

Contemporary Issues in

LAW

Volume 11 Issue 4
ISSN 1357-0374

CRIMINAL JUSTICE

|LAWTEXT|
|PUBLISHING|

CONTEMPORARY ISSUES IN LAW
ISSN 1357-0374
Volume 11 – 4 Issues
£100.00 plus £6.00 airmail post outside Europe

SUBSCRIPTION AND CORRESPONDENCE ADDRESS

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The review may be cited as VOL 11 CIL 000
Contemporary Issues in Law is published by Lawtext Publishing Limited
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Production Editor: Paula Clifford
Publisher: Nicholas Gingell
Typeset by Walker Cook, Hinton-in-the-Hedges, Northants
Printed and bound in the United Kingdom by Information Press, Oxon

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CONTENTS

CONTEMPORARY ISSUES IN LAW VOLUME 11 ISSUE 4

Published by Lawtext Publishing Limited – www.lawtext.com

CRIMINAL JUSTICE

'BABY CAN I HOLD YOU?' PRISONERS, REPRODUCTIVE CHOICES AND FAMILY LIFE 227

Helen Codd, Reader in Law & Criminal Justice, University of Central Lancashire

The imprisonment of both men and women raises a number of controversial issues in relation to reproductive rights and choices, parenting and family relationships. Although there has been an expansion in academic and professional interest in prisoner litigation in the UK in the last decade, partly due to the Human Rights Act 1998, there are still aspects of prisoners' *reproductive* rights which merit further scrutiny. Indeed, the whole question of whether or not a right to reproduce exists, and if so, whether and in what circumstances that right can be limited by the State, has been debated from a number of different perspectives.

This article explores the contours of the socio-legal debates arising from questions of prisoners' reproductive rights, especially of women, mostly in the context of the US, where a number of cases have delineated the scope, nature and limits of prisoners' reproductive choices in relation to conception, abortion, birth and parenting. It is striking that, in contrast with the US appellate constitutional cases and the substantial body of published research literature, little published research exists as to the experiences and legal situation of prisoners in the UK. This article offers a socio-legal analysis of the case law in the context of feminist research into prisons as sites of reproductive control, identifying questions for further research.

EFFICIENT, EFFECTIVE AND FAIR? DISQUALIFYING DRIVERS
IN THEIR ABSENCE AT LONDON TRAFFIC COURTS 249

Claire Corbett, Brunel Law School, Brunel University

As part of a series of London-wide measures designed to streamline end-to-end system efficiency in the criminal justice process, a substantial re-organisation of the traffic court system has taken place alongside a London-wide approach for the prosecution of drivers at risk of disqualification from driving through the accumulation of penalty points. The main aims of the revisions are to reduce costs through raising efficiency and to increase outcome effectiveness. This paper explores one of the key outcomes which is to bring swifter and more certain justice to drivers eligible for disqualification who would prefer to evade or delay the imposition of this court sanction. Comparison is made of the profiles of a sample of London drivers who failed to appear and were disqualified in their absence with one that complied with the justice process. In particular, the implications of the findings are considered in the context of a key British police objective 'to disrupt criminality', and of the current narrative of the cost savings needed across the criminal justice system. Whether a widespread application of the practice to sentence and disqualify in absence is efficient and effective is central to the discussion, as is the procedural fairness of this application of the law.

A PROBLEM OF THE PAST? THE POLITICS OF 'RELEVANCE'
IN EVIDENTIAL REFORM 277

Imogen Jones, Lecturer in Law, University of Manchester

This article examines the way in which the concept of relevance was utilised in the reform of the past sexual history and bad character rules of criminal evidence. It is suggested that this differed for the two types of evidence. Whilst the past sexual history reforms were intended to reduce the admissibility of arguably relevant evidence, the bad character provisions aimed to both expand and reduce admission. However, understanding of the relevance of these types of evidence was informed by more political objectives. Firstly, the need for new balances to be struck between victims, witnesses and defendants during the trial process was advanced. Second was the idea that the law needed to be reformed because the rules, and the judicial discretion permitted by them, were undermining the goal of convicting the guilty. It is concluded that the political manipulation of evidential concepts such as relevance places a burden on the judiciary to negotiate numerous principles and political goals, but that they may be well placed to deal with this difficult task.

AUTONOMY, CONSENT AND THE CRIMINALISATION OF
ASSISTED DYING

302

Ben Livings, Senior lecturer, University of Sunderland

A concern for personal autonomy is central to the seemingly intractable debate that rages around assisted dying, but it is often absent from the legal framework that currently governs, and largely proscribes, its various practices. This article examines the legal status of assisted dying, against the social and political discourses that surround it, asserting that the fragmented responses of the criminal justice system to practices such as assisted suicide, mercy killing and the doctrine of double effect manifest a disjunction between the debate and the substantive criminal law and wider policy response that has been effected.

EFFICIENT, EFFECTIVE AND
FAIR? DISQUALIFYING DRIVERS
IN THEIR ABSENCE AT LONDON
TRAFFIC COURTS*

*Claire Corbett***

Abstract

As part of a series of London-wide measures designed to streamline end-to-end system efficiency in the criminal justice process, a substantial re-organisation of the traffic court system has taken place alongside a London-wide approach for the prosecution of drivers at risk of disqualification from driving through the accumulation of penalty points. The main aims of the revisions are to reduce costs through raising efficiency and to increase outcome effectiveness. This article explores one of the key outcomes, which is to bring swifter and more certain justice to drivers eligible for disqualification who would prefer to evade or delay the imposition of this court sanction. Comparison is made of the profiles of a sample of London drivers who failed to appear and were disqualified in their absence with one that complied with the justice process. In particular, the implications of the findings are considered in the context of a key British police objective 'to disrupt criminality', and of the current narrative of the cost savings needed across the criminal justice system. Whether a widespread application of the practice to sentence and disqualify in absence is efficient and effective is central to the discussion, as is the procedural fairness of this application of the law.

The ultimate non-custodial sanction for drivers

It is generally recognised that disqualification from driving¹ is perceived as the most severe non-custodial sanction available to drivers in Great Britain and elsewhere. Research shows that disqualification is more feared by drivers than substantial fines,² that the threat of it acts as a deterrent against

* The author is indebted to the help provided by the Traffic Criminal Justice Operational Command Unit of the Metropolitan Police Service in completing this research and is grateful for the helpful comments of the anonymous reviewer(s)

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1 'Disqualification' is termed 'licence suspension' or 'licence revocation' in other jurisdictions.

2 For example, Corbett, C, Simon, F and O'Connell, M, *The Deterrence of High-speed Driving: A Criminological Perspective*, Contractor Report 296 (Crowthorne: TRL, 1998) at 19, 24.

breaking traffic laws for many,³ and that a small proportion of drivers at least say they would be willing to avoid it by illegal means if necessary.⁴

There are four main routes to licence disqualification in Great Britain. Either drivers are subject to obligatory disqualification upon conviction of certain serious traffic offences like 'drink driving',⁵ or they can receive a discretionary disqualification rather than other sanctions for slightly less serious offences like exceeding speed limits by high margins.⁶ A third route is under sections 146 to 147 of the Powers of Criminal Courts (Sentencing) Act 2000, where offenders convicted of any criminal offence may be disqualified in addition to, or instead of, a sanction in the normal way. Alternatively, British drivers receive a number of penalty points⁷ when convicted of minor traffic offences. The number of penalty points applicable to different traffic offences varies between two and 11, and each offence may carry a range of points, for example, 'using an uninsured vehicle' attracts between six and eight points.⁸ Drivers become eligible to lose their driving licence when they have accumulated 12 or more points (under section 35 of the Road Traffic Offenders Act 1988). Such drivers are commonly termed 'totters' as their points 'tot up' towards this threshold. In 2010, 94,000 outright disqualifications were awarded by courts in England and Wales,⁹ while 22,000 disqualifications were imposed as a result of 'totting-up', a ratio of just over 4 : 1.¹⁰

Where drivers are eligible for disqualification if convicted, they are normally required to attend a court hearing in front of magistrates where they may wish to show cause against being disqualified. The problem for the courts is that not all drivers at risk of disqualification comply with the standard prosecution procedure and some repeatedly fail to turn up for the sentence hearing. In this event, repeated court adjournments are expensive and wasteful, justice ultimately may fail to be done, and road safety and road users may suffer.

3 Broughton, J. *Recent Trends for Speeding Convictions and Totting-Up Disqualifications*, Project Report PR181 (Crowthorne: TRL, 2008) at ii; Corbett, C, Delmonte, E, Quimby, A and Grayson, G, *Does the Threat of Disqualification Deter Drivers from Speeding?* Road Safety Research Report 96 (London: Department for Transport, 2008) at 7.

4 Corbett *et al.*, Note 3 above, at 35, 84.

5 Obligatory disqualification for 'drink or drug driving' is provided under section 4 of the Road Traffic Act 1988.

6 Discretionary disqualification for exceeding a speed limit is provided under section 89 of the Road Traffic Regulation Act 1984 and in Schedule 2 to the Road Traffic Offenders Act 1988.

