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# OHIO'S NEW DRUNK DRIVING LAW: A HALFHEARTED EXPERIMENT IN DETERRENCE

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*Robert D. Sweeney, Jr.\**

*In response to strong public pressure, Ohio has adopted a stringent DWI law which increased penalties and streamlined procedures so that more offenders would be subject to harsher punishment. This Article analyzes the new law and the obstacles to its effective enforcement, such as Ohio's constitutional guarantee of municipal home rule. Finally, the Article assesses the likely deterrent effect of the new law, and offers proposals to enhance the effect and promote the purposes of the statute.*

## INTRODUCTION

THE TRAGIC proportions of the drunk driving problem in the United States are well-documented. Conservative estimates blame drivers with blood alcohol concentrations<sup>1</sup> of .10% or more<sup>2</sup> for over 15,000 fatal crashes per year,<sup>3</sup> nearly half of the fatal crashes nationwide. In fact, a recent study by several pathologists indicates that over ninety percent of those fatal crashes may be caused by drunk drivers.<sup>4</sup> Further, drivers with BAC's of .10% or more are responsible for one of every ten personal injury crashes

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1. Blood alcohol concentration ("BAC") figures represent the percentage of alcohol in the arrestee's (or the deceased's) blood by weight. In some states, a breath or urine test rather than a blood test is used to calculate BAC.

2. Most states use the .10 figure to define a per se offense or as creating a presumption of intoxication. See U.S. DEP'T OF TRANSP., ALCOHOL AND HIGHWAY SAFETY LAWS: A NATIONAL OVERVIEW 1981, at 44 (1982) [hereinafter cited as NATIONAL OVERVIEW].

3. See U.S. DEP'T OF TRANSP., ALCOHOL AND HIGHWAY SAFETY: A REVIEW OF THE STATE OF KNOWLEDGE, SUMMARY VOLUME 1978, at 8 (1979) [hereinafter cited as SUMMARY VOLUME].

4. Cleveland Plain Dealer, Jan. 9, 1984, at 5-B, col.2.

and one of every twenty property damage accidents.<sup>5</sup> The estimated cost of accidents caused by drunk driving exceeds six billion dollars yearly.<sup>6</sup> The Ohio Department of Highway Safety reported that in 1983, 647 of the 1520 fatal crashes in Ohio, or forty-three percent, were "alcohol-related,"<sup>7</sup> fifty-eight more than in 1982.<sup>8</sup>

The effect of alcohol on driving performance should be evident to anyone who has ever drunk too much and then attempted to drive. The frequency of drunk driving creates a tendency to view this criminal behavior without the condemnation warranted by its often tragic consequences. Until recently, the law's treatment of drunk drivers has been shaped by this tolerant attitude, and enforced and administered by police, prosecutors and judges affected by a "there but for the grace of God go I" syndrome.<sup>9</sup>

The causal relationship between drinking and poor driving is supported by conclusive scientific proof. Epidemiological studies comparing physical conditions and characteristics of drivers involved in crashes with the general driving population demonstrate that as the BAC approaches .08%, the likelihood of involvement in a crash increases dramatically. A driver with a BAC of .15% is fifteen to twenty times more likely to be involved in a fatal crash than a driver who has drunk nothing.<sup>10</sup> Behaviorists, testing the effect of alcohol on psychomotor control under laboratory conditions and in controlled driving situations, have verified that drink-

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5. SUMMARY VOLUME, *supra* note 3, at 10-11.

6. *Id.* at 14.

7. The "alcohol-related death" statistic is somewhat rough, since it includes drunk pedestrians and bicyclists as well as automobile drivers. Moreover, the determination of what constitutes an "alcohol-related death" is generally made by the officer at the scene, and may depend on unscientific factors like the presence of empty beer cans in an automobile involved in a crash. Nonetheless, this statistic gives a sense of the scope of the Ohio problem.

8. *Weekly "Box Score" Report*, OHIO DEP'T OF HIGHWAY SAFETY NEWS (Jan. 6, 1984) [hereinafter cited as *Box Score*].

9. [G]enerally the community wants to see the law enforced, but when they are sitting in the jury box and they are hearing a case, they put themselves in the shoes of the defendant and say, "Well, I have done the same thing. I was just fortunate in not getting caught."

*Oversight into the Administration of State and Local Court Adjudication of Driving While Intoxicated: Hearings Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 80 (1981) (testimony of Capt. Wayne Layfield, Alcohol Enforcement Unit, District of Columbia Police Dep't.) [hereinafter cited as *Hearings*].

10. See SUMMARY VOLUME, *supra* note 3, at 15-17. The following chart is provided by the Ohio Department of Highway Safety:

ing significantly affects driving performance.<sup>11</sup>

In the past five years more than half the states have recognized the seriousness of the problem and amended their driving while intoxicated<sup>12</sup> statutes.<sup>13</sup> These efforts have been prompted by groups like MADD (Mothers Against Drunk Driving) which have appealed to the public and pressured legislatures at every level to adopt more stringent drunk driving laws. Ohio responded to this pressure in 1982 by adopting Amended Substitute Senate Bill 432,<sup>14</sup> which changed Ohio's DWI law effective March 16, 1983.<sup>15</sup>

NUMBER OF DRINKS TO REACH APPROXIMATE BLOOD ALCOHOL CONTENT (BAC)										
DRINKS		BODY WEIGHT IN POUNDS								
		100	120	140	160	180	200	220	240	
One drink	1	.04	.03	.03	.02	.02	.02	.02	.02	REASONABLE
= 1 oz. of	2	.08	.06	.05	.05	.04	.04	.03	.03	
100 proof	3	.11	.09	.08	.07	.06	.06	.05	.05	
liquor, 4 oz.	4	.15	.12	.11	.09	.08	.08	.07	.06	
of table	5	.19	.16	.13	.12	.11	.09	.09	.08	UNSAFE
wine or 12	6	.23	.19	.16	.14	.13	.11	.10	.09	
oz. of beer.	7	.28	.22	.19	.18	.15	.13	.12	.11	
	8	.30	.25	.21	.19	.17	.15	.14	.13	ILLEGAL
	9	.34	.28	.24	.21	.19	.17	.15	.14	
	10	.38	.31	.27	.23	.21	.19	.17	.16	

Subtract .01% for each hour of drinking after first hour

In Ohio, you are legally 'under the influence' at a BAC of .10% or higher

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11. See SUMMARY VOLUME, *supra* note 3, at 17-19.

12. Hereinafter referred to as DWI. States and commentators refer to the offense by several other names, including Driving Under the Influence (DUI), and Operating a Motor Vehicle While Intoxicated (OMVI).

13. See, e.g., ALA. CODE §§ 32-5-192, 32-5A-191 (Supp.1983); ARIZ. REV. STAT. ANN. §§ 28-691, 28-692 (West Supp. 1983); ARK. STAT. ANN. § 75-2501 (West Supp. 1983); CAL. VEH. CODE §§ 13352, 13353 (West Supp. 1983); COLO. REV. STAT. § 42-4-1202 (Supp. 1982); CONN. GEN. STAT. ANN. §§ 14-227a, 14-227b (West Supp. 1983); DEL. CODE ANN. tit. 21, §§ 4177(A)-(E) (West Supp. 1982); HAWAII REV. STAT. § 291-94 (Supp. 1982); IDAHO CODE §§ 49-352, 49-1102A, 49-1102B (1983 Supp.); ILL. ANN. STAT. ch. 95 1/2, § 11-501 (Smith-Hurd 1983); IND. CODE ANN. §§ 9-11-2-1, 9-11-2-2, 9-11-2-3, 9-11-3, 9-11-4 (West Supp. 1983); IOWA CODE ANN. § 321.281 (West Supp. 1983); LA. REV. STAT. ANN. § 14.98 (West Supp. 1984); ME. REV. STAT. ANN. tit. 29, §§ 1311-A, 1312-B, 1312-C (West Supp. 1984); MICH. COMP. LAWS ANN. §§ 257.625, 257.625a, 257.625b (West Supp. 1983); MINN. STAT. ANN. §§ 169.121, 169.123 (West Supp. 1984); MISS. CODE ANN. § 63-11-30 (Supp. 1983); MO. ANN. STAT. ANN. §§ 577.010, 577.012 (Vernon Supp. 1984); N.Y. VEHICLE & TRAFFIC LAW § 1192 (McKinney Supp. 1983); N.D. CENT. CODE § 39-08-01 (Supp. 1983); OHIO REV. CODE ANN. § 4511.19 (Page Supp. 1982); OKLA. STAT. ANN. tit. 47, §§ 11-902, 11-904 (West Supp. 1983); R.I. GEN. LAWS § 31-27-2 (Supp. 1983); S.C. CODE ANN. § 56-5-2930 (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 32-23-1 (Supp. 1983); UTAH CODE ANN. § 41-6-44 (Supp. 1983).

14. Hereinafter S.B. 432.

15. OHIO REV. CODE ANN. § 4511.19 (Page Supp. 1982). S.B. 432 changed or added a total of 19 Code sections.

These amendments concentrate on increased penalties and streamlined procedures so that more offenders may be subjected to harsher punishment. Specifically, the law encourages quick removal of drunk drivers from highways, simplifies evidentiary requirements, mandates incarceration for all convicted defendants, and enhances penalties for recidivists. Its purpose is to shock apprehended offenders into complying with the DWI law, to deter the general community from engaging in the prohibited conduct and, ultimately, to encourage compliance by fostering an attitude that drinking and driving is unacceptable behavior. This article analyzes the amendments to Ohio's DWI law and the constitutional issues they raise, discusses the purported obstacle to the deterrent value of the amended law posed by the Ohio constitutional guarantee of municipal home rule, assesses the likely deterrent effect of the new law, and offers proposals to enhance the effect and promote the purposes of the law.

## I. S.B. 432

### A. *Nature of the Offense*

Ohio's drunk driving law prior to S.B. 432 prohibited the operation of a motor vehicle while intoxicated or under the influence of alcohol or drugs.<sup>16</sup> Chemical tests indicating the blood alcohol content of the driver's "blood, urine, breath, or other bodily substance" were admissible evidence. If the chemical test showed that a statutorily specified level of alcohol was present in the arrestee's blood, a rebuttable presumption of intoxication was created. A BAC of .10% or more created the presumption that the defendant was under the influence of alcohol;<sup>17</sup> more than .05% but less than .10% gave rise to no presumption but was admissible to be considered with other competent evidence in determining guilt or innocence;<sup>18</sup> .05% or less created the presumption that the defendant was not under the influence of alcohol.<sup>19</sup> Thus, under

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16. Prior to the adoption of S.B. 432, § 4511.19 provided: "No person who is under the influence of alcohol or any drug of abuse, or the combined influence of alcohol and any drug of abuse, shall operate any vehicle, streetcar, or trackless trolley within this state." OHIO REV. CODE ANN. § 4511.19 (Page 1982) (current version at OHIO REV. CODE ANN. § 4511.19 (Page Supp. 1982)).

17. *Id.* § 4511.19(B) (repealed 1983).

18. *Id.* § 4511.19(A) (repealed 1983).

19. *Id.* § 4511.19(C) (repealed 1983). Section 4511.19 prior to S.B.432 was very similar to UNIFORM VEH. CODE § N-902.1 (Supp. II 1976).

Ohio law before S.B. 432, the trier of fact had to find beyond a reasonable doubt that the defendant was "under the influence" of alcohol or a drug of abuse. The results of the chemical test could aid in that finding, as could the personal characteristics of the driver at the time of arrest: erratic driving, an odor of alcohol, slurred speech, an inability to walk a straight line or to communicate coherently. Conversely, the defense could rebut the state's claim of intoxication with evidence of the defendant's sobriety. In Ohio the "under the influence" standard was subjective, somewhat undefined, and often difficult to prove.<sup>20</sup>

Yet the 1983 amendments to the DWI law retain this offense for situations in which the defendant is charged with driving under the influence of a drug of abuse, or when the defendant is charged with operating under the influence of alcohol and refuses to submit to a chemical test, or when the defendant's chemical test reading does not surpass the proscribed level.<sup>21</sup> The most significant amendment to the DWI statute is the creation of three new offenses as alternatives to the traditional DWI prosecution. The new *per se* offenses prohibit operation of a motor vehicle if a person has:

- 1) a concentration of ten-hundredths of one percent or more by weight of alcohol in his blood;
- 2) a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath;
- 3) A concentration of fourteen-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his urine.<sup>22</sup>

The alternate offenses greatly simplify the task of the prosecution. The trier of fact need not find that the defendant operated a motor vehicle under the influence of alcohol or drugs, but only that the defendant operated a motor vehicle and that the defendant's chemical test reading was at the proscribed level. The critical issue at trial becomes the accuracy of the test, not the behavior of the accused.<sup>23</sup>

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20. In 1971 the Ohio Supreme Court held that it was not sufficient for the prosecution to establish that the alcohol consumed by the defendant had some influence on his behavior. Rather, the court required the trier of fact to find that the alcohol had deprived the defendant of the "clearness of intellect and control which one would otherwise possess." *State v. Hardy*, 28 Ohio St. 2d 89, 91-92, 276 N.E.2d 247, 249-50 (1971).

21. OHIO REV. CODE ANN. § 4511.19(A) (Page Supp. 1982).

22. *Id.* § 4511.19(A)(2)-(4).

23. There is a distinct hierarchy of accuracy for the three tests. Blood tests are the most accurate, giving a direct reading of blood alcohol concentration, and if properly ad-

The per se offense may be misunderstood as creating a conclusive presumption of intoxication, thus shifting the burden of proof from the prosecution, and depriving the defendant of his right to a jury determination. This misunderstanding arises because under the statute existing prior to the development of the per se offense, a specified BAC created a rebuttable presumption of intoxication. However, the per se offenses do not involve presumptions and, technically, are not concerned with intoxication. They provide an alternative offense to driving under the influence of alcohol, prohibiting the operation of a motor vehicle when the proscribed level of alcohol is found in the blood, breath, or urine.<sup>24</sup> The prosecution need not prove that the defendant was either intoxi-

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ministered, are virtually immune to challenge. Breath tests are subject to a wide array of challenges, and there is extensive literature detailing the scientific reasons for and frequency of the inaccuracy of breath tests. It is generally conceded, for instance, that a margin of error of as much as .03 is possible, and inaccuracy may result depending upon what the person tested had recently eaten, whether he belched or vomited during or just before the test, whether he took medication, or a host of other personal characteristics. See Taylor, *Blood-Alcohol Analysis and the Fourteenth Amendment*, 10 SEARCH & SEIZURE L. REP. 117-19 (1983). But see *State v. Brockway*, 2 Ohio App. 3d 227, 441 N.E.2d 602 (1981) (alcohol breath test results sufficiently reliable to be admitted without expert testimony if conducted under approved methods). The notorious inaccuracy of urine tests makes their inclusion in the statute unwise.

For discussions of criminal defense approaches to the Ohio DWI charges, see generally L. TAYLOR, *DRUNK DRIVING DEFENSE* 163-201, 265-325 (1981 & Supp. 1983); 3 R. ERWIN, *DEFENSE OF DRUNK DRIVING CASES* § 33 (3d ed. 1983 & Supp. 1984).

24. A claim that a similar statute created an irrebuttable presumption of intoxication was rejected in *City of Seattle v. Urban*, 32 Wash. App. 634, 648 P.2d 922 (1982) (statute sets out alternative methods of committing the crime of driving under the influence); see also *Coxe v. State*, 281 A.2d 606 (Del. 1971) (state still has burden of proving physical control of vehicle and failure of breath test beyond a reasonable doubt); *People v. Ziltz*, 98 Ill.2d 38, 455 N.E.2d 70, 72-73 (1983) ("When the State has proved that the defendant was operating the vehicle and his blood alcohol concentrate was over 0.10%, there are no presumptions or inferences . . . . The state must still persuade the trier of fact that the defendant was operating a motor vehicle and had a [BAC] in excess of 0.10%").

An alternative constitutional challenge to the per se offenses raises the claim that the statute is vague and does not provide notice of the offense because a defendant, who is not completely prohibited from some drinking and then driving, has no way of knowing when his BAC reaches the prohibited level. This claim comes close to being frivolous. There are ways for an individual to determine his own capacity by consulting one of the many frequently published charts. See, e.g., *supra* note 10. Moreover, the law intends to encourage drinkers to act conservatively when they intend to drive, and it is not unfair to place the burden upon the individual to know when his conduct becomes a potential violation. It is a matter within the knowledge of any person of common understanding. A trend among state courts considering comparable statutes has been to reject both the vagueness and lack of notice claims. See Gifford and Friedman, *A Constitutional Analysis of Ohio's New Drunk Driving Law*, 15 U. Tol. L. Rev. 133, 136-44 & 169 (1983).

A recent Canton municipal court decision finding the statute unconstitutionally vague was reversed by the Fifth District Court of Appeals. *State v. Jackson*, No. 6253 (1983) (citing with approval *City of Columbus v. Adams*, No. 83AP-305, slip op. (10th Dist. Ct.

cated or driving under the influence, for neither element is part of the offenses described in sections 4511.19(A)(2—4) of the Ohio Revised Code.<sup>25</sup>

### B. *Penalty Changes*

S.B. 432's amendments to the penalties for DWI<sup>26</sup> were designed to communicate the seriousness of the crime to apprehended drivers, to deter other drivers with the threat of certain and harsh punishment, and to eliminate lenient sentences. The legislature reenacted the mandatory minimum three-day sentence for first offenders,<sup>27</sup> except this amendment requires that the days

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App. Aug. 4, 1983)). The defendants in *Jackson* have given notice of their intention to file an appeal in the Ohio Supreme Court. *But cf. infra* notes 72-73 and accompanying text.

25. In most Ohio jurisdictions, arrestees are charged with violating both § 4511.19(A)(1) and one of the per se sections, § 4511.19(A)(2)-(4). Bender, *Ohio's New Alcohol Impaired Driving Law—A Judicial Perspective*, 15 U. TOL. L. REV. 117, 130-32 (1983) [hereinafter cited as *Judges' Survey*]. Eighty-five percent of the judges responding to the question, or 105 out of 123, reported that offenders in their courts are usually charged under both (A)(1) and one of (A)(2)-(4). *Id.* Thus, the prosecutor has great leverage, since the arrestee may be subject to drunk driving prosecution through two different routes, although only one conviction is possible.

As an aid to enforcement of the per se laws, the new law removes some of the previously existing impediments to administration of blood tests. OHIO REV. CODE ANN. § 4511.19(B) (Page Supp. 1982). It allows blood tests to be administered by "a qualified technician or chemist." Under the former law, only physicians and registered nurses were permitted to administer blood tests. The person responsible for drawing blood may use his own judgment in determining whether the "physical welfare" of the driver would be adversely affected by the test. The arrested driver may have similarly qualified people of his choice administer tests in addition to those required by the police. Further, the new law makes a person who withdraws blood immune from criminal prosecution and civil liability, except in cases of malpractice "for any act performed in withdrawing blood from the person." These revisions are important when an allegedly intoxicated driver is hospitalized. Technicians, rather than physicians or nurses, normally perform blood tests on patients; the former statute's requirement that a doctor or nurse perform the test required an unnecessary departure from normal hospital procedure. Where an unconscious driver is given a blood test, the immunity from battery given by the new law prevents the driver from suing the person who administered the test for an unconsented intentional touching while the driver was unconscious.

26. *See* OHIO REV. CODE ANN. § 4511.99(A) (Page Supp. 1982).

27. For three decades, the Ohio General Assembly has been trying to ensure that DWI offenders spend at least three days in jail. A provision specifying that "no court shall suspend the first three days of any sentence imposed under this section" was added to § 4511.99 by S.B. 32, enacted by the General Assembly and signed into law by Governor Lausche in 1953. 1953-54 Ohio Laws 461 (current version at OHIO REV. CODE ANN. § 4511.99(A) (Page Supp. 1982)).

