What is an Impaired Driving Countermeasure?
An impaired driving countermeasure is any action taken to enforce a statute, prosecute and adjudicate the offender, educate the public or stakeholders, raise awareness of the problem, or treat individuals related to driving under the influence of alcohol and/or other drugs. These countermeasures can be supported at the local, regional, state, and/or federal level. This brief outlines several issues related to specific impaired driving countermeasures and speaks to the larger problem of measuring how effective these initiatives might be in the effort to reduce crashes, fatalities and other adverse events related to impaired driving.

Overview
- 23,464 drivers involved in crashes during 2009 were classified by law enforcement as under the influence of alcohol and/or other drugs (TxDOT, 2009)
- 40% of fatally injured drivers had a BAC of 0.08 or above (TxDOT, 2009)
- DWI cases (1st and 2nd offense) accounted for almost 20% of the county court-at-law dockets (Texas Office of Court Administration, 2009)
- Minimal data is collected and analyzed in Texas related to the DWI process (arrests, charging, prosecution, adjudication, ignition interlock orders, etc.)
- Texas has established a DWI working group with representatives from different parts of the DWI process to advise TxDOT on issues related to impaired driving
- 48% of those arrested for DWI in Texas refuse to provide a sample of breath or blood as opposed to 5% in California (NHTSA, 2009)

Measuring the Impact of Impaired Driving Countermeasures
In Texas, one challenge related to sobriety checkpoints, ignition interlocks, and other impaired driving countermeasures is the lack of performance data to gauge the progress/impact of anti-DWI initiatives. Crash data is collected, but a large percentage of crash reports have missing data related to alcohol and/or drug impairment. Texas does not have a statewide database to collect arrest, prosecution, and adjudication data. The lack of this critical data prevents stakeholders from determining the effectiveness of countermeasures. In analyzing the DWI process, it is important to know the arrest information, the original charge, the final charge and disposition, as well as the sentencing to better understand and address problems in the process.

In the past, prosecutors have reported that most first-time DWI offenders received probation and, subsequently, some level of treatment or education. In contrast, more recently, convicted first-time offenders have opted for jail rather than probation. This allows the offender to avoid the time-consuming probation process, with or without an ignition interlock, alcohol education, and the substantial surcharges. This phenomenon combined with the re-filing and pleading to a lesser included charge in DWI cases makes it impossible
to illustrate the true magnitude of the overall impaired driving problem. Appropriate performance measures should be established to ensure that the state not only makes progress in evaluating alcohol-related crashes and fatalities, but also measures the impact of legislation related to impaired driving countermeasures.

As a state we need to be able to answer some or all of the following questions to determine how impaired driving countermeasures impact the overall DWI problem:

- What are the recidivism rates for first time and multiple DWI offenders in Texas? Do the rates vary by geographic/demographic area? Does the variance depend on the sentencing including the ordering of ignition interlock devices?
- Of those arrested for DWI or DUI, how many are actually charged with that offense rather than a lesser charge? How many are convicted of that offense? What is the range of sentencing ordered as part of the conviction?
- In regards to administrative license revocation (ALR): How many hearings are conducted? What are the results of those hearings? How any drivers receive an occupational license?
- For offenders charged with DWI: What was the time period between arrest and disposition? Was there a conviction? Did the prosecutor have breath or blood alcohol evidence? Was there adequate observational evidence from the arresting officer (driving facts, sobriety tests, etc.)? Did the offender go to trial (jury or judge)?

Currently, Texas does not collect or analyze data at a statewide or regional level related to DWI arrests, prosecutions, and adjudication. Data collection and analysis may be completed at the local level, but the analysis criteria are not consistent from one jurisdiction to another. Impaired driving countermeasures can be expensive to plan and deploy at the local and state levels. It is reasonable to provide for the evaluation of the effectiveness of impaired driving countermeasures since they are funded by tax dollars, and the evaluation can help ensure that those dollars are wisely used. By establishing a system of data collection and analysis, even if the system was limited in scope but representative of the state, the state could better identify problems and solutions as well as gage the effectiveness of countermeasures that are deployed.

Texas Impaired Driving Working Group
Texas currently has an impaired driving working group that is organized by the Texas Transportation Institute’s Center for Transportation Safety in conjunction with TxDOT’s Traffic Safety Section. Members of this working group represent law enforcement, prosecution, judicial education, prevention, advocacy, health care, research, probation, etc. This working group meets several times during the year to discuss current projects funded by TxDOT, as well as the strengths and gaps related to deterrence (statues, enforcement,
prosecution, etc.), judicial issues, prevention including media and educational initiatives, rehabilitation/treatment, and systematic challenges related to data collection and analysis. This working group allows TxDOT and appropriate stakeholders to discuss the different aspect of the complex process related to impaired driving and develop effective solutions.

