University of Dayton Law Review

Volume 9 | Number 1 Article 9

1983

S. 432: Ohio Stringent Penalties to Deter Driving While Intoxicated

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LEGISLATION NOTE

S. 432: OHIO ENACTS STRINGENT PENALTIES TO DETER DRIVING WHILE INTOXICATED.

I. INTRODUCTION

Ohio's 114th General Assembly encountered frightening statistics when it attempted to deal with the problem of operating a motor vehicle while intoxicated (OMVI) by enacting Senate Bill 432 (S. 432).[1] Of the total traffic deaths in Ohio in 1982, thirty-nine percent were alcohol-related.[2] Traffic accidents have been the leading cause of death of Ohioans under forty-five years of age, and alcohol-related traffic accidents have been the leading cause of death among all Americans under the age of thirty-five.[3] While the total number of traffic deaths in Ohio has shown a significant decrease in recent years, the percentage of traffic deaths attributable to alcohol has increased.[4] Increased publicity of the tragic stories of the victims of drunk drivers added further urgency to the need to reverse the OMVI statistics.[5] In a recent case, the United States Supreme Court recognized the "carnage caused by drunk drivers," and again emphasized the states' compelling interest in highway safety.[6]

The drunk driving problem clearly existed; something had to be done. A flurry of bills was introduced in the General Assembly.[7] In October of 1981, former Governor Rhodes's Traffic Safety Committee held its annual conference in Columbus, Ohio.[8] Partly as a result of this conference, the Director of the Ohio Department of Highway Safety and the governor's office formed the Governor's Study Group on

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1. Act of Dec. 14, 1982, 1982 Ohio Legis. Serv. 5-500 (Baldwin) (codified in scattered sections of chs. 29, 37, & 45 OHIO REV. CODE ANN. (Page Supp. 1982)).

2. Ohio Dep't Highway Safety, Press Release: Weekly Drunk Driving/Seatbelt Report (Nov. 5, 1982) (on file with University of Dayton Law Review).

3. OHIO DEP'T HIGHWAY SAFETY, THE GOVERNOR'S STUDY GROUP ON ALCOHOL-IMPAIRED DRIVING IN OHIO ii [hereinafter cited as GOVERNOR'S STUDY GROUP] (on file with University of Dayton Law Review).

4. *Id.*

5. *See, e.g.*, Starr, Cook, Zabarsky, Contreras, & Foote, *The War Against Drunk Drivers*, NEWSWEEK, Sept. 13, 1982, at 34.

6. South Dakota v. Neville, 103 S. Ct. 916 (1983).

7. *See* GOVERNOR'S STUDY GROUP, *supra* note 3, at G-5 to G-10.

8. Guest speakers included Ms. Candy Lightner, founder and President of Mothers Against Drunk Drivers (MADD). GOVERNOR'S STUDY GROUP, *supra* note 3, at v.

Alcohol-Impaired Driving in Ohio (Governor's Study Group).[9]

The Governor's Study Group report was not final when S. 432 was introduced in the General Assembly.[10] Contact between S. 432's drafters and the Governor's Study Group, however, was maintained during the legislative process and "selective incorporation" of the Governor's Study Group's recommendations was included within S. 432.[11] As will be noted later, key recommendations of the Governor's Study Group were not incorporated within S. 432—recommendations which would have provided a more comprehensive and integrated approach to the complex drinking and driving problem. The General Assembly instead relied almost exclusively on increased penalties to combat OMVI.

This note will summarize the provisions of S. 432. The provisions are many: the general OMVI prohibition and the new prohibition of driving with a specified blood, breath, or urine concentration; the implied consent statute; case law which will remain valid under Ohio's new drunk driving law; and the increased penalties for OMVI including mandatory imprisonment and license suspensions or revocations.

This note will also analyze S. 432's potential to serve its purpose of reducing drinking and driving. Attention will be devoted to whether the per se OMVI violation is constitutional; whether the bill's increased penalties will be an effective deterrent in combating drinking and driving; whether plea bargaining will undercut the deterrent effect of the bill's penalty provisions; and whether S. 432 adequately addresses behavior modification of the OMVI offender and state agency cooperation, which are both necessary for a successful long-term solution to the drinking and driving problem.

II. S. 432 — PROVISIONS OF THE BILL

A. The General and Per Se Violations

Prior to the passage of S. 432, the law provided that no person under the influence of alcohol[12] or any drug of abuse[13] could operate

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9. *Id.*

10. Telephone interview with C. Jones, Legislative Director for U.S. Congressman Michael DeWine (Mar. 18, 1983) [hereinafter cited as Jones Interview] (on file with University of Dayton Law Review) (Congressman Michael DeWine was an Ohio State Senator when he sponsored S. 432).

11. *Id.*

12. "Under the influence of alcohol" has been interpreted to mean that the accused must have consumed an intoxicating beverage in such a quantity so that its effects were such that they "adversely affect his actions, reactions, conduct, movements or mental processes," in such a way as to deprive him of "that clearness of intellect and control of himself" which he otherwise would have possessed if he were not under the influence of alcohol. State v. Steele, 95 Ohio App. 107, 111, 117 N.E.2d 617, 619 (1952).

13. "Drug of abuse" is any "controlled substance" defined in § 3719.01, any harmful intoxi-

any vehicle in Ohio.[14] The law made chemical analysis results[15] *admissible as evidence* to prove the defendant was driving under the influence of alcohol, drugs, or both.[16] The law created three evidentiary presumptions, each determined by the results of the blood-alcohol content (BAC) test.[17]

The new law now prohibits operation of a vehicle if any of the following are true: the person is under the influence of alcohol, any drug of abuse, or both;[18] the person has a concentration of ten-hundredths of one percent or more by weight of alcohol in his blood;[19] the person has a concentration of ten-hundredths of one gram or more by weight of alcohol per 210 liters of his breath;[20] or the person has a concentration of fourteen-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his urine.[21]

The new law therefore contains both a general OMVI prohibition[22] and a separate prohibition against operating a vehicle if the operator's physiologic alcohol concentration is at a proscribed level. An alcohol content level of 0.10 percent is illegal in and of itself; thus the statute creates a "per se" violation.[23] This per se violation does not mean, however, that a defendant must be found guilty of OMVI if the proscribed percentage is indicated by the alcohol-content test.[24] As will be discussed below, issues—including whether there has been a valid arrest, whether there was probable cause for the arrest, and whether the results of the alcohol-content test device are reliable—will remain as defenses to the per se violation.[25]

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cant defined in § 2925.01, and any "dangerous drug" defined in § 4729.02. OHIO REV. CODE ANN. § 3719.011(a) (Page 1980). These definitions are not affected by S. 432.

14. OHIO REV. CODE ANN. § 4511.19 (Page 1982). This article will not discuss issues pertaining to S. 432's impact upon a municipality's drunk-driving laws. For a discussion of these issues see Nichols, Gingher & Christensen, *Ohio's New Drunk Driving Law*, OHIO CITIES AND VILLAGES, Apr. 1983, at 5.

15. Evidence on the concentration of alcohol in the defendant's blood, as shown by chemical analysis of the defendant's blood, urine, breath, or other bodily substance withdrawn within two hours of the violation was considered admissible under the old law. OHIO REV. CODE ANN. § 4511.19 (Page 1982).

