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Supplementary Notes

The Virginia Transportation Research Council is a cooperative organization jointly sponsored by the Virginia Department of Transportation and the University of Virginia.

Abstract

Fearful that inflation and the gradual erosion of federal support for highway safety programs were undermining Virginia's historic position of national leadership in highway safety, management directed a study of potential sources of new revenue for the programs.

The project reported here employed a five-step process to gather data necessary for the analysis. First, a literature review of studies on alternative revenue sources for financing transportation safety activities was conducted. Second, the Code of Virginia was studied to identify successful funding mechanisms that are currently being utilized in the Commonwealth. Third, a telephone survey of all states was conducted in an attempt to identify innovative methods of funding that are currently being used elsewhere. Fourth, after analyzing Virginia's current safety funding approach and the results of the national survey, sources of revenue inherently related to highway safety were identified. Fifth, once potential revenue sources were identified through these avenues, each was analyzed and reviewed to project how much revenue could be generated and how it might be allocated.

The researcher concludes that there is a need for additional revenue to fund Virginia's highway safety programs. Recommendations are made concerning several viable options, and suggestions are offered concerning both the distribution and use of the funds.

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FINAL REPORT

POTENTIAL REVENUE SOURCES FOR VIRGINIA'S TRANSPORTATION SAFETY PROGRAMS:

REVIEW OF VIRGINIA'S REVENUE SOURCES AND A SURVEY OF OTHER STATES

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Virginia Transportation Research Council
(A Cooperative Organization Sponsored Jointly by the Virginia Department of Transportation and the University of Virginia)

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ABSTRACT

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INTRODUCTION

For years, Virginia has been a leader in the field of highway traffic safety. Virginia pioneered in periodic motor vehicle inspection, volunteer rescue squads, state sponsored community-based alcohol countermeasure programs, habitual offender legislation, and other innovative programs. Moreover, in evaluations of state programs performed by agencies of the federal government concerned with highway traffic safety, Virginia has consistently been rated at or near the top of the list.[1] But those progressive steps and innovations took place, for the most part, years ago.

Now, the highway safety program in Virginia is suffering from the lack of stable, dedicated revenue sources. Although dedicated revenue sources exist for transportation in general, such as the motor fuel tax revenue, none is specifically earmarked for highway safety. Future funding uncertainty and limited resources may prevent innovation in new safety projects, as well as jeopardize the continued quality of existing programs.

The need for programs to enhance highway and traffic safety is apparent when the average costs per traffic fatality and per nonfatal traffic crash are evaluated. According to a study by the Urban Institute for the Federal Highway Administration, the average comprehensive cost for each fatal crash is $2.7 million (in 1988 dollars at a 4 percent discount rate).[2] The comprehensive cost includes out-of-pocket costs; wages and household production; and pain, suffering, and lost quality of life. The study also reported that nonfatal crashes cost an average of $72,000 per crash.[2]

Motor vehicle accidents constitute the sixth leading cause of death in Virginia.[3] In 1990, there were 1,071 persons killed in fatal crashes in the Commonwealth.[3] Overall, there were 134,505 total crashes, of which 948 involved a fatality. If the number of fatal crashes (948) is multiplied by the comprehensive cost per fatal crash ($2.7 million), the total cost of Virginia fatalities alone is found to be more than $2.5 billion. In addition, if the number of nonfatal crashes (133,557) is multiplied by the average comprehensive cost per nonfatal crash ($72,000), this cost is

found to be more than $9.6 billion. Clearly, improving highway safety should be a high priority for the Commonwealth.

The development of a program to enhance highway safety in Virginia began when the Highway Safety Division (HSD) was created in 1968 to implement initiatives outlined in the Federal Highway Safety Act of 1966. In 1978, the HSD was succeeded by the Department of Transportation Safety (DTS). The DTS was responsible for promoting safety for all modes of transportation. In 1983, the DTS was merged into the Department of Motor Vehicles (DMV) under the Transportation Safety Administration (TSA), an organizational structure that extends to the present day. Although the DMV provides limited state funding, TSA's chief funding sources are National Highway Traffic Safety Administration (NHTSA) and Federal Highway Administration (FHWA) grants. In addition, a contractual relationship has existed between the DMV-TSA and both the Virginia Transportation Research Council (VTRC) to conduct safety research and the Transportation Safety Training Center of the Virginia Commonwealth University to conduct training programs for the DMV.

These organizations have implemented many programs to enhance transportation safety in Virginia in such areas as alcohol and drug countermeasures, occupant protection, motorcycle safety, emergency medical services, pedestrian and bicyclist safety, pupil transportation, police traffic services, and roadway safety.

Virginia's safety programs are primarily funded through three sources. Federal 402 grants constitute the major source of funding, providing approximately $2.5 million annually. The DMV special fund provides the second largest source of revenue, allotting $1.0 to 1.5 million annually, mainly for salaries and personnel expenses. Federal 403 grants constitute the third source of revenue, providing about $100,000 annually for pilot projects.

Federal 402 grants are dedicated funds, but the revenue derived is essentially seed money to be used for the implementation of new projects or the expansion of projects that have already proven effective. The 402 moneys are not available for replacement or recurring costs related to established programs. When the Highway Safety Act of 1966 was implemented, it was emphasized that moneys already dedicated to safety programs by the states were not meant to be supplemented or replaced by the 402 fund. Thus, 402 moneys are not intended to finance ongoing state safety programs and are typically phased out after a certain period.[4]

Uncertainty exists concerning the reliability of federal funding. Prior to 1983, federal 402 grants provided about $4.5 million annually for Virginia's safety programs, after which the amount of funding was cut in half. Although the amount of federal funding has remained stable since the major reduction in 1983, the buying power of those funds has been declining. Also, because of current shortfalls in federal revenues for many social programs, many in Washington advocate shifting programs that have historically been supported by federal funds back to the states.

Since the need for ongoing safety programs in Virginia is evident, stable funding sources are clearly needed. The demand for funds by state agencies and

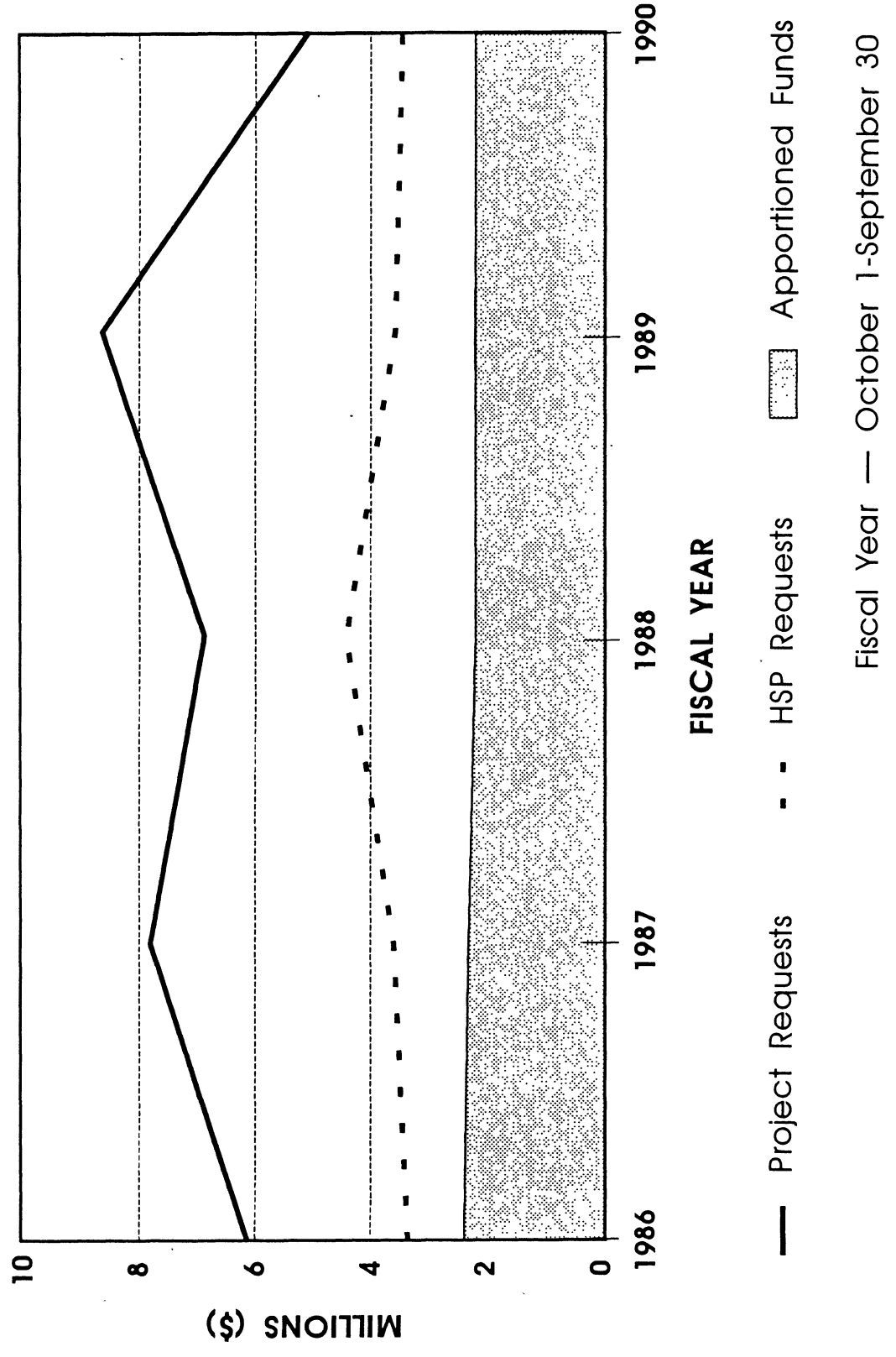

Figure 1. Federal Highway Safety Funds Requested and Received.

