It's Time For States To Enact Effective Marijuana DUI Laws

By **Laura Sedrish and Victor Schwartz** (May 27, 2021)

Plaintiffs and defense attorneys rarely see eye-to-eye on legal policy issues, but we — who have close to 100 years of combined experience representing clients on both sides of lawsuits — agree on this simple truth: There is a strong societal need to curb dangers from driving under the influence of drugs, or DUID, whether the drugs are legal or illegal, with marijuana use poised to overshadow use of other drugs.

Driving is one of the most dangerous activities in America. Vehicles, often weighing more than two tons, are being driven at high speeds and are usually surrounded by many other such vehicles, as well as bicyclists and pedestrians.

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Impairment, or even a moment's inattention, can cause injury, with injuries being suffered in almost one-third of all car crashes. Any type of impairment makes a driver more dangerous on the road, putting themselves and others at risk.

With the COVID-19 stay-at-home orders coming to an end, there will be increasingly more motorists on the road, with more traffic collisions and resulting injuries. More Americans are admitting to using marijuana than ever before. Months of stay-at-home orders likely resulted in increased use. With the opioid crisis, more Americans are also driving under the influence of prescription drugs.

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The momentum among states, and enthusiasm by many people regarding the legalization of marijuana for medical and recreational use, is undeniable. On July 1, Virginia will become the 16th state to legalize recreational marijuana use, bringing the total to 36 states and the District of Columbia where the sale of marijuana is lawful in some form. The speed of recent enactments is breathtaking — in more than one sense of that word.

But, as with Operation Warp Speed in developing COVID-19 vaccines in record time, it remains very important to pay attention to side effects. One such side effect due to more liberalized marijuana laws is serious injury or death as a result of a driver's impairment from drug use. Although marijuana activists argue that there is not enough data to connect marijuana use with traffic crashes definitively, other studies claim to show a statistical association between cannabis use and increased risk of motor vehicle crashes.

However, the issue with all of these studies is that marijuana's role in crashes is not as clear as the link between alcohol and crashes. There are relatively few studies focusing on the effect of marijuana use on driver performance, and the results of these few studies are inconsistent likely due to states' differing laws, the lack of compatible information on driver drug use in crashes, and varying policies and procedures for drug testing.

Moreover, unlike alcohol, which has been studied for decades and is detected via reliable, tried-and-true testing methods, marijuana is more complex. It is absorbed in and affects the body differently from alcohol, and testing for contemporaneous use is limited.

Analyzing marijuana use and its effect on driving is further complicated due to the varying

concentration and potency of THC in the different types, crop and ingestion methods of marijuana, as well as user's frequency of use and tolerance levels that affect behavior.

Although almost everyone knows about the dangers of drunk driving and how to curb it, this is not the case with DUID. Unfortunately, the same lack of attention to DUID is exhibited by many who form our public policy. Lawmakers may be patting themselves on the back for loosening marijuana restrictions, but they are turning a blind eye to what that may mean for another sizable constituency, that is, innocent motorists, vehicle occupants and bystanders.

Policymakers should instead be focusing on answering some basic questions. How should the law recognize, test for and deter DUID to protect people? How might law enforcement do the same, especially when the intoxicating effects of marijuana or other drug use on a driver may not be as readily apparent as the intoxicating effects of alcohol?

Although people may joke about or offer anecdotal support for the notion that marijuana use does not impair driving, the reality is that it can affect an individual's levels of attention, response times, motor-coordination, visual function, completion of complex tasks, and perception of time and speed — all of which are important skills needed for safe driving.

All 50 states and the District of Columbia have general laws prohibiting driving while impaired, including by marijuana impairment. A public policy imperative is to develop meaningful, tailored DUID laws that actually safeguard the public.

Unlike testing for the presence of alcohol, currently there is no in-the-field breath-analyzer test to measure for the presence of marijuana, and the available tests for THC and its metabolites, which may involve blood, urine, hair follicles or saliva, are of limited reliability for drug-impairment enforcement due to the nature of the drug and other variables.

Blood testing may require a warrant, and the results can take days to complete depending on the resources of local law enforcement. The blood test results show the THC concentration in the driver's blood sample; however, the amount of THC in someone's blood is a poor indicator of impairment and does not reveal how recently a person has used marijuana, or whether the person used marijuana or was simply exposed to second-hand smoke.