7 'Penalty points' are often termed 'demerit points' in other jurisdictions.

8 Direct Gov 'When endorsement and penalty points can be removed from your licence': [http://www.direct.gov.uk/en/Motoring/DriverLicensing/Endorsements And Disqualifications/DG_10022425](http://www.direct.gov.uk/en/Motoring/DriverLicensing/Endorsements%20And%20Disqualifications/DG_10022425).

9 Ministry of Justice, Criminal Statistics for England and Wales (2010) Motoring Tables A8.8: <http://www.justice.gov.uk/publications/statistics-and-data/criminal-justice/criminal-justice-statistics.htm>

10 *Ibid.*

Is the London remedy working?

Recently, courts in London set up to hear the less serious traffic cases, which comprise the bulk, have mostly circumvented the problem of 'totter' defendants failing to attend to show cause for why they should not be disqualified. Such courts have largely adopted an approach originally enacted under the Magistrates' Courts Act 1980 section 11(4) that allows them to disqualify convicted drivers in their absence where eligible for this under the 'totting-up' rules. However, while the culture within London courts is for this approach usually to be followed, individual district judges and magistrates still exercise their discretion in individual cases.

Disqualifying in absence ('DIA') is not exclusive to the Metropolitan Police Service ('MPS') region, although it has been well in evidence there for several years, especially since mid-2011. At the time of writing, it appears the situation is changing. In late 2011, the Magistrates' Association ('MA') and the Justices' Clerks Society ('JCS') reached a joint position to issue guidance to their members recommending the adoption of a consistent national practice to disqualify in absence.¹¹ Thus the previous minority of courts in England and Wales that would disqualify in absence is likely to become a majority. However, district judges working within magistrates' courts across the country are reportedly still reluctant to disqualify in absence and to follow the joint guidance issued until such time as the Sentencing Guidelines Council advises otherwise.¹²

The nub of this article will thus focus on how the established DIA approach in London is working in terms of its effectiveness, efficiency and fairness in law. It will contrast this with the 'traditional' approach where the bench requires the defendant's presence for sentence before it will impose a licence disqualification. The article will then ask if DIA is as procedurally fair as the practice of deferring sentence until the defendant attends court, and what the positives and negatives are for defendants, witnesses and road users alike. Although a national policy for magistrates' courts to disqualify in absence has now been recommended by the JCS and the MA, is this supported by the London experience?

First, however, a frame needs to be set around the court disqualification process by sketching in key details of the broad picture of traffic prosecutions in Great Britain and specifically in the London region. How the prosecution apparatus for 'minor' traffic offences in London has been streamlined over recent years will be outlined. The sentencing procedure for 'totter' drivers eligible for disqualification will then be described, distinguishing between the process that unfolds in courts where they will disqualify in absence and where they will not.

11 Joint guidance in 2011 from the Justices' Clerks Society and the Magistrates' Association, entitled 'Disqualification from Driving in Absence' encourages the use of this provision under section 11(4) of the Magistrates' Courts Act 1980.

12 As at February 2012, it is understood the Sentencing Guidelines Council is reconsidering its advice to magistrates' courts in this regard.

At that point, a small study will be described that compares the criminal conviction profiles of a sample of totter drivers from the MPS region who complied with the standard prosecution process and were disqualified when they attended court with those of another sample that tried to evade prosecution and who were 'proved in absence' and disqualified. The implications of the different profiles will be set against the objectives determined for road traffic policing by the Association of Chief Police Officers (2011).¹³

In the home straight, the procedural fairness of disqualifying drivers in their absence will be considered in light of the safeguard provided in law for those who fail to attend their court hearing. The utility (efficiency and effectiveness) of DIA will also be assessed, setting the practice into the contemporary discourse for a slimmed down criminal justice system. Indeed, locating the practice within the broader context of a sharper, smarter and leaner criminal justice system where the Crown Prosecution Service (CPS), Her Majesty's Courts and Tribunals Service (HMCTS) and the police play key partnership roles is an important consideration to be addressed.

The back picture to the problem of increased traffic prosecutions in Britain and the London region

Traditionally, there has always been a large volume of traffic cases requiring investigation and then prosecution in Great Britain. As cars have become more accessible to those other than the elite and middle classes,¹⁴ vehicle ownership has soared massively,¹⁵ and more offences have been proportionately committed requiring more enforcement and prosecution. Over the same period, numbers of dedicated traffic police officers have continued to decline,¹⁶ necessitating other means of enforcement. Into the breach stepped automatic camera devices for 'speeding' and 'red traffic light' offences under the Road Traffic Act 1991.¹⁷ These devices work 24/7, unlike police officers, and numbers in Britain had risen to almost 6,000 mobile and fixed camera devices by 2006.¹⁸ That rise led to an exponential growth in the volume of speeding and red light traffic offences processed over the last 20 years, which in turn was augmented by those who have wished to contest the summons in court. For example, there were 246,000

13 ACPO, Policing the Roads – 5 Year Strategy 2011–2015. http://www.acpo.police.uk/documents/uniformed/2011/201116%2040BA%20PolicingtheRoadYearStrategy2011_2015.pdf

14 Corbett, C *Car Crime* (Cullompton: Willan, 2003) at 20 to 21. The National Travel Survey 2005 showed three-quarters of British households had access to at least one vehicle (London: Department for Transport, 2006).

15 For instance, there was a 76 per cent increase in the number of vehicles registered in Great Britain between 1981 and 2011. Table VEH0103 Vehicle Licensing Statistics (Department for Transport, 2011): <http://www2.dft.gov.uk/pgtr/statistics/datatablespublications/vehicles/licensing/>.

16 A written House of Commons answer showed there was a fall of 19 per cent in the decade to 2008 in police officers patrolling the road (*Hansard*, 21 December 1988: 288W).

17 These are provided for by virtue of section 95A of the Highways Act 1980 (as inserted by section 40 of the Road Traffic Act 1991).

18 Department for Transport (2009) *Frequently Asked Questions: What is the history of speed cameras?* <http://www.dft.gov.uk/pgtr/roadsafety/speedmanagement/safetycamerasfrequentlyasked4603?page=1#a1014>.

fixed penalty notices and 67,000 court prosecutions from camera detections for speeding and traffic light offences in England and Wales in 1996, compared with figures of 1,752,000 and 111,000 respectively in 2006, a rise of 695 per cent.¹⁹

The upshot has been more demand on court space in the magistrates' courts where the more minor traffic cases are heard. Coupled with the usual number of other types of driving offender wishing to contest a summons in court, the higher volume of cases reportedly led to longer time lags between the offence and sentencing, with courts groaning under the weight. In London at least, it seems that around the period when the volume of minor cases began to grow substantially, many contested cases and those where drivers failed to respond to police Notices of Intended Prosecution ('NIP')²⁰ fell by the wayside and were discontinued.

The following changes have helped to provide a solution:

- *A tripartite solution to centralise and streamline prosecutions.* Partly to remedy these logistical issues and inefficiencies, the Metropolitan Police Service Traffic Criminal Justice Operational Command Unit (TCJ OCU) collaborated with the CPS and Her Majesty's Courts Service (HMCS, as it then was) in a tri-partite arrangement to begin a programme of change from 2002 aimed at centralising and streamlining the processing of most traffic cases and their prosecution through the London courts.²¹ Other agencies were also involved in the emerging partnership, including Transport for London and the London Safety Camera Partnership.²² This partnership has been dubbed the 'London Traffic Prosecution Scheme' ('LTPS').
- *Processing of offences at one site.* The centralisation occurred by the move to process all minor summary traffic cases involving offences and collisions across all 32 London boroughs at one site just outside London in Sidcup, Kent. In addition, a team of CPS prosecutors agreed to relocate to work alongside police investigators for the more serious traffic offences involving 'life-changing' and fatal collisions but where the standard of driving was not at issue.²³ A large body of backroom civilian staff was also deployed to process fixed penalty notices for a wide range of minor traffic offences arising from direct apprehension by police officers (for example, document offences, failing to observe road signs) and conditional offers of fixed penalty notices (COFPNs) for offences detected by automatic camera devices. Only cases that involve

19 See National Archives *Motoring Offences 1996*, Table D: <http://webarchive.nationalarchives.gov.uk/20110218135832/rds.homeoffice.gov.uk/rds/pdfs/hosb898.pdf> and Ministry of Justice *Motoring Offences and Breath Test Statistics 2006*, Table D: <http://www.justice.gov.uk/publications/docs/motoring-offences-and-breath-stats-2006-ii.pdf>.

20 Under section 1 Road Traffic Offenders Act 1988.

21 Traffic Criminal Justice Operational Command Unit, *Key Facts, V. 1.* (London: TCJOCU, 2009) at 3 to 5.

22 *Ibid.*

23 Since mid-2011, fatal collision cases have been handled by the CPS Homicide Unit attached to the Central Criminal Court in London.

either-way, indictable or serious summary offences such as drink driving or drug driving are not processed through the TCJ OCU at Sidcup and are largely investigated, charged and processed within each of the 32 London boroughs. This streamlining of case processing has been reported to save £8million for the MPS each year the system has been operating,²⁴ while the volume of cases processed has substantially increased.