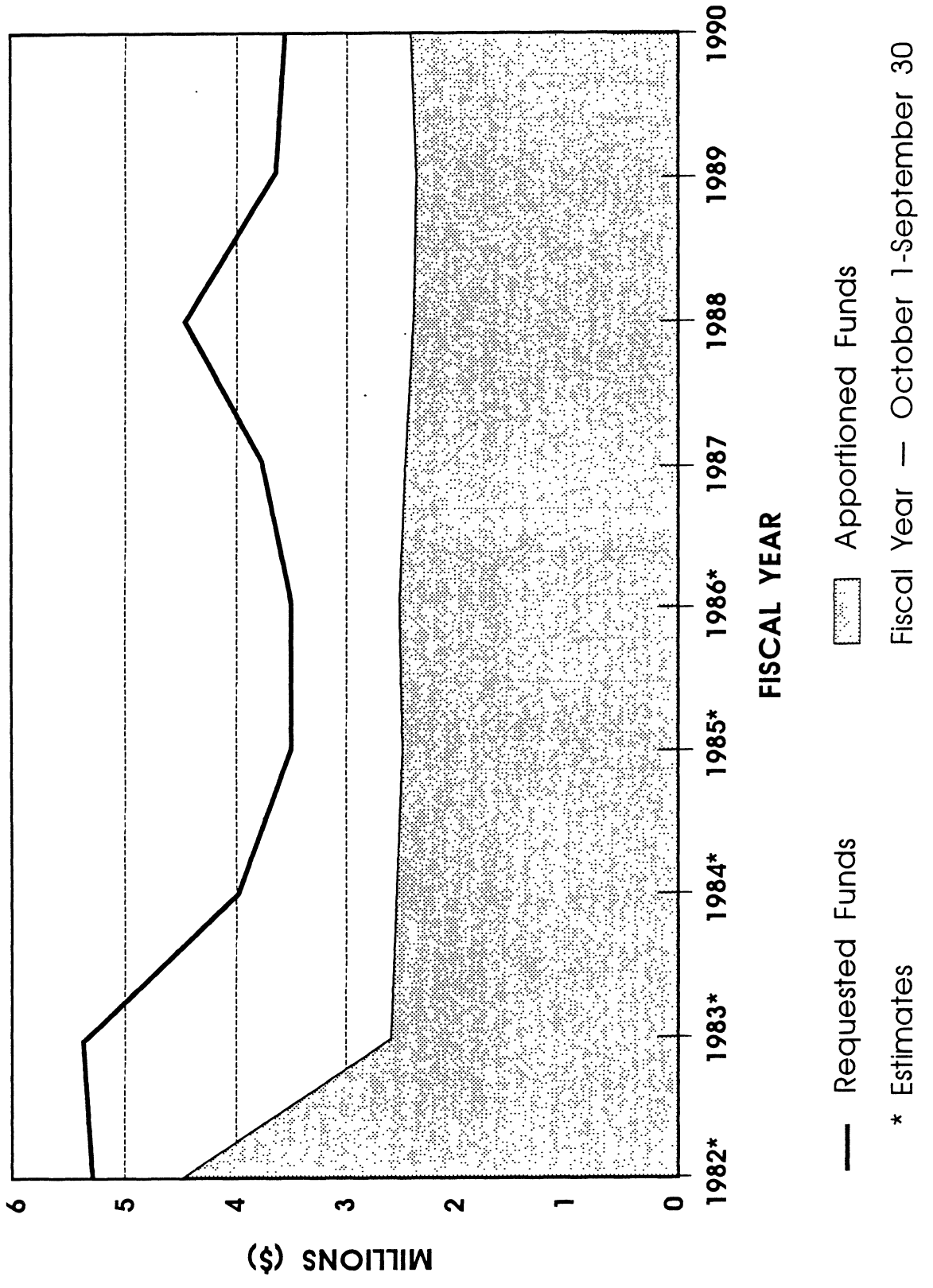

Figure 2. NHTSA Funds Requested vs. NHTSA Funds Apportioned.

local governments in Virginia is significantly higher than the actual amount received for safety programs (see Figures 1 and 2). Although federal funding for safety programs has remained unchanged at $2.5 million annually since 1983, requests for funding have totaled $5 and $8.5 million annually. About 90 percent of the requests for funds represent worthwhile projects that qualify for federal funding.[4]

PURPOSE AND SCOPE

The purpose of this project was to identify potential sources of revenue to help fund Virginia's highway safety programs and develop possible funding mechanisms for each alternative identified. The objectives of the research were as follows:

1. Identify successful methods of funding that have already been implemented in Virginia and in other states.
2. Develop potential funding methods for raising additional revenue for highway safety activities based on the information gathered from past and present Virginia programs, as well as those in other states.
3. Analyze the alternative methods to determine the amount of revenue that could be raised if the methods were implemented.
4. Provide suggestions for allocation of the revenue among localities and for administration or other necessary expenses.

METHODOLOGY

In order to identify and develop funding mechanisms for potential sources of state highway safety revenue, five research steps were undertaken.

1. A literature review of studies on alternative revenue sources for financing transportation safety activities in Virginia was conducted.

2. The Code of Virginia was studied to identify successful funding mechanisms that are currently being utilized in the Commonwealth. In this phase of the research, funding mechanisms for both highway safety–related and nonhighway safety–related activities were identified and reviewed. Annual amounts raised from these sources were obtained by calling the various departments or agencies receiving the funds.

3. A telephone survey of all states was conducted in an attempt to identify innovative methods of funding that are currently being used elsewhere. The survey consisted of a series of questions presented by telephone to various officials contacted in each state's highway or traffic safety office (see Appendix A). The list of

officials to contact in each state was obtained from the National Association of Governors' Highway Safety Representatives.

The survey began with broad, open-ended inquiries into any state funding mechanisms utilized by the state. Later questions were more focused, concentrating on more specific methods of funding. In some cases, the specific questions were unnecessary because the official being questioned offered detailed information at the outset that covered almost the entire survey. In other cases, it was necessary to use questions about specific funding mechanisms as a prompt to obtain the desired information. It became clear to the researcher that some of the safety representatives contacted were much more knowledgeable about a wider range of programs than others. Since this step in the research process was intended only to discover any major successful programs being used by other states that might be feasible for Virginia to explore, only rarely were second or third persons contacted in a given state to obtain further information. Thus, it must be stressed that the information gathered from other states is by no means a complete assessment of each state's funding programs. However, some state officials offered to send more detailed information about their funding programs, and the researcher sought out additional information about programs in other states that seemed deserving of further study.

4. After Virginia's current safety funding approach and the results of the national survey were analyzed, sources of revenue inherently related to highway safety were identified. The researcher hypothesized that it is possible to justify utilizing certain revenue sources for safety programs by finding a relationship between highway safety and the revenue source.

5. Once potential revenue sources were identified through these avenues, each was analyzed and reviewed to project how much revenue could be generated and how it might be allocated. Proposed funding mechanisms and supporting material were then completed and submitted to the DMV.

RESULTS

Literature Review

A three-phase study, *Revenue Sources for Financing Transportation Safety Activities in Virginia*, was compiled from 1978 to 1981 by the VTRC in an attempt to identify new sources of funding for safety activities.[5] The phase 1 report reviewed revenue sources that support all safety programs for modes of transportation other than highways. The first phase dealt almost exclusively with federal assistance programs designed to finance safety activities for the additional modes of transportation included in the newly created DTS in 1978.

The phase 2 report, completed in 1980,[6] reviewed potential state sources of revenue that would support safety activities for all transportation modes. The re-

port recommended pursuing additional revenue through general fund appropriations, special fund appropriations, or the creation of a transportation safety fund that derived revenues from the following possible sources: the reduction or elimination of refunds on fuel taxes, with increased revenue going to the DTS; a portion of corporate charter fees, registration and entrance fees, or franchise taxes; public service corporation taxes; taxes on insurance premiums; aircraft sales and use taxes; and alcohol-related taxes. Also, the report examined the funding methods used for safety programs in other states. This examination revealed potential revenue sources such as reinstating the gross receipts road tax on motor carriers of passengers and instituting a surcharge on traffic fines.

Finally, the phase 3 report, completed in 1981,[7] further developed the alternative of implementing a surcharge on traffic fines. A recommendation was made to adopt such a surcharge and link it to the demerit points assessed for each traffic violation. Since the completion of the three-phase study, no further action has been taken toward implementing the funding mechanisms proposed in the three reports.

Review of Virginia's Funding Methods

In an attempt to discover funding methods used by other entities in Virginia that might also be feasible for highway safety activities, the Code of Virginia and the current budget allocations of several organizations in the Commonwealth were studied. Several funding mechanisms were identified, including those applicable to highway safety programs and other areas.

