What Works, What Doesn't: Revising DUI Laws in West Virginia to Reduce Recidivism and Save Lives

Jennifer L. Tampoya
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Law Enforcement and Corrections Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol111/iss1/14
I. INTRODUCTION ................................................................................... 283
A. Five Lost ................................................................................ 283
B. The Scourge of DUI ............................................................... 285

II. THE PREVAILING APPROACH TO DUI IN WEST VIRGINIA:
WHAT DOESN'T WORK ........................................................................ 287
A. Retributive Justice .................................................................. 287
B. Home Confinement as an Alternative to Traditional Incarceration .............................................. 289
C. Prima Facie DUI - BAC of 0.08 g/dl or Greater ................... 293
D. Vehicle Ignition Interlock in Conjunction with Driver's License Revocation ....................................... 294
E. Safety and “Treatment” Program ............................................. 299

III. INNOVATIVE APPROACHES TO DUI: WHAT WORKS ................... 301
A. DUI Courts ............................................................................ 303
B. Staggered Sentencing ............................................................. 305

IV. CONCLUSION ....................................................................................... 308

I. INTRODUCTION

A. Five Lost

This Note was spurred by a tragedy. On the evening of July 8, 2007, a drunk driver killed three children and two adults and injured several of their family members along Interstate 68 in Monongalia County, West Virginia.  

---


2 The newspaper report of the accident scene described the carnage:

Sheriff’s investigators from Monongalia County said Mr. Stone’s pickup hit the rear of a car, which crossed the median and crashed head-on into an SUV in the oncoming lanes.

In the ghostly glare of spotlights at the crash scene, rescuers worked frantically to try to save the victims. Five died along the road – an adult and a child from the car and an adult and two children from the SUV. Six riders were sent
Before devastating two families with these deaths, Brian Stone had already racked up a long history as a drunk driver.\footnote{For the seven years prior to this accident, the Author was Brian Stone’s neighbor. The Author remembers Mr. Stone as a friendly, hard-working man who often helped his parents with their yard and who enjoyed fixing cars. It was common knowledge, though, that Mr. Stone had a longstanding problem with alcohol and that he had been convicted of multiple DUI offenses.}

Since 1998, Mr. Stone had been arrested nine times for drunk driving.\footnote{Fuoco, supra note 1 at B-5.} A Monongalia County resident, Mr. Stone had been convicted of driving under the influence of alcohol ("DUI") seven times, five times in West Virginia and two times in neighboring Pennsylvania.\footnote{Id.} Mr. Stone was not even licensed to drive at the time of this deadly crash, his West Virginia license having been revoked for ten years after a May 2004 conviction for a second offense DUI.\footnote{Eric Bowen, Stone Held Licenses in Two States: Despite String of DUIs; Accident Victims ID’d, THE DOMINION POST, July 12, 2007, at 1-A. At the time of this deadly 2007 West Virginia crash, Mr. Stone was driving with a fraudulently-obtained Pennsylvania driver’s license in a vehicle registered to a rented post office box in Pennsylvania. Press Release, Attorney General Corbett Announces Insurance Fraud Charges Against West Virginia Man Accused of Falsely Obtaining a Pennsylvania Driver’s License, PENN. OFF. ATT’Y GEN., Dec. 13, 2007, available at http://www.attorneygeneral.gov/press.aspx?id=3206.}

The question begs to be answered: if West Virginia authorities clearly recognized that Mr. Stone was a public "menace" prior to this deadly accident, why and how did West Virginia fail to prevent him from recidivating and killing five innocent people on this busy interstate highway?\footnote{Death in Headlights, supra note 2 (stating "the system should have plucked [him] out of circulation before he exacted such a grievous toll.").}

This Note will discuss how such losses could be better prevented in West Virginia by adjusting the State’s approach to DUI offenses. Recognizing that, as long as people drive vehicles and drink alcohol, there will remain the problem that some people will drive drunk, this Note will make no attempt to comprehensively address every aspect of drunk driving education, prevention, and adjudication. Alternatively, this Note will suggest ways in which West Virginia could undertake an important public policy shift, moving West Virginia away from simply adjudicating DUI offenses, and instead focusing on ways of decreasing DUI recidivism in the State in order to prevent the repeat offenses which tend to be the most deadly. Part I will describe the extent of the DUI problem, nationwide and in West Virginia. Using Monongalia County, West Virginia, as a case study, Part II will then describe important aspects of West Virginia’s current approach to DUI and will suggest ways of strengthening perceived weaknesses. Part II will also address how the newest West Virginia leg-
islation continues to fall short of the goal of reducing DUI recidivism to save lives. Finally, Part III will examine the most promising DUI approaches used in other jurisdictions, and how, if embraced by West Virginia, these approaches may effect a real reduction in DUI recidivism and related deaths in this State.

B. The Scourge of DUI

Alcohol-related traffic fatalities constitute a staggering 41% of annual traffic fatalities in the United States. In 2006, 17,602 people were killed in alcohol-related traffic accidents nationwide. Children are at a high risk of being killed by a drunk driver. Twenty-one percent of the children ages fourteen and younger who were killed in vehicle accidents in 2003 were killed in alcohol-related vehicle accidents.

A majority of these alcohol-related traffic fatalities are caused by drivers with a blood alcohol concentration ("BAC") of 0.08 g/dl or greater. Of these, young drivers between the ages of twenty-one and twenty-four are over-represented. Males outnumber females in this group by nearly two to one.

Repeat drunk drivers or drivers with high BAC have come to be known as "hard core drinking drivers." Hard core drinking drivers are much more likely to be involved in serious or fatal car accidents.

There is evidence that drivers with prior DWIs are more likely to be involved in severe traffic crashes than are other drivers. Older studies provide some clues on the extent of this over-involvement. For example, a study by Fell (1991) using data from the U.S. Department of Justice found that, in 1988, 3.3% of all licensed drivers had been arrested for DWI in the past three years, but that data from NHTSA's Fatality Analysis Reporting System (FARS) in-

---


9 Id.

10 Id.

11 Id. at 1.

12 Id. at 11.

13 Id. at 4 (reporting that 32% of drivers ages twenty-one to twenty-four who were involved in fatal accidents had a BAC of 0.08 g/dl or greater).

14 Id. at 5.

15 NAT'L TRANSP. SAFETY BD., SAFETY REPORT: ACTIONS TO REDUCE FATALITIES, INJURIES, AND CRASHES INVOLVING THE HARD CORE DRINKING DRIVER vii (2000) [hereinafter ACTIONS TO REDUCE FATALITIES] (defining the hard core drinking driver as one who is either a repeat drunk driver or a driver with BAC of 0.15 g/dl or greater).

16 One federal government study places hard core drinking drivers at the scene of a fatal, alcohol-related traffic accident almost twice as often: There is evidence that drivers with prior DWIs are more likely to be involved in severe traffic crashes than are other drivers. Older studies provide some clues on the extent of this over-involvement. For example, a study by Fell (1991) using data from the U.S. Department of Justice found that, in 1988, 3.3% of all licensed drivers had been arrested for DWI in the past three years, but that data from NHTSA's Fatality Analysis Reporting System (FARS) in-
BAC levels at or above 0.08 g/dl who are involved in fatal accidents are nine times more likely to have had one or more prior DUI convictions.\(^7\) Across the nation in 2003, "[t]he most frequently recorded BAC level among drinking drivers involved in fatal crashes was 0.14 g/dl," nearly twice the legal limit in most jurisdictions.\(^8\)

West Virginia is close on the heels of these alarming national figures.\(^9\) In 2006, West Virginia’s 161 alcohol-related fatalities constituted 39% of all traffic fatalities in the State.\(^10\) Of the drivers in these fatal accidents, 31% had BAC levels exceeding 0.08 g/dl.\(^11\) Data shows that 20% of West Virginia’s traffic fatalities involve drivers with very high BAC levels of 0.16 g/dl or greater,\(^12\) a figure that even exceeds the national average\(^13\) and clarifies that hard core drinking drivers\(^14\) cause most of this State’s alcohol-related fatalities. Despite West Virginia’s recent efforts to counter this deadly toll,\(^15\) the State’s alco-


