University of Dayton Law Review

Volume 12 | Number 2 Article 14

1-1-1987

S. 54: Ohio's Seat Belt Law

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I. INTRODUCTION

Motor vehicles have been the primary cause of accidental deaths and injuries in the United States since 1929.[1] In 1984 alone, traffic accidents resulted in 44,250 deaths,[2] and the National Highway Traffic Safety Administration predicts that 70,000 people will become traffic fatalities in 1990.[3] In view of these sobering statistics, mandatory seat belt laws (MULs)[4] would appear to promote the admirable goal of highway safety. Criticism, however, has surfaced that MULs represent a response to the special interests of big business rather than to a perceived need for safety legislation[5] and that weak MULs will not produce the reduction in deaths and injuries which they promise.[6] This note will examine the relevance of those criticisms to the Ohio mandatory seat belt law contained in Senate Bill 54 (S. 54).[7] As part of this analysis, the note will compare S. 54 to the minimum criteria for MULs promulgated by the United States Department of Transportation (DOT), consider whether Ohio's law should include a seat belt defense, and evaluate the likely impact of the law on Ohio highway safety.

II. BACKGROUND

On February 4, 1986, Governor Richard F. Celeste signed S. 54,[8] making Ohio the seventeenth state to adopt a mandatory use seat belt law (MUL).[9] This legislation came in the wake of the July 17, 1984, DOT final ruling on Federal Motor Vehicle Safety Standard No. 208: Occupant Protection Systems (FMVSS No. 208).[10] This standard re-

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1. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 33 (1983).

2. Note, *Mandatory Seat Belt Legislation: Panacea for Highway Traffic Fatalities?*, 36 SYRACUSE L. REV. 1341, 1344 (1986).

3. *Id.*

4. The United States Department of Transportation has adopted this designation to refer to mandatory use laws. *See, e.g.*, 49 Fed. Reg. 28,993 (1984).

5. Wilkins, *The Indiana Mandatory Seatbelt Use Law and Its Effect upon Automobile Tort Litigation*, 19 IND. L. REV. 439, 446 n.25 (1986).

6. Note, *supra* note 2, at 1356.

7. Act of Feb. 4, 1986, 1986 Ohio Legis. Serv. 5-15 (Baldwin) (to be codified at OHIO REV. CODE ANN. §§ 4513.263, 4513.99).

8. *Governor Signs Seat Belt Bill*, Gongwer News Serv., Inc., Ohio Report, Feb. 4, 1986, at 6.

9. *See* Note, *supra* note 2, at 1342 n.13.

10. 49 C.F.R. § 571.208 (S4.1.4)(1986).

quires automakers to install passive restraints[11] in all passenger cars manufactured on or after September 1, 1989, unless two-thirds of the population of the United States are subject to state MULs by April 1, 1989. FMVSS No. 208 further provides that these state MULs must meet specified minimum criteria in order to be counted.[12] To date, twenty-six states and the District of Columbia have passed MULs.[13] Ohio's law does not meet the minimum criteria specified by the DOT[14] and is reported to be one of the weakest in the nation.[15] Nevertheless, state officials have predicted that it "could save up to 300 lives and prevent up to 10,000 serious injuries during the first 12 months it is in effect."[16]

Although FMVSS No. 208 may be the primary incentive for the recent flurry of MULs, public attitudes have also played a role. Citizen interest in improved highway safety is evidenced both by "the grass roots uprising in opposition to drunk driving"[17] and by the adoption of child safety seat laws in forty-seven states and the District of Columbia.[18] Enactment of MULs seems to be a logical extension of these developments and an appropriate legislative response to public concern

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11. Passive restraints include automatic detachable or non-detachable belts, airbags, passive interiors, or other systems that will provide the required degree of protection demanded by 49 C.F.R. § 571.208 (S4.1.2.1)(1986).

12. *Id.* § 571.208 (S4.1.5).

13. *See generally* CAL. VEH. CODE §§ 12810.2, 27315 (West Supp. 1986); CONN. GEN. STAT. ANN. § 14-100a (West Supp. 1986); 1986 Fla. Sess. Law Serv. 86-49 (West); HAW. REV. STAT. § 291-11.6 (1985); IDAHO CODE § 49-764 (1986); ILL. ANN. STAT. ch. 95½, ¶ 12-603.1 (Smith-Hurd Supp. 1985); IND. CODE ANN. § 9-8-14-1 (West Supp. 1986); 1986 Iowa Legis. Serv. (2)32 (West); 1986 Kan. Sess. Laws 231; LA. REV. STAT. ANN. § 32:295.1 (West Supp. 1985); MD. TRANSP. CODE ANN. § 22-412.3 (Supp. 1986); MASS. GEN. LAWS ANN. ch. 90, § 7BB (West Supp. 1986); MICH. COMP. LAWS ANN. § 257.710e (West 1986); MO. ANN. STAT. § 307.178 (Vernon Supp. 1986); NEB. REV. STAT. §§ 39-6,103.04 (1986); N.J. STAT. ANN. § 39:3-76.2(e) (West Supp. 1986); N.M. STAT. ANN. §§ 66-7-370 to -373 (Supp. 1986); N.Y. VEH. & TRAF. LAW § 1229-c (McKinney 1986); N.C. GEN. STAT. § 20-135.2A (Supp. 1985); OHIO REV. CODE ANN. §§ 4513.263, 4513.99 (Anderson Supp. 1986); OKLA. STAT. ANN. tit. 47, §§ 12-416 to -420 (West Supp. 1985); TENN. CODE ANN. §§ 55-9-601, -603 (Supp. 1986); TEX. REV. CIV. STAT. ANN. art. 6701d (Vernon 1986); UTAH CODE ANN. §§ 41-6-181 to -186 (Supp. 1986); WASH. REV. CODE ANN. § 46.61.688 (Supp. 1987); D.C. CODE ANN. § 40-1601 to -1607 (1986). *But see Nebraska's Voters Repeal Seat Belt Law*, Dayton Daily News: The Journal Herald, Nov. 12, 1986, at 2, col. 1. Pennsylvania and Rhode Island have seat belt laws pending. Telephone interview with Charles Spilman, President of Traffic Safety Now (Aug. 12, 1986) (on file with University of Dayton Law Review).