- *Introduction of the Gateway Court system.* Another strand in the centralisation process has been the introduction of the Gateway Court system from 2003, whereby special traffic courts were set up in several different areas spread throughout London, and each court handled summary cases that originated in several of the 32 London boroughs.²⁵ The Gateway Court 1 network of six courts handled all cases from police incident reports and collisions comprising summonsed offences processed through the TCJ OCU, while the Gateway Court 2 network of a further six courts dealt with all contested cases arising from conditional offers of fixed penalty notices for automatic camera detected offences and fixed penalty notices also processed through the TCJ OCU.²⁶ Further restructuring will happen in 2012 when the 12 Gateway Court networks 1 and 2 will reduce to five traffic court centres spread throughout London, providing the same capacity as now.²⁷ Only traffic cases are listed for particular days when these Gateway Courts sit, which reportedly increases efficiency, streamlines throughput of cases and raises levels of consistency in sentencing and case handling. It has also eradicated what was called a 'post-code lottery' arising from inconsistencies in policies and practices between different London Petty Sessional areas.

It is important to note that various other urban areas of England and Wales have since set up centralised Gateway Court systems,²⁸ seemingly designed along the lines of the MPS system, and more are in the pipeline. However, it appears that the MPS Gateway Court network was the first to be established and is likely to remain the largest for a considerable while.

- *More court space.* Integral to the smooth running of Gateway Court operations have been efforts made by the London Criminal Justice Partnership and by HMCTS (Her Majesty's Courts and Tribunals Service)²⁹ to provide more court space in which to hear contested

24 *Constabulary*, 'Ground-breaking traffic unit saves £8m per year' (February, 2007), at 8.

25 This re-organisation was made possible by the abolition of Petty Sessional areas under Statutory Instrument 640/2003. Before 2003, traffic cases in London were heard at the nearest local magistrates' court, either interleaved with mainstream crime cases or heard in specially convened traffic courts.

26 Note 22 above, at 4.

27 The police investigation of fatal and life-changing collisions and their prosecution by the CPS will largely have been returned to the London boroughs by mid-2012.

28 Similar Gateway Court operations have been set up in Carmarthen and Neath in Wales, Gloucester and West Yorkshire in England. Some of these and others centralise the prosecution of non-motoring summary offences too.

29 Formerly, Her Majesty's Court Service.

cases and the added volume from detections made by the automatic camera devices that have boosted demands on court space. Reportedly, at present no traffic case need be discontinued for lack of court space.

- *Deployment of Court Presentation Officers.* The streamlining has also been facilitated by the deployment of a civilian team of Court Presentation Officers ('CPOs') at each Gateway Court since 2003,³⁰ employed by the MPS and working out of the TCJ OCU to help defendants when they arrive at court to answer or to contest charges. This can be achieved by explaining the law as it relates to the defendant's particular case (if asked), or checking the apparent validity of insurance documents. Assuming more drivers change their intended plea to 'guilty' than 'not guilty' as a result of information given by CPOs, CPS time will also be saved through fewer trials to prepare.

Where defendants wish to plead guilty, the prosecution case is read out by the CPOs and the court makes its decision. This is another big cost-saving measure giving greater efficiency, since the vast bulk of cases are dealt with at first hearing in the MPS region. CPOs do not handle contested cases, leaving these for CPS prosecutors at the same courthouse whether or not defendants are present to answer the summonsed offences.^{30a}

- *The London-wide Disqualification in Absence (DIA) approach.* The final strand has been the widespread use of DIA at nearly all the Gateway Courts operating in the London region,³¹ which has the key overarching aims to remedy inefficiencies and to streamline the delivery of justice in the London traffic courts. This extra step contrasts with the hitherto standard procedure of requiring the convicted driver's presence before imposing a disqualification.

The next sections will consider the routes by which 'totter' drivers reach the magistrates' courts for sentencing of their case and what typically happens where they fail to attend their hearing. The DIA approach will then be outlined together with its potential benefits.

Routes by which 'totter' drivers eligible for disqualification reach court for sentencing

'Totter' drivers arrive at court for sentencing via several routes. The main one is where an offender has attended court and pleaded guilty or been found guilty of an endorsable driving offence, and perusal of the driver's licence or computerised record shows the driver could be eligible under the totting-up rules for disqualification given the range of points available

30 Dedicated police staff are permitted for this role under section 3(2)(a) Prosecution of Offences Act 1985.

30a Relevant to this is the Home Secretary's announcement, May 2012, about the introduction of a consistent national practice for police to prosecute uncontested minor traffic cases. <http://www.homeoffice.gov.uk/media-centre/news/HS-speech-policefed2012>

31 Until mid-2011, three of the Gateway Courts did not normally sentence convicted drivers in absence; since then a swing has occurred amongst the remainder.

for an offence of that kind.³² This would be the case where, say, someone has eight penalty points and has been summonsed for an offence that carries between six and eight points, like driving an uninsured vehicle.³³ All such drivers are required to attend court for the sentencing hearing in front of magistrates. Frequently, they will have been stopped at the roadside by a police officer and notified that they may be prosecuted for an alleged offence.

A variant is where a conditional offer of a fixed penalty notice (COFPN) for an automatically detected offence has been accepted by a driver and settled. Yet because the number of penalty points held now reaches or exceeds 12, the driver is required to attend court for sentence. Another key route is where a driver wishes to contest a COFPN in court.

Sentencing procedure for ‘totter’ drivers eligible for disqualification

Those present

Once at the sentencing stage, drivers who are present at court may put forward a case to the bench to ‘show cause’ for why they should not be disqualified. Drivers may offer a plea in mitigation or may claim that it would cause them ‘exceptional hardship’ to lose their licence.³⁴ Magistrates do have some latitude to allow drivers to continue to drive with 12+ penalty points at least for the first time that they exceed 12 points.³⁵ However, previous research by the author found a fair number of drivers reporting more than 15 live points and continuing to drive legally,³⁶ and media reports also show that some slip through the system and continue driving with multiple penalty points.³⁷ These administrative weaknesses suggest justice is not always delivered.

Those absent

Where a defendant fails to attend the court hearing as required and the court is satisfied that the defendant has been given adequate notice of the hearing beforehand and has been served the required documentation, the court will proceed to hear the evidence in absence. This provision under section 11(1) of the Magistrates’ Courts Act 1980 applies to any case where proceedings were commenced by information and summons or by written charge and requisition, and not just to traffic cases attracting penalty

32 Under section 35 of the Road Traffic Offenders Act.

33 Under section 143 of the Road Traffic Act 1988.

34 Courts have a discretion to take such claims of ‘exceptional hardship’ into account under section 35(4)(1)(b) Road Traffic Offenders Act 1988.

35 For example, BBC News, ‘Hundreds of Drivers on Roads with 12 Penalty Points’, 4 January 2001: <http://www.bbc.co.uk/news/uk-england-stoke-staffordshire-12112226>.

36 Corbett *et al.*, Note 3 above, at 19.

37 For example, BBC News, ‘Swindon Driver with 39 Penalty Points Still on Road’, 4 May 2011: <http://www.bbc.co.uk/news/uk-england-wiltshire-13277186>.

points. Of cases heard without the driver present, not all lead to convictions, but where they are ‘proved in absence’, courts will examine the driver’s licence and where the driver is eligible for disqualification, they will adjourn the hearing. The defendant is notified of the adjournment and advised of a new date for the sentence hearing and of the requirement to attend court where he or she may show cause why a disqualification order should not be applied.

Procedure where the court does not disqualify in absence

If after one or more further adjournments the defendant fails to comply, the bench will normally issue a warrant for their arrest where it intends to impose a disqualification. When served, the warrant would either be ‘backed for bail’, meaning that the defendant would be arrested, apprised of the adjournment, the reason for it and the fresh sentence hearing date but released on bail, or it would not be backed for bail with the defendant arrested and remanded in custody for the next court sitting.

At the least, the standard procedure of adjournments and a warrant adds delay, and seasoned offenders apparently know how to play the system and that if they ‘keep their heads down’, they may hear no more. This can happen since traffic offences are given a low status ‘C’ by police with precedence to serve warrants reserved for more serious offences which form part of police ‘offenders brought to justice’ (OBJ) targets. Indeed, not all warrants are subsequently served and some drivers who fail to comply with procedures are never identified.³⁸ After 12 months, the police may apply to the CPS to return outstanding warrants to court to ask the bench to agree to withdrawal.³⁹ Not all withdrawal requests are agreed by the bench where particular seriousness is noted. Yet where warrants are not served or withdrawn, justice is not done and a driver eligible for disqualification just keeps on driving, perhaps dangerously. Moreover, those repeatedly ignoring summonses and warrants (that do not get executed) may not accumulate any penalty points at all despite repeated totting offence prosecutions. Thus the standard procedure of disqualifying only in the convicted driver’s presence has weaknesses.

