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IMHO (In My Honest Opinion)

DUI Laws - .08 Part II: The Nightmare Continues



By Gary Witzenburg

February 4, 2004 --
 You share a bottle of wine over dinner with your partner or a friend, pay your bill and hit the road home. You do not look, feel or act impaired in any way, because you are not. So you have no way of

knowing that, after two glasses, 12 ounces, of wine with a two-hour meal, you're legally "drunk" under your state's ridiculous new .08 BAC (blood alcohol content) limit.

As always, you drive carefully and responsibly...unaware that you're being tailed by a sheriff's deputy eager to make his monthly quota and earn overtime money in court. You may have a burned-out tail lamp, or inadvertently exceed a too-low speed limit, or drift briefly out of your lane making a turn...and he's got you. Invisible behind a blinding flashlight, he says he smells alcohol, or that your eyes look glassy. "Had anything to drink?" he asks. You tell the truth: "Just two glasses of wine over dinner."

Next you're doing stupid human tricks at the side of the road: walk a straight line, touch your nose, balance on one foot, and recite the alphabet backward and forward. You do them fine. You walk and talk fine. You are not impaired. You should be on your way. But not yet.

"Blow into this!" He studies the Breathalyzer read-out. "Do it again! Blow longer, harder!" He studies it again. Finally, the result he was hoping for: "You're over the limit!"

Before you know it, you and your partner

48,347

83.64

are cuffed and crammed into the back of his patrol car because, based on the (highly unreliable) field Breathalyzer reading, you're driving under the influence and your friend is guilty of "Allowing a DUI." Incredibly, in some states, the penalties are identical. Your car is left behind for the sheriff's brother-in-law to tow and impound at great expense, while you are hauled off to the station and your breath tested again. Then your license is shredded.

You will spend that night in jail and the next several months and thousands of dollars fighting these charges. If you're very lucky, with a good lawyer and a reasonable judge, in some states (not Michigan) you may be able to get the charge reduced to a serious non-alcohol offense such as "Careless Driving," which carries a lesser fine and goes away in three years. If not, you may be labeled an alcohol offender for life. That could cost your job and any others you apply for. And good luck finding affordable insurance, or renting a car--ever again!

When this happened to one mid-'30s New Jersey couple, both professionals with clean records, both faced six-month license suspensions, \$5,400 in fines and fees, \$3,500 in lawyers' fees and \$12,000 in insurance surcharges over three years. State laws vary, but most DUI penalties are draconian, even for low-BAC first-time offenders.

Why? Because a highly organized, highly motivated group of anti-alcohol zealots (AAZs) called MADD (Mothers Against Drunk Driving), aided and abetted by the National Highway Traffic Safety Administration (NHTSA), has very effectively used falsified data, distortions, lies, and propaganda to convince the mainstream media, most of the American public and the U.S. Congress that the previous, already-low .10 BAC limit in most states was not low enough. Congress then blackmailed the states: they could adopt the .08 limit or lose millions of dollars in Federal highway funds.

Who has nerve enough to confront and fight these "Mothers Against Drunk Driving," a group seemingly hell-bent on such a noble, well-meaning mission, even when an honest reading of the facts proves them incredibly wrong? Few politicians have. And very few among the media, which gleefully revels in uncovering lies and propaganda in most other areas. And no-one talks about MADD's real mission, which is virtual prohibition.

Inflated Data

NHTSA recorded 42,815 U.S. motor vehicle

accident fatalities in 2002. Of those, 9,495 (22.2 percent) occurred in accidents in which at least one driver was proven or assumed by investigators to have some level of alcohol in his/her blood. This number (which is not readily available) does not include "alcohol related" accidents where no driver had been drinking but at least one victim (a passenger, a pedestrian, a bicyclist) has been. NHTSA misleadingly counts such drinking non-driver fatalities as if they were the drinking drivers, then adds ("imputes") thousands more to come up with an inflated total closer to 18,000, which it and MADD then publicize to deceive everyone into believing the problem is much worse than it is. The data also says nothing about who was at fault, only that some alcohol was involved.