Highway Safety-Related Funding Programs

Several funding mechanisms are currently utilized for activities that are related to highway safety. The first example involves the designation of portions of the motor vehicle registration fees for specific purposes. A surcharge of $3 is added to the motorcycle registration fee and is deposited in the Motorcycle Rider Safety Training Program Fund. Va. Code 46.2-1191 (1989). This measure raises approximately $190,000 annually. Also, an additional fee of $2 per year for each motor vehicle is collected and paid into the state treasury to be set aside as a special fund used for emergency medical services. Va. Code 46.2-694 (A)(13) (Supp. 1991). More than $8 million was collected for this fund in 1991. The moneys collected for this special fund are distributed as follows:

1. 2.5 percent to the Virginia Association of Volunteer Rescue Squads
2. 13.5 percent to the State Department of Health for training programs for Emergency Medical Services, advanced life support training, and recruitment and retention programs
3. 31.75 percent to the Rescue Squad Assistance Fund

4. 27.25 percent available to the State Department of Health for use in Emergency Medical Services

5. 25 percent returned to the locality wherein such vehicles are registered for the training of personnel and the purchase of equipment and supplies

Va. Code 46.2-694 (A)(13).

Other programs, such as the Virginia Alcohol Safety Action Program (VASAP) are self-supporting. When a court requires a person to enter VASAP, the person must pay a fee of not less than $250 but not more than $300. A portion of the fee (not more than 10 percent) is deposited with the State Treasurer for expenditure by the Commission on VASAP, and the balance is held in a separate fund for local administration of driver alcohol rehabilitation programs. Va. Code 18.2-271.1 (B) (Supp. 1991). The amount collected from this fee varies from about $400,000 to $645,000 per month. In addition, any person whose driving privilege was suspended or revoked as a result of a DUI violation must pay a $40 reinstatement fee, of which $30 is retained by the DMV and $10 is transferred to the Commission on VASAP. Va. Code 18.2-271.1 (E). Also, the Commission on VASAP is authorized to accept gifts of money or property, grants, loans, services, or payments for the purpose of driver alcohol education programs administered by localities. Va. Code 18.2-271.1 (G). The driver's license reinstatement fee subsequent to a suspension or revocation for reasons other than a DUI violation is $30, which is paid by the commissioner into the state treasury and set aside as a special fund used to meet the expenses of the DMV. Va. Code 46.2-411 (1989).

Driver education programs in Virginia are funded by revenues raised from portions of driver's license fees and learner's permit fees. Of each fee collected for each original or renewal driver's license, $1.50 is paid into the driver education fund of the state treasury. For each learner's permit issued, $3 is paid into the fund. Va. Code 46.2-332, 46.2-335 (1989). More than $1.5 million is collected annually for this fund. Similarly, driver improvement programs designed for rehabilitation of problem drivers are supported by fees collected from participants in interviews and driver improvement clinics. Va. Code 46.2-502 (1989).

The Child Restraint Device Special Fund was created for those who are financially unable to acquire a child restraint device. Va. Code 46.2-1097 (1989). Civil penalties of $25 and $10 are collected for the failure to use proper child restraints or carry a statement exempting individuals from such use. These fees are paid into the special fund, amounting to more than $50,000 annually. Va. Code 46.2-1098 (1989). Those who violate the adult safety belt law are subject to a civil penalty of $25, which is paid into the state treasury and credited to the Literary Fund. Va. Code 46.2-1094 (1989).

Non-Highway Safety Funding Programs

Several provisions of the Code dedicate portions of revenue raised through taxes, voluntary contributions, assessments, or surcharges used for programs unre-

lated to highway safety. The first example is the provision for disposing of taxes and fees collected for motor and special fuels that reserves portions for use by particular organizations. One-half cent of the tax collected on each gallon of fuel in which a refund of 17 cents per gallon has been paid or 15.5 cents per gallon for fuel consumed in tractors and equipment used for agricultural purposes is paid into the Virginia Agricultural Foundation Fund to defray costs of research and educational phases of the agricultural program. Va. Code 58.1-2146(C) (1991). Similarly, 1.5 cents of the tax collected on each gallon of motor fuel used for commercial boats or ships upon which a refund has been paid is directed to a game protection fund available to the Board of Game and Inland Fisheries for the acquisition, construction, improvement, and maintenance of public boating access areas. Va. Code 58.1-2146 (D) (1991). Also in subsection (D), a portion of this tax established by the General Assembly is paid into the state treasury for use by the Marine Resources Commission, the Virginia Soil and Water Control Board, and the Commonwealth Transportation Board for public dock improvements, commercial and sports fisheries, and environmental improvements.

Several organizations use a fundraising mechanism in which individuals may give a voluntary contribution of a specified dollar amount of their income tax refunds from the state of Virginia. See Va. Code 58.1-345, 58.1-345.1, 58.1-346, 58.1-346.1, 58.1-346.2 (1991). These organizations have received the following amounts from this mechanism:

Organization	1989 (Annual)	1990 (Annual)
Wildlife	421,920	399,657
Democratic Party	25,348	24,185
Republican Party	23,923	19,731
Olympic Committee	94,152	80,802
Open Space Recreation	94,077	95,658
Housing	170,106	160,714

Voluntary contributions may also be made to the Family and Children's Trust Fund of Virginia and to the Department for the Aging, although no figures were received from the Department of Taxation regarding annual amounts collected for these organizations. See Va. Code 58.1-346.3, 58.1-346.4 (1991).

The Department of Fire Programs administers a Fire Programs Fund that receives funds from an annual assessment against all licensed insurance companies in the Commonwealth. An assessment of eight-tenths of 1 percent of the total direct gross premium income is collected annually on fire, miscellaneous property, marine, homeowners, and farmowners insurance or combination policies containing such insurance. Seventy-five percent of the total amount collected is allocated to counties, cities, and towns providing fire service operations, on the basis of population. The funds are to be used by localities for improving volunteer and salaried fire services. The remaining 25 percent is used for underwriting the costs of operating the Department of Fire Programs and constructing, improving, and expanding regional fire training facilities. Va. Code 38.2-401 (1990). This funding mechanism raises revenue at approximately $7 million annually.

Another revenue-generating mechanism is the imposition of surcharges on fines for particular offenses. A surcharge of $30 is imposed for felonies and $20 for any offense punishable as a Class 1 or Class 2 misdemeanor, which is deposited into the Criminal Injuries Compensation Fund. Va. Code 19.2-368.18 (1990). These sums are used for the payment of expenses suffered by victims of crime and a public information program to disseminate information regarding the right to compensation for victims of crime. Va. Code 19.2-368.17 (1990). Approximately $1.5 million is collected annually for this fund.

National Survey Results

The results of the nationwide telephone survey uncovered numerous funding programs in use by other states, some of which are similar to existing Virginia programs, and others that are unique to the particular state. Various officials mentioned that many states are feeling constrained by tightening budgets and are searching for ways to raise more revenue. A program that many states have in common is the earmarking of a portion of motorcycle registration fees for safety training and education. A number of states reported using a portion of traffic fine revenue for law enforcement training programs. A few states reported programs similar to Virginia's Child Restraint Device Special Fund.

Since one line of questioning in the survey specifically dealt with alcohol-related funds, much of the information gathered dealt with programs funded by alcohol taxes, licensing revenue, and drunk driving assessments.

More than 50 percent of the states reported earmarking of revenue related to alcohol. Several states have DWI assessments that are directed toward such areas as education, rehabilitation, treatment, enforcement, evaluation, or training. Also, some states earmark portions of alcohol tax or license revenue for similar programs such as server training, education, treatment, equipment, and enforcement.

The interviewee contacted in New Jersey sent additional information regarding a wholesale alcohol tax that raises $11 million a year. Eighty-five percent of this revenue is directed to counties for programs in alcohol education, prevention, and treatment. Ten percent is returned to the arresting police agency to defray the costs related to drunk driving cases, and the remaining 5 percent goes into a municipal court fund.

In addition, New Jersey has imposed a $100 surcharge on each drunk driving conviction that the offender must pay into the Drunk Driving Enforcement Fund, amounting to $3 million in 1989. On top of this, the convicted DWI offender must pay an $80 fee to an Intoxicated Driving Program Unit, along with a $100 to $150 fee, depending on whether it is a first or subsequent offense, to the Intoxicated Driver Resource Center. Finally, a $30 fee must be paid to the DMV when the driver's license is restored.

Utah has raised a considerable amount of revenue through alcohol-related taxes by assessing a 3 cent tax on each 12-oz beer at the wholesale level,

raising $8 million a year. Of this amount, $2 million was directed to the State Division of Alcohol and Drugs for education and training and $6 million was allocated to cities and towns.

Mississippi and New Mexico raise revenue through assessments on hazardous moving violations that are directed to Emergency Medical Services and a Traffic Safety Education and Enforcement Fund. Kansas has a state safety fund that receives percentages of all moneys received from driver's license fees to provide funding for driver training courses in schools. Finally, New Jersey has a surcharge that is collected by the DMV from convicted DWI offenders and directed toward a Joint Underwriting Association providing a form of state-subsidized insurance. Each offender pays $1,000 per year for a 3-year period for a first or second offense and $1,500 per year for 3 years for a third DWI offense. In addition, if the offender is also convicted of refusing a blood test, the surcharge is doubled. A complete list of funding methods reported by other states appears in Appendix B.