In fact, according to the TCJ OCU, the failure by a large number of drivers to attend the sentencing hearing to show cause led to a huge backlog of warrants in London at a few of the Gateway Courts in the early days of the LTPS’s operation, and to block adjournments of large numbers of cases while warrants from those courts awaited execution. Analysis soon revealed that several other Gateway Courts had few outstanding warrants as a consequence of those courts’ willingness to disqualify in the convicted driver’s absence once the bench was satisfied that all reasonable and

38 This may occur where the details provided by the motorist in the first instance are false.

39 Conditions for this are discussed in the Full Code Test in the Code for Crown Prosecutors, Ministry of Justice.

required efforts had been made to alert the driver; thus the link between DIA and greater efficiency was made.

It is fair to note, however, that the matter of large numbers of unexecuted warrants has not been confined to the MPS region, and this continues to be a concern in many areas of the country. Indeed, it is partly because of the continuing pressure on police resources to execute warrants for the arrest of low status 'C' traffic offenders that the national move for a consistent policy to disqualify in absence is being strongly encouraged.⁴⁰

One group of traffic offenders who have taken advantage of the courts' earlier reluctance to disqualify in absence is those who fail to engage at all with the required procedures for prosecution. According to TCJ OCU in the MPS, such drivers mostly comprise those who have been issued a NIP for an offence detected by automatic camera devices.⁴¹ This NIP is sent to the registered keeper asking that the driver committing the alleged offence be named. The keeper has 28 days to advise the police of this person's identity.⁴² It is not uncommon for keepers to fail to provide this information even after a formal reminder letter. This is an offence in itself – 'failing to comply with required procedures'⁴³ – and conviction leads to an award of six penalty points which is double that of a standard speeding or red light offence. In a very small proportion of cases, this can be the main offence for which a driver is disqualified. In general, it has been mooted that such prevarication causes expense and waste to the system of due process and allows the unscrupulous to seek out others prepared to 'accept' the points⁴⁴ – sometimes for a fee. To improve efficiency and effectiveness, legislation might be amended whereby there would be a rebuttable presumption that the registered keeper was the driver committing the alleged offence. This seems to have much to commend it and further consideration is recommended.⁴⁵

Procedure where the court does disqualify in absence

To circumvent the problem of repeat adjournments, the issuing of warrants, and sometimes case withdrawal, courts in the two Gateway Court networks in the London region now normally follow the option to sentence in absence where convicted drivers are eligible for disqualification

40 Note 11 above.

41 Section 1 Road Traffic Offenders Act 1988.

42 Section 172(7)(a) Road Traffic Act 1988.

43 Section 172(3) Road Traffic Act 1988.

44 Corbett *et al.*, Note 2 above, at 35, 54.

45 Under section 172(2), where the driver of a vehicle is alleged to be guilty of an offence, the registered keeper or any other person is required to provide the identity of the driver or to give details that may lead to his or her identity being made known to the police. Under section 172(7) the recipient of the Notice of Intended Prosecution has 28 days to respond, and by taking the full period and then indicating someone else as the likely driver, the legal six-month time period to bring a prosecution may elapse before the 'driver' is identified. A Home Office/Department for Transport working party to consider amending legislation to prevent such evading tactics by drivers in regard to section 172 was set up in 2011.

under the Magistrates' Courts Act 1980 section 11(4) and the court is satisfied that the driver has had every opportunity to attend the sentence hearing.

Whether a driver is disqualified in presence or absence, CPOs relay the disqualification information to their police force headquarters and local police computer records are changed with the same information passed to the Police National Computer for uploading. The Driver and Vehicle Licensing Authority (DVLA) is notified via LIBRA, the magistrates' courts' computer system, so that the driver's central record is amended, and the driver himself is notified by letter of the outcome and that she or he is now disqualified. If the licence has not already been surrendered to the court, the driver is now asked to do this and to advise his or her vehicle insurer. In the case of DIA, 'communication failure' may mean that drivers knowingly or otherwise continue to drive, which of course comprises another offence of 'driving whilst disqualified'.⁴⁶

So under DIA practice warrants for arrest to attend court for sentence are unnecessary. Instead, warrants are normally only issued should a DIA driver fail to pay the fine that typically accompanies the disqualification. That can lead to bailiffs attending the driver's address to remove comparable value goods.

Potential benefits of DIA practice

As should be clear from the foregoing, if more drivers who should be are in fact disqualified as a result of DIA practice, then there could be more road safety benefit to all road users – *if* the freshly disqualified adhere to their disqualification, and *if* disqualified drivers who adhere to a ban tend to have more road collisions than others. The first condition will be considered later and the second is in fact supported by some research. DeYoung *et al.*⁴⁷ estimated in the United States that compared with validly licensed drivers, those with suspended or revoked licences (equivalent to licence disqualification) may be 3.7 times more likely to be involved in fatal crashes, and that unlicensed drivers may be 4.9 times more likely to be so involved. Certainly, a strong link between unlicensed driving (in all its forms) and collision risk has been found,⁴⁸ so in terms of harmfulness, removing unsafe drivers from the road should yield benefits.

46 Under the Road Traffic Act 1988 section 103(1)(b).

47 DeYoung, D, Peck, R and Helander, C, 'Estimating the Exposure and Fatal Crash Rates of Suspended/Revoked and Unlicensed Drivers in California' [1997] 29(1) *Accident Analysis and Prevention* 17 to 23.

48 For example, AAA (American Automobile Association), *Unlicensed to kill* (Washington: AAA Foundation, 2000); Knox, D, Turner, B and Silcock, D, (2003) *Research Into Unlicensed Driving: Final Report*. Road Safety Research Report No. 48, London DfT.

Moreover, there could be a double advantage in disqualifying those who would otherwise evade justice. Research by Rose⁴⁹ using a large sample of convicted offenders on the Home Office Offenders Index shows that there is a high cross-over between people convicted of mainstream (non-motoring) offences and serious traffic offences including disqualified driving, so that those doing one type tended to be detected for the other. In particular, he found that more of the 'disqualified driver' group had previous convictions for mainstream offences than mainstream offenders themselves (73 per cent *versus* 67 per cent).⁵⁰

It follows that any police detection of those who might be driving whilst disqualified could pay dividends in terms of disrupting other criminal activity. This is in fact a key objective for road traffic policing as set out by the Association of Chief Police Officers (2011).⁵¹ So the TCJ OCU argument is that it may be more efficient for purposes of disrupting mainstream criminal activity to seek 'active' burglars, robbers and habitual violent offenders who are recently disqualified and thought unlikely to comply with their ban in case they do drive while disqualified than to catch such people 'red handed' in the act of offending (which very rarely happens).⁵² In this way, traffic police may contribute to the MPS-wide Operation Target focused on apprehending burglars and violent offenders.

Are disqualified 'totter' offenders similar to more serious traffic offenders?

While the Rose research focused on offenders convicted of serious offences – by virtue of their inclusion on the Home Office Offenders Index – might a similar pattern hold among the ostensibly less serious 'totter' offenders who accumulate penalty points that lead to disqualification? To the author's knowledge such information is not published; to have it would not only broaden research knowledge but would also highlight the importance and usefulness of road traffic policing in disrupting mainstream criminal activity through targeting the recently disqualified thought to be active mainstream offenders.

Further, would there be a difference between the profiles of totter drivers who comply with the standard procedure and attend court where a disqualification order is then imposed and those who seemingly fail to engage with the prosecution process? If so, that could signal further support for the policy of DIA should potential 'evaders' of justice be more likely to have previous convictions for mainstream offences, since not only should further road safety benefits accrue but also more criminal activity

49 Rose, G, *The criminal histories of serious traffic offenders*, HORS 206 (London: Home Office, 2000).

50 *Ibid*, at 32.

51 Note 13 above.

52 A number of arrests have already resulted under the operation of this new scheme.

might be avoided – based on various work that one of the best predictors of future offending is previous criminal history.^{53,54}

Because of the author's interest in this important and quite poorly researched topic and because of proffered assistance from the TCJ OCU, a small study was conducted with the following aims:

- to explore whether drivers disqualified for accumulating 12+ penalty points ('totting') have a similar risk of a previous mainstream criminal record as found among more serious traffic offenders, for example as in Rose;⁵⁵
- to explore whether totter drivers disqualified in absence have a similar risk of a previous mainstream criminal record as totters who attend the court and are disqualified;
- to contrast the DIA practice with the standard practice of disqualifying only in the defendant's presence in terms of efficiency, effectiveness and fairness.

A small study comparing the profiles of 'compliers' and 'non-compliers' of the prosecution procedure in the London region

Given the aims above and with qualified access to the Disqualified Drivers Database (DDD) held by the TCJ Operational Command Unit branch of the MPS, it was decided to extract several details from the records of a large sample of drivers held on the database to explore these matters.

Sampling procedure using the Disqualified Drivers Database

Perusal of the Excel database showed that data had been computerised for three and a half years, and it was decided to use some details of all disqualified drivers then on the database during the period from May 2007 to August 2010, which was the latest month for which data were available for the study. Details gathered from this driver database revealed that almost 12,000 drivers had been disqualified for 'totting' offences under the auspices of the Gateway Courts in London in that period.

