

On the

ROCKS

An in-depth look at Austin's drunk-driving problem. By Steve Uhler



A

FTER A FEW HOURS of barhopping with friends on the night of May 26, 2011, 23-year-old Gabrielle Nestande left Clive Bar on Rainey Street with her boyfriend, William Marchbanks, around midnight. Marchbanks drove her to his house, where, sometime after 12:30 a.m., Nestande climbed into her BMW and began the dark drive home along Exposition Blvd. At the same time, 30-year-old Courtney Griffin was walking to her residence in Tarrytown alongside the same roadway after acting as the designated driver for a friend. She never made it home. Hit by a speeding

vehicle, Griffin was sent sailing into a nearby driveway—and was left to die. The next day, when police questioned Nestande about her shattered windshield and whereabouts the night before, she was sober enough to ask for her lawyer.

On another spring night nearly two years later, Travis County District Attorney Rosemary Lehmborg found herself being pulled over around 10:45 p.m. by a Travis County Deputy, who had been alerted that a vehicle was swerving erratically on FM 620. Glancing at the open bottle of vodka on the front seat, the officer asked her to step out of her car. Preserved for posterity on the dashboard video cam, Lehmborg's slurred and surly response to the Deputy's field sobriety tests went viral immediately: "Oh, that's cool. You have just ruined my career."

These two different high-profile drunk-driving cases produced two wildly divergent—and divisive—outcomes. Lehmborg received 45 days in jail (later reduced to 20 days for good behavior), and a \$4,000 fine, while Nestande was convicted of criminally negligent homicide, fined \$10,000 and sentenced to six months in jail and 10 years probation—many felt her sentence was too lenient. And these are just two recent drunk-driving cases that have changed, ruined and ended lives in our city.

Party Central

WITH ITS DEEPLY IMBEDDED REPUTATION as a music and nightlife mecca, along with its lack of public transportation options and sheer number of bars, clubs and restaurants, all the elements are aligned for Austin to be The Perfect (Binge) Storm. To tourists and locals alike, it's one invitingly endless pub crawl. The real nightmare begins when inebriated revelers stop crawling and start driving. "We're a destination city for people who are looking to have a good time," says Austin Police Chief Art Acevedo. "Unlike other places, people aren't quite that afraid to drink and drive here. It's a tolerant culture, and I think that creates a problem for us sometimes."

Attorney Suzanne Kaplan agrees. "Austin has a culture of enjoyment. What we need is a culture of accountability." She should know. A passionate and vocal advocate for victims of drunk driving, Kaplan has been involved in several notable DWI court cases, and currently represents Griffin's mother, Laurie, in her civil lawsuit against Nestande.

"I think there are three levels of accountability," observes Kaplan. "You have a personal accountability of individuals who are drinking, who know they're going to get in their car. You've got the waitresses and bartenders who are serving alcohol to people who will inevitably get in a car and drive. And you've got business owners who are accountable for making sure their employees are following the law about serving alcohol."

But that's where the question lies: Ultimately, who's responsible when things go bad? The bartenders and waitresses who serve the drinks? The Texas Alcoholic Beverage Commission (TABC), which oversees the industry, or the bar, restaurant and club owners whose livelihoods depend on alcohol sales? Some point to the politicians who pass—or don't pass—the laws. Others blame the legal system that adheres to the letter of law but seemingly bypasses

In the annals of drunk-driving scandals in Austin, the Nestande case stands as a template for Lone Star DWI justice gone awry.



justice. Pick a favorite, place your bet, spin the wheel; by the time it stops, another drunk driver will have hit the streets of Austin.

In 2011, Texas ranked No. 1 in the US for alcohol-impaired driving fatalities with 1,213, and last year, there were a 33 alcohol-related traffic deaths in Travis County alone. And from a statistical standpoint, Austin is one giant 80-proof watering hole. In 2012, the APD made 6,424 DWI arrests—and it predicts more than 7,000 DWIs, a record number, this year. We also boast one of the highest number of bars per capita in the country: According to the TABC, there are currently 288 active bars, 61 of them crowded into a 16-block-long stretch on Sixth Street. And that doesn't even take into account liquor stores, convenience stores, hotels and restaurants that purvey alcohol.

Like the city's skyline, the belly of the beast just keeps expanding. "When I got here in '07, our entertainment district on Sixth Street was basically from the south I-35 frontage road to Brazos,"

PREVIOUS SPREAD: GLASS PHOTO FROM THINKSTOCK

recalls Acevedo. “Now you’ve got bars well-deep into East Austin. Sixth Street goes almost to MoPac, and the Warehouse District and Rainey Street have been growing tremendously. When you have that many establishments in the matter of a few miles of each other, you’re going to have challenges.”