17 \text{TRAFFIC SAFETY FACTS 2003, supra note 10, at 5.}
18 \text{Id. For example, Brian Stone’s BAC was 0.23 g/dl, nearly three times West Virginia’s legal limit, when he killed five and injured seven in July 2007. Bowen, supra note 1, at A-1.}
19 \text{TRAFFIC SAFETY FACTS 2006, supra note 8, at 3.}
20 \text{Id.}
21 \text{Id.}
22 \text{TRAFFIC SAFETY FACTS 2003, supra note 10, at 8.}
23 \text{Id.}
24 \text{Hard core drinking drivers are defined as those who are either repeat offenders or those who drive with a BAC of 0.15 g/dl or greater. Actions to Reduce Fatalities, supra note 15, at vii.}
25 The West Virginia Division of Motor Vehicles summarized the State’s efforts as follows:

\[\text{In September 2004 the Governor’s Highway Safety Program and its law enforcement partners kicked off a year-long sustained enforcement campaign which has extended through 2006. The plan was to commit to 1,526 high visibility enforcement events and 780 public education events along with training, media events and age specific activities. High visibility enforcement events include sobriety checkpoints, low manpower checkpoints, saturation patrols and point of sales enforcement directed patrols. This renewed emphasis on sustained enforcement coupled with the recently passed .08 BAC Bill should help reduce the number of alcohol-related fatalities, injuries and crashes down.}\]

hol-related traffic fatalities actually climbed in 2006, the most recent year for which data is now available.26

II. THE PREVAILING APPROACH TO DUI IN WEST VIRGINIA: WHAT DOESN'T WORK

A. Retributive Justice

Drunk drivers are unlike the prototypical criminal: one who, for wrongful gain or mere enjoyment of violence, lies in wait to do evil to his fellow citizens. Because drunk drivers do not usually fit this description, proponents of "therapeutic justice" seek to address the underlying causes behind drunk drivers' DUI offenses, not only to prevent DUI recidivism, but also to restore the offenders to productive places in society.27 The therapeutic approach stands in direct opposition to a "retributive justice" approach, one which simply doles out earned punishment.28

In adjudicating DUI's, West Virginia currently follows a retributive justice approach. In short, West Virginia's current approach to DUI is "mandatory confinement."29 The Supreme Court of Appeals of West Virginia, however, has indicated that a meaningful "rehabilitative" approach to DUI, including probation, is preferred to the current retributive justice approach.30 Without apparent regard for the Court's suggestion, and despite the fact that "drunk driving fits very uneasily" into the criminal law,31 the West Virginia Legislature has held firm to a traditional retributive justice approach, ensuring DUI offenders serve jail and prison sentences without the option of probation.32 Included in the State's criminal code,33 DUI provisions impose increasing jail or prison terms

26 TRAFFIC SAFETY FACTS 2006, supra note 8, at 3.
27 See Teresa W. Carns, Michael G. Hotchkin & Elaine M. Andrews, Therapeutic Justice in Alaska's Courts, 19 ALASKA L. REV. 1, 5 (2002) ("Therapeutic justice emphasizes the need to address the root causes of a specific offender’s criminality, to treat the offender to remove the problems and to return the offender to the community as a responsible citizen.").
29 Interview with Russell M. Clawges, Jr., Judge, 17th Judicial Dist., State of W. Va., in Morgantown, W. Va. (Nov. 21, 2007) [hereinafter Clawges Interview]. Judge Clawges has served as Circuit Court Judge in Monongalia County, West Virginia, for ten years. Id.
30 See State ex rel. Simpkins, 172 W.Va. at 318 (holding that probation serves a rehabilitative function and may be used in place of a mandatory sentence) (superseded by statute); Kent Grenewalt, Punishment, in CASES AND MATERIALS ON CRIMINAL LAW, 31-32 (Joshua Dressler ed., 3d ed. 2003) (reprinted from 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282, 1282-84 (Joshua Dressler ed., 2d ed. 2002)).
32 Grenewalt, supra note 30, at 31-32.
and fines depending upon the severity of the offense and upon the offender's proclivity to reoffend. Statutory periods of minimum confinement currently range from twenty-four hours in jail for a misdemeanor first offense DUI to two years in state prison for a felony DUI causing death.

In 2008, West Virginia legislators attempted to stiffen the State's DUI penalties. While Senate Bill 535 passed, House Bill 2928 failed. Introduced in January 2008, House Bill 2928 struck at the very heart of the worst-case DUI scenario, seeking to more severely punish the drunk driver who kills by "increas[ing] the penalty for driving under the influence causing death . . . to five to fifteen years in prison." Introduced in February 2008 and passed in March 2008, Senate Bill 535 made a variety of changes to the Code. Notably, Senate

---

34 Fines are often not imposed, however. Interview with Dimas Reyes, Ass’t Prosecuting Att’y, 17th Judicial Dist., State of W. Va., in Morgantown, W. Va. (Oct. 30, 2007) (hereinafter Reyes Interview) (citing many offenders' inability to pay fines as the likely reason). Assistant Prosecutor Reyes has served Monongalia County for eleven years. Id. Prior to that, Mr. Reyes worked as a police officer for over twenty years. Id.

35 Id. For a detailed discussion of the retributivist model, see Adam Lamparello, Note, Reaching Across Legal Boundaries: How Mediation Can Help the Criminal Law in Adjudicating "Crimes of Addiction," 16 OHIO ST. J. ON DISP. RESOL. 335, 337 (2001) (arguing that alternative dispute resolution (ADR) encompasses drug courts, and that ADR should be implemented for more effective adjudication of crimes of addiction) "The retributivist model views punishment as a moral good per se, as an effective response to the morally deprived actions of the individual." Id.

36 Misdemeanor first offense DUI causing injury carries a minimum twenty-four hour jail sentence. W. VA. CODE § 17C-5-2(c)(2) (2006). Effective June 6, 2008, misdemeanor first offense DUI without injury no longer carries a minimum twenty-four hour jail sentence. S.B. 535, 78th Leg., Reg. Sess. (W. Va. 2008) (amending W. VA. CODE § 17C-5-2). In order to save West Virginia counties the cost of re-incarcerating misdemeanor convicts in regional jails to serve the remainder of their previously mandatory twenty-four hour jail sentence, the West Virginia Legislature opted to give "credit for any period of actual confinement [served] after the misdemeanor DUI arrest." Id. While Senate Bill 535 will save West Virginia's counties (and taxpayers) money by reducing the misdemeanor drunk driver's sentence to time served, this change is not about reducing DUI recidivism. See infra Section II, B notes 45-46 and accompanying text.


40 H.B. 2928, 78th Leg., Reg. Sess. (W. Va. 2008) (proposing amendments to W. VA. CODE § 17C-5-2). The Bill incorrectly cited the current penalty as one to ten years in prison; the current penalty is, in fact, two to ten years in prison. W. VA. CODE § 17C-5-2 (2006).

41 Senate Bill 535 stated purposes are to:

reduce[e] the criminal and administrative sanctions for driving a vehicle with a lawfully suspended or revoked license; provid[e] for concurrent sentences for
Bill 535 brought West Virginia in line with federal standards and the majority of other states by creating an "aggravated" DUI offense for drivers with BAC of 0.15 g/dl and by imposing harsher penalties and administrative sanctions on these offenders.  

B. Home Confinement as an Alternative to Traditional Incarceration

In 1990, the West Virginia Legislature enacted the Home Detention Act, making home confinement an available alternative to traditional incarceration. Although home confinement may have initially been used for DUI offenders in response to a shortage of prison space, West Virginia's subsequent reliance upon home confinement for DUI offenders may be more about simple economics. Home confinement saves money. Income tax revenue is not driving a vehicle with a lawfully suspended or revoked license; remove[e] the mandatory 24-hour incarceration for first offense driving under the influence; creat[e] an aggravated offense of driving with a blood alcohol concentration of fifteen hundredths of one percent or more, by weight; permit[] participation in the Motor Vehicle Alcohol Test and Lock Program for first offense driving under the influence; ... mandate participation in the Motor Vehicle Alcohol Test and Lock Program for first offense driving under the influence; provid[e] enhanced administrative sanctions for persons operating a motor vehicle with a blood alcohol concentration of fifteen hundredths of one percent or more, by weight; making certain technical changes to administrative procedures ... .

S.B. 535, 78th Leg., Reg. Sess. (W. Va. 2008). The seeming inconsistencies of the Bill's language (some provisions reduce penalties while other provisions increase penalties) may be the result of Bill proponents' attempts to alter existing Code without jeopardizing federal highway dollars because certain language closely parallels the federal statutory language. See 23 U.S.C. § 164(a)(5) (2006); see also infra notes 73, 74, 75, 80, 100, 116, 127 and accompanying text. Compare also to the stated purpose of Senate Bill 535 to its companion, House Bill 4366:

[T]o make the interlock program available to first time offenders while also increasing incentives for participation in the program; [t]o increase [the] period on the interlock program for aggravating circumstances involving a second or subsequent DUI offense; [t]o reduce[e] the administrative penalties for driving with a suspended license; ... [t]o require mandatory blood alcohol content test for all drivers involved in a motor vehicle crash resulting in death or serious bodily injury.

