

SB 2053

RELATING TO THE USE OF INTOXICANTS WHILE
OPERATING A VEHICLE.

Lowers the threshold of blood alcohol content for the offense
of driving under the influence of an intoxicant.



STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

January 28, 2016
2:45 p.m.
State Capitol, Room 229

S.B. 2053
RELATING TO THE USE OF INTOXICANTS WHILE OPERATING A VEHICLE

Senate Committee on Transportation and Energy

The Department of Transportation (DOT) **supports** S.B. 2053 relating to the use of intoxicants while operating a vehicle. This bill lowers the threshold of blood alcohol content (BAC) for the offense of Operating a Vehicle Under the Influence of an Intoxicant (OVUII).

In Hawaii, drivers with a positive BAC were responsible for 199 fatalities during the calendar years of 2010 through 2014. In addition, from the years 2011 – 2015, there were approximately 34,152 drivers arrested for driving under the influence of an intoxicant. Of the total arrested, 29,817 were charged for having a BAC of .08 or greater and 4,335 had a BAC of .00 - .079. Those who had a BAC of .00 - .079 represented 12.6 percent of the total arrested and were therefore released due to the lack of evidence for OVUII, in spite of their driving.

The Centers for Disease Control and Prevention studies have indicated that drivers who have had a BAC of .05 (approximately 3 drinks) had exhibited exaggerated behavior, loss of small muscle control (focusing with the eyes), impaired judgment, lowered alertness, reduced coordination, reduced ability to track moving objects, difficulty in steering, and reduced response to emergency driving situations. According to the National Highway Safety Traffic Administration's (NHTSA) Fatal Analysis Reporting System (FARS), Hawaii reported 549 traffic deaths during the years 2009-2013. Of the reported alcohol involved deaths, 40 of these fatalities had a BAC of .000 - .079. This represented 7 percent of the alcohol fatalities. As compared to the nation during this period, the BAC of .000 - .079 represented 5 percent of the alcohol fatalities.

The DOT urges your support in passing S.B. 2053 as it will save more lives on our highways by removing more drivers who continue to drink and drive and pose a risk to others. This will also bring Hawaii closer in accomplishing the State and National goal of "Toward Zero Deaths."

Thank you for the opportunity to provide testimony.



The Judiciary, State of Hawaii

Testimony to the Senate Committee on Transportation and Energy

Senator Lorraine R. Inouye, Chair

Senator Mike Gabbard, Vice Chair

(Thursday, January 28, 2016, 2:45 p.m.)

State Capitol, Conference Room 229

by

Derek A. D'Orazio

Chief Adjudicator

Administrative Driver's License Revocation Officer

Bill No. and Title: Senate Bill No. 2053, Relating to the Use of Intoxicants While Operating a Vehicle.

Purpose: Lowers the threshold alcohol concentration (AC) for the offense of driving under the influence of an intoxicant (OVUII), from .08 or more grams of alcohol to .06 or more grams of alcohol (per 210 liters of breath or 100 milliliters or cubic centimeters of blood).

Judiciary's Position:

The Judiciary takes no position on the merits of Senate Bill 2053. If this measure is enacted, the Judiciary anticipates an increase in the number of administrative driver's license revocations that the Administrative Driver's License Office (ADLRO) will be required to adjudicate. This may require additional resources and staff for ADLRO to meet the increased caseload. If this measure is enacted, the Judiciary also anticipates requesting a delayed effective date of at least three months to implement necessary changes to ADLRO forms, databases, and internal processes/procedures.

It is difficult to predict how many additional OVUII arrests will occur statewide if the threshold AC is reduced from .08 to .06. Based on information provided by the Department of Transportation for years 2011-2015, there were approximately 4335 drivers arrested in Hawai'i for OVUII with an AC of .00 -.079; these individuals were released or not processed under current law. It is reasonable to assume that a fair percentage of these individuals had an AC between .06 -.079, and it is also reasonable to anticipate that there will be more OVUII arrests if



SB2053, Relating to the Use of Intoxicants While Operating a Vehicle
Senate Committee on Transportation and Energy
January 28, 2016
Page 2

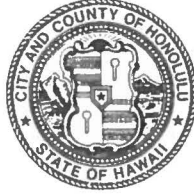
the threshold AC is actually reduced to .06. This will create additional administrative driver's license revocations that ADLRO will be required to adjudicate.

ADLRO estimates needing at least one additional staff member to meet the increased caseload, and possibly more, depending on exactly how many more cases per year would be generated if the threshold AC is reduced to .06. Note that there are strict statutory timelines specified in HRS Chapter 291E, Part III that require timely adjudication of all ADLRO cases.