16. *Id.*

17. *Id.* § 4511.19(A), (B), (C).

18. *Id.* § 4511.19(A)(1) (Page Supp. 1982).

19. *Id.* § 4511.19(A)(2).

20. *Id.* § 4511.19(A)(3).

21. *Id.* § 4511.19(A)(4).

22. The general OMVI prohibition is necessary to enable prosecution for OMVI where a BAC test was not taken. GOVERNOR'S STUDY GROUP, *supra* note 3, at B-2 n.*.

23. Weisenburg, *State House Matters: Ohio's New "Drunk Driving Law"*, 55 OHIO ST. B. A. REP. 2210 (1982).

24. *See* Mathews, *Judge is Wary of Drunk Law*, Columbus Dispatch, Feb. 20, 1983, at C1, col. 1 (quoting Athens Mun. Ct. Judge Thomas Hodson).

25. *See infra* text accompanying notes 162-71.

An alcohol-content test which shows less than 0.10 percent blood-alcohol, 0.10 percent breath-alcohol, or less than 0.14 percent urine-alcohol can be considered with "other competent evidence" to determine whether the accused is in violation of the statute.[26] The new law repeals the old law's presumption that a defendant is innocent of OMVI if his or her BAC is 0.05 percent or less.[27]

The per se violation has been expanded beyond blood level tests alone to include the results of breath-alcohol and urine-alcohol concentration tests.[28] The new law also makes the expanded per se violation applicable to those vehicular homicide cases where the defendant was under the influence of alcohol, drugs, or both at the time the offense was committed.[29]

A direct blood test has been scientifically established to be the most accurate BAC test device, and the results of such tests are widely accepted by the courts.[30] But there are legal limitations to the use of direct blood tests by police departments: specifically, a blood test may only be administered by a physician, registered nurse, or, under the new law, a qualified technician or chemist.[31] The breathalyzer is therefore the most frequently used BAC test device in Ohio.[32]

The new law has expanded the prohibited alcohol-content levels from blood alone to also prohibit specific breath- and urine-alcohol level concentrations.[33] This should frustrate defenses based upon the legal reliability of the correlation and conversion of breath and urine tests to blood-alcohol levels. Drafters of S. 432 felt that the reliability problems of converting breath-alcohol levels to blood-alcohol levels could be eliminated by enacting a pure breath standard.[34] The Ohio State Bar Association, however, notes that "all breath testing devices rely on the principle that breath-alcohol levels correlate with blood-alcohol levels . . . . The principal [sic] of blood-breath alcohol level correlation . . . is far from being generally accepted by the scientific community and is therefore vulnerable to attack."[35] The new per se law,

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26. OHIO REV. CODE ANN. § 4511.19(B) (Page Supp. 1982).
27. *Id.* § 4511.19(C) (Page 1982).
28. *Id.* § 4511.19(A)(3), (4) (Page Supp. 1982).
29. *Id.* §§ 2903.06(B), 2903.07(B).
30. R. ERWIN, DEFENSE OF DRUNK DRIVING CASES, § 15.01 (2d ed. 1966).
31. OHIO REV. CODE ANN. § 4511.19(B) (Page Supp. 1982).
32. Mathews, *supra* note 24.
33. OHIO REV. CODE ANN. § 4511.19(A)(2), (3), (4) (Page Supp. 1982).
34. Letter from David Diroll to Ohio State Senator Michael DeWine (Apr. 14, 1982) (on file with University of Dayton Law Review).
35. Likavec & Thompson, *Challenging Breath Analysis Evidence*, 54 OHIO ST. B.A. REP. 339, 339-40 (1981). *See also* Comment, *Driving with 0.10% Blood Alcohol: Can the State Prove It?*, 16 U.S.F.L. REV. 817 (1982) (various factors such as time, temperature, alcohol absorption and elimination rates affect the reliability of the breathalyzer's findings).

therefore, does not end the legal reliability issue with respect to the results of a breathalyzer test. The reliability issue of breathalyzer tests remains significant, especially if the judge involved believes that breathalyzer tests are inherently unreliable. Judge Thomas Hodson has stated he "has seen acquittals through this [reliability] tactic and probably still will under the new law."[36] The Ohio Supreme Court, however, has determined that results of breathalyzer tests are *reasonably* reliable with respect to the issue of intoxication.[37]

Urine tests, although accepted as reasonably accurate, are not widely used because of the delay in time it takes for alcohol to pass from the bloodstream into the kidneys and bladder.[38] Privacy concerns are also implicated in the administration of a urine test. There is some dispute as to whether a roadside urine test can be administered and whether a police officer of the same gender as the arrestee must be present when the test sample is taken.[39]

The new law provides that BAC test results will not establish an OMVI violation unless the prosecutor shows: (1) the test was administered within two hours of the alleged violation;[40] (2) the bodily substance was analyzed in accordance with methods approved by the Director of Health;[41] and (3) the test was analyzed by a person possessing a valid permit issued by the Director of Health.[42]

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36. Mathews, *supra* note 24.

37. City of Westerville v. Cunningham, 15 Ohio St. 2d 121, 123, 239 N.E.2d 40, 41 (1968).

38. R. ERWIN, *supra* note 30, at § 22.01[1]. The main problem with the use of a urine test is the reliability of the results. Because urine is taken into the bladder a little at a time, the actual test specimen may have accumulated in the bladder over a long period of time. Converting the urine's alcohol content to the arrestee's blood-alcohol content is therefore difficult. For a urine test to be reliable, the arrestee must empty his bladder at least 15 minutes before the test specimen is taken. The specimen taken after this 15-minute interval will then more accurately reflect the current alcohol concentration in the urine. Even under this procedure, however, reliability questions still remain. The time it takes for alcohol to pass from the blood and through the urinary system may vary with each individual. In some cases, the alcohol content of the urine may be diluted because the arrestee had consumed a large quantity of non-alcoholic liquids prior to the administration of the test. In other cases, the alcohol content of the urine may be unreliably high in relation to the BAC because even a small amount of a high alcohol content beverage had been consumed. *Id.*

39. *Compare, e.g.*, FLA. STAT. ANN. § 316.1932(1)(a) (West Supp. 1983) (to maintain the privacy of the arrestee, the administration of a urine test must be done at a detention facility or any other facility, mobile or otherwise) *with* OHIO REV. CODE ANN. § 4511.19(B) (Page Supp. 1982) (no limitation specified).

40. OHIO REV. CODE ANN. § 4511.19(B) (Page Supp. 1982). See Comment, *supra* note 35, at 820-27, for problems that exist with correlating the arrestee's BAC at the time of arrest to the time the BAC test is administered.

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

42. *Id. See also* Cincinnati v. Sand, 43 Ohio St. 2d 79, 85-86, 330 N.E.2d 908, 912 (1975) (the state must show that the test device was in proper working order and that its operator was qualified to administer the test).