Changes to criminal penalties include: removing the mandatory 24 hour sentence for first offense DUI; creating an [sic] new offense for individuals with blood alcohol content of .15 or greater; and reducing the penalties for second offense driving with suspended license. 


lost while previously-employed offenders serve out jail sentences, aid is not doled out to families while their bread-winners serve out jail terms unemployed, and public funds are not expended in administering traditional jail and prison sentences.

In West Virginia, the cost of housing inmates in regional jails must be borne by each of the State’s fifty-five counties. The present rate of roughly $50.00 per inmate per day is motivation enough for a county to employ the less costly alternative of home confinement for many DUI offenders. DUI offenders are also personally and financially motivated to serve their time on home confinement because the flexibility of home confinement permits offenders to participate in certain permissible activities. Home confinement keeps DUI offenders at home with their families; it keeps them “employed, supporting their kids, not losing their jobs, [and] paying their obligations.”

In Monongalia County, West Virginia, for example, home confinement of DUI offenders is “fairly extensive.” With a population of just over 85,000, Monongalia County is one of the State’s most populous counties and is the site of the State’s flagship university. Monongalia County’s officials have more than their fair share of DUI experience, adjudicating over 300 DUI offenses in 2007. While many counties charge all offenders a flat home confinement fee of $10.00 per day, Monongalia County uses a sliding scale: an offender is charged a daily home confinement fee equal to his hourly wage at work. Even if Monongalia County is unable to collect home confinement fees from the rare indigent DUI offender, the County still realizes quite a savings when compared with the likely expenditures associated with traditional incarceration of the same offender.

45 Reyes Interview, supra note 34.
46 Clawges Interview, supra note 29 (noting that the cost to the County for an inmate’s day in the North Central Regional Jail is roughly $50.00, while the cost of home confinement is most frequently borne by the offender).
47 Reyes Interview, supra note 34.
48 Id.
49 Clawges Interview, supra note 29.
52 Reyes Interview, supra note 34.
53 Id. (noting that the sliding scale evaluation of an individual's ability to pay for the cost of home confinement eliminates the potential constitutional argument by an indigent offender that flat rates violate his due process rights by making home confinement "unavailable" to him).
54 Id.
Most DUI offenders who are on home confinement in Monongalia County are "successful" in completing their sentences;\(^{55}\) they abide by rules and regulations similar to those they would encounter if serving their sentences in jail.\(^{56}\) Adequate supervision is an area of real concern, though.\(^{57}\) Monongalia County Assistant Prosecutor Dimas Reyes emphasizes that

[i]f [the County] wants to run a home confinement program to be effective and to save the taxpayer money and impose this cost . . . on the defendants [who] have the service, then [the County] should supervise it properly. Because if we don't, we might as well just send [the offenders] home [and] say, "O.K. You're on home confinement. Good luck!" And that's it. They can do whatever they want, whenever they want.\(^{58}\)

Because the worst case scenario is, of course, a DUI offender who breaks the home confinement rules, drinks, drives, and kills someone, the success of a home confinement system depends upon the ability of a county's home confinement officers to catch an offender breaking the rules and to prevent another DUI nightmare before it happens. Monongalia County has only two home confinement officers to monitor the entire County, though, and could benefit by staffing at least two more.\(^{59}\) Instead, the County presently relies heavily on less costly electronic monitoring devices to help track offenders' movements.\(^{60}\) Monitoring devices used currently in Monongalia County provide home confinement enforcement officers with limited information, verifying only that the offender is either home when he is scheduled to be home or away from home when he is scheduled to be away from home for permissible reasons.\(^{61}\) Unfortunately, current devices do not track an offender's actual location when he is away from his home.\(^{62}\)

Improving DUI offender home confinement means ensuring that West Virginia's counties are able to adequately monitor all offenders, especially the occasional offender who is bent on breaking the terms of his home confinement. Because West Virginia's home confinement system was begun mainly in response to jail and prison overcrowding and to the high cost of traditional incar-

---

\(^{55}\) Id.

\(^{56}\) Id. Offenders remain at home unless a permissible, scheduled appointment, such as a medical or legal consultation, is approved in advance. Id. Home confinement is tailored to the individual offender. Id. Thus, a DUI offender is never allowed to drink or possess alcoholic beverages in his place of confinement. Id.

\(^{57}\) Clawges Interview, supra note 29.

\(^{58}\) Reyes Interview, supra note 34.

\(^{59}\) Id.

\(^{60}\) Clawges Interview, supra note 29.

\(^{61}\) Id.

\(^{62}\) Id.
ceration, the present system, by itself, is unlikely to reduce DUI recidivism. However, employing modern advances in electronic monitoring could greatly enhance the counties’ ability to monitor DUI offenders without requiring more enforcement officer visits to the offenders’ homes, and could actually turn a cost-savings system into an effective DUI countermeasure. Electronic monitors that test an offender’s BAC through his skin would help ensure that an offender abstains from alcohol during home confinement, thereby preventing potential DUI recidivism during the home confinement period. Also, instead of simply confirming that an offender is away from his home somewhere, modern monitoring devices that employ global positioning technology could provide home confinement enforcement officers with an offender’s actual location when the offender is away from his home. This sophisticated data could prevent recidivism and related deaths by enabling home confinement officers to immediately respond to a DUI offender’s actual location if an electronically transmitted BAC level indicates that the offender has violated the terms of his home confinement.

Because additional technology would only be available at an additional cost, counties should impose the cost of advanced monitoring on DUI offenders, to the degree possible, recognizing that some offenders will not have the means to share a portion of the financial burden. To make up the difference, the State should assist West Virginia’s fifty-five counties with the necessary funding to make such modern technology affordable and available. Such assistance could come in the form of a “sin tax” on alcoholic beverages, the revenue specifically earmarked for funding local DUI programs by the percent collected per county. Taxing the drinking activity that leads to the DUI problem is abun-

63 Id.
64 ASS’N OF STATE JUDICIAL EDUCATORS (NASJE), HARDCORE DRUNK DRIVING JUDICIAL GUIDE: A RESOURCE OUTLINING JUDICIAL CHALLENGES, EFFECTIVE STRATEGIES AND MODEL PROGRAMS 29 (2007 Symposium) [hereinafter JUDICIAL GUIDE] (A Los Angeles, Ca., study found that home detention with electronic monitoring reduced recidivism by 33%). (citing Ralph K. Jones, John H. Lacey & C.H. Wilisowski, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN. (NHTSA), U.S. DEP’T OF TRANSP., PROBLEMS AND SOLUTIONS IN DWI ENFORCEMENT SYSTEMS (1998)).
65 Clawges Interview, supra note 29; see NAT’L HIGHWAY TRAFFIC SAFETY ADMIN. (NHTSA), U.S. DEP’T OF TRANSP., STRATEGIES FOR ADDRESSING THE DWI OFFENDER: 10 PROMISING SENTENCING PRACTICES 37 (2004), available at http://www.nhtsa.dot.gov/people/injury/enforce/PromisingSentence/pages/index.htm (A device called “SCRAM” (Secure Continuous Remote Alcohol Monitor) constantly monitors an offender’s BAC “by measuring ethanol vapor as it migrates through the surface of the skin” and by transmitting the data via modem).
67 Clawges Interview, supra note 29.
68 Three Monongalia County DUI “experts” support a “sin” tax on liquor if the tax revenue is used only to provide support to the fifty-five counties’ DUI programs. Clawges Interview, supra
danty appropriate, and while a drinker is unlikely to stop imbibing just because his favorite alcoholic drink costs twenty-five cents extra per glass, such a small tax would prove extremely valuable when many drinkers’ quarters are converted into much-needed operational funding for the enhancement of local DUI programs.

Even if some offenders are unable to bear the additional cost of advanced monitoring and even if sin tax revenue does not fully reimburse counties for the cost of employing advanced monitoring, the “cost savings” to counties as measured in human lives is invaluable. In addition, reducing DUI recidivism removes the “merry-go-round” offender and the related adjudication costs as measured in dollars. For the safety of West Virginia’s citizens and its visitors, the State should assist the counties with such a funding mechanism to help ensure that DUI offenders are securely confined and adequately monitored.

C. Prima Facie DUI - BAC of 0.08 g/dl or Greater

West Virginia’s most recent efforts to reduce the number of “alcohol-related fatalities, injuries, and crashes” have included statutory revisions by the West Virginia Legislature. In 2004, with amendments to the West Virginia Code, West Virginia became one of the last states to lower its per se DUI BAC to 0.08 g/dl, bringing the State in line with federal guidelines. Certainly,

---

69 See Douglas J. Young & Thomas W. Likens, Alcohol Regulation and Auto Fatalities, 20 INT’L REV. L. & ECON. 107, 108 (2000) (finding no significant link between an excise tax on beer, the resultant increased consumer cost, and a reduction in DUI fatalities).