14. OHIO REV. CODE ANN. § 4513.263, 4513.99 (Anderson Supp. 1986). *See infra* text accompanying notes 50–78 (discussing the differences between Ohio's law and the DOT criteria).

15. *Mandatory Seat Belt Law Takes Effect on Tuesday; Ohioans Get 60-Day Grace Period*, Gongwer News Serv., Inc., Ohio Report, May 5, 1986, at 1.

16. *Id.*

17. 49 Fed. Reg. 28,994 (1984).

18. *Id.*

for highway safety. MULs, however, are not without controversy.[19] Opponents claim these laws are "an unwarranted intrusion of public policy into private conduct"[20] and seek to strike them down on constitutional grounds.[21] Such challenges, however, are unlikely to be effective in view of a state's right to use its police power to protect the health, safety, and general welfare of its citizens.[22]

III. PROVISIONS OF S. 54

A. Identification of the Class of Persons to Whom the Law Applies

S. 54 applies to automobile[23] operators, front seat automobile passengers, and school bus drivers.[24] Automobile operators are prohibited from operating their vehicles unless they, and each front seat passenger, are wearing seat belts.[25] Passengers in the front seat of a vehicle being operated on any street or highway are required to wear a seat belt.[26] School bus drivers are required to wear a seat belt if one is provided.[27]

A number of exceptions, however, are created by the law. The law does not apply to any child who is already required by law to use a child restraint device,[28] to employees of the United States Postal Service who are delivering mail,[29] and to persons using an automobile for newspaper home delivery service.[30] In addition, the law exempts persons who obtain a signed affidavit from a licensed physician or chiropractor stating that they have a physical impairment which makes

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19. The Ohio citizen group called "Seat Belts Yes, By Law No" is currently seeking to put the seat belt law on the ballot for determination by the voters. *Man Sues over Petition Law*, Journal Herald, Aug. 20, 1986, at 6, col. 1. In addition, Nebraska and Massachusetts, which already have MULs, will place those laws on the ballot in November, 1986. Telephone interview Doug Putnam, Ohio Legislative Service (Aug. 20, 1986) (on file with University of Dayton Law Review).

20. Krohe, *ProSe*, STUDENT LAW., May 1985, at 12, 12.

21. *Id.*

22. Recent Developments, *The Illinois Seat Belt Law: Should Those Who Ride Decide?*, 19 J. MARSHALL L. REV. 193, 194 (1985).

23. OHIO REV. CODE ANN. § 4513.263(A)(1) (Anderson Supp. 1986) provides:

> "Automobile" means any commercial tractor, passenger car, commercial car, or truck that is required to be factory-equipped with an occupant restraining device for the operator or any passenger by regulations adopted by the United States Secretary of Transportation pursuant to the "National Traffic and Motor Vehicle Safety Act of 1966," 80 Stat. 719, 15 U.S.C.A. 1392.

Id.

24. *Id.* § 4513.263(B).

25. *Id.* § 4513.263(B)(1), (2).

26. *Id.* § 4513.263(B)(3).

27. *Id.* § 4513.263(B)(1).

28. *Id.* § 4511.81.

29. *Id.* § 4513.263(C).

30. *Id.*

wearing a seat belt either impossible or impractical, persons who are drivers or passengers in automobiles which are equipped with automatic air bags, and persons who are drivers or passengers in automobiles built before January 1, 1966.[31]

B. *Limitations on the Methods of Enforcement*

S. 54 contains a secondary enforcement provision which explicitly declares that a law enforcement officer may not stop a vehicle for the sole purpose of issuing a citation for failure to wear a seat belt. Similarly, a law enforcement officer may not inspect the interior of an automobile for the sole purpose of determining if a violation of the mandatory use law (MUL) is being committed.[32] The language of the bill is intended to emphasize the fact that a driver must first be stopped for some other violation[33] before a law enforcement officer may issue a citation for violation of the seat belt law.[34]

C. *Outline of a Criminal Penalty Provision*

The penalty provisions of S. 54 are contradictory. The law states that a driver will be fined twenty dollars for not wearing his or her seat belt and ten dollars for each front seat passenger who is not wearing a seat belt.[35] The total amount of the driver's fine, however, may not exceed thirty dollars.[36] The law then states that a driver will not be fined for the failure of any front seat passenger to buckle up.[37] This obvious contradiction was created by a parliamentary procedure problem,[38] the outcome being that an unbelted driver can only receive a twenty dollar

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31. *Id.*

32. *Id.* § 4513.263(D).

33. *Skirting the Seat-Belt Law*, Dayton Daily News, July 25, 1986, at B8, col. 1. There is no requirement, however, that a motorist be cited for the violation which caused the officer to stop him or her before he or she can be cited for a seat belt violation. *Id.* This situation has caused some people to fear that the seat belt law will be abused by those who enforce it. *Id.*

34. Telephone interview with Doug Putnam, Ohio Legislative Service (Sept. 10, 1986) (on file with University of Dayton Law Review) [hereinafter Putnam Interview].

35. OHIO REV. CODE ANN. § 4513.99(F), (G) (Anderson Supp. 1986).

36. *Id.* § 4513.99(G).

37. *Id.* § 4513.99(I).