Some repeat offenders (those who for a period of five years have not been convicted of the state offense, of violation of a municipal ordinance relating to driving under the influence of alcohol or a drug of abuse, nor aggravated vehicular homicide, *see* OHIO REV. CODE ANN. § 2903.06 (Page 1982), or vehicular homicide, *see* OHIO REV. CODE ANN. § 2903.07 (Page 1982), in a case in which the defendant was found to be under the influence



be served consecutively.<sup>28</sup> The purpose of this language was to avoid judicial circumvention of the statute. The legislature sought to foreclose sentencing practices which, though technically in compliance with statutory requirements, failed to treat the offense as seriously as intended by the General Assembly.<sup>29</sup> For example, the amendment sought to prevent substituting attendance at a treatment program for incarceration, allowing the sentence to be served on three separate Saturdays, or satisfying the three-day requirement by beginning confinement at 11:45 p.m., Monday night and ending at 12:01 a.m., Wednesday morning. The state legislature apparently recognized that leniency for drunk drivers often derives from a failure to perceive a DWI defendant, who is often a model citizen, as a criminal. Its stringent measures reflect the intent to alter this belief.<sup>30</sup> The General Assembly, therefore, felt it necessary not only to provide mechanisms for harsh punishment, but also to prevent the exercise of judicial discretion.<sup>31</sup>

The recidivism problem was confronted by adding enhanced minimum penalties for repeat offenders. Second offenders are subject to incarceration for not less than ten consecutive days, and defendants who have been convicted of more than one prior offense are subject to incarceration for not less than thirty consecutive days.<sup>32</sup> However the rule announced by the United States Supreme Court in *Baldasar v. Illinois*<sup>33</sup> suggests that the heavier penalty may not constitutionally be imposed upon all recidivists.

In *Baldasar*, the Court held that an uncounselled misde-

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of alcohol or a drug of abuse) are, under the 1983 amendments, treated similarly to first offenders. *See* OHIO REV. CODE ANN. § 4511.99(A)(1) (Page Supp. 1982).

28. OHIO REV. CODE ANN. § 4511.991 (Page Supp. 1983) provides: "As used in section 4511.99 . . . three consecutive days means seventy-two consecutive hours."

29. Interview with Ronald Adrine, Cleveland Municipal Court Judge (March 20, 1984); Interview with Nancy Welchans, Clerk of Courts, Cleveland Heights, Ohio (March 20, 1984).

30. *See supra* note 9.

31. Early Ohio Senate proposals for S.B. 432 required judges to state in writing their reasons for allowing plea bargaining in DWI cases, indicating the General Assembly's concern for controlling the leniency that had become endemic to DWI sentencing. REPORT OF SENATE JUDICIARY COMMITTEE ON SUB. S.B. 432, OHIO GEN. ASSEMBLY OF 1982, at 7 (Apr. 22, 1982).

32. OHIO REV. CODE ANN. § 4511.99(A)(2)-(3) (Page Supp. 1982). The increased penalties are applicable to DWI offenders who, within the previous five years, have been convicted of an offense under § 4511.19, or under a municipal ordinance prohibiting driving under the influence of alcohol or drugs, or convicted of aggravated vehicular homicide or vehicular homicide arising out of operating a motor vehicle while under the influence of alcohol or drugs. Ohio judges have identified the increased penalties for repeat offenders as among the best features of S.B. 432. *Judges' Survey, supra* note 25.

33. 446 U.S. 222 (1980) (per curiam).

meanor theft conviction<sup>34</sup> could not be used to elevate a subsequent conviction for a similar offense to a felony. Although there is a difference between a prior conviction establishing the ground to elevate a second offense from a misdemeanor to a felony, as in *Baldasar*, and the Ohio DWI formula, which merely enhances the penalty for the second misdemeanor, the Supreme Court has chosen actual incarceration as the critical point for the right to counsel.<sup>35</sup> Until narrowed or reversed, it is fair to assume that *Baldasar* precludes imposition of the recidivist penalty when based upon prior uncounselled DWI convictions. In such cases, offenders may not be sentenced as recidivists. An exception to this rule may exist, however, if the record of the earlier conviction discloses that the defendant knowingly and intelligently waived his right to counsel.<sup>36</sup> Only then, under the *Baldasar* approach,

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34. Even though counsel was not offered or provided for the misdemeanor offense, that conviction was *valid* under *Scott v. Illinois*, 440 U.S. 367 (1979), because the defendant had only received a fine and suspended sentence.

35. *Id.* at 373 (Stewart, J. concurring). While Justice Marshall did not join Justice Stewart's concurring opinion, he voiced agreement in his own concurrence. 446 U.S. at 227 (Marshall, J., concurring). Justice Blackmun cast the fifth vote for reversal in *Baldasar* and clouded its precedential value. His position mandated reversal in that case because the original conviction was for an offense punishable by more than six months imprisonment. Justice Blackmun maintained that such offenses automatically create the right to counsel, but this position had been rejected by the majority in *Scott*, 440 U.S. at 373. With the departure of Justice Stewart, it is not at all clear that a majority of the Court would reaffirm the position in *Baldasar*. *Cf.* *Lewis v. United States*, 445 U.S. 55 (1980). *Lewis*, decided earlier in the same term as *Baldasar*, let stand a conviction on a federal charge of possession of a firearm by a person who had been convicted of a felony in any state or federal court, even though the prior state conviction was without counsel and automatically subject to collateral attack. The Court relied upon the "unambiguous" language of the statute, which prohibited possession by any person "who has been convicted," as opposed to persons whose convictions were not subject to collateral attack. *Id.* at 60. On constitutional grounds, the Court relied on *Scott* and stated that an uncounselled conviction is not invalid for all purposes. The federal criminal offense enforced a civil disability and the prior offense, the Court held, did not "'support guilt or enhance punishment.'" *Id.* at 67 (quoting *Burgett v. Texas*, 389 U.S. 109, 115 (1967)).

36. "[C]ourts indulge every reasonable presumption against waiver" of fundamental constitutional rights and . . . we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.

*Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937); *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 307 (1937)).

Under that standard, the common municipal court practice of having an accused sign a waiver of the right to counsel at the time he pleads, without inquiry as to his understanding of such an act, will not qualify as an intelligent waiver. The constitutionally suspect situation will arise when a municipal court does not assign counsel for a first offender, since that court (like the City of Cleveland's) almost never jails a first offender under its municipal

may prior uncounselled convictions provide the basis for an enhanced penalty.

Aside from these constitutional issues, the law's incarceration requirement is somewhat uncertain. The draft of S.B. 432 that passed the Senate permitted driver's intervention programs as a substitute for the mandatory three-day sentence for first offenders.<sup>37</sup> The only condition was that such intervention programs be certified by the State Director of Health. But those provisions were rejected in the revised bill drafted by the House of Representatives, which was adopted and became law. However, the section requiring certification of intervention programs was preserved in the final version of the statute.<sup>38</sup> The purpose of that section was to ensure that alcohol and drug intervention programs meet certain minimum standards and not be used merely to avoid the mandatory sentences. By retaining the certification section the legislature has generated some confusion and provided a basis for some judges to substitute intervention for imprisonment.<sup>39</sup> In all likelihood, the General Assembly intended that participation in the intervention programs be assigned as a condition of sus-

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ordinance. If a neighboring community, which prosecutes under the state statute or an identical municipal ordinance, uses the uncounseled municipal conviction as a first offense in order to trigger a minimum 10-day jail sentence, a constitutional problem will arise. See *supra* note 35.

37. Am. Sub. S.B. 432, 114th Gen. Assembly, Reg. Sess. § 4511.99(A)(1) (Apr. 29, 1982) (as passed by the Senate).

38. OHIO REV. CODE ANN. § 3720.06 (Page Supp. 1982).

39. Another provision of the legislation has added to the confusion and serves as additional justification for judges assigning first offenders to intervention programs rather than to jail. OHIO REV. CODE ANN. § 4511.191 (Page Supp. 1982). That section creates a driver's treatment and intervention special account, funded by a \$75.00 license reinstatement fee. Nowhere has the legislature clearly indicated that intervention programs are to be available *in addition* to incarceration, although the legislature probably intended that the programs not be used in lieu of incarceration. H.B. 460, which has been passed by the House and is pending before the Senate, would amend § 4511.99(A) to allow intervention programs as an alternative to jail for first offenders. If enacted, the amendment would clarify the anomaly between § 4511.99(A) and § 3720.06. Otherwise the uncertainty will remain.

Kenneth Cox, Director of the Ohio Department of Highway Safety, estimates that half of the judges in Ohio are interpreting the law to allow intervention. Cleveland Plain Dealer, Dec. 13, 1983, at 5-A, col. 1. Almost half of the judges responding to the *Judges' Survey*, *supra* note 25, said they did not sentence first offenders to mandatory jail terms, and more than three-quarters of the judges who did not sentence first offenders to mandatory jail terms assigned intervention instead. Of course, the survey included many judges interpreting municipal ordinances that may be even less clear than the state statute in requiring jail terms. See, e.g., *infra* notes 105-06 and accompanying text. Cox's estimate of the number of judges who have interpreted the *state* statute to allow intervention is probably too high.

pending a sentence of imprisonment except for the first three days. While mandatory imprisonment was the most significant penalty revision of S.B. 432, the law also toughened the provisions governing license suspension<sup>40</sup> and modified the point system.<sup>41</sup>

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40. Formerly, the statute required either revocation of a DWI offender's license or a 30-day to three-year suspension. OHIO REV. CODE ANN. § 4507.16(A)-(B) (Page 1982) (current version at OHIO REV. CODE ANN. § 4507.16(A)-(B) (Page Supp. 1982)). S.B. 432 changed § 4507.16(B) to require either revocation or a minimum 60-day license suspension, keeping the three-year maximum "[i]f the offender has not been convicted, within five years of the offense, of a violation of section 4511.19 . . . or of a [related] municipal ordinance . . ." *Id.* § 4507.16 (B)(1) (Page Supp. 1982). As with the mandatory minimum jail sentences, repeat offenders are treated more harshly. A second offense within 5 years triggers a minimum 120-day, maximum 5-year suspension, *id.* § 4507.16(B)(2), and any subsequent offense within 5 years triggers a minimum 180-day, maximum 10-year suspension. *Id.* § 4507.16(B)(3). Complete license revocation is also available to the court in all cases. *Id.* § 4507.16(C). For some offenders, these longer suspensions will be a significant burden. Typically, first offenders are given the minimum license suspension. *See Hearings, supra* note 9, at 75 (testimony of Lt. Col. Johnny G. Lough, Maryland state police). For others, however, license suspension is a meaningless sanction. Despite the additional penalties of impoundment of registration and license plates available under OHIO REV. CODE ANN. § 4507.38(C) (Page Supp. 1982) for driving under suspension (DUS), and the fines and imprisonment authorized under *id.* § 4507.99(B), some offenders refuse to respect the suspension and continue to drive. An extreme example is Spencer Blatnik of Sandusky, Ohio who has been convicted 17 times of driving under suspension or without an operator's license. Mr. Blatnik made headlines because, after a history of 13 DWI charges in 6 years, of which he was convicted on 6 and had 7 reduced, he was sentenced to a year in jail. *Cleveland Plain Dealer*, Jan. 27, 1984, at 8-B, Col. 1. His case serves to illustrate that some offenders will simply ignore a license suspension. A recent California study estimates that 65% of drivers with suspended licenses drive despite the suspension. *See R. HAGEN, E. MCCONNELL & R. WILLIAMS, SUSPENSIONS AND REVOCATION EFFECTS ON THE DUI OFFENDER 12* (State of Cal. Dept. of Motor Vehicles No. 75, 1980) [hereinafter cited as LICENSE SUSPENSION STUDY].

41. The changes made by S.B. 432 in § 4507.40 which deal with the points courts must assign to various offenses (an accumulation of a certain number of points will result in license deprivation by the state Bureau of Motor Vehicles) are poorly drafted and have been another source of confusion for courts trying to assess penalties for drunk driving offenders. Section 4507.40(G)(4) provides that "[v]iolation of division (A) of § 4511.19 of the Revised Code or of any ordinance prohibiting the operation of a motor vehicle while under the influence of alcohol or drugs" is a six-point offense. OHIO REV. CODE ANN. § 4507.40(G)(4) (Page Supp. 1982). But § 4507.40(G)(12) provides that "[v]iolation of division (B) of § 4511.19 of the Revised Code or any ordinance prohibiting the operation of a motor vehicle with a specified blood, breath, or urine alcohol concentration" is a four-point offense. Section 4511.19(B), however, does not define an offense; it merely outlines evidentiary and testing procedures for the chemical test offenses specified in § 4511.19(A)(2)-(4). The blame for this error can be laid squarely at the House of Representatives' door. As reported by the House Judiciary & Criminal Justice Committee on November 16, 1982, § 4511.19(A) duplicated the old "driving under the influence of alcohol or any drug of abuse, or the combined influence of alcohol and any drug of abuse" prohibition. Section 4511.19(B) contained the three new per se offenses, § 4511.19(B)(1)-(3). REPORT OF HOUSE JUDICIARY & CRIMINAL JUSTICE COMMITTEE ON SUB. S.B. 432, OHIO GEN. ASSEMBLY OF 1982, at 73 (Nov. 16, 1982). Thus, the original purpose of § 4507.40(G)(4) was to assign a six-point penalty to the old "driving under the influence" offense, and the purpose of

### C. *Implied Consent*

The 1983 revision of the DWI laws changed the implied consent law significantly.<sup>42</sup> It provides that any person operating a motor vehicle is deemed to have consented to a chemical test if arrested for DWI. The consent encompasses a test not only for alcohol but for drugs as well.<sup>43</sup> The apparent reason for this change was the legislature's awareness of the increased role of drugs as a cause of impaired driving. To stress the importance of the chemical test, the legislature altered the administrative license suspension provision as well. It lengthened the suspension following refusal to submit to a chemical test to one year.<sup>44</sup>

In addition, the law allows for police seizure of an arrestee's driver's license, and a judicial suspension pending outcome of the criminal prosecution. The arresting officer is required to seize the license of a driver who refuses to take a chemical test, or of a driver who has submitted to a chemical test which registered the presence of alcohol or drugs at the proscribed level. Following seizure the officer must forward the license to the court having jurisdiction over the criminal offense.<sup>45</sup> Obviously, the immediate

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§ 4507.40(G)(12) was to assign a four-point penalty to the new per se offenses. Why the Committee chose to make this distinction is unclear. Perhaps the drug-related offenses of § 4511.19(A) were considered more serious, or the obvious impairment required to prove an offense under § 4511.19(A) was considered more culpable. The lower point assessment was possibly meant to act as an inducement to an arrested driver to submit to a chemical test. In any case, the Committee's system was dismantled by a floor amendment on November 17, 1982 (offered by Rep. Petro), that put all of the offenses under § 4511.19(A)(1)-(4). J. Ohio H.R., Nov. 17, 1982, at 2715. Unfortunately, the General Assembly failed to recognize the effect of this change on § 4507.40.

42. OHIO REV. CODE ANN. § 4511.191 (Page Supp. 1982).

43. *Id.* § 4511.191(A).

44. *Id.* § 4511.191 (D). The administrative suspension by the registrar of motor vehicles does not commence until after the administrative hearing or judicial appeal which are available following notification of the arrestee by the registrar. The grounds for appeal are specified in § 4511.191(F), and have been enlarged to include "whether the bodily substance taken from the arrested person was analyzed" in a manner approved by the director of health. *Id.* § 4511.191(F). There is no reason for inclusion of this ground for appeal from the suspension, as § 4511.191(D) authorizes an administrative suspension only in cases where the driver *refuses* to submit to chemical testing. However, it is possible that the General Assembly intended § 4511.191(F) to be the appeal provision for the judicial suspension procedure. See *infra* note 70 and accompanying text.

45. OHIO REV. CODE ANN. § 4511.191(E) (Page Supp. 1982). Strictly speaking, the judicial suspension is not imposed for an implied consent violation. The principle of implied consent is that a driver has agreed to a chemical test upon a police officer's justified request merely by being licensed and being on the public highways of Ohio. A driver who agrees to a test but registers an illegal reading may still be subject to a judicial suspension, even though he has not withdrawn his implied consent to a test which is a condition of driving.

seizure and judicial proceedings that follow were intended by the legislature to hasten the process of removing drunk drivers from the roads.

Interestingly, when the police officer seizes a license no suspension occurs. The driver merely loses proof of license.<sup>46</sup> The legislature cautiously drafted this section to authorize only a deprivation of the tangible license, not a loss of driving privileges. Pretrial license suspension is mandated at the defendant's initial court appearance, which must be held within five days of arrest if the court determines one of the following conditions to be true:

[T]he defendant has previously been convicted under the state statute or a municipal ordinance relating to operating a motor vehicle under the influence;

at the time of arrest, the defendant's license was suspended or revoked;<sup>47</sup>

the conduct which led to the pending DWI charge caused death or serious physical harm to another person;

the defendant failed to appear at the initial appearance; or

the court or referee decides that the defendant's continued driving will be a threat to public safety.<sup>48</sup>

If one of these factors is met, the defendant's license is suspended until disposition of the criminal case or until the court determines that the police officer did not have probable cause to make the arrest.

A driver's license, once available or issued under state law, is a statutory entitlement involving an important private interest. Accordingly, state procedures resulting in the deprivation of that interest must comport with due process protections.<sup>49</sup> The administrative and judicial suspensions of a defendant's driver's license, while a DWI charge is pending, must be tested under the *Mackey v. Montrym*<sup>50</sup> standard. In that case, the United States Supreme Court addressed the Massachusetts law which requires

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46. It is not an offense to operate a motor vehicle without physical possession of one's driver's license. When a driver has his license on or about his person, it is an offense to fail to display it when lawfully requested to do so, but the failure to have the license on or about one's person is only prima facie evidence of not being licensed. OHIO REV. CODE ANN. § 4507.35 (Page 1982); see also Op. Att'y Gen. 7575 (1957) ("not guilty of an offense under this section if [the operator] fails to display his license by reason of the fact that such license is not on or about his person and accessible for display"); cf. Gifford and Friedman, *supra* note 24, at 151.

47. OHIO REV. CODE ANN. § 4511.191(K) (Page Supp. 1982).

48. *Id.* Time spent under a pretrial suspension is credited towards a suspension imposed following conviction under § 4511.19.

49. See *Bell v. Burson*, 402 U.S. 535, 539 (1971).

50. 443 U.S. 1 (1979).

the registrar of motor vehicles to suspend a driver's license, without a hearing, for ninety days when a police report indicates a DWI arrest and a refusal to consent to a breath test. The licensee, upon surrender of the license, is entitled to an immediate hearing before the registrar where he may challenge, among other things, the officer's claim that there was probable cause to arrest.<sup>51</sup>

The *Montrym* Court applied the three-part balancing test of *Mathews v. Eldridge* to measure the sufficiency of the state procedures in deprivation cases:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>52</sup>

Analysis of the private interest in *Montrym* proceeded from the Court's recognition that a driver's license is a protected "property interest" to which due process guarantees apply.<sup>53</sup> To measure the impact upon the private interest, the majority examined two criteria: the length of the suspension period and the timeliness of postsuspension review.<sup>54</sup>

The second aspect of the three-part standard requires an assessment of the "risk of an erroneous deprivation of [the private] interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards."<sup>55</sup> This inquiry involves gauging the "relative reliability of the procedures

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51. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f)-(g) (West Supp. 1983). *Montrym* brought a class action suit in federal district court, challenging the constitutionality of the Massachusetts suspension procedure. A three-judge panel declared the statute unconstitutional on its face, as violating fourteenth amendment due process requirements. *Montrym v. Panora*, 429 F. Supp. 393 (D. Mass. 1977).

52. 443 U.S. 1, 10 (citing *Mathews v. Eldridge*, 424 U.S. 319, 325 (1976)).

53. *Id.* at 10 & n.7.

54. *Id.* at 11-12; cf. *Dixon v. Love*, 431 U.S. 105 (1977) (upholding Illinois implied consent law because availability of hardship relief mitigates delay in postsuspension review). The Illinois law, which involved a one-year or indefinite suspension, and a delay of up to 20 days before a postsuspension hearing, was upheld in *Love*, apparently because hardship relief was available. 431 U.S. at 113. In *Montrym*, however, the analogous Massachusetts law afforded no hardship relief. Yet Chief Justice Burger minimized this, declaring that the critical factors are the duration of a potentially wrongful deprivation and the timeliness of available postsuspension review. Based on these factors, the majority concluded that neither the nature nor the weight of the private interest in *Montrym* was great. 443 U.S. at 12.