70 See Clawges Interview, supra note 29 (“At some point, the benefit of the cost of treatment outweighs the alternatives because you don’t have people on the merry-go-round, coming back and coming back. You don’t have the frequent fliers.”); Reyes Interview, supra note 34.

71 DMV 2006 Report, supra note 25, at 6 (focusing on DUI countermeasures such as public education, “high-visibility enforcement events” like sobriety checkpoints, and West Virginia Code revision).


74 See 23 U.S.C. §163(a) (2006) (providing that “[t]he Secretary shall make a grant, in accordance with this section, to any State that has enacted and is enforcing a law that provides that any person with a blood alcohol concentration of 0.08 percent or greater while operating a motor vehicle in the State shall be deemed to have committed a per se offense of driving while intoxicated (or an equivalent per se offense)”).
lowering the State’s per se DUI BAC by an additional two tenths of one percent should enable the adjudication of more drinking drivers in the State and will help to ensure the State’s continued receipt of certain federal highway funding.\(^{75}\)

Despite these advantages, though, reducing the per se DUI BAC is unlikely to reduce DUI recidivism or recidivist-related fatalities. Drivers with high BAC are statistically over-represented in fatal accidents,\(^{76}\) but studies do not conclusively prove that lowering the per se DUI BAC affects any change on a drinking driver’s decision to drive or not to drive.\(^{77}\) In fact, since the Legislature reduced the per se DUI BAC to 0.08 g/dl, DUI convictions\(^{78}\) and fatalities\(^{79}\) have risen in West Virginia. Only in conjunction with other DUI countermeasures that are proven to curb repeat DUI offenses, as discussed in the following Sections of this Note, will West Virginia’s per se DUI BAC reduction aid in the prevention of DUI recidivism and related fatalities.

D. Vehicle Ignition Interlock in Conjunction with Driver’s License Revocation

In 2004, the West Virginia Legislature addressed another federally-recommended provision,\(^{80}\) a vehicle ignition interlock program.\(^{81}\) Ignition inter-

---

\(^{75}\) The NTSB describes some conditions placed on States’ receipt of federal highway funding: The Transportation Equity Act for the 21st Century (TEA-21) was enacted June 9, 1998, as Public Law 105-178. TEA-21 authorizes the Federal surface transportation programs for highways, for highway safety, and for transit and other surface transportation programs for a 6-year period, 1998-2003. A total of $2.7 billion is authorized for nonconstruction highway safety programs; approximately $2.3 billion of these funds are authorized for grant programs. .

\(^{76}\) TRAFFIC SAFETY FACTS 2003, supra note 10, at 1.

\(^{77}\) O’Neill, supra note 73, at 420-21 (2004) (citing North Carolina and California studies indicating no decrease in DUI accidents, while noting a conflicting study by Pacific Institutes for Research and Evaluation that attributed an eight percent drop in fatal DUI crashes across forty states to the lowered BAC level).

\(^{78}\) DMV 2006 Report, supra note 25, at 19 (as demonstrated by a rise in DUI license revocations (FY 2005: 9666; FY 2006: 9842), if said revocations may serve as a rough proxy for DUI convictions where revocation is administratively-mandated).

\(^{79}\) TRAFFIC SAFETY FACTS 2006, supra note 8, at 3 (showing the rising percentage of alcohol-related vehicle fatalities where the driver had a BAC of 0.08 g/dl or greater for the years 2004 (26%), 2005 (29%), and 2006 (31%)).

\(^{80}\) See 23 U.S.C. §164(a)(5)(A)-(B) (2006) (providing that in order to receive certain federal grant monies, "a State law [must] provide[]", as a minimum penalty, that an individual convicted of
lock devices are designed "to prevent an intoxicated person from operating a vehicle," by allowing the vehicle’s engine to engage only if the driver’s BAC measures below "a small, non-zero value, typically 0.025%." Ignition interlocks are widely used and have withstood constitutional challenge. Highly effective in preventing drunk driving while installed on an offender’s vehicle, interlock devices reduce DUI recidivism by 40 - 95%.

With a 2004 West Virginia Code amendment, the West Virginia Legislature authorized the West Virginia Division of Motor Vehicles (“DMV”) to "regulate a motor vehicle alcohol test and lock program for persons whose licenses have been revoked" for DUI offenses. While West Virginia’s Test and Lock Program is mandatory for repeat offenders, participation is merely op-

---

81 ACTIONS TO REDUCE FATALITIES, supra note 15, at 78.
83 JUDICIAL GUIDE, supra note 64, at 27 (Forty-one states have either mandatory or discretionary interlock programs.).
84 Neugebauer, supra note 82, at 2.
85 JUDICIAL GUIDE, supra note 64 (citing Marques, P.R., Bjerre, B., Dussault, C., Voas, R.B., Beirness, D.J., Marples, I.R. & Rauch, W.R., INTERNATIONAL COUNCIL ON ALCOHOL, DRUGS AND TRAFFIC SAFETY, ALCOHOL IGNITION INTERLOCK DEVICES, I: POSITION PAPER (2001)).
87 Id.
88 The West Virginia Legislature recently revisited the West Virginia Code provisions regarding the ignition interlock device. S.B. 535, 78th Leg., Reg. Sess. (W. Va. 2008) (amending the W. VA. CODE § 17C-5A-3a(c)(1) to reduce the minimum revocation period prior to interlock enrollment from thirty to fifteen days). Effective June 6, 2008, the Bill’s provisions provide:

Notwithstanding any provision of the code to the contrary, a person shall participate in the program if the person is convicted under section two, article five of this chapter or the person's license is revoked under section two of this article or section seven, article five of this chapter and the person was previously either convicted or his or her license was revoked under any provision cited in this subsection within the past ten years. The minimum revocation period for a person required to participate in the program under this subsection is one year and the minimum period for the use of the ignition interlock device is two years, except that the minimum revocation period for a person required to participate because of a violation of subsection (n), section two of this article or subsection (i), section two, article five of this chapter is two months and the minimum period of participation is one year. The division shall add an additional two months to the minimum period for the use of the ignition interlock device if the offense was committed while a minor was in the vehicle. The division shall add an additional six months to the minimum period for the use of the ignition interlock device if a person other than the driver received injuries. The division shall add an additional two years to the minimum period for the
tional for first time offenders. Those eligible may enroll in the Test and Lock Program only after completing a minimum driver's license revocation period. The Program thus provides a legal way for the DUI offender to maintain his livelihood by driving himself to work, especially important in rural parts of this State where public transportation is often unavailable. This benefit is not free, however. The DUI offender is responsible for the cost of the installation of the interlock device, for the daily rental of the device from a service provider, and for other administrative charges.

Although such interlock programs have been proven to dramatically reduce DUI recidivism, West Virginia's Test and Lock Program is woefully underutilized. In 2006, while over 9,000 driver's licenses were revoked for DUI, only 514 interlock devices were installed; of these, only 324 participants completed the Program. Why are only 3% of West Virginia's DUI offenders participating in this valuable Program? The cost of the Test and Lock Program, borne by offenders, may be a factor contributing to these low figures. Additionally, by requiring only repeat offenders to participate in the Test and

---

---

Id. (amending the W. VA. CODE § 17C-5A-3a(d)).

In West Virginia, a "repeat offender" is an individual who has had his license revoked for an alcohol-related offense within the past ten years. W. VA. CODE § 17C-5A-3a(d) (2006).

W. VA. DIV. MOTOR VEHICLES, THE WEST VIRGINIA ALCOHOL TEST AND LOCK PROGRAM (agency form) [hereinafter TEST AND LOCK FORM]. The license of a first-time DUI offender, for example, is revoked for six months, but must only be revoked for thirty days prior to driving with an installed interlock device in the Test and Lock Program. W. VA. CODE § 17C-5A-3a(c)(1) (2008). Alternatively, the license of a repeat offender who has been convicted of DUI within ten years of a prior conviction is revoked for a minimum of two years; the license must be revoked for at least two months, followed by installation and one year's use of an interlock device. W. VA. CODE § 17C-5A-3a(d). Recent legislative changes, effective June 2008, have not as yet been incorporated into DMV forms. See supra note 88.

Reyes Interview, supra note 34.

TEST AND LOCK FORM, supra note 90 (In 2007, the interlock service agreement charged an offender $50.00 for installation, $2.13 for daily rental and service, $25.00 for a missed appointment, $25.00 for an NSF check, and $50.00 for a violation reset).


DMV 2006 Report, supra note 25, at 19.

Id.

See id.

See supra note 92 and accompanying text.