38. Rules of parliamentary procedure will not allow a section of a bill to be amended more than once during consideration. Since section 4513.99(G) of the Ohio Revised Code, which fined the driver for each front seat passenger violation, had already been amended, legislators added section 4513.99(I) of the Ohio Revised Code to eliminate that fine. Putnam Interview, *supra* note 34.

It is also important to note that section 4513.99(I) of the Ohio Revised Code applies even when the driver is the parent and the violating front seat passenger is his or her minor child. The parent cannot be cited for the child's violation. The impact of this section has been that law enforcement officers are regularly issuing warnings instead of citations when the violating front passenger is a minor child. Telephone interview with Lt. Jack Holland, Ohio Highway Patrol (Sept. 15, 1986) (on file with University of Dayton Law Review).

fine. The law imposes a ten dollar fine against any front seat passenger who fails to wear a required seat belt.[39]

D. *Creation of a Seat Belt Education Program*

Fines collected for seat belt violations are to be deposited in the "Seat Belt Education Special Account."[40] These monies are to be used to establish and administer a seat belt education program, supervised by the Ohio Department of Highway Safety.[41] The purpose of the program is to educate the public concerning the advantages of seat belt use, to apprise drivers and passengers of the dangers of not using seat belts, and to encourage compliance with the seat belt law.[42] Part of the responsibility of the seat belt education program will be to acquire two films or videotapes, one suitable for persons over sixteen years of age and the other suitable for persons under sixteen years of age. These materials are to depict the advantages of using seat belts and the perils of not wearing them.[43] Persons charged with violating the seat belt law will have those charges dismissed and all fines waived if, prior to their scheduled court appearance, they have viewed one of the films or videotapes.[44] A court is not permitted to dismiss the charge or waive the fine of a person charged with a seat belt violation who fails to appear in court or fails to view one of the films.[45]

E. *Effect on the Seat Belt Defense*

Finally, perhaps the most controversial aspect of the law is the provision which explicitly denies the creation of a seat belt defense.[46] Violation of the seat belt law may not be considered as evidence of negligence or contributory negligence and may not be used to diminish recovery for damages in any civil action arising from the ownership, maintenance, or operation of an automobile.[47] Furthermore, a violation of the seat belt law is not to be used as the basis of a criminal prosecu-

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39. OHIO REV. CODE ANN. § 4513.99(H) (Anderson Supp. 1986).

40. *Id.* § 4501.06 (establishes the State Highway Safety Fund).

41. *Id.* § 4513.263(E). Highway officials predict fines will total $1.9 million for the first twelve months that the law is in effect. *It's Time to Buckle Up for Seat-Belt Law*, Columbus Dispatch, May 4, 1986, at 1C, col. 1.

42. OHIO REV. CODE ANN. § 4513.263(E) (Anderson Supp. 1986).

43. *Id.*

44. *Id.* § 4513.263(F). Court costs, however, cannot be waived, and these may be more than the fine. *Skirting the Seat-Belt Law*, *supra* note 33.

45. OHIO REV. CODE ANN. § 4513.263(F) (Anderson Supp. 1986).

46. Zavarello, *A Legal and Historical Analysis of Mandatory Seat Belt Legislation*, OHIO TRIAL, Sept.–Oct. 1985, at 6. Two versions of a seat belt law were before the legislature. *Id.* One provided for mitigation of damages and the other, S. 54, did not. *Id. See infra* text accompanying notes 79–123 for a discussion of the seat belt defense.

47. OHIO REV. CODE ANN. § 4513.263(G) (Anderson Supp. 1986).

tion for anything other than a violation of the seat belt law and is not admissible as evidence in any civil or criminal action other than a prosecution for violation of the MUL.[48] This provision appears to remove any uncertainty concerning Ohio's position on the seat belt defense.[49]

IV. ANALYSIS OF S. 54

A. Comparison to Criteria Adopted by FMVSS No. 208

The United States Department of Transportation (DOT) has indicated that state mandatory use laws (MULs) must meet certain specified criteria in order to comply with Federal Motor Vehicle Safety Standard No. 208 (FMVSS No. 208).[50] These criteria were adopted in order to insure that the level of safety provided by enacting MULs would be at least equivalent to that offered by passive restraints.[51] A comparison of Ohio's MUL and the DOT's minimum criteria shows that Ohio's law fails to meet these criteria.

The minimum criteria established by FMVSS No. 208 are as follows:

> (a) Require that each front seat occupant of a passenger car equipped with safety belts under Standard No. 208 has a safety belt properly fastened about his or her body at all times when the vehicle is in forward motion.
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> (b) If waivers from the safety belt usage requirement are to be provided, permit them for medical reasons only.
>
> (c) Provide for the following enforcement measures:
>
> (1) A penalty of not less than $25.00 (which may include court costs) for each occupant of a car who violates the belt usage requirement.
>
> (2) A provision specifying that the violation of the belt usage requirement may be used to mitigate damages with respect to any person who is involved in a passenger car accident while violating the belt usage requirement and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident. This requirement is satisfied if there is a rule of law in the State permitting such mitigation.
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> (3) A program to encourage compliance with the belt usage

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48. *Id.*

49. Recent Decisions, Insurance Company of North America v. Paskarnis: *The New Emergence of the "Seat Belt Defense,"* 27 ARIZ. L. REV. 293, 296 n.36 (1985) (listing Ohio as one of the jurisdictions remaining undecided about the seat belt defense).

50. 49 C.F.R. § 571.208 (S4.1.5.2)(1986). FMVSS No. 208 requires automakers to install passive restraints in all passenger cars manufactured on or after September 1, 1989, unless states representing at least two-thirds of the population of the United States have enacted MULs by April 1, 1989. *Id.* § 571.208 (S4.1.5.1).

51. 49 Fed. Reg. 28,999 (1984).

requirement.