Constitutional challenges as to the admissibility in evidence of BAC tests have generally failed. In *City of Piqua v. Hinger,*[43] the Ohio Supreme Court held that BAC tests do not violate the fifth amendment's protection from self-incrimination. In *State v. Starnes,*[44] the court held that the administration of a BAC test is not an unreasonable search and seizure.[45] Although these cases were decided under the old law, they remain persuasive authority under S. 432's provisions.[46]

S. 432 provides that the person being tested must be advised that he or she may have a physician, registered nurse, qualified technician, or chemist of his or her choice administer a BAC test *in addition to* any test given at the discretion of the police officer.[47] The failure or inability to obtain an additional test, however, does not preclude admitting into evidence the results of the test which had been administered at the police officer's discretion.[48]

The new law maintains statutory defenses which are valid against both the general and per se OMVI violations. The administration of a BAC test, license suspension, and prosecution for OMVI must be based upon a valid arrest.[49] The arresting officer must also have had reasonable grounds to believe that the person had been driving under the influence of alcohol or other drug of abuse.[50]

Additional case law defenses which were established prior to S. 432 also remain valid against both the general and per se OMVI violations.[51] Whether the officer had reasonable grounds to believe that the person was driving under the influence must be determined from all of the facts and circumstances of each case.[52] A police officer may make a warrantless arrest only if he or she observes the commission of the offense, or the person admits to driving while under the influence and it

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43. 15 Ohio St. 2d 110, 112-13, 238 N.E.2d 766, 767-68 (1968) (citing as controlling Schmerber v. California, 384 U.S. 757 (1966)).

44. 21 Ohio St. 2d 38, 254 N.E.2d 675 (1970).

45. *Id.* at 43, 254 N.E.2d at 678.

46. These pre-S. 432 cases remain persuasive authority because S. 432 did not amend the old law as it relates to the issues which gave rise to these cases. *See* 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 50.01-.05 (C. Sands 4th ed. 1973).

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

48. *Id.* Pre-S. 432 case law established that the right to be advised of the opportunity to obtain an additional test is a statutory right and not a constitutional guaranty. State v. McDonald, 25 Ohio App. 2d 6, 265 N.E.2d 793 (1970). *See also* Kettering v. Baker, 42 Ohio St. 2d 351, 328 N.E.2d 805 (1975) (one charged for OMVI has no constitutional right to receive a chemical test); State v. Meyers, 26 Ohio St. 2d 190, 271 N.E.2d 245 (1971) (the police BAC test is admissible into evidence even if the defendant was not advised he or she could have an independent test given). S. 432 does not affect these case law rules. *See* 2A J. SUTHERLAND, *supra* note 46.

49. OHIO REV. CODE ANN. § 4511.191(A), (F) (Page Supp. 1982).

50. *Id.* § 4511.191(A), (D), (F).

51. *See* 2A J. SUTHERLAND, *supra* note 46.

52. Atwell v. State, 35 Ohio App. 2d 221, 301 N.E.2d 709 (1973).

is obvious to the officer that the person is intoxicated.[53] However, there is now a requirement that *Miranda* warnings be given[54] after an arrest—even though a BAC test produces "real" or "physical" evidence, the compulsory taking of which is not unconstitutional.[55]

B. Implied Consent

To encourage people arrested for OMVI to submit to a BAC test, Ohio, like every other state, has an implied consent statute.[56] The implied consent law is based upon the premise that persons who operate motor vehicles in Ohio are deemed to have given their consent to a chemical test of their blood, breath, or urine for the purpose of determining their BAC if arrested for OMVI.[57] Refusal to submit to a BAC test gives rise to sanctions apart from those imposed for conviction for OMVI.

The basic provisions of Ohio's implied consent law[58] have been left intact by S. 432. The new law amended section 4511.191(A) to allow the use of chemical tests to determine the drug content of an arrested person's blood, breath, or urine.[59] S. 432 expands the locations where a person can be advised of the consequences of refusing to take a BAC test from "at a police station" to a hospital, first-aid station, or clinic to which the person has been taken for medical treatment.[60] The bill also expands the list of witnesses who will be permitted to attest to the police officer's reading of the advice form to the arrestee. The witnesses have been expanded from "another police officer" or "civilian police employee," to an employee of a hospital, first-aid station, or clinic to which the arrestee has been taken for treatment.[61]

Constitutional attacks upon Ohio's implied consent statute have failed[62] and the case law established by these decisions will remain valid under S. 432.[63] In *State v. Hurbean,*[64] the court held that the implied consent law is to be liberally construed in favor of public

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53. State *ex rel.* Wilson v. Nash, 41 Ohio App. 2d 201, 324 N.E.2d 774 (1974).

54. *See* McCarty v. Herdman, Dayton Daily News, Sept. 7, 1983, at 31, col. 1 (6th Cir. Sept. 6, 1983) (holding that drunk-driving arrestees must be given the same *Miranda* warnings as those arrested for felonies).

55. *Hinger,* 15 Ohio St. 2d at 112, 238 N.E.2d at 767 (1968).

56. Note, 13 AKRON L. REV. 731, 735 (1980).

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

58. *Id.* § 4511.191.

59. *Id.* § 4511.191(A).

60. *Id.* § 4511.191(C).

61. *Id.*

62. *See, e.g.,* State v. Starnes, 21 Ohio St. 2d 38, 254 N.E.2d 675 (1970) (implied consent law not violative of the fourth amendment).

63. *See* 2A J. SUTHERLAND, *supra* note 46.

64. 23 Ohio App. 2d 193, 261 N.E.2d 290 (1970).

safety.

If a person arrested for OMVI refuses to take a BAC test, no chemical test is to be given.[65] The prosecutor must then base an OMVI conviction upon the general OMVI prohibition.[66] However, the defendant would face a possible one-year driver's license suspension for such a refusal.[67] The basic changes in the implied consent law relate to the scope and mode of license suspensions.[68] These changes will be discussed in connection with increased penalties for OMVI below.

C. Increased Penalties

1. Imprisonment for OMVI

The old law provided that a person convicted of OMVI was guilty of a first-degree misdemeanor.[69] The old law also provided for mandatory imprisonment of at least three days for the first and subsequent convictions.[70]

S. 432 also makes OMVI a first-degree misdemeanor.[71] The bill, however, modifies the sentencing structure. The law now states that if the defendant has not been convicted of OMVI within five years of the offense or within five years of a vehicular homicide case[72] where the defendant was found to be under the influence of alcohol, drugs, or both, he or she must be sentenced to a term of at least three days and fined at least $150.[73] The three days must be served consecutively,[74] and three consecutive days are defined to mean seventy-two consecutive hours.[75] The three-day incarceration period cannot be suspended for any reason.[76] If the defendant has been convicted of OMVI within five years of the offense or of a vehicular homicide charge where the defendant was found to be under the influence, he or she must be sentenced for a term of at least ten days and pay at least a $150 fine.[77] This ten-

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65. OHIO REV. CODE ANN. § 4511.191(D) (Page Supp. 1982).
66. *Id.* § 4511.19(A).
67. *Id.* § 4511.191(D).
68. OHIO LEGISLATIVE SERV. COMM., BILL ANALYSIS: AM. SUB. S.B. 432 (AS PASSED BY THE HOUSE) 6 (1982) [hereinafter cited as Legislative Analysis] (on file with University of Dayton Law Review).
69. OHIO REV. CODE ANN. § 4511.99(A) (Page 1982).
70. *Id.*
71. *Id.* § 4511.99(A) (Page Supp. 1982).
72. *Id.* §§ 2903.06(B), 2903.07(B).
73. *Id.* § 4511.99(A)(1). The maximum fine that can be imposed under any OMVI conviction is one thousand dollars. *Id.* § 4511.99(A)(1), (2), (3).
74. *Id.* § 4511.99(A)(1).
75. *Id.* § 4511.991.
76. *Id.* § 4511.99(A)(4), (5).
77. *Id.* § 4511.99(A)(2).