Reyes Interview, supra note 34.
Lock Program, West Virginia legislators have missed a critical opportunity to prevent repeat drunk driving incidents by those drivers who have either only driven drunk once or who have only been caught driving drunk once. While West Virginia permits first time offender enrollment in the Test and Lock Program, and even encourages participation by offering incentives to offenders,\(^9\) the State must require participation by all offenders because anything short of mandated enrollment is sure to produce the same feeble level of participation seen to date. As with the reduction in the \textit{per se} DUI BAC to 0.08 g/dl, the benefit of West Virginia's current Test and Lock Program could primarily be the State's assurance of continued federal highway funding.\(^10\) West Virginia's Test and Lock Program is a potentially valuable tool in reducing DUI recidivism, but because only a small fraction of the State's DUI offenders actually participate, the benefits of this Program remain virtually untapped.

Therefore, in order to realize the fullest reduction in repeat DUI offenses through its existing Test and Lock Program, West Virginia should mandate the installation of interlock devices on vehicles of all DUI offenders.\(^11\) Broadly employed, interlock devices would work in conjunction with other county programs, similarly preventing all DUI offenders from driving drunk even while not under the direct observation of law enforcement or home confinement enforcement officers. Even if some additional related cost is borne by counties employing this effective DUI countermeasure, the cost would be far outweighed by the savings as measured in either human lives or in repeat-adjudication dollars:\(^12\) while installed, vehicle interlocks could save between forty and ninety-five lives in West Virginia each year,\(^13\) and re-adjudication of many offenders would be unnecessary. Even after the completion of a term of home confinement, extended use of vehicle interlock devices would promote continued sobriety in DUI offenders and would provide a measure of public safety assurance in preventing all former drunk drivers from reoffending.

West Virginia could strongly encourage DUI offenders' participation and compliance with the Test and Lock Program by imposing, in the alternative,


\(^11\) Notably, even a prominent Morgantown, West Virginia, DUI defense attorney considers that interlocks should be mandatory for all offenders. Yackel Interview, \textit{supra} note 68.

\(^12\) \textit{See supra} Section II, B note 70 and accompanying text.

\(^13\) This figure was extrapolated by assigning a proportion (two-thirds) of West Virginia's average number of alcohol-related fatalities per year (152) to DUI recidivists, and then multiplying that figure by the rate interlock devices are proven to reduce DUI recidivism (40 – 95%). The average number of alcohol-related fatalities in West Virginia over the last five years was 151.8 per year. \textit{See} TRAFFIC SAFETY FACTS 2006, \textit{supra} note 8, at 3. DUI recidivists are responsible for alcohol-related traffic fatalities at nearly twice the rate of first-time offenders, so roughly two-thirds of these fatalities may be assigned to recidivists while the remainder may be assigned to the first-time offenders. Jones, \textit{supra} note 16, at 3.
the less attractive option of vehicle forfeiture. A "motorist whose vehicle is seized and confiscated pursuant to a drunken-driving incident is said to 'forfeit' the vehicle." A majority of states currently employ vehicle forfeiture in the DUI context, and West Virginia currently utilizes vehicle forfeiture in other contexts. A properly drafted and applied forfeiture law holds up to constitutional challenge because the State has a compelling interest to protect its citizens from the instrumentalities of crime.

Many benefits would flow to this State by adding a DUI offender vehicle forfeiture statute to the West Virginia Code. First, an offender would no longer have access to the instrument of his DUI crime and of potential future DUI crimes. Second, the State could sell forfeited vehicles to help offset the costs of prosecuting and incarcerating DUI offenders. Finally, a widely-publicized vehicle forfeiture law would serve as a strong deterrent to drivers considering drinking before driving. Such employment of vehicle forfeiture would consequently increase DUI offender enrollment in the West Virginia Test and Lock Program since DUI offenders who violate the terms of the Program or who opt out of participation in the Program would forfeit their vehicles to the


105 Neugebauer, supra note 82, at 2 ("Thirty-three states authorize seizure of the vehicles of repeat DUI offenders. New York has even taken the draconian step of seizing vehicles of first-time offenders.").

106 For example, W. VA. CODE § 11-14C-42 provides for the forfeiture of property, including vehicles, used to unlawfully import, transport, deliver, store, or sell motor fuel:

All motor fuel and any property, tangible or intangible, which is found upon the person or in any vehicle which the person is using, including the vehicle itself, to aid the person in the transportation or sale of illegally transported, delivered, stored, sold, imported or acquired motor fuel, and any property found in the immediate vicinity of any place where the illegally transported, delivered, stored, sold, imported or acquired motor fuel is located, including motor vehicles, tanks, and other storage devices, used to aid in the illegal transportation or sale of motor fuel, is considered contraband and shall be forfeited to this state.

W. VA. CODE § 11-14C-42(c) (2003).

107 See Neugebauer, supra note 82, at 2 (citing Grinberg v. Safir, 694 N.Y.S.2d 316 (N.Y.Sup., 1999)). This article cites a New York case where a first-time DUI offender unsuccessfully asserted a variety of constitutional challenges to the forfeiture of his vehicle. The court held that the vehicle forfeiture did not violate the separation of powers doctrine, was not a warrantless seizure, did not violate due process, and was not an excessive fine. See also Porto, supra note 104, at 548 (noting, for example, that a driver's assertion that a forfeiture law violates the constitutional prohibition against double-jeopardy would fail if the forfeiture law had been enacted not as a punitive measure, but as a civil penalty, remedial in nature).

108 Porto, supra note 104, at 547.

109 Id. at 547-48.

110 Id. at 548.
State. Further, because West Virginia currently utilizes forfeiture in other contexts, the Legislature could craft a DUI vehicle forfeiture statute to accompany existing administrative sanctions and put some real teeth in the State's Test and Lock Program.

E. Safety and "Treatment" Program

Although adequately-monitored home confinement and mandatory vehicle interlock devices would encourage a DUI offender's short-term sobriety, bringing about real behavioral change in a long-time alcohol abuser is the best assurance of long-term sobriety and of lowered DUI recidivism rates in West Virginia. Studies indicate that up to 75% of DUI offenders are "alcohol dependent" and up to 98% of DUI offenders have "alcohol abuse problems." Therefore, while employing license and vehicle sanctions to prevent driving, the State should also combat DUI recidivism by treating the alcohol-related problems that underlie many drunk drivers' offenses. The United States Congress has recognized the connection between curbing DUI recidivism and treating the underlying alcoholism of the DUI offender, evidenced by the mandate that states receiving certain federal highway funds assess and treat repeat DUI offenders for alcohol addiction.

111 See Neugebauer, supra note 82, at 2 (arguing that vehicle forfeiture is a legal "[f]lat [w]orse than [i]nterlocks").

112 See supra note 106 (citing, as an example, W. VA. CODE § 11-14C-42(c)).

113 Mothers Against Drunk Driving (MADD) available at http://www.madd.org/Media-Center/Media-Center/Media-Library/Press-Kits/Higher-Risk-Drivers--The-Problem-And-Proven-Soluti.aspx [hereinafter MADD] (citing Wieczorek, W.F., Miller, B.A., and Nochajski, T.H., Multiple and Single Location Drinking Among DWI Offenders Referred for Alcoholism Evaluation, 18 Am. J. Drug & Alcohol Abuse 1, 103-16 (1992) (indicating that ten to fifty percent of DUI offenders are "alcohol dependent" and seventy percent have an "alcohol abuse" problem); JUDICIAL GUIDE, supra note 64, at 5 ("A study of 126 hardcore DWI offenders incarcerated in an Ohio prison found ninety-eight percent had histories of alcohol abuse and seventy five percent were alcohol dependent. They all had been previously arrested for DWI.") (citing Siegal, H.A., et al., The Hardcore Drunk Driving Offender, In: Proceedings of the 15th International Conference on Alcohol, Drugs and Traffic Safety. Stockholm, Sweden).

114 MADD, supra note 113; JUDICIAL GUIDE, supra note 64, at 5 ("A study of 126 hardcore DWI offenders incarcerated in an Ohio prison found ninety-eight percent had histories of alcohol abuse and seventy five percent were alcohol dependent. They all had been previously arrested for DWI.") (citing Siegal, H.A., et al., The Hardcore Drunk Driving Offender, In: Proceedings of the 15th International Conference on Alcohol, Drugs and Traffic Safety. Stockholm, Sweden).

115 Jones, supra note 16, at 25 (summarizing research finding that treatment alone does not significantly reduce recidivism while treatment combined with license sanctions does reduce DUI recidivism).