Potential Revenue Sources Correlated With Highway Safety

Sources of revenue that have some correlation to highway safety exist but are not currently being directed toward safety programs. Three sources are as follows:

1. *Alcohol-related moneys.* In 1990, 50 percent of all traffic fatalities were alcohol-related.[3] In addition, the number of persons killed or injured in alcohol-related crashes increased in the past year.[3] Considering the obvious correlation between alcohol use and highway safety, it is conceivable that a portion of alcohol-related funds could be directed toward safety programs.

The pool of alcohol funds that could be made available for highway safety use consists of taxes collected on the sale of wine, beer, and other alcohol. A tax of 40 cents is currently levied on each liter of wine sold in Virginia. Va. Code 4-22.1 (1988). The state tax on vermouth and wine produced by farm wineries is 4 percent of the price charged, and the tax on other alcoholic beverages is 20 percent of the price charged. 4-22.1.

All moneys collected by the Alcohol Beverage Control (ABC) Board are paid into the state treasury and set aside as a special fund for the payment of salaries and expenses of the board, establishment and maintenance of government stores, and administrative expenses. Va. Code 4-23 (1988). The amount of tax collected on wine and other alcoholic beverages is transferred from the special fund to the general fund of the state treasury. Forty-four percent of the liter (wine) tax is paid from the general fund to the counties, cities, and towns of the Commonwealth in proportion to population, and 12 percent of the liter tax is retained by the board as operating revenue. Va. Code 4-22.1 (D) (1988). The remainder stays in the general fund.

Prior to 1981, an additional tax was assessed on alcoholic beverages bought for resale by the drink. In addition to all other taxes imposed on such beverages, a

tax of 50 cents is collected on distilled spirits per quart; 40 cents on distilled spirits per one-fifth gallon; 25 cents on distilled spirits per pint or less, except for amounts of 2 oz or less, which carry a tax of 5 cents; and 10 cents per bottle of wine containing more than 14 percent alcohol by volume. Va. Code 4-15.3 (Repealed in 1981). The proceeds were paid into the state treasury and distributed as described in section 4-23.

An excise tax is currently levied on beer and other beverages, defined as "similar fermented malt-based beverages, including those blended with fruit juices, wine, wine coolers and similar fermented fruit juices." Va. Code 4-127 (1988). The tax rate is broken down into the following categories:

1. $7.95 per 31-gallon barrel and on such beer and beverages in barrels of more or less than 31 gallons
2. 2 cents per bottle of not more than 7 oz
3. 2.65 cents per bottle of more than 7 oz but not more than 12 oz
4. 2.65 mills per oz per bottle on beverages in bottles of more than 12 oz

Va. Code 4-128 (1988). All moneys collected from the beer tax are paid into the general fund of the state treasury. Va. Code 4-143 (1988).

The total annual amounts collected through the beer, wine, and other distilled spirits taxes for the last three fiscal years were provided by the ABC accounting department:

Type of Tax	1988/89	1989/90	1990/91
Liter (wine)			
Total	$ 14,446,882	$ 14,674,300	$ 14,478,369
To localities	(6,356,628)	(6,456,695)	(6,370,482
Distilled spirits	49,195,255	49,158,836	50,781,261
Beer	38,801,872	38,613,857	39,052,964
Total	$102,444,009	$102,446,999	$104,312,594

2. *Traffic fines.* There is a general reluctance to earmark portions of fine revenue in the Commonwealth. The Code of Virginia requires all fines or forfeitures collected for offenses punishable as felonies, misdemeanors, or traffic infractions to be paid into the state treasury and credited to the Literary Fund. Va. Code 46.2-114 (1989), 19.2-353 (1990). The Literary Fund is a permanent and perpetual fund that receives moneys from the following sources: all public lands donated by Congress for public school purposes, all escheated property, all waste and unappropriated lands, all property accruing to the Commonwealth by forfeiture, all fines collected for offenses committed against the Commonwealth, and the annual interest on the Literary Fund. Va. Code 22.1-142 (1985). The fund is invested and managed by the Board of Education, and moneys belonging to the fund are barred from use for any other purpose whatsoever. Va. Code 22.1-143 (1985), 19.2-353 (1990). The Board of Education is authorized to make loans from the Literary Fund to local school boards for the purpose of erecting, altering, or enlarging school buildings; equipping school buses for alternative fuel conversions; and constructing school bus fueling facilities

for supplying compressed natural gas or other alternative fuels. Va. Code 22.1-146 (Supp. 1991).

Another limitation on the use of fine moneys is found in section 46.2-102 of the Code, which bars law enforcement officers from having an interest in or accepting the benefit of any fine or fee resulting from the arrest or conviction of offenders. The rationale for this limitation was discussed in the phase 3 report compiled by the VTRC regarding surcharges on traffic fines.[7] The concern with implementing a surcharge on fines is that if the agency responsible for enforcement receives a benefit from the increased revenue, an incentive to increase arrests solely to obtain the additional revenue will result.

There is also concern that the judiciary will not want the additional responsibility and cost of collecting, accounting, and directing the proceeds of the surcharges. In addition, there may be a fear that other agencies and groups will seek similar assessments, causing a flood of surcharge proposals.[7]

However, as discussed earlier, the Code of Virginia does provide for the use of fine money for specific programs other than the Literary Fund, such as the use of the child safety restraint violation money (a civil penalty), the additional fee assessed for the victim's fund, and the court-ordered fee for the VASAP program after a DUI violation. Another assessment related to the DUI penalty is a fee not to exceed $25 for the analysis of the alcoholic content of the blood sample. This fee is paid out of the appropriation for criminal charges and taxed as part of the costs of the criminal case, thus paid into the general fund of the state treasury. Va. Code 18.2-268 (I) (Supp. 1991). It appears that to earmark another portion of fine revenue, it would be necessary to justify such an increase or allotment by using the money to fund a specific program related directly to the offense that gives rise to the fine.

3. *A surcharge on insurance premiums.* The Fire Programs Fund mentioned earlier utilizes such a mechanism, and thus it may be possible to implement a surcharge on comprehensive automobile insurance. The theory behind such a program would be that those who pose the greatest risk to highway safety will carry the highest financial burden, since they generally pay the highest premiums. Also, an argument can be made that overall claim costs will be reduced if highway safety is enhanced, which would benefit both insurance companies and customers in the form of lower premiums.

In addition to the utilization of insurance premium revenue by the Department of Fire Programs, Virginia already places a tax of 1 percent on the gross premiums collected from policyholders residing in Virginia, paid by each insurance company conducting business in the Commonwealth. Va. Code 38.2-3812 (1990). The gross premiums tax generated $157 million in fiscal year 1991, which was turned over to the general fund.

A very large amount of money is collected each year for premiums on automobile insurance. The total amount collected through premiums in Virginia for calendar year 1990 was $2.35 billion. The following data were collected from the Bureau of Insurance:

Type of Insurance	Total Premiums Collected in 1990
Auto-Liability	
Private passenger	$1,236,315,000
Commercial vehicle	322,495,000
Auto–Physical Damage	
Private passenger	699,702,000
Commercial vehicle	92,815,000
Total	$2,351,327,000

Analysis of Potential Revenue Field

The first potential revenue source, alcohol taxes, is already earmarked for administration and localities, and the remaining amount is relied upon to support general fund programs. Thus, a measure to increase the current tax rate by a very small percentage and dedicate the additional revenue might be more successful than attempting to earmark another portion of the existing revenue.

The following information represents the additional amounts of revenue that would be available for tax increases from 1 percent to 5 percent of the current taxes:

Increase in Tax	Liter	Beer	Distilled Spirits	Total
1%	$140,000	$ 390,000	$ 510,000	$1,040,000
2%	290,000	780,000	1,020,000	2,070,000
3%	430,000	1,170,000	1,520,000	3,120,000
4%	580,000	1,560,000	2,030,000	4,170,000
5%	720,000	1,950,000	2,540,000	5,210,000

Another possible source of alcohol-related revenue is an additional court cost for each DUI conviction. There are approximately 40,000 DUI convictions per year in Virginia. The following amounts could be raised with assessments from $10 to $40:

Additional Assessment	Approximate Amount Raised
$10	$ 400,000
15	600,000
20	800,000
25	1,000,000
30	1,200,000
35	1,400,000
40	1,600,000

A third possible method of raising revenue for highway safety by implementing a surcharge on automobile insurance could produce a substantial amount of revenue. An assessment of only a very small percentage of the total gross premium income would be necessary to raise a large sum. The following represents the amounts that could be produced by implementing assessments of one-fourth of 1 percent and one-tenth of 1 percent of the total gross premium income:

Percentage Increase	Type of Insurance	Annual Amount
0.25%	Liability-private	$3,091,000
	Liability-commercial	806,000
	Physical damage–private	1,749,000
	Physical damage–commercial	232,000
	Total	$5,878,000
0.10%	Liability-private	$1,236,000
	Liability-commercial	322,000
	Physical damage–private	700,000
	Physical damage–commercial	93,000
	Total	$2,351,000

DISCUSSION

A need for additional revenue to fund Virginia's highway safety programs exists as a result of several factors. The primary source of federal funding has not increased since the 1983 reduction, and the demand for revenue to fund safety programs continues to surpass the amount available to fulfill the Commonwealth's highway safety needs. Also, no expectation exists that federal funding will increase in the near future. Considering the overall costs of traffic crashes to each citizen of Virginia, improvement in highway safety is greatly needed.