(d) An effective date of not later than September 1, 1989.[52]

Three areas where Ohio's MUL falls short of the criteria established by FMVSS No. 208 are evident. The first concerns the provision for waivers. While FMVSS No. 208 only permits waivers for medical reasons,[53] Ohio's law creates additional exemptions for children required by law to use a child safety seat, employees of the United States Postal Service delivering mail, persons using an automobile to deliver newspapers, and drivers or passengers in automobiles which are equipped with automatic air bags.[54] In evaluating the appropriateness of these additional exceptions, it is necessary to consider them in the context of the DOT's responsibilities and goals.

The National Traffic and Motor Vehicle Safety Act of 1966[55] directs the Secretary of Transportation to issue motor vehicle safety standards which are practicable, which meet motor vehicle safety needs, and which are stated in objective terms.[56] In promulgating this law, Congress declared: "Motor vehicle safety is the paramount purpose of this bill and each standard must be related thereto."[57] While the exemptions in Ohio's MUL for children who are required to use child safety seats and motorists who are driving cars equipped with air bags have a relationship to safety concerns, the exemptions for postal workers and persons delivering newspapers evidence no such concern. Instead, these exemptions seem to reflect a concern for convenience,[58] a response to special interest pressures, or both.[59]

The second area of difference between Ohio's MUL and the FMVSS No. 208 minimum criteria is the provision for fines. FMVSS No. 208 specifies a fine of twenty-five dollars or more for each separate violation.[60] Fines in Ohio are twenty dollars for a driver and ten dollars

52. 49 C.F.R. § 571.208 (S.4.1.5.2) (1986).

53. *Id.* § 571.208 (S.4.1.5.2)(b).

54. OHIO REV. CODE ANN. § 4513.263(C) (Anderson Supp. 1986).

55. 15 U.S.C. §§ 1381–1431 (1982).

56. *Id.* § 1391(2).

57. H.R. REP. NO. 1776, 89th Cong., 2d Sess. 16 (1966) (quoted in Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 55 (1983)).

58. These exemptions cannot be justified by concluding that they make the seat belt law "practicable." The term, practicable, means capable of being put into practice. The DOT, via the MUL criteria which it has established, has already determined that a seat belt law without these exemptions is practicable.

59. Witness Slip of Tom Bahl, representing the Ohio Rural Letter Carriers before the Ohio Senate Judiciary Committee (Mar. 13, 1985) [hereinafter Bahl Witness Slip] (on file with University of Dayton Law Review) (Tom Bahl urged an exemption clause for rural carriers while on duty).

60. 49 C.F.R. § 571.208 (S.4.1.5.2)(c)(1) (1986).

for a front seat passenger.[61] Again, these differences must be evaluated in view of the safety concerns that prompted enactment of FMVSS No. 208. It is obvious that seat belts have no effect unless worn, and studies indicate that there is a strong correlation between a MUL's effectiveness in reducing fatalities and its enforcement.[62] In six Canadian provinces where MULs were enacted between 1976 and 1983, seat belt usage rates averaged twenty-one percent prior to enactment and sixty-one percent in 1983 after enactment.[63] Based, in part, upon Canada's experience with MULs, the DOT has concluded that "success [of MULs] is dependent on how well the public is prepared for these laws, [on] the severity of sanctions, and on the diligence of enforcement."[64] In light of this conclusion, the DOT established minimum requirements for state MULs which include a fine of twenty-five dollars or more for each violation.[65] It is therefore reasonable to infer that a state, such as Ohio, which does not establish a fine which meets this minimum criterion,[66] may not be responding primarily to safety concerns. In addition, fines of less than twenty-five dollars are likely to have a negative impact upon the effectiveness of an MUL.

The final difference between the FMVSS No. 208 minimum criteria and Ohio's MUL occurs in the provision for civil penalties. The federal requirements provide that evidence of violation of an MUL by a plaintiff will be allowed in civil litigation.[67] The only purpose of such evidence, however, will be to reduce the damages sought by the plaintiff.[68] In establishing this particular criterion, the DOT seeks to create a seat belt defense in states that adopt MULs.[69] This defense will limit the amount that a plaintiff may recover for all of his or her injuries when there is competent evidence that some of those injuries would have been avoided or lessened if a seat belt had been worn.[70] The language of S. 54 specifically excludes this defense.[71] A violation of Ohio's MUL cannot be used as evidence in any civil or criminal action, except in a prosecution for violation of the seat belt law, and such violation

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61. OHIO REV. CODE ANN. § 4513.99(F), (G) (Anderson Supp. 1986).

62. Note, *supra* note 2, at 1356.

63. 49 Fed. Reg. 28,994 (1984).

64. *Id.*

65. 49 C.F.R. § 571.208 (S4.1.5.2)(c)(1) (1986).

66. OHIO REV. CODE ANN. § 4513.99 (Anderson Supp. 1986).

67. 49 C.F.R. § 571.208 (S.4.1.5.2)(c)(2) (1986). The rule also provides: "This requirement is satisfied if there is a rule of law in the [s]tate permitting such mitigation." *Id.*

68. *Id.*

69. *Id.*

70. Note, *The Seat Belt Defense: Must the Reasonable Man Wear a Seat Belt?*, 50 MO. L. REV. 968, 968 (1985).

71. OHIO REV. CODE ANN. § 4513.263(G) (Anderson Supp. 1986).

does not diminish recovery.[72] As stated above, the DOT has determined that sanctions play a prominent role in the effectiveness of an MUL.[73] The explicit omission of a civil sanction in S. 54 would seem to result from something other than safety concerns.[74]

A review of all the differences between Ohio's law and the minimum requirements for MULs established by the DOT leads to the conclusion that safety concerns did not prompt these differences. It is clear that special interest groups played a role in creating these differences,[75] but other factors may have been equally important. In response to FMVSS No. 208, at least one state has deliberately designed a MUL which does not satisfy the minimum requirements in order to prevent federal recission of the automatic passive restraint requirements.[76] Whether this strategy is ultimately successful remains to be seen,[77] but the motive has strong appeal since federal studies indicate that the most effective occupant restraint system is a combination of airbags and lap/shoulder belts.[78]

B. Should Ohio's Law Include a Seat Belt Defense?

The Ohio General Assembly's rejection of the seat belt defense

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72. *Id.*

73. 49 Fed. Reg. 28,994 (1984).

