The Our American States podcast—produced by the National Conference of State Legislatures—is where you hear compelling conversations that tell the story of America's state legislatures, the people in them, the politics that compel them, and the important work of democracy.

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How States Are Reacting to Drugged Driving | OAS Episode 73

Welcome to "Our American States," a podcast of meaningful conversations that tell the story of America's state legislatures, the people in them, the politics that compel them, and the important work of democracy. For the National Conference of State Legislatures, I'm your host, Gene Rose.

Law enforcement agencies for years have had tools available to determine if drivers are drunk. Now with more states approving the use of recreational marijuana, it's difficult to create a standard to determine if that drug or others have impaired a driver's ability to operate a car.

In this episode of "Our American States," we are going to talk with a Colorado state representative who has successfully passed legislation on this topic after Colorado became the first state in the nation to approve the use of recreational marijuana.

We start our program with a representative of the nation's agency in charge of assisting states in addressing this topic. We have as our guest Robert Ritter, who is the director of the Office of Impaired Driving and Occupant Protection at the National Highway Traffic Safety Administration. Rob, welcome to our program.

Rob: Thanks, Gene. Glad to be here.

          Time Marker (TM): 01:18

Gene: Rob, there seems to be a solid understanding on the effects of alcohol on driving performance. But what do we know about the effects of marijuana on driving performance, and exactly how big of a problem is marijuana-impaired driving?

Rob: You're right, Gene. When we talk about alcohol and driving performance, we really do have a good understanding of how alcohol behaves predictably in the human body. Everyone is probably familiar with the blood alcohol concentration or BAC, and that's really an accurate and reliable predicter of driving impairment.

          In the case of marijuana-impaired driving, however, there's not that same correlation between the concentration of THC, the primary psychoactive substance in marijuana, and driving performance. So, we don't have the same relationship between THC in the blood and driving

performance as we do with alcohol in the blood and driving performance. There's no BAC for THC.

But that said, we do know that marijuana can impair cognitive and psychomotor related skills related to driving. Impaired driving is one of the most prevalent and preventable traffic safety and public health problems facing our nation and we know that marijuana can impair driving related skills.

It can result in distorted perception, difficulty in thinking and problem solving, loss of coordination. It might mean that a user would have difficulty or trouble maintaining lane position while driving, have slowed reaction time, and create a problem in failing to brake in an emergency, for example.

We also have reason to believe that the prevalence of drug use, including marijuana-impaired driving, is increasing. NHTSA's most recent national roadside survey, which we conducted in 2013 and 2014, indicated that among weekend nighttime drivers, 20% of those drivers tested positive for drugs. That means that in the testing of their blood, we found that there were drugs onboard.

Now we know, as I mentioned earlier, that the concentration of drugs in the system does not necessarily reflect in driving impairment, but we do know that drug use is increasing in the driving population. In fact, there was a 48% increase from that 2013/2014 survey from the previous survey in 2007 in drivers testing positive for THC.

And since that survey in 2013/2014, at least a dozen states have expanded their access to marijuana. Today, as of middle 2019, there are 11 states and D.C., along with Guam and Puerto Rico, that have passed laws legalizing marijuana for recreational use, and at least 33 states, D.C., Guam, Puerto Rico and the U.S. Virgin Islands all have laws allowing for medical use of marijuana.

So, we expect that those numbers that we found in 2013 and 2014, that when we do the next roadside survey, that we would see even more use of drugs in the driving population.

TM: 04:10

Gene: So, Rob, how have states reacted to this? What types of laws have they passed to address driving under the influence of marijuana and other drugs?

Rob: So there certainly have been some laws that have been enacted, but let me make clear that impaired driving by any substance is illegal in every state. We don't need new laws in order to identify, arrest and adjudicate and convict impaired driving. That is illegal in every state. The laws that are in place to combat impaired driving can be used for marijuana-impaired driving. We can identify, arrest and prosecute those marijuana-impaired drivers.