A substantial portion of the 402 funds is spent on initial purchases of capital items necessary to implement new programs, and there is little left over for the sort of innovative programs or demonstration projects that could break new ground in highway safety enhancement. If additional revenue is raised for highway safety, the increase could be directed to the localities to purchase the capital equipment necessary to support such programs. Examples of items needed by localities are alcohol and drug countermeasure devices, such as breathalyzers, passive alcohol sensors, and supplies for drug recognition technician (DRT) programs; traffic engineering and safety hardware, such as traffic signals and crash equipment; and microcomputers for local traffic record keeping.

The latter program has proven very successful by vastly improving local traffic record keeping, and nearly $300,000 of 402 funds has been spent for the purchase of microcomputers throughout the past 7 years. Portions of the DMV's own funds have gone toward purchasing the microcomputers also. The amount spent on microcomputers and other capital items for localities, in the aggregate, constitutes a substantial portion of the expenditures from the safety funds. Thus, additional revenue directed toward these purchases would allow a significant portion of 402 funds to be used for innovative research, overtime enforcement, and the initiation of statewide information and education programs.

CONCLUSIONS

An analysis of the sources of revenue currently being utilized in Virginia, as well as a review of prior studies and an overview of how other states are obtaining highway safety funds, reveals the following potential revenue sources for Virginia's highway safety programs: (1) an increase in alcohol taxes, raising $1 to 5 million depending on the percentage increase; (2) an additional assessment on DUI convictions; and (3) a surcharge on the total premiums collected for automobile insurance in Virginia, raising $2 to $5 million through very small percentage increases.

Given the needs discussed previously, the revenue produced should be allocated in a manner that allots a significant portion of the funds to localities, such as 75 percent. Depending on the revenue source, the amounts apportioned to localities should be based on one of the following:

1. proportion of total crashes in each county in relation to the entire state for the previous year (or proportion of total alcohol-related crashes)
2. total population
3. licensed driver population
4. road mileage
5. vehicle miles traveled (VMT)

Priorities for use of funds by localities should be recommended by the state based on traffic crash reports. In order to receive an allocation, the locality should identify problems, document remedial action, submit a plan to attack problems that would be approved by the DMV District Board, and draw up a proposed budget.[4]

The remainder of the additional funds could be retained in the form of a reserve for statewide programs, public information, staff training, research, and expansion of the community transportation safety program (CTSP) in which local clubs and groups organize highway safety campaigns, surveys, and other activities.[4]

RECOMMENDATIONS

1. The current taxes on beer, wine, and distilled spirits could be increased by 3%, raising additional revenue of $3 million to be directed to a special fund to be allocated in the following manner:
   - 75 percent to localities based on the crash rates of each to be used for the purchase of such items as traffic signals, crash equipment, and microcomputers for local traffic record keeping and alcohol-drug countermeasure equipment and supplies, with the requirement that no moneys be allocated unless the locality submits a plan to be approved by the DMV District Board detailing the problem identification, remedial action, and a budget

- 10 percent for the administration of statewide programs
- 15 percent for a state reserve to conduct statewide programs, engage in innovative research, expand the CTSP, and provide for public information

2. An additional assessment of $25, raising approximately $1 million, could be required for each DUI conviction in Virginia and allocated as follows:
   - 75 percent to localities based on the ratio of total alcohol-related crashes in each locality to total state alcohol-related crashes to be used for selective enforcement programs and the purchase of such items as breathalyzers and supplies for DRT programs
   - 15 percent for conducting statewide programs and research on alcohol-drug use in relation to highway safety
   - 10 percent for the administration of the statewide programs
3. A surcharge could be collected from all licensed insurance companies in Virginia in the amount of one-fourth of 1 percent of the total premiums collected by each company providing automobile liability and physical damage insurance on private and commercial vehicles. The additional revenue of more than $5 million could be allocated as follows:
   - 75 percent to localities apportioned according to the number of licensed drivers per county, or the proportion of total crashes per county, with plans submitted in the same manner as mentioned previously to be approved by the DMV; the funds would be allotted for the purchase of hardware items, such as traffic signals, crash equipment, and microcomputers for local traffic record keeping
   - 10 percent for the administration of statewide highway safety programs
   - 15 percent for innovative research and the implementation of statewide safety programs
4. Before legislative proposals can be drafted, a more specific plan for the use of the increased revenue should be developed that identifies the areas in highway safety that are most deserving of additional funding in terms of need and benefit to the Commonwealth's highway safety.

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Appendix A

NATIONAL SURVEY OF REVENUE SOURCES

1602

I am working on a project attempting to identify and develop new dedicated sources of state revenue to fund highway safety activities in Virginia. Because amounts provided from federal grants are uncertain in the future, and there is a lack of stability in state budget appropriations and 403 grants, which must be applied for annually, we are looking for alternative sources of state funding. The reason we are contacting people out of state is to identify innovative funding ideas used by entities in other states that could be modified or attempted in Virginia.

1. Does your state have any specially directed funds that go toward highway or traffic safety, aside from 402 grants, or other federal money?

2. What user fees, or portions of motor vehicle registration or licensing fees, are directed specifically toward traffic safety?

3. Are portions of any of the following taxes specifically directed toward traffic safety: motor and special fuel taxes, motor vehicle sales and use taxes, motor carrier taxes, or any other tax?

4. If your state has a Department of Alcoholic Beverage Control, is any portion of the revenue derived from the operation directed toward a specific organization or safety program (give name, contact person)? If there is no Department of ABC, is any portion of the revenue from alcohol taxes or licensing directed toward safety programs?

5. Does your state designate a portion of traffic fines or add a surcharge on them to direct toward safety programs? Or has an attempt ever been made to implement such a funding method even though it is not currently in place?

6. Has a portion of fines for alcohol-related or drug-related offenses been directed anywhere?

7. Are there innovative funding methods used by other state organizations that deal with safety or services that benefit the general welfare of the public? Examples: Virginia adopted a program called "Two for Life" in which $2 is collected annually for each motor vehicle registration to be used for Emergency Medical Services; organizations receive voluntary contributions from individuals who designate a portion of their income tax refunds to go toward a worthwhile activity (nongame wildlife; recreation space; political parties; U.S. Olympic Committee; Housing, Family & Children's Trust Fund; and Department of Aging).

8. Please indicate a name of another state official who could be contacted if you are unable to provide the information requested for each question. Any suggestions would be appreciated.

Appendix B

FUNDING PROGRAMS IN OTHER STATES

A. DUI Assessments

1. Arkansas	$250 DWI assessment — $100 to localities, $150 for presentence screening and education programs
2. Colorado	$75 assessment — 80% to Law Enforcement Assistance Fund, 20% to Health Department for evaluation, education, and treatment
3. Indiana	$200 additional fee — $20 for state drunk driver programs, equipment, and enforcement; balance to local governments for Drug-Free Community Fund
4. Michigan	3 counties have projects where offenders pay a day's wages—self-supporting programs
5. Montana	$50 reinstatement fee on DUIs to Highway Safety Office—funneled to localities
6. New Jersey	$100 surcharge to DWI Enforcement Fund (raises $3 million), $80 fee to Intoxicated Driving Program Unit ($1.5 million), $100–$150 fee to Intoxicated Driver Resource Center ($3 million), $30 reinstatement fee to DMV
7. North Carolina	Surcharge on breathalyzer to Department of Health for training
8. Rhode Island	$500 highway assessment fine for administration, screening, treatment, and enforcement—56% to Department of Mental Health, 32% to Department of Transportation, 12% to Department of Health
9. Oregon	Portion of $250 DUI fee pays for hearing officers for implied consent, part for treatment; $12 assessment for police training; $40 for victim's fund
10. Utah	$150 assessment for rehabilitation, $100 for victim's compensation

B. Alcohol Tax or License Revenue

1. California	Portion of license fee to server intervention and training

2. Minnesota	"Nickel a Drink"—intended to fund alcohol programs but was diluted
3. New Jersey	Wholesale alcohol tax raised $11 million/ year: 85% to counties for education, treatment, and training; 10% to DWI Enforcement Fund; 5% to Municipal Court Fund
4. New Mexico	1 county uses $100 on alcohol licenses for a "dial-a-ride" program
5. South Carolina	$.50 on each retail minibottle into a "minibottle fund" to the Commission on Alcohol & Drug Abuse
6. Utah	$.03 tax on each 12-oz beer on the wholesale level—$8 million/yr: $2 million to State Division of Alcohol & Drugs for education and training, $6 million to cities and towns
7. Washington	Omnibus Drug Bill: $80 million in beer and alcohol taxes for prisons, prosecutors, and community mobilization
8. West Virginia	Tax on sale of wine and liquor: $700,000 for DUI patrol, equipment, and training

C. Safety Belt or Child Safety Restraint Programs

1. Alaska	Seat belt fine can be paid to court or to local EMS service
2. Minnesota	90% of adult and child safety seat fines goes to EMS
3. Ohio	Portion of fines toward education, training, and public information

Some states reported programs similar to Virginia's current Child Restraint Device Special Fund or attempts to implement such.

D. Traffic Fine Revenue

Several states reported use of portions of traffic fine moneys for law enforcement training: Georgia, Indiana, Maine, South Carolina, South Dakota, Vermont, and West Virginia.