Details of the drivers' age at the time of the offence and the age of the vehicle in which the offence had occurred had to be calculated by hand so a systematic sample was extracted, comprised of 600 compliers and 600

53 For example, Copas, J, Marshall, P and Tarling, R, *Predicting Reoffending for Discretionary Conditional Release*, Home Office Research Study No. 150 (London: HMSO, 1996); Phillpotts, G and Lancucki, L, *Previous Convictions, Sentence and Reconvictions: A Statistical Study of a Sample of 5,000 Offenders Convicted in January 1971*, HORS No. 53 (London: HMSO, 1979).

54 It is vital, however, for police to ensure that proportionate and fair use is made of road traffic intelligence in this endeavour, in order to avoid any perceived or actual harassment of drivers who are known offenders.

55 Note 49 above.

non-compliers (divided over the four years for which data was held). The sex of the drivers was not entered on the database either, although this was available at the time of conviction, so this was done by hand as far as possible using drivers' first names.⁵⁶ Ethnicity was not recorded on the database and it is recommended that these biographic details are included in future for audit or research purposes.⁵⁷

Finally, permission from TCJ OCU was given for a systematic sample of 200 compliers and 200 non-compliers to be extracted, and this was done from each of the 600 larger samples to check whether any entries existed for them on the Police National Computer (PNC). This comprises various databases including details of those having criminal convictions, cautions, arrests and warrants, a vehicles file with registered keepers, and a drivers file with licence details. This was a time-consuming activity carried out by a member of the Disqualified Database staff, thus agreement was given only for this small sample.

Findings from the Disqualified Drivers Database

Table 1: Disqualified 'totters': 'complier' drivers (those sentenced at court) and 'non-compliers' (those sentenced in absence) from the Metropolitan Police Service (TCJ OCU) database, 2007 to 2010

		2007	2008	2009	2010	Total
Total Compliers	n=	1353 ⁱ	2851	2637	1786 ⁱⁱ	8627
Non-compliers	n=	532 ⁱⁱⁱ	948	1110	743 ^{iv}	3333
Total	n =	1884	3799	3747	2529	11960
% non-compliers =		28.4%	25.0%	29.6%	29.4%	27.9%

i This figure is the total from 23 June to 31 December 2007

ii This figure is the total from 1 January to 13 August 2010

iii This figure is the total from 23 June to 31 December 2007

iv This figure is the total from 1 January to 13 August 2010

56 Where any doubt existed such as with unisex names, 'missing information' was recorded for that driver.

57 Data were extracted on the main offence for which drivers had been disqualified, but it was later realised that this information was limited in usefulness. It was not possible to say accurately in what proportion of totting cases any one type of offence contributed points to the disqualification, as only the offence carrying the highest range of points at the summonsed hearing was noted on the record sent to TCJ OCU at Sidcup. By contrast, all offences contributing to a totting disqualification are sent to the DVLA via the court record.

Of the total 11,960 totters extracted from the DDD, Table 1 shows that 27.9 per cent were 'disqualified in absence' over the period examined, with no discernible trend in proportions or absolute numbers seen. This group is termed 'non-compliers'. So over 3,300 drivers were disqualified through the DIA procedure who most likely would not have been had they attended a court requiring the defendant's presence for sentencing. The remaining bulk are termed 'compliers'.⁵⁸

Differences between the compliers and non-compliers

Table 2: Disqualified driver profiles from the Metropolitan Police Service (TCJ OCU) database: complier drivers and non-compliers (those sentenced in absence), 2007 to 2010

	Compliers N = 8627	Non-Compliers N = 3333
Criminal Record?	%	%
Mainstream record only	21	25
Traffic record only ^v	6.5	6
Mainstream + traffic record	16.5	26
No known PNC record	56	43
	n = 200	n = 200
	%	%
Percent male	86	89
Percent aged < 25	29	26
Vehicle driven > 10 yrs old	60	70 ^{vii}
	n = 600^{viii}	n = 600^{ix}

v A 'traffic record' here refers to recordable road traffic offences, that are either either-way or indictable offences

vi X² 7.4, 1 d.f., p < .01. Non-Compliers more likely to have a mainstream/traffic record than Compliers

vii X² 10.91, 1 d.f., p < .001. Non-Compliers more likely to drive older vehicles than Compliers.

viii n = (487-591) through missing data.

ix n = (510-572) through missing data.

58 The DIA procedure was operational before May 2007 but too few details were entered on the DDD for useful analysis.

- In terms of *age and sex*, Table 2 shows very little difference between the compliers and the non-compliers in these characteristics. Non-compliers were slightly more likely to be male (89 per cent *versus* 86 per cent) and older –with fewer – aged under 25 years (26 per cent *versus* 29 per cent). The bulk of each group were driving vehicles older than ten years, with the non-compliers significantly more so (70 per cent *versus* 60 per cent).⁵⁹ Vehicle and maintenance costs could well be an indicative factor here suggesting that those failing to comply with procedures might be less affluent than those who do.
- The main difference however, was in terms of *previous convictions*. Table 2 shows that Non-compliers were significantly more likely to have a mainstream record or mainstream and traffic⁶⁰ record (51 per cent of non-compliers *versus* 38 per cent of compliers).⁶¹ Adding in those with only a serious traffic record, 57 per cent of non-compliers and 44 per cent of compliers were known to police before the current totting offences.⁶² Thus even for relatively minor, endorsable traffic offences in London there was found to be a high association with mainstream crime, and more so among those who failed to comply with the prosecution process in some way (the non-compliers).⁶³

Conclusions from the comparative small study

With regard to the study's *first aim*, Table 1 shows that on average 50.5 per cent of the disqualified totter sample in the DDD over the period covered had a mainstream criminal record (with or without further traffic convictions). This translates into a figure of 47.5 per cent of the whole DDD population expected to have such a criminal record.⁶⁴ A high crossover of traffic and mainstream criminal activity among totter drivers is therefore indicated, but the proportion is not as high as found among Rose's samples of serious offenders on the Home Office Offenders Index. At least two explanations for this disparity are possible.

59 X2 statistic 10.91, 1 d.f., $p < .001$.

60 'Traffic' convictions in this context comprise offences recordable by the police such as drink, drug or dangerous driving offences.

61 $X^2 = 7.74$, 1 d.f., $p < .01$.

62 Also a statistically significant difference, $X^2 7.4$, 1 d.f., $p < .01$.

63 There were no statistically significant interactions between previous record, age group, sex and vehicle age.

64 Non-compliers were over-represented in this small sample of 400. As non-compliers comprised almost 28 per cent of the total population of 11,960 drivers, around 47.5 per cent with a mainstream and/or *serious traffic record* would be expected among the disqualified population overall.

The first suggests that the *more serious* one type of offending (either motoring or mainstream), the *more likely* is the other kind, which appears a reasonable proposition.⁶⁵

The second possible explanation concerns the wider use of ANPR (automatic number plate recognition) cameras within the MPS region in recent years. Because police discretion in whom to stop during an ANPR operation is very largely removed, less stereotypical and 'traditional' offenders may be picked up by these cameras. Given the difficult economic circumstances in the United Kingdom and talk of the 'squeezed middle', drivers who might generally be ascribed as 'law-abiding' may find higher driving insurance premiums increasingly hard to pay. If such drivers are detected in ANPR operations for having no insurance – which appeared the most common offence for which drivers were disqualified in this study – then it may be that the uninsured drivers detected this way do have less criminal propensity, accounting for the lower correlation found here between having traffic and mainstream convictions.⁶⁶

The *second aim* of the study confirms that bringing offenders to justice via DIA practice is as likely as the usual practice of deferring sentence until the convicted driver attends court to achieve the roads policing objective to disrupt criminality, since even more non-compliers than compliers had a previous criminal record. Yet this assumes that disqualification actually removes drivers from the roads, of which more shortly.

So what of the *third aim*: how does the London DIA approach fare in terms of efficiency, effectiveness and fairness when contrasted with the practice of disqualifying only with the defendant present and invited to show cause? Each of these concepts will be assessed in turn, although some points under each of the efficiency and effectiveness heads are not mutually exclusive.

Efficiency

A fall in number of issued warrants

Examination of the annual number of warrants issued within the MPS area for 'failure to appear at a traffic court' between 2006 and 2010 shows that from a 2006 peak of 5120, the total fell every year to 1227 in 2010. Similarly, from a total of 1794 warrants outstanding at the end of 2006, the corresponding figure for 2010 fell to 366. These trends are shown in Table 3.

65 This proposition could be spuriously supported by the use of police discretion, whereby it is possible that the 'law-abiding' are the most likely drivers to be let off with a warning by police for a minor traffic offence, and petty offenders are more likely to be let off than serious mainstream or traffic offenders.

66 Support for this hypothesis comes from a recent internal study by the TCJ OCU similar to the present one. At that time, ANPR was less often used and a 'cross-over' figure of 79 per cent from a random sample of disqualified London drivers was found.