74. *Ohio Seat Belt Law Is Passed*, OHIO TRIAL, Jan.–Feb. 1986, at 8 (The Ohio Academy of Trial Lawyers has taken credit for keeping the seat belt defense out of Ohio's seat belt law.).

75. *Id.* Witness slips indicate that representatives of letter carriers, the Ohio Bar Association, and the Ohio Academy of Trial Lawyers testified concerning specific provisions of the bill. Bahl Witness Slip, *supra* note 59. Witness Slip of William Weisenberg, representing the Ohio State Bar Association before the Ohio Senate Judiciary Committee (Mar. 13, 1985) [hereinafter Weisenberg Witness Slip] (on file with University of Dayton Law Review). Witness Slip of William Zavarello, representing Ohio Academy of Trial Lawyers before the Ohio Senate Judiciary Committee (Feb. 27, 1985) [hereinafter Zavarello Witness Slip] (on file with University of Dayton Law Review).

76. Sullivan, *Seat Belt Law in Jersey Takes Effect Tomorrow*, N.Y. Times, Feb. 28, 1985, at B5, col. 1 (According to New Jersey officials, the exemptions to the law, secondary enforcement policy, and low fines included in the New Jersey MUL were designed to prevent auto manufacturers from using the New Jersey law to avoid the federal requirement to install passive restraints in all cars by 1989.).

77. Molotsky, *States Debate Requiring Use of Belts*, N.Y. Times, Feb. 28, 1985, at B5, col. 4; Zavarello, *supra* note 46 (DOT's position on passive restraints shows vacillation).

A three-judge federal panel sitting in Washington has ruled that twenty of the states which have adopted MULs have "improperly responded" to FMVSS No. 208, making it unlikely that the passive restraint requirement will be rescinded. State Farm Mut. Auto. Ins. Co. v. Dole, 802 F.2d 474, 480–81 (D.C. Cir. 1986). In addition, the court said that any attempt by the DOT to reduce the minimum requirements and bring these states into compliance would be subject to judicial review. *Id.* at 481.

78. 49 Fed. Reg. 28,985 (1984). Statistics show that a combination of airbags and lap / shoulder belts would prevent 45 to 55% of fatalities and 50 to 60% of moderate to critical injuries. *Id.* This statistical result is superior to those estimated for lap belts, lap/shoulder belts, automatic belts, airbags, and a combination of airbags and lap belts. *Id.*

appears to be the most significant policy issue affecting S. 54.[79] Ohio legislators considered two seat belt laws in 1985—one which incorporated a seat belt defense and one which did not.[80] Since legislators were presented with both sides of the seat belt defense issue, it appears that their final product represents a conscious choice.[81]

Advocates for the inclusion of a seat belt defense contend that the use of seat belts promotes safer auto use since these restraints keep occupants in place during an accident, making it less likely that the driver will lose control.[82] They further argue that "ordinary and prudent care would include the use of any available device which reduces the risk of injury."[83] Although these arguments have intuitive appeal, the majority of courts which have considered the seat belt defense have rejected them.[84] These courts have advanced several reasons for this rejection, including the belief that a tortfeasor who causes injuries is not entitled to relief from liability for those injuries because the injured party did not cause the accident.[85] Attempts to trigger the defense under the doctrine of avoidable consequences have also been rejected by several courts which have reasoned that the duty to mitigate damages arises only *after* the accident.[86] Other rationales advanced for rejecting the seat belt defense include uncertainty as to a jury's ability to manage seat belt evidence and the technical problems inherent in the presentation of a seat belt defense.[87]

The Ohio case most often cited as addressing the seat belt defense is *Roberts v. Bohn*.[88] The appellate court in *Roberts* refused to admit

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79. *See* OHIO REV. CODE ANN. § 4513.263(G) (Anderson Supp. 1986).

80. Zavarello, *supra* note 46. Senate Bill 54, as introduced by Paul E. Pfeifer, specifically provided that noncompliance would not be admissible as evidence and could not diminish recovery in any civil or criminal action. *Id.* House Bill 7, sponsored by Arthur Bowers, permitted admission of evidence of noncompliance where the evidence was offered only to determine the amount of damages. *Id.*

81. *Id.*

82. Recent Developments, *supra* note 22.

83. Wilkins, *supra* note 5, at 439.

84. *See, e.g.*, Melesko v. Riley, 32 Conn. Supp. 89, 339 A.2d 479 (1975); Hansen v. Miller, 93 Idaho 314, 460 P.2d 739 (1969); Kavanagh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824 (1966); Romankewiz v. Black, 16 Mich. App. 119, 167 N.W.2d 606 (1969); Miller v. Haynes, 454 S.W.2d 293 (Mo. Ct. App. 1970); Fields v. Volkswagen of America, Inc., 555 P.2d 48 (Okla. 1976); Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138 (1977).

85. *See Melesko*, 32 Conn. Supp. at 89, 339 A.2d at 479; *Hansen*, 93 Idaho at 314, 460 P.2d at 739. *See also* Zavarello, *supra* note 46.

86. *See Romankewiz*, 16 Mich. App. at 127, 167 N.W.2d at 610 (quoting Miller v. Miller, 273 N.C. 228, 239, 160 S.E.2d 65, 74 (1968)); *Miller*, 454 S.W.2d at 300.