day sentence cannot be suspended for any reason[78] and the ten days must be served consecutively.[79] If the defendant has been convicted more than once of OMVI within five years of the offense, or of a vehicular homicide charge where the defendant was found to be under the influence, the sentence is increased to at least thirty consecutive days and a fine of at least $150.[80] This sentence also cannot be suspended for any reason.[81]

Second and subsequent offenders are allowed to make a showing to the court that the sentence imposed would "seriously affect the ability of an offender . . . to continue his employment."[82] The court may then grant a work release, but not until the three-, ten-, or thirty-day sentence has been served.[83]

It is made explicit in the new law that "notwithstanding . . . any . . . section of the Revised Code that authorizes the suspension of a sentence, no court shall suspend the three, ten, or thirty consecutive days of imprisonment required to be imposed by . . . this section."[84] A literal reading of this section raises the question of S. 432's impact upon section 2935.33, which provides for the commitment of alcoholics and intoxicated persons, and authorizes the courts to commit such offenders to close supervision in alcoholic treatment and control centers in lieu of imprisonment.[85] S. 432 did not amend section 2935.33 as it relates to sentencing for OMVI.

In a pre-S. 432 case, the Ohio Supreme Court[86] held that it was within a judge's discretion to imprison a person convicted of OMVI under old section 4511.99(A)[87] by utilizing the definition of "imprisonment" found in section 1.05,[88] or to commit him or her to treatment

78. *Id.* § 4511.99(A)(4), (5).

79. *Id.* § 4511.99(A)(2).

80. *Id.* § 4511.99(A)(3).

81. *Id.* § 4511.99(A)(4), (5).

82. *Id.* § 4511.99(A)(4).

83. *Id.* The duration of a work release privilege is limited to the time actually spent by the offender at his or her place of employment and the time necessary to commute to and from his or her place of work and the place of imprisonment. *Id.*

84. *Id.* § 4511.99(A)(5).

85. *Id.* § 2935.33 (Page 1982).

86. State *ex rel.* Philips v. Andrews, 50 Ohio St. 2d 341, 364 N.E.2d 281 (1977).

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

88. *Id.* § 1.05.

As used in the Revised Code, unless the context otherwise requires, 'imprisoned' means imprisoned in a county or municipal jail or workhouse if the offense is a misdemeanor, and imprisoned in a state penal or reformatory institution if the offense is a felony, or if imprisonment in a state penal or reformatory institution is ordered pursuant to division (E)(3) of section 2929.41 of the Revised Code.

Id.

under section 2935.33(B).[89] The court seized upon the "unless the context otherwise requires" language in section 1.05 to hold that "there is leeway for interpretation of 'imprisonment' as used in R.C. 4511.99(A) when read *in pari materia* with R.C. 2935.33."[90]

Because S. 432 did not amend sections 2935.33 and 1.05, "courts may interpret S. 432 to allow the [new law's] 'mandatory' sentence to be served in alcohol intervention programs as governed by the Ohio Department of Health."[91] Highway Safety Director Kenneth Cox, who was a member of the Ohio Senate when S. 432 was passed, stated at a press conference when S. 432 became effective that

> the most widely accepted interpretation . . . is that judges may divert first offenders into a 72-hour education program rather than sending them to jail.
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> '[T]his interpretation will be upheld by the courts and should help in what some say might cause overcrowding of the jails . . .
>
> 'I believe that the provisions in this legislation can be interpreted in a constructive and positive way by the judiciary of this state, if they are determined to get tough with drunk drivers, and it can be interpreted in a narrow and negative way by the courts if they want to maintain the status quo of wholesale plea bargaining and 40 per cent conviction rates.'[92]

The sponsor of S. 432, now U.S. Congressman Michael DeWine, feels differently. Congressman DeWine's legislative aide stated that "clearly, the intent of the Ohio legislators as the bill was passed was that a person convicted of [OMVI] must first spend time in jail before he can be placed in an intervention program."[93]

S. 432 also enacted section 3720.06 which provides that any driver intervention program used as an alternative to "actual incarceration" must be certified by the Director of Health.[94] This section lends more

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89. 50 Ohio St. 2d 341, 343, 364 N.E.2d 281, 284 (1977).

90. *Id.* at 342 n.2, 364 N.E.2d at 283 n.2.

91. Telephone interview with George Jupinko, General Counsel for the Ohio Department of Highway Safety (Feb. 11, 1983) [hereinafter cited as Jupinko Interview] (on file with University of Dayton Law Review).

92. *New Drunk Driving Law May Permit Some Leniency,* Gongwer News Serv., Inc., Ohio Report, Mar. 17, 1983, at 1 [hereinafter cited as Drunk Driving Leniency] (on file with University of Dayton Law Review).

93. Jones Interview, *supra* note 10.

94. OHIO REV. CODE ANN. § 3720.06 (Page Supp. 1982) A driver intervention program must meet state minimum standards established by the Director of Health. These standards include, but are not limited to: standards governing course hours and content; methods of identifying and testing participants with alcohol and drug abuse problems; referral of such persons to treatment and control centers or similar facilities; referral of such persons to drug treatment and rehabilitation programs; record keeping, including methods of tracking participants for a reasonable time after they leave the program. *Id.* Intervention programs are to be funded by license reinstate-

confusion to the issue of whether a court must imprison a person convicted of OMVI before placing him or her in a driver intervention program. Resolution of this issue is a subject for further legislation.

2. Administrative License Suspensions under the Implied Consent Law.

The old law provided that an arrested person's refusal to take a BAC test resulted in a six-month license suspension by the Registrar.[95] S. 432 extends the Registrar's suspension to one year.[96] The administrative hearing procedures in the new law are identical to those provided for in the old law. Under the new law, the Registrar must notify the person who refused to take a BAC test that he or she may petition for a hearing and that the suspension will be delayed until the hearing or any appeal is taken.[97] The arrestee has twenty days after the mailing of the notice to petition the court, agree to pay costs, and allege error in the Registrar's decision to suspend the license.[98] The scope of this hearing is limited to the determination of whether the arresting officer had reasonable grounds to believe the petitioner was operating a motor vehicle while under the influence of alcohol; whether the person was placed under arrest; whether the person refused to take a BAC test; whether he or she was advised of the consequences of a refusal to take a BAC test; whether the BAC test was analyzed according to methods approved by the Director of Health by a person who possesses a valid operator's permit; and whether his or her employment is of such a nature that the ability to continue his or her employment would be seriously affected if the suspension were to be imposed.[99]

A pre-S. 432 case held that the person alleging that the Registrar erred in suspending the person's license has both the burden of going forward and the burden of persuasion.[100] A driver's license suspension hearing under the implied consent statute has also been held to be limited in scope, administrative in nature, and independent of any criminal proceeding instituted pursuant to section 4511.19.[101] There is no right to a jury trial in the license suspension hearing.[102] The results of neither the administrative hearing under the implied consent statute

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ment fees obtained from people whose licenses had been suspended by the Registrar under the implied consent statute, or by the court for an OMVI conviction. *Id.* § 4511.191(J)(2).