“Austin definitely has a drunk-driving problem,” asserts Lt. Derek Galloway, who heads up the DWI Unit for the APD’s Highway Enforcement Command. With a total staff of 19 officers dedicated to cover the entire width and breath of America’s 11th largest city, Galloway and his team face daunting odds. “The number of DWI arrests we make in a year is really based on how many people we have dedicated to just DWIs and aggressively pursuing drunk drivers,” he says. “If I were to take all my officers and put them on south I-35, it would show we have a drunk-driving problem on



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south I-35. If I put them all downtown, it shows we have a drunk-driving problem downtown.”

Still, some predictable hot spots emerge. “Sixth Street and West Sixth Street, that’s where we have our biggest problem,” says Galloway. “But that’s the highest concentration of bars, as well. Riverside is another area where we have a lot of DWI crashes. Your biggest issues are in the downtown area.” Galloway rifles through a small mountain of documents peppered with printouts on Austin DWIs: Number of arrests (broken down by year, neighborhood, time of day, age group, zip code—you name it), times and dates of “No Refusal” Weekends, blood alcohol concentration ratios, peak DWI hours, countless more graphs, stats and numbers. It’s an impressive assemblage of collated data.

But all statistics go out the window as he pauses before delivering his coup de grâce with a matter-of-fact afterthought: “Bear in mind: These are just the ones we catch.”

Tip of the Iceberg

“IT’S GREAT TO BE A SERVER HERE IN AUSTIN because this is a server industry city,” enthuses Kara Jordan, a recent grad from St. Edward’s and food and beverage server at Austin Ale House on West Sixth Street. She appreciates the flexible hours and cash flow. “It can be really lucrative,” she says.

It had better be. In Texas, servers often work for the cash minimum wage for tipped employees: \$2.13 per hour. So tips are everything.

In the labyrinth of liquor liability, bartenders and servers often get the soggy end of the swizzle stick. Under Texas law, as delineated by the TABC, both are legally liable for over-serving customers and serving minors. “In a lot of places,” says Jordan, “management is constantly telling us to make sure we ID every-

body and not over-serve. Whatever they feel will help prevent any issues with TABC and follow regulations.”

Every licensed bar, restaurant and club employee in Texas is legally bound to adhere to TABC laws and guidelines. “One of those laws says you may not serve more than two drinks per person at any one time,” says TABC Chief of Field Operations Robert Saenz. “It allows that strategic pause, so that the bartender can take a look at you again when you come back after two beers.”

Clear enough on the surface. But vary the equation just a little and things get fuzzier. What if the customer has just come from another bar (or three)? How are busy bartenders and servers supposed to divine their customers’ level of sobriety? “Each employer is different,” says Jordan. “Some have a very specific set of instructions: Are they slurring their speech? How many drinks have they had since they got there? Do they have slow movements? Basic sort of physical things.”

But even the most seasoned bartenders can miss signs that someone is inebriated. “There’s been a couple of times when people have bamboozled me,” admits bartender Clarissa Parrott, who’s been working at the Old School Bar & Grill for a year and a half. “They’ll seem completely coherent and fine and say, ‘Can I get this drink?’ Then they’ll take two sips and be falling over. I’m like, ‘How were you coherent enough five minutes ago to order this drink? If I’d seen you like this, I wouldn’t have served you.’”

Parrott adds, “I have a friend who weighs 105 pounds, and she can drink men under the table for hours on end. But another 100-pound girl could walk in and I don’t know her tolerance. I could serve her two shots and she’d be gone. Everybody’s different.”

Not all bartenders are as candid as Parrott, especially when they’re so reliant on customer tips. “Some bartenders, unless you’re falling down, as long as you’ve got that credit card, they’re going to serve you,” says Acevedo.

When it comes down to it, it’s the bartender who is legally responsible for over-serving. “TABC says, ‘You know what, bartender? We’re holding you responsible if you over-serve.’ That’s what the law says,” says Jonathan Insley, longtime co-owner of Old School Bar & Grill. “As an owner, I like that. Because let’s be fair: As an owner, I can’t be here all the time. You can’t watch everything.”

When it comes to liquor in the Lone Star State, all roads lead to the TABC. Formed in 1935 in the wake of the repeal of Prohibi-

tion, today it oversees the nearly 40,000 locations for alcohol sales throughout the state, from label approval to advertising to on-site inspections. Part of its myriad responsibilities is public safety.