87. *See Kavanagh*, 140 Ind. App. at 139, 122 N.E.2d at 824 (noting problems of pleading and producing evidence); *Amend*, 89 Wash. 2d at 124, 570 P.2d at 138 (*en banc*) (citing fear of speculation by trier of fact); Zavarello, *supra* note 46.

88. 26 Ohio App. 2d 50, 269 N.E.2d 53 (1971), *rev'd on other grounds sub nom.* Suchy v. Moore, 29 Ohio St. 2d 99, 279 N.E.2d 878 (1972).

evidence that the plaintiff had failed to wear an available seat belt.[89] The court rejected a seat belt defense, citing a lack of acceptance of seat belts by the general public,[90] a legitimate fear by motorists that seat belts might cause injury,[91] and the right of a person to assume that other drivers will use due care.[92] In addition, the court noted that adoption of a seat belt defense would completely bar plaintiff's recovery under Ohio's standard of contributory negligence.[93] Since this case was decided in 1971, it is appropriate to consider whether the reasoning of the *Roberts* court is still valid in 1987.

Seat belts have been widely available for twenty years.[94] This seems to be ample time for the motoring public to accept their presence. In addition, testing of seat belt technology combined with crash statistics has elevated seat belts from a novelty with uncertain benefits to a proven automobile safety device.[95] In view of the numerous messages which have been broadcast to the American public concerning the need to buckle up,[96] it can hardly be argued that motorists today are unaware of seat belts or their benefits. Despite this knowledge, many motorists fail to use seat belts.[97] The *Roberts* court cited this custom as grounds for rejecting a seat belt defense,[98] but custom alone is not conclusive. Custom must first "meet the challenge of 'learned reason'."[99] Regardless of how widespread the practice of not buckling up is, it cannot be seriously argued that this behavior is reasonable in light of the known risks which accompany this conduct.[100] Under the same reasonableness test, failure to use a seat belt because of fear of entrapment in a submerged or burning car will also fail.[101]

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89. *Id.* at 56, 269 N.E.2d at 58.

90. *Id.* at 57, 269 N.E.2d at 58.

91. *Id.*

92. *Id.* at 58, 269 N.E.2d at 59.

93. *Id.* at 57, 269 N.E.2d at 58.

94. *See* Comment, *A Realistic Look at the Seat Belt Defense*, 1983 DET. C.L. REV. 827, 842.

95. 49 Fed. Reg. 28,985 (1984) (DOT effectiveness estimates indicate that manual lap and shoulder belts can prevent death 40 to 50% of the time and prevent moderate to critical injuries 45 to 55% of the time).

96. Buzzers and flashing lights on cars which remind motorists to buckle up, public service messages which permeate the media, and recent legislation mandating seat belt use are all examples of these messages.

97. 49 Fed. Reg. 28,983 (1984) ("Based on recent [National Highway Traffic Safety Administration] data, the overall safety belt usage rate for front seat occupants is 12.5%.").

98. *Roberts*, 26 Ohio App. 2d at 57, 269 N.E.2d at 59.

99. Kircher, *The Seat Belt Defense—State of the Law*, 53 MARQ. L. REV. 172, 182 (1970).

100. 49 Fed. Reg. 28,988 (1984) (Motorists often cite not wanting to be bothered, laziness, and forgetfulness as reasons for not using a seat belt.).

101. Note, *The Seat Belt Defense: A Comprehensive Guide for the Trial Lawyer and Suggested Approach for the Courts*, 56 NOTRE DAME LAW. 272, 281 (1980) (The probability that a car involved in an accident will catch fire or become submerged is less than one percent.).

The *Roberts* court also relied upon a person's right to "assume the observance of the law and the exercise of ordinary care by others."[102] This right exists, however, only "in the absence of notice or knowledge to the contrary."[103] While notice or knowledge that a specific accident will occur is generally not available, knowledge that auto accidents occur on a daily basis is universally accepted.[104] In the face of this knowledge, failure to use a seat belt, while perhaps not reaching the level of an assumption of risk,[105] is not reasonable behavior.

The result that the plaintiff could be barred from recovery by Ohio's doctrine of contributory negligence was also cited by the *Roberts* court in its decision not to adopt the seat belt defense.[106] The court reasoned that if the defendant were permitted to establish that some portion of the plaintiff's injuries was caused by the failure to wear a seat belt, the plaintiff would be barred from recovery due to the plaintiff's contributory negligence.[107] Since the *Roberts* decision, however, Ohio has adopted a form of comparative negligence.[108] Under this doctrine, damages are apportioned according to each party's degree of fault so long as plaintiff's negligence is no greater than defendant's.[109] This rule would allow an Ohio court to hold a plaintiff liable for those injuries that he or she could have prevented by wearing a seat belt without necessarily barring him or her from all recovery. In addition, by providing that a plaintiff's failure to use a required seat belt constitutes neither negligence per se nor common-law contributory negligence, any bar to a plaintiff's recovery can be entirely avoided.[110] Thus, evidence of nonuse would be relevant only for the determination of damages, and the reasoning of *Roberts* becomes even less persuasive.

After examining the arguments relied upon by the *Roberts* court, it is clear that these assertions are no longer supportable. In view of the

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102. *Roberts*, 26 Ohio App. 2d at 58, 269 N.E.2d at 59.

103. *Id.*

104. OHIO DEPARTMENT OF HIGHWAY SAFETY, 1984 OHIO TRAFFIC ACCIDENT FACTS 1 (1985) (In the United States, one traffic death is reported every eleven minutes and a traffic injury every nineteen seconds.).

