

# Drugged Driving

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## INTRODUCTION

Drunk driving has plagued American highways for decades. About 28 people die from drunk driving accidents every day: one life every 52 minutes.<sup>1</sup> The effects of alcohol on the body while driving has been studied for years, and the findings are clear: a stronger concentration of alcohol in the body means greater impairment while driving. A 2016 National Highway Traffic Safety Association (NHTSA) study confirmed that drivers are 2.05 times more likely to cause a car accident with a breath alcohol content of .05 than with no alcohol.<sup>2</sup> With a breath alcohol level of .08, the crash risk is 3.98 times greater.

Unfortunately, studies on the effects of drugs other than alcohol on driving do not exist. Meanwhile, drug use is increasing in the United States.<sup>3</sup> Sixteen states and the District of Columbia have legalized recreational marijuana since 2012, and 36 states allow it for medical purposes.<sup>4</sup> Many Americans consider driving while using marijuana less dangerous than drinking and driving, or at least less obvious: a 2018 survey revealed that just 10

percent of respondents thought it was very likely that someone would be caught by the police if driving an hour after using marijuana, versus 27 percent who thought the same for people driving while over the legal alcohol limit.<sup>5</sup>

Car accidents involving drugged drivers have been on the rise in recent years. In Washington state, in the five-year period before marijuana legalization, nine percent of drivers in fatal car accidents tested positive for THC; in the five years after legalization, the number was 18 percent.<sup>6</sup> In Colorado, compared to the three years pre-legalization, “marijuana-related traffic deaths” increased by 48 percent in the following three years, while overall traffic deaths increased by just 11 percent.<sup>7</sup> Moreover, there has been a spike in drugged driving incidents nationwide since the beginning of the COVID-19 pandemic. Between mid-March and mid-July 2020, 65 percent of drivers involved in serious injury or fatal car crashes tested positive for at least one drug (including alcohol, marijuana, and opioids).<sup>8</sup> Looking at opioids specifically, the number of drivers who tested positive nearly doubled compared to the previous six months, and for marijuana, the increase was about 50 percent.<sup>9</sup>

<sup>1</sup> “Drunk Driving.” *National Highway Traffic Safety Administration*. Accessed May 17, 2021.

<https://www.nhtsa.gov/risky-driving/drunk-driving>.

<sup>2</sup> J. H. Lacey, et al. “Drug and alcohol crash risk: A case-control study.” *National Highway Traffic Safety Administration*. 2016. <https://www.nhtsa.gov/behavioral-research/drug-and-alcohol-crash-risk-study>.

<sup>3</sup> James Hedlund. “Drug Impaired Driving: A Guide for States.” *Governors Highway Safety Association*. April 2017. [https://www.ghsa.org/sites/default/files/2017-07/GHSA\\_DruggedDriving2017\\_FINAL\\_revised.pdf](https://www.ghsa.org/sites/default/files/2017-07/GHSA_DruggedDriving2017_FINAL_revised.pdf).

<sup>4</sup> Jeremy Berke, Shayanne Gal, and Yeji Jesse Lee. “Marijuana legalization is sweeping the US. See every state where cannabis is legal.” *Business Insider*. April 14, 2021.

<https://www.businessinsider.com/legal-marijuana-states-2018-1>.

<sup>5</sup> Frederick Kunkle. “Proportion of drivers in fatal crashes who tested positive for THC doubled in Washington after marijuana’s legalization, study finds.” *The Washington Post*. January 30, 2020. <https://www.washingtonpost.com/transportation/2020/01/30/proportion-drivers-fatal-crashes-who-tested-positive-thc-doubled-after-marijuanas-legalization-study-finds/>.

<sup>6</sup> *Id.*

<sup>7</sup> Hedlund.

<sup>8</sup> “Drug-Impaired Driving.” *National Highway Traffic Safety Administration*. Accessed May 17, 2021.

<https://www.nhtsa.gov/risky-driving/drug-impaired-driving>.