Table 3: Number of 'fail to appear' traffic warrants issued and outstanding within the Metropolitan Police Service area^{xi}

	2006	2007	2008	2009	2010
No. of warrants issued for year	5120	2377	2085	1390	1227
No. of warrants outstanding at year's end	1794	737	604	447	366

xi Figures are from the Office for Criminal Justice Reform for each respective year, as reported by the MPS.

This confirms that a policy of disqualifying eligible totters in their absence has not only reduced the number of warrants for arrest issued in the MPS area but has also cut the number outstanding at each year's end. This means fewer adjournments were ordered year on year by the Gateway Courts over that period, which should have incurred lower operating costs for the police, courts and CPS. Fewer adjournments should lead to faster throughput of cases, meaning that more totting offenders accruing 12+ penalty points and who are required to appear for sentencing have been brought to justice more swiftly as court time has been freed up. Moreover, there should have been a falling need for case withdrawal decisions at the end of each year because of fewer unexecuted warrants. Certainly, as noted, the MPS confirmed a figure of £8 million annual savings made by them through the use of all the streamlining procedures in the early days of the Gateway Court reorganisation.⁶⁷

A fine example of partnership working

So use of the DIA procedure exemplifies how the criminal justice system may contribute to reducing Britain's financial deficit by this means of slimming, sharpening and smartening. It also exemplifies excellent practice in partnership working, with several agencies, including the MPS, HMCTS, the CPS and the London Criminal Justice Partnership all working together to achieve these efficiencies.

A case study by the HMIC (2010)⁶⁸ with its quest of improving 21st-century criminal justice through improving efficiency, focused on the MPS more generally and noted many waypoints in the typical criminal prosecution procedure where unnecessary delays and costs were incurred. Despite this, according to the HMIC, savings of £16 million over ten years have been realised from pooling resources of relevant criminal justice system agencies, particularly the police (MPS) and prosecutors (CPS),⁶⁹ which reinforces the earlier finding of £8 million savings for the MPS alone. So partnership working in intelligent ways can help cut costs significantly in processing traffic and mainstream offences.

⁶⁷ Note 24 above.

⁶⁸ Her Majesty's Courts Service, *Stop the Drift: A Focus on 21st-Century Criminal Justice* (London: HMIC, 2010).

⁶⁹ *Ibid.*, at 24 to 25.

In terms of cost reduction and built-in streamlining of the LTPS, the London DIA approach appears to be working well and providing value for money, certainly insofar as immediate financial benefits are concerned. Yet whether any distal financial outcomes are better or worse under DIA compared with the alternative of deferring sentence until the defendant is present could be difficult to establish. As some potential efficiency downsides of DIA link with an assessment of effectiveness, these will feed into the next section.

Effectiveness

Benefits to road safety

As shown by Table 1, it seems that many totter drivers fail to engage with the court prosecution process for one reason or another including actively trying to avoid it. While they may have evaded justice before the London-wide introduction of disqualifying in absence, there is less likelihood now. Indeed, between May 2007 and August 2010 3,300 drivers were disqualified under the DIA procedure of whom far fewer – it may be safely assumed – would have been banned under the procedure of requiring the totter driver's presence in order to disqualify. Thus a double advantage for road safety should indirectly be produced – more drivers who are eligible for disqualification are processed and more of those who try to escape justice do not. In addition, because all those eligible for disqualification – would-be 'non-compliers' and 'compliers' are processed more swiftly in courts where DIA operates, the dangerous drivers among them should in theory be removed from the roads earlier.

Support for the ACPO roads policing objective

Further, because a considerable proportion of disqualified totters in London were shown to have a previous criminal record with 'non-compliers' more likely, the ACPO roads policing objective to disrupt criminality should be at least as well served if not better by disqualification of totter drivers under the DIA procedure. At face value therefore, more planned criminal activities requiring vehicle use may be thwarted by disqualifications under DIA.

The Prolific Disqualified Drivers Database

Whether drivers are disqualified in their absence or presence, the TCJ OCU have compiled a Prolific Disqualified Drivers Database (PDDD) for intelligence purposes. Drivers on the PDDD are categorised in several ways but there are a fair number of drivers with disqualifications that are current and with a prolific criminal record who are believed to be still actively offending. From these offenders is derived a 'Top 20' whose details are passed to officers on beat patrol, who may notice fresh vehicles or vehicle movements during 'walk bys' of offenders' addresses, and to those on traffic patrol who are authorised to pursue moving vehicles such as those

driving while disqualified.⁷⁰ This is good use of the intelligence database in theory but in practice effectiveness may be compromised. TCJ OCU staff maintain that their contribution to Operation Target would be greater if more police resource was devoted to utilising the intelligence concerning the 'Top 20' and if more active engagement could be encouraged among patrol officers. To illustrate this, a recent example was given to the author of a disqualified driver on the PDDD who was not detected driving whilst disqualified ('DWD') until his involvement in a fatal collision for which he was later imprisoned.

As noted by HMIC in 1998,⁷¹ enforcement of traffic offences still had low priority and was seen as 'peripheral work' by police forces. These offences typically are still seen as 'less serious' than other offences included on the Offenders Brought to Justice ('OBJ') list. The OBJ list comprises recordable, either-way and some serious summary offences, and in 1988 DWD was reduced from an either-way offence to a summary one.⁷² Arrests for DWD, therefore, will not contribute to OBJ targets and this can help explain why limited police resource seems to be lent to the enforcement of DWD and other summary motoring offences. Indeed, the summary nature of DWD appears not to have escaped those in danger of committing it. In 2010, the Magistrates' Association decried the maximum length of custodial sentence available to the bench for serial DWD offenders, saying it was clearly not a deterrent to repeat offenders whose previous convictions can run into the 40s.⁷³ An appeal was therefore made by the Magistrates' Association to government for a return to either-way status for DWD offences, but such a move remains outstanding.

Impact on DWD numbers

Linked with DWD is the fact that only a proportion of those who are disqualified reapply for their licence after the expiry of their ban.⁷⁴ Indeed, in 2010, 15,500 drivers were convicted of DWD in courts in England and Wales.⁷⁵ A further 68 convictions for 'causing death by driving while unlicensed, disqualified or uninsured'⁷⁶ were recorded in England and Wales in the same year.⁷⁷ In addition, disqualified drivers will also be committing

70 'Direct surveillance' in circumstances such as sitting up waiting for a disqualified driver to commit an offence is no longer permitted under the Regulation of Investigatory Powers Act 2000.

71 HMIC (Her Majesty's Inspector of Constabulary) *Road policing and traffic. HMIC Thematic Inspection Report 1998* (London: Home Office, 1998) at 19.

72 Under Criminal Justice Act 1988 section 41.

73 Magistrates' Association Road Traffic Committee, Evidence given to the Transport Committee Inquiry on Drink and Drug Driving law, August 2010, 10/60: http://www.magistrates-association.org.uk/dox/consultations/1285770604_60-transport-committee-inquiry-into-drink-drug-driving-response.pdf?PHPSESSID=iammhgb2iboiinhm8qjb22tj7.

74 Pearce, L, Knowles, J, Davies, G and Buttress, S, *Dangerous driving and the law*, Road Safety Research Report, no. 26 (London: DTLR, 2002) at 83. This study found that the majority of those required to pass a retest in order to reapply for a licence did not do so within three years of being banned, suggesting that many continue to drive unlicensed.

75 Ministry of Justice, Criminal Justice Statistics, Motoring Offences, Table A8.3, 2010: <http://www.justice.gov.uk/publications/statistics-and-data/criminal-justice/criminal-justice-statistics.htm>.

76 This is an offence under section 3ZB of the Road Traffic Act 1988, as inserted by Road Safety Act 2006, section 21(1).

offences of driving without insurance and be liable for any injury or damage caused. It seems partly for this latter reason that some benches are reluctant to disqualify a driver in absence.

It might reasonably be anticipated that the DWD rate will be higher among those disqualified by DIA procedures since such drivers have already shown some propensity for failing to engage with the prosecution procedure leading to their disqualification. Further anecdotal evidence that non-compliers may fail to observe their driving ban comes from TCJ OCU figures that only a small proportion of those disqualified in their absence subsequently pay the fine that typically accompanies a disqualification order. Thus, unless those disqualified in their absence adhere to the ban, the net effect ironically may be to boost DWD numbers more under DIA than when totters are disqualified in their presence. So while more are brought to justice by DIA practice, there are system weaknesses following the court conviction.

More risk of identity error with DIA practice?

Anecdotal evidence from police, courts, and justices' clerks suggests that because the defendant is not in court to show cause, there is more room for error in disqualifying the 'wrong' totter driver since there is no-one in front of the bench to compare with the photograph on the DVLA printout of the driver's record. Thus some drivers may be willing to accept a ban in place of the 'real' totter offender (perhaps through a family favour or payment). This may be more likely where remote enforcement cameras have been used to detect the offence rather than police, since police descriptions of such drivers to the court cannot be given.

Will a further condition to regain a driving licence benefit road safety?