Also, impairment levels may differ per individual; the effects are felt differently depending on how THC consumed — i.e., eating versus smoking, as smoking affects the mind quickly, while eating it can postpone the effects for hours. Moreover, blood tests can also show the presence of the metabolites of THC, which are not themselves impairing, for weeks after consumption.

Similarly, urine testing, also typically requiring a warrant or an arrest, cannot be used reliably to establish drug use around the time of driving, as THC and its metabolites can be detected in urine for weeks after usage, and the results are also affected by a person's frequency of use, weight and body fat, among other factors that can give false positive results.

Further, hair tests are not reliable because THC can be found in hair months after usage, can be affected by the use of hair products, and can result from environmental exposure to secondhand smoke rather than direct consumption of marijuana.

The saliva test, performed using a mouth-swab device, is a promising test, as it can readily

detect the presence of marijuana or its metabolites, and such testing is less complicated than blood testing and provides results within minutes. The testing device looks similar to a credit card reader and detects the presence of up to six different drugs in someone's saliva. Some agencies are using these devices, but because they are not prevalent or uniformly approved as legal testing methods, many do not.

Although some progress is being made, developing reliable in-the-field saliva tests, breathalyzers or other testing methods to detect recent THC use should be made the highest priority and be pursued with the same vigor as the warp-speed legalization initiatives. A marijuana DUI is very difficult to prove without effective testing methods and sufficient studies connecting THC use with impairment levels and behavior, and the burden of proof in marijuana DUI cases is a gray area.

In addition, once better testing methods are devised, uniform bright-line rules concerning THC levels and per se maximum limits for driving legally should be developed, similar to blood-alcohol levels for alcohol. Until some objective way is found to measure THC levels and the effect on driving behavior, the only solution would be a zero-tolerance rule based on the better, more advanced testing that indicates the time of the use.

In the meantime, policymakers should not sit idly. One type of low-hanging fruit would be to adopt basic restrictions, similar to alcohol open-container laws, that simply state that a driver cannot consume marijuana for some stated amount of time before getting behind the wheel, and a presumption that a person has consumed marijuana if a joint, pipe or open packet of edibles is found in the driver's cabin, no matter the purported use.

More training of officers in the area of drug impairment is also needed. An impaired driving arrest typically begins with a law enforcement officer stopping a driver for a traffic violation or observing a driver at a crash scene or a checkpoint. Officers are trained to administer field sobriety or preliminary breath tests to check for alcohol impairment when the officer suspects that the driver is impaired by alcohol based on the driver's behavior and/or signs such as the odor of alcohol, or other evidence of its presence.

However, in DUID cases, there may be no evidence of impaired driving, such as when a driver is stopped for an equipment violation or when the driver is stopped as part of a DUI checkpoint. In those cases, the officer will speak with the driver to form an opinion regarding intoxication level, but a majority of law enforcement officers are not trained in recognizing DUID impairment, and many violations likely get overlooked.

Indeed, only a small fraction of law enforcement is qualified as drug recognition experts, who receive specialized training in recognizing the symptoms of drug intoxication or have completed advanced roadside impaired driving enforcement training. Officers should be better trained so that marijuana violators face the same fines as those who get a DUI for alcohol.

Since currently the most reliable means of detecting impairment among drivers who have used marijuana is by observation of physiological, cognitive and psychomotor indicators, additional training of law enforcement officers in detecting impairment is required, as well as additional training of prosecutors and judges assigned to drug-impaired driving cases to improve the handling of them.

Some advocates of more liberal marijuana laws appear to believe that greater public attention to the issue of DUID will stifle or even result in repeal of laws legalizing marijuana use. This concern, however well-intentioned, is misplaced. The public did not associate

drunk driving laws with bringing back prohibition; rather, everyone appreciated that restrictions were in society's best interest so that people could consume intoxicating substances without endangering themselves or others.

In a sense, fully legalizing marijuana, without adequate due diligence, sufficient research and scientific studies, and enhanced law enforcement procedures, is putting the cart before the horse. There is a huge gap in the legal system for protecting vulnerable drivers sharing the road with intoxicated drivers.

There need to be adequate studies regarding the science of THC on driving behavior to develop an effective quantitative standard that correlates the level of THC in a person's body and the level of impairment, as well as better testing and increased training of law enforcement in the detection of drug intoxication.

There is no doubt that increased oversight of driving while under the influence of marijuana and other drugs will help curb injuries and death. We are in this together. Let's invest in science, research and training to help us all stay safer on the road.

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