driving. For a diagnosed problem drinker in need of treatment, much of the fine and all of the jail term would normally be suspended contingent upon successful completion of a rigorous alcohol treatment program.126

121. COUNTERMEASURES PROGRAM, supra note 12, at 10.
123. WASH. REV. CODE § 46.61.515(2) (1979).
124. The relevant portion of the Uniform Vehicle Code provides:
(a) Before sentencing any person convicted for a first offense of violating § 11-902 [Driving While Under Influence of Alcohol or Drugs], the court may, and upon a second or subsequent conviction . . . shall, conduct or order an appropriate examination . . . to determine whether the person needs or would benefit from treatment for alcohol or drug abuse.
(b) After the examination, the court may impose penalties specified in this act or, upon a hearing and determination that the person is an habitual user of alcohol or drugs, the court may order supervised treatment on an outpatient basis, or upon additional determinations that the person constitutes a danger to himself or others . . . , the court may order him committed for treatment at a facility or institution approved by the (State department of health).

UNIFORM VEHICLE CODE § 11-902.2, reprinted in TRAFFIC LAWS ANNOTATED, supra note 7, at 643-44.

This section was added to the Uniform Vehicle Code in 1971 to authorize treatment of alcoholics and drug addicts as an alternative to traditional penalties, which have not adequately controlled drunk drivers. . . . [E]nactment of UVC § 11-902.2 is recommended to complement the Uniform Alcoholism and Intoxication Treatment Act and to provide an important component for a complete drunk driver countermeasures program.

TRAFFIC LAWS ANNOTATED, supra note 7, at 644-45.


126. Any such treatment program might include total abstinence from alcohol (detoxification), limited use of alcohol-reactive drugs such as disulfiram (Antabuse) or citrated calcium carbimide (Tamposil), and systematic involvement with Alcoholics Anonymous, followed up with periodic
Mandatory Jail Sentences for DWI

An effective treatment program must be developed. The present Uniform Alcoholism and Intoxication Treatment Act, by an express exception, does not deal with drunk drivers. Nor does the present DWI statute take sufficient account of the need for early identification and treatment of the problem drinker. Vital state interests require that this gap be filled by a comprehensive treatment program for the problem drinking driver. By integrating and properly funding the state policies dealing with drunk drivers and alcoholics to the extent they coincide, the goals of both programs would be enhanced.##

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1. **Uniform Alcoholism and Intoxication Treatment Act** § 19(c).
2. **WASH. REV. CODE** § 70.96A.190(3) (1979).
3. The legislature committed itself to treating alcoholism and addiction as illnesses rather than crimes by adopting the Uniform Alcoholism and Intoxication Treatment Act in 1972. **WASH. REV. CODE** §§ 70.96A.010–.930 (1979). Enactment of complementary provisions is recommended to provide a vital component to a comprehensive drunk driver countermeasures program. See note 124 supra. Traditional sanctions should remain fully applicable to drunk drivers not diagnosed as problem drinkers. See **TRAFFIC LAWS ANNOTATED**, supra note 7, at 643–45. See generally **COUNTERMEASURES PROGRAM**, supra note 12, at 7–8.

Washington State does not, of course, have unlimited resources for treating problem drinkers. See **STATE OF WASHINGTON DEP'T OF SOCIAL & HEALTH SERVICES**, **WASHINGTON STATE ALCOHOLISM PLAN** i–iv, 37–42, 89–92 (1977) (expenditures, revenues, and resources of state alcoholism programs). There is also no guarantee of success in any given case. But convicted DWI offenders are an appropriate group to screen for participation in a comprehensive treatment program for several reasons. First, they represent, by their drunk driving, an immediate and substantial danger to society. Second, they have, by their criminal conviction, involved themselves with the coercive power of the government: Why not employ rehabilitative treatment rather than imprisonment? Third, by retaining control over the offender in the form of suspended sentences and court supervision, the state can provide the motivation the problem drinker may need. “Since [problem drinkers] do not voluntarily seek treatment as a group, some outside incentive or coercion seems necessary.” J. Little, supra note 16, at 37 (footnote omitted). See also Little, supra note 44. Finally, since referrals of DWI offenders by judges will be spread out over time, there is not likely to be an unmanageable deluge of persons requiring treatment. See **WASHINGTON STATE ALCOHOLISM PLAN**, supra, at 74–76 (estimation of the need for alcoholism services in the state).
A comprehensive program of this kind is likely to prove effective in meeting a significant part of the problem. For although the problem drinker may not be readily deterrable from driving while drunk, he is often treatable, especially if properly motivated. Because proper motivation is so essential to success, no one should be forced to take part in the recommended treatment program. But the alternative sanctions, even for a first offense, should be sufficiently onerous to strongly encourage all those diagnosed as alcohol or drug abusers to successfully complete the treatment program.

130. Views on the treatability of alcoholic patients vary. Relevant factors include the lifestyle of the alcoholic, the stage of the disease, and the alcoholic's motivation to succeed. From the scanty information available, it would appear that the [recovery] prognosis for chronic psychotic and Skid Row alcoholics [categories 1 and 2] is poor, and that less than 10 to 12 percent can obtain substantial aid from ordinary therapy. For the average alcoholic [category 3—usually married and holding down a job, who account for over 70% of alcoholics], the outlook is far more optimistic.


131. F. GRAD, A. GOLDBERG, & B. SHAPIRO, ALCOHOLISM AND THE LAW 51–54 (1971). One expert in the field of alcohol treatment has argued that the fatal consequences of the disease can be impressed on any alcoholic with the will to live. Properly motivated, "alcoholism is . . . 100 percent treatable." Seminar Presentation by Purvis, supra note 120. See note 126 supra. See also COUNTERMEASURES PROGRAM, supra note 12, at 7–8.

132. If there are grounds for invoking the involuntary commitment provisions of the Uniform Alcoholism and Intoxication Treatment Act, WASH. REV. CODE § 70.96A.140 (1979), or its equivalent in a comprehensive DWI statute, see note 124 supra, enforced treatment may be appropriate. Any such involuntary commitment would require that the alcoholic be "incapacitated" or be "likely to inflict physical harm on another." WASH. REV. CODE § 70.96A.140(1) (1979). Grounds for commitment must be "established by clear, cogent, and convincing proof." Id. at § 70.96A.140(4).

133. See TRAFFIC LAWS ANNOTATED, supra note 7, at 641, 644–45 (discussion of alternative sanctions). Although not the focus of this comment, similar treatment should be made available to drug abusers who are cited for DWI.
VI. CONCLUSION

The amended drunk driver statute is an inadequate response to the drunk driver crisis. The mandatory jail sanction is not likely to be more than marginally effective as a deterrent to the proscribed conduct. Further, it will result in a number of significant practical problems.

The problem of drunk driving is sufficiently complex and serious to require an effective, comprehensive response to one of its major underlying causes—unidentified problem drinkers in need of treatment. The recommended approach combines a set of stringent sanctions with a treatment program for appropriate application by the trial judge. The advantages stemming from such a frontal attack on the drunk driver crisis should give the legislature cause to try again.

John T. Oliver