95. *Id.* § 4511.191(D) (Page 1982).

96. *Id.* § 4511.191(D) (Page Supp. 1982).

97. *Id.* § 4511.191(E).

98. *Id.* § 4511.191(F).

99. *Id.*

100. Foks v. Andrews, 55 Ohio App. 2d 253, 255, 380 N.E.2d 756, 757 (1977).

101. State v. Starnes, 21 Ohio St. 2d 38, 46, 254 N.E.2d 675, 680 (1970).

102. Bright v. Curry, 33 Ohio Misc. 51, 54, 300 N.E.2d 470, 472 (1973).

nor the criminal trial for OMVI have res judicata effect upon one another.[103] In Ohio, the prosecutor is allowed to comment at the criminal trial upon the defendant's refusal to take a BAC test.[104] S. 432 will not change these case law rules.[105]

As under the old law, the new law provides that if the court does not find error in the Registrar's suspension, the court must uphold the suspension.[106] If error in the Registrar's suspension is found, the license must be reinstated without charge.[107] The court may grant occupational driving privileges during the suspension.[108] Persons who violate this privilege are now subject to a further license suspension of up to one year.[109]

At the end of a suspension period imposed for either refusing to take a BAC test,[110] or for being convicted of OMVI,[111] the Registrar is required to return the license to the defendant upon the defendant's request and upon a showing of both proof of financial responsibility[112] and payment of a seventy-five dollar license reinstatement fee to be used for driver treatment and intervention programs.[113] The new law continues to authorize the Registrar to terminate an administrative suspension for refusal to take a BAC test upon notice of either the person pleading guilty to or being found guilty of OMVI.[114]

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103. *Starnes*, 21 Ohio St. 2d at 46, 254 N.E.2d at 680.

104. City of Westerville v. Cunningham, 15 Ohio St. 2d 121, 239 N.E.2d 40 (1968). The United States Supreme Court has recently affirmed a similar holding in South Dakota v. Neville, 103 S. Ct. 916 (1983).

105. *See* 2A J. SUTHERLAND, *supra* note 46.

106. OHIO REV. CODE ANN. § 4511.191(G)(4) (Page Supp. 1982).

107. *Id.*

108. *Id.* § 4511.191(G)(5).

109. *Id.* § 4507.38(A). *See infra* text accompanying notes 140-48.

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

111. *Id.*

112. *Id.* § 4511.191(J). Proof of financial responsibility can be shown in one of four ways: (1) a certificate of insurance from an insurance company; (2) a bond of a surety company; (3) a certificate of deposit after a deposit of $30,000 with the State Treasury; or (4) a certificate of self insurance by a person with at least 25 motor vehicles in his name. Legislative Analysis, *supra* note 68, at 5.

The new law amends the financial responsibility prerequisite for the recovery of a driver's license by a person convicted of OMVI by providing that it does not apply when the person is a first-time OMVI offender and serious physical harm was not caused to anyone other than himself or herself. The new law also provides that at the end of an administrative suspension, the person must demonstrate proof of financial responsibility to the Registrar in one of the traditional senses, or demonstrate that he can meet the more lenient standards of having either a liability insurance policy that meets state minimum standards (§ 4509.51), or that he is able to respond in damages in an amount at least equal to the state minimum liability insurance standards. *Id.* at 5-6.

113. OHIO REV. CODE ANN. § 4511.191(J)(2) (Page Supp. 1982).

114. *Id.* § 4511.191(L).

3. Pre-OMVI Trial License Suspensions

The Governor's Study Group initially recommended that the new law require the Bureau of Motor Vehicles to conduct the administrative license suspension hearings.[115] S. 432, however, continues to place this hearing within the court's jurisdiction because of a concern that to do otherwise would have "set up another bureaucracy."[116] In addition to the administrative suspension, the new law requires pre-OMVI trial license seizures and suspensions for persons who either refuse to take a BAC test, or who take the test and have a proscribed BAC level.[117] In either of these situations, the arresting officer is required to seize the offender's license and immediately forward it to the court where the offender is to appear.[118] If a person refuses to take a BAC test, or if a test is taken and the results of the test show a BAC at or above the proscribed levels, the court is required to immediately suspend the person's license if the court determines at the initial hearing[119] that one of the following is true: the person has a previous OMVI conviction; at the time of arrest the person's license is suspended or revoked; the person had caused death or serious physical harm to another person; the person failed to appear at the initial hearing; or the court determines that the person's continued driving will be a threat to public safety.[120] A license suspension under these circumstances continues until the case is adjudicated on the merits or until the court determines by a preponderance of the evidence that probable cause did not exist for the arrest.[121] The court is required to credit the time duration of the pre-trial suspension against the time to be served under a related suspension that is later imposed for a conviction for OMVI.[122]

4. License Suspensions for Conviction of OMVI

Under the old law, a judge was required to suspend the license of a person convicted of OMVI for thirty days to three years.[123] The first thirty days of the license suspension could not be suspended by the judge.[124] The new law now provides that in addition to and independent

115. Jupinko Interview, *supra* note 91.

116. *Id.*

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

118. *Id.* § 4511.191(E).

119. The initial hearing must be held within five days of the citation or arrest. *Id.* § 4511.191(K).

120. *Id. But see Drunken-Driving Law Procedures Modified,* Columbus Dispatch, Aug. 5, 1983, at B12, col. 1 (judges must hold "due process" hearings for pre-trial license suspensions).

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

122. *Id.* § 4507.16(G).

123. *Id.* § 4507.16 (Page 1982).

124. *Id.*

of all other penalties provided by law,[125] a judge must revoke or suspend a person's driver's license according to the person's past convictions for OMVI.[126] If the person has not acquired an OMVI conviction within the past five years, the person's license must be suspended for a period of time of at least sixty days and not more than three years.[127] The first sixty days of the suspension cannot be suspended for any reason.[128] Occupational driving privileges, however, can be granted during the suspension.[129] If the person has been convicted of OMVI within five years of the offense, the court must suspend the person's driver's license for a period of time not less than 120 days nor more than five years.[130] The first 120 days of the suspension cannot be suspended for any reason,[131] but occupational driving privileges can be granted during the suspension.[132] If the person has been convicted of OMVI more than once within five years of the offense, the court must suspend the person's driver's license for not less than 180 days nor more than ten years.[133] The first 180 days cannot be suspended[134] and occupational driving privileges *cannot* be granted during the first 180 days of the suspension.[135]

S. 432 modifies the proof of financial responsibility prerequisite for license reinstatements to make it inapplicable to first-time OMVI offenders.[136] This is true, however, only if the first-time OMVI offender did not cause serious physical harm[137] to anyone other than himself or herself at the time of the offense.[138] Drafters of S. 432 believed the change was necessary because the old financial responsibility standard was viewed by prosecutors and judges to primarily benefit insurance

125. Except as otherwise provided regarding administrative suspensions. Legislative Analysis, *supra* note 68, at 4.

126. OHIO REV. CODE ANN. § 4507.16(B) (Page Supp. 1982).

127. *Id.* § 4507.16(B)(1).

128. *Id.* § 4507.16(F).

129. *Id.* § 4507.16(D).

130. *Id.* § 4507.16(B)(2).