But while NHTSA, MADD and the media like to point to "alcohol-related" fatalities - because that makes the issue look far more severe - it is really much more meaningful to focus on the drinking drivers (below). NHTSA data, collected through its Fatal Analysis Reporting System (FARS), shows 57,803 drivers involved (not necessarily at fault) in fatal accidents in 2002, of which 9,456 (16.36 percent) were proven or assumed to have consumed any alcohol at all. That means nearly 84 percent were stone sober. And of those 9,456, only 574 (a statistically insignificant 0.99 percent) were in this newly criminalized range of .08-.09.

| | | |
|--|--------|-------|
| 0.0 Driver BAC | 48,347 | 83.64 |
| .01-.07 | 1,536 | 2.66 |
| .08-.09 | 574 | 0.99 |
| .10-.11 | 665 | 1.15 |
| .12-.13 | 743 | 1.29 |
| .14-.15 | 863 | 1.49 |
| >.15 | 5,075 | 8.78 |
| Totals | 57,803 | 100.0 |
| (from NHTSA Fatal Accident Reporting System) | | |

Yet NHTSA and MADD -- counting drinking passengers and drinking non-occupant victims of non-drinking drivers, plus thousands more they simply "impute"--somehow continue to get away with claiming that 41 percent of fatalities are "alcohol related." That fiction is then routinely rounded up and distorted by AAZs and gullible media to the blatantly false mantra that "half of [vehicle] fatalities are caused by drunk drivers."

Emotional Reactions

Given the emotion behind this subject and the misguided passion of AAZs, I expected negative reactions to my March 23 article, "DUI laws: Out of Control," and I was not disappointed. Some were reasoned, others highly emotional. All were from fervent believers in MADD propaganda, most of whom believe that emotion and opinion trump hard facts. Many accused me - as one who dares to question this unreasonable new definition of

"drunk" and advocates fair and reasonable laws and penalties - of being "pro-drunk driving."

"Organizations such as yours are responsible for putting drunk drivers out on the road every night," wrote one who disagreed. "I truly hope that one day you are touched when a family member of yours is struck and killed by a DUI driver. Then maybe you will get your heads out of your asses and realize just what you are promoting." Really? What organization?

"It doesn't matter how much you had to drink. Don't drink and drive," wrote another. "Just think how it would be if you lost your son or daughter to a drunk driver. I lost a son (first born), age 16. Let me tell you it's awful, just awful." Yes, it is. And I sympathize deeply. But NHTSA data clearly shows that it does matter how much someone drinks. And no number of terrible tragedies caused by dangerous high-BAC drunks justifies targeting and severely punishing safe low-BAC drivers. Would this grieving parent feel any better if the driver had been sober but simply careless, drowsy, or distracted, as so many are today?

"If you drink, you are impaired. It's that simple," wrote one weekly magazine editor, who must be speaking from his own experience. But not from mine, or those of most people.

I also heard from a couple of police officers. "Some things are constant," one wrote: "1) the majority of officers will tell you that when asked, drivers always state, 'two drinks,' and 2) we have better things to do than lie about supporting facts."

Positive responses, however, far outnumbered negative ones. A sampling of the briefest includes: "Great article on DUI laws," "Thanks for this excellent article," "Amen, I was wondering when someone would have enough courage to face MADD and let the public have the facts," and "Reminds me of the fanatical 'ethic' enforced by Islamic fundamentalists."

Among the many longer ones: "More needs to be published in this vein to counterbalance MADD and like-minded organizations who have seeded the media with distortions and propagandized the rest of us. It's no exaggeration to suspect that their real agenda is to ban alcohol consumption anywhere except (perhaps?) within the 'protected' confines of ones own home."

And: "Since I am in the 120-lb. group, I can get a DUI if I have a glass of wine with dinner. I am a law abiding citizen and don't condone drunk driving, but this is ridiculous. My doctor recommends that I have a glass of red wine a day for a heart condition, yet if I obey his orders, and have a glass of wine at dinner [and then drive], I would be breaking the law."

And from unlucky victims: "Thanks for such an insightful and thought-provoking article. Almost exactly what you stated happened to me this weekend. My wife cried uncontrollably as they took me away and made me sit in a cell for eight hours. I have (had) a perfectly clean record with nothing close to a speeding ticket in 10 years. I am 28 years old, and I think the cop was making an example of me. I blew .097 in the field but only .07 at the station."

"I had a police officer tail me at night," another related, "drive bumper-to-bumper, forcing me to speed up to prevent being rear-ended, only to pull me over for speeding so he could search me and my car for alcohol (this is illegal, so they do it only when no one else is around). All of your horror stories have a common component: dishonest police. Although most police officers I believe are honest and honorable, some are abusive, dishonest, and corrupt."

"MADD is as manic on the alcohol topic as Carrie Nation ever was," wrote one respected journalist who has researched and written extensively on motorists' issues. "NHTSA can cough up all kinds of numbers...but the question always comes down to, 'How does it know?' The answer is, it estimates. What is an estimate worth? Not much. What's interesting to me is the BAC statistics of the real drunks picked up for DUI. They are often two and three times the limit. Also, the BACs of drivers charged with DUI after crashing. There are some real numbers here, and they don't support .08 BAC laws."