In its efforts to curtail over-serving to intoxicated customers, the TABC offers numerous services for bar owners and servers, including seller certification. “No one is required to be TABC-certified, although some employers require it, and we recommend it,” notes TABC Director of Communications Carolyn Beck, in an email. “Regarding liability, bartenders/servers/employees are criminally liable for serving to a minor or intoxicated person ... The bar has administrative liability for the actions of their employees.” Translation: Bar owners who employ TABC-certified servers and sellers enjoy a large degree of indemnification from criminal prosecution, known in the business as “safe harbor,” while their employees remain accountable for any transgressions. Though they can be sued in a civil suit.

The TABC Enforcement Division focuses on public safety issues, and its agents are police officers, so they have the power to arrest. Despite due diligence, the law enforcement units are spread impossibly thin, with a total of 15 field agents assigned to monitor all licensed bars, music venues and restaurants in Austin alone. While they regularly conduct undercover sting operations in bars, their efforts are often hampered by the omnipresence of social media. One tweet from an observant server or customer can go viral in seconds—the 21st century equivalent of yelling “Raid!” in a crowded speakeasy.

A Case-By-Case Basis

IN THE ANNALS OF DRUNK-DRIVING SCANDALS in Austin, the Nestande case stands as a template for Lone Star DWI justice gone awry. Because police didn’t interview her until several hours after

LAW & ORDER

On May 4, Senate Bill 275 was passed with a unanimous vote by the Texas State Senate, and signed into law by Gov. Rick Perry on May 18. Effective Sept. 1, any driver leaving the scene of a serious or fatal auto accident is now subject to a second-degree felony charge. *Austin Monthly* caught up with the bill’s author, Sen. Kirk Watson.

How will this bill make Austin—and Texas—safer?

Prior to this bill’s passage, the failure to stop and render aid was treated as a third-degree felony, regardless of whether the incident results in a death. That’s lower than the penalty for intoxication manslaughter (which is a second-degree felony), despite the fact that a failure to stop and render aid can lead to the victim’s death. Too many people knew they would face lesser charges if they simply fled the scene of the accident.

What spurred your support of the bill?

This bill idea was brought to me by the parents of one of my constituents, Courtney Griffin. I saw there was a loophole in the law, and that too many others had lost their lives in a similar fashion. According to the Austin Police Department, there were 393 cases of failure to stop and render aid in 2012, and that 11 of those cases involved traffic fatalities. This wasn’t acceptable to me or to any other senator.

“I’m convinced that people are choosing to drive because they didn’t have a place to leave their car overnight. They don’t want to take a chance of being towed.”

Art Acevedo

her car hit Griffin, they did not ascertain whether or not Nestande’s blood alcohol level had been sufficiently high to prove intoxication. Despite persuasive surveillance video showing Nestande stumbling in the bar (it could have been her high heels, claimed the defense), and eyewitness testimony from people who insisted she appeared drunk at Clive Bar, proof was fatally elusive for the prosecution.

Then there was the matter of her trial by jury. Word from insiders who requested anonymity whispered that no jury would convict a young and attractive blonde, blue-eyed female first-time offender—a legislative aide, no less—despite the mountain of evidence against her, including pieces of clothing and skin tissue from Griffin on her car. Nestande was charged with intoxication manslaughter, which carries a maximum sentence of 20 years. But due to lack of evidential proof, she was convicted for the lesser charge of criminally negligent homicide. (At press time, Nestande remains incarcerated, due to be released in late September. Calls to her attorney were not returned.)

Nestande may have gotten away with murder in the court of public opinion, but the case is still ongoing. Two years after the death of her daughter, Laurie Griffin has filed a civil lawsuit for \$1 million against Nestande, Clive Bar and Marchbanks. “We have a thriving bar scene here, and bar owners need to do their part to prevent people from getting drunk and getting behind the wheel,” insists Griffin.

The case of Rosemary Lehmberg is a different story. While her arrest is not the first instance high-profile locals have been associated with drunk driving—in 2009, UT baseball coach Augie Garrido was arrested for DWI, KLBJ on-air personality Jeff Ward was busted in 2011 and KUT radio host Laurie Gallardo was arrested on New Year’s Eve morning in 2012—the stakes are higher when you’re the Travis County District Attorney.