Thank you for the opportunity to provide testimony on this bill.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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OUR REFERENCE DI-GR

January 28, 2016

The Honorable Lorraine R. Inouye, Chair
and Members
Committee on Transportation and Energy
State Senate
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Inouye and Members:

SUBJECT: Senate Bill No. 2053, Relating to the Use of Intoxicants While Operating a Vehicle

I am Darren Izumo, Major of the Traffic Division of the Honolulu Police Department (HPD), City and County of Honolulu. The HPD supports the passage of Senate Bill No. 2053, Relating to the Use of Intoxicants While Operating a Vehicle.

Studies have shown that with a blood alcohol content (BAC) of .05, drivers exhibit signs of impairment. The passage of this bill will help to remove more impaired drivers from our roadways to ensure the public's safety.

The HPD urges you to support Senate Bill No. 2053, Relating to the Use of Intoxicants While Operating a Vehicle.

Thank you for the opportunity to testify.

Sincerely,

A handwritten signature in black ink, appearing to read "Darren Izumo", is written over a horizontal line.

DARREN IZUMO, Major
Traffic Division

APPROVED:

A handwritten signature in black ink, appearing to read "Louis M. Kealoaha", is written over a horizontal line.

LOUIS M. KEALOHA
Chief of Police

MITCHELL D. ROTH
PROSECUTING ATTORNEY

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OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN SUPPORT OF SENATE BILL 2053

A BILL FOR AN ACT RELATING TO THE USE OF
INTOXICANTS WHILE OPERATING A VEHICLE

COMMITTEE ON TRANSPORTATION AND ENERGY

Sen. Lorraine R. Inouye, Chair

Sen. Mike Gabbard, Vice Chair

Thursday, January 28, 2016, 2:45 p.m.
State Capitol, Senate Conference Room 229

Honorable Chair Inouye, Vice-Chair Gabbard, and Members of the Committee on Transportation and Energy, the Office of the Prosecuting Attorney, County of Hawai'i submits the following testimony in support of Senate Bill No. 2053.

This measure lowers the threshold of blood alcohol content for the offense of Driving Under the Influence of an Intoxicant.

The current per se threshold for breath or blood alcohol concentration (BAC) in Hawai'i is .08%. This represents one of the highest thresholds in the modern world. Most industrialized nations set lower limits and impose graduated sanctions for BAC levels as low as .05%, if not lower.

According to the latest statistics by the Centers for Disease Control and Prevention (CDC), about one in three traffic deaths in the United States involves a driver with a BAC of .08% or higher. Also, per the CDC, Hawai'i is above the national average in drunk-driver related deaths. These are sobering statistics, and in order to reduce this rate and make our roads safer, it is crucial that this measure be passed.

The Office of the Prosecuting Attorney, County of Hawai'i supports the passage of Senate Bill No. 2053. Thank you for the opportunity to testify on this matter.

Justin F. Kollar
Prosecuting Attorney

Jennifer S. Winn
First Deputy



Rebecca A. Vogt
Second Deputy

Diana Gausepohl-White
Victim/Witness Program Director

OFFICE OF THE PROSECUTING ATTORNEY

County of Kaua'i, State of Hawai'i

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TESTIMONY IN SUPPORT OF
SB 2053 – RELATING TO THE USE OF INTOXICANTS WHILE OPERATING A
VEHICLE

Justin F. Kollar, Prosecuting Attorney
County of Kaua'i

Senate Committee on Transportation and Energy
January 28, 2016, 2:45 p.m., Conference Room 229

Chair Inouye, Vice Chair Gabbard, and Members of the Committee:

The County of Kaua'i, Office of the Prosecuting Attorney, SUPPORTS SB 2053 – Relating to the Use of Intoxicants While Operating a Vehicle.

The current per se threshold for breath or blood alcohol concentration in Hawai'i is .08. This represents one of the highest thresholds in the modern world. Most industrialized nations set lower limits and impose graduated sanctions for breath or blood alcohol levels as low as .05, if not lower.

Approximately 100 people die on Hawai'i's roadways each year. Many more are injured. Police make thousands of arrests for drunk driving every year and for every driver that is caught, there are many others who are not caught.

One of the great successes for law enforcement in our generation has been the decline in fatalities and serious injuries on our roads. This has resulted from reasonable legislation and consistent enforcement. Lowering the per se breath or blood alcohol threshold in Hawai'i would bring us into alignment with many other jurisdictions and make our roads safer.

Accordingly, we are in SUPPORT of SB 2053. We request that your Committee PASS the Bill.

Thank you very much for the opportunity to provide testimony on this Bill.