116 See 23 U.S.C. §164(a)(5)(C) (providing that in order to receive certain federal grant monies, "a State law [must] provide[ ], as a minimum penalty, that an individual convicted of a second or subsequent offense for driving while intoxicated or driving under the influence after a previous conviction for that offense shall . . . receive an assessment of the individual's degree of abuse of alcohol and treatment as appropriate . . . .").
West Virginia’s apparent answer to alcohol abuse treatment for the DUI offender is a DMV-administered “Safety and Treatment Program.”  A DUI offender is required to complete this Program before the DMV will reissue a revoked driver’s license. Safety and Treatment Programs are available statewide, with admission dependent upon space availability in local clinics. As with the West Virginia Test and Lock Program, an offender must bear the cost of the West Virginia Safety and Treatment Program. The Program may be financially burdensome for some offenders because the administering clinic tailors the Program to be “more intense, and therefore more costly to [the offender], the higher [the] breath alcohol [when arrested] and [for] repeat offender[s], . . . [requiring] more meetings, more private therapy, more AA meetings, . . . [thereby] cost[ing] [the offender] more money.”

Like West Virginia’s Vehicle Test and Lock Program, the State’s Safety and Treatment Program may help to assure that federal highway grants find their way to West Virginia, but the Program is minimally effective in curbing the recidivist behavior of hard core drinking drivers. “West Virginia is not equipped, on the rehabilitation side, to deal with big-time alcohol problems. There are no [long-term] facilities for that . . . . There are short-term facilities where you can have [an offender treated] for thirty days. But . . . you can not rehabilitate an alcoholic who has been an alcoholic for twenty years in thirty days.”

117 W. VA. CODE § 17C-5A-3 (2008). The Safety and Treatment Program is statutorily described as follows:

The Department of Health and Human Resources, Division of Alcoholism and Drug Abuse, shall provide for the preparation of an educational and treatment program for each person whose license has been revoked under the provisions of this article or section seven, article five of this chapter, or subsection (6), section five, article three, chapter seventeen-b of this code, which shall contain the following: (A) A listing and evaluation of the offender’s prior traffic record; (B) The characteristics and history of alcohol or drug use, if any; (C) His or her amenability to rehabilitation through the alcohol safety program; and (D) a recommendation as to treatment or rehabilitation and the terms and conditions of the treatment or rehabilitation. The program shall be prepared by persons knowledgeable in the diagnosis of alcohol or drug abuse and treatment.

118 Id. § 17C-5A-3(d)(2) (2008).
119 Yackel Interview, supra note 68 (noting the possibility of a two-month wait prior to admission to the Program).
120 Id. An Alcohol Safety and Treatment Program in Monongalia County charges clients $250.00, payable in advance to the treatment facility. Recorded registration information line voice message: Valley Health Care System, (304) 296-1731 (Nov. 12, 2007). The $250.00 fee covers enrollment, an assessment, an eighteen hour out-patient program, and an exit interview. Id. The fee does not include any of the alcohol testing that is required during the program. Id.
121 Yackel Interview, supra note 68.
122 Clawges Interview, supra note 29; Reyes Interview, supra note 34.
123 Reyes Interview, supra note 34.
Although West Virginia's Safety and Treatment Program is a starting point for dealing with the State's hard core drinking drivers, the Program currently offers more of a "band-aid" than real treatment for serious, long-term alcohol dependency. "If there is a flaw in our system, [lack of treatment] is it. [The Safety and Treatment Program] is not really a 'treatment' program, it's more of an alcohol awareness and education program. It's a mandatory program to get your license back."124 In order to reduce DUI recidivism and related fatalities, West Virginia's lawmakers must recognize that "[i]ntervention for alcohol problems in DUI offenders' lives is only one aspect of larger problems related to employment, families, and connections to other social institutions that are at the source of continuing illegal behavior."125

Understanding that alcohol abuse and dependency is at the root of many hard core drinking drivers' DUI offenses, West Virginia must ensure that comprehensive, in-patient treatment programs are used coextensively with DUI countermeasures and sanctions. Practically, though, such in-patient or long-term treatment may be out of reach to the DUI offender whose life is a shambles from alcohol abuse and who cannot afford the high cost of such treatment. These offenders will need financial assistance, either at the State or county level, to take advantage of necessary treatment. Any cost to counties bearing the expense of such programs could, once again, be offset by an allocation of a "sin tax,"126 while State aid could be offset by federal highway dollars.127 Additionally, any State or county funds expended to provide enhanced treatment for DUI "frequent fliers" will exponentially reduce the immense overall burden caused by such offenders: an eventual eased workload for the courts, prosecutors, public defenders, law enforcement personnel, and the DMV,128 not to mention the relief provided to citizens generally when they are assured of safer roads.

III. INNOVATIVE APPROACHES TO DUI: WHAT WORKS

Although West Virginia has taken some important steps in enacting DUI countermeasures,129 hard core drinking drivers continue to wreak havoc on

---

124 Clawges Interview, supra note 29.
126 See supra Section II, B.
128 Clawges Interview, supra note 29 ("At some point, the benefit of the cost of treatment outweighs the alternatives because you don’t have people on the merry-go-round, coming back and coming back and coming back. You don’t have the frequent fliers."); Reyes Interview, supra note 34.
129 See supra Section II.
the State. Exacting a heavy toll in 2006, alcohol-related accidents in West Virginia not only caused the deaths of 161 people, but had an economic impact of $7.32 million. Clearly, if West Virginia wants to cut these losses, the State must look past its current approach to DUI adjudication.

With the help of the West Virginia Legislature, extended judicial monitoring can be a powerful component of West Virginia’s future efforts to discourage repeat DUI offenses and to compel hard core drinking drivers to seek meaningful treatment and to maintain long-term freedom from the clutches of alcohol abuse. Monongalia County Circuit Court Judge Russell Clawges recognizes that West Virginia’s mandatory confinement approach to DUI offenses is not solving the serious underlying alcohol abuse problem of the hard core drinking driver:

[W]hat I do find is that I’ve got people who can make it through six months of home confinement, they either stay away from alcohol or they just don’t get caught, but give them another six months or a year, they get arrested again for driving under the influence. . . . All you have to do is pick up the [news]paper and you see all of the people who [are] multiple offenders. Most of these multiple offenders have done time in prison. And I think that is what is really bringing it home, at least to me, that just throwing them in jail doesn’t work. Giving them home confinement works from the standpoint of, at least they’re home, at least they’re supporting their family, at least while they’re on home confinement for the most part they’re not violating, they’re not breaking the law, they’re not driving drunk. But it’s not solving the ultimate problem. That is, after they get off the restrictions, many of them go back to doing it. That’s more and more driven home, and certainly isn’t helped, when you do get folks [with] multiple offenses. And these are people who haven’t been let off. They’re people whose offenses haven’t been plea-bargained down to reckless driving. They haven’t been kept out of jail. Most of them, for the most part, have spent some time in jail or in prison. A lot of them spend a good deal of time on home confinement. . . . But it is obvious that we are not solving the problem. Incarceration is not solving the problem.

130 TRAFFIC SAFETY FACTS 2006, supra note 8, at 3.
131 Telephone Interview with Donna Hawkins, West Virginia State Director, Mothers Against Drunk Driving (MADD), Kanawha County, West Virginia (Jan. 4, 2008) [hereinafter Hawkins Interview].
132 See supra note 29.
133 Clawges Interview, supra note 29.
To the degree he can, Judge Clawges is trying to make a real difference in the lives of hardcore drinking drivers. Judge Clawges is using his judicial discretion to assess each DUI offender as an individual, placing conditions on offenders' home confinement privileges such as alcohol abuse assessment, alcohol abuse treatment, participation in a Day Treatment Program, and participation in community-based programs. Home confinement is a privilege; if Judge Clawges is not satisfied with the offender's progress or with the offender's compliance with the home confinement conditions, the judge revokes home confinement and sends the offender to jail to serve out the remainder of his sentence.

A. DUI Courts

Judge Clawges's approach is not dissimilar to the approach of developing DUI courts in many other jurisdictions. A DUI court "provide[s] focused, comprehensive attention to the issues of drunk driving, . . . provid[ing] extended judicial monitoring of hardcore drunk driving offenders [and placing them] into programs designed to promote recovery, reduce recidivism and effect behavioral change." Unlike defendants in the typical, busy criminal court system, the DUI offender is not "lost" in the DUI court. Instead, the DUI offender appears frequently before the same DUI court judge who is familiar with the offender's particular history and goals. The DUI court judge emphasizes the offender's "personal responsibility" for his own progress, rewarding the offender's successes, but sanctioning his relapses. Tools of the DUI court in-

---

134 See Section III, B (describing West Virginia's mandatory minimum sentences as an impediment to judges' imposition of extended probation and judicial intervention in the DUI offender's long-term change).