There are some states that have enacted zero tolerance laws or per se levels, making it illegal to drive with any or a specified amount of drugs in the body. I think everybody is familiar with those per se laws associated with alcohol consumption. So all states have a per se law for

alcohol concentration of .08. Utah has a law for .05 alcohol consumption, making it illegal to drive with that amount of alcohol concentration in your body.

Some states have passed similar laws associated with marijuana or other drugs, but even without those laws, as I said before, law enforcement officers can identify an impaired driver based on observation of the driving task, and those drivers can be pulled over, they can be arrested, they can be convicted for impaired driving regardless of whether or not there's a per se law on the books in the state.

TM: 05:36

Gene: Rob, does NHTSA collect data on drug-impaired driving, and what actions is NHTSA taking to better understand the impact that marijuana-impaired driving has on our roadways?

Rob: Sure, so we've done a lot of work over the last couple of years. We kicked off a drug-impaired driving initiative in March of 2018 with a call to action to our states and law enforcement, toxicology, prosecution partners all across the country, to really get a better understanding of what's happening, and then address the drug-impaired driving problem.

And we have a wide range of research and data analysis efforts underway to better understand the issue. We recognize that there are challenges. The data challenges are significant. There is not a consistent policy or set of procedures between or sometimes even within states for drug testing. There may be a lot of variables within a state or among the states on who is tested for drugs in a fatal crash or in a stop for impaired driving.

Which drugs are tested? So the blood sample may go to a toxicology lab and that toxicology lab may run a certain panel of tests for different kinds of drugs, but those tests are not standard across the country or across toxicology labs, and exactly what level of use that they're looking for in that sample may differ across labs.

So you may get a toxicology lab that's running, for example, a THC test and may test whether or not there are 5 nanograms of THC in that blood sample, and if it's more than 5, they would report a positive result. There may be another toxicology lab that's running a very similar test, but they're testing it for 2 nanograms, and if they find that there is more than 2 nanograms in the blood, that lab would then return a positive result.

So we're having a little bit of trouble comparing across all of this information because there isn't a set of consistent policies.

We also know that in impaired driving cases, very often there are multiple drugs onboard including alcohol, and because of the history that we have and the understanding that we have in terms of how alcohol affects driving performance, in many cases if the test indicates that the blood alcohol concentration for alcohol is over .08, we know that that person can be convicted of impaired driving and there may not be further testing to determine whether or not that person was also using other drugs, whether that's marijuana, over-the-counter prescription drugs, methamphetamines, opioids, others.

So without consistent testing of blood samples all across the country, we're really not able to completely identify what the scope of this issue is.

NHTSA maintains a database of all the fatal crashes across the United States called the Fatality Analysis Reporting System, and we're working with our state partners to increase and improve that system so that we are getting more of this detailed data on what the tests are showing for all of the fatal crashes across the country so that we can see the results of drug tests that were done for those fatal crashes and the details of which drug tests were done and get a little bit more information, so that we can better understand the problem.

We're also conducting our own research and working with the states and with the research community on getting better understanding of the drug-impaired driving problem. Specific to marijuana, we have a research project underway to examine the effect of the legalization and decriminalization of marijuana on the DWI criminal justice system in states to understand what the impact of some more cases is that may be coming out as a result of that legalization and decriminalization.

We are working to examine the feasibility of various field tests to help law enforcement identify marijuana impairment once they have stopped a driver who they believe is driving impaired. We are updating our information on marijuana and other drugs.

NHTSA has a set of drugs and human performance fact sheets that indicate by various drug categories what are the impacts or potential impacts of those drugs on the human body and on driving-related skills. We are updating all of that information on our existing fact sheets and expanding the range of drug categories that we are publishing for those fact sheets.

We are working on the potential of understanding better the potential of various drugs to impair driving. We're studying the prevalence of alcohol and other drug use among crash victims that are admitted to trauma centers, so not just looking at the fatal crashes, but also looking at the serious injury crashes and those crashes that are taken to trauma centers, and understanding the prevalence of alcohol and drug use among those crash victims.