COMMITTEE ON TRANSPORTATION AND ENERGY

Senator Lorraine R. Inouye, Chair
Senator Mike Gabbard, Vice Chair

NOTICE OF HEARING

DATE: Thursday, January 28, 2016
TIME: 2:45 P.M.
PLACE: Conference Room 229
State Capitol
415 South Beretania Street

Testimony in opposition to SB2053

On behalf of the Hawaii Bar Owners Association we write to you to state our opposition to this bill. We seek balance in this matter and we feel the existing BAC level of .08 is a fair balance that protects both the public and the restaurant and bar industry in Hawaii. An Industry that is vital to our continued success as a viable tourist destination. To reduce the BAC to .06 becomes anti-business and anti-jobs.

Currently the BAC level is .08 and is that not sufficient enough? Has not the number of alcohol related deaths been reduced? We question that an adjustment in the BAC level would make significant changes or just remove the responsible customers from our operations.

Has the public demanded this or is this just government reaching out further to regulate us for behavioral purposes? Often the Health Departments and the bureaucracy push these things without the peoples' demand or support. We feel reducing the level will only harm the hospitality industry which provides supervised consumption of alcohol as opposed to the consumption of alcohol off premise where the consumer regulates his own consumption without any supervision. The result being that no change occurs in the number of unsupervised consumers who will continue to drink and drive. Most accidents occur with BAC levels in a range of .14 and above. Responsible bars would not place those people on the road but private parties, sporting events and other casual drinking formats put those people at their own discretion which can produce poor results. A responsible bar staff would put them in a cab.

The approach of lowering the BAC thus punishes the responsible and not the irresponsible. The responsible parties are those in the hospitality industry who have changed the manner of consumption considerably over the last 25 year in their establishments. This is an industry that employs nearly 150,000 people here in Hawaii. An industry that the tourism dollar relies upon to assure a valued vacation. We provide the dining, dancing and entertainment that make a vacation fun. Our government and state rely upon the income provided by that industry through rents, property taxes, GET, liquor and cigarette taxes, liquor licensing fees and income taxes from the business and its employees. It also provides the jobs that provide wages and benefits demanded by this legislature. To demand the higher wages and benefits and then remove the customer base bodes poorly for the industry. The result is loss

of businesses and correspondingly a loss of jobs. A quick government action without serious consideration creates a different crisis of its own creation, loss of tourism, loss of jobs, more unemployment and increased homelessness.

The Smoking Ban closed more than two thirds of the Cabaret licenses in Waikiki, the change in BAC could close the rest of them. Those businesses no longer provide the rents and taxes nor the jobs they once had. Those locations often are not replaced by another business. This is just the most obvious indicator but would reflect similarly throughout the remainder of the hospitality industry.

Ireland and Great Britain followed the dual advocacy of a smoking ban and severely diminished BAC levels and as a result lost 6000 establishments. Let's not follow their folly.

There is no business advocate here at the legislature but remember that you are often the employees advocate shown by the raising of wages and increasing benefits. For those measures to be successful it requires employers to exist that maintain the jobs thus providing the wages and benefits. Let's not create prohibition by inches. View this as a pro-job measure by keeping the balance by deferring this bill and allowing the very reasonable Blood Alcohol Level of .08 to remain as our standard.

Thank you for your consideration in this all important issue.

Sincerely,

Bill Comerford
Chairman and Spokesman
Hawaii Bar Owners Association
10 Marin Lane
Honolulu, HI 96817
521-4712 office
223-3997 cell



Street Bikers United Hawaii (SBU) Submissions

January 25, 2016

Bill SB No. 2053 RELATING TO THE USE OF INTOXICANTS
WHILE OPERATING A VEHICLE

Presenter: Bruce Paige, State Director
Residence: Pearl City
Email: bpaigeco@gmail.com

Introducer(s): Green, Chun Oakland, Shimabukuro, L. Thielen (TRE Committee)

Description:

Lowers the threshold of blood alcohol content for the offense of driving under the influence of an intoxicant.

[SBU Recommends Its Members Oppose Bill SB #2053 On The Grounds It Is Potentially Unfair and Discriminatory Toward a Number of Groups Including Women, African Americans, The Elderly and Men According to Scientific Studies](#)

[SECTION I-“Per-se Statutes” Such as Those Proposed by This Amendment Offend the Principles Underlying Rule of Law and Presumption of Innocence](#)

Unquestionably, the costs of death and injury caused by alcohol related motor vehicle accidents to society, individual victims and their families cannot be understated. Impaired driving is a menace to modern society and creates loss, tragedy and hardship for accident victims of impaired drivers and those victim’s family, friends and employers. The question then is: what is the best way for the law makers and the courts to deal with problem of impaired driving and its many adverse consequences? Mothers Against Drunk Driving (“MADD”) and similar anti-drinking and driving advocacy organizations have favored the “Per Se Drunk Driving Statutes”, such as HRS §291E-61(a)(3)-(4) and the corresponding sub-sections §291E-61.5(a)(a) and (2)(C)and(D), wherein “...a person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:”

“With .08 or more grams of alcohol per two hundred ten liters of breath; or

With .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood.”