55. 443 U.S. at 10 (citing *Mathews v. Eldridge*, 424 U.S. 319, 325 (1976)).

used and the substitute procedures sought.”<sup>56</sup> Applying this standard, the Court stated that the due process clause does not require procedures “so comprehensive as to preclude any possibility of error.”<sup>57</sup> Rather, Chief Justice Burger asserted for the majority that a predeprivation hearing is not an absolute requirement. Despite the judicial predilection for such review, the Court found that postdeprivation hearings suffice, requiring only “that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.”<sup>58</sup> The Court concluded that an evidentiary hearing is not necessary to guarantee due process. To support this conclusion, the majority reasoned that a predeprivation procedure—an arrest—requiring a police officer to rely on objective facts, inevitably within his personal knowledge, comported with due process requirements.<sup>59</sup> Further support for the Massachusetts procedure was found in the fact that an officer is well-trained and has incentives to report the facts truthfully because of potential civil liability. Thus, the procedure had the requisite reliability to validate license suspension without a hearing.<sup>60</sup>

The final leg of the *Mathews v. Eldridge* analysis as applied in

56. 443 U.S. at 13.

57. *Id.*

58. *Id.* Justice Stewart, in dissent, differed with the majority’s perception of due process in property deprivation cases. For him, the fourteenth amendment’s due process requirement mandates a predeprivation hearing, “a presumptive requirement of notice and a meaningful opportunity to be heard *before* the state acts . . . .” *Id.* at 20 (emphasis in original).

59. *Id.* at 13–14. “Cause arises for license suspension if the driver has been arrested for driving while under the influence of an intoxicant, probable cause exists for arrest, and the driver refuses to take a breath-analysis test.” *Id.*

60. *Id.* at 13–17. The Chief Justice’s equation of an arrest with a pre-suspension hearing appears to be a cavalier treatment of the hearing requirement. It should be noted, however, that the law permits a police officer to make warrantless arrests, a deprivation of a liberty interest, without a prior hearing and without an inquiry into the exigency or necessity of the deprivation. Perhaps the analogy to warrantless arrests, especially of a community resident to be charged with a misdemeanor and who has no history of failing to appear in court, would have helped the majority to put the prehearing license deprivation issue in perspective.

Critics of *Montrym* agree with the dissent’s claim that the majority spurned the emergency doctrine of *Bell v. Burson*, 402 U.S. 537, 542 (1971), which formerly offered the only justification for a prehearing suspension. The majority’s balancing of public interests against the right to presuspension review has also been questioned. See Casenote, *The Demise of the Emergency Doctrine of Procedural Due Process: Mackey v. Montrym*, 21 B.C.L. REV. 741, 760 (1980) (*Montrym* might create opportunity for states to assert other nonemergency interests to justify avoiding presuspension hearings); Note, *Implied Consent Statutes and the Requirements of Due Process: Are They Compatible?*, 26 LOY. L. REV. 180, 189



*Montrym* requires balancing the governmental function served by the summary procedure against the additional burdens which would be imposed by an alternate procedure, as well as the degree to which alternative procedures would hinder fulfillment of the legitimate government purpose.<sup>61</sup> The Court found the state's interest in guaranteeing the safety of its highways to be of paramount importance. Thus, the abbreviated deprivation procedure, which might not satisfy a lesser governmental interest, passed muster.<sup>62</sup> The summary sanction, the majority concluded, served the governmental purpose well: its very existence deters drunk driving; it provides strong inducement to take the breath-analysis test, thereby serving the state's interest in obtaining reliable evidence for use in the subsequent criminal prosecution; and, "in promptly removing such drivers from the road, the summary sanction of the statute contributes to the public safety."<sup>63</sup> Thus, the Court concluded that the Massachusetts procedure did not violate due process requirements.

Ohio's DWI law allows for two suspension procedures—administrative, by the registrar of motor vehicles, and the hybrid police-judicial pretrial suspension. To test their constitutionality, both must be measured against the *Mathews v. Eldridge* due process standards as applied in *Montrym*. The administrative suspension raises no constitutional issue because Ohio's statutory protections far exceed the comparable procedures in the Massachusetts statute upheld in *Montrym*. A request for a hearing under the Ohio statute delays license suspension until the "termination of any hearing or appeal. . . ."<sup>64</sup> Thus, the Ohio proce-

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(1980) (there are more rational ways of protecting state interests in highway safety than deprivations of individual due process rights).

61. 443 U.S. at 17-19.

62. *Id.* at 17. The majority reasoned that this interest in safety distinguished *Montrym* from *Bell v. Burson*, 402 U.S. 535 (1971). In *Bell*, the Court held that a state could not suspend the license and registration of a driver who had been involved in an accident and failed to post security to cover damages, without first providing an opportunity to determine whether there was a reasonable possibility of a judgment being rendered against the driver. *Id.* at 542. The Court noted that when a state terminates such an interest, "it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before termination becomes effective." *Id.* (emphasis in original) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). The majority avoided the *Bell* rule in *Montrym* by finding that preservation of highway safety was of greater public interest than assuring the financial responsibility of drivers involved in accidents as in *Bell*.

63. *Montrym*, 443 U.S. at 18. The Court argued that requiring a presuspension hearing would give drivers an incentive not to take the test, and serve as a "dilatatory tactic." *Id.*

64. OHIO REV. CODE ANN. § 4511.191 (E) (Page Supp. 1982). A favorable decision at the hearing or on appeal results in the dissolution of the suspension order.

dure expressly provides the driver with an avenue to avoid suffering the detriment of a prehearing suspension. The suspension is automatically delayed upon the driver's filing a request for a hearing. Like the Massachusetts procedure upheld in *Montrym*, the Ohio statute allows a suspended driver to challenge, at the hearing, the police officer's claim that probable cause supported the arrest and the request that the driver take a chemical test.<sup>65</sup>

The judicial suspension procedure in section 4511.191, however, creates a closer due process question. Each step of the judicial suspension procedure must be evaluated by the due process criteria of *Montrym*. First, a driver who is arrested for DWI has his license taken away for failing or refusing a chemical test.<sup>66</sup> This action by the police officer probably does not create a due process issue, since an Ohio driver need not have physical possession of his license in order to drive.<sup>67</sup> The arrestee has not, at this point, been deprived of his driving privilege.

Next, the police officer is required to forward the license to the court in which the arrestee is scheduled to appear.<sup>68</sup> Within five days of the arrest, that court must hold a hearing to determine whether to suspend the arrestee's driving privileges pending the outcome of the trial on the DWI charge (or the grant of a motion to dismiss the charge for lack of probable cause).<sup>69</sup> Section 4511.191(K) sets out the five criteria which the court must use to determine whether to suspend the arrestee's license.<sup>70</sup> The section fails, however, to provide for review at the five-day hearing of the circumstances which resulted in the arrest. The arrestee's license may be suspended for a lengthy period without the opportunity

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65. *See id.* § 4511.191(F).

66. *Id.* § 4511.191(K).

67. Failure to have physical possession of one's license while driving in Ohio is not of itself an offense. *See supra* note 46 and accompanying text.

68. OHIO REV. CODE ANN. § 4511.191(K) (Page Supp. 1982).

69. *Id.*

70. The five criteria include: whether the defendant has a previous DWI conviction; whether his license was suspended or revoked when arrested; whether he caused death or serious physical harm to another; whether he failed to appear at the five-day hearing; or whether he poses a continuing safety hazard. OHIO REV. CODE ANN. § 4511.191(K)(1)-(5) (Page Supp. 1982). Consequently, the § 4511.191(K) procedure creates an opportunity to be heard in an impartial forum before a license suspension is imposed. Moreover, the criteria for license suspension are directly related to the prospective hazard that continued driving by the defendant would pose, not on the driver's refusal to cooperate with the police. This procedure would probably satisfy even the *Montrym* dissenters, who had found the Massachusetts statute deficient because they felt that no adequate predeprivation hearing was provided and because refusal of the chemical test was the basic criterion for license suspension. 443 U.S. at 24-26.

for prompt postdeprivation review of whether there was probable cause for the arrest, whether the chemical test was properly administered, or whether the arrestee was properly warned of the consequences of refusing a chemical test. The availability of this review of the police officer's actions was critical to the holding of the *Montrym* Court that the Massachusetts statute satisfied due process.<sup>71</sup> Therefore, the Ohio judicial suspension procedure may fail the due process test of *Montrym*. Recently, the Supreme Court of Ohio in *City of Columbus v. Adams*<sup>72</sup> ignored the due process deficiencies of the judicial suspension procedure, holding that a suspension under § 4511.191(K) is not a final appealable order.<sup>73</sup>

The argument that the Ohio judicial suspension procedure fails the due process test of *Montrym* is based on a narrow reading of section 4511.191(K). This statute does not expressly exclude these important arrest and testing issues from review at the five-day hearing. Moreover, courts may be justified in allowing these issues to be raised based on other language in section 4511.191.<sup>74</sup> S.B. 432 added to the administrative suspension procedure section 4511.191(F), which provides that the analysis of the bodily substance withdrawn from the arrestee may be challenged at the administrative suspension hearing.<sup>75</sup> Since an administrative suspension is imposed only for refusal of a chemical test, this pro-

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71. *Id.* at 12.

72. 10 Ohio St. 3d \_\_, \_\_ N.E.2d \_\_ (1984).

73. *Id.* We submit that the Ohio Supreme Court's interpretation renders the judicial suspension proceeding vulnerable to a due process challenge in federal court.

The court reversed the Tenth Appellate District's determination that the defense must be allowed to produce evidence at the judicial suspension hearing. The Ohio Supreme Court majority balanced the value of permitting an appeal from the judicial suspension proceeding prior to trial on the criminal charges against the societal interest in the speedy removal of potentially dangerous drivers from the highway as well as the need to conserve judicial resources. The majority concluded that "[t]he interests advanced by [the City of Columbus] are of such a nature and importance to society in general that the inconvenience occasioned by the temporary suspension of driving privileges pales by comparison." *Id.* at \_\_, N.E.2d at \_\_.

Neither court ruled specifically on the scope of the issues that might be raised at the judicial suspension hearing, but implicit in the Supreme Court's opinion is complete approval of the narrow interpretation of the § 4511.191(K) procedure. The three dissenting justices argued that the majority's reasoning "completely ignore[d]" the United States Supreme Court's analysis of due process requirements for the deprivation of driver's licenses. *Id.* at \_\_, \_\_ N.E.2d at \_\_.

74. Statutes should be interpreted as constitutional whenever possible. Justice Brandeis voiced the classic statement of this canon of statutory construction in *Ashawnder v. TVA*, 297 U.S. 288, 348 (1936) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

75. OHIO REV. CODE ANN. § 4511.191(F) (Page Supp. 1982).

vision makes sense only if the legislature intended that this issue be raised at a judicial suspension hearing.<sup>76</sup> Further, section 4511.191(K) should be read to presuppose the legality of the arrest and testing procedures before the application of the five license suspension criteria. To satisfy the due process requirement of *Montrym*, then, the judicial suspension hearing must be expanded to include challenges to the arrest and testing procedures.<sup>77</sup>

## II. HOME RULE IN OHIO AS AN OBSTACLE TO THE DETERRENT EFFECT OF S.B. 432

Proving the deterrent effect of a criminal sanction or judicial rule is difficult under any circumstances.<sup>78</sup> When the sanction is not applied by the courts, no deterrent effect will be found. Despite vast media attention and judicial protestations, defendants convicted of drunk driving in some Ohio communities are not receiving the mandatory jail sentences required by S.B. 432,<sup>79</sup> thereby undermining the law's potential deterrent effect.

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76. The availability of these additional issues at the five-day hearing may, unfortunately, delay imposition of the suspension. The presence of the arresting officer may be required, for instance, and a judge may have to postpone a hearing until he is available. Thus defense attorneys may challenge the arrest and testing procedures purely as a dilatory tactic. Yet some delay may be necessary to satisfy due process. In holding that defendants must be permitted to introduce evidence at the five-day hearing, the Tenth Appellate District has already expanded the scope of that hearing. *See City of Columbus v. Adams*, No. 83AP-305, slip op. (10th Dist. Ct. App. Aug. 4, 1983).

77. S.B. 432 made several other changes in Ohio statutes, two of which may affect the deterrent impact of the law. First, the amendment eased the requirement of proof of financial responsibility for first offenders to recover their licenses. *See OHIO REV. CODE ANN. § 4509.31(B)* (Page Supp. 1982). The change eliminated the de facto license suspension for impecunious first offenders caused by inability to meet the rather stringent financial responsibility requirement. Second, the penalties for vehicular homicide and aggravated vehicular homicide were toughened, and the burden of disproving intoxication upon failure of a chemical test after a fatal accident was shifted to the defendant. *See id.* §§ 2903.06, 2903.07. Thus, in vehicular homicide cases involving drunk driving, the task of the prosecution was simplified and the consequences of conviction were made more serious.

78. The failures of deterrence are readily apparent, but proof of success is immeasurable. While deterrent effects can be judged by reductions in the number of persons apprehended and charged with an offense, that result is not necessarily attributable to the existence of the law or rule but can be caused by any number of extraneous factors, for instance, changes in enforcement policy. Proving the affirmative deterrent effect of any rule, then, is an insurmountable task because it requires determining the reasons law-abiding persons have chosen not to violate a particular law. Imposing the burden of proving a deterrent effect upon those arguing for the law would virtually determine the debate's outcome. This is true whether the debate focuses upon the deterrent effect of strict drunk driving laws, capital punishment, or the deterrent effect of the exclusionary rule as a means of protecting fourth amendment rights.

79. *See OHIO REV. CODE ANN. § 4511.99(A)* (Page Supp. 1982); *see infra* notes 223, 224, 234 and accompanying text.

Instead of being prosecuted under the new state statute,<sup>80</sup> defendants are permitted to plead guilty or no contest to drunk driving charges filed under municipal ordinances. Often these ordinances mirror the former state statute, which did not prohibit suspension of the "mandatory" jail sentence.<sup>81</sup> Alternatively, a defendant may be charged under both the state statute and the municipal ordinance, permitted to plead guilty or no contest to the municipal charge, and in return receive the prosecutor's agreement to dismiss the state charge, which carries the mandatory, nonsuspendable jail sentence.<sup>82</sup> Such plea bargaining has the United States Supreme Court's imprimatur, and constitutional limitations upon the process have been weakened substantially in the last decade.<sup>83</sup>

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80. OHIO REV. CODE ANN. § 4511.19 (Page Supp. 1982).

81. *See id.* § 4511.99 (1976).

82. The City of Cleveland, for instance, charges all arrestees under the state DWI statute, § 4511.19. However, over 90% of those offenders actually convicted plead guilty to the municipal DWI ordinance, CLEVELAND, OHIO, TRAFFIC CODE § 433.01(a) (1976), or its lesser included offense, *id.* § 433.01(b) (1976). Neither municipal ordinance carries a mandatory sentence. These statistics are based on a study of the Cleveland Municipal Court docket. For more detailed data, see *infra* notes 220-23 and accompanying text. A sampling of the ordinances of other Ohio municipalities reveals the disparity that predominates statewide. *See, e.g.,* AKRON, OHIO, TRAFFIC CODE §§ 73.01, 70.99 (1983) (adopting per se offenses identical to state's for both DWI and actual physical control; imposing identical minimum penalties for DWI, but not actual physical control; no requirement for mandatory 72 consecutive hour sentence); CHAGRIN FALLS, OHIO, TRAFFIC CODE §§ 333.01, 303.99 (1983) (adopting per se offenses for DWI and actual physical control but no adoption of mandatory minimum penalties or prohibition of sentence suspension); CLEVELAND HEIGHTS, OHIO, TRAFFIC CODE §§ 333.01, 303.99 (1983) (adopting per se offenses and license suspension identical to state's; without mandatory minimum imprisonment); COLUMBUS, OHIO, TRAFFIC CODE §§ 2133.01, 2133.99 (1983) (adopting per se offenses and mandatory minimum imprisonment; without mandatory license suspension, 72 consecutive hour requirement, or high-risk insurance requirement; DWI a four-point offense); DAYTON, OHIO, TRAFFIC CODE §§ 71.12, 71.1201, 71.99 (1983) (similar to Akron ordinance); TOLEDO, OHIO, TRAFFIC CODE §§ 333.01, 303.99 (1983) (similar to Akron ordinance; imposes mandatory minimum penalties for physical control offenses, includes 72 consecutive hour requirement). Cincinnati, Ohio, has chosen to abolish its municipal DWI ordinances in favor of prosecuting all DWI offenders under the state statute.

83. It was not until 1971 that lingering doubts about the legitimacy of plea bargaining were dispelled. "The disposition of charges by agreement between the prosecution and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged." *Santobello v. New York*, 404 U.S. 257, 260 (1971). Since *Santobello*, the Court has recognized that prosecutors have tremendous freedom in pretrial bargaining, including the ability to threaten unpleasant consequences if the prosecutor's offer is refused, provided the threat involves a legitimate charge within the discretion of the prosecutor. The visitation of those dire consequences following a defendant's refusal to accept the prosecutor's offer is not a due process violation: "[I]n the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). Under *Bordenkircher*, there is no

The municipal ordinances, existing side-by-side with state statutes prohibiting similar conduct, are a result of Ohio's commitment to municipal home rule, embodied in the Ohio Constitution almost three-quarters of a century ago by article XVIII, section 3.<sup>84</sup> This constitutional provision guaranteeing limited self-government power for Ohio municipalities was a consequence of the General Assembly's inability to meet local needs—the state legislature's treatment of municipal problems had proven chaotic and inflexible.<sup>85</sup>

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due process violation if a prosecutor files or pursues a state DWI charge under § 4511.19 after the defendant refuses the prosecutor's offer to plead guilty to a DWI charge under a municipal ordinance not carrying the mandatory three-day jail sentence.

84. OHIO CONST. art. XVIII, § 3, provides: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

85. Fairlie, *The Municipal Crisis in Ohio*, 1 MICH. L. REV. 352, 352-57 (1903); see Walker, *Municipal Government in Ohio Before 1912*, 9 OHIO ST. L.J. 1, 6-16 (1948).

Prior to 1851, the General Assembly of Ohio had been burdened with the responsibility of passing acts of incorporation and amendments to these acts for each community. This procedure was cumbersome for both municipalities and the General Assembly, since General Assembly action was required for all local needs, however petty, that were outside the scope of each municipal charter. In 1851, a constitutional amendment restricted the General Assembly's power to the passage of general laws, and specifically forbade conferral of corporate powers. In order to continue to exercise control over municipalities, however, the General Assembly adopted the subterfuge of classifying Ohio cities by size and passing purportedly general laws for each classification. By 1900, all the major cities in Ohio had their own classifications. In three 1902 cases, of which *State ex rel. Knisely v. Jones*, 66 Ohio St. 453, 64 N.E. 424 (1902), was the most forthright, the Ohio Supreme Court finally rejected these proliferating classifications as "special legislation." *Id.* at 489, 64 N.E. at 427. The General Assembly responded by dividing all communities into two groups, making a population of 5,000 the dividing line. The laws passed by the General Assembly under this new Municipal Code satisfied the Supreme Court's interpretation of the 1851 amendment, to be sure, but straitjacketed municipalities by imposing the same laws on communities with barely 5,000 inhabitants as on those with over 300,000. Dissatisfaction with this inflexibility throughout the state led to the 1912 constitutional convention.

The delegates to the 1912 convention may have overreacted to the crisis by adopting this home rule provision, since a great deal of independence was granted to municipalities. Home rule in Ohio is termed "constitutional," in that no enabling legislation from the General Assembly is required before a municipality may exercise its home rule powers. *City of Cincinnati v. Hoffman*, 31 Ohio St. 2d 163, 206 N.E.2d 577 (1972); *Village of W. Jefferson v. Robinson*, 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965); *City of Akron v. Criner*, 112 Ohio App. 191, 175 N.E.2d 746 (1960). For a discussion of this point, see 1 C. ANTIEAU, *MUNICIPAL CORPORATION LAW* § 3.10 (1975). Furthermore, Ohio municipalities need not even have a state-approved charter to exercise home rule, which further diminishes state control. *Kraus v. City of Cleveland*, 135 Ohio St. 43, 19 N.E.2d 159 (1939); see *Village of Perrysburg v. Ridgeway*, 108 Ohio St. 245, 140 N.E. 595 (1923). Several states use charter grants as a curb on self-executing home rule power. See 1 C. ANTIEAU, *supra*, § 3.05; Vaubel, *Municipal Home Rule in Ohio*, 3 OHIO N.U.L. REV. 643, 650-54 (1976). For a survey of the practices and policy underlying home rule elsewhere in the United States, see 1 C. ANTIEAU, *supra*, § 3. When the breadth of Ohio's constitutional grant of

Early in the amendment's history, the Ohio Supreme Court ruled that the language of article XVIII, section 3, not the intent of the amendment's framers, would be decisive in apportioning state and local powers.<sup>86</sup> As a result, the municipalities have been the beneficiaries of greater power than was ever intended by the framers of the amendment.<sup>87</sup> Unfortunately, article XVIII, section 3's language authorizing municipalities to "exercise all powers of local self government" and adopt police regulations "not in conflict with general laws," coupled with the Supreme Court's expansive interpretation of the grant of municipal power under this language, can restrict the legislature's ability to address statewide problems that also affect local interests.