E. Motorcycle Registration or License Fee for Training Programs

California
Connecticut
Illinois
Louisiana
Massachusetts
Montana
Nebraska
New Mexico
North Dakota
Ohio
Oregon
South Dakota
Texas
Washington
West Virginia
Wisconsin

F. Miscellaneous

1. Arizona	Attempt to get community or large corporations to donate for advertising campaigns, public information, etc.
2. Colorado	$1 of registration fee for EMS
3. Hawaii	$2 surcharge on insurance policies to support driver education programs
4. Kansas	State Safety Fund receiving 37.5% of all moneys received from class C driver's licenses, 20% from class D licenses, and 20% from class A and B and all commercial driver licenses (about $1.5 million); a Motorcycle Safety Fund receives 20% of class D licenses ($90,000); both provide funds for driver training courses in schools
5. Minnesota	$2 on license fee for volunteer EMS
6. Mississippi	$5 assessment on hazardous moving violations for EMS
7. New Jersey	Insurance surcharge program on drunk drivers: $30 million
8. New Mexico	$3 from hazardous moving violation paid into a Traffic Safety Education and Enforcement Fund ($600,000)
9. North Carolina	Nonprofit Highway Safety Foundation: annual fundraiser from corporations (has not been done yet)

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Supplementary Notes

None.

Abstract

Beginning on April 1, 1988, a revision of Virginia's law concerning drug-related driving under the influence (DUI) enabled police officers to require a person suspected of driving under the influence of drugs to submit a blood sample to be tested for drug content. However, some judges have been reluctant to pass down a DUI conviction in the absence of an established presumptive or per se concentration of a drug in the blood that indicates impairment. In fact, because of the complex chemical nature of most drugs and their varying effects on individuals, establishing a scientific link between a particular concentration of drugs in the blood and impairment is not possible, at least at this time. This study investigated if there were ways to amend Virginia's laws to facilitate drug-related DUI convictions in the event of a finding of drugs in a suspect's blood.

The researchers formulated three options for legislative amendments: two for criminalizing internal possession of drugs regardless of whether a person is driving, thus opening the way for a plea bargain to a reduced charge of drug-related DUI, and one for criminalizing the operation of a motor vehicle with a nonprescribed drug in the blood. An internal possession offense does not seem to be a feasible option for Virginia at this time. However, the researchers recommend that serious, but cautious, consideration be given to proposing that Virginia's current DUI offense be revised to remove the requirement of showing impairment and permit a positive blood test for a nonprescribed drug to be sufficient evidence for conviction.

FINAL REPORT

LEGISLATIVE APPROACHES TO INCREASING VIRGINIA'S CONVICTION RATE FOR DRUG-RELATED DUI

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ABSTRACT

Beginning on April 1, 1988, a revision of Virginia's law concerning drug-related driving under the influence (DUI) enabled police officers to require a person suspected of driving under the influence of drugs to submit a blood sample to be tested for drug content. However, some judges have been reluctant to pass down a DUI conviction in the absence of an established presumptive or per se concentration of a drug in the blood that indicates impairment. In fact, because of the complex chemical nature of most drugs and their varying effects on individuals, establishing a scientific link between a particular concentration of a drug in the blood and impairment is not possible, at least at this time. This study investigated if there were ways to amend Virginia's laws to facilitate drug-related DUI convictions in the event of a finding of drugs in a suspect's blood.

The researchers formulated three options for legislative amendments: two for criminalizing internal possession of drugs regardless of whether a person is driving, thus opening the way for a plea bargain to a lesser charge of drug-related DUI, and one for criminalizing the operation of a motor vehicle with a nonprescribed drug in the blood. An internal possession offense does not seem to be a feasible option for Virginia at this time. However, the researchers recommend that serious, but cautious, consideration be given to proposing that Virginia's current DUI offense be revised to remove the requirement of showing impairment and permit a positive blood test for a nonprescribed drug to be sufficient evidence for conviction.

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INTRODUCTION

In 1988, Virginia implemented a significant revision of its statute concerning drug-related driving under the influence (DUI). Although the previous language of the law made it illegal for a person to drive while impaired by alcohol and/or other drugs, the law provided for a blood or breath test to ascertain the concentration of only alcohol in a suspect's system, not of other drugs. That is, under the law (called the implied consent statute), a person in possession of a Virginia driver's license or who operates a motor vehicle on Virginia's public roads agrees to provide a blood or breath sample if required to do so by a police officer who suspects the person of driving while impaired by alcohol. In 1987, the General Assembly amended the statute to allow collection of a blood sample from persons suspected of drug-related DUI beginning on April 1, 1988.

In the autumn of 1987, the Department of Motor Vehicles (DMV) and the Virginia State Police (VSP) created the Task Force to Combat the Impaired Driver to prepare for the implementation of the revised statute. As a supplement to the general provisions of the statute, the task force decided to establish a pilot Drug Recognition Technician (DRT) Program, which was originally developed by the Los Angeles Police Department (LAPD) as an intensive training program to enhance a police officer's ability to detect impairment and classify the physiological symptoms consistent with seven broad categories of drugs.

In tracking the ultimate resolution of cases associated with the blood samples submitted for analysis in 1988 and 1989 to the Division of Forensic Science (DFS), the official state laboratory, it became apparent that some judges were reluctant to convict a drug-related DUI suspect, even in the case of a finding of drugs by the DFS, because there are no blood drug concentrations that parallel the 0.10% blood alcohol concentration (BAC) that indicates per se impairment by alcohol.

PURPOSE AND SCOPE

The task force requested that the Virginia Transportation Research Council (VTRC) investigate whether Virginia's laws could be changed to facilitate drug-related DUI convictions in the event of a finding of drugs by the DFS. Because Virginia's DRT program is modeled after a similar program in the LAPD that is associated with a high conviction rate, the researchers considered the possibility of modeling Virginia law after California law. California has a statute that makes it illegal for a person to be under the influence of an illegal drug, which is, in effect, an internal possession charge that carries a mandatory 90-day jail sentence. This penalty is much harsher than the penalty for the first drug-related DUI conviction, so a plea bargain is often struck to drop the internal possession charge if the defendant will plead guilty to drug-related DUI—hence, the high conviction rate for drug-related DUI in California. However, the researchers were unsure whether a blood sample acquired under Virginia's implied consent statute could be used as evidence in another type of criminal offense, i.e., internal possession. Thus, the researchers asked the question: Could the results of a blood analysis obtained for a drug-related DUI case be used as evidence in the non–driving-related charge of being under the influence (or internal possession) of drugs, thus opening the way for a plea bargain? Second, because the use of illicit drugs is by definition illegal, the researchers also asked the question: Can Virginia's law be changed to allow a conviction for drug-related DUI merely on the basis of a driver having a nonprescribed drug in his or her system? The findings were used to develop three legislative options for Virginia.

METHOD

To collect the information necessary to answer the two research questions and develop legislative options, reviews of relevant Virginia court cases and legislation were conducted. The case law of other states was also considered. Although Virginia courts are not bound by the decisions of the courts of other states, it was felt that the case law of other states might serve as a useful model for Virginia.

RESULTS

Question 1

Could the results of a blood analysis obtained for a drug-related DUI case be used as evidence in the non–driving-related charge of being under the influence (or internal possession) of drugs, thus opening the way for a plea bargain?

Examinations of statutory amendments and Virginia Supreme Court rulings regarding permissible uses of the blood test results obtained under the implied con-

sent statute indicate the possible use of blood test results in any criminal or civil proceeding. Deciding on the issue of whether blood test results could be used as evidence in a criminal prosecution for involuntary manslaughter, the *Wade* court limited the admissibility of blood test results to criminal prosecutions under the DUI statute that was tied to the implied consent statute. *Wade v. Commonwealth*, 202 Va. 117, 122, 116 S.E.2d 99, 103 (1960). The *Wade* court based its decision on the principle that "penal statutes are to be construed strictly against the State and in favor of the liberty of a person." *Id.* at 122, 116 S.E.2d at 103.

Although *Wade* once circumscribed the use of blood test results, the legislature amended the statute on which *Wade* rested. At the time of *Wade*, the relevant statute provided for a voluntary blood test and stated that blood test results were "admissible in any court or proceeding." Va. Code Ann. §§ 18-75.1–18-75.2 (1950). Four years after *Wade*, a statutory amendment provided for the admissibility of blood test results "in any court, in any criminal proceeding." 1964 Va. Acts C. 240. In 1975, another amendment further broadened the admissibility of blood test results by providing for the admission of such evidence "in any court, in any criminal or civil proceeding." 1975 Va. Acts C. 14. Thus, legislative action following *Wade* has consistently expanded the admissibility of the blood test results obtained under the implied consent statute.

Research revealed only one post-*Wade* ruling that reflected the change in the scope of admissibility for the blood test results created by the legislative amendment. In that case, the admissibility of the blood test results for a non-DUI charge was at issue for different reasons than in *Wade*. *Essex v. Commonwealth*, 228 Va. 273, 322 S.E.2d 216 (1984). In *Essex*, the Commonwealth prosecuted the defendant for DUI and for second-degree murder. *Id.* at 278, 322 S.E.2d at 218. The defendant challenged the admissibility of the blood test results not on the grounds that the statute limited admissibility to DUI prosecutions, but rather on the grounds that the blood test results were not probative. *Id.* at 285, 322 S.E.2d at 223. Because the court determined that the blood test results report "the degree of [the defendant's] intoxication," which tends to show "the relative dangerousness of his conduct," it held that the trial court's admission of the blood test results was proper in the homicide prosecution. Thus, although the *Essex* court specifically addressed neither *Wade* nor the ensuing statutory amendments, its ruling was in accord with the broader scope of the statutory amendments.