These provisions are generally referred to as “Per-se Statutes”. Unlike most criminal offences that require specific proof by way of evidence beyond a reasonable doubt of each element of the offense, the Per-se Impaired Driving Statute presumes or deems that the accused is impaired based on the Blood Alcohol Concentration (“BAC”) evidence that functions as a surrogate for actual evidence of the accused being impaired. The accused has therefore been deemed to have committed the elements of the offence without actually proving the accused’s ability to operate the vehicle was actually impaired.

Traditional impaired driving statutes like most criminal offenses proscribed certain unacceptable conduct as illegal and then require the accused is prosecuted by proof beyond a reasonable doubt of each and every element of the criminal conduct proscribed by law, such as §291E-61(a)(1) and the corresponding sub-sections §291E-61.5(a)(1) and (2), wherein “...a person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:”

(1) *While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty;”*

The difference between the above two types of sections is that in the former (§291E-61(a)(3)-(4) and the corresponding sub-sections §291E-61.5(a)(a) and (2)(C)and(D) is a “Per Se” offence requiring the prosecution only prove the existence of the circumstantial fact that the accused’s breath or blood sample meets the specified quantity (i.e. .08), then the harmful act proscribed by law (i.e. operating or assuming actual control of the vehicle while impaired) is deemed by law to have been established. It may be the case that the accused’s is actually impaired from operating the vehicle due to the influence of alcohol, but it is equally possible the accused’s ability to operate a vehicle may not be impaired. Therefore, the fundamental rule underlying our criminal justice system that a person is presumed innocent of a crime until each of the elements of the offence are proved beyond a reasonable doubt, is circumvented by presuming or deeming the accused is guilty of impairment, when they may in fact not be impaired at all. Yet in either case they are still held guilty of the Per-se Impaired Offence.

Conversely, in the second type of offense (i.e. *operating or assuming actual control of the vehicle while under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty*), the prosecution must prove every element of the offence beyond a reasonable doubt to successfully convict the accused of impaired operation of the vehicle. In other words there must be actual physical evidence produced that establishes the accused’s ability to operate the vehicle was impaired at the time they were operating or assumed control of the vehicle (e.g. evidence of impaired driving such as weaving, failing to obey traffic rules and signals, failure to follow a police officer’s directions, slurring, staggering, bloodshot eyes, smell of alcohol, unable to balance on one foot, or focus their eyes on a specific object, etc), would all be examples of evidence the prosecution could elicit from a witness or the arresting police officer that could prove the accused’s ability to operate a vehicle was impaired the time the accused was operating or had assumed control of the vehicle.

The reason for law makers increasing reliance on Per-se Impaired Driving Statutes to deal with impaired driving prosecutions is convenience and low costs of prosecution. It is much easier and less costly to obtain convictions in impaired driving cases, using Per-se Impaired Driving Statutes as Andrew Gore explains in his article *Know Your Limit: How Legislatures Have Gone Overboard with Per Se Drunk Driving Laws and How Men Pay the Price:*¹

“Through the years, courts have become increasingly cognizant of the dangers drunk drivers pose.⁹ Legislators to have sought various means to prevent and punish drunk driving,¹⁰ one of the most recent being 0.08% per se drunk driving statutes.¹¹ Conventional drunk driving statutes penalized driving while intoxicated, necessitating proof of actual impairment in order to sustain a conviction.¹² Per se statutes, on the other hand, make driving at a given BAC a crime in itself, thus requiring no proof that an individual was actually impaired while driving.¹³”

¹ Andrew Gore, *Know Your Limit: How Legislatures Have Gone Overboard with Per Se Drunk Driving Laws and How Men Pay the Price*, William & Marry Journal of Women and the Law, [2010] Vol 16, Issue 2, Article 7, pp. 423 at 425 (citations omitted).

The problem with Pre-se Impaired Driving Statutes arises when the underlying assumption upon which the deeming provisions is based are flawed. For instance the implied assumptions underlying almost all Pre-se Impaired Driving Statutes, including HRS §291E-61(a)(3)-(4) and the corresponding sub-sections §291E-61.5(a)(a) and (2)(C)and(D) (and of course the Proposed Bill SB 2053 which proposes to reduce the offence threshold from .08 to .06), is that it presumes two things: (a) a driver demonstrated to be operating or in actual physical control of a vehicle with a BAC of .08% ² is impaired (again the BAC of .08 is a surrogate for proof of actual impairment that is deemed evident from proof of that proscribed level of BAC), by operating a vehicle while under the influence of an intoxicant, and; (b) that every person is equally impaired at any particular BAC reading. This is fundamental to our constitutional principles of equal treatment before the laws under the 5th and 14th amendments embodied by the “due process clauses” in both those amendments and in the general principles “due process” underlying “natural justice” and “procedural fairness” embodied in the common law concept of “Rule of Law”.³ In fact there is significant evidence to refute both of these assumptions (a) and (b), which calls into serious question both the efficacy, social justice and the legality of Per-se Impaired Driving Statutes.