Two approaches have been developed which allow a municipality to escape the reach of a state statute controlling a particular activity. The municipality can contend that the statute is not a general law,<sup>88</sup> or even if the statute is found to be a general law, the municipality can argue that its ordinance is not in conflict with the statute.<sup>89</sup> Consequently, the presence of a statute does not necessarily displace municipal authority to legislate on the same subject—municipal ordinances may coexist with state legislation regulating the same activity. If municipal ordinances were required to parallel state statutes exactly, home rule would be a meaningless doctrine—the only advantage municipalities prosecuting under their own ordinances would retain would be the revenues from the fines collected. In some circumstances, municipal independence is warranted so that special local needs may be met. But where a statewide problem like drunk driving is identified, home rule should not be permitted to impede a statewide solution. The principal issue, then, is how uniform treatment of DWI offenders may be effectuated in light of Ohio's tradition of municipal home rule and the existing variety of municipal ordinances.

Before 1970, discrepancies between ordinances and statutes

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home rule power to municipalities is coupled with the expansive interpretation given it by the Ohio Supreme Court, it is likely that Ohio grants as much municipal autonomy as any state.

86. *Cleveland Tel. Co. v. City of Cleveland*, 98 Ohio St. 358, 121 N.E. 701 (1918).

87. *Cf. Vaubel, supra* note 83, at 703-07, 740-51.

88. *See, e.g., City of Columbus v. Molt*, 36 Ohio St. 2d 94, 304 N.E.2d 245 (1973); *Village of W. Jefferson v. Robinson*, 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965); *City of Fremont v. Keating*, 96 Ohio St. 468, 118 N.E.114 (1917); *Fitzgerald v. City of Cleveland*, 88 Ohio St. 338, 103 N.E. 512 (1913).

89. *See, e.g., Toledo v. Best*, 172 Ohio St. 371, 176 N.E.2d 520 (1961); *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923); *Greenburg v. City of Cleveland*, 98 Ohio St. 282, 120 N.E. 829 (1918).

theoretically posed less of a problem, since prosecution under a municipal ordinance did not foreclose a later prosecution for the same offense under a state statute. However, in 1970 the United States Supreme Court held in *Waller v. Florida*<sup>90</sup> that a state and a municipality within it are not dual sovereigns, and therefore prosecution by both for the same offense contravenes the constitutional prohibition against double jeopardy.<sup>91</sup> Thus, a DWI offender charged and convicted under a municipal ordinance who is sentenced to no jail time, or whose sentence is entirely suspended, may not be prosecuted subsequently under the state statute for the same violation. By itself, however, *Waller* does not thwart the intent of the state legislature to toughen drunk driving penalties.<sup>92</sup> The root of the problem is municipal discretion—the conscious decisions made by municipal prosecutors, acceded to by municipal courts, to ignore the state policy by refusing to enforce the stricter state statute.

Despite the limitations posed by the home rule doctrine, the Ohio Supreme Court can avoid them and require that S.B. 432 be applied uniformly throughout the state. S.B. 432, and particularly the changes adopted in the penalty section,<sup>93</sup> should be declared a general law. Any municipal ordinance that imposes less severe penalties would then be deemed to conflict with the general law.<sup>94</sup> The court has also demonstrated a willingness to circumvent the express language of article XVIII, section 3 by holding that a state “police, sanitary” or other regulation must be applied uniformly throughout the state when the matter regulated is of “statewide concern,” a doctrine which might well apply to drunk driving.<sup>95</sup>

### A. *Traditional Test*

#### 1. *General Laws*

The term “general laws” as used in article XVIII, section 3 has eluded positive definition. The leading cases of *Fitzgerald v. City*

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90. 397 U.S. 387 (1970).

91. *Id.* at 395.

92. Of course, absent *Waller*, a grand jury could have indicted under the state statute, thereby expressing its dissatisfaction (but realistically, the county prosecutor's) with a municipality's decision to utilize its own ordinance and thwart the will of the General Assembly.

93. OHIO REV. CODE ANN. § 4511.99(A) (Page Supp. 1982).

94. *See, e.g.*, *City of Cleveland v. Betts*, 168 Ohio St. 386, 154 N.E.2d 917 (1958).

95. *See, e.g.*, *Cleveland Elec. Illuminating Co. v. City of Painesville*, 15 Ohio St. 2d 125, 239 N.E.2d 75 (1968).



of *Cleveland*<sup>96</sup> and *Village of West Jefferson v. Robinson*<sup>97</sup> suggest that attempts by the General Assembly to short-circuit home rule authority by expressly prohibiting or limiting municipal power to legislate or regulate specific activities that are properly local concerns, are not general laws within the constitutional limitation.<sup>98</sup> The rationale for this restriction on the General Assembly's power is that to permit such laws would allow the state legislature, rather than the courts, to define the power distribution between the General Assembly and the municipalities.<sup>99</sup> As the Ohio Supreme Court said in *City of Fremont v. Keating*, "the general assembly of Ohio cannot deprive a municipality of its constitutional rights."<sup>100</sup>

More specifically, the general law standard operates to prevent the legislature from explicitly forbidding municipal legislation on certain subjects. Also, it keeps the legislature from banning the adoption of municipal ordinances solely because they vary from state laws. *City of Columbus v. Molt*<sup>101</sup> presents an example of a statute found not to be a general law. The statute at issue sought to preempt the subject of traffic regulation by prohibiting municipalities from enacting or enforcing any rule or regulation differing in substance or penalty from the state traffic statute regulating the same conduct.<sup>102</sup> The court held that the statute could not foreclose municipalities from regulating traffic, reasoning that the statute simply represented an attempt by the state legislative to usurp

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96. 88 Ohio St. 338, 103 N.E. 512 (1913). The *Fitzgerald* definition typifies the difficulty courts have had with this phrase:

Concerning the provision in Section 3, Article XVIII (may adopt such local police, sanitary and other similar regulations as are not in conflict with general laws), the general laws referred to are obviously such as relate to police, sanitary and other similar regulations, and which apply uniformly throughout the state. They involve the concern of the state for the peace, health and safety of all of its people, wholly separate and distinct from, and without reference to, any of its political subdivisions—such as regulate the morals of the people, the purity of their food, the protection of the streams, the safety of buildings and similar matters.

*Id.* at 359, 103 N.E. at 517–18.

97. 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965).

98. *Id.* at 118, 205 N.E.2d at 386.

99. *City of Fremont v. Keating*, 96 Ohio St. 468, 118 N.E. 114 (1917).

100. *Id.* at 470, 118 N.E. at 114.

101. 36 Ohio St. 2d 94, 304 N.E.2d 245 (1973) (per curiam).

102. *Id.* OHIO REV. CODE ANN. § 4511.06 (Page 1982) provides:

Sections 4511.01 to 4511.78, 4511.99, and 4513.01 to 4513.37 of the Revised Code shall be applicable and uniform throughout this state and in political subdivisions and municipal corporations of this state. No local authority shall enact or enforce any rule in conflict with such sections, except that this section does not prevent local authorities from exercising the rights granted them by Chapter 4521 of the Ohio Revised Code and does not limit the effect or application of the provisions of that chapter.

municipal power.<sup>103</sup>

Within the definition of *Fitzgerald v. City of Cleveland*<sup>104</sup> and *Village of West Jefferson v. Robinson*,<sup>105</sup> S.B. 432 appears to meet the test for general law, suggesting that it may be applied statewide. Its provisions do not facially purport to limit local authority to legislate or enforce laws on drunk driving. Rather, they are health and police statutes regulating the conduct of all citizens throughout the state.<sup>106</sup> As such, the legislative power to establish

103. 36 Ohio St. 2d at 95, 304 N.E.2d at 246.

*Molt* resolved a conflict among Ohio appellate courts between a lower court's decision in *City of Columbus v. Molt*, 63 Ohio Op. 2d 248 (1973), and *State v. Waite*, 27 Ohio App. 2d 187, 273 N.E.2d 343 (1971), which had found § 4511.06 to be a general law superseding a conflicting municipal ordinance. The *Waite* court based its holding on "a clear legislative intent that both the acts constituting violations of law pertaining to the operation of motor vehicles upon the highways of this state, and the range of penalties for violations, should be the same under the state law as well as municipal ordinance." *Id.* at 190, 273 N.E.2d at 344.

104. 88 Ohio St. 338, 103 N.E. 512 (1913).

105. 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965).

106. The general laws issue has not been uniformly addressed. A statute that might fail under the doctrine may nevertheless preempt municipal regulation where the subject matter is of statewide concern. *See infra* notes 136-56 and accompanying text. In spite of the general laws limitation on state legislative authority, the General Assembly may be well-advised, in some situations, to pass statutes which would appear invalid under the general laws doctrine. *See Clermont Envtl. Reclamation Co. v. Wiederhold*, 2 Ohio St. 3d 44, 442 N.E.2d 1278 (1982). In *Wiederhold*, a state regulatory scheme controlling hazardous industrial waste treatment was upheld. One of the regulations was expressly directed toward controlling municipal authority:

"No political subdivision of this state shall require any additional zoning or other approval, consent, permit, certificate, or other condition for the construction or operation of a hazardous waste facility authorized by a hazardous waste facility installation and operation permit issued pursuant to this chapter, nor shall any political subdivision adopt or enforce any law, ordinance or regulation that in any way alters, impairs or limits the authority granted in the permit issued by the board."

*Id.* at 46, 442 N.E.2d at 1280. (quoting and upholding OHIO REV. CODE ANN. § 3734.05(D)(3) (Page Supp. 1982)). A strict application of the general laws test of *Molt* would have invalidated this regulation. However, the court applied the statewide concern doctrine, which circumvents the general laws/conflict test. The statute expressly controlling municipalities was found to be a useful expression of legislative intent to make these hazardous waste regulations uniform throughout the state. In light of *Molt*, this result seems anomalous, yet it is justifiable on statewide concern grounds. Statewide concern determinations are best left to the legislature, when possible, since the legislature is the factfinding body charged with regulating the affairs of all the state's component parts. In fact, the leading statewide concern case invalidating a municipal ordinance relied on an express legislative determination that municipal control over the same subject matter ought to be limited. *See Cleveland Elec. Illuminating Co. v. City of Painesville*, 15 Ohio St. 2d 125, 239 N.E.2d 75 (1968).

A statute like that in *Wiederhold* may be squared with *Molt* as well, if the courts choose to apply the general laws/conflict laws test, though some expansion of the test would be required. The statute invalidated in *Molt* attempted to impose all of the state's traffic laws on municipalities. It is difficult to see any justification for such a law apart from uniformity for its own sake. In *Wiederhold*, however, the challenged statute controlled a very limited

the new drunk driving standards is unassailable.

## 2. Conflict

A finding that a statute meets the general law standard is only the first step in achieving its uniform application throughout the state. The greater hurdle in finding that a statute displaces ordinances with different standards and penalties is the constitutional requirement that those ordinances be found to conflict with the statute. By way of comparison, the Cleveland municipal ordinance prohibiting drunk driving is similar to Sections 4511.19 and 4511.99 as they existed prior to S.B. 432, and thus differs significantly from the new law. The Cleveland ordinance does not define drunk driving in terms of the percentage of alcohol in the blood.<sup>107</sup> It also contains a lesser offense, failure to have actual physical control, that is not a part of the state statute.<sup>108</sup> Most significantly, the Cleveland ordinance does not prohibit suspension of the first three days of a jail sentence, which is the cornerstone of the new state scheme for controlling drunk driving.

The early test for conflict adopted by the Ohio Supreme Court in *Village of Struthers v. Sokol*<sup>109</sup> provided great protection for municipal authority.<sup>110</sup> The court said: "No real conflict can exist unless the ordinance declares something to be right which the state statute declares to be wrong, or vice versa. There can be no conflict unless one authority grants a permit or license to do an act

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area of municipal authority. When read in *pari materia* with the rest of the regulatory scheme, it was found to be necessary to satisfy an important state purpose—construction of "safe and properly operated hazardous waste disposal facilities within the state to receive the potentially dangerous wastes from Ohio industry [thereby preventing] such wastes from fouling our water and countryside." 2 Ohio St. 3d at 48, 442 N.E.2d at 1281. Thus, when the aggrandizement of state power at the expense of municipalities is either the only possible purpose or the dominant purpose of a statute, the general laws limitation of *Molt* should be applied. The constitutional commitment to municipal power must be protected from the legislature. But when the issue addressed by the legislature warrants control of municipal power in a closely circumscribed area, the courts should permit such control. Since the rationale for the general laws limitation is protection of municipal power, occasional inroads upon such power to satisfy important state interests should be permissible, although closely scrutinized, when there is no wholesale threat to municipal autonomy as in *Molt*.

107. "No person who is under the influence of alcohol or any drug of abuse, or the combined influence of alcohol and any drug of abuse, shall operate any vehicle within the City." CLEVELAND, OHIO, TRAFFIC CODE § 433.01(a) (1976).

108. *Id.* § 433.01(b).

109. 108 Ohio St. 263, 140 N.E. 519 (1923).

110. *See also* Greenburg v. City of Cleveland, 98 Ohio St. 282, 120 N.E. 289 (1918) (no conflict when municipality prohibits conduct about which General Assembly is silent).

which is forbidden or prohibited by the other.”<sup>111</sup> Under this narrow test, an ordinance does not conflict with a statute when (1) certain specific acts are declared unlawful by the ordinance and not referred to in the statute, (2) when specific acts prohibited by the statute are not referred to by the ordinance, or (3) when different penalties are prescribed for the same acts, whether the greater penalty is imposed by the statute or the ordinance. *Sokol* has been characterized as promulgating a “head-on collision” test.<sup>112</sup> While the Cleveland ordinance does not define drunk driving in terms of blood alcohol content as the state statute does, it does not legalize driving with those concentrations of alcohol proscribed by the statute. One who operates a motor vehicle with one of the illegal concentrations (blood, breath, or urine) may be found guilty under the different elements of the municipal ordinance. That an offender’s sentence may be suspended under the ordinance but not under the statute is simply irrelevant to the *Sokol* test.

Although *Sokol* is still followed today, more than sixty years since it was decided, it should not apply to differences between state and municipal DWI laws. Central to the decision was the notion that the municipal ordinance did not impede the state’s effort and intention to treat a certain offense harshly, since municipal prosecution was not a bar to a later state prosecution for the same offense.<sup>113</sup> In fact, *Sokol* thoroughly discussed the constitutionality of multiple prosecutions.<sup>114</sup> There is no reason why a discrepancy in penalties between an ordinance and a statute should have been considered a conflict when *Sokol* was decided. However, the later development of double jeopardy protection, and the change in the state/municipality relationship worked by *Waller v. Florida*, mandate reevaluation of the *Sokol* standard, and a new definition of conflict when considering disparities in the severity of penalties.

The Ohio Supreme Court has abided by the *Sokol* doctrine, but its support has not been unwavering. The court has suggested that application of the *Sokol* test is most appropriate in regulating liquor dealing, the context in which the case was decided. This implies that different conflict tests may be warranted depending

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111. 108 Ohio St. at 268, 140 N.E. at 521.

112. Vaubel, *supra* note 83, at 730.

113. See *supra* notes 88–90 and accompanying text.

114. 108 Ohio St. at 269–71, 140 N.E. at 521–22.

on the area of regulation in which a discrepancy arises.<sup>115</sup> In *City of Cleveland v. Betts*,<sup>116</sup> a situation similar though not identical to the conflict arising from dissimilarities between the state and municipal prohibitions and penalties for drunk driving, the court acknowledged that the head-on collision test formulated in *Sokol* is inadequate and "surely . . . is not exclusive."<sup>117</sup> *Betts* involved a prosecution under a Cleveland ordinance classifying the crime of carrying a concealed weapon as a misdemeanor. A virtually identical state statute designated the offense a felony. Acknowledging that the ordinance did not permit what the statute prohibited, thus avoiding conflict under the *Sokol* test, the court found that the ordinance "contravenes the expressed policy of the state with respect to crimes by deliberately changing an act which constitutes a felony under state law into a misdemeanor, and this creates the kind of conflict contemplated by the Constitution."<sup>118</sup> The court reasoned that a misdemeanor entails relatively minor consequences, "whereas the commission of a felony carries with it penalties of a severe and lasting character."<sup>119</sup>

Disparities between municipal ordinances, like Cleveland's, and the state DWI statute fit squarely within the framework of *Betts*. Although the ordinances neither legalize conduct prohibited under the state statute, nor classify as a misdemeanor an offense which the state labels a felony, they run counter to an express state policy by failing to require imprisonment for all defendants convicted of drunk driving. Such disuniformity renders the state policy of deterring drunken drivers a nullity. Once the public perceives that the purported severity of the amended law is illusory, any deterrence factor will disappear and those lives that might have been saved by deterring such conduct will be lost.

Still, the conflict in policy doctrine is not unlimited. The *Betts* rationale does not apply to all differences in penalties between a statute and an ordinance. It certainly applies, however, where the

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115. See *Cleveland v. Raffa*, 13 Ohio St. 2d 112, 235 N.E.2d 138 (1968).

116. 168 Ohio St. 386, 154 N.E.2d 917 (1958).

117. *Id.* at 389, 154 N.E.2d at 919.

118. *Id.*

119. *Id.* The conflict in policy rationale has been accepted in several subsequent cases. In *Toledo v. Ransom*, 84 Ohio L. Abs. 12, 657 (Lucas Cty. Mun. Ct. 1960), the court applied the *Betts* reasoning to find conflict between a municipal DWI ordinance effectively prohibiting suspension of three-day sentence and a state misdemeanor statute. However, the court discussed conflict in terms of the *Sokol* test. See *Shipman v. Lorain Bd. of Health*, 64 Ohio App. 2d 232, 414 N.E.2d 430 (1979); *Hiram v. Conner*, 85 Ohio L. Abs. 161, 173 N.E.2d 408 (Ravenna Mun. Ct. 1960).

penalty differences reach state or federal constitutional proportions when evident on the face of the conflicting laws. As the court noted in *Betts*, the consequences of a felony conviction as opposed to a misdemeanor conviction are quite serious.<sup>120</sup> This principle is equally applicable to the differences between a misdemeanor conviction under ordinances radically different than the state statute. Indeed, the consequences of a conviction under the state statute, which mandates a loss of liberty, are far more serious than the consequences of a conviction under a municipal ordinance when the sentence is suspended, the normal practice in some municipal courts.<sup>121</sup>

Moreover, this disparity is of federal constitutional proportions. The United States Supreme Court has held that certain types of penalties warrant special constitutional safeguards.<sup>122</sup> Where imprisonment is possible, the actual loss of liberty triggers the federally guaranteed right to counsel. In *Argersinger v. Hamlin*,<sup>123</sup> the Court held that an indigent defendant may not be jailed following conviction unless the assistance of counsel was provided or knowingly, intelligently, and voluntarily waived by the defendant.<sup>124</sup> By mandating that all convicted drunk drivers receive a three-day jail sentence, the General Assembly made an important policy choice that necessarily activates great procedural safeguards. The sharp difference between the state approach and municipal leniency is readily apparent.

Yet not all penalty variations would amount to a conflict in policy. If a municipality were to require two days of imprisonment instead of the statutorily-required three, for example, there would be no conflict under *Betts*. Such a slight difference in penalty would not indicate a clear legislative intent to treat an offense more seriously, as required by *Betts*. However, where there are bright lines drawn around certain penalties, *Betts* requires that

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120. See OHIO REV. CODE ANN. § 2961.01 (Page 1982); Op. Att'y Gen. 3242 (1962) (under § 2961.01 one who is citizen of Ohio with all rights of citizen is, upon conviction of felony, incompetent to be elector or juror, or to hold office of honor, trust, or profit).

