



INSURANCE INSTITUTE
FOR HIGHWAY SAFETY

HIGHWAY LOSS
DATA INSTITUTE

www.iihs.org

Enforcement Challenges at Lower Per Se BAC Limits in the United States

Lifesavers Annual Conference
Nashville, TN • April 27, 2014

Michele Fields, General Counsel, IIHS

Authority for lawmaking (police power)

Jacobson v. Massachusetts, 197 U.S. 11 (1905)

- Police power is the constitutional doctrine underlying the states' authority to regulate behavior and enforce order to protect or advance the health, safety, morals, and general welfare of the public
- Use of police power must be justified by a legitimate need and cannot be exercised in an arbitrary or unreasonable manner or go “beyond what was reasonably required for the safety of the public”

Laws must meet a reasonableness standard

- Laws must be rationally designed to prevent or ameliorate the perceived problem
- *Jacobson*, a case upholding mandatory immunization, adopted a means/ends test that requires a reasonable relationship between a public health intervention and achievement of a legitimate public health objective
- Even though the objective of the legislature may be valid and beneficent, the methods adopted must have a “real or substantial relation” to protection of the public health and cannot be “a plain, palpable invasion of rights”

Before BAC laws

- States prohibited driving while intoxicated or under the influence of alcohol
 - Evidence of intoxication consisted of police and other witness testimony based on behavioral cues
 - Rationale for allowing lay testimony on intoxication: the effects of intoxication are so well known to the ordinary observer as to be a matter of common knowledge
- In other words, drinking was so prevalent and its effects were so obvious that it didn't take a scientist to appreciate alcohol's dose/response relationship

Scientific basis for BAC laws

- With the advent of reliable chemical testing, the dose/response to alcohol was quantified
- Researchers for decades have demonstrated that as BAC rises, decrements in cognitive functions necessary for safe driving increase, and are well established at 0.05 BAC
- Therefore, lowering the current 0.08 BAC laws to 0.05 is amply supported as rationally related to a legitimate government objective

A crucial distinction – Validity and enforceability

- A law is valid if it is a rational exercise of the state's police powers
 - Research supporting the validity of the law demonstrates the relationship between BAC and crash risk
- Ease of enforceability may well contribute to the law's efficacy but it is not a requirement for a valid law
 - Research validating enforcement decisions demonstrates the relationship between DUI cues and impairment/BAC

Enforcement challenge for lower BAC laws (≥ 0.05)

Impairment begins as BACs rise *before* traditional DUI cues are present

- Researchers found 20 cues from the original NHTSA (0.10) DUI detection guide were valid at the 0.08 BAC level
- No cues were found to reliably predict BACs below 0.08.
Stuster, 1997

Why not stop and test drivers randomly?

In the US, testing *follows* arrest

US Constitution, 4th Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

It is well established that a vehicle stop ... effectuates a seizure within the meaning of the Fourth Amendment. ... Because the primary purpose of the Indianapolis checkpoint program is ultimately indistinguishable from the general interest in crime control, the checkpoints violate the Fourth Amendment.

Indianapolis v. Edmond, 531 U.S. 32, 40, 48 (2000)

Why not test every driver legally stopped?

In the US, testing *follows* arrest

- Breath/blood testing constitutes a search, so must comply with the 4th Amendment
- Implied consent laws are triggered by arrest for DUI or probable cause for a DUI arrest
- Under implied consent, drivers are not compelled to comply
- Where drivers refused testing, states initiated a blood draw policy citing a long-standing exception to the warrant requirement that allows warrantless searches when there is exigency (i.e., where evidence may be lost before a warrant may be obtained)

Missouri v. McNeely, 2013 U.S. Lexis 3160

Does exigency doctrine justify warrantless blood testing?

Question:

Does the natural dissipation of alcohol in the bloodstream establish a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations?

Answer:

No. The *McNeely* court required a warrant for a blood draw allowing exceptions only upon case-by-case determination

Conclusion:

The courts are not likely to relax 4th Amendment requirements for suspicion prior to investigation

Importance of cues

Signs of intoxication

The *Sitz* checkpoint involved brief, suspicion less stops of motorists so that police officers could detect signs of intoxication and remove impaired drivers from the road. Motorists who exhibited *signs of intoxication* were diverted for a license and registration check and, if warranted, further sobriety tests. *Id.*, at 447. This checkpoint program was clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways, and there was an obvious connection between the imperative of highway safety and the law enforcement practice at issue. The gravity of the drunk driving problem and the magnitude of the State's interest in getting drunk drivers off the road weighed heavily in our determination that the program was constitutional. *Edmond* at 39. (Emphasis added.)

DUI cues and BAC

Two categories of cues

driving cues	behavioral cues
weaving	appearance
speed control	coordination (SFST)
equipment issues (horn, lights, windows)	cognition

Enforcement of low BAC laws is possible

Officer training and experience (NHTSA SFST validation studies)

SFST(s)	% correct decisions 1981	% correct decisions 1998
SFST(s) 1981, 1998 SFST battery (3 tests combined)	81	91
Horizontal gaze nystagmus (HGN)	77	88
Walk-and-turn (WAT)	68	79
One-leg stand (OLS)	65	83



Passive sensor in use at Fairfax county sobriety checkpoint

Detection of drinking drivers, with and without passive alcohol sensors (PAS), Fairfax, VA checkpoints

	percent detected	
	without PAS	with PAS
BAC \geq 0.10	55	71
BACs \geq 0.05 - $<$ 0.10	26	39

Effectiveness of PAS, Maryland patrols 2004-06

Of 405 stops, 33 drivers were given a PBT, all with positive BAC results

- In 28 of those instances, the PAS was used. In 26 (93%) of those instances when the PAS was used, it detected alcohol in the drivers
- In only 2 instances (7%) did the PAS fail to detect the 28 drinking drivers confirmed by the PBT result. Even when the PBT result was less than 0.08 BAC (the illegal limit in every state), the PAS detected alcohol in 4 of 5 instances (80%)



INSURANCE INSTITUTE
FOR HIGHWAY SAFETY

HIGHWAY LOSS
DATA INSTITUTE

www.iihs.org

Dedicated to reducing deaths, injuries,
and property damage on the highway

Michele Fields
General Counsel
703-247-1525
mfields@iihs.org