We are working with the states on developing some guidelines and doing additional surveys to try to understand the prevalence of drug and alcohol use by drivers, as well as preparing a national survey on drinking and drug use and driving attitudes and behaviors, all in an effort to understand the scope of this problem, to understand the science and the research and the impact of the use of drugs on driving-related skills, and to identify ways that we can help to educate, we can provide training and information, and we can develop countermeasures to prevent people from driving impaired.

TM: 10:47

Gene: I know NHTSA recently kicked off a drug-impaired driving campaign called "If you feel different, you drive different." Can you tell us how this campaign aims to combat driving while impaired under substances such as marijuana?

Rob: We initiated this "If you feel different, you drive different" campaign in an effort to raise public awareness and understanding that drugs, including marijuana, can impair your ability to drive

safely. What we found in our market research and in focus groups is that there is a misperception that there are a number of different drug categories, again whether it's prescription and over-the-counter drugs, marijuana or other drugs, and there are many people who believe that those drugs do not affect their driving abilities or, in some cases, they think that they're even better drivers under the influence of drugs.

And so the primary goal of the "If you feel different, you drive different" campaign is to raise the awareness that you're taking these drugs to change how you feel and that can impact your driving abilities.

Our ads focus on responsible choices, identifying a designated sober driver when you've used drugs, and ensuring that you've got a safe option for your mobility.

All of the material that we develop at NHTSA for all of our campaigns is available on our website at trafficsafetymarketing.gov and I would encourage everyone who is interested in this issue and looking to help to educate the public on drug-impaired driving or impaired driving overall to go to trafficsafetymarketing.gov. You can download our ads and our creative materials and you can contact our office of communications and they will help to customize all of that material for states to use.

TM: 12:28

Gene: NHTSA's 2017 report to Congress outlines that there are currently no evidence-based methods to detect marijuana impairment. Do you see a time when the technology catches up so that it can be measured the same way a DWI is measured?

Rob: That report did talk about what we discussed earlier on why THC is not a reliable indicator of driver impairment. So, we can detect THC and there are tests to identify how much THC is in a person's body. The concern at the moment is the research is not indicating a direct correlation between the level of THC and driving impairment. And so that is the issue that makes THC different than alcohol.

So, it's important I think really to focus on what that report says about what we do know about marijuana use and driving. One of the first recommendations in that report is to increase the use of effective and efficient methods for training law enforcement personnel in detecting or measuring the level of impairment of a motor vehicle operator.

And so law enforcement does have a number of techniques in order to identify who is an impaired driver, stop that impaired driver, and try to determine what might be causing that impairment. One of the primary elements of those programs is a program called "The Drug Recognition Experts" or DREs.

Drug Recognition Experts is a proven systematic and standardized 12-step process that allows a highly trained law enforcement officer to determine whether a suspect is impaired by drugs and, if so, what drug category is causing that impairment. DREs are probably, at the moment, among the best tools we have to keep impaired drivers off the roads because they can identify that impairment as well as what is causing that impairment or likely causing that impairment.

Today the United States has more than 9,000 credentialed DREs, the highest number in the program's history, and NHTSA is continuing to invest in this program to continue to train additional officers as drug recognition experts.

We're working with our partners at the Governor's Highway Safety Association as well as the International Association of the Chiefs of Police in order to provide more training opportunities for officers to become DRE trained.

TM: 14:44

Gene: Based off of public meetings that NHTSA has held with various traffic stakeholders, what do you think some of the main program or policy needs are in order to address marijuana-impaired driving?

Rob: Since we had our call to action in 2018, we have gone out across the country and held meetings in 10 different states engaging stakeholders and over half of the states, over 30 states, were involved in those meetings where we've had great discussions with law enforcement officers, with public policy experts, researchers, prosecutors, judges, treatment professionals, to understand what is happening in states associated with marijuana-impaired driving and with drug-impaired driving; hear what those states are doing and what some of the needs and the issues are.