SECTION II-Scientific Studies Raise Serious Questions About the Underlying Assumptions Upon Which Per-se Impaired Statutes Are Based

Recent studies from numerous sources suggest the underlying assumption that everyone is impaired from operating a vehicle when their BAC is .08 may not be correct or accurate. There are Per-se Impaired Driving Statutes in all fifty states and every one of them has set the threshold for impairment at a BAC of .08%. If this assumption were true and categorically established by scientific evidence as originally believed, then a BAC of .08 would be an accurate surrogate for the accused’s being impaired by an intoxicant while operating a vehicle and justified as a simple and cost effective means of establishing the accused’s impairment. However, recent studies have suggested that this assumption is not necessarily true or accurate. Andrew Gore cites numerous studies that show there is a statistically significant difference the level of impairment between a man and a women driving a vehicle at the exact same BAC level. This is not the commonly acknowledged fact that men can actually consume more alcohol than women before reaching a certain BAC because of physical size differences, which is indisputable. This revelation is based on new studies that have found that due to numerous physiological differences between women and men, women have been found to be more impaired than a man at the exact same BAC level. This is a challenge for Per-se Impaired Driving Statutes, as Gore points out:

“Per se statutes may have many positive effects, but in light of the scientific evidence indicating that women are generally more impaired than men at the same BAC,¹⁴ they also create the potential for discrimination against men. The use of the same standard for two physiologically different classes results in an uneven impact of the law. An average man and woman, both driving with the same BAC, are not likely to be equally dangerous, yet the law treats them as such. Per se statutes make actual

² We are using “BAC” as “shorthand term” to reflect the two separate evidential requirements of “With .08 or more grams of alcohol per two hundred ten liters of breath;” or “With .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood”, which are the precise technical evidential requirements under HRS §291E-61(a)(3)-(4) and the corresponding sub-sections §291E-61.5(a)(a) and (2)(C)and(D) for proof of gravamen of the offense.

³ See: <http://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law> “The American democratic system is not always based upon simple majority rule. There are certain principles that are so important to the nation that the majority has agreed not to interfere in these areas. For instance, the Bill of Rights was passed because concepts such as freedom of religion, speech, equal treatment, and due process of law were deemed so important that, barring a Constitutional Amendment, not even a majority should be allowed to change them.

impairment irrelevant with regard to criminal liability. As a result, men, as compared to women, may be paying a steep price.”⁴

“Studies have shown that the physiological effects on women are different from those of men at moderate and high BACs, with women performing far worse at various laboratory tests evaluating motor skills and response to visual stimuli at elevated BACs.⁹⁸ Multiple studies have also been conducted which show statistically significant differences in risk between men and women at certain BACs.⁹⁹ Additionally, breath testing machines may report artificially high BACs in men based on faulty assumptions regarding levels of plasma in the blood.¹⁰⁰ Taken together, this evidence strongly supports the contention that reliance solely on the current uniform BAC level of 0.08% is an unacceptably inaccurate means of determining driver impairment due to unaccounted for discrepancies arising from gender differences.”⁵

Some studies cited indicate the level of impairment measured as an indicator of the likelihood of involvement in a crash of a women operating a vehicle at BAC level of .08% is four times higher than a male counterpart at the same BAC level of .08%.⁶ Other studies and reports have come to the same conclusion⁷. Much more study needs to be done before there can be definitive scientific conclusions made, but from all accounts the evidence points to the likely conclusion that the recent trend to using Per-se Impaired Driving Statutes as a simple, cost effective and convenient way to a prosecute persons for operating a vehicle while under the influence of intoxicants and setting the BAC of .08% as a surrogate for impaired driving likely overstates the level if impairment of men at that BAC level and likely understates the level of impairment of women at that same level. Therefore, in effect punishing men for impaired driving when at BAC .08% there may be little or no actual risk of the man operating the vehicle in a manner that would be considered impaired driving. At the same time a women operating a vehicle at below the BAC .08% level, even slightly below the Bill SB 2053 Proposed BAC level of .06%, may actually be impaired from safely operating a motor vehicle and have a statistically significant likelihood of resulting in a crash. Ironically, she will not be convicted of the Per-se Impaired Driving Statute offense for which her male counterpart is convicted despite not actually being impaired such as to be at risk of being involved in a crash. This is unfair, discriminatory and does not even achieve the ultimate social goal of creating a law prohibiting impaired driving where the BAC is at .08% (or even .06%). The goal is to set level of socially tolerable conduct to make drivers operate their vehicles in conditions that do not involve them being impaired. In our example based on the substantial differences between how the same BAC .08% level affects the degree of impairment of men and women, it is possible that at that BAC level the male driver is not actually impaired and is safe to drive, while the women at that level BAC .08% or even below BAC .06%, she is impaired and not safe to drive, but permitted to drive under that statute or even the Proposed Bill SB 2053. Gore concludes:

“In an effort to save lives and ease burdens on prosecutors, all states have adopted per se drunk driving statutes that make driving with a BAC of 0.08% a crime, regardless of actual impairment. Proponents of 0.08% per se statutes place too much emphasis on the life- saving

⁴ Id. Gore at 426 (citations omitted)

⁵ Id. Gore at 435 (citations omitted).

⁶ Id. at 436.

⁷ “Crash Culpability and the Role of Driver Blood Alcohol Levels,” Joseph A. Kufera, M.A., Carl A. Soderstrom, M.D., Patricia C. Dischinger, Ph.D., Shiu M. Ho, M.S., and Angela Shepard, M.D. *Annu Proc Assoc Adv Automot Med.* 2006; 50: 91–106. PMID: PMC3217472 (See: <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3217472/>). Under the heading Discussion: “While many other studies have reported the increased rate of culpability among male drivers who test positive for alcohol use, this study adds to the literature by describing culpability rates among women drivers at BAC levels above 100 mg/dl that are higher than those found among men.”

potential and facilitation of expeditious prosecution the laws offer, to the detriment of other valid concerns. Given the strong scientific evidence that men are less impaired than women at a given BAC, lawmakers should recognize that a “one size fits all” approach results in discrimination and, consequently, may not be appropriate. Although per se laws certainly show some positive effects, the exact magnitude and consistency of these effects are difficult to determine and still in question. Given this nebulous level of effectiveness, law-makers should not consider the discriminatory effect of 0.08% per se drunk driving laws justifiable as a matter of public policy.

Currently the best alternative to per se laws is a reversion to laws that create a rebuttable presumption of intoxication at 0.08%. Drunk driving laws formulated in this way target those drivers who are actually a danger to others. Further, under these laws, men will not be discriminated against, because they will be free to prove that they are not intoxicated at 0.08%, eliminating a potential discriminatory effect.”⁸

Summary and Conclusions Section II:

Much more study needs to be done, but at present the recent empirical evidence points to a statistically significant difference between the level of impairment of men and women who may be at the exact same BAC. The preliminary results seem to suggest a women can be as much as four (4) time more likely to be involved in a motor vehicle crash than a men where both are at the same BOC level of .08%. If this is the case, then using Per-se Impaired Driving Statutes to control the socially unacceptable effects of impaired driving is unfair, inequitable and discriminatory toward men, and it only gets worse as the threshold is dropped from .08% to .06%, since it likely results in even more male drivers who are not at risk of causing loss, injury or damage being convicted of crimes for deemed or presumed impaired driving, which is in fact unsubstantiated by the empirical studies to date. While women would hopefully be less inclined to drive at levels of BAC equal or above .06%, they may still not be safe to operate a motor vehicle even at legally permissible levels. These new study results suggest that neither of the two assumptions underlying the Per-se Impaired Driving Legislation are correct. Not all persons are impaired and unsafe to drive at the BAC level of .08% and not all persons who record a certain level of BAC, such as .08%, are equally impaired from operating a vehicle or even impaired at all.

The recommendation of Andrew Gore is to do away with the Per-se Impaired Driving Statute entirely given its potential to trammel on the accused’s due process right to a presumption of innocence until proven guilty, and adopt the previous legal standards where an accused was imposed with a “rebuttable presumption” of impairment in light of a BAC reading of .08%, which the could rebutted with evidence showing a lack of any degree of impairedness on the accused’s part. If the male accused driver can safely and responsibly operate a vehicle at a BAC level of .08%, why should he be made a criminal, his life be changed forever, his job lost and his family be made to suffer considerable financial hardship? What has he done so wrong that deserves such punitive treatment? If he is not impaired why is he being punished and what purpose does it serve? On the other hand, it is equally unfair and unjust that a women can drive impaired with impunity, because the Per-se Impaired Driving Statute fails to recognize the physiological differences between men and women make the women impaired and unsafe to drive at levels which a man may be wholly capable of operating a vehicle in a safe, reasonable and responsible manner. The solution of allowing impartial, fair minded and rational judges and/or juries determine if an accused is impaired despite a BAC reading of .08% is consistent with our American values of constitutional due process, presumption of innocence and equal treatment before the law.