New educational measures to retest disqualified drivers as a condition of regaining their licence are heralded under the Strategic Framework for Road Safety (2011), although it is not made clear whether this would include totter drivers.⁷⁸ This initiative reflects the current laudable shift towards reform and rehabilitation with more non-custodial sanctions promoted by the Ministry of Justice.⁷⁹ Certainly, recent evidence by Fylan⁸⁰ shows that nearly all drivers offered and accepting short educational 'speed awareness courses' for speeding offences in place of a fine and penalty points who responded to a follow-up questionnaire three months after the course indicated safer driving behaviour and attitudes than before the course.

77 From Tables 6.1 and 6.6 of Supplementary Tables Vol. 6 (Motoring) Criminal Justice Statistics in England and Wales <http://www.justice.gov.uk/publications/statistics-and-data/criminal-justice/criminal-justice-statistics.htm>.

78 As mooted under the *Strategic Framework for Road Safety* (London: Department for Transport, May 2011) at 10.

79 Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* Command 7972, (Ministry of Justice, November 2010, TSO Ltd): www.justice.gov.uk/downloads/consultations/breaking-the-cycle.pdf.

Thus early indications from speeders are positive for these remediation efforts, although whether re-education would help to inculcate more socially responsible attitudes among those applying to regain their licence after a ban is untested. For those disqualified under the DIA practice, any further measure needed in order to regain their licence could prove one obstacle too many perhaps with a decision to continue or to start DWD. So careful consideration is warranted with regard to strengthening the requirements for licence reapplications. Indeed, more generally it is arguable that the small hardcore of offenders who have little time for the niceties of the criminal justice system and its rules and procedures are as likely to ignore educational opportunities as disqualification orders.⁸¹

Is the threat of disqualification more effective for road safety?

As a last discussion point on effectiveness, it is worth considering whether road safety would actually benefit more by maintaining the threat of, rather than actual, disqualification for drivers? In Corbett *et al.*'s 2008 study, some evidence largely from convicted speeding drivers showed that those eligible for disqualification but who had not been disqualified professed views and attitudes suggestive of safer driving behaviours than drivers who had been previously disqualified.⁸² However, speeding convictions comprised only a 24 per cent proportion of the points from all totting disqualifications in a large related study by Broughton (2008),⁸³ with insurance offences contributing 65 per cent of the points, so the Corbett *et al.* findings may not generalise. Moreover, the demographic of convicted speeders showed that a higher proportion within professional groups, including lawyers and police, had a speeding conviction than other groups (see, for example, Admiral Insurance 2009),⁸⁴ so speeders may have less criminal propensity than other motoring offenders.⁸⁵ Yet it could be that the continuing *threat of disqualification* – as can apply at courts where sentencing is deferred until those totters eligible for disqualification attend court to show cause, and where some may never attend – is a more effective deterrent against further totting offences for some offenders than *actual disqualification*, which is more likely to arise when sentenced in absence.

80 Fylan, F, Cavenev, L, Fylan, B, *Evaluation of the National Speed Awareness Courses* (London: NDORS, 2012).

81 A similar point is made in the Department for Transport's *Strategic Framework for Road Safety*, Note 78 above, at 63, 5.27.

82 Corbett, C, Delmonte, E, Quimby, A and Grayson, G, Note 3 above, at 52 to 53.

83 Broughton, J, Note 3 above, at 13, figure 4.1.

84 Indeed, the Admiral Insurance survey showed that legal professionals were 60 per cent more likely to have a speeding conviction than the average driver (Admiral Insurance, 2009): <http://www.admiral.com/pressReleases/35/Legal-eagles-top-worst-drivers-list>.

85 *Ibid.*

Fairness

While sentencing and disqualifying drivers *in absentia* is not new, widespread use of this option throughout a large urban area is hitherto unusual, and this section reviews some aspects of its fairness.

Crime victims are acknowledged

There may be few direct victims of 'totting' offences except for those of careless driving offences involving collisions. Nevertheless, disqualifying eligible drivers in absence after the court is satisfied that all reasonable efforts have been made to alert the driver could fit well within the contemporary ethos of enhancing crime victims' rights, services and care, which acknowledges the crucial role victims play in bringing offenders to justice.⁸⁶ This also fits with the view of many⁸⁷ that the needs and human rights of crime victims should very much be part of the justice equation and balance.

Justice is seen to be done

An aspect of fairness is that use of DIA where drivers are eligible for disqualification ensures justice is seen to be done in court and just deserts are delivered. These are both important principles of justice⁸⁸ whatever the distal outcome. If drivers then adhere to the ban imposed in their absence, road safety benefits to all road users will accrue through the removal of potentially dangerous drivers,⁸⁹ reducing their harm potential and raising fairness to road users. The corollary of the practice of repeated sentence adjournments is that where warrants are not served successfully on those avoiding the court hearing, most of these cases are reportedly eventually withdrawn by the court. So non-compliers escape penalty points and disqualification and justice is not served or seen to be served.

Ironically, a possible counter-argument is that by proceeding in the defendant's absence the status and gravitas of road traffic crime – which tends to be sidelined by some members of the public and the criminal justice system anyway as 'not real crime'⁹⁰ – is undermined. Yet the DIA process in fact underlines the seriousness with which traffic offending is perceived, since the evasion of justice and the offender 'getting away with it' is prevented by this means.

86 See the Crown Prosecution Service webpage for *Victims and Witnesses*: http://www.cps.gov.uk/victims_witnesses/index.html including revised 2011 *Code of Practice for the Victims of Crime* http://www.cps.gov.uk/legal/v_to_z/victims_code_operational_guidance/.

87 For example, Ashworth, A and Redmayne, M, *The Criminal Process* (Oxford: Oxford University Press, 2005) at 48ff.

88 See, for instance, Flether, GP, *Rethinking Criminal Law* (Oxford: Oxford University Press, 1978).

89 Notes 47 and 48 above.

90 See, for further discussion, Corbett, C, *Car Crime*. (Cullompton: Willan, 2003) chapter 3.

Justice is seen to be 'procedurally fair'

Recent theories of 'procedural justice' are gaining currency as a way to explain how trust in the law and legal institutions can be strengthened. The thesis goes that if the public generally trust the criminal justice agencies such as police and courts to be legitimate authorities they are more likely to co-operate with them, which will enhance normative compliance with the laws.⁹¹ The concept of 'procedural fairness' links with trust and this has been applied to public perceptions of police and court actions, where fair and respectful treatment of suspects is believed to engender trust in police and courts. Moreover, if punishment is experienced as being imposed fairly, justly and respectfully, the perceived legitimate authority of these agencies should not be affected.⁹²

The practice of disqualifying in absence involves both police and courts and has the outcome that, to date, evasion of justice has been prevented among a considerable number of traffic offenders, some of whom may be among the more unsafe or dangerous. Thus public awareness of the DIA procedure could boost public confidence in these agencies through their perceived ability to deliver justice humanely and effectively, perhaps indirectly helping to achieve the anticipated goals of procedural fairness.

Further, in light of stringent budgetary cuts significantly impacting police numbers in Great Britain with fewer enforcement resources available, interest is building in ways to enhance public perceptions of the police, since with less law-breaking there should be less consequent need for active enforcement.⁹³ Again, it is possible that wider application and public awareness of DIA practice could contribute not only to helping raise normative compliance but also to cut future enforcement needs, and these linked topics could benefit from research.

Aside from the foregoing arguments in respect of 'fairness' of the DIA procedure, another is linked with the defendant's right to a fair trial and whether this is compromised should the court proceed in the defendant's absence. The Practice Direction 'Bail: Failure to Surrender' and some domestic case law⁹⁴ indicate that in the magistrates' court, the bench must exercise its discretion to proceed *in absentia* with the utmost care and caution such that any trial must be as fair as circumstances permit and lead to a just outcome.⁹⁵ Lord Bingham of Cornhill identified circumstances that should be taken into account before proceeding in these circumstances, including the public interest, the disadvantage to the defendant, the effect of any delay and whether the attendance of the defendant could be secured

91 See Tyler, T, *Why People Obey the Law* (New Haven, Conn: Yale University Press, 1990).

92 See Tyler, T, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (New York: Russell-Safe Foundation, 2002).

93 Hough, M, Jackson, J, Bradford, B, Myhill, A and Quinton, P, 'Procedural Justice, Trust and Institutional Legitimacy' *Policing: A Journal of Policy and Practice*, 4.3, at 203 to 210, 2011.

94 For example, *R v Jones* [2002] UKHL 5; [2004] WLR 589, 1.13.17, as cited by A. Choo 'Aspects of Criminal Procedure', chapter 14 in Emerson, Ashworth and Macdonald (eds), *Human Rights and Criminal Justice* (2nd edn) at 14-184.

95 *Ibid.*, 1.13.18.

at a later hearing.⁹⁶ Proceedings must also be compliant with Article 6 of the European Convention on Human Rights, which says that every defendant is entitled to a fair trial and is presumed innocent until found guilty.⁹⁷ A body of European case law exists on proceeding *in absentia*, which largely reinforces domestic case law in that, providing all procedures to inform the defendant of the hearing have been correctly followed, the court may exercise its discretion.⁹⁸

However, Article 6 is less of an issue in summary trials since defendants have long had an absolute right to appeal against conviction and sentence to the Crown Court under Part 63 of the Criminal Procedure Rules, and have a right to appeal by way of case stated to the High Court or to seek a judicial review if it is thought appropriate. A further key safeguard refers to section 142 Magistrates' Courts Act 1980, which is discussed shortly.