131. *Id.* § 4507.16(F).

132. *Id.* § 4507.16(D).

133. *Id.* § 4507.16(B)(3).

134. *Id.* § 4507.16(F).

135. *Id.* § 4507.16(D).

136. *Id.* § 4509.31(B). *See also supra* note 112.

137. Serious physical harm is defined to mean any of the following: any mental illness that would normally require hospitalization or prolonged psychiatric treatment; any physical harm which causes a substantial risk of death; any physical harm which causes partial or total incapacity, or causes a temporary, substantial incapacity; any physical harm that causes permanent or serious temporary disfigurement; or any physical harm which causes acute pain of a duration sufficient to result in substantial suffering, or which causes any degree of prolonged or intractable pain. OHIO REV. CODE ANN. § 2901.01(E) (Page 1982).

138. *Id.* § 4509.31(B) (Page Supp. 1982).

companies.[139]

5. Increased Penalties for Driving Under License Suspensions

The old law prohibited driving under a license suspension;[140] the law, however, did not create a separate license suspension for driving under a suspended license. Instead, a person convicted of driving under a suspended license was subject to a $500 fine and a term of imprisonment lasting from two days to six months.[141] Driving under the Registrar's suspension for failure to take a BAC test was a first-degree misdemeanor.[142]

The new law implements three important changes. First, it permits a court to impose a separate license suspension, for driving under a suspended license, for up to one year.[143] Second, the new law states that a person who is granted occupational driving privileges cannot drive except in accordance with the terms of the privilege.[144] Driving in violation of the privilege is now considered as driving under suspension and is subject to the same penalty of a separate license suspension.[145] Third, the new law amends the old law's driving under license suspension sections[146] to make driving under suspension subject to an affirmative defense. It is now an affirmative defense that the offender drove under suspension because a substantial emergency existed and no other person was reasonably available to drive in response to the emergency.[147] The new law makes driving under any suspension a first-degree misdemeanor and eliminates the old law's two-day imprisonment requirement.[148]

6. Increased Penalties for Vehicular Homicide

The new law modifies the old law's provisions regarding aggravated vehicular homicide[149] and vehicular homicide.[150] The availability

139. *See* GOVERNOR'S STUDY GROUP, *supra* note 3, at D-2.
140. OHIO REV. CODE ANN. §§ 4507.38, 4507.39, 4511.192 (Page 1982).
141. *Id.* § 4507.99(A).
142. *Id.* § 4511.99(B).
143. *Id.* §§ 4507.99(A), 4511.99(B) (Page Supp. 1982).
144. *Id.* § 4507.38(A).
145. Legislative Analysis, *supra* note 68, at 10.
146. OHIO REV. CODE ANN. §§ 4507.38(A), 4507.39, 4511.192 (Page 1982).
147. *Id.* §§ 4507.38(B), 4507.39(B), 4511.192(B) (Page Supp. 1982).
148. *Id.* § 4507.99(A).
149. Aggravated vehicular homicide occurs when a person recklessly causes the death of another person while operating or participating in the operation of a motor vehicle. *Id.* § 2903.06(A) (Page 1982).
150. Vehicular homicide occurs when a person negligently causes the death of another person while operating or participating in the operation of a motor vehicle. *Id.* § 2903.07(A).

of shock probation,[151] probation,[152] or shock parole[153] has been eliminated for those persons convicted of either offense if the person has a prior conviction of either of the above offenses, OMVI, or driving under suspension; has accumulated twelve points[154] within one year of the offense; or, in the commission of the offense, the person was driving under suspension or operating a motor vehicle under the influence of alcohol, drugs, or both.[155] To insure that persons who are ineligible for probation and parole cannot obtain them under sections governing release provisions,[156] S. 432 amends the sections governing the placement of a person on probation after suspending his sentence[157] and shock parole eligibility.[158]

The old law required at least a thirty-day license suspension for those persons convicted of aggravated or vehicular homicide.[159] The new law now provides that if the trier of fact determines that the person was under the influence of alcohol or drugs at the time of the commission of the offense, his or her driver's license must be *permanently revoked.*[160] A BAC test may be considered as "competent evidence" to

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151. Shock probation occurs when a person is placed on probation after serving at least 30 days, and not more than 60 days, of his or her sentence in the institution where the sentence was to be served. Shock probation can take place on the convictee person's motion, or upon the sentencing judge's own motion. Under shock probation, the convictee's remaining sentence is suspended, and the convictee is placed on probation upon such terms as the court determines necessary. *Id.* § 2947.061 (Page Supp. 1982).

152. Probation is defined as "[a]n act of grace and clemency which may be granted by the trial court to a seemingly deserving defendant whereby such defendant may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted." (citation omitted). BLACK'S LAW DICTIONARY 1082 (5th ed. 1979). *See* OHIO REV. CODE ANN. § 2951.02 (Page Supp. 1982).

153. With the passage of S. 432, shock parole can now occur when a prisoner confined in a state penal or reformatory institution is released, notwithstanding any other provision for determining parole eligibility, only if all of the following apply: (1) the offense the prisoner was sentenced for was not aggravated murder, murder, an aggravated felony of the first degree, an aggravated felony of the second degree, an aggravated felony of the third degree, or a felony of the first degree; (2) the prisoner had not been convicted for any felony for which he or she was confined for 30 days or more in any state; (3) the prisoner is not a dangerous offender as defined in § 2929.01; (4) further confinement is not needed to rehabilitate the prisoner; (5) the prisoner is likely to respond affirmatively to early parole and is unlikely to commit another offense; (6) the prisoner is not serving a term of actual incarceration; and (7) the prisoner is not ineligible for shock parole due to a conviction for vehicular or aggravated vehicular homicide. OHIO REV. CODE ANN. § 2967.31 (Page Supp. 1982).

154. *Id.* § 4507.40.

155. *Id.* §§ 2903.06(C), 2903.07(C).

156. Legislative Analysis, *supra* note 68, at 9.

157. OHIO REV. CODE ANN. § 2951.02(F)(5) (Page Supp. 1982).

158. *Id.* § 2967.31(G).

159. The license suspension under the old law could not exceed three years. *Id.* § 4507.16(A) (Page 1982).

160. *Id.* §§ 2903.06(B), 2903.07(B), 4507.16(C) (Page Supp. 1982). If an OMVI violation is not found, the new law retains the old law's penalties. *Id.* § 4507.16(A)(7).

prove the offender was under the influence of alcohol or drugs at the time of the offense, and the offender is presumed to have been under the influence if the BAC test result is at or above the proscribed levels.[161]

III. ANALYSIS

A. Constitutionality of the Per Se OMVI Violation.

The per se OMVI violation[162] has been referred to as establishing a "conclusive presumption of guilt."[163] This description of the per se violation is a misnomer. Even if a person's BAC tested at or above the proscribed levels, the prosecutor must still prove that the police officer had probable cause for the arrest,[164] and that the arrestee was placed under arrest[165] and properly advised of the consequences of a test refusal.[166] It must also be shown that the test was administered within two hours of the arrest.[167] If a direct blood test was taken, it must have been administered by a physician, registered nurse, or a qualified technician or chemist.[168] The BAC test must have been analyzed in accordance with methods approved by the Director of Health, by a person possessing a valid operator's permit.[169] In addition, defenses based upon whether the BAC test used is legally reliable will remain as defenses to the per se violation.[170] As long as the BAC test can be challenged, the per se OMVI violation should not be constitutionally infirm.[171]