121. For instance, only about 17% of those offenders convicted in Cleveland Municipal Court of the Cleveland municipal DWI ordinance, actual physical control, or § 4511.19, serve any jail time whatsoever. These statistics are based on a study of the Cleveland Municipal Court docket. For more detailed data, see *infra* text accompanying notes 223-24.

122. See *Duncan v. Louisiana*, 391 U.S. 145 (1968) (United States Constitution requires jury trial when pending charge carried sentence of more than six months).

123. 407 U.S. 25 (1972).

124. *Id.* at 37; see also *Scott v. Illinois*, 440 U.S. 367 (1979) (state court need not provide counsel for indigent defendant charged with offense punishable by imprisonment if no jail sentence imposed).

municipalities respect the state legislature's penalty choices within these bright lines. In addition to this limitation on the conflict policy of *Betts*, the statute must, on its face, reflect the legislative intent to treat an offense harshly. Since Ohio, like most states, has no formal means of discovering legislative history, it would be difficult for a court to find policy beyond the language of the statute itself.<sup>125</sup>

The limitations on the conflict in policy doctrine implicit in *Betts* were more explicitly set forth three years later in *Toledo v. Best*.<sup>126</sup> The court seemed to reinstate the limited *Sokol* test and reiterated that a mere penalty discrepancy does not of itself amount to a conflict: "Where municipal ordinances are analogous to state statutes in all except punishment or are analogous except as to the omission of one element of an offense, these differences do not amount to a conflict with the general laws of the state of Ohio."<sup>127</sup> At least one commentator has interpreted *Best* to overrule *Betts* except when the ordinance designates as a misdemeanor an offense classified by the state as a felony.<sup>128</sup>

However, this conclusion does not ineluctably flow from *Best*. There, the defendant was convicted under a municipal drunk driving ordinance which mirrored the comparable state statute, but for the prohibition on sentence suspension in that earlier version of section 4511.99 of the Ohio Revised Code which the mu-

125. In Ohio, as in most states, the mere fact that municipal penalties may be greater or less than the statutory penalties for the same offense usually does not mean that there is a conflict. See *Matthews v. Russell*, 87 Ohio App. 443, 95 N.E.2d 696 (1949) (greater penalty does not conflict); *In re Calhoun*, 87 Ohio App. 193, 94 N.E.2d 208 (1949) (same). But see *State v. Merlini*, No. 9-105 (Lake Cty. Ct. App. Nov. 26, 1982) ("[A] Mentor City Ordinance which imposed a more severe penalty for possession of marijuana than that imposed by state statute [is] unconstitutional . . . . [T]he nature of the penalty was significantly changed when the local ordinance imposed a jail sentence for possession of less than 100 grams of marijuana when the same offense was treated by state statute as a minor misdemeanor punishable only by a fine.").

See *In re Brown*, 121 Ohio St. 342, 168 N.E.2d (1929) (lesser penalty does not conflict); *Toledo v. Kohlhofer*, 96 Ohio App. 355, 122 N.E.2d 20 (1954) (same); *Lorain v. Petralia*, 8 Ohio L. Abs. 159 (Lorain Mun. Ct. 1929).

The general rule elsewhere in the United States is that penalty discrepancies do not of themselves constitute conflict. See O. REYNOLDS, LOCAL GOVERNMENT LAW, 18 & n.13 (1982). Texas is an exception to the general rule—conformity with state law is required with regard to definition and penalty. *Young v. State*, 160 Tex. Crim. 67, 267 S.W.2d 407 (1954).

126. 172 Ohio St. 371, 176 N.E.2d 520 (1961).

127. *Id.* at 374-75, 176 N.E.2d at 522.

128. Vaubel, *supra* note 83, at 703-07.

municipal ordinance omitted.<sup>129</sup> The court refused to find the conflict in policy necessary to invalidate the ordinance under *Betts*, by citing to other statutes.<sup>130</sup> The court looked to legislation which authorized sentence suspension for all offenses, and thus declared the state policy to be unclear: "This is inconsistency carried to the point of ridiculousness."<sup>131</sup> Importantly, the *Best* court recognized *Betts* as an addition to the head-on collision test of *Sokol*. The *Best* reference to other state statutes—"certain statutory enactments which we feel are controlling"<sup>132</sup>—and state policy which is critical to the decision would have been utterly gratuitous if the simple *Sokol* test had been applied alone.

The inconsistency in state policy regarding suspension of drunk driving sentences referred to by the *Best* court no longer

129. OHIO REV. CODE ANN. § 4511.99(B) (Anderson Cum. Supp. 1961) (current version at OHIO REV. CODE ANN. § 4511.99(A) (Page Supp. 1982)) provided:

"Whoever violates § 4511.19 of the Revised Code shall be . . . imprisoned . . . not less than three days nor more than six months and no court shall suspend the first three days of any sentence provided for under this section."

130. See *id.* §§ 2947.10, 2947.13 (Page) (repealed 1974).

131. 172 Ohio St. at 374, 176 N.E.2d at 522.

132. *Id.* (emphasis added). *Best* may suggest as many as three cumulative tests for later conflict cases. The first, chronologically and logically, is the *Sokol/Greenburg* head-on collision test. The second is the *Betts* conflict in policy test. The third test, if it can be called such, is rather cryptically articulated near the end of the *Best* opinion:

[T]he final clinching argument is the result reached in the Municipal Court. The sentence imposed by the Municipal Court was imprisonment for three days, assessment of the costs of \$81 and suspension of driving rights. Had the defendant been charged under the state statute in its present form, he could have received the identical sentence imposed by the Municipal Court under the municipal ordinance.

*Id.* at 375, 176 N.E.2d at 522. However this passage is interpreted, it makes little sense. One commentator uses it to support his view that only municipal penalties less than the state minimum conflict with the statute, which he believes was the intent of the drafters of the home rule amendment. Vaubel, *supra* note 83, at 735.

Two objections to this view may be raised. First, conflicts in policy should be possible when the municipal penalty is more severe. See *State v. Merlini*, No. 9-105 (Lake Cty. Ct. App. Nov. 26, 1982). Second, the *Best* test makes the penalty actually assigned, rather than the penalty authorized, the basis for a finding of conflict. Using this test, a suspended sentence under the Toledo ordinance would have been unconstitutional even though a three-day sentence was not. It seems somewhat capricious to make constitutionality depend on the exercise of ostensibly permissible judicial discretion. However, this position has some support in other states. See *Billingham v. Schampera*, 57 Wash. 2d 106, 356 P.2d 292 (1960) (city could not impose penalty in excess of those provided by state statute, but since penalties actually imposed were within permissible limits, conviction affirmed).

If read literally, this passage from *Best* cannot be squared with *Betts*. In *Betts*, the sentence actually imposed under the ordinance could have been granted under the statute, but the constitutional defect was the unavailability of the harsh statutory penalties. The sentence actually imposed ought to be irrelevant to the "conflict" test. Perhaps the courts are merely reluctant to overturn convictions on "conflict" grounds when the effect on the defendant would be the same under either municipal or state law.



exists. Ohio criminal procedure statutes permitting the suspension of sentences no longer apply to all offenses.<sup>133</sup> Moreover, the General Assembly specifically addressed the issue in S.B. 432, providing that a court's general authority to suspend a sentence does not extend to defendants convicted of drunk driving. The clarified difference between the statute and the ordinance, therefore, is not merely a penalty discrepancy. The statutory penalty is evidence of a firm state commitment to treat drunk driving harshly by mandating imprisonment for all convicted offenders. With that decision, the legislature also activated the relevant constitutional doctrines.<sup>134</sup> No municipal need, such as the lack of jail space, may deter the clear goal of the state. As the *Betts* court recognized, even though "as a practical matter" varieties of municipal treatment may be desirable, "we cannot ignore those provisions of organic and statutory law which preclude such a result."<sup>135</sup>

### B. *Statewide Concern*

Statewide application of the new DWI law is possible under the traditional conflict with general laws analysis. Ohio courts have also circumvented home rule by applying a different standard to the division of power between state and municipal government—statewide concern. That doctrine, which has developed vigorously in recent years, made its way into the Ohio debate over the proper relationship between the state and its municipalities over fifty years ago.

The issue raised in *City of Bucyrus v. State Department of*

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133. See OHIO REV. CODE ANN. §§ 2929.51, 2951.02 (Page 1982).

134. Even if the state policy regarding sentence suspension had been clear in 1961, when *Best* was decided, the *Best* court might have been justified in not finding a policy conflict. The constitutional significance of imprisonment versus a fine or a license suspension had not yet been addressed by the United States Supreme Court in 1961. *Argersinger*, which illuminated this distinction, was not decided until 1972. See *supra* notes 121-22 and accompanying text. Today, however, cases like *Toledo v. Ransom*, 84 Ohio L. Abs. 12, 169 N.E.2d 657 (Lucas Cty. Mun. Ct. 1960), indicate the approach that the Ohio courts should take.

It is possible that S.B. 432 contains an inconsistency which could make determination of state policy unclear. Despite the mandatory imprisonment language of § 4511.99(A)(1) for first offenders under § 4511.19, some judges have interpreted § 3720.06 to allow driver intervention programs to replace the mandatory jail time required under §§ 4511.99(A)(1). See *infra* notes 247-48 and accompanying text. However, this inconsistency is somewhat tenuous and can be explained as an oversight in the House of Representatives revision of S.B. 432. See *supra* notes 37-39 and accompanying text. A principled reading of § 4511.99 allows for no ambiguity in determining the state policy to be mandatory imprisonment of first offenders under § 4511.19.

135. 168 Ohio St. at 390, 154, N.E.2d at 919.

*Health*<sup>136</sup> was whether the state could compel a municipality, following adoption of the home rule amendment, to provide a sewage treatment facility that had the approval of the state health department. Prior to the amendment, the Ohio Supreme Court ruled, in *State Board of Health v. City of Greenville*, for the state.<sup>137</sup> Likewise, in *City of Bucyrus*, the Supreme Court gave short shrift to the city's claim that the amendment deprived the state of the authority to require that municipalities meet state standards.

First, the court indicated that the relationship between the state and its municipalities had not changed substantially as a result of the home rule amendment on matters governing local police, sanitary, and other similar regulations:

The constitutional provision conferring the power with the limitation that the municipal regulation must not be in conflict with general laws, operates to bestow upon the Legislature the same power to control sanitation by general laws that it had prior to the adoption of that article. The power conferred by that article is conditioned upon the Legislature not having enacted general laws with which the local sanitary regulations of the municipality conflict.<sup>138</sup>

Second, the court established that the subject matter was of concern to the whole state, even if the treatment facility erected by the municipality affected only the residents of the municipality.<sup>139</sup>

Having found a matter of statewide concern, and without determining whether there was an actual conflict, the court assumed that any difference created a conflict. The court held that once the state has acted on an issue which is within its police power, such as preservation of the public health, the authority of municipalities to act on that subject is inherently limited to supplemental local regulations which comport with the state legislation. Thus, the Ohio Supreme Court displaced home rule authority, except for limited additional regulation, without resorting to the traditional conflict test. It did so by assuming that a conflict exists whenever a municipal ordinance in any way impedes execution of the state's mandate.<sup>140</sup>

The most important expansion of statewide concern came forty years later in *Cleveland Electric Illuminating Co. v. City of*

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136. 120 Ohio St. 426, 166 N.E. 370 (1929).

137. 86 Ohio St. 1, 98 N.E. 1019 (1912).

138. 120 Ohio St. at 428, 166 N.E. at 370.

139. *Id.* at 428, 166 N.E. at 371.

140. *Id.* at 429, 166 N.E. at 371.

*Painesville*, when the court considered the home rule authority of a municipality to regulate the placement of high voltage electrical transmission lines.<sup>141</sup> This decision established a rational division of powers and sensible limitations upon local authority when municipal regulation affects statewide interests. The court said that power granted under article XVIII, section 3 of the state constitution relates to local matters "and even in the regulation of such local matters a municipality may not infringe on matters of general and statewide interest."<sup>142</sup> Further, if the impact of a local regulation is not confined to the particular municipality and "affects the general public of the state as a whole more than it does the local inhabitants the matter passes from what was a matter for local government to a matter of general state interest."<sup>143</sup>

The court recognized the changing patterns of life in the state and acknowledged that subjects which once might have been considered to be purely local interests could become matters of statewide concern, "creating the necessity for statewide control."<sup>144</sup> Other states with similar constitutional structures have employed this doctrine extensively.<sup>145</sup> The doctrine of statewide concern reflects a recognition that some subjects are far too complex to be handled through the traditional piecemeal approach of local regulation.

Instead, the courts have sustained the General Assembly's vision of the need for statewide regulation by focusing on statewide concern as the suitable vehicle for achieving such uniformity. Application of the doctrine has resulted in foreclosing municipal regulation of state-licensed hazardous waste disposal facilities.<sup>146</sup> Moreover, application has not been confined only to such global issues as hazardous waste disposal. A municipality's attempt to exempt itself from paying its employees in accordance with the

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141. 15 Ohio St. 2d 125, 239 N.E.2d 75 (1968).

142. *Id.* at 129, 239 N.E.2d at 78.

143. *Id.*, see also *Clermont Envtl. Reclamation Co. v. Wiederhold*, 2 Ohio St. 3d 44, 442 N.E.2d 1278 (1982); *State ex rel. Evans v. Moore*, 69 Ohio St. 2d 88, 431 N.E.2d 311 (1982); *City of Canton v. Whitman*, 44 Ohio St. 2d 62, 337 N.E.2d 706 (1975); *State ex rel. McElroy v. Akron*, 173 Ohio St. 189, 181 N.E.2d 26 (1962); *Beachwood v. Board of Elections*, 167 Ohio St. 369, 148 N.E.2d 921 (1958); *City of Rocky River v. Cleveland Elec. Illuminating Co.*, 40 Ohio Misc. 17 (1973).

144. 15 Ohio St. 2d at 129, 239 N.E.2d at 78 (quoting *State ex rel. McElroy v. Akron*, 173 Ohio St. 189, 192, 181 N.E.2d 26, 28 (1962)).

145. See 1 C. ANTIEAU, *supra* note 83, at §§ 3.20-3.21 (overview of the statewide concern doctrine as used in other states).

146. *Clermont Envtl. Reclamation Co. v. Wiederhold*, 2 Ohio St. 3d 44, 442 N.E.2d 1278 (1982).

state's prevailing wage law was held to have significant extraterritorial effects and to infringe on a statewide concern, the integrity of the collective bargaining system.<sup>147</sup> Similarly, the court has held that state law predominates when the general health of citizens is at stake, as in the prevention of dental caries. One court has declared, rather broadly: "The city may exercise the police powers within its borders, but the general laws of the state are supreme in the exercise of the police power, regardless of whether the matter is one which might also properly be the subject of municipal regulation."<sup>148</sup>

Certainly, the implications for the health and safety of all Ohio's citizens raised by the drunk driving problem are as serious as the prevention of dental caries, warranting utilization of the statewide concern doctrine to achieve the same result. There were 601 alcohol-related crash deaths in Ohio in 1981, and the high incidence of impaired driving threatens the safety of every driver and pedestrian.<sup>149</sup> A recent study claims that ninety percent of all fatal crashes are the fault of drunk drivers.<sup>150</sup> In the more populous areas of the state, an impaired driver who is on the road for only a few minutes may cross the boundaries of several communities, all with different and possibly quite lenient drunk driving laws. Drunk driving is like a contagious disease which does not respect municipal borders, and when not stringently controlled in every community, spills over and threatens the health of the entire state. Some municipalities have proven unwilling to respect the state policy expressed in S.B. 432. However, the legislative determination that drunk driving requires harsh, uniform penalties warrants application of the statewide concern doctrine. Despite the fact that the statewide concern doctrine has never been applied to a traffic regulation, there is no reason why its application is any less appropriate for drunk driving than for the other issues to which it has been applied. Only recently have the scope, nature, and seriousness of the drunk driving problem become evident.<sup>151</sup>

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147. *State ex rel. Evans v. Moore*, 69 Ohio St. 2d 88, 431 N.E.2d 311 (1982).

148. *City of Canton v. Whitman*, 44 Ohio St. 2d 62, 66, 337 N.E.2d 766, 770 (1975).

149. *See Box Score*, *supra* note 8.

150. *See supra* note 4 and accompanying text.

151. The plethora of state per se offenses and mandatory jail terms enacted in recent years evinces a changing response to the drunk driving problem. *See supra* note 13. Federal approaches to the problem lend support to the principles behind S.B. 432. *See Alcohol Traffic Safety and National Driver Register Act*, Pub. L. No. 97-364, Title I, § 101(a), 96 Stat. 1738 (1982); H. R. REP. No. 867, 97th Cong., 2d Sess. 7-12 (1982). Manifestly, com-

Thus, legislative solutions tailored to a deeper understanding of the problem merit assistance from the courts.

Criticism of statewide concern has focused on its lack of constitutional grounding. The Ohio constitution, it is argued, sets up three areas of power: expressly created, exclusive state power; expressly created, exclusive municipal power; and shared police power, where friction is resolved by the article XVIII, section 3 test as interpreted by the courts. This criticism claims that if statewide concern means anything more than the constitutionally defined area of exclusive state power, then it is a fourth power source which bypasses the constitutional limitation on municipal authority—the conflict with general laws test—and is of questionable validity.<sup>152</sup>

Consequently, without a constitutional grounding, critics have argued that there cannot be a principled limitation on state legislative power and see this doctrine as a “threat to municipal autonomy.”<sup>153</sup> However, this criticism envisions a chamber of horrors resulting in the extraconstitutional elimination of home rule which the Ohio courts’ careful and limited application of the statewide concern doctrine has avoided. The experience of other states indicates that ratification of occasional exercises of state power over subjects traditionally deemed to be within the local sphere of authority do not greatly threaten municipalities which, as in Ohio, can exercise all police powers not denied to them.<sup>154</sup> Moreover, Ohio courts have rejected unwarranted applications of the doctrine, such as an attempt to thwart the right of municipalities to appoint police officers free from state interference.<sup>155</sup>

A greater impediment to uniform imposition of S.B. 432 throughout the state is the absence of any expression of legislative intent that the new law should displace less severe municipal ordinances. In many statewide concern cases,<sup>156</sup> the courts have relied

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prehensive state and national programs have emerged as the best solutions to the drunk driving problem.

152. Vaubel, *supra* note 83, at 1108.

153. *Id.* at 736 & 810–13.

154. The basic achievement of the 1912 constitutional convention was this creation of independent municipal power that did not have to flow through the General Assembly. See *supra* note 83.

155. *State ex rel. Canada v. Phillips*, 168 Ohio St. 191, 151 N.E.2d 722 (1958); see also *Dies Elec. Co. v. Akron*, 62 Ohio St. 2d 322, 325, 405 N.E.2d 1026, 1029 (1980) (“[R]etainage of funds to guarantee work executed on a contract for the improvement of municipal property is a matter embraced within the field of local self-government.”) (citations omitted).

156. See *supra* note 104.

on specific statutes to justify imposing the regulatory scheme in question on municipalities, statutes which purport to limit municipal power expressly. In this instance, however, a judicial determination that S.B. 432 can be effective only through uniform statewide application would be adequate grounds for a finding of statewide concern, and would be consistent with the General Assembly's action and intent.

### III. JUSTIFICATIONS FOR PUNISHMENT UNDER THE DWI STATUTE

Deterrence of drunk driving is the primary objective of S.B. 432. At least three specific justifications for the new laws fall under this broad heading.<sup>157</sup> The first, general deterrence, operates to prevent the unapprehended citizen from committing the proscribed acts by creating an impression that the pain of punishment will outweigh the benefit of breaking the law. Second, special deterrence operates to prevent the apprehended offender from repeating the act by exposing him to harsh consequences. A third justification might be termed "formation of a moral component,"<sup>158</sup> or "formation of a habit of obedience."<sup>159</sup> The principle behind habit formation is that if a law is properly enforced over a period of time, citizens come to obey the law not on the basis of a rational pain/pleasure calculation, but simply because it has become the "right" thing and there is no thought of acting otherwise. Of the other justifications for punishment that are advanced to support particular criminal laws, rehabilitation, retribution, and restraint, S.B. 432 largely ignores rehabilitation by mandating minimum terms of imprisonment regardless of the needs or problems of the individual offender. There is no comparable requirement of treatment. To some degree, the harshness of the

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157. These preventive effects of punishment are discussed in J. ANDENAES, PUNISHMENT AND DETERRENCE 8-9 (1974).