It cannot be said with certainty whether the blood test results obtained under the implied consent statute may be used in prosecutions for internal possession. Although a plain language reading of the two statutory amendments indicates that the legislature intended the admissibility of the blood test results in virtually any court proceeding, a plain language reading of the version of the statute on which the *Wade* court relied also indicates that the blood test results should have been admitted in that case. In *Wade*, admissibility under the statute extended to "any court or proceeding," and admissibility under the amended statute presently extends to "any court, in any criminal or civil proceeding." Va. Code Ann. § 18-75.2 (1950) and Va. Code Ann. § 18.2-268(L) (1989). The extension of admissibility in *Essex* beyond that allowed in *Wade* may serve as some indication that the Virginia

Supreme Court may be willing to adhere to a plain language reading of the scope of admissibility of blood test results under the implied consent statute. However, in *Essex*, the murder charge was directly related to the defendant's operation of a motor vehicle while under the influence of alcohol.

In summary, although *Wade*, a case decided more than 30 years ago, indicated that the Virginia Supreme Court would rule strictly and against the Commonwealth in interpreting the scope of admissibility of blood test results under the implied consent statute, two statutory amendments and the more recent *Essex* ruling indicate an expanded scope of admissibility. Whether that scope is broad enough to encompass a non–driving-related charge for internal possession of drugs is not clear.

Question 2

Can Virginia's law be changed to allow a conviction for drug-related DUI merely on the basis of a driver having a nonprescribed drug in his or her system?

Under the California Health & Safety Code § 11550 (West 1990), it is an offense to "use, or be under the influence of any controlled substance . . . except when administered by or under the direction of a person licensed by the state to dispense controlled 'substances.'" The significant part of the offense is not impairment, but the illegal use of a substance. *Culberson*, 140 Cal. App. 2d Supp. at 961, 295 P.2d at 599. Thus, since "under the influence . . . refers to the presence of [illegal drugs] in any detectable manner" (*People v. Mendoza*, 76 Cal. App. 3d Supp. 5, 9, 143 Cal. 404, 406 [1977]), a positive chemical test can provide the sole evidentiary basis for conviction under the statute. In *Posadas de Puerto Rico Assocs. v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986), the Supreme Court stated that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising" of casino gambling. *Id.* at 346. Hence, since California has criminalized the presence of a nonprescribed drug in a person's system and this law has not been overturned in California or federal courts, then the lesser step of criminalizing driving with a nonprescribed substance in the blood would likely be upheld in the federal courts, although the position of Virginia courts is unknown.

The offense of addicted driving likewise supports criminalizing the operation of a motor vehicle with a nonprescribed substance in the blood. Under California case law, proof of withdrawal is a sufficient basis to convict for addicted driving (*Duncan*, 255 Cal. App. 2d at 78, 62 Cal. Rptr. at 825) since withdrawal symptoms pose the primary threat to roadway safety. *O'Neill*, 62 Cal.2d at 756, 44 Cal. Rptr. at 325. Proof of actual withdrawal while driving is not required for conviction. *Id.* at 754, 44 Cal. Rptr. at 324. Thus, the California law confronts the potential threat to roadway safety created by addicted driving, not just individual circumstances in which withdrawal symptoms actually impaired driving.

Although Virginia defines DUI in terms of impairment of the driver's ability to operate a motor vehicle (Va. Stats. Ann. §18.2-266 [1988]), California's addicted

driving statute suggests that actual impairment need not be a requirement for a drug-related DUI conviction. Just as California guards against the possibility of impairment from withdrawal, Virginia may be able to protect the public from the threat of impairment caused by drug use. Whenever a nonprescribed substance is present in a driver's blood, the potential for impaired driving exists, just as it does with addicted drivers subject to withdrawal symptoms. Virginia may be able to guard against this threat, even though it is not manifested in actual impairment. The law assumes, without further proof, that when a person is under the influence of intoxicants "that it is dangerous to the public, as well as to the driver, to operate a motor vehicle." *McMurry*, 184 So. 42, 43 (Ala. 1938).

Indeed, proof of actual impairment is not required by statutes that do not define *under the influence* in terms of "impairment." In construing Alabama Code § 1397 (Michie's Code 1928), which made it illegal "to drive any vehicle upon a public highway while under the influence of liquors or narcotics," the *McMurry* court held that the state need not "prove that the intoxication had reached a stage where it would or did interfere with the operation of the motor vehicle." *Id.* at 42. Driving under the influence of intoxicants is presumed to be dangerous. *Id.* at 42, 43. Before the Virginia law required impairment for conviction under § 18.2-266, the Virginia Supreme Court held that conviction for driving "while under the influence of intoxicants" did not require the Commonwealth to prove that the driver was under the influence of intoxicants to such an extent that his or her ability to drive "safely is materially impaired." *Owens v. Commonwealth*, 136 S.E. 765 (Va. 1927).

Thus, absent a statutory requirement of proof of impairment, it is possible that Virginia might obtain a conviction for drug-related DUI without a showing of impaired driving. Although it may be argued that proving the charge mandates evidence of some effect on the operator's nervous system, California case law establishes that a positive blood test sufficiently demonstrates that a person was under the influence of narcotics. See *Mendoza*, 76 Cal. App. 3d Supp. at 9, 143 Cal. Rptr. at 406. Therefore, it follows that a blood test showing the presence of a controlled substance in the driver's system may be able to provide the sole evidentiary basis for a conviction of drug-related DUI, without further proof of impairment.

Legislative Options

Based on the analysis of the two questions investigated in this study, the researchers formulated three legislative options for consideration in Virginia. The first two options would criminalize internal possession of drugs, and the third would criminalize the operation of a motor vehicle with a nonprescribed drug in the blood.

Options 1 and 2: Criminalizing Internal Possession

- *Option 1: Internal Possession with Penalties Corresponding to Virginia's Drug Possession Laws*

This option models a statute criminalizing internal possession of a controlled substance after Virginia's possession statutes and could be placed in Title 18.2, Chapter 7, Article 1. The language in the prohibition portion was taken from California, Michigan, and Delaware law. The penalty portion of the statute corresponds to Virginia's possession penalties contained in Title 18.2, Chapter 7, Article 1.

18.2-XXX. Use of controlled substances; penalty.

It is unlawful for any person knowingly or intentionally to use or be under the influence of any controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner acting in the course of his professional practice. It shall be the burden of the defense to show that it comes within the exception.

Violation of this section with respect to a controlled substance classified in Schedules I or II of the Drug Control Act is punishable as a Class 5 felony.

Violation of this section with respect to a controlled substance classified in Schedule III of the Drug Control Act is punishable as a Class 1 misdemeanor.

Violation of this section with respect to a controlled substance classified in Schedule IV of the Drug Control Act is punishable as a Class 2 misdemeanor.

Violation of this section with respect to a controlled substance classified in Schedule V of the Drug Control Act is punishable as a Class 3 misdemeanor.

Violation of this section with respect to a controlled substance classified in Schedule VI shall be punishable as a Class 4 misdemeanor.

If Virginia chooses to criminalize internal possession of a controlled substance, provisions should be included for internal possession of marijuana. The following provision is modeled after Virginia's possession statute. The criminalization of internal possession of marijuana is separated from the criminalization of internal possession of a controlled substance because Virginia's possession penalties are separated in that manner. The penalty provision in the following model matches the penalty provision in Virginia's marijuana possession statute.

18.2-YYY. Use of marijuana; penalty.

It is unlawful for any person knowingly or intentionally to use or be under the influence of marijuana unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice.

Any person who violates this section is guilty of a misdemeanor and shall be confined in jail not more than 30 days and fined not more than

$500, either or both; any person, upon a second or subsequent conviction of a violation of this section, is guilty of a Class 1 misdemeanor.

- *Option 2: Internal Possession with a 90-day Mandatory Jail Term*

The following penalty alternative is a modified version of California's penalty for being under the influence.

18.2-XXX. Use of controlled substances; penalty.

Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term in jail of not less than 90 days nor more than 1 year. The court may place a person convicted hereunder on probation for a period not to exceed 5 years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in jail for at least 90 days, notwithstanding section 18.2-251. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in jail.

Like option 1, option 2 would require a separate section to address the internal possession of marijuana:

18.2-YYY. Use of marijuana; penalty.

Any person who violates this section is guilty of a misdemeanor and shall be confined in jail not less than 90 days nor more than 12 months. The court may place a person convicted hereunder on probation for a period not to exceed 5 years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in jail not less than 90 days, notwithstanding section 18.2-251. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in jail.

- *Provisions Common to Options 1 and 2*

The use of internal possession to punish drug-related DUI may require that Virginia clearly allow the use of blood samples acquired under the provisions of the implied consent statute in internal possession proceedings. Following is a modification of Virginia's implied consent statute. The amended statute constitutes one of two feasible alternatives regarding the seizure of blood for evidence in internal possession prosecutions. Either making the amendments suggested below or having no amendments and no search statute at all appears to be the better choice. If no amendment is made to the implied consent statute, and if no separate search provision is drafted, it is possible that the Virginia Supreme Court may interpret the implied consent statute broadly enough to allow the use of blood samples acquired under the provisions of the statute in internal possession prosecutions. The sample provision follows:

§ 18.2-268. Use of chemical test to determine alcohol or drug content of blood; procedure; qualifications and liability of person withdrawing blood; costs; evidence; suspension of license for refusal to submit to test; localities authorized to adopt parallel provisions . . .

