

## *Between the Lines*

### **New Strategies to Curb Drugged Driving**

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#### **Mark Your Calendars**

**NAPC Summer Conference**  
July 7—10, 2010  
Napa, CA

**NDAA Summer Conference**  
July 11—14, 2010  
Napa, CA

**IACP 16th Annual Training Conference on Drugs, Alcohol, and Impaired Driving**  
July 22—24, 2010  
Pittsburgh, PA

**Drunk Driving Over the Limit Under Arrest Labor Day Crackdown**  
August 20—September 6, 2010

**2010 GHSA Annual Meeting "Technology and Highway Safety: What's Driving Our Future?"**  
September 26—29, 2010  
Kansas City, MO

**NAPC Winter Conference**  
December 6—9, 2010  
Asheville, NC

**LIFESAVERS 2011**  
Phoenix Convention Center  
March 27—29, 2011  
Phoenix, AZ

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#### **Introduction**

Although public safety and public health advocates have devoted decades to the reduction of alcohol impaired driving with considerable success, little attention has been given to an equally dangerous threat: driving under the influence of drugs (DUID), including illicit, prescription and over-the-counter drugs. Here we discuss the scope of the drugged driving problem and two new legal strategies to reduce it: the per se standard and internal possession laws.

#### **Drugged Driving: A Pervasive Problem**

Arrest statistics do not give an accurate picture of the drugged driving problem because so few drug tests are done in the context of highway safety; however, we can examine self-report data, vehicle crash data, as well as recent studies to build the foundation of drugged driving knowledge. The Substance Abuse and Mental Health Services Administration (SAMHSA) estimated that approximately 10.2 million Americans drove under the influence of drugs in 2006. Drugged drivers, like alcohol impaired drivers, are disproportionately represented in serious crashes. In a California study of young male drivers killed in automobile crashes, researchers found that over 40% had drugs other than alcohol in their blood at the time of the crash. Similarly, 35% of fatally injured drivers in Washington State and 50.9% of drivers admitted to a Level-1 trauma center in Maryland tested positive for drugs other than alcohol. Simply stated, the problem of drugged driving is a major threat that has been ignored for too long.

#### **Traditional Approaches to Drugged Driving**

In every state, it is illegal to drive while under the influence of at least some drugs. All of these statutes require a demonstration of impairment. These "affected-by" DUID laws often are difficult to enforce. Many officers lack sufficient training to identify the signs and symptoms of drivers impaired by substances other than alcohol and lack sufficient knowledge to link the

impairment they might observe to illicit drugs or medications the driver may have taken. Law enforcement, supported by the National Highway Traffic Safety Administration (NHTSA), has provided one option for DUID investigation, most notably through the Drug Evaluation and Classification (DEC) Program. The program's growth has been limited, largely because extensive training is required and individual investigations are time consuming and labor intensive. The impact of the DRE program is not on scale with the drugged driving problem. As a result the vast majority of potential DUID cases are not properly investigated.

DUID cases based on the "affected by" standard can also be difficult to prosecute, especially in cases where an impaired driver causes a collision, is injured and cannot be assessed for signs of impairment, a frequent occurrence. Additionally, jurors, who often are far less familiar with the effects of drugs than alcohol, may not appreciate the significance of impairment caused by drugs. Accordingly drug-impaired drivers routinely evade prosecution.

#### **Per Se Drugged Driving Laws**

Alcohol impaired driving was more difficult to deter and prosecute before the per se standard, making it illegal to operate a vehicle with a blood alcohol content (BAC) of 0.08 or more, was established. This objective standard has greatly facilitated both public education and increased law enforcement efforts to combat drunk driving. For underage drinkers there is no acceptable BAC; any alcohol consumption by a driver under the age of 21 is considered a violation. The same standard was adopted for illegal drugs for 12 million commercial drivers by the U.S. Department of Transportation in 1988 for which any illegal drug in the driver's system is a violation.

The search for a safe limit for illegal drug use has been illusionary because so many factors influence impairment and because the same blood level of a drug can be associated with a wide range of impairment effects for individual drivers. The drug dose, route of

administration, duration of use, prior experience and tolerance to drug effects can all affect the degree and duration of impairment, and unlike studies conducted on alcohol impairment, scientists cannot study the effects of many illicit drugs to determine impairment levels because human subject experiments would be considered unsafe and unethical. There are also so many different illegal drugs used under so many different circumstances that testing all of them in the way alcohol has been tested and studied is impractical. Regardless, many of the major drugs implicated in DUID cases and vehicular assaults and homicides are illicit; it makes no sense to create a “legal” threshold for illegal drugs, for which there are no safe levels. For all of these reasons the per se standard is the best option.