There is extensive literature available on the efficacy and morality of deterrence. Those who find deterrence to be a poor justification for punishment argue that the deterrence model rests on an overly rationalistic and utilitarian view of human behavior—that it is no more than retribution in sheep's clothing; that it is empirically indefensible, since there is no way to prove why the vast majority of people do not commit particular crimes—or they may cite specific examples, like Prohibition, to show that goodness cannot be legislated into men. See *id.* at 65; F. ZIMRING & G. HAWKINGS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 18-23 (1973). Yet deterrence appears to be as valid an objective as any in the criminal law, even if our belief in its efficacy is based only on psychological or quasi-scientific grounds.

158. See J. ANDENAES, *supra* note 157, at 8-9.

159. *Id.*

laws satisfies the retribution rationale. Citizens groups like MADD are understandably outraged at the senseless carnage caused by drunk drivers. Incarceration of offenders satisfies the restraint rationale. Yet retribution and restraint are essentially *post hoc* reactions to crime. Deterrence is the key *preventive* rationale.

The particular activity which S.B. 432 seeks to deter is excessive alcohol consumption and operation of a motor vehicle. S.B. 432 seeks to promote greater security on the highways by reducing the combination of the two activities; it does not seek to reduce the amount of drinking done in the state. The General Assembly opted to impose all of the legal consequences upon the individual wrongdoer whose behavior creates the threat to safety on the highways. Eschewed were more dramatic remedies, such as reducing the number of hours that alcoholic beverages may be dispensed in public spots and clubs, which would have interfered with commerce and encountered opposition from powerful economic interests. The citizens of Ohio recently rejected a potentially helpful remedy by voting to keep the state drinking age at nineteen rather than raising it to twenty-one.<sup>160</sup>

A. *General Deterrence—The Effect of S.B. 432 on the Entire Community.*

General deterrence as a justification for punishment rests on the psychological theory that in some situations individuals rationally evaluate the legal consequences of their acts before choosing between permitted and proscribed conduct.<sup>161</sup> General deterrence operates on the principle that when the *certainty*, *severity*, and *speed* of punishment for certain proscribed conduct outweigh the benefit of this conduct, the actor will choose to obey the law.<sup>162</sup> The process involves a balancing of risk and benefit. For a law actually to deter, the individual must be able to perceive clearly that the risks outweigh the benefits of the illegal activity. Thus, a fourth element, that of *publicity*, or *awareness*, must be part of any calculation of deterrent effect.

Drunk driving laws have been extensively studied for their

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160. Cleveland Plain Dealer, Nov. 9, 1983, at 1, col. 1.

161. See *supra* note 157; NATIONAL RESEARCH COUNCIL, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 19 (D. Nagin, J. Cohen & A. Blumstein eds. 1978) [hereinafter cited as NATIONAL RESEARCH COUNCIL].

162. H. ROSS, DETERRING THE DRINKING DRIVER 9 (1981).

general deterrent effect, both in the interest of curbing fatal crashes and as a laboratory for testing the psychological theory of deterrence.<sup>163</sup> Data is readily available through various highway safety programs.<sup>164</sup> There is wide variety in the laws, enforcement policies, and publicity attendant upon the enactment of these laws.<sup>165</sup> It has also been suggested that DWI is *mala prohibita*: "less anchored in morality and other legal systems of rules" than other offenses.<sup>166</sup> The general deterrent effect of punishment for some crimes, like murder, is impossible to evaluate because of the great many different motivations for the illegal conduct.<sup>167</sup> Drunk driving offenders are arguably free of this variety of complex motivations:

The decision whether or not to drink is usually made deliberately, as a rational choice; and the motivation to commit the offense is not strong. The law interferes only slightly with personal liberty. It asks the citizen neither to stop drinking nor to stop driving. It merely prohibits combining the two activities. Thus the drunk driving situation is one in which common sense tells us that the risk of punishment can be expected to have more effect than in the case of many other offenses.<sup>168</sup>

This characterization of drunk driving may be somewhat inaccurate because many drunk drivers are alcoholics and problem drinkers who may not make a rational choice to take even their first drink of each day.<sup>169</sup> Nonetheless, the law does not dictate that alcoholics not drink, something which without significant help they may not be able to do. The law's demand is far simpler, requiring only that the drinker refrain from driving once he commences drinking. These studies provide a yardstick by which to evaluate the likely deterrent effect of S.B. 432. To the degree that the provisions of the new Ohio law match statutes in the United States and other western nations, the likelihood of success of the new Ohio law can be predicted.

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163. *Id.* at 12-13 & 100-02.

164. *Id.*

165. *Id.*

166. *Id.* at 10. However, the tragic consequences which these laws seek to prevent may dictate that the conduct involved be labelled at least partly *malum in se*.

167. "The holdup man who kills simply for gain, the sex murderer whose crime assuages the darkest drives of his sick mind, the uxoricide who seeks desperate relief for a mental torment that is more than he can bear—there is a world of difference between these types; all they have in common is the judicial name for the act." J. ANDENAES, *supra* note 157, at 20-21.

168. *Id.* at 104.

169. The differences between social drinkers, problem drinkers, and alcoholics are discussed in SUMMARY VOLUME, *supra* note 3, at 21.



### 1. *Foreign Experiences with Drunk Driving Laws*

a. *The Scandinavian Experience.* Chemical testing of blood alcohol content became possible in the 1920's.<sup>170</sup> In 1936, Norway changed its DWI law, making it an offense to drive with a specified BAC. Sweden followed Norway's lead in 1941. In addition to evaluating drunk driving by measuring blood alcohol content, the new laws prescribed harsher penalties upon conviction, including the virtual certainty of imprisonment. The effect of the definitional change in the offense was threefold: (1) it gave scientific validity to the previously vague concept of intoxication embodied in traditional statutes; (2) it eased the mode of proof required, making it dependent on a simple chemical test rather than a description of behavior; and (3) it provided for faster disposition of cases without difficult trials.<sup>171</sup>

These Scandinavian reforms did not result from a belief that the traditional DWI statutes were failing to control drunk driving. The reforms were sparked by the political ascendancy of a temperance movement and its influence on the parliaments of Norway and Sweden.<sup>172</sup> Regardless of the impetus for their enactment, the Scandinavian laws have been studied extensively as experiments in deterrence.<sup>173</sup> Nonetheless, almost fifty years later, whether these original Scandinavian laws had or continue to have a deterrent effect on the combination of drinking and driving remains the subject of vigorous sociological dispute. The competing positions in the dispute make it virtually impossible to conclude that the laws have had a deterrent effect, but they do prove the importance of methodology in reaching a conclusion. They also demonstrate the difficulties involved in proving the deterrent effect of any law.<sup>174</sup> The researchers agree, however, that

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170. *Id.* at 6. Indiana was the first state to statutorily allow admission of chemical test results as evidence, in 1939. *Id.* at 37.

171. See H. Ross, *supra* note 162, at 21-29.

172. *Id.* at 22.

173. "These characteristics of the law [discussed in text accompanying note 159] are in accord with practical suggestions for behavior control derived from the theoretical model of deterrence." *Id.* at 24.

174. H.L. Ross, perhaps the leading author in the field of deterrence of drinking drivers (and generally the most skeptical of any alleged deterrent effect), has concluded that it is impossible to prove whether the Scandinavian laws had or continue to have any general deterrent effect, and suggests alternate explanations for the evidence commonly offered in support of this belief. *Id.* at 60-69; see also Ross, *The Scandinavian Myth: The Effectiveness of Drinking-and-Driving Legislation in Sweden and Norway*, 4 J. LEGAL STUD. 285, 295 (1975) (more detailed statistical study of Scandinavian laws based on interrupted time series analysis) [hereinafter cited as Ross, *The Scandinavian Myth*]. But see J. ANDENAES,

most Scandinavians refrain from drinking and driving. They differ on the role played by the law in the development of that pattern of national conduct. This disagreement could not be sharper: one researcher characterizes the claim that the laws deter drunk driving as the "Scandinavian myth,"<sup>175</sup> simultaneously acknowledging that the causal changes may have been too small and the effect measures too inaccurate to yield any evidence one way or the other,<sup>176</sup> while a second researcher claims that "the legislation has been instrumental in forming . . . the widespread conviction that it is wrong, or irresponsible, to place oneself behind the wheel when intoxicated."<sup>177</sup>

b. *Great Britain: An Effective Deterrent.* All commentators found at least a temporary deterrent effect on drinking and driving following the enactment of the British Road Safety Act of 1967.<sup>178</sup> The Act made driving with a blood alcohol content in excess of .08% a per se offense, stricter than the Ohio standard. The law did not impose stricter penalties for drunk driving; stricter penalties had been enacted five years earlier, without appreciable deterrent effect.<sup>179</sup> Penalties remained limited to fines and license suspension.<sup>180</sup> Instead, the new law focused upon enforcement, authorizing police to demand that a driver submit to a chemical test when involved in an accident, when stopped for a moving violation, or when police have reasonable cause to believe that he is intoxicated.<sup>181</sup> On paper, at least, the legislation in-

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*supra* note 157, at 60-61 & 82 n.39; Andenaes, *The Effects of Scandinavia's Drinking-and-Driving Laws: FACTS AND HYPOTHESE*, in 6 SCANDINAVIAN STUDS. IN CRIMINOLOGY 35 (1978); Votey, *The Deterrence of Drunken Driving in Norway and Sweden: An Econometric Analysis of Existing Policies*, in 6 SCANDINAVIAN STUDS. IN CRIMINOLOGY 79 (1978). Both Andenaes and Votey are convinced that the Scandinavian laws deter drunk driving.

175. Ross, *The Scandinavian Myth*, *supra* note 174, at 285.

176. See H. ROSS, *supra* note 162 at 62-63.

177. J. ANDENAES, *supra* note 157, at 60. At bottom, those views of the Scandinavian laws are not incompatible; Ross and Andenaes differ over the quality of the proof offered to explain why those laws have worked. "I am persuaded by Andenaes . . . that a plausible case can be made for the long-run effectiveness of the Scandinavian laws in Scandinavia, although the case is complex and far from proven." H. ROSS, *supra* note 162, at 69. Ideally, the Ohio law will have both an immediate general deterrent effect and a long term effect of formation of a habit of obedience.

178. See, e.g., Sabey and Codling, *Alcohol and Road Accidents in Great Britain*, in ALCOHOL, DRUGS AND TRAFFIC SAFETY 73, 74-75 (S. Israelstam & S. Lambert eds. 1975); Ross, *Law, Science, and Accidents: The British Road Safety Act of 1967*, 2 J. LEGAL STUD. 1 (1973).

179. Ross, *supra* note 162, at 25-27.

180. *Id.* at 25 & 27.

181. *Id.* at 26.

creased the certainty and speed of punishment. Moreover, its enactment was attended by widespread publicity provided by opponents who feared the enforcement provisions encroached upon civil liberties, and by a well-financed, government-sponsored media campaign.<sup>182</sup>

A series of analyses have indicated that the British legislation had a significant deterrent effect upon the combination of drinking and driving. During the week's prime drinking hours—Friday evening to Sunday morning—there was a sharp drop in the number of total injuries, fatalities, and serious injuries arising out of motor vehicle accidents. This is especially relevant when compared to a control curve for the remaining hours of the week which showed no change in fatalities or serious injuries. During the test period there was no reduction in the amount of driving done by Britons, nor was there a diminution in the amount of alcohol consumed. The law was credited with deterring the population from combining the two activities. Perhaps the most persuasive documentation for the deterrent effect of the legislation was that in the period before adoption of the legislation, twenty-five percent of drivers involved in fatal crashes had an illegal blood alcohol content, while afterward only fifteen percent had illegal BAC's.<sup>183</sup>

The deterrent effect of the British drunk driving law was short-lived. It began to dissipate within a few years of its adoption. The number of fatal crashes began rising toward its previous level, as did the number of serious injuries and fatal crashes occurring during prime drinking hours. Six years after adoption of the legislation, the percentage of drivers with illegal BAC's reached the pre-Act level, and continued to climb.<sup>184</sup>

The significant change in British drinking and driving practices and the subsequent reversion to old habits has been attributed to the public's perception of the likelihood of apprehension. It has been suggested that initially the public feared that there was a realistic chance of being caught and punished. However, the real chance that a drunk driver would be caught, charged, and convicted, though increased from one in every two million vehicle miles driven to one in every one million vehicle miles driven, was never very great.<sup>185</sup> The publicity surrounding the enforcement

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182. *Id.* at 26–28.

183. *Id.* at 30–32; Sabey & Codling, *supra* note 178, at 74, 78.

184. H. Ross, *supra* note 162, at 32–34.

185. *Id.* at 33.

campaign as well as the dire predictions made by the law's opponents exaggerated the certainty of apprehension, and resulted in compliance. Once the public perception of the risk became more realistic, the initial deterrent effect of the law was negated.<sup>186</sup>

Subsequent studies explain why the British law was initially successful in controlling drunk driving. In 1975, after British drunk driving levels had returned to those existing prior to the legislation, a local campaign known as the "Cheshire Blitz" reemphasized the effect of increased enforcement when coupled with publicity.<sup>187</sup> The "Cheshire Blitz" expanded enforcement of the Act in one locale to six times the national average. The "Blitz" also reawakened the opposition to the Act and received substantial publicity. Although the small size of the sample prevents the statistics from being conclusive, the Cheshire experience resulted in a marked decline in the number of fatal and serious injury crashes during prime drinking hours while the campaign was under way.<sup>188</sup>

A French law adopted in 1978, patterned after the British Act and enforcement campaign, produced similar results.<sup>189</sup> But a New Zealand law, almost identical to the British Act but unaccompanied by a publicity campaign and lacking an active opposition was, at first, relatively ineffective. A later, well-publicized enforcement campaign aimed at scaring young drivers into compliance had short term success in curbing drinking and driving.<sup>190</sup> On the other hand, experiments in controlling drunk driving, which have focused on increasing the severity of punishment without increasing the certainty of apprehension and conviction, have typically been unsuccessful, even in the short run, in deterring drinking and driving.<sup>191</sup> Of themselves, punitive measures appear to have had little impact. However, more zealous enforcement of existing or new laws in communities and countries which have advised the public of the enforcement campaign appear to

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186. *Id.* at 34.

187. *See id.* at 71-75; Ross, *Deterrence Regained: The Cheshire Constabulary's "Breathalyzer Blitz,"* 6 J. LEGAL STUD. 241 (1977).

188. *See* H. ROSS, *supra* note 162, at 71-75.

189. Ross, McCleary & Epperlein, *Deterrence of Drinking and Driving in France: An Evaluation of the Law of 7/12/78,* 16 LAW & SOC'Y REV. 345 (1982).

190. H. ROSS, *supra* note 162, at 52-57.

191. *See id.* at 96-97 & 103-07; Roberston, Rich & Ross, *Jail Sentences for Driving While Intoxicated in Chicago: A Judicial Policy That Failed,* 8 LAW & SOC'Y REV. 55 (1973). *But see Hearings, supra* note 9, at 19 (testimony of William Plymat, Director of Council on Alcohol Problems).

dissuade some who ordinarily drink and drive from combining these activities.<sup>192</sup>

## 2. *Experiments in Deterring Drunk Driving in the United States*

All fifty states have followed the Scandinavian lead and now admit chemical tests as evidence in drunk driving prosecutions.<sup>193</sup> Penalties for refusing the chemical test in this country are less harsh than in Britain, where equivalent penalties are possible for refusal to submit to chemical testing and conviction of drunk driving.<sup>194</sup> Prosecution, then, is somewhat streamlined in the United States; refusal to submit to a chemical test may result in a traditional prosecution, although many states permit the refusal to be used as evidence in the prosecution's case.<sup>195</sup> By way of comparison, the British Road Safety Act allows police to require breath tests of any driver involved in an accident or stopped for a moving violation.<sup>196</sup> This intrusion into privacy stimulated much of the opposition which resulted in the publicity accorded the British Act and initial enforcement campaign.<sup>197</sup> In the United States, neither involvement in an accident or a moving violation, alone, would provide probable cause to permit a law enforcement officer to require a driver to take a chemical test or face license suspension.

While the latitude in enforcement given British police would be impermissible in the United States, experiments and studies of American drunk driving laws typically involve changes in enforcement levels. Increased enforcement campaigns such as the

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192. "A major difference between the Chicago crackdown and the Lackland [Air Force Base] and British efforts is the greater emphasis on apprehension of the drinking driver in the latter two cases. It is reasonable to hypothesize that countermeasures which increase the probability of apprehension may deter a subset of drinkers from driving while impaired but that strictly punitive countermeasures will have little, if any, effect." Robertson, Rich & Ross, *supra* note 191, at 66.

193. NATIONAL OVERVIEW, *supra* note 2, at 43.

194. See H. ROSS, *supra* note 162, at 27.

195. See, e.g., S. D. CODIFIED LAWS ANN. § 19-13-28.1 (Supp. 1983):

Notwithstanding the provisions of § 19-13-28, when a person stands trial for driving while under the influence of alcohol or drugs, . . . and that person has refused chemical analysis, . . . such refusal is admissible into evidence. Such person may not claim privilege against self-incrimination with regard to admission of refusal to submit to chemical analysis.

The constitutionality of § 19-13-28.1 was upheld in *South Dakota v. Neville*, 103 S. Ct. 916 (1983). Ohio courts have consistently held that refusal of a test is admissible. See *State v. Stanton*, 12 Ohio App. 2d 99, 231 N.E.2d 322 (1967) (citing with approval *State v. Nutt*, 78 Ohio App. 336, 65 N.E.2d 675 (1946); *State v. Gatton*, 60 Ohio App. 192, 20 N.E.2d 265 (1938); *City of Dayton v. Allen*, 27 Ohio Op. 2d 179 (Montgomery Cty. C.P. Ct. 1959)).

196. H. ROSS, *supra* note 162, at 26.

197. *Id.*

Alcohol Safety Action Projects (ASAP's), funded under the National Highway Safety Act,<sup>198</sup> have demonstrated a limited ability to deter drunk driving. The ASAP's were local projects operating under National Highway Traffic Safety Administration guidelines but varied depending upon local community standards of law enforcement.<sup>199</sup> Almost a third of the eighty-eight million dollars spent under the program<sup>200</sup> went to fund specially trained police patrols, instructed in techniques for spotting drunk drivers and assigned to key locations during the hours when drunk driving activity is greatest.<sup>201</sup> As a result of this increase in resources and refinement in techniques, drunk driving arrests were two and one-half to forty times greater than previous levels.<sup>202</sup>

Recognizing that additional arrests might clog the courts and result in delays of prosecution which might adversely impact upon the deterrent value of the projects, great emphasis was placed upon diversion and treatment. Court procedures were streamlined: judges were encouraged to distinguish between offenders who would benefit from treatment and those who should be fully prosecuted and punished.<sup>203</sup> Rather than lengthening penalties,

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198. Pub. L. No. 89-564, 80 Stat. 731 (1966) (codified as amended at 23 U.S.C. §§ 401-04 (1982)).

199. See NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, DEP'T OF TRANSPORTATION, SUMMARY OF NATIONAL ALCOHOL SAFETY ACTION PROJECTS 16 (1979) [hereinafter cited as ASAP REPORT]:

The Alcohol Safety Action Program was a series of local projects given consistency only by a single concept and by the National Highway and Traffic Safety Administration guidelines. It was not a monolithic "national program" in the sense of uniformity but a nationwide experimental and demonstration program that stands or falls according to the real world dynamics of local community systems.

200. *Id.* at 22. The \$88 million figure refers to funds provided under 23 U.S.C. § 403 (1982). Funds were also provided under 23 U.S.C. § 402 (1982) and by local sources.

201. ASAP REPORT, *supra* note 199, at 14. The relationship of drinking and driving behavior to time of day is well-documented:

[D]rinking-driving is primarily a nighttime phenomenon. Drinking drivers are found two to four times as often in nighttime crashes as in daytime crashes . . . . [W]ith respect to day of the week, alcohol related crashes and drinking drivers are also more frequent on weekends than on weekdays, although the effect is not nearly as great as it is for the day.

SUMMARY VOLUME, *supra* note 3, at 32.