Probably one of the top priorities that came out of those conversations is raising public awareness. And so our "If you feel different, you drive different" campaign associated with drug-impaired driving and a new campaign that will be coming out shortly associated with helping to educate the public on the potential dangers of using over-the-counter and prescription drugs – over-the-counter and prescription drugs can also impair driving-related skills; so we want to educate the public on that as well.

One of the other policy needs that came out of those conversations is the need for continued research to enable the development of an understanding of impairment of driving under the influence of marijuana and other drugs. We get asked constantly for that impairment standard for something similar to alcohol in terms of at what level do we know that someone under the influence or using marijuana is an impaired driver.

And the research and science are not there yet to tell us that there is a specific standard in place that clearly identifies that someone having that much, a certain level of THC in their blood, for example, is necessarily impaired; that may depend. But we're continuing to work on that research to try to see if we can establish that connection, as well as maintaining training and other support to our law enforcement officers, to prosecutors, to cases using evidence that is currently available.

And we need better tools to screen and then assess impaired drivers and provide the appropriate treatment services, particularly for repeat offenders. When someone is arrested for impaired driving, we want to make sure that we understand what are the issues that are causing that impairment and then provide them the treatment services that are necessary to help them deal with those impairment issues.

We also want to improve our data and record systems. So we are encouraging states to develop record systems to distinguish among alcohol and drugs, so that we don't just have an impaired driving case; we know whether or not it was alcohol or drugs that were causing that impairment and what categories of drugs were causing that impairment so that we can better have a sense of the scope of the issues, where these issues are occurring, and develop countermeasures to address them.

And NHTSA is also recommending that states consider separate and distinct offenses for alcohol versus drug-impaired driving. So all of that detail, we're hoping that states will be looking at their statues, looking at their policies, their procedures, their record keeping and data collection to help provide that information to us and to researchers so that we can really understand what's happening and develop countermeasures to address impaired driving.

TM: 18:02

Gene: Rob, is there anything I haven't asked you that you believe is important for our audience to know?

Rob: Sure. Let me tell you one other thing that, based on those ideas to impact meetings that we had across the country, we identified best practices that are occurring throughout various states. And so as a result of all of those meetings, we have worked to develop a checklist of the types of programs that states have adopted to combat impaired driving and categorize that checklist across the different disciplines associated with the impaired driving problem, whether that's law enforcement, prosecution, judicial programs and education, treatment services, the medical community.

And we're working with those experts that we heard from to put together this checklist and provide it to states so that they can look through and assess their own programs and say: These are some of the things that we have in place that are working really well; here are some ideas that other states have developed and have put in place and that might be something we can consider too to improve how we're addressing the drug-impaired driving problem.

So, we are thrilled to be working with the states, we appreciate this opportunity to share this information with the legislators. This is a problem that we think continues to increase, so this is an issue that we will continue to face along with our existing alcohol-impaired driving problems across the country, and we're looking forward to working with states to find additional ways to educate the public and to identify countermeasures and put them in place to address impaired driving and reduce the number of impaired-driving crashes and fatalities across the country.

Gene: We've been talking with Robert Ritter, who is the director of the Office of Impaired Driving and Occupant Protection at the National Highway Traffic Safety Administration. Rob, thanks for being a guest on "Our American States."

Rob: Thank you.

Gene: We'll be right back after this short break.

BREAK

Gene: So, joining us today is Colorado State Representative Jonathan Singer. Jonathan, welcome to our program.

Jon: Oh, thanks for having me.

TM: 20:58

Gene: So let's talk—a couple of years ago you sponsored Colorado House Bill 1315 that requires cases involving drugs, alcohol or a combination of both be reported to the state legislature for data analysis. Can you tell us what the impetus was for this legislation?