105. PROSSER & KEETON ON THE LAW OF TORTS § 68 (W. Keeton 5th student ed. 1984) [hereinafter PROSSER & KEETON] (An assumption of risk theory is applicable where the individual realizes that a particular risk is involved in his anticipated conduct but proceeds willingly to accept the risk.).

106. *Roberts*, 26 Ohio App. 2d at 57, 269 N.E.2d at 58.

107. *Id.*

108. OHIO REV. CODE ANN. § 2315.19 (Anderson 1981). A negligent plaintiff is not barred from recovery as long as his negligence is not greater than defendant's. *Id.* The amount of damages recoverable, however, will be reduced by an amount that is proportionately equal to plaintiff's percentage of negligence. *Id.*

109. *Id.*

110. See N.Y. CIV. PRAC. LAW § 1411 (McKinney 1986).

changes of the past sixteen years, the *Roberts* decision deserves examination by the legislature within the context of S. 54. An inquiry of this nature may ultimately result in the creation of a seat belt defense in Ohio, structured upon a duty of self protection and a duty to mitigate damages.

A duty of self protection is based upon the known hazards of automobile travel already discussed.[111] The high probability of being involved in an auto accident[112] creates a duty on the part of all motorists to use reasonable means to prevent or mitigate any injuries which may result from an auto accident.[113] Although some courts have rejected the seat belt defense on the grounds that mitigation (or avoidable consequences) is only applicable *after* the injury has occurred,[114] this is an artificial distinction[115] which should be discarded. Seat belts offer motorists "an unusual and ordinarily unavailable means by which [they] may minimize [their] damages *prior* to [an] accident."[116]

Policy considerations also favor the adoption of a seat belt defense in Ohio. As discussed, the use of seat belts prevents injuries and saves lives.[117] Additionally, more persons wear seat belts when required to by an MUL with stringent penalties.[118] Thus, such laws result in the saving of additional lives and millions of dollars.[119] Including a seat belt defense in Ohio's law would establish a civil penalty for noncompliance and create a strong incentive to "buckle up." In addition, creation of a seat belt defense would represent a step toward addressing the litigation and insurance crisis in Ohio.[120] Allowing plaintiffs to recover for

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111. *See supra* notes 94–101 and accompanying text.

112. *Seat Belts: Why Americans Don't Buckle Up*, TRIAL, June 1985, at 74, 75. Over a lifetime the chances of being killed in an auto accident are 1 in 100. *Id.* The chances of being seriously injured are 1 in 3. *Id.*

113. Kircher, *supra* note 99, at 185.

114. *See* cases cited *supra* note 86.

115. PROSSER & KEETON, *supra* note 105, § 65, at 459 ("It is suggested, therefore, that the doctrines of contributory negligence and avoidable consequences are in reality the same, and that the distinction which exists is rather one between damages which are capable of assignment to separate causes, and damages which are not.").

116. Spier v. Baker, 35 N.Y.2d 444, 452, 323 N.E.2d 164, 168, 363 N.Y.S.2d 916, 922 (1974).

117. *See supra* notes 94–101 and accompanying text.

118. 49 Fed. Reg. 28,994 (1984).

119. OHIO DEPARTMENT OF HIGHWAY SAFETY, *supra* note 104, at 5. In 1984, economic costs of accidents in Ohio were $1.475 billion. *Id.* In 1983, economic costs of accidents throughout the entire United States were $43.3 billion. *Id.*

120. *Move to Amend Seat Belt Law Stirs Fury*, Journal Herald, Aug. 22, 1986, at 39. The tort reform package currently before the Ohio General Assembly includes Senate Bill 336 which would allow the introduction of seat belt evidence in product liability cases. *Id.* In addition, a recent amendment approved by the Ohio Select House Committee on Civil Justice and Tort Reform would permit the trier of fact to consider the use or nonuse of seat belts as evidence in suits brought by injured parties against other motorists. *Id. But see Survey Results Show No Insurance*

injuries which they could have prevented by the use of a seat belt constitutes a financial drain upon all of Ohio's citizens.[121] Finally, a seat belt defense is compatible with general tort theory since it reflects the trend in tort law to apportion damages according to comparative fault.[122] This trend reflects the desire of citizens to have laws which are fair and equitable. A seat belt defense, because it would apportion damages according to which party is responsible for specific injuries, satisfies this desire for equity. In addition, when seat belt evidence is only used to assess damages, a seat belt defense will neither allow a plaintiff to receive a windfall for injuries which he or she could have prevented nor allow a defendant to escape responsibility for those injuries which he or she directly caused.

Because the above factors strongly support recognition of a seat belt defense, the Ohio General Assembly should give serious consideration to amending Ohio's seat belt law to allow for the introduction of seat belt evidence for the purpose of mitigation of damages. The positive results of such an amendment outweigh any negative effects.[123]

C. *Impact of S. 54*

As previously discussed, the degree of enforcement of an MUL has a direct impact upon its effectiveness.[124] The secondary enforcement policy, the minimal criminal penalty, and the absence of any civil penalty are all likely to diminish the effectiveness of S. 54. Several recent surveys indicate that a majority of Ohio's citizens favor mandatory seat belt laws.[125] In the wake of this public support, however, Ohio's legislature enacted a law which appears to be more responsive to special interests than it is to public safety concerns. This stance is particularly offensive in light of the consequences of a weak seat belt law—more

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Crisis in Ohio, Journal Herald, Aug. 25, 1986, at 6, col. 1 (survey commissioned by the Ohio Academy of Trial Lawyers).

121. Krohe, *supra* note 20, at 12–13 (nonuse of seat belts resulting in increased hospital rates, insurance premiums, and demands upon police and emergency personnel).

122. *See* Note, *supra* note 101, at 284.

123. Negative effects can be reduced by allowing the court to determine the relevance of seat belt evidence under the circumstances of the case and by placing the burden of proof on the defendant to show by expert evidence the specific injuries which plaintiff could have avoided by wearing an available seat belt.