Communication failure

Reluctance to disqualify in absence can be a matter of court tradition or preference of key members within the court, although it may reduce to concerns about receipt of the court hearing documents.

Indeed, failure to receive posted communications is commonplace; electronic communications cannot be relied upon as evidence of receipt, and language and literacy difficulties may impair understanding of official documents. These could be explanations for failure to engage adequately with the prosecution process, although perhaps few other than some defendants would regard the procedure inherently unfair because of it.⁹⁹ So communication uncertainty remains problematic, and for this contingency a safeguard is provided for genuine and legitimate failures.

The legal safeguard for communication failure

Under section 142 of the Magistrates' Courts Act 1980, there is a power to re-open cases where a mistake has been made. So convicted defendants can ask for their case to be reheard in circumstances that include lack of awareness of proceedings against them, and the magistrates have discretion to re-open a case where considered appropriate. DIA cases are one category for which this process can be used. Driving whilst disqualified ('DWD'), where drivers claim ignorance of the earlier DIA hearing, might also be suitable for this. It involves the need to make an oral statutory declaration at a solicitor for oaths, the sentencing court or a local magistrates'

96 *R v Jones (Anthony)* [2003] AC 1, as cited in Choo, Note 94 above.

97 Under Schedule 1 of the Human Rights Act 1998.

98 For example, *C v Italy* (1988) 56 DF 40 at 59 to 60 ; *Colozza v Italy* (1985) 7 EHRR 516 (paragraphs 28 to 29), both as cited in Choo, Note 94 above; but see *Proshkin v Russia* – 28869/03 [2012] ECHR 238.

99 The requirement that a case is heard as close to the alleged 'crime scene' as possible may prove a disincentive to defendants generally when considering the bother and expense of travel to court. Some of those eligible for disqualification who live far away may be deterred from responding for this reason, and such defendants may think this requirement and any resulting disqualification in absence unfair.

court giving a reason for the case to be reheard. The original sentencing court will then consider the declaration. Anecdotal evidence from the TCJ OCU suggests this procedure is used in a small proportion of MPS DIA cases: estimates of 5 per cent up to 25 per cent were given by police respondents, although actual figures are not available.

However, it takes valuable court space and time for the courts to rehear such cases – although probably no more than an appeal – and somewhat negates the effort and costs saved from avoiding the adjournments associated with sentence deferral until the defendant appears. Reportedly, where the bench agrees to rehear a DIA case, the previous disqualification is often quashed and a fresh disqualification awarded to start immediately, or in the case of DWD the bench may drop that charge but impose a disqualification for the original totting offences. So any perceived unfairness in the DIA procedure should be set right at the rehearing if drivers are prepared for the challenge to contest the DIA outcome and are aware of the possibility to do so.

In this regard, as legal aid is normally unavailable to drivers wishing to appeal totting disqualifications, few may relish the prospect of representing themselves at a traffic court. Moreover, as the standard ‘Notice of Disqualification from Driving’ sent to the driver by the courts makes no reference to the safeguard provided by section 142 Magistrates’ Courts Act 1980, some of the freshly disqualified may do nothing further to redress the situation. The presumption is that those who are genuinely aggrieved will contact the issuing authority to express their shock, while those for whom the court case and disqualification was little surprise will probably not make contact. However, in the interests of procedural fairness consideration should be given to test this presumption among those subject to DIA, and to better communication of this potential remedy to interested parties, many of whom will not have a legal representative to advise them. Or, as one respondent suggested, strengthening conditions for its use such as requiring that costs and fines are first paid into court before the statutory declaration process can ensue, might deter any frivolous claims, refundable upon successful appeal.

Conclusion

This paper has used the recent substantial re-organisation of the traffic court system across London as a frame for some key questions around the prosecution of minor traffic offenders eligible for disqualification through the ‘totting up’ of penalty points. It has done this in light of a well-used approach within the Gateway Courts network normally to disqualify such drivers in absence, provided the bench is satisfied that the driver has had every opportunity to appear for the hearing. In so doing, it has asked whether this London approach helps police to achieve one of their key objectives to remove criminals from the roads, and it has viewed the DIA procedure through the lens of efficiency, effectiveness and fairness criteria.

There were two main aims of the small study of records from the TCJ OCU’s DDD comprised of London drivers recently disqualified through the accumulation of penalty points. It was concluded firstly that almost 48

per cent of the whole DDD were likely to have a mainstream criminal record, demonstrating the high ‘cross-over’ between offending on and off the road and the value for police of targeting ‘minor’ road traffic offenders in their quest to disrupt mainstream criminal activity. Secondly, it was shown that those who failed to comply with normal prosecution procedures and who were subsequently disqualified in absence were significantly more likely to have a mainstream criminal record than those who turned up to ‘show cause’ against being disqualified. Thus the widespread use of the DIA option in Gateway Courts within the MPS region is in theory even more likely to support the police objective of disrupting criminality.

Indeed, figures for 2005–2010, showing how the issue of warrants for drivers failing to turn up at court for sentencing has reduced substantially year on year, illustrated how efficiency has built whereby more drivers eligible for disqualification are receiving justice at considerably lower cost for the MPS and presumably the Magistrates’ Courts too in terms of better use of court space, fewer court adjournments and fewer police warrants to execute. In sum, use of DIA throughout the London Traffic Prosecution Scheme appears to have helped achieve a leaner, sharper and smarter criminal justice system for the less serious but higher volume end of road traffic cases. This has been facilitated by the streamlined reorganisation of the Gateway Court system itself and by the partnership working achieved through the effort and co-operation of several key agencies including the MPS TCJ OCU, the CPS, HMCTS, Transport for London and more recently the London Criminal Justice Partnership.

In respect of effectiveness, far more drivers who arguably should be disqualified on eligibility grounds are disqualified under DIA practice in the MPS area (up to 3,300 over three and a half years in this study) and are seemingly processed more swiftly thanks to fewer court delays. This should benefit road safety for all users, since more unsafe or dangerous drivers should be removed from the roads faster.

On fairness grounds, widespread DIA practice means that more justice is delivered in the courts than otherwise would be the case, and more crime victims can be acknowledged by more convictions of eligible drivers. Moreover, the safeguard inherent in the provision under section 142 Magistrates Courts’ Act 1980 for genuine instances where communications fail may enhance perceptions of procedural justice and fairness among those affected and the wider public, since respectful treatment is indicated. Such a safeguard combined with the absolute right to appeal against summary conviction and sentence to the Crown Court under the Criminal Procedure Rules is held to render the DIA practice ‘Article 6 compliant’. Nevertheless, district judges have been somewhat reluctant to adopt DIA practice, so reservations are still apparent. One suggestion would be to raise awareness of the existence of the section 142 provision among parties who might be interested but are otherwise uninformed, to enhance DIA’s actual and perceived fairness.

To counter this overall favourable face-value assessment of the ‘front end’ of pan-London DIA practice lurk, some questions about the more distal consequences of DIA. In particular, the financial savings from fewer

adjournments, warrants and associated court, prosecution and police costs should be offset by the monies spent on more section 142 hearings and more unpaid fines from higher numbers of the newly disqualified, but this may not be readily quantifiable.

Moreover, the low importance typically afforded to road traffic law enforcement by the police and government, seen here in the less than optimum use and regard for the Prolific Disqualified Driver Database in the MPS, and the continuing problems of those who ignore their disqualification orders and of disqualified drivers who fail to reapply for their licence after the ban, are likely to weaken the ultimate effectiveness of wider DIA practice. And without wishing to appear gloomy, should a further retraining requirement be introduced in order for some banned drivers to regain a driving licence in Britain,¹⁰⁰ the incidence of driving while disqualified could worsen. Thus all may not be so rosy in the DIA garden.

Shaping these issues is a more central concern about the commitment of the British Government to road traffic law enforcement and road safety. More engagement, for example, with the close links between offending on and off road, evaluation of remedial training interventions and resource and support for the intelligent use of road traffic law enforcement strategies as a productive way to disrupt criminal activity may help to cut crime generally and help improve road safety.

Were a national roll-out of DIA practice not already underway, a more formal cost-benefit analysis of the MPS Gateway Court system would be recommended to determine the net effect of DIA for the goals of 'value for money' efficiency and road safety effectiveness. From a justice perspective, however, DIA practice goes a considerable way towards ensuring that justice in minor traffic cases is delivered and seen to be done. Finally, in view of this positive assessment, should sentencing in absence become a routinely adopted practice in non-motoring summary offence cases?¹⁰¹ It is an interesting idea, although a straw poll from the bench suggests this would be impractical where community or custodial sentences were envisaged.

¹⁰⁰ Note 78 above, at 10.

¹⁰¹ Proceeding in absence in all summary cases is provided for under section 11 of the Magistrates' Courts Act 1980.