135 Clawges Interview, supra note 29 (noting plans to expand reliance upon these measures).

136 Id.

137 In some jurisdictions, DUI courts are being combined with longstanding Drug Courts to form Drug/DUI courts with a cohesive judicial approach to crimes manifested by addiction to drugs and alcohol. See Carns, supra note 27, at 1 (describing the successes of the Alaska judiciary in approaching the criminal behavior of addicted offenders with "therapeutic justice," including drug and alcohol courts); Gail Sasnett-Stauffer & E. John Gregory, A Drug by any Other Name is Still a Drug: Why the Florida Judiciary Should Start Treating DUI as any Other Drug Offense, 13 U. FLA. J.L. & PUB. POL’Y 299, 305 (2002) (noting that while DUI courts are common in other jurisdictions, some Florida county courts are just experimenting with forming DUI courts based on the existing drug court model).

138 Judicial Guide, supra note 64, at 25 (summarizing research finding that treatment alone does not significantly reduce recidivism while treatment combined with license sanctions does reduce DUI recidivism). Challenges, Effective Strategies and Model Programs 31 (2007 Symposium).

139 See Carns, supra note 27, at 1.

140 Id.

141 Id.
clude “pharmaceutical treatment” for . . . addiction,” house arrest and electronic monitoring, and suspension of jail or prison sentence pending the offender’s completion of the designated treatment and recovery plan. Although many DUI courts are too new to have been subjected to extensive scholarly study, available research indicates very low recidivism for participants, reporting participant success rates between 80 and 99%.

Because the DUI court is such a valuable tool, having the potential to save eighty lives in West Virginia each year, the concept should be embraced statewide. Dedicated DUI courts with judges specially trained in handling DUI offenders would be the best monitors of an offender’s progress: his ongoing satisfaction of home confinement conditions, his total compliance with treatment programs, and his progress toward long-term abstinence and rehabilitation from alcohol addiction. DUI court judges, through frequent re-evaluation of familiar DUI offenders over an extended period of time, would also be better able to assess when additional tools need to be pulled from the judicial toolbox to protect the public from an offender prone to recidivism: additional probationary conditions, treatment, sanctions, penalties, or incarceration.

*Id.* (describing Alaska’s use of Naltrexone in treating addiction). West Virginia judges might additionally consider the usefulness of the prescription medication, Antabuse, in preventing alcohol consumption by DUI offenders. Antabuse causes severe side-effects when a patient taking the medication consumes even a minute amount of alcohol, such as that found in common baking vanilla. For a complete description of Antabuse (disulfiram), its usage and side-effects, see [http://www.nlm.nih.gov/medlineplus/druginfo/medmaster/a682602.htm](http://www.nlm.nih.gov/medlineplus/druginfo/medmaster/a682602.htm) (last visited Feb. 7, 2008).

*Id.* at 40-41.

*Sasnett-Stauffer, supra* note 137, at 318 (citing a 1996 Oklahoma court with a 96% success rate and a California court with an 80% success rate); *Judicial Guide, supra* note 64, at 36 (reporting 1% recidivism in the Oregon court of Judge Dorothy Baker). Award-winning Missouri DUI courts report only 2.8% recidivism. Hon. Laura Denvir Smith, *Chief Justice Delivers 2008 State of the Judiciary Address* (Feb. 5, 2008), 64 J. Mo. B. 70, 71 (2008) (“Missouri has had the foresight to establish DWI courts as part of its drug court programs. The Greene County DWI court recently was one of only four such courts nationwide to be honored as a model court for its work in turning around repeat DWI offenders. Of its 143 graduates since 2003, only four have been convicted of subsequent DWIs.”).

This figure was extrapolated by assigning a proportion (two-thirds) of West Virginia’s average number of alcohol-related fatalities per year (152) to DUI recidivists, and then multiplying that figure by the lowest rate DUI courts reduce recidivism (80%). The average number of alcohol-related fatalities in West Virginia over the last five years was 151.8 per year. See *Traffic Safety Facts 2006, supra* note 8, at 3. DUI recidivists are responsible for alcohol-related traffic fatalities at nearly twice the rate of first-time offender, so roughly two-thirds of these fatalities may be assigned to recidivists while the remainder may be assigned to the first-time offenders. *Jones, supra* note 16, at 3 (2000).
B. Staggered Sentencing

Although the DUI court approach\(^{147}\) and other judicial innovations\(^{148}\) have proven to be extremely effective in reducing DUI recidivism in hard core drinking drivers, West Virginia judges are constrained from using the most promising of these approaches.\(^{149}\) The West Virginia Legislature has hamstrung the State’s judges: the West Virginia Code requires judges to impose mandatory minimum sentences on DUI offenders,\(^{150}\) thus severely limiting judicial discretion and intervention. “[P]robation is not an option.”\(^{151}\) Therefore, even if a West Virginia judge recognizes that mandatory incarceration will not help the underlying alcohol abuse and behavioral problems of a particular hard core drinking driver, the judge is currently severely limited in his ability to impose the meaningful supervision that could encourage long-term change in that offender.\(^{152}\)

To help the State reduce DUI recidivism, West Virginia’s judges need more statutory flexibility to use the most promising judicial tools.\(^{153}\) One such innovative approach is “staggered sentencing.”\(^{154}\) Originally created, implemented, and studied in Minnesota, staggered sentencing has proven to be very successful, reducing recidivism by 50%.\(^{155}\) Minnesota District Court Judge James Dehn has received national recognition\(^{156}\) for his development of this "powerful new sentencing tool."\(^{157}\)

Unlike traditional sentencing that punishes the DUI offender in one fell swoop, Judge Dehn’s model combines punishment with incentives.\(^{158}\) The staggered sentencing model “works by dangling a legal carrot in front of repeat drunk drivers.”\(^{159}\) The carrot is the promise of a greatly reduced overall sen-

\(^{147}\) See supra Section III, A.

\(^{148}\) See JUDICIAL GUIDE, supra note 64.

\(^{149}\) Clawges Interview, supra note 29.


\(^{151}\) Clawges Interview, supra note 29; see supra Section II, A note 28-30 and accompanying text (citing State ex rel. Simpkins v. Harvey, 172 W.Va. 312, 318, (1983)).

\(^{152}\) Clawges Interview, supra note 29 (commenting that “mandatory [DUI] jail sentences ... limit[,] our ability to put into effect real supervision because we can’t probate it”).

\(^{153}\) Id.

\(^{154}\) Angela Carlisle, Note, Staggered Sentencing for Repeat DWI Offenders: A New Weapon in the War Against Drunk Driving, 25 HAMLINE J. PUB. L. & POL’Y 87, 100-01 (2003).

\(^{155}\) Id. at 88 (citing reduced recidivism of 49.9%).

\(^{156}\) Jeffrey Robert Connolly, Note, Maas v. Department of Commerce and Regulation: Why Can’t South Dakota Curb Repeat Offenses of Driving Under the Influence?, 50 S.D. L. REV. 352, 370-71 (2005); JUDICIAL GUIDE, supra note 64, at 35.

\(^{157}\) Id. at 370.

\(^{158}\) See id.

\(^{159}\) Id.
tence if the offender succeeds in beating his alcohol problem. The staggered sentencing model is so effective because it addresses the alcohol abuse problem underlying many hard core drinking drivers' offenses.

The staggered sentencing model works by splitting the offender's sentence into three equal installments, each separated by lengthy periods of probation. Although the offender is incarcerated immediately, serving the first installment of his sentence in jail, the offender is empowered to make this first installment in jail his last. During the probation period following this first installment, but prior to the second installment of his sentence, the offender is required to completely abstain from alcohol, rehabilitating and treating any alcohol addiction. If the offender is successful in satisfying these and any other conditions of his probation, he may file with the court a motion seeking the suspension of the second installment of his sentence. "Big carrot, big stick." If the offender violates the conditions of his probation, the judge immediately responds by sending the offender to jail to serve out the remainder of his entire sentence. The DUI offender is thus motivated to avoid the unpleasantness of incarceration by effectively treating an alcohol abuse problem and by making lasting lifestyle changes.

