Is BUI like DUI?

Posted At : November 30, 2012 6:00 PM | Posted By : Rick Bernardi
Related Categories: BUI, Bicycle Advocacy

By Rick Bernardi, J.D.

Should bicycling under the influence (dubbed "BUI" by Bob Mionske) be legal? Should it be illegal? And if it is illegal, what is the proper penalty?

These are questions that many jurisdictions have attempted to address. A few days ago, we received an email about a policy change in the Denver Police Department. In Colorado, BUI is a treated as a DUI, with the same criminal penalties —a misdemeanor conviction, jail time, and substantial fines. According to Bicycle Colorado, a DUI conviction while riding your bike does not result in a loss of the cyclist's driver's license.

However, the Denver Police Department has, until recently, had a policy of not enforcing the DUI law against cyclists. That policy changed following a collision between a cyclist and a scooter rider. Both were operating under the influence, but only the scooter rider was arrested. The scooter rider didn't think this was fair, and filed a complaint. As a result of that complaint, the Denver police changed their policy, and now cyclists operating under the influence will be cited and prosecuted, just like any other vehicle operator. The email we received was from Denver journalist Sam Levin, asking for our thoughts about the policy change, and how other jurisdictions handle BUI.

Bob has written several columns on BUI, and has discussed BUI in his book Bicycling & the Law. But in the columns and the book, the discussion has been directed at informing cyclists about what the laws are. We haven't really touched on what we think of BUI policy, and this was the first time that I can recall that we had been asked our opinion of the BUI laws.

It was not a difficult question to answer. For several years now, I have felt that the states that treat BUI exactly like DUI are on the wrong track. To explain why I think these states are making a mistake, let's take a look at Oregon law. In Oregon, a cyclist who is operating a bike under the influence is in violation of the Oregon DUI law, and can be cited, prosecuted, and penalized just like a driver who is DUI. This means the same fines, the same imprisonment, and the same loss of driver's license.

Now, some people might think that cyclists *should* be subject to the exact same law and exact same penalty. But I think this perspective reflects an erroneous understanding of our DUI laws. Drunk driving laws have been on the books since 1910, but it wasn't until the 1980s that the states really began to crack down on DUI, with a combination of stricter standards, tougher enforcement, harsher sentences, and a media campaign to get the message across.

So what changed? An organization called Mothers Against Drunk Driving ("MADD") founded in 1980 by Candice Lightner, who was outraged by the light sentence handed out to the drunk driver who had killed her 13 year old daughter, successfully lobbied for tougher laws and stricter enforcement, and combined with a intensive media campaign, society's views of drunk driving changed from being a relatively petty offense that "everybody does" to a socially unacceptable felony that most people make a serious effort to avoid.

And that is as it should be. And yet, these same facts do not support the extension of the DUI laws to cyclists. Although 24 percent of all cyclist fatalities involve a cyclist who is under the influence, there are virtually no fatalities involving a cyclist under the influence killing somebody else. When there is a fatality involving a drunk cyclist, it is virtually always the cyclist who is killed.

Now, if the rationale for imposing tougher penalties on DUI is to reduce fatalities caused by drunk drivers, then what is the rationale for imposing the same penalties on drunk cyclists? There is none. Just a misguided belief that the two offenses are the same, or ought to be the same—and we already know that they are not the same.

The fact is, the DUI laws were toughened up to reduce drunk *driving*. They were never meant to be a catch-all offense into which we could shoehorn things like drunk cycling, drunk skateboarding, drunk pogo sticking, drunk hula hooping, or even drunk walking. And yet some states have done just that, shoehorning drunk cycling into their drunk driving laws. Well, why stop there? Why not shoehorn drunk walking in too? After all, we know the hazards involved there, too. The answer, obviously, is that drunk walking does not pose the same risk that drunk driving does, and which the beefed-up DUI laws were intended to reduce.

And neither does drunk cycling.

This is not to say that drunk cycling is risk-free. However, the risk is generally to the drunk cyclist. And while society may have a legitimate public health and safety interest in reducing traffic fatalities, treating a cyclist who is taking some measure of risk with his or her own life exactly like a driver who is posing an extremely serious risk to the lives of innocent bystanders is neither rational or just.