124. *See supra* notes 60–66 and accompanying text. *See also* Fed. Reg. 28,994 (1984).

125. Witness Slip of William G. Selsam, Director Ohio Conference of AAA Clubs, before the Ohio Senate Judiciary Committee (Feb. 27, 1985) (on file with University of Dayton Law Review). A survey of Ohio Motorists Association members in Cleveland and northeast Ohio found 70% in favor of seat belt laws; a Columbus Citizen Journal poll in Franklin County found 62% in favor of seat belt laws; and a statewide poll by Market Opinion Research found 61% in favor. *Id.* *But see Man Sues over Petition Law*, Journal Herald, Aug. 13, 1986, at 6, col. 1 (attempt to put seat belt laws on the November ballot).

needless injuries and deaths on Ohio's highways.

A weak MUL, however, may prove to be superior to no MUL at all. Before Ohio's seat belt law took effect, seat belt usage was estimated to be between fifteen and nineteen percent.[126] During the sixty-day grace period which followed the May 6, 1986, effective date of the law, the usage rate rose to forty percent.[127] Even this small increase in usage should result in a decline in highway fatalities and injuries,[128] and a further increase in usage should occur when fines are levied.[129] In addition, the greatest endorsement for S. 54 is that its effects will be immediate. Unlike passive restraints which have been delayed until 1989,[130] seat belts can save lives now.[131]

Another important factor is that the Ohio Department of Highway Safety has mounted an extensive educational and awareness campaign to promote the use of seat belts.[132] Since public awareness also plays a role in usage rates,[133] this campaign has the potential of improving the effectiveness of Ohio's law.

While it is clear that S. 54 will produce quantifiable benefits, it is also obvious that these benefits could be markedly increased by "putting some bite" into Ohio's law. The most potent method of augmenting these benefits would be the legislative adoption of a seat belt defense. Faced with the tremendous human and financial costs of preventable highway injuries and fatalities,[134] Ohio legislators have enacted S. 54. It is a largely symbolic measure with limited benefits, and its specific provisions show clear signs of special interest manipulation and political compromise.[135] S. 54 is an appropriate but inadequate re-

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126. *July 4 the Day to Buckle Up—for Law*, Dayton Daily News, June 29, 1986, at A12, col. 1.

127. Yost, *Buckling Under Pressure Saves Patrolmen's Lives*, Columbus Dispatch, July 4, 1986, at A1, col. 2.

128. *July 4 the Day to Buckle Up—for Law*, *supra* note 126, at A12, col. 1 (Based upon a 50% usage rate, state officials predict that 300 lives could be saved within the first 12 months.).

129. Following enforcement of New York's seat belt law, the usage rate increased from 12 to 69%. *Id.*

130. 49 C.F.R. § 571.208 (S.4.1.4) (1986).

131. 49 Fed. Reg. 28,998 (1984).

132. *Buckle Up—It's the Law!*, South Metro Dayton Traffic Safety Program Tabloid, Apr. 30, 1986, at 2, col. 2.

133. 49 Fed. Reg. 28,994 (1984).

134. Witness Slip of Elaine Petrucelli, Executive Director for the American Association for Automotive Medicine, before the Ohio Senate Judiciary Committee (March 13, 1985) (on file with University of Dayton Law Review) (Road trauma is the leading cause of death for Americans, ages 1 to 24, and the second leading cause of deaths for the 25 through 44 age group.).

OHIO DEPARTMENT OF HIGHWAY SAFETY, *supra* note 104, at 1. In 1984, 1,645 deaths and 14,252 serious injuries on Ohio's highways were reported. *Id.* The total costs of these deaths and injuries is estimated to be $640 million. *Id.* at 5.

135. Weisenberg Witness Slip, *supra* note 75; Zavarello Witness Slip, *supra* note 75 (Witness slips of the Senate Judiciary Committee reveal that the Ohio Trial Lawyers Association and

sponse to the problem of Ohio highway safety. Ohio's citizens deserve more.

V. CONCLUSION

Ohio is one of twenty-five states to adopt mandatory use laws (MULs) in response to Federal Motor Vehicle Safety Standard No. 208 (FMVSS No. 208).[136] S. 54, however, does not meet the federal requirements established for MULs. This shortcoming has great potential for diminishing S. 54's effectiveness as a tool to increase highway safety. The most glaring difference between Ohio's law and the federal requirements is Ohio's omission of a seat belt defense. Although Ohio has failed to recognize this defense judicially, an examination of the case relied upon by Ohio courts[137] reveals that the reasoning given for rejecting a seat belt defense is no longer valid.

S. 54 is a positive, though hesitant, step toward improving the statistics which suggest that many Ohioans are needlessly injured and killed in auto accidents every year.[138] In its present form, however, Ohio's seat belt law will only begin to tap the potential that MULs have for saving lives. Amending Ohio's law to incorporate a seat belt defense would substantially strengthen this law and save additional lives. If Ohio is really serious about safety, it should adopt a seat belt defense.

Deborah Davis Hunt

Code Sections Affected: To enact section 4513.263 and to amend section 4513.99
Effective Date: May 6, 1986
Spouse: Pfeifer (s)
Committee: Judiciary (s)

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the Ohio Bar Association testified against the creation of the seat belt defense.).

136. Note, *supra* note 2, at 1341 (New York adopted its MUL prior to the DOT ruling.).

137. Roberts v. Bohn, 26 Ohio App. 2d 50, 58, 269 N.E.2d 53, 59 (1971), *rev'd on other grounds sub nom.* Suchy v. Moore, 29 Ohio St. 2d 99, 279 N.E.2d 878 (1972).

138. *See supra* note 134 and accompanying text.