L. When any blood sample taken in accordance with the provisions of this section is forwarded for analysis to the Division, a report of the results of such analysis shall be made and filed in that office. Upon proper identification of the vial into which the blood sample was placed, the certificate as provided for in this section shall, when duly attested by the Director of the Division or his designated representative, be admissible in any court, *in any criminal proceeding under Title 18.2* or *in any civil proceeding,* as evidence of the facts therein stated and of the results of such analysis . . .

O. In any trial for a violation of section 18.2-266 or of a similar ordinance of any county, city or town, this section shall not otherwise limit the introduction of any relevant evidence bearing upon any question at issue before the court, and the court shall, regardless of the result of the blood or breath test or tests, if any, consider such other relevant evidence of the condition of the accused as shall be admissible in evidence. If the results of such a blood test indicate the presence of a drug or drugs other than alcohol, *in a section 18.2-266 proceeding,* the test results shall be admissible only if other competent evidence has been presented to relate the presence of a drug or drugs to the impairment of the accused's ability to drive or operate any motor vehicle, engine or train safely. The failure of an accused to permit a sample of his blood or breath to be taken for a chemical test to determine the alcohol or drug content of his blood is not evidence and shall not be subject to comment by the Commonwealth at the trial of the case, except in rebuttal; nor shall the fact that a blood or breath test had been offered the accused be evidence or the subject of comment by the Commonwealth, except in rebuttal.

Option 3: Driving with a Nonprescribed Drug in the Blood

Under this formulation, the offense of drug-related DUI is defined simply as driving with a controlled substance, cannabinoid, or any other self-administered intoxicant or drug of whatsoever nature in the blood. Under Virginia law, the definition of *controlled substances* includes prescribed substances as well as traditionally illicit substances. By using this language, the provision covers illicit, prescribed, and over-the-counter substances. Cannabinoids include marijuana and marijuana-derived substances. Further, this alternative makes a positive chemical test for a nonprescribed controlled substance a sufficient basis for conviction under the statute.

§ 18.2-266. Driving motor vehicle, engine, etc., while intoxicated, etc. It shall be unlawful for any person to drive or operate any motor ve-

hicle, engine or train (i) while such person has a blood alcohol concentration of 0.10 percent or more by weight by volume as indicated by a chemical test administered in accordance with the provisions of § 18.2-268, (ii) while such person is under the influence of alcohol, (iii) while such person is under the influence of any *controlled substance or cannabinoids,* ~~narcotic drug~~ or any other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs or (iv) while such person is under the combined influence of alcohol and any drug or drugs. *For the purposes of this section, a positive blood concentration of non-prescribed, controlled substances or cannabinoids as indicated by a chemical test administered in accordance with the provisions of § 18.2-268 constitutes prima facie evidence that a driver is under the influence of controlled substances.*

An alteration is recommended in Va. Stat. Ann. § 18.2-268(O) (Supp. 1988) if option 3 is to be effective or enacted. The following language should be struck from the current statute:

> O. If the results of such a blood test indicate the presence of a drug or drugs other than alcohol, the test results shall be admissible only if other competent evidence has been presented to relate the presence of drug or drugs to the impairment of the accused's ability to drive or operate any motor vehicle, engine or train safely.

This section may suggest that presumptive or per se levels for controlled substances are necessary to relate the concentration of drugs in the blood to the impairment of driving skills. Such an interpretation is best avoided by deleting the language entirely.

DISCUSSION

One reason for considering options 1 and 2 would be to provide a way to encourage a guilty plea in drug-related DUI cases. Plea bargaining to a plea of guilty in a drug-related DUI case should be facilitated if the internal possession penalty is harsher than the DUI penalty. Although it is also conceivable that, even if the internal possession penalty were less severe than the DUI penalty, a Commonwealth's Attorney's offer to drop an internal possession charge might be sufficient motivation for an accused to plead guilty to drug-related DUI, such a scenario is unlikely.

The following are the penalties that would result for internal possession of drugs if option 1 was implemented:

Schedule	Class	Penalty
I & II	Felony 5	1–10 yrs; up to $2,500
III	Misdem. 1	Up to 12 mos; up to $2,500
IV	Misdem. 2	Up to 6 mos; up to $1,000
V	Misdem. 3	Up to $500
VI	Misdem. 4	Up to $250
Marijuana	N/A	Up to 30 d; up to $500

Va. Ann. Code § 54.1-3445 et seq. (1950).

Drugs are placed in each schedule depending on factors such as medically accepted usage, potential for abuse, and potential for either physical or psychological addiction. Those drugs carrying the harshest possession penalties (i.e., Schedule I drugs) have no accepted medical use and are highly addictive. Hallucinogens, such as LSD, appear in Schedule I. Schedule II drugs, which include opiates, are those with restricted use and are also highly addictive. Schedule III drugs include barbiturates and narcotics, which have medically accepted uses but that are highly psychologically addictive and moderately physically addictive. Drugs in Schedules IV, V, and VI are considered less addictive, with Schedule VI drugs being all prescription drugs not listed in the other schedules. The scheme appears to be based on the relative danger to the individual that could result from use of the drugs—the more dangerous the drug, the greater the penalty.

Several comparisons are noteworthy. Because drug-related DUI is punishable as a class 1 misdemeanor, the penalty is the same as that for possession of a Schedule III drug, less severe than that for possession of a Schedule I or II drug, and more severe than that for possession of a Schedule IV, V, or VI drug or marijuana. Thus, option 1 would likely encourage a plea of guilty to drug-related DUI only in cases in which a defendant had used a Schedule I, II, or III drug.

On the other hand, option 2, which would impose a 90-day mandatory jail term for internal possession, is harsher than the Virginia possession penalties for controlled substances in Schedules V and VI and for marijuana. Although option 2 would likely be extremely effective for plea bargaining purposes, it would also create an inconsistency in Virginia law. Thus, under this formulation, penalties could be far worse if an individual had a controlled substance in his or her blood than if he or she had the same substance in his or her possession.

A further complication to consider under options 1 and 2 concerning internal possession stems from the fact that an internal possession statute would target drug users in general and not impaired drivers only. Thus, police officers and prosecutors could choose to arrest and convict drug users under the harsher penalties of internal possession.

Under option 3, which would criminalize the operation of a motor vehicle with a nonprescribed drug in the blood, drug-related DUI would be redefined in terms of a positive finding of a drug by the DFS. Thus, the focus of the statute would be shifted from impaired driving to a positive blood test, thereby avoiding the

presently unanswerable question of what blood concentration of each illicit substance results in impaired driving.

Indeed, a conviction for drug-related DUI based on a positive blood test is not strict liability, but liability for recklessness. Under strict liability, if the specified event occurs, then the party is held liable. In the application of strict liability to the DUI context, if a driver operates an automobile in an impaired fashion, for example by weaving, the driver could be convicted of DUI without a blood test or further proof. However, a positive blood test strongly implies a reckless basis for impaired driving. Moreover, an interpretation of the present statute by some Virginia judges that would require presumptive or per se levels for controlled substances places an impossible burden on the Commonwealth. The strategy proposed in option 3 may resolve some difficulties in obtaining a drug-related DUI conviction by removing the impediment to effective law enforcement created by the lack of presumptive or per se levels while corroborating that there is a reckless ground for a driver's impaired operation of a motor vehicle.

RECOMMENDATIONS

One purpose of considering an internal possession offense in Virginia would be to encourage a plea of guilty for a drug-related DUI offense in which a sample of the suspect's blood tested positive for drugs. However, it appears that such a structure would not be feasible at this time in Virginia for two reasons:

1. For an internal possession charge to be most effective, the Commonwealth would need a sample of the suspect's bodily fluids that could be tested for drugs. Even though the defendant is required under the implied consent statute to submit a blood sample to be tested for drug content, there is some question as to whether blood acquired under the implied consent statute could be used as evidence in an internal possession trial. Even if Virginia were to amend the current language of its implied consent law, there is no case law that would specifically allow the use of the blood in a non–driving-related charge.
2. In Virginia, possession of most types of illicit drugs carries a less severe penalty than for drug-related DUI. Hence, if the possession penalty scheme were followed for internal possession, most plea bargains would be for the less severe internal possession charge than for the more severe drug-related DUI charge. Conversely, if the internal possession penalties were made harsher than the drug-related DUI penalties in order to encourage a DUI guilty plea, the internal possession penalties would have to be made inconsistent with existing laws governing illicit drug possession.

Thus, the researchers recommend that options 1 and 2 be rejected at this time.

Option 3, which would remove the language of "impairment" from Virginia law, seems to be the most feasible option considered in this investigation. There is

some scientific support for the argument that drugs in any quantity will place an individual under the influence, even if not to the degree of impairment. Further, it appears that option 3 would provide the best strategy for changing the law, and there is some California case law that suggests that Virginia courts might uphold the change (although Virginia courts are not bound by California case law). The choice of option 3 would also result in a significant alteration in the burden of proof for drug-related DUI cases.

It is quite possible that the Virginia General Assembly would not pass such substantial changes to the law if a bill were to come before them on this matter. Hence, legislative acceptance of option 3 is far from certain. However, the researchers recommend that Virginia seriously consider this option, but only in light of the likely opposition it will receive in the General Assembly and the opposition it could receive in the Virginia courts.