So what is a rational and just approach to BUI? As Bob has written elsewhere, several states have taken different approaches. In California, BUI is a separate, less serious offense than DUI, with a lighter penalty reflecting the less serious nature of the offense—DUI is a felony in California, while BUI is a misdemeanor, subject to a $250 fine. And California cyclists take note: Unlike motorists, you cannot be forced to take a blood alcohol test, but if you are stopped on suspicion of BUI, you can request to be tested if you believe that the test results will prove that you are not under the influence.

In Washington, BUI is not illegal. A police officer can stop and offer to give you a ride to a "safe place," but you are not obligated to accept, and the officer cannot cite you for BUI, or for refusing to accept a ride. However, the officer may impound your bike "if the officer determines that impoundment is

necessary to reduce a threat to public safety." The Washington Legislature appears to have adopted this approach to BUI following a 1995 decision by the Washington Court of Appeals which reversed the conviction of a cyclist under the state's DUI law. In that case, City of Montesano v. Daniel Wells, the court, noting its agreement with a 1980 decision by a California court that "*drunk bicyclists are not capable of causing the tremendous 'carnage and slaughter' associated with drunk driving*," wrote:

> *We agree that while riding a bicycle while intoxicated may pose a danger, it is not of the same magnitude as the hazard posed by the intoxicated driver of a motor vehicle. Implicit in all DUI statutes is the recognition that driving or being in control of a motor vehicle while intoxicated poses an extreme danger to the driver and to others. As the Clingenpeel court recognized, that danger is inherent in motor vehicles because of their weight and the speed at which they travel. Moreover, because bicyclists are required to abide by the rules of the road (see RCW 46.61.755), police may cite any person riding in an unsafe manner, whether due to intoxication or not.*

And Washington is not alone in recognizing the lesser danger posed by BUI. In South Dakota, the state legislature changed its DUI statute, specifically exempting cyclists (and equestrians) from the state's DUI laws. Their rationale? They would prefer to have people who are heading home after having a few drinks walk, ride a bike, or even ride a horse, rather than drive drunk. Interestingly, the impetus to change state law began after a man was arrested while attempting to ride his bike while drunk. And I do mean "attempting to ride." As the Supreme Court of South Dakota recounted in State v. Bordeaux,

> *On the afternoon of October 4, 2004, a pedestrian on his way to a friend's home in Sioux Falls observed a bicyclist repeatedly falling off of the bicycle he was attempting to ride on a city street. Suspecting that the bicyclist might be intoxicated and concerned for his safety, the pedestrian used a cell phone to contact law enforcement and report the matter. A law enforcement officer was dispatched to the location given by the pedestrian. On his arrival, the officer also observed the bicyclist falling with his bicycle.*

Unlike the Washington Court, the South Dakota Court upheld the conviction, but eight days after the Bordeaux' conviction was upheld, the South Dakota Legislature passed legislation excluding cyclists from prosecutions under the DUI statute. While Bordeaux was clearly too drunk to balance on his bike, would he have been too drunk to get behind the wheel? This was the type of problem South Dakota legislators had on their minds when they changed state law. And they pointedly observed that while cyclists would no longer be subject to the state's DUI laws, they could still be charged with public drunkenness.

So which approach is best? The answer to that comes down to what one

believes about drunk cycling's potential for harm, and the state's interest in preventing that harm. If one believes that drunk cycling has the potential to cause some degree of harm, either to the cyclist, or to innocent bystanders, and that the state has an interest in reducing that risk of harm, then California's approach makes sense. If one believes that the risk of harm posed by drunk cycling to cyclists or innocent bystanders is too low to be of serious concern to the state, and that the benefits of encouraging people not to drive impaired outweighs the risks posed by drunk cycling, then the approaches of states like Washington and South Dakota may make sense to some.

What does not make sense is to pretend that drunk cycling is exactly the same as drunk driving—and states that do make this mistake need to remember exactly what problem the tougher drunk driving laws are intended to prevent, and find a more rational approach to drunk cycling that reflects the very real differences between drunk driving and drunk cycling.

And if these states still can't see the difference, they should really start cracking down on drunk pogo sticking, drunk hula hooping, and drunk walking too.