In recognition of the difficulties of investigating and prosecuting many of these DUID cases and the virtual impossibility of developing appropriate threshold limits for specific effects, 16 states have adopted per se drugged driving laws to supplement their traditional drug impaired driving laws. These traditional laws prohibit people from driving with specified drugs or types of drugs “on-board” regardless of whether or not they are impaired. With the exception of three states, none of these laws require the prosecution to prove any particular drug level.

In many respects these laws have their roots in the per se commercial driver law. There simply is no reason to allow operators of private vehicles to drive with drugs in their system while imposing a no-use standard on commercial drivers, who are better trained and more experienced. Driving any vehicle is a “safety-sensitive” activity for which any impairment can have potentially lethal consequences.

Per se drugged driving laws make it easier for drivers to understand what is expected of them and what conduct is prohibited. They also make it easier for law enforcement officers to enforce DUID laws and set a clear standard for the driving public: “Don’t Drive After Using Drugs Illegally.” Most of the per se DUID statutes apply to all illicit drugs or a more limited subset. Conceptually, these may be viewed as “internal possession” of an illegal substance while driving.

Most per se statutes include scheduled prescription drugs in some capacity. These statutes typically provide for an absolute affirmative defense to the per se offense for individuals who consume the drugs as prescribed by a licensed professional. Drivers who operate vehicles under the influence of prescription drugs may still be prosecuted for DUID if there is evidence of impairment under the traditional statute, much the same as those driving under the influence of alcohol can be prosecuted even if they are below the illegal limit of 0.08.

Every court that has considered a facial challenge to these statutes has upheld their constitutionality. However, at least two courts have declared per se DUID laws unconstitutional under the unique facts of their cases. In Arizona (*State v. Boyd*, 31 P.2d 140 (Ariz. Ct. App. 1<sup>st</sup> 2001)), the court of appeals found a per se law void for vagueness as applied in a case where the ingested substance converted from a legal drug to a controlled metabolite. In Georgia (*Love v. State*, 517 S.E.2d 53 (Ga. 1999)), the court found that a Georgia law distinguishing between drivers who took marijuana under a prescription from those who did not violated equal protection.

Some critics, mostly from movements to decriminalize or legalize drugs, have attacked these statutes on fairness grounds. Others argue that the laws punish people for past drug use, noting that many drugs or their metabolites may be found in the blood hours, or days after the effect of the drug has passed. However, it is unlikely that unimpaired drivers will be subjected to prosecution because officers cannot compel drivers to provide blood or urine samples unless there is sufficient cause to believe that they drove impaired.

Regardless of these concerns, individuals who use illegal drugs and then choose to drive make a choice that impacts all other road users. Those who choose to use drugs illegally should be prepared for the possibility of being caught and the likelihood that they will be held accountable and face significant consequences.

## Internal Possession Laws

Although it is illegal to possess or use illicit drugs, in most jurisdictions it is not illegal for a person to have those same substances in his or her bloodstream, so called “internal possession.” This, of course, makes little sense since it is highly unlikely that this could occur without illegal possession and use. Laws prohibiting internal possession may provide a viable alternative to DUID per se laws by providing authorities with a mechanism to address illegal usage and provide opportunities for intervention and treatment.

## Conclusion and Recommendations

The traffic safety community and legislators must do more to address drugged driving, a pervasive, dangerous and under recognized threat. Prosecutors should familiarize themselves with the dangers of drugged driving and support necessary improvements to the law that would allow for appropriate enforcement.

## Technical Assistance

The National Traffic Law Center provides evidentiary and technical assistance on a number of topics in the traffic law realm, tracks national and state legislation, provides training programs on legal issues concerning impaired driving, and a number of other services. This includes an informational database on topics related to traffic safety, including expert witnesses, studies, case briefs, decisions and more. If you are in need of any assistance or have any questions, please contact the National Traffic Law Center.

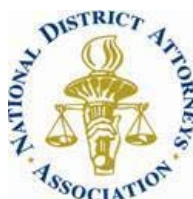
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