"What's happening today is nothing short of criminal," a former police officer wrote: "As a retired member of the NYPD, I see this 'policing' as nothing short of a revenue stream for local government. Despite my experience, I have no idea how to stop this runaway train."

Theories

I truly don't understand why some people strongly believe that even small amounts of alcohol result in dangerous levels of impairment, but I have some theories. Most must be:

- Reformed drunk drivers feeling guilty and frightened by their own past indiscretions, whether or not they ever got caught or hurt or killed anyone.
- Among the small minority who cannot tolerate alcohol, are impaired by even small amounts and believe their experience is typical.
- People who themselves have been tragically victimized or have lost loved ones to (truly) drunken drivers -- such personal tragedy apparently can cloud rationality and create bitter, vengeful feelings toward anyone who drinks and drives at all.
- Police or emergency workers who witness close-up the horrifying human results of vehicle accidents and lose the perspective to differentiate low-BAC drivers from lethal drunks.

Facts and Information

NHTSA and MADD equate "alcohol related" fatalities to "drunk driving" deaths. Who was driving, who was at fault and BAC levels matter not to them. If a sober driver hits a drinking pedestrian or bicyclist; if two sober drivers collide, someone dies and anyone in either vehicle has had a drink, that's "alcohol related." And some level of BAC is entered into the data in a great many cases where there is no testing, no evidence and no one is ticketed as DUI.

Only blood tests provide an accurate reading of blood alcohol content. A breath test measures the percentage of alcohol in that breath, which is affected by medications, aspirin, cough drops and mouthwash and correlates poorly -- plus or minus 50% -- with actual blood alcohol content. This is why you should always demand a blood test if arrested for DUI.

While most other countries have BAC limits lower than ours (a point always emphasized by AAZs), they also have graduated and far more reasonable penalties. A .05 BAC offense, for example, typically results in a fine, while severe penalties rarely apply below .15 BAC.

One web site called DUI Gulag (www.duigulag.com/facts.htm) provides many pages of "true facts MADD propaganda will never tell you." Comparing "alcohol related" fatalities in states that adopted .08 early to those that held out longer, "the only significant difference," it contends, "is that more citizens are being arrested for DUI in the .08 BAC states. Lowering legal limits below .10 does not appear to save lives. It does appear to unnecessarily criminalize our citizens, destroy marriages, wreck careers, lessen self esteem and cause widespread disrespect for law enforcement officers, the courts and our civil government."

A Defense Lawyer's View

Todd Levitt, a Michigan attorney who defends DUI cases, says that officers are trained to always record three specific things in DUI arrest reports: 1) the driver's speech is slurred, 2) his/her eyes are glossy, and 3) there is a smell of alcohol from the vehicle or the individual's breath. "These three factors are in every single report I've ever read," he says.

Not coincidentally, none of these can be later disproved. "I would say that even when those factors are not present," he adds, "the officers put them down as if they were. Prosecutors put on seminars to teach these officers how to make these cases stick."

Levitt also contends that "field sobriety tests" are designed to ensure that people fail. "After the officer's observations," he says, "the next important factor is the sobriety tests -- counting, reciting the alphabet, balancing on one foot. The deck is stacked against the individual because, first of all, you're nervous, and second, you may have had a few drinks. Putting those two factors together, and the nature of the tests...I would fail them sober."

"If you do pass those tests, the officer is supposed to stop right there," Levitt points out. But often, still working for an arrest, they demand a Breathalyzer test. "And if you refuse, you'll be ticketed for refusing. Then if you get taken down to the station and refuse, after being read your "chemical rights," you'll lose your license for six months. Most people are nervous, and they're read this long page of chemical rights that they don't understand.

"And in court you are guilty until proven innocent, not the other way around. You've got the

prosecutor, the judge and the police officers all working together. It's absolutely stacked against you, because officers have instant credibility. For the judges to get re-elected, it's very important that the police support them. So the judges are going to side more often with law enforcement and the prosecutors. That's politics."

Key Questions

Let me (again) be crystal clear: I would never encourage nor condone driving drunk, which is extremely dangerous and irresponsible and deserves severe punishment. But I do strongly believe that DUI laws, enforcement and prosecution should not be so over-the-top that they ruin more lives than they can possibly save. And I respectfully suggest that lawmakers, enforcers and courts should base their life-altering decisions on honest answers to the following questions:

1. What should the legal definition of "drunk" be? Based on NHTSA data, it should not be .08 BAC, where drivers are statistically no more dangerous than if stone sober.
2. What should be the penalties for "suspicion of DUI" which is all any Breathalyzer can provide? Should suspects in that range be dragged off to jail, their vehicles impounded and their licenses shredded without due process? Absolutely not!
3. What should the penalties for DUI be? Shouldn't they be graduated - lesser for lower levels and first-time offenders, much harsher for higher levels and repeat offenders - like those for speeding and other offenses, and those in other countries?