B. Increased Penalties — The Only Deterrent?

Concern has been expressed about the recent trend wherein states rely primarily upon the deterrent effect of more stringent prosecution and more severe penalties to reduce drunk driving.[172] Formulation of

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161. *Id.* §§ 2903.06(B), 2903.07(B).
162. *Id.* § 4511.19(A)(2), (3), (4).
163. *E.g.*, Weisenburg, *supra* note 23.
164. OHIO REV. CODE ANN. § 4511.191(A) (Page Supp. 1982).
165. *Id.* § 4511.191(C).
166. *Id.*
167. *Id.* § 4511.19(B).
168. *Id.*
169. *Id.*
170. *See supra* note 46; Mathews, *supra* note 24. *See also* Drunk Driving Leniency, *supra* note 92, at 2; *supra* text accompanying notes 51-55.
171. *See generally* V. BALL, R. BARNHART, K. BROWN, G. DIX, E. GELLHORN, R. MEISENHOLDER, E. ROBERTS & J. STRONG, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 19, 344 (E. Cleary 2d ed. 1972). *But see* People v. Alfaro, 51 U.S.L.W. 2754 (Cal. Ct. App. June 2, 1983) (per se statute held unconstitutional because proscribed BAC of 0.10% does not afford adequate notice of alcohol consumption which statute forbids).
172. *See, e.g.*, AAA Foundation for Traffic Safety, Press Release: AAA Foundation For Traffic Safety Calls For Balanced DWI Approach [hereinafter cited as AAA News] (on file with University of Dayton Law Review).

an effective deterrent program has been thought to require consideration of four factors: certainty, severity, and swiftness of punishment, as well as the public's perception of the likelihood of being apprehended and prosecuted.[173] The general social acceptance of drinking and driving must also be considered.[174] The complex problem of drinking and driving is best deterred by designing a "comprehensive, integrated approach—one that requires the talents of many [state agencies] plus a high degree of cooperation among all of them. All too often . . . state alcohol action plans overemphasize the more short-lived, tough crackdown punitive efforts for publicity purposes while virtually ignoring important preventative educational activities."[175]

The Licensing/Adjudication Subcommittee of the Governor's Study Group reported that "programs based on severe penalties have not been shown to be effective over the long term in any jurisdiction and have not been found workable in the U.S."[176] The report notes, "generally, severe sanction approaches have resulted in: increased opposition by the courts; the defendants and defense attorneys; increased plea bargaining; increased court backlogs; [and] decreased conviction rates."[177] Mandatory penalties retain their deterrent effect only if the enforcement and judicial systems can be kept free of an "informal system" of arrest and sentencing where the imposition of penalties is based upon the circumstances surrounding each individual offender.[178] Control of this informal system of arrest, prosecution, and sentencing is extremely difficult because the courts have discretionary power to reduce sentences, plea bargain, and offer probation.[179] Laws aimed at modifying the severity of punishment without changing the certainty of punishment do not seem to work.[180]

> '[I]ncreased severity of the prescribed punishment results in changes that lessen the certainty of its application which may in turn even reduce the deterrent effectiveness of the law.' . . . [R]ecourse to heavy fines and mandatory jail sentences seems likely to encourage deformations in the legal system: police leniency and even corruption, plea bargaining, and increased findings of not guilty. 'These adjustments may have the effect of reducing the certainty of punishment and diminishing rather than in-

173. Comment, *supra* note 35, at 833-34 n.67 (quoting H. L. Ross, Insurance Institute for Highway Safety, The Highway Loss Reduction Status Report 2 (Apr. 19, 1981)).

174. GOVERNOR'S STUDY GROUP, *supra* note 3, at iii; *see also infra* text accompanying notes 203-210.

175. AAA News, *supra* note 172.

176. GOVERNOR'S STUDY GROUP, *supra* note 3, at D-12.

177. *Id.*

178. *Id.* at D-13.

179. *Id.* at D-15.

180. Comment, *supra* note 35, at 833 n.67.

creasing the total deterrent effect of the law.'[181]

Ohio's new drunk driving law fails both the integrated approach[182] and the deterrent effects requirement for a successful reduction in the drunk driving problem.

There are four traditional penalties for drunk driving offenses: jail, fines, probation, and license suspension or revocation.[183] There is no evidence which shows that jail terms or fines are effective in modifying drinking and driving behavior.[184] The effectiveness of probation depends upon the availability of personnel to monitor the offender's behavior and the offender's willingness to cooperate with probation requirements. A license suspension is the most effective traditional penalty available for modifying driving behavior.[185] Judicial control of licenses is a "powerful tool" because it allows the court to maintain "control over an offender's driving behavior" and suspensions are rarely imposed due to plea bargaining.[186]

"Offenders whose licenses are suspended may still drive illegally," but there is evidence that they drive more carefully.[187] Ohio's new drunk driving law, as it relates to license suspensions, is comprehensive and should prove effective. The courts must take care, however, when granting occupational driving privileges so as not to detract from the behavior modification and deterrent effect of license suspensions.

C. Plea Bargaining — The Problem Remains

During 1982, sixty percent of all Ohio OMVI arrests were either plea bargained to a reduced charge or were not brought to trial.[188] The Governor's Study Group emphasized one recommendation above all others: "The public must be given reason to believe that anyone who gets behind the wheel of a car after drinking can expect to be arrested, tried on the original charge, convicted, and sentenced to a strict set of thoroughly unpleasant penalties."[189] "No amount" of public education,

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181. *Id.*

182. By "integrated approach," I refer to intra-state agency cooperation. An example of the lack of intra-state agency input into S. 432 is the fact that "there were no cost studies taken of the potential cost to the state for mandatory imprisonment" under the new drunk driving law. Jupinko Interview, *supra* note 91. This lack of input from various state agencies may lead to a lack of cooperation among the state agencies implicated under S. 432.

183. GOVERNOR'S STUDY GROUP, *supra* note 3, at D-16.

184. *Id.*

185. *Id.* at E-12.

186. *Id.* at D-17.

187. *Id.* at E-12.

188. Telephone Interview with John Ross, Public Information Officer for the Ohio Dep't of Highway Safety (Feb. 11, 1982) [hereinafter cited as Ross Interview] (on file with University of Dayton Law Review).

189. GOVERNOR'S STUDY GROUP, *supra* note 3, at iv.

legal reforms, and intervention programs are going to work "until the average Ohioan stops believing he can 'get away with' [OMVI]."[190] Plea bargaining to help clear court dockets and reduce workloads "is not an effective method" to solve the problem of drinking and driving. The Governor's Study Group was well aware of the problems facing all phases of the Criminal Justice System when it made its recommendations, but concluded that if Ohio expects to save lives and reduce alcohol-related accidents, Ohio must pay the price.[191]

Although other states have restricted plea bargaining as a part of their drunk driving laws,[192] Ohio's new drunk driving law does not do so. The new law's drafters believed "the per se violation would alleviate the problem" of wholesale plea bargaining.[193] Despite the drafters' beliefs, S. 432 arguably will increase the occurrence of plea bargaining. In addition to redefining the already existing offense of reckless operation,[194] the new law creates another offense of operating a vehicle "without being in reasonable control" of it.[195] This is a minor misdemeanor[196] subject only to a fine of up to $100.[197] Both the reckless operation and without reasonable control offenses are not lesser included offenses of OMVI.[198] Because S. 432 creates an additional offense which is not a lesser included offense of OMVI, the new law creates a new plea bargaining avenue. The Enforcement Subcommittee of the Governor's Study Group specifically recommended that Ohio should not enact a law that could contribute to an increase in those cases where an original OMVI arrest is reduced to a lesser offense.[199]

During 1982, approximately eight percent of the persons arrested for OMVI refused to take a BAC test.[200] The drafters of S. 432 be-

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190. *Id.*

191. *Id.* at C-13.