<sup>9</sup> *Id.*

Most state laws on drugged driving closely resemble those for drunk driving. All states and the District of Columbia have a driving under the influence of drugs (DUID) statute, a close analogue to those prohibiting driving under the influence of alcohol (DUI). A smaller number of states, however, have additional laws criminalizing particular quantities of drugs detected in drivers' bodies. These laws can be divided into two groups: zero-tolerance laws and *per se* laws. Zero tolerance means that it is unlawful to drive if a test of one's blood, breath, urine, or saliva reveals *any* detectable traces of a prohibited substance. *Per se* laws operate like the maximum legal limits for alcohol: for a given substance, it is unlawful to drive if the amount detected is above a certain threshold set by statute. States' standards differ based on the substance in question. Marijuana is often addressed differently than other substances, especially in states that have legalized it for medicinal or recreational purposes.



For marijuana/THC, 12 states have a zero-tolerance law (Arizona, Delaware, Georgia, Indiana, Iowa, Michigan, Montana, Oklahoma, Pennsylvania, Rhode Island, South Dakota, and Utah). Six states set *per se* limits (Colorado, Illinois, Nevada, Ohio, Wisconsin, and Washington). For other illegal drugs, such as methamphetamine or cocaine, the breakdown is slightly different. Sixteen states have zero-tolerance standards for these substances (Arizona, Delaware, Georgia, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah, and Wisconsin), compared to three with *per se* standards (Nevada, Ohio, and Virginia).

## SCIENTIFIC UNCERTAINTY

One of the most significant challenges in combatting drugged driving is the absence of the same scientific consensus that exists for driving under the influence of alcohol. The precise relationship between drug use and driving impairment is not as clear-cut. For many years, studies of drugged driving relied on self-reported surveys, which can be prone to under-reporting.<sup>10</sup> Some studies contradict each other. For instance, a 2016 NHTSA study on impaired driving measured the increased crash risk from cannabis, benzoylecgonine, cocaine, illicit opiates, benzodiazepines, medicinal opioids, and amphetamines, and *none* of them made a statistically significant contribution to the chance of causing a crash.<sup>11</sup> However, the following year, the National Academy of Sciences released its own review of the effects of marijuana on health, concluding that “there is substantial evidence of a statistical association between cannabis use and increased risk of motor vehicle crashes.”<sup>12</sup>

Another important complication in this field of study is that “drugs” are not a uniform category with uniform effects on the human body. The NHTSA crash risk study observed that its focus on the relationship between different drugs and *all* crashes failed to capture how drugs' particular effects could cause different *kinds* of accidents. Marijuana could cause more accidents due to inattention but fewer due to aggressiveness; stimulants could reduce crashes due to drowsiness but increase speed-related accidents.<sup>13</sup> Generalizations are difficult when there are so many substances that can affect drivers. NHTSA's Fatality Analysis Reporting System has 430 codes for different drugs and their metabolites, each with their own effects on drivers,<sup>14</sup> and those are only the effects of *individual* drugs. Using two or more drugs, including alcohol, magnifies the impairing effects of each drug.<sup>15</sup>

Many states' laws are written with the assumption that the physiology of drugged driving is like that of drunk driving, but recent research suggests that this assumption may be misplaced. Statutes with *per se* standards for marijuana/THC imply that an increased concentration of those substances in the body correlates with increased impairment, much like a rising blood alcohol content (BAC) would. However, 2021 research

<sup>10</sup> Lacey, *et al.*

<sup>11</sup> *Id.*

<sup>12</sup> Hedlund.

<sup>13</sup> Lacey, *et al.*

<sup>14</sup> Hedlund.