Jon: Well, there were two things and one is personal, and one is more on the policy focus. So, I'll start with the policy focus. Being the first state to legalize recreational marijuana in the nation, there were a lot of gaps in data and one of those things that I said as one of the only lawmakers who actually supported the legalization of marijuana in Colorado back in 2012, was that we needed to start treating marijuana like the drug it is and not the drug that some people fear it to be. And that means we need to talk about it in very accurate terms.

         And any state that's thinking about legalizing marijuana, or even if you're not, we should be gathering better data on impaired driving, whether it's marijuana, Benadryl or heroine. So that was the policy impetus.

         But there was also a personal impetus and that was a constituent and a friend of mine actually who lost his stepdaughter on her last day of school; she and he were biking home from school and unfortunately she was run over and killed by an impaired driver. It turns out he was impaired with both alcohol and marijuana, but he was under the legal limit for both.

         And the science is pretty clear that there is a multiplying factor when you combine more than one substance. And so when you add alcohol plus another substance like marijuana, you could be under the legal limit for both, but still impaired. The perpetrator here got less than four months of jail for killing an elementary school kid.

         So every time I think about this bill or just the subject of impaired driving, I think about missed first days of school, I think about just so many missed opportunities that this family is going to have, that no one should have to experience, and if we can do a better job on this policy and actually create better methods of data collection, we can actually form a response to correct this for the next person.

TM: 23:15

Gene: That personal impetus that you described there is definitely heartbreaking. I'm sure you thought that this is not the only time that this has happened.

Jon: Absolutely. You know, unfortunately we see this, and I don't want innocent people to go to jail and I don't want child killers to go free. And until we can actually create a better standard, we need to collect more data and do it the right way, and that's what this bill was really about.

TM: 23:43

Gene: So I know the Colorado Department of Public Safety has published two reports on the state of drug-impaired driving in Colorado since your legislation. Can you tell us what the results have told you so far?

Jon: Yeah, absolutely, and hopefully there will be a link in this to the podcast because it's a pretty lengthy report. The most recent report just came out in June of 2019 actually, and so if people want to take a look at this, I think the first thing that I will tell folks is that we need to actually do a more robust job of collecting data on polysubstance impairment.

And so if there's one takeaway that people have from this podcast, I hope they understand that the drug tests are not cheap and polysubstance drug tests are even more expensive. And so if you are a law enforcement agent, you're a police officer, you arrest someone, they have a .08 BAC for alcohol, you may not want to test them for other substances because we have a per se limit in alcohol across the country.

And that means that you basically have got someone dead to rights. Whether or not they were impaired by marijuana or heroine or Benzos or anything else may not be that consequential in terms of getting the right prosecution, but it's hugely consequential in understanding what trends are happening.

And so I would really encourage folks in other states to make sure that polysubstance drug screens are happening on DUIs so we can take a much harder look at this, not just for people who have a BAC under .08 or .05. So that's the first thing.

I think a lot of the other takeaways… obviously this probably follows national trends – about 75% of the people in 2017 that were defendants in DUI cases were male; typically it's young males. And so that obviously tells us something about who we need to be messaging to.

It's also important to realize that in a huge portion of those cases, this was not that defendant's first DUI either. And so we still have a multi-DUI issue and we need to be nipping those things in the bud when people first get arrested for a DUI. We need to do a better job of making sure that they never have a DUI again.

In terms of polysubstance impairment, one of the things that was really important is making sure that you have drug recognition experts available, so people who can not only detect alcohol impairment, but detect impairment from other substances. And so that's probably the other big takeaway for other states is really making sure that you have good drug recognition expert training for your law enforcement agencies, so people in the field when someone gets pulled over, people in the field are not just prepared with a portable breathalyzer test, but are able to look at the other signs of impairment that don't look like the same thing, don't look like alcohol impairment.

TM: 26:47

Gene: Just so I'm clear on this phrase that you're using, polysubstance impairment, can you describe what that is specifically?