SECTION III There is a Second Type of Potential Bias That Also Affects the Validity of the Assumptions Underlying the Per-se Impaired Driving Statutes

⁸ Id. Gore at 435 (citations omitted)

Studies have recently suggested there may also be a kind of “Sample Test Bias” created by the way Borkenstein Breathalyzers (or similar breath sample machines), used to sample and analyze breath samples (i.e. Alcohol breath tests or “ABTs”), for alcoholic content in breath as an indicator of BAC level. Studies have been undertaken that tend to indicate these breathalyzer machines may be functionally biased against persons with small lung capacities (i.e. women, African Americans and elderly persons, whose lung capacities are smaller than Caucasian males). As Michael P. Hlastala explains:

“Law enforcement continues its aggressive focus on the apprehension, arrest and conviction of drunk drivers. Alcohol breath tests (ABT) are ubiquitous throughout the Country, and are often used as an important or even sole piece of evidence to support the state’s case. Thus there is an interest by everyone involved in maintaining the reliability and integrity of the ABT results.

Inherent in the justification of the ABT is the presumed equality between end-exhaled alcohol concentration and alveolar alcohol concentration that is directly related to the blood alcohol concentration (BAC). Thus the ABT has been viewed as an accurate indirect measure of BAC. However, recent literature has shown that such a relationship between breath and blood is not necessarily identical for all individuals.”⁹

This study’s findings suggested that there were relatively higher ABT BAC results for persons with small lung capacities than for persons with larger lung capacities, based on the fact that the larger lung capacity allowed the breath donor to fill the required mandatory sample container with their breath using less exertion than a person with a smaller lung capacity. This resulted is that the persons with smaller lung capacities tested higher for the same level of alcohol consumed based solely on how much harder they had to “blow”. Based on these finding the author comments:

“We now face a fork in the road. We can continue to support the old paradigm, despite the anomalies, or we can head down the road of progress with research into the mechanisms that cause the anomalies observed. Further research into the mechanisms of the ABT is needed. To- day’s forensic scientists have continued to support the old paradigm despite the anomalous research observations. The field needs a scientific revolution with further experimentation into the sources of the anomalous behavior of the ABT and the revision of procedures used for administration of the ABT. Without such change, it is appropriate to consider increasing the legal limit for individuals with smaller lung volumes (women, African Americans, shorter and older individuals)”

Summary and Conclusions Section III:

As with the tests on discrepancies between male and female levels of impairment at the same BAC level, more study and analysis must be done with respect to the “Sample Test Bias” on breathalyzer analysis due to small lung capacity. However, for the purposes of the proposed Bill SB2053 it seems clear that it is prejudicial to a number of groups that may be adversely affected by their small lung capacity. The above “Hlastala Study” conclusions suggests that until machines can be properly standardized to take into consideration the effect on lung size, the legal limit for BAC threshold of .08% should probably be increased for women, African Americans, shorter and older individuals not decreased as proposed by Bill SB2053.

⁹ “The Alcohol Breath Test Biased Against Individuals with Smaller Lung Volume”, Law & Science. Vol 23, No. 11, November 2008 Pp. 1 at 2.

FINAL POSITION OF SBU ON BILL SB2053

SBU takes the position that the proposed Bill SB2053 is not in the best interests of it is members or the Hawai'i Public in general. There are many studies that seem to suggest that Bill SB 2053 may be perpetuating empirically unfounded myths and assumptions about the legal validity and fairness of that form of Per-se Impaired Driving Statute. In particular the assumption that everyone is impaired from operating a vehicle when they reach the BAC level of .08%, which may not be true according some recent studies referred to herein. Similarly, the assumption that all persons are equally impaired at the same level of BAC such as .08% or .06%, is also likely incorrect based on recent studies. Even the manner of obtaining Alcohol breath test samples may well be inherently biased against groups with smaller lung capacities, who will be even more prejudiced by the Bill SB2053 proposed reduction from a legal threshold of .08 to .06. Therefore, in the short term SBU recommends that the law makers do not change any thresholds until there is more empirical evidence gathered about the scientific issues raised by this paper. In the medium to long term further study and consideration needs to be given to: (a) the entire issue of whether Per-se Impaired Driving Statutes are constitutionally, legally and socially justifiable; (b) law makers should reconsider whether justice can better be achieved by using the "tried and true" traditional impaired driving laws which create: (i) "rebuttable presumptions" that allow accused persons "the right to a reasonable doubt"; (ii) that preserve and protected an accused's rights to due process of law; (iii) that forces prosecutors to prove a person's guilt beyond a reasonable doubt on every element of the criminal offence of impaired driving; and (iv) that allow impartial triers of fact (Judges and Juries) to consider whether sufficient evidence of the accused's guilt beyond a reasonable doubt has been established or has there been other evidence adduced that rebuts the presumption that a BAC level of .08% establishes the accused was impaired thereby guilty of committing the offense of operating a vehicle under the influence of an intoxicant or while assuming actual physical control of a vehicle.