<sup>15</sup> “Drug-Impaired Driving.”

by the National Institute of Justice (NIJ) found that “there is little evidence correlating a specific THC level with impaired driving.”<sup>16</sup> Participants in the experiment were given THC doses in different amounts and by different methods and then performed impairment tests. The results found that THC levels and the time of greatest impairment varied by the dosage and method; simply measuring THC levels in participants bodies was not a reliable indicator of impairment.<sup>17</sup> In fact, some drugs or their metabolites can linger in one’s system for “days or even weeks,” long after any possible intoxication.<sup>18</sup>

## ENFORCEMENT CHALLENGES

This scientific uncertainty has collateral effects on the ability of law enforcement officers to detect drugged driving and of prosecutors to successfully bring charges against offenders. Drugs cause different behaviors in drivers than alcohol does, and officers may not have had the training to become drug recognition experts. A 16-hour course called Advanced Roadside Impaired Driving Enforcement (ARIDE) exists and covers the distinct effects of different categories of drugs, but this course is not generally included in basic training at police academies.<sup>19</sup> Identifying alcohol impairment is generally much easier (both in terms of officers’ expertise and of the ease of administering tests), to the point that if alcohol played a factor in a person’s impaired driving, that often is what is noted on the police report. A Governors Highway Safety Association (GHSA) study found that in these situations, other drugs will be investigated only if alcohol can be ruled out or if the driver’s behavior is inconsistent with his or her BAC level.<sup>20</sup> The American Automobile Association (AAA) Foundation for Traffic Safety found that officers are even “discouraged” to drug test once they have detected a BAC of at least .08.<sup>21</sup>

Even assuming the officer detects drug impairment and administers the appropriate tests, obstacles

remain. There can be challenges to, and delays in, drawing blood, giving time for drugs to metabolize and causing the test result to inadequately reflect the driver’s condition at the time of arrest. Not every test method can detect every possible drug. Some laboratories are understaffed or have lengthy backlogs, preventing timely access to results. Additionally, drug testing is expensive; not every jurisdiction can bear the cost.



When the time comes to prosecute a DUID, prosecutors face many of the same obstacles as law enforcement officers. DUID cases are more expensive and difficult to prove than DUI cases. Therefore, if either DUID or DUI charges can be brought, the prosecutor will pursue the DUI.<sup>22</sup> Testing backlogs can prevent necessary evidence from being available in time for trial. Even if all the scientific evidence can be presented, though, judges and juries that are unfamiliar with how drugs affect driving may not be persuaded by it. Marijuana DUID cases can be particularly difficult to prosecute: many states have legalized the drug, and both judges and juries are often less willing to accept the connection between the use of marijuana and significant impairment.<sup>23</sup> A GHSA survey revealed that many judges expect to see evidence of a specific drug concentration, analogous to a .08 BAC, despite the different legal standards and the current scientific research.<sup>24</sup> Even video recordings of a drugged driver’s roadside behavior may not be persuasive because many judges and juries assume that drug-impaired drivers should behave like alcohol-impaired drivers.<sup>25</sup>

<sup>16</sup> “Field Sobriety Tests and THC Levels Unreliable Indicators of Marijuana Intoxication.” *National Institute of Justice*. April 5, 2021. <https://nij.ojp.gov/topics/articles/field-sobriety-tests-and-the-levels-unreliable-indicators-marijuana-intoxication>.

<sup>17</sup> *Id.*

<sup>18</sup> Hedlund.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> “Enhancing Drugged Driving Data: State-Level Recommendations.” *AAA Foundation for Traffic Safety*. December 2019. <https://aaafoundation.org/enhancing-drugged-driving-data-state-level-recommendations/>.

<sup>22</sup> Hedlund.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

## RECENT INNOVATIONS

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Researchers and policymakers have produced a variety of solutions to improve DUID laws and their enforcement. On the testing front, a method that has received particular praise by the GHSA and the AAA Foundation is the use of oral fluid testing to identify drugged drivers. Several states have tested oral fluid screeners “with promising results:” \$20 screeners can identify the most common driving-impairing drugs and produce results in five minutes.<sup>26</sup> Only Indiana, Michigan, and Alabama, have been regularly collecting oral fluid as part of their roadside drug screening,<sup>27</sup>



For everything from arrest to prosecution, NIJ has identified “13 Top-Tier Needs” for the enforcement process, aimed at three groups.<sup>28</sup> For law enforcement, NIJ highlighted the importance of providing more officers with ARIDE training, adopting new observational tests for drug impairment, seeking faster methods for obtaining blood samples, and training officers to have more confidence when testifying in court about their observations of drug impairment. For forensic

## RESOURCES

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Centers for Disease Control and Prevention. “What is Fentanyl.” Last Reviewed February 16, 2021. <https://www.cdc.gov/drugoverdose/opioids/fentanyl.html>.