Avoiding a First Offense of DWI
Through Plea Bargain or Deferred Adjudication
Presently, some prosecutors opt to reduce charges from DWI to less severe charges in order to receive a guilty plea from a defendant. This creates a win-win scenario for both the prosecution and the defense in that the state receives a conviction and the defense serves their client by avoiding the original DWI charge. However, this creates a problem, in that there is no previous conviction of DWI on the defendant’s record. If the driver is charged again for DWI, it will again be a first offense of DWI which does not allow the prosecutor to enhance the charge. This process is a major problem throughout the state as well as a critical concern for prosecutors, the judiciary, and advocacy groups.

The possibility of deferred adjudication, in conjunction with ignition interlocks, presents a viable approach to dealing with the issue of first-time DWI offenders. If prosecutors and/or judges are allowed to utilize deferred adjudication, restrictions can help ensure that the intended sentencing options are not disregarded. In the cases where a driver never re-offends, the sentence of deferred adjudication allows individuals to learn their lesson without a conviction being on their record forever. This also provides prosecutors with flexibility in the plea bargaining process. In contrast, if the driver is arrested again for DWI, the first conviction can be used to enhance the charge to a DWI (2nd). This approach allows a diverse set of stakeholders to find common ground in the prosecution and sentencing of impaired drivers.

Prohibiting Law Enforcement From Taking Blood Samples
When suspected impaired drivers refuse to provide a sample of their breath, a law enforcement officer may seek a warrant for a blood sample. There have been discussions in Texas and other states to prohibit police officers from taking the blood sample. It should be noted that this sample would be taken in a controlled environment, not at the roadside, similar to how breath samples are acquired. If police officers are permitted to take the blood sample, they should be required to receive and maintain the same training as a phlebotomist. Additionally, agencies will have to consider proper control and testing of the sample.

Permanent Revocation of a Drivers License
The permanent revocation of a driver’s license has a clear purpose, but it also may have an unintended consequence of creating a group of individuals who drive without a license or liability insurance. Even though there is not a definitive number of how many unlicensed drivers we have on our Texas
roadways, it is important to recognize that many unlicensed drivers desire to drive outweighs their perception of risk of detection and arrest. If this option becomes part of the criminal process, judges will have the discretion to impose the restriction as part of sentencing.

Criminalizing Breath Test Refusals

Most states punish the act of refusing a breath test with civil action and impaired driving (DWI) with criminal action. Currently, Texas punishes a breath test refusal with a “civil” action driver’s license suspension. This process is known as Administrative License Revocation (ALR). Some believe this civil sanction is adequate to prevent refusals while others consider refusal to take a breath test an admission of guilt. If criminal sanctions are placed on the individual for failing to provide a sample, that person still the freedom to refuse to provide the sample.

Since the state can introduce the fact that a defendant failed to provide a sample of his or her breath or blood in court, this often places the burden on the defense, creating a “guilty until otherwise proven innocent,” situation. However, the jury or judge is unable to hold the refusal as evidence that the defendant was under the influence of alcohol at the time of the offense. In short, failure to provide a sample of breath or blood limits the state’s case since there is no evidence that the defendant was above the per se limit of 0.08. While the state may claim the second tier level of intoxication through the statutory language of “loss of mental or physical faculties”, this approach can be more complex and may lead to an increase in plea agreements.

In most cases, individuals refuse breath tests to decrease their perceived risk of conviction. Most defendants do not see the potential loss of their divers’ license as a burden compared to the possible conviction of DWI. Currently, defendants who refuse to provide a breath sample may be subject to a blood sample based on a warrant. Additionally, many drivers who refuse to provide a sample receive an occupational license through the ALR process or choose to drive without a license. Research has shown that states that criminalize breath test refusal tend to have lower refusal rates. Of those states with the highest increase in refusal rates, very few had a law that criminalizes test refusal or gives the police a means to obtain a warrant for forced testing in non-mandatory situations.

Criminalizing breath or blood test refusals allows the state more leverage in obtaining best evidence for prosecution. It also closes the “loop hole” for defendants who “work the system”, knowing that they can refuse to provide a sample with no consequence other than losing their privilege to drive rather than risk the more harsh DWI conviction. This type of law strengthens the DWI system by providing a punitive “penal code” sanctions for defendants choosing not to provide a sample.