For all the forgoing reasons SBU recommends against adoption of the Bill SB 5023 proposed changes.

All of which is respectfully submitted:

On Behalf of Street Bikers United Hawaii (SBU)

Bruce Paige

Bruce Paige
SBU State Director

From: mailinglist@capitol.hawaii.gov
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Cc: sendstufftobrian@gmail.com
Subject: Submitted testimony for SB2053 on Jan 28, 2016 14:45PM
Date: Tuesday, January 26, 2016 6:34:14 PM

SB2053

Submitted on: 1/26/2016

Testimony for TRE on Jan 28, 2016 14:45PM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Brian Farr	Individual	Oppose	No

Comments: Passage of this law not make the roads any safer but ruin a lot more people lives. A study done in 2000 by the USDOT shows that the risk factor between 0.06 and 0.08 BAC only increases <1% for all gender/age groups except for males 16-20. However the percentage of people who had 2 glasses of wine or beer with dinner and then getting a no offense DUI's will skyrocket. Sure at \$10,000 a pop for a DUI, that means more money for the government coffers. But what will it do to the countless number of people who become unemployed, struggling and potentially homeless, losing everything they worked for due to this ineffective policy? I could understand if the law was framed where younger age groups had stricter BAC requirements. Or if penalties where tiered based on BAC level and the persons condition at the time of the offense. The this blanket policy makes it seem like there is no consideration of how the cost outweigh the benefits. As a resident of Hawaii Kai, I understand that if I wish to drink in town I need to plan accordingly to get a ride back and not drive. At \$40-60 a cab ride, I already reserve this for special occasions. However the new law will mean I can't even have a drink or two with dinner in town, which means I won't be spending my money out and supporting the local economy. Multiply this by everyone in the same scenario and now you have a major impact on the food and beverage industry. As a 40 year old responsible adult with a good job and home, I completely understand that truly driving while intoxicated should be met with stiff and severe penalties. But the also know that I am not intoxicated after two beers. a 16 year old kid might be, but I am not. I know I have the rational to drive responsibly at 0.06 BAC and the smarts to not drive drunk. So I personally consider this measure as an insult to my judgement and if it passes, I plan to make every effort to be sure everyone who voted for it will be finding other employment the next election cycle. Because that's what supposed to happen when your judgement is impaired! Mahalo for you time Aloha

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Cc: bigcoopatroopa@gmail.com
Subject: *Submitted testimony for SB2053 on Jan 28, 2016 14:45PM*
Date: Sunday, January 24, 2016 10:27:26 AM

SB2053

Submitted on: 1/24/2016

Testimony for TRE on Jan 28, 2016 14:45PM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Chris Cooper	Individual	Oppose	No

Comments:

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SB2053

Submitted on: 1/26/2016

Testimony for TRE on Jan 28, 2016 14:45PM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Clayton Silva	Individual	Oppose	No

Comments: 0.8 is too high already!

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Date: Tuesday, January 26, 2016 4:59:06 PM

SB2053

Submitted on: 1/26/2016

Testimony for TRE on Jan 28, 2016 14:45PM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Fred Remington	Individual	Oppose	No

Comments: This bill will take away employment from the people in the hospitality industry. .08 is low enough. There is no justifiable reason to lower it any more.

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Cc: kathyk323@hotmail.com
Subject: *Submitted testimony for SB2053 on Jan 28, 2016 14:45PM*
Date: Monday, January 25, 2016 5:37:16 PM

SB2053

Submitted on: 1/25/2016

Testimony for TRE on Jan 28, 2016 14:45PM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Kathy Kim	Individual	Oppose	No

Comments:

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Subject: Submitted testimony for SB2053 on Jan 28, 2016 14:45PM
Date: Tuesday, January 26, 2016 11:16:57 AM

SB2053

Submitted on: 1/26/2016

Testimony for TRE on Jan 28, 2016 14:45PM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Ryan Oswald	Individual	Oppose	No

Comments: The drunk driving laws here are already ridiculous. What's the plan here Josh Green?, to swindle government fines out of working guys who aren't even intoxicated at a mere 0.6? Then the same good folks have a f**king record on the books then.

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Subject: *Submitted testimony for SB2053 on Jan 28, 2016 14:45PM*
Date: Wednesday, January 27, 2016 11:13:56 AM

SB2053

Submitted on: 1/27/2016

Testimony for TRE on Jan 28, 2016 14:45PM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Steve Miller	Individual	Oppose	Yes

Comments:

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Subject: *Submitted testimony for SB2053 on Jan 28, 2016 14:45PM*
Date: Tuesday, January 26, 2016 5:19:22 PM

SB2053

Submitted on: 1/26/2016

Testimony for TRE on Jan 28, 2016 14:45PM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Tim Lemke	Individual	Oppose	No

Comments:

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