As a prominent public figure responsible for prosecuting alleged wrongdoings by state officials, Lehmberg was subjected to a singularly harsh spotlight in the wake of her DWI arrest. Her field sobriety test was beamed from every TV newscast in Texas, and the police surveillance video of her being forcibly restrained in her cell became an overnight YouTube sensation. “The media wants good, meaty, juicy stories,” says Alan Bennett, chairman of the Austin Criminal Defense Lawyers Association. In the instance of Rosemary Lehmberg, they got a banquet.

Bennett, who worked with Lehmberg at the DA’s office for several years, is sympathetic. “The only reason Rosemary’s case got

all the attention is she's the elected DA. If she were just Jayne Q. Citizen, it wouldn't make the news at all."

Lehmborg was lucky. She harmed no one but herself, the victim of a self-inflicted bullet of bad judgment. To many, her most serious offense was simply First Degree Irony. Others, though, insisted that she resign her office—including Gov. Rick Perry, who vetoed funding for Public Integrity Unit, which is based in Lehmborg's office, because she did not step down. Lehmborg served 22 days of her sentence, voluntarily sought treatment and announced she would not seek re-election. We reached out to Lehmborg in June, and she responded to questions via email in her first statements since being released from jail. "I felt then, and do now, that I needed to answer for my mistake," she says. "From my own personal experience, I can tell you that going to jail and serving the toughest sentence ever for a DWI was a difficult decision to make."

"Jail is an unpleasant place," she adds, "and I had 22 days to think about what I did. I learned a lot from going to jail and having gone through the system—I believe it will make me a better prosecutor. My time in treatment was a blessing."

Is There A Solution?

MANY BELIEVE OUR CITY'S public transportation system contributes to its drunk-driving problem. The Capital MetroBus system only runs two routes past 1 a.m. on weekends, servicing South Lamar and South Congress, and the MetroRail, which makes its last run at 12:03 a.m. Fridays and midnight on Saturdays, is only convenient for a small part of town. As for catching a cab or leaving your car downtown? Good luck. "Sometimes it seems like you have a better chance of being struck by lightning when you're looking for a taxi at bar closing," says Acevedo, adding that downtown parking problems only exacerbate the problem. "I'm convinced that people are choosing to drive because they didn't have a place to leave their car overnight. They don't want to take a chance of being towed."

Suzanne Kaplan offers a different approach to addressing Austin's DWI crisis: working with the TABC to require bars to carry Liquor Liability Insurance. "Most bars do carry general liability, which means if you slip and fall on the premises, there's going to be coverage to take care of your broken arm," she says. "But if they over-serve a patron, and that patron runs over you and causes brain damage, there's no coverage to take care of you."

And there is no shortage of other suggestions: sobriety checkpoints on strategic roadways, ignition interlocking devices in every vehicle, additional taxis on weekends, more aggressive public education campaigns, tougher laws from the legislature. All good, viable options worthy of discussion. Still, one gets the sinking feeling that even if all were implemented, it would still be like trying to save the Titanic with a dozen champagne bottle cork plugs.

In the end, it all comes down to personal accountability. "Drunk drivers put precious lives at risk," says Laurie Griffin. "Everyone—individuals, bar owners, waitresses, the police, the TABC, the legislature—needs to recognize that they play a role in whether Austin's drunk-driving problem gets better or worse."

Lehmborg agrees, and takes it one step further. "As a community, I believe we need to punish those who commit DWI offenses," she says. "But most importantly, we need to support treatment for those who need it and look for opportunities to decrease drunk driving in Austin. The work that the counselors and therapists do is amazing, and I am very glad I sought out professional help."

Acevedo sums up the bigger picture. "Some people think we're still a sleepy college town," he says. "We need to grow up and realize we're a huge metropolitan city—we have to start acting like one." **AM**

THE BOOZY BREAKDOWN

Texas

85,715

number of people arrested in the Lone Star State in 2011 for DWIs

1,213

Number of alcohol-impaired driving fatalities in 2011, making our state No. 1 in the U.S.

175

number of driving fatalities in 2011 caused by alcohol-impaired people under the age of 21

Austin & Travis County

6,424

DWI arrests made by the APD in 2012

288

number of active bars in Austin

33

alcohol-related traffic deaths in Travis County in 2012

3,267

at press time, the number of DWIs in Austin, up for 2013

Austin vs. New York City

Austin zip code **78701**
Population: **3,855**
Places to drink: **73**

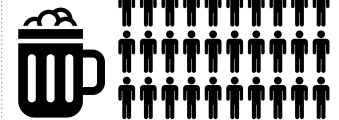
New York City zip code **10003**
Population: **53,673**
Places to drink: **80**



One bar per

52.8

people



One bar per

670.9

people