192. *See, e.g.*, CAL. VEH. CODE § 23212 (West Supp. 1983).

193. Jupinko Interview, *supra* note 91.

194. OHIO REV. CODE ANN. §§ 4511.20, 4511.201 (Page Supp. 1982). The old "reckless operation" sections were interpreted by the courts to require only negligent operation of a vehicle to support a conviction. State v. Cichon, 61 Ohio St. 2d 181, 339 N.E.2d 1259 (1980). The phrase "without due regard" in the old reckless operation law was held to mean that the operator of a vehicle must only operate a vehicle in a manner that a reasonably prudent person would under similar circumstances. Radecki v. Lammers, 15 Ohio St. 2d 101, 238 N.E.2d 545 (1968). S. 432 should make these holdings inapplicable to the new "reckless operation" section.

195. OHIO REV. CODE ANN. § 4511.202 (Page Supp. 1982).

196. *Id.* § 4511.99(I).

197. *Id.* § 2929.21(D) (Page 1982).

198. City of Akron v. Kline, 165 Ohio St. 322, 135 N.E.2d 265 (1956), held that a municipality's reckless operation law, which was similar to § 4511.20, was not a lesser included offense of OMVI. By analogy, the new law's "without reasonable control" violation is also not a lesser included offense of OMVI.

199. GOVERNOR'S STUDY GROUP, *supra* note 3, at C-12.

200. Ross Interview, *supra* note 188.

lieved that plea bargaining would not increase after passage of S. 432 due to a growth in BAC test refusals because the new law increases the license suspension for refusing to take a BAC test to one year.[201] The prosecutor, however, does not have the per se OMVI violation to base an OMVI conviction upon if a person refuses to take a BAC test. Plea bargains are therefore more available to a person who now refuses to take a BAC test because the prosecutor must then rely upon the general OMVI prohibition for a conviction.[202] An increase in BAC test refusals would lead to increased court dockets, prosecutor workloads, and other factors tending to increase the likelihood of plea bargains.

The new law's effectiveness in curbing OMVI is largely dependent upon the public's perception of the likelihood of punishment for drinking and driving. A weakening of the perceived certainty of punishment in the public's eye would seriously undermine the certainty of punishment element necessary for a successful OMVI reduction program.

D. Behavior Modification and State Agency Cooperation

Among the factors often cited as contributing to the drunk driving problem are "ignorance about how and why alcohol impairs driving ability" and the "permissive attitude in our society" toward people who drink and drive.[203] Unfortunately, other than establishing a seventy-five dollar license reinstatement fee to be used for driver treatment and intervention programs,[204] the General Assembly chose to rely upon already existing laws regarding the drunk driving education program. The Ohio Revised Code requires alcohol and drug education in public schools.[205] Although public schools are required to include alcohol and drug education in their health education curriculum, there is no general program which is required to be taught at all Ohio schools. Ohio's main emphasis on alcohol and drug education is in the driver education curriculum. Deferral of alcohol and drug education until after junior high school is most likely too late because "most attitudes" relating to alcohol and drugs "are formulated" at the kindergarten through junior high school age.[206] The Governor's Study Group recommended that legislation be enacted to "develop and implement a comprehensive in-school" curriculum for all Ohio schools from kindergarten through the

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201. Jones Interview, *supra* note 10.

202. OHIO REV. CODE ANN. § 4511.19(A)(1) (Page Supp. 1982). *See also* Willhelm, *For Better or Worse, the Law's the Law*, Dayton Journal Herald, Mar. 14, 1983, at 7, col. 1 (defendants may now as a matter of course request a jury trial thereby increasing costs to the state, and creating more crowded court dockets).

203. GOVERNOR'S STUDY GROUP, *supra* note 3, at iii.

204. OHIO REV. CODE ANN. § 4511.191(J)(2) (Page Supp. 1982).

205. *Id.* §§ 3301.17, 3313.60 (Page 1980).

206. GOVERNOR'S STUDY GROUP, *supra* note 3, at F-1.

twelfth grade.[207]

To counteract the public's permissive attitudes towards drinking and driving, public and private sector organizations must unite. An important strategy for accomplishing this is to "promote identification with the victims" of drunk drivers "rather than the perpetrators of alcohol and drug-related offenses."[208] The resources of the Ohio Department of Safety, MADD, Parent Teacher Associations, to name a few, could be fully utilized.[209] The Governor's Study Group specifically recommended that the Ohio Department of Highway Safety, in conjunction with other state agencies, "should develop program(s) to be made available at no cost" to all youth groups and adult social, fraternal and religious organizations.[210] In short, a long range reduction in OMVI will best be accomplished through legislation aimed at modifying the permissive behavior of our society towards alcohol consumption, and not by the enactment of severe penalties alone.

IV. CONCLUSION

The Ohio General Assembly enacted S. 432 in response to disturbing OMVI statistics which indicated that drunk driving must be reduced. The method it chose to accomplish this purpose was to make conviction for OMVI, refusal to take a BAC test, and driver's license suspensions subject to what have been referred to as strict "mandatory" penalties.

Serious questions, however, remain pertaining to S. 432's potential to reduce the complex drinking and driving problem by relying solely upon strict penalties. The deterrent effect of the new penalties may be seriously undercut by selective enforcement and wholesale plea bargaining due to increased court dockets, prosecutor workloads, and a lack of cooperation among the state agencies affected by the bill's provisions. S. 432 also does not adequately address the need to counteract society's permissive attitude towards drinking and driving by making reforms in Ohio's educational programs in the public and private sectors.

Ohio's new drunk driving law may discourage some Ohioans from driving while under the influence of alcohol or drugs. The General Assembly cannot, however, legislate morality, and cannot alone change the attitudes of society towards alcohol and drugs. Further legislation is necessary to insure that the deterrent effect of Ohio's new drunk driv-

207. *Id.* at A-6.
208. *Id.* at F-5.
209. *Id.* at A-6 to A-7, B-19, F-5.
210. *Id.* at F-5.

ing law is not lost by a continuing attitude among Ohioans that they can "get away with" drinking and driving.

Jon M. Rosemeyer

Code Sections Affected: To amend sections 2903.06, 2903.07, 2951.02, 2967.31, 4507.16, 4507.38, 4507.39, 4507.40, 4507.99, 4509.31, 4511.19, 4511.191, 4511.192, 4511.20, 4511.201, and 4511.99 and to enact sections 3720.06, 4511.202, and 4511.991.

Effective Date: March 16, 1983.

Sponsor: DeWine (S)

Committee: Judiciary (S)
Judiciary (H)