What to do

The unfortunate truth is that DUI enforcement has degenerated into a dollar-driven system supported by AAZs and popular media too afraid or lazy to check the facts or question the propaganda. "Anyone with a modest understanding of this issue, and who is honest, knows that drivers with low BACs such as .08 are no more likely to be involved in an accident than someone with a BAC of 0.0," says National Motorists Association (NMA) president Jim Baxter.

"DUIs are BIG BUSINESS," adds Jeanne Pruett, founder and CEO of Responsibility in DUI Laws (RIDL). "Lowering the BAC limit does nothing to save lives but increases the potential income pool for police, courts, lawyers and insurance companies, which substantially increase rates for DUI offenders." Additional facts, information and advice can be found at these organizations' web sites: www.motorists.org and www.ridl.us/.

How can you avoid this nightmare? You could simply take MADD's advice: "don't drink and drive," anything at all, ever. If you do choose to drink moderately and responsibly and then drive (as the vast majority of Americans routinely do), be very careful...but not overly careful. Driving well below the speed limit, for example, is a sign of impairment to lurking cops.

If stopped "never admit that you've been drinking," attorney Levitt advises. "It's their job to prove it, so don't do it for them. This is the key thing that convicts everybody instantly. An officer will ask, 'have you been drinking?' Ten out of ten people will say, 'Yes, I have.' 'How much?' 'I had a few beers.' Boom, you're convicted right there. You don't have to be Miranda-ized, you're not under arrest, you're not in custody. It's a volunteer question, and you're voluntarily providing the information they need for a conviction."

One other very scary reality: in most states, if you are driving after consuming any alcohol at all and are involved in an accident, especially one that injures or kills anyone, you will automatically be considered at fault. You will be blamed and prosecuted as an at-fault drinking driver simply because you have some level of BAC, regardless of who actually caused the accident and how low that BAC may be. Someone please correct me if I'm wrong, but that's the way it appears to be these days.

One good idea is to buy a quality portable Breathalyzer and test yourself before driving. My experience with my \$140 unit has been enlightening, and scary. As a 190-lb. male, I've learned that a moderate amount of alcohol (say, 16 ounces of wine over three or four hours) usually results in a drive-home BAC of .05 or so, safely below .08. Yet it sometimes goes higher for no apparent reason. And a 100-lb. woman can exceed .08 after just one drink!

Your BAC at any given time depends on how much alcohol you consume, your body weight

and chemistry, what you have eaten and when, and on the passing of time, and it is not reliably predictable. It takes roughly an hour to metabolize each drink, so only time - not coffee, food, even a cold shower -- can reduce it. Food stretches out the process by slowing absorption from the stomach, so eating and/or waiting longer before leaving (which many do, thinking they're "sobering up") may result in a higher drive-home BAC. Even if you drink very little, you want your BAC to peak well before driving or after you arrive home, not on the way.

MADD says that if you must drink any alcohol at all away from home, get a cab or a designated driver. That's great advice if you can find a cab, or someone whose driving you trust and is willing to spend the evening with you without having anything to drink. Personally, I don't trust most other drivers, and I don't want to risk the "Allowing a DUI" bust if I'm in the car when someone else is caught driving at .08 or higher.

AAZs love to point out how scary it is to see people noticeably drunk most any night in most any bar. At first I thought they had a point, but I've learned that most obvious drunks do have designated drivers or plan to cab it home. Thus relieved of the burden of driving, they feel free to drink much more than they normally would.

Finally, know your local laws. In Michigan, you can refuse field sobriety tests without penalty but not the breathalyzer at the station. And you can demand a blood test to verify the result. Few people know or understand these things, and cops and jailers are rarely helpful. Also, one cop advises, keep your attorney's phone number(s) on your person at all times.

Do some research, write letters to editors, call your lawmakers and question anything MADD (or NHTSA) ever says. We all know that government agencies and special interest groups invent and twist facts because they believe their ends justify those means. Why should we believe that these two are any different?

One writer offered an idea that you may or may not want to try. He was stopped one night, and the officer demanded a breath test. He said, "Sure, but you do it first so I know it's correctly calibrated." The officer agreed and blew something like .03. "Have you been drinking?" the motorist asked. "No," said the officer, but, confused and embarrassed, he let the guy go.

Good luck, drink very little, if at all before driving, and be very careful out there!

Gary Witzenburg is not an employee of Consumer Guide or Publications International, Ltd. The views expressed do not necessarily reflect the views of Consumer Guide.

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