Jon: Yeah. So, this is one of the things that I try to tell people is, first of all, the presence of a substance does not necessarily mean that somebody is impaired by that substance. So we have medical marijuana patients that may be able to have a THC blood limit higher than what our 5 nanogram limit is in Colorado, and still be okay to drive on the road. Other people could be below that 5 nanogram limit and still impaired.

The first thing to understand is what impairment is. The second thing is polysubstance impairment is when you have more than one substance present that is impairing your ability to drive. So when you see marijuana plus alcohol, or marijuana plus Benzodiazepines, or alcohol plus Benadryl, this is polysubstance impairment and it's something that is incredibly critical for states to understand.

I had a law enforcement officer put it to me this way not too long ago actually at an NCSL transportation conference. He goes: You know, I might have a glass of wine and half a tablet of Benadryl; I might be under the limit for a DUI; I'm probably impaired at that point.

And so we need to have those real and honest conversations and that's part of why we need good drug recognition experts that can use tools other than just a portable breathalyzer test to detect impairment, even when alcohol is involved.

TM: 28:21

Gene: With more states approving marijuana as a legal substance, taking what you've learned from your experience enacting legislation that addresses impaired driving, what do you see as the necessary next step to continue to combat and better understand driving under the influence of drugs such as marijuana?

Jon: The first thing that I would say is whether or not you're actually considering legalizing recreational or medical marijuana in your state, you should be setting these standards as lawmakers and policymakers regardless, because people are using other substances today and drug use in Colorado really hasn't skyrocketed; it hasn't changed a huge amount since the legalization of recreational marijuana. We have about 17% of our population that uses recreational marijuana and about 17% of our population used recreational marijuana before legalization.

So regardless of whether or not you're thinking about legalizing, get these standards in place just for the protection of public safety. And when I say standards, make sure that you're doing polysubstance drug screening when somebody gets pulled over. Make sure that you have drug recognition experts available on the scene for as many cases as possible.

These are not cheap things to talk about. A single polysubstance drug screen, multi-drug screen, is probably about $300. So if you have 17,000 people, which is about the number we had for DUIs last year pulled over; 17,000 times 300 is not a small chunk of change. And so think about that in terms of your budget and how you want to allocate dollars.

TM: 29:58

Gene: What haven't I asked you, Representative Singer, that you think is important for other state legislators to know about this?

Jon: The most important thing is to make sure that if you are a policymaker and you want to push this issue forward, whether you are a pro-legalization advocate or an anti-legalization advocate, we can all agree that we need better data on these things. Marijuana advocates actually came to the table and testified in favor of this bill side-by-side with law enforcement.

          So if you're a policymaker in a state, whether it's pro- or anti-legalization, this is a pro-public safety, pro-good data policy, and I would say the one limitation of the bill that I passed in 2017 is we didn't look upfront at polysubstance drug screens/drug tests and drug recognition experts. We were gathering data on the back end about what people were actually found guilty of at the end of the sort-of adjudicatory process. So people were arrested, charged, found guilty and then had to report to probation services or other things. And it was really at that point that we started collecting data.

          I would start on the upfront level portion of this because there are people that are going to be found not guilty. I'd like to know what they were accused of in the first place and where we might be misusing our resources to go after people who might be innocent.

          So, long story short, this is a real opportunity to bring everything from DUI victims, marijuana advocates, law enforcement and people who like to see good data and good policy come together in a way. And I hope that people don't use my legislation as a national model; I hope they do better. And I think what we did was a great first step and I think we can take additional first steps, or second steps now to make sure that we're collecting good data on the front end.

Gene: We've been talking with Colorado State Representative Jonathan Singer. Representative Singer, thank you so much for joining us on "Our American States."

Jon: Well, thanks for having me again and please don't hesitate to share my contact information with folks out there. This is an important issue and regardless of where I end up politically, this will be an issue that I will never let go of and continue to advocate for.

Music and Gene VO:

          And that concludes this edition of "Our American States." We invite you to subscribe to this podcast on iTunes and Google Play. Until our next episode, this is Gene Rose for the National Conference of State Legislatures. Thanks for listening.