202. H. ROSS, *supra* note 162, at 87.

203. See ASAP REPORT, *supra* note 199, at 13-16. Judicial policy and attitudes in a statutory ASAP system are examined in Note, *VASAP: A Rehabilitation Alternative to Traditional DWI Penalties*, 35 WASH. & LEE L. REV. 673 (1978). VA. CODE § 18.2-271.1 (Cum. Supp. 1983) gives significant judicial discretion in determining whether an offender will undergo ASAP rehabilitation or will suffer a traditional penalty. The author of the Note suggests that the extent of this discretion may exceed equal protection bounds. The Virginia Supreme Court found equal protection satisfied by interpreting the statute to re-

the diversion program excused many offenders from criminal penalties.<sup>204</sup> The ASAP's were credited with increasing the certainty of apprehension and the speed of court processing leading to conviction or treatment.<sup>205</sup> One-third of the communities participating in the projects experienced significant reductions in fatal crash rates during nighttime hours, the peak drinking period.<sup>206</sup>

### 3. *The Limits of Deterrence*

Since the deterrent effect of drunk driving statutes appears closely tied to public perception of the likelihood of arrest, the impact of any law or enforcement campaign is highly transient. The positive effect will be limited to the period immediately following enactment of the law or inception of the enforcement campaign. Ultimately, the public will gain an understanding that even if the chances of arrest are increased to some degree, the likelihood of arrest will never be great. Moreover, there are limits to any enforcement campaign in a free society. The potential costs in terms of individual liberty must be balanced against the need for strict enforcement of drunk driving laws.

Nonetheless, some campaigns have been successful in saving lives. The key appears to lie not in increasing the severity of punishment but in increasing the certainty of detection and conviction.<sup>207</sup> Publicity is a critical factor. For a harsher law or a tougher enforcement policy to be effective, the public must know about the law or policy. Unfortunately, the public's perception of

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quire " 'good faith consideration' of a motion to assign the offender to an alcohol program . . . ." *Midkiff v. Commonwealth*, 223 Va. 1, 3, 286 S.E.2d 150, 151 (1982).

204. "No effort was made to increase penalties for drinking and driving. Rather, the penalties were de facto reduced due to the provision for diversion of large numbers of offenders from routine punishment to treatment." H. ROSS, *supra* note 162, at 87.

205. *Id.*

206. ASAP REPORT, *supra* note 199, at 17-18. The overall quality of the data derived from the ASAP's has been criticized on methodological grounds. See H. ROSS, *supra* note 162, at 88-89; Zimring, *Policy Experiments in General Deterrence, 1970-75*, in NATIONAL RESEARCH COUNCIL, *supra* note 161, at 149.

207. A number of studies have attempted to measure a drunk driver's chance of apprehension. See *supra* note 185 and accompanying text (chance of apprehension in Britain is one for every million vehicle miles driven); Borkenstein, *Problems of Enforcement, Adjudication and Sanctioning*, in ALCOHOL, DRUGS AND TRAFFIC SAFETY, *supra* note 178, at 660 (2000 violations, that is trips with BAC of .10% or more, for every arrest); Persson, *Actual Drunken Driving in Sweden*, in 6 SCANDINAVIAN STUDS. IN CRIMINOLOGY, *supra* note 174, at 111-12 (at least 200 offenses per arrest in Sweden); L. SUMMERS & D. HARRIS, *THE GENERAL DETERRENCE OF DRIVING WHILE INTOXICATED* (1978), reprinted in H. ROSS, *supra* note 162 at 106 (probability of an accident while driving under the influence .00045; probability of arrest likewise miniscule, .00044).

the likelihood of being punished for a violation cannot be accurate. Once the public knows how unlikely apprehension and conviction are, the law will have minimal deterrent effect, and prior behavior patterns are likely to reemerge. This limitation upon deterrence appears insurmountable, since it would hardly be acceptable for state and local governments to mount disinformation campaigns aimed at scaring their citizens into compliance.

Moreover, a successful enforcement campaign is likely to increase the number of court cases dramatically, thereby impacting upon the speed of conviction, an indispensable element of deterrence. Mandatory jail time and the prospect of a DWI offense on a defendant's record, especially where increased penalties are required for subsequent offenses, are strong incentives for defendants to fight a DWI charge if they are able.<sup>208</sup> Delaying tactics and an increase in the number of trials requested may exhaust the justice system's time and money. Consequently, there may be additional delays for all cases on the docket and a marked decrease in the likelihood of trying all defendants who demand their constitutionally guaranteed right to a trial within the time limits set by speedy trial requirements.<sup>209</sup>

Finally, deterrence may be limited because a substantial percentage of drunk drivers may be alcoholics or problem drinkers.<sup>210</sup> Even in Scandinavia, which has the longest tradition of severe treatment for drunk drivers and arguably marshals the greatest moral indignation toward the problem, the percentage of fatally injured drivers with high blood alcohol contents remains at an alarming level.<sup>211</sup> European laws generally have not focused upon problem drinkers, opting instead to treat all offenders alike.<sup>212</sup> This European approach to deterrence makes some sense. It is based on the assumption that even if many crash fatalities are caused by alcoholics or problem drinkers, it does not necessarily follow that these individuals have lost control over their

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208. By diverting many offenders to treatment programs, the ASAP's largely removed this incentive to delay. See *supra* note 204.

209. See OHIO REV. CODE ANN. § 2945.71 (Page 1982) (Ohio speedy trial law).

210. See SUMMARY VOLUME, *supra* note 3, at 21, for definitions of these categories and estimates of the percentages of each that make up of the drunk driving population. A Quincy, Mass. study estimates the percentage of drunk drivers at 75% or higher. See Kramer, *The Drunk Driver: Where Is He Heading?*, 22 JUDGES' JOURNAL 8, 10 (1983).

211. See H. ROSS, *supra* note 162, at 65-66.

212. Foreign programs employing the legal approach have generally made no deliberate attempt to deal differently with various categories of drinking drivers, even in recent years. SUMMARY VOLUME, *supra* note 3, at 36.



entire lives, in particular the decision to get into a car and drive. Nonetheless, the absence of any effort to treat or cure the alcoholism problems of arrested drivers who are unable to control their drinking may place too much faith in the deterrence theory. It loses sight of the purpose of the DWI laws—prevention of fatal crashes. Such an approach may condemn to death those citizens unfortunate enough to encounter the alcoholic offender once he has served his mandatory time in jail and is again drunk on the road.

In sum, the general deterrent effect of S.B. 432 is likely to be slight. The certainty of punishment under the new law will not increase appreciably, since no effort to increase enforcement has been made. While there has been some streamlining of procedures in processing DWI offenders, potentially decreasing the time from arrest to punishment, the threat of a mandatory jail sentence, where the state provision is enforced, may motivate offenders to ask for trials and thereby create the delay that thwarts deterrence. Severity has been increased on the state level, especially for repeat offenders. However, alleged home rule constraints inhibit statewide uniformity of this severity. Furthermore, severity of penalties alone, the studies show, will not deter drinking and driving. Without a foundation of certainty, speed, and severity, the publicity proclaiming a tougher approach to drunk driving in Ohio will be ignored.<sup>213</sup> Thus, even the limited deterrence that can result from a well-conceived campaign against drunk driving like that in Great Britain or the ASAP's, appears likely to elude Ohio under existing conditions. The ultimate goal of the formation of a habit of obedience will likewise be unattainable.

B. *Special Deterrence: The Effect of the Law Upon the Apprehended Offender*

Perhaps recognizing the impediments to the general deterrent effect of S.B. 432, proponents of the new Ohio law indicated that their primary goal was to influence the future behavior of those

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213. The Ohio Department of Highway Safety (DHS) has conceived some interesting ideas to publicize the new law. One is a wallet-sized chart that estimates one's BAC as a function of number of drinks and body weight. On the other side of this card is a brief summary of "Ohio's Tough New 'Drunk Driving' Laws." Another notion is "REDDI," an acronym for "Report Every Dangerous Driver Immediately," that encourages citizens to report any dangerous driving that they observe. Such a program could aid enforcement of the new law by directly assisting police in locating drunk drivers and by deterring drinkers who are afraid that zealous fellow motorists or neighbors might call police. Without enforcement of tougher penalties, however, these efforts are wasted.

individuals who are arrested and charged with violation of the statute.<sup>214</sup> Critical to this goal is the immediate impact of the law upon the individual. The purpose of physically depriving the arrestee of his driver's license at the scene of the arrest is to shock the driver and alert him to the serious consequences which follow commission of the act. Subsequently, the offender will become aware of the prosecutor's leverage—if the offender has taken a chemical test, then he may be guilty almost automatically of a *per se* offense; if the offender has refused a test, that fact may be used at trial. Moreover, once convicted, the offender must spend at least three days in jail, regardless of a judge's inclination.

In theory, the statutory scheme appears likely to jolt prior offenders into future compliance with the law's demands, but reality discloses substantial obstacles to achievement of this limited goal. First, there will be no initial shock if the automatic license suspension provision is held unconstitutional. Second, since the primary shock to the offender intended under the statute is the mandatory three-day jail sentence, apprehension and conviction in a jurisdiction still operating under a municipal ordinance that does not contain the same provision and where suspended sentences are routine will only reinforce preexisting attitudes that drunk driving is not a serious offense. Further, license suspension is an ineffective sanction. Judges are even more reluctant to jail offenders who drive with suspended licenses than they are to jail drunk drivers. A recent California study showed that sixty-five percent of those who had their licenses taken away continued to drive.<sup>215</sup>

A final problem which will obstruct achievement of the special deterrence goal as well as the general deterrence objective is the alcoholic offender. Regardless of the number of times that an alcoholic or problem drinker is convicted, lack of control over his drinking behavior may result in more offenses. S.B. 432 does not require treatment of alcoholics and problem drinkers, although presumably a judge may order such treatment after the mandatory jail sentence has been served. Without sophisticated and effective diagnostic programs, however, a judge may not be aware of the offender's condition. The message of S.B. 432 is punishment, not treatment. The House of Representatives deleted the treatment alternative for first offenders proposed by the Senate in

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214. Interview with George Jupinko, Chief Counsel, Ohio Department of Highway Safety (June 21, 1983).

215. See LICENSE SUSPENSION STUDY, *supra* note 40.

the original version of the bill.<sup>216</sup> Neither chamber championed mandatory treatment. Therefore, like general deterrence and habit formation, the special deterrence goal may elude Ohio.

### C. *An Empirical Look at S.B. 432*

Empirical evidence supports the prediction that the deterrent effect of S.B. 432 will be insignificant. Notwithstanding the statute's procedural changes and tougher penalties, DWI offenders are not being treated much differently than they were prior to enactment of the law. It may be too early to dismiss the law as a total failure, but statewide statistics on fatal crashes since the effective date of the new law reflect no improvement over previous years. To evaluate the procedural impact of S.B. 432, the DWI dockets of the City of Cleveland and the City of Cleveland Heights were examined. The hundred days following the effective date of S.B. 432, March 16, 1983 until June 24, 1983, were compared with the same hundred-day period in 1982.

The DWI law of the City of Cleveland was not changed to mirror the revisions in the state statute. Cleveland prosecutes arrestees for one of three different offenses: the state DWI statute (which itself contains four separate offenses), the Cleveland municipal DWI ordinance,<sup>217</sup> which is much like the state statute prior to the S.B. 432 revisions, or a lesser included offense to the municipal DWI ordinance, entitled "actual physical control."<sup>218</sup> None of the ordinances mandates a three-day jail sentence. Actual physical control is less serious than municipal DWI in two respects: it carries no points towards license suspension,<sup>219</sup> nor does it qualify as a first DWI offense if the offender is convicted again for DWI, and thus does not trigger the enhanced penalties mandated by the state statute if a subsequent prosecution is brought under the state statute.

The total number of defendants charged with one of the three offenses increased about eight percent between the two hundred-day periods in 1982 and 1983, from 583 to 627.<sup>220</sup> Of those

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216. Compare Am. Sub. S.B. 432, 114th Gen. Assembly, Reg. Sess. § 4511.99(A)(1) (Apr. 29, 1982) (as passed by the Senate) with OHIO REV. CODE ANN. § 4511.99(A)(1) (Page Supp. 1982) (identical to House version).

217. CLEVELAND, OHIO, TRAFFIC CODE § 433.01(a) (1976).

218. CLEVELAND, OHIO, TRAFFIC CODE § 433.01(b) (1976).

219. See OHIO REV. CODE ANN. § 4507.40(G) (Page Supp. 1982).

220. The significance of this increase in charges is unclear; it could mean either increased enforcement of the DWI laws or more drunk driving activity.

charged, ninety-four percent were convicted in 1982, and ninety-seven percent were convicted in 1983.<sup>221</sup> The high conviction rates may be attributed to the fact that almost all defendants pleaded guilty to one of the three charges. There were no DWI trials whatsoever during the two periods. Many defendants were permitted to plead to the actual physical control offense: sixty-eight percent in 1982 and fifty-four percent in 1983.<sup>222</sup> Almost all remaining defendants were permitted to plead to the municipal DWI ordinance, carrying no mandatory jail sentence: twenty-four percent in 1982 and thirty-eight percent in 1983.<sup>223</sup> Only eight percent of all Cleveland DWI offenders charged in the periods each year pleaded and were convicted under the state statute.<sup>224</sup>

The increased percentage of pleas and convictions under the municipal DWI ordinance rather than its lesser included offense is possibly attributable to the increased prosecutorial leverage contained within the threat of prosecuting under the state statute. The most valuable plea bargaining card held by an offender is the threat of a trial, which the system cannot afford. Yet if the outcome of a trial is almost certain to be a finding of guilt, and the penalty for a conviction at trial is far more severe than that available through plea bargaining, the prosecutor holds the stronger hand. The per se offenses simplify the proof required at trial, so that if the defendant has taken a chemical test, he stands less chance of beating the DWI charge than he did prior to the 1983 amendments. Thus, Cleveland prosecutors may be able to induce defendants to plead to the more serious municipal DWI charge rather than actual physical control by using the threat of a per se

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221.		1982	1983
	Defendants Charged	583	627
	Defendants Convicted	550	608
222.		1982	1983
	Convictions Under § 433.01(b)	373	327
	All Convictions	550	608
223.		1982	1983
	Convictions Under § 433.01(a)	130	230
	All Convictions	550	608
224.		1982	1983
	Convictions Under § 4511.19	47	51
	All Convictions	550	608

prosecution and mandatory jail time. For some Cleveland offenders, then, the existence of the state statute may result in DWI convictions, even though not under the harsher state statute.

A key aspect of S.B. 432 is the enhanced jail sentences, fines, and license suspensions for drunk driving. The Cleveland data reveal only minor changes in these categories. In the hundred-day period in 1982, eighty-three offenders, or fifteen percent of the total convicted for all three offenses, spent time in jail. In 1983, only 105 offenders, or seventeen percent, spent time in jail. Strangely, even those offenders convicted under the state statute were not necessarily imprisoned. In 1983, only thirty-four of the fifty-one offenders convicted under the state statute in the hundred-day period were jailed. Thus, Cleveland still imprisons few DWI offenders.

Most DWI offenders in Cleveland received fines: ninety-four percent in both 1982 and 1983.<sup>225</sup> Fines were slightly higher in 1983: seventy-seven percent of all offenders were assessed the state minimum of \$150 or more, while seventy-one percent paid \$150 or more in 1982.<sup>226</sup> License suspensions are not commonly ordered by Cleveland judges: thirty percent of offenders had their licenses taken away in 1982, and even fewer, twenty-eight percent, lost their licenses for any time in 1983.<sup>227</sup> However, license suspensions were more likely to be severe in 1983: twelve percent of offenders lost their licenses for the state minimum of sixty days or more in 1983, compared with only seven percent in 1982.<sup>228</sup> Assignment to rehabilitation programs was down from thirty-one

225.

	1982	1983
Offenders Receiving Fines	517	573
All Convicted Offenders	550	608

226.

	1982	1983
Fines of \$150 or more	388	467
All Convicted Offenders	550	608

227.

	1982	1983
License Suspensions	167	173
Total Convictions	550	608

228.

	1982	1983
License Suspensions of 60 Days or More	41	74
Total Convictions	550	608

percent in 1982 to eight percent in 1983.<sup>229</sup>

The speed of punishment for drunk driving seems to have increased following enactment of S.B. 432. In 1982, only forty percent of DWI cases were disposed of within ninety days, while in 1983, sixty-five percent were disposed of within ninety days.<sup>230</sup> It is not possible to determine whether the speedier dispositions are a consequence of increased prosecutorial leverage, or stem from factors unrelated to S.B. 432.

On its own initiative, the City of Cleveland has made some attempts to increase DWI enforcement. It has assigned a few officers to high-accident areas at times when drunk driving is most frequent.<sup>231</sup> While such increased enforcement is necessary to achieve the deterrence objective, Cleveland lacks the resources to enforce the new law fully. Even if enforcement could be more tenacious, Cleveland does not have the jail space for even those offenders who are currently in the system.<sup>232</sup> Given these constraints, it is not surprising that the Cleveland statistics reveal no substantial change as a result of S.B. 432.

Unlike Cleveland, the City of Cleveland Heights changed its DWI ordinance as a consequence of S.B. 432. Cleveland Heights adopted the *per se* offenses but ignored the mandatory sentence provisions of the state statute. It charges all arrestees under its own municipal ordinance. If breath test results are available, the arrestee is typically charged under both the subjective impaired driving section and a *per se* offense. In some cases, the charge may be reduced to reckless operation, which is similar to Cleveland's actual physical control offense in that it does not constitute a first DWI offense and yields fewer Bureau of Motor Vehicles points.<sup>233</sup>

In the hundred days following the March 16, 1983 effective

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229.

	1982	1983
Rehabilitation Programs Used	170	47
Total Convictions	550	608

230.

	1982	1983
Convictions under § 433.01(a)	221	397
All Convictions	550	608

231. Interview with Fred Bolden, Cleveland Police Department (Feb. 28, 1984).

232. Interview with Ronald Adrine, Cleveland Municipal Court Judge (Feb. 17, 1984). According to Judge Adrine, there are only about 230 jail spaces available to Cleveland's municipal judges.

233. CLEVELAND HTS., OHIO, MUN. ORD. § 333.01 (1983).

date of S.B. 432, eighty-nine percent of Cleveland Heights arrestees charged with DWI were convicted under the municipal DWI ordinance, while the remaining eleven percent were convicted of reckless operation. In the comparable period in 1982, seventy-four percent were convicted of DWI, while twenty percent were convicted of reckless operation.<sup>234</sup> The decline in the total number of arrested and charged offenders between 1982 and 1983, from thirty-four to nineteen, may indicate some reduction in the frequency of drunk driving as a result of S.B. 432, although changes in enforcement activity or police attitudes could be responsible for the drop. The greater percentages of arrestees convicted of either offense and of offenders convicted of DWI rather than reckless operation may be, as in Cleveland, the consequence of greater prosecutorial leverage stemming from the per se offenses. All of the 1983 defendants in this period pleaded guilty to either DWI or reckless operation, while four of the 1982 defendants pleaded not guilty and were tried. Thus, the per se offenses may have strengthened the prosecutor's hand in Cleveland Heights.

A convicted DWI offender in Cleveland Heights, as in Cleveland, is unlikely to spend any time in jail. In the hundred-day period in 1982, only sixteen percent of convicted offenders were imprisoned. This figure rose to thirty-five percent in 1983, indicating that S.B. 432 may have influenced the Cleveland Heights court to award harsher penalties despite the absence of a mandatory sentence in the ordinance.<sup>235</sup> Most Cleveland Heights DWI offenders are fined: in the hundred days after the effective date of S.B. 432, eighty-two percent of offenders convicted under the municipal DWI ordinance were fined \$150 or more (\$150 is the state minimum for first offenders), while seventy-six percent were fined

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234.

	1982	1983
Total Convictions	34	19
Municipal DWI	25	17
Reckless Operation	7	2

One 1982 arrestee was found not guilty at trial, and one failed to appear.

235.

	1982	1983
Offenders Receiving Imprisonment	4	6
Total DWI Convictions	25	17

\$150 or more in the comparable period in 1982.<sup>236</sup> Cleveland Heights, like Cleveland, is unlikely to suspend an offender's driver's license. In 1983, sixty-five percent of convicted offenders received no license suspension at all, and only twenty-four percent received the state minimum for first offenses of sixty days or more. In 1982, twenty-eight percent of convicted offenders had their licenses suspended for sixty days or more.<sup>237</sup> Assignment to rehabilitation programs was down from thirty-six percent in 1982 to eighteen percent in 1983.<sup>238</sup> Thus, the severity of punishment for DWI offenders since S.B. 432 seems to have increased somewhat, except in the realm of license suspension. Perhaps license suspension has fallen into disfavor among judges due to its perceived ineffectiveness in keeping offenders off the road.<sup>239</sup>

Municipalities throughout Ohio have responded in different ways to S.B. 432.<sup>240</sup> A survey of municipal and county court judges reveals that many municipalities have chosen to treat drunk driving as Cleveland or Cleveland Heights do.<sup>241</sup> Of 121 judges responding to the survey,<sup>242</sup> sixty-eight percent reported

236.