While the administration of a staggered sentencing program would certainly not be free of additional cost, the overall benefits would outweigh any costs. Obviously, because human life is invaluable, any life saved through a reduction in DUI recidivism is theoretically worth whatever the administrative cost of the program. But, even from a more fiscal perspective, the staggered sentencing program costs should be outweighed by the benefits: any costs associated with administering a staggered sentencing program would be more than counterbalanced by a 50% reduction in repeat offenders, many of whom would never again revisit West Virginia's police stations, courts, jails, and prisons. In Monongalia County, West Virginia, Judge Clawges would like to employ the power of the staggered sentencing tool, but notes that the inflexibility of the West Virginia Code must be addressed first. Mandatory sentences cannot be suspended. But staggered sentencing depends upon flexible sen-

---

160 Id.
161 Carlisle, supra note 154, at 88 (citing reduced recidivism of 49.9%).
162 JUDICIAL GUIDE, supra note 64, at 35.
163 Id.; Carlisle, supra note 154, at 100-01.
164 JUDICIAL GUIDE, supra note 64, at 35; Carlisle, supra note 154, at 100-01.
165 JUDICIAL GUIDE, supra note 64, at 35; Carlisle, supra note 154, at 100-01.
166 Clawges Interview, supra note 29.
167 JUDICIAL GUIDE, supra note 64, at 36.
168 See Carlisle, supra note 154, at 88.
169 Clawges Interview, supra note 29.
170 Id. Staggered sentencing requires flexible sentencing options; thus, judges must have the discretion to suspend an offender's sentence.
tencing options, upon judges who have discretion to suspend an offender’s sentence, and upon motivational incentives. West Virginia judges, therefore, need the statutory leeway to offer such incentives to offenders, to motivate hard core drinking drivers to make long-term lifestyle changes that will reduce recidivist behavior and related fatalities.\textsuperscript{171}

To enable West Virginia’s judges to use powerful, alternative sentencing tools like Judge Dehn’s staggered sentencing model, legislative action is first required. According to Judge Clawges,

\begin{quote}
I think the Legislature recognizes . . . [that] [t]he DUI Code needs to be revised . . . . The problem with that is that there is such a strong knee-jerk reaction to any of those changes, because the first thing they would have to change is the mandatory jail sentences. . . . it would be tough for the Legislature. As a result, they haven’t taken it up. It is not a politically popular subject. It is not a subject that they will get many pats on the back for addressing, except from the people who know: judges like us whose hands are tied, the prison system having to deal with all of the people who are there who could be maybe more appropriately dealt with in another context.\textsuperscript{172}
\end{quote}

Despite any negative political pressure to the contrary,\textsuperscript{173} the West Virginia Legislature should remove mandatory minimum sentences\textsuperscript{174} from all but the most severe DUI offenses, such as DUI causing death. Removing mandatory minimum sentences would allow judges to more effectively intervene in the lives of hard core drinking drivers through the staggered sentencing model. If the West Virginia Legislature goes one step further and codifies the staggered sentencing model, expressly allowing judges to impose extensively supervised probation periods and related probationary conditions such as those utilized by DUI

\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id. (suggesting that MADD might oppose reducing the State’s mandatory minimum sentences).
\textsuperscript{174} MADD’s West Virginia chapter regularly lobbies the State’s legislators for revisions to the West Virginia Code. Hawkins Interview, supra note 131. West Virginia MADD supports the following: mandatory interlock for all DUI offenders (including first-time DUI offenders); an aggravated DUI offense applicable to offenders with BAC levels greater than 0.15 g/dl (before the 2008 amendment, West Virginia was one of a minority of states without such a provision); and a reduction in the minimum incarceration sentence for misdemeanor DUI from twenty-four hours to time served after the initial arrest (primarily to save financially-burdened counties the cost of re-imprisoning an offender for the remainder of his twenty-four-hour sentence after trial, this provision was passed in 2008). Id.; Phil Kabler, \textit{Higher Penalties Sought for Worst DUIs}, \textbf{THE CHARLESTON GAZETTE}, Oct 9, 2007, at 1-A. \textit{See supra} Sections II, A, B, and D; S.B. 535, 78th Leg., Reg. Sess. (W. Va. 2008) (re-enacting and amending W. VA. CODE §§ 17B-4-3, 17C-5-2, 17C-5-7, 17C-5A-1, 17C-5A-2, 17C-5A-3 and 17C-5A-3a)).
courts, West Virginia’s legislators could counter any claims that they are soft on DUI crimes by pointing to the statistically-proven effectiveness of staggered sentencing in reducing recidivism.\textsuperscript{175} Most importantly, by enabling the use of the staggered sentencing model in West Virginia, the Legislature could save fifty lives each year by reducing DUI recidivism.\textsuperscript{176}

IV. CONCLUSION

Although West Virginia has made some progress in reducing DUI offenses, the Legislature must overhaul the West Virginia Code if more Brian Stone\textsuperscript{177} tragedies are to be prevented. West Virginia legislators must initially acknowledge that, while a traditional retributive justice approach may prevent recidivism while the offender serves his sentence, therapeutic or rehabilitative justice approaches aim to permanently improve the lives of DUI offenders, thus reducing the need for re-adjudication, reducing long-term recidivism, and saving many lives. Recognizing the value of a policy shift toward reducing DUI recidivism to save lives means that the West Virginia Legislature should revise the State’s approach to DUI, not simply to garner federal highway dollars or to effect cost-savings measures, but to truly make the State’s roads safer. To accomplish this, West Virginia must embrace the DUI countermeasures statistically proven to be the most effective in reducing DUI recidivism and related fatalities. This Note has attempted to highlight those DUI countermeasures with the proven statistical potential to accomplish these extremely important goals in West Virginia.

First, the State’s existing systems must be strengthened. When offenders are placed on home confinement, counties must adequately supervise DUI offenders because they are likely to recidivate. The State should play a role in securing these offenders on home confinement by ensuring that each of the fifty-five counties has adequate funding to support local programs. Imposing a “sin tax” on liquor sales, earmarked for county programs, would help accom-

\textsuperscript{175} See supra notes 155-68 and text accompanying.

\textsuperscript{176} This figure was extrapolated by assigning a proportion (two-thirds) of West Virginia’s average number of alcohol-related fatalities per year (152) to DUI recidivists, and then multiplying that figure by the rate that the staggered sentencing model is proven to reduce DUI recidivism (50%). The average number of alcohol-related fatalities in West Virginia over the last five years was 151.8 per year. See Nat’l Ctr. for Stat. & Analysis, Nat’l Highway Traffic Safety Admin. (NHTSA), U.S. Dep’t of Transp., Traffic Safety Facts 2006: West Virginia, 3 (2006), available at http://www-nrd.nhtsa.dot.gov/departments/nrd-30/ncsa/STSI/54_WV/2006/54_WV_2006.htm. DUI recidivists are responsible for alcohol-related traffic fatalities at nearly twice the rate of first-time offender, so roughly two-thirds of these fatalities may be assigned to recidivists while the remainder may be assigned to the first-time offenders. Jones, supra note 16, at 3 (internal citation removed).

plish this goal. To maximize the proven effectiveness of the vehicle ignition interlock device, enrollment in the State’s Test and Lock Program should be mandatory for all DUI offenders; it is most prudent to view a first-time offender as one who has just been caught once. Vehicle forfeiture, as an available sanction for non-compliance with the Test and Lock Program, would strongly encourage Program participation.

Because the State’s best weapon in preventing alcohol-related traffic fatalities is in preventing the most dangerous hard core drinking drivers from recidivating, the DUI offender’s lasting recovery from alcohol abuse must be considered of paramount importance. West Virginia must ensure the development and the financial availability of effective, in-patient and long-term treatment options for DUI offenders who are struggling with alcohol addiction.

Finally, innovative approaches to DUI like staggered sentencing, proven effective in other jurisdictions, could greatly enhance West Virginia’s current efforts to reduce DUI recidivism. Dedicated DUI court judges throughout the State would best administer the variety of available DUI countermeasures, overseeing the offender’s adjudication and ensuring West Virginia’s success in combating DUI recidivism and reducing alcohol-related traffic fatalities. By amending the West Virginia Code to incorporate the statistically-proven DUI countermeasures highlighted in this Note, West Virginia can reduce DUI recidivism and save lives.

Jennifer L. Tampoya*

* Notes Editor, Volume 111 of the West Virginia Law Review; J.D. Candidate, West Virginia University College of Law, 2009; Bachelor of Arts, English, University of California at Los Angeles, 1992. The Author dedicates this Note to the memory of Sawyer Evans, Courtney Evans, Jacquesha Perry, Jentil Perry, and Donnell Perry. See supra, note 1 and accompanying text. The Author extends special thanks to the following for freely giving of their time in interviews: the Honorable Russell M. Clawges, Jr., Monongalia County Circuit Court Judge, 17th Judicial District, West Virginia; Mr. Dimas Reyes, Monongalia County Assistant Prosecuting Attorney, 17th Judicial District, West Virginia; Mr. Raymond H. Yackel, Attorney at Law, Morgantown, West Virginia. The Author thanks her faculty mentor, Professor Charles DiSalvo, Woodrow A. Potesta Professor of Law, for his kind encouragement and most valuable drafting suggestions. The Author thanks her husband, John, and her children, Sahalie, John Connor, and Rylan, for their patience and loving support during the Author’s absence from family activities while researching and writing this Note.