Daly, Max and Sam Iravani. “Why America is the Only Place in the World Where People Use PCP.” *Vice*, March 22, 2021. <https://www.vice.com/en/article/epdy4e/pcp-america-pcp-use-washington-dc>.

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<sup>26</sup> *Id.*

<sup>27</sup> “Enhancing Drugged Driving Data...”

<sup>28</sup> “Drug-Impaired Driving: NIJ-Sponsored Panel Points to Priority Needs for Addressing Complex Enforcement Challenges.” *National Institute of Justice*. April 15, 2021.

toxicology, the most pressing needs are securing funding to bring testing labs up to adequate levels for DUID testing, expanding DUID training to more toxicologists, and identifying the risks to justice and due process caused by testing backlogs. For prosecutions, NIJ emphasized technical training for prosecutors, increasing research on the methods that prosecutors use to prove their cases, and identifying best practices for dealing with drivers who refuse drug tests, such as the expanded use of e-warrants.

Public awareness is a valuable tool to reduce drugged driving and enforce DUID laws. To that end, several states have conducted education campaigns which include informational websites, brochures, and televised public service announcements on the dangers of using drugs and driving.<sup>29</sup> Some campaigns have devoted particular attention to driving while on prescription drugs, and several, after the legalization of marijuana, conducted campaigns to remind citizens that driving while high on marijuana is illegal.<sup>30</sup>

## CONCLUSION

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All 50 states and the District of Columbia have enacted laws to address drugged driving. These laws have changed in response to evolving scientific research and national trends in drug policy, and they will continue to do so. As with many policy challenges, limited resources and imperfect knowledge limit the effectiveness of current laws. Drugged driving is currently prosecuted less than drunk driving, but increasing awareness, adopting new best practices, and, if necessary, amending existing laws can help the states to reduce all forms of driving under the influence.

<https://nij.ojp.gov/topics/articles/drug-impaired-driving-panel-points-priority-needs-addressing-enforcement-challenges>.

<sup>29</sup> Hedlund.

<sup>30</sup> *Id.*

## RESOURCES CONTINUED

Dezman, Zachary, *et al.* “Notes from the Field: High Prevalence of Fentanyl Detected by the Maryland Emergency Department Drug Surveillance System — Baltimore, Maryland, 2019.” *Morbidity and Mortality Weekly Report* 69, no. 23 (June 12, 2020): 724-726. <https://www.cdc.gov/mmwr/volumes/69/wr/mm6923a3.htm>.

Raouf, Mena, Jeffrey J. Bettinger, and Jeffrey Fudin. “A Practical Guide to Urine Drug Monitoring.” *Federal Practitioner* 35, no. 4 (April 2018): 38-44. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6368048/pdf/fp-35-04-38.pdf>.

Snyder, Marion L., Corinne R. Frantz, and Stacy Melanson. “Immunoassay-based Drug Tests are Inadequately Sensitive for Medication Compliance Monitoring in Patients Treated for Chronic Pain.” *Pain Physician* 20, no. 2S (February 2017): SE1-SE9. <https://www.painphysicianjournal.com/current/pdf?article=NDIwNw%3D%3D&journal=103>.

Wish, Eric D. “Remembrance of Things Passed: Using Urinalysis Results to Monitor Emerging Drug Use.” Recorded July 28, 2020 for NDEWS Presents. Video, 1:06:55. [https://www.youtube.com/watch?v=H4oZLDjib\\_4&list=WL&index=7](https://www.youtube.com/watch?v=H4oZLDjib_4&list=WL&index=7).

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