	1982	1983
Offenders Receiving Fines of \$150 or More	19	14
Total DWI Convictions	25	17

237.

	1982	1983
Any License Suspension	14	6
Suspension of 60 Days or More	7	4
Total DWI Convictions	25	17

238.

	1982	1983
Rehabilitation	9	3
Total DWI Convictions	25	17

239. See *supra* note 40. The speed of prosecution in the 100-day period following the effective date of S.B. 432 appears little different from the comparable period in 1982. Sixty-eight percent of cases were disposed of within ninety days in 1983, while 66% were disposed of within ninety days in 1982. Speculation has arisen that the tougher penalties likely to be awarded since S.B. 432 took effect might stimulate delay and longer periods until disposition, since more offenders, it is hypothesized, will fight the charges. However, both Cleveland and Cleveland Heights statistics prove this speculation false: despite generally harsher penalties, cases are being disposed of with speed at least equal to that prior to S.B. 432.

	1982	1983
Disposition in 90 Days or Fewer	21	13
Total Convictions	32	19

240. See *supra* note 82.241. *Judges' Survey*, *supra* note 25.

242. There were 258 municipal and county court judges in Ohio on Dec. 31, 1982. See



that their jurisdictions had revised or were in the process of revising their DWI ordinances.<sup>243</sup> Almost all of those reporting changes reported the addition of per se provisions and enhanced penalties for repeat offenders,<sup>244</sup> and about two-thirds reported the enactment of mandatory jail sentences for first offenders.<sup>245</sup> Including those jurisdictions which did not change their ordinances, it appears that less than half of Ohio's municipalities statutorily require that a convicted offender spend time in jail. It is unclear whether these legal changes have generally increased prosecutorial leverage and caused defendants to plead guilty or no contest to DWI charges—fifty-five percent of the judges reported a higher percentage of guilty or no contest pleas since the effective date of S.B. 432.<sup>246</sup> The estimated average increase in guilty and no contest pleas was thirty-one percent.<sup>247</sup>

The mandatory jail sentences that are essential to the state scheme are thwarted by many of Ohio's municipal and county judges. Only fifty-nine percent reported sentencing first offenders to three-day jail terms.<sup>248</sup> Many reported using intervention programs as a substitute for incarceration.<sup>249</sup> Only a slight majority, fifty-two percent, observed any increase in the speed of prosecution of DWI cases since S.B. 432.<sup>250</sup> Enforcement levels appeared largely unchanged: thirty-eight percent of the judges reported more DWI filings since the effective date of S.B. 432, thirty percent reported fewer filings, and thirty-two percent reported no

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SUPREME COURT OF OHIO, OHIO COURTS SUMMARY 1982, at 71, 125 (23d summary ed. 1983)

243. Eighty-four reported amendments completed or pending, while 37 did not. *Judges' Survey, supra* note 25.

244. Seventy-two judges reported adoption of "specified B.A.C. provisions." *Id.*

245. Fifty-one reported amendments to require mandatory jail sentences for first offenders while 20 did not. Statewide examples of these ordinances run the gamut of options reported by the judges. The City of Cleveland, for instance, has not changed its ordinance. Both Cleveland Heights and Chagrin Falls have adopted the per se offenses but not mandatory jail time. *See supra* note 82.

246. Sixty-six judges reported an increase in guilty or no contest pleas, while 55 did not. *Judges' Survey, supra* note 25.

247. This figure is based on an average of 51 estimates reported. *Id.*

248. Seventy-three judges reported using three-day sentences for first offenders, while 50 did not. *Id.*

249. Seventy reported using alcohol intervention programs, while 11 did not. The fact that more judges reported using both three-day jail sentence and intervention programs than answered the survey (123) may be simply understood by realizing that some judges may do either, depending on the case. The survey question discussed in note 247, *supra*, did not ask, "do you sentence *all* first offenders to minimum three-day jail terms." *Id.*

250. Sixty judges observed faster disposition, while 55 did not. *Id.*

change.<sup>251</sup> Thus, the judicial survey largely corroborates the results from Cleveland and Cleveland Heights: S.B. 432 has had only a slight impact on the enforcement, prosecution and adjudication of DWI cases.

In light of these minimal improvements in the processing of DWI cases, it is not surprising that there has been no reduction in fatal crashes statewide since the effective date of S.B. 432. In fact, there were six more alcohol-related deaths between March 16, 1983 and January 1, 1984 than between March 16, 1982 and January 1, 1983.<sup>252</sup> Moreover, forty-three percent of Ohio traffic deaths in 1983 were determined to be alcohol-related, as opposed to thirty-eight percent in 1982.<sup>253</sup> Although arrests for drunk driving declined thirteen percent in 1983 from the 1982 level,<sup>254</sup> this statistic is ambiguous, since it may reflect changes in enforcement policy and activity rather than the frequency of drunk driving behavior. In any event, arrest statistics are of secondary importance. The most important goal of S.B. 432 is the prevention of fatal crashes through deterrence of drinking and driving. The Ohio approach to drunk driving remains poorly suited to this task.

#### CONCLUSION: A ROADMAP

The general and special deterrent purposes of DWI legislation are intended ultimately to stimulate a public attitude of moral opposition to drunk driving. However, there are innate limitations in the general and special deterrent effectiveness of DWI legislation. Achievement of the ultimate goal, formation of the moral component and habit of obedience to the law's requirements,<sup>255</sup> is impossible without a wholehearted commitment to wresting every possible measure of deterrence from the existing legislation. As-

251. Forty-two judges reported an increase in filings, 32 reported a decrease, and 36 reported no change. *Id.*

252. *Box Score, supra* note 8. There were a total of 515 alcohol-related deaths in this period in 1982, and 521 in the same period in 1983.

253. In 1982, 589/1541 traffic deaths were determined to be alcohol-related, while in 1983, 647/1520 traffic deaths were determined to be alcohol-related. *Id.*

254. From 48,939 to 42,658. *Id.*

255. The awareness of hazards of imprisonment or intoxicated driving is in a country like Sweden a living reality to every driver, and for most people the risk seems too great. When a man goes to a party where alcoholic drinks are likely to be served, and if he is not fortunate enough to have a wife who drives but does not drink, he will leave his car at home or he will limit his consumption to a minimum. It is also my feeling—although I am here on uncertain ground—that the legislation has been instrumental in forming the widespread conviction that it is wrong, or irresponsible, to place oneself behind the wheel when intoxicated . . .

J. ANDENAES, *supra* note 157, at 60-61 & n.39 (emphasis added).

suming the state government's firm commitment, additional steps must be taken to control drunk driving more effectively.

The numerous errors and ambiguities in the statutes must be resolved by the General Assembly. Section 3720.06 must be amended to allow treatment programs to be used only after the mandatory minimum jail sentences have been served, so that treatment is not used by judges as an alternative to incarceration for first offenders.<sup>256</sup> To forestall any due process challenges, the General Assembly should permit the section 4511.191(F) issues to be raised at the initial judicial suspension hearing.

More importantly, S.B. 432 must be applied uniformly throughout the state. Municipal courts imposing sanctions under local ordinances and failing to impose any jail sentence or suspending the first three days of a sentence are nullifying the state statute. An action for a writ of prohibition brought by the attorney general against a municipal court which fails to apply the state sanction would resolve the question of whether municipal nullification is a proper exercise of authority under the home rule amendment. If the drunk driving statute fails to meet the test of statewide concern or if the ordinances are held not to conflict with the statute, proponents of mandatory jail sentences for drunk drivers would be alerted to the need to seek an amendment to article XVIII, section 3 of the Ohio Constitution.

Convicted drunk drivers who continue to drive after their licenses have been suspended or revoked must be treated more seriously than in the past. These offenders have demonstrated that neither the general nor specific deterrent purposes of the law will dissuade them from committing violations. Offenders who have been convicted of drunk driving and reapprehended for driving during the license suspension period have demonstrated an absolute lack of willingness to conform to the law's expectations. They are equally likely to be on the road in an impaired condition as they were without a license, and consequently signify a continuing threat to the safety of all other drivers and pedestrians. The mandatory surrender of license plates during suspension periods should be required if the offender is the holder of plates, and consideration should be given to requiring the surrender of license plates if a vehicle owner permits an unlicensed driver to operate

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256. Likewise, § 4511.191(J)(2) should be amended to indicate that the "treatment and intervention special account" is meant to pay for programs after minimum jail terms. The per se offense based on a urine test should be eliminated from § 4511.19. The points provision should be amended to require that six points be assessed for any § 4511.19 violation.

his vehicle. Serious thought must also be given to preventing drivers whose licenses have been suspended from acquiring new licenses in adjacent states. A solution to this problem is to require all states to participate in a national clearinghouse providing license information. States would then have access to information sufficient to determine whether an applicant's license has been suspended anywhere in the country.<sup>257</sup> If license suspension is to impact significantly on individual behavior and add a deterrent effect to DWI laws, an inescapable revocation of driving privileges must occur.

The sanctions imposed under the Ohio statute are wholly punitive. Criminal penalties will have their greatest impact upon social drinkers who may very occasionally stray over the legal limit and drive in an impaired condition. This class of potential violators may well be deterred by the threat of imprisonment that is uniformly meted out following apprehension and conviction, and may adjust their behavior to avoid drinking and driving. If, at first, such an offender does not learn to obey the law, the increased penalties attached to subsequent convictions should provide the necessary reinforcement to ensure that the lesson is learned.

There is, however, a core group of nondeterrable drunk drivers, problem drinkers and alcoholics, who are responsible for a significant share of America's drunk driving problem. It has been suggested that as the class of individuals who do not fit into the problem drinking category are deterred by the existence of the law, the class of lawbreakers will become less a random sample of drivers. Instead, violators will be those who are problem drinkers, probably with a long history of drunk driving records, and less amenable to being deterred.<sup>258</sup> These individuals may represent a far greater proportion of the drunk driving problem than previ-

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257. In 1982, Congress enacted a law providing for alcohol traffic safety programs and a national driver register. 23 U.S.C. § 408 (1982) (alcohol traffic safety programs); National Driver Registration Act, Pub. L. No. 97-364, §§ 201-11, 96 Stat. 1738, 1740-48 (1982). The national driver register provides for the sort of exchange of information that could make a driver with a suspended license unable to get a license in another state. However, participation in the program is entirely voluntary on the part of each state. See Pub. L. No. 97-364, § 204(a), (b). If Congress were willing to make federal highway grants depend on participation in this program, unanimous participation might be assured. Without unanimous participation, the effectiveness of the law is greatly diminished, since a driver with a suspended license could simply go to a nonparticipating state for a license.

258. "This fact must be taken into account in forecasting the effect of any increase in the level of enforcement or punishment of an offense which is already strictly enforced and punished. He who invests in increased severity, has to expect diminishing returns." J. ANDENAES, *supra* note 157, at 104.

ously perceived. The ASAP program concluded that most drunk driving first offenders are social drinkers whose overindulgence is aberrational and subject to correction through education.<sup>259</sup> However, a survey in one court found the percentage of problem drinkers and alcoholics to be much higher. The Quincy, Massachusetts District Court ordered all defendants charged with drunk driving to undergo a two-day alcohol evaluation. That study concluded that more than seventy-five percent of first offenders were alcoholics and only twenty-five percent were social drinkers. Alcoholic offenders are not likely to be deterred solely by the threat of punishment.<sup>260</sup>

Likewise, alcoholic offenders are unlikely to alter behavior patterns without effective treatment of their problem. Ohio should establish a comprehensive diagnostic evaluation system prior to sentencing for all offenders, patterned after existing models, to determine the extent of the offender's alcohol problem. Sentencing would then be based upon this diagnosis. If the offender is free of alcohol or chemical dependency, sentencing consistent with the present statutory requirement is adequate and likely to affect the offender's future behavior. Those offenders who are found to be dependent on alcohol or drugs should be incarcerated for the minimum term with the remainder suspended, provided the defendant successfully completes an approved treatment program. The nature of the treatment should vary from involvement in counselling groups to the use of the drug antabuse<sup>261</sup> for the individual whose dependency is severe. Many individuals suffering from alcohol or drug dependency will deny their problems or lapse into old habits unless supervised and coerced, thus followup through the probation system is essential to ensure longterm success of treatment. The ultimate coercion is the threat of a return to jail and completion of the suspended jail sentence.

Perhaps the greatest weakness in Ohio's scheme for controlling drunk driving is its failure to provide for enhanced enforcement. European and American pioneer efforts to reduce drunk driving have demonstrated that general deterrence depends upon convinc-

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259. The ASAP's found that one-third of drinking drivers are social drinkers, one-third are problem drinkers, and the remaining third are somewhere in between. Drinkers fall along a continuum, rather than fitting into neat compartments. *See* ASAP REPORT, *supra* note 199, at 12-13.

260. *See* Kramer, *supra* note 210, at 10.

261. Antabuse (disulfiram) reacts violently with ingested alcohol, causing vomiting and other serious physical discomfort. PHYSICIANS' DESK REFERENCE 616 (J. Angel 37th ed. 1983).

ing would-be offenders that they are likely to be apprehended if they violate the prohibition. Law enforcement efforts must be mobilized to enhance detection of drunk drivers by assignment of additional personnel during peak drunk driving hours to locations where the activity is greatest. The information upon which the personnel assignments should be made is already available based upon past records including prior arrests, accident reports, and scenes of fatal crashes.

While the fourth amendment precludes American police officers from utilizing all of the tools employed by British police during the peak period of enforcement of the British Road Safety Act of 1967,<sup>262</sup> ample police tools to enable more vigorous enforcement of drunk driving and other traffic safety laws have passed constitutional muster. Although police may not arbitrarily and without particularized cause stop individual motorists to determine whether they are drunk, the Supreme Court has upheld checkpoint stops involving all motorists or those truly selected at random for purposes of checking drivers' licenses, automobile registrations and vehicle safety.<sup>263</sup>

The Court has utilized a balancing test to determine the validity of this type of stop, weighing the interest of the state against the nature and extent of the intrusion upon a motorist's privacy. Accordingly, the state's interest in ensuring the safety of its highways was held to outweigh the motorist's interest in being free from intrusions. Moreover, the intrusion was characterized by the Court as minimal. It is likely that the same interest in safety would be sufficient to justify roadblock stops to make a minimal inquiry into the sobriety of motorists. The Kansas Supreme Court has found constitutional a police drunk driving checkpoint where all drivers were subjected to a license check and officers were allowed to determine if they could smell the odor of alcohol emanating from the vehicle or the motorist's breath.<sup>264</sup> That court

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262. The commission of a traffic offense or mere involvement in a traffic accident does not provide probable cause to believe that a motorist has been driving under the influence of alcohol. When a police officer is called to the scene of an accident or has stopped a motorist for a traffic offense and ordered the motorist from his automobile pursuant to authority recognized in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), the motorist's conduct or speech may provide sufficient cause to believe that he was operating the vehicle under the influence of alcohol or drugs. To require a chemical test, there must first be probable cause to arrest the motorist for DWI. *See Schmerber v. California*, 384 U.S. 757 (1966).

263. *Delaware v. Prouse* 440 U.S. 648 (1979); *United States v. Prichard*, 645 F.2d 854 (10th Cir.), *cert. denied*, 454 U.S. 832 (1981).

264. *State v. Deskins*, 673 P.2d 1174 (Kan. 1983). *But see Ekstrom v. Justice Court*, 663

said:

When we consider the enormity of the injury and damage caused by the drinking driver and the vital interest of every citizen in being protected as far as possible upon the streets and roadways, we find that the public interest in a properly conducted DWI roadblock containing appropriate safeguards outweighs the individual's right to be free from unfettered intrusion upon his Fourth Amendment rights.<sup>265</sup>

Nothing inhibits the effect of any law more than delay in the period between arrest and disposition. Prompt prosecution and punishment adds to the perception that the community and its criminal justice system view the matter seriously. Conversely, tolerance for delay, as the prosecution and defense wear each other down to the point of accepting a compromise resolution without trial, transmits the message that the matter is not of great importance. Unfortunately, courts beleaguered by overcrowded dockets tend to accept this dilatory behavior from both sides in the interest of reducing the number of trials.

The Ohio statute works both sides of the delay issue. The change in the definition of the crime, making it a per se offense to register a blood alcohol content of .10% or more, simplifies the necessary proof in the event a case goes to trial. It substitutes a scientifically valid and readily understandable term for the vague concept of intoxication, making proof of the offense simply dependent on the chemical test rather than upon descriptions of the accused's behavior. Therefore, the amended law should promote speedier dispositions because defendants confronted with proof of the per se offense might well choose to plead to the charge and relinquish a trial.<sup>266</sup>

On the other hand, a policy of strict enforcement, coupled with the recognition by defendants that guilty verdicts, whether resulting from pleas or trials, will result in imposition of the mandatory

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P.2d 992 (Ariz. 1983) (no guidelines and too much discretion vested in police officers); Commonwealth v. McGeoghegan, 449 N.E. 2d 349 (Mass. 1983) (too much discretion given to police, and roadblock unsafe); State v. Olgaard, 248 N.W. 2d (S.D. 1976) (violation of fourth amendment because of lack of notice to motorists); Koonce v. State, 651 S.W. 2d 46 (Tex. Ct. App. 1983) (no evidence of objective, nondiscretionary procedure).

It is important to note that courts invalidating roadblocks have done so because of the manner and conditions of the roadblock, not because roadblocks are per se invalid.

265. 673 P.2d at 1185.

266. Though the judges' survey indicates that more defendants are pleading guilty or no contest to DWI charges, only about half reported that the speed of disposition of DWI cases increased overall. See *supra* notes 221-40 and accompanying text.

jail sentence, may stiffen the reluctance of some to waive trials and plead guilty. Moreover, this result may be compounded in the case of repeat offenders who face enhanced mandatory sentences for subsequent offenses. If the deterrent effect of the new law is to be maximized, however, the courts will have to play a significant role to ensure that the judicial phase of the state's assault on drunk driving is not obstructionist. Courts facing extended calendars because of trial demands by defendants charged with drunk driving must consider the creation of an alternate, expedited trial calendar for drunk driving cases which should be given preference over other misdemeanors. Alternatively, multijudge urban municipal courts should consider assigning all drunk driving prosecutions to one judge whose primary responsibility would be that particular docket.

Finally, the deterrent effect of any law is limited, and achievement of even limited goals will involve continuous efforts and investment of significant resources. The proposals made here for vigorous enforcement, expanded evaluations of convicted defendants to determine the existence of alcohol or chemical dependency, comprehensive treatment programs, and followup supervision by expanded probation departments involve a substantial commitment of the state's resources. Past experience with similar statutory changes has demonstrated the unlikelihood that tougher penalties alone will have a significant deterrent effect. Equally important to the development of a comprehensive program is that vigorous enforcement be sustained. The deterrent effect will be transient, at best, if enhanced enforcement occurs for a few months and then is dropped. Old behavior patterns can be counted upon to reappear as soon as the public, and especially would-be offenders, perceive that the state has lost its zeal in dissuading this type of illegal behavior.

To date, there is no evidence that Ohio or its individual communities have mounted the sustained, well-publicized campaign necessary to cause the public to reconsider decisions to combine the potentially lethal behavior of drinking and driving. Ohio's drunk driving law, as part of a comprehensive effort on the part of all state and local agencies, can partially achieve the goal sought by the legislature. Partial success which would lead to a saving of some lives should provide sufficient incentive to make this effort. Moreover, enforcement over an extended period of time can lead towards the development of an attitude within the community that the combination of drinking and driving is absolutely unaccept-



able behavior, and thus stimulate a habit of compliance with the law's command. Whether Ohio is able to exhibit the will necessary to mount the effort to achieve the limited success that comprehensive enforcement of the drunk driving law promises is not at all clear. Nothing dampens will more than the prospect of less than total success. In this instance, however, it is a matter of life and death.